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## Diversity in the judiciary: how diversity matters for democratic inclusion, representation, and inequalities

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### ABSTRACT

While a rich and developed body of literature focuses on questions of diversity in legislatures, a growing body of scholarship addresses these questions for the judiciary. This burgeoning area of study presents several challenges, three of which are illuminated by papers in this *Dialogue* section. As the papers show, these three research challenges are empirical and normative. By bringing together political theory and empirical research, and by focusing on both the US and comparative judiciaries, the essays build our understanding of processes of representation in the judiciary and the complexities of the relationships between race, ethnicity, and gender.

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## Introduction

While growing body of research explores diversity and representation in political institutions, some crucial questions remain about how and under what conditions diversity and representation matter on the judiciary. This is, in part, because much of the existing research about descriptive representation has focused on legislative representation. While courts are clearly different institutions, it is not obvious which institutional differences matter and why they matter. This area of study is also challenging because in some countries the role of the judiciary may be shifting and, in particular, becoming more overtly focused on partisan representation. In the US, for instance, some commentators now refer to judges as “Trump judges”, “Obama judges,” “Clinton judges,” or “Bush judges.”

This *Dialogue* emerged from a conference that gathered scholars from different fields to discuss, broadly, diversity on courts. Scholars from a variety of fields and specializations in American Politics, Law, Comparative Politics, Political Theory, Law and Society, and Gender Studies engaged in cross-disciplinary dialog. The resulting work is a reflection of many different perspectives. We include normative papers from political theorists urging scholars to question how we think about the problem and empirical papers (both qualitative and quantitative) that put these ideas to the test. Bringing together these varied perspectives enriches our understanding of the importance and consequences of inclusion/exclusion and diverse/homogenous legal institutions. We understand diversity in a broad sense, including gender, race, ethnicity, and socio-

economic status as well as cross-cutting cleavages and intersectional forms of privilege and discrimination.

The *Dialogue* exposes three challenges in this developing area of scholarship, which are discussed in turn below: (1) norms which are distinctive to the judiciary, (2) how judges' perspectives and identities matter, (3) where diversity is located. The five articles in this *Dialogue* section shed light on these challenges and encourage further research on them.

The first challenge explored centers on the norms that are distinctive to the judiciary as an institution. In most countries, the courts, particularly the highest courts, are relatively small institutions and judges are not dyadic representatives selected to represent a specific set of constituents. However, even in relatively small courts, such as the US Supreme Court with nine members and life terms, most presidents will have the opportunity to name at least two justices to the Supreme Court. Presidential nominations have been influenced by descriptive representational interests, most prominently geography and religion historically, and race and gender recently. The opportunities for representation expand further when we consider the entire judiciary, not just a single apex court.

Several of the papers draw attention to the unique qualities of the judiciary, exploring which norms are distinctive to courts. "Diversity, Consensus, and Decision Making" emphasizes several ways in which the work of judges is quite different from that of legislative representatives. Judges on the US federal appellate branch, for instance, typically work on rotating three-judge panels, they have shifting caseloads, and, unlike legislative representatives, they can write dissents explaining why they disagree with their peers. In a similar way, the paper "Women 'Doing' the Judiciary" emphasizes the importance of paying attention to institutional context. This paper points out that the rules and norms that constrain judges on the US Supreme Court, for instance, differ from those that restrict judges on the International Criminal Court. At the same time, however, judges are focused on bringing about justice. Thus, it is essential to explore, as this paper does, what is meant by justice. The paper "Fairness has a Face" examines tensions between the norm of impartiality and descriptive representation in the judiciary. This paper examines recent arguments in the US that judges should act like umpires, neutral arbiters who do not mirror or stand in for different constituencies. "Fairness has a Face" outlines two difficulties with the umpire ideal. First, it may erase the descriptive representation that white, male judges do, allowing their descriptive representation to go unnoticed and unaccounted for. Second, the umpire ideal may lead to an over-emphasis on the descriptive representation that judges who differ from the white male norm do. To address these problems, the paper argues that descriptive representation should be turned inside out and understood as something that all judges do.

The second challenge concerns how historic patterns of exclusion shape the perspectives and identities that matter in judicial decision making. The earliest research on the judiciary explored whether judges may act as descriptive representatives by "stand[ing] for" women or historically underrepresented groups in their decision making (Pitkin 1972, 60). Scholars have asked, for instance, whether female and racially underrepresented judges "mirror" common interests or shared experiences of their group identity in their decisions. This may imply, by extension, that women and racial minority judges can be evaluated in part on the accuracy of their resemblance to women and racial minorities in the citizenry (Pitkin 1972, 72–73).

This is, of course, a crucial concern. It might be that identity or descriptive representation has little influence on a judge's decision on a case or that it matters greatly or that it matters only on certain cases. The existing literature has been divided on this issue (for comprehensive review of this literature see Means, Eslich, and Prado 2019 and Harris and Sen 2019). Although some scholars conducting empirical analysis of decisions have found that gender matters very little, others find that a judge's identity can play a much more prominent role in cases salient to race, gender, or discrimination.

Adding to this debate, "Judicial Behavior in Disability Cases: Do Judge Sex and Race Matter?" finds few gender differences in Social Security disability cases in federal district courts. The paper does find, however, that non-white judges are significantly more likely than white judges to rule in favor of a plaintiff in Social Security disability cases. The authors theorize that the historic experiences of racial minorities with discrimination leads judges with this experience to rule in favor of others facing discrimination.

The authors of "Diverse and Inclusive High Courts" ask how we can think about diversity in the judiciary when there are multiple and overlapping processes of marginalization. They take up the often overlooked question of intersectionality and consider the high courts of Canada and South Africa, juxtaposing their struggles to represent multiple and overlapping sources of marginalization. While intersectionality emerged within legal communities to redress specifically the negative legal consequences faced particularly by women of color (Crenshaw 1989), it has received less attention in contemporary empirical legal and judicial research on the composition of judiciaries. "Diverse and Inclusive High Courts" argues that judiciaries cannot be fully inclusive if their composition does not reflect multiple and intersecting sources of privilege and disadvantage.

A third challenge is where diversity is located: in the individual or in the composition of the court. Diversity in the judiciary may matter for the individual judge, or for the composition of the court or courts (see Harris and Sen 2019). The "Judicial Behavior in Disability Cases," for instance, takes in an individual approach, asking whether female or racial minority judges decide cases differently from their white male counterparts. In contrast to this individualistic approach, Jane Mansbridge argued for measuring diversity in a wider context (Mansbridge 1999). Descriptive representation can have a "composition effect," in which "the open-ended quality of deliberation gives communicative and informational advantages to representatives who are existentially close to the issue" (635). In the context of elected officials and policymaking, Mansbridge argues that "innovative thinking in contexts of uncrystallized, not fully articulated, interests – descriptive representation enhances the substantive representation of interests by improving the quality of deliberations" (628). This more holistic approach to descriptive representation is an element of "Diverse and Inclusive High Courts" and "Diversity, Consensus, and Decision Making." In these papers, representation is not seen to reside in the individual judge, but rather in the collective. The latter explores decision making across courts in the federal appellate judiciary where it finds that the impact of gender, race, and ethnicity depends on the size of the court, with larger courts yielding more dissent.

As these three challenges suggest, this is a burgeoning and vibrant area of study. Bringing together different lenses, as we do in this *Dialogue* section, is essential to building a comprehensive framework. Given the growing influence of the judiciary around the world, it is all the more important for future work to address these challenges.

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