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## The Role of Emotion in Constitutional Theory

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## THE ROLE OF EMOTION IN CONSTITUTIONAL THEORY

*J. Joel Alicea\**

*Although the role of emotion in law has become a major field of scholarship, there has been very little attention paid to the role of emotion in constitutional theory. This Article seeks to fill that gap by providing an integrated account of the role of emotion within the individual, how emotion affects constitutional culture, and how constitutional culture, properly understood, should affect our evaluation of major constitutional theories.*

*The Article begins by reconstructing one of the most important and influential accounts of emotion in the philosophical literature: that of Thomas Aquinas. Because Aquinas's description of the nature of emotion accords with modern science and the insights of many law-and-emotion theorists, it provides a firm foundation for an analysis of emotion in constitutional theory. Having laid that foundation, the Article examines the role of emotion in constitutional culture, the subset of national culture concerned with a constitution. Constitutional culture combines a society's ideas about, and emotional attachments to, its constitution. Here, the Article develops a novel synthesis between Aquinas's model of emotion and Edmund Burke's sophisticated exploration of the importance of emotion in constitutional culture. Burke argues that theories of constitutional legitimacy shape constitutional culture and must accord with it. If a theory of legitimacy is at odds with a society's constitutional culture, the society risks the instability of the regime. This insight—which is consistent with Aquinas's model of emotion—is the primary basis for understanding the role of emotion in constitutional theory.*

*Finally, the Article turns its attention to constitutional theory. Observing that popular sovereignty is the theory of legitimacy endorsed by our constitutional culture, the Article argues—based on the synthesis of the Thomistic and Burkean accounts—that emotion should play an important role in evaluating the contours and viability of*

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*theories of legitimacy. Theories of legitimacy that accord with popular sovereignty have a stronger argument in their favor because they reinforce the emotional attachments that lend stability to our Constitution. Theories of legitimacy that reject popular sovereignty, by contrast, must be modified or abandoned or, alternatively, must explain why attempts to change our constitutional culture will avoid the instability that the Thomistic and Burkean accounts would predict. The Article therefore has particular relevance to assessing radical constitutional theories—whether from the political right or the political left—that are critical of American constitutional culture. The Article concludes by exploring the implications of emotion for constitutional doctrine, focusing on stare decisis and the examples of *Roe v. Wade*, 410 U.S. 113 (1973), and *Miranda v. Arizona*, 384 U.S. 436 (1966).*

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## INTRODUCTION

In the last three decades, law-and-emotion has become a voluminous, well-established field within legal scholarship,<sup>1</sup> featuring some of the academy's most important and influential scholars.<sup>2</sup> This

1 For overviews of the history of law and emotions scholarship, see Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2003–13 (2010); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 652–56 (2011).

2 See, e.g., MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988).

development of law-and-emotion literature has proceeded in parallel with significant developments in the philosophy and science of emotions,<sup>3</sup> with philosophers like Martha Nussbaum integrating insights from the social and natural sciences into their study of the role of emotion in law.<sup>4</sup> That study has implicated many different areas of law, especially criminal law.<sup>5</sup>

Yet, there has been a curious lack of scholarship on the role of emotion in constitutional theory. With a few notable exceptions,<sup>6</sup> “constitutional theor[ists] ha[ve] largely ignored a voluminous body of empirical and theoretical literature about emotion that has accumulated over the past [thirty] years.”<sup>7</sup> There are many potential explanations for this. One explanation is that, because American constitutional theory focuses on a constitution born during the Enlightenment, it is influenced by Enlightenment-era notions of reason, in which “emotion was thought to be both more primitive and at war with rationality.”<sup>8</sup> Another explanation could be that American constitutional theory has, for the last forty years, been framed as a debate between originalists and non-originalists,<sup>9</sup> and because one of the major themes of that debate has been the originalist argument that non-originalism is devoid of principle,<sup>10</sup> non-originalists have attempted to demonstrate the logical rigor of their theories.<sup>11</sup> Both sides of the debate in constitutional theory, therefore, have had a strong incentive to emphasize the rationality of their views, which

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3 See NICHOLAS E. LOMBARDO, *THE LOGIC OF DESIRE: AQUINAS ON EMOTION* 8–15 (2011); Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1415–19 (2013); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 275–97 (1996); Maroney, *supra* note 1, at 642–51.

4 See, e.g., NUSSBAUM, *supra* note 2, at 1–138.

5 See Abrams & Keren, *supra* note 1, at 2003–13; see, e.g., Kahan & Nussbaum, *supra* note 3.

6 See, e.g., Kathryn Abrams, *Exploring the Affective Constitution*, 59 CASE W. RESV. L. REV. 571 (2009); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623 (2009); Greene, *supra* note 3; Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2004).

7 Gewirtzman, *supra* note 6, at 625; see also Greene, *supra* note 3, at 1393.

8 Maroney, *supra* note 1, at 634; see also Gewirtzman, *supra* note 6, at 635–44.

9 See J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711 (2021).

10 See, e.g., ANTONIN SCALIA, *Interpreting the Constitution*, in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 188, 196–97 (Christopher J. Scalia & Edward Whelan eds., 2017); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–11 (1971).

11 See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 176–275 (1986); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1–49 (2010).

might seem inimical to considering the role of emotion in constitutional theory.

Those few constitutional scholars who *have* considered the role of emotion in constitutional theory—while making significant contributions—have not changed the contours of the debate within the field. For example, Jamal Greene focuses on how emotion functions as a form of rhetoric in judicial opinions.<sup>12</sup> Doni Gewirtzman offers a few suggestions about how emotion might affect debates within constitutional theory,<sup>13</sup> but his focus is less on constitutional theory and more on constitutional culture.<sup>14</sup> Constitutional culture is the part of a national culture that relates to the society's constitution,<sup>15</sup> and while it is crucial to thinking about constitutional theory, the implications of constitutional culture for constitutional theory require sustained attention. Finally, Lawrence Solum's application of virtue ethics to constitutional theory has important potential implications for the role of emotion in constitutional theory because of Aristotle's understanding of the relationship between emotion and virtue,<sup>16</sup> but his work does not make emotion its primary focus.<sup>17</sup>

To show that emotion is relevant to constitutional theory, what is needed is an integrated account that examines the role of emotion within the individual human person, how emotion affects constitutional culture, and how constitutional culture, properly understood, should affect our evaluation of major constitutional theories. Such an account must draw from the deep tradition of philosophical reflection on the nature of emotion while also being consistent with insights from the modern science of emotion.

Offering that account is my task in this Article, and although the role of emotion in constitutional theory is a novel question in modern scholarship, I want to suggest that the answer to it can be found by developing a *new* synthesis of *old* sources. The relationship between reason, emotion, and the will is not a new question; nor is the relationship between emotion and constitutional culture. What *is* new is the need to harmonize the answers to those questions and apply the resulting account to modern American constitutional theory.

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12 See Greene, *supra* note 3, at 1414–46.

13 See Gewirtzman, *supra* note 6, at 677–83.

14 See *id.* at 647–77.

15 See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). Unlike Post's definition, I will not distinguish between the culture within the judicial system and the culture outside the judicial system.

16 Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 70–74, 86 (2006).

17 See *id.* at 89–91; Solum, *supra* note 6, at 502–22.

To do that, we have to begin by examining the role of emotion within the individual human person, since the role of emotion within constitutional theory depends on how emotion functions within the individuals governed by a constitution. Here, we can look to one of the most important and influential answers to that question ever offered: that of Thomas Aquinas. Aquinas's model of the emotions—his explanation of how reason, emotion, and the will relate to each other—draws upon the philosophical arguments of Aristotle, Augustine, and the Stoics, while also anticipating many of the insights from modern science.<sup>18</sup> Aquinas argues that our character traits form when our emotional dispositions align with what we believe to be true through reason, and those traits—depending on whether they are aligned with *right* reason or with error—are virtues or vices.<sup>19</sup>

This essential insight from Aquinas's model of emotion provides us with the foundation for assessing the role of emotion in constitutional culture, and here again, we can draw from an old source to answer our novel question, for it was partly in response to what he perceived as the French revolutionaries' lack of appreciation for the role of emotion in constitutional culture that Edmund Burke wrote *Reflections on the Revolution in France*.<sup>20</sup> There, Burke provides one of the most sophisticated theories ever developed about the ways in which emotions form, and are formed by, constitutional culture. Just as Aquinas argues that *individuals* form stable character traits through the alignment of *their* reason, emotion, and will, Burke argues that *constitutional cultures* form stable character traits through the alignment of *a society's* reason, emotion, and will.<sup>21</sup> He describes the ways in which societies use symbols, images, rituals, and customs—what Burke calls “the wardrobe of a moral imagination”<sup>22</sup>—to cultivate the affections toward a constitution that create settled character traits in the constitution's favor, thereby lending it stability over time.<sup>23</sup>

Burke contends that theories of constitutional legitimacy—theories that explain why members of a polity have a moral obligation to obey their constitution (written or unwritten) and the laws enacted under it—play a key role in forming constitutional culture. And just as Aquinas sees war between reason and emotion as producing instability within the individual,<sup>24</sup> Burke argues that a mismatch

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18 See *infra* Part I.

19 See *infra* Section I.C.

20 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1790).

21 See *infra* Section II.A.

22 BURKE, *supra* note 20, at 67.

23 See *infra* Section II.B.

24 See *infra* Section I.C.

between constitutional culture and theories of legitimacy—a misalignment of emotion and reason—creates instability within a constitutional culture, potentially leading to disastrous consequences.<sup>25</sup> If a constitution is to remain stable, it must be supported by a theory of legitimacy that is woven into the fabric of a constitutional culture.<sup>26</sup> By developing a novel synthesis of the Thomistic model of emotion and the Burkean account of constitutional culture, we can see that there is a close connection between emotion, theories of constitutional legitimacy, and the stability of a regime.

If that conclusion is right, then emotion should play a significant role in evaluating theories of legitimacy, since it is morally relevant that some theories of legitimacy might imperil the Constitution's stability.<sup>27</sup> It also becomes important to know which theory of legitimacy accords with the emotional dispositions woven into our constitutional culture, and I suggest that popular sovereignty is that theory.<sup>28</sup> It follows that theorists who wish to avoid destabilizing our regime and advocate theories of legitimacy at odds with popular sovereignty would need to abandon or modify their theories or would need to explain how our constitutional culture can and should change to conform to their theories without compromising the emotional attachments that sustain the Constitution.<sup>29</sup>

Examples of constitutional theories that might change because of the role of emotion in evaluating theories of legitimacy include the legal-positivist theories of Richard Fallon, William Baude, and Stephen Sachs.<sup>30</sup> Their theories depend on an accurate assessment of our society's constitutional practices, and once we understand the essential role that popular sovereignty plays in forming the emotional attachments that are bound up with our constitutional practices, there is a strong argument that these positivistic theories must embrace popular sovereignty as their theory of legitimacy.<sup>31</sup>

The implications are even more acute for radical constitutional theories that are critical of America's constitutional culture, such as the nascent constitutional theory being developed by Adrian Vermeule, which seeks to root out the liberal philosophical tradition (broadly understood) that is integral to our constitutional culture.<sup>32</sup> If

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25 See *infra* Sections II.C, III.A.

26 See *id.*

27 See *infra* Section III.A.

28 See *id.*

29 See *infra* subsections III.B.2–B.3.

30 See *infra* subsection III.B.2.

31 See *id.*

32 See Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>

such radical theories were adopted, would the result be the erosion of “those inbred sentiments which are the faithful guardians, the active monitors of” the Constitution,<sup>33</sup> thereby destabilizing the American regime?<sup>34</sup> Understanding the role of emotion in constitutional theory, then, raises difficult questions for those who would seek to change our constitutional culture.

My argument about the role of emotion in constitutional theory is a departure from the way many law-and-emotion theorists tend to think about the role of emotion in law. Much of law-and-emotion scholarship has come from critical race or feminist scholars and legal realists who focus on the role of emotion in legal decisionmaking and argue that judges or juries should take their own emotions or those of the litigants into account.<sup>35</sup> My argument, by contrast, is focused on the role of emotions at the societal level and how those emotional dispositions support or imperil a regime.<sup>36</sup> This is a difference over *whose* emotions we are discussing: this Article is focused on society’s emotions, not the judge or litigant’s emotions.<sup>37</sup> Indeed, I reject the notion that emotions should play any conscious role in judicial decisionmaking,<sup>38</sup> though I will not flesh out that argument in this Article. My focus, instead, will be on building an integrated account of emotion within the individual, in constitutional culture, and in constitutional theory.

Because Aquinas’s model of emotion is the foundation for that account, that is where I will begin. Part I describes Aquinas’s model of emotion and the relationship between emotion, reason, and the will. Part II reconstructs Burke’s account of emotion in constitutional culture and develops a new synthesis with Aquinas’s model. Part III then turns to constitutional theory. Section III.A again relies on Burke to argue that theories of legitimacy play a key role in the formation of constitutional culture and suggests that popular sovereignty is the theory of legitimacy endorsed by our constitutional culture. Sections III.B and III.C draw out the implications of emotion for constitutional theory. Section III.B argues that theories of legitimacy that are at odds with popular sovereignty must be abandoned or modified or must

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[<https://perma.cc/4TEQ-3GVE>]. For a discussion of the different strands of liberalism, see Alicea, *supra* note 9.

33 BURKE, *supra* note 20, at 75.

34 See *infra* Section III.C.

35 See Abrams & Keren, *supra* note 1, at 2003–13.

36 Gewirtzman’s article takes a step in this direction. See Gewirtzman, *supra* note 6, at 677–83.

37 Solum’s work tends to focus more on judicial decisionmaking, though his theory certainly has implications for other constitutional actors. See, e.g., Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003).

38 See *infra* Section III.A.



explain how they would maintain the stability of our Constitution if adopted. Section III.C will briefly argue that understanding the role of emotion in constitutional theory helps illuminate the relationship between originalism and *stare decisis*, using *Miranda v. Arizona*<sup>39</sup> and *Roe v. Wade*<sup>40</sup> as examples.

One important caveat: although I will set forth an *integrated* account of the role of emotion in constitutional theory, it is certainly not a *comprehensive* account. Much more can and should be said about each of its three components: emotion in the individual, in constitutional culture, and in constitutional theory. For example, there is a voluminous literature on the issue of constitutional legitimacy,<sup>41</sup> and while Part III focuses on the principal implications of emotion for theories of legitimacy, it would require a significantly more extended discussion to work out the full ramifications. This Article, then, is only the first step toward developing a comprehensive account of emotion in constitutional theory.

Finally, as in any discussion of emotion, there is the notorious, threshold problem of how to define “emotion.”<sup>42</sup> Do emotions include bodily appetites like hunger and thirst, or are those appetites categorically different from emotions like anger and joy?<sup>43</sup> Fortunately, my argument about the relevance of emotion to constitutional theory does not require a precise definition of emotion. Whatever the outer limits of the concept of “emotion” may be, hope, despair, fear, anger, love, and other passions identified by Aquinas are in its heartland,<sup>44</sup> and the reader need only keep this conventional understanding of emotion in mind while reading what follows.

I hope to show that understanding the role of emotion in constitutional theory does not entail abandoning constitutional theory’s commitment to reason. Rather, it is because of our commitment to reason that we must understand the role of emotion in constitutional theory.

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39 *Miranda v. Arizona*, 384 U.S. 436 (1966).

40 *Roe v. Wade*, 410 U.S. 113 (1973).

41 See *infra* notes 274–81.

42 Greene, *supra* note 3, at 1414–19; Carlo Leget, *Martha Nussbaum and Thomas Aquinas on the Emotions*, 64 THEOLOGICAL STUDS. 558, 571 (2003); Susan A. Bandes, *Introduction*, in THE PASSIONS OF LAW 1, 10 (Susan A. Bandes ed., 1999); see also LOMBARDO, *supra* note 3, at 8.

43 NUSSBAUM, *supra* note 2, at 129–37.

44 See THOMAS AQUINAS, SUMMA THEOLOGIAE I-II Q. 23 art. 4 (Fathers of the Eng. Dominican Province trans., Burns Oates & Washbourne Ltd. 2d rev. ed. 1920) (c. 1270), <https://www.newadvent.org/summa/>; ROBERT MINER, THOMAS AQUINAS ON THE PASSIONS: A STUDY OF SUMMA THEOLOGIAE IA2AE 22–48, 62–63 (2009); Leget, *supra* note 42, at 572; Kahan & Nussbaum, *supra* note 3, at 276.

## I. EMOTION IN THE INDIVIDUAL

My argument is that emotion should play an important role in constitutional theory because it plays a vital role in maintaining the stability of a regime over time. That will require an explanation of the role of emotion in constitutional culture, which is the subject of Part II, and since a constitutional culture is composed of individuals, we must first describe the role of emotion within the individual.

That is a topic of enormous complexity, and I do not pretend that we can fully understand it. The best we can hope to achieve is a rough approximation of reality: a model of the emotions. Some scholars—such as Nussbaum—have constructed their own models.<sup>45</sup> I will instead use the model of the emotions proposed by Thomas Aquinas, for three main reasons.

First, in terms of historical importance and influence, few accounts of the emotions rival Aquinas's. When Aquinas published his account of the passions as part of the *Summa Theologiae*, it was likely “the longest sustained discussion of the passions ever written” to that point.<sup>46</sup> Its comprehensive, systematic nature—and its integration of prior landmark works by Aristotle, Augustine, and the Stoics<sup>47</sup>—has meant that, “[d]irectly or indirectly, modern thinkers are responding to [Aquinas's] . . . conception of the passions.”<sup>48</sup>

Second, Aquinas's account is generally consistent with the “ascendant” understanding of emotions in the natural and social sciences.<sup>49</sup> Aquinas's model builds on—and modifies—Aristotle's account in the *Nicomachean Ethics* and the *Rhetoric*, and as the psychologist Richard Lazarus once said, “[I]n the last decades psychology has fought its way back to the place where Aristotle was when he wrote the *Rhetoric*.”<sup>50</sup> Although modern psychology “do[es] not directly lead toward embracing Aquinas's [philosophy],” there are certainly “affinities between Aquinas and contemporary research” with respect to major points of dispute in the philosophy of emotions.<sup>51</sup> I will identify some of those affinities as I describe Aquinas's model,

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45 See NUSSBAUM, *supra* note 2, at 1–138.

46 LOMBARDO, *supra* note 3, at 1; *see also id.* at 1–3, 49.

47 Leget, *supra* note 42, at 569.

48 MINER, *supra* note 44, at 1.

49 See Greene, *supra* note 3, at 1450; *see, e.g.*, Maroney, *supra* note 1, at 643–44 & nn.64–75 (collecting sources); Gewirtzman, *supra* note 6, at 650–57 & nn.169–224 (same); NUSSBAUM, *supra* note 2, at 100–19 & nn.28–76 (same); Kahan & Nussbaum, *supra* note 3, at 284–301 & nn.45–127 (same).

50 Leget, *supra* note 42, at 576 (citing NUSSBAUM, *supra* note 2, at 94 & n.13, which has a similar quote by Lazarus).

51 *Id.*

though my emphasis will be more on the philosophical aspects of Aquinas's model than on the scientific bases for it.

Why not just rely on science to construct the model? Insofar as this objection presupposes a materialistic view of human nature (or at least of human emotions) by which we are reducible to things like biological or chemical processes, I would reject that (very controversial) premise, though this is of course not the place to make the argument against it.<sup>52</sup> With Anthony Kenny, I believe that "there will always remain an irreducible core" of questions about the mind and emotions "amenable only to philosophy."<sup>53</sup> Insights from science are essential, but as Robert Miner has observed, "[a] competent physicist can give an exact acoustical account of a piece of music, delineating its mathematical substructure in precise terms."<sup>54</sup> Yet, "[s]uch an account, while useful for any number of purposes, is not the same as understanding a piece of music as a musician understands it."<sup>55</sup> Our emotions cannot be explained solely by social or natural science, just as music cannot be explained solely by mathematical structures. Rather, a multidisciplinary approach is required in which philosophy, science, and other fields play their part. This is consistent with the approach taken by the most important literature on law and emotion.<sup>56</sup>

Third, Aquinas's account of the emotions is persuasive. His arguments are compelling, and his model accords with what I believe are widely held intuitions about, and experiences with, the ways in which reason, emotion, and the will interact. Unfortunately, I cannot reproduce Aquinas's arguments in the limited space I have here. They are dense and situated within a broader philosophical framework of extraordinary complexity. Instead, my method will be to sketch out Aquinas's model,<sup>57</sup> offer examples that I hope will accord with the reader's own experiences, and note some of the places where his views are supported by modern science and arguments made by other philosophers, such as Nussbaum. This makes for a less complete argument, to be sure, but it is no less complete than those offered by constitutional theorists who assume the correctness of legal

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<sup>52</sup> See Edward Feser, *Kripke, Ross, and the Immaterial Aspects of Thought*, 87 AM. CATH. PHIL. Q. 1 (2013).

<sup>53</sup> ANTHONY KENNY, AQUINAS ON MIND 5 (1993); see also *id.* at 1–13.

<sup>54</sup> MINER, *supra* note 44, at 2.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Greene, *supra* note 3, at 1398–99, 1447–51; Kahan & Nussbaum, *supra* note 3, at 280–97.

<sup>57</sup> I will not, for example, discuss the distinction between concupiscible and irascible passions, even though that is an important feature of Aquinas's model. See AQUINAS, *supra* note 44, at I Q. 81 art. 2; LOMBARDO, *supra* note 3, at 50–74; MINER, *supra* note 44, at 46–57.

positivism<sup>58</sup> or aspects of John Rawls's political liberalism.<sup>59</sup> For readers interested in the arguments Aquinas offers to justify his model, I recommend reading the portions of the *Summa* and the secondary literature on which I rely.

Some readers might object to my use of Aquinas's model because it is embedded within his larger theological system of thought, which many readers will not share. That objection, though understandable, is misguided. As Nicholas Lombardo has observed, the theological components of Aquinas's system "in no way imply that Aquinas's account of emotion is comprehensible only from the perspective of his faith and therefore of interest only to Christian theologians."<sup>60</sup> Rather, "much of Aquinas's account of emotion is intelligible and rigorous from a philosophical perspective" that does not presuppose theism, though of course his account will have even greater significance for those who share his theology.<sup>61</sup>

On the other hand, some may object to my presentation of Aquinas's model of emotion because I disaggregate it from his theological framework and do not focus much on his understanding of the good, which causes his account to lose much of its richness. There is something to this criticism, but it is an inevitable consequence of the narrower ambit of my argument (emotion, rather than the good in general) and my desire to present Aquinas's account in a manner that is acceptable to as broad an audience as possible, which in no way implies a disparagement of Aquinas's theology.<sup>62</sup>

In setting forth Aquinas's model, I have omitted discussion of other potential models, except to note a few places where modern law-and-emotion scholarship converges with, or diverges from, Aquinas's. A survey of other models would require a great deal of space while doing little to advance my argument. Interested readers may consult useful overviews of the literature noted here<sup>63</sup> and explore other models.

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58 See, e.g., William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2364–65 (2015); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 547–49 (1999).

59 Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 30–35 (Apr. 3, 2019) (unpublished manuscript) (on file at <https://ssrn.com/abstract=2940215> [<https://perma.cc/DT8Y-BCXZ>]).

60 LOMBARDO, *supra* note 3, at 7.

61 *Id.*

62 See John Paul II, *Encyclical Letter Fides et Ratio* §§ 73–74, HOLYSEE (Sept. 14, 1998), [https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091998\\_fides-et-ratio.html](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091998_fides-et-ratio.html) [<https://perma.cc/3NEY-5UKW>]; see also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 48–49 (2d ed. 2011).

63 See Greene, *supra* note 3, at 1397–99, 1414–19, 1447–51; Abrams & Keren, *supra* note 1, at 2003–13; Kahan & Nussbaum, *supra* note 3, at 275–301.

Far from desiring more exploration of various models of emotion, some readers may wish I said less about Aquinas's model and arrived more quickly at the discussion of constitutional theory in Part III. But there is simply no way to present a plausible argument in favor of the role of emotion in constitutional theory without first presenting a model of emotion in the individual, since the relationship between reason, emotion, and the will in the individual—and the way in which a person's character is formed—is the key to understanding the role of emotion in constitutional theory. It is common for law-and-emotion scholars to begin their arguments with an explanation of the role of emotion within the individual, and I am simply following that standard approach here.<sup>64</sup>

Finally, as noted above, any account of emotion confronts the threshold problem of defining what we mean by “emotion,” and while I have already described the conventional understanding that I invoke here, the problem takes on a different aspect with respect to Aquinas. For although I have been loosely referring to Aquinas's model of “emotion,” “emotion has been an important psychological category only since the early nineteenth century,”<sup>65</sup> so that “the word ‘emotion’ has no direct parallel in the Latin vocabulary of the thirteenth century.”<sup>66</sup> “Aquinas speaks frequently of *passiones* and occasionally of *affectiones*, but never of ‘emotions.’”<sup>67</sup> Here, I will follow the lead of several prominent scholars of Aquinas who have argued that the modern concept of “emotions” is very similar to Aquinas's understanding of “affections”<sup>68</sup>—of which “passions” are a subset. Any nuances that may be lost by making such an equivalence do not affect my overall argument. To understand Aquinas's account of emotions, then, requires an explanation of his concept of affections, to which I now turn.

#### A. *Appetite and Apprehension*

Aquinas's model of the emotions begins with a description of our appetites. By an “appetite,” Aquinas means “an inclination of a person

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64 See, e.g., NUSSBAUM, *supra* note 2, at 1–138; see also Gewirtzman, *supra* note 6, at 647–57; Greene, *supra* note 3, at 1398–99, 1414–19; Kahan & Nussbaum, *supra* note 3, at 275–301.

65 LOMBARDO, *supra* note 3, at 8.

66 *Id.* at 15.

67 MINER, *supra* note 44, at 4.

68 LOMBARDO, *supra* note 3, at 224–27; MINER, *supra* note 44, at 35–38 & n.6; Leget, *supra* note 42, at 574.

desirous of a thing towards that thing.”<sup>69</sup> It is “a reaching forth, a stretching toward some kind of object.”<sup>70</sup> That a person desires the object tells us something important, since “[t]he essence of goodness consists in this, that it is in some way desirable.”<sup>71</sup> That we desire something shows that it is good in some way,<sup>72</sup> and it is desirable “only in so far as it is perfect” or complete, “for all desire their own perfection.”<sup>73</sup> An appetite therefore “names the universal tendency of anything to seek what completes it.”<sup>74</sup>

Being drawn toward the good necessarily means being drawn away from that which is not good, “since avoiding evil is itself a good.”<sup>75</sup> So although an appetite is always a reaching forth for some good, it might manifest itself in any given case by repelling from the object in question.<sup>76</sup> Since appetites are the foundation of emotions, this explains why emotions can either be oriented toward some object (e.g., hope) or away from some object (e.g., fear).<sup>77</sup>

Notice that an appetite has an end (a *telos*) and is necessarily *object-oriented* (though the object need not be a material object).<sup>78</sup> It reaches out for a *thing*, and it does so because the thing will help complete the person who has the appetite.<sup>79</sup> It follows that an appetite is only

69 AQUINAS, *supra* note 44, at I-II Q. 8 art. 1; *see also* LOMBARDO, *supra* note 3, at 26; MICHAEL S. SHERWIN, *BY KNOWLEDGE & BY LOVE: CHARITY AND KNOWLEDGE IN THE MORAL THEOLOGY OF ST. THOMAS AQUINAS* 21 (2005).

70 MINER, *supra* note 44, at 16.

71 AQUINAS, *supra* note 44, at I Q. 5 art. 1.

72 *Id.*; *see also* ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, at 1094a1–3 (Roger Crisp ed. & trans., Cambridge Univ. Press rev. ed. 2014) (c. 384 B.C.E.). Nussbaum hits on a similar idea when she says that emotions are eudaimonistic. NUSSBAUM, *supra* note 2, at 31–33, 49–56.

73 AQUINAS, *supra* note 44, at I Q. 5 art. 1; ARISTOTLE, *supra* note 72, bk. I, at 1097a15–30; *see also* MINER, *supra* note 44, at 16–17.

74 MINER, *supra* note 44, at 16; *see also* LOMBARDO, *supra* note 3, at 26–27. Nussbaum’s description of emotions as having a close connection to “vulnerability”—that is, the emotions show that we value something outside of our control—bears some similarities to Aquinas’s description of appetites. NUSSBAUM, *supra* note 2, at 43–44; Leget, *supra* note 42, at 575.

75 MINER, *supra* note 44, at 26 (quoting WILLIAM A. WALLACE, *THE MODELING OF NATURE: PHILOSOPHY OF SCIENCE AND PHILOSOPHY OF NATURE IN SYNTHESIS* 174 (1996)).

76 *Id.*

77 LOMBARDO, *supra* note 3, at 63.

78 MINER, *supra* note 44, at 63–65; *see also* NUSSBAUM, *supra* note 2, at 27; Errol Bedford, *Emotions*, 57 *PROC. ARISTOTELIAN SOC’Y* 281, 291 (1957); George Pitcher, *Emotion*, 74 *MIND* 326, 326–27 (1965). Aquinas’s description of emotion as object-oriented is consistent with Aristotle’s. *See, e.g.*, ARISTOTLE, *THE ART OF RHETORIC* bk. II, at 1378a31–37 (Robin Waterfield trans., Oxford Univ. Press 2018) (c. 384 B.C.E.) (describing anger as being directed “at a particular individual”).

79 For a description of the role of love in Aquinas’s conception of appetite, *see* SHERWIN, *supra* note 69, at 72–81.

activated or triggered when it has apprehended or grasped a desirable object (or apprehended a bad object, which causes the appetite to reach *for* the object's opposite and *away* from the object).<sup>80</sup> Otherwise, the appetite remains dormant or passive.<sup>81</sup> We do not, for example, experience anger, sadness, or joy simultaneously and at all times; we experience these emotions only when they are activated by some object.

This is what Aquinas means when he says that “the appetible does not move the appetite except as it is apprehended”<sup>82</sup> or that “appetite follows apprehension.”<sup>83</sup> By “apprehension,” Aquinas means that the reality and significance of the object is *grasped* or *understood* by the person to whom it is presented. Miner helpfully describes this dynamic: “Apprehension brings the thing to us, as it were . . . . Appetite, by contrast, moves us toward the thing itself.”<sup>84</sup> We can represent the order of the relationship this way:

Apprehension → Activation of Appetite

For example, suppose that I see a stranger slap my friend across the face without provocation. I apprehend—both in perceiving what occurred and understanding its significance—the event, which triggers my appetite (in this case, the appetite manifests itself as anger) and moves me toward the object of my appetite (in this case, I am drawn to avenge my friend against the stranger). Anger is a particularly complex emotion,<sup>85</sup> so this example is oversimplified, but it gives a sense of the distinction between apprehension and appetite.

Implicit in all this is that the appetites require an evaluation of the object,<sup>86</sup> a point now well-accepted in the scientific, philosophical, and law-and-emotion literature.<sup>87</sup> We do not necessarily have the same

<sup>80</sup> AQUINAS, *supra* note 44, at I Q. 79 art. 2, 80.2; LOMBARDO, *supra* note 3, at 31.

<sup>81</sup> LOMBARDO, *supra* note 3, at 34–37; MINER, *supra* note 44, at 58–59; Leget, *supra* note 42, at 572.

<sup>82</sup> AQUINAS, *supra* note 44, at I Q. 80 art. 2.

<sup>83</sup> *Id.* at I Q. 79 art. 1.

<sup>84</sup> MINER, *supra* note 44, at 13–15; *see also* Pitcher, *supra* note 78, at 332–33.

<sup>85</sup> *See* AQUINAS, *supra* note 44, at I-II Q. 46 art. 2; ARISTOTLE, *supra* note 72, bk. IV, at 1125b–1126b10.

<sup>86</sup> *See* ARISTOTLE, *supra* note 78, bk. II, at 1378a31–37 (reasoning that a person becomes angry “because of something the individual has done or was intending to do to him or those dear to him”).

<sup>87</sup> *See* Maroney, *supra* note 1, at 643–44 & nn.64–75 (summarizing pertinent studies); NUSSBAUM, *supra* note 2, at 100–19 (same); Kahan & Nussbaum, *supra* note 3, at 282–86; Pitcher, *supra* note 78, at 333–35; Bedford, *supra* note 78, at 292–96. Nonetheless, the notion that emotion depends on evaluation is contrary to the conception that prevailed through much of the twentieth century. *See, e.g.*, William James, *What is an Emotion?*, 9 MIND 188, 189–90 (1884). For a useful summary of contending theories of emotion, *see* Greene, *supra* note 3, at 1416–19; LOMBARDO, *supra* note 3, at 8–15.

emotional response to the same object at all times. Rather, our responses depend on our evaluation of the goodness of the object within a given context. Perhaps, in my example above, I knew that my friend and the stranger were playing a game in which they would slap each other across the face with increasing severity until one of them gave up and paid the other some amount of money for losing the game. My emotional response to the same event—the slap across my friend’s face—is unlikely to trigger the emotion of anger since I have apprehended the object in a different way than I did before.

Because our appetites are object-oriented and require apprehension to become active, Aquinas is able to identify three types of appetites, only two of which concern us here.<sup>88</sup> The first appetite is the sensory appetite, which seeks “some particular good” and is activated by apprehension that relies on the senses.<sup>89</sup> Fundamentally, the sensory appetite seeks what is either “pleasant or useful.”<sup>90</sup> The other appetite is the rational appetite—also called the “will”—which is “inclined towards good in general” and is activated by apprehension that relies on the intellect.<sup>91</sup> It seeks the good simpliciter, which is “goodness itself, or else some action that is suitable for attaining that end.”<sup>92</sup> Thus, the two appetites are (at least) distinguishable based on the object of their desire (the sensory appetite pursues only particular goods, while the rational appetite pursues the good as such) and the manner of apprehension (the apprehension that triggers the sensory appetite relies on the senses, while the apprehension that triggers the rational appetite relies on the intellect).<sup>93</sup> The sensory appetite, via the senses, will pursue the particular good of a steak, while the rational appetite, via the intellect, will pursue the good of wisdom.<sup>94</sup> The latter can only be apprehended as a good apart from particular, material

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88 MINER, *supra* note 44, at 13–15. The third appetite—the natural appetite—might appear to be in tension with my simplified depiction since it does *not* require apprehension on the part of the being to whom the appetite belongs. See LOMBARDO, *supra* note 3, at 31–32 & nn.52–53. But, as Miner points out, this seeming contradiction is resolved by Aquinas by relying on *divine* apprehension. MINER, *supra* note 44, at 19–21. In any event, I think my simplification is justified—even if one rejects Aquinas’s theistic attempt to reconcile the natural appetite with the requirement of apprehension—since my argument does not concern the natural appetite.

89 AQUINAS, *supra* note 44, at I Q. 59 art.1, 80.2.

90 MINER, *supra* note 44, at 22.

91 AQUINAS, *supra* note 44, at I Q. 59 art. 1, Q. 82 art. 5; SHERWIN, *supra* note 69, at 21–22. This is overstating things a bit since the rational appetite takes in information through the senses as well.

92 MINER, *supra* note 44, at 24.

93 AQUINAS, *supra* note 44, at I Q. 80 art. 2; SHERWIN, *supra* note 69, at 25; see ARISTOTLE, *supra* note 72, bk. III, at 1117b28–1118a2.

94 See KENNY, *supra* note 53, at 59.



objects, since it is an abstract and universal good worth pursuing for its own sake.<sup>95</sup>

These distinctions in apprehension point toward distinctions in cognitive faculties. Aquinas argues that there are two forms of cognition: sensory cognition (which pertains to the sensory appetite) and intellectual cognition (which pertains to the rational appetite).<sup>96</sup> For our purposes, the form of sensory cognition with which we are concerned is called “particular reason,” since it is a form of reason concerned with the particular good to which the sensory appetite is directed, while intellectual cognition involves reasoning about abstract and universal concepts, in line with the rational appetite’s desire for universal goods like wisdom.<sup>97</sup> These cognitive faculties conduct the evaluation necessary for apprehension of an object and activation (or nonactivation) of an appetite.<sup>98</sup>

TABLE I: APPETITES

Sensory	Rational (the Will)
Sensory cognition	Intellectual Cognition
Particular Reason	Intellect

Having introduced the idea of “particular reason,” I hasten to clarify that it should not be confused with “universal reason.”<sup>99</sup> Universal reason is where “in syllogistic matters particular conclusions are drawn from universal propositions.”<sup>100</sup> It is “the locus of abstract thought,”<sup>101</sup> where we move from premises to conclusions about nonmaterial matters like morality. This is the form of reasoning to which we usually refer in everyday speech when we speak of “reason.”

<sup>95</sup> For a more extended discussion of the distinction between the sensory and rational appetites, see MINER, *supra* note 44, at 21–25.

<sup>96</sup> AQUINAS, *supra* note 44, at I Q. 78 art. 4, Q. 79 arts. 1–2; LOMBARDO, *supra* note 3, at 21–24, 32–33; MINER, *supra* note 44, at 76–82.

<sup>97</sup> AQUINAS, *supra* note 44, at I Q. 78 art. 4, Q. 79 arts. 1–2; LOMBARDO, *supra* note 3, at 21–22; MINER, *supra* note 44, at 76–82.

<sup>98</sup> See Pitcher, *supra* note 78, at 335–37.

<sup>99</sup> AQUINAS, *supra* note 44, at I Q. 81 art. 3.

<sup>100</sup> *Id.*

<sup>101</sup> LOMBARDO, *supra* note 3, at 97.

Particular reason, by contrast, is a lower-level, more primitive form of reasoning that does not deal in universal principles or abstractions; it reasons only about concrete, particular things taken in through the senses (though it also makes use of nonmaterial information like whether an object is useful).<sup>102</sup>

Although universal reason can affect the sensory appetite by influencing particular reason (as I will discuss below), it has a much closer connection to the will (what I have been calling the “rational appetite”). Aquinas says that the intellect is “apprehensive of universal being and truth,” and understood that way, the intellect is the rational appetite’s counterpart to particular reason: it performs the intellectual cognition that “moves the will.”<sup>103</sup> But intellect and universal reason “are the same power,” in the sense that “[r]easoning”—by which Aquinas means universal reason—“is compared to understanding [or the intellect], as movement is to rest, or acquisition to possession.”<sup>104</sup> In other words, the intellect is our ability to understand things, and reasoning is how we come to understand them.<sup>105</sup> Thus, universal reason has a tight relationship with the will: insofar as our reason understands something to be desirable, it activates the will to seek the desirable thing.<sup>106</sup>

The activation of an appetite leads to what Aquinas calls “affections,” which I have stipulated (based on the work of Aquinas scholars) is the rough equivalent to our modern concept of emotions.<sup>107</sup> The activation of the sensory appetite results in what Aquinas calls a “passion,” which is a subcategory of affections.<sup>108</sup> Strictly speaking, passions do not accompany the activation of the rational appetite,<sup>109</sup> but another form of affection results. For example, Aquinas says that pleasure results from the satisfaction of either a sensory appetite or a rational appetite, but whereas the satisfaction of the sensory appetite results in a passion felt through the senses, the satisfaction of the rational appetite results in an affection known as “joy,” which is a subspecies of pleasure that does not necessarily involve

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102 AQUINAS, *supra* note 44, at I Q. 81 art. 3; LOMBARDO, *supra* note 3, at 24; MINER, *supra* note 44, at 69–82.

103 AQUINAS, *supra* note 44, at I Q. 82 art. 4. Aquinas notes that the relationship between the intellect and the will is complex, in that each can “move” the other depending on the sense in which we are considering them. See SHERWIN, *supra* note 69, at 25–38.

104 AQUINAS, *supra* note 44, at I Q. 79 art. 8; see also *id.* at I Q. 59 art. 1; KENNY, *supra* note 53, at 18.

105 LOMBARDO, *supra* note 3, at 97.

106 *Id.* at 78; KENNY, *supra* note 53, at 41–42; SHERWIN, *supra* note 69, at 39–45.

107 See *supra* note 68 and accompanying text.

108 LOMBARDO, *supra* note 3, at 75–77; MINER, *supra* note 44, at 35–38.

109 MINER, *supra* note 44, at 35–38.

the senses.<sup>110</sup> We can represent the ordering of these processes as follows:

Apprehension → Activation of Appetite → Affection

While these clean divisions are helpful for understanding the relevant concepts, it is important to note that there are many complications that I have not described. For example, although only the rational appetite is drawn to goodness as such, it may “second[]” or agree with the sensory appetite’s desire for some particular good and can “share[] in the sense appetite’s pleasure by seconding it,”<sup>111</sup> and the sensory appetite can be activated based on the good pursued by the rational appetite through a process called “overflow.”<sup>112</sup> But we need not delve into these complications, since they are not important to my argument.

What matters is that emotions are the result of the activation of either the sensory or rational appetite, an activation that occurs after the apprehension of some object, which involves an evaluation of the goodness of an object using either sensory cognition (particular reason) or intellectual cognition (the intellect).

### B. *Activation of the Appetites*

All of this will be easier to understand by examining Aquinas’s description of the triggering of an emotion, which will also set up the discussion of the relationship between reason, emotion, and the will in Section I.C below. I will focus on the sensory appetite because I have already provided a high-level description of the activation of the rational appetite in the preceding section.

The activation of the sensory appetite (which results in the species of emotion called passion) begins with the taking in of sensory information.<sup>113</sup> That information is synthesized by what Aquinas calls the “common sense” so that we can discern what the object is,<sup>114</sup> but if that is all that occurred, we would have the same emotional reaction (or none at all) to the same object regardless of context. Instead, Aquinas argues that our imagination (“a storehouse of forms received through the senses”) and our memory (“a storehouse of” our prior evaluations of the good or evil of a particular form) allow us to place the current form into a broader context by “collat[ing]” what we are

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110 LOMBARDO, *supra* note 3, at 85–86. It can, however, overflow into the sensory appetite. *See id.* at 107.

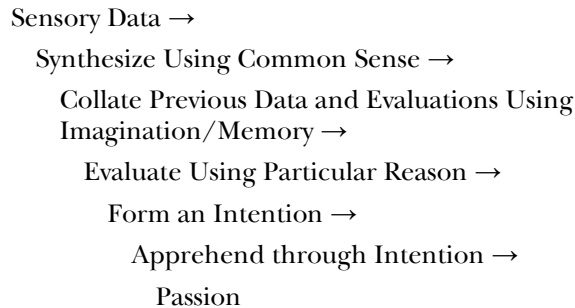
111 *Id.* at 84–85.

112 *Id.* at 89–93; MINER, *supra* note 44, at 103–05.

113 *See* AQUINAS, *supra* note 44, at I Q. 78 art. 4.

114 *Id.*

perceiving with previous forms.<sup>115</sup> Our sensory cognition (particular reason) evaluates the goodness of the current form based on this collation of forms.<sup>116</sup> The product of “perception colored by cognitive evaluation” is called an “intention,”<sup>117</sup> and we apprehend the object based on the intention,<sup>118</sup> which then activates the sensory appetite (that is, produces a passion).<sup>119</sup> A simplified flow diagram would look like this:



An example will help illuminate this. Suppose I am walking in the woods one day and spot a large bear nearby. My common sense takes in and synthesizes the form of the bear, and this form is collated with images and other sensory data relating to bears that I have previously evaluated and that are stored in my imagination and memory. Suppose that I have seen, read, or heard of previous bear attacks in the woods, so that these prior forms are collated with what I am seeing now. My particular reason will evaluate these forms, judge the bear to be dangerous, and present that intention. I will apprehend that the bear is dangerous through that intention, and my sensory appetite will be activated to produce the passion of fear. In Lombardo’s words, “It is not the perception of an object per se that elicits passion, but the perception of an object grasped under a certain aspect.”<sup>120</sup>

It is worth repeating that this depiction of the passions is oversimplified. “This logical progression should not be understood as a chronological progression; the formation of an intention typically

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115 *Id.*; see NUSSBAUM, *supra* note 2, at 64–67.

116 See AQUINAS, *supra* note 44, at I Q. 78 art. 4.

117 LOMBARDO, *supra* note 3, at 21, 24; see also AQUINAS, *supra* note 44, at I Q. 78 art. 4.

118 AQUINAS, *supra* note 44, at I-II Q. 22; LOMBARDO, *supra* note 3, at 22; see NUSSBAUM, *supra* note 2, at 27–31.

119 See AQUINAS, *supra* note 44, at I Q. 78 art. 4. For a more detailed explanation of the process described in this paragraph, see LOMBARDO, *supra* note 3, at 20–25, 34; MINER, *supra* note 44, at 58–87; see also ROMANUS CESSARIO, INTRODUCTION TO MORAL THEOLOGY 100–48 (2001).

120 LOMBARDO, *supra* note 3, at 25.

occurs simultaneously with perception.”<sup>121</sup> But it provides a rough sense of how Aquinas thinks about the passions.

### C. Reason, Emotion, and the Will

We are now in a position to understand the relationship between reason, emotion, and the will under Aquinas’s model, which will be important to my argument in Parts II and III.<sup>122</sup> Emotion, as we have seen, is the result of a cognitive evaluation. Two important implications follow from this.

First, an emotion can be unreasonable or mistaken.<sup>123</sup> Going back to my example of my friend being slapped across the face, if I had been unaware that he and the stranger were playing a game when I saw the slap occur, I would get angry, but while that anger would be reasonable based on what I knew at the time, it would be objectively *unreasonable* given the *actual* state of the facts (i.e., they were just playing a game, so there is no reason to be angry at the stranger for the slap). This is why Aristotle can say that virtue partly consists in “hav[ing] [an emotion] at the right time, about the right things, towards the right people, for the right end, and in the right way.”<sup>124</sup>

Second, emotions can be *changed* due to a change in our cognitive evaluations of objects,<sup>125</sup> a conclusion borne out by modern science.<sup>126</sup> Suppose I walked in just as my friend was slapped across the face, without knowing that a game was being played, and I became angry. But then another friend told me about the game. I would probably no longer be angry, and the reason is that my evaluation of the situation has changed in light of new facts. As Aquinas says, “Anyone can experience this in himself: for by applying certain universal considerations, anger or fear or the like may be modified or excited.”<sup>127</sup>

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121 *Id.* at 22–23.

122 Some will object to the framing of this discussion because of its assertion that reason and emotion are separable. Nussbaum, for instance, has argued that cognitive evaluations are not only *necessary* to an emotion; they are *all* that an emotion is. See NUSSBAUM, *supra* note 2, at 56–64; see also KAHAN & NUSSBAUM, *supra* note 3, at 293–95. Although Nussbaum makes a plausible case for her view, it is not Aquinas’s view, and for reasons described by both Lombardo and Miner, I believe Aquinas’s view is more likely correct. See LOMBARDO, *supra* note 3, at 224–27; MINER, *supra* note 44, at 4–5, 99.

123 NUSSBAUM, *supra* note 2, at 46–49; KAHAN & NUSSBAUM, *supra* note 3, at 286–88; Pitcher, *supra* note 78, at 329–31; Bedford, *supra* note 78, at 292–96.

124 ARISTOTLE, *supra* note 72, bk. II, at 1106b20–23, 1106b37–1107a8.

125 KAHAN & NUSSBAUM, *supra* note 3, at 293–95; Pitcher, *supra* note 78, at 345–46.

126 See Maroney, *supra* note 1, at 648–49.

127 AQUINAS, *supra* note 44, at I Q. 81 art. 3.

It is easy to see how emotions that result from movement of the will are influenced by reason. As described above, the will is moved by the intellect, and Aquinas often describes the will and intellect as so interconnected that they “can be considered as together constituting a single principle.”<sup>128</sup> Since the intellect and universal reason are the same cognitive power, it follows that the relationship between the will and universal reason is very close indeed. Insofar as, through the exercise of reason, we come to see that something we previously viewed as undesirable is in fact desirable, our will should be activated to produce the emotion of joy when we obtain the thing desired.<sup>129</sup> We can represent the relationship this way:

Universal Reason → Intellect → Will

The situation is more complicated with respect to the passions, the emotions that result from the movement of the sensory appetite. Aquinas says that reason may influence the passions in two ways.<sup>130</sup> First, because it is a lower-level form of reasoning, “particular reason is naturally guided and moved according to the universal reason.”<sup>131</sup> Recall that a passion can only be triggered after apprehension, and we apprehend things based on intentions produced (in part) by particular reason’s evaluation of sensory data. By changing particular reason’s evaluation of some object, we can change the intentions produced, the way in which the object is apprehended, and the passion that results (or that does not result).<sup>132</sup> My example of being angry until I learn that my friend is playing a slapping game is a straightforward instance of my universal reason determining that, in light of the fact that a game is being played, I have no cause to be upset with the stranger, which influences my particular reason to evaluate the same action (my friend being slapped by the stranger) differently when it occurs again minutes later.<sup>133</sup> We can represent the relationship as follows:

Universal Reason → Particular Reason → Passions

The second way in which reason can influence the passions is through the will. Aquinas points out that, unlike other animals that take action as soon as they feel a passion, humans can feel a passion and yet *not* act on it, and he attributes this to the will.<sup>134</sup> “The tendencies of the sens[ory] appetite present themselves to the will in

128 LOMBARDO, *supra* note 3, at 81.

129 *Id.* at 78.

130 LOMBARDO, *supra* note 3, at 94–98; Robert C. Roberts, *Thomas Aquinas on the Morality of Emotions*, 9 HIST. PHIL. Q. 287, 288–90 (1992).

131 AQUINAS, *supra* note 44, at I Q. 81 art. 3.

132 LOMBARDO, *supra* note 3, at 96–98.

133 *See id.* at 239.

134 *See id.* at 24–25, 239; Kahan & Nussbaum, *supra* note 3, at 288.

order to be executed; they cannot force themselves on the subject without the will's consent."<sup>135</sup> Because the will is closely connected to reason, reason can prevent the passions from being acted upon.<sup>136</sup> This seems to be what Aquinas means when he says "the sensitive appetite is subject to the reason, not immediately but through the will."<sup>137</sup> We can think about the relationship this way:

Universal Reason → Intellect → Will → Passions

Irrespective of the manner in which reason influences emotions, the very fact that it does so means that emotions are *not* inherently irrational. Rather, insofar as they are guided by reason, they are "rational by participation."<sup>138</sup> That is not to say that they are "essentially" rational; they are only rational insofar as they are guided by reason and therefore "participat[e]" in reason.<sup>139</sup>

But now we come to the crucial caveat: because the passions operate according to their own, distinct form of reasoning (i.e., particular reason), neither universal reason nor the will can *force* the passions to conform to universal reason. To illustrate the point, Aquinas borrows an analogy taken from Aristotle's *Politics*.<sup>140</sup> Aristotle contrasts "despotic" and political (i.e., "constitutional") rule.<sup>141</sup> Despotic rule characterizes the relationship between master and slave, while political rule characterizes the relationship between a leader and free individuals.<sup>142</sup> Aquinas deploys the analogy to describe the relationship between reason and the passions: "But the [passions] . . . do not obey the reason blindly; on the contrary, they have their own proper movements, by which, at times, they go against reason," which is why Aristotle says that "the 'reason rules the [passions] . . . by a political command' such as that by which free men are ruled, who have in some respects a will of their own."<sup>143</sup> Aristotle makes a similar point

135 LOMBARDO, *supra* note 3, at 98. *But see id.* ("Elsewhere [Aquinas] clarifies that this general rule does not always apply: in unusual circumstances, as when there is bodily indisposition, the passions can overwhelm the will." (citing AQUINAS, *supra* note 44, at I-II, Q. 10 art. 3)).

136 *See* AQUINAS, *supra* note 44, at I Q. 81 art. 3; ARISTOTLE, *supra* note 72, bk. III, at 1113b3–14.

137 AQUINAS, *supra* note 44, at I-II Q. 46 art. 4.

138 *Id.* at I-II Q. 56 art. 4, Q. 56 art. 6, Q. 60 art. 1; *see* LOMBARDO, *supra* note 3, at 94–95; Leget, *supra* note 42, at 574.

139 AQUINAS, *supra* note 44, at I-II Q. 60 art. 1; *see also* ARISTOTLE, *supra* note 72, bk. I, at 1102b13–30.

140 ARISTOTLE, *THE POLITICS* bk. I, at 1254a–1254b (B. Jowett trans., London, Oxford Univ. Press 1885) (c. 384 B.C.E.).

141 *Id.*

142 *Id.*

143 AQUINAS, *supra* note 44, at I-II Q. 56 art. 4 (quoting a version of ARISTOTLE, *supra* note 140, bk. I, at 1254b).

when he argues that our appetite “has reason in the sense that a person who listens to the reason of his father and his friends is said to have reason.”<sup>144</sup> As Lombardo has observed, Aquinas can be understood as suggesting that “the passions operate independently of reason, but nonetheless are inclined to obey it, and yet if reason attempts to rule the passions [despotically] . . . , the passions will erupt in rebellion.”<sup>145</sup>

Thus, while the relationship between reason and the passions can be tempestuous, it need not be, and when the passions (or the affections of the will) are oriented in the same direction as reason, they powerfully reinforce it,<sup>146</sup> as shown in the scientific literature.<sup>147</sup> This requires that emotions—which are passive—be repeatedly acted upon and moved by reason: “For everything that is passive and moved by another, is disposed by the action of the agent; wherefore if the acts be multiplied a certain quality is formed in the power which is passive and moved, which quality is called a habit . . . .”<sup>148</sup> Habit-formation, in turn, requires the use of the will,<sup>149</sup> since the will, when moved, results in the emotions associated with the rational appetite<sup>150</sup> and is the means by which reason governs the emotions associated with the sensory appetite.<sup>151</sup>

“As individuals respond to particular events and establish patterns of interaction between passion and reason, character traits emerge.”<sup>152</sup> These are not necessarily good traits. Habits are formed when emotions conform to reason through the will, but that does not guarantee that they are formed by *right* reason.<sup>153</sup> A person whose universal reason has erred and who conditions their emotions to conform to their error will develop *bad* habits.<sup>154</sup> These good and bad

144 ARISTOTLE, *supra* note 72, bk. I, at 1102b29–1103a1.

145 LOMBARDO, *supra* note 3, at 100; *see also* MINER, *supra* note 44, at 93–96, 107–08; SHERWIN, *supra* note 69, at 108–09.

146 Aquinas is clearer about this with respect to the passions, but as Lombardo observes, the same is true of the intellectual affections. *See* LOMBARDO, *supra* note 3, at 243–44.

147 Maroney, *supra* note 1, at 644–45.

148 AQUINAS, *supra* note 44, at I-II Q. 51 art. 2; *see also id.* at I-II Q. 50 art. 3. Aquinas is *not* endorsing an understanding of virtue as nothing more than repeated acts. *See* ROMANUS CESSARIO, *THE MORAL VIRTUES AND THEOLOGICAL ETHICS* 34–38 (2d ed. 2009). A *habitus* is an acquired *disposition* toward acting in a particular way, such that doing so “becom[es] choice and delight.” *Id.* at 35 (quoting *Fifteen Sermons, in* 2 *THE WORKS OF JOSEPH BUTLER* 74 (W.E. Gladstone ed., London, Oxford Univ. Press 1896) (1726)).

149 AQUINAS, *supra* note 44, at I-II Q. 50 art. 5 (habit “is principally related to the will”).

150 MINER, *supra* note 44, at 35–38.

151 *See* AQUINAS, *supra* note 44, at I-II Q. 46 art. 4.

152 LOMBARDO, *supra* note 3, at 101.

153 *Id.* at 103; *see* Maroney, *supra* note 1, at 648–49.

154 *See* AQUINAS, *supra* note 44, at I-II Q. 75 art. 4; CESSARIO, *supra* note 148, at 38–42.



habits are, simply put, virtues and vices.<sup>155</sup> Emotions are thus essential to the attainment of virtue in its truest sense, since the alignment of reason, emotion, and the will toward the good is a more perfect state than the constant internecine warfare of reason and emotion.<sup>156</sup> Thus, a virtuous person—far from being devoid of emotion—will have strong emotional responses *in favor* of that which right reason identifies as good.<sup>157</sup>

And just as reason can give wayward emotions a proper orientation toward the good, rightly ordered emotions can influence universal reason toward the good.<sup>158</sup> A person whose emotions have been properly habituated to reason can experience an emotion pointing toward the good that universal reason has more trouble grasping through a syllogism.<sup>159</sup> This “affective knowledge” can, of course, lead reason astray if the emotions are *not* properly habituated, but in a real though limited way, a person whose emotions have been habituated to the good has *two* means of discerning the correct course of action: moving from premise to conclusion through the use of universal reason, or having a habituated disposition toward the good that manifests itself in an emotional response.<sup>160</sup> And emotion may run out ahead of universal reason in some instances and identify the correct course before universal reason has a chance to catch up,<sup>161</sup> though, as I stressed above, the intellect and particular reason must accord with right reason for them to have identified the correct course.

Reason and emotion, then, interact in complex ways that belie any notion that the former is good and the latter is bad. When opposed to each other, they can cause turmoil; when aligned with each other, they can form character. The key question is what *type* of character is formed.

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155 AQUINAS, *supra* note 44, at I-II Q. 55 art. 1, Q. 75 art. 4; ARISTOTLE, *supra* note 72, bk. II, at 1103a14–1103b25; *see also* LOMBARDO, *supra* note 3, at 104–05, 242.

156 *See* AQUINAS, *supra* note 44, at I-II Q. 59 art. 5; ARISTOTLE, *supra* note 72, bk. II, at 1105b20–1106a13 (virtue is a “state”); *see also* LOMBARDO, *supra* note 3, at 40–43, 103–08; MINER, *supra* note 44, at 6–7, 90–94.

157 *See* AQUINAS, *supra* note 44, at I-II Q. 59 art. 5; *see also* LOMBARDO, *supra* note 3, at 106–08.

158 *See* LOMBARDO, *supra* note 3, at 105–06; MINER, *supra* note 44, at 97–99; SHERWIN, *supra* note 69, at 110–11; Thomas Ryan, *Revisiting Affective Knowledge and Connaturality in Aquinas*, 66 THEOLOGICAL STUD. 49, 50–51 (2005).

159 *See* Ryan, *supra* note 158, at 53–60; Daniel C. Maguire, *Ratio Practica and the Intellectualistic Fallacy*, 10 J. RELIGIOUS ETHICS 22, 26–29 (1982).

160 Ryan, *supra* note 158, at 51, 60–62; *see* AQUINAS, *supra* note 44, at II-II Q. 45 art. 2.

161 *See* Ryan, *supra* note 158, at 66. *See generally* Jacques Maritain, *On Knowledge Through Connaturality*, 4 REV. METAPHYSICS 473 (1951).

#### D. *Contra Aquinas?*

Because Aquinas's model of emotions is the foundation for the remainder of this Article, some may reach this point and ask: What if I disagree with Aquinas? What implications are there for the rest of the Article?

The reader need not agree with all aspects of the Thomistic model I have presented to agree with my argument that emotion should play an important role in constitutional theory. The most significant features of Aquinas's model of emotions—at least for purposes of my argument—are broadly accepted by law-and-emotion theorists and by modern science, namely: emotions (1) are object-oriented,<sup>162</sup> (2) depend on an evaluation,<sup>163</sup> (3) are capable of being changed by modifying how one evaluates an object,<sup>164</sup> and (4) when aligned with one's reasoning, create powerful reinforcement for reason that establishes stable character traits.<sup>165</sup> Different theorists may frame these claims differently,<sup>166</sup> but insofar as readers can sign onto these widely endorsed propositions, they should be able to agree with the gist of my argument below.

Of course, these propositions, so stated, are merely assertions. They only become understandable and defensible when situated within a broader model of emotion, which is why such a model is necessary to my argument. But a reader who subscribes to a different model that includes those propositions can join in much of what I will argue in the remainder of this Article.

## II. EMOTION IN CONSTITUTIONAL CULTURE

With Aquinas's model of emotion in mind, we can now move from the individual level to the societal level by turning to the role of emotion in constitutional culture. My goal in this Part is to synthesize Aquinas's model of emotion and Burke's account of emotion in constitutional culture, a synthesis that has not previously been developed by scholars. As noted, constitutional culture is the part of a national culture that relates to the society's constitution.<sup>167</sup> Its

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<sup>162</sup> NUSSBAUM, *supra* note 2, at 27; Pitcher, *supra* note 78, at 326–27; Bedford, *supra* note 78, at 291.

<sup>163</sup> See NUSSBAUM, *supra* note 2, at 100–19; Bedford, *supra* note 78, at 292–96; Kahan & Nussbaum, *supra* note 3, at 282–86; Maroney, *supra* note 1, at 643–44; Pitcher, *supra* note 78, at 333–35.

<sup>164</sup> See Kahan & Nussbaum, *supra* note 3, at 293–95; Maroney, *supra* note 1, at 648–49; Pitcher, *supra* note 78, at 345–46.

<sup>165</sup> See Gewirtzman, *supra* note 6, at 650–57; Maroney, *supra* note 1, at 644–45.

<sup>166</sup> See, e.g., Kahan & Nussbaum, *supra* note 3, at 293–301.

<sup>167</sup> See Post, *supra* note 15, at 8.

contours will become clearer in the discussion that follows, but it is a mixture of ideas and emotional dispositions that are widely shared by a people with respect to their constitution. I will rely on Burke's account of constitutional culture for four reasons, which largely track the reasons I rely on Aquinas.

First, and most importantly, because any account of constitutional culture must be consistent with an account of emotion within the individual, it is essential that Burke's account is—as I will argue—consistent with Aquinas's. Intuitively, it makes sense that emotion would play a similar role on a societal level that it does within the individual. Society, after all, is composed of individuals, and since Aquinas sees the individual as inherently social and political,<sup>168</sup> his model of the emotions in the individual should carry through to the social and political realms. Nonetheless, some readers may wonder: Why would a British, post-Reformation politician in the late eighteenth century have a view of emotion consistent with that of Aquinas? As Peter Stanlis has observed, Burke was steeped in Aristotelian philosophy, including the *Ethics*,<sup>169</sup> upon which Aquinas based many of his insights about the role of emotion in the individual.<sup>170</sup>

Aquinas and Burke knew that reason and emotion can both be led astray, but they also saw that emotion was essential for the formation of character and can, in some instances, see the good more easily than reason. At the same time, they emphasized the need for emotion to be habituated by reason so that it is oriented toward the good. But while Aquinas primarily advanced these arguments at the level of the individual, Burke did so at the level of society. This Part therefore provides the bridge from discussing emotions within the individual to discussing emotions within constitutional theory, which will be the subject of Part III below.

Second, Burke's account of constitutional culture is one of the most sophisticated in the history of political theory,<sup>171</sup> in part because he was writing in response to an era of increased revolutionary activity (and, most immediately, the French Revolution) that posed deep questions about the fragility of constitutional culture, which is an unusual context for a great work of political philosophy.<sup>172</sup> At the same

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168 THOMAS AQUINAS, DE REGIMINE PRINCIPUM (c. 1267), reprinted in AQUINAS: POLITICAL WRITINGS 5, 5–6 (R.W. Dyson ed. & trans., Cambridge Univ. Press 2002) (Bk. I, ch. 1).

169 See PETER J. STANLIS, EDMUND BURKE AND THE NATURAL LAW 35–36, 71 (1958).

170 See Leget, *supra* note 42, at 569.

171 See WILLIAM F. BYRNE, EDMUND BURKE FOR OUR TIME: MORAL IMAGINATION, MEANING, AND POLITICS 8–13 (2011).

172 See RICHARD BOURKE, EMPIRE & REVOLUTION: THE POLITICAL LIFE OF EDMUND BURKE 677 (2015).

time, Burke brought to his task a lifetime of reflection on constitutional culture as a theorist and statesman, which made him well-suited to it.

Third, Burke's account is compelling, though, as with Aquinas's model, I cannot reproduce all the arguments in favor of his account here.

Finally, like Aquinas's model of emotion, Burke's basic insights about constitutional culture find support from other scholars and modern science,<sup>173</sup> which I will note in passing along the way.

This last point helps answer a similar objection to the one addressed in Section I.D above: What if the reader disagrees with Burke's view of constitutional culture? While many features of Burke's political theory are controversial, scholars across the ideological spectrum share his view that emotions play a crucial role in sustaining a constitution, even though (as I will argue in Section III.A) they have largely overlooked the development or implications of this point.<sup>174</sup> From Robert Bork to Jack Balkin to David Strauss, constitutional theorists acknowledge that "political institutions" require "affective ties" from "many cultural and emotional sources."<sup>175</sup> Gewirtzman relies primarily on developments in modern science to argue that emotion, by "enhanc[ing] individuals' ability to maintain commitments over time by reinforcing habits," is "critical[] . . . to the continued legitimacy and survival of constitutional values and institutions."<sup>176</sup> Thus, much as "psychology has fought its way back to the place where Aristotle was when he wrote the *Rhetoric*,"<sup>177</sup> modern science has provided support for Burke's arguments about constitutional culture in *Reflections*.

Nonetheless, these points of consensus are insufficient, by themselves, to construct a framework for evaluating constitutional theories, which is why Burke's account is necessary to my argument. I therefore acknowledge that readers who reject Burke might likewise have to reject some of the implications that I draw out in Part III. For example, a reader might agree that emotions play a crucial role in sustaining constitutional legitimacy but believe, contra Burke, that changing those emotions does not often result in destabilizing the

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173 See, e.g., Gewirtzman, *supra* note 6, at 650–57.

174 See *id.* at 623–25.

175 David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1739 (2003); see also JACK M. BALKIN, *LIVING ORIGINALISM* 119–20 (2011); ROBERT H. BORK, *Tradition and Morality in Constitutional Law*, in *A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS* 397, 400 (ISI Books 2008) (1984); MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 6 (2013).

176 Gewirtzman, *supra* note 6, at 625; see also *id.* at 647–57.

177 Leget, *supra* note 42, at 576.

regime, which would affect the evaluation of radical constitutional theories in subsection III.B.3. But the heart of my argument—that emotion should play an important role in evaluating constitutional theories—is one that I believe readers who reject parts of Burke’s philosophy can nonetheless affirm.

I will start by explaining Burke’s view of how reason, emotion, and the will interact at a societal level to form a stable national character, which is where Burke’s and Aquinas’s understandings of emotion converge. Next, I will discuss how he thinks these societal emotional dispositions within the political realm are both constitutive *of* and are formed *by* constitutional culture. Finally, I will describe Burke’s argument that constitutional culture is essential to the stability of a regime, an argument consistent with Aquinas’s model of emotion.

#### A. *The Formation of National Character*

Burke’s defense of tradition and his skepticism of the ability of individual reason to arrive at sound conclusions about complex political questions are well known among legal scholars.<sup>178</sup>

We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.<sup>179</sup>

He sees tradition as “a form of social knowledge,”<sup>180</sup> the deposit of human reflection on political, economic, and social problems extended through time. Burke thinks this form of reasoning is at least equally reliable as the reasoning of any given individual—and probably more so.<sup>181</sup>

Notice that Burke is *not* arguing against reason as such. He is not a relativist or an emotivist.<sup>182</sup> “Leave a man to his passions, and you

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178 See STRAUSS, *supra* note 11, at 40–42; Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 519–21 (1996); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–94 (1996); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 369–72 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 642–50 (1994).

179 BURKE, *supra* note 20, at 76.

180 ROGER SCRUTON, *THE MEANING OF CONSERVATISM* 31, 124 (St. Augustine’s Press rev. 3d ed. 2002) (1980); see KENNETH MINOGUE, *THE LIBERAL MIND* 53–55 (Liberty Fund ed. 2000) (1963).

181 See BYRNE, *supra* note 171, at 28–29.

182 See BOURKE, *supra* note 172, at 146, 678, 695–98; BYRNE, *supra* note 171, at 27–28; YUVAL LEVIN, *THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, AND THE BIRTH OF RIGHT AND LEFT* 58 (2014); MATTHEW D. WRIGHT, *A VINDICATION OF POLITICS: ON THE COMMON GOOD AND HUMAN FLOURISHING* 123–26 (2019). “Emotivism is the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but*

leave a wild beast to a savage and capricious nature.”<sup>183</sup> Like Aquinas, Burke believes that reason must govern human affairs, but he thinks that individual reason is likely to err, which is why reason needs to be tested and sifted through generations before arriving at reliable conclusions. The nuance of Burke’s position is best understood by contrasting it with the rationalist position he criticizes, a position aptly described by Michael Oakeshott:

[The rationalist is] the *enemy* of authority, of prejudice, of the merely traditional, customary or habitual. His mental attitude is at once sceptical and optimistic: sceptical, because there is no opinion, no habit, no belief, nothing so firmly rooted or so widely held that he hesitates to question it and to judge it by what he calls his “reason”; optimistic, because the Rationalist never doubts the power of his “reason” (when properly applied) to determine the worth of a thing, the truth of an opinion or the propriety of an action.<sup>184</sup>

Burke is thus against *rationalism* but not against *acting rationally*. He is against privileging individual reason above all other sources of knowledge, such as custom and tradition. And precisely because customs and traditions are manifestations of propositions whose truth has been tested through time and that have been found consistent with the circumstances and culture of a particular society, he is skeptical of philosophical abstractions that would seek to displace them.<sup>185</sup>

Less well-known to legal scholars are Burke’s views on emotions and their importance to constitutional culture. Shortly before and within the same passage quoted above in which Burke describes “the general bank and capital of nations and of ages,”<sup>186</sup> he argues that emotions play a crucial role with respect to “morality,” “the great principles of government,” and the “ideas of liberty.”<sup>187</sup> Speaking again of the British, he observes: “[W]e still feel within us, and we cherish and cultivate, those inbred sentiments which are the faithful guardians, the active monitors of our duty, the true supporters of all liberal and manly morals.”<sup>188</sup> Here Burke asserts that certain emotions

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expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character.” ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 11–12 (3d ed. 2007).

183 Edmund Burke, Speech in General Reply, Second Day: Friday, May 30, 1794, in 11 *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 227, 237 (London, John C. Nimmo 1887).

184 MICHAEL OAKESHOTT, *Rationalism in Politics*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 5, 6 (Liberty Fund, new & expanded ed. 1991) (1962).

185 See BURKE, *supra* note 20, at 31–36.

186 *Id.* at 76.

187 *Id.* at 75.

188 *Id.*

must be “cultivate[d]” and “inbred” so that they may serve as “the active monitors of our duty” and the “true supporters” of morality in the political realm. Like reason, sentiments must be distilled through generations to arrive at reliable outcomes.<sup>189</sup> These are not artificial emotions, however; Burke makes clear that the emotions necessary for a healthy constitutional culture are “*natural*” and in at least some sense “untaught.”<sup>190</sup> In this, he echoes Aquinas’s argument that emotions are, by nature, directed toward the good because we seek that which completes and perfects us,<sup>191</sup> but emotions must nonetheless be conditioned by reason to ensure their proper orientation.<sup>192</sup>

Burke contends that the interaction of reason, emotion, and the will leads to the formation of “prejudices.”<sup>193</sup> This was a provocative term even when Burke wrote *Reflections*,<sup>194</sup> and it has an even greater negative connotation today, so we must be careful to examine what, exactly, Burke means when he uses it. He describes prejudice in this way:

Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.<sup>195</sup>

This passage reveals three important features of prejudice as Burke understands that term. First, prejudice has “its reason” or “the reason involved,” a “latent wisdom” that is often unapparent at first glance.<sup>196</sup> Prejudice is not, therefore, necessarily irrational, though Burke seems to concede that, on rare occasions, it might be. Second, prejudice is not *just* “naked reason”; it also has an emotional component to it, an alignment of affection and “the reason involved” that “will give” the prejudice “permanence.”<sup>197</sup> Third, prejudice “has a motive to give

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189 See WRIGHT, *supra* note 182, at 127.

190 BURKE, *supra* note 20, at 75–76; see also LEVIN, *supra* note 182, at 59–61.

191 See AQUINAS, *supra* note 44, at I Q. 5 art. 1; *id.* at I-II Q. 8 art. 1; see also LOMBARDO, *supra* note 3, at 26–27.

192 AQUINAS, *supra* note 44, at I Q. 81 art. 3; MINER, *supra* note 44, at 81–82.

193 See BURKE, *supra* note 20, at 76.

194 BYRNE, *supra* note 171, at 27; see ADAM ADATTO SANDEL, THE PLACE OF PREJUDICE: A CASE FOR REASONING WITHIN THE WORLD 6, 54 (2014); LEVIN, *supra* note 182, at 136.

195 BURKE, *supra* note 20, at 76.

196 *Id.*

197 *Id.*

action to [its] reason.”<sup>198</sup> This seems to refer back to the earlier passage in which Burke describes “cultivate[d]” and “inbred sentiments” that are “the active monitors of our duty.”<sup>199</sup> Properly cultivated sentiments, then, spur us to act upon the “latent wisdom” in our prejudices.<sup>200</sup>

This description of prejudice sounds remarkably similar to Aquinas’s description of the way in which character traits are formed and result in virtues or vices, and the two accounts can therefore be synthesized. Recall that, for Aquinas, character traits form when reason, emotion, and the will are in alignment. For instance, reason instructs both the rational and sensory appetites, and when a properly formed sensory appetite results in a passion, the passion proposes a course of action to the will, which gives its consent and spurs the person to action.<sup>201</sup> For Burke, prejudice is the combination of “the reason involved” (universal reason), “an affection” (emotion), and “action”<sup>202</sup> (“the command of the will”<sup>203</sup>). In a passage that could have been taken from Aristotle or Aquinas, Burke concludes that the result of prejudice is the formation of habits or character traits that (when properly formed) are virtues: “Prejudice renders a man’s virtue his habit, and not a series of unconnected acts. Through just prejudice, his duty becomes a part of his nature.”<sup>204</sup> Just as Aquinas contends that the virtuous person is conditioned to doing the good and will therefore be drawn to it even without the exercise of reason,<sup>205</sup> Burke argues that prejudice “previously engages the mind in a steady course of wisdom and virtue and does not leave the man hesitating in the moment of decision skeptical, puzzled, and unresolved.”<sup>206</sup> And just as Aquinas believes that the alignment of reason, emotion, and the will is essential to the formation of individual character, Burke believes that the same alignment—which he calls “prejudice”—is essential to

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198 *Id.*

199 *Id.* at 75.

200 *Id.* at 76. Many legal scholars who discuss Burke’s conception of prejudice overlook the components of emotion and will, focusing exclusively on prejudice’s latent wisdom. *See, e.g.*, Sunstein, *supra* note 178, at 369–72.

201 *See supra* Section I.C.

202 BURKE, *supra* note 20, at 76. My argument here owes much to Matthew Wright and William Byrne. The main difference between my analysis and theirs is that I make a novel and explicit connection between Burke’s thought and Aquinas’s model of emotions.

203 AQUINAS, *supra* note 44, at I Q. 81 art. 3.

204 BURKE, *supra* note 20, at 76–77.

205 *See supra* notes 158–61.

206 BURKE, *supra* note 20, at 76; *see* WRIGHT, *supra* note 182, at 127–28; BYRNE, *supra* note 171, at 22–23, 37–38, 79–83.



the formation of “our *national* character.”<sup>207</sup> Thus, both Aquinas and Burke emphasize that “[a] well-ordered soul . . . is not one without passion, but one in which the right sort of passions predominate.”<sup>208</sup>

Nonetheless, although Aquinas and Burke’s accounts of emotion can be synthesized with respect to the points discussed above, it is important not to overstate the extent to which their accounts overlap. Burke’s most complete description of emotion is found in his earlier work on emotion and aesthetics, *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and Beautiful*.<sup>209</sup> The model that Burke offers there is far less systematic than Aquinas’s, so it can be difficult to compare their respective views on key points. But what matters for my purposes here is that they are consistent with each other on the points relevant to my argument.<sup>210</sup>

To be sure, that prejudice contains reason does not mean that prejudice contains *right* reason; there can be evil prejudices as well as good ones.<sup>211</sup> When Burke describes the way in which a person’s “duty becomes a part of his nature,” he says that this happens “[t]hrough *just* prejudice.”<sup>212</sup> Left unsaid is that an *unjust* prejudice could make *the dereliction of duty* a part of a person’s nature.<sup>213</sup> This is why Burke, while expressing confidence that we will generally find “the latent wisdom which prevails” in prejudices if we look for it, nonetheless leaves open the possibility that we will not when he says that we “*seldom* fail” to find it.<sup>214</sup>

Even this might seem overly optimistic. After all, vice is ubiquitous; why is Burke so confident that prejudices will often result in virtues? Part of the answer is that Burke has in mind “our *old* prejudices,” and “the longer they have lasted and the more generally they have prevailed, the more we cherish them.”<sup>215</sup>

Burke retains his skepticism of individual reason and knows that vice is prevalent in the individual person, but he trusts that societal prejudices that have endured over time reflect a tradition of thought and emotion that are likely to be virtuous.

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207 BURKE, *supra* note 20, at 75–76 (emphasis added). Gewirtzman, relying on modern science, provides a similar description of the role of emotion in the formation of national character. See Gewirtzman, *supra* note 6, at 650–57.

208 BYRNE, *supra* note 171, at 82.

209 See EDMUND BURKE, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* (Paul Guyer ed., Oxford Univ. Press 2015) (1757).

210 But see SANDEL, *supra* note 194, at 55–66 (arguing that Burke’s conception of prejudice is opposed to reason).

211 BYRNE, *supra* note 171, at 39–40, 77–78.

212 BURKE, *supra* note 20, at 77 (emphasis added).

213 See T.S. ELIOT, *AFTER STRANGE GODS: A PRIMER OF MODERN HERESY* 18–20 (1934).

214 BURKE, *supra* note 20, at 76 (emphasis added).

215 *Id.* (emphasis added).

Of course, that will not always be the case. The principal reason why the word “prejudice” has such a negative connotation in the United States is precisely because of its association with an old tradition of thought and emotion—racism—that is evil. But while that example should make us less sanguine than Burke about the virtue of enduring prejudices, it does not undermine Burke’s general description of what a prejudice *is*; nor does it negate the possibility of *good* prejudices. Our society has a strong prejudice against cannibalism, for instance, and that is a very good prejudice.

Indeed, if we understand the word “prejudice” as Burke does, then just as the individual person will inevitably develop character traits, a society will inevitably develop prejudices.<sup>216</sup> Even if we claim to disavow prejudices, that is nonetheless adopting, as Hans-Georg Gadamer once put it, a “prejudice against prejudice.”<sup>217</sup> The question is not, therefore, whether to be for or against prejudices, it is what *kinds* of prejudices a society will develop: virtues or vices?<sup>218</sup>

Under Burke’s theory, therefore, national prejudices are national traits—combinations of reason, emotion, and the will—that together constitute a stable national character, which we might also call our national culture. And just as our character traits are both constitutive *of* our character and are shaped *by* our character, national prejudices are both constitutive *of* our national culture and shaped *by* our national culture.

### B. *The Wardrobe of a Moral Imagination*

Both in the same section of *Reflections* described above and elsewhere in that text, Burke describes the kinds of emotions that help form the prejudices relating to that aspect of our national culture that we might call constitutional culture. He is thinking of “awe to kings,” “affection to parliaments,” “duty to magistrates,” “reverence to priests” (given the union of church and state in Britain), and “respect to nobility.”<sup>219</sup> Burke’s emphasis on the need for “reverence to our civil institutions” is telling and must be understood against the backdrop of his *Philosophical Enquiry*.<sup>220</sup>

<sup>216</sup> See BYRNE, *supra* note 171, at 31–33.

<sup>217</sup> HANS-GEORG GADAMER, *TRUTH AND METHOD* 272–73 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (1960).

<sup>218</sup> BYRNE, *supra* note 171, at 181.

<sup>219</sup> BURKE, *supra* note 20, at 76.

<sup>220</sup> *Id.* at 30; see WRIGHT, *supra* note 182, at 121–22, 130–31; see also BOURKE, *supra* note 172, at 119–20; DAVID BROMWICH, *THE INTELLECTUAL LIFE OF EDMUND BURKE: FROM THE SUBLIME AND BEAUTIFUL TO AMERICAN INDEPENDENCE* 11–12 (2014); BYRNE, *supra* note 171, at 41; LEVIN, *supra* note 182, at 57–58.

There, Burke describes the emotions triggered by what he calls “the sublime,” which include, “in its highest degree,” the emotion of “astonishment,” and in its “inferior effects,” “admiration, reverence, and respect.”<sup>221</sup> The sublime arouses “ideas of pain[] and danger”;<sup>222</sup> it is a thing with “a power in some way superior” to our own.<sup>223</sup> Burke provides, as an example of the sublime, “[t]he power which arises from institution in kings and commanders,” which is why “[s]overeigns are frequently addressed with the title of *dread majesty*.”<sup>224</sup> Because Burke believes that “ideas of pain are much more powerful than those which enter on the part of pleasure,” the sublime “is productive of the strongest emotion which the mind is capable of feeling.”<sup>225</sup> This powerful category of emotions “anticipates our reasonings, and hurries us on by an irresistible force.”<sup>226</sup>

But Burke does not believe that a healthy constitutional culture would be founded exclusively on the notions of reverence and awe associated with the sublime; he also appeals to the “beautiful,” which is “founded on . . . pleasure,”<sup>227</sup> has a “light and delicate”<sup>228</sup> aspect, and “cause[s] love, or some passion similar to it.”<sup>229</sup> Constitutional culture is at its best when

we have given to our frame of polity the image of a relation in blood, binding up the constitution of our country with our dearest domestic ties, adopting our fundamental laws into the bosom of our family affections, keeping inseparable and cherishing with the warmth of all their combined and mutually reflected charities our state, our hearths, our sepulchres, and our altars.<sup>230</sup>

Here, Burke makes a strong connection between the affection we have for our families and the affection we have for our country and constitution. In doing so, he draws on a long tradition in political philosophy about the virtue of *pietas*, “the virtue that enables us to do what is right in relation to our family, friends, benefactors, country, and God.”<sup>231</sup> It is a virtue that Aquinas likewise sees as important to

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221 BURKE, *supra* note 209, at 47; *see also* BROMWICH, *supra* note 220, at 77 (“For [Burke], reverence, respect, and fear exist on a single continuum.”).

222 BURKE, *supra* note 209, at 33.

223 *Id.* at 53.

224 *Id.* at 55.

225 *Id.* at 33–34.

226 *Id.* at 47.

227 *Id.* at 101.

228 *Id.*

229 *Id.* at 73.

230 BURKE, *supra* note 20, at 30.

231 James Hankins, *Pietas*, FIRST THINGS (Nov. 2020), <https://www.firstthings.com/article/2020/11/pietas> [<https://perma.cc/3SZJ-L6PA>].

the maintenance of a culture of obedience to legitimate civil authority.<sup>232</sup>

This might strike us as one-sided love: owed *by* the people *to* their institutions. But Burke emphasizes that the relationship goes both ways—or at least it did within a lost culture he calls “chivalry.”<sup>233</sup> A healthy constitutional culture “produce[s] a noble equality and hand[s] it down through all the gradations of social life.”<sup>234</sup> It “mitigate[s] kings into companions and raise[s] private men to be fellows with kings”; “subdue[s] the fierceness of pride and power”; and “oblige[s] sovereigns to submit to the soft collar of social esteem.”<sup>235</sup> This kind of culture “ma[kes] power gentle and obedience liberal”; “harmonize[s] the different shades of life”; and “incorporate[s] into politics the sentiments which beautify and soften private society.”<sup>236</sup> The result is a complex, cross-cutting, and almost-indefinable network of relationships and emotions that bind the people to their constitution, the rulers to their people, and the people to each other.<sup>237</sup> This chivalrous culture, in Burke’s view, is what had “given its character to modern Europe” at the end of the eighteenth century.<sup>238</sup>

How is this kind of constitutional culture created and sustained? Although Burke would disclaim any sort of procedure or rationalistic system for creating something that is necessarily organic, he describes some of its sources.<sup>239</sup> A constitutional culture requires resort to “superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns and the understanding ratifies as necessary to cover the defects of our naked, shivering nature, and to raise it to dignity in our own estimation.”<sup>240</sup> Burke coined the phrase “wardrobe of a moral imagination,”<sup>241</sup> and while he does not elaborate on it, he says enough to give us a sense of what he means. In his *Philosophical Enquiry*, Burke defines the imagination as “a sort of creative power . . . either in representing at pleasure the images of things in the order and manner in which they were received by the senses, or in combining those images in a new manner, and according to a different order.”<sup>242</sup> The imagination acts as both receiver and creator: it stores information taken in by the senses and conjures old

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232 AQUINAS, *supra* note 44, at II-II Q. 101 art. 1.

233 BURKE, *supra* note 20, at 66.

234 *Id.* at 67.

235 *Id.*

236 *Id.*

237 See WRIGHT, *supra* note 182, at 131–33; BOURKE, *supra* note 172, at 678.

238 BURKE, *supra* note 20, at 67.

239 See WRIGHT, *supra* note 182, at 133–36.

240 BURKE, *supra* note 20, at 67.

241 WRIGHT, *supra* note 182, at 129; BYRNE, *supra* note 171, at 7.

242 BURKE, *supra* note 209, at 18.

and new images that can trigger powerful emotions. Burke's use of the word "moral" to modify "imagination" makes sense in this context because he is discussing how we are to act socially and politically, which are moral questions. Thus, for Burke the moral imagination has a relationship with constitutional culture that flows in both directions: the wardrobe of the moral imagination shapes our emotions and produces our constitutional culture, and our constitutional culture stocks the wardrobe with items that shape our emotions.<sup>243</sup>

What are those items? Burke contrasts the healthy culture created by the wardrobe of a moral imagination with the notion that "a king is but a man, a queen is but a woman; a woman is but an animal, and an animal not of the highest order."<sup>244</sup> A moral imagination, then, is what elevates a woman so that she is not just a woman but a *queen*, with the complex mixture of ideas and "awe"<sup>245</sup> that that office evokes. The crown, orb, and scepter of the monarch; the miter, robes, and crosier of the bishop; the helmet, armor, and sword of the knight: these are the "pleasing illusions" taken from the "wardrobe of a moral imagination" to "cover the defects of our naked, shivering nature."<sup>246</sup>

It would be a mistake, however, to take the metaphor of a "wardrobe" literally; Burke is not referring exclusively to the garb of political power. He praises the constitutional culture of the British because they "[a]lways act[] as if in the presence of canonized forefathers."<sup>247</sup> Their constitutional culture "has its bearings and its ensigns armorial. It has its gallery of portraits, its monumental inscriptions, its records, evidences, and titles."<sup>248</sup> One is reminded of John Adams's insistence on the importance of titles in generating the necessary respect for governmental officers.<sup>249</sup> In short, the wardrobe of a moral imagination consists of the symbols, images, rituals, and customs that inspire the mixture of ideas and emotions (e.g., love of constitution, respect of rulers) that form our constitutional culture.

### C. *The Risks of Radicalism*

Burke assails the French revolutionaries for having disregarded the importance of such a culture. They "chose to act as if [they] had never been molded into civil society and had everything to begin

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243 WRIGHT, *supra* note 182, at 133–36.

244 BURKE, *supra* note 20, at 67.

245 *Id.* at 76.

246 *Id.* at 67.

247 *Id.* at 30.

248 *Id.*

249 DAVID McCULLOUGH, JOHN ADAMS 404–06 (2001).

anew.”<sup>250</sup> Burke’s use of “molded” says a lot, since it occurs immediately after he had described the ways in which British constitutional culture molded the British national character. Burke is accusing the revolutionaries of destroying *their own character*: “You began ill, because you began by despising everything that belonged to you.”<sup>251</sup>

Burke sees this as dangerous and destabilizing.<sup>252</sup> By tearing down their constitutional culture and replacing it only with their abstract political theories, the revolutionaries would leave themselves without the *emotional* attachments necessary to sustain a constitution: “Nothing is left which engages the affections on the part of the commonwealth. On the principles of this mechanic philosophy, our institutions can never be embodied, if I may use the expression, in persons, so as to create in us love, veneration, admiration, or attachment.”<sup>253</sup> The resulting regime would be precarious because rational arguments, by themselves, are insufficient to generate popular allegiance to a constitution over time; obedience to the law requires a disposition or character composed, in part, by the emotions formed through constitutional culture.<sup>254</sup> “But that sort of reason which banishes the affections is incapable of filling their place. These public affections, combined with manners, are required sometimes as supplements, sometimes as correctives, always as aids to law.”<sup>255</sup> Burke draws the conclusion that, because the revolutionaries would not be able to rely on a constitutional culture supporting their theories, their regime would ultimately have to rely on fear and violence: “In the groves of *their* academy, at the end of every vista, you see nothing but the gallows.”<sup>256</sup>

Here we again see the insights of Aquinas and Burke coming together. Aquinas insisted that our emotions had to be in line with our reason and will to create a stable character oriented toward virtue. Burke extrapolated from a similar understanding of human nature to argue that a society needs prejudices—the union of reason, emotion, and the will—to form a stable national character oriented toward obedience to the constitution, and the emotional component of these good prejudices is created by a constitutional culture drawing from a

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250 BURKE, *supra* note 20, at 31.

251 *Id.*

252 BYRNE, *supra* note 171, at 24–26.

253 BURKE, *supra* note 20, at 68; *see also* GEORGE SANTAYANA, INTERPRETATIONS OF POETRY AND RELIGION 9 (1922).

254 WRIGHT, *supra* note 182, at 127–28; *see also* BOURKE, *supra* note 172, at 704–06; LEVIN, *supra* note 182, at 57–64; JESSE NORMAN, EDMUND BURKE: THE FIRST CONSERVATIVE 28–29 (2013).

255 BURKE, *supra* note 20, at 68.

256 *Id.*; *see also* BYRNE, *supra* note 171, at 35–39; LEVIN, *supra* note 182, at 57–64.

well-stocked wardrobe of a moral imagination. Just as Aquinas saw that a person's orientation toward virtue would be unstable as long as their emotions were at war with their reason, Burke saw that a nation's orientation toward constitutional obedience would be unstable as long as its constitutional culture was at war with its constitutional philosophy, a point supported by the modern science of emotion.<sup>257</sup> “[I]f reason attempts to rule the passions [despotically] . . . , the passions will erupt in rebellion.”<sup>258</sup>

Burke's insight into the essential role of emotion in the formation of a stable national character oriented toward constitutional obedience is ultimately rooted in an account of human nature consistent with the account offered by Aquinas. Understanding the relationship between reason, emotion, and the will within the individual human person helps us understand the same relationship within constitutional culture.

### III. EMOTION IN CONSTITUTIONAL THEORY

Having examined the role of emotion within the individual and integrated it into our understanding of constitutional culture, we are now in a position to assess the role of emotion in constitutional theory. And when we do so, it becomes clear that emotion has its most important application to theories of constitutional legitimacy: theories that seek to explain why we are morally obligated to obey the Constitution and the laws enacted under it, though I will also touch upon some of the implications for constitutional doctrine (and *stare decisis*, in particular) toward the end.<sup>259</sup> I do not claim that what I argue in this Part exhausts the implications of emotion for constitutional theory; there may very well be other implications.<sup>260</sup> But the synthesized account of the Thomistic and Burkean understanding of emotion is most relevant to assessing theories of constitutional legitimacy.

Based on that account, I will argue that American constitutional theorists have been overlooking the essential role of emotion in evaluating theories of constitutional legitimacy. Reason alone is not

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<sup>257</sup> Gewirtzman, *supra* note 6, at 657–70.

<sup>258</sup> LOMBARDO, *supra* note 3, at 100. Solum, relying on Richard Kraut's work on Aristotle, has made a related argument about the importance of emotional attachments to the stability of a regime in his discussion of justice-as-lawfulness, with lawfulness depending on adherence to laws, norms, and customs generally accepted by a community. *See* Solum, *supra* note 16, at 89–91; Solum, *supra* note 6, at 516–18.

<sup>259</sup> *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 20–46 (2018) (distinguishing between moral, sociological, and legal legitimacy).

<sup>260</sup> *See, e.g.*, Gewirtzman, *supra* note 6, at 677–83; Greene, *supra* note 3, at 1446–69. *See generally* Solum, *supra* note 6.

sufficient to sustain obedience to the Constitution; emotional attachments to the Constitution are essential. This fact has normative consequences insofar as the stability of the Constitution is considered a good thing,<sup>261</sup> and as Burke argued, that stability *is* a good thing insofar as it helps avoid the political, economic, and social breakdown that can accompany the overthrow of a society's constitution.<sup>262</sup> Consequently, theories of legitimacy that accord with the emotional attachments woven into our constitutional culture have a strong argument in their favor. By contrast, those theories of legitimacy that are contrary to our constitutional culture should be abandoned or modified or, alternatively, they must explain how our constitutional culture could conform to the theory without destabilizing the Constitution or why such destabilization is justified.

But just as reason is insufficient to sustain a constitution, so, too, is emotion, and one limitation of my argument is that I will focus only on the role of emotion in assessing theories of legitimacy. I will not assess which theory of legitimacy best accords with reason. Thus, while I argue that some theories of legitimacy have a stronger case in their favor because they accord with our constitutional culture, I leave open the possibility that such theories may nonetheless be *wrong* as a logical matter, which would be a strong reason to reject them and, if necessary, seek to *change* our constitutional culture to suit a more logically sound theory. To do otherwise would be to habituate ourselves to *error*, which would entail the formation of *bad* habits.<sup>263</sup> I address some of the problems that confront efforts to change constitutional culture in subsection III.B.3.

I will begin by describing the role that theories of legitimacy play in constitutional theory and in the formation of constitutional culture.

#### A. *Theories of Constitutional Legitimacy and the Importance of Constitutional Culture*

Complete constitutional theories have two components: a methodology and a justification. By a “methodology,” I mean a form of analysis (one might call it a decision procedure) governing *how* to adjudicate constitutional disputes, and by a “justification,” I mean the reasons *why* a particular methodology should be adopted.<sup>264</sup> For

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261 See JOHN RAWLS, POLITICAL LIBERALISM 140–44 (1996); Solum, *supra* note 16, at 94–95; Solum, *supra* note 6, at 516–18.

262 See *supra* Section II.C.

263 See AQUINAS, *supra* note 44, at I-II Q. 75 art. 4; see also CESSARIO, *supra* note 148, at 38–42, 53–54.

264 FALLON, *supra* note 259, at 132–33; RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 64 (2017); Andrew Coan, *The Foundations of Constitutional Theory*,



example, John McGinnis and Michael Rappaport's originalist constitutional theory offers a methodology: "interpret the Constitution using the same interpretive methods that the enactors would have used."<sup>265</sup> It also offers a justification: because the Constitution (with its amendments) was enacted through supermajoritarian voting procedures, and because supermajoritarian voting procedures "are the most desirable way of creating good constitutional provisions," the Constitution should be interpreted to preserve the meaning agreed upon by the supermajority.<sup>266</sup>

Justifications ultimately rest on normative arguments. While some theorists argue that a particular methodology is—as a factual matter—the correct way to interpret the U.S. Constitution,<sup>267</sup> such an argument cannot explain why we should *care* about that fact (assuming that it is a fact).<sup>268</sup> We could, after all, decide to ignore the Constitution (however interpreted) in resolving disputes about governmental power. A complete constitutional theory must therefore explain why the Constitution is *legitimate*: why we *should* adhere to the Constitution.<sup>269</sup> A theory of constitutional legitimacy also helps determine the appropriate methodology. Knowing *why* the Constitution is legitimate helps us understand *how* to adjudicate disputes about its content and application.<sup>270</sup> If, for instance, a theorist believes that the Constitution is legitimate only insofar as judges can adapt its meaning to reflect the views of those living today,<sup>271</sup> that theorist will need to reject methodologies that impose significant constraints on judicial

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2017 WIS. L. REV. 833, 836. *But see* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3812715> [<https://perma.cc/GKK2-77PV>] (arguing that originalism should not be understood as a decision procedure).

265 JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 14 (2013).

266 *Id.* at 11–12.

267 *See, e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825–33 (1997); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 858–64 (2009); Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL'Y 485, 486–89 (2008).

268 Fallon, *supra* note 58, at 545–49; *see also* Lawson, *supra* note 267, at 1823–25, 1835–36 (acknowledging this point); Paulsen, *supra* note 267, at 919 (same); Prakash, *supra* note 267, at 489–91 (same).

269 *See* FALLON, *supra* note 259, at 1–14; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–11 (1999); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130 (1998).

270 *See* DWORKIN, *supra* note 11, at 190–92; FALLON, *supra* note 259, at 125–54; WHITTINGTON, *supra* note 269, at 111; McConnell, *supra* note 269, at 1130; *see also* ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTION 57–68 (2017).

271 *See, e.g.*, BALKIN, *supra* note 175, at 59–99.

discretion,<sup>272</sup> which means the theorist might instead adopt a methodology that interprets the language of the Constitution at a fairly high level of generality.<sup>273</sup>

For these reasons, it is common for constitutional theorists—originalists and non-originalists alike—to offer a theory of constitutional legitimacy as part of their justification for their methodology.<sup>274</sup> Various theories of legitimacy have been offered. Originalists have often relied on popular sovereignty,<sup>275</sup> but other originalists have grounded the Constitution’s legitimacy in its ability to protect natural rights,<sup>276</sup> to produce good consequences,<sup>277</sup> or to accord with the natural law.<sup>278</sup> Non-originalists have argued that the Constitution is legitimate because it meets the minimum standards of justice and democracy,<sup>279</sup> it provides common ground for settling otherwise difficult and controversial questions,<sup>280</sup> or it accepts integrity as a central principle of our political system.<sup>281</sup> All of these theorists see constitutional legitimacy as a logical premise in a larger argument in favor of their particular methodology.

But the foregoing discussion of the role of emotion in constitutional culture should cause us to focus on a different purpose served by theories of legitimacy. Aquinas and Burke show us that obedience to a constitution must become part of a society’s *habitus*—part of its national character—if the regime is to endure. Good arguments alone will not support a constitution; they must be joined with affection for the constitution and the will to sustain it.<sup>282</sup> There must, in other words, be a *prejudice* in favor of a society’s constitution, which is the product of a particular constitutional culture.<sup>283</sup> As James Madison recognized in *Federalist* 49, “veneration” for governing

272 See *id.* at 24, 59–73.

273 *Id.* at 21–35; see also Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1282–83 (2019); Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31, 32–36 (2015).

274 See, e.g., BALKIN, *supra* note 175, at 59–99; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1–86 (2004); DWORKIN, *supra* note 11, at 176–224; FALLON, *supra* note 259, at 20–46; WHITTINGTON, *supra* note 269, at 110–59.

275 See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007); WHITTINGTON, *supra* note 269, at 110–59.

276 See BARNETT, *supra* note 274, at 1–86.

277 See MCGINNIS & RAPPAPORT, *supra* note 265, at 33–80.

278 See LEE J. STRANG, ORIGINALISM’S PROMISE 221–309 (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 117–38 (2016).

279 See FALLON, *supra* note 259, at 29–35.

280 See STRAUSS, *supra* note 11, at 99–114.

281 See DWORKIN, *supra* note 11, at 176–224.

282 See *supra* Part II.

283 See *id.*

institutions is something “without which perhaps the wisest and freest governments would not possess the requisite stability.”<sup>284</sup>

And as Burke argued, theories of constitutional legitimacy play a key role in the cultivation of the sentiments and ideas that can sustain a regime. When Dr. Richard Price—the target of Burke’s arguments in *Reflections*—asserted that the British constitution was founded on the right of the people “to choose [their] own governors,”<sup>285</sup> Burke did not just argue that this theory of legitimacy was wrong as a historical or legal matter; he argued that it did not fit with Britain’s *constitutional culture*: “The body of the people of England have no share in it. They utterly disclaim it.”<sup>286</sup> Burke asserted that the theory of legitimacy undergirding the British constitution was a theory of hereditary succession, and while he carefully reviewed the relevant historical and legal underpinnings of the hereditary theory,<sup>287</sup> he was emphatic that hereditary succession was the theory bound up with the British people’s *affections*. It is worth repeating his words on this point:

In this choice of inheritance we have given to our frame of polity the image of a relation in blood, binding up the constitution of our country with our dearest domestic ties, adopting our fundamental laws into the bosom of our family affections, keeping inseparable and cherishing with the warmth of all their combined and mutually reflected charities our state, our hearths, our sepulchres, and our altars.<sup>288</sup>

Immediately following this passage, he states that the British people had “call[ed] in the aid of [nature’s] unerring and powerful instincts to fortify the fallible and feeble contrivances of our reason.”<sup>289</sup> In that same paragraph, he describes the numerous cultural artifacts of what he would later in *Reflections* call “the wardrobe of a moral imagination”<sup>290</sup> that have preserved the British constitution by appealing to the people’s “nature rather than [their] speculations.”<sup>291</sup> Burke shows us that a theory of constitutional legitimacy is not just a logical premise in a complete constitutional theory; it is the basis for a constitutional culture that, when successful, produces “those inbred sentiments which are the faithful guardians, the active monitors of” a

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284 THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

285 BURKE, *supra* note 20, at 14 (quoting RICHARD PRICE, A DISCOURSE ON THE LOVE OF OUR COUNTRY 34 (London, George Stafford 2d ed. 1789)).

286 *Id.*

287 *See id.* at 14–29.

288 *Id.* at 30.

289 *Id.*

290 *Id.* at 30, 67.

291 *Id.* at 30–31.

constitution.<sup>292</sup> Stripping away that culture and replacing it with an alien theory of legitimacy—as Burke thought the French revolutionaries did—is thus inherently destabilizing and potentially dangerous.<sup>293</sup> It is analogous to reason attempting to rule the passions despotically: “the passions will erupt in rebellion.”<sup>294</sup>

Yet, constitutional theorists rarely ask whether a theory of legitimacy is consistent with American constitutional culture.<sup>295</sup> That is, they rarely ask whether the American people’s “inbred sentiments”<sup>296</sup> favor a particular conception of the Constitution, and if so, what role that should play in thinking about the basis for the Constitution’s legitimacy. Instead, the debates over constitutional legitimacy occur almost exclusively in abstract philosophical terms—precisely the error that Burke identified in Price’s argument.<sup>297</sup> If Burke’s model of constitutional culture—as synthesized with Aquinas’s model of emotions—is sound, then American constitutional theorists have been overlooking a fundamental consideration in their debates over constitutional legitimacy: Which theory of legitimacy is most consonant with the ideas and sentiments of American constitutional culture?

That is not to say that constitutional theorists have ignored American constitutional culture in formulating their theories. Bruce Ackerman, for instance, has come closest to asking the type of question I am asking here. His project is motivated by a similar concern about the disconnect between constitutional theory and constitutional culture,<sup>298</sup> which leads him to develop a rich and nuanced description of our constitutional culture as the basis for his particular methodology.<sup>299</sup> But while Ackerman often refers to the emotions involved in constitutional politics, his account is almost entirely focused on intellectual history,<sup>300</sup> not on the role that emotion plays in sustaining a constitution. This causes him to miss the potential normative implications of attempting to impose a theory of legitimacy alien to our

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292 *Id.* at 75; *see also* Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 688–95 (2005) (making a similar point).

293 *See supra* Section II.C.

294 LOMBARDO, *supra* note 3, at 100.

295 Gewirtzman, *supra* note 6, at 625; *see id.* at 629–32.

296 BURKE, *supra* note 20, at 75.

297 Gewirtzman, *supra* note 6, at 631 (“[T]he definition of constitutional commitments is still commonly seen as a process dominated by rationality . . .”).

298 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3–5, 56–57 (1991).

299 *See* 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 1 ACKERMAN, *supra* note 298.

300 *See* 1 ACKERMAN, *supra* note 298, at 165–99 (reconstructing the arguments of *The Federalist Papers*).

constitutional culture,<sup>301</sup> which perhaps explains why Ackerman never developed a robust normative argument in favor of his theory of legitimacy.<sup>302</sup> Other rich accounts of our constitutional culture likewise overlook the significance of emotional attachments for theories of legitimacy.<sup>303</sup>

Nor am I arguing that jurists have ignored constitutional culture in their opinions. As Greene has shown, the Justices routinely appeal to emotions embedded in our constitutional culture.<sup>304</sup> When Justice Scalia, in his opinion in *Planned Parenthood v. Casey*,<sup>305</sup> “compare[s] the visage of Roger Taney, a villain within the American constitutional narrative,” with the majority opinion’s authors, “[h]e knows that showing rather than 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.”<sup>306</sup> Indeed, although the Court has never used the phrase “wardrobe of a moral imagination,”<sup>307</sup> it has recognized the ways in which rituals, customs, garments, symbols, and images play a role in shaping America’s constitutional culture by “calling in the aid of [nature’s] unerring and powerful instincts to fortify the fallible and feeble contrivances of our reason.”<sup>308</sup> It did so perhaps most famously in *West Virginia State Board of Education v. Barnette*, where, in a Burkean turn of phrase, Justice Jackson’s majority opinion described a national flag as a symbol that acts as “a short cut from mind to mind.”<sup>309</sup> And it did so recently in *American Legion v. American Humanist Ass’n*, where Justice Alito’s majority opinion described how, “[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity.”<sup>310</sup>

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301 See *infra* subsection III.B.3.

302 See BARNETT, *supra* note 274, at 14 n.17; James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1530–31 (1998) (book review). That is not to say that Ackerman fails to make a normative argument, only that it is thin. See ACKERMAN, *supra* note 298, at 295–322.

303 See, e.g., BALKIN, *supra* note 175, at 277–300. See generally AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2006); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

304 Greene, *supra* note 3, at 1419–46.

305 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

306 Greene, *supra* note 3, at 1420.

307 BURKE, *supra* note 20, at 67.

308 *Id.* at 30.

309 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

310 *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2084 (2019).

But my focus here is not on the role of emotion in judging, a separate topic explored by other scholars.<sup>311</sup> For my own part, I believe, consistent with Aquinas and Burke, that while a virtuous judge would experience emotions that align with the legally proper outcome in a case,<sup>312</sup> the ultimate source of judgment in a case (as in the individual) should be reason, not her own emotions or the emotions of the litigants. While it makes sense that Justice Scalia—given his legal views on the question at issue in *Casey*—experienced a strong emotional response against the majority opinion,<sup>313</sup> his vote in that case should have been ultimately guided by what he understood to be required by reason,<sup>314</sup> and I have no doubt that it was.

My point, rather, is that there is a disconnect between the conversation occurring within constitutional theory (in which scholars offer all manner of abstract theories of constitutional legitimacy of their own invention) and the reality of our constitutional culture (in which the American people are disposed, by both reason and emotion, toward a particular conception of constitutional legitimacy). Constitutional theorists are, in effect, repeating the mistake that Burke highlighted in *Reflections*: ignoring the role of affections in binding a people to their constitution and assuming that a theory of constitutional legitimacy can be sustained through argument alone.

When we pose the question of which theory of constitutional legitimacy is most consistent with our constitutional culture, there is little room for doubt as to what that theory is: popular sovereignty. The Declaration of Independence asserts that governments “deriv[e] their just powers from the consent of the governed.”<sup>315</sup> The Constitution itself declares its legitimacy on the basis of popular sovereignty in its opening words: “We the People of the United States.”<sup>316</sup> The Vesting Clauses describe the powers granted to the Federal Government by the people,<sup>317</sup> and the Ninth<sup>318</sup> and Tenth Amendments<sup>319</sup> confirm that the rights and powers described in the Constitution and its amendments are ultimately held by the people. The pervasive political theory at the Founding was that “the people of the United States” were “America’s

311 See, e.g., Greene, *supra* note 3, at 1446–66; Maroney, *supra* note 1, at 652–73; Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN’S L. REV. 23 (1996).

312 See Solum, *supra* note 37.

313 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

314 On this point, I differ with many law-and-emotion theorists. See, e.g., Gewirtzman, *supra* note 6, at 657–63; Nussbaum, *supra* note 311, at 30.

315 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

316 U.S. CONST. pmbl.

317 *Id.* art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

318 *Id.* amend. IX.

319 *Id.* amend. X.

supreme lawgiver,”<sup>320</sup> which is why “the ratifying conventions that met between 1787 and 1790 operated under special voting and eligibility rules, allowing a wider swath of Americans to vote and serve” compared with the rules for voting or serving in a state legislature.<sup>321</sup>

As numerous constitutional theorists have recognized, popular sovereignty remains the theory of legitimacy endorsed by our constitutional culture today.<sup>322</sup> Presidents<sup>323</sup> and the Supreme Court<sup>324</sup> routinely invoke popular sovereignty. Some of the most powerful and hallowed artifacts of our constitutional culture—the American “wardrobe of a moral imagination”<sup>325</sup>—elicit emotional responses from us by their appeal to the notion of We the People. Aside from our founding documents, perhaps none is equal to Lincoln’s Gettysburg Address, with its concluding resolution that “government of the people, by the people, for the people, shall not perish from the earth.”<sup>326</sup> Popular sovereignty is the theory of legitimacy that engages and shapes our affections toward the Constitution.

Or is that too simplistic? Might there be *multiple* constitutional cultures, such as one constitutional culture regarding social issues like abortion and another surrounding separation-of-powers issues like the scope of the administrative state? Or maybe there *is* a single

320 AMAR, *supra* note 303, at 285; *see also* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 62–81 (2016); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 263–87 (1989); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 372–89 (1998); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429–51 (1987); Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 290–98 (1997).

321 AMAR, *supra* note 303, at 308.

322 *See* BALKIN, *supra* note 175, at 64; BARNETT, *supra* note 320, at 18–26; Baude, *supra* note 58, at 2407; Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 156–57 (2001); Michael Sant’Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1877 (2015); Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO L.J. 407, 436 (2003) (reviewing RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION (2001)).

323 *See, e.g.*, Barack Obama, Inaugural Address (Jan. 21, 2013) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> [<https://perma.cc/95B8-2VQV>]); Ronald Reagan, Farewell Address to American People (Jan. 12, 1989) (transcript available at <https://www.nytimes.com/1989/01/12/news/transcript-of-reagan-s-farewell-address-to-american-people.html> [<https://perma.cc/VM92-NUW4>]).

324 *Gamble v. United States*, 139 S. Ct. 1960, 1968–69 (2019); *see* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 819–21 (2015).

325 BURKE, *supra* note 20, at 67.

326 Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available at [https://rnc.library.cornell.edu/gettysburg/good\\_cause/transcript.htm](https://rnc.library.cornell.edu/gettysburg/good_cause/transcript.htm) [<https://perma.cc/2J6P-YY44>]).

constitutional culture, but it is the result of an overlapping consensus<sup>327</sup> of different theories of legitimacy rather than a single legitimacy theory.

There is truth in each of these objections. It is implausible to say that *all* Americans hold to the *same* theory of legitimacy, so it is true that the legitimacy of the Constitution is sustained through *some* form of overlapping consensus among divergent theories of legitimacy. And I do not doubt that, for some people, their theory of legitimacy might change in subtle ways depending on its implications for a given substantive issue. But none of these qualifications—important though they are—meaningfully detract from the conclusion that popular sovereignty is the *dominant* theory of legitimacy in our constitutional culture.

Of course, as discussed in Part III.B.1, there are *different* theories of popular sovereignty that might be embraced by our constitutional culture to varying degrees, and one might wonder whether that undermines the argument that theories of legitimacy must account for our constitutional culture, since it is unclear *which* popular-sovereignty theory our culture embraces. But the people are not political theorists; they do not—and need not—have a fine-grained understanding of the various conceptions of popular sovereignty. What matters is that any constitutional theory that justifies itself *in the language* of popular sovereignty—broadly conceived—will better accord with our constitutional culture than one that does not.

Yet, it has become common in constitutional theory to dismiss popular sovereignty. Scholars argue that for the people to have genuinely consented to the Constitution, the consent must have been unanimous, which it plainly was not.<sup>328</sup> Others object to the notion of “the people” as a continuous body stretching backward to the Founding and forward in time.<sup>329</sup> Constitutional theorists have not offered their own theories of constitutional legitimacy because they are *unaware* of the popular-sovereignty theory; they have done so because they, like Dr. Price, have *rejected* the theory of legitimacy embraced by our constitutional culture.

### B. *Evaluating Theories of Constitutional Legitimacy*

In light of the synthesized Thomistic and Burkean account of constitutional culture, if we accept that popular sovereignty is the theory of legitimacy endorsed by our constitutional culture, then constitutional theorists cannot so easily dismiss popular sovereignty,

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327 See RAWLS, *supra* note 261, at 133–72.

328 See, e.g., FALLON, *supra* note 259, at 24–35; DWORKIN, *supra* note 11, at 192–93.

329 See, e.g., Strauss, *supra* note 175, at 1722–24.



since it plays a major role in cultivating the “inbred sentiments”<sup>330</sup> that sustain obedience to the Constitution. That leaves us with three choices in evaluating theories of constitutional legitimacy. First, we can show that a theory is consistent with the notion of popular sovereignty enmeshed in our constitutional culture, in which case no modifications to the theory are necessary (at least, not based on what I have said here). Second, we can acknowledge that a theory is contrary to our constitutional culture and modify or abandon the theory as a result. Third, we can take a more radical course: acknowledge that a theory is contrary to our constitutional culture but try to conform the culture to the theory. The implications of emotion for constitutional theory are most evident in the second and third options, so I will begin by quickly moving through the first.

### 1. Constitutional Theories Consistent with Popular Sovereignty

If a constitutional theory is consistent with popular sovereignty, nothing I have said would require any changes to it. Rather, the main implication would be that these theories have a stronger argument in their favor, since they are consistent with the constitutional culture that sustains obedience to our Constitution.

To know whether constitutional theories are consistent with popular sovereignty, we need to know what “popular sovereignty” means. Popular sovereignty is a complicated concept,<sup>331</sup> and there are surely many theories of popular sovereignty that we might consider as possibilities, but there are two main types of popular sovereignty theories found in the constitutional theory literature. The first, dualist conception is represented by Keith Whittington, and it draws a clear line between the people acting in their sovereign capacity and the people acting in ordinary politics. The people acted in their sovereign capacity by ratifying the Constitution, and they continue to do so whenever they amend it.<sup>332</sup> At all other times, the popular sovereign is dormant, but it retains the potential to reassert sovereignty through the amendment process.<sup>333</sup> Ordinary politics, under this view, is not a manifestation of popular sovereignty.<sup>334</sup> Indeed, it is essential that ordinary politics *not* be seen as an act of the sovereign, since it would undermine the basis for judicial review by making statutes (a product

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330 BURKE, *supra* note 20, at 75.

331 See MORGAN, *supra* note 320.

332 See WHITTINGTON, *supra* note 269, at 135–36.

333 See *id.*

334 *Id.* at 136.

of ordinary politics) equal in authority to the Constitution.<sup>335</sup> This view is most consistent with an originalist methodology.<sup>336</sup>

The other type of popular sovereignty theory, represented by Balkin, does not draw a clean line between ordinary politics and the people acting as sovereign.<sup>337</sup> It argues that, while “the initial authority of the text comes from the fact that it was created through successive acts of popular sovereignty,”<sup>338</sup> the people can only truly be sovereign if the Constitution continues to reflect their changing views as expressed through the process of democratic politics.<sup>339</sup> Political and social movements—as manifestations of the popular sovereign—can use ordinary politics to influence constitutional meaning in various ways, including through selecting judges who embody the people’s understanding of the Constitution on particular issues.<sup>340</sup> This view is most consistent with a non-originalist methodology.<sup>341</sup>

Ackerman’s conception of popular sovereignty might be seen as residing between these two positions, since he both insists on dualism while allowing for the people to act as sovereign through ordinary politics under extraordinary conditions.<sup>342</sup> For reasons that Whittington and others have explained, I believe Ackerman’s view ultimately collapses into the view associated with Balkin,<sup>343</sup> and it is telling that Balkin sees a good deal of overlap between his view and Ackerman’s.<sup>344</sup>

While I am sympathetic to Baude’s suggestion that a Whittington-type theory of popular sovereignty has more support in our constitutional culture,<sup>345</sup> resolving that question would require a much more extensive discussion that is beyond the scope of this Article. I

335 *Id.* at 136–42, 153. For Whittington’s complete argument, see *id.* at 110–59.

336 *Id.* at 152–59; *see also* Baude, *supra* note 58, at 2366.

337 This is similar to what Ackerman describes as the “monist” position. *See* I ACKERMAN, *supra* note 298, at 7–10.

338 BALKIN, *supra* note 175, at 55.

339 *Id.* at 55, 59–73.

340 *Id.* at 277–79.

341 *Id.* (explaining the continual change in constitutional meaning as a form of living constitutionalism). Balkin is a self-described originalist, and I do not intend to take issue with that label here. My only point—with which Balkin agrees—is that the component of his popular sovereignty theory that envisions continual constitutional change through ordinary politics is a form of living constitutionalism, not originalism.

342 I ACKERMAN, *supra* note 298, at 6–7, 266–94.

343 *See* WHITTINGTON, *supra* note 269, at 241 n.48, 274 nn.92 & 98 & 275 n.100; *see also* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 120–22 (1994); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 763–75 (1992) (book review); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 928–34 (1992) (reviewing I ACKERMAN, *supra* note 298).

344 BALKIN, *supra* note 175, at 309–12.

345 Baude, *supra* note 58, at 2366.

will assume, therefore, a fairly broad understanding of popular sovereignty for purposes of this Article, which would not rule out either the Whittington or the Balkin conception. For reasons I have explained elsewhere, I find Whittington's conception of popular sovereignty far more coherent and consistent with the design of our Constitution,<sup>346</sup> which is one reason I am an originalist, but that is an argument about the comparative theoretical merits of the two conceptions of popular sovereignty, not an argument about its consistency with American constitutional culture.

The key point, then, is that insofar as some version of popular sovereignty accepted by our constitutional culture is logically sound, it is a strong basis upon which to build a constitutional theory, since it would align with both reason *and* emotion. It would have the ingredients for a prejudice that would form the national character of the American people in support of the Constitution.

## 2. Constitutional Theories That Might Change

For those theories that reject or are inconsistent with popular sovereignty, the foregoing analysis forces us to ask whether they should be modified or abandoned to accommodate our constitutional culture. Theorists who reject popular sovereignty do so because they believe it is a logically flawed understanding of legitimacy,<sup>347</sup> so the notion of nonetheless changing their theories to integrate popular sovereignty would likely rest on the premise that the logical soundness of a theory of legitimacy is less important than its ability to accord with our constitutional culture.

There are various reasons why a theorist might believe that the logical soundness of a theory of legitimacy is less important than its ability to accord with our constitutional culture. One would be that we value social and political stability more than truth, so we should accept a theory of legitimacy endorsed by our constitutional culture even if we know it be irrational, since a legitimacy theory is crucial to the stability of a regime. I reject that view, since it would be asking theorists to take part in a Noble Lie,<sup>348</sup> which is not a permissible approach for

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<sup>346</sup> See Joel Alicea, *Originalism and the Rule of the Dead*, NAT'L AFFS. (Spring 2015), <https://nationalaffairs.com/publications/detail/originalism-and-the-rule-of-the-dead> [<https://perma.cc/R5DU-YU5W>]; Joel Alicea, *Real Judicial Restraint*, NAT'L AFFS. (Fall 2013), <https://www.nationalaffairs.com/publications/detail/real-judicial-restraint> [<https://perma.cc/DN56-WYFF>].

<sup>347</sup> See *supra* notes 328–29.

<sup>348</sup> PLATO, *The Republic*, in PLATO: COMPLETE WORKS 414b–c (John M. Cooper ed., G.M.A. Grube & C.D.C. Reeve trans., Hackett Publ'g Co. 1997) (c. 380 B.C.E.).

anyone who believes that lying is always immoral<sup>349</sup> or that scholars have a special obligation to pursue the truth.<sup>350</sup>

Alternatively, a theorist might think that any viable constitutional theory must be able to explain our current constitutional practices. Many constitutional theorists have some version of this view.<sup>351</sup> For example, both Fallon (a non-originalist) and Baude and Sachs (originalists) argue that constitutional theory should be able to explain what our current law *is*, and since they accept a form of legal positivism that identifies the law by reference to social or legal practices, they believe that a constitutional theory must accord with our social or legal practices.<sup>352</sup> Understanding the role that theories of legitimacy play in fostering the ideas and emotions that sustain a constitution raises the question of whether those theories should be seen as one of the practices that identify what the positive law is, which would commit legal positivists to incorporating popular sovereignty into their constitutional theories (assuming that they agree, as a factual matter, that our constitutional culture endorses popular sovereignty).

Baude has suggested this very possibility,<sup>353</sup> and the account of emotion and constitutional culture outlined above lends added weight to it. That might lead to an interesting dilemma for some positivists. Fallon, for instance, appears to reject popular sovereignty—at least in any strong form—because he believes it is false,<sup>354</sup> but if it is a practice that identifies the positive law, the moral truth or falsity of the practice should be beside the point under his view.<sup>355</sup> Fallon would likely respond that this confuses two distinct questions: (1) what the law *is* (a positivist, descriptive question), and (2) *why* we should obey the law (a normative, moral question),<sup>356</sup> with theories of legitimacy only being relevant to the latter question. But that might be too simple, since—

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349 See CHRISTOPHER O. TOLLEFSEN, LYING AND CHRISTIAN ETHICS (2014); AUGUSTINE, TO CONSENTIUS, AGAINST LYING (c. 420), *reprinted in* 3 NICENE AND POST-NICENE FATHERS, FIRST SERIES (Philip Schaff ed., H. Browne trans., Buffalo, Christian Literature Publ'g Co. 1887), <https://www.newadvent.org/fathers/1313.htm> [<https://perma.cc/X9RA-ZBDV>]; AUGUSTINE, ON LYING (c. 395), *in* 3 NICENE AND POST-NICENE FATHERS, FIRST SERIES, *supra*, <https://www.newadvent.org/fathers/1312.htm> [<https://perma.cc/8MHC-2E6J>].

350 KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 9–27 (2018).

351 Fallon, *supra* note 58, at 554–57 (surveying practice-based theories).

352 FALLON, *supra* note 259, at 85–92; Baude, *supra* note 58, at 2363–72; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. PUB. POL'Y 817, 822–38 (2015).

353 Baude, *supra* note 58, at 2365–67.

354 FALLON, *supra* note 259, at 24–35, 83–85. I say “appears” because it is not entirely clear to me that Fallon would reject the type of popular sovereignty theory I attribute to Balkin.

355 Pojanowski & Walsh, *supra* note 278, at 114–16.

356 *Id.* (distinguishing these two questions).

as Fallon himself argues persuasively—theories of legitimacy significantly influence the choice of constitutional methodology,<sup>357</sup> which in turn affects the determination of what the law is (e.g., popular sovereignty might lead to originalism, which might lead to rejection of at least some non-originalist precedent as part of our law).<sup>358</sup> That is to say, the rule of recognition—which is rooted in precisely the kinds of social practices integral to Burke’s account of constitutional culture—might incorporate a theory of legitimacy,<sup>359</sup> or, as Baude frames the point, it may be that “our *current* legal practice is to treat the dead *as if* they had legal authority.”<sup>360</sup> In any event, at the very least, understanding the role that theories of legitimacy play in our constitutional culture and in the logical structure of constitutional theories provides a new reason for asking whether the usual clean, positivist division between what the law *is* and *why* we should obey it is sustainable.

That dilemma might be exported, in modified form, to other, nonpositivist, practice-based theories as well. Dworkin’s “moral reading”<sup>361</sup> methodology, for instance, asserts that “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>362</sup> Dworkin argues that this methodology follows from his theory of legitimacy,<sup>363</sup> which posits that a regime is morally legitimate insofar as it embraces the principle of integrity (i.e., the principle “that the law be seen as [morally] coherent . . . so far as possible”).<sup>364</sup> Dworkin defends an unusual conception of popular sovereignty,<sup>365</sup> and as Ackerman has argued, there is good reason for believing that it does not accord with American constitutional culture.<sup>366</sup> What if a non-Dworkinian conception of popular sovereignty, in the context of American society, is essential to making the law morally coherent, since it would otherwise

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357 See FALLON, *supra* note 259, at 125–54.

358 See, e.g., Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 5–8 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289–98 (2005). *But see* Baude, *supra* note 58, at 2356–61 (adopting an expansive understanding of originalism that accepts many non-originalist precedents as law).

359 See Pojanowski & Walsh, *supra* note 278, at 110–12; FINNIS, *supra* note 62, at 3–19.

360 Baude, *supra* note 58, at 2366.

361 RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–38 (1996).

362 DWORKIN, *supra* note 11, at 225.

363 *Id.* at 176, 190–92.

364 *Id.* at 176, 186–224.

365 *Id.* at 192–93; DWORKIN, *supra* note 361, at 1–38.

366 I ACKERMAN, *supra* note 298, at 10–16.

be impossible to explain features of our constitutional culture? Indeed, that is the kind of challenge that James Fleming interprets Ackerman to have posed to Dworkin,<sup>367</sup> but understanding the close connection between theories of legitimacy, constitutional culture, and emotion adds force to it. And if that is true, is the American theory of popular sovereignty reconcilable with the exalted Herculean judge whom Dworkin would have “bring[] [his own assessment of] political morality into the heart of constitutional law”?<sup>368</sup>

As to at least some practice-based constitutional theories, then, it may very well be that understanding the crucial role of theories of legitimacy in forming the emotional ties that sustain a constitution could lead to a reevaluation of the viability (or at least the contours) of those constitutional theories.<sup>369</sup> But having raised that possibility, I want to bracket its full exploration and move on from theories that might conform to our constitutional culture to those theories that adopt a more radical approach.

### 3. Radical Constitutional Theories

The preceding subsection assumed that the internal logic of some constitutional theories might cause them to change when confronted with the importance of popular sovereignty to our constitutional culture, but other theories have a radically skeptical disposition toward our constitutional culture and would see no reason to change. This radicalism can originate from either the political left or the political right, and it usually manifests itself in hostility to the American Founding. My point here is not to assess the merits of either of the schools of thought outlined below, which implicate fraught and difficult issues. My purpose, rather, is to explore the implications of the role of emotion in constitutional culture for these theories.

A strain of constitutional theory commonly associated with the political left would argue that any theory of legitimacy that presupposes the authority of the Founding generation to adopt the Constitution is fundamentally, morally illegitimate given the exclusion of slaves, women, and other groups from the ratification process.<sup>370</sup> Some theorists would go even further, asserting that the moral taint of

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367 Fleming, *supra* note 302, at 1530–31.

368 DWORKIN, *supra* note 361, at 2; DWORKIN, *supra* note 11, at 239.

369 This argument is analogous to the argument Greene makes with respect to originalism as a constitutional practice. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 681, 697–702 (2009).

370 LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 16–17 (2012); Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 406–20, 448–52 (2009–2010); see also Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987).

the Founding calls into question the continuing moral legitimacy of the Constitution for those excluded groups living today,<sup>371</sup> or that at least some provisions of the Constitution continue to lack moral legitimacy insofar as that legitimacy is premised on the authority of the Founders to adopt them.<sup>372</sup> The logic of those arguments is hard to reconcile with the view that it is acceptable for American constitutional culture to continue believing that the Constitution derives at least part of its moral legitimacy from its ratification by the sovereign people. If the Founding was so corrupted by the sins of racism, sexism, and other forms of discrimination that it could not claim the moral authority to ratify the Constitution, no theory of popular sovereignty that sees the Constitution as an intergenerational project rooted in the Founding can survive, and a constitutional culture whose affections for the Constitution are based in such a theory must change.

Changing constitutional culture means changing those artifacts that form the combination of ideas and sentiments from which the culture is constituted, which means changing a nation's "wardrobe of a moral imagination."<sup>373</sup> The greater the change in the culture, the greater the change in the wardrobe that is necessary. Changing Americans' understanding of themselves as a sovereign people who adopted the Constitution and continue to govern today would, given that this critique is based on the moral taint of the Founding, require detaching the sentiments of the people from the Founding.

Burke's defense of British constitutional culture was written in opposition to what he perceived as attempts to change it, so we can get a sense of what that change would entail from Burke's description of the things he defended. Affective attachment to the *Founding* is hard to disaggregate from affective attachment to the *Founders*,<sup>374</sup> and it is therefore not surprising that Burke's intergenerational conception of a constitutional culture prominently features "canonized forefathers" and a "gallery of portraits" of "illustrating ancestors."<sup>375</sup> Undoing our emotional ties to the Founders would therefore entail undermining the reputations of the Founders themselves, lowering them in the estimation of the people by emphasizing their vices rather than their virtues.<sup>376</sup> It would mean changing or erasing the "monumental

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371 FALLON, *supra* note 259, at 30–31.

372 Stein, *supra* note 370, at 440–48.

373 BURKE, *supra* note 20, at 67.

374 Baude, *supra* note 58, at 2365–66.

375 BURKE, *supra* note 20, at 30.

376 See, e.g., Paul Finkelman, Opinion, *The Monster of Monticello*, N.Y. TIMES (Nov. 30, 2012), <https://www.nytimes.com/2012/12/01/opinion/the-real-thomas-jefferson.html> [<https://perma.cc/9Q9M-NXQR>]. I do not intend to attribute to Finkelman the views of

inscriptions” that provide physical and public reinforcement of those affective ties,<sup>377</sup> which could be accomplished by, for example, removing or renaming the monuments altogether.<sup>378</sup> It would mean changing the “records, evidences, and titles”<sup>379</sup> of the Founding by, for instance, writing new histories of the Founding focusing on its sins.<sup>380</sup> This changed constitutional culture would be one in which a Founder like Washington “is but a man,” and “not of the highest order,”<sup>381</sup> rather than a uniquely great figure who represents a complex mixture of national ideals to which we aspire and national shortcomings we hope to overcome.<sup>382</sup>

While this critique of the American Founding often comes from the political left, a different critique is more associated with the political right.<sup>383</sup> It sees the Founding as the product and embodiment of political liberalism,<sup>384</sup> which these theorists associate primarily with the political theory of John Locke.<sup>385</sup> It regards liberalism as having created a culture that encourages the severing of social ties,<sup>386</sup> materialism,<sup>387</sup> loss of meaning,<sup>388</sup> and other social pathologies that simultaneously carry out the logic of liberalism while destroying the

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the constitutional theorists I am describing here; nor do I attribute their views to others whom I cite below as examples of ways of changing constitutional culture.

377 BURKE, *supra* note 20, at 30.

378 See, e.g., Colleen Grablick, *Dozens of D.C. Sites Could Get Renamed or Removed Due to Ties with Slavery and Racism*, NPR (Sept. 2, 2020), <https://www.npr.org/local/305/2020/09/02/908752650/dozens-of-d-c-sites-could-get-renamed-or-removed-due-to-ties-with-slavery-and-racism> [<https://perma.cc/P9CU-C7PX>] (describing recommendations of D.C. working group, which originally “identified figures like Thomas Jefferson, Francis Scott Key, Ben Franklin and George Washington as problematic candidates for public-works dedications”). It should be noted that there was confusion and misinformation on social and other media associated with this report. See *DC Mayor Did Not Propose Removing the Washington Monument, Lincoln Memorial*, ASSOCIATED PRESS (Sept. 2, 2020), <https://apnews.com/article/9328592189> [<https://perma.cc/2LAF-GZXT>].

379 BURKE, *supra* note 20, at 30.

380 See, e.g., *The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/W5D8-MVKL>].

381 BURKE, *supra* note 20, at 67.

382 See RON CHERNOW, *WASHINGTON: A LIFE* (2011).

383 Interestingly, Seidman agrees that Vermeule is part of the same movement of radical skepticism of American constitutionalism that Seidman advocates. See LOUIS MICHAEL SEIDMAN, *FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM* 240 (2021).

384 See, e.g., Patrick J. Deneen, *Better than Our Philosophy: A Response to Muñoz*, PUB. DISCOURSE (Nov. 29, 2012), <https://www.thepublicdiscourse.com/2012/11/7156/> [<https://perma.cc/XMT5-YB76>].

385 *Id.*; see also PATRICK J. DENEEN, *WHY LIBERALISM FAILED* 43–63 (2018).

386 See DENEEN, *supra* note 385, at 31–34, 43–63.

387 See *id.* at 9–11, 131–53.

388 See *id.* at 64–90.



kind of society necessary for its continuation.<sup>389</sup> In this view, America contained within its Founding the seeds of its own destruction,<sup>390</sup> and only by constructing a new, postliberal constitutional culture founded on a very different political theory can the society rebuild.<sup>391</sup>

This is less a critique of the personal character or moral status of the Founders and more a critique of the ideas undergirding American constitutional culture. Theorists of this view might try to change those ideas in various ways,<sup>392</sup> but the more ambitious proposals would make use of the vast powers of the modern administrative state “to sear the liberal faith with hot irons, to defeat and capture the hearts and minds of liberal agents, to take over the institutions of the old order that liberalism has itself prepared and to turn them to the promotion of human dignity and the common good.”<sup>393</sup>

Our exploration of the Thomistic and Burkean account of emotions should prompt us to ask at least two questions in evaluating these strains of radicalism within American constitutional theory. First, to the extent that these theorists succeed in severing the affective ties that the people have with the Founding, will the constitutional culture that replaces those ties be sufficient to sustain the stability and durability of our constitutional order? The more committed among these critics might either answer that the demise of that order is inevitable<sup>394</sup> or that such a demise would be welcome and, given the many harmful effects of overthrowing a regime, they would need to justify such a revolutionary result in moral terms.<sup>395</sup> But for constitutional theorists who lack such revolutionary aspirations, the question cannot be avoided. In a culture where Washington “is but a man,” and “not of the highest order,”<sup>396</sup> where the Founding is morally and/or intellectually bankrupt, will there be the union of reason, emotion,

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389 *Id.* at 21–42.

390 *See id.*

391 *Id.* at 179–98.

392 For a less radical approach, see *id.*

393 Adrian Vermeule, *Integration from Within*, 2 AM. AFFS. 202 (Spring 2018) (reviewing PATRICK DENEEN, *WHY LIBERALISM FAILED* (2018)), <https://americanaffairsjournal.org/2018/02/integration-from-within/> [<https://perma.cc/E39A-X7WP>]. Vermeule has yet to set forth his “common-good” constitutional theory in detail, so what I say here about his theory is necessarily tentative. It is possible that, when he describes his theory systematically, he will present it in a less radical fashion. See Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (June 17, 2020), <https://iustetium.com/common-good-constitutionalism-a-model-opinion/> [<https://perma.cc/XA4A-Q5HZ>] (rejecting the notion that his theory was “some sort of alien irruption into our law”).

394 See DENEEN, *supra* note 385, at 21–42.

395 See *supra* Section II.C; *supra* note 261.

396 BURKE, *supra* note 20, at 67.

and will necessary to sustain the Constitution that the Founding produced?<sup>397</sup>

Second, to the extent that these critics do *not* succeed in severing the affective ties that the people have with the Founding but nonetheless attempt to enact their vision through various centers of cultural or political power, would the result be analogous to attempts by reason “to rule the passions [despotically]”: “the passions will erupt in rebellion”?<sup>398</sup> That is, would such efforts to impose a vision of our Constitution fundamentally at odds with the emotional dispositions of the American people lead to the kind of social and political instability that Burke predicted would be the outcome of radical attempts to remake British or French constitutional culture?

Here, some may wonder if this line of thought terminates in precisely what I earlier rejected: the imperative to support a Noble Lie. Am I essentially arguing that these radical critics of the Founding should refrain from voicing their criticisms and trying to change our culture because doing so might endanger the regime?<sup>399</sup> No, that is not my view. Burke did not condemn the French revolutionaries for criticizing and attempting to change their regime; he condemned their lack of appreciation for the importance of constitutional culture. He argued that, rather than discard that culture, they could have appealed to a different tradition *within* that culture from which to reform the current regime, or if no such tradition was available, they could have “follow[ed] wise examples” of similar constitutional cultures that lacked some of the problems they perceived in their own.<sup>400</sup> As both Matthew Wright and David Bromwich have observed—commenting on Burke and the importance of the wardrobe of the moral imagination—Abraham Lincoln was particularly skilled at appealing to virtuous traditions *within* American constitutional culture as a basis for reforming it.<sup>401</sup>

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397 Seidman argues that public officials routinely disobey the Constitution already without causing instability, but his examples of official disobedience include good-faith disagreements about what the Constitution actually requires, which is fundamentally different from adopting a case-by-case approach to whether to obey the Constitution *irrespective* of how it is interpreted. SEIDMAN, *supra* note 370, at 18–19, 63–91. He offers only one or two contestable examples of the latter in American history. *Id.*

398 LOMBARDO, *supra* note 3, at 100.

399 SEIDMAN, *supra* note 370, at 90–91.

400 BURKE, *supra* note 20, at 32–33.

401 WRIGHT, *supra* note 182, at 140–45; DAVID BROMWICH, *Moral Imagination*, in *MORAL IMAGINATION: ESSAYS* 3, 17–21 (2014).

How that model of constitutional reform could be adapted to the critiques described above is a worthwhile question, and one which those critics of the Founding would do well to consider.<sup>402</sup>

### C. *The Effect on Constitutional Doctrine*

Finally, one might justifiably wonder what the *Summa Theologiae*, *Reflections on the Revolution in France*, and concepts like “constitutional culture” have to do with the actual practice of constitutional law in American courts. Even if what I have said is true, what is the effect on constitutional doctrine?

My answer is preliminary, but two possible effects come to mind. First, there is the indirect effect that emotion plays in the selection of constitutional methodologies. As I have argued, understanding the role of emotion in constitutional culture affects our evaluation of, and perhaps our choice among, theories of constitutional legitimacy.<sup>403</sup> Because there is a close relationship between theories of legitimacy and methodologies of constitutional adjudication,<sup>404</sup> and because methodologies of constitutional adjudication influence doctrine,<sup>405</sup> there is a logical connection between understanding the role of emotion in constitutional theory and the development of constitutional doctrine.

But another, more direct effect is possible. Because “character traits emerge” from “patterns of interaction between passion and reason,”<sup>406</sup> a long pattern of emotional and rational reinforcement of a particular idea can lead to a stable character trait, both within the individual person and within society more broadly.<sup>407</sup> One way in which society’s reasons and emotions receive instruction is through the law, which performs a teaching function.<sup>408</sup> This suggests that, when

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402 To his credit, Seidman recently attempted to describe and recover an American tradition of disobedience to the Constitution to support his radical constitutional theory. See SEIDMAN, *supra* note 383, at 178–242. Nonetheless, I respectfully suggest that his effort fails, since he does not show that the tradition to which he appeals would ensure the stability and long-term viability of the American regime. Indeed, his approach seems to be, instead, to deny that our constitutional culture truly *does* create stability. See *id.* at 237–42. While I cannot fully address that argument here, I think the important question to be asked is: Compared to what? That is, does our current constitutional culture—rooted in popular sovereignty and obedience to the Constitution—create *greater* stability than the alternative Seidman proposes? In my view, the answer is clearly yes.

403 See *supra* Section III.B.

404 See *supra* Section III.A.

405 See Alicea, *supra* note 9, at 61.

406 LOMBARDO, *supra* note 3, at 101.

407 See *supra* Parts I–II.

408 See ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993).

the Supreme Court shapes the law through its decisions, it could—over the long term—influence the character of the American people for good or for ill.

For example, in the decades after *Miranda v. Arizona*,<sup>409</sup> the idea of *Miranda* warnings or *Miranda* rights became a familiar part of popular culture, often serving as the dramatic accompaniment to the arrest of the villain at the end of a police procedural drama.<sup>410</sup> Thirty-four years later, the Court, in declining to overrule *Miranda*, relied heavily on the fact that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”<sup>411</sup> The idea of *Miranda* rights had been taught to the American people, and it had become bound up with their emotional attachment to their constitutional liberties. *Miranda*, in other words, had arguably become part of our national character.

This character-forming potential of Supreme Court decisions is sometimes discussed in the Court’s cases under the rubric of reliance interests. For instance, in *Casey*, the Court asserted “the fact that for two decades of economic and social developments, people ha[d] organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”<sup>412</sup> The Court said that people had “ordered their thinking and living around” *Roe*.<sup>413</sup> What the Court was describing was not the paradigmatic reliance interests at stake in a rule of contract law<sup>414</sup>: a mere rational reliance on the notion “that rights thus acquired would not be disturbed.”<sup>415</sup> Rather, the Court said that *Roe* had played a key role in “defin[ing] [people’s] views of themselves and their places in society”<sup>416</sup>—that is, in defining their character. The *Casey* dissenters argued that the Court was wrong about this,<sup>417</sup> and I do not contend that the majority was correct. My point, rather, is that understanding the role of emotion in the formation of character—and the extrapolation of those insights to a societal level—helps us see one of

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409 *Miranda v. Arizona*, 384 U.S. 436 (1966).

410 *See generally Law & Order* (NBC television broadcast 1990–2010).

411 *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

412 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

413 *Id.*

414 KOZEL, *supra* note 264, at 28–30.

415 *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 458 (1852).

416 *Casey*, 505 U.S. at 856.

417 *See id.* at 956–66 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 995–1001 (Scalia, J., concurring in the judgment in part and dissenting in part).

the primary ways in which the Court influences our constitutional culture.<sup>418</sup>

It also raises potentially difficult questions for originalists with respect to stare decisis. Much of modern constitutional doctrine is non-originalist.<sup>419</sup> For those originalists who believe that all erroneous<sup>420</sup> (or at least all demonstrably erroneous)<sup>421</sup> precedents should be overruled—that is, those who have a weak conception of stare decisis—the way in which significant precedents arguably become part of the constitutional culture that binds the people to their Constitution forces them to ask: Would the overruling of such precedents destabilize the people’s attachment to the Constitution? On the other hand, for those originalists who have a more robust conception of stare decisis,<sup>422</sup> they must ask: Do some or many non-originalist precedents create or reinforce *bad* character traits in the American people (i.e., vices)?<sup>423</sup> Perhaps these questions are inappropriate for judicial consideration, as Justice Thomas has suggested,<sup>424</sup> but for originalists who view stare decisis as requiring the Court to “scrutinize the precedent’s real-world effects on the citizenry, not just its effects on the law and the legal system,” they cannot be discounted.<sup>425</sup>

My point is not to resolve these doctrinal questions; it is to show that understanding the role of emotion in constitutional theory provides a new way to think about them.

#### CONCLUSION

What is the role of emotion in constitutional theory? Scholars have almost uniformly either overlooked this question or answered “none.” But emotion plays a crucial role in binding us to the Constitution; reason alone will not sustain it. We need a complex mixture of ideas and sentiments to maintain our Constitution over time, and

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418 See Gewirtzman, *supra* note 6, at 627–28 (observing that doctrine influences constitutional culture); Post, *supra* note 15, at 77–107 (arguing the same). But see Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283–91 (1957).

419 Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1130–31 (2008).

420 See Lawson, *supra* note 358, at 5–8; Paulsen, *supra* note 358, at 289–98 (2008).

421 Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5–8 (2001); see also *Gamble v. United States*, 139 S. Ct. 1960, 1984–88 (2019) (Thomas, J., concurring).

422 See, e.g., Baude, *supra* note 58, at 2358–61.

423 By comparing *Roe* to *Dred Scott*, Justice Scalia suggested that he thought that was true of *Roe*. Greene, *supra* note 3, at 1420.

424 *Gamble*, 139 S. Ct. at 1988 (Thomas, J., concurring).

425 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

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theories of legitimacy are part of that mixture, that constitutional culture. A theory of legitimacy that does not accord with our constitutional culture—that places reason and emotion in opposition—risks destabilizing the Constitution. We cannot, therefore, ignore the role of emotion in assessing the viability and contours of theories of legitimacy, and since theories of legitimacy are foundational to constitutional theory, emotion should play a vital role in constitutional theory.

