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## Voter Knowledge And Constitutional Change: Assessing The New Deal Experience

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# VOTER KNOWLEDGE AND CONSTITUTIONAL CHANGE: ASSESSING THE NEW DEAL EXPERIENCE

ILYA SOMIN\*

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## INTRODUCTION

In recent years the world has seen a massive wave of constitutional change, most notably in Eastern Europe, Latin America, and South Africa. As this Article goes to press, the United States and its allies are beginning the process of creating a new constitution for Iraq. Here at home, there is an ongoing debate over how best to structure change in our own constitutional system.

Yet our understanding of the processes of constitutional change remains in many ways inadequate.<sup>1</sup> A particularly poorly understood issue is the role of voter knowledge. This Article represents the first effort to determine empirically whether voter knowledge increases during periods of constitutional change, thereby enabling voters to impose heightened constraints on political elites.<sup>2</sup> The answer to this question is important, not only for the empirical study of constitutional change, but also for the ongoing normative debate over how such change should be structured. As discussed more fully below, the problem of voter knowledge has crucial implications for the longstanding debate between those constitutional theorists who claim that Article V of the U.S. Constitution should be the sole legal means of constitutional change and those—now led by Bruce Ackerman and Akhil Amar—who contest this proposition.<sup>3</sup>

In all democratic nations that undergo constitutional change, voters are given a role in constitutional development. For both normative and empirical reasons, it is obviously important to understand how they play that role. Numerous political philosophers have argued that voter control of government is intrinsically valuable.<sup>4</sup> Even many who do not share this view believe that voter

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1. See, e.g., Essay, Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 364-65 (1995) (discussing a large number of open research questions on the subject of constitution making).

2. A recent study by Barry Cushman reviews 1930s survey evidence on public opinion regarding various issues relevant to New Deal-era constitutional change. See generally Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7 (2002). However, Cushman does not attempt to measure either voter knowledge or the degree to which voters were able to constrain political elites. See *id.*

3. See *infra* notes 7, 14, 22 (citing works by Ackerman, Amar, and their critics).

4. For arguments asserting the intrinsic value of democratic participation, see BENJAMIN

control is instrumentally valuable as a check on the power of political elites.<sup>5</sup> Robert Dahl, perhaps the most influential analyst of democracy among modern scholars, asserts that "a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens."<sup>6</sup>

An essential element of voter participation in constitutional change, as in "normal politics,"<sup>7</sup> is that the electorate be adequately informed.<sup>8</sup> Without adequate knowledge, voters cannot monitor and control the actions of their elected representatives. Voter knowledge is perhaps even more important in constitutional decision making than in normal politics. Almost by definition, a change in constitutional structure is difficult to reverse. On the other hand, an ordinary policy failure brought on by voter ignorance can potentially be rectified by voting out the government that sponsored the policy in the next election—a process epitomized by the concept of "retrospective voting."<sup>9</sup> In constitutional politics, by contrast, it is much more important that voters "get it right" the first time around, as another opportunity may not arise for many years, if at all.

Unfortunately, decades of voter-knowledge research has shown that knowledge levels are usually shockingly low.<sup>10</sup> Most citizens

R. BARBER, *STRONG DEMOCRACY* xiii-xiv (1984); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 104-05 (1970).

5. See, e.g., WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 6 (1982) (endorsing instrumental value of democracy as a mechanism for popular replacement of political elites).

6. ROBERT A. DAHL, *POLYARCHY* 1 (1971).

7. The distinction between "constitutional moments" and "normal politics" was developed by Bruce Ackerman. See BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 3-33 (1991) [hereinafter ACKERMAN, *WE THE PEOPLE* 1].

8. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 63-65 (1996) (explaining importance of political knowledge to the democratic process); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 *CRITICAL REV.* 413 (1998) (pointing out dangers of voter ignorance and analyzing literature on the subject).

9. For the classic analyses of retrospective voting, see MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981); V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE* (1966).

10. For summaries of the extensive evidence of deep and widespread voter ignorance, see DELLI CARPINI & KEETER, *supra* note 8, at 62-104; Somin, *supra* note 8, at 416-17. For an analysis of the implications of widespread voter ignorance for other issues in constitutional law, see Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory*, *IOWA L. REV.* (forthcoming 2004).

lack even basic political information,<sup>11</sup> and close to one-third are so completely ignorant that one leading scholar categorizes them as "know-nothings."<sup>12</sup> Thus, it is essential to know whether this dismal pattern holds true in periods when fundamental constitutional change is on the political agenda.

The issue of voter knowledge and its relationship to constitutional change has implications for two other important strands of scholarly literature: theories of the growth of government and normative theories of constitutional change. Many theories of government growth point to the ability of governments to exploit periods of crisis—especially periods of crisis massive enough to engender constitutional change—to expand their powers beyond what is necessary to resolve the crisis at hand.<sup>13</sup> What these writers fail to explain is why voters allow political leaders to expand their power to such an extent, sometimes even to expand it in ways that do not address the crisis at all. Voter ignorance may be a crucial part of the story, in that measures taken for other reasons may be packaged to ill-informed voters as crisis management strategies.

In recent years, a number of prominent legal scholars, notably Bruce Ackerman and Akhil Amar, have advocated supplementing the cumbersome amendment procedures of Article V of the Constitution with procedures that allow amendment through majoritarian voting processes.<sup>14</sup> Article V requires constitutional amendments to

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11. See, e.g., Somin, *supra* note 8, at 417 (noting that most survey respondents do not know basic information such as the names of their senators and representatives and the functions of different branches of government).

12. See Stephen Earl Bennett, "Know-Nothings" Revisited: *The Meaning of Political Ignorance Today*, 69 SOC. SCI. Q. 476, 476, 483 (1988) (utilizing the term "know-nothings" as first coined by Hyman and Sheatsley in 1947 "to refer to those steeped in political ignorance").

13. See, e.g., ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 17-18 (1987) (presenting extensive evidence that government grows in times of crisis); JONATHAN R.T. HUGHES, *THE GOVERNMENTAL HABIT* 146-98 (1977) (analyzing the growth of government during and after the New Deal era).

14. See, e.g., ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 53-56; BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* 414-16 (1998) [hereinafter ACKERMAN, *WE THE PEOPLE* 2]; AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 3 *passim* (1998); Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 YALE L.J. 453 (1989) [hereinafter Ackerman, *Constitutional Politics*]; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter Amar, *Consent of the Governed*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); cf. Stephen M. Griffin, *The Nominee is ... Article V*, 12 CONST. COMMENT.

run the forbidding gauntlet of gaining the support of two-thirds majorities in both houses of Congress, followed by ratification by three-quarters of the state legislatures.<sup>15</sup> Throughout American history, critics of Article V have sought to replace or supplement it with a more majoritarian alternative.<sup>16</sup>

Perhaps the most important defense of such proposals is the claim that they represent the considered will of *We the People*, to cite the titles of Ackerman's books,<sup>17</sup> and the informed *Consent of the Governed*, to cite the title of one of Amar's influential articles.<sup>18</sup> Ackerman's and Amar's criticisms of Article V are but the latest in a long line of similar attacks dating back to the Anti-Federalists. For example, Patrick Henry argued at the Virginia ratifying convention that Article V's obstruction of the will of the majority would lead to the destruction of American liberty "forever."<sup>19</sup> Henry condemned Article V for enabling "a contemptible minority" to "prevent the good of the majority."<sup>20</sup> This longstanding argument for

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171 (1995) (describing Article V as a "constitutional stupidity"); Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times has the United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) all of the above)*, 8 CONST. COMMENT. 409 (1991) (arguing that non-Article V amendments are a necessary element of constitutional change, but without endorsing Ackerman and Amar's majoritarian rationale for them).

15. See U.S. CONST. art. V. Article V also allows for amendments to be proposed by a convention of all the states instead of by Congress, *see id.*, but this method has never been used successfully and seems highly unlikely to be resorted to in the future. In any event, amendments proposed by the convention still must be ratified by three-quarters of state legislatures, ensuring that a strong supermajority is still needed for an amendment to pass. *Id.*

16. See generally JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 137-56 (1992) [hereinafter VILE, *THE CONSTITUTIONAL AMENDING PROCESS*] (describing two centuries of criticism of Article V); John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44 (1991).

17. ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7; ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14.

18. Amar, *Consent of the Governed*, *supra* note 14.

19. VILE, *THE CONSTITUTIONAL AMENDING PROCESS*, *supra* note 16, at 33 (quoting Patrick Henry).

20. Patrick Henry, *Speeches of Patrick Henry in the Virginia State Ratifying Convention* (June 5, 1788), in *THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION* 293, 302 (Herbert J. Storing ed., 1985) [hereinafter *THE ANTI-FEDERALIST*]. Other Anti-Federalists also attacked Article V for similar reasons. The Federal Farmer, a leading Anti-Federalist writer, criticized the Article for "transfer[ring]" power "from the many to the few." The Federal Farmer, *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary*

non-Article V constitutional revision would be strengthened by evidence showing that voters in times of constitutional change actually have sufficient knowledge to make meaningful decisions. Conversely, it would be weakened if majoritarian voting processes during periods of constitutional change are primarily conduits for voter ignorance.

Given the critical role of voter knowledge in the process of constitutional change, it is perhaps surprising that neither the literature on constitutional transitions, nor the equally impressive literature on voter knowledge contains a study of the role of voter knowledge during periods of constitutional upheaval.<sup>21</sup> There is, likewise, no study that attempts to analyze the extent to which voters are able to control the constitutional change process. Neither the advocates of non-Article V constitutional change nor their critics who defend Article V's claim to be the exclusive legitimate mode of constitutional change have even attempted to investigate this important issue.<sup>22</sup>

In this Article, these questions are addressed by examining the behavior of both voters and elites during the New Deal era, the most important and wide-ranging period of constitutional change in

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*Alterations in It. In a Number of Letters from the Federal Farmer to the Republican*, in THE ANTI-FEDERALIST, *supra*, at 23, 59. A very similar criticism is advanced by a leading modern political scientist. See JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 13-14 (1986).

21. A rare exception is JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986), which shows how both supporters and opponents of the Equal Rights Amendment (ERA) attempted to exploit voter ignorance by exaggerating the ERA's likely impact for good or ill. *Id.* at 29-35. However, Professor Mansbridge does not examine the actual state of voter knowledge, nor does she attempt to embed her findings in a broader theory of the role of voters in constitutional change. See *id.* Instead, she focuses primarily on the role played by small groups of political activists on both sides. See *id.*

22. For arguments in favor of Article V exclusivity, see, for example, DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 476 (1996); Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 243-44 (1997); David R. Dow, *The Plain Meaning of Article V*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 117, 118 (Sanford Levinson ed., 1995); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 63 (1990); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 177 (1996); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271, 274 (1991). These works, many of them otherwise very thorough, follow their anti-Article V competitors in neglecting the significance of voter knowledge.



American history since the Civil War. This work is the first part of a broader research project investigating the relationship between voter knowledge and constitutional change.

In Part I of the Article, I define the concept of constitutional change used in my analysis and also explain the reasons why voter knowledge in periods of constitutional change should be analyzed separately from voter knowledge in periods of "normal" politics. Part II lays out the opposing hypotheses of the heightened attention and rational ignorance theories. The former predicts that voter knowledge should increase during periods of constitutional change because voters are more likely to pay attention to the unusually important political issues that arise during these times. The latter, by contrast, predicts that voter knowledge should remain relatively constant because the reluctance of voters to invest in the costly process of acquiring substantial political knowledge is a rational result of the insignificance of the individual vote. Part III shows that the New Deal era was an especially important period of constitutional change that provides a critical testing ground for the opposing theories.

In Part IV, I examine survey evidence of voter knowledge during the New Deal period. This evidence strongly suggests that there was no significant increase in voter information levels. Also in Part IV, I briefly address some survey data relevant to the question of elite constraint.

Part V looks at voter knowledge from the perspective of elite political leaders. It examines three critical cases—the National Industrial Recovery Act, the National Labor Relations Act, and the battle over President Roosevelt's plan to "pack" the Supreme Court—to determine if key political leaders perceived the electorate as unusually well informed or whether, by contrast, they saw the constitutional moment as an opportunity for deceptive manipulation of voter ignorance. Sadly, the latter scenario is much more strongly supported by the evidence than the former.

None of the individual pieces of evidence presented in this Article—either quantitative or qualitative—is by itself definitive. Cumulatively, however, they provide strong support for the conclusion that there was little or no increase in voter knowledge or

elite constraint during the twentieth century's most important period of constitutional change.

Part VI of the Article discusses some of the implications of this finding for normative theories of constitutional change. Although my results do not refute all possible arguments in favor of non-Article V constitutional change, they do identify serious shortcomings in some of the best-known such claims. Moreover, I argue that the problem of voter ignorance provides an unanticipated positive rationale for the much maligned supermajority requirements of Article V. This point is significant because even prominent scholars who do not fully endorse the arguments of Ackerman and Amar have been troubled by the absence of a positive justification for this critical element of the Constitution's amendment process. Sanford Levinson, for example, admits that he "can think of no good reasons to support the formal stasis engendered by Article V."<sup>23</sup> The issue of voter knowledge thus turns out to be a critical one for both the normative and empirical study of constitutional change.

## I. ANALYTICAL FOUNDATIONS

The absence of prior studies of the relationship between voter knowledge and constitutional change does not, in and of itself, prove that such a study is needed. The gap in the existing literature may be a case of justifiable benign neglect rather than a lamentable lacuna. Thus, it is important to define what I mean by constitutional change and explain why it requires an analysis of its own.

### *A. Defining Constitutional Change*

For present purposes, I define constitutional change as a major, difficult to reverse, alteration in the structure of government or the distribution of government power. This definition is in line with the definition endorsed by Bruce Ackerman, who stresses that "higher lawmaking," as he refers to constitutional change, is defined in part

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23. Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 123 (1996). Levinson does, however, concede that there may be "good reason" for imposing a supermajority requirement for constitutional change that limits "rights of freedom of speech or freedom of conscience." *Id.*

by its deep embeddedness within political institutions, which makes it difficult or even impossible to reverse, at least in the course of "normal politics."<sup>24</sup>

This functionalist approach to constitutional change can be differentiated from a purely legalistic approach that defines constitutional change as any alteration in the text of a constitution, but ignores even deep and fundamental alterations that do not leave a textual imprint. While such a textualist approach may be appealing as a normative principle of constitutional interpretation,<sup>25</sup> it is not useful for purposes of the sort of empirical analysis that I wish to perform here.

Even scholars sympathetic to the textualist approach as a normative view concede that important changes in constitutional structure have taken place, most notably in the New Deal era, without altering the text.<sup>26</sup> Robert Bork, a committed originalist and formalist, even refers to the New Deal era as a "constitutional revolution."<sup>27</sup> To take an even more dramatic case, it is difficult to doubt, as an empirical matter, that fundamental constitutional change occurred in Germany after the Nazis took power in 1933 even though Hitler never formally abrogated the Weimar Republic Constitution or even altered its text.<sup>28</sup>

The functionalist definition of constitutional change that I use is necessarily more vague than a narrow textualist definition. In practice, however, this issue need not be a serious impediment to this project because the New Deal is a clear example of change that falls well within the definition, rather than a borderline case over which definitional debates may arise.

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24. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 266-94; ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 30. In theory, my definition differs from Ackerman's in that his "higher lawmaking" can, in principle, be addressed to a comparatively minor issue that does not rise to the level of a major change in the distribution of government power. In practice, however, Ackerman recognizes that the kind of mobilization he describes is likely to occur only around major issues, ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 266-94, and all the cases he analyzes in his two books represent instances of what would be considered successful or attempted constitutional change in my terms as well as his own.

25. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23-29 (1997) (defending textualism as a normative theory of interpretation).

26. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 51-67 (1990); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395-99 (1987).

27. BORK, *supra* note 26, at 51.

28. See ALAN BULLOCK, *HITLER: A STUDY IN TYRANNY* 403 (1964).

### *B. Why a Separate Analysis?*

In light of the extensive existing literature on voter knowledge,<sup>29</sup> one may ask why we require a *separate* analysis of voter knowledge in periods of constitutional change. There are three important answers. First, constitutional change differs from ordinary policy change in that a constitutional change is a one-time decision which is very difficult to reverse. This means that it is more important that voters "get it right" the first time, requiring that they be more informed than would be necessary for an "ordinary" election.

Second, constitutional change gives voters considerably less opportunity to employ some of the standard "shortcuts" to knowledge posited in the literature on ordinary politics. Because a decision in favor of constitutional change is a decision in favor of an entirely new framework for government policy rather than just a particular policy change, "retrospective voting"<sup>30</sup> is less likely to be effective. Effective retrospection may tell us that the prior government (for instance, the Hoover Administration in 1932) has failed, but it is of limited utility in determining whether an entirely new institutional structure will be preferable. Retrospective voting is of even less utility in determining whether the proposed new constitutional system should be retained indefinitely, far beyond the end of the immediate crisis at hand. Yet, a decision on constitutional change is by definition a decision in favor of the latter and not just the former.

Similarly, using cues from trusted "opinion leaders"<sup>31</sup> or political parties<sup>32</sup> may not be helpful if the question at hand is whether to

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29. For critical summaries of the literature, see DELLI CARPINI & KEETER, *supra* note 8; ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989); Morris P. Fiorina, *Voting Behavior*, in DENNIS C. MUELLER, *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 391 (1997); Somin, *supra* note 8.

30. For defenses of the theory of retrospective voting, see FIORINA, *supra* note 9; KEY, *supra* note 9; Helmut Norpoth, *Presidents and the Prospective Voter*, 58 J. POL. 776 (1996).

31. For shortcut theories emphasizing the role of trusted opinion leaders as guides for less-informed voters, see ARTHUR LUPIA & MATTHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA* 35-36 (1998); James A. Stimson, *A Macro Theory of Information Flow*, in *INFORMATION AND DEMOCRATIC PROCESSES* 345, 345 (John A. Ferejohn & James H. Kuklinski eds., 1990).

32. For shortcut theories emphasizing the informational benefits of political parties, see JOHN H. ALDRICH, *WHY PARTIES?* 48-50 (1995); KEY, *supra* note 9, at 52-55; Morris P. Fiorina,

reject the entire framework of government espoused by these leaders or parties in favor of a wholly new one advocated by their opponents. Voters cannot easily assume that opinion leaders who have given good guidance on normal political issues will be able to do the same on the much more complex constitutional ones.

Finally, information from everyday life<sup>33</sup> is also unlikely to be useful because everyday life does not provide voters with experiences that would enable them to evaluate a new constitutional regime that has never existed in their country previously. In sum, even those who are confident in the utility of shortcuts to political knowledge under normal conditions may be more skeptical of these mechanisms under conditions of constitutional change.<sup>34</sup> This circumstance increases the importance of individual-level political knowledge.

The third justification for a separate analysis of constitutional change is that at least two important theoretical perspectives make diametrically opposed predictions regarding the role of voter knowledge in periods of constitutional change. The first of these theories is based on the work of Bruce Ackerman,<sup>35</sup> and on the closely related research tradition growing out of studies of realign-

An Outline for a Model of Party Choice, 21 AM. J. POL. SCI. 601, 614-18 (1977).

33. The political utility of information derived from everyday life was first noted by Anthony Downs. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 221-25 (1957). Political scientist Samuel Popkin has made the most sweeping recent claims for the effectiveness of this information shortcut. See SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 23-28 (2d ed. 1994) [hereinafter POPKIN, REASONING VOTER]; Samuel L. Popkin, *Information Shortcuts and the Reasoning Voter*, in INFORMATION, PARTICIPATION, AND CHOICE 17, 17-18 (Bernard Grofman ed., 1993) [hereinafter Popkin, *Information*].

34. For skeptical recent treatments of shortcuts even in the normal context, see MICHAEL ALVAREZ, INFORMATION AND ELECTIONS 152-56 (1997); DELLI CARPINI & KEETER, *supra* note 8, at 51-55; Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194, 194 (1996); Diana C. Mutz, *Direct and Indirect Routes to Politicizing Personal Experience: Does Knowledge Make a Difference?*, 57 PUB. OPINION Q. 483 (1993); Ilya Somin, Book Note, *Resolving the Democratic Dilemma?*, 16 YALE J. ON REG. 401, 402-03 (1999) (reviewing LUPIA & MCCUBBINS, *supra* note 31). For a detailed critique of the major shortcut theories advanced in the political science literature, see Somin, *supra* note 8, at 419-31. Cf. Somin, *supra* note 10 (discussing relevance of the critique of shortcut theories to judicial review).

35. See generally ACKERMAN, WE THE PEOPLE 1, *supra* note 7; ACKERMAN, WE THE PEOPLE 2, *supra* note 14; Ackerman, *Constitutional Politics*, *supra* note 14.

ment.<sup>36</sup> I derive the second theory from collective action<sup>37</sup> and rational ignorance<sup>38</sup> theories.

To summarize briefly, the first theory—the heightened attention hypothesis—predicts that voters should increase their knowledge levels during periods of constitutional change. This increased knowledge in turn enables them to have greater control over policy outcomes.<sup>39</sup> The theory of rational ignorance, by contrast, predicts almost exactly the opposite. It suggests that voter knowledge, while perhaps not declining in an absolute sense, will be relatively more inadequate in times of constitutional change. It also implies that political elites, not voters, should have greater control over policy outcomes in times of constitutional change.

## II. TWO APPROACHES TO CONSTITUTIONAL CHANGE

Unfortunately, there has not been a previous attempt to specify fully the predicted implications of either of these theories for voter knowledge and its impact in periods of constitutional change. Here, I attempt to do so.

### A. *The Heightened Attention Hypothesis*

Ackerman's theory of constitutional change is apparently the only existing theory that explicitly incorporates voter knowledge as a key variable.<sup>40</sup> He argues that "constitutional moments" are characterized by heightened attention to political issues by a normally passive and apathetic public.<sup>41</sup> Accepting the conclusions of a

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36. For the classic works on realignment, see WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970); JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* (rev. ed. 1983).

37. For the most important accounts of collective action theory as applied to political participation, see RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d prtng. 1971) [hereinafter OLSON, *LOGIC OF COLLECTIVE ACTION*]; MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982).

38. The concept of rational ignorance was introduced by Anthony Downs. See DOWNS, *supra* note 33, at 240-59.

39. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 285-88.

40. Although Ackerman limits the applicability of his theory to the United States only, see, for example, *id.* at 6-7, most of its features are applicable more generally.

41. *Id.* at 285-88.

generation of voter knowledge research, Ackerman admits that "citizens normally haven't gathered enough information for an informed opinion [on public policy issues]."<sup>42</sup> He argues, however, that in a constitutional moment, voters will make "special efforts" to increase their knowledge—efforts they would not make during times of normal politics.<sup>43</sup> He even goes so far as to predict that in a true constitutional moment, an average citizen will have "deliberated as much about her commitment to a national ideal as she thinks appropriate in making a considered judgment on an important decision in her private life."<sup>44</sup>

The reasoning underlying Ackerman's prediction is relatively straightforward. In times of normal politics, most voters pay little or no attention to political developments because of rational ignorance<sup>45</sup> and their need to attend to other aspects of their lives.<sup>46</sup> Usually as the result of a great crisis, a political movement is able to place large-scale constitutional change on the agenda. This raises the stakes of politics and therefore leads voters to pay more attention and become more knowledgeable about the alternatives facing them.<sup>47</sup> Once this stage of "mobilized deliberation" is reached, the would-be reformers can prevail if they obtain sufficient depth and breadth of support from voters.<sup>48</sup>

Such support enables them to obtain overwhelming majorities in the legislative and executive, and indirectly in the judicial, branches of government. This in turn allows them to impose their agenda relatively free of preexisting constitutional constraints.<sup>49</sup> The heightened attention that voters pay to political issues during Ackermanian "constitutional moments" also enables the electorate to exert greater control over political outcomes than normally possible.<sup>50</sup>

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42. *Id.* at 272.

43. *Id.* at 271-72.

44. *Id.* at 273-74.

45. See DOWNS, *supra* note 33, at 244-47.

46. ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 271-72.

47. *Id.* at 285-88.

48. See *id.* at 272-77.

49. See *id.* at 288-90.

50. See ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 4-5.

Heightened attention during “constitutional moments” need not, in Ackerman’s view, necessarily result in successful constitutional change.<sup>51</sup> It may lead voters to reject the reformers’ proposals as well as accept them. Ackerman sees the establishment of the Constitution in the 1780s, the Reconstruction Amendments of the 1860s, and the New Deal as examples of successful “constitutional moments.”<sup>52</sup> By contrast, he characterizes the 1890s Populists, the 1960s Great Society liberalism, and the 1980s New Right as serious efforts to achieve constitutional change that led to increased voter attention but failed to gain their full objectives for lack of sufficient popular support.<sup>53</sup> In each case, Ackerman concludes that the reform movements were able to achieve some of their policy objectives by means of normal politics, but were unable to institutionalize their agendas through the Constitution.<sup>54</sup>

Ackerman’s model is similar to and in part derived from models of political realignment.<sup>55</sup> These theories posit that a “realigning” election occurs when a critical new issue arises that reorients the political spectrum around itself and leads to widespread and semipermanent shifts of blocs of voters from one party to another.<sup>56</sup> Alternatively, the new issue may be so destructive to the existing party system that one or both major parties disappear altogether.<sup>57</sup> As in Ackerman’s theory, realignment theory posits un-usual periods during which voters focus intensely on a particular set of issues.<sup>58</sup>

In American history, these periods coincide nicely with Ackerman’s “constitutional moments.” Ackerman sees successful

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51. See, e.g., *id.* at 248 (describing the Populist movement as a failed “constitutional moment”).

52. See *id.* at 8-26.

53. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 56, 108-13; ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 26-27, 248.

54. See, e.g., ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 111-12 (stating that while the Populists had many “normal” political victories, they failed to create a constitutional change).

55. Ackerman himself has acknowledged the links between his theory and realignment theory. See *id.* at 329 n.1. For works on realignment theory, see BURNHAM, *supra* note 36; SUNDQUIST, *supra* note 36. For the classic article by V.O. Key, Jr., see V.O. Key, Jr., *A Theory of Critical Elections*, 17 J. POL. 3 (1955).

56. See SUNDQUIST, *supra* note 36, at 35-37.

57. *Id.* at 30-34, 36.

58. *Id.* at 36.



"constitutional moments" during the 1860s and 1930s,<sup>59</sup> and partial successes ending in failure during the 1890s, 1960s and 1980s, when, he argues, Great Society liberals and New Right conservatives respectively attempted to achieve constitutional change but were thwarted by failure to gain sufficient popular support.<sup>60</sup> Likewise, realignment theorists see successful realignments in the 1850s, 1890s, and 1930s, while simultaneously observing partial "dealignments" that weakened the existing system of party alignments but did not fully displace it in the 1960s and 1980s.<sup>61</sup> This coincidence is striking. Undoubtedly, the explanation is that issues so fundamental and so salient that they result in a serious challenge to the existing constitutional order are also likely to threaten the existing party system.

Realignment theory also implicitly dovetails with Ackerman's theory in another respect. Just as Ackerman's view implies heightened voter control over policy outcomes with respect to the issues that give rise to constitutional change, realignment theory implies heightened party responsiveness to voter opinion with respect to the realignment issue. In theory, the latter could mean merely "position-taking"<sup>62</sup> by the parties rather than any actual impact on policy outcomes, but the realignment theorists clearly imply that policy outcomes are also implicated.<sup>63</sup>

There are, however, two differences between Ackerman's theory and realignment theory. First, a realignment need not involve a challenge to the existing constitutional system. It could involve merely a disagreement over the use of powers that the state already possesses. Challengers to the existing system may simply wish to use those powers for different ends rather than augment them, diminish them, or change their distribution between different branches or levels of government. This distinction, however, is not of great moment to the present study, which seeks to focus specifically on periods of constitutional change. Although realignment

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59. See *supra* note 52 and accompanying text.

60. See *supra* note 53 and accompanying text.

61. See SUNDQUIST, *supra* note 36, at 74-105, 134-69, 198-239, 376-411, 425-49.

62. See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61 (1974).

63. Sundquist in particular refers to policy outcomes at numerous points in his analysis. See, e.g., SUNDQUIST, *supra* note 36, at 208-14 (discussing the different policies of Herbert Hoover and Franklin D. Roosevelt during the Great Depression).

theory may be more broadly applicable, it is clearly applicable to at least these cases. Moreover, as noted above, in practice, cases of realignment and cases of constitutional change seem to coincide.<sup>64</sup>

The second difference between Ackerman's theory and realignment theory is more consequential to this Article. While Ackerman explicitly predicts that periods of constitutional change should see heightened voter knowledge,<sup>65</sup> the realignment theorists predict merely heightened issue salience for voters.<sup>66</sup> While the realignment theorists do not discuss the implications of their theories for voter knowledge directly, it is theoretically possible that voters may attach greater importance to the issue than before without knowing more about it. The latter, however, seems intuitively implausible in the case of an issue, which, as realignment theory posits, rises from relative insignificance to being the main organizing principle of a new political alignment. Thus, it is likely that heightened voter knowledge is a predictable, observable implication of realignment theory, although this conclusion is not as strong as in the case of Ackerman's theory of constitutional change.

To summarize, the heightened attention hypothesis derived from Ackerman's theory and, to a lesser degree, from realignment theory makes two major predictions:

- (1) Voters should pay more attention to the issues at stake during a period of constitutional change and become more knowledgeable about them.<sup>67</sup>
- (2) This heightened knowledge enables voters to exercise greater control over policy outcomes within the key policy areas at issue.<sup>68</sup>

### *1. Implications for Voter Behavior*

The first prediction implies that voters should know more about both the specific issues at stake *and* about what Michael Delli

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64. See *supra* text accompanying notes 61-63.

65. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 285-88.

66. See BURNHAM, *supra* note 36, at 7-8; SUNDQUIST, *supra* note 36, at 35.

67. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 285-88.

68. *Id.*

Carpini and Scott Keeter call "rules of the game" knowledge about the political system.<sup>69</sup> The latter type of knowledge includes information about the distribution of power within the political system. In a period of attempted constitutional change, this type of knowledge is even more crucial than at other times because constitutional change is, of course, a change in the "rules" whose merits cannot be assessed easily without knowing about the rules of the existing system and how they connect to substantive issues.

In addition to increases in voter attention and knowledge, Ackerman's theory posits heightened voter control over policy outcomes with respect to the issues at stake in that particular period of constitutional change.<sup>70</sup> On this point, it is vital to understand that the theory predicts not only greater correspondence between voter preferences and policy than during periods of normal politics, but more importantly, a fairly high *absolute* level of correspondence. Without such correspondence, Ackerman's key contention—that voter preferences ultimately drive constitutional change—would be placed into serious doubt.<sup>71</sup>

## 2. *Implications for Elite Behavior*

Among the most underanalyzed aspects of theories of voter knowledge are their implications for elite behavior. The fundamental insight of Ackerman's argument is that political elites facing a relatively knowledgeable electorate should behave differently from ones who face a comparatively ignorant one.<sup>72</sup> Thus, if there is indeed an upsurge in voter attention during periods of constitutional change, we should observe political leaders taking note of this fact and attempting to adjust their behavior.

The first and most obvious implication of Ackerman's thesis for elite behavior is that we should observe political elites *perceiving* an increase in voter knowledge and attention. Although political elites may misperceive, they have an unusually strong interest in gauging voter sentiment correctly, since their hopes of election to office hinge upon it. Though the possibility of complete elite

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69. DELLI CARPINI & KEETER, *supra* note 8, at 69-73.

70. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 285-88.

71. *Id.*

72. *See id.*

misperception suggests that failure to confirm this prediction should not lead to the rejection of Ackerman's theory in its entirety, it would at least undercut Ackerman's prediction of heightened popular constraint on elites. On the other hand, confirmation of the prediction would be quite strong evidence in favor of the heightened attention hypothesis.

A similar but nonetheless distinct implication of Ackerman's theory is that the elites should perceive themselves as relatively tightly constrained by voter opinion. In times of constitutional change, since voters are paying more attention than normal, policies deviating from public opinion, especially on the issues that brought about the movement for constitutional change, should run an unusually high risk of retribution at the polls. Likewise, Ackerman's theory implies that elites should *not* view periods of constitutional change as opportunities to exploit voter ignorance by misrepresenting the nature of their policies. At least on issues central to the "constitutional moment" in question, we would expect little or no such manipulation.

A final prediction for elite behavior is that elites should act on the above two perceptions: they should alter their policy positions to take voter sentiment into account. Moreover, they should conform their policies to the new positions and not make merely rhetorical changes. By hypothesis, purely rhetorical changes are more likely to be detected and punished by highly attentive voters.

### *B. The Rational Ignorance Hypothesis*

Since the publication of Anthony Downs' work in 1957,<sup>73</sup> many political scientists and economists have argued that voters are "rationally ignorant" about politics.<sup>74</sup> Because of the very low significance of any single vote,<sup>75</sup> there is a vanishingly small payoff to acquiring political knowledge in order to vote in an informed way.

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73. See DOWNS, *supra* note 33, at 240-59.

74. See, e.g., POPKIN, *REASONING VOTER*, *supra* note 33; Mancur Olson, *Supply-Side Economics, Industrial Policy, and Rational Ignorance*, in *THE POLITICS OF INDUSTRIAL POLICY* 245 (Claude E. Barfield & William A. Schambra eds., 1986).

75. See William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25 (1968) (demonstrating that the chance of any one vote determining the outcome of a presidential election is roughly 1 in 100 million).

Of course, even the rationally ignorant voter will likely acquire *some* political knowledge from everyday life,<sup>76</sup> because he or she may find the information interesting or because, for a few groups, the knowledge is professionally useful.<sup>77</sup> If the rational ignorance hypothesis is correct, however, the general level of voter knowledge likely will be very low. Most existing studies of voter knowledge confirm this prediction and also find that there has been little increase in political knowledge over time.<sup>78</sup> Other researchers have found, contrary to the prediction that voter ignorance at the individual level has a random, self-offsetting effect,<sup>79</sup> that ignorance has systematic effects that can swing the results of even presidential elections, where voters know more about the candidates than

76. For optimistic accounts of the utility of this shortcut to political information, see DOWNS, *supra* note 33, at 221-25; POPKIN, REASONING VOTER, *supra* note 33, at 23-28; Popkin, *Information*, *supra* note 33, at 17-22. For criticism, see Mutz, *supra* note 34; Somin, *supra* note 8, at 420-21.

77. See Olson, *supra* note 74, at 245-46 (pointing out that some citizens, such as interest group lobbyists, may acquire political knowledge because it is professionally useful to them for purposes other than voting).

78. See ANGUS CAMPBELL ET AL., THE AMERICAN VOTER 171-72 (1960) (discussing low levels of political knowledge in the 1950s); DELLI CARPINI & KEETER, *supra* note 8, at 62 ("Since the 1940s, scholarly studies have consistently found that the public is poorly informed."); W. RUSSELL NEUMAN, THE PARADOX OF MASS POLITICS 14-17 (1986) ("[E]ven the basic facts of [political knowledge] escape the cognizance of the great majority of the electorate."); SMITH, *supra* note 29, at 191 ("The public's level of knowledge has not changed since 1956."); Bennett, *supra* note 12, at 486 (stating that the same percentage of the public lacks political knowledge as in the 1940s); Stephen Earl Bennett, *Trends in Americans' Political Information, 1967-1987*, 17 AM. POL. Q. 422, 423 (1989) (showing little or no increase in political knowledge over time); Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT 206, 246-47 (David E. Apter ed., 1964) (presenting a classic study showing a low level of political knowledge among American voters); Michael X. Delli Carpini & Scott Keeter, *Stability and Change in the U.S. Public's Knowledge of Politics*, 55 PUB. OPINION Q. 583, 590 (1991) ("Over 40 years, the level of basic public knowledge of some basic facts about the political system has remained remarkably stable."); Somin, *supra* note 8, at 419.

79. In theory, if voting errors caused by ignorance are distributed randomly across a large electorate, "mistaken" votes cast in favor of one candidate should be "cancelled out" by other mistaken votes cast in favor of his or her opponents. In that event, even if the majority of the electorate is severely deficient in knowledge, their errors would have no effect on electoral outcomes, which would be decided by the more knowledgeable minority. For defenses of this position, see BENJAMIN PAGE & ROBERT SHAPIRO, THE RATIONAL PUBLIC 16-17 (1992); Phillip E. Converse, *Popular Representation and the Distribution of Information*, in INFORMATION AND DEMOCRATIC PROCESSES, *supra* note 31, at 369, 378; Stimson, *supra* note 31, at 365. For a critical view, see Somin, *supra* note 8, at 429-31.

in other situations.<sup>80</sup> These studies do not, however, specifically focus on periods of constitutional change. Such periods are of course the main subject of this Article.

Rational ignorance theory, of course, coexists uneasily with the apparent failure of the rational choice prediction that voters simply should not vote. The cost of voting, like that of acquiring information, is likely to be greater than its benefits, at least if the latter are defined in terms of affecting the outcome of an election. Several attempts have been made to reconcile the existence of voting with rational choice theory.<sup>81</sup> Critics of rational choice theory have sought to refute these efforts.<sup>82</sup> This Article will not enter into the debate except to point out that the apparent failure of rational choice theory to explain voting need not imply a simultaneous failure in explaining voter knowledge. The acquisition of political knowledge is a much more costly, time consuming, and difficult process than voting. It is not surprising if voters may make a greater effort to behave rationally in one domain than in the other.<sup>83</sup>

For present purposes, the key element of the rational ignorance is that it predicts little or no increase in voter knowledge during periods of constitutional change. While Ackerman and others are surely right to argue that periods of constitutional change raise the stakes of politics, these periods do not significantly increase the impact of an individual's vote. Thus, the voter has little more reason to acquire additional political knowledge than he or she would during periods of normal politics. Moreover, the same level of

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80. See ALVAREZ, *supra* note 34, at 50-51; DELLI CARPINI & KEETER, *supra* note 8, at 263-64; Bartels, *supra* note 34; Thomas Holbrook & James C. Garand, *Homo Eonomus? Economic Information and Economic Voting*, 49 POL. RES. Q. 351, 367-69 (1996).

81. See, e.g., John H. Aldrich, *Rational Choice and Turnout*, 37 AM. J. POL. SCI. 246, 246 (1993) (arguing that "rational choice accounts of [voter] turnout are possible"); Riker & Ordeshook, *supra* note 75, at 25; cf. TERRY M. MOE, *THE ORGANIZATION OF INTERESTS* 30-33 (1980) (showing that individuals may take part in the political process because they overestimate the likelihood that their participation will make a difference). In particular, Derek Parfit, in a work rarely cited by political scientists and legal scholars, shows how voting may be rational even for a fully informed, completely rational citizen so long as (1) he perceives a substantial difference between the opposing candidates, and (2) he places at least a very small value on the welfare of other citizens and not just on his own. See DEREK PARFIT, *REASONS AND PERSONS* 73-75 (1984).

82. See, e.g., BRIAN BARRY, *SOCIOLOGISTS, ECONOMISTS AND DEMOCRACY* 13-46 (Phoenix ed. 1978); DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 33-46 (1994).

83. See Aldrich, *supra* note 81, at 261-66; Somin, *supra* note 8, at 437-38.

absolute knowledge may be *relatively* less helpful to voters because the issues involved in constitutional change are more far-reaching and complex than those of normal politics. Additionally, as discussed above, constitutional change is less easily understood by means of the standard "shortcuts" to political understanding that voters employ.<sup>84</sup>

The predictions of rational ignorance theory for periods of constitutional change are almost the exact opposite of those made by the heightened attention hypothesis: voter knowledge should not increase and voters should have no greater leverage over policy than normal. Likewise, the elites should not be under the impression that they face unusually strong constraints and they should not perceive an increase in voter knowledge.

There is one additional implication for elite behavior, however, that should be spelled out: Far from being unusually constrained, elites should see opportunities to push agendas of their own that are not viable during periods of normal politics. Ordinarily, the power of political leaders is constrained to a degree by the preexisting constitutional framework. The transaction costs of trying to change this framework are very high, and such change may face strong opposition.<sup>85</sup>

In a period when constitutional change is on the agenda, however, these transaction costs are necessarily reduced. A crisis, such as the Great Depression of the 1930s, leads the population to be more accepting of possible change. If, as Ackerman predicts, this change in the public mood is combined with heightened voter knowledge and attention, the elites will be tightly constrained in the types of changes they can hope to introduce. If the theory of rational ignorance is sound, however, then elites free of prior constitutional restraints can impose changes in policy they wish to achieve, even if those changes are only weakly related to the desires of the public or to the crisis that brought on the period of constitutional change in the first place. Instead of controlling the process of constitutional change, voters merely open the door for elites to impose those changes they themselves desire.

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84. See *supra* notes 30-34 and accompanying text.

85. See, e.g., *supra* notes 24-25 and accompanying text.

Obviously, the precise means of testing this latter prediction will depend on the details of the particular case. The same stricture applies to the determination of who counts as a member of the "political elite." It is clear, nonetheless, that we have two theories of the relationship between voters and constitutional change that make opposing, and to a great extent mutually exclusive, predictions. The opposing predictions make it easier to test the two theories against each other and obtain usable results, since evidence that helps to confirm one theory necessarily helps refute the other.<sup>86</sup>

### III. CONSTITUTIONAL CHANGE IN THE NEW DEAL ERA

To test the opposing theories of constitutional change, this Article focuses on what is by far the most important period of constitutional change in twentieth-century American history: the New Deal. The New Deal is one of the paradigm events that led to the development of both Ackerman's theory<sup>87</sup> and the theory of realignment.<sup>88</sup> It is also the one period of indisputable large-scale constitutional change that has occurred in the United States subsequent to the beginning of modern opinion polling. It is therefore a self-evidently crucial case.

Although the New Deal era saw many social and political changes, the key constitutional change, in the sense defined here, was the massive extension of federal government power over the economy.<sup>89</sup> Previously, federal economic regulatory power, though slowly growing, was severely limited.<sup>90</sup> Afterwards, it was greatly extended and, for the most part, limited only by such restraints as

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86. See STEPHEN VAN EVERA, *GUIDE TO METHODS FOR STUDENTS OF POLITICAL SCIENCE* 83 (1997).

87. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 99-104; ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 279-311 (analyzing the New Deal as a constitutional moment).

88. See BURNHAM, *supra* note 36, at 1, 8; SUNDQUIST, *supra* note 36, at 198-239.

89. For a recent survey, see DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 363-80 (1999).

90. See, e.g., WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 213-16 (1995) (describing tight restraints on the federal government's economic power prior to the 1930s); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 110-55 (1980); Epstein, *supra* note 26, at 1399-1408.



Congress and the President were themselves willing to accept.<sup>91</sup> Although this dramatic shift did not result in changes to the text of the Constitution, it did result in a massive change in its interpretation by the courts. Legal scholars of all political persuasions see this as a virtual revolution in constitutional doctrine.<sup>92</sup>

New Deal constitutional change provides us with several ways to test the competing theories outlined above, including tests of the models' predictions for voter behavior and their predictions for elites. To test the former, I analyze survey data from the time period in question to determine the level of voter knowledge. Because such evidence is extremely limited, however, I also examine later National Election Study data to determine whether respondents of voting age during the New Deal era had greater knowledge of key issues than those who came of age later. To analyze the views of elites, I examine their strategies on three issues directly relevant to constitutional change in the New Deal era: the National Industrial Recovery Act (NIRA), the National Labor Relations Act (NLRA), and President Franklin Roosevelt's plan to "pack" the Supreme Court to ensure that body would uphold his constitutional innovations.

Research into the impact of voter ignorance might explain an important anomaly in New Deal historiography. As a recent leading

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91. For summaries of the growth of federal government economic power, see, for example, HIGGS, *supra* note 13, at 172-80; KENNEDY, *supra* note 89, at 363-80; Epstein, *supra* note 26, at 1443-54; John Joseph Wallis, *Why 1933? The Origins and Timing of National Government Growth, 1933-1940*, in *EMERGENCE OF THE MODERN POLITICAL ECONOMY 1* (Robert Higgs ed., 1985). A minority of scholars argue that the New Deal truly made no fundamental changes, since its policies actually were rooted in those of the Hoover Administration. For the most sophisticated presentation of this view, see Michael S. Lewis-Beck & Peverill Squire, *The Transformation of the American State: The New Era-New Deal Test*, 53 J. POL. 106, 107 (1991) (noting the "rather remarkable policy continuity" between Hoover and the New Deal era). Yet even these writers concede the general point that fundamental constitutional change resulted from the crisis brought on by the Great Depression, merely locating its beginnings one administration earlier. See *id.* at 118. Moreover, even if Hoover and the Republicans originated many of the specific New Deal measures, there is little question that the federal government's new role did not become institutionalized on a permanent basis until the New Deal. During the New Deal, the Supreme Court endorsed the federal government's new role. See, e.g., LEUCHTENBURG, *supra* note 90, at 213-36. Hoover and his administration generally saw their new policies merely as temporary emergency measures that could soon be repealed. See HIGGS, *supra* note 13, at 162-67.

92. See, e.g., ACKERMAN, *WE THE PEOPLE 2*, *supra* note 14, at 279-382 (describing the Court's post-New Deal jurisprudence as "revolutionary"); LEUCHTENBURG, *supra* note 90, at 213-36; see also *supra* notes 26-27 and accompanying text.

history of the New Deal, one generally sympathetic to the Roosevelt Administration and its policies, finds, most of the New Deal had little, if any, connection to the goal of alleviating the Depression.<sup>93</sup>

The pattern of New Deal policies cannot be easily understood merely as a response to public concerns about the Depression.<sup>94</sup> Many of the key policies seemingly had little relevance to ending the economic downturn, and some may even have exacerbated it.<sup>95</sup> A second important anomaly of New Deal policy change is that some key policies were implemented and continued in the face of strong public opposition. For example, New Deal pro-union labor policies were instituted despite strong public distaste for labor unions and strikes revealed in contemporary survey data.<sup>96</sup>

These patterns are difficult, though perhaps not impossible, to account for under the heightened attention hypothesis. They become more understandable in light of rational ignorance theory. If the latter is correct, then many New Deal economic policies may have been a result of political leaders pursuing policy changes that they or organized interest groups, rather than electoral majorities, favored. While the general public may have disliked labor unions, union members and leaders surely supported New Deal policies favorable to their interests. Political leaders may have been willing to pursue pro-union policies because they understood that voter ignorance would limit the force of public backlash.

A number of scholars examining government growth in the 1930s argue that political leaders exploit crisis situations, including

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93. KENNEDY, *supra* note 89, at 363-64 (showing that many New Deal measures were unrelated to the goal of ending the Depression and noting New Deal's "conspicuous failure to produce economic recovery").

94. Of course, such policies are even less understandable if we accept a monetarist rather than a Keynesian interpretation of the Depression's causes. For the seminal work advancing monetarist interpretation theory, see MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES, 1867-1960*, at 299-419 (1963).

95. For a recent detailed statement of the argument that FDR's policies actually made the Depression more severe than it otherwise would have been, see JIM POWELL, *FDR'S FOLLY: HOW ROOSEVELT AND HIS NEW DEAL PROLONGED THE GREAT DEPRESSION* (2003). Although a popular account, Powell's book provides extensive citations to academic literature supporting his argument.

96. Strikes and the labor unions that organized them were viewed unfavorably by a majority of respondents in nearly all surveys on the subject from 1935 to 1941. See *infra* notes 220-32 and accompanying text.

periods of constitutional change, to expand their powers.<sup>97</sup> What these writers do not explain is why voters allow political leaders to expand their powers beyond what is necessary to deal with the crisis at hand, sometimes even in ways that do not address the crisis at all. Voter ignorance may be a crucial part of the story because measures taken for other reasons can be packaged to ill-informed voters as crisis management strategies.

#### IV. SURVEY EVIDENCE OF VOTER KNOWLEDGE DURING THE NEW DEAL ERA

The New Deal era is the first period in American political history for which we have extensive polling data from Gallup, Roper, and, occasionally, other organizations.<sup>98</sup> These surveys include questions on voter knowledge for the 1935-1941 period, which is of most direct concern here.<sup>99</sup> Unfortunately, the surveys contain only a few questions of this type. Overall, they show that there was a relatively low absolute level of voter knowledge during the New Deal era, at least on the issues addressed in the questions. What they do not give us, unfortunately, is a basis of comparison with other periods. Retrospective analysis of voter knowledge through National Election Study survey data, however, can fulfill this need.

##### *A. New Deal-Era Survey Data*

My research has uncovered only a few relevant voter knowledge survey questions from the New Deal era. There are some questions regarding voter attitudes towards constitutional change, however, that shed light on the issue of elite constraint.

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97. See *supra* note 13 and accompanying text.

98. For a catalog of many of the Gallup polls, see GEORGE H. GALLUP, 1 *THE GALLUP POLL: PUBLIC OPINION 1935-1971* (1972) [hereinafter GALLUP]. For Roper and other surveys, see PUBLIC OPINION 1935-1946 (Hadley Cantril ed., 1951) [hereinafter PUBLIC OPINION]. The results of all known Roper, Gallup, and other polls from this era have been cataloged online by the Roper Center for Public Opinion. See Roper Center for Public Opinion Research, at [http://web.lexis-nexis.com/universe/form/academic/s\\_roper.html](http://web.lexis-nexis.com/universe/form/academic/s_roper.html) (last visited Nov. 7, 2003) [hereinafter Roper Center].

99. After 1941, of course, the onset of World War II largely brought the New Deal era of constitutional change to an end. See ALAN BRINKLEY, *THE END OF REFORM* 175-200 (1995).

### *1. New Deal-Era Survey Questions on Voter Knowledge*

In this section, I briefly analyze four New Deal-era voter knowledge surveys. Unfortunately, the evidence they provide is far from definitive.

One of the more revealing and straightforward knowledge questions was a 1940 survey in which respondents were asked to define a "conservative in politics." Only 40% of respondents were able to give an answer considered correct by interviewers.<sup>100</sup> It is difficult to compare this survey directly with later attempts to measure the public's ideological awareness because the survey interviewers were apparently told to use their own judgment in determining what counts as a "correct" answer. The results seem broadly similar to those of leading studies in the 1960s and 1970s, however, which generally found 15% to 30% of respondents conversant with the liberal-conservative dichotomy, usually under standards of evaluation tougher than those of the 1940 survey, including requiring respondents to connect these concepts to specific issues.<sup>101</sup> It is also significant that the absolute number of those able to define liberalism and conservatism correctly was relatively low, despite the fact that the survey was taken after eight years of highly publicized confrontations between liberals and conservatives over fundamental ideological disagreements brought on by the New Deal. If the era of New Deal constitutional change had led to greatly increased ideological awareness, it is difficult to find support for this proposition in the 1940 Gallup survey.

In another Gallup survey, this time in 1945, only 41% of respondents could correctly define the Tennessee Valley Authority (TVA), one of the most prominent and controversial of the New Deal-created government agencies.<sup>102</sup> In this case, the number of respondents able to identify the TVA probably had been inflated by a then-current proposal to create a similar agency for the Missouri River area.<sup>103</sup> Forty-one percent is not an especially high rate, and

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100. PUBLIC OPINION, *supra* note 98, at 584.

101. See NEUMAN, *supra* note 78, at 20-21 (1986).

102. PUBLIC OPINION, *supra* note 98, at 698, question 25.

103. See *id.* questions 26, 29, 30.

one in line with later results from survey questions of similar difficulty administered during "normal" periods.<sup>104</sup>

A 1939 Gallup question revealed a more complex survey result when it asked respondents to rate a number of important political leaders as conservative, liberal, or radical. Unfortunately, this survey also exemplifies some of the difficulties of using survey data from this period.

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104. See DELLI CARPINI & KEETER, *supra* note 8, at 105-34.

**Table 1**  
**1939 Gallup Survey on Ideological Alignment of Leading**  
**Political Figures<sup>105</sup>**

Leader	% Conservative	Liberal	Radical	No Opinion	% "Correct"
Harry Hopkins	3	40	30	27	40(L)
President Roosevelt	1	61	36	2	61(L)
Fiorello LaGuardia	7	54	24	15	54(L)
James Farley	11	55	21	12	55(L)
Thomas Dewey	35	37	6	22	72(if C-L) 35(if C)
Cordell Hull	40	36	2	22	36(L)
John Garner	56	28	3	13	28(if L) 84(if C-L)
Arthur Vandenberg	37	16	2	45	37(C)
Robert Taft	54	8	1	37	54(C)
Herbert Hoover	84	5	3	8	84(C)

The figures in the survey were all highly prominent political leaders. Michigan Senator Arthur Vandenberg, Ohio Senator Robert Taft, and New York Governor Thomas Dewey were all potential Republican presidential contenders for the 1940 election; the former two were highly conservative, while Dewey was arguably more of a moderate, though still to the right of the Roosevelt Administration. Secretary of State Cordell Hull and Postmaster General James Farley were prominent liberal cabinet members and

105. Data is adapted from GALLUP, *supra* note 98, at 164. The survey question asked: "How do you classify each of the following (on card) political leaders—as a conservative, a liberal, or a radical?" *Id.* For a very similar August 1938 Roper survey, see Roper Center, *supra* note 97, Accession Nos. 0175908-0157913.

possible presidential contenders should President Franklin D. Roosevelt have declined to run for a third term.<sup>106</sup> Although Vice President Garner—another possible presidential candidate—by 1939 had clashed publicly with FDR because of his distaste for many New Deal measures, he was surely not nearly as conservative as most Republicans.

Overall, the survey data in Table 1 is hard to interpret because of two complex issues: whether it is acceptable to regard President Roosevelt and other mainline Democrats as radical as well as liberal, and whether it is acceptable to categorize Republican and Democratic moderates (i.e., Dewey and Garner) as both liberal and conservative. If we permit all these possible variations to count as correct, then the survey would indicate a strikingly high rate of voter knowledge, at least with respect to the more prominent figures. If we take a narrower view of correct political labeling, the majority of respondents were unable to place correctly Dewey, Hull, Vandenberg, Taft, and Farley, all of whom were highly prominent politicians and, with the exception of Dewey, had been heavily involved in conflicts over the New Deal.

In sum, the few available knowledge questions from the New Deal era suggest a level of political knowledge similar to that later observed in periods of normal politics. Unfortunately, the small number of questions available prevents us from making any definitive conclusions. Only in conjunction with other evidence presented here do these findings gain significance.

## *2. New Deal-Era Survey Evidence on Constraint*

Several New Deal-era survey questions directly asked respondents whether they supported constitutional change of the sort established by the Roosevelt Administration and its allies. These questions do not measure voter knowledge, but they are relevant to the issue of elite constraint. If political leaders adopted constitutional change despite the fact that the majority of the public was opposed to such change, voters may have lacked sufficient knowl-

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106. In the 1930s and earlier, the position of Postmaster General was much more important than it is today, and generally was held by a prominent politician.

edge to impose their preferences on this issue.<sup>107</sup> From 1936 to 1937, Gallup conducted three surveys asking respondents whether they supported a constitutional amendment to give Congress expanded power to regulate industry and agriculture, the fundamental question at issue in New Deal constitutional change. In a January 1936 survey, Gallup asked: "Would you favor an amendment to the Constitution transferring to the Federal Government the power to regulate agriculture and industry?"<sup>108</sup> Forty-three percent of respondents answered "yes," while a strong majority (57%) said "no."<sup>109</sup> In a similar question asked in December 1936, Gallup asked: "Would you favor an amendment to the Constitution giving Congress the power to regulate agriculture, commerce, industry, and labor?"<sup>110</sup> Once again, a majority (51%) said "no," while 42% answered "yes" and 7% expressed no opinion.<sup>111</sup>

These two surveys are significant in that both were conducted in the year of the 1936 election, which Ackerman views as the time of major popular endorsement of constitutional change creating largely unlimited congressional power to regulate the economy.<sup>112</sup> The December survey was taken only a few weeks after Roosevelt's landslide election victory. Despite this fortuitous—from Ackerman's standpoint—timing, the surveys strongly suggest that a majority of voters actually opposed the constitutional change that the Roosevelt Administration sought to adopt.

The data presented here is obviously not definitive. The surveys do not measure the intensity with which voters held their opinions on this issue. Some of those who said "no" might simply have been expressing a general aversion to tinkering with the Constitution, rather than an opposition to the specific change sought by the New Dealers. Others might have favored granting the federal government the power to regulate industry, but not agriculture or

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107. I am indebted to the analysis of these same survey questions by Barry Cushman. See Cushman, *supra* note 2, at 37-41. Cushman recognizes the significance of these surveys to interpreting public opinion on New Deal constitutional change, but he does not specifically link them to the issue of elite constraint.

108. GALLUP, *supra* note 98, at 12; Roper Center, *supra* note 98, Accession No. 0173555.

109. GALLUP, *supra* note 98, at 12; Roper Center, *supra* note 98, Accession No. 0173555. Apparently this poll did not provide respondents with a "no opinion" option.

110. Roper Center, *supra* note 98, Accession No. 0279185.

111. See *id.*

112. See ACKERMAN, *WE THE PEOPLE 2*, *supra* note 14, at 309-11.



vice versa. Unfortunately, the survey questions did not give respondents the option of endorsing federal regulatory power over one area but not another.<sup>113</sup>

The survey evidence shows, nonetheless, that a majority of the public may well have been opposed to the main constitutional change imposed by the New Deal, and that political leaders were not sufficiently constrained by this majority view to desist from their efforts to establish plenary federal power over economic regulation. The Roosevelt Administration apparently understood that a majority of the public was opposed to broad constitutional change, as evidenced by their decision to avoid mention of constitutional change almost entirely during the 1936 campaign.<sup>114</sup>

This conclusion is reinforced to some degree by the third and final Gallup survey question regarding support for a constitutional amendment to give Congress broad regulatory power over the economy. In March 1937, Gallup asked: "Would you favor an amendment to the Constitution giving Congress greater power to regulate industry and agriculture?"<sup>115</sup> This question differed from the previous two in that it posited a potentially much more modest increase in federal regulatory power. Instead of asking whether respondents would favor giving Congress "the power to regulate" industry and agriculture,<sup>116</sup> which implies complete power over these subjects, this question merely asks respondents whether they would favor granting Congress regulatory power "greater" than that which it currently possesses.<sup>117</sup>

Not surprisingly, this more modest grant of power was supported by a much higher percentage of respondents. Fifty-eight percent of respondents in the March 1937 survey said that they favored the proposed amendment, while 42% said that they were opposed.<sup>118</sup> As Barry Cushman points out, however, it is significant that 42%

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113. This problem is exacerbated in the December 1936 question, which listed four different areas of regulation: agriculture, commerce, industry, and labor. See *supra* note 110 and accompanying text.

114. William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2079-88 (1999).

115. GALLUP, *supra* note 98, at 53-54; Roper Center, *supra* note 98, Accession No. 0173578.

116. See *supra* text accompanying notes 108, 110.

117. See *supra* text accompanying note 115.

118. See GALLUP, *supra* note 98, at 53-54; Roper Center, *supra* note 98, Accession No. 0173578.

may have opposed *any* substantial increase in federal regulatory authority at all.<sup>119</sup> This suggests that much of the opposition to increased federal power expressed in the two 1936 surveys was quite deeply rooted. It also bears noting that the actual constitutional change imposed by the New Deal went far beyond a mere increase in congressional regulatory power, and in fact made that power virtually plenary.<sup>120</sup>

Although the survey evidence analyzed above shows that a majority of voters might have been opposed to giving the federal government broad, unconstrained regulatory power, other surveys show that strong majorities favored more limited constitutional change that allowed for certain specific types of economic regulation without establishing plenary federal regulatory authority. In particular, the vast majority of respondents in a series of Gallup and other surveys conducted from 1936 to 1938 favored constitutional amendments granting Congress the power to regulate and prohibit child labor and to set minimum wages.<sup>121</sup> Support for a constitutional amendment granting Congress the power to "limit, regulate, and prohibit" child labor ranged from 61% to 76% in four identically worded Gallup surveys taken between April 1936 and February 1937.<sup>122</sup> A June 1936 survey showed that 70% of respondents supported "an amendment to the Constitution to regulate minimum wages."<sup>123</sup> Of those supporting the amendment, however, only 56% (39% of the total sample) favored giving this power to the federal government, while 44% preferred to give it to the states.<sup>124</sup>

The child labor and minimum wage surveys are significant in showing broad public support for limited constitutional change. Paradoxically, they also lend additional credence to the claim that most of the public was opposed to giving the federal government broad, unlimited regulatory powers. Clearly, most of the public was not averse to altering the Constitution *per se*; otherwise, the strong majorities in favor of the child labor and minimum wage amendments would be difficult to explain. It therefore seems likely, though not certain, that most of those who expressed opposition to

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119. Cushman, *supra* note 2, at 38-39 (noting that "[e]ven at the height of the constitutional crisis, 42% of those with opinions apparently opposed any increase in federal regulatory power over industry and agriculture").

120. LEUCHTENBURG, *supra* note 90, at 220-36.

121. The survey data on these two issues is described in more detail by Barry Cushman. See Cushman, *supra* note 2, at 39-41.

122. See GALLUP, *supra* note 98, at 23-24, 50; Roper Center, *supra* note 98, Accession Nos. 0173642, 0278912, 0279242, 0173558.

123. GALLUP, *supra* note 98, at 29.

124. *Id.*

constitutional change giving Congress broad regulatory power really were opposed to that particular change itself and were not simply suspicious of changing the Constitution in general.

The survey data on voter attitudes towards constitutional change in the 1930s provide some evidence that political leaders were not as much constrained by public opinion on constitutional change as Ackerman's theory suggests.<sup>125</sup> Although they do not provide definitive proof that the degree of constraint present in the 1930s was no higher than that in periods of normal politics, there is some indirect indication. The question of whether the constitutional order should be altered to give Congress plenary regulatory power over the economy is one of almost immeasurable importance. If political elites could go against majority opinion on such a fundamental and far-reaching question, it is hard to conceive of a situation, whether in normal politics or otherwise, where they would be substantially less constrained than this. We cannot rule out the possibility that political constraint increased modestly during the New Deal, but that the level of constraint was just not great enough to force political leaders to respect majority public opinion on constitutional change. We can, moreover, have greater confidence in rejecting the view that there was a truly massive increase in constraint that enabled public opinion to wrest control of the constitutional change process from political leaders and interest groups.

## *B. Retrospective Evaluations of Trends in Voter Knowledge*

### *1. The 1952 NES Data*

Although I have been unable so far to locate adequate individual-level survey data on New Deal-era voter knowledge, I have developed a methodology for using later National Election Study (NES) surveys to partly offset this gap in the available evidence. The 1952 and 1960 NES surveys both contain voter knowledge questions directly relevant to prominent New Deal issues.<sup>126</sup> I conjecture that if the heightened attention hypothesis is correct, voters who lived through the New Deal era should, controlling for other relevant variables, have higher knowledge levels in the 1952

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125. See *supra* note 50 and accompanying text.

126. The data from the 1952, 1960, and other NES surveys are available from the University of Michigan's Inter-University Consortium for Political and Social Research (ICPSR). See ICPSR Front Page, at <http://www.icpsr.umich.edu> (last visited Nov. 7, 2003). I have recoded the data for the 1952 and 1960 NES surveys in order to make it tractable for purposes of the present research. See *infra* Appendices A, B. The recoded data set is on file with the author and available upon request.

and 1960 surveys than their younger counterparts. Alternatively, it may be that such an effect would appear only in the case of respondents who came of age during the New Deal period. These respondents would be part of the cohort of new voters that political scientist Kristi Andersen argues were the main agents of realignment to the Democratic Party during the New Deal.<sup>127</sup>

In effect, the NES data allow us to compare two different potential "learning experiences" that might increase political knowledge: periods of constitutional change and periods of normal politics. If the Ackerman hypothesis is correct, we should expect that those who had the benefit of both experiences should have learned at least somewhat more New Deal-relevant political knowledge than those who only had the opportunity to learn from normal politics. If living through the New Deal era of constitutional change does not increase one's chances of learning even very basic knowledge, the rational ignorance hypothesis becomes much more compelling than its rival.

I have tested both the "of age" and cohort hypotheses using evidence from the 1952 and 1960 NES surveys. This Article presents only the 1952 evidence, which is greatly superior in quality to the 1960 survey for my purposes.<sup>128</sup> However, the 1960 results do support my conclusion and are therefore included in Appendix B.

Using data from the 1952 NES survey, I have been able to specify both the standard Ackerman model and the Andersen cohort alternative. The dependent variable is the respondent's cumulative score on seven New Deal-related knowledge items.

A brief review of the content of the seven items and the reasons for including them is helpful.<sup>129</sup> The first question asks whether the Democratic Party or the Republican Party supports a large role for the federal government in various areas of social welfare policy. This question obviously relates to the fundamental partisan issue

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127. See KRISTI ANDERSEN, *THE CREATION OF A DEMOCRATIC MAJORITY, 1928-1936*, at 39-72 (1979). For another influential account of cohort theory that emphasizes the importance of "formative" experiences early in a voter's adult life as permanent shapers of political orientation, see ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* 29-31 (1986).

128. The 1952 survey is superior for three major reasons: First, it was closer in time to the actual New Deal. Second, it had seven New Deal-relevant knowledge questions, while the 1960 survey had only five. Third, and most important, the 1960 NES survey is missing a great deal more data than the 1952 NES survey, which leads to much greater skepticism regarding the validity of the data. In the 1952 NES survey, 1141 of 1634 respondents had complete data for all the variables relevant to the study. In the 1960 NES survey, this was true of only 150 to 600 (depending on how many variables were included) out of 1181 respondents. I have, therefore, chosen to focus my analysis on the more reliable 1952 NES survey, especially since the 1960 results support the same conclusions.

129. The complete text of all relevant knowledge questions used is recorded in Appendix A.

raised by the New Deal and the most important divergence between the two major political parties at the time. The remaining six questions asked respondents to identify the likely partisan leanings in the upcoming 1952 election of six groups critical to the New Deal political realignment: members of the working class, union members, "big business," blacks, Catholics, and Jews. With the exception of "big business," all of these groups became staunch supporters of the Democrats during the New Deal era, as a result, historians believe, of President Roosevelt's support of an economically activist federal government.<sup>130</sup> By contrast, "big business" generally supported the Republican Party, both during the New Deal and later.<sup>131</sup> Thus, an individual even moderately well-informed about the New Deal and the resulting alignment of political forces created by it should have been able to answer these seven questions correctly with comparative ease. The questions, therefore, constitute a useful test of basic New Deal-related political knowledge.

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130. See, e.g., ANDERSEN, *supra* note 127, at 9-10; SUNDQUIST, *supra* note 36, at 214-23. The majority of Catholics had been Democrats even before the 1930s, but it is generally believed that the New Deal strengthened their Democratic leanings, and in any event scholars agree that northern Catholic voters were a key component of the New Deal coalition. See, e.g., SUNDQUIST, *supra* note 36, at 215-16.

131. Cf. SUNDQUIST, *supra* note 36, at 224-26 (explaining the Republican countermovement of non-New Deal supporters).

**Table 2**  
**Political Knowledge in the 1952 NES Survey**  
**"Of Age" During the New Deal Model**

Variable Name	Unstandardized Beta	Std. Error	Standardized Beta	T-Stat	Significance
(Constant)	.372	.240		1.547	.122
TV	.295	.059	.151	5.031	.000
Radio	5.644E-02	.062	.026	.908	.364
Newspaper	.264	.076	.116	3.464	.001
Magazines	3.034E-02	.074	.013	.411	.681
Civic Duty	4.049E-02	.095	.012	.427	.670
Race (black=1)	.527	.242	.091	2.180	.029
Sex (female=1)	-.229	.092	-.066	-2.478	.013
Interest in Campaigns (3 pt. scale)	.291	.067	.137	4.317	.000
Family Income (8 pt. scale)	.105	.031	.111	3.395	.001
Region (South=1)	-.456	.128	-.110	-3.564	.000
Southern Black (yes=1)	-.751	.335	-.100	-2.243	.025
Political Acts Beyond Voting (5 pt. scale)	.214	.060	.102	3.584	.000
Of Age During New Deal (yes=1)	7.024E-02	.125	.015	.560	.576
Education (7 pt. scale)	4.878E-03	.036	.005	.134	.893

Dependent Variable: New Deal-Relevant Knowledge. n=1141  $r^2=.247$

**Table 3**  
**"Of Age" During the New Deal Model with**  
**Education/Media Usage Interaction Variable**

Variable Name	Unstandardized Beta	Std. Error	Standardized Beta	T-Stat	Significance
(Constant)	1.298	.217		5.970	.000
Civic Duty	5.879E-02	.096	.017	.614	.539
Race (black=1)	.582	.244	.101	2.388	.017
Sex (female=1)	-.248	.093	-.071	-2.663	.008
Interest in Campaigns (3 pt. scale)	.375	.066	.177	5.712	.000
Family Income (8 pt. scale)	.134	.030	.142	4.406	.000
Region (South=1)	-.617	.125	-.149	-4.938	.000
Southern Black (yes=1)	-.925	.335	-.124	-2.757	.006
Political Acts Beyond Voting (5 pt. scale)	.233	.061	.111	3.832	.000
Education (7 pt. scale)	-7.491E-02	.054	-.071	-1.381	.167
Of Age During New Deal (yes=1)	.105	.126	.023	.834	.404
Education, Media Usage Interaction	.243	.087	.149	2.800	.005

Dependent Variable: New Deal-Relevant Knowledge. n=1141  $r^2=.227$

**Table 4**  
**Political Knowledge in the 1952 NES Survey**  
**New Deal Cohort Model**

Variable Name	Unstandardized Beta	Std. Error	Standardized Beta	T-Stat	Significance
(Constant)	.425	.224		1.897	.058
TV	.312	.059	.160	5.278	.000
Radio	6.859E-02	.062	.032	1.097	.273
Newspaper	.270	.076	.118	3.538	.000
Magazines	1.976E-02	.074	.008	.267	.790
Civic Duty	4.074E-02	.095	.012	.428	.669
Race (black=1)	.490	.242	.085	2.028	.043
Sex (female=1)	-.235	.092	-.068	-2.546	.011
Interest in Campaigns (3 pt. scale)	.297	.068	.140	4.386	.000
Family Income (8 pt. scale)	0.09	.031	.101	3.055	.002
Region (South=1)	-.446	.129	-.108	-3.465	.001
Southern Black (yes =1)	-.736	.335	-.098	-2.193	.028
Political Acts Beyond Voting (5 pt. scale)	.214	.060	.101	3.566	.000
Education (7 pt. scale)	1.084E-03	.036	.001	.030	.976
New Deal Cohort (yes =1)	4.226E-02	.107	.011	.396	.692

Dependent Variable: New Deal-Relevant Political Knowledge. n=1141  
 $r^2=.247$



**Table 5**  
**New Deal Cohort Model with Education/Media Usage**  
**Interaction Variable**

Variable Name	Unstandardized Beta	Std. Error	Standardized Beta	T-Stat	Significance
(Constant)	1.437	.189		7.603	.000
Civic Duty	6.172E-02	.096	.018	.642	.521
Race (black=1)	.548	.244	.095	2.248	.025
Sex (female=1)	-.252	.093	-.073	-2.705	.007
Interest in Campaigns (3 pt. scale)	.381	.066	.180	5.770	.000
Family Income (8 pt. scale)	.125	.031	.133	4.104	.000
Region (South=1)	-.617	.126	-.149	-4.905	.000
Southern Black (yes=1)	-.918	.337	-.123	-2.727	.006
Political Acts Beyond Voting (5 pt. scale)	.230	.061	.109	3.757	.000
Education (7 pt. scale)	-.9.237E-02	.054	-.088	-1.717	.086
New Deal Cohort (yes=1)	5.243E-02	.108	.013	.486	.627
Education, Media Usage Interaction	.266	.087	.164	3.064	.002

Dependent Variable: New Deal-Relevant Knowledge. n=1128  $r^2=.225$

**Table 6**  
**New Deal-Relevant Knowledge**  
**1952 NES Survey Respondents**  
**Frequency Distribution**

No. of Correct Answers	Frequency	Percent	Cumulative Percent
0	254	15.5	15.5
1	218	13.3	28.9
2	300	18.4	47.2
3	338	20.7	67.9
4	305	18.7	86.6
5	152	9.3	95.9
6	54	3.3	99.2
7	13	.8	100.0
Total	1634	100.0	

Furthermore, different types of political knowledge are highly intercorrelated.<sup>132</sup> Thus, even if these particular seven questions have little significance in themselves, they also serve as proxies for other types of political knowledge. A respondent able to answer these items correctly also would be more likely to possess other political knowledge than one who could not.

Using ordinary least squares (OLS) regression, I have specified two models: the standard heightened attention model and a model based on the Andersen cohort theory. In both cases, the cumulative number of correct answers to the seven questions is the dependent variable.

The first specification included every respondent who had turned eighteen by 1940, the last year in which a national election primarily focused on New Deal-related issues, while the second counted all respondents who had turned eighteen between 1933 and 1940.<sup>133</sup> I also have introduced gender, race, region, income, education, interest in politics, participation in politics beyond voting,<sup>134</sup> and use of media such as radio, television, newspapers, and magazines as control variables.<sup>135</sup> In both models, having lived

132. See, e.g., DELLI CARPINI & KEETER, *supra* note 8, at 139-51.

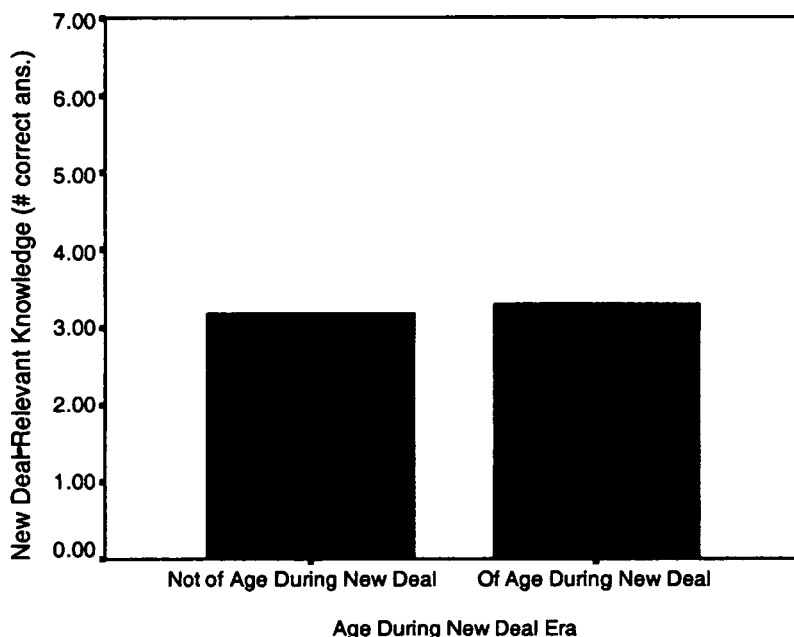
133. Switching the minimum age to twenty-one, which at the time was the minimum voting age in most states, does not affect the results in any statistically significant way. I have chosen to analyze the data based on an eighteen-year-old voting age because most children of the New Deal era had assumed adult responsibilities by this age.

134. Participation "beyond" voting is simply any political activity that the respondent has engaged in other than the act of voting. Examples include volunteering for a campaign or making a financial contribution to a candidate. In the regressions used here, this variable is coded from zero to five depending on the total number of acts reported by the respondent.

135. These media variables are widely accepted as important determinants of political

through the New Deal (or, alternatively, coming of age during that period) had no statistically significant impact on respondents' knowledge. For ease of exposition, a graphic representation of these results is provided in Figures 1 and 2.

**Figure 1**  
**Predicted New Deal-Relevant Knowledge Level for**  
**Average Respondent in 1952 NES Survey: "Of Age" During**  
**the New Deal Model**



Independent variables: education, family income, civic duty, race, gender, interest in campaigns, region, political acts beyond voting, education-media usage interaction variable. Continuous independent variables set at their mean; dichotomous variables set at mode.<sup>136</sup> Dependent variable measured by number of correct answers on seven-point scale.

$n=1141$ ;  $r^2=.227$

Figure 1 demonstrates that a 1952 NES respondent who was not an adult during the New Deal era and was average in terms of

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knowledge in the literature. For detailed discussion, see, for example, DELLI CARPINI & KEETER, *supra* note 8, at 209-10.

136. It should be noted that the modes for the dichotomous variables were as follows:

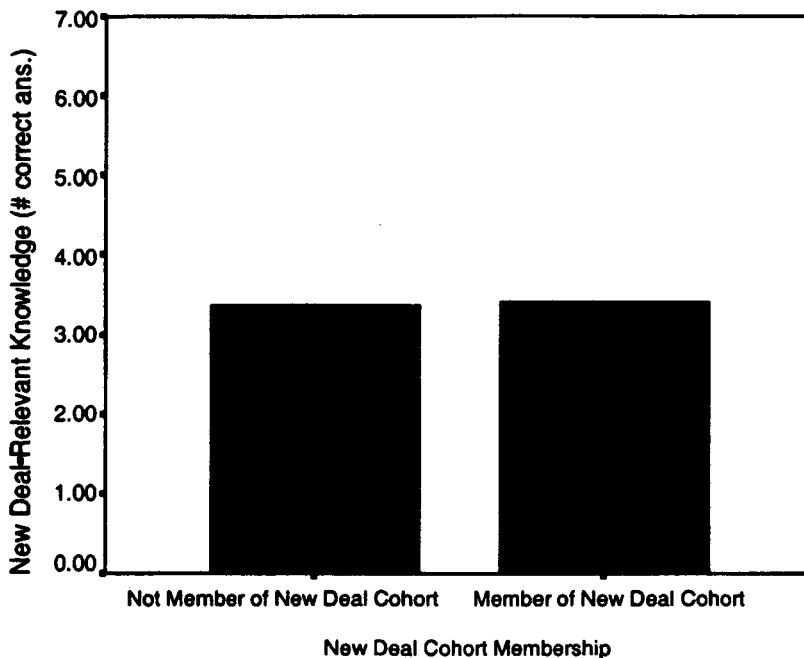
Race: white

Sex: female

Region: non-southern

income, education, race, media usage, and other relevant independent variables had virtually the same level of New Deal-relevant political knowledge as a similar respondent who was of adult age in the 1930s.<sup>137</sup>

**Figure 2**  
**Predicted New Deal-Relevant Knowledge Level for**  
**Average Respondent in 1952 NES Survey:**  
**New Deal Cohort Model**



Independent variables: education, family income, civic duty, race, gender, interest in campaigns, region, political acts beyond voting, education-media usage interaction variable. Continuous independent variables set at their mean; dichotomous variables (other than cohort) set at mode.<sup>138</sup>

Dependent variable measured by number of correct answers on seven-point scale.

$n=1128$ ;  $r^2=.225$

137. The exact predicted number of correct answers for an average respondent who was of age during the New Deal was 3.28 out of 7. The predicted number for an otherwise identical respondent who was not of age during that time was 3.18 out of 7. The difference between these two figures is not statistically significant and thus does not represent any confirmation of the heightened attention hypothesis.

138. The modes for the dichotomous variables are, of course, exactly the same as those for Figure 1. See *supra* note 136.

Figure 2 shows that the same holds true for the New Deal cohort model. A statistically average respondent who was not a member of the New Deal cohort had the same level of New Deal-relevant political knowledge as one who was.<sup>139</sup>

These results are striking for several reasons. First, I have deliberately biased the model in favor of the heightened attention hypothesis by not including age as a control variable for fear that it might dilute some of the effects of the New Deal variable, because age itself has been shown to be an independent cause of increased political knowledge.<sup>140</sup> Second, the questions all relate to very basic political knowledge closely linked to New Deal political conflicts. This should maximize the likelihood of detecting any New Deal-related increases in knowledge that might exist.

To ensure that the results are not the product of factors peculiar to any one specific knowledge question, I ran logistic regressions using each of the seven knowledge questions as an isolated dependent variable in its own right.<sup>141</sup> All fourteen regressions (seven for the "of age" model and seven for the cohort model) failed to show statistical significance for the "of age" and New Deal cohort variables respectively.<sup>142</sup> The conclusion that the New Deal experience did not lead to any substantial increase in voter knowledge is therefore highly robust.

Confidence in the validity of the results is also strengthened by the control variables all having generally the expected impact. Interest in politics and higher incomes thus correlate with greatly increased political knowledge. By contrast, women and African Americans had considerably lower political knowledge levels than white men, a result consistent with research on more recent data sets.<sup>143</sup> Obviously, these gender and racial differences in political

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139. The exact numbers in this case are 3.40 predicted correct answers out of 7 for a member of the cohort and 3.35 for a nonmember. As with the "of age" model, the difference between the two figures is not statistically significant.

140. See DELLI CARPINI & KEETER, *supra* note 8, at 180-85 (noting that age has "at least modest correlations with what people know about politics"). Including age as an additional control variable, not shown here, did not affect the outcome.

141. I used logistic regression ("logit") because the dependent variables in these models are dichotomous. Using logit or probit (a similar methodology) is the standard econometric procedure in such cases.

142. I have not reported the results of these fourteen regressions in detail for reasons of space. I would be happy to provide the results to interested readers, however.

143. In the present analysis I have created a separate variable for southern blacks on the hypothesis that in the 1950s Jim Crow education and social mores decreased political knowledge among southern blacks. This hypothesis turns out to be correct, but it has the interesting consequence of creating a result in which northern blacks (the remaining members of the "black" category in the survey) are shown to have slightly greater political knowledge than northern whites. Too much significance should not be attached to this latter result, as there were only thirty-eight northern blacks in the sample.

knowledge were almost certainly due to a combination of discrimination and other social factors rather than to intrinsic differences in ability to comprehend basic political information.<sup>144</sup> Political activity beyond voting and media usage also considerably increase knowledge.

The one control variable with an unexpected result is education, whose effect upon political knowledge seems to be statistically insignificant. Education, however, does have a significant effect as an interactive variable with media usage, as shown in Tables 3 and 5. I tentatively conjecture that this results from the fact that following politics through the media, especially recently introduced media such as television, was a more elite activity in 1952 than it is today, so that the media usage variables absorb much of the impact of education when the two are included together. An additional factor may be that, given the much more limited availability of information in 1952 than in today's more extensive and diverse media environment, leveraging one's education for the purpose of acquiring political knowledge required considerably more active effort to follow politics through the media than was the case in later periods.

## *2. Potential Objections*

### *a. The Problem of "Forgetting"*

There are several possible objections to the conclusions reached based on the 1952 NES survey. First, and most obvious, the 1952 NES survey was conducted twelve years after the last New Deal-linked national election and seven years after the death of Franklin D. Roosevelt. It is theoretically possible that those respondents who increased their political knowledge during the New Deal had forgotten what they had learned by 1952.

This consideration, however, probably does not invalidate the results. First, in order for the objection to be sound, nearly *all* the respondents who had increased their political knowledge during the New Deal would have had to forget.<sup>145</sup> This scarcely seems plausible. Second, the knowledge in question was very basic and related to matters that continued to be the focus of political controversy in

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144. For more data and analysis on group differences in political knowledge, see Somin, *supra* note 10.

145. Or, more technically, enough respondents would have had to forget in order to ensure that the remainder was small enough to prevent a statistically significant result. With a large sample of over 1100 respondents, however, even a relatively small percentage of learners who had retained the information would have led to a statistically significant coefficient for the variable.

the post-World War II period.<sup>146</sup> Thus, anyone who had learned this information in the 1930s would have continued to find it useful in interpreting postwar politics, a circumstance that would limit the tendency to forget.

Finally, two studies suggest that forgetting over time is not as serious a problem as we might imagine. In a study of party affiliation during the New Deal, Kristi Andersen found that the percentage of respondents surveyed in 1968 and 1972 who recalled being affiliated with the Democratic Party or Republican Party in the late 1930s is almost exactly identical to percentages reported in surveys undertaken in 1937.<sup>147</sup> Although recalling one's own party affiliation may be easier than recalling specific political information related to external events, a countervailing factor is that Andersen's respondents were interviewed more than thirty years after the fact, though the 1952 NES survey was conducted only twelve years after the close of the New Deal era. A more recent study by M. Kent Jennings finds that the vast majority of respondents who knew a given political fact in 1965 still remembered it in 1982, seventeen years later.<sup>148</sup> The rates of successful retention on the five knowledge items tested in Jennings' study ranged from 54% to 97%, with an average retention rate of 76%.<sup>149</sup> If Jennings' findings are reasonably close to an accurate representation of political knowledge retention more generally, there is every reason to believe that a substantial proportion of those who picked up additional political knowledge during the New Deal era would retain it for a long time to come. Notably, only twelve years passed between the last New Deal election and 1952, as compared to seventeen years in Jennings' study. Additionally, the items in the 1952 NES survey were more useful to understanding contemporary politics than most of those tested by Jennings.<sup>150</sup>

### *b. The Possibility of "Catching Up"*

One could also make the opposite criticism of my theory from that of the "forgetting" hypothesis: instead of the New Deal generation "forgetting," it is conceivable that later generations "caught up" with the New Deal veterans over time. This is not impossible; but,

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146. See *infra* Appendix A.

147. ANDERSEN, *supra* note 126, at 59-60.

148. M. Kent Jennings, *Political Knowledge Over Time and Across Generations*, 60 PUB. OPINION Q. 228, 243-45 (1996).

149. The five items in question had retention rates of 54%, 60%, 82%, 85%, and 97% after seventeen years. See *id.* at 244, tbl.2.

150. Several of the items tested by Jennings were purely historical information or other knowledge not directly relevant to contemporary politics. See Jennings, *supra* note 148.

if true, it serves to refute rather than support the heightened attention hypothesis. It implies that during periods of ordinary politics, such as the 1945-1952 period, voters learn no less than during periods of constitutional change. Furthermore, if Ackerman and those who advance related theories are correct, we should at least expect those voters who had the benefit of *two* opportunities to learn (the New Deal era and the postwar period) to acquire more knowledge on average than those who had just one (only the postwar period).

A related potential objection is concern over the fact that the six knowledge questions regarding the political alignment of various groups asked respondents to predict their alignments in the then-upcoming 1952 election rather than during the New Deal era itself. However, the five pro-Democratic groups referenced in the question—African Americans, the working class, union members, Jews, and Catholics—disproportionately supported the Democrats throughout the post-New Deal era, including in 1952. The one pro-Republican group, “big business,” certainly gave the bulk of its support to the Republicans throughout this period, 1952 included. The key point to remember is that the political alignments of all six groups were created during the New Deal era,<sup>151</sup> and that paying attention to the events of that era would provide a respondent with knowledge that enabled him or her to predict accurately those groups’ later allegiances, which had not changed significantly as of 1952. A second relevant consideration is that the purpose of the 1952 evidence is not primarily to analyze absolute knowledge levels but to determine the *relative* knowledge impact of the New Deal era. On this score, there can be little doubt that the acquisition of even a basic understanding of the events of the New Deal would have helped a respondent to predict accurately political alignments in 1952.

### *c. Effects Hidden in Residuals*

Although the “of age” and New Deal cohort variables failed to achieve statistical significance in a wide range of different specifications of the model, defenders of the heightened attention hypothesis could try to salvage the theory by arguing that the effects of these variables are hidden in the residuals. This line of argument would

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151. A partial exception were the Catholics, a majority of whom supported the Democrats even before the New Deal. Catholic voters, however, were a crucial part of the New Deal coalition and their support for the Democratic Party increased during the New Deal era. For these reasons, I have decided to include the question about Catholics in the analysis. Excluding it does not significantly affect the regression results.



be unpersuasive for two major reasons. First and foremost, the residuals in question are extremely small, consisting of approximately 0.1 correct answers on the seven-point knowledge scale.<sup>152</sup> Even if we assume that the full value of the residuals combined with the full value of the statistically insignificant coefficient in reality represents a true knowledge-increasing effect of the New Deal era, it would still constitute an increase of only about one-tenth to one-seventh of a correct answer on the seven-point scale.

By contrast, moving from the lowest to the highest level on the three-point interest in political campaigns scale increases a respondent's knowledge level by almost four-fifths of a correct answer—a very large difference; moving from the lowest to the highest income group (on an eight-point scale) increases knowledge by close to a full point on the seven-point knowledge scale.<sup>153</sup> Such a tiny effect, even if it *were* statistically significant, would fall far short of the vast increase in knowledge predicted by Ackerman and other heightened attention advocates. At most, it would indicate that the New Deal led to a tiny increase in political knowledge that still left the vast bulk of the population shockingly ignorant of what we would consider to be very basic knowledge.

The second reason that the argument from residuals should be rejected is that allowing the heightened attention hypothesis to take credit for residuals would be poor methodology. In virtually all social science data, there will be some margin of error and therefore a residual greater than zero. If a theory asserting the importance of a given variable is considered valid unless disproven by a statistical showing of insignificance that has a standard error of zero, hardly any theory could ever be rejected. Such an approach is especially defective in cases like the present one, where the claimed effect is asserted to be large.

#### *d. Separating Voters and Nonvoters*

To make my findings more complete, it would be useful to be able to separate voters from nonvoters in order to tell if the conclusion of no increase in knowledge holds true for those who actually voted in New Deal-era elections. Unfortunately, assessing political knowledge among voters as a discrete group is difficult or impossible because numerous survey respondents who do not vote routinely tell pollsters that they did.<sup>154</sup> Those citizens most likely to report

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152. See *supra* Tables 2-5.

153. See *supra* Tables 2-5.

154. This is a longstanding and well-established finding in social science research. See, e.g., Robert P. Abelson et al., *Attempts to Improve the Accuracy of Self-Reports of Voting*, in

voting inaccurately are those with the highest levels of income, education, and interest in politics—that is, the same people who are most likely to have high levels of political knowledge.<sup>155</sup> Any attempt, therefore, to disaggregate the 1952 NES data, or other similar survey results, by self-reported voting rates would lead to very large overestimations of the relative knowledge of voters; most of the more knowledgeable nonvoters would be falsely coded as having voted.<sup>156</sup>

Attempts to separate voters from nonvoters in our case are further complicated by the fact that we seek to find people who voted in *past* elections rather than the current one. We cannot, thus, place much credence in the 1952 NES questions on self-reported voting in the 1952 election itself. The 1952 NES does contain, however, a survey question which to some degree addresses the issue of voting in past presidential elections. The question asked respondents: “In the elections for president since you have been old enough to vote, would you say that you have voted in all of them, most of them, some of them, or none of them?”<sup>157</sup>

In order to test whether living through the New Deal era or being a member of the New Deal cohort had an impact on the political knowledge of self-reported voters, I reran both the “of age” and New Deal cohort models using only those respondents who claimed to have voted in at least “some” past presidential elections. With this specification, the New Deal cohort variable continued to produce statistically insignificant results.<sup>158</sup>

In contrast, the “of age” model produced results that at first glance provide support for the heightened attention hypothesis. When we limit the data set to only those respondents who claimed to have voted in at least some past presidential elections, there is a statistically significant increase in New Deal-relevant knowledge of a full point on the seven point scale (1.06 points in all).<sup>159</sup>

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QUESTIONS ABOUT QUESTIONS 138, 138 (Judith M. Tanur ed., 1992); Aage R. Clausen, *Response Validity: Vote Report*, 32 PUB. OPINION Q. 588 (1968). One recent study notes that “overreporting of voting behavior” is “[o]ne of the most frequently observed survey measurement errors.” Robert F. Belli et al., *Reducing Vote Overreporting in Surveys: Social Desirability, Memory Failure, and Source Monitoring*, 63 PUB. OPINION Q. 90, 90 (1999).

155. See Brian D. Silver et al., *Who Overreports Voting?*, 80 AM. POL. SCI. REV. 613, 613-14, 620-22 (1986) (finding that these factors are all strongly correlated with overreporting of voting).

156. Studies show that about 25% to 30% of all nonvoters claim that they voted on surveys. *Id.* at 613.

157. ANGUS CAMPBELL ET AL., SURVEY RESEARCH CENTER 1952 AMERICAN NATIONAL ELECTION STUDY 43 (rev. ICPR ed. 1975).

158. Exact regression results are on file with the author.

159. Complete results for this regression are on file with the author.

Unfortunately, this result may be due entirely not to the significance of voting itself, but to the correlation between lying about past voting and variables highly correlated with political knowledge.<sup>160</sup> Support for this explanation is provided by the fact that there is no statistically significant New Deal-related spike in knowledge among those who claimed that they voted in "all" or "most" past presidential elections.<sup>161</sup> The statistically significant effect seems to be confined to those who said they voted in "some" past presidential elections. Table 7 summarizes these results in a more accessible form:

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160. *See supra* notes 154-56 and accompanying text.

161. Exact regression results are on file with the author.

**Table 7:**  
**Statistical Significance of Being of Age During the New Deal Among Self-Reported Voters**

Frequency of Self-Reported Voting in Past Presidential Elections		Statistically Significant Increase in New Deal Relevant Knowledge Among Those "Of Age" During New Deal Era
	Claimed to have voted in "All" past elections, "Most," or "Some"	Yes
	"All" or "Most" only	No
	"Some" only	Yes

The fact that the knowledge-increasing impact of the New Deal seems confined to those self-reported nonvoters who claimed to have voted in only "some" past presidential elections suggests that the underlying dynamic at work is lying about having voted rather than voting itself. Those highly knowledgeable nonvoters who falsely claimed to have voted in the past presumably would be more likely to lie by saying that they had voted in only "some" past presidential elections rather than making the more extreme deception of falsely claiming to have voted in "most" or "all" past elections. The concentration of false positives in the "some" category seems to be the only available explanation for the fact that the knowledge-increasing effects of the New Deal are concentrated in this small subset rather than ranging equally over all those who reported voting in past elections. Those respondents who claimed to have voted in only "some" past presidential elections constituted just 179 of the 1134 respondents for whom the 1952 NES survey had complete data.<sup>162</sup> Yet the positive knowledge impact on them of living through the New Deal was so strong as to create a statistically significant impact among all those who claimed to have voted in the past when the data for all three possible responses to the past voting question are mixed together.

The best conclusion that can be drawn from my attempt to separate voters from nonvoters is that being of age during the New

162. See CAMPBELL ET AL., *supra* note 157, at 43-44.

Deal caused a substantial increase in political knowledge among a small subset of highly knowledgeable marginal voters (those who truthfully claimed to have voted in only "some" past presidential elections) and among those nonvoters most likely to lie about having voted. It seems to have had no effect, however, on knowledge levels among the vast majority of both voters and nonvoters who do not fall in these categories.

*e. Are the NES Knowledge Questions Too Basic?*

A final possible objection to my methodology is that the knowledge tapped by the questions is too basic. Perhaps constitutional change only increases more sophisticated types of political knowledge. Moreover, the basic knowledge identified in the NES survey may be of the type that most people acquire even in ordinary times. Yet more than two-thirds (67.9%) of the 1952 NES survey respondents knew the correct answers to only three or fewer of the seven questions.<sup>163</sup> Because basic political knowledge is fundamental to the understanding of more complex knowledge,<sup>164</sup> and the two are highly correlated,<sup>165</sup> one would expect the incidence of basic knowledge to increase greatly during a period of constitutional change if the heightened attention hypothesis is sound.

The present analysis is the first direct analysis of 1950s voter knowledge of *any* kind. Previous studies of trends in political knowledge that incorporated the 1950s and early 1960s used indirect measures of "sophistication" rather than knowledge, and ignored those NES survey questions which tapped knowledge directly.<sup>166</sup> The approach proposed here provides us with both a new way of considering the impact of the New Deal on voter knowledge and a possible model for other voter knowledge research focused on this period.

Overall, the NES data is an important supplement to the very limited evidence available from contemporary 1930s surveys. Unlike the latter, it has individual-level data and allows us to compare the political knowledge of the New Deal generation to that of its successors on the same survey items. This evidence strongly suggests that there was no significant increase in voter knowledge as a result of the constitutional upheavals of the New Deal.

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163. See *supra* Table 6.

164. See DELLI CARPINI & KEETER, *supra* note 8, at 63-65.

165. See *id.* at 138-47.

166. For notable studies that followed this methodology, see CAMPBELL ET AL., *supra* note 78; NEUMAN, *supra* note 78; NORMAN H. NIE ET AL., *THE CHANGING AMERICAN VOTER* (1976); SMITH, *supra* note 29.

## V. POLITICAL ELITES, VOTER KNOWLEDGE, AND NEW DEAL CONSTITUTIONAL CHANGE: THREE CASE STUDIES

In contrast with the relative scarcity of studies of New Deal voter behavior, there is a vast literature on New Deal-era political elites.<sup>167</sup> What these studies have not focused on, however, is the elites' view of the electorate, and their perceptions of how voters constrained their policy options. This is what I propose to do here, specifically in the area of federal economic policy.

Although the concept of "political elites" is not easily defined, for present purposes I would like to focus on leading figures in the Roosevelt Administration and Congress during the New Deal era. These officials had the strongest incentives to gauge the electorate accurately since their own chances of reelection depended on it, and they also had the greatest control over constitutional change. Obviously, a truly complete analysis also should include interest group leaders, state-level politicians, and others. National political leaders, however, are the most appropriate focus for a study that must necessarily be limited in scope.

### A. Case Selection Criteria

To analyze elite perceptions of voter knowledge and ignorance, I examined three key policies integrally linked to New Deal constitutional change: the National Industrial Recovery Act (NIRA), the National Labor Relations Act (NLRA), and President Roosevelt's plan to "pack" the Supreme Court. In selecting these three cases, I have been guided by several criteria. First, the cases were directly connected to constitutional change in important and relatively obvious ways. They posed direct and fundamental challenges to the preexisting constitutional order. If such were not the case, they would not be a fair test of the heightened attention hypothesis. Second, the policies chosen had a broad effect. An otherwise minor policy that challenged the existing constitutional system is, of course, more likely to have been ignored by voters, and so poses a weaker test of the theory. Moreover, a minor policy's very insignificance makes it a less serious challenge to the constitutional system

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167. See, for example, BRINKLEY, *supra* note 99; ALAN BRINKLEY, *LIBERALISM AND ITS DISCONTENTS* (1998); LEUCHTENBURG, *supra* note 90; ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* (2d prtg. 1959) [hereinafter SCHLESINGER, *COMING OF THE NEW DEAL*]; ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* (1960), for a small sampling of these studies, which are far too numerous to list. See KENNEDY, *supra* note 89, for the most thorough recent account.

than that posed by a policy with more wide-ranging effects. Finally, I chose only policies relevant to the constitutional powers of the federal government, even though New Deal constitutional change also expanded the economic powers of the states. This criterion was introduced for two reasons. First, the heightened attention hypothesis is primarily a theory about national-level constitutional change because the federal government is much more powerful and visible than that of the states. Second, federal government policies are generally more uniform in their impact than those of states, since state policies obviously vary, which is a factor that would complicate research. Because of these considerations, the heightened attention hypothesis and its alternatives are more readily tested in the federal setting.

To obtain needed evidence on elite perceptions of the public from the three cases, several questions must be answered.

- (1) *Did the elites see the policy as one that would come under unusually tight scrutiny from the general public, as the heightened attention hypothesis would predict? Or did they, by contrast, perceive the New Deal crisis as a period when they were under substantially looser than normal constraints from public opinion, as predicted by the rational ignorance theory?*

This, of course, is the key point of contention between the heightened attention hypothesis and opposing theories. We know that New Deal-era politicians, though lacking the full panoply of modern public opinion polling techniques, closely followed public opinion in other ways, and began to make use of survey research.<sup>168</sup> We also know that the Roosevelt Administration was perhaps the most politically successful in American history.<sup>169</sup> Its leaders' perceptions on these questions are important, in and of themselves, as an indicator of the dynamics of constitutional change, and also provide an additional window on public attitudes.

- (2) *If so, did the elites perceive this scrutiny to be a result of the policy's constitutional implications?*

In theory, close public scrutiny may have been merely the result of the policy's immediate, narrowly defined impact, even if voters missed its broader, long-term constitutional significance. If political

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168. See SUSAN HERBST, *NUMBERED VOICES: HOW OPINION POLLING HAS SHAPED AMERICAN POLITICS* 89-92 (1993).

169. See *supra* notes 87-91 and accompanying text.

elites made a distinction between these two considerations and saw one as more important than the other, it would have important implications for the Ackerman view that constitutional change is special in its dynamics.

- (3) *Did elites believe that they could engage in major deceptions of the public as to the policy's true nature and import, especially its constitutional dimensions?*

Obviously, an elite view that the public is vulnerable to deception is a strong indicator that elites *do not* consider the public to be well informed. It is important, however, to define narrowly "deception." Obviously, some shading or oversimplification of the truth is inherent in nearly all political rhetoric. The kind of deception that is significant here is a conscious and systematic attempt to misrepresent a policy in a major way.

- (4) *Since actions speak louder than words, to what extent did the elites tailor their policy decisions and political strategies as a result of their answers to questions 1 and 2?*

The fact that elites actually acted on their perceptions is, of course, a strong indicator of the elites' confidence in their correctness.

### *B. The National Industrial Recovery Act*

As the centerpiece of Roosevelt's first term economic policy, the National Industrial Recovery Act (NIRA)<sup>170</sup> was arguably the most ambitious effort at governmental economic planning in American history.<sup>171</sup> Enacted in early 1933, the NIRA provided for control of prices and production by industry councils acting as cartels backed by the federal government.<sup>172</sup> The Act further required affected firms to abide by minimum wage and maximum hours regulations that varied by industry.<sup>173</sup> It also enacted a large-scale program of public works.<sup>174</sup> All told, the NIRA covered "almost the entire

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170. National Industrial Recovery Act, Ch. 90, 48 Stat. 195 (1933), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

171. See DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 92 (1988).

172. For a detailed description of the NIRA's provisions, see *id.* at 33-80; MICHAEL M. WEINSTEIN, RECOVERY AND REDISTRIBUTION UNDER THE NIRA 1-31 (1980).

173. BRAND, *supra* note 171, at 11.

174. See § 201-07, 48 Stat. at 200-05.



private, nonagricultural economy."<sup>175</sup> This policy was radically at odds with existing constitutional doctrine, which strictly limited the economic powers of the federal government to the regulation of "interstate commerce," narrowly defined to include only the actual movement and exchange of goods across state lines.<sup>176</sup> In 1935, the Supreme Court declared the NIRA unconstitutional in a unanimous decision, *A.L.A. Schechter Poultry Corp. v. United States*.<sup>177</sup> Nonetheless, the NIRA served as a model for later, more narrowly based New Deal policies,<sup>178</sup> and the Supreme Court eventually conceded federal government regulatory powers of roughly the same breadth as those unsuccessfully claimed by the administration in the *Schechter* case.<sup>179</sup>

In addition to its importance as an element of New Deal constitutional change, the NIRA has considerable intrinsic interest as a massive public policy disaster. Its attempts at centrally planned price controls and production limits apparently caused a massive six to eleven percent decline in the United States' real Gross National Product (GNP) in an already deeply depressed economy.<sup>180</sup> The NIRA's labor regulations, while successful in increasing wages substantially, also caused a large decline in employment centered on poor and unskilled workers.<sup>181</sup> The interesting point here is that the NIRA was at least partially successful in benefitting the organized interest groups—large corporations and labor unions—that were its strongest advocates, while simultaneously inflicting extensive harm on the bulk of the population, exactly the opposite of what the Ackerman hypothesis of heightened voter control would lead one to expect.

Thus the NIRA was the New Deal's first and broadest challenge to the existing constitutional system of political economy. It was also a large-scale policy change with sweeping effects on almost the entire U.S. economy. It therefore qualifies as an appropriate case study for this project. Bruce Ackerman has himself acknowledged the importance of the NIRA as a test for his theory, referring to it

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175. WEINSTEIN, *supra* note 172, at 1.

176. See LEUCHTENBURG, *supra* note 90, at 214-16; Epstein, *supra* note 26, at 1399-1408.

177. 295 U.S. 495 (1935).

178. See, e.g., ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 187-204 (1995) (noting that the failure of the NIRA opened the door for passage of the Wagner Act); KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* 209-11 (1991).

179. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (endorsing expansive federal regulatory power over economic matters); LEUCHTENBURG, *supra* note 90, at 213-36 (describing post-1937 Supreme Court decisions that gave Congress almost unlimited power to regulate the economy).

180. WEINSTEIN, *supra* note 172, at 146.

181. *Id.* at 146-47.

as a far-reaching attempt "to *abolish* market capitalism and replace it with a corporatist structure" and as "the most important initiative of the first New Deal Congress."<sup>182</sup>

Three aspects of the NIRA are particularly relevant to our purposes here: political constraint, deception, and the impact of constitutional problems.

### 1. Political Constraint

As nearly all studies of the NIRA point out, both big business and labor union leaders saw the early Depression period as an opportunity to implement cartelization schemes for product prices and labor markets.<sup>183</sup> Although it is perhaps not surprising that labor unionists saw the period as a political opportunity and did not expect to be hampered by public opinion,<sup>184</sup> it is more surprising that business leaders saw it in the same way, given their apparent unpopularity and President Roosevelt's numerous public denunciations of them as "economic royalists."<sup>185</sup>

Nonetheless, most students of the NIRA portray it as an attempt by business leaders, particularly those in large enterprises, to cartelize the economy for their own benefit.<sup>186</sup> More radical historians even argue that the NIRA was an attempt to strengthen the capitalist class as a whole and quiesce radical sentiments in the labor movement and the general population.<sup>187</sup> Even the one major dissenting analysis of the NIRA attributes it to an "autonomous" state acting to implement "progressive" ideologies of planning rather than to respond to pressure from voters.<sup>188</sup> These studies seem to argue against the heightened attention hypothesis and in favor of the alternative theory that voter ignorance increases the discretion of political leaders and interest groups.

182. ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 286, 288.

183. See, e.g., BERNARD BELLUSH, *THE FAILURE OF THE NRA* 4 (1975); BRAND, *supra* note 171, at 105-16; HAWLEY, *supra* note 178 at 26-31; ROBERT F. HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION* 196-205 (2d ed. 1993); SCHLESINGER, *COMING OF THE NEW DEAL*, *supra* note 167, at 87-102; Ronald Radosh, *The Myth of the New Deal*, in *A NEW HISTORY OF LEVIATHAN* 146, 159-64 (Ronald Radosh & Murray N. Rothbard eds., 1972).

184. Although, as noted below, survey evidence shows unions and strikes to have been generally unpopular in the 1930s. See *infra* text accompanying notes 220-32.

185. See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1937*, 102 COLUM. L. REV. 1, 72 (2002).

186. See, e.g., BELLUSH, *supra* note 183, at 4; HAWLEY, *supra* note 178, at 26-34; HIMMELBERG, *supra* note 183, at 195-210; Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255 (1982).

187. Barton J. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* 263, 263-65 (Barton J. Bernstein ed., 1968); Radosh, *supra* note 183, at 146-47.

188. BRAND, *supra* note 171, at 105-16.

## 2. *The Impact of Constitutionality*

There is little if any evidence that Administration officials or interest group leaders were much concerned about public reaction to the likely constitutional implications of the NIRA. They did of course fear—with justification, as it turned out—that the NIRA would be invalidated by the Supreme Court.<sup>189</sup> There is no evidence, at least in sources examined so far, that they worried about the reaction of voters on this matter, as the Ackerman hypothesis would predict.

## 3. *Deception*

The Roosevelt Administration's strategy for gaining public support for the NIRA apparently involved a substantial element of deception. As virtually all scholars agree, the NIRA was intended to be a permanent restructuring of the American economy along corporatist lines.<sup>190</sup> Supporters of the NIRA among business interest groups and many American liberals hoped that the NIRA would rebuild the American economy on the model of Mussolini's fascist Italy, then widely regarded as a successful alternative to laissez-faire capitalism by both corporate and liberal leaders.<sup>191</sup> National Recovery Administration (NRA) Director Hugh Johnson privately told Secretary of Labor Frances Perkins that, "[w]hen this crisis is over and we have the recovery program started, there won't be any need for a Department of Labor or a Department of Commerce" because their functions would be subsumed by the NRA.<sup>192</sup>

Nonetheless, administration public statements and public relations campaigns trumpeted it as a temporary emergency measure to end the Depression.<sup>193</sup> The theme of the massive publicity campaign headed by Johnson himself emphasized that the NIRA

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189. See WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 31-32 (1963).

190. See BRAND, *supra* note 171, at 105-16; BRINKLEY, *supra* note 99, at 21-47; HAWLEY, *supra* note 178, at 26-34; HIMMELBERG, *supra* note 183, at 200-05; Radosh, *supra* note 183, at 146-47; Skocpol & Finegold, *supra* note 186, at 195-210.

191. See Radosh, *supra* note 183, at 162 (pointing out that "[t]o liberals, fascism appeared to be a system of planning that transcended classes and led to an equilibrium of contending social forces"). See generally John P. Diggins, *Flirtation With Fascism: American Pragmatic Liberals and Mussolini's Italy*, 71 AM. HIST. REV. 487 (1966).

192. FRANCES PERKINS, *THE ROOSEVELT I KNEW* 240 (1946).

193. See Roger I. Roots, *Government By Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 259 (2000).

was a crisis measure similar to those taken in war.<sup>194</sup> New Dealers portrayed the NIRA as the “moral equivalent of war.”<sup>195</sup>

Private sector interest groups that lobbied in favor of the NIRA also stressed the need to portray it as an emergency measure intended to alleviate the Depression. James Emery, general counsel of the National Association of Manufacturers (NAM), the leading business group supporting the NIRA, wrote in May 1933 that the NIRA must be “worked out as an emergency proposal” even though its ultimate objective was “self-government within industry” (a reference to cartel control of production through the NIRA codes).<sup>196</sup> Over time, pro-NIRA business groups “learned to stress ... the public-benefits, recovery-oriented nature of their proposals.”<sup>197</sup>

It is possible that President Roosevelt did not even accept the claim that the NIRA could help achieve recovery, and only came to support the policy as a result of interest group pressure. Even one of the NIRA’s supporters expressed discomfort in urging the President to accept the cartelization of business because of what he considered to be the President’s support for “the workings of free competition.”<sup>198</sup> Obviously, FDR did not believe the NIRA would become as great a disaster as it actually was; nonetheless, his skepticism about its likely effects is noteworthy.

After resisting proposals for legislation to facilitate cartelization for several months, President Roosevelt changed his position and threw his support behind the NIRA after extensive lobbying by business interests led by the NAM.<sup>199</sup> The Administration allowed a NAM-led business “advisory committee” to pre-screen the final version of the bill, which was submitted to Congress only after the business leaders were satisfied that the legislation met their needs.<sup>200</sup> The final “text of the [NIRA], except for Section 7(a), conceded to the business concepts on every important point.”<sup>201</sup> The

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194. See generally HIGGS, *supra* note 13, at 177-80; William E. Leuchtenburg, *The New Deal and the Analogue of War*, in *CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA* 81 (John Braeman et al. eds., 1964). The campaign included extensive use of slogans and symbolism, such as the famous “NRA Eagles,” and included the largest demonstration in U.S. history up to that time. See HIGGS, *supra* note 13, at 179; SCHLESINGER, *COMING OF THE NEW DEAL*, *supra* note 167, at 79.

195. BRAND, *supra* note 171, at 94.

196. HIMMELBERG, *supra* note 183, at 204 (quoting letter from James A. Emery to A.W. Berresford (May 2, 1933)).

197. *Id.* at 205.

198. *Id.* at 189 (quoting letter from John S. Lawrence to Franklin D. Roosevelt (Mar. 1933)). John S. Lawrence was the leader of a regional business association and a college classmate and personal friend of Roosevelt. See *id.*

199. *Id.* at 201-06.

200. *Id.* at 206-07.

201. *Id.* at 207. Section 7(a) was the provision of the NIRA protecting the organization of labor unions. See *id.* at 207. Congress included it at the behest of labor union leaders,

President's willingness to accept the business interests' proposal for a massive cartelization of the American economy despite his own apparent skepticism about its utility is striking. Such domination of the legislative process by interest groups seems inconsistent with the proposition that political leaders believed that the broader voting public was highly knowledgeable and attentive.

Initially, the NIRA was scheduled to expire in two years, subject to renewal by Congress,<sup>202</sup> which the Administration and its allies fully expected to achieve.<sup>203</sup> This suggests, perhaps, that Administration officials *did* fear an adverse public reaction to long-term constitutional change. But if so, it also shows that they saw voters as sufficiently ignorant to be deceived by invocations of temporary "emergency" measures.

It is significant that the failure to extend the NIRA in 1935 resulted not from any upsurge of public opposition but from a combination of bureaucratic inefficiency<sup>204</sup> and irreconcilable conflicting demands of interest groups.<sup>205</sup> It is likewise appropriate to point out that the NIRA did not suffer any significant public backlash from the large decline in GNP and increase in unemployment it caused.<sup>206</sup> Overall, the NIRA experience is a dramatic example of the elites' attempts to exploit voter ignorance to gain their own ends in the context of a constitutional moment. Both administration officials and labor and business leaders calculated—in considerable part correctly—that the existence of a constitutional crisis increased their discretion rather than decreased it.

### C. *The National Labor Relations Act*

The National Labor Relations Act of 1935 (NLRA),<sup>207</sup> despite important later modifications, forms the foundation of American

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particularly American Federation of Labor (AFL) head William Green. *See id.* at 206-07.

202. *See* HAWLEY, *supra* note 178, at 31.

203. The initial NIRA passed overwhelmingly, and the Administration had a large Democratic majority in Congress, supplemented by support from liberal Republicans. *See id.* at 30 (noting that the NIRA was approved by a vote of 325 to 76 in the House of Representatives and 58 to 24 in the Senate).

204. *See* Skocpol & Finegold, *supra* note 186, at 257, 264-68.

205. For descriptions of these conflicts, see, for example, BELLUSH, *supra* note 183, at 55-84; HAWLEY, *supra* note 178, at 119-27; SCHLESINGER, *COMING OF THE NEW DEAL*, *supra* note 167, at 118-22, 144-46.

206. For details of the economic damage caused by the NIRA, see WEINSTEIN, *supra* note 172, at 146-47.

207. *See* Act of July 5, 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2000)). The NLRA is also sometimes known as the Wagner Act, after its principal sponsor, Democratic Senator Robert F. Wagner. *See* WILLIAM H. SPENCER, *THE NATIONAL LABOR RELATIONS ACT: ITS SCOPE, PURPOSES, AND IMPLICATIONS* 1 (1935).

labor law to this day. Briefly summarized, the NLRA requires employers to recognize employee unions, to bargain with them in "good faith," and to refrain from engaging in "unfair" labor practices.<sup>208</sup> It further sets out a framework in which a union gains recognition through a majority vote of workers at a given enterprise, and creates a National Labor Relations Board (NLRB) to adjudicate labor-management disputes under the Act.<sup>209</sup>

With respect to our case selection criteria, the NLRA was obviously a major policy change with broad, long-term effects. It also had clear constitutional implications. From the beginning, Administration officials and NLRB<sup>210</sup> leaders were intensely concerned about the danger that the NLRA would be overturned by the Supreme Court.<sup>211</sup> In the end, the Supreme Court narrowly upheld the NLRA in a 5-4 decision in 1937.<sup>212</sup> This case, *NLRB v. Jones & Laughlin Steel Corp.*, was a key component of the famous "switch in time that saved nine" that eventually consummated the New Deal constitutional revolution.<sup>213</sup>

For the purposes of this Article, the following aspects of the NLRA deserve analysis.

### 1. Constraint

Some analysts of the NLRA's origins attribute its passage, at least in part, to 1934 electoral victories by liberal Democratic members of Congress.<sup>214</sup> If this analysis is correct, the NLRA's passage was not due to any great popularity of unions among the general public. One of the biggest surprises that came to light in the preliminary research for this Article was the consistent unpopularity of unions and strikes in public opinion surveys throughout the middle and late 1930s.<sup>215</sup>

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208. See 29 U.S.C. §§ 157-158 (2000).

209. See IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 129-30 (1950), for more thorough and detailed summaries of the NLRA; SPENCER, *supra* note 207. Bernstein provides the standard liberal defense of the Act. See BERNSTEIN, *supra*, at 132-48. For a conservative-libertarian critique, see Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983). For critiques from the left, see RUTH O'BRIEN, *WORKERS' PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886-1935* (1998); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985).

210. The NLRA established the NLRB. See JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (1974).

211. See *id.* at 149-88.

212. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

213. Cf. LEUCHTENBURG, *supra* note 90, at 213-36.

214. See, e.g., Theda Skocpol et al., *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297, 1300 (1990).

215. See *infra* notes 220-32 and accompanying text.

As in the case of the NIRA,<sup>216</sup> union leaders and their supporters clearly saw the Depression as an opportunity to install policies they had long favored, but were unable to implement under the preexisting constitutional framework.<sup>217</sup> They perceived looser rather than tighter constraints on their political agenda. What is not clear from previous research is their view of constraints by public opinion. We do know that New Deal-era congressional and executive branch officials kept close track of public opinion,<sup>218</sup> even though direct use of survey results was just beginning to become commonplace.<sup>219</sup>

What is striking is the fact that the NLRA prevailed—and indeed became a central element of the emerging New Deal order—despite strong public skepticism about the virtues of unions and strikes. Gallup and Roper surveys from 1935 to 1939 found that large majorities opposed prominent strikes at Ford and General Motors, and sit-down strikes generally, and even supported employers who refused to negotiate with strikers.<sup>220</sup> In a 1937 survey, 57% favored calling out the militia “whenever strike trouble threatens.”<sup>221</sup> Perhaps even more tellingly, an April 1937 Gallup poll found that 65% of respondents endorsed the use of “force” by “state and local authorities ... in removing sit-down strikers.”<sup>222</sup> Survey respondents also expressed generally negative sentiments concerning Congress of Industrial Organizations (CIO) leader John L. Lewis, the most prominent of the more radical labor leaders.<sup>223</sup> In a 1937 survey a strong plurality of 45% of respondents stated that the New Deal had been “too friendly toward labor” while only 13% believed that it was “not friendly enough.”<sup>224</sup> An important point to note is that the question concerned “friendliness” towards “labor”—a term which has generally positive connotations—rather than towards unions *per se*. Had the survey instead used the word “unions,” it is likely that responses would have been even more one-sided. Survey respondents did express strong support for the very existence of labor unions in questions where this issue was not coupled with references to any special legal rights for unions, such as those enshrined in the Wagner Act,<sup>225</sup> and also favored union-backed

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216. See *supra* notes 183-86 and accompanying text.

217. See *supra* note 183 and accompanying text.

218. See HERBST, *supra* note 168, at 89-112.

219. *Id.*

220. See GALLUP, *supra* note 98, at 48, 52-53, 85; PUBLIC OPINION, *supra* note 98, at 873.

221. GALLUP, *supra* note 98, at 63.

222. *Id.* at 55; Roper Center, *supra* note 98, Accession No. 0278891.

223. GALLUP, *supra* note 98, at 31, 48.

224. *Id.* at 69.

225. *Id.* at 31, 67.

measures banning child labor,<sup>226</sup> and establishing a minimum wage.<sup>227</sup> These were not the issues at stake in the NLRA, however, which was concerned with collective bargaining and strikes.<sup>228</sup>

Other examples of survey results indicating hostility to unions and strikes include 1937 and 1939 Gallup surveys indicating that some two-thirds of respondents supported the enactment of laws making "sit-down strikes" illegal.<sup>229</sup> Two 1937 surveys found that 71% of respondents opposed permitting striking workers to receive payments from government relief funds.<sup>230</sup> In one instance, 70% of respondents gave this answer even though the question was limited to "workers who go on strike and have no money of their own."<sup>231</sup> Numerous surveys indicated hostility to particular highly publicized strikes.<sup>232</sup>

Although it is possible that these survey results were tainted by underrepresentation of lower class respondents, both the Gallup and Roper organizations made extensive efforts to cut down on such methodological flaws.<sup>233</sup> Unlike the notorious 1936 *Literary Digest* poll which mistakenly predicted a crushing Republican victory in the 1936 presidential election,<sup>234</sup> Gallup and Roper were fairly successful in predicting electoral outcomes during this period.<sup>235</sup>

The survey results analyzed above cast interesting light on the theory that the NLRA was the result of popular discontent resulting from the large wave of union-led strikes in 1934 and 1935.<sup>236</sup> Given the extreme unpopularity of strikes and those unions that organized them, it seems likely that Roosevelt Administration and congressional leaders would have gained equal or greater popularity by siding with employers, and that their policies were intended either to placate unions as a narrow, organized interest group or as an

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226. *Id.* at 101.

227. *Id.*

228. See *supra* note 207 and accompanying text.

229. GALLUP, *supra* note 98, at 52-53, 143; Roper Center, *supra* note 98, Accession Nos. 0278932, 0274170.

230. GALLUP, *supra* note 98, at 52-53, 143; Roper Center, *supra* note 98, Accession Nos. 0278932, 0274170.

231. Roper Center, *supra* note 98, Accession No. 0279014.

232. See, e.g., GALLUP, *supra* note 98, at 48, 85.

233. For an account of these efforts, see Cushman, *supra* note 2, at 77-101.

234. For brief descriptions of the famous flawed *Literary Digest* poll, see JEAN M. CONVERSE, *SURVEY RESEARCH IN THE UNITED STATES: ROOTS AND EMERGENCE 1890-1960*, at 116-21 (1987); Cushman, *supra* note 2, at 79-83.

235. For example, Gallup's polls predicted the 1936 outcome correctly, and he made further improvements in methodology after the election was over. CONVERSE, *supra* note 234, at 119-20.

236. This argument was first advanced by Michael Goldfield. See Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257 (1989).



expression of "autonomous state" policymaking.<sup>237</sup> In either case, they could not easily be characterized as responsive to majoritarian public opinion.

To the extent that political leaders calculated that voter ignorance and inattention would enable them to ignore majority public opinion with respect to the NLRA, their reasoning is supported by the limited direct evidence of public knowledge of the Wagner Act. In a 1938 survey, taken after three years of ongoing public debates over the NLRA and its implementation and revision, 50% of respondents had "no opinion" as to whether the "Wagner Labor Act is fair to employees," and 51% had no view as to whether it was fair to employers.<sup>238</sup> Such high "no opinion" responses suggest a very low level of public attention to and knowledge of the issue, especially when we consider that survey respondents often express opinions even about issues they know nothing about to avoid seeming ignorant.<sup>239</sup> For this latter reason, the true percentage of respondents who knew little or nothing about the NLRA might have been considerably higher than fifty percent.<sup>240</sup>

## 2. Constitutionality

As in the case of the NIRA, there is little or no evidence in the existing literature that Roosevelt Administration officials and their allies worried about possible popular reaction to the constitutional implications of the NLRA. Here, too, the literature has not focused on this directly, and more analysis and research is needed. The general outline of the evidence nonetheless seems to support the rational ignorance hypothesis, while placing its rival in serious doubt.

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237. See generally Theda Skocpol, *Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 POL. & SOC'Y 155 (1980) (discussing "autonomous state" policymaking).

238. Roper Center, *supra* note 98, Accession Nos. 0279094, 0279095.

239. For the classic survey results showing that many respondents will express opinions even about fictitious legislation, see Stanley Payne's famous finding that 70% of respondents expressed opinions regarding the nonexistent "Metallic Metals Act." STANLEY L. PAYNE, *THE ART OF ASKING QUESTIONS* 17-18 (1951).

240. Surveys that asked respondents whether they had "heard of the Wagner Labor Act" elicited positive responses from well over 70% of respondents. See Roper Center, *supra* note 237, Accession Nos. 0277145, 02774815. It is impossible to know how many respondents really knew about the legislation and how many merely said they did to avoid appearing ignorant. False responses to avoid appearing ignorant are extremely common, as studies of fictitious survey questions have demonstrated. See, e.g., PAYNE, *supra* note 239, at 17-18; Del I. Hawkins & Kenneth A. Coney, *Uninformed Response Error in Survey Research*, 18 J. MARKETING RES. 370, 373 (1981) ("Nearly one-fourth of the entire sample offered an opinion about a fictitious government agency!").

### *D. The Battle Over Court Packing*

President Roosevelt's 1937 plan to "pack" the Supreme Court by expanding its size in response to adverse rulings on numerous New Deal programs brought the issue of constitutional change to a head. Although the plan itself was defeated in Congress, the political pressure Roosevelt was able to bring to bear on the Supreme Court eventually led the Court to back down from its opposition and essentially accept the President's claim of nearly unlimited federal government power over the economy.<sup>241</sup> While some historians and political scientists have traced the growth of federal government power back before the Roosevelt Administration to Herbert Hoover's New Era,<sup>242</sup> the Court's decisions and the New Deal policies they ratified institutionalized and legitimized this growth for the long term.<sup>243</sup>

#### *1. The Issue of Constitutionality*

President Roosevelt and his advisers had been frustrated by the Supreme Court's obstruction of New Deal policies for a long time prior to 1937, particularly after the Court invalidated several prominent New Deal policies, including the NIRA, from 1935 to 1936.<sup>244</sup> The President and his advisers nonetheless deliberately

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241. See David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 146-52 (1998) (strongly reasserting the traditional view that the Court's "switch" was due to external political pressure). For the strongest statement of the revisionist view that purely legalistic concerns drove the Court's decisions, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998).

242. See, e.g., JOAN HOFF WILSON, *HERBERT HOOVER: FORGOTTEN PROGRESSIVE* 122-67 (1975); Lewis-Beck & Squire, *supra* note 91, at 108; Murray N. Rothbard, *Herbert Hoover and the Myth of Laissez-Faire*, in *A NEW HISTORY OF LEVIATHAN*, *supra* note 183, at 111, 111.

243. See ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 359-77. As Ackerman notes, the Hoover policies were still generally viewed as limited exceptions to a general rule of laissez-faire, and it was not a given that they would be extended and permanently institutionalized. *Id.* at 281-82. The revisionist studies also have significant shortcomings in the way they define and operationalize government growth. The most sophisticated revisionist study defines government growth as growth in the number of government employees. See Lewis-Beck & Squire, *supra* note 91, at 116-19. This ignores the possibility, which in fact was true of many New Deal policies, that similar numbers of employees could implement a broader range of policies. Many New Deal policies were implemented by delegation to private entities because of a lack of government bureaucratic capacity. See Skocpol & Finegold, *supra* note 186, at 263-68. An additional point is that Lewis-Beck and Squire focus exclusively on the size of government without considering increases in its scope; yet increases in the latter were no less characteristic of the New Deal and perhaps more so. See HIGGS, *supra* note 13, at 27-30 (emphasizing importance of scope as well as size to theories of government growth).

244. See, e.g., LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 3-17 (2d prtg. 1968); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 349-50.

decided to forgo even mentioning the Court or constitutional issues more generally during the 1936 reelection campaign.<sup>245</sup> This was apparently a conscious political stratagem designed to avoid giving a potentially strong issue to the Republican opposition.<sup>246</sup> Although the issue was of course raised by the Republicans,<sup>247</sup> it is clear that the Roosevelt Administration calculated that its silence would steer public attention away from the issue of constitutional change even as it continued to try to implement such changes on a large scale.<sup>248</sup>

Even after President Roosevelt publicly put forward his court-packing proposal in February 1937, the stated rationale was the alleged inability of the elderly justices to handle their workload.<sup>249</sup> Only after the plan neared defeat did the President, with little left to lose, publicly state the real rationale: his desire to remove the Court as an obstacle to New Deal policies.<sup>250</sup> The plan was ultimately defeated, but only after several decisions upheld challenged New Deal programs and crafted new constitutional principles that endorsed wide-ranging federal government power over the economy.<sup>251</sup>

These actions by the Roosevelt Administration and its Republican adversaries provide limited support for the Ackerman thesis. They indicate that elites on both sides of the political divide perceived constitutional change as an issue that would resonate with the electorate, albeit in favor of the opponents rather than the supporters of change. At the same time, however, the Roosevelt Administration clearly calculated that the bulk of voters were ignorant enough to ignore the issue or to believe that no real constitutional change was in the offing if administration spokesmen refrained from mentioning it. Several of Ackerman's critics have fastened onto the issue of the Administration's silence on constitutional change.<sup>252</sup> FDR's opponents, of course, sought to raise the issue, but they also focused primarily on other considerations, particularly the threat to judicial independence.<sup>253</sup> This strategic gambit, like that

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245. CUSHMAN, *supra* note 239, at 27; Michael J. Klarman, Review Essay, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 771 (1992); Leuchtenburg, *supra* note 114, at 2084; Leuchtenburg, *supra* note 244, at 377-78.

246. Leuchtenburg, *supra* note 244, at 377-79.

247. Leuchtenburg, *supra* note 114, at 2088-96.

248. *Id.* at 2085-88.

249. See BAKER, *supra* note 244, at 8-9; LEUCHTENBURG, *supra* note 90, at 132-34; Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863, 911-13 (1999).

250. See Kline, *supra* note 249, at 922-28.

251. See, e.g., LEUCHTENBURG, *supra* note 90, at 213-36.

252. CUSHMAN, *supra* note 241, at 27; Klarman, *supra* note 245, at 771.

253. See BAKER, *supra* note 244, at 28; LEUCHTENBURG, *supra* note 90, at 139;

of the Roosevelt Administration, sought to obscure the specific constitutional disputes at issue by focusing on procedural matters and by eliding the fact that the Administration's strategy was meant to win a specific constitutional battle of great importance rather than establish a general precedent for replacing Supreme Court justices whenever an administration chose to do so. Previous instances of court packing, primarily in the nineteenth century, had not led to the collapse of judicial independence precisely because they too had been limited to cases of dramatic constitutional confrontation and had not been extended to more "normal" periods.<sup>254</sup>

Here, even more so than in the NIRA and NLRA cases, voter ignorance is a central issue, because the opposing elites' calculations focused directly on the question of whether or not voters were knowledgeable and sophisticated enough to see through the Roosevelt Administration's public rationales and understand that constitutional change was the true underlying issue. Elites on both sides had no doubt that it was.<sup>255</sup>

## *2. Interactions with Public Opinion*

Unlike in the previous two cases, there is some systematic survey evidence of public reaction to the court-packing plan, analyzed by political scientist Gregory Caldeira.<sup>256</sup> Caldeira used a set of eighteen Gallup surveys of support and opposition to the court-packing plan to determine whether events, such as favorable and unfavorable media coverage of Roosevelt's proposal, the Court's new pro-New Deal decisions, and the announced resignation of conservative Justice Van Devanter, affected levels of public support for the plan.<sup>257</sup> Using multiple regression, he found that there was indeed a strong relationship between these variables, with support for court packing dropping once it became clear that the Court would not continue to overturn New Deal legislation.<sup>258</sup>

Unfortunately, however, Caldeira's analysis implicitly assumes the eighteen Gallup polls (his dependent variable) were perfectly accurate, an unreasonable assumption even for modern surveys and certainly so for surveys of the 1930s.<sup>259</sup> This is a particularly serious

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Leuchtenburg, *supra* note 244, at 396-400.

254. See BAKER, *supra* note 244, at 31.

255. See *supra* notes 245, 252-53 and accompanying text.

256. See Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987).

257. *Id.* at 1140-47.

258. *Id.* at 1147-49.

259. See CONVERSE, *supra* note 234, at 124-27.

problem given that opposition to the President's plan ranged only from 41% to 49% during the entire period in question,<sup>260</sup> a range of variance that might have been entirely due to random chance, assuming a mean level of opposition of about 46% (the actual mean of Caldeira's observations) and a mean error of 4% in either direction. Support for the plan varied somewhat more, from 31% to 46% (the remaining respondents had "no opinion"),<sup>261</sup> but even here measurement error might have had a substantial effect. Moreover, the fact that there were only eighteen data points implies that a large measurement error in even a few of the observations might substantially skew the results.<sup>262</sup>

Overall, the court-packing episode, like the previous two cases, presents a picture of political leaders operating as if they faced an ignorant rather than a well-informed public. This result is particularly significant in that the court-packing episode is considered an especially clear-cut case of constitutional conflict by many historians,<sup>263</sup> and it is so understood by Ackerman.<sup>264</sup> Even at the height of the New Deal constitutional crisis, therefore, political leaders saw opportunities for manipulation more than shackles of constraint.

### *E. Deception and Knowledge Reconsidered*

The finding that extensive and apparently successful efforts to deceive voters occurred during all three of the cases examined raises several additional issues that require discussion. First, one could argue that increased efforts at deception by elites were, in fact, a response to a real or perceived increase in voter knowledge. Obviously, it requires more effort to deceive a well-informed audience than a comparatively ignorant one. If this analysis is correct, evidence of efforts at deception might, to an extent, confirm the Ackerman hypothesis rather than refute it.

Such an interpretation cannot be ruled out completely, but two strong considerations militate against the conclusion that it seriously undermines my main thesis. First, the sheer scale of the deception and the fundamental nature of the issues it addressed suggest that the elites involved did not perceive themselves to be facing a highly informed electorate. In all three cases, the deceptions in question addressed matters that were fundamental to the

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260. Caldeira, *supra* note 256, at 1146.

261. *Id.*

262. *See id.* at 1145.

263. *See, e.g.,* BAKER, *supra* note 244, at 1-38; LEUCHTENBURG, *supra* note 90, at 82-162; Leuchtenburg, *supra* note 244, at 347.

264. ACKERMAN, *WE THE PEOPLE 2*, *supra* note 14, at 335-37.

issue at hand and also well understood by political elites. Certainly, even a moderately informed person was unlikely to take seriously the claim that the NIRA was intended to be merely a temporary emergency measure,<sup>265</sup> or the claim that the court-packing plan was proposed to ease the workload of the aging justices.<sup>266</sup> The fact that elites in the cases studied were engaged in bigger deceptions over more important issues than usually occur in normal politics suggests that the increased effort at deception was not the result of any perceived increase in voter knowledge, but merely an indication that it may take more effort to bring off a "big lie" than a small one.

Second, even if the counterargument in question were correct, the implications for the heightened attention hypothesis are still unfavorable. If voter knowledge increased enough to cause a corresponding increase in elites' efforts at deception, but not enough to impose actual additional constraints on their substantive policy choices, the claim that *We the People*<sup>267</sup> impose greater control on political leaders during periods of constitutional change would still be invalidated. Furthermore, an increase in voter knowledge that was so small that it could be overcome by attempts at deception that would be pierced easily with even a modicum of knowledge is unlikely to have been a very great increase in the first place.

While neither the quantitative evidence of voter ignorance nor the qualitative evidence of elite political strategy is by itself definitive, the cumulative weight of both points strongly to the conclusion that the rational ignorance hypothesis is much closer to the truth than its rival. The last Part of this Article considers some of the broader implications of this finding.

## VI. NORMATIVE IMPLICATIONS

The results of this study pose a challenge to legal scholars who advocate circumventing Article V of the Constitution in favor of procedures that allow greater majoritarian popular participation in constitution-making.<sup>268</sup> Such criticisms reassert earlier majoritarian attacks on Article V that date back to the Founding Era.<sup>269</sup>

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265. See *supra* notes 193-97 and accompanying text.

266. See *supra* note 249 and accompanying text.

267. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7; ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14.

268. The two most prominent advocates of greater majoritarian popular participation in constitution making are Bruce Ackerman and Akhil Reed Amar. See generally sources cited *supra* note 14.

269. See *supra* notes 16-20 and accompanying text. For a discussion of Anti-Federalist criticism of Article V, see *supra* text accompanying notes 19-20. Ackerman proposes a kind of compromise between Article V and pure majoritarianism. See ACKERMAN, *WE THE PEOPLE*

Although these writers have at least some arguments in favor of their proposals that are independent of the state of voter knowledge,<sup>270</sup> the idea that majoritarian amendment processes better reflect the popular will than the cumbersome, supermajoritarian Article V system is surely one of their most important claims. Both Ackerman and Amar explicitly emphasize the importance of voter knowledge and deliberation to their theories.<sup>271</sup> Their claims are called into serious question by the evidence assembled in this Article.

In addition to the purely negative conclusion that New Deal-era constitutional change was not occasioned by heightened public attention and knowledge,<sup>272</sup> my analysis points to several potential normative pitfalls of non-Article V constitutional change, and to a possible consequent defense of the much-maligned Article V.

#### *A. Inattention to Broad, Long-Term Consequences of Change*

Ackermanian non-Article V constitutional changes are usually adopted in a crisis atmosphere occasioned by an overwhelming imminent threat. This was certainly true of New Deal-era change, driven by the horrendous impact of the Great Depression.<sup>273</sup> In such a situation, voter attention may well be focused on addressing the immediate crisis rather than on the broader and more long-term implications of any proposed constitutional changes. This danger may arise even with a well-informed electorate. Voters may conclude rationally that they care more about solving their immediate problems than any long-term dangers, the burden of which will fall primarily on future generations.

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1, *supra* note 7, at 53-56; ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 410; Ackerman, *Constitutional Politics*, *supra* note 14. He favors allowing a second-term president to propose a constitutional amendment that, if approved by a majority of Congress, would enter the Constitution if supported by a majority vote, nationwide referendum. *See, e.g.*, ACKERMAN, *WE THE PEOPLE* 2, *supra* note 14, at 410. This proposal, whatever its merits, is still much closer to majoritarianism than to Article V's supermajoritarianism, for it may result in the successful adoption of a constitutional amendment supported by only a modest majority of the public. Moreover, Ackerman also contends that majoritarian amendment processes outside Article V must be allowed to operate unless and until his proposal is adopted. *Id.* at 420.

270. *See, e.g.*, Amar, *Consent of the Governed*, *supra* note 14. Amar and Ackerman both argue that their positions are sanctioned by the history and original intent of the Constitution as well as by democratic theory. *See* works by Amar and Ackerman cited *supra* note 14.

271. *See* ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 285-88 (emphasizing the importance of voter information and considered deliberation in times of constitutional change); Amar, *Consent of the Governed*, *supra* note 14, at 501-03 (emphasizing importance of informed "deliberation" as an element of non-Article V constitutional change).

272. *See supra* Part V.

273. *See* ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 268-69.

The problem is, however, exacerbated if the electorate is substantially ignorant. In such a situation, political leaders can exploit voter ignorance by portraying major long-term structural changes as mere temporary emergency measures. As we have seen, this is exactly what happened with the NIRA, the single most revolutionary new policy adopted during the New Deal.<sup>274</sup> In addition, voter ignorance also exacerbates the problem of inattention to long-term consequences of constitutional change because these consequences may require more knowledge to understand and evaluate them than is necessary for ordinary policy changes.

On an even broader scale, voter ignorance might enable leaders to avoid openly discussing the issue of constitutional change altogether. Strikingly, Roosevelt and the Democrats were able to do just that during the 1936 election, and during much of the court-packing battle.<sup>275</sup>

### *B. Exploitation by Interest Groups*

The second danger posed by allowing rationally ignorant political majorities to control the amendment process is the threat of interest group exploitation. Economists and political scientists have long warned that well-organized interest groups are often able to hijack the political process for their own benefit, at the expense of the less organized general public.<sup>276</sup> Indeed, part of the appeal of Ackerman's thesis resided precisely in the possibility that increased political knowledge on the part of the general public would make such interest group shenanigans less likely during a constitutional moment.<sup>277</sup> Once we recognize, however, that voter knowledge does *not* seem to increase in periods of constitutional change, the resulting picture seems much more bleak. Even more so than periods of normal politics, Ackermanian constitutional moments may provide opportunities for interest group capture of the political process.

Periods of constitutional change provide interest groups with unusual opportunities for two reasons. First, the atmosphere of emergency and crisis loosens existing constitutional and political constraints on legislative action.<sup>278</sup> This occurs both because a grave crisis such as the Great Depression may call the validity of the

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274. See *supra* notes 193-96 and accompanying text.

275. See *supra* text accompanying notes 245-52.

276. For the classic account, see OLSON, *LOGIC OF COLLECTIVE ACTION*, *supra* note 37.

277. See ACKERMAN, *WE THE PEOPLE* 1, *supra* note 7, at 271.

278. See Michael R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 *TEX. L. REV.* 67, 68-69 (1983).



existing constitutional system into question in the minds of many,<sup>279</sup> and because the crisis enables interest groups to portray even major new policy initiatives as merely temporary emergency measures.<sup>280</sup> The history of the NIRA provides examples of both of these dynamics, as does that of some other New Deal policies.<sup>281</sup>

The second critical factor providing heightened opportunities for interest groups is the unusually great complexity of major constitutional issues. Those issues involving the scope of broad governmental powers, such as the federal government's power to regulate economic activity—the principal point at issue in the New Deal era—are especially complex. Unlike issues of normal politics, which usually involve the merits of a discrete policy choice, disputes over the general scope of governmental power address the desirability of giving a particular level of government the authority to enact an entire *range* of policies, the details of which may not even be known at the time the constitutional change is being considered. As argued above, these and other aspects of constitutional change make it much more difficult for rationally ignorant voters to use traditional “shortcuts” to political knowledge to assess broad, proposed changes in the constitutional order.<sup>282</sup> In turn, the difficulty of assessment makes it easier for organized interests to exploit the process.

Obviously, not all policies favored by organized interests, and potentially opposed by the broad mass of voters, are necessarily malign. For example, it is certainly possible to argue that the NLRA was normatively justified despite the fact that its main purpose—the strengthening of labor unions and the guarantee of the right to strike—was opposed by the majority of the public at the time.<sup>283</sup> Some instances of interest group capture of the political process may be beneficial, but this should not blind us to the danger that allowing such capture on a *systematic* basis may well result in a great deal more harm than good to the interests of the majority of the public. At the very least, such systematic capture conflicts with most traditional normative theories of democracy that emphasize the importance of participation in policymaking by a broad and informed electorate.<sup>284</sup> Obviously, the harms of capture are greater when the resulting policy is enshrined as a fundamental part of the constitutional order rather than just as ordinary legislation.

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279. See David J. Hulsebosch, Note, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 1974-77 (1990) (discussing the perceived need for constitutional change).

280. See *supra* text accompanying notes 193-96.

281. See *supra* Part V.B.

282. See *supra* notes 30-34 and accompanying text.

283. For normative defenses and criticisms of the NLRA, see sources cited *supra* note 209.

284. See *supra* notes 4, 8 and accompanying text.

*C. Voter Ignorance as a Possible Defense of Article V*

A full assessment of the normative status of the Article V amendment process obviously would reach well beyond the scope of this Article. My findings do suggest, nonetheless, a possible argument in favor of Article V's stringent supermajority requirements that scholars have ignored in the previous literature on the subject.<sup>285</sup> As one of the Article's critics points out, "[b]y requiring the concurrence of both national and state legislatures, Article V comes close to requiring unanimity to approve any amendment as a practical matter."<sup>286</sup>

This much criticized supermajority requirement may well, at least from the standpoint of mitigating the dangers of voter ignorance, actually be an advantage. Although studies of voter knowledge historically have found that most of the public is severely ignorant,<sup>287</sup> they have also shown that an important minority of voters, ranging from 5% to perhaps as many as 15 or 20%, is much better informed than the average citizen.<sup>288</sup> By requiring a massive supermajority to enact constitutional change, Article V effectively prevents enactment of any amendment that fails to win the support of at least a high proportion of this informed minority. In turn, this makes it difficult to enact an amendment merely through the manipulation of voter ignorance. Even if only a small minority of voters is informed enough to see through the amendment's advocates' campaign of deception, that minority may well be large enough to block its enactment.

The usefulness of Article V's supermajority requirements as a defense against the exploitation of voter ignorance does not, of course, rebut the many different attacks that have been leveled at the Article.<sup>289</sup> It does not even show that Article V is the best possible amendment process for minimizing problems of voter ignorance. Nonetheless, it provides a new and important consideration in favor of a stringent supermajority procedure for constitutional amendments and perhaps even for some other types of legislative decisions.<sup>290</sup>

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285. The argument developed here has been ignored by the defenders of Article V no less than by critics. For works by the defenders, see *supra* note 22.

286. Griffin, *supra* note 14, at 172.

287. See *supra* notes 10-12 and accompanying text.

288. See, e.g., NEUMAN, *supra* note 78, at 33 (calculating that about 12% of the population is adequately informed).

289. For a thorough survey of criticisms of Article V from the Founding Era to the present, see VILE, *THE CONSTITUTIONAL AMENDING PROCESS*, *supra* note 16.

290. For a wide-ranging recent defense of the various supermajority requirements in the Constitution, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian*

To demonstrate that non-Article V processes of constitutional change are seriously flawed from the standpoint of obtaining informed public consent is not, of course, to demonstrate that such processes should never be used. It is certainly possible that, for any given change, its substantive normative merits may outweigh any defects in the process of enactment.

The more flawed a nation's status quo constitutional system is, the more likely it is that any potential change will be for the better. A severely defective constitution might well be improved even by a process of change that is seriously compromised by voter ignorance; in extreme cases, major improvements can be achieved even by a process of change that is not democratic at all. To take a particularly dramatic example, the present constitutional structure of the Federal Republic of Germany was, in considerable part, forcibly imposed by the Western Allies during the occupation of Germany after World War II.<sup>291</sup> Yet few would argue that the resulting constitutional change was not a massive improvement over what came before.

Even with a severely flawed constitution, however, it may still be desirable to create an amendment process that incorporates safeguards against voter ignorance. Such safeguards can still increase the likelihood that the resulting changes will be for the better. After all, if post-World War II Germany shows us that even a seriously flawed process change can alter a constitutional system for the better, the history of the Weimar Republic shows that the manipulation of voter ignorance can help replace a bad constitution with something much worse.<sup>292</sup>

The problem of voter ignorance is not the only factor that needs to be considered in designing a system for handling constitutional

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*Constitution*, 80 TEX. L. REV. 703 (2002). McGinnis and Rappaport deploy a variety of arguments but only briefly consider the possible significance of voter ignorance. *See id.* at 788. They argue that the difficulty of placing a proposed amendment on the public agenda under Article V reduces knowledge costs by enabling the electorate to focus its attention on those few proposals that actually have a chance of passage. *Id.* The shortcoming of this argument is that the public's attention may be diverted away from a proposed amendment by nonconstitutional as well as constitutional issues. Thus, a strategic interest group actor seeking to manipulate public attention might introduce nonconstitutional legislative proposals to divert attention away from its constitutional ones. The pro-Article V argument presented by McGinnis and Rappaport nonetheless complements that developed in this Article.

291. For a detailed account, see PETER H. MERKL, *THE ORIGIN OF THE WEST GERMAN REPUBLIC* (1963). Although German political leaders had a substantial say in designing the new constitution, *id.* at 21, the German public's participation was severely constrained by the Allies' ban on the Nazi Party and other extreme nationalist groups which, at that time, still enjoyed the support of large portions of the West German population. *Id.* at 22-24.

292. For a description of the simplistic but effective appeals that the Weimar-era Nazis made to gain the support of voters, see Peter Fritzsche, *Germans Into Nazis* 197-214 (1998); *see also* RICHARD F. HAMILTON, *WHO VOTED FOR HITLER?* (1982).

change. It is, however, one that has been unduly neglected by both political scientists and legal scholars.

### CONCLUSION

The relationship between voter knowledge and constitutional change is a complex one, unlikely to be explained definitively by the present study. Nonetheless, I have found strong evidence in favor of the rational ignorance hypothesis and against the heightened attention theory.<sup>293</sup> Both quantitative analyses of voter knowledge and qualitative study of elite perceptions and strategy point to the same conclusion. Their cumulative weight is significant, even if no one piece of evidence can be considered definitive.

Obviously, further research is necessary to determine whether my conclusion is applicable beyond the New Deal context. Such research should include both analyses of other "constitutional moments" in American history and studies of constitutional change abroad. I plan to extend this study with analyses of constitutional change in the Civil Rights Era of the 1960s.<sup>294</sup> If the results of this study hold up in other contexts, they may become important implications for theories of constitutional change and for theories of the growth of government. They will also pose a serious challenge to legal scholars who advocate circumventing the cumbersome amendment procedures of Article V of the Constitution in favor of greater majoritarian popular participation in constitution making.<sup>295</sup>

With respect to theories of the growth of government in times of crisis, the present study suggests a potential way to plug a hole in their reasoning. The reason why voters fail to block overreaching by officials seeking to expand their powers beyond what is necessary to resolve the crisis is that they may be unaware of what is going on.

Overall, the problem of voter knowledge is a major underanalyzed issue in the theory of constitutional change. In time, its empirical implications may greatly revise our understanding of both the New Deal and other critical episodes in our history. Its normative dangers pose an important—and as yet unmet—challenge to democratic theory.

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293. See *supra* Part IV.

294. For a survey of constitutional and legal developments during the Civil Rights Era, see HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 3-8 (1990).

295. See sources cited *supra* note 14.

**Appendix A: New Deal-Relevant Knowledge Questions  
from the 1952 National Election Study**

**Q. 520046 NOW, HOW DO YOU THINK THE TWO PARTIES  
FEEL ABOUT**

THIS QUESTION [whether the "national government" should "do more" to address such "problems as unemployment, education, housing, and so on"]. - DO YOU THINK THERE ARE ANY DIFFERENCES BETWEEN THE DEMOCRATIC AND REPUBLICAN PARTIES ON THIS ISSUE, OR WOULD YOU SAY THEY FEEL THE SAME. (HOW IS THAT.)

.....  
**COMPARATIVE SCALE BETWEEN DEMOCRATIC  
AND REPUBLICAN PARTIES**

77	1.	DEMOCRATS WILL DO A LOT MORE THAN REPUBLICANS
443	2.	DEMOCRATS WILL DO MORE THAN REPUBLICANS
621	3.	PRO-CON, SAME
47	4.	DEMOCRATS WILL DO LESS THAN REPUBLICANS
0	5.	DEMOCRATS WILL DO A LOT LESS THAN REPUBLICANS
489	8.	DID NOT KNOW
222	9.	NA, OR NO PRE-ELECTION INTERVIEW

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**Q. 520098 NAME-PERCEIVED NEGRO VOTE**

NOW I'D LIKE TO ASK SOME QUESTIONS ABOUT HOW YOU THINK OTHER PEOPLE WILL VOTE IN THIS ELECTION.

FOR INSTANCE, TAKE NEGROES - DO YOU THINK NEGROES AROUND THE COUNTRY WILL VOTE MOSTLY REPUBLICAN, MOSTLY DEMOCRATIC, OR DO YOU THINK THEY WILL BE ABOUT EVENLY SPLIT.

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593	1.	DEMOCRATIC
266	2.	SPLIT
173	3.	REPUBLICAN
755	8.	DID NOT KNOW
112	9.	NA, OR NO PRE-ELECTION INTERVIEW

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**Q. 520097 NAME-PERCEIVED WORKING CLASS VOTE**

NOW, HOW ABOUT WORKING-CLASS PEOPLE - DO YOU THINK THEY WILL VOTE MOSTLY REPUBLICAN, MOSTLY DEMOCRATIC, OR DO YOU THINK THEY WILL BE ABOUT EVENLY SPLIT.

.....

893	1.	DEMOCRATIC
439	2.	SPLIT
149	3.	REPUBLICAN
306	8.	DID NOT KNOW
112	9.	NA, OR NO PRE-ELECTION INTERVIEW

=====

**Q. 520100 NAME-PERCEIVED BIG BUSN VOTE**

COLUMNS 317 - 317  
NUMERIC  
MD=GE 8

Q.44. 5. PERCEIVED VOTE OF BIG BUSINESS  
<FOR FULL QUESTION TEXT SEE Q. No. 97>

.....

217	1.	DEMOCRATIC
157	2.	SPLIT
983	3.	REPUBLICAN
429	8.	DID NOT KNOW
113	9.	NA, OR NO PRE-ELECTION INTERVIEW

=====

**Q. 520101 NAME-PERCEIVED LABOR UN VOTE**

PERCEIVED VOTE OF LABOR UNION MEMBERS  
<FOR FULL QUESTION TEXT SEE Q. No.

97&gt;

.....

1082	1.	DEMOCRATIC
211	2.	SPLIT
81	3.	REPUBLICAN
410	8.	DID NOT KNOW
115	9.	NA, OR NO PRE-ELECTION INTERVIEW

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## Q. 520103 NAME-PERCEIVED CATHOLIC VOTE

NOW, HOW ABOUT PEOPLE IN DIFFERENT  
RELIGIOUS  
GROUPS, LIKE PROTESTANTS,  
CATHOLICS, AND JEWS - FOR INSTANCE,  
HOW ABOUT CATHOLICS - DO YOU THINK  
CATHOLICS AROUND THE COUNTRY WILL  
VOTE MOSTLY REPUBLICAN, MOSTLY  
DEMOCRATIC, OR DO YOU THINK THEY  
WILL BE ABOUT EVENLY SPLIT.

\*\*\*\*\*

299	1.	DEMOCRATIC
445	2.	SPLIT
140	3.	REPUBLICAN
878	8.	DID NOT KNOW
137	9.	NA, OR NO PRE-ELECTION INTERVIEW

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## Q. 520104 NAME-PERCEIVED JEWISH VOTE

&lt;FOR FULL QUESTION TEXT SEE Q. NO. 103&gt;

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202	1.	DEMOCRATIC
337	2.	SPLIT
145	3.	REPUBLICAN
1082	8.	DID NOT KNOW
133	9.	NA, OR NO PRE-ELECTION INTERVIEW

**Appendix B:**  
**Regression Results from the 1960 National Election Study**

**New Deal "Of Age" Model 1960 NES** **OLS regression**

Model	Unstandardized Beta	Std. Error	Standardized Beta	T Stat	Significance
(Constant)	-5.547E-02	.420		-.132	.895
Region (South=1)	-.339	.134	-.098	-2.531	.012
Education	.143	.048	.135	2.959	.003
Interest in Politics	.259	.106	.095	2.444	.015
Family Income	.133	.028	.216	4.759	.000
TV	.185	.083	.086	2.243	.025
Sex (female=1)	-.531	.111	-.183	-4.806	.000
Race (black=1)	7.898E-02	.323	.012	.245	.807
Strength of Party ID	8.130E-02	.056	.056	1.459	.145
New Deal (of age=1)	.137	.127	.042	1.085	.278
Southern black	.307	.525	.030	.585	.559

Dependent Variable: Knowledge (New Deal related) n=623  $r^2=.152$

**New Deal Cohort Model 1960 NES** **OLS regression**

Model	Unstandardized Beta	Std. Error	Standardized Beta	T Stat	Significance
(Constant)	8.922E-02	.403		.222	.825
Region (South=1)	-.343	.134	-.099	-2.568	.010
Education	.138	.048	.131	2.888	.004
Interest in Politics	.247	.106	.091	2.338	.020
Family Income	.140	.028	.228	4.962	.000
TV	.192	.082	.089	2.332	.020
Sex (female=1)	-.540	.110	-.186	-4.908	.000
Race (black=1)	4.386E-02	.320	.007	.137	.891
Southern black	.392	.520	.038	.754	.451
Strength of Party ID	7.897E-02	.056	.055	1.419	.156
New Deal Cohort	-.226	.125	-.069	-1.805	.072

Dependent Variable: Knowledge (New Deal Related) n=623  $r^2=.141$



**New Deal-Related Knowledge: Frequency Distribution**

<b>Number Correct</b>	<b>Frequency</b>	<b>Percent</b>	<b>Cumulative Percent</b>
.00	88	12.3	12.3
1.00	128	17.9	30.2
2.00	162	22.7	52.9
3.00	142	19.9	72.7
4.00	143	20.0	92.7
5.00	52	7.3	100.0
<b>Total</b>	<b>715</b>	<b>100.0</b>	