Voter Knowledge and Constitutional Change: 
Assessing the New Deal Experience 
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Voter Knowledge and Constitutional Change: The New Deal Experience

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I. INTRODUCTION

In recent years the world has seen a massive wave of constitutional change, most notably in Eastern Europe, Latin America, and South Africa. In the United States, 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.¹ A particularly poorly understood issue is the role of voter knowledge in the process. This Article represents the first effort to determine empirically whether voter knowledge actually increases during periods of constitutional change, thereby enabling voters to impose heightened constraints on political elites.² 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

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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 BUFFALO 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.
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. ³

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. ⁴ Even many who do not share this view believe that voter control is instrumentally valuable as a check on the power of political elites. ⁵ Robert Dahl, perhaps the most influential analyst of democracy among modern scholars, assumes that “a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens.” ⁶

An essential element of voter participation in constitutional change, as in “normal politics,”⁷ is that they be adequately informed. ⁸ Without adequate knowledge, voters cannot monitor and control the actions of their elected representatives. Voter knowledge is perhaps even more important in constitutional than in ordinary politics. Almost by definition, a change in constitutional structure is difficult to reverse, whereas an ordinary policy failure brought on by insufficient voter information can potentially be made good by voting out the government that sponsored the policy in the next election – a process epitomized by the concept of “retrospective

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³ See works by Ackerman, Amar, and their critics cited in nn. 14 and 22 below.
⁵ See, e.g., WILLIAM H. RIKER, LIBERALISM AND POPULISM (1982) (work by a leading political scientist endorsing instrumental value of democracy as a mechanism for popular replacement of political elites).
⁷ The distinction between “constitutional moments” and “normal politics” is made by BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS ch. 1 (1991) [hereinafter, ACKERMAN, WE THE PEOPLE].
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. Most citizens lack even basic political information, and close to one third are so completely ignorant that one leading scholar categorizes them as “know-nothings.” Thus, it is very important 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. What these writers fail to explain is why voters allow political leaders to expand their powers beyond what is necessary, 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

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10 For summaries of the evidence, see Delli Carpini & Keeter, supra note 8 (providing extensive evidence of deep and widespread voter ignorance); Somin, supra note 8 at 416-17 (same).
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).
V of the Constitution with procedures that allow amendment through majoritarian voting processes. Article V requires constitutional amendments to 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. Throughout American history, critics of Article V have sought to replace or supplement it with a more majoritarian alternative.

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, and the informed “Consent of the Governed,” to cite the title of one of Amar’s influential articles. 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.” Henry condemned Article V for enabling “a contemptible minority” to “prevent the good of the majority.” This longstanding argument for non-Article V

15 Article V also allows for amendments to be proposed by a convention of all the states instead of by Congress, but this method has never been used and seems highly unlikely to be resorted to in the future. See U.S. CONST. ART. V. In any event, amendments proposed by the convention must still be ratified by three quarters of state legislatures.
17 ACKERMAN, WE THE PEOPLE I; ACKERMAN WE THE PEOPLE II.
18 Amar, Consent of the Governed.
19 Quoted in VILE, supra note 16 at 33.
constitutional revision would be strengthened by evidence showing that voters in times of constitutional change actually have sufficient knowledge to make meaningful decisions; by the same token, it would be weakened if majoritarian voting processes during periods of constitutional change are in large part conduits for voter ignorance.

Given the critical role of voter knowledge in the process of constitutional change, it is perhaps surprising that neither the extensive 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. 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 – the defenders of Article V’s claim to be the exclusive legitimate mode of constitutional change - have even attempted to investigate this important issue.

In this Article, these questions are addressed by examining the behavior of both voters and elites during the New Deal period, the most important and wide-ranging era of constitutional change in 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 Future articles, I will explore the same issues with reference to other times of constitutional change in American history, notably the Civil Rights era of the 1960s.

In Part II 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 knowledge in periods of “normal” politics. Part III 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 periods. 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 IV 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 V, 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. I also briefly address some survey data relevant to the question of elite constraint. Part VI looks at voter knowledge from the perspective of elite political leaders. It examines three critical cases – the National 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, it turns out that 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 VII 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.”\(^{23}\) The issue of voter knowledge thus turns out to be a critical one for both the normative and empirical study of constitutional change.

II. 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 would be desirable. 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 purposes of the present analysis, 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 concept of constitutionalism developed in “new institutionalist” political economy, which stresses the high transaction costs of altering established political institutions as a major cause of their importance. It is also in line with the concept endorsed by Bruce Ackerman, who stresses that “higher lawmaking,” as he refers to constitutional change, is defined in part by its deep embeddedness within political institutions, which makes it difficult or even impossible to reverse, at least in the course of “normal” politics.

This functionalist approach to constitutional change can be differentiated from a purely legalistic approach which defines as a constitutional change 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, 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

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23 Sanford Levinson, Political Implications of Amending Clauses, 13 CONST. COMMENTARY 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.
25 For an earlier similar approach, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960) (elaborating on the differences between constitutional and normal politics).
26 See ACKERMAN, WE THE PEOPLE I ch. 10; ACKERMAN, WE THE PEOPLE II; Ackerman, supra note. 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 (WE THE PEOPLE I, ch. 10) that the kind of mobilization he describes is only likely to occur around major issues, 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.
New Deal period, without altering constitutional text.\textsuperscript{28} Robert Bork, a committed originalist and formalist, even refers to the New Deal as a “constitutional revolution.”\textsuperscript{29} 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.\textsuperscript{30}

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

B. Why a Separate Analysis?

In light of the extensive existing literature on voter knowledge,\textsuperscript{31} it may be asked 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, very difficult to reverse decision. This means that it is more important that voters “get it right” the first time, and that they arguably 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

\textsuperscript{27}See, e.g., ANTONIN M. SCALIA, A MATTER OF INTERPRETATION (1997) (defending textualism as a normative theory of interpretation).


\textsuperscript{29} BORK, supra note 28 at 55.

\textsuperscript{30} See ALAN BULLOCK, HITLER: A STUDY IN TYRANNY (1964).

\textsuperscript{31} For critical summaries of the literature, see, e.g., DELLI CARPINI & KEETER supra note 8; ERIC R.A.N. SMITH, THE UNCHANGING AMERICAN VOTER (1989); Morris Fiorina, Voting Behavior, OCCASIONAL PAPER 94-I, Harvard University Center for American Political Studies (1994); Somin, supra note 8.
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”\textsuperscript{32} is likely to
be less effective. Effective retrospection may tell us that the prior government (for instance the
Hoover Administration in 1932) has failed, but is of limited utility in determining whether an
entirely new institutional structure will be preferable. It is arguably of even less utility in
determining whether the proposed new constitutional system should be retained indefinitely, far
beyond the ending 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”\textsuperscript{33} or political parties\textsuperscript{34} may not be
helpful if the question at hand is whether or not to 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\textsuperscript{35} is also unlikely to be useful since everyday life does
not provide voters with experience 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

\textsuperscript{32} For defenses of the theory of retrospective voting, see, e.g., FIORINA, supra note 9; KEY, supra note 9; Helmut
\textsuperscript{33} For shortcut theories emphasizing the role of trusted opinion leaders as guides for less-informed voters, see, e.g.,
MICHAEL MCCUBBINS & ARTHUR LUPIA, THE DEMOCRATIC DILEMMA (1998); James Stimson, A Macro Theory of
\textsuperscript{34} For shortcut theories emphasizing the informational benefits of political parties, see, e.g., JOHN H. ALDRICH, WHY
\textsuperscript{35} The political utility of information derived from everyday life was first noted by Anthony Downs. See ANTHONY
DOWNS, AN ECONOMIC THEORY OF DEMOCRACY ch. 14 (1957). Political scientist Samuel Popkin has made the most
sweeping recent claims for the effectiveness of this information shortcut. See SAMUEL POPKIN, THE REASONING
VOTER (1991); Popkin, Information Shortcuts and the Reasoning Voter, in INFORMATION, PARTICIPATION AND
skeptical of these mechanisms under conditions of constitutional change.\footnote{For skeptical recent treatments of shortcuts even in the normal context, see, e.g., Michael Alvarez, Information and Elections (1997); Delli CarPINI & KeETer, supra note 8; Diana Mutz, Direct and Indirect Routes to Politicizing Personal Experience: Does Knowledge Make a Difference? 57 Pub. Opinion Q. 483 (1993); Larry Bartels, Uninformed Votes: Information Effects in Presidential Elections, 40 Am. J. Pol. Sci. 194 (1996); and Ilya Somin, Resolving the Democratic Dilemma? 16 Yale J. on Reg. 401 (1999) (book review of McCubbins & Lupia, supra note 33). For a detailed critique of the major shortcut theories advanced in the political science literature, see Somin, supra note 8 at 418-31.} 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,\footnote{See generally works by Ackerman cited in note 14.} and on the closely related research tradition growing out of studies of realignment.\footnote{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 (2d Ed. 1983).} The second is one I derive from collective action\footnote{For the most important accounts of collective action theory as applied to political participation, see Russell Hardin, Collective Action (1982); Mancur Olson, The Rise and Decline of Nations (1982); Mancur Olson, The Logic of Collective Action (1965) [hereinafter, Olson, Logic of Collective Action].} and “rational ignorance”\footnote{The concept of “rational ignorance” was introduced by Downs, supra note 35 at ch. 13.} theories. To briefly summarize, the first of these theories predicts that voters should, other things equal, be more knowledgeable at times of constitutional change and that this knowledge should enable them to have greater control over policy outcomes. 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. It also suggests that political elites, not voters, should have greater control over policy outcomes in constitutional change.

III. TWO APPROACHES TO CONSTITUTIONAL CHANGE
Unfortunately, there has not been a previous attempt to fully specify 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. He argues that periods of constitutional change are characterized by heightened attention to political issue by a normally passive and apathetic public. Accepting the conclusions of a generation of voter knowledge research, Ackerman admits that “citizens normally haven’t gathered enough information for an informed opinion [on public policy issues],” but argues that in a constitutional moment, they will make “special efforts” to increase their knowledge, efforts they would not make during times of normal politics. 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.”

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 and the need to attend to other aspects of their lives. However, periodically - usually as the result of a great crisis - a political movement is able to place large-scale

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41 Although Ackerman limits the applicability of his theory to the United States only (ACKERMAN, WE THE PEOPLE I ch. 1), most of its features are applicable more generally.
42 ACKERMAN, WE THE PEOPLE I chs. 9-10.
43 Id. at 272.
44 Id. at 272-73.
45 DOWNS, supra note 33 at ch. 13.
constitutional change on the agenda. This raises the stakes of politics and therefore leads voters to pay more attention than normally and become more knowledgeable about the alternatives facing them. 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. Such support enables them to obtain overwhelming majorities in the legislative and executive, and indirectly judicial branches of government, which in turn allows them to impose their agenda relatively free of preexisting constitutional constraints. 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 is normally possible.

Heightened attention during “constitutional moments” need not, in Ackerman’s view, necessarily result in successful constitutional change. 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. By contrast, the 1890s Populists, 1960s Great Society liberalism, and 1980s New Right, are characterized 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. 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.

46 ACKERMAN, WE THE PEOPLE I at 271-73.
47 Id. at ch. 10.
48 Id.
49 Id. at chs. 9-10.
50 ACKERMAN, WE THE PEOPLE I ch. 1.
51 Id. at ch. 10.
Ackerman’s model is similar to and in part derived from models of political realignment. These theories posit that a “realigning” election occurs when a critical new issue arise that reorients the political spectrum around itself and leads to widespread and semi-permanent shifts of blocs of voters from one party to another. Alternatively, the new issue may be so destructive to the existing party system that one or both major parties may disappear altogether. As in Ackerman’s theory, realignment theory posits unusual periods during which voters focus intensely on a particular set of issues.

In American history, these periods coincide nicely with Ackerman’s “constitutional moments.” Thus, Ackerman sees successful constitutional moments during the 1860s and 1930s, 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. Likewise, realignment theorists see successful realignments in the 1860s, 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. 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 create a serious challenge to the existing party system as well.

Realignment theory implicitly dovetails with Ackerman’s theory in another respect as well. 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

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52 Ackerman has himself acknowledged the links between his theory and realignment theory. See id. at 329n.1. For works on realignment theory, see works by Burnham and Sundquist cited in note 38. See also the classic article by V.O. Key. V.O. Key, A Theory of Critical Elections, 17 J. POLITICS 3 (1955).
53 SUNDQUIST, supra note 38 at ch. 3.
heightened party responsiveness to voter opinion with respect to the realignment issue. In theory, the latter could mean merely “position-taking”\textsuperscript{55} by the parties rather than any actual impact on policy outcomes, but the realignment theorists clearly imply that policy outcomes are also implicated at least to a substantial extent.\textsuperscript{56}

There are, however, two differences between Ackerman’s theory and realignment theory. First, at least in theory, 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 and 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 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.

The second difference between realignment theory and Ackerman’s theory is more consequential to my project. While Ackerman explicitly predicts that periods of constitutional change should see heightened voter knowledge, the realignment theorists predict merely heightened issue salience for voters.\textsuperscript{57} 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

\textsuperscript{54} SUNDQUIST, supra note 38.
\textsuperscript{55} On position-taking, see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).
\textsuperscript{56} Sundquist in particular refers to policy outcomes at numerous points in his analysis. See SUNDQUIST, supra note 38.
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.
2. This heightened attention and knowledge enable voters to exercise greater control over policy outcomes within the key policy areas at issue.

Implications for Voter Behavior

The first prediction implies that voters should know more about both the specific issue at stake and about what Delli Carpini and Keeter call “rules of the game” knowledge about the political system.58 The latter form of knowledge is knowledge about general matters of the distribution of power and responsibility within the political system that enable voters to determine, among other things, which elected leaders to hold responsible for which policy outcomes. In a period of attempted constitutional change, this form of knowledge is even more crucial than normally because constitutional change is of course “change in the rules,” one whose merits cannot easily be assessed 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 affected issues at stake in a period of constitutional change. On this point, it is vital to understand that the theory predicts not

57 See BURNHAM, supra note; SUNDQUIST, supra note.
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 it is voter preferences that ultimately drive constitutional change would be placed into serious doubt.\(^{59}\)

**Implications for Elite Behavior**

Among the most underanalyzed aspects of theories of voter knowledge are their implications for elite behavior. The fundamental insight here is that political elites facing a relatively knowledgeable electorate should behave differently from ones who face a comparatively ignorant one. Thus, if there is indeed an upsurge of 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* voters as being more knowledgeable and paying more attention than previously. While, of course, political elites may misperceive, they do 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 misperception suggests that failure to confirm this prediction should not lead us to reject Ackerman’s theory in its entirety, it would at least undercut its 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. Since voters are

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58 DELLI CARPINI & KEETER, *supra* note 8 at 69-73.
59 ACKERMAN, *WE THE PEOPLE* I ch. 10.
paying more attention than normal, policies deviating from public opinion, especially on the issue areas 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 actually act on the above two perceptions: they should alter their policy positions to take into account voter sentiment. Moreover, they should be observed to conform their policies to the new positions and not merely make 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 Anthony Downs’ work, many political scientists and economists have argued that voters are “rationally ignorant” about politics. Because of the very low significance of any single vote, there is a vanishingly small payoff to acquiring political knowledge in order to vote in an informed way. Of course, even the rationally ignorant voter will likely acquire some political knowledge from everyday life, because he or she may find the information interesting or because for a few groups the knowledge is professionally useful. However, if the rational

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60 DOWNS, supra note 35 at ch. 13.
61 See William H. Riker & Peter Ordeshook, A Theory of the Calculus of Voting, 62 Am. Pol. Sci. Rev. 25 (1968) (demonstrating that the chance of any one vote determining the outcome of a presidential election is roughly 1 in 100 million).
62 For optimistic accounts of the utility of this shortcut to political information, see sources cited in note. For criticism, see Somin, supra note 8 at 420-21; Mutz, supra note 36.
63 See Mancur Olson, Supply-Side Economics, Industrial Policy, and Rational Ignorance, in The Politics of Industrial Policy 245 (Claude Barfield & William Schambra eds. 1986) (pointing out that some citizens, such as
ignorance hypothesis is correct, the general level of voter knowledge is likely to be very low. Most existing studies of voter knowledge do indeed confirm this prediction, and also find that there has been little increase in political knowledge over time.64 Other researchers have found, contrary to the prediction that voter ignorance at the individual level has a random, self-offsetting effect,65 that ignorance has systematic effects that can swing the results of even presidential elections, where voters know more about the candidates than in other situations.66 However, these studies do not specifically focus on periods of constitutional change, which is what I do in this Article.

Rational ignorance theory, of course, coexists uneasily with the apparent failure of the rational choice theory’s prediction that voters simply should not vote. After all, 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,67 while critics of rational interest group lobbyists, may acquire political knowledge because it is professionally useful to them for purposes other than voting).

64 See, e.g., ANGUS CAMPBELL, ET AL., THE AMERICAN VOTER (1960); DELLI CARPINI & KEETER, supra note 8; W. RUSSELL NEUMAN, THE PARADOX OF MASS POLITICS (1986); SMITH, supra note 31; Stephen E. Bennett, Trends in Americans’ Political Information, 1967-87, 17 AM. POL. Q. 422 (1989); Bennett, supra note 12; Michael X. Delli Carpini & Scott Keeter, Stability and Change in the U.S. Public’s Knowledge of Politics, 55 PUB. OPINION Q. 583 (1991); Philip Converse, The Nature of Belief Systems in Mass Publics, in IDEOLOGY AND DISCONTENT (David Apter ed. 1964); Somin, supra note 8.

65 In theory, if voting errors caused by ignorance are randomly distributed 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 (1992); James Converse, Popular Representation and the Distribution of Information, in INFORMATION AND DEMOCRATIC PROCESSES, supra note; Stimson, supra note 8 at 429-31.

66 ALVAREZ, supra note 36; DELLI CARPINI & KEETER, supra note 8 at ch. 6; Bartels, supra note 36; Thomas Holbrook & James Garand, Homo Economicus? Economic Information and Economic Voting, 49 POL. RES. Q. 351 (1996).

67 See, e.g., TERRY M. MOE, THE ORGANIZATION OF INTERESTS 31-32 (1980); John Aldrich, Rational Choice and Turnout, 37 AM. J. POL. SCI. 246 (1993); Riker & Ordeshook, supra note 60. In particular, it should be pointed out that 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 or she perceives a substantial difference between the opposing candidates, and 2) she 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 (1984).
choice have sought to refute these efforts.\textsuperscript{68} Here, there is no reason to enter into this 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. After all, the acquisition of political knowledge is a much more costly, time-consuming, and difficult process than is voting, so it is theoretically possible that voters make a greater effort to behave rationally in one domain than in the other.\textsuperscript{69}

For present purposes, the key aspect of the rational ignorance hypothesis 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, they 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 absolute knowledge may be \textit{relatively} less helpful to voters because the issues involved in constitutional change are more far-reaching and complex than those of normal politics and because, as discussed above, constitutional change is less easily understood by means of the standard “shortcuts” to political understanding that voters employ.

\textit{Implications of Rational Ignorance Theory}

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 normally. 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.

However, there is one additional implication for elite behavior that should be spelled out:

\textsuperscript{68} See, \textit{e.g.}, Donald Green \& Ian Shapiro, \textit{Pathologies of Rational Choice Theory} (1994); Brian Barry, \textit{Economists, Sociologists, and Democracy} (1970).
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 to a degree constrained by the preexisting constitutional framework. The transaction costs of trying to change it are very high, and strong opposition can be expected to any attempt to do so. In a period when constitutional change is on the agenda, however, these costs are necessarily reduced. A crisis, such as the Great Depression in the 1930s, leads the population to be more accepting of possible changes. If, as Ackerman’s theory 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. But if the theory of rational ignorance is sound, then elites free of prior constitutional restraints can impose changes they wish to see, 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. Instead of controlling the process of constitutional change, voters merely open the door for elites to impose those constitutional changes that they themselves desire.

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.” Nonetheless, it is clear that we have two theories of the relationship between voters and constitutional change that make opposing and to a great extent mutually exclusive predictions. This makes it easier to test them against each other and obtain usable results, since evidence that helps to confirm one theory necessarily helps refute the other.  

IV. AMERICAN CONSTITUTIONAL CHANGE IN THE NEW DEAL ERA

69 This point is argued in Aldrich, supra note 66, and Somin, supra note 8 at 437-38.
To test the opposing theories of constitutional change, I focus on what is by far the most important period of constitutional change in twentieth century American history: the New Deal era. This case is one of the paradigm events that led to the development of Ackerman’s theory and of the theory of realignment. 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 period 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. Previously, federal economic power, though slowly growing, was quite limited. Afterwards it was greatly extended and – for the most part - limited only by such restraints as Congress and the President were themselves willing to accept. Although this dramatic change did not result in changes in the letter of the Constitution, it did

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70 See, e.g., NORTH, supra note 24.
71 STEPHEN VAN EVERA, GUIDE TO METHODS FOR STUDENTS OF POLITICAL SCIENCE (1997).
72 See ACKERMAN, WE THE PEOPLE I; ACKERMAN, WE THE PEOPLE II 279-382 (analyzing the New Deal as a constitutional moment).
73 See BURNHAM, supra note 38; SUNDQUIST, supra note 38.
74 For a survey, see DAVID KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-45 363-80 (1999).
76 For summaries of the growth of federal government economic powers, see, e.g., HIGGS, supra note 13; KENNEDY, supra note 73 at 363-80; Epstein, supra note 28; John Joseph Wallis, Why 1933? The Origins and Timing of National Government Growth, in THE EMERGENCE OF MODERN POLITICAL ECONOMY (Robert Higgs ed. 1985). A minority of scholars argue that the New Deal made no really fundamental changes, since its policies were really 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 Deal-New Era Test, 53 J. POLITICS 106 (1991). Yet even these writers concede the general point that fundamental constitutional change resulted from the crisis brought on by the Depression, merely locating its beginnings one administration earlier. Moreover, even if Hoover and the Republicans originated many of the specific New Deal policies, there is little question that the federal government’s new role did not become institutionalized on a permanent basis until the New Deal, which saw, among other things, the endorsement of the federal government’s new role by the Supreme Court. Hoover and his associates generally saw their new policies as merely temporary emergency measures that could soon be repealed. HIGGS, supra note 13 at 162-67.
result in a massive change in its interpretation by the courts, one that legal scholars of all political persuasions see as a virtual revolution in constitutional doctrine.\footnote{ACKERMAN, WE THE PEOPLE II, at 279-382; LEUCHTENBURG, supra note 74 at ch. 8; see also sources cited in note 28.}

New Deal-era constitutional change provides us with several ways to test the competing theories outlined above. These can be divided up into tests of the models’ predictions for voter behavior, and tests of 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, however, such data is extremely limited, I also examine later National Election Study data to determine whether respondents of 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 period: the National Recovery Act (NRA), the National Labor Relations Act, and President Franklin Roosevelt’s plan to “pack” the Supreme Court to ensure that his constitutional innovations would be upheld by that body.

Research into the impact of voter ignorance might explain an important anomaly in New Deal historiography. As the recent leading 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.\footnote{KENNEDY, supra note 73 at 363.}

The pattern of New Deal policies cannot be easily understood merely as a response to public concerns over the Depression.\footnote{Of course, such policies are even less understandable if we accept a neoclassical rather than a Keynesian interpretation of the Depression’s causes. See MILTON FRIEDMAN & ANNA J. SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960 (1963) (classic work advancing such a view). However, the latter were not widely accepted in the 1930s, especially by New Deal-era officials and political leaders.} Many of the key policies seem have had little relevance to ending the economic downturn, and some may even have exacerbated it. 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. To take one example, New Deal pro-union labor policies were instituted despite strong public distaste for labor unions and strikes revealed in contemporary survey data.\textsuperscript{80}

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 themselves or organized interest groups favored. Thus, for example, while the general public may have disliked labor unions, union members and leaders surely did support pro-union policies and political leaders may have been willing to pursue them because they understood that voter ignorance would limit the force of public backlash.

A number of theories of government growth focusing on the 1930s argue that political leaders exploit crisis situations, including especially periods of constitutional change, to expand their powers.\textsuperscript{81} 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 to expand it 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.

\section*{V. Survey Evidence of Voter Knowledge during the New Deal Era}

\textsuperscript{80}Strikes and labor unions are viewed unfavorably by a majority of respondents in nearly all the surveys on the subject from 1935 to 1941. See the discussion below.
\textsuperscript{81} See, e.g., works cited in note 13 above.
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. These surveys include a number of questions on voter knowledge for the 1935-41 period which is of most direct concern here. Unfortunately, there are only a few questions of this type which I have been able to find so far. Overall, they show that there was a relatively low absolute level of voter knowledge during the New Deal period, at least on the issues asked about in the questions. What they do not give us, unfortunately, is a basis of comparison with other periods. This latter is provided by retrospective analysis of voter knowledge though National Election Study survey data.

A. New Deal Era Survey Data

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

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 I was able to find was a 1940 survey in which respondents were asked to define a “conservative in politics.” Only

82 Many of the Gallup polls are catalogued in GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-71 (1972). For Roper and other surveys, see HADLEY CANTRIL, PUBLIC OPINION 1935-46 (1951). The results of all known Roper, Gallup and other polls from this era have been catalogued on line by the Roper Center for Public Opinion. They are available at Roper Center for Public Opinion Research, http://web.lexis-nexis.com/universe/form/academic/s_roper.html [hereinafter Roper Center, individual surveys identified by accession number].
83 After 1941, of course, the onset of World War II largely brought the New Deal period of constitutional change to an end. See generally ALAN BRINKLEY, THE END OF REFORM (1995).
40% were able to give an answer considered correct by interviewers.\textsuperscript{84} 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. However, the results seem broadly similar to those of leading studies in the 1960s and 1970s, which generally found some 15 to 30% of respondents conversant with the liberal-conservative dichotomy, usually under standards of evaluation tougher than those of the 1940 survey, requiring respondents to connect these concepts to specific issues.\textsuperscript{85} It is also significant that the absolute number of those able to define liberalism and conservatism correctly seems to have been 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 Gallup survey.

Another Gallup survey, this time in 1945, found that 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.\textsuperscript{86} In this case, the number able to identify the TVA had probably been inflated by a then-current proposal to create a similar agency for the Missouri River area.\textsuperscript{87} This is not an especially high rate, and one in line with later results from survey questions of similar difficulty administered during “normal” periods (Delli Carpini and Keeter 1996, ch. 3).

\textsuperscript{84} CANTRIL, supra note 82, at 584.
\textsuperscript{85} W. RUSSELL NEUMANN, THE PARADOX OF MASS POLITICS 21 (1986).
\textsuperscript{86} CANTRIL, supra note 82 at 698.
\textsuperscript{87} Id.
A more complex survey result was a 1939 Gallup question that asked respondents to rate a number of important political leaders as conservative, liberal or radical. Unfortunately, it also exemplifies some of the difficulties of using survey data from this period.

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

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 viewed as potential Republican presidential contenders for 1940; the former two were highly conservative, while Dewey was arguably more of a moderate, though still to the right of the Roosevelt administration. Cordell Hull (Secretary of State) and James Farley (postmaster general) were prominent liberal Cabinet members and possible presidential contenders should FDR decline to run for a third term. Vice President Garner had, by 1939, clashed publicly with FDR because of his distaste for many New Deal measures; at the same time, he was surely not

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88 Data is adapted from GALLUP, supra note 82 at 109. For a very similar August 1938 Roper survey, see Roper Center, Accession Nos. 0175908-13.
89 It should be noted that in the 1930s and earlier, the position of postmaster general was much more important than it is today, and was generally held by a prominent politician.
nearly as conservative as most Republicans. He was also seen as a possible presidential candidate for 1940.

Overall, the results are hard to interpret because evaluation is made difficult by two complex issues: whether it is acceptable to regard FDR and other mainline Democrats as “radical” as well as liberal, and whether it is acceptable to categorize Republican and Democratic moderates (Dewey, 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, than the majority was unable to correctly place Dewey, Hull, Vandenberg, Taft, and Farley, all of whom were highly prominent politicians. All but Dewey had been heavily involved in conflicts over the New Deal.

In sum, the few available knowledge questions from the New Deal period itself suggest a level of political knowledge similar to that later observed in periods of “normal politics.” However, 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 meaningful significance.

New Deal Era Survey Evidence on Constraint

Several New Deal era survey questions directly asked respondents whether or not 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 it, this suggests that voters lacked sufficient knowledge to impose their preferences on this issue.\footnote{I am indebted to the analysis of these same survey question by Barry Cushman. Cushman, supra note 2 at 38-41. 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 elite constraint as I have done.}

In 1936-37, 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 or oppose an amendment to the Constitution transferring to the Federal Government the power to regulate agriculture and industry?”\footnote{Roper Center, Accession No. 0173555.} Forty-three percent of respondents answered “yes,” while a strong majority of 57 percent said “no.”\footnote{There apparently was not a “no opinion” option in this survey.} In a similar question asked in December 1936, Gallup surveyed respondents as to the issue of: “Would you favor an amendment to the Constitution giving Congress the power to regulate agriculture, commerce, industry, and labor?”\footnote{Roper Center, Accession No. 0279185.} Once again, a majority (51%) said “no,” while 42% answered yes and seven percent expressed no opinion.

These two surveys are significant in that both took place in the year of the 1936 election, which Ackerman views as the major popular endorsement of constitutional change creating largely unlimited congressional power to regulate the economy.\footnote{ACKERMAN, WE THE PEOPLE II at 309-11.} The December survey was taken only a few weeks after Roosevelt’s landslide election victory. Yet the surveys strongly suggest that a majority of voters actually opposed the constitutional change that the administration sought to adopt. Obviously, the data is 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 be 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 vice versa. Unfortunately, the survey questions did not give respondents the option of endorsing federal regulatory power over one area but not the other.\textsuperscript{95}

Nonetheless, the survey evidence suggests 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 shared the view that a majority of the public was opposed to broad constitutional change. That is the likely reason why they chose to avoid mention of constitutional change almost entirely during the 1936 campaign.\textsuperscript{96}

This conclusion is to some degree reinforced 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 if respondents would “favor an amendment to the Constitution giving congress greater power to regulate industry and agriculture.”\textsuperscript{97} This question differs from the previous two in that it posits a potentially much more modest increase in federal regulatory power. Instead of asking about giving Congress “the power to regulate” industry and agriculture, which implies complete power over these subjects, it merely suggests granting Congress regulatory power “greater” than that which it currently possesses. Not surprisingly, this more modest grant of power was supported by a much higher percentage of respondents than the broader one. Fifty-eight percent of respondents in the March

\textsuperscript{95}This problem is exacerbated in the December 1936 question, which listed four different areas of regulation.
\textsuperscript{97}Roper Center, Accession No. 0173578.
1937 survey said that they favored the proposed amendment, while 42 percent said that they were opposed. Nonetheless, as Barry Cushman points out, it is significant that 42 percent may have opposed any broad increase in federal regulatory authority at all. 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 merely increasing Congressional regulatory power and in fact made that power virtually plenary.

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 did favor more limited constitutional change that allowed for particular types of economic regulation. In particular, the vast majority of respondents in a series of Gallup and other surveys conducted in 1936-38 favored constitutional amendments granting Congress the power to regulate and prohibit child labor and to set minimum wages. Support for a constitutional amendment granting Congress the power to “limit, regulate, and prohibit” child labor ranged from 61 percent to 76 percent in four identically worded Gallup surveys taken between April 1936 and February 1937. A June 1936 survey showed that 70 percent of respondents supported “an Amendment to the Constitution to regulate minimum wages.” However, of those answering “yes,” only 56 percent (39 percent of the total sample) favored giving this power to the federal government, while 44 percent preferred to give it to the states.

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98 Id.
99 Cushman, supra note 2 at 38-39.
100 ACKERMAN, WE THE PEOPLE II, at 310-11; LEUCHTENBURG, supra note 74 at ch. 8.
101 The survey data on these two issues is described in more detail by Barry Cushman. See Cushman, supra note at 40.
102 Roper Center, Accession Nos. 0173642, 0278912, 0279242, 0173558.
103 GALLUP, supra note 82 at 29.
104 Id.
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. Thus, it seems likely, though not certain, that most of those who expressed opposition 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 evidence on voter attitudes towards constitutional change in the 1930s provides some evidence that political leaders were not as much constrained by public opinion on constitutional change as Ackerman’s theory suggests. However, they do not provide definitive evidence as to how the degree of constraint present in the 1930s compares to that which exists in periods of normal politics. Even here, however, there is some indirect indication. After all, the question of whether or not 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. Thus, we cannot rule out the possibility that there was a modest increase in constraint that was just not great enough to force political leaders to respect majority public opinion on constitutional change. We can, however, have greater confidence in rejecting the view that there was a truly massive increase in constraint that enabling public
opinion to wrest control of the constitutional change press from political leaders and interest groups.

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

Although I have so far been unable 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 all contain voter knowledge questions directly relevant to prominent New Deal issues.\(^{105}\) I conjecture that if the heightened attention hypothesis is correct, voters who lived through the New Deal period should, controlling for other relevant variables, have higher knowledge levels in these surveys than their younger counterparts. Alternatively, it may be that such an effect would only appear in the case of respondents who came of age in this period; these respondents would be part of the cohort of new voters who political scientist Kristi Andersen\(^{106}\) argued were the main agents of realignment to the Democratic Party in the New Deal era.\(^{107}\)

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

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\(^{105}\) 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) and may be downloaded from the ICPSR website: http://www.icpsr.umich.edu. I have recoded the data for the 1952 and 1960 NES in order to make it tractable for purposes of the present research. The recoded data set is on file with the author and available upon request.

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. In this Article, I present only the 1952 evidence, which is greatly superior in quality to the 1960 survey, for my purposes. However, the 1960 results were very similar and I have reported them in Appendix B.108

Using data from the 1952 NES, 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. It is helpful to briefly review the content of the seven items and the reasons for including them.109 The first question asks whether the Democratic or the Republican Party supports a large role for the federal government in various areas of social welfare policy. Obviously, this question relates to the fundamental partisan issue raised by the New Deal and the central axis of cleavage in the New Deal party system. 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 obvious exception of “big business,” all of these groups became staunch supporters of the Democrats during the New Deal period, as a result, historians believe, of FDR’s support of an economically activist federal government.110 By contrast, “big business” was generally supportive of the

107 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, The Cycles of American History 29-30 (1986).
108 The 1952 survey is superior for three major reasons: First, it was obviously 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, there is a great deal more missing data in the 1960 NES than in the 1952 one, which leads to much greater skepticism regarding the validity of the former. In the 1952 NES, 1141 of 1634 respondents had complete data for all the variables relevant to this study. In the 1960 NES, 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, especially since the 1960 results point to the same conclusions.
109 The complete text of all knowledge questions used is recorded in Appendix A.
110 See, e.g., Sundquist, supra note 38; Andersen, supra note 106. 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 all scholars agree that northern Catholic voters were a key component of the New Deal coalition.
Republican Party, both during the New Deal period and later. 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. They therefore constitute a useful test of basic New Deal-related political knowledge.

Table 2
Political Knowledge in the 1952 NES
“Of Age” during New Deal Model

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

Dependent Variable: New Deal Relevant Knowledge n=1141 R2=.247

Table 3
“Of Age” during New Deal Model with Education/Media Usage Interaction Variable

<table>
<thead>
<tr>
<th>Variable Name</th>
<th>Unstandardized Beta</th>
<th>Std. Error</th>
<th>Standardized Beta</th>
<th>T-Stat</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Constant)</td>
<td>1.298</td>
<td>.217</td>
<td></td>
<td>5.970</td>
<td>.000</td>
</tr>
<tr>
<td>Civic Duty</td>
<td>5.879E-02</td>
<td>.096</td>
<td>.017</td>
<td>.614</td>
<td>.539</td>
</tr>
<tr>
<td>Race (black=1)</td>
<td>.582</td>
<td>.244</td>
<td>.101</td>
<td>2.388</td>
<td>.017</td>
</tr>
<tr>
<td>Sex (female=1)</td>
<td>-.248</td>
<td>.093</td>
<td>-.071</td>
<td>-2.663</td>
<td>.008</td>
</tr>
<tr>
<td>Interest in Campaigns (3 Pt. scale)</td>
<td>.375</td>
<td>.066</td>
<td>.177</td>
<td>5.712</td>
<td>.000</td>
</tr>
<tr>
<td>Family Income (8 pt. scale)</td>
<td>.134</td>
<td>.030</td>
<td>.142</td>
<td>4.406</td>
<td>.000</td>
</tr>
<tr>
<td>Region (South=1)</td>
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<td>-.149</td>
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<tr>
<td>Southern Black (yes=1)</td>
<td>-.925</td>
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<td>-.124</td>
<td>-2.757</td>
<td>.006</td>
</tr>
<tr>
<td>Political Acts Beyond Voting (5 pt. scale)</td>
<td>.233</td>
<td>.061</td>
<td>.111</td>
<td>3.832</td>
<td>.000</td>
</tr>
<tr>
<td>Variable Name</td>
<td>Unstandardized Beta</td>
<td>Std. Error</td>
<td>Standardized Beta</td>
<td>T-stat</td>
<td>Sig.</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
<td>-------------------</td>
<td>--------</td>
<td>-------</td>
</tr>
<tr>
<td>(Constant)</td>
<td>.425</td>
<td>.224</td>
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<td>1.897</td>
<td>.058</td>
</tr>
<tr>
<td>TV</td>
<td>.312</td>
<td>.059</td>
<td>.160</td>
<td>5.278</td>
<td>.000</td>
</tr>
<tr>
<td>Radio</td>
<td>6.859E-02</td>
<td>.062</td>
<td>.032</td>
<td>1.097</td>
<td>.273</td>
</tr>
<tr>
<td>Newspaper</td>
<td>.270</td>
<td>.076</td>
<td>.118</td>
<td>3.538</td>
<td>.000</td>
</tr>
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<td>Magazines</td>
<td>1.976E-02</td>
<td>.074</td>
<td>.008</td>
<td>.267</td>
<td>.790</td>
</tr>
<tr>
<td>Civic Duty</td>
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<td>.095</td>
<td>.012</td>
<td>.428</td>
<td>.669</td>
</tr>
<tr>
<td>Race (black=1)</td>
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<td>.242</td>
<td>.085</td>
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<td>.043</td>
</tr>
<tr>
<td>Sex (female=1)</td>
<td>-.235</td>
<td>.092</td>
<td>-.068</td>
<td>-2.546</td>
<td>.011</td>
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<tr>
<td>Interest in Campaigns (3 Pt. scale)</td>
<td>.297</td>
<td>.068</td>
<td>.140</td>
<td>4.386</td>
<td>.000</td>
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<tr>
<td>Family Income (8 pt. scale)</td>
<td>0.09</td>
<td>.031</td>
<td>.101</td>
<td>3.055</td>
<td>.002</td>
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<tr>
<td>Region (South=1)</td>
<td>-.446</td>
<td>.129</td>
<td>-.108</td>
<td>-3.465</td>
<td>.001</td>
</tr>
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<td>Southern Black (1=yes)</td>
<td>-.736</td>
<td>.335</td>
<td>-.098</td>
<td>-2.193</td>
<td>.028</td>
</tr>
<tr>
<td>Political Acts Beyond Voting (5 pt. scale)</td>
<td>.214</td>
<td>.060</td>
<td>.101</td>
<td>3.566</td>
<td>.000</td>
</tr>
<tr>
<td>Education (7pt scale)</td>
<td>1.084E-03</td>
<td>.036</td>
<td>.001</td>
<td>.030</td>
<td>.976</td>
</tr>
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<td>New Deal Cohort (yes =1)</td>
<td>4.226E-02</td>
<td>.107</td>
<td>.011</td>
<td>.396</td>
<td>.692</td>
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</table>

Dependent Variable: New Deal Relevant Political Knowledge  
\( n=1141 \)  \( R^2=.247 \)

---

Table 4

**Political Knowledge in the 1952 NES**

**New Deal Cohort Model**

<table>
<thead>
<tr>
<th>Variable Name</th>
<th>Unstandardized Beta</th>
<th>Std. Error</th>
<th>Standardized Beta</th>
<th>T-stat</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
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<td></td>
<td>7.603</td>
<td>.000</td>
</tr>
<tr>
<td>Civic Duty</td>
<td>6.172E-02</td>
<td>.096</td>
<td>.018</td>
<td>.642</td>
<td>.521</td>
</tr>
<tr>
<td>Race (black=1)</td>
<td>.548</td>
<td>.244</td>
<td>.095</td>
<td>2.248</td>
<td>.025</td>
</tr>
<tr>
<td>Sex (female=1)</td>
<td>-.252</td>
<td>.093</td>
<td>-.073</td>
<td>-2.705</td>
<td>.006</td>
</tr>
<tr>
<td>Interest in Campaigns (3 Pt. scale)</td>
<td>.381</td>
<td>.066</td>
<td>.180</td>
<td>5.770</td>
<td>.000</td>
</tr>
<tr>
<td>Family Income (8 pt. scale)</td>
<td>.125</td>
<td>.031</td>
<td>.133</td>
<td>4.104</td>
<td>.000</td>
</tr>
<tr>
<td>Region (South=1)</td>
<td>-.617</td>
<td>.126</td>
<td>-.149</td>
<td>-4.905</td>
<td>.000</td>
</tr>
<tr>
<td>Southern Black (yes=1)</td>
<td>-.918</td>
<td>.337</td>
<td>-.123</td>
<td>-2.727</td>
<td>.006</td>
</tr>
<tr>
<td>Political Acts Beyond Voting (5 pt. scale)</td>
<td>.230</td>
<td>.061</td>
<td>.109</td>
<td>3.757</td>
<td>.000</td>
</tr>
<tr>
<td>Education (7pt scale)</td>
<td>-9.237E-02</td>
<td>.054</td>
<td>-.088</td>
<td>-1.717</td>
<td>.086</td>
</tr>
<tr>
<td>New Deal Cohort (yes =1)</td>
<td>5.243E-02</td>
<td>.108</td>
<td>.013</td>
<td>.486</td>
<td>.627</td>
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</tbody>
</table>

Dependent Variable: New Deal Relevant Knowledge  
\( n=1141 \)  \( R^2=.247 \)
Table 6  
New Deal Relevant Knowledge  
1952 NES Respondents  
Frequency Distribution

<table>
<thead>
<tr>
<th>No. of Correct Answers</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>254</td>
<td>15.5</td>
<td>15.5</td>
</tr>
<tr>
<td>1</td>
<td>218</td>
<td>13.3</td>
<td>28.9</td>
</tr>
<tr>
<td>2</td>
<td>300</td>
<td>18.4</td>
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</tr>
<tr>
<td>3</td>
<td>338</td>
<td>20.7</td>
<td>67.9</td>
</tr>
<tr>
<td>4</td>
<td>305</td>
<td>18.7</td>
<td>86.6</td>
</tr>
<tr>
<td>5</td>
<td>152</td>
<td>9.3</td>
<td>95.9</td>
</tr>
<tr>
<td>6</td>
<td>54</td>
<td>3.3</td>
<td>99.2</td>
</tr>
<tr>
<td>7</td>
<td>13</td>
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</tr>
<tr>
<td>Total</td>
<td>1634</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>

In addition, it is important to remember that different types of political knowledge are highly intercorrelated.\textsuperscript{111} Thus, even if these particular seven question are considered to be of little significance, they also serve as proxies for other types of political knowledge. A respondent able to answer these items correctly would also be more likely to possess other political knowledge than one who could not.

Using ordinary least squares (OLS) regression, I have specified two models, one standard “heightened attention” model and one based on the Andersen cohort theory, with the cumulative number of correct answers to these seven questions as the dependent variable. The former specification included every respondent who had turned eighteen by 1940, the last national election primarily focused on New Deal-related issues, while the latter counted all respondents

\textsuperscript{111}See, e.g., DELLI CARPINI & KEETER, supra note 8 at 139-47.
who had turned eighteen between 1933 and 1940.\textsuperscript{112} I have also introduced gender, race, region, income, education, interest in politics, participation in politics “beyond” voting,\textsuperscript{113} and use of media such as radio, television, newspapers, and magazines as control variables.\textsuperscript{114} In both models, having lived 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.

\textsuperscript{112} Switching the minimum age to twenty-one, at the time the minimum voting age in most states, does not affect the results in any statistically significant way. I have chosen eighteen because most children of the New Deal era had assumed adult responsibilities by this age.

\textsuperscript{113} 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.

\textsuperscript{114} These variables are widely accepted as important determinants of political knowledge in the literature. For detailed discussion, see, e.g., DELLI CARPINI & KEETER, \textit{supra} note 8 at ch. 5.
**Figure 1**

**Predicted New Deal Relevant Knowledge Level for Average Respondent in 1952 NES: “Of Age” During 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. Dependent variable measured by number of correct answers on 7 point scale.

N=1141; R²=0.227

<table>
<thead>
<tr>
<th>Age During New Deal Era</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not of Age during ND</td>
</tr>
<tr>
<td>Of Age during ND</td>
</tr>
<tr>
<td>New Deal Relevant Knowledge (# correct ans.)</td>
</tr>
<tr>
<td>0.00</td>
</tr>
<tr>
<td>1.00</td>
</tr>
<tr>
<td>2.00</td>
</tr>
<tr>
<td>3.00</td>
</tr>
<tr>
<td>4.00</td>
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</tr>
<tr>
<td>6.00</td>
</tr>
<tr>
<td>7.00</td>
</tr>
</tbody>
</table>

**Age During New Deal Era**

Figure 1 demonstrates that a 1952 NES respondent who was not an adult during the New Deal period and was “average” in terms of income, education, race, media usage, and other factors.

---

\[115 \text{ It should be noted that the modes for the dichotomous variables were as follows:} \]

- Race: white
- Sex: female
- Region: non-Southern
relevant independent variables had virtually the same level of New Deal-relevant political knowledge as an exactly similar respondent who was of adult age in the 1930s.\textsuperscript{116}

**Figure 2**

**Predicted New Deal Relevant Knowledge Level for Average Respondent in 1952 NES: 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.\textsuperscript{117} Dependent variable measured by number of correct answers on 7 point scale.

\[N=1128; R^2=.225\]

\[\text{New Deal Cohort Membership}\]

\[\text{Member of Cohort} \quad \text{Not Member of Cohort}\]

\[\begin{array}{c|c}
\text{New Deal Relevant Knowledge (# correct ans.)} & \\
0.00 & \\
1.00 & \\
2.00 & \\
3.00 & \\
4.00 & \\
5.00 & \\
6.00 & \\
7.00 & \\
\end{array}\]

\textsuperscript{116} The exact predicted number of correct answers for an “average” respondent who was of age during the New Deal was 3.28 questions out of 7. The predicted number for an otherwise identical respondent who was not of age during that time was 3.18 correct answers. The difference between these two figures is not statistically significant and thus does not represent any confirmation of the heightened attention hypothesis.

\textsuperscript{117} The modes for the dichotomous variables are of course exactly the same as those for Figure 1, noted above.
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.\textsuperscript{118}

The 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.\textsuperscript{119} Second, the questions used 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.\textsuperscript{120} 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.\textsuperscript{121} The conclusion that the New Deal experience did not lead to any substantial increase in voter knowledge is therefore highly robust.

Our confidence in the validity of the results is also strengthened by the fact that the control variables all generally have the expected impact. Thus, interest in politics greatly increases political knowledge and higher income increases it as well. By contrast, women and blacks have considerably less political knowledge than white men, a result consistent with

\textsuperscript{118} 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 non-member. As with the “of age” model, the difference between the two figures is not statistically significant.\textsuperscript{119} \textsc{Delli Carpin & Keeter, supra} note 8 at 184-85. Including age as an additional control variable, not shown here, did not of course affect the outcome.\textsuperscript{120} Logistic regression (“logit”) was used because the dependent variables in these models are dichotomous. Using logit or probit (a similar methodology) in such circumstances is the standard econometric procedure.
research on more recent data sets.\textsuperscript{122} Political activity beyond voting and media usage also increase knowledge considerably. The one exception is education, whose effects on political knowledge seem to be statistically insignificant. However, this anomaly is cleared up once we realize that education 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 “soak up” 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.

\textit{Potential Objections}

\textit{The Problem of “Forgetting”}

There are several possible objections to the conclusions reached based on the 1952 NES study. First, and most obvious, the 1952 NES was 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. However, this consideration probably does not invalidate our results. First, in order for it to be sound, nearly all the respondents who had

\textsuperscript{121} I have not reported the results of these fourteen regressions in detail for reasons of space. However, I would be happy to provide the results to interested readers.

\textsuperscript{122} 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
increased their political knowledge during the New Deal period would have had to forget.\textsuperscript{123} 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 the post-World War II period. Thus, anyone who had learned this information in the 1930s would have continued to find it useful in interpreting post-war politics, a circumstance that would limit the tendency to forget. Finally, an earlier study by Kristi Andersen suggests that forgetting over time is not as serious a problem as we might imagine. In a study of party affiliation during the New Deal, Andersen found that the percentage of respondents surveyed in 1968 and 1972 who recalled being affiliated with the Democratic or Republican Party in the late 1930s is almost exactly identical to percentages reported in surveys undertaken in 1937.\textsuperscript{124} While 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, while 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.\textsuperscript{125} 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\%.\textsuperscript{126} If Jennings’ findings are reasonably close to an

\textsuperscript{123} Or, more technically, enough would have had to forget 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.
\textsuperscript{124} ANDERSEN, supra note 106 at 59.
\textsuperscript{125} M. Kent Jennings, Political Knowledge over Time and Across Generations, 60 PUB. OPINION Q. 228, 243-45 (1996).
\textsuperscript{126} Figures calculated from id. at 244 tbl. 2. The five items in question had retention rates of 54\%, 60\%, 82\%, 85\%, and 97\% after seventeen years.
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 period would retain it for a long time to come. It is worth nothing that only twelve years had passed between the last New Deal election and 1952, as compared to seventeen in Jennings’ study, and that the items in the 1952 NES were more useful to understanding contemporary politics than most of those tested by Jennings.

*The Possibility of “Catching Up”*

One could also make the opposite criticism of my theory from that implied by the “forgetting” hypothesis: instead of the New Deal generation “forgetting,” it is conceivable that later generations “caught up” with it over time. This is not impossible, but if true it serves to refute rather than support the heightened attention hypothesis. For it implies that, during periods of “ordinary” politics such as the 1945-52 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 period and the postwar era) 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 period, and that paying attention to the events of that era would provide a respondent with knowledge that enables him or her to accurately predict 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 help a respondent to accurately predict political alignments in 1952.

*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 be unpersuasive for two major reasons. First and foremost, the residuals in question are extremely small, approximately 0.1 correct answers on the seven point knowledge scale. 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 period, 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

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127 A partial exception were the Catholics, a majority of whom supported the Democrats even before the New Deal. However, Catholic voters 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.

128 See Tables 2-5.
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.\footnote{These figures are calculated from the regression coefficients shown in Tables 2-5.}

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 for 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 believed to be large.

\textit{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 be able to tell if the conclusion of no increase in knowledge holds true for those who actually voted in New Deal-era elections. Unfortunately, it is difficult or impossible to assess political knowledge among voters only because numerous survey respondents who do not vote routinely tell pollsters that they did.\footnote{This is a longstanding and well-established finding in the social science research. See, e.g., Robert P. Abelson, et al., \textit{Attempts to Improve the Accuracy of Self-Reports of Voting}, in \textit{QUESTIONS ABOUT QUESTIONS}, 138 (Judith Tanar ed. 1992); Aage Clausen, \textit{Response Validity: Vote Report}, 32 PUB. OPINION Q. 588 (1968). One recent study} Those citizens most likely to incorrectly report voting 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. Thus, any attempt 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.

Attempts to separate voters from non-voters 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. Thus, we cannot place much credence in the 1952 NES’ questions on self-reported voting in the 1952 election itself. However, the 1952 NES does contain 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.

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.

However, 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


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).

Studies show that about 25-30 percent of all nonvoters claim that they voted on surveys. Id. at 613.

1952 NES, Question number 520071.

Exact regression results available from the author.
significant increase in New Deal relevant knowledge of a full point on the seven point scale (1.06 points in all).\textsuperscript{135}

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.\textsuperscript{136} 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.\textsuperscript{137} 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:

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

<table>
<thead>
<tr>
<th>Frequency of Self-Reported Voting in Past Presidential Elections</th>
<th>Statistically Significant Increase in New Deal Relevant Knowledge Among those “Of Age” during New Deal Era.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claimed to have voted in “All” past elections, “Most,” or “Some”</td>
<td>Yes</td>
</tr>
<tr>
<td>“All” or “Most” only</td>
<td>No</td>
</tr>
<tr>
<td>“Some” only</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The fact that the knowledge-increasing impact of the New Deal seems confined to those self-reported non-voters who claimed to have voted in only “some” past presidential effects 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

\textsuperscript{135} Complete results for this regression on file with the author.
\textsuperscript{136} See nn. and accompanying text.
\textsuperscript{137} Exact regression results are available from the author.
would presumably 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 vote in “most” or “all.” The concentration of false positive 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 had complete data. Yet the positive knowledge impact of living through the New Deal on them was so strong as to create 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.

Thus, the best conclusion that can be drawn from my attempt to separate out voters from nonvoters is that being of age during the New Deal did cause 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 non-voters who do not fall in this category.

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, it may be that the basic knowledge identified in the NES is of the type that most people acquire even in ordinary times. Yet more than two thirds (68%) of the
1952 NES respondents knew the correct answers to only three or fewer of the seven questions.\textsuperscript{138} Since basic political knowledge is fundamental to the understanding of more complex knowledge,\textsuperscript{139} and the two are highly correlated,\textsuperscript{140} 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 questions which tapped knowledge directly.\textsuperscript{141} 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 turns out to be 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. And this evidence strongly suggests that there was no significant increase in voter knowledge as a result of the constitutional upheavals of the New Deal.

\section*{VII. Political Elites, Voter Knowledge and New Deal Constitutional Change: Three Case Studies}

\textsuperscript{138} See Table 6.
\textsuperscript{139} Delli Carpi, supra note 8.
\textsuperscript{140} Id at 139-47.
\textsuperscript{141} Notable previous studies that followed this methodology include Campbell, supra note 63; Nie, supra note 31; Neumann, supra note 85; and Smith, supra note 31.
By contrast with the relative scarcity of studies of New Deal voter behavior, there is a vast literature on New Deal-era political elites.\textsuperscript{142} What these studies have not focused on, however, is the elites’ view of the electorate, and its perceptions of how constrained their policy options were by the voters. 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 FDR administration and Congressional leaders. 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 should also include interest group leaders, state-level politicians, and others. However, key national political leaders 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 examine three key policies integrally linked to New Deal constitutional change: the National Recovery Act, the National Labor Relations Act, and FDR’s plan to “pack” the Supreme Court. In selecting these three cases, I have been guided by several criteria. First, the cases are directly connected to constitutional change in important and relatively obvious ways. They must pose direct and fundamental challenges to the preexisting constitutional order. If such were not the case, they would not be a fair test of the Ackerman heightened attention hypothesis. Second, the policies chosen must have a broad effect. An otherwise minor policy that challenged the existing

\textsuperscript{142} See, e.g., Brinkley, supra note 83; Alan Brinkley, Liberalism and Its Discontents (1998); Leuchtenburg, supra note 74; Arthur M. Schlesinger, Jr., The Coming of the New Deal (1959)[Hereinafter Schlesinger, Coming of the New Deal]; Arthur M. Schlesinger, Jr., The Politics of Upheaval (1960), for
constitutional system is, of course, more likely to be ignored by voters, and so poses a weaker test of the Ackerman theory; moreover, its very insignificance makes it a less serious challenge to the constitutional system 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, 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.

What to Look For

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 would be predicted by 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 as well.¹⁴³ We also know that the Roosevelt Administration was perhaps the most politically successful in American history. Thus, its

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¹⁴³ A small sampling of these studies, which are far too numerous to list. See KENNEDY, supra note 73, for the most thorough recent account.
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 they 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 impact, narrowly defined, even as voters missed its broader, long-term constitutional significance. If political 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 perception that the public is vulnerable to deception is a strong indicator that elites do not believe the public to be well informed. However, it is important to define narrowly what is meant by “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 they 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 their confidence in their correctness.

**B. The National Recovery Act**

As the centerpiece of FDR’s first term economic policy, the National Recovery Act was arguably the most ambitious effort at governmental economic planning in American history.

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143 HERBST, supra note 178.
Enacted in early 1933, the NRA provided for control of prices and production by industry councils acting as cartels backed by the federal government.\textsuperscript{144} The Act further required affected firms to abide by minimum wage and maximum hours regulations that varied by industry. It also enacted a large-scale program of public works. All told, the Act covered “almost the entire private, nonagricultural economy.”\textsuperscript{145} 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.\textsuperscript{146} In 1935, the NRA was declared unconstitutional in a unanimous decision by the Supreme Court, \textit{United States v. Schechter Poultry Co.}\textsuperscript{147}

Nonetheless, the NRA served as a model for later, more narrowly based, New Deal policies,\textsuperscript{148} and the Supreme Court later conceded federal government regulatory powers of roughly the same breadth as those unsuccessfully claimed by the administration in the \textit{Schechter} case.\textsuperscript{149}

In addition to its importance as an element of New Deal constitutional change, the NRA has considerable intrinsic interest as a massive public policy disaster. Its attempts at centrally planned price controls and limitations on production apparently caused a massive 6 to 11 percent decline in GNP in an already deeply depressed economy.\textsuperscript{150} The NRA’s labor regulations, while successful in increasing wages substantially, also caused a large decline in employment centered


\textsuperscript{145} WEINSTEIN, \textit{supra} note 133 at 1.

\textsuperscript{146} LEUCHTENBURG, \textit{supra} note 74 at 214-16; Epstein, \textit{supra} note 28.


\textsuperscript{149} See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942) (most expansive of New Deal era decisions endorsing federal regulatory power over economic matters); LEUCHTENBURG, \textit{supra} note 74, at ch. 8 (describing post-1937 Supreme Court decisions that gave Congress almost unlimited power to regulate the economy).

\textsuperscript{150} WEINSTEIN, \textit{supra} note 133.
The interesting point here is that the NRA was at least partially successful in benefiting 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 NRA 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 US economy. It therefore qualifies as an appropriate case study for this project. Bruce Ackerman has himself acknowledged the importance of the NRA as a test for his theory, referring to it 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.”

Several aspects of the NRA are particularly relevant to our purposes here. They are the issues of political constraint, deception, and the impact of constitutional problems.

*Political Constraint:* As nearly all studies of the NRA point out, both business and labor union leaders saw the early Depression period as an opportunity to implement cartelization schemes for product prices and labor markets respectively. While it is perhaps not surprising that labor unionists saw the period as a political opportunity and did not expect to be hampered by public

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151 Id. at 146-47.
152 ACKERMAN, WE THE PEOPLE II, at 286, 288.
opinion, it is more surprising that business leaders saw it that way, given their apparent unpopularity and FDR’s numerous public denunciations of them as “economic royalists.”

Nonetheless, most students of the NRA portray it as an attempt by business leaders, particularly those in large enterprises, to cartelize the economy for their own benefit. More radical historians even argue that the Act was an attempt to strengthen the capitalist class as a whole and quiesce radical sentiments in the labor movement and the general population. Even the one major dissenting analysis of the Act attributes it to an “autonomous” state acting to implement “progressive” ideologies of planning rather than to pressure from voters. 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.

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 NRA. They did of course fear – with justification, as it turned out - that NRA would be invalidated by the Supreme Court. But 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.

Deception: The FDR Administration’s strategy for gaining public support for the NRA apparently involved a substantial element of deception. As virtually all scholars agree, the

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154 Although, as noted below, survey evidence shows unions and strikes to have been generally unpopular in the 1930s. See text accompanying nn. 168-80.
155 See, e.g., BELLUSH, supra note 142; HAWLEY, supra note 137 at 26-34; HIMMELBERG, supra note 142 at 195-210; Theda Skocpol & Kenneth Finegold, State Capacity and Economic Intervention in the Early New Deal, 97 Pol. Sci. Q. 255 (1982).
157 BRAND, supra note 133.
159 BRAND, supra note 133; BRINKLEY, supra note 83 at ch. 2; HAWLEY, supra note 137 at 26-34; HIMMELBERG, supra note 142 at 200-205; Radosh, supra note 142; Skocpol & Finegold, supra note 144.
NRA was intended to be a permanent restructuring of the American economy along corporatist
tones. Supporters of the NRA among business interest groups and many American liberals hoped
that the Act 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. National Recovery Administration 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.

Nonetheless, administration public statements and public relations campaigns trumpeted
it as a temporary emergency measure to end the Depression. The theme of the massive publicity
campaign headed by Johnson himself emphasized that the NRA was a crisis measure similar to
those taken in war. “New Dealers portrayed the NRA as the “moral equivalent of war” (Brand
1988, 94).

Private sector interest groups that lobbied in favor of the NRA 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 NRA, wrote in May 1933 that the NRA must be “worked out as an emergency
proposal” even though its ultimate objective was “self-government within industry” (a reference

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160 See generally John P. Diggins, Flirtation with Fascism: American Pragmatic Liberals and Mussolini’s Italy, 71
AM. HIST. REV. 497 (1966); see also Radosh, supra note 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 social forces”).
162 See generally William E. Leuchtenburg, The New Deal and the Analogue of War, in Change and Continuity
in Twentieth Century America (John Braeman, et al., eds. 1964); Higgs, supra note 13 at 177-80. The campaign
included extensive use of slogans and symbolism, such as the famous “NRA Eagles,” and included the largest
demonstration in US history up to that time. Schlesinger, Coming of the New Deal, at 101.
163 Brand, supra note 133 at 94.
to cartel control of production through the NRA codes). Over time, pro-NRA business groups “learned to stress . . . the public-benefits, recovery-oriented nature of their proposals.”

It seems possible that President Roosevelt did not even accept the claim that the NRA could help achieve recovery, and only came to support the policy as a result of interest group pressure. Even one of the NRA’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.” After resisting proposals for legislation to facilitate cartelization for several months, FDR changed his position and threw his support behind the NRA after extensive lobbying by business interests led by the NAM (Ibid., 201-206). 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 (Ibid., 206-207). The final “text of the NIRA, except for Section 7(a), conceded to the business concepts on every important point” (Ibid., 207). The 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.

164 Quoted in HIMMELBERG, supra note 142 at 204.
165 Id. at 205.
166 Quoted in Id. at 189. The NRA supporter in question was John S. Lawrence, leader of a regional business association, and a college classmate and personal friend of Roosevelt’s. See id.
167 This exception was the provision of the NRA protecting labor union organizing. It was included at the behest of labor union leaders, particularly American Federation of Labor (AFL) head William Green. See Id. at 206-207.
Initially, the NRA was legally scheduled to expire in two years, subject to renewal by Congress which the Administration and its allies fully expected to achieve.\textsuperscript{168} This suggests, perhaps, that Administration officials \textit{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 NRA in 1935 resulted not from any upsurge of public opposition but from a combination of bureaucratic inefficiency\textsuperscript{169} and irreconcilable conflicting demands of interest groups.\textsuperscript{170} It is likewise appropriate to point out that the NRA did not suffer any significant public backlash from the large decline in GNP and increase in unemployment it caused.\textsuperscript{171} Overall, the NRA experience is a dramatic example of elite 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.

\textbf{C. The National Labor Relations Act}

The National Labor Relations Act of 1935 (NLRA),\textsuperscript{172} despite important later modifications, forms the foundation of American labor law to this day. Briefly summarized, the Act requires employers to recognize employee unions, to bargain with them in “good faith,” and to refrain from engaging in “unfair” labor practices. It further set out a framework in which a

\textsuperscript{168} The initial NRA passed overwhelmingly, and the Administration had a large Democratic majority in Congress, supplemented by support from liberal Republicans. \textit{See, e.g., Hawley, supra note 137 at 30} (noting that the NRA was approved by a vote of 325 to 76 in the House of Representatives and 58-24 in the Senate).

\textsuperscript{169} \textit{See Skocpol & Finegold, supra note 142}.

\textsuperscript{170} For descriptions of these conflicts, see, \textit{e.g., Bellush, supra note 142; Brand, supra note 133; Hawley, supra note 137 at chs. 3-6; Schlesinger, The Coming of the New Deal 118-21, 144-46}.

\textsuperscript{171} For details of the economic damage caused by the NRA, see \textit{Weinstein, supra note 133}.

\textsuperscript{172} The NLRA is also sometimes known as the Wagner Act, after its principal sponsor, Democratic Senator Robert F. Wagner.
union gains recognition through a majority vote of workers at a given enterprise, and created a National Labor Relations Board (NLRB) to adjudicate labor-management disputes under the Act.  

With respect to our case-selection criteria, the Act was obviously a major policy change with broad, long-term effects. It also had clear constitutional implications. From the beginning, administration officials and NLRB leaders were intensely concerned about the danger that it would be overturned by the Supreme Court. In the end, the Act was narrowly upheld in a 5-4 decision in 1937 which was a key component of the famous “switch in time that saved nine” that eventually consummated the New Deal constitutional revolution.

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

Constraint: Some analysts of the NLRB’s origins attribute its passage to 1934 electoral victories by liberal Democratic members of Congress. If this analysis is correct, it 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 proposal is the consistent unpopularity of unions and strikes in public opinion surveys throughout the mid and late 1930s, discussed below.

As in the case of the NRA, 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. Thus, they perceived looser rather than tighter


177 See, e.g., O’Brien, supra note 162; Tomlins, supra note 162.
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, even though direct use of survey results was just beginning to become commonplace.

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 in 1935-39 found that large majorities opposed sit-down strikes and prominent strikes at Ford and General Motors and even supported employers who refused to negotiate with strikers. In a 1937 survey, fifty-seven percent favored calling out the militia “whenever strike trouble threatens.” Perhaps even more strikingly, a December 1937 Gallup poll found 63% endorsing the use of “force” by “state and local authorities . . . in removing sit-down strikers.” Survey respondents also expressed generally negative sentiments concerning CIO leader John L. Lewis, the most prominent of the more radical labor leaders. In a 1937 survey a strong plurality of 45% stated that the New Deal had been “too friendly toward labor” while only 13% suggested that it was “not friendly enough.” An important point to note is that the question concerned “friendliness” towards “labor” (which has generally positive connotations) rather than unions per se. Had the word “unions” been used instead, 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), for

179 GALLUP, supra note 82 at 48, 85; CANTRIL, supra note 82 at 871-72.
180 GALLUP, supra note 82 at 63.
181 Roper Center, Accession No. 0278891.
182 GALLUP, supra note 82 at 31, 48, 63.
183 Id. at 69.
measures banning child labor, and for the minimum wage, but these were not the issues at stake in the NLRA, which was concerned with collective bargaining and strikes.

Other examples of survey results indicating hostility to unions and strikes include the following:

1. 1937 and 1939 Gallup surveys indicating that some two-thirds of respondents supported the enactment laws making “sit-down strikes” illegal.

2. Two 1937 surveys finding that 70% of respondents opposed permitting striking workers to receive payments from government relief funds (Roper Center, Accession Numbers 0279013 and 0279014). 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.”

3. Numerous surveys indicating hostility to particular highly publicized strikes.

It is possible that these survey results are tainted by underrepresentation of lower-class respondents, however both the Gallup and Roper organizations made extensive efforts to cut down on such underrepresentation, and unlike the notorious 1936 Literary Digest poll which mistakenly predicted a crushing Republican victory in the 1936 presidential election, they were fairly successful in predicting electoral outcomes during this period.

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 1934-35. Given the extreme unpopularity of strikes and those unions that sponsored them, it seems likely that Administration and Congressional leaders would have gained equal or greater popularity by

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184 Id.
185 Roper Center, Accession Numbers 0278932, and 0274170.
186 Roper Center, Accession Number 0279014.
187 See, e.g., Roper Center, Accession Number 0278913; GALLUP, supra note 82 at 48, 85.
188 For accounts of these efforts, see JEAN M. CONVERSE, SURVEY RESEARCH IN THE UNITED STATES: ROOTS AND EMERGENCE 1890-1960 chs. 3-4 (1987); Cushman, supra note 2 at 77-100.
189 For a brief description of the famous flawed Literary Digest poll which helped stimulate these results by predicting a Republican victory in the 1936 presidential election — won by Roosevelt in a landslide — see CONVERSE, note 177 at 116-21.
190 For example, Gallup’s polls predicted the 1936 outcome correctly, and he made further improvements in methodology after the election was over. Id. at 119-21.
siding with employers, and that their policies were intended to either placate unions as a narrow, organized interest group or as an expression of “autonomous state” policymaking (Skocpol 1980). 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 Act and its implementation and revision, 50 percent of respondents had “no opinion” as to whether the “Wagner Labor Act is fair to employees” and 51 percent had no view as to whether it was fair to employers. Such high “no opinion” responses suggest a very low level of public attention and knowledge of the issue, especially when we consider that survey respondents often express opinions even about issues they know nothing about in order to avoid seeming ignorant. For this latter reason, the true percentage of respondents who knew little or nothing about the NLRA might have been considerably higher than 50 percent.

**Constitutionality:** As in the case of the NRA, there is little or no evidence in the existing secondary literature that Administration officials and their allies worried about possible popular

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192 Theda Skocpol, *Political Responses to Capitalist Crises: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 POLITICS & SOC. 155 (1980).
193 Roper Center, Accession Numbers 0279094 and 0279095.
194 For the classic survey result showing that many respondents will express opinions even about complete fictitious legislation invented by researchers, see Stanley Payne’s famous finding that 70 percent of respondents expressed opinions regarding the nonexistent “Metallic Metals Act.” STANLEY PAYNE, THE ART OF ASKING QUESTIONS 18 (1951).
195 Surveys that directly asked respondents whether they had “heard of the Wagner Labor Act” elicited positive responses from well over 70 percent of respondents. Roper Center, Accession Numbers 0277145 and 02774815. However, it is impossible to know how many respondents really knew about the legislation and how many merely said they did to avoid appearing ignorant. The latter kind of response is extremely common, as demonstrated by
reaction to the constitutional implications of the NLRA. Here too, however, the existing literature has not focused on this directly, and more analysis and research is needed. Nonetheless, the general outline of the evidence seems to support the rational ignorance hypothesis, while placing its rival in serious doubt.

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 FDR was able to bring to bear on the Court eventually led it to back down and essentially accept the President’s claim of nearly unlimited federal government power over the economy.196 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,197 it was these decisions and the New Deal policies they ratified which institutionalized and legitimized this growth for the long-term.198

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196 David A. Pepper, Against Legalism: Rebutting an Anachronistic Account of 1937, 82 MARQUETTE L. REV. 63 (1998) is a strong recent reassertion of the traditional view that the Court’s “switch” was due to external political pressure. For the strongest statement of the revisionist view that the Court’s decisions were driven by purely legalistic concerns, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998).

197 See, e.g., JOAN HOFF WILSON, HERBERT HOOVER: FORGOTTEN PROGRESSIVE Ch. 5 (1975); Lewis-Beck & Squire, supra note 75; Murray N. Rothbard, Herbert Hoover and the Myth of Laissez Faire, in A NEW HISTORY OF LEVIATHAN, supra note 142.

198 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. ACKERMAN, WE THE PEOPLE II, at 281-82. In addition, the revisionist studies have significant shortcomings in the way they define and operationalize government growth. The most sophisticated defines government growth as growth in the number of government employees, which ignores the possibility (which in fact was true of many New Deal policies) that the same number of employees could implement a broader range of policies. Lewis-Beck & Squire, supra note 75. In fact, many New Deal policies were implemented by delegation to private entities because of a lack of government bureaucratic capacity. Skocpol and Finegold, supra note 142. 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
The issue of constitutionality: FDR 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 several prominent New Deal policies, including the NRA, were invalidated by the Court in 1935-36. Nonetheless, FDR and his advisers deliberately decided to forego even mentioning the Court or constitutional issues more generally during the President’s 1936 reelection campaign. This was apparently a conscious political stratagem designed to avoid giving a potentially strong issue to the Republican opposition. Although the issue was of course raised by the Republicans, it is clear that the 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.

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. Only after the plan neared defeat did FDR, with little left to lose, publicly state the real rationale: his desire to remove the Court as an obstacle to New Deal policies. In the end, the plan was defeated, but only after several decisions upholding challenged New Deal programs and crafting new constitutional principles that endorsed wide-ranging federal government power over the economy.

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).


200 CUSHMAN, supra note 185 at 27; Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments, 44 STAN. L. REV. 759, 771 (1992); Leuchtenburg, supra note 96 at 2079-87; Leuchtenburg, supra note 188 at 377-80.

201 Leuchtenburg, supra note 188 at 377-79.

202 Leuchtenburg, supra note 96 at 2086-89.

203 BAKER, supra note 188 at 8-9; LEUCHTENBURG, supra note 74 at 132-34; Stephen O. Kline, Revisiting FDR’s Court Packing Plan, 30 MCGEORGE L. REV. 863, 907-15 (1999).

204 Kline, supra note 192 at 922-25.

205 See, e.g., LEUCHTENBURG, supra note 74 at ch. 8.
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 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 were to refrain from mentioning it. Several of Ackerman’s critics have fastened onto the issue of Administration silence on constitutional change. Opponents, of course sought to raise the issue, but they too focused primarily on other considerations, particularly the threat to judicial independence. This strategic gambit, like that of the Administration, sought to obscure the specific constitutional disputes at issue by focusing on procedural matters and also 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. In fact, 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.

While existing research has outlined Administration strategy in some detail, and that of its opponents to a lesser extent, there is a clear role for further research focusing explicitly on the role of voter ignorance. Here, even more so than in the NRA 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

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206 CUSHMAN, supra note 185 at 27; Klarman, supra note 189 at 771.
207 BAKER, supra note 188; LEUCHTENBURG, supra note 74 at 137-41; Leuchtenburg, supra note 188.
Administration’s public rationales and understand that constitutional change was the true underlying issue – a point which elites on both sides privately conceded.

*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.\(^{209}\) Caldeira used a set of eighteen Gallup surveys of support and opposition to the court-packing plan to check to see whether events such as favorable and unfavorable media coverage of FDR’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.\(^{210}\)

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.\(^{211}\)

Unfortunately, however, Caldeira’s analysis implicitly assumes that 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. This is a particularly serious problem given that opposition to the President’s plan ranged only from 41% to 49% during the entire period in question, 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 percent in either direction. Support for the plan varied somewhat more, from 31% to 46% (the remaining respondents had “no opinion”), but even here measurement error might have had a substantial effect.\(^{212}\)

Moreover, the fact that there were only eighteen data

\(^{208}\) *Baker, supra* note 188 at 31.


\(^{210}\) *Id.* at 1140-47.

\(^{211}\) *Id.* at 1147-49.

\(^{212}\) Figures derived from *id.*
points implies that a large measurement error in even a few of the observations might substantially skew the results.

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 clearcut case of constitutional conflict by many historians, and it is so understood by Ackerman. 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 raise 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 completely ruled out, but there are two strong reasons that militate against the conclusion that it seriously undermines our 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 issue at hand and also well understood by political elites. Certainly, even a moderately informed person was unlikely to

\[213\] See, e.g., BAKER, supra note 188; LEUCHTENBURG, supra note 74 at chs. 4-5; Leuchtenburg, supra note 188.

\[214\] ACKERMAN, WE THE PEOPLE II at 316-40.
take seriously the claim that the NRA was intended to be merely a temporary emergency measure or the claim that the court-packing battle was about the workload of the aging justices. The fact that elites in the cases studied were engaged 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 lead elites to up their efforts at deception but not enough to impose actual additional constraints on their substantive policy choices, the claim that “We the People” 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 easily be pierced 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.

**VIII. NORMATIVE IMPLICATIONS**

The results of this study pose a 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.\textsuperscript{215} Such criticisms reassert earlier majoritarian attacks on Article V that date back to the Founding era.\textsuperscript{216} Although these writers have at least some arguments in favor of their proposals that are independent of the state of voter knowledge,\textsuperscript{217} 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.\textsuperscript{218} And this claim is called into serious question by the evidence assembled here.

In addition to the purely negative conclusion that New Deal-era constitutional change was not occasioned by heightened public attention and knowledge, 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.

\textbf{A. Inattention to Broad, Long-term Consequences of Change}

Ackermanian-style 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 Depression. In such a situation, voter

\textsuperscript{215} See especially the works by Ackerman and Amar cited in note 14 above.

\textsuperscript{216} See Vile, \textit{supra} note 16; Vile, \textit{supra} note 16. See also discussion of Anti-Federalist criticism of Article V accompanying nn. 19-20. Ackerman proposes a kind of compromise between Article V and pure majoritarianism. He would allow 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 nation-wide referendum. \textit{See} ACKERMAN, \textit{WE THE PEOPLE II} at 410-13. This proposal, whatever its merits, is still much closer to majoritarianism than to Article V’s supermajoritarianism, since it might well 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. \textit{Id.}

\textsuperscript{217} 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 in note 14, especially, Amar, \textit{Consent of the Governed}.
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, since the voters may rationally conclude that they care more
about solving their immediate problems than any long-term dangers the burden of which will fall
primarily on future generations. The problem is, however, exacerbated if the electorate is
substantially ignorant. In such a situation, political leaders can exploit their ignorance by
portraying major long-term structural changes as mere temporary emergency measures. As we
have seen, this is exactly what happened with the NRA, the single most revolutionary new policy
adopted during the New Deal. 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 than the results of 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.

B. Exploitation by Interest Groups

The second danger posed by allowing rationally ignorant political majorities to enact
constitutional change 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 well organized general public
(e.g. – Olson 1965). Indeed, part of the appeal of Ackerman’s thesis resided precisely in the

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218 See ACKERMAN, WE THE PEOPLE ch. 10 (emphasizing importance of voter information and considered
deliberation in times of constitutional change); Amar, The Consent of the Governed, at 501-503 (emphasizing
importance of informed “deliberation” as an element of non-Article V constitutional change).
219 The classic account is OLSON, LOGIC OF COLLECTIVE ACTION.
possibility that increased political knowledge on the part of the general public would make such interest group shenanigans less likely during a constitutional moment.\footnote{\textit{Ackerman, We the People I}, at 271, 309-11.} 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. This occurs both because a grave crisis such as the Great Depression may call the validity of the existing constitutional system into question in the minds of many, and because the crisis enables interest groups to portray even major new policy initiatives as merely temporary emergency measures. The history of the NRA provides examples of both of these dynamics, as does that of some other New Deal policies.

The second critical factor providing heightened opportunities for interest groups is the unusually great complexity of major constitutional issues, especially those 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. 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 most of which may not even be known at the time the constitutional change is being considered. As argued above,\footnote{See Section VII.B of this paper.} 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. 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 to be condemned. 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. But the fact that some instances of interest group capture of the political process may be beneficial 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, it conflicts with most traditional normative theories of democracy that emphasize the importance of participation in policymaking by a broad and informed electorate. And 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.

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

A full assessment of the normative status of the Article V amendment process would obviously reach well beyond the scope of this Article. Nonetheless, my findings do suggest a possible argument in favor of Article V’s stringent supermajority requirements that has been ignored in the previous literature on the subject. As one of Article V’s critics points out, “[b]y

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222 For normative defenses and criticisms of the NLRA, see works cited in note 162.
223 See works cited in nn. 4, 8 above.
224 The argument developed here has been ignored by the defenders of Article V no less than by critics. For works by the defenders, see literature cited in note 22.
requiring the concurrence of both national and state legislatures, Article V comes close to requiring unanimity to approve any amendment as a practical matter.”

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 have historically found that most of the public is severely ignorant, they have also found that an important minority of voters, ranging from 5 to perhaps as many as 15 or 20 percent, is much better informed than the average citizen. 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. 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.

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225 Griffin, supra note 14, at 172.
226 See works cited in note 8.
227 NEUMANN, supra note 85.
228 For a thorough survey of criticisms of Article V from the Founding era to the present, see VILE, supra note 16.
229 For a wide-ranging recent defense of the various supermajority requirements in the Constitution, see John McGinnis & Michael B. Rappaport, Our Supermajoritarian Constitution 80 TEX. L. REV. 703 (2002). McGinnis and Rappaport deploy a range of arguments but only briefly consider the possible significance of voter ignorance. Id. at 788. They argue that the difficult 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...
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 even be achieved 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. 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 change process 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.

The difficulty with 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 one. Nonetheless, the pro-Article V argument presented by McGinnis and Rappaport complements that developed here.

For a detailed account, see THOMAS MERKL, THE ORIGINS OF THE WEST GERMAN REPUBLIC (1963). Although German political leaders had a substantial say in designing the new constitution, 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 likely enjoyed the support of large portions of the West German population. Id.

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 194-214 (1998); see also RICHARD F. HAMILTON, WHO VOTED FOR HITLER (1982).
The problem of voter ignorance is not the only factor that needs to be considered in designing a system for handling constitutional change. It is, however, one that has been unduly neglected by both political scientists and legal scholars.

VIII. CONCLUSION

The relationship between voter knowledge and constitutional change is a complex one, unlikely to be definitively explained by the present study. Nonetheless, we have found strong evidence in favor of the rational ignorance hypothesis and against the heightened attention theory. 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 broadly 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 myself plan to extend this study with analyses of constitutional change in the civil rights era of the 1960s. If the results of this study hold up, it will have important implications for theories of constitutional change and for theories of the growth of government. It 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.

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 – and also fail to retrench after the crisis is over – 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. Its empirical implications may in time greatly revise our understanding of both the New Deal and other critical episodes in our history. Its normative dangers pose an important – as yet unmet – challenge to democratic theory.
### 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.)

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<th>Comparative Scale Between Democratic and Republican Parties</th>
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<td>489</td>
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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.

| 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 |
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>

1082 1. DEMOCRATIC
211 2. SPLIT
81 3. REPUBLICAN

410 8. DID NOT KNOW
115 9. NA, OR NO PRE-ELECTION INTERVIEW

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
Q. 520104 NAME-PERCEIVED JEWISH VOTE

<FOR FULL QUESTION TEXT SEE Q. NO. 103>

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</tr>
<tr>
<td>1082</td>
<td>8. DID NOT KNOW</td>
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<td>133</td>
<td>9. NA, OR NO PRE-ELECTION INTERVIEW</td>
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Appendix B:  
Regression Results from the 1960 National Election Study

### New Deal “Of Age” Model 1960 NES

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<td>-.132 .895</td>
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<td>-.339 .134</td>
<td>-.098 -2.531</td>
<td>.012</td>
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<td>Family Income</td>
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<td>.216 4.759</td>
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<tr>
<td>TV</td>
<td>.185 .083</td>
<td>.086 2.243</td>
<td>.025</td>
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<tr>
<td>Sex (female=1)</td>
<td>-.531 .111</td>
<td>-.183 -4.806</td>
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<tr>
<td>Race (black=1)</td>
<td>7.898E-02 .323</td>
<td>.012 .245</td>
<td>.807</td>
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<tr>
<td>Strength of Party ID</td>
<td>8.130E-02 .056</td>
<td>.056 1.459</td>
<td>.145</td>
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<tr>
<td>New Deal (of age=1)</td>
<td>.137 .127</td>
<td>.042 1.085</td>
<td>.278</td>
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<tr>
<td>Southern black</td>
<td>.307 .525</td>
<td>.030 .585</td>
<td>.559</td>
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Dependent Variable: Knowledge (New Deal related)  N=623  R2=.152

### New Deal Cohort Model 1960 NES

<table>
<thead>
<tr>
<th>Model</th>
<th>Unstandardized Coefficients</th>
<th>Standardized Coefficients</th>
<th>T Stat</th>
<th>Sig.</th>
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<td>(Constant)</td>
<td>8.922E-02 .403</td>
<td>.222 .825</td>
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<td>Region (South=1)</td>
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<td>.131 2.888</td>
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<td>Interest in Politics</td>
<td>.247 .106</td>
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<td>.228 4.962</td>
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<td>TV</td>
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<td>.089 2.332</td>
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<td>Sex (female=1)</td>
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<td>Race (black=1)</td>
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<tr>
<td>Strength of Party ID</td>
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<td>New Deal Cohort</td>
<td>-.226 .125</td>
<td>-.069 -1.805</td>
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Dependent Variable: Knowledge (New Deal related)  R2=.141 N=62
## New Deal-Related Knowledge: Frequency Distribution

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<th>Number correct</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative Percent</th>
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<td>12.3</td>
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<td>22.7</td>
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<td>3.00</td>
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<td>19.9</td>
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<tr>
<td>4.00</td>
<td>143</td>
<td>20.0</td>
<td>92.7</td>
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<tr>
<td>5.00</td>
<td>52</td>
<td>7.3</td>
<td>100.0</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>715</strong></td>
<td><strong>100.0</strong></td>
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