

**FDR'S COURT-PACKING PLAN  
IN THE COURT OF PUBLIC OPINION**

**Gregory A. Caldeira**

*Distinguished University Professor*

Department of Political Science  
Ohio State University  
Columbus, Ohio 43210-1373  
Caldeira.1@osu.edu

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## IN THE COURT OF PUBLIC OPINION

### I. INTRODUCTION

Over the course of three terms, starting in 1934, the Supreme Court struck down large parts of Franklin D. Roosevelt's initial New Deal policies,<sup>1</sup> provoking a continuing constitutional crisis. President Roosevelt criticized the Supreme Court, directly and indirectly, on a number of occasions<sup>2</sup>, the last time prior the election in June of 1936 and then again in his 1937 Inaugural<sup>3</sup>; but, because of the negative response

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<sup>1</sup> For the present, I put aside the question of whether there were one, two, or three New Deals. Rosen (1977) sees the New Deal as a general program, set down in writing during the Spring and summer of 1932; for the case for a First and Second New Deal, the standard view, see Leuchtenberg, 1963, 1995, among many others; and for a "third" New Deal, see Karl (1988) and Forbath (2001).

<sup>2</sup> Press Conference, May 31<sup>st</sup>, 1935: ". . . Then you come down to the A.A.A. itself. I have discussed that. The question is raised by this decision as to whether the Federal Government has any constitutional right to do anything about any crop in the United States; and it suggests by implication that forty-eight States should each have their own crop laws. You see the implications of the decision. That is why I say it is one of the most important decisions ever rendered in this country. And the issue is not going to be a partisan issue for a minute. The issue is going to be whether we go one way or the other. Don't call it right or left; that is just first-year high-school language, just about. It is not right or left – it is a question for national decision on a very important problem of Government. We are the only Nation in the world that has not solved that problem. We thought we were solving it, and now it has been thrown right straight in our faces. We have been relegated to the horse-and-buggy definition of interstate commerce. . . ." Roosevelt was reacting to the recent decision in *United States v. Butler*.

<sup>3</sup> In his second inaugural address, Roosevelt made this indirect comment on the Court: "This year marks the one hundred and fiftieth anniversary of the Constitutional Convention which made us a nation. At that Convention our forefathers found the way out of the chaos which followed the Revolutionary War; they created a strong government with powers of united action sufficient then and now to solve problems utterly beyond individual or local solution. A century and a half ago they established the Federal

from Congress and members of the media in those instances, he said nothing about the Court during the 1936 presidential campaign<sup>4</sup> and came back to the issue only during his 2<sup>nd</sup> Inaugural and then when he proposed his plan to reorganize the judiciary. Supporters of the New Deal had proposed a variety of ways of bringing the Court into line with their program, including statutes to require an extraordinary majority of justices to strike down a law, constitutional amendments to mandate retirement at 70 or 75, and so on (see Ross 1994, Stephenson 1998).<sup>5</sup> During the 1936 election, Governor Landon and other Republi

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Government in order to promote the general welfare and secure the blessings of liberty to the American people.

Today we invoke those same powers of government to achieve the same objectives.... Nearly all of us recognize that as intricacies of human relationships increase, so power to govern them also must increase – power to stop evil; power to do good. The essential democracy of our nation and the safety of our people depend not upon the absence of power, but upon lodging it with those whom the people can change or continue at stated intervals through an honest and free system of elections. The Constitution of 1787 did not make our democracy impotent. . . . Government is competent when all who compose it work as trustees for the whole people. It can make constant progress when it keeps abreast of all the facts. It can obtain justified support and legitimate criticism when the people receive true information of all that government does.”

<sup>4</sup> Assistant Attorney General Robert H. Jackson, later Solicitor General and Attorney General and finally Justice Jackson, in *The Struggle for Judicial Supremacy* (1941) made the cogent point that the issue was implicit, hardly hidden from view; his opponents discussed it time and again; and, given the political fall-out from his earlier statements about the Court, he would have been foolish to have dwelt on it. Leuchtenburg (1999) demonstrates that, although Roosevelt did not discuss the Court during the campaign, his appointments did, repeatedly, warning the public about the kind of justices he would appoint if he had the chance.

<sup>5</sup> None of these was new. Proposals to limit the power or terms of the Supreme Court and federal judges, or to expand the powers of state and national governments over economic activity came in droves during the 1920s, highlighted in LaFollette’s and Wheeler’s Progressive run for the presidency in 1924, in which the Court figured prominently, and continued in the Hoover administration. For the 1920s and earlier, see Ross (1991) and Culp (1928-1929). In 1936, Governor Landon and even some conservative

cans attempted to use the Court's recalcitrance to portray Roosevelt and the Democrats as enemies of the Constitution, liberty, and property. Notwithstanding the barrage of criticism, Roosevelt and the Democrats won a massive landslide in 1936, with the President taking all but two states in the Electoral College and Democrats controlling all but sixteen seats in the Senate and eighty in the House.

On February 5<sup>th</sup>, 1937, after two months of planning,<sup>6</sup> FDR announced his Federal Court Reorganization Bill. This legislation<sup>7</sup> provided for an additional seat on the

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Republicans criticized the Court for adopting an irresponsible stance on the constitutionality of critical segments of the New Deal and similar programs in the states and argued for an amendment to enable state governments to be empowered to enact state-level version of the New Deal.

<sup>6</sup>Solicitor General Stanley F. Reed, Attorney General Homer Cummings, Warner W. Gardner, and probably Carl McFarland (the third an attorney in the Department of Justice and the last, an Assistant Attorney General)--probably with the consultation of Edward S. Corwin (1936) of Princeton (Garvey 1965-1966) and perhaps Carl B. Swisher in the Department of Justice--worked on the proposal, starting in December, according to Cummings' Diary in the Alderman Library at the University of Virginia. See also Gardner (1999) for a personal account of his participation. At the time, many opponents of the proposal attributed it to Thomas Corcoran and Benjamin Cohen, in part because of their unpopularity in some circles (see Johnson 1937) and in part because it seemed plausible, and, indeed, Corcoran had broached something of this sort to Senator Wheeler in summer of 1936 (Wheeler and Healy 1962). See also Niznik's dissertation on Corcoran (1981), the forthcoming biographical study of Corcoran, and Lasser (2002) in particular on Cohen but also on Corcoran, and Schwartz (1994, chapter on Corcoran). FDR's proposal should not have come as much of a surprise because he conveyed much of it in December in an interview with George Creel (1937).

<sup>7</sup> Here are the pertinent subsections:

. . . . (A) When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of 70 years and has held a commission or commissions as a judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the consent of the Senate, shall appoint one additional judge

Supreme Court for each justice over the age of seventy, with a maximum of six new positions; proctors for litigation in the Supreme Court and lower federal courts; and additional judgeships in lower federal courts for judges over the age of seventy. President Roosevelt initially couched the bill as a means of improving efficiency, of helping justices and judges who were behind on their work and were dismissing large numbers of cases each term. This proposal almost immediately set off a spectacular political battle, culminating 168 days later in the defeat of FDR's proposal on the floor of the Senate (Alsop and Catledge 1938, Baker 1967, Leuchtenberg 1995).<sup>8</sup>

This working paper is a preliminary report of a project on the dynamics of public opinion on FDR's "Court-packing" plan (see Caldeira 1987, Cantwell 1946, MacColl 1953), a component of a larger project on the New Deal and constitutional politics in the 1930s,

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to the court to which the former is commissioned. Provided, that no additional judge shall be appointed hereunder if the judge who is of retirement age dies, resigns or retires prior to the nomination of such additional judge.

(B) The number of additional judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States, (2) more than two additional members so appointed to a Circuit Court of Appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or (3) more than twice the number of judges now authorized to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts. . . .

<sup>8</sup> By normal standards the Court had a big year in the public arena. At the end of 1937, Gallup asked people about which event interested them most during the preceding year. The response: Ohio floods, 28 percent; Sino-Japanese war, 28; Supreme Court fight, 28; the Windsor marriage, 25; Amelia Earhart lost, 21; the present business slump, 20; Texas school explosion, 18; Justice Black and the Klan, 16; General Motors strike, 16; Supreme Court decisions on New Deal, 13. Gallup Poll, December 1-6, 1937.

some particulars of which I discuss in my concluding remarks. Scholars have assumed, without investigating, that the public as one opposed Roosevelt's proposal from the beginning, usually pointing to the deluge of negative mail members of Congress received and the overwhelmingly negative editorial commentary in newspapers. Using data from eighteen national Gallup Polls, with over 52,000 respondents, taken during the period from early February through early June of 1937, I propose to demonstrate that the public was divided on and some actually favored FDR's proposal. Specifically, I ask: Who supported Roosevelt in the 1936 election? To what extent did the public favor the central measures of the early New Deal, such as the National Industrial Recovery Act and Agricultural Adjustment Act? Who supported FDR's proposal to reorganize the Court? Did support for the President's proposal reflect his bases of electoral support? Did the determinants of support for the plan change over the course of the campaign for passage? To what extent, under what conditions, did supporters of FDR and of the New Deal's programs desert Roosevelt on the Court-packing proposal? And, finally, did this proposal to pack the Court, and elite criticism of this proposal, cost Roosevelt mass public support; and, if so, in what components of his coalition did he gain and lose?

These Gallup Polls, taken in the infancy of polling, are not rich in items of the sort we expect to find in contemporary surveys, but they provide considerable insight into the social, political, and demographic bases of support for and opposition to Roosevelt, his policies, and his proposal. Here, I shall draw primarily on data from three of these polls--

AIPO68, early February; AIPO71, early March; and AIPO84, early June.<sup>9</sup> This trio of polls, those ready for analysis now, fortuitously span three important junctures in the fight over Court-packing: immediately after FDR's went public with his proposal, after the initial barrage of criticism and some response from its supporters, and toward the end of the campaign, when most people thought the issue was dead.

Assessing the public's role in this constitutional crisis is important for several reasons. First, despite the passage of more than sixty years, the battle over Court-packing continues to be a matter of contention among historians and law professors. In particular, Ackerman's *We the People: Foundations* (1991) and *We the People: Transformations* (1998) have stirred up controversy because of the claims he makes, among many others, for the 1936 election and the period thereafter as a period during which a "constitutional moment" occurred, a period of informal constitutional change in which the public consented to major changes in our Constitution (see Kalman 1999; Leuchtenberg 1999; Burnham 1999).<sup>10</sup>

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<sup>9</sup> The Gallup Poll, like other organizations of this era, multiple-punched their data in order to save room. It therefore involves considerable effort to transform the original versions of the Gallup Polls into a useable form. The staff at the Political Research Laboratory at Ohio State University provided invaluable aid in retrieving these polls.

<sup>10</sup> Then, too, there is the debate about whether Justice Roberts, Chief Justice Hughes, or the Court "switched" in 1937; and, if so, whether it or they switched in response to the results of the landslide 1936 election or to FDR's proposal announced in early February of 1937. See, for examples, Cushman 1998 and White (2000) [Roberts did not switch]; Chambers (1969), Leuchtenberg (1995), Kalman (1999), Mason (1956) and Ariens (1994)[(Roberts switched], and Friedman 1994 (Roberts switched, but not in response to FDR's proposal). Of Roberts and the Court, Rauh (1983, 959), Justice Cardozo's clerk at the time, said later, "I do not doubt that the court-packing plan influenced the Court's decision on the Wagner Act and its subsequent review of New Deal legislation." Kaufman's biography of Cardozo (1998) reports nothing about Cardozo's views on whether Roberts or Hughes switched or how might account for the putative change in

Court-packing plays a major role in the debate about the nature of this “moment.” Moreover, questions about the public’s role in and views, or lack thereof, during this major constitutional crisis dovetail nicely with the influence of “Republican” ideals in American legal and historical thinking. Beyond the question of whether the constitutional change the New Deal entailed was a “constitutional moment” and to what extent the public participated in it, the fight over Judicial Reorganization and the Court’s subsequent turn to the protection of civil liberties are watersheds in American political and constitutional history; and many issues, whether on public’s views of the plan or of elite perceptions and actions, continue to be wide open despite a steady stream of research and commentary (see, for examples, Friedman 2000, and Kramer forthcoming).<sup>11</sup> Second, these Gallup Polls are a treasure trove of information on public evaluations of the Supreme Court and on connections between the Court and politics in the minds of members of the mass public during a time of unparalleled constitutional crisis. The conventional wisdom is that

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orientation. See perhaps John Knox on McReynolds. See also Parrish 1975. On Justice Cardozo’s reactions, Rauh also reports: at the Conference after the arguments on the NLRA, “both Hughes and Roberts switched from their position in *Carter Coal*. When Cardozo reported on the conference action during our ride home from the courthouse, he was elated by the switches. But about all this kindly gentleman bring himself to say in criticism was that he ‘considered it quite an achievement to make the shift without even a mention of the burial of a recent case.’ He did smile some time later when I told him the gag going around about ‘a switch in time saves Nine,’ but he never said anything like that himself” (Rauh, 1990-1991, 217-218).

<sup>11</sup>Thus, Cushman, in his revisionist tract, and prior and subsequent articles, complains: “Until we move beyond the traditional account [of the constitutional changes in the 1930s], our understanding of the New Deal Court will continue to seem anachronistically unsophisticated in comparison with our understandings of other eras in the Court’s history. For the past fifty years, we have heard reiterated a constitutional bedtime story with a happy ending for New Deal liberals” (1994, 260-261).



Congress defeated FDR's plan because of elite and mass public's high regard for the Court as an institution and that the public, even those who strongly supported Roosevelt, rejected the plan. This conventional wisdom about public reverence translating into elite opposition to Court-packing is probably wrong, for it does not incorporate what political scientists know about the instrumental motivations and behavior of legislators and the general lack of political interest among ordinary citizens. But we need not operate on assumptions about public responses to the Court and to FDR, because the Gallup Polls provide the material for a proper test of the conventional wisdom. Third, this set of eighteen soundings, with relatively similar items at regular intervals, is the oldest extended set of observations on the responses of mass publics in the United States to politics and certainly to the Supreme Court. We can learn much about the dynamics of public opinion and the relationship between elite behavior and public opinion from this set of data from a critical period in American political and constitutional history.

Next I discuss the methodology of the Gallup Poll during the 1930s and set out a few of the items I use in the statistical analyses. In Section III, I briefly review the Supreme Court's treatment of the New Deal, the various proposals offered to reshape the Court and Constitution, and how President Roosevelt saw the problem. Section IV I present an overview of FDR's expectations about the sources of support for and opposition to proposal and then I outline a set of hypotheses about public attitudes toward packing the Supreme Court. In the next three sections, I take up, in sequence, the sources of support for Roosevelt in the 1936 election, as reported in 1937; the determinants of support for Court-packing; whether and to what extent this episode exacted a cost in FDR's

personal popularity; and, last, knowledge of and support for two of the New Deal's main laws, the National Industrial Recovery Act and the Agricultural Adjustment Act of 1933. In the conclusion, I spotlight some of the issues I plan to take up in the larger project.

## II. THE DATA: THE GALLUP POLL

The core of this phase of my project is a set of eighteen Gallup Polls taken from February 10<sup>th</sup> through June 10<sup>th</sup> of 1937. The sample for each poll averages about 2900, for a total of about 52,200 respondents. Gallup sought in each poll to sample a national cross-sections of adults, using a modified probability procedure. Prior to 1950, the samples for all Gallup surveys, excluding special surveys, were a combination of what of a purposive design for the selection of cities, towns, and rural areas, and the quota method for the selection of individuals within such selected areas.<sup>12</sup>

The critical item, support for Roosevelt's plan to reorganize the Court, varies a bit

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<sup>12</sup>The first step in obtaining the sample was to draw a national sample of places (cities, towns, and rural areas). These were distributed by six regions and five or six city size, urban rural groups or strata in proportion to the distribution of the population of voting age by these regional-city size strata. The distribution of cases between the non-south and south, however, was on the basis of the vote in presidential elections. Within each region the sample of such places was drawn separately for each of the larger states and for groups of smaller states. The places were selected to provide broad geographic distribution within states and at the same time in combination to be politically representative of the state or group of states in terms of three previous elections. Specifically they were selected so that in combination they matched the state vote for three previous elections within small tolerances. Great emphasis was placed on election data as a control in the era from 1935 to 1950. Within the civil divisions in the sample, respondents were selected on the basis of age, gender and socioeconomic quotas. Otherwise, interviewers were given considerable latitude within the sample areas, being permitted to draw their cases from households and from persons on the street anywhere in the community.

in wording, with a change mid-way through the campaign<sup>13</sup>; but basic demographics remained the same. Unfortunately, Gallup's menu of demographics was more limited than is typical in contemporary polls. Still, it included age; urban, rural, or farm residence; occupation; telephone ownership; car ownership; race; state of residence; gender; subjective social as determined by the interviewer; presidential choice in 1936; presidential preference if the election were held today; and whether or not the respondent voted in 1936 or had the right to vote.

Gallup did not ask about educational attainment, partisanship, income, or religious affiliation on a regular basis, although such items appear on occasion. Ownership of cars or telephones may seem like odd independent variables, but, during the 1930s, they were probably pretty good indicators of social status, income, and perhaps "cognitive mobilization," i.e., connection to national media of communication. On nearly all of the polls, Gallup asked more or more questions about political issues associated with the New Deal and the constitutional crisis, including the National Industrial Recovery Act, the Agricultural Adjustment Act, the National Labor Relations Act, whether the respondent favors a constitutional amendment to limit judicial review, wages and hours, and sit-down strikes. These items vary from survey to survey, so I can use them opportunistically but not systematically.

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<sup>13</sup> In the early surveys: "Are you in favor of President Roosevelt's proposal regarding the Supreme Court?" And then sometimes followed with: "What action should Congress take on Roosevelt's plan to reorganize the Supreme Court--pass it, modify it, or defeat it?" "Do you favor President Roosevelt's plan to increase the size of the Supreme Court to make it more liberal?" "Should Congress pass the President's Supreme Court plan?"

### III. THE COURT AND THE NEW DEAL

For present purposes, we need not go into great detail about the trials and tribulations of the New Deal in the federal courts and the Supreme Court from 1934 through 1936. It suffices to say that the lower federal courts and the Supreme Court struck down most of the first wave of New Deal statutes and certainly the most important of them.<sup>14</sup> Present annual data on the success and failure of the United States in the Supreme Court on cert grants/denials and on the merits. Figure 1, a drawing taken from the *New York Times* in 1937, provides a vivid portrayal of the voting line-ups from case to case. From the perspective of the administration, the large number of judges in black, especially toward the top of the figure, and in cases on the central measures of the early New Deal must have been a sobering prospect for President Roosevelt as 1937 started and the second wave of legislation (e.g., the Wagner Act, Social Security Act) came up for consideration in the Supreme Court.

The drum-roll of cases in which the Supreme Court invalidated New Deal laws or “little New Deal” laws at the state level is impressive and long and here I do not provide

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<sup>14</sup> Prominent New Deal statutes passed prior to 1937 including, inter alia, Agricultural Adjustment Act (1933), Civil Works Administration (1933), Civil Conservation Corps (1933), Economy Act of 1933, Emergency Banking Act of 1933, Farm Credit Act of 1933, Gold Reserve Act of 1933, Federal Emergency Relief Act (1933), Federal Securities Act of 1933, Glass-Steagall Act (1933), Gold Standard Repeal (1933), Home Owners’ Loan Act of 1933, National Industrial Recovery Act (1933), National Youth Administration (1935), Public Works Administration, Rural Electrification Administration, Securities and Exchange Act (1934), Silver Purchase Act of 1934, Social Security Act (1935), Taylor Grazing Act (1934), Tennessee Valley Authority (1933), Wagner Act (1935), Works Progress Administration (1935), Public Utility Holding Company Act (1935). See list in *Landmark Legislation*.

an exhaustive list: *Lynch v. United States*, 292 U.S. 571 (1934), invalidating a clause on war risk insurance in the Economy Act of 1933; *Panama Refining Co. v. Ryan* and *Amazon Petroleum Company v. Ryan*, 293 U.S. 79 (1935), “hot oil” case, striking down a portion of the NIRA as unconstitutional for excessive delegation, “delegation run riot”; *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), in which the Court relied at *Adkins v. Children’s Hospital* to invalidate New York’s minimum law based on the 14<sup>th</sup> Amendment due process clause, despite positive signs in *Nebbia v. New York* a year or so before; *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240, *Nortz v. United States*, 294 U.S. 317, *Perry v. United States*, 294 U.S. 330, which found the abrogation of the gold clause in U.S. obligations, but held the plaintiff not entitled to recover<sup>15</sup>; *Booth v. United States*, 291 U.S. 339 (1934), striking down temporary reduction in salary of retired judges; *Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, invalidating the Railway Retirement Act based on due process and the commerce clause; *Louisville Bank v. Radford*, 295 U.S. 555, striking down the

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<sup>15</sup> *United States v. Perry*, it is worth noting, was the occasion for the creation of the clever and handy “Malolo Doctrine,” named after the S. S. Malolo, the ship on which Attorney General Cummings and Solicitor General Reed concocted a rationale for denying the government’s liability in the cases involving Liberty Bonds: to wit, even if the government’s action in not paying in gold, as it had promised, was unconstitutional, the petitioner had suffered no real loss because the government had also made it illegal to own or trade in gold. February 1, 1957, *New York Times*. “Justice Reed was the author of the ‘Malolo Doctrine,’ out which came the famous ‘Gold Clause’ cases. . . . Mr. Reed and Homer S. Cummings, then Attorney General, were returning from Hawaii aboard the steamship Malolo when the Gold Clause cases were pending. The cases involved the New Deal program to remove from government and private contracts the clause requiring settlements to be under the gold standard of monetary values. Mr. Reed was then chief counsel of the R.F.C. He and the Attorney General discussed the Government’s defense in the pending suits. He came up with the idea that the Government should take the position that while the abolition of the gold clause might not be constitutional it would do no one any financial harm.” February 1, 1957. Page 12. See also Fassett 1995.

Frazier-Lemke Act, the main purpose of which was to relieve farm mortgagors; *Humphrey's Executor v. United States*, 295 U.S. 602, reversing Roosevelt's dismissal of a member of the Federal Trade Commission, a big surprise in light of the broad doctrine enunciated in *Myers v. United States*; *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), the "sick chicken" case, striking down the NRA based grounds of the commerce clause and delegation doctrine; *Hopkins Savings Association v. Cleary*, 296 U.S. 315 (1935), invalidating the Federal Home Owners' Loan Act; *United States v. Butler*, 297 U.S. 1, invalidating the first Agricultural Adjustment Act, based on the commerce clause (agriculture is a local issue and therefore not within the purview of the federal government); *Rickert Rice Mills v. Fontenot*, 298 U.S. 513 (1936), striking down amendments to the AAA of 1933; *Ashton v. Cameron County District*, 298 U.S. 513, invalidating Municipal Bankruptcy Act on the grounds of due process and the commerce clause; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1937), upholding the Tennessee Valley Authority's powers; and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), invalidating the wages-and-hours segments of the Bituminous Coal Act of 1935, the so-called "Guffey Act". This long list of cases, most of them defeats, together with a general sense that most of the New Deal was unconstitutional by the Court's current stands, made enforcement nearly impossible and led to vacillation about what course to take.

In response to this quandary, members of Congress and figures in the administration offered many proposals to change the Supreme Court, either by statute or constitutional amendment, or to broaden the Commerce, General Welfare Clauses via constitutional amendment. No single proposal gained sufficient support to become a focal point

for supporters of the New Deal. Roosevelt described his problem in a letter on February 27<sup>th</sup> to Charles C. Burlingham, a leading American lawyer who had written Roosevelt that although he agreed with retirement of older Justices, he felt it should be done by the process of constitutional amendment (FDR Library):

...Strictly between ourselves there are two difficulties with any amendment method, at this time. The first is that no two people can agree on the language of the amendment.

In general, four types of amendment have each of them substantial backing:

(a) The Wheeler type which gives to the Congress an overriding power on judicial decisions.

(b) The proposal to take away or curtail the right of the Supreme Court to pass on constitutionality.

(c) The type conferring specific or general powers over agriculture, mining and industry on the Congress. [To match that of commerce.]

(d) The type setting an age limit on judges or giving them terms instead of life appointments.

To get a two-thirds vote, this year or next year, on any type of amendment is next to impossible. Those people in the Nation who are opposed to the modern trend of social and economic legislation realize this and are, therefore, howling their heads off in favor of the amendment process. They are joined by many others who do not know the practical difficulties.

Finally, if an amendment were to be passed by a two-thirds vote of both houses, this year or next, you and I know perfectly well that the same forces which are now calling for an amendment process would turn around and fight ratification on the simple grounds that they do not like the particular amendment adopted by Congress. If you were not as scrupulous and ethical as you happen to be, you could make five million dollars as easy as rolling off a log by undertaking a campaign to prevent the ratification by one house of the Legislature, or even the summoning of a constitutional convention in thirteen states for the next four years. Easy money.

Therefore, . . . you must join me in confining ourselves to the legislative method of saving the United States from what promises to be a situation of instability and serious unrest if we do not handle our social and economic problems by constructive action during the next four years. I am not willing

to take that gamble and I do not think the Nation is either.<sup>16</sup>

The counsel of patience, coming from many corners, to see whether the Court would change its direction, or one or more justices would retire or die, did not seem promising in December of 1936 (Wallis 1936); even after the Sumners-McCarran<sup>17</sup> enhanced retirement act for the Court passed in March of 1937, no justices made a move<sup>18</sup>; and the demographics of the Court were such that, if the conservatives wanted to hang on, the odds favored them, notwithstanding the moniker of “Nine Old Men.” Of the New Deal’s favorite justices, Stone was deathly ill from November through January (see Mason 1956, 440-441); Brandeis had a life expectancy of five years, but he was, by some accounts, slipping as early as 1935; and Cardozo, although younger, was not a well man and had suffered serious heart attacks in 1926, 1930, and 1935 (see Kaufman 1998, 160-161, 180, 195, 476, 481, 486). The “Four Horsemen,” as they were called, in contrast, and as their nickname suggested, were healthy as horses, at least to public appearances, and the tables

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<sup>16</sup>For a more optimistic, and I believe wrong, assessment of the prospects for a constitutional amendment to deal with Roosevelt’s problem, see Kyvig 1989, 1996.

<sup>17</sup>Supreme Court Retirement Act had the following elements: “Under the previous law, several times amended, a member of the Court could resign at the age of 70, if he had ten years of continuous service, and receive at the outset the pay he was receiving at the time of his resignation. But this was subject to cuts by Congress, which reduced Oliver Wendell Holmes’s \$20,000 salary to \$10,000 in 1933. Under the Sumners-McCarran law a justice need not resign. He may retire—a privilege granted to all other federal judges—on full pay, which may not be changed during his lifetime because he is subject to the call by the Chief Justice for such judicial service as he ‘may be willing to undertake.’” Arthur Krock, “In Washington,” *New York Times*, March 2, 1937, 20.

<sup>18</sup>On March 2<sup>nd</sup>, Arthur Krock wrote he did not expect any retirements in the near future.



for life-expectancy, if correct, would leave them in position beyond the end of Roosevelt's second and presumably last term as president.<sup>19 20</sup> The President also knew that a constitutional amendment to reduce the Supreme Court's power, or otherwise change its role in our constitutional system was unpopular because, in 1935 and 1936, Gallup had asked about such options. So, for example, Gallup had asked: "As a general principle, would you favor limiting the power of the Supreme Court to declare acts of Congress unconstitutional?" To this query, respondents answered, in the affirmative, 31 percent; in the negative, 53 percent; and, no opinion, 16 percent.<sup>21</sup> If one viewed public opinion on this question as at all firm, a constitutional amendment did not seem like a plausible route to take, especially in light of the ease with which nay-sayers could block one in the state

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<sup>19</sup> The average justice in 1937 had a life-expectancy of 9.3 years, well beyond FDR's second term and nearly to the end of his third. Here are the ages and life-expectancies of the justices: Hughes (75, 7.5), Butler (75, 7.5), Stone (64, 12), Van Devanter (78, 5), Brandeis (81, 5.4), McReynolds (75, 7.5), Sutherland (75, 7.5), Roberts (62, 15), and Cardozo (66, 12). *Historical Statistics of the United States*. Schlesinger (1960, 493) wrote: "The justices appeared to be in good health. The Metropolitan Life Insurance Company calculated that even the oldest had five and a half years of life expectancy." In the event, Hughes died in 1948; Butler, 1939; Stone, 1946; Van Devanter, 41; Brandeis, 1941; McReynolds, 1946; Sutherland, 1942; Roberts, 1955; and Cardozo, 1938.

<sup>20</sup> In the Court's 4-4 decision, with Justice Stone participating, in *Associated Industries of New York v. Department of Labor of New York et al.*, 299 U.S. 515 (1936), handed down in late November of 1936, some contended that it portended a more permissive approach to the New Deal at the state and federal levels. Notwithstanding this viewpoint among some, including Attorney General Cummings, Roosevelt continued to take a skeptical view of the Court and its disposition toward the New Deal.

<sup>21</sup>N = 1500. September 10-15, 1935. The next year Gallup obtained the following result: "As a general principle, would you favor limiting the power of the Supreme Court to declare acts of Congress unconstitutional? Yes, 41 percent; no, 59 percent. N = 1500. November 10-15, 1936.

legislatures or ratifying conventions.

#### IV. THE CAMPAIGN AND ITS SETTING

From the outset of this fight, Roosevelt expected strong support in the Senate from liberals, including Progressives and Independent Republicans, many of whom had supported him in 1936 (McCoy 1956); Northern Democrats; and most of the Southern Democrats, minus Carter Glass, Harry Byrd Sr., "Cotton Ed" Smith, and Josiah W. Bailey (Moore 1965; see biography of Bailey and quotation of letters to Vandenberg and others). Progressives and liberals, and even some conservatives in both parties, had introduced a long list of laws or constitutional amendments to strip the Court of judicial review, to mandate a super-majority to invalidate a federal, to implement a retirement age, and to increase the number of justices (the last proposed in the late summer of 1936) He also had good reason to expect strong and vocal support from organized labor and farmers, two of the main beneficiaries of the New Deal and of the laws the Hughes Court had struck down in 1934-1936, and strong supporters of him in November of 1936.

Unfortunately for FDR, farmers, both leaders and rank-and-file, split on Court-packing--and, for that matter, FDR did not enjoy clear support for the Agricultural Adjustment Act among farmers, as results from polls during 1936 and 1937 revealed.<sup>22</sup> Thus, the National Farmers Union (E. H. Everson) opposed FDR on this issue, as did the

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<sup>22</sup> Indeed, in the 1938 elections, the Democrats lost the most seats in the House and Senate in the farm belt, especially in states in which agricultural income had declined substantially during the previous two years. One of the main sponsors of the second AAA, Senator George S. McGill of Kansas, lost his seat. See articles on McGill 1981,1983.

National Grange (Louis J. Taber, Grant Master); although Edward A. O'Neal, president of the American Farm Bureau Federation supported the plan, at least at first, the Farm Bureau as a national organization and many of branches of the Farm Bureau did not.

By and large, organized labor supported FDR on this issue, but its leaders and rank-in-file were very preoccupied. During the first part of 1937, sit-down strikes in the auto industry, spreading elsewhere, riveted attention on organized labor and led to strong criticism from electoral politicians, friend and foe alike, around the country and even an attempt in the Senate to denounce or even outlaw sit-down strikes (Byrnes Amendment; see Robertson 1994). Simultaneously, unions in the AFL and CIO were in battles to organize workplaces all around the country, putting FDR in an awkward position (see, e.g., Howard 1960 and Fine 1967). He wanted the support of both sets of unions; but, although both wanted him to grant them legitimacy, he chose to stand neutral in those battles. Thus, the leaders of organized labor supported the plan, testified in favor of it, made speeches on national radio; but they used none of their resources to mobilize its members for Roosevelt. And Roosevelt received no help from labor's chief ally in the Senate. From the beginning of the 75<sup>th</sup> Congress, Senator Robert Wagner of New York focused his energies on putting together a coalition in favor of a minimum wage and maximum hours law, what ultimately became the Fair Labor Standards Act (Altman 1937, 1938; see also Seltzer 1995). Senator Robert Wagner took no action in behalf of FDR, stood mute on the issue, and, in July, in response to a plea from Governor Lehman announced his opposition to the measure (*New York Times* on Lehman).

FDR also counted on some less organized or less visible constituencies from his

1936 presidential campaign. In both of his previous campaigns, Roosevelt enjoyed substantial support from “liberals” leaders in both parties, men who had been active as populist or progressive Democrats or as Independent, insurgent, or Progressive Republicans (e.g., McCoy, 1956). This category included such liberal stalwarts as Burton Wheeler, George Norris, Robert LaFollette Jr., Henrik Shipstead, Hiram Johnson, William Borah,<sup>23</sup> and others. Nearly all of those senators deserted him on this issue, almost immediately (see Mulder 1981, Feinman 1981). Wheeler, for example, announced strongly against Court-packing, despite his criticism of the Court and willingness to amend the Constitution to limit its powers,<sup>24</sup> within a few days after FDR’s announcement. Roosevelt carried

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<sup>23</sup> In response to the Reorganization Bill, Senator Borah proposed a constitutional amendment to provide states with constitutional power to deal with all social problems (e.g., child labor, minimum wage): “Section 1. The Fourteenth Amendment to the Constitution of the United States is hereby repealed. Section 2. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Due process as herein utilized shall have reference only to the procedure of executive, administrative, or judicial bodies charged with the execution and enforcement of the law. Section 3. No State shall make or enforce any law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the State or the government for redress of grievances. . . .” *New York Times*, February 25, 1937, 1, 2.

<sup>24</sup> This is in part the text of the Wheeler-Bone Amendment: “In case the Supreme Court renders any judgment holding any Act of Congress or any provision of any such Act unconstitutional, the question with respect to the constitutionality of such Act or provision shall be promptly submitted to the Congress for its action at the earliest practicable date that the Congress is in session...; but no action shall be taken by the Congress upon such question until an election shall have been held at which Members of the House of Representatives are regularly by law to be chosen. If such Act or provision is re-enacted by two-thirds of each House of the Congress to which such Members are elected at such

nearly all of the New Dealers with him on Court-packing, but he lost most of the liberals from the pre-New Deal era. Thus, members of the public received a mixed message from liberals.

During the elections of 1932, for the first time, and 1936, on a widespread basis, blacks voted Democratic, especially for FDR (Weiss 1983, Sitkoff 1981). FDR appointed hundreds of blacks to federal positions, including William Hastie to the United States Court of Appeals in 1937; greeted blacks in the White House; and attempted to incorporate them in the 1936 campaign; and, since they occupied the bottom of the economic ladder, blacks benefitted from relief, the WPA, and similar measures. To be sure, he moved glacially on racial issues--he refused for example to express a public view on the anti-lynching laws proposed in 1937 and 1938--in large part because of his reliance on southern Democratic leaders in the House and Senate and more generally on the electoral votes of the solid south (biography of White; but see McMahon 2000); but, by 1936, blacks had become part of the Roosevelt coalition and a group on whose support he would count in tough political battles (Sitkoff 1981).

Young people constituted one of the critical--and, of course, completely unorganized--constituencies of the New Deal. Much of the growth of the Democratic vote in 1932 and 1936 stemmed from the mobilization of new voters (Anderson 1979; but see Erikson and Tedin 1981). This makes good sense: other things being equal, partisan attachments strengthen over the life-course; and changes in political fortunes typically draw much of

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election, such Act or provision shall be deemed to be constitutional and effective from the date of such reenactment."

their strength from new voters. The New Deal is a classic example of this phenomenon.

With the ascendancy of the Republicans in the South, it is easy to forget just how much support FDR and the New Deal drew from the South, all throughout the 1930s. He, of course, had ties there, dating to the early 1920s when he started going to Warm Springs and then purchased it and surrounding farming ground. Moreover, in the pre-convention phase of the 1932 campaign and during the convention, Roosevelt drew much of his strength from the Southern delegations and they, rather than California, put him over the top, just barely. It was not simply a matter of the “solid South” providing support for anyone who ran on the national Democratic ticket. Simply as a matter of self-interest, many of the policies of the New Deal, such as rural electrification, public works, and building of dams, provided disproportionate benefits to the South.<sup>25</sup> Southerners were some of the most liberal members of the House and Senate during the 1930s (see Poole and Rosenthal 1997). Historians argue about the number of “New Deals,” when the first, second, and even a third began and ended. It is clear, however, that in the 74<sup>th</sup> Congress, with the threat of radical forces on the left (e.g., Huey Long) and right (e.g., Father Coughlin) (Amenta et al. 1994, Brinkley 1982, McCoy 1986), growing opposition from big business (e.g., the American Liberty League; see Rudolph 1950, Wolfskill 1962), and the Court’s invalidation of the early New Deal, President Roosevelt moved to the left, a

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<sup>25</sup> But see the literature on the political economy of the New Deal, in which scholars have debated about whether the New Deal distributed expenditures and other resources, as it claimed, on the bases of “reform, recovery, and relief,” or whether it did so to enlarge and maintain its electoral basis. See Wright 1974, Fishback, Kantor, and 2003, Wallis 1987, 1998. On the negative consequences of the AAA for blacks in the South, see Whatley.

tendency he carried into the 1936 campaign, when he openly challenged “economic royalists” and rallied support from the lower rungs of the social ladder. Members of the public divided much more sharply in 1936 along the social gradient–social class, economic attainment, and occupation–in contrast to the 1932 election, in which FDR had broad support across social and economic cleavages. Thus, in a political fight for the interests of constituents of the New Deal, FDR would anticipate support from the poor, from the working class, from unskilled workers, and from the unemployed.

Several features of the campaign for and against Court-packing deserve comment. (1) During the 168 days of this battle, the Supreme Court drew an extraordinary amount of attention, far more than the judiciary had in the past; see Figure 2 for a graph of the number of stories each day on the Court in the New York Times from early February through June. (2) The division of Democrats and liberals produced a confused message, undermined FDR’s claim on the New Deal coalition, and gave cover to conservative critics of the plan. (3) Since many moderate and conservative Democrats defected, some early and some later, Republicans in the Senate could sit back and let the Democrats argue among themselves. Republicans could oppose FDR with drawing criticism for excessive and reflexive partisanship (see Lamb 1961). (4) Supporters and opponents made frequent and good use of the radio; senators and representatives went to the national airwaves on more than fifty occasions during the 168 days of this campaign.<sup>26</sup> (5) Roosevelt lost the

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<sup>26</sup> Frank Gannett’s National Committee to Uphold the Constitution, created in early February, was the largest and best organized outside opposition (Polenberg 1965, Williamson 1940). Many other, smaller organizations popped up to oppose Roosevelt’s proposal, and, of course, the organized bar at the state, local, and national levels opposed

initiative early in the campaign. He did not make a public address until several weeks into the fight over Court-packing, long after leaders of the opposition had made many public speeches. For that matter, even after making two addresses, FDR did not use the full resources at his disposal to rally the public to his side. For a variety of reasons, both early and throughout the entire period, the negative side of the debate on Court-packing held the floor much of the time and dominated public discourse.<sup>27</sup> Find a list of the radio broadcasts, pro and con, on the issue of the Court. Perhaps from the *New York Times*? (6) Events made the proposal look less compelling as the Court, starting in March, began to uphold the New Deal's major initiatives<sup>28</sup>; Chief Justice Hughes, in cooperation with Senator Wheeler, issued a persuasive public response to FDR's and Cummings' claims about the Court's lack of productivity and therefore the need for younger, additional justices; and, in late May, Justice Van Devanter retired.<sup>29</sup>

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it. See Hearings, supplement, for a report of the ABA's national survey of lawyers and the articles in the Journal of the American Bar Association. Smith (1939).

<sup>27</sup>In just the first six weeks after February 5<sup>th</sup>, over one hundred speakers for and against the plan took to the national airwaves. Check *Vital Speeches* for transcripts and counts of these addresses. Use *New York Times's* daily radio schedules to find and count them.

<sup>28</sup>*West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins* and upholding a Washington state minimum wage law for women); *National Labor Relations Board v. Jones & Laughlin Steel* (upholding the NLRA in the steel industry); and so on.

<sup>29</sup>Leuchtenberg has written: although "it would be too much to conclude that the Court brought about the defeat of FDR's plan, it is accurate to say that this set of interventions by the Justices under Hughes' leadership" [his letter to the Senate Judiciary Committee, favorable decisions, and Justice Van Devanter's retirement] "greatly altered the topography of the struggle" (1997, 55). See also Caldeira (1987), where, in retrospect, I think I gave too much emphasis to the role of the Court's decisions in undermining



## V. WHO SUPPORTED ROOSEVELT?

Roosevelt began his second term having won a massive and broad landslide, in Democratic and Republican states, across occupational categories, religions, partisan loyalties, and social statuses. It would be nice if we had a poll on support for FDR, after the election but before he introduced the Court-packing plan; but we do not. The next best thing is to examine support for FDR at three points for which we do have data: immediately after he announced the plan, February 10-15th; nearly three weeks after, February 24<sup>th</sup>-March 1<sup>st</sup>; and near the end of the polling, May 26-31st.

Gallup had not begun to ask its now-famous item about presidential approval<sup>30</sup>. Instead, Gallup asked a respondent whether he or she voted for any of list of candidates in the immediately prior presidential election<sup>31</sup>; and it usually followed up with an item asking how he or she would vote if the election were held today.<sup>32</sup> The former, of course, does not provide a perfect reflection of how respondents actually voted; we know that in modern polls, respondents over-report voting and tend to remember having voted for the winner. Projection colors these retrospective reports of acts. The latter measure is somewhat akin to an item on presidential approval, implicitly asking the respondent whether he or she would make the same voting choice given what he or she knows based

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support for Judicial Reorganization.

<sup>30</sup> "Do you approve or disapprove of the way President X is handling his job as President?"

<sup>31</sup>"For whom did you vote in the November election?"

<sup>32</sup>"If the November election were held today, how would you vote?"

on the past several months.

Substantial percentages of the samples reported not having voted or not being eligible to vote in 1936, or having voted for a candidate from a third or a fourth party. So, for example, in AIPO68, 54 percent claimed to have voted for FDR, 26 percent for Governor Landon, eleven percent did not vote, ten percent could not vote, and a scattering voted for Norman Thomas or William Lemke. To simplify the analysis, I have recoded this item 1, if a respondent voted for Roosevelt; 0, if he or she claimed to have voted for Landon; and censored if he or she claimed to have voted for someone else or not to have voted at all. To take into account the distinct possibility that respondents did not sort themselves into the category of voting for FDR or Landon, on the one hand, or for a another or not at all, on the other hand, I have adopted Heckman's probit estimator with sample selection (Greene 1993). Explain selection bias and how to deal with it and statistics such as rho.

Table 1 presents the results of probit analyses, with sample selection,<sup>33</sup> for our three Gallup Polls. The top half of the table, under "FDR," presents the maximum likelihood coefficients for support for or opposition to Roosevelt in the 1936 election (0 against, 1 in favor). The bottom half, under "Opinionation," presents the coefficients for whether or not a respondent could or did vote in 1936. Consider, first, the results for opinionation for AIPO68. The results follow the typical pattern for opinion-holding in surveys about politics. Thus, the more affluent, older people, and men were more likely to have claimed to have voted in the 1936 than poorer, younger, and female respondents. Gender, age, and

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<sup>33</sup>This estimator deals with potential "selection bias" in the dependent variable. Coefficients will be biased if those who respond to the item are distributed differently on the independent variables than are those who did not respond. Quote Greene.

car ownership, in particular, did a good job of discriminating between those who claimed to have participated and those who did not. The impact of gender declined somewhat over time, but the other influences were relatively stable. By and large, living in one region or another made little difference in propensity to report having voted in the 1936 election. Southerners, across all three surveys, and citizens living in the Pacific in AIPO84, are the sole exceptions. Indeed, in the case of Southerners, the coefficient actually becomes more negative over the course of the Court-packing campaign—that is, Southerners are less and less likely to have reported having voted for FDR in 1936.

The results from the top quadrant of Table 1, support for FDR in 1936, generally follow the expectations I outlined in the third section of this paper: he drew strong support from people lower on the social gradient, from the young, from Southerners. The impact of social status was strong in AIPO68 and then declined. With one exception, car or telephone owners were less likely to have reported voting for FDR in 1936. The older a respondent, the less likely he or she was to report voting for Roosevelt in 1936, although this relationship disappeared in the third poll. Men and women were no more or less likely to have voted for Roosevelt. Urban residence made no difference in the first two polls; but, in the last, we see a positive relationship between urban residence and voting for Roosevelt. Roosevelt was consistently stronger in the Pacific and the South than in other regions, and this effect strengthened for the South in the final poll. Occupational patterns are mixed. Even though agricultural programs constituted a major component of the New Deal, farmers were no more or less likely to have supported Roosevelt in 1936. Surprisingly, in the first poll, businessmen were actually more likely to report voting for

FDR than were others. More in line with expectations, in the third poll, professionals were much less likely to report voting for Roosevelt; and, across two of the three, unskilled workers were more likely to claim support for FDR.

In sum, then, FDR drew support from people lower on the social gradient, people with fewer resources; young people; people in the South and Pacific; and people in less prestigious occupations.

## VI. WHO SUPPORTED COURT-PACKING?

Table 2 presents the results of probit analyses, with sample selection, for support for Court-packing. Here, as in Table 1, the top half features the coefficients for the relationships between the independent variables and the direction of opinion, in this case for or against Court-packing; and the bottom half, the coefficients for the relationships between the independent variables and having an opinion on the President's proposal. Once again, we see strong relationships between holding an opinion and indicators of social status, affluence, age, and gender; and some evidence of regional effects in opinion-holding. Owners of telephones and car and people of higher social status held opinions on Court-packing at a much higher rate than did others. In two of the three polls, the older the respondent, the more likely he or she was to hold a view on the proposal. Men were much, much more likely than women to hold an opinion on this issue. Blacks were less likely to hold an opinion, but this coefficient reached statistical significance in only one of three polls. Smaller proportions of the residents of the South than in other regions held opinions on Court-packing, especially in the third poll.

Three patterns stand out in the top half of Table 2. First of all, support for Court-packing had a strong regional flavor. It was much more popular in the South and the Pacific than in other regions; and support in the South grew over the course of the three polls. FDR's plan drew significantly greater opposition in the Central part of the nation, the midwest and plains. Second, occupation made a difference. Skilled and unskilled workers were more likely to support the plan than were others. Positive coefficients for business and professional pop up in single survey, but the general pattern goes in the opposite direction. Third, here, as in Table 1, social status and affluence divided the public. The more affluent a respondent, the less likely he was to support Court-packing. Coefficients for the various indicators bobbed around from poll to poll, but the general result is the same.

## VII. THE CONSEQUENCES OF COURT-PACKING FOR FDR'S SUPPORT

Nearly all commentators on the Court-packing battle have scored it as a major loss for President Roosevelt, with enormous long-term consequences (e.g., Nelson 1988, Patterson 1967, Kyvig 1989). Some suggest that the Court-packing fight ended the New Deal. Others denote it as the beginning of the "conservative coalition," the alliance of conservative Democrats and Republicans in the House and Senate. Many attribute the Democrats' major losses in the 1938 congressional elections to FDR's bad judgments on this issue. I cannot test these propositions here, but I can assess the extent to which people's views of Court-packing colored their opinions of Roosevelt and the extent to which support for him declined over the course of the three polls. Table 3 presents results

relevant to these questions.

The dependent variable in Table 3 is the difference between a respondent's answer to the item on presidential vote in 1936 and the answer on presidential vote if the election were held today, at the time of the poll. To make this analysis somewhat simpler than the ones reported in Tables 1 and 2, I have coded vote in 1936 0 for Landon, 1 for Roosevelt, and .5 for those who did not vote, could not vote, or voted for someone else. I follow more or less the same procedure for vote if the election were held today. Positive scores on the dependent variable in Table 3 imply movement toward Roosevelt; negative, movement from him. Table 3 contains results for only the first two polls because, in the last poll, Gallup Poll changed the wording of the item for voting if the election were held today to Democrats and Republicans instead of Roosevelt and Landon or some other Republican. This change in wording makes suspect any results from a comparable analysis of change in support for Roosevelt.

The results in Table 3 indicate clearly that people's views of Court-packing made a difference in their opinions of Roosevelt; and, obviously, the two opinions were closely linked, with ambiguous causal sequences. The impact of Court-packing seems to have grown somewhat from the first to the second poll. Age also made a difference: the older a respondent, the more likely he or she was to have moved away from Roosevelt from the 1936 election. FDR picked up some support from urbanites in the second poll; and, from blacks, in both polls. Support for FDR decreased in the Rockies and Central states in the first poll, but regional differences disappeared in the second poll. In both polls, professionals were considerably less willing to vote for FDR in 1937 than they were in 1936.

Then, in the second poll, we also see a significant decline among skilled workers.

In sum, at least for this pair of surveys, there was some movement, but the movements occurred both toward and away from Roosevelt. More precise and authoritative tests await the full set of surveys, but there does not seem to be a massive shift away from Roosevelt as a result of Court-packing or a major change in the demographic bases of his political support.

### VIII. CONCLUDING REMARKS AND FUTURE QUESTIONS

My initial analysis of three of the eighteen polls taken during the Court-packing fight yielded three broad results. (1) In the 1936 election, FDR drew support from people lower on the social gradient, people with fewer resources; young people; people in the South and Pacific; and people in less prestigious occupations. (2) Support for Court-packing among the mass public came from young people; the less affluent; the working class, especially the unskilled; residents of the Pacific and especially the South; and not from farmers. (3) Respondents' opinions toward Court-packing had an appreciable effect on changes in willingness to support FDR from 1936 to 1937, with those who supported Court-packing more willing to vote for FDR. FDR's support declined among older citizens, in the Rockies and Central states, among professionals, and among skilled workers. In one or both of the polls for which I report results, FDR's support actually increased among blacks and urban residents.

These results and analyses are just the tip of the iceberg. The immense number of observations across the eighteen surveys, 52,000, means that it will be possible to tease out

results impossible to glean from single surveys. For many states, for example, I will have fairly stable estimates of opinion toward Court-packing. I will be able to pinpoint views of Court-packing in small segments of the public. Since it will be possible to construct fairly stable estimates of state-level opinion, I can assess the extent to which senators faithfully represented mass opinion in their states. Furthermore, because I have individual-level data in large numbers collected at many equally-spaced intervals, I will be able to estimate the impact of the campaign on opinions for and against Court-packing.

Several related issues in the larger project deserve comment. (1) One of the big puzzles of the demise of Court-packing, at least in my view, is why southern Democrats opposed FDR's plan in such large numbers, despite the high levels of support from southern voters. These senators had formed the bedrock of support for the New Deal; and, if the results presented here are correct, constituents gave them every reason to support packing the Court. In fact, in the American Bar Associations's survey of more than 40,000 lawyers around the nation, lawyers from the South were much, much more likely to support Court-packing than were lawyers in any other part of the country (see the ABA's Report, *Senate Hearings*, 1509-1519, 1537; Smith 1939).

One obvious answer is that southern senators operated in one-party systems in which they could, for lack of effective opposition, defy public opinion. FDR had always been a strong supporter of public ownership of utilities; but there is reason to believe that one important and additional reason for enthusiasm was that he saw TVA and similar projects as a way of cutting off the flow of campaign money from private utilities to conservative Democrats. Another plausible explanation turns on race: as much as



southerners appreciated the New Deal's flow of resources into the South, senators and representatives deeply feared the growth of federal power and the likelihood Roosevelt would fill the Supreme Court with New Deal liberals, more than willing to extend the hand of the federal government from economic to social issues.<sup>34</sup>

(2) Nearly all commentators on the Court-packing fight have viewed it, in one fashion or another, as a major defeat for Roosevelt. Indeed, it was a big political loss. Thus, Leuchtenburg pinpoints the fight over Court as "probably the most important single event in the creation of the conservative coalition that brought the New Deal to a virtual standstill by 1938" (1995, 224). Burns labels it a critical blunder and blames FDR's approach for the decline of the New Deal (see also Kenneth Davis,<sup>35</sup> Laura Kalman,<sup>36</sup> James Patterson,<sup>37</sup> Arthur M. Schlesinger Jr,<sup>38</sup> and Frank Freidel.<sup>39 40</sup>

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<sup>34</sup> "Some southern leaders affect to believe that an enlarged and more liberal Court would life from the southern Negro some of the weight of oppression that he has carried since the Civil War" (Ickes, 1954, 153).

<sup>35</sup> FDR's "sadly mistaken court-packing effort effectively ended the New Deal as a reforming, transforming social force--effectively destroyed the possibility that the New Deal could achieve those 'practical controls over blind economic forces and blindly selfish men'" (Davis 1991, 99).

<sup>36</sup> "Court-packing divided the Democrats and reformers; undermined middle-class and bipartisan support for the New Deal; and distracted FDR from the realm of foreign affairs at the same time that it increased congressional unwillingness to grant him discretion there. Its defeat shattered the sense of the President's invulnerability" (Kalman, 1999:2205).

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<sup>39</sup>Freidel, perhaps the premier biographer of FDR, opines: "The price was high. Politically, Roosevelt had suffered a staggering setback from a Congress top-heavy with

Some of these writers argued that FDR's proposal had no chance of passage from the beginning. Thus, for example, Burns wrote "[t]hat the court bill probably never had a chance of passing seems now quite clear" (1956, 334; see also Patenaude (1970, 51). But it is important to keep in mind how high Roosevelt set the hurdle. He was asking for six additional justices, which is surely an audacious proposal by anyone's criteria; even Senator Robinson of some of FDR's allies referred to it more than once as "raw". To me, the surprising conclusion from my reading of the fight in the Senate is that a majority agreed with Roosevelt on the principle of enlarging the Court but split on the question of six because FDR refused to compromise. It is clear, at least in my view, that, at any point prior to the death of the Senator Robinson, the Majority Leader, Roosevelt could have had at least two additional justices for the asking. Robinson and others told him as much on several occasions, as early as February and March. "Robinson commanded the loyalty of many of his colleagues, and he hoped for a seat on the Court, a prospect that would be much more likely if the Court's membership were expanded - especially because Roosevelt

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Democrats. He had expended a large part of his political capital on a failed enterprise. He had given a winning cause to conservatives long opposed to him, and had seen former allies, even some of the strongest progressives, join them.... The suspicious the Court fight engendered carried over into struggles over other domestic issues...." (Freidel, 1990, 239).

<sup>40</sup> Writing at the time, Arthur Krock said: "Since there were two ways of writing the report, the personal excoriation of the President is accepted by politicians here as a deliberate choice. And since it was possible to have conceded some merit to certain parts of the... bill, ... that none was admitted is taken for willingness on the part of the seven Democrats... and those whom they represent to have a clean break, party-wise with Mr. Roosevelt. The sum of much experienced Washington opinion is that a large group of Democratic senators, who oppose the later extensions of the New Deal, are determined to take back party control in 1940." Find date in *New York Times*.

was thought reluctant to name Robinson to the Court unless he were accompanied by more liberal nominees” (Friedman, 1997, 84-85). That this proposal could have passed the Senate and House is not in the least fanciful. During the debate in the Senate, the President Pro-Tem, Key Pittman, made a ruling that would have allowed Senator Robinson to have brought debate to a halt over a reasonable period of time.<sup>41</sup> And, as Mayhew (2002) has recently argued, the opponents, despite the opportunity to engage in a filibuster, might not have attempted one (see Burdette 1943; Dion 1997, Binder and Smith 1998). Had the proposal passed the Senate, it very likely would have gone through the House, despite the opposition of Hatton W. Sumners, Chair of the House Judiciary Committee. The Democrats had an enormous majority in the House; and, on several occasions during the 75<sup>th</sup> Congress, the House discharged bills from a recalcitrant Rules (chaired by John J. O’Connor of New York and populated with southern Democrats and Republicans) and Judiciary Committees, the two critical actors in the Court-packing plan if it had gone to the House (Altman 1937).

(3) On the question of the political consequences of Court-packing, the results presented here do not suggest a massive shift away from Roosevelt. My reading of other

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<sup>41</sup>Senator Robinson, the Democratic Leader, “had the votes necessary to control Senate procedure [so] recesses, rather than adjournments, were taken each day. Furthermore, to thwart dilatory tactics, a rule was enforced which forbade more than two speeches on a subject in one day. By interpreting the rules to mean ‘legislative,’ rather than ‘calendar’ day, opponents were to be limited to two speeches each against the bill. Furthermore, the president *pro tempore* decreed that a speech was completed when one yielded for anything other than an interrogation, even a quorum call” (Altman, 1937, 1079). Robinson, together with Pittman, were therefore poised to ram the revised court-packing bill through the Senate.

evidence on the consequences of Court-packing makes me skeptical about some of the larger claims scholars have made. To the extent the New Deal came to a halt, it was a result of the inherent political differences within the Democratic Party, together with the natural exhaustion of political capital associated with presidential second terms; and, even before 1937, in 1935 and 1936, the conservatives in the two parties coalesced against some of Roosevelt's measures and Western and Southern Democrats, along with Progressives such as Hiram Johnson of California began to show wariness at the statism they saw in the New Deal. No contemporary model of congressional behavior of which I know predicts that members of Congress will change political course as a result of anger at the president for having proposed an extreme measure. Surely something more fundamental must undergird legislators' behavior.<sup>42</sup> It also seems unlikely that the fight over Court-packing cost the Democrats seats in the 1938 elections; or, if it did, that it did so in more than a race or two. It is much more likely that the recession, the decline of agricultural prices, and the lack of President Roosevelt at the top of the ticket were the culprits.

Consider each of the cases in the Senate (data from *CQ's Guide to U.S. Elections 2003*). In the 1938 election, as in nearly all, congressional races almost always turn on local issues and the features of candidates. The Democrats lost seven seats in the Senate in 1938. In two cases, incumbents lost primaries--in California, Senator William G. McAdoo to Sheridan Downey, who then beat the Republican; and in Idaho, Senator James M. Pope lost to a

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<sup>42</sup> Political alliances, even within parties, are often in flux. Thus, within eighteen months of his brouhaha with Glass, George, and other Southern Democrats, FDR was once again working closely with them as World War II threatened and issues for foreign policy and defense came to the fore. See Robertson, 1994, 296-297.

conservative Democratic congressman, who also beat the Republican. In the California Democratic primary, Downey simply outbid McAdoo with voters, many of them cross-over Republicans, supporting a liberal pension plan, of \$30 per week, a Townsend-style proposal; Pope was not really a strong candidate in the first place, having had as his sole experience serving as Mayor of Boise. In Ohio, Senator Robert Bulkley, who initially won his seat in a special election in 1930, lost to Robert A. Taft, in what most regarded a normal Republican state (see also Stegh 1974). Senators F. Ryan Duffy of Wisconsin, Augustine Lonergan of Connecticut, and Fred Brown of New Hampshire had little opposition in their primaries but lost to Republican opponents in the Fall. Ironically, Senator Lonergan was a only a modest supporter of the New Deal, and Roosevelt and his aides had given serious consideration to opposing him for renomination but then thought better of it; and he was visited with a Socialist opponent in addition to the Republican, Danaher, who won the seat; and Senator Brown obviously came from a heavily Republican state. Both Lonergan and Duffy faced third party challenges from the left, from Socialists or Progressives, both of which clearly played large role in their respective defeats. Two Democrats seats were open as a result of a retirement (Oregon, Senator Steiwer) and resignation (A. Harry Moore, New Jersey).

Then, too, nearly all scholars (but see Shannon 1939a and 1939b and Price and Boskin 1966) have condemned FDR's attempt to "purge" the Democratic Party of anti-New Deal Democrats as foolish and counterproductive and one of the causes of the difficulties he ran into on domestic issues in the remainder of his administration (see Fagin 1979, Burns 1956, Kalman 1999, Savage 1999, et al). To be sure, it was hardly a rousing

success, but several of his candidates won their primaries or general elections and, perhaps most important of all, John J. O'Connor, Chair of the House Rules Committee, went down to defeat in his primary, the consequence of which was to make the New Deal's road in the House significantly smoother than it had been (see Polenberg 1968). Despite the substantial handicap any president has in interfering with local elections, Roosevelt's candidates won in more than half of their races.

(4) Many scholars and some judges have argued that poor "lawyering" and bad legislative draftsmanship caused some or most of the early New Deal's problems and therefore justified the Court striking down the NIRA, AAA, and other acts. Thus for examples, *inter alia*, Irons (1982) contends that styles of litigation varied across agencies, some more effective than others, and intra-agency conflicts and disputes between agencies and the Department of Justice disadvantaged the government; Cushman (1992) claims that lawyers for the NRLB did a particularly good job in making it easier for the Court to uphold the NLRA. For arguments that lawyering did not matter, see Rauh (1983), who argues for the Court-packing plan and contends that "a thousand Clarence Darrows would not likely have persuaded the [pre1937] Court [to act] otherwise"; see Jackson (1941, 185-185), who suggests that conservative justices were stubborn and resistant to argument and determined to thwart the Roosevelt administration."

One of the canards in the literature, propagated by Felix Frankfurter and Arthur Schlesinger, Jr., among others, was that FDR's Attorney General, Homer Cummings, was a political hack; he retained bad lawyers from the Harding and Coolidge administration; and added his own set of political hacks, sometimes with the collaboration of Postmaster

General James Farley, also Chairman of the Democratic National Committee (Ward 1935). This argument, repeated time and again, simply does not bear up under close scrutiny if one looks at the briefs and the names of lawyers who argued in the cases involving the heart of the New Deal. First of all, Frankfurter was scheduled to be Solicitor General and declined the honor, which naturally creates some skepticism about his evaluations of Biggs' administration. Second, much testimony in this vein comes from lawyers in agencies, e.g., Donald Richberg, with whom the Department of Justice had a naturally tense and adversarial relationship. Emerson (1991), in an otherwise informative memoir, subscribes to this notion as well (see also Ickes 1953, 306-307, in the "hot oil" cases; see, more generally, McKenna 2002, 1-25; and Carter 261-263). Yet, by 1930 or so, as the Depression deepened, the flow of elite law graduates to Washington increased substantially and by Roosevelt's administration it was in full flood. See Auerbach and Bardach 1973, White 1994a and 1994b. Quote Justice Stone on J. Crawford Biggs. Without doubt, Solicitor General Biggs did not endear himself to the Court or help the cause of the United States, but, then, he did not argue the central cases of the New Deal and signed briefs over which many others had control.<sup>43</sup>

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<sup>43</sup> (1) *US v. Butler*: SG Reed, oral with Attorney General Cummings, Solicitor General Reed, Assistant Attorney General Wideman, Assistant Attorney General Morris, and Messrs. Sewall Key, Andrew D. Sharpe, Robert N. Anderson, Alger Hiss, Mastin G. White, and Prew Savoy. (2) *Ashwander v. TVA*: Mr. John Lord O'Brian and Solicitor General Reed, with whom Attorney General Cummings, Mr. James Lawrence Fly, General Solicitor, Tennessee Valley Authority, and Messrs. Paul A. Freund and Allan D. Jones, and Miss Bessie Margolin were on the brief, for the Tennessee Valley Authority, respondent. (3) *Carter v. Carter Coal Co.*, 298 US 238: Oral argument, in part, of Assistant Attorney General Dickinson for respondents in Nos. 636 and 649 and for petitioner in No. 651. Solicitor General Reed, Assistant Attorney General Dickinson, and Messrs. Charles H. Weston, F.B.

(5) Congressional support for and opposition to the President's plan took on unusual and intriguing patterns. What accounts for these patterns? The Senate, of course, did not take a roll-call on the plan, but I have data on the statements legislators made and the positions they and dates on which they became public. These data Analyze rationales. Timing.

(6) If, as most scholars conclude, FDR's proposal was a serious error and the public as a whole opposed it, why did FDR persist and continue to insist throughout the battle that he had the people behind him. We have seen that the "public" was not unified on the merits of his proposal, that very much the same cleavages divided people on the proposal as divided them on FDR as president. Presumably, he, too, saw the reports of the Gallup polls, usually divided by various demographic and political segments (Roosevelt was an avid consumer of polls and reports of polls and later in the 1930s began to commission his own private polls.) In addition, Roosevelt's daily mail, some 50,000 letters strong, consistently gave him positive feedback, with the usual ratio of positive to negatives at least two-to-one, often more (FDR Library).

(7) American's experience with a constitutional crisis, pitting individual and corporate property rights versus the power of governments to harness and regulate them,

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Critchlow, A.H. Feller, Charles Harwood, and Robert L. Stern filed a brief in behalf of the government officers. (4) *NLRB v. Jones & Laughlin*: J. Warren Madden and Solicitor General Reed, with whom Attorney General Cummings and Messrs. Charles E. Wyzanski, Jr., Charles A. Horsky, A.H. Feller, Charles Fahy, Robert B. Watts, Philip Levy, and Malcolm F. Halliday were on the brief, for petitioner. (5) *Jones v. SEC.*: Mr. John J. Burns, General Counsel, Securities & Exchange Commission, and Solicitor General Reed, with whom Messrs. Charles E. Wyzanski, Jr., and Alger Hiss were on the brief, for respondent.



was not unique. Very much the same problem arose in Canada, in 1935 and 1936, as Prime Minister Bennett, a Tory, proposed a series of measures in imitation of large portions of FDR's New Deal. He was nonetheless defeated for re-election, and the new Liberal government referred his proposals to the Supreme Court of Canada for a decision on their validity. Predictably, the Supreme Court struck down most of the measures Bennett had proposed and enacted; and, on appeal, the Judicial Committee of the Privy Council upheld the invalidations and struck down the laws the Canadian Court had upheld (see McConnell 1968, 1971; Steedman 1998; Scott 1937). Thus, Canada's New Deal died in its crib, even before Roosevelt and the Supreme Court went head to head. Canada and the United States are not the only English-speaking democracies to have gone through crises involving the appellate courts; the South African Court of Appeal (Forsyth 1985) and the Australian High Court went through very much the same difficulties in the 1940s (see Blackshield *et al.*).

## APPENDIX I

Apart from the standard battery of items I use in Tables 1-3, the Gallup Poll varied its set of items from poll to poll, sometimes repeating them and other times not repeating them. For purposes of illustration, I present here the item wordings and frequencies for AIPO 69, the second survey Gallup launched in February of 1937.

Q.1. Are you in favor of President Roosevelt's proposal regarding the supreme court?

1350 1. Yes  
 1360 2. No  
 290 3. No opinion  
 16 4. No code or no data

Q.2. What action should Congress take on Roosevelt's plan to reorganize the Supreme Court - pass it, modify it, or defeat it?

1014 1. Pass it  
 620 2. Modify it  
 1049 3. Defeat it  
 291 4. No opinion  
 42 0. No code or no data

Q.2a. Do you think a majority of the nation's voters approve of Roosevelt's plan?

1294 1. Yes  
 1035 2. No  
 610 3. No opinion  
 77 0. No code or no data

Q.3. would you like to see John L. Lewis succeed in organizing the steel industry

841 1. Yes  
 1385 2. No  
 785 3. No opinion  
 32 0. No code or no data

Q.4. Would you like to see John L. Lewis succeed in organizing he Ford Motor company

677 1. Yes  
 1560 2. No  
 741 3. No opinion  
 38 0. No code or no data

Q.5. Do you think the President and Congress should seek to enact a second NRA?

1527 1. Yes  
 1206 2. No  
 253 3. No opinion  
 30 0. No code or no data

Q.6. Would you like to see the AAA revived?

1055 1. Yes  
 1258 2. No  
 677 3. No opinion  
 26 0. No code or no data

Q.7. do you believe the parole system helps to restore prisoners to a useful place in society?

1193 1. Yes  
 1367 2. No  
 375 3. No opinion  
 81 0. No code or no data

Q7a. Should parole boards be more strict, less strict, or about as they are now in granting paroles

2163 1. More strict  
 80 2. Less strict  
 418 3. About the same  
 280 4. No opinion  
 75 0. No code or no data

Q.8. Have you ever been up in an airplane?

1001 1. Yes  
 1985 2. No  
 30 3. No answer

Q.8a. If you had your choice, would you prefer to take a long trip by airplane, by train, by automobile, or by bus?

669 1. Airplane  
 1216 2. Train  
 823 3. Automobile  
 149 4. Bus  
 159 5. No answer

Q.9. If there were only two political parties in this country - one for conservatives and one for liberals - which would you join?

1033 1. Conservative  
 1173 2. Liberal  
 706 3. No opinion  
 104 0. No code or no data

Q.10a. For whom did you vote in the november election?

1565 1. Roosevelt  
 797 2. Landon  
 13 3. Thomas  
 25 4. Lemke  
 301 5. Didn't vote  
 310 6. Too young to vote  
 5 0. No code or no data

Q.10b. If the November election were held today, how would you vote? 1707 1.  
Roosevelt

851 2. Landon  
25 3. Thomas  
23 4. Lemke  
16 5. Others  
394 0. No code or no data

N.11. Classify respondent as:

631 1. Average plus  
985 2. Average  
1131 3. Poor or poor plus  
269 4. On relief

N.12. Check whether:

1814 1. Telephone  
1202 2. No telephone

N.13. Check whether:

1743 1. Car  
1273 2. No car

N.14. Check whether:

1826 1. Man  
1190 2. Woman

N.15. Check whether:

2970 1. White  
46 2. Colored

N.16. Occupation:

194 1. Professional  
186 2. Business  
692 3. Skilled workers  
460 4. Unskilled workers  
140 5. Unemployed  
1344 6. Other and none

N.17. Age:

99. 99 years or more  
00 no code or no data

Age distribution:

124 18-20 years  
645 21-29 years  
676 30-39 years  
685 40-49 years  
464 50-59 years

248 60-69 years  
 60 70-79 years  
 10 80-89 years  
 1 90 years and over  
 103 no code or no data

N18. Rural-urban\*

2247 1. Urban  
 536 2. Farm  
 233 3. Small town

N. 19. Section:

Code for first column of two column state code below:

1. New England  
 2. Middle atlantic  
 3. East central  
 4. West central  
 5 & 8. Southern  
 6. Rocky mountain  
 7. Pacific

N. 20. State:

30 11. Maine  
 21 12. New Hampshire  
 25 13. Vermont  
 100 14. Massachusetts  
 40 15. Rhode island  
 40 16. Connecticut  
 300 21. New York  
 102 22. New jersey  
 254 23. Pennsylvania  
 40 24. Maryland  
 33 25. Delaware  
 40 26. West virginia  
 160 31. Ohio  
 129 32. Michigan  
 86 33. Indiana  
 196 34. Illinois  
 70 41. Wisconsin  
 60 42. Minnesota  
 71 43. Iowa  
 100 44. Missouri  
 30 45. North Dakota  
 31 46. South Dakota  
 47 47. Nebraska  
 60 48. Kansas  
 49 51. North Carolina  
 20 52. South Carolina

35	53. Virginia
30	54. Georgia
31	55. Alabama
37	56. Arkansas
25	57. Florida
68	58. Kentucky
36	59. Louisiana
25	81. Mississippi
64	82. Oklahoma
31	83. Tennessee
61	84. Texas
30	61. Montana
25	62. Arizona
32	63. Colorado
30	64. Idaho
29	65. Wyoming
25	66. Utah
25	67. Nevada
25	68. New Mexico
147	71. California
31	72. Oregon
40	73. Washington

N.21. City:

x. Codes not provided by survey

## APPENDIX II

### Excerpts from The National Industrial Recovery Act June 16, 1933 73rd Congress, 1<sup>st</sup> Session AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes. ...

#### Declaration of Policy

Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present protective capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources. ...

#### Codes of Fair Competition

Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof.

Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended. ...

#### Agreements and Licenses

Sec. 4. (a) The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or, industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition.

(b) Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and, after such public notice and hearing as he shall specify, shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, and shall publicly so announce, no person shall, after a date fixed in such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce, specified in such announcement, unless he shall have first obtained a license issued pursuant to such regulations as the President shall prescribe. The President may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the President suspending or revoking any such license shall be final if in accordance with law. Any person who, without such a license or in violation of any condition thereof, carries on any such business for which a license is so required, shall, upon conviction thereof, be fined not more than \$500, or imprisoned not more than six months, or both, and each day such violation continues shall be deemed a separate offense. Notwithstanding the provisions of section 2(c), this subsection shall cease to be in effect at the expiration of one year after the date of enactment of this Act or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

Nothing in this Act, and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this Act, or regulation thereunder, prevent anyone from marketing or trading the produce of his farm.

Sec. 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other



concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.



## Appendix III

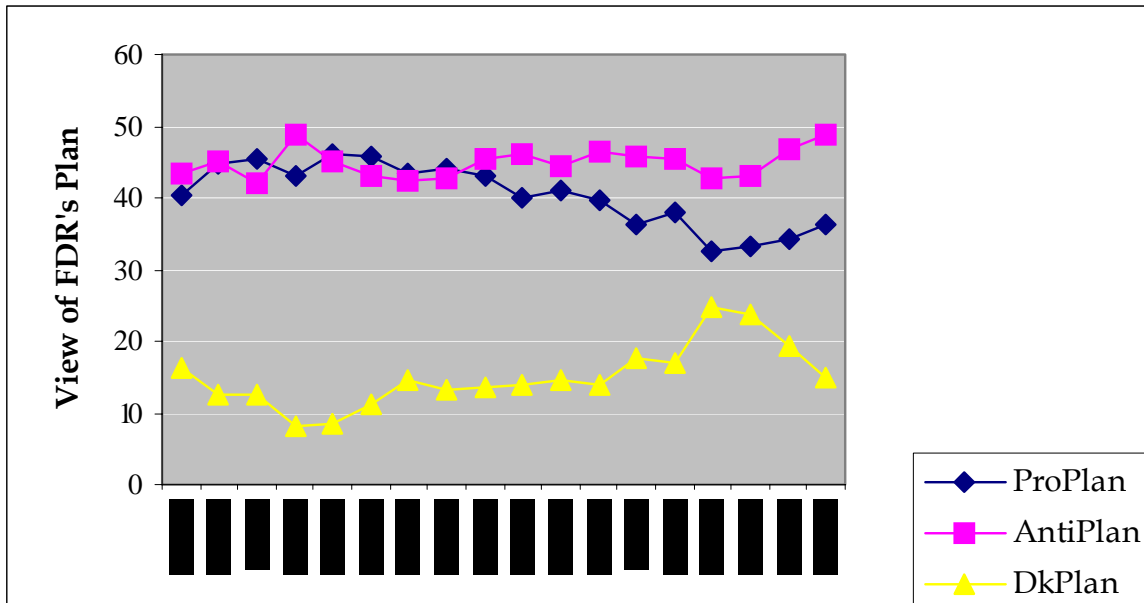


Figure 1. Public Opinion on FDR's Proposal, February 10-June 5, 1937

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Table 1. Support for FDR, 1936: Probit with Heckman Selection

Roosevelt	AIPO68	AIPO78	AIPO84
Social class	<b>-0.22 (.05)</b>	<b>-0.21 (.04)</b>	<b>-0.09 (.03)</b>
Car Ownership	-0.07 (.08)	<b>-0.26 (.07)</b>	<b>-0.19 (.09)</b>
Telephone Ownership	<b>-0.31 (.07)</b>	<b>-0.21 (.07)</b>	<b>-0.19 (.07)</b>
Age	<b>-0.01 (.00)</b>	<b>-0.02 (.00)</b>	<b>-0.01 (.01)</b>
Male	.02 (.08)	.04 (.06)	.02 (.07)
Urban residence	.14 (.12)	-0.07 (.11)	<b>.18 (.08)</b>
Farm residence	.02 (.14)	-0.08 (.13)	-0.14 (.12)
Black	-0.31 (.21)	-0.20 (.26)	.27 (.27)
Pacific	<b>.24 (.12)</b>	<b>.23 (.11)</b>	<b>.18 (.12)</b>
Central	-0.07 (.07)	<b>-0.14 (.06)</b>	-0.05 (.07)
Rockies	<b>.20 (.12)</b>	.04 (.11)	.16 (.12)
South	<b>.63 (.09)</b>	<b>.62 (.09)</b>	<b>.83 (.12)</b>
Professional	.05 (.12)	.07 (.12)	<b>-0.31 (.14)</b>
Business	<b>.20 (.12)</b>	.14 (.11)	-0.14 (.12)
Skilled	.01 (.08)	-0.01 (.07)	.00 (.10)
Unskilled	<b>.18 (.11)</b>	<b>.30 (.10)</b>	.12 (.10)
Intercept	.63 (.47)	1.12 (.20)	.50 (.55)
<b>Opinionation</b>			
Social Class	.07 (.04)	.03 (.04)	.06 (.03)
Car Ownership	<b>.29 (.07)</b>	<b>.34 (.07)</b>	<b>.24 (.07)</b>
Telephone Ownership	.11 (.07)	.09 (.07)	<b>.14 (.07)</b>
Age	<b>.04 (.00)</b>	<b>.05 (.00)</b>	<b>.04 (.00)</b>
Urban residence	.04 (.11)	-0.03 (.11)	-0.04 (.08)

Male	<b>.31 (.06)</b>	<b>.17 (.06)</b>	<b>.14 (.06)</b>
Farm residence	.01 (.14)	.08 (.13)	-.06 (.10)
Black	-.02 (.21)	-.09 (.25)	-.19 (.20)
Pacific	-.12 (.11)	-.06 (.12)	<b>-.27 (.11)</b>
Central	.05 (.07)	-.03 (.07)	-.06 (.07)
Rockies	.15 (.13)	-.04 (.12)	-.02 (.13)
South	<b>-.24 (.09)</b>	<b>-.35 (.08)</b>	<b>-.44 (.09)</b>
Intercept	-1.31 (.20)	-1.23 (.19)	-1.04 (.16)
Rho	-.38	-.92	-.11
Likelihood ratio test	-2553.61	-2517.33	-2549.70
N	2892	2898	2824
Censored observations	606	586	605

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Table 2. Support for Court-Packing: Probit with Heckman Selection

<b>Court-Packing</b>	AIPO68	AIPO78	AIPO84
Social class	<b>-.17 (.05)</b>	<b>-.17 (.05)</b>	<b>-.09 (.02)</b>
Car Ownership	-.12 (.08)	<b>-.19 (.08)</b>	<b>-.26 (.06)</b>
Telephone Ownership	<b>-.27 (.11)</b>	<b>-.36 (.17)</b>	<b>-.24 (.06)</b>
Age	<b>-.00 (.00)</b>	<b>-.01 (.00)</b>	<b>-.00 (.00)</b>
Male	.06 (.19)	-.00 (.23)	-.10 (.11)
Urban residence	-.03 (.12)	.05 (.11)	<b>.16 (.08)</b>
Farm residence	-.11 (.14)	.01 (.13)	.15 (.10)
Black	.09 (.29)	-.03 (.36)	.04 (.21)
Pacific	<b>.38 (.11)</b>	<b>.29 (.13)</b>	<b>.31 (.10)</b>
Central	<b>-.14 (.07)</b>	<b>-.19 (.07)</b>	.11 (.06)
Rockies	-.09 (.11)	.01 (.24)	<b>.18 (.11)</b>
South	.15 (.14)	<b>.21 (.11)</b>	<b>.49 (.09)</b>
Professional	-.14 (.12)	<b>.20 (.12)</b>	-.07 (.12)
Business	<b>.23 (.13)</b>	.14 (.12)	.03 (.10)
Skilled	-.01 (.07)	.11 (.07)	.13 (.08)
Unskilled	.13 (.10)	<b>.23 (.09)</b>	<b>.18 (.08)</b>
Intercept	-.11 (.56)	.17 (.59)	-.09 (.26)
<b>Opinionation</b>			
Social Class	-.06 (.04)	<b>-.09 (.05)</b>	<b>-.09 (.02)</b>
Car Ownership	.10 (.07)	<b>.14 (.08)</b>	<b>.18 (.07)</b>
Telephone Ownership	<b>.37 (.07)</b>	<b>.34 (.08)</b>	<b>.22 (.07)</b>
Age	<b>.01 (.00)</b>	<b>.00 (.00)</b>	<b>.01 (.00)</b>
Urban residence	.06 (.12)	.05 (.12)	.00 (.07)

Male	<b>.50 (.06)</b>	<b>.39 (.06)</b>	<b>.43 (.06)</b>
Farm residence	-.17 (.14)	-.08 (.14)	-.14 (.10)
Black	<b>-.34 (.19)</b>	-.35 (.24)	-.19 (.19)
Pacific	.13 (.13)	<b>-.21 (.12)</b>	-.06 (.12)
Central	-.05 (.07)	.02 (.09)	<b>-.15 (.07)</b>
Rockies	-.09 (.12)	<b>-.36 (.12)</b>	-.14 (.12)
South	<b>-.28 (.09)</b>	<b>-.17 (.10)</b>	<b>-.54 (.05)</b>
Intercept	.40 (.20)	.88 (.21)	.58 (.15)
Rho	.18	-.19	-.81
Likelihood ratio test	-2769.41	-2649.77	-2809.62
N	2892	2898	2824
Censored observations	469	357	605

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**Table 3. Ordered Probit of FDR's Support, 1937, on Consequences of Court-Packing**

Change in Support for FDR, 1936-1937	AIPO68	AIPO78
Support for Court-packing	<b>.21 (.06)</b>	<b>.32 (.06)</b>
Social class	-03 (.04)	-05 (.04)
Car Ownership	-03 (.06)	-06 (.06)
Telephone Ownership	-02 (.06)	-02 (.06)
Age	<b>-.01 (.00)</b>	<b>-.01 (.00)</b>
Male	-06 (.06)	-02 (.06)
Urban residence	-05 (.11)	<b>.24 (.10)</b>
Farm residence	-14 (.13)	.16 (.12)
Black	<b>.30 (.18)</b>	<b>.64 (.22)</b>
Pacific	-12 (.10)	-01 (.11)
Central	<b>-.26 (.06)</b>	-00 (.06)
Rockies	<b>-.20 (.11)</b>	-15 (.10)
South	.01 (.08)	.03 (.08)
Professional	<b>-.36 (.12)</b>	<b>-.24 (.13)</b>
Business	-12 (.12)	-12 (.12)
Skilled	-02 (.07)	<b>-.15 (.07)</b>
Unskilled	-10 (.09)	-02 (.08)
Cutpoint 1	<b>-3.00 (.20)</b>	<b>-2.09 (.18)</b>
Cutpoint 2	<b>-2.43 (.19)</b>	<b>-1.59 (.18)</b>
Cutpoint 3	<b>.54 (.18)</b>	<b>1.33 (.18)</b>
Cutpoint 4	<b>1.41 (.19)</b>	<b>2.19 (.19)</b>
N	2892	2898
Log likelihood	-1744.36	-1743.25

**Table 4. Support for Reviving the AAA and NRA: Probit with Heckman Selection**

<b>Revive AAA</b>	Revive AAA, without FDR	Revive AAA, with FDR	Revive NRA, without FDR	Revive NRA, with FDR
Social class	.02 (.04)	.06 (.05)	<b>-.13 (.05)</b>	-.06 (.06)
Car Ownership	<b>-.15 (.06)</b>	<b>-.19 (.07)</b>	-.09 (.07)	-.11 (.08)
Telephone Owner- ship	-.01 (.06)	.04 (.07)	<b>-.28 (.07)</b>	<b>-.20 (.07)</b>
Age	<b>-.01 (.00)</b>	<b>-.01 (.00)</b>	<b>-.01 (.00)</b>	<b>-.01 (.00)</b>
Male	<b>.20 (.06)</b>	<b>.16 (.07)</b>	.04 (.08)	-.06 (.12)
Urban residence	<b>-.27 (.10)</b>	<b>-.37 (.12)</b>	<b>.28 (.12)</b>	<b>.29 (.14)</b>
Farm residence	<b>.37 (.12)</b>	<b>.30 (.14)</b>	-.11 (.14)	-.16 (.15)
Black	.06 (.19)	.31 (.28)	.07 (.24)	.17 (.30)
Pacific	.02 (.10)	-.03 (.11)	<b>-.18 (.12)</b>	<b>-.28 (.15)</b>
Central	-.02 (.06)	-.04 (.07)	<b>-.30 (.06)</b>	<b>-.30 (.07)</b>
Rockies	<b>-.18 (.10)</b>	<b>-.25 (.11)</b>	<b>-.26 (.12)</b>	<b>-.41 (.13)</b>
South	<b>.30 (.08)</b>	<b>.15 (.08)</b>	-.02 (.08)	<b>-.25 (.09)</b>
Professional	.09 (.11)	.08 (.12)	-.03 (.12)	-.09 (.13)
Business	.04 (.12)	-.06 (.14)	.06 (.13)	-.05 (.15)
Skilled	-.02 (.07)	-.04 (.07)	.05 (.07)	.02 (.09)
Unskilled	.05 (.09)	.02 (.10)	.20 (.09)	.12 (.10)
Reliefers	<b>.19 (.11)</b>	.13 (.13)	<b>.30 (.14)</b>	<b>.24 (.18)</b>
FDR 1936		<b>.98 (.11)</b>		<b>1.24 (.07)</b>
Intercept	-.32 (.18)	-.64 (.22)	.17 (.25)	-.43 (.36)
<b>Opinionation</b>				
Social Class	<b>.12 (.05)</b>	<b>.12 (.05)</b>	<b>.11 (.06)</b>	<b>.11 (.06)</b>
Car Ownership	-.06 (.06)	-.06 (.06)	<b>.15 (.08)</b>	<b>.15 (.08)</b>
Telephone Owner- ship	<b>.17 (.06)</b>	<b>.17 (.06)</b>	.01 (.07)	.01 (.08)

Age	<b>.01 (.00)</b>	<b>.01 (.00)</b>	<b>-.01 (.00)</b>	<b>-.01 (.01)</b>
Urban residence	-.08 (.11)	-.08 (.11)	<b>.26 (.13)</b>	<b>.26 (.13)</b>
Male	<b>.40 (.06)</b>	<b>.40 (.06)</b>	<b>.30 (.07)</b>	<b>.30 (.07)</b>
Farm residence	<b>.54 (.14)</b>	<b>.54 (.14)</b>	-.13 (.15)	-.12 (.15)
Black	<b>-.47 (.18)</b>	<b>-.47 (.18)</b>	<b>-.44 (.20)</b>	<b>-.44 (.20)</b>
Pacific	.12 (.10)	.10 (.10)	<b>-.30 (.11)</b>	<b>-.29 (.12)</b>
Central	<b>.23 (.06)</b>	<b>.22 (.06)</b>	.06 (.08)	.06 (.08)
Rockies	-.00 (.10)	-.00 (.11)	<b>-.21 (.12)</b>	<b>-.22 (.12)</b>
South	.07 (.08)	.06 (.09)	.02 (.10)	.02 (.10)
Professional	.05 (.12)	.05 (.12)	.19 (.16)	.19 (.16)
Business	-.25 (.12)	-.25 (.12)	.42 (.20)	.42 (.20)
Skilled	-.04 (.07)	-.04 (.07)	<b>.15 (.08)</b>	<b>.15 (.09)</b>
Unskilled	-.02 (.09)	-.01 (.09)	-.02 (.11)	-.02 (.11)
Reliefers	.03 (.11)	.04 (.11)	<b>.41 (.14)</b>	<b>.40 (.14)</b>
Intercept	-.36 (.19)	-.36 (.19)	1.05 (.24)	1.05 (.23)
Rho	.96 (.19)	.88 (.55)	-.13 (.60)	.05 (1.2)
Athro	1.94 (.90)		-.13 (.61)	.06 (1.2)
Likelihood ratio test	-2948.79	-2835.69	-2602.23	-2421.16
N	2892	2892	2892	2892
Censored observations	799	799	331	331



A 1937 political cartoon with the caption 'Do We Want A Ventriloquist Act In The Supreme Court?' which was a criticism of FDR's New Deal, depicting President Franklin D. Roosevelt with six new judges likely to be FDR puppets. While it was never voted on in Congress, the Supreme Court justices went public in their opposition to it. And a majority of the public never supported the bill, either, says Barbara A. Perry, director of presidential studies at the University of Virginia's Miller Center. "Congress and the people viewed FDR's ill-considered proposal as an undemocratic power grab," she says. "And FDR eventually packed the Court the old-fashioned way," she says, "through attrition, naming nine members." Public Opinion and the U.S. Supreme Court: Fdr's Court-Packing Plan. Article. Dec 1987. Finally, I use examples from several public opinion studies in the early 1940s to show how the methods of analysis laid out in this article enable us to utilize historical public opinion data. The study of political behavior has flourished in recent decades with the development of long-term, time series data collected by both academic survey researchers and commercial pollsters.