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## Legitimacy without Legality

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## LEGITIMACY WITHOUT LEGALITY

OR BASSOK\*

### ABSTRACT

*Beyond the controversy on women's right to elect an abortion, in Dobbs v. Jackson there is a deep yet hidden disagreement over the Court's source of legitimacy. The majority judgment speaks of the Court's source of legitimacy in terms of expertise, while the dissenting opinion speaks of it in terms of public support. My starting point for exposing this disagreement is the divergence between the accurate quote of Alexander Hamilton's famous dictum from the Federalist No. 78 in Justice Alito's majority opinion, and dissenting Justice Breyer's paraphrase of the same dictum in the Dobbs oral arguments. The paraphrased version replaced Hamilton's saying that without the sword and the purse, all the Court has is "judgment" with the saying that all the Court has is "public confidence." For many decades, both conservative and progressive justices have built an entire jurisprudence that positioned the paraphrase of this dictum as its cornerstone. This seemingly minor paraphrasing captures a profound shift in understanding the Court's source of legitimacy from understanding it in terms of expertise to understanding it in terms of public support. This shift has led to the Court's continuous undermining of the traditional divide between law as the domain of reason, and politics as the domain of will. The traditional divide ensured that after going through the political process of passing a law, in the realm of legality, reason (or "judgment" in Hamilton's terms) reigned supreme. However, starting in the 1930s, the ability to measure public support of the Supreme Court in public opinion polls made legitimacy—understood in terms of public support—the metric for assessing the Court and its judgements. Subsequently, correctness in constitutional law has become more and more dependent on public acceptance rather than the issue of reasoned legal argumentation. Alito's approach in Dobbs reverts to Hamilton's original understanding of the Court's source of legitimacy and has the potential to serve as the starting point for reversing the dangerous trend of eroding the divide between law and politics. To succeed in*

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*re-establishing this divide, the Court will have to reconsider other precedents beginning with Heller.*

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## I. INTRODUCTION

In his 1962 dissenting opinion in *Baker v. Carr*,<sup>1</sup> Justice Felix Frankfurter paraphrased Alexander Hamilton's saying from the Federalist No. 78<sup>2</sup> and wrote, "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."<sup>3</sup> Frankfurter dedicated much thought to this paraphrase and drafted several versions of it.<sup>4</sup>

Frankfurter's paraphrase captures the rationale of a significant shift that has occurred in recent decades in the Court's understanding of its own source of legitimacy. Rather than understanding judicial legitimacy in terms of expertise—as the original version of the Federalist No. 78 called for in speaking of the Court's "judgment"—judicial legitimacy is to be understood in terms of public support.<sup>5</sup> Frankfurter did not intend to become the origin point of such a shift.<sup>6</sup> However, for several decades, both conservative and progressive Justices have used his paraphrase as a reference point for this novel thesis on the Court's source of legitimacy.<sup>7</sup>

While the debate in *Dobbs*<sup>8</sup> over the shift in understanding judicial legitimacy is one of the centers of controversy between Alito and the dissenting Justices, it is mainly under the surface of the judgment and has yet to receive scholarly attention. In this Article, I expose the debate and situate it as part of a long-term controversy in the Court's jurisprudence. Not surprisingly, in *Dobbs*, this controversy manifests in how Hamilton's dictum from the Federalist No. 78 is quoted. Over the years, this dictum has served as a reference point for discussions on judicial legitimacy,<sup>9</sup> and *Dobbs* is no exception in that regard. In his majority opinion, Justice Alito uses the correct version of the Federalist No. 78, which speaks of judgment as the source of the Court's legitimacy.<sup>10</sup> In the *Dobbs* oral argument, Justice Breyer used the paraphrased version, saying: "we're an institution perhaps more than a court of appeals or a district court. It's Hamilton's point, no purse, no sword, and yet we have to have public support

1. *Baker v. Carr*, 369 U.S. 186 (1961).

2. *The Federalist No. 78*, in *THE FEDERALIST PAPERS* 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

3. *Baker*, 369 U.S. at 267.

4. See Or Bassok, *The Supreme Court at the Bar of Public Opinion Polls*, 23 *CONSTELLATIONS* 573, 579-80 (2016) (exposing the various versions of this paraphrase that Frankfurter used in his *Baker* drafts).

5. *Id.*

6. See *id.* at 580 (discussing Frankfurter's understanding of judicial legitimacy).

7. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion of Kennedy, J., Souter, J., and O'Connor, J.); *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

8. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

9. See Bassok, *supra* note 4, at 579.

10. *Dobbs*, 142 S. Ct. at 2278.

...”<sup>11</sup> But the difference in quoting the Federalist No. 78 is only the starting point for the debate over the Court’s source of legitimacy in *Dobbs*.

As I show, it is unclear whether Alito’s position represents the majority opinion in *Dobbs* on the issue of the Court’s source of legitimacy. Be that as it may, I argue that Alito’s judgment purports to reinstate constitutional law as a language of expertise. As part of this process, Alito’s majority opinion overruled one of the weakest precedents in terms of its doctrinal soundness that the Court decided in the last fifty years.<sup>12</sup>

Writing for a five-person majority, Justice Alito’s decision in *Dobbs* to overrule *Roe*<sup>13</sup> presents difficulties in terms of women’s health and well-being, and in terms of the identity of America. While these difficulties are not central to my Article, I briefly address them in considering the path offered by Alito’s judgment. I also address a different type of difficulty Alito’s path presents. Several important precedents—some of which are defended and supported by Alito—emanate from the path of legitimacy without legality that Alito purports to oppose in *Dobbs*. Following *Dobbs*, these precedents require a serious rethinking. First and foremost among them is *Heller*.<sup>14</sup>

My Article tells the story of how constitutional law has been losing its ability to serve as a language of expertise. In order to allow the reader to follow the story of almost a century of constitutional development, I offer a brief outline of the entire analysis in the remainder of this introduction.

Understanding the demise of constitutional law as a language of expertise requires deciphering the basic divide that stands at the core of every constitutional system between legal reason and public will.<sup>15</sup> With enough public support, any agenda can become law through the process of legislation and thus pass from the political realm of will into the legal realm of reason. If a particular agenda cannot be enacted as a law due to its unconstitutional nature, it can still be enacted with broader public support as a constitutional amendment. However, from the moment a political agenda passes through the formal legal procedures required for enactment as law or as a constitutional amendment, legal reason reigns supreme. After passing the divide between politics and law, the

11. Transcript of Oral Argument at 69, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2021) (No. 19-1392).

12. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926, 947 (1973).

13. *Dobbs*, 142 S. Ct. at 2243.

14. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

15. Lord Coke wrote that, “Nihil quod est contra rationem est licitum [Nothing that is against reason is lawful]; for reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man’s naturall reason.” EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON* 97b (Francis Hargrave & Charles Butler eds., 18th ed. 1823).

public will that enabled the enactment of the law becomes irrelevant. In the realm of legal analysis, the law is analyzed using tools of reason, such as analogies, or by following the requirements of systematic logic, such as consistency and coherency.<sup>16</sup>

Yet, in recent decades, the divide between reason and will has collapsed in American constitutional law. Legitimacy, understood in terms of public support, has penetrated the realm of legality in an unprecedented manner. In the following, I analyze the Court's engagement with the relationship between legality and legitimacy throughout the twentieth century and the beginning of the twenty-first century by focusing on several significant cases that represent different eras in the Court's understanding of this relationship.

I begin my analysis by focusing on the *Butler* case, which was part of the *Lochner*<sup>17</sup> decisional line<sup>18</sup> and represents the period between the end of the Civil War up until the end of the 1930s. During this period, constitutional law was understood as a language of expertise in which reason reigned supreme.<sup>19</sup> This period ended with the New Deal reform, the Court's resistance to it, and President Franklin D. Roosevelt's failed plan to pack the Court in response.

For the legal community at that time, the long-standing *Lochner* decisional line—which stood at the core of the Court's resistance to the New Deal reform—was dictated by legal expertise.<sup>20</sup> Yet, it was not overturned due to organic legal development. Rather, it could not sustain itself in the face of intense public pressure and, hence, its reversal is known today as the “switch in time.”<sup>21</sup> For the Court, the lesson from this episode was clear: legality alone is not enough in the face of strong public opinion.<sup>22</sup>

16. See, e.g., PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION 5 (2016) (explaining that courts “cannot simply point to voter interests or constituency groups; it cannot point to the last election. It must give reasons ground in law, not politics.”); John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 1000 (1992) (“[C]onsistency is built into the very nature of the way we think about law.”).

17. *Lochner v. New York*, 198 U.S. 45 (1905).

18. See JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 192 (2011) (“‘*Lochner*’ is not just the decision in *Lochner v. New York*, but an accompanying story about the place of the decision in the history of the Constitution, the Court, and the country.”).

19. See, e.g., PAUL W. KAHN, ORIGINS OF ORDER: PROJECT AND SYSTEM IN THE AMERICAN LEGAL IMAGINATION 224 (2019) (“The Constitution, by the end of the [nineteenth] century, was imagined as an expression of the immanent systemic order of the common law.”); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 123 (3d ed. 2007) (“From Marshall to Harlan, judges conceived themselves as oracles whose function was simply that of rendering intelligible an already existing body of legal principles.”).

20. KAHN, *supra* note 19, at 224.

21. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1936).

22. See *infra* section III(B).

During the same period, the invention of public opinion polls began to impact the political arena significantly. Before this invention, with only elections as the accepted tool for measuring public support, the elected branches were perceived as the sole representation of public opinion.<sup>23</sup> These branches had a monopoly over the claim to legitimacy based on public support. The new tool of public opinion polling allowed everyone to observe the Court's public support for the first time in history.

This invention already played an important role during the clash between President Roosevelt and the Court over the New Deal legislation.<sup>24</sup> However, its primary influence on understanding judicial legitimacy occurred decades later when it was revealed time after time in public opinion polls that the Court enjoys higher levels of public support than other branches of government.<sup>25</sup> A new avenue was suddenly opened for understanding judicial legitimacy: judicial legitimacy could be understood in terms of public support rather than in terms of expertise. This new path was especially appealing as the invention of opinion polls coincided with the rise of understanding democracy in majoritarian terms.<sup>26</sup>

With the *Lochner* lesson and the invention of public opinion polls in the background, *Brown v. Board of Education*<sup>27</sup> proved especially detrimental. *Brown* aimed to solve a serious injustice, yet, as many commentators argue, in terms of doctrinal legality at the time it was decided, *Brown*'s legality was severely flawed.<sup>28</sup> However, after a few decades, *Brown* gained public support, and its public meaning became a pillar of constitutional law.<sup>29</sup> *Brown* proved

23. See, e.g., Amy Fried & Douglas B. Harris, *Governing with the Polls*, 72 THE HISTORIAN 321, 341 (2010) (arguing that in the period before the invention of public opinion polls, "Congress was public opinion").

24. See, e.g., Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1139 (1987).

25. See, e.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 141 (1989) ("[T]he Court has consistently won more approval than Congress or the executive branch (at least since the 1970s).").

26. See G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME III: 1930-2000, at 8 (2019) (discussing the rise of the concept of democracy and its understanding in majoritarian terms); Morton J. Horwitz, *The Supreme Court, 1992 Term, Foreword: The Constitution of Change Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30, 57 (1994) (arguing that around the 1940s, "[d]emocracy suddenly became a central legitimating concept in American constitutional law").

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

28. See, e.g., LEARNED HAND, THE BILL OF RIGHTS 55 (1958) ("I have never been able to understand on what basis [*Brown*] does or can rest except as a *coup de main*."); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 40 (2000) ("A lawyer reading *Brown* was sure to ask, 'where's the law?'").

29. See, e.g., JACK M. BALKIN, *Brown as Icon*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 9 (J.M. Balkin ed., 2001) ("*Brown* became recognized as a symbol, not only of racial equality, but of equality and equal opportunity generally."); RICHARD H. FALLON, JR.,



that a judgment that gained legitimacy in terms of public support, yet was severely flawed in terms of legality, may acquire legality in the end. Today, no one would dare claim that *Brown* is an illegal judgment.

Coupled with these developments is the rise in the centrality of the Court in deciding questions that affect American identity. At least since *Brown*, American national identity's focal point is the Constitution, with the Court as its chief interpreter.<sup>30</sup> As judicial interpretation of the Constitution has become central for public discussions on American national identity, the connection between judicial legitimacy and public support has grown stronger. After all, how can the Court speak on the people's identity without the people's support?<sup>31</sup>

In *Planned Parenthood v. Casey*,<sup>32</sup> all these developments came into fruition and received their most explicit formulation when the Court imagined the *Lochner* decisional line and *Brown* through the lens of legitimacy understood in terms of public support. Following this exercise of imagining the past, the Court decided not to overrule *Roe v. Wade*<sup>33</sup> based partly on a fear of hindering the Court's public support. My cumulative conclusion from the reversal of the *Lochner* decisional line, the success of *Brown*, and the resistance to overruling *Roe* in *Casey* is that while the Court has considered legality without legitimacy as an unviable option, legitimacy without legality has become a viable option.

Since the 1990s, understating judicial legitimacy in terms of public support has dominated the constitutional discourse and has led to the undermining of legality.<sup>34</sup> Two of the most explicit expressions of this development were the adoption of the "broccoli argument" as the law of the land in *Sebelius*<sup>35</sup> and the interpretation given to the Second Amendment as establishing an individual right to bear arms in *Heller*.<sup>36</sup>

*Sebelius* revolved around the constitutionality of the Patient Protection and Affordable Care Act that aimed to solve the problem of people who lack health-

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IMPLEMENTING THE CONSTITUTION 56 (2001) ("In both legal consciousness and the popular imagination, *Brown v. Board of Education* exemplifies constitutional justice . . .").

30. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 223-24 (2004) (explaining that after the Warren Court "the principle of judicial supremacy came to monopolize constitutional theory and discourse").

31. See Or Bassok, *The Schmitz Court: The Question of Legitimacy*, 21 GERMAN L.J. 131, 149-50 (2020) (discussing the connection between courts' ability to serve as guardians of their polities' identity and their public support).

32. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

33. *Roe v. Wade*, 410 U.S. 113 (1973).

34. See generally Or Bassok, *Beyond the Horizons of the Harvard Forewords*, 70 CLEV. ST. L. REV. 1 (2021) (showing through an analysis of the Harvard Law Review forewords the rise to dominance in constitutional discourse of the idea that judicial legitimacy is to be identified with public support as measured in opinion polls).

35. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

36. *Heller*, 554 U.S. at 570.

care coverage by mandating that everyone purchase a plan.<sup>37</sup> The broccoli argument challenged this solution by arguing that accepting the mandate as constitutional would mean that the government can require people to purchase broccoli.<sup>38</sup> When it was first raised, the broccoli argument was considered a clear non-starter by the community of constitutional experts.<sup>39</sup> However, after it gained public support, it was adopted by the majority opinion in *Sebelius* and became the law of the land.<sup>40</sup>

Similarly, until the beginning of the 1990s, interpreting the Second Amendment as establishing an individual right to bear arms was considered a non-starter.<sup>41</sup> The adoption of this reading in *Heller* was driven by a social movement that gained public support rather than by constitutional reasoning that led to a development in constitutional doctrine.<sup>42</sup>

As I show, *Heller* and *Sebelius* demonstrate that with enough public support, arguments outside the borders of constitutional law as a language of expertise can become the law of the land without going through the formal procedures for legislation. These cases demonstrate that constitutional law currently lacks the resources to restrain legitimacy—understood in terms of public support—from undermining legality.

In the last part of the Article, I expose that the two ways of understanding judicial legitimacy clashed in *Dobbs v. Jackson*,<sup>43</sup> and this clash helps explain the way this case was decided. During oral arguments, Justice Breyer, one of the dissenting Justices, spoke of the Court's legitimacy as stemming from its public support. This approach led the dissenting Justices to write that the doctrine of *stare decisis* requires protecting the Court's legitimacy.<sup>44</sup> Subsequently,

37. *Sebelius*, 132 S. Ct. at 2566.

38. *Id.* at 2591.

39. See e.g., Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [<https://perma.cc/Z27B-PTVF>] (“Three years ago, the idea that the Act’s mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics, simply crazy. . . . Yet in three years’ time, the argument that the mandate violates the Constitution has moved from crazy to plausible . . .”).

40. See MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 11 (2013) (“[A]n argument that had been off the wall was now on the table—not because of its intrinsic merits but because it had substantial support by an important political party.”).

41. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 224 (2008) (explaining that “the widespread view in the profession, even among conservative critics of the Warren and Burger Courts” was that the Second Amendment did not protect an individual right to bear arms).

42. See *id.* at 242 (“After decades of gun mobilization, a large majority of Americans believe that the Second Amendment protects an individual right to bear arms. . . . *Heller* seems to register this complex of popular beliefs . . .”).

43. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

44. *Id.* at 2317.

according to the dissenting opinion, the Court is compelled to follow *Roe* as a matter of legality, as otherwise the Court's public support would be undermined.<sup>45</sup> Justice Alito, who wrote for the majority, adhered to viewing the Court's legitimacy in terms of expertise. He insisted that in terms of legal expertise, *Roe* is a flawed precedent that must be overturned without taking into account the effect of overturning it on the Court's public support.<sup>46</sup>

But *Dobbs* also exposes a further and connected divergence between the Justices on the role constitutional law and the Court play in expressing and even determining American identity. The dissenting Justices view constitutional law as a language expressing "what it means to be an American."<sup>47</sup> They also endow the Court with the role of expressing American identity using the language of constitutional law. According to Alito's majority opinion, constitutional law serves as a language of expertise for the legal community, and issues of identity are left to the American people. Constitutional law may be used in public discourse as a vehicle for discussing identity issues, but for the Court, constitutional law serves merely as a language of expertise. *Dobbs* once again exposes the difficulty the Court encounters in trying to hold at the same time both its role as an expert in constitutional law and its role of expressing and, at times, even defining American identity.<sup>48</sup>

Many readers may chuckle over the idea that Alito's judgment is anything more than an ideologically-driven opinion.<sup>49</sup> But even if Alito's effort to present the Court's decision as driven by legal expertise is mere rhetoric, in the legal "language game," such rhetoric has meaning for future Courts's adjudication as any part of judicial reasoning no matter what the motives behind it are.

Furthermore, as I will show, Alito adheres to an understanding of the Court's source of legitimacy that is not required for overruling *Roe*, and that puts future constraints on the Court's ability to enforce conservative ideology. Why choose such a path that revives an understanding of the Court's source of legitimacy long forsaken by conservative Justices, and that would limit the Court's future ability to enforce conservative ideology? My Article aims to answer this question while unveiling Alito's vision regarding the Court's source of legitimacy as expressed in his *Dobbs* opinion.

This Article follows the order of the argument as presented above. But before examining the rise of legitimacy without legality, in the next section, I discuss six concepts that are central to my argument. The six concepts are language of expertise, constitutional identity, will, reason, legitimacy, and

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45. *Id.* at 2348.

46. *Id.* at 2277-78.

47. *Id.* at 2320 (Breyer, Sotomayor & Kagan, JJ., dissenting).

48. See Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1 (2014).

49. Cf. Khiara M. Bridges, *The Supreme Court, 2021 Term, Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 39 (2022) (arguing that the use of history by the majority in *Dobbs* "is fraught with values, convictions, preferences, and, perhaps most of all, power").

legality. The nature of constitutional law as a language of expertise and as a language for discussing identity issues was scarcely discussed in scholarly writing, and for this reason, I offer a broader analysis of these concepts.<sup>50</sup>

## II. CONCEPTUAL TOOLKIT

### A. *Constitutional Law as a Language of Expertise*

#### 1. Ordinary Language vs. Technical Language

While legal language is based on ordinary everyday language,<sup>51</sup> its exact nature as a language is debated.<sup>52</sup> The question can be formulated as whether legal language can be reduced to ordinary language.<sup>53</sup> Those who answer this question in the negative devise different terms to designate law's special nature as a language. Among the terms offered are sublanguage, specialized language, technical language, professional language, and language of expertise.<sup>54</sup>

The term "technical language" is commonly used by scholars who argue that constitutional law has a distinct nature as a language.<sup>55</sup> Charles Caton defined the term "technical language" as "a part of some language like English or French and a part defined only by reference to some particular discipline or occupation or activity among the practitioners of which it is current."<sup>56</sup> When addressing American constitutional law, I prefer the term "language of expertise" as

50. See Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 513 (2015) ("[T]he entire subject of law as, possibly, a technical language needs more attention that it has received to date."); see also Or Bassok, *Constitutional Law: A Language of Expertise?*, 103 GEO. L.J. ONLINE 66 (2015).

51. See, e.g., Peter Tiersma, *The Nature of Legal Language*, in DIMENSIONS OF FORENSIC LINGUISTIC 7, 13 (John Gibbons & M. Teresa Turell eds., 2008) ("For the most part, however, legal languages are registers or dialects or, perhaps better, sublanguages of ordinary speech and writing. Thus, legal English is simply a variety of English."); HEIKKI E.S. MATTILA, *COMPARATIVE LEGAL LINGUISTICS: LANGUAGE OF LAW, LATIN AND MODERN LINGUA FRANCA* 1 (2d ed. 2013) ("It is clear to see that legal language is based on ordinary language. For that reason, the grammar and – in general – the vocabulary of legal language are the same as in the case of ordinary language.").

52. See Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271, 290-303 (1989) (contrasting between Charles Caton's view that legal language is an adjunct of ordinary language and HLA Hart's view that legal language is cut off from ordinary language).

53. See *id.* at 274.

54. See, e.g., Peter M. Tiersma, *Some Myths about Legal Language*, 2 L. CULTURE & HUMANS. 29, 48 (2006) ("Whatever the label, it is somewhere between a separate language and ordinary English, and it is much closer to ordinary English than many people seem to think."); MATTILA, *supra* note 51, at 1 ("Legal language is often characterised as a technical language or 'technolect', which is to say a language used by a specialist profession.").

55. See, e.g., Schauer, *supra* note 50, at 507-09.

56. CHARLES E. CATON, *PHILOSOPHY AND ORDINARY LANGUAGE*, at vii (1963).

constitutional law has a central role in defining American national identity,<sup>57</sup> and defining it as a “technical language” misses this important characteristic.

While I address insights from various accounts that analyze the legal language as a language of expertise, my focus is on a neglected issue: understanding how constitutional law changes in view of its characterization as a language of expertise. I focus on how an argument becomes a proper or “kosher” constitutional argument, and especially on whether an argument can become part of the language of constitutional law based on public support without going through the procedure of being formally legislated into law.

## 2. Can Constitutional Law Function as a Language of Expertise in View of Public Opinion’s Impact on it?

Saying that constitutional law is a language of expertise is not saying that law is a scientific endeavor, nor is it a claim for formalism in disguise. Christopher Columbus Langdell—the legendary Dean of Harvard Law School—famously argued that “law is a science, and that all the available materials of that science are contained in printed books.”<sup>58</sup> But law could never fulfil Langdell’s hope.<sup>59</sup> One chief reason for law’s inability to function as a proper scientific discipline is that secular law can be amended, through certain mechanisms, to comply with public opinion and social needs.<sup>60</sup> The ethos of science—as captured by the famous story behind Galileo Galilei’s words “and yet it moves”—is to stand in the name of truth against public opinion and social needs.<sup>61</sup> But law can always change if there is enough public support. In his book, *The Structure of Scientific Revolutions*, Thomas Kuhn elaborated on this difference in distinguishing between “the sciences” and “fields like medicine,

57. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 36 (1991) (“[O]ur constitutional narrative constitutes us a people.”).

58. Christopher Columbus Langdell, Dean of Harvard Law School, Remarks at the Quarter-Millennial Celebration of Harvard University (Nov. 5, 1886), in *Harvard Celebration Speeches*, 3 L. Q. REV. 123, 124 (1887).

59. See, e.g., KAHN, *supra* note 19, at xv (“[L]aw is not a science but a practice of living together.”).

60. In addition, while in law the need for an ultimate decision is the aim of the endeavor, in pure scientific disciplines, distilling a scientific proposition is often the final goal. In legal disputes, legal propositions are means to get to a decision. See Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1355 (2016) (explaining that, as opposed to law, arguments in scientific disciplines can “exclusively turn on abstract proposition because there is no judgment imperative”); BRUNO LATOUR, *THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D’ETAT* 205-09 (2010) (distinguishing the difference between scientific knowledge that is established through scrutiny based on peer-review with truthfulness pivoting on its acceptance and judicial lawmaking that is oriented towards the settlement of cases).

61. On the meaning of Galilei’s story for the scientific ethos, see Karl R. Popper, *Three Views Concerning Human Knowledge*, in *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 97 (1965).

technology, and law, of which the principal *raison d'être*, is an external social need . . . .”<sup>62</sup>

In American constitutional law, everything (or almost everything), including the most basic principles, can be changed if there is enough public support. Usually, an act of legislation would achieve the desired change, or if there are constitutional hurdles, a constitutional amendment could incorporate the desired agenda into law.<sup>63</sup> This is true now, as it was in the 1890s. The amendment procedure anchored in Article V of the Constitution and the legislative process aim to create a clear formal distinction between the popular will that controls the process of legislation, and legal reason that controls the legislated text after it was incorporated into the realm of legality. This is the divide between politics and law.<sup>64</sup>

The formal barriers between the realm of politics and the realm of law enable the distinction between the separate logics controlling these realms. After a constitutional amendment or a piece of legislation is adopted, it enters a domain ruled by a different logic than the logic controlling the debates before enactment. The sphere of politics is the realm where will reigns supreme; in the sphere of law, reason is supposed to reign supreme.<sup>65</sup> In the sphere of politics, law is set out in terms of a bargain of interests; in adjudication, it is set out as part of a system of reason.<sup>66</sup> In the same vein, while the nomination of Justices to the Court is undoubtedly affected by politics and public support, upon assuming office, the Justices are supposed to follow legality and reason and remain independent of the very forces that led to their selection.<sup>67</sup> For example, in legislative debates, a statement that “I was elected to promote policy X” would be considered a proper argument. A similar statement by a Supreme Court

62. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 19 (2d ed. 1970).

63. I am cabining the question of unconstitutional constitutional amendments due to its current minor role in American constitutional law. For a discussion of unamendability in the American context, see Richard Albert, *The Unamendable Core of the United State Constitution*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* 13 (Andras Koltay ed., 2015).

64. See, e.g., WILLIAM N. ESKRIDGE JR. & JOHN A. FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 104 (2010) (“Article V has the big advantage of producing recognizable Constitutional law, legitimated by a popular consensus dramatically achieved.”).

65. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 60-65 (1988) (explaining that with the decline of the conception of law as rooted in common religious and moral order, “[p]olitical institutions thus become the forum for the triumph of the will, expressed as positive law, and it is the duty of the legal official to implement the public will”); RICHARD H. FALLON JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 130 (2018) (“If there are places in which it is essential for reason to govern decision making, the Supreme Court numbers among them. The Justices’ core mission involves the provision of reasoned justice under law.”).

66. See KAHN, *supra* note 19, at 123.

67. See Tara Leigh Grove, *Which Textualism?*, 134 *HARV. L. REV.* 265, 268 (2020) (“Thus, upon assuming office, judges are supposed to be independent of the very political and ideological forces that gave them their jobs.”).

Justice (“I was nominated by a Republican President who was elected to promote agenda X”) in her judgment scrutinizing a piece of legislation that promotes this agenda would be considered an improper argument.<sup>68</sup> One may indeed put this type of argument under the category of anti-modalities: arguments used in the political debate yet considered out of bounds in constitutional reasoning.<sup>69</sup>

Until a political initiative is ratified in accordance with the procedure anchored in Article V for constitutional amendments or in accordance with the procedure for passing legislation, it has no formal status in constitutional law.<sup>70</sup> Yet if a constitutional amendment or a law has been enacted according to the proper procedure, it will be incorporated into the domain of constitutional reason (assuming the law is not unconstitutional).<sup>71</sup> In other words, while legislative acts or constitutional amendments are the results of acts of political will, after they are legislated, the interpretation of these norms is entirely in the realm of reason, the realm of expertise.

After the legislative process is complete, the narration of constitutional law doctrine is changed to incorporate the new amendment or the new piece of legislation so that the doctrinal account as a whole remains coherent.<sup>72</sup> At the same time, the amendment or the new legislation is interpreted so as to fit the doctrinal account.<sup>73</sup> This back and forth process ensures that the new normative material is incorporated into the language of constitutional law in a manner that maintains at least some level of systematic consistency and coherency.<sup>74</sup> Even if before the enactment of the constitutional amendment or the new piece of legislation one could not see the proposed added normative material as emanating from the inner logic of constitutional law, following the enactment,

68. Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 6 (1982) (“[o]ne does not see counsel argue, nor a judge purport to base his decision, on arguments of kinship . . .”); KAHN, *supra* note 19, at 123 (“A court does not interpret a law by speaking of the lobbyists’ ambitions; it does not interpret a law by looking to campaign contributions made to the relevant political actors.”).

69. See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 753-56 (2021) (discussing partisan arguments as “plainly impermissible in constitutional decisionmaking”).

70. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 12 (1999) (“Until constructions are ratified by the sovereign people and formally embedded in the supreme law, the Court cannot regard them as interpretable constitutional meaning.”).

71. *Id.* at 11.

72. See RONALD DWORKIN, *LAW’S EMPIRE* 176 (1986) (explaining that integrity is “an adjudicative principle, which instructs that the law be seen as coherent . . . so far as possible”).

73. See FALLON, *supra* note 65, at 130 (“In constitutional law as in morality, we should aim at principled consistency, and we should want our Justices to decide cases with that aim in view.”).

74. *Id.*

expert speakers of the language will find a narrative that creates consistency between it and the rest of the constitutional law material.<sup>75</sup>

An example may help to illustrate these arguments. Currently, burning the American flag is considered a protected expression under the First Amendment.<sup>76</sup> Following Supreme Court judgments on the matter, any competent speaker of the language of constitutional law would say that the claim that burning the flag is not a protected expression is simply mistaken. Even if public opinion polls show that a majority of Americans think that burning the American flag is not protected speech under the Constitution,<sup>77</sup> the claim would still be wrong in terms of constitutional law.

However, if a significant and enduring majority wanted to change this situation, they could instruct their representatives to initiate a process of amending the Constitution so that burning the American flag ceases to be a “protected expression.” After such an amendment has passed, the freedom of speech jurisprudence would not be written as if the new amendment created a rupture in it.<sup>78</sup> Even if, prior to the enactment of the Amendment, experts argued that it did not fit constitutional doctrine, after the Flag Amendment, there would be multiple readings—such as originalist and “living Constitution” readings—of First Amendment doctrine. All of these readings would explain the new Flag Amendment in their terms as another chapter in a continuous coherent story of First Amendment jurisprudence that has a thread of inner logic connecting all its parts.<sup>79</sup> The language of constitutional law would be adjusted to include the amendment as an unquestionable part of it. The politics that led to legislating the Amendment would not enter the legal discourse.<sup>80</sup> In this manner, reason remains supreme in the realm of constitutional law, even though all speakers are aware that political will is responsible for constitutional amendments and legislation.

Of course, one could think of a radical amendment that defies this description in the sense that no expert speaker would be able to narrate the

75. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 29 (1999) (explaining that the legal scholar can always “show how all of the opinions together form a single, rational whole that is the authoritative law”).

76. See *Texas v. Johnson* 491 U.S. 397, 420 (1989); *United States v. Eichman*, 496 U.S. 310, 319 (1990).

77. Peter Hanson, *Flag Burning*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 185 (Nathaniel Persily et al. eds., 2008) (“[P]olls taken immediately after the decision [in *Texas v. Johnson*] show high levels of awareness of the case and overwhelming public opposition to the Court’s decision.”).

78. Cf. DWORKIN, *supra* note 72, at 227.

79. *Id.* at 228-29 (suggesting that the legal materials are imagined as a “chain novel,” an ongoing project with inner integrity authored by one communal expert author).

80. See PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 48 (2011) (“The lawyer does not say the farmers’ lobby or the financial sector produced the law. The politics that accounts for law disappears from view . . .”).



previous doctrine of constitutional law while incorporating the newly amended text. Take, for example, a constitutional amendment crowning the current President to be the authoritarian king of the U.S. Such an amendment would not be an amendment, but a revolution.<sup>81</sup> The difficulty of offering a coherent narrative of constitutional law while incorporating such an amendment demonstrates the revolutionary rupture it would create in constitutional law. For the purposes of this Article, I assume a stable functioning democracy that is not going through a radical shift as exemplified by this hypothetical amendment.

To summarize, any language of expertise requires precise mechanisms that regulate and limit the transformation of arguments from the general discourse into the specialized language. Otherwise, the professional language would collapse and become part of ordinary language.<sup>82</sup> In law, the situation is somewhat different, as any popular agenda can become law if it goes through the procedure of legislation even without adhering to the requirements of the language of expertise.<sup>83</sup>

Procedures of legislation and constitutional amendment are the borderline between the realm of politics that is controlled by will and the realm of law that aspires to be controlled by reason. After acts of public will successfully go through the procedure required for transforming will into a piece of legislation or a constitutional amendment, reason is supposed to take the reins. The development of constitutional law following the addition of new normative material is never presented as a rupture in the logic of constitutional law caused by public will. Legal analysis wishes to have autonomy as a language of expertise by detaching itself from popular will. For this reason, when new legislation is adopted, constitutional doctrine is adjusted so its inner logic can incorporate the new normative material without defying the reign of reason. In other words, the new normative material is never presented as a mere political whim that contradicts the logic of doctrinal development. Rather, it is presented as part of doctrinal development. In this manner, constitutional law constitutes a space in which arguments that did not go through the process of transforming will into reason and do not follow the logic of constitutional reason are excluded.<sup>84</sup>

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81. Cf. CARL SCHMITT, *CONSTITUTIONAL THEORY* 151 (1928) (Jeffrey Seitzer trans. & ed., 2008) (noting that individual constitutional articles cannot be revised in such a way that violates the constitution's fundamental principles: constitutional "revision" is not constitutional "annihilation").

82. See KUHN, *supra* note 62, at 168.

83. See, e.g., LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 42-43 (2019) (contrasting between the judiciary and Congress in terms of their commitment to consistency).

84. See Andreas Grimm, *Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice*, 18 EUR. L.J. 518, 527-28 (2012) ("The law constitutes a certain space of argumentation in which non-legal arguments are refused (no

Without legislation or a constitutional amendment, a constitutional argument that the public accepts and uses but does not correspond to expert use is not supposed to dictate changes in the language of constitutional law.<sup>85</sup> In order to determine whether arguments that did not go through the legislative process are part of the language of law, the legal language requires a viable community of experts to filter the various arguments. This group is responsible for maintaining the border between the popular use of constitutional claims and the professional language of constitutional *law*. Without such a filtering mechanism, constitutional law could never function as a language of expertise, like the language of medicine or engineering.<sup>86</sup> In the next section, I discuss this vital requirement.

### 3. The Role of the Professional Community of Constitutional Experts

Arguments and agendas that fail to successfully go through the procedure for passing legislation or constitutional amendments *and* do not comply with the demands of constitutional law systematic reason are supposed to be vetted out of the constitutional domain. If constitutional law's is a language of expertise, then there must be a professional community of speakers who shares this expertise and, based on their expert knowledge, distinguish between proper and improper uses of the language.<sup>87</sup> As David Luban explains, "[i]nterpretive communities set the inarticulate boundaries of legitimate legal disagreement, beyond which a legal opinion will seem frivolous or even outrageous."<sup>88</sup>

Two examples may clarify this point. A politician who was born by cesarean section runs for Presidency. A claim is raised that she is not a "natural born citizen" as required in Article II of the Constitution because she was not born

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litigant would ever argue politically, or with reference to certain self-interests in front of a court). Although interests might be a legitimate motive for making a claim, the law has strict rules about which arguments are acceptable and which are not.").

85. See Kent Greenwalt, *How to Understand the Rule of Recognition and the American Constitution*, in *THE RULE OF RECOGNITION AND THE US CONSTITUTION* 145, 166 (Matthew Adler & Kenneth Einar Himma eds., 2009) ("No one, I think, would say that a bare majority of citizens with an opinion should carry the day on a constitutional issue against the reflective view of most judges and other officials.").

86. Roscoe Pound described his sociological jurisprudence as a form of "social engineering." See ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 164-65 (1930).

87. See Wouter G. Werner, *The Politics of Expertise: Applying Paradoxes of Scientific Expertise to International Law*, in *THE ROLE OF 'EXPERTS' IN INTERNATIONAL AND EUROPEAN DECISION-MAKING PROCESSES* 44, 61-62 (Monika Ambrus et al. eds., 2014) (applying the idea of epistemic communities to international law); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *INT'L ORG.* 1, 16 (1992) ("Epistemic communities need not be made up of natural scientists; they can consist of social scientists or individuals from any discipline or profession who have a sufficiently strong claim to a body of knowledge that is valued by society.").

88. David Luban, *Military Necessity and the Cultures of Military Law*, 26 *LEIDEN J. INT'L L.* 315, 318 (2013).

“naturally,” and thus she cannot serve as President. The claim would not fly. There is a good chance that a lawyer who raises this claim would be laughed out of court, and rightly so.<sup>89</sup> It is possible to imagine using the phrase “natural born citizen” to exclude people born in a cesarean section. However, the current community of constitutional speakers views a claim based on such a use of the phrase as outside the language of constitutional law.

Another more realistic example is the way the legal system treated the claim that the state is not allowed to tolerate and, therefore, enable “private centers of economic and political power to subject women to discrimination and degraded conditions”.<sup>90</sup> William Eskridge and John Ferejohn argue that had a lawyer raised this claim in the early 1970s, she would “have been laughed out of court.”<sup>91</sup> At that period, the professional community saw this claim, although phrased in constitutional terms, as outside the language of constitutional law. This is not to say that this claim could not work in the political realm. Arguments of this genre empowered political groups that persuaded Congress to adopt the Pregnancy Discrimination Act of 1978.<sup>92</sup> As Eskridge and Ferejohn write, “the deliberative norms structuring congressional deliberations are not straitjacketed by legal doctrines . . . Congress can hear vaguely expressed claims that resonate in the shared experience of many Americans.”<sup>93</sup> The “straitjacket” of legal doctrine, that prevented these claims from succeeding in courts, is part of what makes the language of constitutional law a language of expertise that is able to serve as a disciplinary tool for distinguishing between proper constitutional arguments and claims that use constitutional lingo but are part of the public discourse.

Gerald Postema offers the test of being “laughed out of court” to vet non-kosher constitutional arguments out of the legal discourse.<sup>94</sup> He writes that in law, there are issues that are “professionally determinate” in the sense that “duly credentialed members of the legal profession, viewing the matter non-strategically, would have no doubt but that the legal materials yield a unique and dispositive judgment regarding the matter, so that any argument aimed at undermining the judgment would be laughed out of court.”<sup>95</sup> Based on such a

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89. See Lawrence Friedman, *An Idea Whose Time Has Come - The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 ST. LOUIS U. L.J. 137, 140 n.19 (2008) (explaining the cesarean section example).

90. ESKRIDGE & FEREJOHN, *supra* note 64, at 30 (“Federal courts will generally not recognize Constitutional claims based upon the state’s failure to help its citizens, as opposed to its commission of harm against them.”).

91. *Id.*

92. *Id.* at 33.

93. *Id.* at 56.

94. GERALD J. POSTEMA, *LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD* 228 (2011).

95. *Id.*

criterion, as a matter of regular practice, lawyers tell their clients that certain claims simply cannot fly.

Adopting the idea that constitutional law is a language of expertise does not mean adopting a formalist approach that views judicial decisions as mechanically deduced from the law. Instead, the community of experts in constitutional law acknowledges the indeterminacy difficulty and that, in many cases, legal norms are unable to determine legal results.<sup>96</sup> Given the range of available interpretations, which are all within the language of constitutional law, the speakers of the language produce answers using their professional discretion.<sup>97</sup>

Yet a vital limitation remains: the method for evaluating expert knowledge cannot be democratic.<sup>98</sup> In languages of expertise, the question of which argument is proper (or “kosher”) cannot be determined by popular will or the prevalent use of an argument. Expert knowledge cannot be determined by the indiscriminate engagement of the public.<sup>99</sup> To maintain its status as a language of expertise, the borders of the language must be guarded by a community of experts.<sup>100</sup> By determining whether an argument is part of the language of constitutional law, experts maintain the discipline of constitutional law as a field of expertise.<sup>101</sup> As Robert Post stresses, “[t]he creation of reliable disciplinary knowledge must accordingly be relegated to institutions that are not controlled by the constitutional value of democratic legitimation.”<sup>102</sup> Otherwise, a danger lurks: questions of expertise will be answered according to public opinion rather than according to disciplinary criteria.

In ordinary languages, in the long run, widespread use by the public determines whether an utterance is made part of the language.<sup>103</sup> In ordinary languages, the concept of “correctness” cannot prevent a change in the language. Even those in sociolinguistic studies who view correctness in ordinary languages

96. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 200-02 (1992).

97. Cf. WHITE, *supra* note 26, at 59-62 (elaborating the ideology behind the establishment of “Restatements”—which are identified with legal realism—as expressing the idea that legal experts distill the law using their professional discretion rather than mechanically discovering it).

98. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 29 (2012).

99. See KUHN, *supra* note 62, at 169-70.

100. See POST, *supra* note 98, at 31.

101. See KUHN, *supra* note 62, at 169-70, 182.

102. POST, *supra* note 98, at 31.

103. See Brian D. Joseph & Richard D. Janda, *On Language, Change, and Language Change - Or, of History, Linguistic, and Historical and Historical Linguistic*, in *THE HANDBOOK OF HISTORICAL LINGUISTICS* 3, 18 (B. Joseph & R. Janda, eds., 2003) (explaining that change in a natural language occurs when all—or at least most—of a speech community adopts a new feature); Edgar C. Polomé, *Language Change and Saussurean Dichotomy: Diachrony Versus Synchrony*, in *RESEARCH GUIDE ON LANGUAGE CHANGE* 5-6 (E.C. Polomé ed., 1990) (explaining that a change in a natural language occurs only after it is accepted by the speech community).

as based “upon the usage of the speakers of the language who represent the elite and whose behavior in general constitutes the model for society”<sup>104</sup> do not deny that as a descriptive matter, “correctness” cannot prevent language change.<sup>105</sup> In the long run, usage unencumbered by schooling or even grammar reigns supreme in ordinary languages.<sup>106</sup> Social needs may dictate changes against “correct” use.<sup>107</sup> However, in a language of expertise, correctness, as determined by experts, can prevent changes.<sup>108</sup> For this reason, claims that are detected by expert speakers of constitutional law as ludicrous defy the logic of constitutional law as a language of expertise and need to be relegated from the constitutional legal discourse unless they are enacted into law according to the proper procedure.<sup>109</sup>

### B. Identity and Expertise

Law needs to function simultaneously for professionals working within the legal system and citizens living under it.<sup>110</sup> For the former group, law can function as a language of expertise. However, for the general population, to guide their behavior according to the law, it needs to be understood by the lay person. While this tension is common to all fields of law,<sup>111</sup> it is exacerbated in American constitutional law because the Constitution plays a central role in

104. John Myhill, *A Parameterized View of the Concept of ‘Correctness’*, 23 MULTILINGUA 389, 391 (2004).

105. *Id.* at 413 n.3.

106. See JÜRGEN LEONHARDT, *LATIN: STORY OF A WORLD LANGUAGE*, 6-7 (2013); Myhill, *supra* note 104, at 392-93, 400-01, 408; Veda R. Charrow, Jo Ann Crandall & Robert P. Charrow, *Characteristics and Functions of Legal Language*, in *SUBLANGUAGE* 175, 179 (Richard Kittredge & John Lehrberger eds., 2015) (“Ordinarily, languages change over time through *use* . . . But legal language develops many of its forms and meanings through a legal – and not an ordinary linguistic – process . . . It is the courts, legislators, and governments agencies, which decide the legal meanings of terms, not ordinary usage and historical change.”).

107. JEAN AITCHISON, *LANGUAGE CHANGE: PROGRESS OR DECAY?* 153-56, 176-77 (4th ed. 2013) (“Language does not show any tendency to avoid potential problems.”).

108. While scholars have detected that law is more conservative and less malleable to change than ordinary language, they have not connected this point to its nature as a language controlled by experts. See Peter M Tiersma, *Why is Legal Language So Conservative?*, in *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA* 11 (Lawrence M. Solan et al. eds., 2015).

109. Bruce Ackerman, *Interpreting the Women’s Movement*, 94 CAL. L. REV. 1422, 1425 (2006) (“*Professional culture* specifies the range of argumentative moves considered legitimate where law is spoken by knowledgeable lawyers and judges.”).

110. Frederick Schauer, *On the Relationship Between Legal and Ordinary Language*, in *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA*, *supra* note 108, at 35.

111. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 586 n.35 (1987); Morrison, *supra* note 52, at 272.

determining American national identity.<sup>112</sup> Constitutional law serves in many ways as the language through which fundamental issues of American identity are discussed.<sup>113</sup> This identity function of American constitutional law creates a series of problems for conceptualizing it as a language of expertise.<sup>114</sup>

First, as a language of expertise, constitutional law requires systematic rationality while the manner in which we discuss our identity is not always consistent and, at times, is even a-rational.<sup>115</sup> After all, political identity is discussed in existential terms and is not a conclusion of an argument, nor is it a logically organized scheme.<sup>116</sup> It is unclear whether any language can fully capture the energy at the core of political identity. If such energy can be translated into language, poetry and literature may serve as better mediums to capture it than the language of constitutional law. Lawyers are certainly no experts on identity questions.

Second, popular sovereignty's central role in the constitution-based American identity further intensifies the tension between constitutional law's function as a language for discussing identity issues and its function as a language of expertise.<sup>117</sup> If American constitutional identity is constituted by the voice of "We the People," how can the language of constitutional law be detached from the people and serve as a language of experts?<sup>118</sup>

From the outset, the idea that experts would control the interpretation of the constitutional text conflicted with the American Revolution's aim that the people would rule their constituting act.<sup>119</sup> Chief Justice Marshall gave expression to this position in *McCulloch v. Maryland*, writing that the

112. See, e.g., Tracy B. Strong, *Is the Political Realm More Encompassing than the Economic Realm?*, 137 PUB. CHOICE 439, 448 (2008) ("[W]e do know that the Constitution is the final arbiter of what it means to be an American, even if I may not always know, or agree with you, as to what that means in any particular instance.").

113. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 477 (1989) ("[T]he Constitution is best understood as . . . an evolving language of politics through which Americans have learned to talk to one another in the course of their centuries-long struggle over their national identity.").

114. Cf. FALLON, *supra* note 65, at 58 ("The Constitution is written in English and was addressed to the general public, not just to lawyers.").

115. See Bassok, *supra* note 31, at 135.

116. See KAHN, *supra* note 19, at 235; KAHN, *supra* note 16, at 23.

117. On the centrality of popular sovereignty to American constitutional identity see for example, Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 265 (2004).

118. See KAHN, *supra* note 16, at 58 (explaining that in view of the role constitutional law plays in term of self-authorship, "the study of legal doctrine can never teach more than a part of the law.").

119. See THOMAS GUSTAFSON, REPRESENTATIVE WORDS: POLITICS, LITERATURE, AND THE AMERICAN LANGUAGE, 1776-1865, at 13 (1992); Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMANS. 295, 304 (2011) (explaining that during the founding era, "[p]roponents of a lawyer's constitution clashed with champions of a people's constitution.").

Constitution cannot properly “partake of the prolixity of a legal code” because if it did, it would “never be understood by the public.”<sup>120</sup> Marshall viewed the language of constitutional law as continuous with ordinary language.<sup>121</sup>

Moreover, the Revolution’s aim was not only that the People control their destiny through deciding on their constituting act but also that they would control the language with which this act is expressed.<sup>122</sup> The American Revolution created an analogy between opposition to British experts controlling ordinary English language and opposition to legal experts controlling constitutional law.<sup>123</sup> The Revolution was viewed by many not only as an attempt to ensure responsiveness to the American people in terms of political representation, but also in terms of linguistic representation. It was an attempt to ensure the control of popular sovereignty not only over politics but also over the English language.<sup>124</sup>

Letting the people control the language of constitutional law at that period meant that no clear divide existed between law and politics, and as a result, a “political-legal” language existed.<sup>125</sup> The public discourse was conducted in a dialect in which the political and the legal perspectives were indistinguishable. In other words, formulating an argument in political terms meant formulating it in legal terms and vice versa.

However, even during the Republic’s early days, many of the Founders viewed the Constitution as creating a language of expertise analogous to the languages of science.<sup>126</sup> These Founders held a negative view of popular opinion and designed the judiciary to rely on its legal expertise to counter shifts in popular opinion that contradict the Constitution.<sup>127</sup> According to Hamilton, expert knowledge is the tool that enables judges to safeguard the Constitution

120. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

121. See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 260 (1984) (noting that Marshall “defines the language of the Constitution, and hence the language of this opinion and of the law generally, as continuous with ordinary language and capable of the same richness, complexity and variation—indeed, of the same capacity for inconsistency.”); GUSTAFSON, *supra* note 119, at 294 (“For Marshall, the Constitution as a law cannot be severed from the language of the people. The terms of the social contract participate in the rules and conventions of the linguistic contract.”).

122. See GUSTAFSON, *supra* note 119, at 31-39, 199, 303-04.

123. *Id.* at 38.

124. See *id.* at 95; Cornell, *supra* note 119, at 304.

125. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 24, 92 (2004).

126. See, e.g., GUSTAFSON, *supra* note 119, at 272-73.

127. See, e.g., Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405, 410-11 (2004); PAUL O. CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* 203 (2003); THOMAS R. MARSHALL, *AMERICAN PUBLIC OPINION AND THE MODERN SUPREME COURT, 1930-2020: A REPRESENTATIVE INSTITUTION* 11-12 (2022).

from “the effects of occasional ill humors in the society.”<sup>128</sup> Hamilton continues and writes that judges as “men, selected for their knowledge of the laws, acquired by long and laborious study,” are better equipped to ensure that the Constitution would not be breached than elected representatives.<sup>129</sup> The required legal expertise is one reason for Hamilton’s objection that the final appeal in cases will be to the elected Senate.<sup>130</sup>

Those who believed in legal expertise were also not oblivious to the analogy between legal language and ordinary language. The short-lived American Academy of Language and Belles Lettres was created in 1820 as a “supreme court of language” with two Supreme Court Justices as vice presidents and a constitution modeled after the US Constitution.<sup>131</sup> The Academy’s foundational idea was to entrust experts with the task of guiding society on the proper use of the English language based on an analogy to the Supreme Court as the authority controlling the borders of the constitutional language.<sup>132</sup>

The third difficulty in viewing constitutional law as a language of expertise when identity issues are at play is normative. Constitutional issues that relate to identity are fundamental to many Americans.<sup>133</sup> In a democratic society that values deliberation and participation in vital foundational questions, the multiplicity of voices within American society needs to be voiced in the language in which identity issues are discussed and decided.<sup>134</sup> In other words, if the language of constitutional law is the frame through which identity issues are discussed, there is a strong normative argument that the language of

128. *The Federalist No. 78*, *supra* note 2, at 396 (Alexander Hamilton). See also Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1071 (2007) (explaining that according to Hamilton the judiciary was a safeguard against surges in public opinion based on its knowledge of “strict rules and precedents.”); CARRESE, *supra* note 127, at 197, 202-03.

129. *The Federalist No. 78*, *supra* note 2, at 408 (Alexander Hamilton).

130. *Id.* See also CARRESE, *supra* note 127, at 197 (explaining that Hamilton viewed the judiciary as “a body of lawyers elevated to the bench and serving as a depository not of force or will but legal judgment.”).

131. See GUSTAFSON, *supra* note 119, at 41, 306.

132. See *id.* at 40-41.

133. Cf. Yael Tamir, *LIBERAL NATIONALISM* 73 (1993) (“Membership in a nation is a constitutive factor of personal identity. The self-image of individuals is highly affected by the status of their national community.”).

134. See Stephen Macedo, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 97 (1990) (“[W]e have strong reasons of political morality to resist relegating questions of basic political morality to the sphere of esoteric legal craft. A liberal polity makes deliberation on basic liberal rights and principles a matter of public concern and participation, legal arenas are especially apt to take seriously the imperatives of public justification.”).



constitutional law should be accessible and understandable to the lay person and not only to professionals.<sup>135</sup>

*C. Reason vs. Will and Legality vs. Legitimacy*

The division between law and politics has been understood to allow any substantive agenda to become law—and thus move from the political realm into the legal realm—as long as it goes through the proper legislation or constitutional amendment procedure. From the moment an agenda has gone through the formal procedure of enactment and becomes part of the realm of legality, it is reigned by reason. Popular will is the basis for valid legal authority, but once the legislation process is over, popular will is irrelevant to the power of legal arguments. After passing the divide between politics and law, the public will that allowed the law to pass becomes irrelevant.<sup>136</sup> In the realm of legality, whatever the reasoning given to a legal argument, the attempt is to convince based on the argument's merits, not to compel based on public support. Reason-based arguments can use argumentative tools such as analogies but can also be based on values, policies, or history.<sup>137</sup>

The concept of legitimacy is central to legal and political discussions.<sup>138</sup> In discussions on judicial legitimacy, the concept is used in various manners and has accumulated multiple meanings, making, at times, the use of the concept ambiguous and confusing.<sup>139</sup> In constitutional discourse, saying that a particular judgment is illegitimate means that the judgment lacks proper justification (normative legitimacy) or does not enjoy public support (sociological legitimacy).<sup>140</sup> Similarly, as an institution, the Court may lack proper justifications for its authority (flawed normative legitimacy) or lack enduring public support for its authority (low sociological legitimacy).<sup>141</sup>

Given the various uses and multiple meanings the concept of legitimacy has, suggestions were made to abandon this concept and replace it with several new

135. GUSTAFSON, *supra* note 119, at 31; Ming-Sung Kuo, *Whither Judicial Dialogue after Convergence? Finding Transnational Public Law in Nomos-Building*, 19 INT'L J. CONST. L. 1536, 1538 (2021).

136. See KAHN, *supra* note 75, at 49 (“The process of law-making is political; politics ends, however, once law begins.”).

137. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 10-11 (1996) (discussing systematic integrity and consistency as constraints on adjudication in constitutional law cases).

138. See, e.g., EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 144-60 (2005) (discussing the centrality of the concept of legitimacy).

139. See, e.g., FALLON, *supra* note 65, at 7 (“‘Legitimacy’ is a word with many meanings. When we speak about legitimacy, it is easy to talk ourselves into confusion.”).

140. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 *passim* (2005) (discussing various concepts of legitimacy in the context of constitutional law).

141. See, e.g., Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2244-46 (2019) (discussing the two understandings of institutional legitimacy).

concepts that more accurately distinguish between the various sub-meanings of this multi-layered concept.<sup>142</sup> While these suggestions have merits, in this Article, I continue to use the concept of “legitimacy” because I aim to show that a change in how constitutional discourse has used and understood the concept of judicial legitimacy and related concepts shows something important regarding American constitutional law in the current era.

In the following sections, I offer an analysis of constitutional discourse since the 1930s according to a grid of legality, legitimacy, identity, and expertise. In a nutshell, my argument is that a switch from understanding judicial legitimacy in terms of expertise to understanding it in terms of public support has led the Court to forsake constitutional law as a language of expertise. At least in salient cases, legitimacy—in terms of public support—has become the decisive metric, while legality—in the sense of legal correctness—has been pushed to the sidelines. This development has been intensified by the growing influence of the Court’s judgments over issues of national identity. Below, I describe the Court’s changing understanding of judicial legitimacy and its effects on legality using several judgments that are important signposts in this development.

### III. THE ROAD TO LEGITIMACY WITHOUT LEGALITY

#### A. *Butler and Legitimacy in Terms of Legality*

The period between the latter decades of the nineteenth century and up until the 1930s was the heyday of understanding judicial legitimacy in terms of legal expertise.<sup>143</sup> The *Butler* judgment captures this understanding well.<sup>144</sup> In *Butler*, the Court invalidated the first Agricultural Adjustment Act on the grounds that Congress lacked the power to tax agricultural processors in order to subsidize farmers as part of the effort to increase farms’ income.<sup>145</sup> It was decided in January 1936 during a period of high tension between the Court and President Roosevelt over the New Deal reforms.<sup>146</sup>

Speaking for a majority of six justices, Justice Owen J. Roberts rejected the claim that “the court assumes a power to overrule or control the action of the

142. See, e.g., RUBIN, *supra* note 138, at 144-78 (suggesting replacing the concept of legitimacy with the concept of compliance).

143. See, e.g., G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME 2: FROM RECONSTRUCTION THROUGH THE 1920S, at 359 (2016) (“[B]oth nineteenth-century critics and judges assumed that law was ‘out there,’ capable of being discerned and applied by persons with judicial training, and that in discerning and applying legal principles . . . judges were not acting in the same fashion as other elected officials.”); WHITE, *supra* note 26, at 401-04 (discussing the “premodern conceptions of law and judging” that were controlling during this period).

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

145. *Id.* at 78.

146. See WHITE, *supra* note 26, at 174-79.

people's representatives."<sup>147</sup> He stressed that "[w]hen an act of Congress is appropriately challenged," all the Court does is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."<sup>148</sup> Afterwards, the Court "announce[s] its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment."<sup>149</sup> In this last sentence, Roberts is alluding to Alexander Hamilton's famous dictum in the Federalist No. 78. Hamilton wrote 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 . . . ."<sup>150</sup> Roberts not only adheres to the idea that the Court's expertise ("judgment") explains the way it decides cases but also follows Hamilton's vision that the Court's legitimacy ("[t]he only power it has") stems from its expertise. A similar reading of the Federalist No. 78 was expressed by Justice David Brewer and reflected two of pillars of constitutional discourse of that era: first, constitutional law was understood as a language of expertise, and second, the Court's legitimacy was understood in terms of expertise.<sup>151</sup>

In understanding this era, the first step is to acknowledge the minimal role the Court had in discussions over American national identity. After the Civil War, there was a growing acceptance that Americans share one national identity,<sup>152</sup> as was evident in the growing acceptance of speaking of *the* United States rather than *these* United States.<sup>153</sup> While American national identity did solidify as a result of the Civil War,<sup>154</sup> the Court's role in maintaining that identity through its interpretations was significantly less central than today. One chief reason for the Court's narrow role in identity issues is the colossal failure of the Court's judgment in *Dred Scott*.<sup>155</sup> Following this judgment—that many

147. *Id.* at 62.

148. *Id.*

149. *Id.*, at 62-63.

150. *The Federalist No. 78*, *supra* note 2, at 392 (Alexander Hamilton).

151. See David J. Brewer, "The Movement of Coercion," address before the New York Bar Association, January 17, 1893, available at the Minnesota Legal History Project: <http://www.minnesotalegalhistoryproject.org/> [<https://perma.cc/SJB4-EJJH>]. See also WHITE, *supra* note 26, at 401-03; WHITE, *supra* note 143, at 355-60, 369, 372-73, 378.

152. See e.g., SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 108 (2004) ("[A]fter the Civil War the supremacy of national identity became firmly established, and the era from the 1870s to the 1970s was for America the century of nationalism triumphant").

153. See Minor Myers, *Supreme Court Usage & the Making of an 'Is'*, 11 GREEN BAG 457 (2008).

154. See, e.g., MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 53-54 (2006); JOHN A. HALL & CHARLES LINDHOLM, IS AMERICA BREAKING APART? 31 (1999) ("It was only in the middle of the nineteenth century, as the result of the Civil War, that the definite, if imperfect step to a unified nation-state was finally taken.").

155. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

scholars view as one of the causes of the war<sup>156</sup>—the Court’s reading of the Constitution was not considered as a basis for a unifying identity whose focal point is the Constitution.<sup>157</sup> The idea that constitutional law, as interpreted by the Supreme Court, could serve as the reference point of American national identity simply did not have much traction during that period.<sup>158</sup> Subsequently, constitutional law did not need to fulfil its most political function as an identity project, and a boundary was erected between ordinary language and constitutional law. This development allowed the view that constitutional law is a language of expertise to become dominant.<sup>159</sup>

In post-Civil War America, the community of jurists viewed constitutional law as a language of expertise in which reason reigned supreme.<sup>160</sup> In the legal community, the general belief was in the “rationalistic ordering of the whole legal universe.”<sup>161</sup> All players acted under the assumption that the metric for measuring the Court’s adjudication was its adherence to the standards of legality—i.e., to the requirements of constitutional doctrine.<sup>162</sup>

156. See Roberta Alexander, *Dred Scott: The Decision that Sparked a Civil War*, 34 N. KY. L. REV. 643, 643 (2007).

157. See GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 56 (2000) (“Where antebellum lawyers saw society as an organic constitution of law and institutions . . . [after the Civil War] [l]aw could only be legitimate as an instrument rather than a constituent of society.”).

158. See LAURA KALMAN, FDR’S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM 18 (2022) (noting the belief during this period that the Court should evade “hot-button issues since its *Dred Scott* decision pulled the country further down the road to civil war.”).

159. See KAHN, *supra* note 19, at 4 (“Over the course of the nineteenth century, there is a movement from project to system as the dominant way of imaging law, among American lawyers, judges, politicians, and scholars.”).

160. See, e.g., GUSTAFSON, *supra* note 119, at 54–55; WHITE, *supra* note 143, at 376 (explaining that an “overwhelming majority” of the justices at that period “took for granted that judicial pronouncements as to the substantive content and implication of ‘the law’ governing a particular dispute could be presumed to be faithful rendition of *the law itself*. . .”).

161. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RSCH. L. & SOC’Y 3, 3–4 (1980). See also WHITE, *supra* note 26, at 80 (discussing a “shared commitment” among scholars, before the rise of legal realism “to the centrality of doctrine, and doctrinal analysis, in investigations of the nature, sources and methods of American law.”); KAHN, *supra* note 19, at 154 (arguing that by the end of the nineteenth century, “[t]he constitution had once been politics become law”).

162. See, e.g., WHITE, *supra* note 19, at ix (arguing that during this period, “judicial decisions achieved legitimacy when the opinions accompanying them demonstrated that judges were merely discerning finite and transcendent legal principles and applying them to cases.”); BRIAN Z. TAMANAHA, LAW AS MEANS TO AN END: THREAT TO THE RULE OF LAW 17–18, 24–27 (2006) (describing the agreement among legal historians that non-instrumental views of law according to which law was understood as a language of experts were controlling between the 1850s and the 1930s); LESSIG, *supra* note 83, at 224 (describing how during the nineteenth-century, judges, lawyers and the public thought of law “to be a certain kind of science . . .”).

The best proof that constitutional law was understood as a language of expertise during this period is provided by the episode that ended the period: the New Deal crisis and the Court's reaction to it. As will be explained in the following section, any explanation of the change in the Court's interpretation of the Constitution during the New Deal crisis necessitates an acceptance of the position that the language of constitutional law was understood prior to the 1930s as a language of expertise that is able to constrain the Court.

*B. The Lochner Lesson: The Failure of Legality without Legitimacy*

The story of "the switch in time" describes how the Supreme Court broke doctrinal constraints and revolutionized constitutional law following a clash with President Franklin D. Roosevelt over the New Deal legislation. In a short period during the spring of 1937, the Court upheld a state minimum wage law,<sup>163</sup> the National Labor Relations Act,<sup>164</sup> and the Social Security Act<sup>165</sup> in judgments that, on their face, contrasted its prior decisional line represented in cases such as *Lochner*<sup>166</sup> and *Adkins*.<sup>167</sup> While the story of the switch is an oft-told tale, let me briefly re-tell it while focusing on the perspective of constitutional law as a language of expertise.

The conventional narrative presents the Court's adjudication between 1869 and 1932 as a "dark age" in which the Court was legally mistaken. According to this description, the New Deal reforms compelled the Court to rediscover the "true" Constitution and overturn its own precedents.<sup>168</sup> In recent decades, revisionist constitutional historians have shown that it is hard to see how prior to the New Deal reforms the Justices could have decided differently given the available legal materials at that period.<sup>169</sup> For my purposes, the important point is that according to both of these historical narratives, for the legal community at the beginning of the twentieth century, the decisional line of *Lochner* and *Adkins* was considered legal in terms of legal expertise.<sup>170</sup>

163. *West Coast Hotel*, 300 U.S. at 396-97.

164. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

165. *Helvering v. Davis*, 301 U.S. 619, 645-46 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548, 613-16 (1937).

166. *Lochner*, 198 U.S. at 45.

167. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

168. See, e.g., ACKERMAN, *supra* note 57, at 62-67 (presenting the "myth of rediscovery," and claiming that "modern judges do resist the very suggestion that *Lochner* might have been a legally plausible decision in 1905 . . .").

169. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 97-100 (1998); ACKERMAN, *supra* note 57, at 100-03 (concluding that it is hard to see how the *Lochner* Court could have decided otherwise).

170. See, e.g., BALKIN, *supra* note 18, at 177 ("In 1910 many mainstream lawyers and legal scholars would have doubted that either *Lochner* or *Plessy* was wrong, much less wrong the day they were decided.").

The accounts that detect a switch in constitutional doctrine as a result of the clash between the Court and Roosevelt are based on the premise that an understanding of constitutional law as a language of expertise prevailed prior to the clash. Otherwise, if constitutional law was not understood as constraining professional language for the Court to “break” free from, the interpretative shift would have been a non-issue and hardly considered a “switch in time.”

Constitutional historians who dispute whether and to what extent such a switch has occurred as a result of the clash also surely agree that a language of expertise constrained the Court and led it to overrule cases like *Adkins*.<sup>171</sup> After all, the entire explanation of those who deny a switch due to political pressure is based on establishing a continuous line of adjudication driven by constraints of constitutional law as a language of expertise unaffected by external noise.

While all these explanations share the premise that constitutional law was viewed as a language of expertise prior to the clash, the question of whether public opinion is responsible for the change in the Court’s approach towards economic legislation remains contested.<sup>172</sup> The New Deal crisis was the first time in history that the Justices could receive an independent indication—holding the allure of science—of public support for the Court thanks to the invention of public opinion polling in the 1930s.<sup>173</sup> Although it was not until the 1960s that the Gallup and Harris organization began to track public support for the Court and its decisions in any systematic way, there was polling data on support for the Court during the New Deal crisis.<sup>174</sup> The results of opinion polls that measured support for the Court and its judgments were published in real-time in the media during that period. It was the first time public opinion polls guided politicians and the first time they and the Justices saw the levels of the Court’s public support in real time.<sup>175</sup>

Several explanations of the Court’s “switch in time” view the threat posed by Roosevelt’s plan to pack the Court and the pressure created by public opinion

171. See, e.g., CUSHMAN, *supra* note 169, at 11-23 (arguing that it is “unlikely” that the Court’s 1937 shift was a response to the Court-packing plan rather than a result of internal doctrinal development); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1935-39 (1994).

172. See, e.g., TAMANAHA, *supra* note 162, at 80 (“Justices who later spoke about the event denied that they had caved to pressure. A few scholars support their assertion.”).

173. See THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 1-2, 29, 77 (2008) (“Until the 1930s there was no direct test by which to tell whether or not Supreme Court decision agreed with American public opinion.”).

174. See Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1210-12 (1986).

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

that favored New Deal policies as central to explaining the switch.<sup>176</sup> Gregory Caldeira goes as far as arguing that during the four months in 1937 when Roosevelt was trying to “pack” the Court, an “intimate connection” existed between “the actions of justices and support for the Supreme Court,” as reflected by public opinion polls.<sup>177</sup> But even if no such direct connection existed, it is hard to dispute that as a result of this period, the Court had “been baptized ‘in the waters of public opinion.’”<sup>178</sup> With the results of public opinion polls looming in the background, one can understand Justice Sutherland’s emphasis in his *West Coast Hotel v. Parrish* dissent—the case most identified with overturning the *Lochner* decisional line—on the loss of the “benefit expected from written Constitutions” if “public opinion” is able to bend constitutional interpretation.<sup>179</sup>

The failure of Roosevelt’s Court-packing plan, coupled with the Court’s retreat from the *Lochner* decisional line, taught all players valuable lessons on the potential power of public opinion. Scholars have emphasized that the failure of Roosevelt’s plan demonstrated that the combination of public support for the Court (and not necessarily its decisions), as expressed in opinion polls,<sup>180</sup> is a powerful weapon independent of the power of government.<sup>181</sup> Public opinion polls demonstrated to politicians and the Justices how entrenched judicial independence and judicial review have become in the American mind.<sup>182</sup>

176. See, e.g., TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 167, 198-99 (2011) (showing that “following the major confrontation in 1937, the Court retreated and used its power of judicial review at the lowest level since the nineteenth century . . .” and that historical accounts attribute “a causal role to the Court-packing plan and the elections of 1936” in explaining the Court’s decisions).

177. Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR’s Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1139, 1149-50 (1987).

178. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 143 (1995).

179. *West Coast Hotel*, 300 U.S. at 404 (Sutherland, J., dissenting).

180. See, e.g., Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 67-74 (2002) (surveying public polls demonstrating that by and large, the public did not support Roosevelt’s Court-packing plan); JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGEMENTS OF THE AMERICAN PEOPLE* 126 (2009) (“[W]e believe Franklin Roosevelt’s failure in his constitutional scheme in the 1930s was in part due to the institutional legitimacy the Supreme Court enjoyed among the American mass public.”).

181. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 196 (2009) (“The true significance of 1937 requires no hidden clues; it was plain for all to see. The American people signaled their acceptance of judicial review as the proper way to alter the meaning of the Constitution, but only so long as the justices’ decisions remained within the mainstream of popular understanding.”).

182. See, e.g., KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 268 (2007) (“The public and political opposition to the Court-packing plan demonstrated the

However, the lesson the Court learned from this episode has another side: public opinion may compel the Court to overturn constitutional decisions that the Justices believe are legally correct. Without legitimacy in the sense of public support, a constitutional interpretation that was considered legal became unlawful.<sup>183</sup> Hence, legality—in the sense of correctness according to the standards of expert doctrinal reasoning—is not enough.

### C. *The Brown Lesson: Public Support Legitimizes Illegality*

For the legal community during the 1950s, it was extremely difficult to justify *Brown*<sup>184</sup> in terms of legality.<sup>185</sup> At that period, the scholarly consensus was that the original understanding of the Fourteenth Amendment did not support the argument that school segregation was unconstitutional.<sup>186</sup> For this reason, it is not surprising that in his research memo in *Brown*, Alexander Bickel, Justice Frankfurter's clerk at that time, directed the justices away from a historical-based argument.<sup>187</sup> Eventually, the Court even stated explicitly in its judgment that the historical sources for the meaning of the Fourteenth Amendment were “not enough to resolve the problem with which we are faced [but] [a]t best they are inconclusive.”<sup>188</sup> Since there were no precedents to

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substantial authority the Court still possessed, even among those who disagreed with many of its substantive decisions.”); Richard H. Pildes, *Is the Supreme Court a 'Majoritarian' Institution?*, 2010 SUP. CT. REV. 103, 132 (2010) (“[O]ne can read the 1937 experience as suggesting that, for better or worse, judicial independence and the authority of the Court have become so entrenched in America that even the most popular politicians play with fire if they seek too directly to take on the power of the Court.”).

183. Cf. FALLON, *supra* note 65, at 117 (“During that period, policies and programs that once would have been constitutionally unacceptable were, by nearly consensus understanding, constitutionally permissible.”).

184. *Brown*, 347 U.S. at 483.

185. See, e.g., HORWITZ, *supra* note 96, at 258 (arguing that *Brown* “produced a sharply critical reaction among elite legal thinkers, for it challenged at the deepest levels their efforts to re-establish a neutral, value-free system of constitutional doctrine.”); Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 32, 47 (2004) (“the Court’s opinion [in *Brown*] was unsatisfactory to many conventional legal analysts of the era . . .”); THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 55-58 (2004) (describing scholarly critique of *Brown*).

186. See, e.g., FALLON, *supra* note 65, at 52 (“a good deal of historical evidence suggests that most of those who lived at the time of the ratification of the Fourteenth Amendment did not understand the Equal Protection Clause as barring racially discriminatory public schools . . .”).

187. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (arguing that the framers of the Fourteenth Amendment did not intend to prohibit segregated public schools). See also Alferd H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 THE SUP. CT. REV. 119, 144-45 (1965) (discussing Bickel’s memo); JACK M. BALKIN, *LIVING ORIGINALISM* 105 (2011) (“[At that period], most people accepted Alexander Bickel’s conclusion that the framers of the Fourteenth Amendment did not intend to prohibit segregated public schools.”).

188. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).



support its position, the Court relied on the authority of social science, stating that this “modern authority” had now demonstrated that segregated education “generates a feeling of inferiority as to [black children’s] status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”<sup>189</sup> Following the Court’s reliance on the work of Swedish social scientist, Gunnar Myrdal, among others, William Rehnquist, then Justice Jackson’s clerk, echoed in his memorandum for the case Holmes’ famous dissent in *Lochner*. Rehnquist wrote that “[i]f the Fourteenth Amendment did not enact Spencer’s *Social Statics*, it just as surely did not enact Myrdal’s *American Dilemma*.”<sup>190</sup>

One can plausibly argue that *Brown* was illegal at the time it was handed down. In this spirit, Herbert Wechsler famously criticized *Brown* as wrongly decided.<sup>191</sup> Over the years, many scholars agreed that *Brown*’s legality was dubious at best.<sup>192</sup>

In terms of legitimacy in the sense of public support, *Brown* was a “bet on the future.”<sup>193</sup> Even if the majority of the public, according to public opinion polls, did not support *Brown* at the time it was given,<sup>194</sup> “[f]ifty years on, *Brown*

189. *Id.* at 494 n.11.

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

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

192. See, e.g., BALKIN, *supra* note 29, at 4. (“Even many defenders of the result had little good to say about the opinion, arguing that the overruling of the previous precedents was abrupt and unexplained . . .”); Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2014 (1999) (“Even the Warren Court’s staunchest defenders have conceded that in *Brown* ‘the distinction between judgment and will, already tenuous, was honored only in the breach.’”); TAMANAHA, *supra* note 162, at 84 (“[T]he *Brown* decision has always been dubious from a legal standpoint.”); HORWITZ, *supra* note 96, at 340 n.71 (“One is surprised to learn how late it was that legal academics actually sought to defend the *Brown* decision.”); STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT 288-89 (2011) (“For all [*Brown*’s] moral correctness, the Court did not offer much by way of legal arguments against desegregation.”); WHITE, *supra* note 26, at 359 (explaining that in deciding *Brown*, the Warren court “did not advance a legal argument” but an argument based on sociological authorities). *Contra*, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION 85-92 (2010) (*Brown* can be justified “solidly” on the basis of the common law method as many precedents led to it).

193. Cf. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 12-13 (1970) (arguing that the Warren Court betted on the future, relying on vindication of its egalitarian vision by future events).

194. See Pildes, *supra* note 182, at 120-22 (surveying the controversy between scholars who claim *Brown* was a majoritarian decision and those who claim it was a countermajoritarian

has become a primary source of sustained public confidence in the Court . . . .”<sup>195</sup> As Richard Fallon writes, today, “[i]n nearly all eyes, *Brown* reflects the Supreme Court at its best.”<sup>196</sup>

The decision in *Brown* was restricted to primary and secondary public education. Yet soon afterwards, the Court issued orders, based on its decision in *Brown* but without explanation, making segregation unconstitutional in cases unrelated to school education.<sup>197</sup> This series of *per curiam* decisions striking down segregation in a wide range of nonacademic public facilities such as beaches and public golf courses could not be reasoned, at that time, in terms of legality as emanating from *Brown*.<sup>198</sup> Several constitutional scholars viewed these decisions as nothing but pure fiat.<sup>199</sup> Yet public support made these decisions part of the now-unimpeachable decisional line beginning with *Brown*. As the years passed, courts explicitly declared they would follow *Brown*’s symbolic meaning that was legitimated by public support.<sup>200</sup> *Brown*

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decision); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 186 & n.132 (2002) (discussing evidence of “widespread approval” of *Brown*).

195. Pamela S. Karlan, *The Supreme Court, 2011 Term, Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 8 (2012). See also ACKERMAN, *supra* note 57, at 137 (“*Brown* came to possess the kind of numinous legal authority that is, I believe, uniquely associated with legal documents that express the considered judgments of We the People.”); Balkin, *supra* note 29, at 3-4 (“In the half century since the Supreme Court’s decision, *Brown* has become a beloved legal and political icon . . . it is the single most honored opinion in the Supreme Court’s corpus.”).

196. FALLON, *supra* note 29, at 58.

197. See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1564-68 (2004) (“At first it was quite unclear what the decision meant. Rather than directly overruling *Plessy*, the Court merely stated that *Plessy* had no application ‘in the field of public education.’ . . . the meaning of *Brown* shifted to accommodate a shifting political center . . . fifty years of social contestation have produced the *Brown* we know today.”); Laura Kalman, *Brief Lives*, 127 YALE L.J. 1638, 1660 (2018) (noting that, at first, it was unclear whether *Brown* made school segregation or all segregation unconstitutional).

198. *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (public beaches); *Holmes v. City of Atlanta*, 350 U.S. 87 (1955) (golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (parks).

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

200. See Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 715-16 (2007) (analyzing the meaning given to *Brown* in *McFarland v. Jefferson Co. Pub. Schs.*, 330 F. Supp. 2d 834, 852 (W.D. Ky. 2004) and in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2788 (2007)); BALKIN, *supra* note 18, at 140 (“Later on people attributed elements of the theory of citizenship that developed during the 1960s and 1970s to *Brown*. In hindsight, *Brown* has come to represent this second theory of citizenship even though that theory was not yet articulated in 1954 and would not be fully articulated for many years.”); BALKIN, *supra* note 187, at 312 (“*Brown v. Board of Education*, has been continuously reinterpreted since it was first handed down, and there is a strong argument that it has been significantly modified, if not wholly transformed, by later decisions.”); ACKERMAN, *supra* note 57,

demonstrated that public support can be acquired regardless of validity in terms of legality.<sup>201</sup> As years go by, fractures in legality can be healed by strong public support.<sup>202</sup> Today, as David Strauss writes, “[t]he lawfulness of *Brown* is a fixed point for the mainstream legal culture.”<sup>203</sup>

#### D. *Imagining the Past: Casey*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>204</sup> the Justices offered a relatively lengthy discussion on the Court’s legitimacy—an issue rarely discussed explicitly in judgments—while discussing whether to overturn *Roe v. Wade*.<sup>205</sup> The plurality opinion reaffirmed the “essential holding” of *Roe v. Wade*, according to which there is an individual right to terminate a pregnancy while rejecting *Roe*’s trimester framework.<sup>206</sup> This decision was partly based on fear of seriously weakening “the source of this Court’s authority” that the plurality opinion identified with “its legitimacy . . . that shows itself in the people’s acceptance of the Judiciary . . . .”<sup>207</sup>

Furthermore, the plurality opinion discussed “two such decisional lines” that were relevant not because of their similarity in terms of legal doctrine,<sup>208</sup> but because, like *Roe*, these “twin peaks of modern constitutional law”<sup>209</sup> created a public controversy.<sup>210</sup> The plurality opinion chose to view the overruling of the *Lochner* decisional line and *Brown* through this lens, which is different from the traditional legal expertise perspective.

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at 137 (“[T]oday’s judiciary treats *Brown* as a decisive constitutional authority possessing infinitely greater weight than it did in the 1950’s when the *Brown* Court cautiously announced its intention to proceed ‘with all deliberate speed.’”).

201. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 280–81 (2008) (noting that *Brown* “is the unusual constitutional case in which everyone agrees to waive legalist objections by observing that, yes, it was decided on political grounds, but they were good grounds and it would be pedantic to demand more.”).

202. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1738, 1789–90 (2007); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1722–23 (2001).

203. STRAUSS, *supra* note 192, at 78. See also RONALD C. DEN OTTER, *JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM* 73 (2009) (“No one believes any longer that *Brown* was wrongly decided.”).

204. *Casey*, 505 U.S. at 833 (reaffirming by a vote of 5–4 the “essential holding of *Roe v. Wade*” that abortions prior to fetal viability may not be criminalized).

205. 410 U.S. 113 (1973).

206. *Casey*, 505 U.S. at 845–46.

207. *Id.* at 865.

208. See *id.* at 861 (“In a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached.”).

209. Horwitz, *supra* note 26, at 71.

210. See *Casey*, 505 U.S. at 861 (“[T]he sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed.”).

Speaking for the Court, the three plurality Justices explained the “repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by *Brown*” in part based on changes in the factual circumstances and in part in terms of sociological legitimacy as they spoke of the need for the public to accept the Court’s decisions.<sup>211</sup> According to this train of thought, the Court’s persistence to adhere to the *Lochner* decisional line brought a “loss” to the Court in terms of public legitimacy, “and the Court-packing crisis only magnified the loss.”<sup>212</sup> The plurality opinion concluded that a judgment must have legitimacy; otherwise, it “would be no judicial act at all.”<sup>213</sup>

In the plurality opinion’s eyes, in deciding whether to overrule *Roe*, the metric for comparison with the overruling of the *Lochner* decisional line and the judgment in *Brown* is not similarity in terms of legal doctrine but similarity in terms of their effect on the Court’s sociological legitimacy. In this manner, the two cases most responsible for the creation of legitimacy without legality in the Court’s jurisprudence were presented through the perspective they created. The plurality opinion’s narration of the past presented an understanding of the Court’s adjudication through the angle of its sociological legitimacy as if this angle was always in existence.

The plurality opinion expressed the centrality of sociological legitimacy while paraphrasing Hamilton’s dictum from the Federalist No. 78 in writing that:

[a]s Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. 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 as fit to determine what the Nation’s law means and to declare what it demands.<sup>214</sup>

The centrality given in this quote to the “people’s acceptance” and the emphasis not only on the “substance” of the judgment but also its “perception” cannot be understood without an acknowledgment of the rise of the public opinion culture. As part of this culture, public opinion polls have become an authoritative democratic legitimator in public discourse.<sup>215</sup> To ensure polls’ ability to fulfill

211. *Id.* at 863-65 (“[T]he thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty.”).

212. *Id.* at 862.

213. *Id.* at 865.

214. *Id.*

215. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 75-76 (2010) (discussing the process in which public opinion polls “not only supplement but displace election returns as the authoritative democratic legitimator.”); John Durham Peters, *Historical Tensions in the Concept of Public Opinion*, in *PUBLIC OPINION AND THE COMMUNICATION OF CONSENT* 3, 14 (Theodore L. Glasser & Charles T. Salmon eds., 1995) (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.”).

this role, every salient issue brought before the Court has been polled, before the Court's decision and after it, as part of the general frenzy to poll every issue central to American public discourse.<sup>216</sup>

Opinion polls allowed the Court, for the first time in history, to understand its legitimacy in terms of public support, an option that in the past was open only to elected institutions. Moreover, for several decades, opinion polls showed that the Court holds a higher level of public support than the elected institutions.<sup>217</sup> With the decline in belief in legal expertise in constitutional cases,<sup>218</sup> judicial legitimacy based on public support became a viable option. It is no wonder then that the plurality opinion in *Casey* examines the overturning of *Roe* in terms of public support:

A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.<sup>219</sup>

For the plurality opinion, *Roe*'s serious problems on the level of legality were not decisive. As they saw it, the effect on the Court's sociological legitimacy was central to the decision of whether to overrule *Roe*. The plurality Justices wrote that "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."<sup>220</sup> In essence, the joint opinion justified preserving the "essential holding" of *Roe* in order to avoid a self-inflicted wound to the Court's institutional legitimacy.<sup>221</sup>

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216. See, e.g., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 77 (presenting public opinion polls conducted to examine public views on the most central issues that the Court has decided in recent decades).

217. See, e.g., FALLON, *supra* note 65, at 156 ("From 1972, when the Gallup organization began collecting relevant data, through *Bush v. Gore* and for a decade or more thereafter, public opinion surveys routinely registered support and approval rating for the Supreme Court that vastly outstripped those for Congress and that most frequently ran ahead of those for the president.").

218. See Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 189 (2013) ("In the absence of public belief in its expertise, adhering to public opinion rather than to the directives of an expertise-based justification theory may seem like the only viable tactic to ensure that the Court can maintain its enduring public support.").

219. *Casey*, 505 U.S. at 869.

220. *Id.* at 865.

221. See, e.g., Horwitz, *supra* note 26, at 36-37; Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 753 (1994) ("The decision in *Casey* not to overrule *Roe v. Wade* is predicated on the assumption that the Court currently has institutional legitimacy in the eyes of the American public, a legitimacy that protects the Court's right to make decisions about abortion but a legitimacy that could be lost through an ill-considered decision reversing *Roe*.").

The plurality opinion emphasized that “the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”<sup>222</sup> The plurality opinion thus admits that the metric for assessing judicial legitimacy is not solely the Court’s adherence to the requirements of the discipline, but mainly the acceptance of its judgments by American society.<sup>223</sup> *Casey* was unique in its rare and candid discussion on the Court’s legitimacy, making it a landmark case for understanding the Court’s source of legitimacy.

Over the years, *Casey* has gained the status—as the dissenting justices in *Dobbs* noted—of the chief case among precedents that discusses the issue of precedents.<sup>224</sup> Scholars noted that in *Casey*, the Court reached the pinnacle in terms of giving weight to the Court’s public confidence as part of the doctrine of *stare decisis*.<sup>225</sup> While this scholarly analysis did not detect the technological invention that enabled this trend of giving weight to public confidence, unsurprisingly, according to the analysis, the beginning of the trend coincides with the time in which measurements of public support for the Court began.<sup>226</sup>

#### E. *The Rise of Legitimacy without Legality*

Connecting the dots of my analysis leads to a cumulative understanding that can be presented as follows:

Decisional Line	Legality	Sociological Legitimacy	Result
<i>Lochner</i>	+	-	Repudiated
<i>Brown</i>	-	+	Consolidated

The combined lesson of *Lochner* and *Brown* was that in salient cases, legality is less important than legitimacy. On the one hand, the Court learned from the *Lochner* decisional line that legality alone is not enough when faced with hostile public opinion. The *Lochner* decisional line did not lose its force

222. *Casey*, 505 U.S. at 866.

223. In their dissenting opinions, Chief Justice Rehnquist and Justice Scalia rejected the plurality opinion’s position on the role public opinion plays in understanding the Court’s legitimacy. See *id.* at 958-64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part), 996-1000 (Scalia, J., concurring in the judgment in part and dissenting in part).

224. *Dobbs*, 142 S. Ct. at 2348 (2022) (noting that *Casey* is a “precedent about precedent”). See also Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 328 (2020).

225. See, e.g., Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1116-18 (1995).

226. *Id.* at 1109, 1111-12, 1115-16, 1121 (dating the beginning of a shift in the way the doctrine of *stare decisis* explicitly takes into account the Court’s public support to judgments from the 1970s).

because the community of constitutional experts rejected its legal reasoning; it lost because public opinion rejected it.<sup>227</sup>

On the other hand, from *Brown*, the Court learned that a decision that lacks legality according to the standards of the community of constitutional experts could, with time, garner immense public support. In the end, with sustained public support, it may be considered not merely legal but a pillar of constitutional law.<sup>228</sup> In accepting that the question of overruling *Roe* was not to be determined solely by legal expertise but by the influence of the overruling on the Court's legitimacy, the plurality opinion in *Casey* solidified the idea of legitimacy without legality.<sup>229</sup>

As I will show below, Alito's majority opinion in *Dobbs* also reads *Casey* as solidifying the idea of legitimacy without legality, noting that the plurality opinion avoided overruling *Roe* as doing so "would undermine respect for this Court and the rule of law."<sup>230</sup> According to the majority opinion in *Dobbs*, this notion of inserting legitimacy considerations—understood in terms of public support—as decisive factors in determining legality features "prominently in the *Casey* plurality opinion."<sup>231</sup> In overruling *Roe* and *Casey*, Alito aims to break free from legitimacy without legality. Conversely, the dissenting justices' decision in *Dobbs* to uphold *Casey* and *Roe*, as well as the way they describe *Casey*, demonstrates their commitment not only to understanding legitimacy in terms of public support but also to legitimacy without legality.

#### IV. THE COURT CIRCA THE 2000S: LEGITIMACY WITHOUT LEGALITY

In this section, I discuss two examples that demonstrate how arguments that lack any plausibility according to the standards of constitutional law as a language of expertise became kosher constitutional arguments thanks to public support. Using these examples, I show how in a constitutional order controlled by legitimacy—understood in terms of public support—and without legality as a true constraining factor, the boundary between arguments that are part of the constitutional discourse and those that are not is undermined. The first example

227. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383, 1447-48, 1454 (2001) (explaining the "[l]esson of *Lochner*" as "whether or not judicial decisions have a jurisprudential basis, if they lack social legitimacy, judges will be attacked as acting unlawfully. . . . Social legitimacy is not separate from legal legitimacy, but can spill back upon it. When feelings of social illegitimacy are strong enough, the claim easily may be made that the judges are acting illegitimately in a legal sense.").

228. See Klarman, *supra* note 202, at 1722-23.

229. *Casey*, 505 U.S. at 853 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

230. *Dobbs*, 142 S. Ct. at 2241.

231. *Id.* at 2278.

is the Court's treatment of the broccoli argument in *Sebelius*;<sup>232</sup> the second is the interpretation adopted by the Court to the Second Amendment as protecting the individual's right to bear arms.<sup>233</sup>

In *Sebelius*, the Court, in a five to four decision, refrained from invalidating the Patient Protection and Affordable Care Act's (ACA) minimum coverage provision, better known as the individual mandate to buy health insurance.<sup>234</sup> My focus is on the "broccoli argument," which was one of the arguments raised against the individual mandate. The broccoli argument developed an analogy between the government's ability to make its citizens buy health care and compelling them to buy broccoli. According to this argument, Congress did not have power under the Commerce Clause to impose the individual mandate as part of the ACA.<sup>235</sup> Upholding the mandate as constitutional means, so the claim goes, that Congress could mandate the purchase of broccoli.<sup>236</sup> Adopted by a majority of the judges in *Sebelius* as the law of the land, the broccoli argument, as I will explain, is a clear example of legitimacy without legality.

Just a few years prior to *Sebelius*, the broccoli argument was considered a non-starter among almost all speakers of the language of constitutional law.<sup>237</sup> Congress has the authority to regulate activities that are interstate commerce or affect it.<sup>238</sup> Health-care spending constitutes roughly one-sixth of the US's economy,<sup>239</sup> making health-insurance's effect on interstate commerce as clear as it can be. The idea that Congress could not use the Commerce Clause to expand health-care coverage by creating a duty to purchase health-insurance sounded absurd to anyone with knowledge of Commerce Clause doctrine.<sup>240</sup> A rare consensus in the community of constitutional experts was created around this position,<sup>241</sup> even though this community has been splintered since the rise

232. *Sebelius*, 567 U.S. at 558.

233. *Heller*, 554 U.S. at 624 n.24.

234. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

235. *Sebelius*, 567 U.S. at 558.

236. See JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 92-95 (2013) (explaining the broccoli argument).

237. See Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 100-01 (2013).

238. See LESSIG, *supra* note 83, at 192.

239. See *Sebelius*, 567 U.S. at 590.

240. See, e.g., Michael J. Klarman, *The Supreme Court, 2019 Term, Foreword: The Degradation of American Democracy-and the Court*, 134 HARV. L. REV. 1, 229 (2020) (noting that "[t]he idea that Congress could not compel Americans to buy health insurance" was "absurd" and "a fringe position when Congress first took up the Obama Administration's healthcare bill in 2009").

241. See Neil S. Siegel, *More Law Than Politics: The Chief, The 'Mandate', Legality, and Statesmanship*, in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 192, 206 (Nathaniel Persily et al. eds., 2013) (noting that prominent jurists who support conservative positions dismissed the broccoli argument as near-frivolous just two year prior to the *Sebelius* judgment).



of legal realism and the decline in belief in apolitical expertise in constitutional law.<sup>242</sup> Yet, although the broccoli argument was considered frivolous by the community of experts in constitutional law,<sup>243</sup> it was not laughed out of Court.

While the Court in *Sebelius* upheld the individual mandate as a permissible exercise of Congress's taxing power, a majority of the five conservative Justices ruled that the individual mandate was beyond the scope of Congress's power to regulate interstate commerce.<sup>244</sup> Just a few years after the broccoli argument was rejected as farfetched by the legal scholarly community,<sup>245</sup> but with public support backing this argument, a majority of the Justices adopted the broccoli argument as the law of the land.<sup>246</sup> Chief Justice Roberts, who on this issue was joined by Justices Scalia, Kennedy, Thomas, and Alito, explained that because no proper line could be drawn between forcing people to purchase health care and to purchase broccoli, the former scenario is obviously unconstitutional.<sup>247</sup> Congress may not use the Commerce Clause to force people to engage in commerce.<sup>248</sup>

Public support made the broccoli argument a legitimate constitutional argument without going through the formal process required for translating public support for an agenda into law. In this spirit, Mark Rosen and Christopher Schmidt argue that the broccoli argument's acceptance by the Court can be justified only "on the grounds of popular constitutionalism."<sup>249</sup> Neil Siegel reiterates a similar observation, explaining that Roberts's acceptance of the broccoli argument can be defended by the application of criteria that are sound in terms of social solidarity and judicial legitimacy but "are difficult to justify as legal from the internal point of view."<sup>250</sup>

242. See Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 461 (2009) ("The legal academy has erased the distinction between law and politics . . .").

243. See, e.g., Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-healthlaw-hits-supreme-court.html> (noting that when Randy Barnett first began challenging the ACA, "[m]any of his colleagues, on both the left and the right, dismissed the idea as ridiculous—and still do"); David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L.REV. 805, 807-13 (2014) (surveying law professors' statements on the frivolous nature of the constitutional challenge to the ACA).

244. *Sebelius*, 567 U.S. at 558.

245. See TUSHNET, *supra* note 40, at 6-7 ("The constitutional argument against Obamacare seemed nearly frivolous . . . to almost all scholars of constitutional law, or at least all of those not deeply committed to libertarianism.").

246. See, e.g., Balkin, *supra* note 39.

247. *Sebelius*, 567 U.S. at 557-58; Chief Justice Roberts added another rationale: as the Commerce Clause empowers Congress to regulate action and not inaction, the individual mandate could not be justified under Congress's commerce power. See *id.* at 552.

248. *Id.* at 557.

249. Rosen & Schmidt, *supra* note 237, at 129.

250. Siegel, *supra* note 241, at 208.

As explained above, once the Court accepts an argument as a correct legal argument, law professors usually find a way to re-narrate constitutional law in a manner that incorporates the recently accepted argument so that doctrinal legality appears as a continuous, uninterrupted endeavor.<sup>251</sup> Thus, in a highly critical 2017 account of the Roberts Court, Stephen Feldman writes that in *Sebelius*, “[t]he conservative justices extended formalist reasoning that the Rehnquist Court had previously introduced in a series of cases involving the Tenth Amendment, Congress’s commerce power, and Congress’s Fourteenth Amendment, section five, power.”<sup>252</sup> The broccoli argument, that prior to *Sebelius* was outside the realm of legality, has become not only legal but a part of the Court’s “formalist reasoning.” The change the broccoli argument introduced to the interpretation of the commerce clause is described as a mere extension of previous legal doctrine rather than an argument from the political realm that penetrated the legal realm because of the public support it garnered.

The Court’s interpretation of the Second Amendment in recent decades is my second example of the rise of legitimacy without legality in the Court’s adjudication. In 2008, when *Heller* was decided, the position that the Second Amendment included the individual right to bear arms was contrary to established doctrine, though it was already not outside of the realm of legality.<sup>253</sup> However, twenty years earlier, it was clearly outside of that realm.

Up until the beginning of the 1990s, interpreting the Second Amendment as establishing an individual right to bear arms was still considered a non-starter argument.<sup>254</sup> At that time, the Second Amendment was interpreted as primarily concerned with guaranteeing the ability of the militia to bear arms against

251. See KAHN, *supra* note 19, at 255 (“But if the Court persists, the expert must reimagine those immanent principles such that the new case is now included in the overall explanation of what the law is.”).

252. STEPHEN M. FELDMAN, *THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION* 245-46 (2017). See also Jonathan H. Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 171, *supra* note 241, at 180 (arguing that Roberts’s judgment in *Sebelius* “represented a plausible interpretation of the Court’s Commerce Clause jurisprudence as modified by the Rehnquist Court”).

253. See, e.g., Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 251-52 (2008) (explaining that even if “Court’s reading of text and history was hardly preposterous,” *Heller* went against “the established” interpretation that was controlling for over a half-century). On the implausibility of the position adopted in *Heller* according to which the original understanding of the Second Amendment anchors the individual right to have guns for nonmilitary purposes, see Brief for Heller, Jack N. Rakove et al., as Amicus Curiae, 554 U.S. 570 (2008) (No. 07-290), available at [https://www.nraila.org/heller/conamicusbriefs/07-290\\_amicus\\_historians.pdf](https://www.nraila.org/heller/conamicusbriefs/07-290_amicus_historians.pdf) [<https://perma.cc/5Q7P-584T>].

254. Siegel, *supra* note 41, at 224 (explaining that “the widespread view in the profession, even among conservative critics of the Warren and Burger Courts,” was that the Second Amendment did not protect an individual right to bear arms).

government tyranny.<sup>255</sup> For this reason, in 1989, conservative jurist Robert Bork asserted that the Second Amendment operates “to guarantee the right of states to form militia, not for individuals to bear arms,” and indicated his belief that all state gun control is “probably constitutional.”<sup>256</sup> In 1991, former Chief Justice Warren Burger appeared on the *MacNeil/Lehrer News Hour* and called individual rights claims under the Second Amendment “the subject of one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime.”<sup>257</sup> Based on the view expressed by Bork, Burger, and many others, Reva Siegel concludes that the majority decision in *Heller* struck down a law that, until the 1990s, was viewed by “legally literate lawyers” as clearly constitutional.<sup>258</sup> At that period, “the legally literate read the text of the Second Amendment as plainly allowing gun regulation . . . .”<sup>259</sup> For this reason, it is not surprising that in 1968, Congress enacted gun control legislation.<sup>260</sup>

The majority opinion in *Heller* abandoned this well-established interpretation of the Second Amendment. Instead, based on the “reliance of millions of Americans” on a different interpretation,<sup>261</sup> the majority adopted the position that the amendment codified an individual right of self-defense that enables citizens to protect themselves, their families, and their homes against crimes.<sup>262</sup> The acceptance of reading the Second Amendment as protecting the law-abiding citizen’s right to bear arms was driven by the rise of a popular movement supporting this interpretation rather than a development in constitutional doctrine.<sup>263</sup> In her article, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, Reva Siegel depicts how this new understanding of

255. *Id.* at 225.

256. Claudia Luther, *Bork Says State Gun Laws Constitutional*, L.A. TIMES (Mar. 15, 1989), <https://www.latimes.com/archives/la-xpm-1989-03-15-me-587-story.html> [<https://perma.cc/SY4L-NPBH>]

257. Warren Burger, “2nd Amendment Fraud,” - 1991 PBS News Hour, YOUTUBE, <https://www.youtube.com/watch?v=hKfQpGk7KKw> [<https://perma.cc/32C5-9DFM>].

258. Siegel, *supra* note 41, at 238. See also JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 19 (2021) (noting that interpreting the Second Amendment as prohibiting gun regulation is “rubbish” in view of the Founders’ understanding of this amendment).

259. Siegel, *supra* note 41, at 210.

260. The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified in scattered sections of 5, 18, and 42 U.S.C.); Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified in scattered sections of 26 U.S.C.).

261. *Heller*, 554 U.S. at 624 n.24.

262. *Id.* at 624-25 (determining that the Second Amendment protects a right to possess a gun in the home although that possession has no connection to militia service).

263. See Siegel, *supra* note 41, at 241 (“The New Right’s understanding of the original understanding was populist and popular, but clearly partisan - by no means consensual, or even majoritarian. Its gun-rights agenda had majority support in only the thinnest of senses.”).

the Second Amendment rose as a result of the influence of a social movement.<sup>264</sup> The immense influence of this movement led to strong national majorities coming to favor the law-abiding citizen's right to bear arms.<sup>265</sup>

In view of the way legitimacy without legality is demonstrated in this segment of constitutional law, it is no surprise that in examining specific doctrinal arguments which are based on the Second Amendment, Eric Ruben and Joseph Blocher explicitly note that currently, legal correctness is not necessarily the only or even the primary way to assess the success of a constitutional argument.<sup>266</sup> Rather, the power of "political rhetoric" is more detrimental to the success of an argument based on the Second Amendment.<sup>267</sup>

The acceptance of the broccoli argument and the new interpretation adopted for the Second Amendment demonstrate the new logic of legitimacy without legality. For several decades now, judges, scholars, and the media have identified the Court's legitimacy with its public support.<sup>268</sup> Once the Court's performance is measured in terms of public support, it should be no surprise that changes in constitutional doctrine are also assessed according to this metric. A new logic has developed according to which legality, at least in salient cases, is to be reformulated in terms of sociological legitimacy.<sup>269</sup> Sound legal reasoning—which may (or may not) produce sociological legitimacy for the

264. *Id.* at 201 (explaining that the judicial interpretation in *Heller* was "responsive to popular constitutionalism").

265. See Sunstein, *supra* note 253, at 252-53 ("In part as a result of the immense influence of that movement, strong national majorities have come to favor that right. . . . [T]he central holding of *Heller* is thus fully consistent with the view of national leaders as well as that of most citizens. . . . Any ruling against an individual right to have guns for purposes of self-defense and hunting would have been wildly unpopular. . . . *Heller* itself was met with widespread social approval.").

266. Eric Ruben & Joseph Blocher, "Second-Class" Rhetoric, Ideology, and Doctrinal Change, 110 GEO. L.J. 613, 620 (2022).

267. *Id.* ("This approach takes constitutional rhetoric seriously as such, recognizing that metaphors, memes, frames, and argument-bites have the power to shape constitutional doctrine independently of what many would consider to be their merits.").

268. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151 (2019) (establishing their entire thesis on how to save the Court on the idea that there is "a grave threat to the Court's legitimacy—that is, the degree to which it is perceived as legitimate by the American people"); Bassok, *supra* note 34, at 1-45 (showing the rise to dominance of the idea that judicial legitimacy is to be identified with public support as measured in opinion polls through an analysis of the Harvard Law Review forewords).

269. See Reva B. Siegel, The Jurisgenerative Role of Social Movements in United States Law 16 (2004) (unpublished paper, Yale Law School), available at [https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel\\_Jurisgenerative\\_Role\\_of\\_Social\\_Movements.pdf](https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf) [<https://perma.cc/3MS9-8WNP>] (explaining how legal changes occur due to social movements that "voice the changing constitutional understandings of the demos, though they do not always do so in ways that satisfy the conditions of procedural regularity or majoritarianism associated with lawmaking"); Tom Donnelly, *Popular Constitutional Argument*, 73 VAND. L. REV. 73, 134-35 (2020) (describing how the Supreme Court has recently translated convergence in public support into arguments which have been incorporated "into official constitutional doctrine").

Court as a byproduct—is no longer the key for the development of constitutional law. The order is reversed: sociological legitimacy is the key to eventually achieving legality. If this reversed order seems familiar, it is because it is an imitation of how law is created by the political branches. This is “the great process by which public opinion passes over into public will, which is legislation.”<sup>270</sup> Yet here precisely lies the problem. The transformation from public support to legal norms requires it to go through the formal legislation process.

In adopting arguments that, on the one hand, did not go through the process of legislation and, on the other hand, do not follow the logic of legality as a realm of legal expertise, the Court collapses the separation between law and politics. It is extremely difficult to detect the rise of legitimacy without legality because the Court controls which arguments receive the brand of “legal.” The reconceptualization of constitutional decision-making not as the product of legal expertise (with sociological legitimacy as a possible but not a necessary byproduct), but rather as the consequence of public opinion (with sociological legitimacy as its aim) can be hidden in plain sight.<sup>271</sup> The Court can endow its judgments with a veil of legality even when they defy almost all standards of legality.<sup>272</sup> Such judgments are still the lawful acts of judicial officers who made their decisions according to legal procedure. The only barrier that can expose such judgments as illegal and prevent their incorporation into legal doctrine is a strong legal academia that is committed over a long period of time to doctrinally rigorous scrutiny of the Court’s judgments.<sup>273</sup>

The controversy between the majority and the dissenting justices in *Dobbs* cannot be fully understood without comprehending the development of legitimacy without legality in the Court’s adjudication. But before analysing *Dobbs*, I will briefly address another factor that contributed to the decline in understanding constitutional law as a language of expertise.

With the Court holding a more central role in articulating American identity in constitutional terms during the second half of the twentieth century, understanding constitutional law as a language of expertise has lost even more power. The combination of the Court’s growing involvement in identity issues with the rise of judicial supremacy—the idea that the Court has the “final say”

270. FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 131 (1859).

271. See Robert C. Post, *The Supreme Court, 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 111 (2003).

272. See KAHN, *supra* note 75, at 28-29 (“Whatever position [the Court] reaches is an authoritative statement of what the law is, technically and practically.”).

273. Cf. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSCH. L. REV. 581, 588 (1989-90) (“Legislatures are subject to democratic checks upon their lawmaking. Judges less so, and federal judges not at all. The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teaching of the mother of consistency, logic.”).

in questions of constitutional meaning<sup>274</sup>—has contributed even further to the decline of the idea of constitutional law as a language of expertise. If the Court has the decisive word on constitutional matters that include issues of identity, then the language of constitutional law cannot be detached from the bearers of this identity—the American people.<sup>275</sup> As long as the narrative that connects the American people relies on the Constitution, the American people cannot become alienated from their constitutional identity.<sup>276</sup> Even if the public has little effect on constitutional interpretation, and the Court has a monopoly over at least expressing American identity, it cannot speak in a language that is not accessible to the public.<sup>277</sup> In other words, a strong connection continues to exist between constitutional law and ordinary language because of the centrality of constitutional law to the way Americans speak about their national identity.<sup>278</sup>

The position giving prominence to the Court in interpreting the Constitution was adopted over a competing vision, according to which the public participates in interpreting the constitutional text and defining its constitutional identity.<sup>279</sup> This competing vision requires constitutional law to be accessible to the people and thus stands in contrast to the vision of constitutional law as a language of expertise. The vision of constitutional law as a language of expertise can only prosper if constitutional law is detached from issues of identity or by giving the Court a minor role in discussing these issues. The latter path is the one Alito took in his majority opinion in *Dobbs*.

274. See WHITTINGTON, *supra* note 182, at xi, 5-8 (defining judicial supremacy as the ability to authoritatively interpret constitutional meaning).

275. See, e.g., LEVINSON, *supra* note 65, at 37 (noting that in the context of “those questions which might otherwise tear us apart . . . the United States Supreme Court has been quite willing, especially over the past quarter-century, to reward itself with the title of ‘ultimate interpreter of the Constitution’”); GUSTAFSON, *supra* note 119, at 13 (noting that the “text written by the founding fathers [is] guarded by the priests of America’s ‘civil religion’ (the justices of the Supreme Court).”).

276. See Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in THE CONSTITUTION IN 2020, at 25, 27 (Jack M. Balkin & Reva B. Siegel eds., 2009); MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT 113 (2010) (explaining that American constitutional identity cannot “pull ahead” or “lag behind” in a wide margin from the views of the American public).

277. See Schauer, *supra* note 50, at 513 (“If we are to understand what law is and how it operates, we need to understand to whom it speaks. If it speaks to everyone, as Bentham urged, then technical language in law is something to be lamented and expunged.”).

278. See, e.g., Morrison, *supra* note 52, at 334 (“[A]s we internalize the Court’s use of ‘speech,’ we will change our ordinary uses of ‘speech.’”).

279. See LEVINSON, *supra* note 65, at 37-46 (“A ‘protestant’ Constitution is a deinstitutionalized, or at least, given the ubiquity of our life within institutional contexts, nonhierarchical, Constitution. . . . [T]he community joined together in basically egalitarian discussion of the meaning (and demands) of the relevant materials.”).

V. *DOBBS*—REVERSING COURSE?

Like *Brown*, *Roe* was weak in terms of legality and was “a bet on the future” in terms of legitimacy. In *Brown*, the bet succeeded; in *Roe*, it failed.<sup>280</sup> In upholding *Roe*, the plurality decision in *Casey* spoke explicitly in the language of legitimacy in terms of public support.<sup>281</sup> Yet, in those terms, *Roe* never achieved the consensual status of *Brown*.

*Dobbs* could have continued the *Casey* path by upholding *Roe* while further diluting its content with an explanation based on the need to sustain judicial legitimacy. Alternatively, the Court could have reversed *Roe* without deserting the legitimacy line of reasoning, but this time betting on the opposite future: hoping that public support would be endowed to overruling *Roe* and transferring the decision on abortion limitations to the states. While Chief Justice Roberts took the former approach without explicitly discussing issues of legitimacy<sup>282</sup> and Justice Kavanaugh—at least according to some commentators<sup>283</sup>—took the latter approach,<sup>284</sup> Alito’s majority opinion did not take either of these paths.

In *Dobbs*, Alito attempts to reverse the course the Court had taken and revert to an understanding of judicial legitimacy in terms of expertise. The best entry point to the debate in *Dobbs* on the source of judicial legitimacy is Alito’s use of Hamilton’s Federalist No. 78 dictum on judicial legitimacy.<sup>285</sup> Hamilton spoke of legitimacy in terms of expertise (“judgment”), and in its original form, this dictum has served for many years to express the position that the Court’s source of legitimacy lies in its expert judgment.<sup>286</sup> However, since the beginning of the 1960s, Justices—both conservative and progressive—have begun

280. See JACK M. BALKIN, WHAT *ROE V. WADE* SHOULD HAVE SAID, at ix-x (2005) (“*Brown* and *Roe* differ in many respects, but perhaps the most important difference is the degree of public acceptance each has enjoyed.”).

281. See, e.g., Richard Dion Farganis, Is the Supreme Court Bulletproof? 56-60 (June 2007) (unpublished Ph.D. dissertation) (on file with the University of Minnesota) (In *Casey*, “justices’ fears about the Court’s institutional well-being appears to have controlled the decision. . . . What the *Casey* plurality is saying, in effect, is that for the good of the Court, *Roe* should not be overturned.”).

282. *Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J., concurring) (recommending adhering to judicial restraint and *stare decisis*).

283. See, e.g., David J. Garrow, *On Abortion, John Roberts Stands Alone; Justice Kavanaugh Makes Clear in a Concurring Opinion that the Court Would Like to Avoid Future Litigation*, WALL STREET J., June 26, 2022.

284. *Dobbs*, 142 S. Ct. at 2310 (Kavanaugh, J., concurring) (describing “the *Roe* Court” as damaging “the Court as an institution” and noting that the *Dobbs* decision returns the Court to its neutral position).

285. *Id.* at 2278.

286. See, e.g., CARRESE, *supra* note 127, at 197 (explaining that Hamilton viewed the judiciary as “a body of lawyers elevated to the bench and serving as a depository not of force or will but legal judgment”).

paraphrasing Hamilton's dictum by replacing "judgment" (expertise) with "public confidence" (public support).<sup>287</sup>

Not only does Alito quote Hamilton correctly, but he also challenges *Casey*'s explication of the idea of legitimacy without legality. According to Alito, *Roe* lacked any constitutional basis and thus lacked legality. *Casey* could not find a solution to this legality deficiency. Instead, it "featured prominently" the logic that ensuring legitimacy replaces the need for legality.<sup>288</sup> Alito presents *Casey*'s logic as an attempt to address the danger of a loss of public "respect for this Court as an institution that decides important cases based on principle, not 'social and political pressures.'"<sup>289</sup> He continues and explains that according to this logic, overturning *Roe* would be considered surrendering to public pressure. For this reason, *Casey*'s logic leads to the conclusion that "preservation of public approval for the Court weighs heavily in favour of retaining *Roe*."<sup>290</sup>

Alito then states that the starting point of the analysis in *Casey* is partly correct: it is important that the public perceives the Court as deciding according to the law.<sup>291</sup> However, Alito is clear that expertise is the source of the Court's legitimacy, not public support.<sup>292</sup> He concludes that "[i]n suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system."<sup>293</sup> He then quotes the Federalist No. 78 in its correct form, noting that "[o]ur sole authority is to exercise 'judgment'—which is to say, the authority to judge what the law means and how it should apply to the case at hand."<sup>294</sup>

While Alito quotes Hamilton correctly in his judgment, during the oral arguments, Justice Breyer adheres to the revisionist reading of the Federalist No. 78, saying, "we're an institution perhaps more than a court of appeals or a district court. It's Hamilton's point, no purse, no sword, and yet we have to have public support...."<sup>295</sup> In line with this paraphrase of Hamilton's saying, in their dissenting opinion, Justices Breyer, Sotomayor, and Kagan discuss what "[t]he American public" is going to think of the Court following the overruling of *Roe* and the "terrible price" the Court is going to pay in terms of destroying its legitimacy.<sup>296</sup> The dissenting Justices leave little doubt that, in their view,

287. See Bassok, *supra* note 4, at 573-81 (analyzing the change in reading the Federalist No. 78 in the Court's judgements).

288. *Dobbs*, 142 S. Ct. at 2278.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* (quoting Chief Justice Rehnquist's opinion in *Casey* where Rehnquist wrote that "[t]he Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.").

293. *Id.*

294. *Id.*

295. Transcript of Oral Argument, *Dobbs*, *supra* note 11, at 69.

296. *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor & Kagan, JJ., dissenting).



judicial legitimacy is to be understood and measured in terms of public support.<sup>297</sup> Based on understanding the Court's legitimacy in terms of public support, the fear that overruling *Roe* "undermines the Court's legitimacy"<sup>298</sup> is detrimental to the dissenting Justices' decision to uphold *Roe*.

Pointing to the importance of *Casey* as a "precedent about precedent,"<sup>299</sup> the dissenting Justices contest Alito's critique of *Casey*. They formulate Alito's answer to the threat to the Court's legitimacy raised in *Casey* as saying: "well, yes, but we have to apply the law."<sup>300</sup> To that argument, the dissenting Justices reply that the legal doctrine of *stare decisis* requires taking legitimacy arguments into consideration.<sup>301</sup> In other words, applying the law includes a commitment to uphold precedents that, if overruled, would hinder the Court's public support. Subsequently, one reason not to overrule *Roe* is a fear of damaging the Court's public support. Simply put, according to the dissenting Justices' reading of *Casey*, the doctrine of *stare decisis* makes issues of legitimacy part of legality. The dissenting Justices view *Casey* as replying to Alito's attempt to speak in the name of legality with: "[t]hat is exactly the point"<sup>302</sup> of the *stare decisis* doctrine. In their view, *stare decisis* compels the Court, as a matter of legality, to maintain *Roe* as otherwise, the Court's legitimacy would be undermined.<sup>303</sup>

At precisely this point, the corruption of legality is exposed. Based on *Casey*, the dissenting Justices view a question of legitimacy (understood in the sense of public support) as an issue of legality. In this manner, the distinction between legality and legitimacy is decimated, and the legal discourse loses the ability to distinguish between legality and legitimacy.

It is unclear whether Alito's understanding of judicial legitimacy in terms of expertise has a majority among his peers in the Court. Beyond the three dissenting justices who subscribe to the approach that judicial legitimacy is to be understood in terms of public support, the positions of the rest of the Justices are unclear.<sup>304</sup> Take, for example, Chief Justice Roberts. While in *Dobbs* he did not express an explicit position on this issue, in previous cases, he consistently adhered to an understanding of judicial legitimacy in terms of public support.<sup>305</sup> Moreover, his decision-making over the years has shown great awareness of the

297. *Id.*; see also Transcript of Oral Argument, *Dobbs*, *supra* note 11, at 10-11 (Breyer, J.), 15 (Sotomayor, J.), 32-33 (Kagan, J.).

298. *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor & Kagan, JJ., dissenting).

299. *Id.* at 2319.

300. *Id.* at 2348.

301. *Id.*

302. *Id.*

303. *Id.* at 2349.

304. With the retirement of Justice Breyer, it is also unclear what position would be taken by his replacement, Justice Ketanji Brown Jackson, on this issue.

305. See Bassok, *supra* note 4, at 573, 578, 581.

need to preserve public confidence in the Court.<sup>306</sup> His opinion in *Dobbs* seems to follow this line of thinking. Roberts delivered a concurring opinion upholding Mississippi's ban on abortion after fifteen weeks of pregnancy.<sup>307</sup> However, in the name of *stare decisis*, the Chief Justice upheld *Roe*'s determination that a woman has a constitutional right to choose to terminate her pregnancy.<sup>308</sup> At the same time, he rejected *Roe*'s viability line.<sup>309</sup> As many commentators have observed, this tactic of avoiding a symbolic controversial overruling of *Roe* while allowing the conservative majority to achieve a practical small gain sits well with Roberts's attempts over the years to preserve the Court's public support.<sup>310</sup> However, following the harsh public reaction to *Dobbs*, Roberts spoke in terms that correspond to Alito's understanding of judicial legitimacy in stating that "[t]he legitimacy of the Court rests on...the Constitution [that] needs, as John Marshall put it, somebody to say what the law is...I don't understand the connection between the opinions people disagree with and the legitimacy of the Court."<sup>311</sup>

Justice Kavanaugh writes in his concurring judgment in *Dobbs* that *Roe* "damaged the Court as an institution"<sup>312</sup> and that the *Dobbs* majority decision "returns the Court to a position of judicial neutrality on the issue of abortion"<sup>313</sup> by transferring the decision on abortion limitations to the states. One way of reading Kavanaugh's judgment is that he attempts to ensure public support for the Court by re-instating his version of the Court's neutrality.<sup>314</sup> According to this line of thinking, Kavanaugh believes that if the Court distances itself from highly volatile controversies, such as abortion, the Court can bolster its sociological legitimacy.

306. See, e.g., Thomas G. Donnelly, *Supreme Court Legitimacy: A Turn to Constitutional Practice*, 47 BYU L.REV. 1487, 1505-35 (2022) (discussing the various techniques Roberts has used in order to maintain the Court's public support).

307. *Dobbs*, 142 S. Ct. at 2310-11 (Roberts, C.J., concurring).

308. *Id.* at 2311.

309. *Id.* at 2315-16.

310. See, e.g., Jessica Levinson, *Justice Elena Kagan has a Prescription for an Ailing Supreme Court*, MSNBC (Aug. 02, 2022), <https://www.msnbc.com/opinion/msnbc-opinion/kagan-roberts-know-supreme-court-burning-n1297556> [<https://perma.cc/7LSN-QTXD>].

311. C-SPAN, *Chief Justice Roberts on Legitimacy of US Supreme Court*, YOUTUBE (Sept. 10, 2022), [https://www.youtube.com/watch?v=\\_YuafsjhTT0](https://www.youtube.com/watch?v=_YuafsjhTT0) [<https://perma.cc/6AJS-V373>]. See also Holly Barker, *Justices Grapple with Waning Public Confidence in High Court*, BLOOMBERG L. (Sept. 13, 2022), <https://news.bloomberglaw.com/litigation/justices-grapple-with-waning-public-confidence-in-high-court> [<https://perma.cc/4PWR-2X5F>].

312. *Dobbs*, 142 S. Ct. at 2310 (Kavanaugh, J., concurring).

313. *Id.* at 2305.

314. However, one may read Kavanaugh as speaking of the Court's normative legitimacy rather than its sociological legitimacy. According to this line of thinking, Kavanaugh views neutrality as essential for preserving normative justifications for the Court's authority.

As for the three remaining members of the Court, it is still hard to tell what their position on the Court's source of legitimacy will be following the strong push by Alito to reverse an approach that has dominated the Court for decades. It is important to remember that strong forces led the Court to adopt the idea that its legitimacy is to be understood in terms of public support. First, the decline in belief in legal expertise that made understanding constitutional law as a language of expertise problematic.<sup>315</sup> Second, the invention of a new metric with a scientific allure for measuring public support for the Court. According to this metric, since the measurement of support for the Court began, the Court has been very successful for most of the period in maintaining a relatively high level of public support.<sup>316</sup> And finally, the Court's growing engagement with identity issues in recent decades has limited the Justices' ability to use professional jargon. A court that constantly speaks about the people's identity cannot be detached from the people. It must communicate its judgments on the people's identity in a language accessible to non-experts. Unsurprisingly, a court that constantly engages with issues central to the people's identity views the opinions of the people as central to its legitimacy.<sup>317</sup>

It is important to stress that viewing judicial legitimacy in terms of public support does not mean that the Court follows the results of public opinion polls in concrete cases.<sup>318</sup> Think of how inserting patients' satisfaction metrics to measure doctors' performance changed the medical practice. This change did not mean that doctors stopped practicing medicine and merely attempted to be popular, and yet it did create a connection between assessing their performance and their "public support."<sup>319</sup> Similarly, the shift in understanding judicial legitimacy did create an unprecedented linkage between public support and Supreme Court's adjudication.

While Alito's majority opinion in *Dobbs* does not directly address the effect constitutional adjudication has on issues of American identity, *Dobbs* demonstrates how the Court's involvement in identity issues and its source of legitimacy are tightly connected. It also exposes once again the difficulty for the Court in holding both its role as the institution responsible for expressing American identity and its role as a disciplinary expert in constitutional law.<sup>320</sup>

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315. See, e.g., JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 4 (2005) ("[A]s the twentieth century passed into the twenty-first, it had become hard to believe in constitutional law. Hard to take it seriously—as law.").

316. Bassok, *supra* note 218, at 158-65.

317. See Bassok, *supra* note 48, at 22.

318. See Bassok, *supra* note 31, at 146-47.

319. See Or Bassok, *The Arendtian Dread: Courts with Power*, 30 *RATIO. JURIS.* 417, 426 (2017) (surveying studies that discuss the effects of using patients' satisfaction metrics on doctors' performance).

320. Bassok, *supra* note 48, at 51 (explaining that the Court cannot successfully hold both functions).

Alito's judgment represents an approach that tries to downplay the Court's role in identity issues. Alito narrows the Court's role in identity issues by returning the issue of abortion to the decision of the citizens and their elected representatives while acknowledging the fundamental nature of the issue.<sup>321</sup> According to this view, the Court's role in the identity realm would be minimal. The constitutional discourse may continue to serve as the venue for the people to discuss their political identity. However, constitutional *law*, as discussed by the Court, would function as a language of expertise detached from identity issues. Subsequently, judicial legitimacy would be discussed in terms of expertise.

Justice Kavanaugh's insistence on "judicial neutrality" also aims to narrow the Court's role in controversial identity issues and to return these questions "to the people and their elected representatives in the democratic process."<sup>322</sup> With the Court less involved in these identity issues, the language of constitutional law need not be accessible to the public and can function as a language of expertise.

The dissenting opinion in *Dobbs* speaks of constitutional law as a language expressing "what it means to be an American."<sup>323</sup> It views "reproductive control [as] integral to many women's identity and their place in the Nation."<sup>324</sup> The dissenting Justices explain that "the right to choose [an abortion] situates a woman in relationship to others and to the government."<sup>325</sup> In insisting that abortion is an identity issue to be determined by the Court according to its reading of the Constitution, the dissenting Justices want to maintain the Court's role of expressing American identity. With such a view of constitutional law as affecting the personal identity of so many Americans, the language of constitutional law cannot be too far removed from ordinary language.<sup>326</sup> The American people have to understand the language with which the Court discusses their identity. Subsequently, as long as the Court is deeply engaged in controversies on American identity, its legitimacy cannot emanate from expertise.

Some readers may view my analysis of Alito's judgment as, at best, a piece of naïveté. For them, Alito is a conservative zealot who uses legalese to promote a conservative agenda. Yet Alito's understanding of the Court's legitimacy in terms of expertise rather than in terms of public support, coupled with his rejection of the Court's role in deciding issues central to American identity,

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321. *Dobbs*, 142 S. Ct. at 2257 ("Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.").

322. *Id.* at 2310 (Kavanaugh, J., concurring).

323. *Id.* at 2320 (Breyer, Sotomayor & Kagan, JJ., dissenting).

324. *Id.* at 2345.

325. *Id.*

326. *Id.* at 2320 (viewing constitutional law as a language expressing "what it means to be an American").

narrow the Court's role in controversial ideological questions. Such a position hinders Alito's ability to promote conservative ideology through adjudication.

Furthermore, my analysis of *Dobbs* unveils and fleshes-out that the Justices' positions are part of a long and ongoing debate over the Court's source of legitimacy and its role in the identity realm. Precisely because the Justices did not think of their reasoning in *Dobbs* as part of this debate, they failed to critically evaluate the implications of their positions on the Court's source of judicial legitimacy and its role in deciding identity issues. As a result, the Justices' positions on these issues are not entirely in line with their ideological agenda or partisan orientation. For example, in view of the projected dominance in the Court of the conservative majority in the coming years, the progressive dissenting Justices should have supported a much narrower role for constitutional law and the Court in their reasoning in *Dobbs*. Yet their positions on the Court's source of legitimacy and its role in identity issues lead to endowing the Court with a more central role than the one Alito endows it. In a similar vein to Alito, their jurisprudential positions on judicial legitimacy and the Court's involvement in identity issues do not reflect their partisan orientation. Rather, these positions reflect deeper dispositions on the role of constitutional law and the Court in current America.

## VI. CONCLUSION

In order to function as a language of expertise, the relevant community of language "speakers" needs to follow the disciplinary rules of their language.<sup>327</sup> According to the rules of the discipline of constitutional law, any argument can become part of the language if it goes through the legislative process (or the process of constitutional amendment). However, if an argument does not go through this process, it cannot become part of constitutional law unless it follows the "logic" of constitutional law as a language of expertise. If it does not fit the earlier "chapters" of constitutional law, it should be rejected even though the argument may enjoy substantial public support.<sup>328</sup>

My article tells the story of how the disciplining rules of constitutional law, according to which correctness in constitutional law was judged, have lost their power in recent decades, at least in salient cases.<sup>329</sup> Public support has become a determining factor in making an argument "kosher" as part of the language of constitutional law, even though it has not gone through the legislative process.

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327. See POST, *supra* note 98, at xii-xiii, 8, 29-32 (discussing the production of expert knowledge).

328. See *supra* section II.A.2.

329. The influence of a case's saliency was evident in *Casey*. See 505 U.S. at 861 ("In a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed.").

The shift towards the primacy of public support over legality is not merely a change in the “legal grammar that we all share and that we have all mastered.”<sup>330</sup> It is not merely a rise in the relative power of one type of constitutional argument over the others or even the creation of a new modality. While new modalities may develop if and when the constitutional discourse changes,<sup>331</sup> the shift to legitimacy without legality represents a much more radical turn than the creation of a new modality. It is an incorporation of a new logic into the language of constitutional law that contrasts with the logic of constitutional law as such. Even Philip Bobbitt, who equated constitutional law with the practice of constitutional discourse,<sup>332</sup> did not attribute to it the traits of an ordinary language in which an argument becomes proper by its mere extensive use by speakers. Bobbitt explained that in the language of constitutional law, “[n]ot just any argument will do, and a political argument *per se* will never do. . . . the standards of legal argument—neutrality, generality, consistency—are not the standards of the political operative.”<sup>333</sup> Law has a “bite” because it is a professional language that has a different logic than the logic of popular discourse.

Yet currently, public support endows arguments with legality, and they are considered proper constitutional arguments irrespective of their “truth-value” in terms of the language of constitutional law. In salient cases, “legal” persuasiveness is also measured in terms of the strength of public opinion behind an argument.<sup>334</sup> In those cases, authoritative “professional grammar” can no longer effectively ensure that the rules of the discipline are duly followed.

*Dobbs* is an important crossroad for the rise of legitimacy without legality. By shedding Frankfurter’s “public confidence” as the measure for judicial legitimacy in favor of Hamilton’s “judgment,” Alito demonstrates his willingness to reverse direction, restore constitutional law as a language of legal expertise, and reinstate the border between reason and will. However, is reinstating constitutional law as a language of legal expertise such a worthy cause to justify the decision in *Dobbs* to overrule *Roe*? The Court’s decision in *Dobbs* has translated into harsh and unfortunate results in terms of the health,

330. BOBBITT, *supra* note 68, at 6.

331. See Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 U. PA. J. CONST. L. 1067, 1083-84 (2015) (explaining that Bobbitt’s modalities are “a snapshot of our constitutional culture at a particular moment in time” and may evolve and develop).

332. See Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1842 (1994).

333. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 41 (1991).

334. See Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 11, 19-20 (2007).

well-being, and equal dignity of women.<sup>335</sup> In addition, *Roe* was viewed as a statement on women's equality as it affected their ability to choose not to function as mothers and caregivers.<sup>336</sup> For this reason, overruling *Roe* also has unfortunate meaning in terms of American identity.

There is no simple answer to this dilemma. In my view, the shift in understanding judicial legitimacy has contributed significantly to the glaring weaknesses of current American democracy. Following this shift, constitutional law has lost its ability to serve as a language of expertise, and subsequently, the divide between law and politics has eroded significantly.

During the Trump administration, legal scholarship was obsessed with the possibility that American democracy would collapse, and discussions of how the Court could save democracy were abound.<sup>337</sup> With the election of President Joe Biden, these discussions decreased substantially.<sup>338</sup> Following *Dobbs*, the Court lost its status as the potential savior of democracy in the eyes of many.<sup>339</sup> However, the vulnerabilities of American democracy persist; chief among them is the undermining of the border between law and politics.

The idea that the Court requires public support rose to dominance only after the invention of public opinion polls.<sup>340</sup> Tracking the genealogy of the concept of judicial legitimacy proves that understanding this concept in terms of public support does not represent reality but constructs it. Nothing in democratic theory

335. See *Dobbs*, 142 S. Ct. at 2343-45 (Breyer, Sotomayor & Kagan, JJ., dissenting). See also Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1736 (2008).

336. See *Gonzalez v Carhart*, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special References to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 35 (1992).

337. See, e.g., CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA xi, 78-79 (Cass R. Sunstein ed., 2018).

338. The Harvard Law Review forewords—the annual campfire “meeting” of American legal scholarship—serves as a good indication for scholarly currents in elite law schools. Just before the 2020 elections, Michael Klarman published a 264 page long foreword discussing the “the recent degradation of American democracy.” The reader of this foreword—that was written in the spirit of “resistance” to autocracy—could not but feel that the days are equivalent to the last days of the Weimar Republic. See Klarman, *supra* note 240, at 8. A year later, and after the election of President Biden, Cristina Rodriguez published the 2020 foreword that not only does not speak on how American democracy succeeded to survive for another year but promotes the ability of the new administration to make a “regime change—the advent of a new presidential administration that brings with it constitutional, interpretive, philosophical, and policy commitments distinct from those held by its predecessor . . .”, see Cristina M. Rodriguez, *The Supreme Court, 2020 Term, Foreword: Regime Change*, 135 HARV. L. REV. 1, 156 (2021). According to Klarman’s foreword giving such power in the wrong hands would be another nail in American democracy’s coffin.

339. See, e.g., Sean Illing, *How to Save Democracy from the Supreme Court*, VOX (Aug. 5, 2022), <https://www.vox.com/23055652/vox-conversations-supreme-court-democracy-abortion-rights-niko-bowie> [<https://perma.cc/92V7-H7LY>].

340. See Bassok, *supra* note 218, at 154.

requires that every institution—rather than the regime as such—enjoys public support.<sup>341</sup> Think of the Federal Reserve. Signing the Federal Reserve Act, President Woodrow Wilson described the Fed as the “Supreme Court of Finance.” However, does anyone argue that the authority of this institution, which is central to the US’s monetary policy, is grounded in public support as measured in public opinion polls rather than its expertise?<sup>342</sup>

All players need to revert to the Hamiltonian understanding of judicial legitimacy, according to which the Court’s legitimacy stems from its expertise and not from public support.<sup>343</sup> Otherwise, constitutional law is bound to be corrupted. Deprived of constitutional law as a language of expertise, American democracy would lose a powerful tool that can restrain populist movements from taking over constitutional law without fulfilling the requirements of legality.

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341. See Bassok, *supra* note 34, at 13, 35.

342. See Frederick Schauer, *The Supreme Court, 2005 Term, Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 54 (2006) (claiming that there is almost no discussion of the counter-majoritarian difficulty with regard to the Federal Reserve Board partly because “many people believe, rightly or wrongly, that most agency decisions are based on technical knowledge which neither the people nor their directly elected representatives possess.”).

343. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952) (explaining that judicial review is not undemocratic because “democracies need not elect all the officers who exercise crucial authority in the name of the voters. . . . [t]he task of democracy is not to have the people vote directly on every issue . . .”).



