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the U.S. Supreme Court**

Vanessa Baird and Tonja Jacobi

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

Vanessa Baird
Assistant Professor
Department of Political Science
University of Colorado-Boulder
Boulder, Colorado 80309-0333
email: vanessa.baird@colorado.edu

Tonja Jacobi
Assistant Professor
Northwestern University School of Law
357 E. Chicago Ave, Chicago IL 60611
email: t-jacobi@law.northwestern.edu

Abstract: Many judicial outcomes based on the substantial legal merits of the case could potentially be reversed if the case was decided on procedural grounds. Minority coalitions then have an incentive to signal to potential litigants that they would like to see the substance of the legal debate transformed onto a procedural dimension. This article presents a theory of judicial signaling, akin to Riker's (1986) theory of heresthetical manuevering, to Supreme Court justices' use of signals in dissenting opinions as agenda setting tools. The empirical tests of the theory show that when justices write dissenting opinions that signal a preference for transforming the substantive issue to one about federalism, there is an increase in future Supreme Court decisions resting on the basis of federal versus state power. Moreover, the coalition that had previously been in the minority is now in the majority, showing that the heresthetical strategy is systematically successful.

The act of dissenting suggests that a judge has not given up on the losing side of an argument. Often, a dissent will continue to argue the substantive point, despite the fact that the issue has been decided. This suggests that the judge is hoping to instigate a change of heart in a colleague or prompt some outside actor with influence, and eventually win on the merits. Often, however, a dissent will pursue a procedural argument that leads to an alternative conclusion. Then, the judge is identifying a potential fissure in the majority coalition that can be exploited by future litigants. This second type of dissent constitutes a signal by the dissenting judge to potential litigants of alternative routes to success. We show not only that such signals are commonly being issued by Supreme Court justices, but also that this process is often successful: by signaling the potential of federalism as a procedural alternative, the dissent ultimately can become the majority.

This article begins with a case study to illustrate how the signaling process works. It then develops a more general theory, utilizing Riker's (1986) theory of heresthetical manuevering and Positive Political Theory. We then test the theory using Supreme Court cases between 1953 and 1986. We establish that an increase in dissents relying on federalism cause an increase in future cases based at least partially on federal issues. Additionally, by estimating the change in the ideological placement between the initial signal and the later case, we show that these federalism signals actually transform losing cases into majority victories for a given position. These results have important implications, not only for judicial signaling, but by providing more general insights into judicial behavior. We conclude with a discussion of these implications.

I. Seeing Beyond the Trees: Federalism Transforms Bacon's Park

Upon his death in 1911, Augustus Bacon, a United States Senator, donated a piece of land to the city of Macon, Georgia, to be used as a park for recreation for white people only. The estate was left to the care of seven board members, all of whom were supposed to be white. In time, the city of Macon allowed blacks to use the park, and eventually the Board sued the city, and the city responded by giving up control of the park to a new set of private trustees, ensuring the reversion to a policy of segregation in the park. Members of the black community intervened in the legal case and argued 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. *Evans v. Newton.*[1]

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

Justice Black, dissenting, argued that the case did not have anything to do with race 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.

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:

> If the Court is holding that a State is without these powers, it is certainly a drastic departure from settled constitutional doctrine and a vastly important one which, we cannot refrain from saying, deserves a clearer explication than it is given. Ambiguity cannot, however, conceal the revolutionary nature of such a holding, if this is the Court's holding, nor successfully obscure the tremendous lopping off of power heretofore uniformly conceded by all to belong to the States. This ambiguous and confusing disposition of such highly important questions is particularly disturbing to me because the Court's discussion of the constitutional status of the park comes in the nature of an advisory opinion on federal constitutional questions the Georgia Supreme Court did not decide. Consequently, for all the foregoing reasons and particularly since the Georgia courts decided no federal constitutional question, we agree with my Brother HARLAN that the writ of certiorari should have been dismissed as improvidently granted.

Justice Douglas' majority opinion did not consider the implications of the decision for the

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[1] 382 U.S. 296 (1966).

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future of the state's control over its wills and trusts, yet the dissenting opinion raised the issue explicitly. The argument here is that Black's dissenting opinion, intentionally or unintentionally, signaled for future litigation to be explicitly framed in terms of its implications for the powers of the states.

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. Heirs of Senator Bacon, however, sued for the reinstatement of the property to the Bacon estate. The state courts, including the Georgia Supreme Court, agreed and suggested 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, the courts suggested, ought to be reverted to its rightful owners, 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 that time, 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 clearer implications for states' powers in the new case. So, the three member dissent in *Evans v. Newton* became a five member majority in *Evans v. Abney*. Writing for the 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."[2]

Stated simply, what happened here was that a majority opinion in *Evans v. Newton* was decided on the basis of the Fourteenth Amendment and discrimination. The dissenting opinion in that case made the suggestion that the debate ought to take place on the dimension of state police powers to regulate wills and estates. Only one judge of the original 6:3 majority left the Court, yet

[2] 396 U.S. 435, 440 (1970).

the initial dissenting opinion became the majority in the second case. The actions resulting from the Supreme Court's decision resulted in litigation framed according to states' powers rather than discrimination. The Supreme Court, in the final decision, suggested that state courts have a right to decide what they want to do with regard to administering wills originating in their own states. Since the state cannot transfer power over the park to private authorities, the state decided to give up control over the land altogether and give it back to its original owners, the heirs of Bacon. The new case was no longer about racial segregation in a park because it is no longer a park; it is privately owned land. The board of trustees of Bacon's will got what they wanted – control over the land rather than see the park be desegregated against Bacon's wishes.

This transformation of coalition is due to a manipulation of the legal terms of the debate, seemingly as a result of the dissenting opinion's suggestion to frame their case according to states' powers, rather than the substantive policy area of discrimination. The litigants – as well as perhaps the lower state courts – found a way to do this and won their case in a venue in which they had just lost. The Supreme Court justices in the dissent in *Evans v. Newton* also got what they wanted – a case that allowed them to strengthen states' powers.

II. A Heresthetical Theory of Signaling

Bacon's case is an example of Riker's celebrated theory of "heresthetics," a word created by Riker from the Greek root meaning "choosing or electing" (1986).[3] One type of heresthetical maneuver is when the actor who sets the agenda chooses the question strategically to generate supportive majority coalitions for a particular outcome, even when the majority may not seem

[3] Riker (1986) illustrates heresthetical maneuvering with examples such as Lincoln's proposal to Douglas in the Senate election of 1858. Knowing that the Republicans could only lose with their economic policy as the primary platform, Lincoln engaged in heresthetical maneuvering by asking Douglas to state his preferences about the rights of the citizens in territories to decide whether to be slave states. Douglas' response won him the Senatorial election in Illinois but was unpopular among Democrats as a whole. Lincoln used this technique to create a majority coalition in support of the Republican Party; he transformed the agenda from one about economic policy to one about the issue of slavery, thereby splitting Democratic support geographically on that question. Lincoln then beat Douglas in a bid for the presidency two years later.

supportive when the discussion is framed on another dimension. Specifically, the agenda setter can manipulate the substance of the proposal from one dimension to another to transform a minority coalition into a majority coalition. On the substantive dimension of allowing the city to transfer control to authorities who will allow the continuation of a segregated park, those who are interested in promoting Senator Bacon's interest lost. The justices who are interested in preserving states' powers also lost. On the procedural dimension of state control over wills and estates, those who promoted Bacon's interests won and the justices interested in preserving the powers of states also won. By signaling for a change in the dimension from the substantive dimension of discrimination to the procedural dimension of federalism, the dissenting coalition became the majority coalition.

But why do justices need to signal for cases in the future? Surely they can manipulate the issues of the cases themselves without needing to wait for them to be framed appropriately. Ulmer (1982) and McGuire and Palmer (1995) provide evidence that since justices prefer some issues over others, they create issues that were not presented before them, a phenomenon called "issue fluidity." Issue fluidity occurs in the form of "issue creation" when justices address legal questions in their opinions that were not presented to them in the legal briefs written by the parties' lawyers, or in the amicus briefs. Ulmer's (1982) path breaking study of issue fluidity shows that in *Mapp v. Ohio* (1961),[4] one of the most important cases in the Supreme Court's history about the exclusionary rule, the Court was not presented with the question of the exclusionary rule but rather was being asked to decide the extent to which the first amendment protects obscenity. The majority of six justices took this case as their opportunity to make a statement on the exclusionary rule, without regard for whether the parties asked them to address this question. In the first study of issue fluidity, Ulmer (1982) noted that landmark decisions – in other words, important decisions – often go along with issue creation.

The extent to which justices address issues that are not brought to the Court by the lawyer's or amicus briefs in the case is controversial. Epstein, Segal and Johnson (1996) suggest that some

[4] 367 U.S. 643.

justices consider issue fluidity inappropriate; it violates a norm considered important. A reasonable way of reconciling this controversy for the purposes of the theory being developed here is that it is more convenient for the justices when the lawyers present them with the legal questions that they want to resolve.

This is the benefit of signaling. Signaling consists of judges indicating their preferences to hear future cases on a particular topic or argued in a particular manner. Judges provide litigants with this information to encourage them to initiate cases, allowing judges additional control over the Court's agenda. Signaling allows justices to hear the cases they want, framed the way they want, making issue fluidity less necessary. Thus signaling offers the justices a means of having it both ways – a way of implementing their policy preferences while maintaining their appearance of being restrained.

Sometimes Supreme Court justices veer outside of what may be deemed appropriate by those who pay attention to the Court. There are many examples of this, *Bush v. Gore*[5] being one of the most notable of recent examples (e.g. Dionne and Kristol 2001). Justices may go outside of what the case asks them to resolve, they may choose to be more or less tethered to the law that is supposed to guide them. Yet justices are likely to want to limit the use of issue fluidity, as it is costly to their reputations as independent arbiters of the law, deciding the issues brought to them by independent parties. This is significant for the purposes of the theory being developed here because it explains the desire for cases that are framed the way the justices want. Signaling for appropriate legal vehicles with appropriate case facts, with appropriate parties, in the policy areas that they want to influence, is what allows them to maximize their policy making power while minimizing their need to expend what it takes – in their own view – to maintain legitimacy.[6]

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[5] 531 U.S. 98 (2000)

[6] It is necessary to explain the need for the caveat, "in their own view." Epstein and Knight (1998), among others, have detailed the importance of norms that are supposed to help maintain legitimacy and how this constrains the Court. However, the evidence of public opinion work on this subject suggests that justices following these norms has little impact on public perceptions of judicial legitimacy, given the public's woeful ignorance of the Court's inner workings.

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The focus of this article is whether this happens systematically at the Supreme Court, and to answer the myriad questions such behavior raises. When the dissenting opinion mentions the issue of federal versus state powers in a certain policy area – and the majority opinion does not – will there be more decisions on the Supreme Court's agenda in the future in which the majority decides cases on the basis of federal state powers, within that same policy area? We know of anecdotal examples; is there a reason to believe that this effect could be systematic? Moreover, can a conservative dissenting coalition gain the position of a majority in these future cases in those same policy areas when the cases are framed according to the balance of state and federal powers? Do liberal dissenting opinions have a similar impact?

Strategic litigants should (Jacobi 2005) and do (Baird 2004) bring litigation with the policy priorities of the Court in mind. Moreover, they should also bring litigation framed in such a way that will appeal to the most moderate justices' ideal preferences (Baird 2006). In other words, strategic liberal litigants will not ask the Court to make an extremely liberal decision when the Court is conservative; the group will instead try to bring legislation that appeals directly to the median justice. This is also likely true of conservative litigants when the Court is more liberal. The identity and placement of the median justice may depend on the legal issue presenting, giving a reason to consider the presentation of the question carefully.

When conservatives (liberals) find themselves in the losing coalition, conservative (liberal) litigants should try to find a way to frame a new case so that they can win. Litigants can manipulate the framing of the issues in the case so that a case is presented to the Court under a different light than the one that resulted in a loss for that coalition. One way to do this is to frame the issue along a procedural dimension, such as states' powers, rather than the substantive dimension that put them in the dissent in the first place.

The question in this paper is whether U.S. Supreme Court justices in losing coalitions engage

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Nevertheless, what is relevant to this study is justices' perceptions of what affects the Court's legitimacy, and not what actually affects popular perceptions of judicial legitimacy.

in heresthetical maneuvering by suggesting in their dissenting opinions that future cases should be framed along a procedural dimension, in this case, the balance of power between the federal government and states' powers, rather than along the substantive dimension. If so, is this heresthetical maneuvering successful – can the dissent become the majority in those future cases when framed that way? The hypothesis that justices successfully engage in heresthetical maneuvering by providing signals in their dissenting opinions to litigants about how to frame future cases is tested in the context of the effect of dissenting opinions that mention the procedural dimension of federalism on the resulting decisions – and directional outcomes – of the U.S. Supreme Court.

Heresthetical maneuvering is essentially an agenda setting tool, and as such, further elucidation can be provided through a brief Positive Political Theory analysis. This process can also be modeled more formally (see Jacobi 2005, Daughety and Reingamum 2006).

III. A Positive Political Theory of How Federalism Dissents Encourage Future Cases

Most Positive Political Theory (PPT) analysis of judicial decision-making involves one dimensional models. This work has been highly influential in analyzing judicial nominations (e.g. Segal, Cameron and Cover 1992) and inter-branch interactions (e.g. Eskridge 1990; Ferejohn and Weingast 1992). It is also useful in analyzing interactions between higher courts and lower courts (e.g. McNollgast 1994-1995; Cross and Tiller 1997-1998; Lax 2003). Judicial nominations, judicial hierarchies and inter-branch interactions all involve modeling actors who possess differing institutional motivations and powers, which can typically be represented usefully in one-dimensional space.

Judicial decision-making, in contrast, involves modeling multiple decision-makers that all have the same institutional motivations and constraints, although with potentially different preferences. Significant differences among the players tend to come from subtleties in analysis, rather than institutionally determined positioning, and that analysis often involves a second dimension. Limiting analysis of decision-making to one dimension would lead to the conclusion

that majorities are stable around the median. Figure 1 represents the ideological positions of judges on a multi-judge panel in one dimension – a left-to-right continuum, representing the full range between liberalism and conservatism – and the problem.

Figure 1: Multi-Judge Panels in One Dimension

Accounting for only one dimension of decision-making among actors with the same institutional considerations simply renders an array, ordered by ideological preference. Regardless of the position of the underlying status quo, the outcome will always be J_2, as the median always wins in a majority system. This is obviously overly simplistic: we know that the median judge on a panel does not always get his or her ideal outcome in an opinion (Cross 2006). Also, it implies that until there is a change of personnel on the Court, there is little point paying attention to dissents or bringing further cases challenging the majority outcome.

If the median is all powerful, why is dissenting to be a common practice? Judges on the losing side of an issue will want to find ways to undermine the existing majority. Having lost on the substance of an issue, judges can look to an alternative basis – a second dimension – for deciding the case, and in doing so potentially destabilize the winning coalition. Two-dimensional PPT models of judicial decision-making can capture the cross dimensional effect of federalism, and so more effectively model and predict judicial behavior and the responses it will provoke (see e.g. Spiller and Tiller 1996).

This is not merely a theoretic convenience: one dimensional representations of judicial decision-making are inappropriate for modern Supreme Court jurisprudence because federalism constitutes a salient second dimension.[7] While federalism is also a substantive area of the law, federalism as an issue of federal-state power is a procedural factor that crosses all other policy areas, as our empirical evidence below shows. Federalism issues do not simply constitute an additional

[7] See e.g. United States v. Lopez, 514 U.S. 549 (U.S., 1995); United States v. Morrison, 529 U.S. 598 (U.S., 2000); Solid Waste Agency v. United States Army Corps of Eng'Rs, 531 U.S. 159 (U.S., 2001); New York v. United States, 505 U.S. 144 (U.S., 1992); Printz v. United States, 521 U.S. 898, 922 (U.S., 1997).

policy area that should be analyzed on the one dimensional policy spectrum; instead, federalism constitutes a second dimension that cuts across all other major areas of the law. Table 1 illustrates that federalism arguments appear in majority opinions across all policy areas. In the policy areas of environment and taxation, federalism arguments appear in approximately 20% of cases.

Consequently, federalism constitutes a second dimension in judicial decision-making, which can be modeled using PPT techniques. Other variables such as standing arguably also constitute additional procedural dimensions. However, unlike standing which provides a mechanism of denying a claim, provides an alternative means of deciding cases in all areas of the law. As such, it is the most salient additional dimension, and so is the one examined here. Figure 2 represents the policy configurations represented in figure 1 with the addition of the second federalism dimension.

Figure 2: Multi-Judge Panels in Two Dimensions

Figure 2 maintains the position of each judge, J_1, J_2 and J_3, on the original dimension, the x-axis, as in figure 1, but introduces a new y-axis, federalism. Figure 2 illustrates the indifference curve of each judge for the status quo in two dimensions.[8] The addition of the second dimension has a number of significant effects for judicial agenda setting. First, it broadens the winset of any status quo from a single point at the exact ideal point of median justice, to a range of possibilities, extending both to the left and right of the median's ideal. For the status quo represented in figure 2, the entire shaded flower constitutes potential majorities.

Second, as the shaded flower above illustrates, those potential majorities include those that exclude the median. Every possible combination of judges can form a majority. As such, the median is no longer all-powerful, and can even be excluded from the majority. Third, if the status quo is outside the triangle J_1- J_2- J_3, the possibility for unanimous opinions is created. Fourth, the two-dimensional model predicts variation based on the underlying status quo. Different status quos

[8] The indifference curves are drawn as circular, which assumes that the two dimensions are equally salient for each judge. This is not a necessary assumption: the indifference curves could be elliptical, skewed either horizontally or vertically according to which dimension dominates each judge's decision-making preferences. The logic still holds. See generally, Tsebelis 2002.

will result in different winsets: the outcome and the potential majority supporting it is determined by the initial underlying facts, unlike the one dimensional model. Fifth, in the range of potential majorities created by the existence of the second dimension, policy stability is undermined. A majority exists that can overturn any other majority. Consequently, a decision made on the 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 would be extremely beneficial to introduce a federalism argument that constitutes an alternative means of addressing the policy question. If litigants respond to that federalism argument by bringing new cases on procedural grounds, which then work their way through the judicial system in the next few years, a majority will exist to overturn the initial outcome. This does not require any personnel changes or ideological convergence of the justices. It simply requires the second dimension of federalism to be salient to their decision-making.

The enlarged winset creates the possibility of cycling: the problem that an alternative can always garner a majority to overturn a status quo, which in turn can be overturned by another majority (Arrow 1951, McKelvey 1967, Schofield 1977). In the context of judicial decision-making, however, cycling is unlikely to create significant instability because many judicial decisions are dichotomous (see Spiller and Tiller 1996). For instance, the Supreme Court had the choice of returning the park to the control of Bacon's heirs, or continuing to entrust the authority of the park to the state. Figure 3 illustrates the effect of the federalism dimension under dichotomous judicial choices.

Figure 3: Multi-Judge Panels in Two Dimensions and Dichotomous Choices

For simplicity, figure 3 shows only the indifference curves of J_2 and J_3; for these two judges, the addition of the federalism dimension renders an ideologically extreme alternative, SQ_2 preferable to an ideological moderate status quo, SQ_1. With dichotomous choices, federalism will not offer the possibility of a viable alternative majority in every case; but it will do so when, as in figure 3, SQ_2 is interior to SQ_1 for a majority of judges, and will do so without cycling.

Why then do we see change over time, from cases decided on ideological grounds containing

federalism dissents, to later cases being decided on federalism grounds? Put another way, if a majority prefers SQ_2, why is this not the immediate outcome? It does not follow from the foregoing analysis that the alternative majority that rests on federalism grounds could be achieved in the first case: what we are describing here is not simply two dimensions of decision-making, but judicial signaling that occurs in the two dimensions of potential decision-making. Under this theory, judicial agendas are endogenously determined by the signals that litigants receive and respond to. As explained in section II, judges face criticism if they decide cases on grounds not argued; as such, it becomes necessary for judges who find themselves in the minority to signal the alternative means of deciding the case – federalism – so that they can then have cases argued in the appropriate manner to realize the potential alternative majority and achieve their desired outcome.[9]

The conclusions above apply even if there is a strong correlation between the two dimensions. In fact, even if there is a perfect correlation for each judge between their views on each dimension, as long as the status quo is not also perfectly correlated, these findings hold. So if the federalism axis is a pretext for the policy aims of each of the judges, i.e. the second dimension is purely the methodological means of reaching the outcome preferred by each judge on the first dimension, these results hold.[10] 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.

Figure 4: Multi-Judge Panels in Two Dimensions with Dimensional Correlation

The only condition required for the foregoing conclusions is that status quos is not also perfectly correlated with the judges' views on the two dimensions. Figure 4A illustrates the situation

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[9] This differentiates our analysis from authors who have previously considered judicial decision-making in two dimensions – such as Spiller 1992; Spiller and Tiller 1996 – as well as those who do not – such as Stearns 2000.

[10] In contrast to a one dimensional model of judicial decision-making, which implicitly assumes that J = f(I), i.e. judicial decision-making is a function only of ideology, we have modeled judicial decision-making as J = f(I, F), i.e. judicial decision-making is a function of ideology and federalism. If the federalism dimension is perfectly correlated with the ideological dimension, then J = f(I, F), but I = F, so J = f (I, I) = f(I). As such, a two dimensional model adds nothing to a one dimensional model, because judicial decision-making is purely a function of ideology.

of perfect correlation for the judges, but not the status quo. As can be seen, even with perfect correlation for each judge between their policy and federalism views, a winset still exists to overturn the status quo. In fact, in figure 4A, a range of unanimous decisions are possible. As figure 4A illustrates, even under the strong assumption that perfect correlation exists between each judge's views on the two dimensions, as long as the status quo is not perfectly in line with those positions, the results outlined above hold. Consequently, a range of possible majorities will exist. Then, the median judge will be most influential, as J_2's entire indifference circle is included in the winset for the given status quo. However, the winset also includes a range in which J_1 and J_3 can form a majority.

Figure 4B illustrates what happens when the sole condition outlined above does not hold. It shows a situation where there is perfect correlation between not only each of the judges' views on each axis, but also when the aforementioned condition does not hold, that is when the status quo is also perfectly correlated with the judges' views on each axis. The situation illustrated in Figure 4B constitutes an exception to the results above; but this is equivalent to only one dimension being operative in judicial decision-making. That is, the only circumstance in which the federalism dimension does not create the possibility of alternative coalitions and outcomes is when judicial analysis and potential outcomes only occur in one dimension.

Overall, only one narrow exception exists to the results above, and that is when there is effectively no relevant second dimension. As long as judicial decision-making is affected by more than simply the left-right ideological policy continuum, this model explains why a dissent that relies on federalism, and signals the possibility of an alternative outcome argued on federalism grounds, can then result in a majority in favor of the original dissenter's position. We now formalize the hypotheses of this theory and test those hypotheses.

IV. Data and Measurement

The data used for this analysis is the United States Supreme Court Judicial Database[11] as well

[11] *United States Supreme Court Judicial Database* (updated annually), (Ann Arbor, MI: Inter-University Consortium for Political and Social Research, 1997), published as study #9422.

as Phase II of the United States Supreme Court Judicial Database.[12] Phase II includes data on every opinion for every case between 1953 and 1986. These data code all majority, dissenting, and concurring opinions for whether the authors of the opinion invoke topics about federalism or whether they make statements about whether federal or state powers are expanded in relation to one another.[13] In the case of majority opinions, these statements can be thought of as policy making statements. In the case of concurring or dissenting opinions, these statements can be thought of as cues for the justices' preferences about how the case should have been decided. Opinions within all policy areas can invoke the question of federal versus state powers. In theory, all cases that reach the Supreme Court implicitly deal with whether federal jurisdiction applies in the case and therefore whether the Supreme Court has the right to hear the case at all. Nevertheless, there are opinions in which the justices explicitly assess whether the issues in the case invoke questions about the balance of power between federal and state powers.[14]

The analysis takes place in three stages. In the first, the primary independent variable is conceptualized as the signal from the dissent to bring more cases to the Court, framed with regard to federal versus state powers. It is operationalized as the number of dissenting opinions in each policy area for each year that mentions the case's implications for the legal relationship between the states and the federal government. It is only coded positively when the majority opinion does not

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[12] ICPSR number 6987. Gibson, James L. UNITED STATES SUPREME COURT JUDICIAL DATABASE, PHASE II: 1953-1993. ICPSR version. Houston, TX: University of Houston [producer], 1996. Inter-university Consortium for Political and Social Research, Ann Arbor, MI [distributor], 1997.

[13] The reliability of the coder for whether federalism is mentioned is 88%. This is not a perfect reliability but it is likely that problems in the reliability of the coding only have an impact on random measurement error and therefore should not bias the coefficients, even if it makes them less efficient. Therefore, estimates here are probably relatively conservative.

[14] The intercoder reliability of whether cases fall within the topic of federalism is 88.2%. The intercoder reliability of whether the opinion mentions whether the case extends or limits states' powers in relation to federal powers is 87.8% and 88.2% for two recoders respectively. Thus, these codes are fairly reliable. Opinions that were coded as having the topic of federalism or those that either extended state or federal powers were coded as having invoked the issue of federalism in the opinion.

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. Because the purpose of this paper is to assess how the dissent signals for issues to transform itself into the majority, it focuses on signals that come only from dissenting opinions.

There are three hypotheses in this analysis predicting case selection and case outcomes. Hypothesis 1 is that an increase in federalism dissents cause an increase in future cases decided at least partially on the basis of federal versus state powers. The second and third hypotheses build on hypothesis 1, specifying by ideology. Hypothesis 2 is that liberal dissenting opinions that mention federalism when the majority opinion does not mention federalism lead to future majority opinions that mention federalism and move the Court's ideological placement in a liberal direction. Hypothesis 3 is that conservative dissenting opinions that mention federalism when the majority opinion does not mention federalism lead to future majority opinions that mention federalism and move the Court's ideological placement in a conservative direction. The second two hypotheses will be considered later in the paper.

As a reminder, the units of analysis are policy areas for every year, so the effect occurs within each policy area over time. The dependent variable is the number of cases[15] that mention federalism in the majority opinion, across all policy areas. What constitutes an opinion that mentions federal versus state powers is not perfectly straightforward. According to the most expansive definition, implicitly all cases have to be decided on this basis before the Court can hear the case. There must be a federal issue before the Court has legal jurisdiction. However, in the majority of cases, the issue

[15] What constitutes a case is not exactly straightforward. According to the theory that attention to a particular policy area is measured by whether the Court decides something in that area, we included all orally argued cases, whether they resulted in signed or unsigned opinions, including per curium decisions and judgments. We excluded memoranda, decrees and any case that resulted in a split vote. Multiple docket numbers that the justices include into a single case citation are counted only once. At times, some case citations represent multiple issues. When these issues span across different policy areas, they are counted once for each issue represented; otherwise, they are only counted once.

of federal jurisdiction is so obvious as to not require comment from the justices on the issue.

More narrowly, when cases are coded for the most relevant issue, they may be coded positively as being within the policy area of federalism. 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.

In Phase II of the Judicial Database, every opinion for every case is coded for whether it mentions the issue of the balance of power between the federal government and the states as one of the topics.[16] Therefore, a coder is to look at all opinions to see 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 considered as representing other topics or issues; therefore, it can be just one of many issues and must not be coded as the primary or secondary issue. Therefore, if the opinion writer mentions the implications of the decision for federal versus state powers at all, then it is coded positively.

To code the ideological direction of the dissenting opinions (liberal or conservative), we use the measure of the ideological direction of the decision and code the dissent the opposite

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[16] The topic is given the code of 80.2. The description of this code is as follows: this category focuses on the question of whether the nation or the state has authority in the area of police powers to promote the health, welfare, safety, and morals of the citizens. It also includes cases of federal pre-emption of state jurisdiction and state court jurisdiction, disputes over whether there should be national or uniform rules of behavior, or whether states should be permitted to make their own rules.

The presence of the value of federal power versus state power is coded positively if, in answer to the question: does the opinion writer vote in support of the power of the national government or the power of the state government, the coder believes that either the state or the federal government is advantaged.

direction.[17] Table 1 presents the number and percentage of cases during the time frame of 1953-1986 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 the basis of the balance between federal and state powers, ranging from 3% in the privacy policy area to 50.4% of cases in the federalism policy area, but most commonly, the percentage of cases range between 5% and 20%. There do not seem to be large differences between the percentage of liberal cases as compared to conservative cases that mention the values of the balance of state and federal power, but the tendency leans slightly toward liberal majority opinions. Dissents that mention federalism when the majority opinion does not mention federalism are relatively rare, usually 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.

Table 1. Number of Cases and Percentage Mentioning the Balance of Federal and State Powers on the Supreme Court by Policy Area, 1953-1985

V. Analysis I: Predicting the Increase of Majority Opinions Mentioning Federal-State Balance of Power

The question addressed here is: do dissenting opinions that mention the balance of power

[17] According to the documentation of the United States Supreme Court Judicial Database, liberal is pro-person accused or convicted of crime, or denied a jury trial, pro-civil liberties or civil rights claimant, pro-indigent, pro-Indian, pro-affirmative action, pro-neutrality in religion cases, pro-female in abortion, pro-underdog, anti-government in the context of due process, except for takings clause cases where a pro-government is conservative, anti-owner vote is considered liberal except in criminal forfeiture cases, pro-attorney, pro-disclosure except for employment and student records. In the context of issues pertaining to unions and economic activity, liberal is pro-union except in union antitrust, pro-competition, anti-business, anti-employer, pro-liability, pro-injured person, pro-indigent, pro-small business vis-a-vis large business, pro-debtor, pro-bankrupt, pro-Indian, pro-environmental protection, pro-economic underdog, pro-consumer, pro-accountability in governmental corruption, anti-union member or employee vis-a-vis union, anti-union in union antitrust, and pro-trial in arbitration. Between the Warren and Burger Courts, the average intercoder reliability of this variable is 99%.

between states and the federal government in certain policy areas cause litigants to reconsider how they frame their cases (or groups to reconsider which case facts and legal arguments to choose) resulting in an increase in majority outcomes in the same policy area that are decided (at least partially) on the basis of the state versus federal balance of power? The analysis is pooled cross sectional time series analysis because units of analysis are the policy area by each year. The model is estimated using Generalized Least Squares computing Ordinary Least Squares parameter estimates with panel corrected standard errors, according to Beck and Katz's recommendations (1995). Since the policy areas may be correlated, we specify a model that allows for correlation among the cross-sections.[18] Furthermore, since there is a great deal of variation in the number of issues across policy areas, we control for such variation by including a dummy variable for each policy area.[19] To deal with autocorrelation, we include a specification for an autocorrelation term of the first order.

Figure 5 shows the results for the test of hypothesis 1. The x-axis is the tine lag between the dissent tension in federalism and later majority opinions that mention federalism; the y-axis is the number of cases resulting. The figure shows the impact of federalism dissents on majority opinions, within a 95% confidence interval.

Figure 5. The Effect of Dissenting Opinions that Mention Federalism on Majority Opinions that Mention Federalism

Figure 5 shows, as hypothesized, that the number of dissenting opinions that mention federalism in each policy area (only dissenting opinions when the majority makes no mention of state versus federal power) has a positive impact on the number of subsequent majority opinions

[18] The policy areas might be correlated with one another for several reasons. One reason is that the Supreme Court's decision to take up an issue in one policy area potentially leaves less room for cases in other areas. Thus, there is the possibility of negative correlation among some pairs of broad policy areas. Another reason is that when the Court is interested in First Amendment issues, for example, it might also be more likely to grant certiorari to cases that represent other civil rights policy areas, suggesting a possible positive correlation. This may not be true in every instance, but the assumption that it can never be true is not justifiable.

[19] The model includes the panel dummy variables; however, figure 4 does not report the results for these variables.

that mention federalism. The coefficient is statistically significant at the .09 level for a two tailed test. But since we had a good theoretical reason to expect a positive effect, there is reason to use a one tailed test, in which case it would be significant at the well accepted .05 probability.

This process takes six years to occur, which is closely consistent with a previous finding that politically salient decisions cause litigation which affects the Supreme Court's agenda four and five years later (Baird 2004). It is unclear why it would take, on average, a year longer, for these dissenting opinions to have an impact on future majority outcomes, as compared to Baird (2004). It may be that it takes longer for these kinds of signals to work because it may take a state or a federal government actor to act in such a way that causes the case or controversy that causes a case.

Substantially, one federalism dissent results in 0.19 later majority opinions based on federalism, but this figure probably understates the substantive effect for a number of reasons. First, since the Supreme Court has discretion over granting certiorari, our results are likely to underestimate the extent that federalism dissents instigate future cases, as the earlier dissent may produce many more cert. petitions than the Court hears. As such, our results will capture the minimum effect that federalism dissents provoke.

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

Moreover, we have been as restrictive as possible in our definitions – only allowing dissenting opinions when the majority does not mention federalism. Concurring opinions may have an impact. Or, there may be signals outside of the particular policy area that have an impact that would not be observed in this analysis. Thus, this analysis is a conservative estimate of the impact of

these signals on the resulting agenda, and so we can be confident in the rigor of the results.

As such, this first result provides strong support for the conclusion proposed by hypothesis 1 that dissents that are based on federalism when the majority opinion is not encourage litigants to bring similar cases on federalism grounds. These cases then result in majority opinions that reflect the original dissenting position in a significant number of cases.

The next step in the analysis is to find out what impact these new majority opinions have on the ideological placement of Supreme Court decisions. Are these dissenting opinions successful in garnering the support of additional justices, therefore allowing them to become part of the majority in these future cases? Can dissenters, by signaling litigants to frame cases along the federal-state dimension, become represented in the majority cases that actually are decided on federalism grounds? To test this hypothesis, we need to measure the ideological placement of cases. 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 opinions that mention federalism are handed down. 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. The next section discusses the measure of the ideological placement of cases and then tests these two hypotheses.

VI. Measuring the Ideological Placement of Cases

Traditionally, judicial scholars have used the percentage of liberal decisions to measure the ideological 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. Bailey (2002) compares this problem to evaluating students with different tests:

> 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.

He continues:

> 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.

The traditional measure of judicial ideology does not make use of all of the available information: in order to assess the ideological balance of Supreme Court majority coalitions, we can use the measured preferences of those in the majority coalition to measure the output of any case that the Supreme Court hands down. If only five of the most liberal justices agreed with the liberal decision, then the case was probably not that obvious. The ideological placement of the outcome of such a non-obvious case is more liberal than a case in which all justices agreed to the liberal decision. The same is true for conservative decisions. When only the five most conservative justices agree with a decision, then the case is less obvious and the outcome more conservative. When all justices agree with a conservative decision, the case is relatively obvious and therefore, less conservative. "Obviousness" then increases as the number of members in the majority coalition increases.

To restate the problem: cases differ in the placement of their point in ideological space as the agenda is set. When the Court is asked to assess an extreme status quo, then more members of the Court are likely to be represented in the majority coalition. This is because the placement of the status quo is more extreme than what is acceptable to even those justices who are more likely to be friendly to that position. 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 makes a liberal decision, 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. This logic lends itself to use the ideological preferences of the justices on the Court to determine the placement of the cases. We have developed a measure of judicial ideology of the

justices that can adjust for the changes in the ideological position of the Court over time.

To develop a measure that can be derived from an ideological continuum that is constant over time, we first need a valid estimate of the ideological preferences of Supreme Court justices. Martin and Quinn (2002) developed a measure of ideal points of Supreme Court justices, which are similar in spirit to Poole and Rosenthal's D-NOMINATE scores, in that it is based on a rank ordering of justices and the standard is constant, whereas the justices can change in their designation on this constant scale (1997).[20] It is essential that a measure of justices' ideal point rely on a standardized scale for this analysis because this process takes place over half a century. Moreover, it is important to use a measure that allows justices to move over time, because as Martin and Quinn (2002) find, justices' ideal points do not remain constant over time. For example, they note that Brennan becomes more liberal over time, as do Souter and Blackmun (2002).

Martin and Quinn take advantage of voting coalitions to make inferences about the relative placement of justices. To be specific, a justice that is very often a lone dissenter in conservative cases will be ranked as more liberal than a colleague who sometimes joins him in 7-2 conservative decisions. If the colleague is rarely the lone dissenter in conservative cases, then he will be designated as a little 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. Furthermore, this measure provides standardized comparisons over time. Thus, even though Breyer was never on the Court with Brennan, Breyer's scores can be compared to Brennan because Brennan was on the Court with other justices who were on the Court with Breyer. Therefore, the rank order measure simultaneously accounts for change over time and across justices for all years, and therefore renders the ideal points of the justices a standardized comparison of justices with one another over time.

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[20] These scores are different from Poole and Rosenthal's D-NOMINATE scores in that they use Markov chain Monte Carlo methods to fit a Bayesian measurement model to designate ideal points of each Supreme Court justice that are allowed to vary in any pattern imaginable over time without restricting the movements to be linear.

Table 2. Select Supreme Court Justices and their Ideal Points

To measure the place in ideological space of each decision, we used these ideal points to calculate the ideological 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 the justices have in determining the outcome of the case is not clear from the outcome of the decision. Second, since it is difficult to estimate the placement of the status quo (or outcome alternative), it is difficult to use the cut points between justices to show the exact placement. Furthermore, 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. Ideological outcomes within the same year and policy area could vary quite a bit even given identical means. Nonetheless, we believe that this measure is a valid indication of where the Supreme Court places its policies ideologically – it certainly improves upon the simplistic dichotomous conception of liberal versus conservative.

The use of this measure constitutes a significant change in assessing judicial ideology, and so warrants close examination. We have undertaken a more thorough intuitive and formal defense of this measure in a separate working paper (Jacobi and Baird Nd). This working paper compares the estimates of a formal model with our measures of the judicial ideology of justices serving between 1953 and 1986. The formal model estimates the size and ideological placement of potential judicial coalitions. These estimates are based on a continuum of underlying status quos, and three proposed judicial decision-making rules, stemming from a variety of known judicial norms. Our results show a strong correlation between the predicted equilibria resulting from the theoretical model and the empirical measure applied to the current data.

In sum, we have created a measure of the ideological placement of Supreme Court policy outputs. Using Martin and Quinn's (2002) measure of ideal points, we aggregate the 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 1953-1995. Such measures can be calculated for any subset of cases. In this case, we calculate measures to show the distance between the Supreme Court placement in non-federalism cases to compare with those outcomes in cases in which federalism is mentioned.

VII. Analysis II: Explaining the Ideological Placement of Future Majority Opinions that Mention the Federal-State Balance of Power

The two ideologically specific hypotheses are being tested here. The first is that liberal dissenting opinions that mention federalism when the majority opinion does not mention federalism leads to future majority opinions that mention federalism and move the Court's ideological placement in a liberal direction. The second is the same hypothesis but for conservative dissenting opinions, which should lead to moves toward a conservative policy output. The dependent variable is a measure of ideological movement: it equals the change in the ideological placement of the Court's dissenting opinion at year 0, signaling for the transformation, to the ideological placement of those cases at year 6, in which the majority opinion recognizes the case's implications for federal versus state power. We use the six year difference because this is the time it takes for the Court to hand down more cases that are decided on the basis of federalism in response to the signals in the dissenting opinions, as previously established.

To illustrate the operationalization of the dependent variable, in 1955, the mean of the ideological placement for the policy area of discrimination is -.16. In 1961, six years later, the mean of the ideological placement for cases that mention federalism in the majority opinion is -.56. Therefore, the value of the dependent variable for 1961 for the policy area of discrimination is -.41.[21] Policy moved .41 on the scale in a liberal direction. Another example is 1968, when the majority ideological placement for all cases is -1.03. Six years later, the ideological placement of cases that mention federalism in the majority opinion is .47, accounting for a 1.5 change in a conservative direction. Much of this change may have to do with a change in the placement of the

[21] Rounding error accounts for the discrepancy.

median justice (in this case because of replacements on the Court). For this reason, there is a control for the placement of the median justice in the analysis. A positive value is a move in a conservative direction, whereas a negative value indicates a move in a liberal direction. Thus, liberal dissents should cause negative ideological moves and conservative dissents should cause positive ideological moves. 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.

As in the previous analysis, the units of analysis are the policy area for each Supreme Court term from 1953 to 1986. Thus, the signals and the resulting agenda transformation are hypothesized to occur within each policy area. The independent variables are the number of liberal and number of conservative dissenting opinions that mention federalism, when the majority opinion makes no mention of federalism. Again, we use Generalized Least Squares with Ordinary Least Squares parameter estimates with panel corrected standard errors. Again the model allows for correlations among the policy areas, and moreover, controls for the effects within each policy area by including policy area dummy variables. To deal with autocorrelation, we include a specification for an autocorrelation term of the first order.[22]

Whereas the previous analysis included all eleven policy areas, there are excluded policy areas in these analyses. In the analysis of the effect of conservative dissenting signals, the policy area of judicial power is excluded because there were no instances of conservative dissenting opinions that mention federalism when the majority opinion does not. In the analysis of the effect of liberal dissenting signals, the policy areas of privacy, environment and labor are excluded because there

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[22] Because there is a great deal of missing data, when there are no cases that do not mention federalism in the majority opinion, there is missing data on the dependent variable. In these cases, 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 pairwise regression. (Otherwise, computation is impossible). The results are substantively identical.

were no instances of liberal dissenting opinions that mention federalism when the majority opinion does not.

Figures 6 and 7 present the results of the analysis of conservative and liberal dissenting opinions respectively on the change in the direction of the Court's ideological placement over a six year time period. As in figure 5, the x-axis is the time lag between a federalism dissent and a later majority opinion, but the y-axis here is the mean of the majority coalitions, where conservative movements are positive and liberal movements are negative.

Figure 6. The Effect of Conservative Dissenting Opinions on the Change in the Ideological Placement of the Supreme Court's Policy Outputs that Mention Federal versus State Power

Figure 7. 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

As expected, conservative dissents cause moves 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. This means that liberal dissents that mention federalism cause a move in the liberal direction of the Court's overall policy outputs, six years later. Conservative dissenting opinions have a similar impact.

These effects are both statistically and substantially significant. 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. To put this in context, the standard deviation of the means of majority coalitions over all is approximately .5, and so a federalism dissent moves outcomes by approximately one third or more of the standard deviation of the whole scale. This provides strong support for hypotheses 2 and 3, and for the general proposition that dissenting signals not only transform the basis on which future cases are argued, but that engaging in signaling provides previously losing judges with an opportunity to create winning coalitions and move the

overall ideological direction of case outcomes in a given policy area.

VIII. Implications

We find that strategically minded justices signal for cases to be framed in ways that will help them persuade their fellow justices to vote with them in the future. Dissenting opinions that mention the implications of the decision for federal versus state powers implicitly suggest to likeminded litigants possible ways to frame the case to win a majority of justices to their side. These dissenting opinions serve as the sole signal, since they are only counted when the majority opinion makes no mention of federalism.

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 facade for conservatism; nor are the changes we capture simply the result of an increasing use of federalism for conservative ends. 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, not only do these dissenting signals get more cases decided on the basis of federalism, but they succeed at moving policy in their favored direction.

These findings suggest that the story about Senator Bacon's will is not anomalous. Although the example 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. Signals may cause a new chain of events in a different circumstance to bring about litigation with a new way of framing the case. In other words, responses to signals need not be of the same or similar case facts. Signals inspire ideas on the part of sophisticated litigants, litigant entrepreneurs and other political or legal actors whose actions may inspire litigation.

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; and litigant responsiveness to that behavior.

First, our findings confirm that judicial signaling occurs and is a powerful tool for judges 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 judges desire. The results confirm that six years after the original dissenting federalism signal, we observe a significant increase in cases arguing the issue on federalism grounds. Signaling also shapes the outcome of cases, by allowing judges to propose alternative grounds on which to decide cases, and those grounds have been shown to provide means of undermining previous majorities and reversing earlier outcomes. Liberal dissenting signals result in future reversals in a liberal direction; conservative dissenting signals result in future reversals in a conservative direction.

Second, while our results in no way disprove or discredit the notion of issue fluidity, they do show that judges often have other options available to them to achieve non-obvious outcomes. And while judges may be able to manipulate issues themselves, 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 judges. 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 judges.

Third, our results confirm the importance of federalism in Supreme Court jurisprudence. Federalism constitutes an alternative means of deciding cases, across the entire spectrum of issue categories. Additionally, these results indicate the manipulative power of federalism: federalism has been shown to be regularly used by judges 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.

This third implication has significance beyond federalism. 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 (1981) contention that manipulation of the level of generality of a legal question is highly determinative of its answer.

Fourth, our findings suggest a form of strategic judicial behavior – signaling to litigants in the hope of manipulating the Court's agenda – occurs in a significant number of cases. 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 on the Court into consideration (Palmer 1982; Brenner and Krol 1989; Boucher and Segal 1995; Epstein and Knight 1998; Caldeira, Wright and Zorn 1999). 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 influenced by the both substantive and procedural dimensions of an issue.

Fifth, our results suggest 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 argued on federalism grounds. Related to this, one contribution of this paper is that it begins to integrate the spatial models of congressional agenda setting to those of the Supreme Court. Though political scientists have accumulated substantial knowledge about the relationship between agenda control and congressional outcomes (eg. Romer and Rosenthal 1978; Enelow and Hinich 1984; McKelvey and Schofield 1987; Shepsle and Weingast 1987), 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. The suggestion here is 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 implication of this analysis is the implications for future research. If signals about federalism can inspire future litigation, then there are perhaps other ways

to signal in dissenting opinions to get cases framed the way the dissenting justices would like to see cases framed. These dissenting justices may be signaling strategically in ways that they might not otherwise signal, in dimensions that may be less appealing than winning in the substantive policy area. But having lost in the substantive policy area, the justices already know that they can not have it exactly the way they want it. Therefore, they signal. Additionally, signaling may not be restricted to dissenting opinions, but rather may occur in other forms, such as concurrences. Our findings suggest that 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.

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Figures and Tables

Figure 1: Multi-Judge Panels in One Dimension

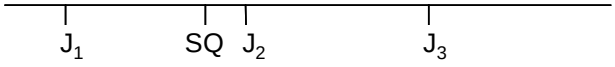


Figure 2: Multi-Judge Panels in Two Dimensions

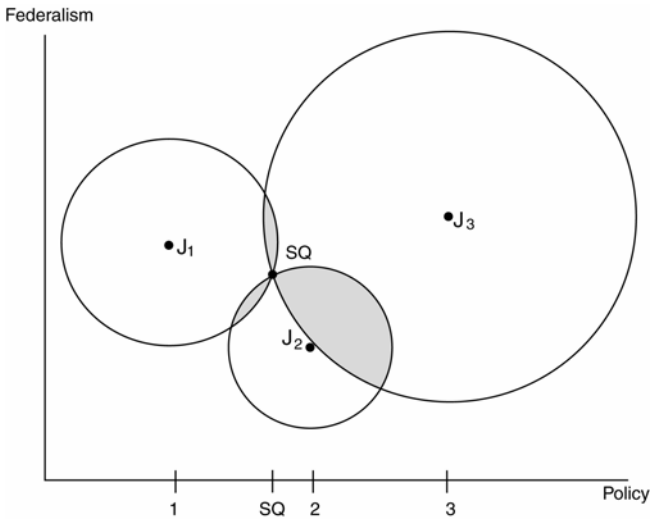


Figure 3: Multi-Judge Panels in Two Dimensions and Dichotomous Choices

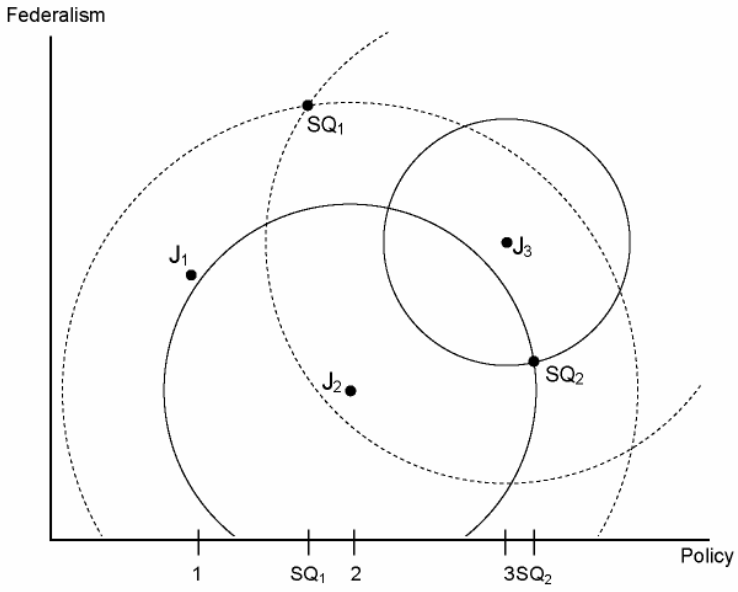


Figure 4: Multi-Judge Panels in Two Dimensions with Dimensional Correlation

Figure 4A

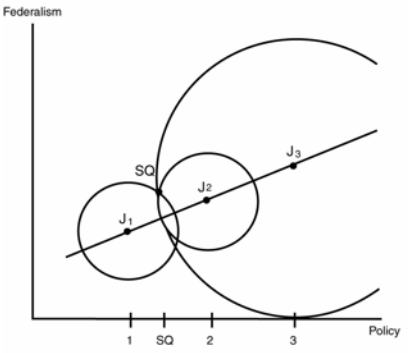


Figure 4B

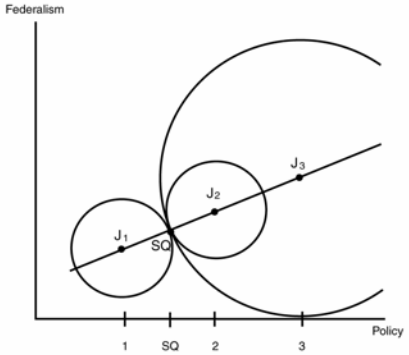


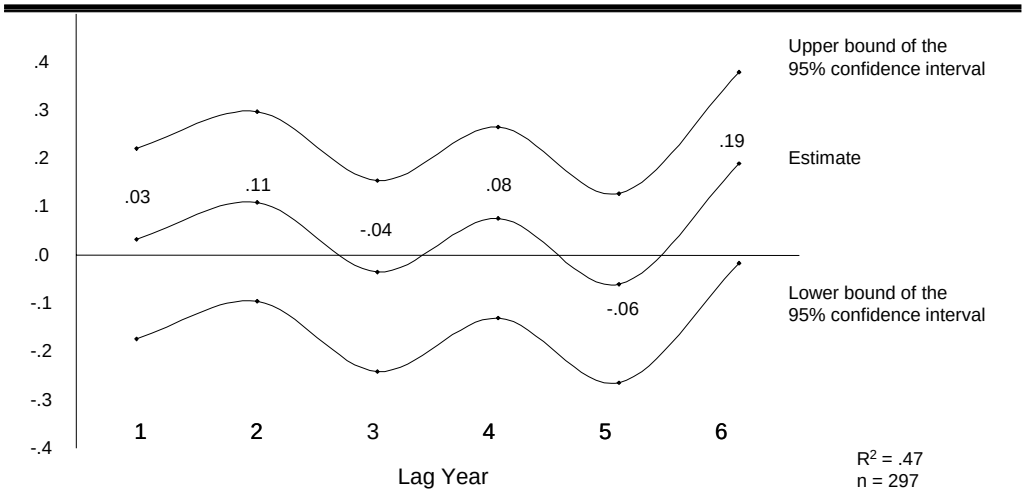
Table 1. Number of Cases and Percentage Mentioning the Balance of Federal and State Powers on the Supreme Court by Policy Area, 1953-1985

Policy Area	Federalism in Majority Opinion	Federalism in Liberal Dissent Only	Federalism in Conservative Dissent Only
Discrimination	159	16	25
	15.6%	1.6%	2.5%
First Amendment	25	2	20
	4.6%	.4%	3.7%
Privacy	2	0	3
	3.5%	.0%	5.3%
Criminal Rights	79	17	12
	5.8%	1.3%	.9%
Labor	25	1	2
	8.4%	.3%	.7%
Environment	21	0	3
	21.6%	.0%	3.1%
Economic Regulation	104	7	12
	10.7%	.7%	1.2%
Taxation	64	3	5
	20.1%	.9%	1.6%
Due Process and Government Liability	25	3	2
	9.8%	1.2%	.8%
Judicial Power	99	9	9
	9.6%	.9%	.9%
Federalism	141	10	5
	50.4%	3.6%	1.8%

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.

Figure 5. The Effect of Dissenting Opinions that Mention Federalism on Majority Opinions that Mention Federalism



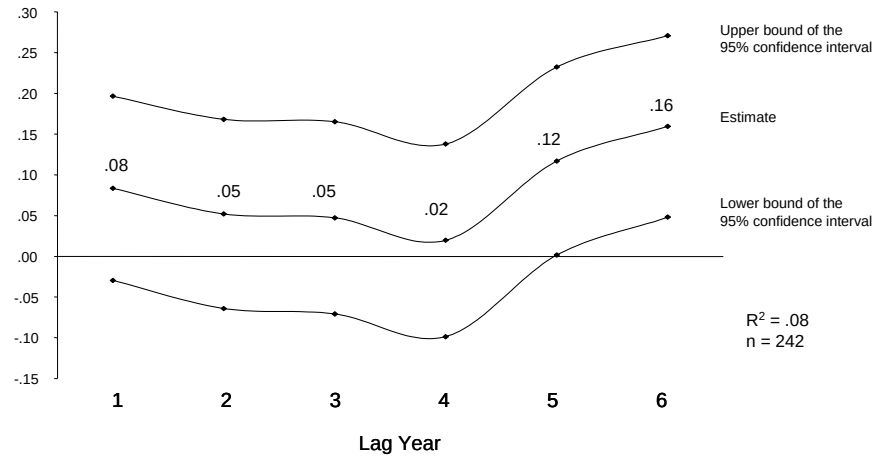
Estimates are Ordinary Least Square unstandardized regression coefficients and confidence intervals are computed using panel corrected standard errors, calculated according to Beck and Katz (1995). The dependent variable is the number of cases on the Supreme Court's agenda that have implications for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

Table 2 Select Supreme Court Justices and their Ideal Points

Justice	**Ideal Point**
Douglas	**-6.15**
Marshall	**-4.29**
Brennan	**-3.73**
Stevens	**-3.19**
Blackmun	**-1.87**
Ginsburg	**-1.72**
Warren	**-1.47**
Souter	**-1.23**
Breyer	**-1.04**
Stewart	**.67**
White	**.52**
Powell	**.76**
O'Connor	**.79**
Kennedy	**.95**
Burger	**2.00**
Rehnquist	**1.81**
Scalia	**3.70**
Thomas	**3.77**

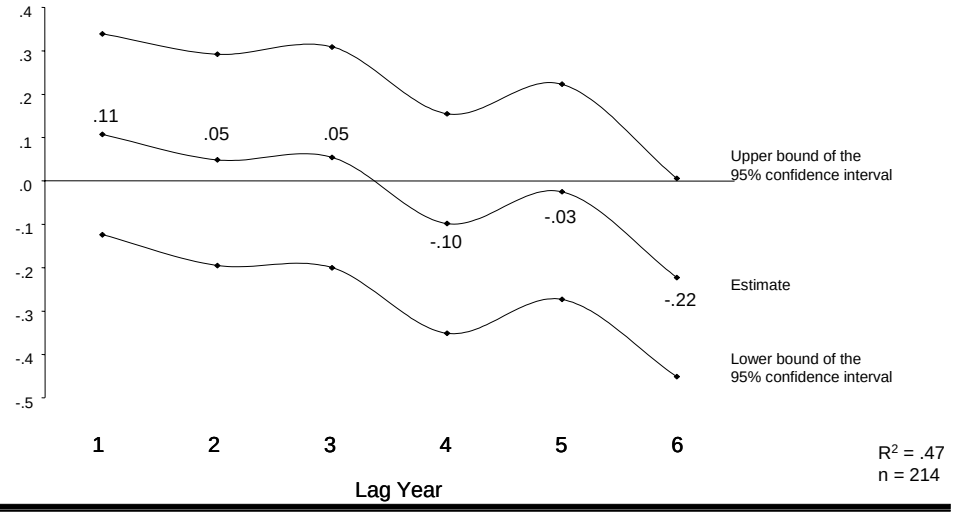
Note: Ideal Points for current justices are ideal points that were calculated in the 1999 term. For other justices, we used the ideal point that was calculated in the last term in which they served.

Figure 6. The Effect of Conservative Dissenting Opinions on the Change in the Ideological Placement of the Supreme Court's Policy Outputs that Mention Federal versus State Power



Estimates are Ordinary Least Square unstandardized regression coefficients and confidence intervals are computed using panel corrected standard errors, calculated according to Beck and Katz (1995). The dependent variable is the ideological placement of the Supreme Court's cases in which the majority opinion mentions the balance of power between the states and the federal government, across eight policy areas from 1953-1985. The independent variable presented here is the number of conservative dissenting opinions that mention federalism when the majority opinion does not mention federalism. The y axis plots the slope coefficient and the x axis plots the lag year of the effect. The policy area of judicial power is excluded because there were no instances of conservative dissenting opinions that mention federalism when the majority opinion does not. Controls in this analysis include policy area dummy variables and a Burger Court dummy.

Figure 7. 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



Estimates are Ordinary Least Square unstandardized regression coefficients and confidence intervals are computed using panel corrected standard errors, calculated according to Beck and Katz (1995). The dependent variable is the ideological placement of the Supreme Court's cases in which the majority opinion mentions the balance of power between the states and the federal government, across eleven policy areas from 1953-1985. The independent variable presented here is the number of liberal dissenting opinions that mention federalism when the majority opinion does not mention federalism. The y axis plots the slope coefficient and the x axis plots the lag year of the effect. The policy areas of privacy, environment and labor are excluded because there were no instances of liberal dissenting opinions that mention federalism when the majority opinion does not. Controls in this analysis include policy area dummy variables and a Burger Court dummy.