

Judicial Agenda Setting Through Signaling and Strategic Litigant Responses

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INTRODUCTION

Throughout its history, the United States Supreme Court has handed down many decisions that have shaped, and continue to shape, the character of public policy. The kinds of issues that have garnered the Court's attention have changed dramatically over time, from cementing both national and judicial supremacy, to regulating the economy, to protecting unpopular minorities. The Supreme Court has ruled on a wide variety of political issues, a phenomenon that is arguably increasing due to what Tate and Vallinder¹ call the

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1. C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 1, 5 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

“judicialization of politics”: the tendency of courts to resolve issues that were once primarily decided by legislatures. Among the most common explanations for the expanding role of courts in making public policy is that legislatures have been overwhelmed with the complexity and number of issues and therefore abdicate their role of legislating in certain policy areas.² Another conventional explanation is that activist justices are to blame.³

Yet these theories are inadequate. Justices face a major institutional hurdle in judicializing issues throughout the American body politic: whereas legislatures can proactively set their agendas, courts can only hear cases that have been litigated. To prevent employment discrimination, for example, Congress can freely pick and choose among the variety of issues dealing with employment, such as equal pay, equal benefits, social security, preferential hiring, and wrongful firing. When Supreme Court Justices want to influence policy regarding employment discrimination, they must wait for cases that represent each one of those issues to be litigated. Whereas legislators are limited only by what other legislators will agree to put on the agenda, courts are dependent on actors outside the judiciary to present them with high quality cases for making comprehensive policy.

The courts are seemingly dependent on litigants to set their agendas, a considerable limitation on their agenda-setting power and their broader influence over the development of law. When cases are not litigated or are settled out of court, courts do not have access to those issues. Moreover, since judicial policy-making is an iterative process, courts need multiple cases within the same policy area to make comprehensive policy. The puzzle, then, is that even though judges are dependent on outside actors for access to issues, we have

2. See generally RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 374 (2d ed. 1996); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 125,300 (2d ed. 1995); ROBERT J. MCKEEVER, *RAW JUDICIAL POWER?: THE SUPREME COURT AND AMERICAN SOCIETY* (2d ed. 1995); Tate & Vallinder, *supra* note 1, at 1–10; Christopher Z. Mooney & Mei-Hsien Lee, *Legislating Morality in the American States: The Case of Pre-Roe Abortion Regulation Reform*, 39 AM. J. POL. SCI. 599, 621 (1995).

3. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); JEREMY A. RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989).

witnessed the expansion of judicial agendas—and thus judicial influence.

The purpose of this Article is to present the theory and empirical evidence that strategic interaction between litigants and Justices transforms the U.S. Supreme Court's agenda. More specifically, we propose that Supreme Court Justices shape the Court's agenda by providing signals to litigants about the sort of cases they would like to see, and litigants consider those signals when deciding whether or not to pursue a given case. First, we lay out a theory for why Justices would have an incentive to signal to litigants for particular kinds of cases. Then we describe how litigants are likely to respond to such signals and explain how those responses affect the Court's agenda. Then we document the empirical evidence that changes on the Supreme Court's agenda reflect indications of the Justices' priorities, as well as the evidence that this process can aid Justices in achieving policy outcomes that they would not otherwise be able to achieve. We show that this signaling results in: more cases being brought in a policy area when Justices signal that the policy area is a judicial priority; and more cases being brought if those cases are likely to effect broad policy change. We also show that litigants respond to specific information about how to frame legal issues. For example, Justices can signal for future cases to be framed according to the balance of federal and state power, which then results in more cases being framed in this way. Moreover, we show that dissenting opinions can signal for a particular way of framing the case that makes the dissenting Justices more likely to be in the majority in the future.

I. JUDICIAL SIGNALING

Justices have priorities and preferences about what kinds of cases are brought to them. This is why certiorari decisions are predictable based on the relative legal or political importance of the cases in the certiorari pool.⁴ Some cases have specific legal and technical

4. See H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); Gregory A. Caldeira & John R. Wright, *Amici Curiae before*

qualities that make them preferable to others, such as the occurrence of a circuit split on an issue. Some *issues* are also preferable to others. Some cases make better policy-making vehicles than others, and some are better equipped to resolve current legal conflicts. As one Justice expressed the matter to Perry, if a Justice wants to hear a case in a certain area,

[h]e says something [in an opinion] that might indicate that the Court would be willing to hear a case which brought up certain issues. We say this is something that we are not deciding here, but that it is something that the Court might want to resolve . . . I think generally that people are sometimes aware of what the Court or a justice might be interested in.⁵

This quotation suggests that judges often wish to shape their agendas, and much judicial scholarship has attempted to answer the question of how they do so. Most of this scholarship has focused on judicial agenda shaping through institutional mechanisms, particularly manipulation of certiorari.⁶ A small but growing literature suggests that judges have another option: sending signals.⁷ Signals are indications of judicial preferences, either for certain cases to be brought to the court, or for particular types of arguments to be

the Supreme Court: Who Participates, When, and How Much?, 52 J. POL. 782 (1990); Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC'Y REV. 807 (1990).

5. PERRY, *supra* note 4, at 213.

6. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); 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 (2002); John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335 (1990); Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1127 (1979); Glendon Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962).

7. See VANESSA A. BAIRD, *ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA* (2007); Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda*, 66 J. POL. 755 (2004); Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 SUP. CT. ECON. REV. 1 (2006); Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1 (2008); Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005); Vanessa A. Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. (forthcoming 2009).

made in cases that are brought. Signals can take many forms, from extrajudicial statements, such as speeches, to statements in an opinion in one case suggesting arguments the judge would be open to hearing in a future case.

Signals are not the exclusive domain of higher court judges. Lower court judges can signal to higher court judges those cases which may be worthy of reconsideration,⁸ or lower court judges can send signals to extrajudicial actors to establish their merits for promotion.⁹ We focus here on signals from the Supreme Court Justices to litigants.

The substance of these signals includes indications of judicial policy priorities. Policy entrepreneurs who litigate to achieve legal or policy change choose from a number of cases that they may support. To use the American Civil Liberties Union (“ACLU”) as an example, the Colorado ACLU receives about ten thousand calls a year from people who maintain that their rights or liberties have been violated.¹⁰ About two thousand of those cases are serious violations. The Board then meets to decide which of those two thousand cases deserve financial or other support so that the cases can go to trial. When they make these decisions, they use information from previous decisions about how case facts can be used to make particular legal arguments that can help them push the envelope of legal change. This is how signals work—Justices provide information to help litigants decide which cases to pursue and how to frame the legal questions.

The Court’s signals need not be—and indeed, are not—monolithic. A simple way of thinking about it is that liberal groups pay attention to the five most liberal Justices to decide what arguments might appeal to them, and conservative groups use information from the five most conservative Justices. Both liberal and conservative actors should pay attention to the preferences and priorities of the Justices who are ideologically in the middle, since the identity of the median Justice may change depending on the issue or how that issue is framed. Policy entrepreneurs make their best guess when they choose which cases to support from among the cases that

8. Daughety & Reinganum, *supra* note 7, at 4–5.

9. Morriss, Heise & Sisk, *supra* note 7, at 67.

10. BAIRD, *supra* note 7, at 29.

they have before them, and thus will respond to signals about the Justices' priorities as they are informative.

There may also be more nuanced legal information. For example, Justices may signal not only their own support for an issue, but their expectations regarding their colleagues' likely support for an issue.¹¹ Signals can encompass statements about the ripeness of an issue. An example is Justice Stevens' unusually forthright statement that, having decided that execution of mentally retarded defendants is unconstitutional, "it would be appropriate for the Court to revisit the issue [of juvenile execution] at the earliest opportunity."¹² Another example is that, when a judge has failed to achieve a victory in the case at hand, he or she may signal a potential fissure in the majority or an alternative way of arguing a future case that will bring about a more positive outcome.¹³ But equally, signals can be more specific, such as suggesting a particular type of argument that will be most likely to sway the Court. One example of this is when a dissenting Justice mentions that the case should have been decided according to a different legal rationale than the one used by the majority. This is an example of what Riker calls "heresthetics"—when a political actor changes the dimension of the issue so that she can split the current majority, thereby creating a new majority that better matches her preferences.¹⁴

The Justices have private information on the expected outcomes of future cases, as they know their own position and often have inside information on their colleagues' expected positions.¹⁵ A Justice who seeks a case as a vehicle can signal his own support for a particular line of argument, as well as his view of the expected position of the rest of the Court. This is not to say that judicial signals will always be entirely reliable. Jacobi formally models how and when signaling will

11. Jacobi, *supra* note 7, at 5.

12. *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting).

13. Baird & Jacobi, *supra* note 7, at 5.

14. WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986).

15. See generally 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 (1995); Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649 (1979); 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 (1999).

occur and shows that under certain conditions Justices have an incentive to overstate the chances of success of some cases.¹⁶ When a Justice and litigant who each support a given side of an argument only want a case brought when that side will ultimately be successful, then the Justice will fully reveal as much information as possible in their signals. But a Justice may seek a vehicle to shape the law—to raise awareness, pressure another branch to act, or to generally agitate for policy change—even when the Justice knows the side he or she supports in the case at hand cannot yet succeed. Justices may be willing to sacrifice their interests in a given case in order to find a vehicle to direct the development of law and make it more likely that the argument they support will win in the long run. Although policy entrepreneurs may share this willingness, individual litigants will seldom be willing to invest in litigating an argument that will fail. As a result, in such a case, Justices will at times have an incentive to exaggerate the chances of success of the case. Judicial signaling, then, is informative but also highly strategic behavior.

II. STRATEGIC LITIGANT RESPONSES

Even if signals are not entirely reliable, they do convey information,¹⁷ and that information will be valuable to litigants weighing whether or not to invest in litigating a particular case. Litigants, then, have an incentive to pay attention to what the Justices want and bring the Court cases reflecting those desires. Our main argument here is that the incentive to support litigation in particular policy areas varies over time in accordance with litigants' changing perceptions of Supreme Court Justices' policy priorities. When the incentive to litigate in some area is strong, litigants or other policy entrepreneurs put their resources into finding cases that are likely to be appealing to Justices on the Supreme Court in policy areas that they perceive the Justices, or some majority subset of Justices, care about. For the purposes of this argument, whether Justices' goals (or

16. Jacobi, *supra* note 7, at 30–31.

17. See David Austen-Smith & John R. Wright, *Competitive Lobbying for a Legislator's Vote*, 9 SOC. CHOICE & WELFARE 229 (1992); Jan Potters & Frans Van Winden, *Lobbying and Asymmetric Information*, 74 PUB. CHOICE 269 (1992).

litigants' goals) are legal or political is less important than whether strategic supporters of litigation are paying attention to the Justices' signals of their goals—whatever they may be—and bringing the Justices the cases they can use to achieve those goals. Thus, through the use of signals, Supreme Court Justices create access to cases that otherwise might not be available. The empirical implication of this process is that the Supreme Court's agenda, defined by its changing levels of attention to broad policy areas, will after some time come to mirror the preceding indications of Justices' priorities.

Of course, when selecting which cases to hear, Supreme Court Justices can choose from among thousands of petitions. So, why do they need litigants to respond to their priorities? The reason is that some cases are better than others in their presentation of legal doctrine, ideas, and case facts, because they have been framed in terms of the most recent cases handed down in those policy areas. And, if cases need to be specially constructed, someone must do this—someone from among the many interest groups and other policy entrepreneurs who spend resources finding, developing, and bringing cases to the Supreme Court. Unique cases with particular facts and sophisticated legal arguments are often necessary. Since identifying appropriate cases requires resources, it matters for Supreme Court policy-making power that sophisticated policy entrepreneurs have an incentive to spend their resources on identifying—or constructing—high-quality cases.

The evidence suggests that legal or political entrepreneurs, defined as actors who desire to influence the “direction and flow” of political or legal change,¹⁸ support litigation in response to what they perceive are the policy priorities of Supreme Court Justices. Policy entrepreneurs scour the environment for cases with appropriate case facts that lend themselves to sophisticated and policy relevant legal arguments, and then support the litigation of the cases so that they are available to the Court. Without access to these cases, the development of the law in the Supreme Court would have a much more piecemeal character. So we expect that some time after Justices signal their interest in hearing particular types of cases, a

18. See Mark Schneider & Paul Teske, *Toward a Theory of the Political Entrepreneur: Evidence from Local Government*, 86 AM. POL. SCI. REV. 737, 737 (1992).

significantly higher number of those cases will be brought to the courts and result in case outcomes.

Judicial policy-making is like piecing together a jigsaw puzzle. Litigants who are paying attention to the Court's signals know which pieces are missing and which pieces should come next. The more active litigant entrepreneurs are in bringing the missing puzzle pieces, the more likely the Court is to fill in the puzzle. The fuller the puzzle, the more voice the Court has over various issues and the more power the Court has over a wider variety of legal and political outcomes. This transmission of information may be the key to understanding the judicialization of politics.

III. MEASURING THE BREADTH OF THE SUPREME COURT'S AGENDA

According to the theory that the Supreme Court is dependent on outside actors for the comprehensiveness of its agenda, an ideal measure of the comprehensiveness of the Court's agenda would be to develop a list of all the possible issues that the Supreme Court could hear and then determine the ratio of issues heard to issues that are not heard. Since there is no bound on all potential issues at any time, a count of the number of issues on the agenda in a particular policy area at any one time is a close approximation. It is essential to measure issue breadth in the context of specific policy areas, because if the justices have indicated that they consider a particular area to be a priority, then we should observe an increase in attention due to increased litigation in that policy area. We have identified eleven policy areas: First Amendment issues, discrimination, privacy, criminal rights and procedure, labor and labor union issues, the environment, economic regulation, taxation, due process or government liability, judicial power, and federalism.

To create a count of cases, we examine all cases from 1953–1997, obtained from the *United States Supreme Court Judicial Database*, collected by Harold J. Spaeth.¹⁹ According to the theory that attention to a particular policy area is measured by whether the Court decides something in that area, we included all orally argued cases, whether

19. Supreme Court Data, <http://www.cas.sc.edu/poli/juri/sctdata.htm> (follow "The Original U.S. Supreme Court Judicial Database" hyperlinks) (last visited Apr. 8, 2009).

they resulted in signed or unsigned opinions, including per curiam decisions and judgments. Memoranda, decrees, and split vote cases are excluded. Multiple docket numbers that the Justices include into a single case citation are counted only once. At times, 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 only counted once in total. Table 1 presents the eleven policy areas in the analysis, along with their mean number of cases and standard deviations from 1953 to 2000. Taking each policy area across all years, the means range from about 1.7 to nearly 35 cases, and the standard deviations range from 1.8 to nearly 12. There is a great deal of variation both within and between policy areas.

TABLE 1: MEANS AND STANDARD DEVIATIONS OF NUMBER OF CASES AND SIGNAL INDEX ON THE SUPREME COURT'S AGENDA BY POLICY AREA

Policy Area	Number of Cases, 1953–2000		Signal Index, 1953–1995	
	Mean	Standard Deviation	Mean	Standard Deviation
Discrimination	24.19	9.76	1.01	.57
First Amendment	12.42	6.40	.75	.33
Privacy	1.71	1.87	.09	.12
Criminal Rights	34.40	11.75	1.01	.53
Labor	6.23	3.32	.16	.14
Environment	1.90	1.81	.06	.07
Economic Regulation	19.69	7.34	.49	.19
Taxation	7.79	3.48	.21	.15
Due Process & Government Liability	6.71	3.85	.20	.17
Judicial Power	24.63	8.64	.53	.30
Federalism	7.77	3.12	.26	.19

IV. MEASURING INDICATIONS OF THE JUSTICES' PRIORITIES

What constitutes an indication of the Justices' priorities? There are a variety of different ways of measuring whether Justices care about a particular policy area: they can make a significant difference in policy to justify being published on the front page of the *New York Times*, they can alter precedent, they can write many separate opinions, they can declare a law unconstitutional, or they can reverse lower court decisions at high rates. We created a measure that incorporates all of these indications of the relative salience of a particular issue area to Justices, which we call the "signal index." Since the activities indicating salience are each measured at the level of the policy area per year, policy areas that show a high number of these attributes relative to other years in the same policy area can be considered a priority by at least some subset of Justices. Moreover, no single indicator dominates the index because each indicator is standardized on a 0–1 scale for the index. Table 1 shows the means and standard deviations of the signal index from 1953–1995.²⁰ It is clear from Table 1 that each policy area has a different range of values on this index. The policy areas of discrimination and criminals' rights have the highest average on the signal index, with First Amendment, economic regulation, and federalism having middling average values, and with privacy and the environment at the low end.

The above analysis provides information that is potentially highly valuable to sophisticated lawyers when deciding *which* cases to support. These measures are only a rough estimate of the other matter lawyers will be interested in: *how* to frame those future cases. The information we have gathered here, about judicial priorities, will directly aid lawyers in deciding whether to support cases in a particular policy area and will give clues about which legal arguments and which case facts will be appealing to the Justices in the future. The two natural questions that flow from our initial evidence that Justices send highly varied signals as to the cases they

20. Epstein and Knight's measure of case salience, which is whether the case appeared on the front page of the *New York Times* measure, is only available until 1995. See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000).

wish to hear in different policy areas are: First, do lawyers and litigant entrepreneurs bring more cases in those areas where signaling is high? Second, if so, does it also affect which *type* of arguments lawyers make when bringing those cases?

V. CASE INCREASES IN RESPONSE TO JUDICIAL SIGNALS

We anticipate that signals will lead to an increase in cases heard in the respective policy area, but not immediately. Following a judicial signal, it should take at least four to five years for a case to be tried, appealed, and ultimately brought to the Supreme Court.²¹ Cross-sectional time series analysis (1953–1995) across all eleven policy areas shows that approximately four and five years after Justices signal their interest in a particular policy area, the Supreme Court hands down additional decisions in those areas. There is no impact on the agenda in the first three years after an increase in the signal index. To show this effect, we split the cases into two groups: those in which the signal index is above the mean and those in which the signal index is below the mean. Then, we compare the mean number of cases on the Court's agenda four and five years after the signal index is either below or above the mean.

21. The median time interval between the filing and disposition at trial of civil cases in U.S. District Courts for the period ending September 30, 2004, is 21.1 months. Administrative Office of the U.S. Courts, Table C-5: U.S. District Courts—Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2004 (2004), <http://www.uscourts.gov/judbus2004/appendices/c5.pdf>. The median time interval between filing notice of appeal to disposition in the U.S. courts of appeals is 10.5 months. Administrative Office of the U.S. Courts, Table B-4: U.S. Courts of Appeals—Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit, During the 12-Month Period Ending September 30, 2004 (2004), <http://www.uscourts.gov/judbus2004/appendices/b4.pdf>. Similar figures for the additional period for U.S. Supreme Court filing to disposition time interval are not available, but we would anticipate a somewhat similar time interval between Supreme Court filing and disposition, suggesting an approximate timeframe of four years.

TABLE 2: AVERAGE NUMBER OF CASES ON THE SUPREME COURT'S AGENDA, FOUR AND FIVE YEARS AFTER SIGNAL INDEX IS BELOW OR ABOVE THE MEAN, 1953–1995

Policy Area	Signal Index Below Mean	N	Signal Index Above Mean	N	Average Difference
Discrimination (48)	43.80	25	61.50	18	17.70
First Amendment (24)	22.83	23	30.00	20	7.17
Privacy (4)	3.39	28	4.07	15	0.67
Criminal Rights (70)	69.76	25	77.11	18	7.35
Labor (12)	11.04	28	14.73	15	3.70
Environment (4)	3.24	29	5.50	14	2.26
Economic Regulation (40)	35.43	21	41.64	22	6.21
Taxation (16)	13.84	25	16.56	18	2.72
Due Process and Government Liability (13)	12.04	25	16.33	18	4.29
Judicial Power (49)	47.44	25	55.00	18	7.56
Federalism (15)	15.85	27	15.69	16	-0.16

Table 2 presents the average sum of cases four and five years after the signal index was either below or above the mean. For ease of interpretation, we added the number that represents twice the mean of each policy area in parentheses since we are reporting the effect of agenda change across two years. In every single policy area, with the exception of federalism, the number of cases on the agenda four and five years after the signal index was above the mean increases, and in some policy areas, the increase is quite dramatic. In discrimination, in the fourth and fifth year after Justices have signaled their interest, the average increase in the number of cases on the agenda over those two years is nearly eighteen additional cases more than when the signal index is below the mean, a 40% increase. This shows that there is a huge transformation of the agenda with regard to discrimination

when the Justices indicate four and five years before that discrimination is a priority. In the First Amendment, criminals rights, economic regulation, and judicial power areas, the average difference ranges from six to seven cases, or 11% to 31%. In those policy areas where the impact is not as great in absolute terms, it is nevertheless proportionally large, given the lower average number of cases in those policy areas.

To check that this pattern or cycle is not just a function of Supreme Court case selection decisions, we ascertain whether the significant increases in Supreme Court cases in response to signals can be seen in a corresponding surge of cases that come through the litigation pipeline. This further analysis indicates that additional cases appear in the U.S. Courts of Appeals in the years before they reach the Supreme Court (three or four years after the Justices signaled their priorities).

This secondary analysis was undertaken using Donald R. Songer's United States courts of Appeals Database.²² The cases of the appeals courts do not actually represent all cases handed down by appeals courts, but rather represent a random sample of each circuit and year. Since our analysis requires that we consider a random sample of all cases within a year, we weighted the appeals courts cases by the total proportion of cases that were handed down that year. Weighting ensures that every case handed down within any single year has the same chance of being represented in the data as a case in any other year. The number of cases excludes cases that are decided again based on a remand from the Supreme Court. Therefore, the increase shown here is only an approximation of the effect, because it only includes a random sample of the cases.

As before, in our analysis of Supreme Court cases, at the appeals court level, in every single policy area, there is an increase in the attention given to those policy areas that the Supreme Court has indicated as a priority. This increase happens exactly a year before the increase occurs at the Supreme Court, or three and four years after the Justices indicate that these policy areas are their priority.

22. Donald R. Songer, United States Courts Of Appeals Database Phase 1, 1925–1988, Inter-Univ. Consortium for Pol. & Soc. Res. (May 27, 1998), <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/02086.xml>.

This evidence also supports the idea that due to its signals the Supreme Court has access to a better selection of cases, substantiating our claim that the Court is dependent on sophisticated political or legal entrepreneurs bringing cases that are good vehicles for making political and legal change.

TABLE 3: AVERAGE NUMBER OF CASES ON THE U.S. COURTS OF APPEALS' AGENDAS, THREE AND FOUR YEARS AFTER SIGNAL INDEX IS BELOW OR ABOVE THE MEAN, 1953–1988

Policy Area	Signal Index Below mean	N	Signal Index Above mean	N	Average difference
Discrimination	24.03	17	34.50	16	10.47
First Amendment	5.86	16	11.15	17	5.29
Privacy	1.01	24	2.34	9	1.33
Criminal Rights	119.83	19	172.65	14	52.82
Labor	36.50	18	38.17	15	1.67
Economic Regulation	133.92	14	158.70	19	24.78
Taxation	22.05	18	25.64	15	3.59
Due Process & Government Liability	22.80	18	27.06	15	4.26
Federalism	2.99	23	3.55	10	.56

The one seeming exception to our evidence of increased cases following judicial signals of interest in an area is the policy area of federalism. However there is reason to expect different results in relation to federalism. Federalism is an issue that is often mentioned in each of the other policy areas. In fact, technically speaking, most cases must implicitly be recognized as falling within the jurisdiction of federal courts, which is a question about the balance of power between the federal and the state governments. Our prior analysis established that when Justices indicate that federalism is a priority, it has an impact on the number of cases in every other policy area that

are framed in terms of the balance of power between states and the federal government.²³ This suggests that federalism is at least partially a mechanism of getting at other issues, and so it is not surprising that the general results do not apply to this issue area.

Our results are mutually reinforcing with Baird's (2004, 2007) findings that the additional cases we observe arising from signals are also more important from the perspective of amici participants and the Supreme Court Justices themselves than ordinary cases.²⁴ For example, there are proportionally more amicus briefs filed for each of these cases at the Supreme Court, as well as proportionally more separate opinions written by the Justices. There are even proportionally more amicus briefs filed at the courts of appeals in the same years where we saw a surge of cases there, confirming that even the additional cases in the pipeline are more politically important than other cases heard by the courts of appeals. What this means is that cases in the system vary in their quantity and quality in ways that are perfectly consistent with the patterns at the Supreme Court.

Moreover, the justices in the Circuit Courts of Appeals write additional concurring and dissenting opinions in those policy areas considered a priority by the Supreme Court Justices. This shows that not only can the Supreme Court Justices depend on extrajudicial actors to provide them with high quality cases, but they can also depend on lower court judges to provide them with various legal rationales that are then available to the Supreme Court Justices when they make their decisions.

These findings corroborate our results above that indications of judicial priorities will lead to an increase in cases in each respective policy area. The results also largely discredit a potential counterargument that cases of equally high quality in all policy areas are always available to Supreme Court Justices. These findings also support the conclusion that lawyers and litigant entrepreneurs will adjust how they frame cases in response to the information provided in judicial signals. The following results provide support for the associated phenomenon that lawyers and litigant entrepreneurs also rely on signals to bring "harder" cases that divide the Justices and

23. See Baird & Jacobi, *supra* note 7.

24. BAIRD, *supra* note 7, at 128–45.

therefore create smaller majorities. Thus, indications that Justices consider a policy area a priority are more likely to result in an increase in the number of split decisions as compared to unanimous decisions in those same policy areas.

VI. SIGNAL-INDUCED STRATEGIES IN LEGAL ARGUMENTS

It is not only the Justices' *priorities* that matter but also the Justices' ideological preferences. The preferences of the most moderate Justices tend to matter most because both liberal and conservative litigants have to frame their arguments in such a way as to appeal to the Justice who they perceive is the median Justice. Litigation entrepreneurs' aims in spending resources on sponsoring cases are to bring about a policy change that moves the status quo in the direction of their preferences. The more they pay attention to the cues from the Justices about their preferences, the more likely they will be successful. The argument here is that litigation inspired by the Court's signals of the Court's priorities, whether brought by liberal- or conservative-minded litigants, should be strategically framed so as to appeal to four of the most ideological friendly Justices, plus the most centrist Supreme Court Justice. Though groups do not want to risk a loss (a bad precedent could last a long time), choosing "easy" questions—those that might inspire agreeable but unanimous outcomes because they are so obvious—may not provide as much gain in policy. More "difficult" questions split the Justices into two separate coalitions; the outcome is sufficiently controversial so as to alienate some set of Justices. Strategically minded litigants should bring questions that will appeal to the moderate Justices, but since they have an interest in pushing the policy envelope, the answer that they are looking for may also alienate some set of Justices.

Of course, in any one case, the litigants could get it wrong; public information about exactly where judicial preferences lie is not perfect. Adding to the problem of incomplete information, Justices' preferences could change, or the targeted Justices might be replaced by the time that litigation reaches the Court, which can change the placement or the identity of the median Justice. Therefore, litigants could easily misjudge what the Justices will do. However, information about preferences, even when incomplete, reduces

uncertainty. Litigants will not frame the legal questions or case facts perfectly every time, but they have an incentive to craft their arguments with an eye to judicial preferences, as revealed in signals, as much as possible.

The empirical implication of the incentive for litigants to favor more difficult cases is that indications of the Supreme Court's policy priorities should bring about a higher rate of relatively close decisions four or five years later. In other words, if the litigants who are responding to the Supreme Court's priorities are successful in framing litigation in such a way as to appeal to the ideologically friendly coalition, plus the moderate Justices, then more vote outcomes should be 5-4 or 6-3 when that litigation reaches the Court. Setting up the analysis in this way allows the identity of the median Justice to vary across years or even within the same year across policy areas. Thus, even though the median Justice is part of the theory, there is no reason to expect that the median Justice is perceived as the same person for all litigants or across all policy areas. Moreover, this analysis seeks to reveal the presence of overall patterns and therefore is not likely to be as affected by the inevitable mistakes that litigants will make in certain cases when they predict how certain Justices will vote on a particular issue.

The evidence presented in Table 4 suggests that the cases that are inspired by the Court's priorities four and five years later are much more likely to result in small majority coalitions of five or six. When Supreme Court Justices signal their interest in a particular policy area, there is an increase in unanimous decisions in every policy area, but the change in the average number of split decisions is greater. This is true in most but not all policy areas. The exceptions are the environmental and taxation cases as well as cases having to do with federalism and judicial power. This may be explained by the fewer number of cases overall in these policy areas, or by the fewer number of split decision cases in those policy areas. In other policy areas, the difference is substantial. For example, the policy areas of discrimination and economic regulation show a substantial impact among split decisions as compared with unanimous decisions. There is virtually no impact of the signals of the Justices' priorities on the number of unanimous decisions in economic regulation, but an increase in the number of split decisions from about five cases,

compared with over nine cases on average after the Justices have signaled their interest in economic regulation.

TABLE 4: AVERAGE NUMBER OF UNANIMOUS AND SPLIT DECISION CASES FOUR AND FIVE YEARS AFTER SIGNAL INDEX IS BELOW OR ABOVE THE MEAN

	Unanimous Decisions			Split Decisions (5–4 or 6–3)		
	Signal Index Below Mean	Signal Index Above Mean	Average Difference	Signal Index Below Mean	Signal Index Above Mean	Average Difference
Discrimination	7.60	11.44	3.84	5.64	12.33	6.69
First Amendment	2.52	4.85	2.33	4.04	7.50	3.46
Privacy	.50	.80	0.30	.17	1.00	0.83
Criminal Rights	9.56	11.61	2.05	12.36	15.83	3.47
Labor	2.18	3.60	1.42	1.46	3.27	1.81
Environment	.62	2.07	1.45	.24	1.00	0.76
Economic Regulation	8.00	8.77	0.77	4.67	9.18	4.51
Taxation	2.68	4.11	1.43	1.60	2.50	0.9
Due Process & Government Liability	2.24	3.72	1.48	1.36	3.00	1.64
Judicial Power	11.64	14.78	3.14	6.04	7.33	1.29
Federalism	3.22	4.44	1.22	2.04	2.19	0.15

The results support these theories, and so further corroborate the claim that litigants are at the source of these changes on the Court's agenda. Not only is there an increase in the attention to policy areas that Justices care about, but the output of the Supreme Court has a

different character in the years that follow signals indicating the Justices' priorities. This further substantiates the claim that the four- to five-year cycles of Court activity are a function of changes in litigation patterns.

The implication of this finding is that divided decisions provide a chance for the median Justices to implement his or her preferences more precisely. For example, in making policy with regard to police searches, strategic litigation meant to appeal to the median Justice allows the median Justice to identify precisely the circumstances in which searches will or will not be allowed. Will they be allowed in circumstance X? The median can side with four of her more liberal colleagues and say no. Circumstance Y? In this case, the median can side with her more conservative counterparts and say yes. And so on. This allows the median Justice a great deal of discretion in discriminating among various conditions and on average results in policies that represent the median's preferences more precisely.

VII. SIGNAL-INDUCED ARGUMENTS IN LITIGATION: FEDERAL VERSUS STATE POWER

Signals may even be more precise. Signaling is not limited to majority Justices: we also argue that dissenting coalitions on the Supreme Court have an incentive to signal potential litigants with specific information about how they would like to see future cases framed. Dissenting Justices may have an idea that if litigants were to reframe the case facts and the legal arguments in a similar kind of case, this may help them get one or a few extra Justices to vote in the dissent's favor, allowing the previously dissenting Justice to form a new majority in a future case. We test this theory by examining signals from dissenting opinions asking future litigants to reframe the legal argument into a debate about federal powers versus states' rights.

Just as which Justice is the median can vary by issue, so too can the relative positions of the Justices vary according to whether an issue is decided on one basis or another. A majority may exist for a ruling in a specific policy area, such as discrimination, but at the same time a different majority may exist for the opposite outcome if the same issue were decided on the basis of a second relevant policy

dimension, such as federalism. A Justice may have strong preferences to see discrimination curtailed, but not at the expense of state power vis-a-vis federal power. That Justice will vote differently on a desegregation case, depending on which dimension is most salient. This creates the opportunity for another Justice, who was initially on the losing side of the case, to signal that future cases should be argued on the basis of federalism instead of the substantive policy area of discrimination. When litigants respond by bringing subsequent cases argued according to the signal, the initially dissenting Justice may then forge a new majority to achieve the opposing outcome.

For the following analysis, we depend on Phase II of the *United States Supreme Court Judicial Database*, collected by James L. Gibson.²⁵ This database provides information on the opinions on every case from 1953–1985, including whether the case was at least partially decided on the basis of the proper balance of power between the states and the federal government. The reliability of the coding for whether federalism is part of the basis for the decision is 88%. This is not a perfect reliability but it is likely that problems in the reliability of the coding only have an impact on random measurement error and therefore should make our inferences of the impact conservative.

Federalism is a policy area in the analysis, but this policy area designation is not the same thing as deciding whether the balance of power between the states and the federal government is at issue in the case—which could happen in any policy area. Not all cases that are coded in the policy area of federalism have to do with the balance of power between the states and the federal government, such as territorial disputes between states. According to Gibson,

this category focuses on the question 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. It also includes cases of federal pre-emption of state jurisdiction and

25. James L. Gibson, *United States Supreme Court Judicial Database, Phase II: 1953–1993*, Inter-Univ. Consortium for Pol. & Soc. Res. (Dec. 11, 1997), <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/06987.xml>.

state court jurisdiction, disputes over whether there should be national or uniform rules of behavior, or whether states should be permitted to make their own rules.²⁶

Almost every case that the Supreme Court hears has an implicit federalism dimension because when the Supreme Court decides to hear it, the Justices must have decided that the case has federal jurisdiction. When there is an explicit federal-state powers issue that is relevant to the case's outcome, cases are coded positively as having implicated the legal question of federal versus state powers.

The empirical tests of the federalism signaling theory show that when Justices write dissenting opinions that signal a preference for transforming the issue into a legal argument about federal versus state power, this results in an increase in the number of cases in that policy area that are decided on the basis of federal-state power. Cross-sectional time series analysis (1953–1985) across all eleven policy areas shows that approximately six years after a dissenting opinion mentions that the relevant issue should have been the proper balance between state and federal powers, the Supreme Court hands down additional decisions that are decided on the basis of state-federal power in those areas. In the analysis presented in Table 5, we only included policy areas that had at least two dissenting opinions that mentioned federal-state power (when the majority opinion does not mention federalism). This reduces the number of policy areas from eleven to seven. In all policy areas except for two, when there is a signal in a dissenting opinion saying that the case should have been decided on the basis of federal-state power, there is an increase in the number of cases decided in that policy area on the basis of federal-state power six years later.

26. *Id.* at 94.

TABLE 5: AVERAGE NUMBER OF CASES ON THE SUPREME COURT'S AGENDA DECIDED ON THE BASIS OF FEDERAL-STATE POWERS, SIX YEARS AFTER DISSENTING OPINION MENTIONS FEDERALISM AS THE ISSUE (WHEN THE PREVIOUS MAJORITY OPINION DOES NOT), 1953–1985

Policy Area	No Dissent Mentioning Federalism*	N	Dissent Mentions Federalism*	N	Average Difference in Mean Number of Cases
Discrimination	4.28	18	5.33	9	1.05
First Amendment	.59	17	1.00	10	0.41
Criminal Rights	2.50	12	2.40	15	-0.1
Economic Regulation	2.11	19	2.50	8	0.39
Taxation	1.22	23	2.00	4	0.78
Judicial Power	3.11	18	2.44	9	-0.67
Federalism	4.28	18	5.33	9	1.05

* when majority does not mention the dispute between federal and state powers

In other analysis, we tested the *extent* of the influence of the dissenting signals by examining the overall ideological position of the law in a given policy area before and after the signal-induced subsequent litigation.²⁷ We find that signals from dissenting Justices seeking a move in a conservative direction not only prompt more cases to be heard that were argued on the basis of federal-state power, but also move the overall policy position of the issue area in a significantly conservative direction. Likewise, liberal dissents result in significant movements in a liberal direction. These results corroborate the theory that how cases are framed matters, and

27. Baird & Jacobi, *supra* note 7.

moreover illustrate the dependence of Justices on litigants who respond to the Justices' signals.

CONCLUSION

This new research on judicial signaling and litigant responsiveness to such signals lends new insight into strategic judicial behavior, in particular how Supreme Court Justices shape the Court's agenda years ahead of time. Supreme Court Justices can summon cases onto their agendas well before the certiorari process begins, by communicating their priorities and preferences to potential litigants. But despite this previously unrecognized power, Supreme Court Justices are still dependent on extrajudicial actors for access to a sufficient number of well-framed cases in order to make comprehensive policy in areas that the Justices consider to be high priorities. Judicial policy-making power depends on policy entrepreneurs or other litigants who systematically respond to the priorities and preferences of Supreme Court Justices. This in turn drives systematic cyclical patterns on the U.S. Supreme Court's agenda that have previously gone unnoticed, challenging the conventional view that Justices must wait passively for the cases that are brought to them. By manipulating this influence, the Court can largely overcome the institutional weakness that they have to wait for cases and controversies to be brought before them by others.

More broadly, these results suggest that there is a previously unexplored bounty contained within much judicial expression. Judicial signals are not simply a means of overcoming the institutional constraint that judges must rely on others to initiate cases; these results indicate that judicial signaling is also a means of mitigating other constraints on judicial behavior, particularly norms of judicial circumspection and disinterest in as yet unheard cases. Judicial signals are a means by which judges reveal their preferences, their strength of feeling about case outcomes, and their ambitions. Litigant entrepreneurs are able to exploit this information in weighing their case prospects and strategies, but information is also being provided to professional observers of judicial behavior. Through such observations, we have additional proof that justices are often sophisticated strategists, able to shape the law not simply through

deciding the outcome of cases brought by others, but through defining which issues should be heard in the first place.