How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court

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HOW THE DISSENT BECOMES THE MAJORITY:

USING FEDERALISM TO TRANSFORM COALITIONS IN THE U.S. SUPREME COURT

VANESSA BAIRD AND TONJA JACOB* 

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 of splitting existing majorities in future cases. Dissenting Justices can ‘signal’ to future litigants when this potential exists, to transform a dissent into a majority in similar future cases.

We undertake an empirical investigation of dissenting opinions where 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 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, it can systematically and significantly shift the outcome of cases in the direction of the dissenting Justices’ views.

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I. 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 – 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 their error. But while this could explain judges circulating drafts of dissents, by the time of publication, such an effort has been lost. 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.1 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 discoverers of law.2 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.3


2 Particularly when judges occasionally harshly emphasize their displeasure when it is clearly too late to influence the decision, for example by extravagantly damning their colleagues. For example, in response to his colleagues ruling that the death penalty cannot apply to mentally retarded defendants, Justice Scalia awarded his colleagues “the Prize for the Court’s Most Feeble Effort to fabricate” evidence of the majority’s argument. Atkins v. Virginia, 536 US 304, at 347 (2002).

We propose an alternative theory: that at least some dissents are explicable as signals from judges to litigants about how to frame future similar cases in order to increase the chances of success of the side of the argument that the dissenting judge supports.

This will not explain all dissents. Sometimes perhaps 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, this 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 goal in mind. In dissenting, a judge may be attempting to summon new litigation with new case facts that would be amenable to an alternative legal argument, 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 – at least for some judges in the previous majority coalition – to consider a different argument when deciding on the merits. That way, the dissenting judge is identifying a potential fissure in the majority coalition that can be exploited by future litigants.

This type of dissent constitutes a signal by the dissenting judge to potential litigants of alternative routes to success. But in order to be effective as a signal, the dissenting judge needs a cross-cutting issue that can split the existing majority. We show that federal-state disputes arise in a significant number of cases in every substantive policy dimension.

Although views on federal-state power may correlate with liberal-conservative division, sometimes a judge’s view on one will conflict with the other. For example in Gonzales v. Raich, 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. On the other side of both issues, Justice Stevens said Raich was one of the two decisions he most regretted having to make that Term – but he had to rule against a policy he agreed with, to accord with his views of the broader federal-state principle.

dissents from certiorari: Justices not wanting the bar to know precisely why cases are granted or denied. This stands in stark contrast to our theory here; however, since we are attempting to explain some dissents, and not all dissents, both theories could be correct.

4 545 U.S. 1 (2005).

5 “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.” Id. at 57. (O’Connor dissenting).

6 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,” Stevens said. But given the broader stakes for the power of Congress to regulate commerce, he added, “our duty to uphold the application
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 we are not confusing a majority-splitting mechanism with a substantive federal-state issue in the case, we look only at cases where the dissent relies on federal-state issues and the majority opinion does not mention federalism. 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 previous dissenting coalition is more often subsequently in the majority.

In other words, conservative dissenters who mention that a case in a particular policy area should have been decided on the basis of federal-state power result in more cases being decided on the basis of 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: they result in additional cases in that policy area decided on the basis of federal-state powers and those cases become measurably more liberal.

This Article begins in Part II with case studies that illustrate how the signaling process works. It then develops a more general theory in Part III. We then test the theory using Supreme Court cases between the 1953 and 1985 Terms in Part IV. 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 that can be used by the extrajudicial community to shape the future of the Supreme Court’s agenda. We discuss these possibilities in the concluding Part V.


7 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 the outcome of the case.

8 We are limited to this time period because we use James Gibson’s Phase II Judicial Database, supra note 3, since we require 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, however this limitation should not substantially affect our results.
II. CASE STUDIES

In this Part, we provide a detailed case study in which a dissent based on federal-state power is transformed into a majority opinion in a subsequent permutation of the litigation. We then provide some brief examples in which the same transformation occurs, but where the subsequent litigation relates to new sets of facts. These examples show that judicial signaling of the kind we are concerned with can have a significant impact, both in terms of re-litigation of specific case facts and in terms of development of doctrine more broadly.

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. 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.\(^9\)

Thus, the Supreme Court ruled that the city had no right to transfer control of the park to a private authority which 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 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.\(^10\)

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; he labeled


\(^10\) *Id.* at 312. (Black dissenting).
the ruling “revolutionary” in its effect on state court power over such matters.\textsuperscript{11}

Justice Douglas’ majority opinion did not consider the implications of the decision for the future of the state’s control over its wills and trusts, yet the dissenting opinion raised the issue explicitly. Our argument is that in this case, intentionally or unintentionally, Black’s dissenting opinion signaled for other potential litigants to explicitly frame future similar litigation in terms of its implications for the powers of the states, 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, Black may have inspired the litigants in this specific case to sue for reinstatement of the property to the heirs. In fact, in this way new case facts did arise that were more amenable to a decision favoring states’ rights.

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. 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. Since 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 policy of desegregation of the park, along with the Attorney General of Georgia, brought the case on appeal.

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 was nevertheless formed in support of the previously losing side by Justice White becoming convinced by the states’ powers implications in the new case. The three member dissent in \textit{Evans v. Newton} became a five member majority in \textit{Evans v. Abney}.\textsuperscript{12} 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.”\textsuperscript{13}

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. Only one judge of the original 6:3 majority left the Court, yet the initial dissenting opinion became the majority in the second case. The actions resulting from the Supreme Court’s decision – namely, the decision on the part of the heirs 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

\textsuperscript{11} Id. at 313. (Black dissenting).
\textsuperscript{12} 396 U.S. 435 (1970).
\textsuperscript{13} Id at 440.
public park; it was privately owned land. The trustees of Bacon’s will got what they wanted – control over the land rather than see the park be desegregated against Bacon’s wishes. Moreover, the Supreme Court Justices in the dissent 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 with them and form a new majority.

In this example, the subsequent case concerns the same dispute and litigants from the initial case, with newly manipulated case facts that serve the purpose of making legal arguments that are amenable to making a decision that relies on state powers. The dissenting minority was successful in inspiring the litigants to reframe the case facts and therefore the legal issue, garnering a new majority. This reframing power, however, is not limited to re-litigation of a particularized dispute, as the next section shows.

B. Beyond Re-litigation: 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 have an impact on the way lawyers decide to frame a case regarding gender discrimination. A dissenting opinion in a case about obscenity and federal-state powers could have an impact on 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 of cases in which a dissenting Justice in an initial case based the dissent on grounds of federal-state relations when the majority ignored the federalism issues, a position that was subsequently accepted by a majority in a later case, with the majority referring approvingly to the initial dissent. We provide a brief outline of three such pairs of cases, to illustrate our theory. However, such illustrations are only suggestive of a relationship between the two cases: our empirical analysis in Part IV 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, which concerned an allegation of price-fixing in women’s clothing. In Moitie, the majority dismissed an anti-trust appeal that had been removed from state to federal court, on the basis of res judicata, and refused to find an equitable exception on the basis of ‘public policy and simple Justice.’ Only the dissent focused on state-federal issues. In 1987, the majority opinion in Caterpillar, Inc. v. Williams found that breach of

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15 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.”)

16 Id at 406 (“An action arising under state law may not be removed solely because a federal right or immunity is raised as a defense.”) (Brennan dissenting)

employment contract claims were improperly removed from state courts to federal courts. 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.\(^{18}\)

The first case was six years before the follow-up case. In Part IV, *infra*, we establish that it takes approximately 4-6 years for new cases to reach the Supreme Court, and thus we expect the effect of these dissenting signals to be seen in cases 4-6 years after the initial dissent mentioning federal-state issues.

A second example concerns pre-emption. In *Motor Coach Employees v. Lockridge*,\(^ {19}\) a challenge to a union firing an employee for not paying his dues failed because of pre-emption, as the NLRB had exclusive jurisdiction. 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.”\(^ {20}\) Justice White dissented on grounds that the question was not simply one of state and federal court jurisdiction. Rather, where federal legislation can arguably be said to not apply, then state laws should be able to apply, and so state courts should not be foreclosed from granting relief to union members under those state laws.\(^ {21}\) Subsequently, in *Oil, Chemical & Atomic Workers v. Mobil Oil Corp., Marine Transp. Dept.*,\(^ {22}\) a Court majority upheld a collective bargaining agreement involving a union, quoting Justice White’s dissent in *Lockridge* for the proposition that in the area of union-security agreements, there was no federal interest, and thus multiformity was acceptable.\(^ {23}\) The first case was five years prior to the follow-up case.

A final illustration where a dissent had an impact on future litigation both within the same issue area as well as in adjacent issues areas is *A Quantity of Copies of Books v. Kansas*,\(^ {24}\) where Justice Harlan dissented from a majority opinion that disallowed state regulations of certain allegedly obscene materials. The majority rejected the state’s treatment of the obscene materials as contraband that could automatically be seized and destroyed, like illegal liquor. The majority reasoned that written materials receive greater protection than other illicit goods, by virtue of the First Amendment, and so procedures controlling such written

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\(^{18}\) *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 Justice Brennan’s dissent in *Moitie*).

\(^ {19}\) 403 U.S. 274, 287 (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.”).

\(^ {20}\) *Id* at 287.

\(^ {21}\) *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.”) (White dissenting).

\(^ {22}\) 426 U.S. 407 (1976).

\(^ {23}\) *Id* at 436. (“In enacting § 14(b) Congress concluded that diversity in the area of union-security agreements would compromise no federal interest. “By making the matter one of state law, Congress has not only authorized multiformity on the subject, but practically guaranteed it.”” Quoting Justice White’s dissent in *Lockridge*).

\(^ {24}\) 378 U.S. 205 (1964).
material must be “searching,” so as to avoid suppression of protected speech.\textsuperscript{25} Justice Harlan said that the majority opinion “serves unnecessarily to handicap the States in their efforts to curb the dissemination of obscene material.”\textsuperscript{26} In the same year, Justice Harlan also dissented in \textit{Jacobellis v. Ohio},\textsuperscript{27} 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.”\textsuperscript{28} The subsequent explosion in obscenity litigation eventually resulted in \textit{Miller v. California},\textsuperscript{29} which put the regulation of obscene materials mostly into the hands of the state.\textsuperscript{30} In \textit{Paris Adult Theatre I v. Slaton},\textsuperscript{31} the majority adopted Justice Harlan’s approach, and approvingly cited the latitude his dissent endorsed giving the states in such matters.\textsuperscript{32}

\textit{Jacobellis} and \textit{A Quantity of Copies of Books} may have resulted in additional cases regarding issue areas outside of obscenity. In the years following those 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 \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{33} where 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.”\textsuperscript{34} This finding is consistent with Justice Harlan’s dissenting opinion in the obscenity cases.

These illustrations suggest that dissents based on federal-state issues can effectively signal for future litigation, and that this may provide the dissenting Justices with cases that allow them to form alternate majorities in subsequent cases. This begs 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 section provides a theory of judicial

\textsuperscript{25} \textit{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.”)

\textsuperscript{26} \textit{Id} at 215. (Harlan dissenting).

\textsuperscript{27} 378 U.S. 184 (1964).

\textsuperscript{28} \textit{Id} at 204 (Harlan dissenting).

\textsuperscript{29} 413 U.S. 15 (1973).

\textsuperscript{30} \textit{Id} at 19 (The 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.”)

\textsuperscript{31} 413 U.S. 49 (1973).

\textsuperscript{32} \textit{Id} at 80 (“Mr. Justice Harlan, on the other hand, believed that the Federal Government in the exercise of its enumerated powevs 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 Justice Harlan’s dissenting opinion \textit{Jacobellis v. Ohio}, and citing Justice Harlan’s dissenting opinions in \textit{Ginzburg v. United States} 383 U.S. 463 (1966), \textit{A Quantity of Books v. Kansas} and \textit{Roth v. United States} 354 U.S. 476 (1957).)

\textsuperscript{33} 418 U.S. 323 (1974).

\textsuperscript{34} \textit{Id} at 346.
signaling to answer the first question, and then our empirical analysis addresses the second and third questions.

III. A Theory of Judicial Signaling

Bacon’s case is an example of re-litigation by the same plaintiffs to achieve a different outcome, but as these other historical illustrations suggest, signaling can have value beyond re-litigation: potential litigants can look to signals coming out of a wide variety of cases in the same policy area, and decide which arguments to emphasize. The Bacon case illustrates that even in relation to the same controversy, new case facts can be generated by litigants who 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, since 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 of the theory itself.

A. Assumptions

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

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. While 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, so as to ensure both that the Court hears the sort of cases the Justices are interested in, and that the Court does not hear cases that will set a precedent contrary to each Justice’s preferences.35

In a comprehensive study using judicial records and some of the Justices’ private papers, Epstein and Knight examined judicial notes and letters which reveal many of the Justices engaging in negotiation and bargaining with one another.36 Epstein and Knight also compared early and late drafts of opinions, and compared Justices’ initial conference votes to their final case positions. They uncovered evidence of four types of strategic activities. First, Justices undertake bargaining with one another – over certiorari, policy at the merit stage and opinion writing. Second, Justices engage in ‘forward thinking,’ which includes: considering the expected behavior of external actors; defensive denials – refusing to take a case the Justice may wish to hear, out of an expectation of being unable to garner majority support; and aggressive grants – taking a case that may not warrant review because the Justice calculates it may be good for developing a doctrine. Third, Justices manipulate the agenda,


36 Supra note 1, at 80
particularly at conference. Fourth, Justices develop sophisticated opinion writing, which attempts to win over ambivalent colleagues. This work provides ample evidence that Justices have preferences of the case outcomes, and overall they act consistently with those preferences.

Second, for signaling to be an effective strategy, the Justices must have enough information about their fellow colleagues’ preferences to enable them to know what kinds of arguments would be likely to persuade their colleagues to join them. Justices have the benefit of conference discussion and less formal interactions with their colleagues to develop private knowledge of their colleagues’ proclivities. Although this evidence is necessarily indirect, a number of studies have provided evidence that the Justices have foreknowledge of their colleagues’ future outcomes. For instance, studies have found that judicial decisions depend on the level of support judges expect from other members of the court, implying some level of foreknowledge. These findings show both that judges can accurately anticipate their colleagues’ likely actions, as well as providing evidence that judges’ own actions vary with their likelihood of casting 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 kinds of case facts and legal arguments will appeal to which Justices. This assumption, too, has also been established in the political science literature. For instance, scholars have shown that both organized interests and professional bars shape judicial agendas, by drawing Justices’ attention to cases with potentially large impact on public policy.

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37 See also Forrest Maltzman, James S. Spriggs II and Paul J. Wahlbeck, Crafting Law on the Supreme Court: The Collegial Game (2000). But see Robert L. Boucher and Jeffrey A. Segal, Supreme Court justices As Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court, 57 J. Pol. 824, 829 (1990), who find evidence for aggressive grants but not for defensive denials. They theorize and find that a decision to grant cert is a function of a desire to reverse, the support the judge expects from the rest of the Court, and an interaction between these two variables. Boucher and Segal find that the extent of strategic behavior varies by individual justice. On this point, see also Perry supra note 3 at 276.

38 This is a fairly standard assumption made by scholars studying the courts. See e.g., Lee Epstein, Jeffrey Segal and Jennifer Nicoll Victor, Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment, 39 Harv. J. Leg’N 395 (2002), at 420; however some assume the opposite, e.g. Lawrence Baum, Policy Goals in Judicial Gate-Keeping: A Proximity Model of Discretionary Jurisdiction, 21 Am. J. of Pol. Sci. 13, at 17 (1977). One of the few studies to challenge this notion is John F. Krol and Saul Brenner, Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation, 43 Western Poli. Quarterly 335, at 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, two are supported by the evidence, and the one which is not in fact relates to predicting the behavior of uncertain judges only.

39 See, Epstein, Segal and Victor, Id.

40 See e.g., Boucher and Segal, supra note 37, at 832.


Thus these three core assumptions about strategic judicial behavior have been well-established. However, there are other aspects of our theory of judicial signaling that may be more controversial. First, for this process to work systematically there must be a sufficient number of sophisticated litigants who pay attention to these 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, since, as we show below, this effect takes several years, the Justices must be willing to wait to hear cases that are not already in the litigation pipeline—that high quality cases, framed in a way that Justices would like to see them framed, are relatively rare and therefore are worth waiting for.

The third of these more controversial assumptions has not been proven in the political science literature. While many authors have recognized that judges act strategically, as discussed, their focus has largely been on short-term strategy: how judges ensure their favored outcome in any given case. For most studies, an assumption of judicial focus being short-term is implicit, for others it is explicit. But there is no reason to assume that judges have such a myopic focus, particularly for judges with lifetime tenure. Judges may seek to have the capacity to set the law of the land (or state or region), and be willing to sacrifice their interest in a given case to find a vehicle to direct the development of the law.

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 Legal Director of the American Civil Liberties Union, (hereafter ACLU) stated that they get ten thousand calls a year from people who claim that their rights or liberties have been violated. Out of those ten thousand, two thousand are serious violations. The ACLU Board meets often to discuss which of those two thousand cases are worthy of ACLU support. In an interview with the Legal Director of the National ACLU, Steven Shapiro, Shapiro claimed that the ACLU is supporting over a thousand cases at any one time. If this is true of all fifty state ACLU, and given the number of other groups and law firms that support litigation, then this leads to a great deal of access to a high number of quality cases from which to choose. 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 puts the “worst” cases as the priority, litigation triage puts 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 are provided with high quality cases that allow them to act in a way that is consistent with their own priorities and preferences, given the preferences of their colleagues (or at least four other colleagues).

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44 Baum, supra note 38, at 16.

45 See e.g., Epstein and Knight, supra note 1, at 18.

46 Interview with the Legal Director of the National ACLU, Steven Shapiro (May 18th, 2001), in the National ACLU office, located on 125 Broad Street, 18th Floor New York, NY 10004.
We consider that, just as the political science literature has shown that Justices are strategic, they are also likely to be strategic in a long-term focus, as well as a short-term focus, and 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

Our theory is akin to Riker’s theory of “heresthetics,” a word created by Riker from the Greek root meaning “choosing or electing.” 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, to transform a minority coalition into a majority coalition.

Justices often write dissents arguing that a case should have been decided according to a different legal rationale. Legal rationales in dissenting opinions can be interpreted by like-minded future litigants 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, when a dissenting opinion in the issue of libel says that the states should have a wider ability to regulate such matters, this dissent will have an impact on litigants who are considering other legal questions associated with the First Amendment. Litigants have an incentive to use all available information, and although dissenting signals may need to be assessed with skepticism, they can nevertheless be informative for litigants deciding how to frame future cases.

It is not important to us to ascertain whether the Justice intended to signal for future cases. What is important is that we can ascertain the Justices’ preferences and then show that litigants use that information to create outcomes that are in line with the Justices’ preferences. Whether the Justice knows that this will happen or intends it is less important than being able to show that the dissenting Justices get what they wanted: a chance to be in the majority when they were previously in the minority.

In this article, we look specifically at dissenting opinions in cases that represent a wide variety of policy areas where the dissent mentions that the case should not have been decided the way it was because of rules about the state and federal balance of power. We consider only dissenting opinions that mention federalism when the majority opinion does

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49 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.
not mention federalism. This way, we can focus exclusively on the effect as coming from 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 on the basis of federalism. Can a conservative dissenting coalition become a majority coalition in future cases in those 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 such a systematic effect. Strategic litigants bring litigation with the policy priorities of the Court in mind. Moreover, they bring litigation framed in such a way that will appeal to the marginal or swing Justice on a given issue. These studies have shown that the lag time in new cases reaching the Supreme Court in response to the Court’s signals is approximately five years.

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 September 30, 2004 is 21.1 months. The median time interval between filing notice of appeal to disposition in the U.S. courts of appeals is 10.5 months. Unfortunately, the Administrative Office of the U.S. courts does not provide similar figures for the additional period for U.S. Supreme Court filing to disposition time interval, and 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. However, we may expect a longer delay in cases generated in response to signals, as this requires a controversy that generates the case; this delay may be longer again 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 approximately four to six years.

Our first step, then, is to ascertain whether there are cycles of Supreme Court attention to certain issues. This will not of course establish a signaling effect, but will be an important initial element of our analysis. We did the first by examining one particular policy area over time, in Figure 1, and then we generalize this examination to all policy areas, in Table 2.

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A look at the historical trend of the Supreme Court’s attention to criminal cases serves to illustrate this effect in the timing of litigation. Figure 1 presents the number of cases that the Supreme Court heard dealing with criminals’ rights cases from 1953-2000. 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 color coded. These years are 1957, 1963, 1967, 1971 and 1972, 1976, 1879, 1983, 1989, 1992, and 1997.

**Figure 1: Attention to Criminals’ Rights Cases at the Supreme Court, 1953-2000**

The interesting aspect of this Figure is that in no year except one where 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 has another spike. The impression formed from this informal look at the data is that there are increases in the attention to criminal cases every 3-6 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.\(^{54}\)

\(^{54}\) Baird, *supra* note 51. The time series analysis reported here looks at the effect of an index measuring “important” decisions handed down on the future caseload of cases in that policy area. A simple Prais-Winsten regression was used. 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 and Jeffrey A. Segal, *Measuring Issue Salience*, 44 Am. J. Poli. Sci. 66 (2000) — declarations of unconstitutionality, cases that formally reverse precedent and proportion of cases that reverse lower court decisions. Each indicator is standardized on a scale of 0-1 and 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 can be found in more detail in Baird *supra* note 51.
Figure 1 does not show the effects of signaling that we theorize, but it does indicate that a trend of the type we expect to arise if such signaling does occur does in fact 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 is from 3-6 years.

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

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>Average Cycle of Supreme Court Attention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discrimination</td>
<td>3-6 years</td>
</tr>
<tr>
<td>First Amendment</td>
<td>3-4 years</td>
</tr>
<tr>
<td>Privacy</td>
<td>3 years</td>
</tr>
<tr>
<td>Criminal Rights</td>
<td>4 years</td>
</tr>
<tr>
<td>Labor</td>
<td>3 years</td>
</tr>
<tr>
<td>Environment</td>
<td>3 and 5 years</td>
</tr>
<tr>
<td>Economic Regulation</td>
<td>4 years</td>
</tr>
<tr>
<td>Taxation</td>
<td>6 years</td>
</tr>
<tr>
<td>Due Process and Government Liability</td>
<td>5 years</td>
</tr>
<tr>
<td>Judicial Power</td>
<td>5 years</td>
</tr>
</tbody>
</table>

Note: These policy area categories match Spaeth’s coding of “Value” from The United States Supreme Court Judicial Database fairly closely, with the exception of the separation of environmental cases into their own category, the inclusion of personal injury and government liability with non-criminal 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 topic of the case involves the balance of power between the states and the federal government. Moreover, every opinion 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 either 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 curium 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 issue span across different policy areas, they are counted once for each issue represented; otherwise, they are only counted once.

The implication of Table 1 is that when Justices indicate – through their decision to focus their agenda on a particular area of jurisprudence – that they consider a particular area a priority, the Court does not immediately pursue further cases in that area in subsequent years. There is a lag of 3-6 years between the Court’s initial flurry of activity in a certain policy area and putting additional cases on the agenda. It seems that if Justices consider a certain policy area a priority in one year, they would consider it priority in the following year. So, why wait?
The answer that we find most appealing is that they are waiting for the most appropriate case vehicles. 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 example of the ACLU, litigants are most likely to pick the cases that respond specifically to the legal arguments in previous cases. The cases then take three to five years in the litigation pipeline before they are able to be heard by the Supreme Court. 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 to occur.

But why do Justices need to signal for cases in the future? If new case facts were not needed, the Justices could simply transform the issue in the initial case to one involving federalism, without needing new litigation. There are instances where Justices can manipulate the issues without waiting for new cases to be framed appropriately. Examples of this are noted by Epstein and Shvetsova, who show that the Chief Justice can have some impact on which issues are taken into consideration on the merits. Moreover, Ulmer and McGuire and Palmer provide evidence that since Justices prefer some issues over others, they 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 to them in the legal briefs.

The extent to which Justices address issues that are not brought to the Court by the lawyers or amicus briefs in the case, however, is controversial. Epstein, Segal and Johnson argue that some Justices consider issue fluidity inappropriate; it violates a norm considered important. By the time cases reach the Supreme Court, they have a well developed record, which is often difficult to ignore. In fact, even before a sympathetic judge, an outcome may depend not simply on the fact of a litigant making a federalism argument, but may require a particular form of that argument. Since litigants need to choose carefully which arguments to make before the Court – due to opportunity costs created by time constraints and judicial impatience with litigants throwing every possible argument into a brief – effective signaling will often require new litigation, and not be amenable to fact or issue manipulation.

Holding all else equal, Justices are likely to prefer having cases with facts that are amenable to particular legal arguments rather than 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 such a case, litigants have

55 On the weight justices give to finding an appropriate vehicle to develop an area of the law, see Perry, supra note 3.
56 See, Lee Epstein and Olga Shvetsova, Heretical Maneuvering on the US Supreme Court, 14 J. THEORETICAL POL. 93 (2002).
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, allowing them to maximize their policy making 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. Whether future cases are closely or loosely linked with the specific issue in previous cases does not affect the implications of our study. The implication of our theory is that Justices benefit from litigants’ interpretation of their written opinions. Litigants aid Justices by interpreting their signals, and by bringing them cases that better enable them to persuade their colleagues to vote with them.

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 below 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.

Together, Figures 2 and 3 illustrate how federalism can be used by a dissenting judge to create an alternative way of deciding a case. Figure 2 shows the overall preference positions of the Roberts Court, using Martin-Quinn measures of judicial positioning in the 2006 Term (2007 Term results are not yet computed).\(^{60}\) The process by which the Martin-Quinn scores are calculated is discussed \textit{infra} in Part IV. For the moment, it is enough to know that the only significant assumption that Martin and Quinn make in developing their judicial preferences scores is that judicial preferences can be summarized on one dimension.

**Figure 2: Judicial Preferences on the Roberts Court, 2006 Term**

<table>
<thead>
<tr>
<th>Stevens</th>
<th>Breyer</th>
<th>Souter</th>
<th>Ginsburg</th>
<th>Kennedy</th>
<th>Alito</th>
<th>Roberts</th>
<th>Scalia</th>
<th>Thomas</th>
</tr>
</thead>
</table>

Empirical judicial scholars have not yet proven whether the overwhelming bulk of decision making for courts can be collapsed down to one dimension of liberalism versus conservatism without losing much explanatory power\(^{61}\) – as it can be for Congress.\(^{62}\) This is


\(^{61}\) See, e.g., Bernard Grofman & Timothy Brazill, \textit{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 the single dimension solution explains much of the Justices’ voting behaviors). Some law scholars, however, take issue with this idea, e.g., Evan H. Caminker, \textit{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 in
an empirical question of great significance for the study of judicial behavior, but does not need to be decided for our purposes. Even if most judicial decision-making can be described in terms of one liberal-conservative dimension, this does not mean that there cannot be cross-cutting issues in some cases. Put another way, even if the liberal-conservative dimension is dominant, other factors can effectively divide majorities on some issues. Interpretive methodology is one such factor; arguably, federalism is another. For example, Spiller and Tiller model federalism as a second decision-making dimension, and find preliminary support for that view.\(^6^3\)

If only one dimension shapes all judicial decisions, then all case outcome results 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 Justice on the Court, but Epstein and Jacobi showed that some median Justices are much more powerful than others, and weaker medians often do not get their way in many cases, including many important cases.\(^6^4\)

A second dimension presents the possibility of multiple alternatives. This provides an explanation for why we see dissenting opinions that raise different issues.\(^6^5\) Judges on the losing side of an issue may be seeking ways to undermine the existing majority. Having lost on the substance of an issue, judges can look to an alternative basis – federalism – for deciding the case, and in doing so potentially destabilize the winning coalition. Figure 3 illustrates why.

Two possible positions of the three central Justices on the current Court are illustrated in Figure 3. Justices Souter, Kennedy and Alito are arrayed as in Figure 2, but with two different hypothesized positions on a federalism dimension (no equivalent score exists of 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, even including majorities that exclude the median. If a case was decided on the substantive criminal rights issue in Figure 3A, Justice Kennedy could form a majority with Justice Alito or Justice Souter or both, but it would be unlikely that any majority would form without him. But if the case was decided the basis of federalism, Justices Souter and Alito

\(^{62}\) See Keith Poole and Howard Rosenthal, Congress: A Political Economic History of Rollcall Voting (1997); Keith Poole, Changing Minds? Not in Congress! 131 PUB. CHOICE 435, 437 (2007) (both 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.”)

\(^{63}\) See e.g. Pablo T. Spiller and Emerson H. Tiller, Invitations to Override: Congressional Reversals of Supreme Court Decisions, 16 INT’L REV. L. & ECON. 503 (1996) (modeling decision-making as a product of a substantive legal issue and federalism, and providing initial empirical evidence of some cases dividing justices by these two dimensions).


\(^{65}\) Scholars have struggled to provide a systematic theory of why judges publish dissents: see e.g. Epstein and Knight, supra note 1.
would be more likely to agree with each other than either 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**

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 nonetheless form as long as the underlying case facts the Justices are facing do not also always arise on the exact dividing line illustrated in Figure 3B. With two potential dimensions, every possible combination of judges can form a majority, and a majority always exists that can overturn any other majority. Consequently, a decision made on the initial policy dimension, can be overturned through the introduction of the second dimension.

So if a judge finds herself in the position of dissenting in a case, it may be beneficial to introduce a federalism argument that constitutes an alternative means of addressing the question. If litigants respond to that federalism argument by bringing new cases on these grounds, 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 changes or ideological convergence of the Justices. It simply requires that the second dimension is salient to judicial decision-making.

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 decision-making is affected by more than simply the left-right ideological policy continuum, this model explains why a

66 So even if federalism is purely a methodological means of reaching an outcome each judge would prefer on the first dimension, different majorities may nonetheless form when only one dimension is at play. In fact, our empirical results below show that federalism is not just a proxy for conservative ideology: it results in liberal movements in outcomes also – see Part IV infra.

dissent that relies on federalism, and signals the possibility of an alternative outcome argued on federalism grounds, can result in a majority in favor of the original dissenter's position. We now formalize the hypotheses of this theory and test them.

**IV. 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 1953-1985. 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 if instead these cases are exceptional. The signals we are concerned with are necessarily coded in the rarefied language of judicial propriety. As such, this is a subtle phenomenon that can only be seen clearly in rare cases. Our case studies may be remarkable because the effects are seemingly 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 two hypotheses in this analysis. Hypothesis 1 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 2 mirrors the ideological component of the first 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 directly testing these hypotheses, we establish more formally our claim that cases take a number of years to reach the Supreme Court. We also show that dissenting signals suggesting federalism as an alternative grounds of case determination result in significantly more cases in the relevant policy area.

Before undertaking our analysis, we describe our data and forms of measurement – essentially the empirical tools we will use in this enterprise. We then describe how we measure changes in overall case outcomes within a given area of the law, before providing out results.

**A. Data and Measurement**

Both of our hypotheses test the effect of dissenting opinions only when the majority opinion does not mention federalism as a relevant dimension. This way, the hypothesis 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 1953-1985.

The data used for this analysis are from the Phase I and Phase II of the United States Supreme Court Judicial Database. Phase I codes all cases as belonging primarily in a

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68 Harold J. Spaeth, ICPSR # 9422, United States Supreme Court Judicial Database, 1953-1997 Terms (1999); and Gibson, infra note 3.
particular issue. We use these issue codings to generate categories of policy areas.\textsuperscript{69} Phase II provides data on every majority and dissenting opinion for every case between 1953 and 1985. These data code all majority, dissenting, and concurring opinions for whether the authors of the opinion make statements about whether federal or state powers are relevant to the opinion.\textsuperscript{70}

\textbf{Figure 4: Attention to the Balance of Federal and State Power in Discrimination Cases at the Supreme Court, 1953-85}

Cases are coded for whether the author of the opinions mentions that the case expands or restricts the relative balance of federal and state powers. Being coded positively for addressing federalism does not preclude a case from being categorized as representing other topics or issues. Opinions within all policy areas can invoke the question of federal versus state powers.\textsuperscript{71} Figure 4 presents an example of discrimination cases from 1953 to 1985,}

\begin{itemize}
\item \textsuperscript{69} These policy area categories match Spaeth's coding of “Value” from The United States Supreme Court Judicial Database fairly closely, with the exception of the separation of environmental cases into their own category, the inclusion of personal injury and government liability with non-criminal 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.
\item \textsuperscript{70} 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 pre-emption 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%.
\item \textsuperscript{71} We include federalism as one of the policy areas in the analysis. This is a little confusing because we are talking about the number of cases within the policy area of federalism that explicitly mention the balance of
\end{itemize}
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.

There is quite a lot of variation over time in the number and proportion of cases that mention federalism as the primary issue that determined the outcome of the case. 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. In the Warren Court, there is an average of 2.3 discrimination cases decided on the basis of the balance of power, whereas in the Burger Court, there is an average of 3.5. Nevertheless, there is quite a large amount of variation, even within these natural Courts. This is the variation that we intend to explain in the first part of the analysis. When dissenting Justices mention that a case should have been decided on the basis of federal and state power, we hypothesize that there is likely to be an increase in those kinds of cases at the Supreme Court on the future agenda. We anticipate that this variation will occur along the recurring three-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 the opposite direction. Importantly, a dissent is only coded positively when the majority opinion does not mention this balance of power. Thus, signals are only counted as signals when the dissent suggests federalism as a relevant issue in the case 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 the purpose of this argument is to assess how the dissent signals for issues, in order to transform itself into the majority, we focus on information that comes only from dissenting opinions.

powers between the federal government and the state. It seems as though all federalism cases would be about this balance of power. However, 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, inter-state disputes, 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 the 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. Judicial power cases might seem not 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 in the case because it is implied in whether the Supreme Court has the right 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.

For a discussion of these categories, see the documentation of the United States Supreme Court Judicial Database. Between the Warren and Burger Courts, the average inter-coder reliability of this variable is 99%. 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, and therefore, will result in more conservative estimates of findings in the analysis.
Table 2. Number of Cases and Percentage Mentioning the Balance of Federal and State Powers on the Supreme Court by Policy Area, 1953-1985

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

Note: These policy area categories match Spaeth’s coding of “Value” from The United States Supreme Court Judicial Database fairly closely, with the exception of the separation of environmental cases into their own category, the inclusion of personal injury and government liability with non-criminal 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 topic of the case involves the balance of power between the states and the federal government. Moreover, every opinion 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 either 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 curium 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 issue span across different policy areas, they are counted once for each issue represented; otherwise, they are only counted once.

Table 2 presents the number and percentage of cases during the time frame of 1953-1985 that are 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% in the privacy policy area to 50.4% of cases in the substantive federalism policy area – but most commonly, the percentage of cases range between 5% and 20%. There are not large differences between the percentage of liberal cases as compared to 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, are relatively rare, constituting about one percent of all cases. There also does not seem to be a great difference between the number of liberal dissents as compared to conservative dissents, though conservative
dissents are slightly more common in 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 such a 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 that mentions federalism is handed down. The next section discusses the measure of the ideological placement of cases and then the subsequent section tests the two hypotheses.

B. Measuring the Placement of Case Outcomes

Both legal scholarship generally and judicial scholarship in particular have become increasingly influenced by empiricism in recent years, and that empiricism has garnered attention from judges, legislators and the press. Nevertheless, during the last four decades of this scholarship, no sophisticated objective measure of case outcomes has been developed.

Traditionally, judicial scholars have used the percentage of liberal decisions to measure the outputs of the Supreme Court for any particular year. Therefore, a year in which the Court made 40% liberal decisions has been considered to be more conservative than a year in which the Court handed down 60% liberal decisions. There is a problem with this measure in that some liberal cases are more liberal than other liberal cases. As Michael Bailey explains:

Suppose one student took a calculus exam and another took an addition quiz. Would the percent correct by the students be a fair way to compare mathematical ability? Certainly not, as a student correct 20 percent of the time on the calculus exam may well have more mathematical ability than the student who was correct 80% of the time on the addition quiz… For the same reason, comparing the liberalness or conservatism of political actors based on percent liberal across different tests (e.g. different selections of vote) is flawed. A person who voted liberally 40% of the time on one sample of votes may, without changing underlying preferences, vote liberally 80 percent of the time on another sample of more conservative proposals.

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 to never let any search stand without


a warrant. If the Court issues that ruling, it is a more liberal outcome than if the Court disallows only some kinds of 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. However, they are different from one another; one is more liberal than the other. Treating them as interchangeable, as the traditional measure of case outcomes does, is unsound.

Not only is the traditional measure of case outcomes theoretically weak in this way, it also does not make use of all of the available information: as well as coding whether a case is “liberal” or “conservative,” the standard judicial databases provide information on the make-up of the judicial coalitions in each case. As such, 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 on the majority coalition.

The essential theory of using such a measure is that case outcomes will be a product of the negotiations among the majority coalition. Prior work by Jacobi has provided a more formal study of the soundness of using the mean of the majority coalition as a measure of case outcomes, as well as an empirical examination of whether such a measure adequately captures the Supreme Court's cases over the last half century. Jacobi and Sag find that the mean of the majority coalition does better than any other existing measure of case outcomes.

Using this measure also addresses the concern that Bailey raises, since such a measure implicitly captures the variation in case facts about the Court cases. If only five of the most liberal Justices agree with a decision, then the case was probably not an “easy case,” in contrast to a case that the entire Court can unanimously agree upon. If a unanimous Court agrees to a change, then the outcome will be fairly moderate, reflecting the views of the median Justice of the Court. But the 5:4 liberal holding will reflect the views of the liberal justices signing on to 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 are not stemming from the use of this measure, Jacobi reran our analysis using the theoretically inferior traditional percentage liberal measure. The results were substantially identical to our results.

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78 Id.

79 Id. Using the percentage liberal measure, conservative dissents move the Court in a conservative direction by 6.04%, and liberal dissents move the Court in a liberal direction by 13.58%. The p-values using this measure are .03 and .02 respectively – enough to establish the effect with confidence. This is comparable to our results, presented in Part IV.C. infra.
To develop a measure of Supreme Court ideological outputs that can be derived from an ideological continuum that is constant over time, we need a valid estimate of the preferences of Supreme Court Justices. Martin and Quinn developed a measure of ideal points of Supreme Court Justices, similar to sophisticated measures of congressional preferences. They are based on a rank ordering of Justices on a constant standard, although the Justices’ ideal points can change over time, as Martin and Quinn find they do. It is essential that the measure rests on a standardized scale because our analysis takes place over half a century.

Martin and Quinn take advantage of voting coalitions to make inferences about the relative placement of Justices. A Justice who is often a lone dissenter in conservative cases will be ranked as more liberal than a colleague who sometimes joins her in 7-2 conservative decisions. If the colleague is rarely the lone dissenter in conservative cases, then she 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 that other Justice. This measure provides standardized comparisons over time. Thus, even though Justice Breyer was never on the Court with Justice Brennan, Breyer’s scores can be compared to Brennan’s because Brennan was on the Court with other Justices who were on the Court with Breyer, such as Chief Justice Rehnquist. Therefore, the rank order measure simultaneously accounts for change over time and across Justices for all years, and so renders the ideal points of the Justices a standardized comparison with one another over time.

The positions of the Justices on the current Court was illustrated in Figure 2. The Martin-Quinn scores closely align with press and popular perceptions of the relative ideological positions of the Justices. 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. In relation to the current Court, Court observers would agree that Stevens is more liberal than Ginsburg, Souter and Breyer, who in turn are more liberal than Kennedy. They would also agree that Alito and Roberts are more conservative than Kennedy but less conservative than Scalia, who is only less conservative than Thomas. 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 Martin and Quinn do not incorporate any measure of

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80 See, Martin and Quinn, supra note 60.


82 In 2004 O’Connor held the position of median Justice with a Martin-Quinn score of 0.08; with her retirement and the death of Rehnquist, Kennedy has become the median Justice, with a Martin-Quinn score of 0.49. Media portraits of Kennedy as the new “swing vote” on the Court fit very well with Martin and Quinn’s analysis. See, e.g., Robert Barnes, Justice Kennedy: The Highly Influential Man in the Middle; Court’s 5 to 4 Decisions Underscore His Power, THE WASHINGTON POST, May 13, 2007; Robert Barnes, In Second Term, Roberts Court Defines Itself; Many 5 to 4 Decisions Reflect Narrowly Split Court That Leans Conservative, THE WASHINGTON POST, June 25, 2007.
directionality into their scores. Unsurprisingly then, negative – i.e. liberal – Martin-Quinn scores correlate with a positive – that is Democrat – coding in the traditional Party of the Appointing President proxy for judicial ideology, and positive/conservative Martin-Quinn scores accord with Justices having been appointed by a Republican president.\(^{83}\)

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 and Quinn ideal points of the Justices in the majority coalition of 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 relative bargaining power of the Justices in determining the outcome of the case is not clear from the outcome of 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 from the means. Nonetheless, we believe that this measure is a valid indication of where the Supreme Court places its policies – it certainly improves upon the simplistic dichotomous conception of liberal versus conservative.\(^{84}\)

A qualitative analysis of the mean of the majority coalition measure 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 1953-2000, according to our measure, is *San Antonio Independent School District v. Rodriguez*.\(^{85}\) This is probably the case that most 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 even argue that this decision reverted back to a *de facto* discrimination that would have been worse than *Plessy v. Ferguson*\(^{86}\) would have allowed. The most liberal case in the policy of discrimination in the time frame is *Missouri v. Jenkins*,\(^{87}\) which sustained a local court order to allow local officials to ignore state tax laws to raise money for failing schools to prevent further white flight to the suburbs. This case was extremely controversial, and many states requested that Congress take action to overturn the decision, and finally the Supreme Court overturned their own decision five years later in *Missouri v. Jenkins*.\(^{88}\)

Figure 5 plots the average of the mean of the majority coalition scores for all First Amendment cases from the 1953-1999 Terms. 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, the mean of the ideal points of each member in


\(^{84}\) See Jacobi and Sag, *supra* note 77 (showing the superiority of the mean of the majority coalition measure of the traditional percentage liberal-conservative measure).

\(^{85}\) 411 U.S. 1 (1973).

\(^{86}\) 163 U.S. 537 (1896) (condoning “separate but equal” treatment under the Fourteenth Amendment).


the majority is calculated and these means are averaged 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, the 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 membership of the Court does not change. The lighter lines show the standard deviations around the score of each case.

Figure 5: Attention to the Balance of Federal and State Power in Discrimination Cases at the Supreme Court, 1953-1999 Terms

These scores are affected by personnel changes on the Court. The graph shows that the Warren Court was much more liberal on First Amendment issues than the Burger Court. However, there is a large amount of variation within natural Courts also. For example, 1959 and 1960 were more conservative years on the Warren Court. And while 1972 was the most conservative year for First Amendment issues, the average dropped in the years afterwards. The conservative averages in years 1975-1977 were followed by a more liberal era from 1979-1981. This means that even with the same Justices on the Court (or mostly the same), either the liberal coalition is tending to dominate the majority coalitions for that year or the conservative coalition is dominating. Justices are not just changing their minds about their preferences; instead it is the nature of the questions posed to the Court that are changing. The Justices are responding to questions posed to them by the litigants. Sometimes, the questions lead on average to the moderate Justices voting 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 are 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 the liberals or the conservatives completely dominated that year. From 1959-1962, 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. In 1966-1968, the standard deviation was low, but the means show that the liberal coalitions are dominating. In 1983-1988, 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 both the liberal and conservative coalitions are winning a significant proportion of those cases.

Our hypotheses are that the signals present in the dissenting opinions will call for questions that will lead to the dissent being more often in the majority. Liberal dissents will lead to more liberal outcomes in the future, and conservative dissents will lead to more conservative outcomes in the future. Figure 6 presents an illustration of the potential differences in the ideological outcomes in cases based on whether they took the issue of federal and state power into consideration, in cases dealing with judicial power. 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, mostly, 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. At times, the federal-state power cases are more liberal than the other cases, such as in 1962, 1964, 1967, 1971 and 1974. Other years, the federal balance of power cases were more conservative than others, as in 1954, 1959, 1970, 1974-1976, and 1980-1982. This is the difference in the outcomes that we seek to 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 between the ideological balance between cases that are

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89 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 the issues are framed in terms of federalism. Although our results below are suggestive that a second federalism dimension is operative in judicial decision-making, our analysis does not depend upon establishing that justices line up often enough in a consistent manner to constitute a significant second dimension in all judicial decision-making. Rather, we test whether federalism is sufficiently salient to alter outcomes in the ideological space.

90 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.
framed according to the federal-state powers issues and those that are not will help control for the general ideological changes in the Court across years.

**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 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. These means are then aggregated across all years and policy areas from the 1953-1985 Terms. Such 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.

C. Explaining the Supreme Court’s Ideological Movement in Federalism Cases

As a reminder, our first 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 second is the same hypothesis but for liberal dissenting opinions, which should lead to greater liberal policy output. The dependent variable is a measure of ideological movement: it equals 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.
As discussed in Part III.B. *supra*, we formed a rough estimate that cases should take approximately four to six years to emerge following a signal of the kind we are interested in. To more accurately predict the range of time in which we would expect to see the effect of signals, we undertook a preliminary test of whether signals, in the form of dissenting opinions mentioning federal-state power in a given policy area, result in an increase in majority outcomes decided at least partially on the basis of federal-state power. We found that six years after a dissenting federalism signal, there is an increase in the number of cases decided by majorities at least partially on the basis of federalism in the given policy area. This effect is statistically significant at the .05 level.\(^91\)

This result is largely consistent with Baird’s evidence on the time lag between signaling cases and cases resulting from those signals. Baird found that the effect of signals on the appearance of cases responding to the signals on the agendas of the U.S. Courts of Appeals takes about three to four years, and that politically salient decisions cause litigation which affects the Supreme Court’s agenda four to six years later.\(^92\) The fact that litigation encouraged by federalism-based signals has a de facto prerequisite that a state or a federal government actor must first act in such a way that causes the case or controversy that results in litigation, for example by enacting legislation, makes it unsurprising that it takes on average one to two years longer for these dissenting opinions to have an impact on future majority outcomes.

Our expectation, then, is that following a federalism-based dissenting opinion at year 0, we will see 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. We treat as disconfirming large movements in years 0-3. This is a conservative test, since some signals could be expected to result in cases earlier than six years, particularly if those cases can be reframed in response to the signal, but 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 .11 and the standard deviation is .74. Thus, 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, for example, to replacements on the Court. For this reason, we control for such change

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\(^91\) We estimated using Generalized Least Squares computing Ordinary Least Squares with panel corrected standard errors according to the recommendations of Beck and Katz (1995). 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.

by including a variable equal to the ideal point of the median Justice. Use of this control is advantageous because it accounts for various causes of median change, including but not limited to: judicial replacement, judicial attitude shifts over time, as well as changes in the political administration or Congress. Because of the many ways in which the median of the Court can change, and so to fully ensure that our findings are not the result of ideological changes on the Court, we also include lags of the absolute value change in the median Justice’s ideal point for each year.

The units of analysis are the policy area for each Supreme Court term from 1953 to 1985. The signals and the resulting agenda transformation are hypothesized to occur within each policy area. The independent variables are 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.\textsuperscript{93} 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.\textsuperscript{94}

Some of the eleven policy areas the Supreme Court considers must be excluded from these analyses due to insufficient data. If there were fewer than two dissenting opinions that mention federalism when the majority opinion does not in the entire time period, we deleted the policy area from the analysis. In the analysis of the effect of conservative dissenting signals, the policy area of due process and government liability is excluded; in the analysis of the effect of liberal dissenting signals, the policy areas of privacy, environment and labor are excluded.

Figures 7 and 8 present the results of the analysis of conservative and liberal dissenting opinions respectively. They show 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% confidence intervals. Thus there is a significant effect on the placement of Supreme Court cases in a year when the center line lies outside the confidence interval lines for year 0.

\textsuperscript{93} We use Ordinary Least Squares parameter estimates with panel corrected standard errors, according to the recommendation of Beck and Katz. See, Nathaniel Beck and Jonathan N. Katz, \textit{What to Do (and Not to Do) with Time-Series-Cross-Section Data in Comparative Politics}, 89 AM. POLI. SCI. REV. 634 (1995).

\textsuperscript{94} To deal with autocorrelation, we include a specification for an autocorrelation term of the first order. 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. Therefore, we corroborated our analysis using only those cases in which majority opinions mention federalism but we use pair-wise regression (otherwise, computation is impossible). The results are substantively identical.
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. Remember conservative movements are positive and liberal movements are negative. Thus in Figure 7, we see that six years after a conservative dissenting signal mentioning 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 such a conservative dissenting signal, there is a distinct movement in a conservative direction, but this effect does not rise to the point of statistical significance. However, the effect in the fifth year is nonetheless important. Since we predicted an effect in the sixth year, but anticipated 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.

A skeptic looking at Figure 7 may consider that federal-state power is really just a facade for conservative arguments, but we find that the effect we identify in Figure 7 is not limited to conservative dissents. In Figure 8 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 in the case 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 use other-year effects are not statistically significant, but once again they also 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 8. 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

![Figure 8](image-url)

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 (excluding privacy, the environment and labor). 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. Controls in this analysis include policy area dummy variables, and six lags of the absolute value change of median voter.

Another concern may be that federalism may simply be becoming more important over time. To check 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. As such, our results are not driven by some jurisprudential change in federalism itself over time.

The results are as we hypothesized, for both conservative dissents 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 .05 level in both analyses, as expected, after six years. The time trends have the shape expected: minimal effects in years 0-3, then with some effects in years 4-5, and reaching statistically significant movements in both
conservative and liberal directions 6 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.

So both 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 7 and 8 into context. A dissent based on federalism moves the overall direction of the Supreme Court in a given policy area after six years by .16 for conservative dissents and by .22 for liberal dissents. The standard deviation of the change in the overall Court’s position over the 33 years studied is approximately .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, to take 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 easily overturned by transformation onto a procedural dimension (there are of course no dissenting signals for 9:0 majorities). Whereas we would expect much more significant effects on closer cases, where majorities should be able to be overturned more easily by transforming the case into one about federal-state powers. Running the same tests looking only at 5:4 and 6:3 majorities produces even stronger results than those shown in Figure 7 and Figure 8. Conservative signals move majority outcomes in a conservative direction by .28 for 5:4 majorities and by .08 for 6:3 majorities; liberal signals move majority outcomes in a liberal direction by .31 for 5:4 majorities and by .16 for 6:3 majorities. All of these results are significant at the .05 level. Though we present the analysis of the liberal dissents on case outcome movement separate from conservative dissents on case outcome movements separately, we again also tested the effect of liberal and conservative dissents in the same model and the effects are substantively identical.

Altogether, our results provide strong support for both hypotheses, and for the general proposition that dissenting signals can transform the basis on which future cases are argued. 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 also engaging in signaling provides Justices who were previously on the losing side of issue with an opportunity to create winning coalitions and move the overall direction of case outcomes in a given policy area in their preferred direction.

V. IMPLICATIONS

We find that dissenting opinions that mention the implications of a case for federal-state powers implicitly suggest to like-minded litigants possible ways to frame cases to win a majority of Justices to their side. We also find that this strategy crosses ideological bounds. It is used by both liberal and conservative Justices, and is an effective strategy for both. Federalism is not simply a façade for conservatism; both liberal dissents and conservative dissents move policy outcomes in their favored direction, precisely in those cases that mention federalism in later majority opinions. So 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 the paper are not anomalous. Also, although the 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 re-litigation of the same dispute. Signals can cause a new chain of events in a different circumstance to bring about litigation with a specific way of framing the case. 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 the 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 those later cases, by allowing the Justices to propose alternative grounds on which to decide cases. Those 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, while 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 issues of the cases that are presented to them, they may well be more likely to persuade their colleagues to join them when those issues are framed for them 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 oft used by the Justices.

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

However, our results have significance beyond federalism. Although dissenting federalism signals occur in only one percent of cases, we have identified a phenomenon that may be utilized in other areas. This includes judicial attempts to destabilize a majority by other means, whether those means are procedural, such as standing, or an alternative substantive dimension. More generally, it shows that the way cases are framed is highly determinative of the outcome in those cases. This lends support to various analyses of judicial interpretive methods, such as Brest’s contention that manipulation of the level of generality of a legal question is highly determinative of its answer, and it opens the door to future studies of other means of fracturing majority opinions.

95 See, Paul Brest, The Fundamental Rights Controversy: the Essential Contradictions of Normative Constitutional Scholarship,
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 cert to a case, they take the preferences of their fellow members of the Court into consideration.\textsuperscript{96} The implication of these prior articles and our findings is that Justices, while motivated by their own policy preferences, are found to account for the preferences of their colleagues in their strategies and have an incentive to take the preferences of the pivotal Justice into consideration when deciding to grant cert to a case. Our analysis expands this approach, illustrating that there can be more than one pivotal Justice in any case, because judicial preferences are potentially influenced by multiple dimensions of an issue.

Fifth, although we do not test this directly, our results imply that litigants are highly responsive to signals from Justices. Dissents referring to federalism result in a statistically significant increase in later cases on a given issue that are decided on federalism grounds, which the dissenting judges are then able to transform into new majorities.

Sixth, a general contribution of this paper is that it begins to integrate models of agenda setting that have previously only been applied 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,\textsuperscript{97} many of these theories have not yet been applied to the Supreme Court. One reason for this is that the rules of the agenda setting process in Congress are very different from the rules in the Supreme Court. In congressional agenda setting models, there is an agenda setter, usually a congressional committee, responsible for bringing the “yea” or “nay” proposal to the floor. Often the setter must take the preferences of the median voter of the legislature 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 of the legislative body, provide clues about which questions to bring. This may open up 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

\textsuperscript{90} \textit{Yale L. J.} 1063-1109 (1981).


signal in dissenting opinions to get cases framed in the manner that the dissenting Justices would like to see cases framed. As mentioned, signaling need not be limited to federalism; also, signaling may not be restricted to dissenting opinions, but rather 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. Additionally, judges may also signal outside actors, for example lower court judges may signal for promotion purposes, or justices may send signals to the Senate about the overall position of the Court, when the Senate is considering other Supreme Court nominations. Judicial signaling may occur in a variety of contexts, with interesting implications for the content of other areas of Supreme Court policy making and our understanding of judicial behavior.

