"When the Devil Turns . . . ": The Political Foundations of Independent Judicial Review

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ABSTRACT

An independent judiciary with the power to constrain the executive and legislative branches is commonly thought to be the foundation of government under the rule of law. However, it is not obvious why those with political power would ever tolerate the constraints imposed by an independent court. I offer an explanation for independent judicial review that is based on ongoing political competition between risk-averse parties. An independent judiciary is a mechanism through which these political competitors can enforce mutual restraint. But support for independent judicial review is sustainable only when (1) the political system is sufficiently competitive, (2) judicial doctrine is sufficiently moderate, and (3) parties are both sufficiently risk averse and forward looking. I employ a simple formal model to show how these variables influence the political sustainability of independent judicial review, and I also present the results of a preliminary empirical test that confirms the central hypotheses.

> *More:* What would you do? Cut a great road through the law to get after the Devil?
> *Roper:* I'd cut down every law in England to do that!

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> *More:* Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws being all flat?
>
> [Robert Bolt, *A Man for All Seasons*]

1. INTRODUCTION

An independent judiciary with the authority to rule on the legality of government policy, and thereby to constrain the government's freedom of action, is taken by many to be the foundation of government under the rule of law. However, this seemingly simple proposition poses a difficult puzzle. The fact that we say the government is constrained, or checked, by an independent court implies that the court is preventing the government from doing something that it would otherwise like to do. But the judiciary does not usually have a strong, independent base of support, let alone its own army or police force. Instead, the judiciary is created, funded, and supported by the government, and courts rely on the executive to enforce judicial rulings. Why, then, would the government accept the limits imposed by a truly independent court? Why would people with money and guns ever submit to people armed only with gavels?

Traditionally, the question of how the independence and authority of the court are preserved has been answered by reference to formal institutional rules, usually those found in the constitution. Indeed, much of the scholarship on judicial independence is devoted to cataloguing and analyzing these provisions (see, for example, Shetreet 1985; Cappelletti 1989). However, while the study of these formal mechanisms is no doubt important for effective and efficient institutional design, looking to "parchment barriers" to explain judicial independence begs the question. Any formal provisions created by the government can be reversed—or indirectly subverted—by the same government. Moreover, a great deal of research has found that formal constitutional protections are no guarantee of a truly independent judiciary (see Rosenn 1987; Vyas 1992; Widner 1999). And other research has concluded that some countries actually give their judiciaries more independence than is strictly required by the relevant formal restrictions (Salzberger 1993).

Therefore, a number of political scientists and legal scholars have begun to look beyond formal institutional protections to the political

factors that give governments an incentive to obey the rulings of independent courts. This paper develops one explanation for independent judicial review—the idea that an independent judiciary can facilitate tacit bargains between political competitors to exercise mutual moderation. Using a simple formal model, I show that support for independent judicial review is sustainable only when the political system is sufficiently competitive, the judiciary is sufficiently moderate, and the political competitors themselves are sufficiently risk averse and concerned with future payoffs. Unlike most existing formal treatments, the model presented here both shows how public support for judicial review arises endogenously and incorporates political competitiveness and judicial policy orientation in a single framework. Moreover, I present preliminary empirical results that show—consistent with the predictions of the model—a strong correlation between stable political competition and judicial independence.

The paper is organized as follows. Section 2 discusses and critiques the extant literature. Section 3 outlines the structure of the model—the players, their utility functions, and the possible strategies. Section 4 analyzes the effect of changes in four types of parameters: the level of risk aversion for each political party, how much each party values the future relative to the present, the relative competitive strength of the parties in the system, and the political and doctrinal orientation of the judiciary. The interdependence between the latter two sets of parameters is also discussed. Section 5 considers, briefly and informally, the possible results when some of the parameter values can be endogenously modified by the players. Section 6 presents a cross-sectional statistical test of some of the major hypotheses. This test provides strong empirical support for the proposition that stable political competition is conducive to judicial independence. Finally, Section 7 summarizes the major hypotheses generated by the model and suggests directions for future research.

2. LITERATURE REVIEW

A great deal of sophisticated research examines the interactive games between executives, legislatures, and courts (see, for example, Marks 1988; Spiller and Gely 1992; Gely and Spiller 1992; Ferejohn and Weingast 1992; McNollgast 1995). However, most of this literature assumes, at least implicitly, that courts have some direct control over policy outcomes, albeit subject to the constraints imposed by the possibility of

formal legislative override. In other words, these "separation of powers" models generally assume, rather than explain, the existence of separated powers. In addressing the more fundamental puzzle of why legislatures and executives grant courts significant power over policy in the first place, scholars have suggested at least five classes of explanation.

First, an independent court may enhance policy credibility. William Landes and Richard Posner (1975) advance this view, contending that an independent judiciary makes legislative bargains more durable, and hence the current government can extract a higher "price" from interest groups for new legislation. However, this explanation suffers from several difficulties. First, it presumes that independent courts will attempt to enforce the original intent of the enacting legislature; the Landes and Posner argument cannot explain an independent court that does not faithfully follow this approach (Epstein 1990). Second, judicial independence is not in fact an equilibrium in the Landes and Posner model. Although each legislature's utility is maximized when all legislatures respect judicial independence, each legislature still has an incentive to free ride: any individual legislature does best when it ignores judicial rulings but every subsequent legislature respects them (Boudreaux and Pritchard 1994). Third, the Landes and Posner explanation overpredicts judicial independence; indeed, it is not clear how their model could account for nonindependent courts.

A second class of explanation focuses on the informational benefits courts provide to legislatures. James Rogers (2001) argues that because courts have better information about the effect of particular policies on actual outcomes, purely policy-oriented legislatures would often tolerate independent courts even when there is some probability that the court's preferences diverge from those of the legislature. The informational benefits to legislatures of independent courts, in Rogers's model, are often worth the policy costs. However, this explanation applies only in situations in which legislatures are uncertain about the court's preferences and the legislature is unable to differentiate "desirable" judicial review (that is, judicial review consistent with legislative preferences) from judicial review that results from a court with divergent preferences. While these conditions may sometimes obtain, they often may not, especially in constitutional adjudication or when high-profile political issues are at stake.

A third explanation is that independent judicial review is useful to governments because it allows them to deflect blame for unpopular policies onto the courts (Salzberger 1993). This logic may also lead gov-

ernments to "judicialize" or "constitutionalize" contentious political issues in order to diffuse pressure on the legislative and executive branches (Hirschl 2000). The biggest problem with this "blame deflection" explanation, though, is that it assumes a public sophisticated enough to observe that courts rather than the government made an important policy decision, but not sophisticated enough to realize that the government could manipulate or ignore the courts if it wanted to. Politicians escape blame neither from totally naïve constituents (who look only to outcomes) nor from totally sophisticated constituents, who understand perfectly well the game the government is playing. Assuming a semi-sophisticated public, without further justification, seems ad hoc. This is not to deny that an independent judiciary, secured by some other mechanism, might be useful to politicians who want to avoid blame. But this cannot constitute a primary explanation for why judicial independence exists unless one is willing to make dubious assumptions about the rationality of political constituents.

Fourth, a common explanation for government deference to independent courts is that the public favors judicial independence and would punish politicians who openly defy the court. The problem with this argument is twofold. First, this public opposition to government interference with the judiciary is generally treated as exogenous, and its source is not explained. For example, even in the sophisticated game-theoretic treatment of legislative-judicial interactions developed by Georg Vanberg (2001), judicial supremacy can almost never be sustained in equilibrium unless the legislature suffers an exogenously determined cost (public backlash) for failing to comply with court decisions. Second, the public often strongly supports policy changes favored by the government and opposed by the courts. While there is evidence that courts do shift position in response to sustained public opposition (Gely and Spiller 1992; Rosenberg 1992), it does not seem to be the case that judicial independence is respected only when public and judicial preferences are aligned. In this context, also note the tension between the "blame deflection" hypothesis and the "public backlash" hypothesis. In the former, the court's decisions are politically unpopular, whereas in the latter, attempts to alter the court's decisions are politically unpopular.

A fifth strand of explanation, explored further in this paper, is that independent judicial review allows parties to minimize the risks associated with political competition. Respecting judicial independence may require the party that currently controls the government to sacrifice some policy objectives, but it also means that when that party is out of power,

its opponent faces similar limitations. The argument that sustained political competition encourages compromise has been put forward as an explanation for many of the institutions associated with modern limited government (North and Weingast 1989; Weingast 1997) and has been applied specifically to judicial independence by J. Mark Ramseyer (1994). However, although the intuition of this hypothesis is appealing, it remains theoretically underdeveloped and empirically undersupported.

This paper builds on the work of Ramseyer and others to develop a more comprehensive explanation of judicial independence based on ongoing, uncertain political competition. The model presented here generates more explicit, testable hypotheses regarding the conditions under which judicial independence can be sustained. Also, by explicitly modeling the game suggested by Ramseyer (1994), I highlight the informational and structural assumptions on which this explanation depends. This model also expands on previous approaches by including as parameters both the competitive structure of the political system and the doctrinal/political orientation of the judiciary. Ramseyer considers only political competitiveness, while most formal separation-of-powers games either do not incorporate political competition or treat political changes as exogenous (see, for example, Gely and Spiller 1992; McNollgast 1995). By incorporating both types of parameters in a single model, I show both how judicial doctrinal orientation affects the sustainability of judicial independence and how political competitiveness affects issues related to judicial doctrine. Finally, I present cross-sectional empirical evidence that demonstrates a strong correlation between stable political competition and judicial independence, which is predicted by the political competitiveness theory but not by most other extant explanations of judicial independence.

3. THE BASIC MODEL

3.1. Players, Utility Functions, and Order of Play

Consider a simple polity with a policy branch and a judiciary, as well as two political parties. These parties are indexed by $i \in \{L, R\}$, where L denotes the "left" party and R denotes the "right" party. The parties compete for exclusive control of the policy branch over a series of periods, $t \in \{0, 1, 2, \ldots\}$. In any given period, party i is the government party (which controls the policy branch) with probability p_i and is the opposition party with probability $1 - p_i$.

The government party at time t selects a policy program; the distributional implications of this policy program are denoted by $x_t \in [0, 1]$, where $x_t = 0$ is the distribution most favorable to party L and $x_t = 1$ is the distribution most favorable to party R. The per-period payoffs of each party i in period t are given by

$$V_{L,t} = (1 - x_t)^{\alpha_L} + \varepsilon_{L,t} \tag{1}$$

and

$$V_{R,t} = (x_t)^{\alpha_R} + \varepsilon_{R,t}, \tag{2}$$

where $\alpha_i \in (0, 1)$ determines the parties' risk aversion (that is, the rate of change in their marginal utility of income) and $\varepsilon_{i,t}$ is a random exogenous shock that has a mean of zero and is independent across parties and over time. (The shocks are due to the fact that each party member's utility is attributable only partially to government policy.) Government "policy" consists of hundreds of decisions in diverse issue areas, and the precise content of each decision may depend on how a government agent exercises her discretion. It is therefore difficult for outside observers to assess government policy with absolute precision. Parties discount the future according to a constant discount parameter $\delta_i \in (0, 1)$. Parties maximize their expected utility over the course of the game:

$$EU_i = \sum_{t=1}^{\infty} (\delta_i)^t V_{i,t}. \tag{3}$$

Let $x^*_{i,t}$ be the x_t party i would select if it were in power in period t. This allows us to rewrite the expected utilities for each party, when that party is in government, as

$$\begin{aligned} \mathrm{EU}_L(\mathrm{gov}) = (1 - x^*_{L,t})^{\alpha_L} + \frac{\delta_L}{1 - \delta_L}[p_L(1 - x^*_{L,t})^{\alpha_L} \\ + (1 - p_L)(1 - x^*_{R,t})^{\alpha_L}] \end{aligned} \tag{4}$$

and

$$\mathrm{EU}_R(\mathrm{gov}) = (x^*_{R,t})^{\alpha_R} + \frac{\delta_R}{1 - \delta_R}[p_L(x^*_{L,t})^{\alpha_R} + (1 - p_L)(x_{R,t})^{\alpha_R}]. \tag{5}$$

In addition to the two parties that compete for control of the policy branch, the polity also includes a judiciary. (Although the judiciary will be discussed as if it were a unitary actor, I do not assume a centralized system

of judicial review.) The judiciary has no direct effect on the choice of policy. However, in each period t, the judiciary can make a declaration as to whether the policy program, and hence the value of x_t, selected by the government party is "legal" or "illegal." (One can think of the "ruling" issued by the judiciary as the total outcome of all judicial decisions that affect the legality of any aspect of government policy. If any particular government action is deemed illegal by a court, the judiciary issues an "illegal" signal.) The set of x_t values associated with the policies that the judiciary would declare legal is the interval $[J - d, J + d]$, where $d \in \left[0, \frac{1}{2}\right)$ and $J \in [d, 1 - d]$. Substantively, J can be thought of as a measure of the partisan "slant" of the judiciary, while d measures how deferential the judiciary is to the government currently in power regardless of party. Alternatively, one could think of d as a measure of how much the government is able to manipulate the judiciary's rulings without this manipulation being detected.

If the policy is declared illegal, the government may revise its policy—that is, select a new x_t—before either party receives its utility payoff for that turn. The judiciary then rules on the legality of the revised policy. This process continues until the policy program is declared legal or the government party decides to ignore the judiciary's ruling.

Note three things about the judiciary as modeled here. First, although the judiciary's rulings have political implications, the model does not assume that the judiciary makes its decisions according to partisan political criteria. The model merely makes the weaker assumption that judicial decisions, however reached, have politically relevant implications. Second, the model is consistent both with a "sincere" judiciary and with a "strategic" judiciary. If the judiciary is sincere, then one can think of $[J - d, J + d]$ as reflecting the judiciary's exogenously determined preferences. If the judiciary is strategic, then $[J - d, J + d]$ will arise from the judiciary's strategic calculations. But because what is important in this model is how the political parties will react to any given $[J - d, J + d]$ interval, it is unnecessary to commit the model either to an assumption of judicial sincerity or to an assumption of strategic behavior.[1] Third, the judiciary does not have the power to "veto" a government policy on grounds of illegality. All the judiciary can do is make a declaration of illegality. The government can choose to modify its policy in order to get the judiciary's approval, but it need not.

1. In Sec. 5, though, I consider how the judiciary might behave if J and d are endogenously selected by the court.

3.2. Information and Communication

The government party i in period t selects x_t and observes its own payoff $V_{i,t}$ but does not observe $V_{-i,t}$, the payoff to the opposition party. The opposition party observes $V_{-i,t}$ but does not observe x_t or $V_{i,t}$.[2] The opposition party will, of course, be able to make an inference about x_t on the basis of its observation of $V_{-i,t}$. However, there will always be some error associated with this estimate. Moreover, the government party does not know the value of the opposition's estimate of x_t (though, of course, this value in expectation in x_t).

The declaration of the judiciary is a public signal observed by both parties.[3] The judiciary also does not observe x_t perfectly. However, in expectation, the judiciary will declare policies associated with x_t values outside of the $[J - d, J + d]$ interval illegal. The political parties thus expect that the judiciary, when independently applying its principles of adjudication (whether legalist, policy motivated, or strategic), will declare illegal anything outside that interval and allow anything inside it. Both political parties know J and d and will conclude, if the court issues an "illegal" ruling, that the government selected a policy with an associated x_t outside $[J - d, J + d]$.

3.3. Possible Equilibrium Strategies

I restrict attention to the three most reasonable equilibrium strategy profiles.[4] The first is the all-or-nothing equilibrium in which both parties always choose their most-preferred x_t—that is, $x^*_{\mathrm{L},t} = 0$, $x^*_{\mathrm{R},t} = 1$ for all t. In this equilibrium, the rulings of the judiciary are always ignored;

2. The assumption that the opposition does not observe x_t at all is, of course, unrealistic, but this assumption is benign. The results would be the same if the opposition party observed x_t with some error and $V_{i,t}$ with some error and then used both pieces of information to form an estimate of x_t. The assumption that x_t is not observable is made to simplify the exposition.

3. If the government party manipulates the judiciary in order to extract a "legal" ruling for any x_t value outside the $[J - d, J + d]$ interval, this manipulation will also be observed and will be treated as equivalent to an "illegal" ruling.

4. A common problem in the analysis of an infinitely repeated game is the existence of an infinite number of equilibrium strategies. See Fudenberg and Tirole (1991). However, strategy profiles other than the three discussed in this section both would be more complex for the parties to implement and would yield lower payoffs than at least one of the strategies discussed in this section. Thus, restricting attention to these strategies, while not theoretically required, is reasonable given the purposes of the model.

independent judicial review effectively does not exist. Denote this equilibrium NoJI. The expected utilities of each party in this equilibrium are

$$\mathrm{EU}_{\mathrm{L}}(\mathrm{gov}|\mathrm{NoJI}) = 1 + \frac{\delta_{\mathrm{L}}}{1-\delta_{\mathrm{L}}} p_{\mathrm{L}} = \frac{1-\delta_{\mathrm{L}}(1-p_{\mathrm{L}})}{1-\delta_{\mathrm{L}}} \tag{6}$$

and

$$\mathrm{EU}_{\mathrm{R}}(\mathrm{gov}|\mathrm{NoJI}) = 1 + \frac{\delta_{\mathrm{R}}}{1-\delta_{\mathrm{R}}}(1-p_{\mathrm{L}}) = \frac{1-\delta_{\mathrm{R}} p_{\mathrm{L}}}{1-\delta_{\mathrm{R}}}. \tag{7}$$

A second possible equilibrium strategy profile entails both parties using punishment strategies, conditioned on their private information, in order to enforce some more cooperative equilibrium where $x^{*}_{\mathrm{L},t} > 0$ and $x^{*}_{\mathrm{R},t} < 1$ when not in the punishment phase of the strategy.[5] However, this sort of equilibrium is ruled out here because, by assumption, it is not possible or cost-effective for parties to condition on their privately observed per-period payoffs, $V_{i,t}$. If the players' private signals are sufficiently noisy—that is, if $\varepsilon_{i,t}$ is sufficiently large—simple conditional punishment strategies break down (see Compte 2002; Mailath and Morris 2002). When a player observes a $V_{i,t}$ value that tells her that she should defect, she does not know if the other player actually defected, and, more important, she does not know if the other player expects her to initiate a punishment phase. If she initiates a punishment phase, she risks provoking a counterpunishment, since the other player may think that she is unilaterally defecting. Substantively, this means that political parties cannot enforce mutual restraint on their own because each party can never be sure that its opponent is cooperating and that its opponent knows that it is cooperating.

It is important to stress that the reason that this strategy breaks down is not because it is impossible for the opposition party to have any idea what the government party is doing. As explained above, parties will be able to make reasonable inferences about the behavior of their opponent. The problem, though, is the absence of a public signal. When party A observes a deviation by party B, party A does not know with certainty whether B really cheated. Similarly, when party A has not cheated, but party B declares that it observed a deviation by party A, party A does not know whether party B's declaration is truthful or not. In no case

5. In general, when players have sufficient information about other players' actions, conditional punishment strategies can be used to support any possible set of payoffs in equilibrium as long as δ is sufficiently close to one. See Fudenberg and Tirole (1991).

can either party be confident that its opponent observed exactly the same signal that it observed, and, moreover, each party has an incentive to be dishonest; this is why cooperation breaks down. This sort of problem is quite plausible in the case of political rivals who try to enforce an agreement to pursue moderate policies without a third-party referee. Imagine a progressive party and conservative party that want to agree to maintain a moderate social welfare policy. When the conservatives are in power, the progressives will have a fairly good idea what the conservatives are doing in general, but the two parties might still disagree about whether the government's policy is too conservative. If the progressives say that they observe an excessively conservative policy, the conservatives do not know whether this is really what the progressives observe or whether the progressives want an excuse to implement a "punishment phase" of extreme progressive policies when they take power.

This problem can be resolved if the parties can coordinate on a third-party public signal that is correlated with the true value of x_t. Thus, the third equilibrium strategy profile to consider is for both parties to use punishment strategies conditioned on the judiciary's public signal. That is, each party, when in government, will cooperate by selecting only x_t values ruled legal by the judiciary, so long as the other party does the same. If one party defects, selecting a policy that the judiciary rules illegal, the other party initiates a punishment phase in which it always picks its ideal point for a duration sufficient to offset the other party's gain from its initial defection.[6] It is clear that, in this equilibrium, parties would always select the value in the $[J - d, J + d]$ interval that is closest to their most-preferred x_t, meaning $x^*_{\mathrm{L},t} = J - d$, $x^*_{\mathrm{R},t} = J + d$. Denote this equilibrium, in which the policy branch accepts the legal constraints imposed by an independent judiciary, JI. The expected utilities of each party, when in government, from playing this equilibrium are

$$\mathrm{EU}_{\mathrm{L}}(\mathrm{gov}|\mathrm{JI}) = \frac{(1 - \delta_{\mathrm{L}} + \delta_{\mathrm{L}} p_{\mathrm{L}})(1 - J + d)^{\alpha_{\mathrm{L}}} + \delta_{\mathrm{L}}(1 - p_{\mathrm{L}})(1 - J - d)^{\alpha_{\mathrm{L}}}}{1 - \delta_{\mathrm{L}}} \quad (8)$$

6. Given the assumptions of this model, the properties of this strategy profile would be identical if players used a "grim trigger," defecting forever as soon as their opponent defected once. A more limited punishment phase, though, is more robust, allowing for occasional mistakes. For a more detailed elaboration of this sort of strategy profile in another substantive context, see Laitin and Fearon (1996).

and

$$\mathrm{EU}_{\mathrm{R}}(\mathrm{gov}|\mathrm{JI}) = \frac{(1-\delta_{\mathrm{R}}p_{\mathrm{L}})(J+d)^{\alpha_{\mathrm{R}}} + \delta_{\mathrm{R}}p_{\mathrm{L}}(J-d)^{\alpha_{\mathrm{R}}}}{1-\delta_{\mathrm{R}}}. \tag{9}$$

3.4. Conditions for Judicial Independence

In order for JI to be a sustainable equilibrium, it must be the case that $\mathrm{EU}_{\mathrm{L}}(\mathrm{gov}|\mathrm{JI}) > \mathrm{EU}_{\mathrm{L}}(\mathrm{gov}|\mathrm{NoJI})$ and $\mathrm{EU}_{\mathrm{R}}(\mathrm{gov}|\mathrm{JI}) > \mathrm{EU}_{\mathrm{R}}(\mathrm{gov}|\mathrm{NoJI})$. If it is the case that at least one party, when in government, prefers NoJI, then judicial independence is not sustainable. However, we assume that if JI is sustainable, it will be achieved. The conditions under which JI is always preferred to NoJI by each of the parties can be written

$$\begin{aligned} &\frac{(1-\delta_{\mathrm{L}}+\delta_{\mathrm{L}}p_{\mathrm{L}})(1-J+d)^{\alpha_{\mathrm{L}}} + \delta_{\mathrm{L}}(1-p_{\mathrm{L}})(1-J-d)^{\alpha_{\mathrm{L}}}}{1-\delta_{\mathrm{L}}} \\ &\qquad > \frac{1-\delta_{\mathrm{L}}(1-p_{\mathrm{L}})}{1-\delta_{\mathrm{L}}} \\ &\Rightarrow (1-\delta_{\mathrm{L}}+\delta_{\mathrm{L}}p_{\mathrm{L}})(1-J+d)^{\alpha_{\mathrm{L}}} + \delta_{\mathrm{L}}(1-p_{\mathrm{L}})[1+(1-J-d)^{\alpha_{\mathrm{L}}}] > 1 \end{aligned} \tag{10}$$

and

$$\begin{aligned} &\frac{(1-\delta_{\mathrm{R}}p_{\mathrm{L}})(J+d)^{\alpha_{\mathrm{R}}} + \delta_{\mathrm{R}}p_{\mathrm{L}}(J-d)^{\alpha_{\mathrm{R}}}}{1-\delta_{\mathrm{R}}} > \frac{1-\delta_{\mathrm{R}}p_{\mathrm{L}}}{1-\delta_{\mathrm{R}}} \\ &\Rightarrow (1-\delta_{\mathrm{R}}p_{\mathrm{L}})(J+d)^{\alpha_{\mathrm{R}}} + \delta_{\mathrm{R}}p_{\mathrm{L}}[1+(J-d)^{\alpha_{\mathrm{R}}}] > 1. \end{aligned} \tag{11}$$

For ease of reference, denote the left-hand sides of the final inequalities in equations (10) and (11) Y_{L} and Y_{R}, respectively. That is,

$$Y_{\mathrm{L}} = (1-\delta_{\mathrm{L}}+\delta_{\mathrm{L}}p_{\mathrm{L}})(1-J+d)^{\alpha_{\mathrm{L}}} + \delta_{\mathrm{L}}(1-p_{\mathrm{L}})[1+(1-J-d)^{\alpha_{\mathrm{L}}}] \tag{12}$$

and

$$Y_{\mathrm{R}} = (1-\delta_{\mathrm{R}}p_{\mathrm{L}})(J+d)^{\alpha_{\mathrm{R}}} + \delta_{\mathrm{R}}p_{\mathrm{L}}[1+(J-d)^{\alpha_{\mathrm{R}}}]. \tag{13}$$

Here Y_i measures the attractiveness of judicial independence to party i, and $Y_i > 1$ implies $\mathrm{EU}_i(\mathrm{gov}|JI) > \mathrm{EU}_i(\mathrm{gov}|\mathrm{NoJI})$.

4. COMPARATIVE STATICS ANALYSIS

We are interested in how the various parameters affect the attractiveness of judicial independence to the parties. Specifically, we want to know the effect of parties' levels of risk aversion (α_{L} and α_{R}), how much they

value future payoffs relative to present payoffs (δ_L and δ_R), the competitiveness of the political system (p_L), the political slant of the judiciary (J), and the level of judicial deference (d). For each of these variables, the analysis can be performed simply by taking the derivative of each Y_i with respect to the variable of interest.

4.1. Risk Aversion

Recall that α_i measures party i's risk aversion; lower values of α_i imply higher levels of risk aversion. To examine the effect of this parameter on the attractiveness of judicial independence we take the derivatives:

$$\frac{\partial Y_L}{\partial \alpha_L} = [1 - \delta_L + \delta_L p_L](1 - J + d)^{\alpha_L} \ln(1 - J + d) + \delta_L(1 - p_L)(1 - J - d)^{\alpha_L} \ln(1 - J - d) < 0 \tag{14}$$

and

$$\frac{\partial Y_R}{\partial \alpha_R} = (1 - \delta_R p_L)(J + d)^{\alpha_R} \ln(J + d) + \delta_R p_L(J - d)^{\alpha_R} \ln(J - d) < 0. \tag{15}$$

Because the derivatives are negative, judicial independence becomes more attractive as parties become more risk averse. This makes intuitive sense, since the lower variability in policy outcomes associated with the JI equilibrium is more valuable to highly risk-averse parties.

4.2. The Shadow of the Future

The derivatives of Y_L and Y_R with respect to discount parameters δ_L and δ_R, respectively, are

$$\frac{\partial Y_L}{\partial \delta_L} = (1 - p_L)[1 + (1 - J - d)^{\alpha_L} - (1 - J + d)^{\alpha_L}] > 0 \tag{16}$$

and

$$\frac{\partial Y_R}{\partial \delta_R} = p_L[1 + (J - d)^{\alpha_R} - (J + d)^{\alpha_R}] > 0. \tag{17}$$

This implies that as a party places relatively more weight on future payoffs, judicial independence becomes more attractive. Again, the logic underlying this result is intuitive. As in most repeated games, a long shadow of the future makes cooperation easier. If the δ value of the

government party is too low, that party will not be willing to give up the extra utility it could get immediately by subverting judicial independence in exchange for the longer-term benefits of cooperation.

Substantively, a low value of δ could correspond to myopia on the part of the party or its leaders, or it may simply mean that party members care less about the future than the present. Parties are especially likely to have lower δ values if the political environment is highly unstable, as players are less sure that they will be around to compete in future periods.

In addition, note that even if the party rank and file are concerned with the long term, it may still be the case that the government leaders prefer to achieve favorable x_t values immediately, either because they do not expect to be leaders in future periods or because they can somehow use short-term gains to undermine rivals for leadership. In this case, the party may behave as if its δ is relatively lower if the rank and file cannot adequately discipline the leaders. These internal party dynamics are not modeled here, but they should be kept in mind when considering the substantive interpretation of the δ parameter.

4.3. Political Competitiveness

One of the most important questions to consider is how the attractiveness of judicial independence relates to the competitiveness of the political system. Note that here, in contrast to α_i and δ_i, the same parameter affects both Y_L and Y_R. The derivatives of both are taken with respect to p_L, the probability that party L is the government party in any given turn (recalling that $p_R = 1 - p_L$):

$$\frac{\partial Y_L}{\partial p_L} = \delta_L[(1 - J + d)^{\alpha_L} - (1 - J - d)^{\alpha_L} - 1] < 0 \tag{18}$$

and

$$\frac{\partial Y_R}{\partial p_L} = \delta_R[1 + (J - d)^{\alpha_R} - (J + d)^{\alpha_R}] > 0. \tag{19}$$

Thus, judicial independence becomes less attractive to parties as they become more successful in political competition. But, of course, political competitiveness is zero sum. If, for example, party L becomes more competitive, judicial independence becomes less attractive to party L and more attractive to party R. This suggests an important conclusion: in order for judicial independence to be sustained, political competition needs to be at some intermediate level. If the system becomes too favorable to either party, that party will abandon its support for the JI

equilibrium. We can conclude that, in general, systems that exhibit a high degree of political competition and alternation in power are more likely to exhibit judicial independence than those in which one party has a virtual lock on government authority. This argument is subject to important qualifications, discussed below in Section 4.5.

4.4. Judicial Policy Slant

The parameter J determines the location of the range of legal values for x_t. High values of J mean that the legal interval is closer to the preferences of party R, while lower J values mean that this interval is closer to party L's preferences. Like the political competitiveness parameter p_L, J affects Y_L and Y_R simultaneously. The derivatives are

$$\begin{aligned}\frac{\partial Y_L}{\partial J} = &-\alpha_L[(1-\delta_L+\delta_L p_L)(1-J+d)^{\alpha_L-1} \\ &+ \delta_L(1-p_L)(1-J-d)^{\alpha_L-1}] < 0\end{aligned} \tag{20}$$

and

$$\begin{aligned}\frac{\partial Y_R}{\partial J} = &\alpha_R[(1-\delta_R p_L)(J+d)^{\alpha_R-1} \\ &+ \delta_R p_L(J-d)^{\alpha_R-1}] > 0.\end{aligned} \tag{21}$$

These results imply that the more the judiciary slants toward a party's preferred position, the more attractive judicial independence is to that party. But, as was the case with political competitiveness, there is a direct, zero-sum trade-off between how much the judiciary favors party L and how much it favors party R. Again, we can conclude substantively that the judiciary cannot lean too far in either direction or else at least one party will prefer the NoJI equilibrium. For judicial independence to be sustainable, J cannot be too high or too low, but must be in some intermediate region. The location of this region depends in part on p_L.

4.5. Relationship between Political Competitiveness and Judicial Slant

We have already shown that parties become more inclined to favor judicial independence when they are politically weak and when they are favored by the judiciary. Because these variables are zero sum from the perspective of the parties, it is impossible to change J or p_i without making judicial independence more attractive to one party and less at-

tractive to the other. Furthermore, these two variables are related in an important way. We can see the nature of the relationship by taking the cross-partial derivatives:

$$\frac{\partial^2 Y_L}{\partial J \partial p_L} = \alpha_L \delta_L [(1 - J - d)^{\alpha_L - 1} - (1 - J + d)^{\alpha_L - 1}] > 0 \tag{22}$$

and

$$\frac{\partial^2 Y_R}{\partial J \partial p_L} = \alpha_R \delta_R [(J - d)^{\alpha_R - 1} - (J + d)^{\alpha_R - 1}] > 0. \tag{23}$$

These results show how the effect of the parameters p_L and J are linked. As p_L increases (that is, as the political system becomes more favorable to party L), a marginal increase in J has an increasingly positive impact on the attractiveness of judicial independence to party R and a decreasingly negative impact on the attractiveness of judicial independence to party L. Similarly, as J increases, a marginal increase in p_L has an increasingly positive impact on the attractiveness of judicial independence to party R and a decreasingly negative impact on the attractiveness of judicial independence to party L. Substantively, this means that the range of possible J values for which judicial independence is sustainable will be skewed toward the point preferred by whichever political party is more successful in political competition. The greater the dominance of the more successful party, the larger the skew, and the smaller the range of possible values for J.

This result follows from the cross-partial derivatives above, but it is easier to see with a numerical example. Assume $d = 0$, $\delta_L = \delta_R = 0.75$, $\alpha_L = \alpha_R = 0.5$, and $p_L = 0.5$. By substituting these values into equations (10) and (11) and solving for J, we find that both parties will support judicial independence so long as $J \in [0.39063, 0.60937]$. But, if $p_L = 0.8$ (with all the other parameter values the same as before), judicial independence is sustainable only if $J \in [0.16, 0.2775]$. Because party L in this second case is more successful in gaining control of the policy branch, the judiciary's political slant must be relatively more favorable to party L if judicial independence is to be maintained. In other words, if the judiciary exhibits a strong political slant (which for some reason it does not modify endogenously to protect its own authority), then judicial independence is more likely when the party toward which the judiciary leans also tends to win most of the contests for power.

So it may be that some judicial "bias" in favor of a more powerful political party is not just a by-product of the same social or cultural

factors that made that party powerful in the first place, or simply evidence that the judiciary is manipulated or stacked with political appointees. Rather, the model here suggests that such "bias" may be necessary in order for the judiciary to preserve its authority. Indeed, as p_L approaches one, the only values of J that can satisfy equations (10) and (11) are extremely close to zero, and vice versa. So, when one party or ruling clique dominates the political system, we expect either a judiciary with preferences almost identical to the ruling party or no real independent judiciary at all.

However, note that this is a limiting case. If party L is stronger than party R, but not overwhelmingly dominant, then the range of sustainable J values will still be greater than zero, as can be seen in the above example. Even when one party is strong enough that an independent judiciary will have to slant at least somewhat in its direction, the judiciary will still be more moderate than that party as long as the stronger party is not guaranteed control of the policy branch.

4.6. Judicial Deference

The final parameter to consider is d, which measures the size of the interval of "legal" policies around J. When d is large, there is a greater range of x_t values that the court would deem acceptable; when d is zero, only J is permitted.[7] To determine the effect of changes in d, we take the derivatives of Y_L and Y_R with respect to d:

$$\frac{\partial Y_L}{\partial d} = \alpha_L\Big\{(1 - J + d)^{\alpha_L - 1} - \delta_L(1 - p_L) \times [(1 - J + d)^{\alpha_L - 1} + (1 - J - d)^{\alpha_L - 1}]\Big\} \tag{24}$$

and

$$\frac{\partial Y_R}{\partial d} = \alpha_R\Big\{(J + d)^{\alpha_R - 1} - \delta_R p_L[(J + d)^{\alpha_R - 1} + (J - d)^{\alpha_R - 1}]\Big\}. \tag{25}$$

In contrast to the other parameters, these derivatives are not constrained to be positive or negative. Thus, whether marginal increases in

7. Recall, though, that $d \in \left[0, \frac{1}{2}\right)$ and $J \in (d, 1 - d)$. Thus, d must be in the interval $[0, \min\{J, 1 - J\}]$. We might think of increasing d as the adoption by the court of a more "expansive" or "deferential" doctrine. But if d is already equal to $\min\{J, 1 - J\}$, then an increase in d must be interpreted as a simultaneous increase in deference and shift in political slant. This is important to keep in mind, though in the equations below we consider only changes to d with J held constant.

d increase or decrease the attractiveness of JI to parties L and R depends on the value of the other parameters. Specifically,

$$\frac{\partial Y_{\mathrm{L}}}{\partial d} > 0 \Rightarrow \frac{1}{\delta_{\mathrm{L}}(1-p_{\mathrm{L}})} - \left(\frac{1-J+d}{1-J-d}\right)^{1-\alpha_{\mathrm{L}}} > 1 \tag{26}$$

and

$$\frac{\partial Y_{\mathrm{R}}}{\partial d} > 0 \Rightarrow \frac{1}{\delta_{\mathrm{R}} p_{\mathrm{L}}} - \left(\frac{J+d}{J-d}\right)^{1-\alpha_{\mathrm{R}}} > 1. \tag{27}$$

From these equations, we can see that an increasingly deferential judiciary is more likely to enhance the attractiveness of judicial independence to a party when that party has a low discount parameter, when it does well in political competition, and when the judiciary tends to slant away from its preferred x_t. Note also that d itself is one of the determinants of the sign on $\partial Y_i/\partial d$. As d increases, it becomes more likely that $\partial Y_i/\partial d$ is less than zero, meaning that further increases in d make judicial independence less attractive to party i. Conversely, as d decreases, $\partial Y_i/\partial d$ becomes more likely to be greater than zero, implying that further decreases in d make judicial independence less attractive to i. This effect is the same for both parties, although the point where $\partial Y_i/\partial d$ crosses zero will depend on the specific parameter values and will usually be different for party L and party R. Therefore, there may be d values that both parties agree are too small (that is, both parties would find judicial independence more attractive if d were higher) as well as d values that both parties agree are too large (that is, both parties would find judicial independence more attractive if d were smaller).

Substantively, this result suggests a practical political reason for the court to avoid both too-expansive and too-restrictive judicial doctrines, if it wants to retain its independent authority. In the intermediate range of d values, there is again a direct trade-off between the attractiveness of judicial independence to each of the parties. The parties that prefer a more deferential judiciary are those that are politically strong, relatively unfavored by the judiciary's political slant, and less concerned about future payoffs.

5. ENDOGENOUS MANIPULATION OF JUDICIAL DOCTRINE

So far, we have treated the parameters of the model as exogenous. We now consider, informally, how the two parties and the judiciary might

try to manipulate parameters J and d if they were able to do so.

The preferences of the two parties have already been defined. When there are at least some parameter values for which JI is preferred by both parties, each party would like to achieve judicial independence, but on terms as favorable as possible to itself. As for the preferences of the judiciary, although the formal model was deliberately agnostic, here we might assume that the judiciary is primarily concerned with maintaining its authority (that is, with making sure that JI is sustained in equilibrium) and, secondarily, that the judiciary has some preference over political outcomes—although again, this may be "accidental" rather than the product of politically motivated "activism."

What are some of the possible implications of these presumptions? First, if the judiciary can adjust J and d, then we can assume that if at least one possible JI equilibrium exists, it will be achieved. If the judiciary, for example, slants too far "right," it can shift leftward until JI is feasible in equilibrium. Once the judiciary's primary goal—securing its independent authority—is achieved, its choice of political orientation will be determined by its policy preferences. Note that since parties are aware of this, each political party has an incentive to stack the judiciary such that the "natural" judicial preference is very close to the party's own ideal point. Then the judiciary will make the minimum necessary adjustment to make judicial independence palatable to both parties. The manipulating party will thus achieve judicial independence on terms most favorable to itself.

However, if the judiciary is too far left or right and for some reason cannot or will not adjust, we would expect both parties—even the one favored by the judiciary's political slant—to support changes that make the judiciary more moderate. For example, imagine that the party R is dominant politically and the judiciary leans far to the right. Then an exogenous shock causes parties L and R to be more evenly matched, such that the current judicial slant makes judicial independence unsustainable. If the judiciary does not adjust on its own, party R will support changes that move the judiciary leftward, just enough so that mutual support for judicial independence is achieved.

In addition, recall here the results for the parameter d. Parties not favored by the court and parties that do well in political competition are more likely to favor an expansion of judicial deference, while those parties that are favored by the court and those that do poorly in political competition are more likely to support a restrictive judicial doctrine.

These conjectures lead to the following tentative predictions. First,

we expect that when judicial independence is at all feasible given the exogenous parameters p_i, α_i, and δ_i, it will be achieved. Second, we expect the judiciary to modify its doctrine in order to preserve its independence. Third, we expect parties, when given the opportunity, to try to stack the court with politically favorable judges. However, fourth, we expect those judges to moderate their position once in office. Fifth, we expect the strongest support for an expansive judicial doctrine from politically strong parties and/or judicially unfavored parties. On the other hand, we expect strong support for a restrictive doctrine from politically weak and/or judicially favored parties.

Two important caveats are in order. First, the fact that players would like to adjust parameters in a certain way does not imply that they will always be able to; these adjustments may be costly or impossible. Second, the fact that parties might try to manipulate J and d while in office may alter all players' expected utility calculations and, hence, may have an effect on equilibrium results. Fully incorporating these factors into the model is beyond the scope of this paper.

6. EMPIRICAL ANALYSIS

A comprehensive empirical assessment of all the model's predictions is not feasible at this stage, owing to the lack of valid and reliable data on several of the relevant variables. Nonetheless, some preliminary empirical evaluation is possible. Using 1995 data for 153 countries, I test the hypotheses that political competition and political stability make judicial independence more likely, controlling for income, education, and cultural background. The results of the statistical tests strongly support these hypotheses.

6.1. Dependent-Variable Data

There is no direct way to measure judicial independence objectively. But the U.S. State Department's *Human Rights Country Reports* provide a standardized, relatively comprehensive subjective assessment of the state of judicial independence in over 180 countries. I use the 1995 *Human Rights Country Reports* (U.S. Department of State 1996) to generate a three-point ordinal Judicial Independence Index. Countries are coded 2 if, according to the report, judicial independence is respected in practice by the government, and they are coded 0 if the report states the judiciary is subservient to the executive or where executive interference with the judiciary is described as "extensive" or "frequent." Ambiguous cases—where,

for example, there is "occasional" executive interference—are coded 1. The United States was coded 2, although it is not included in the *Human Rights Country Reports*. Other countries for which the *Human Rights Country Reports* did not contain adequate information were dropped from the data set. Of the remaining 183 countries, 65 scored 0, 44 scored 1, and 74 scored 2 on the Judicial Independence Index.

6.2. Independent-Variable Data: Political Competition

Testing the hypothesis that greater political competitiveness increases the likelihood that the judiciary will be independent requires a proxy for parties' subjective assessments of their probability of controlling the government. I use the World Bank's Database of Political Institutions (Beck et al. 2000), to construct a variable, Political Competition, that measures the proportion of the lower house of the legislature controlled by the 1995 executive party and its fellow government or opposition parties. Specifically, I take the party that controls the executive (and/or the largest government party in the lower house of the legislature) in 1995 and look at each consecutive year up to 1995 that that party has been a major political competitor—that is, each year it has been a government party or one of the three largest opposition parties. (I go back as far as the data permit, usually 1975 or 1976.) For each of these years, I calculate the proportion of lower-house seats controlled by the government if the party in question was a government party that year, or the proportion controlled by the opposition if the party was an opposition party that year. (This proportion is equal to one if the executive rules without a legislature.) I then take the average of these proportions, which I label AvgProp. The Political Competition variable is equal to $(1 - \text{AvgProp})$ if $\text{AvgProp} \geq .5$ and is equal to AvgProp if $\text{AvgProp} < .5$. Thus, Political Competition varies between 0 and .5, where a value of .5 indicates a highly competitive system (the government party in 1995 has been in the government half the time and in the opposition half the time) and a value of 0 indicates a totally noncompetitive system, where the 1995 government party has been in power for as long as it has been a relevant political player.

The data were adequate to construct the Political Competition variable for 165 of the 183 countries in the original sample. (The others, which were dropped from the sample, tended to be extremely small countries, such as Kiribati and Liechtenstein.) The mean sample value of Political Competition is .258, with a standard deviation of .196. However, most of the countries clustered at either end of the range. Of

the 165 countries, 55 had Political Competition values under .1, while 61 had values above .4; only 49 countries were located between .1 and .4.

6.3. Independent-Variable Data: Democratic Stability

To proxy for parties' discount parameters, I use the number of years of continuous democratic political competition, as of 1995. The theory behind using this measure is that a history of stable political competition is a good predictor of a future of stable political competition. Hence, political parties in a country with a history of continuous institutionalized democracy are more likely to have higher δ values, and therefore the model predicts that judicial independence will be more likely in such a country. I construct the variable Democratic Stability using the Polity IV data set (Marshall and Jaggers 2000). First, I take the total number of years, up to and including 1995, that each country in the sample scored 7 or higher on Polity IV's 0–10 Institutionalized Democracy scale and denote this total YrsDemoc. (The Polity IV data set contains data back to 1800.) The variable Democratic Stability is equal to $\ln(1 + \text{YrsDemoc})$. Data on this variable were available for 157 of the original 183 countries. (Again, the dropped countries tended to be very small.) The values of Democratic Stability ranged from 0 (89 countries) to 5.283 (United States), with mean 1.241 and standard deviation 1.630. The data were heavily skewed toward the lower end of the scale; 104 countries in the sample had fewer than 5 years of continuous democracy.

Because this variable is intended to pick up the effects of continuous, stable political competition, rather than the presence or absence of democracy in 1995, I also include a dummy control variable, Democracy, which takes a value of one if the country scored 7 or higher on the Polity IV Institutionalized Democracy scale in 1995 and a value of zero otherwise. Sixty-eight countries in the sample got a Democracy score of one, while 89 scored zero.

6.4. Control Variables

To correct for potential omitted variable bias, I include as controls the natural log of the 1995 per capita gross domestic product corrected for purchasing power parity (ppp) and the natural log of the adult literacy rate, both available from the 1998 *Human Development Report* (United Nations Development Programme 1998), as well as a dummy that takes a value of one if the country in question is "Western" (a category that includes the countries of Western Europe plus the United States, Canada, Australia, and New Zealand) and a value of zero otherwise. If associ-

ations between judicial independence and political competition or political stability are merely the result of having a rich, educated population or a population that inherited specific political forms developed in Western Europe, then controlling for these variables ought to eliminate the statistical significance of the Political Competition and Democratic Stability variables.

The *Human Development Report* included data for 165 of the 183 countries in the original sample. The ln(GDP per Capita) variable had a minimum value of 5.872 (Zaire), a maximum of 10.434 (Luxembourg), a mean of 8.295, and a standard deviation of 1.069. The ln(Adult Literacy Rate) variable ranged from 2.610 (Niger) to 4.595 (30 countries), with mean 4.305 and standard deviation .360. Twenty-eight countries in the original sample were "Western."

6.5. Regression Results

Using an ordered probit specification, as is appropriate for an ordinal, categorical dependent variable (Greene 1997), I estimate three different models. In all three, the dependent variable is the Judicial Independence Index score. In the first model, I include only the explanatory variables of interest—Political Competition and Democratic Stability—and the Democracy control. In the second model, I control for income and education. In the third, I also control for whether the country is "Western." The results are presented in Table 1.

The coefficients for Political Competition and Democratic Stability are positive, as predicted. Political Competition is statistically significant at over a 95 percent confidence threshold even when controlling for income, education, being Western, and the presence of formal democracy in 1995. While including the control variables does reduce the statistical significance of Democratic Stability somewhat, it is still significant at the 90 percent level (and just barely misses the 95 percent threshold) even with all controls included.

The ordered probit coefficients cannot be interpreted directly, but one can get a sense of the magnitude of the impact by examining the effects of varying Political Competition and Democratic Stability while holding the other variables constant. When all variables are set at their means (with Western Country equal to 0 and Democracy equal to 1), the probability that Judicial Independence Index equals 0 is .311, the probability that it equals 1 is .384, and the probability that it equals 2 is .305. When, with other variables held constant, Political Competition is increased by 1 standard deviation from its mean value to .454, the prob-

Table 1. Ordered Probit Regression on Judicial Independence Index

	Model 1	Model 2	Model 3
Political Competition	1.700**	1.497*	1.465*
	(.658)	(.684)	(.686)
Democratic Stability	.588**	.453*	.391+
	(.157)	(.178)	(.202)
Democracy	−.301	−.115	−.007
	(.446)	(.477)	(.506)
ln(GDP per Capita) ($ppp)[a]		.192	.168
		(.153)	(.157)
ln(Adult Literacy Rate)		.132	.150
		(.351)	(.352)
Western Country			.334
			(.535)
N	153	147	147
Pseudo-R^2	.263	.264	.265
Likelihood ratio χ^2	87.09	84.17	84.56

[a] ppp = purchasing power parity.
+ Significant at the 90% level.
* Significant at the 95% level.
** Significant at the 99% level.

ability that Judicial Independence Index equals 0 decreases to .218 and the probability that Judicial Independence Index equals 2 increases to .412. When Political Competition is decreased by 1 standard deviation from its mean to .062, the probability that Judicial Independence Index equals 0 jumps to .419 while the probability that Judicial Independence Index equals 2 decreases to .213. Thus, the effect of political competition on the probability that a country will have a fully independent judiciary is substantial.

Similarly large effects obtain for Democratic Stability. An increase by 1 standard deviation from its mean of 1.241 to 2.871 (all other variables fixed as before) increases the probability that the Judicial Independence Index equals 2 from .305 to .551. Decreasing the value of Democratic Stability to .693 (the minimum possible value when Democracy equals 1) with all other variables at their means causes this probability to decrease to .235. Table 2 shows the predicted probabilities that the Judicial Independence Index equals 2 with different values of Political Competition and Democratic Stability. The table demonstrates that variation in the level of political competition and the stability of the democratic system can have an enormous impact on the probability that a country will have an independent judiciary.

These results strongly support the hypotheses that political compe-

Table 2. Probability That the Judicial Independence Index Equals 2

	Political Competition		
Democratic Stability	.062	.258	.454
.693	.156	.235	.331
1.241	.213	.305	.412
2.871	.437	.551	.661

tition and stability foster independent judicial review. However, it is important to note three caveats. First, the dependent-variable data are derived from subjective evaluations made by U.S. State Department officials; if their subjective assessments of judicial independence are correlated with other aspects of countries' political climate, the results may be biased. Second, the validity of both explanatory variables of interest hinges on the assumption that past history is a good proxy for subjective assessments of future probabilities. While this assumption seems reasonable as a general rule and has been used in similar research designs (see, for example, Clague et al. 1996), it can lead to the inaccurate characterization of cases when there has been a recent political change. Third, political competition and democratic stability may be endogenous—that is, judicial independence may foster stable democratic competition. In the absence of reliable instrumental variables (which would have to be correlated with Political Competition and/or Democratic Stability but not Judicial Independence), I cannot rule out the possibility of reverse or reciprocal causation. More sophisticated and comprehensive empirical testing will require more and better data.

Nonetheless, the consistency of the empirical results with the predictions of the model increases confidence that the model is accurate. Moreover, note that a number of the other theories described in Section 2 do not account for these empirical correlations. The level of political competitiveness does not affect the desirability of judicial independence in either the Landes and Posner interest group theory and the Rogers asymmetric-information theory, and even an autocrat might have a strong interest in blame deflection. The public backlash theory in its ad hoc form cannot account for this pattern either.

7. SUMMARY OF MAJOR CONCLUSIONS

The model developed in this paper, although parsimonious, generates a number of explicit, empirically testable predictions regarding several

aspects of the relationship between the independent judiciary, judicial doctrine, and the competitive political system. The main findings are restated here:

1. Independent judicial review is valuable to political competitors when those competitors would prefer to exercise mutual restraint but the necessary monitoring and enforcement of this restraint are not possible or are prohibitively costly.

2. Systemic political instability is likely to reduce the attractiveness of judicial independence because parties will assign less weight to the future if they are less sure they will be around to compete in future periods. Similarly, judicial independence is more likely when leaders are insulated from pressures to produce immediate policy results for themselves or their constituencies. Empirical evidence is consistent with the prediction that stable political competition encourages judicial independence.

3. Judicial independence is more likely when the political system is competitive. Parties find judicial independence less attractive as they become more competitively successful, and there is a direct trade-off between the relative competitiveness of the different parties. The prediction that political competition makes judicial independence more likely finds strong support in the data.

4. The judiciary's political orientation is constrained by the nature of political competition. Specifically, the range of judicial political slants compatible with judicial independence is skewed in the direction of the more competitively successful party. If there is a dominant party, the judiciary will either exhibit preferences very similar to that party or be marginalized. In less extreme cases, an independent judiciary is more likely to slant toward the more powerful party, but it will still be more moderate than that party.

5. An independent judiciary will be less attractive to all parties when it adopts a doctrine that is either too restrictive or too deferential. Insofar as the judiciary has control over its own doctrine, we expect that it would adjust accordingly and adopt an intermediate level of deference.

6. To the extent that parties have the ability to manipulate judicial doctrine, we expect politically strong and judicially unfavored parties to promote greater judicial deference, whereas politically weak and judicially favored parties should promote a more restrictive doctrine.

7. If the judiciary has control over its political orientation and is expected to adjust its orientation in order to preserve its independence,

then parties will try to shift the court's "natural" preferences as much as possible toward their own ideal points. But they, and we, expect the judiciary to moderate its position.

8. If the judiciary does not self-adjust—if it gets "stuck" so that it is too favorable to one party for judicial independence to be maintained—we expect even the favored party to support changes that make the judiciary more moderate.

If these hypotheses prove accurate—and if one therefore accepts the basic validity of the model presented here—then these findings have a number of important implications.

First, the model is relevant to how we think about the task of creating and preserving the institution of an independent, authoritative judicial branch. Political competition, a long-term perspective, and a willingness to compromise are fundamental to independent judicial review, and the nature of the political competition and the competitors is largely determinant of the conditions, if any, under which judicial independence is viable. Thus, efforts to build judicial independence in the absence of genuine and stable political competition will likely founder.

Second, the model helps explain the frequent association of democratic politics and independent judicial review. Normative political theorists have long struggled with the problem of the legitimacy of unelected judges making politically significant decisions in a democracy. The essence of the difficulty was summarized succinctly by Alexander Bickel (1962, pp. 16–17): "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. That . . . is the reason the charge can be made that judicial review is undemocratic."

While constitutional theorists and political philosophers have constructed a variety of normative and interpretive theories to reconcile the apparent conflict between the ideals of democracy and constitutionalism,[8] the model developed in this paper suggests that, whatever the possible normative tension between democracy and independent judicial review, there is a positive explanation for the close association between these institutions. Specifically, independent judicial review serves a valuable insurance function for competitors in a stable democracy. Philo-

8. For a sampling of this voluminous literature, see Bickel (1962), Ely (1980), and Holmes (1988).

sophical consistency may be less important, as a practical matter, than functional complementarity.

Finally, the model presented here has implications not only for the political viability of judicial review but also for the nature of judicial doctrine and jurisprudence. Political factors affect the nature of the judiciary that can be sustained, in terms of both political orientation and doctrine. Thus, this model is consistent with other research that suggests that judicial doctrine is shaped not only by the attitudes of judges but by political calculations as well (for example, Ferejohn and Weingast 1992; McNollgast 1995). Similarly, this perspective suggests that political battles over the proper role of the judiciary, often seen as philosophically or ideologically motivated, can be reinterpreted as reflecting the political calculations of different factions.

The model presented here is incomplete. It must be extended to incorporate additional complexity, and its predictions must be tested for robustness to alternative specifications. For example, the current model considers only two parties and a single policy dimension. A useful extension would examine the implications of allowing three or more competitors and two or more relevant policy dimensions. In addition, the model has talked about only the "government" and the judiciary, without subdividing the former into its constituent branches—executive, legislative, administrative, and so on—and incorporating the possibility that different factions could control different branches. A more formal treatment of the possibility of endogenous manipulation of parameter values is also needed. And, of course, rigorous empirical testing will require better data.

Nonetheless, despite these limitations, this model may serve as a useful foundation for more sophisticated theoretical and empirical analyses and will contribute to an understanding of the political foundations of judicial independence. Moreover, while this model deals specifically with judicial review, the principles that underlie the analysis may have a much more general application. A similar logic might be used to explain the sources of the political power of other agents and institutions that lack direct control over the means of coercion.

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