

Senator Sheldon Whitehouse
Kavanaugh Confirmation Hearing Opening Statement
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When is a pattern evidence of bias?

In court, pattern is evidence of bias all the time; evidence on which juries and trial judges rely, to show discriminatory intent, to show a common scheme, to show bias.

When does a pattern prove bias?

That's no idle question. It's relevant to the pattern of the Roberts Court when its Republican majority goes off on its partisan excursions through the civil law; when all five Republican appointees — the Roberts Five, I'll call them — go raiding off together, and no Democratic appointee joins them.

Does this happen often? Yes, indeed.

The Roberts Five has gone on 80 of these partisan excursions since Roberts became chief.

There is a feature to these eighty cases. They almost all implicate interests important to the big funders and influencers of the Republican Party. When the Republican Justices go off on these partisan excursions, there's a big Republican corporate or partisan interest involved **92 percent** of the time.

A tiny handful of these cases don't implicate an interest of the big Republican influencers — so flukishly few we can set them aside. That leaves 73 cases that all implicate a major Republican Party interest. Seventy-three is a lot of cases at the Supreme Court.

Is there a pattern to those 73 cases? Oh, yes there is.

Every time a big Republican corporate or partisan interest is involved, the big Republican interest wins. Every. Time.

Let me repeat: In seventy-three partisan decisions where there's a big Republican interest at stake, the big Republican interest wins. Every. Damned. Time.

Hence the mad scramble of big Republican interest groups to protect a "Roberts Five" that will reliably give them wins — really big wins, sometimes.

When the Roberts Five saddles up, these so-called conservatives are anything but judicially conservative.

They readily overturn precedent, toss out statutes passed by wide bipartisan margins, and decide on broad constitutional issues they need not reach. Modesty, originalism, stare decisis, all these

supposedly conservative judicial principles, all have the hoof prints of the Roberts Five all across their backs, wherever those principles got in the way of wins for the Big Republican interests.

The litany of Roberts Five decisions explains why big Republican interests want Kavanaugh on the Court so badly that Republicans trampled so much Senate precedent to shove him through; so let's review the litany.

What do big Republican interests want? Well, first, they want to win elections.

What has the Roberts Five delivered?

Help Republicans gerrymander elections: *Vieth v. Jubelirer*, 5-4, license to gerrymander.

Help Republicans keep minority voters away from the polls: *Shelby County*, 5-4 and *Bartlett v. Strickland*, 5-4. And *Abbott v. Perez*, 5-4, despite the trial judge finding the Texas legislature actually intended to suppress minority voters.

And the big one: help corporate front-group money flood elections — if you're a big special interest you love unlimited power to buy elections and threaten and bully Congress. *McCutcheon*, 5-4 counting the concurrence; *Bullock*, 5-4; and the infamous, grotesque 5-4 *Citizens United* decision (which belongs beside *Lochner* on the Court's roll of shame).

What else do the big influencers want?

To get out of courtrooms. Big influencers hate courtrooms, because their lobbying and electioneering and threatening doesn't work. In a courtroom, big influencers used to getting their way have to suffer the indignity of equal treatment.

So the Roberts Five protects corporations from group "class action" lawsuits: *Walmart v. Dukes*, 5-4; *Comcast*, 5-4; and this past term, *Epic Systems*, 5-4.

The Roberts Five helps corporations steer customers and workers away from courtrooms and into mandatory arbitration: *Concepcion*, *Italian Colors*, and *Rent-a-Center*, all Roberts Five. *Epic Systems* does double duty here: now workers can't even *arbitrate* their claims as a group.

Hindering access to the courthouse for plaintiffs generally: *Iqbal*, 5-4.

Protecting corporations from being taken to court by employees harmed through pay discrimination, *Ledbetter*, 5-4; age discrimination, *Gross*, 5-4; harassment, *Vance* 5-4; and retaliation, *Nassar*, 5-4. Even insulating corporations from liability for international human rights violations: *Jesner*, 5-4.

Corporations aren't in the Constitution; juries are. Indeed, courtroom juries are the one element of American government designed to protect people against encroachments by private wealth

and power. So of course the Roberts Five rule for wealthy, powerful corporations over jury rights every time — with nary a mention of the Seventh Amendment.

What's another one? Oh, yes. A classic: helping big business bust unions. *Harris v. Quinn*, 5-4; and *Janus v. AFSCME* this year, 5-4, overturning a 40-year precedent.

Lots of big Republican influencers are polluters. They like to pollute for free.

So of course the Roberts Five delivers decisions that let corporate polluters pollute. To pick a few: *Rapanos*, weakening wetland protections, 5-4; *National Association of Home Builders*, weakening protections for endangered species, 5-4; *Michigan v. EPA*, helping air polluters, 5-4; and, in the face of emerging climate havoc, there's the procedurally aberrant 5-4 partisan decision to stop the EPA Clean Power Plan.

Then come Roberts Five bonus decisions advancing a far-right social agenda: *Gonzalez v. Carhart*, upholding restrictive abortion laws; *Hobby Lobby*, granting corporations religious rights over the health care rights of employees; *NIFLA*, letting states deny women truthful information about their reproductive choices—all 5-4, all the Republicans.

Add *Heller* and *McDonald*, which reanimated for the gun industry a theory a former Chief Justice once called a “fraud”; both decisions 5-4.

This year, *Trump v. Hawaii*, 5-4, rubber stamping President Trump's discriminatory Muslim travel ban.

And in case Wall Street was feeling left out, helping insulate investment bankers from fraud claims: *Janus Capital Group, Inc.*, 5-4.

No wonder the American people feel the game is rigged.

Here's how the rigged game works: big business and partisan groups fund the Federalist Society, which picked Gorsuch and now Kavanaugh. As White House Counsel admitted, they “insourced” the Federalist Society for this selection. Exactly how the nominees were picked, and who was in the room where it happened, and who had a vote or a veto, and what was said or promised, is all a deep dark secret.

Then big business and partisan groups fund the Judicial Crisis Network, which runs dark-money political campaigns to influence Senators in confirmation votes, as they've done for Gorsuch and now Kavanaugh. Who pays millions of dollars for that, and what their expectations are, is a deep dark secret.

These groups also fund Republican election campaigns with dark money. The identity of the big donors? A deep dark secret.

Once the nominee is on, the same business front groups, with ties to the Koch Brothers and other funders of the Republican political machine, file “friend of the court,” or amicus briefs, to signal

their wishes to the Roberts Five. Who is really behind those “friends” is another deep dark secret.

It has gotten so weird that Republican justices now even send hints back to big business interests about how they’d like to help them next, and then big business lawyers rush out to *lose* cases, just to get them up before the friendly Court, pronto. That’s what happened in *Friedrichs* and *Janus*.

The U.S. Chamber of Commerce is the biggest corporate lobby of them all. It’s the mouthpiece for Big Coal, Big Oil, Big Tobacco, Big Pharma, Big Guns, you name it—and this year, with Justice Gorsuch riding with the Roberts Five, the Chamber won nine of the 10 cases it weighed in on.

The Roberts Five since 2006 has given the Chamber more than three-quarters of their total votes. This year in civil cases they voted for the Chamber’s position nearly 90 percent of the time.

People are noticing. Veteran court-watchers like Jeffrey Toobin, Linda Greenhouse and Norm Orenstein describe the court as a delivery service for Republican interests:

Toobin has written that on the Supreme Court, “Roberts has served the interests . . . of the contemporary Republican Party.”

Greenhouse has said, “the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda.”

Orenstein described, “the new reality of today’s Supreme Court: It is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen.”

And the American public knows it, too. The American public thinks the Supreme Court treats corporations more favorably than individuals, compared to vice versa, by a 7-to-1 margin.

Now, let’s look at where Judge Kavanaugh fits in. A Republican political operative his whole career, who’s never tried a case. He made his political bones helping the salacious prosecution of President Clinton, and leaking prosecution information to the press.

As an operative in the second Bush White House, he cultivated relationships with political insiders like nomination guru Leonard Leo, the Federalist Society architect of Kavanaugh’s court nominations. On the D.C. Circuit, Kavanaugh gave more than 50 speeches to the Federalist Society. That’s some auditioning.

On the DC Circuit, Kavanaugh showed his readiness to join the Roberts Five with big political wins for Republican and corporate interests: unleashing special interest money into elections; protecting corporations from liability; helping polluters pollute; striking down commonsense gun regulations; keeping injured plaintiffs out of court; and perhaps most important for the current

occupant of the Oval Office, expounding a nearly limitless vision of presidential immunity from the law.

His alignment with right-wing groups who came before him as “friends of the court”? 91 percent.

When big business trade associations weighed in? 76 percent. This is what corporate capture of the courts looks like.

There are big expectations for you. The shadowy dark-money front group, the Judicial Crisis Network, is spending tens of millions in dark money to push for your confirmation. They clearly have big expectations about how you’ll rule on dark money.

The NRA has poured millions into your confirmation, promising their members that you’ll “break the tie.” They clearly have big expectations on how you’ll vote on guns.

White House Counsel Don McGahn said, “There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin.” Big polluters clearly have big expectations for you on their deregulatory effort.

Finally, you come before us nominated by a President named in open court as directing criminal activity, and a subject of ongoing criminal investigation. You displayed expansive views on executive immunity from the law. If you are in that seat because the White House has big expectations that you will protect the President from the due process of law, that should give every Senator pause.

Tomorrow, we will hear a lot of “confirmation etiquette.” It’s a sham.

Kavanaugh knows the game. In the Bush White House, he coached judicial nominees to just tell Senators that they will adhere to statutory text, that they have no ideological agenda. Fairy tales.

At his hearing, Justice Roberts infamously said he’d just call “balls and strikes,” but the pattern – the 73-case pattern – of the Roberts Five qualifies him to have NASCAR-style corporate badges on his robes.

Alito said in his hearing what a “strong principle” stare decisis was, an important limitation on the Court. Then he told the Federalist Society stare decisis “means to leave things decided when it suits our purposes.”

Gorsuch delivered the key fifth vote in the precedent-busting, but also union-busting, *Janus* decision. He too had pledged in his hearing to “follow the law of judicial precedent,” assured us he was not a “philosopher king,” and promised to give equal concern to “every person, poor or rich, mighty or meek.”

How did that turn out? Great for the rich and mighty: Gorsuch is the single most corporate-friendly justice on a Court already full of them, ruling for big business interests in over 70 percent of cases, and in every single case where his vote was determinative.

The president early on assured evangelicals his Supreme Court picks would attack *Roe v. Wade*. Despite “confirmation etiquette” assurances about precedent, your own words make clear you don’t really believe *Roe v. Wade* is settled law.

We have seen this movie before. We know how it ends.

The sad fact is that there is no consequence for telling the Committee fairy tales about stare decisis, and then riding off with the Roberts Five, trampling across whatever precedent gets in the way of letting those Big Republican interests keep winning 5-4 partisan decisions.

Every. Damned. Time.