

POLLS, THE PUBLIC, AND POPULAR PERSPECTIVES ON CONSTITUTIONAL ISSUES

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INTRODUCTION

It is hardly commonplace to ask the public about the cases before the Supreme Court of the United States, and it can be seen as downright idiosyncratic to poll the public about their views on emerging constitutional issues. Nevertheless, this is the core initiative we present in this Essay for *Fordham Law Review's Res Gestae*. We are confident our approach is valuable, innovative, and likely to prompt numerous insights about the Supreme Court and the nature of constitutional law. We make this case in greater detail in the companion piece accompanying this discussion. Here, however, we assume a different tack, outlining the *what* and the *how* of our inquiry into popular perspectives on constitutional issues. Thus, this Essay examines questions related to our selection of cases, our process and methods, as well as anticipating questions about, and objections to, those techniques. Part I of this Essay discusses how we selected the cases. In Part II, this Essay outlines how we conducted the polling. Part III reviews the problems we encountered as well as the results of the polls. Finally, we conclude with a discussion of our findings and our future initiatives.

I. SELECTING THE CASES

In pursuing the idea of testing voters' opinions of cases pending before the Supreme Court of the United States, we set just two criteria. The first was that the cases, or at least their underlying issues, should be of general interest to voters. The nature of polling requires pollsters to ask their citizen-colleagues to volunteer their time responding to questions about public affairs. If the respondents are inattentive or uninterested, the risk is either that they will break off the interview or give unreliable answers—that is, make random responses that cannot be replicated in repeated efforts.

The second criterion was that the cases should be amenable to polling. In other words, the heart of the constitutional dispute examined should be quickly graspable by an untutored layperson. While our polling sample included a wide range of people, with diverse educational and professional backgrounds, a sample that, roughly speaking, mirrors the diversity of the nation's voters as a whole, we had to assume our respondents had little or

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no background in constitutional law. Given our reliance on live telephone interviewing, questions needed to be direct and relatively short. Currently, telephone interviewing is still considered to be the best way to approach drawing a random, and therefore representative sample, but an inherent limitation is that listeners cannot study the question as they might a written questionnaire. Therefore, complex questions are difficult to follow, especially if respondents are not already acquainted with the topic.

Thus, while we examined dozens of cases on the Court's 2010 term docket, we ultimately focused on four that met our criteria. The first case, *Brown v. Entertainment Merchants Ass'n*,¹ pitted the state of California against an interest group arguing that it was legally injured by new restrictions on sales of violent video games to customers under the age of eighteen. In *Brown v. Plata*,² California and eighteen other states opposed judicial rulings that would have the state relieve the overburdened prison system by releasing a significant number of prisoners.

*Arizona Christian School Tuition Organization v. Winn*³ involved objections to using state tax credits, in place of vouchers, to compensate individuals who indirectly contributed to scholarships for children attending private, religiously affiliated schools. Finally, *Camreta v. Greene*⁴ raised the question of whether, absent a warrant, a minor's parents needed to grant permission for an interview when child abuse at home is suspected.

II. CONDUCTING THE POLLS

We selected four cases due to interview time limitations. In this and other surveys conducted by PublicMind, the polling organization associated with our university, we generally try to limit ourselves to less than ten minutes an interview, not to reduce costs, but to ensure a complete interview. Going too long carries the risk of the respondent running out of patience, or encountering a distraction, such as children, pets that require attention, household chores, or TV programs. This concern is particularly important because the last several questions of a standard interview provide crucial demographic information, and allow pollsters the opportunity to both examine the representativeness of the sample and draw conclusions about differences among subgroups.⁵

We should also note that these four Supreme Court cases we selected were not the only topics of the interview. After voters were screened, they were given a line of questions about President Barack Obama, the direction

1. 131 S. Ct. 2729 (2011).

2. 131 S. Ct. 1910 (2011).

3. 131 S. Ct. 1436 (2011).

4. 131 S. Ct. 2020 (2011).

5. An example of these demographic differences include those correlated with ethnicity, income, education, and related factors.

of the country, and questions about potential or actual presidential candidates.⁶

Telephone interviewing⁷ begins with a database of randomly selected telephone numbers acquired from a specialized vendor who has attempted to remove business lines, facsimile machines, and disconnected numbers.⁸ The numbers are then re-randomly selected and called. All of this is an attempt to maximize the number of potential, eligible participants in the survey, in this case, registered voters nationwide, and to ensure that each of these individuals has a statistically identifiable and equal chance of being called. Cell phones are included, which is important given the large and growing number of households that do not have landlines.⁹

For our constitutional issues poll, we used a national sample of 800 registered voters. If we assume they were indeed selected randomly, the measurable margin of error is +/- 3.5 percentage points at the 95 percent level of confidence, meaning that in replicating the poll, 19 out of 20 times the results will be within 3.5 points of each other. But a statistically valid statement like this tends to overstate the precision of polling, which, even when done correctly, is only a scientific method of arriving at an *estimate*. Telephone interviews also suffer from refusals, break-offs, language barriers, equipment problems, and a long list of non-sampling errors, such as variations in approach and effectiveness from the live interviewers and even question wording. Many of these problems cannot be measured or easily redressed.

For our poll, it was an important methodological decision to focus on the opinions of only registered voters. This is due to the fact that demographics of registered voters differ in some significant ways from the demographics of all adults who are permanent residents in the United States. There are certainly a number of important organizations that base their polling, even

6. For these preceding questions and results, *see* Press Release, PublicMind, Jersey Guy Runs Better Nationally than Other Big Republicans (Mar. 31, 2011), <http://publicmind.fdu.edu/2011/1103prez>.

7. All interviews were conducted by OpinionAmerica Group of Cedar Knolls, New Jersey, with professionally trained interviewers using a Computer Assisted Telephone Interviewing (CATI) system.

8. One might ask why we prefer to collect our data by telephone interviews and not online questionnaires. Online interviewing can be less than half the cost of telephone interviewing and thus has become an attractive and now widely used vehicle in market research. However, online interviewing has a range of unattractive limitations, including missing responses, respondents clicking haphazardly, unreliable demographic data, the exclusion of people who do not use the internet, the influence of incentives offered for participation, and the problem of response bias rooted in the idea that people who opt-in to such questionnaires differ in their views from those who routinely refuse or avoid participation, or are never recruited in the first place. Many of these problems may be ameliorated in the future, but for now opt-in questionnaires would make more sense if one were investigating a population that might be difficult and even prohibitively expensive to reach by telephone, such as current law students in New York State. For our purposes of representing the national electorate as accurately as possible, polling results from telephone interviews were preferable.

9. Cell phone interviewing presents other methodological problems, such as over-representing households with multiple cell phones as well as those with both cell phones and landlines.

on political or legal affairs, on the latter group. But sampling voters, a subgroup of the entire adult population, is less difficult than sampling the entire adult population, and therefore less challenging methodologically. Secondly, we believe voters are a much more salient and influential population than non-voters for the purposes of studying public opinion and its relationship to both the Supreme Court and, more generally, the shaping of constitutional law.

III. PROBLEMS AND RESPONSES

As suggested above, the manner in which polling questions are worded can make a significant difference in their results. Our aim in asking the public about pending constitutional cases was to be direct, simple, and fair. We strove to eliminate legal terminology, assuming that it was possible to get at the core dilemmas or choices at issue in our cases without resorting to terms of art, references to pertinent precedent or even specific constitutional language.

In presenting our answer categories, we strived to make the best case for each side. We tested the questions with academicians as well as non-specialists to achieve a balance of clarity and simplicity while maintaining fidelity to the legal heart of the case. For example, we did not say “tax credits” when asking about the core issues in *Arizona Christian*—out of concern that this phrasing would prejudice the case. Instead, we chose “discount on taxes” as our identifying nomenclature. Somewhat differently, we chose the phrase “interrogate a child” rather than “interview a child” in our question about *Camreta*, out of a sense that the former term better captured the legal weight and implications of the questioning.

We also decided that in our polling on constitutional issues *less is more*. We deliberately did not give some information to our respondents. We did not say, for instance, that the state of California had already admitted the seriousness of its prison overcrowding and its violation of Eighth Amendment protections.¹⁰ After all, despite these concessions, California was still seeking to avoid judicially-enforced prisoner releases, preferring to set its own schedule. In other instances, we consciously mimicked the language and argument presented in the briefs in an effort to highlight the central, contested legal issues. Readers can decide whether we achieved our goals of clarity for non-specialists while remaining faithful to the most important constitutional matters at hand.

Those who do not poll regularly may want to note three further safeguards we implemented to protect the integrity of our study.

First, the four cases were presented to each respondent in random order. This technique ensures that there is no systematic influence of one question on a succeeding question, nor a pattern of fatigue. It should be said that we purposely order questions when appropriate, hypothesizing that one will

10. See *Brown v. Plata*, 131 S. Ct. 1910, 1910 (2011) (discussing a lower court ruling in which “the State conceded that deficiencies in prison medical care violated prisoners’ Eighth Amendment rights and stipulated to a remedial injunction”).

have an effect on another, and hoping to measure that effect, but the aim here was to avoid order effects, not measure them.¹¹

Second, it is a matter of course that within each question pollsters do not offer the choice in the same order each time, but have the programmer randomly rotate the answer categories. Making sure that all the listeners do not hear the answers to the questions in exactly the same order minimizes the effects of *primacy* and *recency*, the ideas that respondents may tend to choose the first response they hear simply because it sunk in first, or that they tend to choose the last answer they hear simply because it is the freshest in their minds.

Finally, for three of the four cases we asked two distinct background queries. The first question—“How much have you heard or read” about the case?—was not meant to elicit information, though the answers were recorded and reported. The question was meant to introduce a new subject, and give a bit of basic information to the listener and also to keep him or her engaged, rather than just passively listening to a single, lengthier statement.

All this said, we plead guilty, but with extenuating circumstances, to the charge that our study simplified intricate, layered legal cases that cannot be readily boiled down to brief survey questions,. It is perfectly true that all these cases have a complexity of issues and many subtleties which are lost in reducing them to just a single sentence or group of phrases. A glaring example is found in *Arizona Christian*. On its merits, the case initially revolved around the question of whether the state of Arizona violated the First Amendment’s Establishment Clause by offering tax credits for donations to groups which in turn gave money to private, religiously affiliated schools (presumably a policy attracting parents sending their own children to private, religiously affiliated schools). The Arizona program was described by the *New York Times*’ Adam Liptak as “novel and complicated.”¹² To confuse matters further, by the time the case reached the Court, the matter at issue had largely become a question of whether the Ninth Circuit had properly overruled the United States District Court for the District of Arizona, which had denied plaintiffs’ standing to sue under exceptions regarding tax credits and establishment questions carved out in *Flast v. Cohen*.¹³ Needless to say, the average voter would not be able to sift through these technical criteria; even if we were to devote ten minutes of explanation, never mind the roughly thirty seconds we used to solicit their views on the case. But, notwithstanding this concession, we stand by the value of our polling on *Arizona Christian* and the other cases. While the Supreme Court’s 2011 opinion reviewed Arizona’s distinctive private

11. For purposeful order effects, see Dan Cassino, Krista Jenkins & Peter J. Woolley, *Measuring “What If?” Standard Versus Priming Methods for Polling Counterfactuals*, SURVEY PRACTICE (Nov. 24, 2008, 3:53 PM), <http://surveypractice.files.wordpress.com/2008/11/survey-practice-november-20081.pdf>.

12. Adam Liptak, *Supreme Court Allows Tax Credit for Religious Tuition*, N.Y. TIMES, Apr. 4, 2011, at A16.

13. 392 U.S. 83 (1968).

school support system on the narrow and arguably fraught grounds of *Flast*, and in fact denied standing to the plaintiffs, the decision did not put a stop to Arizona's policy. Thus, the heart of the case is still very much about whether the state could grant such tax credits, and that question is still very much alive. States seeking to emulate, or avoid, Arizona's school policies may very well look at public opinion polling on the subject—which offers some clear perspective—in addition to considering the Court's complex, 5-4 decision.

A more esoteric objection to our polling initiative is to claim that most survey results are simply an artifact of asking the question. In this view, “public opinion” is itself an artificial construct—trees falling in a forest that does not exist. While some people have pertinent, detailed information and are actively engaged with at least some questions pollsters might ask, most of the public do not usually have opinions on most questions of policy, not to mention law. Thus, the concern is that respondents simply invent answers when asked because they can and they know they are expected to have answers.

To this objection we are strangely sympathetic, if only because so much of the literature in psychology and economics supports the charge that humans are rationalizers, acting on underlying impulses or prejudices regardless of the amount of information they have acquired, and often irrespective of objectively defined “good” outcomes.¹⁴

But this concern is so generalized it calls into question all polling and indeed all of public opinion. We know very well from pre-election surveys that polling does rise to impressive levels of accuracy and prediction. As for public opinion, it may consist of little more than what Walter Lippman wrote a century ago: people coming into a theatre in the third act, staying just long enough to decide who is the hero and who is the villain, and leaving long before the curtain comes down.¹⁵ But in a republic committed to popular rule, and especially one in which the lines of accountability and governing are so numerous and tangled,¹⁶ the public voice, however difficult to capture, is still a vital source of information, and polling remains one of the best (admittedly flawed) measures we have.

An objection less comprehensive than calling all survey results artifacts of the investigation would simply charge that the public's lack of information about the Court, to say nothing of emerging constitutional law, makes our investigation foolish.¹⁷ In addition to asking the public about tax

14. See DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 1–25 (2008).

15. WALTER LIPPMANN, *THE PHANTOM PUBLIC* 117 (1925).

16. See Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 1–3 (2003).

17. PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 9 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (“The public often does not have either the relevant information concerning the court's decision or the tools to understand it.”); Tom Goldstein & Amy Howe, *But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 MICH. L. REV. 963, 974 (2011) (“[T]he public is completely unaware of the overwhelming majority of the Supreme

credits or prison overcrowding, why not ask about the merits and demerits of stereotactic radiosurgery as a means of removing a meningioma?

The answer to this query, of course, is that we do not ordinarily think complex surgical techniques are answerable to the views of the public in the same way as constitutional interpretation and understanding. Different currents of what has been sometimes called “popular constitutionalism” insist that either as an empirical or normative matter (or both), the public does or should have some sway in shaping our supreme law.¹⁸ Thus, at a minimum, we are interested in soliciting the views of the voting public on constitutional matters because they are expected to have opinions on this subject. How these opinions, however ill-informed they may be, differ among subgroups (including those demarcated by age, gender, race, geography, and party identification), or differ from what the Court rules, presents original and intrinsically interesting information to students of law and politics.

Moreover, the public’s very level of ignorance about the Supreme Court, its workings, and constitutional law is subject to some debate. James Gibson and Gregory Caldeira, for example, have argued that many reports of the public’s lack of knowledge about the Court are poorly framed and unreliable.¹⁹ And while we have reasons to believe the public has limited awareness or understanding of, say, *Roe v. Wade*²⁰ as a particular decision of the Supreme Court,²¹ this observation does not settle whether the public has coherent views about abortion or the underlying contest of values and even legal principles involved in *Roe* and other abortion cases. Indeed, we note that political scientists are engaging in a broader debate about precisely how we measure political literacy amongst the electorate, with some arguing that the information required for effective and responsible citizenship is qualitatively different from what is often tested in many surveys that purport to find egregious voter ignorance.²²

We also note that even if one were to accept, relatively uncritically, the proposition that the public is generally uninformed and disengaged with respect to constitutional matters, this claim would not necessarily be true across all issue areas and at all times. Consequently, our polling research is valuable as part of wider efforts to understand the circumstances under which the public is more and less attentive and informed—and the

Court’s constitutional law jurisprudence.”); Gerald Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 565, 566–67 (2009) (citing scholarship that “uniformly finds most Americans do not have a clue as to what the Court is doing or has done”).

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

19. James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POLS. 429 (2009).

20. 410 U.S. 113 (1973).

21. Rosenberg, *supra* note 17, at 566 (discussing the public’s lack of understanding about *Roe*).

22. See Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L.J.: RULES, POLS., & POL’Y 111 (2010); Michael Schudson, *America’s Ignorant Voters*, 24 WILSON Q. 16, 22–23 (2000 Spring).

consequences of higher levels of attention and constitutional fluency. In addition, to the degree our polling may help in identifying areas of persistent public ignorance, inconsistency, or confusion about the Supreme Court and constitutional interpretation, our work can play a part in future educational initiatives seeking to correct these deficiencies.

A more refined and particular objection to this project might contend that our efforts are insufficiently fine-grained, that is, that our survey of the public overlooks important subgroups likely to be especially influential with the Court or on a particular topic.²³ While, as noted, our polling did break down responses by region, basic ethnic background, party, gender, and age, we do not doubt there are other categories of likely interest and importance. Concurring with other research, we find it plausible, for example, that highly educated members of the public, along with lawyers, single-issue voters, and members of organized interest groups, represent subgroups within our polled respondents with distinctive relationships to the Supreme Court and constitutional law. Of course, in our minds, these observations suggest that the proper cure for these ills is more polling and greater specification, not less.

Finally, and closely related to this last point, we note that a number of scholars have postulated that distinct blocs of elites as opposed to the general populace have a special relationship with the Court—and it is these cadres that should be the pertinent objects of discussion and investigation with respect to their views on the Court and constitutional law.²⁴ For the moment, we are agnostic on these questions, largely because they are beyond our objectives and do not necessarily diminish the value of our current work. Even if “elites,” however defined, influence the Court and direction of constitutional law more than the people as a whole, this observation hardly ends the case for studying the public’s opinions of emerging cases. First, there is plenty of research to support the importance of public opinion in shaping law. Second, it is likely that the public has a substantial impact on elite political participants—providing at least an indirect channel for influencing our constitutional law and the highest court of the land.

CONCLUSION AND FUTURE INITIATIVES

As with many voyages of discovery, our initial polls of pending constitutional cases presented unanticipated problems, some intriguing outcomes, and ultimately placed us in a vast and, we believe, intellectually fertile landscape for the future. Notably, in presenting our findings to some colleagues and members of the press we encountered some confusion about the purposes and utility of our results. For all the growing recognition in the academy of the myriad ways in which voters, elected officials, and

23. See generally LAWRENCE BAUM, *THE SUPREME COURT* (2010) (discussing groups and individuals influential with respect to the Court’s docket formation and decision making).

24. See Lawrence Baum and Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010) (discussing public support for judicial independence).

private actors and groups shape and interpret constitutional law, we suspect that for many, polling the public about their constitutional views is perceived as eccentric, at best, and possibly antagonistic to judicial independence and the rule of law.²⁵

That said, we are encouraged by the process and results of our solicitation of the public's views on constitutional matters and cases. Through both observation of the survey interview process and examination of the results, we did not detect any obvious confusion, uncertainty, or incoherence in how members of the public contemplated and responded to our questions, at least not more than in other polling exercises. The percentage of respondents whose responses to these polling questions were "don't know" or "unsure," was similar to the percentage of "don't knows" for many standard, broader polling questions.

We also found the results more interesting than anticipated as we discovered differences in opinion among subgroups that we had not predicted. For example, the absence of partisan division in *Camreta*, the case involving interrogation of a minor, may be a marker of the public's entrenched, widespread support for traditional civil liberties in the case of minors, may reflect the low ebb of our current trust in government institutions, or both.²⁶ At the same time, we found cases, such as *Plata*, where there was a seemingly intense and clear public position at odds with the Court's eventual ruling. This outcome invites examination of both whether the public's views remained stable after the decision as well as whether (and what) political organizations and entrepreneurs picked up on and exploited the public mood on this issue.

In sum, we are realistic about the constraints of our research, but encouraged by the degree to which the results raise and sometimes teasingly answer interesting questions about the public's engagement of constitutional issues and the Court's relationship with popular opinion. In order to refine, expand, and systematize our survey of cases, we are currently recruiting a larger group of researchers including scholars of public opinion and the Court, journalists, and legal practitioners, to help identify new, pending cases to be heard during the 2011 term to poll. This group will also assist us in question construction and in identifying shortcomings of our polls or areas where we need additional information such as in the solicitation of information about additional demographic or political subgroups. We anticipate that we will identify at least six cases for the upcoming term, commencing another national poll that will finish long

25. See JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURT SERVES AMERICA* 14 (2006) (citing widespread support for judicial independence as a critical feature of our political and constitutional system). See also Baum and Devins, *supra* note 24, and accompanying text; Bruce Peabody, *Congressional Constitutional Interpretation and The Courts: A Preliminary Inquiry Into Legislative Attitudes*, 29 *LAW & SOC. INQUIRY* 127 (2004) (discussing the rise of deferential attitudes to the Court and judicial review amongst members of Congress).

26. Press Release, Pew Research Center, *Public Trust in Government: 1958-2010* (April 18, 2010), <http://people-press.org/2010/04/18/public-trust-in-government-1958-2010/>.

before the justices hand down their rulings. We will make our results, methods, and interpretations available through the PublicMind website.

As the number of cases we poll grows, and as our understanding of our results becomes more nuanced and robust, we will consider adding additional measures to our work, including focus groups and experimental research. Overall, we anticipate that our observations of patterns, both in public opinion and in its contrasts to and echoes of Court decisions, will become richer over time, and that we will be building up a novel and useful body of original research, pushing outward the bounds of knowledge of the Court, the public, and constitutional democracy.