

Res Gestae

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## Res Publica: Public Opinion, Constitutional Law, and the Supreme Court's 2010 Term

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# RES PUBLICA: PUBLIC OPINION, CONSTITUTIONAL LAW, AND THE SUPREME COURT'S 2010 TERM

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

## INTRODUCTION

In the spring of 2011, Fairleigh Dickinson University's polling organization, PublicMind, conducted a national survey on the substantive issues underlying four constitutional cases decided during the 2010 Supreme Court term. These cases involved an array of specific legal problems, including those posed by state tax credits for donations supporting religious schools, questioning of minors without parental consent, prison overcrowding, and the appropriate regulation of violent video games. More broadly, they encompassed many of the most charged and salient areas of contemporary constitutional discussion including federalism, free speech, and criminal procedure.

While it is not particularly unusual to ask the public about its views on previously decided cases or established areas of constitutional controversy, the PublicMind polls were conducted *before* the pertinent cases were decided. Additionally, each case presented a novel legal issue. In this way, the polls were intended to provide a measure of the public's views of the substantive questions at issue and not public opinion about cases already decided by the Supreme Court.

In this Essay for *Fordham Law Review's Res Gestae*, we present these cases and our polling results, with three primary goals. In Part I we make the case for the utility and importance of examining the public's views on these issues, a perspective that may not be obvious to many readers. In Part II we highlight the cases considered and their significance—both on their own and in the context of understanding the Court's 2010 term as a whole. Finally, we present our results with the hope that readers will take these findings seriously and consider additional ways in which one might explore the relationship between the public's views, constitutional law, and the cases decided by the Supreme Court of the United States.

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I. EXPLAINING THE INTERSECTION OF POLLING AND CONSTITUTIONAL LAW: THE “GOVERNANCE AS DIALOGUE” MOVEMENT

At first glance, the prospect of polling the public on the constitutional issues in pending Supreme Court cases seems dubious—possibly even subversive of cherished legal values. According to traditional if not orthodox narratives dating back as far as *The Federalist Papers*, the Supreme Court is insulated through life tenure, salary protection, and other guarantees in Article III of the Constitution, from both the executive and legislative branches and the “occasional ill humors” that course through society and the public.<sup>1</sup> Turning to public opinion on constitutional matters might seem to threaten this structural divide between the people and their judicial agents. In turn, a move like this could impede the Court’s ability to ensure “a steady, upright, and impartial administration of the laws” and protect “the rights of citizens.”<sup>2</sup>

But our interest in the public’s views on constitutional issues has a different backdrop, with a different set of assumptions about the Court. Since the 1960s, a rising chorus of scholarly voices has contributed to a “governance as dialogue” movement, which presumes we must appreciate the different contributions of Congress, the executive branch, the states, organized interests, and the people as a whole in order to comprehend the Constitution’s evolving place in our lives.<sup>3</sup> Constitutional meaning, in this picture, is formed by an intricate “dialogue” amongst many participants, a political and legal back and forth in which the courts are just one, albeit important, player.<sup>4</sup>

The governance as dialogue literature is diverse and growing. But surveying the public’s views on emerging constitutional issues can play a valuable orienting role in this somewhat crowded scholarly thicket. Specifically, our recent polling efforts can assist researchers in four broad areas of inquiry.

A. *Popular Constitutionalism and Surveys of the Public*

First, polling the public can be an important part of identifying the contours of “popular constitutionalism”—the public’s ability to engage and discuss constitutional issues. Whatever interest we might have in appraising the impact of the “public” on constitutional decisions, it can be challenging to identify precisely what this phenomenon references or includes.<sup>5</sup> Who are “the People” to whom we devote so much political and

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1. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. *Id.*

3. See MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY (2009) (discussing “governance as dialogue”).

4. See LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 231–47 (1988) (discussing “coordinate construction” as constitutional interpretation by all three branches of federal government).

5. See William E. Forbath, *The Will of the People? Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1193–94 (2010) (“‘The People’ is a fiction”).

rhetorical attention? Developing and presenting polling results provides a limited, incomplete, but also concrete and replicable measure of what a statistically valid sample of American voters believes about a set of issues. With this approach, the devil we know can be far more valuable than the devil we think we know but can only vaguely allude to.

Having helped identify the public, polling can deepen our understanding of the degree to which the people as a whole seem engaged on constitutional issues and capable of cogently discussing them. Scholars like Larry Kramer fret that the rise of “judicial supremacy” has diminished the public’s engagement with and ownership of our supreme law.<sup>6</sup> Polling can establish at least some of the parameters and referents for assessing these concerns. In addition to the question of how much “dialogue” there is between courts and the public, we also need a more complex account about the nature, salience, and evolution of popular speech on constitutional issues, and polling can assist in this regard.

### *B. The Value of Polls in Understanding Supreme Court Decisions*

A second contribution of polling is to advance scholarly understanding about the extent to which the public shapes the constitutional decisions of the Supreme Court. Much of the work here has concluded that there is substantial “covariation between the public’s ideological position and Court policy,”<sup>7</sup> that is, a fairly close tracking between the decisions of the Court and the views of the public especially where the latter are stable and relatively well defined. As one scholar concluded, over its history “the Court has seldom lagged far behind or forged far ahead” of public opinion.<sup>8</sup>

Of course, these observations, even if accurate, raise the question: what explains this correspondence? Scholars have attempted to answer this query by investigating whether the views of the public impact the Court through a spectrum of direct or indirect means—examining everything from the public’s influence on political elites, to the play of public opinion in selecting justices, to the place of popular majorities in shaping the kinds of cases that emerge from lower courts and how legal issues are presented.<sup>9</sup>

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6. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (discussing how judicial supremacy is the doctrine that the courts have ultimate if not exclusive authority over constitutional questions).

7. Lawrence Baum, *Jeff Yates’ Presidential Prestige and Executive Success in the Supreme Court*, 45 *JURIMETRICS J.* 367, 370 (2005) (book review).

8. ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 225 (5th ed. 1960). See also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 383 (2009) (“Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public.”); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT 192–93* (1989) (discussing the correlation between public opinion polls taken during the Rehnquist Court and the results in most of those Court’s decisions).

9. See, e.g., JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 116 (1995) (reviewing the influence of public opinion on the Senate and the Supreme Court appointment process); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 *AM. POL. SCI. REV.* 87, 89 (1993) (discussing the justices’ broad awareness of

We also note that while there is a substantial amount of polling data pertaining to constitutional areas widely recognized as important, such as abortion, gun control, and affirmative action, we are not aware of any systematic effort to identify and track opinions on nascent or developing controversies. Taking the public's pulse on these issues can play a valuable part in corroborating or suggesting limits to the "covariation" claim—that the Court largely follows the broad outlines of public opinion.<sup>10</sup> Stated somewhat differently, these polls can create a clearer picture of when the public's influence on the Court is likely to be strong or weak, with the latter perhaps including conditions such as when an issue has a low national profile, or where the public's views are ambivalent or sharply divided.

Survey research might also help identify plausible "tipping points" or the initial circumstances in which it seems likely that the public's views on developing constitutional debates can have an impact on the Court and its rulings.

In addition, a poll-based approach to understanding the public's constitutional views is valuable because the results can be broken down into different demographic and political subgroups. A strong case can be made that in our diverse, complex, far-flung republic, the American people can be best understood as *multiple* publics, and that, rather than "majority rule" we have "minorities rule, where one aggregation of minorities achieves policies opposed by another aggregation."<sup>11</sup> Seen in this light, our capacity to use polling to identify the views of subgroups in American politics can give us unique insight into society's struggles to shape Supreme Court decisions and constitutional meaning.

Finally, one might also note that the Court itself sometimes invokes the public's purported beliefs, by occasionally citing polls when defending its reasoning and legal opinions.<sup>12</sup> Thus, having a record of reliable polling

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public opinion and the willingness of some to "adjust" their decisions accordingly); William B. Turner, *The Lesbian De Facto Parent Standard in Holtzman v. Knott: Judicial Policy Innovation and Diffusion*, 22 BERKELEY J. GENDER L. & JUST. 135, 162 (2007) (making the case that public opinion shaped how civil rights cases involving gays and lesbians came before the Court); see also MARSHALL, *supra* note 8, at 193–95 (setting out numerous models through which public opinion might influence Court rulings).

10. For example, one area where there may be a divergence between the public and a Court ruling involves campaign finance and the Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). See *Impressions of the Citizens United Decision and a Proposed Constitutional Amendment to Overturn It*, HART RESEARCH ASSOCS. (Jan. 20, 2011), [http://freespeechforpeople.org/sites/default/files/me10129b\\_public.pdf](http://freespeechforpeople.org/sites/default/files/me10129b_public.pdf) (finding that a majority of Americans favor a constitutional amendment to overturn the decision).

11. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294 (1957).

12. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (referencing the views of the public in opposing the implementation of the death penalty for the mentally retarded); *Trop v. Dulles*, 356 U.S. 86 (1958) (relying on the "evolving standards of decency that mark the progress of a maturing society"). See generally Susan J. Becker, *Many Are Chilled, but Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & L. 177, 186 (2006) (discussing Justice

results can help to substantiate, challenge, and contextualize the Court's own invocations of the "will of the people."

*C. Polling and the Court's Influence*

In addition to scholarly work examining the public's impact on the Court, a third set of studies has essentially inversed this relationship, considering instead how the Court's rulings affect the public's views on constitutional issues or about the Court itself. Broadly speaking, the consensus from these studies is that Supreme Court decisions do not have much influence on American public opinion. If there is a "dialogue" between courts and citizens, there is not much evidence the Supreme Court is effectively leading this discussion—given, among other factors, the inscrutability and low profile of most Court opinions to most citizens.<sup>13</sup> Notwithstanding these observations, using our polling results to reexamine the nexus between Supreme Court decision-making and public opinion is still valuable. Judges, politicians, and educators continue to insist that the Court serves as a leader in informing the public about constitutional protections and rights. Therefore, setting out the public's views on constitutional matters *prior* to related Court rulings, and analyzing whether these views are subsequently altered, would further test what has sometimes been called the "Court as republican schoolmaster" thesis.<sup>14</sup>

More broadly, even while acknowledging that for many constitutional areas, the Supreme Court has no impact on public opinion, Nathaniel Persily argues that there may be circumstances in which the relationship is more complex.<sup>15</sup> Some Court decisions can lead to public "legitimation," shifting support in the direction of the Court's decision, "backlash," objections to a decision simply because the Court has issued it, and "polarization," shifting views amongst different subgroups comprising "the public."<sup>16</sup> These reactions seem to be issue- and even case-specific, an example being how public opinion on "discretionary" abortions not related to maternal health became *more* divided after *Roe v. Wade*.<sup>17</sup> Therefore, keeping tabs on the public's views about constitutional matters before and after a Court decision remains essential for teasing out the perhaps special conditions under which our highest tribunal impacts popular viewpoints.<sup>18</sup>

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Scalia's invocation of public opinion about "persons who openly engage in homosexual conduct").

13. See PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 8 (Jack Citrin et al. eds., 2008) (contending that in "the vast majority of the cases . . . Supreme Court decisions had no effect on the overall distribution of public opinion").

14. Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 751–52 (1989) (discussing the idea that the Court serves as a "republican schoolmaster" to the nation on constitutional and legal issues).

15. See PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 13, at 8.

16. See *id.*

17. 410 U.S. 113 (1973).

18. See Franklin & Kosaki, *supra* note 14, at 763–65 (discussing polling results about the public's views on abortion following *Roe*).

#### D. Normative Questions and Beyond

A fourth and final application of polling to questions about “constitutional dialogues” in society involves normative questions. For example, we might wonder about the wider significance of today’s public conversations about constitutional meaning, including the association, if any, of popular constitutionalism with civic engagement. In addition, public opinion about constitutional issues raises separate questions about the most appropriate ways in which courts can identify and use this information. Polling can be a useful tool in assessing the quality and coherence of popular discourse on constitutional matters, and the extent to which the public may need education about important constitutional topics.<sup>19</sup> Somewhat conversely, poll results may upset the conventional wisdom about the public’s purported ignorance on constitutional matters, or at least suggest we need new ways to discuss and evaluate constitutional literacy.

It should also be noted that the “governance as dialogue” debate about the relative importance and specific content of the public’s constitutional beliefs does not exhaust the potential value of polling on emerging legal issues. This information can also be useful, for example, in attempting to understand a particular Court’s place and status in “political time”—that is, in assessing its relative strength or vulnerability vis-à-vis the other branches of government and in evaluating whether the Court is affiliated with or departs from the prevalent political regime.<sup>20</sup> Stated somewhat differently, polls can help give us a reading of overall political conditions facing a Court and whether its opinions are consonant with the public and opinion leaders, or whether they instead suggest it may be out of step with the rest of the nation, perhaps as a result of political realignment.<sup>21</sup> Polling can also help scholars wrestle with related questions of implementation: what are the conditions under which Supreme Court opinions are likely to be followed or transformed “on the ground,” viz., when legal commands need to be put into action.

## II. FINDINGS AND DISCUSSION

The previous discussion underscores the intellectual utility and propriety of polling the public on emerging constitutional controversies. What were the actual findings with respect to popular views on pending issues from the 2010 term?

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19. For one example pointing to the public’s somewhat mixed understanding of constitutionalism and constitutional law, see Michael C. Dorf, *Whose Constitution Is It Anyway? What Americans Don’t Know About Our Constitution—and Why it Matters*, FINDLAW (May 29, 2002), <http://writ.news.findlaw.com/dorf/20020529.html>.

20. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 30 (1997) (discussing “political time”).

21. See Charles Geyh, *The Choreography of Courts-Congress Conflicts*, in *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 19–44 (Bruce Peabody ed., 2010) (discussing the role of critical realignments in placing the Supreme Court at odds with Congress).

At the outset one might note that our cases can be divided into two groups. In the first set, including *Arizona Christian School Tuition Organization v. Winn*<sup>22</sup> and *Camreta v. Greene*,<sup>23</sup> the Court declined to rule on the merits, instead handing down essentially procedural and jurisdictional decisions. Our ability to analyze these cases and how they relate to public opinion differs from the second group, *Brown v. Plata*<sup>24</sup> and *Brown v. Entertainment Merchants Ass'n*,<sup>25</sup> in which the Supreme Court handed down majority opinions on the substantive questions at issue.

#### A. Cases Not Decided on the Merits

*Arizona Christian* is a good place to begin because it highlights partisan differences in the public's views, as well as a degree of intuitive self-interest amongst voters.<sup>26</sup> The case dealt with the use of state tax credits to offset donations to school tuition organizations, which in turn provided scholarships to students attending private, religious schools.

Seven in ten voters reported they never heard of *Arizona Christian* or the accompanying controversy but, despite that, 86 percent of respondents offered a definite opinion about the case, while only 14 percent said they were unsure or had mixed views.<sup>27</sup>

Democrats were twice as likely as Republicans<sup>28</sup> to say that Arizona's tax credits for supporting private schools, including religiously affiliated schools, created a policy that supported religious schools.<sup>29</sup> The partisan difference is remarkable given that the case, like many others, was not regularly in the news or talked about by party officials; in other words, voters' views on this issue are unlikely to reflect cues taken from opinion leaders. We also note that partisan divisions amongst voters on this issue arguably reflected divisions amongst the justices. The Court's 5-4 decision

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22. 131 S. Ct. 1436 (2011).

23. 131 S. Ct. 2020 (2011).

24. 131 S. Ct. 1910 (2011).

25. 131 S. Ct. 2729 (2011).

26. For complete results, including question wording and tables, see Press Release, PublicMind, Public Blesses Arizona Christian School Tuition (April 4, 2011), <http://publicmind.fdu.edu/2011/taxcredits/>.

27. The willingness of voters to weigh in on a case, despite their lack of familiarity with it, might point to the capacity of polls to generate opinions that did not previously exist. This critique that citizens do not navigate through life with polling categories in mind, and therefore that surveys "create" voter views as much as they reflect them, is an objection we discuss in our companion piece. See Peter J. Woolley & Bruce G. Peabody, *Polls, the Public, and Popular Perspectives on Constitutional Issues*, 80 FORDHAM L. REV. RES GESTAE 22, 27 (2011).

28. In our polls, partisanship was self-identified, that is, respondents placed themselves in a particular party or no party at all.

29. In asking our respondents about *Arizona Christian*, we sought to avoid entanglement with some of the complexities of the Arizona tuition policy by focusing on "parents who send their children to private schools, including schools with religious affiliations." Press Release, *supra* note 26. Strictly speaking, however, any citizens were eligible to donate to "student tuition organizations" and receive tax credits. Thus, in this case, our effort to provide an accessible poll question came with the price of not achieving complete accuracy in describing the underlying state policy.

held that the challengers to the Arizona tax credit law lacked standing to sue, with the consequence that the policy was allowed to stand. This result was formed by a majority comprised of the Court's conservative justices, Roberts, Scalia, Thomas, Alito, and the more moderate Justice Kennedy. The Court's liberal wing dissented. Given the substantial degree of Court division on this "partisan" dimension throughout the 2010 term, *Arizona Christian* is something of a bellwether.<sup>30</sup>

Another intriguing finding in this case is how the results indicate that different age cohorts have distinctive views. Voters aged 30 to 44 were only half as likely as other age groups to say that the tax credits essentially support religious schools, and they were significantly more likely than other age groups to say the tax credits support parents' right to choose schools. Perhaps not coincidentally, this age group includes parents rearing school-age children. This result also suggests respondents are able to discern a certain self-interest in the answer categories, despite a lack of knowledge about the case.

Overall, the results in *Arizona Christian*, with three in five voters supporting Arizona's credit system for religious schools, indicate that the public's views on this matter have changed substantially since the late nineteenth century, when a majority of states passed laws restricting and even prohibiting the use of public funds by parochial schools.<sup>31</sup>

The second, "procedurally decided" case concerned an issue of the criminal justice system and uncovered differences in views by both ethnicity and gender. *Camreta* involved a nine-year-old girl in Oregon who was questioned for two hours by a deputy sheriff and a social worker about possible sexual abuse by her father.<sup>32</sup> The questioning took place without a court order and without the mother's knowledge.<sup>33</sup>

Again, and not surprisingly, the overwhelming number of voters, more than four in five, reported not having heard anything about the case. However, only 13 percent said they were unsure or "mixed" in their opinion on the dispute.<sup>34</sup> Nearly three in five of our respondents said the parents must be informed unless there is a court order or immediate danger, while only one in three said a minor had to be questioned without permission, given the possible abuse at home.<sup>35</sup>

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30. SCOTUSblog reports that during the 2010 term, the "Court split along traditional ideological lines in an incredible 87% of 5-4 decisions, the highest rate in the last ten years," Kedar Bhatia, *Final October Term 2010 Stat Pack Available*, SCOTUSBLOG (June 27, 2011, 5:43 PM), <http://www.scotusblog.com/2011/06/final-october-term-2010-stat-pack-available>.

31. William W. Bassett, *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 B.Y.U. L. REV. 243, 247-48.

32. 131 S. Ct. 2020, 2021-24 (2011).

33. *See id.*

34. For complete results, including question wording and tables, *see* Press Release, PublicMind, U.S. Public Rejects Interrogation of Minors Without Parental Knowledge—Even when Domestic Abuse Is Suspected (May 26, 2011), <http://publicmind.fdu.edu/2011/4thamend>.

35. Our respondents were not told the age of the child out of concern that limiting the question to a particular age would also limit the ability to generalize the results.

Interestingly, in this case, there were no differences in either partisanship or ideology. In other words, Republicans were just as likely as Democrats to agree with informing the parents, and self-described liberals were just as likely as conservatives to say parents should be informed. The differences that did emerge were, first, in gender: women were considerably more likely than men to say the authorities should be permitted to interrogate the child because the questioning is about abuse at home. While further study is needed, these preliminary results may point to society's continued associations with women and mothers as the primary "protectors" of children, and may also reflect a pragmatic awareness in female respondents that the initiators of domestic violence and sexual abuse are most likely to be males who are often related to the victim.<sup>36</sup>

At the same time, non-whites were significantly less likely than whites to say that authorities should proceed to interrogate the child and more likely than whites to say the parents need to be informed. These results could reflect more general suspicions by many non-white citizens about the good intentions and performance of law enforcement.<sup>37</sup>

#### B. Cases Decided on the Merits

*Plata* is another criminal justice case, concerning California's prison overcrowding.<sup>38</sup> Perhaps predictably, given the general shift towards greater conservatism in criminal justice matters over the past half century, the public was overwhelmingly against a court-ordered release of prisoners: 63 percent said that even if conditions in the prisons were bad, the Court should not order a release of "criminals." Only 25 percent agreed with the proposition that the prisons were so overcrowded, and conditions so bad, that some prisoners should be let go.<sup>39</sup>

*Plata* also brought out the public's partisan leanings, as well as the Court's. Self-described conservatives were more likely than the general public to be against prisoner release, opposed by a margin of 74 to 16 percent. Meanwhile, self-described liberals were more ambivalent, with 40

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36. See Ryan C. W. Hall and Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 459 (2007) (reviewing data showing that males were the most frequent pedophilia offenders and that "[f]ifty percent of offenses committed against children younger than 6 years were committed by a family member, as were 42% of acts committed against children 6 to 11 years old"); Press Release, Bureau of Labor Statistics, *Married Parents' Use of Time, 2003-06* (May 8, 2008), <http://www.bls.gov/news.release/pdf/atus2.pdf> (reviewing data showing that "[m]arried mothers employed full time were more likely to . . . provide childcare on an average day" than their male spouses).

37. This finding is also reflected in other PublicMind surveys. See, e.g., Press Release, PublicMind, *Trusting the System: Democrats vs. Republicans* (Oct. 17, 2006), <http://publicmind.fdu.edu/cj0610>; Press Release, PublicMind, *Blacks and Whites Differ on Trust in State's Criminal Justice System* (July 24, 2006), <http://publicmind.fdu.edu/blackwhitetrust>.

38. 131 S. Ct. 1910 (2011).

39. For complete results, including question wording and tables, see Press Release, PublicMind, *U.S. Voters Weigh in on *Brown v. Plata*: Case Concerning Prison Overcrowding* (May 23, 2011), <http://publicmind.fdu.edu/2011/brownvplata>.

percent recommending prisoner release and 48 percent not recommending release. The public's ideological differences were largely reflected in the split of the Court. Justice Kennedy delivered the majority opinion, joined by Justices Kagan, Sotomayor, Breyer, and Ginsburg. Justices Scalia, Thomas, Alito and Roberts dissented. Justice Scalia's dissent may have captured the seemingly strong judgments of the public on this issue: "One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result."<sup>40</sup>

Like *Camreta*, *Plata* also yielded interesting findings on gender and race. African Americans were twice as likely as whites to recommend some prisoners be released. Meanwhile, there was no statistical difference between white and Latino respondents. But there was a difference between men and women. Men were 50 percent more likely than women to recommend prisoner release, with one in three men saying some should be let go, but only one in five women. At least two explanations may account for these differences. First, we might speculate that given the disproportionate amount of males in the penal system, men are more likely to have some sympathy for ameliorating poor prison conditions. This hypothesis would need more corroboration since we do not generally find greater leniency amongst men on criminal justice matters. Alternatively, the different views may reflect varied assessments of the risk posed by the potential release of thousands of prisoners back into society.

The final case we polled, *Entertainment Merchants Ass'n*,<sup>41</sup> involved parental prerogatives like *Camreta*, but the results leaned in a very different direction. The core question in the case was whether the state should be able to regulate the sale of violent video games to minors the way it already controls cigarettes and alcohol, or whether it is parents who should decide what video games their children consume. Rather than wanting to retain parental supervision, voters weighing in on the "violent video game" case tended to support the state's authority to regulate products deemed harmful to children.<sup>42</sup>

Just 39 percent of voters preferred leaving video game supervision to parents, with 57 percent saying the state should step in. There was no difference between Republicans and Democrats on the question, but political independents were significantly more likely than partisans to say the state should regulate video game sales. In addition, women, more likely to be the primary caregiver to children than men, were also more likely to favor state regulation. To some degree these results echo the gender differences in *Camreta*, in which women were more likely than men to allow the state to interrogate minors without parental permission. On the

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40. 131 S. Ct. 1910, 1950 (2011) (Scalia, J., dissenting).

41. 131 S. Ct. 2729 (2011).

42. For complete results, including question wording and tables, see Press Release, PublicMind, U.S. Public Says Regulate Violent Video Games, the Focus of *Brown v. Entertainment Merchants* (June 6, 2011), <http://publicmind.fdu.edu/2011/vmerchants>.

other hand, voters under 45 were more likely than those over 45 to think parents should have the role of regulating video game consumption.

#### CONCLUSION

Our venture into public polling on emerging constitutional controversies is preliminary and only suggestive. Nevertheless, in addition to the specific observations noted above, we point to several broader conclusions from our cases.

To begin, we are encouraged that the polls suggest the public's capacity for a wider conversation about constitutional matters. Despite voters' lack of knowledge of, and information about, specific cases, they were willing and largely able to decide how they felt about the substantive issues in those cases. Partly related, and corroborating our judgment that we have selected suitable cases for exploring the "government as dialogue" thesis, we note that the featured Court decisions have already prompted discussion and debate amongst elected officials and private citizens over the constitutional issues at hand.<sup>43</sup>

Second, the public's perspective on the constitutional issues we surveyed does not obviously and consistently track party, ideology, or attitudes towards government. While partisanship was an important factor in the public's views on tax credits and prisoner release, it was not a factor in the violent video game case or the question of interrogating minors without parental consent. Somewhat similarly, of the three cases touching on parental prerogatives, the *Camreta* findings rejected the state's authority, the *Entertainment Merchants Ass'n* findings endorsed the state's authority, and the *Arizona Christian* findings offered a mixed decision, with those polled endorsing the ability of states to incentivize school choice. Strong public support for regulation of video games and continued detention of prisoners arguably points to widespread embrace of the "core" government function of protecting citizens against violence. But, in any event, this speculation and our results suggest we may need a different vocabulary and set of metrics for describing the public perspective on constitutional issues, something distinct from our traditional "left-right" nomenclature or partisan categories.

We conclude by noting that two of our cases represent examples where the Court could be seen as pitted against the public in a prominent way. In both *Plata* and *Entertainment Merchants Ass'n*, the Court entered judgments that were at odds with what a clear majority of the public favored. Of these two cases, however, we think only one has a plausible chance of being a source of persistent conflict between the high bench and private citizens.

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43. See, e.g., Adam Liptak, *Justices Reject Ban on Violent Video Games for Children*, N.Y. TIMES, June 27, 2011, at A1 (quoting the chief executive of a major video game developer who praised the Court for affirming "the constitutional rights of game developers" along with the rights of parents and "store owners"); Dan Lungren, Op-Ed., *Another View: Releasing Prisoners Has a Violent Precedent*, SACRAMENTO BEE, May 29, 2011, at 3E (arguing against overturning the video game regulation law).

The violent video game case is part of a pattern of sometimes unpopular “free speech” cases that have not produced entrenched popular hostility, because the issues have a temporary political shelf life and the interested parties often make modifications of the challenged policies to accommodate judicial concerns.<sup>44</sup> But *Plata*, and its underlying value choice, is less likely to go away. Given the inevitability of crime, the enduring popularity of incarceration as a political strategy, and the likelihood that state budgets will remain strained for the foreseeable future, additional decisions like *Plata* could produce greater tension between the courts and the public. This is especially true because this is an issue politicians are likely to happily cede to the courts—putting judges, not elected officials, in the way of an inflamed public. On the other hand, this case may turn out to be the exception that proves the rule, and it would not surprise us to see future courts once again falling in line with the public and backing away from the *Plata* precedent. But either way, we will only know what we know because of our measure of the public’s opinion on emerging constitutional issues, an initiative we look forward to carrying into the future.

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44. See Press Release, Senator Leland Yee, U.S. Supreme Court Puts Corporate Interests Before Protecting Kids (June 27, 2011), [http://dist08.casen.govoffice.com/index.asp?Type=B\\_PR&SEC=%7BEFA496BC-EDC8-4E38-9CC7-68D37AC03DFF%7D&DE=%7B25F3EB3A-3F71-4121-9107-1D6B06F65872%7D](http://dist08.casen.govoffice.com/index.asp?Type=B_PR&SEC=%7BEFA496BC-EDC8-4E38-9CC7-68D37AC03DFF%7D&DE=%7B25F3EB3A-3F71-4121-9107-1D6B06F65872%7D) (pledging to examine whether a more narrowly tailored law might pass the Court’s review).