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Melissa Murray:

This is how the sausage gets made. We've never seen anything like that.

Senator Whitehouse:

Well, we're not making much sausage, it was just yet another McConnell nominee.

Leah Litman:

Oh. Oh God.

Intro:

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

Melissa Murray:

Welcome to a very special episode of Strict Scrutiny. We're your hosts. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

This episode is special for several reasons. One, it is our long anticipated analysis of the keynote remarks given by Strict Scrutiny's favorite justice, Justice Samuel Alito at the Annual Federalist Society convention last month. And so, I have one question about this. Why weren't we invited? Did you get an invitation?

Kate Shaw:

Lost in the mail.

Leah Litman:

I did not. And I think by the end of the episode, it will probably be clear why.

Melissa Murray:

Well, or maybe it's just the USPS is not working at full capacity and we will get our invitations, but it will be in March or April or something. So, keep hope alive ladies, in any event. Leah, do you want to help us introduce our guest for this episode?

Leah Litman:

So, we wanted to add a little diversity to this episode by including a straight, white, cis-man. It's not that we don't want this kind of diversity or haven't tried to achieve it on the podcast, it's just hard because they're not that funny, they're overly emotional, people complain about their voices.

Melissa Murray:

They need to smile more.

Leah Litman:

Right. And they often don't have the kind of general Supreme Court expertise that we expect on the show.

Kate Shaw:

But the people have been clamoring for it, and so we thought it was important to try. So we looked far and wide and we actually found the perfect person to help us dissect Justice Alito's speech. So, welcome to the pod, Senator Sheldon Whitehouse of the great State of Rhode Island.

Senator Whitehouse:

Thank you so much. It's my pleasure to join you.

Leah Litman:

So, one of the reasons why we are so excited to have Senator Whitehouse on this episode is because, as those of you who watch the confirmation hearings for Justice Barrett, or those of you who generally follow the Senate know, Senator Whitehouse is really on the forefront of bringing attention to the moneyed interests that have been fighting, successfully, we should add, for control of the federal courts.

Melissa Murray:

And we mentioned this in our December preview. As I stated there, Senator Whitehouse brought some big whiteboard energy to the Barrett hearing, documenting the network of organizations and interests that have been investing a ton of money into the project of stocking the courts with more conservative voices. And it was his advocacy on this issue that drew the ire of Justice Alito in that Federalist Society keynote speech.

Kate Shaw:

Okay. So, before delving too deeply into the speech, let's set the stage a little bit just with some background. So, what exactly is the Federalist Society? So, it's a conservative legal organization that has been around since 1982, but that in some ways has been at the height of its power in the last four years, at least when it comes to judicial nominations.

Kate Shaw:

So, it has played an out-sized role in selecting judicial nominees for the Trump administration, serving in some ways as a shadow White House Counsel's office. So, leaders of the organization like Leonard Leo have vetted nominees, have compiled lists from which the president then selected nominees to the lower federal courts and to the Supreme Court.

Kate Shaw:

By all accounts, the president and his staff leaned very heavily on Leo's and other Federalist Society leaders recommendations when making their judicial selections, and not surprisingly, many of the

judicial nominees who have been selected via this process. And also members of the executive branch more broadly are themselves devoted members of the Federalist Society.

Kate Shaw:

So, publicly, the organization maintains that it is alternately a debating society or just a loose, broad network that welcomes all-comers. It also insists that it isn't wedded to any particular policy positions but is instead committed to particular methods of interpretation, in particular originalism; the idea that the constitution should be interpreted according to its original meaning, and textualism; the idea that statutes should be interpreted based on the text alone.

Kate Shaw:

And I should say, for folks who were interested in the history of the Federalist Society, there are two terrific books you might pick up on the subject, Steven Teles', *The Rise of the Conservative Legal Movement*, and Amanda Hollis-Brusky's *Ideas with Consequences*.

Leah Litman:

So, Justice Alito gave his own gloss on what the Federalist Society is near the opening of his remarks. He proclaimed that people...

Justice Alito:

May have heard a lot of misinformation about the society. It is not an advocacy group.

Leah Litman:

Justice Alito did acknowledge that most members of the society...

Justice Alito:

Are conservative in the sense that they want to conserve our constitution and the rule of law.

Leah Litman:

In practice, however, the last few years have made even more plain that this isn't the only, or even the most important function of the Federalist Society. And I think that's obvious if you just look at the keynote addresses or feature speakers at recent Federalist Society events.

Melissa Murray:

So last year, Kate and Leah highlighted the remarks of Attorney General Bill Barr and Justice Kavanaugh at the Federalist Society's convention. And Attorney General Barr's remarks, and remember, he is the chief law enforcement officer of the United States. He said this...

Bill Barr:

It is the left that is engaged in the systematic shredding of norms and undermining the rule of law. In any age, the so-called progressives treat politics as a religion. Their holy mission is to use the coercive power of the state to remake man and society in their own image according to an abstract ideal of perfection. They are willing to use any means necessary to gain momentary advantage in achieving their

end regardless of the collateral consequences and the systemic implications. Conservatives on the other hand do not seek an earthly paradise.

Kate Shaw:

You know, look, I think it's hard to dispute, I think as Leah and I said at the time, that this speech was really a partisan rant, right? It was not about methods of interpretation. It was an attack that aimed to delegitimize and in some ways demonize an entire swath of the political and legal community, right? Progressives, Democrats.

Kate Shaw:

And we should say that we know the organization is big enough that not everyone who is affiliated with it should be viewed as co-signing this pretty deranged Bill Barr's speech. But our point is that this is a big part of what the organization does, and celebrating the organization and affiliating yourself with it means you can't totally distance yourself from these parts of it either.

Leah Litman:

And then of course there was Justice Kavanaugh's speech in November, 2019, in which he promised to never forget the people that stood by him after he was accused of attempted sexual assault by Dr. Christine Blasey Ford and sexual assault by Deborah Ramirez. And that too, of course, is a political statement. It's about, I will remember who my friends and enemies are. And it's a scary one coming from one of the nine Supreme Court justices who are appointed for life. That's who and what the Federalist Society chose to feature and that's who and what people were cheering and celebrating when they were tweeting pictures of themselves at the event, which made so many people feel so very uncomfortable.

Melissa Murray:

So, all of that sets the stage for this year's keynote address with Justice Alito. And to be clear, Justice Alito is one of the conservative justices who has actually expressed skepticism about originalism, the method of constitutional interpretation that the Federalist Society favors. And I think it's fair to say after Bostock that he's not necessarily a committed textualist either or breaks company with some of his other conservative colleagues on the meaning and scope of textualism.

Melissa Murray:

So, this is all to say that in many ways, Justice Alito is not always aligned with some of the Federalist Society's core values. And yet he was selected as the organization's keynote speaker for one of their biggest events of the year. And his address gives us some clues about why he was the keynote speaker. Because essentially this address really highlights some of the larger projects that undergird the Federalist Society's activities.

Melissa Murray:

So, Senator Whitehouse, you have been waiting very patiently and we're going to delve into the speech itself, and we're going to seek your insights here. We want to focus on four parts of the speech. Leah, can you break down some of these four parts for us?

Leah Litman:

Sure. So, the first part of the speech we wanted to talk, I think, the most about is how the speech was, in many ways, a broad side attack against the state responses to the coronavirus and judicial responses to the coronavirus. So, Justice Alito proclaimed...

Justice Alito:

The pandemic has resulted in previously unimaginable restrictions on individual liberty.

Leah Litman:

In the course of discussing the pandemic, he criticized the administrative state, disparaged rule by experts and executive fiat. And now here's where the rubber is going to hit the road on how this intersects with the conservative takeover of the courts. Justice Alito's speech expressed the view that the Supreme Court's decision in *Jacobson V. Massachusetts*, which upheld a smallpox vaccination requirement...

Justice Alito:

It did not involve sweeping restrictions imposed across the country for an extended period.

Leah Litman:

Now, in isolation, that statement just seems banal and harmless, but despite Justice Alito's protestations that he was not appointing on any case, that exact criticism and distinction he offered with *Jacobson* would be what Justice Gorsuch wrote in the U.S reports the following week in the case that involved New York's COVID restrictions.

Leah Litman:

Senator Whitehouse, I think this highlights some of what you have been trying to shine a light on about the Federalist Society and the larger conservative network and ecosystem of which it is a part, namely these events and these networks provide opportunities and resources to generate arguments that are going to further the donors and leaders preferences.

Leah Litman:

Could you explain to our listeners a little bit about these networks and how these organizations provide training grounds for young lawyers and ways to experiment with the positions that are going to further these interests?

Senator Whitehouse:

Well, first of all, thank you for having me on. Being on with Professor Litman, and Professor Murray, and Professor Shaw is a little bit frightening. It's a reminder of terrified days in law school.

Melissa Murray:

You are not going to get cold-called, Senator. Don't worry.

Senator Whitehouse:

But I'm glad to be here. And I will do my best to answer these questions. It's tough because this is actually quite a big scheme. You've got the piece of the Federalist Society operation that deals with

supervising and curating judicial nominees. You've got a separate political operation run through Judicial Crisis Network that does all the campaigning and PR stuff. You've got a whole flotilla of front groups that come in and pretend to be separate amicus curiae, but all sing off the same script.

Senator Whitehouse:

All of these groups are funded by the same, very secretive, big funding groups. And those big funding groups also play very hard in political funding. So, you end up with a very toxic mish-mash of dark money funding that pushes political influence in the Congress that controls who gets appointed to our major courts. And that then signals to the judges, whose appointment it has controlled, "Here's what we want you to do in this case."

Senator Whitehouse:

And you can even take it a step further and go back and look at areas that are, I guess you could call them a hot house where the doctrine that produces the results that these donor forces want is confected, and beta-tested, and field-tested and all of that. And then you have these moments where the judges come before their Federalist Society-selected crowd, and go ahead and validate and adopt the doctrines that were cooked up in these hot houses.

Senator Whitehouse:

So, this is no small thing, but if your task is to take over the Supreme Court of the most powerful country in the world, and there are huge stakes just in terms of what can be gained financially through that control, that's cause to which, I think, people are willing to dedicate enormous, enormous effort. And we've only begun to really probe at it.

Leah Litman:

And for listeners who want to see more of this explained and visualized, Senator Whitehouse has a coauthored report, Captured Courts, that documents all of these interests and how those interests essentially have a coordinated campaign that covers, as you were saying, many different issues; the selection of judges, lobbying in Congress, funding of academic research to support their goals. And you can see how all of these different parts work together.

Kate Shaw:

And so much of it happens outside of the transparency regimes that operate totally imperfectly, but to a degree at least when we're talking about the political branches, right? So, when we're talking about campaign finance, dark money is a huge player when we're talking about elections broadly. But there is a lot of money that is subject to disclosure if we're talking about political campaigns and packs. The kind of money that is being spent, or a lot of it, at least, in conjunction with and around judicial nominations, most of it is operating entirely outside of the disclosure regime that applies to, at least, some of the money in the political branches.

Kate Shaw:

So, it is this kind of transparency-free zone. And so too, Senator Whitehouse mentioned Amicus briefs, maybe a little bit later in the hour we'll talk a little bit more about the role of amicus briefs in, well, both these organizations, and funding, and generating, and developing, and refining the ideas that then end up in amicus briefs. And the way then these amicus briefs end up before the Supreme Court has a

lobbying that also operates outside of the disclosure requirements that attach to lobbying if we're talking about the legislature or the executive branch.

Kate Shaw:

So, I think it's important to conceive of it as this multi-site and multi-pronged strategy, but that one important through line is the relative lack, really absence of transparency and disclosure, even compared to other places in our system of politics and governance.

Senator Whitehouse:

Yeah. It's a little bit ironic that the judiciary should be the place where dark money rules with the least restriction or restraint compared to the directly and immediately political world that I live in of election spending and the disclosures that are required in terms of dealing with the executive branch.

Kate Shaw:

Yeah.

Leah Litman:

Right. It inverts exactly what we think the court should be doing. They are supposed to be transparent and giving reasons for their decisions. And we sometimes contrast that with the political branches, but here the funding the transparency is reversed.

Senator Whitehouse:

Yeah.

Kate Shaw:

So, we want to delve deeper into some of those themes. Let's maybe return for a minute to the big themes and substantive themes in Justice Alito's speech. So, he opened with and returned a number of times to criticizing COVID responses. He also used his criticism of COVID responses to insist more broadly that in certain quarters, religious liberty is under attack, that in fact, it is fast becoming a disfavored right. So here he reached beyond COVID pointing to what he described as...

Justice Alito:

The protracted campaign against the little sisters of the poor. The little sisters have been under unrelenting attack for the better part of the decade.

Kate Shaw:

He insisted that they had been targeted by the prior administration. And he pointed to a number of other, again, non-COVID cases, or some non-COVID cases, one challenging a state law that required pharmacists to carry every form of contraception, including morning after pills. He, of course, brought up Masterpiece Cakeshop, which involved the civil rights statute that prohibited discrimination on the basis of sexual orientation.

Kate Shaw:

He brought up a challenge to Nevada's coronavirus restrictions as well as Federal Court decisions blocking enforcement of the rule that women must appear in person to fill out forms in order to obtain medication abortions. And here too, although Justice Alito insisted that they did not reflect his views on particular cases, provided basically a preview of the court's decision in the religious liberty challenge to the New York governor's in-person gathering restrictions just a few weeks later.

Leah Litman:

So, what do we think about Justice Alito's remarks about the coronavirus, and what states' responses to that coronavirus reveal?

Melissa Murray:

Senator Whitehouse, you all are at ground zero for this. You have had events in the Senate where there have been criticisms of those who have not worn masks, there's been a bit of quite public sniping among your colleagues about the question of wearing masks. So, how have these kinds of restrictions impeded your own operations or allowed you to actually have safer operations during this period? And what does Justice Alito statements say more broadly about how these kinds of restrictions might be received by the American public?

Senator Whitehouse:

Well, little by little in the Senate, we've improved our behavior in protecting against contagion, but it took until this week for the majority leader to stop his Republican caucus from meeting in person to eat lunch together. So, it's been obviously a difficult situation, and a number of senators have gotten ill as a result. And what's driving it, I think, is a right wing narrative that is really disassociated from the science of pandemic control.

Senator Whitehouse:

And it's discouraging when you hear that narrative echoed by a Supreme Court justice. And particularly when you put it into the cocktail of being at the Federalist Society and echoing the right wing narrative on the subject and doing so in a tone of grievance, which is the dominant, emotional attitude of the far right. And all of it paid for, we don't know how.

Senator Whitehouse:

So, just in this one little capsule, you have the right wing organization, the Federalist Society, you've got the right wing narrative, you've got the right wing frame of grievance and you've got the right wing dark money all stirred together. And we haven't done a very good job of trying to pick that apart and look into it.

Melissa Murray:

To the point that you're making, this potent cocktail of linking the skepticism of science and the pandemic response with some of these judicial ideologies that have emerged and indeed become even stronger over the last couple of years, that really is, I think, a new shift. And we're seeing it not just in the response to COVID, and perhaps even a broader skepticism of other aspects of government.

Melissa Murray:

So, a couple of terms ago we saw in one particular case, Gundy, an extreme skepticism for bureaucracy and the administrative state. There were a number of voices, including Justice Alito's, on the court that seemed to be quite skeptical of it. And again, this idea that experts in agencies should receive some kind of deference.

Melissa Murray:

I think you can link that skepticism of administrative agencies and expertise in whatever arena to the COVID responses and this idea that there should be skepticism of science around disease control and epidemiology, and then layered onto it is this additional judicial theme of religious freedom, and specifically free exercise.

Senator Whitehouse:

Yeah, the problem here is that most of the skepticism of what they call the administrative state, and it's actually our public agencies and of science and expertise, is the original result of big, special interests wanting to free themselves from the grip of regulation. So, they challenged the agencies, the very validity of the agencies that engage in public safety regulation and protect the public from misbehavior by the regulated entities.

Senator Whitehouse:

And they challenge the validity of the underlying science because this is a battle in which if they've got real experts in the agency who are making decisions based on real facts, real data and real scientific principles, it's hard to battle with that. You'd much rather move to a legislative arena where your dollars and your talking points and the lack of expertise of your audience all militate in your favor.

Senator Whitehouse:

And so, this whole thing got cooked up in order to try to debilitate the power of the regulatory side. But then in the case of COVID, the monster got loose. It got unhinged from that political purpose and now walks free trashing through our pandemic response. That's what happens when you set up this kind of narrative and this kind of nonsense is that at some point it gets away from you. And I think it got away from the big interests who developed it to deprecate regulation.

Melissa Murray:

If you assume that the two aren't necessarily interrelated. So, one way that they might actually be linked as the skepticism of bureaucracy and regulation is about perhaps emboldening a free market economy where business runs unfettered by government regulation.

Melissa Murray:

And the same kind of logic applies to the skepticism of these COVID restrictions, that even in a time of serious public health crisis, we should have an open and free market economy where all businesses are available to all-comers, regardless of the public health risk, which is here, Justice Alito is framing this against the question of free exercise and the idea that certain businesses are being favored and religious institutions are not.

Melissa Murray:

But underlying all of this, I think, and the broader skepticism of the COVID response is an interest in allowing the market to exist unfettered from any kind of restriction. Even those offered in the name of public health.

Senator Whitehouse:

There's also been a thread through the right wing for many, many years of skepticism of science. There have been people who didn't believe in evolution, there have been flat-earthers, literally. There have been people who are anti-vaccine folks. And there are people who don't believe in a variety of other science things.

Senator Whitehouse:

But that tended to be extremists, fringe groups, people with their heads covered in tinfoil in their mother's basement. And what changed is the big, regulated industries deciding that they could take that fringe set of theories and power it up with a lot of money behind it and expand it, setting up these phony front groups and creating a whole apparatus of science denial, primarily around health and pollution issues, climate denial, and so forth.

Senator Whitehouse:

So, they took what was a very minor, latent strain in the right wing. They fed it and developed apparatus and infrastructure for it and brought it to life at an industrial scale. And then, in my view, the narrative and the ideology jumped the tracks and went wandering off into pandemic response when it was really designed just to attack the so-called administrative state to free up big industries from consequences for their misbehavior.

Kate Shaw:

I think that you're right to point to this kind of newly expansive and emboldened anti-science wing of the conservative movement and conservative maybe even legal movement. And you mentioned climate. That of course, to me, is the next big existential question is, how these doctrines that Melissa alluded to that have been... I think it's true that some of the anti-science views have made this migration from the fringe more to the center and have dovetailed with some of these business-promoted anti-administrativist views that just seek to constrain the power of administrative agencies simply because it's costly to comply with regulations that keep the air and the water clean and cars safe and vaccines safe, and all these things that have really significant, but sometimes difficult to quantify or longer term benefits.

Kate Shaw:

But in a moment in which, so we are going to, at some point, and hopefully the coming months be beyond the apex of this crisis. And then we'll be moving into a moment in which, if Congress can't act on some of these really pressing questions in particular climate and agencies are the only ones that can, will they have been so disempowered or will they be in the process of being so disempowered by Supreme Court doctrine that they can't act either?

Senator Whitehouse:

Yeah, that's the danger and you see the court steering towards it with doctrines like unitary executive, which were cooked up for Ed Meese and have been incubated in right wing think tanks and were

viewed, I think, almost without exception as extremist, almost nutty fringe theories. But through persistence and pounding away by groups like the Federalist Society, they've managed to creep their way into the narrative now and we had to face that narrative in the consumer financial decision.

Senator Whitehouse:

And they continue to talk about that as if it's a legitimate theory when in fact, what it really means is you're safe from regulation because you can take a run to the political side and get free of, through the unitary executive by appeal directly to the president, get out from under the independence of a regulatory agency that actually has expertise and is telling you what to do. It's an off-ramp from the rigor of administrative regulation back into the politics of a president who you may have paid good money to elect.

Kate Shaw:

Completely. We've talked some about, there's this passage in the chief justice's opinion in the Seila Law case that strikes down that piece of the Consumer Financial Protection Bureau in which he basically says, "Yeah, our constitution is one in which there's not supposed to be too much power, checks and balances are part of the key design feature, but there's one exception. That's the president, in whom all of Article Two's power resides." But that's okay because he's subject to the ultimate check, which is, standing for election, right?

Kate Shaw:

But it's a little rich to take that and then pair it with one political coalition that doesn't actually seem interested in protecting the integrity of a presidential election, because then there are no checks at all.

Senator Whitehouse:

And by the way, the administrative power is about as heavily checked as any power in government. So, if your concern is with unchecked power, there's judicial review of agency decisions, they're heavily constrained by procedural requirements to keep them within the rails and to keep politics out. They're subject to congressional oversight review and repeal at a moment's notice.

Senator Whitehouse:

And the president can also jump in and affect them, at least in a general way, with appointments to agencies and with the OMB approval process. So, when something has run through all of those obstacles and comes out as a solid, scientifically and factually-supported, economically justified and needed proposition to protect the public, if you're looking at things to get excited about in terms of misdeeds in government, you've really gone to a very benign corner of government to look for misdeeds. Particularly when you're looking at this massive, dark money apparatus creeping its way into government and so many other areas.

Leah Litman:

Yeah. I mean, it's because of those procedural constraints that the Trump administration has lost so many cases in court under the Administrative Procedure Act, because there are so many procedural and substantive constraints on what agencies can do, unlike constraints on the presidency itself.

Senator Whitehouse:

Yeah. If it weren't for the time lost on, say, climate change where every year that goes by is another step towards catastrophe, it would actually be funny to watch their floundering and bumbling in the way the courts have blown them up. It was kind of a preview or precursor to the way all this election litigation has blown up in the faces of the "lawyers" who have been presenting it.

Melissa Murray:

Well, some of these themes though have found some sucker at some parts of the judiciary. So, as Leah alluded to earlier in the episode, this speech by Justice Alito actually presaged some decisions by the court, namely the court's invalidation of New York's executive order restricting in-person gatherings. We've also seen in Michigan, the state Supreme Court struck down restrictions on the ground that the governor had too much authority to set rules under emergency statute.

Melissa Murray:

So, this skepticism, although it is not necessarily welcomed in some parts of the judiciary, has migrated to be accepted in other parts. And so, one of the things that we're thinking about is, as we are moving forward toward a new presidential administration, we are at least for the moment in a period of divided government where the Democrats hold the presidency and the house, but the Senate remains occupied by the GOP.

Melissa Murray:

So, if that's the case and that persists and the Democrats don't take the Senate, what are the opportunities, in your view, going forward to really try and stanch the flow of some of these developments and maybe turn the title a little?

Senator Whitehouse:

I think a lot will depend on whether the Biden administration and democratic controlled house choose to let the big, dark money apparatus that has engaged itself so much in these judicial issues and is also all over the climate denial operation, lets it operate unfettered and unhindered against us. And doesn't ask basic questions for the benefit of the public about who is funding this stuff and who is behind it, and call out the organization of it.

Senator Whitehouse:

There's a heroic group of professors and scientists who, particularly in the climate denial space, have been studying the apparatus that propagates climate denial for decades now. And they've published exhaustive peer reviewed studies. There's a real body of knowledge out there about this. And we have just been too indolent to pick up that body of knowledge and bring it to the public in an effective and meaningful way to show what we're up against.

Senator Whitehouse:

But I think if people understand that this is part of a scheme and that there's somebody behind it and that whoever is behind it is hiding who they are, that's the kind of question that the public often takes an interest in. But if we don't raise that issue, then they will feel no hesitation about continuing to go forward. They're very confident that we usually are, let's just say, not particularly strong adversaries, they have a lot of confidence that if they get into a quarrel with Democrats, we can be bellied around the bar and walked out the door.

Melissa Murray:

I'm sensing that you disagree with this. You can make that clear here. You're going to bring the fight to them?

Senator Whitehouse:

I think we absolutely have to. I think it's an essential public service in a democracy for the citizens to understand who is doing what in the political sphere. And when people come to that political sphere masked and with millions of dollars in their pockets, that's a really obvious signal that you should go and try to figure out who they are. And if you don't do that, I don't think that's being friendly, I don't think that's being bipartisan, I think that's doing a real disservice to the American people and to the democracy that needs to know what's going on to exercise its citizenship responsibilities.

Kate Shaw:

And it strikes me that what you're describing in terms of bringing to the public's attention these dynamics can all be achieved without legislation, even if the Senate does the GOP control. So how's oversight, investigative reporting, public communication and dissemination? It does seem as though these are things that are achievable, but they take money too, right? So, are there people on the left willing to fund these projects in the same way?

Senator Whitehouse:

Well, we're going to have to get around to it, but when we try to figure out what blew up the challenger, there was a presidential committee that was put together and very publicly looked at that. Why not have one that looks at what blew up climate change in January of 2010 when it was a bipartisan issue until that moment? The Department of Justice won a civil lawsuit showing that the tobacco industry's enterprise to deny the harms of its product was a fraud. And got a court order demanding that they cease and desist.

Senator Whitehouse:

Why not take that proven, winning, civil strategy and see if it can be applied to the climate denial operation, which not only tracks the methodology of the tobacco operation but picked up some of the very organizations and people who were the proponents of it. I mean, think about it. You're all incredibly successful academic folks. Is there some place, an arena of academic expertise in which what you know about is that tobacco really isn't bad for you and that climate change really isn't real? When those are the two things that you're propagating, there's no overlay between them except a propensity to lie.

Melissa Murray:

And so, this underscores, I think, another aspect of the dark money organizations is that there is a discrediting, not only of science, but just expertise more generally. Because as you say, I don't think there's any quarter of the academy that would suggest that tobacco is not harmful or that climate change will not in time have deleterious consequences on the planet. But we are often under siege in the anti-intellectualism, where the academy itself is held up as evidence of this bi-coastal elite community that disdains ordinary people and the working class.

Melissa Murray:

And there is an association of this kind of knowledge and these views with a snowflake liberalism that is intolerable to some quarters. And so, I think there's just a widespread discrediting not just of scientific expertise, but any kind of expertise.

Senator Whitehouse:

Yeah. And we haven't done a very good job of pushing back. If we're going to take this on, obviously the focus should be on academics and scientists from universities that have the name of the state in their name, and not just prestigious, coastal, private universities.

Senator Whitehouse:

There's a way to bring this up in a way that makes the Georgia Tech fans understand from their scientists that their coasts are about to be flooded in really appalling ways if we don't get ahead of climate change and Savannah is going to end up, you got to walk around in rubber boots type place, and property values are going to crash, and it's going to be hard to get insurance and mortgages and all those things are going to happen.

Senator Whitehouse:

And if that's coming from Yale, then that's not much help along the Georgia coast, but it's coming from Georgia Tech. That's a different thing. If it's coming from the University of Georgia bulldogs in their station out on Sapelo Island, yeah, that's a different thing. But we aren't either organized to defend against their misleading behavior nor very effective about trying to offset the advantages that lies have over science.

Leah Litman:

We should turn to the University of Michigan, the true font of expertise.

Melissa Murray:

I was going to say-

Senator Whitehouse:

There you go.

Melissa Murray:

... the University of Virginia.

Senator Whitehouse:

Universities with the name of the state should be the source for most things when we're up against this creepy apparatus.

Kate Shaw:

That's a great point. It really is.

Leah Litman:

So one other point that has come up is the possible ethics of Justice Alito expressing these views in a public speech, especially while the court had some coronavirus cases before it. And on some level, none of what he said was surprising for people who follow the court. They know Justice Alito-

Senator Whitehouse:

Which is its own remarkable fact.

Leah Litman:

Exactly. They know Justice Alito's views. This was like the greatest hits of his crazy one-liners that are often in Supreme Court opinions.

Senator Whitehouse:

Yeah. I mean, it's the same, like Fed Soc., right wing narrative, grievance emotion, dark money all around it mess that we talked about. It also catches on a tradition of Justice Alito's of doing a lot of signaling of what laws he'd like to change. So that these groups that are funded by dark money that create a plaintiff of convenience and rush a case up to the court know that they have a waiting audience eager to rule their way.

Senator Whitehouse:

Certainly he gave that signal about COVID cases. He was legendary for giving that signal about labor union funding in the Friedrichs and Janus saga, which went over, I want to say, a series of five Supreme Court cases from when he first signaled that he wanted to overturn the existing law to finally Janice at the end of the day, when they were able to do the deed.

Senator Whitehouse:

You're all very good lawyers. How often do you see a dark money funded litigation group involved in real lawyering, just to begin with? And in the Friedrichs case, which teed up Janus. You had these groups, once they had the Alito signal, rush right into court and start at the district court and say, "Your honor, I'd like to lose as quickly as possible." I have literally never seen that done in a lifetime of litigation.

Senator Whitehouse:

And then they went up to the Circuit Court and they said it again, "Your honor, we'd like to lose and as quickly as possible." Nobody real does that. Everybody wants to bring a winning record up to the Supreme Court. It's only if you actually believe that you have an invitation from the Supreme Court to change a law, that you would go through that. So, their own behavior in that case really is telling about what's going on at the court.

Senator Whitehouse:

And this speech was an exercise and an awful lot of signaling. And as somebody who's involved with courts a lot, let me just say, the idea that religious rights are disfavored, I mean, it's an eye roll. I'll tell you what's disfavored in this court. If you want to find a constitutional right that's disfavored, look at the Seventh Amendment. Look at the civil jury.

Senator Whitehouse:

This is a court that is on a crusade to whittle the civil jury down to a tiny little nub and completely inconsistent with the role of the jury at the time of the founding fathers with its status in the declaration of independence, with its role in Blackstone's commentaries, which were the secular Bible of the legal profession at the time. It just makes no sense at all that they would be attacking the civil jury, except for the fact that juries are what big corporations hate the most because they can't fix them.

Senator Whitehouse:

And if you try it's a crime. So, yeah, I love hearing them talk about disfavored rights when they're out so busily disfavoring Seventh Amendment rights. And if anybody thinks that religious rights and Second Amendment rights are being disfavored by this court, good luck with that argument.

Kate Shaw:

Yeah. Maybe let's pivot to the Second Amendment, because that was, we thought a really striking moment in the speech. So, Justice Alito, I don't think said in this speech, but has certainly joined Justice Thomas and Justice Gorsuch in suggesting that the Second Amendment is being treated as a second class right by the current Supreme Court, although they may think and they may be correct in thinking that with the addition of a new justice that that dynamic will soon change.

Kate Shaw:

But the striking moment, or one of the big moments in the speech for us was Justice Alito's invocation of the amicus brief that you filed with Senator Hirono, and Blumenthal, and Durbin and Gillibrand in the New York gun case NYSRPA that we've talked about actually quite a bit on the show.

Kate Shaw:

So that involved a challenge to New York City gun regulation that the city then repealed and the state prohibited the city from re-enacting while the case was pending in the courts. And your amicus brief, right? Just for our listeners, urged the court not to decide the issue, right? The issue involved a law that was no longer on the books. The case was clearly moot, and your brief, I think, underscored that he would highlight the illegitimacy of the court as an institution for it to reach out and decide this case involving a non-existent statute.

Kate Shaw:

And the brief did go into some of the moneyed interests that have been working for decades toward conservative take over and control of the courts. Let's play some sound from the speech here.

Justice Alito:

Five United States senators who filed a brief in support of the city went further. They wrote that the Supreme Court is a sick institution and that if the court did not mend its ways well, it might have to be "restructured". After receiving this warning, the court did exactly what the city and the senators wanted. It held that the case was moot and it said nothing about the second amendment. Three of us protested, but to no avail.

Justice Alito:

Now, let me be clear again, I'm not suggesting that the court's decision was influenced by the senator's threat, but I am concerned that the outcome might be viewed that way by the senators and others with

thoughts of bullying the court. This little episode, I'm afraid, may provide a foretaste of what the Supreme Court will face in the future. And therefore, I don't think it can simply be brushed aside.

Justice Alito:

The senator's brief was extraordinary. I could say something about standards of professional conduct, but the brief involved something even more important. It wasn't a front to the constitution and the rule of law, that sort of thing has often happened in countries governed by power, not law. The Supreme Court justice from one such place recounted what happened when his court was considering a case that was very important to those in power. He looked out the window and saw a tank pull up and point its gun toward the court. Message was clear, decide the right way, or the courthouse might be, shall we say, restructured. That was a crude threat, but all threats and inducements are intolerable.

Kate Shaw:

So, maybe before we give our thoughts on Justice Alito's characterization, would welcome your reaction to seeing your brief called out like that. It clearly touched a nerve.

Senator Whitehouse:

Yeah. Well, they're amazingly thin skinned. They love to play in politics from behind their robes. Very often in very uninformed fashion. The recent decision about the New York restrictions on churches and synagogues to protect against the pandemic has been described as scientifically illiterate. I'm not a scientist, but I can for sure tell you that Citizens United was politically illiterate.

Senator Whitehouse:

And I think anybody who knows anything about race issues in this country knows that the Shelby County decision that tore a big hunk out of the Voting Rights Act was socially illiterate, just simply wrong. So, they go out there, they make up facts, which is, we all know appellate courts should not be doing, and they deliver their narrative and they mess in politics. But then if you call them out for doing it, they freak out.

Senator Whitehouse:

Well, the answer is, don't play in politics, don't draw illiterate conclusions in areas where you don't know what you're talking about, and don't create a record where every time you do that, it ends up being a victory for big right-wing donors. I mean, the record of 80 now, of these decisions is pretty hard to argue around and being thin skinned and grumpy about it is not, I think, a sensible way of proceeding.

Senator Whitehouse:

It also misrepresented the brief. There's been a lot of right wing faux outrage out of the right wing echo chamber about the brief. And they overlooked the fact that in the key sentence that everybody gets excited about, I'm actually quoting a poll. It's not my language. It is a poll's language. And if you're a Supreme Court justice, you're supposed to be pretty scrupulous about properly analyzing things and knowing where quotations end and begin.

Senator Whitehouse:

So, once again, given the chance to look at this brief in the context of a fake right wing narrative or for what it really was, Alito made the choice to go with the fake right wing narrative. So, again, it seems like it's a signal that things ain't right there.

Melissa Murray:

It's also not the case that your brief was the only brief filed by a group of senators in a pending Supreme Court case during the last term. So, I recall quite-

Senator Whitehouse:

Oh, no, it happens all the time.

Melissa Murray:

Yes, and over really controversial issues as well. Like there was a GOP congressperson's brief in the June Medical Services case, for example, and lots of groups-

Leah Litman:

Senator Hawley filed an Amicus brief asking the court to revisit part of Casey in that decision.

Senator Whitehouse:

Yeah.

Kate Shaw:

Heller itself, 55 senators filed a brief in Heller. Alito was not bothered by that. No, I mean, it's extremely selective outrage, which is always the case.

Senator Whitehouse:

Well, faux outrage is a technique of this right wing machine. And if you've been the subject of the faux outrage machine a couple of times, you actually begin to learn how the mechanism plays out, where it comes through. It has a duration, it has a tone, you can tell right away that it's happening because they say things that aren't true.

Senator Whitehouse:

When a whole bunch of people are saying the same thing that isn't true, there's a pretty good sign that they're doing it in a coordinated fashion. If everybody's saying the sky is blue out there, it's hard to deduce much from that. But if everybody's saying the sky is a really interesting shade of ochre, that interesting shade of ochre becomes a clue that there's a commonality here.

Kate Shaw:

It's true. There is a lifecycle of these manufactured outrage cycles. But I thought it was interesting that he's still thinking about your brief in NYSRPA. There's a lot of things that he-

Melissa Murray:

You are living rent-free in his head right now. You have a holiday home in his head.

Senator Whitehouse:

Well, I'm going to continue to live rent-free in his head because my practice as a lawyer and when I was attorney general and U.S. Attorney, the work that I could get away with doing was appellate work, because it didn't take you away from your regular responsibilities for a long period of time. I've argued in the Supreme Court, I've argued in Circuit Courts, I've argued in our State Supreme Court over and over again.

Senator Whitehouse:

If I know anything about the law, I know a little bit about appellate law, and it is incredibly apparent that this court is often a terrible track. Whether you're looking at the pattern of 85 to 4 partisan decisions, whether you're looking at its indulgence and appellate fact-finding, which is absolutely wrong, whether you're looking at its selective enforcement of its originalism, minimalism, textualism, and other supposedly conservative doctrines over and over and over again.

Senator Whitehouse:

And that's before you even look at the overlay around it of dark money influence on it in the selection and the campaigning and the amicus curiae that argue to the judges. This is not a healthy or good situation at all. And I think the court urgently needs to defend itself. And if I'm a little kid who has to say the emperor has no clothes, so be it.

Melissa Murray:

To that point, it is odd but perhaps not surprising that you are living rent-free in his head because he actually did not prevail in that particular case. The issue was found to be moot. They never reached the merits of that case, even though it was clear that there were some members of the court who were itching to do so. So, he did not win on that point.

Melissa Murray:

But he has won on so many other things. So there is a 6-3 Conservative Super Majority on the court right now. The lower Federal Courts have been utterly transformed by the Trump administration. By all accounts, the Federalist Society and the vision of the federal judiciary that they have in mind is ascendant. So, why is Justice Alito such a sore winner? Why can't he win with grace?

Senator Whitehouse:

Well, grievance is the emotional tone of the movement. So, I think it's hard to abandon that even when you're winning. It's their emotional baseline. You all as law professors know very well the difference between a sword and a shield, and when a doctrine is used to protect someone or when a doctrine is used to attack someone. The grievance idea figures into this because they take the religious idea and they say, "Well, you need to be free as a matter of religious freedom to discriminate against that gay couple and not sell them a cake."

Senator Whitehouse:

And the grievance is that you are being constrained in your religious beliefs. But I think anybody objectively looking at that would say your religious views now aren't just your religious views. Nobody's saying what you can believe or not believe, but they're telling you that if you're going to open a business in the United States of America, you can't tell somebody who's gay, "Don't shop in my store."

Senator Whitehouse:

That's now being used as a sword. That is now stopping a fellow citizen from coming in and using your services because of who they are. And it's hard to justify that unless you've wrapped it all in the cloak of grievance. So, I need to go down and vote, but I'm literally upstairs from the voting chamber. I can be back here in four minutes, so let's give that a try.

Leah Litman:

Okay. Oh.

Melissa Murray:

Oh, okay. Yeah, we'll wait.

Leah Litman:

Okay. So, we've never had an episode with a vote in the middle. So this is a new thing for us.

Kate Shaw:

This is exciting.

Leah Litman:

This is exciting.

Kate Shaw:

Oh, wow. That was so efficient.

Melissa Murray:

This is how the sausage gets made. We've never seen anything like this.

Senator Whitehouse:

Well, we're not making much sausage, it was just yet another McConnell nominee.

Leah Litman:

Oh, God.

Leah Litman:

Oh.

Melissa Murray:

So, Senator Whitehouse, you just mentioned the sense that the right and Justice Alito's speech suggests this really feels aggrieved right now that, especially in the area of religion where they believe that the free expression of religious beliefs is under attack. Another place where I think they also feel similarly embattled is in the area of free speech. And it's not unrelated to the question of religion, but Justice Alito in this speech was especially critical of a proposed rule that would prevent federal judges from

having affiliations with particular groups, including the Federalist Society. So, here's a portion of that part of the speech.

Justice Alito:

I'll have more to say about freedom of speech later. But at this point, I want to express appreciation to the many judges and lawyers who stood up to an attempt to hobble the debate that the Federalist Society fosters. The move was a foot to bar federal judges from membership in the society. And if that had succeeded, the next logical step would have been to forbid them from speaking at law school events and other events sponsored by the society.

Justice Alito:

Four court of appeals judges, Amul Thapar, Andy Oldham, Bill Pryor, and Greg Katsas prepared a letter that devastated the arguments of those who wanted to ban membership. The letter was signed by more than 200 judges, including judges appointed by every president going back to President Ford. And at least for now the proposal is on hold. We should all express our thanks to these defenders of free speech.

Melissa Murray:

So, I thought this was incredibly striking, in large part because he is relating membership in the Federalist Society with a prohibition on speech. And of course, this question of free speech and whether one can freely express one's ideas has become such a major part of the court's jurisprudence over the past couple of years. So, could you comment on this? What did you think when you heard this aspect of the speech?

Senator Whitehouse:

Well, I was involved in that battle. In fact, I've been publicly accused of being behind the scheme to put the rule forward because a Rhode Island judge was part of the panel that did it, and they presume conspiracy wherever they go. In fact, that's complete nonsense. But I did write a memorandum to the committee explaining why they should not have judges be members of these political organizations.

Senator Whitehouse:

And I think it's pretty obvious because once you've decided to be a judge, you give up a lot of First Amendment rights. That doesn't mean the First Amendment right has gone away, it means that you have waived it as part of your higher duty to be a fair and dispassionate judge and not to create in the people coming before you the premonition that you're going to vote against them because of your political views.

Senator Whitehouse:

And so, I think it was very, very reasonable, they should do it. It's a little bit stunning that with, I think, virtually every member of the Republican Senate writing a letter into the same group saying, "Don't you dare touch this rule." It's just another bad sign of where the judiciary is going and how they're tolerating more and more political interference. You had judges writing in, who are Federalist Society-supported judges, saying, "Oh, no, we got to still stay members of the Federalist Society."

Senator Whitehouse:

The scariest thing in all of it for me was, in the course of this general discussion, I had a conversation with a Circuit Court of Appeals judge who said that he has noticed among his colleagues a behavior that he calls auditioning. Auditioning. He sees decisions written by his Circuit Court colleagues in which they are doing things and saying things that he as a colleague sees as them auditioning for advancement in the courts. Which of course raises two really awkward questions.

Senator Whitehouse:

One, auditioning to whom? Obviously, if there is a dark money scheme to control who gets elevated and who gets put on the Supreme Court, that's to whom you are auditioning. And the second thing is, what if you're a party in that case? You're entitled as a party to have a judge whose job it is that day to decide your case and your case alone. And not to use your case as an opportunity to audition for advancement to another court, whether it's a district court judge auditioning for a Circuit Court seat or a Circuit Court judge auditioning for the Supreme Court.

Senator Whitehouse:

So, this whole thing has really gotten pretty toxic, I think, and Federalist Society membership is just a small signal of how the politicization of the courts has proceeded. But my God, auditioning.

Melissa Murray:

This was one of the points of grievance that he repeatedly raised throughout this. And he noted the appeals courts judges who had organized a letter opposing this particular rule.

Senator Whitehouse:

Just look at the power inversion in that sense of grievance, right? Law professors, for Pete's sake, are being held out as a powerful threat against people who wear the robes of the nation's judiciary, who have the ability to meddle in politics without accountability from behind the bench and who, even if they're not meddling in politics are the senior lawmakers on the appellate bench of the United States of America. The idea that that group of people is the aggrieved, injured and weak party versus a bunch of law school professors, it just doesn't stand up to rational scrutiny.

Kate Shaw:

I mean, I wish you were right that we were as powerful as he seems to suggest.

Senator Whitehouse:

I know.

Kate Shaw:

But we're not.

Senator Whitehouse:

There's a reason a lot more people go from law school positions to the bench, then go from the bench to law school positions. And the idea that somehow it's the judges who are the victims in all of that, it just shows the propensity for grievance, even at the cost of fact.

Melissa Murray:

I think the reason why law professors are targeted in that particular litany is because there is some sense that we train the next generation of lawyers and that we are inculcating in them this liberal orthodoxy, which yeah-

Senator Whitehouse:

Well, you did a lousy job with a bunch of these folks if that's so.

Kate Shaw:

Got to up our game ladies.

Melissa Murray:

It is worth noting that the Federalist Society is very active and has active law student chapters across the country. And I think most law professors, whether liberal, moderate, or conservative try very hard to be even handed in the classroom if for no other reason than we are charged with making sure our students are equipped to argue both sides of an issue, which you may have to do as a lawyer.

Melissa Murray:

You may not always find yourself on the side with what you have the most affinity. So again, the sense of grievance, I think, is particularly acute, and maybe outsize relative to what the other interests are doing.

Senator Whitehouse:

Can I give you a preview of coming attractions?

Leah Litman:

Uh-oh.

Senator Whitehouse:

I believe that the court is being marched toward a decision that big, dark money spending by millionaires and billionaires is a First Amendment right of expression protected by the constitution. That the one vote for dark money in Citizens United is going to be expanded by the three new members making it four. And Alito flipping to make it five, to create a constitutional right, if you're a millionaire or a billionaire, to spend unlimited amounts of money in politics without disclosing who you are, totally reversing the majority in Citizens United that said it was essential to the hygiene and transparency and integrity of government that people know what's going on. I'm seeing that already begin to be pled in objections to questions that I ask as a Senator. They just had a big chance in the Lieu V. FEC case to clean up a lot of the Citizens United mess. And they walked away from that opportunity.

Senator Whitehouse:

And they've got a California case that they've been just ticking over, ticking over, ticking over and holding in the court, perhaps waiting for Justice Barrett to arrive which will raise the question of dark money and anonymity. And they've got a whole theory cooked up about how the Alabama NAACP case, in which the membership list of the Alabama NAACP in a time of lynchings, and cross burnings, and church bombings was held to be something that the state couldn't grab and disclose to the racists. That is going to be used as a precedent to say these poor, beleaguered billionaires are going to be forced to

be accountable for their views and their manipulation. And if they get left out of a cocktail party, that's something that is just such a terrible tragedy. We need to change the constitution to protect them.

Senator Whitehouse:

So, if you want to take grievance to its lunatic extreme, then exercising your emotion of grievance on behalf of a handful of manipulating billionaires running a massive dark money scheme, that's going to be the great achievement. But they are marching that way, and unless we head this off and put a spotlight on it, I think that that's where they will go. It's not for nothing that these big, powerful groups are already pleading that. They wouldn't be pleading that if there weren't a plan to make that the law.

Kate Shaw:

And I think it's right that this multi-pronged strategy that you described at the outset has been playing out since soon after Citizens United with respect to this anonymity right issue, right? So, for folks who don't know, Citizens United is actually 8-1 on the question of the constitutionality of the disclosure requirements. Thomas is the only person who writes separately to say these two are, I can't remember if he said actually unconstitutional or constitutionally problematic.

Kate Shaw:

But everybody else joins this very strong language, upholding them and indeed describing them as essential. But of course, they're paired with a substantive limitation. So the court is going to, I think, probably even in Citizens United, even that court might have, I think, looked differently at the disclosure requirements. If it had been looking at them in a standalone way, it was able to say, "Oh, these are fine," in part to justify what it did with respect to the substantive limitations in Citizens United.

Kate Shaw:

And here we are a decade later. And I think the groundwork has been laid using this late 1950s NAACP V. Alabama case using, I hear, constantly invoked the argument that, well, the Federalist papers were written synonymously. And that that too is important historical support for a First Amendment or a constitutionally grounded right to speak in the political sphere with anonymity.

Kate Shaw:

And I totally share your fear that this groundwork has been well laid already. And there's a very real chance the Supreme Court buys this kind of argument. And the groundwork on a countervailing side of these constitutional arguments, that there is a constitutional interest on the part of citizens and voters in knowing where this money is coming from is a weighty constitutional interest too. Right? We have to build out the architecture of the constitutional interests at stake on the other side of the balance. And I don't think it's happening.

Senator Whitehouse:

When the court that dark money built rules to protect dark money as a constitutional matter, that will be a grim day.

Leah Litman:

And we see the auditioning phenomenon happening already along this dimension. So, one of president Trump's nominees, Judge Jim Ho, on the fifth circuit wrote a separate opinion in which he floated the

suggestion that maybe you even have a First Amendment right to buy off regulation and essentially engage in a quid pro quo with government officials.

Leah Litman:

And so again, it is this multi-pronged strategy where you have these interests saying, "Okay. Well, let's fund academic research and think tanks and run conferences in order to lay the groundwork for this theory that you have a constitutional right to dark money. Then let's identify the people that would say you have a constitutional right to dark money and elevate them up this hierarchy and promote them.

Leah Litman:

And the combination of all of these things, and then paying organizations that are going to do these Amicus briefs is going to create the circumstances in which this could actually happen.

Melissa Murray:

Senator Whitehouse, over the course of the podcast, you have sketched a series of developments that have important repercussions for the federal judiciary. What do we do going forward though, if we want it to counteract or even reverse these developments?

Senator Whitehouse:

I think the first thing we need to do is to have the public understand what took place. And that means find out more about who paid to have a seat at the table as the group within the Federalist Society was selecting judges? Who wrote a \$17 million check to provide the funding for the political campaign for Judge Kavanaugh during his nomination process? And was it the same person who paid another \$17 million in the Garland to Gorsuch switch and another \$15 million in the Barrett nomination? If at all it's the same person, somebody paid \$50 million to influence the makeup of the United States Supreme Court, and because we don't know who they are, we don't know what business they had before the court. And that ought to be untenable no matter what your politics.

Kate Shaw:

Are there specific reforms to the way the Supreme Court accepts Amicus briefs that we should also be thinking about?

Senator Whitehouse:

Yeah. Amicus briefs have exploded in number and the dependence of the court on Amicus briefs has exploded. And the rule that requires you disclose who you're really writing the brief for is very poorly enforced. It basically requires you to disclose who paid for the printing and publication of the brief, which is a multi-thousand dollar expense. But if somebody has given you a \$5 million contribution to go in and file a brief, and you've paid for the publication of the brief out-of-pocket you then don't disclose it.

Senator Whitehouse:

So in the CFPB case, we discovered that 11 of the groups that had filed Amicus briefs were all funded by Donors Trust, which is a big right wing identity laundering operation. And eight of them were funded by The Bradley Foundation, a big right wing political advocacy foundation. And none of them had disclosed

their common funding, which I think is a disservice to the other parties, it's a disservice to the court and a disservice to the public.

Senator Whitehouse:

So, I've asked the court on several occasions to try to clean up its act and ask who's really there. We know how to write a rule like that. And it would be quite easy to do. And it, to me, is telling that the Supreme Court has been the one unwilling to clean this particular problem in its own rules up so that the public knows who's behind the scheme.

Leah Litman:

So, in closing, follow the money, look carefully at the briefs. Those are the good places to leave this. Senator Sheldon Whiteboard Whitehouse, thanks so much for joining us and for all of your work on the courts. It's a real bright spot in our listeners to have a democratic Senator so focused on the courts and so attuned to what is happening to them.

Senator Whitehouse:

Thank you to all three professors who are less terrifying than I feared.

Leah Litman:

We're going to play that for our students. Thanks to our producer, Melody Rowell. Thanks to Eddie Cooper for making our music. Thanks to all of you for listening to the podcast. If you'd like to support the podcast, you can sign up at glow.fm/strictscrutiny. And the biggest of thanks to Senator Sheldon Whiteboard Whitehouse and all of the staff that made this show possible.

Leah Litman:

And a little thanks to our boy, Sam, for making clear that we and Senator Whitehouse are Cassandras destined to know the truth about the Supreme Court and not to be polluted, and for giving us this content and occasion to talk to Senator Whitehouse.