Trapped in the Age of Trump: the American Supreme Court and 21st Century Populism Or

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The American Supreme Court is currently ill-equipped to confront populism. This is not because of the political balance between justices nominated by Republican Presidents and those nominated by Democrat Presidents. It is a result of a deeper shift in the way the concept of judicial legitimacy is currently understood in the US. In this post I will briefly present this shift that I analyzed in length in a series of articles.

The introduction of public opinion polling that measured public support for the Court meant that for the first time in American history, the elected representatives lost their monopoly on the claim to legitimacy based on public support. Until the invention of public opinion polls, no source of data could give direct, regular, and reliable measurements of public opinion apart from elections.[1)]See Robert S. Erikson, Norman R. Luttbeg, Kent L. Tedin, *American Public Opinion: Its Origins, Content and Impact* (2nd edition, Wiley 1980). Public opinion polls introduced for the first time in history an independent source of evidence, considered reliable by all relevant players, of public support for the Court.

One may think that opinion polling is a sham; that it constructs public opinion more than merely measuring it, and yet several decades of constant polling reshaped the notion of democratic legitimacy in the US. Since the 1980s and the rise of 'public opinion culture', the term 'public opinion' came to be synonymous with opinion polls results.[2)]See, e.g., George F. Bishop, *The Illusion of Public Opinion* (Rowman and Littlefield 2005) 6; Susan Herbst, *Numbered Voices* (University of Chicago Press 1993) 63. Opinion polls have served in the public discourse as an authoritative democratic legitimator.[3)]See Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press 2010) 75–6; Sarah E. Igo, *The Averaged American* (Harvard University Press 2007) 12–13, 18–19. Between elections, political players rely heavily on these polls in deciding on their positions. The entrance of public opinion polls as a reliable metric, measuring the Court's public confidence and demonstrating it publicly, made it possible to view the Court's legitimacy in terms of public support for the first time in history. This shift brought changes in the institutional dynamic between the branches of government and in the Court's jurisprudence.[4)]For a discussion of these changes see Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. Pa. J. Const. L. (2013) 153. Not less importantly, the shift brought significant changes in the concepts the legal community uses to understand the Court's legitimacy.

The Conceptual Shift in American Constitutional Thinking

Two prominent manifestations of the conceptual shift following the introduction of polls are the shift in how Alexander Hamilton's famous dictum in Federalist No. 78 is read, and the shift in what the countermajoritarian difficulty means. I will briefly present these two manifestations.

Currently, Americans read Hamilton's dictum that the judiciary "truly be said to have neither Force nor Will, but merely judgment" in a manner that seem to them as identical to Hamilton's intention, but reflects a deep change in the understanding of judicial legitimacy. For them, without the force or will, all the Court has is "public confidence." As I explain in a recent article, this way of reading – that rose together with the entrance of public opinion polls – reflects that rather than seeing the Court's legitimacy as emanating from its judgment (expertise), Americans now view it as stemming from public support.[5)]Or Bassok, *The Supreme Court at the Bar of Public Opinion Polls*, 23 Constellations: An International Journal of Critical and Democratic Theory (2016) 573. While in the past the view was that the government as a whole requires public support, but not individual institutions. Now things have changed with regards to the SC (but not with regards for the Federal Bank).[6)]See, e.g., The Federalist No. 39 as well as No. 49. See also Owen M. Fiss, *Foreward: The Forms of Justice*, 93 Harv. L. Rev.

(1979) 1, 38

Most of the time, American judges, lawyers and scholars do not even notice this change in reading the Federalist No. 78. They use the paraphrased version of the Federalist No. 78 and its original version interchangeably. This shift is evident in judgments of justices irrespectively of the political affiliation of the President that nominated them to the Court. Take for example Chief Justice Roberts' dissenting opinion in *Obergefell v. Hodges* (the Gay marriage case). In this judgment, Roberts used the Federalist No. 78 twice in discussing the Court's legitimacy: first in its original version and then, by quoting Justice Kennedy, in its paraphrased version. But at times, Americans do notice that they are paraphrasing. A prominent example is Pamela Karlan's concluding lines in her 2012 Harvard Foreword titled *Democracy and Disdain*.[7)] Pamela S. Karlan, *The Supreme Court, 2011 Term, Foreword: Democracy and Disdain*, 126 Harv. L. Rev. (2012) 1, 71. Karlan writes that "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."[8)] Ibid., 71. In other words, Karlan views public support as the Court's source of legitimacy. According to this understanding of judicial legitimacy, even if the Court lacks expertise, as long as it holds public support, it will function properly.

The shift in understanding the counter*majoritarian* difficulty is even harder to detect. The name of the difficulty – coined by Alexander Bickel – reads as if it was devised precisely for the age of public opinion polling: the counter-*majoritarian* difficulty (hereinafter: the CM difficulty). On its face, the CM difficulty seems to deal with the Court countering the majority of the public as reflected in public opinion polls. But while this is the current dominant understanding of the difficulty, it was not the original meaning of the difficulty. When coining this term, Bickel intended to capture the difficulty of remotely accountable judges that have the authority to invalidate legislation enacted by electorally accountable representatives. Bickel did not understand the difficulty in terms of the Court countering public opinion for the simple reason that at the time of coining the concept, public opinion polls had yet to attain their current status in the public discourse as reliable reflections of popular sentiment. For this reason, Bickel could still write 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."[9)] Alexander M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962), 239.

For Bickel the CM difficulty was unsolvable. The American SC is inherently less accountable than the elected institutions since the Justices' time in office in not directly controlled by the public. For this reason, the only path to deal with the difficulty is to try and justify the Court's function based on judicial expertise. It is no wonder then that under this Bickelian paradigm, the American constitutional discourse was for many years obsessed with finding expertise-based justifications for the Court's CM authority of judicial review over legislation. However, with the rise of public opinion polling, the difficulty has changed its meaning. Currently, the difficulty pertains to a court that its decisions counter the views of the public as expressed in opinion polling.[10)] Or Bassok, *The Two Countermajoritarian Difficulties*, 32 St. Louis U. Pub. L. Rev. (2012) 333. Subsequently, Nathaniel Persily could write that "[a]fter 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."[11)] Nathaniel Persily, *Introduction* to *Public Opinion and Constitutional Controversy* (Nathaniel Persily, Jack Critin & Patrick J. Egan, eds., Oxford University Press, 2008) 5.

A cottage industry has developed in political science journals in which it is demonstrated, using opinion polling data, that the American SC is not CM. For decades now political scientists have been gloating: they have proven that the entire legal academia has been engaged in confronting a difficulty that does not exist. But obviously a court that its judgments correspond to public opinion results remains unaccountable and in that sense the CM difficulty in its original sense is still insolvable. Political scientists are just viewing the Court's legitimacy problem through their limited working tool: public opinion polls.

Two Points of Clarification

A. The American Supreme Court has always understood its legitimacy as dependent of

public support

Barry Friedman has made implicitly the strongest case for this claim in his excellent account of the influence of public opinion on the Court throughout its history. In his book *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*,[12)]Barry Friedman, *The Will of the People* (Farrar, Straus and Giroux 2009). Friedman retells the entire history of the Supreme Court based on the premise that in order to function properly the Court requires public support. The story according to Friedman is one of a structurally unchanged relationship between public opinion and the Court. In essence, according to his account, judicial legitimacy was always understood in terms of public opinion, the only change is that with time the justices have become better in assessing public opinion.[13)]Friedman, supra n 12, at 376. True, long before the invention of public opinion polls, the Court was interested in public opinion and even spoke of its "public confidence." Yet, I argue that while public opinion has undoubtedly affected the Court throughout its entire history, the introduction of public opinion polls changed the institutional dynamics as well as the understanding of concept such as "judicial legitimacy" or "public confidence." This new understanding has manifestations such as the change in reading the Federalist No. 78 or in the understanding of the CM difficulty. Friedman, so I argue, viewed the entire history of the Court through these conceptual "glasses" of the present.[14)]For my critique of his account see Bassok, supra n. 4, at 192-3.

If this argument seems hard to swallow think of the claim that a non-democratic ruler (think of Mubarak) requires public support to rule. For the people under his rule, this is clearly untrue. Non-resistance is not necessarily a result of oppression. Rather, the state of things may just seem natural. In fact, the moment the people put the "glasses" that make them realize that the ruler requires their support to rule is the moment of the ruler demise. Similarly, we can think of institutions in a democracy that their expertise is so obvious to us (central banks?) that we do not view them as requiring public support.

True, changes in the manner the Court views legal expertise and public opinion were not only the result of the introduction of public opinion polls, but also the result of the decline of the belief in legal expertise in constitutional questions.[15)]Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. and Pol. 239 (2011). And yet, the effect of the technological change in measuring public support on the Court has not been detected by Friedman and others who analyzed the relationship between the Court and the public.

B. Other courts worldwide speak "in the name of the people"

In an innovative book titled "In the Name of the People," Armin von Bogdandy and Ingo Venzke discuss the formula "in the name of the people," used by domestic courts to describe "in whose name" they decide cases.[16)]Armin von Bogdandy & Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* 20 & fn. 94-95 (Oxford University Press 2014). The authors explain that this formula invokes the authority of the democratic sovereign.[17)]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). Yet von Bogdandy and Venzke make it clear that this expression is a reflection of 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.[18)]See von Bogdandy & Venzke, supra n. 15, at 20. It is a concept that views the democratic subject as a single collective, mostly a nation or a people, rather than the accumulation of individual voices.[19)]See von Bogdandy & Venzke, supra n. 15, at 140. This is very different from the understanding of public confidence as reflecting public opinion measured by public opinion polls. While the American new understanding of judicial legitimacy has undoubtedly started to migrate to other jurisdictions,[20)]See Or Bassok, *Two Concepts of Judicial Legitimacy*, in Martin Scheinin, Helle Krunke & Marina Aksenova eds., *Judges as Guardians of Human Rights and Constitutionalism* (Edward Elgar Publishing 2016) 50-70. the German Constitutional Court's use of the phrase "in the name of the people" (a use that stems from Article 25(4) of the German Law on the Federal Constitutional Court that states that the judgments of the Constitutional Court are issued "in the name of the people") is not part of this trend.

Conclusion

The introduction of public opinion polls that measure public support for the Court is responsible, at least in part, for a change in understanding judicial legitimacy. These days, to claim that the court is legitimate in the US is to claim it holds public support.[21] see for example Jeffery Rosen, *The Supreme Court Has a Legitimacy Crisis, But Not For the Reason You Think*, The New Republic, June 11, 2012 While this shift does not mean necessarily that the Court has to follow public opinion in every case,[22] See for example the discussion of why originalism has become so prominent in the Court's jurisprudence in Or Bassok, *The Court Cannot Hold*, 30 J.L. & Pol. (2014) 1, 39-40. the claim that a legitimate Supreme Court can somehow confront over a long period of time a populist movement supported by public opinion is under this new conceptual array a contradiction in terms. This result is not because of the inherent "truth" that no court can function without public confidence. This "truth" was never proven by political scientists. In fact, there is at least one case that refutes it.[23] See Or Bassok, *South African Constitutional Doctors with Low Public Support*, 30 Constitutional Commentary (2015) 521. This result is one consequence of deserting the Hamiltonian understanding of judicial legitimacy following the rise of opinion polling. Only if we read the Federalist No. 78 as saying that all the Court has merely public confidence, then it cannot oppose the public.

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References [+]

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2. ↑ See, e.g., George F. Bishop, *The Illusion of Public Opinion* (Rowman and Littlefield 2005) 6; Susan Herbst, *Numbered Voices* (University of Chicago Press 1993) 63.
3. ↑ See Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press 2010) 75–6; Sarah E. Igo, *The Averaged American* (Harvard University Press 2007) 12–13, 18–19.
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6. ↑ See, e.g., The Federalist No. 39 as well as No. 49. See also Owen M. Fiss, *Foreward: The Forms of Justice*, 93 Harv. L. Rev. (1979) 1, 38
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18. ↑ See von Bogdandy & Venzke, supra n. 15, at 20.

19. ↑ See von Bogdandy & Venzke, supra n. 15, at 140.

20. ↑ See Or Bassok, *Two Concepts of Judicial Legitimacy*, in Martin Scheinin, Helle Krunke & Marina Aksenova eds., *Judges as Guardians of Human Rights and Constitutionalism* (Edward Elgar Publishing 2016) 50-70.

21. ↑ see for example Jeffery Rosen, *The Supreme Court Has a Legitimacy Crisis, But Not For the Reason You Think*, The New Republic, June 11, 2012

22. ↑ See for example the discussion of why originalism has become so prominent in the Court's jurisprudence in Or Bassok, *The Court Cannot Hold*, 30 J.L. & Pol. (2014) 1, 39-40.

23. ↑ See Or Bassok, *South African Constitutional Doctors with Low Public Support* , 30 Constitutional Commentary (2015) 521.

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