

# Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan

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## ABSTRACT

Judicial politics scholars are currently engaged in a debate over whether policy disagreement with the Supreme Court causes individuals to view the Court as less legitimate. Traditional legitimacy theory makes the argument that policy incongruence does not affect legitimacy judgments. However, recent research challenges this assertion and demonstrates that incongruence is associated with diminished evaluations of the Court's legitimacy. I contribute to this debate by analyzing public support for the 1937 Court-packing plan. The Court-packing plan is a unique context in which to test theories of legitimacy because the Court's institutional structure faced a credible threat. I find that support for New Deal policies predicts support for the Court-packing plan, a desire to see Congress pass the plan, and wanting to limit the Court's ability to exercise judicial review to invalidate acts of Congress. These results support the emerging notion that policy disagreement is associated with diminished legitimacy.

## 1. INTRODUCTION

Literature on judicial politics is currently engaged in a debate over whether and to what degree an individual's policy disagreement with the Supreme Court influences how he or she perceives the Court's legitimacy (Gibson and Nelson 2014). Traditional legitimacy theory argues that policy disagreement minimally affects legitimacy judgments. Instead, legitimacy judgments are driven by positivity bias, which reinforces the idea that the Court is neutral and separate from traditional politics (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2005; Gibson and

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Nelson 2015). An emerging body of literature argues that ideological or policy disagreement does influence legitimacy judgments. In particular, that literature argues that when the Court makes decisions contrary to an individual's policy preferences, he or she will view the Court as less legitimate (Bartels and Johnston 2013; Johnston, Hillygus, and Bartels 2014; Christenson and Glick 2015, 2019).

I contribute to this debate by analyzing historical public opinion data from President Franklin D. Roosevelt's Court-packing plan of 1937. The Court-packing plan represents a unique setting in which to test theories of legitimacy because it represents a context in which the Court's institutional structure faced a credible threat. During the Court-packing plan, the justices of the Supreme Court, legal experts, and the public largely believed that the plan would pass and that it would diminish the Court's authority. Further, historical evidence indicates that Roosevelt was primarily motivated by a desire to weaken the Court relative to other concerns—that is, efficiency of the Court. Thus, survey respondents during that period were faced with a choice. They could acquiesce and accept decisions with which they disagreed, or they could support proposals that would alter the Court in a way that would better enable them to realize their policy preferences. This choice is not one faced by contemporary survey respondents, who are not presented credible proposals to alter the Court's authority or institutional structure. Thus, analyzing public support for the Court-packing plan offers a unique context to test whether experiencing incongruent policy decisions from the Court is associated with decreased perceptions of the Court's legitimacy.

I find that individuals who have high levels of support for the New Deal are more likely to support the Court-packing plan than those with low levels of support for the New Deal. Further, I show that more individuals with high levels of New Deal support also support Congress's passing the Court-packing plan compared with those with low levels of New Deal support. Additional analysis further demonstrates that individuals who want the Court to be more liberal in its interpretation of New Deal legislation support limiting the Court's ability to declare acts of Congress unconstitutional more than those who do not want the Court to be more liberal in its interpretation of New Deal policies.

The results demonstrate that those who experience policy disagreement with the Court are likely to support proposals that alter the Court's institutional structure in ways that will diminish its authority. Individuals who disagree with the Court's policy outputs will also support propos-

als to formally limit the Court's authority, such as limiting its ability to exercise judicial review. These findings indicate that those who disagree with the Court's policy outputs want to sanction the Court rather than accept its decisions and therefore put its legitimacy at risk. This research indicates that the relationship between policy disagreement and diminished legitimacy judgments in recent studies is not necessarily a recent phenomenon; rather, it has historical support from the earliest available data on public attitudes toward the Court. Further, the present study demonstrates the utility of researchers examining real-world events that implicate the Court's legitimacy instead of relying on the traditional legitimacy index—which largely asks about broad abstractions rather than real-world policies or proposals—used in most contemporary studies.

## 2. POLICY PREFERENCES AND LEGITIMACY

In a democratic system, it is important that political institutions and the actors that make up those institutions maintain the public's support (Lipset 1959). Support for political actors and institutions is often referred to as diffuse support or legitimacy (Easton 1965). Legitimacy is traditionally seen as largely independent of the effects of specific outputs and as a reservoir of favorable attitudes that help actors and institutions maintain credibility when policies are not aligned with the preferences of the public (Easton 1965, p. 273). Research suggests that institutions and their actors will be perceived as legitimate when they are structured in ways that individuals believe lead to procedurally fair outcomes (Easton 1965; Lind and Tyler 1988; Tyler 1990). When institutions are viewed as legitimate, they enjoy a widely accepted mandate to render judgments for the political community (Gibson, Caldeira, and Spence 2003a). However, when institutions are viewed as illegitimate, their decisions are more likely to be ignored, opposed, or challenged (Gibson, Caldeira, and Baird 1998; Gibson, Caldeira, and Spence 2005; Gibson, Lodge, and Woodson 2014).

Being viewed as legitimate is especially important for the Supreme Court, which represents a countermajoritarian institution in American democracy (Bickel 1962). Unlike Congress and the president, the justices of the Court are not elected; rather, they are appointed and are able to serve lifelong terms once confirmed. Therefore, the Court's legitimacy is not replenished through regular elections like the other branches of gov-

ernment. Further accentuating the importance of legitimacy to the Court is the fact that it has no formal mechanism through which to implement its decisions (Caldeira 1986). Writing in *The Federalist Papers*, Alexander Hamilton described the Court as the least dangerous branch of government because it has “neither force nor will but merely judgment” and “must ultimately depend upon the aid of the executive arm” for the implementation of its decisions (Hamilton, Madison, and Jay [1788] 1982, p. 393). As Hamilton indicates, for the Court’s decisions to be properly implemented, it must rely on the powers of the other branches of government. By maintaining high levels of legitimacy, the Court is better able to encourage other political actors to implement its decisions. For example, Clark (2011) finds that Congress is less likely to introduce Court-curbing legislation when public support for the Court is high. In addition, Blackstone (2013) finds that Congress is less likely to attempt to overturn the Court’s constitutional decisions when the Court enjoys high levels of public support. Moreover, when the public views the Court as more legitimate, it is more likely to accept its decisions. Gibson, Caldeira, and Spence (2005) find that people who perceive the Court as more legitimate are more likely to acquiesce to decisions with which they disagree than those who view the Court as less legitimate.

Because legitimacy is important for understanding the Court’s ability to see its decisions implemented, it is critical to understand the dynamics that enhance or diminish its legitimacy. Currently, scholars are involved in a debate over whether and to what extent policy disagreement with the Court causes individuals to perceive it as less legitimate. Traditional legitimacy theory posits that disagreement should only minimally influence legitimacy judgments. Instead, legitimacy judgments are based on perceptions of the institution’s fairness (Easton 1965; Lind and Tyler 1988; Tyler 1990). Simply put, when institutions are perceived as fair, they will enjoy a reservoir of legitimacy.

In the context of the Supreme Court, this view is most associated with Gibson and his collaborators (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003a, 2003b, 2005; Gibson and Caldeira 2009), who argue that the Court is able to maintain high levels of legitimacy through positivity bias. In one of their first studies on the subject (Caldeira and Gibson 1992), they find only a minimal correlation between individuals’ partisanship or ideology and their perception of the Court’s legitimacy. Instead, concepts like attentiveness to the Court and political efficacy are the strongest predictors of legitimacy. Gibson and Caldeira (2009) argue

that perceptions of procedural fairness are reinforced through attentiveness to the Court, a phenomenon they refer to as positivity bias. During conflicts involving the Court, judicial symbols—such as the Court’s image as a marble palace, the honorific titles of the justices, and the language of law—are the most frequent way in which the Court is framed (Davis 1994). These symbols activate preexisting loyalties to the Court and reinforce the idea that it is separate from political institutions in the sense that it is not concerned about political outcomes but is engaged in the neutral and fair process of discovering correct legal outcomes. So while ideological concerns—such as favorable or unfavorable policy responses to a decision—may be the reason individuals initially pay attention to the Court, through exposure to judicial symbols, a second dimension that Gibson and Caldeira (2009) term “judiciousness” is activated and becomes the dominant frame through which individuals evaluate the Court. Judiciousness then reminds individuals that the Court decides cases in a fair and neutral manner and is outside the realm of partisan politics. Understanding that the Court is separate from partisan politics prevents individuals from viewing it as less legitimate when it issues incongruent policy decisions.

Positivity bias finds support in both observational and experimental research. In observational research, Caldeira and Gibson (1992), Gibson, Caldeira, and Spence (2003a, 2003b, 2005), and Gibson and Caldeira (2009) ask participants about their attentiveness to the Supreme Court. They find that individuals who are more attentive to the Court have stronger perceptions of its legitimacy and are more likely to accept incongruent decisions. The reasoning is that individuals with greater awareness of the Court are exposed to judicial symbols more frequently.

In experimental studies, Gibson, Lodge, and Woodson (2014) and Gibson and Nelson (2016) test this mechanism by giving participants prompts that detail a Court decision, and the prompts are manipulated to include or exclude images of judicial symbols. Both studies find that individuals exposed to judicial symbols are more likely to accept incongruent decisions and perceive the Court as more legitimate. These results indicate that incongruence should have minimal effect on evaluations of legitimacy because the information environment surrounding a decision by the Court presents judicial symbols that ameliorate the negative influence of incongruence.

A growing literature has begun to challenge traditional legitimacy theory and the notion that policy disagreement does not cause diminished

perceptions of the Court's legitimacy. This literature argues that disagreement causes individuals to view the Court as less legitimate. It also finds support from experimental and observational designs. Using an experimental design, Bartels and Johnston (2013) randomly assign participants to read a prompt about a Supreme Court decision that is either congruent or incongruent with their policy preferences. They find that those who were assigned to read a prompt incongruent with their policy preferences rated the Court's legitimacy lower than those who read a prompt congruent with their policy preferences. Further, using survey data, Bartels and Johnston (2013) find that when participants' self-reported ideology is incongruent with their perception of the Court's ideology, they view the Court as less legitimate than those who are ideologically congruent with the Court. These findings lead the authors to conclude that policy disagreement with a single decision can cause individuals to perceive the Court as less legitimate.

Using panel survey data, Christenson and Glick (2015, 2019) track participants' views over the course of the final weeks of the Court's 2012 and 2013 terms. The panel design of their analysis allowed them to track attitudes toward the Court in real time as it released opinions. They find that disagreement with the Court's decisions in salient cases such as *National Federation of Independent Business v. Sebelius* (567 U.S. 519 [2012]), *Shelby County v. Holder* (570 U.S. 529 [2013]), and *United States v. Windsor* (570 U.S. 744 [2013]) caused individuals to view the Court as less legitimate.

While scholars are still attempting to understand the process through which policy disagreement causes individuals to view the Court as less legitimate, elsewhere I offer a potential explanation (Badas 2016). I argue that in responding to decisions of the Court, the public engages in motivated reasoning. When reacting to a decision with which they agree, people tend to view the Court as acting legalistically. However, when responding to a decision with which they disagree, they believe that the Court is motivated by extralegal factors such as ideology or politics. By viewing the Court as motivated by ideology and politics, people come to view the Court as less fair and therefore less legitimate.

The debate over whether policy or ideological disagreement with the Court causes individuals to perceive it as less legitimate is important for two reasons. First, resolving this debate speaks to the importance of legitimacy as a concept. Second, it helps contextualize the Court's role in the United States' democratic system. Dahl (1957) argues that the Court

largely acts to legitimize the decision-making of other political institutions and actors rather than to challenge them. Whether the Court is able to maintain its legitimacy when it makes decisions that are inconsistent with the preferences of other political institutions and the public has important implications for understanding why the Court mostly acts as a legitimizer for the status quo.

### 3. ROOSEVELT'S COURT-PACKING PLAN

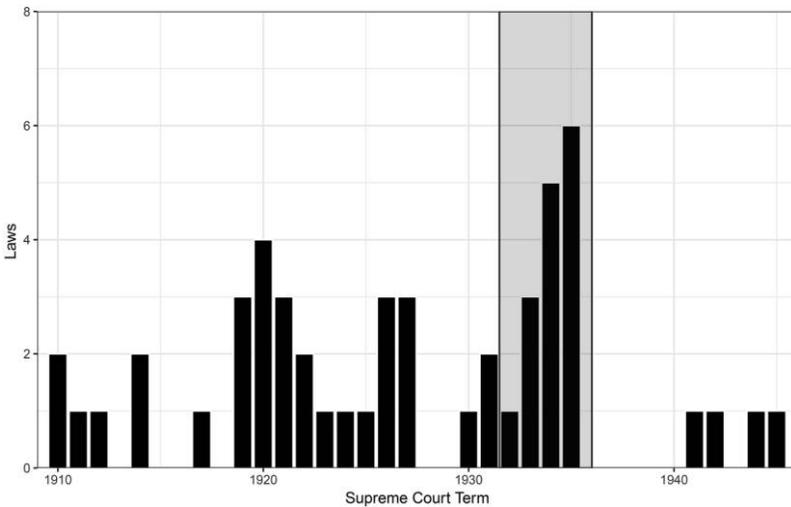
The 1937 Court-packing plan represents an ideal context through which to test if policy disagreement influences how individuals evaluate the Court's legitimacy. This is because rather than accept the Court's decisions contrary to his preferences, Roosevelt sought to alter its institutional structure in an attempt to better allow him to realize his preferences. Roosevelt proposed a plan that would increase the size of the Supreme Court from nine to 15 justices, which would allow him to appoint six additional justices. While increasing the size of the Supreme Court *ipso facto* is not a threat to its legitimacy, as there are compelling justifications related to its efficiency and effectiveness that may require the number of justices to increase, the broader context of Roosevelt's plan signals that he was primarily motivated by a desire to weaken the Court. Thus, Roosevelt's Court-packing plan represents a period in which the Court's institutional structure faced a credible threat. Both experts and the public believed the Court-packing plan would undermine the Court's authority and fundamentally change its position in the political system. If legitimacy is conceptualized as support for institutions and how they are structured, then the Court-packing plan represents an ideal test of whether those who disagree with an institution's policy outputs are willing to change the institution's structure in an attempt to realize policy outputs they would not be able to realize under the current structure.

This choice between accepting the Court's decisions and supporting proposals to change its structure is not a context faced by contemporary survey respondents. Instead, they face a largely hypothetical context when asked questions about limiting the Court's authority or making changes to its institutional structure. The traditional legitimacy index developed by Gibson, Caldeira, and Spence (2003a) is used in most contemporary studies of judicial legitimacy. The index asks survey respondents whether they would do away with the Court or whether the Court's abil-

ity to exercise judicial review should be limited (Gibson, Caldeira, and Spence 2003a). However, in the contemporary context, neither of these proposals have been credibly offered. Because of this, contemporary survey respondents are not faced with a real choice between acquiescence to incongruent policy outcomes and supporting credible proposals to diminish the Court's authority. Thus, they may use questions of the Court's legitimacy as an opportunity to express their positive or negative affective reactions toward the Court or a gut reaction toward such policies, and their responses may not represent how they would respond if there were a credible proposal to alter the Court (Carmines and Stimson 1980; Badas 2019). Because the Court-packing plan represents a policy that was proposed and had a credible chance of passing, it avoids the problems of the traditional legitimacy index. Thus, the Court-packing plan of 1937 represents a compelling context to determine whether policy incongruence is associated with decreased perceptions of the Court's legitimacy.

Roosevelt assumed the presidency in 1933, promising the public a New Deal to combat the Great Depression, which had caused thousands of businesses and banks to close, forced 15 million Americans out of work, and saw agricultural prices drop below the cost of production (Burns 2009). Roosevelt promised to fight the Depression with action and bold, persistent experimentation (Burns 2009). To this end, Roosevelt and the Democratic Congress passed the New Deal, which was a series of laws that extended federal regulation over agriculture, the stock market, banks, and transportation. A major component of the New Deal was the Agricultural Adjustment Act (AAA; Pub. L. No. 73-10, 48 Stat. 31), which was passed to restore farm income by guaranteeing parity prices to farmers who agreed to cut production. The hallmark of the legislative initiative was the passage of the National Industrial Recovery Act (Pub. L. No. 73-67, 48 Stat. 195), which developed codes of fair competition and gave the government the authority to regulate labor relations (Burns 2009).

While Roosevelt and the Democratic Congress faced little political opposition to passing their legislative agenda, they were consistently rebuked by the Supreme Court. Figure 1 shows the number of congressional acts declared unconstitutional by the Court between 1910 and 1945. Roosevelt's first term is represented by the shaded region. During Roosevelt's first term, the Supreme Court declared 15 acts of Congress unconstitutional. Relative to the time period prior to the New Deal, the Court exercising judicial review to this degree was unprecedented. Further, many



**Figure 1.** Laws declared unconstitutional

of the laws declared unconstitutional during Roosevelt's first term are considered landmark legislation, while many of the laws declared unconstitutional prior to Roosevelt's first term are not (Stathis 2003). Among the legislation declared unconstitutional by the Court were key New Deal laws including the New Deal's centerpiece, the National Industrial Recovery Act, in *Schechter Poultry Corp. v. United States* (295 U.S. 495 [1935]) and the AAA in *United States v. Butler* (297 U.S. 1 [1936]). So not only were Roosevelt and Congress frequently rebuked by the Court, they were often rebuked on the most important legislation they enacted.

In response to the Court's decisions invalidating his legislative measures, Roosevelt focused many of his public remarks on the Supreme Court striking down New Deal policies. Roosevelt (1937) said the Court had "cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions." Roosevelt (1937) continued to rail against the Court, claiming that "the Court has been acting not as a judicial body, but as a policy-making body." Roosevelt went as far as to promise to propose legislation that would reorganize the Court and allow him to appoint up to six new justices if reelected for a second term (McKenna 2002, p. 246).

On his reelection, Roosevelt made good on his promise when he proposed the Judicial Procedures and Reform Bill of 1937. The central com-

ponent of the bill would allow Roosevelt to nominate one additional justice for each sitting justice who had served 10 or more years and had declined to retire at the age of 70. If enacted, the proposal would have allowed Roosevelt six additional nominations to the Court. The six additional justices would ensure that New Deal legislation would easily survive future constitutional challenge.

In his fireside chat on March 9, Roosevelt (1937) defended his plan as “nothing novel or radical” and argued that it had historical precedent. Roosevelt then went on to explain previous changes to the number of the justices sitting on the Supreme Court. While the number of justices serving on the Court has varied during its history, Roosevelt was in a difficult position to argue that his plan was not novel or radical. Most of the variations in the number of justices were not the result of political calculations (McKenna 2002) but instead were largely based on the need to have the justices serve on the circuit courts. Prior to the Judiciary Act of 1891 (26 Stat. 826), the justices of the Supreme Court were required to travel to the federal circuit courts and hear cases. As the country grew and Congress established more circuit courts, the number of justices required to serve on them also increased. Of the eight times the number of justices on the Court has changed, six of the changes can be attributed to organizational changes in the federal circuit courts. The remaining two changes can be attributed to political calculations. The outgoing Federalist majority passed the Judiciary Act of 1801, which would reduce the number of justices on the Court from six to five in an attempt to prevent President Thomas Jefferson and the incoming Democratic-Republican majority from being able to appoint a justice to the Court. However, once in office, the Democratic-Republican majority passed the Judiciary Act of 1802, which repealed the Judiciary Act of 1801 before any vacancy on the Court could occur. Thus, the number of justices never changed, and the Federalists failed in their maneuvering. Table 1 details legislation on altering the Court’s size and the reason for each change (McKenna 2002, pp. 396–401).

Thus, Roosevelt’s plan to pack the Court on the basis of political motivations was largely unprecedented in its history. Expert testimony during Senate hearings reflected the unusual nature of Roosevelt’s plan. During his testimony, Harvard law professor Erwin Griswold remarked that the Court-packing plan would create a precedent that would cause a crisis for the Court and the Constitution (McKenna 2002, p. 396). Other witnesses held similar views. Columbia law professor Young B. Smith

**Table 1.** Legislation Altering the Court's Size

	Justices	Reason
Judiciary Act of 1789	6	Establishment of federal courts
Judiciary Act of 1801	5	Federalists' attempt to limit the potential of the new administration to appoint a justice
Judiciary Act of 1802	6	Democratic-Republican repeal of the 1801 act; no vacancy occurred before the repeal
Seventh Circuit Act of 1807	7	Creation of the Seventh Circuit
Eighth and Ninth Circuits Act of 1837	9	Creation of the Eighth and Ninth Circuits
Tenth Circuit Act of 1863	10	Creation of the Tenth Circuit
Judicial Circuits Act of 1866	7	Reorganization of circuit courts after the Civil War; the number of justices was reduced from 10 to nine, not the legislated seven, before the Judiciary Act of 1869
Judiciary Act of 1869	9	Reduced circuit-riding duties

argued that the Court-packing plan would undermine the independence of the judiciary and create fundamental changes in the structure of the Court. Charles C. Burlingham, the president of the New York City Bar Association, stated frankly, “[I]t is astonishing that anyone who understands the fundamental principles and framework of our government can fail to see what a blow the President’s proposal strikes at the independence of the judiciary” (McKenna 2002, p. 402). Members of the Court also viewed the Court-packing plan as a threat to its institutional legitimacy. In an exceptional act, Chief Justice Charles Evans Hughes submitted a letter of testimony to the Senate against Roosevelt’s plan. In the letter, Hughes dispelled Roosevelt’s idea that the plan would increase the Court’s efficiency and warned that the plan would in fact harm the Court (Friedman 1997; Leuchtenburg 1997).

Experts who testified during the hearings warned Congress that the Court-packing plan would fundamentally change the Court. Evidence suggests that the public tended to agree with those experts. A 1937 Gallup poll found that, of those with opinions on the issue, 86 percent of the public believed the Court-packing plan would pass (Gallup 1937c). Further, a November 1936 Gallup poll indicated that 61 percent of the public who had opinions believed that the Court-packing plan would diminish the authority of the Court (Gallup 1936). These polls demonstrate that the public largely thought that the plan would pass and limit the Court’s authority.

Increasing or decreasing the number of justices on the Supreme Court alone is not a threat to the Court's legitimacy. There may be nonpartisan or ideologically neutral reasons for increasing the size of the Court, for example, increasing its effectiveness and efficiency. Indeed, the examples Roosevelt drew on in his speech defending the Court-packing plan highlight how the increased Court would be more effective. However, the broader political and ideological context of the plan makes an increase in the number of justices a threat to the Court's legitimacy. Roosevelt was not attempting to increase the number of justices to make the Court more efficient. Instead, he wanted to increase the number of justices in an attempt to displace the Court's anti-New Deal majority (Leuchtenburg 1966; McKenna 2002). In other words, rather than respect the Court's decisions invalidating New Deal legislation, Roosevelt sought to alter its institutional structure in a way he understood would make it easier for him to achieve his desired policy outcomes. In the context of the Court-packing plan, if members of the public had similar attitudes toward the Court, it would be expected that those with higher levels of support for the New Deal would be more likely to support Roosevelt's Court-packing plan. This expectation is stated as hypothesis 1.

Hypothesis 1. Those who have higher levels of support for the New Deal will be more likely to support the Court-packing plan than those with lower levels of New Deal support.

This paper is not the first to analyze public support for the Court-packing plan. Caldeira (1987) reports the results of time-series analyses on aggregate levels of support for the Court-packing plan that demonstrate that political factors and media coverage influenced overall support. For example, support increased when Roosevelt gave speeches on the plan and the media reported on it. However, support for the plan decreased after the Court upheld the Wagner Act in *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (301 U.S. 1 [1937]) and after the 1937 retirement of Justice Willis Van Devanter, a key opponent of the New Deal. While the research of Caldeira (1987) is informative, its aggregate nature prevents him from making inferences about how individual-level attitudes shape support or opposition to the Court-packing plan. Here, I advance Caldeira (1987) by analyzing how individual-level attitudes, specifically policy disagreement, influenced attitudes toward the Court-packing plan.

## 4. DATA AND ANALYSIS

### 4.1. Support for the Court-Packing Plan

The data are from a 1937 national Gallup survey conducted between February 17 and February 22 (Gallup 1937b). The survey had 3,016 respondents, and after accounting for respondents with incomplete data, the models presented here have 2,541 and 2,520 respondents. (See the Appendix for a sample of questions from the survey.) Relying on surveys prior to the 1950s can be somewhat problematic when the data are not treated appropriately. Contemporary surveys are conducted using probability sampling to ensure that every citizen has an equal probability of being surveyed.<sup>1</sup> However, prior to the 1950s, survey firms used quota-controlled sampling methods, a practice that introduced unintended biases. For example, interviewers were given wide latitude in selecting which citizens to interview. Interviewer selection effects led to biases in the type of respondents selected to participate because interviewers were more likely to select professionals and avoided interviewing inner-city populations (Berinsky et al. 2011). Concerns over sampling methods have deterred scholars from using pre-1950s survey data (Berinsky et al. 2011). Further limiting scholars' willingness to analyze pre-1950s survey data is the fact that the data sets are often in poor shape with coding mistakes and unclear or vague documentation (Berinsky et al. 2011).

Berinsky (2006) and Berinsky et al. (2011) create solutions to these problems. First, they develop a set of survey weights to overcome the problematic use of quota-based sampling methods by using data from the census and model-based poststratification. These weights produce something closer to a representative sample that would be achieved through probability sampling. Further, Berinsky et al. (2011) recommend controlling for traits associated with potential selection biases such as class, race, or age to further limit the biases introduced by quota-controlled sampling methods. Second, they clean the data and rewrite the documentation, such as code books, to be easier to use. The work in Berinsky (2006) and Berinsky et al. (2011) helps ensure that the analysis presented in this paper is a function of public opinion at the time rather than the problematic use of quota-based sampling methods or problems with doc-

1. More and more contemporary survey firms are relying less on probability-based sampling because of costs and difficulty compiling a sampling frame. Contemporary survey firms increasingly rely on model-based poststratification weights to ensure representativeness. For a discussion of these issues, see Baker et al. (2013).

umentation. The analysis presented here includes weights developed by Berinsky (2006) to overcome the problems of those methods.

To assess whether policy disagreement shaped attitudes toward the Court-packing plan, two dependent variables are used in this analysis. One question asked respondents if they were in favor Roosevelt's Court-packing plan. Forty-five percent of respondents indicated that they supported Roosevelt's proposal, and their responses are coded as one. Another 45 percent indicated that they did not support the Court-packing plan, and 10 percent indicated that they did not know; these responses are coded as zero.<sup>2</sup>

The second question asked respondents what action Congress should take on Roosevelt's Court-packing plan, with the response set being pass it, modify it, or defeat it. Thirty-four percent of respondents said pass it, 21 percent replied modify it, 35 percent said defeat it, and 10 percent responded that they did not know. Using this question, I create a binary measure that scores respondents who wanted Congress to pass the Court-packing plan as one and all others as zero. This approach likely underestimates support for the Court-packing plan, as individuals who responded they wanted to modify it may have still supported changes to the Court's institutional structure. For example, Senator Pat McCarran offered a compromise to Roosevelt's plan that would allow Roosevelt to appoint two additional justices rather than six (Leuchtenburg 1966). Individuals who replied they wanted to modify the plan may have supported this compromise. However, there was an alternative proposal that would have stripped all Court-packing language from the Judicial Procedures and Reform Bill of 1937 and would not have granted Roosevelt the ability to appoint any new justices (Leuchtenburg 1966). Thus, since it is not possible to determine if respondents favored McCarran's plan or a modification that would have stripped the Court-packing language from the legislation entirely, coding only those respondents who replied that Congress should pass the plan as one is the most justifiable approach, even if it does produce somewhat conservative estimates.<sup>3</sup>

2. The results here are substantively similar whether those who responded they did not know are coded as zero or excluded from the analysis. The relationship between incongruence and support for sanctioning the Court is stronger when unsure responses are excluded. Models that include unsure responses are theoretically more desirable because when deciding to take action, politicians likely do not parse out individuals who are ambivalent. Instead, politicians likely consider support writ large rather than support among those with opinions.

3. In the Online Appendix, I fit an ordered logistic regression model that includes all response options, and the results are substantively similar to those presented here.

My independent variable is support for New Deal policies. Since the New Deal is a broad set of policy programs and initiatives, it is unlikely that a single indicator could accurately capture support for it.<sup>4</sup> Therefore, I estimate New Deal support as a latent concept using information from two indicators of New Deal support. Two questions capture respondents' support for two key New Deal policies. The first question asked, "Do you think the President and Congress should seek to enact a second [National Recovery Administration] NRA?" Fifty-one percent of respondents agreed. The second item asked respondents if the AAA should be revived. Thirty-five percent of individuals responded affirmatively. Supporting New Deal policies (enacting a second NRA, reviving the AAA) is scored as one, and opposing New Deal policies or stating no preference is scored as zero. To scale the items together, a Birnbaum one-parameter item-response model (IRT) was estimated. The models use binary indicators and create continuous scales. While only two items are used, the IRT approach to scaling is preferable to other approaches, such as a summated scale, for its ability to estimate latent concepts in the presence of missing data (Finch 2008). So, for example, if a respondent answered the question about the NRA but skipped the question about the AAA, in the IRT model one does not need to drop that respondent.

Since my dependent variables are binary, I estimate two logistic regression models that estimate support for the Court-packing plan and a desire to see Congress pass the Court-packing plan as a function of an individual's latent support for the New Deal. The survey questions about whether respondents support or oppose the Court-packing plan are less than ideal, as they reference "Roosevelt's plan" but do not describe it. It is possible that when primed with Roosevelt, individuals responded on the basis of an affective heuristic about how they felt about the president (Slovic et al. 2007). In this context, individuals who had positive affective reactions toward Roosevelt would respond to the question about the Court-packing plan positively, while those with negative affective reactions toward him would respond negatively. To account for this possibility, I control for affective responses toward Roosevelt in two ways. First, I use a binary indicator that equals one if the respondent voted for Roosevelt in the previous election. Second, to capture current affective

4. In the Online Appendix, I use a single-indicator model that predicts support for the Court-packing plan as a function of support for individual policies. I find that support for individual policies predicts support for the Court-packing plan. Therefore, the substantive conclusions would be no different if I use a single-indicator model.

responses toward Roosevelt, I use a question that asked individuals “if the November election were held today, how would you vote?” Those who responded “Roosevelt” are scored as one, while those who named another candidate are scored as zero. In addition, in the Online Appendix, separate models for those who would support Roosevelt and those who would not are estimated. The latent New Deal support measure is statistically significant and positively signed for both supporters and non-supporters. This evidence further supports the idea that an individual’s affective response to Roosevelt is not driving the results. Finally, demographic controls are included to account for potential selection biases of the quota-controlled sampling methods.<sup>5</sup>

The results of the regressions are presented in Table 2. The statistically significant coefficient for New Deal support demonstrates that increased support for the New Deal predicts increased support for the Court-packing plan and wanting Congress to pass it. Substantively, moving from the minimum support to the maximum support for New Deal policies increases the probability of supporting the Court-packing plan by a predicted probability of .32. Going from the minimum New Deal support to the maximum New Deal support increases the probability of wanting Congress to pass the plan by a predicted probability of .23. The predicted probabilities are plotted with 95 percent confidence intervals across the range of New Deal support in Figure 2. The findings demonstrate that policy incongruence can explain how the public responded to the Court-packing plan. Respondents who favored New Deal policies punished the Court and desired to see its structure changed in a way that would benefit their policy preferences. Thus, the analyses presented here support hypothesis 1.

#### **4.2. Support for Formally Limiting the Court’s Authority**

Roosevelt’s Court-packing plan represented a major attempt to change the Court’s institutional structure. Both expert witnesses who testified before Congress and the public believed the Court-packing plan would diminish the Court’s institutional authority, and it was widely believed that the plan would pass. However, the Court-packing plan did not attempt

5. Professional occupation is coded as one if respondents mentioned business, executive, proprietor, management, small business, or white-collar career for profession information. Other workers, coded as zero, include service worker, laborer, farm laborer, machine operator, truck driver, waiter, and clerk. For additional information on coding of professional careers and occupations, see Berinsky (2006) and Berinsky et al. (2011).

**Table 2.** Support for Court Packing

	Favors Plan	Wants Congress to Pass Plan
Latent New Deal support, policy only	1.389*** (.124)	1.139*** (.148)
Roosevelt voter	.752*** (.172)	.622*** (.120)
Would vote for Roosevelt today	1.624*** (.125)	1.256*** (.183)
Liberal	.777*** (.0977)	.732*** (.102)
African American	.620*** (.0745)	.160 (.194)
Female	-.0456 (.0979)	.0470 (.131)
Age group	-.0290 (.0624)	-.164 (.0965)
Class (low to high)	.162*** (.0382)	.273*** (.0769)
Professional occupation	-.134 (.196)	-.0943 (.203)
Constant	-3.061*** (.177)	-3.207*** (.398)
N	2,541	2,520

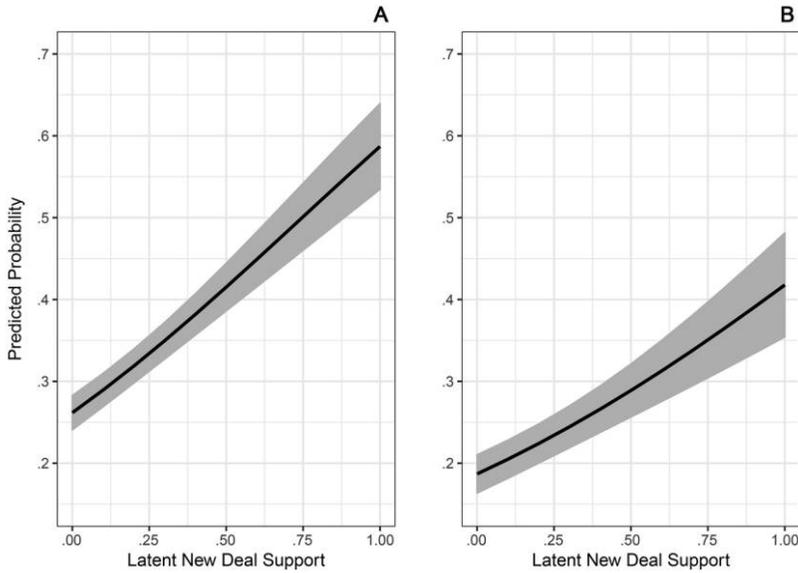
**Note.** Standard errors are in parentheses.

\*\*  $p < .01$ .

\*\*\*  $p < .001$ .

to directly limit the Court's ability to exercise its authority. Instead, its existing authority would remain the same, but the assumption was that Roosevelt and New Deal supporters would be able to achieve their desired policy outcomes by placing new justices on the Court who would vote in favor of New Deal policies. This is because justices tend to support the policies of the president who appointed them (Epstein and Posner 2016). While passage of the Court-packing plan may have set a precedent that would allow for future alterations to the Court during periods of conflict that would make the Court ineffective, its formal authority was not explicitly challenged by the Court-packing plan. Thus, it may be argued that simply supporting the Court-packing plan or wanting to see Congress pass the plan does not imply that individuals do not view the Court as legitimate.

To account for this argument, I conduct additional analyses using



**Figure 2.** Support for (A) the Court-packing plan and for (B) Congress to pass the plan

another 1937 Gallup poll fielded between November 15 and November 20 (Gallup 1937a).<sup>6</sup> The survey included a sample of 2,907 respondents, and after accounting for missing data the analysis presented in this section includes 1,744 respondents. The survey asked respondents whether they would support the principle of limiting the power of the Supreme Court to declare acts of Congress unconstitutional. Thirty-three percent of respondents supported the principle, while 47 percent opposed it, and 20 percent had no opinion. Those who supported the plan are scored as one, while all other responses are scored as zero. The benefit of using this question for additional analysis is that it is similar to those used in contemporary judicial legitimacy studies that ask respondents their willing-

6. However, it is worth noting that this survey was conducted after the Court's decision in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, which was decided April 12. In that case, the Supreme Court reversed course and began to uphold New Deal legislation. This may have resulted in people updating their attitudes about the Court, particularly their willingness to sanction it (Caldeira 1987). For this reason, the support described here may be an underestimate of opposition to the Court if compared with opposition at the peak of the Court's hostility toward the New Deal. However, no earlier survey exists that includes questions about New Deal preferences and about limiting the Court's authority. Because of this, it is likely that any effect observed is a conservative estimate of the true effect.

ness to limit the Court's ability to exercise judicial review (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003a).

To determine whether supporting the principle of limiting the Court's ability to declare acts of Congress unconstitutional is a function of policy disagreement, I use a question that asked respondents whether they believed the Supreme Court should be more liberal in reviewing New Deal measures. Fifty-three percent of respondents replied yes, 37 percent replied no, and 10 percent of respondents had no opinion.<sup>7</sup> Those who replied yes are scored as one, while all others are scored as zero. The key assumption here is that those who want the Court to be more liberal when reviewing New Deal legislation experience policy incongruence with the Court and want it to sustain New Deal policies in future cases. If individuals who wanted the Court to be more liberal on New Deal measures viewed it as less legitimate and supported proposals to alter its institutional structure, they would be more likely to support limiting its ability to exercise judicial review. This is stated formally as hypothesis 2.

Hypothesis 2. Those who want the Court to be more liberal on New Deal measures will be more likely to support limiting its ability to exercise judicial review.

Hypothesis 2 is tested using a logistic regression model predicting whether individuals support the principle of limiting the Court's ability to declare acts of Congress unconstitutional on the basis of their desire to see the Court become more liberal in New Deal cases. The analysis controls for demographics and whether the respondent voted for Roosevelt and includes weights produced by Berinsky (2006) to account for the potential biases introduced by the quota-controlled sampling method. The results of the regression are presented in Table 3.

As the positive and statistically significant coefficient for the variable

7. This question is less than ideal because it may prime respondents to think a certain way about the Court by being framed in terms of wanting the Court to be "more liberal." This may influence how the respondent then answers the question about limiting the Court's authority. Thus, the question has the potential to introduce some degree of endogeneity. An ideal analysis would include the latent measure of New Deal support used in previous analyses. However, these items are not included in the Gallup (1937a) data set. The potential biases introduced by these questions are somewhat assuaged by thematic finding in the analyses conducted across multiple specifications in this paper: support for the New Deal is strongly correlated with a desire to sanction the Court rather than acquiescence to incongruent decisions. Further, rather than potentially introduce endogeneity, the wording of the questions may simply act to give the respondents a reference point on which to draw, as is common in many public opinion surveys.

**Table 3.** Support of Limits to Judicial Review of Congressional Acts

	Supports Limits
Wants Court to be more liberal	2.047*** (.188)
Roosevelt voter	.458* (.180)
Professional occupation	.101 (.220)
African American	-.480 (.514)
Age group	-.0235 (.0614)
Class (low to high)	.117 (.0856)
Female	-.114 (.158)
Constant	-2.508*** (.353)
N	1,744

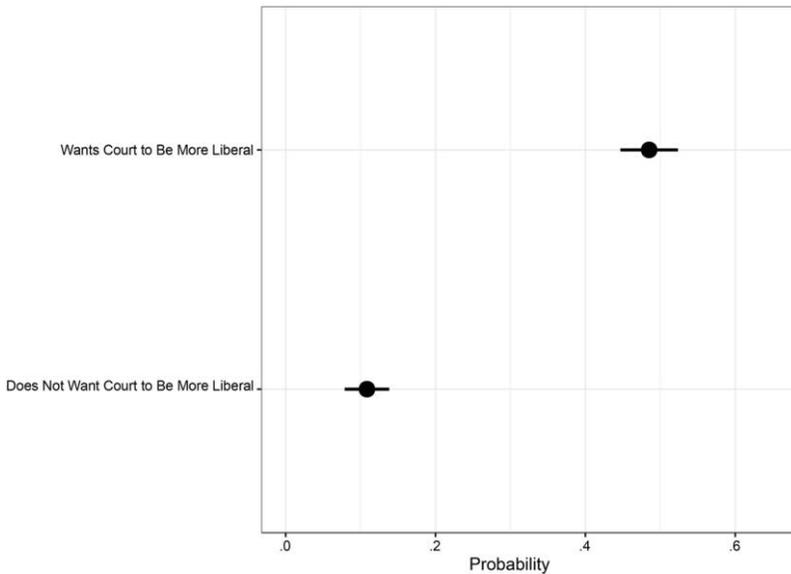
**Note.** Standard errors are in parentheses.

\*  $p < .05$ .

\*\*\*  $p < .001$ .

on wanting the Court to be more liberal indicates, hypothesis 2 is supported. Substantively, those who wanted the Court to be more liberal in its review of New Deal policies have a .485 predicted probability of supporting limits on the Court's ability to exercise judicial review, while those who did not want the Court to be more liberal have only a .108 predicted probability of support. Thus, those who wanted the Court to be more liberal were 4.47 times more likely to support limiting its ability to exercise judicial review than those who did not. This relationship is displayed with 95 percent confidence intervals in Figure 3.

This result further indicates that individuals who experience policy disagreement with the Court view it as less legitimate. This is because those who disagreed with the Court were likely to support policies that altered its institutional structure. In particular, those individuals were more likely to support the Court-packing plan, want Congress to pass the plan, and want to limit the Court's ability to exercise judicial review. Thus, this demonstrates that individuals were not loyal to the Court. The analysis here shows that individuals who wanted the Court to be more liberal in



**Figure 3.** Effect of wanting a more liberal Court on support for limiting judicial review

New Deal decisions were more likely to support the principle of limiting the Court’s ability to declare acts of Congress unconstitutional and thus formally support limiting the Court’s authority.

#### 4.3. Responding to Potential Endogeneity Concerns

One potential criticism of the analyses presented here is the potential for endogeneity. My argument is that support for New Deal policies increased support for Court packing and limiting the Court’s authority to exercise judicial review. However, it could be that attitudes toward the New Deal were shaped by support for the Court. For example, Dahl (1957, pp. 293–94) argues that the Supreme Court enjoyed a “unique legitimacy attributed to its interpretations of the Constitution” and that it could confer that legitimacy to policies on the basis of its decisions to uphold or invalidate them. In the context of the New Deal, this would mean that individuals who held the Court in high regard—and did not support Court packing or limiting the Court’s ability to exercise judicial review—may have conformed their attitudes to the Court’s decisions and been less supportive of New Deal policies.

Ideally, individual-level panel data would be used to rule out endoge-

neity. In that design, individuals would be asked about their support for the Court-packing plan or limiting the Court's ability to exercise judicial review prior to and after it issued decisions on New Deal legislation. Such a design would demonstrate whether policy incongruence causes an increase in support for Court packing or whether supporting the Court causes disagreement with the policies it invalidates. Such a panel design has been adopted in studies on policy incongruence and judicial legitimacy (Christenson and Glick 2015, 2019). However, in the context of the 1937 Court-packing plan, panel data of interviews with the same participants at multiple points in time do not exist. Therefore, such a panel design is not possible here. While the individual-level data here cannot directly counter concerns about endogeneity, I believe there are two compelling arguments to justify that endogeneity is not occurring.

One argument comes from aggregate-level trends in support of Court packing and New Deal policies. Caldeira (1987) collects Gallup polls on aggregate-level support for the Court-packing plan between February 10 and June 9, 1937.<sup>8</sup> He then conducts a time-series analysis to explain the fluctuations in aggregate-level support for the Court-packing plan. His analysis finds that support for the Court-packing plan decreased after the Supreme Court upheld the Wagner Act in *National Labor Relations Board v. Jones and Laughlin Steel Corporation* and decreased even more after the retirement of Van Devanter. The decision in *National Labor Relations Board v. Jones and Laughlin Steel Corporation* signaled that the Court was changing course and would now be supportive of New Deal policies, which would make the Court-packing plan or other institutional changes to the Court unnecessary (Ho and Quinn 2010). Similarly, Van Devanter's retirement would allow Roosevelt to appoint a new justice to the Supreme Court and secure a solid majority that would be supportive of New Deal legislation without needing to pack the Court. Thus, it appears that individuals who initially supported the Court-packing plan because they wanted to see their New Deal preferences upheld by the Court

8. Some readers may be interested in a time-series analysis of the question about wanting the Court to be more liberal on New Deal policies. Unfortunately such an analysis is not possible. Gallup asked this question at only two points, November 15–20, 1936, and March 3–8, 1937, which do not include the Court's rulings in *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (decided April 12, 1937) and *West Coast Hotel Co. v. Parrish* (300 U.S. 379, decided March 29, 1937) or Van Devanter's retirement. Further confounding the usefulness of these two polls is that they rely on different response sets.

became less supportive of the plan when they realized the Court was now aligned with their preferences.

Furthermore, if the positive attitudes toward the Court were depressing support for New Deal policies, support for New Deal policies should have increased as the Court began to uphold their constitutionality. Yet this is not what is observed. Support for New Deal policies remained stable as the Court moved from invalidating New Deal policies to upholding them (Schickler and Caughey 2011). On the basis of this evidence, it appears that New Deal policies influenced support for the Court-packing plan and for limiting the Court's ability to exercise judicial review, and not that attitudes toward the Court influenced support for New Deal policies.

A second argument comes from existing literature on the Court's ability to influence public opinion. Much of this research concludes that the Court can influence public opinion only in a narrow set of circumstances that are not met in the context of the Court-packing plan. One condition that seems to be required for the public to update preferences to be aligned with a Court's decision is that the issue must be of low salience. In the context of *Roe v. Wade* (410 U.S. 113 [1973]) and its follow-up case, *Webster v Reproductive Health Services* (492 U.S. 490 [1989]), Franklin and Kosaki (1989) and Johnson and Martin (1998) find no evidence that the public became more supportive of abortion despite the Court's decisions. Johnson and Martin (1998) also find that the public did not update preferences toward capital punishment in response to the Court's decisions in *Furman v. Georgia* (408 U.S. 238 [1972]), *Gregg v. Georgia* (428 U.S. 153 [1976]), or *McCleskey v. Kemp* (481 U.S. 279 [1987]). Hoekstra and Segal (1996) find some evidence of the public updating beliefs to be aligned with the Court's decisions but only when the issue is of low salience. Because the New Deal and combating the Great Depression were the most important political issues of the day, the findings from this literature suggest it is unlikely that the Court would be able to change public opinion on New Deal policies.

Another condition on the public's willingness to update opinions to be aligned with decisions of the Court is the information environment. Linos and Twist (2016) demonstrate that the public does update preferences to be aligned with the Court's decisions, even on some salient issues. But their results also suggest that the public's willingness to update preferences to be aligned with the Court's decisions is conditional on receiving only one-sided information that is favorable toward the Court's position.

When individuals receive two-sided information—that is, arguments in favor and in opposition to the Court’s decision—they are much less likely to update their attitudes. This two-sided information context likely best represents coverage of the New Deal decisions. Caldeira (1987) categorizes media mentions of the Court-packing plan—many of which include discussions of the Court’s decisions on New Deal policies—as either positive, neutral, or negative. Overall, Caldeira (1987) finds a mix of positive and negative coverage toward the plan. This suggests that the public is exposed to two-sided information and therefore less likely to update preferences on New Deal policies on the basis of the Court’s decisions.

Thus, for these two reasons it seems reasonable to assume the arguments about endogeneity and reverse causation are unlikely. The most likely outcome is that individuals update their attitudes toward the Court-packing plan and other efforts to diminish the Court’s authority on the basis of their policy disagreement with the Court.

## 5. IMPLICATIONS AND CONCLUSIONS

The literature on judicial legitimacy is currently engaged in a debate over the effect policy disagreement has on how individuals perceive the legitimacy of the Supreme Court. Traditional legitimacy theory claims policy preferences should not influence an individual’s legitimacy judgments (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2005; Gibson and Nelson 2015). Instead, legitimacy judgments are a function of believing that institutions are structured in a way that produces procedurally fair outcomes. In the context of the Supreme Court, Gibson and Caldeira (2009) argue this occurs through positivity bias, which posits that through exposure to the Court and its symbols, individuals are primed to think about the Court as fair and separate from partisan politics. An emerging literature suggests policy incongruence does influence how individuals evaluate the Court’s legitimacy (Bartels and Johnston 2013; Johnston, Hillygus, and Bartels 2014; Christenson and Glick 2015, 2019). This literature finds that when an individual’s policy preferences and the Court’s decisions are incongruent, the individual comes to perceive the Court as less legitimate.

The analysis presented here leverages public support for the 1937 Court-packing plan to determine whether policy disagreement with the Court influences legitimacy judgments. In two different contexts, the

analysis here found that policy incongruence with the Court was associated with diminished perceptions of the Court's legitimacy. In particular, individuals who had high support for New Deal policies were more likely to support the Court-packing plan and more likely to support Congress passing the plan. Rather than accept the Court's decisions declaring New Deal legislation unconstitutional, these individuals desired to see the Court packed with justices who would support New Deal legislation in future cases.

Additional analysis demonstrated that individuals who desired to see the Court become more liberal in interpreting New Deal legislation did not accept the Court's decisions to invalidate New Deal legislation. Instead, these individuals sought to limit the Court's ability to declare acts of Congress unconstitutional in an attempt to prevent the Court from further invalidating New Deal policies. These two findings are especially potent considering the context of the Court-packing plan. The plan represented a reasonable threat against the Court, and these individuals were faced with a choice between accepting decisions contrary to their interests or supporting proposals that were widely believed to be likely to pass and would diminish the Court's authority in a way that would better allow them to realize their preferences. In this context, individuals chose the latter and supported attempts to alter the Court's structure and reduce its authority. Thus, when there was a real choice between attempting to sanction the Court and acquiescing to incongruent decisions, many choose to sanction the Court.

While my results suggest that policy disagreement does influence perceptions of legitimacy, there are a few limitations to the analysis. First, the results presented here are potentially limited to the context of the 1937 Court-packing plan and may not be generalizable to other instances of policy disagreement because of the salient nature of the debate over Roosevelt's Court-packing plan. Roosevelt devoted much of his public attention to the issue of the Supreme Court in a way that has not been replicated by other politicians since (McKenna 2002). Thus, the results may be conditioned on politicians being willing to commit a large amount of time and energy to the issue of the Supreme Court in ways politicians since have not. Second, the Court declared 15 federal laws unconstitutional in Roosevelt's first term. The Court taking such an active role in declaring federal legislation unconstitutional was unprecedented (McCutcheon 2014). Furthermore, many of the policies the Court declared unconstitutional enjoyed broad public support (McKenna 2002).

Thus, the results may be conditioned on the Court's being active in a way that agitates majorities. However, these are both contexts in which the Court must depend on its legitimacy the most. When the Court issues decisions with which the political elite and public majority agree, it does not need to worry about noncompliance (Gibson 2015). Instead, it must rely on its reservoir of legitimacy when it issues unpopular decisions. While these are potential limitations, they are also strengths of the analysis. This is because the circumstance created a context in which the Court faced a realistic threat against its structure and authority. Thus, survey respondents had a real choice between accepting decisions with which they disagreed and supporting proposals that would alter the Court's institutional structure and weaken its authority. In the context of contemporary surveys, this choice is not as salient because respondents are not faced with credible proposals attempting to limit the Court's authority or alter its institutional design.

It may be argued that because the Court-packing plan failed and because the Court ultimately did not undergo institutional changes, its legitimacy was able to protect it from the threat of the Court-packing plan. However, there are alternative explanations for why the Court-packing plan failed. For example, McKenna (2002) in part blames Roosevelt's poor strategy and unpreparedness during congressional hearings for the failure of the plan. In fact, going into the hearings, it was widely believed the Court-packing plan would pass, but after the hearings that belief began to change (McKenna 2002). Furthermore, most public opinion polls at the time found that a majority or at least a plurality of the public supported the plan. Thus, the plan did not fail because of low levels of public support or the belief that the plan was unfeasible.

Another explanation claimed that after Van Devanter's resignation and Justice Owen J. Roberts's sudden shift to be supportive of New Deal policies in *West Coast Hotel Co. v. Parrish* (300 U.S. 379 [1937]), the Court-packing plan was no longer needed (Nelson 1988; Ho and Quinn 2010). Thus, there are alternative explanations as to why the Court-packing plan failed that are not dependent on the Court's legitimacy serving as a bulwark against Roosevelt's attack on it.

The results presented here have several implications. Primarily, they produce historical evidence that when members of the public perceive disagreement between themselves and the Court, they seek to alter the Court's institutional structure in ways that they believe will make it easier for them to realize their policy preferences. Providing historical evidence

that a public that disagrees with the Court desires to alter it is important because extant research that finds evidence of a desire to alter the Court focuses exclusively on contemporary data. This leaves it an open question of whether such a relationship was present when the political contexts were much different. The results presented here provide evidence that the negative relationship between policy incongruence and legitimacy was present previous periods, and specifically in the earliest period in which there are public opinion data on attitudes toward the Court. This suggests that the negative relationship between policy disagreement and legitimacy is not new.

The results also speak to the Court's role in the United States' democratic political system. Dahl (1957) observes that the Court largely grants legitimacy to the decision-making of other political institutions instead of challenging them. Research since Dahl (1957) largely validates this view. The Court rarely challenges Congress, the executive branch, or popular majorities (Clark 2011; McGuire 1998; Epstein and Martin 2010; Rosenberg 1991). The results presented here potentially help explain why the Court does not engage in behavior that challenges other political institutions or the public. Simply put, the Court rarely has the institutional capacity to challenge other political institutions and the public. When it issues decisions that are inconsistent with the preferences of other political institutions or the public, those actors can rally support against the Court in a way that puts its legitimacy in jeopardy. Understanding this, the Court strategically aligns itself with the preferences of other political actors and the public or attempts not to engage in prolonged periods of countermajoritarian decision-making in an effort to maintain its institutional standing.

The results have implications for legitimacy as a concept. Elsewhere I (Badas 2019) suggest that there are problematic aspects of the traditional legitimacy index and recommend using an applied legitimacy index, which better represents the discourse surrounding discussions of sanctioning the Court or altering its institutional structure. The results here further support the argument that scholars should focus on applied situations that have implications for the Court's legitimacy. Applied situations—such as the Court-packing plan—give individuals a real choice between acquiescing to the Court's decisions with which they disagree and supporting policies that they believe will more easily allow them to achieve their policy preferences. The traditional legitimacy index does not give individuals the same type of real choice and instead relies on theo-

retical abstractions to measure legitimacy. Thus, using these applied situations allows scholars to get better leverage on the nature of judicial legitimacy and how the public responds to specific proposals aimed at altering the Court.

## APPENDIX: WORDING OF THE QUESTIONS

### A1. Main Analysis

Are you in favor of President Roosevelt's proposal regarding the Supreme Court?

Yes	45 percent
No	45 percent
No opinion	10 percent

What action should Congress take on Roosevelt's plan to reorganize the Supreme Court?

Pass it	34 percent
Modify it	21 percent
Defeat it	35 percent
No opinion	10 percent

Would you like to see the AAA revived?

Yes	35 percent
No	42 percent
No opinion	22 percent

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

Yes	51 percent
No	40 percent
No opinion	9 percent

For whom did you vote in the November election?

Roosevelt	52 percent
Landon	26 percent
Thomas	.5 percent
Lemke	1 percent
Didn't vote	10 percent
Too young	10 percent

If the November election were held today, how would you vote?

Roosevelt	65.18 percent
Landon	32.38 percent
Thomas	.95 percent
Lemke	.88 percent
Other	.61 percent

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

Conservative	35 percent
Liberal	40 percent
No opinion	24 percent

Class: The interviewer classified respondents as

1: Average plus	21 percent
2: Average	33 percent
3: Poor or poor plus	37 percent
4: On relief	9 percent

Professional career

Not professional	87 percent
Professional	13 percent

## A2. Supplementary Analysis

As a general policy, are you in favor of limiting the power of the Supreme Court to declare acts of Congress constitutional?

Yes	33 percent
No	47 percent
Don't know	20 percent

Should the Supreme Court be more liberal in reviewing New Deal measures?

Yes	53 percent
No	37 percent
Don't know	10 percent

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