REPLY

EXPLORING PANEL EFFECTS

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In reply to Stefanie A. Lindquist & Wendy L. Martinek, Response, *Psychology, Strategy, and Behavioral Equivalence*, 158 U. PA. L. REV. PENNUMBRA 75 (2009), http://www.pennumbra.com/responses/11-2009/LindquistMartinek.pdf; Derek J. Linkous & Emerson H. Tiller, Response, *Panel Effects, Whistleblowing Theory, and the Role of Legal Doctrine*, 158 U. PA. L. REV. PENNUMBRA 83 (2009), http://www.pennumbra.com/responses/11-2009/LinkousTiller.pdf.

In *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*,[1] I explored panel effects, the well-documented phenomenon that judges hearing cases together appear to be influenced by the preferences of the colleagues with whom they sit.[2] My study sought to advance our understanding of panel effects by examining when they occur in an effort to better understand why they occur. More specifically, I constructed an empirical test intended to distinguish between two competing theories—an "internal deliberative" explanation and a strategic explanation.[3] The first posits that panel effects result entirely from the processes of discussion, deliberation, and persuasion that occur among the three judges on a circuit panel and that these effects are not influenced by any other actors in

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[1] 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).

[2] *See id.* at 1322-24 and sources cited therein (reviewing recent empirical studies of panel effects).

[3] *Id.* at 1333-38.

the judicial system.[4] By contrast, the second explanation hypothesizes that appellate judges are strategic actors who anticipate the response of the circuit en banc or the Supreme Court.[5] Thus, their willingness to go along with the views of their colleagues (i.e., panel effects) will depend upon how the preferences of the reviewing court are aligned with the views of the panel members. What I found is that circumstances external to the panel appear to matter, at least some of the time.[6] When deciding the sex discrimination in employment cases that I studied, federal appellate judges appeared to be more or less open to influence by their panel colleagues depending upon how the preferences of the panel members aligned with the preferences of the circuit as a whole.[7] On the other hand, their willingness to avoid dissents and go along with their panel colleagues seemed unaffected by their relative alignment with the preferences of the Supreme Court.[8]

These results are important for a couple of reasons. First, they offer evidence that observed panel effects are not likely the result of interactions wholly internal to the three judges on an appellate panel. The circuit environment also matters and mediates the panel effects we observe. Second, the results fail to support the theory that panel effects are driven by the panelists' strategic interactions vis-à-vis the Supreme Court. This finding undermines one of the theories offered to explain how the Supreme Court can effectively exercise control over the lower federal courts when it reviews fewer than one percent of their decisions annually. Specifically, it undermines the theory that the risk of dissent by a minority panel member induces circuit judges to comply with precedent out of fear of reversal by the Supreme Court.[9]

Two responses published in this journal[10]—one by Stefanie A. Lindquist and Wendy L. Martinek, the other by Derek J. Linkous and Emerson H. Tiller—thoughtfully comment on how my study relates to

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[4] *Id.* at 1333.

[5] *Id.* at 1334.

[6] *Id.* at 1358-67.

[7] *Id.* at 1361-67.

[8] *Id.* at 1358-61.

[9] *See, e.g.*, 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, 2159 (1998).

[10] Stefanie A. Lindquist & Wendy L. Martinek, Response, *Psychology, Strategy, and Behavioral Equivalence*, 158 U. PA. L. REV. PENNUMBRA 75 (2009), http://www.pennumbra.com/responses/11-2009/LindquistMartinek.pdf; Derek J. Linkous & Emerson H. Tiller, Response, *Panel Effects, Whistleblowing Theory, and the Role of Legal Doctrine*, 158 U. PA. L. REV. PENNUMBRA 83 (2009), http://www.pennumbra.com/responses/11-2009/LinkousTiller.pdf.

the prior literature and explore the implications of my empirical findings for understanding decisionmaking by collegial courts. Their responses help to sharpen understanding of what my study contributes, as well as its limitations. I believe that some of their comments reflect a misunderstanding of the purpose of my study, however, and I seek here to clarify what might have been misunderstood and where our real differences lie.

Perhaps the most important clarification is that my Article is *not* about whistleblower theory (WT)—at least, not principally—although it does discuss Frank B. Cross and Emerson H. Tiller's influential article, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, which appeared in the *Yale Law Journal* in 1998.[11] In that article, Cross and Tiller hypothesized that judges on ideologically divided panels are more likely to follow doctrine because of the possibility of whistleblowing—that is, a minority judge "through a dissent, [exposing] disobedient decisionmaking by the majority."[12] They tested their theory by examining opinions by the D.C. Circuit Court of Appeals that applied the *Chevron* doctrine[13] in reviewing agency decisions and concluded that the evidence supported their whistleblower theory because ideologically divided panels were more likely to defer to agency decisions with which they (presumably) disagreed.[14]

Because the purpose of my Article was to explore panel effects—an important phenomenon that Cross and Tiller were among the first to document—I tried to be precise about the ways in which my study differed from theirs and to suggest what implications my results might have for their theory. Linkous and Tiller, in their response to my Article, vigorously defend Cross and Tiller's whistleblower theory, arguing that I "needlessly and erroneously 'reject'" it.[15] In doing so, they have misunderstood not only the focus of my empirical study but also the extent of my claims about their whistleblower theory. I believe that Cross and Tiller's 1998 article was an important, indeed seminal, contribution to the literature, and that we still have much to learn from it. At the same time, I also believe that their original theory is in need of some revision and updating.

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[11] Cross & Tiller, *supra* note 9.

[12] *Id.* at 2159.

[13] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (requiring a reviewing court to defer to an agency interpretation of a statute unless the interpretation is contrary to the statute or is unreasonable).

[14] Cross & Tiller, *supra* note 9, at 2172.

[15] Linkous & Tiller, *supra* note 10, at 84 (alteration omitted).

Some misunderstanding likely arose from my statement that "I reject the whistleblowing story," which concluded a paragraph explaining why I avoided adopting their terminology.[16] I framed my empirical study by asking whether strategic theories of appellate court decisionmaking explain why we observe panel effects. I specifically avoided Cross and Tiller's terminology because "whistleblowing" is commonly understood to involve the exposure of covert wrongdoing, and I believe that the suggestion that judges are engaged in wrongdoing when deciding cases is both contestable and unnecessary. As I have argued elsewhere, the open-ended nature of law means that even principled judges sincerely trying to apply precedent may not only differ about the outcome of a particular case, but may also produce systematically different outcomes over a run of cases without any one of them necessarily defying doctrine.[17] Thus, the observation that the voting patterns of judges vary systematically with political affiliation does not necessarily mean that any of those judges are disregarding the law. Some judges might in fact do so, but whether or when and how often cannot be established merely by observing a difference in voting patterns because judging legitimately involves the exercise of discretion. The use of the term "whistleblowing" implies a normative judgment that is inappropriate given the discretionary nature of judging.[18]

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[16] Kim, *supra* note 1, at 1343.

[17] *E.g.*, Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 408-17 (2007).

[18] Linkous and Tiller protest that whistleblowing theory is at its core "[a] [t]heory of [c]ompliance with [d]octrine," but that I "singularly stress[]" disobedience in my critique. Linkous & Tiller, *supra* note 10, at 85 (first four alterations in original) (internal quotation marks omitted) (quoting Cross & Tiller, *supra* note 9, at 2158). That stress, however, merely reflects the emphasis in Cross and Tiller's original article, in which they described judges as pursuing "partisan ambitions," Cross & Tiller, *supra* note 9, at 2175, and engaging in "manipulation or disregard of the applicable legal doctrine," *id.* at 2156, "cheating," *id.* at 2175, "subversions of legal precedent and doctrine," *id.* at 2156, and "disobedient decisionmaking," *id.* at 2159. In a subsequent work, they describe their theory in the following terms: "the minority member can blow the whistle on the majority's unprincipled manipulation of doctrine." Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 229 (1999). Although they may have intended to articulate a theory of *compliance* with doctrine, Cross and Tiller's starting assumption appeared to be that judges are prone to disobey the law. Other readers have understood their argument in similar terms. *See, e.g.*, Harry T. Edwards, Essay, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1337, 1367 (1998) (describing Cross and Tiller's argument as "sheer speculation" based on the assumption "that judicial decision making has nothing to do with principle or internal coherence"); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 244 (1999) (characterizing Tiller and Cross's argument as one that describes judges as "launch[ing] into a jurisprudential free-for-all").

Linkous and Tiller defend the whistleblower terminology on the grounds that "[d]isobedience in the sense used in WT is merely a descriptor used to denote the non-neutral application of doctrine."[19] If by "non-neutral" they mean that judges are sometimes observed to differ systematically in the results they arrive at, I would have no quarrel with a theory resting on that observation. But I believe that language matters, and "disobedience" suggests something more than "non-neutral decisionmaking." "Disobedience" connotes a person acting in deliberate disregard of an instruction she is obliged (legally, morally, or otherwise) to obey, or at the very least, acting contrary to a clear mandate, even if she did not understand the mandate or the fact that her actions violate it.

"Disobedience" does *not* apply to discretionary decisions. It makes no sense, for example, for me to tell my child that she can decide what time to go to bed, and then accuse her of disobedience when she stays up until midnight. Similarly, when legal doctrine affords lower court judges discretionary space when applying the law, it is inapt to describe their decisions in that space as "disobedient" merely because they tend in a particular direction.[20] If "whistleblowing" simply means checking the tendency for judges to use their discretionary authority in a non-neutral manner, then using the terms "disobedience" and "whistleblowing" is misleading given the conventional understanding of those words.[21]

Putting aside this disagreement about terminology, many of Linkous and Tiller's criticisms of my Article are beside the point because they misunderstand what it is about. Most importantly, my empirical study is *not* a test of Cross and Tiller's whistleblower theory. Their theory addresses the question of when appellate judges obey doc-

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[19] Linkous & Tiller, *supra* note 10, at 89.

[20] Kim, *supra* note 17, at 409-10, 417.

[21] Linkous and Tiller argue that applying whistleblowing terminology to judges is "no worse" than describing many decisions in noncriminal contexts as "prisoner's dilemmas." Linkous & Tiller, *supra* note 10, at 90. There is a difference, however. Describing two firms in an oligopoly as facing a "prisoner's dilemma" in their production decisions invokes a metaphor—a figure of speech applied to something not literally applicable to suggest some important similarity. The choice facing the firm deciding whether or not to restrict output might share some structural characteristics with the prisoner deciding whether or not to cooperate, but no one could possibly mistake the firm for an individual criminal defendant. Judges, however, *can* disobey the law and disregard doctrine, and it is confusing, if not misleading, to say that they are "disobeying" the law if what one really means is that they are exercising their discretion in a "non-neutral" manner.

trine.[22] By contrast, my study starts with a different question: what explains panel effects? More specifically, does a strategic explanation best explain why appellate judges appear to be influenced by the preferences of their copanelists when deciding cases?[23] Cross and Tiller's theory does not offer a clear answer to that question. Their "central thesis" is that "legal doctrine's interaction with panel diversity . . . produces 'panel effects.'"[24] But what exactly *is* the nature of that interaction? Cross and Tiller propose two possible explanations. First, a "minority member may threaten to highlight . . . disobedience externally to a higher court or to Congress, producing exposure and possible reversal."[25] Rather than run that risk, the majority might choose to "obey" legal doctrine. A second possibility is that "the minority may expose the subconscious disobedience internally, causing the majority to acknowledge its disregard or unintentional manipulation of doctrine," leading the majority to "capitulate and keep its decision within the confines of doctrine."[26] These two explanations correspond roughly (although not precisely) to the distinction I draw between strategic and deliberative accounts.[27] However, Cross and Tiller's empirical study cannot distinguish between these explanations. Their results show that mixed panels are more likely to defer to agency decisions that run counter to their political preferences,[28] but this pattern is consistent with both explanations. In fact, their whistleblower theory encompasses both: "WT addresses both strategic and deliberative models of panel effects and does not give preference to one of these mechanisms over the other as both may be at work."[29]

In *Deliberation and Strategy* my purpose was to examine when panel effects occur in an effort to tease apart two possible explanations—one focusing on deliberative processes internal to a panel; the other positing strategic interactions among appellate judges in light of the anticipated response of a reviewing court.[30] Thus, my study was not designed to confirm or disconfirm Cross and Tiller's original theory;

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[22] *See* Cross & Tiller, *supra* note 9, at 2158 (describing the inquiry as one determining "under what conditions appellate court judges do obey . . . doctrine[]").

[23] Kim, *supra* note 1, at 1339.

[24] Linkous & Tiller, *supra* note 10, at 84.

[25] Cross & Tiller, *supra* note 9, at 2159.

[26] *Id.*

[27] *See* Kim, *supra* note 1, at 1333-37 (differentiating "strategic" from "deliberative" effects as involving interactions with actors outside the panel).

[28] Cross & Tiller, supra note 9, at 2172.

[29] Linkous & Tiller, *supra* note 10, at 86.

[30] *See generally* Kim, *supra* note 1.

rather it used the phenomenon they had documented as a starting point for further inquiry. The empirical test I undertook—determining whether or not alignment between the minority judge on a mixed panel and a reviewing court affected whether we observe panel effects—was intended to distinguish strategic from nonstrategic accounts of panel effects.[31] What I found was that the relationship between the preferences of the panel members and the preferences of the circuit as a whole affected the degree to which we observed panel effects, while the relationship to the preferences of the Supreme Court did not.[32]

Are my empirical results "consistent with WT"[33] as Linkous and Tiller claim? Because Cross and Tiller's theory encompasses *both* strategic and nonstrategic explanations,[34] *any* outcome of my empirical test would be consistent with their theory. The obviousness of this result simply highlights the fact that my study was not intended to test Cross and Tiller's whistleblower theory.

Are my empirical results consistent with *each component* of their whistleblowing theory? Not quite. The results are consistent with a strategic model of panel decisionmaking vis-à-vis the circuit as a whole but not vis-à-vis the Supreme Court. Thus, to the extent that Cross and Tiller's theory suggests that majority judges may be more likely to bend to the wishes of the minority because of a threat of review and reversal by the circuit en banc, my findings support that explanation.[35] My results, however, are *inconsistent* with Cross and Tiller's whistleblowing theory "*to the extent* that it posits that the presence of a minority judge who will 'blow the whistle' induces the panel majority to obey Supreme Court doctrine."[36] To be clear, I do not mean to suggest that

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[31] *See id.* at 1342-47.

[32] *Id.* at 1367-68 (explaining that the empirical test "offer[ed] no evidence that panel effects are sensitive to the preferences of the Supreme Court" but did "provide[] strong evidence that the preferences of the full circuit influence panel effects").

[33] Linkous & Tiller, *supra* note 10, at 84, 90.

[34] *See id.* at 86 ("WT addresses both strategic and deliberative models of panel effects and does not give preference to one of these mechanisms over the other as both may be at work.").

[35] Linkous and Tiller erroneously assert that I "mischaracteriz[e] the strategic prong of WT as being strictly a circuit panel-Supreme Court model rather than a circuit panel-higher court model." *Id.* at 87. In fact, I describe Cross and Tiller's theory as one in which "appellate judges use dissents as a signal to the Supreme Court *or the circuit en banc*." Kim, *supra* note 1, at 1335 (emphasis added).

[36] Kim, *supra* note 1, at 1367 (emphasis added) (citing Cross & Tiller, *supra* note 9, at 2159). Contrary to Linkous and Tiller's assertion, I did *not* claim that my results are inconsistent with Cross and Tiller's original theory (full stop). Rather, I wrote that

lower courts do not obey Supreme Court doctrine. I assume they generally do. But my results do not support the theory that they are more likely to do so *because* a minority panel member can raise the risk of dissent and reversal. Thus, although my empirical study was not designed to test Cross and Tiller's original theory, its results provide some additional evidence as to which of their hypothesized explanations is more likely to be true.

Linkous and Tiller also level a methodological criticism against my study—that it fails to code for legal doctrine.[37] I am already on record asserting my belief in the importance of legal doctrine in judicial decisionmaking—particularly for lower court judges[38]—so I will not repeat those claims here. Their criticism, however, again stems from a misunderstanding about the focus of my project. My purpose was *not* to test for the role of legal doctrine. I assume that legal doctrine always plays a role in appellate court decisionmaking. Rather, I am interested in those areas in which doctrine does not dictate a given outcome, where appellate judges are free to exercise some discretion in deciding a case. It is in those areas that we are likely to see a divergence in outcomes between judges with different outlooks or policy preferences, and therefore where panel effects are most likely to operate. On the other hand, if doctrine clearly dictates a particular outcome, we are unlikely to observe either voting patterns divided along ideological lines or panel effects. Because my purpose was not to test the influence of doctrine, coding for doctrine was unnecessary. Rather, I was interested in exploring when and why panel effects occur in the discretionary spaces, and therefore my study measured changes in counter-ideological voting—that is, changes in the extent to which a judge appears to be modifying her behavior in response to other actors within the judicial system.[39]

In any case, even Cross and Tiller's original empirical study does not code doctrine directly. Linkous and Tiller defend the original method as follows: they acknowledge that the *Chevron* doctrine will not dictate a clearly correct outcome in every case and that "disobe-

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they were inconsistent to the extent that their theory posited a whistleblower effect vis-à-vis the Supreme Court.

[37] Linkous & Tiller, *supra* note 10, at 90-91.

[38] *See, e.g.*, Kim, *supra* note 1, at 1342, 1368 (pointing out that judges are influenced and constrained by legal doctrine); Kim, *supra* note 17, at 417 (arguing that judges have legal as well as policy preferences and that those legal preferences likely lead them to comply with superior court precedent).

[39] Kim, *supra* note 1, at 1346-47.

dience" cannot be easily identified in a given case.[40] However, they argue that the "uneven application of the *Chevron* doctrine over a 'pattern of cases'" allows Cross and Tiller to identify disobedience to doctrine.[41] But this conclusion does not follow. If the doctrine does not always mandate a single correct outcome, then a pattern of differential results does not necessarily mean that doctrine has been disobeyed. It could be that in all cases in which the application of the doctrine is clear, the judges have reached the correct answer (or more likely, the litigants have settled or never brought the case in the first place), while in those case in which the application of the doctrine is uncertain, the judges exercise discretion—legitimately so—but are inevitably influenced by their beliefs, values, and so on. Thus, the observation that different judges (or different types of judges) have different patterns of deciding cases is *consistent* with obedience to doctrine, given that doctrine does not always dictate a clear outcome.[42] I do not quibble with Cross and Tiller's method of aggregating outcomes across cases, nor do I deny that they found something important when they did so. However, because their methodology measures differences in outcomes under different circumstances,[43] but *not* disobedience to the law in particular cases, it does not capture doctrine either.

My methodology departs from Cross and Tiller's in another way—this one more substantive. According to Linkous and Tiller, the alignment between the panel members and a higher court "is not essential to the strategic prong of WT."[44] In their view, all that is required is that the reviewing court "be compelled (either politically or through its proper judicial role) to enforce doctrine on review of the panel decision."[45] In contrast, I believe that the alignment between the preferences of the panel members and the higher court is crucial to strategic accounts of panel effects. It is possible that the reviewing court—the Supreme Court or the circuit en banc—might feel compelled to enforce doctrine with which it disagrees, but given that each of these courts has the power to review, modify, and even reverse its

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[40] Linkous & Tiller, *supra* note 10, at 88.

[41] *Id.* at 89; *see also* Cross & Tiller, *supra* note 9, at 2165 ("By looking at a pattern of cases, we strive to test for disobedience.").

[42] *See* Kim, *supra* note 17, at 408-17.

[43] Understood in this way, their empirical method and mine are quite similar. Over a large number of cases, we observe a differential pattern of votes between judges with different political or ideological orientations. We each try to exploit variations in those patterns of votes in order to isolate and test particular theories of judicial decisionmaking.

[44] Linkous & Tiller, *supra* note 10, at 84.

[45] *Id.* at 88.

own prior precedents, that seems unlikely.[46] Even if those courts feel compelled "politically or through [their] proper judicial role" not to reverse a prior precedent,[47] the discretionary nature of en banc rehearings and Supreme Court appeals means that they can avoid enforcing a doctrine with which they no longer agree simply by declining review. Thus, if appellate judges did behave strategically, they would try to anticipate the responses of a higher court by focusing on the preferences of that court, not just doctrine.

Often, however, the preferences of the higher court will also be reflected in the doctrine they articulate, and this creates the behavioral-equivalence problem emphasized by Lindquist and Martinek in their response.[48] The measure that I use for the circuit court's policy preferences—the ideal point of the median judge on the circuit—likely also correlates with the location of doctrine in that circuit. Thus, the observation that the minority judge on a panel is more likely to influence the majority judges when the minority judge is aligned with circuit preferences is consistent with *both* a strategic account—the majority judges fear reversal by the circuit en banc—*and* an explanation that points to the persuasive power of doctrine.[49] To that extent, Lindquist and Martinek are correct that the results of my study are "consonant with at least some versions of a deliberative account."[50]

However, although my study cannot definitively distinguish between strategic and deliberative explanations of panel effects, not all versions of these theories are supported by the evidence. A deliberative account that focuses on the role of circuit doctrine in panel decisionmaking is consistent with my results; a purely psychological model is not. So, for example, theories that minority judges change their votes because they feel pressure to conform to the views of the majori-

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[46] Cross and Tiller's starting assumption is that appellate judges sitting on a panel are more likely to follow legal doctrine which supports their policy preferences. *See* Cross & Tiller, *supra* note 9, at 2159 ("Judges are more likely to obey legal doctrine when such doctrine supports the partisan or ideological policy preferences of the court majority."). It is entirely consistent with that assumption to posit that appellate judges sitting en banc and Supreme Court Justices, who face even fewer constraints on their decisionmaking, are also more likely to enforce legal doctrine that comports with their policy preferences.

[47] Linkous & Tiller, *supra* note 10, at 88.

[48] Lindquist & Martinek, *supra* note 10, at 77-78.

[49] *See* Kim, *supra* note 1, at 1374 ("[I]t may be the case that a minority judge will be most successful in convincing the panel majority to change its views when her own views are more closely aligned with the circuit's than with the majority's.").

[50] Lindquist & Martinek, *supra* note 10, at 77.

ty or that unified panels "go to extremes"[51] are inconsistent with my finding that a judge's willingness to go along with her colleagues depends upon whether the minority judge is aligned with the circuit as a whole or not. Purely psychological, group-dynamic effects such as conformity pressures and group polarization should not vary depending upon the views of the circuit as a whole.

At the same time, my study does not support the theory that panel effects occur because appellate judges act strategically with an eye toward Supreme Court review and reversal. Lindquist and Martinek say they are not surprised by this finding, citing an earlier study by David Klein and Robert Hume that found no evidence that fear of reversal influenced circuit judges' decisionmaking.[52] There is other support as well, including Lindquist's and Martinek's own work, which found no evidence that court of appeals judges dissent strategically in order to provoke Supreme Court review.[53] This accumulating evidence is important, because it casts doubt on the hypothesis commonly advanced in the judicial politics literature that lower court judges follow Supreme Court precedent because they fear reversal.[54]

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[51] CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 71 (2006) (emphasis omitted); *see also id.* at 67-78 (arguing that panel effects result from "conformity effects" (the tendency to yield when confronted with unanimous opinions of others) and "group polarization" (the phenomenon that "[d]eliberating groups of like-minded people tend to go to extremes") (emphasis omitted)).

[52] *See* David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 597 (2003) (finding results "directly contrary to what [they] should have found if fear of reversal were the prime driving force behind circuit judges' decisions").

[53] *See* VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 81-86 (2006); *see also* Donald R. Songer, Martha Humphries Ginn & Tammy A. Sarver, *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137, 139, 154-55 (2003) (examining circuit court decisionmaking in tort diversity cases, where there is no "realistic fear of review," and finding that the decisions appropriately follow the relevant state law rather than policy preferences).

[54] *See, e.g.*, Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000) (suggesting that reversal operates as a sanction upon lower courts and that "'[j]udicial culture' famously includes a desire to avoid reversals"); Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 22 (2003) (arguing that the Supreme Court's "obvious mechanism of control over lower court judges is reversal of their decisions"); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 693 (1994) (theorizing that Supreme Court monitoring of lower court decisions is effective because appeals courts anticipate that noncompliant decisions are likely to be appealed and reversed).

Lindquist and Martinek raise a methodological point as well. They note the "limitations of the inferences that can be drawn from a study such as Professor Kim's," which is based exclusively on cases in a particular subject matter area.[55] They are right, of course, and I do not claim that my findings can be generalized to judicial decisionmaking by all types of collegial courts in all types of cases. On the other hand, studies which aggregate across many issue areas, as their earlier work does,[56] also have limitations. While such studies can tell us whether a particular effect is observed systematically across all case types, they may also mask important phenomena that operate only in a subset of cases or under certain conditions. Thus, as I speculated earlier, the choices of Cross and Tiller and Steven Van Winkle to focus on cases in selected issue areas may explain why they found evidence of strategic behavior on the courts of appeals, while Hettinger, Linquist, and Martinek, who drew a sample from all court of appeals cases across issue areas, did not.[57]

At this point, it is useful to juxtapose the methodological points raised in both responses to my Article. Lindquist and Martinek suggest that my results cannot be generalized because they are based on a limited sample of cases. Linkous and Tiller argue that I should have coded for legal doctrine. These two critiques push in opposite directions. Expanding the number of issue areas included in a study makes controlling for doctrine—already a daunting task—truly impossible. On the other hand, *really* coding for doctrine requires narrowing the sample of studied cases to those that entail application of a single rule or doctrinal framework. It is no accident that studies that have most successfully captured the role of doctrine are limited to a single subject matter area.[58]

Ultimately, I think that both Lindquist and Martinek *and* Linkous and Tiller are right. We need more large-scale, quantitative studies that cut across issue areas, and we need more studies that hone in on a particular doctrinal area in order to better understand panel effects

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[55] Lindquist & Martinek, *supra* note 10, at 79.

[56] *See generally* HETTINGER, LINDQUIST & MARTINEK, *supra* note 53.

[57] Kim, *supra* note 1, at 1339-40.

[58] *See, e.g.*, Herbert M. Kritzer & Mark J. Richards, Research Note, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827, 838-39 (2003) (testing theory that jurisprudential regimes structure Court decision-making by examining Establishment Clause cases); Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 AM. POL. SCI. REV. 891 (1984) (testing a model that uses legal variables to predict outcomes in search and seizure cases).

as well as other aspects of judicial decisionmaking. Each of these different methods will reveal different aspects of the phenomenon under study. None alone can provide a complete picture of how judges decide. And, of course, each approach requires caution in interpreting its results and discerning its implications. Judicial decisionmaking is a complex phenomenon, and our understanding of it will advance more quickly if we are flexible and broad-minded in our methodological approaches, rather than insisting on adherence to existing models or a particular methodology.

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