Looking Back to Move Forward: Quantifying Policy Predictions in Political Decision Making

Ryan C. Black Michigan State University
Ryan J. Owens University of Wisconsin

Policy makers constantly face uncertainty, which makes achieving their goals problematic. To overcome this uncertainty, they employ tools to drive down uncertainty and make probabilistic decisions. We provide a method for scholars to assess empirically how actors make probabilistic predictions. We focus on the interactions between the executive and judicial branches, analyzing the conditions under which justices force the United States to provide them with information. Our approach generates substantive knowledge about interbranch behavior as well as a methodological innovation available to scholars who study political decision making under conditions of limited information.

Information is power. When political actors lack information—or worse yet, when they have less of it than their opposition—their power diminishes. And so they try to drive down their uncertainty and make probabilistic decisions. When faced with uncertainty about the policy outcomes of their decisions and the likely responses of those with whom they must interact, they will ask themselves, "How likely is it that my decision and its resulting outcome will improve the existing state of affairs?" If they predict that the resulting policy will improve the status quo, they will move forward with change. If not, they will protect the status quo. This is the essence of forward-looking behavior.

While simple in theory, strategic forward-looking behavior is difficult in practice and raises a host of complex questions. For instance, how can political actors acquire the information they need? And, assuming they have less than perfect and complete information when making decisions, how can they predict their colleagues' responses, or the responses of actors who monitor them? They can do so, we believe, by using their institutional tools to channel information toward them and by making probabilistic predictions.

We provide two contributions to scholarship on political decision making. Existing models of strategic decision making either assume that actors have complete and perfect information or examine how actors seek to collect information to overcome their informational shortcomings. While important contributions, to be sure, these approaches neglect how decision makers jointly seek out information and make probabilistic predictions. We theorize and examine how actors employ their institutional tools to overcome uncertainty and devise an empirically executable theory for how policy actors make probabilistic predictions. Put plainly, by seeking out information *and* by making probabilistic predictions, political decision makers can accomplish their goals more effectively.

This modeling approach offers a way for scholars to examine political decisions made in an interdependent environment subject to information constraints. For example, as we highlight in our discussion, scholars can apply our approach to examine how legislative committees make strategic forward-looking decisions when faced with uncertainty regarding how their parent chambers will react. We also believe that scholars could apply our approach to examine how oversight influences American bureaucratic responsiveness. What is more, the approach could also apply to political behavior in non-American settings. For example, comparative scholars can employ our approach to examine how member states in, say, the European Union operate in the face of higher supervisory institutions. Indeed, since actors in numerous contexts must use their institutional tools to acquire information and make probabilistic predictions, our approach can shed light on a broad array of political behavior.

Ryan C. Black is Assistant Professor, Department of Political Science, Michigan State University, South Kedzie Hall, 368 Farm Lane Road, East Lansing, MI 48824 (rcblack@msu.edu). Ryan J. Owens is Assistant Professor, Department of Political Science, University of Wisconsin, 406 North Hall, 1050 Bascom Mall, Madison, WI 53706 (rjowens@wisc.edu).

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While our approach can shed light on many policy makers and policy contexts, we apply it to the interinstitutional relationship between the executive branch and the Supreme Court. We focus on how justices respond to uncertainty by making probabilistic predictions and by forcing the Solicitor General (SG) of the United States to present them with information. Our approach highlights how justices, like other political decision makers, make probabilistic predictions, invoking the SG when their probability of policy success varies. Substantively, our results show that when justices are uncertain about the policy consequences of their decisions and about whether legal factors compel Court review, they are significantly more likely to force the SG to provide them with information. In short, using a new methodological approach, we unmask important substantive features about a dynamic cross-institutional relationship.

In what follows, we begin by examining how uncertainty impacts decision making in a host of policymaking institutions. Next, we discuss how existing studies model and address political decision making. We then theorize how actors operating in an interdependent environment use their institutional tools to channel information and make probabilistic predictions. After we provide the general outlines of our approach, we apply it to Supreme Court justices' decisions to force the Solicitor General to participate in cases. We conclude with some additional thoughts about how our measurement approach can apply to broader political phenomena.

Uncertainty and Forward-Looking Predictions

Actors across systems of government face information constraints when making decisions. For example, when voting on bills, members of Congress cannot be sure that their votes will generate the policy outcomes they intend (Krehbiel 1991). Presidents, armed with relatively little information, must nominate judges to serve for life—judges who often drift ideologically (Epstein et al. 2007; Owens and Wedeking 2012). Supreme Court justices, too, must make decisions, unsure whether their colleagues will agree, whether lower courts will comply, and whether political actors will respond with acceptance or hostility. In short, uncertainty abounds.

Decisions made in the face of uncertainty can have devastatingly negative effects. If some members of Congress are to be taken at their word, they never meant to sanction the broader war on terror when they voted in support of the "Authorization for Use of Military Force Against Terrorists" in 2001. For his part, President Eisenhower underscored the problem of presidential uncertainty when, in response to a question whether he had made any mistakes as president, he replied: "Yes, two, and they are both sitting on the Supreme Court"—an obvious reference to the unexpected voting behavior of Justice Brennan and Chief Justice Warren, his nominees to the Court (Nemacheck 2007, 44). And, Supreme Court justices failed to foresee punitive responses when they tamped down the House Un-American Activities Committee's ability to question witnesses during the Red Scare (Epstein and Walker 2005, 108). Without reliable information, policy makers' decisions can fall flat—or worse.

How, then, do political actors overcome uncertainty? Existing scholarship offers two general approaches to this problem. One line of studies examines how actors create and employ internal institutions to reduce informational uncertainty. For example, members of Congress use legislative committees and the Congressional Budget Office to obtain information that will increase the odds that their votes translate into sound policy (Krehbiel 1991). Presidents use the Office of Management and Budget to coordinate agencies and acquire information to help further their goals (Strauss and Sunstein 1986). Supreme Court justices also employ a host of tools, such as "passing" during a conference vote (Johnson, Spriggs, and Wahlbeck 2005) and holding cases over for reargument (Hoekstra and Johnson 2003). The goal of these studies and others like them is to examine how actors can use their institutional tools to acquire the information they need to make informed decisions.

A second line of studies downplays decisional uncertainty and, instead, examines how political actors arrive at decisions by assuming that they enjoy complete and perfect information (e.g., Ferejohn and Shipan 1990; Kiewit and McCubbins 1988).[1] These studies, in general, argue that a policy maker engages in a three-step decision-making process to arrive at a decision. First, she identifies the location of the status quo. Second, she considers the

[1] To be sure, not all models neglect uncertainty. For example, McCarty (1997) argues that Congress relies on signals sent by the president to overcome uncertainty about his predicted veto decision (see also Banks 1993). Moe (1989) analyzes how political uncertainty leads to agency structure (and thus, to broader policy quality), while Huber and McCarty (2004) examine how agency noncompliance is affected by bureaucratic competence. Judicial compliance literature likewise focuses on how the appearance of upper court uncertainty about its own precedents can influence lower court compliance with those precedents (Westerland et al. 2010). We seek to build on these studies and provide a more empirically tractable way to measure the uncertainty political actors face when choosing between, for example, the status quo versus a proposed policy alternative.

scope of potential policies that she would prefer to the status quo. In other words, she identifies her "preferred-to region." Third, she determines whether the proposed alternative falls within her preferred-to region (i.e., whether it improves policy for her). If so, she will adopt the change; if not, she protects the status quo.

Both of these approaches have generated important insights into political decision making and interinstitutional behavior. Yet, they are also incomplete. On the one hand, it is indeed critical to understand the conditions under which actors use their institutional tools to overcome uncertainty; but the examination cannot end there. Scholars must also examine how remaining uncertainty motivates behavior. That is, while seeking out additional information is essential, such information is rarely complete. Second, while it is defensible to assert that actors know the policy location of the status quo and the preferences of colleagues with whom they must frequently interact, it is potentially more problematic to assume that actors have complete and perfect information about the final result of the policy they make—especially when that policy must undergo treatment from actors externally. To be sure, political actors are likely to predict events or reactions in a general sense, but their predictions will seldom be perfectly accurate, particularly when making decisions in multistage settings. What is needed is an approach that examines not only how actors can acquire information but also how they make probabilistic predictions with their information.

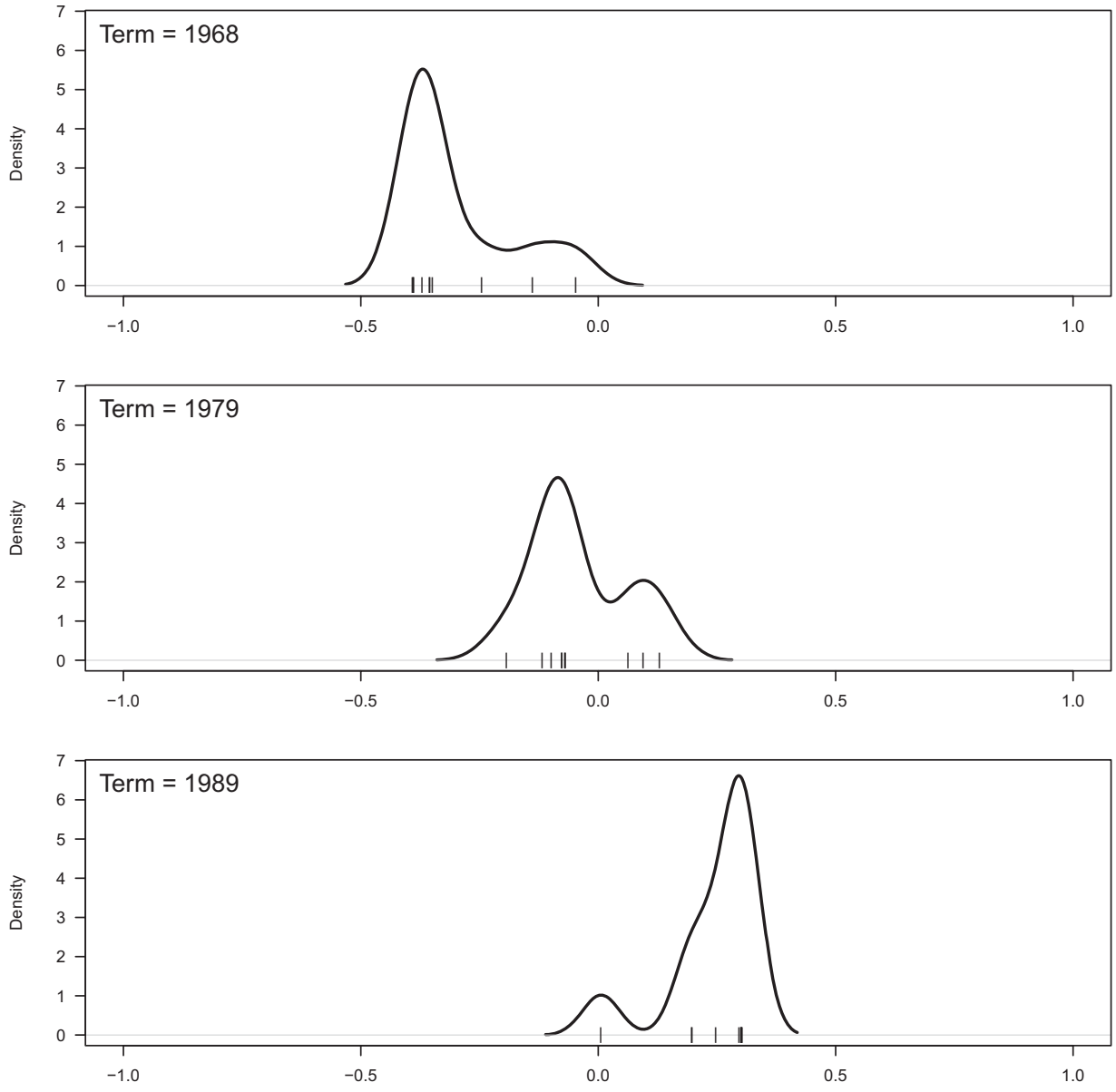
We offer an approach that allows scholars to analyze how actors can make probabilistic predictions about the likely outcome of the decisions before them. We borrow from cognitive psychology literature and suggest that political actors engage in a form of analogical reasoning (e.g., Houghton 1998). To predict future outcomes, a decision maker looks to previous policy outputs involving the same issue. Predicting the future involves looking to the past.

Actors will follow three steps when making probabilistic predictions. First, they will determine the substantive issue under consideration. Is this an issue that deals with fiscal policy? With criminal procedure? With collective bargaining? Once a decision maker identifies the relevant issue or issues at play, she can then look backward at how her colleagues or other actors with whom she must interact behaved when dealing with that issue in the past. Did they adopt a conservative or liberal position? Did they seek changes to draft proposals? What kind of policies did they tolerate? Then the decision maker will use such past behavior to formulate a vision of what the distribution of future policy outcomes would look like. That is, *once the policy maker observes the previous results, she can determine the underlying distribution that was likely to have generated them.* As the range of previous behavior or policies varies, the distribution will increase in width and, accordingly, the actor will have less predictive certainty over where policy in the instant case will locate. On the other hand, as the range of previous behavior or policies becomes more consistent, the distribution will decrease in width, providing the actor with more predictive certainty over where policy will locate in the instant case.

Figure 1 provides an example in one particular (though not exclusive) institutional setting—a Supreme Court justice's decision whether to grant review to a case. We illustrate how a justice would predict the Court's policy in a criminal procedure case across three different Court terms. That is, it represents a justice who seeks to determine whether she should vote to grant review to a case. She will predict how the full Court would decide the case on the merits. What kind of policy would it set, and might that policy improve the status quo for her? The x-axis portrays policy space, ranging from most liberal (-1.0) on the left to most conservative ($+1.0$) on the right. Each of the 10 previous criminal procedure cases decided by the Court are denoted by the vertical ticks along the x-axis. To translate these individual cases into an underlying policy distribution, we use kernel density estimation (Rosenblatt 1956), which produces the curved black lines in each of the three panels—the underlying distribution that was likely to have generated the revealed outcomes in the previous cases.

In the top panel, we examine how a justice in 1968 would predict the Court's policy in criminal procedure cases, based on its outcomes in the previous 10 criminal procedure cases. Using the value of 0 as a crude dividing line for liberal versus conservative outcomes, that justice could observe that 98% of the area under the distributional curve is to the left of zero. Thus, the justice could expect that in 1968, there would be a strong chance that criminal procedure policy would be liberal. Looking next at the middle panel, we observe how a justice during the midpoint of the Burger Court would predict the Court's policy in criminal procedure cases. An obvious rightward shift in the Court's policy output is apparent. Indeed, now only 68% of the area under the distribution falls to the left of zero. Finally, consider how a justice in 1989 would predict the Court's policy in a criminal procedure case. As the density estimate makes clear, justices had strong reason to believe that future criminal procedure cases would be decided conservatively. Only 4% of the area under the curve is to the left of zero. By looking at the Court's recent past behavior, the justice can make informed predictions about how the Court would rule in the case before her.

FIGURE 1 Distribution of Likely Merits Outcomes for Criminal Procedure Cases: 1968, 1979, and 1989 Supreme Court Terms

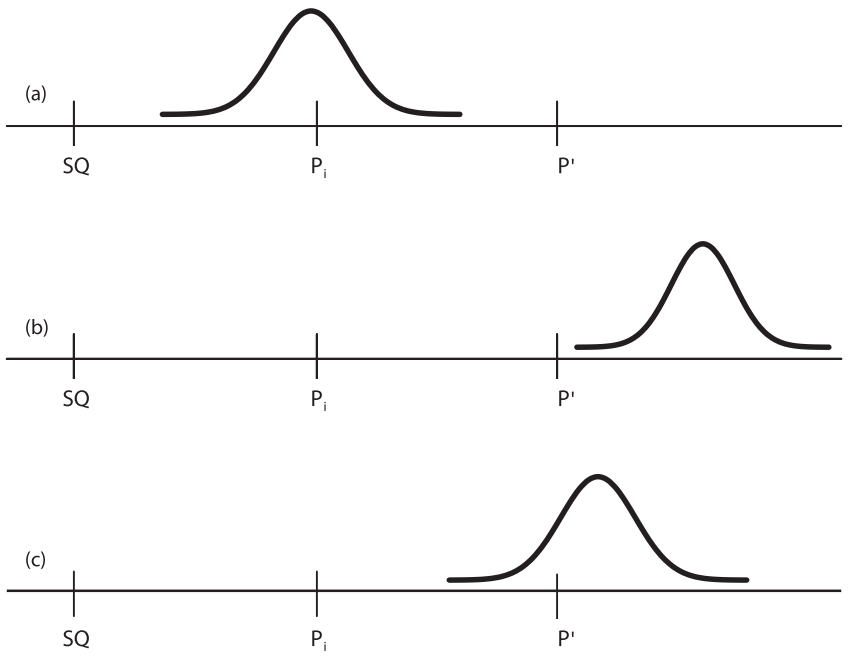


Note: Negative numbers on x-axis reflect liberal outcomes. Positive numbers reflect conservative outcomes. The model displayed uses 10 previous cases as inputs for each panel.

Once the decision maker predicts the likely outcomes of a policy decision (i.e., generates a distribution for the expected outcome), she then must determine the probability that it improves on the status quo. To make this determination, she must calculate how much the underlying probability distribution overlaps with her preferred-to region. As the preferred-to region takes on a larger area under the distribution of likely outcomes, the actor will be made better off by the decision and, thus, more likely to move forward with change. Conversely, as the preferred-to region takes on a smaller area under that distribution, the actor predicts that she will not be made better by moving forward and, thus, will protect the status quo.

Figure 2 illustrates. It assumes that a policy maker (P) must decide whether to maintain the status quo or to change it. Each of the three panels shows the status quo (SQ), the policy maker's ideal point (P_i), and the policy maker's indifference point vis-à-vis the status quo

FIGURE 2 Spatial Configurations of the Status Quo (SQ) and a Policy Maker's Ideal (P_i) Point and Indifference (P') Point



Note: $[SQ, P']$ is the policy maker's preferred-to region. The thick bell-shaped lines are hypothetical distributions of the likely outcomes resulting from the policy maker's decision. As the area under the curve that overlaps with the actor's preferred-to region increases, she will be increasingly likely to seek to change the status quo.

(P'). These three locations generate the actor's preferred-to region. The thick black lines represent the hypothetical distribution of predicted outcomes, using the methodology outlined above. The policy maker must determine the probability that the decision will fall within her preferred-to region. Panel (a) of Figure 2 implies that our hypothetical policy maker would prefer all likely outcomes to the status quo (because the distribution of expected outcomes is entirely inside her preferred-to region). Hence, she would be completely likely to move forward with policy change. At the opposite end of the spectrum, in panel (b), none of the predicted outcomes would improve policy for P_i. Accordingly, she would protect the status quo. Finally, if the predicted distribution of outcomes looked like panel (c), P_i would prefer some values of the distribution over the status quo. The probability that P_i would move forward with policy change would correspond to the area under the distributional curve that falls within her preferred-to region.

In short, policy makers face uncertainty in nearly every stage of their decision-making processes. This uncertainty, if not overcome, can lead to dire consequences. To address their uncertainty, policy makers will not only seek out additional information; they will also use the information they have to make probabilistic predictions. Looking backward at previous decisions and outcomes in similar circumstances, they can make informed predictions about the conditions before them. In other words, while existing empirical scholarship largely addresses political decision making by assuming that actors have complete and perfect information, this need not be so. And, in what follows, we provide an example scholars can use to examine how actors make probabilistic predictions. We focus on the conditions under which justices call for the views of the Solicitor General to obtain information about various forms of uncertainty and, in the process, make probabilistic predictions about legal and policy behavior.

The Supreme Court and the Solicitor General

A fuller understanding of how actors deal with uncertainty requires not only an examination of how they use

their institutional tools to acquire information, but also how they make probabilistic predictions about outcomes. This dynamic, of course, applies to decision makers across the board. Here, however, we apply our approach to the United States Supreme Court and the conditions under which justices force the federal government, through the United States Solicitor General, to participate in cases. We select this dynamic for a variety of reasons. First, we believe it serves as a good example of broader political decision making. Second, the SG is the Court's only consistent link to the executive branch, making the dynamic interesting in an interinstitutional sense (Black and Owens 2012; Pacelle 2003). At the same time, the SG's office is the executive's primary link to the Court. Before almost any executive agency appears before the Court, files a brief in a case in which it is not involved, or even files a petition for review, the SG must first approve (Black and Owens 2011, 2012, forthcoming). As such, the SG is a gatekeeper for the federal government to the Court. Finally, the SG appears before the Court more than any other litigant. During the 2007 term alone, the SG was involved in 78% of the Court's cases. For these reasons, we believe that examining the relationship between the Court and the Solicitor General answers compelling substantive questions but also highlights how scholars can apply our methods to additional topics across institutions.

Like members of Congress and the president, justices seek to make efficacious policy (Epstein and Knight 1998). And, like those actors, they face uncertainty throughout their decision-making processes. Still, justices are not without tools to overcome such uncertainty and make probabilistic predictions. One such tool is the power to "Call for the Views of the Solicitor General" (CVSG). While much of the Court's interactions with the executive branch arise when the SG is a party to a suit or when the SG voluntarily files an amicus curiae brief, in a number of cases, the Supreme Court invites the SG to participate in a case before it decides whether to grant or deny review. Upon the votes of four justices, the Court will publish an order reading: "The Solicitor General is invited to file a brief in this case expressing the views of the United States." And, even though it is formally an invitation, the CVSG is, in practice, an order to submit a brief (Mauro 2003). As one former SG staff member stated: "It's not an invitation; it's an invitation from the king. You don't turn it down" (Salokar 1992, 143). If the Court ultimately grants review to a petition after issuing a CVSG, the Office of the Solicitor General (OSG) participates in the merits stage—brief writing and oral argument (Thompson and Watchell 2009).

All but a small handful of CVSGs occur during the Court's agenda-setting stage, while justices decide whether to hear cases.[2] The SG can also submit voluntary briefs at the agenda-setting stage, but, as an empirical matter, such a practice is exceedingly rare. For example, we identified all CVSGs that occurred between the 1971 and 2010 terms. Of the 851 total CVSGs the Court issued, 300 led to it granting review. And, of the 300 cases in which the Court reviewed a case, only six CVSGs took place after the Court held oral argument.[3]

The agenda stage is where justices have the least amount of information, and the SG is well situated to provide them with it. The SG's office employs lawyers with expertise across numerous issues. At the same time, the SG's constant contact with executive agencies means that SGs can provide significant amounts of specialized information. In a similar vein, because the SG serves at the pleasure of the president, justices know that the SG is something of a mouthpiece for the president. Even when the SG and president disagree on a case, the SG may nevertheless follow the president's demands. As such, there may be a separation-of-powers component to the information justices receive from the SG. And, lawyers in the SG's office are among the ablest attorneys in the profession. Their skills, mixed with their repeated appearances before the Court (which incentivize them to provide credible information), lead justices to trust their information (McGuire 1995). Simply put, justices face uncertainty and can use the SG to overcome that uncertainty.

To be sure, this is not to say that Solicitors General always provide the Court with purely objective information. It is, however, to say that SGs provide justices with usable information. On the one hand, lawyers in the SG's office have strong incentives not to push the boundaries of legal arguments knowing that, should they do so, justices will discount their information (Wohlfarth 2009). Indeed, anecdotal evidence suggests that justices believe the SG's office, on average, presents them with fairly neutral, credible information. Stated one justice, "Every solicitor general who has been here my ___ years has taken this job very seriously; . . . not to get us to take things that don't require our attention relative to other things that do" (Perry 1991, 132). Of course, SGs also have personal reasons to provide truthful information to the Court, as

[2] The Supreme Court enjoys discretionary jurisdiction, which means that justices are free to select for review any of the thousands of cases that are appealed to them annually. As a result, justices by and large select cases that pique their interests and involve heightened legal and policy considerations. Accordingly, the decision to hear a case has significant consequences, and we expect justices to engage in forward-looking behavior.

[3] In our analysis below, we examine the Court's 1986–93 terms. We are limited to such terms because of the limited availability of archival records showing the private voting behavior of justices (see, e.g., Epstein, Segal, and Spaeth 2007).

most of them desire to take their place on that bench in the near future. And even if not, they will certainly want to build their reputations for future private practice work before the Court. As professionals—and repeat players—lawyers within the Office of the Solicitor General have strong incentives not to play fast and loose with cases before the Court. True, as political appointees, Solicitors General are selected to pursue the president's goals before the Court and, at times, they do pursue these policy goals in Court (Caplan 1987). But even when SGs provide politically biased information to justices, that information is valuable as a signal, especially if it contradicts what one might consider to be the general ideological proclivities of the SG (Bailey, Kamoie, and Maltzman 2005). Thus, the question is not whether SGs present justices with objective information (though they largely do) but, rather, whether they provide justices with usable information that they can employ to overcome their uncertainties.

Judicial uncertainty comes in three forms, all of which are likely to lead justices to seek out additional information and make probabilistic predictions. More specifically, they face internal uncertainty (if we grant review to this case, will the full Court make better policy for me than the status quo?), external uncertainty (if the majority decides this case as I predict, will Congress and the president override the decision and make me worse off than the status quo?), and legal uncertainty (are there compelling legal reasons to hear this case and decide it in a particular manner?). When any of these forms of uncertainty are present, justices will not only need to make probabilistic predictions; they will also require additional information—information they can capture from forcing the SG to participate in the case.

Internal Uncertainty. Decades of scholarship show that justices seek to achieve favorable policy throughout every stage of the decision-making process (Caldeira, Wright, and Zorn 1999; Maltzman, Spriggs, and Wahlbeck 2000). During the agenda stage, justices are likely to have but general perceptions of how a case may turn out and, thus, desire additional information to predict that policy outcome. Forcing the SG to synthesize the case and take a position provides one way justices can acquire policy information. Such information will only be useful, however, when a justice is unsure whether the Court's merits decision will improve policy for him or her. In other words, justices who predict that the Court's decision will make them better or worse off have little need to acquire additional policy information, while justices who are uncertain whether the decision will make them better or worse off need such information and will be most likely to CVSG.

By a similar logic, a justice will be more likely to CVSG when it is unclear if the Court's expected outcome will shift policy. If a particular outcome will not change legal policy, justices may be reluctant to expend the Court's finite resources—i.e., its docket space—to review it. In fact, Perry argues that in order to protect the Court's institutional resources, justices' clerks begin reviewing cert petitions assuming they will deny them. Stated one clerk: " . . . there is a strong presumption for not hearing cases . . . Today the backdrop is: 'is this one of the . . . most pressing cases of the year?' . . . " (1991, 219). Thus, we suggest:

> *Merits Outcome Preferred Hypothesis:* A justice who is certain to be made better or worse off by the Court's decision will be unlikely to CVSG, while a justice who is unsure whether she will be made better or worse off will be more likely to CVSG.
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> *Policy Change Hypothesis:* A justice will be more likely to CVSG when it is unclear if the case will shift policy away from the status quo.

External Uncertainty. Justices might similarly pull the Solicitor General into a case in order to determine the political consequences of a ruling. Strategic separation-of-powers (SOP) theory suggests that justices rationally anticipate the *political* ramifications of their decisions with regard to the preferences of external actors (Owens 2010). Congress can pass legislation to override Supreme Court decisions, and presidents can choose to sign or veto such legislation. If justices seek to make favorable policy capable of surviving a possible legislative attack, they must understand the political landscape they face.

Solicitor General briefs may provide justices with information as to how the president may react to Court decisions as well as important information regarding any executive agency charged with implementing a ruling (Johnson 2003). For example, during the Court's 2007 term, the SG submitted a total of 25 briefs in response to a CVSG. Two-thirds of those briefs discussed executive branch preferences or congressional preferences, and half discussed executive branch preferences. *AT&T v. Hulteen*, 129 S. Ct. 1962 (2009) provides an example. In his brief, the SG alerted justices to the fact that proposed legislation in Congress could have made the petitioner's actions illegal, but that legislation "failed to pass the current session of Congress and *is the subject of a presidential veto threat*. . . ." In short, Solicitors General may provide information that justices can employ to determine whether the president will support a decision if it lands in the crosshairs of a legislative override bill:

> *Separation-of-Powers Concern Hypothesis:* A justice will be more likely to CVSG as the outcome that she prefers is increasingly likely to trigger a congressional override attempt that requires a presidential veto to survive.

Legal Uncertainty. Justices also must satisfy legal obligations that befall appellate judges. Justices who wish to create lasting policy must comply with predominant community beliefs, which largely demand adherence to legal norms. Of course, even in the legal realm, justices can face uncertainty. They might, for example, be unsure whether the law stacks up in favor of one approach to a case versus another. They might be unsure whether Congress intended a statutory provision to cover a particular form of behavior. And, most important for purposes of this article, they might be unsure whether the lower courts have created conflict among each other that the Court must clarify.

The SG can help justices by synthesizing the current state of the law among the circuits to determine whether circuit precedents conflict with each other and, therefore, whether they deserve Supreme Court review. A primary Supreme Court duty is to resolve legal conflict among circuits. The Court is expected to unify law in cases where "the issue has fully percolated among the lower courts, . . .the conflict is widespread, and the conflict relates to an issue on which disagreement among the lower courts is intolerable" (Stern et al. 2002, 434). As a result, the presence of circuit conflict is among the most important components of the Court's agenda-setting decision (Perry 1991, 246). Indeed, Court rules, which are largely ambiguous as to the conditions that lead the Court to review cases, state that conflict among lower courts is likely to lead to review (see Supreme Court Rule 10).

Not all conflict is alike, however, and justices may need help determining which type of conflict is present (or absent) in particular cases. Some cases exhibit minor inconsistencies among circuits (i.e., weak conflict) while others evince major circuit disparities (i.e., strong conflict). The Court is theoretically supposed to hear and resolve the strong conflict cases but is less obligated to select cases with weak conflict. And the Solicitor General can help the Court determine whether a conflict is strong or weak. Consider, for example, *Mertens v. Hewitt Associations* (No. 91-1671). The law clerk who summarized the petition for the Court noted that while some circuits disagreed on the legal rule, the split among them might clear up. The Court CVSGed. The SG urged the Court to hear the case, in part, because conflict among the circuits was real and required review.

We argue that when internal review reveals weak conflict, justices will be most likely to CVSG (to determine whether the scale tips toward review), and when such review reveals strong conflict, justices will be less likely to CVSG. Further, they should be least likely to CVSG when no conflict appears at all. Thus, we suggest:

> *Legal Conflict Hypothesis:* A justice will be more likely to CVSG when there appears to be weak conflict among the lower courts than when there appears to be strong conflict and will be least likely to CVSG when there appears to be no conflict at all.

Case complexity represents a second legal consideration that might lead justices to CVSG. Legal complexity influences justices' decisions throughout the decision-making process (Collins 2008; Maltzman, Spriggs, and Wahlbeck 2000). In a complex case, justices may be less sure of relevant legal issues, how those issues have been resolved, and how the Court should treat them. As Mauro (2003) reports, a law clerk for Chief Justice Burger once stated: "CVSGs were a pretty good device when you had a hard time figuring out what a case was all about. The view was, 'Let the SG sort it out and tell you whether the Court should take the case.' . . . " Accordingly, we suggest:

> *Case Complexity Hypothesis:* A justice will be more likely to CVSG in complex cases.

These three forms of uncertainty impede justices' abilities to make efficacious policy. As such, we expect them—just as we expect all policy-making actors—to use their institutional tools to acquire information that reduces uncertainty and to make probabilistic predictions to satisfy their goals.

Measures and Data

To determine the conditions under which justices CVSG, we began by analyzing a subset of petitions considered by the Court during its 1986–93 terms. To retrieve archival information on how justices voted during their private conferences, we used the digital images of the Court's dockets sheets provided by Epstein, Segal, and Spaeth (2007). These materials provide a valid and reliable indicator of justices' private voting behavior (Black and Owens 2009b). Our unit of analysis is the justice vote. Our dependent variable takes on a value of 1 if a justice voted to CVSG and 0 if she did not.[4]

[4] The supporting information provides additional details on how we generated our sample.

Internal Uncertainty. To operationalize our Internal Uncertainty Hypothesis, we followed the strategy outlined above and evaluated the probability that granting review in a case would, for each justice, result in a favorable shift in policy from the status quo. This demanded that we measure each justice's policy preferences, the status quo, and the range of likely merits outcomes per case. Estimates of justices' policy preferences come from their Judicial Common Space (JCS) scores (Epstein et al. 2007). To locate the status quo, we follow Black and Owens (2009a) and analyze the JCS scores of the judges who sat on the lower federal court panel that heard the case (see the supporting information for a summary of this procedure). From those two values we calculated the justice's preferred-to region.

Next, we determined the probability that the Court's merits policy would improve the status quo for each justice in each case. To do so, we read cert pool memos[5] written in every petition and used the *issueArea* coding scheme from the Supreme Court Database to determine the topic at issue in a case. We then identified Supreme Court cases previously decided on the same issue.[6] To place these previous cases in ideological space, we used the JCS score of the median justice of the majority coalition in each of them.[7] Once we identified the issue in dispute and located medians of majority coalitions in similar previous cases, we used kernel density estimation (illustrated above) to generate a distribution of likely outcomes in the case.

Finally, to calculate the probability that the case would improve policy for each voting justice, we calculated the area under the curve where a justice's preferred-to region overlaps with the likely merits outcome. This, in turn, yields the probability that a voting justice would prefer that outcome over the status quo. Our Merits Outcome Preferred Hypothesis suggests that justices who are uncertain about whether the outcome will help or hurt them will CVSG. On the other hand, justices who are more certain the outcome will be better or worse for them will be less likely to CVSG. To tap into this nonlinearity, we include both *Merits Preferred* and *Merits Preferred Squared* in our model.

To operationalize our Policy Change Hypothesis, we examined whether the status quo fell within the likely merits outcome distribution. We coded *Policy Shift Uncertain* as 1 if the status quo falls within the likely merits outcome distribution of a case; 0 otherwise. Justices will be more likely to CVSG when uncertain if a case will shift legal policy.

External Uncertainty. To determine whether the separation of powers influences the decision to CVSG, we took two steps. First, following the procedure just described, we calculated the probability a voting justice would prefer the merits outcome to the status quo. Second, we calculated the probability this preferred-to region would *also* fall within a separation-of-powers regime where the legislature would contemplate introducing override legislation that the president, however, might be expected to veto.[8] That is, we integrated across the region of merits outcomes both where a justice would prefer that outcome to the status quo *and* where that outcome would trigger a congressional override but possible presidential veto—the area between the president and closest legislative pivot. As this value increases, a justice's preferred outcome is increasingly dependent upon protection from the president to survive a legislative challenge. By contrast, when it is small, a justice is less likely to need assistance from the executive. We expect that high values of SOP Concern will increase the probability a justice will CVSG.

Legal Uncertainty. To examine whether justices CVSG to help clarify the conflict among lower courts, we created two variables: weak conflict and strong conflict. We code *Weak Conflict* as 1 if the petitioner alleges a legal conflict but the law clerk writing to the Court—while acknowledging a split—somehow discounts the conflict by suggesting, for example, that it is tolerable or has not fully percolated among circuit courts. We also include *Strong Conflict*, which is coded as 1 when that law clerk notes the existence of conflict, but then does nothing to

[5] Since the early 1970s, the majority of justices pool their clerks together and have them write one "cert pool memo" to the Court summarizing the petition for review (Ward and Weiden 2006).

[6] Lacking a strong theory about the *number* of previous cases to which a justice would refer, we estimated our model using a wide range of previous cases (specifically, 3 through 25). The results we report below use a value of eight previous cases (in the issue area), but our main results are robust to alternative values.

[7] We chose this approach based on recent empirical evidence that shows it outperforms competing models such as the bench median and author monopoly models (Clark and Lauderdale 2010, 14–18). See Carrubba et al. (2012) for a formalized account of this approach. It has also been used in existing empirical work (Hansford and Spriggs 2006; Spriggs and Hansford 2002). The supporting information reports a summary of our results if we use the more traditional median justice approach instead.

[8] Because congressional scholars are divided over which of their models best explains legislative decision making, we examine each of them separately. The supporting information provides a more detailed accounting of these results and an expanded discussion of the underlying spatial model. It also contains a discussion for why the president might sign such override legislation.

discount that it requires Court intervention.[9] To tap into our Case Complexity Hypothesis, we code *Case Complexity* as the number of pages in the law clerk's memo devoted to discussing the petition's procedural history in the lower courts.[10] We suggest that more pages devoted to a case's procedural history equate to more complexity.

Controls. We also control for a host of potentially confounding variables. Since these variables are not germane to our theoretical argument, we present their measurements and results in the supporting information. As a general matter, though, these variables fall into three classes. First, we control for how the quality of the information provided by the SG might influence a justice's propensity to CVSG. These variables include the ideological distance between the justice and Solicitor General, a measure for the extent to which the SG has acted ideologically in previous cases, a surrogate for the quality of the SG's recent legal arguments, and the SG's time in office. Second, we control for situational elements that might affect a justice's need to acquire additional information. Thus, we control for whether the voting justice was new to the Court, case salience, and whether the SG participated in the case in the court below. Third, we control for additional factors identified by previous research as being related to the Court's CVSG behavior, such as the president's time in office and presidential approval.

Methods and Results

Since our dependent variable examines whether or not a justice votes to CVSG, we estimate a logistic regression model and test for statistical significance using robust standard errors. Parameter estimates for our model are reported in Table 1. As our results show, we find strong evidence to support our argument that justices use the CVSG to overcome their informational limitations.

Consider the internal uncertainty hypotheses, which we illustrate with two panels in Figure 3. We argued, first, that when a justice predicted with a high (or low) probability that the Court's final decision would improve policy for her, she would be least likely to CVSG. Conversely, when a justice was unsure whether the Court's final decision would improve policy for her, she would be the most likely to CVSG. The left panel addresses this. The y-axis shows the predicted probability of a CVSG vote, and the x-axis presents our *Merits Preferred* variable. This variable represents the probability the likely merits outcome will yield a favorable policy shift for a voting justice. Our hypothesis suggested a nonlinear relationship, whereby justices would be most likely to CVSG when they face some degree of uncertainty whether the merits outcome would benefit them. The data support this informational strategy. When a justice has a low or high probability of being made better off by the Court's policy, (i.e., the left and right ends of the x-axis), she is not especially likely to CVSG. By contrast, when she is uncertain—that is, when the probability that she will prefer the merits outcome is only moderately large (i.e., falls between the two extremes)—she is more likely to CVSG.[11]

TABLE 1 (Partial) Logistic Regression Model Parameter Estimates of Whether a Justice Votes to CVSG

Uncertainty	
Internal Uncertainty	
Merits Preferred	1.69*
	(0.57)
Merits Preferred Squared	−1.37*
	(0.52)
Policy Shift Uncertain	0.44*
	(0.11)
External Uncertainty	
SOP Concern	0.03
	(0.24)
Legal Uncertainty	
Weak Conflict	0.63*
	(0.09)
Strong Conflict	0.38*
	(0.10)
Case Complexity	0.04*
	(0.01)
Observations	3377
log L	−2585.04

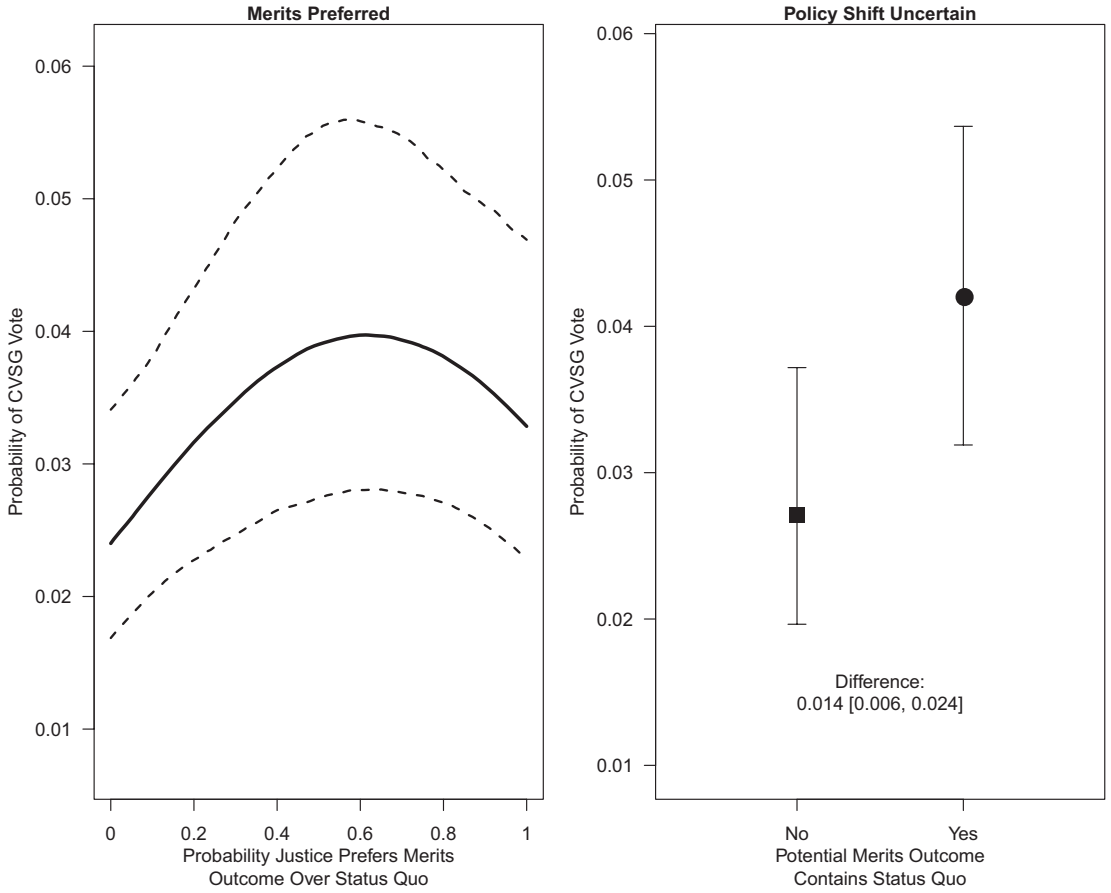
Note: These results come from spatial models where the pivots are defined by the committee median approach to legislative decision making. The likely merits outcome is estimated by using the last eight cases in an issue area. The supporting information contains a full table with control variables and also discusses results for alternative model specifications. *denotes $p < 0.05$ (two-tailed test). Robust standard errors reported in parentheses.

[9] Because coding these variables required some judgment on the part of the coders, we conducted an intercoder reliability study for these variables. Both measures are reliable by common standards (see the supporting information for additional details).

[10] Each memo in the time period we studied followed a standardized format. This should minimize the individual-level variance in how specific clerks author such memos. Moreover, for clerk-level factors to undermine our findings, the bias would have to be both nonrandom and consistent; given the few memos written by each clerk, we believe the potential for such bias is minimal.

[11] As we note in an earlier footnote, we have also replicated our models using the median justice as a way of locating previous

FIGURE 3 Substantive Effect of Internal Policy Considerations on the Probability a Justice Votes to CVSG



Note: The left panel presents the effect of the *Merits Preferred* variable, and the right panel shows the effect of the *Policy Shift Uncertain* variable. Predicted values and their 95% confidence intervals come from stochastic simulations with all other variables held at their mean or modal values.

We note, as an additional matter, that the figure also provides some evidence that legal factors matter. While the thick line is parabolic, the probability values for extremely certain justices are nonzero. That is, a justice with zero probability of policy improvement (i.e., far left side of the plot) still has a modest chance of voting to CVSG. Likewise for a justice who is quite certain that she stands to benefit from granting review. Thus, even justices for whom we would expect policy outcomes to be dispositive might still query the SG—potentially to ascertain whether any legal considerations compel her to hear (or reject) the case. In short, it appears that, contrary to some of the conventional wisdom (Segal and Spaeth 2002), law may influence justices' policy-seeking behavior.

decisions in policy space. Our *Merits Preferred* finding is generally robust to using a version of this alternative approach.

The right panel of Figure 3 shows the effect of our *Policy Shift Uncertain* variable. Our Policy Change Hypothesis declared that a justice would be more likely to CVSG when it is unclear if the case would shift policy away from the status quo. Our results support this conjecture. Justices are 52% more likely to CVSG when the status quo falls within the likely merits range than when it does not.[12]

We also obtain strong evidence that justices CVSG to reduce legal uncertainty. Justices are more likely to CVSG to determine whether they must harmonize conflict among lower courts. When circuit courts sharply disagree about the correct application of law, justices are

[12] As we noted above, we also replicated our models using the median justice as a way of locating previous decisions in policy space. Unlike our other findings, our *Policy Shift Uncertain* finding is not robust to using this alternative approach. For more on this, see the supporting information.

44% more likely to CVSG, hoping the SG's office can help them clear up confusion. Perhaps more importantly, though, justices are even more likely to CVSG when conflict is weak and ambiguous. Indeed, justices are roughly 28% more likely to CVSG when pool memo writers label conflict weak versus strong (and 85% more likely to versus the baseline of no conflict present). And, consistent with our complexity hypothesis, justices are more likely to seek the advice of the SG when the case is complex. A case with eight pages of procedural history (around the 95th percentile in our data) is more than twice as likely to provoke a justice to CVSG than a case with only a single page of procedural history (approximately the 5th percentile in our data).

While we hypothesized that justices might CVSG for separation-of-powers reasons—to probe whether the president would back the Court in its potential ruling—we find no systematic evidence to support this intuition. This finding accords with recent separation-of-powers studies (see, e.g., Owens 2010; Sala and Spriggs 2004; Segal 1997).

Although our results make an important substantive contribution to understanding the relationship between the Court and the executive branch, we are especially interested in the methodological contribution we make. We would be remiss, then, if we did not compare the results of our probabilistic prediction approach with the results derived from a more traditional "point estimate" approach. We reestimated the model presented in Table 1 with some critical modifications. More specifically, this requires that we assume that justices made decisions based on point estimates alone. One immediate consequence of this limitation is our inability to directly test our merits preferred hypothesis, which depends upon a justice's uncertainty about future policy outcomes.

We can, however, still provide a crude test for our remaining hypotheses. Our model specification includes a dummy variable for whether a justice prefers the likely merits outcome—again, a point estimate in this model—to the status quo.[13] We also include a dummy variable that takes on a value of 1 if a justice prefers the merits outcome and if the likely merits outcome might require the president to intervene to protect the Court (i.e., our SOP Concern Hypothesis). Finally, we include the absolute value of the distance between the status quo and the likely merits outcome. Our expectation here is that as the status quo gets closer to the merits outcome, a justice will be uncertain as to whether the case might actually shift legal policy (and hence CVSG).

Results for this model fail to support any of the above three expectations. Justices appear to be no more (or less) likely to CVSG when they prefer the merits outcome to the status quo ($p = 0.28$). This, of course, is not too surprising since our hypothesis involved a nonlinear relationship that simply cannot be measured when one omits the possibility of uncertainty. Similarly, the relative closeness of the status quo from the likely future outcome does not influence a justice to CVSG ($p = 0.66$).[14] In some ways, we should not be surprised that such a coarse measurement strategy yields these results. The traditional approach presupposes that political actors are able to forecast with computer-like precision future policy outcomes. Our approach, by contrast, relaxes this unrealistic assumption and, as our analysis of the CVSG illustrates, allows scholars to examine substantively interesting political phenomena.

Discussion

Information constraints hobble policy makers across our systems of government. Members of Congress are often unsure how their votes will translate into policy outcomes. Presidents must often ride herd over bureaucrats pulled in different directions. And judges can never be sure how their votes will be received, translated, and executed. Because their decisions frequently have significant consequences, these actors will devise tools to drive down uncertainty and make probabilistic predictions about outcomes.

We examined how institutional actors use the tools at their disposal to reduce uncertainty and make probabilistic predictions, focusing on the Court's interactions with the executive branch. Our findings largely accord with our theory. Justices force the Solicitor General to participate in cases to acquire policy and legal information. These findings challenge long-held views of judicial decision making. Indeed, for decades, the common belief among empirical legal scholars was that law was merely window dressing for justices, a "myth" that "serve[d] only to cloak the political character of the judicial process" (Spaeth 1964, 38). These data suggest that justices seek out legal information, which suggests that it matters to them. To be sure, our analysis is not without limitations. Access to available data, for example, necessitated that we confined our study to a relatively short time period under

[13] In terms of evaluating the Court's likely merits outcome, we identified the last eight cases decided in a broad issue area, extracted the median of the majority coalition in each case, which yielded eight values, and then took the median of those values.

[14] The one similarity between the two models is the null result for the SOP Concern Hypothesis.

the leadership of a single chief justice. Nonetheless, our substantive results are informative and shed light on a unique but critical interinstitutional tool for communications.

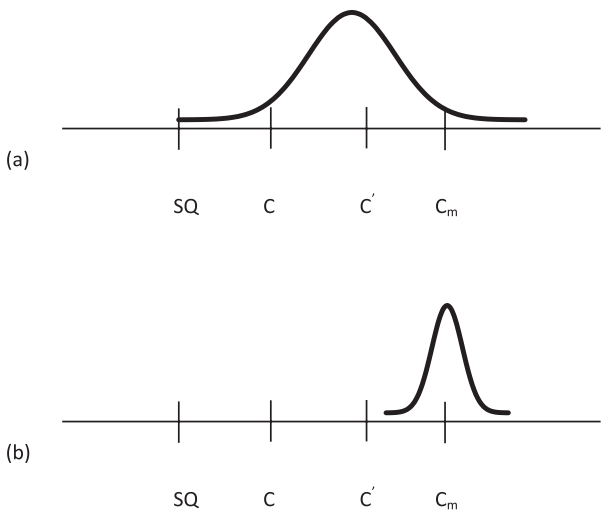
Perhaps more important, though, is the methodological contribution. We show how scholars can measure uncertainty in a decision-making process. We believe that researchers who analyze other institutions like Congress, the bureaucracy, and even comparative institutions can use this approach to add a new layer of depth to their empirical analyses. Certainly, while a Solicitor General-like actor might not exist in other contexts, the problem of information uncertainty exists elsewhere. And we believe that scholars can rely on the logic of our approach there.

Consider the application to legislative studies. Legislative committees operate with uncertainty as to whether the policy they recommend to the full chamber will become law and, more specifically, whether their parent chamber will amend the proposal in a negative fashion. Existing studies largely use point estimates for the chamber preferences (either the chamber median or some other pivotal actor) that are based on votes across all issues (Poole and Rosenthal 1997). By examining how the chambers have treated similar legislation in recent years, however, committees can perhaps more precisely predict how their parent chambers will react, and thus, whether opening the gates with a proposal is the strategically proper move. Figure 4 shows one possible application of the approach.

Imagine a legislative committee, C, that is faced with the decision whether to adopt a legislative proposal to alter the status quo, SQ. Assume that the committee prefers C' equally to the status quo (i.e., it is the committee's indifference point vis-à-vis the status quo). If the committee adopts a proposal and sends it to its parent chamber, that chamber will amend it under an open rule. But what policy, exactly, the chamber adopts, is unclear. Existing studies assume that the chamber median's (C_M) policy will hold. Thus, the committee in Figure 4A and Figure 4B would refuse to adopt a proposal. After all, the resulting policy (C_M) would be worse for the committee than the status quo.

Yet, we know—and so do legislative committees—that the chamber median does not always get what it wants. So where should the committee look to make predictions about congressional behavior? To the coalitional breakdowns in previous congresses on similar issues. By looking at the yeas and nays in recent legislation, the committee might predict future action. And, using the approach we adopt here, the committee could generate a probability distribution from among the previous votes to determine the likelihood that the parent chamber would adopt a better or worse policy than the status quo. So, in panel A, the committee would adopt a proposal and send it to the parent chamber, as there is a greater than 50% probability that the parent chamber will adopt a better policy than the status quo. More than half the distribution falls inside the committee's preferred-to region. On the other hand, in panel B, the committee would not send a proposal to the chamber, since there is a zero probability that the chamber will adopt a policy within the committee's preferred-to region.

FIGURE 4 Hypothetical Probabilities of Committee Action



Note: SQ = status quo. C = committee's ideal point. C' = committee's indifference point vis-à-vis the SQ. C_M = parent chamber ideal point. $[SQ, C']$ is the Committee's preferred-to region. Curve is the distribution of predicted policies the parent chamber will adopt if the committee opens the gates with a proposal. As the overlap between the committee's preferred-to region and parent chamber distribution increases, the committee will be more likely to open the gates with a proposal.

It is not difficult to see how research on executive agencies might benefit from a similar methodological approach. Scholars of American bureaucracy recently have used clever and sophisticated research designs to scale the preferences of agencies with their legislative overseers (Clinton and Lewis 2008; Clinton, et al. 2012). As these studies point out, "[t]heories of bureaucratic control and delegation rely on claims about the degree of congruence between agency preferences and those of the three branches of government" (Clinton and Lewis 2008, 16). And to determine whether agencies behave strategically, they argue, scholars must examine how agencies behave vis-à-vis Congress (and the president). We agree wholeheartedly with these claims and believe that our approach follows in line. By examining, for example, how Congress

has reacted to similar administrative rules in the past, agencies can better determine whether their rules in the instant case will engender legislative rebuke (Ferejohn and Shipan 1990).

At the same time, we hope that our approach triggers research on related topics. For instance, our modeling approach treats the status quo as a fixed and known entity. In many circumstances, this assumption is plausible. In others, however, such as minimum-wage legislation (Clinton 2012) and legislation that is linked to inflation, the status quo can be mutable or even unclear. How the identification of the status quo can influence decisions in these and other settings is worthy of deeper consideration.

Information is indeed power. Seeking to cling to and expand on their power, political actors will do whatever they can to acquire information. Often, this means using their institutional tools to force others to provide them with it. And nearly always, it means making probabilistic predictions.

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Supporting Information

Additional Supporting Information may be found in the online version of this article:

- Petition Sampling Procedure
- Petitions Sampled by Issue Area
- Measuring the Legal Status Quo
- Measuring the Location of Previous Supreme Court Decisions
- Expanded Discussion of the SOP Spatial Model
- Determining the Congressional Pivots
- Intercoder Reliability of Conflict Variables
- Control Variables
- References

Figure A1: Dot plot of cases sampled by issue area.
Figure A2: Location of Supreme Court justices' ideal points on the 1989 (top panel) and 1992 (bottom panel) terms.
Figure A3: SOP spatial model.
Figure A4: Congressional overrides.
Table A1: Logistic regression model parameter estimates of whether a justice votes to CVSG.

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