SPECIAL PRESENTATION

“SUPREME POWER”
FRANKLIN ROOSEVELT VS. THE SUPREME COURT

MODERATED BY:

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MR. JOHN HALPIN: Good afternoon everyone. My name is John Halpin. I’m a senior fellow and the co-director of the Progressive Studies program here at the Center for American Progress. I want to welcome you today to what I know will be a really fascinating discussion about a fantastic new book called Supreme Power: Franklin Roosevelt Vs. the Supreme Court.

Let me first introduce our guest and then we’ll jump into some moderated discussion and then we’ll open it up to the audience.

The author of this fantastic book is Jeff Shesol. He previously wrote – he seems to be a specialist on political feuds. He wrote a book called Mutual Contempt: Lyndon Johnson, Robert Kennedy and the Feud That Defined a Decade. He caught the eye of President Clinton. He was asked to join the speechwriting staff and as a member of the senior staff for the White House. He then went on to start his own political strategy and speechwriting firm called West Wing Writers. Those of you may also remember a political cartoon called “Thatch” that Jeff started. It was excellent but it was syndicated in the 1990s.

Also joining us today to discuss the book and provide her legal expertise is Dahlia Lithwick, who’s a senior correspondent at Slate. She writes the Supreme Court dispatches and jurisprudence columns. She also has a biweekly column at Newsweek and writes frequently on court issues and on legal issues for the New York Times, Harpers, Commentary, other big-name magazines. So first I want to welcome both of you today and thanks for joining us and welcome everyone here.

Jeff, this book – you know, it’s a wonderful narrative history about a somewhat obscure topic, but it has a very important historical scope so there’s basically three acts here.

One is a decades-long battle, ideological battle between competing world views about government, the economy and the Constitution.

The second is how this ideological battle plays out politically in relation to the court in the 1930s.

And then there’s a third act that’s a little more implied, which is what’s the long-term legacy of this battle, both ideologically and politically for the New Deal and for – Dahlia will talk about in a minute as well – for debates about the court and jurisprudence throughout the 20th century.
So why don’t you set the stage a little bit with why you wrote this book and what the broad approach and the message you saw in this battle? Let us know a little bit about your thinking about the court-packing scheme in general.

MR. JEFF SHESOL: Well, I came to write this book as a political historian. I am not a constitutional scholar, although I have been out there impersonating one for the last few weeks on my book tour. I’m very happily impersonating someone who really knows something about the law. And I think with Dahlia next to me, that ride has come to an end today. So I’ll try to stick largely to the politics.

Franklin Roosevelt drew me into this subject. The standard narrative of the court packing fight, to the extent that there is one and it’s mostly neglected – it’s mentioned, but never really fully explained in most biographies of Roosevelt.

We have this wonderful bold visionary Franklin Roosevelt that we all know and many of us love and then suddenly, at the beginning of his second term, he decides to do something seemingly crazy and self-destructive: he proposes to pack the Supreme Court, to expand it by six justices and fill those seats immediately with liberals. And then he fails in this and then he goes back to being the Roosevelt that we all know and many of us love.

And even allowing for the fact that this a strange aberration in the presidency of Franklin Roosevelt, it didn’t seem to me that you could just explain in a way by isolating it. And so what drew into this was an effort – purely for my own sake at first – to try to understand how this brilliant politician who is described at the time by one magazine as the most brilliant politician ever to be fit with any human skin, how he makes this crazy political miscalculation, really the biggest political mistake of his life. And so that’s what drew me into it.

And as I got into it, I came to see that really this plays out on a background like the one that you just described. And I know we’ll get into a lot of these issues as we go forward so I won’t take any more time with this right now but just following your metaphor, this really is a book in two acts.

And the first act is this clash between Roosevelt and the (quarter?) really between liberals and conservatives over the fate of the New Deal in an immediate sense but in a larger sense over the meaning of the Constitution, over the limits, if there are to be any, over governmental power, over the role of judges in a democracy and over the essential question, a kind of enduring question in American history, whether democracy can be made to function in times of economic crisis. So that’s the first act.

And the second act really shifts from the battle between Roosevelt and the courts to a battle between Roosevelt and the Congress over the fate of the court-packing bill and over really control of Roosevelt’s second term.
MR. HALPIN: So why don’t we jump in – that’s a great division. Why don’t we jump into the ideological debate and then we can draw on, Dahlia, your perspective on this?

You lay out a pretty clear division between sometimes confusing notions of constitutional formalism versus a living or organic constitution. We also have literalism – originalism is probably associated somewhat with the first one.

For both of you, what is the actual ideological difference between these approaches to the Constitution? It’s very abstract but it obviously had very practical implications. Do you want to explain a little bit about them? And Dahlia, give your perspective on what this means in terms of legal history and theory?

MS. DAHLIA LITHWICK: Well, let me just start by saying thank you for having me and also by saying this is just a phenomenal book and I really – I read a lot of books and this one was one of those mana from heaven things that drops down at exactly a moment that there’s such urgency about these issues, not only are we now looking at a confirmation fight where all these questions about jurisprudential theories and originalism and living constitutionalism – well, we’re not going to talk about living constitutionalism at whatever hearing we have this summer because nobody talks about it anymore.

But I think as a frame of these issues it’s an amazing moment. And we’re also just coming out of another amazing moment which is President Obama for the first time in a very long time just taking on the court in his state of the union and really openly criticizing the court, having the court pushback.

So this book in some sense – I don’t know if you did it on purpose, if you seeded that idea that the president should go after the court so that your book would become just the best template for talking about these issues but if you did, good job.

MR. SHESOL: It was very carefully negotiated. (Laughter.)

MS. LITHWICK: Well, then. Well, then. But I really do think that these two moments, at this moment in history make this book really urgent and relevant in a way. It would be outstanding under any set of facts but it’s really worth the read.

And just I thought what was striking about this book and I am not a historian. I’m just a court reporter. But to me what was really striking about this book was the extent to which these arguments are utterly timeless. And some of the language that I, in my head, I think we’ve invented this language in the last five or 10 or 15 years, this is the language of John Roberts. This is the language of Bill Brennan. It’s not. I mean, this language really is decades old.

And I just want to flag for you because I think you frame it so well at the beginning of the book, you know, the fight is already framed in terms of organic law,
living law. There’s a real interest by Cardozo and Brandeis in Spencer, in the theories of evolution, in social science, to document changes across time so that there’s this whole notion there that what we later see in *Brown v. Board*, what we still see in standard Supreme Court discussions of look, here’s this all this social science data that shows us the real impact on the ground. That’s not new. That’s here. That starts here. I think that’s really interesting.

And the flip of it is this very, very interesting language about how the Constitution is set in stone, how it’s sort of oracular and how it’s divine and this notion that the Constitution is the secular 10 commandments, it’s immutable, it’s doesn’t change.

And so I do think there’s this very, very similar, familiar framing that we’re reading in the early pages here that continues to play out both through the book, through the conversation in the book and through the conversation we’re still having today.

MR. HALPIN: Well, let’s try and sharpen the discussion about what they actually were fighting about. And you have this great quote from Roosevelt who, of course, can make complicated things sound very simple to understand on numerous fronts, whether it was economics or the court.

And he’s talking about these two competing theories and you have his, quote, “In our early maritime history we constructed a great ship and called it the Constitution. We put in the best timbers which could be found. We constructed it according to the best plans and experience of that period. We sent it forth to do battle. It was crowned with success and achieved wonderful victories. We came to revere it and even to have affection for it. We still do because of what it accomplished. But no one,” said Roosevelt “would be fool enough now to send it out to fight even a tugboat. It has been superceded entirely by what has happened and been learned in the meantime so with the Constitution of the United States. We revere it and have an affection for it because of the principles which it reflects but as times change,” he concluded, “the Constitution too must change.”

That’s the clearest explanation of an organic law or the living constitution that I’ve ever heard but I mean, again, sharpen for us, who were the protagonists in this battle? Who were the nine old men? What were they arguing for? Who were they defending and what obviously was – this living constitution approach that FDR and others believed in – what were they actively dealing with on the ground?

MR. SHESOL: Well, the epithet that was applied to the court at the time was, as you just said, the nine old men. This was actually the oldest court in American history. The average age of a justice in 1936 was 71.

And there was the assumption on the part of most liberals that age had something to do with ideology – that these old men were out of touch with modern realities. The uncomfortable fact which liberals didn’t really want to deal with was the fact that the
oldest justice on this court was Brandeis and nobody ever accused him of being out of touch with reality. He was probably more closely tied in with the New Deal and with the key actors in the New Deal than any of them, including Cardozo. And so that was a bit of an awkwardness for liberals.

But many of the other old men, particularly the group of four conservatives, who were known as the four horsemen, were really 19\textsuperscript{th} century men in spirit not just on their birth certificates.

And Justice Willis Van Devanter, who was one of the conservatives, who I believe had been appointed in 1910 – these guys had been on the court for a very long time – Van Devanter was old enough to remember Lincoln’s funeral procession going through his town when he was a boy. And George Sutherland, another one of the conservatives, had been born in England before either Gladstone or Disraeli had served as prime minister. So these were not just old guys but they came of age in a very different world than the one that was confronting Roosevelt and the rest of the country in the mid-1930s.

So on the court at that time you had a division between these four horsemen on the Right and on the Left, the great liberal trio of Brandeis, Cardozo and Harlan Fiske Stone, Stone being kind of an interesting case because he was a Republican. He was a close friend of Hoover’s but he believed in judicial restraint. He believed that it was up to Congress to screw up the country if they wanted to by passing these New Deal program. He didn’t feel that it was the judges’ role to essentially correct the mistakes of the Congress.

In the middle, if you could suggest that there was a middle, you had two figures. You had Owen Roberts, who was generally more comfortable with the conservatives and was generally grouped with the conservatives and you had Charles Evans Hughes who, as chief justice, awkwardly tried to balance these two factions.

But this really in many ways – and I’ll let Dahlia speak to this – but this really was a court without a center and Hughes seemed to believe that if he could kind of rest on the fine constitutional shadings that he could somehow create a majority that was larger than five for anything and this rarely happened.

It was a bitterly divided court on social and economic questions and over this very basic question, as I mentioned before, about the judges’ role. Was it the judges’ role to essentially pass on the wisdom of economic legislation or was it the judges’ role to essentially, as Stone believed, let the Congress do essentially what it felt needed to be done to advance the general welfare and other notions like that. So that was the basic division in the court at the time.

MR. HALPIN: So following up, Dahlia, give us a little more explanation about what that is – the substantive content of the living constitution ideology was and is today
and a little bit of perspective about, as you said, we won’t be talking about it in the upcoming confirmation battle.

MS. LITHWICK: I’ll do that but I also just want to point out one interesting follow-up to what Jeff just said. I think it’s profound and you see it instantly when you read the book and that is this question of age because one of the things you’re struck by in the profound difference between the story that we hear in the 1930s and the story we’re telling in the 2000s is that the age issue has flipped and where youth in FDR’s time, youth is for Herbert Spencer, it’s for social science, it’s for looking at data and being current and understanding the impact on the ground of decisions.

The momentum on the court, the young men on the Supreme Court, all of the intellectual energy on the Supreme Court is now on the conservative side. And it’s one of the really striking things when you sit at oral argument – I’ve described watching Robert Alito – I’m not going to say Clarence Thomas because he doesn’t talk much at oral argument. He didn’t talk at an oral argument.

And the chief – and watching them is literally akin to watching the Harlem Globetrotters. I mean, they are young. They’re energized. They’re all playing from a playbook that there’s no analogue on the court’s Left today.

And so I just think that that shift, that age shift says so much about where we’re at in the sort of sine wave of history, where we’re at in a cycle where the youth and the energy at the Supreme Court and the real passion, the ability to talk about the Constitution without looking at your shoes is happening on the Right now at the court.

So I think that dovetails into the question but I think that the reason that the court’s progressives today don’t have the ability to write the way Cardozo did or Brandeis did, passionately about a living constitution is because we happen to be in a sort of trough right now in history where to talk about the idea that the Constitution seeks to protect minorities or seeks to protect the underprivileged is to look reckless and to look as though you’re for (uncabin ?) judicial discretion, (uncabin ?) judicial power.

So I think we just happen to be at a moment in history where all the energy is for a real fear of judicial power, a sense that the best thing we can do, whether we’re on the right or the left is to be umpires, to apply the law – right, that’s the language. I love the language of umpire. It’s the language of the mass, right? It’s the language of literally hiding behind something but it’s the language of constraint. It’s the language of doing as little as possible. And I think that that we heard it at Sonia Sotomayor’s hearing that she appropriated the language of we do very little, we call balls and strikes, we apply the facts to the law. And so that is in ascendancy now.

And one of the things that’s really interesting about reading Cardozo or Brandeis is that you read it and you say it’s so compelling, and yet if someone said it at a confirmation hearing today, they would not be confirmed.
So we’ve come a long, long way from the full-throated embrace of living constitutionalism, of the idea that the Constitution changes over time; that is, as life changes, as reality changes, the Constitution has to change with it – not in an unconstrained kind of crazy way. I think that’s the cartoonish vision of the Warren court era but that the Constitution can’t possibly mean what it meant to the framers. You can’t say that anymore.

MR. SHESOL: I just want to add, if I could, that there is a lot of meaning behind these metaphors and while the metaphors change over time, the essential argument, as Dahlia indicated, remains the same.

And the two contrasting metaphors at the time in the 1930s, and this predated the 1930s, was that you had on the one side an organic living constitution as we’ve been talking about it which is really an idea that was some of the terminology introduced by Holmes and others. Holmes said famously that the provisions of the Constitution are not mathematical formulas. They are organic, living provisions. And there were politicians who really embraced this, typically on the Left, as you would expect, Woodrow Wilson and behind Woodrow Wilson, Franklin Roosevelt.

Roosevelt described the Constitution in his own words as the most marvelously elastic compilation of rules ever devised. And this was praise. You know, this was very much what he believed. He didn’t think, as many conservatives did, that the founders or the framers had placed shackles on future generations and really constrained their actions in a significant way.

The contrasting metaphor to the living constitution, so the Constitution as an organism, was the Constitution as a mechanism and this was the prevailing notion in the late 19th century that the natural laws determine the common law, that the study of law was very formulistic. It relied on formulas, that it was heavily deductive. Law was always being described as a science.

And really the perfect articulation of this worldview came in the 1936 case, the Butler case in which a six-three majority of the court overturned the AAA, the agricultural program, one of the centerpieces of the New Deal. That was a decision written by Owen Roberts.

And Roberts described this kind of judicial automatism perfectly. He said in that decision that the judges’ role is simply to lay the article in question, the article of the Constitution that’s been challenged, to lay that next to the statute that’s been challenged and to line them up together and see if they square with one another. And if they do, then it’s constitutional and if they don’t, they don’t. Do they line up? And Roscoe Pound of Harvard called this the slot machine theory of judicial review. And it has its analogue today.

And the last thing I would add on this is that it’s not a coincidence that there’s a perfect alignment between one’s economic views and one’s constitutional views in this
way. If you believed that reform was essential, social and economic reform was essential, you tended to see the necessity to have the Constitution evolve, to have our understanding of these provisions, these vague indeterminate provisions like equal protection and due process and these sorts of things, liberty, to have them evolve with our understanding of contemporary realities.

If you thought that – if you were pretty comfortable with the established order, then you really wanted to see the Constitution, you tended to be drawn to a kind of jurisprudence that saw the Constitution as a constitution of constraints, of limitations that really had no room for these wild social experiments.

MR. HALPIN: Do you have something to add? Yes.

MS. LITHWICK: Well, I just – I think one other way to think about Jeff just said is that when we think about constraint and to the extent that the arc of this book is about the Constitution and the extent to which, right, FDR says why are they trying to constrain me? That’s not what the Constitution is meant to do.

And I think that the analogue today is that the institution we’re most afraid about, the institution we’re now seeking to constrain is the court and that we’re coming off an era and time where we’re not. Well, we’re entering an era where we’re terrified of executive power. We’re terrified of the Congress.

But we’re coming out of an historic era where were very, very anxious as a country about the judiciary. We feel like they made stuff up for a long time, that we’re living in a world where they usurp congressional prerogatives and legislative prerogatives and they invented all of the doctrine around abortion. They have invented all of the doctrine around gay right. They invented all the doctrine that is so kind of roiling society.

And so I think now it’s just interesting that when we talk about constraint, and that explains I think why the conversation has really become very crabbed about the judiciary, the reason we only talk about whether we’re an umpire or an automaton – and that’s the bandwidth, you know, whether we apply the facts to the law or apply the fact to the law and we can’t get out of that bandwidth – is that the anxiety, the public anxiety is about the judiciary now and this feeling that they are out of control. They have been for decades and they’re used to different prerogatives that are not they’re own.

So it’s just an interesting – I mean, again, one of the reasons we’re in this dip right now in terms of the conversation about the Constitution is because we are terrified of the courts.

MR. HALPIN: Right. One other things that’s fascinating about how this actually played out was that when the – on the famous Black Monday when the NRA was struck down, that was a unanimous decision though, right? Brandeis was actually the harshest
against the constitutional foundation for the NRA. The Butler case – that was six-three. You said that was more of a split.

Tell us a little a bit about the actual cases. I mean, the New Deal history here – there were a lot of codes that were written. These are the things that really drove everybody nuts. There were tax issues.

What were they responding to specifically and how did that play out in these cases? And then we want to dive into how did Roosevelt come up with the idea that the best way to deal with these problems was to do a court packing plan?

MR. SHESOL: Well, on the first part of the question – and then we can get into the court plan later – you can come at this two different ways. What was driving the conservatives was you can either look at it from a purely legal constitutional perspective and you can talk about things like due process and liberty of contract and other doctrines that prevailed at the time or you can look at it as essentially a political or even an existential question. Both sides in this fight thought that the stakes were nothing less than the survival of democracy and the conservatives really believed that Roosevelt was regimenting American society. This is not just conservatives out there in the country. These are the justices.

And one of the things that I really wanted to bring to light in this book – I spent a lot of time in the personal correspondence of these justices on both sides of the argument and this wonderfully is an era in which people wrote letters and they weren’t afraid to put things – even if they happen to be a Supreme Court justice, they weren’t terribly afraid of putting these things on paper and then putting them in an envelope and sending them to a close friend. So we have records of all this. A couple were more circumspect. Charles Evans Hughes never put any of this stuff on paper perhaps because of his personality or because he was chief justice or both.

But what you see in the letters of the conservative justices is the feeling that Roosevelt is extinguishing all of the things that made this country great, whether it’s thrift or individual initiative or property rights or local self-government and on down the line that they believe that Roosevelt is centralizing power in his own hands, not just in Washington but in his own hands and that we will be living in a socialist or a communist system before very long.

Roosevelt similarly saw the stakes as a survival of democracy. He believed that if he couldn’t get these programs through the court, if he couldn’t in some meaningful way pass social or economic reform legislation that there would be a total economic collapse in this country that would make the depression look like a cakewalk and out of the ashes a dictator would rise. So both sides interestingly were afraid of dictatorship.

MR. HALPIN: So let’s just sort of solidify – the major parts of the New Deal are struck down. They’re up for – they have to be renewed anyway but they’re struck down.
What was the response? There’s numerous ways they could have dealt with this: they could have written new laws, people were throwing around constitutional amendments.

How did they solidify – and you said it was a strategic blunder – who’s the genius that came up with the idea of the court packing scheme and why did they settle on that course of action and what did it ultimately do to Roosevelt’s legacy in some ways?

MR. SHESOL: Well, I’ll just take a half a step back to set a little bit more context and to answer the second half of your question.

MR. HALPIN: Okay.

MR. SHESOL: Which is that Roosevelt saw no inherent contradiction – given the view he held of the Constitution which we’ve been talking about, he saw no inherent contradiction between the New Deal and the Constitution. His argument was with the court. He didn’t think there was a problem with the Constitution. And so he was no amenable to the ideas that were floating around the country that the Constitution was in some way obsolete or needed to be amended.

You know, that quote that you read using the metaphor of the USS Constitution, just to be clear, Roosevelt didn’t think that the Constitution was out of date. He thought it was a very flexible instrument. What he thought was out of date were the constitutional doctrines that were being used to knock down the New Deal and cited by his opponents around the country.

And so the country in 1935, ’36 is one New Deal program went down after another. The country became something of a rolling constitutional convention. There were dozens or many dozens of ideas of ways in which the Constitution needed to be amended.

Some suggested there should be term limits on justices. Some suggested that there should be age limits on the justices. Others went at the very notion of judicial power and argued that social and economic legislation should be just taken out of the jurisdiction of the Supreme Court so that they couldn’t review it at all. Some argued that judicial review itself ought to be eliminated that it was never intended by the founders and it was usurped by the court in the early 19th century and we ought to make that clear and take it away from them by some kind of amendment. A very popular idea was to allow the Congress to override any decision of the Supreme Court simply by a two-thirds vote, making the Congress rather than the court the final word on the Constitution. So there are all these radical ideas in the air.

And Roosevelt very carefully, he and his Justice Department and his outside advisers, folks like Felix Frankfurter at Harvard who wound up of course serving on the Supreme Court, they examined these questions in great detail, very seriously over the course of a number of years.
But by the time Roosevelt was reelected in the fall of 1936, he felt, A, that these were all impractical solutions that probably had all kinds of horrible unintended consequences, that would be very difficult to get any of them thorough and that they probably wouldn’t solve the problem. And B, he felt that he could not afford to wait any longer. Yes, these were old men and you might count on one of them to retire or to pass away before long.

But Roosevelt really felt, as a wave of sit-down strikes was sweeping across the country and getting very violent in the late ’36 and the early 1937, that there wasn’t a lot of time and if Social Security went down next, as everybody imagined that it would, if the National Labor Relations Act went down next, that there would be a very real chance of violent revolution in the country. So Roosevelt was looking for a solution that was constitutional and that was quick and that would be affective. And he came to this idea of packing the Supreme Court.

And I will just say briefly that many of us today and I think certainly many people in the 1930s imagined that the number nine existed somewhere in the Constitution but it was set by the founders. They in fact don’t set the number at all. And so the number of justices over the course of the 19th century went up and down. It started at six, went to five, went to 10 under Lincoln and in 1866 actually, when one justice announced retirement, Congress immediately eliminated that seat and then eliminated another one pending the next retirement just so Andrew Johnson would not get to appoint anybody. So this was a political football in the 19th century but it had settled at nine in 1869 and so it had this feeling of permanence.

And so Roosevelt really was up against something more serious than he imaged when he proposed to pack the court because it seemed like a new and radical and fairly extreme idea.

MR. HALPIN: One of the things that’s interesting is that regardless of whether the plan itself was shrewd politically or in practice, the practical impact was that the court basically capitulates to a lot of New Deal legislation. They sanctify constitutionally the NLRB, other aspects of it.

Dahlia, how does this play out after this big fight over these huge constitutional theories? The court eventually moves towards a position where it accepts federal government action, intervention in the economy, emergency legislative capacity and then eventually civil rights? How does this play out over the next few decades after the court packing fight in particular?

MS. LITHWICK: Well, one thing I want to just back up and point out because I think it’s so important here, and you would ask Jeff, these (are ?) unanimous decisions. This is not a five-four. This isn’t Citizens United. These are – the court is mad.

And I think one of the things that we need to really recognize is that these were terrible laws. These were badly drafted, hastily drafted laws that gave enormous power
to the president, enormous, unthinkable power. And the way you lose a Brandeis and a Cardozo is you just say there’s really no such thing as the Commerce Clause.

There’s really no such thing as – so I think it’s really important when we think about the court packing plan we have an idea that the court was way out of line that it was striking down good, good laws. Now, these were well-intentioned laws but there’s a hot –

MR. HALPIN: Specifically on the National Recovery Act more than anything is what you’re refereeing to.

MS. LITHWICK: Well, I’m thinking of the Hot Oil case where you have a law that has a provision in it that forgets to be placed in the law. And you’ve got guys who are literally being subject to punishment for something that’s never been codified into law because there was a type O, there was a mistake.

So I just think it’s really important to understand one of the lessons is we need to – and we have done a better job of drafting legislation. But it really – it’s not the case that the court was willy-nillys. I mean, they were horrified by the really, you know, very, very quick – I mean, one after another turning out legislation. And I do think – I guess – I feel like I completely didn’t respond to your question but I thought that was worth saying.

I do think that the consequence has been that – and this goes to Barry Friedman – Professor Barry Friedman has this great book about how the court never gets too, too far away from what public opinion will permit and this is an example – there’s a switch in time that says nine, right? The court blinks in the face of all this and then I think it’s part of this sort of elaborate tango between the court and the president that’s going on until today where the court realizes that you can really get way, way out of whack. The president in this case – the president’s way out of line with public opinion.

But I think what we’re seeing today, for instance, in the blowback to Citizens United is that 80 percent of the public, 80 percent of the public, apparently polls show, hated the Citizens United decision. And I think it’s another example of the court just getting way, way out of whack with what the public will tolerate and what the Congress will tolerate.

So I do think it’s part of this very, very carefully calibrated dance that has nothing to do with the Constitution or constitutional interpretation and everything to do with brinksmanship, how far you can push it.

I mean, one of the things that Jeff wrote right after Obama called out the court and I think it’s this interesting question of who suffers more: the president or the court when you have this moment of brinksmanship. Everybody’s reputation and integrity is on the line, who suffers more? And it’s a question that I think it’s still open after this.
MR. SHESOL: I just wanted to add to that. I think that one of the things that’s worth noting about the New Deal decisions is that I think what Dahlia said is exactly right that the NRA in particular, the National Recovery Act, which begat the National Recovery Administration was a badly drafted law and it was badly conceived and it was – actually had become a huge political liability for Roosevelt by the time the Schechter case, the sick chicken case as it was known, which concerned a kosher poultry plant in Brooklyn, by the time that came before the court in the spring of 1935.

But I think what becomes clear over the succeeding months – the sort of orgy of unconstitutionality beings in January 1935 with the Hot Oil decision. Black Monday is in March 1935. But this runs all the way through the end of the ’35, ’36 terms and ends in June 1936.

And the court has covered the constitutional landscape and it has knocked down not only laws that were sloppily drafted but laws that were exceedingly carefully drafted. I’m just going to quickly give you a couple of examples.

It struck down the Railroad Retirement Act in 1935. This was a five-four bitterly divided court that knocked this down. And Justice Owen Roberts wrote the majority decision and scorned, just bitterly sarcastically the idea that labor relations had anything to do whatsoever with interstate commerce.

You had these (Eli ?) industries, you had strikes sweeping across state lines, shutting down plants, cutting off the flow of interstate commerce and he said labor relations are a local matter.

You had the court in the AAA case that I mentioned before, in Butler you had again Owen Roberts writing the opinion and saying agriculture is a local matter.

As for the dust ball, as for the dust storms that were sweeping the country, as for the droughts, as for the rotting surpluses that caused a collapse of agriculture across the country, Roberts wrote for the majority that this was not a national problem. This was – I’m going to quote him directly because it comes right out of the opinion, this was “a widespread similarity of local conditions.” (Laughter.) Roosevelt consistently argued that these were national problems, required national solutions and had serious implications for the Commerce Clause.

But what you see over this period of time is the court shutting down every avenue to reform in sweeping stridden opinions that not only knocked down the programs and indicate their hostility to the programs but in the case of the railroad decision, preemptively overrule any such legislation in the future.

So Roosevelt came to believe, I think quite rightly, that no matter how carefully the legislation was drafted, as in the case of Social Security which was very carefully drafted partly on a tip from Justice Stone about what kinds of Social Security legislation
might actually get through the court, he came to feel that it didn’t matter at all and that these justices were dead set against anything he might try to do.

MR. HALPIN: So before we turn to audience questions, let’s bring this up to date here. So reading the book there are striking parallels in many ways between the 1930s and what we’re experiencing today. We have a court majority that’s very conservative that routinely defined business interests and tries to limit federal action. We have a new, young, dynamic president who has fairly transformative ideas in some people’s minds and we have an outside movement, you know, we have a modern American Liberty League which may be the Tea Party movement or something else that’s decrying socialism, totalitarianism and the progressive assault on the Constitution.

Dahlia and Jeff, what’s your sense about our current conditions in relation to what we read about in this book: are the similarities real or are they different in some substantive way?

MS. LITHWICK: I think the similarities are real. I think that, as I said, it’s striking how similar the two historic moments are. I think that – one of the conversations we’re having now is about age and the court being out of touch. It’s not an accident that there’s another movement afoot to either have term limits or to – you know, there’s just a feeling again that the court is too old and a lot of the language in here, oh, it’s just a depression. It’s not that bad. People need to not spend money they don’t have is some of what we’re hearing now.

Now I think it’s complicated, as I said, because I think that the difference that we’re seeing in the Roberts court is that there’s no answer, no meaningful pushback on the Left. You have Justice Breyer writing a strong dissent in one case, you have Justice Ginsburg in another case, Citizens United, Justice Stevens writes a dissent for the ages. But I don’t think you have a sort of full-fledged coherent this is what a progressive view of the Constitution would be.

And so as I’ve said initially, I think it’s a much more one-sided conversation than it used to be, a much more we’re going to fight both the Left and the Right are going to fight to sound more conservative.

But I do think that this happens to be a moment where the president has taken on the court and he’s taken – it’s interesting to read about FDR giving lengthy, lengthy discursive discussions about constitutionalism because one of the things I think most Americans would say they’d love to hear Barack Obama talk a little bit more about the Constitution. He’s been so careful. And in fact, when he did go after the court in the state of the union, it wasn’t really to say Citizens United was decided too broadly. There were narrower grounds. He said, wait, foreign interest might be able to influence our elections. That’s not a constitutional point. That’s a pragmatic point.

So I do think there’s a real different in terms of, you know, here’s FDR who struggles through law school, apparently is a pretty halfhearted lawyer on the best of
days. Here’s President Obama who is a constitutional lawyer, a constitutional law professor, who clearly has some very, very coherent vision of constitutionalism and yet it’s FDR who’s able to talk eloquently apparently for hours off the cuff about what the constitution means.

So I think that’s another interesting, very, very interesting shift we’re seeing or not – it’s a sort of a constitution-shaped whole in the conversation that we’re having about this court.

MR. SHESOL: I just want to add that this is another demonstration and I assume, Dahlia, that you agree with this is how completely conservatives have dominated the conversation about the Constitution for the last I don’t know what number of years you pointed on but the last couple of decades.

And it’s almost – and I don’t want to psychoanalyze my side of the argument but it’s almost as if there’s been a collapse of confidence on our side that actually we have some claim as progressives or as liberals on what the founders actually intended.

And one of the striking – I don’t know what President Obama believes and I would imagine that he would agree that these aren’t new ideas that they actually go back to the nation’s founding. But we haven’t heard him say it, as you pointed out, as assertively as Franklin Roosevelt did.

You know, I think that it was a very shrewd choice of phraseology, original intent, because it does suggest that today’s conservatives have some kind of claim on the intentions of the founders.

What Roosevelt understood and what he constantly reiterated is that this argument between these two notions of the Constitution goes back to the nation’s founding. This was the argument between Jefferson and Chief Justice John Marshall. This was the argument between Madison and Hamilton over what the general welfare meant and what the general welfare clause entitled Congress to do or didn’t. And so Roosevelt made this argument with a sense of supreme self-confidence that he was true to the intentions of the founders.

And we have somehow, on the progressive side, allowed the conservatives whether on the court or just more generally to get away with the argument that the founders were universally in favor of smaller, weaker government and states rights and so forth and on down the line. And Roosevelt didn’t believe that. I don’t imagine that President Obama believes it either but it would be, I think, a useful thing to hear him say it forcefully.

MR. HALPIN: It’s a great transition into hopefully a follow-up on a number of these areas. I’d like to now open it up to audience questions. If you wouldn’t mind raising your hand. Christine will bring a microphone. We’ll start in the back and move
forward. And if you wouldn’t mind just briefly stating your name and keep your questions pretty concise, if you don’t mind.

Q: I’m Simon Lazarus and I’m with the National Senior Citizens Law Center. And I’d just like to ask both of these very distinguished – first I’d like to thank them for really exciting presentations.

And I’d like to ask both of them, perhaps Dahlia in particular, don’t you think that there are – well, that there’s a very big difference between this situation and the situation in the 1930 and doesn’t that lead you to think that there are very good reasons why we see progressives making what used to be kind of conservative kinds of arguments because it is – the other side is beginning to run the zoo. We ran the zoo for quite a while. We need to preserve the things that we did when we ran the zoo.

So we have to talk up precedent. We have to talk up judicial restraint because we now see that conservatives have their guns trained on healthcare reform and so forth and I think that that – I would suggest that this makes a very big differences.

We also – I think what Jeff said about progressives recognizing that the Constitution in the founders’ intent actually gives strong support for the values that we’re advancing that you see that happening all the time. Dahlia knows it better than I do, but you see the justices like Stevens grounding their arguments, throwing originalism back at the conservatives and I think that they’re – I just ask whether you think there’s good reason for that. That’s all.

MS. LITHWICK: I think there is good reason for that. You know, thinking back to my comment about how badly drafted some of these initial pieces of legislation was, one of the things that Stevens said in a recent one of the recent interviews he gave is that it’s really important for justices to be in conversation with the Congress, to not assume that legislation kind of is as perfect as the 10 commandments and that it’s really important for justices to work with and I think that’s part of Breyer’s living constitutionalism.

I think that when you look at what Pam Karlan and Goodwin Liu and ACS are trying to do to energize the conversation, I think it has to do with this blend of originalism, minimalism. It’s not as simple as one side gets originalism and one side gets – (inaudible) – and the other side makes stuff up. I think that’s the cartoon version. And I think that the Left in this country has done a really good job of saying it’s much more complicated than that.

But I do think – I guess my only that I want to make is that I do think that absent this very complicated, very complicated notion of empathy that President Obama floated initially during the campaign, floated last year when he talked about what he wanted to see in a Souter replacement. I’m a big proponent of empathy but I don’t know what it means constitutional. I just don’t know what it means. I think it means some of this
which is judges who know what’s happening on the ground and think about the impact on
real people of their decisions.

But I do think I would love to hear a sort of crisp one-sentence articulation and I
want to hear it at a confirmation hearing of what it is – I know what we’re not. We’re
very good at that. But I haven’t heard the one-sentence articulation otherwise.

So while I completely agree that Citizens United is best defended in terms of –
(inaudible) – decisive, Citizens United is best defended in terms of minimalism. Those
are in some sense ends driven words and I want to hear is something much closer to what
FDR was saying when he talked about what the Constitution has to mean in order for this
country to function. That’s what I’m not hearing. I don’t know if that makes sense.

MR. HALPIN: Do you have anything to add or should we take more questions?

MR. SHESOL: No. Let’s – yes.

MR. HALPIN: Yes. Let’s gather. We’ve got a number of hands here.

Q: (Inaudible) – from Safe Foundation. The argument of a living constitution
makes a lot of sense to me in the sense that a Constitution that can sanction and allow
slavery and its aftermath for almost 200 years until it was abolished and event its
aftermath or aftereffects were abolished, it took a while. So if that Constitution should
not be considered sacred should be amended as often as possible as soon as we find the
problems.

MR. HALPIN: Okay. Let’s gather a few more questions and we’ll see if we can
answer them all at once here. Let’s move over to this gentleman here. Thank you.

Q: Hi. I’m Drew Courtney from People for the American Way. I guess I wanted
to follow up a little bit on the comments about articulating a vision and I know Breyer
and Liu and Karlan have been doing that.

But I guess I’m wondering is there any analogue in the political realm or in the
popular realm to that? Do we have to look all the way back to FDR or is there somebody
who’s doing that in a way that you don’t need a law degree to understand. I don’t know
what any suggestion will be but I’d love to hear it.

MR. SHESOL: I’ll just say quickly that what struck Dahlia about the arguments
made by the liberals in dissent, by Stone and those forceful dissent by Brandeis and the
others, actually struck me. I’m coming more from the political side of things but struck
me in the statements of FDR and the sort of forcefulness of his liberalism and the
confidence of his liberalism that the other side had nothing on him.

There was a fearlessness in projecting views that I think most of the people I
served with in the Clinton administration held for all the talk of centris
triangulation and so forth but we would never have been so comfortable making these
arguments so forcefully. And I think you probably have to go back to Kennedy and
Johnson to find presidents who were willing to make the case somewhat as forcefully as
FDR.

There’s – you know, I’ll just repeat myself here. There is a fearlessness to the
way that Roosevelt makes the case and he’s ready to take on anybody who makes a
counterargument. And I wish we had that degree of fearlessness today but I don’t think
that I see it. I don’t see it in our political discourse, not on our side.

MR. HALPIN: It’s attached – the one thing that’s striking is that Roosevelt was
defending a whole set of policies that saved the country, saved capitalism, created a
modern social welfare system and renewed the concept of equal opportunity. Perhaps
part of the problem today is that the issues outside of say, the health bill, don’t seem as
pressing and so they seem to – that may or may not be true but do you see any – does that
make any sense to you, Dahlia, that it’s hard to attach this living constitution idea to a
concrete set of policies that you’re trying to defend?

MS. LITHWICK: Well, I would go further. I would say to the extent that we’ve
had this conversation we’re having it about the war on terror. We’re having it about do
we read the Christmas bomber his Miranda rights? I think that the public discourse is
very freighted against the kind of sort of soaring rhetoric about personal liberty that you
might have been able to make.

I will says just directly to respond to the question that my sense watching
confirmation hearing after confirmation hearing is that where you do hear it in terms that
Americans can get their head around is Sheldon Whitehouse from Rhode Island in a
confirmation hearing.

Believe it or not, and I’ve said this over and over again, it takes the comedian but
I thought Al Franken was able to offer one of the most passionate articulations in the last
confirmation, the round on Sotomayor and he’d been on the Judiciary Committee for all
of about six minutes when he did it. And he’s not a lawyer, by the way. But I think he
was able to do some of this – what Jeff and I are talking about is what I just keep calling
talking about the Constitution, the progressive view of the Constitution without looking
at your shoes and he was able to do it.

So I do think there are people out there – you’re quite right. The really interesting
stuff probably is happening in the academy but I do think that it does nobody any good to
go to a confirmation hearing and hear everybody on both sides of the aisle plus the
nominee say at my very best as a judge I hope to do absolutely nothing. That seems to
me to be the antithesis of what FDR was able to communicate.

MR. SHESOL: And I just want to add a historical analogue to that just quickly
that I was just over at Harvard last week in an event with Noah Feldman who I’m sure
you know is a professor up there and he’d just finished writing a book on the Roosevelt
court which I think will be very interesting. Essentially picks up where my book leaves off.

And one of the things that described – so I will not claim this is my own idea – is that a number of the Roosevelt appointees had been like Justice Stone advocates of judicial restraint during this period and they argued not for an expansive sort of Warren like jurisprudence or even though one of these appointees was Bill Douglas not arguing for what Bill Douglas later did but argued essentially that the legislature ought to be let alone to do most of what it thinks needs to be done. And so was a redefining of – or a sort of pulling back of the judicial role.

And what Noah described is that once some of these appointees, Robert Jackson and others, wound up on the court, Bill Douglas and others, they found that it wasn’t actually so easy or so advisable to be so restrained. And so, there was a brutal argument that carried through the 1940s and into the 1950s among the Roosevelt appointees partly or largely about this.

And ultimately, according to Noah, the last advocate left of this brand of judicial restraint was Felix Frankfurter and he had really isolated himself by sticking to his guns in this way and essentially allowing Congress to do a number of things that the others found to be abhorrent. So there may be some unintended consequences of placing yourself in this minimalist box.

MR. HALPIN: Let’s gather – we just have three quick questions here and then we can – we’ll finish it up there.

Q: Sure. My name is Evan Schultz (sp) and I have a kind of slightly different questions. It’s just about the nuts and bolts. It looks like a big book and you have a day job, I presume. How did you get it done?

MR. HALPIN: Let’s grab all three questions and then we’ll answer them and then we can –

Q: My name is Jonathan. I’m affiliated with the We the People: The Citizen and the Constitution here in D.C. next week. My question is about politicians on the court. We not longer have any since Justice O’Connor retired. We did at the time of Roosevelt and through to Justice O’Connor. Do you think it makes a difference if someone has a political institute with respect to sort of understanding how these questions will play out, how these decisions will play out and whether you think it’s a good idea to return to that kind of a model as soon as in a couple of weeks?

MR. HALPIN: Okay. And the gentleman here.

Q: Thank you. Peter Glock (sp). Given the parallels between then and now, do you think it’s such a stretch to imagine that in four or five years either Justice Roberts or Justice Scalia might write the majority opinion in a five to four decision striking down
the individual mandate portion of the healthcare bill on the grounds that that’s a local matter?

MR. HALPIN: These are three great concise questions. Jeff, you want to take one or all three? The last one is definitely yours.

MR. SHESOL: I’ll tackle the personal question and then I’ll deflect the constitutional questions to Dahlia. I took some time off is the short answer to that question. It was not an easy thing to do to get the head space to do the research and to do the writing but I had some very forgiving partners at West Wing Writers and I wound up out of the last five years – I worked on the book for about five years and two of those years were on leave. So people ask me how long it took and I don’t actually even know. I think probably three out of the last five year I spent working on the book.

MR. HALPIN: And Dahlia, the question of politicians on the court and specifically about whether we’re going to get a Black Monday four years from now on healthcare.

MS. LITHWICK: Politicians on the court I’m very much in favor. I’m in favor of anyone who is an Appeals Court judge on the court. I would like to see a bus driver on the court at this point. Just anything other than more of the same.

And it’s not so much because I believe – you know, the argument in the press this week has all been because someone is going to come along and masterfully manage Anthony Kennedy the way Stevens did. I don’t think that’s going to happen. And I’m not sure that being a politician would make it easier for that to happen. I just think that politicians have some sense of what the world is like out there and how people live. I often joke – I’ll just be very quick.

One of my favorite moments at the Supreme Court was watching the court argue about bus searches on Greyhound buses and your expectation of privacy in your luggage and the luggage rack, and it was astounding watching the justices opine about what people – your average guy on a Greyhound bus would think about the privacy of his luggage because one had a very strong sense they don’t ride a lot of Greyhound buses. My preference is to have just one guy who’s ridden on a Greyhound bus or arguably driven one but someone who has a sense of what’s going on in the world.

You know, having looked at the attorney general suits, I don’t think there’s a claim in there that’s going to be taken seriously by the court. My sense is even though this court did what it did in Citizens United, it didn’t do it in the Voting Rights Act case. It didn’t do it in Ricci. I think that the court did not expect the extent to which the public blowback and the president blowback after Citizens United. Now, that’s an entirely speculative question.

People in my business, every time we go to a cocktail party are asked was the Citizens United an aberration or the beginning of something? And I can’t answer until
three years from now when I’ve got more than N equals one, but it seems to me that – and Jeff makes this point so beautifully. If you think the justices don’t read the newspaper and they’re not affected by it, they are.

And so I really think that it’s fair to say that for the justices to go where they need to go on these lawsuits, I don’t think that you’re going to get five justices who are willing to go that far.

MR. HALPIN: So one thing that will help Jeff in his day job and his outside writing career is for people to buy this fantastic book, *Supreme Power: Franklin Roosevelt Vs. the Supreme Court*. We do have it for sale back there. And Jeff has graciously said that he will be happy to sign some books.

I want to thank both Jeff and Dahlia for a great conversation. And I appreciate you coming. And thanks to the audience for listening and the good questions.

(Appause.)

(END)