RESPONSE

PSYCHOLOGY, STRATEGY, AND BEHAVIORAL EQUIVALENCE

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In response to Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

Virtually all appellate courts are collegial (i.e., multimember) courts. Students of judicial behavior (both political scientists and members of the legal academy), particularly those who view judicial choice through the lens of strategic behavior, have paid quite a bit of attention to this characteristic of appellate courts, .[1] Of interest recently have been the strategic implications of the panel decisionmaking mechanism relied on by the U.S. courts of appeals.[2] The courts of

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[1] *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 10 (1998) (exploring implications of the fact that "[J]ustices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors"); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT 28 (2000) ("[W]e hope to show that . . . our model of strategic interaction robustly explains a wide range of choices made by [J]ustices of the Supreme Court.").

[2] *See, e.g.*, VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 73-88 (2006) (analyzing strategic behavior in circuit courts); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158 (1998) (attempting to "explain and demonstrate empirically under what conditions appellate court judges . . . obey the legal doctrines the Supreme Court has set out"); Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Comparing Attitudinal and Stra-*

appeals decide most cases with the use of rotating, three-judge panels,[3] but the decision of a panel is subject to two kinds of review: review by the circuit en banc and review by the U.S. Supreme Court. Presumably, a strategic member of a panel could attempt to signal to the circuit en banc or to the Supreme Court when, contrary to her preferences, the panel decision is at odds with circuit law or Supreme Court precedent. The key, then, from a strategic perspective, is to understand how the ideological composition of a panel (relative to the circuit or relative to the Supreme Court) can induce strategic behavior on the part of an individual judge.

This is precisely the task to which Professor Kim sets herself in *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*.[4] To do so, she uses the votes cast in Title VII sex discrimination cases decided with published opinions in the courts of appeals.[5] Specifically, Professor Kim focuses on counter-ideological voting.[6] The measurement strategy she takes is elegant; she defines counter-ideological voting as an instance in which a judge votes liberally when she is expected, based on her ideological preferences, to vote conservatively, or vice versa.[7] The use of this dependent variable is advantageous in that strategic accounts of judicial vote choice are explicitly about whether a judge modifies her behavior systematically in response to the anticipated actions of other relevant actors (e.g., the Supreme Court).[8] This dependent variable is explicitly about change in anticipated behavior. Moreover, Professor Kim's empirical analyses are constructed to determine whether the likelihood of counter-ideological voting varies according to the alignment of a judge's

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tegic Accounts of Dissenting Behavior on the U.S. Courts of Appeals, 48 AM. J. POL. SCI. 123, 125 (2004) (discussing the "(non)use of dissents to induce (or prevent) *en banc* review by the circuit"); Steven R. Van Winkle, Dissent as a Signal: Evidence from the U.S. Courts of Appeals 6-16 (Aug. 29, 1997) (unpublished manuscript, on file with author) (proposing a model of strategic behavior based on imperfect commitment, information asymmetry, and costly enforcement on the U.S. courts of appeals).

[3] *See* JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS 70-84 (2002) (describing the internal procedural rules governing appellate court review).

[4] Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

[5] *Id.* at 1327.

[6] *Id.* at 1328.

[7] *Id.*

[8] *Cf.* EPSTEIN & KNIGHT, *supra* note 1, at 12 ("To say that a [J]ustice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take, not just on her own preferences and actions.").

preferences with those of her panel mates and, ultimately, either those of the circuit en banc or the Supreme Court.[9] She concludes that judges do not anticipate the likely reactions of the Supreme Court but do bear in mind the likely reactions of the circuit en banc.[10]

The evidence Professor Kim brings to bear is a welcome addition to the extant literature; however, what ultimately emerges from her analyses is a bit different than what she initially articulates as her avowed purpose. Early in her article, Professor Kim asserts that her intention is to offer "an empirical test of two competing types of explanations: deliberative and strategic."[11] She describes deliberative explanations as "those theories that emphasize the internal exchanges that occur among panel members and the potential for these exchanges to influence a judge's vote."[12] However, the subsequent tests, although empirically crisp and clear, are really tests of two competing strategic explanations for panel effects (i.e., strategy vis-à-vis the Supreme Court and strategy vis-à-vis the courts of appeals en banc) rather than a test of a strategic versus a deliberative theory of panel effects.

While it is certainly fair to say that the empirical patterns Professor Kim finds are consistent with one strategic account of panel effects, they are also consonant with at least some versions of a deliberative account. Professor Kim asserts that "if purely deliberative explanations are true, the preferences of the Supreme Court or the circuit as a whole should have no systematic impact on whether or when panel effects are observed."[13] But a deliberative model where panel members engage in an exchange of ideas and arguments can also lead to an observed pattern in which the preferences of the circuit en banc and the alignment of those preferences with the judges on a panel have an effect. As Professor Kim observes,

> The individual appellate judge interacts with other judges on the same circuit on a regular basis—on other panel sittings, in the context of administrative functions, and even casually in the halls of the courthouse. . . . Because of the routine, ongoing interactions among judges within a circuit, the views of their immediate colleagues will be far more salient for panel members when they deliberate than the preferences of the Supreme Court.[14]

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[9] Kim, *supra* note 4, at 1328.
[10] *Id.*
[11] *Id.* at 1324.
[12] *Id.* at 1325.
[13] *Id.* at 1327.
[14] *Id.* at 1369 (footnote omitted).

Although Professor Kim points to this interaction among court of appeals judges as a possible explanation for why they are attentive to their circuit colleagues but not their Supreme Court superiors, this same interaction is at the root of the behavioral equivalence that undermines the definitive interpretation of her empirical evidence as supporting a strategic account of panel effects. A judge who is in the minority on a panel but in the majority on the circuit certainly may raise arguments in the panel deliberations that are intended to highlight the threat of the panel decision being overturned by the circuit en banc. But such a judge may also present arguments about circuit preferences (as embedded in circuit precedent) because they are the kind of arguments that will persuade her fellow panelists to see her position as the legally correct one.

Professor Kim herself is careful to acknowledge that her results "do not conclusively establish that strategic behavior *explains* panel effects."[15] She readily acknowledges that judges on a panel may be influenced by nonstrategic, psychological aspects of their interactions that result in changes in the "judges' perceptions and sincere views of a case."[16] But she cautions that "[t]hese psychological theories are difficult to verify empirically because they emphasize processes that are internal to individual judges and cannot be observed directly."[17] In making this observation, however, Professor Kim falls prey to a proclivity shared by most strategic theorists. Specifically, Professor Kim appears to resolve the issue of behavioral equivalence in favor of a strategic account of panel effects, even though that account is no less difficult to verify empirically than a deliberative account that focuses on nonstrategic, shared cogitation among panel members aimed at coming to the most legally sound outcome.

Two caveats are in order. First, it is important to emphasize that Professor Kim is by no means rigid in her interpretation of the empirical evidence that she provides to support an account of panel effects as the product of strategy vis-à-vis the circuit en banc. She carefully explores potential alternative explanations, including the deliberative dynamics that may drive panel decisionmaking.[18] But, in the end, she is inclined toward finding the strategic account to be the best fit for the evidence.

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[15] *Id.* at 1370.

[16] *Id.* at 1371.

[17] *Id.*

[18] *See id.* at 1371-74 (discussing conformity effects, group polarization, and other psychological theories as possible explanations for panel effects in circuit courts).

Second, we are not asserting that the evidence presented is a better fit for a nonstrategic, deliberative account of panel effects. Rather, the point we wish to make is that the evidence presented is equally consistent with both a strategic and a deliberative account of panel effects. Further, the deliberative account is no more or less complicated than the strategic account. Stated differently, the strategic account is no more parsimonious or elegant than a deliberative account. Accordingly, there is no basis for favoring a strategic theory over a deliberative theory of panel effects.[19]

If we set aside the issue of behavioral equivalence for the moment and take the evidence that Professor Kim offers as support for a strategic account of panel effects, there are two additional points worth noting. The first highlights the limitations of the inferences that can be drawn from a study such as Professor Kim's, which focuses exclusively on Title VII sex discrimination cases. These cases constitute an entirely reasonable and appropriate set of decisions for examining strategic accounts of judicial behavior, because of their ideological content.[20] Simply put, such cases are likely to bring ideological considerations to the fore, and strategic accounts are, first and foremost, about the conditional expression of ideological preferences. A focus on any one substantive type of case, however, means that the generalizability of any inferences is circumscribed. Accordingly, any claims about strategic accounts of panel effects writ large, based on the analysis of this or any other substantive set of cases, should be tempered by this recognition.

Second, Professor Kim's finding regarding the Supreme Court's lack of influence over circuit judges' voting behavior is readily anticipated in the existing literature. Professor Kim concludes that "the increased possibility of review [by the Supreme Court] in the presence of a potential dissenter does not appear to influence the panel voting behavior of court of appeals judges."[21] She speculates that dissents are impotent as threats to trigger Supreme Court review because circuit judges do not fear reversal in any meaningful sense.[22] In 2003, David Klein and Robert Hume published what we think may be the most thorough analysis of circuit judges' fear of reversal existing in the lite-

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[19] We recognize that parsimony as a benchmark for evaluating a scientific theory is not universally agreed upon, but it is a benchmark often invoked by strategic theorists and, moreover, is consistent with our own epistemological predispositions. For a useful discussion of parsimony, see, for example, Paul K. MacDonald, *Useful Fiction or Miracle Maker: The Competing Epistemological Foundations of Rational Choice Theory*, 97 AM. POL. SCI. REV. 551, 556-57 (2003).

[20] Kim, *supra* note 4, at 1327 & n.29.

[21] *Id.* at 1368.

[22] *Id.* at 1367-68.

rature.[23] Using a well-mined data source on search and seizure decisions compiled by Jeffrey Segal, Klein and Hume sought to measure how well the "fear of reversal" explains circuit-court compliance with Supreme Court policy pronouncements.[24] To do so, they first identified cases that were the most "cert-worthy" in order to evaluate whether circuit judges were more likely to defer to Supreme Court preferences in cases that the Court was likely to review.[25] As the authors described their approach, "[I]f the desire to avoid [reversal] were a major force behind compliance, then deference to a higher court would vary with the threat of reversal: other things remaining equal, compliance would be more likely where the probability that a noncompliant decision would be reversed was higher."[26] Yet the authors found no evidence of differential voting behavior between cert-worthy and more ordinary cases.[27] Although Klein and Hume acknowledged that they were also working with a data set in a limited issue area, they speculated that the reason that compliance is observed even without fear of reversal is related to judges' efforts to "reach legally sound decisions."[28] Thus, given Klein and Hume's earlier analysis, we should perhaps not be surprised that circuit court judges neither dissent strategically in order to prompt Supreme Court review[29] nor vote counter-ideologically to avoid it.

In conclusion, we do not quarrel with the possibility that strategic behavior may take place on some circuit courts, in some cases, under some conditions. But our earlier work finding no such effects suggests that the strongest influences on federal appellate courts come from the collegial environment in which judges seek consensus to promote the efficient administration of justice and to minimize error.[30] Deliberation within the panel over the proper interpretation of circuit precedent, as well as compliance with Supreme Court policy,

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[23] David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003).

[24] *Id.* at 580-81, 586.

[25] *Id.* at 588-94.

[26] *Id.* at 600.

[27] *See id.* at 594 (finding that cert-worthy cases were actually slightly *less* likely to be decided consistently with Supreme Court preferences).

[28] *Id.* at 602.

[29] HETTINGER ET AL., *supra* note 2, at 86 (finding "no evidence of strategic [dissenting] behavior in cases across the board").

[30] *See id.* at 120 ("[A]ppellate judges share the common objective of maximizing the number of 'correct' decisions with the primary goal of error minimization through appellate review.").

furthers these ends. Thus, although strategic explanations may provide some measure of insight into circuit judge behavior, the bulk of the evidence across multiple issue areas is probably more consistent with a form of consensual "team theory" than with rational-choice theory. Having made these observations, we want to reiterate that, while the larger literature devoted to strategic decisionmaking takes the collegial nature of appellate courts seriously, it does so only very narrowly by conceptualizing the multimember court solely as a space for strategic calculations by judges. Professor Kim, in contrast, wishes to take seriously the possibility of nonstrategic explanations for panel effects. We think she is right to do so.

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