Mississippi College Law Review

Volume 9
Issue 1 *Vol. 9 Iss. 1*

Article 5

1989

State Decisis and the Case for Executive Restraint

Craig R. Callen

Custom Citation
9 Miss. C. L. Rev. 79 (1988-1989)

ESSAY/REVIEW

STARE DECISIS AND THE CASE FOR EXECUTIVE RESTRAINT†

*Craig R. Callen**

Lincoln Caplan's book, *The Tenth Justice: The Solicitor General and the Rule of Law,*[1] raises a question basic to any discussion of the status of constitutional liberties in the federal system: the degree to which the Executive Branch of the federal government should consider itself bound by stare decisis in its interpretation of the Constitution. That question is central to the ease with which civil rights in general may be secured—thus its appropriateness for inclusion in this Symposium. The issue arises from Mr. Caplan's discussion of the Reagan Administration's apparent reluctance to defer to stare decisis in the Supreme Court. Mr. Caplan's analysis of salient constitutional doctrine is the only serious flaw in an otherwise illuminating and provocative book.

To supplement Mr. Caplan's analysis, this essay proposes that the Executive Branch should consider itself, at the least, obliged to observe executive restraint, self-restraint analogous to judicial restraint, in deciding whether to ignore judicial precedent in its own constitutional interpretation. The concept of executive restraint is supported by the existing relationship between the branches, and by constitutional doctrine. The discussion of executive restraint is necessarily somewhat limited by the scope of an essay *cum* book review. Yet, the need for executive restraint becomes more clear when we realize, in the light of Mr. Caplan's exposition of the role of the Solicitor General, the tension which a constitutionally-activist Executive Branch can create in constitutional interpretation.

THE BOOK

The Tenth Justice is not, primarily, a work of traditional legal scholarship. It is, instead, what one might call a legal narrative, a *genre* which combines elements of journalism and legal analysis to explain the interaction of people, their motivations, and legal doctrine, which results in changes in the law. As such, legal narratives are a sort of contemporary legal history, with emphasis on the techniques of history and journalism.[2] Although one might wish for

---

*Professor of Law, Mississippi College School of Law. Preparation of this essay was supported by a grant from Mississippi College School of Law.

1. L. CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).

2. Good examples of relatively recent vintage are R. KLUGER, SIMPLE JUSTICE (1976) and B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

more thorough legal analysis in parts of *The Tenth Justice*,[3] legal narratives may be the best account we can expect of the jurisprudential approach of any given administration, i.e., of that administration's intentions, if any, to seek modification of constitutional doctrine.[4] Barring unfortunate circumstances, the Presidency must change hands, at minimum, every eight years. Each change is likely to result in some changes in social policy, and in interaction among the Executive departments. Moreover, to the extent the Executive disagrees with judicial interpretation of the Constitution, there is no profit for the Executive in alienating the Court by doing more to articulate that position than stating that disagreement—absent an intent to defy the Court if it does not overrule the prior decision. (That intent would leave the Executive with nothing to lose.) Accordingly, there may be some parts of an administration's constitutional views which we can only discern through inference or journalistic investigation.

The Tenth Justice raises the issue of the authoritativeness of the Court's construction of the Constitution in a very narrow context. Mr. Caplan argues that the Office of the Solicitor General[5] was unconscionably politicized during the Reagan Administration.[6] He contends that disregard for stare decisis[7] was both cause and effect of the politicization, and that the Administration sought to use constitutional law to promote social policy with which neither Congress nor the public agreed.[8]

The second argument is primarily of interest here. The Reagan Administration's official sway has temporal limits. Whether politicization did, or will, have lasting effects will primarily be a function of the policy of future administrations. That, even under Mr. Caplan's analysis, turns on their attitude toward stare decisis, which is not likely to be affected by the internal squabbles of the Reagan Administration. The core issue, then, is one which has recurred ever

---

3. *See infra* notes 93-120 and accompanying text.

4. There is nothing which corresponds to the United States Reports to record a particular administration's constitutional jurisprudence, and certainly nothing with the internal force of stare decisis. As long as the Executive wishes to pursue success in court, it is unlikely to make many public pronouncements critical of the Court's role in judicial review, nor is it likely to give its adversaries assistance by publicizing the basis for its tactical or strategic decisions. *See infra* text following note 94. Accordingly, precedent of the sort to which legal scholars are accustomed is scarce, and gathering data by interview and investigation is necessary. Each makes traditional legal scholarship about an administration's constitutional jurisprudence or litigation strategy unlikely.

In particular, in view of the likelihood of changes in policy as a result of presidential succession, and the complexity and number of issues with which the Solicitor General's office deals, studies of the office must depend heavily on interview and anecdote. "The literature on the Solicitor General's Office consists almost entirely of articles written by past Solicitors General." Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1443 n.9 (1969).

5. The term "Solicitor General" will hereinafter be used to refer both to the Office of the Solicitor General and to its head. For a discussion of the Solicitor General's role in constitutional litigation in the Supreme Court, *see infra* notes 30-48 and accompanying text.

6. *E.g.*, L. CAPLAN, *supra* note 1, at 7, 149-50.

7. *Id.* at 65-80. Hence, Mr. Caplan's references to the rule of law.

8. *E.g.*, *id.* at 80, 134.

since *Marbury v. Madison*:[9] whether and to what extent the Executive and Legislative Branches should consider the Supreme Court's construction of constitutional law authoritative—an issue implicit in the question whether the Executive ought to exercise restraint in pressing views opposed to stare decisis in the Supreme Court. To the extent the Executive considers itself free to disregard the Court's interpretation, it would follow that there is no doctrinal reason why it should not make any arguments in court which it chooses. *The Tenth Justice* assumes that the Executive ought to regard the Court's interpretation as authoritative, ignoring the contrary arguments.[10]

In contrast, to the extent the Reagan Administration took positions in the Supreme Court which it could only have thought to be futile in that forum,[11] the Administration's actions were inconsistent with what it professed as its con-

---

9. 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *quoted in* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW: CASES & OTHER PROBLEMS 13-14 (4th ed. 1977).

10. *See infra* notes 93-94 and accompanying text.

11. This does assume that stare decisis has some predictable application, i.e., that there are times when one can accurately say that the Court is highly unlikely (or whatever standard one wishes to apply for futility) to overrule or distinguish a precedent. *See, e.g.*, K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4-7 (1960). This argument is made easier for the purposes of the principal example in this essay, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), because the Court in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 & n.1 (1983) stated, "There are especially compelling reasons for adhering to stare decisis in applying the principles of *Roe v. Wade*." *See infra* notes 59-64 and accompanying text.

In addition, appellants in *Thornburgh* did not argue that *Roe* and *Akron* should be overruled. The government's amicus brief, which asked the Court to overrule those cases in the absence of arguments below, thus raised an issue which verged on an abstract question of law—even more reason for the Court to be hesitant to take dramatic action. *See* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. at 452 (O'Connor, J., dissenting). *See also infra* note 58 and accompanying text.

The Court may *now* be prepared to reconsider some, or all, of the questions posed by *Roe*, or *Roe* itself, in Webster v. Reproductive Health Servs., 57 U.S.L.W. 3451 (U.S. Jan. 9, 1989) (No. 88-605), *noting prob. juris.* of Reproductive Health Servs. v. Webster, 851 F.2d 1071 (8th Cir. 1988). It does not follow, though, that the Solicitor General's argument in *Thornburgh*, that *Roe* should have been overruled, had any significant possibility of success.

First, all of the justices who reaffirmed the importance of stare decisis in *Akron* were still on the Court for the *Thornburgh* argument, with no particular reason to believe they would leave the bench soon. Prior to *Webster*, two of them, Chief Justice Burger and Justice Powell, resigned, and Justices Scalia and Kennedy joined the Court. That, of course, created a much greater likelihood that *Roe* would be modified or overruled in *Webster* than in *Thornburgh*.

Second, the tone of the *Thornburgh* amicus brief made it particularly unlikely to be successful. *See infra* notes 68-69 and accompanying text.

Third, the Solicitor General's claim of a federal interest in *Thornburgh* was tenuous, at best. *See* L. CAPLAN, *supra* note 1, at 260; *infra* note 68.

Fourth, appellants in *Webster* may be prepared to directly challenge *Roe* based on Missouri's "state-sanctioned theory of life," 851 F.2d at 1076-77, while appellants in *Thornburgh* did not do so. *See infra* notes 54-58 and accompanying text.

Finally, if one is willing to accept that stare decisis does have predictable applications in constitutional litigation, *Thornburgh*, at the least, is useful as a historical illustration of virtual futility.

ADDENDUM: Although the *Webster* decision weakened the trimester analysis somewhat, only Justice Scalia thought that the question of *Roe*'s validity was squarely posed. 109 S. Ct. 3040, 3064-67 (1989).

stitutional philosophy—the jurisprudence of original intention.[12] Those positions deviated from customary practice of the Executive Branch, and were especially incompatible with the traditional relationship between the Supreme Court and the Solicitor General's office.

THE ROLE OF POLITICS IN THE SOLICITOR GENERAL'S OFFICE

It is only fair to the Reagan Administration to point out that a good part of Mr. Caplan's criticism of the politicization of the Solicitor General's office not only misconceives political reality, but also represents an unduly rigid view of law. At the very least, any Solicitor General would concede that, where the law is unclear,[13] the existing administration's policy should be central to determining the position which the Solicitor General will argue on the government's behalf in the Supreme Court.[14]

Similarly, his argument that the Reagan Administration sought to use the courts as vehicles for social change despite public and congressional opposition sweeps too broadly. It is, for instance, questionable whether prior Solicitor Generals' positions as amici on the side of the parents in *Brown v. Board of Education*[15] or on the side of the voters in *Reynolds v. Sims*[16] would have won congressional approval, and there is room for doubt about their likelihood for success in contemporaneous referenda. Mr. Caplan takes as basic assumptions that constitutional doctrine should be resistant to the immediate will of the majority,[17] and that the Solicitor General should act independently of electoral[18] concerns in taking positions on constitutional issues.[19] Although Mr. Caplan has well-founded substantive objections to positions which the Soli-

12. On original intention, *see, e.g., infra* notes 71, 76-77 and accompanying text. For that matter, they were inconsistent with any approach to constitutional interpretation which does not distinguish between constitutional law on the one hand and changes in the electoral fortunes of a particular view on the other. *See* Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1024-25 (1987); *infra* notes 113-15, 118-20 and accompanying text. There is no intent here to endorse the original intention school. *See, e.g.*, Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1211-14 (1987) (criticizing original intent theories).

13. This is not to say that political effects may only appear when constitutional case law is ambiguous or unclear. *See infra* notes 66, 72 and accompanying text.

14. *See* Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 528 (1969).

15. 347 U.S. 483 (1954).

16. 377 U.S. 533 (1964).

17. As Mr. Caplan argues is expressed in various opinion polls. *See* the discussion *infra* notes 25-27 and accompanying text.

18. The term "electoral" is used herein to refer to positions which the Solicitor General might take with the specific intent that they either have effects at the polls, or serve as a quid pro quo for past electoral or legislative support, or satisfy a superior who is concerned about one or the other. There is no intent to argue that there is a clear distinction between political and legal questions. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

19. *See infra* notes 22-24 and accompanying text.

citor General took in a number of cases,[20] his broad objection to the change, if any, in the relationship between the Solicitor General and the rest of the Reagan Administration is inconsistent with those two assumptions.

Mr. Caplan does marshal evidence that various persons sought to influence the Solicitor General to take various legal positions because those positions were supported by persons who also supported the Reagan Administration.[21] That influence might have caused the Solicitor General to choose one of a set of valid legal arguments when he might have chosen another in the absence of that influence, although there is no specific evidence that such a choice was made. Mr. Caplan relies on an internal memorandum produced by the Justice Department in the Carter Administration to argue that the Solicitor General normally should not be the recipient of unsought advice from the other portions of the Executive Branch, lest the independence of the Solicitor General should be lost.[22]

Solicitors General have traditionally conceived of their client as the United States, and have thought that their charter was to act within a broad conception of the public interest.[23] It is not clear, however, why the Solicitor General should, except in extraordinary instances, be the sole authority for selecting those sources which will best provide information about the public interest. It is likely that some people who communicate with the Solicitor General on their own initiative will be motivated by electoral expediency.[24] On the other hand, unless the Solicitor General has an infallible nose for partisanship, anyone else the Solicitor General contacts may have an axe to grind. The difference in electoral partisanship between (i) those who would contact the Solicitor General on their own initiative and (ii) those the Solicitor General would choose to contact does not seem to be one of kind rather than degree. Accordingly, it is difficult to see that an administration which chooses to allow other officials in the Executive Branch to contact the Solicitor General on their own initiative has made an institutional change in the Solicitor General's office. Certainly, absolutely prohibiting such contacts would attribute a broader degree of expertise in determining the public interest to the Solicitor General than he or she is ever likely to possess. At best, the Carter Administration memo shows a much stronger preference for insulating the Solicitor General from electoral pressure. That preference may well be the wiser course, but it falls considerably short of showing that heavy electoral pressure on the Solicitor General in the Reagan Administration might have caused lasting institutional damage.

---

20. *See, e.g.*, the discussion of *Thornburgh, infra* notes 54-61 and accompanying text.

21. *E.g.*, L. CAPLAN, *supra* note 1, at 79, 165-67.

22. *Id.* at 48-50. *See* Memorandum Opinion for the Attorney General: The Role of the Solicitor General, 1 Op. Off. Legal Counsel 228 (1977). *But see, e.g.*, McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A.L. REV. 1105, 1105 & n.2 (1988) (arguing for a narrower conception of the Solicitor General's role—avoiding the problem of defining the Solicitor General's client).

23. *E.g.*, Griswold, *supra* note 14, at 535.

24. *See* the communication from Senator Laxalt, *quoted in* L. CAPLAN, *supra* note 1, at 165-66.

Second, Mr. Caplan refers to public preference as a criterion for determining the public interest. Yet, he argues that officials of the Reagan Administration, relying on President Reagan's victories at the polls, misconceived public preferences.[25] The argument poses several problems. (i) To the extent constitutional law is to be independent of electoral politics, then it would seem to follow that the Solicitor General's perception of the public interest may, at least occasionally, have to vary from immediate public preference. (ii) The metric which Mr. Caplan uses to determine public preference, namely the use of opinion polls, is unworkable. It is unlikely that any poll is sufficiently fine-grained to establish whether, for instance, the public would favor *Roe v. Wade*'s trimester-based approach, as opposed to the "unduly burdensome" standard which Justice O'Connor advocated in the *Akron* cases.[26] (iii) Even assuming that such a poll existed, and met whatever standards of statistical reliability ought to apply, there would still be a legitimate argument that the Executive is free to rely on the results of the presidential election, rather than instantaneous polls, as the primary expression of public preference.[27]

Where Mr. Caplan's analysis is most provocative, and where its criticism of the Solicitor General's office is most telling, is in regard to the effect of stare decisis on the Executive Branch's role in constitutional interpretation. The Reagan Administration may have thought that its own interpretation of the Constitution could not legitimately be constrained by prior judicial interpretation. The Administration's position was vague, but apparently included the argument that Supreme Court precedent was only authoritative for the parties to a particular case,[28] and might have no effect on the Executive Branch beyond the limits of that case.[29]

Adherence to that theory would dramatically alter the relationship between the Executive and Judicial Branches. In order to show the degree of the change which might result, and to appraise possible justifications, it is first necessary to convey some sense of the special relationship between the Solicitor General's office and the Supreme Court.

THE SOLICITOR GENERAL AS AN OFFICER OF THE SUPREME COURT

Because the government appears so frequently in the Supreme Court, and

25. L. CAPLAN, *supra* note 1, at 80.

26. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

27. *See* THE FEDERALIST No. 71, at 482 (A. Hamilton) (J. Cooke ed. 1961).

28. *E.g.*, Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 987 & n.26 (1987) [hereinafter Meese, *The Law*]. The then-Attorney General may have retreated slightly from this viewpoint. *See* Meese, *The Tulane Speech: What I Meant*, Wash. Post, Nov. 13, 1986, at A21, col. 1, *reprinted in* 61 TUL. L. REV. 1003 (1987) [hereinafter Meese, *What I Meant*]. *See* the discussion *infra* notes 106-20 and accompanying text.

29. Meese, *The Law*, *supra* note 28, at 985-88.

because the Solicitor General is, for most practical purposes, the exclusive representative of the co-equal Executive Branch,[30] the Office of the Solicitor General enjoys a particularly favored status in advocacy before the Court. The Office's rate of success in obtaining writs of certiorari,[31] and on the merits,[32] is extraordinarily high. In addition, the high degree of the Court's deference to the Solicitor General's confessions of error in courts below,[33] and to his position on appeals by agencies,[34] gives the Solicitor General a great deal of power to resolve disputes among agencies and to coordinate the government's strategy in the Court. The Solicitor General, unlike other parties, need not have permission to file an amicus brief with the Court,[35] although the Solicitor General is required to specify the federal government's interest in each one.[36] The Solicitor General's freedom to act as amicus in any case in which there is a substantial federal interest enables the Executive to defend its interests even if it is not directly involved in litigation.[37] Finally, the Court tends to defer to the Solicitor General on substantive issues, based on the Office's perceived reliability and expertise.[38] That deference naturally redounds to the Administration's benefit.

The Court itself benefits from the close relationship with the Solicitor General's office. Deferring to the Solicitor General's guidance in case selection through amicus briefs and selection of cases for government appeal[39] gives the Court substantial assistance in managing its caseload. In addition, the Solicitor General's amicus briefs help the Court to avoid indirect consequences for governmental agencies not immediately involved in the dispute,[40] and provide the Court with a broader view of the problem than adversaries normally take. The Court depends

---

30. *See* Note, *supra* note 4, at 1447-53.

31. *See, e.g., id.* at 1445-46 & n.13.

32. 1986 ATT'Y GEN. ANN. REP. 7. In the 1980-84 Terms, the government's success rate in the Court varied from 67% to 83% of the cases in which the government participated. *Id.* The government participated in from 57% to 72% of the Court's caseload during those Terms.

33.

> The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.

Young v. United States, 315 U.S. 257, 258-59 (1942). *See* Sibron v. New York, 392 U.S. 40, 58-59 (1968). The Court's deference to confessions of error has been strongly criticized by, among others, Chief Justice Rehnquist. Mariscal v. United States, 449 U.S. 405, 406-07 (1981) (Rehnquist, J., dissenting); DeMarco v. United States, 415 U.S. 449, 451 (1974) (Rehnquist, J., dissenting). *See generally* Swarb v. Lennox, 405 U.S. 191, 205-07 (1972) (Douglas, J., dissenting in part) (Court should not be bound by "consensus of the parties" in constitutional adjudication.).

34. Note, *supra* note 4, at 1457-73.

35. SUP. CT. R. 36.4.

36. SUP. CT. R. 36.5.

37. *E.g.*, Note, *supra* note 4, at 1475-81.

38. *E.g.*, L. CAPLAN, *supra* note 1, at 264.

39. *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 161 (1984).

40. Note, *supra* note 4, at 1475-77.

on the Solicitor General's office to provide relevant data not in the record, through a practice called "lodging."[41] Lodging allows the Court access to relevant data it might not otherwise obtain, and gives the Executive yet another avenue through which it can convey its viewpoint to the Court.

Solicitors General have, in the past, been very careful both to act as responsible officers of the Court and to protect the special quality of the relationship, insisting on preserving professional detachment from the Executive Branch.[42] That, in turn, reinforces the Solicitor General's credibility with the Court—which has substantial benefits for the Executive and eases tension between the two branches. The best known exercise of the Solicitor General's independence occurred in *Peters v. Hobby*,[43] a McCarthy-era loyalty case in which none of the evidence of disloyalty against Peters was placed on the record. The Solicitor General, Simon Sobeloff, refused to sign a brief supporting the government's position, based on his conclusion that it was virtually indefensible for the Loyalty Review Board to hold Peters disloyal when the identity of the informants was known neither to Peters nor to the Board.[44] Erwin Griswold, Solicitor General under both Presidents Johnson and Nixon, similarly declined to argue two cases on the ground that the Nixon Administration's view was unlikely to succeed in the Supreme Court.[45] A somewhat less dramatic procedure, known as "tying a tin can" or "dropping a footnote" involves the use of a disclaimer which indicates that the brief, in whole or part, does not represent the position of the Solicitor General's office.[46]

Mr. Caplan argues that the Reagan Administration successfully curtailed the Solicitor General's professional independence, and in the process damaged the Office of the Solicitor General and adversely affected the relationship between the Court and the Executive Branch. If he is right, the effect of the Administration's action might appear to be primarily in the short run, i.e., that the Administration might have lost electorally significant appeals it would otherwise have won. If that were the only problem, the electorate could decide in the quadrennial presidential election whether, and to what extent, it was willing to tolerate that lack of success. If, though, the Administration had influenced

41. L. CAPLAN, *supra* note 1, at 22-24. *See* Turner v. United States, 396 U.S. 398, 412 & n.15 (1970) (acknowledging supplemental memorandum for the United States as source of relevant information about conversion of codeine into morphine). *But see also* Atkins v. Parker, 472 U.S. 115, 118 & n.8 (1985) (criticizing Solicitor General's office for using ill-supported factual arguments).

42. Contrast *infra* notes 49-52 and accompanying text (exercise of independence by Acting Solicitor General Wallace). The Loyola of Los Angeles Law Review has recently published a symposium issue devoted to the question of the Solicitor General's independence. *Symposium: The Role and Function of the United States Solicitor General*, 21 LOY. L.A.L. REV. 1047 (1988).

43. 349 U.S. 331 (1955).

44. L. CAPLAN, *supra* note 1, at 11; Note, *supra* note 4, at 1481 & n.184. *Compare* 1955 ATT'Y GEN. ANN. REP. 16-17 (Sobeloff's report on the case) *with id.* at 221-22 (report of Warren Burger, who argued the case for the government).

45. L. CAPLAN, *supra* note 1, at 34-35.

46. *See, e.g.*, Brief for the United States at I n.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Nos. 81-1 and 81-3).

the role of the Solicitor General in ways which diminished his credibility in the eyes of the Court, that, in turn, could affect cases in which ideology was irrelevant.[47] That loss of credibility might be more a function of unrealistic judicial expectations than of executive action, i.e., the issue may be whether the Court would be justified in holding the Solicitor General to a standard of orthodoxy circumscribed by its opinions.[48] It is that question to which the essay now turns.

STARE DECISIS, *COOPER V. AARON*, AND THE JURISPRUDENCE OF ORIGINAL INTENTION

The most dramatic evidence of change in the interaction between the Solicitor General's office and the Court during the Reagan Administration is the contrast between the briefs which the Solicitor General's office filed in two cases on behalf of the United States. In the first, *Bob Jones University v. United States*,[49] Acting Solicitor General Lawrence Wallace[50] noted in a footnote to the government's brief that he did not subscribe to a portion thereof, a position he took as a middle ground between wholly refusing to brief or argue the government's position, and maintaining contentions which he did not believe were supportable.[51] While that device is not an uncommon one for a Solicitor General who wishes to preserve his independence by expressing disagreement with the legal position of another Executive agency,[52] Mr. Wallace's action apparently resulted in a *de facto* demotion within the Solicitor General's office.[53]

In contrast is the government's amicus brief in *Thornburgh v. American College of Obstetricians and Gynecologists*[54] filed three years later, in which then-Acting[55] Solicitor General Charles Fried argued as amicus for the reversal of *Roe v. Wade*,[56] and of *Akron v. Akron Center for Reproductive Health*,[57] even though (i) those contentions had not been raised below and (ii) the appellants in *Thornburgh* had relied on *Akron*.[58] *Roe* had been reaffirmed in the

---

47. Caplan cites evidence, albeit anecdotal and anonymous, that a loss of credibility may have taken place by the end of the 1985 term. L. CAPLAN, *supra* note 1, at 262-67.

48. Chief Justice Rehnquist, as shown by his approach to confession of error cases, is "skeptical" about the notion that the Solicitor General has a dual responsibility "to the Executive Branch and to the Court." L. CAPLAN, *supra* note 1, at 265; *see supra* note 33 and accompanying text.

49. 461 U.S. 574 (1983).

50. Solicitor General Rex Lee had disqualified himself to avoid an appearance of conflict of interest.

51. L. CAPLAN, *supra* note 1, at 52.

52. *See supra* note 46 and accompanying text.

53. L. CAPLAN, *supra* note 1, at 60-62.

54. 476 U.S. 747 (1986).

55. *See infra* note 66.

56. 410 U.S. 113 (1973).

57. 462 U.S. 416 (1983).

58. *E.g.*, Brief for Appellants at 66, 70, 72, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (No. 84-495).

Akron case[59] two years and one month prior to the filing of the brief in *Thornburgh*, in language which made it clear that the majority intended to uphold *Roe* in the future.[60] In the oral argument in *Akron*, Solicitor General Lee had agreed that it was inappropriate for an amicus to challenge *Roe* when it had not been challenged below.[61]

Solicitor General Fried described the *Thornburgh* amicus brief as "presenting a new constitutional methodology."[62] The claim is implausible.[63] As Professor Herbert Wechsler pointed out, it is doubtful that the Administration could have expected to add any new argument of significance questioning *Roe v. Wade*:

> Charlie Fried was a student of mine in the fifties, and a very brilliant fellow. I think his views as to what is right are close to Meese's. But I was surprised he took the job as Solicitor General, because he must have known he would confront the conflict between the office's and the Court's institutional values versus Administration policy. If Charlie Fried really [believed] that he [had] things to say about *Roe v. Wade* that [had] not been said, and that he [had] a fresh objection to the case that the Court might consider determinative, then he [had] a right to say it. But he [was] obviously a . . . fool if he [thought] he [had] anything to say that [hadn't] already been said.[64]

The *Thornburgh* amicus brief became a legal *cause celebre*.[65] Solicitor General Fried denied that he filed the brief out of any conviction other than that *Roe* and *Akron* were wrongly decided and, since he is the only one who knows his state of mind, it would be only reasonable to credit his statements about his motivation.[66] Statements made by an official Justice Department spokesman and by the Solicitor General himself do, however, indicate that the Administration knew that the Court was highly unlikely to overrule *Roe* and

---

59. 462 U.S. at 419-29 & n.1.

60. *Id. See supra* note 11.

61. Solicitor General's Oral Argument, Tr. of Oral Arg. at 21, Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), *quoted in* Brief for Amicus Curiae Senator Bob Packwood, *et al.* at 8 n.7, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379).

62. L. CAPLAN, *supra* note 1, at 141 & n.27.

63. For instance, the amicus brief itself cites a number of scholarly authorities for the proposition that the rationale of *Roe* was flawed, none of which had a publication date after 1980. Brief for the United States as Amicus Curiae at 24 & n.4, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379).

64. L. CAPLAN, *supra* note 1, at 148-49.

65. *See, e.g.*, L. CAPLAN, *supra* note 1, at 146-52.

66. Mr. Caplan notes anonymous sources that *Thornburgh* was a "loyalty test" for Acting Solicitor General Fried prior to his appointment as Solicitor General. *Id.* at 150. To be fair to Fried, there does not seem to be any evidence that the brief did not represent his convictions. *See* Neuborne, *In Lukewarm Defense of Charles Fried*, MANHATTAN LAW., Oct. 20-26, 1987, at 37, *reprinted in* 21 LOY. L.A.L. REV. 1069, 1071 (1988). *But cf.* the discussion of Solicitor General Fried's attitude toward decisions of the Attorney General, *infra* note 72.

Akron.[67] Finally, the brief itself is cavalierly argued.[68] Portions of the brief are apparently directed to some end other than persuading the Court, for example:

> [T]he further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning . . . .
>
> . . . .
>
> . . . In *Roe v. Wade*, . . . connections [of the right to choose an abortion to specific constitutional provisions] were wholly missing and the Court was forced to leap to its conclusion. Certainly the course of legal attitudes and practice . . . permit no extrapolation from the past to the Court's conclusion in *Roe v. Wade* . . . .
>
> . . . .
>
> As in logic contradictory premises can be used to prove anything, so in constitutional law principles that are ill-founded can be used to justify any conclusion, and thus rob the law of its intrinsically compelling force. And when constitutional law, which is above ordinary politics, seeks to settle disputes of value and vision which are the stuff of politics, both law and politics are more not less subject to the kind of intense pressures which have characterized the abortion debate since *Roe v. Wade.*[69]

The point here is not to emphasize that the government's brief in *Thornburgh* might have been presumptuous. It is, rather, to show that a strong conviction might lead a Solicitor General, from whatever administration, to make an argument which really had no substantial likelihood of success. Whether the *Thornburgh* brief was such an instance is not the critical issue here. It is enough to note that the Administration itself doubted success, and there was substantial other evidence, from the brief and the Court, to indicate that it was right to be dubious.[70] It is at least credible that, in pursuing their view of the jurisprudence of original intention,[71] those who determined the positions which the Reagan Administration would take in constitutional litigation chose to adopt

---

67. L. CAPLAN, *supra* note 1, at 146-47. *See also supra* note 11.

68. In fact, former Solicitor General Griswold thought the brief was so lacking in deference to the Court that it must have been written on the instructions of higher officials in the Executive Branch—a charge that Solicitor General Fried vehemently denied. L. CAPLAN, *supra* note 1, at 150.

The Court, in an unusual decision, denied the Acting Solicitor General time for oral argument in *Thornburgh*. Thornburgh v. American College of Obstetricians & Gynecologists, 473 U.S. 931 (1985). Apparently there was a feeling on the Court that there was no federal interest in the case. L. CAPLAN, *supra* note 1, at 260.

69. Brief for the United States as Amicus Curiae, *supra* note 63, at 24, 27, 30.

70. L. CAPLAN, *supra* note 1, at 142-43. In defense of the government's position, Chief Justice Burger indicated in *Thornburgh* a willingness to re-examine *Roe* which he had not shown as a member of the majority in *Akron*. *Thornburgh*, 476 U.S. at 782-84 (Burger, C.J., dissenting).

The point here is not that the Solicitor General should only take positions that are likely to prevail. *See* McConnell, *supra* note 22, at 1115. Rather, the argument is that the Executive should hesitate to take a position which is unlikely to win without a confluence of improbable circumstances. *See also supra* note 11 (distinguishing *Webster v. Reproductive Health Services* from *Thornburgh*).

71. *See, e.g.*, Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 758-60 (1987); Meese, *Our Constitution's Design: The Implications for Its Interpretation*, 70 MARQ. L. REV. 381, 383, 387 (1987).

a position doomed to failure by stare decisis. Yet that appears to be inconsistent with (i) the jurisprudence of original intention (or any approach to constitutional interpretation which relies on something other than electoral results or the judges' ad hoc preferences as the touchstone of constitutional law), and (ii) the Administration's public position and theoretical stance on the role of the Court in constitutional law.

The remainder of the essay addresses a quasi-hypothetical: the assumption that the Solicitor General, based on severe doubts about the soundness of *Roe v. Wade* and *Akron*, adopted a position in the Supreme Court which, absent fortuitous circumstances, would not succeed. Whether or not that was in fact the case is unknowable. The possibility, though, opens some interesting questions about the relations of the Executive and Judicial Branches in interpreting and applying the Constitution, as well as whether the Solicitor General ought, in legal theory, to be governed by a standard other than Administration policy in formulating legal positions.[72]

The Executive Branch and Stare Decisis

There are, of course, a number of practical reasons why the Solicitor General should not adopt a dubious position in the Supreme Court—primarily stemming from the harm such strategy might do to a special relationship which has substantial benefits for the Executive Branch.[73] In addition, in extreme cases, the Solicitor General may recognize norms of the profession as limitations on the positions which he may adopt.[74] Regardless of those restraints, constitutional theory and the particular constitutional jurisprudence of the Reagan Administration each undercut any claim that advancing a futile argument was intellectually justifiable.

One Administration spokesman defended the *Thornburgh* amicus brief in that it stimulated public debate on the issue of abortion.[75] Yet, if the Administration's jurisprudence of original intention[76] has any foundation, it is that the intention of the framers, rather than public opinion, ought to determine con-

72. While there is no direct evidence that Solicitor General Fried ever used anything but his independent legal judgment in deciding which position the government should take in the Supreme Court, he did say, during his confirmation hearings that it would be "*'peevish* and *inappropriate* for the Solicitor General to be anything but *cheerful*' " in accepting the Attorney General's direction to take a position contrary to the Solicitor General's own judgment. L. CAPLAN, *supra* note 1, at 152 (quoting *Hearings on the Confirmation of Charles Fried to be Solicitor General Before the Senate Judiciary Comm.*, 99th Cong., 1st Sess. (1985)). On the other hand, he did point out that he thought the Solicitor General should not take a position which " 'cannot conscientiously be urged to the Court.' " *Id.* at 153 (quoting *Hearings on the Confirmation of Charles Fried to be Solicitor General Before the Senate Judiciary Comm., supra*).

73. *See supra* notes 31-38 and accompanying text.

74. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1984).

75. L. CAPLAN, *supra* note 1, at 146.

76. *See supra* note 71. An analogous argument applies to any constitutional theory which is premised on the idea that its application ought to be principled, impersonal or objective, i.e., that different persons applying that theory would reach, or would be highly likely to reach, the same results. *See infra* notes 113-20 and accompanying text.

stitutional law. While the fact that the Supreme Court is not popularly elected is a reason for judicial restraint in applying constitutional standards,[77] the popularly elected Executive should recognize an obligation to restrain itself in constitutional interpretation and argument insofar as it recognizes that constitutional doctrine is based on counter-majoritarian principles, or at least principles which must transcend any particular electoral result. It would follow that any use of a hypothetical futile amicus brief to present public opinion as a datum for the formulation of constitutional principles would be inadmissible under the jurisprudence of original intention.

The only way of avoiding this inconsistency would be to argue that the Court is not itself the final arbiter of constitutional interpretation.[78] On that assumption, the Solicitor General would have been entitled to use the amicus brief as a means for the Executive to urge its own interpretation of the Constitution. This approach would require something more than just a recognition that (i) the Court may occasionally overrule itself, and (ii) as Professor Wechsler pointed out,[79] the Executive has the right to bring new arguments, analyses, or information to the Court's attention. Instead, it demands that one be willing to accept limitations on the finality of judicial review of constitutional questions.

The phrase "finality of judicial review" here refers to the idea that prior decisions of the Court ought to be accepted as controlling authority for the Executive to the same extent that the Court would follow them if confronted with an identical problem.[80] Of course, the exact extent to which the Court might

---

77. *E.g.*, Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). The term "judicial restraint" might refer to normative limits on the judge's reliance on certain values in interpreting the Constitution, on the judge's ability to disregard precedent, or both. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 1 (1980). The term is nevertheless useful here—insofar as it indicates the need for the bench to exercise self-restraint on any or all of those bases. The point of this essay is that the Executive Branch should exercise comparable restraint in pressing its views.

78. This argument might even extend to a claim of popular sovereignty over constitutional interpretation, *see infra* note 98 and accompanying text, although it is doubtful that the Reagan Administration would have made such an argument.

79. *See supra* note 64 and accompanying text.

80. Thus, the matters for which judicial review is final do not include constitutional questions committed to the other branches, as for instance (i) political questions (Coleman v. Miller, 307 U.S. 433, 445-55 (1939); Luther v. Borden, 48 U.S. (7 How.) 1, 42-43 (1849)) or (ii) matters in which the Court defers to another decision-making body for lack of expertise (*e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 41-44 (1973)).

Similarly, "finality of judicial review" does not refer to questions of whether the Legislative or Executive Branches, absent judicial compulsion, may refrain from doing an act on the ground that they consider that act to be unconstitutional. *See* Tushnet, *supra* note 12, at 1018-20. Although commitment of questions to other branches and the role of a co-equal branch's opinion of unconstitutionality each raise questions about the margins of judicial review, this essay is addressed to the core of judicial review—the Court's ability to apply its construction of the Constitution to invalidate statutes, executive action or the actions of the states. The ensuing discussion is confined to the effect of judicial review on legislative and executive action. Action of a state, rather than a co-equal branch of the federal government, poses a lesser claim to authoritative constitutional construction, and so, is *a fortiori* dealt with in a discussion of the power of the Executive and Legislative Branches. *See generally* P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 116 (1970) (criticizing *Cooper v. Aaron* because it implicitly made the Court the ultimate authority among the branches in constitutional interpretation, when it need only have dealt with defiance by a state official).

itself apply precedent may be uncertain. There may be, on the other hand, cases like *Akron*, in which the Court has stated that it intends to apply stare decisis on a particular question.[81] While there may be room for judgment about the applicability of stare decisis on many issues, it does not follow that such judgments are insuperably difficult.[82]

The idea that the Court might not be entitled to the last word in declaring statutes or executive action unconstitutional dates, at the least, to *Marbury v. Madison*.[83] Attorney General Meese himself argued that *Cooper v. Aaron*[84] was incorrect in treating the Court's interpretation of *Brown v. Board of Education* as the "supreme law of the land."[85] That contention was a critical premise of his argument that constitutional decisions have no necessary reach beyond the case in which they are made.[86] In his view, the only reasons for Executive deference to Supreme Court precedent[87] are prudence, stability and respect for the Judiciary, each of which he only generally stated.[88] His analysis conceded no finality of review to the Court, even subject to the flexibility of stare decisis. He recognized the effect of the Court's decisions on lower federal and state courts, but was unwilling to say the Court's decisions had anything but persuasive effects on the other branches.[89] Obviously, to the extent the Executive need not acknowledge precedent which the Court would consider binding on itself, there is no reason for the Solicitor General to feel constrained by stare decisis. Conversely, to the degree that the Solicitor General and the Administration consider themselves not to be bound by stare decisis in litigation,[90] the constitutional rationale for their actions becomes more tenuous.

---

81. *See supra* note 11.

82. *See, e.g.*, K. LLEWELLYN, *supra* note 11, at 17-18.

83. 5 U.S. (1 Cranch) 137 (1803). For an example of disagreement with *Marbury, see* letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *supra* note 9, at 13-14. *See also* Lee, *The Provinces of Constitutional Interpretation*, 61 TUL. L. REV. 1009, 1012-13 & n.9 (1987). Disputes over res judicata are, historically, part of constitutional theory. *See* Dawson, *Coke and Ellesmere Disinterred: The Attack on Chancery in 1616*, 36 ILL. L. REV. 127, 145-46 (1941) (dispute over res judicata in *Glanvill's Case* involved a basic dispute over "Jacobean theory of government").

84. 358 U.S. 1 (1958). *See* Meese, *The Law, supra* note 28, at 986-88.

85. 358 U.S. at 18. *See* Meese, *The Law, supra* note 28, at 987.

86. Meese, *The Law, supra* note 28, at 987.

87. Other than cases in which the government is a party, when it appears that he would consider the Executive bound. *Id.*

88. Meese, *The Law, supra* note 28, at 987 & n.26.

89. *Id.* "Arguments from prudence, the need for stability in the law, and respect for the judiciary will and should persuade officials of these other institutions to abide by a decision of the Court. It would be highly irresponsible for them not to conform their behavior to precedent." Meese, *What I Meant, supra* note 28, at 1004. This, of course, falls short of acquiescing in *Cooper. See, e.g.*, Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 991-92 & n.3 (1987).

90. *Cf.* Neuborne, *supra* note 89, at 992-93 & nn.5-6 (discussing problems posed by executive failure to acquiesce in settled law in a particular circuit).

Against the Finality of Judicial Review

The arguments historically offered against finality of judicial review[91] seem to provide the best doctrinal rationale for the Executive's ignoring stare decisis to take positions in the Supreme Court with which the Court was extremely unlikely to agree. Moreover, to the extent that an administration's constitutional positions are based on a view of constitutional law which it considers *a priori* correct, rather than one which draws its force from precedent, the question of the weight to be accorded the Executive's view must necessarily arise.[92] If Mr. Caplan's book can be faulted on the grounds of legal analysis, that fault is in the way he ignores the criticisms of finality of judicial review, as that doctrine is broadly embodied in *Cooper v. Aaron.*[93] The Reagan Administration could have relied on those arguments to justify to itself its somewhat adversary posture to the Court. Mr. Caplan's failing is certainly understandable. Attorney General Meese raised the argument against finality publicly, when he began to expound the Administration's constitutional theories, and then retreated under popular fire.[94] Mr. Caplan's book does, though, deal with institutional considerations which transcend the tenure of any particular administration. If the Reagan Administration were willing to rely on the arguments against finality of judicial review in an attempt to promote modifications of constitutional law, it would have been at the very least imprudent so to inform the Court. In any event, it is certainly possible that a future administration would consider relying on the anti-finality analysis to justify its own effort to revise constitutional law through litigation, or even to support defiance of the Court. So the extent to which the Executive is free to follow its own constitutional interpretation is important for any assessment of the Solicitor General's role *vis-a-vis* the Court.

The Executive may argue that, to the extent *Cooper* was ever intended to bind the national executive,[95] it is merely judicial fiat which does not settle the question of finality of interpretation. While it is true that presidents have never directly challenged judicial finality, preferring to avoid a constitutional crisis, Jefferson, Jackson, Lincoln and Franklin Roosevelt, among others, maintained that the Executive had some right to regard judicial interpretation as less than finally authoritative.[96]

---

91. This doctrine may sometimes be referred to as judicial supremacy—yet all it requires is recognition that each branch has some special function in government, not that any one branch is superior to the others.

92. Such an *a priori* view was apparently one of the premises for the amicus brief in *Thornburgh. See* L. CAPLAN, *supra* note 1, at 147 & n.47; Fried, *supra* note 71, at 751-54 & n.20. *See generally* McConnell, *supra* note 22, at 1113-14.

93. *See* L. CAPLAN, *supra* note 1, at 127-30.

94. *See* Meese, *What I Meant, supra* note 28, at 1003-04.

95. In fact, the persons who attempted to frustrate the Court's order were state officials. Cooper v. Aaron, 358 U.S. 1, 4-5, 9-15 (1958).

96. *See, e.g.*, Lee, *supra* note 83, at 1012-13 & n.9.

The arguments against finality of judicial review stem from several premises: (i) that the Executive and Legislative Branches are co-equal with the Judiciary, so that no one branch ought to be able to supersede the others,[97] (ii) that, at most, the action of the Judicial Branch can bind the other branches, but not the people, who only delegated their authority to it,[98] (iii) that each officer of the federal government swears an obligation to enforce the Constitution as *he* or *she* understands it,[99] and (iv) that when the Executive and Legislative Branches consider a decision erroneous, so long as they are not parties and do not interfere with the enforcement of the judicial decree, those branches have a right to act on their own interpretation in an attempt to have the decision reversed,[100] even when they realize that the Court would not overrule its precedent.[101]

The force of these arguments, and particularly the first, is dissipated by the Judiciary's willingness to defer to the other branches of government, whether in whole or part, in regard to certain types of controversies. That deference may be phrased in terms of the political question doctrine,[102] the presumption that legislation is constitutional,[103] a recognition that resolving certain problems is beyond the Court's expertise, or in a number of other ways.[104] In each case, the Court's deference (or holding of non-justiciability) represents its accommodation to claims of the other branches' special competence in constitutional interpretation.

Point (ii) above is not relevant to the question of whether the Executive should exercise restraint in challenging constitutional precedent—it has to do with whether the Judiciary's interpretations are ultimately binding on the people. The third point, the obligation of each governmental officer to support the Constitution as he or she understands it, seems not to argue against any form of executive restraint so long as the Executive conceives of constitutional doctrine as something other than ad hoc preferences of the individual judges. If one adheres to a view that constitutional doctrine is impersonal, i.e., capable of consistent application by a broad range of judges, then that understanding

97. T. Jefferson, *supra* note 9, at 13-14; A. Jackson, *Veto of Bank Bill*, July 10, 1832, *quoted in* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *supra* note 9, at 14-15.

98. J. Madison, *Report on the Virginia Resolutions* (1800), *quoted in* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *supra* note 9, at 14.

99. A. Jackson, *supra* note 97, at 14-15.

100. A. Lincoln, *Speech During the Lincoln-Douglas Senatorial Campaign*, July 17, 1858, *quoted in* G. GUNTHER & N. DOWLING, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW: CASES AND MATERIALS 26 (1970); A. Lincoln, *First Inaugural Address*, Mar. 4, 1861, *quoted in* G. GUNTHER & N. DOWLING, *supra*, at 27.

101. A. Lincoln, *Speech during the Lincoln-Douglas Senatorial Campaign*, July 17, 1858, *supra* note 100, at 27. This interpretation of the speech is from Tushnet, *supra* note 12, at 1022.

102. *See supra* note 80 and accompanying text.

103. *See, e.g.*, Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 585-86 (1975).

104. *See, e.g.*, Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20, 1230-42 (1978).

entails a strong argument for finality in judicial review.[105] The fourth argument, of which Lincoln is probably the most notable exponent, is likely to be the position which Attorney General Meese originally intended to adopt, at least to the extent of a willingness to seek reversal of existing precedent.[106]

Executive Restraint and Meesian Theory

One can argue, as have Professors Neuborne[107] and Lee,[108] that Lincoln's position was unsound as a matter of constitutional doctrine. The argument here is slightly different, namely that, even though there may be no "knock-out" arguments against Lincoln's position, the Executive ought to recognize the need for considerable restraint in light of the weaknesses in that position.

Whether or not the Executive would defy the Court in an absolute constitutional crisis, the importance of executive restraint follows from the need to accommodate the separate branches under the Constitution. As Professor Brest pointed out in arguing that legislatures should exercise restraint in constitutional matters analogous to judicial restraint, reasons of comity (respect for a coordinate branch)[109] and recognition of the specialized competence of another branch,[110] all argue for restraint in opposing the actions of another branch. Although the fact that judges are not popularly elected argues for judicial restraint in making new law, the notion that constitutional principles should be independent of the latest election results argues for executive restraint in opposing stare decisis.

It is true that these norms of restraint are largely, if not completely, immune from judicial enforcement. But, just as it would be anomalous to argue that the constitutional guarantee of a "Republican Form of Government" in the states[111] has no meaning because it is judicially unenforceable, it makes sense to talk about executive restraint as a constitutional theory which, by definition, is not enforceable, but is nevertheless supported by prevailing constitutional doctrine.[112]

In addition, an administration which adheres to a constitutional theory based on an objective or impersonal standard (such as the original intention standard)

---

105. *See infra* notes 109-20 and accompanying text; *see also* THE FEDERALIST No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961) (view of Constitution as fundamental law which judges, whose function is interpretation of law, are perforce best qualified to interpret).

106. *See* Meese, *The Law*, *supra* note 28, at 985. Whether he believed that outright defiance of the Court's decision could be justified was somewhat hedged. *See supra* note 89.

107. Neuborne, *supra* note 89, at 994-1001.

108. Lee, *supra* note 83, at 1016. *But see* Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987); Tushnet, *supra* note 12, at 1020-25.

109. Brest, *supra* note 103, at 586.

110. *Id.* at 587-88.

111. U.S. CONST. art. IV, § 4.

112. On the status of constitutional obligations and rights which are not judicially enforced, *see, e.g.*, Brest, *supra* note 103, at 585-89; Sager, *supra* note 104, at 1220-28.

would be manifestly inconsistent in arguing against the finality of judicial review. Otherwise, if all the branches of government are co-equal authorities on questions of the unconstitutionality of legislative, executive or judicial action, then three branches are entitled to apply their own subjective views of what purports to be a consistent standard. In other words, there would be an objective standard, but it would not be sufficiently clear to inspire confidence that one branch, on its own, could apply it correctly. Even under generally prevailing conceptions of constitutional stare decisis, the Court can rely on the advice of the other branches in overruling precedent.[113] So, to justify abandonment of the existing standards of finality under a supposedly objective original intention standard, the framers' intention would have to be sufficiently ambiguous that the Court could not be expected to discern it, even if it had the assistance of the other two branches in so doing.

For purposes of this discussion, a Meesian view is one which holds that the Executive has no obligation to attend to stare decisis other than some generalized need for prudence and respect for a co-ordinate branch.[114] Any view of the sources of constitutional law which treats the question whether the Executive should defy, or defer to, the Supreme Court under any legal principle of more broad and enduring application than simple political prudence[115] ultimately contradicts a Meesian position. The Meesian position[116] is, at least, inconsistent with any desire for authoritative interpretation of the Constitution. Moreover, given the intellectual anomaly of affording three co-equal sources of interpretation for supposedly impersonal standards, and the problems which disparate opinions may pose for those who attempt to comply with constitutional law, it is doubtful that abandoning the existing regime of judicial finality is, even in the long run, politically prudent.[117] The fact that no President has ever defied the Court, menacing noises to the contrary notwithstanding, is some

113. While it might not initially receive this advice if the Solicitor General considered it unlikely that the Court would overrule apparently binding precedent, the Court has discretion to raise the issue on its own. *Cf. supra* note 33 (Court's independence in the face of the Executive's confession of error).

114. Although Attorney General Meese's position owes something to Lincoln's opposition to the *Dred Scott* case, it is doubtful that Lincoln would have applied it with anything approximating the breadth of the Reagan Administration's approach. *See, e.g.*, Meese, *The Law*, *supra* note 28, at 988, and Meese, *What I Meant*, *supra* note 28, at 1006, where he apparently defends an Indiana *state* legislator's support of a bill permitting the Ten Commandments to be posted in public school classrooms after Stone v. Graham, 449 U.S. 39 (1980), on the ground that the statute in *Stone* required posting of the commandments in the schools of Kentucky. The Indiana bill was basically indistinguishable from the Kentucky statute. Levinson, *supra* note 108, at 1073. Meese apparently relied on his criticism of *Cooper v. Aaron* to justify the *state* legislator's action. Meese, *The Law*, *supra* note 28, at 988.

115. *See*, arguing that political prudence is, in fact, the ultimate test, Tushnet, *supra* note 12, at 1022-25. "Political prudence" here refers to reasoning, explicitly and primarily, in terms of the possible reaction of others (other than mere theoretical argument) to one's own actions.

116. It is reasonable to assume that no administration in the near future is likely to adopt the view that such questions are merely ones of political prudence–the controversy over Attorney General Meese's criticism of *Cooper* probably settled that. *See, e.g.*, Neuborne, *supra* note 89, at 991; Tushnet, *supra* note 12, at 1017 & n.1.

117. *See, e.g.*, Neuborne, *supra* note 89, at 994-97.

indication of the political imprudence of ignoring stare decisis.

Whenever the Executive proceeds with business-as-usual in constitutional litigation in the Court, it weakens the doctrinal and practical arguments for the Meesian position. By submitting to the Court for adjudication, the Executive implicitly concedes that the Court's action is necessary to strengthen the Executive's position. On the theoretical level, it concedes that the Court is at least entitled, as a co-equal branch, to a veto of the Executive's constitutional position. On the practical level, where political prudence comes into play, the analysis is more complex. Submitting its view for adjudication could give the Executive a sort of exhaustion of remedies argument if it chose to defy or ignore a ruling with which it disagreed. Yet it also takes a risk: that an adverse ruling by the Court would sanction a view opposing the Executive Branch's argument. Concomitantly, submitting to litigation would weaken any claim that the Executive Branch had the power to interpret the Constitution independently of the Court, simply because the Executive would have already asked for the Court's approval.

The Meesian approach to the finality of judicial review is inconsistent with any constitutional jurisprudence other than a theory[118] which equates constitutional law and political prudence.[119] Without regard to the ultimate correctness of *Cooper v. Aaron*'s apparent declaration of judicial supremacy, the argument for the Meesian view is sufficiently weak to entail the need for executive restraint. Although the head of the Executive Branch is popularly elected, reasons for the branch to restrain itself in the face of stare decisis[120] include the need to respect a coordinate branch of government, the need to avoid the encroachment of electoral concerns on less volatile principles of constitutional law, and the recognition that the Executive's claim to a right to authoritatively interpret the Constitution, independent of the Judiciary, is tenuous at best.

Executive Restraint and the Solicitor General's Client

There is another perspective from which a doctrine of executive restraint (or at least its consequences) seems needful. The idea that the Solicitor General should act in the public interest can be a troublesome rationale for the Solicitor General's independence—the public interest is often difficult to determine, and, in any event, the Solicitor General lacks any special expertise in so doing. Yet, his obligations as legal adviser to the public,[121] and in some part to individual

118. *E.g.*, Tushnet, *supra* note 12, at 1024-25.

119. *But see supra* note 117 and accompanying text (ignoring judicial finality may not be politically prudent).

120. This discussion, of course, assumes the question is justiciable. *See supra* notes 80, 102-04 and accompanying text.

121. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 74, Rule 1.13 & comment (government attorney's authority to question decisions by government officials not limited by Rule); McConnell, *supra* note 22, at 1105 & n.2.

members of the public, require that he exercise some independence, and some restraint, in opposing stare decisis.

First, as an official of the government required by statute to be "learned in the law,"[122] the Solicitor General has a statutory role as a legal counselor to the nation as a whole.[123] When, and to the extent, the government's brief is made known to the public, it implicitly communicates that the legal position therein has some likelihood of success. If the position is futile, the brief misleads electors about the need for, and ease of, change in constitutional law. It also may have a chilling effect on those who would choose to exercise the right which the Court has earlier held that they have, but would refrain from exercising that right for fear of steadfast government opposition.

The worst effect of maintaining futile positions may occur when the Court's decisions are the most controversial. When Governor Faubus attempted to interfere with a federal court mandate for school desegregation in Little Rock (the genesis of *Cooper v. Aaron*) under a claim of constitutional right, he implicitly communicated the possibility that that interference might be sustained by the Court.[124] In so doing, he lent an aura of legitimacy to self-help resistance to the Court's order.[125] Maintaining a futile position in such a case, then, may simply increase the hazard of violence and, in any event, may encourage harassment of those who take a position opposed to the government.

There are also two lines of cases which support the idea that the Solicitor General has a doctrinal obligation to act as something other than a normal adversary in constitutional litigation. The first is the line of cases recognizing the Solicitor General's obligation to confess constitutional error when he believes it to have been committed, and, concomitantly, giving him considerable deference when he does so.[126] The Executive Branch benefits greatly from this practice, which is not one imposed on it by the Judiciary, but rather results from a recognition of the branches' institutional needs: the Executive's need to maintain its credibility with a co-equal branch and for coordination and control of litigation, and the Court's need to allocate its resources to perform its function efficiently. The practice of confession of error implies an obligation on the Executive to avoid making futile arguments.

A second line of cases which lends support to the theory of executive restraint is the line of cases beginning with *Brady*[127] which recognizes an obligation on the prosecution to disclose certain exculpatory evidence in criminal cases.

---

122. 28 U.S.C. § 505 (1982). This statutory requirement appears to be unique among officials of the Justice Department. *See* 28 U.S.C. §§ 501-07 (1982).

123. *See, e.g.*, Griswold, *supra* note 14, at 527-29, 535.

124. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 8-9, 17 (1958).

125. *See id.* at 25-26.

126. *See supra* note 33 and accompanying text.

127. Brady v. Maryland, 373 U.S. 83 (1963). *See generally* United States v. Bagley, 473 U.S. 667 (1985) (later development of *Brady*).

It is, of course, apodictic in theory that legal argument, as opposed to exculpatory evidence in the possession of the government, is equally available to everyone so that the due process rationale of *Brady* is not equally applicable here. Yet the Court gives substantial deference to the Executive and Legislative branches[128] (or for that matter state governments)[129] opposing a claim of constitutional right. That deference stems in part from a recognition that, as elected officials or duly constituted sovereigns, they have a special status as representatives of the public interest.[130] It follows that the governmental parties are obliged to their opponents who are members of the public to act in the public interest, as embodied in the Constitution, and to honor their opponents' settled constitutional rights. That would entail avoiding a futile argument opposing those rights which would only delay their exercise, or deter others from attempting to exercise the same rights. Even though that norm may be judicially unenforceable as to questions of law in civil constitutional litigation,[131] it is still a valid constitutional norm.[132] The recognition that a constitutional issue is essentially within the purview of the Executive Branch does not mean that the Constitution has no effect on the point, but rather that the Executive is best equipped to resolve the issue itself.[133] The *Brady* line of cases shows that it may occasionally be necessary to temper the adversary system in order for constitutional rights to be protected in litigation.[134] The degree to which futile litigation can impair or impede the exercise of constitutional rights indicates the need for the Executive to temper its own positions in constitutional litigation.

CONCLUSION

The Reagan Administration may have been unique in its adherence to a particular school of constitutional jurisprudence. It sought to vindicate that view in the Supreme Court through strategy which may well have been the most adversarial approach ever taken by an administration. Mr. Caplan criticizes the Solicitor General's office during that Administration, arguing that its positions were motivated by partisan electoral politics at the expense of rigorous legal analysis and of stare decisis. As to the first point, Mr. Caplan's case is a bit weak, primarily because of a lack of evidence that positions taken by the Administration amounted to anything but its own sincere view of constitutional jurisprudence, whether or not misguided. *The Tenth Justice* does, however, raise

128. *E.g.*, Katzenbach v. Morgan, 384 U.S. 641, 653-56 (1966).
129. *E.g.*, Maher v. Roe, 432 U.S. 464, 479-80 (1977).
130. *See, e.g., id.*
131. As opposed to the criminal evidence issue in *Brady*.
132. *See supra* notes 109-15 and accompanying text.
133. *E.g.*, Sager, *supra* note 104, at 1224-27.
134. *See* United States v. Bagley, 473 U.S. 667, 675 & n.6 (1985).

a second issue: whether any administration which argues for a constitutional jurisprudence grounded in principle rather than in its electoral victory can disregard stare decisis and remain consistent with its principles.

While certain questions are constitutionally committed to the Executive, and others are within the Executive's discretion, there is a strong case for executive restraint when the Court is reasonably certain to apply stare decisis. That case rests on the recognition (i) that arguments that the Executive's interpretations of the Constitution ought to be equally as authoritative as those of the Judiciary are weak; (ii) that, to the extent constitutional law rests on principle, the Executive ought to refrain from taking futile positions dictated by partisan interest or by ideological objectives; and (iii) that the Executive may have obligations to the public which require that it not maintain positions which are, for all practical purposes, futile. The Court's willingness to defer to the Solicitor General based on confidence that his judgment is not colored by partisan concerns, in itself, has substantial practical benefits for the government independent of the doctrinal arguments.

Delineating the roles of the Judiciary and the Executive in the enforcement of the Constitution in the abstract quite often resembles Plato's efforts to describe his forms. Books such as Mr. Caplan's, and controversies such as the storm over the *Thornburgh* brief, remind us that constitutional rights may for practical purposes be contingent on the Executive's independence of the Judiciary. While the Executive sought to restrain some individuals' rights in *Thornburgh*, Lincoln would have relied on a claim of independence in an attempt to protect fugitive slaves.[135] Neither arguments for executive restraint, nor for Lincoln's theory of the Executive's independence of the Judiciary, can rest solely on a need to protect the rights of individuals. The Executive and the Judiciary are each fallible. The argument for executive restraint depends instead on the idea that the Executive must treat constitutional decisions as principles which restrain it even though it may be a non-party. Otherwise, the vindication of constitutional rights may depend on whether the Executive Branch chooses to use the Judiciary as a mere ideological stage.

---

135. *See, e.g., supra* notes 99-101, 114 and accompanying text.