Florida State University Law Review

Volume 28 | Issue 1 Article 10

2000

The Government Litigant Advantage: Implications for the Law

Linda R. Cohen
lrcohen@uci.edu

Matthew L. Spitzer
mls@mls.com

FLORIDA STATE UNIVERSITY
LAW REVIEW

THE GOVERNMENT LITIGANT ADVANTAGE: IMPLICATIONS FOR THE LAW

Linda R. Cohen & Matthew L. Spitzer

VOLUME 28 FALL 2000 NUMBER 1

Recommended citation: Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391 (2000).

THE GOVERNMENT LITIGANT ADVANTAGE: IMPLICATIONS FOR THE LAW

LINDA R. COHEN* AND MATTHEW L. SPITZER**

[A]n American judge can pronounce a decision only when litigation has arisen, he is conversant with special cases, and he cannot act until the cause has been duly brought before the court.[1]

I. INTRODUCTION

Administrative law—whether instantiated in judicial decisionmaking, law practice, or academic work on administrative law—is rooted in reading cases. The role of cases in judicial decisionmaking, and in lawyering that depends in no small part upon predicting judi-

* Professor, Department of Economics, University of California at Irvine; Professor, University of Southern California Law School. Professor Cohen gratefully acknowledges the support of the Olin Foundation and the generosity and hospitality of the USC Law School during the preparation of this study. The authors also thank the participants of the Administrative and Regulatory Law Symposium, particularly Professors Jim Rossi and Daniel Gifford, for their helpful comments on this Article.

** Carl Mason Franklin Professor of Law and Dean, University of Southern California Law School.

1. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA at ch. VI, 99-100 (Alfred A. Knopf, Inc. 1945) (1835).

cial decisionmaking, is so obvious as to require no documentation. The case method, rooted in analogical reasoning, suffuses the area.[2]

Cases fill different roles in different types of scholarship. In historical review,[3] the cases represent part of the record to which we turn to find out "what happened." In evaluations of courts' statutory interpretations,[4] we read the cases to understand a court's reading of the statute in question. When we directly critique the structure of judicial review of agency action,[5] we read the cases and the corresponding regulatory actions to deduce the relationship between judicial review and administrative behavior. When we puzzle through the implications of emphasizing presidential authority for New Deal regulation,[6] we seek to understand how cases approving of this em-

---

2. *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 25-26 (1995); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993).

3. *See, e.g.*, Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 43-48 (1996) (arguing that recent APA reform proposals can be harmonized with the larger, historical purposes of the APA); Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 324-27 (1983); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1760-90 (1975). *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (analyzing how the modern administrative state is unconstitutional); Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159 (1997) (analyzing intellectual history); Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990) (analyzing the administration of the administrative state).

4. *See, e.g.*, Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871 (1999) (critiquing the Supreme Court's evaluation of the Line Item Veto Act); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1998) (highlighting the importance of background principles of administrative law in construing administrative law statutes); Katherine L. Vaughns, *A Tale of Two Opinions: The Meaning of Statutes and the Nature of Judicial Decision-Making in the Administrative Context*, 1995 BYU L. REV. 139 (examining the D.C. Circuit's review of immigration law interpretations by the INS).

5. *See, e.g.*, Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1256 (1988) (explaining that the Constitution circumscribes powers to government branches by limiting the capabilities of the other branches); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) (explaining that agencies have attempted to ensure that rules are capable of withstanding judicial scrutiny); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 8 (1991) (analyzing how judicial review has caused policy paralysis); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 766 (criticizing Pierce, *supra*); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 514 (1997) (defending the hard look doctrine).

6. *See, e.g.*, Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 227 (1998); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 841-44 (1996); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1182 (1994); Mark Seidenfeld, *A Big Picture Approach to*

phasis change the behavior of the agencies and other branches of government. Indeed, the emphasis on reading cases has led to the urge to prescribe canons of statutory construction for courts to use.[7]

Modern "high brow" work in administrative law—work that often merges with constitutional law—tends to use political, constitutional, and social theory as major premises in structuring arguments. Theory may play several different roles, but it cannot supplant reading the cases. Theory's biggest task is to reconcile administrative agencies with democratic constitutional theory.[8] Theory may give us, in some way, the nature of good doctrine in this area[9]—an idea of how things ought to be. At least theory tells us which sets of doctrines are acceptable.[10] Theory may also try to reconcile administrative law with justifications for regulation.[11] At any rate, we then read the

---

Presidential Influence on Agency Policy-Making, 80 IOWA L. REV. 1, 1 (1994); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT. L. REV. 965, 967-68 (1997).

7. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 111-12 (1990). For a trenchant critique, see Richard B. Stewart, *Regulatory Jurisprudence: Canons Redux?*, 79 CALIF. L. REV. 807 (1991) (book review).

8. *See* Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123 (1997) (noting that constitutional law provides rules for the government); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512 (1992) (using civic republican theory to provide a justification for the modern administrative state). For an extremely cranky view of the role of theory in legal academic work, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) ("Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."). Judge Edwards also makes the good point that legal doctrine, rooted partly in cases, must be part of good legal work, applying theory to law. *See id.* at 37.

9. *See* Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 561 (describing the realm of legal theory as "the source of most prescriptions for the reform of legal doctrines and institutions"); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 2 (1997) (suggesting that, among other things, judicial review needs to be less intrusive to allow administration to achieve "collaborative governance").

10. *See, e.g.*, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 760 (1997) (arguing that we must get beyond Bickel's "Least Dangerous Branch" paradigm); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) (finding more difficulties in the legitimization of administrative action); Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 800 (1999) (finding relative to Farina, *see supra*, little conflict between democratic theory and delegation of power to administrative agencies).

11. *See, e.g.*, CHRISTOPHER EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); JERRY MASHAW, GREED, CHAOS AND GOVERNANCE (1997) (arguing for a middle ground between public choice theory's proponents and detractors); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998). For an insightful critique of Mashaw's simultaneous overt distrust and sophisticated use of social choice theory, see Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075 (1998) (book review). *See also* Cynthia R. Farina, *Getting From Here to There*, 1991 DUKE L.J. 689, 694-95 (attempting to chart a research agenda for administrative law once process and substance have been irrevocably joined); Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary*

cases to see if the law conforms to the theoretical ideal, and if not, whether the deviations are large.

A new branch of administrative law scholarship attempts to apply "Positive Political Theory" (PPT) to administrative law and agencies.[12] Under the framework of PPT, the cases assume several roles. In many articles, particular cases provide examples that undergird the analysis.[13] In others, cases are used as intentional manipulations by the justices to get outcomes they want.[14]

For virtually all of these purposes, we read administrative law cases in the Supreme Court. For the most part, we assume that the cases we see are the cases that we "should" see.[15] From that starting point, lower court judges attempt to deduce the law to be applied, lawyers attempt to predict the behavior of judges (of both the lower courts and the Supreme Court), and academics do whatever we do.

What if our assumption that we see the cases that we "should" see is wrong? Perhaps the set of cases we get to see is filtered before we get to see them. What if the set of cases that the Supreme Court gets to decide is biased by the actions of someone not on the Court? It

---

Administrative State, 96 MICH. L. REV. 1746, 1749 (1998) (book review) (pointing out Mashaw's tendency to criticize and utilize public choice theory without a satisfying overarching theory of how to do so).

12. *See* Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757 (1996) (analyzing how a legislative record contains signals about a statute's meaning); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (showing that race-to-the-bottom arguments have no support in present models of interjurisdictional competition, and if they had support over environmental standards, then federal regulation would not play an integral role); Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85 (1997) (applying "game theoretic" analysis to refine Mashaw and Harfst's proposal to delay judicial review of rulemaking).

13. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 *passim* (1991); William N. Eskridge, Jr., & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 523-28 (1992); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1671-73 (1996).

14. *See* John Ferejohn & Barry Weingast, *Limitation of Statutes—Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992) (arguing that courts interpret statutes to favor one legislature over another). Of course, there are parts of academic administrative law where reading cases does not seem to loom large. *See* Elizabeth Garrett, *Rethinking the Structures of Decision-Making in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998) (arguing the need to reconsider and possibly revamp the federal budget process); Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, L. & CONTEMP. PROBS., Spring 1998, at 109 (citing no cases); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995) (reviewing executive orders 12,291 and 12,498). These areas of academic administrative law, while crucial to the full study of our subject, will not be the topic of our inquiry.

15. Of course there are table decisions, but we assume that the Court has decided that they are not important enough to merit our attention.

would affect the accuracy and legitimacy of all the reasons for which we read cases.

In this Article, we present both theory and evidence that the strategic behavior of government litigators routinely alters the set of cases from which the Supreme Court gets to choose. This advantage works in favor of the government—the Supreme Court gets to decide cases in which the government has a large chance of victory. As a consequence, our administrative common law in the Supreme Court is tilted toward the government.

The notion that a petitioner's actions might constrain the Supreme Court's agenda may appear unlikely given low certiorari success rates. Fewer than one hundred cases are now granted certiorari per year, out of over three thousand petitions, suggesting that the Supreme Court has plenty of choices.[16] As opposed to a lack of material constraining the Court, Richard Posner writes that a surfeit of cases (and inadequate judicial resources) reduces the power and effectiveness of the judicial branch.[17] However, the federal government is typically successful, receiving certiorari for 60% or more of its petitions year in and year out.[18] This statistic, vastly at odds with the success rate in the population of certiorari petitions, indicates that the Solicitor General's Office is highly selective in choosing which cases to appeal to the Supreme Court. Indeed, to the extent that the federal government's success rate in obtaining Supreme Court review has been investigated, it has been ascribed to presenting the Supreme Court with only the most important cases.[19] The Solicitor General is usually credited with helping out the Supreme Court by prescreening possibilities and petitioning only the type of cases likely to be granted certiorari.[20]

Our analysis is not at odds with this conclusion, but it goes further by suggesting that, far more than the typical appellant in cases

---

16. *See* LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1998 ANNUAL REPORT OF DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 89 tbl.A1, http://www.uscourts.gov/dirrpt98/a01sep98.pdf.

17. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 129 (1985); *see also* McNollgast, *supra* note 13, at 1638 (asserting that engineering a judicial resource crunch (either fewer judges or more cases) is a deliberate strategy used by the other branches of government when convenient and feasible).

18. *See* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 25 (1992).

19. A substantial body of literature investigates how the Supreme Court sets its agenda by choosing cases to review. As far as we are aware, these studies all assume that the Court is not constrained in its choices by its petitioners. Classic studies include JUDICIAL DECISION-MAKING (Glendon Schubert et al. eds., 1963); Sydney S. Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 901-11 (1979); and, using a very different methodology, H.W. PERRY, JR., DECIDING TO DECIDE 216-270 (1991).

20. *See* Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 L. & SOC'Y REV. 809, 815-17 (1990).

with federal respondents,[21] the Solicitor General declines to petition for certiorari in some cases which the Supreme Court would also like to hear; that is, the screening process applied by the government might be so extremely selective as to change the Supreme Court's menu of cases. Our argument rests on considerations that are standard in rational choice studies of legal appeals. As we will show, there are major asymmetries between the costs and benefits of cases appealed by private litigants and the costs and benefits of cases appealed by government litigants. These asymmetries arise from the institutional structure of the federal judiciary and from administrative judicial review. As a result, the incentives to pursue Supreme Court review differ enormously between the U.S. government and other parties.

None of our analysis should be understood as making any claims about the big normative question in the area: Is the government-petitioner advantage[22] good or bad? The ability of the U.S. government to gain an advantage at the Supreme Court through litigation strategy might be a good thing, a bad thing, or morally neutral. Answering the big question would require confronting questions about whether the decisions of the Solicitor General have moral force independent from decisions of the rest of the executive branch; whether the executive branch, as a unitary whole, has a constitutional role in interpreting statutes and the constitution, perhaps through manipulating litigation; whether the strategic behavior of the Supreme Court justifies strategic behavior by the executive branch; whether strategic litigation behavior by the executive branch is morally acceptable; and so on. Professors Gifford and Rossi, in their comments on our Article,[23] do an admirable job of starting the rather complex conversation needed to parse these moral problems. We take no position on the moral and normative questions, resting with a purely descriptive task—describing a feature of modern administrative law adjudication.

In Part II of this Article, we present our theory of why a government advantage should exist. In Part III, we discuss empirical evi-

---

21. The certiorari success rate for petitions with federal respondents average is less than 4% per year, which is consistent with the claim that the government is more careful with its appeals than are other parties. *See* SALOKAR, *supra* note 18. This statistic is further consistent with a selection effect in that it establishes that not all (or most) cases involving the federal government are worthy of Supreme Court review.

22. The government-petitioner advantage refers to the U.S. government's greater chance of victory at the Supreme Court level.

23. *See* Daniel J. Gifford, *Why Does a Conservative Court Rule in Favor of a Liberal Government? The Spitzer-Cohen Analysis and the Constitutional Scheme*, 28 FLA. ST. U. L. REV. 427 (2000); Jim Rossi, *Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?*, 28 FL. ST. U. L. REV. 459 (2000).

dence that supports the existence of a government advantage. In Part IV, we discuss implications for administrative law.

II. GOVERNMENT ADVANTAGE

An apparent government advantage could exist for several reasons. First, the government may diverge from private litigants in its petitioning behavior. Another possibility is that the Supreme Court is in general more progovernment than are circuit courts. Third, the government may, in general, do a better job at preparing and arguing its case before the Supreme Court than do other litigants. Each of these possibilities is considered below.

A. Suit and Settlement in Public Law

We follow the standard law and economics analytic framework and assume that a potential appellant appeals only on the expectation of gain, and an appellant considers, in addition to the benefits of winning or costs of losing, the likelihood of success on appeal, the costs of further litigation, and the settlement opportunities. Our analysis focuses on two distinctions between the way that the federal government and other litigants evaluate these parameters: the first relates to the enhanced ability of the federal government to internalize externalities of Supreme Court decisions, and the second relates to differential authority of lower court decisions over the federal government vis-à-vis private litigants.

1. The Scale and Scope of Supreme Court Decisions

Our analysis builds on the function that the Supreme Court plays in the judicial hierarchy. As H.W. Perry documents in his extensive study of certiorari, the Supreme Court does not believe its role is to correct errors of lower courts or even to ensure justice, but rather, as Justice Vinson wrote, "to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts."[24] Implications of this characterization of Supreme Court decisions are that the decisions typically have greater scope and scale than the appellate decision under review and that they are likely to affect agencies, companies, or individuals not party to the original suit. Indeed, externalities of scope or scale might be considered a prerequisite for Supreme Court review.

---

24. PERRY, *supra* note 19, at 36 (quoting Chief Justice Fred M. Vinson, Remarks Before the American Bar Association (Sept. 7, 1949)).

The federal government, to a much greater extent than other litigants, can take account of these externalities when it decides whether or not to pursue litigation. The federal government's range of activities, like the reach of Supreme Court decisions, is national in scale. If, for example, a litigant with local operations appealed a circuit court decision and the Supreme Court affirmed the lower court, the litigant would have merely lost litigation costs relative to his position prior to the appeal; the "loss" in court (net of litigation costs) would be the same whether the Supreme Court heard (and affirmed) the case or not. The executive branch, similarly situated, might have to modify operations not only within the original circuit but also in other parts of the country.

This discrepancy continues to hold even when the nongovernmental litigant is national, as is frequently the case in Supreme Court litigation, or when the case originates from the exclusive jurisdiction caseload of either the Federal Circuit Court or the executive branch agencies.[25] The *Chevron* decision, which came to the D.C. Court of Appeals under its exclusive jurisdiction, illustrates the point.[26] The *Chevron* decision established a standard of greater judicial deference to the executive branch that applied across the entire range of administrative actions, as well as upholding the EPA regulation that defines a "source" for purposes of pollution abatement standards.[27]

Two prominent, recent cases illustrate the differential incentives of federal and other parties similarly situated as potential petitioners.[28] In both of these cases, the federal government argued against certiorari, although its denial would automatically uphold appellate

---

25. The circuit courts that have exclusive jurisdiction receive national precedential authority for their decisions. *See* Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990). The national precedential authority includes appeals of patent cases by the Federal Circuit Court and appeals of cases related to aspects of the clean air and broadcasting regulation by the D.C. Circuit Court. *See id.* at 1123-25. The Federal Circuit Court also has exclusive jurisdiction over cases involving claims against the federal government; however, these cases often involve issues related to tax cases heard by other circuit courts, limiting the national precedential value of the cases. *See id.* at 1112. Exclusive jurisdiction cases are very rarely granted certiorari and heard by the Supreme Court, perhaps because of the diminished possibility for intercircuit conflicts. *See id.* at 1158-61. For a comprehensive discussion of exclusive jurisdiction, see Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts and the Administrative Lawmaking System*, 64 N.Y.U. L. REV. 1 (1989); Revesz, *supra*.

26. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984).

27. *See id.* Very extensive literature analyzes the nature and implications of this decision. *See, e.g.*, Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 433 (1996).

28. *See* Animal Legal Defense Fund, Inc. v. Shalala, 104 F.3d 424 (D.C. Cir. 1997); Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996).

court decisions against the government.[29] In the fall of 1997, the Piscataway, New Jersey, Board of Education unexpectedly settled with a white high school teacher, Ms. Taxman, who had successfully sued the school board by claiming that her layoff was based on illegal racial discrimination.[30] Both a federal district court[31] and the Third Circuit Court of Appeals (where the Board of Education was joined by the EEOC in arguing for the legality of the district's retention policies)[32] had agreed with Ms. Taxman's claim—the latter awarding her back wages and punitive damages of over $400,000.[33]

In 1997, the Piscataway Board of Education petitioned for Supreme Court review.[34] The Clinton Administration, concerned that a Supreme Court decision would have a negative impact on efforts elsewhere in the country to promote diversity through policies like those of the Piscataway Board of Education, argued unsuccessfully that the Supreme Court should decline to review the case.[35] The Supreme Court granted certiorari.[36] In November 1997, the Black Leadership Forum, hoping to avoid the anticipated national precedent, offered to pay 70% of the settlement if the Piscataway Board of Education would drop the case, which it did.[37] Newspaper articles called the move a "tactical retreat"; affirmative action opponents claimed that the rights groups "ducked a fight."[38] Of course, sooner or later such a case might make it to the Supreme Court. The Black Leadership Forum was hoping for later.[39]

An analogous issue arose during 1997 when the National Research Council (NRC) (the operating arm of the National Academy of Sciences) lost a series of court appeals to the Animal Legal Defense Fund, which argued that its members had been illegally barred from NRC meetings and that the NRC was subject to the Federal Advisory Committee Act[40] (FACA).[41] The NRC appealed the case from the D.C.

---

29. *See* Linda Greenhouse, *Settlement Ends High Court Case of Preferences*, N.Y. TIMES, Nov. 22, 1997, at A1; Andrew Lawler, *Government Bows Out of Academy Case*, SCIENCE, Oct. 3, 1997, at 28.

30. *See* Greenhouse, *supra* note 29; *see also* Barry Bearak, *Rights Groups Ducked a Fight, Opponents Say*, N.Y. TIMES, Nov. 22, 1997, at A1.

31. *See* United States v. Board of Educ., 832 F. Supp. 836, 851 (D.N.J. 1993).

32. *See* 91 F.3d at 1565-66.

33. *See id.*; *see also* 832 F. Supp. at 851; Greenhouse, *supra* note 29.

34. *See* Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997) (granting certiorari).

35. *See* Greenhouse, *supra* note 29; *see also* Bearak, *supra* note 30.

36. *See Piscataway*, 521 U.S. at 1117.

37. *See* Greenhouse, *supra* note 29; *see also* Bearak, *supra* note 30.

38. Bearak, *supra* note 30.

39. *See* Greenhouse, *supra* note 29.

40. 5 U.S.C. app. §§ 1-15 (1998) (requiring federal "advisory committees" to maintain public records and have public meetings).

41. *See* Animal Legal Defense Fund, Inc. v. Shalala, 104 F.3d 424, 426 (D.C. Cir. 1997).

Circuit to the Supreme Court and asked the Justice Department to file a petition supporting the appeal and the Academy.[42] The Justice Department declined to file a supporting petition because of concern that a Supreme Court review would jeopardize previous rulings that exempted some committees from FACA, and would perhaps open up other committees that had escaped FACA notice.[43] At the time, a Justice Department "source" told *Science* magazine that "there was a lot of pressure from the agencies [to join the case], but if we got a bad result from the court, the ramifications weren't limited to the academy."[44] The Supreme Court denied certiorari, letting the lower court decision stand.[45] In a further twist, Congress then passed, and the President signed, a bill that exempted the NRC from the Federal Advisory Committee Act.[46]

While these cases illustrate the difference in costs of losing, they may perhaps appear of limited practical importance. In the *Piscataway* case, the local party (the Board of Education), because of the intervention of the Black Leadership Forum, pursued the strategy that would have been taken by a national interest.[47] The Coase Theorem teaches us that externalities are relevant to litigation only in the presence of transaction costs.[48] Externalities create asymmetric costs and benefits only if the two sides to the litigation are also asymmetrically able to internalize the externalities.[49] That is, the effort required to take account of the externalities must be more costly for one of the litigants than the other.[50] It seems plausible to assert that the government would have lower transaction costs and be successful more often in internalizing external costs (or benefits) of appeals. The Black Leadership Forum intervention is unusual. National interests like the National Resource Defense Council, which pursued the *Chevron* case, are frequently involved in Supreme Court cases, but these organizations have narrower constituencies than the federal government. The final Part of this Article considers in more detail the extent of the difference in the scope of interests between the

---

42. *See* Lawler, *supra* note 29, at 28.
43. *See id.*
44. *Id.*
45. *See* National Academy of Sciences v. Animal Legal Defense Fund, Inc., 522 U.S. 949 (1997).
46. *See* Federal Advisory Committee Act Amendments of 1997, Pub. L. No. 105-153, 111 Stat. 2689 (1997) (exempting the NRC from FACA but with other kinds of sunshine restrictions). Examining the strategies to appeal and accept appeals of all the actors is well beyond this Article. It is interesting, however, to speculate about this case and whether the Supreme Court was cognizant of the likelihood of statutory reversal at the hands of Congress by its denial of certiorari. On the general issue of statutory overrides, see generally Eskridge, *supra* note 13.
47. *See* Greenhouse, *supra* note 29; *see also* Bearak, *supra* note 30.
48. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).
49. *See id.* at 44.
50. *See id.*

two parties in typical cases. Another difference, critical to our empirical formulation, however, is institutional. In contrast to other parties, the federal government not only starts with the advantage that it is, in its entirety, national in scale and broad in scope, but the government, through the activities of the Department of Justice and the Office of the Solicitor General, has institutionalized a mechanism to manage the appellate caseload that accounts for interjurisdictional externalities.

The Department of Justice handles most government litigation.[51] The specific relationship between the Justice Department lawyers and the lawyers who work in the administrative agencies is important to both the argument and the empirical analysis in the following Part.[52] Litigation in federal district courts may be conducted by either Department of Justice (DOJ) or agency lawyers.[53] In either event, the decision to litigate is effectively at the discretion of the agency (and, of course, its opposing party).[54] Appeals follow a different pattern. DOJ lawyers are generally involved in all appeals before circuit courts of appeal.[55] Any appeal by the government requires the approval of the Office of the Solicitor General, which approves only a modest fraction (around one quarter, according to Horowitz) of appeal requests by agencies.[56] Alternatively, DOJ lawyers routinely advise agency lawyers or undertake a defense themselves when an agency is the defendant in a case before an appellate court; this litigation requires no formal review by the Solicitor General.[57] Finally,

---

51. *See* DONALD L. HOROWITZ, THE JUROCRACY: GOVERNING LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS 1 (1977).

52. Some exceptions to the characterization in the text exist, most often when the Justice Department asserts litigating authority and an agency disagrees. *See, e.g.*, Mail Order Ass'n of America v. United States Postal Serv., 986 F.2d 509 (D.C. Cir. 1993) (denying DOJ's challenge to U.S. Postal Service's attempt to represent itself in appeal of a Postal Rate Commission order), *discussed in* Patricia Wald, *"For the United States": Government Lawyers in Court*, L. & CONTEMP. PROBS., Winter 1998, at 107, 127 & n.83; Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88 (1994) (restricting the ability of the Federal Election Commission to seek certiorari without the approval of the Solicitor General), *discussed in* Alane Tempchin, Note & Comment, *Fall From Grace:* Federal Election Commission v. NRA Political Victory Fund *and the Demise of the FEC's Independent Litigating Authority*, 10 ADMIN. L.J. AM. U. 385, 403-08 (1996).

53. *See* HOROWITZ, *supra* note 51, at 39-44.

54. *See id.* at 6.

55. *See id.* at 44-45.

56. *See id.* at 48.

57. *See id.* at 63. Horowitz offers several arguments for the distinction: the need to maintain reasonable relations with district court judges who have ruled in favor of the government and might be put off if the government abandoned the case; support for the government lawyers who successfully tried the case; and avoidance of conflict with an agency, which, fresh from a victory in a district court, might be unpersuaded by an argument from the DOJ that the case lacks merit. *See id.* The same features are credited with the government's relative enthusiasm for pursuing Supreme Court cases as defendant rather than plaintiff, although in that forum the Solicitor General is virtually always involved. *See* Wald, *supra* note 52, at 127.

the Solicitor General files all petitions for certiorari and litigates essentially all government cases before the Supreme Court.[58]

The centralized litigating authority of the DOJ responds to a need perceived by Congress (and others) for consistency in the federal position in litigation.[59] The issue is revisited periodically due to conflict between agencies and the DOJ and due to dissatisfaction outside the executive branch with the DOJ's handling of cases. The usual conclusion is that the system, if flawed, is necessary. The need for consistency and the centralization response relate directly to our discussion of externalities. While the federal government only rarely finds itself in direct litigation against itself,[60] the immediate litigation interests of different agencies frequently are at odds with the positions of other agencies; other parts of the executive; or the longer-run goals, interests, or reputation of the government as litigator. Such discrepancies are usually at the root of decisions by the DOJ to forego appeals.[61] By foregoing appeals, the DOJ internalizes litigation externalities for the executive branch of government.

2. Federal Administrative Agencies and the Lower Federal Courts

The preceding discussion suggests that the government (for example, the executive branch of the government) may routinely calculate the costs and benefits of a Supreme Court defeat or victory differently from other litigants. By internalizing broader impacts of a decision, both the costs and benefits may be larger for the federal government than for other litigants. This does not by itself imply that success rates would be different if both costs and benefits increase proportionately and then that no change in appellate strategy would result. However, other features of the system contribute to such a conclusion.

One feature that contributes to this conclusion is that the cost to the federal government of staying with a loss at a district court, or even circuit court, can be modest.[62] Indeed, a significant part of the external benefits from a victory at the Supreme Court fade when the differential treatment of the executive branch by the lower courts is taken into account. When the government loses a case in a lower court, the government is obligated to alter its behavior only toward the particular plaintiff in the suit; the government will not have to change practices relative to similarly situated individuals in other

---

58. *See* HOROWITZ, *supra* note 51, at 47.

59. *See id.* at 6.

60. *But see* United States v. Interstate Commerce Comm'n, 377 U.S. 426 (1949); Wald, *supra* note 52, at 127.

61. *See generally* HOROWITZ, *supra* note 51, at chs. 2, 7.

62. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 699-702 (1989).

circuits, to analogous activities in other agencies, or even to identically situated individuals in the same circuit.[63]

Administrative nonacquiescence (refusing to generally change governmental behavior because of a loss in a lower court) has been the subject of a substantial body of legal literature.[64] The logic of intercircuit nonacquiescence is straightforward. The Supreme Court, among others, finds value in the lack of *intercircuit* stare decisis.[65] Divergent opinions in the circuit courts signal difficulties in interpreting laws and changing social values or norms, and these opinions allow "percolation" of issues, providing valuable signals and information to the Supreme Court about which issues it should review.[66] Moreover, when a circuit court invalidates some administrative practice, the law is presumed to be in a state of flux, hence the availability of further review.[67] If administrative agencies changed national regulations in response to a single circuit decision, they would curtail the ability of other courts to issue divergent opinions.[68] Furthermore, on occasions when the circuits disagree, an agency would be in an impossible situation, needing to institute conflicting regulations nationwide.[69]

Once the principle of intercircuit nonacquiescence is accepted, the far more controversial *intracircuit* form is close at hand. One set of justifications arises from the goal of the federal administrative agencies: to institute a national, standard regulatory regime.[70] In addition to the obvious managerial problems associated with administering conflicting regulations in different parts of the country, some form of standardization was deemed desirable to justify federal, as opposed to state, regulation in the first place.[71] For example, different standards of fair labor practices in different parts of the country might promote an unfair basis for competition among businesses.[72] If an

---

63. *See id.* at 681 & n.1.

64. *See, e.g.*, Revesz, *supra* note 25.

65. *See* Estreicher & Revesz, *supra* note 62, at 736-37.

66. A particularly insightful discussion of this issue and its relationship to the strategies open to the Supreme Court to manage the judicial hierarchy is contained in Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095-96 (1987).

67. *See* Estreicher & Revesz, *supra* note 62, at 737-38.

68. *See id.* at 738.

69. Some proponents of nonacquiescence go further, arguing that while agencies must defer to Supreme Court rulings, no such constitutional provision exists with respect to the circuit courts. Both the circuit courts and the agencies are created by Congress; delegation from Congress to the agencies means they need not defer to the circuit courts. *See id.* at 730.

70. *See Estreicher & Revesz*, *supra* note 62, at 695 & n.66, 720 & n.212.

71. *See id.* at 695 & n.66, 714 & n.186.

72. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1998) (protecting the health, efficiency, and well-being of workers in working conditions).

agency follows a circuit court's directives by modifying regulations within a circuit, but leaves them unchanged in other circuits, the agency creates nonstandard regulatory regimes.

A second set of justifications arises from the structure of judicial review for administrative law. In some cases, the identity of a reviewing court is not known beforehand.[73] Some statutes (for example, the National Labor Relations Act[74]) allow a plaintiff to appeal a case to courts in different circuits: the plaintiff's own circuit, the circuit of his place of business, or the circuit of the corporate headquarters of his employer.[75] Similarly, patent infringement suits may be initially taken to a variety of districts with connections to the plaintiff, defendant, and both of their headquarters or research divisions.[76] While the judiciary has tried to cut back on forum shopping, it is still the case that some administrative actions can be appealed to a variety of different circuit courts.[77] Agencies have argued that it is not possible to determine *ex ante* which circuit's decisions should be controlling.[78] Hence, the arguments that justify intercircuit nonacquiescence, when combined with the plaintiff's ability to choose the circuit, may also justify intracircuit nonacquiesence.

Not surprisingly, the various federal courts find the practice of nonacquiescence deeply aggravating, but the practice persists and has been upheld by the Supreme Court.[79] Patricia Wald, former Chief Judge of the Court of Appeals for the District of Columbia Circuit, in an analysis of government lawyers in courts, conceded that:

> [t]he conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which particularly affect the Government. In short, collateral estoppel may not be applied against the government if the parties are not the same.[80]

Nonacquiesence can help alter the value of appeals to the federal government, when compared to the costs and benefits of appeals to private parties. If the costs of a Supreme Court loss are higher for the government than they are for other litigants, and if the costs of staying with a lower court loss are *lower* for the government than they are for other litigants, then we would expect that, in deciding

---

73. *See* Joshua I. Schwartz, *Nonacquiesence,* Cromwell v. Benson, *and Administrative Adjudication,* 77 GEO. L.J. 1815, 1818-19 & nn.6-10 (1989).

74. 29 U.S.C. §§ 151-169 (1998).

75. *See* Schwartz, *supra* note 73, at 1819.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See* United States v. Mendoza, 464 U.S. 154, 162-63 (1984).

80. Wald, *supra* note 52, at 126 (quoting *Mendoza*, 464 U.S. at 162-63).

whether to appeal, the government will require a higher likelihood of success than other litigants. If enough cases fall into the category of appeals that are unattractive to the federal government (an empirical issue) then the distortions in law discussed above may follow.

B. Progovernment Supreme Court: The Repeat Player

It is possible that the Supreme Court is more progovernment than the circuit courts. This progovernment tendency might provide an additional (and possibly complementary) explanation for the federal government's high success rate before the Supreme Court. Two main explanations have been offered for the idea of progovernment tendencies. First, a closer policy relationship may exist between the government and the Supreme Court than between the government and lower federal courts, where appointments are not subject to as much scrutiny, particularly by the executive branch.[81] Historically, U.S. Senators and state political parties have had considerable influence over the choice of circuit court nominees while the President has retained his nominating prerogative for the Supreme Court.[82]

The second explanation arises from the special relationship between the Supreme Court and the Office of the Solicitor General. The government's frequent position as litigator and the very frequent participation of the Solicitor General in front of the Supreme Court have been offered as explanations of the very high success rates that the government enjoys in that venue.[83] There are multiple interpretations of the observation that repeat play breeds success. One view is that it is simply repetition that breeds success by affording the repetitive litigant with knowledge about the workings of the courts and the nature of winning arguments.[84] For example, McGuire claims that this is all there is to the winning position of the government and that no additional, special status is afforded the Solicitor General by the judiciary.[85]

---

81. *See* ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY at ch. 4, 85-124 (1971).

82. *See id.* at 100-01.

83. The classic text in this area is SCIGLIANO, *supra* note 81. More recent, excellent discussions are contained in SALOKAR, *supra* note 18, and PERRY, *supra* note 19. Kevin T. McGuire provides a somewhat iconoclastic view and a comprehensive survey of recent literature in *Explaining Executive Success in the U.S. Supreme Court*, POL. RES. Q., June 1998, at 505, 505-06.

84. *See* McGuire, *supra* note 83, at 505-06.

85. *See id.* McGuire's analysis is based on a painstaking data collection where he characterized the experience of the solicitors in all cases before the Supreme Court during two terms and showed that the experience "benefit" accrued equivalently to government or nongovernment litigants. He also ran a regression that attempted to measure whether the Solicitor General additionally does a good job of selecting cases—what we are arguing here. He did not find a "selection" effect beyond the "experience" effect. *See id.* at 522-23.

Another aspect of repeat play is that it increases the value of a good reputation.[86] Repeat players will consequently attempt to develop a good reputation with hope that judges will know their reputation and be inclined to defer to them.[87] Most of the time such players win because they are good, and some of the time they trade on their reputation and win anyway.[88]

Finally, the most dignified version of the repeat-play hypothesis is that government is in the courts a great deal and wins frequently because of its responsibilities to promote the public good.[89] In this version, government lawyers and judges are to some degree on the same team, balancing and checking each other as the Founders planned, but still working towards similar goals and visions.[90] According to Judge Wald, this view makes judges more demanding and critical of government lawyers than of other litigants; nevertheless, the government appears well-treated by the courts.[91]

For our purposes, the key feature of each of these hypotheses is that they apply to government litigation regardless of whether the government is the appellant or the appellee. If the courts defer to litigants due to expertise, reputation, or a shared goal of furthering the public good, and if these characteristics appear more often in government litigants than in other litigants, then the courts will uphold the government position disproportionately more often. We would not, however, conclude that the nature of cases nor the resulting case interpretations are in any sense unrepresentative of what the courts would want. Our challenge then, empirically, is to distinguish this possibility—that progovernment tendencies of the Su-

---

Our analysis differs from his in two ways. First, he assumes that only cases in which the government is the petitioner can benefit from the selection effect, ignoring the fact that selection occurs at the circuit court level. Hence, a fraction of cases in which the government is the respondent before the Supreme Court might also have a selection effect. This correction is critical to our results. The second difference is a more subtle one: How should we interpret collinearity? It is entirely plausible that the more experienced lawyers agree only to work on the "best" cases and that they, being experienced, have a good idea of what those cases are. This applies to government and nongovernment cases. As a result, the correlation, which clearly exists in McGuire's data (both the selection bias and the government bias obtained without the experience variable, leading to a correlation of these measures) might be due to selection rather than (or at least, in addition to) experience.

Finally, we note that our results are not entirely at odds with his: if any experienced litigant has an advantage, and the government is more often experienced, then the overall jurisprudential bias with which we are concerned continues to hold. By the same token, one could argue correctly that sometimes nongovernmental litigants also internalize externalities and when they do, they tend to win cases. Again, the bias holds if the government does it much more often than anyone else.

86. *See id.* at 510.
87. *See id.*
88. *See id.*
89. *See id.* at 509.
90. *See id.*
91. *See* Wald, *supra* note 52, at 128.

preme Court produce the high rates of success for the government in the Supreme Court—from the possibility that more strategic behavior by the government in case selection produces the high rate of government success.

There is a critical assumption in the analysis that follows: neither a close policy relationship between Supreme Court Justices nor any of these repeat-play attributes distinguishes government as the petitioner from government as the respondent. The Solicitor General and Supreme Court Justices are there in both cases.[92] In fact, Horowitz suggests that appeals and defenses are treated very differently by the Solicitor General's office and by the DOJ more generally.[93] Whatever the motivation for treatment, if the result is a selection of appeals, then the bias we hypothesize is a possibility. Clearly, however, simply observing that the government tends to win is an inadequate test. To the extent that these other reasons—policy relationship and repeat-play relationship—hold, the government will tend to win more often. Hence, we must seek evidence of disproportionate success when the government is in the position of selecting cases for review, over and above the high success it may enjoy due to expertise, cultivation of reputation, or policy consonance.

III. DOES THE GOVERNMENT CONSTRAIN THE SUPREME COURT? EMPIRICAL EVIDENCE

Part II discusses our theory of why the cases presented to the Supreme Court differ between government and private litigants. This does not suggest, even at a theoretical level, that the litigants' choices change the Supreme Court's behavior. If the Supreme Court were to be given a free choice of all the cases in the courts of appeal to review, it might choose a set contained within the group appealed by the government and private litigants. If this were to be true, then the petitioning behavior of the parties would not affect the Supreme Court's selection of cases to hear and decide. Put differently, if the government's petitioning and settlement strategy constrains the Supreme Court's activities, then the government must forego appealing some cases the Supreme Court would like to hear and then affirm.

This Part proceeds in two steps. First, we provide an overview of our econometric strategy, drawing on the traditional wisdom about government litigation in the Supreme Court. Then, we discuss our attempt to detect—empirically—a strategic government-petitioner advantage[94] beyond that suggested by the traditional wisdom.

---

92. *See* HOROWITZ, *supra* note 51, at 10.

93. *See id.* at 63.

94. We will not be able to distinguish between an abnormally high reversal rate for government-petitioner cases and an abnormally high affirmance rate for government-respondent cases. Consequently, in this Part, we will refer to the advantage as a govern-

A. Existing Studies and the Null Hypothesis

Studies of public litigation at the Supreme Court find that the government tends to prevail and that it is more successful as the petitioner than as the respondent.[95] Table 1 below[96] contains raw statistics about all full Supreme Court decisions between the 1985 and 1997 terms which were heard on appeal from a circuit court and in which the Solicitor General was either a petitioner or a respondent, or in which there was no government involvement.[97] The pattern is striking: the government wins in over 70% of the cases where it is the petitioner, and it wins in just under 60% of the cases where it is the respondent. The other party does better as the petitioner than as the respondent as well but appears to be at a tremendous disadvantage in both roles, prevailing in only 40% of the cases as the petitioner and under 30% of the cases as the respondent.

This pattern appears to be consistent with strategic petitioning and settlement by the government. However, it is also consistent with a combination of two other hypotheses about the Supreme Court's strategic certiorari behavior that have been discussed in the literature. The first hypothesis concentrates on the Supreme Court's managerial responsibilities.[98] The argument, in brief, is as follows. The Supreme Court can only review a tiny proportion of the lower court caseload. One strategy for allocating its scarce reviewing "budget" is to grant certiorari preferentially to cases that appear to be outliers—cases that are most at variance with the Supreme Court's preferences. If lower courts dislike being overturned on review (if, for instance, they wish to maximize their own policy influence by writing opinions that hold on appeal) and if they anticipate that a decision substantially at variance with the preferences of the Supreme Court is likely to attract the Court's attention and be reviewed, then lower courts will attempt to avoid outlier decisions. The Supreme Court can, in theory, greatly expand its authority by selectively reviewing outlier cases, as it then will encourage *ex ante* compliance with its preferences by the lower courts. The upshot of this

---

ment-petitioner advantage although it may arise from either the government's petitioning or settlement strategy.

95. *See* SALOKAR, *supra* note 18, at ch. 4.

96. *Infra* p. 422.

97. Omitted from this table are cases where the Solicitor General entered an amicus brief either for the petitioner or the respondent. This choice was made to provide a "government-free" control group. *See* Cohen & Spitzer, *supra* note 27, at 431 & n.1, for more details on the case selection choices.

98. *See* Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model on Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 690-94 (1994). The result is also consistent with traditional "cue theory," in which error correction is a factor in grants of certiorari. *See* Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185, 1185-94 (1979).

strategy is to preferentially grant certiorari to cases that are likely to be reversed.

Some direct evidence of this principal-agent strategy is provided by Boucher and Segal, who show that justices who vote to grant certiorari are statistically more inclined subsequently to vote to reverse the lower court than are the justices who voted against certiorari.[99] Certainly the aggregate pattern of case outcomes suggests such a factor. Note that in Table 1, reversals are more common than affirmances among cases with no government participation. For cases involving the government, both government and the private party are more successful as the petitioner than as the respondent, although among cases where the private party petitions for certiorari, affirmances are more common than reversals.

Figure 1[100] shows the difference between the different reasons for affirmance and reversal rates. In Figure 1, *x* is the "management" effect: the base rate at which the Supreme Court reverses the circuit court in order to carry out its managerial functions. We would expect this rate to vary with the extent of policy consonance between the Supreme Court Justices and the judges on the appellate court under review. Accordingly, this rate should vary depending on the year and the circuit court from which a particular case originates.

In the results reported here, we separated *x* into two parts and estimated each in our regression equation. First, we used a constant term. This constant picks up the overall tendency in the system to reverse the circuit courts, regardless of the year in which the case was decided or the circuit court from which the case came. Second, we calculated the average rate at which the Supreme Court reversed cases that did not involve the government as either the petitioner or the respondent from the circuit court under review during the previous three years. We chose this strategy, first, to measure an effect independent of government participation and, second, to avoid possible correlation to the cases under review in the current year. Three previous years were chosen in order to have a sufficiently large sample of cases. Of course, this introduces some error into the measure as the personnel of the courts change each year, albeit slowly. Because of the dearth of cases without government participation in the D.C. Circuit, we included a dummy variable for that district, and we defined the reversal rate for cases originating from that court as the national average for the preceding three years.[101]

---

99. *See* Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 833 (1995).

100. *Infra* p. 425.

101. *See* Cohen & Spitzer, *supra* note 27. We also report a "fixed effects" conditional regression that, in effect, controls for each circuit and each year. The results of interest are equivalent to those discussed here. This alternate specification has the advantage of a

We need to control for a second possibility—that the Supreme Court may be, in general, more progovernment than are the circuit courts.[102] Recall the claims, reviewed in the previous Part of this Article, that the Solicitor General is held in high regard by the Justices, a position which he enjoys by unusual competence, by litigating the most before the Supreme Court, and by being the possible beneficiary of the Supreme Court's predilection to defer to the executive.[103] This hypothesis will be called the Solicitor General "deference effect" to distinguish it from a strategic case selection advantage.[104] All of the government cases in our sample were litigated by the Office of the Solicitor General.[105] Both of the explanations for government's litigant advantage lead one to expect that the Supreme Court *on its own volition* will grant certiorari more often to cases where the government is likely to prevail. Thus, the Court's decisions will be progovernment, but its reviewing choices would not be constrained by the government. The deference effect does not, on its own, suggest that

---

more intuitive fixed effect and also more data (the procedure reported here "wastes" three years to construct the reversal rate coefficient) but is limited in ease of interpretation and particularly in the ability to calculate predicted values.

102. The Supreme Court also reviews some decisions of state supreme courts and directly reviews some federal district court decisions. The logic that argues a progovernment advantage of the U.S. Supreme Court relative to circuit courts applies more strongly to these cases. We restrict our statistical analysis to cases appealed from circuit courts. Consequently, it is the relationship between the courts and the Supreme Court that is the focus of the discussion in this Part.

103. There is an enormous literature on this point. For a sample, see Symposium, *The Role and Function of the United States Solicitor General*, 21 LOY. L.A. L. REV. 1047 (1988).

104. The Office of the Solicitor General (OSG) may indeed be responsible for some or all of the selection activities tested for in this study. The OSG reviews requests by most government agencies who want to appeal cases to circuit courts and decides whether to petition for certiorari for cases decided adversely by the circuits. Functionally, cases go through both an agency filter, which requests the OSG to appeal to a circuit or to petition for certiorari, and the OSG filter. The OSG turns down most requests to ask for certiorari. The logic that suggests selectivity by agencies (considering the externalities of affirmances) applies perhaps more strongly to the OSG, which would consider interdepartmental externalities as well as intradepartmental ones. We have no empirical way of distinguishing between advantages that arise from agency incentives and those that arise from the OSG in this study. Thus, we lump the two together under the rubric of government advantages. However, the subsequent Part returns to the question of reputation and motivation in the selection criteria.

105. During the years covered by our sample, the Supreme Court did not grant certiorari to any cases brought directly by federal departments or agencies. Thus, this sample includes all Supreme Court cases with a federal petitioner. During this period, as far as we can tell, the Solicitor General always defended the federal government before the Supreme Court. Consequently, we believe that we have a comprehensive set of cases involving the federal government as either the petitioner or the respondent before the Supreme Court. The formal ability of agencies to bring suits to the Supreme Court appears more diverse than their practices. The right of agencies to appeal to circuit courts, as opposed to going through the Solicitor General's Office first for approval, varies in practice, but this complication is ignored in the current paper. For a game-theoretic analysis of the relationship between the Supreme Court and the Solicitor General, see Linda R. Cohen & Matthew L. Spitzer, Including the Solicitor General, Part II (1998) (unpublished manuscript, on file with authors).

the government would do even better as the petitioner than as the respondent.

Figure 1 identifies the deference effect as *y*. When the government is the petitioner, it enjoys a success rate of *x+y*.[106] When the government is the respondent, it can expect to lose cases at a rate of *x-y*, which is less often than private party respondents (who lose at rate *x*). Figure 1 also shows that we assume that the Solicitor General institutional advantage is symmetric around *x*. We expect the deference effect, *y*, to vary by year. For example, changes in the relative policy positions of the Supreme Court, the President, and the agencies (which may involve Congress as well) may produce changes in *y*. It may also vary depending on the issue area. For example, the Court may be more inclined to defer on issues involving national security, foreign affairs, or highly scientific debates than those addressing individual rights.[107]

To detect the institutional advantage, we coded the cases "1" when the government is the petitioner, "0" if there is no government involvement, and "-1" if the government is the respondent. *Ceteris paribus*, we would expect the coefficient for this variable to be positive—reversals are more common when the government is the petitioner and less common when it is the respondent. In the regression reported here, two complications are included: First, the variable may vary by year to capture the changes discussed above. Second, we coded cases to distinguish between two types of government cases. Type I cases are those where the government petitioned to the circuit court. All Type I cases passed through the Solicitor General filter *prior* to the circuit court decision and prior to the petition for certiorari. Thus, in Type I cases, there may be selection effects present whether the government is the respondent or the petitioner. Type II cases, in contrast, are those where the government did not appeal to the circuit court. In Type II cases, either the government won at the district court, and so was the appellant at the circuit level, or the case came on direct appeal from an administrative agency. Hence, in Type II cases, the first opportunity for selection occurs at the certiorari petition level.

Finally, to detect a strategic component, we include a variable that indicates whether the government has had the opportunity to select the case under review. Figure 1 below shows this as *z*: if the

106. This figure is intended only to illustrate the idea behind our estimation. In fact, our statistical approach utilizes a logit estimation that is nonlinear to take account of the constraint that a probability must lie between zero and one. The estimation assumes that the government bias is not linearly (or additively) symmetric, but rather in effect proportionately symmetric, taking account of the upper and lower bounds on a likelihood of reversal.

107. Variation by issue area is examined in Cohen & Spitzer, *supra* note 27, at 455. There are systematic differences in deference as outlined here.

government is the petitioner, then its success rate would be $x+y+z$, in part due to the general success of petitioners granted certiorari (x), in part due to its favored role as government litigant (y), and in part due to strategic selection (z). If selection has no constraining effect on the Supreme Court, we would estimate z to be zero. We only expect to find a z effect in those cases where the first opportunity for strategic selection is at the certiorari level, that is, in the Type II cases. Such bias would be expected in all Type I cases or possibly be much weaker if the selection is even narrower at the Supreme Court level than the circuit court level.[108] Table 2 below[109] reports success rates by case type. Note that these numbers roughly correspond to the discussion in this Part, although this table cannot control for variation in the management effect across circuits or terms.

B. Results of the Econometric Study

Table 3[110] contains the results of the logit estimation. We find that, controlling for both a progovernment tendency and an underlying propensity to reverse lower courts, the government still is abnormally successful before the Supreme Court when the government petitions for review. To restate this conclusion, the government succeeds more often as the petitioner before the Supreme Court than we would predict on the basis of two regularities: petitioners tend to be successful once their petitions are granted certiorari and the Supreme Court favors the government's position more than do the circuit courts. The latter two effects can be interpreted as choices made by the Supreme Court: its strategy in setting its certiorari agenda. Additional success for the government in Type II cases runs counter to the standard hypotheses about how the Supreme Court chooses its agenda when unconstrained. It is consistent with our hypothesis that the government is far more selective in its petitioning strategies than are its adversaries before the federal courts.

We estimate the effect only for those cases where the government's first opportunity to select out of appeal is at the Supreme Court. While the same effect may hold for other cases, we cannot directly separate the institutional and strategic impacts for cases where the government had the opportunity to select out of litigation at the appellate level. Our sample consists of all cases heard by the Supreme Court that came on appeal from a circuit court of appeals from the 1987 and 1997 terms. To keep the possible reputational effect of the Solicitor General "clean," we omitted from the sample any

108. Why the strategic selection effect would vary by either year or administration is not clear. Without a compelling reason to so distinguish and with already low degrees of freedom, we constrained this coefficient to be constant across sample years.

109. *Infra* p. 423.

110. *Infra* p. 424.

cases where the Solicitor General filed an amicus brief on whether to grant certiorari or on the substantive issues.

The regression reported in Table 3 includes six explanatory variables.[111] The coefficient for the reversal rate variable is positive and highly significant, and it supports the strategic management hypotheses about the Supreme Court: the outcomes are highly correlated for cases granted certiorari from a single circuit court within a small number of years.[112] Finally we include a dummy variable for labor cases, as during this period the Court was systematically more likely to affirm cases that involved the labor agencies (the Department of Labor and the National Labor Relations Board) than for other cases.

Coefficients for the government selection and deference effects are both positive and significant, consistent with our main hypotheses. How important is the selection effect? Interpreting logit coefficients is not straightforward. Because the logistic curve is nonlinear, the effect of a single variable depends on the values that other variables assume for each observation. A useful way to evaluate the results is to consider the difference in the likelihood of reversal for the cases that we hypothesize are subject to the selection bias: those where the government petitioned for review at the Supreme Court but not at any lower court. There are ninety such cases in the subexample used in the estimation, of which 79% were reversed (that is, the government position prevailed) and 21% were affirmed. We calculated for each of these cases the predicted likelihood of reversal if the government had petitioned these cases for review, but the additional selection effect did not hold—that is, allowing for the relative esteem that the Supreme Court held for the appellate court under review and for a progovernment bias in the case due to the preferences of the Supreme Court rather than strategic selection by the executive branch. In this case, we estimate that the expected number of reversals would be 65% of the total.

From these estimates, we can infer how many cases the Solicitor General declined to petition for review that, absent selection, we would predict that the Supreme Court would have reviewed and affirmed. In the actual sample, seventy-one cases were reversed, or 79% of the ninety cases in this category. For seventy-one cases to be 65% of the sample, the sample would have to include thirty-eight cases where the government lost, or a total of 109 cases rather than

111. See Cohen & Spitzer, *supra* note 27, at 432-33, for further model specifications and discussion of the sample and estimation. The alternate specifications explore differences in selection and deference over time and by issue area. Results for the selection bias reported here are robust in these more complicated specifications.

112. In Cohen & Spitzer, *supra* note 27, at 470, we consider a fixed effects (conditional logit) model which yields the same qualitative results for the variables of interest here.

ninety. Thus, the estimates here predict that the Solicitor selected out nineteen cases.

As is discussed above, our coefficient for the selection effect is likely to be biased down for two reasons. First, we are ascribing any selection bias that might take place prior to circuit court appeals to a deference effect rather than a selection effect. Second, an asymmetric settlement strategy by the government will weaken the measured selection effect. Thus, the extent to which we can estimate the selection effect is likely to be understated. Given this bias, our result that in the cases where we can measure selection, the government may be withholding 20% of the cases that the Supreme Court would like to review is a substantial number—certainly sufficient to give credence to the concerns discussed in the first Parts of this paper.

IV. IMPLICATIONS FOR ADMINISTRATIVE LAW

The government-petitioner advantage produces several implications for administrative law. We consider here the implications of the analysis for private parties versus the government and for the judiciary versus the executive, and we offer some preliminary comments about the implication of our analysis for statutory design.

A. The Government-Petitioner Advantage and the Coase Theorem

Part II assumes that the cost of an affirmance by the Supreme Court is zero for a private (local) party and positive for the government. The affirmance cost modeled, however, is only the cost to the private potential petitioner. More generally, there is a cost associated with a Supreme Court affirmance and possibly a benefit with a reversal, which includes the costs imposed on and the benefits enjoyed by similarly situated parties in other circuits, now subject to the decision of the original reviewing court. By petitioning the Supreme Court to review weak cases, the private party imposes a potential externality on similarly situated firms or individuals in other circuits.[113] By settling strong cases, rather than pursuing them to the Supreme Court, the private party denies similarly situated firms or individuals potential benefits.

These external costs will only show up in a subset of the cases. Where the first circuit court to address an issue resolves it in favor of the government, then there may be no external cost. The government

113. The externality here is from a change in law, rather than costs and deterrence, as analyzed by Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371 (1986), Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997), and Susan Rose-Ackerman & Mark Geistfeld, *The Divergence Between Social and Private Incentives to Sue: A Comment on Shavell, Menell, and Kaplow*, 16 J. LEGAL STUD. 483 (1987), who consider social costs of private law rather than the issues that arise in public or administrative law.

is already pursuing its own policies in all the circuits, and an affirmance by the Supreme Court will not change the law that is being applied in any of the circuits.[114] However, if there have been prior circuit court cases favorable to private parties in other circuits, an affirmance of a case favorable to the government may impose costs on other private parties.[115] The affirmance will overturn doctrine favorable to private parties in other circuits. The private party who is considering appealing will not take the external costs into account when making its decision.

This is a standard problem of the commons. The nonstandard feature of the problem is the asymmetry in calculations among types of litigants. The government petitioner does not suffer from a failure of the commons. The federal bureaucracy, through strategic choice of appeal, can avoid, for a while, judicial decisions to its disadvantage while promptly pursuing those with broader positive impacts for the bureaucracy. Other parties have negative decisions imposed relatively promptly but may experience a delay in decisions to their favor. Thus, in administrative cases, the federal structure of judicial review works to the advantage of the federal bureaucracy over regulated parties.

"But why," those of us raised on the Coase Theorem[116] might ask, "doesn't the market take care of this"? After all, in the absence of transaction costs—perfect information, no bargaining costs, and no strategic bargaining—those who stand to gain or lose by a private litigant's decision to appeal will offer the private litigant some money to change his mind. If the external costs are large enough to justify a payment to the private litigant to induce him to change his behavior, then those who stand to gain or lose will pay enough to change the decision. That is precisely what our example of the *Taxman* case, discussed in Part II.A.1, shows. There may be a transfer of resources, but the set of cases brought by private parties to the Supreme Court should have just as strong a petitioner advantage as the government cases have.

This analysis is internally consistent but wrongly applied to this setting. Information is far from perfect. To be sure, some industry trade associations try to track the external impacts of some cases in the federal courts. However, this activity can only track a fraction of

---

114. We thank Dan Gifford for pointing this out to us in comments on a prior draft.

115. This presumes that the government is not engaging in intracircuit nonacquiesence.

116. *See* Coase, *supra* note 48, at 1 (1960); *see also* Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J.L. ECON. & ORG. 381 (1990); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995); Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982); Richard D. McKelvey & Talbot Page, *Taking the Coase Theorem Seriously*, ECON. & PHIL., Oct. 1999, at 235, 246-47.

the potentially important cases. Second, there will be significant bargaining costs in persuading a private litigant to forego an appeal. Third, there may be substantial strategic posturing by private parties hoping to "free ride" on the efforts of others to head off potentially damaging petitions. This would include firms hoping that other firms in the same industry would pay a potential appellant not to bring the appeal. It might also include organizations like the NAACP or the NRA, hoping to avoid the negative affects of an affirmance. For all of these reasons, we cannot expect bargaining and contracting between appellants and third parties adversely affected by the appeals to "correct" the set of cases brought to the Supreme Court. Instead, we can expect imperfect information, transaction costs, and strategic behavior to produce a government-petitioner advantage at the Supreme Court. This is exactly what our statistical analysis confirms.

B. Private Parties vs. the Government

When an attorney for a private party advises a client who is subject to a form of government regulation, part of the attorney's advice must be based on a prediction of what the courts might do if an administrative rule or order is challenged in court. To make that prediction, the attorney usually reads, among other things, the extant case law from the Supreme Court. The attorney's "best reading" of the law is to include his or her appraisal of the arguments for and against the winning parties in each of the cases, the similarity between the facts and issues of decided cases and the interests of the client, the degree to which the passage of time has changed the membership or views of important justices, and so on. We believe that all of these things are important.

However, our results show that there is something else that is just as important as the considerations just mentioned. In particular, the attorney *should* consider sets of cases that never got to the Supreme Court because of the government-petitioner advantage. Cases which the government might well have lost if appealed to the Supreme Court were systematically weeded out before the Supreme Court got a chance to make its judgments and issue decisions. Hence, the set of decisions that the attorney gets to read will have an overabundance of decisions for the government. In the process of making analogies between decided cases and his or her own, the attorney will have a much easier time making analogies to cases in which the government wins than he would have had if there were no government-petitioner advantage. As a result, it will be easy for the attorney to overestimate the government's chances of winning in the Supreme Court.

Of course, the attorney can try to adjust for this advantage (after reading this Article). He or she can say to himself or herself, "I know

that there are some ?missing' cases from the Supreme Court Reports because the government refused to appeal (or settled out) some likely losers."[117] However, the attorney has the difficult job of imagining what might be in those cases and then trying to give them the proper weight. This entire process seems difficult and fraught with error. We suspect that such attorneys, like miners who failed to notice that canaries had stopped singing, will neglect the import of cases that have been weeded out by the government-petitioner advantage.

C. Academics

As we pointed out in the introduction to this Article, academics read administrative law cases for many reasons. All of them are subject to the government-petitioner advantage. Our historical accounts, our doctrinal analysis, our law reform efforts, and our big theories are all predicated upon a reading of Supreme Court cases that have a progovernment tendency. In some contexts this is more important than in others. For example, pure historical work seems least affected. One who is chronicling "what happened" in administrative law can, it seems to us, justifiably spend much less time worrying about what might have happened if only the government were petitioning nonstrategically.[118] On the other hand, if we try to deduce the Justices' or the Court's ideology and motivations by reading the cases, perhaps in historical context, then the government-petitioner advantage is more troublesome.[119] Strategic petitioning will have weeded evidence of the antigovernment ideology out of the record. The government-petitioner advantage will lead us to conclude mistakenly that the Justices embraced ideologies that were more statist than was actually the case.

---

117. In addition, the attorney can read the lower court cases, perhaps note that they tend to be slightly less friendly to the government, and then make estimates of winning in the courts of appeal. However, without the adjustments in text, the attorney may still misestimate the chances of winning in the Supreme Court.

118. Even here, however, one can run into trouble, depending on what one means by "what happened." For example, some new left historians claim that 19th Century appellate courts were biased in favor of the railroads and other large capitalist enterprises. *See* HOROWITZ, *supra* note 51, at 48. If the logic of government-petitioner advantage also works for large capitalist enterprises that operate in many circuits, and theory says that it should, then the *observed* advantage in the case law might be, in part, a result of strategic petitioning, rather than just the preferences of the judges.

119. Thus, the most important single article in administrative law, in our opinion, Richard Stewart's *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975), possibly has some of these problems. Of course, if read as a synthetic *historical* account, explaining how the extant cases could be read in each era if one wanted to rationalize them, then the piece does not suffer from the government-petitioner advantage. It is only if the article is read, in part, as trying to deduce what *really* motivated the Justices, that the government-petitioner advantage becomes important. We can make similar observations about the enormous volume of scholarship on the *Chevron* doctrine.

Our law reform efforts may also suffer from the government-petitioner advantage. First, when deciding whether the existing system is "broken," we read a censored record of Supreme Court opinions. We may be led to conclude mistakenly that there is (is not) a problem when there really is not (is) one. Second, when we formulate new suggested laws, they will be at variance with what may really be "needed." Third, unless we anticipate that the government will utilize our new suggested laws so as to minimize the chance of adverse verdicts, our suggestions may miss the mark.[120] We academics can try to adjust our thinking, just as practicing attorneys and judges may try to adjust. We recommend trying to do so. However, we suspect that academics will do no better than our brothers and sisters in practice.

D. Judges vs. Bureaucrats

Our model also has implications for the relative authority of the branches of government. This result is easiest to conceptualize in a zero-litigation world. Recall that in a zero-litigation cost model, the private party always appeals a loss it obtained at a lower court. Only the government appeals selectively. In this simplified world, our model predicts a ratchet (in the short term) into the Supreme Court's ability to change administrative law. If the Court wants to move in a progovernment direction, it will have plenty of cases to adjudicate. Cases that are likely to be useful for progovernment rulings will move through the courts and up to the Supreme Court at a reasonable clip. When the government controls the appellate decision (for example, it has lost at a lower court), it will appeal cases up through the courts. Alternatively, when the private party loses in a lower court, it always appeals. Thus, the Supreme Court has its choice for cases that will be useful for changing policy in favor of a government policy or position.

When the Supreme Court wants to move in an antigovernment direction, the situation is more complex. Under the same set of assumptions as above, it will receive cases only from private parties; the government itself will not petition such cases for review. Thus, if the lower courts have generally ruled *in favor of* the government, then a private party can appeal the relevant cases and the Supreme Court will be able to put into effect its policy change. Alternatively, if the lower courts have ruled *against* the government, then the government controls the agenda, and the Supreme Court gets rolled.

Whether the Supreme Court receives cases in which it might change precedent, then, depends on the actions of the lower courts. If

120. For a recent piece integrating law reform, big thinking, and strategic considerations, see Freeman, *supra* note 9.

these courts anticipate a change in precedent by the Supreme Court, assuming that the government anticipates the change (and we expect no less of the lower federal courts) and if the lower courts want to further the interests of the Supreme Court, then their appropriate strategy is to rule counter to what they believe the Supreme Court will ultimately do; that is, they should set themselves up to be reversed.

We have never seen any evidence of this type of strategic behavior. Under the more standard scenario, the lower courts will on occasion reverse the government when it expects that action from the Supreme Court. The implication is that the Supreme Court will not get the cases it may want or need to change policy in an antigovernment direction.

Furthermore, the more disposed the courts are against the government, the more tilted the system is in favor of the government. The relevant comparison here is between a situation where the courts, in unity, are inclined to rule against the federal bureaucracy versus the reverse case where the courts, again in unity, are inclined to rule against local concerns. With a high likelihood of obtaining review and then failing at the Supreme Court, the bureaucracy is most unlikely to appeal relative to the optimal strategy of a local party. Of course, if literally every circuit ruled against the government, the federal bureaucracy would presumably find it difficult to maintain a credible justification for nonacquiescence. However, up to a point, such an argument is plausible, and substantial delays in modifying policies towards those favored by the courts are possible.

The situation described in the preceding paragraph may be a reasonable characterization of the position of the courts and some of the federal bureaucracies in the early part of the Reagan Administration. Two Department of Health and Human Services (HHS) cases under the leadership of Secretary Heckler are held as models of nonacquiescence, and they are responsible for the perception that the policy of nonacquiescence was created as a crisis in judicial policy.[121] After Reagan's election, HHS sharply modified some welfare and disability policies, which unleashed a rash of litigation at the district courts. HHS lost these cases, they were not appealed, and HHS did not modify its policies—the classic case of nonacquiescence.[122] Only later—after Reagan had appointed Supreme Court Justices—did such cases reach the Supreme Court.[123]

---

121. *See* Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984) (finding intracircuit nonacquiescence is a per se violation of separation of powers doctrine); Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985) (barring intracircuit nonacquiescence).

122. *See* Estreicher & Revesz, *supra* note 62, at 699-702.

123. *See id.* at 699 & n.95.

E. Statutory Design

This analysis suggests some mechanisms by which the extent of the probureaucrat advantage can be modified through statute. If we suppose that the enacting coalition of legislators and the President had determined the desirable mix of judicial and bureaucratic authority over a regulatory area, what statutory provisions would ensue?

The legislature could control, in part, the degree of government-petitioner advantage by controlling the extent to which judicial review is split into more and smaller components. More circuits, more levels of review, and more ways to distinguish local results from national ones would likely exacerbate the commons problem for local concerns and the extent to which government and local incentives diverge. These would tend to reduce the relative authority of the judiciary and disadvantage the targets of regulation. Alternatively, statutory provisions that specify direct appeal to higher courts would work in the reverse manner.

Statutory provisions that affect the justification for nonacquiescence play a similar role. The greater the latitude for nonacquiescence, the more costly to the government is a Supreme Court loss relative to a circuit court loss. Thus, statutory provisions that allow multiple venues work to the advantage, in this respect, of the bureaucracy; those that require appeals to be taken to the D.C. Circuit (or the Federal Circuit) empower the judiciary and regulated parties.

F. Limits of the Analysis

All of the above implications for administrative law presume that the increased number of cases in favor of the government worked their way into the law of administrative agencies. The most likely mechanism is the common law method, based on analogical reasoning. The more cases there are that rule in favor of the government, the easier it will be to find decided cases with fact situations and stated rationales that are similar to any given case that is being litigated. Thus, the government-petitioner advantage should make it easier for the government to win in the future.

If the Supreme Court can issue decisions with broad rules and rationales that clearly are more important than other cases, the connection between the government-petitioner advantage and administrative law is rendered less obvious. If the Supreme Court can issue a decision that is against the government and is clearly much more important than several progovernment decisions, then "the law" cannot be determined by counting cases. Instead, one would have to do an analysis of content and importance to assess whether the government-petitioner advantage had an influence on the law. We take no

position on this question in this Article, leaving its resolution for future scholarship.

V. CONCLUSION

In this paper, we developed a model of rational appeals in public law which suggests that the government will selectively petition the Supreme Court for review—much more so than other petitioners do on average. The empirical results support the hypothesis that the selectivity matters: the government petitions so little that the Court is constrained in its certiorari choices, and the docket will overall appear more favorable to the government than the Court would want. In brief, the government will not appeal cases where it fears an adverse decision. The Court will have to wait for a different party to appeal such cases, which might take a while, particularly if the lower courts and the Supreme Court decide cases in a similar way.

This asymmetry results from three aspects of the American judicial system. First, only losers can appeal. When the government consistently loses, it can avoid higher levels of review, for only it has the power to appeal. Second, the hierarchical structure of American courts means that the lower court decisions need not be authoritative, particularly (indeed, uniquely) for a federal litigant. Finally, as de Tocqueville observed, the American courts must wait for an appeal. They are structured to be reactive rather than proactive in choosing topics to adjudicate. Our analysis shows that this structure inherently limits the power of the courts relative to the executive branch of government.

Table 1: Supreme Court Outcomes by Status of the Federal Government

Government Status	**Supreme Court Outcome**		**Total**
	Affirm	**Reverse**	
Respondent	128 59.8%	86 40.2%	214 100%
Petitioner	72 29.3%	174 70.7%	246 100%
No Government Participation	146 42.6%	197 57.4%	343 100%
Total	346 43.1%	457 56.9%	803 100%

Table 2. Supreme Court Outcomes by Case Type

Case Type	Appellate Court Decision	Gov't Status at Supreme Court	Supreme Court Outcome*		Total
			Affirm	Reverse	
Type I: DC ruled against gov't; gov't appealed to Circuit Ct.	Affirm District Ct.; against	Petitioner	38 38.4%	**61** **61.6%**	99 100%
	Reverse District Ct.; for gov't	Respondent	**40** **64.5%**	22 35.5%	62 100%
Type II: Direct Appeals to Circuit Ct.	Against gov't	Petitioner	9 27.3%	**24** **72.7%**	33 100%
	For gov't	Respondent	**17** **60.7%**	11 39.3%	28 100%
Type II: DC ruled for gov't; other party appealed to Circuit Ct.	Reverse District Ct.; against	Petitioner	25 21.9%	**89** **78.1%**	114 100%
	Affirm District Ct.; for gov't	Respondent	**71** **57.3%**	53 42.7%	124 100%
All Type II Cases	Against gov't	Petitioner	34 23.1%	**113** **76.9%**	147 100%
	For gov't	Respondent	**88** **58%**	64 42%	152 100%
Type III: No gov't participation	Affirm District Ct		87 43.1%	115 56.9%	202 100%
	Reverse District Ct		59 41.8%	82 58.2%	141 100%
All Cases			346 43.1%	457 56.9%	803 100%

***bold entries indicate decision in favor of the government**

Table 3: Regression Results (Logit Regression)

Dependent Variable: Probability of Reversal at the Supreme Court

Independent Variables	**Coefficient**	**Standard Error**
Government selection ("z": government petitioner; Type II case)	.758**	.383
Court deference to government ("y": institutional advantage of government litigant)	.559**	.151
Reversal rate of cases from same circuit ("*x*": management effect)	2.322**	.450
Labor cases	-1.199*	.676
Appeal from DC or Federal Circuit	-.730**	.337
Circuit Court affirmed District Court	.081	.205
Constant	-1.007**	.314

** $p < .05$
* $p < .10$

Figure 1: Supreme Court Reversal Rate