

# The Health Care Case in the Public Mind: How the Supreme Court Shapes Opinion About Itself and the Laws It Considers

Andrea Campbell  
Department of Political Science  
MIT

Nathaniel Persily  
Columbia Law School  
LAPA Fellow Princeton University

The Supreme Court's decision in *NFIB v. Sebelius* achieved a level of media coverage and public salience reached by very few Supreme Court decisions. It represented a political moment, if not a constitutional one. Although legal scholars might focus on the doctrinal importance of the decision for shaping the contours of congressional power, this unusually high profile case is also fascinating to study as an event that structured public opinion about the ACA and the Court itself. As such, it also presented a unique test for larger theories about the role of the Supreme Court as an agenda-setter for public opinion.

Perhaps more than any case in the post-New Deal period, the Health Care case evolved into a judicial referendum on a President and his signature legislative achievement. Leading up to the decision, media coverage resembled that of a sporting event or a campaign. It became clear that the case would end with a reported “win” or “loss” for the President. Coming, as it did, five months before the President would stand for reelection, the decision also threatened to frame the presidential race in unprecedented ways.

This Chapter examines the effect of the Court's decision on public approval of the Court and the ACA. Part I briefly reviews previous research on court decisions and opinion formation. Part II describes the predecision polling on both the ACA and the Roberts Court. Part III compares public opinion before and after the decision to evaluate the decision's short term impact. Part IV presents our conclusions.

The data suggest that the Court's decision had a small but noticeable impact on attitudes toward the Court and the ACA. Although the Court found itself with historically low approval ratings before the decision, it dropped further soon after the opinion's release. Moreover, the structure of opinion toward the Court became more polarized along partisan lines following the decision. Given the partisan split in opinion over the ACA, perhaps this should come as little surprise. The Court gave a win to the President, so Court approval and presidential approval became more aligned following the decision. Less obvious, however, might be the effect of the decision on attitudes toward the ACA. The Court's perceived stamp of approval for the ACA led some Americans to switch their minds about it, leading to a small increase in approval of the law following the decision. Some of this opinion transformation might simply have come from the favorable media attention heaped on the law as a “winner” at the Court. In other words, the Court's upholding of the law sent a signal that it was objectively good policy. For still others, the decision provided an opportunity for elite discussion and

persuasion, instituted in particular by the President, who either convinced them on the law's merits or triggered their latent approval for him by expressing newfound support for the law. In other words, precisely because the decision clearly defined the political stakes and discussion surrounding it became more politically polarized, support for the Act (which had lagged presidential approval) now became more closely correlated with it.

## I. Previous Research on Public Opinion Toward the Court and its Decisions

### A. The Strong “Reservoir of Good Will” for the Supreme Court

For almost the entire history for which we have polling, the public has held the Supreme Court in higher regard than either the President or Congress. Indeed, as compared to all public and private institutions, the Supreme Court has ranked quite high in the public mind. Although public support for the Court will wax and wane depending on both national trends and specific cases the Court decides, the range of approval is much narrower than for other institutions.

The sources for such support are varied. They include lack of knowledge of the Court's business (and personnel), the symbolism surrounding the institution (think marble columns, black robes and life tenure), and the obvious fact that members of the political branches (but not the Court) are repeatedly in electoral fights where voters hear negative messages about their performance. The Court's relatively high favorability, then, comes both from its status as a black box and the association many Americans continue to make between the Court and lessons learned in grade school civics classes.

Political scientists, such as James Gibson and Gregory Caldeira, often remark on the Court's strong “reservoir of good will” that allows it to weather individual cases.<sup>1</sup> They distinguish between “diffuse support,” which translates into beliefs as to the legitimacy of the institution, and “specific support,” which relates to short term evaluations of Supreme Court performance. Individual court decisions may affect measures of specific support, such as approval ratings and confidence measures, but even the most controversial cases, such as *Bush v. Gore*, do not affect attitudes as to the Court's legitimacy.<sup>2</sup>

Even with respect to specific support, though, very few cases are sufficiently salient to have much of an impact on public attitudes toward the Court. To affect approval of the Court, not only must a certain segment of the public be paying attention to the case (and receive signals from the media and elites about it), but they must also care enough about the issue so as to let it determine their attitudes toward the Court. More still, for opinion to shift, the Court decision cannot have been factored into approval before the Court issues the decision. In other words, the greatest effect on Court approval should be seen when a large segment of the public is aware of the decision, thinks it involves an important issue that could affect their overall evaluation of the Court, and is somewhat surprised by the decision such that it disrupts settled expectations as to how the Supreme Court is performing its job.

### B. The Effect of Court Decisions on Public Opinion Concerning Constitutional Questions

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<sup>1</sup> See James I. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-inflicted or Otherwise?*, 33BRIT. J. OF POL. SCI. 535 (2003).

<sup>2</sup> *Id.*

A similar dynamic occurs with respect to public attitudes toward the issues the Supreme Court considers. A Court decision will have the greatest effect on issues that are sufficiently salient to attract media coverage but about which a significant share of the public does not yet hold firm beliefs. Given that most Court decisions occur below the public radar, very few will affect public attitudes on issues. Although we may say that the decision itself has the effect, we mean so only indirectly. The Court elevates an issue onto the national agenda with its decision, elites in politics and the media then send signals to the mass public about the issue, and depending on the character of the signals, some share of public may shift in its opinion.

The public can shift in one of three possible directions, which the literature describes as legitimation, backlash, and polarization.<sup>3</sup> First, legitimation occurs when the public moves in the same direction as the Court following its decision. For the Health Care Case, for example, legitimation would occur if the public became more favorable toward the ACA following the Court's decision (largely) upholding the law. An example of legitimation might be the Court's 1967 decision in *Loving v. Virginia* striking down bans on interracial marriage. Second, backlash refers to the opposite dynamic: that is, when the public moves in the direction opposite the Court's decision on the issue. *Lawrence v. Texas*, the 2003 Supreme Court decision striking down Texas' ban on sodomy produced a short-term backlash on gay rights, which evaporated within two years. Finally, polarization results when aggregate opinion does not change but individuals become more intense in their beliefs on the issue. Usually this occurs when attitudes on the issue become more closely correlated with other demographic or political characteristics. *Roe v. Wade* is often described in these terms.<sup>4</sup>

Of course, these dynamics are not mutually exclusive, especially if one expands the time frame for analysis. As in *Lawrence*, a decision might produce short term backlash on an issue, which quickly subsides and is replaced by long-term legitimation. Some suggest *Brown v. Board of Education* or *Miranda v. Arizona* are such examples, although public opinion data before those decisions on the relevant issues of desegregation and the right against self-incrimination are quite scant. The longer it takes to see an effect the more difficult it is to conclude that the decision and contemporaneous discussion of it "caused" the public opinion change. The constitutional ban on school prayer erected by the Court in the 1960s, for example, remains highly unpopular today, but perhaps not as unpopular as it was in the immediate aftermath of the decision. So much has happened in the country's religious and political life since the Court issued those decisions that it would be difficult to draw anything but a very faint line between those decisions and attitudinal change.

Even in the short term, the public opinion dynamics for court decisions are usually very difficult to pinpoint, given the scarcity of available longitudinal data. If one is to conclude that a decision has affected public opinion on an issue, one must know the trajectory of opinion both before and after the decision. To determine backlash from the Supreme Court's anti-death penalty 1972 decision in *Furman v. Georgia*, for example, one need know more than that the death penalty became more popular following the decision (which it did). Prior to that decision public opinion on the death penalty was already on a positive trajectory, so it is difficult to point to the decision as "cause" for its greater popularity. We would suspect that the story is similar with the supposed backlash to the Court's very unpopular 2005 decision upholding the taking of private property in *Kelo v. New London*. Although pre-decision data are unavailable, we doubt that the Court decision decreased what was already the

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<sup>3</sup> See Nathaniel Persily, *Introduction*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick Egan eds., 2008).

<sup>4</sup> See Charles H. Franklin & Liane C. Kosacki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion and Abortion*, 83 AMER. POL. SCI. REV. 751 (1989)

very low popularity of takings of private property. Finally, and most recently, the Roberts Court's famously unpopular decision in *Citizens United v. FEC* (2010) did not add to the already extremely high popularity of restrictions on corporate campaign expenditures, just as most countermajoritarian First Amendment decisions usually do not affect opinion on popular speech restrictions.

The rich amount of available data concerning the ACA, both before and after the Health Care Case, provided a unique opportunity to analyze that decision in ways few other such decisions could be assessed. We should emphasize, though, that we are still viewing a public opinion snapshot in time. The independent effect of the decision (to the degree one exists) may be muted by other events, such as other Supreme Court cases or the presidential election. Indeed, just as many describe a convention bounce that presidential candidates typically receive, we might expect public opinion toward the Court and the ACA to return to "normal" patterns sometime over the next year. Moreover, as the ACA is implemented over its lifespan and perhaps becomes an accepted part of the administrative state, the independent effect of the Court's decision may become very difficult to identify. Even with those caveats, the short term effect of the decision is interesting to analyze in its own right. Very few decisions are followed by comparable, identifiable shifts in public attitudes toward the Court or the issues it considers.

## **II. Pre-Decision Public Opinion toward the Court and the ACA**

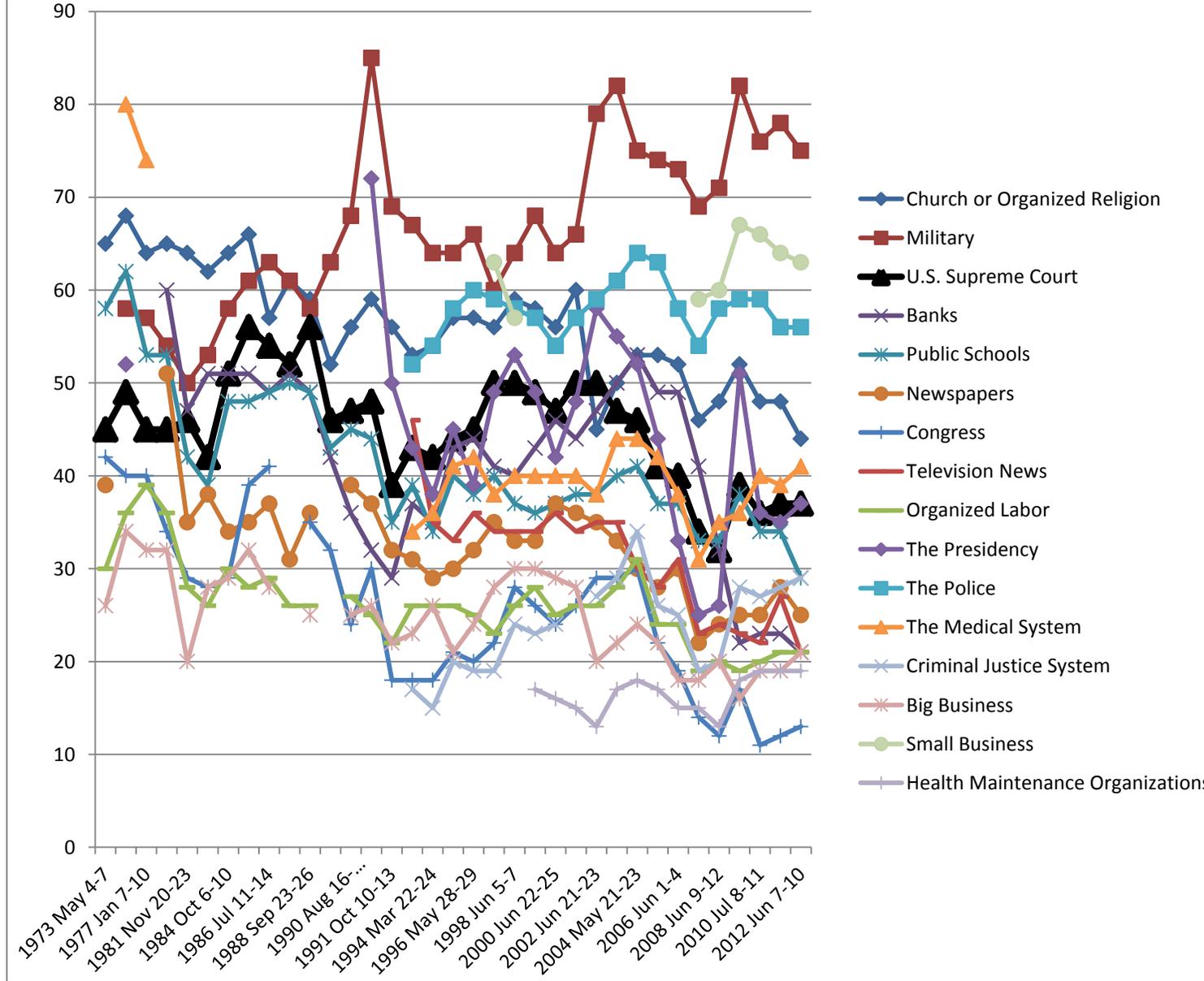
### **A. Supreme Court**

Much had been made in the months prior to the Health Care decision of the record lows in approval that the Supreme Court had posted. According to the Pew polls, favorability ratings of the Court in 2012 were at their lowest in 25 years of polling, with only 52 percent describing their opinion of the Court as "very" or "mostly" favorable. The 2012 Gallup Poll found only 37 percent expressed "a great deal" or "a lot" of confidence in the Supreme Court and only 46 percent approved of the job the Court was doing, a figure echoed by the CBS/NYTimes poll that found just 44 percent approval. (By September 2012, however, a new Gallup Poll showed a small rebound to 49 percent approval.)

For the most part, the Court has suffered the same fate as other powerful institutions. General distrust of those in power, fueled in part by the soured economy, has been a tide that has sunk all boats. Opinion toward Congress has been injured the most, the proportion expressing confidence falling from 42 percent to 13 percent between 1973 and 2012. However, other institutions, such as banks, the Church and public schools all engendered historically low levels of confidence in recent years (Figure 1).

Figure 1. Confidence in American Institutions 1973 - 2012

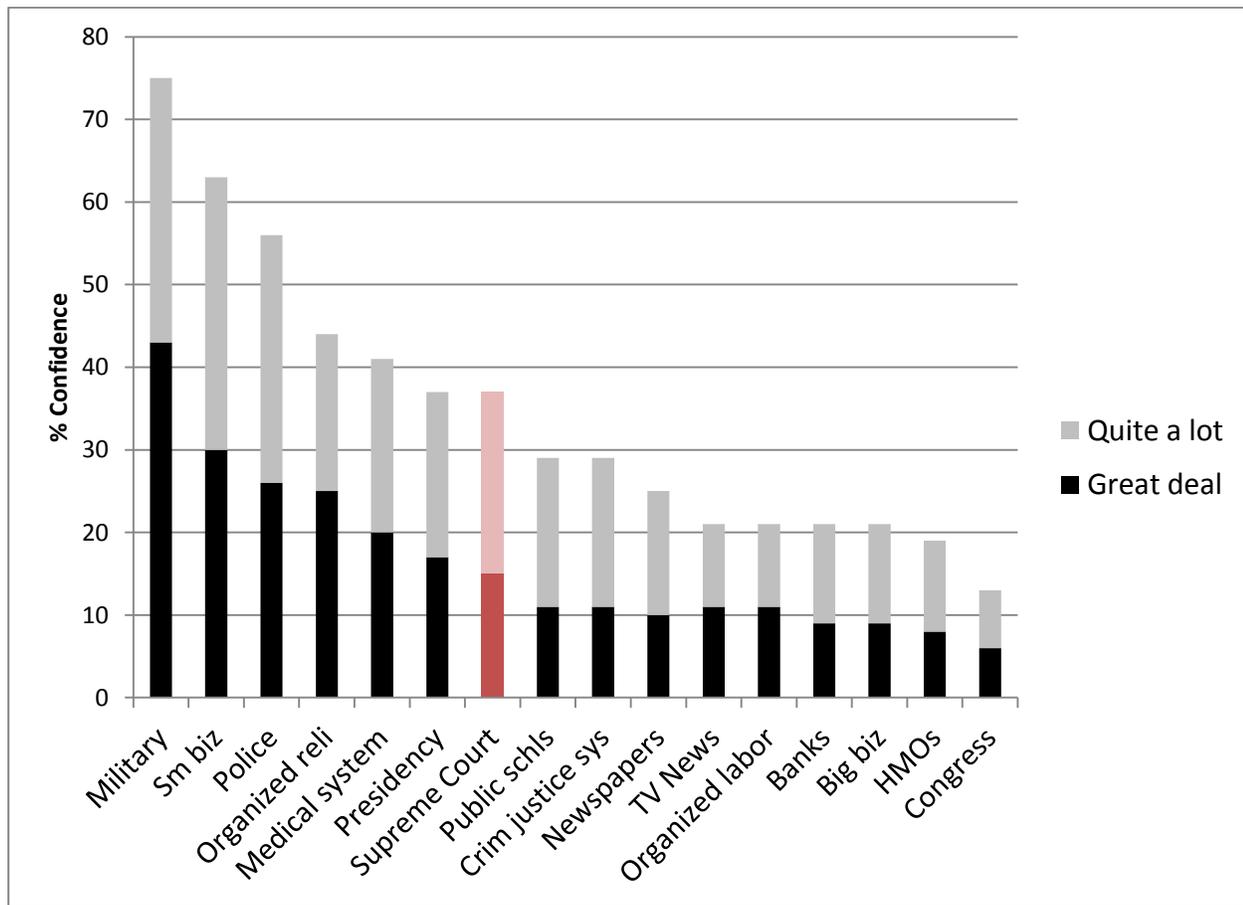
Source: Gallup.



Source: Gallup poll.

Even as it has posted historic lows, however, the Court still outranks many, but by no means all, other institutions in terms of confidence (Figure 2). At 37 percent expressing “a great deal” or “a lot of confidence,” the Court ranked below the military, small business, the police, organized religion, and the medical system. Although the Court has often enjoyed greater confidence than the presidency, as of 2012 the two institutions were tied, with the presidency garnering a slightly higher percentage of Americans expressing a “great deal” of confidence, 17 percent compared to 15 percent for the Court.

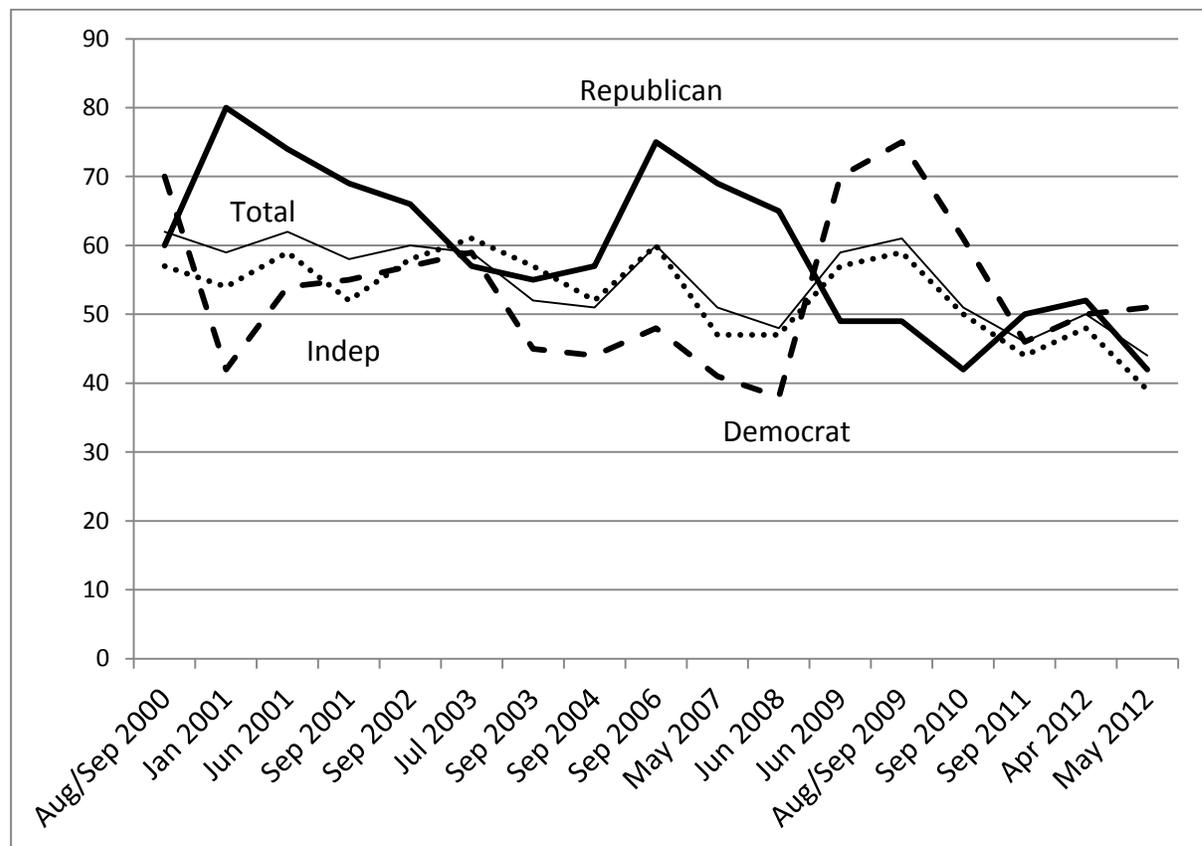
Figure 2. Confidence in American Institutions, 2012



Gallup Poll, June 7-10, 2012.

With respect to public approval and confidence, the Court falls victim to political forces beyond its control in two respects. First, larger shifts in attitudes toward government, in general, afflict opinion toward the Court. Second, the partisan structure of support for the Court will vary depending on which party holds the presidency. Because respondents' attitudes toward government are often shaped by their approval of the President, and because such general governmental attitudes feed into attitudes toward the Court, copartisans of the President tend to express greater support for the Court than partisan opponents of the President. As Figure 3 demonstrates with respect to Gallup's approval ratings of the Court, Democrats have shown greater approval than Republicans of the Court during the Clinton and Obama presidencies, while Republicans have generally had higher approval of the Court during George W. Bush's presidency. The correlation is not perfect, because approval will also vary somewhat based on highly salient decisions, such as the *Citizens United* case in 2010, but the dynamic is quite easy to see from the data.

Figure 3. Supreme Court Job Approval by Party Identification



Source: Gallup polls (except April 2012 CNN/ORC and May 2012 NYT/CBS); Karlyn H. Bowman and Andrew Rugg. *Public Opinion on the Supreme Court*, AEI PUBLIC OPINION STUDIES, June, 2012, pp. 9-10.

In addition to measuring approval, favorability, and confidence, surveys tapping public attitudes toward the Supreme Court often attempt to gauge cynicism concerning the bases for the Court’s decisions. Of course, experienced legal analysts might decry these polls for constructing an unrealistic and artificial law-versus-politics dichotomy. However, the interesting findings (or lack thereof) concern whether individual decisions shake respondents’ confidence in the legal basis for judicial decisionmaking. For example, in a NYT/CBS poll administered in May 2012, shortly before the Court’s ACA ruling, 13 percent of respondents said that generally Supreme Court justices decide the cases before them based on legal analysis, while a large majority – 76 percent – said that the Justices’ own personal or political views mattered (Table 1, upper panel). However, when the same respondents were subsequently asked about the bases for ruling on the ACA specifically, the proportion saying that the decision would be based on legal analysis rose to 32 percent, while the proportion citing personal or political views fell to 55 percent. There are no clear patterns of partisanship or ACA opinion in the “off-diagonals,” that is, respondents whose views on the bases of court decision-making differed between general cases and the healthcare ruling. In other words, the group of respondents who said that, in general, the Court makes its decisions based on legal analysis but that in the case of the ACA the decision would be made on the basis of the justices’ own personal or political views was not dominated by Republicans or by respondents who disapproved of the health care law.

Interestingly, there was no shift in the perceived basis of decision-making after the Court issued

its ACA ruling. In a NYT/CBS poll administered in July 2012, after the ruling, the proportions of respondents saying that the Court’s ruling on health care was based on legal analysis (31 percent) or the justices’ own personal and political views (54 percent) was virtually the same as in the May pre-decision poll (Table 1, upper panel).

However, this stasis in overall opinion hides partisan polarization following the decision. Prior to the ACA ruling, partisans did not have different views on how justices generally decide cases or how they thought the justices would decide the ACA (Table 1, lower panel). The same proportion of Democrats and Republicans (14 and 12 percent) thought justices generally base their decisions on legal analysis while larger, but similar proportions (35 percent of Democrats, 33 percent of Republicans) thought the ACA decision would be based on legal analysis. However, after the ruling was announced, the partisans polarized, with the proportion of Democrats saying that the ruling was based on legal analysis increasing to 43 percent, while the proportion of Republicans holding that view fell to 21 percent (with independents in between at 30 percent). In the post-decision poll, almost two-thirds of Republicans thought the ACA decision had been based on the justices’ own personal or political views, compared to just 42 percent of Democrats who thought so.

Table 1. Perceived Bases of Justices’ Rulings

	May 2012	May 2012	July 2012
	How justices generally decide cases	How justices will decide ACA	How justices did decide ACA
Legal analysis	13%	32%	31%
Own personal or political views	76	55	54
Both (vol.)	4	4	2
DK	8	9	13

	May 2012			May 2012			July 2012		
	How justices generally decide cases			How justices will decide ACA			How justices did decide ACA		
	Dem	Ind	Rep	Dem	Ind	Rep	Dem	Ind	Rep
Legal analysis	14	13	12	35	33	33	43	30	21
Own personal or political views	76	73	75	56	54	48	42	55	65
Both (vol.)	3	4	5	3	5	7	2	3	1
DK	7	9	8	6	8	13	13	12	14

Source: NYT/CBS News Polls, May 31-June 3, 2012 and July 11-16, 2012.

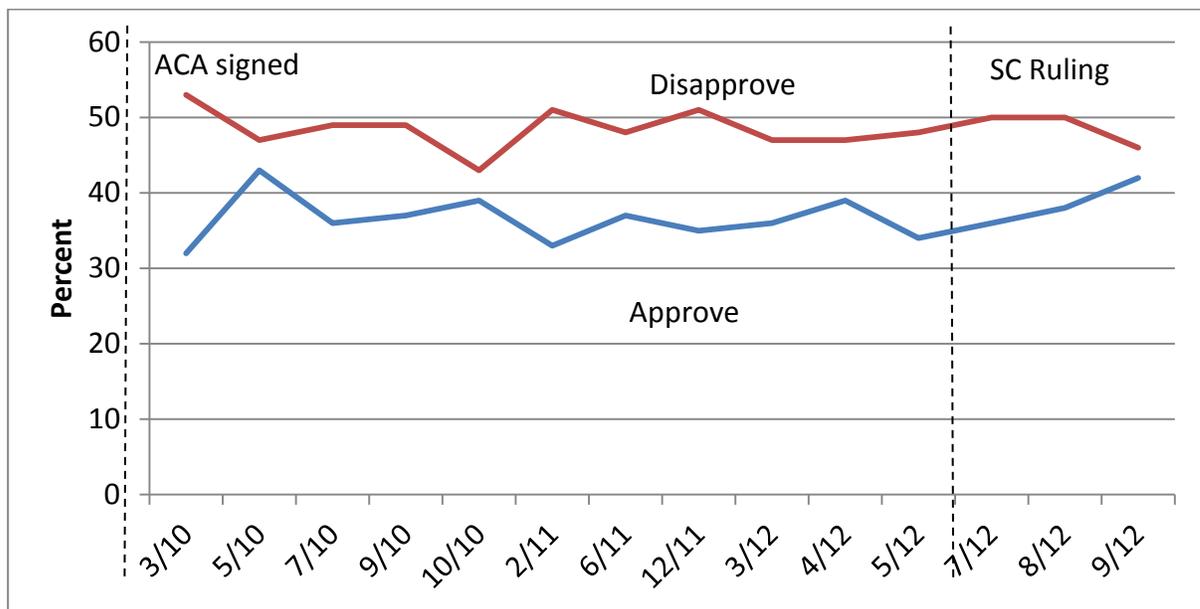
In sum, prior to the Health Care Decision, the Supreme Court had suffered from the loss of confidence that afflicted many other powerful institutions. However, the reservoir of support that the Court uniquely enjoys kept approval ratings of the Court higher than many other institutions and branches of government. Although partisan differences in approval had narrowed, Democrats displayed marginally higher support for the Court as they had for most of President Obama’s term in

office. When the Court issued its decision, it remained to be seen whether and how attitudes toward the decision might affect support for the Court given the larger forces that had shaped opinion to that point.

### B. ACA Opinion before the Ruling

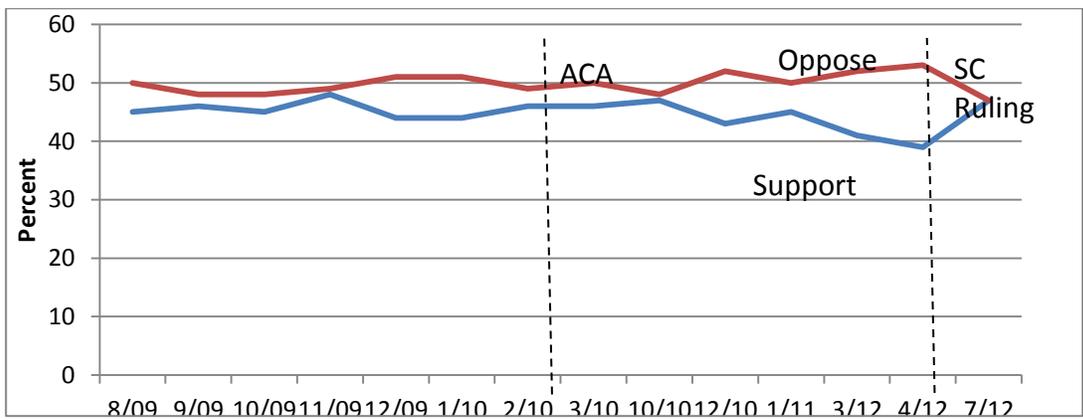
Public opinion toward the Affordable Care Act was divided throughout the legislation’s development and passage. As time series from the NYT/CBS, Washington Post/ABC News, and Kaiser polls all demonstrate, approval of the ACA overall never consistently hit 50 percent, and opposition exceeded support throughout (Figure 4). The Obama proposal never suffered the catastrophic drop in public support that plagued the 1993-94 Clinton health care reform effort, but neither did it enjoy increased public support over time. As many observers have noted, this is somewhat curious, given that large majorities of the public supported individual provisions in the legislation, such as allowing children to stay on their parents’ insurance until age 26, prohibiting the denial of insurance for pre-existing conditions, and providing tax breaks to small businesses that offer health insurance.<sup>5</sup> A hope among the legislation’s proponents was that as individuals learned more about the legislation, they would come to support the overall package at greater rates. However, that effect never came to fruition.

Figure 4. ACA Opinion over Time

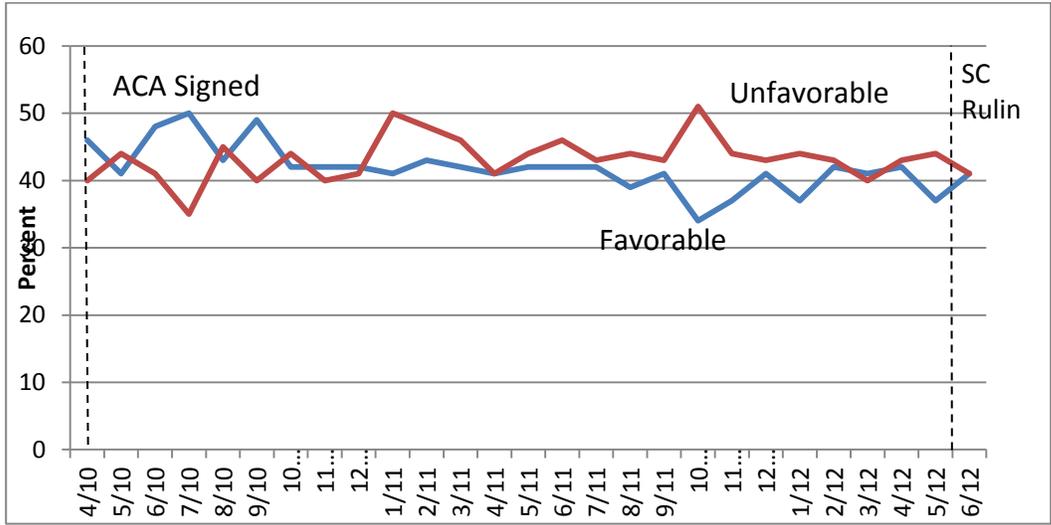


Source: New York Times/CBS News poll, July 11-16, 2012 and prior polls.

<sup>5</sup> Robert J. Blendon & John M. Benson. *Public Opinion at the Time of the Vote on Health Care Reform*, 362 NEW ENGLAND J. OF MED. e55 (2010); Mollyann Brodie, Drew Altman, Claudia Deane, Sasha Busche, & Elizabeth Hamel, *Liking the Pieces, Not the Package: Contradictions in Public Opinion during Health Reform*, 29 HEALTH AFF. 1125-30 (2010).



Source: Washington Post/ABC News poll, July 5-8, 2012 and prior polls.

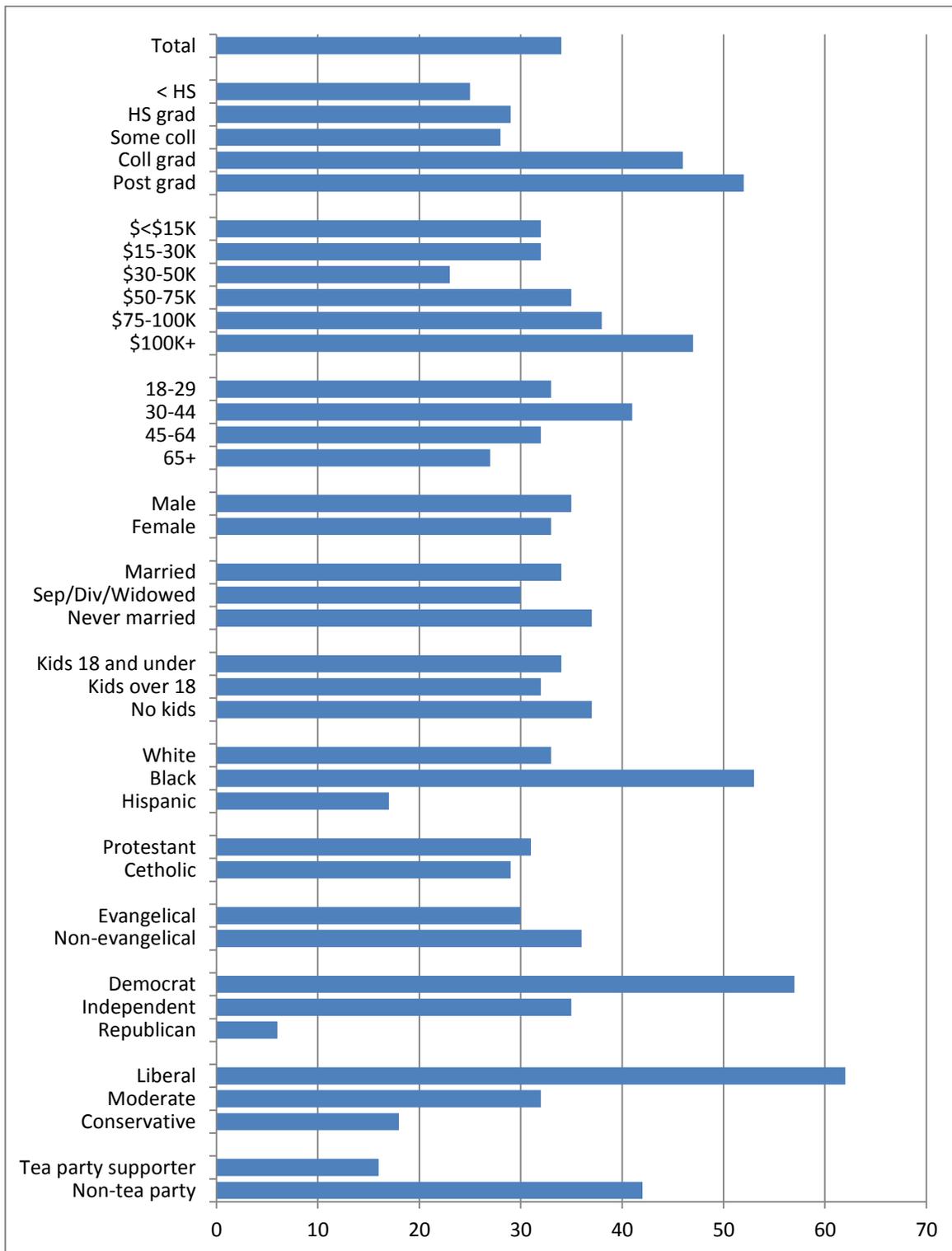


Source: Kaiser Health Tracking Poll, June 28-30, 2012 and prior polls.

Pre-decision ACA opinion was also characterized by substantial intergroup differences in support for the legislation. Figure 5 shows the proportion of various demographic and political groups approving of the ACA in a May 2012 NYT/CBS News poll. There are statistically and substantively significant differences by level of education, marital status, and race/ethnicity. The largest differences, however, are found across political groups, with Republicans, conservatives and Tea Party supporters much less supportive of the legislation than their Democratic, liberal, or non-Tea Party counterparts. The partisan and ideological polarization that characterizes contemporary public opinion is very much evident in ACA opinion.<sup>6</sup>

<sup>6</sup> Note that several authors have also found racial attitudes to be important in the structure of Obama health care reform attitudes. See Michael Henderson & D. Sunshine Hillygus, *The Dynamics of Health Care Opinion, 2008-2010: Partisanship, Self-Interest, and Racial Resentment*, 36 J. HEALTH POL., POL'Y AND L., 945-60 (2011); Michael Tesler, *The Spillover of Racialization in Health Care: How President Obama Polarized Public Opinion by Racial Attitudes and Race*, 56 AM.J. POL.SCI.690-704 (2012). We lack measures of racial attitudes in the polls analyzed here.

Figure 5. ACA Approval by Demographic and Political Subgroup



Source: NYTimes/CBS News Poll, May 31-June 3, 2012.

**Part III. Public Opinion after the Supreme Court Ruling**

Given the close divide among the public on the ACA, would the Court's upholding of much of the law increase support for the ACA? Would it cause opinion on the ACA – or on the Court itself – to become even more polarized?

### **A. Public Opinion on the Ruling Itself**

In the immediate aftermath of the decision, opinion on the ruling was closely divided. Some polls showed a small majority supporting the decision, while others showed small majorities opposing it. Most people had an opinion on the decision. However, in the first few days after the decision was issued (June 28 to July 2012) and most polls were taken, a significant share of the public did not know how the Court had ruled on the law. The Pew survey at the time asked “From what you’ve read and heard, did the Supreme Court [uphold or reject] most of the provisions in the health care law?” 55% answered “uphold”; 15% answered “reject”; and 30% did not know or refused to answer. Of those who correctly answered, 50% approved of the decision and 42% disapproved.<sup>7</sup>

This initial lack of understanding, and correlatively the question wording of different survey questions, may explain some of the divergences in the polls. In polling questions that did not mention which way the Court ruled, disapproval of the decision exceeded approval, 44 to 42 percent (the Washington Post/ABC item), or 40 to 36 percent (Pew Poll of all respondents). However, in three polls that mentioned that the Court's decision upheld the law, approval exceeded disapproval (Table 2). In a June 2012 Kaiser poll fielded immediately after the ruling was announced, 47 percent of respondents approved the Court's decision “to uphold the health care law” compared to 43 percent who disapproved. A Quinipiac poll with a similar wording revealed a comparable breakdown – 48 percent approved, while 45% disapproved. Similarly, in a July 2012 NYT/CBS poll, 46 percent of respondents said that it was a “good thing” that the Supreme Court kept the health care law “mostly in place,” versus 41 percent who said it was a “bad thing.”

The impact of question wording and many Americans' uncertainty about what the Court had ruled is apparent in Figures 6a and 6b, which contrast survey respondents' own feelings toward the ACA and their opinion of the Court ruling. Figure 6a shows the results for the Washington Post/ABC July 2012 poll, in which the horizontal axis represents each demographic and political groups' level of support for “the federal law changing the health care system” while the vertical axis represents each groups' support for the Court's ruling. This item did not specify which way the Court ruled, and more groups appear below the 45-degree line than above, indicating that their support for the Court's ruling was lower than their own support for the ACA. In contrast, a similar graph of the NYT/CBS News item (Figure 6b), in which respondents were asked whether the Court's decision to uphold “most” of the law was a good or bad thing, shows that the proportion of each subgroup saying the decision was a good thing was higher than their own approval of the ACA (all of the groups appear above the 45-degree line). This suggests that when they know that the Court ruled in favor of the ACA, some legitimation takes place.

Given that opposition to the health care law exceeded support for most of the pre-decision period, the narrow majority supporting the Court's decision also suggests some legitimation. To be more specific, some share of the population that opposed the law probably supported the decision because of the respect those respondents have for the Court. Of course, for survey respondents as with judges, one

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<sup>7</sup> Pew Research Center, *Division, Uncertainty over Court's Health Care Ruling: Top One-Word Reactions – 'Disappointed,' 'Surprised,'* July 2, 2012, available at <http://www.people-press.org/2012/07/02/division-uncertainty-over-courts-health-care-ruling/>.

can disapprove of a law while approving of a Court decision upholding it under the Constitution. However, even beyond the possibility that respondents correctly disentangle favorability from constitutionality, some small share of the population is predisposed to agree with a Court decision, even if the result – upholding a law they dislike – is not the one they were hoping for from the Court.

Table 2. Public Opinion about the Court Ruling

Date	Poll	Question	Approve/ Agree	Disapprove/ Disagree
July 1-8, 2012	Quinnipiac	The Supreme Court has heard a challenge to the health care law and voted to uphold it. Do you agree or disagree with the Supreme Court’s decision to uphold the health care law?	48	45
June 2012	Kaiser	The Supreme Court recently decided to uphold the health care law. Do you approve or disapprove of the Court’s decision in this case?	47	43
July 2012	NYT/CBS	As you may know, the Supreme Court upheld most of the 2010 health care law. Do you think the Supreme Court’s decision to keep the health care law mostly in place was a good thing or a bad thing?	46 (good thing)	41 (bad thing)
July 2012	Wash Post/ABC	Regardless of your feeling about the law itself, do you approve or disapprove of the U.S. Supreme Court ruling on the health care law last week?	42	44
June 28 - July 1 2012	Pew	From what you have read and heard about the Supreme Court’s ruling on the 2010 health care law, would you say you strongly approve, approve, disapprove, or strongly disapprove of their decision?	36	40

Figure 6a. Court Ruling Support vs. ACA Support: Direction of Ruling Not Given

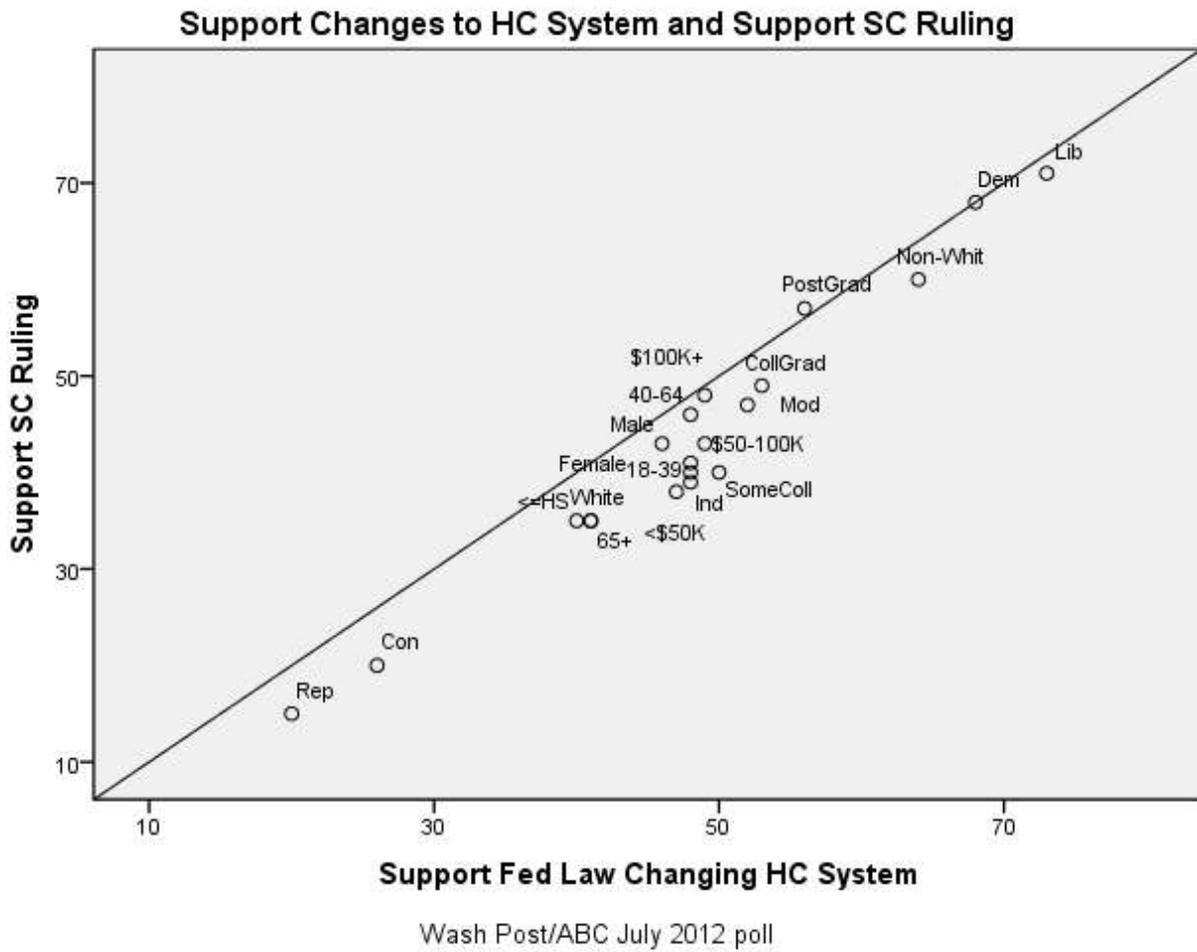
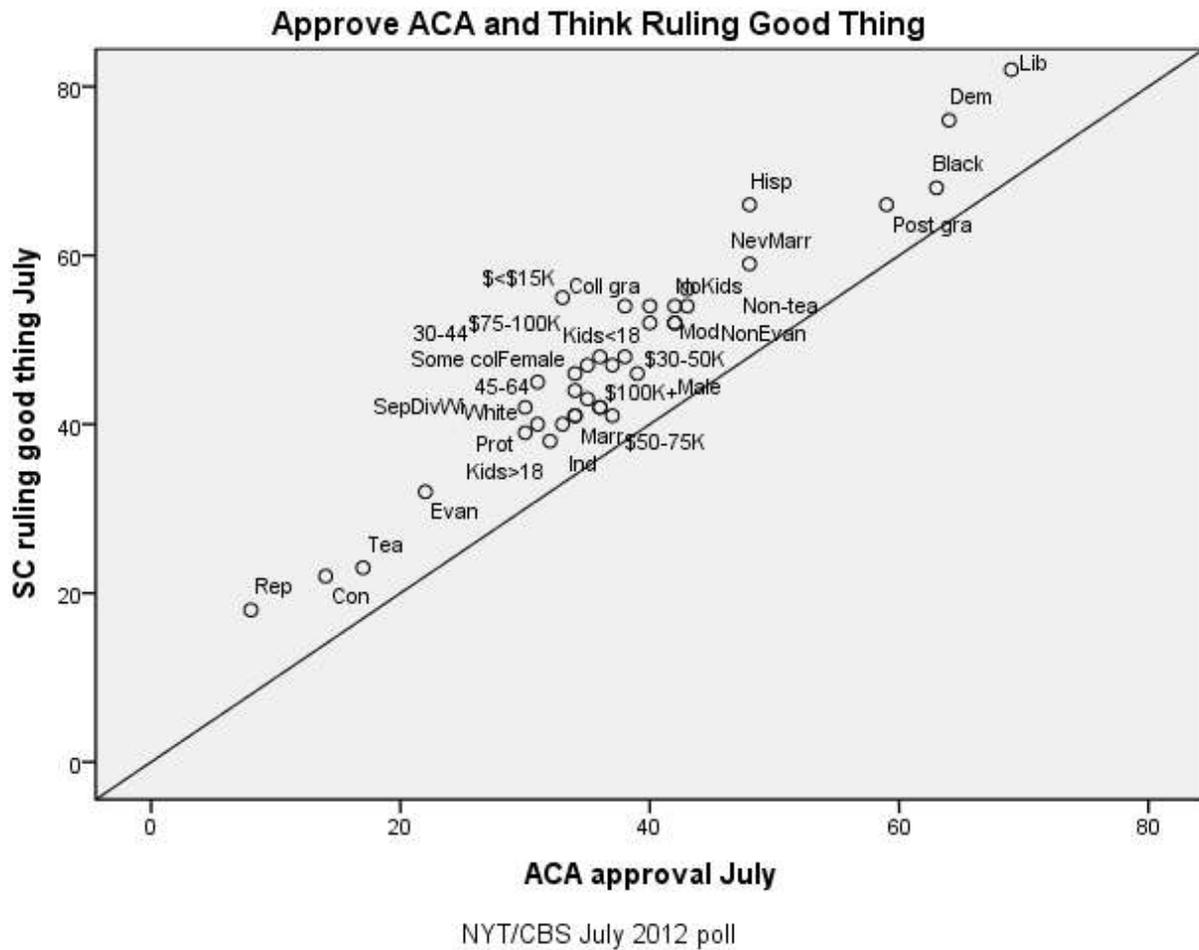


Figure 6b. Court Ruling Support vs. ACA Support: Direction of Ruling Given



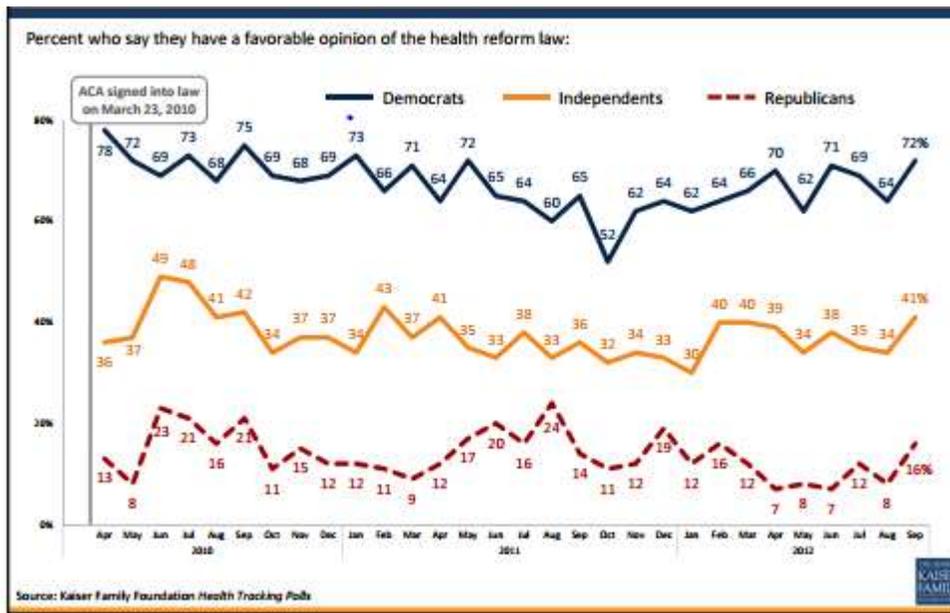
### B. Post-Decision Opinion on the ACA

For a decision to have a truly legitimating effect, opinion on the underlying law would need to move in the direction of the Court’s decision. In this case, the public would need to become more supportive of the ACA itself. Time series of public opinion polls suggest, in fact, that the ruling had a small positive effect on ACA support. In all three time series in Figure 4, support of or favorability toward the law increased slightly in the first poll taken after the Court’s decision. For the NYT/CBS Poll we have two additional post-ruling readings, for August and September 2012, and ACA approval continued to trend upward, to 42 percent in September, the highest level of approval since the 43 percent reached in May 2010, two months after the reform’s passage. At least in the very short term, the Court’s ruling seemed to have bolstered ACA support. By September 2012, the Kaiser tracking polls even suggested that support exceeded opposition, with 45 percent viewing the law favorably and only 40 percent viewing it unfavorably..

Because the greatest change in attitudes occurred among Democrats, the ruling also appears to

have exacerbated the other underlying characteristic of ACA opinion, the pronounced partisan divide. In the Kaiser time series, for which we have opinion by party identification, favorability toward the ACA increased by 9 points among Democrats after the Court’s ruling, from 62 to 71 percent, and increased by 4 points among Independents, from 34 to 38 percent. In contrast, favorability among Republicans continued to slide, reaching a low of 7 percent after the ACA ruling (Figure 7). By September 2012, however, opinion among all partisan groups became considerably more favorable to the ACA, even if the pronounced partisan divide remained. We suspect that the presidential campaign and rising support for President Obama (whose job approval surmounted 50 percent) helps explain the increasing favorability of the law.

Figure 7. Partisan Divide Over ACA



A look across demographic and political groups in the NYT/CBS polls for which we have individual-level data shows that approval of the ACA increased among most groups after the Court’s ruling (Figure 8a). Groups appearing above the 45-degree line exhibited an increase in ACA approval after the Court ruling, while groups whose ACA approval fell appear below the line. Note, however that approval of the ACA remained below 50 percent for most groups, with majorities of only a few groups supporting the reform, notably liberals, Democrats, Blacks and those with post graduate educations. Figure 8b shows the comparable data from April and July 2012 polls by the Washington Post/ABC News: there, the proportion of supportive responses to the question, “Do you support or oppose the federal law making changes to the health care system,” increased for all demographic and political groups.

Figure 8a. Pre/Post ACA Approval: NYT/CBS Polls

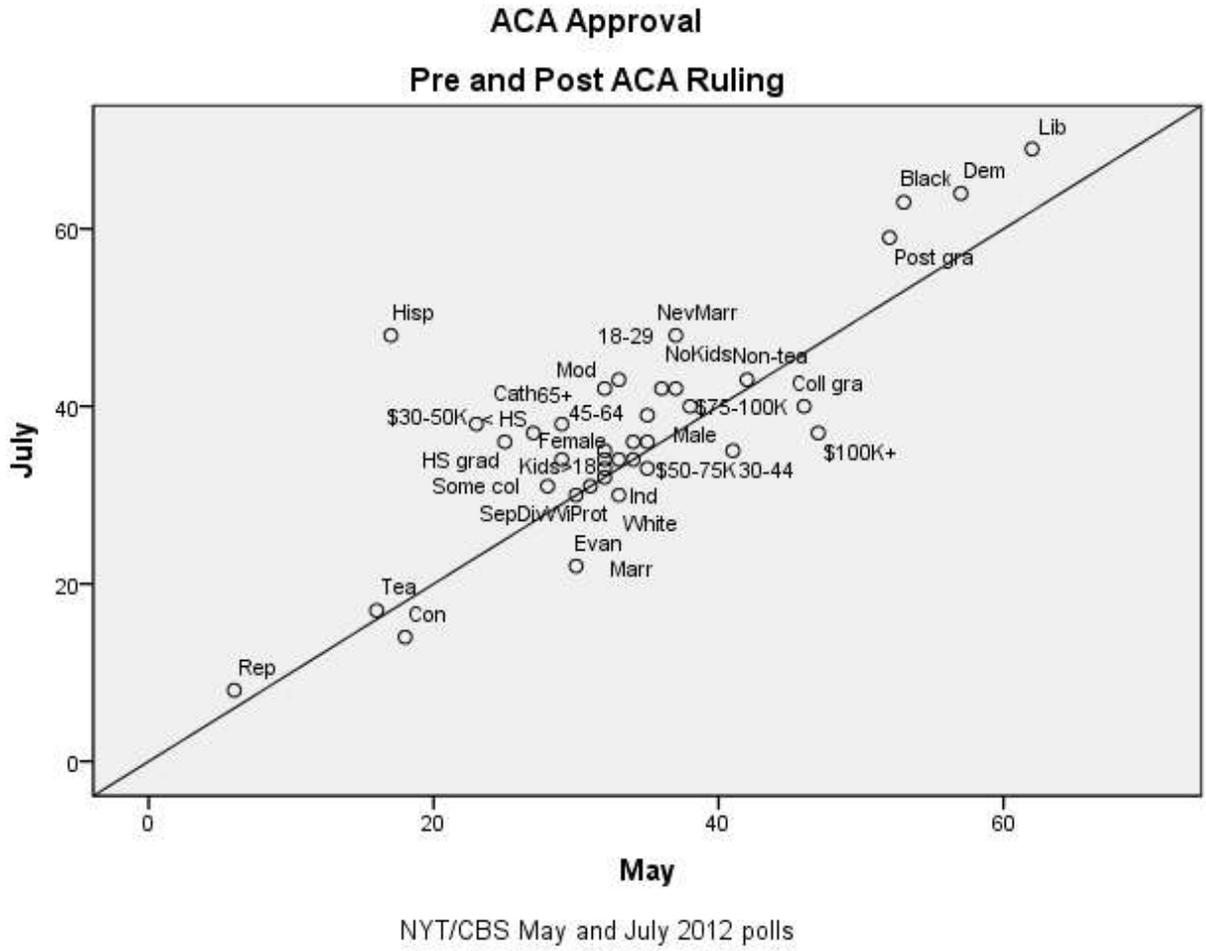
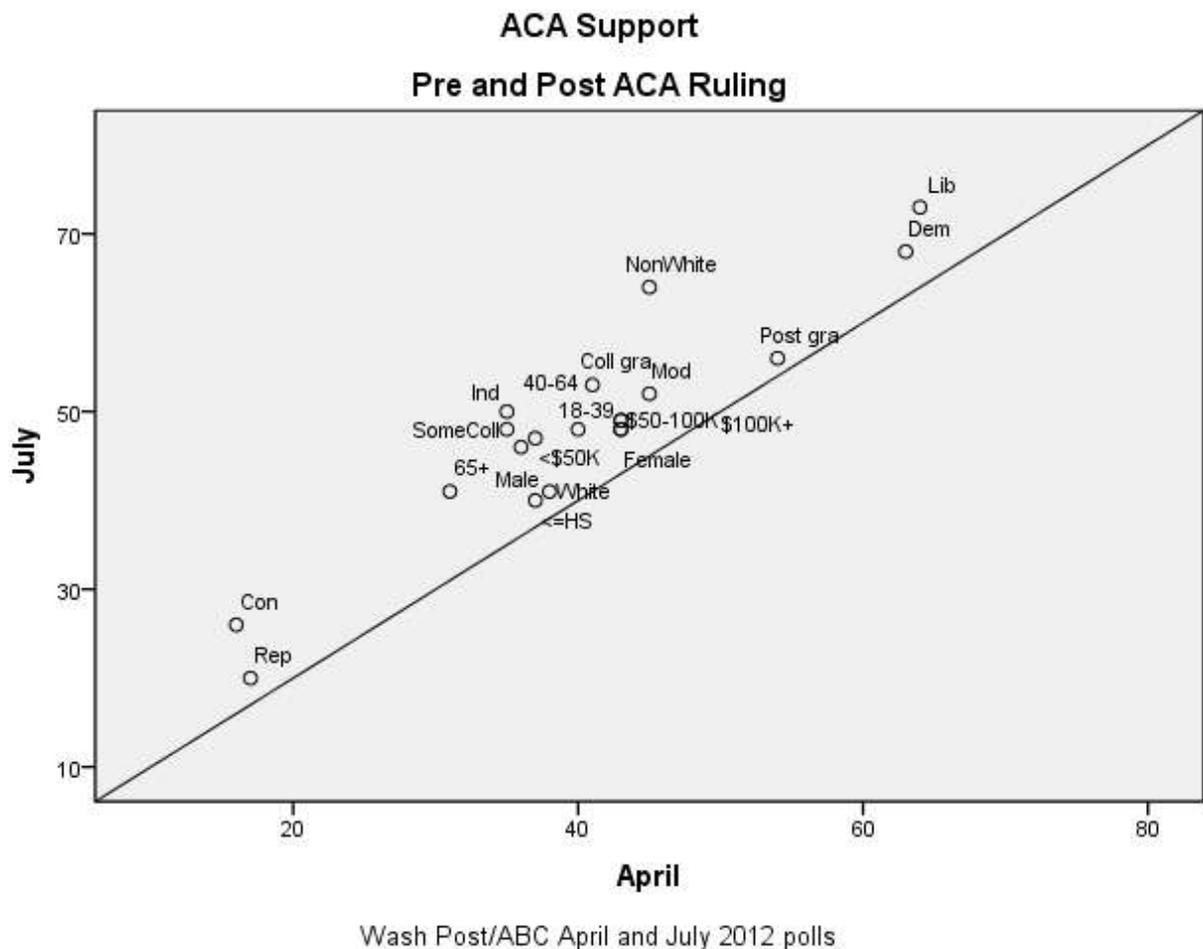


Figure 8b. Pre/Post ACA Support: Washington Post/ABC Polls



Thus, the Court’s ruling upholding most of the ACA had a positive effect on public opinion, making most demographic and political groups more positive about the health reform than they had been. Shifts were most pronounced among groups that had been most supportive of the ACA prior to the decision. However, the aggregate opinion changes were small, and approval and support of the ACA remained below 50 percent for most groups. Even these small shifts suggest some legitimating effect from the Court decision, and more likely, from favorable media coverage and elite discussion of the decision in its immediate aftermath.

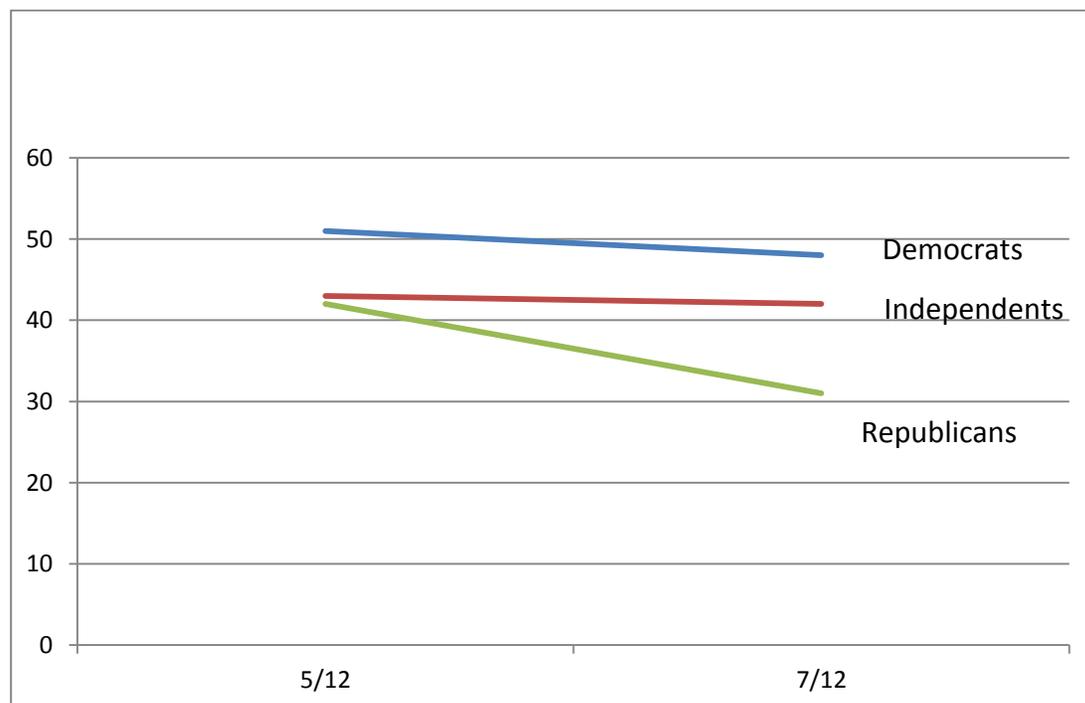
### C. Post-Decision Attitudes toward the Court

The sports-like media coverage of the Health Care Case, which pitted Republicans against Democrats and the Court against the President, suggested that the decision might have fundamental consequences for the Court’s reputation and political capital. As with the warnings surrounding *Bush v. Gore*, the case was described as a test of the Court’s legitimacy, not a mere run-of-the-mill adjudication of a law’s constitutionality. According to Jeffrey Toobin, Chief Just Roberts perceived the case this way and his change of heart may have derived from his perception that the Court’s public reputation

would suffer if five Republican appointees struck down President Obama’s signature legislative achievement.<sup>8</sup> Given the threat the case was described as posing to the Court as an institution, what would the ruling on this highly contentious and polarized issue mean for regard for the Court and its standing among the public?

The ruling may have had a slightly positive effect on ACA opinion, but it had an immediate negative effect on opinion toward the Court. Overall, the job approval rating of the Court in the NYTimes/CBS poll declined from 44 percent in May/early June, before the ruling, to 41 percent after the ruling in July. Approval also became more polarized, with Republican approval falling 11 points, from 42 to 31 percent, while Democratic approval fell just three points, from 51 to 48 percent, and Independents stayed the same (43 and 42 percent; Figure 9). (As we noted earlier, a September 2012 Gallup Poll suggests some rebound in Court approval, which reached 49 percent. The partisan divide declined but was still pronounced: 57 percent of Democrats approved of the Court compared to only 36 percent of Republicans.)

Figure 9. Supreme Court Job Approval, Before and After the ACA Ruling



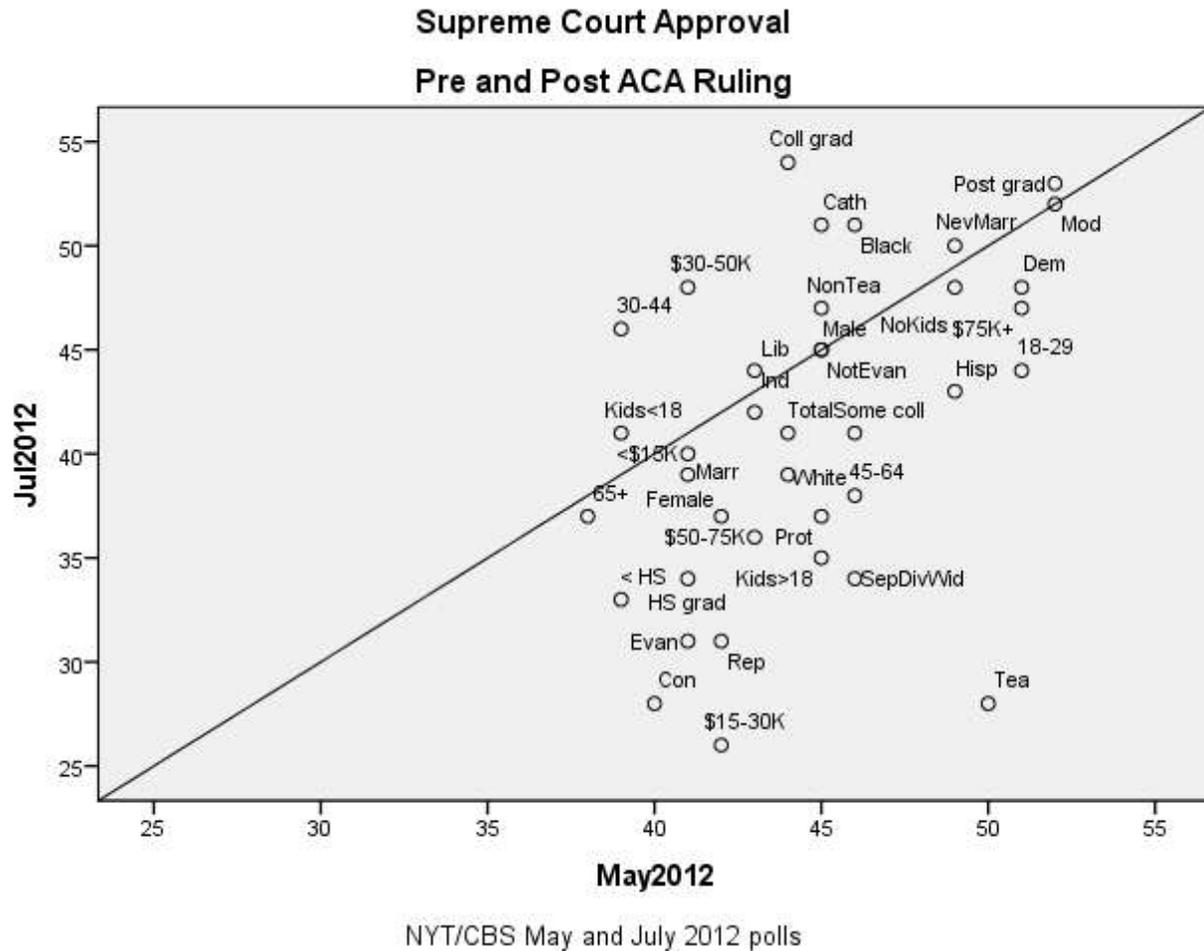
Source: NYT/CBS News Polls, May 31-June 3, 2012 and July 11-16, 2012.

Figure 10 shows the same pre- and post-decision Court job approval ratings for a variety of demographic and political subgroups. Groups appearing above the 45-degree line exhibited an increase in Supreme Court job approval after the ACA ruling, while groups whose approval rating fell appear below the line. In contrast to favorability toward the ACA itself, which increased among most groups after the ruling (Figure 8), the Court’s job approval fell among the majority of groups after the ACA decision, most notably among Tea Party supporters, those with household incomes between \$15,000 and 30,000, Conservatives, Republicans, and separated/divorced/widowed respondents. Job approval

<sup>8</sup> See JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT (2012).

increased the most among college graduates, Catholics, those aged 30 to 44, and those with incomes between \$30,000 and \$50,000. Thus Court job approval fell the most among groups most likely to be embittered by the ruling, namely political groups such as Conservatives, Republicans, and Tea Party supporters (the changes in attitudes among the income and marital status groups are more mixed and difficult to interpret).

Figure 10.



Multivariate analysis of the post-ruling July 2012 NYT/CBS poll for which we have the individual-level data allows us to examine similarities and differences in the structure of attitudes toward the Court, Obama, the ACA, and the Court’s ACA ruling (Table 3). The analysis shows that Supreme Court approval after the decision was structured by education, race, and religion, and modestly by political variables (column 1). However, whether respondents thought the ruling a “good thing” (column 4) has a structure almost identical to that of underlying ACA approval (column 3) and Obama job approval (column 2), with political variables dominating. Interestingly, whether respondents thought the Court’s ruling was made on a legal basis versus a personal or political basis had a structure that seems some combination of the factors behind the Supreme Court’s job approval and ACA approval.

Table 3. Post-Ruling Supreme Court, Presidential, and ACA Attitudes: Multivariate analysis

	Supreme Ct Job Approval (1)	Obama Job Approval (2)	ACA Approval (3)	SC Ruling Good Thing (4)	SC Ruling Legal basis (5)
Education	.255***	.137	.175 <sup>#</sup>	.348***	.262**
Income	.135*	-.032	.060	.017	.118 <sup>#</sup>
Age	-.002	.002	.011	.001	.014 <sup>#</sup>
Female	-.301 <sup>#</sup>	-.522**	-.406*	-.521**	.057
Black	1.053***	2.182***	1.035***	.394	.774*
Hispanic	.054	1.424***	1.463***	1.192***	.612*
Asian	.247	.590	-.695	1.009	-.066
Kids 18 and under	-.068	.270	-.776***	-.399	-.771**
Kids over 18	-.221	-.067	-.771***	-.604*	-.742**
Sep/div/widowed	-.050	.169	.025	.354	-.257
Never married	.521 <sup>#</sup>	1.549***	-.065	.293	-.664*
Catholic	.764***	.056	-.094	.304	-.107
Evangelical	-.019	-.392 <sup>#</sup>	-.587*	-.170	-.130
Independent	-.347 <sup>#</sup>	-1.940***	-1.228***	-1.490***	-.234
Republican	-.584**	-2.096***	-2.732***	-2.113***	-.463 <sup>#</sup>
Moderate	.427*	-1.047***	-.917***	-1.040***	-.126
Conservative	-.221	-1.779***	-2.212***	-2.213***	-.889***
Tea Party	-.336 <sup>#</sup>	-1.069***	-.333	-.761***	-1.279***
Constant	-1.350	1.609	.975	1.596	-.930
Cox & Snell R <sup>2</sup>	.15	.42	.36	.37	.20
% correctly predicted	67.5	82.5	80.7	79.5	73.4
N	838	838	838	838	718

Note: Entries are logit coefficients. References categories are: White; no kids; married; Democrats; liberals. Dependent variables are proportion of respondents approving of the Supreme Court’s job (compared to disapprove or don’t know); approving of President Obama’s job performance; approving of the Affordable Care Act (vs. disapproving or DK); thinking that the Supreme Court’s ACA ruling was a “good thing” (vs. a bad thing, both good and bad, and DK); and thinking that the Court’s ACA ruling was based on legal analysis (vs. personal or political views).

<sup>#</sup> $p < .10$ ; \* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .

Source: New York Times/CBS News Poll, July 11-16, 2012.

Table 4. Pre- and Post-Ruling Supreme Court and ACA Attitudes: Multivariate analysis

	Supreme Ct Job Approval		ACA Approval	
	May (1)	July (2)	May (3)	July (4)
Education	.105	.255***	.419***	.175 <sup>#</sup>
Income	-.041	.135*	.027	.060
Age	-.016*	-.002	.000	.011
Female	-.182	-.301 <sup>#</sup>	-.237	-.406*
Black	-.096	1.053***	.201	1.035***
Hispanic	.452	.054	-1.245**	1.463***
Asian	-.480	.247	.889	-.695
Kids 18 and under	-.278	-.068	-.129	-.776***
Kids over 18	.264	-.221	.011	-.771***
Sep/div/widowed	.281	-.050	.325	.025
Never married	.004	.521 <sup>#</sup>	.551 <sup>#</sup>	-.065
Catholic	-.199	.764***	-.009	-.094
Evangelical	-.211	-.019	.066	-.587*
Independent	-.339	-.347 <sup>#</sup>	-1.257***	-1.228***
Republican	-.327	-.584**	-3.315***	-2.732***
Moderate	.680**	.427*	-1.209***	-.917***
Conservative	.359	-.221	-1.122***	-2.212***
Tea Party	.279	-.336 <sup>#</sup>	-.779**	-.333
Constant	.786	-1.350	.467	.975
Cox & Snell R <sup>2</sup>	.05	.15	.34	.36
% correctly predicted	60.5	67.5	74.3	80.7
N	619	838	664	838

Note: Entries are logit coefficients. References categories are: White; no kids; married; Democrats; liberals. Dependent variables are proportion of respondents approving of the Supreme Court's job (compared to disapprove or don't know) and approving of the Affordable Care Act (vs. disapproving or DK).

<sup>#</sup> $p < .10$ ; \* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .

Source: New York Times/CBS News Polls, May 31-June 3, 2012 and July 11-16, 2012.

Finally, did the ruling change the structure of Supreme Court job approval or ACA approval? That is, did the Court's stamp of approval change the underlying correlates of opinion on the Court itself or on the health care law? Table 4 shows that after the ACA ruling was issued, education became a stronger predictor of Supreme Court job approval, which might make sense given that educated people were probably more likely to receive the positive signals from elites and the mass media regarding the news of the decision. Similarly, Blacks and Catholics were more approving of the Court's job performance after the law, whereas there were no statistically significant differences among racial or religious groups in the pre-decision poll. Most notably perhaps, while there were no partisan differences in Supreme Court job approval before the ACA ruling, after it was issued Republicans were less approving of the Court than Democrats.

The Court's ruling also had some modest effects on the structure of ACA approval. The ruling

did little to change the basic effect of the political variables: Republicans and Independents were much less supportive of the law than Democrats both before and after the ruling; similarly conservatives and moderates were much less supportive than liberals. A number of demographic correlates became statistically significant after the ruling, although in some cases the changes are difficult to interpret.

#### **Part IV. Conclusions**

Empirical analysis of public opinion data shows that the Court's ruling upholding much of the Affordable Care Act had a mildly positive effect on public support for the law, but a mildly negative short-term effect on public approval of the Court itself. Support for the ACA increased by 10 or 11 points among a number of groups, including Blacks, moderates, the never married, those under 30 and over 65, the less educated, and those with incomes between \$30,000 and 50,000, while approval of the Court fell the most among Republicans, conservatives, and Tea Party supporters.

In the immediate aftermath of the ACA ruling, opinion continued to polarize. Already divided by opinion gaps of 50 to 60 points on the health care reform, Democrats became even more supportive of the ACA while Republican support declined slightly. By September 2012, after the party conventions and in the run-up to the presidential election, favorability of the ACA appeared to rise among all partisan groupings, even if the substantial gap between Democrats and Republicans remained.

Partisans also viewed the basis for the Court's decision differently, with Republicans much more likely than Democrats to say that the justices had made their decisions on personal or political grounds rather than on a legal basis. The ruling seemed to sour Republicans on the Court, as their job approval rating was statistically the same as Democrats' before the ACA ruling, but more negative afterwards. Thus, the Court's upholding of much of the ACA seems to have raised popular support for the law, which rose even further and more markedly within three months of the decision. Its short-term effect for the Court, however, was to project upon it the partisan polarization in public attitudes that characterizes contemporary American politics. As the decision recedes further into the past, we should expect to see other forces, events, and decisions subsume the Health Care Case in importance in determining attitudes toward the Court. Indeed, as the presidential campaign entered its final month, it appeared that the Court had rebounded slightly in aggregate approval, even if the partisan divide in support begun by the Health Care Case still remained.

These results suggest *NFIB v. Sebelius* is in a public opinion class by itself among Supreme Court decisions. Never before, to our knowledge, has the Court's upholding of a federal law led to increased favorability of the law, yet polarization and lower approval toward the Court even in the short term. Indeed, even with the small effects noted, the case may exist as the most polarizing instance of judicial restraint on record. Such a result may have been inevitable, though, given the salience of the case and polarization in attitudes regarding the underlying issue before the Court. However the Court ruled on the constitutional challenge to the ACA, the winners and their supporters in the mass public would have rejoiced and the losers would have felt aggrieved. For the most part, concerns about backlash and polarization due to a constitutional decision arise when the Court shuts off democratic debate, for instance when it strikes down restrictions on abortions, same-sex marriage, or even campaign finance activity. The Health Care Case demonstrates that when all politics is perceived as a zero sum game, even judicial affirmation of a result reached by the political branches can further split the public both on its attitudes toward the Court and the issues the Court decides.