

Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals

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Students of judicial behavior have increasingly turned to strategic accounts to understand judicial decision making. Scholarship on the Supreme Court and state high courts suggests that the decision to dissent is better understood in light of strategic considerations rather than simply reflecting ideological disagreement. We investigate whether these findings comport with behavior by judges on the U.S. Courts of Appeals. We develop a spatial model of the decision to dissent that incorporates both attitudinal and strategic elements and subject this model to empirical analysis. We find that ideological disagreement between a judge and the majority opinion writer is a more persuasive explanation of the decision to dissent than a strategic account in which a judge conditions a dissent on whether circuit intervention would obtain the judge's preferred outcome. Though we do not discount the existence of other types of strategic behavior on the Courts of Appeals, our research suggests that strategic accounts of dissenting behavior are not generalizable to all courts.

The effects of ideological preferences on judicial behavior are well established, with the link between preferences and behavior—that is, the attitudinal model—most clearly established in the case of U.S. Supreme Court justices (Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002). However, students of law and courts have increasingly found strategic explanations of judicial decision making alluring. The hallmark of this strategic approach is its focus on the interdependent nature of judges' decision making. This account of behavior does not eschew the importance of the policy preferences of judges. Rather, strategic accounts begin with the assumption that judges are motivated by their policy preferences, but further recognize that the realization of those preferences may be a function of the behavior of other relevant actors. In the context of Supreme Court justices, Epstein and Knight summarize the strategic perspective as follows:

[J]ustices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based only on their own ideological attitudes. Rather, justices are strategic actors who realize their ability to achieve their 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. (1998, 10)

Hence, while a judge acting on the basis of his attitudes (without regard for the actions or reactions of others) might be expected to act in one way, a judge sharing the same preferences might well behave differently based on strategic considerations. Indeed, such a judge may determine that his preferences (or a closer approximation thereof) can be actualized *only* if his choices also account for the preferences and expected reactions of, for example, his fellow judges on his court or panel.

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Scholarly advocates of this strategic approach include those who study the behavior of Supreme Court justices (e.g., Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000), judges on the U.S. Courts of Appeals (e.g., Cross and Tiller 1998; Songer, Segal, and Cameron 1994), as well as state Supreme Court jurists (e.g., Hall and Brace 1992; Langer 1997). The empirical evidence suggests that this strategic account does explain behavior that may not otherwise be understood as driven solely by attitudinal concerns. We pursue this line of inquiry further to examine dissenting behavior on the part of judges on the U.S. Courts of Appeals. Existing literature on both the Supreme Court (e.g., Maltzman, Spriggs, and Wahlbeck 2000) and state courts of last resort (e.g., Brace and Hall 1990) suggests that dissenting opinions are often rendered for strategic reasons. Our goal is to determine whether a strategic conception of dissenting behavior on the circuit courts provides an enhanced explanation of dissents beyond the attitudinally driven account. We begin with a discussion of the potential for strategic dissents by circuit judges. We go on to develop a spatial model based on the relative positions of a judge, the majority opinion writer, and the circuit median to elucidate the decision-making contexts in which a potential dissenter might find himself. Then, based on this spatial model, we derive a statistical model that allows us to subject both the strategic and attitudinal accounts of dissenting behavior to empirical verification. In our concluding section, we discuss what our results suggest about dissenting behavior on the U.S. Courts of Appeals and strategic accounts of judicial decision making more generally.

The Strategic Use of Dissenting Opinions and Judicial Decision Making

The attitudinal model represented a paradigmatic shift in Supreme Court scholarship and, subsequently, in judicial scholarship more generally (Pritchett 1948, 1954; Schubert 1965; Ulmer 1960). This shift gave rise to disputes over the relative influence of attitudinal forces versus more traditional legal factors in the judicial calculus. While such debates certainly continue,¹ a perusal of the literature of the past decade suggests that the attitudinal model has become an accepted explanation of

judicial behavior—particularly judicial behavior on the Supreme Court. In more recent years, however, the dominance of the attitudinal model has been challenged by a portrayal of judges as strategic actors. Scholars studying judicial behavior have theorized that judges may evidence strategic behavior in a variety of contexts. For example, judges may behave strategically when setting their agendas (Brenner and Krol 1989; Caldeira, Wright, and Zorn 1999; Epstein and Knight 1998; Langer 1997, 1999; but see Provine 1980), when writing majority opinions (Maltzman, Spriggs, and Wahlbeck 2000), and when issuing separate opinions (Hall and Brace 1999).

The phenomenon of dissenting opinions is of particular interest to students of judicial politics because judges may dissent both because dissents reflect the expression of differences over the appropriate legal outcome and for strategic purposes. Several studies undertaken by Brace and Hall at the aggregate (Brace and Hall 1990; Hall and Brace 1989) and individual level (Brace and Hall 1993; Hall and Brace 1992), implicitly or explicitly touch upon strategic explanations of dissenting behavior. They find that state Supreme Court justices choose *not* to follow their ideological preferences in certain situations in anticipation of decisions by external actors (i.e., their electoral constituency) in order to remain on the court and thus further their preferences in less politically salient disputes. Wahlbeck, Spriggs, and Maltzman (1999) also pursue a strategic line of inquiry vis-à-vis dissenting behavior, though their focus is on the U.S. Supreme Court. Their study of the Burger Court considers several potential internal strategic motivations for a Supreme Court justice's decision to author or join a separate opinion, including such factors as past cooperative behavior on the part of majority opinion writers. Wahlbeck, Spriggs, and Maltzman find evidence to support a strategic (at least in part) account of dissenting and concurring behavior on the Supreme Court. Their findings led Wahlbeck and his co-authors to conclude: "Our analysis lends credence to the view that Supreme Court justices are rational actors who pursue their policy goals within constraints—strategic and institutional factors temper justices' pursuit of policy preferences" (1999, 507).

This research on dissenting behavior on state courts of last resort and the Supreme Court is suggestive for strategic models of dissenting behavior on the U.S. Courts of Appeals and at least two studies corroborate this premise. In his evaluation of dissenting behavior on the U.S. Courts of Appeals, Van Winkle (1997) tested a signaling model and evaluated the behavior of attitudinal mainstreamers versus outliers on the decision-making panel in relation to the circuit majority. Van Winkle found evidence to support the hypothesis that mainstreamers will be more likely

¹See, for example, the exchange among scholars appearing in the November 1996 issue of *American Journal of Political Science* (Brenner and Stier 1996; Brisbin 1996; Knight and Epstein 1996; Segal and Spaeth 1996; Songer and Lindquist 1996).

to dissent to signal to the circuit majority that the outliers have violated circuit preferences. This evidence of a signaling motivation for dissenting behavior dovetails with subsequent work by Cross and Tiller (1998) that evaluated the impact of a potential whistleblower on a panel's adherence to Supreme Court precedent requiring judicial deference to the decisions of administrative agencies. Both of these studies, however, are limited by their focus on narrow issue areas (search and seizure cases in the former instance, administrative discretion in the latter) and limited time frames (1992–1993 and 1991–1995, respectively). Nonetheless, these two studies suggest that circuit court judges *may* use panel dissents in an effort to achieve their policy preferences. By signaling to their like-minded colleagues on the circuit, dissenting judges may seek to prod the panel majority to conform its behavior, to trigger *en banc* review that reverses the panel decision, or to increase the likelihood of Supreme Court review.

Herein, we focus on the (non)use of dissents as a strategic tool to induce (or prevent) *en banc* review by the circuit.² *En banc* review is the procedure whereby a three-judge panel decision—the mechanism by which the vast majority of a circuit court's docket is processed—is reviewed by the entire membership of the circuit.³ Though it occurs infrequently (cf. George 1999; Solimine 1988), *en banc* review may result in the affirmance, modification, or reversal of the original three-judge panel decision, based on a majority vote of the judges sitting *en banc*. In effect, an *en banc* proceeding provides a member of a three-judge panel who is dissatisfied with the panel outcome another potential opportunity to secure an outcome more amenable to his own preferred disposition.

In the spatial model we develop below, judges' strategic calculations concerning the choice to dissent from a panel decision involve the likelihood that other circuit judges will vote to trigger *en banc* review of the decision. The evidence from existing research clearly establishes the potential for such a connection. In her model of the determinants of *en banc* review in three circuits, for example, George (1999, 267) found that the existence of a dissenting opinion at the panel level was the strongest factor in the circuits' decisions to hear cases *en banc*. In particular, George found that the odds that a divided panel would be reheard *en banc* were 38.85 times higher than the odds for a unanimous panel in the years and circuits she studied (1999, 267; for similar results, see also Ginsburg and Falk

1991). Circuit judges are, no doubt, aware of this connection between dissents and *en bancs* and thus realize the *potential* strategic importance of dissenting opinions vis-à-vis the circuit *en banc*.

Defining Strategic Dissents on the Courts of Appeals

One of the difficulties in the development of strategic explanations has been a lack of common definitions for the terms used to describe various behaviors (cf. Baum 1997, 90–91 footnote 2). We begin, therefore, by discussing the nature of strategic judicial behavior and start with the premise that judges' actions and behaviors may be characterized as either nonstrategic or strategic.⁴ *Nonstrategic behavior* refers to the choice of the preferred outcome in light of the judge's policy or attitudinal preferences, without regard to the choices of other relevant actors or to any later, final outcome (see Volden 1998, 149; footnote 1).⁵ As Baum has noted, "Judges vote sincerely [or nonstrategically] when they support the case outcomes and doctrines that they most prefer, without considering the impact of their votes on the collective result in their court (if it is an appellate court) or in other institutions" (1997, 90).

In contrast, strategic behavior refers to judges' actions to maximize their overall benefits in light of their expectations concerning the choices of other actors involved in the decisional process. This definition of strategic behavior gives rise to two behavioral manifestations. *Strategic/sophisticated behavior* is often defined as behaving in a manner that is contrary to a judge's actual policy preference, so as to avoid adverse results due to the expected actions of others.⁶ The focus is on how a judge's expectations concerning the behavior of other actors constrain his ability to choose an outcome based on his attitudinal predilections.⁷ *Strategic/sincere behavior*, on the other hand, refers to the situation in which a strategic judge determines that she may vote in accordance with her policy preferences, even in light of her expectations concerning

⁴In doing so, we follow Farquharson (1969) and Denzau, Riker, and Shepsle (1985). Certainly, others may disagree with the semantic choices made here. Our goal is to provide a set of definitions and to use them consistently throughout this article.

⁵Nonstrategic behavior is alternatively referred to by some scholars as myopic, naïve, or sincere behavior (cf. Denzau, Riker, and Shepsle 1985; Spiller and Spitzer 1995).

⁶See Epstein and Knight (1998, 12, 17) for similar use of sincere and sophisticated terminology.

⁷*Strategic/sophisticated behavior* is often described simply as strategic behavior (cf. Austen-Smith 1987).

²Dissents may be useful for other purposes, such as signaling the Supreme Court for certiorari; however, here we focus exclusively on the potential for a judge to use a dissent strategically within the circuit.

³The procedure differs in the 9th Circuit in that a subset of the entire circuit membership hears a case *en banc*.

the choices of others. In this situation, the strategic judge is *unconstrained* in her ability to choose her preferred outcome by the expected choices of other actors involved.

This particular account creates a challenge for those interested in empirically evaluating strategic accounts, because *nonstrategic behavior* and *strategic/sincere behavior* (as termed above) are behaviorally equivalent (Epstein and Knight 1998, 57). In other words, under certain circumstances, strategic and nonstrategic explanations predict the same behavior. This necessitates developing a model that identifies the “*distinct and discrete kinds of activities in which justices engage if they were seeking to advance policy goals in a strategic fashion*” (Epstein and Knight 1998, 57). Situations in which judges recognize the constraints imposed by other actors and suppress their preferred ideological response as a result of those constraints provide evidence of *strategic/sophisticated behavior*. As described above, *strategic/sophisticated behavior* clearly provides an empirically distinct manifestation of strategic action on the part of judges. In the context of dissenting behavior, therefore, establishing evidence of *strategic/sophisticated behavior* includes establishing that judges *fail* to dissent even when they are ideologically predisposed to do so. This would occur because dissenting would be disadvantageous in the long run.

We depart from this conventional focus on constrained behavior as the sole evidence of *strategic/sophisticated behavior* by arguing that strategic judges may also find themselves in situations in which they experience an enhanced incentive to dissent. In other words, when a judge finds that his preferences diverge from those of the panel majority but converge with those of the circuit median, he may find it advantageous to use dissent as a signal to the circuit beyond his basic attitudinal incentive to dissent given the configuration of preferences of other actors relevant to the decision-making process. We consider these advantageous dissents to be consistent with *strategic/sophisticated behavior* as well—and consistent with the type of dissents examined by Van Winkle (1997) and Cross and Tiller (1998). We recognize that some will argue that these observations are difficult or impossible to distinguish from those expected under nonstrategic behavior since conditions giving rise to advantageous dissents reinforce the already existing attitudinal impulse to file a dissent; we address this point in our subsequent analysis.

To explore how potential *en banc* review induces strategic behavior, consider first the decision to dissent based on a nonstrategic account. In such an account, when the preferences of an individual judge differ from those of the majority opinion writer on the panel—who represents not only himself but also the panel majority—that

individual judge chooses to dissent to express his ideological disagreement. This simple attitudinal reaction is not tied to any expectation about *en banc* review. It simply reflects disagreement with the panel outcome.

In the strategic account, when the preferences of an individual judge diverge from those of the panel majority *and* diverge from the circuit median, that judge may find his basic incentive to dissent curtailed, since the circuit is unlikely to intervene (if an *en banc* proceeding were to take place) in a manner that places the final outcome at a point more congenial to the potential dissenter. Consequently, when the preferences of the circuit median, the panel majority, and the potential dissenter are configured in certain ways, a potential dissenting judge may act in a strategically sophisticated fashion, by declining to signal the circuit as a whole, thereby hoping to avert a final outcome even more dissonant with his preferred position. This disincentive to dissent is an empirically distinct behavior that is consistent with *strategic/sophisticated* accounts.

In contrast, when the preferences of the judge diverge from the panel majority, but converge with the circuit median, the strategic judge may well find his basic incentive to dissent enhanced. The dissent not only expresses disagreement with the majority opinion but also signals the circuit that the panel has rendered a decision that deviates from the circuit’s preferences, with the hope of triggering *en banc* review. This, too, is *strategic/sophisticated behavior*.⁸

We now turn to formalizing these intuitions. Doing so will clarify under what conditions strategic behavior might be expected and will facilitate introduction of an important concept: uncertainty. Further, the spatial models set out below will provide guidance for our subsequent empirical models.

A Signaling Model of Dissent on the U.S. Courts of Appeals

Divergent judge-panel preferences are, *ceteris paribus*, expected to increase the likelihood of dissent. No doubt judges have multiple objectives they seek to achieve (Lindquist 1997; Posner 1995), but achieving legal outcomes that are consistent with their own ideological or policy preferences must be counted as chief among them. Hence, the distance between a judge’s ideal point and that of the panel majority can be conceptualized as the loss a judge experiences when the majority’s policy position

⁸As noted above, some may argue that strategic and nonstrategic accounts point to outcomes that are not empirically distinct. We address this possibility in the models presented later in this article.

fails to conform to his preferences. The greater this distance, the greater the judge’s loss, and, hence, the more likely the judge is to dissent.

A potential dissenter is not only cognizant of differences between his preferred outcome and the outcome of the panel decision, but also aware of what he likely stands to gain or lose in the event the circuit steps in to take “corrective” action through *en banc* review. In other words, a potential dissenter has at least some idea of the distribution of preferences among the three relevant actors—the judge himself (J), the circuit median (C), and the majority opinion writer (MOW)—and this distribution of preferences structures the judge’s decision to dissent.

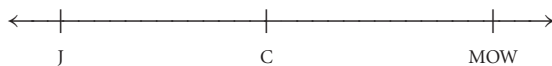
We assume the policy preferences of the majority opinion writer represent the preferences of the panel majority. This represents some deviation from reality, in that the majority opinion writer may accommodate the other judge(s) in the majority. Circuit court judges, however, have little time to engage in extensive bargaining over the content of opinions, panel members are often geographically dispersed, and panels only hear a particular set of cases before being dissolved. These characteristics make bargaining and negotiation difficult. We also assume that the outcome of any *en banc* decision reflects the preferences of the circuit median.

We conceptualize the distribution of preferences for these actors along a single liberal—conservative ideological dimension, with the actors’ ideal points placed along this continuum. The strategic/sophisticated logic enters the picture when MOW falls between C and J—that is, $(C < MOW < J)$ or $(J < MOW < C)$:



In this situation, J would prefer the position of MOW to that of C. In other words, J has a disincentive to dissent, since, if his dissent results in a circuit intervention via an *en banc* proceeding, the final outcome will be even further away from the potential dissenter’s preferred outcome than it would be if the final outcome remained at MOW.

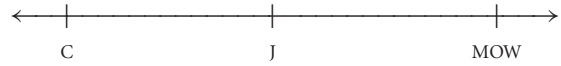
Alternatively, consider when C falls between J and MOW— $(J < C < MOW)$ or $(MOW < C < J)$ —as depicted below:



When C falls between J and MOW, J has an extra incentive to dissent since J would prefer the position of C to that of MOW under any circumstances. While the distance between J and MOW represents J’s loss along the policy continuum, if C steps in, this loss is reduced by the dis-

tance between C and MOW. This moves the final outcome closer to J’s ideal point. Hence, the judge experiences an enhanced incentive to dissent over and above the basic incentive to dissent to express ideological disagreement with the panel decision.

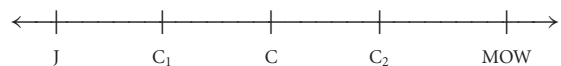
Finally, consider the situation in which the judge’s ideal point (J) falls between the circuit median’s ideal point (C) and the majority opinion writer’s ideal point (MOW)—that is, $(C < J < MOW)$ or $(MOW < J < C)$:



In this case, J has an extra reason to dissent *if* his ideal point is closer to that of C than that of MOW (that is, if $|J-C| < |MOW-J|$). In contrast, J would have a disincentive to dissent *if* his ideal point is closer to MOW than C (that is, if $|J-C| > |MOW-J|$), as J will prefer the position of MOW to C.

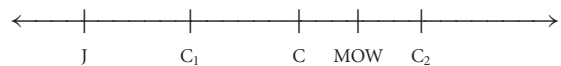
There is, however, an asymmetry in the information a judge possesses regarding what he stands to lose if the majority opinion prevails and what he stands to gain or lose in the event of a circuit intervention. The judge has complete information with regard to his losses if a panel decision contrary to his ideal point prevails since he was a direct party to the panel deliberations and has the majority opinion before him. On the other hand, while a judge undoubtedly has at least some sense of the outcome of an *en banc* proceeding, he does not know *exactly* what that outcome will be. The position of the circuit median is surely a good basis for an informed guess as to the likely outcome of an *en banc* proceeding. But there is at least some degree of uncertainty surrounding this best guess.

Consider, again, the scenario in which C falls between J and MOW— $(J < C < MOW)$ or $(MOW < C < J)$ —as depicted below:



In this case, the interval between C_1 and C_2 represents the zone of uncertainty surrounding J’s best guess (C) as to what the outcome will be in the event of a circuit intervention. If J signals C, no matter where the outcome lies (whether it be at C_1 , C_2 , or someplace in between), J is still better off than if the panel decision at MOW stands.

In contrast, however, consider the situation in which the zone of uncertainty *encompasses* the position represented by MOW:



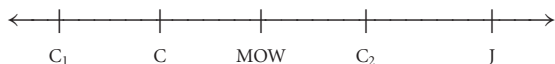
In this case, if J signals C and a circuit intervention occurs, J may find that he is actually worse off if the outcome after

an *en banc* proceeding is between MOW and C_2 . In other words, he could be better off or worse off, depending upon where in the zone of uncertainty the *en banc* outcome actually falls. J’s choice to dissent is thus compromised by uncertainty.

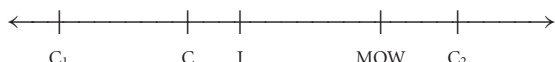
When MOW falls between C and J, J prefers the panel outcome to the *en banc* outcome, as long as the zone of uncertainty surrounding C does not encompass MOW’s position:



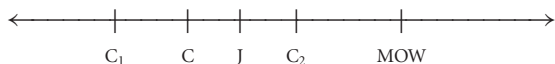
If, however, the position represented by MOW is within the zone of uncertainty surrounding C (as depicted below), J might be better off with the *en banc* outcome (if it falls between MOW and C_2) or, conversely, worse off with the *en banc* outcome (if it falls between MOW and C_1). In short, J is, once again, uncertain.



The situation is slightly more complex, though the underlying logic the same, when J falls between C and MOW. When J falls between C and MOW, and MOW falls within the uncertainty zone, J may or may not be better off with a circuit intervention. If, for example, the *en banc* outcome lies between MOW and C_2 , then J is worse off. Similarly, if the *en banc* outcome falls at or close to C_1 , J is worse off as well. If an *en banc* outcome falls anywhere between C and MOW, however, then J is better off with this outcome. J is simply uncertain of the outcome in the event of a circuit intervention under these conditions:

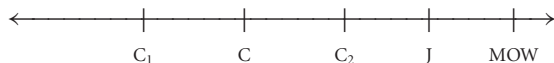


When J falls between C and MOW, the uncertainty zone surrounding C’s position does not encompass MOW’s position, and the boundary of the uncertainty zone farthest from J (C_1) is closer to J than the position represented by MOW, J has an enhanced incentive to dissent. Even though C_1 is farther from J than C, C_1 is still closer to J than MOW; hence J prefers any point between C_1 and C_2 to MOW:

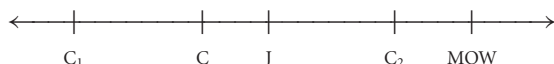


Alternatively, when the uncertainty zone does not encompass MOW, J’s incentive (or disincentive) to dissent is conditioned by how close the nearest boundary (C_2) of the uncertainty zone is to J relative to MOW’s distance from J. When MOW is outside the uncertainty zone and

MOW is closer to J than C_2 is to J (as depicted below), J is clearly better off not signaling, as, no matter where in the uncertainty zone the *en banc* outcome lies, it is less preferable to J than MOW.



It is also possible for J to be uncertain about the benefits of a circuit intervention when MOW falls outside the uncertainty zone. J is uncertain about whether he will be better or worse off by inviting and receiving an *en banc* proceeding when the boundary zone farthest from J (C_1) is farther away from J than the position represented by MOW, but C_2 is closer to J than MOW is to J. If the outcome of an *en banc* hearing places the outcome anywhere between C and C_2 , for example, J is better off than allowing the panel decision to stand at MOW. However, if the *en banc* hearing results in an outcome at C_1 , J is worse off than if he had not signaled.



We can think of these various conditions collectively as a set of three regimes under which a judge decides whether to file a dissenting opinion as a signal to the circuit: (1) advantageous dissent, (2) disadvantageous dissent, and (3) uncertainty. The advantageous dissent regime corresponds to those conditions under which a judge will always be advantaged in the final outcome in the event of a circuit intervention through *en banc* review. The disadvantageous dissent regime corresponds to those conditions under which a judge will always be disadvantaged in the final outcome in the event of a circuit intervention. Finally, the uncertainty regime corresponds to those conditions under which a judge is uncertain if he will be advantaged or disadvantaged in the event of a circuit intervention. It is highly unlikely, of course, that the level of uncertainty a judge faces will be invariant across all decision-making scenarios. Some circuits are undoubtedly more homogeneous than others in terms of individual policy preferences. The more homogenous a circuit in this sense, the less uncertain a judge will be as to where an *en banc* outcome will fall.

These scenarios demonstrate that, if J’s choice to dissent has a strategic component (i.e., as a signal for *en banc* review), it should be conditioned by the preferences of the panel majority (about which he is fairly certain) and the preferences of the circuit as a whole (about which he is less certain). Thus we have presented a portrait of circuit judges as strategic actors who “realize that their ability to achieve their 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” (Epstein and Knight 1998, 10). In the next section, we articulate an empirical model of the decision to dissent on the U.S. Courts of Appeals, one that includes both measures of this strategic account of dissenting behavior as well as basic ideological concerns. Our objective is to construct a model amenable to empirical testing that will enable us to ascertain whether the strategic narrative is borne out when controlling for more conventional explanations of the decision to dissent.

Research Hypotheses

Ideological Distance. Earlier research has established that ideological incompatibility between a circuit judge and a majority opinion writer is associated with an enhanced likelihood of dissent (Hettinger, Lindquist, and Martinek 2001, 2003). Moreover, existing research has established that judges desire to see their policy preferences embedded in the law. Further, scholars have found ideology to be a consistent predictor of judicial voting behavior in the U.S. Courts of Appeals (see Songer 1991; Songer and Haire 1992). Accordingly, we expect that dissent writing will be, in part, a function of the ideological distance between the majority opinion writer and the judge. This hypothesis represents the basic attitudinal (i.e., nonstrategic) explanation for dissenting behavior. The greater the general ideological disagreement between the two, the greater the number of opportunities for disagreement as to the desired disposition of a case. Hence:

H1: The greater the ideological distance between a judge and the majority opinion writer, the greater the likelihood of writing a dissent.

Strategic Regimes. In addition, however, we are interested in examining the expectation that a judge may have an additional impetus to file a dissent when he has reason to believe that an intervention by the circuit as a whole will move the final outcome closer to his preferred position. Alternatively, the decision to file a dissent should be negatively influenced when the judge has reason to believe that a circuit intervention will result in a less favorable outcome. As discussed above, these conditions are dependent upon the configuration of preferences of the judge and the majority opinion writer as well as the best guess as to the circuit median’s preference. And, in light of the imperfect information a judge possesses about the outcome in the event of a circuit intervention, some configurations will result in uncertainty. Accordingly, we offer the following related hypotheses:

H2_A: Regime 1, Strategic and Advantageous Dissent

Where a judge has reason to believe that a circuit intervention will move the final outcome closer to his preferred position, the judge will have an enhanced likelihood of dissent, even in addition to his basic attitudinal incentive.

H2_B: Regime 2, Strategic and Disadvantageous Dissent

Where a judge has reason to believe that a circuit intervention will move the final outcome farther away from his preferred position, the judge will have a diminished likelihood of dissent.

H2_C: Regime 3, Uncertainty

Where a judge is uncertain about the effect that a circuit intervention will have on the final outcome, the judge will have neither an enhanced nor a diminished likelihood of dissent.

Control Variables. To test the attitudinal and strategic explanations of dissenting behavior rigorously, we must situate these hypotheses in a more general model of dissenting behavior. Accordingly, we include a set of seven additional variables as controls. Existing research suggests that judges’ attitudes and goals, and hence their behavior, are shaped by background characteristics. We focus on certain basic background characteristics—race and gender—that shape a judge’s policy goals and objectives.⁹ The expectation of decision-making differences linked to the race and gender of the judge is based on the premise that such judges will bring to the bench different experiences that have fundamental consequences in the shaping of their goal orientations. Slotnick (1984) has found differences in the backgrounds and experiences of white male and minority or female federal court judges. The effect of these background differences on voting and opinion-writing behavior has been uneven (cf. Haire, Humphries, and Songer 2001; Sisk, Heise, and Morriss 1998; Songer, Davis, and Haire 1994; Walker and Barrow 1985; Welch, Combs, and Gruhl 1988), but there is at least modest evidence that judges with different background experiences are more likely to author a dissent (Hettinger, Lindquist,

⁹An argument could be made that these are not the only background characteristics that might matter (but, see, Hettinger, Lindquist, and Martinek N.d.). For example, if our focus was on criminal procedure cases, prior experience as a prosecutor or defense attorney would have strong a priori claims for influencing the vote choice of judges. It is much more difficult to make such an argument when the focus is on dissenting behavior and especially dissenting behavior across issue areas.

and Martinek 2003; Teets 2001). As a consequence, we hypothesize that:

H3: A judge who is a woman will be more likely to write a dissenting opinion.

H4: A judge who is a minority will be more likely to write a dissenting opinion.

Further, while there is certainly no consensus about the most suitable method of measuring salience (compare and contrast, for example, Caldeira and Wright 1988; Danelski 1989; Spaeth 1984), there is both theoretical justification and empirical evidence in support of a relationship between salience and the likelihood of writing a separate opinion (e.g., Hettinger, Lindquist, and Martinek 2003; Teets 2001; Wilcox 1998). Obviously, the more salient a case is, the more likely it is to have policy consequences and, hence, the more likely it is to stimulate judges to devote the necessary effort to write a dissenting opinion. This leads us to hypothesize as follows:

H5: A judge will be more likely to write a dissenting opinion in a salient case.

Another case-related characteristic of potential importance is legal complexity. The more complex a case is in terms of the type and number of issues raised, for example, the greater the grounds for potential disagreement among judges as to the most appropriate means of adjudicating the appeal. This yields the following hypothesis:

H6: A judge will be more likely to write a dissenting opinion in a complex case.

In addition to controlling for characteristics of judges and of cases, we also control for variations across circuits. To begin with, writing a dissenting opinion is not a cost-free activity. There are very real costs in terms of the time necessary to research and craft separate opinions. Hence, judges are likely to condition their decision to write a dissenting opinion by other pressures on their time. Most obviously, the greater the workload, the less time judges have to author dissenting opinions, *ceteris paribus*. This theoretical relationship between heavy workloads and a decreased propensity to dissent has already found empirical support in research on state supreme courts (Wold and Caldeira 1980) as well as the U.S. Courts of Appeals (Atkins and Green 1976). This leads us to hypothesize the following:

H7: A judge will be less likely to write a dissenting opinion when serving in a circuit with a heavier workload.

An additional characteristic that varies across circuits and may well condition judges' propensity to write separate opinions is the acceptability of writing separate opinions within each circuit. Students of the U.S. Supreme Court have identified a norm of consensus, although that norm has weakened over the past 60 years (cf. Epstein, Segal, and Spaeth 2001; O'Brien 1999). The literature on dissent on the federal Courts of Appeals is less extensive, but logic suggests that when separate opinions are a common occurrence, judges may be less reluctant to engage in writing such opinions themselves and more likely to indulge their desire for individual expression. Accordingly:

H8: A judge will be more likely to write a dissenting opinion when separate opinion authorship is more common within the judge's circuit.

Finally, we consider one additional difference among circuits: circuit size. We suggest that circuit size is potentially related to dissent because the greater the number of judges, the greater the opportunities for disagreement (Peterson 1981, 415). And, if a judge wants to notify his circuit colleagues about an ideologically "deviant" opinion, a separate opinion may be the most feasible vehicle for doing so in larger circuits (Van Winkle 1997). This leads us to hypothesize as follows:

H9: A judge will be more likely to write a concurring or dissenting opinion when he is a member of a larger circuit.

Data and Methods

We proceed by empirically modeling dissenting opinion authorship using data from 1970 to 1988 available in the U.S. Courts of Appeals Database (Songer 1999).¹⁰ We began by reconfiguring the database such that the judge is the unit of analysis rather than the case. Since this article examines whether dissents are a function of ideological differences alone or a function of ideology and

¹⁰The data are available at <http://www.ssc.msu.edu/~pls/pljp/judgedata.html>. We chose the time period 1970–1988 because the scores used for calculating judicial ideology are only available back through Eisenhower. Many panels prior to 1970 included judges appointed by presidents before Eisenhower. Nonetheless, the time period 1970–1988 provided an ample number of observations for analysis: more than 7,700 separate observations on 256 unique judges.

calculations of circuit preferences, we limit our analysis to decisions rendered by three-judge panels composed of active or senior appeals court judges. Our dependent variable reflects whether the judge wrote a dissenting opinion, coded as 1 if so and 0 otherwise. To construct the dependent variable, we accessed each case that contained a dissent (according to the Courts of Appeals Database) in Lexis-Nexis to identify which judge(s) wrote a dissenting opinion. This permitted us to model only those decisions to write a dissenting opinion, rather than the decision merely to dissent without opinion.¹¹

We measured ideological divergence on the basis of the Giles, Hettinger, and Peppers (2002) ideology scores for the majority opinion writer and the judge. These scores are based on Poole common-space scores (see Poole 1998).¹² The judge's score is equal to that of the appointing president when senatorial courtesy is absent and to the senator(s)' score(s) when courtesy is present.¹³ The absolute value of ideological distance between the score of the judge and of the majority opinion writer is the final measure.

To operationalize the strategic regime variables, we began by identifying the Giles, Hettinger, and Peppers ideology score for the individual judge, the majority opinion writer, and the circuit median in each case. We then calculated the zone of uncertainty surrounding the circuit median's position based on the standard deviation surrounding the circuit median by circuit and year. From an empirical perspective, of course, the larger the standard deviation, the greater the variation in circuit preferences. And, the greater the variation, the more uncertain a

¹¹In practice, the decision to dissent is almost always accompanied by the filing of a dissenting opinion. The decision to dissent resulted in a dissenting opinion in all but 13 (<3%) of the total number of dissenting votes (459) we have from 1970 to 1988.

¹²Poole and Rosenthal (1997) scale the votes of congressman to derive their common space scores. Their analysis suggests that there is a single ideological dimension, though a second dimension makes an appearance in some historic periods. Poole (1998) extended this procedure to provide common space scores for presidents.

¹³Giles, Hettinger, and Peppers consider senatorial courtesy to be at play when there is at least one senator of the president's party representing the state in which the vacancy arises. In the absence of senatorial courtesy, the ideological measure takes the value of the president's score. When there is one senator of the president's party, the measure takes the value of that senator's score. And, when there are two senators of the president's party, the measure takes on the value of the average of the two senators' scores. While there is at least some evidence to suggest that presidents have not always strictly adhered to the norm of senatorial courtesy, there is also persuasive evidence that the norm is alive and well, as presidents who ignore it imperil the fortunes of their nominees (Bell 2002). Further, Giles, Hettinger, and Peppers (2002) provide a rigorous assessment of the validity of this measure and find it to be a much superior measure to that commonly employed (i.e., party of the appointing president).

judge will be regarding final disposition of an *en banc* proceeding, *ceteris paribus*. The zone of uncertainty is thus defined as ± 1 s.d. around the circuit median's ideology score.¹⁴ If the outer boundary of the zone of uncertainty was closer to the judge's position than that of the majority opinion writer—indicating that the judge would be better off with an *en banc* intervention regardless of where in the zone of uncertainty the *en banc* outcome would actually be—we coded the Regime 1 (Advantageous Dissent) variable as 1. If the outer boundary of the zone of uncertainty was not closer to the judge's position than that of the majority opinion writer—indicating that the judge would be better off with the majority opinion writer's position—we coded the Regime 2 (Disadvantageous Dissent) variable as 1. Finally, we used the Regime 3 (Uncertainty) classification as the excluded category. Thus, when the outer boundary of the zone of uncertainty was such that the judge could not be sure whether he would be better off leaving the outcome at the point represented by the majority opinion writer or seeking an *en banc* intervention, we coded both Regime 1 and Regime 2 variables as 0.¹⁵

Gender and minority status were measured as simple dichotomies. The gender variable was coded as 1 if the judge was female (0 otherwise) and the minority status variable was coded as 1 if the judge was a minority (0 otherwise).¹⁶ The concept of salience has been measured in a number of ways in the previous judicial scholarship.¹⁷ Three variables, in particular, recur with regularity: amicus curiae participation, civil rights and liberties claims, and judicial review. Amicus curiae filings reflect salience to the larger social and political systems. In addition, a case involving a civil rights or liberties claim is likely to have greater ideological importance, making it a useful means of evaluating salience or importance to judges themselves. Moreover, the exercise of judicial review clearly partakes of policymaking since, when judges engage in judicial review, they are considering overriding the judgments of the

¹⁴Langer (1997) used a similar strategy to derive a zone of no conflict with the elected branches of office vis-à-vis judicial review. While others may disagree with our choice to use ± 1 s.d. around the mean, we think it is a reasonable alternative. Note that we also calculated a zone of uncertainty based on $\pm .05$ s.d. around the circuit median's ideology score and replicated the models reported with no substantive differences in results.

¹⁵In the analyses that follow, we also considered the possibility that the strategic regimes might condition the effect of ideological distance by including appropriate interactive terms. This auxiliary analysis, however, did not provide evidence supportive of this hypothesis.

¹⁶This information was taken from Zuk, Barrow, and Gryski (1997).

¹⁷See Epstein and Segal (2000), Brenner and Arrington (2001), and Benesh and Spaeth (2001) on this point.

TABLE 1 Descriptive Statistics

Variable	Minimum	Maximum	Mean	Standard Deviation
Dissent	0	1	0.057	0.232
Ideological Difference	0	1.158	0.353	0.285
Advantageous Dissent	0	1	0.241	0.428
Disadvantageous Dissent	0	1	0.082	0.274
Female Judge	0	1	0.037	0.189
Minority Judge	0	1	0.053	0.225
Salience	-0.515	5.341	-0.003	1.002
Legal Complexity	-1.765	6.366	-0.011	0.991
Workload Pressure-Merits Terminations/Judge	38.880	251.750	100.465	32.946
Circuit Norm-Separate Opinion Percentage	0	36.670	14.020	8.181
Circuit Size	3	28	10.686	4.819

more traditional policy makers. The far-reaching political and policy consequences that attach to the exercise of judicial review suggest that such cases are likely to be of special interest to the political system. Based on these considerations, we proceeded by factor analyzing three measures of salience: the presence of amicus curiae participation, the presence of a civil rights or liberties claim, and the exercise of judicial review. We then used the resulting factor scores as a summary measure of the concept.¹⁸ We similarly derived a measure of legal complexity based on a factor analysis of several factors derived from the extant literature (e.g., Hettinger, Lindquist, and Martinek 2001, 2003; Spriggs and Hansford 2001; Teets 2001; Wahlbeck, Spriggs, and Maltzman 1999). In particular, we included the length of the opinion¹⁹ and the number of issues raised (Spriggs and Hansford 2001; Wahlbeck, Spriggs, and Maltzman 1999).²⁰ Workload was measured as merits termination per active judge per circuit per year (as reported by the Administrative Office of the United States Courts), while circuit norms regarding the permissibility of filing separate opinions was measured as the per-

¹⁸For a useful introduction to principal components and factor analysis, see Hamilton (1992). All three variables loaded highly on a single factor, corroborating the empirical validity of the resulting index.

¹⁹Lengthier opinions—measured in terms of the number of pages of the opinion—suggest the opinion author was faced with a case that required more detailed analysis, *ceteris paribus*.

²⁰We investigated other variables as potential constituent elements in a measure of complexity (e.g., number of parties, presence of cross appeals), but based on the factor loadings derived from the principal components analysis, the number of issues raised and the length of the opinion were the strongest candidates. These two variables loaded highly on a single factor (≥ 0.8).

centage of decisions with separate opinions in the circuit, lagged one year.²¹ Finally, circuit size was measured as the number of authorized judgeships, based on information provided by the Federal Judicial Center (2003).

Relevant descriptive statistics for each variable are reported in Table 1. Since the dependent variable in our model is dichotomous, we selected logit as our estimation technique (Aldrich and Nelson 1984).²²

Results

The results of our complete model estimating the likelihood that a judge will write a dissent appear in Column 1 of Table 2.²³ To facilitate interpretation, Table 3 reports some predicted probabilities based on discrete changes in the values of the independent variables. Note that, while

²¹Some may disagree that the percentage of separate opinions by circuit and year measures a circuit norm, *per se*. Norms are, however, notoriously difficult to measure, and, in the absence of a better alternative, we include this variable (lagged one year) as a control. We calculated this data using the Songer database (1999). Arguably, this is less than ideal in that the Songer base samples from each circuit and year. However, using the reported weights ameliorates that difficulty.

²²To account for potential temporal and circuit level effects, as well as the fact that each case can yield more than one observation, we clustered by year, circuit, and case citation. We also accounted for the sampling structure of the Court of Appeals Database by using the weights reported in the Database.

²³Given the fact that the sample is unbalanced (i.e., dissenting opinions are quite rare), we also estimated the empirical model using the Rare Events Logistic Regression package developed by Tomz, King, and Zeng (1999, see also King and Zeng 2001). The substantive results are virtually identical.

TABLE 2 Logit Estimation of the Likelihood of Writing a Dissent

	Model Omitting Enhancement Regime	
	Full Model ^a (column 1)	Regime (column 2)
Ideological Difference	0.725*** (0.208)	0.649*** (0.192)
Signaling Regime		
Enhance	-0.092 (0.141)	—
Diminish	-0.159 (0.221)	-0.156 (0.221)
Female Judge	0.275 (0.267)	0.274 (0.266)
Minority Judge	0.372** (0.207)	0.371** (0.208)
Salience	0.088** (0.049)	0.089** (0.049)
Legal Complexity	0.248*** (0.048)	0.248*** (0.047)
Workload Pressure-		
Merits	0.001 (0.002)	0.001 (0.002)
Terminations		
Circuit Norm—Separate	0.013** (0.007)	0.013** (0.007)
Opinion Percentage		
Circuit Size	-0.002 (0.011)	-0.002 (0.011)
Constant	-3.380*** (0.234)	-3.370*** (0.235)
N	7767	7767
Log Likelihood	-1603.39	-1603.63
Wald χ^2	62.19***	59.59***
Pseudo R ²	0.02	0.02
% Correctly Predicted	94.3%	94.3%

*p < 0.10, **p < 0.05, ***p < 0.01.

^aEntries in parentheses are robust standard errors clustering on year, circuit, and case.

the changes in predicted probability are small in absolute terms, given the rarity of a dissent to begin with, the magnitude of the changes in predicted probabilities is not unexpected.

Unsurprisingly, the parameter estimate corresponding to ideological difference between the judge and the majority opinion writer is both positive and statistically significant (p < 0.001). Hence, as that ideological distance increases, the likelihood of writing a dissent likewise increases, a result that comports with an attitudinal

(nonstrategic) explanation of dissenting behavior. While this finding is not surprising, the finding regarding the use of dissents to signal the entire circuit does not meet expectations based on the strategic account of dissenting behavior. To wit, the parameter estimates associated with the signaling regime variables fail to achieve statistical significance. In other words, we find no evidence in support of a strategic account of dissenting opinions on the U.S. Courts of Appeals.

It might be argued that the Advantageous Dissent variable is not really strategic in any sense since it is merely reinforcing an existing likelihood of dissenting rather than resulting in a change in behavior (i.e., reducing the likelihood of dissent). The Disadvantageous Dissent variable, of course, clearly would represent strategic behavior if it achieved statistical significance.²⁴ Nevertheless, to insure that the failure of the lack of statistical significance for the Disadvantageous Dissent variable is not in some way an artifact of collinearity with the Advantageous Dissent variable, we reestimated the model omitting the latter variable.²⁵ The results of this estimation are reported in Column 2 of Table 2, and the parameter estimates are virtually identical. Evidence of strategic behavior on the part of circuit court judges vis-à-vis dissenting behavior remains elusive.

The results with regard to our control variables are all largely as anticipated (as well as virtually invariant across model specifications). Though the parameter estimate for gender is signed in the correct direction (indicating a positive relationship between being a female judge and writing a dissenting opinion), it does not achieve statistical significance at any conventional level. Despite the fact that there has been a great deal of attention devoted to the idea that female judges “speak in a different voice” (cf. Gilligan 1982), empirical evidence of such a difference has remained elusive at best (Haire, Humphries, and Songer 2001; Sisk, Heise, and Morriss 1998; Songer, Davis, and Haire 1994; Walker and Barrow 1985; Welch, Combs, and Gruhl 1988; but see Teets 2001). The findings reported—and corroborated by other recent research on dissent on the courts of appeals (Hettinger, Lindquist, and Martinek 2001, 2003)—fail to uncover a gender-based difference

²⁴However, if we could observe the underlying (baseline) probability of a judge filing a dissenting opinion rather than just the discrete outcome of filing a dissent or not, then any change in that probability based on a calculation of what others will do (whether that calculation results in an increase or decrease in the baseline probability) would represent strategic behavior.

²⁵Note that the examination of correlation matrices for the ideological difference, Advantageous Dissent, and Disadvantageous Dissent variables revealed no evidence of collinearity, with all correlation coefficients less than or equal to 0.52.

TABLE 3 Predicted Probabilities of Writing a Dissenting Opinion^a

Variable	$\Delta\sigma^b$	Δrange^c	$0 \rightarrow 1^d$
Ideological Difference	0.021	0.050	n.a.
Minority Judge	n.a.	n.a.	0.022
Salience	0.007	0.032	n.a.
Legal Complexity	0.025	0.181	n.a.
Circuit Norm-Separate Opinion Percentage	0.011	0.026	n.a.

^aPredicted probabilities calculated based on parameter estimates for full model reported in Table 3 with all variables set at their mean values (modal value for dichotomous variables) unless otherwise specified.

^b $\Delta\sigma$ = change from 1 standard deviation below the mean to 1 standard deviation above the mean

^c Δrange = change from minimum to maximum

^d $0 \rightarrow 1$ = discrete change from 0 to 1 for dichotomous variable

with regard to dissenting opinion authorship. In an interesting contrast, however, minority status is both signed in the correct direction and statistically significant. Hence, it appears that minority, though not female, judges are more willing to express disagreement with their colleagues in the form of a dissent.

Both salience and legal complexity are positively related to the likelihood of authoring a dissenting opinion, noncontroversial findings that are consistent with prior empirical work (Pacelle and Pauly 1996; Teets 2001; Wilcox 1998). The same cannot be said regarding workload. The evidence uncovered here fails to support a relationship between workload and dissenting behavior. This is a finding that is seemingly at odds with conventional wisdom (Peterson 1981; Songer 1982), though there is some previous research that has uncovered the same finding (or nonfinding, in this case) (Hettinger, Lindquist, and Martinek 2001, 2003). Circuit norms, as measured through a lagged variable representing the percentage of separate opinions by circuit and year, are, on the other hand, related to the likelihood of dissent in the anticipated direction; i.e., a judge is more likely to write a separate opinion the more common separate opinion authorship is in his circuit. Our final control variable, circuit size, appears to manifest no effect on the authorship of separate opinions.

Conclusion

The strategic account of judging has attracted many adherents, and has received some empirical support in the literature (e.g., Epstein and Knight 1998; Van Winkle 1997). Yet it still remains a relative newcomer when compared to the more extensively tested attitudinal model of judicial decision making. In this article, we have attempted

to construct a rigorous test of strategic dissents on the U.S. Courts of Appeals in the form of signals from the panel to the circuit in an effort to extend empirical evaluations of this intriguing theory. Our specification of a strategic model did not yield results supportive of such an account. When we consider strategic and sophisticated behavior to be manifest only when there is a diminished likelihood of dissent, or when we consider an enhanced likelihood of dissenting over and above that arising from basic ideological disagreement with the majority opinion writer as strategic as well, we find no evidence supportive of strategic dissenting behavior on the part of circuit judges. The decision to dissent is better accounted for on the basis of the attitudinal model.

Our findings contradict those in previous research, particularly Van Winkle (1997). Van Winkle evaluated whether a judge in the minority on a panel is less likely to dissent if he is a circuit outlier than if he is a member of the circuit majority. Thus, Van Winkle assessed the extent to which judges' ideological positions vis-à-vis the circuit as a whole influenced their decision to dissent as a signal to the entire circuit. Where a judge is an outlier on a panel dominated by mainstreamers (for example, a liberal judge on a circuit dominated by conservatives), Van Winkle found that the judge is less likely to dissent. Conversely, when a judge is a mainstreamer on a panel dominated by outliers, Van Winkle found that the judge is more likely to dissent as a signal to the circuit majority. We essentially evaluated the same concepts but in a different context. Van Winkle tested his theory using data from search and seizure decisions in 1993. Here we use data from all decisions over a much longer period. But, in other regards, we evaluate the same concepts. In particular, we account for the ideological distance between the judge and the circuit median, thus controlling for whether the judge is an outlier or mainstreamer on the

circuit. And, we account for the ideological distance between the potential dissenter and the majority opinion writer, thus controlling for whether the judge is an outlier on the panel itself. Yet our research fails to yield the type of results found by Van Winkle that seem to support the strategic account more clearly. Several possible explanations for this discrepancy exist.

First, strategic accounts of judging might well be time- or issue-bound, as Van Winkle himself suggested. “[T]he [1993] bench was not typical. Carter judges (and less than a handful of Clinton judges) were the only Democratic-nominated jurists in a data set overwhelmingly composed of Republican-nominated colleagues” (1997, 17). Thus, the time period Van Winkle considered may have presented a context uniquely configured to promote strategic decision making. In contrast, the data we consider covers a much longer period with far more observations, which may mask these more unique circumstances. Second, Van Winkle evaluated behavior only in a subset of civil liberties decisions (search and seizure decisions). Again, these ideologically charged cases may present a more clear circumstance for judges to behave strategically or opportunistically, an explanation ripe for future empirical investigation.

Ultimately, however, we believe that our research represents an improvement over existing research because it offers a rigorous evaluation of strategic accounts of decision making derived from a well-specified model of strategic dissents that incorporates both attitudinal effects and uncertainty regarding the circuit’s response *en banc*. We note that circuit judges may certainly use dissenting opinions strategically for other purposes. No doubt these judges are aware that their dissenting opinions may serve to signal the Supreme Court concerning certworthy cases, as the empirical correlation between dissent below and the decision to grant certiorari has been well documented (e.g., Caldeira, Wright, and Zorn 1999). Thus, future work may seek to uncover any such strategic behavior on the part of circuit court judges. As for signaling to the circuit itself, however, the evidence from the broad cross section of cases we analyzed here does not support a strategic account of dissenting opinions at the circuit level.

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