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BEYOND THE HORIZONS OF THE HARVARD FOREWORDS

OR BASSOK*

ABSTRACT

American constitutional thought is controlled by certain paradigms that limit the ability to think beyond them. A careful reading of the *Harvard Law Review* Forewords—the "tribal campfire" of American constitutional thinkers—is one way to detect these paradigms. Based on reading these Forewords since their inception in 1951 and until 2019, I track how the concept of judicial legitimacy has been understood over the years. My analysis shows that in recent decades an understanding of judicial legitimacy in terms of public support has risen to the status of a controlling paradigm. While this understanding is currently considered commonsensical, it stands in tension with an understanding of judicial legitimacy in terms of expertise that goes back to Alexander Hamilton and dominated the Forewords up until the 1960s. Rather than viewing the Supreme Court as requiring public support for its legitimacy, according to the Hamiltonian view, the Court requires "merely judgment." Tracking the genealogy of judicial legitimacy in the *Harvard* Forewords also shows how the shift from Hamilton's understanding of judicial legitimacy to the current understanding was connected to the invention of public opinion polling. This invention allowed for the first time in history to measure public support for the Court. Before this invention, with only elections as the accepted tool for measuring public support, understanding the Court's legitimacy in terms of public support was impossible. With the rise of opinion polls as an authoritative democratic legitimator, the concept of judicial legitimacy changed as is reflected in the *Harvard* Forewords.

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CONTENTS

I. INTRODUCTION

It is hard for scholars to see beyond the horizons of the paradigms controlling their discipline, even when it comes to the authors of the *Harvard Law Review* Forewords (hereinafter Forewords). Disciplinary paradigms are akin to a lens through which members of a profession see reality.[1] Because the Forewords reflect the current state of American constitutional thought,[2] tracking a concept throughout the Forewords allows us to expose the paradigms controlling current American constitutional thinking.

In this Article, I focus on one paradigm that received its most explicit statement in Pamela Karlan's 2011 Foreword titled *Democracy and Disdain*.[3] Karlan's Foreword

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[1] *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 36–37 (2d ed. 1970). This article follows Kuhn's use of the term "paradigm" as "way of seeing" phenomena in a certain field. *See* Margaret Masterman, *The Nature of a Paradigm*, *in* 4 CRITICISM AND THE GROWTH OF KNOWLEDGE 59, 59–79 (Imre Lakatos & Alan Musgrave eds., 1970).

[2] *See* Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 463 (1994–95) (discussing the unique status of the *Harvard* Forewords and noting that "[w]ithin the community of scholars of constitutional law the 'Forewords' are widely taken to be good indications of the state of the field.").

[3] *See Pamela S. Karlan, The Supreme Court, 2011 Term – Foreword: Democracy and Disdain*, 126 *HARV.* L. REV. 1 (2012).

is controlled by the idea that the Supreme Court requires enduring public support to function properly. While Karlan presents this idea as an uncontested truth of constitutional thought, I argue that it is merely a product of the current age in American constitutional thinking. In order to show that Karlan does not merely state a fact or an inherent principle of constitutional system, I expose the history of this idea as it is manifested in the *Harvard* Forewords. In earlier Forewords—as perhaps best exemplified by Owen Fiss's 1978 Foreword—authors did not consider public support for the Court as a requirement for its proper function.[4] By describing a period in which this paradigm did not control American constitutional theory, I dispel the claim that the connection between judicial legitimacy and public support is an inherent truth of constitutional thinking.[5]

Furthermore, I show that this paradigm's current hold over American constitutional thinking is a result of certain contingent historical conditions that only arose in recent decades. One central condition that enabled the rise of this new paradigm was the invention of public opinion polling and the measurement of support for the Court. Therefore, this paradigm is not an inherent truth that is derived analytically from constitutional "structure" or logic. Rather, it is a contingent understanding that stems from certain conditions that currently persist in the US.[6]

The Article proceeds as follows: I begin with a brief discussion of the methodology used for demonstrating that a conceptual change has occurred. Next, I juxtapose Karlan's view that the Court's source of legitimacy is public support with Alexander Hamilton's view that the Court's source of legitimacy is expertise. Based on the preparatory work done in these two sections, I am able in the following section to identify a shift in the understanding of judicial legitimacy in the Forewords. In this section, I conduct a genealogical journey through the pages of all the Forewords published in Harvard Law Review since its inception in volume 64 (1951)[7] until

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4 *See* Owen M. Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979).

5 *Cf.* Colin Koopman, *Foucault Across the Disciplines: Introductory Notes of Contingency in Critical Inquiry*, 24 HIST. HUM. SCIS 1, 6–8 (2011) ("Foucault's way of showing that discipline is optional was to show how discipline has been contingently made up in such a way as to be potentially revisable.") (emphasis omitted).

6 *Cf.* Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. AND THEORY 3, 52–53 (1969) ("A knowledge of the history of such ideas can then serve to show the extent to which those features of our own arrangements which we may be disposed to accept as traditional or even 'timeless' truths may in fact be the merest contingencies of our peculiar history and social structure.") (footnote omitted).

7 The Foreword published in 1951 of the 1950 Supreme Court's term is the first one titled "Foreword" and signed by an author. Louis Jaffe, *The Supreme Court, 1950 Term – Foreword*, 65 HARV. L. REV. 107, 107 (1951). A footnote states that "[t]he purpose of this Note is to analyze only a few selected areas of the law which received substantial attention during the October Term, 1950." *Id.* A year earlier, a similar footnote appeared in a section titled "The Supreme Court, 1949 Term." *See The Supreme Court, 1949 Term*, 64 HARV. L. REV. 114, 114 (1950). However, that section was not titled "Foreword," nor was it signed by an author. *Id.* I read this note to confirm it does not disprove my thesis, but I do not consider it a "proper" Foreword. The 1950 article is the first proper Foreword. The 1949 Foreword began the transition to the

volume 133 (2019)[8]. I analyze Forewords written prior to the switch in the understanding of judicial legitimacy, those written during the switch, and those which were written after it had occurred. In my discussion, I use two markers to detect this change. The first marker is Hamilton's famous dictum from *The Federalist No. 78*. The second is the countermajoritarian difficulty. As I explain in the methodological discussion that follows this section, if a change in understanding judicial legitimacy did occur, it will have manifested itself in the discussions of these markers in the Forewords. Before concluding, I discuss Larry Kramer's Foreword[9] which presents a challenge to my argument.

In this Article, I do not attempt to elaborate on the consequences of the shift in understanding judicial legitimacy.[10] I merely aim to show how the understanding of this construct has undergone a radical shift in recent decades.

II. THE METHODOLOGY OF DEMONSTRATING A CONCEPTUAL CHANGE

A depiction of a conceptual change means tracking the genealogy of a concept and showing that at a certain period the understanding of that concept changed. Take, for example, the shift in how we understand the concept of being "smart" today in comparison to Biblical times. The Bible tells us that King Solomon was considered the smartest of all people, because, among other things, "he uttered 3,000 proverbs."[11] Today, a person like Solomon, who offers a proverb for every situation, would surely not be considered the smartest of all. Based on this example, Neil Postman argues that the meaning of the word "smart" has altered as a result of technological innovations.[12] In an oral society, in which memory had the utmost importance, "smart" meant the ability to remember things. After the invention of the printing press and more so since the advent of the internet, memory is far less central for our understanding of what it is to be smart.[13]

The switch from an oral society to a print society is the explanation Postman offers to the shift in the meaning of the word "smart." A theory explaining a conceptual shift is one way to persuade that a conceptual shift has occurred. Such explanation makes sense of the discrepancy between using "smart" to describe King Solomon and using the word "smart" in current times. Yet, an explanation—even a persuasive one—is not enough to demonstrate that a shift has occurred. Counterexamples can be easily found. One such counterexample is our current treatment of masters of the game of chess as

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Foreword model as before it there was no section in the *Harvard Law Review* focused on reviewing the last Court's term.

8 Dorothy E. Roberts, *The Supreme Court, 2018 Term – Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

9 Larry D. Kramer, *The Supreme Court, 2000 Term – Foreword*: *We the Court*, 115 HARV. L. REV. 5 (2001).

10 For such an attempt, see Or Bassok, *The Arendtian Dread: Courts with Power*, 30 RATIO JURIS 417, 424–27 (2017).

11 1 *Kings* 4:32 (Revised Standard).

12 *See* NEIL POSTMAN, AMUSING OURSELVES TO DEATH 25 (1986).

13 *See id.*

very smart people. This attitude is still prevailing even though there are many who argue that after all possible chess moves have been charted by computers, the game at the highest levels has become, in many ways, a contest of memory.[14] Thus, in the context of chess masters, even in the current era, we still consider people with high memory skills as smart. Counterexamples show that, plausible as it may be, an explanation for why a conceptual shift has occurred does not equate to demonstrating that such a shift has indeed occurred. For this reason, my explanation for the change in understanding judicial legitimacy which relies on the rise of the public opinion polling technology is not enough. I need to demonstrate that such change has actually occurred.

One technique for demonstrating a conceptual shift is to offer a "thick" description of the uses of the concept in question before, during, and after the period in which the conceptual shift has allegedly occurred.[15] Take for example Samuel Moyn's book, *The Last Utopia: Human Rights in History*.[16] Moyn argues that human rights "emerged in the 1970s seemingly from nowhere."[17] Yet, Moyn obviously cannot argue that the concept of "human rights" was born in the 1970s as it existed in many languages for many years prior to its "emergence" in the 1970s. Moyn's thesis is about a change in the way we understand human rights as a concept after the 1970s. His main rival is the conventional thesis according to which the shift in understanding human rights is a result of the lessons of the Second World War.[18]

Moyn's use of thick description was heavily criticized.[19] Perhaps most prominently, it was claimed that his thesis of "discontinuity" between how human rights were understood before and after the 1970s is based on a selective narration of the past to fit his thesis.[20] For example, Philip Alston argues that Moyn's "thesis is driven with such single-mindedness, selectivity, and lack of nuance that it is essentially a polemic . . . ."[21] Christopher McCrudden speaks of "an historical essay

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14 *See* David M. Lane & Yu-Hsuan A. Chang, *Chess Knowledge Predicts Chess Memory Even After Controlling for Chess Experience: Evidence for the Role of High-level Processes*, 46 MEMORY & COGNITION 337 (2018) (examining various theories on the role of memory in playing chess).

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16 SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

17 *Id*, at 3.

18 *See, e.g.*, 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. 16, 42 (2002) ("We are experiencing a human rights revolution as a result of the Second World War and the Holocaust.").

19 In addition to his narrative-based description, Moyn included in his book as an Appendix a graph that documents the amount of news items in the *New York Times* and the *London Times* between 1785 and 1985 that included the phrase "human rights." MOYN, *supra* note 16, at 231.

20 Philip Alston, *Does the Past Matter? On the Origins of Human Rights: The Slave Trade and the Origins of International Human Rights Law*, 126 HARV. L. REV. 2043, 2066 (2012).

21 *Id.*

of a purely narrative variety,"[22] and that Moyn "fails to join the dots."[23] Indeed, in reading Moyn's relatively short narrative that covers a very long period, the reader is left pondering whether Moyn did not force his thesis on the vast amount of historical material, and cherry-picked the evidence so as to fit his narrative while neglecting other evidence that did not. This is a central difficulty in using the thick description as the methodology for proving that a conceptual change occurred. In view of the large amounts of data available for analyzing changes in the use of central concepts such as human rights or legitimacy, how can one overcome this difficulty and still be able to prove that a conceptual change occurred without attempting the impossible mission of surveying every use of the concept during the period examined?

One well-known technique is sampling. By thoroughly investigating a narrow field that represents the use of the concept in a much broader field, this technique aims to capture the use of the concept in the entire terrain that the sample represents. The sampled field can be defined by limiting the investigation into a short time frame or by limiting it to certain media outlets.

Sampling has its merits. It allows a thorough investigation of a narrow field. If the sample accurately represents the entire field it samples, then the findings emanating from the sample would offer valid conclusions on the entire field. But that is a big "if".

In earlier work, I investigated the shift in the understanding of judicial legitimacy using both thick description and sampling.[24] In terms of thick description, I offered a narrative of Supreme Court adjudication in order to demonstrate such a shift.[25] I also used two sampling techniques. First, I tracked references in the Court's adjudication to Alexander Hamilton's famous dictum from *The Federalist No. 78* on judicial legitimacy.[26] This dictum has served as a starting point for discussions on judicial legitimacy since the early days of the Republic. For this reason, I hypothesized that if there was a shift in understanding judicial legitimacy, it would be reflected in discussions in which reference is made to this dictum. This hypothesis proved correct, and I was even able to identify Justice Felix Frankfurter's dissenting opinion in *Baker v. Carr* as the moment the shift began.[27] In his dissent, Frankfurter paraphrased Hamilton's dictum, and wrote "[t]he Court's authority— possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[28]

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22 *See also* Christopher McCrudden, *Human Rights Histories*, 35 OXFORD J. LEGAL STUD. 179, 187 (2014).

23 *Id.* at 192.

24 *See* Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013) [hereinafter Bassok, *Source of Legitimacy*].

25 *Id.* at 166.

26 *See* Or Bassok, *The Supreme Court at the Bar of Public Opinion Polls*, 23 CONSTELLATIONS 573 (2016) [hereinafter Bassok, *Bar of Public Opinion Polls*].

27 Baker v. Carr, 369 U.S. 186, 266 (1962). (Frankfurter, J., dissenting).

28 *Id.* at 267.

Second, I analyzed the development of the countermajoritarian difficulty.[29] This concept has been understood for decades as capturing the Court's legitimacy difficulty.[30] If there was a shift in the understanding of judicial legitimacy, one would expect to see it reflected in the discussions of this difficulty. My findings showed that the understanding of the countermajoritarian difficulty changed from viewing it as an inherent unsolvable difficulty focused on the unaccountable nature of the judiciary to a solvable difficulty focused on rulings that counter public opinion.[31]

In analyzing the *Harvard* Forewords, I relied on insights derived from both of these sampling investigations. So far as the Forewords' authors referred to Hamilton's dictum from *The Federalist No. 78* or used the countermajoritarian difficulty to elaborate their arguments, I used insights gained in my previous work to detect which understanding of judicial legitimacy the authors used.

III. PAMELA KARLAN AND ALEXANDER HAMILTON

Pamela Karlan concludes her 2011 *Harvard* Foreword titled *Democracy and Disdain* by stating "Alexander Hamilton was slightly off base when he wrote that the judiciary has 'neither Force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.' The judiciary must ultimately depend on the people."[32]

The assumption that the Court relies on "public respect"[33] or on "public confidence"[34] cuts across Karlan's Foreword. Karlan argues that the Court's recent disdain for the elected branches undermines public confidence in the democratic process. She further argues: "[t]he Court's dismissive treatment of politics raises the question whether, and for how long, the people will maintain their confidence in a Court that has lost its confidence in them and their leaders."[35]

Hamilton was not "slightly off base" as Karlan argues.[36] He just viewed the Court's source of legitimacy differently than Karlan. In *The Federalist No. 78*, Hamilton proclaimed that:

> [t]he judiciary on the contrary has no influence over either the sword or the purse . . . It may truly be said to have neither Force nor Will, but merely

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29 *See* Or Bassok, *The Two Countermajoritarian Difficulties*, 32 ST. LOUIS U. PUB. L. REV. 333 (2012) [hereinafter Bassok, *Countermajoritarian Difficulties*].

30 *See id.* at 335.

31 *See id.* at 333–62.

32 Karlan, *supra* note 3, at 71 (emphasis omitted).

33 *Id.*

34 *Id.* at 8, 13.

35 *Id.* at 13; *see also id.* at 71 ("A Supreme Court that so distrusts the political process that it hobbles the democratic branches' capacity to provide opportunities and effective protection to large swathes of society will find it hard over the long run to retain public respect.").

36 *Id.*

> judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[37]

According to Hamilton, the government's support is an essential component for the efficacy of the Court's rulings.[38] This support is acquired because the executive branch acknowledges the value of the Court's *judgment* and not because it is fearful of public reaction.[39] Even if the Court gives a judgment that is contrary to popular opinion or to the government's interests, the government will still enforce the judgment, in a similar way to a patient who takes the advice of her doctor and complies with medical treatment that causes her pain. Hamilton based the Court's legitimacy "merely" on its judicial expertise; not on public support for the Court.[40]

Hamilton's position reflects the negative view of popular opinion held by many of the founders as well as their shared belief in legal expertise.[41] The Court was designed to counter shifts in popular opinion that contradicted the Constitution.[42] In this spirit, Hamilton wrote that "the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society."[43] Hamilton viewed professional judges as bulwarks against populist threats that could potentially arise from the legislative branch.[44] According to this line of thought, expert knowledge is the tool that enables judges to safeguard the Constitution from the ill influences of public opinion.[45] For this reason, in *The Federalist No. 81*, Hamilton explains that as

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37 THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) (emphasis omitted).

38 *Id.*

39 *Id.*

40 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 54 (1999) (explaining that according to Hamilton, "a court's only claim to authority is the force of its reason and the clear accuracy of its decision."); Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 Yale J.L. & Human. 295, 318–20 (2011) (explaining Hamilton's position as adhering to the "Federalist vision of the lawyers' constitution" that is to be interpreted by legal experts).

41 *See, e.g.*, Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405, 410–11 (2004); PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM 203 (2003) (explaining that belief in legal expertise was so accepted "among drafters and ratifiers alike that, in contrast to Articles I and II there is not a word in Article III about qualifications for office.").

42 *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 103–04 (2002).

43 THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (Ian Shapiro ed., 2009).

44 *See* CARRESE, *supra* note 41, at 197 (explaining that Hamilton viewed the judiciary as "a body of lawyers elevated to the bench and serving as a depository not of force or will but legal judgment.").

45 *See* Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1071 (2007) (explaining that according to Hamilton the judiciary was a safeguard against

"men selected for their knowledge of the laws, acquired by long and laborious study," judges are better equipped to ensure that the Constitution would not be breached than elected representatives.[46] The requirement of expert legal knowledge is one reason for Hamilton's objection in *The Federalist No. 81* to entrust the final appeal in cases in the hands of the elected Senate.[47]

IV. GENEALOGY: JUDICIAL LEGITIMACY IN THE HARVARD FOREWORDS

A. The Court's Legitimacy in Harvard Forewords Prior to the Paradigm Shift

Louis Jaffe ends his 1950 Foreword—the first Foreword to have been written[48]—by speaking of the value of "inflowing respect of the profession" to the Court.[49] Jaffe uses "respect" and "confidence" to discuss the inner dynamics between the justices and the legal profession. These terms are used to describe the profession's—and not the public's—attitude towards the Court.[50] The notion of *public* confidence in the Court is absent. Rather, the Court is judged by its professional community as with any expert.

Albert Sacks' 1953 Foreword is the first foreword to discuss the 1954 judgment of *Brown v. Board of Education*.[51] Had the Foreword been written today, it would be hard to imagine that a discussion of the impact of such judgment on the public support for the Court would be missing. Indeed, current discussions of *Brown* frequently raise this issue.[52] Even the Court in *Casey* discussed *Brown* in context of public support for the judiciary.[53] The only passage in Sacks' Foreword that gets close to discussing public opinion, goes against the idea of a connection between public opinion and the Court's legitimacy:

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surges in public opinion based on its knowledge of "strict rules and precedents"); CARRESE, *supra* note 41, at 197, 202–03.

46 THE FEDERALIST NO. 81, at 408 (Alexander Hamilton) (Ian Shapiro ed., 2009).

47 *Id.*

48 *See supra* note 7 and accompanying text.

49 Jaffe, *supra* note 7, at 114.

50 *Id.*

51 Albert M. Sacks, *The Supreme Court, 1953 Term – Foreword*, 68 HARV. L. REV. 96 (1954).

52 For example, Luis Fuentes-Rohwer, who explicitly speaks of the Court's legitimacy in terms of public support, views *Brown* as the watershed moment in discussions of judicial legitimacy. Based on an empirical search of the word "legitimacy" in the Court's judgments, Fuentes-Rohwer argues that after *Brown*, "the Justices have referenced warning about judicial legitimacy seventy-one times, and only nine times in the prior 164 years." An explanation for why *Brown* is the watershed moment is lacking in Fuentes-Rohwer article. He disregards completely the fact that before 1960 there was simply no regular data on public support for the Court. *See* Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI.-KENT L. REV. 505, 520 (2018).

53 *See* Planned Parenthood v. Casey, 505 U.S. 833, 864–65 (1992); *see also* Bassok, *Source of Legitimacy*, *supra* note 24, at 184–88.

> in those states imposing school segregation . . . there exists an inner, unexpressed sense that segregation and equality are like oil and water, even though it is accompanied by an equally strong feeling that segregation is nevertheless essential. It may be that such an 'inner sense' will not be dominant in electoral processes. It was, however, relevant to the problem before the Court, a politically sheltered institution whose function it is to seek to reflect the sober second thought of the community.[54]

In his 1955 Foreword, Charles Fairman notes that he believes "the attack" on the Court following the Segregation Cases is "unjust" and that the Court "merits our confidence and support."[55] It is unclear exactly to whom Fairman refers in speaking about "our confidence and support" (the public? the professional community?) and in any event, there is no discussion of the connection between this support and the Court's legitimacy.

The School Prayer cases of *Engel v. Vitale*[56] and *School District v. Schempp*[57] are two additional examples of cases that current literature frequently discusses in terms of their impact on public support for the Court and hence on its legitimacy.[58] Louis Pollak's 1962 Foreword that is focused on these two cases lacks any such discussion.[59] The public reaction to the Court's judgments is discussed, but the "Court's authority" is presented as standing "against" this reaction.[60] Although opinion polls began during the 1930s and regular measurement of public support for the Court in opinion polling started during the 1960s,[61] no data on polling results are presented in the Foreword.

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54 Sacks, *supra* note 51, at 96.

55 *See* Charles Fairman, *The Supreme Court, 1955 Term – Foreword: The Attack of the Segregation Cases*, 70 HARV. L. REV. 83, 83 (1956).

56 Engel v. Vitale, 370 U.S. 421 (1962).

57 School Dist. v. Schempp, 374 U.S. 203 (1963).

58 *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 238, 264–67, 327, 377–78, 520 n.265, 548 n.39, 549 n.42 (2009); Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479 (2015).

59 Louis H. Pollak, *The Supreme Court, 1962 Term – Forward: Public Prayers in Public Schools*, 77 HARV. L. REV. 62 (1963).

60 *See id.* at 62 (The clamorous public hostility which greeted Engel could hardly have come as a great surprise to the Justices. They surely knew that in entering the lists against officially sponsored professions of religious faith they were pitting the Court's authority against a vastly powerful adversary—an adversary which commands strong and widespread popular support . . . . To turn aside from enforcement of the Constitution because enforcement is unpopular would be wholly antithetic to one of the Court's chief responsibilities.").

61 *See, e.g.*, FRIEDMAN, *supra* note 58, at 264 (discussing Gallup Polls on the School Prayer decisions).

While Pollak does not mention Alexander Bickel's 1960 Foreword[62] and his 1962 book, *The Least Dangerous Branch*,[63] Bickel's idea of the Court's "passive virtues" hovers above Pollak's analysis. Bickel viewed public support not as the source of the Court's legitimacy, but as a constraint to its true source of legitimacy—its expertise—that may prevent it at times from following legal expertise.[64] In a similar vein, Pollak notes that the Court avoided the issue of school prayer two years prior to its 1962 term by denying certiorari in order not to corrupt its source of authority.[65] He explains that in the end, the vitality of the two School Prayer judgments "must depend upon their intrinsic persuasiveness."[66] And following this sentence, Pollak engages in examining the judgments' doctrinal validity, not their ability to persuade the masses.[67]

In his 1956 Foreword titled *The Citizen's Immunities and Public Opinion*, Arthur Sutherland concludes his Foreword noting the "the Court has always irritated some of the American people."[68] He brings newspapers quotes from 1920s and the 1820s to make his point: critique of the Court has always existed.[69] In a Foreword with "public opinion" in its title, at no point does Sutherland refers to the Court's authority as dependent on public support or to the danger public criticism may pose to the Court's legitimacy.

In his 1958 Foreword Henry Hart explains that without "the power either in theory or in practice to ram its own personal preferences down other people's throats," all the Court can be is merely "a voice of reason."[70] Rather than speaking of public confidence as the Court's source of legitimacy, Hart is loyal to the Hamiltonian expertise-based view of legitimacy. He explains that "[o]nly opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do."[71] Due to failure to comply with standards of legal expertise, Hart is worried from a loss of confidence in the Court but only that of the professional community, not of the public. He writes:

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62 Alexander M. Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1961).

63 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

64 *See id*. at 69–71 ("When it strikes down legislative policy, the Court must act rigorously on principle, else it undermines the justification for its power."); *see also* Bassok, *Countermajoritarian Difficulties*, *supra* note 29, at 365–66.

65 Pollak, *supra* note 59, at 62–63.

66 *Id*. at 64.

67 *See Id*. at 64–78.

68 Arthur E. Sutherland, *The Supreme Court, 1956 Term – Foreword: The Citizen's Immunities and Public Opinion*, 71 HARV. L. REV. 85, 92 (1957).

69 *See id*. at 92–93.

70 Henry M. Hart, Jr., *The Supreme Court, 1958 Term – Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

71 *Id*.; *see also id*. at 125 ("[R]eason is the life of the law . . . .").

> It needs to be said with all possible gravity, because it is a grave thing to say, that these failures are threatening to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court, and this at the very time when the Court as an institution and the Justices who sit on it are especially in need of the bar's confidence and support.[72]

In his 1963 Foreword, Philip Kurland discusses Bickel's book, *The Least Dangerous Branch*, but without mentioning the countermajoritarian difficulty.[73] Kurland criticizes the Court mainly for its inability to follow the path of legal expertise. He points out that the Court's judgments offer "'hallowed catchword and formula' in place of reasons" and fail to follow precedents.[74] Yet, interestingly he concludes his foreword noting that

> The time has probably not yet come for an avowal that, in the field of public law, 'judicial power' does not describe a different function but only a different forum and that the subject of constitutional law should be turned back to the political scientists . . . . The Court will continue to play the role of the omniscient and strive toward omnipotence. And the law reviews will continue to play the game of evaluating the Court's work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship.[75]

While in this paragraph Kurland speaks of legal expertise as a realm of fiction and of politics as the true reality of judicial power, the Hamiltonian idea that the Court relies on the other branches rather than on public opinion is still controlling his analysis. Hence, Kurland writes

> It would appear that those who have feared that the Court, by asserting its powers too frequently and too vehemently, would risk its own destruction have been wrong. So long as the third branch – 'the least dangerous branch' – does not arouse effective opposition from both of the other branches of the national government at the same time, it is in no serious danger of being curbed.[76]

Kurland thus does not share Karlan's premise that "[t]he judiciary must ultimately depend on the people."[77]

It is striking to compare current *Harvard* Forewords where the discussion of judicial legitimacy in terms of public support is prevalent to Forewords from before

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[72] *Id.* at 101.

[73] Philip B. Kurland, *The Supreme Court, 1963 Term – Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 169, 175 (1964).

[74] *Id.* at 169-75 (footnote omitted).

[75] *Id.* at 175.

[76] *Id.*

[77] Karlan, *supra* note 3, at 71.

the 1970s, where discussion of judicial legitimacy is scarce. As the pool of Forewords is a pre-determined sample of scholarship, this absence is not an absence of evidence. Rather, it is evidence of absence. In other words, if the *Harvard* Forewords indeed reflect the scholarly discourse on American constitutional law, the scarce discussion of the Court's legitimacy in the 1950s and 1960s in comparison to the ample discussion of judicial legitimacy in terms of public support in the decades afterwards supports the argument that this understanding of judicial legitimacy arose later.

In every epoch there are some assumptions that are considered so commonsensical that people do not explicate them because no other way of putting things has ever occurred to them.[78] Martha Minow addresses this point in her Foreword noting that a certain "perspective may go unstated because it is so powerful and pervasive that it may be presumed without defense."[79] In the Forewords, until the 1960s, an unstated presumption was that a court that fails in the test of legal expertise fails in the legitimacy test as well. According to this line of thinking, the almost complete lack of discussion of judicial legitimacy in Forewords prior to the 1970s, coupled with a strong emphasis on analyzing doctrinal failings of the Court throughout the 1950s and the 1960s, are to be explained as manifestations of an embedded assumption that legitimacy is to be understood in terms of expertise.

Remnants of this understanding of judicial legitimacy continued to exist in the Forewords years later. In his 1978 Foreword, Owen Fiss explains that 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."[80] Fiss adds that only the government as a whole (the regime), and not specific institutions, depends on the support of the people.[81]

B. When did the Paradigm Shift Occur in the Harvard Forewords?

As with other historical processes, it is an elusive endeavor to find the exact starting point for a change in the understanding of a concept.[82] Limiting the scope of inquiry to the *Harvard* Forewords makes the task of identifying the time of the shift in understanding judicial legitimacy manageable, yet still quite tricky.

In his 1977 Foreword, John Hart Ely wrote that while Hamilton's *The Federalist No. 78* "must have made a good bit of sense at the outset of our nation . . . . Time has

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78 *See* ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODREN WORLD 49 (1925); JOHN H. HALLOWELL, THE DECLINE OF LIBERALISM AS AN IDEOLOGY 2 (1946).

79 Martha Minow, *The Supreme Court, 1986 Term – Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 54 (1987).

80 Fiss, *supra* note 4, at 38.

81 *Id.*; see *also* 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) ("[C]onsent 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 . . . .").

82 *See* MARC BLOCH, THE HISTORIAN'S CRAFT 25 (Peter Putnam trans., 1954) ("[F]or most historical realities the very notion of a starting-point remains singularly elusive.").

proven Hamilton's vision on this score badly mistaken."[83] Contrary to Karlan, Ely does not think Hamilton is "slightly off base when he wrote" his dictum in 1788.[84] Rather, Ely believes that while at the time Hamilton wrote his famous dictum it made sense, the Warren Court's resilience to public backlash showed it is not the weakest of branches anymore.[85] In order to prove this resilience, Ely refers to three sources.[86] The third is a news report on a "1977 Harris survey that ranked the Court high in public confidence."[87] The two other sources are law review articles that offer an impressionistic assessment of "the prestige"[88] and "respect"[89] of the Supreme Court. One of the articles is Henry Monaghan's 1974 Foreword; the other is a 1976 article by Archibald Cox.[90] Monaghan and Cox's respective claims about public support for the Court are assessments about the public's mood rather than measurements of public support in the aggregate form we are familiar with today. These two lack any references to substantiate their assertions, and both use tentative phrasing.[91] While Ely is the first scholar who connects in the *Harvard* Forewords between public opinion polling data and the legitimacy of the Court, there were some earlier signs for the upcoming shift in the understanding of judicial legitimacy.

It is not surprising to find first signs of the shift in the 1961 Foreward written by Robert McCloskey, the then-Chairman of the Department of Government at Harvard.[92] Once the conceptual shift occurred, political scientists became the most enthusiastic adherents of public opinion polling as a metric for assessing judicial

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[83] John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 18–19 (1978).

[84] Karlan, *supra* note 3, at 71.

[85] Ely, *supra* note 83, at 21.

[86] *Id.* at 21 n.78.

[87] *Id.* ("Wash. Post, July 10, 1978, at A4, col. I (reporting 1977 Harris survey that ranked the Court high in public confidence).").

[88] Archibald Cox, *The New Dimensions of Constitution Adjudication*, 51 WASH. L. REV. 791, 826–27 (1976).

[89] Henry P. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitution Common Law*, 89 HARV. L. REV. 1, 1–2 (1975).

[90] *See id.*; Cox, *supra* note 88, at 791.

[91] *See* Cox, *supra* note 88, at 827 ("Still, the prestige of the Supreme Court is surely greater today than that of other branches of government, and I am inclined to think that it has never been higher."); Monaghan, *supra* note 101, at 1 ("[T]he Court's claim to be the 'ultimate interpreter of the Constitution' appears to command more universal respect today than at any time since Chief Justice Marshall invoked that document . . . .") (footnote omitted).

[92] *See* Robert G. McCloskey, *The Supreme Court, 1961 Term – Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962).

legitimacy.[93] It is no wonder then that McCloskey—as one of the pioneers of researching judicial behavior by using political science methods—showed the way.[94]

McCloskey's Foreword is focused on *Baker v. Carr*[95] and is titled *The Reapportionment Case*. In his Foreword, McCloskey uses concepts and ideas from the world of public opinion research such as "latent consensus" or the idea of institutions lagging behind public opinion.[96] Yet, data from opinion polls measuring support for the Court or its judgments is absent from his Foreword.

McCloskey discusses the Court's source of legitimacy, and in this context, he quotes Justice Frankfurter's line from *Baker v. Carr* in which Hamilton's famous dictum from *The Federalist No. 78* is paraphrased.[97] Yet, McCloskey does not detect the connection between Frankfurter's line and Hamilton's dictum. He thus fails to detect the radical difference between viewing the Court's legitimacy in terms of expertise as Hamilton suggested ("judgment") and viewing it in terms of public support ("public confidence") as Frankfurter wrote.[98]

I will further address the paraphrasing of Hamilton's dictum later in my argument. For the purposes of analyzing McCloskey's Foreword, it is important to notice how the entry of ideas coming from public opinion research are starting to impact the terms in which judicial legitimacy is discussed. Thus, McCloskey acknowledges the connection between public opinion and the Court's authority.[99] Moreover, in the last paragraph of his Foreword, he notes that the compliance with the decision in *Baker* "may indicate that the decision has activated a latent consensus in American opinion."[100] He then adds that before the justices proceed to the next issue, "they would be well advised to speculate about the precise nature of this consensus they

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93 David Adamany & Stephen Meinhold, *Robert Dahl: Democracy, Judicial Review, and the Study of Law and Courts*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR 361, 373 (Nancy Maveety ed., 2003) ("[B]y the mid-1980s, public opinion polls of one kind or another had been conducted for almost half a century, and scholars began to closely examine the relationship between the Court's decisions and public opinion.").

94 *See* Howard Gillman, *Robert McCloskey, Historical Institutionalism and the Art of Judicial Governance*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR 336, 336 (Nancy Maveety ed., 2003).

95 McClosky, *supra* note 92, at 63 (quoting Justice Frankfurter's dissent in Baker v. Carr, 369 U.S. 186 (1962)).

96 *Id.* at 59, 74.

97 *See id.* at 67. For the discussion of Frankfurter's paraphrasing of the Federalist No. 78 see the text accompanying fn 27-28.

98 Bassok, *Bar of Public Opinion Polls*, *supra* note 26, at 580–81 (explaining the complexity of Frankfurter's position and arguing that the current use of his quote from *Baker v. Carr* distorts his position).

99 *See* McCloskey, *supra* note 92, at 67 ("If the public should ever become convinced that the Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the Court's future as a constitutional tribunal would be cast in grave doubt.").

100 *Id.* at 74.

seem to have aroused. Speculation it must be, for there are few certainties about such matters."[101] While the tool for measurement of public opinion was already known at the time McCloskey wrote the Foreword, data from regular measurements of public support for the Court and its judgments were still not readily available.[102] For this reason, McCloskey writes that justices can only "speculate" on the actual measurements of public support for the Court's judgments.[103] Thus, while the Foreword lacks the data produced by using the metric for measuring "consensus," the terminology of public opinion polling is already affecting the discussion.

Three years later, Paul Mishkin writes in his 1964 Foreword of "public support that is the ultimate foundation of the Court's power."[104] In 1965, Archibald Cox writes in his Foreword:

> [c]onstitutional government must operate by consent of the governed. Court decrees draw no authority from the participation of the people. Their power to command consent depends upon more than habit or even the deserved prestige of the Justices. It comes to an important degree from the continuing force of the rule of law—from the belief that the major influence in judicial decisions is not fiat but principles which bind the judges as well as the litigants and apply consistently yesterday, today, and tomorrow . . . . A chief function of the judicial opinion is to preserve this element in the Court's power to command the consent of the governed.[105]

While Cox's discussion of *Brown* and the sit-in cases raises issues of "public acceptance" and "degree of assent,"[106] it still lacks any discussion of measurable public support for the Court.

When reading these Forewords from the 1960s, one must bear in mind that they were written during a unique period in time. Scientific public opinion polling was invented in the 1930s,[107] yet it was not until the 1960s that the Gallup and Harris organization began to track public support for the Court and its decisions in any systematic way.[108] Before the 1960s—and surely before the 1930s—it was very

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101 *Id.*

102 Bassok, *Source of Legitimacy*, *supra* note 24, at 157-58.

103 McCloskey, *supra* note 92, at 74.

104 Paul J. Mishkin, *The Supreme Court, 1964 Term – Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 67 (1965).

105 Archibald Cox, *The Supreme Court, 1965 Term – Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 98 (1966).

106 *See id*. at 94.

107 *See, e.g.*, 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).

108 *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,

difficult to speak of the Court as holding public support. There was no reliable public evidence that enabled one to view the Court's legitimacy in terms of public support.

Until the 1930s, the democratic legitimation of political power had been controlled by elections that were considered the most reliable mechanism for determining the will of the people.[109] In that state of affairs, public attitudes toward the Court, independent of those expressed by Congress, could have been deduced only indirectly, in a crude and imprecise manner, from the rare occasions when the Court was raised as an issue in national presidential campaigns.[110] The news media could also provide an impressionistic indication of how the public perceived the Court. But besides elections, no other source of data could give direct, regular, and reliable measurements of what the public was thinking.[111] This point was illustrated by Arthur Sutherland in his 1956 Foreword where he points out that "[i]f journalistic comment reflects popular opinion, a large number of Americans are thinking of this year as 'the time the Supreme Court went wrong on all those Communist cases.'"[112] An attempt to make a similar statement today would have to be supported by reference to public opinion polls.

The 1960s was a period in which public opinion polls measuring support for the Court had already been introduced, but there were still no regular measurements of public support for the Court that were published in popular media. Opinion polls in general still lacked their current hold on the public's mind.[113]

True, even before the invention of public opinion polls, several Justices did write that the Court "operates by its influence, by public confidence."[114] Similarly, one can find quotes of the founders speaking of "the public deference to and confidence in the

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1210–12 (1986); Roger Handberg, *Public Opinion and the United States Supreme Court, 1935-1981*, 59 INT'L. SOC. SCI. REV. 3, 5 (1984).

109 *See, e.g.*, STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW 6 (2010) ("Since Jean-Jacques Rousseau . . . the legitimate exercise of political power has been associated with elections that provide a mechanism for determining the will of the people.").

110 *See, e.g.*, 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."); FRIEDMAN, *supra* note 58, at 177–80 (noting that "[j]udicial review was a major issue in three presidential campaigns" and pointing on the 1896, 1912 and 1924 elections).

111 *See* ROBERT S. ERIKSON ET AL., AMERICAN PUBLIC OPINION: ITS ORIGINS, CONTENT AND IMPACT 23 (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.").

112 *See* Sutherland, *supra* note 68, at 87.

113 Bassok, *Bar of Public Opinion Polls*, *supra* note 26, at 575.

114 *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 618 (1840); s*ee also* United States v. Lee, 106 U.S. 196, 223 (1882).

judgment" of the judiciary.[115] But remember the difference between understanding the word "smart" in the sentence "King Salmon was the smartest person of his time" and understanding the same word in our era for example, in the sentence "Ludwig Wittgenstein was the smartest person of his time." Similarly, we need to read statements on "public confidence" written before the rise of public opinion polling through different "eyeglasses" than similar statements made by the current Court or by current politicians. For example, the latter quote read in context uses the term "public deference and confidence" as saying that the public should or would support the judiciary rather than as saying that the judiciary holds or requires a measurable level of public support.[116] On other occasions, public opinion was understood not as a simple aggregate of individual opinions, but as a diffused public state of mind expressed by institutions such as Congress.[117]

European courts' use of the formula "in the name of the people" to invoke the authority of the democratic sovereign can also teach us an important lesson.[118] This formula reflects an older concept of popular sovereignty that is detached from the actual public support of the here and now as measured in public opinion polls.[119] According to this concept, the democratic subject is a single collective rather than the accumulation of individual voices.[120] The views of the actual public–rather than an abstract fictive public–were still not the measure for judicial legitimacy.

The shift towards a measurable understanding of the concept of the "people" began with the acceptance of elections as the tool for capturing the voice of the "real" people.[121] This shift meant that the persuasive power of pro-forma statements of courts proclaiming to speak in the name of an abstract "people" lost much of its

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115 *See* Kramer, *supra* note 9, at 91 (quoting James Madison's letter from 1834).

116 *See* Kramer, *supra* note 9, at 146 (continuing the quote by Madison in which he wrote that "[w]ithout losing sight, therefore, of the coordinate relations of the three departments to each other, it may always be expected that the judicial bench, when happily filled, will for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the Constitution . . . .").

117 *See* LEO BOGART, POLLS AND THE AWARENESS OF PUBLIC OPINION 14–15 (1985) ("The term 'public opinion' as used in polling is quite distinct from the historical concept of public opinion as a state of mind . . . ."); Amy Fried & Douglas B. Harris, *Governing with the Polls*, 72 HISTORIAN 321, 341 (2010) (arguing that in that in the period before the invention of public opinion polls, "Congress *was* public opinion.").

118 *See* Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification,* 23 EUR J. INT'L L. 7, 7–8 (2012) [hereinafter Bogdandy & Venzke 2012].

119 *See* ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME?: A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 20 (2014) [hereinafter BOGDANDY & VENZKE 2014].

120 *See* Bogdandy & Venzke 2012, *supra* note 118, at 140.

121 *Cf.* Kramer, *supra* note 110, at 128 (quoting Benjamin Rush's explanation from 1787 that the power of the people is possessed "only on the days of their election.").

power.[122] As Edward White shows, in the United States, by the early twentieth century, "the people" had taken the meaning of voting majorities.[123]

Several decades of constant polling reshaped the notion of democratic legitimacy in the United States.[124] In "the Age of Democracy," as Richard Pildes titles the current age in the opening sentence to his 2003 Foreword,[125] the tendency in the United States to understand democracy in majoritarian terms has strengthened,[126] and the term "public opinion" has come to be synonymous with opinion poll results.[127] Since the 1980s and the rise of "public opinion culture," opinion polls operate in public discourse as an authoritative democratic legitimator.[128] In recent decades, any salient issue that has been brought before the Court has been polled, before the Court's decision and after it, as part of the general frenzy to poll every issue in American public discourse.[129] Speaking in the name of the people has been transformed, at least in the United States, so as to mean not the voice of one collective entity but an aggregate of individual opinions as measured in opinion polls.

In view of this transitionary period, it is no surprise that a year after Ely, Fiss would still follow the Hamiltonian line of thinking. In his 1978 Foreword, Fiss wrote that in

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122 *See* Fried & Harris, *supra* note 117, at 341; Or Bassok, *The Schmitelsen Court: The Question of Legitimacy*, 21 GER. L.J. 131, 136 (2020) [hereinafter Bassok, *Schmitelsen Court*] (analyzing Carl Schmitt's argument that facing a democratically elected institution rather than the monarch means that in terms of democratic legitimacy the judiciary possesses an inferior basis of democratic legitimacy).

123 *See* EDWARD G. WHITE, LAW IN AMERICAN HISTORY, VOLUME III: 1930-2000, at 9 (2019).

124 *See, e.g.*, BOGART, *supra* note 117, at xxx ("Not only polling, but the publication and serious acceptance of polls by the public have introduced into the political process the notion of an independent criterion of legitimacy in the conduct of government.").

125 Richard Pildes, *The Supreme Court, 2003 Term – Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 29 (2004) ("This is the Age of Democracy.").

126 *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) ("[W]e 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.").

127 *See, e.g.*, BOGART, supra note 117, at xxix ("[O]ur understanding of public opinion today is inseparable from our familiarity with opinion polls . . . ."); SUSAN HERBST, NUMBERED VOICES 63 (1993) ("[S]cholars writing from the 1940s to the present have been forced to contend with the notion that polls are becoming synonymous with public opinion.").

128 *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 75–76 (2010) (discussing the process in which public opinion polls "not only supplement but displace election returns as the authoritative democratic legitimator"); Peters, *supra* note 107, at 14 (arguing that 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").

129 *See* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008) (presenting public opinion polls conducted to examine public views on the most central issues in which the Court has decided in recent decades).

a democracy, only the government as a whole—rather than the Court as a distinct institution—depends on the support of the people.[130] A year later, Ely already expressed a revisionist position. According to Ely, Hamilton was not "off base" at the time he wrote *The Federalist No. 78*, as Karlan argued. His position had merit "at the outset of our nation."[131] However, Hamilton came to be wrong, and the Court is not the weakest branch any more by the time Ely writes his Foreword, and to prove that he points to a new source of legitimacy: public support as measured by Harris polls.[132]

As opposed to Karlan, Ely writes during a transitionary period, before the current paradigm that controls the understanding of the Court's source of legitimacy became dominant. For this reason, he is able to imagine the past better than Karlan and to depict more accurately the institutional dynamics envisioned by Hamilton during a period in which the Court's legitimacy was understood as relying on a source of legitimacy other than public support. For Karlan, the past is colored by the current understanding of judicial legitimacy, and through this perspective, Hamilton was off base.

In order to demonstrate how the shift in understanding judicial legitimacy came into play in the *Harvard* Forewords, in the following parts of this Article, I focus on a concept that served as the site for debates over the Court's legitimacy for decades: the countermajoritarian difficulty.[133] After briefly describing this concept and the change it went through as a result of the invention of public opinion polling, I examine how the authors of the *Harvard* Forewords discussed this concept as part of their discussions on the Court's legitimacy.

C. The Period of Shifting Understandings: The Countermajoritarian Difficulty as a Marker

1. Bickel and the Two Countermajoritarian Difficulties

One very important marker which helps demonstrate the shift in the understanding of judicial legitimacy is the countermajoritarian difficulty (hereinafter: CM difficulty). Alexander Bickel, who coined the term "CM difficulty" in his 1962 book *The Least Dangerous Branch*,[134] did not yet envision it in his 1960 Foreword. In his Foreword, Bickel identifies judicial review as "at least potentially a deviant institution in a

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130 *See supra* notes 80–81 and accompanying text. The transitionary period between the two understandings of judicial legitimacy may also explain why Lawrence Tribe's Foreword which is focused on analyzing *Roe v. Wade* does not mention opinion polls. Tribe's discussion is doctrinal and is based on the premise that the Court's legitimacy is understood in terms of expertise. *See* Laurence H. Tribe, *The Supreme Court, 1972 Term – Foreword*: *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

131 Ely, *supra* note 83, at 18–19; Karlan, *supra* note 3, at 71.

132 Ely, *supra* note 83, at 21.

133 *See, e.g.*, NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 419 (2010) (noting that Bickel's countermajoritarian difficulty, "[f]or at least a generation after he posed this problem in 1962 . . . the field of academic constitutional law was obsessed with solving it").

134 BICKEL, *supra* note 63, at 16.

democratic society."[135] However, while a similar sentence is part of his discussion of the CM difficulty in his 1962 book,[136] in his 1960 Foreword this observation has yet to morph into the CM difficulty.

In its original formulation, the CM difficulty raises the difficulty of remotely accountable judges that have the authority to invalidate legislation enacted by electorally accountable representatives.[137] Bickel did not understand the difficulty in terms of public support. Understanding judicial legitimacy in such terms was still not dominant in his era. For this reason, Bickel wrote that "[m]ost assuredly, no democracy operates by taking continuous nose counts on the broad range of daily governmental activities."[138] However, he was not oblivious to the future potential effects of the new polling technology on the role of the Court and explained 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 public sampling is no further developed than it is."[139]

The CM difficulty as understood by Bickel was thus not about countering the majority of the public as reflected in public opinion polls. Bickel was focused on what I dub as "the traditional understanding of the CM difficulty" that captures the problem of Justices striking down statutes that are the fruits of electorally accountable branches.[140] An unelected court that enjoys public support and whose decisions are in line with public opinion still raises the CM difficulty in its traditional sense when it reviews legislation, because it is electorally unaccountable.[141]

Decades after Bickel coined the difficulty, a different—literal—understanding of it arose. The *literal* understanding of the CM difficulty emphasizes the majoritarian component of democracy, i.e., the correspondence between the Court's judgments and the aggregated preferences of the populace.[142] When the Court rules counter to the views of the majority, as quantified by polling, it is acting in a literal CM fashion.

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135 Bickel, *supra* note 62, at 47.

136 *See* BICKEL, *supra* note 63, at 18 ("[T]he essential reality that judicial review is a deviant institution in the American democracy.").

137 *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. J. 491, 492 (1997). On the centrality of accountability to Bickel's thought, see Guido Calabresi, *The Supreme Court, 1990 Term – Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–04 (1991).

138 BICKEL, *supra* note 63, at 17.

139 *Id.* at 239.

140 Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?*, 11 INT'L J. CONST. L. 13, 14 (2013).

141 *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 4–5 (1980) ("[T]he central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.").

142 *See, e.g.*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2596 (2003) ("There is a regrettable lack of clarity in the relevant scholarship about what

These two CM difficulties are obviously connected. As Michael Perry notes, "one important reason we value electorally accountable policymaking is that we think it more sensitive to the sentiments of the majorities than is policymaking that is not electorally accountable."[143] Indeed, laws enacted by accountable legislators ordinarily reflect majoritarian preferences.[144] Striking down laws is thus usually CM in both senses. Yet, there are still cases in which the difference between the two CM difficulties is revealed. When the Court strikes down legislation that the majority of the public, as measured in public opinion polls, opposes, the Court's decision is *not* CM in the literal sense because the public supports the decision.[145] However, it is still CM in the traditional sense because an unaccountable institution thwarted the will of an accountable institution.[146]

This distinction correlates with a dramatic difference in how these two difficulties are confronted. The literal CM difficulty can be dissolved and even solved if the Court is not countering public opinion as measured in public opinion polls.[147] The traditional CM difficulty cannot be solved.[148] Unless judges are elected by the public, the Court will always be unaccountable to the public in comparison to elected institutions. In other words, an unelected court that enjoys public support and whose decisions are in line with public opinion still raises the CM difficulty in its traditional sense when it reviews legislation, because it is electorally unaccountable. For this reason, the only way to confront the traditional CM difficulty is by providing reasons for why the unaccountable judiciary should hold this power. Such reasons or justifications are usually based on a special property which makes the Court, the institution, best fitted

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'countermajoritarian' actually means. At bottom it often seems to be a claim, and perhaps must be a claim, that when judges invalidate governmental decisions based upon constitutional requirements, they act contrary to the preferences of the citizenry.").

143 MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 170 n.4 (1982).

144 *See* Washington v. Glucksberg, 521 U.S. 702, 711 (1997) ("The primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws." (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989))).

145 *See* Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 129, at 5 ("After all, if the Court merely reflected public opinion in its decisions, then whatever other problems it might have, it could not be described as countermajoritarian."); Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 283 (2010) ("Recent scholarship in political science and law challenges the claim that judicial review in the United States poses what Alexander Bickel famously called the 'counter-majoritarian difficulty.'").

146 *See* David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, at xxxix (David Kairys ed. 3d ed. 1998) ("[W]hen legislatures act counter to the will or inclinations of the majority of their constituents, judicial invalidation of legislation can be both majoritarian (in the sense that most people support it) and countermajoritarian (in the sense that a court is negating the action of a majoritarian institution).").

147 *See* Bassok & Dotan, *supra* note 140, at 14.

148 *See id.* at 14–15, 23–24.

to ensure society's adherence to the right constitutional course.[149] In other words, the Court has to have expertise in some field.[150] This is the connection between the traditional CM difficulty and understanding judicial legitimacy in terms of expertise. If the Court has proper expertise, its CM authority can be justified, and the Court possesses legitimacy.[151] In the same vein, understanding judicial legitimacy in terms of public support corresponds to the literal CM difficulty. If the Court holds public support, the literal CM difficulty does not exist, and the Court possesses legitimacy.[152]

The distinction between the traditional formulation of the CM difficulty and the literal formulation will assist me in distinguishing between Forewords that adhere to the understanding of judicial legitimacy in terms of expertise and ones that adhere to the understanding of judicial legitimacy in terms of public support. As the CM difficulty has been understood to encapsulate the Court's legitimacy problem, one would expect that the difficulty would be discussed in terms that correspond to the paradigm controlling the understanding of judicial legitimacy in that era. In a period in which judicial legitimacy is understood in terms of expertise, one would expect to find discussions of the CM difficulty in its traditional sense. Conversely, in a period in which judicial legitimacy is understood in terms of public support, one would expect to find discussions of the CM difficulty in its literal sense. If, during the period in which I argue that judicial legitimacy was understood in terms of expertise, one finds discussions of the CM difficulty in its literal sense then something is amiss with my argument.

2. The Countermajoritarian Difficulty in the *Harvard* Forewords

In his 1980 Foreword, Lawrence Sager discusses the "tension between democratic theory and the Supreme Court's prominent role as constitutional adjudicator."[153] He explains that this tension is "often reflected in questions about the 'legitimacy' of modern federal constitutional adjudication."[154] He then adds that "[l]egitimacy here means compatibility with the principle of majority rule – a principle normally realized in our society through the mechanism of rulemaking by elected, politically accountable officials."[155] While not mentioning it by name, Sager essentially speaks

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149 *Id.* at 15.

150 *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 1–3 (2001) ("Most scholars and judges assume that the Court's power is justifiable (if at all) on the basis of its special legal expertise . . . . This view is common ground among people who disagree radically about . . . the *nature* of legal craftsmanship.") (emphasis in original).

151 *See* Bassok & Dotan, *supra* note 140, at 15-16.

152 *Id.* at 16-17.

153 Lawrence Gene Sager, *The Supreme Court, 1980 Term – Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 38 (1981).

154 *Id.*

155 *Id.* at 38.

of the CM difficulty in its traditional sense: a tension between the accountable legislature and the unelected Court.[156]

Robert Cover also adheres to the traditional definition of the CM difficulty in his 1982 Foreword.[157] Cover explicitly mentions the CM difficulty and characterizes it as "an insoluble confrontation between principle and process" created by the "veto exercised . . . by an unelected judge."[158] In line with the traditional understanding of the CM difficulty, Cover argues that the inherent tension at the core of the difficulty cannot be solved by public support for the Court, even though it can be mitigated by a close identity "between administration and popular politics."[159] For Cover, the CM difficulty begins with James Thayer's 1893 criticism of judicial review, and Bickel merely offered a catchy term as part of a transformation of terms.[160]

Like Sager and Cover, Erwin Chemerinsky in his 1988 Foreword still follows the traditional definition of the CM difficulty in explaining that "Bickel argued that judicial review is anti-democratic in that unelected judges invalidate the decision of popularly elected officials."[161] Chemerinsky explicitly rejects the view of democracy "as government decision accurately reflecting the preferences of the citizens . . . ."[162] However, he recognizes the rising dominance in the Court's judgments of understanding democracy in mechanical majoritarian terms.[163] He speaks of the "majoritarian paradigm" and the unjustified emphasis it gives to the question of "which branch is more 'democratic.'"[164] Chemerinsky argues that "[t]he critical issues are substantive disputes about values" and that "[t]he rhetoric of the majoritarian paradigm masks these critical issues . . . ."[165]

Chemerinsky's Foreword does not mention opinion polling and has yet to fully digest its impact on constitutional thinking. Nonetheless, the impact of the public opinion culture is already present as Chemerinsky aspires that the Court would "break free from the majoritarian paradigm that constrains its analysis and the development of constitutional theory."[166]

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156 *See id.* at 41 (speaking of jurisdiction limitations on federal courts "[a]s a majoritarian check on an unaccountable judiciary . . . .").

157 *See* Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

158 *Id.* at 57.

159 *Id.*

160 *See id.* at 57 n.158.

161 Erwin Chemerinsky, *The Supreme Court, 1988 Term – Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 70 (1989); *see also id.* at 74, 102.

162 *Id.* at 82; *see also id.* at 81 n.173.

163 *Id.* at 64–65, 87–89 ("[D]emocracy increasingly came to mean majority rule . . . .").

164 *Id.* at 87, 98–100.

165 *Id.* at 87.

166 *Id.* at 99–100.

Morton Horwitz's 1992 Foreword offers another step in the process of the paradigm shift.[167] Horwitz argues that around the 1940s, "[d]emocracy suddenly became a central legitimating concept in American constitutional law."[168] Even though he refers to Chemerinsky's Foreword in his discussion of the CM difficulty,[169] Horwitz's version of the CM difficulty adopts the "mechanical" version of democracy that Chemerinsky explicitly rejected.[170] He writes that "[I]n fact, in order to limit judicial review, New Deal ideologues narrowly and mechanically defined democracy simply to entail majority rule [refers to Chemerinsky's Foreword]. Judicial review eventually came to be characterized negatively as 'counter-majoritarian' . . . [refers to Bickel]."[171] The shift is small, almost undetectable. In discussing Bickel's CM difficulty, Horwitz jumps from majority rule immediately to the CM difficulty. There is no mention—as there was in Sager and Chemerinsky's Forewords—of the elected accountable legislature, which is not always fully responsive to public opinion. Horwitz's Foreword shows signs of the transformation of the CM difficulty because he defines it—contrary to Bickel's definition—more in terms of responsiveness to majority opinion rather than in terms of accountability.[172]

The earliest signs of a change in describing the CM difficulty that reflect the transformation in understanding judicial legitimacy can be detected seven years earlier in Frank Michelman's 1985 Foreword.[173] Early in his discussion, Michelman presents the Court as "irredeemably an undemocratic institution" "vis-à-vis the people."[174] Throughout his Foreword, he focuses on the manner in which "the people" express their current voice and depicts progress in the attempt to make "the people" more "actual."[175]

Michelman begins by describing the difference in the meaning Hamilton and Bickel ascribe to the concept of "the voice of the people." He explains that "[a]ccording to Hamilton, the Constitution speaks the democratic will of the sovereign

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167 *See* Morton J. Horwitz, *The Supreme Court, 1992 Term – Foreword: The Constitution of Change Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30 (1993).

168 *Id.* at 57, 61, 63.

169 *Id.* at 62–63.

170 *Id.*

171 *Id.* at 61–62.

172 While Minow does not discuss in her 1986 foreword the CM difficulty, she also speaks of judicial legitimacy in terms of responsiveness. *See* Minow, *supra* note 79, at 81 ("Judges can and should act as representatives, standing in for others and symbolizing society itself. Judicial acts of representation must also be responsive to the demands of the people they govern, in order to secure apparent legitimacy and, ultimately, to remain effective.").

173 *See* Frank I. Michelman, *The Supreme Court, 1985 Term – Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76–77 (1986).

174 *Id.* at 16.

175 *Id.* at 60–65.

people, which binds both Congress and the courts."[176] According to Michelman, Bickel presented a more realist view of "the people" than Hamilton. Rather than an abstract entity, the "actual people" speak through their elected representatives.[177] This description of progression in capturing the voice of the people leads from Hamilton, who viewed the voice of the people as the sovereign will embodied in the Constitution, to Bickel who aimed to demystify the notion of "the people" and show that the people's will is captured by their elected representatives. According to Michelman's depiction, in attempting to present the people's voice in a demystified manner, Bickel discovers the CM difficulty: the unaccountable Court that speaks in the name of the Constitution, confronts the accountable Congress, that speaks in the name of the actual people.[178]

Yet, Michelman contests Bickel's view that the voice of the people is better captured by the legislature than by the Court. Based on his reading of Bruce Ackerman's work, Michelman notes that from the perspective of locating the voice of the people, Congress is not that different from Hamilton's constitution-making sovereign. It also speaks in the name of an abstract notion of the people rather than the "real" people. "The people" are not in any useful sense "in" Congress.[179] Rather, "Congress 'represents' the people in the far more attenuated sense of 'standing in' for them during their vacations into privacy . . . ."[180]

According to Michelman, the next step beyond Bickel's partial-realistic view is Ackerman's dualist model. According to this model, in certain periods "[w]e the People actually speak" and informally amend the Constitution even if they do not follow the formal procedure established by Article V for amending the Constitution.[181] By showing that the "actual" people speak for themselves in "constitutional moments,"[182] Michelman explains that "[i]n a total reversal of Bickel's view, Ackerman finally demystifies representation…"[183]

Michelman claims that Ackerman's project aims to answer Bickel's CM difficulty. According to Ackerman, in times of enhanced constitutional deliberation, the "actual people" speak outside the elected institutions, outside the legislative procedure.[184] Afterwards, during times of "regular politics," the Court can incorporate into constitutional interpretation the voice of the people that was voiced outside the legislative procedures during "constitutional moments," and was not incorporated into

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176 *Id.* at 62.

177 *Id.*

178 *See id.* at 62–63.

179 *Id.* at 62; *see also id.* at 75 ("Congress is not us.").

180 *Id.* at 62.

181 *Id.* at 60–61.

182 *Id.* at 63.

183 *Id.*

184 *Id.*

the Constitution as a formal constitutional amendment.[185] By defending the achievements of these "constitutional moments," the Court has the ability to better represent the voice of the people than the elected institutions that are engaged in regular politics. In this manner, according to Michelman, Ackerman overcomes Bickel's CM difficulty.[186]

Michelman adopts Ackerman's line of thinking and views it as part of a trend of getting closer to the people's voice. Following Ackerman's idea that changes to the Constitution can be made outside the amendment procedure prescribed in Article V, Michelman accepts that with enough public support, the legal validity of constitutional changes can be acquired without following the formal procedure for its legal validation.[187]

There is no direct link between Ackerman's model and the shift in understanding judicial legitimacy. However, Ackerman's idea of constitutional amendment outside of Article V allows public support to replace the formal procedures required for acquiring legal validity. Ackerman argues that an agenda that acquired sufficient legitimacy in terms of public support, without going through the formalized legalized procedure of Article V, may have a constitutional meaning akin to a constitutional amendment. In putting emphasis of legitimacy in terms of public support rather than legality, Ackerman's insight is analogous to viewing judicial legitimacy in terms of public support rather in terms of legal expertise. Legitimacy in the form of public support endows authority to the Court, not its adherence to legality in a manner analogous to the manner Ackerman endows legitimacy to constitutional amendment outside of Article V. It is no surprise then, that in a footnote, Michelman notes:

> [j]udicial construction of the People's will goes 'all the way down' to the People's willing this constructive role upon the judiciary . . . . That self-government resides finally in the judiciary is not, of course, Ackerman's declared message. His message is that the people are self-governing in moments of constitutional politics.[188]

As Michelman writes, there is a link between acknowledging the people's ability to endow legitimacy to constitutional changes without going through the procedure of constitutional amendment and the Court's ability to rely on legitimacy stemming from the people in confronting the CM difficulty. Understanding judicial legitimacy in terms of public support as demonstrated in public opinion polls is just the next step in a story-line of making the voice of the people more actual and present.[189] In line with Michelman's focus on the perspective of "The People, Where?," one may view the

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185 *Id.* at 61, 63.

186 *See id.* at 63 ("The reviewing Court is the people's representative in the most straightforward sense . . . .").

187 *See id.* at 63–64.

188 *Id.* at 65 n.352.

189 Interestingly, Ackerman's joint project with James Fishkin that attempts to discover the actual voice of the people in elections, relies on a sampling technique derived from public opinion polling. *See* BRUCE A. ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY, 4 (2004).

voice of the people as captured in opinion polls as merely another step in a long path of harnessing the legitimating power of "the people."[190]

D. After the Shift: The Current Controlling Paradigm

While it is hard to determine the exact point in time in which a shift in the paradigm occurred in the *Harvard* Forewords, reading Forewords from the last two decades or so leaves little doubt that a shift has occurred. During the 1990s—even before the shift was apparent—the trend was clear. In her analysis of *Casey* as part of her 1991 Foreword,[191] Kathleen Sullivan paraphrases *The Federalist No. 78* in a manner that fits the new paradigm. She writes: "The Court is the least dangerous branch. It cannot tax, and it has no tanks. So why should people obey it? Because it has 'legitimacy, a product of substance and perception.'"[192] Sullivan does not reference *The Federalist No. 78* when she creates the clear equivalence between *The Federalist's* purse/sword and the tax/tanks appearing in her sentence. But while her updated version of the first part of *The Federalist No. 78* dictum does little in terms of changing Hamilton's insight, she transforms Hamilton's conclusion. Hamilton wrote that all the judiciary has is "judgment," yet Sullivan speaks of "legitimacy" and adopts the language from *Casey*[193] on the public following the Court as a "product of substance and perception."[194] In explaining what the judiciary has in the absence of the purse and the sword, Sullivan does not speak merely of the Court's expertise ("substance"), but also on the public's "perception" of the Court.

Sullivan also clarifies the role of expertise under the new understanding of judicial legitimacy. She explains that both Chief Justice Rehnquist and Justice Scalia believe that "the only way" to "preserve the Court's legitimacy," is "to make the people think" the Court "is engaging in law, not politics."[195] Both further believe that it is possible to achieve this goal only by ignoring the public "altogether—pay no attention to their current opinions or their folkways."[196] In other words, Rehnquist and Scalia share an underlying assumption according to which legitimacy is understood in terms of public

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190 *Cf.* PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY, 12 (2011) ("In place of the popular sovereign, the political scientist today speaks of popular majorities and of the forces that effect electoral politics – all measurable entities."). Interestingly, Michelman writes that Ackerman did not "seriously confront the difficulties of political self-government on a continental scale in modern, mass conditions." *See* Michelman, *supra* note 173, at 65 n.352.

191 *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 71 (1992).

192 *Id.* at 71.

193 Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

194 Sullivan, *supra* note 191, at 71; s*ee also id.* at 73, 121 (discussing "public legitimacy").

195 *Id.* at 80.

196 *Id.*

support.[197] They view the way to recruit public support as entailing statements of disregard of the people's views, and presenting the Court as engaged solely in an endeavor of legal expertise.[198] But the driving force is what the public thinks, and demonstrating expertise is merely the means to achieve it.[199]

Sullivan's Foreword focuses on the difference between rules and standards. She explains the endorsement of standards by "the liberal Justices" and "the moderate Justices" in *Casey* as an attempt to preserve public support for the Court. According to Sullivan, by allowing to "split differences," standards, rather than rules, ensure better responsiveness to the moderates among the American public.[200] In the context of *Casey*, Sullivan even refers to an op-ed titled "Justices' Abortion Ruling Mirrors Public Opinion," and stresses that this "coincidence" was "to be expected."[201] However, she clarifies that "the moderate Justices" do not conceive themselves as "doing politics" by following public opinion polls or election returns.[202]

In their 1993 Foreword, William Eskridge and Philip Frickey aim to present "the institutional perspective" that goes beyond "the traditional debate" between "legal formalism" and "legal realism."[203] The authors discuss the Court's attempt to maintain its legitimacy in *Casey* (as well as in other cases) and refer to research analyzing the correspondence between public opinion polling and the Court's adjudication.[204] While they do not identify the Court's "institutional position" with the results of public opinion polls measuring public confidence in the institution and in its decisions, the connection between this tool of measurement and assessing the Court's legitimacy is already explicitly made in their Foreword.[205]

A further step towards the current controlling paradigm is made by Michael Dorf in his 1997 Foreword. Dorf identifies the Court's institutional legitimacy with the

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197 *See id.* at 102 ("Standing fast under fire undermines – rather than promotes – judicial legitimacy, they say.").

198 *Id.* at 101–02.

199 On Justice Scalia's approach, see Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 266–67 (2011) (exposing that Justice Scalia used originalism as an esoteric language that allows the Court to preserve its image as a legal expert).

200 *Id.* at 100–01.

201 *Id.* at 100–01 & n.518 (referring to E.J. Dionne, Jr., *Justices' Abortion Ruling Mirrors Public Opinion: Polls Show Americans Would Keep Procedure Legal, But Are as Divided as Court on Limits*, WASH. POST, July 1, 1992, at A4.).

202 *Id.* at 101. Sullivan also refers to opinion polls showing "that more American voters identify themselves as 'moderate' than either 'conservative' or 'liberal'." *See id.* at 100.

203 William N. Eskridge Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term, Foreword – Law as Equilibrium*, 108 HARV. L. REV. 26, 95 (1994).

204 *See id. at* 38 & n.45.

205 *Id.*

results of public opinion polling.[206] In a section titled "Legitimacy and the Bully Pulpit*",* he writes that "[t]he legal realist insight that courts make political decisions has been with us for over a century without having substantially eroded confidence in courts generally, or in the Supreme Court specifically. According to one recent survey, the Court enjoys greater public confidence than Congress or government in general."[207]

A year later, in his 1998 Foreword, Mark Tushnet paraphrases *The Federalist No. 78* in writing that "[l]acking any direct ability to enforce its judgments, the Court must rely on other political actors if it is to act effectively as an institution of government."[208] Yet rather than explaining—as Hamilton did—that gaining the support of these political actors is based on their belief in the Court's expertise, Tushnet presents a model according to which the support of these actors is driven by the position of the Court's "constituencies."[209] Tushnet ascribes this "constituency model"[210] to political scientists, thus somewhat distancing his legal point of view from theirs.[211] Nonetheless, he offers a survey the Court's various "constituencies" and their support for the Court in different periods.[212]

While Tushnet does not directly refer to opinion polling when examining the Court's source of legitimacy,[213] he uses terms such as "diffuse support" that play a central role in understanding the Court's legitimacy in terms of public support.[214] For example, he writes:

> [t]he Court can develop constituencies of support by deciding cases in ways consistent with the interests of these constituencies. These constituencies, who are now generally favorable to the Court, provide a type of diffuse, unfocused support. The Court then draws on that diffuse support in deciding

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206 *See* Michael C. Dorf, *The Supreme Court, 1997 Term, Foreword – The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 74 (1998).

207 *Id*.

208 Mark Tushnet, *The Supreme Court, 1998 Term, Foreword – The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 64–65 (1999).

209 *Id.*

210 *Id.* at 108 n.372.

211 *See id.* at 64.

212 *Id.*

213 Outside the context of judicial legitimacy, Tushnet refers to opinion polling in trying to establish a narrative of American national unity connecting the People. He also refers to "communications about public opinion" while discussing the manner in which political scientists view the Court's decision-making as influenced by sources external to the law. *Id.* at 108 n.372.

214 *See, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); *see also* Tushnet, *supra* note 208, at 65 n.165.

> controversial cases that are not directly responsive to any particular constituency's interests.[215]

Tushnet is already speaking in the language of the new paradigm, but three years later in Aharon Barak's 2001 Foreword, the discussion becomes much more explicit. Barak dedicates a full section to "public confidence" in the judiciary as part of a discussion of the "preconditions" required to realize "the proper judicial role."[216] He begins this section by stating that "another essential condition for realizing the judicial role is public confidence in the judge."[217] He adds, "the judge has neither sword nor purse." However, in the footnote to this sentence he references not to Hamilton's dictum from *The Federalist No. 78*, but to Frankfurter's dissenting opinion from *Baker v. Carr*.[218] In his dissent, Frankfurter paraphrased Hamilton saying that "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[219] Frankfurter's quote—and not Hamilton's—is brought by Barak as if it is the original source for the insight that the judiciary "has neither sword nor purse." Hamilton's insight on expertise as the Court's source of legitimacy is replaced by Frankfurter's paraphrased version that puts "public confidence" as the Court's source of legitimacy. Barak's use of Frankfurter's dissent without referencing to the original version by Hamilton demonstrates the dominance the new paradigm has acquired. The best proof for dominance of a new paradigm is its ability to re-write the past in a manner that incorporates it under a revised terminology.

Based on his adoption of Frankfurter's paraphrase of *The Federalist No. 78*, Barak concludes that "[a]ll [the judge] has is the public's confidence in him. This fact means that the public recognizes the legitimacy of judicial decisions, even if it disagrees with their content."[220] As expressed here, Barak's notion of public confidence is close to what, in political science jargon, is known as diffuse support. Barak views public confidence in the judiciary as vital for resisting changes to courts' composition and jurisdiction in case of a clash with the other branches of government.[221] Barak writes that "public confidence does not mean the need to ensure popularity. Public confidence does not mean following popular trends or public opinion polls."[222] And

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215 *Id.* at 65 n.165.

216 *See id.* at 53, 59–62. It should be noted however that Barak defines and discusses the CM difficulty in its traditional sense as a problem of non-accountability. He stresses that "I contend that the most important asset a judge has in fulfilling his or her role is the lack of direct accountability to the public." *Id.* at 52.

217 *Id.* at 52.

218 *Id.* at 59 n.172.

219 Baker v. Carr, 369 U.S. 186, 267 (1962).

220 *Id.* at 59–60.

221 *See id.* at 117.

222 *Id.* at 60; s*ee also id.* at 161 ("Judges are not the representatives of the people, and it would be a tragedy if they became so.").

yet, when discussing *Brown v. Board of Education*,[223] Barak emphasizes the inability of a court to "retain public confidence if it announces a new *Brown* twice every week."[224]

In his 2002 Foreword, Robert Post identifies two paradigms for understanding the Court's source of authority. One based on the "autonomy of constitutional law" (or in my terms: expertise) and the other based on trust (or in my terms: public confidence).[225] According to Post, the Court's "legal authority" cannot depend merely on its expertise, but must instead be conceived as "the result of a certain relationship of trust that the Court works to establish with the American public."[226] Post concludes his Foreword by noting:

> [T]he Court must begin to reconceive judicial authority as the consequence of a relationship of trust that it continuously strives to establish with the nation. It must come to believe that the institution of judicial review will remain legitimate to the extent that the Court retains the warranted confidence of the country, conferred in recognition of a judiciary that is deeply loyal to 'the compelling traditions of the legal profession' apprehended with due regard for the constitutional convictions of the American people.[227]

Post not only presents a conceptual distinction between the Court's two sources of authority, but also alludes to public opinion as the Court's source of authority.[228] True, Post does not identify the rise of public opinion polling as responsible for a shift in understanding judicial legitimacy. Moreover, at times he seems to believe that expertise is still a viable source of legitimacy for the Court.[229] He notes that the Court will continue to be divided on the issue of which understanding of legitimacy is viable.[230] Yet, on other occasions, Post argues that understanding the Court's legitimacy in terms of expertise—an understanding Post attributes to Justice Scalia—has failed or is at least doomed to fail.[231]

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[223] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[224] Barak, *supra* note 18, at 88; *see also id.* at 104–06.

[225] *See* Robert C. Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003).

[226] *Id*. at 109.

[227] *Id.* at 111–12.

[228] *See id.* at 107–09.

[229] *See id.* at 9–11, 110–11.

[230] *See id.* at 10–11.

[231] *See id.* at 31–32, 110–11 ("Even if the jurisprudential claim of autonomy is theoretically unsustainable, therefore, Scalia's position remains nettlesome precisely because this conception of the law-politics distinction is deeply ingrained and pervasively regarded as a necessary foundation for the maintenance of judicial independence . . . . The authority of that law does

As I explain elsewhere, Scalia, and current Justices who speak in the name of expertise, adhere to understanding judicial legitimacy in terms of public support. They view expertise as a tool to achieve public confidence.[232] Their position should not be confused with working under the understanding of judicial legitimacy in terms of expertise.[233] For Hamilton, expertise is the source of judicial legitimacy, not a means by which public support is to be obtained.

The understanding of democracy in quantitative terms is at the center of Fredrick Schauer's 2005 Foreword.[234] He explains:

> the worry in the United States — and the motivation behind the call for popular constitutionalism or for limiting judicial review — seems also to be primarily about a democratic deficit in the aggregate rather than the theoretical problem arising from isolated and relatively inconsequential individual exercises of nondemocratic power, or even from episodic but consequential judicial countermajoritarian interventions. It is thus this quantitative sense of democracy that appears to be at stake in many of the debates, and it is this quantitative claim that there is a democratic deficit that is my primary target here.[235]

Even though the switch to the literal version of the CM difficulty can serve as further evidence to support the trend Schauer detects of adopting a "quantitative sense of democracy," he does not identify the switch in understanding the CM difficulty and the rise of the CM difficulty in its literal version. He conflates the two versions of the CM difficulty. At some points in the Foreword, he relies on the traditional version of the CM difficulty and in other parts on the literal one.[236]

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not, and cannot, depend upon the exercise of purely professional logic, but rather upon public support for the Court that fashions it.").

232 *See* Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1, 37–41 (2014).

233 At times Post seems to agree with such an assessment. Post, *supra* note 225, at 50 ("The impassioned rhetoric of *Lawrence* suggests that the Court well understands that the opinion's legal authority is connected to the Court's success in influencing public opinion. Despite his embrace of the autonomy of constitutional law, Scalia also plainly understands this dynamic, for he uses his dissent to denigrate *Lawrence* . . . and to mobilize political resistance to *Lawrence* . . . .").

234 *See* Frederick Schauer, *The Supreme Court, 2005 Term – Foreword: The Court's Agenda — and the Nation's*, 120 HARV. L. REV. 4, 52–53 (2006).

235 *Id.* at 53.

236 At the beginning of the Foreword Schauer explains that "[p]olicymaking in a democracy, so the argument goes, should be left to officials more responsive to popular will than judges, who because of their comparative nonaccountability to the public should keep their policymaking to a minimum. Government by judiciary, it is said, is the antithesis of democracy." *Id.* at 5–6. In an accompanying footnote he notes that "'Government by judiciary' is of course a tendentious phrasing of what we now call the 'countermajoritarian difficulty.'" *Id.* at 6 n.2. While in these sentences both versions of the CM difficulty are present, later in the article Schauer switches to an understanding of the CM difficulty in its literal sense. He writes:

> at times the Supreme Court's decisions help to make the issues with which it deals more salient, its post-New Deal history suggests a positive correlation between low

The gist of Schauer's Foreword is that the Court does not decide on the most salient issues that occupy public discourse, and thus, "the people and their elected representatives can nevertheless be understood as still making the vast bulk of decisions that are most important to the people themselves."[237] He therefore concludes that "the central decisions" in the United States are made "in a comparatively more popularly responsive way."[238] Based on this conclusion he "calls into question much of the contemporary and not-so-contemporary angst about the countermajoritarian or anti-democratic behaviour of the Court."[239] For the purposes of this Article, the important point is that Schauer detects that the Court's legitimacy problem, as it is currently understood, is focused on the Court's responsiveness to public opinion. Furthermore, he emphasizes that this problem is understood not in "theoretical" but in "quantitative" terms.[240] While he does not detect the switch to the literal CM difficulty as another manifestation of his thesis, his discussion is based on understanding the Court's legitimacy in terms of measurable public support rather than in normative theoretical terms.[241]

A year before Schauer, Richard Posner, in his 2004 Foreword, also offered a distinction demonstrating his adherence to understanding judicial legitimacy in terms of public support.[242] Posner distinguishes between constitutional cases—that Schauer would probably define as salient cases—and non-constitutional cases.[243] In constitutional cases, according to Posner, the Court's "gallery . . . is the court of public

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> salience and judicial counter-majoritarian aggressiveness . . . Indeed, even in its most important and most famous Watergate case, United States v. Nixon, the Court climbed on the train of anti-Nixon public opinion well after it had left the station.

Id. at 59–60. In a similar fashion Richard Fallon also refers to both definitions in his 1996 Foreword, though his discussion of the Court's legitimacy is very thin. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term – Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 143 (1997) ("Recognizing that reasonable people differ, we can still vest responsibility for relatively nondeferential constitutional decisionmaking in a nonmajoritarian institution, with rational hope of getting better determinations of constitutional principle and more successful constitutional implementation than we would get from the not necessarily unreasonable judgments of other, more politically accountable institutions.").

237 Schauer, *supra* note 234, at 53.

238 *Id.*

239 *Id.*; *see also id.* at 55.

240 *Id.* at 52–53.

241 Interestingly, at one point, Schauer discusses the argument that the Court makes "final decisions" about many central issues in total "disregard either [to] the views of the people at large or the views of the people's elected representatives." In a footnote accompanying the sentence quoted, he contrasts ("*But see*") between the text and *Atkins v. Virginia*, noting that this case was decided by "drawing on polls to prohibit capital punishment for the mentally retarded." *Id.* at 53 & n.186.

242 *See generally* Richard A. Posner, *The Supreme Court, 2004 Term – Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005).

243 *Id.* at 79–81.

opinion, and its participation in constitutional controversies injects a democratic element into constitutional adjudication."[244]

Adrian Vermeule's 2009 Foreword identifies a "fallacy of division" in the assumption that "if the overall constitutional order is to be democratic, the Supreme Court must itself be democratic."[245] Using sophisticated terminology, Vermeule uncovers an insight Fiss already identified in his 1978 Foreword. As noted above, Fiss observed that democracy as a system of government requires the consent of the people to the system as a whole and not to each of its institutions. [246] Vermeule identifies a similar "fallacy of division" in his discussion of the CM difficulty. He attempts to salvage the now almost forgotten understanding that a democratic regime does not require all of its organs to be majoritarian.[247] For Fiss, the realization that the legitimacy of the judiciary is not determined by majority support did not require exposing a fallacy and an excavation effort as this understanding was still part of a fading paradigm of a recent era. Vermeule's Foreword is written in an era controlled by the majoritarian paradigm, and in order to see beyond this paradigm, refuting a fallacy is required.

The dominance of this paradigm is also apparent from Vermeule's characterization of the CM difficulty. Vermeule's aim to counter the problem that "arises from the claim that the Supreme Court's power to overturn statutes on constitutional grounds is inconsistent with the constitutional order's deep commitment to majoritarian democracy."[248] As is apparent from this quote, Vermeule writes according to the understanding that the CM difficulty is about majoritarianism rather than about accountability.[249] Understanding the CM difficulty in this literal sense is in line with understanding judicial legitimacy in terms of public support.

Two years earlier, Lani Guinier puts at the center of her 2007 Foreword the argument that judges who offer oral dissenting opinions "may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process."[250] Guinier's entire thesis in her Foreword is built on understanding judicial legitimacy in

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244 *Id.* at 81.

245 Adrian Vermeule, *The Supreme Court, 2008 Term – Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 37 (2009); s*ee also id.* at 6, 9.

246 *See* Fiss, *supra* note 4, at 38.

247 *See id.* at 38 ("It is an analytic mistake, rather than an empirical one, to argue from the premise that the overall constitutional order should be democratic to the conclusion that an undemocratic Supreme Court must be undesirable.").

248 *Id.* at 37.

249 It should be noted that Vermeule writes that the CM difficulty "originated with Alexander Bickel, but it has a long history and periodically reappears, in changing and ever more sophisticated forms." *See* Vermeule, *supra* note 245, at 53.

250 Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14 (2008); *see also id.* at 50 ("[t]he Court's legitimacy – its ability to engender confidence in its judgments . . . ."). *Id.* at 54 (noting that oral dissents "help reframe our understanding of the important role that mobilized or engaged constituencies play in legitimating the Court's constitutional role.").

terms of public support for the Court.[251] For this reason, she writes that democracy-enhancing "dissenters need to be clear that their potential audience are external, not internal."[252] According to this argument, evaluating at least some dissenting judicial opinions is conducted not according to a "measurement" of legal expertise, of convincing fellow-lawyers, but according to measurement of public opinion.[253]

In Dan Kahan's 2010 Foreword, the public confidence paradigm is so uncontroversial that it is assumed as an uncontested premise.[254] Kahan's thesis is that "[t]he United States Supreme Court is an institution in crisis" because the public is losing its confidence in the reality of the Court's neutrality.[255] In his Foreword, he aims to show that this crisis in confidence is based on the way "culturally diverse groups form impressions on what the Court's decisions mean," rather than on the Court's actual positions.[256] The focus is not on critiquing the Court's adjudication in terms of legal expertise, but whether the Court is losing public confidence.

Many of the 1960s and 1970s Forewords were solely interested in improving the Court's doctrinal craft as an independent goal. Any doctrinal discussion in Guinier's and Kahan's Foreword is instrumental to the goal of improving the Court's ability to harness public support.[257] In a reality in which public support for the Court is at the center of discussion, the way in which the Court's adjudication is conveyed to the public has a vital importance as well as the biases that influence public perception of the Court. Thus, it is not surprising that media coverage of the Court's judgments and the opportunities to communicate judicial opinions to the public through the internet are so central to Guinier's Foreword.[258] Equally unsurprising is the focus of public perception in Kahan's Foreword.

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[251] *See id.* at 56 ("The Court can of course be responsive to the will of the people expressed through the legislature, but that is not the only way the Court is democratically accountable."); *see also id.* at 115, 126–27.

[252] *Id.* at 113.

[253] *See id.* at 16 ("Demosprudence, unlike traditional jurisprudence, is not concerned primarily with the logical reasoning or legal principles that animate and justify a judicial opinion.").

[254] *See* Dan M. Kahan, *The Supreme Court, 2010 Term – Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

[255] *Id.* at 4–6.

[256] *Id.* at 6.

[257] For example, in discussing Justice Stevens' oral dissents in *Heller*, Guinier comments that "[a]lthough his use of eight points exceeds the classic three-point protocol for maintaining an audience's attention, Justice Stevens keeps those points concise and comprehensible for listeners. He uses simple language that refers to case precedents plain to the average high-school-educated listener." *See* Guinier, *supra* note 250, at 73–74, 94.

[258] *Id.* at 10, 24, 29–31, 34, 37, 41, 53–54, 67–69, 76, 82–83, 101, 120.

As opposed to most American legal scholars and social scientists of the current era,[259] Karlan's 2011 Foreword does not read Hamilton through the current controlling paradigm and paraphrases his dictum to fit the paradigm. She detects that Hamilton did not subscribe to the current controlling understanding of the Court's legitimacy.[260] She argues that Hamilton was "slightly off base."[261] Yet, as explained above, Hamilton was not off at all. He had a different understanding of judicial legitimacy, one in which the Court does not need to rely on public confidence to function properly.

In line with the new paradigm, Karlan quotes Frankfurter's paraphrase of Hamilton's insight as the correct view of the Court's source of legitimacy.[262] Yet she argues that Frankfurter's concern that the Warren Court eroded its public support proved "to be unfounded."[263] In fact, Karlan explains that the Roberts Court enjoys public support thanks to the Warren Court "having been on the right side of history in *Brown v. Board of Education*."[264] Yet, she quotes recent public opinion polls that, in her view, demonstrate that the Court is risking its public standing because the public perceives it more and more as a politically motivated.[265]

In his 2015 Foreword, Daryl Levinson contrasts the "endless hand wringing over the countermajoritarian nature of judicial review" and the position according to which the "Court appears not supreme over the political branches and popular majorities but subservient to them."[266] He then writes that "[g]enerations of political scientists have followed Dahl in observing 'the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.'"[267] In the footnote accompanying this text he refers to Barry

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259 *See, e.g.*, Fuentes-Rohwer, *supra* note 52, at 507 (equating judicial legitimacy and "acceptance of the Court as a constitutional branch, measured by public opinion polls"); James W. Stoutenborough & Donald P. Haider-Markel, *Public Confidence in the U.S. Supreme Court: A New Look at the Impact of Court Decisions*, 45 SOC. SCI. J. 28, 29 (2008) (referring to the Federalist No. 78 and to Frankfurter's quote from *Baker v. Carr* and noting that "[l]egitimacy is tied, to a great extent, to the public's confidence, or specific support, in the Court as an institution . . . and without a reservoir of goodwill the Court will struggle to maintain its legitimacy.").

260 *See* Karlan, *supra* note 3, at 71.

261 *See id.*

262 *Id.* at 8.

263 *Id.*

264 *Id.* at 70.

265 *Id.* at 7 & n.34.

266 Daryl J. Levinson, *The Supreme Court, 2015 Term – Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 60 (2016).

267 *Id.*

Friedman's work that documented "the Court's responsiveness to public opinion."[268] There is a tension between the text that speaks on the Court's responsiveness to "lawmaking majorities" and the footnote that refers to its responsiveness to public opinion. This tension is best explained by examining the manner in which Robert Dahl's work is currently used, including by Levinson.

Many scholars have expressed their puzzlement that Bickel formulated the CM difficulty in 1962, while only five years earlier, Robert Dahl, a Yale political scientist—who sat only a few blocks away from Bickel's office at Yale Law School—already disproved the difficulty.[269] This depiction of intellectual history is misguided for two reasons.[270] First, as outlined above, Bickel defined the difficulty in terms of accountability making the problem inherently insolvable (unless Supreme Court justices are elected).[271] Second, Dahl did not rely on measurements of public support for the Court and its judgments.[272] Hence, he did not resolve the CM difficulty in its modern literal formulation that focuses on the difficulty of the Court countering the views of the public as measured in public opinion polls. Dahl's article discussed the responsiveness of the Court to the "dominant national alliance" by using the position of the legislative majority in Congress up to four years before the Court's decision as an "indirect" indication for majority will.[273] This is the origin for Levinson's reference to "lawmaking majorities."[274] Dahl used this methodology because "scientific opinion polls [were] of relatively recent origin" and not enough direct data of public views were available at the time he wrote his article.[275] He explained that "lawmaking majorities" are considered on "somewhat uncertain grounds…as equivalent to a national majority."[276] Dahl suggested that the Court counters "lawmaking majorities" only during "short-lived transitional periods," when the dominant political coalition is disintegrating or otherwise unstable.[277] Most of the time, the appointment of Justices

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268 *Id.* at 60 n.165; *see also id.* at 73 ("the Justices do not want to place the Court's public esteem and political independence at risk by taking unpopular positions on issues that the public and the political branches care most about.").

269 *See, e.g.*, Richard H. Pildes, *Is the Supreme Court a 'Majoritarian' Institution?*, 2010 SUP. CT. REV. 103, 104 (2010); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 220–21 (2002).

270 *See* Bassok, *Countermajorian Difficulties*, *supra* note 29, at 333–62.

271 *See supra* Part VI.C.1.

272 *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283–84 (1957).

273 *See id.* at 284, 293.

274 Levinson, *supra* note 266, at 60.

275 Dahl, *supra* note 272, at 283–84.

276 *Id.* at 284.

277 *See id.* at 293.

by Presidents who are part of dominant political coalition ensures that the Court's decisions are in line with the will of lawmaking coalitions.[278]

Dahl may have already foreseen the future in terms of conceiving judicial legitimacy in measurable terms of public support. Yet, he lacked the opinion polling data to complete the shift in understanding judicial legitimacy. As he explained: "for the greater part of the Court's history . . . there is simply no way to establish with any high degree of confidence whether a given alternative was or was not supported by a majority of adults or even of voters."[279]

Levinson follows Dahl's footsteps in viewing "lawmaking coalitions" as a surrogate for "popular majorities."[280] Yet, in presenting the CM difficulty as potentially resolved by empirical research conducted by political scientists measuring public support for the Court's decisions,[281] Levinson adheres to the current literal understanding of the CM difficulty that is a product of understanding judicial legitimacy in terms of public support. Thinking that the CM difficulty can be resolved by showing that the Court's decisions are in sync with the results of public opinion polls was foreign to Bickel who saw the difficulty as inherent to an unaccountable judiciary. Responsiveness does not equate to accountability.

Jamal Greene's 2017 Foreword promotes adopting proportionality review in American adjudication as the technique for deciding constitutional controversies over rights.[282] In discussing "the costs of proportionality," Greene explores the impact that using proportionality review would have on the judiciary's legitimacy.[283] He notes that since proportionality "mimic[s] the decisional process of legislatures, [it] risks decreasing the legitimacy of courts . . . . The opiate of the masses is not religion on

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[278] *See* Adamany & Meinhold, *supra* note 93, at 362–63, 374; Pildes, *supra* note 269, at 104 (Dahl "concluded that the Supreme Court had not functioned historically as a countermajoritarian institution and, for structural reasons, was unlikely to do so."); Levinson, *supra* note 266, at 60–61.

[279] Dahl, *supra* note 272, at 284.

[280] *See* Levinson, *supra* note 266, at 36; *see also id.* at 88–89, 90 n.323.

[281] The depiction of political scientists whose work is focused on the Court has changed over the years in the Harvard Forewords. In the opening lines to his 1952 Foreword, Mark DeWolfe Howe writes:

> [t]he stream of constitutional law to which the editors of the Harvard Law Review each year devote their attention runs a course in which not only the practitioner is professionally interested but with which the political scientist is also concerned. The one is interested in the direction which law has followed; the other is concerned with the course which political theory has taken.

Mark DeWolfe Howe, *The Supreme Court, 1952 Term – Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953).

[282] *See* Jamal Greene, *The Supreme Court, 2017 Term – Foreword: Rights as Trumps*, 132 HARV. L. REV. 28 (2018).

[283] *Id.* at 85–90.

this view, but law."[284] A few pages later, to support his claims on the "institutional legitimacy of the Supreme Court," Greene brings results of public opinion polls that were conducted by James Gibson and Gregory Caldeira and measure support for the Court.[285] This identification of judicial legitimacy with results of public opinion polls is vivid in Greene's conclusion of this point, which states, "[m]ore generally, studies of diffuse public support for the constitutional or apex courts of jurisdictions that practice proportionality as a matter of course, such as Canada and Germany, do not report substantial differences from support for the U.S. Supreme Court among the American public."[286] For Greene, the idea that judicial legitimacy means public support for the judiciary, as measured in opinion polls, is an inherent truth of constitutional theory. For this reason, it applies not only to the U.S. Supreme Court, but also to other national high courts worldwide.[287]

E. The Challenger

Among the *Harvard* Forewords, Larry Kramer's 2000 Foreword presents the most serious challenge to my thesis on the shift in understanding judicial legitimacy. According to Kramer, in recent decades among both conservative and progressive justices, there is an acceptance of the understanding that "the Constitution is nothing more than a species of ordinary law, hence something whose content and meaning are properly resolved by judges."[288] The rise of this understanding occurs while the competing understanding of viewing the Constitution as "a special kind of fundamental law outside the regular legal system" is in decline.[289] In other words, Kramer presents the acceptance of judicial supremacy in recent decades as a result of a rise in viewing the Court's legitimacy in terms of legal expertise.

Kramer's Foreword undermines my argument. He describes the current controlling understanding of judicial legitimacy in terms of expertise and argues that this understanding is on the rise rather than in decline, as I argue. This Article treats the Forewords mostly as pieces of data that prove or disprove my argument that the change in understanding judicial legitimacy is reflected in the *Harvard* Forewords. As a piece of data, Kramer's Foreword shows that not all authors of the *Harvard* Forewords in recent decades express in their arguments an understanding judicial legitimacy in terms of public support. In other words, in this Article, I examine whether my thesis on the shift in understanding of judicial legitimacy is manifested in the Forewords' arguments. Kramer's Foreword not merely fails to support this thesis, its existence

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284 *Id.* at 89; s*ee also id.* at 91 ("Judges must persuade citizens that courts are needed and worth listening to.").

285 *Id.* at 92.

286 *Id.*

287 For difficulties with transplanting the American paradigm with regard to the legitimacy of constitutional courts in South Africa and Germany see generally Or Bassok, *South African Constitutional Doctors with Low Public Support*, 30 CONST. COMMENT. 521 (2015); Bassok, *Schmitelsen Court, supra* note 122, at 158.

288 Kramer, *supra* note 9, at 160; *see also id.* at 85, 95–96, 99, 104, 130, 153, 164.

289 *Id.* at 163–64.

goes against it. My only counterargument against Kramer's Foreword, as a piece of data, is to point out that it is merely an outlier to the paradigm that has been manifested in the *Harvard* Forewords since the 1990s.

While I cannot negate Kramer's Foreword as a piece of data that undermines my argument, I do criticize the substance of his argument in the lines below. In other words, the discussion below is not focused on whether the *Harvard* Forewords as a sample of constitutional scholarship demonstrate the correctness of my argument on the shift in understanding judicial legitimacy. Rather, I aim to confront Kramer's claim that there is a rise, rather than a decline, in understanding judicial legitimacy in terms of expertise.

In terms of describing American constitutional history, there are several points of correspondence between my account and Kramer's. In both accounts, there is no story of a linear decline or a constant rise in the belief in judicial expertise. Kramer's account emphasizes that during the early republic the judiciary's legitimacy stemmed from viewing judges as "the people's agents."[290] He explains that "[i]f judicial review was permitted, it was . . . as a 'political-legal' act, a substitute for popular resistance, required by the people's command to ignore laws that were ultra vires . . . ."[291] This account stands in contrast to the strong reliance on legal expertise during the early days of the republic.[292] Kramer cannot—and indeed does not—deny that during the same years, many prominent figures, such as Hamilton, understood judicial legitimacy in terms of expertise.[293]

Both Kramer's account and mine agree that the rise of the position known as judicial supremacy occurred in recent decades.[294] As Kramer points out, according to this position, "judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone."[295] But there is an important point of divergence between Kramer's account and mine when it comes to explaining the rise of judicial supremacy. My explanation is that the rise of judicial supremacy occurred following the invention of public opinion polls that allowed measurements of public support for the Court. These measurements enabled the rise of a novel understanding of judicial legitimacy. This new understanding of judicial legitimacy opened the door for acceptance of judicial supremacy by the elected branches not based on belief in judicial expertise, but due to

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290 *See id.* at 53; *see also id.* at 54–56, 82.

291 *Id.* at 74.

292 *Compare id.* at 74 ("If judicial enforcement was implicit in the Constitution, it was not because the Constitution was the kind of law that courts were normally responsible for overseeing or because it was a kind of law that judges were uniquely qualified to interpret and enforce . . . ."), *with* ACKERMAN, *supra* note 128, at 33 ("The only expertise the Founders recognized was of the legal variety . . . .").

293 *See* Kramer, *supra* note 9, at 68, 94.

294 *See id.* at 6–7 ("It seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course.").

295 *Id.* at 6.

the Court's public support as expressed in public opinion polls. Kramer detects that there is strong public support for judicial supremacy (though he does not refer to opinion polls to establish it).[296] However, he views the rise of judicial supremacy as emanating from a shared understanding of constitutional law in terms of "ordinary law."[297]

Kramer's depiction of the connection between the rise of judicial supremacy and understanding constitutional law as "ordinary law" is in tension with the growing understanding of the political nature of constitutional law.[298] According to Kramer, the rise of judicial supremacy is connected to a growing belief in law as an autonomous realm.[299] But how does this assessment fit the clear decline in viewing constitutional law as an apolitical field of expertise? This decline explains—according to my argument—the Court's need to seek a new source of legitimacy.

Even if we follow Kramer's line of thinking, the decline in belief in judicial expertise should have pushed towards disbelief in constitutional law as ordinary law. According to Kramer, during periods in American history in which constitutional law was not viewed as a field of expertise, the "political-legal language" was used by the people for discussing and interpreting the Constitution.[300] Subsequently, the "political-legal language" should have been on the rise as it better fits a period in which the divide between law and politics is eroding. Such developments should have been accompanied by a rise of "the people themselves," rather than judges, as the chief interpreters the Constitution. Yet, Kramer argues that the opposite has happened as the Court has become the supreme interpreter of the Constitution.

Kramer understands that the way the voice of the people is conceptualized changes over time. One of his chief insights touches on this point. "Bear in mind," he writes, "that the practice of popular constitutionalism had changed, because the means of expressing popular will were understood differently in 1840 than they had been in 1790."[301] Kramer refers here to the rise of party politics that absorbed the voice of the people into a party-based political system. He adds that "[b]y 1840, then, popular constitutionalism meant popular will expressed by and through elected

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296 *See id.* at 6–7 ("It seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course."); *id.* at 123.

297 *See id.* at 8–9 ("Put simply, everyone—friend or foe of supremacy—begins with a shared understanding of the Constitution as ordinary law."); *id.* at 129–30.

298 *See, e.g.*, Suzanna Sherry, *Democracy's Distrust*, 125 HARV. L. REV. F. 7, 11 (2011) ("[M]any people no longer see judges as possessing *legal* expertise); CHARLES GARDNER GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY 2 (2016) ("The public has long internalized what scholars have confirmed: When judges decide difficult cases, they are subject to the influence of ideology, strategic consideration, race, gender, religion, emotion, their life experience, and other extralegal factors despite their assertions to the contrary.").

299 *See* Kramer, *supra* note 9, at 8.

300 *See id.* at 26, 79, 87.

301 *Id.* at 112.

representatives."[302] However, while Kramer detects the effect of this change in "the means of expressing popular will," he fails to detect a similar change following the invention of opinion polling. Kramer does not detect that the publication of public opinion polls in news media has demonstrated public support for the Court publicly and regularly, thus having a detrimental effect on understanding judicial legitimacy.[303]

V. CONCLUSION

In Forewords from recent decades, understanding judicial legitimacy in terms of public support appears as an objective truth that describes "the world unclouded by preconceptions."[304] However, by tracking the genealogy of this understanding in the *Harvard* Forewords, I demonstrated that its meaning changed in recent decades, and thus exposed its contingent nature. Judicial legitimacy is a man and woman-made construct. Different generations have attributed different meaning to this construct. The shift detected in the Forewords reflects a change in the understanding of the judicial legitimacy construct. Today, there is almost a consensus among American scholars and Supreme Court justices that because the Court lacks direct control over either the "sword or the purse," enduring public support (or sociological legitimacy in professional jargon) is necessary for the Court's proper function.[305]

This change can be presented as a debate on how to measure the performance of the Supreme Court. Should the Court be assessed merely in terms of legality by its professional community, or should it be assessed by the general public that evaluates the Court's performance according to standards that do not necessarily correspond to legal expertise? In his 1970 Foreword, Harry Kalven offered a similar insight in a context not so far from the one discussed in this Article. He wrote that "[t]he special burden of the Court, then, is to exercise great political powers while still acting like a court . . . . For institutions with such mixed function there can be no simple blueprint against which to measure performance."[306]

Scholars who argue that the Court has followed public opinion throughout its history fail to detect the great shift caused by the introduction of a metric—public opinion polling—that has allowed for the first time in history the assessment of the

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302 *Id.* at 112–13.

303 *See id.* at 129 ("Identifying the origins of this drift toward judicial exclusivity is not easy."). Barry Friedman's book *The Will of the People* suffers from the same flaw. See my critique in Bassok, *Schmitelsen Court*, *supra* note 122, at 161–62.

304 Minow, *supra* note 79, at 46 (discussing W.V. Quine's ideas and noting that "we cannot see the world unclouded by preconceptions.").

305 *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary . . . ."); Friedman, *supra* note 269, at 221 ("[M]any commentators made the point that judicial power ultimately depended upon popular acceptance.").

306 Harry Kalven Jr., *The Supreme Court, 1970 Term – Foreword*: *Even When a Nation Is at War*, 85 HARV. L. REV. 3, 3–4 (1971).

Court's work according to public support.[307] The ability to track public support for the Court, the public record of this support (often published by popular media), and the scientific allure of opinion polls made public confidence in the Court more "real" in the public imagination.[308] Before the introduction of public opinion polls, the Court may have followed public opinion, in the sense of following the cues it received from Congress or following impressionistic assessments of what public opinion is.[309] However, the Court never had a distinct, independent, and public metric that demonstrated to the other branches that it enjoys public support. The entrance of public opinion polls as a reliable metric—measuring the confidence of the public in the Court and demonstrating it publicly—made it an independent criterion of legitimacy.[310] This metric—followed as a matter of regular course of business by the elected branches—created an alternative to legal expertise in terms of assessing the legitimacy of the Court's adjudication.

However, the end result is not two metrics that are equally available to evaluate the Court's work. As this Article shows, the expertise metric has been distorted and incorporated into the public support metric. One example of this development is Kahan's and Guinier's forewords where legal expertise is understood as mere means for maintaining public support for the Court.[311]

In her 1986 Foreword, Minow emphasizes the importance in detecting which pictures of reality are excluded "from discussion or even imagination."[312] A picture of reality becomes most powerful when it is viewed as the "truth," and the competing visions "disappear behind the vision that prevails."[313] A good example to such a process in the *Harvard* Forewords is the paraphrasing of Hamilton's dictum from *The Federalist No. 78*. Originally Hamilton spoke of expertise as the source of judicial legitimacy, but his dictum is now read as saying that the Court's legitimacy is based on public confidence. The "re-writing" of *The Federalist No. 78* and the disappearance of understanding judicial legitimacy in terms of expertise should come as no surprise once we understand how paradigms work. Phenomena that transgress or contradict a controlling paradigm are either ignored, relegated as a temporary aberration or re-narrated so that they will fit the controlling paradigm.[314]

Every discipline works under certain paradigms. A discipline cannot confront, every day anew, the vast amount of knowledge without some organizing

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307 *See* Bassok, *Source of Legitamacy*, *supra* note 24, at 192–93.

308 *See* Fried & Harris, *supra* note 117, at 323.

309 *See, e.g.*, FRIEDMAN, *supra* note 58; TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 194 (2011).

310 *See* BOGART, *supra* note 117, at xxx.

311 *See* Kahan, *supra* note 254, at 4; Guinier, *supra* note 250, at 56.

312 Minow, *supra* note 79, at 68.

313 *Id.* at 67 ("Ideological success is achieved when only dissenting views are regarded as ideologies; the prevailing view is the truth.").

314 *See* KUHN, *supra* note 1, at 36–37.

paradigms.[315] By researching the genealogy of paradigms we can expose their contingent nature, and thus see how they present constrains our thinking.[316] These paradigms influence not only what arguments are considered valid, but also what arguments are made or even conceived.[317] Exposing the paradigms that control American constitutional thought is the first step in understanding their influence on the Court's adjudication and on constitutional thought. Only afterwards, we may be able to see beyond the current horizons that are controlled by these paradigms.

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315 *See id.*

316 *See* Skinner, *supra* note 6, at 53.

317 *See* Quentin Skinner, *Some Problems in the Analysis of Political Thought and Action*, 2 POL. THEORY 277, 299–300 (1974).