# DOES THE SOLICITOR GENERAL ADVANTAGE THWART THE RULE OF LAW IN THE ADMINISTRATIVE STATE?

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## I. INTRODUCTION

With a few exceptions, the Office of the Solicitor General controls all aspects of federal agency litigation before the U.S. Supreme Court, bearing a significant influence on the high court's legal decisions.[1] For example, in recent high-profile administrative law cases involving the federal government's regulation of tobacco cigarettes[2] and ozone,[3] the Solicitor General requested that the Supreme Court grant certiorari to review government losses below and possibly reverse opinions by lower courts. By making such requests, the Solicitor General made it highly probable that the Supreme Court would hear each case.[4] Once the Court granted certiorari, the probability of a government victory in each case was also high.[5]

Linda Cohen and Matthew Spitzer's study, *The Government Litigant Advantage*,[6] sheds important light on how the Solicitor General's litigation behavior may impact the Supreme Court's decision-making agenda and outcomes for regulatory and administrative law cases. By emphasizing how the Solicitor General affects cases that the Supreme Court decides, Cohen and Spitzer's findings confirm

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1. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 311 (1994) ("The Solicitor General wins roughly three fourths of his cases because of his care in selecting cases, his experience in presenting them, and his reputation before the Supreme Court.").

2. *See* FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000).

3. *See* Whitman v. American Trucking Ass'ns, 121 S. Ct. 903, 911-14 (2001), *rev'ing in part* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999).

4. *See* Devins, *supra* note 1, at 318. Devins notes that the Solicitor General seeks certiorari in only 5-15% of the cases when desired by federal agencies. According to Devins, the Court has shown some deference to the Solicitor General's function as a "gatekeeper," granting certiorari to 70% of requests by government litigants.

5. *See id.* at 311.

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

that administrative law's emphasis on lower appellate court decisions is not misplaced. Some say that D.C. Circuit cases carry equal—if not more—precedential weight than Supreme Court decisions in resolving administrative law issues. Cohen and Spitzer use positive political theory to provide a novel explanation for some of this bias towards circuit court decisions in defining the rule of law in administrative law practice and scholarship.

What Cohen and Spitzer's finding of "government litigant advantage" means more generally for the rule of law in the regulatory context requires further elaboration. Their data suggest that the government is significantly more successful as a petitioner before the Supreme Court, even taking into account that petitioners are more likely than not to be successful once certiorari has been granted, and that the Supreme Court favors the government's position more than do circuit courts. Cohen and Spitzer's findings should not come as a surprise given the Solicitor General's participation as a repeat player in Supreme Court litigation. Although their study raises questions regarding the desirability of the government litigant advantage, they do not explain why the government's high degree of success as a litigant before the U.S. Supreme Court thwarts the rule of law in a constitutional democracy. Indeed, the government's success as a litigant may have virtues for our constitutional democracy, which recognizes a unitary or strong executive.

## II. THE PROMINENCE OF THE D.C. CIRCUIT IN ADMINISTRATIVE LAW

Government reformers often decry an "unequal playing field" in the litigation arena as a reason for tilting the rule of law in the regulatory context to be more favorable for private litigants. Cohen and Spitzer caution that, to the extent reformers focus their criticism on a limited sample of Supreme Court cases, reformers may be watching the wrong game. Since, by their sheer number, circuit court decisions sometimes speak with equal, if not more, finality than Supreme Court decisions, passing judgment on the rule of law based solely on the outcome of Supreme Court decisions may overinflate any government advantage in administrative procedure.

In administrative law corners, some say that D.C. Circuit cases carry equal—if not more—precedential weight than Supreme Court decisions. Judge Henry Friendly once observed that the D.C. Circuit "savored its role" as a specialized administrative law court because of its exclusive jurisdiction over decisions on Federal Communications Commission licensing and decisions as to emission standards under the Clean Air Act[7] by the Environmental Protection Agency, as well

7. 42 U.S.C. §§ 7401-7671q (1994).

as an optional venue under many regulatory statutes.[8] Richard Pierce speculates that "the D.C. Circuit is second only to the U.S. Supreme Court with respect to the volume of critical writing its opinions elicit."[9] One recent author concludes that the D.C. Circuit is recognized among practitioners as a "de facto, quasi-specialized administrative law court of last resort."[10] Cohen and Spitzer use rational choice theory to provide a novel explanation for some of this bias towards circuit court decisions, and away from the Supreme Court decisions, in defining the rule of law for the regulatory state.

In explaining this finding, Cohen and Spitzer reaffirm what most practicing administrative lawyers already know; the D.C. Circuit, to a greater extent than the Supreme Court, makes the relevant body of law for administrative practice. The implications of Cohen and Spitzer's findings impact administrative law scholarship as well. If scholars focus exclusively on Supreme Court decisions, they are likely to miss certain trends in administrative law. For example, as Peter Schuck and Donald Elliot have found, lower courts, including the D.C. Circuit, seem to give more credence to the *Chevron* doctrine[11] than the Supreme Court.[12] Cohen and Spitzer's findings give a novel and plausible explanation as to why focus on the D.C. Circuit and other circuit courts is not misguided.

Cohen and Spitzer's study also seems to bolster approaches to scholarship that move away from judicial decisions and towards bureaucracy and more "informal" legal sources. Private party appeals of agency action—whether real or perceived threats to the agency—may have some effect on the agency decisionmaking process prior to appeal. Jerry Mashaw and David Harfst, for instance, chronicle how the threat of litigation affected the National Highway Traffic Safety Administration decisionmaking process.[13] Since informal mecha-

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8. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1310-11 (1975).

9. Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics*, 67 GEO. WASH. L. REV. 797, 797 (1999).

10. CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT at xiii (1999).

11. *See* Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). The Court stated:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

*Id.*

12. *Compare* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 984 (1992) (finding *Chevron* has little discernable influence on the Supreme Court's decisions), *with* Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1061 (finding lower court deference to agency interpretations increased significantly following *Chevron*).

13. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 200-01 (1990).

nisms may affect the administrative process outside of appellate litigation, focusing on appellate litigation as the sole source for the rule of law may exaggerate the overall statist bias of judges' preferences or of legal doctrine.

## III. THE SOLICITOR GENERAL AS TENTH JUSTICE?

Using principal-agent rational choice methods, Cohen and Spitzer model the Solicitor General as an agent of the executive branch. They distinguish between cases where the government has been involved as a party in litigation below and cases where the government files as amicus. In the former set of cases, the federal government may have strong institutional concerns. In the latter set of cases, the Solicitor General is more likely to participate because of the Administration's views on controversial issues, such as the constitutionality of state abortion laws, over which the federal government may have no direct institutional involvement.[14] In both contexts, Cohen and Spitzer find a government litigant advantage, although the former is more substantial than the latter.

Apart from this distinction, however, Cohen and Spitzer do not model all of the complexities of the Solicitor General's role in the practice of government litigation. Some have described the Solicitor General as a "Tenth Justice" of sorts, serving dual loyalties to both the executive and judicial branches.[15] Francis Biddle, who served as Solicitor General during 1940-41 under President Roosevelt, wrote that the Solicitor General "is responsible neither to the man who appointed him [the President] nor to his immediate superior in the hierarchy of administration [the Attorney General]."[16] Instead, Biddle suggested that although the Solicitor General represents the executive branch, "his guide is only the ethic of his own profession framed in the ambience of his experience and judgment."[17]

Two aspects of the Solicitor General's role lend credibility to the account of the Solicitor General as a Tenth Justice. First, the Solicitor General does not pursue every case that executive agencies wish to appeal.[18] The Solicitor General rejects five requests for appeal from

14. For further focus on the distinction between the Solicitor General's roles in these two types of cases, see David A. Strauss, *The Solicitor General and the Interests of the United States*, L. & CONTEMP. PROB., Winter 1998, at 165, 166-67 (1998) (distinguishing between "institutional" and "Administration" based views of the Solicitor General's interests).

15. *E.g.*, LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 3 (1987).

16. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962).

17. *Id.*

18. *See* Devins, *supra* note 1, at 318.

federal agencies for every one he sends to the Supreme Court.[19] In deciding which appeals to pursue, the Solicitor General may consider the executive branch's political agenda, but he probably also weighs the importance and merits of the legal arguments, the limited resources of the government, and the crowded dockets of the courts.[20]

Second, as Cohen and Spitzer's findings seem to confirm, Justices on the Court give extra credibility to the role performed—and the views expressed—by the Solicitor General. Filing between seventy and eighty petitions for certiorari and jurisdictional statements and participating in oral arguments in most of the cases involving the federal government, the Solicitor General amasses considerable appellate experience before the Supreme Court. With this experience, the Solicitor General's office has the opportunity, foreclosed to private litigants, to build reputation and credibility with the Court.[21] Due in part to familiarity, the Solicitor General also has a tradition of relationships with the Justices and their clerks.[22] Thus, although he clearly operates within the executive branch, the Solicitor General may have dual loyalties, suggesting that a principal-agent model limited exclusively to the executive branch is overly simple.

## IV. WHAT DOES A GOVERNMENT LITIGANT ADVANTAGE MEAN FOR THE ADMINISTRATIVE STATE?

Despite this alternative conception of the Solicitor General's role, Cohen and Spitzer model the Solicitor General as an agent of the executive branch. Their approach makes sense. Cohen and Spitzer's model may fail to describe some of the filtering and influence of the Solicitor General, but their model does allow the simplification necessary to empirically model the complex phenomena of government litigation and their effect on outcomes, such as the Court's decision to grant certiorari. The Solicitor General, as a member of the executive branch, is appointed by the President. Although he may hold special

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19. *See* Rex E. Lee, *The Office of Solicitor General: Political Appointee, Advocate, and Officer of the Court*, *in* AN ESSENTIAL SAFEGUARD: ESSAYS ON THE UNITED STATES SUPREME COURT AND ITS JUSTICES 51, 60 (D. Grier Stephenson Jr., ed. 1991) ("[F]or every time the Solicitor General accedes to a request to seek Supreme Court review, he says no about five times.").

20. *See* United States v. Mendoza, 464 U.S. 154, 161 (1984). The Court stated:

> It would be idle to pretend that the conduct of government litigation in all its myriad features, from the decision to file a complaint in the United States District Court to the decision to petition for certiorari to review a judgment of the Court of Appeals, is a wholly mechanical procedure which involves no policy choices whatever.

*Id.*

21. *See* Devins, *supra* note 1, at 311.

22. *See* CAPLAN, *supra* note 15, at 255-67 (discussing the erosion of trust between the Justices' clerks and the Solicitor General's office during Charles Fried's term under President Reagan).

persuasive authority with the Court, the Solicitor General does not vote on cases. The effect Cohen and Spitzer attempt to measure is associated with the Solicitor General's role as a litigator, so a principal-agent understanding allows comparison of the success rates between government and private litigators.[23]

At the same time, Cohen and Spitzer characterize the government's win record as "abnormally successful," raising the issue of whether a government litigant advantage is desirable.[24] Clearly, their study does not purport to supply a normative analysis of whether government litigant advantage thwarts the rule of law in a constitutional democracy. But such a normative explanation is necessary to draw recommendations from their analysis.

On the one hand, to the extent the Solicitor General is able to tilt the playing field against private litigants, the government litigant advantage may raise legitimate concerns. If the government is more able than private litigants to influence the Supreme Court and win cases, such influence may affect the perceived legitimacy of the rule of law and the judicial process that helps to define it, leading to a loss of public confidence in the judiciary. A government litigant advantage could also feed reformist impulses by contributing to public skepticism about the influence of the President and the independence of the judiciary.

On the other hand, Cohen and Spitzer do not completely account for one phenomenon that would make a finding of government litigant advantage more meaningful. The finding of an advantage towards the government should be unsurprising,[25] but their study does not establish whether the advantage exists as a government (executive branch) advantage as opposed to litigator (Solicitor General) advantage. Even if the advantage their data supports can truly be described as a *government* litigant advantage, this alone does not make the case for modifying the advantage by statute or other reforms. By facilitating coordination of the unitary executive, a government litigant advantage may promote, rather than undermine, rule-of-law values.

An advantage in favor of the Solicitor General in appellate litigation is no surprise. The simple fact that the Solicitor General is a repeat player is likely to have some effect on his ability to influence the

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23. At least one other scholar urges that the Solicitor General be understood solely as an "executive officer playing a part in the adversarial process." Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105, 1118 (1988).

24. Cohen & Spitzer, *supra* note 6, at 412.

25. In fact, the current Solicitor General acknowledges these advantages. "[A]s Solicitor General, I must—and I do—proceed with the conviction that the positions we take before the Court, and the way we take them, play a role in the Court's decisionmaking." Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1298 (2000).

Supreme Court. Given his experience, the Solicitor General may be a more astute appellate litigator than other private litigants before the Supreme Court.[26] Despite any asymmetry in experience and skill between the Solicitor General and private litigants, the Solicitor General's repeat-player status makes him less likely to take positions that are not likely to be convincing with the Court.[27] Given the Solicitor General's familiarity and reputation with the Court, the Solicitor General's positions may carry more weight with the Justices than the positions of private litigants.[28] Cohen and Spitzer are aware of this and adjust their findings for a "deference" variable, accounting for the Court's deference to government positions.[29] Beyond this variable, however, Cohen and Spitzer do not appear to account for the repetitive litigation of the Solicitor General in their model. What portion of government litigant advantage is attributable to repetitive litigation, superior litigation strategy (because of the Solicitor General's higher level of experience), and reputation effects; and what portion of the advantage can be attributed to the fact that this is the government? In other words, who has the advantage: the lawyer (the Solicitor General) or the client (the executive branch)?[30] The deference variable used by Cohen and Spitzer explains some of the advantage, but further study comparing the advantages of other repeat litigants would be necessary to more accurately isolate any advantage as being rooted in the government rather than its lawyers.[31]

The benefits to repeat executive branch participation, through a single litigation mechanism, must be acknowledged. Without the filtering device of the Solicitor General, individual agencies would di-

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26. *See supra* notes 21-22 and accompanying text.

27. *Cf.* McConnell, *supra* note 23, at 1107 (noting that the Solicitor General's "credibility in other cases will suffer if a brief is less than fully accurate"); *see also* CAPLAN, *supra* note 15, at 19 (discussing the tradition of high-quality submissions from the Solicitor General's office); REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 34 (1992) (praising the Solicitor General's office for the "accuracy and reliability of its briefs").

28. *See* Eric Schnapper, *Becket at the Bar: The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187, 1224 (1988) ("The Solicitor General's reputation with the Court for advancing only reasonable arguments gives his or her contentions a special credibility.").

29. *See* Cohen & Spitzer, *supra* note 6, at 424.

30. *Cf.* Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995) (focusing on the repeat-player phenomenon, this study nonetheless fails to account for the influence of the Solicitor General).

31. Other data, more directly addressing the repeat-player phenomenon before the Court, seem to accord with Cohen and Spitzer's findings. One recent study finds that the Solicitor General's amicus briefs are more likely to be cited and have more of an influence on the Court's decisions than the briefs of other repeat-player amici such as the ACLU and the AFL-CIO. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 803 (2000) ("Among the three institutional litigants with experienced Supreme Court lawyers, the largest deviation from the benchmark success rates occurred in cases where the Solicitor General appeared as amicus.").

rectly seek certiorari of opinions they wish to have reversed. With this, the loss of presidential coordination, especially over independent agencies, is obvious. Further, the executive branch may lose the ability to implement a unified policy agenda in its litigation strategy, a particular problem when multiple agency interpretations of a legal issue conflict. The Solicitor General serves to coordinate agency appellate concerns, mediating conflicting agency interpretations before they reach the Court.[32] If the Solicitor General did not perform this task, the Court would have to. In this sense, the Solicitor General may work to reduce the public costs associated with government litigation. The Supreme Court itself has acknowledged this benefit of the Solicitor General, the statutory delegate of the Attorney General, as a singular office in which the government's litigation process is consolidated.[33] Although questions remain, especially in the independent agency context,[34] the Court has continued to reaffirm the benefits of consolidating litigation authority within the Solicitor General's office.[35]

In the end, as Cohen and Spitzer acknowledge, the implications to be drawn from their findings depend on normative questions outside the realm of their methods of positive political and rational choice theory. Specifically, Cohen and Spitzer have not presented a normative argument that the Supreme Court should have a monopoly over the articulation of the rule of law. Popular culture and, to a fault, legal education place an awful lot of emphasis on the Supreme Court's role in defining what the law is. But as Justice Jackson famously remarked of the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final."[36] Cohen and Spitzer remind us that in many instances lower courts—not the Supreme Court—are final. Cohen and Spitzer's findings also illustrate how the executive branch may influence the issues on which the Supreme Court speaks with finality. This observation, however, does not undermine the legitimacy of final—or even interim—decisions on statutory, regulatory, and constitutional issues by the executive branch of government.

Since, on most issues of administrative law, the federal government has a strong institutional interest in the outcome of the Su-

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32. *See* SALOKAR, *supra* note 27, at 78 (describing the Solicitor General as a "gatekeeper—mediator, judge, broker, or 'head basher' when conflicts arise between agencies, departments, or divisions").

33. *See* United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888).

34. *See* Devins, *supra* note 1, at 304-12.

35. *See* Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88 (1994) (holding the Federal Election Commision lacked authority to petition for certiorari independent of the Solicitor General even in actions brought under the statute the Federal Election Commision was created to administer).

36. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

preme Court's decisions, it is legitimate for the Court to give the executive branch's arguments some special weight, especially given the filtering role performed by the Solicitor General. The Solicitor General serves an important function in providing executive branch input to the Court's final resolution of issues in which the executive branch has a significant stake. The U.S. Constitution charges the President to "take Care that the Laws be faithfully executed."[37] The "Laws" for which the President assumes enforcement responsibility certainly include statutes and regulations. Often, as in the recent tobacco regulation case,[38] when the Court does weigh in on issues of administrative law, it determines whether the executive authority has been wrongly exercised. Such cases do not necessarily concern constitutional error but rather the legality of exercises of executive discretion under statutes and regulations.[39] By paying special deference to the executive branch, the Court may promote the values of the Administration, in providing expertise and political accountability for the coordinated policies of executive agencies.

The nonacquiescence issue emphasized by Cohen and Spitzer is a potential problem if the executive branch continues to adhere to a position after several circuit court defeats or if it engages in "intracircuit" nonacquiescence, adhering to a position in the same circuit that had previously adjudicated it illegal. The Supreme Court, however, has implicitly approved intracircuit nonacquiescence.[40] Ultimately, courts may define the boundaries regarding what the law may require or allow. But as the judicial position is taking shape, it is entirely legitimate for the executive branch to insist on its own reading of the law. Indeed, if the executive branch does not make efforts to actively promote its own reading of the law, the expertise and political accountability values of the *Chevron* approach to statutory interpretation will be lost.

One of the issues not included in Cohen and Spitzer's analysis goes beyond the executive branch's concerns with the federal government's institutional interests. The Solicitor General often advocates the Administration's view on constitutional issues where the federal government has a direct institutional stake.[41] Less fre-

37. U.S. CONST. art. II, § 3.

38. *See* FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000).

39. *See, e.g.*, Peter L. Strauss, *The President and Choices Not to Enforce*, 63 L. & CONTEMP. PROBS. (Columbia Law School, Public Law Working Paper No. 013, forthcoming 2000) (highlighting how the Supreme Court has become less interested in allowing federal courts to adjudicate these types of questions in recent years, refusing to hear cases on grounds such as unreviewability and lack of standing), *available at* http://papers.ssrn.com/paper.taf?ABSTRACT_ID=204231 (last visited Oct. 14, 2000).

40. *See* United States v. Mendoza, 464 U.S. 154, 161 (1984) (rejecting the application of nonmutual collateral estoppel to government litigants).

41. *See* Strauss, *supra* note 14 and accompanying text.

quently, the Solicitor General may weigh in as an amicus on constitutional issues over which the federal government has no immediate institutional stake. For instance, since there are no federal laws banning abortion, the Solicitor General's participation as an amicus in abortion cases involving state law is little more than an effort by the executive branch to influence the Supreme Court's constitutional positions. Is such participation inappropriate? This too depends on questions that are beyond the scope of positive political theory, such as whether the politics of presidential elections are relevant to constitutional interpretation. The Solicitor General was much maligned during the Reagan years, but history reveals a long tradition of Solicitor General involvement as an amicus in high-profile constitutional matters for political reasons, including *Brown v. Board of Education*,[42] the reapportionment cases,[43] and the abortion cases.[44] There are obvious costs to the Solicitor General in advocating every political viewpoint endorsed by the Administration. Yet, not all constitutional scholars would deem the President's views on constitutional issues irrelevant to the Supreme Court's decisionmaking agenda and its outcomes, even where the issues are purely issues of presidential viewpoint regarding constitutional interpretation.[45] Ar-

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42. 347 U.S. 483, 485 (1954). Note, however, that *Brown* does not include the Solicitor General as the filing party. *See* Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 826-27 (1987) (noting that Philip Elman of the Solicitor General's office was significantly involved in the writing of the United States' amicus brief in *Brown*, but a newly appointed Solicitor General who was not involved in the brief's production did not sign the brief).

43. *See* Baker v. Carr, 369 U.S. 186 (1962); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964). During the reapportionment cases, Solicitor General Archibald Cox urged the Court to reconsider precedents permitting malapportioned legislatures. *See* CAPLAN, *supra* note 15, at 190-94.

44. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of the Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (No. 84-495); *see also* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 33-35 (1991) (discussing Fried's role as Acting Solicitor General in the controversy over whether the Solicitor's Office would file a brief in *Thornburgh* arguing to overrule *Roe v. Wade*).

45. *See, e.g.*, John O. McGinnis, *Principle Versus Politics: The Solicitor General's Role in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 806 (1992) ("[I]n arguing for the President's view of the Constitution, the Solicitor General provides political accountability for the executive branch's position on fundamental issues of social importance."). The basic principle is supported by constitutional theorists endorsing a range of political perspectives. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 273-74 (1991) (arguing that, in moments of "higher lawmaking," presidential influence on the Court can transform constitutional meaning by use of judicial opinions as *de facto* constitutional amendments); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343 (1994) (concluding that the President has coequal interpretive authority with courts on issues of constitutional law and that the President is not literally bound by the legal views of the other branches, not even the pronouncements of the Supreme Court); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 127 (1993) (arguing that the President should treat constitutional questions as a Justice of the U.S. Supreme Court would).

guably, the "Laws" for which the President assumes enforcement authority include the Constitution itself.

## V. CONCLUSION

Treating the government as any other private litigant may allow us to identify and isolate behaviors, but unless understood within a normative understanding of the government's role, such treatment also risks misinterpretation of a study's results. When the government wins before the Supreme Court, we might characterize this as an "advantage" for one litigant, as do Cohen and Spitzer. At the same time, the government's victory must be assessed in the context of the issues it has raised. A government win might well indicate an "advantage," but it might also evidence that the public has emerged victorious over private interests.

The degree of weight the Court should afford to the executive branch on issues of regulatory, statutory, and constitutional law is a complex normative question about which Cohen and Spitzer's method, positive political theory, has almost nothing to say. As a descriptive and explanatory—but not a normative—method, positive political theory sheds little light on whether the executive branch should have more of a voice than private litigants or Congress in the Supreme Court's consideration of the rule of law. The theory of the unitary executive provides some normative justification for government litigant advantage, as Cohen and Spitzer describe in the context of the Solicitor General. By coordinating and bolstering the policies of the executive branch, a government advantage may promote, rather than undermine, the rule-of-law values of a constitutional democracy.