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THE ROLE OF EMOTIONS IN CONSTITUTIONAL DECISIONS REGARDING THE RIGHT TO ABORTION

Abstract

The paper[***] *provides an overview of the influence of emotions on law and legal decision-making, with particular emphasis on their significance in the constitutional interpretation of the right to abortion. The first part offers an analysis of the historical and theoretical relationship between law and emotions. Until recently, emotions were almost entirely excluded from legal scholarship. The prevailing view was that legal reasoning should be based solely on reason and professional training. The judge's dominant paradigm was that of an impartial and objective decision-maker. In reality, such complete emotional detachment is unattainable, which has made the examination of the role of emotions in judicial argumentation a legitimate subject of scholarly interest. The second part of the paper analyses the understanding of emotional argumentation, primarily in the work The Logic of Legal Argumentation: Multi-Modal Perspectives by the Slovenian author Marko Novak. Finally, the paper explores the significance of emotions in constitutional interpretation, with emphasis on the US Supreme Court's abortion case law. The decision in the case Gonzales v. Carhart deserves special attention in this context, since it was a landmark decision for several reasons, including that it announced the introduction of the emotion of regret as a new rationale for abortion regulation. However, the Gonzales majority's opinion has been criticised from many aspects, including the fact that this form of regret appears as a possible justification for restricting women's access to abortion. Furthermore, the final section of the paper examines the influence of emotions on abortion-related constitutional decisions across Europe and in the case law of the European Court of Human Rights.*

***Keywords*:** *reason, emotion, abortion, constitutional reasoning, emotional argumentation*

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1. Introduction

The aim of this paper is descriptive, providing an overview of the influence of emotions on law and legal decision-making. There are different views about the nature of emotions, which have returned to the spotlight. Over the past few decades, the diversity of phenomena encompassed by the term "emotion" has become the subject of numerous philosophical and affective-scientific studies. According to Andrea Scarantino and Ronald de Sousa, emotions are commonly viewed "as a subject's phenomenologically salient responses to significant events and as capable of triggering distinctive bodily changes and behaviors".[1] Emotions have a long history, having been the subject of analysis since ancient times under various terms: "passion, sentiment, affection, affect, disturbance, movement, perturbation, upheaval, or appetite". The term emotion only began to be used in English in the 17th century, as a translation of the French expression "émotion".[2]

The paper is divided into three parts. First, the complex relationship between law and emotions in legal scholarship is explored. The second part of the paper analyses the understanding of emotional argumentation, primarily in the work The Logic of Legal Argumentation: Multi-Modal Perspectives by the Slovenian author Marko Novak.[3] Finally, the paper explores the significance of emotions in constitutional interpretation, with emphasis on the US Supreme Court's abortion case law. The decision in the case Gonzales v. Carhart deserves special attention in this context, since it was a landmark decision for several reasons, including that it announced the introduction of the emotion of regret as a new rationale for abortion regulation. However, the Gonzales majority's opinion has been criticised from many aspects, including the fact that this form of regret appears as a possible justification for restricting women's access to abortion. Furthermore, the final section of the paper examines the influence of emotions on abortion-related constitutional decisions across Europe and in the case law of the European Court of Human Rights.

2. Law and Emotions

The significance of emotions in legal studies diminished dramatically in the period following the Enlightenment, the French and American Revolutions, and the rise of legal positivism.[4] During this time, a clear divide emerged between reason and emotions, leading to a legal tradition that regarded legal reasoning as a cognitive process primarily influenced by

[1] Scarantino, Andrea, and de Sousa, Ronald. "Emotion", The Stanford Encyclopedia of Philosophy (Summer 2021 Edition), Edward N. Zalta (ed.). Accessed April 24, 2025, URL = <https://plato.stanford.edu/archives/sum2021/entries/emotion/>.
[2] *Ibid.*
[3] Novak, Marko. The logic of legal argumentation: multi-modal perspectives. London; New York, Routledge, 2024.
[4] Sajó, Andras. Constitutional Sentiments. Yale University Press, 2011, 2; Maroney, Terry A. "Judicial Emotion as Vice or Virtue: Perspectives Both Ancient and New". In Aristotle on Emotions in Law and Politics, edited by Coelho, Nuno M. M. S., and Huppes-Cluysenaer, Liesbeth, 11-26. Cham: Springer Verlag, 2018, 17.

professional training.[5] This separation fostered the belief that emotional responses could significantly disrupt legal decision-making.[6]

In legal theory, a dominant position is occupied by what Maroney calls a "caricatured view of emotion"; reason and emotions are viewed separately as if they "exist in an oppositional relationship to one another".[7] The involvement of emotions in reasoning is seen as "a troubling external nuisance", and law is viewed "as a mechanism" that should remove this problem.[8]

Law becomes a subject of scientific research, a scientific discipline. Laws are deduced from legal principles to be applied to specific cases. Furthermore, judges' detached and rational approach when making decisions should protect them from political pressures and the influence that sympathies they feel towards one of the litigants can have on their decision-making.[9] Emotions are viewed as a "judicial vice".[10] Marko Novak argues that the ideal judge is commonly depicted as a "'sober' logomachy", able to deliver entirely objective decisions while resisting any influence of personal emotions.[11]

We are discussing the impartial judge model, which T. Maroney refers to as the "persistent cultural script of judicial dispassion". This approach to judicial power emerged in the mid-1600s, particularly in the work of Thomas Hobbes, who depicted the ideal judge as someone free from negative emotions, such as fear, anger, and hatred, as well as positive ones, like love and compassion.[12] Nevertheless, this model does not accurately reflect reality, as judges are still human beings subject to emotions, even when performing their function. This necessitates exploring "a legitimate role for emotions" in legal decisions.[13] The ongoing distinction between reason and emotion, which is still prevalent in the field of law today, is also scientifically unfounded. Advances in neuroscience have revealed significant connections between emotions and logical thinking.[14] Legal scholars and policymakers must brace themselves for new insights into human decision-making. Contemporary neuroscience will influence the legal landscape by reshaping perceptions of free will and responsibility.[15]

Sajo notes that new economics and social science research generally seeks to "rehabilitate" emotions. Scholars' research is based on cognitive models that consider emotions equal partners in human judgment.[16] Abrams and Keren emphasise three movements that today question "the narrow definition of rationality" commonly held by lawyers and legal scholars: law and emotions, behavioural law and economics, and law and neuroscience.[17]

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[5] Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions". Minnesota Law Review 94 (2010):1997-2074, 2003.
[6] *Ibid.*
[7] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 13.
[8] *Op. cit.* Sajó, Andras. Constitutional Sentiments, 11-13.
[9] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2003.
[10] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 17.
[11] *Op. cit.* Novak, Marko. The logic of legal argumentation, 120.
[12] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 16.
[13] *Ibid.*
[14] *Op. cit.* Novak, Marko. The logic of legal argumentation, 120.
[15] *Op. cit.* Sajó, Andras. Constitutional Sentiments, 3.
[16] *Ibid.*
[17] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 1998-1999.

Research on the law-and-emotions movement is vital to our purpose. Today, it constitutes a dynamic set of scientific works that incorporates various interdisciplinary approaches to analysing emotions that influence law and legal decision-making.[18] This movement is based on the claim that emotions significantly influence legal thinking and decision-making.[19] The movement originated from feminist legal theory and critical legal studies, evolving into an interdisciplinary field of research on different affective reactions.[20] As Maroney points out, law and emotion are closely connected, as legal issues often trigger intense feelings in both the public and those responsible for enforcing the law:

> "Law and emotion interact on multiple levels. Events that call for a legal response— violent crime, property theft and damage, environmental destruction, and infringements on personal liberty, just to name a few—evoke powerful emotional responses among those immediately affected and in the public at large. The people who implement those legal responses—police, legislators, lawyers, judges, and jurors—experience emotions of their own".[21]

Legal scholars and philosophers are increasingly exploring scientific research from evolutionary biology, neuroscience and psychology, which affirms the cognitive component in the structure of emotions. Martha Nussbaum, for example, follows this path in her book *Upheavals of Thought: The Intelligence of Emotions.*[22] This interdisciplinary approach challenges the traditional legal perspective that views emotions as irrational, instinctive, mysterious, stubborn, and uncontrollable, contrary to reason.[23] The fundamental premise is "that emotions contain and rely on evaluative thoughts".[24] In this view, emotions are considered "beliefs about states of the world".[25] Moreover, neuroscientists and psychologists have provided compelling evidence that "without a normal capacity for emotion, human beings become incapable of practical reason".[26]

The law and emotions movement aimed to convince jurists that emotions permeate the law.[27] Rather than focusing on a broad concept of emotional responses, proponents of this movement focused on specific emotions, such as revenge, shame, anger, and compassion.[28] Negative emotions like anger and revenge have long been an important topic in criminal law, which is not unique to other areas of law. Questions such as whether a defendant acted in the "heat of passion" or showed remorse are explored.[29] When sentencing in criminal proceedings, judges

[18] *Ibid.*, 1999.
[19] *Ibid*., 2003.
[20] *Ibid.*
[21] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 12.
[22] Nussbaum, Martha. Upheavals of Thought: The Intelligence of Emotions, Cambridge University Press, 2012; *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2041; *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 14.
[23] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2010; *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 13-14.
[24] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 14.
[25] *Ibid.,* 14.
[26] *Ibid.,* 16.
[27] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2008-2009; Maroney, 2018, p. 13)
[28] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2009.
[29] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2009.

routinely express anger because of the harm a perpetrator has caused to individuals and the community. This also creates the impression among the injured parties "that they are within the judge's zone of care".[30]

3. Emotional arguments

Novak explores how emotional arguments can function as grounds in legal argumentation.[31] The validity of an argument is contingent on the domain in which it operates. Law is a field of argumentation that has specific rules. Novak identifies two categories of typical emotional arguments: Emotional Argument 1 (dialectical) and Emotional Argument 2 (rhetorical).[32] Novak presents departures from the idea that emotions should not be special grounds or premises in legal arguments, specifically in the areas of legislation.[33]

3.1. Constitutional Order and Legislation

Applying the law in a narrower sense implies that courts or other legal bodies apply law to facts in legal proceedings. Courts "follow the deductive pattern of subsuming facts under legal norms".[34] Facts and legal norms are premises in a "deductive syllogistic argument". In a formal and normative sense, in this typical example of the application of law, it is considered that emotions cannot be an independent premise.[35] But what about the creation of laws or constitutional norms? [36]

The "inductive element" plays a key role in the legislative process. When laws or constitutions are passed in parliament, emotions are acknowledged as "legal or institutional facts." Emotions play a role in legal arguments in a dialectical manner.[37] Novak references András Sajó's book, *Constitutional Sentiments*, which challenges, as noted by Matthias Mahlmann in the Forward, the traditional answer to the problem of the foundations of constitutionalism. Sajo analyses the claim that the foundation of constitutional legal systems must derive from the permanent "material of rational thought".[38] The foundation of constitutional legal systems is shaped by reason as modernity triumphs over "irrational emotionalism". The development of human rights-based constitutionalism is one of the most important dimensions of the broader process of rationalisation characteristic of modernity.[39]

Sajo challenges this prevailing view, emphasising that the constitution is not only a product of reason, but it also arises from individual and collective social emotions. This second category of emotions is even more important than the first.[40] Emotions thus play a key role in shaping

[30] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 22.
[31] *Op. cit.* Novak, Marko. The logic of legal argumentation, 120.
[32] *Ibid.*, 121.
[33] *Ibid.*, 123
[34] *Ibid.*, 124.
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] Mahlmann, Matthias. Foreword to Constitutional Sentiments, by Sajó, Andras. Yale University Press, 2011, VII.
[39] *Ibid.*
[40] *Ibid.*

constitutional orders, with fear and anger being particularly prominent. The neutrality of law in modern constitutional systems arose from the fear of cruelty and oppression. This neutrality, Mahlmann emphasises, is a central mechanism for shaping a society where human rights are respected—a society with no room for "destructive emotions".[41]

According to Sajo himself, modernity has reduced emotions to "second-class citizenship".[42] The constitutional system and the judiciary are regularly considered institutions that, in their effort to remove emotions from the public sphere, improve the efficiency of human affairs. The American Bill of Rights (ratified in 1791) and the French Declaration of the Rights of Man and Citizen of 1789 established a rational framework for human rights that became dominant in the Western Hemisphere (Sajo, 2011, p. 2). Laws aim to create a "sterile mental environment"; emotions are considered misleading and therefore unacceptable (Sajo, 2011, p. 3). Legal decisions should be exclusively cognitive, deductive and subject to rational control. But, Sajo points out, the problem is that this ignores the extensive body of laws that recognize and do not suppress emotions. Laws sometimes selectively protect emotions, as can be seen in the example of religious freedom.

Sayo uses the eighteenth-century term "sentiment" instead of the (scientific) term "emotion" to highlight the crucial place that social emotions have in the constitutional order (Sajo, 2011, p. 4). In the Middle Ages, the view that specific emotions influence human behaviour prevailed, but this was abandoned, and the focus shifted to the individual's self-interest as the primary source of explanation for his behaviour.[43] Modern law represents an attempt to "rationalise emotions" and, according to Sajo, has been relatively successful. However, the distinction between reason and emotion may be oversimplified. The goal of the Enlightenment was not to suppress emotions, but to promote self-control, which allows for the appropriate expression of feelings. The Enlightenment wanted to free individuals from superstition, believing that emotions did not threaten reason as much as fanaticism.[44]

Sayo devoted a special chapter of his book to discussing fear as a fundamental social experience in the adoption of the Constitution. Even today, when parliamentary representatives pass laws, they are guided by interests and emotions. For example, fear may influence their decisions when enacting anti-terrorism legislation or public health legislation, such as provisions related to combating contagious diseases. Along these lines, Jamal Greene claims that emotional thinking is crucial when making laws, since emotions are a key component of public morality.[45]

We concur with Sajo that the constitution must be a subject of multi-disciplinary research; otherwise, we are left with "an impoverished view of the constitution as a collection of pompous words".[46] However, the legislative procedure is primarily political and not legal.[47] Unlike law, which many still view as an area where emotions are not welcome or where only "rational and logical thinking" is acceptable, politics "provides an institutional process for the

[41] *Ibid.*
[42] *Op. cit.* Sajó, Andras. Constitutional Sentiments, 1.
[43] *Ibid*., 5.
[44] *Ibid.,* 3.
[45] Greene, Jamal. "Pathetic Argument in Constitutional Law". COLUM. L. REV. 113 (2013): 1389-1482, 1395.
[46] *Op. cit.* Sajó, Andras. Constitutional Sentiments, 4.
[47] *Op. cit.* Novak, Marko. The logic of legal argumentation, 124.

fulfilment or channelling of desire".[48] Politics is seen as "emotional and instinct-driven acting".[49]

3.2. Emotional expression of legal (logical or dialectical) arguments

The institutional framework of the judiciary does not leave a space, Novak points out, for Emotional argument 1. Emotional reasons cannot represent "separate premises in a legal argument". Emotional grounds are not valid in law. Novak then raises a question regarding Emotional Argument 2.[50] Lawyers regularly appeal to emotions in courtrooms. Similarly, judges who write dissenting opinions frequently use emotions to convey their differing viewpoints from the majority.

Ancient legal rhetoricians were aware of the importance of emotions, Novak points out, and this importance varies depending on the different phases of trials. The type of emotions that lawyers appeal to also depends on the audience they are addressing. In court proceedings conducted before judges of lower courts, emotions are directed at them, and lawyers attempt to influence their decisions through emotional appeals. Conversely, lower court judges aim to sway their audience, consisting of higher court judges. Supreme Court justices, in making their decisions, seek to convince the general public of the validity of their reasoning. Since logical argumentation predominates today, Novak emphasises that emotions are used rhetorically rather than dialectically in the judicial context.[51]

4. The use of emotions in constitutional interpretation

Constitutional rights are among the youngest forms of rights, emerging with the first written constitutions in the middle of the 18th century. Their role in today's social and political life surpasses the role of other rights, some of which have existed since antiquity.[52]Popular discourse on constitutional rights in Western liberal countries, especially in the United States, in the last decades, as Alexander Loehndorf points out, is no longer just "competitive, aggressive, and mired in bad faith";[53] we are witnessing a political polarisation that endangers existing democratic institutions. Loehndorf calls it "constitutional emotivism" as "the conflation of moral disagreements with constitutional rights grievances".[54] In pluralistic societies, misunderstandings about constitutional rights are inevitable; most rights are not absolute and depend on the context.

[48] Gragl, Paul, "Lawless Extravagance: The Primacy Claim of Politics and the State of Exception in Times of COVID-19". In Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, edited by Ketteman, Matthias C., and Lachmayer, Konrad, 9–31. Hart Publishing, 2022, 2014.
[49] *Ibid.*
[50] *Op. cit.* Novak, Marko. The logic of legal argumentation, 128-129.
[51] *Ibid.*
[52] Loehndorf, Alexander. "Rights Talk and Constitutional Emotivism." Canadian Journal of Law & Jurisprudence. 37 (2024):133-166.
[53] *Ibid.*, 133.
[54] *Ibid.*, 154-155.

Pathetic argument (*pathos*) is one of three "modes of persuasion" based on participants' emotions.[55] In Aristotle's classic work *On Rhetoric*, there is a logical argument (*logos*), which relies on "deductive or inductive reasoning", and an ethical argument (*ethos*), which is based on the speaker's character. Pathetic arguments are often present in constitutional law.[56] To fully grasp the concept of pathetic argument, emphasise Jamal Green, it is crucial to understand it as a mode of persuasion, in a way similar to Marko Novak's, rather than an "archetype of argument", such as historical or textual analysis.[57] Pathos is not solely a personal emotion; it also encompasses a significant public aspect, relying on common human feelings and reactions shaped by "collective visual culture".[58] According to Sayo,

> "Emotions are not momentary personal feelings, headaches to be forgotten as soon as the pain goes away. Emotions scholarship has demonstrated that emotions contain social information, contribute to social coordination and are culturally regulated".[59]

Scholarly research emphasising the role of emotions in judgment has received support from prominent members of the judicial profession.[60] In this context, the text of the renowned U.S. Supreme Court Justice William Brennan's lecture, *Reason, Passion, and 'The Progress of the Law'*, delivered during the Forty-Second Annual Benjamin N. Cardozo Lecture, is significant. According to Maroney, this lecture initiated the law and emotion movement by highlighting it as a real danger to due process principles, transforming law into an instrument of "sterile bureaucracy".[61]

> "It is my thesis that this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality. This is particularly true, I think, in constitutional interpretation" .[62]

Brennan is not talking about emotions, but about passion:

> "By 'passion' I mean the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason" (Brennan, 1988, p. 9).

Brennan highlights the case of *Goldberg v. Kelly*, 397 U.S. 254 (1970) as a pivotal moment that initiated the modern "due process revolution". In this case, the Court ruled that social assistance recipients have the right to be heard before their benefits can be terminated.[63] Brennan argues that the decision in this case demonstrates "an expression of the importance of passion in

[55] *Op. cit.* Greene, Jamal. "Pathetic Argument in Constitutional Law", 1389, 1398; Pinho, Fabiana. On Logos, Pathos and Ethos in Judicial Argumentation. In Aristotle on Emotions in Law and Politics, edited by Coelho, Nuno M. M. S., and Huppes-Cluysenaer, Liesbeth, 133-153. Cham: Springer Verlag, 2018, 138-139.
[56] *Op. cit.* Greene, Jamal. "Pathetic Argument in Constitutional Law", 1389- 1398.
[57] *Ibid.*, 1394.
[58] Harrington John, Series Lucy, and Ruck-Keene Alexander. "Law and Rhetoric: Critical Possibilities." J Law Soc. 46 (2019): 302–327, 307.
[59] *Op. cit.* Sajó, Andras. Constitutional Sentiments, 11-13.
[60] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2005.
[61] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 16.
[62] Brennan, William J. Jr. "Reason, passion, and the progress of the law." Cardozo Law Review 10 (1988): 3-24, 3.
[63] *Ibid.,* 19.

governmental conduct, in the sense of attention to the concrete human realities at stake".[64] He believes that by validating emotions in constitutional interpretation, *Goldberg v. Kelly* corrects a system that had been misguided by "abstract rationality".[65]

However, Mahoney criticises Brennan, noting that while he recognised the significance of emotions, he did not clearly define the characteristics that attribute value to them. According to Maroney, these characteristics include "emotions reflect reason, enable reason, and are educable".[66] This contemporary understanding of emotions resonates with the views held by early 20th-century representatives of American legal realism, who argued that "judicial emotions are not only inevitable but valuable".[67] Although emotions hold value, it is important to note that they are changeable.

> **"**That emotions are valuable does not, of course, mean they are invariably reliable guides; no one attempts to make that case. Nor could one make such a case while taking seriously the cognitive theory of emotions, as emotions can reflect inaccurate beliefs or bad values".[68]

Additionally, we should only mention the role of emotions in selecting judges, without exploring it further. Is there a place for emotions in this process? Are emotions such as empathy and compassion important in the work of judges? US President Obama faced considerable criticism when he nominated Sonia Sotomayor to the US Supreme Court. He argued that her "capacity for empathy" made her suitable for the role on the court.[69]

4.1. The use of emotions in constitutional decisions regarding the right to abortion

In 1973, the year the US Supreme Court established the constitutional right to abortion, Justice Blackmun opened the *Roe v. Wade* majority opinion by stating that emotions must play no role in jurisprudence on abortion, intoning that:

> "(O)ur task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection".[70]

In the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U. S. 833 (1992), the Supreme Court chose not to overturn *Roe v. Wade*. What both decisions have in common is that they provide a woman with the right to abortion at least until the moment of "the viability" of the foetus, and that they do not recognise the foetus as a legal entity. In this case, Justice Scalia utilised an emotional argument. He concluded his partial concurrence by describing a portrait of seemingly tormented Justice Roger Taney on display in the Caspersen Room of the Harvard Law School Library. Scalia argued that the *Casey* decision on the constitutionality of the right to abortion was akin to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), in which the majority led by Taney affirmed the constitutional right to own slaves.[71]

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[64] *Ibid.,* 20.
[65] *Ibid.*
[66] *Op. cit.* Maroney, Terry A. "Judicial Emotion as Vice or Virtue", 16.
[67] *Ibid.,* 17.
[68] *Ibid.*
[69] *Ibid.*, 16.
[70] *Roe v. Wade*, 410 U.S. 113 (1973) at 116.
[71] *Op. cit.* Greene, Jamal. "Pathetic Argument in Constitutional Law", 1420.

Disgust as an emotional argument first appeared in the Supreme Court's abortion case-law in 2000, in dissenting opinions in *Stenberg v. Carhart*, when the Court considered the constitutionality of Nebraska's D&X ("dilation and extraction"), or partial-birth abortion ban. Although Stenberg's majority struck down Nebraska's statute on constitutional grounds,[72] it also "marked disgust's entry into the Supreme Court's abortion jurisprudence".[73] In its dissenting opinions, Justices Scalia, Kennedy, and Thomas explained abortion procedure in "disgust-driven terms"[74], describing it as "barbarian", "gruesome", "abhorrent", "so horrible"[75]and describing it in a graphic, lengthy manner.[76]

In 2003, three years after *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act, with the aim "to prohibit any physician or individual from knowingly performing a partial-birth abortion".'[77] Four years later, in 2007, the Supreme Court upheld this Act in *Gonzales v. Carhart* (5-4):

> "It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form".[78]

As Cahill notes, Gonzales was a landmark decision for several reasons, including that it announced the introduction of regret as "an entirely new rationale for abortion regulation".[79] The Court's concern about "a mother who comes to regret her choice to abort" and the "severe depression and loss of esteem that can follow" was a central factor in the respective decision to uphold the federal ban on D&E abortions.[80] The Gonzales majority with Justice Kennedy's opinion in some ways pretty similar to his *Stenberg* dissent,[81] especially when it comes to graphic, detailed and lengthy descriptions of the particular abortion procedure, declared that "respect for human life finds an ultimate expression in the bond of love the mother has for her child", that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained", and that "severe depression and loss of esteem can follow" the procedure.[82] In his opinion that "some women come to regret their choice" to abort, Justice Kennedy cited the brief of Sandra Cano at al. as *Amici Curiae* and 180 women having emotional, physical and psychological consequences of abortion.[83] The

[72] Cahill, Courtney Meghan. "Abortion and Disgust" 48 Harvard Civil Rights-Civil Liberties Law Review: 410 (2013), p. 418.
[73] *Ibid.*
[74] *Ibid.,* 419.
[75] *Ibid.*
[76] *Stenberg v. Carhart*, 530 U. S. 914 (2000), Justice Kennedy dissenting, at 958-960.
[77] Partial-Birth Abortion Ban Act of 2003, https://www.congress.gov/108/plaws/publ105/PLAW-108publ105.pdf, accessed October 20, 2025.
[78] *Gonzales v. Carhart*, 550 U.S. 124 (2007), at 159.
[79] *Op. cit.* Cahill, Courtney Meghan, 410.
[80] Ehrlich, J. Shoshanna. "Ministering (In)Justice: The Supreme Court's Misreliance on Abortion Regret in *Gonzales v. Carhart*" 17 Nevada Law Journal: 599 (2017), 601.
[81] *Op. cit.* Cahill, Courtney Meghan, 419.
[82] *Gonzales v. Carhart*, 550 U. S. 124 (2007), at 159.
[83] Larsen, Allison Or. ''The Trouble with Amicus Facts'' Faculty Publications (2014): 11, p. 1797, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2769&context=facpubs accessed October 15, 2025

testimonies were collected by a group called "Operation Outcry" that has been hard working for years in promoting the women's protective anti-abortion policy.[84] As Reva B. Siegel has observed, Justice Kennedy's citation of (only one) respective amicus brief and "women-protective rationale for restricting abortion" is "particularly important" because this rationale was not discussed by Congress when the Partial-Birth Abortion Ban Act was enacted.[85] The focus on regret and women-protective justification has triggered a vigorous dissent from Justice Ruth Bader Ginsburg, who described concerns about regret as "an antiabortion shibboleth for which it concededly has no reliable evidence".[86] She also observed that that if the Court is concerned with women's regret regarding their choices, the solution is to "require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks", and not "to deprive women of the right to make an autonomous choice, even at the expense of their safety".[87] Justice Ginsburg has expressed a few other concerns. One of them is that the Gonzales majority relied on testimony from *Amici Curiae* with whom it agreed. Justice Ginsburg, however, observed that neither the scientific evidence nor the reality "comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have".[88] Furthermore, Justice Ginsburg admits that ''moral concerns'' could result in the prohibition of any abortion.[89]

The majority's opinion has been criticised from many aspects. Madeira criticised the majority's "shoddy use of social science research",[90] as well as its misunderstanding of regret as a psychological concept and its ''image of women as emotional reproductive decision makers".[91] Cahill critically observes that the majority in no way limits its "repugnance'' approach to a particular D&X procedure, or indeed, to abortion generally.[92] Guthrie also noted that Carhart's regret doctrine "has the potential to extend well beyond abortion".'[93] Ronald Turner observes the Court's recognition of the women's regret rationale as "self-evident" and "unexceptionable" as one of the actions that were "part of a committed and perseverant campaign to rewrite the narrative and to change the terms of the abortion-rights debate."[94]

Terry Maroney, in the article *Emotional Common Sense as Constitutional Law*, criticises the use of emotions in constitutional interpretation. The decision in the case of *Gonzales v. Carhart* illustrates this point.

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[84] *Ibid.*
[85] Siegel, Reva B. ''Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart'' Yale Law Journal 117 (2008), p. 1697.
[86] *Gonzales v. Carhart*, 550 U. S. 124 (2007), Ginsburg, J., dissenting, at 183.
[87] *Gonzales v. Carhart*, 550 U. S. 124 (2007), Ginsburg, J., dissenting, at 184.
[88] *Gonzales v. Carhart*, 550 U. S. 124 (2007), Ginsburg, J., dissenting, at 183.
[89] *Gonzales v. Carhart*, 550 U. S. 124 (2007), Ginsburg, J., dissenting, at 182.
[90] Madeira, Jody Lineé. ''Aborted Emotions: Regret, Relationality, and Regulation'' Michigan Journal of Gender & Law, 21 (2014), 3.
[91] *Ibid*., 3.
[92] *Op. cit.* Cahill, Courtney Meghan, 421.
[93] Guthrie, Chris, ''Carhart, Constitutional Rights, and the Psychology of Regret'' 81 Southern California Law Review (2008): 877, p. 880.
[94] Turner, Ronald. ''Gonzales v. Carhart and the Court's ''Women's Regret'' Rationale'' Wake Forest Law Review: 43 (2008), 43.

> "The Court was proudly folk-psychological, representing its observations about women's emotional experiences as 'self-evident'."[95]

Maroney criticises this approach. When making decisions, courts must not rely on what she calls "emotional common sense".

> "'Emotional common sense' is what one thinks she simply knows about emotions, based on personal experience, socialisation, and other forms of casual empiricism".[96]

Their holders regard them as self-evident and universally valid; however, they are determined by time, culture, and place.[97] Emotions are evident in American constitutional judgments on reproductive rights, but they are associated solely with women, which presents a problem.[98]

It is noteworthy that constitutional scholar Jamal Green criticises the inconsistency of one of the most significant rhetoricians on the American Supreme Court, the late Justice Antonin Scalia. In *Making Your Case: The Art of Persuading Judges*,[99] which he co-authored with Bryan Garner, Scalia rejected the notion that lawyers should use emotional appeals to judges. Instead, he argued they should appeal to the judge's "sense of justice".[100] However, Greene contends that Justice Scalia was inconsistent on this point, regarding his use of pathos in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

''A dramatic substantive change''[101] in the Supreme Court's abortion case-law happened in 2022 when it overruled *Roe* and *Casey* holding that the Constitution ''does not confer the right to abortion'' and that ''the authority to regulate abortion is returned to the people and their elected representatives".''[102] Declaring that *Roe* was ''egregiously wrong and deeply damaging",[103] the majority in *Dobbs* concluded that the Constitution is neutral on the issue of the existence of the problem on right to access an abortion, that is, ''neither pro-life nor pro-choice". Since the Constitution is neutral, the Court likewise must be scrupulously neutral, as summarised by Justice Kavanaugh.[104] While emotion as an argument was not a central point in *Dobbs* itself, the dissenting justices Breyer, Sotomayor and Kagan, who ''place women at the heart of their opinion'',[105] invoked emotions by discussing the fear and suffering of women in States where legal abortions are not available to obtain safe abortion care, and turning to illegal and unsafe abortions (Breyer, Sotomayor, and Kagan, J. J., dissenting, at C).

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[95] Maroney, Terry A. "Emotional common sense as constitutional law". Vanderbilt Law Review. 62 (2009): 849-918, 851.
[96] *Ibid.*, 854.
[97] *Ibid*., 857.
[98] *Op. cit.* Abrams, Kathryn, and Keren, Hila. "Who is afraid of law and the emotions", 2029-2030.
[99] Scalia, A. & Garner, B. A. (2008). Making Your Case: The Art of Persuading Judges, West Group.
[100] *Op. cit.* Greene, Jamal. "Pathetic Argument in Constitutional Law", 1414.
[101] Williams, Lucy. ''Making a Mother: The Supreme Court and the Constitutive Rhetoric of Motherhood'' 102 North Carolina Law Review: 395 (2024), p. 450.
[102] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022)
[103] *Dobbs*, at. III. A
[104] *Dobbs*, Kavanaugh, J., concurring.
[105] *Op. cit.* Williams, Lucy, 451.

Now, we will concentrate on the use of emotions in abortion decisions in Europe. Much has been said about the ‘’textualist and originalistic approach to the Constitution’’[106] of the *Dobbs* ruling. Still, as far as this ‘’constitutional neutrality’’ argument is concerned, we may say that it is already at the heart of the European Court of Human Rights (ECtHR) case-law – of course, having in mind that this Court has always regarded the European Convention as a ‘’living instrument which must be interpreted in the light of present-day conditions”.[107] Although the competences in the area of abortion regulation are “primarily in the purview of member states”,[108] the ECtHR has developed a relatively rich abortion case-law, especially in the last three decades. Within the margin of appreciation as a doctrine used in areas with a lack of agreement among states, such as on the point of beginning of life, the ECtHR applies the test of proportionality in each respective case to find a fair balance between protection of an individual right and protection of public interest, assessing the lawfulness, necessity and whether the states’ interference was with legitimate aim.[109] Abortion cases of the ECtHR are concentrated on Article 2 (the right to life), Article 8 (the right to private and family life), and recently Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) of the European Convention on Human Rights. The analysis of the Strasbourg Court abortion case-law has shown that the Court uses several ways of argumentation and their combination, including ‘’arguments based on the authority of the codified law’’ and ‘’arguments from the margin of appreciation.’’[110] The analysis shows that in ECtHR abortion cases, emotion functions only implicitly, which is especially evident in those cases where respondent states are those with the extreme restrictions to access to abortion. This is why the respective cases involved the respondents' states of Ireland and Poland. For example, in case *A, B and C v. Ireland* (2010), which involved three women who faced difficulties in accessing lawful abortion and had to travel to England for abortions, the ECtHR found that the absence of clear and effective criteria in the medical consultation process had ‘’a significant chilling factor for both women and doctors,’’[111] and that applicants felt fear and considerable stigma when they travelled abroad for abortions.[112] Or, in case *R. R. v. Poland* (2011), the Court has recognised that the applicant whose foetus was affected with an unidentified malformation was in a “situation of great vulnerability” and “deeply distressed.”[113] However, some shift in judicial attitudes can be observed in recent cases, especially in the case *M.L. v. Poland* (2023), in the concurring opinion of Judges Jelić, Felici and Wennerstrom. In the case where the applicant, who was seventeen weeks pregnant when she was denied the previously authorized abortion, which she had requested on the grounds of a malformation of the fetus, three judges disagreed with the majority’s decision to declare the complaint about Article 3 inadmissible. The aforementioned Judges argued that the emphasis in the case should be put not only on the

[106] Tucak, Ivana, and Blagojević, Anita. “The Right to Abortion and the Possible Effects of the Dobbs Decision on Contemporary Legal Trends.” Studia Iuridica 99 (2023), 269.
[107] Mezykovska, Aleksandra, and Mlynarska-Sobaczewska, Anna. ‘’Persuasion and Legal Reasoning in ECtHR Rulings’’ Routledge, 2023, 112.
[108] *Op. cit.* Tucak, Ivana, and Blagojević, Anita, 264.
[109] *Ibid.*, 266.
[110] *Op. cit.* Mezykovska, Aleksandra, and Mlynarska-Sobaczewska, Anna, 106-120.
[111] *A, B and C v. Ireland*, App. no. 25579/05, 2010, at 254.
[112] *A, B and C v. Ireland*, App. Np. 25579/05, 2010, at 126.
[113] *R. R. v. Poland*, App. no. 27617/04, 2011, at 159.