

DEFENDING THE JUDICIARY: A CALL FOR JUSTICE, TRUTH, AND DIVERSITY ON THE BENCH

*Prepared Remarks upon Receiving the
Thomas Jefferson Foundation Medal in Law*

*Hon. Carlton W. Reeves**

April 11, 2019

I am deeply honored to receive this award. When I was a student here over 30 years ago, Justice O'Connor received the Medal in Law. To be named alongside legends such as herself, Marian Wright Edelman, and Elaine Jones is one of the great honors of my life.

Of course, it is complicated because Thomas Jefferson was complicated. There is so much to admire about him: his genius, his curiosity, and his industry. I was pleased to quote from *Notes on the State of Virginia* in a decision a few years ago.¹ It captured something true about the case, despite being more than 200 years old.

One of the things I appreciate about universities is that we can engage in difficult conversations in more than 280 characters. So I should add that truth requires us to recognize the complication of Jefferson the slaveholder. Because in *Notes on the State of Virginia*, he also wrote that black people were “much inferior,” among many other things.² To him, people like me were best fit to give our labor, blood, and sweat to build this great University. We certainly were not fit to attend it, let alone be honored by it.

Now, Jefferson would truly question what you have done if he knew I was not just a black man, but a black *federal judge*. For he believed that federal judges were “sappers and miners, steadily working to undermine the independent rights of the States”³ and “assault[] . . . the Constitution.”⁴ Jefferson led his party to attack the judiciary’s independence.⁵

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¹ See *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 922 (S.D. Miss. 2014).

² THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 149–50 (1785) (referring to black people as “much inferior” in reason, “dull, tasteless, and anomalous” in imagination, and incapable of “utter[ing] a thought above the level of plain narration”); see also CHARLOTTESVILLE 2017: *THE LEGACY OF RACE AND INEQUITY* (Louis Nelson & Claudrena Harold, eds., 2018).

³ THOMAS JEFFERSON, *THE AUTOBIOGRAPHY OF THOMAS JEFFERSON* 73 (1821).

⁴ Thomas Jefferson, *Letter to Joseph Cabell Breckinridge*, Dec. 11, 1821, <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-2494>.

⁵ See generally Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805: Political Forces and Press Reaction*, 14 AM. J. OF LEG. HIST. 55 (1970); see also HON. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 12–14 (2010).

So I am here today not just as a black man, but as a black judge. My friend Judge Reggie Walton once said that when black judges “see injustice,” we “have an obligation to stand up and speak.”⁶ So as a black judge, accepting an award⁷ named for a man whose views on race cannot be untethered from an assault on the judiciary, I must stand up and speak about that pairing. How corrosive it has been since the days of Jefferson, who we all agree, was a man of *his* time. How often that pairing has been embraced throughout our history, by men of *their* times. And why we must defend against its poison when spewed today, by men of *our* time. Because there is another vision of what the judiciary is and should always be – a vision of the courts as the defender of justice.

First, let me explain what I mean by the word “justice.” People go to church to find peace, to the hospital to be healed, and to school to be educated. But they go to courts to get justice.⁸ Now, the Constitution says that “We the People” were united “to form a more perfect union.” But that great document has another purpose: “to establish Justice.”⁹

At heart, justice is a search for truth.¹⁰ Deciding what is fair, what is reasonable, what is owed – these questions are too important to be decided by position, power, or tradition. Only truth can resolve them. Thus, as Justice John Marshall Harlan II wrote, “the job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law.”¹¹

⁶ Hon. Reggie B. Walton in LINN WASHINGTON, *BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH* 104 (1994) (“As a Black person in this society and as a Black judge, I know that when you see injustice you at least have to speak out. From the perspective of knowing that the system still is not fair – and probably never will be fair – because of race, you do have an obligation to stand up and speak.”) [*hereinafter* BLACK JUDGES ON JUSTICE]; *see also* Hon. Veronica S. McBeth in BLACK JUDGES ON JUSTICE 45 (“If we sit here and don’t say anything and don’t do anything, then we don’t need to be here. . . . We have to . . . be part of the leadership that is saying things people don’t want to hear.”); *but see* Hon. A. Leon Higginbotham in BLACK JUDGES ON JUSTICE 5 (“ . . . as a Black judge, you have the burden of being continually monitored by people who expect you to not say anything about America having been unfair or unjust. And to the extent that you don’t do that, that you don’t keep quiet, you become suspect.”).

⁷ I am happy to say I am *not* the first black honoree, as Marian Wright Edelman, Elaine Jones, and Loretta Lynch have come before me. I am honored to walk in their footsteps.

⁸ Establishing justice has been the aim of courts from Aristotle’s day to Jefferson’s to ours. Aristotle, *NICOMACHEAN ETHICS*, Book V, Chapter VII (describing judges as “living justice”); *THE FEDERALIST* NO. 80 (Alexander Hamilton) (noting that the Constitution must be structured to allow “federal judicatories to do justice”); CHIEF JUSTICE JOHN ROBERTS, *YEAR-END REPORT ON THE FEDERAL JUDICIARY* 3 (2010) (“The judiciary’s central objective is, of course, to do justice according to law in every case.”).

⁹ U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

¹⁰ *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (“[T]he very nature of a trial [is] a search for truth.”); *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of truth.”); *see also* HON. DAVID W. PECK, *THE COMPLEMENT OF COURT AND COUNSEL* 9 (1954) (“The object of a lawsuit is to get at the truth and arrive at the right result. That is the sole objective of the judge[.]”).

¹¹ Hon. John Marshall Harlan II, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 *CORNELL L. REV.* 6, 7 (1955).

Finding truth is hard.¹² It takes time. That’s why courts follow carefully-crafted rules of evidence¹³ and procedure¹⁴ – and why injustice happens when courts place expediency and finality ahead of truth.¹⁵ Finding truth also takes independence. That’s why courts must be shielded from partisanship and undue influence.¹⁶ Most of all, finding truth takes *experience*.

Experience is, famously, “the life of the law.”¹⁷ Where people come from, what they have lived through, what they do with the time they have, and who they spent that time with — it all matters. Because we don’t see the beauty of Monticello by looking at it from one angle, nor the horror of its slave quarters by observing them from a distance. To find truth, we need all angles, all distances, all perspectives – what Judge A. Leon Higginbotham called “a multitude of different experiences.”¹⁸ *That* is what justice requires.

Justice’s demand for diverse experiences is best seen in the heart of our court system: the jury. The Constitution requires trials “by an impartial jury.”¹⁹ The Supreme Court says we should try to draw juries that “reflect a representative cross section of the community.”²⁰ Excluding classes of people from juries, like women and black folk, results in decision-making that – according to the Supreme Court – is exposed to “the risk of bias.”²¹ Reams of scientific evidence support this conclusion, along with the idea that diversity is essential to all kinds of courtroom decision-making.²² As

¹² *Accord* Hon. Theodore A. McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709, 1712–15 (2007) (“The umpire metaphor obscures the reality of personal bias. Getting beyond that bias is extremely difficult even for the most introspective and sincere judge. I submit that we will never get beyond it if we do not allow for the certainty that each of us harbors some bias in some degree, and that our bias may be impacting a given decision in ways in which we are simply not aware.”).

¹³ *See Funk v. United States*, 290 U.S. 371, 381 (1933) (“The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth.”)

¹⁴ *See Stone v. Powell*, 428 U.S. 465, 491 n.30 (1976) (“[O]ur procedures are not the ultimate goals of our legal system. Our goals are truth and justice, and procedures are but means to these ends.”).

¹⁵ *See Dunn v. Ray*, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting) (“The Eleventh Circuit wanted to hear that claim in full. Instead, this Court short-circuits that ordinary process—and itself rejects the claim with little briefing and no argument—just so the State can meet its preferred execution date.”).

¹⁶ *See Thompson v. McNeil*, 556 U.S. 1114 (2009) (Stevens, J., respecting the denial of certiorari) (“Judicial process takes time, but the error rate in capital cases illustrates its necessity.”).

¹⁷ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).

¹⁸ Hon. A. Leon Higginbotham in *BLACK JUDGES ON JUSTICE* 11–12; *see also* Hon. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329 (2002) (“A deliberative process enhanced by collegiality and a broad range of perspectives necessarily results in better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law.”); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 103 (1997) (“[A] racially homogenous bench permits judicial decision making to take place in the absence of alternative perspectives and viewpoints which might deepen and enhance the quality of judicial decision making.”).

¹⁹ U.S. CONST. amend. VI.

²⁰ *Peters v. Kiff*, 407 U.S. 493, 500 (1972).

²¹ *Id.* at 503.

²² *See* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269 (2015) (collecting studies). Research on federal judges’ ideological tendencies shows that their votes, on multi-member courts, tend to be ideologically dampened when “sitting with two judges of a different [expected] political party.” Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304 (2004). Other research has demonstrated “that for at least two types of cases—Title VII sex discrimination and sexual harassment—a significant correlation existed between gender and individual federal

Justice Thurgood Marshall said, “if we deprive the legal process of the benefit of differing viewpoints and perspectives on a given problem,” then we are left with “one-sided justice.”²³

Mississippians know what one-sided justice looks like. We’ve seen it. We’ve felt it. We’ve been hurt by it. Sometimes, we’ve been killed by it.

One-sided justice was when Mississippi’s courts declared that black folk were “inferior.”²⁴ That we were personal “property.”²⁵ That beating and whipping us was “not cruel or unusual.”²⁶ One-sided justice enabled the exclusion, torture, and sale of black people, enabled the system of slavery that shapes my state’s dismal socio-economic statistics to this day.

This one-sided justice was not exclusive to Mississippi. Virginians had it too, as did the rest of the country. The law of the land was *Dred Scott*, which said black people were “beings of an inferior order” with “no rights which the white man was bound to respect.”²⁷

What these decisions reflected was a lack of experience: the black experience. A lack of acknowledgment that black folk also have souls. Without that black experience, courts were led to falsehood. As Abraham Lincoln said, *Dred Scott* was wrong for a simple reason: it was “based on assumed historical facts which were not really true.”²⁸

Reversing the untruths of *Dred Scott* took a war and a new Constitution, rewritten to reflect the truth of black equality through the 13th, 14th, and 15th Amendments.²⁹ It also took “revitalized federal courts,” with expanded jurisdiction, more judgeships, and new causes of action to protect civil rights.³⁰ Mississippi’s courts saw black plaintiffs, black juries, black lawyers, black witnesses,

appellate judges’ decisions,” and “that the presence of a female judge significantly increased the probability that a male judge supported the plaintiff in the cases analyzed.” Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005). Studies of jurors, meanwhile, establish that “the mere presence of non-whites in the jury room made the white jurors . . . open to other possible interpretations.” STEVEN JOHNSON, *FARSIGHTED* 54 (2018).

²³ Hon. Thurgood Marshall in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 243 (Mark V. Tushnet, ed., 2001); accord Hon. Sandra Day O’Connor, *The Story Behind the Storyteller Thurgood Marshall*, PHILA. INQUIRER, July 5, 1997, at E7 (“At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.”).

²⁴ *Mitchell v. Wells*, 37 Miss. 235, 252 (1859).

²⁵ *John (A Slave) v. State*, 24 Miss. 569, 574 (1852).

²⁶ *McCoy v. McKowen*, 26 Miss. 487, 489 (1853).

²⁷ *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

²⁸ President Abraham Lincoln, Speech on the *Dred Scott* Decision (Jun. 26, 1857).

²⁹ See generally ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (1988); see also GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006). Mississippi was the last state to ratify the Thirteenth Amendment, doing so only in 2013. See Rachel Nuwer, *Mississippi Officially Ratifies Amendment to Ban Slavery, 148 Years Late*, SMITHSONIAN MAG., Feb. 20, 2013.

³⁰ PETER CHARLES HOFFER ET AL., *THE FEDERAL COURTS: AN ESSENTIAL HISTORY 167–174* (2016) [hereinafter THE FEDERAL COURTS]; see also Robert J. Kaczorowski, *Federal Enforcement of Civil Rights during the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 158 (1995).

and – yes – black judges.³¹ For the first time ever, Mississippi’s judiciary was equipped with the experiences of black folks.

But then came pushback.

In Mississippi and across the South, the Klan responded to the threat of democratic justice by trying to assassinate black judges,³² shooting black jurors, and murdering federal court officers.³³ In Congress, advocates of white power smeared federal judges as “unresponsive to . . . the will of the people,”³⁴ pushed to “roll back the jurisdiction and autonomy of federal courts,”³⁵ and filled judgeships with former Confederates who had sworn to uphold slavery.³⁶ One judge, a former lawyer to the Klan, L.Q.C. Lamar, is the only Mississippian to have served on the U.S. Supreme Court.³⁷

The great assault on the judiciary succeeded. Black perspectives were again banished from our courts, especially in my Mississippi. But barren of the experience of a majority of its citizens, our courts saw only a disfigured growth, like a tree raised with water but not light. That tree bore strange fruit,³⁸ like *Plessy v. Ferguson*, which assumed – in ignorance of all relevant experience – that segregation “stamps the colored race with a badge of inferiority . . . solely because the colored race chooses to put that construction upon it.”³⁹

If you want to know what that kind of all-white justice looks like, what it feels like, what it *hurts* like, ask the people in Mississippi who lived through it.

Ask those whose lynchings were sanctioned by a judiciary that was “the Klan in black robes instead of white sheets,”⁴⁰ as described by former Mississippi Supreme Court justice Fred Banks.⁴¹

³¹ See generally DOROTHY VICK SMITH, *BLACK RECONSTRUCTION IN MISSISSIPPI, 1862–1870* (1985); DAVID M. HARGROVE, *MISSISSIPPI’S FEDERAL COURTS: A HISTORY* (2019); DENNIS J. MITCHELL, *A NEW HISTORY OF MISSISSIPPI 200* (2014) (describing how, in the wake of Reconstruction, “[t]he all-white court system disappeared”).

³² See, e.g., LEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 119* (2008) (“An armed mob of 60 or 70 disrupted the hearings of the [Colfax, Louisiana] parish court late in July and attempted to assassinate the African American judge, R. C. Register . . . [.]”).

³³ Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870 – 1890*, 53 J. OF SOUTHERN HIST. 421, 432 (1987).

³⁴ HOFFER., *THE FEDERAL COURTS* at 205.

³⁵ *Id.* at 200–05.

³⁶ *Id.* at 193 (“a near majority” of Article III judges appointed in the wake of Reconstruction were former Confederates).

³⁷ See Governor William Winter, *Tributes to Chancellor Emeritus Robert C. Khayat*, 81 MISS. L.J. 37 n.1 (2011).

³⁸ BILLIE HOLIDAY, *STRANGE FRUIT* (1939) (“Southern trees bear strange fruit / Blood on the leaves and blood at the root / Black bodies swinging in the southern breeze / Strange fruit hanging from the poplar trees”).

³⁹ 163 U.S. 537, 551 (1896).

⁴⁰ Hon. Fred L. Banks, *BLACK JUDGES ON JUSTICE 82*. The South’s judiciary had, in the words of then-Attorney General Amos Ackerman, “succumb[ed] to the pressure of a local sentiment.” Kaczorowski, 23 *FORDHAM URB. L.J.* at 175.

⁴¹ Appointed in 1991, Fred Banks was the second African-American to serve on that court.

Ask Ed Brown, Henry Shields, and Yank Ellington, three black men arrested for murder of a white man,⁴² who were beaten, indicted, tried, and sentenced to death, all within five days, after the jury deliberated for just 30 minutes. Their prosecutor – John Stennis – graduated from this institution 61 years before me.⁴³ How badly were these defendants tortured? “Not too much for a negro . . . not as much as I would have done if it was left to me,” a deputy testified.⁴⁴

Ask Emmett Till. That child was kidnapped. That child was beaten. An eye gouged out. That child was shot. That child was killed. His body mutilated, undressed, and thrown into the Tallahatchie River, tied to a 100-pound gin, so that his desecrated body would never be discovered.⁴⁵ A *child*. A child whose killers were served Mississippi justice. “Justice” whose servants called black folks “niggers” in open court. “Justice” that ignored black eyewitness testimony. Justice that delivered a unanimous “not guilty” verdict from an *all-white, all-male* jury that deliberated for all of an hour and seven minutes.⁴⁶ Why that long? Because they took a “pop” break.

Mississippi justice showed the world what courts look like when twisted by the falsehood of hate, deprived of the experiences of those they serve. That revelation helped fuel a struggle for *real* justice, to push experiences of black folk back into the places they had been excluded from for generations. Ordinary folks like Fannie Lou Hamer, Vernon Dahmer, Medgar Evers, and George Lee led a freedom movement of blood, sweat, and tears. Judges like William Henry Hastie integrated our Article III courts, ending 160 years of judicial segregation.⁴⁷ Lawyers like Thurgood Marshall revived civil rights statutes, prying open the doors of “antebellum courthouses where white supremacy ruled.”⁴⁸

With black folks’ oppression once again on the scales of justice, our courts tipped again towards truth. The result, of course, was *Brown v. Board of Education*, with the Supreme Court embracing a few, simple facts. That “the doctrine of ‘separate but equal’ has no place” in a free society.⁴⁹ That black people *are* “created equal.” That *WE* are included in “We the People.” *Brown* showed that our courts were once again willing to incorporate the experiences of the many, rather than the few, into their searches for truth.

Then came the second great pushback against the judiciary.

⁴² See generally RICHARD C. CORTNER, A “SCOTTSBORO” CASE IN MISSISSIPPI: THE SUPREME COURT AND BROWN V. MISSISSIPPI (1986).

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 28.

⁴⁵ See STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL 22 (1988).

⁴⁶ *Id.* at 42.

⁴⁷ Hon. A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1035 n.15 (1993) (noting that Hastie, who integrated courts that were *de jure* segregated for their first 80 years and *de facto* segregated for the next 80 years, was initially appointed as a non-Article III federal judge in 1937).

⁴⁸ GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA 2 (2012); see generally JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT (2004); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998).

⁴⁹ 347 U.S. 483, 495 (1954).

White power returned to the playbook of the past: smearing judges, shrinking judicial power, and scrubbing diversity from courtrooms. Through the Southern Manifesto, segregationists launched a “massive resistance” against the judiciary.⁵⁰ The signatories, including Mississippi’s “moderate,” John Stennis,⁵¹ attacked courts as “dangerous,” guilty of “judicial usurpation,” filled with judges who encouraged “agitators and troublemakers invading our States.”⁵² Its signatories pushed to strip federal courts of jurisdiction over civil rights claims and impeach judges receptive to those claims.⁵³ South Carolina’s Strom Thurmond decried the “tyranny of the judiciary.”⁵⁴ Alabama’s George Wallace lamented what he called the “sorriest federal court system in the world.”⁵⁵ And Mississippi’s other, more strident Senator, James Eastland, attacked judicial nominees whose experiences affirmed black truths, asking Thurgood Marshall during his confirmation hearings if he was “prejudiced against white people.”⁵⁶ How ridiculous!

To counter the experiences of Marshall and those like him, segregationist Senators wielded their seniority, seniority built on the disenfranchisement of black people. Men like Senator Eastland – who saw his voter suppression efforts in Mississippi rewarded with the chairmanship of the Judiciary Committee – demanded the appointment of men who would enforce white supremacy. Men like Harold Cox, a man who called black people in his court “baboons,”⁵⁷ “chimpanzees,”⁵⁸ and “niggers.”⁵⁹ His “behavior was repugnant to anyone with a sense of fairness.”⁶⁰

Cox was far from the only threat to the rule of law during those times. I think of Virginia Senator Harry Byrd, vowing to fight *Brown v. Board* “with every ounce of our energy and capacity.”⁶¹

And so they did. I know. I know them. I know their children. After *Brown v. Board*, in my hometown of Yazoo City, a group of 1,500 white citizens formed a Citizens Council to protect white supremacy.⁶² When 53 black parents signed a petition asking the Yazoo City school board

⁵⁰ NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950’S* 117 (1999) (“Senator [William] Byrd . . . explained that the Manifesto was ‘a part of the plan of massive resistance[.]’”).

⁵¹ *Id.* (noting that the sixth and final draft of the Manifesto was “written by a committee of five . . . ‘moderates’” including Stennis).

⁵² DECLARATION OF CONSTITUTIONAL PRINCIPLES (Mar. 11, 1956).

⁵³ See generally J. Patrick White, *The Warren Court Under Attack: the Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181 (1959).

⁵⁴ Jane S. Schacter, *Putting Politics of “Judicial Activism” in Historical Perspective*, THE SUPREME COURT REVIEW 237 (2017).

⁵⁵ TINSLEY E. YARBROUGH, *JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA* 87–96 (1981). Wallace also called federal judges who desegregated schools “usurp[ers]” who “ought to be impeached.” *Id.*

⁵⁶ JAMES O HEATH, *TO FACE DOWN DIXIE: SOUTH CAROLINA’S WAR ON THE SUPREME COURT IN THE AGE OF CIVIL RIGHTS* 121 (2017).

⁵⁷ TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963* 508 (1988).

⁵⁸ DAVID M. HARGROVE, *MISSISSIPPI’S FEDERAL COURTS: A HISTORY* 213 (2019).

⁵⁹ WILLIAM P. HUSTWIT, *INTEGRATION NOW: ALEXANDER V. HOLMES AND THE END OF JIM CROW EDUCATION* 91 (2018).

⁶⁰ GORDON A. MARTIN, *COUNT THEM ONE BY ONE: BLACK MISSISSIPPIANS FIGHTING FOR THE RIGHT TO VOTE* xi (2010).

⁶¹ BRIAN J. DAUGHERITY, *KEEP ON KEEPING ON: THE NAACP AND THE IMPLEMENTATION OF BROWN V. BOARD OF EDUCATION IN VIRGINIA* 54 (2016).

⁶² See WILLIE MORRIS, *YAZOO: INTEGRATION IN A DEEP SOUTHERN TOWN* xv (1971).

to desegregate, the Council listed their names in full-page newspaper ads and signs posted around town.⁶³ Almost immediately, signatories lost their jobs. Their businesses lost customers and shut down. Even those known as “The Help” were needed no more. Soon, nearly every signatory had removed their names from the petition. The two names left? Well, they had already fled.

The story of my Yazoo City isn’t unique. Black folks across the country who had the gall to ask for justice were interrogated, tracked, beaten, jailed, bombed, and murdered – sometimes by officers of justice themselves, the police.⁶⁴ Judges who sought to deliver justice faced an “onslaught”⁶⁵ of death threats and hate mail. Their pets were poisoned.⁶⁶ Their children’s graves were desecrated.⁶⁷

White power tried to snuff out the Light of Freedom.⁶⁸ But the brave leaders, judges, and plaintiffs who saw the truth – that *We* are “We the People” – prevailed. And in *Alexander v. Holmes County* – decided just 50 years ago this year– the Supreme Court ruled that “all deliberate speed” was no longer a strategy for keeping Mississippi’s schools segregated.⁶⁹ With the independence, power, and fortitude to do justice, our courts’ search for truth bore freedom’s fruit.

I count myself among the harvest. *Alexander* came down when I was in kindergarten. So I was among that first full class to enter an integrated first grade classroom at Annie Ellis Elementary. I spent the next 12 years of public education with black *and* white children. Maxine *and* Melanie. Don *and* Thomas. Phyllis *and* Charles, and every other member of my class of 1982, whose graduation song was Stevie Wonder and Paul McCartney’s classic, *Ebony and Ivory*.

Across Mississippi, thousands of children like me learned from white *and* black teachers, played for black *and* white coaches, sang for black *and* white choirmasters. We were in harmony, learning that white *and* black kids could be hungry to learn, brilliant, curious, and silly – *especially* silly, as I’m sure all of my friends could tell you. We learned the truth that our courts had affirmed: that black people are equal with white folks, deserving of every opportunity given to the latter.

I got many of those opportunities, including an education at this institution. This institution, which put me on the path to one of the greatest opportunities of my life: serving as a federal judge.

That opportunity, just like the opportunity of an integrated education, came from an effort to defend and strengthen our courts. For eight years at the beginning of this century, building on the

⁶³ *Id.* at 18–19.

⁶⁴ See J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 65–92 (1971) (“Negroes whose children are being discriminated against are the only persons who can initiate legal complaints. Segregationists know that if they can keep Negroes from suing in federal courts they can continue to operate segregated institutions. They have not hesitated therefore to intimidate Negro plaintiffs.”).

⁶⁵ *Id.* at 244.

⁶⁶ See Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOWARD L.J. 1, 91 (2006).

⁶⁷ *Id.*

⁶⁸ See generally CHARLES M. PAYNE, I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION (2d ed. 2007).

⁶⁹ 396 U.S. 19 (1969).

legacy of the President elected the year of America's bicentennial,⁷⁰ our nation witnessed a revolution, one that dramatically expanded and improved the body of expertise federal courts depend on to find truth.⁷¹ We saw the addition of more black judges, more women judges, more Latina and Latino judges, more Asian-American judges, more Native American and Pacific Islander judges, and more openly LGBTQ judges than ever before.⁷²

For a brief moment, there were so many “firsts” – each one making our judiciary better reflect the best of America. I know, because I was there. On the day of my confirmation hearing, five of us – all people of color – appeared before the Senate Judiciary Committee. There was Mary Murguia, a first-generation Mexican-American headed to the Ninth Circuit Court of Appeals. Denise Casper, the first African-American female federal judge in Massachusetts.⁷³ Edmond Chang, the first Asian-American federal judge in Illinois.⁷⁴ And Leslie Kobayashi, the first Japanese-American confirmed during the Obama Administration.⁷⁵ Finally, there I was, the *second* black federal judge in Mississippi's history, ready to claim the seat once held by Harold Cox. The only white men in the room were the two Senators.

I cannot list the endless array of useful experiences the revolution in judicial appointments allows our courts to draw on. Think of Abdul Kallon, who sits in Alabama. Judge Kallon, born in Freetown, Sierra Leone, and raised by a single mother,⁷⁶ shows us how immigrants “get the job done.”⁷⁷ Think of Nitza Quiñones Alejandro, who is first openly lesbian Latina Article III judge serving in Pennsylvania.⁷⁸ Think of my friend Luis Restrepo, who took his oath of office 20 years after taking his oath of citizenship, strengthening the Third Circuit with the insights only a former public defender can know.⁷⁹ It was during these years that Mississippi got its first African-

⁷⁰ “President Jimmy Carter appointed 57 minority judges and 41 female judges to the federal judiciary, more than all previous presidents combined.” The Carter Center, *Trailblazer Legend Award Recognizes President Carter's Judicial Appointments*, June 14, 2012; see also Gwyneth Kelly, *Jimmy Carter's Most Important Legacy: Female Judges*, THE NEW REPUBLIC (Aug. 13, 2015), <https://newrepublic.com/article/122538/jimmy-carters-most-important-legacy-female-judges>.

⁷¹ See Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016*, 26 BERKELEY LA RAZA L.J. 92, 108 (2016) (concluding that “President Barack Obama has established a pattern of making more demographically diverse appointments than any of his predecessors.”).

⁷² *Id.* at 108-09.

⁷³ See Christopher P. Sullivan & Lauren N. Tran, *Judicial Profile: Hon. Denise J. Casper*, FED. BAR ASSOC., http://www.fedbar.org/PDFs/Past-Judicial-Profiles/First-Circuit_1/Casper-Hon-Denise.aspx.

⁷⁴ Press Release, National Asian Pacific American Bar Association, *Kobayashi and Chang Confirmed by Senate* (Dec. 23, 2010).

⁷⁵ *Id.*

⁷⁶ Robert K. Gordon, *U.S. judgeship nominee Kallon wins praise for cool intellect*, BIRMINGHAM NEWS, Aug. 10, 2009; Jacob Gershman, *Judge Abdul K. Kallon: From Sierra Leone to a Shot at the 11th Circuit*, WALL ST. JOURNAL, Feb. 16, 2016.

⁷⁷ See HAMILTON: THE MUSICAL.

⁷⁸ See Angela Thomas, *Nitza Quiñones Alejandro Becomes First Lesbian Latina Federal Judge*, S. FLA. GAY NEWS, June 20, 2013.

⁷⁹ See Emily Neil, *'I am an American Immigrant,' Judge Restrepo tells honorees*, AL DIA, June 21, 2018.

American female federal judge.⁸⁰ Appointments like these wove the essence of America into the tapestry of our judiciary, making our courts of, by, and for “We the People.”⁸¹

That effort to make our judiciary reflect America was as brief as it was remarkable. We are now eyewitnesses to the third great assault on our judiciary.

If you’ve never relied on a court, you may not *see* the assault. If you’ve never seen a friend or loved one wrongly imprisoned, you may not *feel* it. If you have never been stopped for Driving While Black, like my friend Judge Robert Wilkins,⁸² you might not *fear* it. But if you know the words of Mississippi’s darkest moments, you can hear it.

When politicians attack courts as “dangerous,”⁸³ “political,”⁸⁴ and guilty of “egregious overreach,”⁸⁵ you can hear the Klan’s lawyers, assailing officers of the court across the South. When leaders chastise people for merely “us[ing] the courts,”⁸⁶ you can hear the Citizens Council, hammering up the names of black petitioners in Yazoo City. When the powerful accuse courts of “open[ing] up our country to potential terrorists,”⁸⁷ you can hear the Southern Manifesto’s authors, smearing the judiciary for simply upholding the rights of black folk. When lawmakers say “we should get rid of judges,”⁸⁸ you can hear segregationist Senators, writing bills to strip courts of their power. And when the Executive Branch calls our courts and their work “stupid,”⁸⁹

⁸⁰ See Terryl Rushing, *U.S. District Judge Debra Brown Sworn into Office in the Northern District*, CAPITAL AREA BAR ASSOC., Sept. 2014.

⁸¹ See President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

⁸² John Lamberth, *Driving While Black*, WASH. POST., Aug. 16, 1998 (“In 1992, Robert L. Wilkins was riding in a rented car with family members when Maryland State Police stopped them, ordered them out, and conducted a search for drugs, which were not found. Wilkins happened to be a Harvard Law School trained public defender in Washington. With the support of the Maryland ACLU, he sued the state police, who settled the case with, among other things, an agreement to provide highway-stop data to the organization.”).

⁸³ In a series of tweets on November 21, 2018, President Trump wrote, “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an ‘independent judiciary,’ but if it is why . . . are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security - these rulings are making our country unsafe! Very dangerous and unwise!” Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), <https://twitter.com/realDonaldTrump/status/1065346909362143232>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 1:09 PM), <https://twitter.com/realDonaldTrump/status/1065351478347530241>.

⁸⁴ Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:44 AM), <https://twitter.com/realdonaldtrump/status/871679061847879682>.

⁸⁵ The White House, Statement on Sanctuary Cities Ruling (Apr. 25, 2017), <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling/>.

⁸⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 18, 2017, 5:55 AM), <https://twitter.com/realdonaldtrump/status/898528795308642304>.

⁸⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 4:48 PM), <https://twitter.com/realdonaldtrump/status/828042506851934209>.

⁸⁸ Colby Itkowitz, *Trump: Congress needs to ‘get rid of the whole asylum system’*, WASH. POST, Apr. 5, 2018.

⁸⁹ The White House, Remarks by President Trump at the White House Opportunity and Revitalization Council Meeting (Apr. 4, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-white-house-opportunity-revitalization-council-meeting/>.

“horrible,”⁹⁰ “ridiculous,”⁹¹ “incompetent,”⁹² “a laughingstock,”⁹³ and a “complete and total disgrace,”⁹⁴ you can hear the slurs and threats of executives like George Wallace, echoing into the present.

I know what *I* heard when a federal judge was called “very biased and unfair” because he is “of Mexican heritage.”⁹⁵ When that judge’s ethnicity was said to prevent his issuing “fair rulings.”⁹⁶ When that judge was called a “hater” simply because he is Latino.⁹⁷ I heard the words of James Eastland, a race-baiting politician, empowered by the falsehood of white supremacy, questioning the judicial temperament of a man solely because of the color of his skin. I heard those words and I did not know if it was 1967 or 2017.⁹⁸

This false seed is being sown across this country, from Mississippi to Virginia. I know, because I am there. The proof is in *my* mailbox. In countless letters of hatred I’ve been called a “piece of garbage,” “an arrogant pompous piece of sh**,” “a disgrace,” an “asshole . . . [who] will burn in hell,” and the “embodiment of Satan himself.” One person has even told me that he has “prayed that God will give [me] complete discomfort.” The deliverers of hate who send these messages aim to bully and scare judges who look like me from the judiciary. And so they share an aim with those who used whips and ropes and trees against my ancestors: scrubbing the black experience from our nation’s courts.

Of course, courts can – and *should* – be criticized. Judges get it wrong, all the time. That includes me. Scrutiny of our reasoning is not, on its own, troubling.⁹⁹ Indeed, debating judicial decisions *improves*, rather than impedes, our courts’ search for truth. But the slander and falsehoods thrown at courts today are not those of a critic, seeking to improve the judiciary’s search for truth. They are words of an attacker, seeking to distort and twist that search toward falsehood.

⁹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 8, 2017, 5:04 AM), <https://twitter.com/realdonaldtrump/status/829315036329963521>.

⁹¹ Josh Gerstein & Eli Stokols, *Trump lashes out at judge who put his travel ban on ice*, POLITICO, Feb. 3, 2017, <https://www.politico.com/story/2017/02/trump-travel-ban-legal-win-234634>.

⁹² Donald J. Trump (@realDonaldTrump), TWITTER (July 13, 2016, 3:26 PM), <https://twitter.com/realdonaldtrump/status/753354905897668608>.

⁹³ Dan Merica, *Trump labels US justice system ‘laughingstock’*, CNN, Nov. 1, 2017, <https://www.cnn.com/2017/11/01/politics/trump-justice-laughing-stock/index.html>.

⁹⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 3, 2017, 9:54 AM), <https://twitter.com/realdonaldtrump/status/926492915626663939>.

⁹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (June 2, 2016, 9:54 AM), <https://twitter.com/realdonaldtrump/status/738413456118841345>; Denis Slattery & Leonard Greene, *Donald Trump attacks judge presiding over Trump University fraud case, says he has ‘an inherent conflict of interest’ because judge is ‘of Mexican heritage’*, N.Y. DAILY NEWS, June 3, 2016, <https://www.nydailynews.com/news/national/donald-trump-attacks-mexican-judge-trump-u-fraud-case-article-1.2659323>.

⁹⁶ Z. Byron Wolf, *Trump’s attacks on Judge Curiel are still jarring to read*, CNN, Feb. 27, 2018, <https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html>.

⁹⁷ *Id.*

⁹⁸ See Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27, 37, 40 (1989).

⁹⁹ *But see* Ariane de Vogue, *Chief Justice Roberts ‘Troubled’ by Scene at the State of the Union Address*, ABC NEWS, Mar. 10, 2010.

This attack is heard loudest in the slander of Judge Curiel. But it will be felt through this Administration's judicial nominations, especially those confirmed with the advice and consent of the Senate. Of the Article III judges confirmed under the current Administration, 90% have been white.¹⁰⁰ Just one of those judges is black.¹⁰¹ Just two are Hispanic.

It's not just about racial diversity. Barely 25% of this Administration's confirmed judges are women.¹⁰² None have been black or Latina.¹⁰³ Achieving complete gender equality on the federal bench would require us to confirm only 23 women a year.¹⁰⁴ How hard could that be? I suspect Deans Goluboff and Kendrick would say, "not very hard."

Think: in a country where they make up just 30% of the population,¹⁰⁵ non-Hispanic white men make up nearly 70% of this Administration's confirmed judicial appointees.¹⁰⁶ That's not what America looks like. That's not even what the legal *profession* looks like.¹⁰⁷

Some say our judicial nomination process is hampered by a "campaign of systematic and comprehensive obstruction."¹⁰⁸ They may be right, but what others see is a systematic campaign to deprive America of a bench that reflects the richness of the nation.

There is no excuse for this exclusion of minority experiences from our courts. Minority populations are not monoliths; we contain multitudes.¹⁰⁹ Presidents from Nixon to Reagan to Bush have proven that Republican Administrations have no trouble finding women and people of color with suitable judicial philosophies. Justice Sotomayor was originally a George H.W. Bush appointee.¹¹⁰ And the last Republican Administration confirmed 24 black judges.¹¹¹ This Administration has confirmed one.¹¹²

¹⁰⁰ See ALLIANCE FOR JUSTICE, TRUMP'S ATTACKS ON OUR JUSTICE SYSTEM (2019), <https://afj.org/wp-content/uploads/2019/04/Trumps-Attacks-on-Our-Justice-System-Final.pdf> ("In the 115th Congress, over 76% of Trump's confirmed appellate and district court nominees were male and over 91% were white. As of April 1, 2019, over 75% were male and over 90% were white.").

¹⁰¹ See Alliance for Justice, Judicial Selection Snapshot (April 10, 2019), <https://www.afj.org/wp-content/uploads/2018/05/Final-Snapshot-4.10.19.1.pdf>.

¹⁰² *Id.*

¹⁰³ See Alliance for Justice, Trump's Confirmed Judges (April 10, 2019), <https://www.afj.org/wp-content/uploads/2018/05/Confirmed-4.10.19.pdf>.

¹⁰⁴ See Stubbs, 26 BERKELEY LA RAZA L.J. at 96 ("Stated differently, at any given time, are there twenty-three women in the United States who are competent, available, and willing to serve as federal judges?").

¹⁰⁵ See U.S. Census, QuickFacts, Population Estimates, July 1, 2017, <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

¹⁰⁶ See Alliance for Justice, Trump's Confirmed Judges (April 10, 2019), <https://www.afj.org/wp-content/uploads/2018/05/Confirmed-4.10.19.pdf>.

¹⁰⁷ See Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 283 (2014).

¹⁰⁸ Ana Radelat, *CT to feel fallout from bitter partisan fight over judges*, CT MIRROR (Apr. 4, 2019), <https://ctmirror.org/2019/04/04/ct-to-feel-fallout-from-bitter-partisan-fight-over-judges/>.

¹⁰⁹ See WALT WHITMAN, LEAVES OF GRASS § 51 "Song of myself" (1855).

¹¹⁰ Federal Judicial Center, Sotomayor, Sonia, <https://www.fjc.gov/history/judges/sotomayor-sonia>.

¹¹¹ Minority Corporate Counsel Association, Article III African-American Judges by President, <https://www.mcca.com/resources/reports/federal-judiciary/african-american-judges-by-president/>.

¹¹² See Alliance for Justice, Trump's Confirmed Judges (April 10, 2019), <https://www.afj.org/wp-content/uploads/2018/05/Confirmed-4.10.19.pdf>.

This Administration and a bare majority of the Senate, walking arm-and-arm, are not stumbling unaware towards a homogeneous judiciary. Think of the slurs against Judge Curiel. Think of the nominations to the bench of those who call diversity “code for relaxed standards,”¹¹³ who call transgender children part of “Satan’s plan,”¹¹⁴ who defend the KKK in online message boards,¹¹⁵ who led voter suppression efforts for segregationists like Jesse Helms.¹¹⁶ Think of the pattern of judicial nominees refusing to admit, like generations of nominees before them have, that *Brown v. Board* was correctly decided.¹¹⁷ That same *Brown* which led to *Alexander v. Holmes County*, which breathed justice into the segregated streets of my Yazoo City. As if equality was a mere political position.

Friends, let it be said that equal protection of the law is not a political position. It is enshrined in our Constitution.

As Alexander Hamilton said of the judiciary, “all possible care is requisite to enable it to defend itself against their attacks.”¹¹⁸ To fulfill the Constitution’s promise to “establish Justice,” “We the People” need to defend the judiciary.

Defending the judiciary means more than demanding that more women and people of color be appointed to the bench. With no Muslims on the bench, will our judiciary understand the many facets of religious freedom? How can it defend economic opportunity with so few judges who know the taste of a free lunch program or the weight of poverty? How can our judiciary understand the depths of mass incarceration¹¹⁹ when so few judges have stood with the accused or know them as neighbors, as Sunday School students, as loved ones? Filled only with the experiences of prosecutors and state court judges, of Big Law partners and corporate counsel, of a single religion or sexual orientation, our courts will fail to find the many truths justice must see. We need a judiciary as diverse as our country – as diverse as “We the People.”

And that brings us to the Supreme Court. It is no doubt overflowing with wisdom. But it is wisdom drawn from a shallow pool. For our current Justices collectively have 21 degrees, none of which were from a public university—unless you consider Oxford “public.” Every current Justice went to Harvard or Yale. Almost every Justice served on a federal appellate court. Just one served as a

¹¹³ Zoe Tillman, *One of Trump’s Judicial Nominees Once Wrote that Diversity is “Code for Relaxed Standards”*, BUZZFEED (Feb. 15, 2018), <https://www.buzzfeednews.com/article/zoetillman/one-of-trumps-judicial-nominees-once-wrote-that-diversity>.

¹¹⁴ Kevin Diaz, *Cornyn has doubts about nominee who said transgender rights were ‘Satan’s plan’*, SAN ANTONIO EXPRESS NEWS (Sept. 28, 2017), <https://www.expressnews.com/news/local/article/Cornyn-has-doubts-about-nominee-who-said-12239028.php>.

¹¹⁵ See Mark Joseph Stern, *Trump Judicial Nominee Brett Talley Appears to Have Defended “the First KKK” in Message Board Post*, SLATE (Nov. 15, 2017), <https://slate.com/news-and-politics/2017/11/trump-nominee-brett-talley-appears-to-have-defended-the-first-kkk.html>.

¹¹⁶ See Jeffrey Billman, *For Decades, Thomas Farr Helped N.C. Republicans Suppress Black Votes. He’ll Probably Become a Federal Judge Anyway*, INDY WEEK (Nov. 28, 2018), <https://indyweek.com/news/soapboxer/thomas-farr-federal-judge-confirmation-vote-jesse-helms/>.

¹¹⁷ See Stephanie Mencimer, *Trump Judicial Nominees are Refusing to Endorse Brown v. Board of Education*, MOTHER JONES (Feb. 14, 2019), <https://www.motherjones.com/politics/2019/02/trump-judicial-nominees-are-refusing-to-endorse-brown-v-board-of-education/>.

¹¹⁸ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹¹⁹ See generally JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017).

trial judge. None served in a legislature, as a governor, or as an attorney general. None worked as a public defender or a legal aid attorney. Justices O'Connor, Kennedy, Warren, and Douglas brought to the Court a unique perspective on the American West. Today that perspective is best represented by Justice Gorsuch, a graduate of Georgetown Prep. We have as many justices who have graduated from Georgetown Prep as we have Justices who have lived as a non-white person.

When our Supreme Court captures such a narrow set of perspectives, what truths will it overlook? When Oliver Wendell Holmes said that experience was “the life of the law,” he noted that these experiences included “the prejudices which judges share with their fellow-men.” With the experiences of *some* of “the People,” not “We the People,” what prejudices, misperceptions, and stereotypes will be left unchallenged, and forged into precedent? What *Dred Scotts* and *Plessys* will be handed down?

James Madison cautioned that it was “essential” a democracy’s officials “be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it.”¹²⁰ We ignore this warning at our peril.

But a diverse bench, be it at the Supreme Court or elsewhere, is not enough to democratize the judiciary. Article III judges represent a tiny fraction of the people involved in our judiciary’s decision-making processes. There are the bankruptcy and magistrate judges. The powerful prosecutors and public defenders. The many clerks and court staff we hire.¹²¹ The lead counsel, receivers, and steering committees that our judges appoint to serve. The marshals and police who structure our criminal justice system. All of these positions are critical parts of our courts’ truth-seeking function. We cannot overlook how these positions fail to reflect the experiences and diversity of the public they serve.

When people of every race, ethnicity, religion, gender, and sexual orientation can see their own experiences reflected in our highest institutions, they receive hope and inspiration beyond measure. When courts look like the country they represent, that – more than any claim to pedigree or prestige – is what instills public confidence in the courts.

My mailbox proves it. For every piece of hate-mail I get, I receive 10 letters telling a different story of America. Letters like the one that reads, “Thank you, from the bottom of my heart, for standing up for the LGBT+ Community of Mississippi.” Signed, “A Closeted Gay Mississippi Teen.” “I [am] sending you positive energy, good thoughts and loving prayers your way,” said another. A fellow American proclaimed that “I am [] grateful for our strong and independent judiciary.” While another simply said, “Thank God for you and for [our] system of Justice.”

¹²⁰ THE FEDERALIST NO. 39 (James Madison).

¹²¹ A 2019 study, for example, found that “court reporters in Philadelphia regularly made errors in transcribing sentences that were spoken in a dialect that linguists term African-American English. . . . The findings could have far-reaching consequences, as errors or misinterpretations in courtroom transcripts can influence the official court record in ways that are harmful to defendants, researchers and lawyers said.” John Eligon, *Speaking Black Dialect in Courtrooms Can Have Striking Consequences*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/black-dialect-courtrooms.html>.

Each of us has a role to play in defending our judiciary. Judges, politicians, and citizens alike must denounce attacks that undermine our ability to do justice. It is not enough for judges, seeing race-based attacks on their brethren, to say they are merely “disheartened,”¹²² or to simply affirm their non-partisan status.¹²³ We must do more to defend our bench.¹²⁴

Those who control the judicial confirmation process – and those who elect them – must demand that diverse experiences be seen as a necessary qualification for office, rather than a box happily left unchecked. Moreover, they must realize that democratizing our judiciary will take more than a return to past practices. For example, even if future presidents appoint female judges at the same unprecedented rate as the Obama Administration did, we will *never* have women’s experiences truly reflected in our courts – as they would forever be stuck at 42% female.¹²⁵

Judges must recognize their own power to orient the judiciary toward inclusiveness. We must ensure the communities we serve are represented on our court staff – *especially* amongst our clerks. Judge Chhabria in California is challenging us to do better by advocating for using the NFL’s “Rooney Rule” in our law clerk hiring.¹²⁶ We must push for the appointment of diverse bankruptcy and magistrate judges. Many federal judges, including my friend Kathryn Vratil, have taken important steps to diversify the judiciary.¹²⁷ We must follow in their footsteps.

¹²² Sean Sullivan, *Gorsuch calls attacks on federal judges ‘disheartening’ and ‘demoralizing,’* WASH. POST. (Mar. 21, 2017), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-calls-attacks-on-federal-judges-disheartening-and-demoralizing/?utm_term=.65880b20975a (“Judge Neil Gorsuch said he finds personal criticism against federal judges are deeply troubling — but he declined to weigh in specifically on President Trump’s attacks against some members of the federal judiciary. ‘When someone criticizes the honesty, the integrity, or the motives of a federal judge, I find that disheartening, I find that demoralizing,’ said Gorsuch.”).

¹²³ Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

¹²⁴ The threats go beyond the ones we can see in public. One white lawyer, who was 14 years old when the Neshoba County murders happened, wrote to me in the wake of my sentencing the murderers of James Craig Anderson. “I have seen the hatred,” he wrote, “and still hear the names and comments that won’t be said in your earshot.”

¹²⁵ Stubbs, 26 BERKELEY LA RAZA L.J. at 94.

¹²⁶ Hon. Vince Chhabria, *Why We Should Adopt a Rooney Rule for Law Clerks*, NAT’L LAW JOURNAL (Jan. 4, 2019), <https://www.law.com/nationallawjournal/2019/01/04/why-we-should-adopt-a-rooney-rule-for-law-clerks/?slreturn=20190311155804>.

¹²⁷ See DANA ALVARÉ, *VYING FOR LEAD IN THE ‘BOY’S CLUB’: UNDERSTANDING THE GENDER GAP IN MULTIDISTRICT LITIGATION LEADERSHIP APPOINTMENTS* (2017), <https://www2.law.temple.edu/cs/cjs/cms/wp-content/uploads/2017/03/Vying-for-Lead-in-the-Boys-Club.pdf>; see also Elizabeth A. Fegan, *An Opportunity or Landmine: Promoting Gender Diversity from the Bench*, FED. LAW., May 2016, at 38, 40 n.16; Hon. Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 393 (2014). Courts have taken admirable steps to close this disparity. See, e.g., Stephanie Francis Ward, *Women Should Be Among Lead Lawyers in IUD Case, Federal Judge Says*, ABA JOURNAL, May 20, 2013; Michael Baylson and Cecily Harris, *Equal Opportunity?*, 101 JUDICATURE 65, 67 (2017) (describing application procedure in *In re: Volkswagen “Clean Diesel” Marketing*, No. 15-MD-2672 (N.D. Cal. Dec. 22, 2015) that has “the potential to increase diversity among lead counsel”); *In re Ethicon, Inc., Power Morcellator Prod. Liab. Litig.*, No. 15-MD- 2652-KHV, 2015 WL 7303527, at *1 (D. Kan. Nov. 19, 2015) (appointing majority of women as lead counsel); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 137 (E.D. La. 2013) (noting importance of diversity in appointment of lead counsel); *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) (requiring diversity in appointment of lead counsel).

Courts must do more than denounce and diversify. For the attack on the judiciary aims to close the courthouse doors to those who most need justice by shrinking the size, resources, and jurisdiction of courts. Over the last 30 years, while the U.S. population has increased by over 30%;¹²⁸ Congress has increased the number of Article III judges by just 3%.¹²⁹ Meanwhile, there are continued attempts to close the doors to our own courtrooms. I think of heightened pleading standards, the rise of mandatory arbitration, and judges who proclaim that “prisoner civil rights cases should be eliminated from federal dockets.”¹³⁰ Defending the judiciary requires judges to demand, not diminish, the resources they need to find truth. We must expand the reach and power of our courts, offering justice to *all* who claim the promise of America.

This speech began with Thomas Jefferson, and it will end with him as well. Because for all of his failings, Mr. Jefferson, a man of his times, also framed our country’s greatest truth: that “all men are created equal.” Searching for this truth, interpreting its meaning, and applying its mandates are the tasks that make our judiciary a bastion of democracy – what makes “We” *THE PEOPLE*. We do Jefferson justice – we do the martyrs of Mississippi justice – we do *our country* justice – by defending our judiciary. Now, more than ever. Thank you.

¹²⁸ In 1990, the United States had a total population of 249 million people; in 2018, that figure had risen to 327 million reflecting a 31.3% increase. *Compare QuickFacts*, <https://www.census.gov/quickfacts/fact/table/US/PST045218>, U.S. CENSUS BUREAU (accessed Apr. 9, 2019) with U.S. CENSUS BUREAU, POPULATION CHANGE AND DISTRIBUTION: 1999 TO 2000 (Apr. 2001), available at <https://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>.

¹²⁹ In 1990, there were 842 permanent and temporary Article III judges; in 2018, there were 870 such judges, reflecting a 3.3% increase. *Authorized Judgeships*, U.S. COURTS ADMIN. OFF., <https://www.uscourts.gov/judges-judgeships/authorized-judgeships>.

¹³⁰ Hon. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1502 (1995); see also Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 330 (2012).