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THE PUBLIC'S CONSTITUTIONAL THINKING AND THE FATE OF HEALTH CARE REFORM: PPACA AS CASE STUDY

Bruce G. Peabody* & Peter J. Woolley**

INTRODUCTION

The 2011 Supreme Court Term will be remembered most vividly for its decision in *National Federation of Independent Business v. Sebelius*,¹ the ruling that upheld the Patient Protection and Affordable Care Act (PPACA or Affordable Care Act).² For many scholars, commentators, and political figures, its significant legal legacy will be the justices' analysis—especially the Court's rejection of the Commerce Clause as a basis for the law—as well as lingering questions about whether the Obama Administration's landmark health care legislation will face new challenges as a result of the Court's somewhat narrow ruling grounded in the government's taxing power.³

But we assess the end of the 2011 Term, and the health care battlefield specifically, in an entirely different light. From our perspective, *Sebelius* demonstrates, and calls for greater understanding of, something largely overlooked but more fundamental than pundits' celebration or anguish over the ruling. The controversy surrounding this case and the important questions it posed also revealed that ordinary citizens can and do opine about constitutional values, and the public indeed has some facility distinguishing that which is legislatively desirable from what is constitutionally permissible. In short, we see America's recent health care

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1. 132 S. Ct. 2566 (2012).
No. 11-393 (U.S. June 28, 2012).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by The Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (2010) (codified as amended in scattered titles of U.S.C.).

3. See, e.g., Wendy E. Permet, *Uncertainty Over When Conditions Are Coercive*, NAT'L L. J., July 9, 2012, at 43; Michelle Boorstein, *Affordable Care Act Ruling Promises Religious Fights For the Forseeable Future*, WASH. POST, June 28, 2012, http://www.washingtonpost.com/blogs/under-god/post/health-care-decision-religious-reaction-swift-catholic-groups-lawsuits-will-continue/2012/06/28/gJQAkI5D9V_blog.html; Jonathan Cohn, *Did the Court Undermine the Medicaid Expansion?* NEW REPUBLIC (June 29, 2012, 2:54 PM), <http://www.tnr.com/blog/plank/104510/supreme-court-roberts-ruling-on-medicaid-expansion-obamacare-impact>.

moment more as a chronicle of the public's ability for adept constitutional thinking than as a story about judicial politics or the success or failure of the Obama Administration's legal and political maneuvering.

We examined the public's constitutional perspective on the health care legislation by asking voters about key legal issues surfaced by the PPACA litigation in two surveys based upon random sampling of the national population.⁴ The results confirmed what we had suspected from our prior work.⁵ Despite cries that the public is ignorant and incapable of addressing substantive constitutional issues,⁶ voters can be confident, conflicted, and principled (sometimes all at once) when considering the range of values that major constitutional controversies entail, even in a case as complex as *Sebelius*.

We suspect that the pages of other legal journals will long be filled with analyses of how *Sebelius* comports with (or deviates from) case law dating from the early nineteenth century,⁷ its impact on the leadership and legacy of the Roberts Court, new challenges to the legislation, and how the ruling will impact the future of American health care—not to mention relations between the judiciary and other branches of government. But this essay has a different emphasis, targeting why and how the legal issues underlying *Sebelius* can help to develop a portrait of popular constitutionalism.⁸ Although this essay considers the Court's ruling on PPACA, it only serves to compare the Court's decision with public opinion, which offers an instructive contrast that sheds light on both the implications of the health care debate and how we understand the evolving nature of constitutional law.

4. In current and prior studies of Americans' constitutional judgments, we focus on registered voters. Although it requires certain tradeoffs, this approach also offers several advantages, including access to respondents and more easily gauging their political impact. See Peter J. Woolley & Bruce G. Peabody, *Polls, the Public, and Popular Perspectives on Constitutional Issues*, 80 *FORDHAM L. REV. RES GESTAE* 22, 23–25 (2011), http://fordhamlawreview.org/assets/res-gestae/volume/80/22_Woolley.pdf (explaining our focus on registered voters).

5. See *id.* at 30–31.

6. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1997); Gerald Rosenberg, *Romancing the Court*, 89 *B.U. L. REV.* 563, 566–67 (2009) (highlighting research suggesting that “most Americans do not have a clue as to what the Court is doing or has done”); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 *CRITICAL REV.* 413 (1998).

7. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that Congress may regulate interstate commerce under the Commerce Clause of the U.S. Constitution).

8. See Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 *Nw. U. L. REV. COLLOQUY* 300 (2011), <http://colloquy.law.northwestern.edu/main/2011/04/the-tea-party-movement-and-popular-constitutionalism.html>, for a discussion of “popular constitutionalism” both as a term and an emerging scholarly interest. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); RICHARD D. PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994).

I. POLLING THE PUBLIC ON THE PPACA: METHODS AND RESULTS

A great deal of polling has been conducted by many firms since PPACA became law in the spring of 2010. Indeed, one website has tracked more than 275 extant polls on the legislation, aggregating these results to present a long trend line as well as an up-to-date snapshot of public thinking on the issue.⁹ We note briefly that in the two and a half years before the Court announced its decision (January 2010 to June 2012) the trend line was fairly flat and public disapproval generally outpaced approval by a ratio of five to four.¹⁰

With rare exceptions, these numerous polls asked a variety of questions about health care reform and even about how (and why) justices of the Supreme Court would rule on the *Sebelius* case.¹¹ But few pollsters probed the public on their own understanding of the legal controversy. Instead, they asked questions ranging from specific (e.g., “[d]o you approve or disapprove of the health care legislation[?]”¹²) to general (e.g., “do you approve or disapprove of the way Barack Obama is handling healthcare policy?”¹³). Questions of approval and disapproval concerned individuals’ agreement or disagreement with the legislation, however, not their legal judgments. Indeed, not until late in the 2011 Term did pollsters pose questions of PPACA’s constitutionality, and, even then, very few did so.¹⁴

Within this context, Fairleigh Dickinson University’s research group PublicMind conducted two national surveys in the winter 2011–12, after the

9. See *Obama Job Approval—Health*, HUFFINGTON POST, <http://elections.huffingtonpost.com/pollster/obama-job-approval-health> (last updated Nov. 15, 2012).

10. Mark Blumenthal, *Obamacare Polls Show Little Change Since Reform’s Passage*, HUFFINGTON POST (Mar. 27, 2012), http://www.huffingtonpost.com/2012/03/27/obamacare-polls-affordable-care-act-health-care-reform_n_1380986.html.

11. See *id.*

12. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MARCH 2012 POLITICAL SURVEY FINAL TOPLINE 44, 65 (2012), available at <http://www.people-press.org/files/legacy-questionnaires/Topline%20for%20release%203-14-12.pdf>.

13. *Presidential Ratings—Issues Approval*, GALLUP, <http://www.gallup.com/poll/726/presidential-ratings-issues-approval.aspx#2> (last visited Nov. 19, 2012).

14. After Fairleigh Dickinson University’s PublicMind had twice made national measurements of public opinion on the constitutionality of the legislation, a number of others followed. Gallup fielded the question on February 20 and 21, 2012. See Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP (Feb. 27, 2012), <http://www.gallup.com/poll/152969/Americans-Divided-Repeal-2010-Healthcare-Law.aspx>. A Reason-Rupe poll fielded the question from March 10 to 20, 2012. See *New Reason-Rupe Poll: Americans Think Health Care and Broccoli Mandates Are Unconstitutional*, REASON.COM (Mar. 26, 2012), <http://reason.com/poll/2012/03/26/reason-rupe-health-care-mandate-poll>. Fox News fielded the question from April 9 to 11, 2012 and again from June 3 to 5, 2012. See *Poll: 60% of Americans Say Mandate Is “Violation of Individual Rights,”* FOX NATION (June 28, 2012), <http://nation.foxnews.com/obamacare/2012/06/28/poll-60-americans-say-mandate-violation-individual-rights>; Dana Blanton, *Poll: 56% Say Obama Tried To Intimidate Court on Health Care*, FOXNEWS (Apr. 12, 2012), <http://www.foxnews.com/politics/2012/04/12/fox-news-poll-56-say-obama-tried-to-intimidate-court-on-health-care/>. The exception was Time/Abt SRBI, which fielded the question on June 20 and 21, 2011. See Seth Brohinsky & Mark Schulman, *Most Agree US Constitution Withstands Test of Time*, ABT SBRI (June 23, 2011), http://www.srbi.com/Constitution_Poll.html.

Supreme Court agreed to hear the PPACA case and well before it issued its decision in *Sebelius*. These polls probed the public's views on what we deemed to be the most salient constitutional question posed by the PPACA litigation.¹⁵ First in December 2011 and then in February 2012, we asked two separate groups of randomly selected registered voters if Congress could "legally require everyone to have health insurance or not."¹⁶

A majority of respondents indicated they had heard a fair amount about PPACA. Almost three in four voters reported that they had heard either a "great deal" or "some" about health care reform.¹⁷ Nevertheless, a sizable minority, one in five (21%), reported hearing "just a little," and slightly less than one in ten saying they had heard "nothing" about the law.¹⁸ Given the low profile of even the most important policy issues in the eyes of the public,¹⁹ these figures capture an impressive level of attention. The figures certainly stand in stark contrast to public awareness of other Supreme Court cases, for which nine of ten voters routinely report they have never heard about a given case.²⁰

The figures also stand in contrast to reporting by The Henry J. Kaiser Family Foundation, which claimed "confusion and relative lack of attention" on the part of the public and that "most Americans say they are not paying very close attention to the case."²¹ Even in the Kaiser poll, however, three quarters of respondents reported that they were following at least some news about *Sebelius*, even if not especially closely; only one in four said they were not following any news about the case.²²

15. See Press Release, Fairleigh Dickinson Univ.'s PublicMind, Health Insurance: Can They or Can't They? Voters Speak Clearly On Question of Mandating Health Insurance (Mar. 20, 2012) [hereinafter, Press Release, PublicMind], available at <http://publicmind.fdu.edu/2012/require/>, for a detailed presentation of our questions, methodology, and results. See also Woolley & Peabody, *supra* note 4, at 23–25 (discussing the methodology of our previous polling efforts, which employed the same basic approach as our health care surveys).

16. Press Release, PublicMind, *supra* note 15, at 2.

17. See *id.* at 2. We posed the question, "The US Supreme Court will also rule on the health care bill, passed by Congress, that requires everyone to have health care insurance. How much have you heard or read about the Health Care Bill . . . a great deal, some, just a little, or nothing?" *Id.* at 3.

18. See *id.* at 3.

19. See generally CARPINI AND KEETER, *supra* note 6.

20. See Bruce G. Peabody & Peter J. Woolley, *Res Publica: Public Opinion, Constitutional Law, and the Supreme Court's 2010 Term*, 80 FORDHAM L. REV. RES GESTAE 10, 16–20 (2011), http://fordhamlawreview.org/assets/res-gestae/volume/80/10_Peabody.pdf (discussing cases from the 2010 Term and voters' reported unfamiliarity with them).

21. HENRY J. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL—MARCH 2012, at 1–2 (2012), available at <http://www.kff.org/kaiserpolls/upload/8285-F.pdf>.

22. See *id.* at 1. Indeed, one wonders whether and to what degree the Kaiser poll's respondents were exposed to news about the case at all, as the poll was conducted from February 29 to March 5, 2012. The Republican presidential primary debates, during which the bill was lambasted, were over. Oral argument in *Sebelius* would not take place for another three weeks. Moreover, we note that the Kaiser poll sampled from all adults residing in the United States, a broader population than registered voters, which made up the focus of our surveys. *Id.* at 13; Woolley & Peabody, *supra* note 4, at 23–25 (discussing our use of registered voters).

Indeed, we hasten to note that high public awareness of the debate leading up to the Affordable Care Act's passage reverberated in the public's subsequent willingness to offer their opinion of the constitutionality of the law. More than nine in ten respondents provided a clear answer to the question, "Can Congress legally require everyone to have health insurance or not?"²³ In the two polls conducted by PublicMind, just ten percent or fewer said they did not know, were unsure, or did not care to offer an opinion on the bill's constitutionality.²⁴ In fact, many voters who reported having heard little about *Sebelius* were still prepared to weigh in on the key constitutional question.²⁵

What did American voters actually conclude? Majorities (56% in February 2012; 61% in December 2011) opined that Congress may not legally require everyone to have health insurance, while about a third of respondents (34% in February 2012; 33% in December 2011) asserted that the individual mandate was legally permissible.²⁶ Thus, the "topline" or aggregate results were consistent from one measurement to the next.²⁷ Subsequent polls by other organizations found roughly similar results despite considerable variation in question construction.²⁸

23. See Press Release, PublicMind, *supra* note 15, at 3.

24. See *id.* at 4-5.

25. See *id.*

26. See *id.*

27. These results are also consistent with other recent national surveys reporting public skepticism about PPACA and the individual mandate in particular. See, e.g., Matthew Cooper, *Poll: Mixed Views on Health Care, Farm Bill*, NAT'L J. (June 4, 2012, 9:45 PM), <http://www.nationaljournal.com/daily/poll-mixed-views-on-health-care-farm-bill-20120604> (reporting that nearly three of four voters hope that the Supreme Court will "strike down the individual mandate that's at the heart of the Affordable Care Act"); FOX NATION, *supra* note 14 (citing a poll in which 60 percent of respondents indicated that forcing Americans to buy health insurance is a violation of individual rights protected by the Constitution).

28. A Gallup poll reported that 72 percent of respondents believed the mandate was unconstitutional, with just 20 percent believing it to be constitutional. See Jones, *supra* note 14. Their question was considerably longer than the PublicMind question, and expressly asked the respondent to put aside his or her favorability toward the law and to focus only on its constitutionality. *Id.* ("As you may know, the Supreme Court will hear arguments next month concerning a requirement in the healthcare law that every American must buy healthcare insurance or pay a fine. Regardless of whether you favor or oppose the law, do you think this requirement is constitutional or unconstitutional?"). In March 2012, Reason-Rupe asked a simple question similar to that posed by PublicMind, yielding essentially the same result. See REASON.COM, *supra* note 14 (finding that 62 percent of respondents reported thinking that PPACA was unconstitutional and 30 percent thought it was constitutional in response to the question, "Do you think it is constitutional or unconstitutional for Congress to require Americans to have health insurance?"). The Time/Abt SRBI Poll conducted in June 2011 showed similar results, with 56 percent of respondents reporting that PPACA was unconstitutional and 38 percent stating that it was constitutional; this poll also offered an introductory sentence before the question that was arguably gratuitous and burdensome:

The Affordable Health Care Act passed last year [in March 2010] requires most individuals who do not have health care insurance to purchase it beginning in 2014. The government would provide [assistance to] low and moderate income persons who don't get health care coverage through their jobs to purchase coverage. Based upon your understanding of the health care law, would you say

Certain differences in results across respondent subgroups are interesting and worthy of mention. For example, women were more likely than men to say the individual mandate was constitutional.²⁹ There were no differences among age cohorts even though one often finds such distinctions in high profile policy controversies.³⁰ Young voters were not more likely than the oldest voters to find PPACA's mandate constitutional.³¹

Not surprisingly, we also found ideological and partisan differences. In the 2012 poll, self-identified Democrats and liberals comprised two prominent subgroups,³² within which majorities agreed that Congress could mandate the purchase of health insurance (54% and 62% respectively).³³ In contrast, Republicans and conservatives were the two subgroups that expressed the deepest doubts about the legislature's power to pass a health insurance mandate (85% and 77%, respectively).³⁴

In addition to this direct question about Congress's authority to "require everyone to have health insurance," we also asked the more nuanced query, whether the legislature could not only legally require "every adult to have health insurance," but also, "if they don't have health insurance, to pay a tax penalty."³⁵ We sought to gauge the public's views on Congress's authority not only to enact the law, but also to enforce the individual mandate with a financial penalty. This emphasis was crucial for us to understand the wider political battle over how PPACA was framed and debated; it also became important, of course, because the Court's ultimate decision to uphold the law was grounded in the taxing power.

At oral argument, the government did not advocate aggressively that Congress had the power to enact the individual mandate under its broad taxing powers, presumably because it wanted to portray Congress as providing new access to health care and insurance and not as imposing a new tax.³⁶ Our question tested the wisdom of this strategy, at least in the court of public opinion.

The Court's ultimate decision notwithstanding, introducing the notion of a penalty and describing it as a "tax" only *increased* voter skepticism about

that it is constitutional or unconstitutional for the federal government to require most individuals to have health care insurance?

Brohinsky & Schulman, *supra* note 14.

29. See Press Release, PublicMind, *supra* note 15, at 3.

30. See *id.*

31. *Id.*

32. African Americans and respondents supporting President Obama were the only other groups in which a majority of respondents believed that Congress could legally require carrying insurance. See *id.* at 4.

33. See *id.* at 3. The December 2011 figures were slightly lower. See *id.* at 4.

34. See *id.* at 3.

35. *Id.*

36. Meanwhile, Professor Jack Balkin, among others, has argued that PPACA could be constitutionally justified both under Congress's "powers to tax and spend for the general welfare or its powers to regulate commerce among the several states." See, e.g., David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of An Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 102-08 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf>.

the legal moorings of PPACA. The percentage of voters reporting that Congress could not mandate health insurance increased by nine points (totaling 65%) when the threat of a tax penalty was introduced to the question; indeed, only pluralities of Democrats (49%) and liberals (50%) expressed support for this mechanism to expand coverage.³⁷ Among respondents who had said they approved of President Obama's job performance, 55 percent reported that the tax penalty was permissible, comprising the only group for whom a majority came to this conclusion.³⁸ Republicans, conservatives, moderates, and independents, as well as voters in every age cohort, all viewed the law's tax penalty provision as beyond Congress's legal authority.³⁹

II. CAN WE AND SHOULD WE ASK THE PEOPLE?

A skeptic might be inclined to dismiss much of this discussion on the grounds that public opinion on legal matters, including constitutional questions, is simply irrelevant. How can we hope to identify—and why should we bother to take seriously—the views of the public on a legal case as complex as *Sebelius* when we have reasons to be skeptical of people's knowledge and expertise on more basic matters of public policy⁴⁰ (and, for that matter, their basic interest in the topic)? This objection has two components, and we consider them in turn: first, can we extract the public's views on constitutional matters; and second, should we?

Regarding the first concern, we submit that our polling efforts provide a clear rejoinder. The method of examining a random sample from a much larger population is a proven technique for drawing inferences about the larger group, even one as vast as the nation's citizenry. Undoubtedly, one can and should raise questions about how survey queries are phrased and how sophisticated the public's response to these questions really are, but, as an operational matter, it is certainly possible to make reliable and valid observations of public opinion—understood as an aggregate of individual judgments—based on “snapshot” readings of a representative subgroup. When one wants to measure the views of any large population, such as the American electorate, there is no obvious substitute for these scientific estimates, despite their imperfections. The considerable consistency between the December 2011 and February 2012 surveys further supports our approach. They returned essentially the same results, meaning that any differences have fallen within the surveys' margin of error.⁴¹

Setting aside these questions of methodology, one might still disregard our efforts to gather information about popular views on constitutional

37. Press Release, PublicMind, *supra* note 15, at 3.

38. *See id.*

39. *See id.*

40. *See, e.g.*, Carl Bialik, *Americans Stumble on Math of Big Issues*, WALL ST. J., Jan. 7, 2012, at A4 (noting that voters hold strong opinions on policy issues while lacking information about many of these issues).

41. *See* Press Release, PublicMind, *supra* note 15, at 3.

questions as being some kind of sideshow. Polling the public ignores the fact that constitutional law is formed by the judiciary and, in high profile cases such as *Sebelius*, by decisions of a Supreme Court majority. According to this view, polling the public—which is not well versed in the technical and abstruse questions at the heart of the PPACA litigation—distracts us from the true sources of constitutional law.

As countless scholars have argued, however, the judiciary is hardly the sole actor shaping constitutional law.⁴² Popular constitutionalists take seriously both the normative appeal and descriptive accuracy of accounting for the range of nonjudicial, nongovernmental, and “private” actors who help shape the contours of the Constitution, as well as the decisions that interpret our constitutional law. Conceding that the details of the *Sebelius* oral argument and ensuing decision are beyond the grasp of the vast majority of the public⁴³ does not diminish the impact the public may have in shaping how *Sebelius* is implemented, interpreted, framed, or resisted.

In other words, ignoring the views of the public on the health care case in favor of the opinion of the justices in the *Sebelius* majority needlessly compresses our understanding of how to apply constitutional law to contemporary public affairs and policy debates. As Louis Fisher has argued, we should not automatically defer to the Court’s reading of the Constitution because the contemporary “Justices of the Supreme Court are increasingly in the habit of not interpreting a constitutional provision directly but in interpreting what the Court itself said at some earlier date. The legal dispute is not over constitutional values but over highly complex and abstract judicially created ‘rules’ and ‘standards.’”⁴⁴

Many of our constitutional debates are, at their core, about tradeoffs and contests between central political values; it is not at all obvious why members of the public are unequipped to weigh in on these in a meaningful way.

A final rationale for turning to the public on the legal issues in the health care debate is that claims by partisans and advocates about the public’s views have been a central and recurring feature of that debate. Because so

42. See, e.g., LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63 (1999); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993).

43. See Peter J. Woolley & Bruce Peabody, *Health Insurance and Strip Searches: The Public as Constitutional Thinkers*, HUFFINGTON POST (Apr. 5, 2012, 2:28 PM), http://www.huffingtonpost.com/peter-j-woolley/health-insurance-and-stri_b_1406418.html.

44. Louis Fisher, *Judicial Credibility*, in THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC 227, 228 (Bruce Peabody ed., 2010).

many others claim to speak for them, we need a clear picture of the people's constitutional judgments about the PPACA.

For example, in arguing that the Court should resist pressure to uphold PPACA, *Washington Post* writer Jennifer Rubin cited figures showing that “70 percent of the public think the law is unconstitutional.”⁴⁵ Other political opponents of PPACA have pointed to public doubts over the law's constitutionality. U.S. Senator Mike Lee argued, for instance, that “Americans fervently oppose” the individual mandate and “are on the side of restoring constitutionally limited government and putting the power back in the hands of the people.”⁴⁶

In a different context, Frank Newport, Gallup's editor-in-chief, examined public views of PPACA's constitutionality and concluded that the nation faces a related “paradox” with respect to the law.⁴⁷ And, without citing the public's views directly, President Obama contended in April 2012 that the Supreme Court ought to uphold the health law because it was supported by “a strong majority of a democratically elected Congress,” implying that upholding the law would be consistent with popular will.⁴⁸

Taken together, this backdrop suggests the political utility of gathering sound, methodologically defensible measures of the public's opinions of PPACA, especially in an environment where public opinion is referenced for so many different purposes. This imperative is even bolstered by the Court's ruling, as political and legal resistance to the law will persist, with the public's views figuring prominently in the claims on both sides of the issue.

III. EVIDENCE OF CONSTITUTIONAL THINKING?

All of these arguments suggest both the possibility and desirability of taking the public's views on constitutional issues seriously. Reinforcing this conclusion is preliminary evidence of a conscientious and interested public—capable of thinking in constitutional terms. As previously noted,

45. Jennifer Rubin, *What Would a Change of Vote on Obamacare Cost?*, WASH. POST (May 23, 2012, 9:02 AM), http://www.washingtonpost.com/blogs/right-turn/post/what-would-a-change-of-vote-on-obamacare-cost/2012/05/23/gJQApViNkU_blog.html.

46. Press Release, Senator Mike Lee, Poll: Overwhelming Majority Still Opposes Unconstitutional Mandate (June 5, 2012), *available at* <http://www.lee.senate.gov/public/index.cfm/2012/6/poll-overwhelming-majority-still-opposes-unconstitutional-mandate> (citing the results of a United Technologies/ National Journal Congressional Connection Poll as justification for repealing PPACA's individual mandate).

47. See Frank Newport, *The Paradox of the Affordable Care Act and Public Opinion*, GALLUP (Mar. 28, 2012), <http://pollingmatters.gallup.com/2012/03/paradox-of-affordable-care-act-and.html>.

48. Barack Obama, Remarks at Rose Garden Press Conference (Apr. 2, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/04/02/joint-press-conference-president-obama-president-calderon-mexico-and-pri>. Nevertheless, Obama's claims of a strong majority overstated the very narrow majorities by which the House of Representatives first passed the legislation, 220–215, and later, 219–212. See Karen Yourish et al., *House Democrats Pass Historical Health-Care Legislation*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/votes/house/finalhealthcare/> (last updated Mar. 18, 2012).

very few of those polled refused to answer our questions or expressed no opinion regarding the constitutionality of PPACA's mandate. The preparedness of voters to weigh in on this issue compares favorably with other survey results, such as measures of people's policy and candidate preferences.⁴⁹ Voters' capacity for constitutional thinking was confirmed through direct oversight and review of the individual interviews that took place between polling agents and the public; these encounters revealed respondents who were engaged in the questions about PPACA and interested in assessing its legal standing.⁵⁰

Of course, voters' willingness to offer opinions on the health care law does not necessarily speak to the thoughtfulness or cogency of their views. The literacy and potential sophistication of voters' judgments is, however, indicated by another observation. Notwithstanding evidence of partisan and ideological influence on voters' attitudes, these explanatory factors only go so far. In our polls, large blocs of self-identified liberal and Democratic respondents indicated doubts about the constitutionality of PPACA's individual mandate and tax penalty, despite their political orientation.⁵¹ In the same vein, outside polling has shown that a significant majority believes that Congress may not require Americans to buy health insurance or impose a fine, regardless of whether voters believe the health insurance bill is "a good thing" or "a bad thing."⁵²

If questions about the desirability of the health insurance reform and its constitutionality yielded the same result, we might conclude that citizens could not see or distinguish beyond their personal and ideological interests. The results of our work and other polling, however, suggest the opposite: many American voters seem to be able to untangle their policy and partisan preferences from their legal judgments.

Skeptics may discount this preliminary evidence of "constitutional thinking" by the public on two different grounds. First, one may question whether the health care controversy is unique or, at least, unrepresentative. Extensive media attention to both the challenged law and the claims behind the litigation might have made the struggle over PPACA a false test case—the rare exception in which a generally inattentive and inarticulate public is suddenly attuned to constitutional issues through the unrelenting glare of publicity. Of course, even if this assessment were accurate, it would hardly downplay the importance of both identifying this moment of constitutional awakening and understanding it as a possible test case of the conditions

49. See, e.g., Press Release, Fairleigh Dickinson Univ.'s PublicMind, Flabby Support for Menendez: Kyrillos Remains a Blank Slate (May 10, 2012), available at <http://publicmind.fdu.edu/2012/flabby/> (finding that 24 percent of poll respondents report being undecided in a Senate race).

50. For example, according to the principal investigator monitoring our poll, supervisors and interviewers recorded few refusals or objections to questions or their construction. Generally, respondents were neither confused by nor hostile to the questions.

51. See Press Release, PublicMind, *supra* note 15, at 3.

52. See, e.g., Jones, *supra* note 14.

under which an ordinarily quiescent public becomes constitutionally engaged.⁵³

Moreover, our findings are not obviously *sui generis*. They square with similar results we reported from the previous Supreme Court term when, for example, we found little evidence that partisanship was an important factor in voters' judgments on the underlying issues in cases like *Brown v. Entertainment Merchants Association*,⁵⁴ which overturned a California law that would restrict the sale or rental of violent video games to minors.⁵⁵ As we concluded from our previous polling efforts, "the public's perspective on the constitutional issues we surveyed does not obviously and consistently track party, ideology, or attitudes toward government."⁵⁶

A second objection to results might zero in on the seemingly decisive power of President Obama as a factor in shaping public views about the legal standing of PPACA. Voters' approval or disapproval of the president seemed to be a vital factor in shaping their constitutional judgments about the law. Indeed, the most pronounced split we observed was not between Democrats and Republicans but between those who approved of the job the president was doing (60% of whom affirmed PPACA's constitutionality) and those who did not; indeed, 87% of those who said they "disapprove" of the president also stated that they found the individual mandate to be beyond the legal powers of Congress.⁵⁷ These findings might lead one to conclude that, for all our talk of a conscientious public seriously weighing constitutional values, voters' assessments of PPACA's constitutional status boiled down to their political satisfaction with the president.

While the issue merits further study, we think this conclusion goes too far. Given the degree to which PPACA is tethered to the president by both supporters and critics—after all, the policy has repeatedly been dubbed "Obamacare"—and given the president's distinct role as the political figure the media covers most extensively, we are not particularly surprised that individual attitudes toward Obama are an important factor in public judgments about many issues, especially the constitutionality of PPACA's individual mandate. As our other findings indicate, public attitudes toward the law may be complex, but they still constitute meaningful and measurable "attitudes." The partial correlation to presidential approval and disapproval should not minimize the existence or importance of public evaluations of PPACA's constitutionality.

IV. THE PUBLIC AS PARTICIPANT IN CONSTITUTIONAL CONFLICTS

Our studies of public opinion and the constitutionality of PPACA have implications for the judiciary's capacity to implement future decisions and

53. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (discussing constitutional "moments").

54. 131 S. Ct. 2729 (2011).

55. *Id.* at 2732–33.

56. Peabody & Woolley, *supra* note 20, at 20 (discussing *Brown*).

57. See Press Release, PublicMind, *supra* note 15, at 3.

maintain its independence moving forward. At least one scholar has already inquired about the impact of *Sebelius* on the Supreme Court's legitimacy, understood as its capacity to see its decisions implemented by supporters as well as opponents.⁵⁸ Political scientist James Gibson and others have noted that the Court historically enjoys widespread political support as an institution even when its individual decisions are opposed.⁵⁹ In other words, attitudes toward the Court as an institution generally do not suffer even at moments of partisan or ideological polarization.⁶⁰ This diffuse support is useful in implementing otherwise unpopular and controversial decisions.⁶¹ Lacking the proverbial powers of the purse or sword, courts—even the Supreme Court—are dependent upon elected officials, bureaucrats, and a compliant public to turn their written opinions into material policy.

As Gibson puts it, the

key issue from the perspective of legitimacy theory is whether those who lose on the health-care decision will accept their loss, and, more specifically whether they will be willing to respond favorably to attacks on the court as an institution. Is the Supreme Court's supply of legitimacy sufficient to ride it through the storm its rulings on health care and other highly politicized and polarized legal issues will undoubtedly create?⁶²

Concerns about the emerging interplay of *Sebelius*, public attitudes, and the legitimacy of our court system are significant due to four notable elements in today's political climate. First, the Court's public approval is at a low ebb. Recent polling finds that the public's confidence in the Court is approaching a historic low over the past three decades.⁶³ This observation is compounded and potentially reinforced by a second dynamic: the identification of political motives (rather than legal factors) by large numbers of voters as driving the behavior and rulings of the judiciary.⁶⁴

58. See, e.g., James L. Gibson, *Can the Supreme Court Survive a Health-Care Decision?*, PAC-STANDARD (Mar. 26, 2012), <http://www.psmag.com/legal-affairs/can-the-supreme-court-survive-a-health-care-decision-40598/>.

59. See *id.*; see also JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 14 (2006) (discussing judicial independence as a critical feature of our political and constitutional system); Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127 (2004) (presenting deferential attitudes to the Court and judicial review among members of Congress).

60. See Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32 (2001).

61. Gibson, *supra* note 58.

62. *Id.*

63. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 7, 2012, at A1.

64. Leigh Ann Caldwell, *Poll: Most Think Politics Will Influence Supreme Court Health Care Decision*, CBSNEWS.COM (June 7, 2012, 6:30 PM), http://www.cbsnews.com/8301-503544_162-57449249-503544/poll-most-think-politics-will-influence-supreme-court-health-care-decision; THE HENRY J. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL—APRIL 2012, at 2 (2012), available at <http://www.kff.org/kaiserpolls/>

Third, there is a sense that recent terms have involved a number of especially controversial cases likely to spur some organized and sustained opposition in the years to come, further underscoring the importance of the Court's legitimacy. If we take Gibson's legitimacy thesis seriously, then more contested decisions will require greater levels of legitimacy to sustain their implementation. Regarding PPACA alone, we anticipate ongoing litigation, perhaps relating to Congress' taxing power that will keep the policy and the Court in the legal and political spotlight for years to come.

Fourth and finally, today's challenges to judicial legitimacy are likely to have greater bite given some evidence that Democrats and liberals—who have generally supported judicial independence and power since the civil rights and civil liberties decisions of the Warren Court—may be rethinking their historic allegiance to the judiciary.⁶⁵ Adding to Obama's cautious but high profile criticism of the judiciary, a number of the president's allies in Congress have rebuked the courts even more pointedly. For example, in 2010, Senator Charles Schumer, the third-ranking Democrat in the Senate, criticized *Citizens United v. Federal Election Commission*,⁶⁶ the decision that allowed corporations and unions to spend unlimited sums on “independent” campaign ads.⁶⁷ Senator Schumer called the ruling “poisonous” and a threat to the viability of our democracy.⁶⁸ While *Sebelius* represents a victory for its liberal and Democratic supporters, future cases in areas such as affirmative action, the Voting Rights Act, same-sex marriage, and Congress's Commerce Clause power may further erode support from the judiciary's previously stalwart Democratic allies, a development that may impact judges' ability to see controversial rulings implemented effectively.

These observations about our unstable new climate of judicial politics highlight, among other things, the importance of identifying and understanding the public's voice in discussing constitutional questions and values. As the White House and leaders in Congress wrestle in the months and years to come with the legacy of *Sebelius*, we should not lose sight of the public's role as a crucial participant in our national debate about the

upload/8302-F.pdf. In fact, recent research has found empirical evidence in support of the view that the Supreme Court's actions in recent decades have been more political and strategic. See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011) (offering evidence that the Court's deference to Congress has been supplanted by more strategic deference when the Court finds itself a political outlier relative to the rest of the national government).

65. Bruce Peabody & Kyle Morgan, *Are Liberals About To Lose Their Faith in Courts?*, HUFFINGTON POST (June 5, 2012, 1:33 PM), http://www.huffingtonpost.com/bruce-peabody/supreme-court-health-care-law_b_1570753.html; Bruce Peabody & Kyle Morgan, *Hope, Fear and Loathing, and the Post-Sebelius Disequilibrium: Assessing the Relationship Between Parties, Congress, and Courts in Tea Party America*, BRIT. J. AM. LEGAL STUD. (forthcoming).

66. 130 S. Ct. 876 (2010).

67. Andrea Seabrook, *Lawmakers Weigh Ruling On Campaign Finance*, NPR (Jan. 21, 2010), <http://www.npr.org/2010/01/21/122823094/Lawmakers-Weigh-Ruling-On-Campaign-Finance>.

68. *Id.*

relationship between our Constitution, our courts, and the evolution of major public policy.

V. FUTURE RESEARCH AND THE STAKES OF MEASURING THE PEOPLE'S CONSTITUTIONAL VOICE

Our polling on the issue of health care reform suggests that the public has some capacity for an assessment of constitutional issues that is distinct from their partisan and policy judgments, as well as self interest.⁶⁹ Our findings also point to challenges for the Obama Administration in its ongoing efforts to advance its vision of national health care, especially since *Sebelius* does not foreclose future litigation.

With respect to further study, we are first interested in tracking whether the public's constitutional views on PPACA remain consistent after the *Sebelius* decision, and if not, when, how, and why the public's views change.

Second, while we have no evidence that the public's constitutional thinking on PPACA directly influenced the Court, as the health care story continues to unfold we will need to follow the interaction of public attitudes and future behavior of the Supreme Court, including new decisions. A long line of scholars have argued that the public's views serve as an important outer boundary for the judiciary—a basic limitation on how far the Court can go in advancing its jurisprudential vision and agenda.⁷⁰ The story of health care in the years to come may then turn as much on *Sebelius* as it does on whether the public evinces consistent and strongly held attitudes about the limits of legislative power under the Constitution.

As a third, and perhaps, most important implication, our study invites further exploration and testing of the public's capacity for a distinct, independent, and measurable level of constitutional thinking that occurs outside of court chambers. Our research illustrates the need for additional work to clarify the incidence and nature of the public's distinctive constitutional voice. For example, how, exactly, is the public's constitutional thinking substantively different from the judgments of courts or the efforts of other elites to apply constitutional principles to public affairs? Are there specific conditions or subject areas under which the public's constitutional judgments are more removed from policy, partisan, and other political considerations?

Since it is likely that the public weighs in on constitutional questions without significant understanding of the case or constitutional provisions at

69. With respect to self interest, our findings indicate that the public was more likely to report approval of health care reform when asked about its impact on their lives (i.e., if they believe their family and the country will be better or worse off with health care reform). See Press Release, Fairleigh Dickinson Univ.'s PublicMind, Obama and Menendez Ahead in New Jersey (Jan. 17, 2011), available at <http://publicmind.fdu.edu/oandm/final.pdf>.

70. See, e.g., FRIEDMAN, *supra* note 42; ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT (Sanford Levinson ed., 5th ed. 2010); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

bar, we must develop a better understanding of the source of public judgments. Is the public's constitutional thinking informed by media sources, a common vision of the Constitution's meaning, a general set of political principles, or some complex interplay of ideology, party, personal interest, and perceived constitutional values? Or something else entirely, such as gut reaction? Is it predictable?

The stakes of getting constitutional thinking right both descriptively (what the public is thinking) and normatively (what is the proper role of this phenomenon) are substantial. As previously noted, the recent battles over health care were distinguished in part by explicit claims to what the public supposedly believed about PPACA's constitutionality, a pattern that has repeated in other constitutional controversies, such as those relating to the death penalty and the Eighth Amendment.⁷¹ As these appeals to popular constitutionalism have become a feature of our political landscape, we need accurate, consistent, and reflective measures of the public's actual thinking so we can evaluate leaders' claims about their constituents.

Further, we need to take the public's constitutional thinking seriously, not only when it is hotly sought after but also when it is simply a latent but powerful force. Whether we measure it or not, the public at large is likely to have judgments about a range of constitutional issues and values that can shape everything from the political leaders they select to their confidence in government to their assessment of substantive policies.⁷² As scholars like Walter Murphy have argued, the enterprise of constitutional interpretation can "help us collectively articulate, justify, and enforce the fundamental principles and rules that guide our common public life."⁷³ In this diffuse, social task, the people have a seminal, irreducible, and unique role in expressing their understanding of themselves and constitutional law.

71. See *Atkins v. Virginia*, 536 U.S. 304, 307 (2002) ("[T]he American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case . . .").

72. Cf. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 358 (1990) (discussing "constitutional improprieties" as political behavior "contrary to the *spirit* of the Constitution" even if it is not deemed unconstitutional as a matter of law).

73. WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 21 (3d ed. 2003).