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Why Does a Conservative Court Rule in Favor of Liberal Government? The Cohen-Spitzer Analysis and the Constitutional Scheme

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WHY DOES A CONSERVATIVE COURT RULE IN FAVOR OF A LIBERAL GOVERNMENT? THE COHEN-SPITZER ANALYSIS AND THE CONSTITUTIONAL SCHEME

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I. INTRODUCTION

This paper is a commentary upon the important analytical work done by Linda Cohen and Matthew Spitzer. The focus of my commentary is upon their most recent work, that dealing with the government's high win-rate before the Supreme Court: *The Government Litigant Advantage: Implications for the Law*.[1] Although I will focus primarily upon what these authors have to say about the government win-rate before the Court, I will extend my remarks at times to refer to their earlier work on the Supreme Court's *Chevron* decision.[2]

In their most recent work, Cohen and Spitzer have provided statistical proof of a proposition which most of us had believed or suspected: the federal government is, in general, significantly more successful before the Supreme Court than are other parties. Cohen and Spitzer accompany their quantitative analysis with a theoretical explanation: the government wins more often because it is highly selective in the cases which it brings before the Court.[3]

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

2. *See* Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65 [hereinafter Cohen & Spitzer, *Chevron Puzzle*]; Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

3. *See* Cohen & Spitzer, *Government Litigant Advantage*, *supra* note 1, at 395.

This is not the first time that Linda Cohen and Matthew Spitzer have investigated the government's success before the Supreme Court. For several years they have been investigating how an ostensibly impartial judicial system skews results towards the government. In 1994, they published their first analysis of judicial deference to government administrators, *Solving the Chevron Puzzle*.[4] In 1996, they published their influential article, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*.[5] In these articles Cohen and Spitzer have provided us with a theory about deference and an empirical investigation supporting that theory. Now, several years later, they are again addressing the question of how it is that a seemingly impartial judiciary apparently skews its decisionmaking in favor of the government. Again, Cohen and Spitzer have provided us with a theory about how this result comes to pass and with a quantitative analysis which supports their theory.

In their earlier articles, Cohen and Spitzer contended that the deference towards agency interpretations which the Supreme Court had commanded in its *Chevron* decision was grounded in the policy concerns of the Justices.[6] When the Reagan Administration replaced the Carter Administration in 1981, its executive agencies adopted more conservative positions.[7] By commanding greater deference by the courts to administrative interpretations, the Supreme Court ensured that the conservative agenda of the Reagan administration would not be undermined by a hostile judiciary. Thus, their *Chevron* article provided an explanation about why government regulators tended to prevail in the courts. They prevailed because the Court throughout the mid-1980s insisted upon an increased amount of deference.[8] They continue to prevail because the Court has not signaled that the higher-deference standard imposed in the mid-eighties should be modified.

In their current paper, Cohen and Spitzer provide us with another analysis of why government regulators tend to prevail in the courts. This time their focus is upon the Supreme Court. These regulators (acting through the Solicitor General's office) petition for certiorari strategically, petitioning only when the chances of winning are high.[9] The government's petitioning strategy is dominated by policy considerations which are irrelevant to its private-party opponents.[10] The government is concerned with pursuing its chosen policies and wants

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4. Cohen & Spitzer, *Chevron Puzzle*, *supra* note 2.

5. 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 (1996).

6. *See* Cohen & Spitzer, *Chevron Puzzle*, *supra* note 2, at 71-78.

7. *See id.* at 77.

8. *See id. supra* note 2, at 99-100.

9. *See* Cohen & Spitzer, *Government Litigant Advantage*, *supra* note 1, at 404-05.

10. *See id.* at 416-17.

to avoid generating Supreme Court precedents unfavorable to those policies. Because a Supreme Court ruling creates a precedent throughout the nation, while a circuit court precedent is limited to a single circuit, the government wants especially to avoid the generation of Supreme Court precedents which would interfere with its policy program. Consequently, in many cases its potential losses from an unfavorable Supreme Court ruling are likely to outweigh its gains from a favorable ruling. Thus, the government is likely to seek Supreme Court review only when the likelihood of a favorable ruling is high.[11]

However, the private parties opposing the government choose their appeal strategies from a quite different standpoint.[12] Because the private parties are generally in court on a one-shot basis, they are not concerned at all with the precedential effect of a Supreme Court decision. Each party is concerned only with the results in its own particular case. Thus, when the stakes are high enough, private parties will be inclined to seek Supreme Court review, even in cases in which their legal costs are high and their probabilities of winning are low. The government achieves a high win-rate because it appeals only those cases in which it is likely to prevail. The Court's decisions are not skewed to the government's positions; rather, the government's appeals are skewed to the anticipated positions of the Court.[13]

These conclusions are both unexceptionable and revealing. We all know that the government tends to be successful at the Supreme Court. If we didn't know that already, there is a vast literature to which we might have recourse which tells us that the government tends to be successful at the Supreme Court.[14] Moreover, we all know that repeat players manage their strategies differently from nonrepeat (or ad hoc) players.[15] And we also know, or should know, that the Solicitor General is governed by these same repeat-player incen-

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11. *See id.* at 395.
12. *See id.* at 416-17.
13. *See id.* at 395.
14. *See* David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 555 (1990) ("The Office of the Solicitor General, which represents all government agencies in the Supreme Court, is rigorously selective regarding the cases it takes to the Court. Partly as a result, it has an enviable record of success before that body."). Professor Chemerinsky has complained that all governments (federal, state, and local) tend to win before the Supreme Court. *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term–Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 57 (1989). In a discussion of the Supreme Court' review of Ninth Circuit decisions, Professor Herald noted a similar tendency. *See* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 412 (1998).
15. *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). *See also* Shilton, *supra* note 14.

tives.[16] Cohen and Spitzer, however, have provided us with a quantitative analysis which provides solid support for these results. Accordingly, they have moved us forward from folk wisdom to scientific specification and empirical support. Our discussions, henceforth, of government litigation strategy and its impact on Supreme Court rulings will begin at the new, more solid level to which Cohen and Spitzer have brought us. In addition, Cohen and Spitzer have revealed with stunning clarity that a major explanation for the high government win-rate is to be found in the highly sophisticated selection process of the Solicitor General's office.

II. AN ASSESSMENT AND A COMMENTARY: AN OUTLINE

In the following pages, I explore the legal and institutional context of the government strategizing which Cohen and Spitzer have identified. In pursuing this exploration, I recognize in Part III a tendency, in all institutions, toward aggrandizing their power. It would obviously be an oversimplification of reality to assume that this tendency explains all institutional behavior; however, it is nonetheless helpful to focus our attention upon how, in what directions, and upon what type of issues the Court and the executive would attempt to aggrandize their powers, if and when they are doing so.

Next, in Part IV, I raise the question of the time horizons of these institutions. Would we expect the Court to attempt to maximize its powers in the short run or the long run? What is its likely time horizon or discount rate? What is the time horizon of the executive? What was the Court's discount rate in its *Chevron* decision? Was *Chevron* decided for short-run or long-run policy goals? Does it make a difference? I raise the last two questions about a number of related separation-of-powers cases which the Court decided in the 1970s and 1980s, and conclude that the Court's time horizon in these cases is unclear.

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16. *See, e.g.*, James L. Cooper, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 683 n.51 (1990) ("The Solicitor General is able to minimize his overall losses by not appealing cases lost in the lower courts that might be affirmed by the Supreme Court and thus cover the whole country rather than just one circuit."); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 417 n.34 ("A principal reason for the Government's success is that the Solicitor General carefully screens the cases in which the Government has lost in the court below."); Richard J. Lazarus, *Litigating* Suitum v. Tahoe Regional Planning Agency *in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179, 182-83 (1997) ("The United States will . . . decline to petition for a writ of certiorari in certain cases . . . . The government's strategic objective is to press its legal argument in a case with sympathetic facts."); Shilton, *supra* note 14 (discussing the Solicitor General's petitioning strategy); *see also* United States v. Mendoza, 464 U.S. 154, 161 (1984) ("Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal.").

In Part V, I caution against idealizing the Court's role in interpreting constitutional and legislative provisions. There I argue that those who believe that the Court is entitled to rule upon all important legal issues are mistaken. The determination of what issues the Court will address is highly contingent. It depends (both descriptively and normatively) upon the development of disputes and upon the appeal strategies of the parties, including the government's appeal strategies.

In Part VI, I address the constitutional tradition directly. I show that Alexis de Tocqueville accurately described the characteristics of American courts and that these characteristics were incorporated into the constitutional design and into the tradition generated by that design. It then follows that the government's strategizing over petitions to the Court for review is part of the interbranch rivalry contemplated by the Framers and relied upon by them as means by which the branches keep each other in check.

In Part VII, I illustrate the government's appeal strategy as part of interbranch rivalry, employing the method of positive political theory (PPT). Finally, in Part VIII, I show that in addition to the interbranch rivalry, which is part of the constitutional design, there is another tradition spawned by the separation-of-powers structure, one which values the autonomy of each of the constitutional branches. That is, however, a double-faceted tradition. One facet of that tradition is concerned with each branch's assertion of its own autonomy. The other focuses upon the respect which each branch accords to the autonomy of the others. The former aspect of the tradition, branch autonomy, provides direct support for the executive's strategizing under review. Under the latter aspect of the tradition, respecting the other branches' autonomy, the courts accord wide scope to the interpretative function of the executive branch. I show that this tradition is an old one, extending at least to the early nineteenth century. This part of the tradition provides support for the government's behavior as well. Thus, while interbranch rivalry fully explains and justifies the government's strategizing over appeals, both facets of a related but separate tradition having to do with the autonomy of the branches can be understood as providing additional support for this behavior.

Thus, I attempt to show, from a variety of perspectives, that the government's strategizing underlying its high win-rate is the kind of government behavior which we would expect from a government structure like that of the United States. Indeed, the strategizing which Cohen and Spitzer have identified is exactly the kind of activity which the constitutional Framers intended. Thus Cohen and Spitzer have given us somewhat more than they are claiming. They claim merely to provide us with a quantitative analysis showing that

the government wins at a high rate because of the strategic way it selects cases for appeal. But they have given us a new (quantitative) description of the way the constitutional structure operates.

III. INSTITUTIONAL POWER MAXIMIZING

Positive political theory (PPT) has come to play an increasingly important role in administrative law analysis and theory.[17] Cohen and Spitzer have themselves employed PPT in their earlier papers.[18] Analysts employing PPT frequently adopt the assumption that each of the institutional actors being considered is seeking to maximize its powers. In their earlier *Chevron* papers, Cohen and Spitzer assumed that the Court wants to maximize its power.[19] This assumption was useful to their analysis of deference. While they do not employ assumptions of power maximizing explicitly in their present paper, their analysis appears to assume that both the Court and the executive branch are attempting to maximize their respective powers. These assumptions, especially if understood as broad tendencies, are unexceptionable. Indeed, the Framers appear to have designed the American governmental structure on assumptions that the various component parts will strive to aggrandize their respective powers.

My commentary is compatible with assumptions that both the Court and the executive branch are prone to maximize their respective powers, although it does not rigidly assume that these tendencies permeate their every action. Recognizing the tendencies of institutions to expand their powers does not require us to attribute crass motives to the political actors involved. Both the officials in the executive branch and the justices may seek to maximize their own powers from the highest of motives. All of these actors may believe that the national welfare can be best furthered through the expansion of their own powers.

In their current paper, Cohen and Spitzer direct our attention to attempts by the executive branch to maximize its power—or at least its opportunity for pursuing its policy program—by choosing the cases which it brings before the Court. Their inquiry necessarily focuses upon the executive branch and provides us with important in-

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17. *See* Daniel A. Farber & Philip P. Frickey, *Forward: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992); Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1564 (1995). Professors Eskridge and Frickey have employed the positive-political-theory approach which takes into account both cooperation and rivalry among political institutions. They then focus upon how interdependent institutional decisionmaking may support a view of law as equilibrium among those institutions. *See also* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term–Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 42 (1994).

18. *See, e.g.*, Cohen & Spitzer, *Government Litigant Advantage*, *supra* note 1, at 394-95; Cohen & Spitzer, *supra* note 5, at 456.

19. *See* Cohen & Spitzer, *Chevron Puzzle*, *supra* note 2, at 96.

formation about how the Solicitor General's office operates. But to place this information into context requires that we broaden our perspective beyond the executive branch. If all of the institutional actors are attempting to maximize their powers, then the behavior of both the executive branch and the Court begins to make sense. Both the strategizing of the executive branch over the certiorari petitions it selects for submission and the wishes of the Court about the cases it would like to review become exercises in actual or attempted power maximization. The strategizing which the authors reveal to us then becomes not a devious exercise by the executive to undermine the Court's law-declaring role, but merely an exercise in interbranch rivalry.

As I argue below, the strategizing in the Solicitor General's office, which Cohen and Spitzer have identified, is part of an attempt by the executive branch to maximize its power. Thus the executive-branch strategizing which they identify here nicely complements the judicial strategizing which they explained in their earlier papers. Before examining the ramifications of executive-branch strategizing, however, I want to further consider the complementary power-maximizing activities of the Court as part of the background against which the executive activity takes place.

IV. POWER MAXIMIZING AND THE DISCOUNT RATE: HOW THE COURT AND THE EXECUTIVE PLAY THE POWER-MAXIMIZING GAME

The government's jockeying over the cases it selects for review reflects the conflict between the government's policies and the perceived hostile reception which the Court would accord those policies. Cohen and Spitzer do not explore the basis for these conflicts in their current paper. By contrast, in their *Chevron* papers, they assumed that the government and the Court were both pursuing similar short-run conservative policies.

I make two related suggestions here. First, I suggest that the actual and potential conflicts which are the subject of the Cohen-Spitzer analysis, in large measure, may reflect the different perspectives between the two institutions. Contrary to the assumptions of their earlier papers, I suggest here that the Court may be maximizing long-term goals. The conflicts then result from the Court's focus upon long-term objectives and the executive's focus upon the short-term. In these conflicts, the Court sees certain long-term issues as matters of principle. These issues may be deeply normative or they may involve the constitutional structure—such as issues involving the allocation of power among the branches of the federal government or issues concerning the relationship between the federal government and the states. By contrast, the government is concerned

with the pursuit of short-run policies. When the agendas of these two institutions are brought together in litigation, some conflict is likely.

Second, the contention that the Court is focused upon long-term objectives requires me to take issue with the prior analysis of Cohen and Spitzer which, in its examination of *Chevron*, concluded that the Court was focused (at least in *Chevron*) upon short-term objectives.[20] I review below their approach to the *Chevron* issue, adding additional support which would strengthen their conclusions. I conclude, however, that *Chevron* and other cases which can be used to support the hypothesis that the Court is focused upon the short-run are ultimately ambiguous on that issue. Because decisions such as *Chevron* also have long-term effects which contain policy implications that are inconsistent with the short-run approach and because the pursuit of long-run objectives are more compatible with the Court's institutional capabilities, I conclude that it is more likely that the Court is predisposed to a longer-term view than these authors have previously assumed.

A. The Court: Parameters of Power Maximizing

There are several models for maximizing the Court's power. These models differ primarily in the perspective through which power maximization is viewed. These models also differ on scales measuring both the generality and the longevity of their impact.

In the simplest power maximizing model, the Court can intervene whenever it desires and impose its own short-run policy position. The problem with this model from the Court's perspective, however, is that the Court is unable to intervene in every case where it might like to impose its policy views. If the Court can decide only between 100 and 150 cases per year,[21] its impact is likely to be small. Supreme Court intervention in an ad hoc (that is, unrelated) manner at 100 or 150 policy points is unlikely to fully exploit the Court's potential power.

Conversely, the more that the Court's decisions impact the core of an integrated policy web, the greater the short-run impact of the Court's decisions will be. Thus, the Court could maximize its impact by deciding those cases whose influence is most general: cases which create precedents controlling or significantly affecting lower court

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20. *See* Cohen & Spitzer, *Chevron Puzzle*, *supra* note 2, at 109-10.

21. Professor Hellman reports a significant downward trend in the number of plenary cases decided by the Court since 1988:

> In the 1989 Term, the number of plenary decisions dropped to 132 [from an average of 147 cases each term from 1971 through 1988]. . . . [I]n 1990 the number dropped still further, to 116. Thereafter, with one trivial exception, the plenary docket continued to shrink. The 1995 Term . . . yielded only 77 plenary decisions—half the number that the Court was handing down a decade earlier.

Hellman, *supra* note 16, at 403.

behavior throughout a policy area. Yet, even when the Court selects issues for decision which have a wide impact, it runs the risk of dissipating its limited powers. Lawrence Friedman and others have pointed out that the resolution of major policy issues often places heavy demands upon the Court.[22] As the chief decisionmaker possessing the capacity to decide only a small number of cases, the Court must be able to develop decisional rules which it can delegate to other authorities to administer.[23]

Sometimes, however, the Court has difficulty in formulating a decisional standard which effectively delegates decisionmaking to the lower courts. If the decisional standard is unclear, then additional clarifying decisions by the Supreme Court may be necessary. But these clarifying decisions impinge on the Court's other work and reduce the efficiency of its supervision.

Friedman gives as an illustration the early voting-district reapportionment decisions of the Court, which are structural decisions apparently made for long-term goals.[24] In its 1962 decision, *Baker v. Carr*,[25] the Court abandoned its previous refusal to review apportionment issues on political question grounds.[26] But *Baker* itself was unstable because it did not provide an administrable standard for deciding apportionment issues. It stimulated lawsuits without providing the criteria for deciding them. Only in 1964 in its decision in *Reynolds v. Sims*,[27] and companion cases, did the Court provide the "one man, one vote" standard that provided a stable operational standard for the lower courts and the state legislatures. Unstable rules are those engendering "constant, ceaseless testing of the boundaries of doctrine through litigation."[28] The Court has long understood that its rulings must be operational in the sense that lower courts can apply them without continuous monitoring from above. As it stated fifty years ago in *Universal Camera*, the Court wants and expects to "intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."[29]

Chevron provides another illustration of a decision with operational effect. In their analysis of the *Chevron* decision, Cohen and Spitzer portray it as an exercise in maximizing short-term policy im-

22. *See* Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786 (1967).
23. *See id.* at 815.
24. *See id.* at 817-18.
25. 369 U.S. 186 (1962).
26. *See id.* at 209.
27. 377 U.S. 533 (1964).
28. Friedman, *supra* note 22, at 826.
29. Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

pact.[30] Whether the Court was motivated by short- or long-term goals, however, its decision appears to have met Friedman's standard of operationality. Cohen and Spitzer have suggested that the Court's sympathies during the early years of the Reagan Administration were towards the conservative policies of that administration. The Court could have chosen to construe the statutory language of the Clean Air Act[31] rather than to rule on the mode of interpreting regulatory statutes. Either way it could have helped to further the conservative agenda of the Reagan administration. But by choosing to resolve the broader, and hence more far-reaching (interpretative) issue, the Court expanded the policy impact of its decision. By requiring the lower courts to defer to executive branch policies (as it did in *Chevron*) when the relevant statutory provision was ambiguous, the Court furthered its policy agenda vastly beyond what it could have done by simply deciding the narrow substantive policy issue raised by the *Chevron* litigation: whether it was appropriate to read in the "bubble concept" to an interpretation of the "stationary source" term in the Clean Air Act. Thus, the Court, in a stroke, compelled the lower courts to facilitate the application of conservative policies to the whole array of regulatory and administrative programs.[32] Moreover, there was no tradeoff. By retaining the power to determine when congressional intent was clear, the Court preserved its ability to intervene ad hoc on substantive issues of interpretation whenever it wished.[33]

From a related but slightly different perspective, *Chevron* can also be seen as an example of the Court enlisting other institutional actors (here the lower courts) to carry out its short-term policy agenda. Its *Chevron* decision converted the lower courts from obstructing to facilitating the implementation of the Reagan agenda. From this perspective, *Chevron* is an example of how an institution with limited resources can expand its power by enlisting the cooperation and support of other actors. In their influential 1989 article, Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast pointed out how legislators who lacked the time and resources to engage in effective monitoring could surmount that problem by enlisting private groups

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30. *See* Cohen & Spitzer, *Chevron Puzzle*, *supra* note 2, at 109-10.

31. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended in scattered sections of 42 U.S.C.).

32. In a legislative context, an enacting coalition would structure legislation in such a way as to enlist the aid of an outside group to monitor its administration. *See, e.g.*, Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989). Analogously, here the Court enlisted the aid of the lower courts to support the conservative program of the Reagan Administration.

33. *See, e.g.*, *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 111, 304-05 (1995).

to perform that function.[34] By so doing, the legislators could expand their power. *Chevron* shows us that the Court can make use of a similar technique to expand its own policy impact. Here the lower courts rather than private groups were enlisted in the enterprise. But this was no routine case of lower courts following Supreme Court instructions about what a statute means: *Chevron* was focused upon the implementation of all administrative and executive interpretative decisions throughout the entire range of regulatory policy. In context, its political impact was uniquely broad.

The Court's decisions on the issue of standing can be seen as similarly furthering the Court's short-term policy objectives by confining or broadening the powers of private groups to assist with enforcement. Through its standing decisions, the Court has been able to dampen the activities of liberal environmental activists and to strengthen the powers of conservative property owners. Thus in *Lujan v. National Wildlife Federation*,[35] and *Lujan v. Defenders of Wildlife*,[36] the Court cut down the power of environmental groups to seek judicial help in imposing strict environmental policies. In *Bennett v. Spear*,[37] the Court enhanced the power of landowners to challenge government-imposed restrictions under the Endangered Species Act.[38] In so doing, the Court also affected the mix of cases which would be brought before the courts. More challenges to aggressive government enforcement of environmental laws and fewer challenges to government under-enforcement of those laws would be the likely result. Analogously to its action in *Chevron*, the Court maximized its policy impact by conferring power on groups pursuing policies consistent with the Court's substantive views and by reducing the power of groups pursuing policies inconsistent with those views.[39]

B. Another Short-Term Exercise? A Separation-of-Powers Puzzle

From 1969 to 1977, the President was Republican while both Houses of Congress were controlled by Democrats. The Court had become more conservative. The Court decided *Buckley v. Valeo*[40] in 1976, during the Gerald Ford presidency. In that decision, the Court invalidated an attempt by the Congress to oversee the administration of its recently enacted federal election law.[41] That law had created a Federal Election Commission whose membership included

34. McCubbins et al., *supra* note 32, at 479-81.
35. 497 U.S. 871 (1990).
36. 504 U.S. 555 (1992).
37. 520 U.S. 154 (1997).
38. *See* Endangered Species Act of 1973, 16 U.S.C. § 1531 (1999).
39. *But cf.* McCubbins et al., *supra* note 32.
40. 424 U.S. 1 (1976).
41. *See id.* at 140.

representatives of both Houses of Congress.[42] It dealt with campaign financing, a highly sensitive matter to both parties. The structure of the Commission is best understood in the light of that subject matter. Senators and Representatives from both parties were included in the Commission membership in order to assuage concerns from both parties that the legislative compromise be carefully observed. It performed the "fire alarm" function described by McCubbins, Noll and Weingast: the potential for administrative deviations from the legislative compromise would be minimized and any actual deviations would be immediately identified and transmitted to Congress.[43] Yet this structure was in patent conflict with the Constitution's Appointments Clause.[44] The Court's ruling that the Federal Election Commission was unconstitutionally structured, however, is, like many decisions, a complex one which can be read at a number of levels. At its most elemental level, *Buckley* can be read as enforcing the literal mandate of the Appointments Clause. *Buckley* can also be understood as an attempt by the Court to prevent Congress from impinging upon the prerogatives of the executive branch to administer the laws and, concomitantly, to confine the Congress to the task of legislating. So understood, *Buckley* fits a highly formalistic model of constitutional structure, a model which the Court perfected during the Reagan presidency.[45] That model was reinforced and refined during the mid-1980s in *INS v. Chadha*[46] and *Bowsher v. Synar*.[47] As I will show, *Chevron* fits neatly into that formalistic model. The question here, however, is whether that carefully constructed model is focused on the short-run or on the long-run.

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42. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

43. McCubbins et al., *supra* note 32, at 434.

44. *See* U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for").

45. This is a model of constitutional structure in which the dividing line between congressional power and executive power is defined by the completion of the process of enactment. Prior to enactment, Congress has the power to formulate policy by incorporating its wishes into explicit provisions of the statute. To the degree that Congress fails to specify, it effectively delegates power to the executive to develop policy through the course of administering the statute. This model underlies *Buckley*, *Chadha*, and *Bowsher*. It is consistent with *Chevron*. This model is inconsistent with *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935), where the Court appeared to blur the lines between the legislative and executive branches by allowing administrators to develop in a context which was "independent" to a significant degree from the executive. This model is formalistic, because it focuses upon the formal tasks of the respective branches and neglects the various ways (such as through oversight and appropriation) in which Congress can in fact influence administration.

46. INS v. Chadha, 462 U.S. 919 (1983).

47. 478 U.S. 714 (1986).

In *Buckley*, *Chadha*, and *Bowsher*, the Court articulated a model in which the Congress exhausted its powers in the writing of legislation. Effectively, it delegated to the executive branch the power to formulate policies in the process of administration which were not foreclosed by the statutory language. Was this model designed to further the short-run policy goals of the Court, enhancing the powers of the then-conservative executive branch and restricting the powers of the then-liberal Congress? Or was this model designed to optimize power allocation over the long haul? Many scholars saw these cases as an effort by the Court to encourage Congress to face hard policy choices and to resolve them in legislation. Justice Rehnquist's proposed reinvigoration of the anti-delegation doctrine in *American Textile*,[48] has been seen as a part of that effort.[49] The core of that effort by the Court to force Congress to take greater responsibility for policy, however, lay in the Court's denial of Congressional power to oversee administration. Issues that Congress saw fit to leave unresolved were effectively delegated to the executive branch to resolve in the course of administering the legislation. *Chevron* can be seen as a confirmation of this model. In *Buckley*, *Chadha*, and *Bowsher*, the Court effectively told Congress that issues which it did not resolve in the specifics of legislation were delegated to the executive to resolve in administration.

Chevron can be understood as related to the constitutional model which the Court articulated in *Buckley*, *Chadha*, and *Bowsher*. In *Chevron*, the Court confirmed the delegation described in the former cases: issues not resolved by Congress were to be resolved by government administrators. All of these cases are consistent with an assumption that the Court is pursuing its short-run policy objectives. *Buckley*, *Chadha*, *Bowsher*, and *Chevron* were decided during periods in which a Republican sat in the White House and the Democrats controlled Congress. *Buckley*, *Chadha*, and *Bowsher* restricted Congressional power and *Chevron* expanded executive power. These results are consistent with a conservative Court attempting to implement its own short-run conservative agenda. Yet these cases can also be seen as an attempt by the Court to adjust power allocations among the branches in accordance with a longer-range vision, one independent of its short-term policy impact.

Thus, the separation-of-powers model exemplified in *Buckley*, *Chadha*, *Bowsher*, and *Chevron* is ultimately ambiguous. That model may have been designed for the short term, but it could also be un-

48. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).

49. *See* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1362 (1996); Paul Maynard Kakuske, *Clear-Cutting Public Participation in Environmental Law: The Emergency Salvage Timber Sale Program*, 29 LOY. L.A. REV. 1859, 1885 (1996).

derstood as a model for the long term. Indeed, the short-term explanation is problematic. If these cases are understood as judicial efforts to enhance the powers of a conservative executive and to restrict the powers of a liberal Congress, then they accomplish perverse results when, as during most of the 1990s, the executive is liberal and the Congress is conservative.

A different approach to maximizing its power would move the Court toward structural issues and away from determinations about short-run substantive policies. Should the Court adopt a long-run time horizon (or a low future discount rate), it would emphasize issues of power allocation and procedure. From this perspective, the actual rationale of the *Chevron* decision would be more in line with the reasons articulated in the Court's opinion. Thus, the Justices might have wanted to maximize their power, not by focusing their views on substantive policy, but by imposing their views of optimal governmental design. From a standpoint of governmental design, it is a plausible position for the courts to determine congressional "intent" when that determination can be made from sources in the law libraries (the statutory words, the statutory structure, or legislative history), but to defer to the administrators on questions which those sources leave unanswered or ambiguous. Indeed, such a position might be seen as maximizing the power of the judiciary over time by excusing them from involvement in minor matters of policy and thus reserving their limited decisional capacity for more important matters.

C. The Discount Rate

Although the Court may have maximized its short-run policy goals in *Chevron* by reducing lower-court resistance to the conservative policies of the Reagan Administration, that particular policy goal may have been short-lived. With the advent of a liberal Democratic administration in 1993, *Chevron* produces a different effect on the liberal-conservative policy continuum. Now *Chevron* compels the courts to accept the liberal policies of the Clinton administration.[50] Neither *Chevron* nor its application has been modified since the beginning of the Clinton administration.[51] With the advent of the George W. Bush administration, *Chevron* will return to an instrument for compelling courts to enforce conservative policies. More to the point of the present inquiry, would not the Supreme Court of 1984 have foreseen the possibility that its *Chevron* decision would one day require the lower courts to further liberal policies? The same questions pervade the Court's separation-of-powers decisions in

50. *See, e.g.*, Babbitt v. Sweet Home Chapter, 515 U.S. 687 (1995).
51. *See id*.

Buckley, *Chadha*, and *Bowsher*. From a short-term perspective those decisions can be seen as an effort by the Court to constrain a liberal Congress. Yet over the long run, they operate as a double-edged sword. In the 1990s, these decisions constrained a conservative Congress.

The prospect that the effect of *Buckley*, *Chadha*, *Bowsher*, and *Chevron* on substantive policy is reversed with a change in administrations compels us to inquire further into the Court's decisional perspective. Maybe it is interested in short-term results, but those short-term successes are eventually offset by longer-term losses. Perhaps it operates (at least sometimes) with a short time horizon or a high discount rate towards the future. Certainly the differing impact of *Buckley*, *Chadha*, *Bowsher*, and *Chevron* between the short run and the long run would suggest that if the Court is seeking to maximize its influence on substantive policies, it must be operating with a short time horizon, applying a high discount rate to the future. Finally, what are we to say about such cases as *Clinton v. New York*,[52] where the Court, in 1998, struck down the line-item veto, thus shifting power away from a liberal president? This is, of course, what we would expect from a Court preoccupied with short-term political considerations. But if these short-term objectives were indeed motivating the Court, how could it continue to follow the path marked out by *Chevron* through the remainder of the 1990s?

It seems unlikely that the Court is operating with the short time horizons which would explain *Buckley*, *Chadha*, *Bowsher*, and *Chevron* as a means of furthering the short-run policies of conservative administrations. If the Court were acting upon the basis of such short-run concerns, why would it not overrule those decisions when a liberal administration came to power? The implausibility of viewing those decisions as focused primarily upon the short term is reinforced when the Court's institutional characteristics predisposing it towards longer-term considerations are taken into account.

D. Institutional Characteristics and Comparative Time Horizons

A number of factors indicate that the executive is institutionally focused upon events with relatively short time horizons.[53] The President is elected for a four-year term and cannot serve more than two terms. Cabinet members serve at the President's pleasure and thus cannot serve longer than the President. These electoral constraints help to focus the attention of the President and his cabinet officers

52. 524 U.S. 417 (1998).

53. On the differing capabilities of governmental institutions, see Henry M. Hart, Jr., *Comment on Courts and Lawmaking*, *in* LEGAL INSTITUTIONS TODAY AND TOMORROW 40 (Monrad G. Paulsen ed., 1959). Hart argues here that the courts are uniquely capable of principled decisionmaking. *See id.* at 42.

upon the limited period in which the President holds office. Anything he accomplishes must be done during a period which cannot exceed eight years. Moreover, the executive is differentially qualified to pursue short-term objectives. The election of the President and his accountability to the electorate focus his attention on policies and programs which are popular with the electorate and which are generally seen to have a short-term payoff. Moreover, the selection, design, and pursuit of such short-run policy objectives are often heavily dependent upon information and its analysis. The huge executive bureaucracy possesses, among other things, enormous resources for collecting, synthesizing, analyzing, and using information. Those capabilities thus contribute to the executive's relative advantages in planning and implementing short-run policies.

By contrast, the Supreme Court is institutionally focused upon a longer term. The Justices are appointed for life, thus freeing them from concern with forthcoming elections and encouraging them to take a long-term perspective. Moreover, the freedom of the Justices from accountability to the electorate enables them to take unpopular positions. Because the Court lacks the information-gathering capacity of the executive, it is less capable of initiating or developing its own short-run policy objectives. The Court, of course, can acquire information from the parties in litigation, but the parties can, concomitantly, deny the Court information which they deem irrelevant or inopportune to bring into the record. The Court thus appears unable to initiate an informed short-run policy agenda and appears to be disadvantaged in reviewing the substance of short-run policy objectives. Structural issues having to do with long-term allocations of power among the branches and between the federal government and the states tend to be more normative and less dependent upon the collection and analysis of large amounts of information. Thus, the rivalry between the Court and the executive over the latter's docket might come to a head in cases in which the long-term goals of the Court come into conflict with shorter-term strategies of the executive and of Congress. Examples of this kind of conflict are not hard to find.[54]

We have no way of knowing whether, and the extent to which, these relative institutional capabilities may affect the Court's perspective. Yet, a fully rational Court would take them into account as it set about maximizing its own policy agenda.

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54. *See, e.g.,* Printz v. United States, 521 U.S. 898 (1997) (striking down the Brady Handgun Violence Prevention Act of 1993, and holding that Congress' attempt to compel state officers to execute federal laws was unconstitutional); United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act of 1990, as being outside the scope of the Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (striking down a portion of the Low-Level Radioactive Waste Policy Amendment Act of 1985, which compelled states to either provide radioactive waste sites or to take title and assume liability for all undisposed waste).

V. PUBLIC POLICY AND INDIVIDUAL RIGHTS

By deciding not to seek review of an adverse circuit court decision, the government has prevented the Supreme Court from considering the issue raised in the litigation and perhaps from affirming the circuit court ruling. The government therefore pursues its policies in the other circuits. Is anyone harmed by this strategizing over appeals? Since the opposing party has prevailed, that party has not been injured. Indeed, the opposing party has been saved the legal expenses that it would have incurred on appeal. Because the law within the deciding circuit is adverse to the government, the interests of other persons within the circuit whose circumstances are similar to the opposing party are observed and protected by the unappealed circuit court ruling.

Are there, then, losers in such a situation? Who are they? Are they wronged? The losers are those in the other circuits who would have been vindicated by a Supreme Court ruling and who must now assert their rights in litigation. They must bear the expenses of litigation. That is their only loss. Of course, there is no way of knowing whether they would in fact prevail. If they litigate, they may be vindicated by the lower courts. Or, if not, and the Supreme Court in fact wants to decide the issue in their favor, the Court will grant their petition and rule in their favor. At most, under this scenario, those disadvantaged by the government's appeal strategy must incur the legal costs of vindication. They are unable to "free ride" on the efforts of the parties in the original suit.

Who are the winners? The winners may be the public or those parts of the public who are being courted by the administration through the pursuit of the policies that were challenged in the litigation. The constitutional scheme contemplates that politicians in the elected branches will pursue shorter-term objectives which benefit or appear to benefit their constituencies, while the courts will intervene in two major types of cases. First, the courts will intervene when necessary to impose the unpopular constraints which are essential to the constitutional compact: the preservation of essential liberties, the protection of minorities, and the maintenance of the constitutional structure. Second, the courts will intervene when necessary to impose what may be the presently unpopular terms of a legislative bargain.[55]

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55. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 289 (1985) (commenting that "where the lines of [the legislative] compromise are discernable, the judge's duty is to follow them"); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (arguing that the scope for judicial interpretation of a statute should be "restricted to cases anticipated by its framers and expressly resolved in the legislative process"). *See also* Eskridge & Frickey, *supra* note 17, at 29 (commenting that "the Court

Since under this analysis, the winners from government strategizing over appeals are the public, that strategizing is not suspect or devious conduct. It is behavior likely to further the short-term public interest. Of course, even though the short-term public interest is being furthered, that is not reason to ignore the longer-term interests inhering in constitutional provisions or in the terms of a legislative bargain. But those interests can seek vindication in litigation. Government strategizing over appeals does not remove their constitutional or legislative protections. It only requires them to bear the expenses of litigation. In short, government strategizing furthers the short-run public interest, subject to the continuing potential check that someone else will challenge the policy in litigation.

Is the government normatively obliged to petition for review those cases which it believes it will lose? In this paper I argue that it is not so obliged. The constitutional scheme obliges the government to respect the judgments to which it is a party. Generally, the government should conform its activities to Supreme Court precedents. But the government is not bound to seek unfavorable rulings. As I argue below, the government's ability to deny the Court the opportunity to rule on cases which the Court wants to review is part of the inter-branch rivalry built into the constitutional structure.

VI. IDEALISTIC MISPERCEPTIONS

Observers of the high government win-rate before the Supreme Court have sometimes lamented the fact that all of the cases which the Court would like to review have not been brought before the Court. Cohen and Spitzer make the point that the Court is being denied cases which it would like to review, although they are careful not to include a normative element to their observation.[56] Others, however, are not so careful. These others suggest that the Solicitor General ought to provide the Supreme Court with the opportunity to review cases that the Court would like to review.[57] Underlying this suggestion is the premise that there is a true or best interpretation of

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will interpret statutes to reflect legislative deals in the short-term and new political balances over time").

56. *See* Cohen & Spitzer, *Government Litigant Advantage*, *supra* note 1, at 396.

57. Among those adhering to such a view have been several prior Solicitors General, including Robert Bork, Archibald Cox, and Philip B. Perlman. *See* Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187, 1219-20 & n.86 (1988). In the hearings on his nomination to be Solicitor General, Bork stated: "I do not see how a Solicitor General who imposed his own views upon the appeal process and kept cases from the Court that the Court thinks it ought to have, could conceivably retain the trust of that Court." *Nominations of Joseph T. Sneed, of N.C., to be Deputy Att'y General and Robert H. Bork, of Conn., to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary*, 93rd Cong. 11 (1973). Schnapper discusses the differing positions on the propriety of the Solicitor General deciding against petitioning in certworthy cases. *See* Schnapper, *supra*, at 1219-20.

all statutory and constitutional issues and that only the Justices of the Supreme Court can tell us what those interpretations are. The resolutions of statutory and constitutional issues by other government officials do not attain quite the same level of quality as those of the Supreme Court. This point of view, which tends towards the conceptualism permeating the continental codes, bears a remarkable resemblance to Plato's allegory in which persons imprisoned in a cave saw only shadows of objects but not the objects themselves.[58] Interpretations by executive branch officials might imperfectly reflect the ultimate reality of a Supreme Court interpretation, but they would be as different in kind as were the shadows in the cave to the objects creating them and would, in this view, be entitled to substantially less respect.

As I argue below, this view does not fit the American constitutional scheme for the following reasons: it fails to recognize the limited role assigned to the Supreme Court under the Constitution; it fails to acknowledge the legitimate role of executive interpretation; and it is blind to the Framers' own strategy of encouraging interbranch rivalry. Under the constitutional framework, the Supreme Court may have the ultimate responsibility for interpreting the law, but only when legal issues are brought before it in a litigation context. When and where the law is interpreted is determined by the contingencies of litigation or the requirements of administration. Thus, the appropriate philosophical metaphor is not the cave, but rather Wittgenstein's language game in which meaning is determined by usage.[59]

Yet, the attractiveness of that idealistic view is strong. Even Cohen and Spitzer sometimes have employed language or symbols suggestive of the Platonic allegory. When they attempt to symbolize deference in their PPT analysis, they measure the extent of deference from a "best statutory interpretation" (BSI)[60] and show deviation from the BSI point in two directions: in the liberal direction and in the conservative direction.[61] Although they surely know that speaking of a best statutory interpretation is an inaccurate mode of speech, their presentation conveys the suggestion, however unintentionally, that there in fact *is* a best statutory interpretation.[62] This is, of course, wrong. Judging the best interpretation of a statute is similar to judging Hamlet's sanity. There are better and worse analyses, but

58. *See* PLATO, THE REPUBLIC at pt. vii, ll. 514a-521b (Desmond Lee trans., Penguin Books 2d rev. ed. 1987).

59. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 43 (G.E.M. Anscombe trans., MacMillon 1953).

60. Cohen & Spitzer, *Chevron Puzzle*, *supra* note 2, at 72-83.

61. There they symbolize the scope for *Chevron* deference as *BSI ? d*. *See id.*

62. In their *Chevron* analysis, that best statutory interpretation was one which even the Supreme Court did not tell us.

there is no identifiable "best" approach to either issue. The quality of statutory interpretation (like the interpretation of Hamlet's mental state) is frequently indeterminate. In using the BSI concept in their exposition, Cohen and Spitzer surely are influenced by standard statistical analysis which measures dispersion in both directions around a mean. But there is another latent influence which statistical analysis may exert upon analysts who are working in other fields. Because statistical analysis is employed to ascertain the view of a large population from a small sample, the underlying understanding is that there is a "real" answer which is only approached by the results given by the sample. The same is true in regression analysis which attempts to ascertain the relation between two or more variables.[63] The cave allegory is thus apt here. Analysts who immerse themselves in statistical analysis must take care not to carry over the implicit approach-to-the-ideal attitude when dealing with other subject matters where there are no "ideal" answers but only contingent ones identified by actual behavior.

As I argue below, the constitutional scheme limits the opportunities for the courts to pass on issues of interpretation. As Alexis de Tocqueville observed in the passage quoted by Cohen and Spitzer,[64] American courts are passive institutions which interpret constitutional provisions and legislation only when litigants bring issues before them in a concrete dispute. I establish below that the Solicitor General's selection of the cases to bring before the Court reflects that part of the constitutional scheme that is designed to encourage interbranch rivalry. But, concomitantly, the respect which each of the constitutional branches has for the others has also been understood to mean that the courts must (or should) often decline to interpret a constitutional or statutory provision, thus recognizing the interpretative autonomy of the other branches. This tradition is an old one which is imbedded in a host of legal doctrines.[65] It acknowledges the legitimacy and importance of constitutional and statutory interpretation by executive branch officials. Cohen and Spitzer themselves rec-

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63. *See* RALPH E. BEALS, STATISTICS FOR ECONOMISTS 234-35 (1972). Beals explains:

> [T]he method of least squares determines estimators of the parameters in the true relation $Y_i = ? + ?X_i + u_i$; a relation $Y_i = a + bX_i + e_i$ is determined using sample data. Each new sample produces new estimates a and b. . . . Whether or not a and b are good estimators of $?$ and $?$ depends on whether or not their probability distributions are concentrated near the true values of the parameters.

Id.

64. *See* Cohen & Spitzer, *Government Litigant Advantage*, *supra* note 1, at 391 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, ch. VI, 99-100 (Alfred A. Knopf ed., 1985) (1945)).

65. *See infra* Part VII.

ognize the legitimacy of executive branch interpretation in their discussion of intercircuit and intracircuit nonacquiescence.[66]

The concept of maximizing the opportunities for the Court to answer all unsettled questions is foreign to the mainstream American legal tradition. In that tradition, interpretative questions are answered (or not) as the courses of litigation and administration require. The Court's role is not only designedly contingent, resolving legal issues brought before it only when the parties choose to bring cases there, but the Court has affirmatively recognized a duty to stand aside in many circumstances in order to permit executive officials to interpret legal provisions free from judicial interference.

VII. PUTTING STRATEGIC BEHAVIOR INTO CONTEXT

Cohen and Spitzer have prefaced their paper with a quote from de Tocqueville: "[A]n American judge can pronounce a decision only when litigation has arisen, he is conversant only with special cases, and he cannot act until the cause has been duly brought before the court."[67] In de Tocqueville's language the authors find a reference to the American judiciary being constrained by a lack of cases. After first suggesting that such a reference might be found "quaint" as applied to the Supreme Court at a time when three thousand or more petitioners are seeking certiorari, the authors provide us with an analysis which does indeed show that the government, through its strategic action, is exerting a constraining effect upon the Supreme Court's docket. The government is denying the Court the opportunity to review cases which the Justices might wish to review. The authors, in short, develop the case that de Tocqueville's remarks remain valid and applicable to the Supreme Court, even today, over a century and a half after they were first published.

The conceptual framework in which Cohen and Spitzer would have us view the continuing relevance of de Tocqueville's remarks is one in which both the Court and the government are striving for the maximum policy impact. In order to further its policy goals, the Court would like to select for review those decisions of the lower courts which raise the policy issues the Court would like to address. The Court's power to select its case agenda is constrained by the decisions of the parties regarding whether to seek certiorari. Private parties will tend to seek certiorari, weighing only the legal costs of Supreme Court review against the probabilities of success. As a result, the Court is likely to be inundated with certiorari petitions from

66. *See* Cohen & Spitzer, *Government Litigant Advantage*, *supra* note 1, at 402-03; *see also, e.g.*, Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies,* 98 YALE L.J. 679 (1989).

67. DE TOCQUEVILLE, *supra* note 64.

private parties. The government, however, as a continuing player, is concerned not only about the result in the case at hand, but about the effect of a Supreme Court precedent. An adverse Supreme Court precedent constrains the government throughout the United States, whereas an unappealed adverse decision in a circuit court constrains the government only in that circuit. On the issues which arise in the numbered geographical circuits, the damage suffered by the government from an adverse Supreme Court precedent would be eleven times the damage which it suffers from an adverse circuit court decision if the circuits were all equally important. As a result, the government is less likely to seek review in those cases where its probabilities of success are low. An unsuccessful appeal impacts the government much more severely than a private litigant. In the language of Cohen and Spitzer, the strategizing of the government constrains the Court, skewing its decisions in favor of the government.[68]

Putting all this into its context, Cohen and Spitzer are providing us not just with a quantitative analysis of Supreme Court decisionmaking showing the effects of the government's strategizing, although this is all that they are claiming. They also provide an analysis of the underlying constitutional structure. De Tocqueville's description of an American judge fits the model of judicial decisionmaking which had been embraced by the Framers and adopted by the judiciary during the formative period of American constitutional law. It follows, by logical extension, that the government's strategizing is part of that model.

Article III itself limits the exercise of the judicial power to "cases and controversies,"[69] and thus to disputes that are brought before the courts by litigants. That the courts lack power to issue rulings or to provide advice on their own motion or at the request of others has been part of the common understanding and practice from the beginning of the Republic. Hamilton's description of the proposed federal judiciary in the Federalist Papers[70] takes for granted the fact that the judiciary is a passive institution, reacting only to cases brought before it. As he notes, the judiciary "can take no active resolution whatever,"[71] its limited strength consisting of "merely judgment."[72] Hamilton's conclusion that "the judiciary is beyond comparison the weakest of the three departments of power"[73] assumes this passive role for the judiciary. And a mere three years after the adoption of the Constitution, *Hayburn's Case*[74] reported that the Court declined a

68. *See* Cohen & Spitzer, *Government Litigant Advantage*, *supra* note 1, at 394-95.
69. U.S. CONST. art. III, § 2, cl. 1.
70. *See* THE FEDERALIST NOS. 78-83 (Alexander Hamilton).
71. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
72. *Id*.
73. *Id*. at 465-66.
74. 2 U.S. (2 Dall.) 409 (1792).

request of the Attorney General to perform tasks outside of a litigation context. This insistence that the Court act only in the context of specific litigation was reconfirmed the following year in the famous *Correspondence of the Justices*.[75] In that correspondence, Chief Justice John Jay and his Associate Justices refused President Washington's request to advise him on the meaning of certain treaties and agreements because those interpretative questions did not come before the Court in litigation.[76] In *Osborn v. Bank of the United States*,[77] Justice Marshall described the "judicial power" conferred on the federal courts by Article III as exercisable only in a litigation context: Thus, according to Marshall, "[t]hat power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law."[78] This model indeed underlies the great case of *Marbury v. Madison*,[79] where the Court first exercised its power to review congressional legislation for constitutionality. Justice Marshall, writing for the Court, there defined appellate jurisdiction as one which "revises and corrects the proceedings in a cause already instituted, and does not create that cause."[80] Thus, *Marbury* not only accepted the passive judicial model, but employed it as a premise for conforming the Court's appellate work to that passive model.

As is also well known, the Framers divided governmental powers among Congress, the executive branch and the courts as a means of forestalling an excessive concentration of power among any person or group. Well aware of the human tendency to seek ever greater influence and power, the Framers enlisted this tendency in their efforts to ensure that power would remain dispersed over time. Madison's famous remark that "[a]mbition must be made to counteract ambition"[81] describes the Framers' strategy: The efforts of each branch to aggrandize its powers will be offset by efforts of the other branches to aggrandize their own. Thus, the vision of Cohen and Spitzer that the Supreme Court Justices have their own views of governmental policy and that they would like to maximize their policy impact largely tracks the assumptions of the Framers. Because the Court cannot act until cases are brought before it, the Court is dependent upon litigants to supply those cases. As Cohen and Spitzer show us, the government actively withholds cases from Supreme Court review. This

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75. *See* Letter from Chief-Justice Jay and Associate Justices to President George Washington (August 8, 1793), *reprinted in* 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Henry P. Johnston ed., New York, G.P. Putnam's Sons 1891).

76. *See id*.

77. 22 U.S. (9 Wheat.) 738 (1824).

78. *Id*. at 819.

79. 5 U.S. (1 Cranch) 137 (1803).

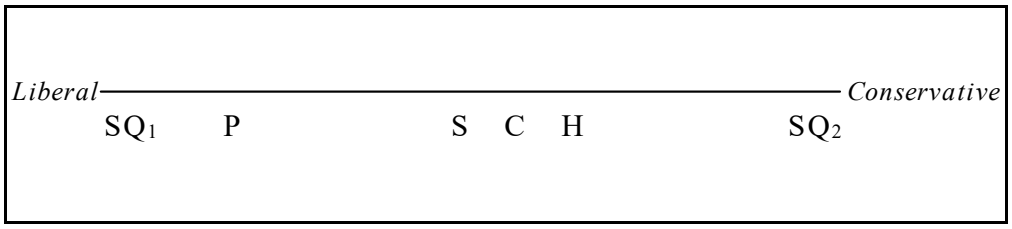
80. *Id*. at 175.

81. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

government strategizing is one means by which the executive branch constrains the power of the Supreme Court. Indeed, the circumstance which Cohen and Spitzer describe is one in which the Court wants to constrain the executive by issuing adverse decisions and in which the executive, aware of this potential, seeks to avoid this constraint. This is, *par excellence*, the interbranch rivalry which the Framers contemplated and sought to encourage.

VIII. POSITIVE POLITICAL THEORY, STRATEGIZING, AND THE CONSTITUTIONAL STRUCTURE

Employing a variation of the positive political theory (PPT) analysis which Cohen and Spitzer used in earlier papers[82] and imposing a reality-simplifying liberal/conservative continuum, we could construct a one-dimensional diagram outlining the operations of the constitutional scheme. In the context of the 1990s when we had a liberal executive, a conservative Senate, a more conservative House and a conservative Supreme Court, the alignment of these institutions is represented on the diagram below.[83]



On these assumptions, new legislation can be enacted only if the status quo lies to the right of *H* or to the left of *P*. If the status quo is at SQ_1, then all three institutions which participate in the legislative process (*P*, *S*, *H*) would favor moving the status quo to the right. In the absence of horse trading, the new legislation would move the status quo only to *P*, since the President would veto legislation moving the status quo further to the right. If the status quo lies at SQ_2 the new legislation would move the status quo to the left, but not further than *H*, since the House would not agree to a move further to the left. Should the status quo lie anywhere between *P* and *H*, there will be no legislation changing it, because a movement in either direction would be vetoed by at least one of the three institutions whose interest would be adversely affected by such a move. Thus, in a case in which the President and the two Houses of the Congress

82. *See* Cohen & Spitzer, *Chevron Puzzle*, *supra* note 2, at 69-83; Cohen & Spitzer, *supra* note 5, at 441-43, 450-51. As they have noted, they drew their notation from William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 529 (1992).

83. The notation is straightforward: *P* = President; *S* = Senate; *C* = Supreme Court; *H* = House.

differ in their ideologies, the constitutional scheme contemplates that the only legislation that will be enacted will be that which changes situations lying outside of a central ideological core bounded by the left-most and the right-most ideological positions of the three institutions that participate in legislating. That central core marks the broad area in which there are no legislative changes.

Now let us explore the Supreme Court's role on this continuum. We will do this with the use of two models, which differ from each other primarily in their complexity. The first model is extremely simple. In this very simple model, the Supreme Court is limited to affirming or reversing the decision below. An affirmance endorses the decision below, thus making the lower-court ruling that of the Supreme Court. In this model, a reversal is constrained by the rationale supplied by the appealing party in the sense that the Court, in reversing a circuit court decision, cannot move on the liberal-conservative spectrum beyond the scope allowed by the rationale supplied by the appealing party.

In reversing, the Court is, however, free to move within the confines of the appealing party's rationale. Thus the appealing party's rationale sets the limits of the Court's movement on the liberal-conservative spectrum, but within those limits, the Court is free to select the point on that spectrum where it wishes to place its own decision. We also assume that the impact of a decision by a circuit court is limited to that circuit and that a Supreme Court decision has a nationwide impact. Finally, we ignore the unnumbered circuits (the Federal Circuit and the District of Columbia Circuit) and assume that the policy impact of any circuit court is equal to the policy impact by any other circuit court. Thus, the policy impact of a Supreme Court decision is eleven times the impact of the policy impact of a circuit court.

In the simplest version, the model suggests that the government (represented by *P* above) will appeal cases whose results lie to the left of *P*. In those cases, the Supreme Court's policy objectives and the government's policy objectives are opposed to the ruling below. The government will appeal, because it wants a reversal, and it is encouraged to appeal because it believes that the Supreme Court will reverse.[84] This model also suggests that the government will appeal cases whose results lie to the right of *C*. In those cases, the Supreme Court's policy objectives and the government's policy objectives are also opposed to the ruling below. The government will appeal, because it wants a reversal, and it is encouraged to appeal because it

84. In these cases (where the lower court decision lies to the left of *P*) the government appeals, but it provides a rationale which limits the Court to a move to the right no further than *P*.

believes that the Supreme Court will reverse.[85] The government will not, however, appeal cases whose results lie to the right of *P* and to the left of *C*. Cases whose results fall on this part of the policy spectrum would be affirmed by the Supreme Court.

Note that the lower court decisions which the government appeals in this model lie at the two extremities of the ideological continuum. Lower court results which fall in a central core bounded by *P* and *C* are not appealed. The results of the government's decision whether to appeal resemble the results of the legislative process. Results which are given (in the case of legislation) by a preexisting status quo or by a lower court decision falling within an ideological center are left alone. No legislation alters a status quo situation falling within a *P-H* central core. No lower court decisions falling within a *P-C* central core are appealed. The constitutional structure of three branches (and a legislative branch divided between two houses) vying with each other over power and policy issues produces these results.

We will now proceed to a more complex model. In this model, the Supreme Court is no longer limited merely to affirming or reversing the decision below, nor is the Court confined by the rationales supplied by the parties. In this more complex model, the Court can affirm, reverse, modify, remand with instructions, or handle cases in all of the various ways that the Supreme Court actually does. Moreover, in this model the Court accompanies its decision with an opinion setting forth its construction of the law. These additional powers of the Court complicate the government's decision whether to appeal. Should the government appeal a decision whose results fall to the left of *P*, the Court is no longer limited merely to reversing. Now the Court can reverse and accompany that reversal with an opinion, perhaps imposing an interpretation of the law which would fall on the policy continuum somewhere to the right of *P*. The government now has to consider whether it wants to seek a reversal of a lower court decision falling to the left of *P* so badly that it is willing to bear the risk that, in reversing, the Court will impose an interpretation to the right of *P*.

Let us make this complex model more precise. We assume that there are limits or bounds to the possible interpretations of any constitutional or statutory provision that may come before the Court. These limits are set by constitutional or statutory text and the accepted modes of argumentation. In the diagram below, the range of possible interpretation is indicated.

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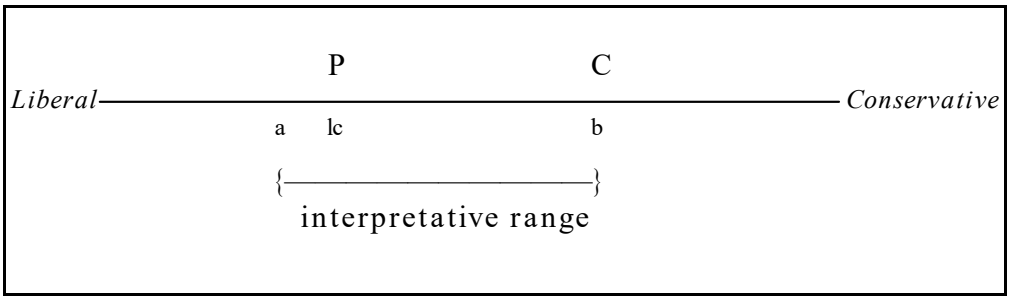
85. In these cases (where the lower court decision lies to the right of *C*) the government appeals, but, in reversing, the Court will choose to move no further to the left than its own policy preferences at *C*.



In this diagram, a circuit court has decided a case with policy results which fall at *lc* on the liberal/conservative continuum. The government objects to the decision because its results are too liberal. The government is confident that if it seeks Supreme Court review, the Court will reverse the lower court decision, because its results are also too liberal for the Supreme Court. But the government believes that there is sufficient interpretative leeway in the legal provision at issue for it to be interpreted in ways that could range from *a* to *b* on the liberal/conservative policy continuum. Thus, an appeal would enable the Court to impose an interpretation at the *b* end of the interpretative range, the possible interpretation most consonant with the Court's objectives. Even though the government is displeased with the *lc* interpretation of the lower court, it will probably decide to live with an interpretation which is too liberal but which is confined to one circuit rather than to seek review and enable the Supreme Court to impose an interpretation which is too conservative and whose impact extends throughout all eleven numbered circuits.

This complex model describes in PPT terms the government strategizing identified by Cohen and Spitzer. It is a description of the interbranch jockeying for advantage which the Framers intended. In at least some situations, the PPT framework enables us to describe the interbranch rivalry with greater conceptual clarity. In the complex model described above, it reveals the difficulties which the government often faces. The government must balance the positive effects of a likely Supreme Court reversal which the government wants against the negative effects of the Court's doctrinal statements which the Court may include in its opinion.

IX. LEGAL INTERPRETATION AND TRADITIONS OF EXECUTIVE AUTONOMY

The preceding pages have shown that the constitutional design contemplates the interbranch rivalry which would be generated when each of the branches seeks to maximize its own powers. Those pages have also shown that government strategizing about which cases to appeal fits the model of interbranch rivalry. Government

strategizing is therefore the kind of behavior which the Framers contemplated and sought to foster.

Now I want to shift the focus ever so slightly from interbranch rivalry to a focus upon the autonomy of each of the constitutional branches. There is, of course, a major overlap between these perspectives. Autonomy is almost a necessary precondition for rivalry, and the aggressive assertion by a branch (the executive, for example) of its autonomy can (and often does) constitute part of the interbranch rivalry which has already been discussed. Despite the overlap between these perspectives, I want to focus directly upon the extent to which the constitutional design has engendered traditions concerned with preserving the autonomy of the branches. More precisely, because of our present concern with executive strategizing, I want to examine the traditions which would add further support to that activity, beyond that which the discussion has so far identified.

A. Executive Autonomy Independently Asserted

The separation-of-powers traditions concerned with the claim of each of the branches to operate autonomously have two faces. The first face of this tradition concerns the extent to which each branch may assert its own independence in interpreting the laws, apart from the question of whether that independence is recognized by the other branches. While today there is widespread recognition—including recognition by the courts—that the interpretative authority of the executive at least sometimes takes precedence to that of the courts,[86] there are a variety of views as to the extent to which the President and his officials may operate independently from judicial interpretations. My colleague, Mike Paulsen, takes an especially strong view of executive branch interpretative independence.[87] Paulsen argues that the President is free, at least in some circumstances, to disregard judicial interpretations, even those by the Supreme Court. In support of his position Paulsen relies on a variety of sources, including Madison's statement in the Federalist Papers that no department "can pretend to an exclusive or superior right of settling the boundaries

86. *See infra* Part IX.B.

87. *See, e.g.*, Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671 (1995); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337 (1999); Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385 (1994); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

between their respective powers."[88] Paulsen also brings up President Lincoln's refusal to obey a writ of habeas corpus issued by Chief Justice Roger Taney,[89] and his rejection of the *Dred Scott* decision[90] as a rule binding upon the President and Congress.[91] Paulsen could have also cited President Andrew Jackson's refusal to enforce the Court's ruling in *Worcester v. Georgia*.[92]

On the opposite extreme from Paulsen is the position recently argued by Larry Alexander and Frederick Schauer that the Supreme Court's resolutions of constitutional issues are broadly binding on the executive: the Court's resolutions carry obligatory force beyond the judgments and the parties to those judgments.[93] The Court's resolutions are binding beyond the particular case, these authors contend, because society needs coordination, cooperation and, especially, authoritative settlements of controversial issues.[94] Although Alexander and Schauer focus upon constitutional interpretations, the logic of their position appears to demand official deference to the Court's legislative interpretations as well.

A perhaps more common view sees the executive as obliged to respect judgments to which it is a party, but as not necessarily obliged to accept a judicial interpretation beyond the particular judgment. This view is an old one, sometimes associated with Chief Justice Taney.[95] It is also a modern view, one exemplified by the practice of government nonacquiesence in lower-court decisions invalidating administrative rules.[96] Indeed, Cohen and Spitzer acknowledge pow-

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88. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961), *quoted in* Paulsen, *supra* note 87, at 1351.

89. *See Ex Parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 84 (1993).

90. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); Paulsen, *supra* note 89, at 88.

91. *See* Abraham Lincoln, Sixth Debate with Stephen A. Douglas, at Quincy, Ill. (Oct. 13, 1858), *in* 3 COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953) ("[W]e . . . do oppose that decision as a political rule . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.").

92. 31 U.S. (6 Pet.) 515 (1832). Jackson is reputed to have accompanied his refusal to enforce that decision with the remark: "John Marshall has made his decision; now let him enforce it." DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 104 (4th ed. 1998).

93. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

94. *See id.* at 1372-73, 1377.

95. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 179 (1965) ("Each branch of the Government in Taney's theory was competent within its area to act on its theory of the Constitution.").

96. Nonacquiesence is the practice under which an agency continues to follow its own policy despite a court ruling (generally in another circuit) declaring that policy unlawful. *See, e.g.*, Estreicher & Revesz, *supra* note 66.

erful arguments supporting that practice and appear to accept its legitimacy.

B. Judicial Recognition of Executive Autonomy.

The second face of the traditions concerned with the autonomy of the respective branches is more benign and less controversial. It involves the respect which each branch accords to the right of the other branches to operate free from interference. It includes judicial respect for the interpretative functions of executive officials. Indeed, there is a long and continuous tradition of judicial recognition of a need for the executive branch to carry out its own activities, including interpreting the laws, free from judicial interference. First, the courts have long recognized that they can best respect executive branch autonomy by restricting their own interpretative role to the litigation context. That was Justice Marshall's point in *Marbury*: although the duty to review statutes could not be escaped,[97] it was narrowly limited. Disavowing any intention to intrude into the process of administration, he strictly confined judicial review to the litigation context, and even within the litigation context, to cases where "rights of individuals" were at issue.[98] This careful delineation of the judicial task to avoid interfering with the tasks of administration would be refined in the Taney Court but its broad outlines would be preserved.

Thus, forty-some years after *Marbury*, the Court was again called upon to recognize an allocation of interpretative tasks between the judiciary and executive officials. In *Decatur v. Paulding*,[99] the Court abstained while executive officials performed their "interpretative" duties. In that case, the Court refused to interpret legislation in order to avoid interfering with the administration of the Navy Department.[100] The widow of a naval officer had claimed pensions both under special legislation enacted for her and under general legislation.[101] The Naval Secretary had ruled that she could choose to take under either legislative grant but not under both.[102] When the widow sought to mandamus the Secretary, the Supreme Court refused to interfere with the Secretary's interpretative judgments, thus providing support to the view that it was the task of each branch to interpret legal provisions for itself. The approach of the Court in the *Decatur* case is represented today in a host of administrative law doctrines restricting the occasions when the courts can exercise their interpre-

97. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
98. *Id.* at 170.
99. 39 U.S. (14 Pet.) 497 (1840).
100. *See id.* at 515.
101. *See id.* at 513-14.
102. *See id.* at 514.

tative powers: doctrines precluding judicial review entirely,[103] the exhaustion doctrine,[104] and ripeness.[105] The very existence of these doctrines establishes not only the propriety of executive branch interpretation but also the propriety of an area in which the authority to interpret falls, in the first instance, on the executive branch.

C. Executive Autonomy and the Politics of Interbranch Rivalry

There is some ground for believing that the Court's recognition of executive interpretative autonomy may reflect constraints on judicial expansion that have been generated from time to time from the politics of interbranch rivalry. Thus, the narrow limits within which Justice Marshall's assertion of the power of judicial review was confined may reflect the political realities of the time—so also may the fact that this assertion was combined with a ruling that avoided a confrontation with the executive.[106] Marshall, in short, sought to maximize the Court's power, but within limits of the politically obtainable. Similarly, a generation later, when Chief Justice Taney approved the issuance of a writ of mandamus by the lower courts to the Postmaster General,[107] a cabinet officer, he confined the circumstances for the writ within narrow limits, later confirming these limitations on the writ when he required the courts to abstain from interfering with the interpretative work of the Naval Secretary.[108] Taney then too appears to have taken an expansive view of the judicial power, while judiciously accepting the limits which the political realities of the time imposed.

The array of contemporary judicial doctrines requiring the courts to respect the autonomy of executive officials[109] probably reflects present-day political realities. Thus, for example, the apogee of the exhaustion doctrine, which occurred during the New Deal period after the election of 1936, confirmed the popularity of President Franklin

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103. *See* Heckler v. Chaney, 470 U.S. 821 (1985) (refusing to scrutinize the Food and Drug Administration's refusal to institute enforcement action); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943) (holding that a decision of the National Mediation Board was not reviewable by the courts).

104. *Compare* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (holding that the district court had no power to enjoin an action by the National Labor Relations Board until the plaintiff had first exhausted all administrative remedies), *with* Darby v. Cisneros, 509 U.S. 137 (1993) (holding that, under the APA, the exhaustion doctrine only applies when imposed by statute or agency regulation).

105. *See* Abbott Labs. v. Gardner, 387 U.S. 136 (1967) (establishing the structure of the ripeness doctrine); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967) (same); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967) (same).

106. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). Marshall ruled on behalf of the Court that the Court's appellate jurisdiction prevented it from issuing a writ of mandamus, thus avoiding a confrontation with the executive.

107. *See* Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).

108. *See* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840).

109. *See supra* Part VII.

Roosevelt and strengthened his hand in his struggle with the Court.[110] Inroads into the scope of the doctrine began to appear during the Eisenhower administration,[111] when government activism had ceased and the public wanted stability. On this view, judicial respect for executive autonomy itself has a double face. One face reflects a judicial internalization of the separation-of-powers doctrine: the courts in fact believe that each branch should be free to perform its own work without interference from the other branches. But the other face reflects the political realities limiting the judicial potential for expanding its powers.

X. CONCLUSION

The government carefully selects the cases for which it seeks certiorari. In doing so, it enhances its win-rate. This is a process by which the government impedes the opportunities for the Supreme Court to project its power. This governmental behavior is part of the broad scheme of checks and balances that the Framers contemplated when they divided governmental powers among the three branches. Cohen and Spitzer have provided us with a valuable quantitative description of this process. In so doing, they are staking out a productive path for much future research, research which will provide new conceptual and descriptive insight into the actual operations of the constitutional scheme.

110. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

111. *See* Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954) (ruling on the validity of the wage stabilization program despite the failure of the plaintiffs to exhaust administrative procedures).