The Conscientious Legislator and Public Opinion on Taxes

*By Lawrence Zelenak**

If a conscientious legislator desired to enact the tax policy preferences of the general public (as indicated by public opinion polling), she would have to start, of course, by identifying those preferences. Unfortunately, on a number of important tax policy questions, public opinion is difficult to discern; on some issues, public opinion even appears to contradict itself. This article examines some of the difficulties of understanding public opinion on taxes and offers some suggestions as to how the conscientious legislator might proceed in light of those difficulties. Part I describes two contexts in which public opinion appears to contradict itself and suggests how the apparent contradictions might be resolved. Part II offers three suggestions for the conscientious legislator whose goal is to discern, rather than to manipulate, public opinion on taxes—to be neither unduly optimistic nor despairing about the potential for educating the public on tax policy issues, to understand and guard against the manipulation of public opinion by those with particular tax policy agendas, and to be guided by opinion surveys that give the public a range of policy options rather than forcing a choice between two polar positions. Part III briefly concludes.

I. TWO EXAMPLES OF THE DIFFICULTY OF DISCERNING PUBLIC OPINION ON TAX POLICY

This section considers two examples of the difficulty of discerning public opinion on tax policy issues and in each case proposes a strategy for overcoming the difficulty. In the first case, the proposed solution seems simple and workable; in the second case, the problem seems less tractable, and the proposed solution may or may not succeed.

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A. The Highest Rate of Tax Anyone Should Be Required to Pay

Accepting the Republican Party's presidential nomination in 2000, George W. Bush declared, "On principle no one in America should have to pay a, [sic] more than a third of their income to the federal government."[1] Although the source of such a principle is not self-evident and Bush offered no analysis in support of his claim, polling suggests that Bush's proposed ceiling is, if anything, too high to satisfy public opinion.

A 1995 Roper Center/Reader's Digest poll, for example, asked, "What's the highest amount, highest percentage you think would be fair for any family of four to pay in all their taxes combined, *no matter how high their income*?"[2] The mean response was 23%, and the median response was 20%.[3] An earlier national survey, conducted by Peggy A. Hite and Michael Roberts, asked respondents for the "highest marginal rate of tax [married taxpayers] should have to pay . . . *no matter how much [their] income*."[4] The mean response was 27.97%.[5] It is doubtful whether most respondents understood the distinction between average rates and marginal rates, but to the extent respondents were thinking in terms of marginal rates, their ceiling for average rates presumably would have been somewhat lower.[6]

Other surveys have asked for "the highest percentage *anybody* should have to pay" with respect to "all taxes, state, federal, and local."[7] Although asking the question with respect to "anybody" implies the qualification, "no matter how high their income," it is not surprising that the failure to make the qualification explicit results in lower preferred rates, with both means and medians well below 20%.[8] Still other

1. George W. Bush, Republican Presidential Nomination Acceptance Speech (Aug. 3, 2000), *in The Republicans; Bush Outlines His Goals: 'I Want to Change the Tone of Washington,'* N.Y. TIMES, Aug. 4, 2000, at A24.

2. KARLYN BOWMAN, AMER. ENTER. INST., PUBLIC OPINION ON TAXES 28 (2008) (emphasis added), *available at* http://www.aei.org/docLib/20050415_TAXES.pdf.

3. *Id.*

4. Peggy A. Hite & Michael L. Roberts, *An Experimental Investigation of Taxpayer Judgments on Rate Structure in the Individual Income Tax System*, 13 J. AM. TAX'N ASS'N 47, 55 (1991) (emphasis added).

5. *Id.*

6. A taxpayer's average rate of tax is her tax liability as a percentage of her taxable income. A taxpayer's marginal rate of tax is the rate that applies to her last dollar of income. In a tax system with a graduated rate structure, a taxpayer subject to more than one rate bracket will have a higher marginal rate than average rate.

7. BOWMAN, *supra* note 2, at 28 (reporting results of Fox News/Opinion Dynamics polls conducted in 1999, 2001, and 2003) (emphasis added).

8. *Id.* In 1999, the mean was 15% and the median 10%; in 2001, 17% and 15%; and in 2003, 17% and 10%. *Id.*

surveys omit even the reference to "anybody" and simply ask for the "maximum percentage of a person's income that *should* go to taxes – that is, all taxes, state, federal and local."[9] Although this calls even less attention to the highest income taxpayers than the "anybody" formulation, the mean responses—in the mid-teens—are quite similar to the mean responses to the "anybody" questions.[10] In the case of the "a person" questions, and perhaps in the case of the "anybody" questions as well, there is reason to suspect that many respondents interpret the questions to ask about the highest rate of tax the respondents themselves should have to pay—in other words, a respondent may think of himself as the "person" referred to in the question. This is suggested by the way in which the mean responses are higher for respondents in higher income groups. In a 2007 survey, for example, the mean was 13.2% for respondents with incomes of $25,000 to $35,000, but 17.5% for respondents with incomes of $75,000 or more.[11]

Even in the case of the questions of the "no matter how high their income" variety, respondents seem to suffer from a certain failure of imagination concerning how high the highest income might be. This is strongly suggested by within-survey inconsistencies between responses to "no matter how high their income" questions, and responses to questions that ask respondents to assign appropriate tax burdens to taxpayers at various specified income levels. In the same 1995 survey that produced a mean maximum tax burden of 23% and a median of 20%, "no matter how high their income," a question asking for "the highest percentage you think would be fair for a family making $200,000 a year to pay when you add their taxes together" produced a mean of 27% and a median of 25%.[12] The Hite and Roberts survey that produced a mean highest *marginal* tax rate of 27.97% for married taxpayers, "[n]o matter how much income [they] have," also asked respondents to assign *average* tax rates to married couples at various income levels, "so that every household is paying its 'fair share.'"[13] At

9. ANDREW CHAMBERLAIN, TAX FOUNDATION SPECIAL REPORT NO. 154, WHAT DOES AMERICA THINK ABOUT TAXES? 8 (2007), *available at* http://www.taxfoundation.org/files/sr154.pdf.

10. The mean response was 16% in 2005, 15% in 2006, and 14.7% in 2007. *Id.* In addition to the "a person" question quoted in the text, the 2005 survey also asked, "Out of every dollar what's the highest percentage anybody SHOULD HAVE TO PAY in taxes?" BILL DALBEC & AMIE WANG, TAX FOUNDATION, ATTITUDES ON TAX AND WEALTH ISSUES – TOPLINE RESULTS 5 (2005). The mean response of 16% was the same as the 2005 mean response to the "anybody" question. *Id.*

11. CHAMBERLAIN, *supra* note 9, at 3.

12. BOWMAN, *supra* note 2, at 28.

13. Hite & Roberts, *supra* note 4, at 55.

$100,000 family income (the highest income level specified), the mean average tax rate was 29.16%.[14]

In both surveys, asking respondents to imagine a specific income amount—high, but far from stratospheric—produced higher maximum tax rates than asking a "no matter how high" question mentioning no specific income amounts. As far as I have been able to discover, no survey has ever asked about the maximum fair tax burden for any specified dollar amount of income above $200,000. Given the strong evidence that questions of the "no matter how high" and "anybody" varieties do not prompt respondents to think about taxpayers with very high incomes, we simply do not know what the public thinks should be the maximum average tax rate for a taxpayer with income of $1,000,000, $10,000,000, or $100,000,000. There is good reason to suspect, however, that it is considerably higher than any of the mean responses to the questions that have been asked and perhaps higher than Bush's one-third principle as well. In the case of polls commissioned by organizations with low-tax agendas, the failure to ask about average rates for specified very high income levels may be intentional. Such organizations may understand that the responses to questions phrased in terms of "no matter how high their income," "anybody," or "a person," can plausibly be used as evidence of public opinion on the appropriate tax rates for billionaires, and they may suspect that more specific dollar-based questions would produce results less congenial to their policy agendas. However, organizations with different policy agendas and pollsters with no policy agendas should recognize the failure of imagination reflected in the responses to questions that do not specify income levels, and they should address that failure by devising new questions focused on income levels far higher than the low six figures.

B. The "Metric Effect": Tax Dollars Versus Tax Rates

Opinions as to appropriate tax burdens at different income levels are highly sensitive to whether the question is asked in terms of percentages or dollars. In a study by Roberts and Hite, the average preferred effective tax rate on $100,000 income was about 29% (corresponding, of course, to a tax burden of about $29,000); when a substantively identical question was asked in terms of dollars rather than percentages, however, the average preferred tax burden was only $20,000.[15] A more recent study by Edward J. McCaffery and Jonathan Baron produced

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14. *Id.*

15. Michael L. Roberts & Peggy A. Hite, *Progressive Taxation, Fairness, and Compliance*, 16 L. & POL'Y 27, 32–33 (1994).

similar results.[16] This "framing effect" or "metric effect" makes a significant difference in desired levels of tax progressivity; public opinion supports much greater average rate progressivity when questions are framed in percentage terms than when questions are framed in dollar terms.[17]

Assuming Congress would like to distribute the tax burden in accordance with public preferences as expressed in opinion polling, how could it do so in light of these inconsistent preferences? One possibility would be to rely on intuition about which frame—percentages or dollars—is likely to produce the more authentic preferences. Unfortunately, intuitions on this question tend to differ. Commenting on their results, Roberts and Hite opine that the answers to the dollar question are more reliable, because people tend to confuse average tax rates with marginal tax rates, while "[b]y comparison, assessments in dollar terms are unambiguous and therefore are more valid."[18] In contrast, McCaffery and Baron describe the responses to the dollar questions as being based on a "progressivity illusion" (i.e., the illusion that a tax is progressive if it imposes dollar burdens which increase with income, even if the burdens represent flat or decreasing percentages of income as income rises), thus implying that the answers to the percentage questions reveal the respondents' true preferences.[19]

Neither view is entirely persuasive. When Hite and Roberts reject the rate-based (as contrasted with dollar-based) questions on grounds of confusion between average rates and marginal rates, their concern is that respondents may be answering in terms of marginal rates when the question is asking them to answer in terms of average rates. If so, and if desired marginal rates are higher than desired average rates (as one would expect), rate-based questions will produce higher average rates than respondents actually desire. Although this is possible, it seems unlikely. The concept of marginal tax rates is almost certainly more difficult for the public to grasp than the concept of average tax rates. If that is right, people might well think in terms of average rates when they are asked to think in terms of marginal rates, but they would not be

16. Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1755–57 (2005) (stating that at $100,000 income, the mean preferred average tax rate was 18.8%, but the mean preferred tax burden in dollars was only $15,200; at $200,000 income the mean preferred average tax rate was 24.6%, but the mean preferred tax burden in dollars was only $16,800).

17. McCaffery & Baron, *supra* note 16, at 1757 tbl.B; Roberts & Hite, *supra* note 15, at 33 fig.1.

18. Roberts & Hite, *supra* note 15, at 42.

19. McCaffery & Baron, *supra* note 16, at 1755. They do not mention the contrary view of Roberts and Hite. *See id.*

likely to think in terms of marginal rates when asked to think in terms of average rates. When McCaffery and Baron claim that the answers to dollar-based questions are influenced by a "progressivity illusion," they are implicitly claiming that the public's true preference is for progressive average tax rates, but that the public mistakenly believes that average rate progressivity results as long as dollars of tax liability increase with income (even if the increase is only proportional to income, or less than proportional to income). They do not consider, however, an alternative hypothesis which seems equally plausible: that the public's true preference is simply that dollars of tax liability increase significantly with income, but that the public mistakenly believes that achieving that result requires progressive average tax rates.

It is far from clear that either frame—dollars or percentages—is more revealing of true preferences than the other. A possible approach to resolving the inconsistency would be to ask the same respondents substantively identical questions using first one frame and then the other, with enough time separation between the two questions to weaken or eliminate the influence of the answer to the first question on the answer to the second. (The questions could be asked in one order for one set of subjects, and in the opposite order for another set.) If a subject's answers under the two frames were not consistent, the questioner would point out the inconsistency and ask the subject for his true preferences in light of the inconsistency. This would be a considerably more complicated process than the typical tax opinion survey, but it is the most promising route for resolving the inconsistent responses to dollar-based and rate-based questions—certainly more promising than attempting to choose between the competing intuitions of Roberts and Hite, and McCaffery and Baron.

II. LESSONS FOR THOSE WHO WOULD DISCERN RATHER THAN MANIPULATE PUBLIC OPINION

This section offers three suggestions for the conscientious legislator who wishes to discern—rather than manipulate—public opinion on tax policy issues. The suggestions are: (1) be realistic, but not despairing, about the role education can play in informing public opinion; (2) understand how those with particular tax policy agendas can manipulate public opinion and how that manipulation can be countered; and (3) seek out public opinion on a range of policy options, rather than requiring the public to choose between two policy extremes.

A. Difficult Tax Concepts and the Role of Education

Part of the problem in discerning public opinion on tax issues may be that some tax policy concepts are too difficult for most of the public to grasp. There is evidence, for example, that "even relatively sophisticated individuals do not really understand [the concept of tax] incidence," the idea that the economic burden of a tax may fall partly or entirely on someone other than the nominal taxpayer.[20] Similarly, there is good reason to suspect that the concept of progressive effective tax rates may be beyond the grasp of most of the public. In one study, the results of which are rather shocking, investigators asked a group of undergraduate students who had just completed either an introductory or an advanced tax class at one of two large public American universities to indicate whether various tax systems were progressive, flat, or regressive. One of the tax systems was described as imposing a tax of $5,000 on a taxpayer with an income of $60,000, and a tax of $3,000 on a taxpayer with an income of $30,000. Despite the fact that the effective tax rate on the higher-income taxpayer was 8.3% and the effective tax rate on the lower-income taxpayer was 10%, 57.5% (107 out of 186) of the students identified the tax system as progressive.[21]

Some have argued that education is the solution to the problem of poorly informed public opinion on tax issues, but these results suggest that there are limits to what education can achieve. On the other hand, it is too early to give up. On at least some issues, the educational approach appears promising. The choice between the Hall-Rabushka-Forbes flat tax and the current income tax provides an example.[22] During the high point of public interest in replacing the income tax with the flat tax, a number of polls indicated the public narrowly preferred the flat tax to the income tax. In a 2002 poll, for example, 53% of those expressing an opinion favored replacing the income tax with the flat tax.[23]

Using other data from the same survey, Joel Slemrod was able to determine that a substantial amount of the support for the flat tax was based on the widespread misconception that the current income tax is

20. Steven M. Sheffrin, *What Does the Public Believe About Tax Fairness?*, 46 NAT'L TAX J. 301, 306 (1993).

21. *See* Michael L. Roberts, Peggy A. Hite & Cassie F. Bradley, *Understanding Attitudes Toward Progressive Taxation*, 58 PUB. OPINION Q. 165, 172, 176, 178, 180, 183 (1994) (author's calculations, based on tables 1, 2, 3, 4, and 5).

22. *See generally* ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 1995) (discussing the flat tax proposal).

23. *See* NATIONAL PUBLIC RADIO, KAISER FAMILY FOUNDATION & KENNEDY SCHOOL OF GOVERNMENT, NATIONAL SURVEY OF AMERICANS' VIEWS ON TAXES 8 (question 25) (2003).

regressive, so that a switch to the flat tax would be a progressive change.[24] He concluded that "completely eliminating the misconceptions would reduce the percentage favoring a flat tax by 10.3[%] . . . from 52.9[%] to 42.6[%]."[25] Correcting this misconception would require only the conveyance of fairly simple and straightforward information. This task seems feasible in a way that explaining tax incidence or progressivity to the general public does not. The task has not been made easier, however, by the fact that in recent years the income tax has actually become regressive at the very top of the income distribution, as a result of the extensive impact of the favorable rates on capital gains and dividends on the tax liabilities of the wealthiest taxpayers. In 2005, the most recent year for which data are available, the average federal income tax rate for taxpayers with adjusted gross incomes (AGIs) of one million dollars or more (23.0%) was almost one percentage point lower than the average rate for taxpayers with AGIs in the $500,000 to one million dollar range (23.9%).[26] Additionally, the 2005 average tax rate on the 400 highest income taxpayers—the so-called "Fortunate 400"—was a mere 18.23%.[27] In addition to the obvious immediate benefit to wealthy taxpayers of highly preferential rates for capital gains and dividends, the high-end regressivity produced by those rates may help make the case for the flat tax with the general public.[28]

24. Joel Slemrod, *The Role of Misconceptions in Support for Regressive Tax Reform*, 59 NAT'L TAX J. 57, 57 (2006).

25. *Id.* at 66.

26. Kyle Mudry & Justin Bryan, *Individual Income Tax Rates and Shares, 2005*, *in* STAT. OF INCOME BULL., Winter 2008, at 8, 11 fig.B.

27. Tom Herman, *There's Rich, and There's the 'Fortunate 400,'* WALL ST. J., Mar. 5, 2008, at D1.

28. To the extent the public desires progressivity and the current income tax is not progressive throughout its entire range, it would seem more rational to eliminate the regressive aspects of the current system than to adopt some form of flat tax (thus abandoning the progressivity goal in despair). It is not clear, however, that the majority of the general public would agree. In this regard, it is interesting to note the strangely populist flavor of Mike Huckabee's support for replacing the federal income tax with a national sales tax. At times during his campaign for the Republican presidential nomination, Huckabee seemed to be arguing that the appropriate policy response to the inequity produced by the avoidance or evasion of tax on *some* investment income by *some* wealthy taxpayers would be to amend the law so that *no* wealthy taxpayer would owe tax on *any* investment income. In one debate, for example, he made the following case for replacing the income tax with a sales tax:

> [Rich] people . . . can take their money, shelter it at maybe 15 percent income, not the 35 percent that the self-employed people in the country pay, or they can hide it away in a Cayman Island offshore bank account and pay no tax on it. The average American is going to resent the fact that there is not a level of equity in the tax system.

Fox News: Republican Forum (Fox television broadcast Jan. 6, 2007), *available at* http://www.cfr.org/publication/15179/republican_forum_transcript_fox_news.html.

The work of James S. Fishkin suggests an interesting approach to the education problem: thoroughly educating a small number of people, whose views might then be taken as an indication of what the general public would think if it were similarly educated. Fishkin has pioneered the concept of the "deliberative poll," under which a group of people selected using the usual selection principles of opinion polling are brought together for a weekend of non-partisan education and discussion on a number of public policy issues.[29] They are polled on the issues before the education begins and again at the end of the weekend. Fishkin urges policymakers to give substantial weight to the results of such deliberative polls, on the grounds that they represent *genuinely informed* public opinion—what the general public would think if it had been exposed to the education received by the polled group. There are obvious concerns about the quality and neutrality of the weekend's education, and about the extent to which policymakers and the general public would accept the legitimacy of the results of deliberative polls, but Fishkin's approach is nevertheless intriguing. As it happens, the flat tax was one of the topics Fishkin included in his first American deliberative poll, held in Austin, Texas, in 1996. Support for the flat tax fell from 44% at the beginning of the weekend to 30% at the end.[30] At least on this important tax policy issue, education—either of the general public or of a deliberative polling group serving as a surrogate for the general public—does seem to produce better-informed opinions, which can serve as a better guide for the conscientious legislator.

B. The Problem of Opinion Manipulation

A public, poorly informed on tax policy issues, can be exploited by a poll commissioned by a group with a particular policy agenda. For example, in recent years, the Tax Foundation, an organization which somewhat dubiously describes itself as non-partisan, has commissioned annual polls on various tax policy questions, including the following:

> Last year 43.4 million Americans–that's one-third of all taxpayers–paid no federal income tax after deductions and credits. Thinking about your own tax burden, do you think this is fair, or do you feel everyone should be required to pay some minimum amount of tax to help fund government?[31]

29. JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY (1997).

30. *Id.* at 214.

31. CHAMBERLAIN, *supra* note 9, at 11.

With the question presented in those terms, it is hardly surprising that the majority of those polled, 61%, thought this was not fair. This result fits neatly with the Tax Foundation's goal of increasing the percentage of Americans with positive federal income tax liabilities. Scott A. Hodge, the Tax Foundation's President, has claimed:

> While some may applaud the fact that millions of low- and middle-income families pay no income taxes, there is a threat to the fabric of our democracy when so many Americans are not only disconnected from the cost of government but are net consumers of government benefits. The conditions are ripe for social conflict if these voters begin to demand more government benefits because they know others will bear the costs.[32]

A question designed to educate, rather than to take advantage of ignorance, might have explained that in many cases the absence of an income tax liability is the result of the earned income tax credit (EITC), which plays an important role in lifting low-wage working families above the poverty level. Such a question might also have informed (or reminded) respondents that those who pay no income tax often pay substantial federal payroll tax, federal excise taxes, various state and local taxes, and in many cases have paid and will pay substantial federal income tax in other years. Using simulations based on a simplified model of 2003 federal income tax law and inflation-adjusted earnings data from the Panel Survey of Income Dynamics, Lily L. Batchelder, Fred T. Goldberg, Jr., and Peter R. Orszag have estimated that "about three-quarters of tax units who would be eligible for the refundable element of the EITC or CTC [child tax credit] at some point during a twenty-year period under current law should nevertheless have positive net federal income tax liability over that period if historic earnings patterns are any guide."[33] When they broaden their analysis to include the employer and employee portions of the federal payroll tax, in addition to the federal income tax, they estimate that over 99% of those eligible for the refundable element of the EITC or CTC for at least one

32. SCOTT A. HODGE, PUTTING A FACE ON AMERICA'S TAX RETURNS: SOUND TAX REFORM MUST BEGIN WITH A SOLID UNDERSTANDING OF THE CHANGING FACE OF AMERICAN TAXPAYERS 8–9 (2005), *available at* http://www.taxfoundation.org/files/dba37618d9c2d2df02f24766ac4cc39d.pdf. Concern over an excessive number of Americans without positive federal income tax liabilities is a frequent theme in Tax Foundation publications. *See, e.g.*, Scott A. Hodge, *Number of Americans Paying Zero Federal Income Tax Grows to 43.4 Million*, FISCAL FACTS, Mar. 30, 2006, *available at* http://www.taxfoundation.org/news/show/1410.html; J. Scott Moody & Scott A. Hodge, *The Growing Class of Americans Who Pay No Federal Income Taxes*, FISCAL FACTS, Apr. 14, 2004, *available at* http://www.taxfoundation.org/news/show/206.html.

33. Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 68 (2006).

year of a twenty-year period should have a positive federal tax liability over those twenty years.[34]

Of course, a question which included any information of this sort might not have produced the answers desired by the Tax Foundation. In fact, less leading versions of the same basic question, asked in prior decades, have produced results which would not be congenial to the Tax Foundation. A 1986 Roper/H&R Block survey asked: "As a matter of public policy, do you think that everyone who receives an income should pay SOME tax–even if it's only one dollar–or do you think that people below the poverty level should not have to pay any tax?"[35] The no-tax option was the choice of 59% of respondents; only 39% wanted to impose the tax on everyone.[36] When the same question had been asked in 1979, the results were similar—56% opposed tax on the poor, while 41% favored it.[37] The only effective response to questions such as the Tax Foundation's question, by those who are trying to discover true public opinion rather than take advantage of a poorly-informed public, is to commission their own polls using questions designed to educate rather than to obfuscate.

C. The Importance of Providing a Range of Policy Options

Perhaps the most important lesson for those interested in trying to discern rather than manipulate public opinion is that polls must present the public with a range of policy options, rather than merely with two extremes. Two recent stories of public opinion and the tax legislative process illustrate this point.

The first story is about the attempt to repeal the estate tax (which has resulted, so far, in the repeal of the estate tax for the single year 2010[38]). When polls taken in the early years of the current decade simply asked whether or not one favored repealing the estate tax, substantial majorities consistently supported repeal. In the 2002 National Election Survey, for example, 67.8% of those polled favored "doing away with the estate tax."[39] Interestingly, and perhaps contrary to conventional

34. *Id.*

35. ROPER/H&R BLOCK STUDY #1986-0643: THE AMERICAN PUBLIC AND THE AMERICAN INCOME TAX SYSTEM 16 (question 15) (1986).

36. *Id.*

37. ROPER H&R BLOCK STUDY #1979-0673: THE AMERICAN PUBLIC AND THE INCOME TAX SYSTEM: THE THIRD IN A SERIES OF STUDIES 21 (question 22) (1979).

38. Economic Growth and Tax Reconciliation Act of 2001, Pub. L. No. 107-16, § 501, 115 Stat. 69 (2001) (codified in scattered sections of 26 U.S.C.).

39. Mayling Birney, Michael J. Graetz & Ian Shapiro, *Public Opinion and the Push to Repeal the Estate Tax*, 59 NAT'L TAX J. 439, 444 (2006) (internal quotation marks omitted).

wisdom, purely rhetorical differences in the wording of the question made little difference in the results. In the same survey, some respondents were asked about "doing away with the death tax" rather than about "doing away with the estate tax"; this increased the percentage in favor of repeal only modestly, from 67.8% to 70.0%.[40] What made a major difference, however, was offering respondents intermediate options between repeal and the status quo.[41] A 2002 poll, for example, found a slight public preference for retaining the estate tax and raising the exemption level to $3 million rather than simply repealing the tax (by a margin of 47% to 42%).[42] Another poll found only 26% of respondents preferred outright repeal to increasing the exemption level to $25 million.[43] Polls also suggested that the public enthusiasm for estate tax repeal would weaken if the public were presented with a choice between estate tax repeal and an equal-size income tax cut focused on the middle class.[44] More generally, support for estate tax repeal is likely to drop in any poll which makes the crucial point that estate tax repeal is not free. In a period of budget deficits, estate tax repeal implies some combination of increased deficits, decreased government spending, and increases in other taxes.

The story of public opinion and the 2001 and 2003 Bush income tax cuts is similar to the estate tax story. Despite the heavy skewing of those tax cuts in favor of the rich in terms of dollars of tax cuts per taxpayer, opinion polling consistently found modest majorities in favor of the cuts when questions simply asked respondents to choose between the Bush cuts and no cuts. In his analysis of those polls, Larry Bartels concludes that these majorities were dependent on the existence of a sizeable group of taxpayers who would support any package of tax cuts, no matter how skewed in favor of the rich, as long as the package included *some* tax reduction—however modest—for the taxpayers themselves.[45] Proponents of the cuts were able to claim public support for the cuts precisely because most polling simply pitted the Bush cuts against the status quo. As Jacob S. Hacker and Paul Pierson have demonstrated, however, polling which pitted the Bush tax cuts against equal-revenue tax cuts less skewed in favor of the rich indicated a

40. *Id.*

41. *See, e.g.*, *id.* at 448.

42. *Id.* at 447–48.

43. *Id.* at 443 (discussing 2003 NPR/Kaiser/Kennedy poll).

44. *Id.* at 447.

45. Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 PERSP. ON POL. 15 (2005); *see also* Larry M. Bartels, *A Tale of Two Tax Cuts, a Wage Squeeze, and a Tax Credit*, 59 NAT'L TAX J. 403 (2006).

strong public preference for the alternative tax cuts.[46] One poll, for example, found the public preferred—by a margin of fifty-three percentage points—that the tax cut plan be "adjusted so more of the tax cuts went to lower-income taxpayers."[47] And when the public was asked to evaluate tax cuts relative to other possible uses of the expected federal budget surpluses, respondents strongly preferred foregoing the tax cuts and using the surpluses to strengthen Social Security (preferred over tax cuts by a margin of 74% to 21%) or to shore up Medicare (preferred over tax cuts by a margin of 65% to 25%).[48] In short, public opinion supported the Bush tax cuts only because most polling presented the public with an impoverished range of policy options.

Bartels engaged in a rather sharp debate with Hacker and Pierson, in a 2005 issue of *Perspectives on Politics*, concerning whether the public really supported the 2001 and 2003 tax cuts.[49] The debate was not about the actual contours of public opinion regarding the tax cuts—as to which the two sides largely agreed—but rather about the descriptive label (supportive or unsupportive) that should be attached to those contours. According to Hacker and Pierson, the 2001 tax cut was "directly at odds with majority views,"[50] despite substantial polling majorities in favor of the cut:

> [T]hese polls say almost nothing about what kind of tax cuts the public wanted and how much priority they gave them. In fact, by isolating the issue of tax cuts from any discussion of alternatives or tradeoffs, the polls fail completely to capture public opinion about policy priorities.[51]

Bartels, however, argued that the position of Hacker and Pierson reflected "a fundamental confusion about the nature of democracy."[52] According to Bartels,

> Democratic policy agendas are set by elected leaders, not by voters. As E. E. Schattschneider aptly put it, "The people are a sovereign whose vocabulary is limited to two words, 'Yes' and 'No.'" In the case of the tax cuts, President Bush posed the question and the

46. Jacob S. Hacker & Paul Pierson, *Abandoning the Middle: The Bush Tax Cuts and the Limits of Democratic Control*, 3 PERSP. ON POL. 33 (2005).

47. *Id.* at 38.

48. *Id.*

49. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, *supra* note 45, at 21.

50. Hacker & Pierson, *supra* note 46, at 34.

51. *Id.* at 37.

52. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, *supra* note 45, at 21.

people's response, insofar as they responded at all, was a vigorous "Yes."[53]

As important as this debate may be from the perspective of political scientists, it seems beside the point from the perspective of a conscientious legislator—an "elected leader" able to participate in the setting of "democratic policy agendas"—attempting to discern public opinion on matters of tax policy. Suppose elected leaders presented the public with a meaningful range of policy options, and opinion polling investigated public opinion with respect to those options. (Even if Bartels and Schattschneider are correct in claiming that the people can answer only "yes" or "no," the people can certainly be asked more than one yes-or-no question.) In that case, the disagreement between Bartels and Hacker and Pierson would disappear, because in responding to (in Bartel's words) "policy agendas . . . set by elected leaders,"[54] the people would be expressing their preferences among (in the words of Hacker and Pierson) "alternatives [and] tradeoffs."[55]

III. CONCLUSION

It is possible to create polling majorities seemingly on both sides of contentious tax policy issues, by taking advantage—or not—of public ignorance and confusion, and by artificially restricting—or not—the choices presented to the polled public. Because of these competing majorities, and also because tax legislation generally has rather low salience with the voting public (that is, voters do not often vote for or against a particular candidate based on his positions on tax issues), legislators typically have considerable "running room" on tax legislation.[56] Often they can choose to support or oppose pending tax legislation without much fear of voter reprisal in either case. In many cases, then, public opinion will not greatly constrain a legislator's vote on proposed tax legislation. Even if she is not constrained, however, a conscientious legislator will want to take public opinion into account when making her decisions—*if* the opinion is that of a public well-informed and presented with a reasonable range of policy options. Given the ease with which public opinion on taxes can be manipulated by the exploitation of ignorance and the restriction of options, those who want to employ public opinion legitimately and effectively in the

53. *Id.* (quoting E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 52 (1942)).

54. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, *supra* note 45, at 21.

55. Hacker & Pierson, *supra* note 46, at 37.

56. *See* Birney, Graetz & Shapiro, *supra* note 39, at 454–56 (discussing the concept of "running room" with respect to tax legislation).

tax legislative process are faced with a challenging—but not impossible—task.