

FDR and the Transformation of the Supreme Court

Tuesday, December 13, 2022

Visit our media library at constitutioncenter.org/medialibrary to see a list of resources mentioned throughout this program, listen to previous episodes, and more.

[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This month we hosted a conversation about FDR and the Supreme Court. We were joined by legal historian Laura Kalman, author of *FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism*. Ken Kersch, professor of political science at Boston College and author of *Conservatives and the Constitution*. And Jeff Shesol, author of *Supreme Power: Franklin Roosevelt vs. The Supreme Court*. We're sharing it with you now as part of our Best of 2022 Town Hall series. Enjoy the show and happy holidays.

[00:00:53] Jeffrey Rosen: Jeff, let's start with you, if I may. Your book, *Supreme Power: Franklin Roosevelt vs. The New Deal*, I read with the greatest pleasure and recommended to all of our Constitution Center friends as the best place to begin to understand the court packing fight and its legacy. Please introduce to our great listeners what the court packing fight was about and what we should make of it.

[00:01:19] Jeff Shesol: Well, thanks so much, Jeff. Before I begin, I just wanna thank you, The National Constitution Center, and just say how grateful I am to be on a panel with the three of you, three people whose work I so admire, and have referred to, and learned from over the years. I'll be happy to kick us off, and then I'll be eager to hear what everybody else has to say. What was the court packing fight all about? I should begin by saying that Roosevelt when he was elected President in 1932 anticipated that he was going to run right into a conservative Supreme Court.

[00:01:54] Jeff Shesol: The court had been a powerfully conservative force in American life for decades by that point, not without some variations on that theme over the decades. But fundamentally, there was an understanding that there was going to be a conflict, that what Roosevelt wanted to do within the New Deal and possibly beyond the New Deal was going to meet a constitutional challenge. And at the same time, there wasn't really much to do about that except to get those programs passed, to get that legislation written, and to try to begin to pull the country of the Great Depression. And those cases in any event were gonna take some time to work their way up to the Supreme Court, and Roosevelt hoped that by the time that they did, that

the programs would be so successful that they would become, if not beloved, then at least entrenched in American life, and that the court would think twice about overturning them.

[00:02:49] Jeff Shesol: It did not. And in the beginning of 1935, the court begins to consider the New Deal in earnest, and begins, as one conservative newspaper put it in 1935, to throw this revolutionary nonsense into the Potomac where it belongs. And by the end of the '35, '36 term, by the summer of 1936, some observers were likening the landscape to the end of a Shakespearean tragedy where the stage is strewn with dead bodies, those dead bodies being in this case various New Deal programs, and also state reforms by the way, which were also facing a stern test in this conservative Supreme Court.

[00:03:30] Jeff Shesol: And so, really in this period, '35, '36 begins what could be called a rolling constitutional convention across the country as not just members of the administration or members of Congress, but really Americans of many different backgrounds, many different lines of work, began to consider this question, what could be done about the Supreme Court? And there was no shortage of ideas and no shortage of proposals in the Congress proposals to amend the Constitution mainly in all manner of ways, either to curb the powers of the Supreme Court or to expand the powers of the Congress to override the Supreme Court. And quietly, Homer Cummings, Roosevelt's Attorney General, began what he called a project of great importance, which was to begin to consider many of these many possibilities that Roosevelt faced.

[00:04:24] Jeff Shesol: Roosevelt was disinclined to wait for time simply to work its forces on this court. It was the oldest Supreme Court in history at that point, I believe. They were known colloquially as the nine old men. But Roosevelt really felt that if something could not be done and soon to save the New Deal from this court, that democracy itself was in danger, and that there would be a total economic collapse that would make the Great Depression look like a cakewalk. And so something needed to be done, but he wanted to consider his options very carefully. And by the time Roosevelt was reelected in what to that point was the greatest landslide in American history in 1936, he and Cummings had come around to an idea that had always kind of been out there but mostly dismissed, including by Roosevelt, which was to pack the court, to increase the numbers of justices, which is a perfectly constitutional approach.

[00:05:16] Jeff Shesol: The size of the court had gone up and down over the course of the 19th century for various reasons, and it could be done quickly if you could get the Congress simply to vote on it. And Roosevelt felt that with 76 out of 96 senators taking seat in January of 1937 being Democrats ... 76 out of 96, that he would have no trouble getting done what he needed to get done. And so the plan was unveiled after being developed with great secrecy in February of 1937. I won't go into too much detail here. I'm just, you know trying to help set the stage. But this begins then a sixth-month fight known as the Court fight over the fate of the court-packing plan and not incidentally, the fate of the New Deal.

[00:06:02] Jeff Shesol: Roosevelt made a couple of really critical errors in judgment in how he unveiled the plan and how he described the plan. He described it as mainly a matter of increasing the efficiency of these old men on the court, who he suggested because they were old they were falling behind in their work, and they needed some new blood to infuse the Supreme Court and

the federal judiciary broadly. Really, everybody in the country understood that this was not the real rationale. They had been well aware of what the battle was. It was banner headlines on the front pages for the preceding couple of years. No one missed what the reasoning was, and yet Roosevelt wouldn't cop to it initially, and this disheartened a lot of his supports and fed the worst suspicions of his enemies.

[00:06:48] Jeff Shesol: And yet, one of the things that I tried to establish in *Supreme Power*—and I think that, Laura, you do so well to reinforce here and really to challenge people's thinking on this—is that this was not simply a rash act on Roosevelt's part. This was the product of that project of great importance and a lot of consideration by both Roosevelt and Cummings. And it was also—and I know we'll talk about this—it was not doomed to fail. It's easy for us to think so. We know how the story ends, at least we think we do—and that's something else, Laura, that I know that you want us to reconsider in your book. But through this fight, even when Roosevelt is dealt setbacks, it is still possible that if he was willing to compromise that before this fight was out that he could have had two or even four additional justices added to the court, and we'd have a court of 11 or 13 today, and we would probably read this history very differently.

[00:07:46] Jeffrey Rosen: Thank you very much indeed for setting the stage so well. Laura Kalman, as Jeff Shesol notes, in your new book, *FDA's Gambit: The Court-Packing Fight and the Rise of Legal Liberalism*, you challenge the conventional story that the court-packing plan was a rash act and it was doomed to fail. And in the book, you note that in challenging the conventional wisdom, you believe that Roosevelt was displaying the same shrewdness that enabled him to win a massive reelection victory and further on, almost every day he battled with Congress and the Court. He could reasonably anticipate achieving some success in the form of additional justices and for the principal of court enlargement. And you conclude whether or not it's the right remedy for today's troubles, court-packing does not deserve to be recalled as one fated for failure in 1937. Tell us more about the important argument of your new book.

[00:08:38] Laura Kalman: Thank you, and I echo Jeff in my thanks of the National Constitution Center and my respect for Jeff who has written the most riveting account of the Court fight, and for Ken, whose scholarship has enlightened me for years. You know, it's easy if you look at how the Court fight turned out, it's recommitted by a vote of 70 to 20, to think that it was doomed to fail from the beginning. And from that we tend to take the message that FDR was the victim of his own reelection triumph and that he had won the greatest electoral victory in history, and that he showed hubris. He was arrogant. He overreached. That's been pretty much—although Jeff challenges it too—the picture of the Court fight ever since Joseph Alsop and Turner Catledge calcified it in their wonderful read *The 168 Days*.

[00:10:01] Laura Kalman: But as you mentioned, Jeff, I don't think that hubris explains this. FDR had won this incredible victory in 1936 despite the efforts of an overwhelmingly hostile press and overwhelmingly hostile elite, and I think he was showing shrewdness. Now granted, he made mistakes. But I think what we need to remember is, as Jeff just suggested, that far from erring tragically, how close FDR came to succeeding. In other words, if we don't look at it how it ended up, and we look at every day of the fight he came very close to success even after the Senate majority leader, Joe Robinson, died on July 14th, which is typically taken as the end of

the plan. Conservatives who had mobilized to fight it were convinced that FDR would get four or five new justices at the rate of one per year, and they remained very anxious that he would continue to introduce court-packing after the 1937 session ended.

[00:11:37] Laura Kalman: Now why did FDR take so long? I mean, if he could have two justices at least, why didn't he compromise sooner? I think from his perspective, playing hardball made sense. The justices couldn't be sure that he wouldn't get what he wanted. And I think partially in response to his overwhelmingly victory in '36 and his threat of the Court fight, it moved the justices. Now to be sure, there are plausible doctrinal reasons for why the justices shifted course and began upholding New Deal legislation. But I think that the justices themselves through their correspondence showed how much the election and the Court fight was affecting their thinking.

[00:12:46] Laura Kalman: So given that success, to conclude, given that success in the courts changing direction and producing a new agenda for the court where it shifted from protecting property to protecting civil rights and civil liberties, I don't think that the Court fight should be remembered as a failure, and I don't believe that we should conflate all contemporary proposals to increase the size of the court with that Court fight in 1937 itself.

[00:13:32] Jeffrey Rosen: Thank you so much, Laura, for your powerful argument that the Court fight may indeed have influenced the Court to change directions. Your intervention in this central question of why the court shifted is important, and will very much affect the debate moving forward. Ken Kersch, I'd love you to address whether or not conservatives think that the court was correct to shift course. In your enthusiastic review of Jeff Shesol's book, you note that the Court's four conservative justices, joined initially by Owen Roberts, were convinced that doctrines concerning the separation of powers, federalism, and fundamental rights were indispensable foundations of the nation's constitutional order, and these justices were opposed by a president for whom law held no interest other than as a mean to policy or a political end. Was the court correct to shift course, and why?

[00:14:26] Ken Kersch: Well I think as Laura has just indicated maybe toward the end of her remarks, there were real reasons why this potential change in the rulings of the Supreme Court was viewed by the conservatives and many Americans as a threat. Look, one of the interesting things about Laura's new book is that she focuses on not just the facts of the Court fight, but the memory of the Court fight. And to a certain extent the memory of the court fight, which where we view it as this pivotal moment where FDR challenged the court and then ultimately prevailed, the memory of that sticks for real reasons. While the changes that happened after 1937 had been in motion for a long time doctrinally on the Court and outside the Court, the Court fight has come to symbolize a major shift in an understanding of the Constitution. And I think the conservative justices of the Court were anchored and recognized that reality.

[00:15:58] Ken Kersch: Jeff, in his comments a moment ago, referred to this period as a rolling constitutional convention. And if that is in fact true, there were arguments that, at least by the prevailing conventional understandings of the limits of government power, particularly national government power, but also state government power, there was a major change afoot. Again,

they didn't all happen with the New Deal. But the New Deal and this fight has come to stand in as the moment we focus on to discuss these broader issues. So let me address your question by just listing a few objections that they would have that I think were very serious objections to this change.

[00:16:54] Ken Kersch: Now I wanna preface this with a footnote and say that look, ultimately, I think some of these changes had been in motion for a long time, and they were gonna happen anyway. And in fact, had this gone on through a different process, it might have happened somewhat differently, but there was going to be much more of a role for government in the modern era, and the Court was at least gonna negotiate that change, maybe not in the same way they did, but it was gonna happen anyway. But let's take the real objections, okay?

[00:17:31] Ken Kersch: First of all, in his first inaugural address, which is famous for, "We have nothing to fear but fear itself," Franklin Roosevelt himself made one of the boldest statements of executive power in American history, essentially arguing that the economic situation was akin to war, and in a sense that under these conditions there would have to be unprecedented assertion of executive authority. Now in the context of the rise of dictators in Italy with Mussolini and Hitler, that it is plausible that many people wondered at least about whether Franklin Roosevelt had aspirations—maybe a more benign version—but had aspirations to executive leadership that entailed dictatorship, and there were many cartoons about this.

[00:18:29] Ken Kersch: But you have to remember the context of the 1930s, and I would even add to this that it's quite plausible that the liberal view, and even Franklin Roosevelt's view about untrammelled executive authority, was moderated by the experience of World War II, in which he has a different speech, his For Freedom speech, which places much less emphasis on statism and much more an emphasis on, yes, empowered government, but also civil rights and civil liberties, right? So executive power.

[00:19:05] Ken Kersch: The other thing, and this is one of my favorites because I teach in class. FDR's address on the court-packing scheme, he refers to the national government as a three-horse team, and said one of the horses is not pulling in the direction of the other two horses, and any proper constitutional government, the three horses would pull in the same direction. My students start the semester by reading James Madison, about the separation of powers, and ambition must counteract ambition, and checks and balances. Well, the three-horse team metaphor is radically different from what they read at the beginning of the semester about the Constitution. Two more points. The initial delegation of power to private businesses to write the codes was described even by the liberal Justice Cardozo as delegation running riot. And even the liberal justices on the Court fired a shot across the bow, that this was perhaps way beyond the pale of what they would accept, and I think the conservatives were right about that.

[00:20:16] Ken Kersch: And then one final thing from teaching this, FDR had certain advisors who were very radical, including Rexford Tugwell. And my students are always shocked when they read, for example, Tugwell's paper in the American Economic Review praising the Soviet Union as the future and as a model for America. Now obviously, there were plenty of people in the Roosevelt administration that did not hew to that, but it was in the mix. So I think the

conservatives at least were reacting to something that was real and seemed to them perhaps undisciplined, out of control, and dangerous. There was something that needed to be faced, something that needed further thought, and something that needed to be addressed.

[00:21:04] Jeffrey Rosen: Thank you so much for that, Ken Kersch, and for that extremely clear and concise summary of the conservative case against the New Deal constitutional revolution. You argue that in areas ranging from executive power to the limits of congressional power, and the separation of powers, to the non-delegation doctrine, to the scope of the regulatory state, conservatives argued that the Supreme Court was wrong in 1937 to abandon the founders' Constitution and to embrace a new and far more robust notion of national power.

[00:21:35] Jeffrey Rosen: Now let's take a round to debate this crucial question, which has such important consequences today. Jeff Shesol, what does history teach us, in your view, about whether or not the Court was right to shift course? Progressives argue that it was absolutely right, and that whether prompted by the court-packing threat or not, the new and more expansive notion of federal power was responsive to the shifting needs of a modern economy and modern society. And conservatives disagree, for the reasons that Ken Kersch well argued. What is your view and what can history teach us?

[00:22:13] Jeff Shesol: Well, I think it's a great question, Jeff, and an important one in our own time as well as in the 1930s. And I think that it's important to note that there are at least two primary traditions in considering the Constitution and interpreting the Constitution, and I think Ken is absolutely right, that conservatives no less than Roosevelt believed that the the future of democracy, the survival of democracy was at stake. I talked a bit earlier about why Roosevelt took that view, and conservatives certainly believed, not just on the Court but elsewhere in the country, believed that if Roosevelt was able to achieve his purposes, that we would in fact be a European style dictatorship with that degree of concentration of power at the top.

[00:23:00] Jeff Shesol: At the same time, I think that it's important to unpack a little bit, the traditions that they asserted as they were reflected in Supreme Court decisions. There is certainly a tradition in this country going back to the founding of limited government, and that had been the prevailing tradition through the 19th century and into the 20th. And yet the way it was being reflected in Supreme Court decisions of that sort of extended period in the late 19th century to the early 20th century was through doctrines like Liberty of Contract that rested on a false understanding of how actual power is exerted in the economy broadly, but also within any given workplace. And it became clearer over the course of this run of not just New Deal cases, New Deal proper, but also when the Court was considering these state reforms and state minimum wages, some of which had been on the books since the beginning of the 20th century.

[00:23:58] Jeff Shesol: The Court appeared to many to be resorting to any doctrinal means necessary to knock down reforms that it disagreed with, that it was not simply this notion of Liberty of Contract. It was not simply a kind of benighted and formalistic and increasingly anachronistic understanding of what constituted interstate commerce, which earned the Court's conservatives a rebuke from Chief Justice Hughes in one of the pivotal cases of 1937 when he said the Court essentially needs to confront, in his words, the plainest facts of our national life.

But also, the Court was resurrecting doctrines that had never been applied in this regard. The Privileges and Immunities Clause, for example, of the 14th Amendment, in a state-based case, the *Colgate* case which considered tax law in Vermont.

[00:24:47] Jeff Shesol: But the critical thing here is that the Court 44 times had considered applying the privileges and immunities clause in this context and had rejected it every time until it was in this crucible of battling with Roosevelt about the survival of democracy. And so, there are traditions valid traditions, but there was also a lot of essentially innovation, if you wanna call it that, that was being done in the name of that set of traditions. And I'll just briefly acknowledge that there was another tradition that Roosevelt hewed to. I don't think it's quite right to say that Roosevelt was utterly unconcerned with law. He certainly understood the Constitution to be a more flexible instrument than conservatives did. But he was fond of citing a quote from Chief Justice Edward Douglas White from an earlier period who described the Constitution not as a barrier to progress, but as he put it, "The broad highway through which alone true progress may be enjoyed."

[00:25:47] Jeff Shesol: Roosevelt's later attorney general and future appointment to the Supreme Court, Robert Jackson, later wrote that the Constitution contemplated a really effective government, and that doesn't mean that all bets are off and that the government can simply do as it pleased. But I think, again, Roosevelt appealed to a different mode of interpreting the Constitution, which allowed a much broader range for both state and federal officials to make democracy work.

[00:26:12] Jeffrey Rosen: Thank you so much for that. Absolutely fascinating to note, as you do, about the rejection of doctrines like the Privileges or Immunities Clause 44 times until the Court resurrected it and to paint the debate, as you so well do, as a debate about competing notions of how the Constitution should be interpreted. Should it be interpreted in terms of textualism, or its original understanding, or as a flexible document that was not a barrier to progress and that contemplated a different course. Laura Kalman, you've written definitively about all of these issues, both in your books about the legacy of legal liberalism, about the Court in the 1960s, and about the New Deal court as well. In your view, what light does history cast on this crucial debate about whether or not the Court was correct to shift courses in 1937?

[00:27:02] Laura Kalman: Well, first, I'm really glad that Jeff brought up *Colgate v. Harvey*, because we have to think about how the situation looked to FDR and Cummings. They thought no national legislation could be enacted because of the Court's interpretation of the Commerce Clause. And with *Colgate v. Harvey*, they thought that no state legislation could be enacted for reform and recovery purposes either. The conservative critique that Ken so elegantly summarized, as far as that goes, I would say the point that Ken mentioned about FDR's inaugural address, where he said, "We will take the war power if necessary." that was the part of the address as Eleanor Roosevelt noted, that received the loudest clapping. The country was absolutely desperate for change.

[00:28:22] Laura Kalman: To be sure, FDR's three-horse metaphor was not very useful, and it led people to believe that he wanted to appoint rubber stamps. But the people that FDR

appointed to the Court—and he got eight appointments ultimately which helped to change the Court's direction—were anything but rubber stamps, and they fought like cats and dogs. As far as the New Dealers who appeared before the Court in the 1930s were concerned, the Court was treating them like ignorant schoolboys, and this was very bad. And it helped to give rise, in FDR's view, to the belief that it wasn't the Constitution that was the problem, as Jeff so well emphasizes in his book. But it was the “benighted interpreters” of the Constitution, those five old men, who by razor-thin margins, were striking down all —Well, not all. I'm getting carried away—much national and state legislation that the Court needed to change.

[00:29:52] Laura Kalman: I think he made a good call. I think the Court did need to change. The Court had always shown some interest in civil liberties and civil rights, but I think it was useful that it shifted more towards that. There was a problem here, however. With the court-packing fight, FDR shattered the bipartisan coalition in Congress that had supported him, and made conservative domination of Congress possible, which mean for the next 25 years, reform could only come from the Supreme Court, in effect. Think of *Brown v. Board of Education* and that fueled complaints that the Court was acting democratically.

[00:30:47] Jeffrey Rosen: Thank you so much for that powerful intervention. “I think he made a good call,” you argue, and you talk about the ways that the shift in the Court was historic. Ken Kersch, we now come squarely to the question of why conservatives believe that FDR did not make a good call. I'm gonna just put a thesis on the table and see if you agree or not, that really there have been four eras in constitutional interpretation in American history. First, the founding. Second, reconstruction. Third, the New Deal era. And that New Deal period which lasted from 1937 until about last year, is now being succeeded by a fourth era, a textualist era, where the new Supreme Court is repudiating FDR's constitutional vision as being inconsistent with text and original understanding. Is that thesis right, and make the case as you do so well in your book about the history of legal conservatism, about why conservatives thought that it was so important to overturn the New Deal.

[00:31:49] Ken Kersch: Well, Jeff, I think obviously the current Supreme Court, and the conservative movement generally since the 1930s, has targeted New Deal constitutionalism as its political enemy. And I think that many people are actually quite surprised by this because for much of the 20th century, that was actually not the position of the Republican Party. It was the position of the conservative movement, which tried to take over and nominated Barry Goldwater in 1964, but ultimately was crushed in another landslide election. It wasn't until Ronald Reagan that the conservative movement took control of the Republican Party, and their agenda had always been—at least a major part of the conservative movement—had always targeted Franklin Roosevelt and New Deal constitutionalism.

[00:33:01] Ken Kersch: Look, I would say there's a huge question mark here, because of some of the things that both Jeff and Laura rightly mention, which is that the world has changed. And the question is, as it often is for conservatives, how much are they willing to dismantle? Because the world without New Deal constitutionalism, and the federal government without New Deal constitutionalism, would look completely different. There would be no federal agencies. There would be no FDA. There would be maybe even no Federal Aviation Administration. There

would be no Securities and Exchange Commission. The government would look radically different, and the question becomes, however conceptually they may be committed to this, how far are they willing to go?

[00:34:00] Ken Kersch: And so, actually, I would say that there is a division within even amongst the justices. I mean, obviously Clarence Thomas seems quite committed to this. Neil Gorsuch, somewhat committed to it. But it's not clear even with this conservative Court that they would be willing to actually push that nuclear button. And then the answer to your question would be, we would have a major adjustment to the doctrine that pushed back against the New Deal, but doesn't ultimately overturn it. And I wanna make a point here, which is a conceptual point that I think both Laura and Jeff raised, which is when they were talking about, or Jeff was talking, about the conservative justices who decided Liberty of Contract, something like that, as making up new doctrine. I would also add that they relied on this what's often called a formalistic distinction between local manufacture and production versus commerce, and treated much of labor regulations as a local matter constitutionally, therefore barring the national government from regulating employer/employee relationships.

[00:35:15] Ken Kersch: The conceptual point I would make here is that although we don't often say this, the courts are constantly making up new doctrines, which are very technical and obscure, and shift things in a slight 50 degree direction in another way, rather than usually overturning something. And liberals invented bifurcated review and tiers of scrutiny, where they applied different levels of skepticism towards economic regulation versus individual rights regulation. And the conservatives are now being very aggressive about inventing new doctrines like the Major Questions Doctrine concerning the delegation of power. Again, I think that's a good example because they are not reviving completely other than Clarence Thomas, the non-delegation doctrine, that the legislature can't delegate power to an executive agency.

[00:36:17] Ken Kersch: But they're snipping and trimming back the scope of the delegation doctrine, and I think it's quite likely that ultimately that will be what happens, and it's against the spirit and thrust of New Deal constitutionalism. But I personally think it would be probably much too radical, even for Amy Coney Barrett or Brett Kavanaugh, certainly John Roberts, to completely overturn the New Deal, which is an action that would be dear to the heart of libertarians and the Cato Institute. But I'm not quite sure the Supreme Court would do that. The potential blowback would make Dobbs look like a footnote. I hope I've discussed it enough, but I still consider it an open question, and the thrust of the question raises a key point, but even I can't believe that they would be so radical in great enough numbers to do that.

[00:37:25] Jeffrey Rosen: Absolutely fascinating. Ken, thank you so much for that very thoughtful response and as you say, although there may be some support on the Court for a radical challenge to the core of New Deal constitutionalism, the majority of justices, even the conservatives ones, may favor a more incremental approach that could push the law in a less regulatory direction without completely striking down the post-New Deal regulatory state. Alright, I think we probably have time for one last major intervention from everyone. And Jeff Shesol, you recently wrote a really provocative piece for the New York Times saying that the Supreme Court is broken. Where is Biden? And you talk about the fact that President Biden has

not engaged in court-packing rhetoric during the 2020 campaign. His ambitious agenda invited comparisons to that of FDR, and he leant into the analogy, but now he's not been attacking the Court. You argue that he should, particularly noting a case like Bruen, the rifle case. Tell our audience, what do you think that President Biden might do, what lesson he might learn from the court-packing plan, and what lessons you think the court-packing plan can tell us about how Democrats might respond to the Court today?

[00:38:42] Jeff Shesol: Thanks, Jeff. I'll take that sort of in two parts. First, to consider what Biden, in my view anyway, ought to be saying about the Court and about the Constitution. Something, would be my short answer. He says virtually nothing about the direction that the Court is taking, or the means by which is getting there, which are two hugely significant questions in our national life. And what Biden has done, and no doubt will continue to do, is to speak out about and against decisions of the Court that he finds to be deplorable, whether it is a decision like Dobbs or a decision like Bruen, the individual gun rights case of this past term. And he will decry a decision and then move on. But what he is not doing, and what I think it's very important for him to do if he cares about these things—which of course he does, not simply because he's President, but because he is someone who has taken, I think, a longer view of these sorts of matters. His service over many years at the helm of the Senate Judiciary Committee suggest that he is someone who certainly has the vocabulary and the historical understanding to speak to these ideas.

[00:39:55] Jeff Shesol: What I think he needs to do, and is his responsibility to do, is to do what Roosevelt did. And by that, I don't mean pack the Court. We'll come to that in a minute. But I mean that he should, as Felix Frankfurter advised Roosevelt to do in the middle of the court-packing crisis, take the country to school. To educate the country, to make clear to the country that originalism, textualism—whatever name or doctrine we apply to it—is only one way of considering the Constitution. It is only one tool in the toolbox, but that there is another view. It's what I was talking about before, and what others have spoken to before, which is the notion that the Constitution was not meant to freeze the nation in the 18th century, but was created to give subsequent generations a foundation but also the flexibility to govern themselves effectively amid changing circumstances. And that is a set of principles that we know Joe Biden adheres to but never speaks about. And so that is the kind of criticism that I think connects the dots of these various decisions. They are not discreet events. They are reflective of a constitutional worldview and an ideological worldview, and we have not heard enough about that from Joe Biden.

[00:41:14] Jeff Shesol: So when I say that Biden should be speaking out about the Court, I don't mean that he should be trashing the Court. I don't mean that he should be attacking its integrity, that he should be calling it corrupt, doing a lot of things that we hear activists doing on the margin of the debate. I think there is a responsible and thoughtful way, but forceful way, for him to do it. Roosevelt was fond of saying, and one of his favorite lines was that the Constitution is not a lawyer's contract, it's a layman's document. And by that, he meant that it ought to be able to be explained to everyone, and it shouldn't just be a matter for people who have a law degree or are wearing judicial robes. And so, I think that responsibility adheres to his successors in the presidency.

[00:42:01] Jeff Shesol: As to whether Biden should do the next thing, which is to threaten or propose court-packing, it's a large question, and I'll just give you my very quick view on this. And that is that I think that as much as circumstances have changed, that there are certain fundamental principles that the objectors put forth in 1937 that still apply here. I think that it would set off a cycle of retribution, and I think that it is absolutely the case that if Biden or some other future Democratic president were to succeed in increasing the number of justices, that agenda item number one for the next Republican president would be to undo that and one up that. And I think that it would set that sort of cycle in motion. Once that norm has been broken, the norm being the one set in 1869 that we have nine justices—which is not in the Constitution, but has certainly been the case for a very long time.

[00:42:54] Jeff Shesol: The other thing and last thing that I would say about court-packing in this particular moment is that I think—Laura, you make a very powerful point throughout your book about the power even of the threat, and that that threat was more profound than I think that most have understood it to be. And I think that's exactly right, and you bring a lot of evidence to bear in establishing that. But I think that the political valence of a threat like that in this moment is not in any way equivalent to what it was in 1937. Roosevelt, as I said, 76 out of 96 senators were Democrats, and Roosevelt had gotten essentially everything that he had asked Congress to do in his first term, and had an even bigger majority to work with in his second.

[00:43:38] Jeff Shesol: Joe Biden is heading into a year where he will have 51 Democrats, which is a step up from 50 to be sure. But he doesn't even have a majority of support among the Democrats for the idea of packing the Court. And so, if it happens to be the case that a court-packing threat could conceivably have an effect on a Justice Thomas, on a Justice Alito, on a Justice Gorsuch—and I do doubt that—it would have to be the case that the threat is real, and that it could actually get through this Congress. And I think that they're all close enough observers of political dynamics to understand that it's going nowhere in this moment. And so, I don't think it functions as anything other than a symbolic protest, and that's one of the reasons that I think advocates of Court reform, and I'm one of them, need to focus their energy on something that actually has broader public support such as term limits for Supreme Court justices.

[00:44:36] Jeffrey Rosen: Thank you very much indeed for that, Jeff Shesol. Laura Kalman, I'm asking you the same question, which is what the legacy of the court-packing plan can teach us about the debate about the Court today, and on what grounds its critics can effectively attack it. Jeff Shesol notes the crucial role of politics both today and in the past, and the big difference between now and 1937. As he said, there were a majority of Democrats supported court-packing, and today a narrow majority may not. Based on your deep scholarship and study of this question, what light can the legacy of New Deal constitutionalism cast on our current debates over the Supreme Court?

[00:45:16] Laura Kalman: Well, historians are very reluctant to draw lessons from the past. That said, I mean, there are some obvious lessons from the Court fight. You could make sure the Court is not signaling a change in directions, as it seemed to be doing, some believe, after the election, and before FDR proposed court-packing. You could consult more widely. You could

take key congressional leaders into your confidence. You could try to prevent the opposition from framing the debate and line up your interest groups better than FDR did, and you could signal your willingness to negotiate sooner than FDR did. Now as I said, and as Jeff as just said, the political environment is so different. But we do now that Chief Justice Roberts has alluded to the influence of Chief Justice Hughes and the skillful way he guided the Court through the morass of the 1930s. And I'm inclined to believe that anything we can do to reinforce that, including as Henry Stimson would have said, wear court-packing rather ostentatiously on our hip, just as Harry Truman wore the bomb, would be useful.

[00:46:57] Laura Kalman: I also think it depends on how we frame the debate. A lot of what bothered the public about the Court in 1937 was that the Court was striking down all this legislation by razor thin margins, five to four. Now if you just added one new justice to the Supreme Court, guess what? I'm not talking about six. You would effectively create the need for a six to four division. And that would reassure the public, I think, that a greater majority of the justices approve of the legislation or disapprove of the legislation that they were striking down. So I'm a court-packing supporter, although I don't think it'll go anywhere.

[00:48:06] Jeffrey Rosen: Thank you for that, Laura Kalman. So many interesting observations ranging from the comparison of Chief Justice Roberts and Chief Justice Hughes, which several of our friends in the chat have asked you to do, to the idea that it's significant by what margins the Court is striking down laws in terms of the effectiveness of a critique. Ken Kersch, last word in this great discussion is to you. I'll let you sign us off in whatever way you think best. But I will ask you, as you noted, there are different conservative critiques of the New Deal, ranging from the radical claim that it's inconsistent with text and original understanding, therefore, the whole thing has to fall, to a more pragmatic idea that some adjustment of doctrine may be appropriate without throwing the baby out with the bath water. As a historian in your own study of the conservative movement, what do you think is the most convincing critique of the New Deal court, and how would you urge the Supreme Court to proceed?

[00:49:05] Ken Kersch: At the most basic level, and maybe even Jeff Shesol would agree with me about this. At the most basic level, the conservative critique of the New Deal court created initially by Franklin Roosevelt, and of New Deal liberals generally, and of liberals generally, is that they don't care about the Constitution. That essentially their main interest is in policy—and this is my reference to Jeff Shesol's comments—they don't like actually talking about the Constitution. And I think Biden despite being quite knowledgeable about it, and chair of the Senate Judiciary Committee in the Senate, someone very focused on the Constitution, his constituency, his party does not really want to frame the current debates in constitutional terms. They rarely talk about it, and I think in an odd way this is the legacy of 1937, or Franklin Roosevelt. That precisely because of what Laura and Jeff just said about the context of the fight during FDR, we can understand why he was for many, many reasons, so impatient.

[00:50:34] Ken Kersch: But part of the impatience was that the liberals and his party dominated the entire rest of the federal government, and by 1936 pretty much all the state governments as well. So the Constitution to them was standing—and the Supreme Court's understanding of it by one vote margin toward the end—was basically a finger in the dike that was preventing

everything from taking its natural political course. And to a certain extent, once that dam was broken, and FDR eventually pointed the entire Supreme Court, along with his successor Truman—that essentially the liberals were stuck with this idea of first of all they were completely dominant for a very long period of time. They had complete control of the Supreme Court, and essentially this history where the Constitution was viewed as a barrier to things we want to do.

[00:51:44] Ken Kersch: And once they were unshackled from that, they honestly did not have much to say about the Constitution. Now look, there are some exceptions, but I'm not talking about particular individual rights or particular other clauses. Obviously, if you're involved in government, you have to deal with that, but they didn't have a big, overarching narrative, and a willingness to discuss things in constitutional terms. And they tried to avoid it, and Biden still tries to avoid it. And the liberal Democratic Party has never actually been comfortable on that ground, and given that, as the Constitution Center, Jeff amply demonstrates every day this is a country that has long revered its Constitution as a cultural matter, as a matter of nationalism. And to a certain extent, if they don't do what Jeff Shesol says, if they can't talk about politics in significant part in a constitutional idiom, they are going to continue to be at a disadvantage politically in setting the agenda and the direction of the country.

[00:52:49] Jeffrey Rosen: Thank you so much, Ken Kersch, Jeff Shesol, and Laura Kalman for a superb discussion of the constitutional legacy of Franklin Roosevelt. Regardless of how politicians talk about the Constitution, you can rest assured that the National Constitution Center will continue to convene spectacular discussions like this to illuminate the constitutional dimensions of our political debates and to view them through a historical lens. It's just so clarifying to learn from the three of you, three great historians, about what history can teach us about our current debates and on behalf of all of our friends who have been watching, I'm so grateful to all three of you.

[00:53:29] Jeffrey Rosen: Today's show was produced by Tanaya Tauber, John Guerra, Lana Ulrich, and Melody Rowell. It was engineered by the NCC's crack AV team. Research was provided by Sophia Gardell and Lana Ulrich. Please rate, review, and subscribe to We the People on Apple Podcasts and recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional education and debate. And always remember, as the holidays approach, the National Constitution Center is a private nonprofit. We rely on the generosity, passion, and engagement of people from across the country who are inspired to learn, and grow, and read, and open their minds to arguments on all sides of the important issues at the center of American life. Support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including this podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.