

## THE SUPREME COURT'S NEW SOURCE OF LEGITIMACY

*Or Bassok\**

### ABSTRACT

*In recent decades, the Supreme Court has lost its ability to base its legitimacy solely on its legal expertise, yet it has gained public support as a new source to legitimize its authority. Due to growing public understanding that legal expertise does not award the Court with determinate answers, the Court has partly lost expertise as a source of legitimacy. The idea that judges decide salient cases based on their political preferences has become part of the common perception and has eroded the Court's image as an expert in the public mind. On the other hand, as a result of the invention of scientific public opinion polls and their current centrality in the public mind, the Court has now available a new source of legitimacy. Thanks to public opinion polls that measure public support for the Court, the Court for the first time in its history, has now an independent and public metric demonstrating its public support. The monopoly elected institutions had on claiming to hold public mandate has been broken. As a result of these changes, as well as the lessons the Court took from the Lochner decisional line and Brown, an important shift in the political balance of power and subsequently in the Rehnquist Court's understanding of its own sources of legitimacy occurred.*

### TABLE OF CONTENTS

INTRODUCTION.....	154
I. LEGITIMACY.....	155
II. THE RISE OF PUBLIC OPINION POLLS.....	157
III. THE CHANGE IN THE COURT'S LEGITIMATION THEORY.....	166
A. <i>The Decline of Legal Expertise</i> .....	167
B. <i>The Lochner Decisional Line</i> .....	175
C. <i>Brown and Its Progeny</i> .....	179
D. <i>Imagining the Past</i> .....	183

---

\* Tikvah Scholar, New York University School of Law. JSD & LL.M, Yale Law School; LL.M & LL.B, Hebrew University of Jerusalem. I am extremely grateful to Bruce Ackerman, Jack Balkin, Paul Kahn, and Robert Post for many illuminating discussions and thoughtful comments. For their invaluable comments, I also want to thank Yoav Dotan, Shai Dothan, Barry Friedman, Samuel Issacharoff, Richard H. Pildes, Iddo Porat, and participants at Yale JSD colloquium. All mistakes are my own.

IV. THE PUBLIC CONFIDENCE LEGITIMATION THEORY.....	188
V. THE MAJORITARIAN COURT THESIS REVISITED .....	190
CONCLUSION.....	196

#### INTRODUCTION

In a democracy, institutions have two potential sources of legitimacy. The first is popular support; the second is expertise.<sup>1</sup> In this Article, I tell the story of how the Supreme Court of the United States partly lost the ability to base its legitimacy on the latter and gained the ability to base its legitimacy on former. I also argue that the Court indeed adopted public support as its basis of legitimacy during the Rehnquist Court years.

In the following, I do not attempt to examine the normative validity of popular support as a source of legitimacy for the Court.<sup>2</sup> My aim is merely to show how the rise of public opinion polls as an authoritative democratic legitimator in American “social imaginary”<sup>3</sup> created a shift in the balance of power between the three branches of government. The Court, now less remote from public opinion than ever before, can base its legitimacy on the master before whom all tremble.<sup>4</sup>

I begin the Article with a short discussion of the term “legitimacy.” I then describe the rise of public opinion polls, measuring the Court’s public support, as a mechanism that allowed the Court, for the first time in its history, to base its legitimacy on public support. I continue by describing other developments that, together with the rise of public opinion polls, led the Rehnquist Court to adopt a new

---

1 See YARON EZRAHI, *IMAGINED DEMOCRACIES: NECESSARY POLITICAL FICTIONS* 262 (2012) (discussing the “two distinct and often competing sources of authority in public affairs: knowledge and participation”); James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in *WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE* 281, 284 (Charles Gardner Geyh ed., 2011) (arguing that “[i]n a democratic society, the principal sources of legitimacy for political institutions are elections and accountability” but in the absence of an electoral connection, courts base their legitimacy on expertise).

2 For such an examination see Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?*, 11 *INT’L J. CONST. L.* 13 (2013).

3 See CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004).

4 See 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 263 (Liberty Fund 1995) (1888) (“Public opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it.”).

understanding of its sources of legitimacy. These developments include the decline of the Court's image as an expert in the public mind and the particular lessons it adopted from the *Lochner* and *Brown* decisional lines. Next, I conceptualize the Rehnquist Court's new understanding of its legitimacy. Before concluding, I situate my argument in relation to recent theories that attempt to explain the Rehnquist Court's majoritarian tendencies and yet fail to detect the vital influence of the rise of public opinion polls.

## I. LEGITIMACY

In the context of the Supreme Court's authority, the normative aspect of its institutional legitimacy deals with the justification of the Court's authority.<sup>5</sup> The sociological aspect of its institutional legitimacy deals with the trust or enduring support that the public actually awards the Court over a relatively long period of time.<sup>6</sup>

Arguing that the Court's normative legitimacy is based on its expertise means that the Court holds special knowledge or a special position which makes it particularly suited to assist in fulfilling a worthy goal.<sup>7</sup> These goals must be anchored in the Constitution and include projects such as protecting society's principled values, guarding disadvantaged groups of society, preserving democratic procedures, and guarding certain basic moral values.<sup>8</sup> Yet, in discussing the Court's institutional normative legitimacy, the focus is not on examining the worthiness of the goal. Assuming that the goal is normatively worthy,

---

5 See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (analyzing three concepts of legitimacy: legal, sociological, and moral).

6 See, e.g., C.K. Ansell, *Legitimacy: Political*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8704–06 (Neil J. Smelser & Paul B. Baltes eds., 2001); Fallon, *supra* note 5, at 1790–91, 1794–96, 1828 (“When legitimacy is measured in sociological terms . . . [an institution] possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support . . . .”); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 358 (2003) (characterizing institutional legitimacy as, among other things, “a generalized trust that the institution will perform acceptably in the future”).

7 See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1962); Or Bassok, *The Two Countermajoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333, 343–44 (2012) (analyzing the typical format of normative justifications for the countermajoritarian difficulties created by the Court).

8 See, e.g., John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705 (2002) (“For many years now, constitutional scholars have been developing theories of the Constitution. These theories generally make both descriptive and normative claims. Descriptively, the theories argue that the Constitution promotes a single political principle. Normatively, they assert that this principle is a desirable way to govern the nation.”).

the question is whether it is justified to give an expert Court the authority to protect it. If the Court can offer a special contribution in achieving the goal based on its expertise in fields such as legal-doctrinal analysis, human rights, or history, then its authority may be justified.<sup>9</sup> The Court can also have expertise that is based merely on its insular position or detachment from politics.<sup>10</sup>

Arguing that the Court has normative legitimacy based on popular support means that due to enduring public support of the Court (or diffuse support in scholarly jargon), it is justified that the Court will have authority to decide on certain controversies. In this Article, I argue that until recent decades, the option of basing the Court's normative legitimacy on popular support for the Court was not really on the table. Without an accepted metric to measure public support for the Court, one would find it extremely hard to argue that the Court's authority is justified by its enduring public support. The Court was, of course, interested in public opinion throughout its history, but before the invention of public opinion polls, *elected* representatives had a monopoly on the claim to legitimacy based on public support. In this institutional dynamic, the Court could hardly rely on its own source of popular support and had to revert to its expertise.

Sociological (or descriptive) institutional legitimacy is a concept that aims to describe the enduring popular support for the Court, i.e., the public's institutional loyalty. This diffuse support for the Court extends beyond mere satisfaction with a particular decision of the Court, i.e., its specific support.<sup>11</sup> In the scholarly arena, arguments still persist on the exact definition of sociological legitimacy and the precise polling questions required to measure the public diffuse support for the Court.<sup>12</sup> Yet, in recent decades, the metric measuring public confidence for the Court has gained the status of an authoritative indicator of the Court's sociological legitimacy in the public discourse.<sup>13</sup>

---

<sup>9</sup> See Bassok, *supra* note 7, at 343–50 (examining scholarly justifications for the Court's countermajoritarian authority).

<sup>10</sup> See MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 102 (1982) (“As a matter of comparative institutional competence, the politically insulated federal judiciary is more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer . . . than is the political process left to its own devices . . .”).

<sup>11</sup> James L. Gibson, *Public Images and Understandings of Courts*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 828, 837 (Peter Cane & Herbert M. Kritzer eds., 2010).

<sup>12</sup> See, e.g., Gibson et al., *supra* note 6, at 358 (characterizing sociological institutional legitimacy).

<sup>13</sup> See TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 125 (2011) (arguing that the public confidence metric “is the most reliable and consistent way to capture public sup-

In the following Part, I describe how a technological development—the invention of scientific public opinion polls—shifted the manner in which the Court’s legitimacy question is understood in the public discourse, especially by the elected branches.

## II. THE RISE OF PUBLIC OPINION POLLS AND THE COURT’S NEW SOURCE OF LEGITIMACY

Scientific public opinion polls entered onto the national arena in the 1930s.<sup>14</sup> After the Gallup accurately predicted President Franklin D. Roosevelt’s 1936 victory in the Presidential elections based on a scientific sample (refuting a magazine’s opposite prediction based on a non-scientific poll of more than two million mail ballots), the idea that a relatively small scientific sample of public opinion may accurately reflect public opinion of the entire nation was established in the public mind.<sup>15</sup> Gallup began conducting polls to measure public confidence in the Supreme Court as early as the late-1930s, yet it was not until the 1960s that Gallup began to track public support for the Court and its decisions in any systematic way.<sup>16</sup> Several decades of constant polling reshaped the notion of democratic legitimacy in the United States. The tendency to understand democracy in populist-majoritarian terms has increased,<sup>17</sup> and the term “public opinion”

---

port for the Court . . .”); Gibson et al., *supra* note 6, at 354–55 (acknowledging that “unfortunately” the “public confidence” is the common metric).

- 14 See, e.g., SARAH E. IGO, *THE AVERAGED AMERICAN SURVEYS, CITIZENS, AND THE MAKING OF A MASS PUBLIC* 103–49 (2007) (describing the development of the techniques for creating the modern science of polling and their rise onto the national stage); John Durham Peters, *Historical Tensions in the Concept of Public Opinion in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT* 3, 14 (Theodore L. Glasser, Charles T. Salmon eds., 1995) (“By the 1920s and 1930s, public opinion was reconceived as a measurable quantity that could be tapped by survey research.”).
- 15 JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 77–78 (1995).
- 16 See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE REHNQUIST COURT* 1–2, 29, 77 (2008) (“Until the 1930s there was no direct test by which to tell whether or not Supreme Court decision agreed with American public opinion.”); Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1210–12 (1986) (surveying a variety of public evaluations of the Court); Roger Handberg, *Public Opinion and the United States Supreme Court, 1935–1981*, 59 INT’L. SOC. SCI. REV. 3, 5 (1984).
- 17 See, e.g., Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 291 (2002) (“We accept (to a certain extent) a ‘populist’ form of democracy in which all of the elected branches are understood to be directly elected by the people (the electoral college notwithstanding), and there is a direct role for public opinion in the form of polls, initiatives, and referenda.”).

came to be synonymous with opinion polling results.<sup>18</sup> Since the 1980s and the rise of the “public opinion culture,” opinion polls have served in the public discourse as an authoritative democratic legitimator.<sup>19</sup> In a reality riveted by persistent disagreements, an aggregative conception of democracy in which public opinion polls reveal the “will of the people” in a seemingly clear-cut manner has become central to the public mind.<sup>20</sup>

Though before the invention of public opinion polls in the 1930s, public support for the Court could not be reliably measured,<sup>21</sup> long before the arrival of public opinion polls, the Justices of the Court already held that it “operates by its influence, by public confidence.”<sup>22</sup> Hence, even before the rise in authority of opinion polling, the Court acknowledged that its power—i.e., its ability to function properly—depends on public opinion. Letters from the public, random impressions of public attitudes, and media coverage played a significant role in forming Justices’ and politicians’ views about the Court’s public

---

18 See SCOTT L. ALTHAUS, *COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS* 2 (2003) (noting the recent trend toward equating public opinion with public surveys); GEORGE F. BISHOP, *THE ILLUSION OF PUBLIC OPINION: FACT AND ARTIFACT IN AMERICAN PUBLIC OPINION POLLS* 6 (2005) (describing the rise in polling for public opinion in the 1930s and 1940s); SUSAN HERBST, *NUMBERED VOICES* 63 (1993) (“Scholars writing from the 1940s to the present have been forced to contend with the notion that polls are becoming synonymous with public opinion.”); Amy Fried & Douglas B. Harris, *Governing with the Polls*, 72 *THE HISTORIAN* 321, 323–24, 353 (2010) (“Increased legitimacy of polling made public opinion itself more ‘real’ and legitimate . . .”).

19 BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 75–76 (2010); IGO, *supra* note 14, at 12–13, 18–19 (showing that polls’ results serve as social facts with considerable authority); Peters, *supra* note 14, at 14 (“[Since the 1930s,] the polling of ‘public opinion’ has been installed as both a symbol of democratic life and a cog in the machinery of the market and the state.”).

20 Cf. GERALD F. GAUS, *CONTEMPORARY THEORIES OF LIBERALISM* 149 (2003) (“[T]he outcome of a vote could be considered the expression of public reason or the public will.”).

21 See, e.g., THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 6 (1989) (“Until the mid-1930s, public opinion polling did not follow scientific, random-sampling methods.”).

22 See *United States v. Lee*, 106 U.S. 196, 223 (1882) (“While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all . . . [W]ith no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.”); *Holmes v. Jennison*, 39 U.S. 540, 618 (1840) (“The power of this Court is moral, not physical; it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts; not by its mere authority as a tribunal, from which there is no appeal . . .”).

support.<sup>23</sup> But until the invention of public opinion polls, Congress *was* public opinion.<sup>24</sup> Hence, countering the will of Congress was understood as contravening the will of the majority of the public. Thus, it is no wonder that before the rise of public opinion polls, according to a strong strand in constitutional thinking, the Court's *power* was not dependent on public opinion, but on the executive branch. This strand of thinking can be traced to *The Federalist No. 78*, in which Alexander Hamilton explained that the Court's power "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."<sup>25</sup> Contrary to the contemporary use of *The Federalist No. 78*,<sup>26</sup> according to Hamilton, the lack of "Force" or "Will" does not mean that the Court needs to rely on public confidence.<sup>27</sup> The government's support is acquired because the executive branch acknowledges the value of the Court's *judgment* in a manner similar to a patient who recognizes a doctor's expertise.<sup>28</sup>

The entrance of public opinion polls as a reliable method for measuring the Court's public confidence and publicly demonstrating the people's confidence in the Court opened for the Court, for the first time in its history, a path to base its normative legitimacy on public opinion. In a sense, the claim that public support serves as a source of legitimacy for the Court's authority is trivial in public discourse these days as polls on the public confidence in the Court are

---

23 See, e.g., JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 305 (2010) ("[I]n 1937 there was one instant, if incomplete measure of popular opinion: the telegram. And by that benchmark, Roosevelt's plan was, from the start, in very serious trouble.").

24 Fried & Harris, *supra* note 18, at 341 ("Prior to the application of survey methods to politics (and for some time after that), members of Congress held . . . to the view that, collectively, Congress *was* public opinion.").

25 THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

26 See, e.g., CLARK, *supra* note 13, at 67 ("Indeed, at least since Alexander Hamilton wrote in *Federalist #78* that the Court is 'possessed of neither force nor will, but merely judgment,' students of American government have recognized that the Court is limited in its efficacy by the necessity of public and political will to give its decisions force."); RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT IN THE MEDIA AGE* 19 (2011) (quoting *The Federalist No. 78* and then adding that "[t]he Court lacks coercive power to enforce its decisions. Therefore, public deference to the Court is the most powerful weapon in the justices' arsenal").

27 See Bassok, *supra* note 7, at 368–76 ("Hamilton based the Court's power 'merely' on its judicial expertise.").

28 See PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 126 (1997) ("A judge's knowledge of the rule of law functions analogously to a doctor's knowledge of health. . . . Power flows from knowledge. . . ."); Peters, *supra* note 14, at 5 ("Even today judges and physicians render legal or medical opinions: we are to understand that deciding a case or diagnosing an illness are acts of expert judgment, not of guaranteed truth. To give an opinion, one must be an authority.").

presented frequently in the media to justify the Court's authority.<sup>29</sup> Thus, the great shift in our social imaginary became almost invisible. Scholars now agree that "[l]ike the executive and legislative branches, the judiciary depends on public support for its legitimacy."<sup>30</sup> In the same vein, one should not discount the almost total disappearance from constitutional discourse of claims that explicitly disconnect the Court's legitimacy from public support for the Court. For example, in the 1980s, Owen Fiss argued that in a democracy, "consent is not granted separately to individual institutions. It extends to the system of governance as a whole. Although the legitimacy of the system depends on the people's consent, an institution within the system does not depend on popular consent."<sup>31</sup> Thus, the Court's legitimacy depends "not on the consent—implied or otherwise—of the people, but rather on [its] competence, on the special contribution [it] make[s] to the quality of our social life."<sup>32</sup> Only the government as a whole, and not specific institutions, depends on the support of the people.<sup>33</sup> Such claims are hardly prevalent in the constitutional discourse today. The idea that the Court's legitimacy is somehow derived from public support for the system as a whole, and that the Court as an independent institution does not require enduring public support, has almost completely disappeared from current discourse.<sup>34</sup>

<sup>29</sup> See, e.g., Adam Liptak & Allison Kopicki, *Public's Opinion of Supreme Court Drops After Health Care Decision*, N.Y. TIMES, July 18, 2012, at A21 (reporting on a poll conducted by the New York Times and CBS news).

<sup>30</sup> Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 379 (2006). See, e.g., Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 71 (2012) (concluding that Hamilton "was slightly off base" in thinking that the Court has "merely judgment" and depends on the "executive arm," and adding that "[t]he judiciary must ultimately depend on the people. A Supreme Court that so distrusts the political process . . . will find it hard over the long run to retain public respect"); David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24, 24 ("A court that does not have the trust or confidence of the public cannot expect to function for long as an effective resolver of disputes, a respected issuer of punishments, or a valued deliberative body.").

<sup>31</sup> Owen M. Fiss, *Two Models of Adjudication*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 36, 43–44 (Robert A. Goldwin & William A. Schambra eds., 1985).

<sup>32</sup> Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 38 (1979).

<sup>33</sup> *Id.* at 38 ("Legitimacy does not depend on the popular approval of the institution's performance . . . . It is the legitimacy of the political system as a whole that depends on the people's approval, and that is the source of its democratic character.").

<sup>34</sup> Cf. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 221 (2002) ("[M]any commentators made the point that judicial power ultimately depended upon popular acceptance.").



Indeed, the advent of scientific public opinion polls that measure public support for the Court created an important shift in the political balance of power and, subsequently, in the Court's understanding of the basis of its legitimacy.<sup>35</sup> In the era before the invention of public opinion polls, all the Court had was indeed "merely judgment," as Hamilton proclaimed in *The Federalist No. 78*.<sup>36</sup> Without a publicly accepted metric for measuring public support, the Court could not claim to hold public support. Besides elections, no other source of data could give direct, regular, and reliable measurements of public opinion.<sup>37</sup> In view of the limitations of elections to articulate political views,<sup>38</sup> public attitudes toward the Court could have been deduced only indirectly, in a crude and inexact manner, from the rare occasions when the Court was an issue in national presidential campaigns.<sup>39</sup>

As long as the elected branches were perceived to be the sole representation of public opinion, their attacks on the Court served as the

---

<sup>35</sup> Cf. FISHKIN, *supra* note 15, at 91–92 (arguing that the American political system was transformed by a new method of assessing public attitudes, i.e. opinion polling).

<sup>36</sup> Cf. THE FEDERALIST NO. 78, *supra* note 25, at 523.

<sup>37</sup> See ADAM J. BERINSKY, SILENT VOICES: PUBLIC OPINION AND POLITICAL PARTICIPATION IN AMERICA, 6 (2004) ("At an empirical level, there is a general agreement on one point among academics and professionals, be they proponents or opponents of the polling enterprise: opinion polls are broadly representative of popular sentiment."); ROBERT S. ERIKSON, NORMAN R. LUTTBEG & KENT L. TEDIN, AMERICAN PUBLIC OPINION: ITS ORIGINS, CONTENT AND IMPACT (2d ed., 1980) ("Before the advent of public opinion polls in the early 1930s, one had to rely on much more inexact measures of what the public was thinking . . . . But the most relied upon method of assessing public opinion prior to the opinion poll was the interpretation of election results, and the occasional referendum that managed to find its way onto the ballot.").

<sup>38</sup> See, e.g., Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 10–12 (2002) ("[T]he vote is not a particularly articulate means of political expression. . . . How can we tell whether the public is voting for the man or for his platform?").

<sup>39</sup> See STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER 50 (2011) ("Anti-court rhetoric is evident in the campaigns of 1800, 1832, 1860, 1896, 1912, 1924, 1936, 1980, 1984, 1996, and 2004 . . . ."); OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 3–5 (2006) (the Court has been a major subject in the presidential elections of 1896 and 1912); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 177–80 (2009) (in the *Lochner* period, "Judicial Review was a major issue in three presidential campaigns": the 1896, 1912, and 1924 elections); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 190 (2004) ("In the absence of polling data or other means of obtaining a more refined picture of public opinion, it is difficult to gauge with any precision public sentiments on a question like judicial supremacy."); MARK TUSHNET, WHY THE CONSTITUTION MATTERS 9–10 (2010) ("[N]o candidate for the presidency in modern times has been able to get the public to care much about whom he or his rival will appoint to the Supreme Court.").

major informative signal of the Court's waning public support.<sup>40</sup> In any conflict between the Court and the political branches, the President and Congress could aver, based on their mandate as representatives, that the public was against the Court's policies or that, contrary to the Court, they enjoyed public support.<sup>41</sup> The Court, as an unelected institution, could not rebut the claim of the political branches since, except on rare occasions, its sociological legitimacy could not be demonstrated through elections or any other means. There was no way for the Court to rely on the tacit understanding, following published public opinion polls, that it enjoys public support.<sup>42</sup> Thus, it could not oppose the other political branches in the public's name. The elected players could always claim to hold public support, and there was no accepted counter-evidence except elections.<sup>43</sup> Even if the Court was perceived during some historical periods as the people's delegate and the Justices were seen as representatives of the people,<sup>44</sup> in any confrontation with the elected branches, no evidence

---

40 Cf. CLARK, *supra* note 13, at 71, 80, 255–57 (“Specifically, I have sought to demonstrate that congressional attacks on the Court can be interpreted as institutional signals about public opinion.”); *Id.* at 260 (“Because the Court is more insulated from the public than are other institutions—in particular, the Congress—the Court learns from institutional signals to which it can attribute meaning about public support for the judiciary.”); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 9 (2006) (“[F]or much of American history, the most reliable representative of the constitutional views of the American people was Congress.”).

41 See Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts can be More Democratic than Parliaments*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 25, 27 (Adam Czarnota et al. eds., 2005) (describing “the standard democratic story” according to which “elected politicians” hold a “democratic and majoritarian mandate” that courts lack).

42 See ACKERMAN, *supra* note 19, at 75 (before the introduction of public opinion polls there was “no way of proving” public support between elections).

43 Cf. FRIEDMAN, *supra* note 39, at 128 (arguing that in the aftermath of the *Milligan* case and the loyalty oaths cases, members of Congress as well as of the popular press stressed that the structure of institutions would be destroyed if the Court, not chosen by the people, were to become superior to Congress, which acts in the name of the people).

44 Many scholars claim that this was the situation during the early days of the republic, see ENGEL, *supra* note 39, at 74–77 (“Taking the Constitution to be an artifact of popular sovereignty and judges as representatives of the people are cornerstones of judicial review’s original legitimacy.”); *Id.* at 84–85, 104, 282 (noting that during the Founding generation, the dominant understanding was the “judicial interpretation should accord with the popular will since the Constitution is, by definition, an act of popular sovereignty”); KRAMER, *supra* note 39, at 60–63 (“Courts *must* exercise judicial review because they are the people’s agents *too* . . . . In refusing to enforce unconstitutional laws, judges were exercising the people’s authority to resist . . . .”); *id.* at 80–82, 91–92 (“If judicial review was to occur, it would be . . . a ‘political-legal’ act, a substitute for popular resistance . . . .”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 161 (1972) (“[M]ost of the early constitution-makers had little sense that judicial independence meant independence from the people.”); *id.* at 338, 448–49, 456, 460 (describing the position that in the early days of the Republic, “[t]he judges were in a sense as much agents

could confirm the Court's claim of public legitimacy. Indeed, the question is not only whether election returns, public representatives, and the media gave an accurate representation of public opinion on the Court before the introduction of scientific polls. The question is also whether the Court's legitimacy could be understood by the Court and by the other branches as based on public support without an accepted metric publicly demonstrating that support.

A good illustration that demonstrates the patterns of thinking prior to the rise of the public opinion culture can be found in the aftermath of the Court's 1935 decisions in the "Gold Clause" cases.<sup>45</sup> In its decisions, the Court upheld the federal government's power to reduce the gold content of the dollar as well as its power to nullify the gold clause in private contracts. The *New York Times* reported relief within the Administration after hearing of the Court's decision. It also told readers that based on letters sent to President Roosevelt by private citizens prior to the decision, President Roosevelt had "strong evidence that a vast aggregation of people do not think that the Supreme Court . . . has either the legal or moral right" to thwart the Administration's decision to regulate money in that manner.<sup>46</sup> Similarly, in 1937, the flood of mail to the Court in which people expressed opposition to President Roosevelt's plan to pack the Court was also considered, at that period, as reflecting public opinion.<sup>47</sup> But, not only letters served as a barometer for public mood; impressionistic recollection also served as an indicator. Thus, the then At-

---

of the people as the legislator . . ."); *id.* at 546–49, 598 ("Therefore all governmental officials, including even the executive and judicial parts of the government were agents of the people, not fundamentally different from the people's nominal representatives in the lower houses of the legislatures."); Gordon S. Wood, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 54 (Amy Gutman ed., 1997) (explaining that in *The Federalist No. 78*, "Hamilton implied . . . that the judges, though not elected, resembled the legislators and the executives in being agents or servants of the people with a responsibility equal to that of the other two branches of government to carry out the people's will, even to the point of sharing in the making of law.").

<sup>45</sup> *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935); *Nortz v. U.S.*, 294 U.S. 317 (1935); *Perry v. U.S.*, 294 U.S. 330 (1935).

<sup>46</sup> See Arthur Krock, *Gold Ruling Effects Weighed at Capital: Justice Stone's Concern Shared by Some Who Look to a Statutory Ban on Suing Government: Roosevelt Radio in Reserve*, N.Y. TIMES, Feb. 24, 1935, at E3.

<sup>47</sup> See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 13–14 (1998) (noting that for the players at that period, the flood of mail on the Court-packing plan served to indicate public opinion); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 134–35 (1995) (quoting Senator Royal Copeland of New York who said after FDR presented his program to pack the Court, that in view of thirty thousand letters and telegrams received by his office, he feels "fully informed of the wishes of my constituents").

torney General Robert Jackson reported to the President that after spending time “among the plain people,” he regretted to report that in his opinion, “support is not increasing for your court reform but rather decreasing.”<sup>48</sup>

During that period, public opinion polls had only begun their ascent, and members of Congress were still “confused by the polls and the mail and the contradictions between them.”<sup>49</sup> In current era, public opinion polls are considered the authoritative indicator of public opinion. Inferences based on mail are considered unreliable, amateurish, and unscientific. Indeed, contrary to the prevailing attitudes of the 1930s, today, politicians and Justices cannot argue that they are speaking for the people if public opinion polls provide contrary evidence.<sup>50</sup>

The ability to track public support for the Court, the public record of this support (often published by popular media),<sup>51</sup> and the scientific allure of opinion polls made public confidence in the Court more “real” in the public imagination.<sup>52</sup> The introduction of a metric that measures public support for the Court, the same metric that is central to political players’ own understanding of their legitimacy,<sup>53</sup> changed the balance of power between the branches. Now, there is

48 SHESOL, *supra* note 23, at 367–68 (quoting Jackson’s report to President Roosevelt and suggesting that President Roosevelt may have changed his views based on that report).

49 *Id.* at 331. *See also id.* at 372 (“Gallup, on March 1 [1937], reported that public support for the plan had dropped . . . . But mail to members of Congress seemed to hint in the other direction. Neither side, in short, had much to show for a month’s worth of making speeches.”); BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* 184 (2009) (arguing that earlier that year, President Roosevelt “had reason to think the public would support him. The White House mail continued to show a thumping approval for enlarging the Court. The scientific opinion polls, on the other hand, still showed a public almost evenly divided—tilting against the president’s plan, according to Gallup’s measurements, but by no more than half a dozen percentage points. The president, not yet six months beyond his landslide reelection, felt that he understood the American people’s wishes and needs better than any interviewer carrying clipboard”).

50 *Cf.* LEUCHTENBURG, *supra* note 47, at 109 (“It might be anticipated that the emphatic outcome of the [1936] elections would startle some Justices who had believed that they were speaking for a nation outraged by the New Deal.”).

51 During the time of the Rehnquist Court, six percent of poll questions measured trust, confidence, or approval of the Court as an institution (139 questions) rather than attitudes toward specific decisions. MARSHALL, *supra* note 16, 3–4.

52 *See, e.g.,* Fried & Harris, *supra* note 18, at 323 (public opinion itself became more “real” making it a political source of legitimacy).

53 *See* Zizi Papacharissi, *The Virtual Sphere 2.0* in ROUTLEDGE HANDBOOK OF INTERNET POLITICS 230, 233 (Andrew Chadwick & Philip N. Howard, 2009) (“Politicians, opinion leaders, and the media frequently rely on aggregation of public opinion obtained through polls.”).

an independent, reliable source of evidence, a public proof available to all, of public support for the Court.

At least since the 1970s, this public metric has shown that public support for the Court as an institution is “stable and high.”<sup>54</sup> Data also show that at least since 1987, the Court has enjoyed a significant bedrock of diffuse support.<sup>55</sup> The public has consistently awarded the Court more approval than Congress or the executive branch.<sup>56</sup> Thus, the political branches may capitulate to the Court not due to its designated function as the expert interpreter of the Constitution—as if they were the patient doing as the doctor ordered—but due to public support of the Court.<sup>57</sup> Indeed, even if the political elites lost their faith that the Court holds a relevant expertise for interpreting indeterminate constitutional norms, political resistance to its decisions seems infeasible as long as it holds public confidence. Public opinion is the drive wheel of American politics, and no politician wants to stand against it.<sup>58</sup>

Backed by survey results, the claim that the Court holds normative legitimacy based on public support was placed on almost the same empirical footing as the elected branches’ claim of normative legitimacy. Besides relying on the mandate they received in the elections, the President and Congress base many of their legitimacy claims, in the intervals between elections, on the outcome of public opinion polls. The Court’s inferiority in terms of democratic legitimacy was no longer an a priori structural premise, but an empirical question.<sup>59</sup>

---

<sup>54</sup> See, e.g., Jeffery J. Mondak & Shannon Ishiyama Smithey, *Dynamics of Public Support for the Supreme Court*, 57 J. POL. 1114, 1118–19 (1997) (tracking public support for the Court from 1972 to 1994 and showing that it consistently exceeds support for the executive branch and Congress).

<sup>55</sup> See Gibson, *supra* note 11, at 840–41 (summarizing six surveys between 1987 and 2008).

<sup>56</sup> FRIEDMAN, *supra* note 39, at 15 (“The justices regularly outpoll the Congress and often even the President in terms of public support or confidence.”); MARSHALL, *supra* note 21, at 138–41 (“[T]he Court has consistently won more approval than Congress or the executive branch (at least since the 1970s).”).

<sup>57</sup> See Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346, 351–52 (2001) (“The idea is that supportive publics can help enforce judicial decisions via an implicit threat of a political backlash in response to instances of public authority defiance or delay in implementation.”).

<sup>58</sup> See CLARK, *supra* note 13, at 81–82 (“[M]embers of Congress will generally have an interest in correctly position-taking in line with public opinion, which is a central activity in the pursuit of reelection . . . .”); JAMES A. STIMSON, *TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS* xv–xvii (2004) (“Public opinion matters. . . . Its power is that it points always to the future, telling those whose careers and strategies depend on public support that success depends on being with the tide, not against it.”).

<sup>59</sup> Cf. Scheppele, *supra* note 41, at 44–45 (claiming that at a certain period, in many ways the Hungarian Constitutional Court held stronger democratic legitimacy than the Hungarian Parliament).

A technological development created a new and distinct source of legitimacy for the Court which is not very different from the democratic support which makes representative institutions so confident in their source of legitimacy.

### III. THE CHANGE IN THE COURT'S LEGITIMATION THEORY

Thus far, I have argued that the introduction of public opinion polls allowed the Court, for the first time in its history, to base its normative legitimacy on public support rather than solely on its expertise. I did not argue that this change had an actual influence on the Court's adjudication, nor did I claim that this source of legitimacy is necessarily normatively valid or suited for the Court.<sup>60</sup> In the following, I argue that normatively valid or not, the Rehnquist Court changed its way of understanding its own normative legitimacy following the rise of public opinion culture and the availability of this source of legitimacy. While the division of the Court's history by the tenure of each Chief Justice can be misleading, I argue that the combination of the technological invention presented above, the rise in saliency of the indeterminacy of constitutional law, the decline of the public perception of the Court as an expert, and the lessons the Court derived from the *Lochner* and *Brown* cases are all responsible for the Rehnquist Court's new understanding of its sources of legitimacy.<sup>61</sup>

I dub the Court's understanding of the sources of its institutional legitimacy: "legitimation theory." A legitimation manifests itself in the Court's institutional habits. It is a conceptualization of the way the Court behaves in its endeavor to maintain its own legitimacy.<sup>62</sup> A legitimation theory captures the Court's institutional perspective on what makes judicial power legitimate.<sup>63</sup>

---

<sup>60</sup> For an analysis of the normative validity of this source of legitimacy for the Court, see Basok & Dotan, *supra* note 2.

<sup>61</sup> Cf. PIERRE BOURDIEU, ON TELEVISION 77–78 (1996) (raising the question of what would happen to judges if their "hypocritical" claim to "pure" expertise would be publicly disproved, and it would be exposed that they are subject to the pressures of the media and through it, public opinion).

<sup>62</sup> See THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT xiv (1935) ("Institutions . . . develop institutional habits, entirely separable from the personal habits of those who spend their working hours in their service.").

<sup>63</sup> Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 196 (1997) ("If the justices believed that fidelity to original intent was an essential part of what made judicial power legitimate and defensible, then this interpretive tradition may

Legitimation theories are not permanent; indeed, the Court switched its legitimation theory several times over the years.<sup>64</sup> In the following, I focus on one such switch and the rise of a particular legitimation theory, the “public confidence” legitimation theory that was dominant at the time of the Rehnquist Court.

I should stress that my aim is not to analyze the thoughts of certain members of the Rehnquist Court on the issue of legitimacy. My argument is not that certain Justices consciously adopted a certain legitimation theory, but how the Court and other institutions behaved.<sup>65</sup>

I examine the Court as an institution that has institutional habits just like any other multi-member institution.<sup>66</sup> I focus on one of these institutional habits: the Court’s legitimation theory.

#### A. *The Decline of Legal Expertise*

Since the 1880s and up until the 1930s, legal expertise served as the Court’s source of legitimacy. Most players acted under the assumption that as long as the Court was true to standards of legality—i.e., to the requirements of legal doctrine and to the original meaning of constitutional provisions—both its normative and sociological legitimacy were secured.<sup>67</sup> Law was understood in the public mind as

---

be properly viewed as important component of the Court’s nineteenth-century institutional perspective.”).

<sup>64</sup> Cf. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 317 (2000) (arguing that the decision in *Giles v. Harris*, “provides perspective on how much different the Court’s proclaimed self-conception of the nature and effectiveness of judicial power was in the pre-*Brown* era”).

<sup>65</sup> Cf. John McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 489 n.10 (2002) (“In speaking about the Warren Court, Ely did not purport to show that Chief Justice Earl Warren or any member of the Court consciously conceived of their decisions in terms of Ely’s theory . . .”).

<sup>66</sup> See ARNOLD, *supra* note 62.

<sup>67</sup> See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 14–15 (1960) (“We entrusted the task of constitutional interpretation to the courts because we conceived of the Constitution as law, and because it is the business of courts to resolve interpretative problems arising in law.”); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* ix (3d ed. 2007) (“Judicial decisions achieved legitimacy when the opinions accompanying them demonstrated that judges were merely discerning finite and transcendent legal principles and applying them to cases.”); *id.* at xvi, 123 (“From Marshall to Harlan, judges conceived of themselves as oracles whose function was simply that of rendering intelligible an already existing body of legal principles.”); Gillman, *supra* note 63, at 194 n.7 (“Prior to the twentieth century, debates about constitutional meaning were evaluated with reference to an accepted standards of fidelity to what was assumed to be the immutable meaning of the constitutional text . . .”). As always, there were certain individuals who saw beyond the horizons of the controlling social imaginary. Justice Holmes, arguably the first legal realist on the Supreme Court, was already aware,

a scientific endeavor in which the Justices held special knowledge, endowing their decisions with normative and sociological legitimacy based on legal expertise.<sup>68</sup> As a whole, the dominant force controlling the Court's work was that of expertise either in the form of doctrinal legality or in the form of what we would now call original-intent Originalism.<sup>69</sup> Sociological and normative legitimacy were understood as a corollary to legal legitimacy.

The *Butler* decision, given in January 1936 during a period of high tension between the Court and President Roosevelt over New Deal reforms, contains an explicit elaboration of the Court's legitimation theory.<sup>70</sup> In *Butler*, the Court invalidated the first Agricultural Adjustment Act on the grounds that Congress lacked the power to tax agricultural processors in order to subsidize farmers as part of the effort to increase farms' income.<sup>71</sup> Speaking for a six-Justice majority, Justice Owen J. Roberts rejected the claim that "the court assumes a power to overrule or control the action of the people's representatives."<sup>72</sup> He stressed, in his opinion, that "[w]hen an act of Congress is appropriately challenged," all the Court does is "to lay the article of the Constitution which is invoked beside the statute which is chal-

---

before the end of the nineteenth century, of some of the changes in the Court's commitment to legal doctrine that would accompany the exposure of the indeterminacy of constitutional norms. His dissent in *Lochner*, discussed *infra* in Part III.B, as well as his 1903 opinion in *Giles v. Harris*, 189 U.S. 475 (1903), are a good illustrations of this awareness. See Gillman, *supra* note 63, at 218–20 (discussing the novelty in Justice Holmes's position regarding the role of majority opinion in constitutional decision-making); Pildes, *supra* note 64, at 306–07, 317–18 (discussing Justice Holmes's political realism regarding the Court's legitimacy in comparison to the prevailing understanding during the *Lochner* era and the *Brown* era).

68 See THOMAS GUSTAFSON, REPRESENTATIVE WORDS: POLITICS, LITERATURE, AND THE AMERICAN LANGUAGE, 1776–1865, at 54–55 (1992) ("The dominant rhetoric of antebellum constitutional hermeneutics represented the judge as the servant of the law who found the proper or correct meaning."); Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 249 (2011) ("[T]here is ample evidence that, at least until the New Deal, the Court's legitimacy in the public mind was based on the Court's image as a legal expert."); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1083 ("The postbellum Court's pseudo-scientific jurisprudence apparently fooled, or at least satisfied, enough people . . . for twenty to thirty years after the Civil War.").

69 JACK M. BALKIN, LIVING ORIGINALISM 92 (2011) ("Until the end of the nineteenth century, virtually all federal judges and justices understood themselves to be what we would now call originalists."); Gillman, *supra* note 63, at 192 ("From the time of the founding throughout the nineteenth century, there was a consensus in courts opinions and legal treaties that judges were obligated to interpret the Constitution on the basis of the original meaning of constitutional provisions.").

70 *United States v. Butler*, 297 U.S. 1 (1936).

71 *Id.* at 70.

72 *Id.* at 62.



lenged and to decide whether the latter squares with the former.”<sup>73</sup> Afterwards, the Court “announce[d] its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment.”<sup>74</sup> According to the majority in *Butler*, the Court’s expertise (“judgment”) not only explains the way it decides cases, but also the Court’s legitimacy.

The Court’s reliance on legal expertise as the basis for its legitimacy does not mean that its decisions were legally correct during that period. Scholars have argued that during the *Lochner* era, the Court’s understanding of the law was based on the misguided idea of Social Darwinism.<sup>75</sup> For my argument, the adequacy of the Court’s understanding of constitutional law is immaterial. The only relevant point is that the Court believed in legal expertise as the basis for its legitimacy.

Although realist observations about the indeterminacy of legal norms had already appeared by the turn of the twentieth century,<sup>76</sup> only during the 1930s did indeterminacy begin to receive saliency in public discourse due to the clash between President Roosevelt and the Court over New Deal legislation.<sup>77</sup> The discovery of wide judicial discretion in constitutional cases eroded the Justices’ claim to have professional, special *legal* expertise that compelled them to arrive at the right answer.<sup>78</sup> Scholars agree that by the 1940s, the public un-

<sup>73</sup> *Id.* at 62.

<sup>74</sup> *Id.* at 62–63.

<sup>75</sup> See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 26–27 (1975) (arguing that the Justices decided cases according to the laissez-faire philosophy of Herbert Spencer, which was read into the Constitution); Alpheus Thomas Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385, 1393 (1962) (“Natural law—the inevitability of the human struggle, survival of the fittest in the economic no less than in the biological world—replaced the Constitution.”).

<sup>76</sup> See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 52 (2002); BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 78–79 (2009).

<sup>77</sup> See, e.g., Bassok, *supra* note 68 at 249 (“The clash between President Franklin D. Roosevelt and the Court over the New Deal reforms created a growing public awareness of the inherent indeterminacy of law and, consequently, of the political influences on judicial discretion.”); Letter from Felix Frankfurter to Franklin D. Roosevelt (Mar. 30, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928–1945, at 392 (Max Freedman ed., 1967) (“Now with the shift by Justice Roberts in Jones-Laughlin, overthrowing the Commerce Clause doctrines which the Court had used to strike down New Deal legislation, even a blind man ought to see that the Court is in politics, and understand how the Constitution is ‘judicially’ construed.”).

<sup>78</sup> See, e.g., FRIEDMAN, *supra* note 39, at 214–15 (“The country had traveled a long way to this pervasive realism about the Constitution and judging. . . . By the time of the New Deal, views had changed; it was widely understood that judges’ philosophies influenced constitutional decisions.”); Bassok, *supra* note 68, at 247–53 (discussing the link between the

derstanding that legal expertise does not award the Court with determinate answers in constitutional cases, and that the law's malleability allows judges to decide cases based on their political preferences, was already widespread and has been spreading ever since.<sup>79</sup>

After the New Deal era, writes Robert McCloskey,

[I]t was no longer possible for the judges and their supporters to take refuge from reasoned criticism behind the old incantations—the idea that the Court was merely the passive mouthpiece of an unambiguous constitution; the idea that the nature and range of the Court's power to intervene was settled once and for all by the Constitution itself or by unmistakable inferences from the Constitution.<sup>80</sup>

In view of the decline in the Court's ability to rely on legal expertise as the source of its legitimacy, a search for a new source of legitimacy began.<sup>81</sup> Indeed, scholars' whole endeavor to find new justifications for the Court's countermajoritarian authority may be viewed as an attempt to find a new source of expertise to preserve the Court's sociological legitimacy in view of the decline of its legal expertise in the public mind, rather than an attempt to normatively justify its authority.<sup>82</sup> For example, some scholars attribute to the Court special position or knowledge that enables them to protect rights.<sup>83</sup> *Judicial*

---

rise in saliency of the indeterminacy difficulty and the decline in the belief in legal expertise).

79 See, e.g., FRIEDMAN, *supra* note 39, at 171–72, 223–25 (“It would be difficult to overstate the extent to which the public and commentators had by mid-century become reconciled to Realist (or anti-formalist) conceptions.”); Bassok, *supra* note 68, at 253 (“[C]onstitutional theorists generally agree that the rise in public saliency of the indeterminacy of legal norms and the decline of the Court's mythical image date back to the first half of the 20th century.”); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1157 (1993) (noting that after the New Deal, the belief that constitutionalism is a special expression of reason or science was undermined, and that constitutionalism “appeared simply as another instance of rule by political interests”).

80 ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 259 (5th ed., Sanford Levinson rev. ed. 2010) (1960). See PERRY, *supra* note 10, at 140–41 (noting that among the general public no one believes anymore that the Court's decisions are based on “pure law”).

81 See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 37 (2004) (arguing that due to a “breakdown of constitutional consensus” during the 1940s, Justices devised various new justifications for judicial review).

82 See Bassok, *supra* note 7, at 343–50.

83 See Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 42 (2002) (“We are experiencing a human rights revolution as a result of the Second World War and the Holocaust. . . . It is the task of the judge to protect and uphold human rights.”); Leonardo Pierdominici, *Constitutional Adjudication and the ‘Dimensions’ of Judicial Activism: Comparative Legal and Institutional Heuristics*, 3 TRANSNAT'L LEGAL THEORY 207, 219 (2013) (“Courts are uniquely well situated to protect rights of individuals or disadvantaged groups against an excessively powerful majority . . .”).

review is thus justified as a necessary means to guarantee the protection of these rights.<sup>84</sup> But, human rights serve not only as the basis for the Court's normative legitimacy. They also serve as a basis for the Court's sociological legitimacy. At least since the 1960s, the Court has come to be identified and legitimized in the public mind, at least partly, with the enforcement of rights-based limits on political action.<sup>85</sup> Similarly, according to some originalists, the Court's counter-majoritarian authority is normatively justified because it allows the Court, as an expert in constitutional history, to express the people's original voice over the passing whims of public opinion.<sup>86</sup> Yet, not less importantly, Originalism also "sells" in public discourse due to its appeal as a determinate system of interpretation and, thus, is able to ensure the Court's sociological legitimacy.<sup>87</sup> Process-based arguments justify judicial intervention in majoritarian decisions as means to correct failures in the democratic majoritarian process.<sup>88</sup> Rather than attributing judicial expertise in a certain substantive field, legal process scholars identify judges as "experts on process" and "political outsid-

---

84 *E.g.*, DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 11 (2009) ("Majority rule by itself cannot be trusted to protect religious, political, racial, and geographic minorities from oppression, nor to protect fundamental human rights when they are needed by the powerless or the unpopular.").

85 *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 4–6 (1991) (discussing the connection between rights-talk and the rise of judicial power in the U.S.); KECK, *supra* note 81, at 7, 71–72; Lawrence M. Friedman, *The Rehnquist Court: Some More or Less Historical Comments*, in THE REHNQUIST COURT: A RETROSPECTIVE 143, 147 (Martin H. Belsky ed., 2002) ("People look to the Courts for vindication of their rights; and for this reason all the arguments about 'countermajoritarianism' seem quite beside the point—politically at least."); Martin Shapiro, *The United States in THE GLOBAL EXPANSION OF JUDICIAL POWER* 43, 46–47 (C. Neal Tate & Torbjorn Vallinder eds., 1995) ("[T]he expansion of judicial power in the United States, and perhaps even worldwide, is essentially associated today with the great movement toward judicial protection of human rights initiated, or at least dramatically signaled, by the great desegregation decision *Brown v. Board of Education* . . .").

86 *See* Bassok, *supra* note 7, at 347–348 ("Judicial review is the best mechanism for ensuring loyalty to the people's original voice, since the Justices possess expertise in the field of constitutional history or in textualist analysis.").

87 *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (arguing that "notwithstanding its many academic critics," empirical evidence shows that "originalism continues to sell" among a large segment of the public); Bassok, *supra* note 68, at 266–67 (explaining the adoption of originalism reasoning "as based not on its normative superiority as an interpretive approach but based on the Court's concern for the sociological-legitimacy difficulty" and that "[o]riginalism has the appeal of making it seem that the Court is constrained by objective answers, derived by the expert judge from history and text, with no room for subjective choice or political considerations").

88 *See* Bassok, *supra* note 7, at 345–46; Samuel Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547, 552 (1981).

ers,” “uniquely situated to ‘impose’” process-based values.<sup>89</sup> They also believe in the power of procedural legal reasoning to gain sociological legitimacy.<sup>90</sup>

Thus, scholars offered new formulations of judicial expertise not only to confront the Court’s countermajoritarian normative difficulty, but also to confront the concern about the erosion of enduring public support for the Court (sociological legitimacy) in view of the decline of legal expertise in the public mind.<sup>91</sup> In other words, in order to explain to the public why the Court holds the ability to strike down legislation, a new source of judicial expertise needed to be exposed or devised.

It is no wonder that in European countries such as Germany, in which doctrinal expertise in constitutional law is still widely acknowledged both in academia and by the public,<sup>92</sup> problems such as the countermajoritarian difficulty are much less pronounced.<sup>93</sup> With le-

---

89 See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 & n.\*; 88, 102, 112 (1980).

90 Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1475–77 (2007) (“Hart and Wechsler did not insist on reason and principle because they would render courts more accountable, or because they were necessary to ensure fairness to litigants. They believed instead that reason and principle would endow law with legitimacy. . . . Professional reason appeared in their work as an unquestioned source of authority and legitimacy.”)

91 See Bassok, *supra* note 68, at 268–71 (discussing the relationship between the Court’s sociological and normative difficulties).

92 See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1995 (2004) (“Americans at bottom tend to be highly skeptical about the claims of a nonpolitical, neutral constitutional law. They are well aware that judges’ values invariably inform constitutional law. Europeans tend to have a different attitude, which is often expressed in the form of a more dogmatic insistence on the separateness of politics from law, including constitutional law.”); Armin von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe*, 7 INT’L J. CONST. L. 364, 367–68 (2009) (“[M]ost Continental constitutional scholars conceive of constitutional scholarship as a science . . . .”); *Id.* at 391 (“Throughout Europe, legal doctrine is an important—if not the primary—emphasis of constitutional scholarship.”); Anke Grosskopf, *A Supranational Case: Comparing Sources of Support for Constitutional Courts* 27 (2000) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with author) (“[I]n Europe, where the notion of judging as the ‘neutral application of the text of law’ is still much more widespread than in the US.”); Michaela Hailbronner, *Rethinking the Rise of the German Constitutional Court: Value Formalism (7.2013)* (unpublished draft) (on file with author) (arguing that the authority of the German Constitutional Court has much less to do with Germany’s Nazi past than commonly assumed and more with the German emphasis on legal expertise).

93 See, e.g., Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 843 (1991) (“[T]he so-called ‘counter-majoritarian difficulty,’ the term Alexander Bickel used to describe the root problem of judicial review in America, is not a major problem in Germany.”); Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2779 (2003) (“Americans grapple with, but never

gal expertise strongly rooted in the social imaginary and with a distinction between law and politics still holding firm,<sup>94</sup> in these European countries, the constitutional courts' authority is still accepted in a manner similar to a patient who recognizes the doctor's expertise.<sup>95</sup> Hence, the difference between the U.S. and European countries, such as Germany, is not merely a difference that stems from the fact that in the U.S. the authority of judicial review over federal legislation is not explicitly established by the Constitution while in most countries where judicial review over legislation currently exists, the authority of judicial review is explicitly anchored in the Constitution.<sup>96</sup> It is a difference that stems also from the difference in how Americans and Europeans imagine expertise in general and legal expertise in particular.<sup>97</sup> The way people imagine expertise in different cultures is a

---

finally resolve, the 'countermajoritarian' problem . . . . European academics and constitutional judges will state as much in one breath, and then move on to more interesting issues.").

- 94 See, e.g., GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 12 (2005) ("Especially among European (legal) scholars, courts are still often assumed to be 'above politics,' and their decisions tend to be treated as purely legal texts that can be understood in isolation from their political context."); J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 *COMP. POL. STUD.* 510, 525 (1994) (discussing the European tradition's tendency to view the judicial process above and outside politics); Grosskopf, *supra* note 92, at 71 ("[G]eneral trend in German (as in most of continental Europe) to view courts as fundamentally non-political actors.").
- 95 See, e.g., Wojciech Sadurski, *Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?*, 42 *ISR. L. REV.* 500, 516–519 (2009) ("[In central and Eastern Europe,] the rationale that carried the most weight . . . certainly in the self-legitimation produced by constitutional judges themselves—was a rather simple-minded view that constitutional judges have a privileged insight into the true, 'objective' meaning of constitutional rights . . .") (Isr.).
- 96 See WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STORY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* xiii (2005) ("[T]he power of constitutional adjudication, in its abstract form is explicitly contained in the constitutional texts of European states, rather than only being recognized as implicit therein by the doctrine developed by the court itself, as was the case in the United States."); Barak, *supra* note 83, at 128 ("Since the end of World War II, most new constitutions have included express provisions about judicial review, thereby ending the legal debate over its legitimacy.").
- 97 See, e.g., Clark A. Miller, *Civic Epistemologies: Constituting Knowledge and Order in Political Communities*, 2 *SOC. COMPASS* 1896, 1903–04 (2008) ("While science is often mobilized by competing parties in political disputes in the United States . . . this occurs much less frequently in Europe. This has been constantly apparent in the debate about climate change, where European countries have been subjected to far fewer debates than the United States over the scientific basis of climate change. Indeed, in Germany, when industry groups sought to reject the reality of climate change, they were forced to import US critics of climate science, as no German scientist would become involved.").

“mere” social construct, but it attains the character of objective reality for legal reasoning and thinking.<sup>98</sup>

The use of the proportionality doctrine is merely one manifestation of the difference in the way Europeans and Americans imagine legal expertise and the distinction between law and politics. In Germany, proportionality is the most dominant doctrine in constitutional adjudication and is conceived of as a doctrine of expertise—part of the judicial expert “tool-kit”—that offers answers to constitutional controversies.<sup>99</sup> In the United States, it is considered too indeterminate and fluid to offer any clear answers, and thus it is almost never used.<sup>100</sup> In Germany, it is imagined as a politically neutral tool, while in the United States, it is imagined as a conduit to insert the Justices’ political agenda.<sup>101</sup> Thus, the seeming paradox of an American constitutional discourse that is saturated with legal realist insights, and yet is characterized by categorical doctrines, is dissolved.<sup>102</sup> American courts prefer categories that are perceived as more determinate, such as strict scrutiny, in view of the decline of their expertise in public

---

<sup>98</sup> See PETER BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 9 (1967) (discussing a “humanly produced world [that] attains the character of objective reality”); TAYLOR, *supra* note 3, at 50 (explaining the idea of the social imaginary as “the way we collectively imagine, even pretheoretically, our social life”); Weiler, *supra* note 94, at 525 (“The *belief* in the apolitical and neutral nature of the judicial process is, in fact, the reality that counts.”).

<sup>99</sup> See Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 393 (2009) (“[R]ather than being perceived as illegitimate judicial intervention in policymaking, balancing is viewed in Germany, and elsewhere on the Continent, as the objective, systematic, and logical implementation of constitutional rights, while realizing values in everyday life is considered to be the quintessential task of the court.”); *id.* at 404 (“[D]espite its lofty and abstract goals, proportionality is the product of a legal frame of mind that is far more formalistic than the American one.”).

<sup>100</sup> See, e.g., Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 424 (2008) (“U.S. courts . . . reject the near-universal proportionality test in favor of the more categorical, rule-like, fixed tiers or standards of review.”); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 799 (2011) (“In contrast to the United States, constitutional courts in legal systems around the world have converged on a method for adjudicating rights claims—proportionality analysis . . .”).

<sup>101</sup> See Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT’L J. CONST. L. 263, 286 (2010) (noting that in the U.S., balancing is viewed as “allowing judges far too much discretion,” while in Germany, proportionality “does not raise as much suspicion . . . [and] has gained the status of a central and non-controversial doctrine”); Mathews & Stone Sweet, *supra* note 100, at 807 (arguing that outside the U.S., the proportionality doctrine “bestows a sheen of politico-ideological neutrality on a court, across time and circumstances”).

<sup>102</sup> See Cohen-Eliya & Porat, *supra* note 101 at 264–65 (observing the paradox of describing the American system, “the birthplace of antiformalism,” as a system committed to categorical thinking).

discourse.<sup>103</sup> Even if proportionality will one day take hold in the United States, it will not be understood in the same manner as it is understood in Europe. Even if all of its internal doctrinal components will be identical to its German counterpart, it will still be considered as much more political and indeterminate.<sup>104</sup>

It is thus important to stress that the rise of public opinion polls does not necessarily lead to the abandonment of the notion of legitimacy based on expertise. Even with the rise to dominance of the idea that the Court has to have enduring public support, as demonstrated in opinion polls, to function properly, the Court does not have to consider public opinion in order to preserve its public confidence. As long as the public awards the Court enduring support based on its belief in expertise (legal or other kind of expertise), the Court's expertise-based legitimation theory can remain intact.<sup>105</sup> Yet, due to the current dominance of the idea that the Court's power depends on enduring public support, the Court's legitimation theory must prove viable in opinion polls. If public opinion polls show a decline in public confidence in the Court, the Court may have to switch its legitimation theory in order to preserve its public stand. Hence, the decline of the Court's image as legal expert made the Court search for a new legitimation theory necessary. But, in order to understand the rise of the public confidence legitimation theory, one needs to look beyond the background conditions to lessons the Rehnquist Court learned from *Lochner* and *Brown*.

### B. *The Lochner Decisional Line*

The Court's adjudication during the period between 1869 and 1932 is presented, at least according to the current dominant professional legal narrative, as a dark age in which the Court was legally mistaken. According to this description, the New Deal reforms com-

---

103 Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59-60 (1992) (“The Court ties itself to the twin masts of strict scrutiny and rationality review in order to resist (or appear to resist) the siren song of the sliding scale. Bipolar two-tier review did penance for the appearance of naked value choices that had brought the Court into disrepute in the *Lochner* era.”).

104 Cf. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 92 (1997) (“Continental legal theory is uncannily ‘other’ for an American, perhaps because just about everything in our legal culture is present in theirs, often translated word by word, but nothing seems to have the same meaning.”).

105 See Bassok, *supra* note 68, at 251 (“The notion of legal expertise is a historical and social construct. Its place in the social imagination depends by and large on the trust society is willing to extend to claims of independent legal expertise.”).

pelled the Court to rediscover the *true* Constitution.<sup>106</sup> In recent decades, revisionist constitutional historians argue that in view of the available legal materials of that period, it is hard to see how the Justices could have decided differently.<sup>107</sup> In any event, according to both of these historical narratives, for the legal community at the beginning of the twentieth century, the decisional line of *Lochner* and *Adkins* was considered legal.<sup>108</sup>

The crisis surrounding President Roosevelt's Court-packing plan involved, perhaps for the first time, politicians guided by public opinion polls.<sup>109</sup> But, not only politicians became aware of this new tool. The Court had also "been baptized 'in the waters of public opinion.'"<sup>110</sup>

A sharp controversy still exists on the question of whether the Court's "switch in time" was caused by political pressure from outside the Court or whether it was the manifestation of deeper doctrinal shifts that had been taking place in the Court's adjudication for some time before the switch.<sup>111</sup> Scholars that support the former approach

106 See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 62–67 (1991) (presenting the "myth of rediscovery," claiming that "modern judges do resist the very suggestion that *Lochner* might have been a legally plausible decision in 1905 . . ."); *id.* at 100–01 (the myth portrays "the *Lochner* Court as if it were abusing the idea of constitutional interpretation by imposing its idiosyncratic and reactionary views on a polity yearning for the New Deal"); CUSHMAN, *supra* note 47, at 3–4 (describing the "conventional wisdom" and arguing that "it certainly has been overstated, and that it may well be just plain wrong").

107 See, e.g., 1 ACKERMAN, *WE THE PEOPLE* *supra* note 106, at 100–03 (concluding that it is hard to see how the *Lochner* Court could have decided otherwise); FRIEDMAN, *supra* note 39, at 188 ("Modern-day revisionists have done a great service in correcting the sometime impression that judges during the *Lochner* era were simply making the law up as they went along. Rather, there were established legal principles, like the prohibition on 'class legislation,' upon which judges relied when invalidating progressive measures.")

108 See, e.g., JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 177 (2011) ("In 1910 many mainstream lawyers and legal scholars would have doubted that either *Lochner* or *Plessy* was wrong, much less wrong the day they were decided."); see also *id.* at 189–90, 203 ("Given existing constitutional understandings and political forces at play, the result in *Lochner* was certainly within the range of possible decisions. It may have been wrong, but it was certainly not implausible.")

109 See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 982 (2000) ("Popular opinion shifted in response to political events, and political tides shifted quickly with popular opinion—perhaps the first demonstration of a phenomenon of politicians driven by polls and public opinion that has become so prominent today.")

110 See LEUCHTENBURG, *supra* note 47, at 143.

111 See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 290–92 (1998) (describing the controversy and offering a middle ground); CUSHMAN, *supra* note 47, at 11–23 (arguing that it is "unlikely" that the Court's 1937 shift was a response to the Court-packing plan rather than a result of "internal" doctrinal development); Friedman, *supra* note 109, at 1054 ("Scholars differ greatly on the question whether political pressure could account for the Court's switch."); Laura Kalman, *AHR Forum: The Constitution, the*



point to the threat posed by President Roosevelt's Court-packing plan or the pressure created by public support for New Deal policies as the two vivid manifestations of external pressures.<sup>112</sup> Gregory Caldeira shows that during the four months in 1937 when President Roosevelt was trying to pack the Court, an "intimate connection" existed between "the actions taken by the Court and the justices" and support for the Supreme Court as reflected by public opinion polls.<sup>113</sup>

While the controversy over the causes for the Court's "switch in time" may remain forever unresolved, one can hardly question that public opposition to tinkering with the Court after the switch, as reflected in opinion polls,<sup>114</sup> was a major reason for the failure of President Roosevelt's plan.<sup>115</sup> The failure of the Court-packing plan taught all players a valuable lesson on the potential of public opinion. It demonstrated that the combination of public support for the Court (and not necessarily its decisions), as expressed in opinion polls, together with the mass media's support,<sup>116</sup> is a powerful weapon inde-

---

*Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1054–55 (2005) (describing the disagreement over the reasons for the Court's changing position).

- 112 See CLARK, *supra* note 13, at 167 (showing that "following the major confrontation in 1937, the Court retreated and used its power of judicial review at the lowest level since the nineteenth century"). See also *id.* at 198–99 (noting that externalist historical accounts attribute "a causal role to the Court-packing plan . . . and the elections of 1936 . . . in explaining the Court's decisions"); Kalman, *supra* note 111, at 1054 ("[T]he Court's behavior seemed calculated to undermine that support, since it became harder for FDR to claim that he needed additional justices to protect his program.").
- 113 Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1139, 1149–50 (1987).
- 114 See, e.g., CLARK, *supra* note 13, at 197 ("[F]rom the beginning, the proposal [to pack the Court] did not garner even a bare majority of public support."); BARBARA A. PERRY, *THE PRIESTLY TRIBE: THE SUPREME COURT'S IMAGE IN THE AMERICAN MIND* 19–20 (1999) ("Despite his electoral popularity, President Roosevelt never commanded the allegiance of a majority of Americans in struggle against the Supreme Court."); Cushman, *supra* note 38 at 67–74 (surveying public polls demonstrating that by and large, the public did not support Roosevelt's Court-packing plan).
- 115 See, e.g., JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVIST THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 126 (2009) ("We believe Franklin Roosevelt's failure in his constitutional scheme in the 1930s was in part due to the institutional legitimacy the Supreme Court enjoyed among the American mass public."); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 737 (2011) ("Although an obstructionist Court was ultimately brought into line with the views of the dominant national political coalition, the political unpopularity of Roosevelt's Court-packing plan seemed to reveal a significant measure of support for an independent judiciary.").
- 116 CUSHMAN, *supra* note 47, at 13 (arguing that "[f]rom the beginning, the press voiced near-unanimous out-rage and disdain to the program to pack the Court" and that polls taken between February and May of 1937 indicate that this initiative "was consistently opposed by a majority of the same American people who had so overwhelmingly returned him to office"). See also SHESOL, *supra* note 23, at 245–46 ("Though nearly 60 percent of

pendent of the power of government.<sup>117</sup> Indeed, the 1937 experience demonstrated how entrenched judicial independence and judicial review have become in the American public mind.<sup>118</sup> Barry Friedman writes of a “tacit deal” formed as a result of the New Deal, according to which “the American people would grant the Justices their power, so long as the Supreme Court’s interpretation of the Constitution did not stray too far from what the majority of the people believed it should.”<sup>119</sup>

But, as I show below, the lesson that the Rehnquist Court learned from this episode has another side: public legitimacy may compel the Court to overturn constitutional decisions which it believes are legally correct. Without public legitimacy, a constitutional interpretation that is considered legal will become unlawful. Hence, legality, i.e.,

---

the public wanted the Court to take a ‘more liberal’ view of the New Deal, this did not equal a desire to curb the Court: only 41 percent favored limits on judicial review.”); *id.* at 301–02 (“A survey taken at the time showed that more than two thirds of the newspapers that had backed Roosevelt’s re-election in 1936 now opposed him on the Court bill, and more than half of these did so ‘vigorously.’”); Friedman, *supra* note 109, at 1049 (“Gallup polls . . . showed both dissatisfaction with Court decisions and opposition to tinkering with the Court.”).

117 See Richard H. Pildes, *Is the Supreme Court a ‘Majoritarian’ Institution?*, 2010 SUP. CT. REV. 103, 132 (“[M]ore remarkable, here was the most popular president in history, with a Congress his party controlled overwhelmingly, confronted by the most aggressive Court in American history—and yet, it is entirely plausible that FDR’s legislative challenge to the authority of the Court would have failed, given how deep the cultural and political support was for the Court’s institutional authority, even as the Court issued one unpopular decision after another.”).

118 See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 268 (2007) (“The public and political opposition to the Court-packing plan demonstrated the substantial authority the Court still possessed, even among those who disagreed with many of its substantive decisions. The authority of the Court to interpret the Constitution and guard it against political violation, an authority that conservative political leaders had been building in the public mind for several decades, bore its ultimate fruit.”). See also, Pildes, *supra* note 117, at 132 (“[O]ne can read the 1937 experience as suggesting that, for better or worse, judicial independence and the authority of the Court have become so entrenched in America that even the most popular politicians play with fire if they seek too directly to take on the power of the Court.”).

119 FRIEDMAN, *supra* note 39, at 4. Friedman also claims that, The true significance of 1937 requires no hidden clues; it was plain for all to see. The American people signaled their acceptance of judicial review as the proper way to alter the meaning of the Constitution, but only as long as the justices’ decisions remained within the mainstream of popular understanding.

*Id.* at 196. As a result,

The 1937 fight over the Court ushered in the modern era of judicial review and American constitutionalism: judicial review now was widely valued, but only so long as important judicial decisions did not wander far from the mainstream of American belief about the meaning of the constitution.

*Id.* at 236.

expert doctrinal reasoning, is not enough.<sup>120</sup> Justice Holmes's dissent in *Lochner* presents this lesson very vividly by advising against autonomous doctrinal thinking that isolates the Court from public opinion.<sup>121</sup> Jack Balkin succinctly summarized this lesson by noting that "[t]o respond to changes in the national political process, courts may have to discard a substantial proportion of existing doctrine."<sup>122</sup> While this lesson became apparent only with the "switch in time" in *West Coast Hotel v. Parrish*, *Lochner* became the symbol of the era.<sup>123</sup> For that reason, I entitle this lesson "the *Lochner* lesson."

### C. *Brown and Its Progeny*

For the legal community during the 1950s, it was extremely hard to justify *Brown*<sup>124</sup> in terms of legality.<sup>125</sup> At that period, the scholarly consensus was that the original understanding of the Fourteenth

<sup>120</sup> See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1388 (2001) ("The important lesson of this era is that the legitimacy of law and the independence of judges require a certain basic acceptance of judicial decisions."). See also, TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 182 (1999) ("[A]s the New Deal episode and public opinion research demonstrates, public opinion is determined by the *political* acceptability of its decisions rather than the presence of persuasive constitutional authority for the Court's intervention and its subsequent decisions.").

<sup>121</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."); see also Wilson, *supra* note 68, at 1098 ("The *Lochner* majority did not only err because they constitutionalized their own economic ideology. They also ignored the public's views . . .").

<sup>122</sup> BALKIN, LIVING ORIGINALISM *supra* note 69, at 307–08 (extracting this lesson from *West Coast Hotel v. Parrish*).

<sup>123</sup> See 2 ACKERMAN, WE THE PEOPLE, *supra* note 111, at 257 (noting, while discussing the New Deal constitutional moment, that "*Lochner v. New York* serves as the paradigm"). Balkin notes that "'*Lochner*' is not just the decision in *Lochner v. New York*, but an accompanying story about the place of the decision in the history of the Constitution, the Court, and the country." BALKIN, LIVING ORIGINALISM, *supra* note 69, at 192.

[Rather,] *Lochner v. New York* came to symbolize an entire period of jurisprudence, called the '*Lochner era*.' It ran from 1897, when the Court first began to strike down state laws for violating a constitutional liberty of contracts, to 1937 when the Supreme Court upheld a minimum wage law for women workers in the famous case of *West Coast Hotel v. Parrish*.

*Id.* at 176.

<sup>124</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>125</sup> MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 258 (1992) ("*Brown v. Board of Education* produced a sharply critical reaction among elite legal thinkers, for it challenged at the deepest levels their efforts to re-establish a neutral, value-free system of constitutional doctrine." (footnote omitted)); KECK, *supra* note 81, at 55–58 (describing scholarly critique of *Brown*).

Amendment did not support the assertion that school segregation was unconstitutional. It is unsurprising then that in his research memo in *Brown*, Alexander Bickel, Justice Felix Frankfurter's clerk at that time, directed the Justices away from a historical-based argument.<sup>126</sup> The Court thus explicitly stated that the historical sources for the meaning of the Fourteenth Amendment were "not enough to resolve the problem with which we are faced. At best, they are inconclusive."<sup>127</sup> Since there were no precedents to support its position, the Court relied on the authority of social science, stating that this "modern authority" had now demonstrated that segregated education "generates a feeling of inferiority as to [black children's] status in the community that may affect their hearts and minds in a way unlikely to ever be undone."<sup>128</sup> The Court's reliance on the work of Swedish social scientists, Gunnar Myrdal among others, made William Rehnquist, then Justice Robert H. Jackson's clerk, echo in his memorandum in the case, Justice Oliver Wendell Holmes' famous dissent in *Lochner*. Rehnquist wrote that "[i]f the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdal's [sic] *American Dilemma*."<sup>129</sup>

One can plausibly argue that at the time it was handed down, *Brown* was illegal. In this spirit, Herbert Wechsler famously criticized *Brown* as wrongly decided.<sup>130</sup> Over the years, many scholars agreed that the decision lacked legal legitimacy.<sup>131</sup>

---

126 Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 7, 56–58 (1955) (framers of the Fourteenth Amendment did not intend to prohibit segregated public schools). See also BALKIN, *LIVING ORIGINALISM*, *supra* note 69, at 105 ("[At that time], most people accepted Alexander Bickel's conclusion that the framers of the Fourteenth Amendment did not intend to prohibit segregated public schools."); Alferd H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 145 n.101 (discussing Bickel's memo).

127 *Brown*, 347 U.S. at 489. See also, KECK, *supra* note 81, at 48–52 (discussing the process leading the Court to reject the historical sources).

128 *Brown*, 347 U.S. at 494.

129 Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 SUP. CT. REV. 245, 246 (1988) (quoting Rehnquist) (footnote omitted).

130 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959). See Louis Michael Seidman, *What's So Bad About Bush v. Gore? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 1011 (2001) ("At least Justice Jackson and probably Justice Frankfurter believed that *Brown* was indefensible as a matter of constitutional law, but voted for the result anyway because of their strong belief that an end to legally enforced segregation was a political and moral imperative.")

131 See, e.g., I ACKERMAN, *WE THE PEOPLE*, *supra* note 106, at 144; ELY, *supra* note 89, at 54–55; ENGEL, *supra* note 39, at 288–89 ("For all [*Brown's*] moral correctness, the Court did not offer much by way of legal arguments against desegregation."); LEARNED HAND, *THE BILL OF RIGHTS* 55 (1958) ("I have never been able to understand on what basis [*Brown*] does or can rest except as a coup de main."); HORWITZ, *supra* note 125, at 340 n.71 ("One is

As for sociological legitimacy, at the time it was given, *Brown* may have been a countermajoritarian decision in the sense that, according to public opinion polls, the majority of the public did not support the decision.<sup>132</sup> Yet, even if *Brown* was a countermajoritarian decision at that time, “[i]n the half century since the Supreme Court’s decision *Brown* has become a beloved legal and political icon . . . it is the single most honored opinion in the Supreme Court’s corpus.”<sup>133</sup> Balkin adds that it is “the most central symbol of the legitimate exercise of judicial review.”<sup>134</sup> In the same vein, Richard Fallon writes that *Brown* is viewed as a paradigm of appropriate Supreme Court decision making.<sup>135</sup> Today, “[i]n nearly all eyes,” Fallon adds, “*Brown* reflects the Supreme Court at its best.”<sup>136</sup> Indeed, as Pamela Karlan notes, “[f]ifty years on, *Brown* has become a primary source of sustained public confidence in the Court . . . .”<sup>137</sup>

Though *Brown*’s main rationale was based on social facts that restricted the decision to primary and secondary public education

---

surprised to learn how late it was that legal academics actually sought to defend the *Brown* decision.”); LUCAS A. POWE, *THE WARREN COURT IN AMERICAN POLITICS* 40 (2000) (“A lawyer reading *Brown* was sure to ask, ‘where’s the law?’”); TAMANAHA, *supra* note 76, at 84–86 (“[T]he *Brown* decision has always been dubious from a legal standpoint.”); Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* 4 (J.M. Balkin ed., 2001) (“Even many defenders of the result had little good to say about the opinion, arguing that its overruling of previous precedents was abrupt and unexplained . . .”); Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction and the Transformation of the American Constitution*, 108 *YALE L.J.* 2012, 2014 (1999) (noting that the *Brown* Court’s “approach has failed to persuade many legal analysts, who generally approve of the decision, that *Brown* advances a ‘neutral principle’—that is, a principle that can transcend time”). *Contra* PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* xvi (1970) (“The *School Desegregation Cases* . . . were in the making for a decade before the opinion was rendered.”); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 85–92 (2010) (arguing that *Brown* can be justified “solidly” on the basis of the common law method as many precedents led to it).

132 See Pildes, *supra* note 117, at 120–22 (surveying the controversy between scholars who claim that *Brown* was a majoritarian decision and those who claim that it was a countermajoritarian decision).

133 Balkin, *supra* note 131, at 9 (“*Brown* became recognized as a symbol, not only of racial equality, but of equality and equal opportunity generally.”). *See also*, 1 ACKERMAN, *WE THE PEOPLE*, *supra* note 106, at 137 (“*Brown* came to possess the kind of numinous legal authority that is, I believe, uniquely associated with legal documents that express the considered judgment of We the People.”); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 56 (2001) (“In both legal consciousness and the popular imagination, *Brown v. Board of Education* exemplifies constitutional justice.”).

134 BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 108, at 209.

135 FALLON, *supra* note 133, at 58.

136 FALLON, *supra* note 133, at 58.

137 Karlan, *supra* note 30, at 8.

(without even directly overturning *Plessy*), the Court soon issued orders, based on its decision in *Brown*, making segregation unconstitutional in cases where this rationale did not apply.<sup>138</sup> This series of per curiam decisions striking down segregation in a wide range of non-academic public facilities, such as beaches and public golf courses could not be reasoned, at that time, in terms of legality as emanating from *Brown*.<sup>139</sup> Several constitutional scholars view these decisions as nothing but pure fiat.<sup>140</sup> Yet, sociological legitimacy made these decisions part of the now-unimpeachable decisional line beginning with *Brown*. As the years passed, courts explicitly declared that they would follow *Brown*'s public symbolic meaning.<sup>141</sup>

After a while, *Brown*'s public meaning became the legal baseline, and when the Court strayed from this baseline, Justice Thurgood Marshall could complain that the decision not to compel suburban school districts to integrate with racially segregated urban districts "is

---

138 See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1541 (2004) ("In *Brown* itself, the Supreme Court did little more than announce that 'separate but equal' was unconstitutional as applied to elementary and secondary education . . ."). As a result,

At first it was quite unclear what the decision meant. Rather than directly overruling *Plessy*, the Court merely stated that *Plessy* had no application 'in the field of public education.' . . . [T]he meaning of *Brown* shifted to accommodate a shifting political center . . . fifty years of social contestation have produced the *Brown* we know today.

*Id.* at 1564–68. See also ROBERT H. BORK, *THE TEMPTING OF AMERICA* 76 (1990) (describing how the Court ruled, based on *Brown*, that segregated beaches, golf courses, parks, and courtrooms were unconstitutional).

139 *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor v. Dawson*, 350 U.S. 877 (1955) (public beaches).

140 See, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 13 (2010) ("The series of per curiam decisions striking down segregation in other contexts were nothing but pure fiat, a point made repeatedly in their wake.").

141 I ACKERMAN, *WE THE PEOPLE*, *supra* note 106, at 137 ("[T]oday's judiciary treats *Brown* as a decisive constitutional authority possessing infinitely greater weight than it did in the 1950's when the *Brown* Court cautiously announced its intention to proceed 'with all deliberate speed.'"); BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 108, at 140 ("Later on, people attributed elements of the theory of citizenship that developed during the 1960s and 1970s to *Brown*. In hindsight, *Brown* has come to represent this second theory of citizenship, even though that theory was not yet articulated in 1954 and would not be fully articulated for many years."); BALKIN, *LIVING ORIGINALISM*, *supra* note 69, at 312 ("*Brown v. Board of Education* has been continuously reinterpreted since it was first handed down, and there is a strong argument that it has been significantly modified, if not wholly transformed, by later decisions."); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 715–16 (2007) (analyzing the meaning given to *Brown* in *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 852 (W.D. Ky. 2004) and in *Parents Involved in Community. Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2788 (2007)).

more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law."<sup>142</sup>

The lesson of *Brown* is that sociological legitimacy can be acquired regardless of legal legitimacy.<sup>143</sup> As years go by, fractures in legality can be healed by strong public support.<sup>144</sup> Thus, today, as David Strauss writes, "[t]he lawfulness of *Brown* is the fixed point for the mainstream legal culture."<sup>145</sup>

#### D. *Imagining the Past*

In essence, Alexander Bickel depicted the Warren Court during the 1960s as understanding its legitimacy as based on the idea of a "bet on the future."<sup>146</sup> While Bickel did not formulate his claim in terms of a "legitimation theory," his picture of the Warren Court suggested that the Justices no longer understood their legitimacy as stemming from legal doctrinal expertise. Instead, the Court "bet on the future," relying on vindication of its egalitarian vision by future events, more than on reasoned argument, to achieve both normative and sociological legitimacy.<sup>147</sup> The Justices believed that adhering to the goal of progress toward an egalitarian society would ensure the

<sup>142</sup> Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

<sup>143</sup> See EUGENE GARVER, FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF 72 (2004) (arguing that persuading the legal community was a minor issue in *Brown* since Chief Justice Warren understood that it is the lay public "who decide whether the opinion is legitimate, and this particular decision had to be legitimate in order to be successful"); RICHARD A. POSNER, HOW JUDGES THINK 280–81 (2008) (noting that *Brown* "is the unusual constitutional case in which everyone agrees to waive legalist objections by observing that, yes, it was decided on political grounds, but they were good grounds and it would be pedantic to demand more"). Bork notes additionally that scholars used to worry that the Court would damage its authority if it acted politically. . . . The fact is quite the contrary. The Court is virtually invulnerable, and *Brown* proved it. The Court can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency. . . . Much of the rest of the Warren's Court's history may be explained by the lesson it learned from its success in *Brown*.

BORK, *supra* note 138, at 77.

<sup>144</sup> See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1789–90 (2007); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1722–23 (2001).

<sup>145</sup> STRAUSS, *supra* note 131, at 78.

<sup>146</sup> See ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970).

<sup>147</sup> Cf. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 84 (1999) (noting that the Warren Court's egalitarian vision as its source of normative legitimacy rose during the mid-1960s, as "the 'footnote 4' jurisprudence no longer provided sufficient authority for the Court's programmatic liberalism. Instead the Court began to move in the direction of taking the regime's programmatic liberalism as a constitutional mandate").

Court's legitimacy in the long run, even if they deviated from the standards of legality in the short run.<sup>148</sup> Bickel explained that "[i]f the bet pays off, whatever their analytical failings . . . it isn't going to matter that . . . [the Court's] reasoning is . . . faulty."<sup>149</sup> The future public would just be grateful to the Court for a more just society and forget the faulty legal reasoning.

In terms of legitimation theories, the Rehnquist Court is a direct progeny of the Warren Court. The way the Rehnquist Court "imagined the past and remembered the future"<sup>150</sup> offers the best way to detect its legitimation theory. The way a Court narrates its past is hardly the only possible way. Legal scholars offer various narratives for the Court's stream of decisions. Thus, a Court's choice of a certain storyline reflects not only on past Courts but mostly on the imagining Court.<sup>151</sup>

As Morton Horwitz notes, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>152</sup> the Rehnquist Court posited "two . . . decisional lines from the past century," culminating with *Lochner* and *Brown*, as the "twin peaks of modern constitutional law."<sup>153</sup> The plurality opinion concluded that a judgment must have legal legitimacy, otherwise it "would be no judicial act at all."<sup>154</sup> Yet, the "repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by *Brown*" is explained in terms of sociological legitimacy.<sup>155</sup>

This understanding of these two decisional lines corresponds well with the lessons of *Lochner* and *Brown* as presented above. The cumu-

---

148 BICKEL, *supra* note 146, at 12–14; BICKEL, *supra* note 75, at 27–28. *See also*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 46 (1996) ("Some Warren Court opinions did make no pretense of suggesting law and legal theory compelled the justices to reach their decision. . . . One popular quip described the apparent thought of the Warren Court majority: 'With five votes, we can do anything.'"); KURLAND, *supra* note 131, at xxii ("The Court's opinions have tended toward fiat rather than reason."). *See also id.*, at 37–38 (discussing the Warren Court's "reluctance to be guided by precedent in constitutional cases").

149 BICKEL, *supra* note 146, at 99.

150 *Id.* at 13 (citing Namier).

151 *Cf.* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 108, at 220 ("If *Bush v. Gore* becomes characteristic of the legal culture of the late twentieth century, it will be because the future remembers selectively and perpetually remakes the past in its own image.").

152 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming by a vote of 5-4 the "essential holding of *Roe v. Wade*," that abortions prior to fetal viability may not be criminalized).

153 Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 38, 71 (1993).

154 *Casey*, 505 U.S. at 865.

155 *Id.* at 864–65.



lative understanding rising from the way the Court in *Casey* imagined the *Lochner* and *Brown* decisional lines can be presented as follows:

DECISIONAL LINE	LEGALITY	SOCIOLOGICAL LEGITIMACY	RESULT
<i>LOCHNER</i>	+	-	REPUDIATED
<i>BROWN</i>	-	+	CONSOLIDATED

The combined lesson of *Lochner* and *Brown* taught the Court that in visible cases, legal legitimacy is less important than sociological legitimacy. On the one hand, decisions which the Court perceives as having a solid legal basis can still lack sociological legitimacy. The doctrinal merits of a legal position are hardly a guarantee of public support.<sup>156</sup> Fierce political attacks against these decisions and hostile public opinion may, in the end, compel the Court to switch its legal position, even if it is doctrinally well-established. Thus, eventually, the Court may deprive these legal decisions of their legal legitimacy.<sup>157</sup> On the other hand, an illegal decision can become sociologically legitimate, and in the end legal, with enough public support.<sup>158</sup>

Following this imagining of the past, the plurality opinion concludes that

A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both pro-

<sup>156</sup> See Bassok, *supra* note 7, at 363–66 (“[P]rincipled arguments that are persuasive in legal terms are not necessarily persuasive in the public discourse.”); Friedman, *supra* note 120, at 1387 (“The public rarely knows, and undoubtedly little cares, if there is a preexisting doctrinal basis for judicial decisions.”).

<sup>157</sup> The “Lesson of *Lochner*,” as Friedman explains, is whether or not judicial decisions have a jurisprudential basis, if they lack social legitimacy, judges will be attacked as acting unlawfully. . . . Social legitimacy is not separate from legal legitimacy, but can spill back upon it. When feelings of social illegitimacy are strong enough, the claim easily may be made that the judges are acting illegitimately in a legal sense.

Friedman, *supra* note 120, at 1447–48, 1452–54.

<sup>158</sup> See Klarman, *supra* note 144, at 1722–23. This was the destiny, not only of *Brown*, but also of the “switch in time” judgments. At the time of the “switch in time,” the overwhelming majority of the legal profession was stunned by the change in interpretation. From a legalistic point of view, “the switch in time” judgments were illegal, creating a rupture in legality that was bridged by sociological legitimacy. FRIEDMAN, *supra* note 39, at 231–32, 234, 236 (“The Constitution changed dramatically” without a constitutional amendment. “Yet there was absolutely no furor about this method of constitutional change at the time. This change too was plainly ‘political’ but it apparently was the sort of constitutional change with which the country was comfortable”).

found and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.<sup>159</sup>

*Roe*'s serious problems on the level of legality were not decisive.<sup>160</sup> As the Court saw it, in the end, all boils down to sociological legitimacy, and more precisely to the effect on the sociological legitimacy of the Court: "[O]verruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."<sup>161</sup> In essence, the joint opinion justified preserving the essential holding of *Roe v. Wade* in order to avoid another self-inflicted wound to the institutional legitimacy of the Court.<sup>162</sup> *Casey* thus included an explicit and rare admission that public opinion on the substantive issue as well as public confidence in the Court affected the decision.<sup>163</sup>

---

159 *Casey*, 505 U.S. at 869. *See id.* at 867 ("So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

160 *See, e.g.*, Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1437 (1979) (arguing that *Roe* is the "classic example of judicial usurpation and fiat without reason").

161 *Casey*, 505 U.S. at 864–65.

162 *See* Horwitz, *supra* note 153, at 36–37; Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 753 (1994) ("The decision in *Casey* not to overrule *Roe v. Wade* is predicated on the assumption that the Court currently has institutional legitimacy in the eyes of the American public, a legitimacy that protects the Court's right to make decisions about abortion but a legitimacy that could be lost through an ill-considered decision reversing *Roe*."); Wilson, *supra* note 68, at 1044–45 ("One reason Justice Souter affirmed *Roe* was to create the judicial constancy that would sustain overall public respect for the Supreme Court, even if many members of the public disliked the Court's protecting women's right to an abortion under the Constitution."); Dion Farganis, *Is the Supreme Court Bulletproof?* 57, 60 (June 2007) (unpublished Ph.D. dissertation, University of Minnesota) (on file with author) ("[In *Casey*,] justices' fears about the Court's institutional well-being appears to have controlled the decision . . . [w]hat the *Casey* plurality is saying, in effect is that for the good of the Court, *Roe* should not be overturned.").

163 *See* DAVIS, *supra* note 26, at 6 (The Court's decision [in *Casey*] hewed closely to extant public opinion on abortion . . . [T]he opinion of the three justices in the plurality even acknowledged that they were responding to the public's acceptance of the *Roe* decision."); POSNER, *supra* note 143, at 275–76 ("In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justices O'Connor, Kennedy, and Souter, in a joint opinion, let slip the mask . . ."); Tyler & Mitchell, *supra* note 162, at 733 ("To summarize, the *Casey* Court argues for the importance of acting in ways that maintain the Court's legitimacy in the eyes of the public and, through that legitimacy, the Court's authoritativeness."); Barry Friedman, *Benched*, NEW REPUBLIC, Sept. 23, 2009, at 7,8, available at <http://www.newrepublic.com/article/politics/benched> ("Then there was *Planned Parenthood v. Casey*, the decision that didn't overrule *Roe v. Wade*. Why not? It was hard to follow the plurality's convoluted explanation, but looming large was anxiety about the Court's public 'legitimacy . . .').

Following this logic, legality, at least in visible cases, can be reformulated in terms of sociological legitimacy. Sound legal reasoning is not the key for gaining sociological legitimacy. The order is reversed: sociological legitimacy is the key for achieving legality. If this reversed order seems familiar, it is because it is a depiction of how law is created by the political branches. This is “the great process by which public opinion passes over into public will, which is legislation.”<sup>164</sup> The adoption of a judicial legitimation theory built upon this idea can mean nothing other than the collapse of the separation between law and politics at least in visible constitutional cases.

Since legality and legitimacy are so closely intertwined, it is extremely hard to detect whether this reconceptualization of constitutional decision-making—not as the product of legal expertise (with sociological legitimacy as a byproduct) but rather as the consequence of public opinion (with sociological legitimacy as its aim)—has become a reality.<sup>165</sup> Legal legitimacy is determined by the Court. The Court can thus endow its judgments with a veil of legality even when they defy almost all of the standards of legality of their time.<sup>166</sup> Such judgments are still the lawful acts of judicial officers who made their decisions according to legal procedure. As such, these judgments are incorporated into the continuous strand of doctrine even when the entire contemporary legal community agrees that the judgments lack legal basis.<sup>167</sup> Indeed, even in these exceptional cases, in which there is agreement among jurists that the Court’s decision can be understood only as a retreat from legality, this retreat can be portrayed as a temporary move. The Court retreats for a short period of time in order to guard its sociological legitimacy, only so it can return to its usual adherence to the standards of legality.<sup>168</sup> Moreover, the wide discretion judges have in interpreting many of the constitutional norms allows public opinion to creep into legal doctrine in a “legal” manner.<sup>169</sup> Thus, no conflict between legality and legitimacy will sur-

---

164 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 178 (Kessinger Publishing 2004) (1859).

165 On the re-conceptualization, see Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 111 (2003).

166 See PAUL W. KAHN, THE CULTURAL STUDY OF LAW 28–29, 71–73 (1999).

167 See POSNER, *supra* note 143, at 41; Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444–47 (2001).

168 Cf. Bassok, *supra* note 7, at 365–66 (discussing Bickel’s notion of passive virtues that are aimed at allowing the Court to avoid deciding cases in order to both protect its sociological legitimacy and avoid corrupting the legal language).

169 *Id.* at 357–58 (presenting the argument that public opinion functions in certain areas of constitutional law as a legitimate legal argument).

face as public opinion becomes a constitutive part of legal decision-making; it will just become part of the “rule of law.”<sup>170</sup> The only barrier that can perhaps prevent such incorporation is a strong legal academy committed, over a long period of time, to doctrinally rigorous scrutiny of the Court’s judgments.<sup>171</sup>

#### IV. THE PUBLIC CONFIDENCE LEGITIMATION THEORY

At the beginning of the twentieth century, before the invention of public opinion polling, the connection between the Court’s legitimacy and public support for the Court was much less evident and thus public support was less crucial for the Court’s legitimacy discourse.<sup>172</sup> Since the 1880s and at least up until the invention of public opinion polls, the Court adhered to a legal expertise legitimation theory. This was arguably the natural choice for an unelected institution.<sup>173</sup> Yet, several decades afterwards, in a reality in which the public belief in Justices as legal experts has declined,<sup>174</sup> the ability of expertise to serve as the basis for the Court’s legitimacy has eroded.<sup>175</sup> While other unelected institutions, such as central banks, still base their under-

---

170 See Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89 (2005) (explaining how political preferences are incorporated to the idea of following the rule of law); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1423–24 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)) (“[B]ecause the Court itself is perceived as a source of legal authority, unlike the President, the Court will have more freedom of action to depart from the law without sanction.”).

171 Cf. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1989) (“Legislatures are subject to democratic checks upon their lawmaking. Judges less so, and federal judges not at all. The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teaching of the mother of consistency, logic.”).

172 See *supra* Part II.

173 See Gibson, *supra* note 1, at 284 (arguing that courts base their legitimacy on expertise since they lack an electoral connection); Jurgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 768–69 (2001) (“Again and again, civic republicans who are convinced that ‘all government is by the people’ bristle at the elite power of legal experts to void the decisions of a democratically elected legislature, although these experts themselves are not legitimated by a democratic majority but can only call on their technical competence in constitutional interpretation.”).

174 See Bassok, *supra* note 68, at 247–53 (describing the erosion in public perception of the Court’s expertise); Suzanna Sherry, *Democracy’s Distrust: Contested Values and the Decline of Expertise*, 125 HARV. L. REV. F. 7, 11 (2011) (“[M]any people no longer see judges as possessing legal expertise.”).

175 See WHITE, *supra* note 67, at xii (arguing that the Court needed to develop a new basis of legitimacy that does not deny indeterminacy but also disassociates the Court from partisanship).

standing of their legitimacy on expertise,<sup>176</sup> this path has become less and less available for the Court. Economics is still considered, in the public mind, as an area of expertise. Law, at least in highly salient cases, has lost much of its expert allure.<sup>177</sup>

According to the “public confidence” legitimation theory, the Court maintains its legitimacy as an institution by adhering, in visible cases, to the position that ensures public confidence for the Court. In the absence of public belief in its expertise, adhering to public opinion rather than to the directives of an expertise-based justification theory may seem like the only viable tactic to ensure that the Court can maintain its enduring public support.<sup>178</sup> Since reasoning that pleases public opinion may be different than reasoning that adheres to the demands of doctrinal coherency or consistency,<sup>179</sup> it is unsurprising that in visible cases the Rehnquist Court’s legal reasoning has been described as doctrinal disarray.<sup>180</sup>

---

176 See Bassok, *supra* note 68, at 270–71 (“The situation of Federal Reserve Bank is telling in this regard. Whether due to a lack of awareness of questions of accountability or a belief in apolitical expertise in the field of economics, the public supports this institution even though it is not elected and its policy decisions, at times, contradict public opinion.”); Gibson, *supra* note 1, at 284 (“Even in a democratic society, a wide variety of public-policy decisions are turned over to experts—for instance, much of the control of the economy is placed within the purview of relatively unaccountable institutions. Such experts are subject to limited accountability; they are given the freedom to ‘do the right thing’ within the context of their expertise.”).

177 See ENGEL, *supra* note 39, at 293 (arguing that due to the decline of the belief in a fix and singular legal meaning, “the Court seemed to lose any special claim to interpretive authority”).

178 Cf. ENGEL, *supra* note 39, at 15 (“[T]he Court has recently striven to justify its authority of majoritarian grounds. Justices have emphasized the democratic credentials of their holdings, stressing how they follow majoritarian trends, however defined, evident in the broader polity.”); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 601 (1993) (“At any rate, examining the sources of constitutional decision makes increasingly apparent the extent to which judges seek to appeal to majoritarian values, if not to rely upon them entirely.”); Horwitz, *supra* note 153, at 40 (explaining that the plurality opinion in *Casey* that focused on the decision’s effects on the public support of the Court “may also be symptomatic of a crisis of legitimacy in constitutional thought in which the generally accepted paradigms and modes of thought are no longer felt capable of yielding convincing solutions to constitutional questions”).

179 See, e.g. Michael L. Wells, “Sociological Legitimacy” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1014–15 (2007) (“Badly-reasoned opinions may lack legal legitimacy, yet succeed in winning sociological legitimacy. There may be a difference between reasons that will please the Court’s audience and those that do the work of deciding cases.”).

180 Compare Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291 (2005) (arguing that there is no doctrinal logic in the current constitutional disarray) with Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT. 431, 436–37 (2009) (“Tribe’s abandonment of his treatise seems to reflect a newly developed suspicion that there is no order obscured by the disorder.”).

The method for evaluating expert knowledge cannot be democratic. Expert knowledge cannot be determined by the indiscriminate engagement of the public.<sup>181</sup> As Robert Post stresses, “[t]he creation of reliable disciplinary knowledge must accordingly be relegated to institutions that are not controlled by the constitutional value of democratic legitimation.”<sup>182</sup> Otherwise, a danger lurks that questions of expertise will be answered according to public opinion rather than according to disciplinary criteria. Yet, a Court that adheres to the public confidence legitimation theory has created a situation in which legal expertise capitulates to the demands of public opinion.<sup>183</sup>

In its endeavor to maintain its legitimacy, the Rehnquist Court’s institutional habit was to decide cases with a view of preserving public confidence in the Court. The Court is an unaccountable institution, but direct accountability is not a necessary condition for maintaining public support. The public awards the Court support since the public confidence legitimation theory ensures that the Court is in sync with public opinion on the issues decided in salient cases most of the time.

The public confidence legitimation theory does not mean that the Court is interested solely in corresponding to public opinion on the issues decided in salient cases. Rather, it is interested in preserving public confidence in the Court. Yet, over time, the Court cannot repeatedly fail the public opinion test in salient cases without undermining the logic of the public confidence legitimation theory. A Court that makes too many decisions contrary to public opinion risks eroding its enduring public support—or so claims the public confidence legitimation theory.<sup>184</sup>

## V. THE MAJORITARIAN COURT THESIS REVISITED

While many scholars now agree that the Rehnquist Court’s decisions were in sync with public opinion as expressed in public opinion polls,<sup>185</sup> this correlation does not necessarily confirm that the

---

181 ROBERT C. POST, *EXPERTISE AND ACADEMIC FREEDOM* 29 (2012).

182 *Id.* at 31.

183 See Bassok, *supra* note 7, at 362–66 (discussing Bickel’s answer to the danger of capitulating the legal language to the demands of public opinion).

184 See CLARK, *supra* note 13, at 18; Klarman, *supra* note 144, at 1751 (“[C]onstitutional rulings that contravene overwhelming public opinion, at least on salient issues, do jeopardize the Court’s standing. No doubt cognizant of this reality, the Justices rarely have tempted fate by frustrating the wishes of dominant majorities.”).

185 See, e.g., FRIEDMAN, *supra* note 39, at 364–65 (“By the end of the Rehnquist Court, it was a widely acknowledged fact that the Court was mirroring public opinion.”); ROSEN, *supra* note 40, at 4 (“How did we get to this odd moment in American history where unelected

Rehnquist Court adopted the public confidence legitimation theory. The Court's decisions may correlate to majority opinion, but the causal mechanism may not be the legitimation theory mechanism.

Scholars have offered various mechanisms to explain how the Court's decisions correspond to public opinion.<sup>186</sup> For example, the sync may be achieved through the appointment mechanism. As Robert Dahl first suggested, the appointment of new Justices to the Court, by the President with the consent of the Senate, ensures that periodic partisan realignments in the dominant governing coalition will be reflected in personnel changes in the Court.<sup>187</sup>

Scholars argued in later studies that Dahl's "dominant political coalition," which controls the Court's composition, serves as a proxy for the majority's views. In this manner, the sync between public opinion and the Court's decisions is maintained.<sup>188</sup> Thus, it is the changing makeup of the Court that ensures the correspondence of its decisions to public opinion, not its legitimation theory. Indeed, even if the Court's adjudication is directed somehow by public opinion, the mechanism is not necessarily a legitimation theory.

Yet, the "public confidence" legitimation theory is able to explain a specific conundrum regarding the sync with public opinion during the Rehnquist Court era that most other mechanisms fail to explain. The eleven-year period from 1994 through 2005 was the longest the Court had gone without a change in membership since the Court's size was fixed at nine Justices in 1869.<sup>189</sup> In addition, no serious public backlash occurred during those years, and the other two branches' "weapons to control the justices look[ed] to have been ruled off the table or lost their force."<sup>190</sup> However, during this period, the Court

---

Supreme Court Justices sometimes express the views of popular majorities more faithfully than the people's elected representatives?").

186 See Pildes, *supra* note 117, at 126–42 (examining the different mechanisms offered).

187 See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); see also KECK, *supra* note 81, at 3 (examining "political explanations" for Court's decisions that followed Dahl's line of thinking).

188 See, e.g. Friedman, *supra* note 178, at 612 ("Although federal judges are not elected, they are appointed by Presidents who stand for popular election. Judicial appointments often mirror the popular will that elected a President."); FARBER & SHERRY, *supra* note 84, at 148 (contending that today, electoral responsiveness in Supreme Court appointments follows de facto from the politicization of the nomination and confirmation processes).

189 See Linda Greenhouse, *Access to Justice: The Social Responsibility of Lawyers: Change and Continuity on the Supreme Court*, 25 WASH. U. J.L. & POL'Y 39, 39 (2007).

190 FRIEDMAN, *supra* note 39, at 376; see also H.W. Perry, Jr., *Constitutional Faith, Constitutional Redemption, and Political Science: Can Faith and Political Science Coexist?*, 71 MD. L. REV. 1098, 1115 (2012) ("There have been virtually no serious attempts to 'punish' the Court for many years by things such as impeachment, changing the size of the Court, jurisdiction stripping, or even budget reduction.").

was more in line with public opinion than ever before.<sup>191</sup> This alignment between the Rehnquist Court's decisions and public opinion posed a challenge for mechanisms that rely on the appointment process or on public backlash.

In light of this conundrum, Barry Friedman presented a theory of "quiet equilibrium," or "marriage," between the Court and public opinion. In his book, Friedman offers an exhaustive account of "how public opinion has influenced the Supreme Court" (as the subtitle of his book proclaims) throughout its history. He views the effect of public opinion as a continuous story, structurally unchanged throughout the Court's entire history.<sup>192</sup> While the Court has always been attentive to public opinion, only recently, after more than two hundred years, have the public and the Court understood how to interact with each other effectively. Today, "[t]he justices don't actually have to get into trouble before retribution occurs; they can sense trouble and avoid it."<sup>193</sup> Yet, Friedman fails to recognize the great shift in the relationship between the Court and public opinion due to the entrance of scientific public opinion polls to the arena.<sup>194</sup>

Public-opinion culture is so deeply ingrained in the current American social imaginary that it is hard to detect its influence.<sup>195</sup> For example, it is now natural in the media to speak of the position of the American people in a certain controversy, while referring to results of public opinion polls as evidence. This way of perceiving the world was completely unnatural a few decades ago and completely impossi-

---

<sup>191</sup> See, e.g., FRIEDMAN, *supra* note 39, at 353, 358–59, 376.

<sup>192</sup> See Richard Primus, *Response: Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1208–09 (2010) ("In Friedman's telling, Justices throughout history have decided cases by tempering their first-order preferences with their knowledge, or at least their best guesses, as to what the public will bear."); see also ROSEN, *supra* note 40, at 7 ("[T]hroughout American history, judges have tended to reflect the wishes of national majorities and have tended to get slapped down on the rare occasions when they have tried to thwart majority will.").

<sup>193</sup> FRIEDMAN, *supra* note 39, at 376. See Barry Friedman, *Reply: The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1245 (2010) ("[I]f the system is in equilibrium, little will be observed in the way of overt struggle.").

<sup>194</sup> However, at times, it does seem that Friedman detects the occurrence of a change though not its causes. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 336 (1998) ("It might strike many as paradoxical, to say the least, that the scope of constitutional protections has been defined so often with reference to the preferences of popular majorities. Yet, that has been the result of the Court's adherence to the 'majoritarian paradigm' that came to dominate constitutional law in the latter half of the twentieth century." (emphasis added)).

<sup>195</sup> For a discussion of the notion of social imaginary and the manner in which it blocks our horizons, see TAYLOR, *supra* note 3.



ble before the invention of public opinion polling.<sup>196</sup> Thus, Friedman views the past through the current culture, failing to detect the great shift in the relationship between public opinion and institutions due to the rise of the public opinion culture since the 1980s. For example, he finds it hard to explain the Warren Court's judgments that went against public opinion, such as the "Communist cases" and the school prayer cases.<sup>197</sup> Rather than adopt Bickel's "bet of the future" diagnosis for an era before the rise of public opinion culture, he resorts to claims of "miscalculation of public sentiments" by the Court<sup>198</sup> that expose his theory to accusations of unfalsifiability. According to this claim, decisions by the Court contrary to public opinion can still be explained according to Friedman's theory as a miscalculation of public reaction by the Court. Thus, no decision by the Court, no matter how countermajoritarian it would be, can falsify his theory.<sup>199</sup>

Tom Clark presents an empirical study that explains the sync between public opinion and the Court's decisions. Clark argues that the introduction of Court-curbing bills serves as a signal of waning public support for the Court.<sup>200</sup> The Court learns about public opinion mainly from Court-curbing threats emanating from Congress.<sup>201</sup> A rise in the number of these signals of public discontent leads to judicial self-restraint, according to Clark.<sup>202</sup>

Clark's theory is one example of a very dominant approach: the "strategic behavior model." The strategic behavior approach portrays

196 See Bassok, *supra* note 7, at 337–39 (describing the shift from a period in which "Congress was public opinion" to the period in which "Congress was no longer considered as the voice of the popular will, rather, opinion polls were").

197 See FRIEDMAN, *supra* note 39, at 238, 250, 264.

198 See *Id.* at 250 ("Then, in what only could have been a miscalculation of public sentiments, during the 1956 term the Court handed down twelve decisions in domestic security cases, every single one of which defended the rights suspected Communists and fellow travelers."); *id.* at 252–53, 264–265 ("The justices' surprise at the public backlash suggests that they had miscalculated public opinion on the issue [of school prayer] . . .").

199 See Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 783 (2011) (criticizing Friedman's theory as nonfalsifiable thus preventing "assessment of the theory's validity").

200 CLARK, *supra* note 13, at 20–21 ("Court-curbing . . . may simply be a proxy for a number of elements in the political environment. Other forms of information come to the Court about public support, types that are less easily quantifiable.").

201 *Id.* at 18–19 (arguing that "best signal for the Court" of public opinion are Court-curbing proposals in Congress); *id.* at 193–94 ("I have argued that Congress serves an important intermediary role, communicating public opinion to the Court."); *id.* at 251–52, 256–57, 266–67 ("Court-curbing bills are, I believe, the primary institutional signal that conveys information to the Court about its public legitimacy.").

202 *Id.* at 175–80, 187 ("The Supreme Court responds to Court-curbing by exercising self-restraint in its constitutional cases . . ."); *id.* at 193 ("The results of the statistical analysis provide evidence that a concern for its institutional legitimacy motivates the Supreme Court to exercise self-restraint.").

the Justices as strategic players, who anticipate the reaction of the public and other majoritarian political players and adjust their decisions accordingly.<sup>203</sup> This approach and the public confidence legitimation theory share a picture of the Court as an institution concerned for its institutional legitimacy and public prestige.<sup>204</sup> Yet, according to the public confidence legitimation theory, the Court's main source of knowledge of its public support is public opinion polls measuring that support. Clark ignores opinion polls as an independent source of data that affects the Justices' mindset,<sup>205</sup> and argues that "the Supreme Court, although it has beliefs about public opinion, is less well informed about public support for the Court than is Congress."<sup>206</sup> Yet, one important effect of the invention of public opinion polls is the Court's ability to cut the intermediary to public opinion. No longer is Congress the sole representation of public opinion.<sup>207</sup> The Court no longer needs to infer the status of its public support from the actions of the elected branches. Moreover, these branches cannot claim a monopoly anymore in representing public views of the Court. The Court now has an indicator of its popular support that is public and considered reliable. Indeed, public opinion polls currently serve as mechanisms of legitimation in public discourse, while Clark views them as mere measurement tools.

The idea that public opinion polls have shifted the institutional balance of power by creating an independent indicator of public support for the Court is completely absent from Clark's account. Much like Friedman, Clark describes the relationship between the Court and public opinion as a story in which the rise of public opinion polls does not cause any shift in the institutional balance of pow-

---

<sup>203</sup> See, e.g., Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 161–63 (2012) (discussing the strategic behavior explanation).

<sup>204</sup> See CLARK, *supra* note 13, at 187 ("The evidence paints a picture of a Court concerned for its legitimacy and learning from the political environment about how treacherous the political waters may be."); *id.* at 250, 258 (distinguishing his work from the work of scholars who argue that the Court is interested in implementing its policies).

<sup>205</sup> See *id.* at 94, 267 (specifying the sources from which the Court learns of his public support without acknowledging the role of public opinion polls).

<sup>206</sup> *Id.* at 87.

<sup>207</sup> See Fried & Harris, *supra* note 18, at 341 (describing the situation before the invention of public opinion polls when Congress was public opinion). Cf. CLARK, *supra* note 13, at 202 n.44 ("Congress, I believe, is most closely tied to the public and therefore offers perhaps the most carefully calibrated representation of public opinion."); *id.* at 257, 260–61 ("[T]he influence of public opinion of the Court is mediated by elected representatives, who can serve to communicate the breadth and depth of public discontent with the Court.").

er.<sup>208</sup> As other strategic behavior models, Clark's model suggests that the Rehnquist Court's orientation toward public opinion was no different than that of previous Courts. In my depiction of the Court, there were periods in which the Court held a legitimation theory that did not lead it to follow public opinion.

Moreover, the strategic approach repudiates the claim that ideas have a substantial influence over the Court's adjudication. According to this approach, external material incentives, rather than legal-interpretive schemes, are the major driving force in keeping the sync between public opinion and the Court's adjudication.<sup>209</sup> I agree that theories of interpretation by themselves are not central to explaining the Court's adherence to public opinion.<sup>210</sup> However, I argue that changes in the Court's understanding of how it gains public support are crucial for explaining such an adherence. Thus, changes in ideas concerning public support for the Court are central for understanding changes in the Court's adjudication (including changes in its interpretative theories).<sup>211</sup> For example, the shift in the Court's legitimation theory fits the depiction of the Rehnquist Court as minimalist both in its tendency since 1995 to decide fewer cases and to avoid controversial salient issues,<sup>212</sup> and in its inclination to decide salient cases on a narrow and shallow basis, leaving many issues of basic

---

208 See CLARK, *supra* note 13, at 193 ("The statistical analysis of judicial review from 1877 through the present demonstrates that when Court-curbing bills are introduced in Congress, the justices will exercise self-restraint by attenuating their use of judicial review to invalidate federal legislation."); *id.* at 259 ("The existing research considering how public support for the judiciary affects the balance of power between courts and elected branches has not considered the implications of the elected branches' informational advantage over the courts in matters of public opinion . . .").

209 See Pildes, *supra* note 170, at 1404–05 (describing how rational-choice theories understand the behavior of judges and other public officials wholly in terms of the material incentives rather than in terms of internal sense of doctrinal legal constraint).

210 See BALKIN, LIVING ORIGINALISM, *supra* note 69, at 19, 91–93 ("Generally speaking, judges have responded to changing social and political mobilization for the institutional reasons I have identified above, and they have done so regardless of their normative interpretative theories.").

211 See Bassok, *supra* note 68, at 266–67 (explaining the rise of originalism as a result of the anxiety from the decline of the Court's image as an expert).

212 See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 578–85 (2003) (arguing that after 1994, the Rehnquist Court avoided "culture war" issues and focused on less salient issues such as Federalism; noting that the Court's shrinking docket "is a central mystery of the second Rehnquist Court" as the Court reduced its power to influence policy). See also *id.* at 637–38 ("[T]he Court turned away from social issues . . . because Justices O'Connor and Kennedy found the costs of continuing to engage with these issues in terms of public opinion to be unacceptably high.").

principle undecided.<sup>213</sup> Attentive to public confidence for the Court more than in previous periods, the Rehnquist Court attempted, according to this line of thought, to avoid decisions and forms of reasoning that would jeopardize its enduring public support.

Several other scholars have exposed the manner in which the Court has incorporated public opinion into legal discourse as a legitimate source for constitutional interpretation.<sup>214</sup> Utilizing indeterminate phrases in the Constitution, the Court is able to imbue public opinion into its interpretation and thus invalidate a “statute if it no longer reflects popular opinion or if the trends in popular opinion are running against it.”<sup>215</sup> In that manner, the Court can ensure correspondence in certain areas of law between its decisions and public opinion. As opposed to these scholars, my claim is not that public opinion became a legitimate source in professional constitutional discourse. I am not searching for the legal channels through which public opinion infiltrates and flows into the legal discourse. My argument is not based on a change in the sources for deciding cases. I argue that there has been a change in the institutional dynamics following the rise of public opinion polls that measure public support for the Court and in the way the Court understands how it gains public support. The shift in the Court’s legitimation theory may explain why the Court opened routes for public opinion to enter constitutional discourse as a legitimate constitutional source.

#### CONCLUSION

At the end of the nineteenth century, James Bryce predicted that if the “will of the majority of citizens were to become ascertainable at all times . . . public opinion would not only reign but govern.”<sup>216</sup> In

---

213 See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* xi (1999) (“The current Supreme Court embraces minimalism. Indeed, judicial minimalism has been the most striking feature of American law in the 1990s.”).

214 See, e.g., Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 *REV. CONST. STUD.* 1, 6, 8–9, 18–19 (2007).

215 See David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 *U. CHI. L. REV.* 859, 893–95 (2009) (demonstrating how over the last generation or so, the Court accommodates trends in public opinion through interpreting open-ended text such as the Cruel and Unusual Punishment Clause of the Eighth Amendment or through the application of the “intermediate scrutiny” test in judging sex classification under the Equal Protection Clause); see also Primus, *supra* note 214, at 20–28 (describing how public consensus can serve as a referent in constitutional decision-making either through indeterminate concepts such as “equal protection” or “standing on its own bottom” as an “input into constitutional analysis” which affects constitutional meaning).

216 BRYCE, *supra* note 4, at 919.

1962, Bickel wrote that “[s]urely the political institutions are more fitted than the Court to find and express an existing consensus—so long, at least, as the science of opinion sampling is no further developed than it is.”<sup>217</sup> Public opinion still did not reign, and Bickel still adhered to the position that the Court is a unique institution in that “insofar as is humanly possible,” it “is concerned only with principle” and not with “electoral responsibility.”<sup>218</sup> Bruce Ackerman has recently showed that Bryce’s prediction has become reality because polls “not only supplement, but displace, election returns as the authoritative democratic legitimator.”<sup>219</sup> The creation of a “public opinion culture” has not left the Court untouched. Opinion polls’ new status as democratic legitimators has changed the balance of power between the branches. For the first time in history, a metric that is considered by the public and the other branches as a reliable measure of public opinion continually demonstrated for several decades that the “Court has consistently been the most favored institution of government.”<sup>220</sup> Public support as a basis of legitimacy is no longer the monopoly of the elected branches. The Court can now rely, even if only tacitly, on public support for the Court as a viable, independent basis of legitimacy.<sup>221</sup>

In addition, the rise in saliency of the indeterminacy difficulty exposed that legal expertise by itself does not equip the Court with the ability to find the correct answer in visible cases. The combination of the Court’s inability to base its legitimacy on expertise and public support for the Court as a new available source of legitimacy brought a great shift in the Court’s self-understanding of its sources of legitimacy. By the time of the Rehnquist Court, the Court was unable anymore to adopt an expertise-based normative justification, such as the *Carolene Products* criterion,<sup>222</sup> as its guiding star.<sup>223</sup> Instead, in sali-

---

217 BICKEL, *supra* note 7, at 239.

218 *Id.* at 25–26, 68–69.

219 ACKERMAN, *supra* note 19, at 14. See Fried & Harris, *supra* note 18, at 321 (“By the turn of the twenty-first century, bureaucrats and politicians in the United States were governing with the polls.”).

220 JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 99 (2002).

221 Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 148–49 (1999) (noting that since the Burger Court era, the Court took the “opportunity to act relatively freely to develop its own constituency of support”).

222 Cf. John Hart Ely, *Supreme Court, 1997 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5–6 (1978) (“Generally speaking, the Warren Court was a *Carolene Products Court*, centrally concerned with assuring broad participation, not simply in the processes of government but in the benefits generated by those processes as well.” (internal footnote omitted)); KECK, *supra* note 81, at 72 (“[B]oth contemporary critics and sub-

ent cases, the Court chose a different criterion, made available by the rise of opinion polls: public support for the Court. The Court's sociological legitimacy became its guiding star.

Thus, the combination of the rise of public polling, the rise of saliency of the indeterminacy of constitutional norms, and the lessons the Court learned from unrepresentative, unique periods during which the Court was "a central player in the dominant issue of the times,"<sup>224</sup> created the conditions for the rise of the public confidence legitimation theory during the Rehnquist era. The Court became the perfect institution of "stealth democracy," responsive to public opinion without requiring the messy democratic process to receive input from the public.<sup>225</sup> Ironically, a Court guided by the public confidence legitimation theory allows the public to obtain its preferences while avoiding the daily confrontation with the painful responsibility to deliberate and decide its own destiny.

---

sequent historians have described the Warren Court by reference to Stone's influential footnote from *United States v. Carolene Products . . .*").

223 Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 13–14 (1996) (noting that the Rehnquist Court as a whole, as well as many of its individual Justices, refused to choose an interpretative approach to guide its decisions on constitutional issues).

224 Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 42–43 (2006) ("This is what makes the New Deal era different from most of what has transpired since. . . . In the 1930s, unlike in later times, there can be little doubt that the most visible part of the Court's agenda was closely aligned with the nation's. . . . [I]t is clear that we have never come anywhere near the New Deal alignment.").

225 HIBBING & THEISS-MORSE, *supra* note 220, at 4 ("People do not want responsiveness and accountability in government; they want responsiveness and accountability to be unnecessary."); *id.* at 7 ("The processes people really want would not be provided by the populist reform agenda . . . ; it would be provided by a stealth democratic arrangement in which decisions are made by neutral decision makers who do not require input from the people in order to function.").