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Mackenzie Israel-Trummel
William & Mary, mit@wm.edu

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"Because He Is Gay": How Race, Gender, and Sexuality Shape Perceptions of Judicial Fairness

Ana Bracic, Michigan State University
Mackenzie Israel-Trummel, William & Mary
Tyler Johnson, University of Oklahoma
Kathleen Tipler, University of Oklahoma

How does a judge's identity affect perceptions of their ability to preside fairly? We theorize that identity categories operate as ideological cues and that the public views judges perceived as ideologically proximate to be fairer, more impartial, and more inspiring of trust in courts broadly. Using a conjoint survey experiment with a diverse national sample, we find support for this theory and show that race, gender, and especially sexuality are used as ideological cues. The effect of identities is conditioned by respondent partisanship. Democratic respondents trust judges with marginalized identities more than judges with dominant identities. Republicans are relatively indifferent to judges' race or gender but are significantly less trusting of gay judges. We also uncover limited effects when judges preside over a case in which their identity is salient. These results suggest that the public does not seek descriptive representation as such but uses identity categories to achieve ideological congruence.

After Judge Vaughan Walker found California's same-sex marriage ban unconstitutional in 2010, advocates of the ban argued Walker's decision should be vacated because he was in a same-sex relationship (Lovett 2011). However, another judge said to question Walker "would institute a 'double standard for minority judges'" inconsistent with "the Constitution and other law" (*Perry v. Schwarzenegger*, 628 F.3d 1191 [9th Cir. 2011], 1129–30; *United States v. Alabama* 828 F.2d 1532 [11th Cir. 1987], 1542). While "a segment of the public [might] question [Walker's] impartiality," the judge ruled that public opinion does not determine legal standards (*Perry v. Schwarzenegger*, 1130).

But do judges' marginalized identities decrease perceptions of fairness? And when the identities of judges are salient in a case, does that provoke doubts about their ability to preside impartially? How judges' identities influence support for the

judiciary is understudied (but see Ono and Zilis 2021, 2022). Research on judicial legitimacy has mostly focused on how attitudes are driven by the Supreme Court's policy outputs and ideological affinity (Ansolabehere and White 2020; Bartels and Johnston 2013; Malhotra and Jessee 2014) and on the adherence of judges to liberal values such as the rule of law (Gibson, Caldeira, and Spence 2003; Gibson and Nelson 2015). But if judges are evaluated on the basis of their identities, the legitimacy of courts—as well as the behavior of judges who anticipate perceptions of bias—may be shaped by these evaluations, too.

Drawing on judicial politics and political psychology research, we argue that individual judges' identities affect how the public perceives their ability to adjudicate a particular case; this perception could shape broader views of individual judges and the courts. We posit that judges' identities operate as

ideological cues and that people who perceive ideological disagreement between themselves and a judge will be less likely to view that judge as fair, trustworthy, and impartial. We test our hypotheses with a conjoint survey experiment on a diverse national sample ($N = 4{,}042$). In five different types of employment discrimination cases, we show respondents pairs of federal judges with randomized characteristics and ask them to select the judge they trust to most fairly hear the case. Respondents then briefly explain their choice, place the judges on an ideological scale, assess the judges' level of impartiality, and indicate their trust in the Supreme Court if these judges were to join the bench. Our design offers several important advancements. First, we directly test how the public uses identity categories to make ideological estimates and how these identity categories affect beliefs about judges' ability to preside fairly, as well as trust in the court broadly. Second, we examine multiple racial/ethnic categories at once (including Native identity, which existing work has not done). Third, we move the judicial identity literature beyond race/ethnicity, gender, and partisanship to also consider sexuality. Finally, we capture both respondents' behaviors in the conjoint task and their justification for their choices in open-ended responses.

We show that identities operate as ideological cues and shape beliefs about judges' ability to provide fair hearings. Respondent partisanship conditions the effects of identity; sexuality is a strong ideological cue for Republicans, while race and gender are not. Democrats consistently trust judges with marginalized race, gender, and sexual identities more than judges with dominant identities. While Republicans are less likely to trust a gay judge than a straight judge, their distrust does not deepen when this identity is salient in a case, as Walker's was. By contrast, Democrats' trust of judges with marginalized identities sometimes increases when that identity is salient. Our findings suggest that the public does not seek descriptive representation as an end but rather as a means to achieving ideological congruence.

Our article has important implications for judicial legitimacy. In the contemporary polarized environment, judges are increasingly subject to partisan attacks on their marginalized identities, which has the potential to undermine judicial legitimacy and the rule of law (Ono and Zilis 2022). Unlike those who hold explicitly political positions (such as members of Congress), judges are evaluated using standards of fairness (Gibson and Nelson 2015; Gibson et al. 2003). Since judges are evaluated on fairness, prejudice against out-group judges might most readily be expressed as perceptions of those judges as unfair (Tajfel et al. 1971). And if the public perceives that judges with certain identities are less fair, the implication is that those with such identities are not good judges, which further marginalizes those already marginalized. It also

has the potential to affect who is selected as a judicial candidate or nominee, the content of debates over potential judges, and who ultimately sits on the bench.

THEORETICAL BACKGROUND AND IMPLICATIONS

There is a small but growing literature on the relationship between judges' identities and support for the judiciary. Most of this research follows theories of legislative descriptive representation—which show that it enhances institutional legitimacy (Bobo and Gilliam 1990; Mansbridge 1999; Tate 2003)—and examines whether shared identity increases support for the judiciary or a nominee (Badas and Stauffer 2018; Evans et al. 2017; Kaslovsky, Rogowski, and Stone 2021; Scherer and Curry 2010; Sen 2017). The effects of congruent identities are mixed and may depend on the particular identity: for example, people express greater support for judicial nominees of the same race but not of the same gender (Kaslovsky et al. 2021).

There is a second, additional effect of identity categories that has not yet been thoroughly investigated: judges' identities may serve as ideological cues, which in turn may shape perceptions of fairness, political motivation, and support for the courts. In her theory of "political searching," Sen (2017) applies similar logic to argue that people use race and gender (and other nonidentity characteristics) as partisan cues when other partisan information is unavailable. Nowadays, partisan information is more present and reliable for the Supreme Court (Badas and Simas 2022) and is often available in lower federal courts and state courts as well (Carp, Manning, and Holmes 2019; Rock and Baum 2010). Therefore, if the presence of partisan cues rendered identity cues superfluous, we might be less concerned with them. However, we argue that even when partisanship is known, Americans are likely to infer judges' ideology from race, gender, and sexuality categories.

Psychology research shows that identity categories—such as race and gender—are often used as cues to infer ideological position. The conservative-progressive dimension is one of three stereotypical dimensions people employ when they mentally distinguish between social groups like Democrats, lesbians, immigrants, and Muslims (Koch et al. 2016, 2020). Mental organization along this dimension happens even when people are merely asked how similar or different 80 pairs of commonly named social groups are (Koch et al. 2016). In other words, when people see identities, they tend to make assumptions about their ideological position. People arrange gays and lesbians to the ideological left of heterosexuals, Democrats to the left of Republicans, and women to the left of men (Koch et al. 2016). Similarly, Black and Hispanic people are placed to the left of White people, but Asian people are

not (Koch et al. 2020). These categorizations generally reflect average racial and ethnic divisions in mass ideology and partisanship (Herrick and Mendez 2018; Hutchings and Valentino 2004; Masuoka et al. 2018; Segura 2012) and smaller but consistent partisan gender gaps (Kaufmann and Petrocik 1999; Norrander 1999; Schlesinger and Heldman 2001). Although there has been less political behavior research on sexuality, LGB (lesbian, gay, and bisexual) people are also more liberal and Democratic relative to heterosexuals (Egan 2012; Flores 2019; Lewis, Rogers, and Sherrill 2011; Strolovitch, Wong, and Proctor 2017).

These psychological processes can also shape the public's evaluation of political candidates and officials. In low-information environments, the mass public frequently relies on cues and heuristics to make political decisions (Lupia 1994; Lupia and McCubbins 1998; Mondak 1993). Partisanship cues are particularly potent (Rahn 1993), but identities such as race, gender, and sexuality are also often used heuristically. In accordance with categorizations of social groups, people assume candidates and legislators with marginalized racial, gender, and sexual identities are more liberal than those with dominant identities (Jacobsmeier 2014; McDermott 1998; Schneider and Bos 2011; Visalvanich 2017b).[1] This mapping of identity to perceived ideology also reflects realities in legislator behavior: political representatives of color and women are sometimes more liberal than White representatives and men (Eckhouse 2019; Frederick 2010; Hogan 2008; Norton 1999). Moreover, as with legislators, judges' identities and backgrounds have been shown to shape judicial outputs and behavior in the United States and beyond (Boldt et al. 2021; Boyd, Epstein, and Martin 2010; Choi, Harris, and Shen-Bayh 2022; Choi et al. 2011; Davis, Haire, and Songer 1993; Farhang and Wawro 2004; Glynn and Sen 2015; Harris and Sen 2019; Hofer and Casellas 2020; Kastellec 2013; Peresie 2005; Songer, Radieva, and Reid 2016). Therefore, we anticipate a similar use of identity as an ideological cue with judges:

H1. Respondents will perceive judges with marginalized race, gender, and sexual identities as more liberal than judges with dominant identities, even when partisanship is known.

We argue that beyond simply making ideological estimates, Americans use identity-based ideological cues to evaluate judicial legitimacy. Indeed, newer research suggests

that people use explicit partisan cues to evaluate the legitimacy of judicial decisions (Nicholson and Hansford 2014), the institution of the Supreme Court itself (Clark and Kastellec 2015), and the trustworthiness of judicial nominees (Sen 2017). This work largely assumes that ideological cues provide information on judicial decision-making and that Americans, to varying degrees, view the judiciary in terms of its policy outputs. Political psychology, however, identifies another function of ideological cues: they help people categorize themselves and others into in-groups and out-groups. Group categorization, in turn, leads people to favor the in-group over the out-group (Tajfel et al. 1971).

Many recent studies show not only that Americans are affectively polarized by party (e.g., Iyengar et al. 2019) but also that political ideology functions as a social identity (Egan 2020) through which people see others as members of their ideological in-group or out-group (Kinder and Kalmoe 2017; Mason 2018). Surpassing in-group favoritism, people in fact feel prejudice toward those who differ from them ideologically (Brandt 2017). We expect, then, that identity-based ideological cues will shape perceptions of judicial legitimacy, as judges seen as ideologically different are disfavored. We examine three dimensions of judicial legitimacy: fairness, impartiality, and trust in a court to operate in the country's best interest.

Why should fairness affect legitimacy? Traditionally, the literature on judicial legitimacy has looked at two dimensions of public opinion: attitudes toward courts as institutions ("diffuse support"); and attitudes toward specific decisions ("specific support") (Caldeira and Gibson 1992; Easton 1965). But perceptions of judicial fairness are increasingly recognized as fundamental to institutional legitimacy, consistent with the traditional approach's understanding that legitimacy rests on judicial power being used in a principled way (Gibson and Nelson 2014). Symbols of fairness play a key role in shoring up institutional legitimacy (Gibson and Caldeira 2009), and procedural fairness is likewise central to the concept (Ono and Zilis 2021, 2022). Therefore Americans' perceptions of fairness—of individual judges and the courts on which they serve—speak to judicial legitimacy more broadly. To the extent that identity provides cues of ideology, and ideology provokes group categorization, a judge's identity should then cause Americans to form opinions about their fairness—and, correspondingly, legitimacy.

Given that legitimacy rests on perceptions of principled decision-making, institutional legitimacy examines not just fairness but impartiality: Is a court "fair and objective in its rulings" or "politically motivated" (Bartels, Johnston, and Mark 2015, 771)? Is a court "too mixed up in politics" (Gibson et al. 2003, 336)? We theorize that judges who are perceived to be ideological kinfolk will be viewed as less politically

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1. However, some work shows that mass group stereotypes do not always map cleanly onto stereotypes of politicians (Schneider and Bos 2011, 2014).

motivated and more impartial. In addition to tending to evaluate in-group members more favorably, people tend to believe that their own views reflect reality, while the views of those with whom they disagree do not and are therefore biased (Kennedy and Pronin 2008; Pronin 2007; Robinson et al. 1995). An implication of this theory is that a respondent may perceive one judge as more ideologically extreme than another, while believing the more extreme judge is less politically motivated than the more moderate one—if the extreme judge's ideology aligns with the respondent's.

Finally, general trust in the courts to operate in the best interest of the people is a central component of diffuse legitimacy (Gibson et al. 2003). Although traditionally courts have been perceived as relatively insulated from politics, recent work shows that support for the institution responds to political cues (Clark and Kastellec 2015). As such, when people perceive that courts are composed of judges who differ from them politically, trust in the courts' ability to operate in the people's interest will erode. Thus, we argue that as judges' identity categories are used to infer ideology, they will then be used to determine whether a judge is likely to preside fairly over a particular case, whether a judge is likely to be politically motivated in general, and whether a court on which the judge serves is trustworthy:

> **H2a.** Democratic respondents will trust judges with marginalized identities to provide a fair hearing more than they will trust judges with dominant identities.

> **H2b.** Republican respondents will trust judges with dominant identities to provide a fair hearing more than they will trust judges with marginalized identities.

> **H3a.** Democratic respondents will view judges with marginalized identities as less politically motivated than judges with dominant identities.

> **H3b**. Republican respondents will view judges with dominant identities as less politically motivated than judges with marginalized identities.

> **H4a.** Democratic respondents will trust the US Supreme Court more if judges with marginalized identities were to join the bench than if judges with dominant identities were to join.

> **H4b.** Republican respondents will trust the US Supreme Court more if judges with dominant identities were to join the bench than if judges with marginalized identities were to join.

What happens when a judge's identity is salient in a case, as with Judge Walker and same-sex marriage? Recent work suggests that Republicans consider women judges and Hispanic judges more biased in cases related to "women's issues" or "Hispanic issues," respectively (Ono and Zilis 2021, 2022). However, research on electoral candidates offers an alternative possibility: identity is used to infer issue competence. For example, men are perceived to be more competent on defense policy and national security, whereas women are considered better able to handle education and antipoverty programs (Alexander and Andersen 1993; Fox and Lawless 2004; Fox and Oxley 2003; Huddy and Terkildsen 1993; Kahn 1992; Koch 1999; Lawless 2004). Likewise, voters may make assumptions about issue competency by candidates' race/ethnicity (Israel-Trummel 2015; Shortle and Johnson 2017; Sigelman et al. 1995; Williams 1990). For example, Shortle and Johnson (2017) show that Latino candidates are viewed as more competent on immigration—an issue that is associated with Latinos (Brader, Valentino, and Suhay 2008). In addition, certain issues prime the public to incorporate identity-driven judgments into their decision-making (Mendelberg 2001; Reeves 1997; Winter 2008). Importantly, this work notes it is marginalized identities that are typically implicated, as dominant identities are rendered invisible. Thus "racial issues" are rarely invoked to highlight Whiteness, nor are "gender issues" considered relevant to men. This leads to our final hypothesis:

> **H5.** When a judge's marginalized identity is salient in a case, on average respondents will be more likely to trust that judge to provide a fair hearing than a judge whose identity is not salient.

DATA AND METHOD

We use a conjoint experiment, which allows us to test the causal impact of multiple characteristics on decision-making (Bansak et al. 2018; Flores and Schachter 2018; Hainmueller and Hopkins 2015; Peterson 2017). This approach is widely used to test how the public chooses political candidates and evaluates trust (Knudsen and Johannesson 2019; Schwarz and Coppock 2022); it also reduces social desirability bias (Bansak et al. 2021) and increases external validity (Hainmueller, Hangartner, and Yamamoto 2015). Conjoint experiments are also used specifically in the context of public opinion and the judiciary (Kaslovsky et al. 2021; Sen 2017). Conjoint designs test for the average effect of any particular attribute averaging across all others. This means that we have very few respondents for any particular combination of all the randomized variables, but we are sufficiently powered to examine the

effects of, for example, race averaging across all other identity categories (Bansak et al. 2021).

We fielded our experiment to 4,042 respondents via Lucid Theorem from October 9 to 30, 2019. Lucid uses quotas to achieve a representative sample with respect to age, gender, race, ethnicity, and region. The sample also has partisan and ideological variation: 41% are Democrats and 38% are Republicans; 35% are liberal and 31% are conservative. Respondents were told they would first read about a case and then consider pairs of judges who might be assigned to hear it. The case involved a fictional plaintiff named Sharon Hodges suing her employer, Johnson Metals, for discrimination. We chose employment discrimination as (1) it enables varying the marginalized identity salient in each case, (2) the case subject could appear in both state and federal courts, and (3) employment discrimination cases used to constitute the "largest single category of federal civil cases" (Clermont and Schwab 2009, 103). Respondents were randomly assigned one of five reasons Hodges claimed Johnson Metals refused to promote her: she is a woman (sex discrimination), she is Black (racial discrimination), she is a lesbian (sexual orientation discrimination), she is transgender (gender identity discrimination), or she is religious (religious discrimination). Figure 1 provides the full text of the experiment. We placed the title of the case and the type of discrimination at issue at the top of each judge pairing. We do not specify which court is hearing the case, as we are interested in the effect of marginalized identities on the evaluation of judges broadly speaking, and it simplifies the information for respondents. A downside of our approach is that evaluations could vary by court. However, most Americans possess so little knowledge of judicial process that detailed information about the court seems as likely to confuse as to clarify.

Each judge's profile listed seven randomized characteristics: race, gender, sexual identity, partisanship, age, law school type and ranking, and previous job (see table 1). Existing work shows that identity effects often disappear in the presence of biographical and party information (Crowder-Meyer, Gadarian, and Trounstine 2020; Sen 2017); by including this information, we provide a harder test of the effects of judges' identities.

To capture perceptions of fairness, we asked respondents which of the two judges they trusted more to fairly hear the case.[2] They were given the opportunity to briefly explain why.[3] We next asked respondents to place judges on a seven-

point ideological scale from very liberal to very conservative,[4] to place them on a seven-point scale from impartial to politically motivated,[5] and to indicate on a four-point scale how much they would trust the Supreme Court if each judge were confirmed to the bench.[6] Our dependent variables draw from existing measures of institutional legitimacy; we capture perceptions of the particular judges' ability to preside fairly on a particular case and their general impartiality or political motivation (Bartels and Johnston 2013; Bartels et al. 2015; Ono and Zilis 2021, 2022) and respondents' beliefs about how the judges' presence on the Supreme Court might affect trust in it to operate in the interests of the people (Gibson et al. 2003). Respondents then repeated this battery of questions on the same discrimination case for four additional pairs of judges. As respondents were asked about both judges in each of the five pairings, we have 10 observations per respondent, yielding 15,060 complete observations from Republicans and 16,340 complete observations from Democrats. We use ordinary least squares regressions with standard errors clustered on the respondent to derive the average marginal component effect (AMCE) of attributes (Bansak et al. 2021) and control for a variety of respondent characteristics: gender, race, sexuality, income, religiosity, ideology, education level, age, and knowledge of the court. All question wordings are in the appendix.

FINDINGS

We start by pooling discrimination case types to derive the AMCEs for Democratic and Republican respondents separately. We plot the AMCE of judge identities for each dependent variable, rescaled from 0 (min) to 1 (max) to ease comparison.[7] These analyses demonstrate the average effect of a single characteristic, for example, the effect of a Black judge compared to a White judge, while pooling across all other characteristics in our treatment.

First we examine how judges' identities affect perceived ideological position. The results for Democratic respondents in figure 2A are as expected: Democrats perceive judges from marginalized race, gender, and sexuality groups to be more

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2. "Which of these judges do you trust more to fairly hear this case on [insert type here] discrimination?"

3. "Why do you trust this judge more to fairly hear this case? Please answer in one sentence or less."

4. "Thinking about politics these days, how would you describe the political viewpoint of the following judges?"

5. "Judges are supposed to provide an impartial hearing, but sometimes people think judges are politically motivated. Where would you place these two judges on a scale from impartial to politically motivated?"

6. "Imagine one of these judges were nominated to the United States Supreme Court. If they joined the Court, how much would you trust the United States Supreme Court to operate in the best interest of the American people?"

7. Regression models are presented in tables A1 and A2.

> *Hodges v. Johnson Metals.*
>
> Sharon Hodges has sued her employer, Johnson Metals, for (gender/gender identity/racial/sexual orientation/religious) discrimination. Hodges argues that her supervisor refused to promote her because (she is a woman/she is transgender/she is black/she is a lesbian/of her religion). Johnson Metals argues that there was no discrimination, and that the supervisor had not promoted her for other reasons. A judge has to decide whether Johnson Metals discriminated against Hodges because (she is a woman/she is transgender/she is black/she is a lesbian/of her religion).

Figure 1. Experimental vignette

liberal than judges from dominant groups. Crucially, we obtain these findings despite explicitly providing partisanship to respondents. Republican evaluations in figure 2*B* are somewhat surprising. While Republicans do perceive women judges to be more liberal than men, and gay judges more liberal than straight judges, there is no significant difference in ideological placement for judges of color compared to White judges. These null effects of race among Republicans are unexpected given prior research on race and ideological estimates of political candidates. Both Democratic and Republican respondents show the expected response to judicial partisanship and see Republican judges as more conservative than Democratic judges.

As figure 2 shows, the magnitudes of treatment effects are similar across party. Race and gender have effects between 0.01 and 0.02 on the rescaled ideology variable (although the race effects are not statistically significant among Republicans). Strikingly, the perceived difference between gay and straight judges is substantially larger: 0.05 for Democrats and 0.07 for Republicans. A comparison to partisanship is instructive. Among Democrats the sexuality effect is approximately one-third of the effect of partisanship, or three times as large as the effect of racial identity or gender. Among Republicans the effect of sexual identity is 40% of the effect of partisanship and five to 10 times as large as the effect of race or gender. Given that partisanship is essentially an ideological cue, it is remarkable that sexuality has 30%–40% of the effect of par-

tisanship on perceived ideology. Our respondents' perceptions of gay judges as more liberal than judges with other marginalized identities are consistent with Koch et al. (2016, 2020), who find that people place gays and lesbians at the far left of the ideological spectrum and the other identities closer to the center. This may also explain Republican respondents' unexpected view of judges of color as no more liberal than White judges when partisanship is stated. Hypothesis 1 posited that respondents will perceive judges with marginalized identities as more liberal than judges with dominant identities. Our analysis supports this hypothesis, with the exception of Republicans who do not appear to use race as an ideological cue in this experiment where partisanship is known.

Fairness

Next we examine the effect of the treatments on selecting a particular judge as being more trustworthy to offer a fair hearing in the case at hand. Consistent with hypothesis 2a, figure 3*A* shows positive and significant effects of all marginalized identity treatments for Democratic respondents. That is, relative to White judges, Democrats are more likely to trust an Asian, Black, Hispanic, or Native judge to provide a fair hearing; they are more likely to trust a woman than a man; and they are more likely to trust a gay judge than a straight judge.

By contrast, Republicans in figure 3*B* are unaffected in their choice of judge by the race or gender treatments but

Table 1. Profile Attributes and Attribute Values

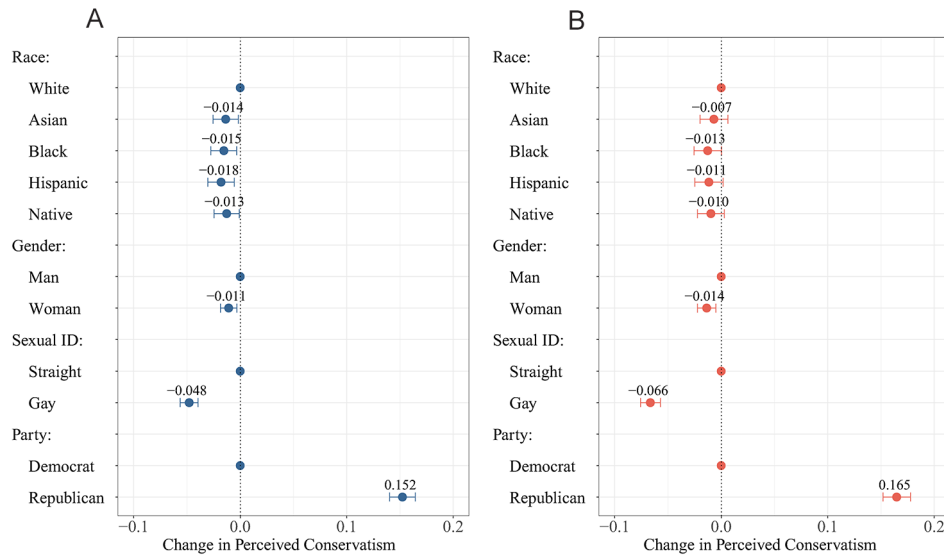| Attribute	Value
Race	White, Black, Hispanic, Asian American, Native American
Gender	Man, woman
Sexual orientation	Straight, gay
Nominated by	Republican, Democrat
Age	40–80 years old
Law school ranking	{Top 10, 11–25, 26–50, 51–100, 101–200} × {public, private}
Previous job	Civil rights lawyer, corporate lawyer, defense lawyer, law professor, prosecutor, public defender

Figure 2. Perceived conservatism: *A*, Democrats; *B*, Republicans. AMCEs with 95% confidence intervals derived from the models in tables A1 and A2. Dependent variable is a seven-point scale rescaled 0–1, where higher values mean more conservative. For each attribute category we plot the reference category from the model at 0 to show the relevant baseline comparison. For example, for judge's party, Democrat is the reference to which Republican is compared.

are significantly less likely to trust a gay judge to fairly hear a case compared to a straight judge. Figure 3 shows the relative effects of the identity treatments. Given that these effects are controlling for all other attributes, they are sizable and similar in magnitude to those reported by other choice task conjoint experiments (Bansak et al. 2018; Flores and Schachter 2018). Democrats have a 0.06 to 0.09 higher probability of choosing judges of color, women judges, and

gay judges than White, male, or straight judges, respectively. These effects are 40%–60% of the size of the partisanship effect for Democratic respondents. Republicans are not swayed by the race or gender of judges but are significantly less likely to choose a gay judge compared to a straight judge (a 0.06 decrease in probability). Again, partisanship exerts the strongest effect, and the effect of sexuality is slightly more than half the effect of partisanship for Republican respondents.
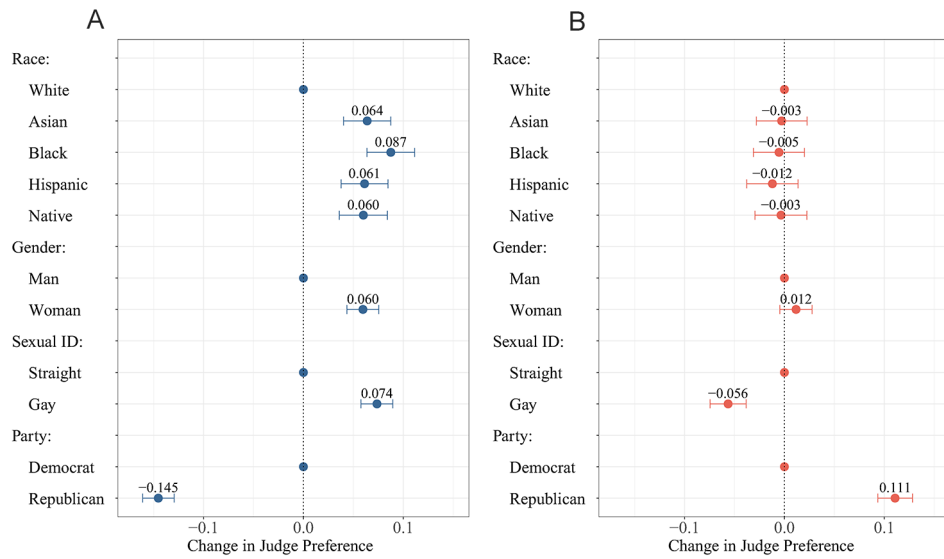
Figure 3. Judge trusted to hear case more fairly: *A*, Democrats; *B*, Republicans. AMCEs with 95% confidence intervals derived from the models in tables A1 and A2. Dependent variable is binary, where 1 means respondents chose a judge and 0 means they did not. For each attribute category we plot the reference category from the model at 0 to show the relevant baseline comparison. For example, for judge's party, Democrat is the reference to which Republican is compared.

These findings offer full support to hypothesis 2a, which stated that Democratic respondents will on average trust judges with marginalized identities more. Our support for hypothesis 2b is partial. Republicans are less likely to trust gay judges than straight judges to fairly hear a case, consistent with hypothesis 2b. We reasoned that Republicans' preference for judges with dominant identities largely relies on dominant identities cuing conservative ideology. Given this reasoning, the finding on race is also consistent; Republicans see judges of color as ideologically similar to White judges and also trust them to fairly hear the case as much as they trust White judges to do so. Republican respondents' trust in women judges, however, does not seem to track perceived ideology. Republicans trust women judges to fairly hear the case just as much as men, even though they view women judges as more liberal.

Political motivation

It is possible that respondents think that judges' fairness is compromised in the case at hand but that their identities will not affect perceptions of judges' capacity more broadly. Therefore, we next turn to impartiality and its contrast—political motivation—in figure 4. Generally, Democrats believe that judges from marginalized groups will be less politically motivated than judges from dominant groups. Democrats do not perceive a gender difference in political motivation, but they believe White judges are more politically motivated than Asian, Black, Hispanic, and Native judges,

with effect sizes around 0.02 on the rescaled variable. Democrats perceive straight judges to be more politically motivated than gay judges, with an effect size of 0.01. Our support for hypothesis 3a is thus strong but incomplete.

Our support for hypothesis 3b is again restricted to sexual identity. Similar to the null treatment effects on judge choice, Republicans show little differentiation between judges on gender or race, with the exception of Asian judges. Republicans perceive Asian judges to be significantly less politically motivated than White judges, a finding consistent with research showing Asian electoral candidates can benefit from positive racial stereotyping (Visalvanich 2017a). The coefficients on all other racial identities and for women judges fail to achieve statistical significance. By contrast, Republicans perceive gay judges to be more politically motivated than straight judges, with an effect size of 0.02. Once again, it appears that Republican respondents react differently to judges' sexuality than to their race or gender, at least when partisanship is known.

There are consistent effects of copartisanship on perceived politicization. Both Democrats and Republicans perceive copartisans to be less politically motivated compared to outparty judges (effect size of just under 0.04 for Democrats and just over 0.04 for Republicans). The relative effect of sexuality for Republicans is quite impactful, as seen in figure 4. The effect of a judge being gay compared to straight is 47% of the effect size of partisanship for Republicans. For Democrats, the effect of judges' sexuality is within a similar range as racial
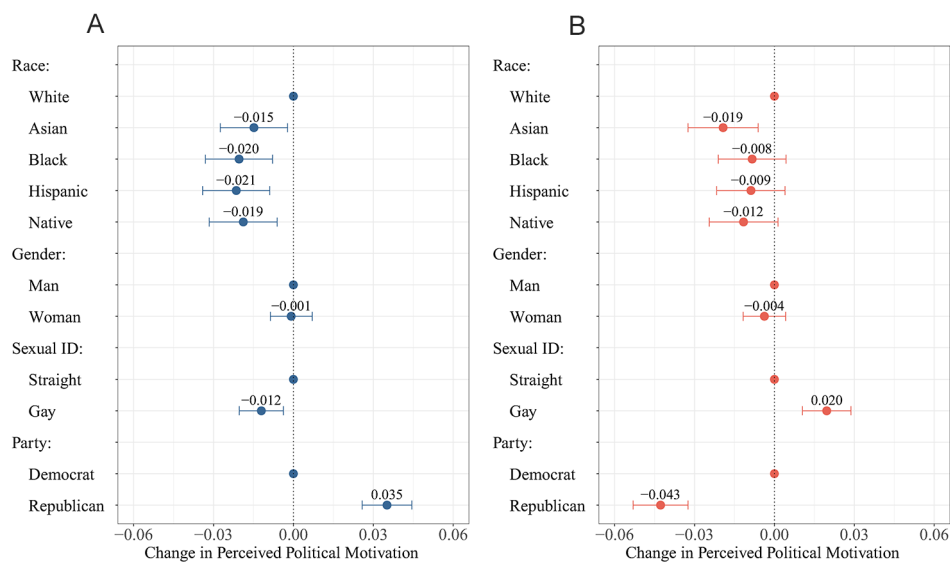
Figure 4. Perceived political motivation in decision-making: A, Democrats; B, Republicans. AMCEs with 95% confidence intervals derived from the models in tables A1 and A2. Dependent variable is a seven-point scale rescaled 0–1, where lower values indicate more impartiality and higher values indicate more political motivation. For each attribute category we plot the reference category from the model at 0 to show the relevant baseline comparison. For example, for judge's party, Democrat is the reference to which Republican is compared.

identity: sexuality has 34% of the effect size of partisanship, and racial identity exerts an effect between 43% and 60% of the size of partisanship.

Trust in Supreme Court

We theorized that respondents would use ideological estimates to evaluate not just a judge specifically but courts on which that judge serves. Figure 5 presents the effects of judges' characteristics on trust in the Supreme Court to act in the people's best interest. Democrats indicate that confirming judges of color, women, and gay judges would increase their trust in the Supreme Court relative to confirming White, male, and straight judges. The effects for these three identity categories all range between 0.02 and 0.03 on the rescaled trust variable. Republican partisanship yields an effect of −0.08 for Democrats. We therefore have full support for hypothesis 4a, in which we hypothesized that Democratic respondents would trust the Supreme Court more if judges with marginalized identities were to join the bench.

By comparison, Republicans express no difference in future trust in the court by the race or gender of judges but say they would be significantly less trusting of the court if a gay judge were confirmed. The negative effect of gay identity on Republican trust in the court is −0.04, which is nearly one-half of the size of the 0.09 effect of partisanship for Republicans. In hypothesis 4b, we hypothesized that Republican respondents would trust the Supreme Court more if judges with dominant identities were to join. Our support for hypothe-

sis 4b is partial—holding only for straight judges—but consistent with findings on perceived fairness presented above.

Notably, our findings on the Supreme Court question closely match our findings on the perceptions of individual judges' fairness among Democrats and Republicans alike. Altogether, this suggests that people make ideological inferences based on judges' identities, which they use to evaluate not only individual judges' fairness and impartiality but also the courts on which those judges might serve. Specifically, respondents prefer judges whom they see as members of their ideological in-groups (with the exception of Republicans who view women judges as more liberal but trust them as much as men). These findings are consistent with scholarship showing that people evaluate the institutional legitimacy of the Supreme Court via explicit partisan cues (Clark and Kastellec 2015). We also show in tables A3–A6 that our results are consistent when holding judges' partisanship constant. That is, when the sample is subset to only Democratic or only Republican judges, Democrats still trust those with marginalized identities more and Republicans trust gay judges less.

While we argue that divergent responses to judges' identities stem from partisanship, it is possible that our results instead reflect in-group preferences. Indeed, research from electoral behavior shows that voters—particularly those who have been underrepresented—often prefer representatives with whom they share identity categories (e.g., Barreto 2004; Philpot and Walton 2007; Rosenthal 1995), although the effects of candidate identity are often complicated and contingent
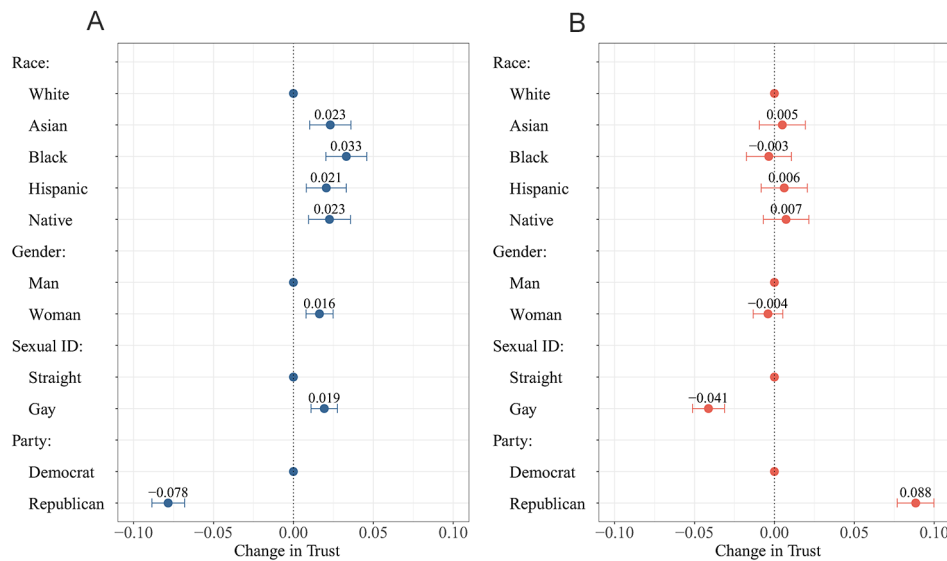
Figure 5. Effect of potential nomination on trust in US Supreme Court: *A*, Democrats; *B*, Republicans. AMCEs with 95% confidence intervals derived from the models in tables A1 and A2. Dependent variable is a four-point scale rescaled 0–1, where higher values indicate greater trust in the court. For each attribute category we plot the reference category from the model at 0 to show the relevant baseline comparison. For example, for judge's party, Democrat is the reference to which Republican is compared.

(e.g., Benjamin 2017). We test for this possibility by coding every judicial identity category as either an in-group or out-group member for each respondent. In table A7, we have little evidence to support the idea that the public simply trusts judges who descriptively represent them.[8] Instead, there is a clear and consistent preference for partisan and ideological congruence. This suggests that the congruence the public seeks in the judiciary is not rooted in classic descriptive representation categories like race or gender but in ideology.

Are the choices deliberate?

While the conjoint experiment reveals average effects, it offers little insight into whether respondents intentionally respond to identity or whether these treatment effects reflect less than explicit reasoning. To gain insight into respondents' decision-making process, we asked them to briefly explain why they saw one judge as fairer than the other immediately after making their choice.[9] We code the text from the first judge pairing for every respondent into a number of relevant categories.[10]

Before turning to explicit mentions of identity, we examine the open-ended answers for comments regarding the forced choice task. Respondents who see judges as calling balls and strikes might react negatively to having to choose one option over another, particularly if they believe the characteristics presented in the conjoint are irrelevant. A prevailing view among the respondents that the experiment demands a false choice would be cause for concern. Fortunately, the open-ended question offers an opportunity for respondents to express frustration. Very few took umbrage. Across the 4,331 decisions, only 0.3% (13 statements) comment on having to choose one judge; an additional 1% claim their choice was a coin toss. This mitigates any concern that the choices are meaningless to respondents. Further, it is likely that respondents who firmly believe that judges are neutral arbiters would have chosen judges in a haphazard fashion; if prevalent, this view would have led to null effects in the

conjoint. Instead, the quantitative findings as well as the answers to open-ended statements suggest the opposite: identity matters.

Indeed, in 26.7% of answers respondents mentioned a judge's race, gender, sexuality, or general minority status as a reason behind their decision. This suggests that a substantial number of the respondents deliberately used judges' identities in their decision-making and that they did not think such considerations were socially undesirable. The most common attributes mentioned were prior occupation (21.6%), age (13.4%), sexuality (11.9%), and gender (11.1%). For example, one respondent chose a judge because "she was a public defender instead of a corporate lawyer," while another chose a judge "because he is older than the other judge." A third respondent chose a judge "because he is outside of being a lesbian [*sic*]," and a fourth chose a judge because she was "a woman of color."[11]

Ten percent of respondents invoked political motivation in their choices and sometimes connected the judges' identity to their ability to be impartial. One respondent simply said that the chosen judge "seems to be impartial," while another respondent wrote, "she is a law professor and woman [*sic*] are more impartial." Yet another respondent chose one judge "because he is gay and knows about discrimination." Similarly to this respondent who saw a gay judge as more fair because of assumed knowledge of discrimination, 5.7% of respondents stated that they chose judges because they would be familiar with discrimination. A few statements (3.9%) were explicitly intolerant; one person wrote they chose a judge because "she's not a crusty old one," while another respondent stated "I don't like gay people." In short, the respondents paid attention to judges' identities and invoked them in their choices both in support of and in opposition to judges with marginalized identities.

The open-ended statements provide evidence that respondents were attentive to the treatments, as they pointed to various attributes as the reason for their decision-making. However, they also demonstrate a degree of disconnect between respondents' decisions and their justifications for those decisions. For example, while respondents were most likely to mention a judge's previous occupation as the reason behind their decision, this attribute was not consistently significant in the conjoint experiment, where other attributes prevailed (see tables A1 and A2). Our research design thus reveals the benefit of measuring the causal effects of attributes in addition to asking respondents about their decisions.

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8. Democrats are actually significantly less likely to select a judge matching their racial or sexuality in-group. Among Republicans, we see little evidence for in-group affinity by race or gender but a strong in-group preference on sexuality, reflecting the fact that Republicans do not trust gay judges, and most respondents are straight. The only in-group category that consistently matters is, of course, partisanship. Democrats prefer Democratic judges and Republicans prefer Republican judges. In total, our evidence for the mass public preferring identity congruence in judges is weak at best.

9. Of the 4,331 decisions, 7.5% provided no justification. A further 7.6% were nonsensical, and 11.6% did not fit any of our coding categories.

10. See the appendix for coding rules.

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11. In our coding rules, using gender pronouns without explicitly referencing gender did not count as mentioning gender.

Does case type matter?

Our final hypothesis is that when the discrimination case focused on a marginalized identity category shared by a judge, respondents would trust more that the judge would provide a fair hearing. We next examine whether responses to judges' identities vary by case, using both the quantitative data and the open-ended responses. Since the religious discrimination case is the only case in which the pertinent characteristic is not shared by a judge, we use it as a baseline in case-to-case comparisons. This baseline offers leverage to explore judicial identity salience, as it holds constant the content of the case (discrimination) while randomizing the particular identity made salient.

Both the open-ended statements and the conjoint analysis (figs. A1–A5) suggest that marginalized identities can shape perceptions of judicial fairness when those identities are salient. Compared to Democrats in the religious discrimination case in which the effect of judge gender is null, Democrats in the sex discrimination condition are more likely to trust a woman judge than a man. The open-ended responses show a similar effect: respondents assigned the sex discrimination case are more than twice as likely to mention judges' gender compared to respondents in the religion case.[12] In the gender identity case, where Hodges claims she was fired because she is transgender, the positive effect for gay judges among Democrats is 0.15 compared to 0.04 in the religious case. Republicans also respond differently to the gender identity discrimination case, where—in contrast to all other cases—they show no preference for a straight judge.

The gender identity discrimination case reveals an interesting, if unsurprising, relationship between trans identity and sexuality in the minds of Americans. Compared to respondents in the religion case, respondents assigned this case were somewhat more likely to mention gender as part of their reasoning,[13] but they were well over twice as likely to point to sexual identity.[14] Both familiarity with "LGBT" as a political coalition and lack of familiarity with transgender identities could contribute to the salience of sexuality in gender identity cases.

For some cases there is no heightened effect of salient marginalized identities on fairness, but open-ended responses indicate marginalized identity is an important factor in a respondent's choice. Respondents assigned the racial discrim-

ination case are not more likely to trust judges of color than those assigned other types of cases. Yet respondents who were assigned the case on racial discrimination were over three times more likely to mention judges' race as the motivation for their decision than respondents in the religion case.[15] We obtain a similar pattern for the sexual orientation case and trust of gay judges in the quantitative data relative to mentions in the open-ended responses.[16] These results again show a gap between choices and justifications.

Finally, respondents receiving the religious discrimination case were most likely to mention judges' previous occupation as the reason behind their decision and did so significantly more often than respondents assigned the other cases.[17] Respondents' tendency to mention occupation more often in the religious discrimination case suggests race, gender, and sexual identities are less salient in religious discrimination cases than the other types of discrimination cases.

Altogether, when a judge's marginalized identity was salient, respondents were more likely to mention marginalized identities but did not consistently react more strongly to those same identities in the quantitative data—providing us with somewhat weak support for hypothesis 5. In the conjoint analysis, the enhanced effects of salient marginalized identity were only apparent in sex and gender identity discrimination cases and, in those cases, were most apparent for Democratic respondents. This increased preference for marginalized identities is consistent with recent arguments made by Democratic elites: in party platforms and presidential speeches over the past five decades, liberals have more frequently advocated for gender and racial diversity on the bench than conservatives (Cameron, Kastellec, and Mattioli 2019). And, it seems that while some objected to Judge Walker's ability to be impartial on a case related to his identity, Republicans are simply unlikely to trust gay judges to provide a fair hearing regardless of the identities at stake.

CONCLUSION

This study contributes to growing efforts to examine how judges' identities shape perceptions of the judiciary. Democrats and Republicans in our sample far prefer a judge appointed by a president of their political party, but we show that even when partisan information is readily available, people

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12. In the sex discrimination case, 16.5% mention gender compared to 6.8% in the religion case ($p < .05$).

13. In the gender identity case, 10% mention gender compared to 6.8% in the religion case ($p < .05$).

14. In the gender identity case, 18.5% mention sexuality compared to 7% in the religion case ($p < .05$).

15. In the racial discrimination case, 18.1% mention race compared to 5.8% in the religion case ($p < .05$).

16. In the sexual orientation case, 17.5% mention sexuality compared to 7% in the religion case ($p < .05$).

17. In the religion case, 27.1% mention previous occupation compared to 20.3% in all other cases ($p < .05$).

rely on judges' identities—especially sexuality—to form expectations about judges' ideological positions and make judgments about fairness, impartiality, and broader institutional trust. Identity's influence differs by respondent partisanship. Marginalized identities increase Democrats' perceptions of judicial fairness, impartiality, and trust in the Supreme Court in largely equal amounts. Republicans see gay judges as less fair and impartial than straight judges but do not perceive differences based on race and gender—except for Asian judges, whom they see as more impartial. As far as the emerging debate over descriptive representation in courts, our study offers little evidence that people perceive judges who share their race, gender, or sexual identity as more fair and impartial. People prefer judges who they assume will think like them rather than those who look like them. And despite the complaints from Judge Walker's critics, our study does not offer much evidence that judges are distrusted in cases in which their own marginalized identity is salient; we instead show occasional positive effects of marginalized identity salience, particularly among Democrats.

Like any study, ours has limitations, which suggest areas for future research. First, we do not specify the judges' court, although we ask about trust in the Supreme Court if the judge were to join the bench. Evaluations of fairness and impartiality may differ by court, and judges with marginalized identities may be perceived differently on the Supreme Court versus lower courts. Second, our vignette presents an employment discrimination case. While we capture perceptions of impartiality and trust beyond the particular case, future research could examine other case types. Finally, our study does not speak to trust beyond the judiciary. Our findings that Democrats see those with marginalized identities as more trustworthy whereas Republicans are particularly distrusting of gay people could extend to other domains. Our work only shows that judges' identities matter for Americans' perceptions of judicial fairness and trust. We leave work that explores this question in the context of legislatures or interpersonal relationships to future endeavors.

We wish to underscore our findings on sexuality: both Democrats and Republicans perceive gay judges as more liberal than their straight counterparts, the effect of sexuality is larger than the effects of race or gender, and the effect is larger among Republicans than Democrats. The size of this effect reflects research showing that gays and lesbians are stereotyped as more liberal than any other marginalized group (Koch et al. 2016, 2020) and that LGB identity is particularly "infused with politics" (Egan 2020). Our findings contribute to a small but growing literature on LGBTQ (lesbian, gay, bisexual, transgender, and queer or questioning) representation (Haider-Markel 2010; Haider-Markel et al. 2017) and suggest perceived liber-

alism may be more impactful for queer representatives than for those with other marginalized identities. Depending on the judicial or political context, perceived liberalism could be either a barrier or an advantage, as our analysis shows. Understanding such impacts is crucial and timely, as LGBTQ representation on the bench and in the legal profession is increasing (American Bar Association 2020; Bajko 2022).

These findings have implications for both judicial behavior and the relationship between the public and the courts. First, judges' concerns with public perceptions of the courts as legitimate may shape LGBTQ judges' willingness to out themselves publicly. Indeed, there was speculation that Judge Walker was gay, but he only confirmed these rumors after his retirement (Talbot 2011). We might imagine that gay judges would be reluctant to out themselves for fear of undermining perceptions of their own judicial abilities, as well as institutional legitimacy. Yet this may not necessarily hold across the ideological spectrum as partisanship heavily conditions perceptions of fairness: Democrats perceive gay judges as enhancing legitimacy while Republicans perceive them as diminishing it. While Republicans are unlikely to support an openly gay judge, nominating out judges may become a matter of strategy and timing for Democratic elites. Diversity of nominees is now a salient issue in presidential campaigns, and Democrats support presidents who nominate underrepresented groups to the Supreme Court (Badas and Stauffer 2023).

Second, the implications for the relationship between the public and the courts hinge on the visibility of gay judges. If LGBTQ judges stay closeted in order to be nominated or elected, actual diversity on the bench will not shape public perceptions of the bench. Openly gay judges, however, may shape who turns to courts for justice and for which causes. Since victims of discrimination may be less likely to seek recourse in court if they perceive it as biased (Clermont and Schwab 2009), it stands to reason that those whose perceptions of legitimacy are enhanced by visible diversity on the bench may be more likely to take legal action. While the impact for those who seek justice is acute, public perceptions of judicial fairness matter for everyone. Fairness, impartiality, and trust in the court are central components of judicial legitimacy, and each matters for the durability of democratic institutions.

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