THE SOCIOLOGICAL-LEGITIMACY DIFFICULTY

Or Bassok•

Abstract. While the US Supreme Court's normative legitimacy problems, and especially the countermajoritarian difficulty, have received wide scholarly attention, only scant scholarly attention has been paid in recent decades to the Court's problems with its descriptive or sociological legitimacy. The sociological-legitimacy difficulty captures the Court's inability to sustain its sociological legitimacy if the public perceives it as unconstrained by the law and deciding cases according to the Justices' own political opinions. By the 1940s, the understanding that law's malleability allows judges to decide cases based on their political preferences was already widespread, and it has been spreading ever since. While several scholars claim that the sociological-legitimacy difficulty is fictitious, I show that it very much affects Supreme Court's adjudication. The effects of this difficulty are not restricted merely to prudence on the part of the Court in face of potential public backlash, but extend to areas such as judicial choice of interpretative method.

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INTRODUCTION

Over the years, the idea of a causal linkage between public support for the US Supreme Court (hereinafter: the Court) and its ability to function properly has become so powerful in the imagination of the American legal community that it is now a myth in the Barthesian sense. It has become natural.[1] Today, there is an almost total consensus among American scholars that having no direct control over either the "sword or the purse," sociological legitimacy is necessary for the Court's proper function.[2] The Court has also acknowledged that its power rests on its sociological legitimacy.[3]

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[1] ROLAND BARTHES, MYTHOLOGIES 129 (1982) (1957) ("We reach here the very principle of myth: it transforms history into nature.")

[2] *See, e.g.,* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 122 YALE L.J. 153, 221 (2002) ("many commentators made the point that judicial power ultimately depended upon popular acceptance."); Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1016 (2007) ("Like anyone who does not live on a desert island, the Court, in order to achieve its goals, has to be concerned with what other people think of it…the Court must take care to behave in a way that inspires or maintains public confidence."); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT 209 (1960) ("If public opinion had rejected it, the performance by the courts of the function of judicial review would have been impossible."). *Cf.* THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Jacob E. Cook ed., 1961) ("The 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 judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")

[3] *See, e.g.,* Holmes v. Jennison, 39 U.S. 540, 618 (1840) ("The power of this Court is moral, not physical; it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts; not by its mere authority as a tribunal, from which there is no appeal… ."); U.S. v. Lee, 106 U.S. 196, 223 (1882) ("While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all ….[W]ith no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives."); Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter J., dissenting) ("The Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction."); Planned

Yet while constitutional scholars of recent decades have been obsessed with finding solutions to the countermajoritarian difficulty, and thus to the Court's most prominent normative legitimacy problem,[4] only scant scholarly attention has been paid to the Court's descriptive or sociological legitimacy problems. The aim of this article is to close this gap by shedding light on one of the Court's most prominent sociological-legitimacy problems and its important effects on the Court's jurisprudence.

In the first part, I examine the concept of sociological institutional legitimacy. In the second part, I examine the mythical image of the Court as a legal expert, which served as the basis for its descriptive legitimacy in the period between 1880s and 1930s. In the third part, I describe how beginning in the 1930s, increased public awareness of the indeterminacy of legal norms undermined this myth. In its place, a belief arose that the Justices' political positions determine the outcomes of cases. These changes created a threat to the Court's sociological legitimacy which I dub "the sociological-legitimacy difficulty." It is unclear whether the erosion of the myth caused a decline in the Court's sociological legitimacy. Some scholars doubt not only the effects of such erosion but also the fragility of the Court's sociological

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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..."); Republican Party of Minnesota v. White, 536 U.S. 765, 817-18 (2002) (Stevens J., dissenting) ("Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.") *See also* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 733 ("[T]he Court regards public legitimacy as central to its effectiveness.").

[4] *E.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 578 (1993) ("At least since Alexander Bickel's *The Least Dangerous Branch*, constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimizing judicial review."); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 476 (2005) ("The perennial questions of constitutional theory in the United States have been: 'Is judicial review justified?' and 'How should the constitution be interpreted?'").

legitimacy. Their attempts to expose the fictitious aspects of the sociological-legitimacy difficulty are examined in the fourth part. In the fifth part, I show that even if this difficulty is fictitious, it is very real in the social imagination of the Justices. In the sixth part, I examine originalism from the perspective of the sociological-legitimacy difficulty. My aim is to demonstrate the pervasive effect of this difficulty on the Court's jurisprudence. Before concluding, I examine the differences and connections between the challenge that the countermajoritarian difficulty poses for the Court's normative legitimacy, and the challenge posed to the Court's descriptive legitimacy by the increased public awareness of the indeterminacy of legal norms.

I. DESCRIPTIVE INSTITUTIONAL LEGITIMACY

The concept of legitimacy has several faces. One face is normative, another empirical or sociological.[5] As regards the Supreme Court's institutional legitimacy, the normative aspect deals with the justification of the Court's authority. In the American context, the focus is on the justification of judicial review over legislation in light of the countermajoritarian difficulty. The empirical aspect of legitimacy deals with the trust or confidence that the public actually awards the Court over a relatively long period of time.[6] Sociological (or descriptive) institutional

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

[6] *See* C.K. Ansell, *Legitimacy: Political*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8704-06 (Neil J. Smelser & Paul B. Baltes eds., 2001); Fallon, *supra* note 5, at 1790-91, 1794-96, 1828; James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POLICE SCI. 354, 358 (2003) (characterizing institutional legitimacy as, among other things, "a generalized trust that the institution will perform acceptably in the future.").

legitimacy is a concept that aims to describe this institutional capital or institutional loyalty.

It is not obvious that descriptive institutional legitimacy can be directly measured by polls.[7] Even if such a concept can be measured by polls, scholars are divided as regards its definition and the method of measurement. Gregory Caldeira and James Gibson equate descriptive institutional legitimacy with diffuse support.[8] Following Easton's classic definition, they define the latter term as the Court's "reservoir of favorable attitudes or good will."[9] According to Gibson and Caldeira, in order to measure the fundamental and relatively enduring features of the public's orientation towards the Court, the focus should be on support for maintaining the institution. Thus, according to this view, the Court enjoys high levels of diffuse support when individuals object to changes in the Court's decision-making authority.[10] At times, the public may disagree with a certain decision or with the substantive policy reflected in its outputs. This would lower the Court's specific public support. However, the more durable diffuse support transcends the reaction to the specific performance of the Court and remains unscathed.[11] Only sustained disappointment with the Court's decisions can lead to a decline in the Court's descriptive

[7] James Gibson, *Understanding of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23(3) LAW & SOC'Y REV. 469, 487 (1989) (questioning whether legitimacy can be directly measured in survey research).

[8] *See, e.g.*, Gibson, Caldeira & Spence, *supra* note 6, at 358.

[9] DAVID EASTON, A SYSTEM ANALYSIS OF POLITICAL LIFE 273 (1965). *See, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992).

[10] Caldeira & Gibson, *supra* note 9, at 638-39 ("diffuse support is opposition to basic structural and functional change").

[11] Caldeira & Gibson, *supra* note 9, at 636-38; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2614-17 (2003). Specific support is defined as "satisfaction with the performance of a political institution." James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1126 (1992).

legitimacy.[12]

Other scholars use surveys measuring "public confidence" in the Court as the metric of the Court's descriptive legitimacy.[13] This approach treats diffuse and specific support as opposite poles on a metric measuring the durability of public support, with public confidence positioned between them.[14] While this approach tends to conflate diffuse and specific support,[15] its chief advantage is the number of surveys that have examined public confidence in the Court over the years. Since surveys conducted by the media and organizations such as Gallup use "public confidence" as the measure of the Court's legitimacy, this metric has gained much greater prominence in public discourse.[16] Moreover, a similar metric is frequently used to measure support for the President and Congress, allowing for a comparison between institutions.[17] Such a comparison is vital for

[12] Friedman, *supra* note 11, at 2615 ("intense enough specific disagreement with an institution ultimately will have an impact on diffuse support."); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 344, 351-56 (1998) ("only prolonged dissatisfaction would erode levels of diffuse support."); JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZEN, COURTS AND CONFIRMATIONS 5 (2009) (same).

[13] *E.g.*, Robert H. Durr, Andrew D. Martin & Christina Wolbrecht, *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 768-69 (2000); Jeffery J. Mondak & Shannon I. Smithey, *Dynamics of Public Support for the Supreme Court*, 57(4) J. POL. 1114, 1116 (1997).

[14] Mondak & Smithey, *supra* note 13, at 1116 n.2.

[15] *See* Caldeira & Gibson, *supra* note 9, at 637 ("Unfortunately, previous studies of the Supreme Court have not escaped the peril of mixing together elements of specific support in measures of diffuse support."); Tom R. Tyler, *The Psychology of Public Dissatisfaction with Government*, *in* WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 227, 232-33 (John R. Hibbing & Elizabeth Theiss-Morse, eds. 2001) (surveys measuring "trust" do not directly assess legitimacy). However, some claim that disentangling diffuse support from specific support is difficult if not impossible. Durr, Martin & Wolbrecht, *supra* note 13, at 769 n.3.

[16] During the time of the Rehnquist Court, six percent of poll questions concerning the Court measured trust, confidence, or approval of the Court as an institution (139 questions) rather than attitudes toward specific cases. THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 3-4 (2008)

[17] *See, e.g.*, Durr, Martin & Wolbrecht, *supra* note 13, at 772-75.

determining whether a decline of public confidence in the Court is part of a larger trend of declining public confidence in governmental institutions in general.

It should be stressed from the outset that the since the general public is only aware of the most visible cases, only these cases can influence the Court's descriptive legitimacy.[18] As Fredrick Schauer has convincingly shown, the Court "operates overwhelmingly in areas of low public salience…"[19] Hence, only a relatively small number of cases (including certain cases at the certiorari phase) can influence the Court's sociological legitimacy.[20]

II. THE COURT'S MYTHICAL IMAGE AS A LEGAL EXPERT

Although throughout the Reconstruction era the Court was publicly perceived as partisan and political, by the 1880s the Court's authority was publicly legitimized mainly on the basis of its special expertise in an autonomous body of knowledge known as "law."[21] While no scientific public polling data from that period exist, scholars claim that in the period between the 1880s and the 1930s, the Court's descriptive legitimacy was

[18] *See, e.g.*, MARSHALL, *supra* note 16, at 124 (media exposure sets limits on how much the Court's decisions can influence public opinion.)

[19] Frederick Schauer, *The Supreme Court, 2005 Term - Foreword: The Court's Agenda - and the Nation's*, 120 HARV. L. REV. 4, 11 (2006). *See also id.*, at 30-32, 44.

[20] *See, e.g.*, Friedman, *supra* note 11, 2620-23 ("Only a small number of the cases attract the sort of media attention that cause them to stick in the public consciousness."); Lawrence Baum & Neil Devins, *Why the Supreme Court Cares About Elites, Not the American Public*, 98 GEO. L.J. 1515, 1547-50 (2010) ("the great majority of Supreme Court decisions are essentially unknown to the general public… The Justices hardly need to worry that such decisions will precipitate a public uprising.").

[21] BARRY FRIEDMAN, THE WILL OF THE PEOPLE 133-37 (2009); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1031-37 (2000).

derived from the public's belief that the Justices are vested with the special legal knowledge and expertise that enables them to discover the true meaning of the Constitution.[22]

The special expertise that legitimated the Court's authority during that period was analogized on different occasions to that of various experts in other bodies of knowledge. At times, law was analogized to science and the Court's expertise to that of a scientist.[23] According to this analogy, judges, like scientists, objectively and systematically identified or deduced the law.[24] On other occasions, the Justices were analogized to priests who

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[22] *See* James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1083 (1993) ("The postbellum Court's pseudo-scientific jurisprudence apparently fooled, or at least satisfied, enough people…for twenty to thirty years after the Civil War."); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION viii-ix (3d ed., 2007) ("In the period in which the 'oracular' theory of judging was in place, which stretched from the time of the framing of the Constitution through the nineteenth century, the dominant understanding of judicial decision-making treated it as an exercise in 'finding' rather than 'making' law, with 'law' being conceived as a body of finite and immutable principles that existed independent of its interpreters."); MARSHALL, *supra* note 16, at 123 ("Several early accounts argued that Americans hold the Court in high esteem and believe that the justices have special insights into the Constitution."); J.C. Rosenberger, *The Supreme Court of the United States as Expounder of the Constitution*, 30 AM. L. REV. 55, 58 (1896) ("The only power possessed by the judges is that which gained by their learning and integrity. Should they at any time lose the respect and confidence of the people, their decisions would be as if written on empty air.…They have spent their lives in the attainment of a high degree of technical skill…."); *id.* at 66 ("To interpret laws requires the skill of a trained expert.").

[23] *See, e.g.,* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END 15-18 (2006) ("In the course of the nineteenth century in the United States, a marked shift took place in which science, which enjoyed unmatched prestige as the font of knowledge in the Enlightenment age, became the ascendant form of legitimation for law. …Non-instrumental views of law as science survived into the first third of the twentieth century."); *id.* 20, 49 (claiming that formalistic scientific style of judging serves as the basis of Court's public legitimacy.).

[24] *See e.g.*, Christopher C. Langdell, *Harvard Celebration Speeches*, 3 L. Q. REV. 123, 124 (1887) ("[L]aw is science, and…all the available materials of that science are contained in printed books... ."); ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 170-174, 188 (1993); Paul W. Kahn, *Marbury in the Modern Era: Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2703 (2003) ("The American Court… pursued an ideal of legal science at the end of the nineteenth and the beginning of the twentieth century."); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 9-

held special knowledge in the sacred scripture and were "brushed with divinity."[25]

These notions of legal expertise have several basic properties in common: the law is understood as fixed; by using legal reasoning and legal materials, judges can ascertain or discover the law; judges are bound by the law, which they apply impersonally and impartially, without making any personal choices and with no political agenda of their own to advance; "the law" is a stock of specialized professional knowledge, esoteric legal know-how held by lawyers.[26] Hence, all those employing legal expertise properly will decide cases in the same manner, creating a "government of laws not men."[27] Law serves as the referent, existing independently of its interpreters and providing determinate answers. Expertise in law enables a determinate decision based on an autonomous body of knowledge.[28] These properties

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10 (1992) (the scientific vision of the law wished "to established a non-political oasis through law.").

[25] *See* Alpheus Thomas Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385, 1387 (1962). *See also* Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1293, 1307-12 (1937) ("The judges become, thus, not ordinary men, subject to ordinary passion, but 'discoverers' of final truth, priests in the service of a godhead."); Arthur Selwyn Miller, *Some Pervasive Myths About the United States Supreme Court*, 10 ST. LOUIS U. L.J. 153, 154 (1965) ("To some extent, Americans are nation of Constitution-worshippers, with the Supreme Court acting as a high priesthood administrating to the faithful.").

[26] *See* 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, 62-63 (1965); FRIEDMAN, *supra* note 21, at 192, 214; BLACK, *supra* note 2, at 159-61 (claiming that during the nineteenth century, the prevailing view was that "[l]aw is to be ascertained or found, by the exercise of technical reason operating on the technical materials (statutes, precedents, and the rest).").

[27] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[28] *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 498 (2003) (describing Langdellian jurisprudence: "Every decision was made in advance by a body of law that was at once simple and comprehensive (hence, transparency), and exact (hence, determinacy). The body of law thus established was autonomous and properly scientific... ."); KRONMAN, *supra* note 24, at 15, 18-23.

combined to create what is known as "the mythical image" of the Court.[29]

III. THE INDETERMINACY OF LEGAL NORMS AND THE EROSION OF THE COURT'S MYTHICAL IMAGE

The indeterminacy of legal norms exposes the gap between the law and its application, as well as the multiplicity of applicable legal sources, replacing the notion of compulsion by "the law" with that of judicial discretion.[30] In many cases, legal norms are unable to determine legal results and allow for a range of interpretations which are all plausible according to professional standards. The choice of one interpretation over another cannot be justified solely by legal expertise.[31] At least in certain cases, law could no longer serve as the sole determinative referent according to which cases are decided.[32] Law is open-ended, and can lead in

[29] The term "mythical" is used not to imply that this image of the Court is completely fictitious but only to illuminate the sacred, noble image of the Court in the public mind during the period between 1880s and 1930s. For a similar use of the term "myth," see PETER NOVICK, THAT NOBLE DREAM: THE 'OBJECTIVITY QUESTION' AND THE AMERICAN HISTORICAL PROFESSION 3-4 (1988). For a similar use in a study examining courts' institutional legitimacy see Gad Barzilai, *Courts as Hegemonic Institutions and Social Change*, 3 POLITICS 31, 40 [in Hebrew] ("A myth is not necessarily a total fiction. A myth means a combination of reality and imagination and that is the source of its social and political power.").

[30] JEROME FRANK, COURTS ON TRIAL 147 (1949) (describing the legal realists' criticque: "[N]o judge was a mere judicial slot-machine…the idea of a 'mechanical jurisprudence' was an absurdity."); PAUL W. KAHN, THE REIGN OF LAW 108-09 (1997) ("In the post-Langdellian world, the power of the rule of law cannot be located in its formal deductive character."); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 613-17 (2007) ("[R]ealism views legal doctrine as hopelessly indeterminate not (or, at least, not primarily) because of the indeterminacy of discrete doctrinal sources but mainly because of their multiplicity.").

[31] *See* HORWITZ, *supra* note 24, at 200-02; Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U.L. REV. 875, 883 (2003).

[32] The extent of the indeterminacy difficulty is disputed. Most legal scholars and judges claim that in practice this problem does not arise in most cases. Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77, 88-90 (2009). For my

many contexts to more than one outcome.[33]

The indeterminacy problem exposes not only that adjudication involves choice and not just discovery, but also that in certain cases, "there is almost no legal outcome that a really skillful analyst cannot cover with a professional varnish."[34] Judges, so the claim goes, choose their results and reason backward using legal language as mere rhetoric.[35] In view of law's malleability, expert legal discourse becomes just a form of sophist rhetoric justifying an outcome reached by other means.[36]

A complete historical survey of the awareness of law's malleability among jurists in general, and judges in particular, is well beyond the scope of this article. Brian Tamanaha may be completely correct in his claim that even during the so-called "formalist" period, members of the legal

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purposes it is sufficient to agree that Supreme Court cases are usually focused on indeterminate legal norms. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma,* 45 U. CHI. L. REV. 462, 490 (1987) ("The Supreme Court certainly uses indeterminacy or underdeterminacy of practical importance as criteria for selecting the cases it hears.")

[33] *See, e.g.*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 5 (1996); TAMANAHA, *supra* note 23, at 65-67 ("According to Realists, to summarize, law is neither objectively filled in nor predetermined in any sense, nor is it completely determinate; judges do not reason mechanically, and the law is not a neutral presence standing above the conflict of interests within society."); JEROME FRANK, LAW AND THE MODERN MIND 5 (2009) [1930] (law "is uncertain, indefinite, subject to incalculable changes."); Karl N. Llewellyn, *Some Realism about Realism – Responding to Dean Pound,* 44 HARV. L. REV. 1222, 1237-38 (1930-1931) (describing one of legal realism's "characteristic marks" as "a distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions.").

[34] RICHARD A. POSNER, HOW JUDGES THINK 286 (2008). *See also, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 52 (1988) ("The limits of craft ... are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants.")

[35] FRANK, *supra* note 30, at 101 ("Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively reached."). *See also* ROBERT H. BORK, THE TEMPTING OF AMERICA 69-70 (1990).

[36] The intentions of legal realists may have been completely different than the results of their criticism. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH 9-10 (3rd printing, 1969) (legal realism is "an effort at more effective legal technology"); TAMANAHA, *supra* note 23, at 70-71 (most realists had faith in law and thus in the ability of rules to bind judges).

community, including judges, were well aware of the indeterminacy of legal norms.[37] Formalistic reasoning may have always been only a means to disguise the judge's thought process rather than a method to decide cases.[38] However, there is ample evidence that, at least until the New Deal, the Court's legitimacy in the public mind was based on the Court's image as a legal expert.[39] Whether formalism ever really existed, or was simply a construction of progressive or leftists critics of the Court,[40] the concept of the Court as an expert in law (with roots based in formalism) did control the American social imagination up until the New Deal era.[41]

The clash between President Franklin D. Roosevelt and the Court over the New Deal reforms created a growing public awareness of the inherent indeterminacy of law and, consequently, of the political influences on judicial discretion.[42] As elaborated below, this rise in public awareness

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[37] BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 4-7 (2009) ("the realists' views of judging closely matched what the historical jurists wrote in the 1880s and 1890s…judges, in particular, have consistently and candidly expressed a balanced realism about judging."); *id.* at 19-22, 30-35, 44, 51, 55-56, 63-93, 107-08, 113-15, 125-27, 186-87 ("a balanced realism is what most jurists have been saying about judging all along.").

[38] *Id.* at 57-59.

[39] *E.g.*, Lloyd M. Wells, *The Supreme Court and Public Opinion 1937-1957*, *in* THE POLITICS OF JUDICIAL REVIEW, 1937-1957, at 33, 35 (John M. Claunch ed., 1957) (describing the controlling mythical image during the previous 75 years and asserting that "the tendency to confer priestly status upon justices of the Supreme Court was checked and reversed by significant developments in the period 1937-1957…"); C. HERMAN PRITCHETT, THE ROOSEVELT COURT 14-15 (1963) ("Every Court prior to the Roosevelt Court had enjoyed the protection of perhaps the most potent myth in American political life – the myth that the Court is a non-political body, a sacred institution...When justices went onto the Court they…were presumed to sit divining the law and applying it without regard of the feeling or interests of any person or class."). See also *infra* text accompanying notes 52-59.

[40] TAMANAHA, *supra* note 37, at 4, 59-63 ("'[F]ormalism' appears to be largely a patched-together invention."); *id.* at 200-01.

[41] *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court*, 91 GEO. L.J. 1, 52 (2002) (claiming that by the Populist-Progressive Era, "[t]here were some who suggested that law was whatever the judges said it was, but for the most part, newspapers and law review commentary indicated the belief that there were attainable answers to constitutional questions.").

[42] See PRITCHETT, *supra* note 39, at 19 (discussing the "smashing" of the mythical

touched the very core of Justices' claim to legitimacy based on legal expertise thus threatening to erode the Court's sociological institutional legitimacy.[43]

The appearance of determinacy in the application of legal rules is central to the mystification of the law as a neutral and apolitical field of expertise.[44] The "discovery" of wide discretion eroded Justices' claim to have professional, special legal knowledge that compelled them to arrive at the right answer. As Tamanaha notes, the message the public received from the 1937 "switch in time" was that "judicial interpretations of the Constitution were, beyond doubt, a product of the views of the individual justices, demonstrating this more convincingly than all the Realist articles put together."[45] Even if indeterminacy of the legal referent is limited to a relatively very small number of cases as not to render law fundamentally indeterminate, the saliency of many of these cases in popular discourse makes indeterminacy a serious problem for the Court's descriptive legitimacy.[46]

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image following the clash); JOHN HART ELY, DEMOCRACY AND DISTRUST 44 (1980) ("About forty years ago people 'discovered' that judges were human and therefore were likely in a variety of legal contexts consciously or unconsciously to slip their personal values into their legal reasoning… .").

[43] MAX LERNER, AMERICA AS A CIVILIZATION 445 (1957) (claiming that after the New Deal Crisis, Americans "no longer believe so readily that judicial decision are babies brought by constitutional storks."); Dagan, *supra* note 30, at 611 ("The realist claim that the multiplicity of legal sources renders the formalist pretence of doctrinal determinacy an insidious falsity entails devastating consequences for the legitimacy and authority of a formalist legal regime."); Wells, *supra* note 39, at 36-37 ("[A]fter 1937 the notion of a fixed constitution and of judges controlled by an objective, external entity called 'law' was examined and rejected by an ever increasing number of scholars, teachers, publicists, and other opinion leaders whose function it is to interpret the Court to the public at large.").

[44] *See* Solum, *supra* note 32, at 469-70 ("the myth of determinacy is a specific instance of mystification."), 503.

[45] TAMANAHA, *supra* note 23, at 80-81.

[46] TAMANAHA, *supra* note 37, at 190, 197-99; Miller, *supra* note 25, at 173-74 ("the idea that the Supreme Court (and all courts) might lose their high position in the value hierarchy of the American people if it ever became widely known that judges were not

The Court's mythical image created a sharp distinction between law and politics.[47] In contrast, some legal realists claimed that since there are several possible plausible legal outcomes in almost all Supreme Court cases, judges will inevitably chose among them according to their own political values.[48] As a result of the saliency of this kind of criticism in public discourse during and following the "Court-packing crisis," the strict separation between law and politics in public discourse began to crumble, and with it belief in an objective autonomous science of law, applied by judges who acquire special expertise in a distinct system of legal reasoning.[49]

The notion of legal expertise is a historical and social construct. Its place in the social imagination depends by and large on the trust society is willing to extend to claims of independent legal expertise.[50] If the Court is perceived as deciding cases according to the judges' own politics, then the rule of law is exposed as the rule of men, judicial opinion becomes "simply

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passionless vehicles for the enunciation of 'The Law.'")

[47] *See* KAHN, *supra* note 30, at 16-17; HORWITZ, *supra* note 24, at 16-17 (describing the late-nineteenth century effort to create a system of legal reasoning immune to charges of politicization); *id*. 193, 198-99.

[48] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 845 (1935) (describing judges' decisions as "usually reflect[ing] the attitudes of their own income class on social questions"); MICHAEL C. DORF, NO LITMUS TEST: LAW VERSUS POLITICS IN THE TWENTY-FIRST CENTURY xvii (2006) (claiming that according the legal realists, "any judicial decision will be found in the judges' politics rather than the conventional legal materials"); *id.* at 1, 10-11; KAHN, *supra* note 30, at 42-43; HORWITZ, *supra* note 24, at 5-6 ("Beginning…in *Lochner v. New York* (1905)…Progressive legal thinkers sought to undermine the claim of Classical Legal Thought that law was a 'science' that could be separated from politics and that legal reasoning could be sharply distinguished from moral and political reasoning."); *id.* at 170, 193.

[49] *See* Mason, *supra* note 25, at 1400 ("It was now increasingly evident that the Supreme Court operates within the ambit of political considerations."); Friedman, *supra* note 21, at 1063 ("It is difficult after 1937 to insist that there is a strict separation of law and politics; it is not clear anyone does.").

[50] Robert C. Post, *Constitutional Scholarship in the United States*, 7(3) I-CON 416, 423 (2009).

politics by other means," and judges are perceived as no more than unelected politicians. Accordingly, judicial expertise is revealed as a myth and the Court's sociological legitimacy is threatened.[51]

The exact period when the American public "sobered up" from the "mythical" image of the Court is a subject of dispute. Although realist observations about judging had already appeared by the turn of the previous century, it took time for this criticism to fully enter public discourse.[52] Barry Friedman dates the beginning of this process to the early years of the 20th century. In that period, according to him, the understanding that "the law lacked any meaningful content and so was easily turned to the predispositions of the judges" became salient in public discourse.[53] Beginning in the late 1930s, claims that judges were simply imposing their own values and political views became more and more frequent in the public discourse.[54] Paul Mishkin argues that up until the mid-1930s, the

[51] *See* KAHN, supra note 30, at 182; ARCHIBALD COX, THE COURT AND THE CONSTITUTION 362 (1987) ("The legitimacy of judicial decrees depends…in considerable part on public confidence that the judges are predominantly engaged not in making personal political judgments but in applying a body of law."); Mason, *supra* note 25, at 1399 ("Public confidence was thereby jeopardized. For, once the mystery that surrounds judicial doings is penetrated, once the public recognizes the personal nature of judicial power, it would become difficult for the judiciary to function at all.").

[52] Friedman, supra note 41, at 52; TAMANAHA, *supra* note 37, at 78-79.

[53] FRIEDMAN, *supra* note 21, at 187-90 (describing a growing popular awareness in the beginning of the 20th century of judicial discretion and judicial bias: "Simply put, the 'layman' was coming to believe that judging was all about favoring the ruling class."); Friedman, *supra* note 21, at 1011 (at the time of *Lochner* the Court was viewed as politically biased); *id.* at 1012 ("By the 1920s journalists would join academics in wondering about judicial indeterminacy.").

[54] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner,* 76 N.Y.U. L. REV. 1383, 1423, 1428 (2001) ("Whether or not there was a firm doctrinal basis for judicial decisions, the law was seen as indeterminate. And in the face of that perceived indeterminacy, observers accused judges of applying their own political and class biases, rather than acting consistently with law."); FRIEDMAN, *supra* note 21, at 214-15 ("The country had traveled a long way to this pervasive realism about the Constitution and judging... By the time of the New Deal, it was widely understood that judges' philosophies influenced constitutional decisions.").

mythical image of the expert Court appears "to have influenced greatly the public's view of the Court." Though the insights of legal realism were spreading since "at least the twenties," they did not become pervasive in the public discourse until the mid-1930s.[55] Similarly, Tamanaha claims that after the 1937 "switch in time," "Justices could no longer credibly claim that they were legal oracles merely pronouncing the written words of the document."[56] Most scholars agree that by the 1940s, the public understanding that legal expertise does not award the Court with determinate answers, and that law's malleability allows judges to decide cases based on their political preferences, was already widespread and has been spreading ever since.[57] By 1956 Robert McCloskey could already write that the New Deal crisis "shred" the mythical-naïve view "beyond any reasonable hope of mending."[58] Martin Shapiro summarized the situation in 1964, noting that the principal basis upon which the Court's public legitimacy rests, "the judicial myth of impartiality and nondiscretionary application of 'correct' legal maxims has lost much of its force in the United States."[59]

The erosion in public imagination of the Court's claim to legal expertise has many manifestations in current popular discourse. For

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[55] Mishkin, *supra* note 26, at 68.

[56] TAMANAHA, *supra* note 23, at 80-81 ("The critical point is the nigh universal *perception* that the external pressure on the Court did the trick.").

[57] *See, e.g.*, Friedman, *supra* note 2, at 171-72, 223 ("It would be difficult to overstate the extent to which the public and commentators had by mid-century become reconciled to Realist (or anti-formalist) conceptions."), 225; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1157 (1993) (noting that after the New Deal, the belief that constitutionalism is a special expression of reason or science was undermined, and that constitutionalism "appeared simply as another instance of rule by political interests").

[58] Robert G. McCloskey, *The Supreme Court Finds a Role*, 42 VA. L. R. 735, 736 (1956).

[59] MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 26-27 (1964).

example, claims that "changing judges changes the law," are frequent; and great attention is given to the influence of political parties on the make-up of the Court.[60] In view of this discourse, it is not surprising that the public has little difficulty evaluating the Court according to political standards.[61]

IV. A FICTITIOUS DIFFICULTY?

Constitutional theorists and social scientists have criticized several components of the claim that the American Supreme Court has a sociological-legitimacy difficulty caused by an erosion of its mythical image. However, as I will show in part V, even if this difficulty is fictitious, it is still very much present in the imagination of several Justices.

[60] POSNER, *supra* note 34, at 1; Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENTARY 431, 451-52 (2009) ("[S]uspicions of indeterminacy or underdeterminacy are not the unique province of the academy. Think of the discussions of Supreme Court appointments in presidential elections."); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1995 (2004) ("Americans at bottom tend to be highly skeptical about the claims of a nonpolitical, neutral constitutional law. They are well aware that judges' values invariably inform constitutional law."); LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION 7 (2001) ("Judges regularly insist on the political neutrality of their role, but most ordinary citizens are not fooled.").

[61] Randy Wagner, *Does the Public Care whether the Court is Political* 35-38 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969255 ("[I]nvited to do so, most Americans readily judge the Supreme Court against expressly political standards. The public, it seems, is not reluctant to see the Court and the justices as political actors."); Roger Handberg, *Public Opinion and the United States Supreme Court 1935-1981*, 59(1) INT'L. SOC. SCI. REV. 3, 10 (1984) (noting that in 1973, "the public [was] clearly willing to ascribe political motivations or preferences to the Court and its members."); STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 10 (2009) ("A Gallup poll conducted in 2005 found that only 2% of Americans believe that federal judges do not allow their political views to influence their decisions."); John M. Scheb II & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273 (1994) (88% of American public think political views influence the Court's decisions).

A. The Court's Mythical Image Never Existed

As demonstrated above, constitutional theorists generally agree that the rise in public saliency of the indeterminacy of legal norms and the decline of the Court's mythical image date back to the first half of the 20th century.[62] Some social scientists, however, claim that at least until the 1970s, Americans were saturated in a political imagination under which the mythical image still played a central role in legitimating the Court.[63] Other social scientists raise serious doubts concerning the very existence of the mythical image even during the early days of the 20th century. They claim that scientific-empirical research of this issue began during 1940s and offers only "scant support" for the existence of the mythical image.[64] In response, scholars claim it is possible that these social scientists just waited too long allowing the mythical image to dissipate without detection by their surveys.[65]

Studies examining public confidence in the Court show a "downward drift in Court ratings" during the 1960s and the early years of

[62] See *supra* text accompanying notes 52-59.

[63] Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 440, 467-69 (1977) (surveying several empirical studies showing that the institutional legitimacy of the Court was based on the mythical image); Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 L. & SOC'Y REV. 385, 398 (1974) ("the conclusion the Court's myth enjoys widespread diffusion is certainly justifiable.").

[64] *See* Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1210 (1986); Kenneth M. Dolbeare & Philip E. Hammond, *The Political Party Basis of Attitudes Toward the Supreme Court*, 32 PUB. OPINION Q. 16, 30 (1968) ("few hints" of the mythical image in data collected since the 1940s).

[65] William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1176 (1992) (claiming that social scientists begun paying serious attention to the public perception of the Court only in the 1960s and that by then "the Court's stature might have been frittered away by the Warren Court. The more likely explanation, however, is that the pre-Warren Court's mythic stature was overrated.")

the 1970s, thus suggesting that the erosion of the Court's mythical image did have an effect on public trust in the Court. However, this decline could also be explained as part of a general decline in public support for governmental and social institutions during that period.[66] In any event, since the 1970s, the public, while sometimes disagreeing with specific judgments, has mostly awarded the Court a steady and relatively high level of support.[67]

B. Even if the Mythical Image Existed in the Past, Today the Court Maintains its Descriptive Legitimacy without It

A recent survey conducted by Gibson and Caldeira shows that though "[m]ost Americans have a fairly realistic view of how Supreme Court justices make their decisions," they still display a relatively high

[66] See Handberg, *supra* note 61, at 10-11; Caldeira, *supra* note 64, at 1218-19 ("[S]upport for the Supreme Court took the greatest proportionate drop from 1967 to 1971… . Public attitudes toward the Court, as well as toward virtually every element of the American 'Establishment,' fell in the late 1960s from the lofty pedestals of the years of Eisenhower and Kennedy."). *But see* Caldeira & Gibson, *supra* note 9, at 635 ("Even during the 1960s, when support for other institutions plummeted, public evaluations of the Court remained relatively high.")

[67] *See, e.g.*, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 138-41 (1989) ("[T]he Court has consistently won more approval than Congress or the executive branch (at least since the 1970s)."); Gibson, Caldeira & Spence, *supra* note 6, at 355 (providing data on support of the Supreme Court since 1973); GIBSON & CALDEIRA, *supra* note 12, at 38 ("[E]arlier research on the legitimacy of the Supreme Court has generally found that the institution enjoys a fairly substantial 'reservoir of goodwill' among the American people."), 42; James L. Gibson & Gregory A. Caldeira, *Have Segal and Spaeth Damaged the Legitimacy of the U.S. Supreme Court?*, 4 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm ?abstract_id=1436426 ("The U.S. Supreme Court is a deeply legitimate institution."); FRIEDMAN, *supra* note 21, at 15 ("In this course of acting thus, the Supreme Court has made itself one of the most popular institutions in American democracy. The Justices regularly outpoll the Congress and often even the President in term of public support or confidence."); Mondak & Smithey, *supra* note 13, at 1118-19 (tracking support from 1972-1994**)**.

degree of support for the Court.[68] Thus, "the legitimacy of the U.S. Supreme Court does not depend on the perception that judges merely 'apply' the law in some sort [of] mechanical and discretionless process."[69] "Belief in Mechanical Jurisprudence," the authors emphasize, "is not a necessary underpinning of judicial legitimacy; belief in legal realism is not incompatible with legitimacy."[70] The survey still shows that a perception of the Justices as politicians is not part of the "realistic view" held by most Americans. This strengthens the claim, raised in other empirical studies, that the Court should seek to distinguish itself from the political realm in order to preserve its legitimacy.[71]

However, according to Gibson's and Caldeira's recent book, the "myth of legality" still serves as the basis for public support of the Court. This mythical image differs from the traditional mythical image of the Court as an expert. Though the Court's institutional legitimacy is still based on public belief in legal expertise, the scope of this belief is limited to "the

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[68] James L. Gibson & Gregory Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?* 12-13 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491128. *See also* John M. Scheb II, William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81(4) SOC. SCI. Q. 928, 937-38 (2000) (claiming that most Americans hold views regarding the Supreme Court that are more realistic than the views offered by the myth of legality).

[69] Gibson & Caldeira, *supra* note 68, at 18-19 ("The American people seem quite capable of understanding the true nature of decision making in the third branch, but at the same time regard courts as highly legitimate within the American political scheme.").

[70] Gibson & Caldeira, *supra* note 67, at abstract, 18.

[71] Gibson & Caldeira, *supra* note 68, at 5 ("The Court is best able to maintain its legitimacy by pointing toward its distinctive 'non-political' role in the American political system."), 12-13, 15 ("[S]upport depends upon seeing judges as different from ordinary politicians, in part because, unlike politicians, they are principled in their decision making."). *See also* GIBSON & CALDEIRA, *supra* note 12, at 90-91 & n.20 ("It seems that those with strong loyalty to the Court expect an institution that is not necessarily mechanical in its approach to decision making, but that nonetheless is not characterized by the demons of 'partisan bickering,' self-interestedness, et cetera, that are perceived to dominate decision making in Congress."), 119, 125; Gibson and Caldeira, *supra* note 67, at 3-5, 15; Scheb & Lyons, *supra* note 68, at 935, 938.

belief that judicial decisions are based on autonomous legal principles" and "that cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning."[72]

Even if one accepts Gibson's and Caldeira's insights from their recent articles (rather than their more qualified conclusions from their 2009 book) that the saliency of the indeterminacy of legal norms did not harm the Court's descriptive legitimacy,[73] the correct conclusion to be drawn from these insights is not necessarily that the mythical-expert image was not required for the Court to sustain its legitimacy in earlier eras. Rather, with the decline of the mythical image, the Court may have adopted a different tactic to preserve its descriptive legitimacy. Indeed, there is no reason to assume that the Court would be passive when faced with threats to its descriptive legitimacy.

[72] Scheb & Lyons, *supra* note 68, at 928-29 (distinguishing between the pre-modern "marble temple" myth and the modern "myth of legality"); CALDEIRA & GIBSON, *supra* note 12, at 8 (relying on the definition of the myth of legality given by Scheb and Lyons), 15-16, 60-61, 70 ("Those holding strong institutional commitments to the U.S. Supreme Court tend toward accepting the myth of legality, rejecting the view that courts are ordinary institutions."), 80-81, 119. *Contra* GIBSON & CALDEIRA, *id.*, at 89-91 (survey "data suggests a slight amendment to our thinking about the myth of legality: institutional loyalty in this case seems to be distinctive *less* with regard to adopting a strong commitment to a mythical understanding of the role of the judge, and *more* with regard to the rejection of an explicitly political definition of what constitutes a good judge.").

[73] Gibson and Caldeira, *supra* note 67, at 12-13 ("Most Americans reject the mechanical jurisprudence model: most believe that discretionary decisions are made on the basis of ideology and values, even if not strictly speaking on partisanship.")

C. The Court can Function properly even without Descriptive Legitimacy

What will happen if the public forsakes the Court? Not much, according to John Hart Ely. The "mysterious" threat of "destruction" in face of public loss of confidence is false. "This isn't the way it works," he writes, "and the justices know it isn't."[74] Writing in 1980, Ely adds that the warnings of "the possibility of judicial emasculation by way of popular reaction against constitutional review… probably reached [its] peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact, the Court's power continued to grow and probably never has been greater than it has been over the past two decades."[75]

Another challenge to claims of a causal linkage between public support and the Court's authority is embodied in Owen Fiss's fierce conceptual objection to the notion of separately legitimating the Court based on the people's consent. In a democracy, Fiss explains, "consent is not granted separately to individual institutions. It extends to the system of governance as a whole. Although the legitimacy of the system depends on the people's consent, an institution within the system does not depend on popular consent…"[76] Thus, the Court's legitimacy depends "not on the consent – implied or otherwise – of the people, but rather on [its]

[74] ELY, *supra* note 42, at 47.

[75] *Id.* at 48. *See also* Sarat, *supra* note 63, at 456 (arguing that survey data cannot refute the hypothesis that "legal institutions function quite as efficiently with low levels of support as with high.")

[76] Owen Fiss, *Two Models of Adjudication*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 36, 43 (Robert A. Goldwin & William A. Schambra eds., 1985) ("The people's consent is required to legitimate the larger political system, of which the judiciary is an integral part… .").

competence, on the special contribution [it] make[s] to the quality of our social life."[77]

D. The American Supreme Court's Descriptive Legitimacy is almost Bullet-Proof

Some scholars claim that even if judicial power ultimately depends upon popular acceptance and even if popular support for the Court may be threatened under certain conditions, the American Supreme Court's power in American society is so well established that there is no real threat on the horizon. "As a historical matter," Larry Kramer explains, the Court is "anything but fragile."[78] Erwin Chemerinsky agrees with this statement, contending that there is no evidence to support the idea that the Court's legitimacy is fragile and "200 years of judicial review to refute it."[79] In similar vein, William Lasser notes that "the Court has endured serious criticism and controversy throughout its history and, at least in the long run, has consistently survived and prospered."[80] In view of the Court's resiliency, Terri Perretti contends that "the idea that the Court's legitimacy is uniquely dependent on public esteem and reverence and will, therefore, be destroyed if the Court is too political persists despite strong evidence to the contrary."[81]

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[77] Owen Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 38 (1979) ("Legitimacy does not depend on the popular approval of the institution's performance… It is the legitimacy of the political system as a whole that depends on the people's approval, and that is the source of its democratic character.").

[78] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 251 (2004).

[79] Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 948 (1999).

[80] WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER 3-7 (1988).

[81] TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 161-62 (1999). *See*

Richard Farganis criticizes the "conventional view" that controls the legal and popular discourse and equates public support of or confidence in the Court as an institution with its institutional legitimacy. "[A] drop in approval is a drop in approval, and not a sign of a legitimacy crisis," he writes, arguing that a decrease in public support is not a good proxy for a decline in legitimacy that would threaten the Court's ability to function. Only an enduring shift in fundamental features of the public's attitudes towards the Court – the public's "institutional loyalty" (a more narrowly defined measure of the public's openness to major structural and functional changes in the Court) – would produce such a threat.[82] However, such a threat is nowhere to be seen, as "the most reliable historical and empirical evidence… seems to show that the Court is almost completely immune to damaging backlash …. Simply put, the Court appears too be less fragile than it is bulletproof."[83] Following this line of thought, Lawrence Baum and Neal Devins argue that the Court's diffuse support is "strong and robust, and it is not fragile in the sense that negative reactions to the Court's decisions threaten it."[84] Therefore, "the Justices have little reason to adapt their decisional outputs in order to maintain their legitimacy."[85]

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also Tyler & Mitchell, *supra* note 3, at 724-25 (discussing doubts concerning this dependency).

[82] Richard Dion Farganis, Is the Supreme Court Bulletproof? 79-80, 109-40, 215-17, 259-60, 277-80 (2007) (unpublished Ph.D. dissertation, University of Minnesota). *See also* Gibson, Caldeira & Spence, *supra* note 6, at 139-40 (characterizing "institutional loyalty"). Farganis himself also fails to explain how the mechanism of destruction will materialize due to a drop in institutional loyalty. Moreover, he admits there is a connection between the Court's effectiveness (rather than vulnerability) and public support short of "loyalty" as he defines it. *Id.*, 279-80.

[83] Farganis, *supra* note 82, at 2. *See also id.* at 43, 134-35, 142-214 ("Despite ominous predictions to the contrary, divisive and controversial rulings have time and again failed to diminish the public's preparedness to stand by the Court's authority as legitimate decision-maker."), 261-63, 277-79, 292 ("loyalty to the Court is almost impossible to shake.").

[84] Baum & Devins, *supra* note 20, at 1552. *See also id.* at 1554-55.

[85] Baum & Devins, *supra* note 20, at 1546. *See also id.* at 1548, 1560, 1579-80.

However, while all these scholars rely on the metric of diffuse support, the media uses "public confidence" as a metric for the Court's descriptive legitimacy.[86] Hence, the public and the elite discourse are controlled by changes in this more dynamic criterion. No wonder that the Justices themselves speak of the Court's "public confidence" rather than of the Court's "diffuse support" as the metric for the Court's descriptive legitimacy.[87] A decline in the public confidence in the Court would probably be perceived by the Justices and the public as a sign of a legitimacy crisis.

V. THE OVERT INFLUENCE OF THE SOCIOLOGICAL-LEGITIMACY DIFFICULTY ON THE COURT'S ADJUDICATION

Whether or not empirically well founded, the fear that erosion of the myth of legal expertise would lead to a decline in the Court's institutional legitimacy was pervasive in legal discourse during the Warren Court era.[88] While most constitutional scholars have neglected this concern in recent

[86] *See supra* note 16. On the profound influence of the media on the Justices' discretion see Baum & Devins, *supra* note 20, at 1542-44, 1574-79.

[87] *See, e.g.*, Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, 35 CT. REV. 10, 13 (1999) ("We don't have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions."); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 72 (2010) ("To help maintain the public's confidence, the Court must exercise its power of judicial review in a manner that honors the lessons of the past.").

[88] *See, e.g.*, SHAPIRO, *supra* note 59, at 26 ("Since this myth is the principal support of judicial activity, Judge Hand counseled retreat …particularly [in] decisions on the constitutionality of legislation, where the most damage was likely to be done to what remained of judicial prestige."); Miller, *supra* note 25, at 173-74 ("Forsaking the mythology of an infallible finder of truth and getting involved in 'politics' and value judgments may, accordingly, result in a substantial diminution of Court prestige."); Wells, *supra* note 39, at 35 ("Thus the demythologizing process is of major concern.").

decades, Justices have continued to express it.[89] Justice Scalia perhaps best captured the connection between the indeterminacy of legal norms and the Court's descriptive legitimacy in his dissenting opinion in *Casey*:

> "[A]s long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here – reading text and discerning our society's traditional understanding of that text – the public pretty much left us alone. … [I]f in reality our process of constitutional adjudication consists primarily of making *value judgments*… then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different."[90]

The fear that the Court's sociological legitimacy would decline was also very present in the *Casey*'s plurality opinion. The plurality opinion justified the decision not to overrule the "essential holding" of *Roe v. Wade*[91] by expressing fear of another self-inflicted wound to the institutional legitimacy of the Court.[92] Justices O'Connor, Kennedy, and Souter

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[89] *See* Jack Goldsmith & Daryl Levinson, *Law For States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1839 (2009) ("[I]t is the legal legitimacy, or legality, of the Constitution, or judicial decisions interpreting the Constitution, that attracts the support of officials and citizens. The Court itself has expressed this view in a number of cases, arguing that public support for the institution of judicial review rests on the public's belief that the Justices are following the law rather than their own moral or political preferences."); Katheleen R. Guzman, *Replies to Professor Chemerinsky: The Undiluted Values of Justices Versus the Justice of Undiluted Values*, 54 OKLA. L. REV. 17, 57 (2001) ("The point is that whether or not legitimacy is a valid concern, the Supreme Court Justices throughout history have behaved as though it were. And that, I think, is why the Justices have found the 'allure of formalism' . . . overwhelming."); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 272-73 (1997) ("There is a widespread belief, held by the courts themselves, that the legitimacy of judicial decisionmaking depends upon the belief that it is based on precedent and not politics.").

[90] Planned Parenthood v. Casey, 505 U.S. 833, 1000-01 (1992) (Scalia, J., dissenting).

[91] Roe v. Wade, 410 U.S. 113 (1973).

[92] *See e.g.*, Morton J. Horwitz, *The Supreme Court, 1992 Term - Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L.

explained:

> "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe's* original decision, and we do so today."[93]

The three Justices believed that by avoiding overruling *Roe* "under fire," the Court would maintain its image as an apolitical, consistent legal expert, and subsequently its descriptive legitimacy.[94] Thus, preserving the Court's descriptive legitimacy rather than pure legal analysis seems to have led the Justices to affirm the "central holding" of *Roe* "with whatever degree of personal reluctance any of us may have" [95] in regards to the legal merits.[96]

In his opinion, Chief Justice Rehnquist opposes the "fetish for legitimacy"[97] and adheres, at least rhetorically, to "faithful interpretation of the Constitution irrespective of public opposition."[98] Justice Scalia's dissent, as quoted above, expressed concern over the threat to the Court's

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REV. 30, 36-37, 40 (1993); Tyler & Mitchell, *supra* note 3, at 754 ("The decision in Casey not to overrule *Roe v. Wade* is predicated on the assumption that the Court currently has institutional legitimacy in the eyes of the American public, a legitimacy that protects the Court's right to make decisions about abortion but a legitimacy that could be lost through an ill-considered decision reversing Roe.").

[93] Casey, 505 U.S. at 869.

[94] *See id.* at 865-69.

[95] *Id.* 860-61; *See also id.* at 867 ("So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

[96] *See* Horwitz, *supra* note 92, at 36, 40. *See also* Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 45 (2005); Farganis, *supra* note 82, at 56-60 ("[J]ustices' fears about the Court's institutional well-being appears to have controlled the decision… . What the Casey plurality is saying, in effect is that for the good of the Court, *Roe* should not be overturned.").

[97] Casey, 505 U.S. at 964 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[98] *Id.* at 963-64.

descriptive legitimacy. However, at the same time, he also criticized the plurality opinion for taking into account the danger of harm to the Court's sociological legitimacy from overturning *Roe*:

> "[I]instead of engaging in the hopeless task of predicting public perception – a job not for lawyers but for political campaign managers – the Justices should do what is *legally* right …. How upsetting it is, that so many of our citizens ... think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus."[99]

Sociological legitimacy issues served as a rhetorical tool in another extremely salient case: *Bush v. Gore*.[100] In his dissenting opinion, Justice Breyer was concerned that "the appearance of a split decision" in such a "highly politicized matter" will undermine "the public's confidence in the Court itself."[101] He further explained:

> "That confidence is a public treasure. It has been built slowly over many years… It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, 'John Marshall has made

[99] *Id.* at 998-1000 (Scalia, J., dissenting).
[100] Bush v. Gore, 531 U.S. 98 (2000).
[101] *Id.* at 157 (Breyer, J., dissenting); *cf., id.* at 128 (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.").

> his decision; now let him enforce it!'... But we do risk a self-inflicted wound – a wound that may harm not just the Court, but the Nation."[102]

Thus, his conclusion was that "the Court was wrong to take this case."[103] Surveys following the *Bush v. Gore* decision showed that Justice Breyer's concern did not materialize; the Court's descriptive legitimacy did not decline following the decision.[104] While these surveys may add further support to the claim that the sociological-legitimacy difficulty is fictitious, Justice Breyer's opinion is further proof of the important role that this difficulty has in the imagination of some Justices.

Based on a comparison between results of the Court's adjudication and opinion polls, several social scientists have claimed that the Court, like all political institutions, seeks to gain public support.[105] However, they failed to detect in the Court's reasoning the Justices' concrete concern for the sociological-legitimacy difficulty i.e. the fear of a decline of the Court's descriptive legitimacy following the erosion of its mythical image as a legal expert. As will be demonstrated in the next part, through this difficulty public opinion has a deep influence on the Court's jurisprudence. It does not merely appear in "raw" form, tilting the Justices' discretion. Rather, it

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[102] *Id.* at 157-58.

[103] *Id.* at 144. Justice Stevens and Justice Ginsburg joined this part of Justice Breyer's decision.

[104] *See, e.g.*, James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 543, 553-556 (2003).

[105] *E.g.*, Micheal W. Giles, Bethany Blackstone, Richard L. Vining, Jr., *The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making*, 70 J. POL. 293, 294-95 (2008); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution?*, 87(1) AMERICAN POLITICAL SCIENCE REVIEW 87 (1993). *But see* Baum & Devins, *supra* note 20, at 1516, 1519 (arguing that Justices "are likely to care more about elite audiences than public opinion"), 1529, 1545-46, 1566.

forms part of the picture that several Justices have of the foundations of the Court's descriptive legitimacy. Thus, the reasoning of Justice Breyer in *Bush* and that of Justice Scalia and the plurality Justices in *Casey* are merely overt expressions of the Court's concern of the sociological-legitimacy difficulty.[106] Social scientists' failure to detect this concern should not come as a complete surprise, since they usually tend to belittle the importance of "words" as opposed to the Justices' "observable behavior."[107]

Constitutional scholars, on the other hand, have mostly focused, in recent decades, on finding solutions to the threat to the Court's *normative* legitimacy posed by the countermajoritarian difficulty. They too have neglected the effects of the sociological-legitimacy difficulty on the Court's jurisprudence.[108] The few scholars who have discussed the jurisprudential effects descriptive legitimacy considerations have on the Court's adjudication, formulated these effects in terms of mere prudence: the Court

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[106] For another overt expression see *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve").

[107] *See* Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW. & SOC. INQUIRY 465, 470 (2001) ("After all, the point of focusing on behavior was that one did not have to worry about the law.").

[108] *Cf.* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 514-16 (2007) (claiming that in their adjudication, judges are guided much more by social and political mobilization than by normative theories of constitutional interpretation.). Chemerinsky agrees that "[t]he real question for debate is how much discretion the Court should have in interpreting the meaning of the Constitution. This is an inquiry… that is much different from the question of whether judicial review can be reconciled with majority rule." However, his criterion for choosing an approach to judicial discretion is based on a normative theory. Chemerinsky explicitly denies descriptive legitimacy as a criterion since "[t]here is… no support for the argument that the Court's theory of discretion will affect the judiciary's [descriptive] legitimacy." Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1210, 1226-33, 1238-48, 1254-55, 1258-61 (1984).

should avoid certain cases that are likely to bring a loss in terms of its institutional "capital."[109] However, as I demonstrate in the next part, the effects of the sociological-legitimacy difficulty on the Court are not restricted to mere avoidance tactics.[110] They extend beyond their influence on a particular decision and affect the Court's constitutional jurisprudence becoming an immanent part of the Court's way of thinking.

Recently, a few scholars, who stress the Court's majoritarian character, have forsaken the attempt to find a solution to the countermajoritarian difficulty, which they perceive as a non-existent.[111] Some of them have begun to focus on the tactics devised by the Court in order to preserve its descriptive legitimacy.[112] In line with their position, I next examine originalism from the perspective of the Court's sociological-legitimacy difficulty rather than, as most scholars do, from the perspective

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[109] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 58, 69-71, 95-96, 205 (1962) (claiming that the Court should use "passive virtues" in order to protect its descriptive legitimacy); PHILIP BOBBIT, CONSTITUTIONAL FATE 59-73 (1982) (discussing the "prudential argument").

[110] *Cf.* Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1626-27 (2007) ("Under the Court's analysis, public confidence considerations may serve as a limiting factor…or may be a prompting factor - calling upon the Court to either withdraw from an erroneous precedent or revisit its interpretation in light of new public perceptions and attitudes."); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 972-73, 979-85, 991-96 (2008) (arguing that the Court may consider the social legitimacy of the legal order as a reason to intervene, rather than avoid, in a concrete case).

[111] *See, e.g.*, Friedman, *supra* note 4, at 582-88, 609-14 (claiming that the countermajoritarian difficulty is dissolved since in essence the Court is both responsive and accountable to public opinion: Justices are unaccountable "only in the most formalistic and unanalytic of senses..."); Barry Friedman, *Reply: The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1234 (2010) (contending that the countermajoritarian difficulty "is insidious to understanding judicial review because it has preoccupied the academy for years now, distracting scholars from a slew of really good and important questions.").

[112] Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, GEO. L.J. 1, 5, 29, 34, 39, 45-50, 63 (forthcoming, 2010) (arguing that fearful the overruling of a precedent would hinder the Court's descriptive legitimacy, Justices engage in "stealth overruling" in order to avoid publicity and thus public scrutiny).

of the Court's normative difficulty.[113]

VI. ORIGINALISM AND THE COURT'S SOCIOLOGICAL-LEGITIMACY DIFFICULTY

A. Originalism's Legitimating Effect

There are different versions of originalism; one version, now rarely held by originalists, professes to interpret the Constitution according to the intentions of its drafters.[114] A second version claims that the only legitimate method of interpreting the Constitution is to do so according to the understanding of the ratifying generation.[115] A third version, which aims to distance itself from any hint of reliance on mental states, takes as its referent the "general and publicly shared meanings of the text at the time of enactment."[116] However, all versions of originalism have one thing in common: they ascribe to Justices expertise in the field of constitutional history, thus professing to provide the Court with an objective method of constitutional interpretation.[117]

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[113] *See, e.g.*, BORK, *supra* note 35, at 143-60; David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1389 (1999) ("for Scalia and his defenders, the countermajoritarian difficulty can be mitigated, if not solved, by a close reading of constitutional text, fidelity to long-standing historical traditions, and adherence to rigid rules that serve to 'limit judicial discretion and the imposition of subjective value judgment.'"). For an exception see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 661 (2009).

[114] *E.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, 3, 7-8 (1977).

[115] Robert Post & Reva Siegel, *Originalism As A Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545-47 (2006); FRIEDMAN, *supra* note 21, at 306-07, 310.

[116] Balkin, *supra* note 108, at 444-46 (describing the evolution from original intention to original understanding, and then to original meaning).

[117] BERGER, *supra* note 114, at 8-9, 18; Horwitz, *supra* note 92, at 116 ("The discretion

Adherents of originalism claim that history constrains judicial discretion and ensures the separation of law from politics by supplying "an objective basis for judgment that does not merely reflect the judge's own ideological stance."[118] Without it, the Justices "will be able to find no scale, other than [their] own value preferences, upon which to weigh" constitutional claims.[119] With it, judges are freed from making controversial judgments as their discretion is constrained by the decisions of the framers' generation.[120] Critics of originalism argue that this pretense of objectivity, determinacy, and constraint is unrealistic, considering the highly indeterminate and relativistic nature of history as a discipline, which exposes originalism to the same failing it set out to correct.[121] Recently, in *McDonald v. City of Chicago*,[122] Justice Scalia agreed that historical analysis can bring indeterminate results but contended that it is

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of judges is thus thought automatically capable of being limited by determinate answers to constitutional questions derived from studying history and text.").

[118] Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (book review). *See also, e.g.*, Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 195 (2008) ("Justice Scalia has long advocated originalism on the grounds that it constrains judicial discretion and so enables judges to enforce the Constitution as law, not politics.").

[119] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971).

[120] DANIEL A. FARBER & SUSANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATION 11-13 (2002) (originalism profess to be the "only way to prevent judges from imposing their own political and moral views on the rest of the nation."), 42-44, 126.

[121] *E.g.*, Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2012-13 (2002) ("[U]sually there are choices to make about who counts as a Framer, what they thought, and at what level of abstraction to state their views."); Austen L. Parrish, *A Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 656 (2007) ("[M]any respected commentators have explained how unconstrained and unconstrainable the use of history is in originalist constitutional interpretation."), 664; McDonald v. City of Chicago, 130 S. Ct. 3020, 3116-19 (2010) (Stevens, J., dissenting) ("a limitless number of subjective judgments may be smuggled into his [Scalia's] historical analysis. Worse, they may be *buried* in the analysis.").

[122] McDonald v. City of Chicago, 130 S. Ct. 3020, 3118 (2010).

"demonstrably much better" than any other proposed approach in constraining judicial discretion.[123]

Even if originalism does not succeed in providing an adequate referent for deciding cases, it has been quite successful in awarding the Court with descriptive legitimacy. As Jamel Greene recently showed, "notwithstanding its many academic critics," empirical evidence shows that "originalism continues to sell" among a large segment of the public.[124] Originalism has the appeal of making it seem that the Court is constrained by objective answers, derived by the expert judge from history and text, with no room for subjective choice or political considerations. It re-mystifies constitutional interpretation in the public mind as providing objective and relatively determinate answers.[125] No wonder some claim that the true cause of Scalia's originalism is not the quality of constitutional history as a constraining referent, but originalism's value in legitimating the Court's judgments.[126]

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[123] *Id.* at 3057-58 (Scalia, J., concurring).

[124] Greene, *supra* note 113, at 659, 695 (describing polls showing that a large segment of the public believes that the Court should adhere to the originalist approach); Jamal Greene, Stephen Ansolabehere, Nathaniel Persily, *Profiling Originalism*, 2, 6-7 (2010), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1567702 (describing empirical surveys showing that 39%-44% of the public supports originalism as a constitutional method of interpretation. Another survey shows that a substantial percentage (35%) of the non-originalist people still partly support an originalist view), 13-15 (describing survey showing that originalism is attractive partly for its disciplinary value), 20-21, 24, 27.

[125] *See, e.g.*, Chemerinsky, *supra* note 121, at 2012 ("Originalism has the appeal of making it seem that the Court isn't making value choices at all, but rather just following the intent of the drafters."); Horwitz, *supra* note 92, at 34-35 & n.15, 99 ("static originalism has been modern American legal culture's chief means of infusing the nation's founding political document with an objective authority that modernism refuses to concede."), 116.

[126] *See* Gordon S. Wood, *Comment, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW AN ESSAY 63 (1997) ("The real source of judicial problem that troubles Justice Scalia lies in our demystification of the law… ."); Lawrence M. Friedman, *The Rehnquist Court: Some More or Less Historical Comments, in* THE REHNQUIST COURT: A RETROSPECTIVE 143, 149 (Martin H. Belsky ed., 2002) ("Legitimacy is a constant theme in Scalia's work."). Farber and Sherry make the contrast in this regard

B. Originalism as Method of Esoteric Writing

Interestingly, while Scalia himself treats originalism as a genuine method for deciding cases, he categorizes the use of originalism by past liberal judges as a case of esoteric writing. He explains that "[I]n the past, nonoriginalist opinions [i.e. opinions written by liberals Justices who did not decide cases according to the originalist method of interpretation] have almost always had the decency to lie, or at least dissemble, about what they were doing."[127] Well aware of the consequences if the public knew the truth – i.e. knew of the legal indeterminacy problem and that judges are not adequately constrained by the Constitution – liberal judges, according to Scalia, preferred to "lie" in order to sustain the Court's legitimacy. Their liberal ideology served as their referent, but they understood that the Court's descriptive legitimacy is based on public perception of judicial expertise. Hence, these Justices wrote in an esoteric manner, cloaking the indeterminacy of constitutional norms from the public by publicly reasoning in the language of originalism.[128]

According to Scalia, the professional milieu has always been aware of the indeterminacy of legal norms; for many judges, the legal realists

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between Bork's originalism and Scalia's version. FARBER & SHERRY, *supra* note 120, at 11 ("[Bork] is drawn to originalism primarily as a method of constraining judges from imposing their own values on democratic majorities."), 38-39, 42-43.

[127] Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 852 (1989). On another occasion, Scalia claimed that originalism "used to be the orthodoxy until about sixty years ago. Every judge would have told you that's what we do." Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer,* 3 I-CON 519, 525 (2005).

[128] *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it…"). On esoteric writing generally see MOSHE HABERTAL, CONCEALMENT AND REVELATION 2-7, 142-68 (2007).

exposed nothing new. Indeed, "Those judges wise enough to be trusted with the secret already knew it."[129] However, while liberal Justices of earlier eras manipulated the law for ideological purposes just like the liberal Justices of the present, the former knew how to conceal their aims and legitimate the Court's decisions using originalism as their mode of public reasoning.

According to Scalia, either current liberal Justices mistakenly think that the public is unaware of the indeterminacy of legal norms, or else they are insufficiently aware of the destructive power of truth on the masses' confidence in the Court.[130] In short, they do not take into account the sociological-legitimacy difficulty. These Justices hold an incorrect theory of legitimation – i.e., their understanding of how the Court gains its descriptive legitimacy is flawed.

Justice Scalia views this flawed understanding as a new phenomenon: "It is only in relatively recent years…that nonoriginalist exegesis has, so to speak, come out of the closet, and put itself forward overtly as an intellectually legitimate device."[131] He explains that this new tendency may have unfortunate consequences in terms of the Court's institutional legitimacy.[132] Based on his assessment of the Court's fragile descriptive legitimacy, he seems to recommend that even Justices who view

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[129] Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 589 (1989-90).

[130] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY 149 (1997) ("The glorious days of the Warren Court, when *judges* knew that the Constitution means whatever it ought to, but the people had not yet caught on the new game (and selected their judges accordingly), are gone forever. …That era of public naivete is past.").

[131] Scalia, *supra* note 127, at 852. *See also* SCALIA, *supra* note 130, at 131-32 ("[T]here have always been, as there undoubtedly always will be, willful judges who bend the law to their wishes. …There has been a change in kind, I think, not just in degree, when the willful judge no longer has to go about his business in the dark – when it is publicly proclaimed, and taught in the law schools, that judges *ought* to make the statutes and the Constitution say what they think best.").

[132] *See supra* text accompanying footnote 90.

constitutional history as a flawed referent ought to use originalist rhetoric as a sort of a noble lie.[133] According to this line of thinking, as long as the public is convinced of judicial commitment to originalism as a "brand," descriptive legitimacy is guaranteed even if originalism, as a method of interpretation, does not decide cases.[134]

VI. THE INDETERMINACY OF LEGAL NORMS VS. THE COUNTERMAJORITARIAN DIFFICULTY

The indeterminacy of legal norms exacerbates the Court's countermajoritarian difficulty. While judicial review of legislation, by its nature, counters the will of the elected representatives, in a world without legal indeterminacy, judicial review would mean that the will of the people as embedded in the Constitution is supreme. However, even in such a fictitious world, judicial review could still be countermajoritarian in the sense of countering the will of the majority of the current public.[135] In reality, the highly indeterminate nature of most of the constitutional text allows for different plausible readings and thus unelected judges are able to adopt a certain interpretation of the Constitution removing the issue, at least formally, from the realm of majoritarian politics. Conversely, salient criticism of the countermajoritarian character of the Court's decisions may harm its descriptive legitimacy. Even if the Court perceived by the public as

[133] *See* FARBER & SHERRY, *supra* note 120, at 38-39, 43. However, in exposing this use of originalism to hide the true motives of judges, Scalia is eradicating this esoteric technique.

[134] *See* Greene, *supra* note 113, at 707-08.

[135] The countermajoritarian difficulty is conventionally described as presenting "the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy" where the will of the people should be sovereign. Friedman, *supra* note 2, at 155. *See also* ELY, *supra* note 42, at 4-5 (same).

deciding based on its legal expertise, the public may still avoid supporting the Court as an institution due to its countermajoritarian nature. Though connected, the Court's main normative and sociological legitimacy difficulties are not identical and thus are not necessarily resolved in the same way.[136]

Thus, normative justifications of judicial review, even if valid, may not save the Court's descriptive legitimacy from erosion. The public may remain ignorant of such normative justifications, or reject them despite their plausibility on the professor's writing table. Moreover, even if successful in persuading the public that the Court's countermajoritarian authority is justified, these justifications may still fail to prevent an erosion of the Court's descriptive legitimacy due, for example, to the exposure of its political orientation.

On the other hand, the public may award the Court its support and view it as legitimate even without being persuaded by any normative justification for judicial review. First, the public may be ignorant of the countermajoritarian difficulty. Though the countermajoritarian difficulty was recognized during earlier periods in American history, and its profile grew somewhat during the Populist-Progressive Era,[137] until recently, it

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[136] *See* Dorf, *supra* note 31, at 889-90; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 351 (1998) ("It comes as little surprise that at that time judicial decisions often were viewed as nothing more than an imposition of the Justices' own views, a strong contributing factor to frequent countermajoritarian criticism during the period."); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769, 773-74 (1971); Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1114-15 (2006) (contending that the indeterminacy of legal norms intensifies the countermajoritarian difficulty).

[137] Friedman, *supra* note 136, at 342-43 (acknowledging that "some limited countermajoritarian criticism in virtually every era in American history…"); Friedman, *supra* note 54, at 1429 ("[T]he countermajoritarian difficulty… arose during the Populist-

remained mainly an *academic* obsession. It thrived only since the 1940s with the trend towards viewing majoritarian decision-making as end in itself.[138] Second, even if the public is aware of the countermajoritarian problem, as long as it believes that the expertise rather than the Justices' political persuasions determines the result, it may award the Court diffuse support even though the Court's judicial review power is deemed normatively unjustified.[139] Moreover, convinced of the Court's expertise, the public may even endow the Court with specific support when the Justices decide contrary to current public opinion on a specific controversy.[140] In other words, the public may prefer expert institutions over institutions "of" and "by" the people.

Empirical data lends support to the hypothesis that the public prefers a neutral expert over an accountable-deliberative institution.[141] A large body

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Progressive Era."), 1432-36, 1438-39 ("Countermajoritarian criticism found full voice as early as the 1890s … .").

[138] Friedman, *supra* note 136, at 334 ("The 'countermajoritarian difficulty' has been the central obsession of modern constitutional scholarship."), 345-46; Friedman, *supra* note 2, at 157, 167-68 ("Beginning in 1940, academic discussion about judicial review and the Supreme Court diverged sharply from broader public commentary about the Court. This was a novel and portentous event."); Friedman, *supra* note 21, at 984 n. 42; Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. REV. 53, 60 (2004) ("Indeed, one key factor in the confinement of the countermajoritarian debate to academic circles, as opposed to popular debate, is the public's continued perception, rooted in nineteenth century jurisprudence, of the Court as a vindicator of objective Constitutional rights… .").

[139] *Cf.* Greene, *supra* note 113, at 661 ("[P]aradoxically, originalism may help resolve the countermajoritarian difficulty in practice even if it fails to do so in theory. That is, originalism's responsiveness to public demand may supply it with a legitimating force that, as non-originalists have ably demonstrated, it otherwise lacks."), 702.

[140] *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 17 (1964) ("People, it would seem, are more ready to accept unpleasant decisions which appear to be the ineluctable result of rigorously logical deductions from 'the law,' than they are rulings which are frankly a medley of legal principle, personal preferences, and educated guesses as to what is best for society.").

[141] Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 923 (2005) (arguing that various empirical studies show that a lack of popular accountability did not damage public's

of empirical evidence indicates that the American public is not interested in engaging in deep political-constitutional debates.[142] According to this data, in times of normal politics, the public does not want the freedom to decide; it prefers a holiday from decision-making.[143] Therefore, the public may prefer an expert Court which decides for them.[144] Another study shows that while the public wants democratic procedures, "they do not want to see them in action."[145] The public's dislike of the partisan give and take of normal open democracy can explain why institutions whose decision process is relatively secretive and perceived as non-partisan enjoy high public legitimacy.[146] All these studies lead to the conclusion that it is possible for the Court to enjoy descriptive legitimacy while its normative legitimacy is in deemed doubtful due to the countermajoritarian difficulty.[147]

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perception of the Court's fairness and that the public recoils from a prolonged and contentious deliberative process preceding a decision); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 4, 139 (2002) (presenting a survey showing that almost half of the respondents agreed that the political system would be better if "decision making were left to successful business people" or "non-elected experts.").

[142] Gewirtzman, *supra* note 141, at 899.

[143] *Cf.* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 230-43 (1991) (discussing the disengagement of "private men and women" from politics during "normal" times).

[144] HIBBING & THEISS-MORSE, *supra* note 141, at 1-2 ("the last thing people want is to be more involved in political decision making: They do not want to make political decisions themselves; they do not want to provide much input to those who are assigned to make these decisions; and they would rather not know all the details of the decision-making process."), 44-47; Gewirtzman, *supra* note 141, at 920-21 (claiming that Americans are likely to prefer a constitutional "interpretive processes that make minimal demands on their time and attention. Judicial supremacy, in turn, begins to look increasingly attractive to the average Joe."), 934 ("many Americans see the courts as a preferable alternative to direct participation or a flawed political process.").

[145] JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY 19 (1995).

[146] *See* HIBBING & THEISS-MORSE, *supra* note 145, at 18-20, 58-61, 148-49.

[147] *See* Farganis, *supra* note 82, at 71-74; Fallon, *supra* note 5, at 1795. *Cf.* KRAMER, *supra* note 78, at 234 ("Most people who support the Court's supremacy in constitutional

The situation of Federal Reserve Bank is telling in this regard. Whether due to a lack of awareness of questions of accountability or a belief in apolitical expertise in the field of economics, the public supports this institution even though it is not elected and its policy decisions at times contradict public opinion.[148] Similarly, in spite of the normative flaws of judicial review, the public has awarded high levels of institutional legitimacy to the Court, accepting the practice of judicial review.[149]

Yet another difference between the indeterminacy of legal norms and the countermajoritarian difficulty relates to scope: while the latter is restricted to the Court's authority of judicial review over legislation, the former is not restricted only to the text of the Constitution. Thus, the indeterminacy of legal norms can affect the Court's descriptive legitimacy even when the Court does not practice its countermajoritarian authority.

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law today probably do so without thinking about it much…").

[148] Schauer, *supra* note 19, at 54-55 (claiming that there is almost no discussion of the countermajoritarian difficulty with regard to the Federal Reserve Board partly because "many people believe, rightly or wrongly, that most agency decisions are based on technical knowledge which neither the people nor their directly elected representatives possess."); Suzanna Sherry, *Too Clever by Half: the Problem with Novelty in Constitutional Law*, 95 NW. U.L. REV. 921, 922 (2001) ("[T]ake the Federal Reserve, which, like the courts, lacks much political accountability: its decisions arguably affect Americans more directly than do most Supreme Court rulings, yet no one suggests that the Fed is unconstitutional or even problematic.").

[149] Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1779 (1994) ("a legitimate practice might be unjustified. We might believe that although the practice of constitutional argument is established, it is an unjust practice."); Kevin L. Yingling, *Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem*, 15 J.L. & POL. 81, 83 (1999) ("The solution to the countermajoritarian difficulty is somewhat of a paradox: the majority of people prefer courts with a countermajoritarian capacity."); Friedman, *supra* note 136, at 341.

CONCLUSION

The gravity of two Court-related difficulties was exposed as a result of the clash between President Roosevelt and the Court during the 1930s.[150] The first, a normative legitimacy difficulty, known as the countermajoritarian difficulty, has become an academic obsession. The second, the sociological-legitimacy difficulty, has in recent decades received only scant attention from legal scholars.[151]

These difficulties, while connected, arise from opposite anxieties. The countermajoritarian difficulty originates in a clash between the notion of self-rule and that of constitutionalism. It captures a fear of judicial tyranny, of rule by Platonic guardians.[152] The sociological-legitimacy difficulty originates in a clash between the promise of an expert legal authority and the indeterminacy of legal materials. The rise in saliency of the indeterminacy of legal norms and the erosion of the myth of legal expertise exposed the public to a disturbing feature of constitutional democracy: self-rule without an institution that knows the right

[150] *See* Friedman, *supra* note 2, 162 ("Ever since Franklin Roosevelt appointed enough Justices to the Supreme Court to change its politics to the left of the political spectrum, liberal legal academics have struggled to justify judicial review."); Lerner, *supra* note 25, at 1313-15 ("The most lasting result of the conflict between the New Deal and the Supreme Court was educational…[The public] learned that judges are human, and that the judicial power need be no more sacred in our scheme than any other power.").

[151] This was not always the case. In the days of the Warren Court, the sociological-legitimacy difficulty received serious attention from legal scholars. *See, e.g.*, Dolbeare & Hammond, *supra* note 64, at 17-18 ("The proliferating discussion over 'neutral principles' and some of the clashes over 'judicial restraint' and 'judicial activism' have their root in concern for the reactions of the general public to particular types of Court performance."); PHILIP B. KURLAND, POLITICS THE CONSTITUTION AND THE WARREN COURT xxiii (1970) ("At the close of Warren's tenure…The Court's lack of prestige was reflected in data published by the Gallup poll…The restoration of public confidence is vital both to the continuance of the Court's powers and to the maintenance of the rule of law in this country.").

[152] LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958).

constitutional answers. This difficulty captures the anxiety arising from self-rule.[153]

While some claim the Court's sociological-legitimacy difficulty is merely a fiction, Justices have devised different strategies to tackle it over the years. It is high time that legal scholarship devoted more attention to examining the important effects of this difficulty on the Court's jurisprudence.

[153] *Cf.* HIBBING & THEISS-MOORE, *supra* note 145, at 60 (the public dislikes Congress since it "embodies practically everything Americans dislike about politics. …[I]t is based on compromise and therefore reminds people of the disturbing fact that most issues do not have right answers."); Lerner, *supra* note 25, at 1316-19 ("[T]he fear of not having the Court and the Constitution to fall back upon…the creeping fear of people who do not want to make decisions, and prefer to surrender their decisions to others.").