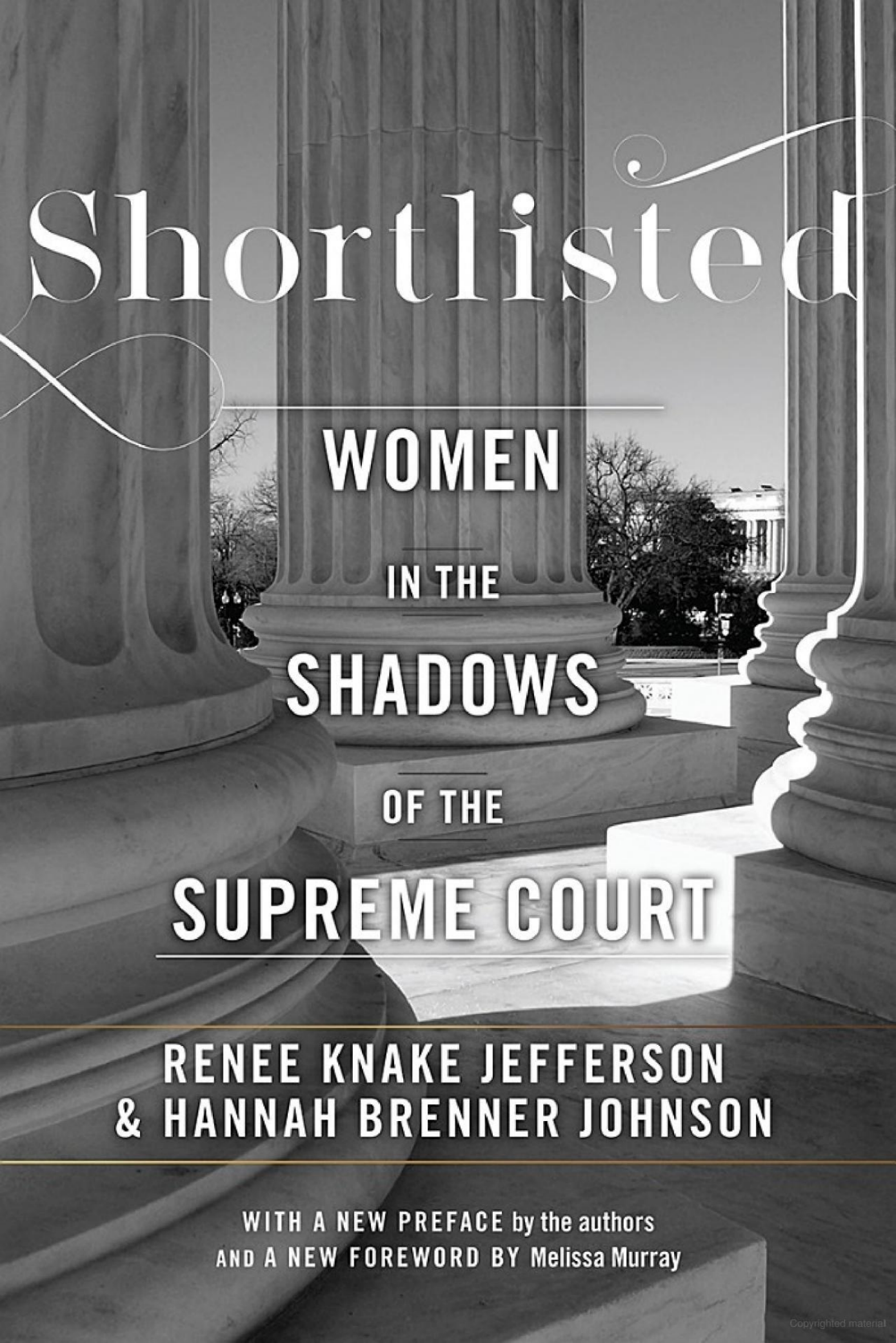

Shortlisted

WOMEN IN THE SHADOWS OF THE SUPREME COURT

RENEE KNAKE JEFFERSON
& HANNAH BRENNER JOHNSON

WITH A NEW PREFACE by the authors
AND A NEW FOREWORD BY Melissa Murray

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FOREWORD TO THE PAPERBACK EDITION

On February 25, 2020, during a presidential primary debate, candidate Joseph R. Biden declared that, if elected president, his first Supreme Court pick would be a Black woman. Although it would be months before Biden secured the Democratic nomination, and eventually the presidency, the announcement sent the media and the Twitterverse into a frenzy. Almost immediately, pundits began speculating about the shortlist of prospective nominees.

It is perhaps unsurprising that Biden's announcement would prompt such a response. After all, at that point, although the Court has welcomed four women (one of whom was Latina) and two Black men into the hallowed ranks of justices, no Black woman had yet crossed the marble threshold to be named an associate justice of the U.S. Supreme Court. Further, at least one sitting justice—Ruth Bader Ginsburg—seemed primed for a speedy retirement upon Biden's election. For Black women, a highly momentous and symbolic appointment—and the prospect of representation on the Court—seemed to be in the offing.

By the end of September 2020, the mood had shifted considerably. On September 18, 2020, that heady optimism gave way to pessimism and despair with the unexpected passing of Justice Ginsburg. Although early voting in the 2020 presidential election was already under way in a number of states, President Donald Trump moved swiftly to announce his nominee to replace the Court's leading liberal justice. On September 26—eight days after Ginsburg's death—President Trump announced his nomination of Amy Coney Barrett, a judge on the Chicago-based U.S. Court of Appeals for the Seventh Circuit—to replace Ginsburg.

According to her granddaughter, Clara Spera, on her deathbed Ginsburg's "most fervent wish" was that her seat on the Court would not be filled "until a new president is installed." Despite this dying declaration, and regardless of their earlier claims (voiced in the wake of Justice Scalia's unexpected death in February 2016, eight months before the 2016 presidential election) that Supreme Court vacancies should not be filled during a presidential election year, Senate Republicans moved quickly to confirm Barrett to the Court. After roughly a week of confirmation hearings, on October 27, 2020, Barrett was confirmed to the Court.

I first read *Shortlisted* in Spring 2020, well before Ginsburg's death and Barrett's confirmation. Reading it anew, with this most recent judicial confirmation just in the rearview mirror, its insights seem sharper and more urgent than ever. In surfacing the lost histories of the women who were "shortlisted" and considered for a Supreme Court appointment in the days when the prospect of a woman justice was indeed a novelty, Professors Jefferson and Johnson, at bottom, prompt an essential question: Does representation matter in the selection of those charged with doing justice at the highest level of our legal system? Should it?

Having lived through this latest judicial confirmation, it is hard to say that gender did not matter in the selection of the newest justice. It surely did. In July 2018, Judge Amy Coney Barrett had been among those shortlisted to fill Justice Anthony Kennedy's seat on the Court. However, when President Trump tapped D.C. Circuit judge Brett Kavanaugh to replace Kennedy, he intimated that he was "saving" Barrett for Ginsburg's seat. The implication was obvious: if Ginsburg's seat became available, her replacement would be a woman.

But critically, Ginsburg's seat would not be filled by just *any* woman. Her replacement would be a woman whose juridical predispositions would take her far afield of Ginsburg's

brand of legal feminism. Like her predecessor Trump nominees, Ginsburg's replacement would be a candidate vetted to ensure that she was skeptical of—if not hostile to—*Roe v. Wade*, the 1973 decision that announced the right to choose an abortion—a decision that Ginsburg had spent her career on the Court defending. In this regard, as one pundit put it, Barrett's nomination was something of a Trojan horse for women—a nominee who would appeal in terms of gender representation, but whose judicial philosophy would be less solicitous of women's rights.

Which brings us back to the question at the heart of *Shortlisted*: Does representation matter? And if it does, what does it mean to *represent* a particular group? Is it simply a matter of aesthetics? Swapping out one woman for another? Or does representation demand more than mere aesthetic fungibility?

As I think back to February 25, 2020, when then-candidate Biden made his pledge to nominate a Black woman, the prospect of seeing someone like me on the Court was thrilling—something I could show my daughter as evidence of social change and the possibility of increased opportunities for the young women of her generation. Today, I am more sanguine about the prospect of representation. In my lifetime, I have seen gender representation on the Court triple. And yet, as I write this, reproductive rights are hanging by a thread, voting rights are more precarious than ever, the labor movement has been hobbled, and the courthouse doors are closing for civil rights plaintiffs. And the common denominator in all of these developments has been the Court itself.

As I consider these developments, I can't help but ask, does this Court represent me and my interests? Does it serve the interests of a multiracial democracy? Is it enough for the Court to look (somewhat) like America, if, in fact, its work makes the promise of America elusive for so many?

Shortlisted does not answer these questions—nor should it. Instead, *Shortlisted* lays the foundation for a difficult—but urgently necessary—conversation. One in which we must ask ourselves whether representation matters. And if it does matter, how do we ensure that representation is *substantive*, as opposed to merely *aesthetic*? How do we ensure that our institutions not only reflect the diversity of our country but actively work to protect it?

It is a difficult conversation—both to broach and to sustain. But as *Shortlisted* suggests, it is a conversation worth having. Again and again and again.

—Melissa Murray, Frederick I. and Grace Stokes Professor of Law, New York University School of Law

PREFACE TO THE PAPERBACK EDITION

Engaging in a historical project is inherently challenging because stories continue to unfold even after a paper or book is published. *Shortlisted* has a definite beginning (starting with the consideration of Florence Allen for Supreme Court in the 1930s) and middle (centering around the appointment of Sandra Day O'Connor as the first woman to serve), but the end continues to evolve and will undoubtedly do so over the coming years and decades. In the years since we submitted the final manuscript to our publisher in mid-2019, the world changed in significant ways and in this new Preface to the paperback edition we provide an overview of some of these happenings that bear relation to the *Shortlisted* story.

We begin with some good news. In several sectors, more women—particularly women of color—ascended into positions of leadership and power. At the start of the 2021 academic year, a record twenty-eight black women served as law school deans, making up 14 percent of leadership at ABA-accredited law schools.[1] This statistic reflects a significant increase since 2019; half of these women were appointed in 2020 or 2021. The number of women running *Fortune* 500 companies "soar[ed] to an all-time high" in 2021, with twenty-three female CEOs, six of whom are women of color. In 2021 we also saw a record number of women serving in the 117th Congress. Women composed 27 percent of the House of Representatives, up from 23 percent in 2018, and women of color held forty-eight of those seats.[2] The Senate saw a slight uptick from 23 to 24 percent during this period.[3] At the same time, however, the United Nations announced on International Women's Day in 2021 that "at the current rate of progress, gender equality among Heads of Government will take another 130 years."[4]

On January 20, 2021, Kamala Harris became the first female vice president of the United States. She is the first black and Indian person to hold this office.[5] Harris, the former attorney general of California, is familiar with being the first. She was the first black woman elected district attorney in San Francisco and the first black woman to represent California in the Senate.[6] Also, in 2021 Deb Haaland was appointed as secretary of the interior, the first female Native American to be a presidential cabinet secretary.[7]

The quest for equal rights moved forward with Virginia's ratification of the Equal Rights Amendment in January 2020, making it the thirty-eighth state to do so.[8] This vote secured the necessary approval from three-fourths of state legislatures to pass a constitutional amendment. However, debate endures whether the deadline for passage expired in the 1980s. In May 2021, the U.S. House of Representatives passed the "'Pregnant Workers Fairness Act,' prohibiting employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy."[9] It remains to be seen whether the bill will make it out of the U.S. Senate.[10]

We must also acknowledge a host of losses and disappointments in the years since the first edition of *Shortlisted* hit the shelves. At the time, Ruth Bader Ginsburg was alive and an active member of a Supreme Court composed of three women. Ginsburg's death on September 18, 2020, was devastating. We both recall, as do so many people, exactly where we were when that news broke. We will forever remember how we came to hear the news and the combination of personal sadness and collective loss. It would be an understatement to say that we were stunned at the loss of such a powerful jurist who shaped antidiscrimination law and inspired so

many individuals in law and beyond. The death of Justice Ginsburg reverberated across the globe. Her contributions to the profession as a lawyer and to the Court as a justice are unprecedented. Her death, tragic in its own right, also raised serious concerns about who might be selected to fill the vacancy and the potential threat to women's rights.

These concerns were not misplaced, given that the latest shortlist released by President Trump just before Ginsburg's death included no candidates with a background similar to hers. On September 9, 2020, the administration posted a new list of twenty potential nominees for the Supreme Court on the White House website, updating his previous list of dozens of candidates.[11] In hindsight, this move seems like eerie foreshadowing, as just one week later Justice Ginsburg passed away. On September 19, the day after Ginsburg's death, Trump declared at a rally in Fayetteville, North Carolina: "I will be putting forth a nominee next week. It will be a woman."[12] Ginsburg's dying wish for her vacancy to be filled by the winner of the presidential election went unfulfilled.

Amy Coney Barrett quickly became the front runner. President Trump first considered Barrett in 2018 for the open seat created by Justice Kennedy's retirement. Though Trump ultimately nominated Brett Kavanaugh, he privately stated he was "saving her for Ginsburg."[13] Apparently, he believed that three women on the Court was enough (again, ignoring Ginsburg's wish—she of course famously called for nine!).

Past presidents took religion, geography, and political affiliation into account in their judicial selection decisions, as we discuss in chapter two, but they have been reluctant to reserve a seat for gender. Indeed, Barrett is the first female to fill the seat vacated by another woman. Interestingly, both Justices Ginsburg and Thurgood Marshall (who was replaced by Clarence Thomas) were replaced by an individual who shared their respective gender and racial identity. However, their successors differed ideologically and sometimes undermined the work of their predecessors' careers.[14]

Trump drew criticism for his statement about selecting a woman; picking a woman appeared to be a political choice rather than perpetuating an interest in or commitment to gender equity. After all, he filled two prior seats with white men, and his list of forty-two potential nominees included only twelve women.[15] (Notably, he found twelve women qualified for the Court yet did not appoint them.) With dwindling support from women just weeks before the election for his potential second term, his choice appeared to be one that would bring this critical voting bloc back into the fold.[16] A focus group of Republican women in swing states revealed that they thought the focus on selecting a woman was a play for voters more than genuine consideration for the importance of a woman's viewpoint on the Court.[17] Trump's strategy (if one sees it that way) was to appeal to women voters through the appointment of women, similar to Nixon's shortlisting of two women in 1971 and Reagan's promise to put the first woman on the Court in 1980, a phenomenon we explore and critique in part I of the book.

The juxtaposition of Ginsburg and Barrett is stark: Ginsburg was heralded as a feminist champion and pop-culture celebrity even by those who knew little of the Supreme Court. Articles penned about Barrett revealed a feminist divide. Headlines ranged from "Amy Coney Barrett: A New Feminist Icon"[18] to "The Contempt of 'Notorious ACB.'"[19] In the first article, the author argues, "Barrett embodies a new kind of feminism, a feminism that builds upon the praiseworthy antidiscrimination work of Ginsburg but then goes further. It insists not just on the equal rights of men and women, but also on their common responsibilities, particularly in the realm of family life. In this new feminism, sexual equality is found not in imitating men's capacity to walk away from an unexpected pregnancy through abortion, but rather in asking men to meet women at a high standard of mutual responsibility, reciprocity and care."[20] It's hard to imagine the author of the second article is describing the same person: "I've been struggling to decide how to feel about Barrett. I am reliably told that she is intelligent,

dignified, and kind. I believe it. But her kindness and love for her family and colleagues doesn't change the fact that her legal and extralegal record evinces a systematic hostility to workers' rights, reproductive freedom, access to health care, gun safety, and the rights of prisoners and asylum-seekers and elderly workers and racial minorities whose erasure Ginsburg could not bear. None of this sounds anything like feminism to me. It sounds like subordination and diminution, which are the things men do to erase women—the things Justice Ginsburg devoted her life to battling."[21]

Immediately before her Supreme Court appointment, Barrett served as a judge on the Seventh Circuit Court of Appeals. Earlier in her career, she received tenure as a law professor at Notre Dame Law School, the same institution where she earned her law degree years earlier. Before entering academia, she worked in private practice and held a coveted clerkship with Supreme Court justice Antonin Scalia, who became her mentor. During her nomination, she was vetted by the ABA Standing Committee on the Judiciary and received its "well qualified" rating.[22] Despite her qualifications, she was still evaluated in gendered ways, just like the women considered before her. In their opening statements, members of the Senate Judiciary Committee focused on explicitly gendered themes. Senators particularly homed in on her dual roles as both mother and professional. Senator John Cornyn noted that all young women would "marvel at the balance you've achieved in your personal and professional life."[23] Senator Ted Cruz expressed that it was extraordinary how Barrett managed to achieve so much while being a mom to seven children.[24] Senator Joni Ernst criticized the left for attacking a mom and woman of faith.[25] By contrast, a review of the transcript of opening statements in Justice Kavanaugh's confirmation hearings reveals no similar fixation on how he managed to "balance" career and family. The only reference to his family in opening statements was to introduce family present at the hearing and a mention of his coaching his daughter's basketball team.[26] The gendered focus continued throughout Barrett's Senate confirmation hearings. Senator Kennedy even went so far as to ask her who did the laundry in her house.[27]

Barrett was confirmed quickly. Just over a month after Justice Ginsburg's death, on October 26, 2020, the Senate voted fifty-two to forty-eight in her favor. She joined the court at the age of forty-eight, making her the youngest serving member.

The 2020 presidential election was exceptionally notable due to the volatility of competing political parties and the spread of misinformation. After an embattled election season, Trump's reign ended, though it took several days following the actual election for the winner to be confirmed.[28] More than sixty lawsuits challenging the results were dismissed after judges appointed by both Democrats and Republicans (including Trump) refused to entertain voter fraud allegations.[29] On January 6, 2021, the nation watched in horror during a violent attack on the U.S. Capitol building as members of Congress met to certify the vote. The insurrection left five dead, including one police officer,[30] and hundreds injured, including "concussions, rib fractures, burns, and even a mild heart attack" as well as mental harm such as post-traumatic stress disorder.[31] Four additional police officers who defended the Capitol committed suicide.[32] "This was a singular and chilling event in U.S. history, raising legitimate concern about the security—not only of the Capitol building—but of our democracy itself."[33] More than five months into Biden's term, 32 percent of all Americans still believed his election was due to fraud, as did 63 percent of Republicans,[34] even though Republican-led investigations found no evidence of voter fraud.[35]

Biden, like presidents before him, made a campaign promise to address gender inequality. His website outlined the "Biden Promise" in which he committed "[t]o build our country back better after this economic crisis and that includes ensuring we get closer to full inclusion of and equality for women. Women—particularly women of color—have *never* had a fair shot to get ahead in this country."[36] In March 2020, at an early Democratic debate, Biden publicly committed to appointing a woman to the vice presidency and a black woman to the Supreme

Court.[37] Despite this progressive declaration, some criticized Biden for pandering rather than emphasizing policy or the number of qualified, progressive women.[38]

Unlike most of his predecessors, however, Biden stayed true to his commitment to diversity in the early years of his presidency. Not only did he give the nation its first black female vice president, but his first nominations for the federal bench further diversified the judiciary. As of June 2021, Biden had nominated nineteen people for the federal bench, including fifteen women, eleven of whom are women of color.[39] He has not yet had an opportunity to fill a vacancy on the Supreme Court, though speculation about possible contenders has swirled in political circles and media reports. The appointment of Ketanji Brown Jackson to the U.S. Court of Appeals for the District of Columbia in June 2021 drew speculation that she would be a natural pick for a future Supreme Court appointment.[40] Several other judicial contenders include California Supreme Court justice Leondra Kruger, U.S. District Court for the Middle District of Georgia judge Leslie Abrams Gardner, U.S. Court of Appeals for the Ninth Circuit judge Jacqueline Hong-Ngoc Nguyen, and U.S. Court of Appeals for D.C. judge Patricia Millett.[41] Beyond the bench, other names floated have included Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense Fund, and Melissa Murray, New York University law professor (and author of the new foreword to this paperback edition). In the same vein as President Jimmy Carter, Biden is well on his way to transforming the federal judiciary through the diversity of his appointments. In addition, Biden charged the Presidential Commission on the Supreme Court of the United States to review reforms such as term limits and expand the number of justices on the Court.[42]

Justice Ginsburg was only one of many powerful female leaders who passed away since the original publication of this book. We were similarly heartbroken to learn that one of our shortlisted sisters, Joan Dempsey Klein, died at her home in Santa Monica on Christmas Eve of 2020, at the age of ninety-four. As is often the case for so many prominent women in normal times, Klein's death went relatively unnoticed. To address this glaring omission from mainstream media, we penned our own tribute to Klein, titled "Rest in Power: Justice Joan Dempsey Klein, Who Devoted 'Every Day' to Eliminating Gender Discrimination," which was published by *Ms.* magazine.[43]

In the days following Klein's death, the nation lost another brilliant legal mind. Professor Deborah Rhode, the Ernest W. McFarland Professor of Law and director of the Center on the Legal Profession at Stanford University, passed away on January 8, 2021. Rhode was one of the nation's first female law professors in the United States and only the second woman tenured at Stanford. "She's known for almost singlehandedly building the field of legal ethics, and for her extensive work on women's issues, access to justice, gender and the law, and the teaching of leadership, especially to women."[44] Her scholarly contributions will certainly endure. Deborah was more than just a colleague in the legal academy; she was a mentor and dear friend. Her early support and enthusiasm for our work played an important role in bringing this book to the world. She gave us comments on our initial writing, shared her book contracts when it came time to negotiate with our publisher, and bought copies to give as gifts to friends.

One of Rhode's final publications focused on mental health issues faced by lawyers. She called for more openness about mental health issues, a legacy that could not be more important for members of the legal profession given the rates of substance abuse and suicide. She wrote: "Lawyers report almost three times the rate of depression and almost twice the rate of substance abuse as other Americans. Law ranks among the top five careers for suicide."[45] However, the published version of her article is not what she wrote in a draft shared with one of us. That draft contained pages of personal details about her own struggle. She discussed issues related to love and loss. These same themes emerged in our research about the lives of the shortlisted sisters, though not necessarily framed in the language we use today about mental health. We adopt Rhode's call for greater support and normalization of mental health

as another strategy to add to the list of lessons we draw upon from the lives of the women profiled in this book in chapter eight. We urge leaders and those in positions of power to embrace vulnerability and tell their *whole* stories, just as we do in this book through reliance on archives and oral histories from the shortlisted sisters.

Although the deaths of these individual women lawyers are profound to us personally and collectively to our nation, they are contextualized within the devastating impact of the global COVID-19 pandemic. According to the World Health Organization, by late 2021, there have been nearly five million COVID deaths worldwide.[46] Over seven hundred thousand of these were in the United States alone.[47] Countless others suffered significant health consequences and economic hardships because of this deadly virus. The years 2020 and 2021 are forever marked by this enormous loss.

The pandemic's impact, however, was felt far beyond the deaths and record-setting illnesses. It forced the shutdown of our country and the world for months, with schools and businesses shuttered or shifted online for well over a year. The impact was felt particularly hard by women and minorities, many of whom lost their jobs and suffered health concerns at alarming rates while simultaneously pressed with increased care-giving responsibilities. When evaluating unemployment statistics, the rate of female unemployment rose into double digits in 2020 for the first time since 1948; black and Latina women faced much higher rates of unemployment than did white women and men.[48] At twice the rate of men, women were dropping out of the labor market partially due to lack of child care.[49] The pandemic unearthed the shortcomings of American society, many of which profoundly impact women and minorities. These shortcomings are increasingly providing fodder for investigation and analysis by scholars. Law professor Jessica Fink has focused on a particularly egregious dimension of this systemic problem: "government's failure to provide meaningful and affordable support for working families—and, in particular, for working women—when it comes to their child care obligations."[50] Similarly, Meera Deo's "Investigating Pandemic Effects on Legal Academia" exposed the impact on law faculty retention and mental health, especially on the most vulnerable professors, including junior faculty, caregivers, faculty of color, women faculty, and women of color.[51] The scientific journal *Nature* documented in mid-2020 that while prepublication submissions increased for men during the height of social isolation, they decreased for women. On the specific topic of COVID-19, only one-third of authors were women from January 2020 through at least July 2020.[52]

Although the volume of significant events since the first edition of Shortlisted was published are more than we can possibly cover exhaustively in this new Preface, we would be remiss not to mention the ongoing developments in the #MeToo movement. The New York governor Andrew Cuomo stepped down from his post mid-year in the wake of numerous allegations of sexual harassment. A major scandal erupted within the Time's Up organization after the findings of an investigation were released. Time's Up was created to address gender discrimination in the workplace. The organization's lawyer, however, was allegedly engaged in a cover up involving the Cuomo sexual harassment cases, and the organization's CEO, Tina Tchen, abruptly resigned following sharp criticism of her handling of the organization's response. The entire board (which included numerous Hollywood superstars, among them Eva Longoria and Shonda Rhimes) subsequently disbanded.

On a more personal note, our May 2020 release date for the first edition of *Shortlisted* fell at the height of pandemic-related closures. This meant disappointment as we canceled numerous in-person book signings and author talks. More than a year passed before either of us saw *Shortlisted* on an actual bookstore shelf! But we did not let this hold us back from sharing the stories of our shortlisted sisters with audiences at academic conferences and in popular media including radio, podcasts, and television shows.

Like the rest of the world, we quickly pivoted to Zoom sessions and video webinars to share our work. We had the opportunity to talk about *Shortlisted* with diverse audiences across the country and internationally, which led us to some unexpected insights about strategies for addressing enduring gender inequity that we would add to chapter eight's list. One of our favorite pieces of advice came from California Supreme Court justice Goodwin Liu, who encouraged the attendees of our author-meets-reader session at the Association of American Law Schools 2021 Annual Meeting to seek assurances before agreeing to be vetted on a shortlist that the process leaves us better off, in terms of both personal growth and professional reputation, even if we are not ultimately selected for the position under consideration.

Often as we spoke about the book, audience members shared their own stories of discrimination and experiences of prejudice. Child care and caregiving burdens were common themes, along with the need to amplify women's voices, even if we may not all share the same viewpoints. At the Southeastern Association of Law Schools 2021 Annual Meeting, law professor Wenona Singel reminded us that some women remain largely absent from professional life, noting that our study of shortlisted women included no Native American women. At that same presentation, RonNell Andersen Jones, also a law professor and a former clerk to Sandra Day O'Connor, shared meaningful wisdom that the justice passed on to her during the clerkship: "being a woman is your most important and least important professional trait." These observations reinforce our advocacy to remedy inequities with structural improvements that do not impose further burdens on those historically excluded from participation in professional life.

Finally, our book was not the only one whose launch was compromised by occurring during the pandemic. *Shortlisted* joined a host of others also addressing gender inequality and the untold stories of women, including *Constitutional Orphan: Gender Equality and the Nineteenth Amendment* by Paula Monopoli, *Paving the Way: The First American Women Law Professors* by Herma Hill Kay and edited by Pat Cain, *Unequal Profession: Race and Gender in Legal Academia* by Meera Deo, and *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* by Julie Suk. We are grateful to be in their company and hope our collective work inspires others to take up these conversations.

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PREFACE TO THE FIRST EDITION

This book finds its origins in the nominations of Sonia Sotomayor (2009) and Elena Kagan (2010) to serve on the United States Supreme Court. Both were exceptionally well-qualified candidates, with educational pedigrees and legal experience rivaling if not exceeding any male justice ever to serve. Rather than heralding these qualifications, however, the media focused on other attributes after President Barack Obama dared to nominate not only one but two single females. Examples of articles appearing at the time include "Then Comes the Marriage Question,"[1] appearing in the *New York Times*, and "The Supreme Court Needs More Mothers,"[2] featured by the *Washington Post*. The blog *AbovetheLaw.com* ran a story, "Elena Kagan v. Sonia Sotomayor: Who Wore it Better?,"[3] critiquing the nominees' appearance in similar blue blazers during their respective confirmation hearings. *TheDailyBeast.com* demanded, "Put a Mom on the Court"[4] in response to their shared childless status and also cautioned that a "Fat Judge Need Not Apply."[5] Reading these and similar headlines, we struggled to recall any mention of body weight, clothing choice, or parental status when President George W. Bush nominated John Roberts and Samuel Alito just five years earlier. Both of us—unbeknownst to the other—clipped these articles from the newspaper much in the same way as Sandra Day O'Connor did in the early 1970s when the press speculated about the possibility of a woman nominee to the Court.

As relatively new colleagues, we exchanged these articles as well as blog posts and other online discussions. We typed lengthy emails to one another, reacting to what we read in the media and watched on the television. The gendered nature of the headlines and related photographs, even the particular location of an article on the newspaper page or the photo selected, led us to ask each other a number of questions. What are the similarities and differences in subject matter of news coverage for nominees? What sort of introduction do they receive in the early articles that appear after their nomination is announced? Does coverage differ between male and female nominees? We wondered whether the bias and stereotyping we saw in news stories reflected perceptions and practices in the workplace that keep women from attaining the highest ranks in numbers equal to their entry into the profession. Ultimately, we speculated that a more systematic analysis of these media depictions would help advance the conversation about persistent gender inequality in the legal profession and beyond.

The importance and complexity of these questions warranted more analysis than what anecdotal clipping of articles and exchanging of emails could possibly reveal. So, we embarked upon an empirical study of the media's depiction of Supreme Court nominees with an interdisciplinary focus, situating our work at the under-explored intersection of gender, law, media studies, political science, and sociology. To conduct the study, we compiled, read, and coded thousands of articles from the *New York Times* and the *Washington Post* about every Supreme Court nominee from William Rehnquist and Lewis Powell, who were both nominated and confirmed in late 1971 and sworn in during the first weeks of 1972, through Sotomayor and Kagan. We selected the early 1970s as a starting point, mindful of the feminist movement's influence at the time. Our empirical research revealed that women are, in fact, portrayed in explicitly gendered and often unfavorable ways, specifically in the context of appearance,

marital status, motherhood, and sexuality. The media frequently commented on the female nominees' attire, childlessness, dating life, and sexual preferences, among other topics completely unrelated to their competency for judicial office, in stark contrast to coverage of their male counterparts. We concluded that the gendered media coverage of nominees serves as a proxy for how women fare in the legal profession and all workplaces.[6]

Our study was the first to undertake such a comprehensive empirical evaluation of the gendered portrayal of Supreme Court nominees. This is surprising because vacancies on the Court generate a significant amount of public scrutiny and attention. Less surprising, perhaps, were the study's results. After embarking on this project, we soon learned that others were engaging in similar conversations about the media's portrayal of nominees. We posted an abstract of our media study article on the Social Science Research Network and quickly received an email from Linda Greenhouse, a professor at Yale Law School and *New York Times* op-ed contributor and former Supreme Court reporter. She relayed that her students were also concerned about these very same issues.

One article in particular stood out as we read through thousands for the media study. That article contained a rather colorful description of the physical appearance of a female judge from California who appeared on President Richard Nixon's shortlist for the Supreme Court in 1971. We were stunned to be learning of her story for the first time in this way. Why hadn't we read about this accomplished female jurist in our high school history classes, or even our law school classes on feminist history? How many other women were shortlisted before Sandra Day O'Connor became the first to join the U.S. Supreme Court? Who was the first president to include a woman on the shortlist? How might the Court be different had women been selected before O'Connor? Might this have avoided the continued disparities for women, especially minority women, in positions of leadership and power in law and other professions?

To answer these questions, we first researched presidential archives. (You can read more about this process at the end of the book.) We uncovered not only the story of the female California judge, but also those of eight additional women formally shortlisted by presidents before Sandra Day O'Connor, going all the way back to the 1930s. We wanted to learn more about these women, so we visited libraries and museums across the nation to review collections of their personal papers. We looked to the research of historians and other scholars. We read autobiographies, biographies, news articles, and oral histories. We even attended the memorial service of one of the women. (Since many of the women are no longer living, we intentionally decided not to conduct personal interviews in order to maintain a consistent approach for all.) As we immersed ourselves in the lives of these women, we observed commonalities and themes that are relevant today for addressing unequal gender representation in positions of leadership and power. We also saw in them images of ourselves both personally and professionally.

This is how *Shortlisted: Women in the Shadows of the Supreme Court* began. Our commitment to this project persevered through several professional moves over the course of a decade that took us to opposite ends of the country. We hope the stories of these women inspire you as much as they have inspired us.

Introduction

shortlisted, *adj.* qualified for a position but not selected from a list that creates the appearance of diversity but preserves the status quo

As the *New York Times* reported in 1971, Mildred Lillie *fortunately* had no children. The article marveled at how she maintained "a bathing beauty figure" in her fifties.[1] Lillie was not, however, featured in the news as a swimsuit model.

Instead, she was shortlisted. President Richard Nixon had included her among six potential nominees on his list for the United States Supreme Court. At the time, Lillie had served as a judge on California courts for more than twenty years. Her resume was as competitive if not more so than others on Nixon's list. Lillie could have been the nation's first female justice, but she was not chosen. Instead, Nixon claimed to care about diversity but preserved an all-male Court.

This book exposes the potential harms of being shortlisted and offers inspiration for women to chart a path from shortlisted to selected in any career. Stories of women shortlisted for the Supreme Court illuminate how this can be accomplished—their early successes in a world hostile to women offer excellent guidance for navigating the inequalities that endure in the #MeToo world. We share their stories and their collective strategies for moving from shortlisted to selected in the pages that follow.

But first, back to the "bathing beauty," the Honorable Mildred Lillie. The *Times* article provoked outrage on the opinion page even in that era. As one reader observed:

> To the Editor:
> Your description of the "qualifications" of Judge Mildred Loree Lillie (biographical sketches of Supreme Court nominees Oct. 14) illustrates perfectly the absurd sexist prejudices to which all women are persistently subjected. Why did you choose to objectify this woman and diminish her accomplishments by including such a totally irrelevant and subjective item? You implied that Judge Lillie's body was just as significant as any single professional attribute she possesses. There was no discussion of the health—much less the physique—of any of the other possible nominees. Perhaps you could rectify this inequality by printing a discussion of the extent to which Senator Byrd has retained his schoolboy figure or the manner in which Herschel Friday fills his swimsuit.[2]
>
> —Barbara B. Martin, "Sketch of Judge Lillie," *New York Times*, October 23, 1971

The image of Lillie in swimwear reflects the sexism of that era and resonates even today as consistent with society's ongoing obsession about the female body. The prevailing sentiment during Lillie's time placed men at work and women at home, with minority women often cooking and cleaning for others. Women were largely excluded from the professional class. As articulated by Justice Bradley, concurring in the Supreme Court's decision to deny Myra Bradwell admittance to the Illinois Bar in 1873: "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the

divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[3] Even as the United States neared its bicentennial, a woman certainly had never occupied a position on the Supreme Court. In fact, women were not supposed to pursue the law at all.

The simple fact that President Nixon shortlisted Lillie for the Court pushed back against gender norms that dominated the era and still persist. His shortlisting of Lillie is an early example of the very idea this book explores—being sufficiently qualified but not ultimately selected from a list that creates the appearance of valuing diversity but preserves the status quo. Nixon faced immense political pressure to place a woman on the Court but personally believed women belonged only in the home—he did not think women should even be allowed to vote![4] Shortlisting a woman allowed Nixon to pacify those demanding equal representation on the Court while simultaneously maintaining it as a man's world. But Nixon was not the first president to shortlist a woman and would not be the last.

Before Sandra Day O'Connor secured her legacy as the first woman nominated and confirmed to the Court in 1981, a handful of presidents formally shortlisted at least nine others for that role. *Shortlisted* is a project of first impression. We are the first to identify and explore the stories of these women in light of their shared experience of being shortlisted. Until now, their individual and collective stories have largely gone untold.

* * *

In early 2020, three women sat on the United States Supreme Court. Justice O'Connor retired in 2006. Only four of the 114 justices have been women, a mere 3.5 percent. No president has nominated a woman to the position of chief justice. This glaring lack of gender parity on the Court is reflective of leadership positions across all sectors of the legal profession and the workplace as a whole. Women enter law school and most entry-level legal positions in numbers roughly equal to men. For nearly two decades, around fifty percent of all law graduates have been women, and that number increases every year. Yet they do not advance into the upper echelons of the profession in similar numbers.[5]

Numerous studies document the lack of women lawyers in positions of power and the results have remained relatively static over the years. The data cited here captures the state of women in the legal profession in the years ranging from 2018 to 2019. According to the National Association of Women Lawyers annual survey, twenty-two percent of managing partners and twenty percent of equity partners in the nation's largest law firms are women.[6] Only three percent of equity partners are women of color.[7] Women represent less than twenty-six percent of female general counsels in the Fortune 500,[8] make up almost thirty-two percent of law school deans,[9] and account for thirty-two percent of tenured law school professors.[10] Only thirty-eight percent of law review editors-in-chief at the top fifty U.S. law schools are women.[11] In 2019, women held just over twenty-three percent of statewide elective executive offices,[12] down from a peak during 1999–2001.[13] Nationally, as of 2018, the percentage of women in Congress was twenty-three percent in the Senate and twenty percent in the House.[14] In the same time frame, only thirty-six percent of the judges serving on state supreme courts or their equivalent were women.[15] Just a handful of states have a *majority* of women on their highest court, and many have only one.[16] Only twenty-three percent of lawyers who argue cases before the Supreme Court are women.[17] The situation deteriorates even more when factoring in race, ethnicity, and sexual orientation.[18]

Contemporary discourse on gender and the Supreme Court in disciplines like gender studies, law, media, and political science (including our own previous research, described in the preface) has mostly focused on the stories of the women who are selected, not shortlisted.[19] Reporters, commentators, and scholars frequently retell Justice O'Connor's story

as the first woman to serve on the Court, followed by a discussion of the three successful female nominees who followed in the wake of her legacy. The year 1981 is remembered as a pivotal and celebrated year as President Ronald Reagan made history by nominating the first woman to the Court. Over the course of the next thirty years, four more women would be nominated, three successfully confirmed. Ruth Bader Ginsburg was nominated and appointed to the Court in 1993, followed by Sonia Sotomayor in 2009 and Elena Kagan in 2010. Harriet Miers was nominated but withdrew from consideration in 2005.

Coverage of the women nominated and confirmed to the Court is important, but here we expand the narrative to include the untold stories stumbled upon in our media study, the stories of those shortlisted. It is valuable, as a preliminary matter, to tell their stories as part of the larger historical record of women's entry into the legal profession. But beyond that, their stories also expose barriers that endure whenever a candidate is shortlisted but not selected. Their collective history offers insights for transcending modern shortlists. Our work builds upon earlier scholarly efforts that developed the theory of the "leaking pipeline,"[20] in other words, the idea that women enter the profession in numbers equal to men but do not advance into leadership positions at the same rate, if at all. One way the pipeline "leaks" is via shortlisting, with qualified women considered in the mix of candidates but not selected.

Shortlists help to identify and explain latent discrimination and bias both within and outside of the judiciary. Many attempts to achieve diversity are effectively nothing more than window-dressing intended to create the appearance that diversity is valued. Take the so-called "Rooney Rule," named for former president and owner of the Pittsburg Steelers Dan Rooney, which is a policy adopted by the National Football League requiring that at least one ethnic minority be interviewed when hiring for head coaching and senior leadership positions. Some herald the rule as a success because it has increased the number of minorities who interview for these positions, arguing that even if a minority candidate is not selected, there is benefit in at least considering them. Aspirational policies like these, however, have done little to change the demographics of who is actually hired.

Some companies have experimented with similar policies. In 2017, the Diversity Lab launched the Mansfield Rule for law firms and corporate legal departments, named after Arabella Mansfield, the first woman admitted to practice law in the United States when she received a law license from the Iowa Bar in 1869.[21] The Mansfield Rule requires that employers consider diverse candidates for thirty percent of open positions in leadership or governance; thus, for ten potential hires, three must be women or minorities.[22] With a significant cohort of prestigious firms and corporations committed to the effort, this new policy seems promising, but it is too soon to assess the impact. In 2010, the Securities and Exchange Commission began requiring companies to disclose efforts to address diversity when choosing board directors in their proxy statements; however, this effort has not increased the number of women on Fortune 500 boards.[23] The data reveals a dismal picture where, even after implementation of the SEC rule, the number of women named to boards actually decreased by two percent, down from approximately twelve percent to ten percent.[24] We do not mean to diminish the importance of policies like these, but we are more concerned with who is actually selected, not just who appears on the shortlist.

This book not only recounts the history of women shortlisted for the Supreme Court, but it develops their stories as a framework to identify the harms of shortlisting and strategize solutions for women to be selected, not just shortlisted. The individual life of each woman profiled here could easily be the subject of an entire book of her own. (For two women, this is actually the case.[25]) However, the stories of women shortlisted before and immediately after O'Connor's confirmation have not yet been told in any meaningful way and have certainly not been studied in relation to one another as they are here. We believe there is power in a collective narrative of their lives, especially as we strive to better understand and ultimately

ameliorate the dynamics that perpetually keep women on the shortlist. Each woman profiled here repeatedly went from shortlisted to selected as she ascended to the judiciary, the dean's office, or the president's cabinet, even if not selected from the ultimate shortlist for the Supreme Court. Their stories offer lessons to inform and remedy the pervasive, enduring gender inequality in positions of leadership and power.

It is time for more women to move from shortlisted to selected.

PART I

The Shortlisted Sisters

An Untold "Her"story of the Supreme Court

[T]he Court which has said to woman "You cannot enter here," must now open its doors at her approach when she comes armed with the proper documents.[1]
—Myra Bradwell, *Chicago Legal News*, 1879

The dominant narrative surrounding the United States Supreme Court focuses on the individuals who are nominated and confirmed. Academics and authors devote entire careers to telling and re-telling mainstream stories about the Court and its justices. The four women who have made it onto the Court, in particular, are subjects of extraordinary attention. Justices O'Connor, Ginsburg, Sotomayor, and Kagan have become popular culture icons, appearing on book covers, t-shirts, stickers, coffee mugs, tote bags, tattoos, action figures, and, in the case of "Notorious RBG," even closet air fresheners and breath mints. These are compelling stories, to be sure. But what of those women shortlisted before O'Connor became the first woman to serve on the nation's highest court?

Part one of the book tells a new Supreme Court history—*her story*—to include these important, and overlooked, narratives. It is a history of bathing beauties, lesbians, mistresses, and more who repeatedly went from shortlisted to selected for positions of power as lawyers before being considered to fill the ultimate role of Supreme Court justice. This book not only fills a glaring omission in the Court's history, but it also advances a critical aspect in the evolution of feminism and women's rights. Stories of the shortlisted sisters began as first wave feminism was just taking hold during the suffrage movement and continued through the rise of the second wave in the 1960s and '70s. Their legacy offers many lessons for feminism and the future of women's rights movements.

To best understand the significance of the shortlisted sisters' stories, it is worth briefly revisiting the history of women's rights in America to provide some context for their coming of age. Women were not among those whose rights were secured by the United States Constitution in 1789. More than five decades later, women gathered in Seneca Falls to hold the first Women's Rights Convention in 1848. The gathering featured a document, the Declaration of Sentiments, which outlined a list of grievances authored by middle- and upper-class white women.[2] Modeled on the Declaration of Independence, it contained a list of complaints surrounding women's inequality including education, employment, moral expectations, property rights, and voting. Many of the demands have since been resolved, evidencing progress. After all, women today no longer face total disenfranchisement or a complete ban on formal education. But a number of the grievances listed in the Declaration of Sentiments remain relevant, such as the critique of male dominance in employment and a lack of pay equity: "He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration."[3] The Seneca Falls convention

was a successful endeavor in many ways, but notably less so for minority women, especially black women. This error is one that feminists have repeated time and time again.[4]

It was not until 1869 that a woman was admitted to the practice of law: Arabella Mansfield shattered that glass ceiling with her admission to the Iowa Bar. The same year, Washington University in St. Louis became the first law school to admit women. Three years later, in 1872, Charlotte Ray became the first African American female lawyer, admitted to the District of Columbia Bar after graduating from Howard University.

It would be a full decade following Mansfield's achievement in Iowa before a woman would be admitted to the Supreme Court Bar. Belva Lockwood holds that distinction. The Court initially denied her application, so she turned to Congress and boldly convinced the male legislators to pass a statute entitled "An Act to Relieve Certain Legal Disabilities of Women." President Rutherford B. Hayes approved the legislation in 1879 and Lockwood was admitted that same year. Just a few years earlier, the Court had rejected Myra Bradwell's appeal from the denial of admission to the Illinois Bar—as noted in the introduction, it was here that Justice Bradley extolled the virtues of keeping women in the home.[5]

One year after Lockwood's admission, she became the first woman in the United States to argue a case before the Supreme Court, representing a female client with an unpaid debt.[6] Though Lockwood lost the case, she appeared again in 1906, this time winning a case on behalf of the Cherokee Nation seeking payment from the federal government for land ceded to the government.[7] She went on to be nominated as a presidential candidate in 1884 by the Women's National Equal Rights Party, campaigning on promises to give women equal rights in marriage and to place a woman on the Supreme Court. Grover Cleveland won that year, and when Lockwood ran again four years later, Benjamin Harrison was elected president. (The litany of men running for and winning the presidency continues into the present day.) More than a century passed—102 years—from Lockwood's admission to the Supreme Court Bar before a female justice sat on that bench.

Feminism's first wave focused on securing the right to vote, one of the main issues noted by the women at Seneca Falls. The suffrage movement, led by well-known activists like Susan B. Anthony, Elizabeth Cady Stanton, and Alice Paul, was marked by different perspectives on not only the best way to achieve the desired end, but also how to address race. For example, "[w]hen Paul staged the famous women's rights parade of 1913 in Washington, she ordered black suffragists to march at the back of the line in order to spare the feelings of Southern sympathizers. Ida B. Wells-Barnett, who had been leading a group of black women from Chicago, vanished into the crowd along the sidewalk, then stepped back into the street as the Illinois delegation marched by, joining her white friends and integrating the demonstration."[8] This same sort of racial tension endured even fifty years later, when "Paul ignored pleas that she decline to accept support for the ERA [Equal Rights Amendment] from the segregationist presidential candidate George Wallace."[9] Racial divisiveness and struggles to accomplish social change continue to this day.

After securing the right to vote with the passage of the Nineteenth Amendment in 1920, many of the same women began to lobby for broader rights. The Equal Rights Amendment was introduced by Paul in 1923. It was not until 1972 that it finally passed in Congress and was sent to the states for ratification—where it still sits. Again, some minority women felt excluded from these efforts, which accounted for at least part of the reason why states like Illinois failed to ratify it in the 1970s. When Illinois finally voted for its passage in 2018, Representative Mary E. Flowers, a black legislator, critiqued the law as being designed to advance the rights of white women but not all women, similar to the fight for suffrage.[10] On the House floor, she explained, "There were some laws on the books, but they did not apply to me."[11] Instead, "I've never had my rights given to me. I always had to fight for what was mine."[12] With Illinois becoming the thirty-seventh state to ratify, just one more is needed before the

constitutionally-required three-quarters vote by all states occurs. Should a thirty-eighth state do so, however, it remains unclear whether the ERA will be deemed ratified within the appropriate time-frame.[13]

Even without a constitutional amendment to document equal rights for women, many believed that the dearth of female leaders would not be permanent. More women entered the pipeline once undergraduate and professional schools increasingly opened their doors and federal lawmakers passed formal measures like Title VII of the Civil Rights Act of 1964 (banning employment discrimination based on race, color, religion, sex, and national origin) and Title IX of the Education Amendments of 1972 (protecting access to education in federally funded institutions of education). This belief, while reasonable, has not borne out. No matter the field or profession, the percentage of women in leadership roles comes nowhere close to their percentage of the population.

One hundred twenty-nine years after Seneca Falls, in the midst of feminism's second wave (which focused on issues like labor, pay equity, sexuality, reproduction, and dissatisfaction with domesticity[14]), women marched the streets of Houston in 1977 at the first—and only—National Women's Conference, with delegates representing every state. Participants hoped that the endeavor would galvanize final support to pass the ERA, but it did not.[15] Instead, women struggled to put their professional training to work, and often found themselves rejected for positions because they might "distract" their male counterparts, become pregnant, or simply take a position held for a "more-deserving" man. Women who managed to secure positions in the workplace found themselves forced to endure sexual harassment and were paid less than men with the same qualifications and responsibilities.

Landmark sexual harassment and discrimination cases, like *Meritor Savings Bank v. Vinson*[16] in 1986, made remedies available to some women but did little to change misogynistic culture. Nowhere was this more evident than when Anita Hill disclosed her experiences of sexual harassment perpetrated by Supreme Court nominee Clarence Thomas in 1991. Hill testified for eight hours in front of the Senate Judiciary Committee about the sexual harassment she endured while working for Thomas when he was director of the Equal Employment Opportunity Commission (EEOC) and a supervisor at the U.S. Department of Education. Her testimony included revelations that Thomas shared graphic descriptions of pornography and made references to pubic hair. Although Hill's role was to provide testimony in the context of hearings about Thomas's suitability as a justice, it appeared that Hill herself was on trial or under investigation. A similar phenomenon bizarrely repeated itself nearly thirty years later when Republicans on the Senate Judiciary Committee hired a "female prosecutor" (distinctly noting her gender) to question Dr. Christine Blasey Ford, who alleged that Supreme Court nominee Brett Kavanaugh had sexually assaulted her as a teenager. We return to this parallel phenomenon at the end of the book. Despite Anita Hill's highly credible testimony, Thomas was confirmed 52–48. The ordeal caused bitter disagreement within the African American and feminist communities. Nonetheless, Hill's testimony would forever change the landscape of sexual harassment, making the term a household word and dramatically increasing the number of complaints lodged with the EEOC.

Outraged and inspired by Hill's experience, a record number of women ran for—and won—congressional offices in 1992, making it what *Time* magazine dubbed "The Year of the Woman."[17] Keep in mind, however, that this number of wins was only twenty-seven, which emphasizes how grossly underrepresented women have been in Congress. The magazine cover story championed the "flurry of fresh female faces" as a response to second-wave feminism: "If the women's movement of the 1970s was the lightning flash of female empowerment, then the long-awaited roll of thunder began to resound in this year's election results. From coast to coast, women candidates, thrust forward by Anita Hill-inspired outrage and helped along by

anti-incumbency sentiment, were in contention as never before."[18] Hill's testimony and the election results that followed marked the start of feminism's third wave.

Twenty-five years later, the nation watched one of the most objectively qualified persons in history run for the presidency—a Yale-trained lawyer, law firm partner, New York senator, and U.S. secretary of state who had also spent eight years working in one of the most prestigious areas of the White House as first lady. Hillary Clinton was the first woman to ever be nominated for the office by a major political party. Polls predicted widely that she would win, but instead the nation chose Donald J. Trump, a man who exposed the reality of American misogyny in unprecedented ways. He shamed Republican opponent Carly Fiorina's appearance ("Look at that face! Would anyone vote for that?"[19]) and stalked—literally—Clinton on stage during a presidential debate.[20] His bragging comment to "grab 'em by the pussy"[21] played over and over during the campaign, foreshadowing what would follow. As president, Trump ridiculed Fox News anchor Megyn Kelly as having "blood coming out of her eyes, blood coming out of her wherever"[22] and told ABC reporter Cecilia Vega, "I know you're not thinking, you never do"[23] after she thanked him for calling on her at a press conference. He also targeted black female journalists with persistent name calling.[24] These disparaging, denigrating comments about women are so common[25] that it was newsworthy when Trump *did not* make them.

In response to Trump's election, women across the country marched, yet again. This time, instead of donning suffragist white or burning bras, they gathered by the millions in hot pink pussy hats to protest the commander in chief. The day after his inauguration, the Women's March in Washington, D.C., became what has been called the largest protest in U.S. history,[26] and even more marched in cities throughout the United States and around the globe. Almost simultaneously, the #MeToo movement emerged in full force. First created by Tarana Burke, an African American woman, in 2006 (Burke, incidentally, rarely gets attribution for her significant contributions), the effort went mainstream over a decade later when celebrity actress Alyssa Milano tweeted about her own experience with sexual assault/harassment on October 15, 2017, prompting millions of other women to do so as well.[27] The #TimesUp movement launched in January 2018 to support women in sexual harassment cases, raising a legal defense fund of more than $20 million. Many women (including the authors of this book) revealed publicly for the first time sexual assaults and harassment that they had kept hidden their entire lives. Some published detailed descriptions of the trauma, such as the op-ed penned by journalist Connie Chung in the *Washington Post*[28] and the profiles by actresses Ashley Judd and Gwyneth Paltrow featured in the *New York Times* along with eighteen other survivors.[29] Not only did the effort bring women together to share their experiences, but it brought prominent men down from their positions of power.

One year after the #MeToo movement went viral, the *New York Times* inventoried the number of "high-profile men and women in the United States who permanently lost their jobs or significant roles, professional ties or projects (e.g., concert tours, book deals) within the past year after publicly reported accusations of sexual misconduct."[30] The list featured 201 men and three women, including comedian Louis C.K., news anchor Matt Lauer, journalist Charlie Rose, actor Kevin Spacey, media mogul Harvey Weinstein, and numerous state politicians. While nearly half of their replacements were women, this hardly made a dent in the gender disparities in leadership and power, especially for the legal profession, which has yet to experience its own #MeToo reckoning. Only two men on the list were practicing lawyers or judges—Eric Schneiderman, the former attorney general of New York, and Alex Kozinski, the former chief judge of the United States Court of Appeals for the Ninth Circuit (more on him in chapter five). The relative absence of the legal profession from the list does not mean women in that industry are not experiencing sexual harassment and assault. A study of nearly 7,000 lawyers from 135 countries published by the International Bar Association in 2019 found that

thirty-seven percent of women and seven percent of men reported experiencing sexual harassment in the workplace.

With the failures and shortcomings of the first, second, and third waves of feminism exposed yet again, many women, especially minority women, rejected feminism entirely, though arguably the fourth wave of feminism began in 2012 with the advent of social media. Despite these powerful surges in the name of feminism, many are left feeling lost in the undertow. Some argue that whatever wave of feminism we are in, it amounts to nothing more than another version of white supremacy.[31] Others acknowledge the flawed past of feminism while simultaneously pushing toward meaningful equality that embraces the complexities and struggles of intersectionality, including ability, class, education, race, religion, sexuality, and other underrepresented statuses. As Chimamanda Ngozi Adichie explains in *We Should All Be Feminists*, "My own definition of a feminist is a man or a woman who says, 'Yes, there's a problem with gender as it is today and we must fix it, we must do better.'"[32] We choose this as our definition as well, and we see this book as providing one pathway for all of us to do better.

Though the initial #MeToo reaction led to some men in power being replaced by women, we are concerned about the inevitable backlash. Some men have responded by avoiding women in the workplace entirely. As one news article explained in late 2018:

> No more dinners with female colleagues. Don't sit next to them on flights. Book hotel rooms on different floors. Avoid one-on-one meetings. In fact, as a wealth adviser put it, just hiring a woman these days is "an unknown risk." What if she took something he said the wrong way? Across Wall Street, men are adopting controversial strategies for the #MeToo era and, in the process, making life even harder for women. Call it the Pence Effect, after U.S. Vice President Mike Pence, who has said he avoids dining alone with any woman other than his wife. In finance, the overarching impact can be, in essence, gender segregation.[33]

This contemporary gender segregation looks and sounds much like the world the women profiled in this book had to navigate as they advanced through their careers, regularly excluded from spaces where "business" was conducted by men. While that news article suggests this is limited to the world of finance, we fear that it may become the status quo across all sectors and signal a return to an era we thought long behind us.

This #MeToo backlash makes the stories of the shortlisted sisters all the more relevant today. Each of them endured—and thrived—in worlds where men regularly excluded women and yet they repeatedly ascended into prestigious positions of power previously held only by men. The first two chapters of part one introduce these incredible women and place their lives and accomplishments in historical context. Chapters three and four explore their stories in connection with those who followed, including the women who made it onto the Court and those who did not. Part two then turns to the consequences and harms of shortlisting and outlines ideas about how more women can move from shortlisted to selected.

1

The First Shortlisted Woman

FLORENCE ALLEN

As we consider national and international situations we realize that the woman lawyer is needed by America and by the world as never before. She is needed by the country, for her training enables her to join with men in teaching citizens and particularly the youth coming on, the meaning of the Constitution of the United States.[1]
—Florence Allen in her memoir, *To Do Justly*, 1965

Florence Allen was a woman before her time as the first female judge in Ohio, the first female to sit on a state court of last resort, and the first female appointed to an Article III federal appellate court, the United States Court of Appeals for the Sixth Circuit. She was also the first woman whose name appeared repeatedly on official lists of possible candidates for appointment to the United States Supreme Court.[2] We initially uncovered Allen's name listed as one of forty individuals in an undated and unsigned letter suggesting names for the Supreme Court preserved among Herbert Hoover's presidential papers. The letter, addressed to White House Press Secretary Ted Joslin, was likely written in 1932, as it references filling the vacancy created by Justice Holmes, who stepped down from the Court that year.[3] In the same archive, we discovered a one-page typed "Application for Appointment" for "Associate Justice of the Supreme Court of the U.S." that was filled out with Florence Allen's biographical information and professional accomplishments.[4] According to one historian, Hoover's attorney general, William Mitchell, considered Allen for a seat on the Court.[5] He was reportedly amenable to a woman filling that role, and when Hoover wrote to Mitchell inquiring about this possibility, Mitchell responded that he would be happy to appoint a woman "if he could find one."[6] Apparently he was not trying very hard, since Allen was quite well-known throughout the White House, the state of Ohio, and the entire nation. In a 1930 editorial, the *Christian Science Monitor* noted a "missing element" in all newspapers that published lists of possible nominees: no one "mentioned the name of a woman."[7] The piece endorsed Allen and Mabel Walker Willebrandt, whose name also appeared in the Joslin letter. (She served as an assitant attorney general under Presidents Harding and Coolidge.)

The reference to Allen as a possible nominee during the Hoover administration would prove to be just the beginning. We found evidence that she was also officially listed as a contender for the high court in 1937 during the Franklin Delano Roosevelt administration, and public support for her candidacy was quite strong. Harry S. Truman later considered Allen for the Court, and women also lobbied Dwight D. Eisenhower to this effect. While Allen was not ultimately nominated, her legacy as an exceedingly accomplished lawyer and jurist who achieved a multitude of firsts set the stage for a new era of diversity on the Supreme Court and in the workplace as a whole. One cannot help but wonder, however, what the impact of Allen's appointment to the Court as early as the 1930s would have been on both judicial decision-making and the path for women in professional and leadership roles. We reflect further on this in chapter seven.

There is historical evidence to suggest that Allen was *recommended* for a seat on the Court at least as early as 1924, during President Calvin Coolidge's time in office. A letter sent by E. L. Kenyon of Elkhart, Indiana, to Coolidge when Justice Joseph McKenna planned to resign from the Court urged, "If there is a woman in the United States who represents the legal profession, and who is qualified to fill the position of a justice of the Supreme Court, I believe Miss Allen is that woman."[8] Kenyon conceded it would be unusual for two sitting justices to hail from the same state of Ohio (Chief Justice William Howard Taft's home state), but he nonetheless opined, "It has always seemed queer to me that women did not enter the legal profession ages ago, and I believe that in another century you will see if you can look back from the great beyond that women are the justices of this world. For is it not a fact that JUSTICE is depicted by a woman holding up the scales. I cannot recall of seeing Justice represented by a man, either in statuary or pictures. Can you?"[9]

FIGURE 1.1. Florence Allen (Credit: Courtesy of the Ohio History Commission, AL00128)

Similar early advocacy for a woman on the Court appeared in a news article from *The Day Book*, published in Chicago on February 12, 1913: "Women Candidates for Harlan's Seat on the Supreme Bench."[10] The front-page article featured photos of two women, Emma M. Gillett and Ellen Spencer Mussey, with the author suggesting that "[m]any people will agree that President Taft might—and probably will—do a whole lot worse than to appoint a woman as a justice of the supreme court, in the late Justice Harlan's place."[11] But proposals like these were rare, until Allen.

Beginning early in her career, Florence Allen gained notoriety for her achievement of many extraordinary successes never before attained by a woman that continued throughout her lifetime. She was an author, common pleas judge, federal appellate judge, legal aid attorney, prosecutor, public speaker, state supreme court justice, and suffragist. Kenyon sent that letter

to President Coolidge even before Allen's arguably most significant accomplishment: her appointment to the United States Court of Appeals for the Sixth Circuit. While her life has been studied to some extent by historians, she is not a household name in the same way as Sandra Day O'Connor or Ruth Bader Ginsburg. She barely even graces a history book with the exception of her own autobiography, *To Do Justly*, and a biography, *First Lady of the Law*, published in 1984.[12] Her consideration by multiple presidents as a possible justice on the Supreme Court, paving the way for the other women shortlisted (and eventually selected), has largely escaped significant exploration.

Allen was born in Salt Lake City, Utah, on March 23, 1884, just fifteen years after Arabella Mansfield became the first woman admitted to practice law in the U.S. Allen's father, Clarence Emir, was a state legislator and successful mine developer in Utah; he was eventually elected to serve in the U.S. Congress. Unlike many women of that era, Allen was not the first in her family to attend college. Allen's older sister, Esther, would become the dean of women at Ohio State University. Her mother, Corinne, was the first woman admitted to Smith College. Allen described her mother as incredibly devoted, with a strong interest in her children's lives. Her mother would frequently implore them to "Make your point and sit down,"[13] advice that would serve Allen well in her career.

Education played an important role in Allen's upbringing. She attended Western Reserve University in Ohio, graduating in 1904, and then spent two years in Berlin studying music.[14] When she returned to Ohio, Allen completed her master's degree in political science in 1908 at Western Reserve. She then enrolled in the University of Chicago Law School in 1909, the lone woman out of about one hundred students.[15] She took criminal law with Roscoe Pound, the renowned legal scholar who went on to serve for twenty years as the dean of Harvard Law School. Male students in Allen's class expressed their admiration of her; they complimented her by saying that she had a "masculine mind."[16] This reference highlights stereotypes and biases that female attorneys have faced throughout their careers both historically and in the present day. The archetype of a lawyer is male, and it is against this backdrop that women are compared. Allen, however, had a mind of her own.

After her first year at the University of Chicago, Allen transferred to New York University School of Law in the hope of finding a more supportive environment where she would not be the only female student. There, she encountered a dean who was encouraging of her academic pursuits, and a law school culture where she and other women enjoyed the opportunity to participate fully in campus life. Allen recollected, "There was this wonderful woman, a symbol of the inevitable march of progress, of the inevitable granting of political liberty to women. She needed no defense, and neither did we. There we were in the Law School on equal terms with men, and we said to ourselves, if we pass our examinations and are admitted to the bar, no one can prevent us from practicing. This was the spirit given us by New York University Law School."[17] The atmosphere at NYU differed markedly, in a positive way, from institutions like Columbia Law School, where Allen would have liked to transfer but for the fact that the school did not admit women as full-time students. Columbia did not change its policy until 1927; this may seem shocking until one considers that Washington and Lee—the last law school to admit women—barred them until 1972.

Allen graduated second in her class from NYU in 1913 and after graduation she returned to Ohio. Whatever ambitions she had to practice in New York were quashed when prestigious law firms in that city did not extend offers to her.[18] In fact, firms back in her home state were hesitant to hire women lawyers as well, so Allen opened her own law firm and volunteered with the Cleveland Legal Aid Society.[19] Her "first case was that of an Italian woman who was suing her husband for divorce because he had deserted her and their children. The woman's brother paid Allen $15. In her first year she made $875."[20] (Years later as a judge, she refused to take over the divorce docket from her male colleagues because she disdained the notion that

this was somehow uniquely women's work, even if it was where she got her start.) She soon combined her office with the Legal Aid Society, and was later appointed as an assistant prosecutor in Cuyahoga County. Although she earned less money in this new position than she had in legal aid, she valued the experience it provided her over the salary.

Between 1910 and 1920, Allen devoted a good deal of time and attention to the suffrage movement. Her interest in this cause was inspired by a woman she heard speak in college, who would later become a significant role model, influence, and mentor: Maude Wood Park. Park visited Western Reserve University to encourage the female students to create a women's suffrage club. Allen credited Park with teaching her the importance of organizing women to bring about change—a lesson that would become vital later in Allen's career.[21] During her time working as part of the suffrage movement, Allen also learned the value of taking every opportunity to use her voice and speak about the causes, regardless of location or circumstance.[22] As she campaigned for the reelection of President Woodrow Wilson in 1916, Allen learned of an important case on women's suffrage in municipal elections granted through the East Cleveland Charter Commission that would be heard before the Supreme Court of Ohio. Allen ended up litigating the case before the state's high court and won, but women soon lost their newfound right to vote granted by the high court as a result of a popular referendum.[23]

The referendum was only a temporary defeat. Allen continued to persevere alongside other suffragists. Those efforts culminated in victory when women finally won the right to vote with the Nineteenth Amendment's passage in August 1920. Allen expressed the importance of this work in the following way: "This battle for the rights of full citizenship is a matter of such ancient history that we are inclined to accept the privilege of the vote as if we had always had it, forgetting what we owe to the hard-working and courageous women who devoted their lives to this cause."[24]

Women voters had a direct effect on Allen's subsequent political and judicial career: "I was the beneficiary of the entire women's movement."[25] Her entrance into the judiciary was made possible in large part by the campaigning she did for the suffrage movement. Allen reflected, "So I had friends everywhere. Moreover, they were not merely well-wishers; they were capable workers. They had made house-to-house canvasses before they got the vote, and now with the consciousness of political power they went forward joyously to make a house-to-house canvass for me."[26] She launched her campaign for the common pleas court in Ohio just days following the ratification of the amendment and was elected in 1920, beating nine male opponents.[27] While on that court, she instituted a number of reforms and worked diligently to alleviate the court's backlog of cases. To this end, she presided over almost 900 cases. Allen was also the first female judge to sentence a man to death.

Two years later, Allen continued on her trajectory of firsts when elected by the voters as the first woman justice on the Supreme Court of Ohio in 1922. As part of her campaign, Allen was required to secure 21,000 signatures from eighty-eight counties on a petition for her name to appear on the ballot. She received a large outpouring of support from the women she worked with in the suffrage movement. Allen remembered, "The women put the petitions into practically every one of the eighty-eight counties, and the local women in the counties obtained over forty-two thousand signatures,"[28] twice as many as was required. Her name appeared on the ballot without any affiliation; she faced opponents from both political parties and was bitterly opposed by the Republican Party. Nevertheless, she won, and credited her victory to the women who worked tirelessly for her throughout the state, and the press who reported favorably on her campaign. The *Washington Post* noted, "Newspaper woman, teacher, investigator of immigration conditions, lawyer, assistant county prosecutor and judge of common pleas court are the steps which have led Florence E. Allen to an associate judgeship on

the Ohio supreme court, as far as records show, the only woman in the world who will hold such a position."[29]

In 1928, Allen easily won her reelection campaign to the same court by 350,000 votes; again, she credited her friendships with the women of Ohio.[30] There is perhaps no better illustration of the power to change laws and policies by going directly to the people and asking for their vote. This highlights how important voting rights are in the struggle for equality, not only in *obtaining* the right to vote, but also in reforming limitations related to gerrymandering, poll locations, and voter identification.

Allen was revered and respected as a jurist. Her gender did not seem to impact public perception of her competence or qualification. As one commentator observed at the time, "Miss Florence E. Allen, elected justice of the Supreme Court of Ohio last fall, is establishing the fact that she is entitled to prominence not simply because she is the first woman to be elected to the supreme court of any State, but rather because of her unusually clear and up-to-date thinking. There is no jurist in Ohio today who is manifesting a deeper consciousness of present-day ideals than she."[31]

In 1934, after a career filled with professional accomplishments, Allen was nominated by President Roosevelt to the United States Sixth Circuit Court of Appeals. The nomination to this federal appellate court was strongly supported by Eleanor Roosevelt, who was one of many first ladies[32] to support female judicial appointees and who would continue to be a champion for Allen in the years that followed. In an article written for *Home Magazine* in 1932, she praised Allen's work and speculated that increased visibility of women like her might eventually lead to the perception that "sex should not enter into the question of fitness for office."[33]

The Senate unanimously confirmed Allen for the Court of Appeals, making her the first woman in the United States to receive a lifetime federal appellate judicial appointment. While her confirmation was unanimous, members of the appeals court themselves were not thrilled at the prospect of being joined by a woman: "None of the judges of the Sixth Circuit favored her appointment and one of the men was reported to be so upset he took to his bed for two days."[34] The courthouse facilities were also unprepared for the presence of a woman. Allen "had to make a long trek to the public areas of the building to use the restroom, and it was weeks before permission could be acquired from Washington to appropriate one of them and equip it with a lock and key to give her some privacy."[35] Even when her presence on the bench lost its novelty, the male judges continued to exclude her from their lunches.[36] Judge Allen would be the only woman appointed to a federal appellate court for thirty-two more years.

Allen's professional accomplishments are remarkable by any standards, and our research also uncovered that she was determined to be fully self-sufficient and financially independent in her adult life. She never married, but historians have pieced together the details of two long-term romantic relationships. Allen shared a home with Susan Rebhan, a YWCA organizer, for many years before Rebhan died unexpectedly in 1935. Rebhan orchestrated all of Allen's campaigns for office. After Rebhan's death, Allen shared her life with Mary Pierce, a school director, who also supported Allen in her work.[37] Allen and Pierce were buried next to each other upon their deaths. These relationships were not likely viewed as traditional romances, in part because of the time in which they existed, and we examine them in greater detail in chapter six. For now, we delve further into Allen's consideration for the Supreme Court.

Room in Roosevelt's Court Packing Plan for Allen?

In the 1930s, the appointment of a woman to the role of a Supreme Court justice was novel in ways that a contemporary audience might not appreciate. Recognizing the historical context at the time in which Allen's name surfaced in presidential circles is crucial to fully understanding the significance. Like modern women who experience success in their professional pursuits

but encounter painful resistance along the way, Allen too plateaued. Though she achieved an extremely high level of leadership and power, the Supreme Court proved off limits.

Women's organizations like the American Association of University Women, American Legion Auxiliary, Business and Professional Women, General Federation of Women's Clubs, New York Women's Trade Union League, Women's Bar Association of D.C., and Women Lawyers of New York City actively supported Allen's potential nomination to the Court. Their members spoke publicly about the importance of appointing a woman like Allen, and they directly appealed to presidents and members of the Court with their message.[38] These efforts, while not ultimately resulting in their desired end, did establish an important foundation for the women who later followed.

Allen was one of the first women to try and crack the glass ceiling well before it was even known by such a name. One historian aptly described the context in which qualified, exceptional women like Allen found themselves: "Except for her sex, Florence Allen met the basic political, professional, and representational standards for Supreme Court selection."[39] During her time on the Sixth Circuit, Allen served for several years on the Committee on Cultural Relations with Mexico, wrote a book on the U.S. Constitution, and was chair of the International Bar Section on Human Rights.[40] Meanwhile, she continued to author important judicial opinions.[41]

It is, in some respects, almost unbelievable the extent of Allen's accomplishments given their entirely unprecedented nature. Although never making it to the Supreme Court, the public attention paid to her nonetheless carved out a path where there previously had not been one, showing other presidents at least the possibility of a female Supreme Court appointee, and also modeling to other women the potential for their own professional achievements. Allen was a force in her own right even before her name appeared on the list of potential Court candidates. She illustrates the reality that women often not only need to be qualified, but must be exceedingly so, in order to be taken seriously, especially when they are a first. Allen herself possessed a certain self-awareness, writing that "her work must be as nearly letter-perfect as possible because people are ten times more critical of a woman in an unprecedented position than of a man in the same position."[42] Justice O'Connor later reflected a similar sentiment when she contemplated accepting the nomination herself; we explore this more fully in chapter six, evaluating the potential downfalls of being the first, or a token.

President Roosevelt's tenure in the executive branch was characterized by his efforts toward innovation, but he encountered resistance to his ideas along the way. Faced with the challenge of helping the country recover after the Great Depression, Roosevelt created a series of government reforms famously known as the New Deal. He introduced left-leaning programs like the National Labor Relations Act, the Social Security Administration, the Wealth Tax, and the Works Progress Administration. Initially, the federal courts were rather obstructionist to Roosevelt's goals. At the Supreme Court level, starting in January 1935 and spanning nearly seventeen months, the Court found eight of ten cases involving his New Deal legislation unconstitutional, effectively thwarting Roosevelt and his administration's efforts to move the country out of the Great Depression.

In large part due to his dissatisfaction with the Court's decision-making and overall conservative dynamic, Roosevelt sought to radically restructure the Court through his now infamous court packing plan. It was during one of his "fireside chats" that Roosevelt first shared his ideas for judicial reorganization, proposing the Judicial Procedures Reform Bill of 1937. Appealing to Congress, he asked for an increase to the total number of seats on the Court. Roosevelt proposed that for each sitting justice who attained the age of seventy but refused to retire, a president could appoint a new member to the Court. That same year, a memo was prepared for Roosevelt with a list of possible nominees. Dated August 3, 1937, with a handwritten note that it belonged in the Supreme Court Appointments file, the memorandum

included, among an otherwise unremarkable three-page list of men, the name of a woman. The entry read, "Judge Florence E. Allen, of Ohio, located in the Sixth Circuit."[43]

Had Roosevelt's Congress approved this new appointment scheme, the Court would have increased in size from nine to fifteen justices, and Allen might have been selected. Roosevelt believed that a larger Court would benefit from an infusion of new ideas, and that one's increased age stifled such possibility. Could a woman be part of this world? Ultimately, Roosevelt's plan did not gain traction with Congress and never became law. Even so, he had many opportunities to appoint Allen, or another woman, and never seized them.

Although Roosevelt's appeals to Congress for judicial expansion were unsuccessful, he faced an unprecedented eight vacancies and one lateral appointment of a chief justice during his time in office. These vacancies gave him the ability to reshape the Court, though not exactly in the way he initially contemplated.

Roosevelt confronted the first high court vacancy four years into his presidency, when Justice Willis Van Devanter announced his intention to retire. Van Devanter was a vocal opponent of New Deal legislation and his retirement ignited whisperings about the president's plan to transform the Court to create his ambitious programs. In addition to appearing on that White House memo, Allen's name was also listed by the *New York Times* in an article announcing Van Devanter's retirement, among a list of possible replacements.[44] But Roosevelt instead selected Hugo Black, a Democratic Senator from Alabama (and former Klan member) as the new justice. Roosevelt was known for selecting political friends, rather than legal experts—Black had repeatedly voted to support the New Deal legislation and endorsed the court-packing plan. He would go on to author the opinion in *Korematsu v. United States*,[45]upholding the constitutionality of an executive order demanding that Japanese Americans move into relocation camps as a matter of national security, and the dissenting opinion in *Griswold v. Connecticut*,[46] rejecting the majority's decision to extend the right to privacy to married persons surrounding their use of contraception.

Van Devanter's retirement was only the first of many vacancies for Roosevelt. Justice Sutherland retired in January 1938,[47] and, as with the previous vacancy, Allen again was floated as a possible candidate to fill the position. Allen herself seemed surprised at the mention of her name as a possible contender for the Court, as if the idea came out of the blue. She wrote in her memoir, "All of a sudden my name was mentioned to fill an existing vacancy in the United States Supreme Court."[48] Roosevelt ultimately nominated Solicitor General Stanley Reed to the Court, and he was confirmed on January 15, 1938. Interestingly, Reed did not even hold a law degree. Despite Allen's apparent surprise at being a contender for the vacancy, she was also somewhat hopeful about the possibility. However, "on the morning of the announcement of Reed's appointment to the Sutherland seat, Judge John Gore told Judge Allen to smile when she entered the courtroom, so that the watching reporters could not impute to her a disappointment."[49] Disappointing as the announcement may have been personally, Allen also began to speculate that there probably would not be a female Supreme Court justice during her lifetime. She was right in this prediction; Sandra Day O'Connor's appointment did not occur until fifteen years after Allen's death.

In July of that same year, Justice Benjamin Cardozo passed away, and President Roosevelt nominated Felix Frankfurter, an adviser to the president and founder of the American Civil Liberties Union. Although Allen's gender surely played a role in keeping her off the Court, the discrimination she experienced was not always explicitly based on this factor. Instead, there is some speculation that one impediment to her appointment in this instance was related to severe criticism of her judicial record. This criticism, which alleged that she had an overwhelming number of decisions overturned by the higher courts on appeal, was actually untrue. According to Allen, this misinformation was intentionally conveyed to Attorney General Frank Murphy, who played a pivotal role in the appointment process, to undermine

her credibility. A significant amount of media attention perpetuating the untruths was dispersed across the country and, despite Allen's best efforts to correct the record, the damage was done. While the nomination in this instance did not go to a woman, it did go to the man who would later refuse to hire Ruth Bader Ginsburg as a clerk at the Supreme Court.

A succession of male nominations followed in the later years of Roosevelt's presidency. Justice Louis Brandeis retired in February 1939. Again, Allen's name surfaced. The nomination went to William O. Douglas, just forty years old at his confirmation, who hired the first female clerk, Lucile Lomen, in 1944. Attorney General Murphy evolved from vetting nominees to becoming the nominee on January 4, 1940, to fill the vacancy after Justice Pierce Butler died on November 16, 1939. (This phenomenon of the vetter becoming the nominee surfaces again later in the book.) Upon Chief Justice Charles Evan Hughes's retirement in June 1941, Roosevelt nominated Justice Harlan Fiske Stone to the position of chief justice, and for Stone's former position, Roosevelt nominated Robert H. Jackson, his former solicitor general and attorney general. Finally, the last of Roosevelt's appointments to the Court occurred when Justice James Francis Byrnes resigned in October 1942; he tendered his resignation at the order of the president in order to head the Office of Economic Stabilization (Truman later appointed Byrnes to secretary of state in 1945). In 1943, Roosevelt nominated Wiley Rutledge, a Democrat, in his place. Rutledge was a supporter of Roosevelt's court packing plan and had served on the D.C. Court of Appeals for just three years before his appointment to the Court.

By the end of Roosevelt's presidency, he had replaced almost every sitting justice on the Court but he never nominated a woman, even though Allen must have been on his mind—his wife, Eleanor, was a strong, supportive voice for her. During her time in the White House, she invited Allen to work on various commissions. On a number of occasions, Mrs. Roosevelt used her daily news column, *My Day*, as a platform to highlight Allen's accomplishments. She wrote about Allen's excellence on the bench and mentioned events at which the two women's lives intersected. Sometimes the references were off-handed, such as mentioning that she attended a dinner honoring Allen. Other times she was much more direct. On November 17, 1948, Mrs. Roosevelt actually endorsed Allen as a contender for the Court. She wrote, "I would like to add, that if a President of the United States should decide to nominate a woman for the Supreme Court, it should be Judge Allen. She will be a nominee with a backing, on a completely nonpartisan basis, of American women who know her career and her accomplishments."[50] The women shared personal correspondence; a handful of letters between the two are preserved in Allen's archives located at the Western Reserve Historical Society.[51] Additional examples of presidents' wives advocating for female candidates are found throughout the chapters that follow.

Throughout Roosevelt's service in the executive branch, Allen's name surfaced repeatedly as someone eminently qualified for the Supreme Court. Certainly, with eight vacancies, he had ample opportunity to appoint her. Some historians have noted that Allen's greatest professional achievement was her judicial experience. However, Roosevelt was known to appoint Supreme Court justices not for their accomplishments on the bench, but rather their involvement in politics.[52] And, given that he had appointed her as the first woman on a federal appellate court, he may have felt that he had done enough to support the cause of women.

Would Truman or Eisenhower Finally Nominate Allen?

Harry Truman, who replaced Henry Wallace as FDR's running mate in his fourth and final campaign for president in 1944, served with FDR for just eighty-two days before Roosevelt died and Truman ascended to the presidency. Truman, like Roosevelt, could have made history as the first to name a woman to the Supreme Court, but he did not do so.

Despite the path that Roosevelt forged for women to serve on federal courts with his appointment of Allen to the Sixth Circuit, progress for women in the judiciary stalled in the years that followed. Truman did elevate some women into leadership roles in the federal government during his tenure in the Oval Office. He appointed Frances Perkins, who served as secretary of labor under President Roosevelt, to the U.S. Civil Service Commission. (Perkins famously helped craft the Fair Labor Standards Act and Social Security Act.) Truman also appointed the first woman to serve as a United States ambassador, making Eugenie Anderson the ambassador to Denmark in 1949. And Truman appointed a woman, Georgia Neese Clark, as U.S. treasurer. Unbeknownst to Truman, he started a trend; since her appointment, as of early 2020, every U.S. treasurer has been a woman. Bess Truman was credited with her husband's female appointments. It was thought he would not have done so but for his having a "smart wife."[53]

Nonetheless, Truman and other male leaders in his administration seemed to be of the mind that judgeships should be held by men.[54] However, Truman did eventually succumb to pressure from Democratic leader India Edwards, who implored him to nominate a woman in October 1949 in the midst of making a significant twenty-seven judicial nominations. A powerhouse in Democratic politics, Edwards served in multiple leadership roles, as the associate director (1947–48) and then executive director (1948–53) of the Women's Division of the Democratic National Committee, the vice-chair of the Democratic National Committee (1950–56), and consultant to the Department of Labor (1964–66). She convinced Truman that public reaction would be unfavorable if there was not *at least* one woman among the appointment of so many new federal judges.

Truman nominated Burnita Shelton Matthews to the United States District Court for the District of Columbia in 1949 as a recess appointment.[55] She "was a last-minute choice" after "the President was bombarded by letter, wire and telephone, and personally by representatives of women's organizations all over the country, who were backing the candidacy of Mrs. Matthews."[56] Matthews was the first woman to serve as a federal district judge and she faced blatant sexism on the bench. As one district judge commented on her appointment, while "'Mrs. Matthews would be a good judge,' there was 'just one thing wrong: she's a woman.'"[57] Judge Matthews would remain the only female judge appointed by Truman during his entire presidency. Like Allen, she occupied a token role as she carried out her judicial service. But she would work to change this status, advancing women's legal rights in many ways. Matthews served with organizations like the National Association of Women Lawyers (of which she was president from 1934–35) and drafted laws sponsored by women's groups related to female jury service, equal pay, and elimination of male inheritance preferences.

In addition to the lower-level judicial appointments, Truman was presented with four high court vacancies. His first opportunity occurred when Justice Owen Roberts retired in 1945. Allen's name resurfaced amidst a very long list of men prepared by Truman's soon-to-be-confirmed attorney general, Tom Clark.[58] Responding to the political shift created by Roosevelt's eight appointments, Truman felt significant pressure to nominate a Republican to balance the Court when Justice Roberts retired. This pressure ultimately led to Harold Burton's nomination. When Chief Justice Harlan Stone died the following year, Truman's first instinct was to elevate Justice Robert Jackson to chief justice. However, there was conflict behind the scenes between Jackson and the other justices. Concerned that the promotion of Jackson might divide the Court, he ultimately nominated Fred Vinson, then secretary of the treasury.

Truman's appointment sealed the fate of any female until his departure, as Chief Justice Vinson was adamantly opposed to the presence of a woman. India Edwards later reflected, "I tell you we would have had a woman on the Supreme Court if it hadn't been that Fred Vinson vetoed it."[59] Specifically referencing Florence Allen as a possible candidate, Edwards recalled:

> [W]hen there was a vacancy on the Supreme Court I went over and talked to the President about appointing Florence Allen to the Supreme Court and he said, "Well, I'm willing. I'd be glad to. I think we ought to have a woman." And he was perfectly sincere. He really did feel that we should have women serving more and more. He said, "But I'll have to talk to the Chief Justice about it and see what he thinks." Then he had Matt call me and I went over to the office and he said, "No, the Justices don't want a woman. They say they couldn't sit around with their robes off and their feet up and discuss their problems." I said, "They could if they wanted to."[60]

Years later, Justice Ginsburg reflected on the outcome of President Truman's nomination efforts in much the same way: "President Truman was discouraged by the negative reaction of the Chief Justice (Fred Vinson) and the associate justices Vinson consulted. Allen had gained universal respect for her intelligence and dedicated hard work. But the Brethren feared that a woman's presence would inhibit conference deliberations where, with shirt collars open and sometimes shoes off, they decided the great legal issues of the day."[61] Breaking with gendered traditions proved too much for Truman.

Justice Murphy died in 1949, providing another vacancy. At the time, Murphy held the Court's unofficial "Catholic" seat before his unexpected death, as did his predecessor, Pierce Butler. Truman broke with tradition in his nomination of a non-Catholic, Tom C. Clark, his own attorney general who had vetted previous nominees including the shortlisted Allen. He ignored political pressure to appoint a woman. Although women, including those influential in the Democratic Party, readily promoted Allen for these vacancies along the way, their voices never amassed enough political pressure to sway Truman.

When Wiley Rutledge, a Democrat appointed by Roosevelt, died just a few months later in September 1949, Justice Burton was once again the only Republican on the Court, and, after the death of Murphy, there was still no Catholic justice. Many people surrounding Truman urged him to nominate someone to fill one of the two gaps (if not both). Again, he departed from tradition—though not the gendered one—and instead nominated Sherman Minton, an atheist Democrat, to reward the loyalty he had shown to Truman earlier in his career.[62] Judicial appointments at that time were essentially an extension of the "old boys' club" to which Judge Allen clearly did not belong.

In 1953, Dwight D. Eisenhower was elected president, and just nine months into his term, he had to appoint a new chief justice to the Supreme Court upon the death of Fred Vinson. After two Democratic presidents, the judiciary was still heavily Democratic. Eisenhower chose former governor of California Earl Warren, a Republican known for his liberal views. Warren would go on to lead the Court in its landmark decision in *Brown v. Board of Education*, which ruled public school segregation unconstitutional and ushered in the era of the fight for civil rights.[63] The president used a recess appointment to appoint Warren, a tool infrequently used in the past but deployed two more times by Eisenhower. The following year, in October 1954, Justice Robert H. Jackson died, and Eisenhower nominated John Marshall Harlan. Harlan's nomination was heavily influenced by Attorney General Herbert Brownell, who was so determined to have Harlan nominated that he did not even compile a list of nominees after the death of Jackson.

Justice Minton retired two years later, in October 1956. After Minton's retirement, Eisenhower expressed a desire to restore the "Catholic seat." He also wanted to maintain his expressed belief that the Court should remain neutral and told Brownell to include Democrats in a list of possible nominees. William Brennan, a Catholic and a Democrat, met Eisenhower's conditions, and he was ultimately nominated, again via a recess appointment. Next, Justice Stanley Reed retired in February 1957. Eisenhower nominated Charles Evans Whittaker to fill this vacancy. (Whittaker assumed his role on the Court, but soon called Attorney General William Rogers and complained of being overwhelmed by the job, even expressing a desire to quit.) When Harold Burton retired in October 1958 due to health issues, Eisenhower nominated