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Legal academics and political scientists continue to debate whether the legal, attitudinal, or strategic model best explains judicial decision making. One limitation in this debate is the high-court bias found in most studies. This article, by contrast, examines federal district court decisions, specifically interpretations of the Private Securities Litigation Reform Act of 1995. Initial interpretations of the Act articulated distinct liberal and conservative positions. The data compiled here support the hypothesis that the later emergence of an intermediate interpretation was the result of strategic statutory interpretation rather than simply judges acting consistently with their ideological preferences, although there is some evidence that judges adopting the most conservative interpretation of the Act were acting consistently with the attitudinal model. There is weaker evidence to support the legal model, an unsurprising result given the severe test the study design creates for that model.

Legal academics and political scientists continue to debate three rival theories of judicial decision making. Consider a common decision making setting—interpreting a newly enacted statute. Under the traditional legal model, the court interpreting the statute makes a reasoned decision based on generally recognized and legitimate sources of authority, without refer-

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ence to the judge's own ideological beliefs.[1] Many political scientists, by contrast, deride the legal model as little more than a myth perpetrated to legitimate judicial power.[2] These attitudinalists argue that judges have a great deal of discretionary authority that they use to inject their ideological preferences into their decisions.[3] Empirical studies have repeatedly shown that ideology matters, although it is not outcome determinative;[4] as a result, the attitudinal model largely dominates judicial politics.[5]

In recent years, however, some positive political theorists have challenged the attitudinal model's hegemony by attempting to show that judges are strategic actors whose decisions, while goal oriented, are influenced by and dependent on the choices of other political actors and by their institutional settings.[6] Strategic judges are theoretically willing to move from their ideal position based on the individualized dynamics of the decisional setting.[7] Attitudinalists retort that judges have a relatively free rein to ignore such influences and suggest that strategic models "have been spectacularly unsuccessful when subjected to empirical testing."[8]

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[1]See Edward H. Levi, An Introduction to Legal Reasoning 27–57 (University of Chicago Press, 1949).

[2]Political scientists have described legal reasoning as a "low form of rational behavior" akin to "creative writing, necromancy, or finger painting." Harold J. Spaeth, Supreme Court Policy Making: Explanation and Prediction 64 (1979).

[3]See C. Herman Pritchett et al., The Pioneers of Judicial Behavior 53–192 (Nancy L. Maveety ed., 2003); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (Cambridge University Press 2002).

[4]See Frank B. Cross, Decisionmaking in the U.S. Circuit Courts of Appeals, 91 Cal. L. Rev. 1459, 1479–82 (2003).

[5]See Lee Epstein & Jack Knight, Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead, 53 Pol. Res. Q. 625, 634 (2000).

[6]See, e.g., Lee Epstein & Jack Knight, The Choices Justices Make 10 (1997); Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision Making, in Supreme Court Decision Making: New Institutional Approaches 46 (Cornell W. Clayton & Howard Gillman eds., 1999).

[7]See Lee Epstein & Thomas G. Walker, The Role of the Supreme Court in American Society: Playing the Reconstruction Game, in Contemplating Courts 315, 322 (Lee Epstein ed., 1995).

[8]Cornell W. Clayton, The Supply and Demand Sides of Judicial Policy-Making (Or, Why be so Positive about the Judicialization of Politics?), 65 L. & Contemp. Probs. 69, 83 (2002);

A notable shortcoming in this debate is the high-court bias found in past studies, which tend to focus almost exclusively on appellate courts.[9] The results of these studies are not necessarily generalizable to decision making at the district court level, where most judicial activity occurs. Although there have been a number of studies suggesting that judicial ideology is a significant determinant of lower court decision making, only a few scholars have attempted to evaluate the legal model in federal district courts[10] and none appear to have tested whether district courts engage in strategic statutory interpretation.[11]

This article addresses this gap in the literature by assessing whether federal district court judges' statutory interpretations are consistent with one of the three models. The specific setting is a sample of 268 decisions on motions to dismiss in securities fraud lawsuits. The decisions interpret the heightened pleading requirement of the Private Securities Litigation Reform Act of 1995 (the PSLRA or the Act)[12] in situations where the relevant circuit court had not yet interpreted the Act.

This setting provides a fertile ground for examining the competing models of judicial decision making for three reasons. First, the PSLRA and securities litigation are ideologically contested, with conservatives (as that term is typically used) generally viewing securities fraud actions as predomi-

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Cross, supra note 4, at 1509–12 (finding no evidence that federal courts of appeals act strategically).

[9]See Nancy L. Maveety, The Study of Judicial Behavior and the Discipline of Political Science, in The Pioneers of Judicial Behavior 18 (Nancy L. Maveety ed., 2003).

[10]See, e.g., Gregory C. Sisk, Michael Heise & Andrew P. Morriss, Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. Rev. 1377 (1998).

[11]See Epstein & Knight, supra note 5, at 650.

[12]Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.). There appears to be only one existing empirical study that examines the impact of ideology on interpretations of the pleading standard. Joseph A. Grundfest & A.C. Pritchard, Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, 54 Stan. L. Rev. 627 (2002). Using a sample of 167 interpretations of the pleading standard, the authors find that judges appointed by Presidents Carter, Ford, and Nixon were more likely to adopt a pro-plaintiff interpretation of that standard. They note that "[t]his latter observation is inconsistent with a pure Democrat-Republican dichotomization of the bench. It instead suggests that, to the extent political factors correlate with judicial decisionmaking, it may be necessary to adopt a more refined description of the judicial process." Id. at 635. This article attempts just such a description.

nantly strike suits, and liberals (again, as that term is typically used) generally viewing such actions as a necessary supplement to inadequate governmental enforcement resources. Second, in each of these cases the district judges were confronted with precisely the same legal issue[13] and had a broad interpretational space in which to work because opinion over the exact requirements of the standard was sharply divided.[14] Finally, the observed pattern of case law development provides a quasi-natural experiment for testing the competing judicial decision-making theories. In the earliest decisions, district courts staked out two widely divergent views—a liberal interpretation that was the least restrictive possible under the statutory language and a conservative interpretation that appeared to raise the bar significantly higher for plaintiffs trying to survive a motion to dismiss. Later, a third, intermediate approach emerged that became, by some measures, the prevailing approach.

Consequently, any of the three models might explain the emergence of this intermediate standard. The intermediate standard may have come to dominate because courts viewed it as the best and most persuasive reading of a vague and ambiguous statute. Different interpretations could have been driven by ideological differences in the district courts. It is also possible that judges opting for the intermediate standard were acting strategically. They may have preferred the liberal (conservative) approach but articulated a marginally more (less) restrictive standard in an attempt to avoid reversal by an ideologically dissimilar appellate court.

To analyze these competing explanations, this article proceeds as follows. Section I provides background information on securities fraud actions, the PSLRA, and the pattern of case law development. Section II reviews the literature on the legal, attitudinal, and strategic models in order to develop several empirically testable hypotheses linking these theories to the emergence of the intermediate standard. Section II also discusses the variables employed in the study. Section III discusses the empirical results. The data suggest that strategic considerations played the largest role in the

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[13]The study is thus similar to Sisk, Heise, and Morriss, who use decisions on the constitutionality of the Federal Sentencing Guidelines to study the impact of a variety of judicial characteristics on outcomes. See Sisk et al., supra note 10; see also Mark A. Cohen, Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission? 7 J. L. Econ. & Org. 183 (1991).

[14]See Michael A. Perino, Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action, 50 Stan. L. Rev. 273, 293–94 (1998).

decision to adopt the intermediate standard. Liberal and conservative judges sitting in ideologically dissimilar circuits were significantly more likely to adopt the intermediate standard than were other judges. At the same time, some evidence suggests that the judges opting for the most conservative interpretation were acting consistently with the attitudinal model. There is weaker evidence of the legal model, an unsurprising result given the severe test the study design creates for that model. Section IV discusses these results and outlines avenues for future research. Section V contains brief concluding remarks.

I. Securities Litigation and the PSLRA

Private securities litigation has been the subject of a continuing public policy debate since at least the mid-1970s.[15] Proponents of private enforcement of the federal securities laws contend that "[p]rivate securities litigation . . . help[s] to deter wrongdoing" and "is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action."[16] Critics counter that plaintiffs' lawyers typically control these cases and thus have incentives to act primarily in their own self-interest, often to the detriment of the deterrent and compensation functions that private litigation is supposed to perform.[17]

Securities litigation reform became a plank in the Republican Party's Contract with America in 1994.[18] After Republicans gained control of Congress in the 1994 mid-term elections, the 104th Congress passed the PSLRA, the only statute enacted over a presidential veto during the Clinton Administration.

The PSLRA's heightened pleading standard was one of the Act's more controversial provisions. The most salient statutory requirement is that plaintiffs must "state with particularity facts giving rise to a strong inference that

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[15]See Perino, supra note 14, at 288–89.

[16]H.R. Conf. Rep. No. 104-369 at 31 (1995), reprinted in 1995 U.S.C.C.A.N. 730.

[17]See Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorneys Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991).

[18]Newt Gingrich, Bob Schellhas, Ed Gillespie, Richard K. Armey, Contract with America: The Bold Plan 150–51 (1994).

the defendant acted with the required state of mind."[19] The statute's language was clearly drawn from a standard the Second Circuit applied prior to passage of the PSLRA, which plaintiffs could satisfy by pleading specific facts demonstrating that defendants had both the motive and the opportunity to commit fraud.[20] This standard was generally acknowledged to be the most stringent in use at the time the PSLRA was debated; nonetheless, Republicans inserted language in the conference report suggesting that the PSLRA's pleading barrier was actually higher than the Second Circuit standard.[21]

This language sparked a heated debate over how Congress intended courts to apply the new standard. Remarkably, given the arcane nature of the issue, President Clinton cited that legislative history as a reason for his decision to veto the Act. He stated that he would support a standard that was no higher than the Second Circuit standard.[22] Congress overrode the president's veto, but it remained unclear what interpretation of the Act should control.

In the earliest cases, courts staked out two distinctly different positions. Some courts held that the PSLRA standard was equivalent to the Second Circuit standard.[23] By contrast, *In re Silicon Graphics, Inc. Securities Litigation* held that the PSLRA did not codify the Second Circuit standard and that allegations of motive and opportunity were never sufficient to demonstrate a strong inference of fraudulent intent.[24]

Following *Silicon Graphics,* courts interpreting the PSLRA were left with four distinct choices. As Table 1 shows, about 32 percent of the decisions in

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[19]15 U.S.C. § 78u-4(b)(2).

[20]See, e.g., Shields v. Citytrust Bancorp., Inc., 25 F.3d 1124, 1128–30 (2d Cir. 1994).

[21]See H.R. Conf. Rep. No. 104-369 at 41. In particular, the report observed the need to establish "more stringent pleading standards to curtail the filing of meritless lawsuits" and noted that the conference committee did "not intend to codify the Second Circuit's case law interpreting this pleading standard." Id.

[22]See President's Message to the House of Representatives Returning Without Approval the Private Securities Litigation Reform Act, 31 Weekly Comp. Pres. Doc. 2210 (Dec. 19, 1995), reprinted in 141 Cong. Rec. S19034 (Dec. 21, 1995).

[23]See, e.g., Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F. Supp. 1297 (C.D. Cal. 1996); Zeid v. Kimberley, 930 F. Supp. 431 (N.D. Cal. 1996).

[24]In re Silicon Graphics, Inc. Sec. Litig., 1996 WL 664639 (N.D. Cal. Sept. 25, 1996); In re Silicon Graphics, Inc. Sec. Litig., 970 F. Supp. 746 (N.D. Cal. 1997), *aff'd,* 183 F.3d 970 (9th Cir. 1999).

Table 1: Distribution of Statutory Interpretation Decisions in Sample

	No Standard	*Second Circuit*	*Intermediate*	Silicon Graphics	*Total*
Cases (% total)	86 (32.1%)	101 (37.7%)	64 (23.9%)	17 (6.3%)	268 (100%)

SOURCE: Motion to dismiss decisions in securities fraud actions available on Westlaw and Lexis and decided between January 1, 1996 and July 31, 2004.

the sample chose to avoid the issue by holding that under any pleading standard the complaint was either sufficient or insufficient.[25] About 38 percent adopted the Second Circuit standard, while only about 6 percent chose to follow *Silicon Graphics*. The remaining 24 percent set a different, intermediate course. In those cases, the courts generally held that, while the PSLRA did not codify the Second Circuit standard, allegations of motive and opportunity could under certain circumstances give rise to a strong inference of fraud.[26] This intermediate approach has predominated among circuit courts, with eight of the eleven circuits that have analyzed the issue adopting that standard.[27]

Congress reentered this interpretational morass in 1998 in connection with passage of the Securities Litigation Uniform Standards Act (SLUSA).[28] SLUSA preempts certain state securities class actions and was designed to stem a shift of these cases from federal to state court.[29] To secure White House approval,[30] Congress agreed to include legislative history in SLUSA

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[25]See, e.g., In re FAC Realty Corp., 990 F. Supp. 416 (E.D.N.C. 1997). This kind of decision may also be a strategic attempt to avoid reversal. See infra note 61.

[26]See, e.g., In re Baesa Sec. Litig., 969 F. Supp. 238 (S.D.N.Y. 1997).

[27]See Makor Issues & Rights, Ltd. v. Tellabs, Inc., 437 F.3d 588 (7th Cir. 2006); Ottmann v. Hanger Orthopedic Group, Inc., 353 F.3d 338 (4th Cir. 2003); Florida State Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645 (8th Cir. 2001); Nathenson v. Zonagen, Inc., 267 F.3d 400 (5th Cir. 2001); City of Phila. v. Fleming Cos., 264 F.3d 1245 (10th Cir. 2001); Greebel v. FTP Software, Inc., 194 F.3d 185 (1st Cir. 1999); Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999); In re Comshare, Inc. Sec. Litig., 183 F.3d 542 (6th Cir. 1999).

[28]Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.).

[29]See Perino, supra note 14, at 307–18.

[30]Statement by President William J. Clinton upon Signing S. 1260, 34 Weekly Comp. Presidential Docs. 2247 (Nov. 9, 1998).

stating that the PSLRA intended to codify the Second Circuit standard.[31] Although some courts cited this language, many courts noted the traditional view that courts interpreting statutes should generally discount congressional attempts to create postenactment legislative "history."[32]

As previously noted, the legal, attitudinal, or strategic models could each explain the emergence of the intermediate standard. A proponent of the legal model might suggest that the spread of the intermediate standard was the product of judges who were persuaded by the reasoning of earlier cases. As the weight of precedent in favor of the standard grew, other courts became increasingly likely to adopt it. An attitudinalist, by contrast, could hypothesize that the varying standards might be explained by the ideology of the judges. Those opting for the Second Circuit or *Silicon Graphics* approaches may have been, respectively, liberal and conservative, while the intermediate approach may have come from moderate judges. It is also possible that judges opting for the intermediate standard were acting strategically. They may have preferred, perhaps, the Second Circuit approach but articulated a marginally more restrictive standard in an attempt to avoid reversal by a more conservative court of appeals.

II. Testing the Impact of Law, Ideology, and Strategy

This article tests these rival hypotheses using a binary logistic regression model, with the decision to adopt the intermediate standard (INTERMEDIATE) as the dependent variable.[33] This section discusses the explanatory variables used in the models and the methodological issues associated with specifying them.

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[31]S. Rep. No. 105-182 at 5–6 (1998).

[32]See Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 132 (1974).

[33]The standards courts adopted have a natural order (least to most restrictive), suggesting that ordinal, rather than logistic, regression might be a useful approach. I chose not to use ordinal regression because it is unclear how cases that did not adopt a standard should be ranked. Still another potential approach would have been to use a multinomial logistic regression, which would not have required combining all the nonintermediate cases into one group. That method was rejected because the small number of cases adopting the *Silicon Graphics* standard were clustered in the Ninth Circuit over a relatively short period of time, meaning that there was insufficient variation in the data to make the multinomial procedure optimal.

A. The Legal Model

The legal model posits that judicial decision making flows from reasoned analysis of generally recognized and legitimate sources of legal authority.[34] As with the PSLRA, the first courts interpreting a statute may reach inconsistent decisions. Over time, however, other judges will look to the existing precedents and will rely on the most persuasive reading of the statute and not simply the one that most closely accords with their own policy preferences. Eventually, a predominant interpretation will emerge through a process that is frequently described in evolutionary terms.[35] In the strong form of the legal model, ideology plays no role in this developmental process. Contemporary commentators, however, recognize that judges' worldviews necessarily inform their decisions but, they contend, only in a small category of truly indeterminate cases.[36]

The conception of the legal model as iterative, experimental, and largely divorced from personal ideological preferences is often missing from empirical studies of judicial decision making. Many empirical studies purporting to find that the legal model has no explanatory power were in truth testing and rejecting the antiquated conception of judicial decision making as a mechanistic process through which judges find and apply clear and determinate rules.[37] Law is not completely determinate and different judges using the same legal materials can and do reach different conclusions, but that does not necessarily mean that the legal model has no influence on judicial decision making. Law can still act as a constraint that limits the discretionary space in which a judge may operate.[38] Whether by socialization, self-selection, or screening, it is certainly possible that judges derive at least

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[34]John Chipman Gray, The Nature and Sources of the Law, 2d ed. (Beacon Press 1963).

[35]See, e.g., Benjamin N. Cardozo, The Nature of the Judicial Process 22 (1921) ("Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience are sacrificed mercilessly and thrown into the void.").

[36]See, e.g., Jon O. Newman, Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values, 72 Cal. L. Rev. 200, 204 (1984).

[37]See Howard Gillman, What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making, 26 L. & Soc. Inquiry 465, 471–75 (2001).

[38]See Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 Nw. L. Rev. 251, 299 (1997).

some utility from playing the judicial game according to its established rules.[39]

That being said, the setting for this article—district court interpretations of a vague statute made in the absence of controlling superior court authority—represents a severe test for the legal model. This bias in the study design suggests that any empirical support for the legal model would be surprising and perhaps indicative that the legal model has greater force in more routine district court decision making. Although the pull of the legal model might be weaker in this setting, existing survey evidence suggests that it still exists. In such settings, judges claim that the closest precedent in the circuit or the closest precedent in any circuit are important determinants of judicial decision making.[40] Other empirical work finds that horizontal precedent (i.e., the decisions of other district courts within the circuit) was significant in explaining district courts' statutory interpretation decisions.[41]

Here, four variables are used to test whether the emergence of the intermediate standard is consistent with the legal model. Following Sisk, Heise, and Morriss, CIRCUIT PRECEDENT measures the extent of support for the intermediate standard within the circuit in which the district court is located.[42] If the legal model is correct, then this variable should be positively correlated with the decision to opt for the intermediate standard. OTHER CIRCUIT PRECEDENT measures the growing weight of circuit court precedent for the intermediate standard.[43] If horizontal circuit precedents are a significant explanatory variable, then all other things being equal, OTHER CIRCUIT

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[39]Richard A. Posner, Overcoming Law 133 (1995).

[40]J. Woodford Howard, Courts of Appeals in the Federal Judicial System 165 (1981).

[41]Sisk et al., supra note 10, at 1427; see also David E. Klein, Making Law in the United States Courts of Appeals 75–76 (2002).

[42]CIRCUIT PRECEDENT is calculated by subtracting the number of prior, nonintermediate precedents within each circuit from the number of prior intermediate precedents, multiplying the result by the absolute value of the difference, and dividing the result by the total number of prior decisions in the circuit. Using this methodology preserves the sign of the result and distinguishes between situations in which a single precedent exists and those with a margin of one among multiple precedents. See Sisk et al., supra note 10, at 1428–29.

[43]OTHER CIRCUIT PRECEDENT is the number of circuit courts adopting the intermediate standard at the time of the decision divided by the total number of circuit decisions interpreting the PSLRA.

PRECEDENT should also be positively associated with the decision to adopt the intermediate standard.

SLUSA is an indicator variable that takes a value of 1 if the decision came down after passage of SLUSA and 0 otherwise. If the legal model is correct, this variable should be negatively correlated with the decision to adopt the intermediate standard. Once Congress signaled its view that the Second Circuit standard should control, the legal model would suggest that, all things being equal, courts should be less likely to adopt an alternative approach like the intermediate standard. Still, because courts often claim to discount this kind of postenactment legislative history, the impact of SLUSA's legislative history should be smaller than the impact of other legal model variables. Finally, PREVIOUS 2D CIRCUIT is an indicator variable that takes a value of 1 if the circuit court had adopted the Second Circuit standard in pre-PSLRA cases and 0 otherwise. If courts look to the closest precedent in the circuit, then this variable should be negatively correlated with the decision to adopt the intermediate standard.

B. The Attitudinal Model

The attitudinal model posits that judges act predominantly on the basis of their own ideological preferences. Although district courts are likely to face a substantial number of routine cases where the judge has no preferred ideological position, there is empirical support that links judicial ideology to case outcomes at the district level.[44] If the district judge's ideology played the dominant role, then we should expect to see a close correlation between the ideology of the district court and the standard chosen. In other words, we should see, all other things being equal, liberal judges opting for the Second Circuit standard, moderate judges opting for the intermediate standard, and conservative judges opting for the *Silicon Graphics* standard.

The key methodological problem in testing the attitudinal model is obtaining a reliable and accurate measure of judicial ideology. Most studies

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[44]See, e.g., C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts 30–31 (1996) (finding that Democratic judges were more likely to render liberal decisions on civil rights, labor, and economic issues than were Republican judges); but see Max Schanzenbach, Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics, 34 J. Legal Stud. 57 (2005) (finding little evidence that political composition of district affects sentencing disparities); Orley Ashenfelter et al., Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257 (1995) (finding political party of appointing president was an insignificant explanatory variable in study of more than 2,500 civil rights and prisoner cases).

of the impact of ideology on lower courts rely on the party of the appointing president as a proxy for the judge's ideology.[45] But, as Epstein and King note, there are a number of reasons for questioning the standard methodology.[46] A dichotomous variable obviously masks considerable variation among both appointing presidents and judges. Presidents frequently use their nominating powers to push partisan or personal, rather than ideological, agendas.[47] The president's party also fails to account for the impact of senatorial courtesy, the practice of deferring to home-state senators from the president's party with respect to judicial nominations.[48] Even in states with two out-party senators, presidents may have reciprocal arrangements on appointment matters.[49]

To address these concerns, the ideological measure used here (DISTRICT IDEOLOGY) relies on a modified version of the methodology recently developed by Giles, Hettinger, and Peppers.[50] Under this methodology, judges' ideological scores are derived from Poole common-space scores, a preexisting scale used in the political science literature for presidential and senatorial ideology scores.[51] Common-space scores are calculated using sena-

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[45]See, e.g., Frank B. Cross & Emerson Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155 (1998); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1718 (1997); Cass R. Sunstein, David Schkade & Lisa Michele Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 Va. L. Rev. 301 (2004). Grundfest and Pritchard used this measure in their study of decisions in securities class actions as well as dummy variables for specific appointing presidents. See Grundfest & Pritchard, supra note 12, at 693.

[46]Lee Epstein & Gary King, The Rules of Inference, 69 U. Chi. L. Rev. 1, 87–96 (2000).

[47]Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 3–4 (1997).

[48]Rowland & Carp, supra note 44, at 87–116; Goldman, supra note 47, at 10.

[49]For example, President Nixon had an arrangement with California's two Democratic senators pursuant to which Nixon gave the senators the right to name every fourth appointment in exchange for their support of every three Nixon appointees. Donald Dale Jackson, Judges 261 (1974).

[50]Michael W. Giles, Virginia Hettinger & Todd Peppers, Picking Federal Judges: A Note on Policy and Partisan Selection Agendas, 54 Pol. Res. Q. 623 (2001).

[51]See Keith T. Poole & Howard Rosenthal, Congress: A Political-Economic History of Roll Call Voting (1997); Keith T. Poole, Recovering a Basic Space from a Set of Issue Scales, 42 Am. J. Pol.

tors' role-call votes and measure ideology on a scale of −1 (for most liberal) to +1 (for most conservative). Giles, Hettinger, and Peppers do not appear to have created common-space scores for district judges, nor does their methodology adequately consider the influence that out-party senators may have on the appointment of district court judges. For these reasons, this article calculates common-space scores for district judges based not only on the president's and home-state senators' ideological scores, but also on the judge's political party.[52]

If the attitudinal model is correct, then moderate judges should be the most likely to adopt the intermediate standard. Because DISTRICT IDEOLOGY is the absolute value of the judge's ideological score, there should be a significant, negative correlation between DISTRICT IDEOLOGY and the dependent variable INTERMEDIATE—moderate judges should be more likely than their conservative or liberal counterparts to adopt the intermediate standard.

C. The Strategic Model

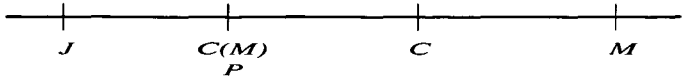
The strategic model differs from the attitudinal model because in the strategic account, judges "are not unconstrained actors who make decisions based only on their own ideological attitudes. Rather, [judges] are strategic actors who realize that their ability to achieve goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."[53]

Sci. 954 (1998). The analysis in this article uses the Poole common-space scores for the 75th through the 107th Congresses, which are available at ⟨ftp://pooleandrosenthal.com/Junkord/BL75107.xls⟩.

[52]Specifically, I assign the judge the absolute value of the common-space score as follows: (1) if there is no senator from the president's party in the state and the president appoints a judge from his party or if the judge's party affiliation is unavailable, the president's common-space score is used; (2) if there is no or one senator from the president's party and the president appoints a judge from the other party, the common-space score of the out-party senator is used; (3) if there are one or two senators from the president's party and a judge from the same party is appointed or if the judge's party affiliation is unavailable, the common-space score of the home senator is used. If there are two senators from the same party, the mean score for the senators is used.

[53]Epstein & Knight, supra note 6, at 10.

Figure 1: Strategic statutory interpretation in the Supreme Court.



SOURCE: Lee Epstein & Jack Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead," 53 *Pol. Res. Q.* 625, 650 (2000).

One of the more well known of these models is Eskridge's model of strategic statutory interpretation in the Supreme Court.[54] Eskridge argues that if the Court wants to establish a policy that is as close as possible to the one it prefers, it must take into account what Congress (which has the power to overturn its statutory decisions) and the president will do in response to its interpretation. Figure 1 illustrates this relationship. The model assumes that all the actors have complete information about the other actors' preferences and that each actor has a single-peaked utility function. *J* represents the preference of the median member of the Court, *P* the president's preferred point, and *M* the median member of Congress's preferred point. *C* is the preference of the relevant congressional committee, while *C(M)* represents its indifference point—the point at which it is indifferent between its preferred position and the preferred position of the median member of Congress.

In Figure 1, the Court's preferred policy position *J* is to the left of all other players. If the Court decides consistently with its preference, the committee will introduce legislation to override the decision, which Congress and the president will favor. If, by contrast, the Court modifies its position to *C(M)*, there will be no statutory override because the relevant committee is indifferent as between this point and its preferred position. Setting the policy in this way avoids the potential that a statutory override will result in a policy that is to the right of *C(M)*.

This kind of strategic model has an intuitive appeal; however, critics argue that strategic models "have been spectacularly unsuccessful when subjected to empirical testing."[55] Many attitudinal scholars recognize that judges have the ability to act strategically, but suggest that judges rarely need to do so because responses from other political actors are rare and because

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[54]William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991).

[55]See Clayton, supra note 8, at 83 (2002); Cross, supra note 4, at 1489 (finding no evidence that federal courts of appeals act strategically).

judges are not harmed personally if they are reversed (other than perhaps a hypothesized loss of reputational capital).[56]

These critiques, however, may not be generalizable to district judges. Appellate court review of their statutory interpretations is far more likely than congressional overrides of Supreme Court decisions and will occur under a nondeferential de novo standard. There thus appears to be little basis for claiming that the district court can safely ignore the court of appeals' preferences. Moreover, district judges may be able to derive more tangible benefits from strategic decision making than Supreme Court justices. Reversals may limit promotion opportunities for district judges, an irrelevant consideration for Supreme Court justices.[57] The district court may also be able to achieve tangible gains from its preferred policy. Statutory interpretations affect not only the litigants who bring cases, but also the district court, which will have the primary burden of administering the statute. A particular statutory interpretation might reduce the court's workload or make the cases it does handle easier to process. Under these conditions, rational district judges may find it advantageous to adopt strategies that increase the chances that the appellate court will adopt statutory interpretations that are reasonably close to the policies the lower courts prefer.

But are such strategic responses even available to district judges given the vast structural differences that exist in the relationship between district and circuit courts as opposed to the Supreme Court and Congress? To be sure, both relationships can be modeled in accordance with familiar principal-agent terms because in each the principal has the ability to alter the interpretations of the agent. Nonetheless, the mechanisms for implementing that override power are quite different. Congress's override power is not self-actualizing; invoking it requires an initial affirmative step, typically the introduction of legislation by a member of the relevant committee. As a result, the Court is likely to have some discretionary space in which to operate because the transaction and opportunity costs of the override process may cause Congress not to take action.[58]

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[56]See Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 Am. Pol. Sci. Rev. 28, 31 (1997).

[57]See Sisk et al., supra note 10, at 1423. For other views on judges' aversion to reversal, see Posner, supra note 39, at 112–13, 118–19 (citing studies).

[58]See Daniel B. Rodriguez, The Positive Political Dimensions of Regulatory Reform, 72 Wash. U. L.Q. 1, 96 (1994); Segal, supra note 56, at 31.

By contrast, in the majority of cases, the court of appeals does not have discretionary jurisdiction. Under these circumstances, why would a court of appeals with distinct policy preferences be willing to accept a compromise position? In part, the answer to that question may turn on the fact that the court of appeals is a "they," not an "it."[59] The outcome of any appeal will depend at least to a degree on the three-person panel that hears the case. Consider the example of a liberal district court judge sitting in a circuit that was predominantly conservative, but that contained some moderate and liberal judges as well. Empirical studies show that when panels are ideologically consistent (e.g., a panel of three conservative judges), decisions tend to be more ideologically extreme because the judges' policy preferences tend to reinforce one another.[60] If mixed or moderate panels are the norm, it is reasonable to expect that district judges may benefit from acting strategically because the probability of the circuit court accepting the intermediate position should increase.[61]

To test this, I calculated the probability of a mixed or moderate ideological panel for each circuit in the years during which cases from that circuit appear in the database. Probabilities are based on all active judges and active

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[59]See Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron, 12 Int'l Rev. of L. & Econ. 239 (1992).

[60]See, e.g., Cross & Tiller, supra note 45, at 2156.

[61]There is another potential strategic explanation. Rather than offering a compromise legal interpretation in an attempt to establish a policy that is as close as possible to the district judge's policy preferences, judges could be strategically attempting to predict the position the court of appeals is likely to adopt so as to lessen the probability that they will be reversed. If mixed or moderate appellate panels are the norm, then a district judge engaging in this sort of expected probability calculation might well decide to adopt an intermediate interpretation of an ambiguous statute. Although there does not appear to be a ready method for distinguishing empirically between these motivations, it seems plausible that the strategy here is based more on policy preferences and less on fear of reversal. The reason is that if judges were primarily motivated by fear of reversal, they would have a much simpler strategy than attempting to engage in a highly complex and indeterminate probabilistic analysis of the likely interpretation that some as yet unknown panel will adopt. They could, instead, simply decide not to decide. Indeed, as shown in Table 1, that is precisely what 32 percent of the judges in the sample did. By taking no position on the proper interpretation of the statute, they ensured that they could not be overturned on that basis. Even if the motivation for adopting the intermediate standard is an attempt to avoid reversal, this fact does not undermine the proposed test for strategic decision making. After all, such judges are still acting strategically, and thus inconsistently with either the legal or attitudinal models.

Table 2: Probability by Circuit of Mixed or Moderate Ideology Three-Judge Panels (1996–2004)

	1996	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*	*2004*
1st Cir.	0.958	0.958	0.908	0.869	—	—	—	—	—
2d Cir.	0.931	0.900	0.730	0.749	—	—	—	—	—
3d Cir.	0.979	0.976	0.979	0.971	—	—	—	—	—
4th Cir.	0.784	0.813	0.871	0.893	0.864	0.823	0.790	0.758	—
5th Cir.	0.757	0.757	0.786	0.786	0.769	0.736	—	—	—
6th Cir.	0.791	0.815	0.790	0.790	—	—	—	—	—
7th Cir.	0.705	0.901	0.874	0.914	0.901	0.874	0.901	0.874	0.843
8th Cir.	0.951	0.951	0.909	0.915	0.909	0.895	—	—	—
9th Cir.	0.929	0.911	0.917	0.913	—	—	—	—	—
10th Cir.	0.847	0.855	0.807	0.835	0.835	0.835	—	—	—
11th Cir.	0.746	0.878	0.841	0.874	—	—	—	—	—

SOURCE: Federal Judicial Center, *Federal Judge's Biographical Database*; Poole Common Space Scores ⟨ftp://pooleandrosenthal.com/junkord/BL75107.DAT⟩; U.S. Administrative Office, *Federal Court Management Statistics*; *Biographical Directory of the United States Congress (1774 to Present)*; Lexis.

senior judges serving in a circuit[62] who were classified as liberal, moderate, or conservative based on the common-space score assigned to the judge.[63] Table 2 reports the results. The probability of a mixed or moderate ideological panel is high across circuits. None of the cells in Table 2 has a probability lower than 0.7, including what are traditionally viewed as conservative circuits. Indeed, in nearly 73 percent of the cells, the probability of getting a mixed or moderate ideological panel exceeds 0.8. Consequently, it

[62]Judges were included if they served at any time during that year. Some senior judges were included because during the study period resident senior judges typically accounted for about 15 percent of case participations on the U.S. courts of appeals. See Judicial Facts and Figures, Table 1.7 (available at ⟨www.uscourts.gov/judicialfactsfigures/table1.07.pdf⟩). The activity level among senior judges varies greatly, however. To determine whether a senior judge should be included, I relied on 28 U.S.C. § 371(c), which provides that senior judges are entitled to the same pay increases as active judges if they handle a caseload that is at least 25 percent of that of an average active judge. Accordingly, U.S. Administrative Office data were used to calculate the average caseload for each judge by circuit over the period from 1997–2004. The names of senior judges were then searched in Lexis to determine whether they served on the requisite number of panels in a given year.

[63]Judges were classified into liberal, moderate, and conservative by dividing the observed ideological range for district court judges in the sample roughly into thirds. Specifically, judges were classified as follows: (1) liberal if the judge had an ideological score less than or equal to −0.2000; (2) moderate if the judge had an ideological score of between −0.2000 and 0.2000; and (3) conservative if they had an ideological score greater than or equal to 0.2000.

seems reasonable to believe that even in the most conservative circuits, strategic district court behavior might be successful. Indeed, three such circuits, the Fourth, Fifth, and Seventh, ultimately adopted the intermediate approach.[64]

There are five variables in the model that test for strategic decision making. The first is DISTRICT IDEOLOGY, the ideological measure for district judges. As noted previously, a significant, negative correlation between DISTRICT IDEOLOGY and INTERMEDIATE would support the hypothesis that the decision to adopt the intermediate standard was ideologically driven because it would suggest that, all things equal, moderate judges were more likely than liberal or conservative ones to adopt that standard. By contrast, a significant positive correlation would appear to provide some support for the strategic hypothesis because it would suggest that, all else being equal, as judges became less moderate they were more likely to adopt the intermediate standard.

A fundamental premise of the strategic model is the presence of a gap between the preferred policy position of the median court of appeals judge and that of the district judge deciding the case. Indeed, it may be particularly important for district courts seeking to achieve policy goals to act strategically in such a circumstance because empirical studies suggest that monitoring is in fact more vigorous in the presence of these kinds of ideological mismatches.[65]

To capture this dynamic, the model uses an indicator variable (STRATEGY) that takes a value of 1 where there is an ideological mismatch between the district and the median circuit court judge and 0 where there is no mismatch or where the district judge is moderate (and thus under the attitudinal model would be expected to adopt the intermediate standard).[66] The median circuit court ideology is calculated in a fashion similar to

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[64]See Makor Issues & Rights, Ltd. v. Tellabs, Inc., 437 F.3d 588 (7th Cir. 2006); Ottmann v. Hanger Orthopedic Group, Inc., 353 F.3d 338 (4th Cir. 2003); Nathenson v. Zonagen, Inc., 267 F.3d 400 (5th Cir. 2001).

[65]See Susan B. Haire, Stefanie A. Lindquist & Donald Songer, Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective, 37 Law & Soc'y Rev. 143, 144–45 (2003); Cross, supra note 4, at 1504–09.

[66]STRATEGY takes a value of 1 in the following district-circuit combinations: (1) conservative district-liberal circuit; (2) liberal or conservative district-moderate circuit; and (3) liberal district-conservative circuit.

DISTRICT IDEOLOGY.[67] If judges act strategically in response to ideological disparities between the district and circuit courts, then there should be a significant positive correlation between STRATEGY and the decision to adopt the intermediate standard.

The model also includes several second-order effects, which may increase the likelihood of strategic decision making. First, a district judge deciding whether to act strategically should consider the likelihood that the appellate court will review his or her decision. If no appeal is likely, there would appear to be less reason to operate strategically. Under the final judgment rule, a decision granting a motion to dismiss is a final decision that plaintiffs may immediately appeal, whereas denial of a motion is an interlocutory order for which, under most circumstances, defendants may not immediately seek appellate review.[68] The final judgment rule is an important institutional structure that has generally not been considered in the political science literature, which tends to assume that all district court decisions are subject to meaningful appellate review.[69] Here, the models include an indicator variable (DISMISS) that takes a value of 1 if the motion to dismiss is granted with prejudice and 0 otherwise. If the intermediate standard is the result of strategic decision making, then this variable should be positively related to the decision to opt for that standard.

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[67]Out-party senators appear to have less of a role with respect to circuit appointments and therefore circuit ideological scores are calculated without reference to the circuit judge's political party. Instead, common-space scores are calculated as follows: (1) if there are no senators from the president's party in the judge's home state at the time of nomination, then a circuit judge is assigned the appointing president's ideological score or (2) if there was a senator from the president's party in the judge's home state at the time of nomination, then that senator's ideological score is used. The home state is determined from the Federal Judicial Center's Federal Judges Biographical Database, ⟨http://www.fjc.gov/newweb/jnetweb.nsf/hisj⟩, or from the location of the judge's chambers. If there are two senators from the same party, the mean score for the senators is used.

[68]28 U.S.C. § 1291 (2004). There are two primary exceptions to the final judgment rule: interlocutory appeals and writs of mandamus. Neither exception typically results in appellate review of denials of motions to dismiss in securities class actions. Research revealed only two such cases during the eight-and-one-half-year study period. See Phillips v. Scientific-Atlanta, Inc., 374 F.3d 1015 (11th Cir. 2004); Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999).

[69]See, e.g., Haire, Lindquist & Songer, supra note 65, at 144–45.

Second, a judge might attempt to decrease the likelihood of review and reversal by issuing an unpublished opinion.[70] Accordingly, PUBLISHED takes a value of 1 if the decision is published and 0 otherwise. If published decisions are more likely to be reviewed on appeal, then this variable should be negatively correlated with the decision to adopt the intermediate standard. Finally, some scholars suggest that judges seeking to enhance their reputations or to increase their prospects for promotion would attempt to limit the number of reversals of their decisions.[71] If such judges are also motivated by a desire to see the law reflect as closely as possible their own policy preferences, then they may be more willing to engage in strategic decision making. To test this possibility, the model includes a variable TENURE, the time in years from when the district judge received his or her commission to the date of the decision. If judges act strategically when building their reputations or when prospects for promotion are higher, then TENURE should be negatively correlated with the decision to adopt the intermediate standard. Judges who have served for shorter times (and who may be more concerned with establishing their reputations or who may view their prospects for promotion as greater) should be more willing to adopt the intermediate standard.

III. EMPIRICAL RESULTS

The data set consists of 268 published and unpublished opinions by federal district court judges on motions to dismiss securities fraud cases brought under Rule 10b-5, a catch-all anti-fraud rule that is the most common cause of action in these cases. All the decisions are from the time period January 1, 1996 through July 31, 2004.[72] Table 3 reports descriptive statistics for the

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[70]Donald R. Songer, Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review, 50 J. Pol. 206, 213 (1988).

[71]See, e.g., Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1 (1994). But see David E. Klein & Robert J. Hume, Fear of Reversal as an Explanation of Lower Court Compliance, 37 Law & Soc'y Rev. 579 (2003).

[72]Cases were identified using Westlaw and Lexis searches. Cases were excluded from the sample on the following bases: (1) they did not involve motions to dismiss or were motions to dismiss that did not implicate the PSLRA's pleading standard; (2) they were decided by non-Article III judges (e.g., magistrates or territorial judges); or (3) they were cases where the relevant circuit

Table 3: Descriptive Statistics for Intermediate Versus Nonintermediate Cases

	Sample (N = 268)		*Intermediate Cases (N = 64)*		*Nonintermediate Cases (N = 204)*	
	Mean/ Proportion	SD	*Mean/ Proportion*	SD	*Mean/ Proportion*	SD
Intermediate	0.239		1.00		0.000	
Circuit precedent	−7.849	5.705	−6.866	4.411	−8.157	6.031
Other circuit precedent	0.249	0.286	0.363	0.273	0.214***	0.281
SLUSA	0.601		0.828		0.529***	
Previous 2d Circuit	0.313		0.250		0.333	
Judicial ideology	0.343	0.164	0.383	0.149	0.330*	0.167
Strategy	0.541		0.453		0.569	
Dismiss	0.287		0.266		0.294	
Published	0.519		0.672		0.471**	
Tenure	10.172	7.428	9.675	7.763	10.328	7.333

*Significant at 0.05; **significant at 0.01; ***significant at 0.001.

SOURCE: Motion to dismiss decisions in securities fraud actions available on Westlaw and Lexis and decided between January 1, 1996 and July 31, 2004; Federal Judicial Center, *Federal Judge's Biographical Database*; Poole Common Space Scores ⟨ftp://pooleandrosenthal.com/junkord/BL75107.DAT⟩; U.S. Administrative Office, *Federal Court Management Statistics*; *Biographical Directory of the United States Congress (1774 to Present)*.

variables employed in the model and identifies significant differences between courts that adopted the intermediate standard and those that did not. Consistent with the legal model, OTHER CIRCUIT PRECEDENT was significantly larger for the intermediate than for nonintermediate cases. By contrast, there were significant differences in SLUSA, but opposite of what the legal model would have predicted (the proportion of intermediate cases adopted after SLUSA was higher than for nonintermediate cases). There were also a higher proportion of published decisions among the intermediate cases. Although Table 3 shows a significant difference in DISTRICT IDEOLOGY, the difference is inconsistent with the attitudinal model (judges adopting the intermediate standard were significantly less moderate than those adopting some other standard).

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had already interpreted the PSLRA's pleading standard. Because there were only two cases from the District of Columbia, those cases were also excluded, yielding the final total of 268 cases.

Table 4: Ideology by Standard Adopted

	District (N = *268*)		*Circuit* (N = *268*)	
	Mean	SD	*Mean*	SD
Silicon Graphics	0.230	0.299	–0.055	0.136
No standard	–.006*	0.358	0.100**	0.218
Second Circuit	–0.025*	0.382	0.137***	0.194
Intermediate	0.002+	0.414	0.143***	0.216
Overall	0.004	0.381	0.114	0.209

+Significant at 0.1; *significant at 0.05; **significant at 0.01; ***significant at 0.001.

SOURCE: Motion to dismiss decisions in securities fraud actions available on Westlaw and Lexis and decided between January 1, 1996 and July 31, 2004; Federal Judicial Center, *Federal Judge's Biographical Database*; Poole Common Space Scores ⟨ftp://pooleandrosenthal.com/junkord/BL75107.DAT⟩; U.S. Administrative Office, *Federal Court Management Statistics*; *Biographical Directory of the United States Congress (1774 to Present)*.

A somewhat different picture emerges, however, in Table 4, which reports the results of a multiple comparison test for the mean ideology of district judges and circuits, broken down by the standard adopted. In Table 4, ideology is measured on a –1 to +1 scale rather than by absolute value of the ideological score. The data in Table 4 show that judges who opted for the conservative *Silicon Graphics* standard were more conservative than district judges opting for either no standard or the Second Circuit standard. The mean ideological score for the *Silicon Graphics* judges was 0.230, which is significantly different from that of the judges who did not adopt a standard (mean ideology = –0.006, p value = 0.048) or who adopted the Second Circuit standard (mean ideology = –0.025, p value = 0.027). The difference in ideology between the *Silicon Graphics* and intermediate district judges was significant at 0.1 (mean ideology = 0.002, p value = 0.087).

At the same time, the mean ideological score for the *Silicon Graphics* circuits was significantly more liberal than for any other circuit. The mean circuit ideology score for the courts adopting *Silicon Graphics* was –0.055, which was significantly different from that of the judges who did not adopt a standard (mean ideology = 0.100, p value = 0.003), who adopted the Second Circuit standard (mean ideology = 0.137, p value = 0.000), or who adopted the intermediate standard (mean ideology = 0.143, p value = 0.000). These data suggest that judges opting for the *Silicon Graphics* standard were acting in accordance with the attitudinal model—on average, the most

Table 5: Binary Logistic Regression for Decision to Adopt Intermediate Standard

	Coeff. (Std. Error)
Circuit precedent	0.046 (0.039)
Other circuit precedent	1.164 (0.774)
SLUSA	−1.292 (0.504)**
Previous 2d Circuit	0.169 (0.394)
Judicial ideology	3.250 (1.169)**
Strategy	0.918 (0.383)*
Dismiss	0.637 (0.364)+
Published	−1.090 (0.347)**
Tenure	−0.038 (0.024)
Constant	−2.110 (0.933)*
Observations	268
Nagelkerke r^2	0.257
−2 log-likelihood	244.282
Omnibus test of model coefficients	$\chi^2 = 50.357$ (p value = 0.000)

+Significant at 0.1; *significant at 0.05; **significant at 0.01; ***significant at 0.001.

SOURCE: Motion to dismiss decisions in securities fraud actions available on Westlaw and Lexis and decided between January 1, 1996 and July 31, 2004; Federal Judicial Center, *Federal Judge's Biographical Database*; Poole Common Space Scores ⟨ftp://pooleandrosenthal.com/junkord/BL75107.DAT.; U.S. Administrative Office, *Federal Court Management Statistics*; *Biographical Directory of the United States Congress (1774 to Present)*.

conservative judges adopted the most conservative standard despite the fact that they were in the most liberal circuits.[73]

Table 5 moves from descriptive statistics to the regression results for the decision to adopt the intermediate standard. The model correctly classifies 77.6 percent of the cases, although it classifies nonintermediate cases

[73]This finding should not be taken to mean that conservative judges are more willing to decide cases ideologically than their liberal counterparts. The sample of judges opting for the *Silicon Graphics* standard is small, meaning that the results must be interpreted with caution. A simple means comparison does not test whether some other factor rather than ideology is driving the decision to adopt a conservative standard. Moreover, conservative judges had a larger discretionary space in which to work because the statutory and legislative history materials effectively precluded liberal judges from adopting a standard to the left of the Second Circuit standard. See Section I. Nothing in these data suggests that liberal judges would not have acted in the same manner as the conservative judges in this sample if the situation were reversed and the interpretational materials effectively precluded conservative positions.

(94.6 percent) better than intermediate cases (26.6 percent).[74] The model provides significant support for the hypothesis that the intermediate standard was the product of strategic decision making. DISTRICT IDEOLOGY is positive and significant, meaning that, all other things being equal, as judges become less moderate they were more likely to adopt the intermediate standard. The attitudinal model, by contrast, would have predicted precisely the opposite. A one standard deviation increase in DISTRICT IDEOLOGY increases the odds that a judge will adopt the intermediate standard by 62.27 percent. STRATEGY is also positive and significant and has an even larger apparent impact. The odds that the district judge will opt for the intermediate standard are 150 percent higher in the presence of an ideological mismatch between a conservative or liberal district court judge and the circuit that will potentially review its decision. This finding suggests that district judges do indeed consider the likely reactions of the circuit.

Also consistent with the strategic model, PUBLISHED was negative and significant. All else being equal, published decisions were on average 99.8 percent less likely to adopt the intermediate standard than unpublished ones, providing some support for the hypothesis that judges write unpublished decisions in an attempt to decrease the likelihood that the court of appeals will review their decisions. The coefficient for DISMISS was significant at 10 percent. The model thus provides some evidence that strategic decision making is a function of the likelihood of appeal. The coefficient for TENURE was negative, as predicted, but insignificant. There is thus insufficient evidence to support the hypothesis that younger district judges were more likely to adopt the intermediate standard.

The regression model provides no support for the attitudinal hypothesis and weak support for the legal hypothesis. As noted, the findings with respect to DISTRICT IDEOLOGY are inconsistent with the attitudinal model—DISTRICT IDEOLOGY was positive and significant rather than negative and significant. Moreover, the fact that STRATEGY is significant suggests that attitudinalists are incorrect when they assert that judges generally vote their values without regard to the potential reactions of third parties. With respect to the legal model, three out of four legal model variables (CIRCUIT PRECEDENT, OTHER CIRCUIT PRECEDENT, and PREVIOUS 2D CIRCUIT) are insignificant. Only SLUSA is significant, a somewhat surprising finding given judges'

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[74]Standard logistic regression diagnostics were also performed and demonstrated that the model fits the data. See David W. Hosmer & Stanley Lemeshow, Applied Logistic Regression, 2d ed. 143–86 (Wiley-Interscience 2000).

consistent claims that they accord a great deal of weight to horizontal precedent and very little weight to postenactment legislative history. On average, cases decided after passage of SLUSA were 99 percent less likely to adopt the intermediate standard than those decided before. Judges do not appear to discount postenactment legislative history, despite their protestations to the contrary. Still, given the severe test that this setting creates, even this weak finding suggests some support for the legal model.

IV. Discussion and Directions for Future Research

The regression analysis supports the hypothesis that the emergence of the intermediate standard was primarily the product of strategic decision making. However, the setting for this article represents just a sliver of the myriad decisions district court judges must make, and therefore the data cannot tell us the relative frequency of strategic decision making among district judges or the extent to which the attitudinal or legal models accurately describe other kinds of more routine district decisions.

Nor do these data suggest that strategic decision making is the norm for district court judges even when there is an ideological mismatch between the district and circuit court. The judges who opted for the conservative *Silicon Graphics* standard were significantly more conservative than district judges in the other categories despite the fact that they were in the most liberal circuits. Thus, the presence of an ideological mismatch between district and circuit courts would appear to be a necessary, but insufficient, condition for strategic decision making. Although other factors, such as the likelihood of reversal or issue salience,[75] may have played a role in this apparently attitudinalist decision making, isolating the impact of these variables is difficult given the small number of cases ($N = 17$) and the lack of variation in the sample adopting the *Silicon Graphics* standard.

By the same token, nothing in this article should be taken to suggest that the legal model is entirely irrelevant to district court decision making. Existing studies of routine district court decision making suggest that ideo-

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[75]The Ninth Circuit is one of two circuits (the other being the Second Circuit) where approximately 50 percent of securities class actions are filed.

logical differences among judges do not significantly impact outcomes.[76] Even though the highly indeterminate nature of this statutory interpretation question created a severe test for the legal model, one legal model variable was significant. The failure to find significance for the remaining variables should therefore not be taken to mean that precedent is irrelevant to district court decision making.

Given the complex nature of human decision making, it seems unlikely that there can be a one-size-fits-all theory of judicial decision making. Accordingly, future research on district courts, in addition to looking for other categories of decisions that appear to exemplify legal, attitudinal, or strategic decision making, should also seek to identify context-specific variables that cause one or another model to take precedence. What might those variables be? Most obviously, different judges will simply approach their jobs in different ways.[77] The willingness to allow ideological preferences to enter into the decision-making calculus and the ability to act strategically will not be uniformly distributed among the population of district court judges. These differences in approaches and talents would be enormously difficult, if not impossible, to sort out empirically.[78]

Still, the data and prior research allow for some speculation on factors that may be more susceptible to empirical testing. The model suggests that the likelihood of appeal and reversal play an important role, although significant questions remain. For example, the data support the hypothesis that a decision to dismiss a case is correlated with a greater likelihood of strategic decision making. That finding leaves open the question of whether strategic considerations play a role in case outcomes as well as in legal questions.

The salience of the issue for the district court would also seem to play an important role in the likelihood of strategic decision making, but it is

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[76]See Ashenfelter et al., supra note 44, at 260; Schanzenbach, supra note 44, at 89. A number of studies support the more limited proposition that ideology is a significant explanatory variable in nonroutine, ideologically charged cases. See Gregory C. Sisk & Michael Heise, Judges and Ideology: Public and Academic Debates about Statistical Measures, 99 Nw. L. Rev. 743, 769–78 (2005).

[77]See Howard, supra note 40, at 160–67 (reporting on differences among circuit court judges' perceptions of the limits of judicial innovation); John L. Gibson, Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model, 72 Am. Pol. Sci. Rev. 911 (1978) (finding the interaction of role perceptions and attitudes to be a significant determinant of sentencing practices).

[78]See Lawrence Baum, The Puzzle of Judicial Behavior 125–28 (1998).

difficult ex ante to predict its impact. For example, it is possible that as the importance of the issue increases, the district court will vote its convictions, that is, that the court's interpretation will be more consistent with its ideological inclinations. Such a relationship may explain why the conservative district judges in the Ninth Circuit tended to favor the *Silicon Graphics* standard. It is equally plausible, however, to suppose that as an issue becomes more important to the court, it will make strategic behavior more likely because judges will be more concerned about setting a policy that is reasonably close to their preferences.[79]

Finally, this article does not address other kinds of strategic decision making that could occur in district courts. For example, the legal model would predict complete compliance with directly applicable superior court precedents. Once the relevant circuit court adopts an interpretation of a statute, we should see no instances of districts within that circuit applying a different standard.[80] It is important to remember, of course, that there is a difference between a district court stating that it is applying the circuit's standard and faithfully applying that standard. Indeed, this kind of noncompliance can be thought of as a species of strategic decision making and may be quite feasible where, as here, the requirements of the standard are imprecise.[81]

V. Conclusion

This article finds evidence supporting the hypothesis that district courts engage in strategic decision making. In particular, this article finds that the emergence of an intermediate interpretation of the PSLRA's higher pleading standard is best explained by the strategic model, rather than either the attitudinal or the legal model. Liberal and conservative judges sitting in ideologically dissimilar circuits were significantly more likely to adopt the

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[79]Existing studies suggest that this may be true for Supreme Court Justices. See Maltzman, supra note 6, at 51 (compiling studies).

[80]There is substantial empirical support for the existence of this kind of lower court compliance, although ideological differences appear to persist. See David E. Klein & Robert J. Hume, Fear of Reversal as an Explanation of Lower Court Compliance, 37 Law & Soc'y Rev. 579 (2003) (collecting studies).

[81]See Rowland & Carp, supra note 44, at 39–41.

intermediate standard than were other judges. Nonetheless, there is some evidence that the judges opting for the most conservative standard were acting attitudinally and there is also weak evidence that the legal model affected statutory interpretations. Consequently, much more research is necessary to determine the relative frequency of strategic decision making, other variables that trigger it, and the extent to which the legal and attitudinal models accurately describe some portion of district court decision making.