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2-15-2021

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#### Recommended Citation

Rachael K. Hinkle, *Rachael K. Hinkle, Unintended Consequences. How the Publication Norm as a Tool of Compromise Reduces the Influence of Female and Minority Judges*, (2021).

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## Blog 9

### Rachael K. Hinkle, *Unintended Consequences. How the Publication Norm as a Tool of Compromise Reduces the Influence of Female and Minority Judges*



*Photograph courtesy of Canva Pro, 2021.*

**Blog Author:** Rachael K. Hinkle, JD, PhD, Associate Professor of Political Science, University at Buffalo, SUNY

**Introduction:** Even when women and people of color achieve positions of political power, that does not guarantee they will be able to wield the same amount of influence as similarly-situated white men. Institutional norms may combine with social constructions of difference to create a system in which power is distributed disproportionately. Such a pattern is evident in the U.S. Courts of Appeals. Benign procedural practices and laudable deliberative processes combine with divergent viewpoints generated by fundamentally different social experiences to create a system in which power is exercised unequally.

**Unintended Consequences: How the Publication Norm as a Tool of Compromise Reduces the Influence of Female and Minority Judges**

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**Keywords:** Political Power, Women, Minority, Minorities, Power, Diversity, Diverse, Decision-makers, Policy, Legal, Policy, Homogeneous Groups, Judge, Judicial, Opinions, Influence, Gender Equality, Homogeneous Panels, Gender Disparity.

Even when women and people of color achieve positions of political power, that does not guarantee they will be able to wield the same amount of influence as similarly-situated white men. Institutional norms may combine with social constructions of difference to create a system in which power is distributed disproportionately. Such a pattern is evident in the U.S. Courts of Appeals. Benign procedural practices and laudable deliberative processes combine with divergent viewpoints generated by fundamentally different social experiences to create a system in which power is exercised unequally.

Judges on the U.S. Courts of Appeals split their time between resolving important, policy-shaping cases and routine matters that do not have an impact on circuit law. In order to keep up with an increasing number of overall appeals, yet still provide quality legal analysis, circuit courts developed the practice of designating some opinions as “unpublished.” Such opinions are not binding legal precedent. As a result, they do not play a role in shaping policy. Each case is resolved by a panel of three judges who also decide whether the opinion should be binding precedent (i.e., “published”) or not.

A wide variety of research shows that diversity in decision-making groups produces both a wider range of ideas and more deliberation. This dynamic can lead to higher quality policy outputs. But the same patterns may also inadvertently depress the ability of diverse groups of judges to shape legal policy, resulting in law disproportionately crafted by homogeneous groups of judges. More diverse decisionmaking groups tend to produce a wider range of perspectives. This can generate divergent viewpoints about a case and, thus, a need to compromise. One way to compromise is to leave an opinion unpublished so that the judge unhappy with the result can be assured it will at least not shape the law of the circuit. Consequently, cases where there is more likely to be disagreement among judges may also be more likely to result in unpublished opinions. This, in turn, suggests that judicial diversity may be associated with lower levels of opinion publication and, thus, policy influence.

I use a comprehensive original dataset of dispositive circuit opinions from 2002 to 2012 to explore the correlation between publication and panel diversity. Figure 1 illustrates that there is consistent evidence of demographic diversity depressing publication rates. Overall, cases with homogeneous panels published 32% of their opinions while panels with race and gender diversity published only 21%. Regression analysis accounting for a number of other case factors (including ideological diversity) confirms the important role of demographic diversity, but the publication gap is approximately 4-5%. The circuit courts issued an average of nearly twenty thousand opinions per year. Based on the frequency of diverse and homogenous panels from 2002 to 2012, the estimated diversity gap of 4-5%

represents nearly 900 opinions annually issued by diverse panels that did not make law which would have if the panel in question was homogenous. In short, federal law is shaped by homogeneous groups of judges to a greater degree than diverse groups of judges. Nearly all homogenous panels in the dataset (98%) were composed of white men. Not all federal circuit judges share the same policy-making power. Even those women and people of color who make it to such a powerful position wield less influence than their white and male peers.

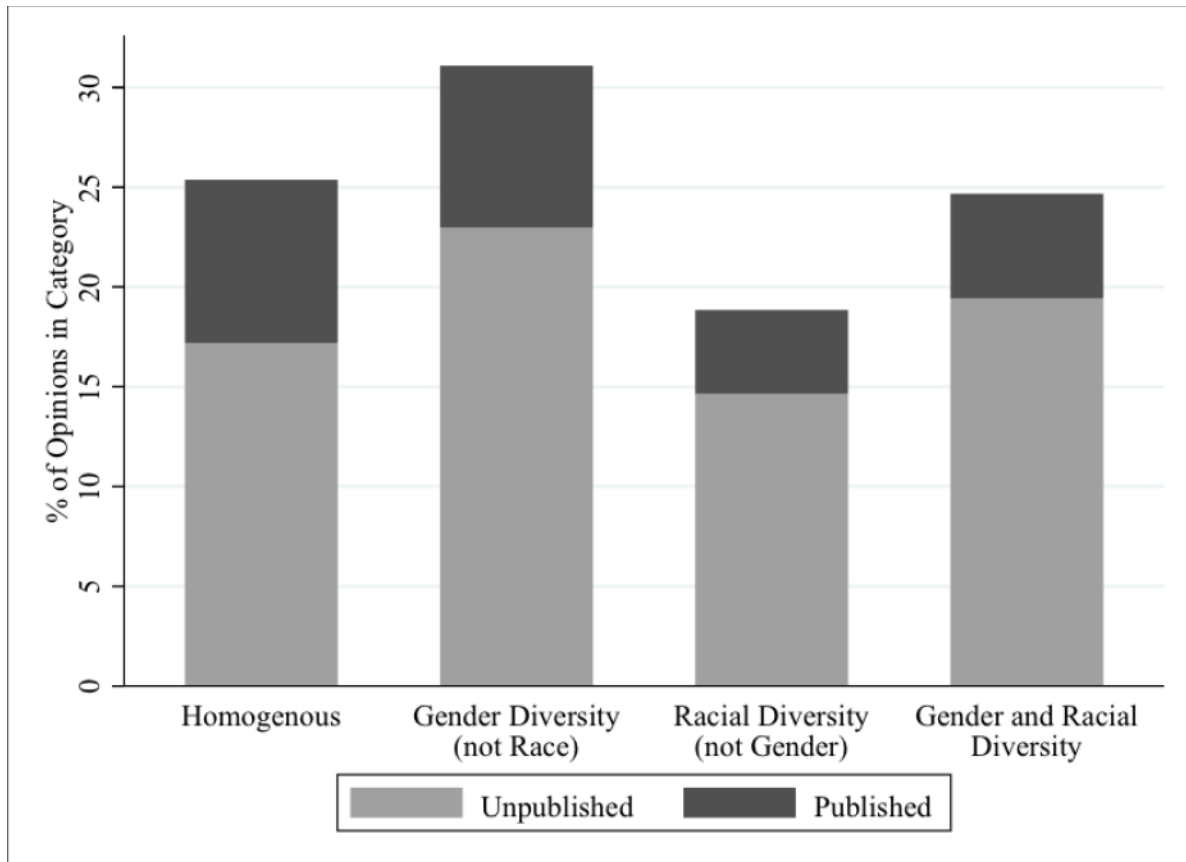


Figure 1: Distribution of published and unpublished opinions by demographic makeup of the panel for U.S. Courts of Appeals cases resolved from 2002 to 2012