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Constitutional Sentiments

Abstract. The principal claim of the essay is that sentiments and assumptions about sentiments

– have an important role in setting up constitutional designs and interpretation ("evolving standards of decency");

– constitutional arrangements do have impacts on social emotions;

– the disregard of the interrelation of emotions and other forms of cognition condemns legal theory to one-sidedness and the efforts of behavioral economics seem not to undo this one-sidedness.

For example, fear is present in the making of many constitutions. Constitutions are designed to give assurances against fear that stems from, among others, pre-constitutional oppression, mob rule and factional passions. Constitutional rights are also structured by emotions: Compassion and indignation serve as emotional grounds to accept and claim human rights.

A simplified vision of modernity claims that law and constitutional design is all about rationality. Brain imaging studies indicate that moral emotions guide many moral judgments or are in competition with reasoning processes. Of course, moral emotions contribute to the shaping of law through moral judgments. To the extent law intends to shape behavior, it will rely on its legal folk psychology. A theory of constitutional sentiments shall reconstruct the assumptions on human nature as emotional nature that shape the constitution and its interpretation.

Historically, constitutional path dependence presupposes emotional choices and emotional action tendencies that are institutionalized and 'imposed' on law and society. Paradigmatic changes in constitutional law cannot be explained without considering the path-breaking rule of emotions. For example, the commitment to abolish slavery cannot be explained without the emotional condemnation (based on disgust and resulting in indignation) of the institution. The ban on torture is also rooted in sentiments of disgust. Concepts of cruel and unusual punishment are rooted in emotions of disgust. Law is both trying to script emotions (in order to prevent challenges to the status quo) and accommodates prevailing (or preferred) emotions (hence the difficulty of a non-revenge based criminal policy).

Keywords: constitutional design, psychology, enlightenment, militant democracy, politics of emotion, social risk evaluation, populism

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> And it is fortunate for men to be in a situation in which,
> though their passions may prompt them to be wicked,
> they have nevertheless an interest in not being so.
> *Montesquieu*

It is not obvious that sentiments and assumptions about sentiments are crucial in setting up constitutional design or that constitutional arrangements have impacts on social emotions. To show that such relations are important I could use the genuine indignation that women's rights triggered in Afghanistan among the faithful, but I prefer to discuss fear, empathy, and compassion in democratic constitutional contexts to illustrate the role of sentiments in limiting government power and in accepting or rejecting certain fundamental rights. This will be followed by an analysis of political emotionalism and irrational risk handling that challenge the institutional design of liberal democracy.

A discussion of the role of emotions in constitutional law and political institution design presents methodological difficulties as well as challenges related to the conflicting scientific knowledge that is generated regarding emotions. The methodological problem is this: emotions are individual empirical phenomena, even if occurring in a social environment in social interaction. Institutions, on the other hand, are collective normative expectations and patterns, or symbols, or what not.

Strictly speaking, one can speak about emotions that *might* have existed in individuals who designed institutions. More importantly, in the making of a constitution, constitution makers have assumptions about human emotions. But these are hardly measurable. Is it relevant in the creation of institutions what the related actual individual emotional processes are? How do we observe or reconstruct such emotions? After all, it is quite possible that the constitutional design is the work of a small drafting elite's false consciousness about emotions. It might be the false assumption of judges who redesign the constitution. The assumptions on emotions might be wrong: nevertheless the constitution will be operative. But at what price?

My research hypothesis is that emotions, through complicated mechanisms, do have an actual impact on constitutional design. By improving our knowledge regarding emotions, we can improve constitutional design.

Such research has to consider many interrelated matters: first, it is about the impact of sentiments and assumptions regarding emotions on constitutional law; secondly, it is about the effort of constitutional law to handle and shape public sentiments; thirdly, it considers the public reactions, including emotional reactions, to constitutional arrangements; and finally, it is about the actual impact of constitutional and other legal designs on the social construction and

use of sentiments. Consideration of these matters will enable the discussion of policy issues of how to deal with emotions.

I am not offering any definition of emotions in the constitutional context. Instead, I use the 18th century term *sentiment* to indicate that in constitutional design what matters is the assumption about social emotions. Sentiments refer to prevailing language usage regarding the social interpretation of behavior and related expectations. I hope that in the long run a closer relationship between sentiments, which serve as social-normative shorthand in constitutional and political reasoning, and emotions, understood here in a scientific, e.g. neurological sense, can be developed.

The term constitution is used here in a broad sense. It goes beyond constitutional texts and includes various judicial and other legally and socially relevant meanings, constitutional conventions, practices and customs that emerge in the use of public power. On the other hand, I limit myself to constitutional settings that emerge under the paradigm of constitutionalism. Here constitutionalism entails democracy and 19th century liberalism. I understand constitutionalism as a crucial part of the reason-based modernity project, something that became quite problematic recently, because of, among other things, the mistreatment of emotions in favor of distorted reason.

It is true that in a desiccated tradition political institutions claim legitimacy precisely because they are able to operate rationally, hence efficiently. They claim to deserve respect and obedience because these constitutional institutions enable rational behavior in society. Contemporary constitutional systems are typically presented as if they were operating according to rationality, or at least as if their problems were related to some problem of bounded rationality, some difficulty in intellectual processing. All the above is in line with the centrality of reason, the alleged core assumption of modernity. Today people take pride in debasing reason-based modernity. At a time when reason is suspicious, constitutions join the usual suspects in the academic round up. But the reason-passion opposition is a gross simplification: the goal of the enlightenment was not the oppression of sentiments, but self-control that enables propriety in the display of sentiments. The enemy of reason is not passion; it is fanaticism. This message of Voltaire is to be remembered in our age of new fanaticism.

Constitutionalism and the administration of justice are often presented as institutions that claim to improve efficiency in human affairs by promising the eradication of emotion from the constitutional public sphere. Notwithstanding the relevance of sentiments for constitutionalism, constitutional law allegedly neglects this relevance. Why is that so? There is a historical path dependence here. The paradigm of fundamental rights is provided to the modern world by the 1789 French Declaration of the Rights of Man and Citizen. The Declaration

offered a rationalistic frame and this is what became prevalent in constitutional thinking. But it would be wrong to consider the Declaration to be a pure negation of sentiments and an example of the modernist plot of enlightened reason. The French revolution was a sentimental revolution.

Let me quote the Marquis de La Fayette arguing at the National Assembly in favor of the Declaration: "Let me call to mind the *sentiments* which Nature has engraved in the heart of every citizen, and which take a new force when they are solemnly recognized by all: For a nation to love liberty, it is sufficient that she knows it; and to be free, it is sufficient that she wills it."[1] In this approach, liberty exists in natural sentiments and reason is only there to remind us of our sentiments. It is only the result of positivist science and legal positivism that moral sentiments are pushed into oblivion in scholarship and positivist ideology.

While in the Middle Ages behavior was taken to be shaped by certain passions, this was gradually replaced by conceptions of interest as the proper source of guidance for and basis of explanation of social behavior. It should be added that the 18th century cult of sentiments is related to the attempt to use them as a crucial technique of social control under Louis XIV. The technique faded away in favor of scientific positivism, but it seems to me that it is back in the culture of narcissism. In a culture of narcissism, rational arguments are replaced by narratives of suffering that are amplified in the hope of manufacturing indignation and compassion.

The dismissal of passions did not result in the annihilation of sentiments in some socially construed and institutionalized quarantine of mental asylums, poor houses, educational institutions, and correct manners, as one could conclude from a superficial reading of Foucault. It is only in the positivism of the 19th century that sentiments are neglected in political thinking and in law, with some exceptions like crimes of passion.

Among many others, Hume, Adam Smith, and Rousseau have emphasized that sentiments are constitutive to social institutions. Rousseau's crucial sentiment in this regard is pity and related empathy or, as it was called, sympathy. It is through sympathy, Edmund Burke wrote, "that we enter into the concerns of others; that we are moved as they are moved, and are never suffered to be indifferent spectators of almost any thing which men can do or suffer."[2]

The simplest reference to the foundational tenets of constitutionalism that prevailed in the 18th century will suffice to prove that modern constitutional design, although it is a rational venture, is intended to handle human sentiments,

[1] Quoted in Paine, T.: *The Rights of Man*. Hormondsworth, 1792.

[2] Burke, E.: *A Philosophical Enquiry into the Origins of Our Ideas of the Sublime and Beautiful.* Oxford, New York, 1757. Section XIII.

even beyond constraining passion. True, constitutions are silent about sentiments, and modern law is to a great extent a set of decisional norms that tends to create barriers to the operation of emotions in legal and judicial decisions. But silence is not the sign of indifference. On the contrary, it disguises preoccupation.

As proof of this claim, let us quote Madison:

> "AMONG the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. […] By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community. [Factions bring] instability, injustice, and confusion introduced into the public councils [that is, they destroy rational deliberation]. In particular this is the source of the tyranny of the majority."[3]

In Madison's view the problem is solved by representative government, separation of powers, and federalism. These institutions do not allow people to have their passions directly operate. This way "the [passionate] majority must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression."[4]

Please note that the constitutional plan is not about the prevention of the emotionally driven irrationality of factional thinking and action. These cannot be prevented. There is no place for pedagogical optimism here. Madison offers a purely rational design that limits the success of irrational mass movements and the irrationality of all monopolies. Further, Madison, following Montesquieu, attributes emotions to the constitutional bodies:

> "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. […] Ambition must be made to counteract ambition. […] It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all *reflections on human nature*? If men were angels, no government would be necessary."[5]

[3] Madison, J.: *The Federalist,* 1787.
[4] *Id.*
[5] Madison, J.: *The Federalist,* 1788.

Constitutions cannot annihilate sentiments. More importantly, they do not intend to do so. Constitutional law is not about the annihilation or disregard of moral sentiments; it is about the *manipulation* of sentiments. It offers mechanisms to cool down passions that endanger the constitutional system. (This, of course, includes oppressive mechanisms that serve the maintenance of the political status quo.) Constitutional pre-commitments, the difficulty of constitutional amendment, gag rules, etc., are some examples of such mechanisms. Sentiments might result in social instability: institutions offer solidarity and permanence and these become more and more important to the constitutional designer. "The dead weight of institutions, which have a life of their own, then gradually tames the impetus" of the original sentiments.[6]

It is not by accident that the victorious politics of emotions often pushes for constitutional reform or a new constitution. Constitutions are often replaced in very emotional social processes. In 1958 General de Gaulle decided to disregard the existing rules of constitutional amendment that were available to him and preferred to have a new constitution of France via plebiscite. De Gaulle's gamble was to generate emotional support for his constitution by generating personal sympathy towards his rule.

Collective political sentiments are decisive in constitutional design. More precisely, fear is one of the crucial social experiences that dictate specific fundamental constitutional solutions. Fear was important in shaping Madison's plan, but here I am referring to a collective emotional experience as the creative force shaping the constitution. The 1789 French Declaration, many of the solutions that were accepted at Philadelphia in 1787, and the German Basic law after WWII were all clearly dictated by considerations of fear. Indeed, fear helped to overcome collective and individual resistance to certain solutions.

In July 1789, the French Constituent Assembly was in the middle of a bitter debate about the meaning of the rights of man. Quite a remarkable treat, given that the matter was declared to be obvious in the light of reason. It was hotly debated, for example, if free exercise of religion would be extended to Protestants. It was only thanks to a most emotional speech of a pastor that the Assembly considered reason to favor a more equitable position. At the end of July an epidemic of hatred raged through the villages of France. Within a fortnight, French peasants successfully burned the documents containing feudal privileges together with the castles where the documents were held. When the news reached the Assembly on the night of August 4, the debate on the Declaration came to a sudden halt and in an all-night session the panicked delegates of the Assembly one after another voluntarily renounced their feudal privileges, as if

[6] Canetti, E.: *Crowds and Power.* New York, 1984. 24.

subject to a miraculous act of reason. Two weeks later the abolition of feudal privileges was proclaimed by the National Assembly. A couple of days later, and without much additional debate, a list of fundamental rights was adopted, without the catalogue ever having been finished.

The works of fear generated by the Shays rebellion and the Philadelphia mob rule (or call it premature democracy) had their obvious impact on the US Constitution. The American and the 1948 German Constitutions do not allow for referenda, because of fear of irrational mob reactions. Other constitutions considerably limit the subject matter of referenda. Fear resulting from past injustice is expressly present in the German and South African Constitutions, and in other post-totalitarian constitutions (see prohibition on totalitarian political organizations, the right to resist, etc.)

While the impact of a fearful consideration of the past is undeniable, the methodological problem remains. How did these considerations make their way into the constitution, and how do these considerations influence future constitutional developments? To what extent do these considerations, which are the reconstruction of emotions and shorthand for the scholarly observer, have real emotional equivalents? Were the drafters actually afraid? Did they feel fear? Did they assume that people or at least their constituency were afraid and expected them to alleviate that fear by institutional design that promises safety? Does it matter? Assuming that the small elite that actually drafted the constitution shared the public fear, or a group dynamics of fear did play a role in the negotiations, is this to say that the constitution actually expresses and radiates social fear?

Fundamental rights offer a second illustration of the relationship that exists between constitutional institutions and moral sentiments. Rights are hard to deny when they meet emotional resonance.

Torture is rejected because other people's suffering triggers disgust and compassion. But torture is culture dependent. The ancestors of the same Frenchmen who today abhor the death penalty took pleasure in the brutal execution of the regicide Damiens in 1757 when he was torn in pieces by horses. By the way, Adam Smith was working on the manuscript of his *Theory of Moral Sentiments* that very year. He claims that other people's pain is felt as one's own through mechanisms of empathy. I assume that empathy does play a role in the contemporary success of socio-economic rights claims, and in humanitarian intervention. In a more troubling way, as Nietzsche has indicated, *ressentiment*, this strange marriage of bad consciousness and envy, plays an enormous role here.

To use a different example, altruism urges us, not always with success, to give alms, although we have quite rational strategies to avoid the good deeds of the heart. Social welfare is justified in the eyes of the compassionate, although

the socially decisive factor is to whom we feel compassion. (See the social war on the construction of the deserving poor.) Given these sentiments, it becomes difficult to attack welfare policies. The acceptance of anti-welfare reasons has to overcome personal emotional resistance.

It has to be emphasized that under ordinary circumstances empathy and resulting solidarity feelings as such do not result in action. The compassion is without a specific object of action and its importance is primarily to facilitate the operation of reason, or to offer a predisposition for collective action. How this collective action is structured, and what are its norms and objectives, cannot be decided on the basis of moral sentiments. Social representations will determine with whom and how one should feel solidarity and compassion. Gertrude Himmelfarb describes the difficulty of compassion-triggered action:

> "In its sentimental mode, compassion is an exercise in moral indignation, in feeling good rather than doing good; this mode recognizes no principle of proportion, because feeling, unlike reason, knows no proportion, no limit, no respect for the constraints of policy or prudence. In its unsentimental mode, compassion seeks above all to *do* good, and this requires a stern sense of proportion, of reason and selfcontrol."[7]

There is a long way to go from compassion to social rights, and this is not a one-way street. Changes in the social patterns mobilizing compassion might result in the reversal of legal arrangements. The object of empathy, like other emotional objects, is determined, at least according to sociological and phenomenological theories of emotion, in the *Lebenswelt*.

Compassion today plays a contradictory role. As Marco Steenbergen states: "On first sight there indeed appears to be 'compassion fatigue' (Kozol 1995) in American society including the prevailing social indifference in face of the dismantling of the social safety net. [… But] Americans talk individualism but often behave in the spirit of compassion."[8] Already Tocqueville noted that Americans were quite willing to offer assistance to those in need, in spite of their emphasis on the norm of self-reliance.

This is not to suggest that sentiments can explain constitutional change. Abolitionism was not the result of a sudden compassion epidemic: it was the result of long-term processes (including economic processes) with group dynamics

[7] Himmelfarb, G.: *Poverty and Compassion: The Moral Imagination of the Late Victorians*. New York, 1991. 5.

[8] Steenbergen, S.: Compassion & American Public Opinion: An Analysis of the NES Humanitarian Scale. *NES Pilot Study Report,* (1996), 1–2.

that sped up certain cognitive changes that then enabled the re-framing of slaves as being humans. At this historical point, keeping them in slavery met indignation. On the other hand, constitutionalizing the dictates of sentiments helps to sustain and extend the cultural environment that provides interpretive schemes to sentiments, or, if emotions are cognition dependent, it may shape the emotions. Social sentiments become normative patterns through constitutionalisation. The constitutional solution, be it in the text of the constitution or in a judicial decision that embodies rights, finds echo in the public sentiment. The best-case scenario is that the constitution meets with constitutional enthusiasm: the constitution offers values for public identification. Constitutions are often acts of nation and state formation and the reception of the constitution, or its rejection, is part of identity formation. Such identification increases both the short-term and long-term success of the constitution. The present difficulties of the new European Constitution indicate that lack of enthusiasm may result in the failure of the constitution-making exercise.

Now we have a sketch of how sentiments shape constitutions: public sentiments influence constitutional design directly in some of the cases, but more importantly, constitutional decisions operate with assumptions about the current sentiments and also contain assumptions about emotions that will be generated by the constitutional design. Much of the constitutional arrangements is designed to *predict, anticipate,* and *cope with* what the drafters or judges imagine are popular sentiments.

To illustrate the complexity of the relation between sentiment and constitutional design, I would like to discuss only the impact emotions have on modern democracies. This story indicates how difficult, perhaps impossible, it is to keep public sentiments within the boundaries of constitutionalism. I will discuss militant democracy that deals with the arguably illicit use of emotions in politics.

As mentioned above, fear dictates that post-totalitarian constitutions include provisions that enable preventive measures against anti-democratic movements and actions. This preventive repertoire is called militant democracy. The name comes from a 1937 article of the German émigré political scientist, Karl Loewenstein.[9] He argued that democracies should not stick to formal liberal and democratic processes when fascists are abusing these processes.

According to Loewenstein, authoritarian regimes and movements are held together not by violence, but by emotionalism. This is what replaces the rule of law. Authoritarian regimes and fascist movements possess an arsenal of techniques for emotional mobilization. Nationalist fervor and intimidation,

[9] Loewenstein, K.: Militant Democracy and Fundamental Rights I., II., *American Political Science Review,* 31 (1937) 417, 638.

which is conjured up with the image of physical coercion, are the most common elements of political emotionalism. The only genuine goal of such politics is to seize and retain power at all costs. In this, movements may succeed even if they operate within the democratic institutional infrastructure. Loewenstein talks explicitly about the perfect adaptation of the politics of emotions to democracy. An example of this is when new elections or referenda are extorted by means of emotional mass politics, including threatening mass demonstrations, strikes, etc., bordering on violence. It is not by accident that reputable democracies refrain from having national referenda, or limit the right to demonstrate. In direct decision-making methods, the politics of emotional manipulation and its momentary considerations prevail at the expense of the more or less rational problem-solving methods of constitutional institutions. Therefore, a constitutional democracy must be ready and able to confine the politics of emotions.

For militant democracy, decisions based on emotional impulses are suspect. Given the fear of the consequences of emotional politics, militant democracy becomes risk averse. This is in net opposition to freedom-maximizing constitutionalism that stands for constitutional risk-taking. Risk aversion is troubling in a constitutional democracy that stands for liberty. Risk-taking is required for liberty, at least according to Justice Brandeis, who gave the following justification for not limiting freedom of speech:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail against the arbitrary. […] They believed […] courage to be the secret of liberty […. and] that the greatest menace to freedom is an inert people."

Further, he referred to the negative consequences of preventive oppression: "fear breeds repression […], repression breeds hate."[10]

Along these lines of risk-taking for liberty, Brandeis (referring to speech) suggested that the seriousness of the evil, the probability of occurrence, and the reasonableness of the assumption regarding the probability are to be taken into account. The problem is that fear and other emotions, and emotionally conditioned perceptions, undermine the probability calculus.

As mentioned above, if a society operates under the assumption of risk aversion in matters of political action, liberty-based reasoning is not attractive. The inclination to social risk aversion increases where specific historical

[10] Whitney v. California, 274 U.S. 357 (1927). 375.

experiences dictate precaution; once again, constitutions may help to perpetuate past experiences of fear.

In order to counter the politics of emotion one has to rethink the basic risk-taking position of liberty-enhancing constitutionalism. In practical terms, this means that, for example, the authorization of mass demonstrations requires a rethinking of arrangements that were considered to be settled under the liberty paradigm. See, for example the problems related to the authorization of anti-globalization demonstrations, like the one at the G-8 Seattle meeting. Authorizing demonstrations remains a matter for constitutional rethinking, when certain groups make it clear that they cannot achieve their goals without seriously burdening other citizens and the public order.

President Franklin Roosevelt said that the only thing we have to fear is fear itself. The intellectual hero of the Hungarian anti-communist movement, István Bibó's most often quoted line among dissidents was that "he who is afraid cannot be a good democrat." But most political systems do not subscribe to this pathos. It remains part of the research agenda to determine to what extent and under which circumstances the fearlessness position make sense, in light of the decision-shaping capacities of emotions, including fear.

With increased social fear it is difficult to sustain institutionalized risk-taking. Here risk-taking, also known as liberty, is replaced with the precautionary principle.

The politics of emotion remains a fundamental challenge to deliberative democracy. Terrorism generates emotional reactions that may preclude reasonable reactions. Liberty is curtailed in panic, but such action might be justified by the dictates of sentiments.

The politics of emotion is with us even without terrorism. Ordinary electoral processes and referenda are fought and won by mobilizing emotions. Democracy understood as popular election is turned into a process of choosing leaders from the elite on the basis of unconscious preferences (hardly a robust republican theory). This clearly negates the fundamental assumption of constitutional law that democracy is legitimated as a process that enables socially optimal decisions through participation and deliberation. The opportunities for reasonable arguments are further undermined by the prevailing culture of narcissism where victimhood and related suffering become trumps, especially where suffering is visualized enough to generate emotions, including indignation and sympathy. In this way, politics has become a beauty contest of public indignations.

Of course, the constitutional institutional design contains elements that are intended to diminish emotionalism and related populism. An important organizational solution aims at insulating public institutions from the emotional public

process. Insulation means that social decisions are taken by experts, instead of being decided by politically accountable institutions or directly by the people. These allegedly neutral experts deliberate on the basis of allegedly professional considerations. Examples range from central banks to constitutional courts as policy makers.

The argument is that these professional bodies will be deliberative. However, given well-known organizational interests, actual partisan influences, bounded rationality, personal emotions within the organization unchecked by public scrutiny and accountability, and other trends like cascades, professional decision-making might be as emotionally loaded as any plebiscite.

The ambivalent role of emotions in democracy is well illustrated in the current debate between Cass Sunstein of Chicago Law School and his critics regarding the proper handling of social risks. The debate centers on those public risks that are quintessential for constitutional law: terrorism, nuclear energy, global warming, etc. Sunstein claims that humans are irrational risk evaluators, partly because of affect that determines risk perception. Scientifically trained experts are less vulnerable to cognitive defects originating in emotional distortions. It thus makes sense to transfer decision-making in these areas to experts insulated from political processes.[11] The opposite view was recently presented by Dan Kahan and co-authors. They point to the enormous discrepancies among experts in matters of risk perception. Increased government regulation that bypasses the democratic process shows shortcomings that are not that different from public democratic judgment. In particular, Dan Kahan and colleagues argue that the disagreements between lay and expert perceptions of risk are grounded on different value choices. These value choices are emotionally grounded, but emotions and values cluster in society, as they are culturally shaped. The Dan Kahan approach is based on the assumption that "culture is *cognitively* prior to facts in the sense that cultural values shape what individuals *believe* the consequences of such policies to be."[12]

One cannot deny the existence of these cultural choices that serve for the emotional reactions regarding facts and assumptions. As Martha Nussbaum summarized it recently,[13] emotions are not thoughtless surges of affect but value-laden judgments shaped by social norms. There is a place for democratic

[11] See Sunstein, C.: *Laws of Fear: Beyond the Precautionary Principle*. Cambridge, 2005.

[12] Kahan, D. *et al*.: Fear and Democracy or Fear of Democracy? A Cultural Evaluation of Sunstein on Risk*, Yale Law School Public Law Working Paper,* (2005), 17–18.

[13] Nussbaum, M.: *Upheavals of Thought: The Intelligence of Emotions*. Cambridge, 2001.

political choice that cannot be replaced by expert regulation; it is not an issue for expert knowledge which of the following dangers you prefer: gun-induced violence under a right to bear arms regime, or the anxiety and the danger of being left without personal self-defense in case guns are prohibited.

The above debate is decided partly on normative grounds, i.e., what follows from one or another theory of democracy and theory of the constitution. But the formation and acceptance of such theories depends on an underlying, emotionally shaped risk preference. It seems risky to leave vital matters to be decided by normative considerations only.

At this point, scientific knowledge regarding the impact of emotions becomes decisive. An informed theory of constitutional sentiments should provide enough knowledge to enable a critical approach to the assumptions about sentiments that prevail in constitutional choices. Are political and legal scholarship and practices going to use the lessons emerging from behavioral sciences? Law is an interest-driven practical activity. It is not out of the question that interests will prevail in law in disregard of improved knowledge about emotions. Or, perhaps a better understanding of emotions will only add to the repertoire of legal manipulation. Feminist and other scholars offered evidence regarding the role of emotions in legally relevant behavior, but the legal profession resisted the accommodation of that knowledge, because of mental rigidity and special interests of domination, among other reasons.

Lawyers and regulators may distort knowledge but this is not to say that the scholarly analysis of constitutional emotions lacks a proper subject.

These short remarks are certainly far from covering all the important relations between emotions and constitutional law. I hope, however, that this was sufficient to show that constitutional decisions and critical thinking about government requires the taking into consideration of public emotions.