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1-1-2013

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## Recommended Citation

Woolley, Peter J. and Peabody, Bruce G., "Popular Constitutional Values: The Links Between Public Opinion and the Supreme Court's 2011 Term" (2013). *Res Gestae*. Paper 14.

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# POPULAR CONSTITUTIONAL VALUES: THE LINKS BETWEEN PUBLIC OPINION AND THE SUPREME COURT'S 2011 TERM

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

## INTRODUCTION

Over the past few decades, scholars have begun to explore the role private citizens play in shaping constitutional law. Some of these research efforts engage normative questions, while others construct descriptive, historical, and positive accounts of this phenomenon.<sup>1</sup> Despite this increased interest in “popular constitutionalism,” few have sought to identify and measure the precise form and political impact of this variant of extrajudicial constitutional interpretation. Stated differently, not much empirical work has defined popular constitutionalism’s specific content and parameters.

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1. See, e.g., NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* (1996) (examining the role of various actors in interpreting the Constitution in the context of the abortion debate); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (examining the impact of public opinion on constitutional change); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (positing that customary constitutionalism is only achieved when the Constitution reflects the will of the people); RICHARD D. PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994) (examining the flaws of anti-populist decision making); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing against constitutional judicial review); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006) (examining some of the obstacles for popular constitutionalism in light of the rule of recognition (i.e., the rule for identifying law that is accepted as the ultimate rule by officials in the legal system)); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (arguing that social movements influence constitutional understanding); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (observing that popular constitutional movements have helped advance racial equality and gay rights); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986) (examining who should be the ultimate constitutional interpreter).

We attempt to address some of this deficiency in this essay (and in other work) by measuring and marking the constitutional attitudes of members of the public through scientific surveys. We use the shorthand “constitutional thinking” to denote our interest in obtaining measurements of the public’s views on constitutional issues, especially in contexts where the public is likely to articulate a distinctive voice, rather than simply mimicking the pronouncements of courts and judges.

Over the Supreme Court’s past two terms, the Fairleigh Dickinson University poll, PublicMind, has asked voters their legal opinions about cases being heard by the high court, testing the proposition that members of the public not only can be, but actually are, capable constitutional thinkers. This national polling has provided unique measures of public opinion on a number of substantive constitutional matters before the Court. These issues, while notable to scholars and the most attentive Court watchers, were neither familiar to the public nor widely discussed in popular media.

Indeed, while polling has provided snapshots and trend lines of the public’s views over many decades on a number of high profile decision areas,<sup>2</sup> rarely do other obscure, but important, cases or topics receive similar treatment. Thus, we have a great deal of data on public attitudes towards gun control, abortion, affirmative action, and now, health insurance reform,<sup>3</sup> but minimal knowledge of what the public thinks about the scores of other important topics and controversies before the Court each term. With this “blind spot” in mind, this essay examines five important cases from the 2011 Term with which the public are unfamiliar and compares these results with the results from our first poll last year, when we also polled public attitudes regarding several obscure cases prior to the Court issuing its decisions.

During the 2010 Term, we polled four cases to help us plumb the popular constitutionalism phenomenon.<sup>4</sup> We were genuinely surprised by the results and encouraged to gather additional data and search for patterns. Thus, during the 2011 Term, we offered American voters the opportunity to weigh in on six constitutional issues pending before the Court. The first

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2. See generally PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

3. *Id.* For a discussion of recent polling on health care, see Bruce G. Peabody & Peter J. Woolley, *The Public’s Constitutional Thinking and the Fate of Health Care Reform: PPACA As Case Study*, 81 FORDHAM L. REV. RES GESTAE 26 (2012), [fordhamlawreview.org/assets/res-gestae/volume/81/26\\_Peabody.pdf](http://fordhamlawreview.org/assets/res-gestae/volume/81/26_Peabody.pdf).

4. 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](http://fordhamlawreview.org/assets/res-gestae/volume/80/10_Peabody.pdf) [hereinafter Peabody & Woolley, *Res Republica*] (discussing results from the 2010 term); Peter J. Woolley & Bruce G. Peabody, *Polls, the Public, and Popular Perspectives on Constitutional Issues*, 80 FORDHAM L. REV. RES GESTAE 22, 24–25 (2011), [http://fordhamlawreview.org/assets/resgestae/volume/80/22\\_Woolley.pdf](http://fordhamlawreview.org/assets/resgestae/volume/80/22_Woolley.pdf) (explaining the methods and rationale for our polling).

issue, from *United States v. Jones*,<sup>5</sup> asked whether police must have a proper warrant to attach a GPS tracking device to a suspect's vehicle.<sup>6</sup> The second, from *Lafler v. Cooper*,<sup>7</sup> examined the limits of the right to counsel, asking whether defendants had a right to correct advice about a plea bargain.<sup>8</sup> This question was distinct from that posed in our third case, *Missouri v. Frye*,<sup>9</sup> which probed whether defendants must be informed of a plea offer.<sup>10</sup> Fourth, we asked the public to consider *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Employment Opportunity Commission*<sup>11</sup> and whether there is a "ministerial exception" to the First Amendment such that church employees are not covered by the same labor protections as employees of other organizations.<sup>12</sup> The fifth issue, from *Florence v. Board of Chosen Freeholders*,<sup>13</sup> concerned whether prison guards may strip search prisoners without reasonable suspicion, regardless of a prisoner's offense.<sup>14</sup> Finally, we asked respondents to consider the divisive issue posed in *National Federation of Independent Business v. Sebelius*,<sup>15</sup> concerning the propriety of a health insurance mandate.<sup>16</sup> Because of its greater press coverage and awareness by the public, as well as its highly partisan context, we treat polling on the *Florida* case as a separate query from the other five cases and therefore analyze in a separate essay.<sup>17</sup>

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5. No. 10-1259 (U.S. Jan. 23, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf>.

6. Press Release, Fairleigh Dickinson Univ.'s PublicMind, High Court Agrees with Public in *US v Jones*: Electronic Tails Need a Warrant 2-4 (Jan. 23, 2012), available at <http://publicmind.fdu.edu/2012/tailing/> [hereinafter GPS Monitoring Press Release].

7. No. 10-209 (U.S. Mar. 21, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-209.pdf>.

8. Press Release, Fairleigh Dickinson Univ.'s PublicMind, Like US Supreme Court, US Voters Split on Bad Legal Advice 3-6 (Mar. 22, 2012), available at <http://publicmind.fdu.edu/2012/badadvice/> [hereinafter Legal Advice Press Release].

9. No. 10-444 (U.S. Mar. 21, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-444.pdf>.

10. Legal Advice Press Release, *supra* note 8, at 3-6.

11. No. 10-553 (U.S. Jan. 11, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-553.pdf>.

12. Press Release, Fairleigh Dickinson Univ.'s PublicMind, In Contrast to High Court, US Voters Split on Freedom of Churches to Hire and Fire 2-4 (Jan. 11, 2012), available at <http://publicmind.fdu.edu/2012/hosanna/> [hereinafter Ministerial Exception Press Release].

13. No. 10-945 (U.S. Apr. 2, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-945.pdf>.

14. Press Release, Fairleigh Dickinson Univ.'s PublicMind, Nation Sides with New Jersey Motorist Against Court, Automatic Strip Searches 2-4 (Apr. 2, 2012), available at <http://publicmind.fdu.edu/2012/strip/> [hereinafter Strip Searches Press Release].

15. No. 11-393 (U.S. June 28, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>.

16. Press Release, Fairleigh Dickinson Univ.'s PublicMind, Health Insurance: Can They Or Can't They? 2-5 (Mar. 20, 2012), available at <http://publicmind.fdu.edu/2012/require/> [hereinafter Health Insurance Press Release].

17. For our analysis of the *Sebelius* decision, see Peabody & Woolley, *supra* note 3.

### I. THE ENDLESS WAR ON ERROR: AN INTRODUCTION TO OUR POLLING TECHNIQUES

The polling that underlies this research was based on a national, randomly selected sample of registered voters. The sample for the 2011 Term comprised 855 voters recruited and interviewed by telephone, including both landline and cell phones.<sup>18</sup> Professionals conducted the interviews using a script provided to them.<sup>19</sup> The margin of error for our sample of 855 randomly selected respondents is +/- 3.5 percentage points at the 95 percent level of confidence—meaning that nineteen of twenty runs of the experiment will produce variations in the “topline” (aggregate) results of just a few points.<sup>20</sup>

Consistent with our previous effort in the Supreme Court’s 2010 Term, two main criteria informed our choice of cases. First, we selected cases whose core issues would be of sufficient interest to voters that they would remain engaged. Practically speaking, when constructing a questionnaire one must remember that telephone interviews and human beings have finite, if somewhat variable, limitations. Even under the best conditions, a poll entails a stranger telephoning in the evening, often at a respondent’s home, and asking him or her to sacrifice time immediately, generally with no reward other than a perceived obligation of civic duty. Having accepted the initial request, respondents must still reply to questions about their views on public affairs, carrying on for about ten minutes on a variety of topics.

To minimize nonattitudes, nonresponses, question refusals, and interview break-offs, it is good practice not to try respondents’ patience and to be clear, swift, and mercifully short. That said, given the nature of our polling—which consisted of a series of questions about sometimes related but substantively distinct areas—by the time anyone was asked about, say, the constitutional tradeoff of law enforcement needs and privacy interests in

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18. The telephone eliminates the possibility of the interviewer using physical signs or gestures to get his or her point across. Questions were presented in a neutral manner, as follows: “Some people argue . . . . Other people argue . . . . Which comes closer to your view?” See, e.g., Strip Searches Press Release, *supra* note 14, at 3. Nevertheless, a telephone interview cannot eliminate all external influences, as it is possible that people at home might have distractions that affect their responses. Televisions, computer games, children, spouses, pets, and grumbling stomachs all may distract and detract from the respondent’s concentration.

19. For the exact question wording and order, see *2012 Releases Year to Date*, PUBLICMIND POLL, <http://publicmind.fdu.edu/prioryears/2012.html> (last updated Sept. 17, 2012).

20. The margin of error for subgroups is larger and varies by the size of that subgroup. Survey results are also subject to nonsampling error. This kind of error cannot be measured and arises from a number of factors including, but not limited to, nonresponse (eligible individuals who refuse to be interviewed), question wording, question order, and variations among interviewers. The interviews were conducted by Opinion America of Cedar Knolls, New Jersey, from November 29, 2011, through December 5, 2011. Professionally trained interviewers utilized a computer assisted telephone interviewing system. The total combined sample, which included both land-lines and cell phones, was mathematically weighted to match known demographics of age, race, and gender among the voting population. See *id.*, for press releases on polling results that contain details of the sample population.

*United States v. Jones*, he would already have answered a gauntlet of questions from presidential candidate preferences and the direction of the country to his attitude toward betting on professional sports.<sup>21</sup>

The second criterion we used in our selection was that the core issue in the case had to be amenable to polling; that is, not so complex that it would be impossible to represent a core issue clearly and quickly to our polled public. Again, the issue would be presented on the telephone to a stranger and would be presented to as wide a variety of respondents as there are voters. We deemed both of these factors as important constraints on polling individuals on complex constitutional issues.<sup>22</sup>

Beyond these basic selection criteria, we tried to follow “best practices” to achieve the most useful polling results. One such practice is to balance each question to the extent possible. Respondents should not get any indication that one answer is more desirable to the interviewer, or to the question writers, than another. The questions should signal parity in the proffered choices, in the following manner: “Some people argue that . . . and other people argue that . . . .” The questions should invite agreement with any possibility: “Which comes closer to your view?” Meanwhile, the answer categories should be parallel, containing language that signals parity and equal validity. For instance, in our polling on *Hosanna-Tabor* we phrased the conflict as follows: “To protect religious freedom, churches have . . . .” and, “To protect individual rights, churches have . . . .”<sup>23</sup> Moreover, the answers are always read in random order so that no one answer category is always read first or last.<sup>24</sup>

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21. For exact question wording and order of questions preceding the questions on pending Supreme Court decisions, see Press Release, Farleigh Dickinson Univ.’s PublicMind, Gingrich is New Fave, Voters Approve of Iraq Withdrawal, President Beats All Comers (Dec. 7, 2011), <http://publicmind.fdu.edu/2011/newfave/>, and Press Release, Farleigh Dickinson Univ.’s PublicMind, Too Soon to Think about Vice Presidential Candidates? For some . . . but Not Others (Dec. 14, 2011), <http://publicmind.fdu.edu/2011/toosoon/>.

22. It must also be remembered that most voters are neither lawyers nor Court watchers and may also not be informed on the topics of the day nor accustomed to talking about public affairs. Furthermore, they may not only be inattentive to the Court but also relatively uneducated. Indeed, when it comes to cases on the docket of the U.S. Supreme Court, voters of many backgrounds are untutored laypersons. We did not poll on many cases of interest to us, or of potential interest to the public, because we were unable to construct questions that were easily accessible to the general public.

23. Ministerial Exception Press Release, *supra* note 12, at 2.

24. We followed other best practices, obvious but too important to ignore. First, we did not ask one question about a case. To keep the interview moving and the respondent engaged, we asked at least two questions. The first question served the main purpose of simply introducing the topic. For example, to begin the four question series on *Lafler*, we asked, “Are you aware or not aware that the U.S. Constitution gives people the right to a lawyer in criminal cases?” Legal Advice Press Release, *supra* note 8, at 4. We were not especially interested in the answer to this question (92 percent said they were aware), but we were keenly interested in establishing the topic, helping our respondents to make a cognitive shift from one set of queries to another, more pointed set about lawyers representing clients in the context of plea bargaining. *Id.* at 3. For other topics, we began by asking respondents whether they had ever heard about a particular case by surfacing some of its key identifying or orienting features. For example, with *Jones* we introduced the subject by saying: “In one

Clearly, the questions we put to voters were not as rich in terms of their fact patterns, legal complexity, or overall context as the arguments submitted to the Court. The voters in our sample received only the most basic and relevant background—indeed, the equivalent of index cards for the petitioner and respondent in each case. Nevertheless, we contend that this information was thoughtful and free of jargon, drawing choices in clear contrast.

## II. CASES AND RESULTS: LAWYERS, DRUGS, AND MINISTERS

Our cases from 2011 Term included two search and seizure cases (*United States v. Jones* and *Florence v. Board of Freeholders*), two intertwined cases involving the right to counsel (*Lafler v. Cooper* and *Missouri v. Frye*), and a First Amendment dispute involving the contours of the “ministerial exception” to employment discrimination laws (*Hosanna-Tabor v. EEOC*). The cases addressed very different questions of civil liberties and civil rights and, like our study of the 2010 Term, brought up issues with implications for both criminal justice and religious accommodation.

### A. *United States v. Jones: Popular Constitutionalism and Fourth Amendment Limits on Technology*

In *Jones*, the Court considered whether attaching a GPS device to a vehicle and then using that device to monitor the vehicle’s movements for twenty-eight days constituted an unreasonable search, for which a warrant is required under the Fourth Amendment.<sup>25</sup> The case involved suspected drug dealer Antoine Jones, who police tracked for almost a month as he rode around conducting business in his wife’s car.<sup>26</sup> Jones, a nightclub operator, was subsequently convicted and received a life sentence for his part in a drug trafficking scheme.<sup>27</sup> However, his lawyers appealed on grounds that his Fourth Amendment rights were violated by dint of a warrantless search.<sup>28</sup> To obtain evidence against him, police had installed the GPS tracking device without a valid warrant, as the date of a previously obtained warrant had expired and the police installed the device outside the jurisdiction in which it was valid.<sup>29</sup> The Court was faced with the question of whether attaching a GPS device and following the car’s movements constituted a “search” for which a valid warrant was even required?<sup>30</sup>

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case, the question is whether police need a warrant—like a search warrant—in order to put a GPS tracking device on a suspect’s car.” GPS Monitoring Press Release, *supra* note 6, at 2. Then the interviewer immediately asked, “Have you heard or read about this case . . . ?” *Id.* This practice allowed us to introduce the topic, keep the respondent attentive, and test our sense about whether the case indeed had a low public profile.

25. *United States v. Jones*, No. 10-1259 (U.S. Jan. 23, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf>.

26. No. 10-1259, slip op. at 1–2.

27. *Id.* at 3.

28. *Id.*

29. *Id.* at 1–2.

30. See generally Brief for Respondent, *Jones*, No. 10-1259, 2011 WL 4479076.

Despite the complexity of cases involving the intersection of privacy expectations and technology, this question was sufficiently direct to set before the American voter.

For this case, we offered two possible arguments and asked people which came closer to their view. On the one hand, we said, “[O]nce you drive your car, your movements are public anyway. Using a tracking device just saves police the expense and difficulty of following the car with detectives.”<sup>31</sup> On the other hand, we said, “[T]he car is private property. Police need permission from the owner, or from a judge, to put a tracking device on personal property.”<sup>32</sup>

Surprisingly, in this instance (and others), only a small percentage could not make up their minds. Just 6 percent said they did not know or had mixed views about this basic choice.<sup>33</sup> Three-quarters (73%) sided with the position advocated by respondent Jones and identified the government’s use of GPS monitoring as a Fourth Amendment search.<sup>34</sup> Thus, voters concluded that police should be required to obtain a proper warrant before putting a GPS device on a suspect’s vehicle. Only 22 percent thought convenience to the police, savings to taxpayers, or law enforcement’s need to track the car were values that should prevail.<sup>35</sup> Indeed, the wide consensus against warrantless use of GPS tracking technology was the most lopsided result of the five cases polled.

In light of the Court’s subsequent ruling in favor of Jones, it is also worth noting that the public’s agreement crossed generations, parties, and races. Similarly high percentages of Republicans (67%), independents (68%), and Democrats (78%) agreed that a warrant was needed.<sup>36</sup> Likewise, those under thirty years of age agreed (74%) with those over sixty years of age (66%).<sup>37</sup> Non-whites (80%) and whites (70%) both concluded placing the GPS device constituted an unconstitutional search.<sup>38</sup>

We note that the polled public did not know that the D.C. Circuit had already thrown out Jones’s conviction on the grounds that GPS tracking violated his Fourth Amendment freedom from “unreasonable searches and seizures.”<sup>39</sup> Furthermore, it is likely that few of the respondents ever learned of the Supreme Court’s unanimous decision, issued only weeks after our poll, to affirm that a proper warrant must be obtained when using a GPS device to track the movements of a suspected criminal over a lengthy

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31. GPS Monitoring Press Release, *supra* note 6, at 2.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff’d in part sub nom. United States v. Jones*, No. 10-1259 (U.S. Jan. 23, 2012).

period.<sup>40</sup> With respect to the basic ruling in the case, the Court and the public were in accord.

The result suggests that the public and the Court are similarly cautious about the implications for privacy in the brave new age of GPS. As noted, the public had little trouble deciding the case, with three quarters in agreement with the respondent Jones and just 6 percent reporting that they were not sure how to resolve the conflict.<sup>41</sup> The Court, meanwhile, was not only unanimous but also warned broadly about governmental scrutiny of citizens. “Awareness that the Government may be watching chills associational and expressive freedoms,” wrote Justice Sotomayor, concurring with Justice Scalia’s majority opinion.<sup>42</sup> Justice Sotomayor continued, “[T]he Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.”<sup>43</sup>

Arguably, the Court’s 9–0 opinion in favor of Jones masked considerable division among the Justices about the proper legal reasoning for that outcome. For five Justices—the Chief Justice Roberts and Justices Kennedy, Scalia, Sotomayor, and Thomas—the legal analysis turned on the government’s installation of the GPS tracking device on the car, a Fourth Amendment invasion of privacy because police “physically occupied private property.”<sup>44</sup> For the remaining Justices—Justices Alito, Ginsburg, Breyer, and Kagan—the physical trespass onto Jones’s property (in this case, his wife’s car) was less important than the government’s lengthy monitoring of the respondent.<sup>45</sup>

These distinctions partially reflect the Justices’ concerns about how to apply this case as precedent in the future to other technologies and other episodes of law enforcement monitoring. We would not be surprised if, in teasing out some of these other scenarios and issues, we uncovered greater diversity in the views of the polled public as well. Our core conclusion remains the same: on the basic and specific legal issue posed in the *Jones* case, we find a great deal of overlap between the Court’s judgment and that of the public.

For our purposes, Justice Alito’s concurring opinion in the case may be the most interesting in signaling the essential link between the Court’s work and public opinion. Alito acknowledged that changing public opinion has a role in determining what is a reasonable expectation of privacy and what is

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40. See *Jones*, No. 10-1259, slip op. at 12.

41. The result is also consistent with the many polls summarized by EPIC, the Electronic Privacy Information Center, showing that the public is willing to make certain tradeoffs on privacy for national security purposes; absent national security concerns, however, the public insists on privacy protections from new, privacy threatening technologies. See *Public Opinion on Privacy*, EPIC.ORG, <http://epic.org/privacy/survey/> (last visited Nov. 19, 2012). We thank Matthew Sundquist for directing us to this point.

42. *Jones*, No. 10-1259, slip op. at 3 (Sotomayor, J., concurring).

43. *Id.*

44. *Id.* at 4 (majority opinion).

45. *Id.* at 12–14 (Alito, J., concurring).

an unreasonable, unconstitutional search.<sup>46</sup> He further observed that “[d]ramatic technological change may lead to periods in which popular expectations [of privacy] are in flux.”<sup>47</sup> Accordingly, these developments

may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.<sup>48</sup>

Clearly, Justice Alito’s remarks underscore the vital, unavoidable, and reciprocal relationship between the public’s vision of constitutional values (such as privacy) and the way in which courts and other public officials try to give shape to our constitutional law.

*B. Florence v. Board of Freeholders: Popular Constitutionalism and Strip Searching Prisoners*

*Florence* was our second case involving criminal procedure and civil liberties.<sup>49</sup> In this case, state troopers in Burlington County, New Jersey, ran a license plate check and stopped Albert Florence, an African American,<sup>50</sup> as he was driving with his wife.<sup>51</sup> He was arrested on a bench warrant issued in Essex County, New Jersey, for failure to pay a court fine.<sup>52</sup> He had, in fact, paid the fine<sup>53</sup> and even carried papers demonstrating his good legal standing.<sup>54</sup> During the stop, his wife produced this seemingly exonerative record to no avail.<sup>55</sup> Thus began a week long ordeal in which Florence was strip searched twice: first at the Burlington County jail and then at the Essex County jail where he had been transferred to appear before a magistrate.<sup>56</sup> The judge quickly determined that Florence was not wanted and ordered the defendant released.<sup>57</sup> Nevertheless, Florence’s post-arrest treatment raised the question of whether it was reasonable to strip search defendants automatically even for

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46. *Id.* at 5–7.

47. *Id.* at 10.

48. *Id.*

49. *Florence v. Board of Freeholders*, No. 10-945 (U.S. Apr. 2, 2012), *available at* <http://www.supremecourt.gov/opinions/11pdf/10-945.pdf>.

50. We mention the race of the petitioner because it is noted in the Supreme Court briefs for the case and in light of New Jersey law enforcement’s recent, controversial history of “racial profiling.” *See, e.g.*, Press Release, ACLU, ACLU of New Jersey Files Turnpike Racial Profiling Lawsuit (July 10, 2007), *available at* <http://www.aclu.org/racial-justice/aclu-new-jersey-files-turnpike-racial-profiling-lawsuit>.

51. *Florence*, No. 10-945, slip op. at 2.

52. *Id.*

53. *Id.*

54. Brief of Petitioner at 3, *Florence*, No. 10-945, 2011 WL 2508902, at \*3 (“Petitioner kept with him a copy of the official document certifying that [he had paid the fine].”).

55. *Id.*

56. *Florence*, No. 10-945, slip op. at 2–3.

57. Brief of Petitioner, *supra* note 54, at 6–7.

minor offenses absent suspicion that the suspect was carrying weapons or drugs.

In order to surface the core constitutional question at hand in *Florence*, we asked our national sample of voters whether “prison officials can automatically strip search any person admitted to a jail, even if it is for a minor offense” or “prison officials need to have a reasonable suspicion before they strip search any person admitted to a jail, especially if it is for a minor offense like failing to pay a traffic ticket.”<sup>58</sup>

More than four of five voters (82%) said they had never heard of the case, yet just 4 percent subsequently reported they were unsure or had a mixed opinion in the case.<sup>59</sup> Notwithstanding their unfamiliarity with the case, the public was ready to weigh in on the legal controversy. Two-thirds (65%) said the same search procedure should not apply to everyone regardless of the nature of their offense.<sup>60</sup> Only 31 percent said that prison officials may automatically strip search everyone, a two-to-one margin in favor of the petitioner’s argument (which, of course, they had never heard before).<sup>61</sup>

The public’s untutored opinion mirrored the written law of New Jersey and of Burlington County where *Florence* was first strip searched.<sup>62</sup> That law prohibits strip searches of prisoners at intake generally unless there is reasonable suspicion that a weapon, drugs, or other contraband may be found.<sup>63</sup> In fact, the jail recorded and subsequently contended that *Florence* was not strip searched but only visually observed at arms’ length with his clothes off while he lifted his arms, rotated, squatted, and lifted his testes.<sup>64</sup> Justice Kennedy noted, however, that “[t]he opinions in earlier proceedings, the briefs on file, and some cases of this Court refer to a ‘strip search.’”<sup>65</sup> Indeed, “[t]he term is imprecise.”<sup>66</sup>

The Court ruled 5–4 against the petitioner and in favor of allowing routine searches of anyone in the general prison population.<sup>67</sup> This opinion was at odds with the public’s judgment.

Writing for the Court, Justice Kennedy cited the overriding need for safety and security in any detention center; although people arrested for minor offences are often among the detainee population, maintaining security while drawing innumerable distinctions within this group would

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58. Strip Searches Press Release, *supra* note 14, at 2.

59. *Id.*

60. *Id.*

61. *Id.*

62. See N.J. STAT. ANN. § 2A:161A-1 (2012) (directing that strip searches are prohibited absent a warrant, probable cause, or consent); N.J. ADMIN. CODE § 10A:31-8.4-.7 (2012) (listing rules regarding strip searches and body cavity searches).

63. N.J. STAT. ANN. § 2A:161A-1.

64. *Florence*, No. 10-945, slip op. at 2–3 (U.S. Apr. 2, 2012).

65. *Id.* at 4.

66. *Id.*

67. *Id.* at 19.

simply be “unworkable.”<sup>68</sup> Chief Justice Roberts and Justices Scalia, Alito, and Thomas joined Justice Kennedy’s opinion, but Roberts, Alito, and Thomas all voiced doubts, as well.<sup>69</sup> Their votes were essential to achieving a majority on the outcome, but they emphasized that while it may be reasonable to apply the same search procedures to everyone in the specific prisoner population and conditions present in this case, it might not always be reasonable to do so.<sup>70</sup> The ruling, they pointed out, did not authorize jail officials to conduct a strip search unless the prisoner was to be placed among other prisoners at the facility. Thus, on closer inspection, the narrow 5–4 ruling in *Florence* was even more divided and will most likely serve as a somewhat uncertain precedent for analogous cases in the future.

Meanwhile, the four dissenters unknowingly agreed with the American public that it was altogether unreasonable to subject minor offenders to such a “humiliating” search “unless prison authorities have reasonable suspicion to believe the individual possessed drugs or other contraband.”<sup>71</sup>

The Court split 5–4 along ideological lines, with the five “conservatives” making the majority. A notable difference between public opinion and the opinion of the Court, then, is that the former did not split ideologically. As in *Jones*, the public’s judgment on the case cut across all demographics. Two-thirds of both Democrats and Republicans were against automatic strip searches.<sup>72</sup> Likewise, self-identified conservatives, moderates, and liberals were in agreement.<sup>73</sup>

### C. *Cooper and Frye: Popular Constitutionalism and the Right to Counsel in Plea Bargaining*

While *Jones* and *Florence* dealt with procedural matters involving law enforcement, two other important cases from the 2011 Term involved questions about the Sixth Amendment “right to counsel,” particularly as it impacts the plea bargaining process. Criminal defendants have a right to counsel, but whether that includes a right to good (i.e., strategically sound) counsel was the core issue posed both to the public and to the Court.

In *Cooper*, respondent Anthony Cooper fired a gun at the victim’s head and, despite missing, chased her while firing several rounds into her lower

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68. *Id.* at 14.

69. The Chief Justice and Justice Alito each wrote separate concurring opinions. *See id.* at 1 (Roberts, C.J., concurring); *id.* at 1 (Alito, J., concurring). Although they both joined the opinion of the Court, Roberts and Alito each emphasized how narrow they thought the decision actually was. Justice Thomas declined to join a portion of Kennedy’s reasoning. *See id.* at 1 (majority opinion).

70. *Id.* at 1 (Roberts, C.J., concurring) (“[I]t is important for me that the Court does not foreclose the possibility of an exception to the rule it announces.”); *id.* at 1 (Alito, J., concurring) (“I join the opinion of the Court but emphasize the limits of today’s holding.”).

71. *Id.* at 2, 4 (Breyer, J., dissenting).

72. Strip Searches Press Release, *supra* note 14, at 2.

73. *Id.*

extremities.<sup>74</sup> Cooper stood accused of assault with intent to murder, among other things, and faced a potential sentence of 185–360 months’ imprisonment.<sup>75</sup> Although the prosecutor had offered to dismiss two of the charges against Cooper in exchange for a guilty plea—which would have resulted in a maximum sentence of 51–85 months in prison—Cooper followed his attorney’s advice to turn down the offer and hold out for a better deal because, in the attorney’s view, the prosecution could not prove Cooper’s intent to kill.<sup>76</sup> After all, counsel reasoned, after the first bullet missed the victim’s head, the bullets Cooper subsequently fired at her all struck below the waist: one in the hip, one to the side of the abdomen, and two to the buttocks.<sup>77</sup> However, the prosecutor refused to offer a better deal and went forward with the trial for intent to murder.<sup>78</sup> Cooper was subsequently convicted, and the judge sentenced him to the mandatory minimum of 185–360 months in prison—three times the sentence he would have received had he accepted the plea.<sup>79</sup>

Did this constitute ineffective assistance of counsel? There was no question that the trial was fair, and counsel’s conduct at the trial was not in dispute. Moreover, accepting a plea bargain would have limited and waived some of Cooper’s rights including “all the constitutional protections a trial entails.”<sup>80</sup>

In speaking to the public, we consolidated the history and relevant information in *Cooper* to two sentences and offered two possible positions. We asked our respondents whether the defendant had a right to good advice from his lawyer, rendering the rejected plea-bargain “a case of unfair legal procedure” entitled to a “do-over.”<sup>81</sup> Alternatively, we allowed respondents to agree with the proposition that “you can’t jam up the legal system with re-trials just because lawyers sometimes give bad advice.”<sup>82</sup>

Faced with this choice, the public split closely: 44 percent said the case should receive a do-over, but a statistically equivalent share, 42 percent, said this was impractical.<sup>83</sup> The remaining fourteen percent in this case were undecided.<sup>84</sup> Women, Democrats, and liberals—by five-to-four ratios—tended to say that the defendant had a right to good advice and that the procedure leading to his conviction was unfair.<sup>85</sup> Men, independents, and Republicans leaned the other way by similar margins.<sup>86</sup>

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74. No. 10-209, slip op. at 1–2 (U.S. Mar. 21, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-209.pdf>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Brief for the Petitioner at 3, *Cooper*, No. 10-209, 2011 WL 1523284, at \*3.

81. Legal Advice Press Release, *supra* note 8, at 3.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

The most interesting divergence in this case, however, related to race. Whites split fairly evenly, with 45 percent saying that lawyers sometimes just give bad advice, while 41 percent said that an inadvisable, rejected plea bargain should trigger a do-over.<sup>87</sup> African Americans, on the other hand, found by a nearly three-to-one margin that the scenario was unfair and that a defendant has the right to good advice.<sup>88</sup> We infer that different experiences with, and perceptions of, the criminal justice system are responsible for these divergent outcomes.

In early April 2012, months after our polling concluded, the Court revealed its own divisions, ruling 5–4 that a defendant’s right to counsel includes good advice even in the context of plea bargaining.<sup>89</sup> However, the Court ruled that a good deal of the burden in this context would fall on the accused. Specifically, the accused must show that,

but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the court . . . that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.<sup>90</sup>

In a concurrence joined by Justice Thomas and Chief Justice Roberts, Justice Scalia criticized the majority for opening “a whole new field of constitutionalized criminal procedure: plea-bargaining law.”<sup>91</sup> Scalia’s dissent concluded that “the ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice.”<sup>92</sup> These remarks seem to reflect the sentiment expressed by much of the public that “you can’t jam up the legal system with re-trials just because lawyers sometimes give bad advice.”<sup>93</sup>

*Cooper* was tied to another case involving a plea offer gone awry: *Frye*.<sup>94</sup> Here, the issue was not that the defense counsel offered bad advice in connection with a plea offer but that he failed to inform his client that a plea bargain was even available.<sup>95</sup> In this case, respondent Frye was charged with his fourth instance of driving with a revoked license and, as a result, faced a maximum sentence of four years’ imprisonment.<sup>96</sup> The prosecutor offered defense counsel a choice of two plea bargains, each of which would have resulted in a sentence of no more than ninety days in

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87. *Id.*

88. *Id.*

89. *See* Lafler v. Cooper, No. 10-209 (U.S. Mar. 21, 2012).

90. *Id.* at 5.

91. *Id.* at 1 (Scalia, J., dissenting).

92. *Id.*

93. Legal Advice Press Release, *supra* note 8, at 3.

94. No. 10-444 (U.S. Mar. 21, 2012), *available at* <http://www.supremecourt.gov/opinions/11pdf/10-444.pdf>.

95. *Id.* at 2.

96. *Id.*

prison.<sup>97</sup> By the time the defendant became aware of the prosecutor's offers, however, both had expired and other events interceded, including another arrest of Mr. Frye on the same offense.<sup>98</sup> Frye eventually pled guilty without the option of any plea bargain, and the court meted out a three year sentence.<sup>99</sup> Frye appealed, arguing that had he known about the initial plea offer he would have accepted it and received a much lighter penalty.<sup>100</sup> Conversely, the state of Missouri argued, "[T]he accused has no right to a plea bargain, and a plea bargain standing alone has no constitutional significance."<sup>101</sup>

We asked the public whether the defendant's sentence should be overturned because he never had the chance to consider a lesser sentence or upheld because "the defendant doesn't have a right to a plea bargain, only a right to a fair trial."<sup>102</sup> In this test, the public and the Court matched up more closely than in *Cooper*.

The majority of respondents (53%) said Frye's sentence, which had been imposed without his knowledge of the plea bargain option, should be overturned.<sup>103</sup> Meanwhile, only a third (34%) said that the defendant's rights were limited to a fair trial.<sup>104</sup> Again, there was a pronounced difference in the category of race. While white voters favored overturning the sentence by 49 percent to 36 percent, black voters favored overturning it by 67 percent to 22 percent.<sup>105</sup>

The Court's 5-4 split very much mirrored public opinion with respect both to the substance and the ratio of division. A majority of the Court concluded that the "Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected."<sup>106</sup> Justice Kennedy, writing for the majority, observed that the "simple reality" is that plea bargains have "become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."<sup>107</sup>

Justice Scalia, who read aloud his dissenting opinions in both *Cooper* and *Frye*, called the rulings "inconsistent with the Sixth Amendment and decades of our precedent."<sup>108</sup> Scalia maintained that each case should have

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97. *Id.*

98. *Id.*

99. *Id.*

100. See generally Brief for Respondent, *Frye*, No. 10-444, 2011 WL 2837937.

101. Brief for the Petitioner at 9, *Frye*, No. 10-444, 2011 WL 2837937, at \*9.

102. Legal Advice Press Release, *supra* note 8, at 3.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Missouri v. Frye*, No. 10-444, slip op. at 1 (U.S. Mar. 21, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-444.pdf>.

107. *Id.* at 7.

108. *Id.* at 5 (Scalia, J., dissenting). Chief Justice Roberts and Justices Alito and Thomas joined in Scalia's dissent.

been resolved based on the fairness of the trial process, not the integrity of the plea process by which a fair trial was waived.<sup>109</sup> In *Frye*, he observed, “it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction.”<sup>110</sup>

The dissenting Justices conceded that the “plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained.”<sup>111</sup> Nevertheless, they also noted that this process “happens not to be . . . a subject covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction.”<sup>112</sup>

Not surprisingly, the Court’s split divided the four Justices appointed by Democrats on one side and four Justices appointed by Republicans on the other, with Justice Kennedy holding the deciding vote. Likewise, among the public, approximately two thirds of liberals and Democrats were in favor of overturning the defendant’s sentence, while Republicans and conservatives were essentially split on the question.<sup>113</sup>

D. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC:*  
*Popular Constitutionalism and a Ministerial Exception to*  
*the First Amendment*

Finally, we have the case of *Hosanna-Tabor*, which addresses limits on religious organizations’ ability to hire and fire employees who double as ministers, irrespective of federal laws that forbid various forms of discrimination in employment decisions.<sup>114</sup> In *Hosanna-Tabor*, the congregation of a Redford, Michigan, church dismissed an employee on the grounds that she was no longer “called.”<sup>115</sup>

Many of the church’s teachers, though not all, were classified as “called” (i.e., considered to have been called to their vocation by God through the church’s congregation).<sup>116</sup> Once called, a teacher receives the title of “Minister of Religion, Commissioned.”<sup>117</sup> To be eligible for this title, a candidate must complete courses in theological study, obtain the endorsement of her local Synod district, and pass an oral examination given by the faculty committee.<sup>118</sup> Called teachers may serve for an open ended term subject to rescission only for cause and only by a supermajority vote of the congregation.<sup>119</sup> In contrast, “lay” or “contract” teachers are not

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109. *Id.* at 2–3.

110. *Id.* at 1.

111. *Id.* at 4–5.

112. *Id.*

113. Legal Advice Press Release, *supra* note 8, at 3.

114. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (U.S. Jan. 11, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-553.pdf>.

115. No. 10-553, slip op. at 3.

116. *Id.* at 2.

117. *Id.*

118. *Id.*

119. *Id.*

required to undergo any special training nor are they appointed by the congregation and are only hired for renewable one-year terms.<sup>120</sup>

Cheryl Perich, who taught religion (among other subjects) to kindergarteners and led prayer services, was among those teachers considered called to her vocation.<sup>121</sup> When she fell ill with narcolepsy several years later, however, the congregation wished to release her from called status.<sup>122</sup> Perich, then cleared by her doctors to return to work, refused the offer.<sup>123</sup>

The awkwardness that ensued prompted the congregation to rescind Perich's call.<sup>124</sup> Meanwhile, Perich filed a complaint with the Equal Employment Opportunity Commission (EEOC) asserting that the church had retaliated against her for opposing its decision to change her status, a decision she claimed was based on its erroneous conclusion that she was too ill to carry out her duties and resentment that she challenged its wishes at all.<sup>125</sup>

Setting theological and medical questions aside, the case amounted to the following questions: Could the church dismiss Perich on the religious grounds that she was no longer called? Or was being no longer called simply a mask for discrimination?

In exploring the important legal questions in this case, we asked voters whether "[in order] to protect religious freedom, churches have the right to hire and fire employees for religious reasons without interference from government rules," or "[in order] to protect individual rights, churches have to follow the same rules as government and business when it comes to hiring and firing."<sup>126</sup> Once again, the public split quite evenly: 46 percent sided with the church, supporting its unencumbered right to hire and fire, and 43 percent sided with the teacher, a division that amounted to a statistical tie.<sup>127</sup> Only 10 percent of voters were unsure or had mixed views.<sup>128</sup>

Behind these different views were clear partisan and ideological differences. A majority of Democrats (56%) believed that an individual's rights must be protected, whereas a greater majority of Republicans (64%) believed that government may not interfere with church hiring.<sup>129</sup> Self-described liberals, by a similar five-to-three margin, believed that a church must abide by existing employment laws, while a majority of conservatives

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120. *Id.*

121. *Id.* at 2–3.

122. *Id.* at 3.

123. *Id.*

124. *Id.*

125. *Id.* at 4–5.

126. Ministerial Exception Press Release, *supra* note 12, at 2.

127. *Id.*

128. *Id.*

129. *Id.*

(60%) agreed with the church's argument and its prerogative to change the vocational status of its employees to enable their termination.<sup>130</sup>

Whatever the differences among the public, the Court was not of two minds in this dispute, ruling 9–0 in an opinion delivered by the Chief Justice in January 2012, just weeks after our polling had concluded.<sup>131</sup> The Court held that church ministers, however they are defined, serve as an exception to the antidiscrimination rules that govern other businesses, nonprofits, and government agencies.<sup>132</sup> Writing for the Court, Chief Justice Roberts observed that “[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”<sup>133</sup> He concluded that “[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”<sup>134</sup>

Clearly, the public was not this unified, decisive, or forceful. It is intriguing that the Justices were in strong agreement regarding this area of First Amendment law, while the general public splintered on the competing values of equal employment protection and religious accommodation.

### III. POLL POSITION: TAKING STOCK OF POPULAR CONSTITUTIONALISM AND THE 2011 TERM

All five of the constitutional cases discussed in this essay concern individual rights, as opposed to questions about the scope of government powers or federalism. In all five, the public was barely aware of the case, if they were familiar at all. Yet, in all five, the public had little trouble identifying a preference for deciding the controversy.<sup>135</sup> In several cases from this term and our prior surveyed term—such as *Brown v. Plata*, a prison overcrowding case from the 2010 Term,<sup>136</sup> and *Florence*, the strip

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130. *Id.*

131. Justice Thomas filed a concurring opinion. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, slip op. at 1 (U.S. Jan. 11, 2012) (Thomas, J., concurring), available at <http://www.supremecourt.gov/opinions/11pdf/10-553.pdf>. Justice Alito also filed a concurring opinion, which was joined by Justice Kagan. See *id.* at 1 (Alito, J., concurring).

132. *Id.* at 15–18 (majority opinion).

133. *Id.* at 21.

134. *Id.* at 21–22.

135. These outcomes square with our results from last term. In our previous polling on *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), for example, 69 percent of voters indicated that they had never heard of the case or the underlying controversy (a number that is probably underestimated), but 86 percent of these respondents still offered an opinion about the case, while only 14 percent said they were unsure or had mixed views on how to resolve the controversy. See Peabody & Woolley, *Res Publica*, *supra* note 4, at 16.

136. 131 S. Ct. 1910 (2011).

search case from this term—the public’s pronounced opinion was in stark contrast with the ruling delivered by the Court.<sup>137</sup>

While our surveys cannot register the intensity of the public’s views, the results underscore a point made frequently by scholars: the Court’s power derives, in part, from its relative seclusion from the public eye. In this way, high profile, widely discussed cases, such as *National Federation of Independent Business v. Sebelius*, may be the exceptions that prove the rule. This is to say that the Court is able, for the most part, to do its work away from an immediate tumult of public opinion, the result being that public attitudes toward the Court as an institution (so called “diffuse” support) tend to remain positive even when Court opinions go against the wishes of a majority of the public.

To reinforce this point—that public opinion need not mesh perfectly with the Court’s individual decisions for the Court to enjoy a broad reputation for legitimacy—we will take another look at how our five recent measures of public opinion reconcile with the corresponding Court decisions. The cases can be classified in several ways.

A. *Agree To Disagree: Cases Where the Court or the Public Express Strong Consensus or Disagreement*

One approach is to compare cases where the margins of agreement or disagreement, within either the Court or the public, were high. Of the five cases, three resulted in 5–4 decisions by the Court: *Florence*, *Cooper*, and *Frye*. Only in *Cooper* was public opinion also closely divided.<sup>138</sup> In *Florence* and *Frye*, however, the public had a decided preference. The public’s twenty-point preference in *Frye* for the defendant accorded with the Court’s 5–4 ruling.<sup>139</sup> In contrast, the public’s thirty-point preference in *Florence* for the defendant was in contrast to the Court’s 5–4 majority.<sup>140</sup>

The two other cases, *Jones* and *Hosanna-Tabor*, resulted in unanimous decisions by the Court.<sup>141</sup> In *Hosanna-Tabor*, public opinion was split evenly, in stark contrast to the Court’s emphatic ruling for the church.<sup>142</sup> In *Jones*, however, the public’s fifty-point margin in favor of the defendant was just as emphatic as the Court’s unanimous ruling, a perfect alignment.<sup>143</sup>

In light of our limited sample, we are unable to conclude that when the Court has a close ruling, the public’s opinion will be similarly divided. Nor

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137. See Peabody & Woolley, *Res Publica*, *supra* note 4, at 18–19 for our commentary on *Brown*.

138. See *supra* notes 74–93 and accompanying text.

139. See *supra* notes 94–113 and accompanying text.

140. See *supra* notes 49–73 and accompanying text.

141. Overall, 44 percent of the cases from the 2011 Term resulted in unanimous rulings, an unusually high figure. Adam Liptak, *Supreme Court Moving Beyond Its Old Divides*, N.Y. TIMES, July 1, 2012, at A1.

142. See *supra* notes 114–34 and accompanying text.

143. See *supra* notes 25–48 and accompanying text.

can we say that when the Court rules with great consensus, public opinion will be similarly unified. No pattern in this regard emerged in our cases from this term or when combining these cases with those from the previous term.

*B. The Political Divide: Cases Where the Court or the Public Split on Ideological Differences*

Another way we can classify the cases is to identify those where clear partisan divides emerged among the public or the Court. Importantly, if not surprisingly, the cases decided by narrow margins—*Florence*, *Cooper*, and *Frye*—reflected obvious partisan cleavages within the Court, with Chief Justice Roberts and Justices Scalia, Thomas, and Alito on one side and Justices Ginsburg, Breyer, Sotomayor, and Kagan on the other. In only two of those three cases, however, did similar partisan divides emerge in the public. In *Cooper* and *Frye*, both cases regarding criminal procedure, Democrats differed significantly from Republicans, as did liberals from conservatives.<sup>144</sup> In *Florence*, however, public opinion did not reflect the Court's partisanship.<sup>145</sup>

Meanwhile, the Court's unanimous opinions in *Jones* and *Hosanna-Tabor* did not evidence partisan division. This result was consistent with the public's opinion of *Jones*, such that the Court and public were equally emphatic that the police's use of GPS technology to monitor the defendant for an extended period constituted an unreasonable search for which a valid warrant was required.<sup>146</sup> In *Hosanna-Tabor*, however, the public broke with the Court and voiced strong partisan differences, with Democrats favoring the same statutory rules for church employers and Republicans favoring limits on government interference with religious institutions.<sup>147</sup>

Consequently, we cannot say that the Court's partisanship reflects the public's partisanship or vice versa.

*C. The Ties That Bind: Cases Where the Court and Public Agree*

A third way to classify the cases is to identify those where the Court's majority and the public majority were in agreement. In *Cooper* and *Hosanna-Tabor*, however, public opinion was evenly split, so one could reasonably object that it is too tenuous to say that the Court's decision contradicted public opinion. Alternatively, one could say that the Court's close vote in *Cooper* reflects the public's divided opinion.<sup>148</sup> In *Hosanna-Tabor*, however, where the public also split evenly, the Court's unanimity was, in some sense, at odds with the divided public.<sup>149</sup>

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144. See *supra* notes 74–113 and accompanying text.

145. See *supra* notes 49–73 and accompanying text.

146. See *supra* notes 25–48 and accompanying text.

147. See *supra* notes 114–34 and accompanying text.

148. See *supra* notes 74–93 and accompanying text.

149. See *supra* notes 114–34 and accompanying text.

In *Frye* and *Jones*, both the public and the Court were in agreement. The public's twenty-point margin in *Frye* was more decisive, however, than the Court's 5–4 majority.<sup>150</sup> In *Jones*, the public's emphatic preference matched that of the Court.<sup>151</sup>

Only in one case can we say that the public's preference was clearly at odds with the Court's ruling. In *Florence*, the public disapproved of prison officials' broad authority to conduct strip searches regardless of the inmate's crime.<sup>152</sup> In contrast, the Court upheld the procedures of the prison's administrators, albeit by a small margin.<sup>153</sup>

In summary, we cannot conclude that the Court and the public were generally in accord or disagreement. We can only say that the Court's rulings did not fly in the face of public opinion generally, with the exception of *Florence*.

#### D. Implications of Our Findings

Although many scholars have concluded that the opinions of the Court and public are often aligned,<sup>154</sup> we are offering a more cautious view. We suspect that this common viewpoint reflects some substantial accord between the public and the Court in the most salient cases, but this, of course, only reflects a fraction of the Court's docket. Our study invites a wider review of the circumstances in which the Court and the public act together, a review that can now be bolstered with greater evidence from cases and controversies of a lower profile.

In light of our findings, we believe that the most egregious anomalies—*Hosanna-Tabor* and *Florence*, the cases for which the gap between the Court and public opinion seemed widest—deserve a closer look.

In *Hosanna-Tabor*, it was not that public preference clearly went against the decision of the Court.<sup>155</sup> In fact, public preference split fairly evenly (46% to 43%). What strikes us, however, was that the Court emphatically interpreted the First Amendment to create a new, bright line rule that protects the autonomy of religious organizations. At least three factors may help to explain the apparent discrepancy between the public and the Court in this case.

First, the Court's opinion emphasized the lengthy history of recognizing religious organizations' discretion to control themselves internally, including employment decisions. The weight of this history along with the

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150. See *supra* notes 94–113 and accompanying text.

151. See *supra* notes 25–48 and accompanying text.

152. See *supra* notes 49–73 and accompanying text.

153. See *supra* notes 49–73 and accompanying text.

154. See generally ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (Sanford Levinson ed., 5th ed. 2010); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

155. See *supra* notes 114–34 and accompanying text.

Court's frequent acceptance of such practices provides a degree of legal "path dependency" that would otherwise be absent for the overwhelming number of voters who may consider the case without this background. A second and related point is to note the concerted, strategic, and often successful efforts of conservative interest groups to litigate cases regarding the free exercise of religion.<sup>156</sup> This context is also unique to the Court and is also one that is certainly beyond almost every voter.

Finally, whatever force these factors may have had in driving the Court to its decision, they were reinforced by the "functional" emphasis adopted in the case. As Justices Alito and Kagan noted in their concurrence, in determining whether an individual was properly regarded as a "minister" performing religious functions (and thereby an agent falling under the "ministerial exception" to the First Amendment), courts should analyze "the function performed by persons who work for religious bodies."<sup>157</sup> But such an orientation would only underscore the justice's inclination to defer to religious organizations instead of involving the Justices in the exhaustive (and exhausting) task of judging whether a person performed identifiable religious activities.

The other case that deserves a closer look is *Florence*, involving the prison strip search.<sup>158</sup> While the public opposed the searches the Court ultimately sanctioned—indeed, by a wide margin (63% to 31%)—the Justices' decision was a narrow 5–4 ruling. Interestingly, public preference showed no partisan divergence, though the Court did. Democrats, Republicans, liberals, and conservatives all heavily favored *Florence*. Coincidentally, *Florence* was also the only case of the five in which the Court's majority deferred to the administrative expertise of the correctional system's bureaucracy as a basis for their decision, not doubting how prison officials could most effectively accomplish their job. In other words, the Court may have conceded *Florence*'s objections to the strip search but deferred to administrative demands anyway. Moreover, the Court's decision could easily have gone the other way but for the concurring Justices' emphasis on the limited application of the Court's decision. In other words, the Court's split decision—and its apparent tension with public opinion—is less dramatic than first meets the eye.

The cases tested over this term and the 2010 Term posed questions relating to the First, Fourth, Fifth, and Sixth Amendments. In this regard, we note that three of the First Amendment cases (involving free speech and religion) brought out larger differences between the Court and public opinion than other cases.

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156. See generally JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

157. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, slip op. at 2 (U.S. Jan. 11, 2012) (Alito, J., concurring), available at <http://www.supremecourt.gov/opinions/11pdf/10-553.pdf>.

158. See *supra* notes 49–73 and accompanying text.

The Court's unanimous decision in *Hosanna-Tabor* ran contrary to the public's split decision on the case, and the Court's unanimity stood in contrast to the public's partisanship. In *Brown v. Entertainment Merchants Association*,<sup>159</sup> a case from the 2010 Term, the public decisively favored allowing the state of California to regulate minors' access to violent video games, but the Court, in a 7–2 decision, protected the speech of game makers and game sellers.<sup>160</sup> In addition, the public broadly supported school choice in *Arizona Christian School Tuition Organization v. Winn*<sup>161</sup> even if the school had religious affiliations, while the Court's majority avoided this issue by reaching a narrow ruling on the grounds that the petitioners lacked standing on this question of tax policy.<sup>162</sup>

In light of these results, we would posit that discoverable patterns in public opinion and Court rulings diverge by subject matter. In other words, any broad statements about correlations between public opinion and Court rulings may need to distinguish among various constitutional provisions and the specific values, powers, and liberties at issue.

#### IV. EXPLAINING THE RELATIONSHIP BETWEEN THE COURT AND PUBLIC OPINION: ADVANCING HYPOTHESES

Five cases from the 2011 Term are not enough to establish clear, much less predictable, patterns or relationships between the public's constitutional thinking and the Court's resolution of constitutional cases. Even combined with four polled cases from the 2010 Term, one can only offer the most tentative of hypotheses—speculation based on some of our more intriguing results, and a set of conjectures that certainly require more systematic testing.

One hypothesis we are ready to advance is that when there are sharp partisan preferences among the public, these are likely to show up on the Court as well. That is not to say that the opinion of the Court will reflect the preference of the public, but only that when public opinion seems to have a sharply partisan bite, we would expect a similar split to occur on the Court.

We speculate that this relationship is somewhat one-sided: in other words, when the Court's vote and opinion presents an apparently partisan or ideological divide, we do not necessarily anticipate public opinion will reflect the same division. In *Jones*, for example, public opinion exhibited little partisanship, in strong contrast with the Court's opinion.

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159. 131 S. Ct. 2729 (2011).

160. See Press Release, Fairleigh Dickinson Univ.'s PublicMind, U.S. Public Says Regulate Violent Video Games, the Focus of *Brown v. Entertainment Merchants* 1 (June 6, 2011), available at <http://publicmind.fdu.edu/2011/vmerchants/>.

161. 131 S. Ct. 1436 (2011).

162. Press Release, Fairleigh Dickinson Univ.'s PublicMind, Public Blesses Arizona Christian School Tuition 1 (Apr. 4, 2011), available at <http://publicmind.fdu.edu/2011/taxcredits/>.

It should be noted again that none of these polled cases were discussed widely in popular media or by political leaders at any level. Voters were simply unaware of these cases and received no cues, direct or indirect, from political or opinion leaders of any kind. Therefore, we might initially explain our observations about partisanship by noting the public's lower degree of ideological identification and orientation than elites. If ordinary voters, who tend not to think consistently in ideological and partisan terms,<sup>163</sup> show evidence of this behavior for particular cases, it may be telling and would help us to identify an issue, case, or controversy that kindles such division. Where voters show an ideological orientation, then, we think they are likely to serve as proverbial canaries in a coalmine, presaging a similar divide amongst judicial elites who are more likely to think (and are generally more capable of thinking) in ideological terms. Obviously, this is a testable claim, which we look to confirm, disconfirm, or qualify in future research.

A second hypothesis we offer is that, absent a threat to national security or public safety, the public generally favors an expansion of individual rights, especially when they can identify with the individual whose rights are in question. Just as people favor tax cuts for themselves and oppose tax increases on themselves—and just as they are generally willing to favor tax increases on others but not tax cuts for others—citizens typically prefer more rights rather than fewer when they can identify and sympathize with the specific identity and qualities of the rights bearer. This observation does not preclude disagreement or split decisions in the electorate, as the public may differ as to which constitutional value choice best expands rights, or they may simply not sympathize or affiliate with the particular group or class of individuals at issue in the controversy.

This nascent theory of “egocentric rights expansion” is corroborated by a number of our observations from the 2010 and 2011 Terms—including the public's simultaneous unwillingness to extend constitutional protections to prisoners in crowded confinement (last term's *Brown v. Plata*) but their sympathy for incoming prisoners arrested for minor offenses (*Florence*). We think more individuals can picture themselves humiliated in the context of a strip search occasioned by a minor offense than amongst a crowded cohort of inmates who need to be released. (Indeed, in such a scenario, their identification is more likely to be with the members of the community suddenly faced with an influx of released prisoners.)<sup>164</sup> Arguably, some of

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163. See Kathleen Knight, *Ideology in the 1980 Election: Ideological Sophistication Does Matter*, 47 J. OF POL. 828 (1985) (providing evidence to show that under most conditions “ideological thinking” does not impact voter behavior).

164. Our results in these two cases may also stem from our language choices. Respondents in *Plata* were asked about releasing “criminals,” but those asked about *Florence* were asked to make a decision about the legal rights of “person[s] admitted to jail.” Compare Press Release, Fairleigh Dickinson Univ.'s PublicMind, U.S. Voters Weigh in on *Brown v. Plata*, Case Involving Prison Overcrowding 2 (May 23, 2011), available at <http://publicmind.fdu.edu/2011/brownvplata/>, with Strip Searches Press Release, *supra* note 14, at 2.

this effect can also be found in our results on race and the legal counsel cases. African Americans' higher rates of detention, arrest, and incarceration and greater levels of distrust toward the American criminal justice system may account for some of their greater willingness to insist on good legal advice in plea bargaining.

This identification thesis also helps to explain why the results in several of these cases, such as *Jones* and *Florence*, cut across ideological lines. Someone who personally identifies with a defendant may set aside other cognitive frames, such as ideology.<sup>165</sup> Our egocentric rights hypothesis also implies that the public will be more likely to support rights earlier in the criminal justice process, when they can identify with defendants as those merely accused of a crime, as opposed to convicted criminals.

#### CONCLUSION

Our polling on issues coming before the Supreme Court was driven by two broad objectives. First, we wished to measure public opinion on cases pending before the high court until patterns or relationships of one kind or another can be discerned or until we can conclude that there is no discernible relationship between public opinion and Supreme Court decisions. It is a journey of exploration, worthy of undertaking, because the existence and nature of the link between public opinion and government policy is at least as important to defining our democracy as the Court's judgments.

A second, related goal was to become more adept, accurate, and systematic in describing and analyzing the specific contours and content of popular constitutional thinking, understood as the public's capacity for articulating its own judgments and voice on constitutional disputes and problems. Setting aside the question of how (and whether) the public's judgments shape, or are shaped by, the Court, we found it important to obtain a better measure of how ordinary voters approach constitutional questions. The work captured in the preceding pages will help chart trends and changes in popular constitutionalism and obtain evidence for evaluating whether the public's understanding of constitutional values and the application of those values is a basis for optimism or concern when it comes to diagnosing our civic literacy and political health.

With two Supreme Court terms and ten cases now comprising our set of topics and issues, we have taken modest steps in the direction of addressing both of these important inquiries. We are more confident than ever that the traditional standards used for evaluating the public's constitutional

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165. For example, in our polling on *Camreta v. Greene*, 131 S. Ct. 2020 (2011), a case from the 2010 Term, voters identified more strongly with the need or desire of parents to protect children from invasive interviewing of children than with the need or desire of government agents to perform their duties in protecting those children. See Press Release, Fairleigh Dickinson Univ.'s PublicMind, U.S. Public Rejects Interrogation of Minors Without Parental Knowledge—Even When Domestic Abuse Is Suspected 1 (May 26, 2011), available at <http://publicmind.fdu.edu/2011/4thamend/>.

competence—that is, measuring their knowledge of discrete facts about the Court or its case law—are not only deceptive but also beside the point. In contrast, polling on pending constitutional questions is an important part of a more sympathetic approach to assess the quality and depth of the public's understanding of our constitutional law.