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Vital Tissues of the Spirit: Constitutional Emotions in the Antebellum United States

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"VITAL TISSUES OF THE SPIRIT"

Constitutional emotions in the antebellum United States

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In 1837, Theodore Weld, a revivalist minister and abolitionist, wrote a letter to his wife and sister describing his methods for changing hearts and minds on the issue of slavery: "[I]f it is not felt in the very vital tissues of the spirit, all the reasoning in the world is a feather thrown against the wind."[1]

Weld's comment reflects a prolonged nineteenth-century struggle over the relationship between law and emotion in constitutional culture.[2] Throughout the antebellum era, Americans wrestled with the way feelings affected constitutional interpretation, the emotional worth of the Constitution as a symbol worth fighting for, and the need for law and legal institutions to cultivate certain emotions while constraining others in order to maintain a sustainable constitutional order. The debates pushed at the boundaries between law and politics, passion and reason, morality and formalism, elites and laypeople. The capacity of feelings to both revitalize and degrade constitutional culture became a recurring theme in attempts to resolve the role of "We the People" in constitutional interpretation, the institutional competition for interpretive supremacy, moral reform, and competing visions of union and disunion.

Two dynamics – ambivalence and reciprocity – lie at the heart of the relationship between the United States Constitution and emotion. Ambivalence about emotion is hardwired into the 1787 Constitution through its simultaneous embrace of popular sovereignty and written constitutionalism.[3] Popular sovereignty recognizes "the People" as the ultimate authority within the constitutional regime, situating collective emotions as a vital part of the system's founding myth and integral to its status as supreme law.[4] Constitutional commitments are imagined, legitimated, perpetuated, and renewed through collective social practices motivated by emotion and systems of belief that rely upon emotional cues to sustain their power. Constitutional law is deeply dependent on feelings to produce certain social outcomes, facilitate constitutional change, and generate the loyalty and allegiance necessary to preserve constitutional institutions and structures. At the same time, written constitutionalism, with its embrace of positivism and "Ulysses tied to the mast" precommitments,[5] instills into American constitutional law's DNA a preference for rational decision making and a healthy suspicion about the potentially destructive effects of collective emotions. Written constitutional commitments operate as constraints on emotional performance and expression in the political arena by channeling popular input into decision-making processes and institutions that introduce deliberation, delay, rationality, and reflection into the process of forming legal norms, the resolution of disputes, and the construction of legal meaning.

The dynamic between constitutional law and emotion is also reciprocal: just as constitutional law works to construct emotions, emotions work to construct constitutional law.[6] Constitutions establish institutional structures that construct, influence, and guide collective emotions in the public arena. For example, Article I's requirement that legislation pass through two separate legislative bodies rests in part on assumptions about how certain emotions affect decision making and a belief that extended deliberation will help manage the deleterious effects of passion.[7] At the same time, the feelings constructed by those institutions are fed back into the system, altering the evolution of constitutional meaning through public opinion, social movements, and other forms of democratic popular expression.[8]

This chapter provides a framework for examining the ambivalent and reciprocal connection between constitutional law and emotion in the antebellum era[9] through three distinct lenses that correspond to three interrelated constitutional functions: text, instrument, and symbol.

Text. First, how did beliefs about emotion affect the process and methodology of constitutional interpretation? Early nineteenth-century Americans recognized feelings as an essential part of how individuals made sense of the world around them.[10] Consequently, emotion's role in the interpretation of a newly created legal text filled with ambiguous language became an inevitable source of contention. During the 1830s and 1840s, the divide between reason and emotion became a commonly used weapon in the struggle for supremacy between a judicial elite that used reason and rationality to legitimize their use of interpretive power and popular social movements that used emotions to spur alternative visions of constitutional meaning. A closer examination of the period also highlights the rich historical lineage of debates about the reason–emotion divide[11] and the way those debates helped to shape contemporary American legal culture, as well as providing essential context for a range of related questions that continue to occupy scholars well into the twenty-first century: the extent to which reason and emotion are mutually dependent,[12] their respective effects on decision making,[13] the malleability of each category's definition,[14] and the ability of each to exacerbate or correct for deficiencies in the other.[15]

Instrument. Second, how did constitutional law construct and manage popular emotion? The Constitution was designed to serve a core instrumental function: to control, channel, and dilute the harmful effects of "passion" on public life. One of the antebellum era's lingering puzzles is why the framers' assumptions about the Constitution's capacity to constrain popular emotion failed so dramatically. In the years leading up to the Civil War, the political world became infused with anger, indignation, and jealousy, all of which the Constitution was supposed to manage and transform into an enlightened reasoning process through the machinations of constitutional institutions. Yet by the mid-nineteenth century, Thomas Jefferson's inaugural vision of a "rising nation . . . united with one heart and one mind" by "harmony and affection" was in tatters.[16]

Symbol. Third, how did different American subcultures feel about the Constitution itself? The document, then and now, maintains a unique status at the intersection of law and feeling. It is not simply a legal text and source of supreme law but a contested cultural symbol imbued with emotion that connects political principles to particular affective responses. The Constitution's evolution as a national symbol during the antebellum period was slow and uneven, as other symbols – like the Declaration of Independence and "Union" – were far more established and emotionally resonant, raising questions about the reasons behind the Constitution's relative lack of semiotic power.

Within the realms of text, instrument, and symbol, antebellum American writers and artists responded and contributed to developments in the political and legal arena. They offered portrayals of judges who struggled with constraints upon their use of feeling and moral sentiments when interpreting legal texts, mobilized and channeled emotions into constitutional culture, and sought to create alternative emblems of national unity. The evolving relationship between

constitutional law and emotion was constructed through legal and nonlegal texts and through interactions that occurred both within and outside law's domain.

I. Constitution as text

Legal and literary historian Perry Miller called "the never-ending case of Heart versus Head" the "great issue" of nineteenth-century America,[17] reflecting the dichotomous division within moral philosophy that characterized the era.[18] During the period leading up to the Civil War, the tension between Heart and Head played itself out through conflicting approaches to constitutional interpretation that were deeply intertwined with class divisions.[19] One, anchored in populism, frontier culture, and evangelical reform, used theatricality, sentiment, and feeling to assert popular sovereignty over the interpretive process. Political parties and social movements helped create an antebellum political climate bathed in emotion, using feelings to generate moral outrage and spur collective action in order to redefine the terms of core constitutional commitments. The other theory centered around an increasingly professionalized and elite group of legal practitioners who saw law as a rational science.[20] This approach positioned judges, guided by reason, as critical to maintaining the positivist limits imposed by a written constitution and barriers against the corrosive effects of popular emotion on constitutional meaning.[21]

Each side claimed legitimacy from Founding era commitments to popular sovereignty and written constitutionalism as they became embroiled in a power struggle for interpretive supremacy over the constitutional text, using the divide between emotion and reason to negotiate the often permeable boundaries between the worlds of law and politics. In turn, interpretive power ebbed and flowed between a judiciary with limited capacity to recognize and engage with the highly emotional culture of antebellum American politics and social institutions that were capable of cultivating and valuing emotional expression.

A. *Popular constitutionalism*

Popular sovereignty emerged as a powerful animating force in American constitutionalism in the years immediately after the Founding,[22] taking hold during a sentimental era where emotions were a major preoccupation in political and social life. Early-nineteenth century Americans openly celebrated their capacity for feeling and viewed their emotional sensitivity as a defining characteristic that separated them from Great Britain.[23] As Andrew Burstein describes it, the Declaration of Independence "played up the distinction between the feeling and the unfeeling."[24] In Jefferson's words, it was the betrayal of America's "agonizing affection" that forced Americans to "renounce forever these unfeeling brethren."[25] This type of political rhetoric survived into in the post-revolutionary era, where political elites embraced sentiment to "sustain the enterprise of nation building. . . . used by a people who routinely called themselves peace-loving" as a "defense against inner and outer turmoil."[26]

During the early antebellum period, the performance of emotions like sympathy and affection was culturally valued[27] and feelings were treated as essential drivers of moral action.[28] Many recognized that emotions were socially constructed: they could be shaped by public opinion and transmitted from generation to generation.[29] It is therefore not surprising that politics were often framed in emotional terms, even beyond the so-called Era of Good Feelings. The successful "pursuit of happiness" was seen as an essential goal of politics,[30] and analogies to affective familial bonds were often used to describe the foundation of the new political union.[31] James Madison used *The Federalist* to attack skeptics who believed that "the people of America, knit together as they are by so many chords of affection, cannot live together as members of the same family."[32]

In his 1826 eulogy for John Adams and Thomas Jefferson, Daniel Webster placed the heart of the union in the collective emotions generated by mourning, reminding his audience that "the tears which flow, and the hours that are paid, when the founders of the republic die, give hope that the republic itself may be immortal."[33] Many Whig constitutionalists, including Joseph Story, used cemetery dedication addresses and college speeches to lend emotional content to their constitutional vision, invoking a language of sentiment to promote allegiance to a constitutional republic grounded in moral progress and economic development.[34]

Within this post-Founding era emotional context, there was widespread support for the idea that popular will, even with its vulnerability to volatile and unpredictable emotional forces, had a role to play in constitutional interpretation. For many, the Constitution represented the embodiment of popular sovereignty,[35] and constitutional law emerged as a special form of "popular law" where judges, elected officials, and the people shared interpretive power.[36] This populist vision of constitutional interpretation invited members of the public to engage as active participants in a wider cultural dialogue over constitutional meaning, welcoming collective emotions into the interpretive process. Larry Kramer's account of "popular constitutionalism" in the Founding era describes mechanisms for asserting popular input over legal meaning outside of the formal political system, including juries, petitions, parades, and "mobbing."[37] Civic associations often adopted their own constitutions, giving ordinary citizens a firsthand experience with a scaled-down version of constitutional self-governance.[38]

This populist lens also informed early narratives about the legitimacy of judicial interpretation. When early American jurists exercised the power of judicial review, they operated not as countermajoritarian and undemocratic elites but as representatives of "the People" that provided an institutional check against the power of self-interested and corrupt elected officials.[39]

Gradually, this link between popular sovereignty and judicial review began to deteriorate, as deep suspicions about the political and elitist motives of federalist judges drove efforts to constrain the exercise of judicial power and limit the influence of common law.[40] Gerry Leonard describes a historical transition from a moderate form of populism embodied by Jefferson, who sought to balance a commitment to reason and the rule of law with popular sovereignty, to the more unabashed party-centered populism of Andrew Jackson and Martin Van Buren.[41]

By the late 1820s and 1830s, the political party had evolved into a primary institutional mechanism for introducing popular emotion into constitutional interpretation. Under Van Buren's guidance, mass political parties began to position themselves as prominent competitors to judges in the battle for interpretive supremacy, despite conscious efforts by the founding generation to limit their existence and influence.[42] Jacksonians saw political parties, not the courts, as the true antiaristocratic embodiment of popular sovereignty and the primary vehicles for ensuring that the ultimate definition of constitutional meaning remained firmly in the hands of "the People."[43] By the 1840s, they had used the party system to effectively implement a constitutional agenda that revolved around strict construction and state sovereignty[44] and had begun to bring greater democratization to the judicial branch through the popular election of state judges.[45] Within a cultural environment that celebrated oratory and theatricality,[46] political party rituals injected emotional rhetoric into constitutional culture through personal appeals, long speeches, and parades.[47] Political parties also "domesticated" and managed popular interpretive input by filtering collective emotion through organizational frameworks and channeling populist energy into the winning of elections.[48]

Reform movements operated alongside the party system, using emotions as tools to motivate social action and inject strongly held moral beliefs into conversations about constitutional meaning. Perry Miller's classic account of antebellum intellectual thought describes a dichotomous battle between reason and emotion conducted through legal and nonlegal texts, with

the evangelical Protestant Revival embodying the forces of the Heart.[49] By the 1840s, religious evangelism was "the largest, and most formidable, subculture in American society."[50] Revivalist efforts at moral reformation embraced a rhetorical style that was both emotional and imaginative,[51] where feelings operated "like electricity moving through the telegraph line to God, who would respond to the sender upon receiving the message."[52] This evangelical style had a widespread influence on American culture beyond the pulpit as lurid literary descriptions of vice became more common,[53] facilitating a national conversation about moral reform with constitutional implications. Temperance literature became more and more dramatic and sensational in describing the social and familial effects of alcohol use, a rhetorical tactic embraced by antislavery novels from the period as well.[54]

Evangelical movements influenced antebellum constitutional culture in a range of ways, reacting against the idea that constitutional interpretation was the exclusive terrain of judges and reason.[55] John Compton describes the Revivalists' use of law as a tool for moral reform through zealous efforts to abolish slavery, alcohol, and lotteries, driven by the belief that "the will of democratic majorities should be accorded greater weight in constitutional adjudication."[56] In turn, "the judiciary came to be viewed as among the most serious obstacles blocking moral regeneration," as reform efforts came into conflict with constitutional rules that protected property rights, the movement of goods through interstate markets, and the rights of slaveholders.[57] Judges repeatedly invoked the Contracts Clause to strike down efforts to interfere with existing state lottery grants, upheld the constitutional property rights of liquor licensees whose livelihoods were threatened by temperance legislation, and relied upon the Fugitive Slave Clause to strike down state laws that protected escaped slaves.[58] In response, evangelicals "reacted against the elevation of law into an intricate system of reason by insinuating that lawyers . . . separated substance from form, spirit from letter, and sacrificed justice to technicality."[59]

Abolitionists, many with deep roots in evangelical religion and transcendentalism,[60] used emotional rhetoric to accompany their legal attacks on slavery.[61] On the legal front, antislavery activists relied on arguments based in natural law and moral principle to address a constitutional text that offered few legal remedies for addressing human bondage.[62] Outside the courtroom, they relied on a language of feeling to create "moral shocks" and motivate popular support for the abolitionist cause.[63] Abolitionist narratives about the institution of slavery often evoked sympathy and mourning for its victims, while portraying the South as immune to the emotional impact of human suffering. Through "indignation rallies" throughout the North, they sought to mobilize opposition to the slave power and facilitate "a sense of moral superiority and unity of purpose by defining slavery's champions as the objects of righteous outrage."[64] Antislavery narratives of the 1830s and 1840s often contained gruesome accounts of human pain and suffering designed to create strong feelings of sympathy, laying the popular groundwork for a rights discourse and a shift in moral reasoning that culminated in the legal reforms of the Reconstruction era.[65]

B. *Judicial interpretation*

It is difficult to characterize the early nineteenth-century relationship between judicial interpretation and emotion in a monolithic way. Most, though certainly not all, legal historians describe early nineteenth-century judicial interpretation as heavily influenced by instrumentalism,[66] a theory of reasoning that emerged from the common-law tradition and treated judge-made law as mutable and changeable in the service of certain larger social goals, like economic prosperity and the preservation of the national Union.[67] While still maintaining a deep commitment to the use of reason, precedent, and logical inference in judging, the instrumentalist approach also allowed some space for judges to experience emotion in the interpretive process.[68] During this period,

the effective administration of law was often linked to feelings, with the ideal jurist maintaining a strong, love-like, affective bond with justice, uniformity, or prosperity.[69] Peter Karsten describes a "Jurisprudence of the Heart" that was embraced by some antebellum jurists (particularly outside the Northeastern judicial elite), whose religious convictions influenced the application of common-law rules to aid the victims of economic growth and entrepreneurship.[70]

At the same time, early American judges also demonstrated a strong respect for reason, *stare decisis*, and English common law. Karsten identifies a distinct "Jurisprudence of the Head," where judges routinely invoked precedent and tools of logical inference to position law as a rational inductive process rather a creative tool to facilitate a larger set of normative values.[71] In contrast to private law, where instrumentalism remained dominant, formalism dominated the public law arena, often as a tool for judges to constrain legislative efforts to redistribute wealth.[72]

To the extent that reason and emotion were able to coexist within the judicial sphere, the status quo became increasingly untenable as the judicial branch, and common law came under political attack during the Jeffersonian and Jacksonian eras. As codification began to supplant common law in the 1820s and the political environment became increasingly skeptical of judicial power, influential Supreme Court judges fought back by claiming interpretive legitimacy and supremacy based on their ability to subordinate themselves to the will of the people as expressed in written codes and the Constitution itself. Narratives of judicial power increasingly treated law as a science best practiced by experts in the art of deduction and reason that would remain unaffected by the temporary erratic sway of popular passions that surrounded them.[73]

Joseph Story, a Supreme Court justice, law professor, author of a highly influential 1833 constitutional law treatise, and published poet, led the battle to insulate constitutional law from the effects of collective emotions and their potential effects on judicial independence and subjectivity.[74] In his *Commentaries on the Constitution*, Story lamented that

> the rules of interpretation have often been shifted to suit the emergency; and the passions and prejudices of the day, or the favour or odium of a particular measure, have not infrequently furnished a mode of argument, which would, on the one hand, leave the constitution crippled and inanimate, or, on the other hand, give it an extent and elasticity, subversive of all boundaries.[75]

In line with the growing treatise tradition, he saw his task as articulating "true rules of interpretation . . . so that we may have some fixed standard by which to measure [the Constitution's] powers and limit its provisions"[76] and worried about "how easily men satisfy themselves that the Constitution is entirely what they want it to be."[77] In 1835, lawyer and orator Horace Binney described Chief Justice John Marshall's judicial methodology, placing constitutional law solidly within the exclusive domain of judges and rationality. In Binney's depiction of Marshall, "[r]eason is the great authority upon constitutional questions, and the faculty of reasoning is the only instrument by which it should be exercised."[78]

Reason became a tool to establish judicial supremacy over constitutional interpretation, as Story's solution to interpretive malleability was to identify the Supreme Court as the "final and common arbiter" of constitutional meaning.[79] Elite jurists began to see law as a specialized science that should be governed by trained professionals – individuals whose powers of observation and experience gave them the unique ability to discern general principles that would lead to a "rational understanding of the universe"[80] that existed apart from their personal subjective values. Constitutional law, from this perspective, began to look less like a special

form of "popular law" and more like "ordinary law," subject to interpretive rules designed and implemented by judges.[81]

The dichotomous relationship between passion and reason not only reflected Enlightenment thinking but also served the interests of the increasingly elite and professionalized federal judiciary. In a competition with political parties for interpretive power, Story and others began to reinforce the idea that the judiciary's institutional competence was based on its ability to bring rationality to the legal system and remain independent from politics and popular will. In this context, it is not surprising that the divide between reason and emotion became one way for antebellum judges to dismiss abolitionist efforts in the 1840s and 1850s to read constitutional texts through an explicitly moral lens. Many jurists saw the antislavery movement's move toward legal arguments based in natural law and morality as an attack on the positivism that came with the invention of a written Constitution,[82] inviting too much subjectivity into the process of defining constitutional meaning[83] for a founding document that was supposed to embody core principles that remained consistent across generations.[84] In rejecting an antislavery reading of the New Jersey Constitution in 1845, the New Jersey Supreme Court dismissed the natural law arguments made by abolitionists as "addressed to the feelings" rather than to "the legal intelligence of the court."[85] Judges responded to abolitionist arguments with an increasingly formalist, rationality-driven conception of their own role, as antislavery judges professed helplessness when confronted with legal attacks on slavery.[86] Story, the author of the Supreme Court's decision in *Prigg v. Pennsylvania* declaring a state kidnapping law unconstitutional under the Constitution's Fugitive Slave Clause, wrote to a friend after the decision: "you know full well that I have ever been opposed to slavery. But I take my standard of duty as a judge from the Constitution."[87] Even Justice Benjamin Curtis's blistering dissent in *Dred Scott* reinforced this conception of the judicial role: "General considerations concerning the social and moral evils of slavery" were "reasons purely political" that made "judicial interpretation impossible – because judicial tribunals cannot decide upon political considerations."[88]

Popular American authors noticed this move toward the sublimation of judicial emotion, attacking judges whose embrace of rationality and formalism immunized them from the feelings necessary to generate moral outrage and appreciate the human suffering caused by slavery. In a pair of texts, *A Key to Uncle Tom's Cabin* and *Dred: A Tale of a Great Dismal Swamp*, Harriet Beecher Stowe condemned "the severe, unflinching accuracy of logic"[89] in American legal decisions, as judges with "unflinching calmness . . . walk . . . through the most extreme and terrible results and conclusions, in obedience to the laws of legal truth."[90] A judge in Stowe's novel *Dred* reveals that he "can only perceive and declare. What I see, I must speak, though it go against all my feelings and all my sense of right."[91] Whitman's idealized vision of law in "Great Are the Myths" situates "Justice" not in "legislators or laws" but in the "Soul," with "perfect judges" ruling "on the highest grounds."[92] And in James Fenimore Cooper's *The Pioneers*, Judge Marmaduke Temple finds his commitment to reason and law in direct conflict with the unbounded spirit of frontier culture embodied by Natty Bumppo.[93]

The pre–Civil War battles over interpretive power and methodology would culminate after the War in the triumph of legal formalism, with judges purporting to administer law as a science governed by logic and inference from precedent. Melville's Captain Vere in *Billy Budd* would come to embody the spirit of the moral–formal divide, agonizingly rejecting any appeal to "private conscience" in sentencing Billy to death.[94] Years of emotional struggle (among a multitude of other factors) left many Americans eager to turn their attention away from politics and matters of constitutional interpretation, leaving the federal judiciary ample room to chart the course of the Reconstruction Amendments in the war's aftermath.

II. Constitution as instrument

Judicial efforts to emphasize the importance of reason in constitutional interpretation aligned with one of the Constitution's critical instrumental functions: to serve as an elaborate system of emotion management, channeling popular passions into institutional structures designed to bring deliberation, contemplation, and rationality into democratic decision making.[95] The document was written by a group of elite statesmen who saw collective emotions as volatile and chaotic, threatening to constitutional commitments, connected to divisive factionalism, and a potentially destructive force in public life.[96] The belief that "the passions of men will not conform to the dictates of reason and justice without constraint"[97] led to the design of constitutional institutions – like a bicameral legislature, large legislative districts, and an onerous and time-consuming amendment process – that would slow public decision making and allow reason to take hold.[98] In his 1826 *Commentaries on American Law*, James Kent complemented the Senate's ability "to destroy the evil effects of sudden and strong excitement, and of precipitate measures springing from passion, caprice, prejudice, personal influence, and party intrigue."[99]

Early nineteenth-century legal and political elites echoed Founding era beliefs about "passion's" detrimental impact on public decision making, seeing a clear division between law and politics as vital to creating the stability necessary for a commercial economy to thrive.[100] Reason held an exalted status over emotion, and the effective exercise of popular sovereignty required a balance of both.[101] Jefferson noted that "although the will of the people is in all cases to prevail, that will to be rightful must be reasonable."[102] As mob violence became a greater threat in the 1830s and started to affect the national debate over slavery, collective emotions began to seem more dangerous and destructive to the rule of law.[103] In his 1838 Lyceum speech, Abraham Lincoln reinforced a sharp hierarchy between reason and emotion: "passion has helped us; but can do so no more. It will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence."[104] Antebellum judges often echoed these themes, warning about the threat that popular emotions and passion presented to the constitutional regime and the rule of law.[105]

Among many other forces contributing to the fragmentation of the Union,[106] growing sectionalism in the 1840s and 1850s placed extreme pressure on the ability of constitutional institutions to use political compromise as a mechanism to manage emotions in the absence of a social or political consensus about how to deal with slavery and western expansion. In both North and South, feelings that were inextricably linked to moral judgment[107] helped create a polarized and sectarian political environment, resulting in a nation with two very different emotional subcultures that constitutional structures seemed unable to deal with effectively.[108] Jealousy, an emotion viewed with sharp disdain by many Northerners, became a source of sectional unity in the South, where it became closely linked to the proslavery cause and generated a moral obligation for Southern whites to defend their rights and honor against Northern infringements. In the North, feelings of indignation about slavery, the beating of Senator Charles Sumner on the floor of United States Senate, and other affronts "nurtured a sense of moral superiority and unity of purpose"[109] against the slave power. Many antebellum constitutional movements increasingly relied upon a "paranoid style" that saw conspiracies at the heart of America's problems,[110] triggering strong feelings and sharp in-group/out-group distinctions that contributed to sectional division. These culturally validated emotions generated a strong sense of regional allegiance, making efforts by constitutional institutions to generate political or legal compromises about slavery nearly impossible.

As these tensions became more acute, the constitutional system's inability to manage the effects of passion became a major preoccupation among political elites. Throughout the lead-up to the

Civil War, many began to frame the conflict in explicitly emotional terms. Daniel Webster lamented that slavery had brought up "grievances, real or supposed, [that] alienate the minds of one portion of the country from the other, exasperate the feelings, subdue the sense of fraternal connect, and patriotic love, and mutual regard,"[111] while Jefferson warned that antislavery activism would "kindle such mutual and mortal hatred, as to render separation preferable to eternal discord."[112]

An emotional disease required an emotional cure.[113] Emotions that brought divergent perspectives together were seen as critical to ensuring that the Constitution made good on its promise of perpetuity and political union, just as divisive emotions were seen as pivotal to tearing that union apart. As Michael Woods demonstrates, an "affective theory of the Union" pervaded antebellum American political culture, embracing the idea that "the power of feeling, not force, made the United States uniquely harmonious and free."[114] Politicians from across the ideological spectrum thought the key to resolving sectional conflict lay in cultivating "brotherly feelings and harmony" and "a better feeling and more fraternal sentiments between the South and the North."[115] In his farewell address, Andrew Jackson recognized this critical role for emotions, asserting that the "foundations" of the constitutional regime lay "in the affections of the people."[116] Similarly, James Buchanan cautioned "that if the Union 'can not live in the affections of the people, it must one day perish.' "[117] John Quincy Adams' description was typical of many who saw the Union as a tie based in feelings, intuition, and spirit:[118] "the indissoluble link of Union between the people . . . is, after all, not in the right, but in the heart."[119] In his First Inaugural Address, Lincoln reinforced this same theme, where he imagined an America where the "mystic chords of memory" would "swell the chorus of the Union" and maintain "our bonds of affection."[120]

As sectional tensions increased, evangelicals used a discursive method that "addresse[d] itself to the heart" and "lay[ ] the foundations of union in . . . affections, sympathies, and hopes."[121] They saw a shared religious vision driven by emotion as the solution for a problem the symbolic Constitution seemed unable to solve: national unity. In Perry Miller's words, "the explosive Revival became a gallant effort, by insisting upon the purification of American hearts, to conserve the Republic."[122]

Antebellum literature fed into efforts on all sides, using feelings both to overcome increasingly rigid and irreconcilable social divisions and to stoke political passions. Whitman's *Leaves of Grass* is a massive literary effort to "hold America together" through emotional ties forged by a vision of common humanity, history, and democratic spirit.[123] Whitman prophesized that "affection shall solve the problems of freedom yet, Those who love each other shall become invincible, They shall make Columbia victorious."[124] In *Uncle Tom's Cabin*, Harriet Beecher Stowe used grief and other collective emotions to generate empathy and to facilitate interracial bonds between both characters and activists, while also generating emotional responses that would help galvanize the abolitionist movement.[125] Frederick Douglass said the book "rekindled the slumbering embers of anti-slavery zeal into an active flame. Its recitals have baptized with holy fire myriads who before cared nothing for the bleeding slave."[126] William Lloyd Garrison had a similar response: "We confess to the frequent moistening of our eyes, and the making of our heart grow liquid as water, and trembling every nerve within us, in the perusal of incidents and scenes so vividly depicted in her pages."[127]

III. Constitution as symbol

While reason was deemed essential to effective decision making within a constitutional system, the cultivation of certain emotions was also essential to constitutionalism's legitimacy and survival. Constitutional regimes sustain themselves through symbol, using myth, foundational text, iconography, and ritual to create emotional ties that legitimize the use of power over extended periods of time.[128] The creation of constitutional systems is "ideological and social in nature," a

process that requires a culture to "shift allegiances, realign sources of authority, and cultivate new identities, mind-sets, and habits consistent with good citizenship."[129] Constitutions are a legal instrument for making and preserving long-term social commitments,[130] and symbols facilitate the affective attachments necessary for those commitments to sustain and legitimate themselves over time.[131] The determination of how individuals "felt" about the constitution requires attention to the use of cultural symbols as much as it requires attention to law.

Within this context, the most striking thing about the Constitution as a national cultural symbol in the antebellum era is its absence. When compared with the reverence and emotional rhetoric generated by the Declaration of Independence, the Founding generation (and George Washington in particular), the Revolutionary War, and the concept of Union, the Constitution itself seems, at times, to enjoy an almost second-class status within the world of antebellum American semiotics, emerging as a major national symbol only "slowly and inconclusively."[132] The Constitution's Golden Jubilee in 1837–1839 appears to have generated little enthusiasm (particularly when compared with the pomp and circumstances that accompanied the fiftieth anniversary of the Declaration of Independence in 1826),[133] the physical document itself spent much of its pre–Civil War life hidden from public display in the North Wing of the Treasury Department,[134] artistic images of the document and the Convention were relatively rare,[135] and many lamented the pervasive public ignorance about the document and its provisions.[136]

Indeed, the Declaration of Independence was a far more common and emotionally resonant symbol in antebellum political life. Abraham Lincoln referred to the Constitution as a mere "frame of silver" around the Declaration's "apple of gold," and both the Gettysburg Address and the Emancipation Proclamation reference the Declaration and 1776 rather than the Constitution and 1787 as the most important moment in the American cultural mythos.[137] Just prior to his inauguration, Lincoln observed that he had "never had a feeling politically that did not spring from sentiments embodied in the Declaration of Independence."[138] When compared with the Constitution, which was increasingly seen as a "compromise document," the Declaration offered a set of core principles that could form the basis for a coherent and unified national identity.[139] In Lincoln's words, it was the Declaration that provided the "electric cord . . . that links the hearts of patriotic and liberty loving men together."[140]

In the lead-up to the Civil War, the symbol of "Union" did far more work to generate emotional ties "of regard and reverence . . . [of] attachment and pride" to the Founding constitutional regime than the Constitution itself.[141] Union imagery was common in antebellum iconography, often portrayed by artists as a chain to provide comfort and reassurance during difficult times.[142] Many political leaders believed that the Union preceded and transcended the Constitution, which confirmed the Constitution's status as a secondary symbol within the antebellum political order.

The Constitution's failures and omissions, including the lack of any commitment to racial or sex equality, also made it an easy target for symbolic attack. Radical abolitionists like Wendell Phillips called it "a piece of parchment," while William Lloyd Garrison famously called it "a covenant with death, an agreement with hell."[143] This forced many to seek out and develop other texts capable of providing symbolic value that would generate a shared vision of equality and a common sense of humanity. Abolitionists sought out the Bible,[144] first-wave feminists created the 1848 Seneca Falls Declaration of Sentiments, Whitman called upon the power of epic poetry, while Lincoln relied heavily on the Declaration of Independence.

If the strength of symbols is tied to a strong foundational myth, the Constitution's semiotic weakness as a unifying symbol can be partially attributed to a lack of consensus around a unifying narrative about the Founding.[145] Secessionist Southern leaders subscribed to a contractual theory about the Constitution's formation in which states rather than the People were the agents that constituted the Republic through a legalistic compact that could be repudiated by the parties. By

contrast, Unionists saw a Constitution that obtained its legitimacy from the People, created by a set of transcendent bonds that linked individuals together as part of a collective polity. The inability to reconcile these two founding stories – one transactional and impersonal, the other metaphysical and affective – made it challenging for the Constitution to cohere as a national symbol.

In the crowded world of post-revolutionary symbolism, the Constitution did maintain some cultural relevance. Whitman called the Constitution "a perfect and entire thing . . . the grandest piece of moral machinery ever constructed" whose "architects were some mighty prophets and gods."[146] John Calhoun situated the Constitution at the root of the nation's shared emotional connection, the instrument that made "the Union a union in truth – a bond of mutual affect and brotherhood, and not a mere connection."[147] Lincoln himself referenced emotions to describe his bond with the document when debating its meaning with David Dudley Field: "He loves [the Constitution] in his way; I in mine."[148] And there are numerous examples of the Constitution serving as a framing device for public discourse on all sides of the sectional conflict in the years right before the Civil War.[149]

Even if the Constitution never achieved true primacy as an emotionally resonant unifying symbol, constitutionalism nevertheless became embedded in the practices of more radical antebellum social movements that sought to reconstitute America's founding commitments. As a symbol of popular sovereignty, written constitutions based on the founding document retained value as a tool for "public acts of defiance" by groups who sought to renegotiate the terms of the 1787 text.[150] Several groups engaged in acts of constitution writing, using this new form of law to enhance the legal status of their moral principles and form a bridge between the emotional world of politics and a world of law that operated by inference from universal principles. John Brown's 1856 provisional constitution was an integral part of his moral war against slavery, while the 1861 Confederate constitution – despite substantial overlap with the content of the 1787 Constitution – became a vehicle for expressing "cultural sovereignty" and "regional distinctiveness."[151] Both documents are efforts to imagine and implement efforts to reconstitute the nation in ways that address slavery far more directly than the 1787 document ever did.

One remarkable outcome of the antebellum era is that the Constitution emerged without shouldering much of the blame for a conflict that left two percent of the American population dead on the battlefield. If the Constitution's primary symbolic mission was to create an affective environment of loyalty and allegiance that would allow the new nation to resolve disputes about deep-seated cultural questions without imploding, it is hard to see the 1787 document as anything short of an utter failure. Yet despite the paranoia provoked by the Reconstruction Amendments throughout large swaths of the South,[152] the late nineteenth century witnessed a period of cultural "constitution worship," where the narrative of the Union surviving the Civil War meant the Constitution emerged intact as well.[153] The document's substantive and symbolic failings were largely glossed over, causing *The Nation*'s E. L. Godkin to note during the Constitution's 1887 Centennial that "so little mention has been made of the failure of the instrument to overcome the main difficulties in the way of its original framers."[154]

IV. Future work

While it has attracted increased scholarly attention in recent years, the field of law and emotions remains relatively new, and there are many opportunities for major interdisciplinary contributions that use nineteenth-century legal and nonlegal sources to develop richer historical and cultural accounts of constitutional law from textual, instrumental, and symbolic perspectives.

Within the realm of text, there is no comprehensive account of the evolving and historically contingent relationship between constitutional interpretation and emotion or of the ways that

the relationship developed differently from other areas of legal doctrine. From this starting point, there are a number of underexplored areas: in a system that maintains simultaneous normative commitments to judicial supremacy and various forms of popular constitutionalism, how did shifting beliefs about the effect of different emotions on legal and political decision making influence institutional power struggles over constitutional meaning? How have nonlegal texts described the relationship between feelings and legal decision making over time, and to what extent do literary and artistic portrayals of that relationship influence or accurately reflect the actual lived experiences of practitioners, judges, and other actors within the legal system? How do major constitutional disputes, like the tension between nationalism and state sovereignty, adopt narratives with a particular emotional valence within and outside law's domain? How did discourse about emotion help to define and alter interpretive struggles over class, sex, and race? What subcategories of persons were seen as capable of having emotions (or only capable of displaying particular emotions), and how did legal practitioners use narratives about emotional capacity to reinforce constitutional categories or spur constitutional change? How did feelings arise as a dynamic in the interpretation of state constitutions? How have changing cultural perceptions about collective emotions affected the dynamic relationship between public opinion and constitutional law?

As an instrument for emotion management, there is need for further work on exactly how the framers' assumptions about emotion and emotion management were embedded into constitutional design, the extent to which those assumptions were dependent on particular political realities, where those assumptions failed in the lead-up to the Civil War, and the degree to which contemporary understandings about the relationship between emotion and reason might help to explain that failure. There are larger questions as well: how, if at all, should constitutional design and institutions address the presence of multiple emotional subcultures within a heterogeneous society? How do interpretive systems perform in the absence of strong collective emotions, during periods of high public disengagement, inattention, and apathy? How did the framers of the Reconstruction Amendments think about the Constitution's emotion management function in the aftermath of the Civil War, and how did their assumptions affect legal and political developments in the Reconstruction and post-Reconstruction eras?

Finally, how did different subcultures, reform efforts, and social movements respond affectively to the Constitution as a symbol, and to what extent did narratives about those responses play a role in efforts to mobilize constitutional change? How did different power centers within American culture work to reinforce the Constitution's symbolic resonance, and to what extent did those efforts emphasize particular aspects of the constitutional regime and deemphasize others? How did feelings about the Constitution as a symbol evolve in response to the Reconstruction Amendments?

Notes

* Professor of law, New York Law School. Thanks to Ed Purcell and Rebecca Roiphe for their thoughts and comments, Michael Roffer for his incredible research assistance, and Daniel Ellis-Ferris for his support.

1 Michael P. Young, "A Revolution on the Soul: Transformative Experiences and Immediate Abolition," in *Passionate Politics and Social Movements*, ed. Jeff Goodwin, J. Jasper, and F. Polletta (Chicago: University of Chicago Press, 2001), 103; Robert H. Abzug, *Passionate Liberator: Theodore Dwight Weld and the Dilemma of Reform* (New York: Oxford University Press, 1980), 129.

2 There is an extensive body of multidisciplinary literature dedicated to exploring the widespread disagreement about how to define the term "emotion" and the way it intersects with concepts like "reason," "rationality," and "interests." Susan A. Bandes and Jeremy A. Blumenthal, "Emotion and the Law," *Annual*

Review of Law and Social Science 8 (2012): 161–81, 163–4. While the core "definitional" question is beyond the scope of this piece, for the purposes of this article, I use Bandes and Blumenthal's definition:

> Emotions are a set of evaluative and motivational processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli and that are formed, interpreted, and communicated in social and cultural context. They help us screen, categorize, and interpret information; influence our evaluations of the intentions of others; and help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate.

Ibid. Reva Siegel defines "constitutional culture" as a "network of understandings and practices that structure our constitutional tradition, including those that shape law but would not be recognized as 'lawmaking' according to the legal system's own formative criteria." Reva B. Siegel, "Text in Contest: Gender and the Constitution from a Social Movement Perspective," *University of Pennsylvania Law Review* 150 (2001): 297–351, 303.

3 Robert L. Tsai, *America's Forgotten Constitutions: Defiant Visions of Power and Community* (Cambridge, Mass.: Harvard University Press, 2014), 2. Throughout the antebellum era, this ambivalence was often framed as a tension between "liberty" and "order." Michael Kammen, *Spheres of Liberty: Changing Perceptions of Liberty in American Culture* (Jackson: University Press of Mississippi, 2001), 69–75.

4 Paul W. Kahn, *The Cultural Study of Law: Restructuring Legal Scholarship* (Chicago: University of Chicago Press, 1999), 120–1.

5 Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (New York: Cambridge University Press, 1984).

6 András Sajó, *Constitutional Sentiments* (New Haven, Conn.: Yale University Press, 2011), 4; Peggy A. Thoits, "The Sociology of Emotions," *Annual Review of Sociology* 15 (1989): 317–42, 336.

7 Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (New York: Cambridge University Press, 2000), 130–1.

8 Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009).

9 The primary focus of this chapter is the United States Constitution. But the historical narrative of nineteenth-century American constitutional law also includes state constitutions, which underwent dramatic transformations during the antebellum era. Laura Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820–1850* (DeKalb: Northern Illinois University Press, 1999).

10 John Corrigan, *Business of the Heart: Religion and Emotion in the Nineteenth Century* (Berkeley: University of California Press, 2002), 4.

11 Shelly Chaiken and Yaakov Trope, eds., *Dual-Process Theories in Social Psychology* (New York: Guilford Press, 1999); David Hume, *A Treatise of Human Nature*, ed. David F. Norton and Mary J. Norton (1738; Oxford: Oxford University Press, 2007).

12 Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Penguin Books, 2005); Joseph E. LeDoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (New York: Simon & Schuster, 1996).

13 Drew Westen, *The Political Brain: The Role of Emotion in Deciding the Fate of the Nation* (New York: PublicAffairs, 2007); Robert H. Frank, *Passions within Reason: The Strategic Role of the Emotions* (New York: Norton, 1988).

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15 Doni Gewirtzman, "Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture," *University of Richmond Law Review* 43 (2009): 623–83, 668–9.

16 Merrill D. Peterson, ed., *The Portable Thomas Jefferson* (New York: Penguin, 1975), 290–2.

17 Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965), 100.

18 Alfred L. Brophy, "Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists" (book review), *Boston University Law Review* 79 (1999): 1161–214, 1169–76.

19 For more on the relationship between class tensions and interpretive method, see Richard D. Parker, *Here, the People Rule: A Constitutional Populist Manifesto* (Cambridge, Mass.: Harvard University Press, 1998).

20 Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 164.

21 G. Edward White, *The Marshall Court and Cultural Change 1815–1835* (New York: Oxford University Press, 1991), 755.
22 Kramer, *The People Themselves*, 45.
23 Andrew Burstein, *Sentimental Democracy: The Evolution of America's Romantic Self-Image* (New York: Hill & Wang, 1999), 4–6.
24 Ibid., 4.
25 Ibid., 5; Sarah Knott, *Sensibility and the American Revolution* (Chapel Hill: University of North Carolina Press, 2009), 22.
26 Burstein, *Sentimental Democracy*, 6–7.
27 Jan Lewis, "'Those Scenes for Which Alone My Heart Was Made': Affection and Politics in the Age of Jefferson and Hamilton," in *An Emotional History of the United States*, ed. Peter N. Stearns and Jan Lewis (New York: New York University Press, 1998), 54.
28 Nicole Eustace, *1812: War and the Passions of Patriotism* (Philadelphia: University of Pennsylvania Press, 2012), xi–xii.
29 Eustace, *1812*, xii–xiv.
30 Michael E. Woods, *Emotional and Sectional Conflict in the Antebellum United States* (New York: Cambridge University Press, 2014), 37.
31 Lewis, "Those Scenes," 57.
32 *The Federalist* No. 14; Lewis, "Those Scenes," 57.
33 Burstein, *Sentimental Democracy*, 270.
34 Alfred L. Brophy, "The Road to the Gettysburg Address," *Florida State University Law Review* 43 (forthcoming 2016); Alfred L. Brophy, "The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in the Graduation Addresses at the University of North Carolina," *North Carolina Law Review* 89 (2011): 1879–964, 1940–9.
35 Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1986), 13.
36 Kramer, *The People Themselves*, 45–9.
37 Ibid., 108–13.
38 Jason Mazzone, "The Creation of a Constitutional Culture," *Tulsa Law Review* 40 (2005): 671–98, 673–4.
39 Stephen M. Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power* (New York: Cambridge University Press, 2011), 74, 129; Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World 1664–1830* (Chapel Hill: University of North Carolina Press, 2005), 256.
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41 Gerald Leonard, "Jefferson's Constitutions," in *Constitutions and the Classics: Patterns of Constitutional Thought from John Fortescue to Jeremy Bentham*, ed. Denis Galligan (New York: Oxford University Press, 2014).
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43 Ibid., 14; Engel, *American Politicians*, 144.
44 Leonard, *Invention of Party Politics*, 251; Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (Lawrence: University Press of Kansas, 2007), 61–73.
45 Shugarman, *The People's Courts*, 105–6.
46 David S. Reynolds, *Walt Whitman's America: A Cultural Biography* (New York: Alfred A. Knopf, 1995), 166–75.
47 Thomas Hunter, "The Institutionalization of Legal Education in North Carolina, 1790–1920," in *The History of Legal Education in the United States: Commentaries and Primary Sources, Volume I*, ed. Steve Sheppard (Pasadena, Calif.: Salem Press, 1999), 420.
48 Kramer, *The People Themselves*, 168. Alexis De Tocqueville described presidential elections as intense, emotional departures from a "calmer season," where the "ardor of action is redoubled . . . all the artificial passions which the imagination can create in the bosom of a happy and peaceful land are agitated and bright to light . . . [and] the whole nation glows with feverish excitement."
49 Miller, *Life of the Mind*, 65.
50 John W. Compton, *The Evangelical Origins of the Living Constitution* (Cambridge, Mass.: Harvard University Press, 2014), 29.

51 Reynolds, *Walt Whitman's America*, 155.
52 Corrigan, *Business of the Heart*, 10.
53 David S. Reynolds, *Beneath the American Renaissance: The Subversive Imagination in the Age of Emerson and Melville* (New York: Knopf, 1988), 64.
54 Ibid., 62–76.
55 Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1997), 293.
56 Compton, *Evangelical Origins*, 15; Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (Cambridge, Mass.: Harvard University Press, 2010), 7–9.
57 Compton, *Evangelical Origins*, 8.
58 Ibid., 16–17.
59 Miller, *Life of the Mind*, 188.
60 William E. Nelson, "The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in the Nineteenth Century," *Harvard Law Review* 87 (1974): 513–66, 525–7.
61 András Sajó, "Emotions in Constitutional Institutions," *Emotion Review* 8 (2016): 44–9.
62 Nelson, "Impact of the Antislavery Movement," 534–5. This is not to suggest that antislavery advocates saw moral or natural law readings of the Constitution as driven by emotion and feeling. To the contrary, many abolitionists saw themselves as employing conventional legal reasoning techniques, using deduction and inference to apply universal principles to specific circumstances.
63 Young, "Revolution on the Soul," 106, 112.
64 Woods, *Emotional and Sectional Conflict*, 150.
65 Elizabeth B. Clark, "'The Sacred Rights of the Weak': Pain, Suffering, and the Culture of Individual Rights in Antebellum America," *Journal of American History* 82 (1995): 463–93.
66 Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977), 1–30.
67 Nelson, "Impact of the Antislavery Movement," 520–1.
68 Bruce A. Green and Rebecca Roiphe, "Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence," *New York University Annual Survey of American Law* 64 (2008): 497–557, 508.
69 Ibid.; Simon Stern, "Blackstone's Legal Actors: The Passions of a Rational Jurist," in *Impassioned Jurisprudence: Law, Literature and Emotion, 1660–1800*, ed. Nancy Johnson (Lewisburg, Pa.: Bucknell University Press, 2014), 1–19.
70 Karsten, *Heart versus Head*, 4–8.
71 Ibid., 25–46; Polly J. Price, "Precedent and Judicial Power after the Founding," *Boston College Law Review* 42 (2000): 81–121, 102.
72 Horwitz, *Transformation of American Law*, 255–6.
73 Ibid., 256–9.
74 William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994), 29, 35.
75 Joseph Story, *Commentaries on the Constitution* (Boston: Hilliard Gray & Co., 1833), 383; Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, Conn.: Yale University Press, 1975), 136.
76 Ibid.
77 Kammen, *Machine*, xxii.
78 Miller, *Life of the Mind*, 119.
79 Daniel W. Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (New York: Oxford University Press, 2007), 123; Kramer, *The People Themselves*, 184–5.
80 LaPiana, *Logic and Experience*, 29.
81 Kramer, *The People Themselves*, 164.
82 White, *The Marshall Court*, 740.
83 Cover, *Justice Accused*, 29.
84 White, *The Marshall Court*, 374.
85 *State v. Post*, 20 N.J.L. 386, 369 (1845); Cover, *Justice Accused*, 56–7.
86 Cover, *Justice Accused*, 121.
87 Ibid., 119.
88 *Scott v. Sandford*, 60 U.S. 393, 620 (1856) (Curtis, J., dissenting); Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), 77.

89 Harriet Beecher Stowe, *A Key to Uncle Tom's Cabin* (Boston: Jewett, 1853), 82; Alfred L. Brophy, "Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp," *Boston University Law Review* 78 (1998): 1113–61, 1136–7.
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91 Harriet Beecher Stowe, *Dred: A Tale of the Great Dismal Swamp* (Cambridge, Mass.: Riverside Press, 1856), 438; Brophy, "Humanity," 1138.
92 Reynolds, *Walt Whitman's America*, 337.
93 Brophy, "Humanity," 1116–17.
94 Cover, *Justice Accused*, 1–6.
95 Gewirtzman, "Our Founding Feelings," 645; *Federalist* no. 49, in *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 343 (James Madison) ("[I]t is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."); White, *The Marshall Court*, 54.
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121 Miller, *Life of the Mind*, 65.

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