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# Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s

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## ARTICLES

### Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s

BARRY CUSHMAN†

#### INTRODUCTION

Like most ages of anxiety,<sup>1</sup> ours is suffused with nostalgia. Concerns over the purported decline and fall of the “New Deal Order”<sup>2</sup> and efforts “to dismantle the welfare state”<sup>3</sup> have sparked a revival of interest in the political and constitutional history of the 1930s. A distinguishing feature of recent studies has been a shift in the focus of attention from the policy performances of elite governmental actors to the policy preferences of the American people themselves.

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† Professor of Law & History and Elizabeth D. & Richard A. Merrill Research Professor, University of Virginia. Thanks to Dianne Avery, Les Benedict, Patty Cushman, Kim Forde-Mazrui, Howard Gillman, Bob Gordon, Sally Gordon, John Harrison, John Jeffries, Fred Konefsky, Larry Kramer, Gerry Leonard, Daryl Levinson, Chuck McCurdy, Bill Nelson, Caleb Nelson, Jim Ryan, Ted White, and the participants in a workshop at Washington & Lee for helpful suggestions, and to Rebecca Parra and Ray Reduque for valuable research assistance. A version of this article was delivered as the James McCormick Mitchell Lecture at the University at Buffalo Law School on April 5, 2002. My thanks to the organizers of and participants in that event for their gracious hospitality.

1. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 68 (1977).

2. *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at xviii (Steve Fraser & Gary Gerstle eds., 1989).

3. Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1519 (1997) [hereinafter Ackerman, *A Generation of Betrayal?*].

From within that literature has emerged a debate over the terms in which those preferences are best understood. Professor Bruce Ackerman views them as constitutional in character. Ackerman sees "consistent and sustained support of the American people for the constitutional principles elaborated by New Deal Democracy through three Presidential, and six Congressional, elections,"<sup>4</sup> and concludes that "the American people repudiated Republican constitutional values in the 1930s."<sup>5</sup> The "Roosevelt revolution," he maintains, should "be viewed as a constitutive act of popular sovereignty that *legitimately* changed the preceding Republican Constitution."<sup>6</sup> For Ackerman, "the language of popular sovereignty provides an appropriate description for the constitutional transformations achieved during this period."<sup>7</sup> Constitutional lawyers should therefore "recognize that Americans of this era hammered new fundamental commitments which we today have a constitutional obligation to honor."<sup>8</sup> Because the People "constitutionalize[d] their revolutionary re-forms"<sup>9</sup> in favor of "activist national government,"<sup>10</sup> contraction of the New Deal state is to Ackerman an act of constitutional apostasy perpetrated by "a generation of betrayal."<sup>11</sup> "Who does this generation of midgets suppose itself to be," he asks, "when it seriously considers discarding the contributions of Americans who actually accomplished

4. *Id.* at 1534.

5. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 280 (1998) [hereinafter 2 ACKERMAN, *WE THE PEOPLE*].

6. *Id.*

7. Ackerman, *A Generation of Betrayal?*, *supra* note 3, at 1522.

8. *Id.* Professor Willy Forbath apparently agrees with Ackerman that the commitments of the New Deal generation were constitutional rather than merely political in character, differing with Ackerman only with respect to the content of those commitments. William E. Forbath, *Class, Caste, and Equal Citizenship*, 98 MICH. L. REV. 1, 5-6, 64-73, 89 (1999).

9. 2 ACKERMAN, *WE THE PEOPLE*, *supra* note 5, at 314.

10. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 49 (1991).

11. Ackerman, *A Generation of Betrayal?*, *supra* note 3, at 1528 ("It is no small thing to ignore the constitutional achievements of any generation of Americans, much less a generation like our parents' that successfully renewed and redefined America's democratic commitments during the darkest hours of the century. It is even more serious when this act of betrayal is contemplated by a generation like our own, which has conspicuously failed time and again to hammer out stable constitutional solutions that have won the mobilized consent of our fellow citizens.").

something very great indeed in the annals of the Republic?"<sup>12</sup>

By contrast, Professor William Leuchtenburg disputes Ackerman's contention that "in 1936 the voters were consciously amending the Constitution. Surely, whatever else they were doing," he concludes, "they were not doing that."<sup>13</sup> Yet Leuchtenburg is prepared to offer Ackerman half a loaf. "[I]f the country was not amending the Constitution," he continues, "it was doing something else of immense importance: legitimating the advent of the Leviathan State," of "Big Government."<sup>14</sup> "Thanks to Roosevelt and the Democrats, the country had been introduced to the Welfare State, and in 1936 voters gave it a ringing endorsement."<sup>15</sup> On this view, the developments to which Ackerman objects may be regrettable, but they are apparently not unconstitutional.

Having sketched the outlines of this debate, I want to set it aside for the moment in order to focus on the methodological issue it implicitly raises: How, exactly, does one go about discerning the content and character of the preferences and commitments of the American people of the New Deal era? As the passages I have quoted suggest, the starting point for both Ackerman and Leuchtenburg is the people's electoral performance. They have, as Finley Peter Dunne's Mr. Dooley once famously<sup>16</sup> said of the Supreme Court, followed the election returns.

12. *Id.* "[I]t is a bit much," he objects, "to nonsuit an entire generation after they have left the constitutional field." *Id.* at 1529.

13. William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 *YALE L.J.* 2077, 2111 (1999). Leuchtenburg maintains that Ackerman "goes much too far in maintaining that the American people were consciously amending the Constitution in 1936. . . . The evidence falls far short of sustaining Professor Ackerman's bold claim about the intent of the electorate to amend the Constitution." *Id.* at 2113-14.

14. *Id.* at 2111. "Ackerman is unquestionably right . . . in advancing a very significant claim: that 'the People were . . . supporting a change in their governing philosophy.'" *Id.* at 2113.

15. *Id.* Walter Dean Burnham concurs: "[A]t no time during the election campaign of 1936 did Franklin Roosevelt given any hint that the Court was a central issue or that he might launch an ambitious program to pack it. But if 1936 was no 'mandate' in this area, it surely was in virtually all others." Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 *YALE L.J.* 2237, 2261 (1999).

16. FINLEY P. DUNNE, *MR. DOOLEY'S OPINIONS* 26 (1901).

Of course, the election returns alone tell us no more than which person or persons won and will accordingly control which offices.<sup>17</sup> In order to extract any further meaning from the results, we must resort to some form of extrinsic evidence. How, then, might one go about fleshing out the meaning of the election returns?

One could simply review party platforms and some campaign speeches, a few presidential news conferences and fireside chats, a handful of newspaper columns and editorials, toss in an assortment of legislative enactments and a smattering of congressional debate, and let one's imagination do the rest.<sup>18</sup> Even with the assistance of these interpretive aids, however, our conclusions would be subject to two important caveats. First, as James Bryce famously observed long ago, the vote is not a particularly articulate means of political expression.<sup>19</sup> "The choice of persons for offices," Bryce observed, "is only an indirect and often unsatisfactory way of declaring views of policy."<sup>20</sup> George Gallup elaborated Bryce's insight: "[E]lections are a confusing and imperfect way of registering national

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17. "A placard which appeared in one of the scenes of *Of Thee I Sing* carried words more nearly true than the authors of this musical comedy probably suspected. The sign read, 'A Vote for Wintergreen Is a Vote for Wintergreen.'" George Gallup, *Testing Public Opinion*, 2 PUB. OPINION Q. 8, 8-9 (1938). As V.O. Key, Jr. put it, "The election returns establish only that the winner attracted a majority of the votes—assuming the existence of a modicum of rectitude in election administration. They tell us precious little about why the plurality was his." V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING, 1936-1960*, at 2 (1966) [hereinafter KEY, RESPONSIBLE ELECTORATE].

18. See generally 2 ACKERMAN, *WE THE PEOPLE*, *supra* note 5, at 255-382.

19. See 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 357-58 (1920).

20. *Id.* at 358. "[V]oting for a man is an inadequate way of expressing one's views of policy, because the candidate is sure to differ in one or more questions from many of those who belong to the party." *Id.* at 329. Bryce continues:

It is especially inadequate in the United States, because the strictness of party discipline leaves little freedom of individual thought or action to the member of a legislature, because the ordinary politician has little interest in anything but the regular party programme, and because in no party are the citizens at large permitted to select their candidate, seeing that he is found for them and forced on them by the professionals of the party organization. . . . A body of unorganized opinion is, therefore, helpless in the face of compact parties.

*Id.* "[A]n election can at best do no more than test the division of opinion between two or three great parties, leaving subsidiary issues uncertain, while in many cases the result depends so much on the personal merits of the candidates as to render interpretation difficult." *Id.* at 357.

opinion. . . . [A]s Bryce pointed out in *The American Commonwealth*, it is virtually impossible to separate issues from candidates. How can we tell whether the public is voting for the man or for his platform? How can we tell whether all the candidate's views are endorsed, or whether some are favored and others opposed by the voters?"<sup>21</sup> "As a device for ascertaining the state of the public mind," Harwood Childs concurred:

[T]he election process, however adequate it is for the purpose of selecting officials . . . seldom functions so as to give a precise indication of what the public actually thinks on major issues. The outcome of presidential elections, for example, may clearly indicate which of several candidates the public prefers, but give only the vaguest notion regarding the actual state of public opinion on selected issues[;] because of . . . the vague and elusive qualities of party platforms, [elections] have come more and more to be devices for selecting public officials, rather than instruments for bringing to light the precise state of public opinion on specific issues.<sup>22</sup>

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21. GEORGE GALLUP, PUBLIC OPINION IN A DEMOCRACY 6 (1939) [hereinafter GALLUP, DEMOCRACY]. Gallup repeatedly invoked Bryce's authority for this view. See, e.g., GEORGE GALLUP & SAUL FORBES RAE, THE PULSE OF DEMOCRACY 18 (1940).

Bryce knew that periodic voting might fail to elicit real divisions of opinion on public questions because of the tendency to confuse issues and men. . . . The problem of interpreting the vote at elections is equally pressing in our own day. The confusion between candidates, on the one hand, and fundamental issues, on the other, is still with us.

*Id.* Or as V.O. Key put it,

[I]t is never easy to determine what is decided by an election. The result may represent an expression of dissatisfaction with the conduct of the government by the party in power; or of discontent arising from conditions over which the government has no control, with the persons in charge of the government as the scapegoats for that popular discontent; or of general agreement with the prevailing orientation of public policy. Under some conditions the outcome of the election may indicate the direction in which public action should proceed in the future. But usually there is no clear-cut understanding of what the result of an election means in terms of public attitudes regarding specific public policies. In fact, it is quite plain that occasionally a majority of people will favor a candidate and at the same time a majority will be opposed to some of his policies or ideas.

V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 639 (1st ed. 1942) [hereinafter KEY, POLITICS].

22. Harwood L. Childs, *Rule by Public Opinion*, ATLANTIC, June 1936, at 756, 761. Similarly, Childs emphasized "the limitations of such devices as the press, representations of pressure groups, mass meetings," and the like, "whereby the public mind reveals itself spasmodically, and often in such a way

"It thus can be a mischievous error," V.O. Key concluded, "to assume, because a candidate wins, that a majority of the electorate shares his views on public questions, approves his past actions, or has specific expectations about his future conduct. . . . [E]lectorate victory cannot be regarded as necessarily a popular ratification of a candidate's outlook."<sup>23</sup>

The second type of objection concerns the representativeness of the extrinsic sources to which Ackerman turns for interpretive assistance. As William Forbath has put it,

Ackerman asserts rather than demonstrates an equivalence between the outlooks of reform elites and those of popular movements. The latter are the seedbed of new constitutional visions in Ackerman's theory, yet we never glimpse them or their visions in his narratives. To put it harshly, for Ackerman, the popular will was whatever elites said it was. . . . The election returns are no substitute for examining how popular ideas and aspirations are tallied and translated or suppressed and erased in

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as to place a heavy burden on the imagination of the legislator and administrator"—and, he might have added, on that of the historian. *Id.* at 761-62; see also GALLUP & RAE, *supra* note 21, at 24-28.

23. KEY, RESPONSIBLE ELECTORATE, *supra* note 17, at 2. George Gallup was fond of citing public opposition to the Court-packing Plan as an illustration of this principle. See George Gallup, *Government and the Sampling Referendum*, 33 J. AM. STAT. ASS'N 131, 133-34, 135 (1938) [hereinafter Gallup, *Sampling Referendum*] ("It is only by means of sampling referenda that programs can be separated from personalities and the mandates of the leaders defined."); see also ALBERT B. BLANKENSHIP, CONSUMER AND OPINION RESEARCH: THE QUESTIONNAIRE TECHNIQUE 229 (1943). Gallup was similarly fond of pointing out the inadequacy of congressional action as a barometer of public opinion.

Only in one respect, the distribution of population by geographical areas of the country, can Congress be regarded as a true cross section of the public. As judged on the basis of occupation, income, education, age, sex, it is obviously unrepresentative of the public at large. And what may seem strangest to the layman, Congress is seldom an accurate reflection of the political sentiments of the country.

GEORGE GALLUP, A GUIDE TO PUBLIC OPINION POLLS 92 (1st ed. 1944) [hereinafter GALLUP, PUBLIC OPINION POLLS].

[P]arty representation in Congress is often far out of proportion to the actual party vote cast. After the 1936 election the membership of the Senate was nearly 5 to 1 Democratic, and of the House 3 to 1 Democratic. But the electorate had voted Democratic by a ratio of only 3 to 2. Since we have no system of proportional representation in our national government, the interests of the Republican minority were most inadequately represented.

GALLUP, DEMOCRACY, *supra* note 21, at 7; see also GALLUP & RAE, *supra* note 21, at 20-22.

relations among social movements, political parties, lawmakers, and Presidents.<sup>24</sup>

One might seek to allay both of these concerns by broadening the range and number of extrinsic sources consulted. One could, as Professor Leuchtenburg has done, supplement these sources by drawing far more extensively on the relevant newspaper, periodical, and secondary literature, and conducting a conscientious canvas of relevant letters, memoranda, and diaries contained in hundreds of manuscript collections scattered around the country.<sup>25</sup> Yet even after such Herculean efforts one might still worry that one's sources were not sufficiently representative, that they inevitably privileged the voices of the most vocal and literate over those who, for one reason or another, may not have left a written record of their views.<sup>26</sup>

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24. William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917, 1923-24 (1999). The point is well taken, though Ackerman might with reason question whether Forbath has entirely escaped the difficulty in his own analysis of the 1930s. See Forbath, *supra* note 8, at 64-73.

25. See generally Leuchtenburg, *supra* note 13.

26. As Bryce put it,

[S]uch is the din of voices that it is hard to say which cry prevails, which is swelled by many, which only by a few, throats. The organs of opinion seem almost as numerous as the people themselves, and they are all engaged in representing their own view as that of "the people." Like other valuable articles, genuine opinion is surrounded by counterfeits.

2 BRYCE, *supra* note 19, at 357; see also KEY, POLITICS, *supra* note 21, at 639-40 ("The Congressman, state legislator, mayor, or other public official is likely to pay close attention to his mailbag, but he has no assurance that the people who feel impelled to write letters of complaint, letters urging action, or (occasionally) letters of commendation are representative of his constituency."); *id.* at 640 ("The politician has the newspapers as a guide of sorts to the status of the public mind, but the views of newspaper editors may be in complete disagreement with the predominant views of the electorate."); GALLUP, DEMOCRACY, *supra* note 21, at 8 ("Even in the event that an elected representative does try to perform his duty of representing the whole people, he is confronted with the problem: What is the will of the people? Shall he judge their views by the letters they write him or the telegrams they send him? Too often such expressions of opinion come only from an articulate minority. Shall the congressman judge their views by the visitors or delegations that come to him from his home district?"); HARWOOD L. CHILDS, AN INTRODUCTION TO PUBLIC OPINION 50 (1940) ("The newspapers of a country do undoubtedly reflect the opinions of a large number of persons. The difficulty is that we do not know what persons. We do not know just how positive the correlation is between the editorial opinions of particular newspapers and given publics."); Childs, *supra* note 22, at 756 (noting that the press "expresses its own opinion, which may or



Fortunately, there is available a promising, if underutilized, additional source of data. In 1935, George Gallup and Elmo Roper began to publish the results of a new type of public opinion survey.<sup>27</sup> Employing a technique known as "stratified" or "quota" sampling, they used government data and election figures in order to "build the miniature electorate."<sup>28</sup> Rather than surveying millions of Americans, as had the ill-fated *Literary Digest* poll, Gallup and Roper sought to interview a small but representative sample that would, ideally, reflect the views of the American populace. Gallup's findings were regularly published in a widely syndicated weekly column; Roper's findings were published first quarterly, and then, beginning in 1937, on a monthly basis, as the *Fortune* survey in *Fortune* magazine.<sup>29</sup>

The election returns are not a perfect test of the accuracy of poll predictions,<sup>30</sup> but they are the best test at

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may not represent the current opinion of the time"); GALLUP & RAE, *supra* note 21, at 22-28.

27. See Archibald M. Crossley, *Early Days of Public Opinion Research*, 21 PUB. OPINION Q. 159, 162-63 (1957).

28. GALLUP & RAE, *supra* note 21, at 56-77; see also GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 27. Gallup relied on census data to provide "detailed information on the population by states, age, sex, education, racial background, occupation, the number of persons who rent and who own their property, and many other similar facts." GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 36. He turned to election figures to "provide an index of the political divisions within every country, city, township, and precinct in the United States." *Id.* at 37. And he relied on the Treasury Department, the Department of Labor, and the Department of Commerce for statistics on income. *Id.*

29. For more information on the pollsters, their methods, and the *Literary Digest* fiasco of 1936, see *infra* Appendix.

30. See Hadley Cantril, *The Public Opinion Polls: Dr. Jekyll or Mr. Hyde?*, 4 PUB. OPINION Q. 212, 214 (1940) ("Many variables enter in to keep some people away from the voting booth. The weather, transportation difficulties, party activity, intimidation of various kinds may distort the final vote but not affect poll results. Hence it could be argued that the polls may reflect the wishes of the electorate more faithfully than the elections themselves."); Gallup, *Sampling Referendum*, *supra* note 23, at 139 ("[A]n election is itself a sample, and conceivably, an unofficial poll can be more nearly representative of public opinion than an official election, due to the variability of turnout among different classes of voters."); Daniel Katz & Hadley Cantril, *Public Opinion Polls*, 1 SOCIOLOGY 155, 162 (1937) ("Election returns are a poor criterion for evaluating the reliability of a scientific poll because not all American citizens exercise their highly prized franchise."); Archibald Crossley, *Straw Polls in 1936*, 1 PUB. OPINION Q. 24, 25 (1937) ("It is an actual fact, though little realized, that the will of the majority may very well be expressed more accurately in a poll than in an election."); GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 52 ("[E]lection returns, it should be emphasized, are by no means a

our disposal.<sup>31</sup> And as Princeton social psychologist Hadley Cantril remarked in 1940, "if we compare poll results with elections over the past four years, we must conclude that the polls have demonstrated their right to be taken seriously."<sup>32</sup> "[M]odern polls . . . have predicted elections with uncanny accuracy."<sup>33</sup> In the 1936 election, Gallup underpredicted Roosevelt's 60.7% nationwide popular vote total by 6.9%;<sup>34</sup> the average state-by-state error was 6%.<sup>35</sup>

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perfect measure of the accuracy of public opinion polling techniques. Election returns are affected by many extraneous factors which have little or nothing to do with the true reflection of the public's views regarding candidates or issues. The weather, corruption on the part of election officials, and the efficiency of political machines in getting their members to the polls, all have an important influence on election returns."); see also GALLUP & RAE, *supra* note 21, at 81-82; CHARLES W. SMITH, *PUBLIC OPINION IN A DEMOCRACY: A STUDY IN AMERICAN POLITICS* 405 (1939) ("The straw poll may measure public opinion more accurately than the election, because an election is only a more or less rough approximation of public opinion. Between 30 and 50 per cent of the people of voting age usually do not vote in official elections. The official election is itself only a sample, and not necessarily representative of a typical cross-section of the adult population.").

31. See Henry C. Link & A.D. Freiberg, *The Problem of Validity vs. Reliability in Public Opinion Polls*, 6 *PUB. OPINION Q.* 87, 91 (1942) ("[A] comparison between the results of the poll and the final election results is the basic technique for establishing the validity of the poll."). As Charles Smith observed,

Elections furnish the most obvious test of the accuracy of . . . polls, and about the only test that can commonly be applied . . . [E]lections provide our most authoritative expressions of public opinion, and for most of us they furnish the only check on the accuracy of straw polls that is definite enough to seem even approximately reliable.

SMITH, *supra* note 30, at 405.

32. Cantril, *supra* note 30, at 214.

33. *Id.* at 212.

34. *Id.* at 212-13.

35. Lawrence E. Benson, *Studies in Secret-Ballot Technique*, 5 *PUB. OPINION Q.* 79, 79 (1941). "Gallup's error on this first try was in fact the largest it would ever be." JEAN M. CONVERSE, *SURVEY RESEARCH IN THE UNITED STATES: ROOTS AND EMERGENCE 1890-1960*, at 119 (1987). Gallup attributed the error to two factors. First, "sentiment was rapidly moving toward Roosevelt in the closing days of the campaign;" and second, that he had "under-represented the lower income groups." Gallup, *Sampling Referendum*, *supra* note 23, at 139. As Gallup explained, "We studied the turnout of wealthy and poor wards in previous elections with great care, and set our quotas on this basis. But in 1936 the poor were aroused. They went to the polls in much greater numbers than in previous elections, and they were voting for Roosevelt. Our research had misled us in this respect." *Id.*; see also AM. INST. PUBLIC OPINION, *THE NEW SCIENCE OF PUBLIC OPINION MEASUREMENT* 11 (1938).

In 1936, all the straw polls probably underestimated the number of voters in the low-income groups who would go to the polls. . . . They

Following the election, Gallup made some technical refinements that appear to have improved the performance of subsequent polls.<sup>36</sup> In the 1937 Maine Sales Tax Referendum, Gallup overpredicted the 67% "[a]gainst" vote by 5%; he came within 2% of predicting accurately Reading's 63% tally in the 1937 Detroit mayoralty election; and he overpredicted LaGuardia's 60% total in the 1937 New York mayoralty election by 4%.<sup>37</sup> In 1938, Gallup overpredicted Barrows's 75% total in the Maine Republican gubernatorial primary by 3%; Barkley's 57% tally in the Kentucky Democratic senatorial primary by 2%; Smith's 55% take in the South Carolina Democratic senatorial primary by 2%; and George's 44% vote in the Georgia Democratic senatorial primary by 2%.<sup>38</sup> That same year he underpredicted Tydings's 60% total in the Maryland Democratic senatorial primary by 1%; and Lehman's victory in the New York gubernatorial election by 0.5%.<sup>39</sup> By 1940, Gallup's prediction of 52% was 3% lower than Roosevelt's

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probably underestimated the number of those who failed to vote in 1932 who would in 1936 turn out to vote for Roosevelt. . . . They may also have underestimated the importance of the new voters.

SMITH, *supra* note 30, at 407.

It is probable that the estimates of the percentage of the *population* in the different income groups as used by the polls . . . underestimated the percentage of *voters* in the lower income brackets. . . . The poll administrators probably underestimated the proportion of enfranchised citizens who failed to vote in the 1932 election but turned out in 1936 to vote for Roosevelt. This was due . . . chiefly . . . to the class nature of the election . . . . The last-minute swing to Roosevelt may have slightly affected the weighted polls. The final tabulation of the American Institute was based on data from one to two weeks old. . . . The weighted sample technique had its difficulties with the political realignment, because it used the 1932 returns as a reference point. Nevertheless, it did well for its first appearance in forecasting elections. Its outlook for the future is particularly bright.

Katz & Cantril, *supra* note 30, at 168-71. Daniel Katz, while generally admiring the accuracy of Gallup's forecast of the 1940 election, similarly attributed part of the error in the forecast to underrepresentation of lower-income groups in the sample. Daniel Katz, *The Public Opinion Polls and the 1940 Election*, 5 PUB. OPINION Q. 52, 76 (1941). Albert Blankenship agreed. See BLANKENSHIP, *supra* note 23, at 218.

36. See Cantril, *supra* note 30, at 213. Among these was the movement from a mix of personal interviews and mail ballots to personal interviews exclusively. GALLUP & RAE, *supra* note 21, at 77-78. For a discussion of the reasons for the bias of the mail ballot method, see *infra* Appendix.

37. Cantril, *supra* note 30, at 213.

38. *Id.*

39. *Id.*

actual 55% of the vote, but his average state-by-state error had been reduced to 2.4%.<sup>40</sup> *Fortune* did not make a state-by-state prediction for the 1936 election, though it predicted Roosevelt's percentage of the popular vote within one percentage point.<sup>41</sup> In 1940, the *Fortune* poll produced "an amazingly accurate forecast," predicting Roosevelt's percentage within 0.2%.<sup>42</sup>

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40. See Katz, *supra* note 35, at 75-76 ("The predictive performance of the 1940 polls compares favorably with predictive measurement in the social sciences. The outstanding achievement was the 2.4 average percentage error for the 48 states made by the American Institute of Public Opinion—the lowest state-by-state error in polling history."); Benson, *supra* note 35, at 79; George Gallup, *Question Wording in Public Opinion Polls*, 4 SOCIOMETRY 259, 264 (1941) [hereinafter Gallup, *Question Wording*]; Link & Freiberg, *supra* note 31, at 90 ("[A]n analysis of the results of the Gallup Poll in the last presidential election, by states, shows errors so small as to indicate a good distribution of the components of the sample in each state.").

41. Harold F. Gosnell, *How Accurate Were the Polls?*, 1 PUB. OPINION Q. 97, 100 (1937) (citing *The Fortune Quarterly Survey: VI*, FORTUNE, Oct. 1936, at 130, 130). *Fortune* predicted that Roosevelt would receive 61.7%; his actual total was 60.7%. See *id.*; Cantril, *supra* note 30, at 213. According to Jean M. Converse,

The *Fortune* quarterly survey did not actually publish a straight-out forecast. Rather, it presented in October the results of a four-point attitude scale that ordered sentiment about a Roosevelt reelection from a high approval of "essential for the good of the country" to a low of "about the worst thing that could happen to this country." With a small percentage of "Undecideds" excluded, these results showed pro-Roosevelt sentiment of 61.7%. This amounted to a forecast and was captioned as showing Roosevelt "the favorite". . . .

CONVERSE, *supra* note 35, at 119-20 (footnotes omitted).

42. Katz, *supra* note 35, at 56, 76. Some observers conceded the accuracy of the polls' electoral predictions, yet cautioned that while "[t]he statistical accuracy of surveys of pre-election preferences is verifiable on Election Day; Gallup's findings on issues like the Wagner Act, which justifiably occupy the bulk of the institute's time, cannot be checked." James Wechsler, *Polling America*, NATION, Jan. 20, 1940, at 64-65. For a similar concern, see Childs, *supra* note 22, at 763. V.O. Key acknowledged this—"[e]lection results test the accuracy of polls on candidates, a test that is lacking for polls on issues"—yet maintained that "[i]t may be presumed, however, that issue polls are equally accurate when made by the same methods employed in candidate polls." V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 567 (2d ed. 1947). Moreover, as Daniel Katz observed, polling by multiple organizations provided a check on the accuracy of competing polls. See Katz, *supra* note 35, at 58-59. "*Fortune* surveys on public questions, taken from time to time," he pointed out, "agree fairly well with those taken by the American Institute of Public Opinion." *Id.*; see also GALLUP & RAE, *supra* note 21, at 220-25. Gallup similarly maintained that "[d]uring recent years the National Opinion Research Center (located at the University of Denver), the Princeton Public Opinion Research Project, and the American Institute of Public Opinion have had occasion to check results on

These early polls were of course not perfect indicators of the state of public opinion on the issues of the day.<sup>43</sup> But it would be a mistake to eschew the illumination they can provide.<sup>44</sup> As the leading historian of survey research has concluded, the survey technique of the 1930s "was sophisticated applied social science for its time."<sup>45</sup> The eminent political scientist V.O. Key was prepared to assert in 1942 that "[t]he continual sampling of public opinion on issues between elections . . . furnishes fairly reliable knowledge about public attitudes on particular issues."<sup>46</sup> And in the view of Princeton social psychologist Daniel Katz, himself a sophisticated observer and critic of the era's public opinion

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scores of issues." GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 100. "The results have seldom varied by more than two or three per cent, despite the fact that the size of the sample employed by these organizations often varies considerably." *Id.* Accordingly, he was prepared to assert of his issue polls that, "[i]n the great majority of instances in which the American Institute . . . reports the division of sentiment on any issue, the figures can be interpreted as a forecast of the division of opinion which would result if the same question were put to the entire electorate in a nationwide plebiscite or referendum." *Id.* at 57.

43. The pollsters themselves made no claim to "infallibility," allowing instead for error of 3-4%. Cantril, *supra* note 30, at 212.

44. Indeed, both Ackerman and Leuchtenburg explicitly rely upon a selective handful of the polling data collected by Gallup, and in the case of Leuchtenburg, by Elmo Roper as well. See Ackerman, *A Generation of Betrayal?*, *supra* note 3, at 1531; 2 ACKERMAN, WE THE PEOPLE, *supra* note 5, at 333-34; Leuchtenburg, *supra* note 13, at 2085-86, 2109, 2111, 2113. Ackerman even insists that Gregory Caldeira's "quantitative study of public opinion should be required reading." 2 ACKERMAN, WE THE PEOPLE, *supra* note 5, at 324 (citing Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987)). Yet neither Ackerman nor Leuchtenburg even begins to tap the remarkably rich lode of public opinion data made available through the efforts of these pioneers in survey research.

45. CONVERSE, *supra* note 35, at 441 n.5. For V.O. Key's defense of Gallup's polling data, see V.O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 30 n.2 (1961); KEY, RESPONSIBLE ELECTORATE, *supra* note 17, at 3 ("The invention of the sample survey—the most widely known example of which is the Gallup poll—enabled [scholars] to make fairly trustworthy estimates of the characteristics and behaviors of large human populations."). On the path that led Key to this conclusion, see Arthur Maass, *Foreword*, in KEY, RESPONSIBLE ELECTORATE, *supra* note 17, at xiii.

46. KEY, POLITICS, *supra* note 21, at 641; see also Katz & Cantril, *supra* note 30, at 177 (finding that the straw polls "confirm evidence from social research that when these techniques are carefully handled they can give fairly reliable results").

polls,<sup>47</sup> the appropriate perspective was the comparative one.<sup>48</sup>

It should be remembered that an instrument must be evaluated with reference to other available devices. And from this point of view the polls of public opinion immediately take on stature. Our other sources for this type of information on the whole have been and are meager as compared with the polls. . . . The historian and the sociologist have often had to be content with studies which deal with secondary sources of data. They consult newspaper files, the popular songs of the period, the best sellers of the day, to get at what the polls will give the future historian more directly.<sup>49</sup>

The future of which Katz wrote has arrived. What follows is a report on the polls taken by Gallup and Roper on various issues of public importance between 1935 and 1940. A review of their findings should better enable us to assess the character and content of the preferences and commitments of American people of the day, and to evaluate the extent of constitutional change required to accommodate those commitments. I hope that it may also provide other participants at the roundtable following this Lecture with an informed baseline from which to determine the ways and extent to which contemporary Americans have deviated from the commitments of an earlier generation.

## I. THE PEOPLE AND THE ISSUES

When asked to summarize their views of the New Deal as a whole, public response was congruent with the behavior of the electorate. Americans on the whole approved of the New Deal. A *Fortune* survey published in March 1939 inquired of its respondents, "The Roosevelt Administration has tried many experiments, enacted many reforms. What do you think it should try to do from now until 1940?"<sup>50</sup> While a mere 18.8% of those questioned thought the Administration should "[c]ontinue with more reforms along the lines already laid out," only 26.9% responded that it should "[l]et more conservative elements

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47. See, e.g., Katz, *supra* note 35; Katz & Cantril, *supra* note 30.

48. Daniel Katz, *Three Criteria: Knowledge, Conviction, and Significance*, 4 PUB. OPINION Q. 277, 286 (1940).

49. *Id.*

50. *The Fortune Survey: XIX*, FORTUNE, Mar. 1939, at 66, 135.

in the party try to undo the damage already done."<sup>51</sup> By far the most popular response, offered by 40.5% of those questioned, suggested that Roosevelt and company "[j]ust make any necessary improvements on laws already passed but try nothing new."<sup>52</sup> As the editors remarked,

[N]o part of the country has really turned to the point of wanting to repeal the New Deal instead of extending or preserving it . . . . [The] general sense seems to be that the New Deal has been a good thing for the country, Roosevelt has achieved much that needed doing, and the national problem that now remains is to perfect those achievements and settle down.<sup>53</sup>

The November 1939 survey asked, "Which of the following statements most nearly represents your idea of the New Deal?"<sup>54</sup> While only 10.3% agreed that "[t]he New Deal has been the kind of government best suited to our times, and it should be continued without modification," only 16.2% felt that "[t]he New Deal had a bad influence upon the nation, and it will take years of good government by others to clean up the mistakes."<sup>55</sup> Another 20.9% thought that "[t]he New Deal may have done some good, but it has done so many bad things that now we need a different administration."<sup>56</sup> Again, the most common response by far was one of qualified support, with 44.9% agreeing that "[a]lthough the New Deal has not worked perfectly in many ways, it has done a lot of good and should be continued with some modifications and improvements."<sup>57</sup> A survey published the following May asked, "What would you like to see the next administration do about the New Deal?"<sup>58</sup> While only 10% thought the next administration should "[g]o further with the New Deal," and only another 14.4% responded "[k]eep it as it is," no more than 20.6% answered "[r]epeal most of it."<sup>59</sup> Again, the largest single response was the moderate one: 39.4% answered "[m]odify it."<sup>60</sup> Similarly, the October

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51. *Id.*

52. *Id.* Of those questioned, 13.8% expressed no opinion. *Id.*

53. *Id.*

54. *The Fortune Survey: XXIV*, FORTUNE, Nov. 1939, at 168.

55. *Id.*

56. *Id.*

57. *Id.*

58. *The Fortune Survey: XXX*, FORTUNE, May 1940, at 76, 169.

59. *Id.*

60. *Id.* Of those questioned, 15.6% expressed no opinion. *Id.*

1940 survey showed that 51.4% of those questioned, and 62.9% of those expressing opinions, wanted the next administration to “[c]ontinue most of the New Deal measures.”<sup>61</sup>

But the pollsters of the day did not confine themselves to posing questions framed at this level of generality. In this section I canvas the data from all of the polls Gallup and Roper took between 1935 and 1940 seeking to ascertain public opinion on five major public issues of the day: labor, federal regulatory power, redistribution, fiscal policy, and relief and social security. An examination of the results of their investigations provides us with a far more granular understanding of the temper of the times.

### A. Labor

Throughout the period, polling results showed continued support for labor unions. When asked in July of 1936, “Are you in favor of labor unions?” 76% answered yes, while only 24% responded negatively.<sup>62</sup> These sentiments were echoed in responses to identical questions posed in June of 1937 (76-24%),<sup>63</sup> May of 1939 (70-30%),<sup>64</sup> and November of 1939 (74-26%).<sup>65</sup> Moreover, these views

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61. *The Fortune Survey*: XXXIV, FORTUNE, Oct. 1940, at 65, 175.

62. 1 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971, at 31 (1972) [hereinafter 1 GALLUP, PUBLIC OPINION]. Unlike Roper, Gallup typically excluded those expressing no opinion from his calculation, basing his percentages on those who offered an opinion. Except where otherwise indicated, Gallup figures are percentages of those offering an opinion, rather than percentages of those questioned.

63. *Id.* at 67. 67.9 % expressed no opinion. GALLUP & RAE, *supra* note 21, at 306.

64. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 158. 11% expressed no opinion. GALLUP & RAE, *supra* note 21, at 307.

65. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 193-94. Unpublished Gallup polls asking the same question elicited comparable support. A survey administered between October 10 and October 15 of 1938 saw 58% answer yes, 28% no, and 14% express no opinion. Gallup Poll, Oct. 10-15 (1938), available at Roper Center for Public Opinion Research, [http://www.lexis-nexis.com/universe/form/academic/s\\_roper.html](http://www.lexis-nexis.com/universe/form/academic/s_roper.html) [hereinafter Roper Center Online] (n.q., Accession No. 0274556). Between August 10 and August 15 of 1939, 71% answered yes, 22% no, and 7% expressed no opinion. Gallup Poll, Aug. 10-15 (1939), available at Roper Center Online, *supra* (Question QAB08, Accession No. 0272324). When asked between January 27 and February 1 of 1940, “On the whole, do you approve or disapprove of labor unions?” 63% said they approved, 26% disapproved, and 11% had no opinion. Gallup Poll, Jan. 27-Feb. 1 (1940), available at Roper Center Online, *supra* (n.q., Accession No. 0200135).



were shared across regional and party lines. In July of 1936, for example, 74% of southerners supported labor unions, as did 65% of Republicans polled.<sup>66</sup> A *Fortune* survey published in February of 1939 revealed that 66.1% of those with opinions thought it was “foolish for the management of businesses to try to keep unions from organizing in their plants,” while only 33.8% considered such action “wise.”<sup>67</sup>

But responses to other questions on labor issues caution against drawing extravagant inferences from these data. A *Fortune* survey published in January of 1937 asked, “If you see strikers picketing a place of business, which attitude does it generally arouse in you: sympathy for the strikers, or for the employers, or indifference?”<sup>68</sup> Of those questioned, 17.6% of respondents answered “[s]ympathy for the strikers,” while 21.8% felt sympathy for the place of business instead.<sup>69</sup> In 28.5% of those questioned, picketing evoked “[a] feeling [that] they are probably both to blame,” and an additional 18.9% felt “[m]erely neutral” in the face of such demonstrations.<sup>70</sup> When asked in July of 1937, “Should government employees join labor unions?,” only 26% answered affirmatively, while 74% were opposed.<sup>71</sup> Similarly, only 21% of respondents with opinions in December of 1939 thought that “people on W.P.A. [the Works Progress Administration] [should] be allowed to form

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When asked between November 17 and November 22 of 1939, “Do you think workers should have the right to join together in a union in order to bargain with their employers?,” only 6% expressed no opinion; 6% answered no, and another 5% answered “no (emphatic).” Gallup Poll, Nov. 17-22 (1939), available at Roper Center Online, *supra* (Question QB05A, Accession No. 0189031). By contrast, 43% answered yes, and an additional 39% answered “yes (emphatic).” *Id.*

66. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 31.

67. *The Fortune Survey: XVIII*, FORTUNE, Feb. 1939, at 91. 55.1% of those questioned answered “foolish,” while 28.2% responded “wise.” *Id.* 16.7% expressed no opinion. *Id.*

68. *The Fortune Quarterly Survey: VII*, FORTUNE, Jan. 1937, at 153.

69. *Id.*

70. *Id.* A *Fortune* survey published in February of 1940 asked, “Do you think that the interests of employers and employees are, by their very nature, opposed, or are they basically the same?” *The Fortune Survey*, FORTUNE, Feb. 1940, at 133. The results showed that 56.2% of those questioned, and 69.3% of those expressing opinions, thought they were the same. Additionally, 24.8% of those questioned answered “opposed,” and 19% expressed no opinion. *Id.*

71. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 66. 14% expressed no opinion. GALLUP & RAE, *supra* note 21, at 307.

W.P.A. unions,” while 79% were opposed,<sup>72</sup> and only 15% thought that “people on W.P.A. should have the right to strike.”<sup>73</sup> 85% thought not.<sup>74</sup> The October 1937 *Fortune* survey asked, “All over the country there have been strikes of [W.P.A.] workers against being discharged. Which is your attitude?”<sup>75</sup> Of those questioned, 48.2%, including 41.1% of the poor and 43.4% of the unemployed, responded that they had “[n]o sympathy” with W.P.A. strikers.<sup>76</sup> An additional 19.8% felt that “although it is hard on W.P.A. workers, the number of jobs and the expense of maintaining them must be cut down at all costs.”<sup>77</sup> Only 21.2%, including 33.5% of the poor and 36.3% of the unemployed, thought that the strikers were “right in demanding to be kept in decent

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72. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 200. According to the Roper Center report of the poll, 19% answered yes, 71% no, and 10% expressed no opinion. Gallup Poll, Dec. 24-29 (1939), *available at* Roper Center Online, *supra* note 65 (Question RA07A, Accession No. 0172083). Unpublished Gallup polls of the period echo the published poll. When asked between December 24 and December 29 of 1939, “Should people on W.P.A. (Works Progress Administration) be allowed to organize W.P.A. unions?,” 14% answered yes, and an additional 5% answered “yes (definitely).” *Id.* (Question QA07A, Accession No. 0188698). By contrast, 27% answered no, and an additional 43% answered “no (definitely).” *Id.* 11% expressed no opinion. *Id.* Between February 8 and February 13 of 1940, respondents were asked, “In the last three or four years, some people on W.P.A. . . . have been joining W.P.A. unions. Do you approve of their joining these unions?” 14% answered yes, while 70% said no and 17% had no opinion. Gallup Poll, Feb. 8-13 (1940), *available at* Roper Center Online, *supra* note 65 (Question QT08, Accession No. 0268988). During the same time period another group was asked, “Persons on work relief now have the right to join unions of W.P.A. . . . workers if they want to. Should they continue to have this right, or should they be forbidden by law to join such unions?” *Id.* (Question QK08, Accession No. 0268981). 36% thought they “[s]hould be able to join,” while 48% thought they “[s]hould be forbidden to join,” and 16% expressed no opinion. *Id.*

73. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 200.

74. *Id.* at 200. According to the Roper Center account, 14% of those questioned thought “people on W.P.A. . . . should have the right to strike,” while 77% thought not and 10% expressed no opinion. Gallup Poll, Dec. 24-29 (1939), *available at* Roper Center Online, *supra* note 65 (Question RA07B, Accession No. 0172084). In another survey asking the same question during the same time period, respondents were listed as offering one of five responses: (1) 4% thought “yes (definitely);” (2) an additional 9% answered yes; (3) 54% answered “no (definitely);” (4) an additional 25% answered no; and (5) 8% expressed no opinion. *Id.* (Question QA07B, Accession No. 0188699).

75. *Fortune Quarterly Survey: X*, FORTUNE, Oct. 1937, at 159.

76. *Id.*

77. *Id.*

jobs.”<sup>78</sup> The same survey observed that “there have also been strikes of [W.P.A.] workers for better pay,” and asked, “Are you sympathetic with them?”<sup>79</sup> 19.1%, including 30% of the poor and 33.1% of the unemployed, answered that they were sympathetic with the striking workers.<sup>80</sup> But 70.1%, including 58.1% of the poor and 58% of the unemployed, said they were not sympathetic to such strikers.<sup>81</sup> In July of 1939, respondents were informed that “[t]he head of the W.P.A. says W.P.A. workers who go on strike will be dropped from the W.P.A. after five days on strike.”<sup>82</sup> When asked whether they approved of this action, 74% affirmed that they did.<sup>83</sup> Moreover, this attitude was not confined to those characterized as “upper income” (88-12%) or “middle income” (78-22%) respondents.<sup>84</sup> 62% of “lower income” respondents approved, as did 49% of W.P.A. workers themselves!<sup>85</sup>

While the American people were staunch supporters of labor organizations, they remained committed to government regulation of unions. When asked in April of 1937, “Do you think labor unions should be regulated by the Government?,” 69% responded yes.<sup>86</sup> In February of 1939, 75% of those with opinions (including 73% of “middle income” and 72% of “lower income” respondents) agreed that “every labor union should be required to take out a license (permit) from the Federal Government.”<sup>87</sup> The same

78. *Id.* Of those questioned, 2.8% expressed indifference, and 8% stated they “[d]on’t know.” *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Of those questioned, 10.8% stated they “[d]on’t know.” *Id.*

82. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 169.

83. *Id.* 26% disapproved, while 9% expressed no opinion. *Id.* An identical question posed in July of 1940 again produced a 74-26% split in favor. *Id.* at 233.

84. *Id.*

85. *Id.*

86. *Id.* at 58. 31% were opposed, with 14% expressing no opinion. GALLUP & RAE, *supra* note 21, at 306. An unpublished Gallup poll taken between June 23 and June 28 of 1937 saw 66% answer the same question affirmatively, with 24% answering no and 10% expressing no opinion. Gallup Poll, June 23-28 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279405). In an unpublished Gallup poll administered between August 10 and August 15 of 1939, the same question elicited 61% support for regulation and 27% opposition, with 12% expressing no opinion. Gallup Poll, Aug. 10-15 (1939), available at Roper Center Online, *supra* note 65 (Question QAB07, Accession No. 0272323).

87. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 143. An unpublished

poll asked whether respondents thought that “all companies doing business in more than one state should be required to get a license from the Federal Government.”<sup>88</sup> Here, by contrast, only 57% of those with opinions answered affirmatively.<sup>89</sup> When asked in November of 1939 whether “labor unions should be regulated to a greater extent by the Federal Government,” 79% of those with opinions thought they should.<sup>90</sup> Asked the same question in May of 1940, 75% of those with opinions still answered yes.<sup>91</sup> When asked in the same poll whether during the ensuing four years “business should be regulated to a greater extent by the Federal Government,” only 33% of those with opinions answered in the affirmative.<sup>92</sup> On the eve of the 1940

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Gallup survey taken that same month asked, “To give the United States Government greater control of labor unions, do you think every labor union should be required to take out a license (permit) from the Federal Government?” Gallup Poll, Feb. 4 (1939), *available at Roper Center Online*, *supra* note 65 (Question QA06, Accession No. 0274813). Here, 51% answered yes, 21% no, and 28% expressed no opinion. *Id.*

88. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 143.

89. *Id.* The figure may have been lower. The report of the poll from the Roper Center at the University of Connecticut shows only 43% answering yes, while 40% answered no and 17% expressed no opinion, meaning that 52% rather than 57% of those with opinions responded affirmatively. Gallup Poll, Jan. 27-Feb. 1, *available at Roper Center Online*, *supra* note 65 (Question QA04, Accession No. 0274826).

90. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 194. According to the Roper Center report, 67% answered yes, 19% no, and 15% expressed no opinion. Gallup Poll, Nov. 17-22 (1939), *available at Roper Center Online*, *supra* note 65 (Question QB05B, Accession No. 0189032). Between July 4 and July 11 of 1938, Gallup asked respondents whether “there should be more regulation of labor unions.” Gallup Poll, July 4-11 (1938), *available at Roper Center Online*, *supra* note 65 (n.q., Accession No. 0189457). 34% answered “yes (emphatic)” and an additional 25% answered yes. *Id.* 14% answered “no (emphatic),” and an additional 9% answered no. *Id.* 18% expressed no opinion. *Id.*

91. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 234. According to the Roper Center report, 62% answered yes, 21% answered no, while 18% expressed no opinion. Gallup Poll, May 5-10 (1940), *available at Roper Center Online*, *supra* note 65 (Question RK06B, Accession No. 0172180). A *Fortune* survey released that month showed that 58.9% of those questioned, and 73.9% of those expressing an opinion, thought that the next administration should “[h]ave the government regulate labor unions.” *The Fortune Survey: XXX*, FORTUNE, May 1940, at 76, 170. Support for such regulation included 66.7% of factory workers. *Id.* The survey published that October showed 48.4% of those questioned, and 65.9% of those with opinions, thought the next administration should “[e]stablish government supervision of labor unions.” *The Fortune Survey: XXXIV*, FORTUNE, Oct. 1940, at 65, 175.

92. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 234. 67% answered no, while 17% expressed no opinion. *Id.* Similarly, in October of 1940, 60% of

election, 27% of those with opinions thought there ought to be more regulation of business, 22% preferred the status quo, and 51% favored less business regulation.<sup>93</sup> By contrast, 60% of those with opinions thought there should be more regulation of unions, while only 21% thought there should be less and 19% about the same.<sup>94</sup>

Responses to the sit-down strikes of early 1937 underscore these attitudes toward labor regulation. In early February of 1937, Gallup asked respondents whether, “[i]n the current General Motors strike,” their sympathies were “with the John L. Lewis group of striking employees or with the employers.”<sup>95</sup> 44% said their sympathies lay with the Lewis group, while 56% supported the employers.<sup>96</sup> 66%

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respondents thought that there should be more regulation of labor unions by the federal government during the ensuing four years, while 21% thought there should be less and 19% hoped it would remain the same. *Id.* at 251 (27% expressed no opinion). When asked the same question with respect to regulation of business, 27% of respondents favored more, 51% favored less, and 22% hoped for continuity. *Id.* (20% expressed no opinion).

93. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 251. According to the Roper Center report, 22% expressed no opinion. Gallup Poll, Oct. 26-31 (1940), available at Roper Center Online, *supra* note 65 (Question RK04A, Accession No. 0172287). A poll taken during the same period showed 22% (27% of those with opinions) favoring more regulation, 20% (24% of those with opinions) about the same level of regulation, 42% (51% of those with opinions) less regulation, and 17% expressing no opinion. *Id.* (Question QKT04, Accession No. 0268998).

94. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 251. 44% thought there should be more regulation, 15% less, 14% the same, and 27% expressed no opinion. Gallup Poll, Oct. 26-31 (1940), available at Roper Center Online, *supra* note 65 (Question RK04B, Accession No. 0172288). A poll taken two weeks earlier produced virtually identical numbers: 44% for more regulation, 15% for less, 14% “about the same,” and 26% no opinion. Gallup Poll, Oct. 11-16 (1940), available at Roper Center Online, *supra* note 65 (Question QK03B, Accession No. 0270571). When asked in March of 1940 whether the next administration should “[h]ave the government regulate the labor union,” 59% said it should, 21% that it should not, and 20% expressed no view. Gallup Poll, Mar. (1940), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0176471). When asked that May whether the next administration should “[r]egulate labor unions,” 58% said it should, 21% that it should not, and 21% expressed no opinion. Gallup Poll, May (1940), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0161705). When asked that August whether they would like to see the next administration “[e]stablish government supervision of labor unions,” 48% said they would like it, 25% said they would not, and 27% expressed no preference. Gallup Poll, Aug. (1940), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0156101).

95. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 48.

96. *Id.* Between January 13 and January 18 of 1937, 47% said they supported the Lewis group, while 53% supported the employers. Gallup Poll, Jan. 13-18 (1937), available at Roper Center Online, *supra* note 65 (n.q.,

believed that GM was “right in refusing to negotiate with the sit-down strikers until they leave the General Motors plants,” and only 38% believed that “John L. Lewis represents a majority of General Motors workers.”<sup>97</sup> When asked in early March whether they believed that the legislatures of their states “should pass legislation making sit-down strikes illegal,” 67% answered yes.<sup>98</sup> By February

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Accession No. 0278913). Between February 10 and February 15, respondents were asked whether “[i]n the current General Motors strike” their sympathies were “with the strikers or with the employers.” Gallup Poll, Feb. 10-15 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279254). 34% supported the strikers, 37% supported the employers, 18% supported neither, and 11% expressed no opinion. *Id.* That June, respondents were asked whether “in the present steel strikes” their sympathies lay “with the strikers or with the companies.” Gallup Poll, June 23 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279401). 35% supported the strikers, 41% the companies, and 24% expressed no opinion. *Id.*

97. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 48. Public attitudes toward Lewis and the Congress of Industrial Organizations (C.I.O.) remained at best lukewarm throughout the period. In July of 1936, the 76% of respondents who were “in favor of labor unions” were asked whether they preferred “separate unions for each craft in an industry (like carpenters, masons, machinists, etc.), or one single union for all workers in an industry (the industrial union).” *Id.* at 31. 59% favored craft unionism, while 41% supported industrial unions. *Id.* Democrats split 53-47% in favor of craft unions, while Republicans did so by a 70-30% margin. *Id.* at 32. Socialists favored industrial unions by a 66-34% margin, but labor union members themselves favored craft unions 52-48%. *Id.* In June of 1937, respondents favored the American Federation of Labor (A.F. of L.) “craft type” over “the C.I.O. industrial type” of union (64-36%), with union members favoring the A.F. of L. type by a 57-43% margin. *Id.* at 63. Respondents were also asked, “Which labor leader do you prefer: Green of the A.F. of L. or Lewis of the C.I.O.?” *Id.* at 62-63. Green won in a landslide, 67-33%. *Id.* Even those in the “lower one-third” income group favored Green 53-47%, while those in the “upper two-thirds” backed him over Lewis 74-26%. *Id.* In September of 1938, the public still preferred Green to Lewis by a 78-22% margin. *Id.* at 120. In both instances, however, 43% of those questioned expressed no opinion. GALLUP & RAE, *supra* note 21, at 307. By May of 1939, the drubbing was even more striking: Green 80%, Lewis 20%. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 159. In the summer of 1938, 34% of respondents professed an opinion of the National Labor Relations Board (NLRB). *Id.* at 114. Of those, 68% answered that they thought the Board had been more “partial to one union more than the other.” *Id.* Of those, 92% thought the NLRB had been partial to the C.I.O. over the A.F. of L. *Id.*

98. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 52. Again, these sentiments transcended differences of region, age, sex, occupation, and party affiliation. See *id.* at 52-53. 62% of Democrats and 80% of Republicans agreed. *Id.* at 52. Of the various groups asked the question, a majority only of “Relievers” (53%) answered no. *Id.* Between February 24 and March 1, 68% of those with opinions agreed that “this state should pass legislation making sit-down strikes illegal.” Gallup Poll, Feb. 24-Mar. 1 (1937), available at Roper Center Online, *supra* note

of 1939, this percentage had swollen to seventy-five.<sup>99</sup> In the first week of April 1937, 65% of those with opinions agreed that “state and local authorities should use force in removing sit-down strikers.”<sup>100</sup> When asked in mid-June of 1937 whether their “attitude toward labor unions” had “changed any during the last six months,” 50% answered that it had.<sup>101</sup> Of those who answered yes, only 29% said they were “[m]ore in favor” of unions than they had been, whereas 71% indicated that they viewed labor unions less favorably.<sup>102</sup> 57% believed that the militia should “be called out whenever strike trouble threatens,” though 58% maintained that the “Post Office Department [should] deliver food and other packages to workers in factories where strikes have been called.”<sup>103</sup> A *Fortune* survey published in July of 1937 asked respondents what they

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65 (n.q., Accession No. 0278932). 11% had no opinion. *Id.*

99. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 143. 25% thought not, and 12% expressed no opinion. GALLUP & RAE, *supra* note 21, at 305. When asked during the same time period, “Do you think this state should pass a law making sit-down strikes illegal?,” 65% answered yes, 24% no, and 12% expressed no opinion. Gallup Poll, Feb. 4-9 (1939), available at Roper Center Online, *supra* note 65 (Question QAB07, Accession No. 0274170).

100. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 55. 35% thought not, with 10% expressing no opinion. GALLUP & RAE, *supra* note 21, at 305. Again, the majority of people from different regions, occupations, and ages agreed that force should be used. See 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 55. Here, even 65% of “Relievers” concurred. *Id.* A Gallup poll taken between March 17 and March 22 of 1937 produced the same result: 66% of those with opinions thought state and local authorities should use force in removing sit-down strikers. Gallup Poll, Mar. 17-22 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279156). Of those questioned, 60% said yes, 31% no, and 9% had no opinion. *Id.* Between March 20 and March 25, 54% answered yes, 36% no, and 10% had no opinion, meaning that 60% of those with opinions thought force should be employed. Gallup Poll, Mar. 20-25 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279272). Between March 24 and March 29, 61% answered yes, 30% no, and 9% had no opinion, meaning that 67% of those with opinions approved of the use of force. Gallup Poll, Mar. 24-29 (1937), available at Roper Center Online, *supra* note 65 (N.Q., Accession No. 0279283). Between April 1 and April 6, 60% answered yes, 32% no, and 8% had no opinion, meaning that 65% of those with opinions thought force should be used. Gallup Poll, Apr. 1-6 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278943). And between December 1 and December 6 of 1937, 63% answered yes, 24% no, and 13% had no opinion, meaning that 72% of those with opinions approved of the use of force. Gallup Poll, Dec. 1-6 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278891).

101. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 63.

102. *Id.*

103. *Id.*

thought ought to be done about sit-down strikes.<sup>104</sup> Three quarters (74.4%) of all respondents, including 59% of factory laborers and 67.6% of the unemployed, thought “they should be stopped.”<sup>105</sup> Of those questioned, 20.1% thought they should be stopped “even if bloodshed is necessary,” while a comfortable majority of 54.3% thought “[t]hey should be stopped, but not at the cost of bloodshed.”<sup>106</sup> Additionally, 14.1% thought “[l]abor should use them if it does not carry them too far,” but only 2.8% agreed that “[l]abor should use them whether legal under present laws or not.”<sup>107</sup>

In 1938, Gallup began taking a series of polls asking respondents whether “the Wagner Labor Act should be revised, repealed, or left unchanged.”<sup>108</sup> These polls consistently revealed that, while the American people favored some form of national regulation of labor relations, they were not satisfied with the Wagner Act. In April of 1938, 43% (39% of Democrats, 49% of Republicans) favored revision of the Act and 19% (11% of Democrats, 32% of Republicans) favored outright repeal.<sup>109</sup> 38% (50% of Democrats, 19% of Republicans) thought the statute should be left unmodified.<sup>110</sup> By October of that year, the support for repeal held nearly steady at 18% (14% of Democrats, 30% of Republicans), while sentiment for revision had risen to 52% (50% of Democrats, 58% of Republicans).<sup>111</sup> In January of 1939, 18% (12% of Democrats, 29% of Republicans) still favored repeal, while 48% (45% of Democrats, 56% of Republicans) preferred revision.<sup>112</sup> A

104. *The Fortune Quarterly Survey: IX*, FORTUNE, July 1937, at 98.

105. *Id.*

106. *Id.*

107. *Id.* Of those questioned, 2.2% expressed indifference, and 6.5% had no opinion. *Id.*

108. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 101.

109. *Id.*

110. *Id.* 56% were either unfamiliar with the Act or expressed no opinion. GALLUP & RAE, *supra* note 21, at 300.

111. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 125.

112. *Id.* at 144. The question was asked of the 78% of the respondents who had heard of the Wagner Act. 29% of them thought the act should be revised, 11% thought it should be repealed, 21% thought it should be left unchanged, and 39% expressed no opinion. Gallup Poll, Jan. 27-Feb. 1, *available at* Roper Center Online, *supra* note 65 (Question QAB02B, Accession No. 0274816). Among “upper income” respondents, 58% favored revision, 25% repeal, 17% no change; among “middle income” respondents, 51% favored revision, 18% repeal, 31% no change. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 144. Meanwhile,



series of polls taken that April produced similar results.<sup>113</sup> And in December of that year, 18% (10% of Democrats, 27% of Republicans) favored repeal, while 53% (50% of Democrats, 58% of Republicans) supported revision.<sup>114</sup>

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34% of "lower income" respondents favored revision, while 13% supported repeal. 53% of "lower income" respondents thought that there should be no change to the statute. *Id.*

113. Between April 2 and April 7, 51% of those with opinions (28% of those questioned) thought the Act should be revised, 16% (9% of those questioned) thought it should be repealed, and 35% (19% of those questioned) thought it should be left unchanged. Gallup Poll, Apr. 2-7 (1939), available at Roper Center Online, *supra* note 65 (Question QB18, Accession No. 0279889). 45% expressed no opinion. *Id.* Between April 8 and April 13, 53% (31% of those questioned) thought the Act should be revised, 16% (9% of those questioned) thought it should be repealed, and 29% (17% of those questioned) thought it should be left unchanged. Gallup Poll, Apr. 8-13 (1939), available at Roper Center Online, *supra* note 65 (Question QA15, Accession No. 0274206). 42% expressed no opinion. *Id.* Between April 21 and April 26, 52% (28% of those questioned) thought the Act should be revised, 13% (7% of those questioned) thought it should be repealed, and 35% (19% of those questioned) thought it should be left unchanged. Gallup Poll, Apr. 21-26 (1939), available at Roper Center Online, *supra* note 65 (Question QB08, Accession No. 0276769). 46% expressed no opinion. *Id.* In addition, Gallup conducted two polls in which he omitted the option of repeal, asking simply "Do you think the Wagner Labor Act should be revised or left unchanged?" Gallup Poll, Apr. 8-13 (1939), available at Roper Center Online, *supra* note 65 (Question QB16 Accession No. 0274217). Between April 8 and April 13, 66% (35% of those questioned) thought it should be revised, while 34% (18% of those questioned) thought it should be left unchanged. *Id.* 47% expressed no opinion. *Id.* Between April 21 and April 26, 63% (33% of those questioned) thought it should be revised, while 37% (19% of those questioned) thought it should be left unchanged. Gallup Poll, Apr. 21-26 (1939), available at Roper Center Online, *supra* note 65 (Question QA08, Accession No. 0276759). 48% expressed no opinion. *Id.*

114. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 203. According to the Roper Center report, 22% of those questioned favored revision, 8% favored repeal, 12% favored the status quo, and 58% had no opinion. Gallup Poll, Dec. 15-20 (1939), available at Roper Center Online, *supra* note 65 (Question RA05A, Accession No. 0172089). A poll taken in November showed 16% of those questioned favored revision, and 8% favored repeal. Gallup Poll, Nov. 17-22 (1939), available at Roper Center Online, *supra* note 65 (Question QA06A, Accession No. 0189016). 20% thought the statute should be left unchanged, 13% expressed no opinion, and 43% responded that they were not familiar with the Act. *Id.* Between December 14 and December 19, Gallup asked the question of the 72% of respondents who had heard of the Wagner Act. Gallup Poll, Dec. 14-19 (1939), available at Roper Center Online, *supra* note 65 (Question QB05B, Accession No. 0279833). 51% (31% of those who had heard of the Act) thought the Act should be revised, 18% (11% of those who had heard of the Act) thought it should be repealed, and 33% (20% of those who had heard of the Act) thought it should be left unchanged. *Id.* Even among those who had heard of the Act, 39% had no opinion. *Id.* Between January 21 and January 27 of 1940, Gallup asked the question of the 78% of respondents who had heard of the Wagner Act.

But the most striking feature of these polls appears not in these numbers, but in the percentage of those questioned who were either unfamiliar with the Wagner Act or expressed no opinion. In no case was it lower than 40%, and in most it was well over 50%!<sup>115</sup> This statistic may reveal to us more than any other the extent of the general public's engagement in the contemporary debate over the labor question.

Though the polls cast only a little light on what changes to the statute those favoring revision would have liked, responses to more specific questions are suggestive. When asked in August of 1937 whether the New Deal had been "too friendly toward labor, not friendly enough, or just about right," 45% answered "[t]oo friendly," 13% "[n]ot friendly enough," and 42% "[a]bout right."<sup>116</sup> When asked in mid-summer of 1938 whether they had an opinion on the NLRB, only 34% said they did.<sup>117</sup> Of those holding an opinion, 59% believed its opinions had not been fair to

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Gallup Poll, Jan. 21-27 (1940), available at Roper Center Online, *supra* note 65 (Question QK06B, Accession No. 0271227). 50% (31% of those who had heard of the Act) thought it should be left unchanged, 15% (9% of those who had heard of the Act) thought it should be repealed, and 35% (22% of those who had heard of the Act) thought it should be left unchanged. *Id.* Again, 38% of those who had heard of the Act had no opinion. *Id.* During the same time period, Gallup put the question to the 45% of another sample who had an opinion of the Wagner Act. *Id.* (Question QT06B, Accession No. 0271235). 50% thought the Act should be revised, 15% thought it should be repealed, and 30% thought it should be left unchanged. *Id.* 6% of those with an opinion of the Act expressed no opinion on the question. *Id.* And again between October 11 and October 16 of 1940, Gallup put the question to the 74% of respondents who had heard of the Act. Gallup Poll, Oct. 11-16 (1940), available at Roper Center Online, *supra* note 65 (Question QKT04B, Accession No. 0270560). 44% (25% of those who had heard of the Act) thought it should be revised, 11% (6% of those who had heard of the Act) thought it should be repealed, and 47% (27% of those who had heard of the Act) thought it should be left unchanged. *Id.* Again, 41% of those who had heard of the Act expressed no opinion. *Id.* 2% simply did not answer the question. *Id.*

115. See *supra* notes 113-14.

116. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 69. 17% expressed no opinion. GALLUP & RAE, *supra* note 21, at 307. A Gallup poll taken between October 30 and November 4 of 1937 showed 39% thought the administration had been too friendly, 15% not friendly enough, and 46% about right. Gallup Poll, Oct. 30-Nov. 4 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279202). In November of 1939 *Fortune* published a survey in which it asked, "Considering Mr. Roosevelt's six and a half years in office, on the whole do you approve or disapprove of his attitude toward labor and labor unions." *The Fortune Survey: XXIV*, Nov. 1939, at 72, 166. 40.1%, or 58.3% of those with opinions, expressed approval. *Id.*

117. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 114.

employers.<sup>118</sup> In the spring of 1939, 86% of respondents said they would “favor a law requiring employers and unions to submit their differences to a federal labor board before a strike could be called.”<sup>119</sup> Only 27% counted themselves “in favor of the so-called closed shop—that is, hiring only persons who are already members of the union,” while 73% opposed the closed shop.<sup>120</sup> Similarly, only 29% favored “the so-called union shop—that is, requiring every worker to join the union.”<sup>121</sup> Here, 71% were opposed.<sup>122</sup> A *Fortune* survey

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118. *Id.* Between February 5 and February 10, Gallup found that only 39% of those questioned had an opinion of the NLRB. Gallup Poll, Feb. 5-10 (1938), available at Roper Center Online, *supra* note 65 (Question QA03B, Accession No. 0278098). Of those, 42% thought its decisions had been fair to employers, 51% thought not, and 7% had no opinion on the fairness issue. *Id.* In another poll taken during the same week, Gallup found that 24% thought the NLRB had been fair to employers, 24% thought it had not, and 52% had no opinion. *Id.* (Question QB03A, Accession No. 0278102). When asked between October 10 and October 15 of 1938 whether the NLRB “is fair to business men and other employers,” 22% told Gallup they thought it was, 28% said it was not, and 49% expressed no opinion. Gallup Poll, Oct. 10-15 (1938), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0274557). And between January 27 and February 1 of 1940, Gallup asked whether the NLRB “has favored employers, or the labor unions, or has it been fair to both sides.” Gallup Poll, Jan. 27-Feb. 1 (1940), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0200134). 4% said the NLRB had favored employers, 27% said it had favored unions, 30% said it had been fair to both, and 39% expressed no opinion. *Id.*

119. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 158-59. Similarly, Gallup and Rae report that a July 1937 poll showed 89% agreeing that employers and employees should “be compelled by law to try to settle their differences before strikes can be called.” GALLUP & RAE, *supra* note 21, at 306. Only 11% disagreed, while 8% expressed no opinion. *Id.* A Gallup poll taken the same month showed that 84% would “favor laws regulating the conduct of strikes.” *Id.* Here, 16% were opposed, and again 8% expressed no opinion. *Id.* Yet in a *Fortune* survey published in June of 1939, only 34.8% of those questioned, or 43.8% of those with opinions, thought that the federal government should “[m]ake all decisions in disputes between capital and labor.” *The Fortune Survey: XXII*, FORTUNE, June 1939, at 68, 109.

120. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 159.

121. *Id.*

122. *Id.* When asked the same questions between June 30 and July 4 of 1937, 28% told Gallup they favored the closed shop, 59% said they did not, and 13% expressed no opinion. Gallup Poll, June 30-July 4 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278987). In April of 1940, *Fortune* asked respondents simply, “Do you believe in ‘the closed shop?’” Gallup Poll, Apr. (1940), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0176937). Here, 38% answered yes, 36% no, 12% answered “[d]epends,” and 14% expressed no opinion. *Id.* A *Fortune* survey published in July of 1936 showed that 29.3% of respondents thought that all wage earners should belong to a labor union, 7.6% thought most should, 22.9% that some

published in October of 1937 asked, "When there is a strike against a company, do you think the plant should be closed, or do you believe it should be kept open for nonstrikers?"<sup>123</sup> Here, 24.7%, including 36.8% of factory laborers, thought struck plants should be closed.<sup>124</sup> But 47.4%, including 39.7% of factory workers, thought the plants should be kept open for nonstriking workers.<sup>125</sup>

### B. Federal Regulatory Power

On the question of federal regulation of industry, public response bore an inconsistency bespeaking a deep ambivalence. The National Recovery Administration (N.R.A.) had become generally unpopular by the time its two-year charter expired and Congress elected not to renew it in 1935. George Gallup reported that a poll taken one week before *Schechter v. U.S.*<sup>126</sup> was decided in May of 1935 showed 62% of respondents "against the N.R.A."<sup>127</sup> Yet in the third week of September 1936, a slight majority (51%) of those polled thought the N.R.A. should be revived.<sup>128</sup> Curiously, by the following week, the number had shrunk to 44%.<sup>129</sup> But by mid-February of 1937, the number who thought that "Congress and the President should seek to enact a second [N.R.A.]" was back up to 53% (72% of

should, and 24.6% that none should, with 15.6% answering "[d]on't know." *The Fortune Quarterly Survey: V*, FORTUNE, July 1936, at 83, 152. The October 1937 *Fortune* survey asked whether respondents agreed or disagreed with "the charge that the C.I.O., headed by John L. Lewis, is forcing workers to join it or lose their jobs." *The Fortune Quarterly Survey: X*, FORTUNE, Oct. 1937, at 108, 160. Of all questioned, 44.6%, including 34.5% of factory laborers, agreed. *Id.* Another 7.8%, including 6.9% of factory laborers, "partly" agreed. *Id.* 17%, including 31.6% of factory laborers, disagreed, and 30.6%, including 27% of factory laborers, expressed no opinion. *Id.*

123. *The Fortune Quarterly Survey: X*, FORTUNE, Oct. 1937, at 108, 162.

124. *Id.*

125. *Id.* Of those questioned, 19.6%, including 17.2% of factory workers, responded "[d]epends on conditions," while 8.3%, including 6.3% of factory workers, expressed no opinion. *Id.*

126. 295 U.S. 495 (1935).

127. Dr. George Gallup, *National Poll 57 Per Cent Against Amending Constitution*, N.Y. HERALD TRIB., Feb. 9, 1936, at 6.

128. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 41.

129. *Id.* at 40. A Gallup poll taken on November 6 and 7 of 1936 showed 49% (52% of those with opinions) in favor of enacting a second N.R.A., with 47% opposed, and 5% expressing no opinion. Gallup Poll, Nov. 6-7 (1936), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0189358).

Democrats, 20% of Republicans, 37% of farmers, 76% of reliefers).<sup>130</sup>

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130. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 52. According to the Gallup and Rae report, 47% thought not and 8% expressed no opinion. GALLUP & RAE, *supra* note 21, at 299. A Gallup poll taken the preceding week, between February 10 and February 15, showed 49% in favor of a second N.R.A., 41% opposed, and 11% expressing no opinion, meaning 55% of those with opinions favored enactment. Gallup Poll, Feb. 10-15 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0279257). By December of 1937, after the economy had slid back into recession, 51% favored enactment, 40% opposed it, and 8% expressed no opinion, meaning that 56% of those with opinions favored enactment. Gallup Poll, Dec. 17-22 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0189377).

In contrast, a *Fortune* survey published in January of 1936 showed strong opposition to a government takeover of the railroads, with only 34% of those with opinions favoring government ownership. *The Fortune Quarterly Survey: III*, FORTUNE, Jan. 1936, at 46, 146. A Gallup poll taken in December of 1937 showed that only 30% thought "the Government should buy, own, and operate the railroads." 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 91. The July 1938 *Fortune* survey showed opposition to government takeover holding at 67.2-32.8% for those expressing opinions. *The Fortune Quarterly Survey: XIII*, FORTUNE, July 1938, at 36, 80. The June 1939 survey asked whether the federal government should own and operate all, some, or none of a number of industries and services. *See The Fortune Survey: XXII*, FORTUNE, June 1939, at 68, 110. The responses indicated majority or plurality support for public ownership of at least some postal and parcel-post services (all, 86.9%; some, 5.3%; none, 3.8%), hospitals and medical service (all, 14.4%; some, 59.2%; none, 18.8%), natural resources (all, 21.3%; some, 33.5%; none, 32.9%), and electric power (all, 19.7%; some, 24.3%; none, 41.9%). *Id.* Majorities opposed public ownership of railroads (all, 21.7%; some, 12%; none, 52.6%), telephone and telegraph systems (all, 15%; some, 14.5%; none, 57.7%), insurance companies (all, 13.1%; some, 14.4%; none, 61.1%), and "[t]he factories producing the essentials of life, like clothes, food, etc." (all, 7.3%; some, 14.3%; none, 70%). *Id.* at 112. A survey released in May of 1940 showed only 35% of those with opinions thought that the next administration should "[w]ork toward government ownership of public utilities," though only 40.8% of those with opinions thought the Tennessee Valley Authority (TVA) should be turned over to private operation. *The Fortune Survey: XXX*, FORTUNE, May 1940, at 76, 170. A survey published in October of 1940 showed only 28.2% of those with opinions hoped that the next administration would "[t]ake over and operate all public utilities." *The Fortune Survey: XXXIV*, FORTUNE, Oct. 1940, at 65, 175. Opposition to federal control, however, did not entail opposition to all public ownership. A survey published in July of 1936 showed "a considerable majority of those with opinions favoring public ownership of all utilities." *The Fortune Quarterly Survey: V*, FORTUNE, July 1936, at 83, 154-56. Respondents supported public ownership of water (60.1%), light (55.6%), gas (54.8%), telephone (50%), and trolleys and busses (49.2%), with "about 14 per cent of the people answering 'don't know' to each part of the question." *Id.* at 154. Moreover, 48.5% of those polled in the June 1939 *Fortune* survey, or 55.5% of those expressing opinions, thought that the federal government should "regulate all public utility rates like electricity, gas, etc." *The Fortune Survey: XXII*, FORTUNE, June 1939, at 68, 109.

In 1939, Gallup asked a series of questions about relations between the Roosevelt Administration and business. When asked in early March whether “the general attitude of the Roosevelt Administration toward business is too friendly or not friendly enough,” only 9% answered “[t]oo friendly,” while 52% responded “[n]ot friendly enough” and 39% thought it was “[a]bout right.”<sup>131</sup> When asked whether “the attitude of the Roosevelt Administration toward business is delaying business recovery,” 41% answered “[y]es, a lot,” 26% said “[y]es, a little,” and a third (33%) thought it was not.<sup>132</sup> By mid-May, 54% thought the Administration’s attitude toward business was “[n]ot friendly enough,” 11% thought it was “[t]oo friendly,” and 35% thought it was “[a]bout right,” while respondents maintained by a 63-37% margin that the Administration’s attitude toward business was delaying recovery.<sup>133</sup> Responses to two other questions asked in the May poll reveal something of a “plague on both houses” attitude toward the Administration and business.<sup>134</sup> While 11% believed that the attitude of business toward the Roosevelt Administration was “[t]oo friendly,” and 24% thought it was “[a]bout right,” 65% thought it was “not friendly enough.”<sup>135</sup>

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131. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 145. A Gallup poll taken that same week, between March 4 and March 10, asked whether “the general attitude of the (Franklin D.) Roosevelt Administration toward businessmen is too friendly or not friendly enough?” Gallup Poll, Mar. 4-10 (1939), *available at* Roper Center Online, *supra* note 65 (Question QA04, Accession No. 0274684). Only 6% answered “[t]oo friendly,” while 41% answered “[n]ot friendly enough,” 33% responded “[a]bout right,” and 20% expressed no opinion. *Id.* A Gallup poll taken between October 30 and November 4 of 1937 asked the same question, but this time about the Administration’s attitude toward “big business” rather than “businessmen.” Gallup Poll, Oct. 30-Nov. 4(1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0279203). Here, 19% answered “[t]oo friendly,” 33% “[n]ot friendly enough,” and 48% “[a]bout right.” *Id.* A Gallup poll taken between March 17 and March 22 of 1938 asked the same question, but this time about the Administration’s attitude toward “business” rather than “big business.” Gallup Poll, Mar. 17-22 (1938), *available at* Roper Center Online, *supra* note 65 (Question QAB09, Accession No. 0278679). Here 13% answered “[t]oo friendly,” 39% “[n]ot friendly enough,” 35% “[a]bout right,” and 14% expressed no opinion. *Id.*

132. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 145-46. The Roper Center report of the poll suggests that the numbers are closer to 40%, 27%, and 33%, with 19% expressing no opinion. Gallup Poll, Mar. 4-9 (1939), *available at* Roper Center Online, *supra* note 65 (Question QA05, Accession No. 0274685).

133. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 156.

134. *Id.*

135. *Id.*

And 69% believed that the attitude of business toward the Roosevelt Administration was delaying recovery.<sup>136</sup> But when asked in late January of 1939 whether, "to create new jobs and reduce unemployment, it would be better to follow the ideas of big businessmen or the ideas of the Roosevelt Administration," 55% answered "[f]ollow businessmen," while 45% responded "[f]ollow Administration."<sup>137</sup>

The public attitude toward the Administration's agriculture program was more consistently negative. When asked in December of 1935 whether they favored or opposed the Agricultural Adjustment Act (AAA), only 41% (70% of Democrats, 8% of Republicans) supported the Act, while 59% opposed it.<sup>138</sup> When asked in February of 1937 whether they would like to see the AAA revived, only 41% (and only 53% of farmers) answered yes.<sup>139</sup> When asked in April of 1939 whether "the Roosevelt Administration has done a good job or a poor job of handling the farm problem," 48% of those with opinions said "good job," while 52% answered "poor job."<sup>140</sup> And the *Fortune* survey published in June of 1939 showed that 73% of those with opinions thought the

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136. *Id.*

137. *Id.* at 140.

138. *Id.* at 9.

139. *Id.* at 67-68. According to the Gallup and Rae report of the poll, 59% answered no and 23% expressed no opinion. GALLUP & RAE, *supra* note 21, at 298. In a Gallup poll taken between February 10 and February 15 only 29% of those questioned, or 40% of those with opinions, said that they would "like to see the AAA (Agricultural Adjustment Administration) crop control act revived." Gallup Poll, Feb. 10-15 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0279258). Of those questioned, 44% said they would not, while 27% expressed no opinion. *Id.* When asked the same question between December 17 and December 22 of 1937, 35%, or 45% of those with opinions, answered affirmatively, while 42% (55% of those with opinions) said no and 23% expressed no opinion. Gallup Poll, Dec. 17-22 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0189378).

140. Of those questioned, 36% answered yes, 39% no, and 25% expressed no opinion. Gallup Poll, Apr. 21-26 (1939), *available at* Roper Center Online, *supra* note 65 (Question RA11A, Accession No. 0173233). When asked of southern and midwestern farmers only, the "good job" number rose to 53%. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 153-54. 58% of those surveyed thought Henry Wallace had done a good job as Secretary of Agriculture, though only 55% of southern and midwestern farmers agreed. *Id.* at 154. By October of 1940, however, opinion on this question had changed. Now, 45% of those questioned, or 60% of those with opinions, thought the Administration had done a good job. Gallup Poll, Oct. 11-16 (1940), *available at* Roper Center Online, *supra* note 65 (Question QK02, Accession No. 0270569). 30% of those questioned thought the job had been poor, while 25% again expressed no opinion. *Id.*

federal government should *not* “[c]ontrol the price of farm products by controlling production.”<sup>141</sup>

This ambivalence is captured in more general questions asked about federal power in 1936 and 1937. When asked in a poll taken in January of 1936, after the Court had invalidated the National Industrial Recovery Act (NIRA) and the AAA,<sup>142</sup> “Which theory of government do you favor—concentration of power in the Federal Government, or concentration of power in the state governments?” 56% (72% of Democrats, 35% of Republicans, 71% of Relievers) favored the federal government, while 44% (28% of Democrats, 65% of Republicans) favored state government.<sup>143</sup> Yet, when asked in the preceding week whether they “would favor an amendment to the Constitution transferring to the Federal Government the power to regulate agriculture and industry,” only 43% answered yes, while 57% responded no.<sup>144</sup> In mid-December of 1936, just six weeks after the 1936 elections, Gallup asked, “Would you favor an amendment to the Constitution giving Congress the power to regulate agriculture, commerce, industry, and labor?”<sup>145</sup> Only 42%, or 45% of those with opinions, responded favorably to the proposal.<sup>146</sup> In March of 1937, Gallup asked the question differently. Now respondents were asked, “Would you favor an amendment to the Constitution giving Congress *greater* power to regulate industry and agriculture?”<sup>147</sup> The question asked not whether Congress should enjoy plenary regulatory authority in the realms identified, but instead only whether it ought to have more authority than it presently

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141. *The Fortune Survey: XXII*, FORTUNE, June 1939, at 68, 109. 22.9% of those questioned thought the national government should engage in such activity, while 61.8% did not. *Id.*

142. See *Schechter v. U.S.*, 295 U.S. 495 (1935); *U.S. v. Butler*, 297 U.S. 1 (1936).

143. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 14.

144. *Id.* at 12.

145. Gallup Poll, Dec. 16-21 (1936), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279185).

146. *Id.* 51% answered no, with 7% expressing no opinion. *Id.* In late November of 1936, the *New York Times* reported that the convention of the American Federation of Labor had “refused to ask amendment of the Federal Constitution to permit labor and social welfare legislation and to curb the Supreme Court.” Louis Stark, *A.F. of L. Demands 30-Hour Week Law; Green Re-Elected*, N.Y. TIMES, Nov. 28, 1936, at A1.

147. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 53 (emphasis added).



possessed.<sup>148</sup> 58% favored such an amendment, while 42% opposed it.<sup>149</sup>

This poll was taken at the height of the Court-packing crisis, and the support for the proposal may reflect the desire for an alternative to the Court-packing plan, which was never supported by a majority of respondents.<sup>150</sup> In any event, while the more modest proposal at this time garnered the support of a clear majority, it never acquired the support of the sort of supermajority one associates with revision of the fundamental law.<sup>151</sup> Even at the height of the constitutional crisis, 42% of those with opinions apparently

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148. *Id.*

149. *Id.* In a survey released in July of 1938, more than a year after the Wagner and Social Security Acts had been upheld, respondents were asked, "In the division of government power between the federal and the state governments, do you think the federal should have more power and the state less, or the state more and the federal less?" *The Fortune Quarterly Survey: XIII*, FORTUNE, July 1938, at 36, 76. 20% of those questioned had no opinion. *Id.* Of those with opinions, 34.2% thought the federal government should have more power, 25.6% thought the current balance satisfactory, and 40% thought the states should have more power. *Id.*

150. See *infra* notes 338-39 and accompanying text.

151. The Roosevelt Administration rejected the strategy of amendment in favor of Court-packing in part because they doubted that an acceptable proposal could win ratification in the requisite number of state legislatures, which Roosevelt believed were dominated by lawyers and other conservative interests hostile to such reform. See JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 28-29 (1938); LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 130-31 (1967); William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, in ESSAYS ON THE NEW DEAL 73 (1969); Letter from Franklin D. Roosevelt to Felix Frankfurter (Feb. 9, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, at 381-82 (1967); Letter from Benjamin V. Cohen to Louis Brandeis (n.d.) (Cohen Manuscripts, Box 13, Library of Congress). Roosevelt was particularly mindful of the unhappy fate of the Child Labor Amendment. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 360, 384-85. In contrast, Rafael Gely and Pablo T. Spiller take the position that the Supreme Court decided as it did in the spring of 1937 precisely because the possibility of such an amendment had become realistic with the outcome of the 1936 elections. Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45, 46-47 (1992). Their contention, apparently not shared by the contemporary political professionals in the Roosevelt Administration, rests on the curious assumption that the legislatures in the thirty-three states then controlled by the Democrats could be relied upon to follow Roosevelt's lead, and that half of the nine divided state legislatures could be expected to break the Democrats' way on the issue. *Id.* at 60-61. For Professor Bruce Ackerman's embrace of this hypothesis, see 2 ACKERMAN, WE THE PEOPLE, *supra* note 5, at 341-42.

opposed any increase in federal regulatory power over industry and agriculture.<sup>152</sup> And even such majority support may, in any event, have been fleeting. In late August of 1937, Gallup asked respondents, “[d]uring recent years the trend has been to give the Federal government greater power to regulate business, labor, and agriculture. Are you in favor of this trend towards centralizing power in Washington?”<sup>153</sup> Now, only 43% of those questioned, or 48% of those with opinions, favored the trend.<sup>154</sup>

There were two sorts of regulatory proposals that did enjoy broad and deep support, and both of them pertained to labor regulation.<sup>155</sup> When asked in April of 1936 whether they would favor “an amendment to the Constitution giving Congress the power to limit, regulate, and prohibit the labor of persons under 18,” 61% responded affirmatively.<sup>156</sup> By early February of 1937, support for such an amendment had ballooned to 76%.<sup>157</sup>

152. See *supra* notes 147-49 and accompanying text.

153. Gallup Poll, Aug. 25-30 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279454).

154. *Id.* 46% of those questioned opposed it, while 11% expressed no opinion. *Id.* Professor Ackerman asks us to:

[S]uppose that Roosevelt had not pushed his court-packing plan in 1937, but had instead put the formidable forces of New Deal Democracy squarely behind the constitutional amendment proposed by Senator Logan [S.J. Res. 8, 75th Cong. (1937)] and Representative Keller [H.R.J. Res. 316 74th Cong. (1935)] granting Congress the power to legislate “for the general welfare.”

Ackerman, *A Generation of Betrayal?*, *supra* note 3, at 1528. These polling data may provide us with some limited clue as to how such a counterfactual scenario might have played out.

155. A third arena of federal action that was relatively uncontroversial was conservation and flood control. The October 1937 *Fortune* survey showed that 67.4% thought the federal government should take care of conservation and flood control, with only 16.2% responding that it should be handled by state or local government. *The Fortune Quarterly Survey: X*, FORTUNE, Oct. 1937, at 108, 174. 3.3% thought it should be handled by some combination of these, 0.6% thought no government should be involved in such activity, and 12.5% expressed no opinion. *Id.*

156. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 23. The “yes” vote included 72% of Democrats, 81% of Socialists, 61% of women, and 67% of relievers, though only 46% each of Republicans and farmers. *Id.* at 23-24.

157. *Id.* at 50. Three Gallup polls taken immediately before the published poll also evidenced strong support for such a measure. Between January 13 and January 18 of 1937, 70% supported such an amendment, 25% were opposed, and 5% expressed no opinion. Gallup Poll, Jan. 13-18 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278912). Between January 20 and January 25, 76% were in favor, 21% opposed, and 3% expressed no

The second proposal attracting great popular support concerned regulation of minimum wages and maximum hours. A *Fortune* survey published in July of 1936 showed that 67.7% of respondents favored some kind of minimum wage regulation.<sup>158</sup> 37.8% believed that minimum wages should be fixed by law for all work, with 14.2% agreeing such wages should be fixed for most work, and 15.7% maintaining they should be set for some work.<sup>159</sup> Only 22.5% were categorically opposed to minimum wage regulation.<sup>160</sup> In late June of 1936, following the Court's invalidation of New York State's minimum wage law for women,<sup>161</sup> respondents to a Gallup poll were asked whether they favored "an amendment to the Constitution to regulate minimum wages."<sup>162</sup> 70% (84% of Democrats, 51% of Republicans, 84% of reliefers, 59% of farmers) supported such a measure.<sup>163</sup> Of those who answered affirmatively, however, only 56% favored granting the power to Congress, while 44% preferred that the power be conferred upon the states.<sup>164</sup> Yet support for federal regulation grew over time. By May of 1937, 61% of respondents agreed that "the Federal Government ought to set the lowest wages employees should receive in each business and industry,"<sup>165</sup> while 58% agreed that Congress should "set a limit on the hours employees should work in each business and industry" as well.<sup>166</sup> By early November of that year, 69%

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opinion. Gallup Poll, Jan. 20-25 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279228). And between January 27 and February 1, 69% were in favor, 27% opposed, and 4% expressed no opinion. Gallup Poll, Jan. 37-Feb. 1 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279242).

158. *The Fortune Quarterly Survey: V*, FORTUNE, July 1936, at 83, 152.

159. *Id.*

160. *Id.* 9.8% responded "don't know." *Id.*

161. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

162. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 29.

163. *Id.*

164. *Id.*

165. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 61. 10% expressed no opinion. GALLUP & RAE, *supra* note 21, at 299. Between July 28 and August 2 of 1937, 55% of Gallup's respondents, or 60% of those with opinions, agreed that Congress should "set the lowest wage employees should receive in each business and industry." Gallup Poll, July 28-Aug. 2 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279012). 37% thought not, while 8% expressed no opinion. *Id.*

166. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 61. 10% expressed no opinion. GALLUP & RAE, *supra* note 21, at 299. Between April 1 and April 6 of 1937, 54% of those questioned, or 59% of those with opinions, had responded

avored "a federal law providing for minimum wages and maximum hours."<sup>167</sup> When asked in April of 1938 whether Congress should "pass a bill regulating wages and hours before ending this session," 59% answered yes.<sup>168</sup> And after the Fair Labor Standards Act was enacted in 1938, 71% (80% of Democrats, 51% of Republicans) of those polled in early December responded that they were "in favor of the new wage and hours law."<sup>169</sup>

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affirmatively to the question. Gallup Poll, Apr. 1-6 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278945). 38% had responded negatively, with 8% expressing no opinion. *Id.* Between July 28 and August 2 of 1937, 57% of those questioned, or 61% of those with opinions, had responded affirmatively. Gallup Poll, July 28-Aug. 2 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279011). 36% had responded negatively, with 7% expressing no opinion. *Id.* In contrast, between April 28 and May 3 of 1937, Gallup asked, "Would you favor reducing the hours of labor in business and industry, even if doing so would raise the price of goods?" Gallup Poll, Apr. 28-May 3 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279322). Here, 46% of those questioned, or 49% of those with opinions, said they would. *Id.* 47% of those questioned said they would not, while 7% expressed no opinion. *Id.*

Support for some form of regulation of working hours had been strong at least since the summer of 1936. A *Fortune* survey published in July of that year showed that 69.2% of those questioned favored hours limitations for public employees, while 75.2% favored them for factory workers, 70.3% for store employees, and 53.7% for those engaged in domestic service. *The Fortune Quarterly Survey: V*, FORTUNE, July 1936, at 83, 152. A *Fortune* survey published in October of 1937 showed that 71.4% of those questioned favored some sort of regulation of wages and hours: 39.8% favored federal regulation, 17.7% favored state regulation, and 12.3% local regulation. *The Fortune Quarterly Survey: X*, FORTUNE, Oct. 1937, at 108, 174. Only 12.1% thought no level of government should regulate wages and hours, while 16.5% professed no opinion. *Id.*

167. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 84.

168. *Id.* at 101. 41% answered no; 16% expressed no opinion. GALLUP & RAE, *supra* note 21, at 300. Support was strong in every region but the "West Central," which split evenly. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 101-02. Support was surprisingly strong in the South, where 56% responded affirmatively. *Id.* at 102. 38% believed that the federal minimum wage should be the same throughout the country, while 62% maintained that it should vary by section. *Id.* at 105.

A *Fortune* survey published in July of 1938 showed that 63.4% of those polled did not think that labor should take a wage cut. *The Fortune Quarterly Survey: XIII*, FORTUNE, July 1938, at 36, 79. Only 12.6% thought all labor should take a cut, while 2.6% thought most but not all workers should and 11.6% thought some but not most should; 9.8% had no opinion. *Id.*

169. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 133.

### C. Redistribution

In a decade of severe economic dislocation, it was not surprising to see frequent discussion of the desirability of wealth redistribution. This was a matter with which the editors of *Fortune* magazine were particularly preoccupied, and all of the relevant polling data are accordingly drawn from the *Fortune* survey. Of course, questions of redistribution not infrequently involve questions of taxation. And then, as now, Americans liked to complain about the size of their tax bills. The July 1935 survey asked whether respondents considered their tax bills high, low, or reasonable.<sup>170</sup> 53.9% of those with opinions said they were high; fewer than 2% (1.8%) said they were low.<sup>171</sup> The February 1939 survey observed, "[y]ou pay out a part of your income in taxes, either directly or as part of the cost of what you buy," and then asked, "Do you think that you (and other taxpayers) are paying too much, too little, or about right for what the government provides out of the tax money?"<sup>172</sup> Again, 52.8% of those with opinions thought they were paying too much; only 2.5% thought they were paying too little.<sup>173</sup>

These attitudes toward taxation were reflected in Americans' cautious approach toward redistribution. The October 1937 *Fortune* survey asked, "Do you think that the federal government should follow a policy of taking money from those who have much and giving money to those who have little?"<sup>174</sup> While 43.1% of those with opinions were categorically opposed to such a sentiment, 31.9% were in favor of it, and another quarter (24.9%) supported redistribution "if it doesn't go too far."<sup>175</sup> What it might mean to "go too far" is not disclosed by the poll, but responses to questions posed in other surveys help to flesh out the sensibility of this moderate middle. A *Fortune* survey published in June of 1939 revealed that only 39% of those expressing opinions thought that the federal government should "redistribute wealth by heavy taxes on the

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170. *The Fortune Survey*, FORTUNE, July 1935, at 65, 67.

171. *Id.*

172. *The Fortune Survey: XVIII*, FORTUNE, Feb. 1939, at 68, 88.

173. *Id.*

174. *The Fortune Survey Quarterly Survey: X*, FORTUNE, Oct. 1937, at 108, 154.

175. *Id.*

rich,<sup>176</sup> and only 16.9% thought it should “[c]onfiscate all wealth over and above what people actually need to live on decently, and use it for the public good.”<sup>177</sup> To be sure, the April 1936 survey revealed that more than two-thirds (70.7%) of those with opinions thought that “in general the officials of large corporations are paid too much . . . for the work they do.”<sup>178</sup> But expressing the sentiment and embodying it in public policy were two different things. As the February 1939 survey demonstrated, fewer than a third (32.9%) of those with opinions agreed that “there should be a top limit of income and that anyone getting over that limit should be compelled to turn the excess back to the government as taxes,” while two-thirds (67.1%) disagreed.<sup>179</sup> And the March 1940 survey revealed that only a quarter (25.4%) of those with opinions thought “there should be a law limiting the amount of money any individual is allowed to earn in a year,” while three-fourths (74.5%) stood opposed to limits on income.<sup>180</sup>

This tolerance of exaggerated wealth inequality extended not only to earned income, but to rentier interests as well. The July 1935 *Fortune* survey asked, “Do you believe that the government should allow a man who has investments worth over a million dollars to keep them, subject only to present taxes?”<sup>181</sup> As the editors pointed out, there were at the time probably fewer than 5000 people in the entire country falling into this category.<sup>182</sup> (The editors reasoned that there were only about 5000 with incomes representing a million dollars in capital—\$50,000 or more—and “not all of them by any means receive[d] that income

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176. *The Fortune Survey: XXII*, FORTUNE, June 1939, at 68, 68.

177. *Id.* at 68-69.

178. *The Fortune Survey Quarterly Survey: IV*, FORTUNE, April 1936, at 215.

179. *The Fortune Survey: XVIII*, FORTUNE, Feb. 1939, at 68, 86. On a related note, the March 1940 survey asked respondents' views about profit sharing. *The Fortune Survey: XXVIII*, FORTUNE, Mar. 1940, at 54, 98. Of those with opinions, 38.1% agreed that “[i]f a business pays top wages, it is fully entitled to keep for its stockholders any amount of profit it can earn.” *Id.* In contrast, only 20% were of the view that “[r]egardless of how much the profits are, stockholders are entitled only to a certain fixed per cent, and everything over that should be distributed among the workers.” *Id.* The most common response was, again, the moderate one: 41.8% believed that, “[i]f a business pays top wages, it should pay a certain fixed per cent to stockholders, and everything over that should be divided somehow between workers and stockholders.” *Id.*

180. *The Fortune Survey: XXVIII*, FORTUNE, Mar. 1940, at 54, 98.

181. *The Fortune Survey*, FORTUNE, July 1935, at 65, 66.

182. *Id.*

from a million dollars in investments.”)<sup>183</sup> Yet even in the midst of the greatest economic crisis of the nation’s history, 49.6% of those with opinions thought this handful of millionaires ought to be able to hold onto their wads.<sup>184</sup>

#### D. Fiscal Policy

In reviewing the polling results from the New Deal period, one is struck by the persistent fiscal conservatism of the American people. In September of 1935, respondents were asked whether they thought “expenditures by the Government for relief and recovery [were] too little, too great, or just about right.”<sup>185</sup> Only 9% answered “[t]oo little.”<sup>186</sup> 31% answered “[a]bout right,” and 60% answered “[t]oo great.”<sup>187</sup> In January of 1936, 70% (55% of Democrats, 89% of Republicans) agreed that it was “necessary at this time to balance the budget and start reducing the national debt.”<sup>188</sup> Of those who answered affirmatively, 80% thought this should be accomplished through “[g]overnmental economies,” 2% thought it should be done through “[h]igher taxes,” and 18% preferred some combination of the two.<sup>189</sup> Shortly after the November election in 1936, 70% of those with opinions thought it was “necessary for the new administration to balance the budget.”<sup>190</sup> By April of 1937, 72% of those with opinions thought it was “necessary at this time to balance the budget and start reducing the national

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183. *Id.*

184. *Id.* Similarly, the October 1935 survey asked, “How much money do you think any one person should be allowed to inherit?” *The Fortune Survey*, FORTUNE, Oct. 1935, at 56, 56. From among the variety of responses, two stood out above all others. First, fewer than 1% of respondents would have abolished inheritance altogether. Second, 61.1% of those with opinions, including 59.5% of the lower middle-class and 57.3% of the poor respondents, thought there should be “no limit” to the amount one could inherit. *Id.* As the editors observed, “this reply [did] not necessarily indicate disapproval of steeply graduated taxes upon the higher brackets,” but it did reflect “a belief in the right of property, and in the transmission of property, great or small, from one generation to the next.” *Id.*

185. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 1.

186. *Id.*

187. *Id.*

188. *Id.* at 12.

189. *Id.*

190. Gallup Poll, Nov. 15-20 (1936), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0189367). 65% thought so, 28% thought not, and 7% had no opinion. *Id.*

debt.”<sup>191</sup> At the end of 1938, 61% believed that the federal government was spending too much, while 10% believed expenditures were too small, and 29% thought spending was about right.<sup>192</sup>

A *Fortune* survey published in March of 1939 asked, “If you were a member of the incoming Congress, would you vote yes or no on a bill to reduce federal spending to the point where the national budget is balanced?”<sup>193</sup> 77.8% of those expressing an opinion responded yes.<sup>194</sup> A survey released in May of 1940 showed that 76.2% of those questioned thought the next administration should balance the budget, while only 9% thought it should not.<sup>195</sup> 71.1% of those in favor of balancing the budget thought it should be done “[b]y reducing expenditures,” 4% “[b]y increasing taxes,” and 15% through “[b]oth.”<sup>196</sup> In February of 1940, respondents were asked to “[s]uppose there were two candidates for United States Senator in your state. One candidate promises to vote to reduce all Federal Government spending. The other promises to vote to spend more Federal Government money in your state. Other things being equal, which candidate would you vote for?”<sup>197</sup> A remarkable 64% responded that they would prefer the candidate favoring reduced federal spending, while only 36% supported the candidate promising to increase it.<sup>198</sup>

These attitudes were remarkably resistant to the forces of economic change. After the economy slid into recession in the summer of 1937, Gallup began asking respondents whether “the Government should start spending again to help get business out of its present slump.”<sup>199</sup> In early

191. Gallup Poll, Apr. 14-19 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279300). 63% thought so, 24% thought not, and 13% had no opinion. *Id.*

192. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 134.

193. *The Fortune Survey: XIX*, FORTUNE, Mar. 1939, at 135.

194. *Id.* 61.3% of those questioned answered yes, 17.4% no, and 21.3% had no opinion. *Id.* This included 74.1% of the unemployed expressing an opinion (57.5% said yes, 20% said no, and 22.5% had no opinion). *Id.*

195. *The Fortune Survey: XXX*, FORTUNE, May 1940, at 76, 170. The survey showed comfortable supermajorities in support across demographic categories: “Prosperous” (87.7%), “Poor” (70.5%), “Executives” (94.2%), “Factory Labor” (75.4%). *Id.*

196. *Id.* at 171. 9.9% expressed no opinion. *Id.*

197. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 212.

198. *Id.* 13% expressed no opinion. *Id.*

199. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 80.



December of 1937, 62% said no.<sup>200</sup> 63% said no in late January<sup>201</sup> and again in mid-March of 1938.<sup>202</sup> The “no” vote was whittled to a mere 58% after a fire-side chat in April,<sup>203</sup> but this proved to be a temporary blip. By late May, opposition to increased spending was back up to 62%.<sup>204</sup> A *Fortune* survey published in November of 1939 asked, “Considering Mr. Roosevelt’s six and a half years in office, on the whole do you approve or disapprove of his theory of government borrowing, spending, and lending for recovery?”<sup>205</sup> 57.8% of those expressing opinions said they disapproved.<sup>206</sup> The same survey asked whether respondents thought that “Congress was right or wrong in refusing to grant President Roosevelt’s request to authorize the federal

200. *Id.* This included 81% of those characterized as of “[a]bove average” income, 70% of those with “[a]verage” income, 53% of those with “[b]elow average” income, and 53% of the “[p]oor.” *Id.* at 80-81. The only group favoring increased spending were those on relief, by a margin of 69-31%. *Id.*

201. *Id.* at 89.

202. *Id.* at 95. Those in opposition included 54% of Democrats and 82% of Republicans. This poll appears to have broken the responses down with 15% answering “YES!”, 20% answering yes, 37% answering “NO!”, 21% answering no, and 8% expressing no opinion. Gallup Poll, Mar. 17-22 (1938), available at Roper Center Online, *supra* note 65 (Question QB03, Accession No. 0278694).

203. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 100.

204. *Id.* at 107. Those opposed included 77% of “upper income” respondents, 68% of “middle income” respondents, and 43% of “lower income” respondents. *Id.* Support for a spending stimulus, however, would return in the summer. Compare these results with a Gallup poll taken between July 4 and July 11 of 1938, in which respondents were asked “Do you favor the federal government’s spending program to help get business out of its present slump?” Gallup Poll, July 4-11 (1938), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0189453). Here, 53% of those questioned responded yes, with 30% responding emphatically. *Id.* 40% responded no, with 29% responding emphatically. *Id.* 6% expressed no opinion. *Id.*

Moreover, in the *Fortune* survey published in October of 1938, respondents were asked whether they thought “the government’s program for spending and lending five billion dollars [was] necessary for relief” or “recovery.” *The Fortune Survey: XV, FORTUNE*, Oct. 1938, at 87, 92. 52.9% agreed that it was necessary for relief, with 35.7% disagreeing and 11.4% having no opinion. *Id.* 47.8% agreed that the expenditures were necessary for recovery, with 38.3% contending they were not, and 13.9% having no opinion. *Id.*

The impulse to greater government spending again proved short-lived, however. A Gallup poll taken between May 28 and June 3 of 1939 showed that 58% of those questioned, or 66% of those with opinions, did *not* agree that “government spending should be increased to help get business out of its present slump.” Gallup Poll, May 28-June 3 (1939), available at Roper Center Online, *supra* note 65 (Question QB07, Accession No. 0274743).

205. *The Fortune Survey: XXIV, FORTUNE*, Nov. 1939, at 72, 166.

206. *Id.* 33.7% of those questioned approved, while 46.3% disapproved. *Id.*

government to lend \$2,800,000,000 for its recovery program?"<sup>207</sup> 68.4% of those with opinions thought Congress had been right.<sup>208</sup> Support for Congress's action was not limited to "executives" and the "prosperous." As the editors opined,

[W]hen Congress, during its last rebellious session, clamped the lid upon the latest edition of the spending-for-prosperity doctrine, it had even the pro-Roosevelt poor and factory labor with it on this question. . . . So if Mr. Roosevelt had taken his case "before the people," as he threatened to do, he would have found a people with its mind fairly solidly made up not to agree with him.<sup>209</sup>

In a series of polls taken in early April of 1939, respondents were asked whether they thought that various types of federal expenditure ought to be cut by 10%.<sup>210</sup> 53% thought that public works spending should take such a cut,<sup>211</sup> and 69% thought that the ordinary operating expenses of the federal government should be so trimmed.<sup>212</sup> Only 38% thought that farm benefits should be cut by 10%,<sup>213</sup> but this support had eroded by February of 1940, when respondents were asked whether they supported President Roosevelt's proposed cut of farm benefits by 30%.<sup>214</sup> Now, 52% supported such a cut.<sup>215</sup> In addition, 62%

207. *Id.* at 168.

208. *Id.* 55.1% of those questioned supported the congressional action, 25.4% opposed it, and 19.5% expressed no opinion. *Id.* The Gallup poll produced similar results. In August of 1939, 68% agreed that "Congress was right in defeating President Roosevelt's three-billion-dollar lending bill." 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 177.

209. *The Fortune Survey: XXIV*, FORTUNE, Nov. 1939, at 72, 168.

210. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 150-51. Between March 10 and March 15 of 1939, Gallup asked respondents whether they favored a 10% across-the-board cut of federal expenditures, "including relief, farm aid, pensions, national defense and ordinary government running expenses." Gallup Poll, Mar. 10-15 (1939), *available at* Roper Center Online, *supra* note 65 (Question QAB05A, Accession No. 0274702). 42% favored such a cut, but 44% were opposed, while 14% expressed no opinion. *Id.*

211. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 151.

212. *Id.*

213. *Id.* at 150.

214. *Id.* at 210-11.

215. *Id.* The proposed cut was supported by 45% of Democrats, 63% of Republicans, 69% of upper income respondents, 52% of middle income respondents, and 45% of lower income respondents. *Id.* at 211. 14% of those polled expressed no opinion. *Id.*

now supported the President's proposed 21% reduction in federal spending for public works.<sup>216</sup>

### E. Relief and Social Security

Throughout the period, there was consistent support for reductions in federal relief expenditures. When asked in December of 1936 whether they approved of the Government's reduction in relief expenditures, 60% of respondents answered yes.<sup>217</sup> In early April of 1937, 56% agreed that "the Federal government should further reduce relief expenditures at this time."<sup>218</sup> In March of 1938, 71% maintained that people on relief in their communities were "getting as much as they should."<sup>219</sup> In April of 1939, 57% of those polled agreed that relief spending should be reduced by 10%.<sup>220</sup> And in February of 1940, 59% of those with opinions supported the President's proposed 28% reduction in relief expenditures.<sup>221</sup> Indeed, as early as March of 1936,

216. *Id.* at 210. According to the Roper Center report, 56% approved, 35% disapproved, and 9% expressed no opinion. Gallup Poll, Feb. 2-7 (1940), available at Roper Center Online, *supra* note 65 (Question RK08C, Accession No. 0172058). Supporters included 52% of Democrats, 74% of Republicans, 69% of upper income respondents, 52% of middle income respondents, and 45% of lower income respondents. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 210. A Gallup poll taken at the same time recorded a larger range of possible responses. See Gallup Poll, Feb. 2-7 (1940), available at Roper Center Online, *supra* note 65 (Question QT08C, Accession No. 0270749). 28% responded "APPROVE!", 25% responded "approve," 17% responded "DISAPPROVE!", 18% responded "disapprove," and 12% expressed no opinion. *Id.* A Gallup poll taken between January 12 and January 17 of 1940 showed that 59% of respondents approved of the proposed cut, 34% disapproved, and 8% expressed no opinion. Gallup Poll, Jan. 12-17 (1940), available at Roper Center Online, *supra* note 65 (Question QK07C, Accession No. 0273961). Meanwhile, 79% approved a proposed 28% increase in defense spending. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 210. Supporters here included 85% of Democrats, 72% of Republicans, 75% of upper income respondents, 78% of middle income respondents, and 83% of lower income respondents. *Id.*

217. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 45.

218. *Id.* at 55.

219. *Id.* at 98. 29% of respondents answered no, and 19% expressed no opinion. GALLUP & RAE, *supra* note 21, at 301. A *Fortune* survey published in October of 1936 asked respondents how well they thought "the unemployed in this locality are provided for." *The Fortune Quarterly Survey: VI*, FORTUNE, Oct. 1936, at 130, 210. 12.8% answered "[t]oo well," 12.9% "[j]ust right," 42.8% "[f]airly well," 12.5% "[n]ot well enough," and 19% "[d]on't know." *Id.*

220. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 151.

221. Gallup Poll, Feb. 2-7 (1940), available at Roper Center Online, *supra* note 65 (Question RK08B, Accession No. 0172057). 53% approved, 37%

55% of those polled had agreed that “the responsibility of caring for all persons on relief [should] be returned now to state and local governments.”<sup>222</sup> This view was echoed in a *Fortune* survey published in October of 1937.<sup>223</sup> When asked “Which kind of government—federal, state, or local—do you feel should take care of . . . relief?” respondents preferred state and local government to federal authority by a substantial margin.<sup>224</sup> 34.8% thought the federal government should take care of it, 17.6% thought the state governments should, and an additional 28.4% thought that the local governments should.<sup>225</sup> A Gallup poll taken at the end of 1938 showed that 60% of those with opinions thought that “unemployment relief should be handled” by “state and local governments” rather than the federal government.<sup>226</sup> And in May of 1940, 62% of those with opinions thought that the next administration should “[t]urn the management of relief over to state and local authorities.”<sup>227</sup>

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disapproved, and 10% expressed no opinion. *Id.* Supporters included 49% of Democrats, 73% of Republicans, 79% of upper income respondents, 67% of middle income respondents, and 38% of lower income respondents. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 210.

222. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 19. In October of 1938, respondents were asked, “In deciding where and how to spend federal money for relief and recovery, who should have the greater say, Congress or the President?” *Id.* at 126. 78% preferred Congress to the Chief Executive. *Id.*

223. *The Fortune Quarterly Survey: X*, FORTUNE, Oct. 1937, at 77, 174.

224. *Id.*

225. *Id.* 6.4% responded “[c]ombinations of these,” and 10.3% expressed no opinion. *Id.* Only 2.5% answered “[n]one of them.” *Id.* A *Fortune* survey published in March of 1939 reveals a populace more receptive to some continuing role for the federal government in providing work relief. *See The Fortune Survey: XIX*, FORTUNE, Mar. 1939, at 66, 132. While only 21.5% thought that the “[W.P.A.] should be continued by the federal government on the same scale as it is now,” and 23.4% thought “[a]ll relief, including work relief, should be handled by the states only,” 36.8% believed that the “[W.P.A.] should be continued by the federal government, but on a smaller, more restricted scale.” *Id.* Only 6.2% thought that “[a]ll relief should again become the sole responsibility of private charity.” *Id.* 11.5% expressed no opinion. *Id.*

226. Gallup Poll, Dec. 25-30 (1938), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0278738). 53% of those questioned preferred state and local government, 34% federal, 2% both, and 11% had no opinion. *Id.*

227. Gallup Poll, May (1940), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0161702). In January of 1940, however, Gallup asked, “The W.P.A. . . . is paid for and controlled by the national government. Do you think the W.P.A. should continue to be controlled from Washington or should it be turned over to state and local government?” Gallup Poll, Jan. 13-17 (1940), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0200125). 52% answered that the national government should continue to control the

None of this should be taken as an indication that the American people did not support government relief for those in need. They most emphatically did. In December of 1937, 69% (76% of Democrats, 57% of Republicans) maintained that "it is the Government's responsibility to pay the living expenses of needy people who are out of work."<sup>228</sup> The June 1939 *Fortune* survey showed 75.3% of those expressing opinions maintaining that the federal government should "provide for all people who have no other means of subsistence."<sup>229</sup> As the editors observed, "[o]n the question of providing for the needy, every class and occupation, every part of the country, agree that it is a proper function for the federal government."<sup>230</sup> A *Fortune* survey released in March of 1940 showed that 70% of those expressing opinions still believed that "the government should provide for all people who have no other means of obtaining a living."<sup>231</sup> And in March of 1938, 67% (69% of Democrats, 63% of Republicans) of those polled agreed that "the United States will have to continue relief appropriations permanently."<sup>232</sup>

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W.P.A., 34% thought it should be turned over to state government, and 14% expressed no opinion. *Id.*

228. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 84. 31% of respondents answered no and 8% expressed no opinion. GALLUP & RAE, *supra* note 21, at 301. When asked the same question by Gallup in July of 1938, 34% responded "yes (emphatic)," another 34% yes, 17% "no (emphatic)," and another 11% no. 4% expressed no opinion. Gallup Poll, July 4-11 (1938), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0189451).

229. *The Fortune Survey: XXII*, FORTUNE, June 1939, at 68, 68.

230. *Id.* 69.1% of those questioned thought the federal government should provide for the needy, while 22.7% thought it should not. *Id.* at 69.

231. *The Fortune Survey*, FORTUNE, Mar. 1940, at 54, 55. 65.1% answered yes, 27.8% responded no, and 7.1% expressed no opinion. *Id.* Of those who answered affirmatively, a slight majority or a plurality said they would be willing to endure higher taxes for business (51.5% yes, 37% no), higher personal taxes (47.5% yes, 41.5% no), and higher prices (47.8% yes, 41.8% no) in order to support the needy, but not "more government competition with industry" (28.5% yes, 50.5% no), abolition of the right to strike (27.5% yes, 52.6% no), an end of the capitalistic system (13% yes, 63.1% no), or "that government tells you what you must work at—assigns you to your job" (12.7% yes, 72.8% no). *Id.*

232. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 98. 33% of respondents answered no, and 10% expressed no opinion. GALLUP & RAE, *supra* note 21, at 301. A Gallup poll taken in November of 1936 had shown that 51% thought relief appropriations would continue permanently, 43% thought not, and 6% had no opinion. Gallup Poll, Nov. 6-7 (1938), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0189360). A Gallup poll taken in April of 1938 allowed for more gradation of opinion. See Gallup Poll, Apr. 2-7 (1938), available at Roper Center Online, *supra* note 65 (Question QAB04, Accession

But Americans had strong views about the type of relief that government should provide. A *Fortune* survey published in October of 1936 asked, "Which do you believe is the better form of relief for the unemployed, direct cash payments or jobs created by the government?"<sup>233</sup> Only 9% favored direct cash payments, while 74.5% preferred jobs created by the government.<sup>234</sup> In April of 1937, only 21% of those polled thought that the government should "do away with the [W.P.A.] and give only cash, or direct, relief."<sup>235</sup> When asked in December of 1937 whether "relief should be given as work relief or direct cash relief," 90% (90% of Democrats, 88% of Republicans) favored work relief, while only 10% (10% of Democrats, 12% of Republicans) preferred direct cash relief.<sup>236</sup> A *Fortune* survey published in January of 1938 observed that "[i]t has been predicted that hundreds of thousands of able-bodied people now out of work will never again find jobs," and asked, "If this is so, what do you think should be done about them?"<sup>237</sup> 57.7% thought they should be given "[g]overnment-made work, like [W.P.A.]," whereas only 3.6% thought they should be given "[d]irect cash relief."<sup>238</sup> 2.5% thought they should rely on private charity, while a hard-hearted 17.9% replied, "[l]et them shift for themselves."<sup>239</sup> As the editors observed, "[i]n every class and every place a majority of people with opinions assume that the government will and should create work to support the nation's superfluous and marginal labor."<sup>240</sup> When asked in May of 1939, "Which way do you think relief

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No. 0279073). When asked whether "the United States will have to continue relief appropriations permanently," 27% answered "YES!", another 34% yes, 16% "NO!", and another 14% no. *Id.* 9% expressed no opinion. *Id.*

233. *The Fortune Quarterly Survey: VI*, FORTUNE, Oct. 1936, at 130, 210.

234. *Id.* This notwithstanding the fact that direct cash relief cost the government less than a third per client what the W.P.A. did. 4.4% of respondents favored "both," 7.6% "neither," and 4.5% didn't know what they thought. *Id.*

235. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 61. 62% of those polled thought that state and local governments should pay a greater share of the costs of relief. *Id.*

236. *Id.* at 84.

237. *The Fortune Quarterly Survey: XI*, FORTUNE, Jan. 1938, at 83, 83.

238. *Id.*

239. *Id.* 11.2% expressed no opinion, while another 7.1% offered a variety of alternative solutions, including "reduced hours for all," "absorption by industry," "home-steading," "deportation of aliens," and "other government or state aid." *Id.*

240. *Id.*

should be given—in the form of work relief (such as W.P.A. jobs) or as direct cash relief?” respondents favored work relief by an 89-11% margin.<sup>241</sup> On the eve of the 1940 election a *Fortune* survey showed that 55.2% of those with opinions opposed the abolition of the W.P.A..<sup>242</sup> A *Fortune* survey published in July of 1935 revealed that 76.8% of those questioned believed that “the government should see to it that every man who wants to work has a job.”<sup>243</sup> As the editors remarked, “public opinion overwhelmingly favors assumption by the government of a function that was never seriously contemplated prior to the New Deal . . . . The country has definitely accepted the theory of state responsibility for an opportunity to earn a living.”<sup>244</sup> By June of 1939, 65.5% of those with opinions still maintained that the federal government should “[b]e responsible for seeing to it that everyone who wants to work has a job.”<sup>245</sup>

At the same time, Americans took seriously the responsibility of individuals to grasp such opportunities to earn a living. In July of 1939, respondents were asked their opinions of “the new relief law that requires all W.P.A. workers to work an average of 30 hours a week (130 hours a month).”<sup>246</sup> Among W.P.A. workers only, 28% approved strongly of the measure, 25% approved mildly, 31% disapproved strongly, and 16% disapproved mildly.<sup>247</sup> Among all other voters, however, 46% approved strongly, an

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241. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 155. A *Fortune* survey published in October of 1936 asked whether respondents agreed that “the [W.P.A.] [had] been doing useful work in this locality.” *The Fortune Quarterly Survey: VI*, FORTUNE, Oct. 1936, at 130, 210. 54.2% answered yes, and another 22.2% responded “partly.” *Id.* Only 13.5% said no, and 10.1% didn’t know. *Id.* The same poll asked whether “the job of taking care of the unemployed in this locality has been done efficiently or extravagantly.” *Id.* at 215. 38.1% said it had been done “efficiently,” 31.3% thought “extravagantly,” 2% answered “inefficiently,” and 28.6% didn’t know. *Id.*

242. *The Fortune Survey: XXXIV*, FORTUNE, Oct. 1940, at 65, 175. 38.9% of those questioned favored the W.P.A.’s abolition, while 13% had no opinion. *Id.*

243. *The Fortune Survey*, FORTUNE, July 1935, at 65, 67.

244. *Id.* Yet, as a *Fortune* survey released in February of 1940 demonstrated, the majority of the American people still preferred employment in the private sector. See *The Fortune Survey: XXVII*, FORTUNE, Feb. 1940, at 133, 133. 50% of those questioned, and 55.8% of those with an opinion said they would prefer private business to the government as an employer. *Id.*

245. *The Fortune Survey: XXII*, FORTUNE, June 1939, at 68, 68-69. An affirmative response was given by 61.2% of those questioned, a negative response by 32.2%. *Id.*

246. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 171-72.

247. *Id.*

additional 25% approved mildly, 16% disapproved strongly, and 13% disapproved mildly.<sup>248</sup> That same summer, respondents were informed that "Pennsylvania has a law requiring all able-bodied people on relief (including W.P.A.) to accept any job offered by a local government, no matter what kind of job it is. If they refuse to take the job, their relief is cut off."<sup>249</sup> When asked whether they approved of this measure, 81% answered that they did.<sup>250</sup>

This endorsement of work relief was reflected in strong public support for the Civilian Conservation Corps (C.C.C.). In May of 1936, 82% of those polled told Gallup that they were "in favor of continuing the C.C.C. camps."<sup>251</sup> In March of 1938, as sentiment for slashing relief appropriations continued to mount, 78% of those with opinions thought that "the Civilian Conservation Corps should be made permanent."<sup>252</sup> A *Fortune* survey published in November of 1939 showed 91.4% of those with opinions expressing approval of the C.C.C.<sup>253</sup> Support for federal expenditures to support work and ownership were similarly reflected in a poll taken in the early autumn of 1936, in which 83% of those with opinions favored "Government loans, on a long time and easy basis, to enable farm tenants to buy the farms they now rent."<sup>254</sup>

248. *Id.* When asked whether W.P.A. workers should be paid more or less than workers in private industry, 73% answered less, 26% answered about the same, and only 1% answered more. GALLUP & RAE, *supra* note 21, at 302. 3% expressed no opinion. *Id.*

249. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 173.

250. *Id.* Relievers approved by a margin of 64-36%, while 84% of Pennsylvanians polled supported the policy. *Id.*

251. *Id.* at 27-28. Supporters included 92% of Democrats, 67% of Republicans, and 79% of Socialists. *Id.* 77% of those polled thought "military training [should] be included in the C.C.C. program." *Id.*

252. *Id.* at 97. 22% thought not; 7% expressed no opinion. GALLUP & RAE, *supra* note 21, at 299. The "yes" vote included 85% of Democrats and 62% of Republicans. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 97. 75% of those polled still thought that military training should be part of the duties of those who joined the C.C.C. *Id.* According to Gallup and Rae, 25% thought not and 7% had no opinion. GALLUP & RAE, *supra* note 21, at 299. In May of 1936, support for the inclusion of military training had run 77-23%. *Id.*

253. *The Fortune Survey: XXIV*, FORTUNE, Nov. 1939, at 72, 166. 83.7% of those questioned approved, while only 7.8% disapproved. The same poll showed weaker support for, but still overall approval of, the Administration's relief program. *Id.* When asked, "Considering Mr. Roosevelt's six and a half years in office, on the whole do you approve or disapprove of his relief program?" 52.3%, or 58.3% of those expressing opinions, approved. *Id.*

254. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 43. Gallup and Rae



Anxious as Americans were to avoid direct cash relief where possible, they were prepared to authorize federal expenditures to assure the well-being of the needy. A *Fortune* survey published in October of 1936, for example, showed that 74% of those questioned believed that "the government should provide free medical and dental care at the expense of the taxpayer for those who can't pay," while only 20.3% opposed the proposition.<sup>255</sup> In June of 1937, 80% of those with opinions agreed that "the Federal government [should] provide free medical care for those unable to pay."<sup>256</sup> In May of 1938, 81% of those with opinions still agreed that "Government should be responsible for providing medical care for people who are unable to pay for it."<sup>257</sup> Moreover, willingness to spend federal dollars to promote public health appears in some instances to have extended beyond provision for the destitute. In August of 1937, 81% agreed that the federal government should "help state and local governments in providing medical care for mothers at childbirth" as it had with the Sheppard-Towner Maternity Act of 1921.<sup>258</sup> In May of 1938, 53% said that if they were "assured of complete medical and hospital care . . . in case of accident or illness (excluding dentistry) [they] would . . . be willing to pay something for this service."<sup>259</sup> However, of those 53%, only 59% (or 31% of those surveyed) said they would "be willing to pay higher taxes for this purpose."<sup>260</sup> By contrast, a poll taken in the spring of 1938 showed 86% of respondents concurring in the view

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reported that 17% were opposed, and 17% expressed no opinion. GALLUP & RAE, *supra* note 21, at 298.

255. *The Fortune Quarterly Survey: VI*, FORTUNE, Oct. 1936, at 130, 222.

256. Gallup Poll, June 16-21 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278980). 76% answered yes, 19% no, and 5% expressed no opinion. *Id.*

257. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 106. 19% said no and 4% expressed no opinion. GALLUP & RAE, *supra* note 21, at 312.

258. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 76. 19% were opposed and 10% expressed no opinion. GALLUP & RAE, *supra* note 21, at 312. Between June 30 and July 4 of 1937, 74% of those questioned, or 82% of those with opinions, told Gallup that "the federal government [should] aid state and local governments in providing medical care for babies at birth." Gallup Poll, June 30-July 4 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278988). 16% said no, while 10% expressed no opinion. *Id.*

259. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 107. 13% said no and 34% expressed no opinion. *Id.*

260. *Id.* 41% said they would not and 9% expressed no opinion. GALLUP & RAE, *supra* note 21, at 312.

that "Congress should appropriate money to aid states in fighting venereal disease."<sup>261</sup> Of those 86%, 69% (or 59% of those surveyed) indicated that they would "be willing to pay higher taxes for this purpose."<sup>262</sup> Forms of social provision for the needy that simultaneously worked to ameliorate other social problems were especially attractive. In November of 1939, respondents were asked whether they approved of "a food stamp plan which lets people on relief buy certain surplus farm products below their regular selling price. The Government makes up the difference to the merchant."<sup>263</sup> 70% (80% of Democrats, 60% of Republicans) said they approved of the plan, and 57% said they would approve of "extending the food stamp plan to families earning less than \$20 a week as well as to persons on relief."<sup>264</sup>

One reform that enjoyed particularly strong public support was government pensions for the elderly. While majorities of those asked in April of 1939 were prepared to cut relief spending, public works spending, and ordinary operating expenses by 10%, only 14% agreed that "old-age pensions should be reduced by 10%."<sup>265</sup> Indeed, a *Fortune* survey released that month showed 56.4% of those with opinions responding that, if they were members of Congress, they would vote in favor of "a bill to increase the size of old-age pensions payable under present laws."<sup>266</sup> This

261. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 102. 14% said no and 9% expressed no opinion. GALLUP & RAE, *supra* note 21, at 311.

262. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 102. 31% said no and 12% expressed no opinion. GALLUP & RAE, *supra* note 21, at 311. A poll taken in January of 1937 showed 92% agreeing that Congress should "appropriate \$25 million to help control venereal disease." 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 58. A *Fortune* survey published that month showed 50.5% favoring "legalized controlled prostitution" to curb the spread of venereal disease. *The Fortune Quarterly Survey: VII*, FORTUNE, Jan. 1937, at 86, 164. 30.9% were opposed, while 18.6% did not express an opinion. *Id.* A poll published in the same issue revealed that 17.1% thought moral standards were better than they had been a generation before, while 45% thought they had gotten worse. *Id.* at 167-68. 27.8% thought they were the same, and 10.1% expressed no view. *Id.*

263. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 191.

264. *Id.* at 191-92.

265. *Id.* at 150-51.

266. *The Fortune Survey: XX*, FORTUNE, Apr. 1939, at 84, 85. 46.4% of those questioned responded affirmatively, while 35.8% responded negatively and 17.8% expressed no opinion. *Id.* Two Gallup polls taken in January of 1939 also showed support for increased spending for old-age pensions. When asked between January 9 and January 14 whether government spending for old-age pensions should be increased or decreased, 53% voted for an increase and only

led the editors to observe, "in spite of the wave of economy sentiment . . . the public has not been weaned away from the idea of federally administered new social-welfare measures."<sup>267</sup> As William Leuchtenburg has noted,<sup>268</sup> 68% (82% of Democrats, 50% of Republicans) polled in early November of 1936 favored "the compulsory old age insurance plan, starting in January, which requires employers and workers to make equal contributions to workers' pensions."<sup>269</sup>

But responses to other questions asked about old-age pensions during this period afford us a fuller view of the type of "Welfare State"<sup>270</sup> that commanded the support of the American people. In August of 1938 Gallup asked, "Do you believe in government old age pensions?" 88% of those questioned, or 91% of those with opinions, answered yes.<sup>271</sup>

8% for a decrease. See Gallup Poll, Jan. 9-14 (1939), available at Roper Center Online, *supra* note 65 (Question QAB06D, Accession No. 0274772). 29% thought pension spending should remain the same, while 10% expressed no opinion. *Id.* Between January 22 and 27, 45% thought pension spending should be increased, while only 7% voted for a decrease. 40% thought pension spending should remain the same, and 9% expressed no opinion. Gallup Poll, Jan. 22-27 (1939), available at Roper Center Online, *supra* note 65 (Question QA06D, Accession No. 0276740).

267. *The Fortune Survey: XX*, FORTUNE, Apr. 1939, at 84, 85.

268. Leuchtenburg, *supra* note 13, at 2113.

269. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 40. A *Fortune* survey published in April of 1937 concluded that "about three quarters of the public" approved of "the U.S. old-age pensions law," while only 19.9% opposed it. *The Fortune Quarterly Survey: VIII*, FORTUNE, Apr. 1937, at 186.

In the waning days of the 1936 presidential campaign, Republican candidate Alf Landon had warned that "keeping track of those covered under the [Social Security] program would open the field to 'federal snooping,' perhaps even fingerprinting, photographing, and the wearing of identification tags." DONALD R. MCCOY, LANDON OF KANSAS 336 (1966). Had Landon had the benefit of two Gallup polls, published in January of 1937 and 1939, he might have thought twice before floating this scenario as a parade of horrors. In January of 1937 Gallup asked, "Do you think everyone in the United States should be fingerprinted?" 68%, precisely the same number that had evinced support for the Social Security Act the preceding November, answered yes. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 48. The sentiment for compulsory fingerprinting only increased over the next two years. In January of 1939, 71% of respondents thought that "everybody in this country should be fingerprinted by the Federal Government." 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 137.

270. Leuchtenburg, *supra* note 13, at 2113.

271. 9% answered no, while 3% expressed no opinion. Gallup poll, Aug. 12-17 (1938) available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278261).

In January of 1939, 94% answered yes.<sup>272</sup> When asked the same question again in November of that year, the affirmative responses still came in at a whopping 90%.<sup>273</sup> Why was support for the principle of old-age pensions so much greater than support for the Social Security Act? Responses to a follow-up question suggest the likely explanation. When asked of those who replied in the affirmative, "Do you think pensions should be given to old people who are in need, or to all old people?" 77% replied "needy only."<sup>274</sup> Fewer than a quarter thought pensions should go to "all old people."<sup>275</sup> These results were corroborated by polls taken in 1935 and in 1938. Asked in December of 1935 whether they were "in favor of Government old age pensions for *needy* persons," 89% answered affirmatively.<sup>276</sup> In August of 1938 respondents who favored government pensions were asked, "Should Government pensions be paid to all old people or only to those in need?"<sup>277</sup> Again, 79% replied that only "those in need" should receive pensions, while 21% favored pensions for all.<sup>278</sup> The American people supported the Social Security system their representatives had given them. But, given

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272. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 142. According to Gallup and Rae, only 2% had no opinion. GALLUP & RAE, *supra* note 21, at 296. 87% of said they would "be willing to pay a sales tax or an income tax to provide for these pensions," with 13% unwilling and 7% expressing no opinion. *Id.*

273. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 192. Here again, 3% expressed no opinion concerning government old-age pensions. GALLUP & RAE, *supra* note 21, at 296.

274. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 192.

275. *Id.*

276. *Id.* at 9 (emphasis added). 6% had no opinion. GALLUP & RAE, *supra* note 21, at 297. Supporters thought that the national average monthly payment to a single person should be \$40, and to a husband and wife, \$60. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 9. This may account in part for the 96.2% opposition to the Townsend Plan's proposal to pay each aged husband and wife \$200. *Id.* at 10. But the emphatic support for a need-based system suggests that a major portion of the public hostility to the Townsend Plan was attributable to the Plan's universality.

277. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 118.

278. *Id.* 4% had no opinion. This poll also showed support for a \$40 monthly payment to singles, and a \$70 monthly payment to a husband and wife. GALLUP & RAE, *supra* note 21, at 297. In December of 1938, 55% of those questioned told Gallup that they favored "reducing the age at which *needy* people begin receiving old-age pensions from 65 to 60." Gallup Poll, Dec. 4-9 (1938), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0278710) (emphasis added). 37% did not, while 8% expressed no opinion. *Id.*

their druthers, they would have preferred a pension system that was means-tested rather than universal.<sup>279</sup>

## II. THE ISSUES AND THE CONSTITUTION

What transformations in constitutional doctrine were necessary in order to accommodate the desires of the American people in the 1930s? First, we can be certain that two often-criticized precedents had to go. Just as *Adkins v. Children's Hospital's*<sup>280</sup> reading of the Due Process clauses stood in the way of state and federal minimum wage legislation, so *Hammer v. Dagenhart*<sup>281</sup> had to be overruled in order to clear the way for national legislation prohibiting child labor.<sup>282</sup>

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279. It would appear that lower support for the Social Security Act than for the principle of old age pensions was *not* owing to the requirement that employees contribute equally with employers to the system. While 68% of those polled in November of 1936 approved of the Act, a Gallup poll published in January of 1938 revealed that 85% of those questioned did *not* think "the Social Security law should be changed to make the employer pay the whole amount of the security tax," and that 73% approved of "the present Social Security tax on wages." GALLUP, PUBLIC OPINION, *supra* note 62, at 86; *see supra* note 269 and accompanying text. With respect to the former question, 13% expressed no opinion; with respect to the latter, only 5%. GALLUP & RAE, *supra* note 21, at 300-01. Similarly, the April 1937 *Fortune* survey showed that, of 19.9% of respondents opposed to the Act, only 6.2% (.07% of the total) gave as the reason for their opposition that "worker's wages should not be taxed; the employer should bear the whole cost." *The Fortune Survey: VIII*, FORTUNE, Apr. 1937, at 186. By contrast, 27% of opponents maintained that "the whole principle of it is wrong," while 23.9% of the opposition feared that "Congress will spend the money on something else before the people get any benefit." *Id.*

The January 1938 Gallup poll did make clear one reservation the American people had about the Act: the exclusion from its coverage of certain categories of workers. Informed that "The present Social Security law does not cover household help, sailors, farm workers, and employees in small shops," respondents were asked whether "the law should be extended to include these workers." 74% answered that it should. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 86. 26% thought not; 11% expressed no opinion. GALLUP & RAE, *supra* note 21, at 300. Similarly, the single most common reason given for opposition to the Act in the April 1937 *Fortune* survey was "the law does not go far enough to provide real security." 32.2% of those opposed to the Act offered this explanation. *The Fortune Survey: VIII*, FORTUNE, Apr. 1937 at 186.

280. 261 U.S. 525 (1923).

281. 247 U.S. 251 (1918).

282. *Adkins* was overruled in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), *Hammer* in *United States v. Darby*, 312 U.S. 100 (1941). While I doubt that these decisions were directly responsive to the published results of the public opinion polls, there can be no doubt that the decisions were congruent with those results.

Beyond this, however, it is not clear that much, if any change was required to bring constitutional doctrine in line with public sentiment.<sup>283</sup> Without doubt, the American people supported the old-age pension provisions of the Social Security Act upheld in *Helvering v. Davis*.<sup>284</sup> But was any revolution in constitutional law necessary to reach that result? Justices Van Devanter and Sutherland certainly didn't think so. Like their fellow Horsemen, Justices McReynolds and Butler, they had dissented from the Court's earlier 1937 decisions sustaining the minimum wage<sup>285</sup> and upholding the application of the Wagner Act to manufacturing enterprises.<sup>286</sup> But in *Helvering*, Van Devanter and Sutherland joined in making the seven-man majority embracing the constitutionality of the federal old-age pension program. The American people were not asking that the Constitution or its interpretation be altered in order to accommodate their desire for a national pension system. Indeed, the preference expressed in the polls for a pension system restricted to the needy among the aged reflected a longstanding commitment of American constitutionalism. Courts and policy makers had long looked askance at redistributive legislation that sought to take property from A and give it to B for what they saw as private rather than public purposes.<sup>287</sup> By the same token,

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283. This is not to suggest that the public did not support many of the significant changes in institutional arrangements and practices, both in degree and in kind, that we associate with the New Deal. It is only more modestly to maintain that comparatively little modification of existing constitutional doctrine was necessary to accommodate those changes. I thank Bob Gordon for urging me to clarify this point.

284. 301 U.S. 619 (1937).

285. *West Coast Hotel*, 300 U.S. at 400 (Sutherland, Van Devanter, McReynolds, and Butler, J.J., dissenting).

286. *The Labor Board Cases*, 301 U.S. 1, 76 (1937) (McReynolds, Van Devanter, Sutherland, and Butler, J.J., dissenting).

287. For historical scholarship examining the roots and ramifications of this principle, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 47-105 (1998); OWEN FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 156, 160 (1993); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 19-31 (1992); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293, 298, 304-31 (1985); Edward Corwin, *The Basic Doctrine of American Constitutional Law*, 12 *MICH. L. REV.* 247 (1914); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of 'Laissez-faire' Constitutionalism, 1863-1897*, 61 *J. AM. HIST.* 970 (1975); Stephen A. Siegel,

however, it was an established principle, as Justice Miller put it in *Kelly v. Pittsburgh* in 1881, that "the support of the poor . . . [is a] public purpose[] in which the . . . community [has] an interest, and for which, by common consent, property owners everywhere in this country are taxed."<sup>288</sup> As Thomas Grey has reminded us, the use of revenue from public taxation for the support of the indigent was a settled practice in the American colonies that had persisted throughout the history of the new nation.<sup>289</sup> Despite numerous instances in which taxation was subjected to successful constitutional attack for violating the public purpose doctrine, "there was no attack at all on the universally recognized power of government to tax its citizens to provide the basic needs of the poor,"<sup>290</sup> and "no court and no commentator invoked the public purpose doctrine to attack the basic structure of poor relief."<sup>291</sup> Constitutional conservatives from Brewer to Cooley concurred that poor relief was "among the unquestionably legitimate functions of government."<sup>292</sup> Only public wealth transfers to non-indigents were constitutionally problematic. The preference of the overwhelming majority of the American people was for a pension system that was narrowly tailored to comply with this established constitutional norm.

Consider next the Court's decisions upholding application of the Wagner Act to manufacturing enterprises. I have explained in detail elsewhere my view that there was nothing particularly revolutionary in these decisions,<sup>293</sup> so I will not rehearse that argument here. Instead I want to ask whether the Court's decisions were necessary to accommodate the public's policy preferences. Several relevant considerations emerge from the polls. First, although skeptical of some of their leadership, the

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*Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 189-92 (1984); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 278 (1987); Cass Sunstein, *Lochner's Legacy*, 873 COLUM. L. REV. 873, 878-89 (1987).

288. 104 U.S. 78, 81 (1881).

289. Thomas Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 42 (1986).

290. *Id.*

291. *Id.* at 43.

292. *Id.* at 44.

293. See CUSHMAN, *supra* note 287, at 131-89.

public generally favored private-sector unions.<sup>294</sup> Second, the people favored federal regulation of unions, and a large majority of them consistently favored either the Wagner Act or some modified version of it.<sup>295</sup> Third, the people valued industrial peace: they disliked pickets and they deplored the sit-down strikes.<sup>296</sup> The labor regulation proposal that won the single largest measure of public support was one that would have required unions to submit their differences to a federal labor board before calling a strike.<sup>297</sup> All of this must be weighed against the far more equivocal attitude expressed in response to more general questions about the desirability of expanding federal regulatory power over industry and labor. As we have seen, none of the polls taken on this question showed a majority in favor of “transferring” such regulatory authority to the federal government, and only one of the two polls asking whether respondents approved of granting the federal government “greater” regulatory authority than it had traditionally enjoyed showed a majority in favor.<sup>298</sup> We cannot be certain, but I think it a fair guess that if asked the public would have approved the Court’s decisions applying the Wagner Act to larger enterprises such as the Jones & Laughlin Steel Corporation, The Fruehauf Trailer Company, and Consolidated Edison.<sup>299</sup> But would the people have disapproved had the Court refused to extend the Act’s coverage to the Friedman–Harry Marks Clothing Company in Richmond, Virginia, or to the Santa Cruz Fruit Packing Company, or, in *NLRB v. Fainblatt*, to a New Jersey concern processing materials into women’s sports garments on a contract basis?<sup>300</sup> Again, we can only speculate, but these cases strike me as far from certain.

More certain, it seems to me, is the relation between public opinion and the Court’s decisions sustaining the Second New Deal’s agriculture program. The public had

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294. See *supra* notes 62-66, 97, 122 and accompanying text.

295. See *supra* notes 108-114 and accompanying text.

296. See *supra* notes 68-70, 95-105 and accompanying text.

297. See *supra* note 119 and accompanying text.

298. See *supra* notes 146-48, 152-53 and accompanying text.

299. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *Consolidated Edison Co. v. Nat’l Labor Relations Bd.*, 305 U.S. 188 (1938).

300. See *NLRB v. Friedman–Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453 (1938); *Nat’l Labor Relations Bd. v. Fainblatt*, 306 U.S. 601 (1939).



disliked the original Agricultural Adjustment Act, set a face of flint to its resurrection, and overwhelmingly opposed federal support of the price of farm products through the control of agricultural production.<sup>301</sup> It would therefore be utterly implausible to assert that the Court was vindicating the *vox populi* when it upheld the marketing quota provisions of the second AAA in *Mulford v. Smith* in 1939.<sup>302</sup> And in light of the polling data, I don't think it requires much imagination to ascertain what the average contemporary American would have thought of the result in *Wickard v. Filburn*.<sup>303</sup>

However, this should be taken to reflect neither a lack of sympathy for the plight of the American farmer, nor opposition to federal efforts to ameliorate the crisis he faced. In a *Fortune* survey published in April of 1936, respondents were asked, "Now that the AAA has been abolished do you think that the benefit payments to farmers should be given to them in some other way?"<sup>304</sup> 69% of those with opinions responded affirmatively.<sup>305</sup> Those who had answered yes were then asked, "even if it takes a constitutional amendment?" Here, 71.2% still responded affirmatively.<sup>306</sup>

But no such constitutional amendment was necessary.<sup>307</sup> For as the Court held in *Frothingham v. Mellon*,<sup>308</sup> decided

301. See *supra* notes 138-141 and accompanying text.

302. 307 U.S. 38 (1939).

303. 317 U.S. 111 (1942).

304. *The Fortune Quarterly Survey: IV*, FORTUNE, Apr. 1936 at 208.

305. 49.3% answered yes, with 22.2% answering no and 28.5% responding "don't know." *Id.* A *Fortune* survey published in January of 1938 echoed this view. When asked, "[d]o you believe it is wise for the government to guarantee farmers a minimum price for certain crops, or do you think that farmers should take whatever prices they can get for what they produce?," 48.2% answered "guarantee," while 38% responded "no guarantee" and 13.8% had no opinion. Of those who answered "no guarantee," 25.8% explained that it was "unfair to nonfarmers," 8.4% that it would "raise everyone's taxes," 11.8% that "the government can't afford it," and 43.4% that "it just won't work." *The Fortune Quarterly Survey: XI*, FORTUNE, Jan. 1938, at 84. The October 1940 survey showed that 60% of those asked, and 71.2% of those with opinions, thought the next administration should "give more aid to farmers so as to increase their buying power." *The Fortune Survey: VIII*, FORTUNE, Oct. 1940, at 65, 175.

306. *The Fortune Quarterly Survey: IV*, FORTUNE Apr. 1936, at 210 (35.1% of the total sample).

307. This paragraph and the one that follows are drawn from Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J. SUP. CT. HIST. 79, 91-93.

308. 262 U.S. 447 (1923).

in 1923, no taxpayer had standing to challenge federal expenditures paid from the Treasury out of general revenue.<sup>309</sup> The original AAA had been subject to challenge because it was financed out of an excise tax on food processors, the proceeds of which were earmarked for acreage reduction benefit payments.<sup>310</sup> But as Edward Corwin pointed out at the time, "so long as Congress has the prudence to lay and collect taxes without specifying the purposes to which the proceeds from any particular tax are to be devoted, it may continue to appropriate the national funds without judicial let or hindrance."<sup>311</sup> So while the Court had invalidated the AAA's processing tax in *United States v. Butler*,<sup>312</sup> the federal government continued to make the benefit payments it had promised to individual farmers. With the processing tax no longer enforced, no one had standing to challenge the appropriations from general revenue by which the payments were now funded.<sup>313</sup> Moreover, within two months of the *Butler* decision, Congress had enacted a statute to replace the AAA. The Soil Conservation and Domestic Allotment Act of 1936 authorized the Secretary of Agriculture to pay farmers to shift acreage from soil-depleting crops to soil-conserving crops.<sup>314</sup> It turns out that the soil-depleting crops were the very surplus commodities whose production the original AAA had sought to control. \$500 million were appropriated to fund the payments, but no companion taxing measure was enacted to provide the necessary revenue. Opponents of the measure complained that it was clearly unconstitutional in light of the *Butler* decision; but because there was no tax identified with the expenditure, no one had standing to challenge the constitutionality of the payments.<sup>315</sup>

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309. *Id.* at 487-89.

310. Act of May 12, 1933, ch. 25, §§ 8(1), 9, 12, 48 Stat. 31 (1933); *U.S. v. Butler*, 297 U.S. 1, 57-61 (1936). The dissent did not take issue with the majority on the question of standing. See 297 U.S. at 78 (Stone, J., dissenting).

311. EDWARD S. CORWIN, *TWILIGHT OF THE SUPREME COURT* 176 (1934).

312. 297 U.S. 1 (1936).

313. DEAN ALFANGE, *THE SUPREME COURT AND THE NATIONAL WILL* 180-81 (1937).

314. Pub. L. No. 74-461, 49 Stat. 1148 (1936).

315. See CARL SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 838 (2d ed. 1954); Richard Kirkendall, *The New Deal and Agriculture*, in *THE NEW DEAL: THE NATIONAL LEVEL* 94 (John Braeman et al, eds., 1975); Robert Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 *HARV. L. REV.* 645, 689-90 (1946).

Senator Daniel Hastings challenged defenders of the bill's constitutionality "to add to it a tax provision to supply the necessary money and thus give to the American people an early opportunity to test its validity. Do not do the cowardly thing and separate the tax provision from this bill, thus making it impossible to prevent the illegal spending of at least a half billion dollars."<sup>316</sup> But proponents of the bill, chastened by the fate of the AAA, ignored this schoolyard taunt, and the law was enacted and implemented in its unchallengeable form.<sup>317</sup>

The ramifications of this "taxpayer standing doctrine" were by no means limited to the Administration's efforts to aid American farmers. As Benjamin Wright observed, it also served to place

the spending of billions of dollars in civilian relief, and in the building of public works . . . beyond the range of constitutional litigation . . . the principal way in which the Court sustained . . . New Deal measures was by refusing to pass upon the validity of the spending power.<sup>318</sup>

Throughout the 1930s, the Supreme Court and the lower federal courts repeatedly invoked the *Mellon* doctrine in rejecting constitutional attacks on loans and grants made by one of the most important New Deal relief agencies, the Public Works Administration.<sup>319</sup> Undoubtedly because the

316. 80 CONG. REC. 1778 (1936).

317. See Note, *Soil Conservation and Domestic Allotment Act*, 24 GEO. L.J. 962, 965-67 (1936). This continuation of transfer payments may account for the response to a poll released in the November 1939 issue of *Fortune*, in which respondents were asked, "Considering Mr. Roosevelt's six and a half years in office, on the whole do you approve or disapprove of the means by which his administration has tried to aid the farmer?" *The Fortune Survey: XXIV*, FORTUNE, Nov. 1939, at 166. Despite the unpopularity of the AAA, 50.6% of those questioned, or 60.5% of those with opinions, said they approved. *Id.* Only 32.9% of those questioned, or 39.4% of those with opinions, said they disapproved. *Id.*; see also *supra* note 140.

318. BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 183-84 (1942).

319. See *Cal. Water Serv. v. Redding*, 304 U.S. 252 (1938); *Duke Power v. Greenwood County*, 302 U.S. 485 (1938); *Ala. Power Co. v. Ickes*, 302 U.S. 464, 478-79 (1938); *Central Ill. Pub. Serv. Co. v. City of Bushnell*, 109 F.2d 26, 29 (7th Cir. 1940); *Duke Power Co. v. Greenwood County*, 91 F.2d 665, 676 (4th Cir. 1937); *Greenwood County v. Duke Power*, 81 F.2d 986, 997 (4th Cir. 1936); *Arkansas-Mo. Power Co. v. City of Kennem*, 78 F.2d 911, 914 (8th Cir. 1935); *City of Allegan v. Consumers' Power Co.*, 71 F.2d 477, 480 (6th Cir. 1934); *Iowa S. Util. Co. v. Town of Lamoni*, 11 F. Supp. 581, 585 (S.D. Iowa 1935); *Mo.*

*Mellon* doctrine posed such an insuperable obstacle to securing judicial review, a vast array of New Deal spending programs, all financed from general revenue, never underwent constitutional challenge during Charles Evans Hughes's tenure as Chief Justice. Examples include the Farm Credit Act,<sup>320</sup> the Reconstruction Finance Corporation,<sup>321</sup> the Rural Electrification Administration Act,<sup>322</sup> the Emergency Relief Appropriation Act,<sup>323</sup> and the enormously popular Civilian Conservation Corps.<sup>324</sup> We

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Power & Light Co. v. City of La Plata, 10 F. Supp. 653 (E.D. Mo. 1935); Mo. Utils. Co. v. City of California, 8 F. Supp. 454, 464 (W.D. Mo. 1934); see also Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (relying on *Mellon* in denying standing to challenge determination made under Public Contracts Act); Graff v. Town of Seward, 9 Alaska 205 (1937) (denying plaintiff standing to challenge Public Works Administration).

*Mellon's* broader justiciability doctrine was also invoked by the lower courts in repulsing attacks on significant New Deal legislation. See Bethlehem Shipbuilding Corp. v. Nylander, 14 F. Supp. 201, 207 (S.D. Cal. 1936) (National Labor Relations Act); Ohio Custom Garment Co. v. Lind, 13 F. Supp. 533, 536 (S.D. Ohio 1936) (same); *In re* Chilton, 16 F. Supp. 14, 16 (D. Col. 1936) (the second Frazier-Lemke Act); *In re* Paul, 13 F. Supp. 645, 647 (S.D. Iowa 1936) (same); Barnidge v. United States, 101 F.2d 295, 298 (8th Cir. 1939) (Emergency Relief Appropriation Act of 1935); Detroit Edison Co. v. Securities & Exchange Commission, 119 F.2d 730, 740 (6th Cir. 1941) (Securities and Exchange Commission); Wallace v. Ganley, 95 F.2d 364, 366 (D.C. Cir. 1938) (certain provisions of the amended Agricultural Adjustment Act); Frahn v. Tenn. Valley Auth., 41 F. Supp. 83, 84, 86 (N.D. Ala. 1941) (Tennessee Valley Authority); Tenn. Valley Auth. v. Ashwander, 78 F.2d 578, 583 (5th Cir. 1935) (same); Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137 (1939) (same); Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936) (same).

320. Pub. L. No. 73-75, 48 Stat. 257, 258 (1933).

321. Pub. L. No. 74-1, 49 Stat. 1, 4 (1935).

322. Pub. L. No. 74-605, 49 Stat. 1363, 1364 (1936).

323. Pub. L. No. 74-739, 49 Stat. 1597, 1608 (1936).

324. Pub. L. No. 73-5, 48 Stat. 22, 23 (1933). As Carl Swisher put it, "Congress . . . continued to make appropriations of this kind, largely immune from judicial scrutiny." SWISHER, *supra* note 315, at 838-39. The Supreme Court and the lower federal courts also rejected challenges to the Home Owners' Loan Corporation on standing grounds. See Kay v. United States, 303 U.S. 1 (1938); see also Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939) (assuming constitutionality of Home Owners' Loan Corp.); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 492 (1939) (same); United States v. Hill, 90 F.2d 573 (3d Cir. 1937), *cert. den.*, 302 U.S. 736 (1937), *rehg. den.*, 302 U.S. 779 (1937) (upholding constitutionality of Home Owners' Loan Corporation). The Federal Emergency Relief Act, 48 Stat. 55, 56 (1933), was subjected to an unsuccessful "collateral attack" in *Langer v. United States*, 76 F.2d 817, 824-25 (8th Cir. 1935), where the court upheld the Act as a legitimate exercise of Congress's power to appropriate money for the general welfare. In any event, the court held, citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923), *Frothingham's* companion case, that "no personal right of any appellant is infringed," and that

cannot know whether the Court might have found one or more of these Acts unconstitutional had it reached the merits of such a challenge, but we can be certain that no change in constitutional doctrine was necessary to sustain them. The taxpayer standing doctrine insulated these measures from constitutional attack just as effectively as if their constitutionality had been beyond suspicion.

In May of 1939, Gallup asked "What do you think is the greatest accomplishment of the Roosevelt Administration during the six years it has been in office?"<sup>325</sup> The most common response, given by 28% of those questioned, was "Relief and the W.P.A."<sup>326</sup> Placing second were the constitutionally unproblematic "[b]anking reforms," garnering 21%.<sup>327</sup> Third was the Civilian Conservation Corps, taking 11%.<sup>328</sup> "Social Security" received 7% of the vote, and all others—" [f]arm [p]rogram" (5%), "[l]abor [p]olicies" (4%), "[r]epeal of [p]rohibition" (3%), "[f]oreign [p]olicy" (3%), "[p]ublic works construction" (2%), and "N.R.A." (1%) — received 5% or less.<sup>329</sup> If, as these polls suggest, spending to relieve poverty was the thing Americans most wanted from their government in the 1930s, it is clear that no change in constitutional law was necessary to accommodate them.

In short, the American people of the 1930s did desire the modification of some discrete areas of constitutional doctrine necessary to underwrite the particular social reforms they favored. But the data would not appear to support the claim that they demanded a revolution in constitutional law. What they more modestly sought, to use

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even if the Act constituted an invasion of state power, "still only an abstract question of political constitutional law would be presented, with which the courts are not concerned." 76 F.2d at 825.

325. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 157.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* 15% offered some other response. *Id.* Responses to a follow-up question showed that there was strong opposition even to programs that enjoyed strong support. Asked, "What do you think is the worst thing the Roosevelt Administration has done in the past six years?," 23% answered "[r]elief and the W.P.A.," 16% answered "[s]pending policy," and 12% answered "[f]arm [p]rogram." These were followed by "[f]oreign [p]olicy" (6%), "[l]abor [p]olicy" (6%), "[i]nterference with business" (5%), "Supreme Court plan" (5%), "N.R.A." (4%), "[r]epeal of prohibition" (3%), and "[r]aising [t]axes" (2%). 18% offered some other response. *Id.*

Edward Corwin's apt phrase, was a "Constitutional Revolution, Limited."<sup>330</sup>

### III. THE PEOPLE AND THE COURT

The fact that little constitutional change was necessary to accommodate the public's policy preferences helps to rationalize, if it does not explain, public attitudes toward the Supreme Court in the 1930s. In the autumn of 1935, well after the "Black Monday" decisions of that spring, only 31% of those polled said that they would "favor limiting the power of the Supreme Court to declare acts of Congress unconstitutional."<sup>331</sup> 53% were opposed, with 16% expressing no opinion.<sup>332</sup> A *Fortune* survey published in April of 1936 asked, "Do you think the Supreme Court has recently stood in the way of the people's will? or Do you think it has protected people against rash legislation?"<sup>333</sup> 21.7% said the Court was "in the way of the people," while nearly twice as many (39.2%) thought the Court had "protected the people."<sup>334</sup> The editors remarked that "New Dealers wishing

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330. See generally EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941). One constitutional transformation of the late 1930s that apparently did win the favor of the populace was the Court's relaxation of the doctrine of intergovernmental tax immunities. In July of 1938 Gallup asked whether respondents would "favor an amendment to the constitution requiring employees of state and local governments to pay federal income taxes." 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 112. 82% responded yes, with only 18% answering no. *Id.* at 112. Gallup asked again in January of 1939, "Do you think people who work for the state and local governments should pay federal income taxes on their salaries?" *Id.* at 138. Again, respondents overwhelmingly supported withdrawal of the immunity, this time by an 87-13% margin. *Id.* at 138. On this view, the Supreme Court took a step in the right direction in *Helvering v. Gerhardt*, 304 U.S. 405 (1939), where it cautioned that the states' implied immunity from federal taxation was to be narrowly limited, and held subject to federal income taxation the salaries of three employees of the Port Authority of New York. Respondents favored exposure of investment income to such taxes as well. The July Gallup 1938 poll showed 74% agreeing that "people who own federal state, and municipal securities" should "be required to pay taxes on the income from these securities," 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 112, while the poll taken in January of 1939 still showed 75% concurring that "people who own United States government bonds or state or municipal bonds" should "have to pay federal income taxes on their incomes from these securities." *Id.* at 138-39.

331. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 2.

332. *Id.*

333. *The Fortune Survey: IV*, FORTUNE, Apr. 1936, at 210.

334. *Id.* 6.3% said "neither," while 32.8% answered "don't know." *Id.*

to curtail the power of the Court by constitutional amendment would apparently have a long handicap of established opinion to overcome. . . . [S]upposing that the President were to consider basing his campaign upon an attack on the Supreme Court," he would conclude that "there is political dynamite in appealing to the nation to curtail the powers of the Court."<sup>335</sup> Subsequent polls demonstrated the durability of this judgment. In a poll taken in mid-November of 1936 and published December 13, 59% of respondents maintained that the Court should "be more liberal in reviewing New Deal measures,"<sup>336</sup> yet only 41% said that they would favor, "as a general principle . . . limiting the power of the Supreme Court to declare acts of Congress unconstitutional."<sup>337</sup> The public continued to voice such sentiments throughout the Court-packing fight. On six separate occasions between mid-February and the middle of May, Gallup published the results of polls in which respondents were asked either whether they were "in favor of President Roosevelt's proposal to reorganize the Supreme Court," or whether Congress should "pass President Roosevelt's Supreme Court plan."<sup>338</sup> In none of these polls did Roosevelt's proposal ever command the support of a majority.<sup>339</sup> In fact, the Court-

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335. *Id.* at 210-215.

336. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 43. Similarly, in an unpublished Gallup poll conducted between March 3 and March 8, 1937, 56% thought the Court "should be more liberal in reviewing New Deal measures," while 32% did not and 12% expressed no opinion. Gallup Poll Mar. 3-8 (1937), at Roper Center Online, *supra* note 65 (n.q., Accession No. 0189392).

337. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 43. 59% were opposed; 19% expressed no opinion. GALLUP & RAE, *supra* note 21, at 303.

338. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 50.

339. *Id.* (poll taken in mid-February and published February 28 shows 53-47% opposition); *Id.* at 53 (poll taken in early March and published March 25 shows 53-47% opposition); *Id.* at 54 (poll taken in mid-March and published March 28 shows 52-48% opposition); *Id.* at 55 (poll taken in early April and published April 11 shows 51-49% opposition); *Id.* at 57 (poll taken in late April and published May 2 shows 53-47% opposition); *Id.* at 58 (poll taken in early May and published May 23 shows 54-46% opposition). A poll taken in September of 1937 asked respondents whether they would "like to have President Roosevelt continue his fight to enlarge the Supreme Court." *Id.* at 70. As Gallup reported, "Throughout the United States, less than one voter in three answered in the affirmative." *Id.* 68% answered no; 32% yes; 19% had no opinion. GALLUP & RAE, *supra* note 21, at 304. Moreover, Democrats were asked in September of 1937 whether "the Administration should try to defeat the reelection of Democratic congressmen who opposed the Supreme Court plan." 73% thought not; 27% supported such action. 1 GALLUP, PUBLIC OPINION, *supra*

note 62, at 70. 26% had no opinion. GALLUP & RAE, *supra* note 21, at 304. When the category of respondents was not restricted to Democrats, opposition rose to 80%, with 20% in favor and 25% expressing no opinion. *Id.* Asked again in June of 1938, 69% of Democrats still opposed such a proposal. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 109. The failure of Roosevelt's effort to "purge" the Party in the 1938 primaries is told in WILLIAM LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 266-72 (1963).

In addition to the published polls, Gallup conducted several unreleased surveys of public opinion on the Court-packing issue. Like the published polls, these surveys showed persistent opposition. A poll taken between February 10 and February 15 asked whether respondents favored "President Roosevelt's plan to increase the size of the Supreme Court to make it more liberal." 41% answered yes, 44% no, and 16% expressed no opinion. Gallup Poll, Feb. 10-15 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279252). Between February 24 and March 1 respondents were asked, "Are you in favor of President (Franklin) Roosevelt's proposal regarding the Supreme Court?" Gallup Poll, Feb. 24-Mar. 1 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0278930). Here, 42% answered yes, 46% no, and 12% expressed no opinion. *Id.* In the wake of Roosevelt's fireside chat in support of the plan, there followed a brief period in late March in which two polls showed a slight plurality of support for the proposal. Asked the question between March 20 and March 25, 46% answered yes, 45% no, and 9% had no opinion. Gallup Poll, Mar. 20-25 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279266). Between March 24 and 29, 44% answered yes, 43% no, and 14% had no opinion. Gallup Poll, Mar. 24-29 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279282). By the time the April 11 poll, *see supra*, was released, however, the tide had turned for good. Between April 7 and April 12, 44% evinced support, 46% opposition, and 11% no opinion. Gallup Poll, Apr. 7-12 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0278952). Between the 14th and the 19th, 40% thought Congress should "pass the President's Supreme Court plan," but 47% thought not, while 13% had no opinion. Gallup Poll, Apr. 14-19 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279295). These percentages were replicated in a survey taken between April 28 and May 3. Gallup Poll, Apr. 28-May 3 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279320). Between May 12 and May 17, 39% responded affirmatively to the question, 46% negatively, and 15% with no opinion. Gallup Poll, May 12-17 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279348). By the time respondents were polled between May 19 and May 24, support had dwindled to 33%, with those opposed at 43% and those without opinions at 24%. Gallup Poll, May 19-24 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279363). Between May 26 and May 31, 34% registered support, 44% opposition, and 22% no opinion regarding congressional passage of "the President's Supreme Court proposal." Gallup Poll, May 26-31 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279378). Between June 3 and June 8, only 35% thought Congress should "pass the President's plan to enlarge the Supreme Court," while 48% were opposed and 18% had no opinion. Gallup Poll, June 3-8 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0279394). Asked the question again between June 9 and June 14, 36% were in favor, 49% opposed, and 14% had no opinion. Gallup Poll, June 9-14 (1937), *available at Roper Center Online, supra* note 65 (n.q., Accession No. 0278964).



packing episode seemed only to harden the views of the Court expressed in the April 1936 *Fortune* survey. In the issue published in July of 1937, 23.1% of those questioned agreed that the Court had "recently stood in the way of the people's will," while 43.1% contended that the Court had "protected the people against rash legislation."<sup>340</sup>

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These data differ in some particulars, most of them inconsequential, from those presented in Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1147 (1987). Most significantly, where I find only two unreleased polls indicating a plurality of support for the Court-packing plan, Caldeira's graph suggests the presence of four between March 12 and April 1. *Id.* at 1147.

The fact that public support for and opposition to the Court-packing plan changed very little in the wake of the Court's decisions in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), upholding minimum wage regulation on March 29, and the *Labor Board Cases*, 301 U.S. 1, 76 (1937), upholding the Wagner Act on April 12, casts considerable doubt on Professor Bruce Ackerman's claim that the Justices

joined in creating opinions of the Court that had an obvious public meaning to the other participants in the constitutional conversation then raging about them. So far as the President and the Congress and ordinary Americans were concerned, the public switch had a performative meaning of transparent and high importance. Simply put, the Court's switch was broadly interpreted by all concerned as a symbolic acknowledgment of the People's voice and an indication from the Court that it was unnecessary for the President and Congress to contemplate more drastic actions to assure that the Justices would now cooperate in elaborating the constitutional principles of New Deal Democracy.

Ackerman, *A Generation of Betrayal?*, *supra* note 3, at 1531.

Ackerman reiterates this view in his book. See 2 ACKERMAN, WE THE PEOPLE, *supra* note 5, at 343. As Caldeira (upon whom Ackerman relies) points out, the decision in *Parrish* "made little or no difference in the pattern of public support . . . it is doubtful whether many observers saw the decision" as "a watershed. . . It expressed a change in attitude . . . that was apparently too subtle for the public to detect." Caldeira, *supra*, at 1147-48. In Caldeira's view, *Parrish* had no such obvious public meaning to ordinary Americans. Even "[a]s a result" of the Labor Board decisions, Caldeira observes, support for the plan dropped fewer than five percentage points. *Id.* at 1148. Insofar as the polling data provide us with any ground to assess the "performative meaning" of the Labor Board opinions, they enable us to infer at most that the meaning ascribed to them by Ackerman was "transparent" to between 4% and 5% of the population. For a catalog of contemporary commentators for whom the decisions had no such meaning, which includes such distinguished government lawyers as Solicitor General Stanley Reed and NLRB General Counsel Charles Fahy, such eminent scholars as Robert Cushman and Lloyd Garrison, and numerous members of the federal bench, see CUSHMAN, *supra* note 287, at 177-82.

340. *The Fortune Quarterly Survey: IX*, FORTUNE, July 1937, at 97. 4.6% said "neither," 4.3% "both," and 24.9% expressed no opinion. *Id.* A comparison of those with other *Fortune* polls showed the following:

While the Court plan repeatedly lost a straight up-or-down vote in the polls, one poll taken by Gallup in late February paints a more complex picture. When asked, "What action should Congress take on the Roosevelt plan to reorganize the Supreme Court—pass it, modify it, or defeat it?" 38% said they would prefer passage, and 39% recommended defeat. Yet nearly a quarter of those polled (23%) responded that they would like to see Congress modify the proposal.<sup>341</sup> What sort of modification these respondents had in mind we cannot know for sure, but later polls provide some clue. In early May, Gallup set out to determine whether the public would support the sort of compromise congressional leaders had been pushing with Roosevelt (and that the President had been rejecting) since mid-February. Asked, "Would you favor a compromise on the President's Court plan which would permit him to appoint two new judges instead of six?" 62% answered no.<sup>342</sup>

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[B]efore the President made an issue of the Supreme Court he enjoyed the confidence of 35.9 per cent of the people who approved of the present Court's performance; now a third of these [the July figure was down to 23.6%] have swung over to the opposition. More surprising is this fact: before the controversy he was opposed by only 15.2 per cent of the Court's critics; now, after he has attacked the Court, there are twice as many of the Court's critics in the opposite camp [the July figure was up to 33.6%]—presumably because they dislike either the means of reform he chose or the reasons he gave for proposing it. So among people who have given the matter enough thought to have any kind of opinion the President has lost even more ground on the Court issue than among the population as a whole. . . . Thus Roosevelt has espoused a cause than is more unpopular than he is popular, and perhaps this has broken a spell that had held steady so long.

*Id.* at 97-98.

341. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 51. The poll was published March 7. Similarly, three unpublished surveys taken by Gallup asked, "Do you think some kind of change is necessary regarding the Supreme Court?" Between February 24 and March 1, 53% answered yes, 35% no, and 12% had no opinion. Gallup Poll, Feb. 24-Mar. 1 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0278931). Between March 3 and March 8, 51% answered yes, 40% no, and 9% had no opinion. Gallup Poll, Mar. 3-8 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0189388). And between March 20 and March 25, 54% answered yes, 37% no, and 10% had no opinion. Gallup Poll, Mar. 20-25 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0279265). Only 28% thought that appropriate change might include the appointment of a nonlawyer to the Court, as an unpublished Gallup poll taken between March 3 and March 8 revealed. 65% were opposed, and 7% expressed no opinion. Gallup Poll, Mar. 3-8 (1937), *available at* Roper Center Online, *supra* note 65 (n.q., Accession No. 0189391).

342. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 59. 38% answered yes;

The public also opposed the compromise proposal on which Roosevelt and Democratic leaders ultimately settled. Between July 14 and July 19 Gallup asked respondents, "The Senate is now debating a plan which permits the President to enlarge the Supreme Court by adding one new judge each year. Do you favor this plan?"<sup>343</sup> 36% answered yes, while 50% responded no and 14% had no opinion.<sup>344</sup> Asked between July 21 and July 26, "Are you in favor of the plan now being discussed in the Senate to enlarge the membership of the Supreme Court?" 33% answered yes, 49% no, and 18% expressed no opinion.<sup>345</sup> And in April of 1938, 61% of those with opinions said that they would "favor an amendment to the Constitution to fix the number of justices at nine."<sup>346</sup>

The same poll, however, revealed that 70% of those with opinions thought that "Supreme Court justices should be required to retire after reaching a certain age," and that most thought the appropriate age would be seventy.<sup>347</sup> And in a similar poll taken in early April of 1937, just before the decisions in the *Labor Board Cases* were announced, 64% said they would "favor an amendment requiring Supreme Court justices to retire at some age between 70 and 75."<sup>348</sup>

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21% expressed no opinion. GALLUP & RAE, *supra* note 21, at 304. An unpublished survey asked a nearly identical question between April 28 and May 3. 30% answered yes, 52% no, and 18% had no opinion. Gallup Poll, Apr. 28-May 3 (1937), available at Roper Center Online, *supra* note 65 (Question Q02, Accession No. 0279321). Another unpublished poll taken between June 9 and June 14 asked, "Would you favor a compromise on the plan (to enlarge the Supreme Court) which would permit the President to appoint two new judges instead of six?" 37% said yes, 47% no, and 16% had no opinion. Gallup Poll, June 9-14 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0278965). On the unsuccessful efforts of Democratic leaders to secure Roosevelt's consent to such a compromise, see ALSOP & CATLEDGE, *supra* note 151, at 29, 78, 95, 109-13, 152-53, 158-59, 161, 196-97, 216; LEUCHTENBURG, *supra* note 339, at 98-99; BAKER, *supra* note 151, at 182, 190, 198-99, 232-33; JAMES PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS 1933-1939, at 94 (1967).

343. Gallup Poll, July 14-19 (1937), available at Roper Center Online, *supra* note 65 (Question Q03A, Accession No. 0279839).

344. *Id.*

345. Gallup Poll, July 21-26 (1937), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0279413).

346. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 104-05.

347. *Id.* at 104.

348. *Id.* at 56. 36% answered no; 10% had no opinion. GALLUP & RAE, *supra* note 21, at 304.

Similarly, a *Fortune* survey published in July of 1937 showed that more respondents opposed the plan (32.1%) than supported it (31.1%).<sup>349</sup> But an additional 15.9% favored some alternative reform. 3.3% thought that, “instead of enlarging the Court, it would be better to pass a law requiring two-thirds or unanimous opinions of the court to overrule acts of Congress.”<sup>350</sup> Another 3.7% believed “it would be better to submit to [a] vote of the people a constitutional amendment enlarging the powers of Congress.”<sup>351</sup> But the most common alternative proposal, offered by 8.9% of those questioned, was “leave the number of Justices at nine, but force retirement at the age of seventy.”<sup>352</sup>

Roosevelt’s Court-packing proposal, Ackerman tells us, “catapulted the country into a great debate” over the following question: “Was the President right in claiming that the Democrats’ electoral victories had given the New Dealers a mandate from the People to take unconventional action to constitutionalize their revolutionary reforms?”<sup>353</sup> The available polling data suggests that the answer to that

349. *The Fortune Quarterly Survey: IX*, FORTUNE, July 1937, at 96. The published response for those in opposition to the plan was “let the Supreme Court alone.” *Id.* The figure for support is the sum of those who responded “believe the President is right and that Congress should pass the law he requests” (26.8%) and “don’t know much about it, but if Roosevelt wants it, let him have it” (4.3%). *Id.* The survey lists as “Anti-plan Rooseveltians” those who responded, “[a]ll right under Roosevelt, but afraid of what might happen under someone else” (2.6%); 15.8% expressed no opinion. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* The wording of these questions makes it impossible to determine whether respondents anticipated that such an amendment would operate retrospectively so as to affect the tenure of sitting Justices, or only with respect to future appointments. If the former, such an amendment would have granted the President authority to make a number of appointments to the Court *if*—and Administration officials saw this as a big “if”—and *when* the amendment managed to run the gauntlet of the ratification process. See *supra* note 151. All of these polls were taken after FDR’s early March fireside chat warning his supporters against the dangers of relying on constitutional amendment alternatives to his Court-packing proposal. See 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 131-32 (1937). The issue is almost certainly academic in any event. Justice Van Devanter retired at the end of the 1936 term; Justice Sutherland retired in January of 1938, and would have retired earlier but for the Court-packing threat. See CUSHMAN, *supra* note 287, at 21, 230 n.30. Roosevelt was therefore assured of a solid New Deal majority before any such amendment was likely to secure congressional passage and obtain ratification by the requisite number of states.

353. 2 ACKERMAN, WE THE PEOPLE, *supra* note 5, at 314.

question was no. The American people did not support statutory enlargement of the Court's membership.<sup>354</sup> They did, however, support a constitutional amendment, ratified through the procedures specified by Article V of the Constitution, to impose a requirement of mandatory retirement from the Supreme Court.<sup>355</sup>

### CONCLUSION

As we conclude this review of the particulars of public opinion in the 1930s, let us pull the camera eye back to the level of generality at which we began. In a poll taken in March of 1937, 50% of those questioned identified themselves as Democrats, 33% as Republicans, 15% as Independents, and 2% as Socialists.<sup>356</sup> Yet asked in May of 1936, "If there were only two political parties in this country—Conservative and Liberal—which would you join?", "respondents selected the Conservative option by a 53-47% margin."<sup>357</sup> Asked in June of 1939, "In politics, do you consider yourself a radical, a liberal, or a conservative?" 2% answered "radical," 46% "liberal," and 52% "conservative."<sup>358</sup> Asked in November of 1936 whether President Roosevelt's

354. The American Institute of Public Opinion asked and suggested:

Was Mr. Roosevelt right in interpreting his election victory as an authorization to change the Supreme Court? Apparently not, for the continuous surveys of the Institute [Gallup's American Institute of Public Opinion] show that at no time during the long and bitter fight were the majority of voters in favor of his plan.

AM. INST. OF PUBLIC OPINION, *supra* note 35, at 14; cf Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2178-79 (1999) (suggesting that "public opinion polls . . . demonstrat[e] the longevity of Court-packing, in some form").

355. In light of the other relevant polling data, it is difficult to interpret support for such a constitutional amendment as a systematic repudiation of the Court's jurisprudence, any more than ratification of the Twenty-Second Amendment, limiting the President to two terms in office, is properly understood as a repudiation of the policies of the Roosevelt Administrations. It may simply have reflected a view that seventy was a suitable age of mandatory retirement from most occupations, including that of Supreme Court Justice.

356. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 59. A poll taken at the end of 1939 showed 42% Democrats, 38% Republicans, 19% Independents and 1% "Socialist, other." *Id.* at 202. In July of 1939 the breakdown was 41-38-20-1%. *Id.* at 235.

357. *Id.* at 26. A poll taken in May of 1938, while not offering aggregate numbers, revealed that 85% of Republicans and 36% of Democrats would have selected the Conservative party. *Id.* at 99.

358. *Id.* at 164.

second Administration should be “more liberal, more conservative, or about the same as his first,” 15% responded that it should be more liberal, and 35% hoped it would remain “about the same.”<sup>359</sup> 50% of those polled thought it should be “more conservative.”<sup>360</sup> Asked in June of 1938, “During the next two years, would you like to see the Roosevelt Administration become more liberal or more conservative?,” 72% (including 59% of Democrats, 78% of middle-income respondents, and 52% of lower income respondents) opted for “more conservative.”<sup>361</sup> Later that summer, 34% told Gallup that they’d like to see the Roosevelt Administration “continue along its present lines” over the next two years, while 66% said they’d like to see the Administration become “more conservative.”<sup>362</sup> As *Fortune*’s editors put it in the autumn of 1937, “If all simon-pure American radicals or conservatives were gathered together in the state of New York neither group might be numerous enough to elect so much as a Congressman at large.”<sup>363</sup> Even in a time of extraordinary economic strain, contemporary measures of public opinion consistently portrayed the American people, like much of the New Deal they endorsed, as persistently, even stubbornly pragmatic and moderate in political temper.<sup>364</sup> I

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359. *Id.* at 41, 45.

360. *Id.*

361. *Id.* at 109. The Roper Center report of the poll shows the split closer to 70-30% in favor of “more conservative,” with 16% expressing no opinion. Gallup Poll, June 11-16 (1938), available at Roper Center Online, *supra* note 65 (Question QB04, Accession No. 0278236).

362. 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 116. 30% answered “continue along present lines,” 57% answered “more conservative,” and 13% expressed no opinion. Gallup Poll, July 29-Aug. 4 (1938), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0277869). That July 77% of those questioned, including 62% of those who had voted for Roosevelt in 1936, said that, had they been members of Congress for the past two years, they would not have “supported every bill recommended by President Roosevelt.” 1 GALLUP, PUBLIC OPINION, *supra* note 62, at 113. In August, 61% of Democrats with opinions indicated that they disapproved of “President Roosevelt’s campaign to defeat Democrats who oppose his views.” *Id.* at 117. 39% approved, while 20% expressed no opinion. *Id.*; GALLUP & RAE, *supra* note 21, at 297. When asked of the general population, the disapproval rate rose to 72% of those with opinions (58% of those questioned), with 28% (23% of those questioned) expressing approval and 19% expressing no opinion. Gallup Poll, Aug. 18-23 (1938), available at Roper Center Online, *supra* note 65 (n.q., Accession No. 0274541).

363. *The Fortune Quarterly Survey: X*, FORTUNE, Oct. 1937, at 108-09.

leave it to others to assess how far we may have retreated from the commitments and preferences of that generation of Americans. But one thing is clear: Any such assessment must begin with an informed understanding of the nature of those commitments and preferences. We must first remember the American people the way they were, not as we might like to imagine them.

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364. The subject of American political exceptionalism has spawned its own rich literature. Among its classics are WERNER SOMBART, *WHY IS THERE NO SOCIALISM IN THE UNITED STATES?* (Patricia M. Hocking & C.T. Husbands, trans., 1976); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 259-83 (1955); DANIEL BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* 1-35 (1953); DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* 275-78 (rev. ed. 1962); BARRY D. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945*, at 233-36 (1983).

## Appendix

### A NOTE ON THE POLLSTERS AND THEIR METHODS

#### *Origins*

In 1968, survey research pioneer Elmo Roper told an interviewer that “published public opinion research came out of marketing research—absolutely directly.”<sup>365</sup> “[I]t is probably safe to say,” he wrote in 1940, “that the advertising men, regardless of what other sins they may have been guilty of, are to be credited with . . . the early development of the technique which has been evolved for sampling public opinion.”<sup>366</sup> Survey research historian Jean Converse confirms that “[t]he technical methods of the new polls of 1935 had indeed been developed in market research, a field in which well-trained and sophisticated businessmen, psychologists, economists, and statisticians all played an important part.”<sup>367</sup> George Gallup and Elmo Roper “were market researchers who became straw-vote journalists.”<sup>368</sup> They “constructed the new opinion polls . . . using methods of market research and financing them with the money and publicity of election straw-vote journalism.”<sup>369</sup>

Elmo Roper entered the field of market research after his jewelry business failed in the 1920s.<sup>370</sup> In 1934, he

365. CONVERSE, *supra* note 35, at 113 (footnote omitted); *see also* Link & Freiberg, *supra* note 31, at 87 (characterizing public opinion polls as an “off-shoot” of consumer surveys).

366. Elmo Roper, *Sampling Public Opinion*, 35 J. AM. STAT. ASS’N 325, 325 (1940); *see also* GALLUP & RAE, *supra* note 21, at 44-45; Jerome H. Spingarn, *These Public-Opinion Polls: How They Work and What They Signify*, HARPER’S, Dec. 1938, at 98 (“Advertising agencies had begun to send people out to ring doorbells and ask housewives what they bought and why. . . . [T]hese market surveys had a definite business value. . . . Great care was taken to insure that the people who were being questioned would be a real cross section of the market as a whole; for these sampling methods were used to ascertain such important matters as whether housewives liked their vermifuge in boxes or jars or whether people were taking seriously the hair-restorative pretensions of a certain mouth wash.”).

367. CONVERSE, *supra* note 35, at 88; *see also* KEY, POLITICS, *supra* note 21, at 640-41.

368. CONVERSE, *supra* note 35, at 87.

369. *Id.* at 88; *see also* Spingarn, *supra* note 366, at 98 (noting that both Gallup and Roper “were trained in the school of market research, and both are still primarily engaged in market analysis”).

370. CONVERSE, *supra* note 35, at 113.



formed the marketing consulting firm of Cherrington, Roper & Wood with Paul Cherrington and Richardson Wood.<sup>371</sup> Wood initially had the idea of putting together a survey for *Fortune* to inform the business community about various consumer preferences and attitudes.<sup>372</sup> The early *Fortune* surveys focused not only on political and social issues, as Gallup's poll did, but also on such weighty matters as the brands of automobiles and cigarettes people liked best.<sup>373</sup> Wood had left the partnership by 1936, with Cherrington departing two years later.<sup>374</sup> By 1938, the firm had become Elmo Roper, Inc., and the formerly quarterly survey was being published in *Fortune* on a monthly basis.<sup>375</sup>

The "personable" and "energetic" George Gallup received his doctorate in applied psychology from the State University of Iowa in 1928.<sup>376</sup> His interest in polling was a product of three factors: first, his experience in writing his dissertation, *An Objective Method for Determining Reader Interest in the Content of a Newspaper*, for which he had conducted interviews of 1,000 people drawn from a quota sample he had developed of readers of the *Des Moines Tribune and Register*; second, his interest in journalism and public opinion, on which he had taught a course at the University; and third, the political career of his mother-in-law, who had first been swept into office as the Iowa Secretary of State on Roosevelt's coat tails in 1932.<sup>377</sup> After brief stints as a professor of journalism, first at Drake University in Des Moines, and then at Northwestern, Gallup accepted a job as director of research for the advertising firm of Young & Rubicam in 1932.<sup>378</sup> In his spare time, he began to develop the Gallup Poll, which was

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371. *Id.*

372. *Id.*

373. *See id.*

374. *Id.*

375. *Id.* at 114; *see also* Gallup, *Sampling Referendum*, *supra* note 23, at 132; GALLUP & RAE, *supra* note 21, at 45; Henry C. Link, *Some Milestones in Public Opinion Research*, 1 INT'L J. OPINION ATTITUDE RES. 36, 40 (1947); Claude E. Robinson, *Recent Developments in the Straw-Poll Field*, 1 PUB. OPINION Q. 45, 46 (1937).

376. Spingarn, *supra* note 366, at 98. For a more complete personal profile of Gallup, *see* Williston Rich, *The Human Yardstick*, SATURDAY EVENING POST, Jan. 21, 1939.

377. CONVERSE, *supra* note 35, at 114-15.

378. *Id.* at 115; Spingarn, *supra* note 366, at 98.

first published in October of 1935.<sup>379</sup> Gallup called his operation the American Institute of Public Opinion (AIPO) and based it in Princeton, New Jersey, directly across the street from the main campus entrance of Princeton University.<sup>380</sup> The Gallup poll appeared two or three times a week in major metropolitan newspapers such as the *New York Times* and the *Washington Post*.<sup>381</sup> Through numerous speeches, articles, and books, he became “the foremost spokesman for what he called ‘The New Science of Public Opinion Measurement.’”<sup>382</sup>

### *The 1936 Election and the Literary Digest Episode*

The Gallup and Roper polls attained their preeminence as a result of the 1936 presidential election. Before 1936, the *Literary Digest* was the nation’s most highly acclaimed electoral poll.<sup>383</sup> As Jean Converse explains, the *Digest* poll “had become something of an institution in American politics and journalism. . . . Of the few [polls] with pretension to national coverage, the *Digest* was the largest and

379. CONVERSE, *supra* note 35, at 115; Spingarn, *supra* note 366, at 98; Gallup, *Sampling Referendum*, *supra* note 23, at 132; Robinson, *supra* note 375, at 46. As Jean Converse noted,

The publication of the Gallup Poll came a few months after the first *Fortune* survey, but Roper and his associates knew that Gallup was not simply “copying” their work. . . . Gallup had in fact been doing experimental work on election forecasts since 1933-34 and other relevant survey work for still longer.

CONVERSE, *supra* note 35, at 114 (footnote omitted).

380. CONVERSE, *supra* note 35, at 116. Not, as Jean Converse points out, “without awareness that a Princeton address might help to encourage the return of mail questionnaires, which were a heavy component of his earliest polling.” *Id.* “Gallup was a brilliant publicist, and he has been rewarded in the marketplace for his abilities.” *Id.* at 123.

381. *Id.* at 116.

382. *Id.* James Wechsler observed:

Dr. George Gallup, who guides the institute, and Elmo Roper, who directs the monthly survey for *Fortune*, are the leading lights of the flourishing public-opinion industry. Alumni of the school of market research, Gallup and Roper operate in visibly non-proletarian environments. Gallup divides his time between his duties as an advertising executive for Young and Rubicam and his supervisory work at the institute. When Roper isn’t exploring the public mind for *Fortune*, he is running surveys for commercial clients who want private information on public preferences.

Wechsler, *supra* note 42, at 64.

383. CONVERSE, *supra* note 35, at 118.

most famous.<sup>384</sup> The *Digest* had the largest circulation of any newsmagazine, in part as a result of the poll it conducted.<sup>385</sup> Moreover,

The *Digest* laid claim to “uncanny accuracy” in its election polls, and congratulated itself regularly on its amazing record. The *Digest* even came to misremember its record somewhat and took credit for predicting Wilson in 1916, citing its poll of labor leaders, which favored Wilson, when its largest poll showed that Hughes was the winner.<sup>386</sup>

The *Digest* had correctly predicted the victories of Coolidge in 1924, of Hoover in 1928, and of Franklin Roosevelt in 1932.<sup>387</sup> But,

Sophisticated, disinterested observers knew that the *Digest* results were less impressive than the magazine claimed. In 1924, for example, the *Digest* poll had shown LaFollette coming in second, when in fact he proved to be a very slow third runner. It had long been apparent that the Republicans were overrepresented in the poll. . . . [T]his overrepresentation was easy to see. The *Digest* was cautioned repeatedly by sophisticated poll watchers. But the editors shrugged off technical criticism. . . . and they made no changes to reduce or adjust their biases.<sup>388</sup>

George Gallup was among the sophisticated observers who recognized the weaknesses in the *Digest's* polling methodology.<sup>389</sup> He also had his eye on the main chance. Risking ruin, Gallup urged subscribing newspapers to run his poll side by side with the *Digest* poll, and offered them “a money-back guarantee: his prediction would have to be more accurate in the 1936 election than that of the *Digest* or he would return the money to the newspapers that paid for the poll.”<sup>390</sup> “The *Washington Post* trumpeted Gallup’s

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384. *Id.*

385. *Id.*

386. *Id.*; cf. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 107 (1995) (maintaining that, prior to the 1936 election, the *Digest* survey “had never been wrong”).

387. CONVERSE, *supra* note 35, at 118.

388. *Id.* at 119; see also Robinson, *supra* note 375, at 53; Spingarn, *supra* note 366, at 101-02.

389. See Gallup, *Sampling Referendum*, *supra* note 23, at 138 (“Students of polls knew that, under circumstances such as those existing in 1936, the *Digest's* face would, after the election, turn to a brilliant red.”).

390. JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 78 (1995); see also CONVERSE, *supra* note 35, at 118.

challenge by renting a dirigible and flying it around Washington to advertise the launch of Gallup's column on October 20, 1935.<sup>391</sup> Moreover, in a column published in July of 1936,

Gallup threw down the gauntlet to the *Digest*, predicting that it would come to grief in November with a forecast of Landon by 56 percent. In a letter to the *New York Times*, the editor of the *Digest* spluttered at Gallup's cheek: never before had anyone had the effrontery to tell the *Digest* what their poll was going to show before it had even started polling.<sup>392</sup>

But Gallup was soon to be vindicated. The final *Digest* tally forecasted that Landon would take 57% of the vote, only 1% more than Gallup had predicted it would.<sup>393</sup>

How could Gallup predict the star-crossed *Digest* forecast with such "uncanny accuracy?" Because his Institute collected a portion of its data from the same sources consulted by the *Digest*: telephone directories and automobile registration lists.<sup>394</sup> And therein, Gallup explained, lay the *Digest's* difficulty.<sup>395</sup> For these were lists in which "the upper economic levels were much better represented than the lower levels."<sup>396</sup> About 40% of all homes had telephones; about 55% owned cars, and there was a substantial overlap between these two groups.<sup>397</sup> So the *Digest* sent ballots to "roughly the upper half or upper three-fifths, economically, of the voting population."<sup>398</sup> This sampling frame bias did not reckon with "the division of votes along income lines which began with Roosevelt's

391. FISHKIN, *supra* note 390, at 78.

392. CONVERSE, *supra* note 35, at 117 (footnote omitted); *see also* FISHKIN, *supra* note 390, at 78. "The editor did not really address Gallup's brief; he simply invoked the *Digest's* record." CONVERSE, *supra* note 35, at 117. The letter, in which editor Wilfred J. Funk contemptuously dismissed Gallup as "our fine statistical friend," is quoted in Rich, *supra* note 376, at 9.

393. CONVERSE, *supra* note 35, at 120. Gallup himself lost no opportunity to crow over his great victory. *See, e.g.*, GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 61-62, 82-83; AM. INST. OF PUBLIC OPINION, *supra* note 35, at 12; GALLUP & RAE, *supra* note 21, at 41-49.

394. CONVERSE, *supra* note 35, at 117-18.

395. *Id.*

396. *Id.* at 118.; *see also* Wroe Alderson, *Trends in Public Opinion Research*, in HOW TO CONDUCT CONSUMER AND OPINION RESEARCH: THE SAMPLING SURVEY IN OPERATION 291 (Albert B. Blankenship ed., 1946).

397. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 61.

398. *Id.*

administration in 1932, and the substantial increase in the voting population which took place between 1932 and 1936. These new voters came predominantly from the poorest levels—from income groups which favored Roosevelt.<sup>399</sup>

The second and related difficulty was response bias. The *Digest* had relied entirely on the use of mail ballots.<sup>400</sup> "Persons most likely to return mail ballots," Gallup explained, were "those in the higher income and educational levels, and, conversely, those least likely to return their ballots represent the lowest income and educational levels."<sup>401</sup> "Lower-income groups, the ones that the *Digest*

399. *Id.*; CONVERSE, *supra* note 35, at 120; Katz, *supra* note 35, at 70 ("[A]ny underestimation of lower-income groups is an underestimation of the Democratic vote. Studies of the popularity of New Deal measures . . . [have] shown that social legislation receives greater support as one goes down the income scale."). Gallup pointed out the following:

Before 1936, political sentiment in the upper income groups was sufficiently representative . . . to enable the *Digest* to get by. But in 1936 the lines of political cleavage were severely drawn between the haves and the have-nots, and the income bias in the *Digest* sample resulted in a disproportionate number of Landon votes.

Gallup, *Sampling Referendum*, *supra* note 23, at 139. Jean Converse observed that "[t]hrough the political realignment theory has been refined and enriched by recent historical scholarship, Gallup's theory of the *Digest's* failure has not been improved upon in any major way." CONVERSE, *supra* note 35, at 120; *see also* S. S. Wilks, *Representative Sampling and Poll Reliability*, 4 PUB. OPINION Q. 261, 266 (1940); Robinson, *supra* note 375, at 52-53; Link, *supra* note 375, at 43-44; KEY, POLITICS, *supra* note 21, at 642-43; Katz & Cantril, *supra* note 30, at 167-68 (1937). For a concise summary of the *Literary Digest* episode, see NICK MOON, OPINION POLLS: HISTORY, THEORY AND PRACTICE 10-11 (1999).

400. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 61-62.

401. *Id.* at 62; *see also* Wilks, *supra* note 399, at 266. Roper agreed that "older people answer mail ballots more readily than young people; that the prosperous and well-to-do return a great many more ballots than the poor people, and that the people with violent emotions . . . against whatever is going on, return mail ballots in greater percentage than do people of more moderate sentiments." Roper, *supra* note 366, at 332. The *Digest's* returns "were heavily weighted with the old who were less strongly pro-Roosevelt than the young, heavily weighted with the prosperous who were more strongly pro-Landon than the poor, and also weighted with a large return from violent critics of the administration." *Id.*; *see also* Alderson, *supra* note 396, at 291-92; Katz & Cantril, *supra* note 30, at 160; Robinson, *supra* note 375, at 54 (noting that the *Digest's* sample and its use of the mail ballot biased the response in favor of higher-income and older voters, both of whom tended to favor Landon); SMITH, *supra* note 30, at 402 ("Experience shows that less than a fifth of mailed ballots will be returned, and those returned will not constitute a typical cross-section of the population. People with intense opinions, people who ardently favor a change, people in the higher income groups are the ones who will return their ballots in the greatest proportion.").

was missing, were heavily for Roosevelt; to reach them, Gallup pointed out, it was necessary to go beyond the *Digest's* lists and beyond their mailings, to personal interviewing.<sup>402</sup>

### *Sampling Method*

By 1938, the *Literary Digest* had disappeared, and Gallup and Roper stood as the reigning titans of public opinion research.<sup>403</sup> The lessons were twofold. First, large sample size was no guarantee of accuracy. The *Digest* poll was based on 2,376,523 returned ballots, and yet it underpredicted Roosevelt's percentage of the popular vote by over 17%.<sup>404</sup> By contrast, Roper's national sample, which predicted Roosevelt's percentage of the popular vote within 1%, consisted of only 4500 cases.<sup>405</sup> As Gallup himself had written in *Scribner's* in the early fall of 1936, "in most fields of commercial research a sample of three or four thousand cases has been found to be entirely adequate for a national survey."<sup>406</sup>

The second, and related lesson, was equally clear. Gallup explained:

The crucial factor in the entire undertaking is the nature of the cross-section used in the survey. If the cross-section is properly chosen, a very small sample will accurately represent the larger body of public opinion from which it is taken, and great increase in

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402. CONVERSE, *supra* note 35, at 118; see also Wilks, *supra* note 399, at 266. Daniel Katz maintained that the even greater accuracy of Gallup's 1940 forecast "confirmed the 1936 results in the superiority of the interview technique over the mail ballot." Katz, *supra* note 35, at 76.

403. Jean Converse cautions:

[T]he *Digest* was not "hotted out of the business" simply because its 1936 forecast failed; it had been struggling a good three years to find a way to *stay in* the business. The size of the magazine was shrinking, and its circulation had fallen to half of its high-water mark of the 1920s. *Time* magazine, in particular, which had entered the field in 1923, had cut into the *Digest's* circulation and its advertising revenues. The great embarrassment of the misforecast obviously provided another weight on an already sinking magazine. The *Digest* was sold to new publishers in June of 1937; early the following year, a new version of the magazine went into bankruptcy.

CONVERSE, *supra* note 35, at 121 (footnotes omitted).

404. Link, *supra* note 375, at 39.

405. CONVERSE, *supra* note 35, at 120-21.

406. George Gallup, *Putting Public Opinion to Work*, SCRIBNER'S, Nov. 1936, at 36, 39 [hereinafter Gallup, *Putting Public Opinion to Work*].

the number of voters will bring no impressive increase in accuracy.<sup>407</sup>

As Roper reported of the development of survey technique in market research,

It was found by experiment that if one could determine what constituted a proper cross-section of the public and if one were shrewd enough to figure out what questions to ask the public, the people themselves were perfectly willing to tell why they were not buying the manufacturer's goods in the kind of quantities which might make him happy.<sup>408</sup>

For surveys involving "national questions," Gallup interviewed between 3,000 and 50,000 people.<sup>409</sup> If the cross-section were properly chosen, Gallup explained, "[t]he theoretical chances are 95 in 100 that the error will be held within a margin of 2.2 per cent when the number of cases reaches 2,000."<sup>410</sup> Error due solely to the size of the sample could be "reduced to a practical minimum by increasing the number of cases to 10,000. Then the probabilities are 997 in 1,000 that any error arising solely from the size of the sample will not be greater than 1.4 per cent."<sup>411</sup> Similarly, Roper reported that he and his colleagues had used "from 2,500 to 10,000 in a national survey and have become convinced that if the sample is properly selected and the interviewing skillfully done, a sample of 5,000 will give results accurate within 3 per cent on most subjects."<sup>412</sup>

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407. George Gallup & Claude Robinson, *American Institute of Public Opinion—Surveys, 1935-38*, 2 PUB. OPINION Q. 373 (1938); see also GALLUP, *DEMOCRACY*, *supra* note 21, at 9 (noting that "a few thousand voters correctly selected will faithfully reflect the views of an electorate of millions of voters"); AM. INST. OF PUBLIC OPINION, *supra* note 35, at 1, 9.

408. Roper, *supra* note 366, at 325-26.

409. Gallup & Robinson, *supra* note 407, at 373-74; Wilks, *supra* note 399, at 266; KEY, *POLITICS*, *supra* note 21, at 643.

410. GALLUP, *PUBLIC OPINION POLLS*, *supra* note 23, at 55.

411. *Id.* "Should the error in poll results be greater than this amount, then the amount of the error in excess of 1.4 per cent must normally be ascribed to a faulty cross section, to the time element, or to other sources of error." *Id.* As one statistician explained, with a truly representative sample of 3,000, there was a 99% chance that the poll was accurate within a margin of error of approximately plus or minus 2.5%; with a sample of 10,000, the margin would be reduced to plus or minus a little more than 1%. Wilks, *supra* note 399, at 266-67; see also GALLUP & RAE, *supra* note 21, at 68-72.

412. Roper, *supra* note 366, at 331. Roper explained that "[t]he size of the sample depends upon the nature of the subject and on the number of

The key, then, was the creation of a representative sample.<sup>413</sup> According to Gallup, "the most important factors which have to be considered are occupational groups, income levels, political preferences, age, education, racial and religious groups. And these major groups must be represented correctly by cities of various sizes, and by rural areas."<sup>414</sup> Thus, every Institute sample was "tested for its proportional accuracy with respect to six factors: (1) representation by states, (2) men and women, (3) urban-rural distribution, (4) age, (5) size of income, (6) political

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breakdowns desired," and that "most of us engaged in the work are only aiming for results which are within 3 per cent of absolute accuracy." *Id.*; see also *The Fortune Quarterly Survey: II*, FORTUNE, Oct. 1935, at 56, 58 (describing sample size, mechanics, and probable error of survey). By 1940, Roper was uniformly using a sample of 5,200 for his *Fortune* survey. Wilks, *supra* note 399, at 266 n.1. Gallup allowed himself a margin of error of 4 per cent. Albert B. Blankenship & Dean I. Manheimer, *Whither Public Opinion Polls?*, 12 J. PSYCHOL. 7, 9 (1941); see also AM. INST. OF PUBLIC OPINION, *supra* note 35, at 13.

413. GALLUP, DEMOCRACY, *supra* note 21, at 9; Wilks, *supra* note 399, at 262-63; AM. INST. OF PUBLIC OPINION, *supra* note 35, at 1-2.

414. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 26; GALLUP, DEMOCRACY, *supra* note 21, at 9 ("Elaborate precautions must be taken to secure the views of members of all political parties—of rich and poor, old and young, of men and women, farmers and city dwellers, persons of all religious faiths—in short, voters of all types living in every State in the land. And all must be included in the correct proportion."). In 1936, when Gallup was still conducting some of his survey by mail ballot, he described his sampling method in an article for *Market Research*:

If 10% of the voting population lives in New York State, then 10% of our returns must come from that area. Then, as people's finances color their reactions, if 15% of New York State's voters are on relief, then 15% of the New York returns must come from the relief rolls. Next, the political bias: If 60% of New York State voted Democratic in 1932, then 60% of the return ballots must show that the sender had voted Democratic in 1932. And finally, occupational, if 30% of New York State's voting population works on farms, then 30% of the State's returns must come from farmers. Each of these percentages must be maintained. If returns are too low in respect to any of the listed requirements, more ballots must be sent out until the correct percentage is reached. To back up and supplement the mailed ballots, especially to the low income groups who do not respond readily, personal interviews are used. The same method is applied to each state.

George Gallup, *How America Was Made to Speak*, 4 MARKET RES. 6, 6 (1936). A similar description of the early procedure appears in Gallup, *Putting Public Opinion to Work*, *supra* note 406, at 38; see also KEY, POLITICS, *supra* note 21, at 643-44.



partisanship.”<sup>415</sup> “On occasion,” Gallup recognized, it might be important to consider “other factors” as well.<sup>416</sup>

For example, on some issues which involve labor unions it may be important to test the sample to see that it contains the right number of union members. Or, in the case of an issue which involves the farm population, it would be equally important to test the sample to see that it contains the right number of farm renters and owners.<sup>417</sup>

But, “[t]ypically, when a cross section correctly represents the major occupational and income groups, other factors will normally take care of themselves and the cross section will be accurate on virtually every other score.”<sup>418</sup> Gallup

415. Gallup & Robinson, *supra* note 407, at 374; see also Robinson, *supra* note 375, at 47. Gallup listed these “six statistical keys or ‘controls’ used to assure a representative cross-section.” AM. INST. OF PUBLIC OPINION, *supra* note 35, at 9. These included the proper proportion of

(1) voters from each state, (2) men and women, (3) farm voters and voters in towns of 2,500 population or less, 2,500 to 10,000, 10,000 to 100,000, 100,000 to 500,000, and 500,000 and over, (4) voters of all age groups, (5) voters of above average, average and below average incomes, as well as persons on relief, and (6) Democrats, Republicans, and members of other political parties.

*Id.*; see also GALLUP & RAE, *supra* note 21, at 60-66, 72-80; BLANKENSHIP, *supra* note 23, at 102. The actual number of people in each of these groups was obtained by consulting census reports, election returns, and government and private statistics on incomes. AM. INST. OF PUBLIC OPINION, *supra* note 35, at 10; SMITH, *supra* note 30, at 402. James Wechsler noted that:

[I]t is recognized that a valid sampling must reach—in person—an accurate ratio (to the whole nation) of voters from each state, from rural communities, towns, and cities of varying size, of men and women, of different age groups and of every economic level, and of varying political allegiances. To get these proportions, election returns, census reports, and similar documents are constantly sifted. When an interviewer sets out he is not only given his printed sheets listing about fifteen questions, but he is told how many people in each category—“wealthy,” “average-plus,” “average,” “poor-plus,” “poor,” “on relief”—must be accosted, on street corners or in their own homes.

Wechsler, *supra* note 42, at 66; see also GALLUP & RAE, *supra* note 21, at 110-11.

416. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 26.

417. *Id.*

418. *Id.* Harwood Childs was more skeptical about Gallup’s categories:

The obvious difficulty with this method is that we have no proof that the factors used in selecting the sample are the most important in the opinion-forming process. Nor do we know the *relative* influence of the factors in this process. Instead of assuming that all persons in the same sex, age, income, and residence categories think alike it would seem more reasonable to assume that the relative influence of these factors depends upon the type of question at issue. Evidence so far

maintained that “[a] very small sample of this sort gives a better result than even a tremendous sample in which there is disproportion under any of the six heads.”<sup>419</sup>

Roper also employed six statistical controls.<sup>420</sup> With these in place, he and Gallup were then able to employ

accumulated indicates that persons in particular categories tend to think alike on certain types of questions, but not on others. . . .

It is improbable that the factors which influence opinion in one instance are the same in all. . . . Much is made of the point that the samples used are representative, true cross sections. The question arises, however, of what are they representative? Even assuming that the samples are truly representative of the population in terms of age, race, religion, income, residence, etc., it does not necessarily follow that they are representative of the opinions of the people of the country as a whole unless it is established that only these factors are significant in the opinion-forming process.

CHILDS, *supra* note 26, at 54-55. Childs did not propose a solution to the problem he identified.

419. Gallup & Robinson, *supra* note 407, at 373-74. S.S. Wilks described the process with greater specificity:

[W]hat is done is to select several hundred fairly small sampling areas (e.g., cities, counties, etc.) over the United States which may be regarded as a representative sampling by areas of major geographical districts, and allocate the sampling to these areas in such a way that the portion of the sample drawn from each area is representative with respect to age, sex, color, and economic status within that area. The number of individuals allocated to the areas are chosen in such a way that the sample is representative with respect to city size and rural population in each major district; the numbers allocated to the major districts being proportional to the population sizes in the districts. Extensive use is made of U.S. census and similar data in order to obtain the proper proportions of individuals to be included in these various population subgroups.

Wilks, *supra* note 399, at 263.

420. Roper, *supra* note 366, at 326-27. Roper maintained that:

Our purpose is to set up an America in microcosm. We want to have each constituent element of the entire population represented in its proper proportion in the sample.

. . . [O]ne of the first considerations has to do with geography. Each census area, each economic unit of the country, must be represented in its proper proportions. If 3 per cent of our total population live in the mountain states, then 3 per cent of our sample must come from the mountain states. . . . The second important consideration in the selection of the sample is the size of place. If 10.3 per cent of our people live in cities from 25,000 to 100,000, then we must take 10.3 per cent of our sample from cities of that size. . . . The third important control is sex. We need both men and women represented in their proper proportions in the sample because there are certain subjects on which they think quite differently. . . . The fourth important control is the age of the people constituting our sample. . . . The fifth important control is

various "check-data" to insure the representativeness of their samples.<sup>421</sup>

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the occupation of the people constituting the sample. If lawyers constitute less than 1 per cent of the total population of the country, we must be careful that lawyers do not run to 10 per cent in our sample just because they are easy to interview and often (but not always) have interesting ideas. Sixth and by all odds the most important single control is that of economic levels . . . [based on] a combination of factors which take into account the geographical variations in average income as well as the size of place variations in average income.

*Id.*; see also *The Fortune Quarterly Survey: II*, FORTUNE, Oct. 1935, at 58. For a discussion of some of the difficulties involved in classifying by economic status, see *The Fortune Quarterly Survey: II*, FORTUNE, Oct. 1935, at 58 and Wilks, *supra* note 399, at 263-64. For Gallup's method, see BLANKENSHIP, *supra* note 23, at 104.

421. Roper, *supra* note 366, at 327-28.

With these six controls as the yardstick by which we determine our sample, we find we are able then to check on the accuracy of the sample by several devices. If the people in our sample do not report that they own their own homes in approximately the same ratio as the United States census figures show Americans generally own their homes, or if they don't have the right percentage of telephones or electricity meters, or if the percentage of 1936 Ford cars is high or low as compared to national registration figures, we know [sic] that our sample is open to the charge of being unrepresentative to that extent. If, however, with a fair knowledge of economic and geographical variations we have carefully considered all of the yardsticks I have mentioned and if we then find, following the field work, that the sample measures up to par on these various items of checking data, I think we are warranted in feeling sure that we have in fact selected for interviewing an America in microcosm.

*Id.* Gallup assured himself that he was working with a proper cross-section by requiring the interviewer to record on every ballot a number of facts about the interviewee:

[H]ow he voted in the last election, his age, his occupation, where he lives, his general income level, whether he owns an automobile, whether he has a telephone—and, when necessary, such information as his education, his religion, his racial ancestry, membership in labor or other organizations, etc. By checking the returned ballots from any given area or from the nation as a whole, the statistical staff can readily learn whether or not these ballots represent a true cross section. By the use of automatic tabulating machines it is possible to find out in a few minutes whether any given sample contains the proper number of farmers, whether it includes the right proportion of people in any age group, whether it embraces the right proportion of persons in any occupational or political group. By constantly checking the returned ballots against the assigned cross section, it is possible to make certain that every assignment which goes out to interviewers produces a perfect, or nearly perfect, cross section.

On social issues, Gallup polled samples drawn from a cross section of the adult population. "However," he observed,

[S]uch a cross section of the whole population would not be representative of the *voting* population of the United States since many adults do not and cannot vote. For example, in a number of southern states, many poor people do not vote because of the poll

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GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 28-29. An AIPO interviewer was ordinarily instructed to interview a certain number of people, "normally between 10 and 50." *Id.* at 49.

Of this number, he is asked to interview a certain number in each major group in his community. Thus, if he is assigned to talk to six people on relief, he can choose *any* six people on relief. The same is true, of course, of any other group. Each assignment tells him how many men to interview, how many women, how many persons in each income level. Toward the close of each interview, the interviewer obtains and records many facts about the person interviewed, including among them, his occupation, general income level, whether he is white or colored, whether he is single, his age, whether he has a telephone, an automobile, how he voted in previous elections. This information is all-important in seeing that the sample from each area meets all requirements of the cross section—in other words, that it is an accurate "miniature" of the population in that area.

*Id.* S.S. Wilks agreed:

[T]he device of using "check-data" related to social and economic status, or even political status, has been found to be satisfactory for determining whether or not a given set of proportions to be assigned to the economic levels can be regarded as a reasonably good approximation to the true proportions in the population. The "check data" [were] obtained from each individual in the sample to determine how well the distribution of a certain characteristic in the sample agrees with the corresponding distribution in the population. For example, each individual may be asked if he belongs to a family which owns an automobile, or a radio, or subscribes to a telephone, or he may be asked how he voted in the last presidential election. The percentages of people owning automobiles, radios, or subscribing to telephones, or voting for Roosevelt in 1936 are known with considerable accuracy and can be compared to the corresponding percentages obtained in the samples to see how well the sample is balanced with respect to these characteristics in the population. A national sample which has been made representative with respect to geographical district, city size and the rural group, age, sex, color and economic status is usually found to agree fairly closely with "check data." If it is found that the proportion of automobile owners, radio owners, etc., is too high in a preliminary sample, this is taken as evidence that too many individuals in the higher economic levels have been included, and steps are taken to reallocate the sampling so as to include more individuals in lower economic levels and fewer in the higher levels.

Wilks, *supra* note 399, at 264; see also GALLUP & RAE, *supra* note 21, at 111, 116.

tax. In most southern states the great majority of Negroes are in effect disfranchised. Persons in the very poorest level in many northern states are less likely to vote than persons of higher income. Therefore, on questions involving strictly political matters, the voting population must constitute the basis of the cross section.<sup>422</sup>

Accordingly, people below the voting age were typically excluded from Gallup's sample.<sup>423</sup> Roper reported that he regularly included southern blacks in the samples for the *Fortune* survey, though he confirmed that "on questions where we are trying to estimate voting strength the Southern Negroes are disregarded."<sup>424</sup>

In December of 1938, Jerome Spingarn wrote in *Harper's* that "[b]oth George Gallup's American Institute of Public Opinion poll and the *Fortune* survey are conducted in accordance with fairly well-settled rules of statistics, familiar in outline to all who are versed in that science. . . . [B]oth are conducted by persons of recognized scholarship."<sup>425</sup> By the end of the 1940s, a lively debate over the comparative merits of quota, or stratified sampling, and random, or probability sampling, would break out in scholarly literature.<sup>426</sup> But during the late 1930s, quota

422. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 28; see also GALLUP & RAE, *supra* note 21, at 65-68.

423. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 31. "On certain special issues," he wrote, "the views of younger people are interesting and valuable. On political questions, since persons under the age of twenty-one are unable to vote, the inclusion of these younger people is pointless." *Id.*; see also KEY, POLITICS, *supra* note 21, at 644.

424. Elmo Roper, *Classifying Respondents by Economic Status*, 4 PUB. OPINION Q. 270, 272 (1940). Gallup noted:

The polls undertaken by *Fortune* magazine under the direction of Elmo Roper ordinarily represent the views of the entire adult population. Such a sample includes a full representation of Negroes of the South and nonvoting whites. Polls of the American Institute of Public Opinion usually are based upon samples of the voting population of the United States. Except on questions involving social issues, nonvoting groups in the South and elsewhere are excluded.

GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 101. Cantril and Katz maintained that *Fortune's* use of a sample representing a cross-section of the American adult population rather than of the voting population probably inadvertently helped in its more accurate prediction of the outcome of the 1936 election, because it "probably contained a more accurate representation of the proportion of voters in the various economic classes" than did Gallup's cross-section. Katz & Cantril, *supra* note 30, at 171.

425. Spingarn, *supra* note 366, at 97.

426. For an extensive discussion of the comparative merits of stratified or

sampling was state of the art. As Jean Converse reports, “[s]ocial scientists were not, on the whole, very critical of the quota sample itself until the mid- and late 1940s. Those who were involved in survey work themselves accepted the practicality of the quota sample.”<sup>427</sup>

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“quota” sampling and random or “probability” sampling in the wake of the 1948 presidential election, see THE POLLS AND PUBLIC OPINION: THE IOWA CONFERENCE ON ATTITUDE AND OPINION RESEARCH 210 (Norman C. Meier & Harold W. Saunders, eds. 1949) (comments of Samuel A. Stouffer: “I believe that probability sampling is the only method we know now by which we are going to be able to know how much error is involved, and how much is attributable to the selection of respondents by interviewers”); *id.* at 231 (comments of Thomas McCormick, predicting that in the future, opinion pollsters would rely more on “purely mechanical or random methods and will avoid to a somewhat greater extent everything depending upon personal judgment”); *id.* at 233 (comments of Morris H. Hansen, predicting greater use of probability sampling); *id.* at 245-46 (comments of Norman C. Meier, presenting studies favoring quota sampling); *id.* at 257 (comments of J.E. Bachelder, discussing the merits of each, and maintaining that “we don’t know yet which is best”); *id.* at 265 (comments of Morris H. Hansen: “there are many situations in which one would normally expect, at least I would normally expect, a quota or purposefully selected sample to give you results superior to a random sample, depending on your ability and techniques in drawing that sample”); see also BLANKENSHIP, *supra* note 23, at 22 (expressing a preference for the quota sample in studies employing the personal interview technique); Alderson, *supra* note 396, at 306 (“The last word has not yet been said on the relative merits of these two systems of sampling control.”). For an early critique of the use of “sample blocks,” “sample townships,” and “sample counties,” favoring instead selection of a random sample, see Frederick F. Stephan, *Practical Problems in Sampling Procedure*, 1 AM. SOC. REV. 569, 573 (1936). For Gallup’s discussion of area sampling, see GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 64-65. Nick Moon reports that this debate in the research community over the comparative merits of random and quota sampling persists to this day. See MOON, *supra* note 399, at 40. Moon himself concludes that random sampling is less susceptible to bias than is quota sampling, but that “if one looks at quota surveys over the years they tend to come up with answers well within the levels of sampling error one would expect for random samples of comparable size.” *Id.* For Moon’s accessible presentation of sampling theory, see *id.* at 24-40.

427. CONVERSE, *supra* note 35, at 126; see also MELVIN G. HOLLI, THE WIZARD OF WASHINGTON: EMIL HURJA, FRANKLIN ROOSEVELT, AND THE BIRTH OF PUBLIC OPINION POLLING 69, 75 (2002); Frederick Mosteller, *Sampling and Breakdowns: Technical Notes*, in GAUGING PUBLIC OPINION app. at 288 (1944) (“[T]he ordinary polling agency does not have access to a list of the complete population it is sampling, nor is it economically feasible for such an agency to enumerate its population. Thus random sampling of the universe cannot be seriously considered in nationwide polls. . . .”); Wilks, *supra* note 399, at 268 (“Representative sampling as practiced in scientific polling and in many large-scale surveys is a practical device for overcoming the difficulties which arise in trying to get a purely random sample from the given population.”); J. Stevens Stock, *Some General Principles of Sampling*, in GAUGING PUBLIC OPINION, *supra*, at 142 (pointing out that stratified random sample of the sort used by

### *Pretesting and Wording*

Both Gallup and Roper pretested their questions in order "to avoid phrasing which will be unintelligible to the public[,] . . . to avoid issues unknown to the man on the street," and to eliminate any possible bias in the wording of the inquiry.<sup>428</sup> Gallup found that pre-testing questions served "to eliminate questions on which a high proportion of voters have not enough information to have an opinion," and "to eliminate ambiguities and to simplify wordings."<sup>429</sup> "Questions are presented as many times as is necessary to make them lucid and free from bias. . . . [A] question may be reworded five or six times before it is actually submitted in its final form to the national sample."<sup>430</sup> Gallup reported that "[i]n some instances as many as twenty-five to fifty different wordings have been tried out."<sup>431</sup> Roper reported a similar process of question-framing.<sup>432</sup>

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"the vast majority of opinion research agencies" is "relatively inexpensive and accurate enough for most public opinion research"). Gallup embraced a form of random sampling in the mid-1940s, only to return to quota sampling in the 1970s. See Alderson, *supra* note 396, at 295; MOON, *supra* note 399, at 46-47. His organization was still using quota sampling in the 1990s. See Alderson, *supra* note 396, at 295; MOON, *supra* note 399, at 46-47.

428. See Katz, *supra* note 48, at 279; see also Albert B. Blankenship, *These Opinion Polls Again!*, 5 SOCIOLOGY 89, 101 (1942) ("According to available evidence, the AIPO questions are clearly stated.")

429. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 40.

430. *Id.*

431. *Id.*

432. See Roper, *supra* note 366, at 328.

One must, of course, make a start by writing a question which seems to simply and clearly convey our meaning and in such terms as avoid in so far as possible any leading words or phrases, but in the final analysis, the actual questionnaire is written in the field by a group of intelligent and skilled pre-testers who not only understand thoroughly the meaning back of the questionnaire as a whole, but have a certain acquired skill in finding words which convey the same impression to an A economic level doctor as they do to a D economic level housewife of foreign extraction. Most questionnaires we work on require the pre-testing services of three or four of these skilled people for three or four days. One questionnaire we had . . . was rewritten in its entirety fifteen times, and one question in this questionnaire was written twenty times before we felt it was ready to be printed and sent to the field.

*Id.* The October 1935 *Fortune* survey emphasized the following:

[I]n the questions themselves lies the greatest possibility for distortion. Accordingly, before final phrasing, *Fortune's* questions are passed through a series of trials to determine their fairness. Many questions conceived in innocence, many hundreds of interviews made in good

Gallup insisted that “[e]very effort is made, before a question actually appears on the ballot, to eliminate any possible bias. The question must first run the gauntlet of a half dozen persons, all with different points of view, and then must actually meet all field tests.”<sup>433</sup> If there were still doubt about which of two phrasings of a question to use, the “split-ballot” technique was employed.<sup>434</sup> That technique was one in which

[S]eparate ballots are prepared with different phraseology for the same fundamental question. One phraseology is used for one set of voters and another for an entirely different but analogous set of voters. If the results of these two special tests are appreciably different, that shows something wrong with the phraseology, and a more neutral wording is discovered before the final report is issued.<sup>435</sup>

Interviewers in the field conducted further tests for bias. According to Gallup,

These interviewers are requested to report any objections which respondents raise in regard either to the form or to the content of the question. If these interviewers find any question faulty, they report this fact, and either a new attempt is made to reword the question, or it is discarded. Normally, then, every question on which results are reported in the press by the American Institute of Public Opinion has met four tests. . . . First, it has been carefully worded and reworded by a staff experienced in the technique of simple and unbiased wording of questions. Second, it has successfully met all requirements in actual test interviews before it appears on the ballot. Third, it has met any split-ballot test which may have been indicated in the preballot testing. Fourth, it has met the final test in the field with the public as reported by scores of interviewers.<sup>436</sup>

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faith, were discarded as misleading before the queries . . . were finally approved. For *Fortune*, seeking only the facts, wants no loaded questions.

*The Fortune Quarterly Survey: II*, FORTUNE, Oct. 1935, at 56, 58 (alteration in original).

433. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 40.

434. *Id.* at 40-41.

435. Gallup & Robinson, *supra* note 407, at 374; *see also* AM. INST. OF PUBLIC OPINION, *supra* note 35, at 10-11; Spingarn, *supra* note 366, at 99.

436. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 41; *see also* GALLUP & RAE, *supra* note 21, at 92-107.



Notwithstanding these efforts to avoid bias in the wording of questions, Gallup maintained that in general "it has been our experience that a question may be worded in different ways and bring the same result, provided the basic meaning is not changed."<sup>437</sup>

If two questions convey the same meaning—and both are expressed in a strictly neutral manner—their variations in wording produce, normally, no significant difference in results. When opinions are lightly held, when a question deals with a problem on which the public has little information and little interest, or where any condition exists that makes people particularly suggestible, then the way a question is worded is likely to influence the answers. When issues are widely discussed and are highly controversial, when the public has taken definite sides, a wide variety of wording can be used and virtually the same results will be obtained from all of them.<sup>438</sup>

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437. Gallup & Robinson, *supra* note 407, at 374; see also AM. INST. OF PUBLIC OPINION, *supra* note 35, at 11. Gallup reported:

[T]he Institute has discovered in several hundred split-ballot experiments that the supposed influence of stereotypes and prestige-bearing names is rather less than has commonly been supposed, when opinion is well-formed. The use of the name "President Roosevelt" has been found to have either no effect at all, or only a very small effect one way or another upon the results in such cases. Nor has the phrase "German government" in a question produced any appreciable difference in results from the name "Hitler." As evidence of the firmness with which the public holds its opinions on certain subjects, the Institute has even found in its split-ballot experimentation that in some cases where opinion is pretty definitely crystallized the use of arguments prefixed to the question, using an unfavorable argument on one form and a favorable argument on the second, has brought no variation in results.

Gallup, *Question Wording*, *supra* note 40, at 264, 265-66.

438. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 42; Link, *supra* note 375, at 43 (citing numerous experiments conducted on the impact of the form of the question on response, and concluding that even when questions were deliberately worded to produce different results, "the differences were often of a minor nature. If a question was worded simply enough so that it could be understood, and if it dealt with a problem on which people were well informed, the exact wording of the question seemed to be of secondary importance"); Donald Rugg & Hadley Cantril, *The Wording of Questions*, in GAUGING PUBLIC OPINION, *supra* note 427, at 48-49. Rugg and Cantril concluded:

The extent to which the wording of questions affects the answers obtained depends almost entirely on the degree to which the respondent's mental context is solidly structured. Where people have standards of judgment resulting in stable frames of reference, the same answer is likely to be obtained irrespective of the way questions are

*Interview Process*

Critics of the polls identified the interviewing process as the weak link in contemporary survey technique. By 1938, Gallup was relying on "more than 600 field reporters situated in all parts of the country."<sup>439</sup> While some of his early sampling had mixed mail ballots and personal interviews, after the 1936 election, he discontinued his use of the mail ballot.<sup>440</sup> Roper's surveys relied from the beginning on door-to-door interviews exclusively.<sup>441</sup> Even so, Jean Converse observes, early survey research's field procedures were "undeniably rough-hewn."<sup>442</sup> Harold Gosnell worried that Gallup's employment of college graduates as interviewers showed that he was "not fully aware of the dangers of this procedure in lower income group distortion. Interviewees in the lowest income brackets are likely to conceal or misrepresent their views when interrogated by persons of superior economic status, especially if those views have been negatively propagandized."<sup>443</sup>

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asked. On the other hand, where people lack reliable standards of judgment and consistent frames of reference, they are highly suggestible to the implications of phrases, statements, innuendoes or symbols of any kind that may serve as clues to help them make up their minds.

*Id.*

439. Gallup & Robinson, *supra* note 407, at 373.

440. GALLUP & RAE, *supra* note 21, at 77-78.

441. *The Fortune Quarterly Survey: II*, FORTUNE, Oct. 1935, at 56, 58.

442. CONVERSE, *supra* note 35, at 126.

443. Harold F. Gosnell, *Book Reviews*, 5 PUB. OPINION Q. 341, 342 (1941) (reviewing GEORGE GALLUP & SAUL FORBES RAE, *THE PULSE OF DEMOCRACY* (1940)). For more extensive treatment of this and related themes, see Harold F. Gosnell & Sebastian de Grazia, *A Critique of Polling Methods*, 6 PUB. OPINION Q. 378 (1942); Daniel Katz, *Do Interviewers Bias Poll Results?*, 6 PUB. OPINION Q. 248, 267 (1942) (concluding that Gallup's underestimation of the Democratic vote in 1936 and 1940 may have been attributable to "[m]iddle-class or white-collar interviewers . . . [who] find a greater incidence of conservative attitudes among lower income groups than do interviewers recruited from the working class"); Blankenship, *supra* note 428, at 92 ("[T]he sample of respondents is likely to contain too high a proportion of the upper socio-economic respondents, since most interviewers (who tend to interview persons of their own level) come from the upper middle group. Distance between status of the interviewer and his respondent may also result in evasive or no answers."); Donald Rugg, *How Representative Are "Representative Samples"?*, in GAUGING PUBLIC OPINION, *supra* note 427, at 147-49 (pointing out that "the tendency on the part of interviewers to select, within each economic category, the more articulate" respondents produces a bias in favor of the better-educated members of that

category; similarly observing that "the reluctance of the typical middle-class interviewer to approach people in the lowest economic brackets" and "the fact that, when he does contact these people, it is relatively difficult for him to secure rapport with them" produces a "clearly evident" bias, though "not of unduly large proportions," in favor of "groups labeled professional, and proprietors, managers, and officials, and the accompanying under-representation of the worker groups"); KEY, *supra* note 42, at 566-67; William Turnbull, *Secret vs. Nonsecret Ballots*, in GAUGING PUBLIC OPINION, *supra* note 427, at 77 ("When strangers ask them for their opinions, there is a possibility that respondents may be suspicious, embarrassed, nervous, inarticulate, irritated, hostile, or patronizing. . . . [T]he greater the difference between the status of the interviewer and the respondent, the more likely he is not to report his true opinions."); Katz & Cantril, *supra* note 30, at 168-69 ("The weighted polls missed the size of the labor vote for Roosevelt because of the unreliability of the answers of people in the lower income groups. The worker, who fears the loss of his job if he votes for the 'wrong' man, is likely to suspect an interviewer in these days of stool-pigeons, strike-breakers, and company spies. He may, therefore, either refuse to answer or give the 'right' answer, although his mind may be clear regarding his intended conduct at the election booth. It is a well-known fact that during the [1936] campaign, many workers displayed Landon signs on their automobiles and in their houses just to play safe with the boss when they had no intention whatever of voting Republican."); Katz, *supra* note 35, at 69-70 ("Both theory and fact in social psychology assert that ideally the interviewer should have membership-character in the group he interviews and yet be personally unknown to the group. The polls so far have not been able to meet this criterion of membership-character in a systematic way. Their interviewers succeed remarkably well, in spite of this fact, because they are mostly middle-income people who can adapt to other groups. . . . It is still true, however, that the poll interviewers as representatives of an average-plus income group are better dressed, more academic in speech, and more bourgeois in outlook than the majority of people they interview. This can distort their interviewing. . . . [I]n some working-class quarters a well-dressed stranger who comes snooping around to find out how people are going to vote may not get frank answers from all respondents. Union members may sometimes fear company spies and may be suspicious of prying interviewers."). Katz leveled this criticism at both Gallup and Roper. Katz, *supra* note 35, at 76. On the other hand, in 1940, Gallup and Archibald Crossley conducted an experiment to determine whether the "undecided" response to a presidential election poll would be reduced were they to allow respondents to reply on a secret ballot sealed and deposited in a ballot box carried by the interviewer rather than by a direct oral response to the interviewer. Katz, *supra* note 35, at 72. They found that the secret ballot technique

did reduce the size of the no-opinion vote but its results were equivocal. In some sections of the country the American Institute found a higher Roosevelt vote, in others a higher vote for Willkie. In the South the Willkie vote was increased; in the Middle West and in the Far West it made little difference; in New England and the Northeast generally Roosevelt gained. The Crossley experiment made in two key cities favored Willkie. The lower-income groups were slightly more favorable to him on the secret ballot.

*Id.*

Frederick Stephan detailed various ways in which "groups of families whose behavior and characteristics differ widely from other groups" might be "inaccessible" to pollsters: geographical remoteness; "the dog in the yard, the locked door, pretended inability to speak English . . . feigned ignorance[, and] . . . a childless couple who live in an apartment where no one knows them, working during the day, eating their meals out, and spending only a few hours at home to sleep."<sup>444</sup> Because these social phenomena were not necessarily distributed at random geographically, they introduced "serious practical problems of locating the clusters, transporting investigators to each district, supervising a scattered field force, and securing information from certain types of informants."<sup>445</sup> In 1938, Elmo Roper "indicted 'careless fieldwork' as one of the three major weaknesses of market research."<sup>446</sup> The difficulties were many. "The solitary work of interviewers, their minimal training, the skeletal supervisory staffs, the supervision by mail, the short factual questionnaire—most of these factors," in Roper's view, "were likely to increase the chances of error and of possible deception."<sup>447</sup> As Jean Converse reports, the "best market researchers continued to worry about this problem and to take steps to try to control it—and opinion researchers would too."<sup>448</sup>

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444. Frederick F. Stephan, *Practical Problems in Sampling Procedure*, 1 AM. SOC. REV. 569, 572 (1936).

445. *Id.*; see also BLANKENSHIP, *supra* note 23, at 100 (discussing the difficulties in obtaining a truly random sample in certain areas); Ernest R. Hilgard & Stanley L. Payne, *Those Not at Home: Riddle for Pollsters*, 8 PUB. OPINION Q. 254 (1944); cf. John Harding, *Refusals as a Source of Bias, in GAUGING PUBLIC OPINION*, *supra* note 427, at 123 (concluding that "refusals do not greatly affect the extent to which the sample secured by poll interviewers is a representative cross section of the population"). James Wechsler reported that, "[a]lthough probably less than one in twenty of those interviewed have ever heard of the Gallup Institute, only a handful won't talk. At first they suspect that the interviewer is a salesman; they are occasionally reluctant to disclose their political affiliations, especially if they are on relief." Wechsler, *supra* note 42, at 66; see also GALLUP & RAE, *supra* note 21, at 228-35; Spingarn, *supra* note 366, at 99 ("People are very willing to express their views, and as the surveys become better known they feel a certain pride in being represented in the nation's cross section.").

446. CONVERSE, *supra* note 35, at 98.

447. *Id.*

448. *Id.*; see also BLANKENSHIP, *supra* note 23, at 141 (expressing concern over the possibilities for "bias, poor work, and dishonesty" in field work).

Gallup was particularly concerned with issues of quality and bias in field work. He reported that he selected the interviewers for a given community "on the recommendation of educators, editors, and others in responsible positions who know them personally and believe they meet the necessary requirements."<sup>449</sup> Roper reported that his interviewers were "personally selected in their home towns by the personal interview method, either by myself or by a responsible member" of his organization.<sup>450</sup>

Concerns about potential bias prompted use of a battery of controls. With such a large staff of interviewers, wrote one observer, "Gallup can scarcely guarantee the integrity of each investigator. He believes none the less in maintaining a political balance in his field force: 35 per cent are Democrats, 37 per cent Republicans, 5 per cent belong to 'other parties,' and 23 per cent profess no allegiance."<sup>451</sup>

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449. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 45. His ideal interviewer had to be "conscientious, alert, open-minded" and "well acquainted with the community in which he interviews." *Id.* He also should "enjoy meeting and talking with people" and be able to secure the collaboration of his interviewees. *Id.* He must "take an active and personal interest in the work he is doing [and] . . . carry out his assignment exactly as planned by the poll taker and preserve the attitude of complete objectivity." *Id.*

450. Roper, *supra* note 366, at 329. The interviewer was then "trained in his home community," and in 1938 Roper "adopted the policy of bringing in eight to a dozen of these interviewers on any commercial job" his organization happened to be doing within five hundred miles of their homes, "thus giving them the further opportunity to be trained for several weeks in the field." *Id.* Roper insisted that his interviewers be honest, "have personalities sufficiently attractive to let them sell respondents on the idea of giving an interview," and that they "realize the importance of letting no inflections creep into their voice which might influence answers." *Id.* They must be genuinely interested in the work, and realize "the extreme importance of an objective and impartial viewpoint." *Id.* at 330. Their "conscientiousness and industry" were "constantly subject to check both directly and by report cards sent to the persons questioned." *The Fortune Quarterly Survey: II*, FORTUNE, Oct. 1935, at 56, 58. Roper counted among his interviewers "one of Hollywood's foremost character actors," who used interviews as an opportunity to study character types; "the vice-president of a nationally-known manufacturing concern," who spent his weekends interviewing to indulge his interest in sociology; and "a woman who is a practicing lawyer." *Id.*; see also Katz & Cantril, *supra* note 30, at 161. Gallup described his corps of interviewers as 68% male and 32% female; the median age for both was 30; 90% were "college trained"; and 48% were "professional men and women—teachers, high-school principals, lawyers, and ministers, as well as a large body of students." GALLUP & RAE, *supra* note 21, at 109. On the use of a follow-up technique for checking interviewer honesty, see BLANKENSHIP, *supra* note 23, at 149, 152-53.

451. Wechsler, *supra* note 42, at 66. By contrast, Roper employed fewer than

Moreover, Gallup's interviewers were not permitted to discuss the questions on the ballot at length with their interviewees, for fear that an interviewer's bias might be revealed and might influence the answer given to the question.<sup>452</sup> Instead, interviewers were "required to read questions from a printed ballot exactly as they were printed, without discussion or explanation."<sup>453</sup> In addition, the work of interviewers was "compared with the work of any other interviewers, given similar assignments in similar or in neighboring communities. Any interviewer whose results differ[ed] widely from those of interviewers working in similar communities," Gallup insisted, "would obviously be suspect."<sup>454</sup> "[I]f interviewers with Democratic leanings find too high a proportion of persons who favor Democratic candidates, or interviewers with Republican leanings find too high a ratio favoring Republican candidates, their results are also suspect."<sup>455</sup>

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75 interviewers, each of whom he knew intimately. *Id.*; Spingarn, *supra* note 366, at 100; see also Katz, *supra* note 35, at 69 ("The American Institute constantly checks on the accuracy of the individual interviewer and in addition enlists both Republican and Democratic interviewers in proportion roughly comparable to the strength of the parties on election day. On the whole their system is very effective. . . . [S]tatistical comparison of the errors of interviewers by state show no systematic error.").

452. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 47.

453. *Id.*

454. *Id.*

455. *Id.* at 48. Gallup took comparable care in selecting his central office staff: "At the Gallup Institute [questions] are drafted by Gallup and four aides whose politics range from left Democrat to right Republican." Wechsler, *supra* note 42, at 65. In a profile in *The Saturday Evening Post*, Williston Rich insisted that Gallup wasn't "to be pegged politically. He has voted for only two presidential candidates, [Progressive Republican Robert] LaFollette [in 1924] and [Democratic nominee Al] Smith [in 1928], which would seem to put him left of center, but both sides, all sides, irritate him." Rich, *supra* note 376, at 71. James Wechsler similarly reported that "Roper voted for [Socialist] Norman Thomas in 1932 and for Roosevelt in 1936. Gallup is farther to the right but voices a faith in the 'common man' that would not recommend him to the Union League Club." Wechsler, *supra* note 42, at 65. In 1936, the year of his great triumph in dethroning the *Literary Digest*, Gallup's personal preference was for Landon over Roosevelt, but he obviously did not allow this preference to color his prediction. Spingarn, *supra* note 366, at 102. Gallup explained the need for and incentives to scrupulous honesty in all phases of his polling operation:

What guarantees have we that polling organizations are honest and impartial? In my humble judgment we have a pretty realistic guarantee. The American Institute of Public Opinion . . . derives all its income from the sixty-odd leading newspapers of the country which subscribe to its service. Editorially, these papers are of all shades of

Gallup recognized that “[n]o polling organization can afford to trust blindly all the hundreds of interviewers it uses, no matter how carefully they have been selected.”<sup>456</sup> Accordingly, “[i]n the case of each interviewer, as soon as an assignment is returned, the ballots are examined and rated for the care with which all comments have been recorded, answers filled in, and the assigned cross section followed.”<sup>457</sup> Gallup assured his public that:

Simple and effective methods exist to detect dishonesty on the part of the interviewer. This work of discovering the dishonest interviewer is now so perfected that it can be said, without qualification, that it is impossible for an interviewer who does not do his interviewing honestly and efficiently to stay in the field any length of time.<sup>458</sup>

Arthur Blankenship, a contemporary authority on survey technique, recognized that if interviewer bias was “in a constant direction, the poll results may be entirely

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opinion. Some are left of center; some are right of center; and some are driving down the middle of the road. Now with a collaboration of this kind, how long do you suppose we would last if we were anything but honest? Furthermore, should any organization or party doubt the honesty and impartiality of opinion news furnished by the Institute, it can check on public opinion with samples of its own. To be dishonest in this business is to commit professional suicide, and I cannot imagine a situation where business necessities are more naturally conducive to plain, unvarnished honesty and faithfulness in the discharge of duty.

Gallup, *Sampling Referendum*, *supra* note 23, at 138; *see also* GALLUP & RAE, *supra* note 21, at 218-20; Eugene Meyer, *A Newspaper Publisher Looks at the Polls*, 4 PUB. OPINION Q. 238, 240 (1940) (“The fact that about 110 papers of both political parties now publish the Gallup poll, regardless of what facts the poll reports, is in itself a measure of the desire of the American press to publish the truth concerning American public opinion, whether or not it conforms to the editorial slant of the publishing newspaper.”). Even as persistent a critic as Harwood Childs would insist that “[n]o one, I believe, can fairly question the honesty of purpose and painstaking care that go into the polling efforts of most of the agencies. They have taken every effort to avoid the danger of ballot stuffing and manipulation. They desire to find the truth, if for no other reason than a commercial one.” CHILDS, *supra* note 26, at 59.

456. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 48.

457. *Id.*

458. *Id.* at 48-49; *see also* BLANKENSHIP, *supra* note 23, at 152 (“The reports of a dishonest field worker usually vary so greatly from those of any other worker that they immediately stand out.”); KEY, *supra* note 42, at 567 (“Most ‘cheating’ . . . can be fairly readily spotted by the odd statistical characteristics of reports filed by such interviewers.”); Spingarn, *supra* note 366, at 99.

misleading.”<sup>459</sup> But he nevertheless maintained that, “in the nationwide study which employs a large number of interviewers, there is not likely to be any constant bias, as such an effect probably cancels out.”<sup>460</sup>

Even with all of these efforts to control for error, Gallup conceded that “[f]act-finding methods in the field of public opinion, or for that matter, in any field which deals with human reactions, have not, and never will achieve the exactness of those employed in the pure sciences. Human beings can’t be studied as easily as the elements. But this does not mean,” he insisted, “that even as of today it is impossible to obtain a highly accurate measurement of public opinion, both quantitative and qualitative.”<sup>461</sup> His and Roper’s success in predicting electoral outcomes lends ample credence to this claim.<sup>462</sup>

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459. Albert B. Blankenship, *The Effect of the Interviewer upon the Response in a Public Opinion Poll*, 4 J. CONSULTING PSYCHOL. 134, 136 (1940).

460. *Id.*; see also William Salstrom et al., *Interviewer Bias and Rapport*, in GAUGING PUBLIC OPINION, *supra* note 427, at 118 (“Although interviewer bias exists, by and large the biases in one direction cancel those in the opposite direction, so that the over-all percentage of opinion is not likely to be significantly wrong.”). Gallup agreed. See GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at 47-48. For Blankenship’s views on proper interviewing technique, see BLANKENSHIP, *supra* note 23, at 25.

461. GALLUP, PUBLIC OPINION POLLS, *supra* note 23, at vi.

462. See Mosteller, *supra* note 425, app. at 289 (“Empirically it is fairly clear that no very great national bias has been present, otherwise presidential predictions by such organizations as the American Institute of Public Opinion and *Fortune* poll would have missed their estimates by wider margins.”).



