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Promoting Women's Advancement in the Judiciary in the Midst of Backlash: A Comparative Analysis of Representation and Jurisprudence in Key Domestic and International Fora

Shruti Rana*

ABSTRACT

Women's advancement in the judiciary of the United States has been slow and uneven, and has long lagged behind other nations. Parity in representation remains distant, and the gains to date vulnerable to changes in administrations and fluctuating levels of state commitment to gender equality, with the recent global backlash to gender equality and international norms and institutions providing a critical example of this fragility. In this light, this Article argues that gender parity in the judiciary should not be viewed as merely a laudable goal. Rather, representation and parity should be viewed as fundamental state legal obligations under international law as well as critical mechanisms for achieving gender equality. This Article further situates the debates over gender equality and parity in the judiciary of the United States within the broader context of the global backlash to gender equality and global norms and institutions, shedding additional light on the ways that this backlash is playing out on American shores.

In doing so, it re-conceives the attacks on gender equality in the judiciary in the United States and globally as both a reaction to and indicator of the foundational significance and strength of the legal obligations to achieve gender parity in national and international judiciaries. It also explores the role and impact of women judges in strengthening global law and institutions, and the roles they can play achieving transformative change by ana-

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lyzing the impact of the decisions and decisionmakers in a unique quasi-judicial forum involving the United Nations Commission on the Status of Women. Ultimately, in re-framing debates over representation and parity and grounding them in legal obligations, this Article aims to contribute to the literature and strategies for achieving meaningful representation in the judiciary and gender equality in the United States and globally.

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INTRODUCTION: THE LONG JOURNEY TO EQUALITY

Women's advancement in the judiciary of the United States has been slow and uneven, and has long lagged behind other nations.[1] U.S. Supreme Court Justice Ruth Bader Ginsburg famously pointed out these gaps, and the long road ahead to equality, from a comparative perspective when she noted:

> Our neighbor to the north, Canada, has a woman as Supreme Court Chief Justice, and three other Justices are women—four out of the nine. People ask me about the U.S. Supreme Court, "When will there be enough?" My reply: "When there are nine!"

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1. Sally J. Kenney, *Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go*, 2012 MICH. ST. L. REV. 1499, 1500 (2012) [hereinafter Kenney I] (arguing that in the United States, "[p]rogress toward women's equality is not quick, steady, or irreversible, and the bumpy road to women's equality in the judiciary is no exception").

> Some are startled by that answer. I remind them that, from the beginning until 1981, the Supreme Court's bench had been composed of nine men.[2]

By 2023, only 6 women had been appointed to the United States Supreme Court in its 234-year history.[3] It took until 2022 for the United States to reach the same landmark proportion of female judges, four out of nine, that its neighbor Canada had achieved decades earlier.[4]

U.S courts outside of the highest court in the land have fared no better in terms of parity and advancement of women. Despite decades of advocacy and advancement in the legal profession, by 2019 women made up only about 27 percent of all lower federal court sitting judges in the United States, and less than one-third of state court judges.[5] Not a single state in the United States has reached numbers of women judges on their state benches commensurate with their representation in the state's population.[6]

Even as women have joined the legal profession in larger numbers, the proportions of female judges has failed to rise in tandem, indicating that "time is not the only barrier" and that the obstacles for women's advancement in the judiciary run much deeper than the size or growth of the pool of eligible lawyers.[7] Indeed, the gap between the numbers of women making inroads into the legal profession and the number of women ascending to the judiciary is stark enough to lead many to question why, in the United States, "the torrent of women's entry into the legal profession [has] not produced a pipeline to power for women in the judicial branch of government."[8] The gap between the numbers of women in the legal profession and the much smaller numbers who make it into the ju-

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2. Ruth Bader Ginsburg & Linda Greenhouse, *A Conversation with Justice Ginsburg*, 122 YALE L.J. ONLINE 283, 299 (2013).

3. *See Justices 1789 to Present*, SUP. CT. U.S., https://bit.ly/3ZqEF5g [https://perma.cc/PDW6-MFUL] (last visited Mar. 19, 2023).

4. *Id.*

5. Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, AM. CONST. SOC'Y FOR L. & POL'Y 8–9 (2016) (noting that "women comprise roughly one-half of the U.S. population[, b]ut, less than one-third of state judges"); *see also Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 13, 2020), https://bit.ly/3ITqmzg [https://perma.cc/Y42G-ELBC].

6. George & Yoon, *supra* note 5, at 9 ("Not a single state has women on the bench in the numbers commensurate with their representation in the general population.").

7. *See* Sally J. Kenney, *Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States*, *in* GENDER AND JUDGING 461, 465 (Ulrike Schultz & Gisela Shaw eds., 1st ed. 2013) [hereinafter Kenney II].

8. *See* Kenney I, *supra* note 1, at 1500.

diciary has persisted over time; by the start of this decade, despite the substantial increase in the numbers of women entering law school and the legal profession in the preceding seven decades, women still made up less than one-third of the judges in the lower federal courts in the United States.[9] The size of the gap between women's representation in the profession and the judiciary also remains significant—women now comprise over 38 percent of lawyers in the United States, and more than half of law students (55.3 percent in 2021), yet as noted above still comprise less than one-third of lower federal court and state court judges.[10] In short, despite their gains in the legal profession, women have failed to "trickle up" into judicial offices, or move from lower to higher judicial positions, in any numbers that would be even "close to proportionate to their numbers in the legal profession with the passage of time."[11]

Moreover, in both the federal and state courts throughout the United States, progress over time in terms of parity and advancement for women has been sporadic and uneven.[12] The rates and levels of women's advancement in the judiciary vary "enormously" across jurisdictions and courts, and the patterns of advancement are significant for their "erratic nature over time."[13] State and federal administrations have ranged from being openly supportive of judicial diversity to openly hostile.[14] As a result, gains in gender and racial representation in both state and federal courts are fragile and can—and have frequently been—rolled back.[15]

The disparities in representation appear even more stark upon closer examination of intersectional and marginalized identities. For example, while women in the United States federal judiciary are still far short of parity, women of color today comprise less that ten percent of sitting and active federal court judges.[16] Eight of the 13

9. *See Profile of the Legal Profession 2022: Women in the Legal Profession*, AM. BAR. ASS'N (July 2022), https://bit.ly/3ZnkdCz [https://perma.cc/9JZC-PPFP] (citing figures showing that from "1950 to 1970, only 3% of all lawyers were women. The percentage increased to 8% in 1980, 20% in 1991 and 29% in 2000" and 38% by 2022); *see also* CTR. FOR AM. PROGRESS, *supra* note 5.

10. *See* AM. BAR ASS'N, *supra* note 99 (citing under "Demographics" and "Women in Law Schools").

11. *See* Kenney I, *supra* note 1, at 1503.

12. *See* George & Yoon, *supra* note 5.

13. *See* Kenney I, *supra* note 1, at 1518.

14. *See, e.g.*, Madison Alder & Jasmine Ye Han, *Trump Nears Post-Nixon First: No Black Circuit Judges (Corrected)*, BLOOMBERG L. (June 25, 2020, 1:44 PM), https://bit.ly/3JRAfPJ [https://perma.cc/CZ9M-9997] (detailing how the Trump administration, in a reversal of priorities from previous administrations, decreased gender and racial diversity on the federal courts).

15. *Id.*

16. *See id.*

federal circuits have no women of color serving as active judges at all, and 90 percent of all federal district courts have no judges identifying as LGBTQ+.[17]

The numbers of judges with intersectional and marginalized identities is so low that even the appointments of a handful of judges during brief bursts of progress can dramatically transform the judicial landscape, producing uneven and potentially fragile gains. One example of how "small changes in the appointment or vacancy of judges identifying as LGBTQ, women, people of color and women of color can drastically alter statistics because of how radically underrepresented these judges are on courts across the judiciary" became visible in 2010, when even after President Barack Obama nominated a record number of Asian American judges during his first term, Asian American judges were still being described as the "Missing Minority Judges."[18] At that time, despite representing 4.9 percent of the total United States population, 4 percent of legal professionals, and 6.3 percent of law students, only 12 federal judges—less than 1 percent of the total number of sitting federal judges in the country—were Asian American.[19] Of these, four were women.[20] In fact, in the entire centuries-long history of the United States federal court system, only 19 Asian Americans had served in the federal judiciary at all by that point.[21]

By 2022, after another record-breaking surge in appointments under President Biden,[22] the percentage of Asian American judges rose to 47 total active judges or 6 percent of the total number of sitting federal judges.[23] This percentage almost doubled between 2016 and 2022 alone.[24] In the state courts, however, during the same period (2016–2022) the number of Asian American judges rose from eight to nine, remaining at approximately 2.6 percent of the

17. *See* CTR. FOR AM. PROGRESS, *supra* note 5.

18. *See id.*; Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER, RACE & JUST. 179, 179–80 (2010).

19. *Id.* at 180–81.

20. *Id.* at 181.

21. *Id.*

22. *See* John Gramlich, *Biden Has Appointed More Federal Judges than Any President Since JFK at This Point in His Tenure*, PEW RSCH. CTR. (Aug. 9, 2022), https://pewrsr.ch/3ZtJmLU [https://perma.cc/8PP2-MFAC] (noting that "[i]n addition to the large overall number of judges Biden has appointed so far, the 46th president stands out for the many women and racial and ethnic minorities he has appointed to the bench").

23. TYLER DANG ET AL., AM. BAR FOUND. & NAT'L ASIAN PACIFIC AM. BAR ASS'N, A PORTRAIT OF ASIAN AMERICANS IN THE LAW 2.0: IDENTITY AND ACTION IN CHALLENGING TIMES 42–43 (2022), https://bit.ly/40t3Bc1 [https://perma.cc/4HNP-8EPS].

24. *See id.* at 76.

total number of state-court judges.[25] These gains, or lack thereof, stand in marked contrast to demographic developments, as during this same time period Asian Americans became the fastest-growing racial or ethnic group in the country, making up approximately seven percent of the overall national population by 2021.[26]

Against this backdrop, President Biden's recent record-breaking efforts in appointing "the highest number and share of women judges of any president," as well as the "highest number and share of non-White federal judges of any president" at the same stage in presidential tenure[27] are promising, yet not irreversible, steps toward parity, advancement, and representation. However, the overall historical trend remains the same—progress or change toward parity and equality comes in uneven fits and starts.[28] Many barriers to appointment and advancement remain, from lack of access to networks, double standards, stereotyping, tokenism, backlash, and cronyism.[29] Even the most hard-won gains can be easily halted or reversed, and sustained overall progress over time is not inevitable.[30] In fact, at least forty-eight states in the United States "have reversed their progress, each going from one woman on its supreme court (like Indiana, Idaho and Iowa) to none, or from a majority of women to a minority (such as Minnesota) or not replacing a woman who leaves with another woman."[31] In the United States, this fragility is both caused and exacerbated by the fluctuations between administrations, as gender parity in the judiciary has suffered from a

25. *See id.* at 43.

26. *See* Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), https://pewrsr.ch/3Zx7UUk [https://perma.cc/E7VP-LWBG].

27. *See supra* note 22.

28. *See* Sital Kalantry, *Women in Robes*, AMS. Q. 83, 88 (2012) (noting that "[w]e have yet to achieve gender parity in judiciaries across the Americas"). "Progress has been made, but it is slow and sometimes there has been regression." *Id.* "Even in the U.S., progress towards equality on the courts has been slow." *Id.* at 85. "While women occupied almost 20 percent of all federal judge seats in the U.S. a decade ago, they fill only about 30 percent of such seats today." *Id.*; *see also* INT'L ASS'N OF WOMEN JUDGES, LEAGUE OF WOMEN VOTERS & INTER-AM. DIALOGUE, WOMEN AND THE JUDICIARY IN THE AMERICAS: LEADERSHIP AND OUTCOMES 19 (2013), https://www.bit.ly/3JsPJbs [https://perma.cc/KS7E-6HYM] (highlighting the "slower increase" in women's advancement in the judiciary in the United States).

29. *See* Kenney I, *supra* note 1, at 1500–10 (detailing data reflecting a range of barriers to women's appointment and advancement in the judiciary).

30. *See* Kalantry, *supra* note 28, at 88 (noting periods of regression in women's advancement in the judiciary); *see also* Kenney I, *supra* note 1, at 1518 (discussing the wide variations in advancement over time across states, courts, and time in the United States).

31. Kenney I, *supra* note 1, at 1502.

lack of sustained government commitment to closing (or even narrowing) the gaps.[32]

On a global scale, the gaps between women's advancement and representation in the United States' judicial system as compared to gains in these areas in other countries, as well as in the level of government commitment to women's advancement and parity, is also striking.[33] These gaps are visible both in the numbers of female judges currently in office, but also in the gains made over time, and even in the limited availability of data or analyses on intersectional and marginalized identities. For example, data from the Organisation for Economic Cooperation and Development (OECD) showed that by 2014, women in OECD countries made up more than 54 percent of professional judges in these countries, significantly higher—approximately 10–20 percentage points higher—than the proportions in the United States discussed above.[34] (Notably, however, just as in the United States, these countries also saw smaller gains in parity in the higher courts as compared to lower courts,

32. *See id.* at 1516 ("Presidential appointments of women judges have varied enormously rather than followed a pattern of steady increase reflecting women's greater presence in the legal profession or even the overall strength of the feminist movement.").

33. *See* Kalantry, *supra* note 28, at 85 (pointing out that in the United States, "progress toward equality on the courts has been slow"). In 2020, the World Economic Forum dropped the overall ranking of the United States on its Global Gender Gap ranking to 53, due in part to the United States' low ranking on women's progress in achieving political leadership roles, including in the judiciary, and noted that the "United States' progress towards gender parity is stalling." *See* WORLD ECONOMIC FORUM, GLOBAL GENDER GAP REPORT 32–33 (2020), https://bit.ly/3mE5JQ0 [https://perma.cc/ADM5-KM4D]; *see also* INT'L ASS'N OF WOMEN JUDGES, *supra* note 28, at 19.

> [The] emergence of women's rights issues on the political agendas of Latin American and Caribbean countries has also coincided with the ascendance of women to top judicial posts in the hemisphere. The percentage of women judges in Latin America's high courts has risen dramatically over the past decade, increasing from zero positions in some countries in the year 2000 to a third of appointments in 2010. The bench of the Eastern Caribbean Supreme Court, which includes nine countries, is filled with 60 percent women. Latin America and the Caribbean ranks second in term of women's representation in the judicial system with over one-third of seats occupied by women, beating the world average by nearly 10 percent. This figure is also on par with Canada and the United States, which have seen a slower increase but still have women occupying 32 percent and 30 percent of federal judicial posts respectively.

INT'L ASS'N OF WOMEN JUDGES, *supra* note 28, at 19.

34. *See also* OECD, *Women in the Judiciary: Working Towards a Legal System Reflective of Society* (Mar. 2017), https://bit.ly/401Ooin [https://perma.cc/HDZ3-DCL4]. To view the list of OECD member countries, see OECD, *Who We Are*, https://bit.ly/3Jy05Ii [https://perma.cc/SP37-5L3N] (last visited Mar. 19, 2023).

indicating similar lags in women's promotion and advancement within the judicial system.)[35]

Women's advancement in high courts globally has also been slow, with many nations often taking decades to achieve incremental increases in the numbers of women judges, yet again many nations have still progressed towards parity more quickly than the United States.[36] One study showed that in 1970, only .6 percent of high court justices in 84 countries were women.[37] Although women began entering law schools in significant numbers globally beginning in the 1970s, and by 1992 made up nearly 50 percent of law students both in the United States and many other nations,[38] by the 1990s, women still comprised only 3.1 percent of high court justices in 91 countries.[39] However, by 2010, the number of women high court justices globally had risen to 19.3 percent.[40]

By comparison, at the beginning of 2009, Justice Ginsberg was the sole woman serving on the U.S. Supreme Court.[41] Representation improved with the appointment of Justice Sonia Sotomayor later that year and Justice Elena Kagan the following year.[42] Prior to that date, Justice Sandra Day O'Connor had been the sole woman on the U.S. Supreme Court from 1981 through Justice Ginsburg's appointment in 1993.[43]

As is the case within the United States and its federal and state court systems, there is significant variation worldwide between

35. *See supra* note 34.

36. MARIA ESCOBAR-LEMMON ET AL., REIMAGINING THE JUDICIARY: WOMEN'S REPRESENTATION ON HIGH COURTS WORLDWIDE 7, 133 (2021) (discussing regional courts such as the Inter-American Court of Human Rights which has "had very few women on its bench, with one woman appointed in the late 1980s, reverting back to an all-men panel, and finally increasing to three women of the seven justices by 2007").

37. *Id.* at 7.

38. *See Women's Underrepresentation in the Judiciary*, REPRESENT WOMEN (Nov. 21, 2017), https://bit.ly/3ZMcRZm [https://perma.cc/9NG4-AGTB] (noting that the ratio of female to male law students has approached 50/50 since 1992); *see also* OECD, *Women in the Judiciary: Working Towards a Legal System Reflective of Society*, *supra* note 34 (noting that in "many countries around half of law students are women" and that "women are often successful at gaining entry into the legal profession but progress slowly into senior posts").

39. *See* ESCOBAR-LEMMON ET AL., *supra* note 36; *see also* AM. BAR ASS'N, *supra* note 9 (citing figures for women's advancement in the legal profession and law schools in the United States).

40. *See* ESCOBAR-LEMMON ET AL., *supra* note 36.

41. *See* SUP. CT. U.S., *supra* note 3.

42. *See id.* (reflecting that Justice Ginsberg served on the U.S. Supreme Court from 1993 to 2020, and Justice Sotomayor was appointed in 2009 and Justice Kagan in 2010).

43. *Id.*

"[j]urisdictions, states and countries" in the percentages of women serving as judges.[44] As noted above, the United States lags behind many other nations, including both countries with similar legal systems and population sizes, as well as some of the newest and most fragile countries. By 2013, for example, women justices held 40 percent of the seats in the Supreme Courts of New Zealand and Argentina, and women justices occupied approximately one-third of the seats in the highest courts in Canada and France.[45] Some newly independent countries like Latvia and Slovenia had already exceeded parity by that time with women judges making up 57 percent and 56 percent of the total number of high court judges, and Rwanda had reached parity with women holding approximately 50 percent of the judicial offices in its high court.[46] In fact, 15 countries had achieved gender parity on their high courts by 2013.[47]

In this light, it is important to question why progress towards gender parity in the United States judiciary, and official commitment to this progress, has lagged so far behind women's progress in the legal profession and progress in other nations. This Article argues below that one critical factor hindering progress towards parity in the United States is that, unlike most other nations, the United States has failed to make the achievement of gender parity in its courts a sustained national commitment nor has it viewed parity as a binding legal obligation. Instead, as noted above, in the United States, commitment to parity in the judiciary, expressed as a goal rather than obligation, fluctuates sometimes quite dramatically based on the presidential administration or governor in office at the time.[48]

In recent administrations, the share of women (and people of color) appointed by each President has varied widely. In sequential order, of the judges President George H.W. Bush appointed, 19 percent were women and 10 percent were people of color, under President Bill Clinton, these numbers were 28 percent and 25 percent, under President George W. Bush 22 percent and 18 percent, under President Obama 42 percent and 36 percent, and under President Donald Trump 24 percent of judges appointed were women

44. *See* Kenney II, *supra* note 7, at 461–62.
45. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 44–45.
46. *Id.*
47. *Id.* at 45–46.
48. *See* Kenney II, *supra* note 7, at 1 (arguing that data from the United States and other nations indicates that diversity in the judicial bench often comes when "a particular governor, president, or prime minister with the power to appoint judges has made a diverse and representative judiciary a priority and chosen women and minority men accordingly").

and 16 percent were people of color.[49] These numbers show that progress towards parity varies dramatically by administration and party, with some Republican administrations actually showing declines in the diversity of appointments over time. Promisingly, President Biden has formally included increasing the number of women judges in his National Strategy on Gender Equity and Equality, an important show of commitment to gender parity in the judiciary, if still not one that rises to the level of a legal obligation.[50]

Even when, as now, national leaders are committed to the goal of increasing gender equality and parity, the United States lags behind other countries not only in terms of the political and legal strength of commitment to parity but also the rates of concrete progress towards parity.[51] For example:

> In African and Arab judiciaries, the large imbalance which has been presented for decades appears to be correcting. A decade ago, less than 30 per cent of those working in these regions were female; now, according to UN Women, progress made on the Beijing Declaration shows that these numbers are rapidly increasing. Crucially, this includes in the highest courts where top decisions are made. In Africa, for instance, there are currently six women Chief Justices in African countries – Ethiopia, Niger, Lesotho, Sudan, Côte d'Ivoire and Zambia.[52]

In other regions as well, the pace of change has similarly showed increases over time; for example, the appointments of the first female judges in Morocco and Tunisia in the 1960s was followed by a wave of appointments of female judges in those countries.[53]

Focusing back on the situation of the United States, then, the above data and analyses indicate that within the United States judiciary—across time and jurisdictions—and in comparison with other nations, the progress and advancement of women judges has been halting and uneven, with periods of rapid change interspersed with

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49. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://pewrsr.ch/4220lGR [https://perma.cc/JTU4-GN65].

50. THE WHITE HOUSE, NATIONAL STRATEGY ON GENDER EQUITY AND EQUALITY 36 (2021).

51. *See Progress Towards Parity: The Representation of Women in the Judiciary*, UNITED NATIONS OFF. ON DRUGS & CRIME (Apr. 30, 2021), https://bit.ly/3ZL0LQ5 [https://perma.cc/Q8CE-AJ53].

52. *Id.*

53. *Id.*

periods of stagnation.[54] Parity in representation remains distant, and the gains to date vulnerable to changes in administrations, areas of democratic or institutional weakness, or even, as will be explored below, to historical shocks like the COVID-19 pandemic and the accompanying moves by nation-states to disengage from the global rules-based order and democratic backsliding.[55]

This Article delves deeper into these trends and analyzes why the failure to achieve parity matters, both within the United States and on a global scale. It conducts a comparative analysis of jurisprudence and representation in key global fora with recent U.S. data, to offer deeper global perspectives, ideas, and best practices for improving parity and representation. It argues that gender parity in the judiciary is not merely a laudable goal, but is a fundamental state legal obligation and a critical mechanism for achieving gender equality in the United States and globally. It further links the debates over these obligations and goals to the larger global backlash to gender equality, providing crucial context and support for the recognition of gender parity in the judiciary as a legal obligation.

This Article breaks new ground in situating the debate over gender parity in the judiciary within the broader context of the global backlash to gender equality. It further re-conceives the attacks on gender equality in the judiciary in the United States and globally as a reaction to and indicator of the foundational significance and strength of the legal obligations to achieve gender parity in national and international judiciaries. In re-framing these debates and grounding them in legal obligations, this Article seeks to further invigorate legal and advocacy efforts to achieve gender parity and equality in the judiciary of the United States, as well as shed additional light on the ways that the global backlash to gender equality is playing out on American shores. Ultimately, in providing comparative analyses, and in deepening the connections between efforts to strengthen parity in the judiciary with the efforts to combat the global backlash to gender equality and the global rules-based order, this Article aims to contribute to the literature and strategies for achieving meaningful representation in the judiciary and gender equality in the United States.

Part I below begins this analysis by exploring why gender parity in the judiciary matters. It examines the role of women judges in

54. *See To Achieve Justice, We Need More Women in Justice*, UNITED NATIONS, https://bit.ly/40eZhhz [https://perma.cc/E5SE-F2HL] (last visited Mar. 19, 2023) (pointing out that "equality in the judiciary has been historically uneven" and listing examples of uneven progress across the world).

55. *See* discussion *supra* Part I.B.

creating and enforcing the jurisprudence of equality and the critical importance of women judges to the advancement of equality throughout societies and nations worldwide. It analyzes how representation, both numerically and in transforming views of what judges and legal professionals look like, is critical to the advancement of women and equality more broadly. It further argues that the gaps and lack of progress in the advancement of women into the judiciary in the United States implicate its state obligations under international law as well as domestic equality provisions. In addition, it argues that these legal principles, and the battle to increase representation of women, as well as people of color, in the nation's judiciary have become important sites of contestation in larger global battles over the future of the global rules-based order and support for democracy and the rule of law.

Against this backdrop of contestation and challenge, Part II seeks to center the potential and power of gender parity in the judiciary, focusing on the role of gender parity in supporting and enhancing equality. Part II is thus framed around a visionary question—what would a court comprised mostly or entirely of women look like, and how would its jurisprudence be distinctive? It seeks to answer that question by looking at the jurisprudence of and the judicial functions carried out by the United Nations Committee on the Elimination of Discrimination Against Women, a globally representative body comprised almost entirely of women from a variety of racial, ethnic, and religious backgrounds, with a mandate of enhancing gender equality.[56] It explores the promise, potential, and problems this body faces despite or because of its gender composition and mandate. It further explores the transformative effect that women judges can have on the judiciary, as well as on jurisprudence and recognition of rights.

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56. *See* G.A. Res. 34/180, annex, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW]; *see also CEDAW Elections: An Introductory Guide*, INT'L WOMEN'S RTS. ACTION WATCH ASIA PACIFIC (Mar. 17, 2020) [hereinafter "*CEDAW Elections*"], https://bit.ly/3TklFDh [https://perma.cc/K22H-YSRC]. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) is the expert body which monitors compliance by State Parties to CEDAW and its Optional Protocol. *Id.* at 1. The CEDAW Committee is comprised of 23 independent experts on women's rights issues from around the world. *Id.* Under the Convention, the experts elected must reflect an equitable geographic distribution of member states and represent a diversity of legal systems, societies, and marginalized groups. *Id.* They are recognized as experts "of high moral standing and competence" in the Convention's focus areas. *Id.* at 2. Specifically, the CEDAW Committee is the body with the main authority to interpret the treaty and elucidate its provisions, as well as to monitor its implementation. *Id.* at 1–2.

The second Section of Part II continues this analysis, focusing on a comparative analysis of recent outcomes and decisions from international fora involving the Commission on the Status of Women, to that of recent U.S. and Supreme Court jurisprudence on gender-based violence and reproductive coercion. This Section explores the arguments raised by Justice Ginsburg in the quote that starts this Section. That is, is it enough to have a judicial body made up of almost entirely women? What can we learn from this comparative analysis about the strategies and modes of representation that promote equality and those that do not? Where and how are intersectional analyses and representation needed, and how are they intertwined with or implicate state obligations for parity and equality?

The Article concludes with implications and strategies for the future. We are currently in the midst of a moment of transformative possibility and change in terms of representation and progress towards parity in the United States judiciary. At this juncture, it is well worth examining what lessons we can learn from the only high-level judicial body comprised primarily of women and its current status as a site of contestation in the global backlash to gender equality. This part argues that to create meaningful change, parity and representation must be supported by institutions and strategies for achieving substantive as well as numerical or formal equality.

I. WHY PARITY AND REPRESENTATION MATTER IN COURTS AND JUDICIAL FORA

While parity and representation for women in the United States judiciary remain unrealized and distant goals, they are deeply intertwined with and critical to achieving and supporting gender equality. In fact, the achievement of gender parity or gender equality in the judiciary and in political systems of nation-states is viewed as so vital that it is considered to be a fundamental international legal norm.[57] The legal obligations stemming from this norm also have attained heightened significance in the wake of the COVID-19 pandemic, with its devastating impacts on equality, rights, health, development and even the global rules-based order.[58] Further, gen-

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57. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 124 (tracing "some broad contours of the rise of the global norm of gender equality in the judiciary" and also stating that "[g]ender equality on decision-making bodies has emerged as an international norm").

58. *See generally* Shruti Rana, *Seismic Shifts: The COVID-19 Pandemic's Gendered Fault Lines and Their Implications for International Law*, 39 AUSTRALIAN Y.B. INT'L L. 91 (2021).

der equality norms like gender parity in the judiciary and the advocacy spaces surrounding them have also become sites of contestation globally[59] and where they are being eroded, key signifiers of democratic decline.[60]

This Section examines these norms and current challenges to gender equality in the judiciary through a global lens. It situates attempts to weaken states' obligations regarding gender parity and equality in their judiciaries, as well in the regional and global institutions and judicial fora supporting these principles and norms, withing the context of the broader global backlash to gender equality. These global perspectives provide important context often missing in discussions of gender equality and parity in the judicial system of the United States and set the stage for the comparative analysis of United States and global fora in Part II and the Conclusion.

A. *Gender Equality and Parity in the Judiciary as Foundational Ius Cogens Principles of International Law*

As a starting point, it is important to recognize that while gender parity and representation in the judiciary are often viewed in the United States as idealistic or laudable goals, they are in fact deeply and broadly embedded in international law, and to a substantial extent, in American law. These international legal norms are significant not only for the legal obligations that flow from them, but also because such "international expectations for gender equality draw attention to the inclusion of women in the judiciary as a problem that needs addressing" and also operate to provide

59. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 134 (explaining that the global norm of gender equality on decision-making bodies has emerged from international organizations such as the United Nations ("UN"), international meetings such as the UN world conferences on women, and women's movements that have "forged a global consensus about the importance of women's equal presence when and where decisions are being made"); *see also* Shruti Rana, *The Populist Backlash to Gender Equality in International Fora: Analyzing Resistance and Response at the United Nations*, 35 MD. J. INT'L L. 156, 160–61 (2021) (describing the transnational spaces focused on gender equality that have arisen around the UN, other international institutions, and civil society and advocacy groups, and how they have become critical sites of contestation of and resistance to international human rights).

60. *See generally* Conny Roggeband & Andrea Krizsán, *Democratic Backsliding and Backlash Against Women's Rights: Understanding the Current Challenges for Feminist Politics*, UN WOMEN 1 (2020), https://bit.ly/3Ti7Bdp [https://perma.cc/9VUP-NP2J] (defining backsliding in the context of gender equality as "States going back on previous commitments to gender equality norms as defined in their respective political contexts"); *UN Women, Comm'n on the Status of Women, Beijing +25: Current Context, Emerging Issues and Prospects for Gender Equality and Women's Rights*, U.N. Doc. EGM/B25/2019 (Dec. 2019).

important mechanisms of change, giving "individuals and groups something to leverage"[61] when seeking enhanced parity and equality.

The international legal norm of gender parity in the judiciary rests on three fundamental components: foundational human rights standards, support for democratic governance and the rule of law, and sustainable development.[62] The human rights aspect has both a legally protective component and a positive legal obligation component, founded in "well-established and widely accepted provisions of international law."[63] The core of the human rights obligations regarding gender equality in the judiciary stem from the foundational international legal principle of non-discrimination, which in turn is found in numerous international legal instruments as well as domestic ones.[64] That is the *ius cogens* norm that the prohibition of discrimination is essential to the concept of human dignity, and specifically, that states must respect human rights without distinction on the basis of sex and have a legal obligation to prohibit discrimination on the basis of sex.[65] *Ius cogens* norms are considered to be "norms from which no derogation is permitted," given "the fundamental values they uphold."[66]

On a global level, this norm is enshrined in the Charter of the United Nations (UN), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[67] The UN Charter sets forth the obligation of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language,

61. ESCOBAR-LEMMON ET AL., *supra* note 36, at 125.

62. *See* Elizabeth Odio Benito, *Gender Parity in International Courts—The Voice of an International Judge*, OPINIO JURIS (2021), https://bit.ly/407cSGZ [https://perma.cc/KC9C-V8HV] (citing human rights, democracy, and sustainable development as the three core components of the right to equality in the judiciary).

63. International Human Rights Law Clinics, University of California Berkeley Law, *Achieving Gender Parity on International Judicial and Monitoring Bodies: Analysis of International Human Rights Laws and Standards Relevant to the GQUAL Campaign* 2 (IHRLC Working Paper No. 4, 2017) [hereinafter GQUAL], https://bit.ly/3Lpk8tN [https://perma.cc/7TZG-KLBB]; *see also id.* at 8–9 (explaining that although "in human rights instruments the norm against discrimination facially appears to be a negative prohibition of discrimination, it has been interpreted to require positive obligations to provide substantive equality").

64. *See id.* at 8.

65. *See id.* at 6.

66. Anne Lagerwall, *International Law: Jus Cogens*, OXFORD BIBLIOGRAPHIES (Nov. 7, 2017), https://bit.ly/3Llov9h [https://perma.cc/T5A8-FBXX].

67. *See generally id.*

or religion."[68] The Universal Declaration of Human Rights states that everyone "is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[69]

These legal obligations apply to and are binding on the United States as well. The United States was a leader in shaping both the UN Charter and Declaration.[70] The UN Charter is binding on all member states, including the United States, and contains an "'unequivocal legal obligation' for States to respect human rights without distinction on the basis of sex, which the authoritative commentary on the Charter also characterizes as an *ius cogens* norm."[71] The United States has ratified the ICCPR.[72] However, it has failed to ratify the ICESCR as well as the treaties and documents focusing more specifically on gender equality, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[73]

The United States does not have a constitutional provision expressly guaranteeing gender equality or prohibiting discrimination on the basis of sex.[74] However, in the absence of express constitutional prohibitions, and the failure to ratify the Equal Rights Amendment, the Constitution's equality prohibitions have been interpreted to provide some legal protections against discrimination on the basis of sex.[75] Congress has also codified a range of antidiscrimination provisions.[76] For example, Title VII of the Civil Rights Act prohibits employers from discriminating on the basis of sex.[77] (However, it fails to expressly cover the Article III judiciary

68. U.N. Charter art. 55(c).

69. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948).

70. *See* David Simcox, *Where Does the US Stand on UN Human Rights Conventions?*, CINCINNATI.COM (Jan. 3, 2018), https://bit.ly/405OnKr [https://perma.cc/7MCT-MV7Y].

71. GQUAL, *supra* note 63, at 6.

72. *See* ACLU, *Treaty Ratification: What's at Stake*, https://bit.ly/42admxT [https://perma.cc/C47B-99DA] (last visited Mar. 14, 2023).

73. *See id.*

74. *See generally* Robin Bleiweis, *The Equal Rights Amendment: What You Need to Know*, CTR. FOR AM. PROGRESS (Jan. 29, 2020), https://bit.ly/3LpwFNR [https://perma.cc/W4CU-ZBR8].

75. *See id.*

76. *Id.*

77. *Sex Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://bit.ly/3Yu03FF [https://perma.cc/ZVA4-76C3] (last visited Mar. 7, 2023).

itself in the United States, a subject of some controversy.[78]) More substantive commitments to gender equality or parity with respect to the judiciary of the United States are left to the discretion or level of commitment of individual administrations.[79]

Thus, for further nuance and substance to legal principles regarding gender equality in the judiciary, we must turn to international law. The principle of parity as found in international law is defined as "the ultimate measure of equality" and that "no less than 50 percent of a given body consists of one gender."[80] This definition comes from the Commission on the Status of Women, and the Working Group on the Issue of Discrimination Against Women in Law and in Practice.[81] The concept of parity also goes beyond numbers. Drawing upon such concepts, the European Institute for Gender Equality defines parity in more depth as a

> [c]oncept and a goal that aims to acknowledge the equal value of women and men, rendering visible the equal dignity of women and men and establishing social organisations in which women and men actually share rights and responsibilities, are liberated from pre-determined spaces and functions engendered by prejudices and gender stereotyping, and fully enjoy equality and freedom in their participation at every level and in every sphere.[82]

Other international courts, treaty bodies, and organizations have developed specific legal principles around gender equality and parity in the judiciary, further fleshing out the *ius cogens norm*. They are founded in CEDAW, the Women's Convention, which has both an express anti-discrimination provision (Article 2) as well as a provision, Article 7, providing for women's right to equal participation in political and public life.[83] CEDAW Article 2 sets forth the foundational equality provisions, asking state parties to "condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating dis-

78. *See* Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 88–89 (2018) (discussing the rules covering judges and law clerks).

79. *See supra* notes 49–50 and accompanying text.

80. GQUAL, *supra* note 63, at 10.

81. *Id.*

82. *Parity*, EUROPEAN INST. FOR GENDER EQUAL., https://bit.ly/424Mvn9 [https://perma.cc/Y4H9-8TEM] (last visited Mar. 7, 2023) (drawing upon statements from the Council of Europe (genderware—The Council of Europe and the Participation of Women in Political Life and the Alliance for Parity Democracy & Feminine Intervention)).

83. CEDAW, *supra* note 56, ¶¶ 2, 7; *see also* GQUAL, *supra* note 63, at 18–19.

crimination against women" and undertake specific obligations stemming from these bases.[84] Article 7 includes the right to be eligible for election, to participate in the formulation and implementation of government policy, to hold public office and perform public functions, and to participate in non-governmental organizations concerned with public and political life.[85]

International law, grounded in CEDAW and other treaties, also provides for a right of access to equal opportunity in employment, which includes promotion within employment.[86] Evolving international law also includes a right of access to justice, which is sometimes interpreted as including aspects of the ability to participate in and render justice on an equal basis.[87]

Notably, since the 1970s, advocacy groups and transnational organizations, institutions, and conferences have been working to articulate and enhance recognition of a gender-specific right to parity in the judiciary. In fact, the principle of gender equality in the judiciary as one embedded in and available in international law emerged at and are incorporated into the action plans from the UN World Conferences on Women in Mexico City (1975); the UN's Third World Conference on Women in Nairobi (1985), and the Fourth World Conference on Women in Beijing (1995).[88] The Beijing Declaration and Platform for Action called upon states to "[c]ommit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary."[89] It also asked governments to work to "[e]nsure that women have the same right as men to be judges" including by setting targets and implementing measures.[90]

These declarations and platforms have led to greater international and domestic advocacy and progress for gender equality in the judiciary. Other international human rights treaties have incorporated similar provisions, and still other, more recent treaties have built on them, incorporating express provisions requiring States to take gender representation into account while appointing members of courts or other treaty bodies, grounded in the right of equal par-

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84. CEDAW, *supra* note 83, ¶ 2.

85. *Id.*

86. *See id.* ¶ 7; GQUAL, *supra* note 63, at 25.

87. GQUAL, *supra* note 63, at 42.

88. *See* ESCOBAR-LEMMON ET AL., *supra* note 39, at 125–26.

89. *Id.* (quoting Beijing Declaration and Platform of Action, *Fourth World Conference on Women*, 95, A/CONF.177/20 (Oct. 27, 1995), https://bit.ly/3FgvVa5 [https://perma.cc/PR7F-HCFM]).

90. *Id.*

ticipation.[91] Notable measures include CEDAW General Recommendation No. 23 on Political and Public Life in 1997, which called upon states to recognize that the elimination of discrimination against women includes removing barriers to "the exercise of legislative, judicial, executive, and administrative powers."[92] In addition, when the International Criminal Court (ICC) was created in 1998, advocacy and mobilization succeeded in the incorporation of a treaty provision requiring state parties to "take into account the need for a fair representation of female and male judges," and when the inaugural court was formed, 7 out of 18 judges were women (a record for supranational courts).[93] The United Nations has also expressly recognized the significance of, and prioritized, gender parity in the judiciary by adopting a General Assembly Resolution marking an International Day of Women Judges (March 10).[94]

Case law is also beginning to develop in support of a state obligation under international law to work toward gender parity in the judiciary.[95] Specifically, states and treaty bodies have relied on the international consensus recognizing the rights and obligations for equality in access to decision-making to interpret in case law (and codify provisions) for "equal access to international courts and monitoring bodies."[96]

Gender parity and equality in the judiciary have also been embedded in emerging legal standards around sustainable development. Most recently, in 2015, when the UN Sustainable Development Goals (SDGs) were adopted as a global framework for progress on sustainable development, gender equality was included as an express focus, in addition to an emphasis on the foundational norms regarding equity and opportunity for all—human

91. GQUAL, *supra* note 63, at 34.

92. *See* UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 23*: Political and Public Life, 1997, ¶ 5, U.N. Doc. A/52/38 (1997); *see also* ESCOBAR-LEMMON ET AL., *supra* note 39, at 126.

93. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 126.

94. *See* UNITED NATIONS OFF. ON DRUGS & CRIME, *supra* note 51 (noting that "while equality in the judiciary has been historically uneven, steps are being taken to remedy this, as evidenced by the acceptance of a new United Nations General Assembly Resolution marking 10 March as the International Day of Women Judges").

95. GQUAL, *supra* note 63, at 16–45 (discussing evolution of international law including case law and soft law provisions supporting state obligations to work towards gender parity in the judiciary).

96. *Id.* at 24–25.

rights, democratic governance, and the rule of law.[97] SDG 5 focuses on gender equality, and the goal that "[w]omen and girls everywhere must have equal rights and opportunity and be able to live free of violence and discrimination."[98] SDG 16 includes an express goal for "effective, accountable, and inclusive institutions" for sustainable development, including the achievement of equal proportions between men and women in national and local institutions, including the judiciary.[99]

Together, these international law principles, standards, and goals have "forged a global expectation that judiciaries must not just include women but also achieve gender balance."[100] This obligation draws power from not only the law itself but from the idea that "it is the collective result of "the best possible dialogue at the national level" and utilizes and "reproduces domestic best practices."[101]

Notably, in global arenas focused on gender equality "the United States has stood outside of the advances brought on by reference to international law" as it is one of a handful of countries that has failed to ratify CEDAW,[102] leaving it globally isolated with the "strange bedfellows" of Sudan, Somalia, Iran, Tonga, and Palau.[103] Many scholars have argued that despite United States' failure to ratify the treaty, CEDAW's provisions are "consistent with the letter and spirit of the United States Constitution and laws, both state and federal."[104] A number of state and local jurisdictions in the United States have also adopted resolutions or other instruments either endorsing or adopting CEDAW or its provisions.[105] Nonetheless, while the relevant *ius cogens* norms are binding on the United States as set forth above, the failure of the United States to ratify CEDAW contributes to the lack of awareness of these legal

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97. Anthony F. Pipa & Kaysie Brown, *American Leadership on the Sustainable Development Goals*, BROOKINGS (Oct. 13, 2019), https://bit.ly/41Xmdmw [https://perma.cc/GB27-K6GB]; *see* United Nations General Assembly, *A/RES/70/1 Transforming Our World: The 2030 Agenda for Sustainable Development* (Oct. 21, 2015), https://bit.ly/3Z2oz0N [https://perma.cc/3MZ4-MWJR].

98. *See* Benito, *supra* note 62.

99. *See* United Nations General Assembly, *supra* note 97, at 14, 18, 25–26; ESCOBAR-LEMMON ET AL., *supra* note 36, 39 at 126–27.

100. *See* ESCOBAR-LEMMON ET AL., *supra* note 39, at 127.

101. *See* Benito, *supra* note 62.

102. *Id.*

103. Rangita de Silva de Alwis & Amb. Melanne Verveer, "*Time Is A-Wasting": Making the Case for CEDAW Ratification by the United States*, 60 COLUM. J. TRANSNATIONAL L. 1, 5 (2021).

104. Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 270 (2002).

105. *Id.* at 274.

obligations and their significance, and deprives domestic advocacy groups of an important mechanism or lever for change used successfully in other countries to promote women's advancement in the judiciary.[106]

The United States does have a strong history, however, of women's advocacy organizations successfully lobbying for the inclusion of women in the judiciary, although presidential administration's level of cooperation with these groups has varied, and the lack of formal domestic equality provisions such as the Equal Rights Amendment (ERA) or CEDAW incorporation has been an obstacle to these efforts.[107] The United States has an affiliate of the International Association of Women Judges, called the National Association of Women Judges (NAWJ), which provides a link between U.S. domestic and international gender parity advocacy spaces and advocates for more women judges as well as ending discriminatory practices.[108]

However, a critical principle underlying gender equality treaties, laws, and advocacy strategies both globally and in the United States is that the formulation or adoption of laws or legal principles alone cannot achieve equality. Rather, formal or *de jure* equality provisions must be accompanied by attempts to achieve equality in practice, that is, *de facto* or substantive equality.[109] In fact, "for most of the world's women the laws that exist on paper do not always translate into equality and justice."[110] This also means that whether or not the United States ever ratifies CEDAW, it may still pursue substantive equality measures, taking affirmative steps toward and adopting best practices for achieving gender equality and parity. The United States may also pursue gender parity and equality measures as part of its foundational commitments to democracy and the rule of law, which would also reinforce these commitments

106. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 136.

107. *Id.* at 134–35.

108. *Id.* at 135.

109. Sandra Fredman, *The Challenges of Measuring and Continuous Improvement and Lessons from the Sustainable Development Goals*, *in* THE RIGHT TO THE CONTINUOUS IMPROVEMENT OF LIVING CONDITIONS: RESPONDING TO COMPLEX GLOBAL CHALLENGES 226–27 (Jessie Hohmann & Beth Goldblatt eds., 2021) (discussing the definitions and implications of substantive equality, notably that "human rights should hold out more than just the promise of freedom from State interference"). They should also concern the extent to which people can enjoy this freedom. *Id.* at 227. This in turn carries with it more than a formal idea of equality before the law, to include substantive equality, and that while "the State needs to be restrained from abusing its power, only the State can supply what is needed for an individual to fully enjoy their human rights equally with others." *Id.*

110. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 153.

at a critical moment of democratic contestation and decline. These possibilities and their foundations are explored in more detail below.

B. Gender Equality, Parity in the Judiciary, and the Backlash to Global Law and Institutions

As set forth above, from an international law perspective, the achievement of gender equality and parity in judicial systems is more than an admirable goal; it is a state obligation.[111] Furthermore, pursuit of equality and parity for women in the judiciary is important not just because these are fundamental legal obligations for states or ideals to be pursued for their intrinsic value.[112] Rather, these obligations have extrinsic or instrumental value to societies as well.[113] These legal obligations and their value and impact on society have become more urgent and critical in the wake of the COVID-19 pandemic as inequality deepens and threats to democracy rise.[114]

This Section examines these obligations and their implications, setting them against the broader backdrop of the global backlash to gender equality, itself deeply intertwined with the functioning and strength of the system of global governance and rule of law, now under threat. Understanding this backdrop and the nature of backlash also reinforces the significance of gender parity in the judiciary as a global norm, underscoring the need to raise awareness of this norm as both a state obligation and transformative tool for achieving gender equality.

1. Gender Equality and Parity as Key Pillars of Democracy and the Rule of Law

Strengthening equality and parity in the judiciary is vital to the functioning of the rule of law and democracy.[115] Indeed, "the representation of women in the judiciary is essential for the rule of law."[116] It is critical because "the inclusion of women at all levels of the justice system allows the judiciary to gain credibility and legitimacy in the eyes of the public."[117] Judicial independence is a key component of the rule of law, critical to establishing legitimacy and

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111. *See supra* Part I.A.
112. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 3.
113. *Id.* at 3–5.
114. *See* Rana, *supra* note 58.
115. Kalantry, *supra* note 28, at 87.
116. *See* Benito, *supra* note 62.
117. *Id.*

trust in the legal system by supporting the idea that everyone will have their chance to make their case in court and that judges will be impartial in their decision-making, unswayed by bias, political influence, or partiality to certain groups.[118] Conversely, "[p]erceptions of an unfair selection process or unequal access to justice can undermine confidence in the judiciary."[119]

In recent Congressional hearings on diversity in the judiciary in the United States, one representative poignantly noted:

> Female and minority judges are still sorely underrepresented on our Federal bench, which is dominated by former prosecutors and corporate law firm partners from the most expensive law schools in the country.
>
> The lack of diversity is especially stark among bankruptcy and magistrate judges, who, together, handle the vast majority of the Federal docket. The upshot is this: If you are a plaintiff or criminal defendant, you could very well look at the Federal judiciary taken as a whole, and wonder if you will get a fair shot. If you are litigator or criminal law practitioner, you might wonder how you will be heard, and if you are an extraordinary lawyer who might want to be a Federal judge, you might wonder if you really belong.[120]

As this passage indicates, diversity and representation are critical to public perceptions of judicial independence and impartiality. Thus, diversity on the bench including gender equality and representation of women are crucial components of the rule of law because they "can enhance representation, public confidence in the judiciary, and access to the judicial process."[121] These principles are embedded within American law as well; in the United States, for example, defendants have a right to a trial by of their peers, and it has been argued that similarly, "the composition of the judiciary should reflect the demographic makeup of society."[122]

There is also ample data showing that diversity in perspectives and representation at high levels of government and corporate decision-making lead to better outcomes and decisions. More specifically, data shows that diverse judiciaries are "more likely to lead to

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118. *What Is the Rule of Law*, AM. BAR ASS'N, https://bit.ly/3SWe5P1 [https://perma.cc/4DBZ-M674] (last visited Mar. 9, 2023).

119. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 4–5.

120. *The Importance of a Diverse Federal Judiciary, Part 2: The Selection and Confirmation Process: Hearing Before the Subcomm. on Cts., Intell. Prop. & Internet of the H. Comm. on the Judiciary*, 117th Cong. 2 (2021) (opening statement of Hon. Henry C. Johnson, Chairman, Subcomm. on Cts., Intell. Prop & Internet).

121. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 154.

122. Kalantry, *supra* note 28, at 87.

better-informed and impartial decisions.[123] In addition, representation in the judiciary is important because "[j]udicial decision-making processes are enriched when they include a variety of perspectives and lived experiences, especially of those who experience multiple and intersecting forms of marginalization."[124] In these ways, diverse and inclusive courts contribute to public confidence in the judiciary and the legitimacy of judicial decisions as well as better outcomes, which in turn encourage the public to follow laws and accept decisions.[125]

Furthermore, the judiciary plays a key role in the functioning of the rule of law, which is itself a critical component of democracy globally. The UN General Assembly adopted a Declaration in 2012 expressly re-affirming that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and individual core values and principles of the United Nations."[126] A key dimension of this relationship is that the "judiciary, which applies the law to individual cases, acts as the guardian of the rule of law. Thus, an independent and properly functioning judiciary is a prerequisite for the rule of law which requires a just legal system the right to a fair hearing, and access to justice [which along with] the rule of law [are] fundamental principle[s] embraced in most modern democracies."[127] Within the broader human development discourse, the rule of law and democracy are interlinked and mutually reinforcing as the concept of the rule of law incorporates "such elements as a strong constitution, an effective electoral system, a commitment to gender equality, laws for the protection of minorities and other vulnerable groups and a strong civil society."[128]

Gender equality is critical to the rule of law and democracy because of the recognition that "women's rights have important consequences for all of society—not just for women. A wealth of research finds that women's rights and gender equity improve economic growth, health outcomes, and global peace and security."[129] Again, conversely, undermining the commitment to gender equal-

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123. *Id.*

124. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 3.

125. *Id.* at 4–5.

126. Massino Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, 4 UN CHRONICLE 29, 29 (2012), https://bit.ly/41SUHqs [https://perma.cc/87PR-SP5C].

127. *Id.* at 30.

128. *Id.*

129. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 1.

ity, itself a human right *and ius cogens* norm, undermines the rule of law and democracy:

> Systemic and systematic marginalization and exclusion of any segment of the population in democracy building processes and institutions undermines the architecture and promise of democracy. The need to address patterns of exclusion, structural barriers, stereotypes and unequal power relations that produce and reproduce exclusionary practices and outcomes in societies is a democratic imperative which cannot be over emphasised.[130]

At this critical moment, however, in the wake of the COVID-19 pandemic, human rights including gender equality, the rule of law, and democracy are all facing a variety of threats.[131] These developments provide new urgency and resonance to the need for gender parity in judiciaries around the world.

2. Equality, Parity and Representation in the Wake of Pandemic and Backlash

The COVID-19 pandemic arrived at a critical juncture for gender equality.[132] Rising authoritarianism and populism in the years leading up to the pandemic had left the global legal protections against gender discrimination and human rights "at their weakest in decades."[133] Freedom House reported that 2019 marked the 14th consecutive year of decline in global freedom and that democratic deterioration was accelerating, with "the unchecked brutality of autocratic regimes and the ethical decay of democratic powers . . . combining to make the world increasingly hostile to fresh demands for better governance."[134]

The advent of the COVID-19 pandemic was also accompanied by a sudden rise in the "fragility of international institutions."[135]

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130. *Gender Equality and Inclusion in Democracy*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, https://bit.ly/3kRtzHs [https://perma.cc/6MQG-RXWE] (last visited Mar. 7, 2023).

131. Rana, *supra* note 58; *see also* Roggeband & Krizsán, *supra* note 60 (arguing that "States going back on previous commitments to gender equality norms as defined in their respective political contexts" was a critical part of democratic backsliding around the world).

132. Rana, *supra* note 58, at 97.

133. *Id.* at 98.

134. SARAH REPUCCI, FREEDOM HOUSE, FREEDOM IN THE WORLD 2020: A LEADERLESS STRUGGLE FOR DEMOCRACY 1 (2020), https://bit.ly/3Jhr8aH [https://perma.cc/28TC-XT78].

135. *See* Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1, 7 (2017) (discussing the threats of populism and rising authoritarianism to human rights in the years leading up to the pandemic and also noting some of the ways that global multilateral and legal organizations were being deliberately

This fragility was compounded by the weakening of the global rules-based order,[136] that is, the international order formed after WWII and intended to preserve peace and minimize human suffering and armed conflict, with legal rules governing the behavior of states.[137] Indeed, these developments led some to question whether "we have reached a watershed moment in the evolution of the international system in which the rules-based international order confronts multiple threats that have the potential to undermine or seriously erode that order."[138]

Even more ominously, this weakening of the legal frameworks and institutions protecting human rights, gender equality, democracy, and the rule of law were accompanied during the pandemic by rapid rollbacks in human rights and equality, as the COVID-19 pandemic exacerbated and accelerated existing declines while increasing inequality.[139] The impact was deep and broad, as the COVID-19 pandemic "initiated a backslide of much of the progress towards racial and gender equality made over not just the past few years, but even the past few decades."[140] Moreover, the "socio-economic consequences of the pandemic have disproportionately affected vulnerable groups, exposing the intertwined nature of structural racism and sexism."[141] In fact, with women concentrated in the most precarious positions on the frontlines of the pandemic, it is not surprising that women bore the brunt of the economic fallout from the pandemic, and that historic employment and salary gains made over the course of decades were overturned almost overnight during the

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undermined); *see also* Mark Copelovitch & Jon C.W. Pevehouse, *International Organizations in a New Era of Populist Nationalism*, 14 REV. INT'L ORGS. 169, 170 (2019) (describing a wave of challenges in the years prior to 2019 to the "globalization and the multilateral economic and security institutions that have been the bedrock of the liberal international order since World War II").

136. *See* Danchin et al., *Navigating the Backlash Against Global Law and Institutions*, 38 AUSTRALIAN Y.B. INT'L L. 33, 33 (2020) ("The recent rise of populism and illiberal democracy especially within major Western democracies has challenged the longstanding and widespread commitment of those states to the rules-based order."); *see also id.* at 46–55 (providing examples of withdrawal from and crippling of multilateral institutions).

137. David L. Sloss, *Introduction: Preserving a Rules-Based International Order*, *in* IS THE INTERNATIONAL LEGAL ORDER UNRAVELING? 1, 1–3 (David L. Sloss ed., 2021) [hereinafter Sloss, *Introduction*]; *see also* Danchin et al., *supra* note 136, at 1 (explaining that the "current global legal order was established after World War II and is underpinned by the United Nations Charter, international law in general, and the growing collection of multilateral international legal instruments by which states agree to conduct their international relations").

138. *See* Sloss, *Introduction*, *supra* note 137, at 1.

139. *See* Rana, *supra* note 58, at 100–01.

140. *See* Alwis & Verveer, *supra* note 103, at 9.

141. *Id.*

pandemic.[142] In these ways, as the world emerges from the COVID-19 pandemic, gender equality in law and in practice is under siege, including the strength of legal protections, advancements in key areas such as the economy, and the supporting framework of global institutions and the rules-based order.

Against this backdrop, gender equality norms and laws have become a key site of challenge and contestation for human rights, democracy, and the global rules-based order.[143] Retreat from gender equality laws, norms, and goals has become a marker of rising authoritarianism and democratic backsliding worldwide.[144] In country after country, rising populist and authoritarian movements have targeted and then succeeded in significantly dismantling gender equality laws and achievements. For example, in countries as varied as the United States, Brazil, Hungary, and the Philippines, populist leaders have sought to exploit and channel domestic grievances against "foreign threats" which were deemed to include not only the institutions and advocates of global governance and human rights, but critically, anyone deemed a threat to "traditional" families and hierarchies.[145] In these nations, beginning shortly prior to the COVID-19 pandemic and continuing to the present, populist leaders have sought to "invoke the 'will of the people' as they 'promote state projects to enforce heteronormative and patriarchal family models, aim to curtail reproductive rights and are strongly oppositional to rights of sexual minorities,' while women 'are referred back to their role as mothers and reproducers of the nation.'"[146] Rollbacks to reproductive rights and other equality provisions such as those protecting against gender-based violence are an often repeated casualty in these challenges.[147]

Like human rights and gender equality more generally, key equality norms like gender parity in the judiciary and the advocacy

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142. *See* Rana, *supra* note 58, at 99.

143. *See* Rana, *supra* note 59, at 157.

144. *Id.*; *see also* Roggeband & Krizsán, *supra* note 60 ("States going back on previous commitments to gender equality norms as defined in their respective political contexts" is a critical part of democratic backsliding around the world.).

145. Roggeband & Krizsán, *supra* note 60.

146. *Id.*

147. *See Authoritarian Regimes Have More Progressive Abortion Policies than Some U.S. States*, CTR. FOR AM. PROGRESS (July 8, 2022), https://bit.ly/3J3wiFN [https://perma.cc/YC88-P85X] (noting that with *Dobbs*, the "United States joins only three other countries—El Salvador, Poland, and Nicaragua—that have regressed on abortion rights in recent years" and that each "of these countries have seen significant democratic regressions in recent years"); *see also* Rana, *supra* note 59 (describing rollbacks of protections against gender-based violence in countries experiencing democratic decline).

spaces surrounding them[148] have also become sites of contestation and as previously noted, signifiers of democratic decline.[149] The United States has not been immune to this backlash against gender equality, the rule of law, and global governance, and this Article argues that the battles over gender equality in the judiciary should be viewed as key examples of these trends.

As noted above in the Introduction, presidential administrations in the United States have varied widely in their commitment to and actual appointments of women in the judiciary.[150] Moreover, while Republican presidents have historically appointed women and people of color to the judiciary at significantly lower rates than Democratic presidents,[151] the Trump administration's open hostility to both groups marked a notable shift. Although "progress in judicial diversity has fluctuated from administration over administration over the past several decades" it "stopped completely" under President Trump.[152] Some argued that the administration was going further, "explicitly trying to undo" the diversity gains in the judiciary under the preceding Obama Administration.[153]

The Trump Administration, again in contrast to previous administrations, also more deeply prioritized conservative ideology over merit and qualifications.[154] It rejected the opportunity to work with groups focused on diversity and equality such as the National Association for the Advancement of Colored People (NAACP)

148. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 134 (explaining that the global norm of gender equality on decision-making bodes has emerged from international organizations such as the United Nations (UN), international meetings such as the UN world conferences on women, and women's movements that have "forged a global consensus about the importance of women's equal presence when and where decisions are being made").

149. *See* Rana, *supra* note 59, at 156 (describing the transnational spaces focused on gender equality that have arisen around the UN, other international institutions, and civil society and advocacy groups, and how they have become critical sites of contestation of and resistance to international human rights and democracy).

150. *See supra* notes 48–50 and accompanying text.

151. *See id.*; *see also* Gramlich, *supra* note 49 ("Republican presidents have generally been less likely than Democrats to appoint women to the bench, but the chief executives of both parties have increasingly done so" until President Trump.).

152. *See* Derrick Johnson, *Trump Is Undoing the Diversity of the Federal Bench*, WASH. POST (Jan. 22, 2019, 8:14 PM), https://bit.ly/3ZKFpm0 [https://perma.cc/DXN7-ZE5H].

153. *See* Andrew Cohen, *Trump and McConnell's Overwhelmingly White Male Judicial Appointments*, ANALYSIS & OPINION, BRENNAN CTR. FOR JUST. (July 1, 2020), https://bit.ly/3yA1O9A [https://perma.cc/W29L-CXJX].

154. *See, e.g.*, Alder & Han, *supra* note 14, at 49 (noting that "considerations about diversity mattered less to Trump than ensuring potential nominees were philosophically reliable" and that the main goal was to get conservatives into the courts).

that had worked with previous presidential administrations.[155] The Trump Administration openly rejected gender equality as a legal obligation or principle to be prioritized. To the contrary, it was reported that "nearly 40% of judges President Donald Trump appointed to the federal appeals court have a history of hostility toward LGBTQ rights," sparking fears about the danger to the rule of law and the integrity and credibility of the judiciary from judges openly hostile to gender equality.[156] These developments have contributed to a "legitimacy crisis" in the judiciary of the United States given "the lack of federal judges representing historically underrepresented groups, such as people of color, women, individuals who self-identify as LGBTQ, people with disabilities, and people belonging to minority religions."[157]

In terms of the advancement of women in the judiciary, President Trump's most high-profile and controversial appointment was of Justice Amy Coney Barrett, appointed to the United States Supreme Court for her record of anti-abortion views and jurisprudence, among other factors.[158] Justice Barrett's appointment can be understood against the backdrop of "tokenism and backlash" in the history of women's advancement in the judiciary, that is, the idea that selectors often select a single woman as a token to gain credit and attention for the appointment, and that from these same corners "resistance increases and is qualitatively different as more women progress."[159] As expected by Trump and other supporters of her appointment, Justice Barrett did, in fact, later become part of the majority of Justices that would overturn the critical constitutional equality protections in *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*.[160] *Dobbs* confirmed that in the face of an increasingly conservative and un-representative federal judiciary in the United States, "arguments against sex discrimination rooted in the 14th Amendment are under threat, and existing protections are vulnerable to being rolled back."[161]

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155. *Id.*

156. *See* Kristine Phillips, *Trump's Judicial Appointments Will Impact LGBTQ Rights Far Beyond Presidency*, USA TODAY (Jan. 5, 2021), https://bit.ly/3Lq8YEx [https://perma.cc/5XTN-2RT5].

157. *See Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), https://bit.ly/403pQFE [https://perma.cc/R7TD-LNMT].

158. *See* Alexandra Villarreal, *Amy Coney Barrett: What Will She Mean for Women's Rights?*, GUARDIAN (Sept. 27, 2020), https://bit.ly/3mV5l0e [https://perma.cc/LHP9-RAKT].

159. *See* Kenney I, *supra* note 1, at 1506–07.

160. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

161. *See* CTR. FOR AM. PROGRESS, *supra* note 74.

Dobbs also marked a singular moment in that it was the first time the United States Supreme Court "reversed a right that the Court itself had justified as important to a group's equal participation 'in the economic and social life of the Nation.'"[162] Reva Siegel has argued that *Dobbs* exemplifies the rollbacks of rights that are a product of how members of "the conservative legal movement have pursued constitutional change: through specialized appointment practices designed to achieve movement-party goals."[163] She elucidates how "a Supreme Court that the Republican Party composed by a series of norm-busting appointments practices immediately thereafter changed several bodies of law to decide *Dobbs*" and did so in ways that "make our constitutional order less democratic," and significantly, "in order to enforce a family-values backlash against the decisions" of previous Supreme Courts.[164]

This Article argues that this backlash, implemented through the judiciary, should be viewed as part of a larger backlash by the Trump Administration to the international rules-based order, and specifically, to a number of foundational international human rights norms including gender equality. Indeed, during his administration, President Trump was one of the most outspoken global leaders in openly "rejecting the 'rules-based international order'" as well as engaging in a backlash to the post-World War II framework of liberal norms and institutions.[165] The eagerness of the Trump Administration in rejecting gender parity, representation, and equality, later echoed by the *Dobbs* majority, should dispel any doubts as to the critical role Justice Barrett's appointment was meant to play in efforts to roll back gender equality, and the depths of the backlash in the United States to foundational principles of gender equality. Justice Barrett's appointment as well as the Trump Administration's flouting of principles of gender equality and parity in the judiciary more broadly can be viewed as part of the Trump Administration's larger project of challenging equality, human rights, the rule of law, and unfortunately ultimately democracy itself.[166] This backlash from the Trump Administration can also be viewed as an American expression or example of the larger global

162. *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 1).

163. *Id.* at 5.

164. *Id.*

165. *See* Danchin et al., *supra* note 136, at 2.

166. *See World Shocked by Trump Supporters' Attack On U.S. Democracy*, REUTERS (Jan. 6, 2021), https://reut.rs/3V53xyo [https://perma.cc/XX4X-CQ56].

backlash to global norms and institutions such as international human rights and the rules-based order.[167]

In these ways, in both the United States and globally, gender equality norms like gender equality and parity in the judiciary and the advocacy spaces surrounding them have become sites of contestation[168] and even harbingers of democratic decline. The legal obligations supporting gender equality in the judiciary, and the role of gender equality and parity in the judiciary in supporting democracy and the rule of law, are thus increasingly significant as both tools and obligations in the United States and abroad in view of the rising threats to human rights, the international rules-based order, and democracy.

Part II below explores these urgent needs and offers pathways for transformation, for the judiciary itself and also for the principles judges uphold and the people they serve.

II. THE POWER OF TRANSFORMATIVE APPROACHES TO EQUALITY IN THE JUDICIARY

A. *The Role and Impact of Women Judges*

This Part argues that women judges play a critical role in creating, recognizing, and enforcing equality and anti-discrimination laws and jurisprudence, obligations that are now more fragile but also more critical than ever. Moreover, beyond their own courts and jurisdictions, women judges play a singular role in the advancement of equality in their nations and globally in visibly transforming gender stereotypes of leadership and expertise while simultaneously transforming the courts and laws themselves. The critical nature of these roles highlight the significance of representation, both in terms of numbers and in substantive support for gender equality. Each of these factors in turn reinforce how crucial parity and equal-

167. *See* Danchin et al., *supra* note 136 (discussing the backlash to the international rules-based order); *see also* Rana, *supra* note 59 (discussing the backlash to the international rules-based order and the backlash to gender equality as part of the larger global pushback to the rules-based order).

168. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 134 (explaining that the global norm of gender equality on decision-making bodes has emerged from international organizations such as the United Nations (UN), international meetings such as the UN world conferences on women, and women's movements that have "forged a global consensus about the importance of women's equal presence when and where decisions are being made"); *see also* Rana, *supra* note 59 (describing the transnational spaces focused on gender equality that have arisen around the UN, other international institutions, and civil society and advocacy groups, and how they have become critical sites of contestation of and resistance to international human rights and democracy).

ity in the judiciary are for the advancement of women and equality more broadly. They also hold promise for how the judiciary could be reformed and re-envisioned, and the changes that might result.

Building on these arguments, this Part explores a visionary question—what would a court comprised mostly or entirely of women look like, and how would its jurisprudence be distinctive? To answer that question, it focuses on the jurisprudence of and the judicial functions carried out by the United Nations Committee on the Elimination of Discrimination Against Women, a globally representative body comprised almost entirely of women from a variety of racial, ethnic, and religious backgrounds, with a mandate of enhancing gender equality.[169] This Part explores some of the promise and potential that a judiciary more representative of gender equality principles might hold, by examining some of the primary achievements of as well as problems this body faces in light of its gender composition and mandate. It further explores the transformative effect that women judges can have on the judiciary as well as on jurisprudence and the recognition of rights.

Earlier sections explored some of the intrinsic or instrumental values that support more gender equal judiciaries, as related to legal obligations, the rule of law and democracy. But human rights also have intrinsic value to the people who hold them, as well as the power to exert transformative changes throughout people's lives and society.

For example, equal opportunities with respect to access and participation in the judiciary and justice process hold deep value in that:

> Fundamentally, it is a human right to participate in decisions that affect oneself. The interpretation of the constitution affects everyone in a country. Excluding half the population denies them a chance to participate in the decisions that will ultimately affect their lives. Women's inclusion as judges on courts is a question of equal opportunity. All citizens should have the same chances to be included in the political process, in governance, and in the adjudication of law. It would strike many as inconceivable to purposefully exclude men from serving as judges: the same must be held for women.[170]

Women judges have used these opportunities not only to support their own human dignity, but to achieve transformative

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169. *See* CEDAW, *supra* note 56, art. I; *see also CEDAW Elections*, *supra* note 56.

170. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 3–4.

changes. Women in positions of power hold symbolic power that is meaningful for both individuals and society. For example, to individuals, the presence of women judges can break stereotypes about what leaders look like and inspire people to follow in their footsteps.[171] In addition, when people see judges who look like them, it can diminish psychological barriers and "the sense of marginalization that may prevent them from filing complaints in the first place."[172] For people across society, including "scholars, analysts and voters, the presence of a female leader signifies a particular turning point. There is renewed hope that women's rights norms will be embedded into domestic law, policy, and government decision-making."[173]

A number of theories have been proposed about the different perspectives women judges might bring to the bench and to their decision-making, although the evidence substantiating these is mixed.[174] However, women judges have made a clear impact on the law in at least two ways. First, there is evidence that judges' gender and victims' gender impacts the outcomes of employment discrimination cases, suggesting that empathy or lack thereof plays a role in these cases.[175]

Second, women judges have played a significant role in the sweeping changes over time in recognizing and addressing violence against women. Gender-based violence, estimated to impact one in three women over the course of their lifetimes,[176] is a leading cause

171. *See* OECD, *Women in the Judiciary: Working Towards a Legal System Reflective of Society*, *supra* note 34, at 3.

172. *Id.*

173. *See* Ramona Vijeyarasa, *When Women Lead: Legislating Against Gender-Based Violence in Bangladesh, Indonesia, the Philippines and Sri Lanka*, 23 AUSTL. J. ASIAN L. 2, 27 (2022).

174. *See* Kalantry, *supra* note 28, at 86 (discussing different theoretical approaches including the "different voice" approach focusing on whether women judges bring a unique feminist perspective to the bench; the representational theory which "suggests that women on the bench will represent the interest of other women and will use it as an opportunity to make decisions that favor equality" and the informational theory which suggests that "women don't necessarily represent a class but that their professional experiences give them unique and valuable information that may impact their decision-making").

175. *See* Chew & Kelley-Chew, *supra* note 18, at 191–92; *see also* OECD, *Women in the Judiciary: Working Towards a Legal System Reflective of Society*, *supra* note 34, at 2 (citing "a recent study that found women judges rule in favor of victims of discrimination in 11 percent more cases than men," a difference "attributed to their life experiences with prejudice in the workplace and outside of it").

176. *See* Kalantry, *supra* note 28, at 88.

and effect of discrimination against women.[177] The "norm-setting value" of international human rights norms, and particularly in this case under CEDAW, has helped usher in a wave of reform around this issue worldwide.[178] Utilizing international human rights standards and theories, advocates and courts have successfully transformed the understanding of gender-based violence from an unregulated private act to one that states have an obligation to prevent.[179] Around the world, "women judges are leading the charge against gender-based violence."[180] They have been responsible for establishing state obligations to address gender-based violence, understanding and highlighting the power dynamics and gender stereotypes at play in these cases,[181] as well as creating new remedies like protective orders and special tribunals to address forms of violence against women.[182]

Unsurprisingly, perhaps, rolling back laws protecting against violence against women has been a central focus of the backlash to gender equality and the rules-based order, playing out in similar ways to the backlash to gender equality and parity in the United States judiciary under the Trump Administration discussed above in Part I.B. Over the last decade, several nations have unraveled laws addressing gender-based violence (such as Russia), withdrawn from global treaties addressing gender-based violence like the Istanbul Convention (such as Turkey), or as in the case of the United States during the Trump Administration, simply let laws on violence against women lapse.[183]

This erosion of the legal framework supporting gender equality highlights another deep impact gender equality in the judiciary can have. At moments like the current moment, where rights and gains are threatened and increasingly fragile, courts and judges "play an indispensable role in safeguarding women's rights and protecting rights gained in other venues."[184] As the United States' recent experience with *Dobbs* has shown, "the long and painstaking process

177. *See* Vijeyarasa, *supra* note 173, at 31 (discussing gender-based violence definitions as well as conceptualization under CEDAW's anti-discrimination provisions).

178. *Id.*

179. *See* Kalantry, *supra* note 28, at 88.

180. *Id.*

181. Benito, *supra* note 62, at 304.

182. *See* OECD, *Women in the Judiciary: Working Towards a Legal System Reflective of Society*, *supra* note 34, at 3.

183. Rana, *supra* note 58, at 99.

184. *See* ESCOBAR-LEMMON ET AL., *supra* note 36, at 1.

of building legislative support for anti-discrimination laws can unravel if those laws are struck down as unconstitutional."[185]

In this light, it is worth examining a promising development that may help bridge these gaps and provide a foundation for envisioning a future building upon these critical aspects of gender equality in the judiciary. The next Section thus focuses on the potential of and the lessons that may be learned from a unique quasi-judicial forum centered on women's equality.

B. The Role and Impact of a Forum Focused on Women's Equality

The transnational advocacy emerging from CEDAW, the women's human rights treaty, has served both a norm-setting and diffusing function as well as provided mechanisms and levers for change.[186] This section discusses the impacts of CEDAW and the advocacy surrounding it on judicial decision-making itself. CEDAW has become more than simply a document or repository of standards. It has become "a keystone human rights document that is at the heart of the international gender equality agenda."[187] It has been described as "an international bill of rights for women" which affirms that women have "an inalienable right to live and work free of discrimination."[188] As noted above, it contains specific provisions detailing the various forms of discrimination that women face around the world, as well as procedures for monitoring and implementation of the treaty.[189] It focuses on ending both *de jure* and *de facto* inequality, or inequality in law and practice.[190] It was drafted intentionally with "the realities of women's lives in mind."[191]

Notably, even after CEDAW was drafted and went into effect, questions remained as to how to enforce its gender equality provisions. One answer to this question came when the Optional Proto-

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185. *Id.*; *see also infra* Part II.B.

186. *See* Vijeyarasa, *supra* note 173, at 31; *see also* ESCOBAR-LEMMON ET AL., *supra* note 36, at 125.

187. Alwis & Verveer, *supra* note 103, at 12.

188. Koh, *supra* note 104, at 266.

189. Convention on the Elimination of All Forms of Discrimination Against Women art. 1, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

190. *Id.*; *see also* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 10, 1999, 2131 U.N.T.S. 83 (entered into force Dec. 22, 2000).

191. Koh, *supra* note 104, at 267.

col to CEDAW was adopted and entered into force in 2000.[192] The Optional Protocol allows for an individual complaints procedure as well as an inquiry procedure and is intended to promote meaningful enforcement of the state obligations under CEDAW.[193] It is similar to mechanisms created under other human rights treaty bodies to provide for an individual complaints mechanism, which is a procedure by which any individual who has suffered a human rights violation can file a complaint before the relevant treaty body against the state that is party to the applicable convention and complaint mechanism.[194]

The inquiry procedure allows individuals to initiate an investigation of a state party that has agreed to be subject to the procedure, upon receipt of reliable information on serious, grave, or systematic violations alleged to have been committed in the state party's territory.[195] If a treaty body initiates an inquiry procedure based on reliable information of systemic human rights violations, the treaty body then gathers information from state and civil society sources in order to better understand and investigate the situation.[196] This may include, with the state's consent, a visit to the country, and members of civil society may also submit relevant information and facts regarding the situation to the treaty body.[197] After the conclusion of its investigation, the treaty body will report its findings and recommendations to the state for it to implement, and request a response to its report and recommendations from the state.[198] As of the start of the COVID-19 pandemic, the CEDAW Committee has released 16 reports from 5 different inquiry procedures.[199]

The creation of these procedures is ground-breaking for gender equality, as the decision-maker overseeing these procedures is

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192. Catherine O'Rourke, *Bridging the Enforcement Gap? Evaluating the Inquiry Procedure of the CEDAW Optional Protocol*, 27 AM. U. J. GENDER, SOC. POL'Y & L. 1, 2 (2018).

193. *Id.*

194. *See, e.g.*, The Human Rights Committee (CCPR), the Committee on the Elimination of Racial Discrimination (CERD), Committee against Torture (CAT).

195. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984).

196. *See* WOMEN ENABLED INTERNATIONAL, ACCOUNTABILITY TOOLKIT, A GUIDE TO USING U.N. HUMAN RIGHTS MECHANISMS TO ADVANCE THE RIGHTS OF WOMEN AND GIRLS WITH DISABILITIES 5 (2017), https://bit.ly/3Jo3Pfb [https://perma.cc/UW68-UDQ5].

197. *Id.*

198. *Id.*

199. *See* Office of the United Nations High Commissioner for Human Rights, *UN Treaty Body Database*, UNITED NATIONS HUM. RTS. TREATY BODIES, https://bit.ly/3Jp2B3C [https://perma.cc/5BKR-SLE7] (last visited Mar. 8, 2023).

the Committee on the Elimination of Discrimination Against Women ("CEDAW Committee"), the expert body made up of independent experts which monitors compliance by State Parties to CEDAW and its Optional Protocol.[200] The CEDAW Committee "is a unique and fascinating institution; composed almost entirely of women, it dramatically inverses the typical gender 'balance' of international institutions."[201] The CEDAW Committee is made up of 23 independent experts on women's rights issues from around the world, who must reflect an equitable geographic distribution of member states and represent a diversity of legal systems, societies, and marginalized groups.[202] They are recognized as experts "of high moral standing and competence" in the Convention's key focus areas.[203] Each expert serves in their personal capacity and not as representative of any state party or institution for a term of four years, and may be eligible for re-election; terms are staggered with elections held every two years.[204]

The Optional Protocol has "particularly potent transformative potential" given its position in the human rights treaty body institutions and spaces recognized and empowered under international law[205] but also because of its gender makeup and unique focus on gender equality.[206] Further, it offers a unique forum for countering the "silencing of women's voices in shaping international law"[207] and also operates with a broad understanding of rights, culture, development, and structural reform[208] that allows it to take a "wide-ranging approach" to addressing human rights violations.[209] Reviews of the successes of the Optional Protocol and the decisions emanating from it have been mixed to date, though, with some lauding its potential while others decrying unmet expectations with its limited decision-making thus far.[210]

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200. *See CEDAW Elections*, *supra* note 56; *see also Introduction to the Committee*, UNITED NATIONS, https://bit.ly/3H9B4BJ [https://perma.cc/9AK9-FYRT] (last visited Apr. 24, 2023).

201. Loveday Hodson, *Women's Rights and the Periphery: CEDAW's Optional Protocol*, 25 EUR. J. INT'L L. 561 (2014).

202. *See CEDAW Elections*, *supra* note 56.

203. *Id.*

204. *Id.*

205. Hodson, *supra* note 201, at 567.

206. *See id.* at 561.

207. *Id.* at 563.

208. *See id.* at 566.

209. *See* OECD, *Women in the Judiciary: Working Towards a Legal System Reflective of Society*, *supra* note 34, at 3.

210. O'Rourke, *supra* note 192, at 4; *see* Hodson, *supra* note 201, at 574.

However, some broad lessons can be drawn from the successes and failures of the Optional Protocol, the Committee's interpretations, and decisions from this forum to date, with particular significance for the advancement of women and gender equality in the judiciary. Indeed, focusing on the representational aspects and significance of its makeup and focus is a particularly apt area of analysis in view of the limited number of decisions released to date.

First, a primary lesson that can be drawn from this fora and its output is that simply providing a space that elevates women and women who focus on gender equality into decision-making roles has already had an important effect on the judiciary. In addition to shattering limiting gender stereotypes of what decision-makers look like, and providing representation important to public perception, which are by themselves transformative impacts as discussed in Section II.B. above, the Committee has also created a pipeline of experienced experts who have moved to other high-level judicial and official positions.[211]

Second, the creation of the Optional Protocol has created a singular space where women themselves can make complaints directly to a judicial body on behalf of themselves or others.[212] This is a marked contrast with the United States Supreme Court or other high courts, where direct complaints are generally not accepted and most litigants have or need counsel to reach the court; in fact, these barriers can be so high that "in some countries, human rights treaties are the only instruments people have to render their government accountable in any way."[213] Complainants are required to attempt to exhaust domestic remedies before turning to the Optional Protocol; however, the Optional Protocol does also allow the CEDAW Committee to make an exception for the exhaustion of remedies requirement "if the application of such remedies is unreasonably prolonged or unlikely to bring effective relief"[214] providing an important avenue of relief for individuals who cannot otherwise access courts or legal counsel.

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211. *See* OECD, *Women in the Judiciary: Working Towards a Legal System Reflective of Society*, *supra* note 34, at 4; *see also CEDAW Elections*, *supra* note 56.

212. *See* Hodson, *supra* note 201, at 562.

213. Deutsches Institut für Menschenrechte, *The Optional Protocol to CEDAW: Mitigating Violations of Women's Human Rights*, INT'L TRAINING SEMINAR FOR NGOS & WOMEN'S RTS. ACTIVISTS (Mar. 13–15, 2003), https://bit.ly/3FajAUS [https://perma.cc/CU5Z-SJVP].

214. International Women's Rights Action Watch Asia Pacific, *The OP-CEDAW as a Mechanism for Implementing Women's Human Rights: An Analysis of Decisions Nos. 6–10 of the CEDAW Committee Under the Communication Procedure of the OP-CEDAW*, IWRAW ASIA PACIFIC OCCASIONAL PAPER SERIES NO. 13, at 12 (2009), https://bit.ly/3JbucUG [https://perma.cc/N69D-NSM7].

This mechanism addresses a representational concern as well; for example, in the United States, there is a significant gender gap in the appellate bench of lawyers arguing before the courts of appeals and Supreme Court, leading to concerns about how well an unrepresentative bar can serve a diverse population.[215] The more direct route to the CEDAW Committee and its processes, coupled with the ability to obtain civil society support, thus increases accessibility or perceptions of accessibility and operates as a safety valve for people who have suffered human rights violations.

Third, the CEDAW Committee's decisions have taken an expressly intersectional, comprehensive approach to addressing gender inequalities that holds great promise in the face of global backlash.[216] The CEDAW Committee is able to rely and build on CEDAW's provisions as well as evolving concepts of discrimination and human rights.[217] Violence against women has been a particularly repeated theme in the decisions of the Committee,[218] and the Committee in its decisions and interpretations has helped flesh out key concepts such as the state responsibility of due diligence as well as acknowledgement of particular intersectional vulnerabilities.[219] The Committee's ability and willingness to engage with issues concerning reproductive health and bodily autonomy and integrity[220] holds particular promise for women in the United States and worldwide who are facing rollbacks of rights in the midst of global backlash. For example, in two separate cases involving forced sterilization and maternal mortality, the Committee discussed the systemic and intersectional nature of the violations before it and even emphasized "the duty of States parties to ensure women's right to safe motherhood and emergency obstetric services,"[221] offering critical bulwarks against the erosion of rights in cases such as *Dobbs* and the weakening of laws addressing gender-based violence.

Fourth, despite the successes of the Optional Protocol and the Committee's experts in producing critical and transformative recommendations, reports and decisions, the experience of the Com-

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215. *See* Lynne Barr & Juanita Harris, *Stalled Progress Among Women Lawyers Requires a Multifaceted Solution*, Ms. MAG. (Feb. 10, 2022), https://bit.ly/3H9B3xw [https://perma.cc/N46U-SZTR].

216. *See* International Women's Rights Action Watch Asia Pacific, *supra* note 216, at 6.

217. *See id.* at 41.

218. *See* Hodson, *supra* note 201, at 567–68.

219. *Id.*

220. *Id.* at 569.

221. *Id.* at 569–70.

mittee's output and practice under the Optional Protocol has also made clear that additional support beyond diverse judges and gender-sensitive courts is needed to truly realize gender equality. The Optional Protocol is still a limited remedy, available only to people who have been able to access the legal system at least in some form, and judges may not have access to all the tools needed to address a particular issue.[222] Even more concerning is that although the Committee holds power in the international human rights system, arguably it simultaneously occupies a peripheral role within that system with significantly less power than other human rights bodies or other institutions of global governance.[223] This type of marginalization is replicated throughout global judicial systems, as even where women make it into judiciaries, they are often concentrated in family or civil courts, which indicates as with the Committee itself, gender issues and "women are not being fully or equitably integrated into the judiciary in many countries."[224] Ultimately, the Committee's role and experience simply confirms that the judiciary remains only one tool in the more comprehensive toolbox needed to enforce women's rights throughout law and society.[225]

CONCLUSION

Here, we may return to the question raised by Justice Ginsberg at the start of the Article; that is, will it be enough to have a judicial body made up of almost entirely women? What can we learn from this comparative analysis about the strategies and modes of representation that promote equality and those that do not, particularly in the midst of backlash?

The analysis above indicates that women judges play a transformative role in judiciaries, changing stereotypes of leadership and affecting change in areas of profound inequality and discrimination for women. Even the mere presence of judges who support the legal principle of gender equality and parity in the judiciary strengthens the rule of law, human rights, and democracy. Yet, the presence of women judges alone cannot move gender equality in law and practice forward without a strong legal framework underlying rights, including the recognition of gender parity in the judiciary as a legal

222. *See* International Women's Rights Action Watch Asia Pacific, *supra* note 216, at 5.

223. *See* Hodson, *supra* note 201, at 566–67.

224. INT'L ASS'N OF WOMEN JUDGES, *supra* note 28, at 2.

225. *See* International Women's Rights Action Watch Asia Pacific, *supra* note 216, at 5 (acknowledging that litigation and the judicial system must be used in conjunction with policy and law reform for social transformation of gender norms).

obligation as well as a powerful tool for achieving equality. Moreover, the judiciary, including the courts, judges and the legal principles and decisions that comprise judicial systems, form just one piece, albeit a critical one, in the arsenal of tools and mechanisms needed to achieve widespread change and move closer to gender equality. Nevertheless, especially at this critical moment of backlash in international and domestic legal arenas, judicial parity and gender equality are crucial tools and standards in the long journey to sustainable and comprehensive gender equality.

This Article has provided comparative data and analyses to support the recognition of gender parity in the judiciary as a legal obligation, as well as highlighting the powerful roles that representation and parity play in achieving gender equality. It has further argued that efforts to strengthen parity in the judiciary are deeply intertwined with and must be viewed in the context of efforts to combat the global backlash to gender equality and reinforce the global rules-based order. In situating the debate over gender parity in the judiciary within the broader context of the global backlash to gender equality and international norms and institutions, it seeks to add to the scholarship and strategies focused on achieving meaningful representation in the judiciary and gender equality in the United States. Ultimately, to create meaningful change, gender parity in the judiciary must be supported as a foundational legal obligation as well as a mechanism for achieving gender equality, not merely viewed as an admirable goal. If supported by institutions, norms, resources, and strategies, pursuit of representation and gender parity in the judiciary holds great transformative potential for the achievement of equality in the United States and globally.

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