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## **HOW THE DISSENT BECOMES THE MAJORITY: USING FEDERALISM TO TRANSFORM COALITIONS IN THE U.S. SUPREME COURT**

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### ABSTRACT

*This Article proposes that dissenting Supreme Court Justices provide cues in their written opinions about how future litigants can reframe case facts and legal arguments in similar future cases to garner majority support. Questions of federal-state power cut across most other substantive legal issues, and this can provide a mechanism for splitting existing majorities in future cases. By signaling to future litigants when this potential exists, dissenting judges can transform a dissent into a majority in similar future cases.*

*We undertake an empirical investigation of dissenting opinions in which the dissenting Justice suggests that future cases ought to be framed in terms of federal-state powers. We show that when dissenting opinions signal a preference for transforming an issue into an argument about federal-state power, more subsequent cases in that*

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*area are decided on that basis. Moreover, the previous minority coalition is in the majority significantly more often, showing that these signals are systematically successful. Not only can federalism-based dissents transform the rhetoric of cases, they can systematically and significantly shift the outcome of cases in the direction of the dissenting Justices' views.*

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## INTRODUCTION

Why do judges dissent? Legal scholars have long struggled to answer this seemingly simple question satisfactorily. One traditional legal view is that the dissenting judge is simply laying out an

alternative theory of the law<sup>1</sup>—but by definition, the court has rejected that interpretation of the law. To the extent that we believe the myth that judges discover the law, dissents simply represent rejected dead ends along that path of discovery. A more public-choice view is that dissents are an attempt to convince the majority of its error.<sup>2</sup> This could explain why judges circulate drafts of dissents—but by the time of publication, dissenting judges have lost the fight. A game theoretic twist on this view is that publication is necessary to make those drafts credible threats. Under this theory, it is necessary to publish even when the fight has been lost; otherwise, future threats to dissent will not be credible.<sup>3</sup> But that argument necessarily assumes that dissenting is costly to the court, presumably by harming judicial legitimacy and challenging the fiction of judges as apolitical

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1. One judge described judges as having the “right and duty” to dissent and to “honestly state[] the law and its application to the case as conscience dictates.” Michael Kirby, Justice, High Court of Australia, *Judicial Dissent*, Address to the Law Students’ Society of James Cook University at Cairns (Feb. 26, 2005), available at [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_feb05.html](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_feb05.html). There is dispute, however, as to the effect of expressing that disagreement. For example, Chief Justice Taft described dissents as “a form of egotism.” He continued, “They don’t do any good, and only weaken the prestige of the Court. It is much more important what the Court thinks than what any one thinks.” Letter from William Howard Taft to Willis Van Devanter (Dec. 26, 1921) (on file with the Library of Congress), quoted in Robert Post, *The Supreme Court Opinion As Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court* 42 (UC Berkeley Pub. Law and Legal Theory Research Paper No. 48, 2001), available at <http://ssrn.com/abstract=265946>. In contrast, Professor Sunstein argues that the potential of a colleague to dissent can “reduce the likelihood of . . . an incorrect or lawless decision [and render a decision] more likely to be right, and less likely to be political in a pejorative sense.” CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 184 (2003).

2. This analysis has been particularly well developed in the context of dissents from denials of certiorari. Famously, Justice Stevens published an opinion in response to a dissent from denial: “One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta . . . .” *Singleton v. Comm’r*, 439 U.S. 940, 944–45 (1978) (Stevens, J., respecting the denial of the petition for writ of certiorari). Such a dissent, however, can have the benefit that it “sometimes persuades other Justices to change their votes and a petition is granted that would otherwise have been denied.” *Id.* at 945–46; see also H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 170–92 (1991) (providing interviews with numerous Justices who describe using dissents from denial of certiorari as a method of persuading fellow Justices to hear a case). For a discussion of different categories of dissent from denial of certiorari—ranging from “neutral grounds” dissents, to “irredentist” dissents, to dissents as forward-looking policy arguments—see Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1127, 1262 (1979).

3. Cf. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 62 (1998) (noting in the context of dissents from denial of certiorari that Justices must “[o]n occasion . . . publish so that their future threats will be credible”).

discoverers of law.<sup>4</sup> Presumably, this harm applies as much to the dissenting judge as to the majority judge, and so the theory cannot really explain why two-thirds of all cases involve published dissents.<sup>5</sup>

We propose an alternative theory: at least some dissents may be explained as signals from judges to litigants about how to frame future similar cases to increase the chance of success for the argument the dissenting judge supports.

This will not explain all dissents. Sometimes dissents are simply expressions of frustration or strength of feeling—as emphasized when read aloud from the bench—or attempts to instigate a change of heart in a colleague somewhere down the line. But when a dissenter pursues an alternative line of reasoning as a means of deciding the case differently, it can mean that the judge is doing more than simply arguing the point. The act of publicly dissenting suggests that a judge has not given up on the losing side of an argument; by continuing to argue the point, the judge may be laying the logical groundwork for future cases. Success in the form of the dissenter's preferred outcome eventually winning on the merits may only come when new judges are appointed. But a more impatient judge may have another strategy available. In dissenting, a judge may be attempting to summon litigation with new case facts amenable to an alternative legal argument, enabling the court to reach an alternative conclusion. In other words, these dissents can signal how to frame future litigation to create a more persuasive line of reasoning that encourages at least some judges in the previous majority coalition to consider a different argument when deciding on the merits. In this way, the dissenting judge identifies a potential fissure in the majority coalition that can be exploited by future litigants.

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4. This is particularly relevant when judges occasionally emphasize their displeasure in harsh terms, even though it is clearly too late to influence the decision—for example, by extravagantly damning their colleagues. In response to his fellow Justices' ruling that the death penalty cannot apply to defendants with mental retardation, Justice Scalia awarded his colleagues "the Prize for the Court's Most Feeble Effort to fabricate" evidence for the majority's argument. *Atkins v. Virginia*, 536 U.S. 304, 347 (2002).

5. Between 1953 and 1985, 54 percent of cases had accompanying published dissents. James L. Gibson, United States Supreme Court Judicial Database, Phase II: 1953-1993 Terms (ICPSR Study No. 6987, 1997), available at <http://dx.doi.org/10.3886/ICPSR06987>. Dissents appear to be on the rise. Between 1953 and 2000, the figure rose to two-thirds of cases. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 227–31 tbl.3-2 (2007). Professor Perry details another disincentive for publishing dissents from certiorari: Justices do not want the bar to know precisely why cases are granted or denied. PERRY, *supra* note 2, at 174. This stands in stark contrast to our theory here, but because we are attempting to explain some and not all dissents, both theories could be correct.

This type of dissent signals potential litigants about alternative routes to success. But to use this signaling effectively, the dissenting judge needs a cross-cutting issue that can split the existing majority. In this Article, we use federal-state disputes—which arise in a significant number of cases in every substantive policy area—as an example of such a cross-cutting issue.

Although views on federal-state power may correlate with liberal-conservative division, a judge's view on one may conflict with the other. For example, in *Gonzales v. Raich*,<sup>6</sup> Justice O'Connor commented that she did not like California's medical marijuana policy and would not have voted for it as a legislator, but to be consistent with her previous positions on states' rights and restrictions on congressional power, she voted to uphold the legislation.<sup>7</sup> On the other side of both issues, Justice Stevens said that *Raich* was one of the two decisions he most regretted having to make that Term,<sup>8</sup> but that, to accord with his views of the broader federal-state principle, he had to rule against a policy he agreed with.<sup>9</sup>

In this Article, we test our theory of judicial signaling by examining dissenting opinions that argue that the case should be decided on the basis of the proper balance of power between states and the federal government. To ensure that we are not confusing a majority-splitting mechanism with a substantive federal-state issue in the case, we look only at cases in which the dissent relies on federal-state issues and the majority opinion does not mention federalism.<sup>10</sup> We show not only that such signals encourage more cases in the given substantive policy area, framed in terms of the balance of state and federal power, but also that this process is often successful: the

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6. *Gonzales v. Raich*, 545 U.S. 1 (2005).

7. *Id.* at 57 (O'Connor, J., dissenting) ("If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.").

8. The other case was *Kelo v. City of New London*, 545 U.S. 469 (2005).

9. In an address to the Clark County Bar Association, Justice Stevens stated: "I have no hesitation in telling you that I agree with the policy choice made by the millions of California voters." John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., Judicial Predilections, Address to the Clark County Bar Association (Aug. 18, 2005), in 6 NEV. L.J. 1, 4 (2005). But given the broader stakes for the power of Congress to regulate commerce, he added that "our duty to uphold the application of the federal statute was pellucidly clear." *Id.*

10. This ensures that we are not confusing a signal from the majority opinion, or a non-signal, when federalism is in fact a determinant of a case's outcome.

previous dissenting coalition is more often subsequently in the majority.

In other words, conservative dissents that mention that a case in a particular policy area should have been decided on the basis of federal-state power result in more decisions based on federal-state powers. Moreover, those cases are decidedly more conservative. The same is true with liberal Justices who mention federal-state powers in their dissents. Their dissents result in additional cases in the same policy area that are decided on the basis of federal-state powers, and those cases become measurably more liberal.

This Article begins in Part I with case studies that illustrate how the signaling process works. It then develops a more general theory in Part II. In Part III, we test this theory using Supreme Court cases between the 1953 and 1985 Terms.<sup>11</sup> We establish that an increase in dissents that mention federal-state power as the relevant issue when the majority does not rely on federalism causes an increase in future cases based on the balance of power between states and the federal government. Then, by estimating the change in the ideological placement between the initial set of cases in the policy area of the signal and the later cases in that policy area, we show that these dissenting signals actually transform past losses into subsequent majority victories.

These results have important implications for how Justices can shape their own agendas by communicating indirectly with future litigants through their written opinions. The findings lay the groundwork for more research in the area of understanding written opinions as indications of Justices' preferences and priorities. Research in this area can help the extrajudicial community shape the future of the Supreme Court's agenda. We discuss these possibilities in the concluding Part IV.

## I. CASE STUDIES

In this Part, we provide a detailed case illustration in which a dissent based on federal-state power is transformed into a majority opinion in a subsequent permutation of the litigation. We then

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11. We are limited to this time period because we use James Gibson's Phase II Judicial Database, *supra* note 5, for information on whether the authors of case opinions make statements about whether federal or state powers are relevant to the opinion, for all majority, dissenting, and concurring opinions. Unfortunately, Gibson has not yet updated his database, but this limitation should not substantially affect our results.

provide some more brief case examples in which the same transformation occurs, but the subsequent litigation relates to new sets of facts. These examples show that the judicial signaling with which we are concerned can have a significant impact, in terms of both the relitigation of specific case facts and, more broadly, the development of doctrine.

A. *The Trees Beyond the Forest: Federalism Transforms Bacon's Park*

Upon his death in 1911, U.S. Senator Augustus Bacon donated some land to the city of Macon, Georgia, to be used as a park for white people only. The estate was left to the care of seven white board members. In time, the city of Macon allowed blacks to use the park, and the Board sued the city.<sup>12</sup> The city responded by giving up control of the park to a new set of private trustees, ensuring reversion to a policy of segregation in the park. Members of the black community intervened in the legal case, arguing that the city's decision to give up control of the park violated the Fourteenth Amendment. Writing for the majority, Justice Douglas agreed:

[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations . . . [T]he public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.<sup>13</sup>

Thus, the Supreme Court ruled that the city had no right to transfer control of the park to a private authority that would then enforce segregation.

Justice Black, dissenting, argued that the case did not have anything to do with racial discrimination, but was rather about states' powers to enforce wills and trusts:

I find nothing in the United States Constitution that compels any city or other state subdivision to hold title to property it does not want or to act as trustee under a will when it chooses not to do so. The State Supreme Court's interpretation of the scope and effect of this Georgia decree should be binding upon us unless the State

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12. *Evans v. Newton*, 382 U.S. 296, 297 (1966).

13. *Id.* at 302.

Supreme Court has somehow lost its power to control and limit the scope and effect of Georgia trial court decrees relating to Georgia wills creating Georgia trusts of Georgia property. A holding that ignores this state power would be so destructive of our state judicial systems that it could find no support, we think, in our Federal Constitution or in any of this Court's prior decisions.<sup>14</sup>

Black further argued that the Court did not have the right to hear the case, as this decision should have been entirely within the providence of state powers and state courts.<sup>15</sup> He labeled the ruling "revolutionary" in its effect on state court power over such matters.<sup>16</sup>

Justice Douglas's majority opinion did not consider the implications of the decision for the future of the state's control over its wills and trusts, but the dissenting opinion raised the issue explicitly. Our argument is that in this case, intentionally or unintentionally, Justice Black's dissenting opinion signaled for other potential litigants to explicitly frame future similar litigation in terms of its implications for states' powers, as a way of undermining the existing majority coalition and potentially changing the outcome in future litigation. Moreover, by bringing up the fact that the state should not be compelled to act as the trustee of the will if it does not wish to hold title to the property,<sup>17</sup> Black may have inspired the litigants in this specific case to sue for reinstatement of the property to the heirs. Indeed, new case facts that were more amenable to a decision favoring states' rights actually did arise.

After the Supreme Court's decision, the Georgia Supreme Court suggested that it no longer had any right to maintain segregation and simply invalidated the segregated portion of the will, maintaining its right to oversee and regulate the park.<sup>18</sup> In response, Senator Bacon's heirs sued for the reinstatement of the property to the Bacon estate. The Georgia Supreme Court agreed that the segregated nature of the park was an essential and inseparable part of Bacon's will.<sup>19</sup> Because the state could no longer be entrusted with that authority, the property ought to be reverted to Bacon's heirs. The petitioners who wanted to maintain the city's right to continue its ownership and

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14. *Id.* at 312 (Black, J., dissenting).

15. *Id.* at 313.

16. *Id.*

17. *Id.* at 312.

18. *Evans v. Newton*, 148 S.E.2d 329, 330 (Ga. 1966).

19. *Evans v. Abney*, 165 S.E.2d 160, 163-64 (Ga. 1968).

policy of desegregation of the park, along with the Attorney General of Georgia, brought the case on appeal.<sup>20</sup>

By the time the appeal reached the Supreme Court, Chief Justice Burger had joined the Court; but this change in personnel only provided one extra vote to the three-judge minority. A majority nevertheless formed in support of the previously losing side when Justice White became convinced by the implications of states' powers in the new case. The three-member dissent in *Evans v. Newton*<sup>21</sup> became a five-member majority in *Evans v. Abney*.<sup>22</sup> Writing for the new majority, Justice Black stated plainly, as he did in his previous dissenting opinion, "We are of the opinion that in ruling as they did the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will."<sup>23</sup>

Stated simply, an initial majority opinion was based on the Fourteenth Amendment; only the dissent suggested that the debate ought to be about state police powers to regulate wills and estates. Although only one judge of the original 6–3 majority left the Court, the initial dissenting opinion became the majority in the second case. The actions that followed the Supreme Court's decision—namely, the heirs' decision to sue for recovery of the land—resulted in new case facts that allowed new litigation to be framed according to states' powers rather than equal protection, as the dissent had suggested with its signal. The new case was no longer about racial segregation in a public park because there was no longer a public park; it was privately owned land. Rather than seeing the park desegregated against Bacon's wishes, the trustees of Bacon's will got what they wanted—control over the land. Moreover, the dissenting Supreme Court Justices in *Evans v. Newton* also got what they wanted—a case framed in such a way to persuade colleagues from the previous majority to join them and form a new majority.

In this example, the subsequent case concerns the same dispute and litigants as the initial case, with newly manipulated case facts that enable litigants to make legal arguments that are amenable to a decision based on state powers. The dissenting minority was successful in inspiring the litigants to reframe the case facts and

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20. *Evans v. Abney*, 396 U.S. 435, 437 (1970).

21. *Evans v. Newton*, 382 U.S. 296 (1966).

22. *Evans v. Abney*, 396 U.S. 435 (1970).

23. *Id.* at 440.

therefore the legal issue, garnering a new majority. As the next section shows, however, this reframing power is not limited to relitigation of a particularized dispute.

*B. Beyond Relitigation: Developing Doctrine in Subsequent Litigation*

We argue that dissents in a particular policy area can have an impact on cases that are entirely separate from the original case. A dissenting opinion regarding race discrimination could impact the way lawyers decide to frame a case regarding gender discrimination. A dissenting opinion in a case about obscenity and federal-state powers could impact the framing of a free exercise case. A dissenting opinion regarding the right to counsel could inspire the framing of a prisoner's rights case. Thus, though the dissent may have to do with one specific set of case facts, it could have an impact on how litigants choose to frame many different cases within the same policy area.

We found numerous examples in which the majority in an initial case ignored federalism issues and a Justice dissented on the ground of federal-state relations, whereas the majority in a later case referred approvingly to the initial dissent and accepted that dissent's position. We provide a brief outline of three such pairs of cases to illustrate our theory. These illustrations, however, are only suggestive of a relationship between the two cases. Our empirical analysis in Part III explores whether these effects are idiosyncratic or systematic.

One example can be found in a technical res judicata case, *Federated Department Stores, Inc. v. Moitie*,<sup>24</sup> which concerned an allegation of price fixing in women's clothing.<sup>25</sup> In *Moitie*, the majority dismissed an antitrust appeal that had been removed from state to federal court on the basis of res judicata, refusing to find an equitable exception on the basis of "public policy and simple Justice."<sup>26</sup> Justice Brennan dissented, expressing the view that under settled principles of federal jurisdiction, the claims refiled in state court should not have been removed to federal court in the first place.<sup>27</sup> Only his dissent focused on state-federal issues. In 1987, the majority opinion in

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24. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

25. *Id.* at 394.

26. *Id.* at 398 ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

27. *Id.* at 406 (Brennan, J., dissenting) ("An action arising under state law may not be removed solely because a federal right or immunity is raised as a defense.").

*Caterpillar, Inc. v. Williams*<sup>28</sup> found that breach of employment contract claims were improperly removed from state courts to federal courts.<sup>29</sup> Explicitly citing the *Moitie* dissent, the opinion laid out strict requirements under which cases can be properly removed from state courts and forced into federal courts.<sup>30</sup>

Both the case facts and the cases' timing support our theory. The first case occurred six years before the follow-up case. In Part III, *infra*, we establish that it takes approximately four to six years for new cases to reach the Supreme Court, and thus we expect the effect of these dissenting signals to appear in cases four to six years after an initial dissent mentioning federal-state issues.

A second example concerns preemption.<sup>31</sup> In *Motor Coach Employees v. Lockridge*,<sup>32</sup> a challenge to a union's firing of an employee for not paying his dues failed because of preemption, as the National Labor Relations Board had exclusive jurisdiction.<sup>33</sup> The majority stated that "nothing could serve more fully to defeat the congressional goals underlying the Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law."<sup>34</sup> Justice White dissented on the ground that the question was not simply one of state and federal court jurisdiction.<sup>35</sup> Rather, state laws should apply when federal legislation arguably does not apply, and so state courts should not be foreclosed from granting relief to union members under those state laws.<sup>36</sup> Justice White stated:

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28. *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

29. *Id.* at 399.

30. *Id.* at 397 ("Caterpillar does not seek to point out that the contract relied upon by respondents is in fact a collective agreement; rather it attempts to justify removal on the basis of facts not alleged in the complaint. The 'artful pleading' doctrine cannot be invoked in such circumstances." (citing *Moitie*, 452 U.S. at 410 (Brennan, J., dissenting))).

31. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971) ("[The] National Labor Relations Act pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act.").

32. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

33. *Id.* at 302; *see also id.* at 276.

34. *Id.* at 287.

35. *Id.* at 309 (White, J., dissenting).

36. *Id.* at 309 ("I could not join the opinion of the Court since it unqualifiedly applies the same doctrine where the conduct of the union is only arguably protected under the federal law.").

By making the matter one of state law, Congress has not only authorized multiformity on the subject, but practically guaranteed it. . . . [Section] 14 (b) of NLRA . . . has authorized States to choose for themselves whether to require or permit union shops. This allows the States to regulate union or agency shop clauses, so that union insistence on a security agreement as part of a collective bargaining agreement may be prohibited in one State and protected or even encouraged in another.<sup>37</sup>

Subsequently, in *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*,<sup>38</sup> a Court majority endorsed Justice White's approach by upholding a collective bargaining agreement involving a union.<sup>39</sup> The Court specified that although the National Labor Relations Act

articulates a national policy that certain union-security agreements are valid as a matter of federal law, § 14 (b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from that policy. . . . We have recognized that with respect to those state laws which § 14 (b) permits to be exempted from § 8 (a)(3)'s national policy "[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . . ."<sup>40</sup>

The first case was five years prior to the follow-up case.

A final illustration in which a dissent had an impact on future litigation—both within the same issue area, as well as in adjacent issue areas—is *A Quantity of Copies of Books v. Kansas*,<sup>41</sup> in which Justice Harlan dissented from a majority opinion that disallowed state regulations of certain allegedly obscene materials.<sup>42</sup> The majority rejected the state's treatment of the obscene materials as contraband that could automatically be seized and destroyed, like illegal liquor.<sup>43</sup> The majority reasoned that written materials receive greater protection than other illicit goods by virtue of the First Amendment,

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37. *Id.* at 317–18 (citations omitted).

38. *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407 (1976).

39. *Id.* at 416–17.

40. *Id.* (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Note, however, that in this case, Texas's statute did not satisfy § 14(b) "because most of the employees' work is done on the high seas, outside the territorial bounds of the State of Texas, [and so] Texas' right-to-work laws cannot govern the validity of the agency-shop provision at issue here." *Id.* at 420.

41. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

42. *Id.* at 215 (Harlan, J., dissenting).

43. *Id.* at 211 (majority opinion).

and so procedures controlling written material must be “searching” to avoid suppression of protected speech.<sup>44</sup> Justice Harlan said that the majority opinion “serves unnecessarily to handicap the States in their efforts to curb the dissemination of obscene material.”<sup>45</sup> That year, Justice Harlan also dissented in *Jacobellis v. Ohio*,<sup>46</sup> saying that the states were afforded more latitude to ban “any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.”<sup>47</sup>

The subsequent explosion in obscenity litigation eventually resulted in *Miller v. California*,<sup>48</sup> which put the regulation of obscene materials mostly into the hands of the state.<sup>49</sup> The same year, in *Paris Adult Theatre I v. Slaton*,<sup>50</sup> the majority approvingly cited multiple dissents by Justice Harlan<sup>51</sup> and adopted his overall approach of giving the states great latitude in these matters.<sup>52</sup> The Court’s exposition on the law began: “It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material.”<sup>53</sup> The majority emphasized that there are numerous legitimate state interests at stake in “stemming the tide of commercialized obscenity,”<sup>54</sup> and that the Court must give deference

44. *Id.* at 212 (“[The] use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications.”).

45. *Id.* at 215 (Harlan, J., dissenting).

46. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

47. *Id.* at 204 (Harlan, J., dissenting).

48. *Miller v. California*, 413 U.S. 15 (1973).

49. *Id.* at 19 (“[T]he States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”).

50. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

51. *See, e.g., id.* at 60.

52. *Id.* at 80 (“Mr. Justice Harlan, on the other hand, believed that the Federal Government in the exercise of its enumerated powers could control the distribution of ‘hard core’ pornography, while the States were afforded more latitude to ‘[ban] any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.’” (quoting *Jacobellis*, 378 U.S. at 204 (Harlan, J., dissenting)) (citing *Ginzburg v. United States*, 383 U.S. 463, 493 (1966) (Harlan, J., dissenting); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 215 (1964) (Harlan, J., dissenting); *Roth v. United States*, 354 U.S. 476, 496 (1957) (Harlan, J., dissenting)).

53. *Id.* at 54.

54. *Id.* at 57.

to a state's determination that obscenity is harmful to the public.<sup>55</sup> The Court's attempts to articulate a national standard to the regulation of obscenity had proved unworkable, and Justice Harlan's approach to treating the issue as one of respecting state-federal division provided the Court with a means of avoiding many of these intractable disputes.<sup>56</sup>

*Jacobellis* and *A Quantity of Copies of Books* may have resulted in additional cases regarding issue areas outside of obscenity. In the years following these decisions, the Court heard a variety of First Amendment cases that invoked the question of the balance of power between the federal government and the states. One example is *Gertz v. Robert Welch, Inc.*,<sup>57</sup> in which the Court found that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."<sup>58</sup> This finding is consistent with Justice Harlan's dissenting opinions in the obscenity cases.

These illustrations suggest that dissents based on federal-state issues can effectively serve as signals for future litigation, and that this may provide the dissenting Justices with cases that allow them to form alternate majorities in subsequent cases. This raises three questions: First, why would this strategy be successful? Second, are these illustrations aberrations, or is there a significant and consistent pattern in this phenomenon? Third, if there is a pattern, does it work for both liberal and conservative initial dissents? The following Part provides a theory of judicial signaling to answer the first question, and then our empirical analysis addresses the second and third questions.

## II. A THEORY OF JUDICIAL SIGNALING

Bacon's case is an example of relitigation by the same plaintiffs to achieve a different outcome, but as our other historical illustrations suggest, signaling can have value beyond relitigation. Potential litigants can look to signals coming out of a wide variety of cases in

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55. *Id.* at 60–61 ("Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.").

56. *Id.* at 64 ("The States, of course, may follow such a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction.").

57. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

58. *Id.* at 345–46.

the same policy area, and decide which arguments to emphasize. Bacon's case illustrates that even in relation to the same controversy, litigants can sometimes generate new case facts when they interpret the dissent as a signal to frame future litigation according to federal versus state powers. More typically, we expect subsequent cases to occur a number of years after the initial case because the alternative approach to the issue area will generally require new case facts. This Part first spells out the assumptions our theory is based on, and then provides more detail on the theory itself.

#### A. *Assumptions*

Our theory hinges on the truth of six assumptions about judicial behavior. The first group of three assumptions about the policy preferences of Justices is now fairly uncontroversial, as they have been well established in empirical legal and political science literatures. We briefly outline the literature substantiating each of these assumptions. The second group of three assumptions is more controversial, and we address their plausibility and impact.

1. *Justices' Policy Preferences and Strategic Behavior.* First, the notion of signaling implicitly presumes that Justices have priorities and preferences about case dispositions, and act in ways that are consistent with those preferences. Whereas at one time this position may have been controversial, these days it is fairly well established. For example, an extensive empirical literature exists that shows that Justices vote strategically over certiorari, to ensure both that the Court hears the sort of cases the Justices are interested in and that it does not hear cases that will set a precedent contrary to each Justice's preferences.<sup>59</sup>

In a comprehensive study using judicial records and some of the Justices' private papers, Professors Epstein and Knight examined judicial notes and letters that reveal Justices engaging in negotiation and bargaining with one another.<sup>60</sup> Epstein and Knight also compared early and late drafts of opinions, and compared Justices' initial

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59. See, e.g., Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 825–26 (1995); Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 *passim* (1999); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 717–18 (1993).

60. EPSTEIN & KNIGHT, *supra* note 3, at 73–76.

conference votes to their final case positions.<sup>61</sup> They uncovered evidence of three types of strategic activities. First, Justices undertake bargaining with one another—over certiorari, policy at the merit stage, and opinion writing.<sup>62</sup> Second, Justices engage in “forward thinking,” which includes: considering the expected behavior of external actors; defensive denials, or refusing to take a case the Justice may wish to hear out of an expectation the Justice will be unable to garner majority support; and aggressive grants, or taking a case that may not warrant review because the Justice calculates that it may be good for developing a doctrine.<sup>63</sup> Forward thinking also includes manipulating the agenda, particularly at conference.<sup>64</sup> Third, Justices write sophisticated opinions, which attempt to win over ambivalent colleagues.<sup>65</sup> Epstein and Knight’s work provides ample evidence that Justices have preferences about case outcomes, and that overall they act consistently with those preferences.

Second, for signaling to be an effective strategy, Justices must have enough information about their colleagues’ preferences to enable them to know what kinds of arguments would be likely to persuade their colleagues to join them.<sup>66</sup> Justices have the benefit of conference discussion and less formal interactions with their

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61. *Id.* at 90–98, 99–105 tbl.3-6.

62. *Id.* at 58–79.

63. *Id.* at 79–88.

64. *Id.* at 88–95.

65. *Id.* at 95–111. *See generally* FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000) (highlighting the extent to which strategic interactions among the Justices shape the Court’s opinions). *But see* Boucher & Segal, *supra* note 59, at 829 (finding evidence for aggressive grants but not for defensive denials, and theorizing and finding that a decision to grant certiorari is a function of a desire to reverse, the support the Justice expects from the rest of the Court, and an interaction between these two variables). Professors Boucher and Segal find that the extent of strategic behavior varies by individual Justice. *Id.*; *see also* PERRY, *supra* note 2, at 276 (“It was clear that strategic considerations tended to be the exception rather than the rule for all of the justices, though some justices were clearly strategic more often than others.”).

66. This is a fairly standard assumption that scholars studying the courts make. *See, e.g.*, Lee Epstein, Jeffrey A. Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 420 (2002). Some scholars, however, assume the opposite. *E.g.*, Lawrence Baum, *Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction*, 21 AM. J. POL. SCI. 13, 17 (1977). One of the few studies to challenge this notion is John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335, 338 (1990), but arguably their results actually support the hypothesis that judges consider their colleagues’ likely actions. Of the three hypotheses relating to this topic that they test, the evidence supports two, and the one the evidence does not support relates to predicting the behavior of uncertain judges only.

colleagues to develop private knowledge of their proclivities. Although this evidence is necessarily indirect, a number of studies have provided evidence that the Justices have foreknowledge of their colleagues' future outcomes.<sup>67</sup> For instance, studies have found that judicial decisions depend on the level of support judges expect from other members of the court,<sup>68</sup> implying some level of foreknowledge.<sup>69</sup> These findings show both that judges can accurately anticipate their colleagues' likely actions and that judges' own actions vary with the likelihood that they will cast the pivotal vote.

Third, the theory of judicial signaling to litigants must implicitly assume that litigants want to win and will use whatever arguments they believe will help them win, and that their lawyers use information from Justices' written opinions to gauge which case facts and legal arguments will appeal to which Justices. This assumption is also established in the political science literature.<sup>70</sup> For instance, scholars have shown that both organized interests and professional bars shape judicial agendas by drawing Justices' attention to cases with a potentially large impact on public policy.<sup>71</sup>

2. *Litigants, Their Access to Cases, and the Timing of Litigation.* Thus, these three core assumptions about strategic judicial behavior are well established. There are other aspects of our theory of judicial signaling, however, that may be more controversial. First, for the process to work systematically, there must be a sufficient number of sophisticated litigants who pay attention to signals so that opinions in cases with one issue can successfully summon cases in other issue areas within the same broad policy area. Second, litigants must have access to a wide variety of cases with a wide variety of case facts, some of which lend themselves to appropriate legal arguments that are likely to appeal to the Justices. Third, because, as we show in Section B, this effect takes several years, Justices must be willing to wait to hear cases that are not already in the litigation pipeline—

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67. See Caldeira et al., *supra* note 59; Epstein et al., *supra* note 66.

68. See, e.g., Boucher & Segal, *supra* note 59, at 832.

69. Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649, 651 (1979) ("Justices can be expected to calculate with a high degree of accuracy for they have the motivation, ability, and opportunity to do so.")

70. See, e.g., Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 L. & SOC'Y REV. 807, 828–29 (1990) (showing that the filing of amicus briefs greatly increases the odds that the Court will grant certiorari).

71. See McGuire & Caldeira, *supra* note 59, at 724.

because high-quality cases, framed in a way that Justices would like to see them framed, are relatively rare and are therefore worth waiting for.

To defend the two assumptions relating to strategic litigant activity, we drew evidence from personal interviews with directors of interest groups who support litigation. In 2001, the Colorado Legal Director of the American Civil Liberties Union (ACLU) stated that the Colorado branch receives ten thousand calls a year from people who claim that their rights or liberties have been violated.<sup>72</sup> Of those ten thousand, two thousand are serious violations. If this is true of all fifty state ACLUs, and given the number of other groups and law firms that support litigation, then there is a great deal of access to a high number of quality cases from which to choose.<sup>73</sup> The ACLU Board meets often to discuss which of those two thousand cases are worthy of ACLU support. In an interview with Steven Shapiro, the Legal Director of the National ACLU, Shapiro claimed that the ACLU supports over a thousand cases at any one time.<sup>74</sup> Thus, there are probably a sufficient number of controversies so that these groups or law firms serve as a form of litigation triage. Whereas triage in an emergency room prioritizes the worst cases, litigation triage prioritizes the cases that are most likely to lend themselves to legal arguments that will balance the preference for legal change with a preference for winning. As this process occurs, Justices receive high quality cases that allow them to act in a way consistent with their own priorities and preferences, given the preferences of their colleagues (or at least four other colleagues).

The third of these more controversial assumptions has not been proven in the political science literature. Although many authors have recognized that judges act strategically, they have largely studied short-term strategy: how judges ensure their favored outcome in any given case. For most studies, an assumption of short-term judicial focus is implicit;<sup>75</sup> for others it is explicit.<sup>76</sup> But there is no reason to

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72. Interview with Simon Mole, Intake Dir., Colorado ACLU, in Denver, Colo. (May 6, 2001) (on file with author).

73. On the role of other interest group-based litigation, see VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 46–48 (2007).

74. Interview with Steven Shapiro, Legal Dir., National ACLU, in N.Y., N.Y. (May 18, 2001) (on file with author).

75. Baum, *supra* note 66, at 16.

76. See, e.g., EPSTEIN & KNIGHT, *supra* note 3, at 18.

assume that judges have such a myopic focus, particularly those with lifetime tenure. Judges may seek to have the capacity to set the law of the land (or state or region), and thus may be willing to sacrifice their preferred outcome in a given case to find a better vehicle to direct the development of the law.

Just as the political science literature has shown that Justices are strategic, we consider that they are likely to have a long-term as well as a short-term focus. We also believe that litigants as a whole are likely to act strategically, even if any given individual may be less sophisticated. Ultimately, if we are wrong in these assumptions, then we should not find the effect we hypothesize.

### *B. Formalizing a Theory of Judicial Signaling*

In this Section, we clarify all aspects of our theory explicitly. First, we describe the theory in detail. Then, we present empirical evidence that helps bolster our expected time lags between the signals and the resulting cases. Third, we explain how issue agendas are transformed to a dimension dealing with federal and state powers.

1. *Description of Signaling Theory.* Our theory is akin to Riker's theory of "heresthetics," a word Riker created from the Greek root meaning "choosing or electing."<sup>77</sup> A heresthetical maneuver involves an actor who sets the agenda by choosing a question strategically to generate supportive majority coalitions for a particular outcome, even when the majority may not seem supportive when the discussion is framed on another dimension. The agenda setter manipulates the substance of the proposal from one dimension to another, transforming a minority coalition into a majority coalition.<sup>78</sup>

Justices' dissents often argue that the Court should have decided a case according to a different legal rationale. Likeminded future litigants can interpret legal rationales in dissenting opinions as information about how they might reconstruct the case facts and legal arguments to be more likely to win on the merits in the future. We argue that these dissenting opinions could have an impact on a wide variety of issues in the same policy area. For example, if a dissenting opinion on the issue of libel says that the states should have a wider ability to regulate these matters, the dissent will have an impact on litigants who are considering other legal questions associated with the

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77. WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION*, at ix (1986).

78. *Id.* at 1.

First Amendment. Litigants have an incentive to use all available information—and although dissenting signals may need to be assessed with skepticism, they can be informative for litigants deciding how to frame future cases.<sup>79</sup>

It is not essential for us to ascertain whether a Justice intended to signal for future cases. What is vital is that we can ascertain Justices' preferences and then show that litigants use that information to create outcomes that are in line with those preferences. Whether Justices know or intend that this will happen is less important than showing that dissenting Justices get what they want: a chance to be in the majority when they were previously in the minority.

In this Article, we look at dissenting opinions in cases representing a wide variety of policy areas. We look specifically at dissenting opinions that mention that the Court should not have decided the case the way it did because of rules about the state and federal balance of power. The policy areas include First Amendment, discrimination, privacy, criminal rights and procedure, labor and labor union issues, the environment, economic regulation, taxation, due process and government liability, judicial power, and federalism. We consider only dissenting opinions that mention federalism when the majority opinion does not mention federalism, which we refer to as "federalism dissents." This way, we can focus exclusively on the effect of the dissenting opinion. We examine whether signals have a systematic impact on the ideological placement of the Supreme Court's policy outputs in future cases that are framed in terms of federalism. Can a conservative dissenting coalition become a majority coalition in future cases in the same policy areas when the cases are framed in terms of the balance of state and federal power? Do liberal dissenting opinions have a similar impact?

Past research bolsters our claim that there is indeed a systematic effect. Strategic litigants bring litigation with the Court's policy priorities in mind.<sup>80</sup> Moreover, they bring litigation that is framed in a way that will appeal to the marginal or swing Justice on a given issue.<sup>81</sup> Studies have shown that the lag time in new cases reaching the

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79. See Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1, 11–13 (2008) (discussing the signaling interaction between judges and litigants).

80. See Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda*, 66 J. POL. 755, 756 (2004).

81. See BAIRD, *supra* note 73, at 149 (“[T]he strategy is to figure out a way to appeal to the tie-breaker, or the justices that are ideologically in the center.”).

Supreme Court in response to the Court's signals is approximately five years.<sup>82</sup>

This theory relies on two specific assertions. One is the issue of litigation timing. Sending a signal to inspire litigants to bring issues that are based on federal-state powers will require some number of years. Here we rely on previous empirical research that looks at the timing of the effect of signals on future litigation. Secondly, our theory relies on the idea that when litigants present Justices with new case facts in which the balance of federal-state powers is the dominant issue, they can persuade Justices to vote a different way. The following two sections provide evidence of these two effects.

2. *The Litigation Time Lag*. Why do we expect this level of time lag? We can form a rough estimate of the time lag we should expect by looking at statistics on the time interval between filing at the district court level and disposition at the Supreme Court. According to the Federal Judicial Caseload Statistics provided by the Administrative Office of the United States Courts, the median time interval between filing and disposition of civil cases in U.S. district courts for the period ending on September 30, 2004, is 21.1 months.<sup>83</sup> The median time interval between filing notice of appeal and disposition in the U.S. courts of appeals is 10.5 months.<sup>84</sup> Unfortunately, the Administrative Office does not provide similar figures for the additional interval between Supreme Court filing and disposition, so we cannot be sure of the cumulative total for disposition. But we would anticipate a somewhat similar time interval between Supreme Court filing and disposition, suggesting an approximate time frame of four years. We may, however, expect a longer delay in cases generated in response to signals, as this requires a case-generating controversy. This delay may be even longer for cases generated in response to federalism signals, as the relevant initiating action is some governmental action, such as the passage of legislation. Thus, we expect that dissenting signals will generate new cases with new case facts in the given policy area sometime in the following four to six years.

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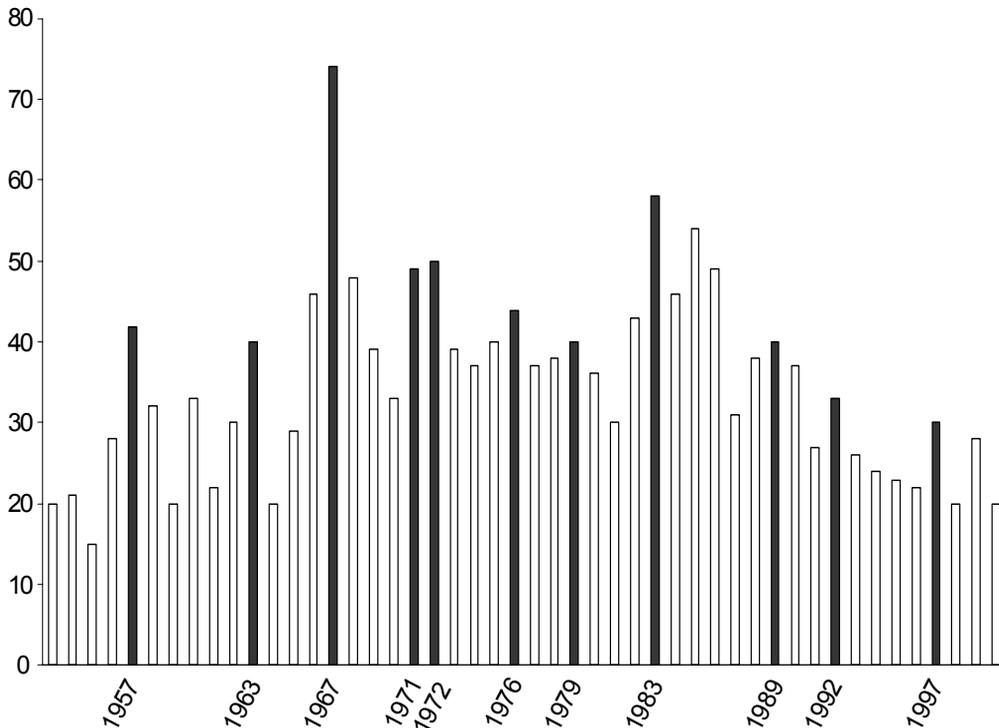
82. *Id.* at 69.

83. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 162 tbl.C-5 (2004), available at <http://www.uscourts.gov/judbus2004/appendices/c5.pdf>.

84. *Id.* at 97 tbl.B-4, available at <http://www.uscourts.gov/judbus2004/appendices/b4.pdf>.

Our first step, then, is to ascertain whether there are cycles of Supreme Court attention to certain issues. This determination will not establish a signaling effect, but it will be an important initial element of our analysis. We did this first by examining one particular policy area over time, in Figure 1, and then we generalized this examination to all policy areas, in Table 1.

*Figure 1. Attention to Criminals' Rights Cases at the Supreme Court, 1953–2000*



A look at the historical trend of the Supreme Court's attention to criminal cases serves to illustrate the signaling effect in the timing of litigation. Figure 1 presents the number of cases that the Supreme Court heard dealing with criminals' rights cases from 1953 through 2000. The x-axis is the Term of the Court; the y-axis is the number of cases the Court hears. The years in which there are a significantly higher number of cases than previous years are shaded. These years are 1957, 1963, 1967, 1971, 1972, 1976, 1979, 1983, 1989, 1992, and 1997.

The interesting aspect of this figure is that in no year except one, during which there was a high yield, does the caseload remain as high

in the subsequent year. Except for the years 1971 and 1972, when there are a high number of cases, the caseload drops in the following two to five years. It then reaches another spike. This informal look at the data gives the impression that there are increases in the attention to criminal cases every three to six years. A time-series analysis that looks at the effect of important cases on the number of future cases reveals that on average, in criminal cases, the cycle is four years.<sup>85</sup>

Figure 1 does not prove the signaling effects that we theorize, but it does indicate that the kind of trend we expect to arise if signaling occurs does exist—at least in relation to criminal rights. Table 1 shows that this effect is not confined to criminal rights cases; it reports a similar effect in the average time lag for all other Supreme Court policy areas. In every policy area on the Court’s agenda, the attention cycle ranges from three to six years.

*Table 1. Average Time Lag of the Effect of Important Decisions on Future Supreme Court Agenda Attention*

| Policy Area                          | Average Cycle of Supreme Court Agenda Attention |
|--------------------------------------|---|
| Discrimination                       | 3 to 6 years                                    |
| First Amendment                      | 3 to 4 years                                    |
| Privacy                              | 3 years   |
| Criminal Rights                      | 4 years   |
| Labor                                | 3 years   |
| Environment                          | 3 to 5 years                                    |
| Economic Regulation                  | 4 years   |
| Taxation                             | 6 years   |
| Due Process and Government Liability | 5 years   |
| Judicial Power                       | 5 years   |

Note: These policy area categories match Spaeth’s coding of “Value” from the United States Supreme Court Judicial Database fairly closely, with a few exceptions: the separation of environmental cases into their own category, the inclusion of personal injury and government

85. See Baird, *supra* note 80, at 764. The time-series analysis reported here looks at the effect of an index measuring “important” decisions on the future caseload of cases in that policy area. We used a simple Prais-Winsten regression. Important cases are measured by counting the number of cases that are reported on the front page of the *New York Times*, see Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72 (2000); declarations of unconstitutionality; cases that formally reverse precedent; and the proportion of cases that reverse lower court decisions. Each indicator is standardized on a scale of 0 to 1 and is then summed. This index is meant to indicate signals from the Court that at least some subset of Justices considers this policy area a priority. This analysis appears in more detail in Baird, *supra* note 80, at 759–62.

liability with noncriminal due process cases, and the inclusion of state and federal taxation into the same category. Furthermore, miscellaneous and attorney law issues are excluded from the analysis.

Phase II of the United States Supreme Court Judicial Database codes every opinion for whether the case's topic involves the balance of power between the states and the federal government. Moreover, every opinion is coded for whether it expands or restricts the powers of the states or the federal government in relation to one another. The presence of federalism is coded positively when the topic is the balance of power or when the value either expands or restricts federal or state power.

All orally argued cases, whether they resulted in signed or unsigned opinions, including per curiam decisions and judgments, are counted. Memoranda, decrees, multiple docket numbers, and any case that resulted in a split vote are excluded. Some case citations represent multiple issues. When these issues span across different policy areas, they are counted once for each issue represented; otherwise, they are counted only once.

The implication of Table 1 is that when Justices indicate—by deciding to focus their agenda on a particular area of jurisprudence—that they consider a particular area a priority, the Court does not immediately pursue additional cases in that area in subsequent years. After the Court's initial flurry of activity in a certain policy area, there is a lag of three to six years before the Court puts additional cases in that policy area on the agenda. It seems that if Justices consider a certain policy area a priority in one year, they would consider it a priority in the following year. So why wait?

The answer we find most appealing is that they are waiting for the most appropriate case vehicles.<sup>86</sup> When litigants—or interest groups or other political actors interested in legal change—perceive that a particular policy is a priority, they begin to scour the universe for appropriate cases. As with our ACLU example, litigants are most likely to pick cases that respond specifically to legal arguments in previous cases. The cases then take three to five years in the litigation pipeline before the Supreme Court hears them. Seemingly, the Court depends on litigants to respond to what the Justices are saying in their cases, and this process tends to take three to six years.

But why do Justices need to signal for cases in the future? If the Justices did not need new case facts, they could simply transform the issue in the initial case into one involving federalism, without needing new litigation. There are instances when Justices can manipulate the issues without waiting for litigants to frame new cases appropriately. Professors Epstein and Shvetsova note examples of this, showing that the Chief Justice can have some impact on which issues are taken into consideration on the merits.<sup>87</sup> Moreover, Professors Ulmer<sup>88</sup> and

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86. On the weight that Justices give to finding an appropriate vehicle to develop an area of the law, see PERRY, *supra* note 2, at 234.

87. See Lee Epstein & Olga Shvetsova, *Heresthetical Maneuvering on the US Supreme Court*, 14 J. THEORETICAL POL. 93, 104–13 (2002).

McGuire and Palmer<sup>89</sup> provide evidence that Justices, because they prefer some issues over others, create issues that were not presented before them—a phenomenon called “issue fluidity,” whereby Justices address legal questions in their opinions that were not presented in the legal briefs.<sup>90</sup>

The response to this counterargument is that Justices may not always be as willing or able to address issues that the litigants did not present. Professors Epstein, Segal, and Johnson argue that some Justices consider issue fluidity inappropriate; it violates a norm they consider important.<sup>91</sup> By the time a case reaches the Supreme Court, it has a well-developed record that is often difficult to ignore. In fact, even before a sympathetic judge, an outcome may depend not simply on the fact that a litigant makes a federalism argument, but may require a particular form of that argument. Because litigants need to choose carefully the arguments they make before the Court—due to opportunity costs created by time constraints and judicial impatience with litigants who throw every possible argument into a brief—effective signaling will often require new litigation, and will not be amenable to fact or issue manipulation.

Holding all else equal, Justices are likely to prefer cases with facts amenable to particular legal arguments, rather than cases in which they have to create the issue themselves. And if the initial case facts do not lend themselves to being framed on the basis of federal-state power, the Justices will require new case facts to generate different legal arguments. In this situation, litigants have an incentive to find (or create) new case facts and bring new litigation that allows dissenting Justices to persuade their previously unsympathetic colleagues to join them in their opinion.

Signaling provides a means of finding appropriate legal vehicles with appropriate case facts and appropriate parties in the policy areas that Justices want to influence, thus allowing them to maximize their

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88. See S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 319, 322 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

89. See Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 *AM. POL. SCI. REV.* 691, 691 (1995).

90. See *id.*; Ulmer, *supra* note 88, at 322.

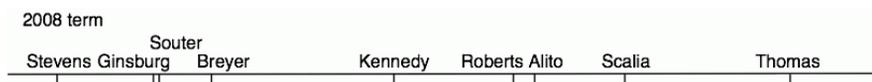
91. See Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 *AM. POL. SCI. REV.* 845, 845 (1996) (“[T]he *sua sponte* doctrine, namely, the practice disfavoring the creation of issues not raised in the record before the Court, is a norm.”).

policymaking power while minimizing their need to violate judicial norms. Litigants facing analogous but unrelated circumstances can benefit from judicial signals of how best to argue their case. The implication of our theory is that Justices benefit from litigants' interpretation of their written opinions. Litigants aid Justices by interpreting their signals and bringing them cases that better enable them to persuade their colleagues to vote with them.

3. *Transforming the Issue Dimension of Judicial Decisionmaking.* If litigants are responsive to judicial signals, what can dissenting Justices signal as a means of upsetting the existing majority on an issue? Our illustrations suggest that federal-state issues often cut across the various substantive legal issues, providing an alternative route to deciding the case. Consistent with this, Table 2, *infra*, shows that federalism arguments appear in majority opinions across all policy areas. Questions of federal-state power are not raised in every case, but they do cross every broad policy area the Supreme Court addresses and arise in a significant number of cases.

Figure 2 shows the overall preference positions of the Roberts Court using Martin-Quinn measures<sup>92</sup> of judicial positioning in the 2008 Term along a unidimensional liberal-conservative scale. The process by which the Martin-Quinn scores are calculated is discussed *infra* in Part III. For the moment, it is enough to know that one way of summarizing judicial preferences is along a single ideological dimension.

Figure 2. *Judicial Preferences on the Roberts Court, 2008 Term*



Empirical judicial scholars have not yet proven whether the overwhelming bulk of decisionmaking for courts can be collapsed down to one dimension of liberalism versus conservatism without losing much explanatory power<sup>93</sup>—as it can be for Congress.<sup>94</sup> This is

92. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

93. See, e.g., Bernard Grofman & Timothy J. Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of "Natural Courts" 1953-1991*, 112 PUB. CHOICE 55, 58 (2002) (noting that a single dimension explains much of the Justices' voting behaviors). Some law scholars, however, take

an empirical question of great significance for the study of judicial behavior, but we need not decide it for our purposes. Even if much of judicial decisionmaking can be described in terms of one liberal-conservative dimension, this does not mean that there cannot be cross-cutting issues in some cases. We do not dispute the possibility that much of judicial decisionmaking can be described unidimensionally. Indeed, our theory reinforces the idea that at times, Justices behave strategically by using other dimensions to persuade their colleagues to vote a different way so that they can achieve outcomes consistent with their pure policy objectives. Put another way, even if the liberal-conservative dimension is dominant, other factors can effectively divide majorities on some issues. Interpretive methodology or procedural issues could be factors; arguably, federalism is another. For example, Professors Spiller and Tiller model federalism as a second decisionmaking dimension, and find preliminary support for that view.<sup>95</sup> It is this variation that we explain here.

If only one dimension shapes all judicial decisions, then all case outcomes should look the same, regardless of the position of the underlying case facts or policy outcome if the Court does not reverse. The outcome will always be at the median Justice's ideal point. We know that median Justices are typically the most important Justices on the Court, but Professors Epstein and Jacobi showed that some median Justices are much more powerful than others, and that

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issue with this idea. *See, e.g.*, Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2320 (1999) ("It is frequently assumed that . . . the majority will converge in a moderate or median position. This may well be quite likely when the Justices' ideal points can be lined up nicely in a single-peaked fashion along a single dimension, for instance from liberal to conservative. . . . But sometimes the options under discussion cannot easily be aligned along a single dimension.").

94. *See* KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 229 (1997) ("The most recent Congresses are highly unidimensional, very polarized, and fit the spatial model extremely well."); Keith T. Poole, *Changing Minds? Not in Congress!*, 131 PUB. CHOICE 435, 437 (2007) (reporting that voting in Congress is almost exclusively one-dimensional, such that now "a single dimension accounts for about 92 percent of roll call voting").

95. *See generally* Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996) (modeling decisionmaking as a product of a substantive legal issue and federalism, and providing initial empirical evidence of some cases dividing Justices by these two dimensions).

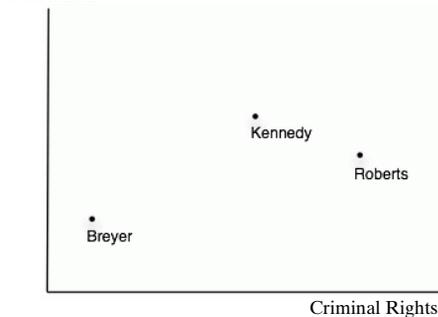
weaker medians do not get their way in many cases, including many important ones.<sup>96</sup>

Considering a second dimension presents the possibility of multiple alternative strategies. This provides an explanation of why dissenting opinions raise different issues.<sup>97</sup> Judges on the losing side of an issue may seek to undermine the existing majority. Having lost on the substance of an issue, judges can look to an alternative basis—federalism—to decide the case, potentially destabilizing the winning coalition. Figure 3 illustrates why.

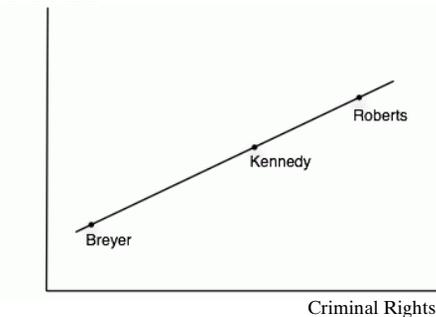
Figure 3 illustrates two possible positions of the three central Justices on the current Court. Justices Breyer, Kennedy, and Roberts are arrayed as in Figure 2, but with two different hypothesized positions on a federalism dimension (no equivalent score exists for judicial preferences in relation to federalism in particular). If judicial preferences vary by topic, as in Figure 3A, it is easy to see why different combinations of judges can form majorities, including majorities that exclude the median. If a case were decided on the substantive criminal rights issue in Figure 3A, Justice Kennedy could form a majority with Justice Roberts or Justice Breyer or both, but it would be unlikely that any majority would form without him. But if the case were decided on the basis of federalism, Justices Breyer and Roberts would be more likely to agree with each other than either Justice would with Justice Kennedy—and thus a different majority could form, potentially deciding the case in the opposite direction.

*Figure 3. Possible Judicial Positioning in Two Dimensions*

*Figure 3A. Variation by Topic*



*Figure 3B. Perfect Correlation*



96. Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 73–89 (2008).

97. Scholars have struggled to provide a systematic theory of why judges publish dissents. See, e.g., EPSTEIN & KNIGHT, *supra* note 3, at 60–62.

If instead there is little difference between judicial views on the substantive issue of criminal rights and federalism, as illustrated in Figure 3B, different majorities could form as long as the underlying case facts facing the Justices do not always arise on the exact dividing line illustrated in Figure 3B.<sup>98</sup> With two potential dimensions, every possible combination of judges can form a majority, and a majority always exists that can overturn any other majority.<sup>99</sup> Thus, not only could Justices Breyer and Roberts agree on an outcome that Justice Kennedy disagreed with—as their purported federalism positions in Figure 3 indicate—but even Justices whose positions are extremely divided on most substantive issues, such as Justices Stevens and Scalia, could potentially agree on an outcome. For instance, in *Raich*, as we discussed, Justices Stevens and Scalia both decided in favor of the federal government—Justice Stevens’s subsequent statements suggest that he based his decision on federalism, whereas Justice Scalia’s vote is easier to reconcile with his views on the substantive issue, rather than with his position in previous cases regarding federalism.<sup>100</sup> Consequently, some decisions made on the initial policy dimension can be overturned through the introduction of the second dimension.

Thus, if a judge intends to dissent in a case, it may be beneficial to introduce a federalism argument that constitutes an alternative means of addressing the question. If litigants respond by bringing new cases based on that federalism argument, which then work their way through the judicial system in the next few years, a majority may exist to overturn the initial outcome. This does not require any personnel

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98. Thus, even if federalism is purely a methodological means of reaching an outcome that each judge would prefer on the first dimension, different majorities nonetheless may form when only one dimension is at play. In fact, our empirical results show that federalism is not just a proxy for conservative ideology, but also results in liberal movements in outcomes. See *infra* Part III.

99. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46–60 (2d ed. 1963); Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472, 472 (1976); Norman Schofield, *Transitivity of Preferences on a Smooth Manifold of Alternatives*, 14 J. ECON. THEORY 149, 149 (1977).

100. Justice Scalia joined the majority in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), both of which favored restrictions on the federal government and protection for traditional state activities. Justice Scalia’s overall ideological score, however, was a very conservative 2.736 in the 2008 Term, Andrew D. Martin & Kevin M. Quinn, *Martin-Quinn Scores*, <http://mqscores.wustl.edu/measures.php> (last visited Oct. 3, 2009), which is compatible with the strong law and order substantive outcome that *Raich* enabled.

changes or ideological convergence of the Justices. It simply requires that the second dimension be salient to judicial decisionmaking.

Our aim is not to identify the exact location of case outcomes in two-dimensional space, but rather to show the extent to which manipulation of the second dimension can change the outcome of a case in the first dimension. As long as judicial decisionmaking is affected by more than simply the left-right ideological policy continuum, this model explains why a dissent that relies on federalism, and signals the possibility of an alternative outcome on federalism grounds, can result in a majority favoring the original dissenter's position. We now formalize the hypotheses of this theory and test them.

### III. AN EMPIRICAL ASSESSMENT OF JUDICIAL SIGNALING

In this Part, we statistically test the impact of dissenting signals on the ideological placement of subsequent Supreme Court cases across various policy areas from 1953 through 1985. Although our choice of case studies may be somewhat persuasive, we think that a large-scale empirical approach is essential to assessing whether the effect that these cases preliminarily identify is common or exceptional. The signals with which we are concerned are necessarily coded in the rarefied language of judicial propriety. Thus, this is a subtle phenomenon that can only be seen clearly in rare cases. Our case studies may be remarkable because the effects seem quite clear. Fortunately, we have empirical tools to conduct a broader analysis that allows us to ascertain whether our case studies are representative of a more systematic effect.

There are three hypotheses in this analysis. Hypothesis 1 is that any dissenting opinion that raises the issue of federalism leads to an increase in the number of cases that are decided primarily on the basis of federalism. Hypothesis 2 is that conservative dissenting opinions that mention federalism lead to future majority opinions that are decided on the basis of federalism and move the Court's ideological placement in a conservative direction. Hypothesis 3 mirrors the ideological component of the second hypothesis: it proposes that liberal dissenting opinions that mention federalism lead to future majority opinions that are decided on the basis of federalism and move the Court's ideological placement in a liberal direction.

Before undertaking our analysis, we describe our data and forms of measurement—the empirical tools we use in this enterprise. We

then describe how we measure changes in overall case outcomes within a given area of the law, before providing our results.

### A. *Methods*

1. *Data.* Our second and third hypotheses test the effect of dissenting opinions only when the majority opinion does not mention federalism as a relevant dimension. This way, the tests can focus directly on the effect of the information contained in the dissenting opinion. Our units of analysis—that is, where we look for an impact of these federalism-based dissents—are each policy area for each Supreme Court Term from 1953 through 1985.

The data used for this analysis are from Phase I and Phase II of the United States Supreme Court Judicial Database.<sup>101</sup> Phase I codes all cases as belonging primarily in a particular issue. We use these issue codings to generate categories of policy areas.<sup>102</sup> Phase II provides data on every majority and dissenting opinion for every case from 1953 through 1985. These data code all majority, dissenting, and concurring opinions for whether the opinions' authors make statements about whether federal or state powers are relevant to the opinion.<sup>103</sup>

Cases are coded for whether the opinion's author mentions that the case expands or restricts the relative balance of federal and state powers. A case coded positively for addressing federalism is not precluded from being categorized as representing other topics or issues. Opinions within all policy areas can invoke the question of federal versus state powers.<sup>104</sup> Figure 4 presents an example of

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101. Gibson, *supra* note 5; Harold J. Spaeth, United States Supreme Court Judicial Database, 1953–1997 Terms (ICPSR Study No. 9422, 1999), available at <http://dx.doi.org/10.3886/ICPSR09422>.

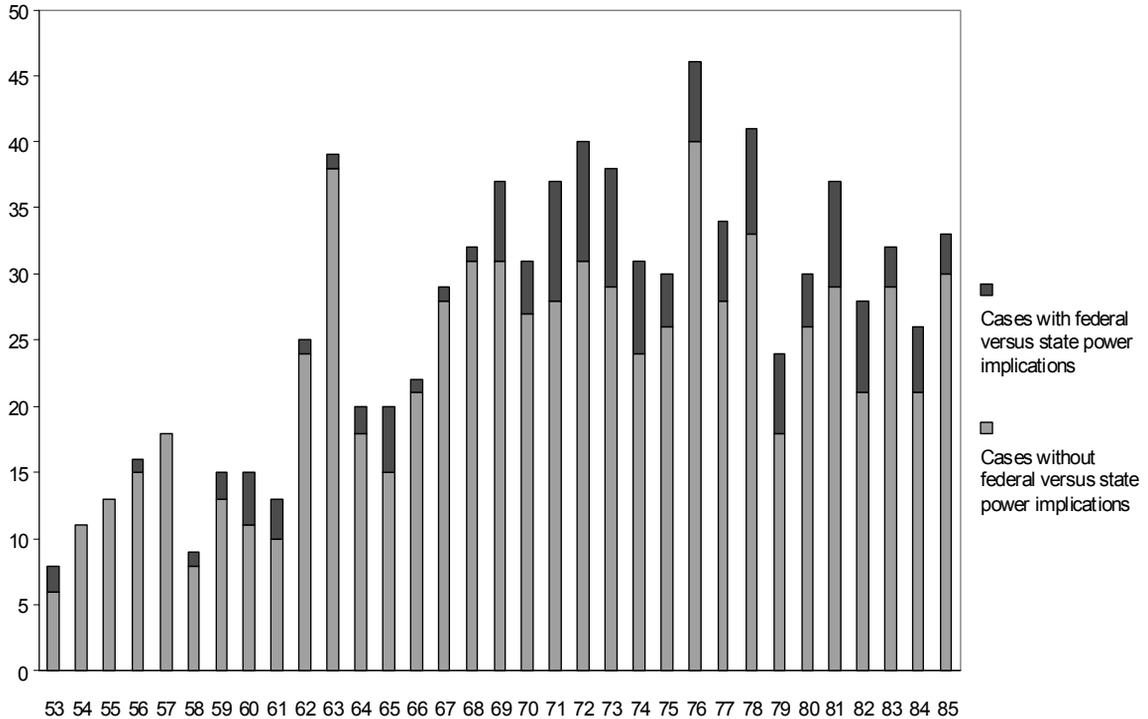
102. These policy area categories match Spaeth's coding of "Value" from the United States Supreme Court Judicial Database fairly closely, with a few exceptions: the separation of environmental cases into their own category, the inclusion of personal injury and government liability with noncriminal due process cases, and the inclusion of state and federal taxation into the same category. Miscellaneous and attorney law issues are excluded from the analysis.

103. This category includes issues of whether the nation or the state has authority in the area of police powers to promote the health, welfare, safety, and morals of the citizens; federal preemption of state jurisdiction and state court jurisdiction; whether there should be national or uniform rules of behavior; and whether states should be permitted to make their own rules. The intercoder reliability for whether federalism is mentioned is 88 percent.

104. We include federalism as one of the policy areas in the analysis. This is somewhat confusing because we are talking about the number of cases within the policy area of federalism that explicitly mention the balance of powers between states and the federal government. It

discrimination cases from 1953 through 1985, showing the total number of cases along with the proportion of cases that are decided on the basis of the balance of state and federal power. The x-axis is the Term of the Court; the y-axis is the number of cases.

*Figure 4. Attention to the Balance of Federal and State Power in Discrimination Cases at the Supreme Court, 1953–1985*



seems as though all federalism cases would be about this balance of power. But not all issues within the policy area of federalism are explicitly about the balance of power between states and the federal government. For example, issues of state versus federal ownership, taxation, interstate disputes, and the resolution of private property disputes such as marital property disputes, do not necessarily fall within the category of resolving the balance of power between states and the federal government. Therefore, not all cases within the policy area of federalism are coded positively as having invoked the issue of intergovernmental balance of power. Cases about judicial power might not seem to involve federalism questions, but these cases are coded positively for federalism when the case is about the balance of power between states and federal courts. Technically, all cases that reach the Supreme Court implicitly deal with whether federal jurisdiction applies because it is implied in whether the Supreme Court has the power to hear the case at all. Nevertheless, only opinions in which the Justices explicitly assess whether the case invokes questions about the balance of federal-state power are coded positively as raising federalism as an issue.

There is a lot of variation over time in the number and proportion of cases that mention federalism as the primary issue that determined the case outcome. We see small increases early on, in 1960, 1965, and 1969. Consistent with what we might expect, there is a sharp increase in attention to the balance of power between the federal government and the states from the Warren Court to the Burger Court. During the Warren Court, there is an average of 2.3 discrimination cases decided on the basis of the balance of power each Term, whereas during the Burger Court, there is an average of 3.5. Nevertheless, there is quite a large amount of variation, even within these natural Courts. We intend to explain this variation in the first part of the analysis. When dissenting Justices mention that the Court should have decided a case on the basis of federal and state power, we hypothesize that there is likely to be an increase in this kind of case on the Supreme Court's future agenda. We anticipate that this variation will occur along the recurring three-to-six-year cycle, as with other signals and their effect on the agenda.

The independent variables—those factors that we hypothesize are the causative variables—are the number of liberal and conservative dissenting opinions in each policy area, for each year, that mention the case's implications for the legal relationship between the states and the federal government. To code the ideological direction of the dissenting opinions (liberal or conservative), we identify the ideological direction of the majority decision and code the dissent in the opposite direction.<sup>105</sup> Importantly, a dissent is only coded positively when the majority opinion does not mention this balance of power. Thus, signals only count as signals when the dissent suggests federalism as a relevant issue but the majority does not. Otherwise, it would be difficult to know whether the signal came from the dissent or the majority opinion, or whether the mention of federalism is a signal at all. Because this argument's purpose is to assess how the dissent signals issues to transform itself into the majority, we focus on information that comes only from dissenting opinions.

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105. For a discussion of these categories, see Spaeth, *supra* note 101. Between the Warren and Burger Courts, the average intercoder reliability of this variable is 99 percent. It is possible that in a small number of cases, the dissenting opinion is not actually ideologically opposite to the majority opinion. The introduction of such measurement error should not be correlated with the tendency of the Court to be liberal or conservative, and will lead to inefficient rather than biased estimates, thus resulting in more conservative estimates of findings in the analysis.

*Table 2. Number and Percentage of Supreme Court Cases Mentioning the Balance of Federal and State Powers by Policy Area, 1953–1985*

| Policy Area                        | Federalism in Majority Opinion | Federalism in Liberal Dissent Only | Federalism in Conservative Dissent Only | Total Number of All Cases |
|------------------------------------|--------------------------------|------------------------------------|---|---------------------------|
| Discrimination                     | 159 (15.6%)                    | 16 (1.6%)                          | 25 (2.5%)                               | 1424                      |
| First Amendment                    | 25 (4.6%)                      | 2 (0.4%)                           | 20 (3.7%)                               | 712                       |
| Privacy                            | 2 (3.5%)                       | 0 (0.0%)                           | 3 (5.3%)                                | 105                       |
| Criminal Rights                    | 79 (5.8%)                      | 17 (1.3%)                          | 12 (0.9%)                               | 1873                      |
| Labor                              | 25 (8.4%)                      | 1 (0.3%)                           | 2 (0.7%)                                | 353                       |
| Environment                        | 21 (21.6%)                     | 0 (0.0%)                           | 3 (3.1%)                                | 126                       |
| Economic Regulation                | 104 (10.7%)                    | 7 (0.7%)                           | 12 (1.2%)                               | 1239                      |
| Taxation                           | 64 (20.1%)                     | 3 (0.9%)                           | 5 (1.6%)                                | 430                       |
| Due Process & Government Liability | 25 (9.8%)                      | 3 (1.2%)                           | 2 (0.8%)                                | 365                       |
| Judicial Power                     | 99 (9.6%)                      | 9 (0.9%)                           | 9 (0.9%)                                | 1373                      |
| Federalism                         | 141 (50.4%)                    | 10 (3.6%)                          | 5 (1.8%)                                | 438                       |

Note: These policy area categories match Spaeth's coding of "Value" from the United States Supreme Court Judicial Database closely, with a few exceptions: the separation of environmental cases into their own category, the inclusion of personal injury and government liability with noncriminal due process cases, and the inclusion of state and federal taxation into the same category. Furthermore, miscellaneous and attorney law issues are excluded from the analysis.

Phase II of the United States Supreme Court Judicial Database codes every opinion for whether the case's topic involves the balance of power between the states and the federal government. Moreover, every opinion is coded for whether it expands or restricts the powers of the states or the federal government in relation to one another. The presence of federalism is coded positively when the topic is the balance of power or when the value either expands or restricts federal or state power.

All orally argued cases, whether they resulted in signed or unsigned opinions, including per curiam decisions and judgments, are counted. Memoranda, decrees, multiple docket numbers, and any case that resulted in a split vote are excluded. Some case citations represent multiple issues. When these issues span across different policy areas, they are counted once for each issue represented; otherwise, they are counted only once.

Table 2 presents the number and percentage of cases from 1953 through 1985 that were decided at least partially on the basis of the balance of power between the states and the federal government. There is considerable variation across policy areas in conservative and liberal cases decided on this basis—ranging from 3.5 percent of cases in the privacy policy area to 50.4 percent in the substantive federalism policy area—but the percentage of cases most commonly ranges between 5 and 20 percent. There are not large differences between the percentage of liberal and conservative cases that

mention the balance of state and federal power, but the tendency leans slightly toward liberal majority opinions. Dissents that mention federalism when the majority opinion does not mention federalism are relatively rare, constituting about 1 percent of all cases. There also does not seem to be a great difference between the number of liberal and conservative dissents, though conservative dissents are slightly more common in the areas of First Amendment, discrimination, privacy, and the environment.

We hypothesize that liberal dissents should cause a move in the liberal direction of those cases that are decided according to federalism; conservative dissents should cause a move in a conservative direction. To test these hypotheses, we need to measure the ideological placement of Supreme Court policy output. With this measure, we can estimate the change in the ideological placement from the time that the signal went out to the time that the new majority opinion mentioning federalism is handed down. Section A.2 discusses the measure of the ideological placement of cases, and Section B tests the three hypotheses.

*2. Measuring the Placement of Case Outcomes.* Both legal scholarship generally and judicial scholarship in particular have become increasingly influenced by empiricism in recent years,<sup>106</sup> and that empiricism has garnered the attention of judges, legislators, and the press.<sup>107</sup> Nevertheless, during the last four decades of this scholarship, scholars have not developed a sophisticated objective measure of case outcomes.

Traditionally, judicial scholars have used the percentage of liberal decisions to measure the Supreme Court's outputs for any given year.<sup>108</sup> Therefore, a year in which 40 percent of the Court's decisions were liberal has been considered more conservative than a year in which 60 percent of the Court's decisions were liberal. There is a problem with this measure, in that some liberal cases are more liberal than other liberal cases. If two students took math exams, but

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106. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 1–14 (2002) (reviewing the increasing use of formal empiricism in legal analysis).

107. See Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 748–49 (2005) (describing increased public notice of empirical research on judicial decisionmaking).

108. See, e.g., Lee Epstein, Thomas G. Walker & William J. Dixon, *The Supreme Court and Criminal Justice Disputes: A Neo-Institutional Perspective*, 33 AM. J. POL. SCI. 825, 830–35 (1989).

one took a calculus test and the other took an addition quiz, looking at the percent of correct answers of each student would not be a fair way of comparing their mathematical competence.<sup>109</sup> Michael Bailey reasons that comparing two judges' percentage of liberal votes across different "tests"—i.e. case votes—is similarly unreliable. The same judge may vote liberally 40 percent in one Term and then vote liberally 80 percent in another Term that presented more conservative proposals, without changing her underlying preferences.<sup>110</sup>

For example, the Court may be presented with a case in which pro-defendant litigants ask the Court to make a decision that would set precedent disallowing any search without a warrant. If the Court issues that ruling, it is a more liberal outcome than if the Court disallows only some searches under certain conditions without a warrant. Both cases would be coded as liberal according to a dichotomous measure because both protect the defendant in question. They are different from one another, however, because one is more liberal than the other. Treating them as interchangeable, as does the traditional measure of case outcomes, is unsound.

Not only is the traditional measure of case outcomes theoretically weak in this way, but it also does not make use of all available information. In addition to coding whether a case is liberal or conservative, the standard judicial databases provide information on the makeup of judicial coalitions in each case. Thus, we can use a measure of case outcomes that aggregates the overall proclivities of each Justice in the majority coalition as a summary of the position of each case outcome. We use the average of the preference scores of every Justice in the majority coalition.

The essential theory behind using this measure is that case outcomes will be a product of negotiations among the majority coalition. Professor Jacobi's prior work has provided a more formal study of the soundness of using the mean of the majority coalition as a measure of case outcomes,<sup>111</sup> as well as an empirical examination of whether such a measure adequately captures the Supreme Court's

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109. We would like to thank Michael Bailey for this example.

110. See Michael A. Bailey, *Comparable Preference Estimates Across Time and Institutions for the Court, Congress and Presidency*, 51 AM. J. POL. SCI. 433, 436–38 (2007) (elaborating on associated problems arising from assuming direct translation of these scores across time within an institution, as well as across institutions).

111. Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411, 445 (2009).

cases over the last half century.<sup>112</sup> Professors Jacobi and Sag find that the mean of the majority coalition is more sound than any other existing measure of case outcomes.<sup>113</sup>

Using this measure also addresses the concern that Professor Bailey raises, because the measure implicitly captures the variation in case facts among Court cases. If only five of the most liberal Justices agreed with a decision, then the case was probably not an “easy case,” in contrast to a case upon which the entire Court can unanimously agree. If a unanimous Court agrees to a change, then the outcome will be fairly moderate, reflecting the views of the Court’s median Justice. But a 5–4 liberal holding will reflect the views of the liberal Justices signing onto the opinion—that is, the holding will reflect the views of the median Justice of the *coalition*.

The mean of the majority coalition has been shown to be both formally and empirically sound, but to ensure that our results do not stem from the use of this measure, Professor Jacobi reran our analysis using the theoretically inferior traditional percentage liberal measure. The results were substantially identical to our results.<sup>114</sup>

To develop a measure of Supreme Court ideological outputs that can be derived from an ideological continuum that is constant over time, a valid estimate of the preferences of Supreme Court Justices is necessary. Professors Martin and Quinn developed a measure of ideal points of Supreme Court Justices,<sup>115</sup> similar to sophisticated measures of congressional preferences.<sup>116</sup> The Justices’ ideal points are based on a rank ordering of Justices on a constant standard, although as Martin and Quinn find, these points can change over time.<sup>117</sup> It is essential that the measure rests on a standardized scale because our analysis takes place over half a century.

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112. Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. (forthcoming Nov. 2009), available at <http://ssrn.com/abstract=1345982>.

113. *Id.*

114. Jacobi, *supra* note 111, at 450–51. Using the percentage liberal measure, conservative dissents move the Court in a conservative direction by 6.04 percent, and liberal dissents move the Court in a liberal direction by 13.58 percent. *Id.* at 449. The p-values using this measure are 0.03 and 0.02 respectively—enough to establish the effect with confidence. *Id.* This is comparable to our results, presented *infra* Part III.B.

115. See Martin & Quinn, *supra* note 92, at 134–35.

116. See POOLE & ROSENTHAL, *supra* note 94, at 233–49 (introducing the D-NOMINATE scores of congressional preferences).

117. See Martin & Quinn, *supra* note 92, at 152.

Professors Martin and Quinn take advantage of voting coalitions to make inferences about the relative placement of Justices.<sup>118</sup> A Justice who is often a lone dissenter in conservative cases will be ranked as more liberal than a colleague who sometimes joins that Justice in 7–2 conservative decisions. If the colleague is rarely the lone dissenter in conservative cases, then that colleague will be designated as somewhat more conservative. A moderate Justice can change places with another moderate Justice by increasing the number of conservative or liberal votes as compared with the other Justice. This measure provides standardized comparisons over time. Thus, even though Justice Breyer was never on the Court with Justice Brennan, their scores can be compared because Justice Brennan was on the Court with other Justices who were on the Court with Justice Breyer, such as Chief Justice Rehnquist. Therefore, the rank-order measure simultaneously accounts for change over time and across Justices for all years, rendering the Justices' ideal points a standardized comparison with one another over time.

We illustrate the Justices' positions on the current Court in Figure 2. The Martin-Quinn scores closely align with press and popular perceptions of the Justices' relative ideological positions.<sup>119</sup> Not only do the relative positions look about right—and thus the Martin-Quinn scores pass the “smell test”—but the results are consistent enough that we can refer to negative scores as liberal and positive scores as conservative, even though Professors Martin and Quinn do not incorporate any measure of directionality into their scores. Unsurprisingly, then, negative (that is, liberal) Martin-Quinn

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118. *Id.* at 147.

119. In 2004, Justice O'Connor held the position of median Justice with a Martin-Quinn score of 0.08. With her retirement and the death of Chief Justice Rehnquist, Justice Kennedy has become the median Justice with a Martin-Quinn score of 0.49. Media portraits of Justice Kennedy as the Court's new swing vote fit very well with Professors Martin and Quinn's analysis. See, e.g., Robert Barnes, *In Second Term, Roberts Court Defines Itself; Many 5 to 4 Decisions Reflect Narrowly Split Court That Leans Conservative*, WASH. POST, June 25, 2007, at A3; Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle; Court's 5 to 4 Decisions Underscore His Power*, WASH. POST, May 13, 2007, at A1. Historically, the most extreme Justices on the Court since 1937 were Justice Douglas in 1974, who scored -6.33, and then-Justice Rehnquist in 1975, who scored 4.31. When Rehnquist became Chief Justice, he became more moderate, with an average score of 1.48. The most consistently conservative Justice on the Court has been Justice Thomas, with a score of 3.77. The historical mean of the Court is approximately 0. Court observers would agree that Justice Stevens is more liberal than Justices Ginsburg, Souter, and Breyer, who in turn are more liberal than Justice Kennedy. They would also agree that Justices Alito and Roberts are more conservative than Justice Kennedy but less conservative than Justice Scalia, who is only less conservative than Justice Thomas.

scores correlate with a positive (that is, Democrat) coding in the traditional party of the appointing president proxy for judicial ideology, whereas positive/conservative Martin-Quinn scores accord with a Republican president's appointment of a Justice; nevertheless, the scores provide a much more nuanced measure of judicial ideology.<sup>120</sup>

To measure the placement of each decision, we used these ideal points to calculate the position of each case by computing the mean of the Martin-Quinn ideal points of the majority coalition Justices in each case. We then aggregate these majority coalition means for each year and policy area. This measure is not perfectly accurate for several reasons. First, the Justices' relative bargaining power in determining a case's outcome is not clear from the decision. Second, the measure is aggregated to the policy area from various cases; therefore, two identical means could have different standard deviations, making it more difficult to make inferences about the placement of the means. Nonetheless, we believe that this measure is a valid indication of where the Supreme Court places its policies—it improves upon the simplistic dichotomous conception of liberal versus conservative.<sup>121</sup>

Now that we have shown how to place each case on an ideological spectrum, we must also show how we aggregate these

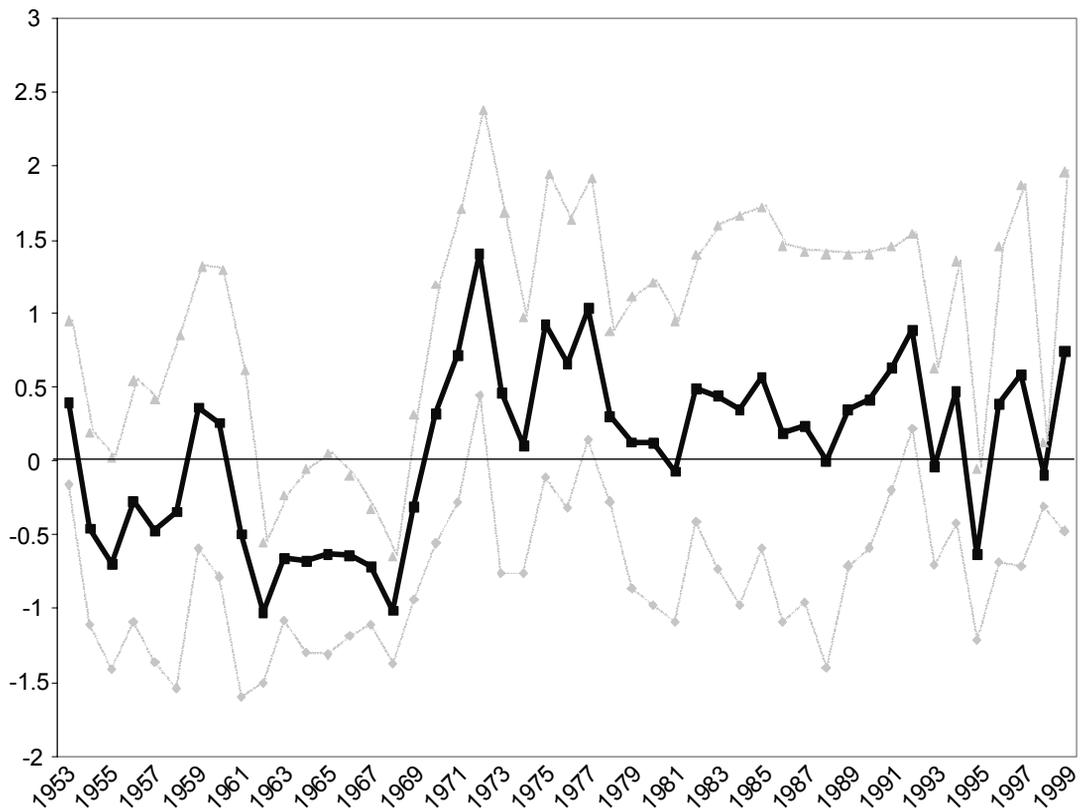
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120. See Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 838 (2009) (finding that when using both Martin-Quinn scores and party of the appointing president, the Martin-Quinn scores soak up all of the explanatory power of party of the appointing president).

121. See Jacobi & Sag, *supra* note 112 (showing the superiority of the mean of the majority coalition measure to the traditional percentage liberal-conservative measure). A qualitative analysis of the mean of the majority coalition measure also reveals that it measures the placement of Supreme Court cases fairly well. For example, the most conservative discrimination case on the Supreme Court's agenda from 1953 to 2000, according to our measure, is *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). This is probably the case that stands out in people's minds as one of the most conservative discrimination cases in the period analyzed, because it allows the unequal distribution of funds for schools, even though that distribution largely correlated with national origin. Some might argue that this decision reverted back to a de facto discrimination that would have allowed more discrimination than *Plessy v. Ferguson*, 163 U.S. 537 (1896), which condoned "separate but equal" treatment under the Fourteenth Amendment, *id.* at 550–51. The most liberal case in the policy area of discrimination in the time frame is *Missouri v. Jenkins*, 495 U.S. 33 (1990), which sustained a local court order allowing local officials to ignore state tax laws about raising money for failing schools to prevent further white flight to the suburbs, *id.* at 33. This case was extremely controversial, and many states requested that Congress take action to overturn the decision. The Supreme Court finally overturned their own decision five years later in *Missouri v. Jenkins*, 515 U.S. 70 (1995).

cases to measure the average ideological movement for each policy area across time. This is important because our theory relies on finding changes in these overall aggregate trends. Figure 5 plots the average of the mean of the majority coalition scores for all First Amendment cases from the 1953 Term through the 1999 Term. The x-axis is the Term of the Court; the y-axis is the average score of that Term's cases, using the mean of the majority coalition measure of case outcomes. For each case, we calculate the mean of each majority member's ideal points and average the means across all First Amendment Cases for the year. The plot includes information about the standard deviation of these ideal points. This way, we can observe that in some years, liberal members of the Court tended to be in the majority more often, and in other years, conservative members of the Court tended to be in the majority more often. This is true even when the Court's membership does not change. The lighter lines show the standard deviations around the score of each case.

*Figure 5. Average of Ideological Positions for All First Amendment Cases at the Supreme Court, 1953–1999 Terms*



Personnel changes on the Court affect these scores. The graph shows that the Warren Court was much more liberal on First Amendment issues than the Burger Court. There is also, however, a large amount of variation within natural Courts. For example, 1959 and 1960 were more conservative years on the Warren Court. And although 1972 was the most conservative year for First Amendment issues, the average dropped in the following years. The conservative averages in years 1975 through 1977 were followed by a more liberal era from 1979 through 1981. This means that even with the same (or mostly the same) Justices on the Court, either the liberal or the conservative coalition is tending to dominate the majority coalitions for that year. Justices are not just changing their minds about their preferences; instead, the nature of the questions posed to the Court are changing. The Justices are responding to questions posed by the litigants. As a result of these questions, moderate Justices sometimes vote with their more conservative colleagues; at other times, the moderate Justices vote with their liberal colleagues.

Another aspect of this figure worth noting is the striking variation of the standard deviations of these majority coalitions. Standard deviations measure the dispersion around the mean. When the standard deviation is high, there is likely to be a high number of both conservative majorities and liberal majorities, and these majorities are more likely to be split along ideological lines in 5–4 or 6–3 outcomes. A low standard deviation could indicate many unanimous decisions, or it could indicate that liberals or conservatives completely dominated that year. From 1959 through 1962, the mean is more conservative compared to previous and future years, but the standard deviation is high, showing that there are some cases that the liberal coalition won. From 1966 through 1968, the standard deviation was low, but the means show that the liberal coalitions are dominating. From 1983 through 1988, there are more moderate outcomes but very high standard deviations. This indicates that there are many split decisions, with 5–4 or 6–3 coalitions, and that both the liberal and conservative coalitions are winning a significant proportion of those cases.

Our hypotheses are that signals in dissenting opinions will call for questions that will place the dissent more often in the majority. Liberal dissents lead to more liberal outcomes in the future, and conservative dissents lead to more conservative outcomes in the

future.<sup>122</sup> Using cases dealing with judicial power, Figure 6 illustrates the potential differences in cases' ideological outcomes based on whether the cases considered the issue of federal and state power.<sup>123</sup> The x-axis is the Term of the Court; the y-axis is the average score of that Term's cases, using the mean of the majority coalition measure of case outcomes.

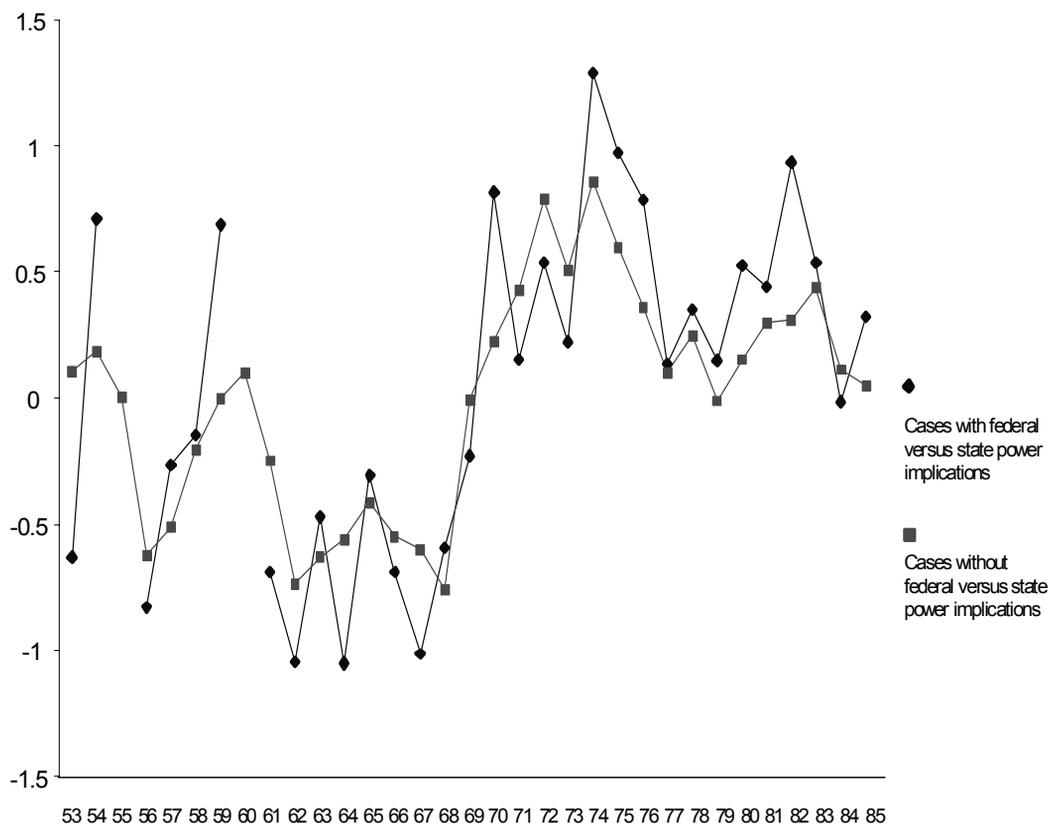
The first thing to notice is that, not surprisingly, these trends vary together. Another thing to notice is that, during the Warren Court years, the cases that are decided on the basis of federal-state power tend to be more liberal than the average case. This tends in the opposite direction during the Burger Court. The federal-state power cases are at times more liberal than other cases, such as in 1962, 1964, 1967, 1971, and 1974. In other years, the federal-state power cases were more conservative than other cases, such as in 1954, 1959, 1970, 1974 through 1976, and 1980 through 1982. This is the difference in the outcomes that we explain: we expect that litigants responding to signals will bring cases with particular facts and legal questions that will, on average, benefit those Justices who signaled for these cases in their dissents. Looking at the difference in ideological balance between cases that are framed according to the federal-state powers issues and those that are not will help control for the Court's general ideological changes across years.

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122. Note that we are testing the change in the ideological dimension, not the exact position in two-dimensional space. We are not measuring the movement within a federalism dimension; rather, we are examining the extent to which Justices who have voted in a particular way on the ideological dimension can be persuaded to vote differently when litigants frame the issues in terms of federalism. Although our results in Figures 8 and 9 are suggestive that a second federalism dimension is operative in judicial decisionmaking, our analysis does not depend on establishing that Justices line up often enough in a consistent manner to constitute a significant second dimension in all judicial decisionmaking. Rather, we test whether federalism is sufficiently salient to alter outcomes in the ideological space.

123. The most common Judicial Power issues are judicial review of administrative agencies, resolution of circuit conflict or conflict between other courts, mootness, jurisdiction, Federal Rules of Civil Procedure, writ improvidently granted, comity, personal injury, venue, private or implied cause of action, justiciable questions, and standing.

Figure 6. *Mean of Majority Ideal Points for Judicial Power Cases at the Supreme Court, 1953–1985*



In sum, we use a measure of the ideological placement of Supreme Court policy outputs, aggregating Professors Martin and Quinn's ideal points of each Justice in the majority to get a value of the mean of the majority coalition for each case. We then aggregate the means across all years and policy areas from the 1953 Term through the 1985 Term. These measures can be calculated for any subset of cases. We look for ideological change from the time of the signal to the cases resulting from the signal.

## B. Results

1. *The Effect of Federalism Dissents on the Number of Federalism Cases.* The question we address here is whether dissenting opinions that mention the federal-state balance of power in certain policy areas cause litigants to reconsider how they frame their cases (or groups to reconsider which case facts and legal arguments to choose), resulting in an increase in majority outcomes in the same policy area that are decided (at least partially) on the basis of state versus federal power.

The units of analysis are the policy area for each Supreme Court Term from 1953 through 1985. The signals and the resulting agenda transformation are hypothesized to occur within each policy area. The independent variable is the number of conservative and number of liberal dissenting opinions that mention federal-state power when the majority opinion makes no mention of federalism. We use techniques that ensure that no error arises from the fact that we are examining cases over time.<sup>124</sup> We also allow for correlations that may exist among the policy areas, and moreover, we control for the effects of any correlation within each policy area by including policy-area dummy variables.<sup>125</sup>

Figure 7 shows the results for the test of hypothesis 1. The x-axis is the time lag between the dissent's discussion of federalism and later majority opinions that mention federalism; the y-axis is the number of cases resulting. The figure shows the impact of federalism dissents on majority opinions within a 95 percent confidence interval. Figure 7 shows, as hypothesized, that the number of dissenting opinions that

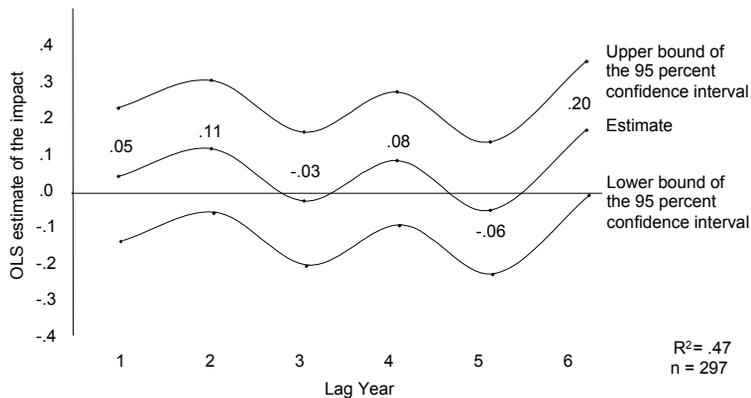
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124. We use Ordinary Least Squares parameter estimates with panel corrected standard errors, according to the recommendation of Professors Beck and Katz. See Nathaniel Beck & Jonathan N. Katz, *What to Do (and Not to Do) with Time-Series Cross-Section Data*, 89 AM. POL. SCI. REV. 634, 634–35 (1995).

125. Because we are dealing with time-series data—that is, data that includes multiple years of Court activity—we need to check that our results are not perverted by autocorrelation—that is, regression results shaped by the internal correlation of a variable with itself over time. To deal with autocorrelation, we include a specification for an autocorrelation term of the first order. For example, we include a one-year-lagged version of the variable. When there are no cases that mention federalism in the majority opinion, there is missing data on the dependent variable. In these cases, we substituted lagged values of the dependent variable. In cases in which there are four years of continuous missing data, we substituted the mean of the majority opinion for all cases. This is problematic because it includes possibilities of movements that were not caused by outcomes affected by the transformation. We therefore corroborated our analysis using only those cases in which majority opinions mention federalism, but we use pairwise regression (otherwise, computation is impossible). The results are substantively identical.

mention federalism in each policy area (only when the majority makes no mention of state versus federal power) has a positive impact on the number of subsequent majority opinions that mention federalism. The coefficient is statistically significant at the 0.08 level for a two-tailed test. But because we had a good theoretical reason to expect a positive effect, there is reason to use a one-tailed test, in which case it would be significant at the well-accepted 0.05 probability.<sup>126</sup>

*Figure 7. The Effect of Dissenting Opinions that Mention Federalism on Majority Opinions that Mention Federalism*



Note: Estimates are Ordinary Least Square unstandardized regression coefficients and confidence intervals are computed using panel corrected standard errors, calculated according to Beck and Katz (1995). The dependent variable is the number of cases on the Supreme

126. When a hypothesis specifies an expected difference, but not the direction of that difference, a two-tailed test is appropriate. But when the hypothesis includes the directionality of the effect, a one-tailed test is appropriate. Using a 0.05 test of statistical significance under a one-tailed test, the null hypothesis can be rejected if the value of the test statistic falls in the top *or* bottom 0.05 end of the distribution, whichever was hypothesized. In contrast, under a two-tailed test, the null hypothesis is rejected if the value falls in *either* end of the distribution, but only if it falls in the 0.025 range. Both distributions add up to 5 percent, resulting in 95 percent confidence in the results, but the direction of the effect under a one-tailed test must be prespecified in the hypothesis.

Court's agenda that have implications for the balance of power between the states and the federal government, across eleven policy areas from 1953–1985. The independent variable presented here is the number of dissenting opinions that mention state-federal balance of power, when the majority opinion does not mention federalism. The y-axis plots the slope coefficient and the x-axis plots the lag year of the effect. Controls in this analysis include policy area dummy variables, a Burger Court dummy, the legislative agenda, and the absolute value change of the median Justice.

This process takes six years, which is closely consistent with Professor Baird's finding that politically salient decisions cause litigation that affects the Supreme Court's agenda four and five years later.<sup>127</sup> Because litigation encouraged by federalism-based signals has a de facto prerequisite that a state or federal government actor first act in a way that causes the case or controversy that results in litigation (for example, by enacting legislation), it is unsurprising that it takes on average one to two years longer for these dissenting opinions to have an impact on future majority outcomes.

Substantially, one federalism dissent results in 0.20 later majority opinions based on federalism. This effect is statistically significant at the 0.05 level.<sup>128</sup> This figure probably understates the substantive effect for a number of reasons. First, because the Supreme Court has discretion over granting certiorari, our results are likely to underestimate the extent to which federalism dissents instigate future cases, as an earlier dissent may produce many more certiorari petitions than the Court hears. Thus, our results will capture the minimum effect that federalism dissents provoke.

The second reason why our results may underestimate the effect of federalism dissents is that we are testing the statistical significance of an effect in any given year, and so our coefficients do not capture any cases that are instigated when there is variation in the time lag. The effect often may happen at earlier stages, with responses to the signals in other years that simply did not achieve statistical significance. Our results are conservative because they expect a result that is statistically significant in a particular year; a cumulative test would show a larger effect, but poses the danger of overinclusion. We therefore have conducted the hardest test, and nevertheless have

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127. Baird, *supra* note 80, at 761–66.

128. We estimated using Generalized Least Squares computing Ordinary Least Squares with panel-corrected standard errors according to the recommendations of Professors Beck and Katz, *supra* note 124, at 634–35. We specified a model that allows for correlation among the cross sections, controlled for variation in the number of issues across policy areas by including a dummy variable for each policy area, and included a specification for an autocorrelation term of the first order.

shown a result that is both statistically significant and substantially meaningful.

Moreover, we have been as restrictive as possible in our definitions, only allowing dissenting opinions when the majority does not mention federalism. Concurring opinions may have an impact. Or, there may be signals outside of the particular policy area that have an impact we would not observe in this analysis. Because this analysis is a conservative estimate of the impact of these signals on the resulting agenda, we can be confident in the rigor of the results.

Thus, this first result provides strong support for the conclusion proposed by our first hypothesis that dissents based on federalism when the majority opinion is not based on federalism encourage litigants to bring similar cases on federalism grounds.

*2. Explaining the Supreme Court's Ideological Movement in Federalism Cases.* Our first hypothesis was that federalism-based dissents result in significantly more federalism-based majority opinions in the same policy area four to six years later. Our first set of results have supported this hypothesis. Our second hypothesis is that conservative dissenting opinions that mention federal-state power, when the majority opinion does not, lead to future majority opinions that mention federal-state power and move the Court's ideological placement in a conservative direction. The third hypothesis states the same for liberal dissenting opinions, which should lead to greater liberal policy output. As a reminder, the dependent variable is a measure of ideological movement, equaling the change in the ideological placement of the Court's majority opinion at year 0 (the case in which the dissent signals for the transformation) to the ideological placement of those cases in later years.

Our expectation, then, is that a federalism-based dissenting opinion at year 0 leads to a significant movement in the ideological placement of cases in that policy area at approximately year 6, when the majority opinion recognizes the case's implications for federal versus state power. It would be disconfirming to see large movements in years 0 through 3. This is a conservative test, as some signals could result in cases earlier than six years, particularly if litigants reframe those cases in response to the signal at an earlier stage—for example, between phases of litigation.

A positive value is a move in the dependent variable—the overall average of the mean of the majority coalitions in a given area of law in any year—in a conservative direction. A negative value

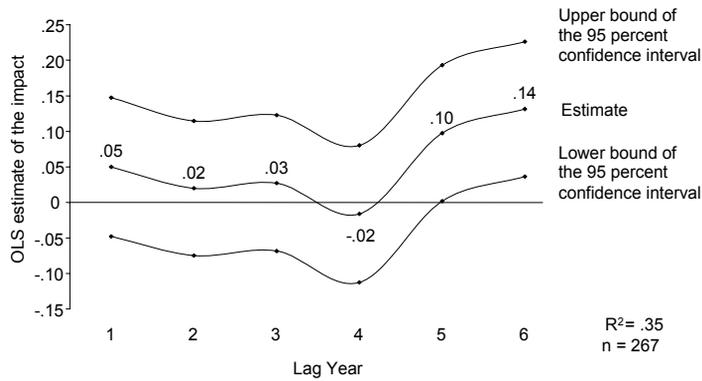
indicates a move in a liberal direction. Thus, liberal dissents should cause negative movements and conservative dissents should cause positive movements. Ideological change ranges from -2.15 to 2.59. The mean of the dependent variable is 0.11 and the standard deviation is 0.74. There is considerable variation in the position of the Court's case outcomes over time.

Much of this change may have to do with a change in the placement of the median Justice due to, for example, replacements on the Court. For this reason, we control for this change by including a variable equal to the median Justice's ideal point. Using this control is advantageous because it accounts for various causes of median change, including judicial replacement, judicial attitude shifts over time, and changes in the political administration or Congress. Because of the many ways in which the Court's median can change, and because we want to fully ensure that our findings do not stem from ideological changes on the Court, we also include lags of the absolute value change in the median Justice's ideal point for each year.

Due to insufficient data, we must exclude from these analyses some of the eleven policy areas the Supreme Court considers. If the entire time period had fewer than two dissenting opinions that mention federalism when the majority opinion did not, we deleted the policy area from the analysis. In the analysis of the effect of conservative dissenting signals, we do not exclude any policy areas; in the analysis of the effect of liberal dissenting signals, we exclude the policy areas of privacy, environment, and labor.

*a. The Conservative Hypothesis.* Figure 8 presents the results of the analysis of conservative dissenting opinions. The effect of liberal dissents is shown below. Running the tests in one regression has identical results. We present them separately here for clarity in the direction of the movement of the dependent variable for each type of signal. It shows the change in the direction of the Court's placement over a six-year time period. The x-axis is the time lag between a federalism dissent and a later majority opinion, and the y-axis is the estimated effect of the signal on the mean of the majority coalitions. The center line shows the movement in case outcomes over time; the two outer lines are the 95 percent confidence intervals. Thus, there is a significant effect on the placement of Supreme Court cases in a year when the confidence interval lies entirely above the x-axis.

*Figure 8. The Effect of Conservative Dissenting Opinions on the Change in the Ideological Placement of the Supreme Court’s Policy Outputs that Mention Federal Versus State Power*



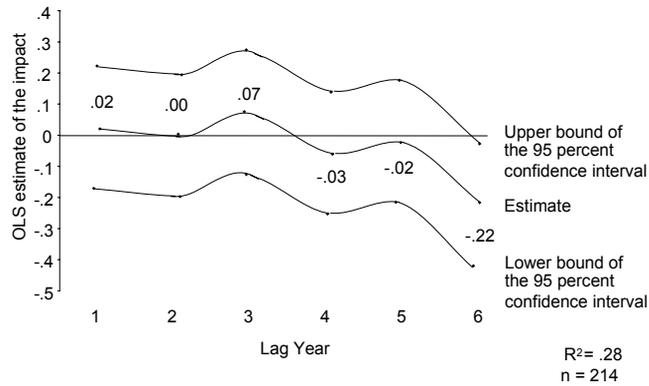
Note: Estimates are Ordinary Least Square unstandardized regression coefficients and confidence intervals are computed using panel corrected standard errors, calculated according to Beck and Katz (1995). The dependent variable is the ideological placement of the Supreme Court’s cases in which the majority opinion mentions the balance of power between the states and the federal government, across eleven policy areas from 1953–1985. The independent variable presented here is the number of conservative dissenting opinions that mention federalism when the majority opinion does not mention federalism. The y-axis plots the slope coefficient and the x-axis plots the lag year of the effect. Controls in this analysis include policy area dummy variables, a Burger Court dummy, the legislative agenda, and the absolute value change of the median Justice.

As discussed, conservative movements are positive and liberal movements are negative. Thus, Figure 8 shows that six years after a conservative dissenting signal that mentions federal-state powers, there is a significant movement in the overall placement of Supreme Court cases in any given policy area. Additionally, in the fifth year after the conservative dissenting signal, there is a distinct movement in a conservative direction, but this effect does not rise to the point of statistical significance. The effect in the fifth year is nonetheless important. Because we predicted an effect in the sixth year, but anticipated that an effect could arise as early as the fourth or fifth

year, the effect on the fifth and sixth year combined is even more substantively significant. At any rate, the effect on the sixth year is both substantively and statistically significant in the direction we hypothesized.

*b. The Liberal Hypothesis.* A skeptic looking at Figure 8 may think that federal-state power is really just a façade for conservative arguments. We find, however, that the effect we identify in Figure 8 is not limited to conservative dissents. In Figure 9, we see a similar effect for liberal dissents; in fact, the effect is even greater. Once again, in the sixth year after a liberal dissent mentions federal-state power when the majority does not, the overall Court outcomes in that area of the law move in a significantly liberal direction. In the case of liberal dissents, case outcomes in the fifth year are considerably more liberal than in year 0, and even more so in the fourth year. Once again, the other-year effects are not statistically significant; but once again, they dilute the extent to which we can measure the impact on the sixth year. Nonetheless, liberal dissents that mention federalism cause a statistically significant move in a liberal direction in the Court's overall policy outputs six years after the dissenting signal.

Figure 9. *The Effect of Liberal Dissenting Opinions on the Change in the Ideological Placement of the Supreme Court’s Policy Outputs that Mention Federal Versus State Power*



Note: Estimates are Ordinary Least Square unstandardized regression coefficients and confidence intervals are computed using panel corrected standard errors, calculated according to Beck and Katz (1995). The dependent variable is the ideological placement of the Supreme Court’s cases in which the majority opinion mentions the balance of power between the states and the federal government, across eight policy areas from 1953–1985. The independent variable presented here is the number of liberal dissenting opinions that mention federalism when the majority opinion does not mention federalism. The y-axis plots the slope coefficient and the x-axis plots the lag year of the effect. The policy areas of privacy, environment, and labor are excluded because there were fewer than two instances of liberal dissenting opinions that mention federalism when the majority opinion does not. Controls in this analysis include policy area dummy variables, a Burger Court dummy, the legislative agenda, and the absolute value change of the median Justice.

Another concern may be that federalism simply is becoming more important over time. To confirm that our results were not a product of a general increase in the importance of federalism over time, we included a linear time control variable. This variable was not significant. Thus, our results are not driven by some jurisprudential change in federalism itself over time.

3. *The Magnitude of the Impact.* The results are as we hypothesized for both conservative and liberal dissents: conservative

dissents that mention federal-state powers move case outcomes in a conservative (positive) direction, and liberal dissents cause moves in a liberal (negative) direction. This effect is statistically significant at the 0.05 level in both analyses, as expected, after six years. The time trends have the shape expected: minimal effects in years 0 through 3, some effects in years 4 through 5, and statistically significant movements in both conservative and liberal directions six years after a conservative or liberal dissenting signal, respectively. As anticipated, the effect drops off again in years 7 and 8, after the signals have achieved their purpose.

Thus, all three hypotheses are supported by findings of statistically significant effects in the directions predicted. But are these effects substantively significant? To answer this question, we need to put the movements measured in Figures 8 and 9 into context. A dissent based on federalism moves the overall direction of the Supreme Court in a given policy area after six years by 0.14 for conservative dissents and 0.22 for liberal dissents. The standard deviation of the change in the overall Court's position over the thirty-three years studied is approximately 0.74. This means that a federalism-based dissent moves outcomes by approximately one-fourth or more of the standard deviation of the whole scale. This makes the effect extremely large.

We can break down our results further, taking into account the effect of different-sized majority coalitions. The above results were for tests run on cases for all-sized majority coalitions. But we would expect that 8–1 and 7–2 majorities would typically be too stable to be overturned easily by transformation onto a procedural dimension (there are of course no dissenting signals for 9–0 majorities). In contrast, we would expect much more significant effects on a closer case, in which it should be easier to overturn majorities by transforming the case into one about federal-state powers. Running the same tests for only 5–4 and 6–3 majorities produces even stronger results than those shown in Figures 8 and 9. Conservative dissenting signals move Supreme Court outcomes in a conservative direction by 0.29 for 5–4 and 6–3 majorities. Liberal dissenting signals move majority outcomes in a liberal direction by 0.25 for 5–4 and 6–3 majorities.<sup>129</sup> Though we present the effects of liberal and conservative dissents on case outcome movement separately, we

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129. The effect of conservative signals is significant beyond 99 percent confidence; the effect of liberal signals just approaches significance with 94 percent confidence.

again also tested the effect of liberal and conservative dissents in the same model. These effects are substantively identical.

Altogether, our results provide strong support for both ideological movement hypotheses, as well as for the general proposition that dissenting signals can transform the basis on which litigants argue future cases. Not only do dissents based on federal-state powers result in significantly more cases being argued on that basis in the relevant substantive policy area, but signaling provides Justices who were previously on the losing side of an issue with an opportunity to create winning coalitions. In this way, dissenting Justices can move the overall direction of case outcomes in a given policy area in their preferred direction.

#### IV. IMPLICATIONS

We find that dissenting opinions that mention a case's implications for federal-state powers implicitly suggest to like-minded litigants possible ways to frame cases to win over a majority of Justices. We also find that this strategy crosses ideological bounds. Both liberal and conservative Justices use this strategy, and it is effective for both. Federalism is not simply a façade for conservatism; both liberal and conservative dissents move policy outcomes in their favored direction, precisely in those cases that mention federalism in later majority opinions. Thus, dissenting signals based on federalism succeed at moving policy in the dissenting coalition's favored direction.

These findings suggest that the historical illustrations we present in this Article are not anomalous. Furthermore, although our primary example about Bacon's park is one in which the same litigants responded to the signal to achieve a different outcome, our results show that signaling has value beyond the bounds of relitigation of the same dispute. Signals can cause a new chain of events in a different circumstance to bring about litigation framed in a specific way. These results have significant implications in a variety of areas, including: the phenomenon of judicial signaling, the use of issue fluidity, the importance of federalism, the nature of judicial behavior, litigant responsiveness to that behavior, and judicial agenda setting.

First, our findings confirm that judicial signaling occurs and is a powerful tool for Justices to shape both their agendas and the outcome of cases. Signaling shapes judicial agendas by encouraging litigants to bring cases of the type and on the terms that the Justices

desire. The results confirm that six years after the original dissenting federalism signal, there is a significant increase in cases arguing the issue on federalism grounds. Signaling also shapes the outcome of later cases by allowing the Justices to propose alternative grounds on which to decide cases. These grounds have been shown to provide means of undermining previous majorities and reversing earlier outcomes. Liberal dissenting signals result in future cases decided in a liberal direction; conservative dissenting signals result in future cases decided in a conservative direction.

Second, although our results in no way disprove or discredit the notion of issue fluidity, they do show that dissenting Justices often have other options available to them to achieve alternative outcomes. Even if the Justices can manipulate the issues of cases presented to them, they may well be more likely to persuade their colleagues to join them when those issues are framed by litigants, rather than invented by the Justices themselves. Given the normative constraints that operate against the use of issue fluidity, it is unsurprising that signaling has been shown to be a tool often used by the Justices.

Third, our results suggest the importance of federalism in Supreme Court jurisprudence as an alternative means of deciding cases across the spectrum of issue categories. Additionally, these results indicate the manipulative power of federalism. It has been shown that Justices regularly use federalism as an alternative means of deciding cases within those categories, and as a means of achieving the reverse outcome in a case decided on the basis of the substantive issue of law.

But our results have significance beyond federalism. Although dissenting federalism signals occur in only 1 percent of cases, we have identified a phenomenon that may be utilized in other areas. This includes judicial attempts to destabilize a majority through other means, whether through procedural means such as standing, or through an alternative substantive dimension. More generally, our results show that the way in which litigants frame cases is highly determinative of the cases' outcomes. This lends support to various analyses of judicial interpretive methods—such as Professor Brest's contention that manipulation of the level of generality of a legal question is highly determinative of its answer<sup>130</sup>—and it opens the door to future studies of other means of fracturing majority opinions.

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130. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1078–85 (1981).

Fourth, our findings show that a form of strategic judicial behavior—signaling to litigants in the hope of manipulating the Court’s agenda—occurs and is highly effective in shaping case outcomes. This contributes to and corroborates previous judicial scholarship regarding strategic models of the agenda-setting process. Strategic models of the certiorari process show that when Justices decide to grant certiorari to a case, they take the preferences of their fellow members of the Court into consideration.<sup>131</sup> The implication of this prior scholarship and our findings is that Justices, though motivated by their own policy preferences, account for their colleagues’ preferences in their strategies and have an incentive to take the pivotal Justice’s preferences into consideration when deciding whether to grant certiorari. Our analysis expands this approach, illustrating that there can be more than one pivotal Justice in any case because multiple dimensions of an issue potentially influence judicial preferences.

Fifth, although we do not test this hypothesis directly, our results imply that litigants are highly responsive to Justices’ signals. Dissents referring to federalism result in a statistically significant increase in later cases on a given issue that are decided on federalism grounds, allowing dissenting judges to garner new majorities.

Sixth, this Article begins to integrate models of agenda setting that previously have been applied only to Congress, and applies them to the Supreme Court. Though political scientists have accumulated substantial knowledge about the relationship between agenda control and congressional outcomes,<sup>132</sup> many of these theories have not yet been applied to the Supreme Court. One reason for this failure to apply congressional theories to the Supreme Court is that the rules of the agenda-setting process in Congress are very different from those in the Supreme Court. In congressional agenda-setting models, there is an agenda setter, usually a congressional committee, that is responsible for bringing the “yea” or “nay” proposal to the floor.

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131. See EPSTEIN & KNIGHT, *supra* note 3, at 56–111; Boucher & Segal, *supra* note 59, at 829–36; Krol & Brenner, *supra* note 66, at 336; Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court’s Certiorari Decisions*, 39 PUB. CHOICE 387, 387–90 (1982).

132. See, e.g., JAMES M. ENELOW & MELVIN J. HINICH, *THE SPATIAL THEORY OF VOTING: AN INTRODUCTION* 131–68 (1984); Richard D. McKelvey & Norman Schofield, *Generalized Symmetry Conditions at a Core Point*, 55 ECONOMETRICA 923, 923–33 (1987); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27, 27–29 (1978); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 85–92, 100–02 (1987).

Often, the setter must take the preferences of the legislature's median voter into consideration when deciding the substance of the yea or nay question. Our theory suggests that strategic litigants are the agenda setters, somewhat analogous to congressional committees. Strategic Justices, analogous to the legislative body, provide clues about which questions to bring. This may open a diverse set of questions about the relationship between strategic litigants, the Justices on the Court, and the Court's agenda.

Probably the most important outcome of this analysis is its implications for future research. If signals about federalism can inspire future litigation, then there are perhaps other ways to signal in dissenting opinions so that litigants frame cases in the manner that the dissenting Justices would like them framed. As mentioned, signaling need not be limited to federalism. Moreover, signaling may not be restricted to dissenting opinions, but may occur in other forms, such as concurrences. Judges may even signal to other judges in other courts—higher court judges may send signals to lower courts as part of hierarchical control, or lower courts may signal cases worthy of reconsideration.<sup>133</sup> Additionally, judges may signal to outside actors. For example lower court judges may signal for promotion purposes,<sup>134</sup> or Justices may send signals to the Senate about the Court's overall position when the Senate is considering Supreme Court nominations.<sup>135</sup> Judicial signaling may occur in a variety of contexts, with interesting implications for the content of other areas of Supreme Court policymaking and for our understanding of judicial behavior.

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133. See Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 S. CT. ECON. REV. 1, 2–7 (2006).

134. See Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 S. CT. ECON. REV. 63, 64–69 (2005).

135. Alvaro Bustos & Tonja Jacobi, *Strategic Judicial Preference Revelation: Signaling in Judicial Nominations 2–5* (Jan. 8, 2006) (unpublished manuscript, on file with the *Duke Law Journal*).