Does the Supreme Court reflect the America it serves?

If Brett Kavanaugh is confirmed, he will blend into a culture that replicates itself, but hardly reflects the America it serves.

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Last week's nomination of Judge Brett Kavanaugh to the United States Supreme Court further normalizes a history of indifference to the rights, concerns and citizenship of women. Many pundits and scholars raise alarm regarding how Judge Kavanaugh, who currently sits on the U.S. Court of Appeals for the D.C. Circuit, might rule on abortion cases given his well-documented anti-abortion record on the DC Circuit. Indeed, much of the debate about Kavanaugh singularly addresses that one very important point -- and for good reason. The history of pre-Roe was literally a bloodbath with estimates of a million deaths per year in botched "back alley" abortions.

Those times have changed: a legal abortion is as safe as a penicillin shot. Having an abortion is safer than a colonoscopy or having wisdom teeth removed and the risks of death are less than the probability of being struck by lightning, hit by a distracted driver, or killed at work. An abortion is safer than enduring a pregnancy; a woman is fourteen times more likely to die by carrying a pregnancy to term than by ending it. The rates of pregnancy related deaths are frightening and shockingly high, especially in states known for anti-abortion legislating.

However, we would be fooling ourselves if we believe the debate over abortion had anything to do with keeping women safe, healthy, and promoting their well-being. Clearly, that is not what drives the men behind the anti-abortion movement.

Even with this critical issue on the line, and perhaps because of it, we should all be concerned about whether the Supreme Court reflects and properly represents the complexity, nuance, and diversity of the United States, rather than an old boys club. Since 1790, out of 113 justices who have served on the Supreme Court, only four have been women. There have been no black women at all. The White House curated nearly three dozen testimonials to support Brett Kavanaugh's nomination -- all were men; as if they are the only people fit to judge his credentials.
Why does this matter? Sadly, the judiciary fails to reflect both in representation and values — the concerns of women. Importantly, this is not just about abortion, but every aspect of women’s lives. Male power, control and dominion over women’s lives historically served political purposes and entrenched social and cultural norms that framed women’s capacities almost exclusively as service to a husband, mothering, reproducing and sexual chattel. Even after the ratification of the Fourteenth Amendment, while legislatures recognized women’s citizenship, they insisted upon denying them suffrage based on the fiction that women lacked the sophistication of mind and judgment to cast a vote. The Supreme Court deferred to state legislatures on this sophistry by ruling in *Minor v. Happersett* that although the Constitution granted women citizenship, it did not confer upon them a right to vote.

These were not the norms courts foisted on men. Instead, in the United States, courts granted white men recovery for the losses associated with their wives’ sexual unavailability and even for the debauchery of their daughters.

The Supreme Court played a profound role in conscribing women to second-class citizenship that denied them broad civic participation, including voting, participating on juries, and professional employment. In *Bradwell v. Illinois*, the U.S. Supreme Court upheld a law barring women law graduates from practicing law. Justice Joseph Bradley found that nature and law deemed it “repugnant” for a woman to adopt “a distinct and independent” civic life from her husband because by law she lacked fundamental capacities.

And perhaps most shocking of all remains *Buck v. Bell*, where the Supreme Court sanctioned eugenics and the forced sterilization of poor girls and women long before Hitler did so in Nazi Germany. The court compared a state’s authority to inflict such terror on women to the scope of its power in requiring vaccinations. The case has never been overruled.

Nor are these matters of the past. Recently, the Supreme Court struck down a California law intended to protect pregnant women by requiring crisis pregnancy centers to disclose resources available to poor women. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the court limited a woman’s right to file suit under Title VII of the Civil Rights Act for gender pay claims; in a separate case, it denied female plaintiffs class action status to sue their employer for sex discrimination; and in *Burwell v. Hobby Lobby* permitted private employers to deny contraceptive coverage to their female employees if doing so is incompatible with the company’s religious beliefs. In each instance, these were all male majorities. No woman on the Supreme Court voted in favor of these rulings — and that is no surprise.

Far too often, the Supreme Court has undermined the core constitutional values it is charged to protect. Its members have done so by advancing spurious and sexist arguments and delivering ideologically driven opinions rooted in stereotypes. Claims of fidelity to originalism and textualism serve as fig leaves for this type of jurisprudence. The result is that in important areas of women’s lives, the Supreme Court pays lip service to their equality, privacy, freedom, and autonomy. Will Kavanaugh’s potential appointment bring forth a new day? Likely not, as his record on the D.C. Circuit evinces a jurisprudence much like that of the Supreme Court.

To be sure, these issues are broader than sex and implicate other social matters such as class and race too. Only three people of color have ever been appointed to the Supreme Court — two serving now. And, currently, each justice on the court was educated at either Harvard or Yale. If Kavanaugh is confirmed, he will blend into a culture that replicates itself, but hardly reflects the America it serves.