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A switch in time saves nine: Institutions, strategic actors, and FDR's court-packing plan *

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Abstract. President Roosevelt's attempt to add as many as six additional justices to the Supreme Court through his infamous "court-packing plan" of 1937 has long been heralded as a misuse of presidential power that nearly undermined the integrity of our constitutional system. Using an analytic narrative framework, we offer an alternative theoretical account of the events and argue that Roosevelt used the proposal to obtain his immediate goal: a shift in policy direction of the Court. Our framework is supported with historical evidence, suggesting that all of the actors were acting rationally by attempting to maximize their payoffs.

Roosevelt's "court-packing" plan has been the subject of a great deal of historical debate. While some historians go so far as to decry Roosevelt's plan as the surest sign that he had dictatorial ambitions, many scholars agree that it represented a significant political failure for this otherwise successful president. According to most accounts, Roosevelt, having just won an overwhelming majority in the 1936 election, believed he had become invincible in the political arena. Under this misguided illusion of invulnerability, Roosevelt went forward with a plan that, some historians claim, could have undermined the integrity of our constitutional system. Compounding the perception of his arrogance is the fact that Roosevelt seemed unwilling to build a coalition of support prior to the proposal of the initiative. Moreover, some scholars argue that the Court successfully "outfoxed" Roosevelt by switching its position and upholding the New Deal legislation. As Caldeira (1987) wrote, "The Supreme Court outmaneuvered the president. Through a series of shrewd moves, the Court put President Roosevelt in the position of arguing for a radical reform on the slimmest of justifications" (1150). Or, as Alsop and Catledge (1938), the journalists who first recounted the events, wrote, the Court had achieved "self-salvation by self-reversal" and the "destruction of the President by giving him what he wanted" (147).

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While historians do disagree about the extent of Roosevelt's defeat, they are nearly unanimous in claiming that one occurred. Alsop and Catledge (1938) wrote, "At its [the court-packing plan] start he enjoyed a power like the power of no American president of the past. At its close fortune's wheel had revolved until the President was humiliated and powerless to get his way" (13). Alsop and Catledge also call the president a "tragic hero," a victim, like those in Shakespeare's tragedies, of his tragic flaw: an excessive taste for power. Burns (1956), while not quite as critical of Roosevelt, maintained that the plan was a "miscalculated risk" in which the President "lost the battle, won the campaign, but lost the war" (315). Eventually, Burns asserted that, "All in all, the court fight was a stunning defeat for the President" (315). Nelson (1988), in his retelling of the saga, claimed that Roosevelt possessed a "dulled strategic sense in the court-packing episode" due to his popular success in the election of 1936 (278).

While the historians' tales of Roosevelt's excessive hubris make for a great story, the ensuing analysis casts doubt on their underlying validity. We argue that Roosevelt, as the initiator of the court-packing plan, obtained what he wanted politically (a shift in policy direction on the Court), while allowing both Congress and the Court to believe they had successfully outmaneuvered him. After briefly recounting the historical context surrounding the court-packing episode, we present an analytic narrative using game theory that enriches extant research by assuming that all the actors were acting strategically and obtained the best outcome available to them given the political constraints.[1] Additionally, we illustrate that Congress played a pivotal role in the temporal sequence of the court-packing episode. While we primarily offer a theoretical framework that treats the actors *as if* they were acting rationally, we will supplement the theory with primary and secondary historical evidence to substantiate our analysis.[2]

1. Historical context

The hallmark of Roosevelt's first term as president was his far-reaching attempt through the New Deal to bring the country out of the Depression. In his first years in office, Roosevelt had proposed a number of bills ultimately passed by Congress that were intended to counteract the Depression and jump-start the economy. These initiatives enlarged the power of the federal government to a degree which it had never before reached. Prior to Roosevelt's New Deal, the federal government had mostly only regulated the economy; it had always played a fairly small role in actual economic growth. Roosevelt's legislative agenda significantly enlarged the government's role in an unprecedented way.

In 1935, the Supreme Court's conservative majority, composed of Willis Van Devanter, George Sutherland, James McReynolds, Pierce Butler (the "four horsemen") along with Chief Justice Charles Evans Hughes and occasionally Owen Roberts, began striking down key legislation. The Supreme Court, using a strict interpretation of the Constitution, consistently held that New Deal legislation extended the power of the federal government beyond its proper jurisdiction. As Gely and Spiller (1992) note, for instance, "By 1936, the court position in relation to the cases involving the federal government could be summarized as being against the enhancement of presidential power, further legislative control over the economy, and the granting of discretion to administrative agencies." Roosevelt came to the conclusion that he had to find some means with which he could thwart the Court's adverse decisions toward his programs.[3]

As early as 1935, Roosevelt began formulating a strategy for curbing the court's intervention (Roosevelt, LX).[4] Some advisors recommended pursuing a constitutional amendment that expanded the commerce clause. Others wanted to decrease judicial authority by requiring, for example, a two-thirds majority of the Court to declare an act of Congress unconstitutional. Still others sought to redefine the Court's jurisdiction by restricting its power over certain constitutional issues.[5] However, none of these suggestions appealed to Roosevelt both because he thought an amendment would take too long to pass and because he was not even confident that it would pass both chambers of Congress, let alone three-fourths of the state legislatures. In fact, Roosevelt had this to say in a letter to Felix Frankfurter on February 9, 1937:

> As a matter of fact, the decision was arrived at by a process of elimination . . . the reason for the elimination of the amendment process was to me entirely sufficient: to get two-thirds of both houses of this session to agree on the language of an amendment which would cover all of the social and economic legislation, but at the same time not go too far, would have been most difficult. In fact, the chance of a two-thirds vote in this session was fifty-fifty.
>
> Supposing such an amendment had passed at the close of this session, every state legislature would have adjourned for the year. In 1938, only about one-third of the legislatures meet and because of the congressional elections in 1938 the issue would, in all probability, be delayed in enough states to make ratification in 1938 impossible.
>
> That brings us to 1939. The chances are that quite aside from this issue an unwieldy Democratic majority in both Houses will be slightly reduced as a result of the 1938 elections. Any such reduction would be used as an argument against ratification, thus, in all probability leaving the amendment unratified up to and through the 1940 election.

Roosevelt also proclaimed later, "Give me ten million dollars and I can prevent any amendment to the Constitution from being ratified by the necessary number of states" (as cited by Burns, 1956).

After his reelection in 1936, Roosevelt decided the time was ripe for action. On February 5, 1937, he announced his court-packing plan. Although he couched the plan in terms of a judicial reorganization, it allowed him to name up to six more Supreme Court justices; presumably, he would name justices who would approve of the New Deal.[6] According to the plan, Roosevelt could appoint another justice for every sitting justice over the age of 70 up to a maximum total of 15 justices.[7] Surprisingly, considering the importance of the issue, Roosevelt only consulted one member of his advisory team, Homer S. Cummings, in preparation of the plan. Moreover, before announcing the plan, Roosevelt did not attempt to marshal any support for it from any of the Democratic leaders of Congress (Alsop and Catledge, 1938). They first heard about the plan as he delivered the announcement to the entire country. Some scholars attribute this secrecy and lack of coalition-building to Roosevelt's inordinate confidence. According to them, Roosevelt became convinced of his own political invincibility after his reelection (Burns, 1956; Nelson, 1988).

After Roosevelt announced the plan, the next step was the battle for its passage in both houses of Congress. Legislators understood the necessity of counteracting the Court as Roosevelt's plan was neither the first nor would it be the last proposal introduced in Congress.[8] However, both Speaker Bankhead and House Majority Leader Rayburn immediately indicated their opposition to court-packing (Leuchtenburg, 78; fn 20). When the bill was introduced in the House, they made it clear that the bill would never make it out of committee; they would even go as far as prohibiting the use of a discharge petition to report the bill to the floor (Alsop and Catledge, 1938: 88–89). Similarly, the Senate leadership also was reluctant to report the bill to the floor and Senator Burton Wheeler, the chair of the judiciary committee, appealed to the Court in a letter to Chief Justice Hughes. In the letter, Wheeler asked Hughes to show that the Court had no problem with its workload and did not need more justices as FDR claimed in his original proposal (Burns, 1956).[9]

Congress responded to Roosevelt's plan by initially passing what some scholars have called a "watered-down" version of the court-packing bill (Poole and Rosenthal, 1997). Since a majority of legislators recognized that the real problem lay in the justices' reluctance to retire because they would only receive half their pensions, the House passed H.R. 2518 on February 10, 1937 allowing for their retirement on full pensions. The Senate followed suit on February 26, 1937 in a 76-4 vote, thereby opening the door for one or more of the "four horseman," the oldest members of the Court, to retire.[10]

On March 29, 1937, the Supreme Court made what appeared to be the first in a series of switches that reversed the Court's previous position with regard to New Deal legislation. In *West Coast Hotel Co.* v. *Parrish*, the Court upheld a state minimum-wage law in a five-four majority decision.[11] Two weeks later, the court's decision in *NLRB* v. *Jones & Laughlin Steel Corp*. upheld the imposition of far-reaching federal control over labor and industry. On May 24, the Court affirmed the constitutionality of the Social Security act. These decisions were the beginning of a long-lasting streak of New Deal victories in the Court.

Despite these initial victories, Roosevelt chose not to renounce his court-packing plan. Instead, it remained bottled up in committee in both of houses of Congress. On May 18, 1937, Senators Wheeler and Borah, knowing of Justice Van Devanter's interest in retirement, contacted the justice. In their discussion, they conveyed to him that a retirement decision that coincided with the bill's vote in committee would help the prospect of its defeat. As Burns writes, "A few minutes after Roosevelt read Van Devanter's notice of retirement on the morning of May 18 and had written in longhand a cool but polite note of acceptance, the Senate Judiciary Committee met in executive session. After brushing aside several compromise measures, it voted 10-8 that the President's bill [sic] 'do not pass'" (306). Although by mid-July both the House and the Senate had tabled the bill indefinitely, Roosevelt would later claim the outcome of the court-packing episode as one of the most important achievements of his first two terms (Roosevelt, XLVII).

2. Roosevelt's court-packing plan as an extensive form game

To gain a more complete understanding of the series of events surrounding FDR's decision to initiate the court-packing plan, we will model the situation as a game played between the president, the congressional leadership, and one or more members of the Supreme Court. Since we are attempting to illuminate the underlying strategic interaction between two or more actors, game theory is the appropriate modeling technique (Gates and Humes, 1997). Our theory assumes rational behavior on the part of all actors and, informed by historical evidence, makes certain assumptions about their preferences. We then formulate a game theoretic model of the interaction between the three players and examine the extent to which our theory explains the actual series of events. Like most rational choice accounts, we do not argue the actors actually make the calculations described, but that they act "as if" they do.[12]

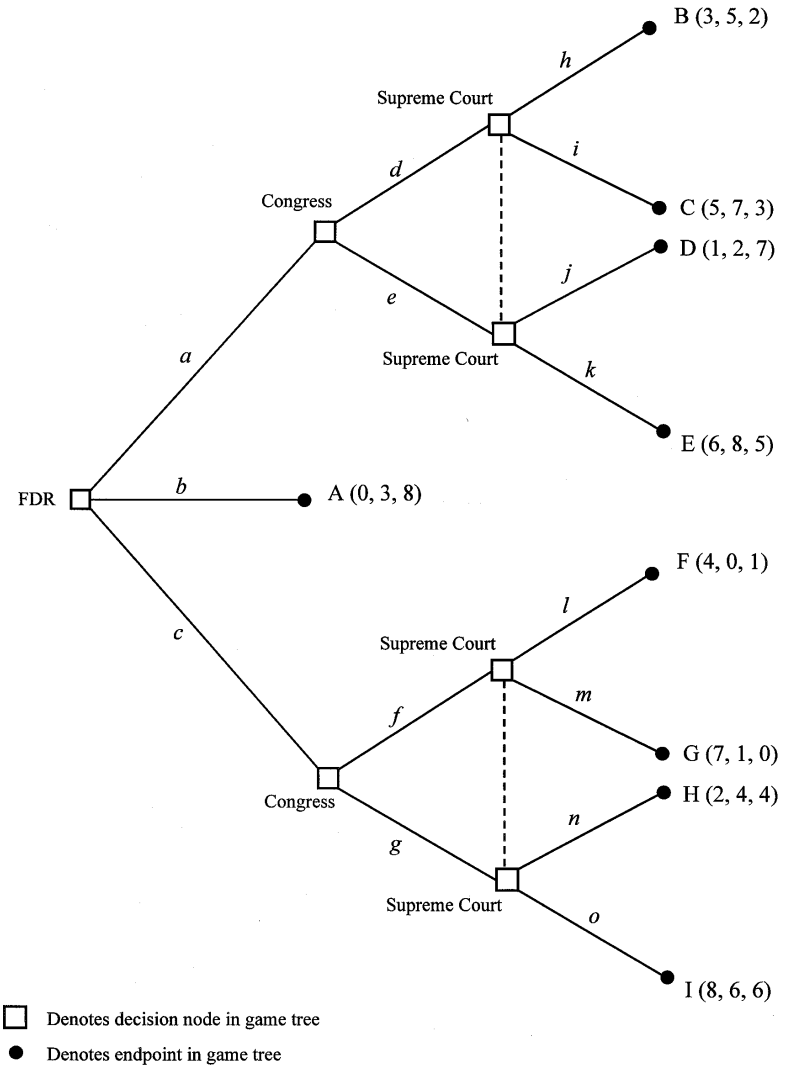
Although the potentially strategic nature of the court-packing plan lends itself well to a game-theoretic analysis, it is noteworthy that little scholarly effort has been made to examine this specific case within a formal

modeling framework. Schubert (1959) introduced the idea of examining the court-packing episode in game-theoretic terms, but he directed his attention principally to voting behavior on the part of justices on the Court. As a result, he failed to take into account the role played by both the congressional leadership and the president. More recent and non-formal efforts (see, for instance, Caldeira, 1987; Nelson, 1988; Kyvig, 1989), while offering us some substantive insights, do not provide an appropriate analytical framework within which to recognize the strategic nature of the court-packing plan. Gely and Spiller (1992) are the only scholars we found who have incorporated spatial modeling into their analysis of the court-packing plan. However, their study deals with a more limited aspect of the events surrounding Roosevelt's plan in that they explore the increased possibility of passage of a constitutional amendment constraining the Court's behavior after the 1936 election.

Insofar as the study of history can provide certain broader generalizations about the mechanisms affecting political life, our analytic framework can shed some light on the overall nature of the strategic interaction between the three branches of government (see Riker 1990: 167). With this in mind, it should be emphasized that our analysis ought to be judged as much by those insights that lead us to broader generalizations concerning this interaction as by its historical accuracy.[13] By showing how FDR used an initiative as an instrument to persuade the judiciary to change its policy direction while the congressional leaders willingly chose to delay action so as to maintain the threat to the Court's institutional integrity, we establish a framework that may be used to compare with other interactions between the three institutions.[14]

We model the court-packing drama as a multi-actor non-cooperative game with the president, the congressional leadership, and the Chief Justice as the principal players. The extensive form of the game is displayed in Figure 1 and is modeled as a game of incomplete information. Since FDR alters the status quo by proposing the court-packing plan, we model Roosevelt as the first player in the game, where he chooses between proposing the court-packing initiative, recommending the adoption of a constitutional amendment, or doing nothing. If he chooses not to propose the plan (represented by b), then the game ends and leads to outcome A.[15] If choice b is selected, however, none of the other actors get a chance to respond, resulting in the respective payoffs as labeled by outcome A. If Roosevelt opts for either the constitutional amendment or the court-packing initiative by selecting alternatives a or c respectively, members of the congressional leadership in either the House or the Senate have the opportunity to make the next move.[16]

One may ask at this point why we have chosen to make FDR's move first in the game as presented rather than the Court acting first by striking down one or more aspects of the New Deal legislation. This is done simply



Note: Uppercase letters denote outcomes in the game tree whereas lower case letters denote choices made by the respective actors.

Figure 1. Extensive form of game tree.

for the sake of parsimony since we argue that FDR's action (his announcement of the court-packing plan) is the impetus for subsequent actions by congressional leaders and the Chief Justice. While it is true that the Court's finding of unconstitutionality originally precipitated Roosevelt's action, the new equilibrium we are interested in explaining (the shift in the Court's policy

direction) comes as a result of FDR's subsequent proposal. Thus, his move is the first to upset the previous equilibrium (the Court continuously declaring New Deal bills unconstitutional), thereby making it the first move of interest.

Assuming that FDR decides either to pursue a constitutional amendment (choice a) or to announce his court-packing initiative (choice c), the congressional leadership has two options available to them. First, they can allow the measure (either the court-packing bill or the constitutional amendment) to be reported to the floor for a vote to be taken on its success or failure. This decision to let the measure be reported out of committee is represented by either choice d or f (depending on the initial choice made by Roosevelt), which would necessitate a subsequent move by the Supreme Court if the measure were to pass. Given that many members of Congress were perceived to have ridden in on FDR's "coattails" during the 1936 election, however, we argue that the congressional leaders would have assumed that a measure reported out of committee would have a high probability of passage. In fact, a poll taken in the House in February 1937 by representative Fred Vinson clearly showed a 100-vote margin *in favor* of an immediate legislative response (Alsop and Catledge, 1938: 92). As a result, we model either choice d or f as the decision by the leadership to allow the measure to come to the floor where the likelihood of passage was likely.

Assuming the congressional leadership recognized that the court-packing bill or a constitutional amendment would most likely be passed in one form or another if allowed to come to the floor, the only remaining alternative for the leadership is to stall action on the proposed measure by not allowing it to be reported from the committee.[17] This decision is represented by either alternative e or g, which necessitates a response by the Supreme Court. However, since the Court was uncertain of what the members in Congress might do, an information set connects the Court's position in the game, thereby making its move simultaneous with that of the congressional leadership.

Of course, we recognize that Congress could have proposed and voted upon their own legislation at any point in early 1937 in an attempt to address the problems created by the Supreme Court. However, for this analysis, we confine Congress's actions to those which would be a direct response to Roosevelt's first move. Moreover, insofar as the court-packing plan stands as a credible threat to the institutional integrity of the Supreme Court and Roosevelt's popularity (evidenced by his landslide reelection in 1936) makes his plan the most viable alternative for addressing the problem, we argue that the only alternative the congressional leadership took seriously besides a constitutional amendment was action related to this plan. Although the congressional leadership in particular could have pursued other actions, our analysis points to the reasons they did not.[18]

After Roosevelt's initial move, the Court had to act before knowing with certainty how Congress would respond to either the constitutional amendment or the court-packing bill. Regardless of Congress's preference, however, the Court must choose either to remain belligerent or to be deferential. For instance, if FDR proposes a constitutional amendment, the Court can continue to declare legislation unconstitutional as represented by choices h and j. Alternatively, the Court could choose to uphold the legislation and be deferential as represented by choices i and k. If Roosevelt instead favors the court-packing plan, the pair of choices remains the same for the Court as the justices can remain belligerent (alternative l and n) or be deferential (alternative m and o). Should the justices decide to remain belligerent, however, they would also recognize that the congressional leadership would be unable to prevent either the constitutional amendment or the court-packing bill from being reported out of committee. Given that either measure would most likely be enacted, especially considering the results of the poll mentioned earlier, this would effectively constrain the Court's actions and cause them to reevaluate their original move.[19]

For ease of interpretation, we have provided a summary of final outcomes, sequence of choices, descriptions of actions taken in the game, and individual payoffs for each of the actors in Table 1. The values assigned to the payoffs represent *ordinal* rather than *cardinal* rankings for each actor's preference ordering. While we are aware that the assignment of ordinal rankings can be problematic when dealing with specific game-theoretic models, our intention is only to evaluate the relative merit of payoffs with respect to all others. Also, with nine distinct outcomes in the game, we have assigned values to the payoffs such that 8 represents the best outcome for an actor, 7 represents the next best outcome, and so on down to zero which represents the worst possible outcome for any particular actor.

To understand better the relative distinction in individual payoffs for each of the actors in the game, it is necessary to review the assumptions associated with our model. For Roosevelt, proposing the court-packing plan is clearly a dominant strategy for him since he always prefers proposing the initiative over doing nothing or waiting for the passage of a constitutional amendment (all outcomes yield higher expected payoffs for FDR than their respective counterparts resulting from the proposal of an amendment). Because the congressional leadership also has a dominant strategy of stalling passage of the legislation assuming Roosevelt advances his court-packing plan, Roosevelt clearly prefers one or more justices to switch their position (acting deferential) with respect to the New Deal legislation than having them continue to be belligerent (thus, outcome I is clearly preferred to H by Roosevelt).

Table 1. Summary of actions, choices, and outcomes.

Outcome	Sequence of choices	Description	Roosevelt's value	Congress's value	Court's value
A	b	Roosevelt does not propose court-packing plan; Congress and the Court do not have the chance to respond	0	3	8
B	a-d-h	Roosevelt proposes constitutional amendment; Congress approves amendment; Court is belligerent	3	5	2
C	a-d-i	Roosevelt proposes constitutional amendment; Congress approves amendment; Court is deferential	5	7	3
D	a-e-j	Roosevelt proposes constitutional amendment; Congress stalls legislation; Court is belligerent	1	2	7
E	a-e-k	Roosevelt proposes constitutional amendment; Congress stalls legislation; Court is deferential	6	8	5
F	c-f-l	Roosevelt proposes court-packing initiative; Congress approves increasing size of Court; Court is belligerent	4	0	1
G	c-f-m	Roosevelt proposes court-packing initiative; Congress approves increasing size of Court; Court is deferential	7	1	0
H	c-g-n	Roosevelt proposes court-packing initiative; Congress stalls legislation, Court is belligerent	2	4	4
I	c-g-o	Roosevelt proposes court-packing initiative; Congress stalls legislation, Court is deferential	8	6	6

Given Roosevelt's initial choice, members of the congressional leadership also have a dominant strategy of keeping the court-packing bill in committee since allowing the bill to be reported would most likely ensure its passage. This would result in the worst two possible outcomes for the congressional leadership – to allow the bill to pass would establish a precedent whereby the president could potentially add or remove justices at his whim. The congressional leadership would view the expansion of presidential power as a potential threat to its *own* institutional integrity. Moreover, even if the congressional leadership had been willing to support the plan initially, Roosevelt, by failing to consult with them before its introduction, made them that much more unwilling to support a plan that expanded the president's power to such a great extent. In other words, even if alternative g was not a dominant strategy without FDR's apparent disregard for the input of congressional leadership, by acting in the manner that he did, Roosevelt insured that it became one.[20]

If FDR had not proposed the court-packing plan, however, the congressional leadership might have been forced to pursue their own action to curb the court. This would result in a low payoff for the congressional leadership since they could then be held responsible for the failure of any plan that was proposed. Even if such a plan were successful, the long-term electoral implications of such a highly visible action made the congressional leadership want to shy away from such action.[21] Once Roosevelt's court-packing plan is proposed, however, the congressional leadership would clearly favor stalling action on the bill since this yields a much higher expected payoff regardless of the action of the Supreme Court.

Unlike Congress, the Court obtains its best possible outcome (A) when the president decides not to go forward with his court-packing plan. However, given that this is clearly not an optimal strategy for Roosevelt, the Court is now in a position of reacting to the plan once it has been proposed. Moreover, the Court is forced to respond to the plan while a decision is pending before Congress. The Court does not know at any instance during the game whether or not the congressional leadership will be able to continue to stall, given the members' apparent desire to pass the bill. Assuming that the Court recognizes the likelihood of passage should the bill be reported to the floor, the Court preferred having the congressional leadership delay action (given its limited alternatives). To ensure that the leadership can continue to delay, however, one or more justices on the Court would realize they must switch their position on the constitutionality of New Deal legislation. If the Court remained belligerent toward the New Deal, the congressional leadership would be unable to prevent the court-packing plan from being reported out of committee, which, because of the poll taken in early February, would

ensure its passage. Recognizing this would essentially force the justices to choose between alternatives l or m, a selection they would not prefer given their low expected payoffs; thus, the justices would choose to be deferential (represented by choice o). This action would yield the highest payoff, while simultaneously protecting the institutional integrity of the Supreme Court and making it appear that the Court had "outmaneuvered" the president.

In sum, we observe that no matter what Congress or the Court chooses to do, Roosevelt has a clearly dominant strategy of advancing the court-packing plan (alternative c). Recognizing this and given the arguments presented above, the Nash equilibrium for this game would be cgo. FDR would propose the court-packing plan, the congressional leadership would choose to delay action, and one or more justices on the Court would choose to act deferential. This would yield the highest expected payoffs for each of the respective actors given their available alternatives.

3. Historical evidence

Having established the underlying assumptions of our model and the expected payoffs, we must now offer evidence that demonstrates our game is more than mere speculation. Although game theory often assumes intent from effect, we seek to move beyond what might be characterized as speculation by showing that only within this analytic framework can one make sense of much of the anecdotal evidence that has previously been considered a puzzle. We attempt to show not what the actors might have been thinking, but why they would have had to be thinking in *strategic* terms to behave the way that they did.

3.1. *The President*

Scholars recounting the tale of Roosevelt's political "defeat" have emphasized deficiencies in the manner in which Roosevelt advanced his court-packing plan. Alsop and Catledge (1938) wrote, "The election had caused him to throw caution to the winds . . . he no longer troubled to consult anyone . . . he believed that compliance with his wishes had become automatic" (60). Burns follows Alsop and Catledge in criticizing Roosevelt for failing to build "a broad coalition behind the bill and ironing out multifarious tactical details before springing the attack" (314). Scholars criticize Roosevelt for failing to compromise while Congress was considering the bill. Nelson writes, "Even after he introduced the Court-packing plan, election-born overconfidence continued to blur Roosevelt's tactical decision making" (286). He also criticized Roosevelt for going so far as to laugh in the faces of some congressional leaders when they proposed a more modest three-seat increase

in the Court. But should we be so willing to view the actions of Roosevelt as serious tactical mistakes due to post-election overconfidence when nearly all scholars simultaneously agree that he was one of the most able politicians of the twentieth century? While many scholars have attributed Roosevelt's behavior to election-born overconfidence, our framework challenges these explanations by attributing his behavior to strategic considerations.

In considering Roosevelt's uncharacteristic behavior, scholars seemed to have assumed that one of his goals in proposing the controversial plan was a fundamental shift in the balance of political power in favor of the executive. Scholars have recognized that Roosevelt's plan did arise to combat the Court's belligerent behavior toward New Deal legislation. Nevertheless, by calling the episode a failure for Roosevelt, they seem to confuse this goal with another more sweeping objective which was the increase in the power of the president over the judiciary. To argue convincingly that Roosevelt failed in this attempt, however, one must show that he wanted a judiciary subservient to him as a matter of principle. This raises an interesting and rather important question: was Roosevelt's court-packing plan both a means and an end in and of itself or is it better viewed as a means to a more specific end? Both our analytical framework and previously overlooked historical evidence point to the latter conclusion.

If, as most historians have alleged, Roosevelt wanted to increase his power at the expense of the judiciary, Roosevelt should have immediately conceived of the court-packing bill. In fact, one would assume that Roosevelt would have pursued not a bill, but a constitutional amendment giving him that specific power. There is some evidence to suggest that Roosevelt would have been successful with such an amendment (see Gely and Spiller, 1992). From a theoretical standpoint, however, Roosevelt later stated,

> I was convinced an amendment was wholly unnecessary to meet the situation. I knew that the Constitution was not to blame, and that the Supreme Court as an institution was not to blame. The only trouble was with some of the human beings on the Court (LXIII).

Moreover, as was mentioned earlier in a letter written to Felix Frankfurter, the amount of time necessary to pass an amendment clearly made it an unfeasible option for Roosevelt. Finally, as Kyvig (1989) argues, Roosevelt did not want to incur the political damage that an amendment would most likely involve.

Recognizing that the pursuit of an amendment was not Roosevelt's first choice among available alternatives, his task was to find a solution without such a high political cost. As was discussed earlier, Roosevelt and his advisors began considering a number of proposals for changing the court's ideological direction. In searching for a plan, Roosevelt became fascinated by one

particular English precedent from earlier in the century. Lloyd George had threatened through the King to pack the House of Lords with 300 new lords if that chamber did not pass the prime minister's social legislation (Ickes, 467–468). Roosevelt's interest in this precedent suggests that he was looking to change the court's behavior by means of a *threat* to its power, not an actual change. Just as in the precedent, FDR did not want to pack the Court; instead, he wanted to use the proposal to convince the Court that it must uphold his legislation. Moreover, Roosevelt's choice of the court-packing plan as his threat still left the door open for a constitutional amendment should the Court not fall in line. Many scholars have criticized FDR for not going forward with a constitutional amendment (Nelson, 1988; Kyvig, 1989; Gely and Spiller, 1992); but they fail to understand that Roosevelt's selected plan made the most strategic sense. By choosing a legislative plan that threatened the court's institutional integrity, Roosevelt forced the Court's hand without unnecessary and potentially costly delay.

Additionally, Roosevelt himself set the record straight in 1941 concerning his true motives for initiating the court-packing plan as evidenced by the following statements:

> Time and again during the fight, I made it clear that my chief concern was with the objective – namely, a modernized judiciary that would look at modern problems through modern glasses. The exact kind of legislative method to accomplish the objective was not important. I was willing to accept any method proposed which would accomplish that ultimate objective – constitutionally and quickly (LXV).

When we link this statement with what Roosevelt said concerning the problem he had with the people on the Court, we reach the conclusion that his most preferred outcome would have been for one or more justices to recognize on their own that they needed to switch their policy position. After all, even from a psychological standpoint, what could be more rewarding for Roosevelt than having the very justices that had previously thwarted his political objectives recognize their mistake and change their position? Thus, Roosevelt concluded that, "the change would never have come, unless this frontal attack had been made upon the philosophy of the majority of the court" (LXVI).[22]

As more than one scholar has pointed out, Roosevelt was otherwise extremely adept at building coalitions of legislators behind his proposed bills (Burns, 1956: 314; Nelson 1988). Therefore, if we accept that the bill had a strategic purpose, rather than an ideological one, it is understandable that Roosevelt may have been secretive and uncompromising for tactical reasons. In one sense, Roosevelt may have wanted the power that the court-packing bill would have theoretically given him. However, there are a few problems

with this outcome. First of all, one cannot ignore the possibility that the Supreme Court might have tried to strike down the court-packing bill just as it had reversed Roosevelt's social legislation. In that scenario, he would have been forced to pursue a constitutional amendment – something we have already shown he did not prefer to do. Secondly, if for some reason the bill had failed in Congress before the Court had reversed its decisions, Roosevelt's hands would have been tied in attempting to thwart the court. Consequently, we argue that Roosevelt sprung the bill on Congress and failed to compromise to attain its passage so that the bill would remain bottled up in committee as a constant threat to the Court in its upcoming session. Additionally, if Roosevelt had consulted with his advisors about the court-packing plan, word might have gotten out that it was a political bluff, thereby removing the immediacy of the threat. That is, absolute secrecy enhanced the credibility of Roosevelt's threat.

Our final piece of evidence, which casts doubt upon viewing this episode as a political defeat for the President, lies in his own understanding of what happened. In 1941, Roosevelt claimed more than once that the outcome of the Court battle ranked among the most significant achievements of his first two terms (Roosevelt, LXVI). Many historians have passed off Roosevelt's jubilance about the outcome as mere political rhetoric to avoid embarrassment. However, while it is certainly true that politicians very rarely admit defeat, they also do not often claim defeats as significant achievements. If Roosevelt believed he had failed, he would have been much more likely simply to ignore the incident. Instead, the *intensity* with which Roosevelt celebrated this supposedly embarrassing incident makes the conclusion that Roosevelt was successful in accomplishing his political goals much more convincing.[23]

3.2. *The Congress*

By placing the series of events within a temporal and strategic framework, the pivotal role that Congress played in the court-packing plan becomes clearer. While previous scholars have often mentioned the activities of Congress in connection with the court-packing saga, they often downplay its importance because neither chamber took definitive action on the plan. We show that Congress's inaction was due to strategic considerations made by the congressional leadership who wanted to avoid taking either a positive or negative position with respect to the plan until the Court had responded.

As soon as the court-packing initiative was introduced in Congress, the leadership in both the House and the Senate announced that the bill would stay in committee (Alsop and Catledge, 1938: 88–89). The rationale for this behavior seems straightforward. First, if both chambers agreed to support the initiative, this could lead to a number of both unpopular and negative

outcomes. Giving the president the power the bill entailed would result in an executive usurpation of power at the expense of the legislative and judicial branches. Moreover, passing the initiative could have resulted in a public opinion nightmare for members of Congress. As Caldeira (1987) has demonstrated empirically, public sentiment toward the court-packing plan waned while the bill was in Congress. While a majority of the Democratic membership in Congress probably would have supported the plan if the bill were put to a vote, the congressional leadership was unwilling to report the bill out of committee – both because it would sacrifice their own power and it might hurt the image of the Democrats in Congress if they gave in to the president on this issue.[24]

To understand the congressional leadership's decision to delay action on the court-packing bill, an application of a general theory that extends beyond this particular incident may be useful. Kiewiet and McCubbins (1991) have argued that, occasionally, Congress may willingly abdicate authority to either the bureaucracy or the president to avoid having to make costly political decisions. If we apply this general theoretical framework more broadly to the situation at hand, we gain some new insights concerning why the congressional leadership would have vigorously avoided having to take a definitive stand on the court-packing bill. By keeping the legislation bottled up in committee, the leadership retained the plan as a threat to the Court's integrity while letting the president "take the heat" for the unpopularity of the bill.

Given these concerns, both chambers of Congress chose not to act at all, or at least not to act on this bill immediately. The congressional leaders could easily justify this decision to stall since Roosevelt had chosen not to consult with them prior to his announcement of the plan. In fact, Congress did undertake some actions to avoid either passing the bill or voting it down immediately. For instance, they passed H.R. 2518 which allowed for the retirement of the justices on full pension.[25] This plan offered the older, more conservative justices a chance to exit gracefully, thereby giving Roosevelt a chance to name justices to the Court who would be more ideologically sympathetic to his initiatives without granting him the excessive power that packing the Court would involve. Some scholars also have claimed that Senators Wheeler and Borah, both on the committee that held the bill, encouraged Justice Van Devanter to retire in order to buttress their own political goal to vote the plan down (Jackson, 1941; Burns, 1956; Leuchtenburg, 1969). The mere fact that these two men would attempt to get this justice to retire before voting on the plan lends support to our argument that Congress was acting strategically. If one of the four "horsemen" had retired before they rejected the court-packing bill, this would provide members of Congress with insurance against the possibility of a political backlash. One of their fears was

a Court that continued to reject New Deal legislation after the bill's defeat; Van Devanter's retirement nearly guaranteed that this would not happen.[26]

3.3. *The Supreme Court*

Given that the leadership in Congress seemed to be stalling, the Court, for all intents and purposes, had to make a difficult choice. As long as the bill remained in committee, it represented a threat to the institutional integrity of the Court. In discussing the Court's reaction to the threat offered by FDR's court-packing plan, Cushman (1998) has asserted that as early as the end of February 1937, the Court would have become aware of growing opposition in the Senate to FDR's plan. He claims that the justices were aware that sufficient support existed to sustain a filibuster if the court-packing bill eventually came to the Senate floor for consideration. As a result, he concludes that, "It is therefore likely that the justices never saw the president's bill as a serious threat to the Court's independence, because the administration forces never held a card capable of trumping what appeared to be the opposition's one sure ace – the filibuster" (20).

Cushman's view of the justices' perceptions of the severity of the threat offered by the plan seems to take an "illogical" leap of faith. The justices' awareness of opposition in the Senate may be necessary to assert that they did not respond to the plan; but it is not a sufficient condition for this conclusion. After all, what rules out the possibility that some justices, although aware of some opposition, were still intimidated enough by the threat of passage of Roosevelt's proposal that they would change their behavior?

Regardless of the motivations of the remaining eight justices on the Supreme Court, Chief Justice Hughes' actions in early 1937 suggest another problem with Cushman's argument. The fact that Hughes felt it necessary to write a letter to Senator Wheeler, to be presented before the Senate, arguing against Roosevelt's plan demonstrates that he saw the plan as a serious threat to the Court.[27] From a strategic point of view in which actors engage in certain types of behavior to achieve their best possible outcome, Hughes' decision to express his opposition to this bill only makes sense if he thought the bill might pass. The fact that Hughes acted politically against the bill shows he engaged in strategic behavior in light of uncertainty.

Evidence also suggests that the threat to the Court was more immediate than Cushman's argument implies. Gely and Spiller (1992) show that support for a constitutional amendment was great enough that its passage was extremely likely after 1936. If the Court had some inkling of this support, it would be more inclined to switch its position to avoid a major constitutional attack upon its institutional integrity. They go on to claim that it was this threat, and not Roosevelt's bill, that made the Court switch its position.

However, this conclusion is problematic because Roosevelt's bill supercedes the threat of the amendment. It forces the Court's hand more concretely than the distant threat of an amendment. Of course, the prospect of an amendment should this more immediate threat not thwart their decisions does play a role in their decision to act sooner rather than later.

One remaining, yet important point to be considered is the timing of the "switch" attributed by many scholars to Justice Owen Roberts and the role of one other justice in the Court's policy shift. Recent scholars (see, for instance, Gely and Spiller 1992; Cushman 1998) have correctly pointed out that Roberts' initial switch in *West Coast Hotel* actually occurred in December, rather than March, suggesting that he could not have been influenced by the court-packing initiative.[28] In our framework, Roberts's switch in *West Coast Hotel* is inconsequential. The crucial switch on the Court actually came on April 12, 1937 when Chief Justice Evan Hughes, in *NLRB* v. *Jones & Laughlin Steel Corp.*, sided with the previous liberal minority and wrote a decision that upheld the constitutionality of the National Labor Relations Board. This decision represented a significant departure for Hughes from his position on previous cases.[29] Rather than Roberts, whose decision in *West Coast Hotel* was based on a mere technicality, we argue that Chief Justice Hughes was the pivotal player on the Court, who behaved strategically to obtain the best possible outcome in light of the impending court-packing bill.[30] For the same reason that Hughes felt it necessary to write a letter to Senator Wheeler, he also modified his position with regard to New Deal legislation.[31]

4. Conclusion

The tale of the court-packing saga has been told many times before. Nevertheless, some accounts offer new insights no matter how many times they are told. On its own merit, we argue that the retelling of the court-packing saga is especially useful for scholars because it reveals much about the nature of the institutional relationship between the president, Congress, and the Supreme Court. Moreover, insofar as it may have led to an abrupt shift in the Court's interpretation of the Constitution and, alternately, a new respect for the institutional integrity of the Supreme Court – both long-term consequences that continue to affect the operations of our government today – this episode seemed worthy of another look.[32]

However, by applying some analytical tools of political science, we do more than simply rehash the story for a new generation of scholars. Our reexamination of the court-packing plan may, first of all, provide new insights that help solve lingering puzzles associated with our understanding of the incident. One problem comes from Roosevelt's claim that this bill was one

of the most significant achievements of his first two terms in office. Scholars have, for the most part, either passed off this remark as the excessiveness of a man prone to hyperbole (see, for instance, Burns, 1956; Nelson, 1988) or have taken it seriously and left it as a puzzle (see, for instance, Greer, 1958). Instead, the conventional wisdom concerning the court-packing episode holds that FDR "lost the battle, but won the war." Scholars do differ in their arguments concerning the extent of Roosevelt's failure; but nearly all agree that FDR did commit some grave tactical errors in pursuing the passage of the court-packing bill. They emphasize the battle that Roosevelt lost, rather than the war that Roosevelt won. Our analytical framework raises the possibility that any distinction between the battle and the war is essentially empty.[33] Roosevelt's goal was to change the direction of the Supreme Court's ruling and the court-packing bill achieved this goal.[34]

Beyond an adjustment in the conventional wisdom concerning Roosevelt's success in the episode, our analytical framework also helps to make more sense of the temporal ordering of the events during the episode. We show why some legislators would have communicated with justices on the Court while the bill remained bottled up in committee. We explain why Congress might have passed the bill that allowed justices to retire with full pay. We also show why Congress waited five months to decide to relegate the bill indefinitely to committee. Previous scholars have discussed these events in some way or another. Without an analytic framework within which to understand how and why the episode played itself out as it did, however, they have not sufficiently connected the events in such a way that the account of the rational interaction between strategic political actors seeking different ends could be understood.

Finally, our discussion raises a potentially interesting question that should be examined further. Why were legislators so willing to pass off their responsibility (after all, the New Deal legislation was enacted by Congress) to the president rather than pursue a specific action themselves? In some respects, members of Congress seemed virtually content to allow the president to search for alternatives to solve the problem on his own. This suggests that Roosevelt would receive the credit if he succeeded, but would receive the blame if he failed. Is this behavior unique to this particular historical episode or is it indicative of a more general pattern of behavior in which members of Congress delegate authority to the president when dealing with major issues that may potentially polarize the population?

Notes

1. For a more extended discussion of the court-packing plan, see Leuchtenburg, Chapter 5 (1995a).

2. This analysis fits within a rational choice literature reexamining historical events to show the nature of the strategic interaction between actors and institutions. See, for instance, Allison (1971), Clinton (1994), Segal (1997), Jenkins and Sala (1998), Bates et al., (1998) and Spriggs, Maltzman, and Wahlbeck (1999).
3. In 1935, the Court held that certain provisions of the NIRA represented an unconstitutional delegation of legislative power to the president in *Panama Refining Co.* v. *Ryan*. Subsequently, the Court invalidated the NIRA in its entirety in *Schecter Poultry Corp.* v. *U.S.* citing as their justification the abuse of congressional power under the commerce clause. In 1936, the court continued to interpret narrowly the delegation of power in cases such as *Carter* v. *Carter Cole Co.* and *Morehead* v. *New York ex rel. Tipaldo*.
4. This fact also is clearly stated in the diary of Harold L. Ickes, 11 January 1935 and was mentioned by Representative Millard in one of the frequent debates on the subject of judicial reorganization in the House of Representatives (*Congressional Record*, 16 February 1937, p. 1250).
5. For more information about these various proposals, see *The Secret Diary of Harold Ickes*, Volume 1.
6. For details on the judicial reorganization, see the *Congressional Record*, 5 February 1937, pp. 893–896.
7. Ironically, it was one of the four horsemen's own suggestions that ultimately led FDR to consider adopting the court-packing plan. In 1913, then Attorney General McReynolds made a recommendation that when any federal judge reached a certain age and failed to retire, the president should appoint another justice to the court. As Burns (1956) writes, "Roosevelt, with his penchant for personalizing the political opposition must have delighted in the thought of hoisting McReynolds by his own petard."
8. For a list of bills introduced to regulate the Supreme Court in early 1937, see Gely and Spiller, pp. 58–59.
9. The full text of the letter written by Chief Justice Charles Hughes in response to Senator Wheeler's original inquiry can be found in the *Congressional Record*, 29 March 1937, pp. 2813–2815.
10. For more information on the debate and passage of this bill in the Senate, see the *Congressional Record*, 26 February 1937, pp. 1643–1649.
11. While there is some disagreement in the literature concerning whether the decision occurred before or after the court-packing plan's introduction, we are reserving this discussion for Section 4 of our paper.
12. The classic example of this is found in Friedman (1953) in his discussion of expert pool players. While they do not actively employ geometry for each shot, their behavior would make it appear as if they do.
13. Of course, we recognize that our model is a simplification of reality. At times, other alternatives may have been available to the individual actors. We chose the alternatives discussed in the paper based on a careful review of historical evidence. Any historical account necessarily simplifies in an effort to elucidate the strategic behavior and causal mechanisms underlying observed actions and outcomes.
14. While this episode appears unique in American history, there have been seven other instances in which the size of the Court was altered (see Carson and Kleinerman, 2001) and other cases in which changes were proposed, but ultimately failed. Thus, careful attention to this historical event may provide insights when examining other instances of judicial restructuring (on this point, see Murphy 1964: 27).

15. Had Roosevelt not proposed the court-packing plan, we recognize that the congressional leadership was not precluded from taking action independently. We will have more to say about this in Section 4.
16. We are fully aware of the problem of modeling Congress as a single entity (Shepsle, 1992). In this case, the pivotal players in the House are Speaker Bankhead and Majority Leader Rayburn. Other legislators also played important roles while the court-packing plan was being debated in both chambers. In fact, we will later point to the importance of Senators Wheeler and Borah in coordinating the Senate's rejection of the court-packing bill with Justice Van Devanter's retirement. For the sake of parsimony, we represent the leadership in both chambers and the Court as a unitary actor in the game. Since previous literature has emphasized the similarity in the motivations of the congressional leadership, we do not believe this simplification confounds our analysis (on this point, see also Bueno de Mesquita 1981 and Riker 1990: 169). In terms of the Court, we will argue Chief Justice Hughes is the pivotal player in the game.
17. While the congressional leadership could stall action on the bill for a limited period of time, they could not do it indefinitely should the Court continue to remain belligerent. The leadership had indicated that they would go so far as prevent the members from using a discharge petition to force the bill out of committee, but this can be best understood as "cheap talk." Since a sizable majority of the membership expressed a desire to go forward with the court-packing plan, it would have been impossible for the leadership to stall indefinitely, *even though this was clearly a dominant strategy for them*. (For a general discussion on this latter point, see Krehbiel, 1998).
18. We will later point to a general theoretical framework within which the congressional leadership's action (and inaction) in response to the court-packing bill can best be understood.
19. For the sake of parsimony, we have incorporated this decision calculus into the expected payoffs of the Court instead of adding a subsequent choice node and thus, extending the game. Although this extension would be necessary if the Court saw this as a legitimate course of action, we argue later in the paper that the Court did not view this alternative in such a manner.
20. We are aware that Congress would no longer have a dominant strategy of stalling if the Court were to remain belligerent. Congress will stall only as long as the Court begins to shift its policy direction (see also note 19). Although we considered modeling the interaction between Congress and the Court as a repeated game, we decided against this strategy for two reasons. First, including a repeated move in the game would make the model unnecessarily complex and would detract from the substantive insights offered by our analysis. Second, and most importantly, the game is *not* the central focus of this paper. It is simply a tool within the analytic narrative framework to illustrate the strategic interaction between the actors involved in the game. As such, we model the interaction between the two actors within a static framework.
21. Why else was no serious action taken in Congress on any other proposed measure addressing the problems of the Court striking down the New Deal legislation?
22. These statements were taken from Roosevelt's own introduction to Volume 6 of *The Public Papers and Addresses of Franklin D. Roosevelt*.
23. We grant that political actors are notoriously unreliable in their reassessment of their past behavior. Thus, a certain level of skepticism concerning Roosevelt's jubilance is understandable. However, given his actions, whatever else they may have accomplished, did solve the problem of the Court's intransigence, we should at least give serious consideration to the possibility that he intended the episode to proceed as it did.

24. As the party in the majority, members of the Democratic leadership were obviously thinking ahead to the potential electoral implications of the bill on the outcome of the next election.
25. For more information on the specifics of this bill, see the *Congressional Record*, 10 February 1937.
26. The court-packing bill was eventually voted down in Congress; however, this only occurred after the Court's reversal of behavior and in conjunction with Van Devanter's retirement.
27. In fact, Hughes initially wanted to appear publicly before the Senate to present his argument against the bill (Danelski and Tulchin, 1973: 304–305). Why would this public display by a Chief Justice supposedly above political concerns be necessary if the bill was not perceived as a real threat to the Court?
28. Although the decision in West Coast Hotel Co. v. Parrish was handed down on March 29, 1937, both Gely and Spiller (1992) and Cushman (1998) note that the case was actually decided in late December 1936 but the outcome was delayed because Justice Stone became ill and could not cast his vote at that time.
29. It should be noted that this switch by Justice Hughes was not unique to this particular case. Hughes continued to side with the liberal majority in subsequent cases on the New Deal.
30. Roberts' acknowledgment of the technicality on which he based his decision in *West Coast Hotel* was discovered in a memorandum written to Felix Frankfurter and given to him on November 9, 1945.
31. Our argument concerning Hughes' actions does not differ significantly from previous scholarship (see Burns, 1956: 304; Caldeira, 1987: 1150). Scholars have argued that Hughes, a politician-judge, "outmaneuvered" the president by changing his position. We only differ from previous scholars in asserting that this maneuver, rather than outwitting Roosevelt, was anticipated and even desired by the President.
32. To argue that the negative reaction to Roosevelt's plan created a new respect for the institutional integrity of the Court would not contradict our argument concerning the underlying strategic phenomena (see, for instance, Caldeira, 1987). We simply assert that the bill itself is best understood as a means to secure Roosevelt's principal end: the change in the Court's direction with respect to his policy initiatives.
33. We recognize that Roosevelt used this language. However, scholars have taken the terminology and used it to illustrate Roosevelt's failure. He may have used the phrase for rhetorical effect; but insofar as the phrase has become the conventional wisdom concerning the episode, we argue it is misleading.
34. Burns (1956) argues that Roosevelt "lost the battle, won the campaign, but lost the war" (315). In making this argument, he points to the materialization of a conservative, Democratic voting bloc due to the fragmentation that the debates surrounding this bill caused within the Democratic party. The validity of this argument is beyond the scope of this paper. However, we would argue that understanding more comprehensively the strategic nature of the court-packing bill would allow scholars to characterize more accurately the judiciousness of the bill when considering its long-term ramifications.

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