

**THE IMPACT OF GENDER PERSPECTIVES ON THE LEGITIMACY OF THE UNITED STATES SUPREME COURT’S APPEARANCE AND JUDICIAL-DECISION MAKING**  
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**I. Introduction**

The late Supreme Court Justice Ruth Bader Ginsburg stated: “people ask me sometimes when—when do you think it will be enough? When will there be enough women on the court? And my answer is when there are nine.”<sup>1</sup> Though Justice Ginsburg’s wishes are far from fulfilled, President Joe Biden’s nomination of Ketanji Brown Jackson to fill the role of retiring Justice Stephen Breyer is significant. Justice Jackson’s recent confirmation signifies the most women justices the Court has had in its history, and the first Black woman on the Supreme Court.<sup>2</sup> The impact of women’s voices on the Supreme Court is far reaching. Women’s presence on the highest bench in the nation is crucial to the advancement of the law in this country.<sup>3</sup> Women—especially multiple women from a diverse range of backgrounds—bring unique perspective to a historically white-male bench.<sup>4</sup> Additionally, the presence of diverse women provides a more accurate representation of all citizens.<sup>5</sup>

**II. The First Women Justices**

In 1981, Sandra Day O’Connor was nominated by President Reagan to be the first woman justice on the Supreme Court.<sup>6</sup> However, Justice O’Connor was not the first woman to be considered for a seat on the bench.<sup>7</sup> In 1934, Florence E. Allen was appointed to the United States Court of Appeals for the Sixth Circuit by President Roosevelt.<sup>8</sup> Even though Allen had most, if not all, of the qualifications

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<sup>1</sup> PBS NEWSHOUR, *When will there be enough women on the Supreme Court? Justice Ginsburg answers that question* (Feb. 5, 2015, 7:48 PM), <https://www.pbs.org/newshour/show/justice-ginsburg-enough-women-supreme-court>.

<sup>2</sup> Robert Barnes, *Four women on the Supreme Court would bring historic, near gender parity for institution long dominated by White men*, WASH. POST., (Feb. 27, 2022, 6:48 PM), <https://www.washingtonpost.com/politics/2022/02/27/ketanji-jackson-supreme-court/>.

<sup>3</sup> Marissa Melton, *Female Supreme Court Justices Can Change the Conversation*, VOA NEWS, (Oct. 3, 2020, 9:27 PM), [https://www.voanews.com/a/usa\\_female-supreme-court-justices-can-change-conversation/6196654.html](https://www.voanews.com/a/usa_female-supreme-court-justices-can-change-conversation/6196654.html).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> CTR. FOR LEGIS. ARCHIVES, *President Ronald Reagan’s Nomination of Sandra Day O’Connor to be Associate Justice of the Supreme Court of the United States, August 19, 1981*, (last visited Mar. 20, 2022, 6:08 PM), <https://www.archives.gov/legislative/features/oconnor.html#:~:text=Sandra%20Day%20O’Connor%20was,court%20in%20the%20United%20States>.

<sup>7</sup> Beverly B. Book, *The First Woman Candidate for the Supreme Court—Florence E. Allen*, 1981 Y.B. SUP. CT. HIST. SOC’Y 19 (1981).

<sup>8</sup> *Id.*

and eligibility requirements that the 101 men that came before her did,<sup>9</sup> President Roosevelt felt he had nothing to gain by nominating her to the Supreme Court.<sup>10</sup> Even with public support for a woman on the bench and Allen's uncontested qualifications, the notion of a woman on the Supreme Court was not accepted by the President, and he did not think Allen's nomination was necessary to pass his programs or to win another election.<sup>11</sup> Even with the prevalent notion that a woman's place was in the family and not in a profession,<sup>12</sup> prominent women's groups, homemakers, and female socialites supported Allen's appointment to the Court; but the Senate, other justices, and the President did not.<sup>13</sup>

The premise of a woman on the Supreme Court changed drastically in the 1960s as women's groups gained a better understanding of how to successfully push for a woman justice, and political figures began acknowledging the public's yearn for a woman on the court.<sup>14</sup> In the 1980s, President Reagan made it a campaign promise to nominate a woman to Court,<sup>15</sup> and the Court decided to start designating their opinions with "Justice" instead of "Mr. Justice."<sup>16</sup> After Justice Stewart's resignation in 1981, President Reagan was given the opportunity to fulfill his campaign promise of putting a woman justice on the Court—and the list of women judges shortlisted was the longest in the history of the Court.<sup>17</sup>

This led to the nomination and confirmation of Justice Sandra Day O'Connor, who, unlike Florence Allen and the other shortlisted women, had the political moment on her side.<sup>18</sup> At the same time that Reagan was searching for a new appointee to the Court, the constitutionality of abortion was a major focus of the Supreme Court's docket following the aftermath of *Roe v. Wade*.<sup>19</sup> O'Connor was one of the first justices whose presidential vetting process would focus on the

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<sup>9</sup> Beverly B. Cook, *Women as Supreme Court Justices: To Sandra O'Connor*, 65 JUDICATURE 314, 316 (1981) (positing the "three unwritten requisites" shaping Supreme Court justices' eligibility are: "1) early training in a socially advantaged family with a tradition of political participation; 2) excellent academic performances at prestigious undergraduate and law schools"; and 3) "recognition as established and productive members of the legal and/or political professions").

<sup>10</sup> *Id.* at 323.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Beverly B. Cook, *Women as Supreme Court Justices: To Sandra O'Connor*, 65 JUDICATURE 314, 323-324 (1981) (In 1938, poll results showed that 37% of respondents favored an appointment of a female justice, whereas in 1972, a poll reported that 57% of women and 50% of men favored a female justice.) *But see* Renee Knake Jefferson & Hannah Brenner Jefferson, *Shortlisted: Women in the Shadows of the Supreme Court*, NYU PRESS, 94 (2020) (a New York Times/CBS News Poll found that "72% of the public believed that it made no difference whether a man or a woman was appointed").

<sup>15</sup> CTR. FOR LEGIS. ARCHIVES, *supra* note 6.

<sup>16</sup> Cook, *supra* note 9 at 325.

<sup>17</sup> Jefferson, *supra* note 14 at 74 (In 1981, five woman judges were shortlisted for nomination to the Supreme Court.)

<sup>18</sup> Cook, *supra* note 9 at 326.

<sup>19</sup> Jefferson, *supra* note 14 at 95.

issue, and Reagan’s initial decision to nominate O’Connor was reaffirmed by her strong pro-life ideology.<sup>20</sup> Still, O’Connor’s appointment was met with extensive public criticism of her past judicial experiences, highlighting the heightened scrutiny women face when nominated to the bench.<sup>21</sup> Ultimately, Justice O’Connor’s position as the first woman justice on the Supreme Court marked an incredible step forward for women in breaking through the “impenetrable gendered tradition of men’s dominance in this realm.”<sup>22</sup>

### III. More Women Join the Court

In 1993, Justice Ruth Bader Ginsburg joined Justice O’Connor as the second woman justice on the bench.<sup>23</sup> Aside from both being women, Ginsburg and O’Connor’s upbringings and paths to the Supreme Court created rather different approaches to their legal outlooks and judicial decision-making.<sup>24</sup> For instance, Ginsburg’s position as an “advocate” allowed her to be “uncompromising” in the arguments she presented to the Court to further women’s rights, whereas O’Connor’s position as a “leading member of the Republican party’s establishment and her position as the first woman Supreme Court Justice created a complex dichotomy where many commenters believe she had to compromise her dedication to women’s rights for the “conservative agenda.”<sup>25</sup> However, O’Connor often used her position as a woman justice and a conservative to “wield her position as the ‘clear center of the more conservative court’” to promote gender equality.<sup>26</sup> It may be intuitive to consider Ginsburg as being the Supreme Court justice to have been the trailblazer for women’s rights—especially given her advocacy work for gender equality with the American Civil Liberties Union. However, O’Connor was in a position where she was the only woman justice on the bench for twelve years. She was faced not only with making judicial decisions, but with “proving” herself as a woman to the other justices, and the legal community, in turn, making sure that she was not the last woman justice to sit on the Court.<sup>27</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 96-98 (O’Connor had spent six years as a judge before her appointment, spending three years as a judge on the Maricopa Superior Court and two years on the Arizona Court of Appeals).

<sup>22</sup> *Id.* at 99.

<sup>23</sup> USATODAY, *Meet the four women who preceded Amy Coney Barrett on the Supreme Court*, (Oct. 27, 2020, 5:22 PM) <https://www.usatoday.com/in-depth/life/women-of-the-century/2020/10/26/four-women-preceded-amy-coney-barrett-us-supreme-court-sonia-sotomayor-ruth-bader-ginsburg/3710518001/>.

<sup>24</sup> Mary Jane Mossman, *Gender and Judging: Reflections on “Sisters in Law”*, 28 CAN. J. WOMEN & L. 685, 687 (Sept. 1 2016), <https://web-p-ebsohost-com.proxygt-law.wrlc.org/ehost/pdfviewer/pdfviewer?vid=1&sid=f780648c-87b4-4b75-b24f-3af500245d86%40redis>.

<sup>25</sup> *Id.* at 694.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 695-96.

When Justice O'Connor retired in 2006, she left the Court with only one woman's voice on the bench once again.<sup>28</sup> By 2010, three women sat on the bench for the first time in history: Justice Ginsburg was joined by Justice Sonia Sotomayor in 2009 and Justice Elena Kagan in 2010.<sup>29</sup> After Justice Ginsburg's passing in September 2020, President Donald Trump nominated another woman, now-Justice Amy Coney Barrett, to fill her spot, which maintained the six to three sex ratio on the court.<sup>30</sup> These women justices brought diversity to the Court not only in their gender experiences, but in their ethnic, cultural, and ideological backgrounds as well. Justice Ginsburg and Justice Kagan were two of eight Jewish Supreme Court justices to join the court, Justice Sotomayor was the first Latina Supreme Court justice, and Justice Kagan was one of the few justices to never previously served as a judge.<sup>31</sup> As far as ideology, Justice Kagan is considered a "centrist" on the Court and Justice Barrett, though too new to the Court to be certain, has a judicial record of conservative decisions and methods similar to those of Justice Antonin Scalia, for whom she clerked from 1998-1999.<sup>32</sup>

Even after the confirmation of Justice Barrett, the Supreme Court still did not adequately represent the whole of the United States. Therefore, when Justice Stephen Breyer announced his retirement in the early months of 2022, President Joe Biden re-emphasized his campaign promise to appoint a Black woman to fill his spot.<sup>33</sup> On Friday, February 25, 2022, President Biden announced his nomination of Ketanji Brown Jackson, who was, at the time, a DC federal appellate judge.<sup>34</sup> The confirmation of Ketanji Brown Jackson is historic for a number of reasons: Judge Jackson is the first Black woman to sit on the bench, the first former public defender, and her confirmation marks the largest amount of woman Justices serving on the Supreme Court at a given moment.<sup>35</sup>

Even with this new makeup of the court, the words of associate professor Meghan Leonard remain true: "a conservative woman will vote more like a conservative

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<sup>28</sup> USATODAY, *supra* note 23.

<sup>29</sup> *Id.*

<sup>30</sup> Supreme Court of the United States, *In Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, <https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/Section4.aspx> (last visited Mar. 20, 2022, 6:15 PM).

<sup>31</sup> USATODAY, *supra* note 23.

<sup>32</sup> *Id.*; see also Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/article/amy-barrett-views-issues.html>.

<sup>33</sup> Amy Howe, *Biden reiterates promise to nominate a Black woman, lauds Breyer as "model public servant"*, SCOTUSBLOG (Jan. 27, 2022, 4:27 PM), <https://www.scotusblog.com/2022/01/biden-reiterates-promise-to-nominate-a-black-woman-lauds-breyer-as-model-public-servant/>.

<sup>34</sup> Jake Tapper et al., *Biden nominates Ketanji Brown Jackson to be first Black woman to sit on Supreme Court*, CNN (Feb. 25, 2022, 5:01 PM), <https://www.cnn.com/2022/02/25/politics/supreme-court-ketanji-brown-jackson/index.html>.

<sup>35</sup> *Id.*

man than a liberal woman.”<sup>36</sup> While Jackson’s appointment to the Supreme Court does not change the six to three conservative ideological make-up of the court, the presence of diverse women Supreme Court Justices remains vital to creating and maintaining a Court that makes judicial decisions representative of the country as a whole.

#### **IV. Gender’s Impact on Judicial Decisions and the Courtroom: Women’s Perspectives and Representation**

Although the political or legal ideology a justice embraces is not correlated to gender, women justices bring differing experiences to the bench, making the presence of women on the Supreme Court vital to group-decision making.<sup>37</sup> The differences in men and women justices then, goes beyond just ideology.<sup>38</sup> In addition to general life experiences as a woman, “[women’s] shared experiences with differential treatment in law school and their legal profession had a profound effect, for many, in shaping their perspectives on being a ... judge.”<sup>39</sup>

Researchers have found that often a woman’s perspective is a mere “lens” through which they view legal issues, as opposed to directly impacting judicial ideology, making differences in judicial decision-making more dependent on the issue-area at hand and less on gender specifically.<sup>40</sup> For example, in 2009, when Justice Ginsburg was the sole woman justice, the Court decided *Safford Unified School District v. Redding*. In *Safford Unified School District*, the court held that a school strip-search of a thirteen year old girl violated the Fourth Amendment’s prohibition against unreasonable searches and seizures.<sup>41</sup> As the lone woman Justice, Ginsburg emphasized to her fellow male justices in her concurring opinion the “particular sensitivities for a teenage girl to be strip-searched.”<sup>42</sup>

Additionally, men and women justices view men and women counsel differently, reinforcing the importance of having a more diverse bench to promote the success of more diverse attorneys.<sup>43</sup> Research shows that men justices view counsel as more successful when they conform to typical gender norms, whereas women

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<sup>36</sup> See Melton, *supra* note 3.

<sup>37</sup> *Id.*

<sup>38</sup> Maya Rich, A gendered voice: Effects of gender on Supreme Court decisions (2016) (Senior Honors Thesis, Eastern Michigan University).

<sup>39</sup> Susan B. Haire & Laura P. Moyer, *Diversity Matters: Judicial Policy Making in the U.S Court of Appeals*, UNIV. OF VA. PRESS, 36 (2015).

<sup>40</sup> Shane A. Gleason et al., *The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices*, 47(3) AM. POL. RSCH., 494, 497 (2019).

<sup>41</sup> *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364 (2009).

<sup>42</sup> *Id.* at 382. Melton, *supra* note 3.

<sup>43</sup> Gleason, *supra* note 40 at 514 (This is especially true where the Supreme Court Bar is overwhelming male. From 2010 to 2013, females made up only 12% of attorneys filing briefs.); *see id.* at 507.

justices do not.<sup>44</sup> It has also been suggested that women justices are more likely to vote differently than men justices when they reach “critical mass” on the bench, thus suggesting that a multiple women composition on the Supreme Court would emphasize women’s perspectives.<sup>45</sup> For example, one statistical analysis for sex discrimination cases found that when both Justice O’Connor and Justice Ginsburg were on the court, more cases found a law unconstitutional on discrimination grounds.<sup>46</sup>

As well as bringing important perspectives to the historically white-male dominated legal field, the presence of more women justices is important for adequate representation of the citizens the Supreme Court serves.<sup>47</sup> This is especially true given the impact public opinion has on the confirmation of Supreme Court nominees, suggesting that women Supreme Court nominees may receive more women’s public support.<sup>48</sup> One study analyzing the effect of Justice Kagan’s gender on her public support found that conservative women’s identification with Justice Kagan as a woman negated the effect of their ideological differences, suggesting that the representation of women on the Supreme Court is sought after and valued by women of all ideologies.<sup>49</sup> Yet another study suggested President Trump’s decision to appoint a woman—Justice Barrett— after Justice Kennedy’s retirement generated greater political support, and her gender would help negate criticisms about her abortion views.<sup>50</sup>

## V. Gender and Racial Representation on the Supreme Court

Commentators and evidence suggest biases towards women and racial minorities are incredibly pervasive in the judicial field and on the Supreme Court.<sup>51</sup> One example of such biases playing out are in Supreme Court nomination hearings. Studies suggest that the historical make-up of Congress and the Senate Judiciary Committee as mostly white-men create an in-group and an out-group, thus making male, white nominees receive more favorable treatment during their confirmation hearings.<sup>52</sup> As the first Latina justice and third woman to undergo a Supreme Court confirmation hearing, Justice Sotomayor felt that she was treated

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<sup>44</sup> *Id.* at 513 (For female attorneys, the research shows that arguing more aggressively and forcefully has a lower success rate with male justices than if they present their arguments in a conciliatory and warm manner).

<sup>45</sup> *Id.* at 517

<sup>46</sup> Rich, *supra* note 38.

<sup>47</sup> Melton, *supra* note 3.

<sup>48</sup> Alex Badas & Katelyn E. Stauffer, *Someone like Me: Descriptive Representation and Support for Supreme Court Nominees*, 71 (1) POL. RSCH. Q., 127, 128-29 (2016). *But see* Badas at 130 (some scholars find no relationship between female gender and support for female nominees).

<sup>49</sup> *Id.* at 134.

<sup>50</sup> Jaclyn Kaslovksy et al. *Descriptive representation and public support for Supreme Court nominees*, 9(3) CAMBRIDGE UNIV. PRESS 553, 595 (2021) (research also suggests that female judicial appointments shape general attitudes about women in leadership positions).

<sup>51</sup> Christina L. Boyd, et al. *The Role of Gender and Race at U.S. Supreme Court Confirmation Hearings*, LAW & SOC’Y REV. 871, 876 (2018).

<sup>52</sup> *Id.* at 878.

differently than her white-male counterparts who underwent the process.<sup>53</sup> Research showed that at Justice Sotomayor’s confirmation hearing, 19% of the questions asked pertained to her judicial philosophy, including questions about her ability to be impartial, which was more than any other justice (not including Justices Alito and O’Connor.)<sup>54</sup>

Once confirmed, Justice Sotomayor became the single intersectional representative justice on the Court for women of color.<sup>55</sup> Further, only seven justices on the Supreme Court have ever been non-white men.<sup>56</sup> The confirmation of Ketanji Brown Jackson marks a vital step forward for representation of the intersectional identities of Black women in the legal field.<sup>57</sup> Of all active federal judges, only 4.9% are Black women, and Black judges comprise less than 10% of all sitting judges.<sup>58</sup> Increasing representation of women and racial minorities on the Court has the effect of under-represented groups viewing the judicial institution as more legitimate and valuing varying perspectives in the political process.<sup>59</sup> Further, intersectional identities foster more diverse judicial decision-making processes and diverse jurisprudence on the bench.<sup>60</sup> As the highest court in the United States, the presence of intersectional women justices is crucial to achieving a bench that completely represents all citizens, and to make sure each judicial decision is reached with the consideration of the broadest ranges of experiences.

## VI. Conclusion

Ultimately, the confirmation of Justice Ketanji Brown Jackson to the Supreme Court marks an important, historical step for the diversity of the Supreme Court. Although research suggests that the ideological make-up of the Court is the most prominent factor in how judicial decisions will be made, the presence of women justices on the bench is still vital to our judicial institution. First, research suggests that women justices will sway the court towards decisions which

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 893.

<sup>55</sup> Angela Robinson, *History shows why it’s time for a Black woman to sit on the Supreme Court*, WASH. POST (Feb. 1, 2022, 6:00 AM) <https://www.washingtonpost.com/outlook/2022/02/01/history-shows-why-its-time-black-woman-sit-supreme-court/>.

<sup>56</sup> “*She Will Rise*” on the importance of having a Black woman on the Supreme Court: “*We believe that representation is important*”, CBSNEWS (Feb. 26, 2022, 1:31 PM) <https://www.cbsnews.com/news/she-will-rise-supreme-court-ketanji-brown-jackson/>.

<sup>57</sup> *Id.*

<sup>58</sup> Virginia Kase Solomón, *What Happens When a Black Women Gets Nominated to the Supreme Court?*, LEAGUE OF WOMEN’S VOTERS BLOG, (Feb. 24, 2022) <https://www.lwv.org/blog/what-happens-when-black-woman-gets-nominated-supreme-court/>.

<sup>59</sup> *Id.* at 128, 137 (stating that many theories argue “institutions are most legitimate when they mirror the characteristics of the population they represent”); *see also* Alicia Bannon and Douglas Keith, *What Research Shows About the Importance of Supreme Court Diversity*, BRENNAN CTR. FOR JUST. (Feb. 1, 2022) <https://www.brennancenter.org/our-work/analysis-opinion/what-research-shows-about-importance-supreme-court-diversity>.

<sup>60</sup> *See* Bannon, *supra* note 59.

disfavor discrimination when they sit in tandem with one another, despite differing ideology. Additionally, women justices bring unique perspectives to the Court based on both their personal and professional experiences with the law, which can have a large impact on generally male-leaning decisions. Finally, and regardless of the actual impact women justices have on Supreme Court decisions, the presence of women justices of varying backgrounds, races, and ethnicities is imperative to creating a representative bench. The diversification of the bench remains vital to the continuing growth of representation within the historically white-male legal field, expanding the Court's understanding of legal doctrine, and maintaining the legitimacy of the United States Supreme Court for all citizens which it is intended to serve.