Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights
"What's wrong with the Supreme Court: The Big-Money Assault on Our Judiciary"

Senator Whitehouse's Questions for Michael Klarman

1. In *Shelby County*, Justice Roberts wrote that it was necessary to invalidate the Voting Rights Act preclearance formula because "[n]early 50 years later, things have changed dramatically" in the South with respect to minority voting rights. In reaching that conclusion, he disregarded Congress's findings of fact that "[e]vidence of continued discrimination . . . clearly show[ed] the continued need for Federal oversight" in covered jurisdictions."
    a. Was it appropriate for the Court to disregard Congress's factual findings? Is it the role of the Supreme Court to engage in fact-finding? **No, the Supreme Court generally owes at least some degree of deference to congressional fact finding**
    b. In your view, was Justice Roberts correct that "things have changed dramatically"? How has that assessment fared since *Shelby County* was decided in 2013? **Chief Justice Roberts is right that some things have changed dramatically as of 2013. The percentage of African Americans registered to vote and actually turning out to vote is not much different from what of whites in 2013, while it was vastly different in 1965. What Chief Justice Roberts does not acknowledge is that racial bloc voting is much more severe in the South than in the North. Only 10 percent of Mississippi whites voted for Barack Obama for president in 2008. The chief Justice also ignored the fact that Republican state legislatures in the North and the South are now equally likely to deploy devices making it harder to vote—voter ID laws, limits on absentee balloting, limits on early voting, bans on drop boxes, etc. The purpose and effect of such measures are to make it harder for people of color, poor people, and young people to vote. This is known as voter suppression. The fact that Republicans do it throughout the country perhaps is not the strongest argument for striking down a coverage formula that would limit their ability to do so only in the South.**
2. Was there a textualist or originalist basis for the Court's ruling in *Shelby County*? Where can the "principle of equal sovereignty" announced in that case be found in the Constitution? **No, it is entirely made up. Not sure why the Chief Justice preferred that doctrinal rationale to Section 5 of the Fourteenth Amendment.**
3. The Georgia House of Representatives recently passed a voter suppression bill that enacts new restrictions on absentee voting, cuts back weekend early voting, and criminalizes handing out water or food to voters waiting in line to vote. Before *Shelby County,* what would have happened with a voter suppression law like this? **It would have been struck**

down by the DC federal court or, if there were a Democratic administration, it would have been rejected for preclearance by the Attorney General.

4. In your opinion, why have the Republican-appointed Justices on the Supreme Court weakened federal voting and campaign finance laws? All of these decisions seem to benefit the Republican Party. But is there any doctrinal consistency to what they've done in these domains? **No doctrinal consistency. All of this stuff is essentially made up. It is almost impossible to avoid the conclusion that they do these things because they benefit the Republican Party. The Court has become, in essence, a wing of the Republican Party. It is hard for me to understand why all Democrats fail to see this and take measures to expand the Court.**

5. You testified that Republican Justices have "unleashed over the last four and a half decades a virtually unrestricted flow of money into politics on the basis of contrived constitutional rationales, which disproportionately benefits wealthy donors, corporations, and well-funded interest groups." What do you mean when you say these constitutional rationales were "contrived"? **Before 1976, I don't think anyone imagined that "money" was speech, and I am sure that nobody dreamed that "corporations" had the same free speech rights as people. All of this doctrine has been invented from whole cloth by the Court since 1976.**

6. In *Citizens United*, as in *Shelby County*, the Republicans on the Supreme Court disregarded Congress's findings of fact—in this case about the corrupting influence of money in politics. Instead, they reached their own conclusion that unlimited political spending could not lead to corruption.

    a. Was it appropriate for the Court to disregard Congress's factual findings? **The Court owes at least some deference to Congress's findings, though, in fairness to the Court, Congress and the Justices have different definitions as to what counts as "corruption." The Justices have invented out of the First Amendment the notion that "corruption" is limited to something close to explicit vote buying. To my knowledge, there is no basis in text or history for some a limited notion of "corruption."**

    b. When is it appropriate for the Supreme Court to engage in its own fact-finding?

    c. In your assessment, were the Republican-appointed justices correct that money in politics could not be corruption? Eleven years later, how has that decision stood the test of time? **Our political system has become a joke because of the nearly unlimited flood of money into it. No other country in the world would tolerate this. More than $15 billion was spent on the 2022 off-year elections. 8 of the 10 biggest donors to super pacs are conservative. 50 years ago, nobody dreamed that money in politics was subject to the stringent const'l protection the Court has invented. Even Mitch McConnell was defending campaign finance restrictions in the early 1970s—before he figured out that switching sides would benefit Republicans**

7. Proponents of dark money argue that mandatory disclosure of donors' identities violates the First Amendment's freedom of association. In a case now before the Supreme Court,

AFPF v. Becerra, the plaintiffs seek to extend the constitutional protections afforded to NAACP activists in 1950s Alabama to the billionaire donors behind the Americans For Prosperity Foundation, a group in the Koch network.

a. You have written about that case, 1958's *NAACP v. Alabama*. Can you describe it? **The Court held that Alabama could not demand access to the NAACP's membership lists because it had no good reason to see them and because it would have published them, leading to economic reprisals and possibly physical violence against NAACP members.**

b. Is the NAACP being forced to disclose membership lists in Alabama in the late 1950s anything like forcing a billionaire dark money donor to put his or her name behind their political money? **I'm sure it would be a mild inconvenience for billionaires to see their political spending revealed to the public. The public benefit would be massive. And I doubt that billionaires would be subject to economic reprisals or realistic threats of violence, like NAACP members were in the 1950s.**

8. You testified that Republican-appointed Justices have "aggressively advanced the agenda of the Republican Party." ("They have undermined labor unions, protected corporations from class action litigation and punitive damage awards, upheld arbitration agreements that prevent employees and customers from airing their grievances against corporations in court, curbed antitrust laws, eroded the constitutional right to abortion, invalidated gun control measures, struck down voluntary efforts by school boards to achieve integration through race-conscious means, and threatened to invalidate race-based affirmative action.") Do you think these outcomes are consistent with the justices just "calling balls and strikes," as Chief justice Roberts famously described the judge's role? Is it fair to draw conclusions about their motivations based on this consistent pattern of outcomes? **No, of course not. I am confident that Chief Justice Roberts is much too smart to really believe his own confirmation-hearings rhetoric. Nobody who teaches or studies Constitutional Law genuinely believe that Justices are calling balls and strikes when they resolve constitutional controversies. Ascribing motives is complicated. I doubt that most of the conservative Justices think of themselves as an arm of the Republican Party. But people have almost infinite capacity for self-delusion. I think most free-marketeers honestly believe that cutting taxes for the rich is the best way to help the poor. And I am convinced that most 19th century slaveholders believed that slavery was good for the slaves, not just for the owners. So perhaps the Republican Justices do not conceive of themselves as an arm of the Republican Party. This hardly proves that this is not the best way for us to see them.**

9. In his testimony, Professor Adler rejects the label that the Roberts Court is "activist" and an instrument of corporate interests. How would you respond to that? **Of course the Roberts Court is activist. When they strike down gun control, campaign finance, race-based affirmative action, laws giving union organizers access to private property, etc., etc. they are being activist. It is hypocritical of them to write opinions denouncing "activism" in cases like Roe and Obergefell when they practice indistinguishable activism in their own jurisprudence. On the "corporate interests"**

point, this Court is more pro-Chamber of Commerce than any since the 1930s. This is not limited to const'l law, as I noted above.

10. Professor Adler argues that the Roberts Court's record of over 5-4 partisan cases—all of which advance Republican and donor interest—represent just a "tiny fraction" of the cases it has heard, and therefore aren't a reliable indicator that it has partisan bias. He points out that the Court "is unanimous in a large share of the cases it hears." How would you respond to that? **I'm sorry but this is silly. The Court decides many cases that do not involve issues of great ideological intensity. That the Justices can agree what the best reading of the law is when (a) not much is at stake; and (b) perhaps the case involves a statute with a pretty clear meaning, says nothing about whether the Justices have a partisan bias on the issues that matter. How can it possible be that the Justices are not influenced by their own ideology when they divide along consistent ideological lines on abortion, affirmative action, campaign finance reform, the death penalty, gun control, Bush v. Gore, free exercise and establishment clause issues, etc., etc.? I suppose one could argue that the differences are methodological, not ideological, but as already noted above, the conservative Justices are not methodologically consistent. They talk about originalism when it suits them and they ignore it when it doesn't.**

11. Professor Adler testified: "It is certainly true that the side favored by a majority of business groups prevails before the Supreme Court more often than not, but this hardly means the Court has embraced a 'pro-business' agenda or that any of the justices consciously seeks to advance a corporate agenda." Do you accept that conclusion? Why or why not? **The best way to predict the Court's rulings on issues that are part of the "corporate agenda" is to see how the Chamber of Commerce thinks about an issue and then see how the Republican Justices rule. Academics have shown this is the most pro-Chamber of Commerce Court since the 1930s. That is true whether the issue is class actions, arbitration, punitive damages, the rights of labor unions, or campaign finance reform. Again, the question of motive is complicated. I doubt that the best way to understand what these Justices think there are doing is "favoring the Chamber of Commerce." But because they came up through the Federalist Society, probably read the editorial page of the Wall Street Journal, and have been feted by think tanks and interest groups funded by billionaire donors like the Koch Brothers, they have a Chamber of Commerce view of the world. They dislike regulation, administration agencies, and national government power. Perhaps they convince themselves that "neutral principles" of law support their decisions, but they are badly mistaken if they do.**

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Questions for the Record
Submitted March 17, 2021

QUESTIONS FROM SENATOR BOOKER

1. The Voting Rights Act of 1965 is often called the crown jewel of the Civil Rights Movement. In 2013, the Supreme Court's decision in *Shelby County v. Holder* gutted the Voting Rights Act's preclearance provision.[1] Then, in 2018, the Court watered down another protection in the Voting Rights Act against intentional racial discrimination.[2] And now the Court is considering a pair of cases that could threaten a critical protection against state voting laws that have a racially discriminatory impact.[3]

   As Justice Ginsburg wrote in her dissent in *Shelby County*, jettisoning voter protections that have succeeded in stopping discrimination "is like throwing away your umbrella in a rainstorm because you are not getting wet."[4]

   a. You wrote recently in the *Harvard Law Review* that "some of the Supreme Court's finest historical moments have involved safeguarding democracy"—such as the Court's decisions in the 1960s on legislative districting, poll taxes, and the constitutionality of the Voting Rights Act.[5] In your assessment, why is the federal judiciary well suited to intervening to preserve our democracy? And how has the Supreme Court failed to live up to that potential more recently? **Many electoral issues raise special concerns of legislators and parties entrenching themselves in power. By intervening on such issues, the Court can protect democracy, whereas its interventions on many other issues—such as abortion or gun control—risk countering the will of majorities. Thus, for example, when the Court invalidated legislative malapportionment in 1964, it protected democracy, which was being corrupted by legislatures' pervasive refusal to reapportion themselves to enable all voters to exercise equal weight with their votes. When the conservative Justices recently refused to intervene against partisan gerrymandering, they failed to play this role. Partisan gerrymandering is a disaster for our democracy, and it is has no good justification. Intervening against it would have saved us from some of our political pathologies, and there were clearly manageable standards that the Republican Justice refused to acknowledge. Today's Republican Justices have also upheld voter suppression, upheld voter purges, and this term are threatening to gut Section 2 of the Voting Rights Act in the redistricting context, after gutting it in the voter suppression context last year. It is hard to describe what is going on as anything but Republican Justices doing the handiwork of the Republican Party, which is voter suppression—because changing demographics have made the GOP a minority party with dwindling support at the polls, necessitating voter suppression, gerrymandering, and other electoral shenanigans to keep it afloat.**

   b. In your view, how does the *Shelby County* decision fit into the broader frame of the Supreme Court's recent rulings on other issues affecting our democracy and the right to vote—from voter ID laws to voter roll purges to partisan gerrymandering? **Yes, Shelby Count guts preclearance. That opens the door to southern states doing**

what GA did in 2021—making it harder to vote absentee, reducing early-voting days, reducing drop boxes, facilitating voter challengers, criminalizing offering food and water to voters in line, ending mobile voting. Each of these restrictions on voting probably disfranchise thousands of would-be voters. Taken together, they easily disfranchise more voters than the margin of difference in the presidential election in GA in 2020.

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[1] 570 U.S. 529 (2013).
[2] *Abbott v. Perez*, 138 S. Ct. 2305 (2018).
[3] *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257 (U.S. 2021); *Ariz. Republican Party v. Democratic Nat'l Comm.*, No. 19-1258 (U.S. 2021).
[4] *Shelby Cty.*, 570 U.S. at 590 (Ginsburg, J., dissenting). *See generally* DEMOCRATIC POL'Y & COMMC'NS COMM., WHAT'S AT STAKE: EQUAL JUSTICE UNDER LAW (2020), https://www.democrats.senate.gov/imo/media/doc/Captured%20Courts%20Equal%20Justice%20report.pdf.
[5] Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 178 (2020), https://harvardlawreview.org/wp-content/uploads/2020/11/134-Harv.-L.-Rev.-1.pdf.

The Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights - Questions for the Record from Senator John Kennedy
March 10, 2021

Hearing entitled: "What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary."

Questions for Professor Klarman

1. In your testimony, you claimed that "today's [Supreme] Court is the most conservative in the last hundred years." In what ways is the Court more "conservative" than it was in 1920? **Today's Court seems determined to eviscerate the power of the modern, federal administrative state. It does this in the conservative majority's apparent interest in reviving the nondelegation doctrine, its enforcement of a novel "Major Questions Doctrine," and in its cutback of federal power under the Commerce Clause, the Spending Power, and Congress's power to enforce Section 5 of the 14th amendment.**

2. Is the scope of federal power to regulate commerce under the Supreme Court's jurisprudence broader or narrower than it was in 1920? **Broader than in 1920 but much narrower than it was in the 1960s. It's also not clear whether it is possible to answer such a question intelligently without taking account of context. The federal government is vastly more powerful in 2022 than it was in 1902. That is for many good reasons—indeed it is true of every national government throughout the world. The right question is probably relative to that massive shift in regulatory authority towards the national level that has occurred throughout the world, where is today's Supreme Court situated? And the answer is that today's conservative majority holds a fairly radical view of the Commerce Power relative to the dominant paradigm in the world today—radically limiting, as in a conservative majority's willingness to invalidate under the Commerce Power the individual mandate in the Affordable Care Act.**

3. Is the permissible scope of governmental power to regulate labor conditions under the Supreme Court's jurisprudence broader or narrower than it was in 1920? **Broader, but again, the question makes little sense out of context. It's like asking whether today's Court is more or less protective of women's rights in 2020 than in 1920. In 1920 the Court had never once protected women under the 14th amendment. So, obviously, today's Court is more protective of women's rights than the 1920 Court. But today's Court, which just overruled a woman's right to abortion, is radically less protective of women than any Supreme Court in the last 50 years. "Most conservative in the last 100 years means most conservative relative to the dominant views of contemporary society"**

4. Is the Supreme Court's Equal Protection jurisprudence more or less protective of racial and ethnic minorities than it was in 1920? **More in some ways, less than in others. The**

1920 Court would never have invalidated school segregation. But it also would not have invalidated minority voting districts or race-based affirmative action, because such concepts would have been entirely alien to that society, so the Justices would not have created any edifice for invalidating such measures. Today's Court is less protective of the interests of African Americans of any sitting since at least 1950.

5. Is the Supreme Court's Equal Protection jurisprudence more or less protective of the rights of women than it was in 1920? **As noted above, more.**

6. Is the Supreme Court's jurisprudence more or less protective of freedom of speech and expression than it was in 1920? **Since the Court had never invalidated a law on free speech grounds before 1931, I would say more.**

7. Is the Supreme Court's jurisprudence on reproductive rights more or less protective of abortion than it was in 1920? **I would say about the same, since Dobbs says that the Constitution does not protect a woman's right to abortion.**

8. Is the Supreme Court's jurisprudence more or less protective of homosexuals than it was in 1920? **More, though the rationale of Justice Alito's opinion in Dobbs, would suggest that it ought to be the same—meaning, zero protection, because this is not a right protected by history and tradition.**

9. Does the Supreme Court's jurisprudence impose greater or fewer limitations on capital punishment than it did in 1920? **More, though I think it is hard to know whether today's six-person conservative majority believes there are any constitutional limits on capital punishment, and since, post-Dobbs, we don't know whether precedent has any binding force on the Court at all. Given the "history and tradition" approach, it's not clear these Justices believe in any const'l limits on capital punishment.**

10. Under the Supreme Court's jurisprudence, it is easier or more difficult for governments to adopt discriminatory policies and impose racial segregation than it was in 1920? **I assume Brown is still good law, though it too fails the "history and tradition" approach, so I would have to say it is harder.**

11. Under the Supreme Court's jurisprudence, is there greater or lesser protection of the rights of criminal defendants than there was in 1920? **Much more.**

12. Under the Supreme Court's jurisprudence, is it easier or more difficult to sue manufacturers for defective products than it was in 1920? **Easier**

13. Under the Supreme Court's jurisprudence, is it easier or more difficult to file a class action than it was in 1920? **Easier**

14. How does the Supreme Court's enforcement of the exclusionary rule compare with that of 1920? **There was an exclusionary rule at the federal level as of 1920 but not at the same level until 1961.**

15. Is the right of a criminal defendant to have legal representation subject to more or less protection than it was in 1920? **Much more.**

    As I've already said, these questions don't strike me as the right way to evaluate whether a Court is the more or less conservative than at a previous point in time. If the Court stays in the same spot while the country becomes vastly more progressive on issues such as race or gender equality, then the Court can fairly be labeled "very conservative." Robert Taft was known as "Mr. Conservative" but I assume he would have repudiated slaveholding or denying married women any property or contract rights. The implicit premise of these questions is that Taft couldn't really be called "conservative" because his views on these questions were more liberal than those of most mid-19th century southern whites.