Politics, Identity, and Class Certification on the U.S. Court of Appeals

December 2021

Published by The Civil Justice Research Initiative, part of UC Berkeley School of Law, with support from AAJ's Robert L. Habush Endowment

Berkeley Law | Civil Justice Research Initiative

ABOUT THE AUTHORS

Stephen B. Burbank
David Berger Professor for the Administration of Justice at the University of Pennsylvania, Carey Law School

Stephen B. Burbank is David Berger Professor for the Administration of Justice at the University of Pennsylvania, Carey Law School. Burbank is the author of definitive works on federal court rulemaking, inter jurisdictional preclusion, litigation sanctions, international civil litigation, litigation retrenchment, and judicial independence and accountability. He is co-editor (with Barry Friedman) of Judicial Independence at the Crossroads: An Interdisciplinary Approach (Sage, 2002). His 1982 article, "The Rules Enabling Act of 1934," reoriented the theory and practice of court rulemaking. Burbank's recent scholarship includes a detailed study of the Class Action Fairness Act of 2005 in historical perspective, an analysis of different approaches to the study of judicial behavior in law and political science, and an empirical study of the retirement decisions of federal judges (with Judge Jay Plager and Gregory Ablavsky). His recently published book (with Sean Farhang), Rights and Retrenchment: The Counterrevolution Against Federal Litigation (Cambridge, 2017) uses original archival research and original data sets to map efforts to scale back private enforcement of federal law across institutional sites. Burbank was appointed by the Speaker of the U.S. House of Representatives to the National Commission on Judicial Discipline and Removal and was a principal author of the Commission's 1993 report.

Sean Farhang
Elizabeth Josselyn Boalt Professor of Law, and Professor of Political Science and Public Policy, at the University of California, Berkeley

Sean Farhang is Elizabeth Josselyn Boalt Professor of Law, and Professor of Political Science and Public Policy at Berkeley Law. His research interests focus mainly on civil litigation, and the role of litigation and courts in regulatory implementation, with a particular interest in the political and institutional forces that shape it. His first book, The Litigation State: Public Regulation and Private Lawsuits in the U.S. (Princeton University Press, 2010), examines the sources of private litigation in the enforcement of federal law, stressing Congress's role in enacting incentives calculated to mobilize this form of regulatory implementation in the American separation of powers context. The book won the American Political Science Association's Kammerer Award for the best book in the field of U.S. national policy. His second book, Rights and Retrenchment: The Counterrevolution Against Federal Litigation (with Stephen Burbank, Cambridge University Press, 2017), examines the emergence and development of the political and legal movement to restrict opportunities and incentives for private enforcement of federal law through litigation. His work on the institutional and political dimensions of American civil justice has also appeared in numerous social science and law journals.

ABSTRACT

This white paper presents the first empirical analysis of how the ideology, race, and gender of Court of Appeals judges influence class certification decisions under Rule 23 of the Federal Rules of Civil Procedure. We find that the ideological composition of the panel (measured by the party of the appointing president) has a very strong association with certification out-comes, with all-Democratic

panels having dramatically higher rates of pro-certification outcomes than all-Republican panels. We also find that the presence of one African American on a panel, and the presence of two women (but not one), is associated with procertification outcomes.[1]

KEY FINDINGS

- Contrary to conventional wisdom in scholarship on diversity on the Courts of Appeals, the impact of diversity extends beyond conceptions of "women's issues" or "minority issues."
- As transsubstantive procedural law, class action doctrine traverses many policy areas, and the consequences of gender and racial diversity on class certification decisions radiate widely across the legal landscape. It would be rational for judges to consider how class certification doctrine in a case that does not implicate issues on which they have distinctive preferences might affect certification in cases that do implicate these issues.
- Transsubstantive procedural law affecting access to justice may itself be a policy domain in which women and African Americans have distinctive preferences.
- Women have substantially more procertification preferences based on outcomes when there are two women on a panel. However, panels with one woman are not more likely to yield procertification outcomes. Panels with two women occur at sharply lower rates than women's percentage of judgeships, and as a result, certification doctrine underrepresents women's preferences while overrepresenting those of male judges.

INTRODUCTION

This white paper explores the relationship between the ideology, gender, and race of U.S. Court of Appeals judges and decisions addressing class certification under Rule 23 of the Federal Rules of Civil Procedure. Our findings shed important light on the potential impact that diversity on appellate courts can have on access to justice.

One goal of increasing the diversity of the judiciary is the creation of a federal bench that descriptively reflects the country's demographics, which can enhance the judiciary's democratic legitimacy and appearance of impartiality. Another purpose concerns legal substance. Some believe that because women and racial minorities are more likely to have seen or experienced discrimination, they are more inclined to believe and empathize with a plaintiff who has been discriminated against, affecting case outcomes. During the first two years of his administration, Trump's judicial appointments were 92% white and 76% male, and debates over gender and racial diversity in federal judicial appointments have escalated in recent years.

The relationship between judge characteristics and judicial decision-making is among the largest fields of inquiry in the social scientific study of courts, and empirical scholars have done substantial work on the role of ideology, gender, and race in judicial decision-making on the U.S. Courts of Appeals.

[1] This white paper presents edited excerpts from "Politics, Identity, and Class Certification on the U.S. Courts of Appeals" by Stephen B. Burbank and Sean Farhang in the Michigan Law Review (2020).

However, this field has largely ignored procedural law, including class actions—we have not been able to find a single empirical Court of Appeals study on the relationship between judge characteristics and decisions on class certification. The scholarly neglect of the possible influence of ideology with respect to class actions is puzzling, because class aggregation under Rule 23 can be a vehicle of enormous regulatory power. The neglect of gender and race as possible influences on class certification decisions may reflect the apparent consensus that judges' gender and race influence their preferences only in a narrow band of cases implicating discrimination and inequality.

In Part I, we briefly review the literature on Court of Appeals decision-making that we build on. We emphasize two points. First, the literature shows that when Court of Appeals judges' party, gender, and race are associated with their votes, the composition of the panel often explains more variation in judges' votes than their own individual characteristics. The key point is that Court of Appeals judges' preferences (measured by their characteristics) can influence the votes of their copanelists. Second, studies focusing on some types of civil rights claims show that panels with one woman or African American are more likely to produce pro-civil rights outcomes compared to panels with all men or all whites, providing systematic evidence that minority-group judges may influence outcomes even when they are in the panel minority.

Parts II and III contain our core contributions. We rely on an original and comprehensive dataset of Court of Appeals panel decisions spanning from 1967 to 2017 that address whether to certify a class under Rule 23. We find a very strong association between the political party of the appointing president and certification votes and outcomes, with all-Democratic panels yielding nearly three times as many procertification outcomes as all-Republican panels. We also show that the role of ideology in certification is comparable in size to the role of ideology in cases presenting some of the most contentious issues of our day, including capital punishment, employment discrimination, desegregation, and abortion. If the judicial-behavior literature's neglect of class certification reflects an assumption that the effects of judicial ideology do not reach into this domain, we show that assumption to be false.

We go on to show that racial and gender diversity on panels is also consequential to certification, although we discern important differences between the race and gender dynamics on panels. The presence of a single African American on a panel increases the probability of a procertification outcome. In notable contrast, the presence of a single woman on a panel is not associated with an increased probability of a procertification outcome. This does not mean, however, that women do not have more procertification preferences. When two women serve on a panel, forming a majority, its rate of procertification outcomes is much larger than on panels with three men. These results highlight some important limits of Court of Appeals scholarship suggesting that women and racial minorities do not have different policy preferences than men and whites, but basing that claim only on panels with women or non-whites in the panel minority. Neither our data nor prior panel-effects scholarship allows us to identify the reasons for the different preferences of women and African Americans as to class certification or, in the case of gender, why two women on a panel as opposed to one are associated with higher rates of procertification voting and outcomes. We do, however, offer suggestions on both questions as a possible guide for additional research.

As transsubstantive procedural law, the Federal Rules of Civil Procedure apply across substantive domains and can enable or constrict access to justice in many different areas. A controlling interpretation of a Federal Rule in an antitrust case, for example, can carry over to its application in a voting rights case. One important insight of this white paper is that the transsubstantive nature of the

Federal Rules also conveys the significant effects of diversity, where they exist, across the landscape of American regulatory law.

I. PAST RESEARCH ON APPELLATE DECISION-MAKING

From the dawn of judicial-behavior literature until the late 1990s, judicial-politics scholars studied appellate decision-making by evaluating whether judges' characteristics (of various kinds) were associated with their votes. Beginning with landmark studies by Revesz (1997) and Cross and Tiller (1998), scholars discovered that in many salient policy areas, the votes of judges on three-judge Court of Appeals panels are associated with the identity characteristics of their panel colleagues. These initial studies found that Court of Appeals judges' votes were influenced by the party of the appointing president of other judges on the panel, and these insights were then extended to the influence of judges' gender and race on panel dynamics. A number of studies, such as those of Farhang and Wawro (2004) and Boyd, Epstein, and Martin (2010), found that in employment discrimination cases, men serving on three-judge Court of Appeals panels with one woman were more likely to rule for the plaintiff than men serving on panels with two other men. Similarly, Cox and Miles (2008) found that in voting rights cases, whites on an appellate panel were more likely to vote in favor of liability when sitting with one member of a racial minority. Kastellec (2013) also found that in affirmative action cases, whites were more likely to vote in the pro-affirmative action direction when sitting with one African American on the panel.

In addition, the panel-effects literature makes clear that studying the influence of a minority group on the appellate bench requires considering the institutional context of three-judge appellate panels. Scholars regard panel unanimity as a "norm" on the U.S. Courts of Appeals, where disagreement is rare. One explanation—the "suppressed dissent" explanation—for the norm of panel unanimity is that judges join opinions that they disagree with because of external factors such as workload pressures or the loneliness of dissent. Another explanation—the "modified content" explanation—is that judges withhold their dissents so they can modify and influence the majority opinion in the direction of their preferences.

Long-established social scientific evidence (relied on throughout this paper) shows that systematic differences exist in preferences across groups of Court of Appeals judges, such as Democratic versus Republican appointees, whites versus nonwhites (or other racial subsets), or men versus women. Research on the U.S. Courts of Appeals civil docket finding variation along gender or racial lines has clustered heavily in areas relating to discrimination and in-equality, and such variation has sometimes been absent even in those areas. By recognizing that such evidence sometimes exists, we do not indulge the facile notion that women or racial minority judges have homogeneous preferences, or believe that there is a monolithic women's perspective or racial minority perspective among judges. We do believe, however, that in some domains of law, race and gender may be one constitutive element of a judge's views. The same is true of ideology.

In a widely cited study, Boyd, Epstein, and Martin (2010) analyze the relationship between the gender and votes of Court of Appeals judges in thirteen separate policy areas. They report that women vote differently, and influence men, in only one area—gender-based employment discrimination claims. They find that women do not vote differently than men in numerous areas that do not explicitly implicate issues of discrimination, such as campaign finance, federalism, piercing the corporate veil, Takings Clause, and environmental cases. Perhaps more surprisingly to some observers, they also find that

women do not vote differently than men in some areas that do implicate gender and discrimination, including abortion, sexual harassment, and affirmative action. Ultimately, their interpretation is that women vote differently, and influence men, in domains in which they "possess unique and valuable information emanating from shared professional experiences." Haire and Moyer (2015) similarly conclude that issues of gender discrimination are "the single exception" to the general rule that women judges do not vote differently than their male colleagues.

II. METHODOLOGY

This project is part of a larger study of decision-making by federal Courts of Appeals on issues of class certification. We examine both published and unpublished cases. With respect to published (precedential) cases, we endeavored to build a comprehensive dataset of federal Court of Appeals panel decisions on class certification[2]. These decisions range from 1966, when the modern Rule 23 became effective, through 2017. With respect to unpublished (nonprecedential) cases, we collected the same data from 2002, by which time nearly all unpublished cases appeared in the Federal Appendix, through 2017. In total, we identified 1,344 certification decisions.

Of course, published Court of Appeals decisions differ from a random sample of decisions in important respects; published decisions are not representative of all litigated cases. But we can learn from both types of decisions. Regarding precedential decisions, we are interested in the influence of the ideological and identity characteristics of judges on the creation and development of law in a pro- versus anti- plaintiff direction. In initial models we will examine only published opinions.

We are also interested in the full universe of decided certification appeals because solely analyzing published opinions would possibly lead to unrepresentative or misleading findings. The same judges that render decisions in published cases also decide whether the case will be published, threatening to confound inferences about the relationship between judge characteristics and case outcomes. Thus, we also examine models of a random sample of cases, restricted to the circuit years in which we have data on both published and unpublished cases. In those models, the results look very similar to what we observe when analyzing only published cases.

Our dependent variable is whether a decision is pro- or anti-certification. In order to code it, the certification analysis in each decision was read in full.

We code a decision as procertification (=1) if the Court of Appeals

- affirms the trial court's certification,
- reverses the trial court's decision not to certify and directs it to certify,
- or reverses the trial court's decision not to certify and remands for further proceedings on certification.

We code a case as anticertification (=0) if the Court of Appeals

- affirms the trial court's decision not to certify,
- reverses the trial court's decision to certify and directs that a class not be certified,

[2] See the appendix of the full-length article for additional quantitative material.

- or reverses the trial court's decision to certify and remands for further proceedings on certification.

The task of measuring how a judge or panel characteristic may influence lawmaking is difficult. While the most clearly observable manifestation of influence is an increase in the probability of pro- or anti-certification decisions, the ways in which judges frame and justify their decisions can also reflect the influence of panel characteristics on the policy consequences of a case. Although we believe that our dependent variable captures much that is important to certification under Rule 23, we readily acknowledge its limits, and this measurement constraint limits the inferences we can make from our data. For example, if we find that some judge or panel characteristic is not associated with either pro- or anti-certification voting, we cannot conclude that the judge or panel characteristic has no directional influence on opinion content. On the other hand, to the extent that we find that a judge or panel characteristic is associated with a decision on certification in a particular direction, that characteristic is likely influencing opinion content in the same direction in more subtle ways.

For each case, we identified the party[3], gender, and race of each judge using the Federal Judicial Center's biographical database. With respect to race, our models focus on whether African Americans have different voting behavior than whites and other judges, with "other" being Hispanic, Asian American, and Native American. Numerous past studies on the relationship between race and Court of Appeals judges' decisions have focused, in whole or in part, on African Americans as a discrete category. We also examined alternative models pooling all nonwhites into a single racial minority category and comparing them to whites. In those models, we found no statistically significant differences at either the individual or the panel level[4]. The race differences we report are distinctive to African Americans.

The inferences we draw from the party, gender, and race variables are based on the assumption that case assignment to panels is random. The models contain circuit fixed effects and year fixed effects. Circuit fixed effects account for any variables differing across circuits, such as circuit doctrine that may have a pro- or anti-certification slant or variation in the size and content of caseloads. Year fixed effects account for any variables that change over time, such as national caseload trends, changes in Rule 23, and the changing composition of the Supreme Court, as well as attitudes among male and/or white judges towards co-panelists who are women or African Americans. The circuit and year fixed-effects approach most effectively allows us to estimate the effects of identity characteristics because it controls for any variables that would take the same value for each judge in the same circuit and each judge in the same year.

III. FINDINGS

A. A DESCRIPTIVE LOOK AT THE DATA

[3] We use the party of the appointing president as a proxy for judges' ideological preferences.

[4] We also find that Hispanic judges' votes and the presence of a Hispanic judge on a panel are not associated with higher probabilities of procertification votes and outcomes. Among our cases with published opinions, we have an insufficient number of panels (twelve cases) with a majority of Hispanic judges to evaluate their preferences when in the majority. It is not possible to evaluate with confidence whether minority-group judges have distinctive preferences in some issue domains based only on their individual votes and outcomes when they are in a panel minority. There are an insufficient number of cases in the data with Asian American and Native American judges to evaluate them separately.

We first present the data descriptively and then turn to statistical models. We recognize that there may be interesting variation over time in certification voting behavior and outcomes. However, our focus in this white paper is on the relationship between judge characteristics and certification votes and outcomes. Other than subsetting the data at its approximate midpoint, we treat the data cross-sectionally and do not examine longitudinal variation.

TABLE 1: POLICY AREAS OF CAUSES OF ACTION UNDERLYING CERTIFICATION DECISIONS

	1967–1994 Published	**1995–2017 Published**	**2002–2017 Published & Unpublished**
Antitrust	6%	6%	6%
Civil Rights, Antidiscrimination	39%	13%	10%
Civil Rights, Prisoner	7%	4%	7%
Civil Rights, Other	8%	6%	4%
Consumer	5%	23%	25%
Environmental	___	3%	2%
Insurance	___	4%	6%
Labor and Employment	5%	15%	18%
Product Liability	___	6%	5%
Public Benefits	8%	___	___
Securities	11%	9%	8%
Other	11%	11%	9%

Table 1 shows the policy areas of the causes of action underlying the certification decisions in our data for all policy areas that exceed 2% of the data for each subset displayed. We show descriptive statistics separately for discrete periods and data sources that are used in the models discussed later.

TABLE 2: INDIVIDUAL-LEVEL CERTIFICATION PERCENTAGES

	1967–1994 Published	**1995–2017 Published**	**2002–2017 Published & Unpublished**
All Votes	43%	41%	37%
Republicans	39%	34%	30%
Democrats	47%	51%	44%
Men	44%	38%	34%
Women	38%	49%	43%
White/Other	43%	40%	36%

African Americans	43%	54%	43%

Table 2 provides the percentage of procertification votes by party, gender, and race. The procertification voting rate in published cases was similar in 1967–1994 (43%) and 1995–2017 (41%), but the gap between groups grew in the later period. The difference between Republican and Democratic voting about doubled, increasing from 8 to 17 percentage points. In the earlier period, African American and white/other judges voted in favor of certification at equal rates, but in the later period African Americans were more pro-certification by 14 percentage points. Women were less pro-certification than men by 6 percentage points in the earlier period, and were more pro-certification by 11 percentage points in the later period.

One-third of the cases in the period 2002-2017 are unpublished—when unpublished cases are accounted for, the certification rates decline for all judge types since denials are more prevalent in unpublished dispositions.[5] In these cases, the party and gender gaps remain comparable to published cases in 1995–2017, whereas the race gap narrows. The dissent rate in the data is quite low, at only 2%. Although it increased over time, it never reaches 3% in any segment of the data.

TABLE 3: PANEL-LEVEL CERTIFICATION PERCENTAGES

	1967–1994 Published	**1995–2017 Published**	**2002–2017 Published & Unpublished**
"___" indicates fewer than ten cases.			
All Cases	43%	41%	36%
PARTY			
All Republicans	32%	28%	28%
1 Dem, 2 Reps	41%	37%	28%
2 Dems, 1 Rep	48%	51%	45%
All Democrats	49%	63%	58%
GENDER			
All Men	44%	34%	30%
1 Woman, 2 Men	38%	44%	37%
2 Women, 1 Man	___	60%	51%
All Women	___	___	___
RACE			
All White/Others	44%	39%	35%
1 African American, 2 White/Others	42%	51%	42%
2 African Americans, 1 White/Other	___	___	43%

5 In 2002–2017, there was a procertification outcome in 43% of published cases and 24% of unpublished cases.

All African Americans	___	___	___

Table 3 examines the percentage of procertification outcomes (not votes) on panels that have zero, one, two, and three panel members with the characteristic in question. We lack sufficient data on panels with three women, or with two or three African Americans, to meaningfully characterize them. At the panel level, the relationships are more pronounced than at the individual level. In published cases, the difference in procertification outcomes on all-Republican panels compared to all-Democratic panels was 17 percentage points in 1967–1994; it jumped to 35 percentage points in 1995–2017; and it was 30 percentage points in all cases (published and unpublished) in 2002–2017.

We observe small differences across gender and racial panel compositions in published cases from 1967–1994 (when women and African Americans are nearly always in the panel minority). In published cases from 1995–2017, more clear differences emerge. The move from a panel with three men to one with a single woman and two men is associated with a 10 percentage-point increase in procertification outcomes, and the addition of a second woman is associated with another 16 per-centage-point increase, for a total of 26 percentage points. These differences decline modestly but remain large in all cases from 2002–2017, growing by 7 percentage points with the addition of one woman, and an additional 14 percentage points with the addition of a second woman, for a total increase of 21 percentage points. In published cases from 1995–2017, the addition of one African American to an all-white/other panel is associated with a 12 percentage-point increase in procertification out-comes, which declines to a difference of 7 percentage points in all cases from 2002–2017.

B. STATISTICAL MODELS

Of course, bivariate descriptive statistics can be misleading, especially when they pool cases over a half century and across every circuit. A statistical model is required to get a stronger handle on the data. In the empirical models of published cases that we discuss below, we first present a model pooled over the full period 1967–2017 and then present models separately for the periods 1967–1994 and 1995–2017. Dividing the data roughly in half allows us to observe whether the significance or magnitudes of results changed materially over time.

In addition, the breakpoint we select is substantively significant. As documented in our prior work, beginning around the mid-1990s, the Republican Party became more focused on restricting private civil actions, particularly class actions—Congressional Republicans introduced a growing number of anti-class action bills, conservative advocacy groups elevated their focus on curtailing class actions, and Supreme Court justices became more ideologically polarized in their voting on Rule 23 issues.

TABLE 4: PREDICTED PROBABILITIES OF PROCERTIFICATION OUTCOMES FOR PARTY, GENDER, AND RACE PANEL COMBINATIONS

	Model A 1967–2017 Published	***Model B 1967–1994 Published***	***Model C 1995–2017 Published***	***Model D 2002–2017 All Cases***	***Model E 2002–2017 All Cases No Discrim.***	***Model F 2002–2017 All Cases No Civ. Rts.***
"___" indicates that panel type is not statistically distinguishable from the reference category (in italics). ** indicates no cases in model.						

PARTY						
3 Reps	26%	31%	24%	20%	21%	17%
1 Dem, 2 Reps	48%	51%	___	___	___	___
2 Dems, 1 Rep	55%	56%	52%	47%	47%	50%
3 Dems	61%	57%	64%	58%	58%	67%
GENDER						
3 Men	37%	41%	32%	28%	28%	31%
1 Wom, 2 Men	___	___	___	___	___	___
2 Wom, 1 Man	59%	___	57%	49%	50%	49%
3 Women	**	**	**	___	___	___
RACE						
3 White/ Others	41%	43%	38%	34%	34%	35%
1 Af Am, 2W/Os	50%	___	54%	47%	48%	49%
2 Af Ams, 1W/O	___	___	___	___	___	___
3 Af Ams	**	**	**	**	**	**

Note: In models with three women or two African Americans designated as statistically indistinguishable from panels with three men and those with three white/other judges, the maximum number of cases present is four and fourteen, respectively, and thus we lack sufficient data to offer meaningful estimates.

1. INDIVIDUAL-LEVEL MODEL OF JUDGE VOTES

We begin with naive models (ignoring panel composition) that include judge-level variables measuring party, gender, and race. In published cases over the full period (Model A), party is significant and positive with a magnitude similar to the simple percentage differences in raw voting rates. Party is associated with an increase of 11 percentage points in the probability of a procertification vote. The separate models for 1967–1994 (Model B) and 1995–2017 (Model C) show that panel ideology grew from a 7 percentage-point difference in the first period to a 12 percentage-point difference in the second. In the 2002–2017 model of all cases (Model D), the difference was 10 percentage points. Gender and race are insignificant in the 1967–2017 (Model A) and 1967–1994 (Model B) models of published cases. They cross the .1 threshold in the 1995–2017 model of published cases (Model C) and the 2002–2017 model of all cases (Model D). African American judges were 8 percentage points (Model C) and 6 percentage points (Model D) more likely to vote in a procertification direction, and women were 4 percentage points more likely to do so in both models.

2. PANEL-LEVEL MODEL OF OUTCOMES

The data are much more interesting at the panel level. In our panel-level outcome model, the unit of analysis is the case. In each case, we measure panel effects with dichotomous variables (taking the value of 0 or 1) indicating whether the panel contained zero, one, two, or three Democrats; zero, one, two, or three women; and zero, one, two, or three African Americans. The reference categories for the party, gender, and race panel variables are panels with three Republicans, panels with three men, and panels with three white/other judges. This allows us to evaluate, for example, whether panels with one, two, or three Democrats have a probability of procertification outcomes that is statistically distinguishable from an all-Republican panel (the reference category), and if so, by what margin.

Party. Model A shows that panels with one, two, and three Democrats are all statistically significantly more likely to render procertification outcomes than all-Republican panels in published cases over the full period.

"[P]anels with one, two, and three Democrats are all statistically significantly more likely to render procertification outcomes than all-Republican panels in published cases over the full period"

Table 4 displays the predicted probabilities of procertification outcomes for each of the four partisan (ideological) panel combinations. All-Republican panels have a 26% estimated probability of a procertification outcome. The probability grows to 48% for RRD panels, to 55% for RDD panels, and to 61% for all-Democrat panels.

The separate models for published cases in 1967–1994 (Model B) and 1995–2017 (Model C) show that the impact of panel ideology is potent in both periods but materially larger in the latter. In the 1967–1994 period, the move from an all-Republican to an all-Democratic panel is associated with a 26 percentage-point increase in the probability of a procertification outcome, from 31% to 57%. In the 1995–2017 period, this move is associated with a 40 percentage-point increase, from 24% to 64%. Further, while RRD panels are statistically distinguishable from RRR panels in the earlier period, in the latter period they are clearly not. This means that one Democrat is not panel affecting two Republicans in 1995–2017. A supplemental regression shows that one Republican did not panel affect two Democrats in published cases in either 1967–1994 or 1995–2017.[6] Thus, the difference in certification outcomes on DDD panels and RRR panels grew in the contemporary period. During this period, as measured by outcome in published cases, partisan panel dynamics became uniformly majoritarian, with partisan minorities in general failing to influence partisan majorities.

Model D includes both published and unpublished cases from the period 2002–2017, and we find that the addition of unpublished cases changes little. Although the rate of procertification outcomes declines marginally for all panel types—indicating that unpublished dispositions have a lower certification rate on average—the results for party differences look very similar to those in the 1995–2017 model of published cases. The gap between all-Republican and all-Democratic panels is 38 percentage points (as

6 To arrive at this conclusion, we reran the same models (B and C), but this time we held out as the reference category panels with three Democratic judges. The coefficient for a DDR panel is clearly insignificant in both models, showing that one Republican does not panel affect two Democrats.

compared to 40 in published cases in 1995–2017). And it remains the case in this model that partisan minorities do not panel affect partisan majorities.

"[P]anels with two women (but not one) are statistically more likely to reach a procertification outcome than panels with three men."

Gender. Controlling for the partisan and racial composition of the panel, panels with one woman do not have a statistically distinguishable probability of a procertification outcome compared to panels with three men in any model. Although we have many panels with one woman—276 panels, or 45% of the cases in the 2002–2017 model of all cases—the coefficient on the variable is small and it never approaches significance. In contrast, for panels with two women it is highly significant, and the difference is large, indicating that panels with two women (but not one) are statistically more likely to reach a procertification outcome than panels with three men.

In published cases over the full period (Model A), moving from a panel with three men to one with two women is associated with a 22 percentage-point increase (37% to 59%) in the probability of a procertification outcome.

The separate models for published cases in 1967–1994 (Model B) and 1995–2017 (Model C) show that the result for panels with two women is driven entirely by the latter period. This is no surprise because there were only two panels with two women in our data prior to 1995. When analysis is restricted to the latter period, the difference between panels with two women and those with three men is a little larger, associated with an increase of 25 percentage points (32% to 57%) in the probability of a procertification outcome.

In our model of both published and unpublished cases decided in 2002–2017 (Model D) we again find that the addition of unpublished cases changes little. Panels with two women are associated with a 21 percentage-point growth in the probability of a procertification outcome, which is comparable to the 1995–2017 model of published cases. In our data for the 2002–2017 period, there are 104 panels with two women. Sixty-five different women appear on those panels, which are spread over ten circuits.

This raises the question of whether women in the panel minority, when not affecting the outcome votes of their male colleagues, are more likely to dissent. Or are women in the panel minority joining the majority opinion nevertheless and suppressing their dissents? We found that as compared to a man serving on a panel with two other men, women are not more likely to dissent when serving with two men, nor are men when serving with two women—the gender composition of the panel is not in any respect associated with dissenting behavior.

We considered the possibility that men's probability of a procertification vote is unaffected by the presence of one woman because women are, on average, less senior. That is, it is possible that judges are more likely to defer to more senior panel colleagues, so the lack of women's influence on outcomes when they are in the minority may be a function of their relative lack of seniority rather than their gender. We evaluated whether increasing levels of seniority among women serving on panels with two men are associated with certification outcomes and found the relationship to be clearly statistically insignificant. Women's lack of influence on outcomes when they are in a minority is not associated with their level of seniority.

We also considered the possibility that women from a particular political party are associated with a distinctive probability of procertification voting that is not captured by the direct effects of party and gender. We find no evidence that the gender differences we detect are distinctively driven by Democratic or Republican women.

Our interpretation of the higher rate of procertification voting by women when they form a panel majority is that it more accurately reflects women's sincere preferences. When women are in the panel minority, they generally do not affect certification outcomes in the direction of the procertification preferences revealed when they are in the majority. From this we conclude that they are joining opinions with which they disagree without modifying the content of those opinions *as measured by outcome*.

This result stands in marked contrast to past work finding gender or race panel effects on the Courts of Appeals. In each of these studies, where there was clear evidence of gender- or race-based variation in preferences, the presence of one woman or African American in the panel minority influenced the voting of men and whites in the majority. All of these results, however, concerned issues of discrimination and inequality, and we find that a different and more majoritarian gender dynamic is at work in class certification decisions.

An important caveat is necessary regarding what can be inferred from the data, which shows that one woman's presence on a panel does not increase the probability of a procertification outcome compared to panels with three men. Because we lack a sufficient number of panels with three women (there are only four in the data), we cannot rule out the possibility that one man on a panel with two women would similarly fail to influence the probability of certification relative to panels with three women. Thus, we do not know whether the structure of gender panel dynamics is symmetric or asymmetric.

Fifteen percent of the votes in the data are cast by women, and there is at least one woman on 29% of the three-judge panels, but women are in the majority in only 8% of the panels. Men are 87% of the votes and in the majority 92% of the time. As distinguished from the earlier studies finding gender panel effects, where women in the minority influenced outcomes, the majoritarian gender panel dynamics in certification decisions yield circuit lawmaking that significantly underrepresents women's preferences (and overrepresents men's preferences) relative to their numbers on the Courts of Appeals.

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Race. Panels with one African American have a statistically significantly higher probability of a procertification outcome than all-white/other panels in published cases over the full period (Table A-2, Model A). All white/other panels have a 41% predicted probability of reaching a procertification outcome, while panels with African Americans have a 50% probability (Table 4)—a 9 percentage point difference. In contrast, panels with two African Americans are not statistically distinguishable from all

"Panels with one African American have a statistically significant higher probability of a precertification outcome than all-white/other panels."

white/other panels. However, with only eleven such panels in this model, we do not regard this estimate as meaningful.

The separate models for published cases in 1967–1994 (Model B) and 1995–2017 (Model C) show that the higher probability of certification on one-African American panels is primarily driven by the latter period. Of 166 panels with one African American, 72 are in the former period, and 94 in the latter. In the first period the variable is insignificant, and in the second period the coefficient doubles and becomes significant. In the 1995–2017 model, the presence of one African American is associated with an increase of 16 percentage points (38% to 54%) in the probability of a procertification outcome (Table 4).

In the model of both published and unpublished cases decided in 2002–2017 (Model D) we again observe little change compared to the model of published cases decided in 1995–2017. The presence of one African American remains significant and is associated with a 13 percentage-point increase in the probability of a procertification outcome, from 34% to 47%. In our data for 2002–2017, there are 130 panels with one African American. Thirty-three African Americans appear in those panels, which are spread over every circuit.

We also considered the possibility that African Americans from a particular political party are associated with a distinctive probability of procertification outcomes that is not captured by the direct effects of party and race. We find no evidence that the race differences we detect are distinctively driven by Democratic or Republican African Americans. Likewise, we considered whether judges with the intersectional identity of African American women (or men) are associated with more (or less) procertification voting than is captured by the separate direct effects of the race and gender variables. We again find no evidence that it is the case, although the small number of African American women in the data precludes confidence in this result.

3. PANEL-LEVEL MODEL OF JUDGE VOTES (AS DISTINGUISHED FROM CASE OUTCOMES)

We also examined models of individual judge votes, where the key independent variables capture both the salient characteristic of the voting judge and those of her colleagues on the panel. This allows us to compare, for example, the votes of a man sitting with two men with the votes of a man sitting with one man and one woman. We then examined vote-level versions of the case-level logit models we have just discussed, including the same control variables. Given the very high rate of unanimity in our cases (98%), it is not surprising that the vote-level models tell the same panel effects story as the outcome-level models with respect to party, gender, and race panel effects.

4. DISCRIMINATION AND OTHER CIVIL RIGHTS CLAIMS VERSUS OTHER UNDERLYING CAUSES OF ACTION

Another distinctive feature of our results concerns the existence of variation along gender and race lines in judges' preferences related to class certification. We considered the possibility that the gender and race results we report as to class certification are being driven by cases with underlying discrimination claims, and thus that they do not represent much of a departure from existing work on gender, race, and judging. That is, past work has shown that women and African Americans on the Courts of Appeals

are more likely to favor plaintiffs making at least some types of discrimination claims, perhaps making them more likely to favor discrimination plaintiffs seeking class certification. When all types of discrimination claims are combined, they constitute 10% of the data for our 2002–2017 models of published and unpublished cases, so their influence on the results may be important. We excluded those cases and reran the model.

When we drop discrimination claims, the same gender and race panel variables remain significant and of comparable magnitude. The differences in predicted probabilities between panels with three men and panels with two women, and between panels with three white/other judges and panels with one African American, are virtually identical. We then additionally excluded cases related to prisoners' rights and other civil rights (which together constitute another 11% of the data) so that there are no civil rights claims of any kind remaining in the data. When all civil rights claims are excluded from the data for the 2002–2017 period, the policy areas constituting 2% or more of the underlying claims are, in descending order: consumer, labor and employment (primarily wage and hour and ERISA), securities, insurance, antitrust, product liability, and environmental and toxic substances. In this model, the differences in predicted probabilities across the same panel types again remain significant. Panels with two women are associated with an 18 percentage-point increase in the probability of a procertification outcome, and panels with one African American are associated with a 14 percentage-point increase. It is likewise the case that when we exclude all discrimination and other civil rights claims from the 1995–2017 model of published cases, the gender and race panel results are robust.

We conclude with confidence that the results are not driven by discrimination claims or civil rights claims more broadly. Even outside the domain of antidiscrimination and civil rights law, panels with women in the majority and panels with one African American are more procertification. This result departs sharply from conventional wisdom and existing research.

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C. EXPLAINING PROCERTIFICATION PREFERENCES AND GENDER PANEL EFFECTS

1. PROCERTIFICATION PREFERENCES

It is unclear why women and African Americans on the Courts of Appeals have more procertification preferences. The explanation that connects most readily to existing literature is that women and African Americans are more attentive to claims of discrimination and inequality. The fact that our gender and race results are robust when such claims are excluded does not rule out this line of reasoning. It is beyond question that the class action device has been an enormously valuable tool in the struggle for gender and racial equality. Because the Federal Rules are transsubstantive, strategic judges concerned with developing the class action device to advance gender and racial equality may be motivated to render more procertification decisions in areas unrelated to discrimination or other civil rights, since they recognize that the decisions may reverberate back to those areas. This leads to procertification spillover effects in all other domains to which Rule 23 applies.

To be sure, this is speculative. The fact that the gender and race results are robust when discrimination and other civil rights claims are excluded may also mean that women and African Americans simply have more procertification preferences in general. If women and African Americans are more pro-plaintiff in cases related to discrimination and inequality, and they recognize the importance of class actions in the struggle for equality, then it may be that women and African Americans have a more favorable view of the class action device as a vehicle to provide remedies and achieve regulatory goals in general.

Whatever the reason, our gender results counsel caution in interpreting past studies as having demonstrated that women on the Courts of Appeals do not have different preferences than men apart from certain discrimination claims. An important study cited for this conclusion was conducted by Boyd, Epstein, and Martin (2010), who find that in twelve out of thirteen policy areas, gender was not associated with votes. The single exception was gender-based employment discrimination claims. However, they acknowledge that in each area they studied, their sample sizes were too small to evaluate panels with two women. The study was therefore unable to evaluate the possibility that a combination of majoritarian voting dynamics and pressure toward suppressed dissent, or some other mechanism, could cause women's different preferences to only become visible in panels where they constitute the majority. That is what we observe in our class-certification data.

It is only because of our unusually large dataset relative to norms in the field and the heavy concentration of our cases in the last two decades—during which time there was a substantially larger number of panels with two women—that we were able to detect that women's preferences are more procertification when in the majority. This limitation in existing scholarship is an important contextual consideration for interpreting every study (that we are aware of) concluding that gender does not have a meaningful impact, because none of these studies examine panels with women in the majority.

2. GENDER PANEL EFFECTS

Our data do not allow us to identify the panel dynamics that explain why the presence of one woman on a panel is not associated with higher rates of procertification outcomes, but the presence of two women is. Nevertheless, we recognize some possible explanations. One is straightforward. A single woman on a panel, on average, advocates a more procertification view, but this advocacy does not affect the outcome votes of the men in the majority because judges have intense preferences in the domain of class certification and do not concede on outcomes. Sunstein et al. (2006), who studied partisan panel effects but not race and gender, argue that panel effects are less likely to occur in policy domains, such as abortion and capital punishment, in which judges have intense and "entrenched" preferences, undermining the potential influence of partisan panel minorities on the majority. On this account, judges simply care intensely about certification and have entrenched views, and thus majoritarian dynamics prevail.

Our results for panels with one African American counsel caution in embracing—and arguably discourage—this interpretation. At the same time that one female judge is not panel affecting her two copanelists, one African American judge is doing so strongly. We therefore know that Court of Appeals judges' votes on certification are, in fact, not impervious to significant influence by one judge from another group. The puzzle is why this occurs with respect to race but not gender.

Recent innovative work in political science has focused on the gender gap in political discussions and decision-making. This work draws on insights from existing literature finding that numbers alone do not guarantee women substantive representation, and identifies structural arrangements and norms that may affect the ability of women to exercise authority during the decision-making process.

This institutional perspective enables another key insight: achieving substantive representation sometimes requires institutional help, such as a decision rule requiring unanimity rather than a simple majority. Research has shown that, at least in some settings, a decision rule requiring a simple majority prevents women from exercising a fair share of influence when they are in the minority, a disadvantage that continues until women constitute a majority (or even a super-majority). Empirical research suggests two distinct (but obviously related) mechanisms that may explain this pattern.

In their award-winning research, Mendelberg and Karpowitz (2016) find that under majority rule in an experimental context, women in the minority are treated as having less authority, are accorded less respect, and are seen as less influential compared to when they are in the majority. The authors detect no corresponding reductions for men on these dimensions when they move from majority to minority. A reasonable reading of this research is that, holding constant the substance of a woman's contributions, she will be more likely to persuade others and affect outcomes when in the majority.

An alternative or supplementary mechanism concerns how the deliberative context affects the substance of women's contributions. Mendelberg and Karpowitz find—again, under majority rule in an experimental context—that women in the minority are less likely to express their sincere preferences as compared to when they are in the majority. The authors see this outcome as tied to women being treated as less authoritative, less deserving of respect, and less influential when in the minority.

We are mindful of the hazards of transposing a theory previously tested in quite different contexts to decision-making on the Courts of Appeals. That said, the potential explanatory power of this theory should not be rejected based on the false notion that gender bias, even unconscious gender bias, does not play a role in Court of Appeals decision-making. We suspect that few men would have thought that women experience gender bias when arguing cases in the Supreme Court. Yet, recent research shows that they do. More to the point, recent research also shows that women on the Supreme Court themselves experience gendered behavior during oral argument, where they are interrupted at higher rates than men and speak significantly less when interrupted by male justices.

This work on gender may shed light on why gender panel effects in our class action data differ from those found in employment discrimination cases. In the latter area, researchers concluded that the presence of one woman *did* significantly influence men in the majority, an effect that they thought may be explained by the men taking "cues" from women who were perceived (based on gender) as more expert or informed. If this account of the mechanism is correct, in employment discrimination cases in the Courts of Appeals, women may be perceived by men as *more*, rather than less, authoritative. Why does this panel effect disappear when we shift to class-certification decisions?

In contrast with employment discrimination, there is no reason to anticipate that men on a panel will think that a woman is more expert or informed in the domain of class certification. Consequently, a woman is no longer empowered to sway the men's votes by invoking the perspectives and experiences unique to her gender. If the dynamics identified by Mendelberg, Karpowitz and their colleagues are at

play, they could suggest several possibilities. One is that a woman in the minority is less successful because, as a panel minority in a domain that does not elicit gender-based deference, she is regarded as less authoritative and influential. Another is that the reinforcement of another woman on the panel increases her propensity to advocate preferences that differ systematically from those of her male colleagues in areas without obvious gender salience, such as class certification. We are aware of no research that explores the issues we have been discussing as applied to race rather than gender.

CONCLUSION

In this white paper, we have undertaken the first empirical analysis (as far as we are aware) of how the race, gender, and ideology of Court of Appeals judges and panels influence class-certification decisions under Rule 23. We find that the party of the appointing president has a very strong association with Court of Appeals judges' votes on certification, with all-Democratic panels having dramatically higher rates of certification than all-Republican panels. Our findings also show that the race and gender of judges matter significantly to certification. We are aware of no prior study that reports both gender and race panel effects in the same body of cases.

Our findings on gender panel effects in particular are novel in the literature on panel effects and the literature on gender and judging. Past work focusing on antidiscrimination law found that one woman on a panel can influence the votes of men in the majority (mirroring what we find with respect to African Americans in class-certification decisions). These results allowed for optimism that the panel structure—which threatens to dilute the influence of minority groups on the bench—actually facilitates minority influence. In these studies, it was clear that panels were not operating in a simple majoritarian fashion that trounced minority views.

Our gender results are quite different and normatively troubling. We observe that women have more procertification preferences based on their votes when they are in the majority. However, women are not more likely to vote in a procertification direction when they are the panel minority, and men sitting with women are not more likely to vote in a procertification direction when they are in the majority. As a result, cases heard by panels with one woman and two men are not more likely to yield procertification outcomes. Only when women are in the majority do we observe notably elevated procertification votes by both women and men, with a higher rate of procertification outcomes. Panels with a majority of women occur at sharply lower rates than women's percentage of judgeships, which suggests that Court of Appeals class certification decisions significantly underrepresent the preferences of female judges.

In seeking to explain these results, we consider a number of admittedly speculative possibilities. One is that men on the Courts of Appeals have intense and entrenched views on certification, making their votes exceptionally difficult to influence. Several other possible explanations are illuminated by recent scholarship on the gender gap and critical mass theory. One is that in the domain of class certification, unlike that of employment discrimination, a woman cannot sway the votes of men by the perspectives and experience that her gender is presumed to entail. Because women are regarded as less authoritative and influential in domains such as class certification, a woman in the minority advocating for a procertification outcome is less successful. Another explanation is that when there are two women on a panel, the reinforcement of another woman increases a female judge's willingness to advocate preferences that differ from men's preferences in areas not explicitly related to gender, such as class certification.

Finally, our gender panel results, and the majoritarian structure that they reveal, counsel caution in the interpretation of prior work finding that gender is consequential to Court of Appeals decision-making only in rare circumstances. That work has largely been based on sample sizes too small to evaluate panels with a majority of women, or it simply did not evaluate them. Because prior studies do not isolate and consider panels with a majority of women, they cannot rule out the possibility of different preferences along gender lines, and they may reflect suppression of women's influence.

Although we find that the presence of one African American is associated with increased procertification votes and outcomes, we believe that our gender results counsel caution when interpreting models showing the lack of influence of any minority judge characteristic (including race) if these models do not isolate votes and outcomes when the group is in the majority. Scholars understand little about mechanisms underpinning panel effects, including when and why gender and race are associated with variation in judges' preferences across different substantive domains. It would be foolish to assume that the panel dynamics we observe with respect to gender in class-certification decisions will never be present with respect to race in another field of law.

Contrary to conventional wisdom, our results show that diversity on the bench is consequential to lawmaking beyond policy areas conventionally thought to be of particular concern to women and racial minorities, which constitute a relatively narrow band of substantive law. In seeking an explanation for the procertification preferences of women and African Americans on the Courts of Appeals, we note that class action doctrine is a form of transsubstantive procedural law that traverses many policy areas. Whether or not as a result of strategic judicial behavior, the impact of gender and racial diversity on certification decisions radiates widely across the legal landscape, influencing implementation in areas such as consumer, securities, labor and employment, antitrust, insurance, product liability, and environmental law. The results highlight the importance of exploring the effects of diversity on transsubstantive procedural law more generally, because the consequences of diversity on the federal bench extend far beyond conceptions of "women's issues" or "minority issues."

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