

# Justice by the Numbers

When it comes to deciding the future of Obamacare, the Supreme Court should ignore public opinion.

By [Barry Friedman](#) and [Dahlia Lithwick](#)



Supreme Court justices John Roberts, Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan

Nobody following last month's stunning Supreme Court hearings on the fate of health care reform could have missed the prominent role played by public opinion polls in the debate. The *New York Times*' headlines trumpeting the day's arguments at the high court were [printed alongside the polls](#) showing significant public disapproval of the law. The *Times* was hardly alone. The fact that the Affordable Care Act was polling poorly became a dominant theme in coverage of the case in the mainstream media and the rollicking blogosphere. The Supreme Court's argument over Obamacare may well be the first in history in which news about public opinion was driving the news about constitutional decision-making, rather than vice versa.

This media fixation on polling and the Constitution is bad news for the court. It openly jeopardizes the justices' already weak credibility on the question of whether they can truly operate above politics. A recent poll (yes, another poll) shows that the public is certain the [justices will render an ideological](#)—as opposed to constitutional—decision in June. And Gallup shows the justices' public approval ratings [at the second lowest in a decade](#), down to 46 percent, which is pretty low for the court historically. But now there also may be a real risk that the justices will sip the polling Kool-Aid themselves, and conclude

that there is safety in the numbers. In other words, since the law isn't polling well, the coast is clear to strike the law down. If members of the court are thinking along these lines, they not only risk seriously misreading the polls; they will also make a mockery of the court's constitutional role.

Let's start with the question of how polling does or should affect Supreme Court decision-making. Over the last decade or so, it has become commonplace in academic circles to believe there is *some* relationship between public opinion and the decisions the Supreme Court hands down. How much, and by what means, is still largely a matter of debate. But once mass media pundits got their hands on some of that scholarship, it turned into a child's game of "telephone" gone bad. The message that we are getting from the media about public opinion and the court has lost all relationship to the academic thought that gave rise to the idea in the first place. What pundits and the press seem to be suggesting by linking opinion polls to the constitutional debate over healthcare is this: *If* the health care law is unpopular, the justices *will*—or worse, *should*—strike it down.

Most recent academic thinking doesn't assess how the Supreme Court decides cases. Rather, it [observes that public opinion might constrain](#) what [the justices would otherwise do on legal or ideological grounds](#). (And [even on this point there is disagreement](#).) Say, for example, that the current justices believe the ACA is unconstitutional but are worried that they may get in hot water if they strike it. To the extent the polls are giving the justices accurate information—itself a dubious proposition—there may well be breathing room for them to do what they believe is appropriate. Conversely, if public opinion were hot for health care reform, then the justices might want to think twice before letting a negative view of the law take its course. The idea here is that if the justices get too far out of line, they are apt to feel the sting of a disgruntled populace. (Ronald Dworkin ends [this piece with a version of that argument](#).)

Another academic theory runs a little closer to what the media are saying. This theory is that [the zeitgeist of the times](#) actually affects the way the justices think about legal questions, whether consciously or not. As Yale Law School's Jack Balkin has put it, an idea that seemed "[off the wall](#)" [can begin to appear "on the wall."](#) For instance, there's surely something to the idea that long-changing notions of the role of women in society affected the evolution of the gender-discrimination cases in the 1960s, 1970s, and 1980s. Public views about congressional control over the national economy, which evolved between the early 1900s and 1936, may well have played a role in the Supreme Court's decisions upholding New Deal legislation. This is a story some endeavor to tell about the health care law today. The idea that the individual mandate is unconstitutional—which seemed implausible a year ago—has evolved into something far more acceptable in the public mind.

The problem with the zeitgeist theory as applied to health care is that there's all the difference in the world between a zeitgeist many years in the making affecting a string of Supreme Court decisions and the notion that instant polling can reasonably predict or decide one particular case. To the contrary, history suggests that a court trying to catch and ride that zeitgeist wave can easily get knocked over by it, particularly when—as here—there is no room to correct course. In 1972 in *Furman v. Georgia*, the Supreme Court boldly struck down the death penalty throughout the country. According to popular opinion at the time, it didn't seem like a bad guess. Polls showed support for capital punishment at an

all-time low, there were rampant concerns about racism in executions, and several states had either explicitly or de facto abolished the death penalty. Unfortunately for the court, its anti-death penalty decision rapidly became the piñata at the public backlash party. In no time flat, some 35 states and the federal government re-established death penalty laws. When the justices confronted those new laws in the 1976 decision in *Gregg v. Georgia*, they backpedaled fast. They've been backpedaling ever since.

What academics (but not always the popular media) understand is that the zeitgeist usually settles in *after* a Supreme Court decision, not before it. If *Furman* seems like ancient history, consider something surely on the justices' minds today. They could not have anticipated the strength of the negative public reaction to the *Citizens United* decision on campaign finance reform. Unfortunately for them, they got the memo only after *that* decision, too.

Compare *Furman* with another Supreme Court venture that went bad, and you can see the peril the justices face in the health care case. In *Dred Scott v. Sanford*, the justices attempted to resolve the slavery issue for the country by deciding Congress was essentially powerless to eliminate the practice. Although one can tell a story about why some justices thought they could bring peace this way to [deeply troubled waters](#), we all know how that experiment in judicial fiat came out. The justices were hooted down in infamy at the time, and *Dred Scott* remains the leading exemplar of what a court should never do. At least the *Furman* decision left the justices with room to maneuver when their tacit understanding about popular opinion proved seriously wrong. Not so *Dred Scott*. The issue came once, and never again. The justices—with no opportunity to tack back—have paid a price for that misstep ever since.

The ACA case is a lot more like *Dred Scott* than *Furman*. If the court strikes down the law, in part or altogether, there won't be a string of cases over time allowing for nuance and course correction. Health care reform will be dead.

The danger for the court in even glancing at polling about Obamacare is all the more severe given that pundits seem to be misreading the polls—or, more accurately, reading only half of what the polls have to say.

Assume it is true that a majority of Americans (a slim majority in most polls) has come to believe the individual mandate is unconstitutional. Then note the point the pundits overlook—that those very same polls also show a majority of the same people like their health care, and believe that the rest of the legislation should be upheld. For example, a [March New York Times/CBS poll](#) showed that 85 percent of respondents approved of the requirement that insurance companies cover people with a pre-existing medical condition, and 68 percent approved of the provision allowing children to remain on their parents' policies until age 26. In the same poll, 51 percent of the respondents disapproved of the mandate. The problem is that Johnny and Janie Public can't have what they want: affordable health care *and* no mandate.

Here's the risk for the court: The public may not like the mandate, but when it becomes apparent the choice was mandate or rejection for pre-existing condition (or any other provision of the law the public adores), Johnny and Janie may be really angry at whoever took their health care away. Think

about *Citizens United* again. Who knew the public was so enamored of McCain-Feingold? The answer is no one—until the court showed what life without campaign finance regulations would look like.

It's hard to predict, of course. But that's the reason for caution in claiming polls are going to point the way out of this debate. To hear some in the media tell it, you'd think the justices not only *are*, but *should* be, reading the polls to decide this case. That's the very antithesis of constitutionalism: reading the latest poll to understand our most long-standing and binding commitments. The justices should keep their day job, and leave the poll numbers to the pollsters.

**Read all of Slate's coverage of the [Affordable Care Act](#).**

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