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## The Two Countermajoritarian Difficulties

Or Bassok

*Yale Law School*, [or.bassok@yale.edu](mailto:or.bassok@yale.edu)

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## THE TWO COUNTERMAJORITARIAN DIFFICULTIES

OR BASSOK\*

### ABSTRACT

*In recent years, the countermajoritarian difficulty has split into two. According to its traditional version, the difficulty arises when unaccountable Justices strike down statutes passed by electorally accountable branches of government. According to the newer, literal version, the difficulty arises when Justices strike down statutes that are supported by the majority according to public opinion polls. By explicating the difference between the two versions of the difficulty, I expose the deep influence of public opinion polls on American constitutional thought. For many years, scholars conflated the two difficulties under one banner and offered normative justifications for the Court's countermajoritarian authority. In recent years, many constitutional theorists, oriented toward social science, attempt to dissolve the literal countermajoritarian difficulty by showing that the Court is not countering the majority will but following it. I further demonstrate that the distinction helps to explain four additional issues of constitutional theory. First, this distinction explains the connection between the countermajoritarian difficulty and the "passive virtues" technique that Alexander Bickel devised for the Court. Second, it exposes the importance of the distinction between cases that the media covers and non-visible cases. Third, it sheds new light on the basis of the Court's power. Finally, this distinction is crucial for a better understanding of a puzzle that stands at the heart of the rise of judicial power worldwide.*

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\* Robina Foundation Visiting Human Rights Fellow, Yale Law School; LL.M, Yale Law School; LL.M & LL.B, Hebrew University of Jerusalem. I am extremely grateful to Bruce Ackerman, Jack Balkin, Paul Kahn and Robert Post for many illuminating discussions and thoughtful comments. I wish also to thank Kiel Brennan-Marquez, Robert Burt, Yoav Dotan, Noam Y. Finger, James E. Fowkes, Alon Harel, Shay Levi, Han Liu, Lucas Mac-Clure, Itamar J. Mann-Kanowitz, Fernando L. Munoz, Erin L. Miller, Iddo Porat, and participants at the 2011 Yale Law School *Doctoral Scholarship Conference* and the College of Management Law School faculty workshop for helpful comments on earlier drafts. All mistakes are my own.

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## INTRODUCTION

The countermajoritarian (hereinafter “CM”) difficulty is changing. Long before Alexander Bickel conceptualized the problem and gave it its catchy name,<sup>1</sup> the tension between constitutionalism and democracy was understood to arise from the authority of unaccountable judges to invalidate legislation enacted by electorally accountable representatives.<sup>2</sup> This conceptualization of the CM difficulty, to which I refer as “*traditional*,” has obsessed American legal academia for decades.<sup>3</sup> The main tactic for tackling it has been to propose justifications for the Court’s CM authority.<sup>4</sup>

Following the invention of scientific public opinion polls and especially with the rise of “public-opinion culture,”<sup>5</sup> a second understanding of the CM difficulty has emerged. According to this *literal* understanding, the difficulty arises when the Court decides to invalidate legislation that enjoys the support of the majority of the population, as captured by public opinion polls before the decision or shortly thereafter.<sup>6</sup> The “literal” nature of this formulation of the difficulty is embedded in the premise that “majority will” is scientifically measured by public opinion polls. Scholars find this premise controversial, yet

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1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

2. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 342–43 (1998) (acknowledging “some limited countermajoritarian criticism in virtually every era in American history”); Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 846 (2001) (“Bickel was certainly not the first to express concern about judicial review, nor the first to associate that difficulty with the nondemocratic nature of the courts.”).

3. See, e.g., Friedman, *supra* note 2, at 334 (“The ‘countermajoritarian difficulty’ has been the central obsession of modern constitutional scholarship.”); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 104 (“[I]t is not wrong to characterize American legal thought as ‘obsessed’ with the moral problem of judicial review.”).

4. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 659 (2011) (“[T]he leading question in constitutional theory for generations has been how to justify constitutional limitations on the authority of democratic majorities given our background commitments to popular sovereignty and self-government—the infamous ‘countermajoritarian difficulty.’”).

5. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 75 (2010) (“Right or wrong, decades of polling have had a profound impact on the public mind.”); SUSAN HERBST, *NUMBERED VOICES: HOW OPINION POLLING HAS SHAPED AMERICAN POLITICS* 12 (1993) (“Quantitative surveys, both scientific and unscientific, are now a pervasive component of public discourse . . .”).

6. See, e.g., Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2596 (2003) (“There is a regrettable lack of clarity in the relevant scholarship about what ‘countermajoritarian’ actually means. At bottom it often seems to be a claim, and perhaps must be a claim, that when judges invalidate governmental decisions based upon constitutional requirements, they act contrary to the preferences of the citizenry. Some variation on this premise seems to drive most normative scholarship regarding judicial review.”).

it is undisputed in the public discourse where polls' results are presented as the will of the people.<sup>7</sup> While justifications of the Court's CM authority are usually formulated in a manner that allows them to confront the literal version of the difficulty, the distinct main tactic for tackling this version has been to *dissolve* it, by showing that the Court actually follows majority opinion.

This Article emphasizes the importance of the distinction between the two CM difficulties for understanding constitutional theory fifty years after Bickel published *The Least Dangerous Branch*.<sup>8</sup> I begin by exploring the historical background as well as the conceptual meaning of this under-theorized split in the definition of the CM difficulty. The second section surveys prominent attempts to justify the Court's CM authority. Next, I explore mechanisms offered to dissolve the CM difficulty in its literal sense. I then examine what is left of the CM difficulty in view of these dissolution efforts.

After establishing the distinction between the two CM difficulties and exploring the paths taken to confront them, I turn to examine the explanatory power of this distinction in four additional constitutional issues. Using this distinction permits a better understanding of the connection between Bickel's discussion of the CM difficulty in the first part of *The Least Dangerous Branch* and the "passive virtues" device that he offered in the second part of the book.<sup>9</sup> At the time he wrote the book, before the rise of the "public-opinion culture," Bickel could not fully comprehend the CM difficulty in its literal sense. However, he did devise a technique to counter the dangers that stem from it. Next, I explain why visibility of cases in the media is important for the efforts to dissolve the CM difficulty in its literal sense, but not for the attempts to justify the Court's CM authority. Based on the distinction between the two difficulties, I explain two distinct understandings of the basis of the Court's power. One understanding anchors the Court's power in its expertise, the other in public support. While both ways to understand the Court's power may have existed in parallel throughout the Court's history, the rise of public opinion polls has sharpened the distinction between these two understandings. Finally, I demonstrate that the CM difficulty in its literal sense is at the center of an important puzzle in the field of comparative constitutional law. Thus, though the CM difficulty has been considered for many years as an exceptional American obsession, its split into two difficulties exposes that this truism is inaccurate.

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7. See ACKERMAN, *supra* note 5, at 75–76.

8. BICKEL, *supra* note 1.

9. See *id.* at 111–98.

## I. DISTINGUISHING BETWEEN THE TWO CM DIFFICULTIES

A. *Historical Background*

The CM difficulty captures two fundamental components of democratic government: majoritarianism and electoral accountability.<sup>10</sup> Judicial review of legislation may entail not only an unaccountable institution scrutinizing the work of an accountable one, but also a non-majoritarian institution countering majority opinion. However, the separateness of these two components became vivid only as polls measuring public support for the Court's decisions proliferated in the 1960s, and with the rise of public polling in the public mind to the status of an on-going referendum.<sup>11</sup>

Before the invention of scientific opinion polls and the rise of the public-opinion culture, majoritarianism and electoral accountability were conflated in discussions of the CM difficulty. Though the concept of public opinion in its modern sense as the collective voice of the popular will appeared already in the eighteenth century,<sup>12</sup> there was no viable tool for measuring it (except on election-day) before the invention of scientific public opinion polls in the 1930s.<sup>13</sup> Thus, many thought, "Congress was public opinion."<sup>14</sup> Hence, countering the will of Congress meant contravening the will of the public majority.

Moreover, even after the invention of scientific public polling, it took time until public support for the Court and its decisions was measured. Polling had been institutionalized by the White House in the 1930s, yet it has become a

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10. See, e.g., Kevin L. Yingling, Note, *Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem*, 15 J.L. & POL. 81, 106 (1999) ("Just as majoritarianism is fundamental to democracy, electoral accountability is also an indispensable feature.").

11. See, e.g., ACKERMAN, *supra* note 5, at 75 ("Nowadays, Americans simply take it for granted that the polls serve as kind of privatized voting system, providing a rolling referendum on the president's democratic standing."); GEORGE F. BISHOP, *THE ILLUSION OF PUBLIC OPINION: FACT AND ARTIFACT IN AMERICAN PUBLIC OPINION POLLS* 66–67 (2005) (discussing the dangers in the growing tendency to present opinion polls as a referendum on public opinion).

12. John Durham Peters, *Historical Tensions in the Concept of Public Opinion*, in *PUBLIC OPINION AND THE COMMUNICATION OF CONSENT* 3, 9, 11–14 (Theodore L. Glasser & Charles T. Salmon eds., 1995) [hereinafter Peters (1995)] ("Public opinion is, first of all, an 18th-century invention, not an eternal given of human life."); John Durham Peters, *Realism in Social Representation and the Fate of the Public*, in *PUBLIC OPINION & DEMOCRACY VOX POPULI-VOX DEI?* 85, 86 (Slavko Splichal ed., 2001) ("The idea of a public realm of citizens or a sociological aggregate—the public—did not exist until the eighteenth century.").

13. See ACKERMAN, *supra* note 5, at 75 (before the introduction of public opinion polls there was "no way to prove" public support between elections); Peters (1995), *supra* note 12, at 14 ("By the 1920s and 1930s, public opinion was reconceived as a measurable quantity that could be tapped by survey research.").

14. Amy Fried & Douglas B. Harris, *Governing with the Polls*, 72 *HISTORIAN* 321, 341 (2010).

central preoccupation of presidents only since the 1970s.<sup>15</sup> Amongst Congressional members, polling had become a common practice by the mid-1960s.<sup>16</sup> Gallup began conducting polls to measure public confidence in the Supreme Court as early as the late 1930s, but it was not until the 1960s that the Gallup and Harris organizations began to track public support for the Court and its decisions in any systematic way.<sup>17</sup>

Hence, at the beginning of the 1960s, the period in which *The Least Dangerous Branch* was written, public opinion polls had yet to attain their current status in the public discourse as reliable reflections of popular sentiment.<sup>18</sup> Thus, Bickel could write with confidence that “[m]ost assuredly, no democracy operates by taking continuous nose counts on the broad range of daily governmental activities.”<sup>19</sup> Since only following the rise of the public-opinion culture, a *literal* understanding of the CM difficulty could arise, there is no wonder that Bickel conflated the two CM difficulties.<sup>20</sup> He coined the phrase “counter-majoritarian,” which is suitable for the literal sense, while probably trying to describe the traditional sense of the problem.<sup>21</sup> The more

15. See ACKERMAN, *supra* note 5, at 24–25 (“White House interest in polling began with Roosevelt, but it only became a central preoccupation under Richard Nixon.”); ROBERT M. EISINGER, *THE EVOLUTION OF PRESIDENTIAL POLLING* 1–5 (2003); Fried & Harris, *supra* note 14, at 332–39.

16. See Fried & Harris, *supra* note 14, at 339–45; EISINGER, *supra* note 15, at 6–7.

17. See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE REHNQUIST COURT* 1–2, 29, 77 (2008) (“Until the 1930s there was no direct test by which to tell whether or not Supreme Court decisions agreed with American public opinion.”); Roger Handberg, *Public Opinion and the United States Supreme Court 1935-1981*, 59 INT’L. SOC. SCI. REV. 3, 5 (1984); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the U.S. Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1210–12 (1986).

18. See ACKERMAN, *supra* note 5, at 74.

19. BICKEL, *supra* note 1, at 17. However, Bickel was not oblivious to the potential effects of the polling technology on the role of the Court. See *id.* at 239 (“Surely the political institutions are more fitted than the Court to find and express an existing consensus—so long, at least, as the science of opinion sampling is no further developed than it is.”).

20. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1531 (1990) (“Bickel too cavalierly glides over the distinctions between representative government and majoritarianism when it comes to labeling the ‘difficulty’ with judicial review.”); Terri Peretti, *An Empirical Analysis of Alexander Bickel’s The Least Dangerous Branch*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY*, 123, 125–26 (Kenneth D. Ward and Cecilia R. Castillo eds., 2005) (examining Bickel’s different uses of the term “majority will”).

21. BICKEL, *supra* note 1, at 16–19; see also Eule, *supra* note 20, at 1531 (describing the two available interpretations to the CM difficulty and noting that “[Bickel] described judicial review as thwarting ‘the will of representatives’”); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1298 (2004) (“[Bickel] claimed that the requirements of democracy are satisfied so long as ‘a representative majority has the power to accomplish a reversal’ of policy.” (quoting BICKEL, *supra* note 1, at 17)). *Contra* David S. Law, *A Theory of*

proper name for the traditional difficulty should have been the “counter-representative” difficulty.<sup>22</sup>

Robert Dahl’s famous 1957 article on the responsiveness of the Court to the “dominant national alliance” used the position of the legislative majority in Congress four years or fewer before the Court’s decision as a surrogate for majority will since “scientific opinion polls are of relatively recent origin.”<sup>23</sup> Thus, Dahl argued that “[f]or the greater part of the Court’s history, . . . there is simply no way of establishing with any high degree of confidence whether a given alternative was or was not supported by a majority or a minority of adults or even of voters.”<sup>24</sup>

Only after decades of constant polling reshaped our notion of democratic legitimacy did the difficulty capturing the clash between constitutionalism and democracy change to reflect the new reality in which opinion polls serve as an authoritative democratic legitimator.<sup>25</sup> With the rise of public-opinion culture, the term “public opinion” came to be synonymous with poll results.<sup>26</sup> Congress was no longer considered as the voice of the popular will, rather, opinion polls were. This development opened the path for the rise of the literal version of the CM difficulty.

#### B. Conceptual Analysis

Today, one can speak of two CM difficulties.<sup>27</sup> In its traditional sense, the CM difficulty deals with “the question of whether the democratic principle of majority rule can be reconciled with the practice of remotely accountable

*Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 728 n.15 (2009) (noting that according to Bickel’s account, “there is nothing countermajoritarian about judicial review unless one equates the acts of elected officials with the wishes of a majority”).

22. Eule, *supra* note 20, at 1531–32 (noting that “[Bickel’s] error is less in his theory than in his terminology” and suggesting the terms “counter-representative” or “counter-republican” as better labels for the difficulty).

23. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L 279, 283 (1957). *But cf.* Pildes, *supra* note 3, at 117 (claiming that Dahl preferred legislative outcomes since another concept would be difficult if not impossible to pin down).

24. Dahl, *supra* note 23, at 284.

25. ACKERMAN, *supra* note 5, at 75–76; SARAH E. IGO, *THE AVERAGED AMERICAN: SURVEYS, CITIZENS, AND THE MAKING OF A MASS PUBLIC* 12–13, 18–19 (2007) (showing that polls’ results serve as social facts with considerable authority); Peters (1995), *supra* note 12, at 14 (“Since [the 1930s] the polling of ‘public opinion’ has been installed as both a symbol of democratic life and a cog in the machinery of the market and the state.”).

26. *See* BISHOP, *supra* note 11, at 6; HERBST, *supra* note 5, at 63 (“[S]cholars writing from the 1940s to the present have been forced to contend with the notion that polls are becoming synonymous with public opinion.”); Fried & Harris, *supra* note 14, at 323–24, 353.

27. *Cf.* Law, *supra* note 21, at 728 (elaborating the “two senses in which judicial review might be described as countermajoritarian”).

judges invalidating legislation enacted by electorally accountable representatives.”<sup>28</sup> The emphasis is on the difficulty of Justices striking down statutes passed by electorally-accountable branches of the government, and not on the majority support for these statutes.<sup>29</sup>

Accountability allows the public to replace its representatives through periodical elections and for whatever reason. Elected branches are *responsible* to the electorate.<sup>30</sup> Justices, on the other hand, are not directly and regularly accountable to the electorate or to its representatives. While they must survive a majoritarian process of nomination and confirmation administered by elected representatives,<sup>31</sup> there is no effective mechanism for holding them accountable to the public and its representatives once on the bench.<sup>32</sup> Justices cannot be replaced directly by the electorate, nor can the elected representatives dismiss them at will. Indeed, they rarely bear the costs of their mistakes.<sup>33</sup>

The literal version of the CM difficulty emphasizes the majoritarian aspect of democracy, i.e. the Court’s *responsiveness* to public opinion. Elected branches are responsive to the majority’s will as expressed in elections and in

28. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 492 (1997).

29. See ROBERT JUSTIN LIPKIN, CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM 7–9 (2000) (discussing the CM difficulty); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4–5 (1980) (“[T]he central function, and it is at the same time the central problem, of judicial review [is that] a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.”); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 48 (2002) (“Critics of my theory argue that the non-accountability of judges should deprive them of the power to void statutes. Such power must only be given to the representatives of the people, who are accountable to them. This is the countermajoritarian argument made again and again.”).

30. See Dennis Murashko, *Accountability and Constitutional Federalism: Reconsidering Federal Conditional Spending Programs in Light of Democratic Political Theory*, Comment, 101 NW. U. L. REV. 931, 939 (2007) (discussing different meanings of the term “accountable” and stating that “[f]or their actions, public officials are *responsible* to the electorate”).

31. Thus, they can be considered to be indirectly accountable to the public. See, e.g., MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 9–10 (1982) (distinguishing between direct and indirect accountability); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1391 (2006) (“The President is elected and people often know what sort of persons he is likely to appoint to the Supreme Court, and the U.S. Senators who have to approve the appointments are elected also, and their views on this sort of thing may be known as well. True, the Justices are not regularly held accountable in the way legislators are, but, as we have already remarked, we are not looking for perfection.”).

32. LIPKIN, *supra* note 29, at 246 n.31.

33. Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1575 (1988).

other manifestations such as opinion polls. They adopt policies that are signaled as preferred by citizens.<sup>34</sup> Justices, on the other hand, have lifetime tenure, which relieves them from the need to be responsive to the majority (of the public or its representatives), as well as an ethos of unresponsiveness to popular pressure.<sup>35</sup>

Some commentators, even today, conflate the Court's countering elected and accountable institutions with the Court's countering public opinion.<sup>36</sup> Others, like Nathaniel Persily, understand and adopt the literal version wholeheartedly: "After all, if the Court merely reflected public opinion in its decisions, then whatever other problems it might have, it could not be described as countermajoritarian."<sup>37</sup> According to the traditional version of the CM difficulty, this statement is false. The fact that the Court's decision aligns with the majority's views does not negate, at least as a formal matter, the

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34. See, e.g., Bernard Manin, Adam Przeworski & Susan C. Stokes, *Introduction to DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 1, 9 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999) ("These signals may include public opinion polls . . ."); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 33–38 (1980) ("[T]he empirical surveys divulge that congressmen *feel* that their voting records will contribute significantly to their election and thus they are strongly influenced by their *perception* of their constituents' preferences.").

35. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 420 (1908) ("Constitutional questions . . . are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action . . ."); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1120 ("[M]any Justices have separated the judicial domain, excluding public opinion, from the political domain, where public opinion reigns supreme."); Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 44 (1993) ("[T]he courts are not, either in their ethos or image, elective institutions, whereas parliament—whatever its imperfections—obviously is.").

36. See, e.g., Scott E. Lemieux & David J. Watkins, *Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory*, 41 POLITY 30, 32 (2009) ("It is assumed that when courts exercise judicial review, they are contravening the will of the political branches, and therefore by extension the will of the majority.").

37. Nathaniel Persily, *Introduction to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 3, 5 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008); see also Friedman, *supra* note 6, at 2605 ("Ultimately, the [CM] claim (and the fear) must be that judges strike down popular laws."); Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1212–13 (2010) ("[T]he countermajoritarian difficulty is a normative problem that attaches to those decisions in which courts . . . contravene the majority's preference. . . . [C]ourts make constitutional decisions with which most Americans disagree."); Peretti, *supra* note 20, at 125–41 (arguing that the Court is not CM since it "decides consistently with public opinion a majority of the time").

problem with an electorally unaccountable institution striking down laws enacted by an elected and accountable institution.<sup>38</sup>

The two versions of the CM difficulty are obviously connected. As Michael Perry notes, “one important reason we value electorally accountable policymaking is that we think it more sensitive to the sentiments of the majorities than is policymaking that is not electorally accountable.”<sup>39</sup> Indeed, laws ordinarily correspond to the majority’s preferences.<sup>40</sup> Yet, the two difficulties are still distinct from each other. When, according to public opinion polls, the public supports the Court’s decision to overrule a statute, the Court’s decision is not CM in the literal sense. However, it is still CM in the traditional sense since an unaccountable institution struck down a statute that was passed by electorally accountable branches of government.<sup>41</sup> The Court acts in a CM manner in the traditional sense whenever it invalidates a statute enacted by an elected body, and not only, as the literal definition of the CM difficulty entails, when it invalidates statutes that enjoy popular support.<sup>42</sup>

Similarly, the Court may enjoy public support as an *institution* making it in a sense a “majoritarian institution,” yet it remains a “deviant institution in the American democracy” since it is CM in the traditional sense.<sup>43</sup> Moreover, the Court may enjoy *durable* majoritarian support as an institution even while deciding some cases in a CM fashion in the literal sense. The public may disagree with certain decisions making them CM in the literal sense. However, the more durable public support for the Court as an institution can transcend such reactions to the Court’s concrete performance and remain unscathed.<sup>44</sup> Hence, the Court may be a majoritarian *institution* in the literal sense while deciding some cases against public opinion i.e., deciding literally in a CM

38. See Friedman, *supra* note 6, at 2596 & n.3 (detecting a “lack of clarity” in the definition of the CM difficulty concerning the question whether the difficulty is with “the substance of judicial decisions (i.e., that they do not comport with outcomes the majority would prefer) or the process of judicial decisionmaking (i.e., that judges are unaccountable in an electoral sense).”).

39. PERRY, *supra* note 31, at 170 n.4.

40. See Eule, *supra* note 20, at 1532.

41. David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 19 n.16 (David Kairys ed., 3d ed. 1998) (“[W]hen legislatures act counter to the will or inclinations of the majority of their constituents, judicial invalidation of legislation can be both majoritarian (in the sense that most people support it) and countermajoritarian (in the sense that a court is negating the action of a majoritarian institution).”).

42. See PERRY, *supra* note 31, at 170 n.4 (“[T]he political principle to which we are philosophically committed demands only that policymaking be electorally accountable, not that it necessarily generate policies supported by a majority of the electorate . . .”).

43. BICKEL, *supra* note 1, at 18.

44. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636–38 (1992); Friedman, *supra* note 6, at 2614–17.

fashion. However, overtime, sustained disappointment with the Court's decisions will lead to a decline in the durable support that the Court enjoys.<sup>45</sup>

The technological change that separated public opinion from the representatives' position brought to light the distinction between the two CM difficulties. However, it should be stressed that the split between the two CM difficulties is not between countering public opinion and countering the opinions of representatives. The literal difficulty deals with Court's decisions countering majority public opinion.<sup>46</sup> The traditional difficulty deals with striking down legislation of an electorally accountable institution by an institution that is unaccountable.

## II. JUSTIFYING THE COURT'S CM AUTHORITY

For many years, scholars who confronted the CM difficulty had usually done so by proposing normative justifications for the Court's CM authority. Until recently, however, the two definitions of the CM difficulty had been conflated. Therefore, scholars did not usually examine whether the justification they proposed addressed one or both of these difficulties.

These justifications typically have a two-step format. First, the scholar explicates a worthy normative goal that can be extracted from the

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45. Friedman, *supra* note 6, at 2615 (“[I]ntense enough specific disagreement with an institution ultimately will have an impact on diffuse support.”); CHOPER, *supra* note 34, at 139 (“At some point—the exact location of which is unknown, but the existence in fact virtually undisputed—the Court’s continued antimajoritarian rulings will tip the balance of credit accumulation and expenditures and animate a public sentiment that it has but a gossamer claim to legitimacy in a democratic society . . .”).

46. A further distinction between the will of the majority of the public and the will of the current majority of the representatives can be made. Thus, the CM difficulty in its literal version can be split into two. One version deals with the Court that counters the opinion of majority of the public; the other deals with the Court that counters the opinion of the current majority of representatives. Indeed, it is possible for the majority of representatives to support a law that runs against public opinion. It is also possible for the majority of representative to oppose a law, without repealing it, although the public supports the law. See, e.g., JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* 49–53 (2005) (showing that Congress can diverge from popular opinion substantially and for a significant period of time). While such a distinction is not a meaningless exercise in hair splitting, it is not the focus of my argument and thus for the purposes of clarity I will disregard it. For discussion on this distinction see LIPKIN, *supra* note 29, at 11 (“Even in a direct, participatory democracy, a ‘new’ majority must wait for elections to give its voice effect.”); Pildes, *supra* note 3, at 120 (“[T]he *Lochner* era’s activism might have reflected majority popular opinion even as the Court overturned lawmaking majorities.”); John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353, 360–65 (2010) (“In any representative democracy it is always possible to have a double majority where the parliamentary and popular majorities diverge, and this indeed becomes likely as the election recedes in time.”).

Constitution,<sup>47</sup> such as protecting disadvantaged groups of society, preserving democratic procedures, and guarding certain basic moral values.<sup>48</sup> Second, the scholar explains why the mission of achieving this goal is “peculiarly suited to the capabilities of the courts,” and “will not likely be performed elsewhere if the courts do not assume it.”<sup>49</sup>

All the justifications for the Court’s CM authority share two other important features: first, according to all of the approaches, the Court’s CM authority is acknowledged and embraced, not dissolved or condemned.<sup>50</sup> Second, each justification for the Court’s CM authority serves as an Archimedean point of agreement, a shared perspective. From an external point of view, each justification may be contested. But from the point of view internal to constitutional discourse, the adopted justification serves as the metric according to which all arguments are measured. Indeed, within the boundaries of a system that adopted a certain justification, the power of a legal argument is measured by its persuasiveness in terms of that justification. A few prominent examples of justifications for the Court’s CM authority will demonstrate these points.

#### A. *Rights-Based Arguments*

Rights-based arguments seek to justify the Court’s CM authority by claiming that certain basic rights are required in order to achieve the constitutional commitment to freedom, independence, equality, the full humanity of every member of society, or any other concern that stands at the basis of the Constitution.<sup>51</sup> Such arguments hold (or at least assume) that due to their special training or their relative insularity from public opinion (or

47. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 11 (1991) (describing the common thread of “rights foundationalists” as “[w]hatever rights are Right, all agree that the American constitution is concerned, first and foremost, with their protection”).

48. Roberto Gargarella, *In Search of a Democratic Justice – What Courts Should Not Do: Argentina, 1983-2002*, in *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES* 181, 182 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004) (describing several justifications for the CM authority).

49. BICKEL, *supra* note 1, at 24.

50. See, e.g., Klarman, *supra* note 28, at 492 (“One familiar response turns the tables by treating the *difficulty* as a *virtue*.”); Lemieux & Watkins, *supra* note 36, at 32 (“[T]he countermajoritarian nature of the courts is a good thing, because courts are uniquely well situated to protect the rights of individuals or disadvantaged groups against an excessively powerful majority.”).

51. See Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts*, 38 *WAKE FOREST L. REV.* 635, 638–39 (2003) (“[T]he foundational moral commitment of liberal democracy is to the true and full humanity of *every* human being—and, therefore, to the inviolability of *every* human being—without regard to race, sex, religion, etc. This commitment is axiomatic for liberal democracy.”); Waldron, *supra* note 35, at 20–21 (specifying various concerns at the basis of theories of rights).

both), judges enjoy some institutional advantages over legislators with respect to the process of discovering, asserting, and implementing human rights.<sup>52</sup> Subsequently, judicial review is justified as a necessary means to guarantee the protection of these rights.<sup>53</sup>

### B. Process-Based Arguments

Process-based arguments read the Constitution as anchoring a thin normative goal. “[P]reserving fundamental values is not an appropriate constitutional task,”<sup>54</sup> and thus, besides the procedure of political majoritarianism, no other value is constitutionally entrenched.<sup>55</sup>

According to the process-based justification, first raised in *Carolene Products*’ footnote four<sup>56</sup> and further developed most famously by Ely,<sup>57</sup> in order to perfect democracy, the role of detecting democratic procedural malfunctions should be entrusted in the hands of the judiciary. While courts are inferior to legislators in making substantive judgments, judges are “experts on process and . . . political outsiders,” “uniquely situated to ‘impose’” process-based values.<sup>58</sup> Hence, the intervention in majoritarian decisions by judicial review can only be justified when it is required to correct failure in the democratic majoritarian process.<sup>59</sup> Judicial review to secure rights is appropriate in instances in which these rights are constitutive of a well-functioning majoritarian process.<sup>60</sup>

52. See, e.g., Perry, *supra* note 51, at 654–57 (“[M]any articulated human rights are not likely to be optimally protected in a democracy unless politically independent courts play a significant role in protecting them.”).

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

54. ELY, *supra* note 29, at 88; see also Ernest Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT’L L.J. 527, 530 (2003) (“[T]he main restrictions on governmental power under the American Constitution are procedural rather than substantive in nature.”).

55. See, e.g., ELY, *supra* note 29, at 181 (“[J]udicial review . . . can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack.”).

56. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

57. ELY, *supra* note 29, at 75–77 (characterizing his own theory as filling in the outlines of *Carolene Products*).

58. ELY, *supra* note 29, at 75 n.\*, 75–77, 88, 102, 112.

59. See Samuel Estreicher, *Platonic Guardians of Democracy: John Hart Ely’s Role for the Supreme Court in the Constitution’s Open Texture*, 56 N.Y.U. L. REV. 547, 552–54 (1981); see also Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (“The footnote identified two instances of legislative failure: abridgment of the right to vote and victimization of a discrete and insular minority . . .”).

60. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46 (2001) (discussing process-based justifications).

Process-based theories do not only justify the Court's CM authority, they also partly dissolve the CM difficulty in its literal sense. These theories acknowledge that due to failures in the democratic process, laws do not necessarily represent the will of the electorate. Thus, limiting the Court's interventions to instances in which it can perfect, rather than override, the workings of the majoritarian political process ensures that the CM difficulty in its literal formulation is partly dissolved.<sup>61</sup> Indeed, process-based theories aim only to police majoritarianism democracy, not to override it by making substantive choices, as do justification theories that offer a substantive vision.<sup>62</sup> Yet, process-based theories do not suggest that the Court's interventions are limited to cases in which a certain law counters the majority's view. Their aim is to protect the process of political majoritarianism, not to dissolve the CM difficulty in its literal sense.<sup>63</sup>

### C. *Dworkin's Empire*

Ronald Dworkin's argument combines the rights-based and process-based approaches.<sup>64</sup> According to Dworkin, the goal of democracy is to ensure that each person receives equal concern and respect for his or her basic rights by the institutions of government, not that the majority of the citizens necessarily or usually get its way.<sup>65</sup> Judicial review can thus be justified if it increases the

61. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 895 (2003); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 893–95 (2009).

62. ELY, *supra* note 29, at 103; see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 34, 69 (1985) (analyzing process-based approaches as suggesting that “the Court can avoid trespassing on democracy by policing the processes of democracy itself”); FISS, *supra* note 59, at 6 (“The theory of legislative failure should be understood as a general presumption in favor of majoritarianism . . . .”); PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 148–49 (1992) (“[T]he Court’s role is limited to remedying the process; it may not substitute its value judgments for those of elected institutions.”).

63. ELY, *supra* note 29, at 103 (“Our government cannot fairly be said to be ‘malfunctioning’ simply because it sometimes generates outcomes with which we disagree, however strongly . . . .”).

64. Compare Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 143 (1997) (book review) (“It may be useful to think of Dworkin’s approach to the practice of judicial review as belonging to the same family as John Hart Ely’s approach.”), with Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 824 (1999) (“[M]ajoritarian procedures are adopted to guarantee equal status for individuals, not to satisfy the goals of majority rule.”).

65. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 16–17 (1996) (rejecting the “majoritarian premise” and arguing that “the defining aim of democracy [is] . . . that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect”); *id.* at 72–78, 212–16; DWORKIN, *supra* note 62, at 32 (noting that

likelihood of fulfilling this goal. As with rights-based approaches, the goal is to protect rights, not majoritarian procedures.<sup>66</sup> But due to his broad definition of democracy, Dworkin views a failure to respect the moral equality of all citizens as a democratic malfunction that justifies a review of legislation.<sup>67</sup> Thus, by adopting a broader definition of democracy, Dworkin is able to argue, in the spirit of the process-based approach, that judicial review strengthens rather than undermines democracy.<sup>68</sup>

While Dworkin denies that judges enjoy some inherent advantages over other officials with respect to the process of discovering constitutional values or protecting fundamental rights,<sup>69</sup> he contends that in the United States the authority of judicial review “is already distributed by history,” and it is currently settled that the Supreme Court holds the final interpretative authority.<sup>70</sup>

#### D. *Textualism and Originalism*

Textualism and originalism aim to bind the current public to the original constitutional course as plainly expressed in the words of the Constitution or understood by those who wrote the Constitution/the generation living at that period.<sup>71</sup> All the approaches described above present themselves as emanating from the constitutional text, but textualism and originalism are more “text-based” theories.<sup>72</sup>

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democracy and the rule of law “are rooted in a more fundamental ideal, that any acceptable government must treat people as equals”); *see also* Luna, *supra* note 64, at 824–25 (summarizing Dworkin’s position).

66. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 133 (1977) (arguing that constitutional restraints “[can] be justified by appeal to moral rights which individuals possess against the majority”).

67. Dorf, *supra* note 64, at 143 (summarizing Dworkin’s position as being that, “legislation that denies persons equal respect is . . . inconsistent with constitutional democracy”).

68. *See* DWORKIN, *supra* note 65, at 153–55; DWORKIN, *supra* note 62, at 70 (“If we give up the idea that there is a canonical form of democracy, then we must also surrender the idea that judicial review is wrong because it inevitably compromises democracy.”).

69. *See* DWORKIN, *supra* note 65, at 7, 12, 34. There seems to have been a shift in Dworkin’s position. In his earlier writings, one can find indications that he believed courts were structurally the best institution for principled decision. *See* RONALD DWORKIN, *LAW’S EMPIRE* 244 (1986).

70. *See, e.g.*, DWORKIN, *supra* note 65, at 2, 12, 33–35, 74.

71. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427, 444–46 (2007) (describing the development of different versions of originalism: original intention, original understanding, and original meaning).

72. *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *CALIF. L. REV.* 535, 541–45 (1999) (distinguishing between text-based theories and practice-based theories, and positioning “originalism” in the former camp).

The CM difficulty captures the clash between the voice of “We the People” who produced the constitutional text and the voice of the current people and their representatives. According to originalists and textualists, review of legislation is justified since in terms of democratic legitimacy, the original voice of the popular sovereign as fixed in the Constitution is superior to the current passing whims of public opinion.<sup>73</sup> Judicial review is the best mechanism for ensuring loyalty to the people’s original voice, since the Justices possess expertise in the field of constitutional history or in textualist analysis.<sup>74</sup>

*E. Ackerman’s Dualist Model*

According to Bruce Ackerman’s dualist model, in times of normal politics, the Court’s CM role is justified because the CM judicial review power binds the People to *their own* constitutional principles that were ratified in times of “higher lawmaking.”<sup>75</sup> In these relatively short periods of time of “constitutional politics,” constitutional changes are not necessarily made according to the formal procedure for amending the Constitution that is anchored in Article V. Ackerman argues that the constitutional constraints of Article V compel the People to recruit sustained and enduring political energy to either amend the Constitution according to Article V or make a constitutional change transgressing its constraints.<sup>76</sup> Only a significant mobilization of the People can muster enough force to change the achievements of previous higher lawmaking power.<sup>77</sup> Public support of such a change has to be qualitatively different from the support of normal legislation,

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73. Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 2, 7, 9, 42–44 (2011) (explaining the fixation thesis and the argument for originalism’s democratic legitimacy); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 276 (2009) (“Originalism is uniquely consistent with democratic government, they argue, because it ensures that judges will invalidate democratically enacted laws only when those laws conflict with the judgment of the supermajority that ratified the constitution.”).

74. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 8–9, 18 (1977).

75. ACKERMAN, *supra* note 47, at 9–10.

76. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 4–5 (1998) (“The higher lawmaking system imposes specially rigorous tests upon political movements that hope to earn the heightened sense of democratic legitimacy awarded to spokesmen for We the People.”); ACKERMAN, *supra* note 47, at 7, 10 (“Only after negotiating this more arduous obstacle course can a political elite earn the authority to say that We the People have changed our mind.”); *id.* at 19 (recognizing “a deepening dialogue between leaders and masses within a democratic structure that finally succeeds in generating broad popular consent for a sharp break with the status quo”); *id.* at 27.

77. ACKERMAN, *supra* note 47, at 10, 13, 48, 165, 184–85, 264–65; ACKERMAN, *supra* note 76, at 6, 29.

both in the degree of majority support and in the duration and depth of deliberation.<sup>78</sup> After the period of “constitutional politics,” in times of “normal politics,” the Court’s role is to “translate the rare successes of constitutional politics into cogent doctrinal principles capable of controlling normal politics.”<sup>79</sup>

Simple passing desires do not express the considered judgments of the people in their collective capacity. These are mere public opinion, even when enacted into law. As such, these desires should be constrained by the judicial review mechanism, which binds the people to their considered constitutional judgments.<sup>80</sup> The political branches similarly cannot be allowed to stray from the constraints placed upon them by the people.<sup>81</sup> Indeed, the Justices’ role “is to preserve the higher law solutions reached by the People against their erosion during periods of normal politics.”<sup>82</sup> In such times, the Court “represents” the people, who are absent.<sup>83</sup>

Ackerman thus justifies the Court’s CM authority based on its ability to preserve the people’s higher-law achievements, even those that were not formally codified. But Ackerman’s model does more. It also presents a mechanism for the dissolution, at least in some cases, of the CM difficulty in its literal sense. In certain constitutional moments, “We the People” are able to break through the formal procedures of legality, and accord enduring public opinion a de-facto status of a constitutional amendment. In other words, if the transformation in public opinion is enduring and strong enough, it can overturn judicial constitutional decisions which counter public opinion.

According to Ackerman, the preservationist function is very suited for the Court, since it relies on judicial expertise in identifying extraordinary moments

78. Bruce Ackerman, *The Political Case for Constitutional Courts*, in LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR 205, 209–10 (Bernard Yack ed., 1996) (discussing depth, breadth, and decisiveness required to endow an initiative with special constitutional status).

79. ACKERMAN, *supra* note 47, at 290; *see also id.* at 60 (“[The Court’s] job is to preserve the higher law solutions reached by the People against their erosion during periods of normal politics.”); *id.* at 72, 263–65; David M. Golove, *Democratic Constitutionalism: The Bickel-Ackerman Dialectic*, in THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY, *supra* note 20, at 71, 80–81.

80. *See* ACKERMAN, *supra* note 47, at 242–43, 262–63.

81. *Id.* at 171 (“During periods of normal politics, [government officials] must be constrained by the constitutional forms imposed during rare periods of constitutional creativity, when the People mobilize and speak with a very different voice.”); *id.* at 261–64, 289.

82. *Id.* at 60; *see also id.* at 9–10, 72, 192, 263.

83. *Id.* at 264–65 (“[T]he Supreme Court is . . . an ongoing representative of a mobilized People during the lengthy periods of apathy, ignorance, and selfishness that mark the collective life of the private citizenry of a liberal republic.”).

of public mobilization (“constitutional politics”).<sup>84</sup> “Quite simply,” he explains, “the Justices are the only ones around with the training and the inclination to look back to past moments of popular sovereignty, and to check the pretensions of our elected politicians when they endanger the great achievements of the past.”<sup>85</sup>

### III. DISSOLVING THE CM DIFFICULTY IN ITS LITERAL SENSE

#### A. *Robert Dahl Plants the Seeds for Dissolving the Literal CM Difficulty*

In 1957, Robert Dahl published a revolutionary article.<sup>86</sup> Dahl’s aim was to examine the empirical basis of what is arguably the most common justification for the Court’s CM authority: the claim that the Court “stands in some special way as a protection of minorities against tyranny by majorities.”<sup>87</sup> Based on empirical data, Dahl argued that Supreme Court decisions rarely obstruct important policies of national majorities.<sup>88</sup> Dahl suggested that the Court acts in a CM fashion only during “short-lived transitional periods,” when the dominant political coalition is disintegrating or otherwise unstable.<sup>89</sup> Most of the time, the appointment of Justices by Presidents who are part of dominant political coalition ensures that the Court’s decisions are in line with the will of lawmaking coalitions.<sup>90</sup>

84. *See id.* at 263–65; Golove, *supra* note 79, at 80–81.

85. Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1806–07 (2007); *see also* ACKERMAN, *supra* note 47, at 139 (“What the judges are especially equipped to do is preserve the achievements of popular sovereignty during the long periods of our public existence when the citizenry is not mobilized for great constitutional achievements.”).

86. Dahl, *supra* note 23. While the idea that the Court, “with but few exceptions, adjusted itself in the long run to the dominant currents of public sentiment,” had already been suggested by DEAN ALFANGE, *THE SUPREME COURT AND THE NATIONAL WILL* 40 (1937), or even by 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 242–43 (1995) (1888), Dahl provided it with a firmer empirical basis. *See* Pildes, *supra* note 3, at 114–15 (discussing the relation of Dahl’s work to that of Alfange); Adrian Vermeule, “*Government by Public Opinion*”: Bryce’s Theory of the Constitution 17 (Harvard Working Paper No. 11–13, 2011), available at <http://papers.ssrn.com/abstract=1809794> (“[I]t is Bryce, not Robert Dahl, who first clearly articulates the thesis that judges in some sense follow either current public opinion or the views of past political coalitions . . .” (footnote omitted)). For the revolutionary nature of Dahl’s article, see David Adamany & Stephen Meinhold, *Robert Dahl: Democracy, Judicial Review, and the Study of Law and Courts*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 361 (Nancy Maveety ed., 2003).

87. Dahl, *supra* note 23, at 282; *see also* Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227, 232 (2010) (noting that the rights-based justification is “perhaps the most popular and well entrenched in American legal thought”).

88. *Id.* at 283–84.

89. *Id.* at 293.

90. Adamany & Meinhold, *supra* note 86, at 362–63, 374 (discussing Dahl’s argument); Pildes, *supra* note 3, at 104–05 (“Dahl . . . concluded that the Supreme Court had not functioned

Following Dahl, other social scientists have shown a correlation between the Court's constitutional decisions and the policy preferences of *legislative majorities* at the national level.<sup>91</sup> Since the mid-1980s, social scientists have published studies that present a correlation between *public opinion*, as measured by polls, and the Court's decisions on most publicly salient-issues.<sup>92</sup> In his comprehensive studies of the relationship between the Court's decisions and public opinion, Thomas Marshall concluded that "[o]verall, the evidence suggests that the modern Court has been an essentially majoritarian institution."<sup>93</sup>

Until recently, however, constitutional theorists have largely focused on offering normative justifications for the Court's CM authority.<sup>94</sup> This has changed significantly during the last decade or so, as more and more legal theorists have come to realize the importance of social-science research to constitutional discourse.<sup>95</sup> Thus, empirical findings have convinced many of them that over time, the Court's decisions tend to reflect the majority's opinion rather than thwart it.<sup>96</sup>

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historically as a countermajoritarian institution and, for structural reasons, was unlikely to do so.").

91. See, e.g., Michael McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 63, 69 (Howard Gillman & Cornell Clayton eds., 1999) (presenting the conventional wisdom among social scientists following Dahl's article and its refinement as a result of further studies).

92. See, e.g., Adamany & Meinhold, *supra* note 86, at 372–73; JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 6 (2006) ("Beginning with Robert Dahl in the 1950s, political scientists have argued that the Supreme Court throughout its history has tended to follow national opinion rather than challenging it."); Peretti, *supra* note 20, at 132 ("Overall, the research refutes Bickel's characterization of the Court as a countermajoritarian institution."); Law, *supra* note 21, at 730 ("[E]mpirical studies suggest that the Court's actions are at least as consistent with public opinion as those of the *elected* branches."); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 *J. POL.* 652, 662 (1985); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 *AM. POL. SCI. REV.* 711, 714–15, 718, 720 (1994); *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY*, *supra* note 37.

93. THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 192–93 (1989) ("Where clear poll margins exist, three-fifths to two-thirds of Court rulings reflect the polls."); see also *id.* at 7, 78–81, 97–98, 117; MARSHALL, *supra* note 17, at 4–5 (stating the modern Court appears to be as majoritarian as other American policy makers); *id.* at 35, 55–59.

94. See Pildes, *supra* note 3, at 104 ("For several decades, Bickel's and Dahl's warring perspectives remained largely cabined within their own respective disciplines. Legal scholars continued to develop normative constitutional theories . . .").

95. See *id.* at 105 (describing how Dahl's research and Bickel's CM difficulty came in recent years into "more direct conversation and collision").

96. See, e.g., ROSEN, *supra* note 92, at xii; BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 364–65 (2009) ("By the end of the Rehnquist Court, it was a widely

Scholars have suggested several mechanisms that might explain this correlation between the Court's decisions and public opinion. Before examining in detail each of these mechanisms, it is important to emphasize a property they share. All of these mechanisms aim to *dissolve* the difficulty in its literal meaning, to demonstrate that the CM difficulty is a myth or an illusion and that the Court is in fact a majoritarian institution in the sense that its decisions correspond to majority opinion.

## B. Dissolution Mechanisms

### 1. The Appointment Process

Many scholars explain the correlation between the Court's decisions and majority opinion by pointing to the judicial appointment process.<sup>97</sup> This process allows the President and the Senate majority to control the Court's composition.<sup>98</sup> As Dahl first demonstrated empirically, the judicial appointment process ensures that the Court remains attuned to the dominant political coalition.<sup>99</sup> Based on Dahl's theory and subsequent empirical corroboration, several constitutional scholars have claimed that Dahl's "dominant political coalition," which controls the Court's composition, serves as a proxy for the majority's views.<sup>100</sup> In this manner, the sync between public opinion and the Court's decisions is ensured.<sup>101</sup>

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acknowledged fact that the Court was mirroring public opinion."); *id.* at 382 ("What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*."); Peretti, *supra* note 20, at 123, 136, 140 ("[T]he Court's decisions match majority opinion more often than not and about as often as the other branches.").

97. See, e.g., Pildes, *supra* note 3, at 139–40 ("Indeed, most majoritarians rely centrally on this mechanism to explain how the Court purportedly comes to reflect national political majorities."); Peretti, *supra* note 20, at 132 ("Most scholars agree that the appointment process is the dominant path through which public opinion influences Supreme Court decisions and the best explanation for the majoritarian character of most Supreme Court decisions.").

98. Dahl, *supra* note 23, at 285 ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.").

99. *Id.* at 284–85.

100. See, e.g., MARSHALL, *supra* note 17, at 55 (presenting updated empirical data supporting Dahl's thesis); McCann, *supra* note 91, at 69 ("[C]onventional accounts suggest [that] the Court typically follows the policy agenda and preferences of legislative majorities at the national level . . ."). *Contra e.g.*, KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 12, 42–44 (2007) ("Subsequent empirical analyses of Dahl's thesis have generally failed to confirm his findings."); Pildes, *supra* note 3, at 142–43 ("Dahl's work, pathbreaking in 1957, has not stood up over time.").

101. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 612 (1993) ("Although federal judges are not elected, they are appointed by Presidents who stand for popular election. Judicial appointments often mirror the popular will that elected a President.");

For example, Jack Balkin and Sanford Levinson devised the theory of “Partisan Entrenchment.”<sup>102</sup> “[B]y installing enough judges and Justices with roughly similar ideological views over time,” they suggest, “Presidents can push constitutional doctrine in directions they prefer.”<sup>103</sup> The controlling elected coalition determines the appointments, and thus “the Supreme Court tends, in the long run, to cooperate with the dominant political forces of the day.”<sup>104</sup> In this manner, responsiveness to the opinion of the electing public is indirectly created.<sup>105</sup> “Justices resemble Senators who are appointed for 18-year terms by their parties and never have to face election.”<sup>106</sup> Partisan entrenchment is “roughly but imperfectly democratic,” thus dissolving the CM difficulty in its literal sense.<sup>107</sup>

Other scholars, however, claim that this proxy is only a crude one, and can hardly create a perfect calibration between public opinion and the Court.<sup>108</sup> Presidents usually do not appoint Justices who capture mainstream popular thought, and even Justices appointed as “perfect proxy for public opinion” may experience “ideological drift” during their term of service on the bench.<sup>109</sup> Moreover, in view of the large number of issues adjudicated by the Court and the length of time necessary to replace a substantial number of Justices,

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FARBER & SHERRY, *supra* note 53, at 148 (contending that today, electoral responsiveness in Supreme Court appointments follows de-facto from the politicization of the nomination and confirmation processes); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030–31 (2004) (“Because Article III lodges the composition of the federal judiciary in the political control of the President and the Senate, no judicial interpretation of the Constitution can withstand the mobilized, enduring, and determined opposition of the people. Even Justice Antonin Scalia concedes that ‘the appointment and confirmation process will’ ensure the ultimate influence of popular opinion.”).

102. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

103. *Id.* at 490; *see also id.* at 501 (“If the Court as a whole strays too often and too widely from the desires of the dominant forces in national politics . . . the appointment process soon pushes the Court back into line. The calibration is hardly perfect . . . .”); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) (“Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”).

104. Balkin & Levinson, *supra* note 102, at 490; *see also id.* at 495, 501.

105. *Id.* at 501.

106. Balkin & Levinson, *supra* note 103, at 1067.

107. *Id.* at 1076 (“[P]artisan entrenchment . . . is in some sense the opposite of Alexander Bickel’s famous ‘counter-majoritarian difficulty’ . . . .”).

108. *See, e.g.*, Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 12 (2007).

109. *See* FRIEDMAN, *supra* note 96, at 374.

appointment of Justices is not an effective way to ensure the responsiveness of the Court to public opinion.<sup>110</sup>

In light of this criticism, several scholars have pointed out that the confirmation process has changed dramatically over the last forty years. In the past, confirmation hearings were not generally on the public's agenda, and mass public opinion thus had almost no role in the process.<sup>111</sup> In recent decades, the confirmation process has become like an electoral campaign, with public opinion serving as "the implicit gauge of selection and confirmation."<sup>112</sup> Hence, the Court's responsiveness to public opinion is ensured also through public opinion's direct control of the appointment process.<sup>113</sup>

## 2. Strategic Behavior and Attitudinal Change

Rather than invoking a mediating mechanism by which majority opinion influences the Court, several social scientists have suggested a direct link between majority opinion and the Court's decisions.<sup>114</sup> Both the strategic behavior and the attitudinal change explanations, described below, suggest that the Justices internalize majority opinion into their own way of thinking.

The strategic explanation portrays Justices as strategic players, who modify their behavior in light of public opinion and the behavior of other majoritarian political players, in order to protect the Court's enduring public

110. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 193 (1990).

111. RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 10–11 (2005) (arguing that Supreme Court nominations have been highly public processes from the late 1960s, and even more so since the 1980s); *id.* at 29 ("Until the last quarter century or so, the public's role was minimal in Supreme Court confirmations."); BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 174–75 (2006).

112. DAVIS, *supra* note 111, at 16 ("[P]ublic opinion surveys and other less scientific measures . . . become tools for proponents and opponents in justifying appointment or rejection."); see also *id.* at 6–9 ("The similarities between presidential elections and judicial appointments are becoming increasingly apparent."); *id.* at 29–31, 61–64, 75–76, 102–03; JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 1 (2009) ("Today, one of the crucial elements in confirmations strategies concerns how public opinion will be managed and manipulated. . . . [A]t least since the days of the Bork defeat and Thomas victory, the preferences of the mass public have been influential in determining who goes on the Supreme Court.").

113. See, e.g., Law, *supra* note 21, at 728 ("[I]t is impossible to deny that the composition of the Supreme Court . . . is the product of pitched struggle among political actors who pay very close attention to the substantive views of judicial nominees.").

114. See, e.g., William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96–98 (1993); 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, 300, 303 (2008).

support (sociological legitimacy) and policy effectiveness.<sup>115</sup> According to this theory, Justices worry that a decline in the Court's enduring public support would lead to poor implementation of the Court's decisions, backlash, and other negative consequences. To avoid such a decline, the Justices remain, to some degree, responsive to public opinion.<sup>116</sup>

The attitudinal model suggests that the Justices make result-oriented decisions, based primarily on their ideologies. The Justices' ideologies, in turn, are shaped by factors similar to those shaping the ideological preferences of the public and its representatives. To the extent that the Justices share the public's ideological preferences, they will vindicate public opinion without even intending to do so. Political socialization ensures that the Court's adjudication does not stray too far from the views of the general public and its representatives, and a shift in public opinion is usually reflected by a parallel shift in Justices' ideology.<sup>117</sup> After surveying recent studies that examine public influence on the Court, Lee Epstein and Andrew Martin have concluded that both the strategic behavior model and attitudinal change model are "equally plausible."<sup>118</sup>

### 3. Backlash Theories

According to Barry Friedman, as history demonstrates, the correlation between public opinion and the Court's decisions is driven, to a large extent, by public backlash.<sup>119</sup> Public backlash, as Cass Sunstein elaborates, is the "[i]ntense and sustained public disapproval of a judicial ruling, accompanied

115. See, e.g., Giles, Blackstone & Vining, *supra* note 114, at 294–95; LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 11–12 (1998).

116. See, e.g., Lawrence Baum & Neil Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *GEO. L.J.* 1515, 1546–47 (2010) (describing the mechanism of "legitimacy as a source of responsiveness to public opinion"); see also *id.* at 1563–65, 1580; Neal Devins, *The Majoritarian Rehnquist Court?*, 67 *LAW & CONTEMP. PROBS.* 63, 75 (2004) ("Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance.").

117. See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *NW. U. L. REV.* 251, 265–67, 278–79 (1997); Giles, Blackstone & Vining, *supra* note 114, at 295; Baum & Devins, *supra* note 116, at 1520–22 ("[T]he Justices have made clear that they are not immune from the social and political forces that surround them."); *id.* at 1557, 1560–63.

118. Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 *U. PA. J. CONST. L.* 263, 280–81 (2010) (arguing that it is equally plausible that "the public has a direct influence on the Court because the Justices are concerned about their legitimacy in the short and long-terms . . . [or that] the same things that influence public opinion may influence the Justices, who are, after all, members of the public too").

119. FRIEDMAN, *supra* note 96, at 362 ("One of the greatest engines of constitutional change has been mobilization against Supreme Court decisions by those unhappy with the results.").

by aggressive steps to resist that ruling and to remove its legal force.”<sup>120</sup> If a backlash movement “muster[s] strong support, then, and only then,” Friedman explains, “the Court tends to fall into line with the dissenting opinion.”<sup>121</sup> Thus, social mobilization is another mechanism that ensures that the Court is ultimately responsive to public’s views.<sup>122</sup>

The alignment between the Rehnquist Court’s decisions and public opinion posed a challenge for both the appointment mechanism and the backlash mechanism.<sup>123</sup> The eleven-year period from 1994 and 2005 was the longest the Court had gone without a change in membership since the Court’s size was fixed at nine Justices in 1869.<sup>124</sup> In addition, no serious public backlash occurred in those years, and the other two branches’ “weapons to control the justices look to have been ruled off the table or lost their force.”<sup>125</sup> Yet, the Court in this period was more in line with public opinion than ever before.<sup>126</sup>

In light of this conundrum, Barry Friedman has recently presented a theory of “quiet equilibrium,” or “marriage” between the Court and public opinion.<sup>127</sup> According to Friedman, the Court has always been attentive to public opinion, but only recently, after more than two hundred years, have the public and the Court understood how to interact with each other effectively.<sup>128</sup> Today, “[t]he justices don’t actually have to get into trouble before retribution occurs; they can sense trouble and avoid it.”<sup>129</sup>

The “quiet equilibrium” mechanism, by which Friedman explains the current sync between the Court and public opinion,<sup>130</sup> is a variation on the

120. CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* 125 (2009).

121. FRIEDMAN, *supra* note 96, at 383.

122. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 8, 96–97 (2011).

123. FRIEDMAN, *supra* note 96, at 354 (“From the first Rehnquist Court right down to the third, most, if not all, of the major decisions could be seen as keeping within the mainstream of popular opinion.”).

124. Pildes, *supra* note 3, at 141 (“[T]hree of the five longest periods between vacancies since the Court went to nine members have occurred in the last thirty years.”).

125. FRIEDMAN, *supra* note 96, at 376; *see also* Pildes, *supra* note 3, at 139 (“The political branches today are less likely effectively to resist the Court.”).

126. FRIEDMAN, *supra* note 96, at 358–59, 371, 376 (“Perhaps more than ever before, Supreme Court decisions run in the mainstream of public opinion.”).

127. *Id.* at 376.

128. *Id.*

129. *Id.*; *see also* Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1245 (2010) (“[I]f the system is in equilibrium, little will be observed in the way of overt struggle.”).

130. FRIEDMAN, *supra* note 96, at 376.

backlash mechanism. It emphasizes the *fear* from an anticipated public reaction rather than its actual occurrence.<sup>131</sup>

#### 4. Public Opinion as a Legitimate Legal Argument

According to Richard Primus's description, in certain areas of law, strong public opinion is incorporated into legal discourse as a legitimate source of constitutional interpretation, even without going through the formal democratic process and even without a threat of public backlash.<sup>132</sup> In these areas the only relevant question is whether public opinion is "strong" enough.<sup>133</sup> Thus, in Primus's picture of constitutional law, the line separating between public opinion and the legal language disappears completely: Public opinion is incorporated into legal language.<sup>134</sup> A strong argument in terms of public opinion will be considered as persuasive in terms of constitutional law.<sup>135</sup>

Similarly, David Strauss points out the Court's attempt, "over the last generation or so," to "anticipate[] . . . developments in popular opinion" and to adjudicate accordingly.<sup>136</sup> He labels this trend "modernization."<sup>137</sup> "[I]nstead of facing down popular majorities," as would be expected from a court adjudicating literally in a CM fashion, in certain areas the Court "yields when it finds out that it has misgauged public opinion."<sup>138</sup> Strauss demonstrates that several of the Court's recent judgments were consciously tailored to coincide with trends in popular opinion.<sup>139</sup> Utilizing provisions in the Constitution which allow a great deal of interpretative latitude, the Court is able to invalidate a "statute if it no longer reflects popular opinion or if the trends in popular opinion are running against it."<sup>140</sup> It is also able to change course, upholding statutes "that the court previously struck down—if it becomes apparent that popular sentiment has moved in a different direction from what the court anticipated."<sup>141</sup>

131. *See id.*

132. Primus, *supra* note 108, at 6, 8–9, 18–19.

133. *Id.* at 20 ("[I]n cases where strong public opinion bore on the question, judges would err if they arrived at their conclusions without reference to that opinion.").

134. *Id.* at 11, 19–20.

135. *Id.* at 8, 14.

136. Strauss, *supra* note 61, at 859–60 ("[O]ver the last generation or so, a very different form of judicial review has quietly emerged—an approach that, more or less consciously, looks to the future, not the past; that tries to bring laws up to date, rather than deferring to tradition; and that anticipates and accommodates, rather than limits, developments in popular opinion.").

137. *Id.* at 860.

138. *Id.* at 859–60 ("This approach, which might be called modernization, has not been fully avowed by the Supreme Court, and it does not characterize every area of constitutional law. But it is the dominant approach in many important areas . . .").

139. *See, e.g., id.* at 864–87.

140. *Id.* at 861.

141. *Id.*

One important implication of “keeping the content of constitutional law aligned with the public’s strongly held views” is the dissolution of the CM difficulty in its literal sense.<sup>142</sup> In Strauss’s view, the rise of the “modernization” as “a central theme in constitutional law” serves perhaps as a “response to the relentless criticism of judicial review as antidemocratic.”<sup>143</sup> This mechanism ensures that “judicial review has, in principle, a more comfortable place in democratic government.”<sup>144</sup>

### C. *What is Left of the CM Difficulty?*

Several dissolution theorists have suggested that since the CM difficulty is dissolved, constitutional scholars should cease to invest their time in confronting it.<sup>145</sup> In their view, there is no difficulty with judicial review as long as it is responsive—over the long run—to public opinion.<sup>146</sup> But even if one accepts that the mechanisms described above make the Court by and large *responsive* to public opinion, the second traditional CM difficulty remains undissolved. The Court may be *responsive* to the public and the elected branches, but as long as it is not *accountable* to them, the CM difficulty in its traditional sense is not dissolved.<sup>147</sup> The Justices are not elected, and thus are not *responsible* to the electorate in the way legislators are.

Rule by the electorate is something different from rule in accordance with the electorate’s views. When people go and vote they intend to influence the elections and through it the elected institutions, but in expressing their attitudes in public polls, especially regarding the Court, they have no such intention. Thus, even if opinion polls guarantee that the public’s views are tracked

142. Primus, *supra* note 108, at 10.

143. Strauss, *supra* note 61, at 860–61.

144. *Id.* at 861.

145. See Friedman, *supra* note 129, at 1234 (“[T]he one suggestion . . . with which I vigorously disagree is Professor Primus’s notion that the counter-majoritarian difficulty should nonetheless be retained as a heuristic . . . [O]n this one point I believe he is misguided.”); Pildes, *supra* note 3, at 105 (arguing that some constitutional theorists “sought to dissolve Bickel’s question or suggest that it is naive and passé”); Peretti, *supra* note 20, at 137 (arguing that the CM difficulty is “a straw-man argument if there ever was one”).

146. BALKIN, *supra* note 122, at 71 (“What gives the system of judicial review its legitimacy, in other words, is its responsiveness—over the long run—to society’s competing views about what the Constitution means.”).

147. Cf. BICKEL, *supra* note 1, at 19 (“[O]ne may infer that judicial review, although not responsible, may have ways of being responsive.”); PERRY, *supra* note 31, at 31 (“What is crucial about majoritarian policymaking, unlike constitutional policymaking by the Supreme Court, is that policy decisions are made by those *accountable*, even if not always *responsive*, to electoral majorities. . . . What is crucial is electoral accountability, not degree of responsiveness to majority sentiments.”).

accurately, that is different from the *people* being in control.<sup>148</sup> To dissolve the difficulty in its traditional sense, which focuses on accountability rather than on majoritarianism, one would need to demonstrate that the Court is responsible to the electorate, and thus that the people themselves are in control.<sup>149</sup>

The Court can be considered to be indirectly accountable to the public through the appointment process, since it is administrated by elected representatives.<sup>150</sup> Other mechanisms, such as impeaching Justices or slashing the Court's budget, can also be understood to create indirect accountability.<sup>151</sup> Moreover, some view responsiveness as "a measure of how much accountability an institutional structure permits."<sup>152</sup> According to this view, the scholarly effort that exposes the Court's responsiveness to elected representatives and to the general public shows that the Justices are subject to their control.<sup>153</sup> Indeed, the dissolution theorists have tried to show that Justices, much like elected representatives, adhere to public opinion, thus exposing mechanisms of accountability without elections.<sup>154</sup> Similarly, dissolution theorists conceptualize congressional opposition and presidential pressures<sup>155</sup> as mechanisms that ensure that the Court will be somewhat accountable to elected representatives.<sup>156</sup> These manifestations of discontent by politicians may also serve as signals for the Court on its waning public confidence, and thus can ensure indirectly accountability to the public.<sup>157</sup> As

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148. DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 76 (2008).

149. *See id.* at 76–77.

150. *See* Yingling, *supra* note 10, at 106–07; EISGRUBER, *supra* note 60, at 4 (“Though the justices are not chosen by direct election, they are nevertheless selected through a process that is both political and democratic. . . . The justices have . . . a democratic pedigree . . .”).

151. *See* CHOPER, *supra* note 34, at 47–55 (discussing the political accountability of the Supreme Court).

152. John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 34, at 131, 131.

153. *See id.* at 133–34.

154. *See, e.g.*, Baum & Devins, *supra* note 116, at 1562–63 (“If the Justices respond frequently to what they perceive as direct pressure from the general public, then they are fundamentally similar to elected officials in their accountability to public opinion.”); Waldron, *supra* note 35, at 43 (“Judicial review, it may be said, is a form of democratic representation, albeit a rather indirect form.”).

155. *See, e.g.*, Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 *REV. POL.* 369, 373 (1992) (noting that in times of intense congressional “hostility,” the Court retreated).

156. Seidman, *supra* note 33, at 1572 (surveying different mechanisms that make the Court accountable).

157. *See* TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 18–20, 257–67 (2011).

opposed to Bickel's formal accountability through elections, these scholars point to accountability through politics.<sup>158</sup>

However, the traditional version of the difficulty captures an additional important aspect of self-government. The ability to remove representatives whose performance is deemed unsatisfactory is a crucial aspect of direct control over representatives.<sup>159</sup> In the absence of an agreed upon justification for judicial review, in the absence of an agreed-upon "moral compass" for society to follow, one way to ensure that the Court will not stray from the "right" course is to subject those who decide to the control of the people.<sup>160</sup> This aspect has special importance in societies where the public is less politically active. In such societies, the public will be less engaged in daily monitoring of its representatives and in forming opinions on political issues. Public support levels are less relevant and more weight is given to delegation of political power from the citizenry to its elected representatives and hence to the ability to replace these representatives.<sup>161</sup> This aspect of accountability received special emphasis with regards to experts in the field of economics after the 2008 financial collapse.<sup>162</sup>

The ability to remove representatives is a built-in feature of the system that has both an instrumental value, in that it promotes responsiveness, and an intrinsic value, in that it allows the public to determine its representatives at regular intervals.<sup>163</sup> Hence, rather than misconceiving accountability as merely means to achieve responsiveness to the majority will, we should understand it also as a structural feature, a check against abuses of power.<sup>164</sup> But the

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158. See Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. LAW SOC. SCI. 361, 362–63 (2008).

159. See Hanna Fenichel Pitkin, *Introduction to REPRESENTATION 9* (Hanna Fenichel Pitkin ed., 1969) (describing the scholarly view that "[w]hat defines representation is not an act of authorization that initiates it, but an act of holding-to-account that terminates it."); HENRY J. FORD, *REPRESENTATIVE GOVERNMENT* 158 (1924) (arguing that "to establish a representative system all the following conditions are essential: 1. That the people shall be free to choose whom they will to represent them . . . 4. That elections shall be confined to the choice of representatives.").

160. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 284–85 (3d ed. 1950) ("Democracy means only that the people have the opportunity of accepting or refusing the men who are to rule them."); see also Somin, *supra* note 21, at 1298; Manin, Przeworski & Stokes, *supra* note 34, at 13 ("Under democracy, people invest governments with the power to rule because they can remove them.").

161. See MATTHEW R. CLEARY & SUSAN C. STOKES, *DEMOCRACY AND THE CULTURE OF SKEPTICISM: POLITICAL TRUST IN ARGENTINA AND MEXICO* 3 (2006).

162. See, e.g., IAN SHAPIRO, *THE REAL WORLD OF DEMOCRATIC THEORY* 18–19 (2011) (discussing the pressure to subject the architects of the economic system to "new regimes of accountability" in view of the dire results of the economic crisis).

163. See Waldron, *supra* note 35, at 37–38.

164. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535 (1998).

Justices are answerable to no outside source.<sup>165</sup> As opposed to most influential appointed officials, Justices are hardly subject to removal by the political branches.<sup>166</sup> The lack of this “majority control” over Supreme Court Justices will remain as long as the public cannot have some measure of control at regular intervals over the identity of the judicial decision-makers.<sup>167</sup> The process designed to create such control is popular elections.<sup>168</sup> Notwithstanding the imperfections of elections as a mechanism of democratic accountability,<sup>169</sup> in their absence, even a fully responsive Court does not dissolve the CM difficulty in its traditional sense.<sup>170</sup> Thus, in some sense, the traditional CM difficulty is insoluble unless the public elects its Justices or has another mechanism to truly hold them accountable.<sup>171</sup>

Hence, while scholars have concluded that “[c]ompared with the electoral control over legislatures, judges may not seem so relatively unaccountable,”<sup>172</sup> and that Congress “is the new ‘deviant institution in American democracy,’”<sup>173</sup>

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165. See 2 THE COMPLETE ANTI-FEDERALIST 438 (Herbert J. Storing ed., 1981) (“There is no power above them to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven.”); see also *id.* at 442; Shlomo Slonim, *Federalist No. 78 and Brutus’ Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 15–17, 30–31 (2006) (explaining Brutus’ objection to judicial supremacy).

166. CHOPER, *supra* note 34, at 56 (presenting the “sharp contrast” between the Justices and “highly placed and greatly influential” appointed officials in terms of accountability).

167. See WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* 38 (2005).

168. See Friedman, *supra* note 101, at 588–89.

169. See, e.g., *id.* at 582–88, 609–10 (claiming that elections “do not appear to guarantee accountability,” and concluding that Justices are unaccountable “only in the most formalistic and unanalytic of senses”); Manin, Przeworski & Stokes, *supra* note 34, at 50 (arguing that elections are not a sufficient mechanism to ensure citizens’ control over politicians).

170. CHOPER, *supra* note 34, at 58 (“That a majority of the people may ultimately prevail vis-à-vis the Court by outright resistance or through methods of dubious legitimacy under a rule of law, even if a reality, is not the same as their ordained ability to change the composition of the political branches at regularly scheduled periodic elections.”).

171. Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1214, 1231 (1984) (arguing that no theory can reconcile judicial review with democratic theory since judicial review is CM by definition).

172. Friedman, *supra* note 101, at 611; see also CHOPER, *supra* note 34, at 16–25 (presenting the claim that the national lawmaking process is “anything but a system that simply articulates some readily identifiable popular will”).

173. Graber, *supra* note 158, at 362 (using Bickel’s famous dictum regarding the Court in summarizing Mann & Ornstein’s work *The Broken Branch: How Congress is Failing America and How to Get It Back on Track*).

at the end of the day, a core right to self-government is inevitably lost when an unelected Court exercises the authority of judicial review.<sup>174</sup>

#### IV. BICKEL AND THE TWO CM DIFFICULTIES

As explained above, Bickel did not distinguish between the two difficulties. However, he was not focused solely on devising a normative justification for the Court's judicial review authority, as were many legal scholars.<sup>175</sup> Instead, Bickel was also occupied with the threat to the Court's public support.<sup>176</sup> He did not attempt to show that the Court is a majoritarian institution in the sense that it follows public opinion. But he was occupied with the question of what will happen to the Court if it decides against public opinion.<sup>177</sup>

According to Bickel, the Court is a unique institution in that "insofar as is humanly possible," it "is concerned only with principle" and not with "electoral responsibility."<sup>178</sup> He portrayed the Justices as having "the leisure, the training, and the insulation to follow the ways of the scholar," offering a "sober second thought" in their task to pronounce and guard "the enduring values of a society" as opposed to the shifting and short-term public sentiments to which the legislature is responsive.<sup>179</sup> Thus, the Court is not a mere register of public opinion; it serves as a leader of public opinion, a teacher in a national seminar, where "conversations between the Court and the people and their representatives" take place.<sup>180</sup> This vital and otherwise unfulfilled function of

174. See Waldron, *supra* note 31, at 1394 ("[T]he issue is comparative, and these credentials are not remotely competitive with the democratic credentials of elected legislators.").

175. See Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1573 (1985).

176. BICKEL, *supra* note 1, at 68 (explaining that the Court needs to consider both principle and expediency); see also ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 90–91 (1970) (stressing the need for "widespread assent" for implementing the Court's judgments); Christopher J. Peters & Neal Devins, *Alexander Bickel and the New Judicial Minimalism*, in THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY, *supra* note 20, at 45, 51 (noting that Bickel recognized that "[t]he Court could not then simply impose its judgments upon an unwilling populace; those judgments had instead to earn acceptance, if not immediately then over time"); KAHN, *supra* note 62, at 143 ("Instead of seeking to take the Court out of politics, [Bickel] hoped to solve the countermajoritarian difficulty by frankly recognizing the majoritarian basis of the Court's work.").

177. See Kronman, *supra* note 175, at 1585–86.

178. BICKEL, *supra* note 1, at 25–26, 68–69; see also PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 146 & n.4 (2005) (discussing the notion of the Court as the forum of reason).

179. BICKEL, *supra* note 1, at 27–24; see also KAHN, *supra* note 62, at 144 (discussing Bickel's theory); Friedman, *supra* note 101, at 579.

180. BICKEL, *supra* note 176, at 91; BICKEL, *supra* note 1, at 26 ("The Justices, in Dean Rostow's phrase, 'are inevitably teachers in a vital national seminar.'" (citation omitted)); *id.* at 239.

offering a sober and principled second thought is Bickel's justification for CM judicial review.<sup>181</sup>

In addition to this attempt to justify the Court's CM authority, Bickel also focused on confronting dangers that stem from the CM difficulty in its literal sense. As both Bickel and Paul Mishkin recognized, legal discourse follows the logic of professional reason, whereas popular discourse follows the logic of symbolism.<sup>182</sup> For example, the logic of legal discourse requires consistency with existing precedents. This requirement seems much less important to the public.<sup>183</sup> In other words, principled arguments that are persuasive in legal terms are not necessarily persuasive in the public discourse. Since the intrinsic merit of a legal position is hardly a guarantee of public support, the Court at times confronts the dilemma of whether to decide salient cases against the directives of legal doctrine in order to avoid unpopular decisions (decisions that are CM in the literal sense).

The Court's decision in *Texas v. Johnson*<sup>184</sup> exemplifies that fidelity to legal doctrine and legal principles alone may not always secure public support. The Court held that burning the American flag was an act of political dissent and hence a protected expression under the First Amendment.<sup>185</sup> Subsequently, the State of Texas could not criminalize such act.<sup>186</sup> As Akhil Amar writes, the Court's decision "was plainly right, and even easy—indeed, as right and easy a case in modern constitutional law as any I know."<sup>187</sup>

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181. See Stanley C. Brubaker, *The Counter-majoritarian Difficulty: Tradition Versus Original Meaning*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY*, *supra* note 20, at 105, 106; Peretti, *supra* note 20, at 124 (arguing that Bickel's special justification for "this deviant institution" is "its unique capacity for reasoned elaboration of principle").

182. 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) ("[T]his symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions."); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1484–85, 1497, 1506 (2007).

183. See James L. Gibson, *Public Images and Understandings of Courts*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 828, 849 (Peter Cane & Herbert M. Kritzer eds., 2010) ("Perhaps the most surprising finding in these data is the relatively small weight that Americans give to respecting existing Supreme Court decisions (only 37.3% rate it as very important).").

184. 491 U.S. 397 (1989).

185. *Id.* at 399, 420.

186. *Id.* at 418–20.

187. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992); see also Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 547 (1991) ("*Johnson* is an easy case if well-established first amendment principles are applied to it."); Norman Dorsen, *Flag Desecration in Courts, Congress, and Country*, 17 T.M. COOLEY L. REV. 417, 439 (2000) ("It may be true, as scholars

However, from the perspective of public support, the holding that flag burning was a constitutionally protected act had obvious potential to stir a harsh public response.<sup>188</sup>

The decision received wide media coverage<sup>189</sup> and “was met with virtual hysteria—by the people, in the press, and in the Congress.”<sup>190</sup> A large majority of the public, 73%, disagreed with the decision.<sup>191</sup> One commentator argued, “no Supreme Court decision in recent memory, if ever, was so quickly, bitterly, and overwhelmingly denounced by the American public and political establishment.”<sup>192</sup> Following the *Johnson* decision and the *Webster* decision on abortion,<sup>193</sup> there was a “dramatic drop” in public confidence in the Court.<sup>194</sup>

In reaction to the *Johnson* decision, Congress passed the Flag Protection Act.<sup>195</sup> In June 1990, the Court in *U.S. v. Eichman* followed its reasoning in *Johnson* and invalidated the Act as an unconstitutional restraint on free

have written, that *Texas v. Johnson* is an ‘easy case’ and ‘obvious.’” (footnote omitted)). *Contra* Paul F. Campos, *Advocacy and Scholarship*, 81 CALIF. L. REV. 817, 820–25 (1993) (criticizing the Court’s reasoning and Amar’s claim that the case was an easy one).

188. *See* Peter Hanson, *Flag Burning*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 37, at 184, 185.

189. Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 638–39 (1998) (examining the wide coverage of the decision by the major television networks and the New York Times); *see also* Hanson, *supra* note 188, at 185 (“[P]olls taken immediately after the decision show high levels of awareness to the case and overwhelming public opposition to the Court’s decision.”); *id.* at 198–99 (examining media coverage).

190. Dorsen, *supra* note 187, at 424 (“[W]hat may be true as a matter of constitutional principle is often not accepted by the public.”); *see also* Hanson, *supra* note 188, at 198 (“Immediately after *Texas v. Johnson*, flag burning was thought to be the most important of four major policy issues in a Gallup survey.”).

191. Grosskopf & Mondak, *supra* note 189, at 642–43, 651–52; *see also* Hanson, *supra* note 188, at 185–86 (“[P]olls taken immediately after the decision show high levels of awareness of the case and overwhelming public opposition to the Court’s decision.”).

192. ROBERT JUSTIN GOLDSTEIN, *BURNING THE FLAG: THE GREAT 1989–1990 AMERICAN FLAG DESECRATION CONTROVERSY* 113 (1996).

193. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 499 (1989) (upholding constitutionality of a statute banning the use of public facilities and public employees for the performance of abortions not necessary to save the life of the mother).

194. Grosskopf & Mondak, *supra* note 189, at 641–42 (“Circumstantially, the data suggest that *Webster* and *Texas v. Johnson* profoundly affected public confidence in the Supreme Court. . . . Functionally, confidence in the Supreme Court reached rock bottom in July and August of 1989.”). *Texas v. Johnson*, 491 U.S. 397 (1989), was announced on June 21, 1989, and *Webster v. Reproductive Health*, 492 U.S. 490 (1989), followed on July 3.

195. The Flag Protection Act of 1989, 18 U.S.C. § 700 (2006), *invalidated by* *United States v. Eichman*, 496 U.S. 310 (1990).

speech.<sup>196</sup> Once again, polls showed that the vast majority of the American public rejected the decision.<sup>197</sup> The decision in *Eichman* vividly demonstrates the Bickelian dilemma. The Court had to choose between adhering strictly to the standards of professional legal reasoning, even at the price of going against public opinion, or instead corrupting its principled, professional language in order to resolve the case in a manner suitable for public digestion.<sup>198</sup> Bickel realized that in face of serious popular resistance, the Court may choose the latter option. Saving its public support, the Court would lose its ability to serve as the forum of principle and thus its justification for judicial review.<sup>199</sup> Hence, he suggested that the Court use prudential justiciability doctrines to dismiss certain cases, thus avoiding the corruption of the legal language.<sup>200</sup> These “passive virtues” allow the Court to avoid cases in which preserving the standards of legal expertise would harm its public support.<sup>201</sup>

Thus, Bickel was the first to structure a court-centric theory of judicial review—i.e., one featuring “a highly strategic Supreme Court” that is interested in preserving the quality and efficacy of its decisions as well as its public support.<sup>202</sup> But he did not portray the Court as an institution controlled—in deciding substantive issues—by considerations such as preserving its public support as an institution.<sup>203</sup> On the contrary, the passive-virtues technique aims precisely to save the Court from such a grim destiny. Thus, when the Court decides a volatile case on its merits, rather than use the passive virtues, Bickel insisted that it must make a fully principled decision.<sup>204</sup>

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196. 496 U.S. at 317–18.

197. Hanson, *supra* note 188, at 185–86.

198. See Post & Siegel, *supra* note 182, at 1487–88, 1496–97 (explaining that Mishkin found this tension “unresolvable”).

199. See BICKEL, *supra* note 1, at 258.

200. *Id.* at 69–71.

201. *Id.* at 58, 69–71 (explaining that passive virtues are “the secret” of the Court’s ability “to maintain itself in the tension between principle and expediency”); see *id.* at 95–96, 205. *Contra* KAHN, *supra* note 62, at 146 (“[Bickel] converts the Court into a political institution that cannot claim a privileged place for law.”).

202. Sanford Levinson, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 107 (2010) (“[Bickel’s passive] virtues featured a highly strategic Supreme Court. Knowing where it actually wanted to come out on some of the great issues of the day, it self-consciously chose to take, or more to the point, reject certain cases because they didn’t present the best vehicle for winning popular support because the timing just wasn’t right.”); Peters & Devins, *supra* note 176, at 50, 58 (noting that the Court’s strategy was “an approach motivated by juricentrism—by a desire to preserve the Court’s position as a coequal institution with inherent importance in the constitutional scheme”).

203. See Peters & Devins, *supra* note 176, at 45–46.

204. BICKEL, *supra* note 1, at 69 (“When it strikes down legislative policy, the Court must act rigorously on principle, else it undermines the justification for its power.”); *id.* at 199–200; see also Mark Tushnet, *The Jurisprudence of Constitutional Regimes: Alexander Bickel and Cass Sunstein*, in THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE

The Court's role and its *raison d'être* is after all, in his view, to decide cases in a principled manner.<sup>205</sup>

However, only on rare occasions should the Court act contrary to public opinion and endorse controversial principles, acting then as both a “shaper and prophet of the opinion that will prevail and endure.”<sup>206</sup> In order not to lose its public support, the Court must pick these occasions carefully. There is a limit to the number of principles pronounced by the Justices contrary to public opinion that the public is willing to tolerate and that the political institutions are willing to execute. In Gerald Gunther's words, Bickel insisted that the Court be one hundred percent principled twenty percent of the time.<sup>207</sup> A Court that does not adhere to this limit will soon discover that its decisions are not executed and its institutional survival is endangered. In view of this danger, the Court “labors under the obligation to succeed,” and to do so, “in a rather immediate foreseeable future.”<sup>208</sup>

At the end of the day, with neither sword nor purse, the Court, according to Bickel, has only public confidence that is based both on its “mystic prestige” and on society's “readiness to receive principle from the Court.”<sup>209</sup> Thus, Bickel's story ends on a sad note. In a later work, he wrote that he had “come to doubt in many instances the Court's capacity to develop ‘durable principles,’ and to doubt, therefore, that judicial supremacy can work and is tolerable in broad areas of social policy.”<sup>210</sup>

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COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY, *supra* note 20, at 23, 26; Peters & Devins, *supra* note 176, at 58–59, 61.

205. BICKEL, *supra* note 1, at 188.

206. *Id.* at 239.

207. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

208. BICKEL, *supra* note 1, at 239. (“The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own . . . .”); see BICKEL, *supra* note 176, at 94–95; Introduction, *Arthur Garfield Hays Conference: The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 476 (1964) (“[A] court that decided the equivalent of five cases such as *Brown v. Board of Educ.* in a single year would have seen the end of the institution, I am sure.” (footnote omitted)); Golove, *supra* note 79, at 83.

209. BICKEL, *supra* note 1, at 204, 252; see also BICKEL, *supra* note 176, at 94 (“The Court's effectiveness, it is often remarked, depends substantially on confidence, on what is called prestige.”).

210. BICKEL, *supra* note 176, at 99. For a description of the change in Bickel's view, see J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 780–83 (1971); Robert F. Nagel, *Principle, Prudence, and Judicial Power*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY*, *supra* note 20, at 9, 14. *Contra* Kronman, *supra* note 175, at 1568 (“Bickel did in fact have a political philosophy that remained unchanged throughout his career, a consistent outlook that connects all of his most important ideas on the role of the Supreme Court . . . .”).

## V. VISIBLE CASES

The CM difficulty in its literal sense is restricted to high-salience issues. No viable public opinion is likely to emerge on low-salience issues. Thus, the Court cannot decide cases in a literally CM manner on issues that are obscure to the public.<sup>211</sup> Only in relatively few cases that deal with salient issues and receive media coverage can the literal CM difficulty emerge.<sup>212</sup>

The media has a prominent role in determining which cases will become CM in the literal sense. First, since, as Chief Justice Earl Warren noted, “the public cannot be expected to read the opinions themselves [and] must depend on newspapers, periodicals, radio, and television for its information,” a case cannot become visible to the public without media coverage.<sup>213</sup> Second, media coverage does not only reflect the Court’s decisions; it reconstructs the Court’s decisions according to the media’s criteria.<sup>214</sup> Thus, a case can become CM in the literal sense if it is covered in a manner that creates a stir in public opinion even if from an internal legal perspective the case is not controversial (an “easy case”). Similarly, public support for the Court as an institution is also dependent to a large extent on the manner in which the media covers the Court.<sup>215</sup> The Court’s “symbolic image” as it is constructed by the media rather than only the content of its decisions may prove crucial for the emergence of the CM difficulty in the literal sense.<sup>216</sup>

For most of the theorists who offer justifications for the Court’s CM authority (hereinafter “justification theorists”), the question of whether a case

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211. See MARSHALL, *supra* note 17, at 124 (arguing that media exposure sets limits on how much the Court’s decision can influence public opinion).

212. See, e.g., Friedman, *supra* note 6, at 2620–23 (“Only a small number of the cases attract the sort of media attention that cause them to stick in the public consciousness.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (plurality opinion) (“Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.”).

213. RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* 16 (1994) (quoting statements made by Chief Justice Warren).

214. See PAUL THALER, *THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL* xxii–xxiii, 3–4, 6, 71 (1994).

215. See Kelli L. Sager & Karan N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public’s First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1540 (1996) (quoting Justice Frankfurter who claimed that “the public confidence in the judiciary hinges on the public’s perception of it, and that perception necessarily hinges on the media’s portrayal of the legal system”).

216. See, e.g., CHOPER, *supra* note 34, at 139 (“The fortress of judicial review stands or falls with public opinion and the Court’s symbolic image is not forever indestructible.”); James L. Gibson, *Judicial Institutions*, in *THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS* 514, 526–27 (R.A.W. Rhodes et al. eds., 2006) (suggesting that exposure to courts is typically associated with exposure to legitimizing symbols of courts thereby contributing to their legitimacy).

is visible to the public or not is immaterial.<sup>217</sup> First, the question of public support is not at the center of their theories. Their theories are mostly focused on the normative justifications of the Court's decisions and these justifications, according to most of these theories, are unrelated to public opinion. Second, justification theorists either view the question of public support as irrelevant or assume that public support will be achieved as a direct byproduct of the Court's adherence to their normative theory. Exhibiting its expertise in the realm of rights or constitutional history will award the Court with public support, or so it is assumed.

Frederick Schauer's claim that the scholarly tendency to focus on visible cases "distorted the debates about judicial review and judicial supremacy,"<sup>218</sup> is perhaps correct as long as the discussion is restricted to the CM difficulty in the traditional sense. Yet, for the discussion of the CM difficulty in its literal sense, only these exceptional cases are relevant. These cases are "hard cases" for the Court according to the CM difficulty in its literal sense. Non-salient cases are "easy cases" according to this logic since the Court can "go its own way" in deciding these cases, adhering strictly to its chosen justification theory.<sup>219</sup>

#### VI. JUDGMENT VS. PUBLIC CONFIDENCE

In the Federalist No. 78, Alexander Hamilton famously proclaimed that "[t]he judiciary on the contrary has no influence over either the sword or the purse . . . . It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."<sup>220</sup> According to Hamilton, the government's support, essential for the efficacy of the Court's rulings, is acquired because the executive branch acknowledges the value of the Court's *judgment*.<sup>221</sup> Thus, Hamilton based the Court's power "merely" on its judicial expertise.

217. However, some justification theorists did devise mechanisms to confront issues of public support, and thus were not oblivious to questions of visibility. For example, as elaborated above, Bickel devised his "passive virtues" to prevent the ill effect of certain kind of visible cases. See *supra* Part IV.

218. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda - and the Nation's*, 120 HARV. L. REV. 4, 11–12 (2006).

219. Cf. FRIEDMAN, *supra* note 96, at 377 ("The Court also has a better chance of going its own way in cases that are of low public salience."); WHITTINGTON, *supra* note 100, at 121–22 ("Elected officials may tolerate and even favor judicial authority when the courts operate in issue areas of relatively low political salience."). *Contra* Giles, Blackstone & Vining, *supra* note 114, at 302, 304 (detailing empirical data showing that public opinion effects the justices more in non-salient cases than in salient cases).

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

221. *Id.*

Almost two hundred years later, Justice Felix Frankfurter wrote in his dissenting opinion in *Baker v. Carr*, “[t]he Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”<sup>222</sup> Other Justices have repeated this idea in various formulations.<sup>223</sup> Though at first glance Justice Frankfurter’s argument seems like a paraphrase of Hamilton’s dictum in the Federalist No. 78, it is different in an important way. Justice Frankfurter wrote that the Court’s power relies on “public confidence” in the Court’s “moral sanction,”<sup>224</sup> rather than “merely” on its “judgment.”<sup>225</sup> The Court’s power lies then not “merely” in its expertise but in its ability to recruit public support.

In fact, Justice Frankfurter’s argument is more reminiscent of an argument made two years before the *Baker* decision by Charles Black. In his book *The People and The Court*, Black explained that judicial review would have been impossible “if public opinion had rejected it . . . because such an institution, founded in the end only on moral authority, could never have had the strength to prevail in the face of resolute public repudiation of its legitimacy.”<sup>226</sup>

Hamilton’s view represents well the negative view of popular opinion held by many of the founders.<sup>227</sup> Based on this view, Justices were given life tenure

222. 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). Justice Frankfurter emphasized the need of public support as basis for the Court’s legitimacy while dissenting from a decision which was the point of origin of the “one person, one vote” thesis. *Id.* This decision was part of a wider trend of promoting democracy and popular will as the foundational governing ideal of American Constitutional law. Justice Frankfurter opposed the Court’s involvement in reapportionment because of his fear that it would undermine the Court’s legitimacy. See Erwin Chemerinsky, *How Should We Think About Bush v. Gore?*, 34 LOY. U. CHI. L.J. 1, 4 (2002).

223. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“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 Minn. v. White*, 536 U.S. 765, 817–18 (2002) (Ginsburg J., dissenting) (“Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.”).

224. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

225. THE FEDERALIST NO. 78, *supra* note 220, at 523.

226. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 209 (1960).

227. See, e.g., MARSHALL, *supra* note 17, at 1–2 (“Hamilton’s views also reflected a then-widely-held ‘classical’ view of public opinion. During the 1600s and 1700s most political writers viewed mass public opinion as based largely upon emotion, not reason; as unstable and easily changeable; as coercive of individuality; and, very frequently, as contrary to higher, principled views of law and rights. From this classical perspective, direct expressions of mass public opinion presented a serious threat to political and economic rights.”); DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 86 (2002) (“[M]any (if not most) of the drafters and ratifiers of the Constitution profoundly mistrusted the people, and structured the Constitution to put as little power as possible in the hands of the masses.”); Friedman, *supra* note 101, at 617–20 (“Thus, time and again during the period of drafting and ratification of the Constitution, the Framers

and salary protection to ensure their ability to resist shifts in the popular opinion and to reject majoritarian policies that run counter to the Constitution.<sup>228</sup> The Court was viewed as one among several CM mechanisms that exist in the Constitution.<sup>229</sup> In this spirit, Hamilton described judicial independence as “an essential safeguard against the effects of occasional ill humours in the society.”<sup>230</sup>

Indeed, many of the Framers envisioned the Constitution as a constraint on majoritarian desires, binding the people to the right track.<sup>231</sup> The judiciary’s role is to serve as a “safeguard” that ensures the Constitution’s binding effect. The judiciary is able to fulfill this role because it holds legal expertise required for interpreting a legal document such as the Constitution.<sup>232</sup> In view of the “laborious study” required to “acquire a competent knowledge” of the law, Hamilton explained that only “few men . . . will have sufficient skill in the laws to qualify them for the stations of judges.”<sup>233</sup>

The various justifications for the Court’s CM authority that were presented above are in line with Hamilton’s dictum.<sup>234</sup> According to each of these justifications, the Justices hold a certain unique knowledge, training, or position that allows them to produce the correct constitutional judgment. Yet while according to Hamilton, the Court’s expertise is restricted to the domain of legal doctrine, justification theorists understand that in view of the indeterminate nature of many constitutional norms, legal expertise cannot serve as the sole source for judgment.<sup>235</sup> Thus, whether judicial expertise is in

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condemned the evil of faction and expressed fear of the tyranny of the majority.”); 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 926 (1995) (1888) (arguing the Founders “conceived of popular opinion as aggressive, revolutionary, unreasoning, passionate, futile, and a breeder of mob violence”); Eule, *supra* note 20, at 1522–23 (describing the Framers’ distrust of majorities).

228. MARSHALL, *supra* note 93, at 1; FARBER & SHERRY, *supra* note 227, at 103–04 (according to the founders’ beliefs, “one function of the Supreme Court is to preserve that venerable document [the Constitution] from the onslaughts of a temporarily impassioned majority”); ACKERMAN, *supra* note 5, at 33 (“The Founders disagreed—building on their colonial experience, they took strong measures to protect the judges from political pressures.”).

229. See Friedman, *supra* note 101, at 620.

230. THE FEDERALIST NO. 78, *supra* note 220, at 528.

231. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 421 (Max Farrand ed., 1937) (documenting Madison’s view that the role of constitutional constraints is “to protect [the people] agst. the transient impressions into which they themselves might be led”).

232. ACKERMAN, *supra* note 5, at 33 (“The only expertise the Founders recognized was of the legal variety . . . .”); ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 16–17, 21 (2009) (criticizing Hamilton’s “idea that the courts embody ‘judgment,’ while the legislative and executive branches embody ‘will’”).

233. THE FEDERALIST NO. 78, *supra* note 220, at 529.

234. See *supra* Part II.

235. See, e.g., L.H. LaRue, *Neither Force Nor Will*, 12 CONST. COMMENT. 179, 181 (1995) (“I do not recall anyone arguing [in recent controversies over judicial appointments] that a deep, scholarly knowledge of the precedents was the fundamental prerequisite for the job. Why not?”)

the realm of enunciating values and articulating principles for the long term as Bickel suggests,<sup>236</sup> or in the realm of constitutional history as Ackerman and the originalists proclaim,<sup>237</sup> according to all these justification theorists, Justices hold expert abilities that are not restricted merely to the realm of legal doctrine.

But Hamilton's position was not only a result of his distrust of the multitude, he also had serious doubts as to whether Justices would be able to muster public support. Arguing against assigning Supreme Court Justices a role in the impeachment process, Hamilton wrote that "it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable, towards reconciling the people to a decision, that should happen to clash with an accusation brought by their immediate representatives."<sup>238</sup>

At least in the early days of the Republic, one can find indications that Hamilton's prediction was correct.<sup>239</sup> For example, after Chief Justice Oliver Ellsworth fell ill, President John Adams turned to John Jay, asking him to return to the position. Jay refused the appointment, explaining that the Court labored under a judicial system so defective that it could never "obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."<sup>240</sup> In the aftermath of the *McCulloch* decision, Ellsworth's successor, Chief Justice Marshall, also acknowledged the truth of Hamilton's observations. In response

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Because none of us believes that our judges are 'bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.' None of us believes that Hamilton has correctly described the type of judiciary, the type of judges, that we live with today."); Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 247–53 (2011) (discussing the influence of the rise of the indeterminacy difficulty on the decline in the belief in legal expertise).

236. BICKEL, *supra* note 1, at 24, 58 ("[T]he root idea is that the process [of judicial review] is justified only if it injects into representative government something that is not already there; and that is principle . . ."); *id.* at 68 ("The constitutional function of the Court is to define values and proclaim principles."); *id.* at 188; BICKEL, *supra* note 176, at 175 ("The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays.").

237. See FARBER & SHERRY, *supra* note 227, at 98; BERGER, *supra* note 74, at 8–9, 18.

238. THE FEDERALIST NO. 65, *supra* note 220, at 441 (Alexander Hamilton); see also CHOPER, *supra* note 34, at 140.

239. Friedman, *supra* note 101, at 623 ("Not only did the Framers call the Supreme Court the 'least dangerous' branch, but its prestige seemed to mirror this assessment of its power." (footnote omitted)).

240. Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1750 & n.161 (2001); William H. Rehnquist, *The Supreme Court: The First Hundred Years Were the Hardest*, 42 U. MIAMI L. REV. 475, 477–78 (1988).

to Virginia's attack on the judgment, Marshall wrote (under a pseudonym), "[t]he judicial department, being without power, without patronage, without the legitimate means of ingratiating itself with the people, forms the weakest part."<sup>241</sup>

But after a while, the doubts regarding the Court's ability to acquire public support were "dispelled."<sup>242</sup> In the current era, consistent empirical data demonstrates that since the 1970s, the public, though disagreeing at times with specific judgments, has mostly awarded the Court with a steady and relatively high level of confidence.<sup>243</sup>

One may argue that the difference between Hamilton's famous dictum and Frankfurter's less famous one is merely a difference of paraphrasing of the same truism. On the one hand, allegedly every institution requires public confidence to function properly. This was a well-known premise even at the time Hamilton wrote the Federalist No. 78.<sup>244</sup> Even with regards to the Court, it was known well before the invention of scientific public polling that its power "is moral, not physical; it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts."<sup>245</sup> On the other hand, to recruit public confidence, the Court must rely on its expertise. After all, it lacks the sword and the purse. Thus, even at the time of the framers, so the claim goes, it was well understood that the basis of the Court's power is public confidence, and the way to gain that confidence was through demonstrating expertise.<sup>246</sup>

241. FRIEDMAN, *supra* note 96, at 83.

242. *See, e.g.*, BICKEL, *supra* note 1, at 129–30 ("Indeed, Jefferson, when writing to the Justices for their advisory opinion, spoke for a President who wanted their support because 'their authority [would] insure the respect of all parties.' The Court's high 'degree of credit' is a fact of life, and has been at least since *McCulloch v. Maryland* was decided . . .").

243. *See, e.g.*, James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 tbl.1 (2003).

244. *See, e.g.*, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 135 (1972) ("In classical Whig thought all rulers, whether English kings or Venetian doges, supposedly derived their powers ultimately from the people; election only made explicit what was always implicit."); *id.* at 612 (discussing the eighteenth century view that all power was "derived from public opinion").

245. *Holmes v. Jennison*, 39 U.S. 540, 618 (1840); *see also* *United States v. Lee*, 106 U.S. 196, 223 (1882) ("While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all. . . . [W]ith no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.").

246. Moreover, some scholars suggest that during the early days of the Republic, the Court's power was based on adherence to public opinion. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 60–63 (2004) ("Not

Yet exactly here lies the explanatory power of the distinction between the two CM difficulties, as it allows us to flesh out an important and delicate insight on the basis of the Court's power. According to the "merely judgment" thesis, the basis of the Court's power is grounded in the Justices' expertise in applying a justification theory. The emphasis is on the Court's adherence to the directive of its expert knowledge.<sup>247</sup> Public confidence in the Court is assumed to be a mere contingent byproduct of such adherence.<sup>248</sup> Moreover, as long as the executive is persuaded by the Court's expertise and the system of governance as a whole possesses public confidence, public support of the Court is immaterial.<sup>249</sup> The Constitutional Court of South Africa seems to present a current example of a court which lacks public confidence and whose power relies on its ability to persuade the dominant political party of its legal expertise. As Theunis Roux explains, in view of the domination of a single political party in South Africa, the Constitutional Court can function properly over time even without public confidence.<sup>250</sup> The Constitutional Court can ignore public opinion as a limit to its adherence to legal expertise, provided that the dominant political party is persuaded that the Constitutional Court adheres to the directive of legal expertise.<sup>251</sup>

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everyone agreed that judicial enforcement of a constitution was improper, however. . . . [C]ourts must exercise judicial review because they are the people's agents *too*. . . . In refusing to enforce unconstitutional laws, judges were exercising the people's authority to resist . . . ."); *id.* at 80–82, 91–92 ("If judicial review was to occur, it would be . . . a 'political-legal' act, a substitute for popular resistance . . . ."); Gordon S. Wood, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 54 (Amy Gutman ed., 1997) ("[In the Federalist No. 78,] Hamilton implied . . . that the judges, though not elected, resembled the legislators and executives in being agents or servants of the people with a responsibility equal to that of the other two branches of government to carry out the people's will, even to the point of sharing in the making of law."); *see also id.* at 49, 58.

247. *Cf.* PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 127 (1997) ("Courts make a claim to knowledge that founds their power.").

248. *See, e.g.,* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 35 (1921) ("Only experts perhaps may be able to gauge the quality of his work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith.").

249. Fiss, *supra* note 59, at 38 ("Legitimacy does not depend on 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.").

250. Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 106–12, 118–23 (2009).

251. *Id.* at 120 (arguing that the Court made clear in its second case that "its claim to legitimacy would be based on strict adherence to the law/politics distinction"); *id.* at 138 (noting "the CCSA's reputation for legally credible decision making lending . . . the ANC government's continued respect for, and obedience to, the CCSA's decisions").

Indeed, scholars today are too quick in switching from Hamilton's dictum to the conclusion that the Court's power is based on public confidence.<sup>252</sup> They thus fail to detect the shift in the understanding of the Court's power that is partly the result of the rise of the opinion polls culture.

In the era before the invention of public opinion polls, all the Court had was indeed "mere" expertise. Besides elections, no other source of data could give direct, regular, and reliable measurements of public opinion.<sup>253</sup> The public attitude toward the Court could have been deduced only indirectly, in a crude and inexact manner from the rare occasions when the Court was an issue in national presidential campaigns.<sup>254</sup> As long as the elected branches were perceived as the central representation of public opinion, their attacks on the Court have served as the major informative signal on the Court's waning public support.<sup>255</sup> The elected players could thus always claim to hold public support for their position and there was no accepted public indicator to repute their claim.<sup>256</sup> Even if the Court was perceived at some historical periods as the

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252. See, e.g., CLARK, *supra* note 157, at 67 ("Indeed, at least since Alexander Hamilton wrote in *Federalist* #78 that the Court is 'possessed of neither force nor will, but merely judgment,' students of American government have recognized that the Court is limited in its efficacy by the necessity of public and political will to give its decisions force.").

253. ROBERT S. ERIKSON, NORMAN R. LUTTBEG & KENT L. TEDIN, *AMERICAN PUBLIC OPINION: ITS ORIGINS, CONTENT, AND IMPACT* 23 (2d ed. 1980) ("Before the advent of public opinion polls in the early 1930s, one had to rely on much more inexact measures of what the public was thinking. . . . But the most relied upon method of assessing public opinion prior to the opinion poll was the interpretation of election results, and the occasional referendum that managed to find its way onto the ballot."); ADAM J. BERINSKY, *SILENT VOICES: PUBLIC OPINION AND POLITICAL PARTICIPATION IN AMERICA* 6 (2004) ("At an empirical level, there is a general agreement on one point among academics and professionals, be they proponents or opponents of the polling enterprise: opinion polls are broadly representative of popular sentiment.").

254. See Rosenberg, *supra* note 155, at 380, 384-86 (stating the 1860, 1896, 1924 and 1964 presidential campaigns at least partly focused on the proper role for the Court); see also OWEN M. FISS, *8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 3-5 (2006) (noting the Court has been a major subject in the presidential elections of 1896 and 1912); FRIEDMAN, *supra* note 96, at 177-80 (arguing that during the *Lochner* period, "[j]udicial Review was a major issue in three presidential campaigns"). Friedman's three are the 1896, 1912, and 1924 elections. *Id.* at 177-80.

255. CLARK, *supra* note 157, at 71, 80, 255-56 ("[S]pecifically, I have sought to demonstrate that congressional attacks on the Court can be interpreted as institutional signals about public opinion.").

256. For example, in 1935, Arthur Krock reported that based on "letters" sent to President Roosevelt by private citizens, FDR had "strong evidence that a vast aggregation of people do not think that the Supreme Court...has either the legal or moral right" to thwart the administration's decision to regulate money in a certain manner. Arthur Krock, *Gold Ruling Effects Weighed at Capital*, N.Y. TIMES, Feb. 24, 1935, at E3. In a reality in which public opinion polls are considered as the authoritative democratic legitimator and these polls show strong public support for the Court, such inference would be unavailable.

people's delegate and the Justices were seen as representatives of the people,<sup>257</sup> no independent public indicator could confirm this claim to public legitimacy when a clash with the elected branches occurred.

The ability to track public support for the Court, the public record of this support (often published by popular media), and the scientific allure of opinion polls made public confidence in the Court more "real" in public imagination.<sup>258</sup> The existence of a metric measuring public support of the Court, a metric that is central to political players' own understanding of their power,<sup>259</sup> opened new paths for understanding the Court's basis of power. Now the political branches may enforce the Court's decisions not due to its expertise—as if they were the patient doing as the doctor ordered<sup>260</sup>—but due to the public support of the Court.<sup>261</sup> Indeed, even when the Court is perceived to act politically i.e., not according to its expertise, as long as it holds public confidence, political resistance to its decisions seems unfeasible. Public opinion is the drive wheel of American politics, and no politician wants to stand against it.<sup>262</sup>

257. See for example during the early days of the republic: WOOD, *supra* note 244, at 161 ("[M]ost of the early constitution-makers had little sense that judicial independence meant independence from the people."); *id.* at 448–49, 456, 460 (describing the position that "[t]he judges were in a sense as much agents of the people as the legislator"); *id.* at 546–49, 598 ("Therefore all governmental officials, including even the executive and judicial parts of the government were agents of the people, not fundamentally different from the people's nominal representatives in the lower houses of the legislatures."); STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER 72, 99, 133, 74–77 (2011) ("Taking the Constitution to be an artifact of popular sovereignty and judges as representatives of the people are cornerstones of judicial review's original legitimacy."); *id.* at 84–85 (noting that during the Founding generation, the dominant understanding was the "judicial interpretation should accord with the popular will since the Constitution is, by definition, an act of popular sovereignty"); *id.* at 104, 282.

258. See, e.g., Fried & Harris, *supra* note 14, at 323 (arguing that public opinion itself became more "real" making it a political source of legitimacy).

259. See Zizi Papacharissi, *The Virtual Sphere 2.0: The Internet, the Public Sphere, and Beyond*, in ROUTLEDGE HANDBOOK OF INTERNET POLITICS 230, 233 (Andrew Chadwick & Philip N. Howard eds., 2009) ("[P]oliticians, opinion leaders, and the media frequently rely on aggregations of public opinion obtained through polls . . .").

260. Cf. Peters (1995), *supra* note 12, at 5 ("Even today judges and physicians render legal or medical opinions: we are to understand that deciding a case or diagnosing an illness are acts of expert judgment, not of guaranteed truth. To give an opinion, one must be an authority."); KAHN, *supra* note 247, at 126 ("A judge's knowledge of the rule of law functions analogously to a doctor's knowledge of health. . . . Power flows from knowledge . . .").

261. See Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346, 351–52 (2001).

262. See JAMES A. STIMSON, TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS xv–xvii (2004) ("Public opinion matters. . . . Its power is that it points always to the future, telling those whose careers and strategies depend on public support that success depends on being with the tide, not against it.").

In the view of these changes, the Court may try to maintain its power as an institution by dissolving the CM difficulty in its literal sense. In a reality in which the public has partly lost its belief in Justices as legal experts,<sup>263</sup> adhering to public opinion rather than to the directives of an expertise-based justification theory may seem as the only viable tactic to ensure that the Court can maintain its public support.<sup>264</sup> Indeed, deciding according to the directives of expertise-based justification theory does not necessarily bring public support, especially if the public has lost its faith in legal expertise. At times, deviating from the correct expert “judgment” may be the only way to ensure public support. Justice Frankfurter fiercely objected to the idea of a Court directed by public opinion, naming it “despotic,”<sup>265</sup> yet his idea of “public confidence” as the source of the Court’s power may lead in the end to judicial capitulation to public opinion.

## VII. THE CM DIFFICULTY IN ITS LITERAL SENSE GOES ABROAD

One of the few truisms in the field of comparative constitutionalism is that the scholarly obsession with the CM difficulty is a uniquely American phenomenon.<sup>266</sup> It is not as important, so the claim goes, to the constitutional

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263. Bassok, *supra* note 235, at 247–53 (describing the erosion in public perception of the Court’s expertise); Suzanna Sherry, *Democracy’s Distrust: Contested Values and the Decline of Expertise*, 125 HARV. L. REV. F. 7, 11 (2011) (“[M]any people no longer see judges as possessing legal expertise.”).

264. *Cf.* ENGEL, *supra* note 257, at 15 (“[T]he Court has recently striven to justify its authority of majoritarian grounds. Justices have emphasized the democratic credentials of their holdings, stressing how they follow majoritarian trends, however defined, evident in the broader polity.”); *id.* at 282 (Due to the decline of the belief in a fix and singular legal meaning, “the Court seemed to lose any special claim to interpretive authority.”); Friedman, *supra* note 101, at 601 (“At any rate, examining the sources of constitutional decision makes increasingly apparent the extent to which judges seek to appeal to majoritarian values, if not to rely upon them entirely.”); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 40 (1993) (explaining that “[t]he joint opinion in *Casey*” that focused on the decision’s effects on the public support of the Court, “may also be symptomatic of a crisis of legitimacy in constitutional thought in which the generally accepted paradigms and modes of thought are no longer felt capable of yielding convincing solutions to constitutional questions”).

265. *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 557 (1949) (Frankfurter, J., concurring) (“Mr. Dooley’s ‘th’ Supreme Court follows th’ illiction returns’ expressed the wit of cynicism, not the demand of principle. A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will.”).

266. *See, e.g.,* Alec Stone Sweet, *Why Europe Rejected American Judicial Review—and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2779–80 (2003) (“Americans grapple with, but never finally resolve, the ‘countermajoritarian’ problem . . . . European constitutions expressly provide for review and for the supremacy of constitutional courts with respect to constitutional interpretation. European academics and constitutional judges will state as much in one breath,

discourse in other countries where national high courts play a central role.<sup>267</sup> The distinction between the two CM difficulties exposes that while the *traditional* difficulty may indeed play only a marginal role in the scholarly debates over the role of national high courts outside of the United States,<sup>268</sup> the CM difficulty in its *literal* sense is very much present in those debates.

Current comparative theories present the worldwide phenomenon of judicial empowerment as the work of political, economic, and judicial elites securing their interests over the preferences of the multitude.<sup>269</sup> Based on “bottom-up” inquiry, Ran Hirschl argues that political elites, in association with economic and judicial elites, support constitutionalization and the shift towards “*juristocracy*” in order to preserve or enhance their political

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and then move on to more interesting issues.”); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1996–97, 2002 (2004) (“While there of course remains anxiety in Europe about judicial overreaching in constitutional matters, the idea that constitutional law as such faces a fundamental theoretical difficulty in explaining its own democratic legitimacy—particularly in explaining the democratic legitimacy of counter-majoritarian judicial review—no longer has nearly as much bite in Europe as it does in America.” (footnote omitted)); SADURSKI, *supra* note 167, at xiii (“Continental constitutional courts do not, therefore, feel any special reasons for anxiety about their own legitimacy when deciding on the constitutionality of statutes.”); Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in EUROPEAN AND US CONSTITUTIONALISM: SCIENCE AND TECHNIQUE OF DEMOCRACY 165, 191 (Council of Eur. ed., 2005) (“As Dieter Grimm, a former justice on the German Constitutional Court, emphasizes, ‘. . . the counter-majoritarian difficulty, the perennial problem of American constitutional law, plays no role in Germany.’” (citation omitted)).

267. See, e.g., Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 843 (1991) (“[T]he so-called ‘counter-majoritarian difficulty,’ the term Alexander Bickel used to describe the root problem of judicial review in America, is not a major problem in Germany.”).

268. The traditional difficulty is present in the debate over the power of regional courts such as the European Court of Justice. However, the term used to describe the problem of unaccountability, at least in the European context, is “democratic deficit” rather than the CM difficulty.

269. See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11–12, 16, 37–40, 43–44, 47–49, 98–99, 169–172, 199, 210–218 (2004) (arguing that elites seek to insulate their policy preferences from the vicissitudes of democratic politics); ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 1, 8–9 (2003); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18, 24–26, 30–33 (2003) (arguing that judicial review in new democracies is created by political elites that, at the time democratization occurs, foresee themselves losing in elections and thus seek to entrench judicial review as a form of “political insurance”); Rogers M. Smith, *Judicial Power and Democracy: A Machiavellian View*, in THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM 199, 204–07 (Steven Kautz, et al. eds., 2009) (“Powerful judiciaries are at bottom not partners of modern democracy, but efforts by elites to retain hegemony within them, as a Machiavellian analysis would lead us to expect.”).

hegemony.<sup>270</sup> Since public support for the policy preferences of the elites is weakening, these threatened elites transfer power from majoritarian decision-making arenas to unelected institutions such as national high courts thus ensuring the preservation of their hegemony.<sup>271</sup>

Robert Bork contends that courts are “enacting the agenda of the cultural left” in “the culture war in every Western nation” against the “great mass of citizens who, left to their own devices, tend to be traditionalists.”<sup>272</sup> Being a “political minority,” the cultural left, or as Bork titles them the “New Class,”<sup>273</sup> loses elections. Hence, in order “to avoid the verdict of the ballot box,” and in order to “outflank majorities and nullify their votes,” the “New Class” empowers national high courts that tend to adopt the values of these elites.<sup>274</sup>

Hirschl and Bork agree that as a descriptive matter, in the countries they examined, national high courts have entrenched the policies of the elites against public preferences. These courts thus decide in a literally CM fashion. Thus, while Hirschl is correct in arguing that his juristocracy theory is not preoccupied “with the well-rehearsed *normative* debate over the ‘countermajoritarian’ nature of judicial review,”<sup>275</sup> his theory, as well as Bork’s, is modeled according to the CM difficulty in its literal sense. Hirschl describes courts deciding cases contrary to the majority’s will.

Bork and Hirschl mainly disagree on the values that guide the elites in their endeavor to transfer fundamental public, political and moral disputes to courts. While Hirschl claims that judicial empowerment is an “institutional solution” for promoting a neo-liberal agenda of “open markets, economic deregulation, anti-statism, and anticollectivism,”<sup>276</sup> Bork argues that judicial empowerment

270. HIRSCHL, *supra* note 269, at 11; *see also id.* at 75, 78, 80–81 (Canada), 88–89 (New Zealand), 92–95 (South Africa).

271. *Id.* at 12, 16, 40 (“Accordingly, a strategic, political-power-oriented explanation for voluntary, self-imposed judicial empowerment through the constitutionalization of rights and the establishment of judicial review suggests that political power-holders who either initiate or refrain from blocking such reforms estimate that it enhances their absolute or relative political power vis-à-vis rival political actors.”); *id.* at 49, 98–99.

272. BORK, *supra* note 269, at 2 (describing the struggle between the “elite” and “the general public”).

273. *Id.* at 5–6.

274. *Id.* (“The judiciary is the liberals’ weapon of choice.”); *id.* at 9–10 (“The ideas and values of the New Class are part of the furniture of most judges’ minds and seem self-evident.”); *id.* at 109 (“[T]hey are speaking for values of the New Class that have not yet found, and perhaps never can find, favor in the legislature.”).

275. HIRSCHL, *supra* note 269, at 3 (emphasis added).

276. *Id.* at 12, 43–44 (arguing that elites promote through the judiciary an agenda of “[r]elative cosmopolitanism, open markets, formal equality, and Lockean-style individual autonomy”); *id.* at 118 (“All four national high courts . . . fortify and expand the boundaries of the private sphere . . .”); *id.* at 146–48.

is actually aimed to promote the values of “eclectic socialism” held by “the cultural or liberal left.”<sup>277</sup>

But here is the puzzle: While these and other leading accounts explain the rise of judicial power as an elite endeavor against the populus, opinion polls consistently show that many national high courts receive high public support as *institutions*.<sup>278</sup> If national high courts act in the name of elites “insulating policy making in general, and their policy preferences in particular, from the vicissitudes of democratic politics,”<sup>279</sup> how is it that these courts have received over a long period of time such high public institutional support? If these courts have been preserving the interests of elites whose public support is eroding,<sup>280</sup> if “an activist judiciary helps to advance the ends that democratic branches of government would never sanction,”<sup>281</sup> how do these courts succeed

277. BORK, *supra* note 269, at 2–3, 8 (“In a word, courts in general have enlisted on the liberal side of the culture war. They are infected, as is the New Class to which judges belong and to which they respond, with the socialist impulse.”); *id.* at 10 (“Everywhere judicial review has taken root, activist courts enforce New Class values, shifting the culture steadily to the left.”); *id.* at 31 (“The Left wants expanded judicial review in the name of rights . . .”).

278. James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 344 (1998) (surveying data on public support of national high courts from eighteen countries); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 139 (2000) (noting that in Europe constitutional courts have high “institutional legitimacy”); SADURSKI, *supra* note 167, at 33 (“[It] is indisputable that the constitutional courts in the region discussed here [Central and Eastern Europe] enjoy a high level of social acceptance, despite occasional disagreements with and criticisms of particular decisions. They do not, therefore, have a problem with ‘legitimacy’ in the sense of a general public acceptance of their authority to do what they are doing—including the invalidation of statutes.”); Law, *supra* note 21, at 791 (“In [the US] and elsewhere, courts known for striking down supposedly majoritarian legislation have nevertheless enjoyed high levels of public support that put other government institutions to shame.”); F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION & THE COURT PARTY 17 (2000) (“In the [1987 and 1999 national surveys in Canada], 62 per cent expressed greater confidence in courts and judges than in legislatures and politicians when it came to having the final say on rights issues.”). However, as noted above, the Constitutional Court of South Africa enjoys a very low level of public support. Roux, *supra* note 250, at 107. While Bork and Hirschl do not examine courts in Latin America, it is interesting to note that the rise in judicial power in Latin America has occurred while these courts suffer from a low level of public support. See Gretchen Helmke, *Public Support and Judicial Crises in Latin America*, 13 U. PA. J. CONST. L. 397, 398 (2010) (“One of the most widely touted facts about the rule of law gap in Latin America is how poorly the public regards the judiciary.”); GRETCHEN HELMKE, COURT UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA 1–2 (2005) (“[In Latin America], judges today are less popular than presidents, the military, or the police. . . . Latin America’s courts have become vitally important political institutions.”).

279. HIRSCHL, *supra* note 269, at 11–12; see also *id.* at 98–99; BORK, *supra* note 269, at 6 (“Democracy and the rule of law are undermined while culture is altered in ways the electorate would never chose.”).

280. HIRSCHL, *supra* note 269, at 12.

281. BORK, *supra* note 269, at 11; see also *id.* at 77–78 (referring to the U.S. Supreme Court).

in preserving their public support over a long period of time? In other words, if national high courts consistently decide cases against public preferences, i.e. deciding literally in a CM fashion, how is it that these courts remain majoritarian *institutions* in the literal sense? This fascinating puzzle has yet to receive any elaborate scholarly attention.<sup>282</sup>

#### CONCLUSION: THE TWO CM DIFFICULTIES IN THE TWENTY-FIRST CENTURY

The introduction of public opinion polls created substantial changes in American political thought.<sup>283</sup> The manner in which we understand the CM difficulty is a vivid example of these changes. For many years, the clash between constitutionalism and popular sovereignty, also known as the CM difficulty, was understood as a problem of unaccountable judges who invalidate legislation enacted by electorally accountable representatives. Opinion polling introduced quantitative results of opinion surveys as a new form of popular sovereignty.<sup>284</sup> As a result, in recent years, constitutional scholars have attempted to discard any understanding of the difficulty which cannot be measured. Thus, many of them, influenced by social science studies of the Court, formulate the difficulty in completely measurable terms, as a clash between public opinion, measured in opinion polls and the Court's decisions.<sup>285</sup> This formulation of the difficulty reduces popular sovereignty to mere responsiveness to public opinion and dismantles the presumed connection between popularly elected legislators and majority will.<sup>286</sup> It fits well the American tendency, stretching back to the early days of the republic, of

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282. One answer to this puzzle is "give it time." According to this answer, it takes time for the public to digest the change in the courts' function. As soon as the public acknowledges the shift, public confidence in the courts will decline rapidly. Another explanation is "blame the media." According to this explanation, the media presents the rise of judicial power as a positive development thus effecting public perception. Both of these explanations are backed by the Israeli experience. The Israeli Supreme Court, that served as "exhibit A" in many of the accounts on the rise of judicial power, has experienced in recent years a sharp decline in its public support. For an elaboration of these and other explanations in the Israeli case see Or Bassok, *Television Coverage of the Israeli Supreme Court 1968–1992: The Persistence of the Mythical Image*, 42 *ISR. L. REV.* 306, 307–08 (2009); MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 154–169 (2011).

283. Cf. JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 91–92 (1995) (arguing that the American political system was transformed by a new method of assessing public attitudes, i.e. the opinion polling).

284. SCOTT L. ALTHAUS, *COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS* 6 (2003).

285. See PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 12 (2011) ("In place of the popular sovereign, the political scientist today speaks of popular majorities and of the forces that effect electoral politics—all measurable entities.").

286. See GINSBURG, *supra* note 269, at 1 ("The superior position of the popularly elected legislature and its corollary of majority rule have been central principles for democratic revolutionaries since the notion was appended to the unwritten English constitution.").

understanding democracy in populist and majoritarian terms.<sup>287</sup> In the current “public opinion culture,” the role of majority opinion, as measured by public polls, has become even more central. Now it is indeed “the master of servants who tremble before it.”<sup>288</sup>

While many constitutional theorists continue to devise normative justifications for judicial review,<sup>289</sup> other theorists have taken a new path. Dissolving the CM difficulty became a major tactic for confronting the difficulty.<sup>290</sup> Rather than conceptualizing the difficulty as an inherent normative question concerning the Court’s authority, these theorists view the CM difficulty as a question concerning the Court’s actual performance.<sup>291</sup> As long as the Court’s decisions correspond to public opinion, no difficulty exists. Thus, the debate over democratic legitimacy is focused not on the justifications for the institution’s decisions but on the way public opinion responds to highly-salient decisions taken by the institution.<sup>292</sup>

Fifty years ago, Alexander Bickel identified the dangers lurking for a Court that capitulates to public opinion. In response, he suggested the device of “passive virtues” that enables the Court to avoid the most volatile controversies. Today, in view of the current focus on the literal CM difficulty, other techniques, such as “stealth overruling” of highly salient precedents, are

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287. See, e.g., WOOD, *supra* note 244, at 362, 368–69; Steven Barnett, *Distorting Democracy: Public Opinions, Polls, and the Press*, in PUBLIC OPINION & DEMOCRACY VOX POPULI-VOX DEI?, *supra* note 12, at 287, 288–90; ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 17 (2012) (arguing that constitutional democracy in the US seeks to instantiate the value of self-government by rendering government decisions responsive to public opinion); CHOPER, *supra* note 34, at 2 (“[J]udicial review is incompatible with a fundamental precept of American democracy—majority rule . . .”); *id.* at 4–5.

288. BRYCE, *supra* note 86, at 267, 923 (“[P]ublic opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it.”); see also Jeff Manza, Fay Lomax Cook & Benjamin I. Page, *Navigating Public Opinion: An Introduction*, in NAVIGATING PUBLIC OPINION: POLLS, POLICY, AND THE FUTURE OF AMERICAN DEMOCRACY 3, 4 (Jeff Manza, Fay Lomax Cook & Benjamin I. Page eds., 2002) (surveying commentators that criticize the development of “poll driven leadership”).

289. See, e.g., Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006).

290. See, e.g., Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757 (2011) (“Today’s external legal history is marred by . . . ‘consensus constitutionalism,’ the claim that the Supreme Court interprets the Constitution in a manner that reflects the ‘consensus’ views of the American public.”).

291. Cf. EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 173 (2005) (“[Q]uestions about the origins or constitution of the state tend to fade from view, to be replaced with questions about its day-to-day performance.”).

292. Cf. *id.* at 174 (arguing that currently the debate over legitimacy is conducted in terms of performance rather than origins).

surfacing.<sup>293</sup> Indeed, in a sense the shift in scholarly emphasis from the traditional difficulty to the literal difficulty is merely a shift from the first part of *The Least Dangerous Branch* to the book's second part.

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293. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 1, 4–5, 29, 33, 46–50, 62–63 (2010) (arguing that, fearful the overruling of a precedent would hinder the Court's public support, Justices overruled it under the public radar in order to avoid publicity and, thus, public scrutiny).