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RESEARCH NOTE



Do Americans perceive diverse judges as inherently biased?

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ABSTRACT

Although women and minorities hold an increasing share of judgeships in the United States, they remain underrepresented. We explore Americans' perceptions of the bias of women and minority judges – one of the possible challenges to creating a diverse bench. We argue that prejudice against these groups manifests in a subtle way, in the belief that diverse judges cannot fairly adjudicate controversies that involve their ingroup. To test our theory, we use a list experiment specifically developed to minimize social desirability effects. We find that many respondents rate female and Hispanic judges to be biased decision makers. Our results highlight the nature of prejudice against female and Hispanic judges and suggest multiple important implications. They shed light on the reasons why female and Hispanic candidates for judgeships may win at a lower rate and also suggest negative implications for the legitimacy of their decisions.

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Two perspectives on judicial diversity have recently emerged. U.S. Supreme Court justice Sonia Sotomayor has highlighted the value of diverse perspectives on the bench, referring to her experiences as a Latina woman (see also Kenney 2013; Navarro 2019). However, a distinct perspective was voiced by then-presidential candidate Donald Trump in 2016. Trump criticized a sitting judge due to his “Mexican heritage” and called for him to be recused from an ongoing case involving Trump University (Wolf 2018). In this paper, we explore where the public stands in this debate, focusing on whether Americans perceive female and Hispanic judges as biased (or unbiased) decision makers.

The issue of whether the public perceives certain judges to be biased is critically important for at least two reasons. First, procedural justice research shows a strong connection between the belief that judges are unbiased and acknowledgement of their legitimacy (Tyler 2006). Second, 40 U.S. states employ some type of election for their high court judges. If judges with certain racial, ethnic, or gender backgrounds are scrutinized more closely by the electorate, this can negatively impact judicial diversity.

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Indeed, although women and minorities hold an increasing share of judgeships in the United States, they remain underrepresented (e.g., George and Yoon 2018; Knobler 2017). To accurately gauge whether citizens view these judges as likely to be “biased” in favor of their ingroup, we use an experimental design specifically developed to minimize social desirability effects. List experiments allow respondents to indicate agreement with unpopular positions indirectly, so that they do not have to pay the reputational costs of explicit endorsement. For this reason, list experiments have become a staple in the study of sensitive political questions (e.g., Benson, Merolla, and Geer 2011; Burden, Ono, and Yamada 2017; Gilens, Sniderman, and Kuklinski 1998). However, none of this work looks at the judicial context.

Our results highlight that diverse judges face hurdles when it comes to being perceived as fair. We find that a significant number of Americans believe that female and Hispanic judges are susceptible to giving “biased” rulings on cases involving their ingroup (such as immigration cases before Hispanic jurists). The findings provide some of the first insights into how stereotyping influences perceptions of the U.S. legal system, a critical aspect since many judges in the U.S. are popularly elected and depend on perceptions of fairness to ensure their legitimacy. Moreover, our findings suggest an inherent tension between legitimacy and the push for judicial diversity.

Perceptions of women and minorities in political office

Two streams of research are relevant in considering how Americans evaluate female and Hispanic judges. First, there is an extensive literature concerning perceptions of female and minority candidates, lawmakers, and chief executives (e.g., Benson, Merolla, and Geer 2011; Dolan 2010). Evidence suggests that Americans stereotype women as poorly suited to certain offices (Burden, Ono, and Yamada 2017), and minority candidates also suffer negative consequences from stereotyping (Sides, Tesler, and Vavreck 2018). Second, although little research considers whether stereotyping takes place against female and minority judges (but see Ono and Zilis, *forthcoming*), recent studies explore how ascriptive characteristics influence the *behavior* of judges (e.g., Boyd, Epstein, and Martin 2010; Chew 2009; Sen 2015). One takeaway is that judges from underrepresented groups must go to greater lengths to safeguard the legitimacy of their decisions.

The dearth of literature is consequential for three reasons. First, many U.S. judges are elected. Because perceptions of fairness are a key consideration for evaluating the judiciary (Tyler 2006; Tyler and Huo 2002), when voters perceive judicial candidates as biased it can affect their vote choice. Indeed, judicial elections are often low information contests. Citizens may enter the voting booth with only a few pieces of information, such as the judge’s name and, perhaps, partisan identification (in states with partisan judicial elections).¹ In this context, a candidate’s name is important because voters may use it to make inferences about her gender and race/ethnicity, shaping their assessments of that candidate (Ono and Zilis, *forthcoming*). Second, prejudice against women and minority judges can have indirect effects on appointed judges as well. Presidents take into account potential public support when choosing who to nominate and public support can also influence the likelihood of Senate confirmation (Kaslovsky, Rogowski, and Stone 2019). Third, for women and minority judges, negative attitudes mean that their

decisions may be uniquely scrutinized. This not only has implications for how they behave (Martin, Reynolds, and Keith 2002; see, relatedly, Sen 2015), but also for whether the public acknowledges their rulings as legitimate.

Our theoretical expectations rest on two pillars concerning how citizens use group cues when evaluating the political (McDermott 1997; Valentino and Hutchings 2004) and legal (Ono and Zilis, *forthcoming*) systems. From the political side, voters use ascriptive traits to infer the policies or groups a candidate favors, a fact which has electoral consequences (Koch 2000; Koch 2002; Meyer and Woodard 2017). From the legal side, citizens believe that judges may engage in improper “favoritism” towards parties from their ingroup (Ono and Zilis, *forthcoming*). More generally, Scherer and Curry (2010) show that Americans take into account descriptive representation when evaluating the legitimacy of the judiciary more generally.

Design

We test whether Americans perceive diverse judges as inherently biased with a list experiment. The list design “works by aggregating the sensitive item” – in this case, whether female or Hispanic judges are inherently biased – “with a list of nonsensitive items,” making it particularly effective when social desirability is a concern (Glynn 2013, 160; Kuklinski, Cobb, and Gilens 1997). We administered our study using a sample of the U.S. adult population during the summer of 2018 via Survey Sampling International (now known as Dynata). Our sample was balanced by age, gender, ethnicity, and census region to match the demographics of the American voting population ($N = 3117$). See the appendix for more detail.

Using a list design, we investigated whether Americans believe (1) female judges and (2) Hispanic judges favor their “ingroup” when ruling. To develop a realistic set of items for our lists, we used statements made by Donald Trump, some of which took positions that Republicans typically support and others that Democrats were more likely to support.² We randomly assigned respondents to one of three experimental conditions. The control group read a four-item list, while the treatment groups saw the same list with an additional item.³ The female judge treatment item read: “When a court case concerns issues like #metoo, some women judges might give biased rulings.” The Hispanic judge treatment item read: “When a court case concerns issues like immigration, some Hispanic judges might give biased rulings.” Following Ono and Zilis (*forthcoming*), we chose the issues because of their high profile nature and their clear connections to the gender/ethnicity of the potential judge. Our statements focus on whether citizens believe judges are impartial, which is a basic ingredient in determining support for courts and the rule of law more generally (Gibson 2008; Tyler 2001).⁴ Importantly, with our list design, we minimize social desirability bias, thus providing a fuller portrait of attitudes on the sensitive topic.

Note that we did not use “extreme” question wording (e.g., “*all* women judges will give biased rulings”), so the counterfactual implied by our statement is that female and Hispanic judges will not give biased rulings. One may argue that we observe a higher degree of perceived bias with our approach, but there are a few reasons to recommend it. First, we can still accurately compare *across subgroups* how many people are concerned that some female and Hispanic judges are biased. Second, by endorsing that idea, without

evidence, that “some” members of a group are inclined to behave in an undesirable way, respondents are engaging in stereotyping. It is not necessary for Americans to endorse the extreme version for negative implications to result. If citizens stereotype women and Hispanics as potentially biased in some cases, this can put them at an electoral disadvantage. Similarly, our approach allows us to capture people with less extreme, but still negative, attitudes towards judicial diversity. Indeed, the “extreme” question wording would go beyond even the controversial statements made by Donald Trump. Finally, our moderate question wording shares features with that used in other list experiments, where voters indicate whether they are “upset” by diverse candidates (e.g., Burden, Ono, and Yamada 2017). Nonetheless, we recognize that including an additional comparison group, such as white male judges, may be useful in future work.

Bivariate results

Table 1 presents the bivariate results, showing a large portion of the public believes that female and Hispanic judges may sometimes be biased. Nearly 39% of Americans respond that female judges display bias. About 35% believe that Hispanics display bias. The size of these effects is notable when compared with prejudice against a female president, for example, which is found among about 13% of Americans (Burden, Ono, and Yamada 2017).

We suspect that a key theoretical reason for the difference is that we have targeted ingroup bias. We did not ask whether women or Hispanics are entirely unfit for office, but rather whether they cannot resolve some cases fairly. While a less blunt form of bias, the idea of judicial favoritism may be integral in undermining legal legitimacy.

The subgroup results from Table 1 uncover interesting effects for respondent race and gender. About 36% of women see female judges as biased, while the comparable figure for men is 42%. These differences are even more stark for Hispanic judges – 42% of men, but only 30% of women, see minority judges as biased. When it comes to respondent race, African-Americans are quite mistrustful of Hispanic judges. Over one-half of blacks believe that Hispanic judges display bias. The patterns are different for Hispanic respondents. Hispanics do *not* believe that Hispanic judges are biased. But about 53% of Hispanics believe that female judges give biased rulings, one of the highest levels in the study.

Lastly, our bivariate analysis shows a strong effect for partisanship. On the whole, Republicans perceive significantly more bias than do Democrats.⁵ While the partisan divide is consistent with other work, we find that even Democrats may display opposition to women and minorities in office under certain conditions.

Multivariate results

Our multivariate regression analysis draws on maximum likelihood models for the analysis of list experiments (Blair and Imai 2012; Imai 2011). The models examine the number of items selected across treatment and control groups, and allow us to offer estimates for how each covariate affects the likelihood of selecting the “judicial bias” item. Our key covariates include respondents’ gender, educational attainment, age, class, region, race/ethnicity, and partisanship.⁶ The dependent variable is the proportion of

Table 1. Evaluations of female and Hispanic judges.

Demographic	Control Mean	Treatment: anti-female judge		Treatment: anti-Hispanic judge	
		Mean	Difference	Mean	Difference
All respondents	1.91 (0.03)	2.30 (0.04)	0.3892*** (0.05)	2.27 (0.04)	0.3532*** (0.05)
Male	1.91 (0.04)	2.34 (0.05)	0.4249*** (0.07)	2.33 (0.06)	0.4193*** (0.07)
Female	1.91 (0.04)	2.27 (0.05)	0.3596*** (0.06)	2.21 (0.05)	0.2957*** (0.07)
No BA degree	1.98 (0.05)	2.35 (0.06)	0.3735*** (0.08)	2.35 (0.07)	0.3725*** (0.08)
BA degree	1.84 (0.04)	2.28 (0.06)	0.4383*** (0.07)	2.18 (0.05)	0.3414*** (0.07)
18–35 years old	1.98 (0.06)	2.39 (0.07)	0.4121*** (0.09)	2.38 (0.07)	0.4075*** (0.09)
36–55 years old	1.98 (0.06)	2.39 (0.07)	0.4121*** (0.09)	2.38 (0.07)	0.4075*** (0.09)
56+ years old	1.89 (0.05)	2.27 (0.06)	0.3784*** (0.08)	2.23 (0.06)	0.3395*** (0.08)
Lower class (<50k)	1.91 (0.05)	2.33 (0.06)	0.4201*** (0.08)	2.29 (0.06)	0.3840*** (0.08)
Mid class (50–100k)	1.96 (0.05)	2.27 (0.06)	0.3117*** (0.07)	2.31 (0.06)	0.3508*** (0.08)
Upper class (100k+)	1.84 (0.07)	2.31 (0.08)	0.4754*** (0.10)	2.15 (0.08)	0.3119*** (0.10)
South	1.94 (0.06)	2.33 (0.07)	0.3923*** (0.09)	2.39 (0.08)	0.4506*** (0.09)
Non south	1.90 (0.04)	2.29 (0.04)	0.3878*** (0.06)	2.22 (0.04)	0.3188*** (0.06)
White	1.93 (0.04)	2.30 (0.04)	0.3636*** (0.05)	2.25 (0.04)	0.3135*** (0.06)
Hispanic	1.93 (0.10)	2.46 (0.14)	0.5307*** (0.17)	2.18 (0.11)	0.25 (0.15)
Black	1.84 (0.09)	2.13 (0.11)	0.2930** (0.14)	2.37 (0.13)	0.5333*** (0.16)
Other	1.81 (0.12)	2.39 (0.13)	0.5812*** (0.18)	2.41 (0.13)	0.6018*** (0.18)
Democrat	1.85 (0.04)	2.18 (0.05)	0.3270*** (0.07)	2.14 (0.05)	0.2950*** (0.07)
Republican	2.06 (0.05)	2.52 (0.06)	0.4676*** (0.08)	2.44 (0.06)	0.3815*** (0.08)
Independent	1.75 (0.09)	2.20 (0.10)	0.4490*** (0.14)	2.33 (0.11)	0.5805*** (0.15)

Notes: Means represent the number of items selected in the list of controversial statements, with standard errors in parentheses. Differences display the percentage increase in selected statements in the treatment versus control condition, which shows the extent of anti-female and anti-Hispanic attitudes.

* $p < 0.05$.

** $p < 0.01$.

*** $p < 0.001$.

respondents predisposed against female and minority judges. For more details on the model, including coefficient estimates, intercept, and standard errors, please see the appendix.

Figure 1 displays the coefficient estimates. We continue to see that many Americans believe that diverse judges are biased. A few noteworthy patterns exist when it comes to how prevalent this belief is among subgroups of the population. First, our multivariate analysis shows that men and women have somewhat different views about the capabilities of judges. When compared with women, men are very slightly, though not significantly,

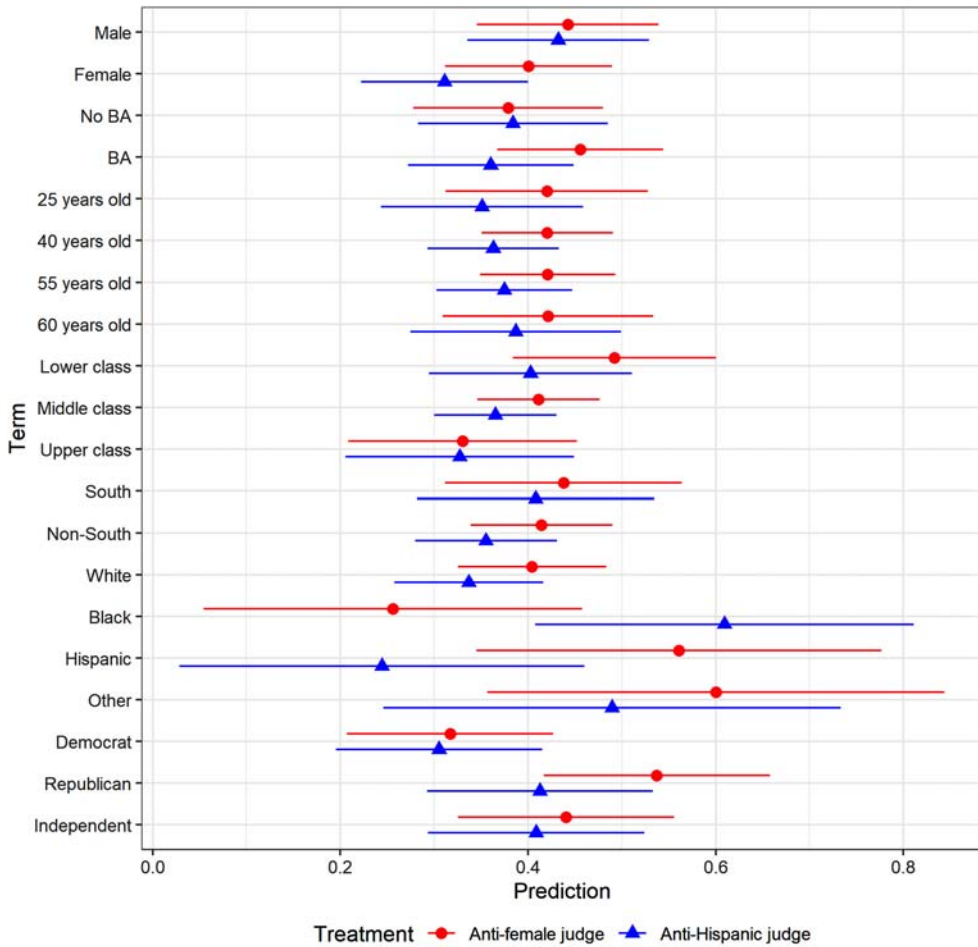


Figure 1. Multivariate estimates of evaluations of female and Hispanic judges.

Note: Dots represent estimated proportions of respondents predisposed against female and minority judges, and lines are 95% confidence intervals from the multivariate regression model.

more likely to rate female judges as biased. But male respondents are much more likely to rate Hispanic judges as biased.

Another notable result concerns attitudes based on a respondent’s race. Over 60% of African Americans rate Hispanic judges as biased, based on the multivariate estimates. This may be attributable to the fact that priming a judge’s race increases the likelihood of thinking in racialized terms. Since there are only a small number of minority judges on the bench, it is possible that African Americans see the presence of Hispanic judges as a factor that limits the number of seats for black judges, thus increasing negative feelings. Yet white and Hispanic respondents display distinct attitudes. For these groups, there is a strong belief that female judges are biased.

Our multivariate analysis offers clear evidence of partisan effects. Over *half* of all Republicans say that female judges are biased in cases involving sexual assault.

Interestingly, about one in three Democrats also perceive female judges as biased. We observe similar, albeit less pronounced, partisan distinctions when it comes to Hispanic judges. About one-third of Democrats see Hispanic judges as biased, but this number rises to about 40% of Independents and Republicans.

The multivariate regression results provide some evidence that is consistent with an “ingroup bias” theory of judicial evaluation. Specifically, we find notable results when it comes to race and partisanship, which may be driven by the fact that members of the public become more concerned with judicial bias when they perceive a judge to favor members of a different racial or partisan group.

On the whole, a significant number of Americans question the impartiality of female and minority judges. In fact, the proportions are so large – in many cases between 30% and 50% of citizens – that they strongly contradict the idea that Americans are opposed to attacks on a judge based on her ethnicity or gender.

Discussion

Many Americans doubt whether women and Hispanic judges can rule without bias. This is both important and alarming because perceived bias can negatively impact the likelihood that diverse judges are elected or retained in office, and it can also impact reactions to their rulings. Our findings speak to ongoing theoretical and substantive debates regarding bias, diversity, and the rule of law. We advance the literature on bias in a distinct context, with one of the first studies to look at stereotyping of judges. This is valuable because the traits that Americans perceive as beneficial for serving as a lawmaker or executive branch official are likely different than those for judges. Citizens place a high value on fairness and impartiality in the legal system, but we find here that they doubt whether some judges consistently display these qualities. Even so, we acknowledge that our results cannot speak to how Americans perceive other judges, such as white males or minorities other than Hispanics.

Additionally, we make a theoretical advancement by highlighting how bias is rooted in perceptions of judges favoring their “ingroup.” Indeed, in a separate list experiment that we deployed, which we describe in the appendix, we show that citizens do not *generally* oppose females and minorities as judges. Rather, prejudice is more subtle. It manifests in the idea that female and Hispanic judges cannot fairly adjudicate certain cases that come before them. In the modern era, perceived ingroup bias may be particularly resilient in American politics.

From a substantive perspective, we engage directly with ongoing controversies. Following Donald Trump’s comments about a Hispanic judge, polling suggested that a small number of Americans believed his complaint was justified (Moore 2016). Social desirability concerns, however, may have depressed this number. Moreover, it is important to recognize that some states are actively addressing idea of “bias” in the courts, suggesting that this is a politically pressing concern.⁷ We acknowledge that we do not directly compare the extent of opposition towards females and Hispanics with that towards, for example, white or male judges. We see this as a fruitful avenue for future research, particularly given findings that some Democrats might perceive a bit more bias on the part of white male jurists (Ono and Zilis, *forthcoming*).

As the judiciary becomes more diverse, our results suggest challenges ahead. In spite of the benefits that diversity brings, we find that Americans are susceptible to stereotyping female and minority judges as infected by ingroup favoritism.

Notes

1. The use of partisan elections varies depending on the level of court involved. See “Judicial Selection in the States,” *American Judicature Society*, http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.
2. The statements were about gun violence, taxes, climate change, and the police. See appendix for full statement wording.
3. We explored whether including a different number of items across conditions impacted the results (see Rimbau and Oswald 2021). Specifically, we considered whether the different numbers impacted the responses of individuals lower in educational attainment, finding little evidence to this effect. These results are presented in the appendix.
4. In their discussion of race, gender, and judging, Harris and Sen (2019) suggest that reaching a different decision than one’s colleagues does not imply that a judge is biased. We agree. Rather, bias indicates that a judge displays *prejudice* toward or against an individual or group. Alternatively, some respondents might interpret bias to indicate that a judge lacks impartiality. While our survey data does not offer the possibility of probing each respondent’s interpretation, we contend that any commonly accepted understanding of bias – as favoritism, prejudice, or partiality – reflects a negative evaluation when applied to a judge. Indeed, the Code of Conduct for U.S. Judges stresses that judges must perform their duties with “impartiality” and avoid all “prejudiced” and “biased” behavior.
5. Independents are strongly predisposed against Hispanic judges (58%) when leaners are counted.
6. We measure partisanship using the standard seven-point scale and present the results without leaners counted as partisans, although we find very similar effects when leaners are included.
7. See, for example, Florida’s push for “Recognizing and Eliminating Bias from Court Operations,” (<https://www.flcourts.org/content/download/216082/file/RecognizingEliminatingBias.pdf>) and similar efforts in California (https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB242).

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No potential conflict of interest was reported by the authors.

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