

FDR and the Transformation of the Supreme Court

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates, hosted by the Center in person and online. I'm Tanaya Tauber, Senior Director of Town Hall Programs. This month we hosted a conversation about FDR and the transformation of the Supreme Court. Our guests were Laura Kalman, author of *FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism*, Ken Kersch, author of *The Supreme Court and American Political Development*, and Jeff Shesol, author of *Supreme Power: Franklin Roosevelt vs. the Supreme Court*. They discuss Franklin D. Roosevelt's constitutional legacy, the court packing fight, and how the Supreme Court appointees transformed America. Jeffrey Rosen, president and CEO of the National Constitution Center, moderated. This conversation was streamed live on December 13th, 2022. Enjoy the show.

[00:01:03] Jeffrey Rosen: Hello friends, welcome to the National Constitution Center and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the President and CEO of this wonderful institution. Before we begin, let's inspire ourselves as always for the learning and light ahead by reciting together the National Constitution Center's mission statement. Here we go.

[00:01:22] Jeffrey Rosen: The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the Constitution among the American people on a non-partisan basis. Welcome to the National Constitution Center. Laura Kalman, Ken Kersch and Jeff Shesol. Jeff, let's start with you if I may? Your book, *Supreme Power: Franklin Roosevelt vs. the New Deal* is... I- I read with the greatest pleasure and recommend it 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.

[00:02:05] Jeff Shesol: Well, thanks so much Jeff and I just before I... before I begin, I just want to 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.

[00:02:27] Jeff Shesol: 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. The court had been a powerfully conservative force in American life for decades by that point, not without some, you know, variations on that theme over the decades. But fundamentally there was an understanding that there was going to be a conflict.

[00:02:54] Jeff Shesol: 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 out of the Great Depression. And those cases in any event we're going to 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- in American life and that the court would think twice about overturning them.

[00:03:35] 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.

[00:04:05] Jeff Shesol: 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. 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 of what could be done about the Supreme Court?

[00:04:39] Jeff Shesol: 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 all of these many, or many of these many possibilities that Roosevelt faced. 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.

[00:05:20] Jeff Shesol: 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 re-elected 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 number of justices, which is a perfectly constitutional approach.

[00:06:03] 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 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. And 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 six-month fight known as the court fight over the fate of the court-packing plan and not incidentally the fate of the... of the New Deal.

[00:06:48] 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 supporters and fed the worst suspicions of his enemies.

[00:07:34] 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 you know through this fight even when Roosevelt is dealt setbacks it's... 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.

[00:08:32] Jeffrey Rosen: Thank you very much indeed for setting the stage so well. Laura Kalman as Jeff Shesol notes, in your new book *FDR'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 re-election victory, and further on almost every day he battled with Congress in the court. He could reasonably anticipate achieving some success in the form of additional justices and for the principle 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 faded for failure in 1937. Tell us more about the important argument of your new book.

[00:09:24] Laura Kalman: Thank you, and I echo Jeff in my thanks to 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 re-election 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 by... ever since Joseph Alsop and Turner Catledge calcified it in their wonderful read *The 168 Days*.

[00:10:47] 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, is that far from airing 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.

[00:11:58] Laura Kalman: 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. And now why did FDR take so long? I mean if he could have had two justices at least why didn't he compromise sooner? I think he was... from his perspective playing hardball made sense. The justices couldn't be sure that he wouldn't get what he wanted. And I think in... partially in response to his overwhelming victory in '36 and his threat of the court fight, he came... that 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.

[00:13:31] Laura Kalman: So, given that success to conclude, I don't think, given that succession the court's change in 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.

[00:14:18] 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 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 courts for 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?

[00:15:12] 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. That this was the... 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. That 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.

[00:16:34] Ken Kersch: And I think the conservative justices of the court were anchored and recognized that reality. 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.

[00:17:28] Ken Kersch: 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. Now, I wanna preface this with a footnote and say that look, ultimately I think some of these changes have been in motion for a long time and they were gonna happen anyway. And, in fact, you know, 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.

[00:18:14] Ken Kersch: But let's take the real objections, okay? 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 situation, the economic situation was akin to war. And in a sense that under these conditions there would have to be an 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.

[00:19:11] Ken Kersch: And there were many cartoons about this, 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, right? The other thing, this is one of my favorites, because I teach it in class, FDR's address on the court-packing scheme, he refers to the national government as a three-horse team, right?

[00:20:04] Ken Kersch: 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 the 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, I do think some of the initial delegation of power to private businesses to write the codes was described even by the liberal Justice Cardozo as delegation running riot.

[00:20:49] Ken Kersch: 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. 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 hue 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.

[00:21:42] Ken Kersch: There was something that need to be faced, something that needed further thought and something that needed to be addressed.

[00:21:50] 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. Now let's take a round to the 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 in modern society, and conservatives disagree for the reasons that Ken Kersch well argued. What is your view and what can history teach us?

[00:22:58] 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, you know, Ken is absolutely right that conservatives no less than Roosevelt believed that 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 believe, 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.

[00:23:46] 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.

[00:24:28] Jeff Shesol: 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 state minimum wages, some of which had been on the book since the beginning of the 20th century. That 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 that the court essentially needs to confront, in his words, the plainest facts of our national life.

[00:25:17] Jeff Shesol: 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, but the critical thing here is that the court 44 times had considered applying the privileges in immunities clause in this context and rejected it every time until it was in this crucible of battling with Roosevelt about the survival of democracy. And so what was... there are traditions valid traditions, but there was also a lot of essentially innovation, if you want to call it that, that was being done in the name of that set of traditions. And I'll just briefly acknowledge that there was... there was another tradition that Roosevelt hewed to.

[00:26:06] Jeff Shesol: 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 the conservatives did. But he was fond of citing a quote from Chief Justice Edward Douglass 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. 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 cover-... government can simply do as it pleased.

[00:26:47] Jeff Shesol: 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.

[00:26:58] 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?

[00:27:48] 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, is the conservative critique that can show 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 seize, 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 court was... I mean the country was absolutely desperate for change.

[00:29:08] 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 school boys. And this was very bad, and it helped to give rise in FDR's view to the beliefs 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.

[00:30:17] Laura Kalman: 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. I think he made a good call. I think the court did need to change. It needed to shift away. 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. Now 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 meant for the next 25 years, reform could only come from the Supreme Court, in effect.

[00:31:25] Laura Kalman: Think of *Brown v. Board of Education*, and that fueled complaints that the court was acting democratically.

[00:31:33] 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- 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.

[00:32:35] 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.

[00:33:27] Ken Kersch: 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. 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 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 government without... 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 no maybe even no Federal Aviation Administration [laughs].

[00:34:30] Ken Kersch: There would be no Securities and Exchange Commission to take an agency that it created. 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? And so actually I would say that there's 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 pushes back against the New Deal, but not... doesn't ultimately overturn it.

[00:35:21] Ken Kersch: 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 the formalistic distinction between local manufacture and production versus commerce, and treated much of labor regulations as a local matter constitutionally and therefore barring the national government from regulating employer-employee relationships. 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, you know, a slight, you know 50 degree direction in another way, rather than usually overturning something.

[00:36:24] Ken Kersch: And look, liberals invented bifurcated review and tears of scrutiny where they apply 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 the executive agency, 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.

[00:37:17] Ken Kersch: 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 dear... you know, 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 blowback, the potential blowback would make Dobbs look like a footnote, you know? I hope I've discussed it enough, but it's... 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.

[00:38:10] 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 conservative 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. all right, 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's Biden?

[00:38:54] Jeffrey Rosen: 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 lent 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 Biden... President Biden might do, what lessons 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?

[00:39:28] 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. That would be my [laughs]... would be my short answer. He says virtually nothing about the direction that the court is taking, or the means by which it 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 and the individual gun rights case of this past term.

[00:40:12] Jeff Shesol: 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 suggests that he is someone who certainly has the vocabulary and historical understanding to speak to these ideas. What I think he needs to do and it is 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.

[00:41:01] Jeff Shesol: 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.

[00:41:43] Jeff Shesol: And so that is the kind of criticism that I think connects the dots of these various decisions. They are not discrete events, they are part... they are reflective of a constitutional worldview and an ideological worldview, and we have not heard enough about that from Joe Biden. 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, you know, 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 on one of his favorite lines was that the Constitution is not a lawyer's contract, it's a layman's document.

[00:42:29] Jeff Shesol: 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 you know, people who have a law degree or are wearing judicial robes. And so I think that responsibility adheres to his successors in- in the presidency. 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, 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.

[00:43:08] Jeff Shesol: 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 it's certainly been the case for a very long time. The other thing and the last thing that I would say about court-packing in this particular moment is that I think that, you know, 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.

[00:43:57] Jeff Shesol: 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. Joe Biden is heading into a year where he will have 51 Democrats, which is a [laughs], you know, 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.

[00:44:37] Jeff Shesol: 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.

[00:45:21] 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, which is that then, as you 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?

[00:46:01] 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, like you could make sure the court is not signaling a change in directions as it seemed to be doing, some believed, 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.

[00:46:53] Laura Kalman: Now, as I said and as Jeff has just said, the political environment is so different, but we do know 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 Simpson would have said, wear court-packing rather ostentatiously on our hip, just as Harry Truman wore the bomb, would be useful. I also think... I mean really it depends on how we frame the debate. You know, 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.

[00:48:05] Laura Kalman: Now if you just added one new Justice to the Supreme Court, just one, I'm not talking about six, you would effectively create the need for a 10 to six division. Excuse me, 10... six to four and that would reassure the public, I think, that a greater majority of the justices approved of the legislation, or disapproved of the legislation that they were striking down. So, I'm a court-packing supporter, although I don't think it'll go anywhere.

[00:48:51] 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 words 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 a 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?

[00:49:50] Ken Kersch: At the most basic level and maybe even Jeff Shesol [laughs] would agree with me about this, at the most basic level the conservative critique of the New Deal court created by... 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 actually like talking about the Constitution.

[00:50:29] Ken Kersch: 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 the Franklin

Roosevelt, that precisely because of what Laura and Jeff had just said about the context of the fight during FDR, I mean we can understand why he was so for many, many, many reasons so impatient.

[00:51:19] 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, you know, 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.

[00:52:28] Ken Kersch: And once they were unshackled from that, they honestly did not have much to say about the constitution or now, look, there are some exceptions, but I'm not talking about particular individual rights or particular 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 try 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 you head, 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.

[00:53:35] 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 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.

[00:54:07] Jeffrey Rosen: And on behalf of all of our friends who've been watching, I'm so grateful to all three of you. Thanks also to you, friends, it's so inspiring that you've taken an hour out in the middle of your day to learn and

grow and dig deep into these crucial constitutional debates and to listen to different perspectives, and it's been such a joy and a privilege to learn with you in 2022. Here's to lots of light and learning together in the new year, and until then, please join me again in thanking our great panelists, and have a wonderful holiday all.

[00:54:38] Tanaya Tauber: Today's show was produced by John Guerra, Lana Ulrich, Melody Rowell and me. It was engineered by the Kevin Kilbourne of the NCC's wonderful EV team. Research was provided by Sophia Gardell and Lana Ulrich. For a list of resources mentioned throughout this episode, visit constitutioncenter.org/debate. While you're there, check out our upcoming shows and register to join us virtually. You can join us via Zoom, watch our live YouTube stream, or watch the videos later in our media library at constitutioncenter.org/media-library. If you like the show, please help us out by rating and reviewing us on Apple Podcasts, or by following us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.