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A Podcast of One's Own

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A PODCAST OF ONE'S OWN

*Leah M. Litman, Melissa Murray & Katherine Shaw**

ABSTRACT

In this short Essay, we discuss the lack of racial and gender diversity on and around the Supreme Court. As we note, the ranks of the Court's Justices and its clerks historically have been dominated by white men. But this homogeneity is not limited to the Court's members or its clerks. As we explain, much of the Court's broader ecosystem suffers from this same lack of diversity. The advocates who argue before the Court are primarily white men; the experts cited in the Court's opinions, as well as the experts on whom Court commentators rely in interpreting those opinions, are often white men; and the commentators who translate the Court's work for the public are also largely white men. We suggest this lack of diversity has consequences both for the Court's work and for the public's understanding of the Court. We also identify some of the factors that contribute to the lack of diversity in the Court's ecosystem, including unduly narrow conceptions of expertise and a rigid insistence on particular notions of neutrality. We also note and discuss our own modest efforts to disrupt these dynamics with Strict Scrutiny, our podcast about the Supreme Court and the legal culture that surrounds it. To be sure, a podcast, by itself, will not dismantle the institutional factors that we have identified in this Essay. Nevertheless, we maintain that our efforts to use the podcast as a platform for surfacing these institutional dynamics, while simultaneously cultivating a more diverse cadre of Supreme Court experts and commentators, is a step in the right direction.

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INTRODUCTION

The February 2019 State of the Union featured an arresting visual of the changing face of representation in the federal government. On the heels of an historic midterm election that sent 102 women to the House of Representatives and twenty-five women to the Senate,¹ women from both sides of the aisle arrived at the Capitol outfitted in white, in honor of the suffrage movement that secured women's right to vote in 1920. In the sea of white clothing there were a number of faces of color, reflecting not just a shift in Congress's gender makeup, but in its racial and ethnic diversity as well.²

But if the halls of Congress are becoming more diverse, the situation across the street from the Capitol is decidedly different. The Supreme Court has long been understood as a countermajoritarian institution,³ with a degree of insulation from the political process. But its composition is also out of sync with the broader contours of the electorate. As currently constituted, the Court is overwhelmingly male, Catholic, and white. And if the Court is notably lacking in diversity, the ecosystem that surrounds it is even more so. Supreme Court clerks are

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1. Deena Zaru, *Why Republican Women Face a Bleaker Picture in the Battle for Representation in Congress*, ABC NEWS (Oct. 14, 2020), <https://abcnews.go.com/GMA/News/republican-women-face-bleaker-picture-battle-representation-congress/story?id=73560569> [https://perma.cc/9UMG-8CEV] The 116th Congress, which began in January 2019, represented "the most diverse group of lawmakers in U.S. history." *Id.*
 2. *See id.* (noting that of the 127 women in Congress in 2019, forty-seven were women of color, and that a record number of women of color won Congressional primaries in 2020).
 3. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (describing the "countermajoritarian difficulty").

largely male and white, hailing from a handful of elite law schools. Those who practice before the Court are also a relatively homogenous group, as is the pundit class and commentariat that covers the Court and translates its doings for the general public.

The homogeneity that surrounds the Court is not simply concerning. It has real costs both for how the Court does its work, and for how the general public understands that work.

This Essay proceeds in three parts. Part I elaborates on the homogeneity in the Court's ecosystem. Part II considers the implications of this homogeneity for the Court's jurisprudence and for discussions of the Court and its work. Part III then pivots to consider efforts to address these dynamics. We discuss our decision to launch a podcast that provides commentary on the Supreme Court and the legal culture that surrounds it, as well as some of the responses to our decision to do so.

I. HOMOGENEITY AND THE SUPREME COURT, BY THE NUMBERS

In the history of the United States, 115 Justices have served on the Supreme Court. Of these 115 Justices, 108 (93.9%) have been white men. Indeed, there have been only five women Justices (4.3%) and three Justices of color (2.6%).⁴ Of the three Justices of color, only one is a woman.⁵ All seventeen of the Court's Chief Justices have been white men.⁶ The ranks of those who work most closely with the Justices—the clerks—reflect a similar lack of diversity. In 2017, Supreme Court correspondent Tony Mauro conducted a survey of Supreme Court clerks, finding that between 2005 and 2017, 85% of the 487 clerks hired at the Supreme Court were white.⁷ During this period, only twenty of the

4. Jessica Campisi & Brandon Griggs, *Of the 114 Supreme Court Justices in US History, All But 6 Have Been White Men*, CNN (Sept. 26, 2020), <https://www.cnn.com/2020/09/25/politics/supreme-court-justice-minorities-history-trnd/index.html> [<https://perma.cc/59QW-RYAU>].

5. Justice Sonia Sotomayor, the first Latina Justice, was appointed to the Court in 2009. Charlie Savage, *Sotomayor Confirmed by Senate*, 68-31, N.Y. TIMES (Aug. 6, 2009), <https://www.nytimes.com/2009/08/07/us/politics/07confirm.html> [<https://perma.cc/ZU6W-Q6ZV>].

6. See Campisi & Griggs, *supra* note 4.

7. Tony Mauro, *Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, NAT'L L.J. (Dec. 11, 2017), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/12/11/mostly-white-and-male-diversity-still-lags-among-scotus-law-clerks/> [<https://perma.cc/L929-EANW>].

clerks hired were Black (4.1%).⁸ Roughly one-third of the clerks were women.⁹

When it comes to the Justices, the demographic data are largely unsurprising. After all, for much of the Court's—and the country's—history, the legal profession was one in which white men predominated. With the rise of part-time law schools in the postbellum period, the profession underwent a kind of tentative democratization as part-time law schools often catered to the working class and immigrants.¹⁰ But these fledgling outfits were hardly the proving ground for Supreme Court Justices, the ranks of whom were, then as now, more often composed of the products of elite networks and elite education.¹¹

If racial and gender diversity on the Court have increased in recent decades, diversity in educational background has actually decreased; even against an elite baseline in which many members of the Court have attended Ivy League institutions, as well as other well-regarded schools,¹² the current Court is notable in the near-ubiquity of elite credentials. Among the current members of the Court, all but two Justices completed their undergraduate education at Stanford or an Ivy League school (Justices Thomas and Barrett attended the College of the Holy Cross and Rhodes College, respectively), and all but one received a law degree from Yale Law School or Harvard Law School (Justice Barrett attended Notre Dame Law School).¹³

8. *Id.*

9. *Id.* The report does not indicate how many clerks were women of color.

10. Melissa Murray, *Afterword* to HERMA HILL KAY, PAVING THE WAY: THE FIRST AMERICAN WOMEN LAW PROFESSORS 295, 298 (2021).

11. Although “the first year when every Justice had four years of undergraduate work and three years of law school was 1986, when Justice Scalia replaced Chief Justice Burger,” a number of Justices on earlier courts held degrees from elite institutions. Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1168-69 (2012). For example, the Taney Court “featured Harvard alumnus Justice Joseph Story, Princeton (then called the College of New Jersey) alumni Justices Smith Thompson and James Wayne, and Yale alumnus Justice Henry Baldwin.” *Id.* at 1170 n.100.

12. See Ilana Kowarski, *Where Supreme Court Justices Earned Law Degrees*, U.S. NEWS (Nov. 5, 2020), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/where-supreme-court-justices-earned-law-degrees> [<https://perma.cc/8A68-GZ9W>] (“Among the 60 justices who were appointed in the 20th and 21st centuries, 38 received law degrees from law schools that are ranked among the top 25 in the 2021 Best Law Schools rankings.”).

13. See *id.*; see also Valerie Strauss, *The ‘Cloistered’ Harvard-Yale Monopoly on the Supreme Court*, WASH. POST (July 10, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/07/10/the-cloistered-harvard-yale-law-monopoly-on-the-supreme-court/> [<https://perma.cc/3XCX-ZG9U>].

The persistent homogeneity of the clerk pool is in some ways more surprising, particularly given the demographic changes that have occurred at law schools over the last twenty years. Today, most law schools boast diverse student bodies, with women comprising roughly half of law school graduates.¹⁴ Yet the pool of Supreme Court clerks remains overwhelmingly white and male.¹⁵

To be sure, some Justices have done a better job of diversifying their chambers.¹⁶ As of 2017, 31% of Justice Sotomayor's clerks had been racial minorities—the highest percentage among the Justices.¹⁷ And in October Term 2018, his first on the Court, Justice Kavanaugh boasted the first all-women complement of clerks.¹⁸ Indeed, due in part to Justice Kavanaugh's clerk class, the 2018 Term was the first time that a majority of Supreme Court clerks were women—twenty-one of the forty-one clerks (51.2%).¹⁹ The 2018 Term also saw the first Native American clerk, in Justice Gorsuch's chambers.²⁰ And many of the Justices have looked beyond the halls of traditionally elite law schools in their search for new clerks.²¹

14. See Abigail Rowe, *The Parity Paradox*, BEST LAWYERS (June 25, 2018), <https://www.bestlawyers.com/article/women-now-outnumber-men-in-law-school/2029> [<https://perma.cc/DCG5-85RW>].

15. See Mauro, *supra* note 7.

16. See Debra Cassens Weiss, *Supreme Court Law Clerks Still Mostly White Men: Which Justices Had the Most Diverse Clerks?*, A.B.A. J. (Dec. 12, 2017), https://www.abajournal.com/news/article/supreme_court_law_clerks_are_still_mostly_white_men_which_justices_had_the [<https://perma.cc/3NQS-FZTN>].

17. Mauro, *supra* note 7.

18. Then-Judge Kavanaugh made much of this fact during his Supreme Court confirmation hearings: In the same speech in which he called Dr. Christine Blasey Ford's sexual assault allegations "a calculated and orchestrated political hit . . . on behalf of the Clintons" and warned the Democratic members of the committee, "[y]ou sowed the wind. For decades to come I fear the whole country will reap the whirlwind," he also informed the Senate that "if confirmed, I'll be the first justice in the history of the Supreme Court to have a group of all-women law clerks." Trish Turner & Meghan Keneally, *You'll Never Get Me to Quit: Read Brett Kavanaugh's Defiant Opening Statement*, ABC NEWS (Sept. 28, 2018), <https://abcnews.go.com/Politics/read-kavanaughs-opening-statement-effort-destroy-good-drive/story?id=58096427> [<https://perma.cc/S4WQ-6ZTK>].

19. Erin Coe & Jacqueline Bell, *A High Court Milestone Stirs Hope of Gender Parity*, LAW360 (Oct. 17, 2018), <https://www.law360.com/articles/1093264/a-high-court-milestone-stirs-hope-of-gender-parity> [<https://perma.cc/C678-8335>].

20. Tony Mauro, *Gorsuch Hires Native American Law Clerk, Likely First in SCOTUS History*, NAT'L L.J. (April 14, 2018), <https://www.law.com/nationallawjournal/2018/04/14/gorsuch-hires-native-american-law-clerk-likely-first-in-scotus-history/> [<https://perma.cc/U9WD-WT6H>].

21. For example, the first group of law clerks hired by the Court's newest member, Justice Amy Coney Barrett, includes graduates of the Northwestern University Pritzker

Despite these bright spots, however, racial and gender diversity among the clerks at the high Court remains elusive. Although Mauro reported modest improvement in clerkship diversity between 1998, when he first conducted the informal study, and 2005, he also noted that Justices Ginsburg and Alito had each only hired one Black clerk during the same time period.²² And while the 2018 Term was a high-water mark for women's representation in the clerk ranks, in the 2019 Term the number of women clerks decreased to sixteen (41% of the total class) and remained at sixteen for the 2020 Term.²³

Part of the problem may be the small pool from which the Justices select their clerks. Although law clerk hiring is no longer completely outsourced to law professors or law school deans, as it once was,²⁴ such gatekeepers continue to play important roles in law clerk hiring decisions.²⁵ An equally important stepping stone is a clerkship with a "feeder" judge, a lower federal court judge (or occasionally a state supreme court justice) whom the Justices trust and respect. And the pool of so-called feeder judges also reflects a startling homogeneity. From 1970 to 2014, the top ten feeder judges were all men, and, with the exception of one, they were all white.²⁶ Over those forty-four years, this group of ten judges sent 392 clerks to the Supreme Court.²⁷ Although there were notable women judges who "fed" clerks to the Court, none did so with the kind of frequency of the all-men top ten.²⁸ Indeed, from 1970 to 2014,

School of Law, the University of Chicago Law School, and George Washington Law School. See David Lat, *Supreme Court Clerk Hiring Watch: Meet Justice Amy Coney Barrett's Clerks* (Nov. 3, 2020), <https://abovethelaw.com/2020/11/supreme-court-clerk-hiring-watch-meet-justice-amy-coney-barretts-clerks/> [https://perma.cc/N5D5-QQ29].

22. Mauro, *supra* note 7.

23. *Id.*

24. As Judge Richard Posner described the selection process in the 1960s, when he was chosen to serve as a law clerk, "There weren't many applications; there were no particular standards. Often the justice would delegate the selection of his law clerks to a personal friend, a professional acquaintance, or a law professor he was friendly with, without bothering to screen or interview applicants himself." Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 301 (2013).

25. See Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 N.W. U. L. REV. 599, 626-28 (2020).

26. Alexandra G. Hess, *The Collapse of the House That Ruth Built: The Impact of the Feeder System on Female Judges and the Federal Judiciary, 1970-2014*, 24 J. GENDER SOC. POL'Y & L. 61, 80 (2015).

27. *Id.* at 81.

28. *Id.*

the top ten *women* feeder judges sent only ninety-one clerks in total to the Court.²⁹

This disparity shows no signs of abating. In the past three Terms, men continued to dominate the ranks of feeder judges. Of the twenty-four judges who have “fed” at least two clerks to the Supreme Court in a single Term, only two of them, Judge Debra Livingston (Second Circuit) and Judge Dabney Friedrich (District Court for District of Columbia), are women (8.3%) and just three are racial minorities (12.5%).³⁰ No women judges of color sent multiple clerks to the Supreme Court in any of the last three Terms.³¹

To the extent that the ranks of feeder judges are only as diverse as the judiciary itself, the recent wave of Trump appointees is unlikely to disrupt the homogeneity of the feeder judge pool. As of January 2021, only 24% of President Trump’s judicial appointees were women, compared to 45% for President Obama by the end of his first term.³² The racial demographics are even starker: A full 84% of President Trump’s judicial nominees have been white, compared to 64% of President Obama’s nominees during the first four years of his presidency.³³

This homogeneity is evident throughout the Court’s ecosystem, not just in the ranks of the feeder judges and clerks. Those who argue before the Court, as well as those who comment on the Court and translate its doings for the larger world are also a relatively homogenous group. During the 2019 Term, there were 155 oral argument appear-

29. Of this group of women feeder judges, then-Judge Ruth Bader Ginsburg “fed” seventeen clerks to the Court. *Id.* Her feeder status came to an abrupt conclusion in 1993 when she was appointed to the Court. The runner up, Judge Patricia Wald, sent sixteen clerks to the Court between 1970 and 2014. *Id.* By contrast, during the same period, 1970 to 2014, the top male feeder judge, then-Judge Alex Kozinski, sent fifty-eight clerks to the Court, followed by Judge J. Harvie Wilkinson, who sent fifty-five clerks to the Court. *Id.* at 80.

30. Feeder Judges, SCOTUS Race & Gender Statistics (last updated November 2020) (unpublished dataset) (on file with authors).

31. *Id.*

32. John Gramlich, *How Trump Compares with Other Recent Presidents When Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021) [hereinafter Gramlich, 2021], <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [https://perma.cc/2LZW-E9Q6]; John Gramlich, *How Trump Compares with Other Recent Presidents When Appointing Federal Judges*, PEW RSCH. CTR. (July 15, 2020) [hereinafter Gramlich, 2020], <http://web.archive.org/web/20210110233032/https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.

33. Gramlich, 2021, *supra* note 32; Gramlich, 2020, *supra* note 32.

ances made by 103 advocates.³⁴ Of those 155 appearances, only twenty (12.9%) were made by women, and twenty-seven (17.4%) were by advocates of color.³⁵

But even these numbers obscure the limited pool from which Supreme Court advocates are drawn. Three attorneys account for nine of the twenty appearances by women advocates: Lisa Blatt for private parties, and Erica Ross and Morgan Ratner for the Office of the Solicitor General.³⁶ Fourteen, or just more than half, of the appearances by advocates of color were made on behalf of the Office of the Solicitor General, including seven appearances by *the* Solicitor General, Noel J. Francisco.³⁷ In the entire 2019 Term, only one woman of color, Jessica E. Méndez-Colberg, made an appearance before the Court, arguing on behalf of Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment*.³⁸

The Supreme Court bar is also narrow in terms of bar members' credentials. In the last five Terms, a small number of elite law schools have been responsible for a disproportionate number of Supreme Court advocates.³⁹ Specifically, over half of the Supreme Court appearances made in the past five terms were by advocates trained at just four law schools—Harvard, Yale, Chicago, and Stanford.⁴⁰ Indeed, Harvard graduates alone accounted for nearly one-quarter (23%) of the appearances made in the past five Terms.⁴¹

This homogeneity—of both the Court and those who argue before it—is rarely remarked upon in media coverage. This may be because the lack of diversity in these spaces is expected⁴²—even normalized.⁴³ It may

34. Supreme Court Bar, SCOTUS Race & Gender Statistics (last updated November 2020) (unpublished dataset) (on file with authors).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. The lack of diversity in American newsrooms has been documented and critiqued. See, e.g., *17% of Newsroom Staff Is Not White*, COLUM. JOURNALISM REV. (Nov. 5, 2018), https://www.cjr.org/special_report/race-ethnicity-newsrooms-data.php [<https://perma.cc/6RXL-GFAP>] (“Despite being in majority-minority cities, the newsrooms of *The New York Times* and *The Wall Street Journal*, for instance, are both 81 percent white. *The Washington Post* is 70 percent white. Minorities make up 72 percent of the population of Los Angeles, but only 33 percent of the *Los Angeles Times*. According to the Radio Television Digital News Association, the numbers in other media look slightly better, if still not impressive: in 2018, about a quarter of

also be because those covering the Court look a lot like the Court itself. The Supreme Court beat is very specific, requiring journalists with particular expertise—ordinarily legal training or at least some familiarity with the federal courts. But that criterion need not cut against diversity, particularly at a time when there is greater diversity in law school matriculation and the legal profession more generally.⁴⁴

Still, despite these changes in the profession, the ranks of the Supreme Court beat remain stubbornly fixed. Of the top ten daily newspapers by circulation,⁴⁵ five have a journalist dedicated to covering the Supreme Court and its doings. All five of these journalists are white men: Adam Liptak (*New York Times*), Robert Barnes (*Washington Post*), Jess Bravin (*Wall Street Journal*), David Savage (*Los Angeles Times*), and Richard Wolf (*USA Today*).⁴⁶ To be sure, other prominent Court commentators are women—such as Linda Greenhouse (*New York Times*), Dahlia Lithwick (*Slate*), Joan Biskupic (*CNN*), and Nina Totenberg (*National Public Radio*). While Greenhouse was, from 1978 to 2008, the *New York Times*'s principal journalist assigned to the Court, she has since retired from regular coverage and now writes a biweekly column

staffers in TV newsrooms are people of color; in radio, it's 11.7 percent.”); Elizabeth Grieco, *Newsroom Employees Are Less Diverse than U.S. Workers Overall*, PEW RSCH. CTR. (Nov. 2, 2018), <https://www.pewresearch.org/fact-tank/2018/11/02/newsroom-employees-are-less-diverse-than-u-s-workers-overall/> [https://perma.cc/K6JV-7442] (“More than three-quarters (77%) of newsroom employees—those who work as reporters, editors, photographers and videographers in the newspaper, broadcasting and internet publishing industries—are non-Hispanic whites, according to the analysis of 2012-2016 American Community Survey data.”).

43. There have been a number of recent high-profile efforts to disrupt the pervasive lack of diversity in journalism and media. 2020 saw the launch of *The 19th*, “a nonprofit, nonpartisan newsroom reporting on gender, politics, and policy,” created in response to the lack of women and women’s perspectives in journalism. See THE 19TH, <https://19thnews.org/about/> [https://perma.cc/6HJX-Q5V9]. In response to journalists of color, who have spoken candidly about their own experiences in homogeneous newsrooms, several newspapers “have announced initiatives aimed at changing their culture and their coverage, creating new beats, promoting people of color within and examining their hiring practices.” See Julie Drizin, *Why Is Public Media So White?*, CURRENT (June 24, 2020), <https://current.org/2020/06/why-is-public-media-so-white/> [https://perma.cc/EV5X-RT39].

44. See Rowe, *supra* note 14 (discussing enrollment in law schools).

45. *Top 10 U.S. Daily Newspapers*, CISION MEDIA RSCH. (Jan. 4, 2019), <https://www.cision.com/us/2019/01/top-ten-us-daily-newspapers/> [https://perma.cc/Q74W-3GF9].

46. SCOTUS Journalists, SCOTUS Race & Gender Statistics (last updated November 2020) (unpublished data) (on file with authors). John Fritze, also a white man, replaced Richard Wolf at *USA Today* in early 2021. See *John Fritze*, USA TODAY, <https://www.usatoday.com/staff/2647507001/john-fritze/> [https://perma.cc/QL4-JMXZ].

on the Court.⁴⁷ And while Lithwick and Totenberg are well-known and deeply respected for their trenchant coverage of the Court, their outlets—*Slate* and *National Public Radio*—may reach smaller audiences than the top ten newspapers.⁴⁸

While Greenhouse, Lithwick, and Totenberg's presence provides greater gender diversity in the Supreme Court beat, there is far less racial and ethnic diversity among the Court commentariat. While certainly not an exhaustive review, a search of Twitter profiles found several additional Supreme Court correspondents and commentators, including: Andrew Chung (*Reuters*), Ariane de Vogue (*CNN*), Garrett Epps (*The Atlantic*), Jessica Gresko (*Associated Press*), Jimmy Hoover (*Law360*), Lawrence Hurley (*Reuters*), John Kruzel (*The Hill*), Elie Mystal (*The Nation*), Kimberly Robinson (*Bloomberg Law*), Greg Stohr (*Bloomberg News*), and Jeffrey Toobin (*CNN*/formerly *The New Yorker*). Of these twelve journalists, six are white men (Epps, Hoover, Hurley, Kruzel, Stohr, and Toobin); three are, like Biskupic, Greenhouse, Lithwick, and Totenberg, white women (de Vogue, Gresko, and Robinson); one is an Asian man (Chung); and one is a Black man (Mystal).

When journalists seek commentary on the Court, the experts on whom they rely tend to be less diverse as well. The homogeneity of the Supreme Court clerks may exacerbate this problem, as journalists often solicit the input of those who have worked at the Court. But even where journalists turn to the legal academy for subject-matter expertise, they often call upon law professors who are white men.

Consider that *New York Times* reporter Adam Liptak cited individuals 119 times for their expertise or commentary about the Court between October 2019 and October 2020.⁴⁹ Only thirty-three of those times (just over 25%) were the individuals cited women.⁵⁰ Seven of those thirty-three times were citations to Professor Lee Epstein, a professor of law and political science at Washington University in St. Louis,

47. Linda Greenhouse, *2,691 Decisions*, N.Y. TIMES (July 13, 2008), <https://www.nytimes.com/2008/07/13/weekinreview/13linda.html> [https://perma.cc/ZG3M-2AHT]; Linda Greenhouse, N.Y. TIMES, <https://www.nytimes.com/column/linda-greenhouse> [https://perma.cc/R8LH-G6HH].

48. *Compare, e.g., Audience & Traffic*, WASH. POST PR BLOG, <https://www.washingtonpost.com/public-relations/audience-traffic/> [https://perma.cc/R4ZJ-UQME] (estimating more than 111 million people visited the *Washington Post* in January 2021), *with, Media Kit*, SLATE, <http://mediakit.slate.com/advertise/p/1> [https://perma.cc/3AHU-Y9AM] (estimating twenty million people visit *Slate* per month).

49. Adam Liptak Article Scholar Citations, Oct. 2019-Oct. 2020 (last updated November 2020) (unpublished dataset) (on file with authors).

50. *Id.*

who conducts empirical studies of the Court and its decisions.⁵¹ One of the thirty-three citations was to an academic article written by Justice Kagan.⁵²

In this regard, the commentariat may take its cues for citing experts from the Court itself. Since the beginning of 2019, Justice Thomas has cited scholarly pieces that were authored by 128 individuals.⁵³ Of the 117 different named individuals he cited, eighty-eight were men—over 75%.⁵⁴ Justice Gorsuch cited pieces authored by 149 individuals, 121 of whom were men—over 80%.⁵⁵

II. THE CONSEQUENCES OF HOMOGENEITY AT AND AROUND THE COURT

As we explain below, the lack of diversity on the Supreme Court and in the ecosystem that surrounds it likely has substantive consequences for the Court's jurisprudence; it also impacts the ways in which the Court's work is translated and presented to the public.

A. *Substantive Jurisprudence*

Consider some of the Court's jurisprudence related to policing: It is a touchstone of Fourth Amendment doctrine that a stop by police has occurred only if a reasonable person would not feel free to leave an encounter.⁵⁶ Applying that standard in *Florida v. Bostick*, the Court concluded that a reasonable person would feel free to leave when police boarded a bus and asked a passenger for consent to search the passenger's luggage.⁵⁷ But even as a majority of the Court insisted on this vision of the Fourth Amendment, some members of the Court noted that it was wildly out of step with the experiences of racial minorities. In dis-

51. *Id.*

52. *Id.*

53. Thomas, Data Analysis: Thomas and Gorsuch Scholar Cites, 2018, 2019 Terms (last updated November 2020) (unpublished dataset) (on file with authors).

54. *Id.*

55. Gorsuch, Data Analysis: Thomas and Gorsuch Scholar Cites, 2018, 2019 (last updated November 2020) (unpublished dataset) (on file with authors).

56. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("So long as a reasonable person would feel free 'to disregard the police and go about his business,' *California v. Hodari D.*, 499 U.S. 621, 628 (1991), the encounter is consensual and no reasonable suspicion is required.").

57. *Bostick*, 501 U.S. at 434.

sent, Justice Thurgood Marshall, the first Black Justice and, at the time, the only racial minority member of the Court, observed that for the respondent, a Black man, leaving the bus was hardly the most reasonable course of action. As Marshall explained, leaving “would have required respondent to squeeze past the gun-wielding [police] inquisitor who was blocking the aisle of the bus,” which “hardly seems like a course that [the respondent] would have viewed as available to him.”⁵⁸ Justice Marshall may have been drawing on his own experiences,⁵⁹ and recent evidence confirms how dangerous, and deadly, police encounters can be, particularly for Black men.⁶⁰ Still, these insights are wholly absent from the majority opinion and the resulting Fourth Amendment jurisprudence.

Utah v. Strieff similarly illustrates how considerations of race—and, specifically, the ability of seemingly neutral rules to selectively disadvantage racial minorities—are absent from the Court’s criminal procedure jurisprudence. In that case, the Court held that evidence obtained during an unlawful stop could be admitted at trial so long as the person stopped had an outstanding arrest warrant.⁶¹ Although the majority opinion scarcely acknowledged its likely impact on racial minorities, Justice Sotomayor, one of two racial minority members of the Court, did so in a vehement dissent.⁶² As she explained, the ruling “risk[ed] treating members of our communities as second-class citizens,” particularly given the prevalence of outstanding warrants in communities such as Ferguson, Missouri, the site of major Black Lives Matter protests.⁶³ In a particularly memorable passage, Justice Sotomayor, citing W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates, wrote:

58. *Bostick*, 501 U.S. at 448 (Marshall, J., dissenting).

59. As Justice Sandra Day O’Connor has noted, all Justices “come to the Court with [their] own personal histories and experiences.” Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992). “At oral arguments and conference meetings, and in opinions and dissents” Justice Marshall, she observed, “imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.” *Id.*

60. See, e.g., Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 961 (2020) (“[A]cross several circumstances of police killings . . . Black suspects are more than twice as likely to be killed by police than are suspects from other racial or ethnic groups.”).

61. *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

62. *Strieff*, 136 S. Ct. at 2063. Justice Ginsburg joined other portions of Justice Sotomayor’s dissent, but not this part. Justice Kagan wrote a separate dissent.

63. *Strieff*, 136 S. Ct. at 2059, 2069 (Sotomayor, J., dissenting); *id.* at 2068-69 (citing prevalence of outstanding warrants in New Orleans, Louisiana; Ferguson, Missouri; and Newark, New Jersey).

[F]or generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.⁶⁴

The consequences of the Court’s lack of diversity are also evident in its reproductive rights and justice jurisprudence. In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,⁶⁵ the Court held that the Trump administration had the statutory authority to exempt employers from having to notify the federal government of their objections to providing health insurance coverage for contraception.⁶⁶ (The relevant employers were not churches, who enjoyed a separate exemption.) While the majority opinion and Justice Kagan’s concurrence focused on the vagaries of administrative law,⁶⁷ Justice Ginsburg, in her last dissent on the Court, emphasized the decision’s likely impact on women throughout the country. As she explained, not only is contraception a critical aspect of women’s health care that has been shown to improve health outcomes, it also “improves women’s social and economic status.”⁶⁸ The Court’s decision, Ginsburg observed, would be devastating—likely resulting in “between 70,500 and 126,400 women . . . immediately los[ing] access to no-cost contraceptive services.”⁶⁹

Even Justice Thomas, the Court’s staunchest conservative and for nearly thirty years its only Black member, has felt obliged to surface issues of race and representation that have gone unnoticed or uncommented upon by his colleagues. In 2003, Thomas dissented in *Virginia v. Black*, a challenge to a Virginia statute that made it a felony “for any person . . . with the intent of intimidating any person or group . . . to burn . . . a cross on the property of another, a highway or other public place,” and further specified that “[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group.”⁷⁰ A plurali-

64. *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

65. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

66. *Little Sisters of the Poor*, 140 S. Ct. at 2373.

67. *Little Sisters of the Poor*, 140 S. Ct. at 1378-82; *id.* at 2397 (Kagan, J., concurring).

68. *Little Sisters of the Poor*, 140 S. Ct. at 2402 (Ginsburg, J., dissenting). Justice Sotomayor joined Justice Ginsburg’s dissent.

69. *Little Sisters of the Poor*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting).

70. *Virginia v. Black*, 538 U.S. 343, 348 (2003). In addition to his dissent, Justice Thomas made a rare set of interventions at the oral argument. See Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES (Dec. 12, 2002), <https://www.nytimes.com/2002/12/12/us/an-intense-attack-by-justice-thomas-on->

ty of the Court concluded that the statutory presumption that cross-burning constituted “prima facie evidence” of intent to intimidate violated the First Amendment.⁷¹ In dissent, Justice Thomas explained that the plurality overlooked “not only the words of the statute but also reality”—in particular, cross-burning’s long-standing use by, and association with, the Ku Klux Klan, “the world’s oldest, most persistent terrorist organization.”⁷²

Taken together, these examples suggest that the Court’s homogeneity is not simply a question of demographics. It has substantive implications for the Court’s work. In areas of critical importance, the majority’s decision-making is woefully inattentive to its impact on underrepresented groups. Where these perspectives have been surfaced, it has been in dissenting opinions written by the Court’s few minority and women members.

But it is not just the limited diversity of the Court itself that impacts its jurisprudence. The Court’s decisions and decision-making processes may also suffer when the advocates who appear before the Court reflect an exceedingly narrow range of backgrounds and experiences.⁷³ Former Fourth Circuit Judge J. Michael Luttig voiced this concern in a 2014 interview with Supreme Court reporter Joan Biskupic—one of the few prominent women on the Supreme Court beat. Luttig observed that the emergence of a “narrow group of elite justices and elite counsel talking to each other” could result in both a Court and a bar that are “detached and isolated from the real world, ultimately at the price of the healthy and proper development of the law.”⁷⁴ In this regard, just as underrepresented voices on the Court can surface overlooked perspectives,

cross-burning.html [https://perma.cc/6BVP-86Q7] (quoting Justice Thomas describing a burning cross as “unlike any symbol in our society,” in that “[t]here’s no other purpose to the cross, no communication, no particular message,” but “to cause fear and to terrorize a population”). For more on race and Justice Thomas’s jurisprudence and worldview, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2068-70 (2021).

71. *Black*, 538 U.S. at 367(2003).

72. *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

73. See Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations*, 101 CORNELL L. REV. 1533, 1583 (2016) (“[A] more diverse pool of advocates might bring to the Justices creative ways of approaching cases—ways they might not otherwise encounter, and that might ultimately enrich and even improve our body of law.”).

74. See Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/investigates/special-report/scotus/> [https://perma.cc/N6YC-5ZV2]; see also Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1520-21 (2008).

as Justices Marshall, Thomas, and Sotomayor have done in their dissents, underrepresented voices *before* the Court can raise viewpoints that might otherwise go unstated in the rarefied air of One First Street.

B. *Communicating Jurisprudence*

Although the Court makes its decisions publicly available on its website and through other distribution channels, in truth, few Americans actually read the substance of Supreme Court opinions. Instead, many Americans rely on media outlets—like newspapers, television, and podcasts—to translate the Court's doings into lay terms. With this in mind, the lack of diversity in the ecosystem surrounding the Supreme Court bar, and particularly within the commentariat that translates the Court's work to the public, may have consequences for the ways in which the public receives and understands the Court's decisions. The largely homogeneous commentariat has adopted a very particular understanding of what constitutes expertise about the Supreme Court—namely, an overly formal and rigid commitment to neutrality. This conception of expertise in many ways reproduces the Court's homogeneity in the commentariat: By insisting that one marker of Supreme Court expertise is that an individual avoid strong substantive positions and maintain a studious commitment to neutral, “both sides” commentary, the norm excludes many qualified people from being considered and credited as Supreme Court experts.

The homogeneity among Supreme Court “experts” is partially a product of the ways in which we credit—and discredit—expertise. For some, Supreme Court expertise means the ability to recall arcane historical facts or procedural complexities divorced from the substance of a particular case. Treating legal trivia as a proving ground for expertise risks dismissing—or worse, excluding—people who don't understand a reference, and it generates a contextless kind of expertise. Knowledge of procedural intricacies or legal arcana is certainly one kind of expertise, but it is not the only kind of expertise—or even the most important kind. Another, less valued kind of expertise is understanding the socio-political context of an issue or the potential consequences of decisions—such as *Strieff*'s consequences for heavily policed communities, or *Little Sisters of the Poor*'s consequences for women with limited job mobility. Also less appreciated—though no less important—is awareness of the racial or gender dynamics underlying a particular area of law or particular Court decision. For example, it should be a serious mark in favor of someone's Supreme Court expertise if they are aware of maternal mor-

tality rates for Black women and the history of “Mississippi appendectomies.”⁷⁵ Yet this kind of knowledge can be devalued as a kind of specialized expertise—a “nice-to-have” rather than a necessary predicate for securing status as an informed Supreme Court commentator.

Equally concerning is what gets treated as evidence of a *lack* of expertise. Too often, when minorities and women advert to their own lived experiences in dissecting legal decisions, their commentary is viewed as relying unduly on anecdote and narrative, as opposed to *real* expertise. Similarly, holding strong views on an issue is treated as incompatible with genuine expertise.⁷⁶ Having substantive views and holding principles does not make someone less reasonable as a lawyer or less equipped to comment on the Supreme Court and its work. Yet the media often seek studiously neutral experts—and commentators cultivate such personas, dutifully reporting the merits of “both sides” of an argument. The interest in neutral, dispassionate commentators may have particularly negative consequences for women, particularly women of color, who are often viewed as being too emotional or personally invested in their opinions.⁷⁷

These norms about expertise can affect how the public understands the Court. In particular, they may fuel the perception that the Court is merely a forum for debating abstract ideas that have few consequences for real people’s lives—a game between competitors with equal chances to prevail, based only on the logic of their arguments. In fact, the Court is a proving ground for some of the most consequential issues of the

75. See Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/> [<https://perma.cc/82F6-KKFT>] (“‘Mississippi appendectomies’ was another name for unnecessary hysterectomies performed at teaching hospitals in the South on women of color as practice for medical students.”)

76. See, e.g., Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 120 (2020) (“[A]s I see it, the rot that infects our body politic comes less from the parade of Professor Klarman’s horrors than from the contempt that has become the animating spirit of much of our public discourse. On that view of things, Professor Klarman’s jeremiad is no cure for the infection that ails the heart of our democracy. Indeed, the tone and manner of his complaint compound the problem.”).

77. Quentin Fottrell, *‘Women Are Judged for Being Emotional’ Yet It’s More Acceptable for Men to Get Upset and Angry, Female Executives Say*, MARKETWATCH (Nov. 29, 2019), <https://www.marketwatch.com/story/serena-williams-got-angry-at-the-us-open-final-and-paid-a-heavy-price-working-women-say-this-sounds-eerily-familiar-2018-09-10> [<https://perma.cc/SH45-8TZ9>]; Roxane Gay, *Who Gets to Be Angry?*, N.Y. TIMES (June 10, 2016), <https://www.nytimes.com/2016/06/12/opinion/sunday/who-gets-to-be-angry.html> [<https://perma.cc/T9CK-MT9U>].

day; and given its current ideological composition, some issues may be more hospitably received than others.

Other features of Supreme Court commentary, including how commentators speak about the Court's work, may further reinforce the view of the Court as forum for disembodied debate. Supreme Court commentary sometimes has what might be called a "law bro" vibe, which manifests in different ways, but collectively codes in masculine terms. Sometimes this may be nothing more than an affect or style of conversation—a competitive exchange in which the goal is to one up the other speakers rather than engage in a collective effort of clarification or complication. It may also involve metaphors of sport or battle: Justices or advocates "score points," "clash," or "duel" while precedents "live to fight another day."⁷⁸ And explaining the Supreme Court through metaphors of competition is more in keeping with the adversarial style of communication that tends to be associated with men.

Some of these dynamics may not just reflect the homogeneity in the Supreme Court commentariat; they may also reproduce it. Consider the idea that, in the interest of neutrality, a good Supreme Court commentator and "true" expert will routinely find things to criticize about both ideological "sides" of the Court. This obligatory performance of even-handedness likely contributes to the homogeneity in the ranks of Supreme Court experts. As Justices Marshall and Sotomayor have acknowledged, the effects of the Court's decisions are likely to be experienced unevenly, with members of certain communities disproportionately bearing the impact. The assumption that those who are most affected by the Court's jurisprudence can view the different wings of the Court as equally reasonable ignores the very real impact of the Court's decisions on people's lives. As troublingly, this assumption may winnow out prospective members of the Supreme Court commentariat as people are dismissed—or, as likely, are never considered—because they are in-

78. As linguists confirm, whatever the constellation of causes, women often have different ways of speaking from men. Women may ask more questions, while men issue more directives, and women may be more likely to make statements with caveats and humility. DEBORAH TANNEN, *GENDER AND DISCOURSE* (1996); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (2007); see also Thomas Rogers, *Why Do Men and Women Talk Differently?*, SALON (Oct. 16, 2011), https://www.salon.com/2011/10/16/why_do_men_and_women_talk_differently/ [<https://perma.cc/G27F-YF6A>]; Caroline Turner, *Masculine-Feminine Difference: How We Talk*, HUFFPOST (July 16, 2014), https://www.huffingtonpost.com/caroline-turner/masculinefeminine-difference_b_5559127.html?ncid=engmodushpmg00000004 [<https://perma.cc/H44H-NCSM>].

clined toward a particular position.⁷⁹ Put differently, it may be difficult for women and minorities to treat opinions that so acutely affect them and their lives as theoretical abstractions to be debated. Their inability to maintain a distant neutrality with regard to the Court's decisions makes them less likely to be viewed as credible experts capable of "good" Supreme Court commentary.⁸⁰

The norms that pepper the rarefied atmosphere of elite legal practice also reinforce the homogeneity of the group of people considered to be Supreme Court experts. Consider the norms of collegiality and loyalty that exist among elite lawyers. One of us has written about elite lawyers' unwillingness to hold their colleagues accountable for the positions they take, even when those positions threaten basic tenets of our constitutional democracy.⁸¹ Time and again, despite having participated in actions that have been broadly condemned as deleterious to the rule of law, elite lawyers have been welcomed back into the fold with little more than a slap on the wrist for their earlier conduct. The norm of virtually unconditional collegiality and loyalty operates to shelter lawyers from censure and public accountability for some of their worst actions. That norm may be unpalatable to those who think the effects of a lawyer's positions are relevant to assessing her merits within the professional community. The norm may also be unsettling to those who must live with the real-world consequences of a lawyer's earlier actions.

Yet when push comes to shove, the norm of professional collegiality and loyalty operates to exclude—and disadvantage—those lawyers who work on behalf of the less powerful or who, because of their backgrounds and circumstances, are not fully entrenched within elite networks. Consider, for example, that both Caitlin Halligan and Goodwin Liu are undoubtedly "elite" lawyers by any metric—they graduated from top law schools, clerked for the Supreme Court, and had successful professional careers. Yet their elite credentials were insufficient to insulate them from the consequences of their decisions as advocates—

79. In the case of women, especially women of color, it is more likely they will agree with the more liberal side of the Court. See, e.g., Alex Tyson, *The 2018 Midterm Vote: Divisions by Race, Gender, Education*, PEW RSCH. CTR. (Nov. 8, 2018), <https://www.pewresearch.org/fact-tank/2018/11/08/the-2018-midterm-vote-divisions-by-race-gender-education/> [<https://perma.cc/Q2LP-7MX8>].

80. We should also note that the tenor of Supreme Court commentary can impact not only the views of the public, but the Justices themselves: There is evidence that the Justices may respond to elite cues, including those sent by members of the Supreme Court press corps. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1579 (2010).

81. Leah Litman, *Lawyers' Democratic Dysfunction*, 68 DRAKE L. REV. 303 (2020).

Halligan supported gun control measures, earning the ire of Second Amendment enthusiasts⁸² who organized to oppose her nomination to the D.C. Circuit, while Liu breached the norm of elite loyalty by testifying against the confirmation of Justice Samuel Alito,⁸³ a fact that was emphasized repeatedly in Liu's failed nomination to the U.S. Court of Appeals for the Ninth Circuit. By contrast, Rod Rosenstein, who reportedly helped to orchestrate the Trump administration's family separation policy,⁸⁴ left the administration for a lucrative partnership with King & Spalding. Jay Bybee, who, as head of the Office of Legal Counsel for the second Bush administration, signed the infamous Torture Memos, was confirmed to a seat on the U.S. Court of Appeals for the Ninth Circuit.⁸⁵ While Rosenstein and Bybee, both white men, faced few consequences for their participation in two widely condemned government programs, both Halligan, a white woman, and Liu, an Asian American man, paid the price for their earlier decisions. In a profession that prides itself on collegiality and loyalty, few elite lawyers stepped up to expend social or professional capital to support Halligan and Liu. Their nominations to federal appeals courts foundered and were ultimately withdrawn.⁸⁶

In a similar vein, there are myriad examples of lawyers of color whose membership in elite networks was not enough to insulate them from criticism or questions about their intelligence and legal acumen. Throughout their careers on the Court, both Justice Thurgood Marshall and Justice Clarence Thomas, the only two Black jurists to serve on the

82. *Caitlin Halligan's Record of Activism*, SENATE RPC (Mar. 4, 2013), <https://www.rpc.senate.gov/policy-papers/caitlin-halligans-record-of-activism> [<https://perma.cc/MC9F-NJKD>]; Gary Marx, *Halligan and the Second Amendment*, NAT'L REV. (Mar. 10, 2011), <https://www.nationalreview.com/bench-memos/halligan-and-second-amendment-gary-marx/> [<https://perma.cc/2EYC-7VSD>].

83. Wall Street Journal, *Goodwin Liu: A Liberal Nominee of Illiberal Temperament*, REAL CLEAR POL. (Apr. 17, 2010), https://www.realclearpolitics.com/2010/04/17/goodwin_liu_a_liberal_nominee_of_illiberal_temperament_232765.html [<https://perma.cc/BHW2-6UQV>].

84. Michael D. Shear, Katie Benner & Michael S. Schmidt, 'We Need to Take Away Children,' *No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> [<https://perma.cc/8AW4-47MS>].

85. Litman, *supra* note 81, at 309-10.

86. Abby Phillip, *Goodwin Liu Withdraws Nomination*, POLITICO (May 25, 2001), <https://www.politico.com/story/2011/05/goodwin-liu-withdraws-nomination-05572.4> [<https://perma.cc/7727-TRC7>]; Rachel Weiner, *White House Withdraws Caitlin Halligan Nomination*, WASH. POST (Mar. 22, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/03/22/white-house-withdraws-caitlin-halligan-nomination/> [<https://perma.cc/R9P5-KRH5>].

Court, were routinely cast as intellectual lightweights under the sway of more intelligent colleagues.⁸⁷ Likewise, when Justice Sonia Sotomayor was nominated to the Supreme Court, numerous commentators publicly questioned her intellect⁸⁸ despite the fact that she was a *summa cum laude* graduate of Princeton, received her law degree from Yale, and practiced for years as a prosecutor under the tutelage of long-time Manhattan District Attorney Robert Morgenthau.⁸⁹

In some cases, advocating on behalf of underrepresented groups or unpopular causes can limit one's admission to the highest rungs of the legal profession. As a lawyer with the NAACP Legal Defense Fund, Debo Adegbile signed on to an appellate brief on behalf of Mumia Abu-Jamal, an internationally-known prisoner convicted of the murder of a Philadelphia police officer. Years later, when Adegbile was President Obama's nominee to serve as Assistant Attorney General for the Civil Rights Division,⁹⁰ bipartisan objections to this pro bono work scuttled

87. See Ian Millhiser, *Beware: Clarence Thomas Is One of America's Top Legal Minds*, THINKPROGRESS (Feb. 24, 2014), <https://archive.thinkprogress.org/beware-clarence-thomas-is-one-of-americas-top-legal-minds-718abf17a851/> [<https://perma.cc/QG69-QD2D>] (maintaining that Justice Thomas's silence on the bench "perpetuates a myth that Thomas is a lightweight, disengaged from his work and unequal to the task of jousting with his more intellectually gifted colleagues"); Mike Sacks, *Clarence Thomas' Questions, Part 3: The Myth of Scalia's Puppet Is Quashed as Quickly as It's Created*, HUFFPOST (Nov. 21, 2011), https://www.huffpost.com/entry/clarence-thomas-antonin-scalia_n_1105776 [<https://perma.cc/S7SC-JE4X>] (noting that "[t]he most persistent myth about Justice Thomas" is "that he is Justice Antonin Scalia's puppet"); Juan Williams, *The Many Masks of Thurgood Marshall*, WASH. POST (Jan. 31, 1993), at C1 (noting that Bob Woodward and Carl Bernstein's *The Brethren*, a depiction of the Burger Court, portrayed Justice Thurgood Marshall "as a lazy man who spent much time watching TV and who left his court work to a series of first-rate law clerks").

88. Jeffrey Rosen, *The Case Against Sotomayor*, NEW REPUBLIC (May 3, 2009), <https://newrepublic.com/article/60740/the-case-against-sotomayor> [<https://perma.cc/38R6-4GZ4>]; Debra Cassens Weiss, *Laurence Tribe's Leaked Memo: Sotomayor 'Not as Smart as She Seems to Think She Is,'* A.B.A. J. (Oct. 29, 2010), https://www.abajournal.com/news/article/laurence_tribes_leaked_memo_sotomayor_not_as_smart_as_she_seems_to_think_sh [<https://perma.cc/7DEA-7QYJ>].

89. Verena Dobnik, *Sotomayor Pays Tribute at Robert Morgenthau's Funeral*, AP NEWS (July 25, 2019), <https://apnews.com/article/5c85aa57b09540cd95b14eee2d733cab> [<https://perma.cc/WDU2-PHPL>].

90. Al Kamen, *Debo Adegbile, Whose Nomination for Civil Rights Post Was Blocked in Senate, Joins Private Law Firm*, WASH. POST (Sept. 15, 2014), <https://www.washingtonpost.com/blogs/in-the-loop/wp/2014/09/15/debo-adegbile-whose-nomination-for-civil-rights-post-was-blocked-in-senate-joins-private-law-firm/> [<https://perma.cc/G9BV-5H5R>].

his nomination.⁹¹ Although President Obama defended his nominee's record, condemning the "wildly unfair character attacks against a good and qualified public servant," a majority of Senators were undeterred, raising the prospect of opposition from law enforcement as an impediment to Adegbile's ability to succeed in the position.⁹²

Adegbile's experience was hardly exceptional. Two decades earlier, Senate Republicans torpedoed Lani Guinier's nomination to the same position based on her "controversial writings"⁹³ about voting rights and the need to increase the political power of minorities.⁹⁴ Like Adegbile, Guinier was a product of elite legal institutions and possessed sterling credentials.⁹⁵ As a young lawyer, she had litigated civil rights cases with the NAACP Legal Defense Fund.⁹⁶ At the time of her nomination, she was a tenured professor at Harvard Law School—the first Black woman to achieve this distinction.⁹⁷ It did not matter. In the face of opposition, President Bill Clinton withdrew his support for Guinier, saying that, upon belatedly reviewing her writing, he concluded that her views were "inconsistent" with his own.⁹⁸

Dawn Johnsen, President Obama's first nominee to head the Office of Legal Counsel, suffered a similar fate. Despite her extensive experience as a top executive-branch lawyer (she had already served for a period as the acting OLC head during the Clinton administration) and a number of years as a distinguished law professor, her nomination was ultimately defeated based in part on Republican opposition to work she

91. Meredith Clark, *Obama Withdraws Nomination of Top DOJ Civil Rights Lawyer*, MSNBC (Sept. 15, 2014), <https://www.msnbc.com/msnbc/obama-withdraws-nomination-debo-adegbile-doj-civil-rights-lawyer-msna412696> [https://perma.cc/ZHR2-38BU] ("Adegbile's confirmation was shot down in March after senators objected to legal work he did with the NAACP's Legal Defense Fund.").

92. *Id.*

93. David Lauter, *Clinton Withdraws Guinier as Nominee for Civil Rights Job: Justice Dept.: The President Says He Only Lately Read Her Legal Writings. He Decided She Stood for Principles He Could Not Support in a Divisive Confirmation Battle.*, L.A. TIMES (June 4, 1993), <https://www.latimes.com/archives/la-xpm-1993-06-04-mn-43290-story.html> [https://perma.cc/NGF8-CB5T].

94. *The Destruction of Lani Guinier*, CHI. TRIBUNE (June 6, 1993), <https://www.chicagotribune.com/news/ct-xpm-1993-06-06-9306060004-story.html> [https://perma.cc/K2PU-V8J9].

95. *See Lani Guinier: Bennet Boskey Professor of Law Emerita*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10344/Guinier> [https://perma.cc/SM76-DB9D].

96. *Id.*

97. *Id.*

98. Lauter, *supra* note 93.

had done on behalf of abortion rights as a young lawyer with the ACLU and NARAL.⁹⁹

Taken together, these episodes gesture toward a number of insights. They make clear that membership in elite circles has its privileges, insulating those within the group from censure or criticism of their professional decisions and conduct. But membership within the elite can be selective. Despite the right credentials and experiences, not all lawyers who take on contested positions or controversial causes can be secure in their membership within the elite. Race, gender, and class—of the individual and those she may champion—may distance one from the security and protection that elite status may provide. In this way, the norms of collegiality and loyalty that mark the profession also serve as engines to preserve and perpetuate its homogeneity.

III. DISRUPTING HOMOGENEITY, ONE EPISODE AT A TIME

Recognizing the homogeneity in all of these aspects of the Court's ecosystem, we wanted to do something to remedy these disparities—to highlight the voices of women and people of color, to celebrate the expertise and skill of lawyers who work on behalf of the less powerful, and to challenge prevailing views about what a Supreme Court expert looks and sounds like. Starting our podcast, *Strict Scrutiny*, was a small step in that direction. We are a podcast led by women and we wanted to create a space that was welcoming and inclusive to women, victims of gender-based violence, people of color, and victims of racial discrimination and violence. That is the audience to whom we speak. We are not shy about offering our opinions. We do not aim to spend equal amounts of time criticizing and praising both sides of the Court. Nor do we judge our success based on whether all ideological sides of the Supreme Court bar like what we have to say.

As importantly, we want to help democratize the Supreme Court and the discourse surrounding it. We want more lawyers to feel empowered to weigh in about the Supreme Court and to share their opinions. It is our hope that by sharing our views, others will feel comfortable doing the same. We also hope that by helping to keep the public up to date on the Court's work, we make it easier to stay abreast of an im-

99. Charlie Savage, *Obama Nominee to Legal Office Withdraws*, N.Y. TIMES (Apr. 9, 2010), <https://www.nytimes.com/2010/04/10/us/politics/10johnsen.html> [<https://perma.cc/REV6-P7ZH>]; Carrie Johnson, *Dawn Johnsen: 'I Have No Regrets'*, NPR (June 25, 2020), <https://www.npr.org/templates/story/story.php?storyId=128099976> [<https://perma.cc/HL4G-FK5Y>].

portant institution in our system of government—one whose output can often feel impenetrable and inaccessible.

On the whole, it has been an incredibly rewarding experience. We have delighted in each other's company and in the community that we have created with our listeners. It has been incredibly rewarding to hear from law students, particularly women law students, law students of color, and first generation law students, who tell us how much they enjoy the podcast and what it means to them to hear their perspectives surfaced in discussions of the Court and legal culture. And we have had more than a few laughs at ourselves, with each other, and (of course) at the Court, too.

And that's part of the point: We want to change the sound of Supreme Court expertise. Commentary and expertise can be fun and funny, rather than studiously abstract and stiflingly neutral. On the show, we talk about pop culture in addition to the Supreme Court and try to push back on some of the "male-ness" of Supreme Court commentary.

As with any endeavor, there have been challenges. One of us is untenured, prompting occasional questions about how she is spending her time. There are the occasional internet haters who explain—in detail—all the things we have done wrong and could do better. It is never fun to be on the receiving end of missives questioning your competence to opine on matters of actual technical expertise or difficulty. Nor is it easy to read reviews about your "ranting" and "unreflective[] bias[]." There are also the expected comments about how our "voice and cadence are very difficult to listen to." Some people don't even like Leah's Voting Rights Act jokes. (Sorry; she's not sorry.)

But the challenges are clearly outweighed by the rewards. In just two years, we have been able to draw greater attention to issues that matter to us and to many of our listeners. We have celebrated stellar advocates while urging the Court to take greater steps to expand the ranks of its bar. We have highlighted cases—both those that garner outsized attention and those that pass with little fanfare—and dissected decisions. And in doing all of this, we have tried at every turn to underscore the many ways in which the Court's work impacts so much of our lives.

CONCLUSION

It is tempting to think that the diversity of the federal courts, the Supreme Court, the Supreme Court bar, and the Supreme Court commentariat will improve over time, as changing demographics at law schools result in a more diverse pool of attorneys. But it would be a mis-

take to think that result is inevitable—that is, that diversity in the Supreme Court ecosystem will follow naturally from diversity in law schools. Law schools have been admitting and graduating women in equal numbers to men for decades, and they have been committed to admitting and graduating people of color. And yet that has failed to result in women and people of color breaking into the Supreme Court ecosystem in substantial numbers. Instead, what has happened is some small gains, followed by regression and stasis.

If we want a Supreme Court ecosystem that tracks the trajectory of the academy and the legal profession, we have to be open to rethinking the norms, rules, and cultural practices that together create and sustain that ecosystem.♣