THE PUZZLING (IN)DEPENDENCE OF COURTS: A COMPARATIVE APPROACH

J. MARK RAMSEYER*

I. INTRODUCTION

As law professors, we make our living off the courts. We study them.1 We use them to justify our salaries. Naturally, we stress their importance. Concurrently, we also stress their independence from the electoral marketplace. "An independent and honorable judiciary is indispensable to justice in our society," our American Bar Association proclaims.2 And "all freedom-loving nations are faithful, after their fashion, to the principle of judicial independence," we scholars too often reply.3

We exaggerate badly, of course, and that exaggeration is the source of the puzzle at hand. Basic comparative research shows that independent judiciaries (defined here as courts where politicians do not manipulate

* Professor of Law, University of Chicago. I received generous financial help from the Lynde and Harry Bradley Foundation, the National Science Foundation (award SES 9113755), the John M. Olin Foundation, and the Sarah Scaife Foundation. Portions of this manuscript (primarily Section IV) will become part of a book with Frances McCall Rosenbbluth, tentatively entitled "The Politics of Oligarchy: Institutional Choice in Imperial Japan." I received helpful suggestions on this essay from John Ferejohn, David D. Friedman, Stephen Gilles, John Haley, William Klein, William Landes, Geoffrey Miller, Richard Posner, Frances Rosenbluth, Pablo Spiller, David Strauss, Cass Sunstein, Oliver Williamson, Stephen Yeazell, and participants in workshops at the AALS and University of California, Berkeley. Dan McGuire provided excellent research assistance.

1 Though one prominent law professor responded to an earlier draft of this essay with, "Good for you! Not me, boss."


[Journal of Legal Studies, vol. XXIII (June 1994)]
© 1994 by The University of Chicago. All rights reserved. 0047-2530/94/2302-0003$01.50

721
the careers of sitting judges)\textsuperscript{4} are not common to freedom-loving nations everywhere. Independent courts are not as likely as we hope, and the basic puzzle is why. Why do rational politicians in some democracies offer independent courts, while politicians in other democracies do not?

In this generalization of an argument made nineteen years ago by William Landes and Richard Posner,\textsuperscript{5} I suggest that the answer lies in an analogy to the simple theory of repeated games. When in a Prisoner’s Dilemma, rational players who expect to play the game only once will defect. Players who expect to play it indefinitely may sometimes defect and sometimes cooperate. So too with whether rational politicians will keep courts independent. Fundamentally, whether they keep them independent (whether they adopt the cooperative strategy) depends on two things: (a) whether they expect elections to continue indefinitely, and (b) if elections will continue, whether they expect to continue to win them indefinitely. Only where they rate (i) the likelihood of continued electoral government high and (ii) the likelihood of their continued victory low might they provide independent courts. Landes and Posner identified the electoral logic to the class of jurisdictions meeting both conditions. In this essay, I generalize their argument to a broader range of political markets.

I illustrate the electoral market logic to judicial independence through three examples: modern (post-1945) Japan, the modern (twentieth-century) United States, and imperial (1868–1945) Japan. In the modern United States, politicians in both parties expect the electoral system to continue, but no one gives either party high odds of controlling the government indefinitely—so politicians offer independent courts. In modern Japan, politicians in all parties expect competitive elections to continue indefinitely, but until recently those in the ruling Liberal Democratic Party (LDP) rationally expected to win the elections—so they offered less independent courts. In imperial Japan, none of the politicians could expect his party to continue to win elections, but none could expect the electoral system itself to continue—so they offered less independent courts.

I first contrast the independence of the courts in modern Japan (Section

\textsuperscript{4} In this essay I use judicial independence exclusively to refer to systems where politicians do not try to intervene in the courts to reward and punish sitting judges for the politics of their decisions. For an excellent example of empirical research on judicial independence that adopts a very different definition, see Pablo T. Spiller & Rafael Gely, Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988, 23 RAND J. Econ. 463 (1992).

II), the United States (Section III), and imperial Japan (Section IV). I then outline a simple game-theoretic explanation for the differences (Section V) and conclude by contrasting bureaucracies with judiciaries (Section VI).

II. **Puzzle 1—Modern Japan**

A. **Introduction**

Japanese politicians in the LDP ruled Japan continuously from 1955 to 1993. They did not hold power this long by chance. In part, they held it by providing median voter policies. In part too, however, they held it by rationally manipulating the institutional structure of government to their electoral advantage. In the process, they manipulated the judiciary as well. Consider first the institutional structure of the courts (Section II B below) and then a short summary of how LDP leaders manipulated that structure (Section IIC). 

B. **Judicial Structure**

The modern Japanese Constitution\(^7\) vests the "whole judicial power" in the courts. It bans other judicial institutions (art. 76(a)) and gives parties to administrative disputes the right to appeal to the courts (art. 76(b)). "All judges," it further declares, "shall be independent in the exercise of their conscience and shall be bound by the Constitution and the laws" (art. 76(c)). Although the cabinet does appoint the judges to the Supreme Court and lower courts,\(^8\) it cannot fire them at will. Instead, only the Diet can fire them, and only through impeachment (art. 78). To impeach, it must find that a judge grossly violated the standards of the office, neglected the duties of the job, or dishonored the institution of the courts.\(^9\)

The American occupation officials who designed this structure did place a few institutional limits on judicial independence. They subjected Supreme Court justices to a popular referendum every ten years and

---


\(^7\) Nihon koku kempō [Constitution of Japan], promulgated May 3, 1947.

\(^8\) Art. 79 (Supreme Court). The lower court judges are picked by the cabinet upon the nomination of the Supreme Court. See Kempō, *supra* note 7, art. 80; Saibansho hō [Judiciary act], Law No. 59 of April 16, 1947, § 40.

\(^9\) Saibansho hō, *supra* note 8; Saibankan dangai hō [Judicial impeachment act], Law No. 137 of November 20, 1947, § 3. Judges can also lose their job if declared "mentally or physically incompetent" by a court (Kempō, *supra* note 7, art. 78).
mandatory retirement at age seventy.\textsuperscript{10} They subjected lower-court judges to mandatory retirement at sixty-five and placed them on ten-year terms. They thus gave the cabinet the right to evaluate a sitting judge at the end of each ten-year term.\textsuperscript{11}

C. Political Practice

1. The Controls. Although Japanese judges have not been as independent as their American federal peers,\textsuperscript{12} the reason does not primarily lie in any of the obvious institutional constraints.\textsuperscript{13} The Japanese Diet seldom impeaches judges. From 1948 to 1989, its Judicial Impeachment Committee received 5,700 impeachment complaints but ruled against the judges only twelve times.\textsuperscript{14} Japanese voters never expel Supreme Court justices. Again during the same four decades, they never gave any justice a negative vote greater than 16 percent.\textsuperscript{15} And the Japanese cabinet rarely refuses to rehire a judge at the end of a ten-year term. During the same period, it did so only twice. Only once did anyone claim it refused for political reasons.\textsuperscript{16}

Instead, LDP politicians controlled judges more subtly, primarily

\textsuperscript{10} Kempô, supra note 7, art. 79; Saibansho hô, supra note 8, § 50.

\textsuperscript{11} Kempô, supra note 7, art. 80; Saibansho hô, supra note 8, § 50. For a close analogue, see Mo. Const. of 1945, art. V.

\textsuperscript{12} For some empirical evidence that American federal judges may not act quite as independently as we have often thought, see Mark A. Cohen, The Motives of Judges: Empirical Evidence from Antitrust Sentencing, 12 Int'l Rev. L. & Econ. 13 (1992); Mark A. Cohen, Explaining Judicial Behavior, or What's "Unconstitutional" about the Sentencing Commission, 7 J. L. Econ. & Org. 183 (1991); Spiller & Gely, supra note 4; Eugenia Froedge Toma, Congressional Influence and the Supreme Court: The Budget as a Signaling Device, 20 J. Legal Stud. 131 (1991).

\textsuperscript{13} To be sure, this does not make the institutional structure irrelevant. If judges know that the Diet can impeach them, that the cabinet may refuse to rehire them, or that voters can expel them, they may ignore majority preferences less. If so, then in equilibrium, politicians and voters would not often exercise the institutional control anyway. Judges would not ignore majority preferences, and voters and politicians would not punish them.


\textsuperscript{15} ZSKS, supra note 14, at 472–74. On the effect of judicial elections in the United States, see Mary L. Vawse, The Effects of Judicial-Selection Reform: What We Know and What We Don't Know, in Dubois ed., supra note 14, at 79.

\textsuperscript{16} On these reappointment controversies, see Ramseyer & Rosenbluth, supra note 6, at 165 (Judge Miyamoto) & 156 (Judge Hasegawa).
through job assignments. In the Japanese judiciary, would-be judges apply for a job at the end of their legal training. If chosen, they receive a ten-year appointment. At the cabinet's discretion, they then receive renewals every decade. During this time, they rotate through positions every two or three years. By controlling these two- and three-year postings, the LDP leaders could control their judges: industrious and orthodox judges they could reward with prestigious postings; the indolent and heterodox they could sentence to years in obscure posts.

Liberal Democratic Party leaders controlled these assignments through the court's administrative offices, the Supreme Court Secretariat. In turn, they controlled the Secretariat through a series of strategic moves. First, in part because the Supreme Court formally controls the Secretariat, they appointed only loyal LDP partisans to the Supreme Court. Second, to ensure that those appointees did not change their views while in office, they appointed them late in life. As a result, Japanese Supreme Court justices served a mean of only six years before retiring at seventy. Third, LDP leaders regularly appointed to the Supreme Court a career judge who had served as Secretary General to the Secretariat. At all times, therefore, they had on the Court a loyal partisan who knew in detail how the administrative offices worked.

Liberal Democratic Party leaders used this control over the Secretariat to reward judges according—in part—to how closely they decided politically important cases by LDP preferences. Judges who decided controversial cases according to LDP policy preferences (and who otherwise did good work) they moved to important positions in Tokyo. Others they

---

17 The extent to which cabinets in other civil law countries adopt the LDP-style strategy is a question on which I know of no empirical work. Casual observations are ambiguous: see, for example, Mauro Cappelletti, Who Watches the Watchmen? A Comparative Study on Judicial Responsibility, 31 Am. J. Comp. L. 1, 20–21 (1983) (political control through careers is declining); Robert P. Davidow, Beyond Merit Selection: Judicial Careers through Merit Promotion, 12 Tex. Tech. L. Rev. 851 (1981) (France); Daniel J. Meador, German Appellate Judges: Career Patterns and American-English Comparisons, Judicature, June–July, 1983, at 16–27 (Germany); Judicial Independence, supra note 3 (collecting country-specific studies). The point of this essay, of course, is that the answer will depend on the nature of the electoral market, not on whether the jurisdiction is a civil- or common-law country.

18 Nominally, judges have the right to refuse these assignments. In fact, they do not: one of the two judges who found his contract not renewed was a judge who exercised that right. The LDP thus used its indirect right not to reappoint to reenforce its control over job assignments. Note, however, that the right to refuse reassignments is statutory. Saibansho hō, supra note 8, § 48. As a result, should the LDP have wanted to do so, as a majority party it could have enforced the same discipline on its judges by repealing the right to refuse seats rather than by using its power under the ten-year contractual terms.

19 ZSKS, supra note 14, at 468–70.
moved to rural branch offices. Through this control over job assignments, they regularly and precisely rewarded and punished their judges.

2. *An Illustration.* As an example of this political control, consider five judges who sat on a series of three-judge panels in the Tokyo District Court. In 1967, an antigovernment group petitioned the Tokyo Public Safety Committee (TPSC) for a permit to demonstrate through central Tokyo. The TPSC approved the permit but ordered the group to avoid the Diet building. The group then sued in Tokyo District Court for the right to demonstrate in front of the Diet as well.

Faced with the petition, Judges Ryōkichi Sugimoto, Kenkichi Nakahira, and Fujio Senda held for the group. Demonstrators, they explained, have a constitutional right to march past the Diet building. The matter was sensitive, however, and Prime Minister Eisaku Satō protested. The judges promptly capitulated and revoked their order. The demonstrators’ constitutional rights, apparently, were less constitutional than they had thought.

The next month, another group of demonstrators petitioned for a similar permit. Again, the TPSC approved the march but without a trip past the Diet. Again, the group sued, and again, Sugimoto, Nakahira, and Senda held that the group had a constitutional right to disrupt traffic at the Diet. Again, Satō intervened and—yet again—the three judges backed down.

Curiouser and curioser, Alice would have said. The leader of the first group of demonstrators now sued the city of Tokyo for damages. He had had a constitutional right to march past the Diet building, he claimed. When the TPSC denied him that right, he suffered anguish. For that, the city owed him money damages. He presented his claim to Sugimoto, Nakahira, and one Shun Iwai. This panel (two of whom had earlier denied him that constitutional right) awarded him damages.

A flurry of politically bizarre opinions followed. In 1968, the judges (now Sugimoto, Iwai, and an Akira Watanabe) held that the Ministry of Education violated the constitutional right of textbook writers when it

---

20 Adapted from Ramseyer & Rosenbluth, *supra* note 6, at 172–75.
22 He intervened pursuant to the Gyōsei jiken soshō hô [Administrative case procedure act]. Law No. 139 of 1962, § 27; 483 Hanrei jihō 11 (Satō petition).
23 [No names given], 483 Hanrei jihō 12 (Tokyo D.C. June 10, 1967) (Sugimoto, Senda, Murakami, JJ.).
26 Hoshino v. Tōkyō to, 575 Hanrei jihō 10 (Tokyo D.C. December 1969).
reviewed books for school use. They continued to reverse the TPSC in protest cases. And the following year, they held that leftists had a constitutional right to ship potential military equipment to the People's...
LDP political preferences incurred a substantial risk that the Secretariat would assign them to a series of low-status positions. If they used their independence to flout LDP preferences, they did so at their peril.\textsuperscript{35}

III. PUZZLE 2—THE UNITED STATES

A. The Twentieth Century

By contrast, American federal politicians implicitly follow a strict hands-off-the-courts rule. Unless a judge is insane, incompetent, or crooked, they let the judge sit in court and draw the standard salary. Whether the judge implements the majority party’s ideology or anything else, they let the judge be.

American federal politicians instead try to shape judicial ideology only at the stage of appointment. Even there, of course, some try to shape it more than others. Over the decades, some have weighted ideology heavily, others more lightly. Few, however, have ignored it altogether, and few have picked many judges from the rival party.\textsuperscript{36}

Nonetheless, the implicit hands-off-the-courts rule is strong enough that sometimes observers criticize even partisan appointment strategies. When Ronald Reagan nominated Robert Bork, some Democrats in effect claimed he violated an implicit agreement to appoint only relatively centrist jurists. When Bill Clinton named Lani Guinier to a position in the Attorney General’s office, many Republicans argued the same.

The implicit rule is deeply held—Franklin Roosevelt discovered just how deeply. His story has become part of our common legal lore. When the Supreme Court rejected Roosevelt’s New Deal,\textsuperscript{37} he proposed to enlarge the Court. Nothing in the Constitution required that it have nine justices. Indeed, politicians had manipulated its size to political ends before,\textsuperscript{38} and lower court size everyone seemed to think fair game. By

\textsuperscript{35} The LDP did not always punish deviant judges, and (one strongly suspects) did not always have complete information about the performance of its judges. Politically deviant judicial decisions (and the accompanying punishment) appear in the record precisely because both judges and LDP leaders adopted randomized strategies in a noisy informational environment.


enlarging the Court to fifteen and appointing committed New Dealers to it, Roosevelt planned to build the majority he needed to implement his programs.  

Even Roosevelt’s friends balked. Not only were judicial careers off-limits to American politicians, apparently the number of justices was off-limits too. Roosevelt may have won by a landslide in 1936, but in politics as in much of life, turnabout is fair play. What the Democrats could do, Republicans could do in turn. The Democrats knew that they would eventually lose office. If they manipulated Court size now, Republicans would not hesitate to do so in the future. That, many of them did not want. Rather than renege on the implicit rule now, they opted to risk Roosevelt’s entire program. “The message is mixed,” writes John Hart Ely, “but what now seems important about the episode is that an immensely popular President riding an immensely popular cause had his lance badly blunted by his assault on judicial independence.”

B. The Early Nineteenth Century

By the standards of the early republic, Roosevelt’s scheme was meek. Politicians a century earlier had not followed any hands-off-the-courts rule. Before the Revolution, the Crown had sometimes controlled judicial careers.  

After it, many politicians continued the Crown’s interventionist tactics. Some states made judges elected officials and gave them one-year terms. Others let their judges hold office only at the pleasure of the legislature.  

Not only could politicians manipulate state courts, federal courts were fair game too. Consider the shift from Federalist to Republican rule. In 1800, Thomas Jefferson beat John Adams in a bitter election, and Adams was not conciliatory. With but two weeks left in his term, he obtained the 1801 Judiciary Act. Through it, he expanded the judiciary—which


40 Democracy and Distrust: A Theory of Judicial Review 46 (1980). The moral of the story is ambiguous, of course, as Ely notes. Two months after Roosevelt announced his plan, the Supreme Court backed down. See, for example, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Caroleine Products Co., 304 U.S. 144 (1938); see generally Geoffrey P. Miller, The True Story of Caroleine Products, 1987 Sup. Ct. Rev. 397.


43 2 Stat. 89 (1801).
he then packed with party loyalists.\textsuperscript{44} Along with stacking the courts, he also cut the size of the Supreme Court. It had been six. He now cut it to five, effective on the next retirement. Thereby, he prevented Jefferson from appointing anyone to the court until two justices quit.

Upon taking office, Jefferson retaliated in kind. First, he fired Adams's nonjudicial appointees. Then, he fired all the new judges. Given Article III, he could not do so directly, of course. If Adams's Congress had passed the 1801 Judiciary Act, however, Jefferson's Congress could repeal it. And repeal it his Congress did.\textsuperscript{45} In the process, it threw out the judges appointed under the 1801 Act. By the Constitution, they held their office during "good Behavior." Yet their office itself was a creature of Congress. What Congress could create, Congress could abolish. It now abolished their offices, and the judges were out of a job—good behavior or bad. Lest John Marshall's Federalist Supreme Court rule the ploy unconstitutional, Congress recessed the Court for fourteen months.\textsuperscript{46}

By the time the Supreme Court finally faced the issue, even the Federalist justices had lost their nerve. They declined to hold the 1802 Act unconstitutional.\textsuperscript{47} Discretion may have saved them their jobs, for many Republicans were ready to go further. Some wanted to amend the Constitution and appoint judges to serve at the pleasure of Congress. Others wanted to abolish the courts altogether.\textsuperscript{48}

Eventually, moderation prevailed. The Republicans never amended the Constitution to control the judges, and no one ever fired out-of-office judges again. Indeed, when Congress abolished the Commerce Court at the turn of the century, it deliberately kept the judges on the payroll.\textsuperscript{49} By Roosevelt's time, this moderation had become the modern hands-off-the-courts rule. Even Supreme Court size was now sacred.

\textsuperscript{44} See Kathryn Turner, The Midnight Judges, 109 U. Pa. L. Rev. 494 (1961). The most famous of his late appointees, of course, was one justice of the peace named William Marbury.

\textsuperscript{45} 2 Stat. 132 (1802).

\textsuperscript{46} Even at the time, not all observers thought that the judges should lose their salary. See 3 Joseph Story, Commentaries on the Constitution of the United States 494 (1833) (on the 1802 Act: "if its constitutionality can be successfully vindicated, [it] prostrates in the dust the independence of all inferior judges"); 2 George Lee Haskins & Herbert A. Johnson, History of the Supreme Court of the United States 171–72 (1981). More recently, at least some Supreme Court justices have argued that abolishing the courts would simply create salaried judges without courts. See, for example, Glidden v. Zdanok, 370 U.S. 530, 544–47 (1962) (Harlan, J.).

\textsuperscript{47} The Court faced the constitutionality of the 1802 Judiciary Act, but (with Marshall recused) avoided the issue. See Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

\textsuperscript{48} See Ellis, supra note 42, at 21.

\textsuperscript{49} See Donegan v. Dyson, 269 U.S. 49 (1925).
C. Judicial Might-Have-Beens

Modern Japanese and American politicians treat their judges differently, but not because of any differences in the constitutional text. If they chose, Japanese politicians could insulate judges from political control. At least by the text of the Constitution, American politicians could intervene LDP-style in the courts.

Start with the American Constitution itself. Once a president appoints a judge, he or she cannot freely fire a specific judge or dock his or her pay.\textsuperscript{50} Suppose Steven Spielberg becomes president in 1996 and appoints University of Chicago professor I. Jones to the local Seventh Circuit Court of Appeals. Neither Spielberg nor any of his successors could fire Jones without evidence of serious indiscretion.\textsuperscript{51} Neither could anyone reduce his pay. That is all the American Constitution says on point, and the Japanese Constitution says much the same thing.

Yet Spielberg need not be very creative to penalize Jones. Even under the existing statute, he can transfer Jones. For example, suppose he controls the chief justice. If he can make a plausible showing of need, he can order Jones to show up "temporarily" for work in Omaha.\textsuperscript{52}

Suppose Spielberg heads the majority party in Congress and finds the Seventh Circuit a hotbed of unreconstructed radicals. To punish the judges, he could merge the Seventh Circuit into the adjoining Eighth Circuit.\textsuperscript{53} He could then force the Chicagoans to appear for work at either St. Louis, Kansas City, Omaha, or St. Paul. The Supreme Court itself once held that Congress could order the justices to ride circuit.\textsuperscript{54} By comparison, sending even Chicago judges to Omaha seems mild.

More basically, if Spielberg's allies controlled Congress they could import the entire Japanese system on a turnkey basis. They would first abolish the statutory circuit designations.\textsuperscript{55} All judges would then serve

\textsuperscript{50} U.S. Const., art. III, § 1.


\textsuperscript{52} See 28 U.S.C. § 291 (the chief justice makes the designation on a showing of need by the chief judge or circuit justice of the recipient circuit). Note that the chief justice does not serve at the pleasure of the president.


\textsuperscript{54} See Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803). Though some commentators had their doubts. See 3 J. Story, supra note 46, at 437 & n.1.

on one national circuit. Either directly or through the chief justice, Spielberg would now transfer judges at will. Like the LDP leaders, he would reward the faithful with glamorous posts. He would dispatch the renegades to the outback.

Indeed, Spielberg could do more. The president now appoints judges as either district or circuit judges.\textsuperscript{56} With a modest statutory change, he could henceforth appoint all judges as "federal judges." Depending on their performance, he could move them on or off appellate panels. Similarly, all district judges now earn the same pay, and all circuit judges earn the same pay. With a little change, he could establish a salary range and reward the faithful with bigger and more frequent raises.

The \textit{text} of the American Constitution prevents none of this. Before 1891, the president appointed only two tiers of federal judges—district judges and Supreme Court justices.\textsuperscript{57} As recently as 1875, district judges received a salary from a pay range.\textsuperscript{58} And when the Congress abolished the short-lived Commerce Court,\textsuperscript{59} existing Commerce Court judges became judges without a court. Like Japanese judges, they sat wherever the Supreme Court chief justice told them to sit.\textsuperscript{60}

Although modern Japanese judges enjoy less political independence than federal judges, the difference has nothing to do with the constitutional text. The Japanese Constitution does not require LDP intervention in the courts; the text of the American Constitution does not prevent Congress and the president from intervening in the courts. Before considering \textit{why} Japanese and American politicians do adopt their very different approaches (Section V), consider first the approach that Japanese politicians took before the Second World War (Section IV).

\textbf{IV. Puzzle 3—Imperial Japan}

\textbf{A. Introduction}

The imperial Japanese Constitution\textsuperscript{61} seemed to give judges less independence than the modern Constitution. After all, the imperial judges were under the Ministry of Justice rather than a formally independent Supreme Court. Nonetheless, actual practice differed little. Before the

\textsuperscript{56} See 28 U.S.C. §§ 44, 133.

\textsuperscript{57} Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; see Posner, \textit{supra} note 55, at 23–24.

\textsuperscript{58} The differences were based on workload. See Posner, \textit{supra} note 55, at 43.

\textsuperscript{59} Act of October 22, 1913, 38 Stat. 208, 219.

\textsuperscript{60} See Donegan v. Dyson, 269 U.S. 49 (1925).

\textsuperscript{61} Dai-Nippon teikoku kempō [The Constitution of the great Japanese empire], promulgated Feb. 1, 1889.
Second World War as after, political leaders could use the judicial career structure to influence the way judges decided cases.

B. Judicial Structure

The 1889 Constitution set the basic institutional contours of judicial independence: "no judge shall be dismissed from work except through a criminal conviction or disciplinary disposition." The 1890 Judicial Organization Act then specified the detail to this constitutional mandate. Although it placed courts squarely within the Ministry of Justice, it appeared to insulate judges from control in several ways.

First, the act prohibited the minister of justice from transferring a judge against his (they were all men) will. Second, it let him order a judge to retire only if the judge no longer had the physical or mental capacity to perform his work and he obtained the approval of the en banc High Court or Supreme Court. Third, it let him discipline a judge only if the judge had misbehaved egregiously, and only through proceedings before panels of either the High Court or the Supreme Court. Last, because the act did not specify a mandatory retirement age, it effectively gave judges life tenure.

This institutional framework made it hard for government leaders to manipulate the judiciary. Notwithstanding that difficulty, the oligarchs of late nineteenth-century Japan soon decided to override this framework (Section IVC below). Thirty-some years later, the professional politicians who followed them to power would eventually do the same (Section IVD).

63 Saibansho kōsei hō [Judicial organization act], Law No. 6 of February 10, 1890. Further details on the status of judges were determined by the Hanji kenji kan nado hōkyōrei [Order regarding the compensation of judges and prosecutors, etc.], Chokurei No. 17 of February 14, 1894.
64 Saibansho kōsei hō, supra note 63, § 135. Under the postwar Constitution, the courts are under the Supreme Court. See Kempō, supra note 7, arts. 76–77.
65 Why the oligarchs did this is not clear—though it probably had to do with renegotiating the consular jurisdiction imposed by Western governments under the treaties in effect at the time.
66 Saibansho kōsei hō, supra note 63, § 73.
67 Id. § 74.
68 The judge would then face penalties ranging from pay cuts to impeachment. Hanji chūkai hō [Judicial disciplinary act], Law No. 68 of August 20, 1890, §§ 2–9.
69 Mandatory retirement was introduced with Law No. 101 of May 17, 1921.
C. Oligarchic Manipulation

At the turn of the century, a clique of unelected oligarchs still held power in Japan. Formally, they held power by virtue of their access to the emperor. Substantively, they held power by virtue of their control over the military. Already by the mid-1890s, these men intervened in the judiciary.

These oligarchs intervened primarily for "technical" reasons. They had created the judicial system itself in 1872. During the first two decades, they had hired as judges men with very little legal education. They had had little choice, for legally trained men were not available. By the 1890s, the new university system gave them a large cadre of men with sophisticated legal training. Accordingly, they could replace the untrained judges with far better educated men. During the nineteen months from July to March 1893–94 and August to May 1898–99, they told 158 judges to retire. The institutional framework did not make this easy. If the minister of justice ordered a judge to retire (or even moved him to an obscure provincial court), the judge could properly refuse. To force him to retire, the minister had to submit the matter to the High Court or Supreme Court. He had no assurance, however, that the courts would decide matters the way he wanted.

To induce judges not to contest his contestable order, the minister of justice instead bribed them. He did so by promoting them to a more prestigious court at a high pay, in exchange for their agreeing to retire quickly and quietly thereafter. In doing so, he not only gave them the face-saving chance to resign from a higher court. He also boosted their pension. Under the rules then in effect, a judge's pension depended on his total years of service and his final pay. Suppose he earned a high salary for a day. He earned a highly paid judge's pension for the rest of his life.

The minister of justice bribed judges with high pensions on a wide scale. During the last months of 1898 and early months of 1899, for exam-

---

70 See Shihō shokumu teisei [Rules regarding judicial functions], Dajōkan unnumbered Tatsu of August 3, 1872. The Supreme Court (Daishin'in) was created by the Daishin'in sho saibansho shokusei shotei [Rules and duties of the Supreme Court and other courts], Dajōkan Fukoku No. 91 of May 24, 1875.

71 J. Mark Ramseyer & Frances McCall Rosenbluth, The Politics of Oligarchy: Institutional Choice in Imperial Japan, ch. 6 (unpublished manuscript, 1993). The capacity of the courts at the time was about 1200 judges. See Chokurei No. 17 of February 14, 1894 (1,220 judges); Chokurei No. 122 of June 20, 1898 (1,195 judges).

72 See Kanshi onkyū hō [Government employee pension act], Law No. 43 of June 21, 1890, § 5.
ple, the Ministry of Justice even appointed fifteen judges to the twenty-nine-member Supreme Court. They served terms of one day to three weeks each. At stake was a deal: he agreed to name them to the Court; they agreed to quit.

D. Political Manipulation

Over the next several decades, the oligarchs gradually lost control of the cabinet to the professional politicians in the Diet. By the mid-1920s, the transition was complete. The oligarchs were gone, the politicians were in control—and, ominously, an independent military waited in the wings. Institutionally, the politicians inherited from the oligarchs a legacy that complicated their ability to constrain judges.

At an aggregate level, the data on senior judicial appointments (Tables 1 and 2) show little trace of political involvement until 1931 (the year before the military commandeered the government). Only Prime Ministers Giichi Tanaka and Tsuyoshi Inukai replaced the administrative vice minister of justice, and only they replaced the Supreme Court chief justice. No prime minister replaced either the civil bureau chief or the chief prosecutor.

Moreover, none of the three prime ministers preceding Inukai who replaced a prime minister of a different party appointed many supporters either to the top (the Supreme Court) or to the bottom of the judiciary (forced retirement) (Table 2). Interventionist politicians might have fired disloyal judges during the first months in office and named their own friends to the Supreme Court. On reconfiguring his cabinet in 1925, Kato seems not to have done so at all. If Tanaka and Hamaguchi did, it barely shows.

Nonetheless, these tables understake the extent some politicians (especially in the Seiyūkai party) manipulated the courts. Back in 1913, the Seiyūkai had controlled both the cabinet and the Diet. That April it set out to remake the courts, apparently in its own image. It first amended the Judicial Organization Act to ease its job. Under the revised act, the minister of justice could now transfer judges by a simple majority vote in either the High Court or the Supreme Court. Through a similar vote,

73 Seiichirō Kusunoki, Meiji rikken sei to shihō kan [The Meiji Constitution and judicial officers] 282–93 (1989) (Supreme Court tenure). For the size of the Supreme Court, see Hanji kenji kan nado hōkyūrei, supra note 63, § 2.

74 Law No. 6 of April 5, 1913; Law No. 7 of April 5, 1913. Law No. 6 in fact provided that the transfer provision applied “when necessary for trial business.” Because the Judicial Organization Act already allowed the minister of justice to transfer judges when it was necessary to fill a vacancy (Act, § 73 proviso), ordinary canons of statutory interpretation suggest this was a looser requirement.
# TABLE 1

**Major Personnel Changes within the Ministry of Justice**

<table>
<thead>
<tr>
<th>Post Type</th>
<th>Katô</th>
<th>Tanaka</th>
<th>Hamaguchi</th>
<th>Inukai</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 2, 1925</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>April 20, 1927</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>July 2, 1929</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>December 13, 1931</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Administrative vice minister</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vice minister</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal Bureau</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial Bureau</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prosecutor, Supreme Court</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice, Supreme Court</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Party posts:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prosecutor, High Court (7 posts)</td>
<td>0, 0</td>
<td>0, 4</td>
<td>3, 1</td>
<td>2, 0</td>
</tr>
<tr>
<td>Prosecutor, District Court (51 posts)</td>
<td>1, 16</td>
<td>3, 17</td>
<td>1, 9</td>
<td>12, 12</td>
</tr>
<tr>
<td>Chief, Supreme Court (8 posts)</td>
<td>0, 0</td>
<td>0, 1</td>
<td>0, 0</td>
<td>0, 1</td>
</tr>
<tr>
<td>Judge, High Court (7 posts)</td>
<td>1, 0</td>
<td>0, 1</td>
<td>0, 0</td>
<td>1, 0</td>
</tr>
<tr>
<td>Judge, District Court (51 posts)</td>
<td>3, 19</td>
<td>0, 14</td>
<td>3, 12</td>
<td>2, 14</td>
</tr>
</tbody>
</table>

---

*Calculated on the basis of data found in Ikuhiko Hata, *Senzenki Nihon kanryōsei no seido, soshiki, jinji* [The system, organization, and personnel of the Japanese bureaucracy] 359–65 (1981); Shihō enkakushi [A documentary history of the judiciary] 557–836 (Shihō shō ed. 1939, republished 1960). Party affiliations of cabinets involved—Katô (Kenseikai); Tanaka (Seiyūkai); Hamaguchi (Minecraft); Inukai (Seiyūkai). Wakatsuki cabinets are omitted if followed cabinets of the same party.

1. From cabinet change to personnel change, if within one year.
2. If reassignments within two months, followed by number of additional reassignments within shorter of (i) subsequent ten months and (ii) period of tenure in party controlling cabinet.
TABLE 2

JUDICIAL REASSIGNMENTS DURING THE FOUR MONTHS precedeD AND FOLLOWING CABINET CHANGES

<table>
<thead>
<tr>
<th></th>
<th>Before</th>
<th>After</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Number of judges assigned to the Supreme Court:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Katō (August 2, 1925)</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Tanaka (April 20, 1927)</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Hamaguchi (July 2, 1929)</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Inukai (December 13, 1931)</td>
<td>3</td>
<td>13</td>
</tr>
</tbody>
</table>

B. Number of judges forceably retired:

<table>
<thead>
<tr>
<th></th>
<th>Before</th>
<th>After</th>
</tr>
</thead>
<tbody>
<tr>
<td>Katō (August 2, 1925)</td>
<td>16</td>
<td>8</td>
</tr>
<tr>
<td>Tanaka (April 20, 1927)</td>
<td>13</td>
<td>15</td>
</tr>
<tr>
<td>Hamaguchi (July 2, 1929)</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Inukai (December 13, 1931)</td>
<td>7</td>
<td>29</td>
</tr>
</tbody>
</table>

Source.—Compiled from the daily government gazette, Kanpō [Government gazette] (various issues).

Note.—"Forced retirement" refers to judges officially ordered to retire—those for whom the notice "taishoku wo meizu" appeared in the official government gazette, the Kanpō. Wakatsuki cabinets are omitted because they followed cabinets of the same party.

he could place as many as 232 judges and prosecutors on inactive status. From April to June, he retired ninety-eight judges and prosecutors, placed 131 on inactive status, and transferred 443.75

When the Seiyūkai regained the Diet and Cabinet several years later, it instituted mandatory judicial retirement.76 By doing so, it automatically purged many of the men appointed by the oligarchs, and let it install its own. During the dozen years after 1913, only about half of the time did it control the cabinet. Although the remaining years might have given the rival Kenseikai party time to appoint its own sympathizers to the Ministry, it did not. Instead, it wasted almost half its term in office with a minister of justice (Yukio Ozaki) who had little interest in personnel
or 2. Consider the career of one Mannosuke Yamaoka. On finishing college in 1899, Yamaoka worked as a prosecutor’s apprentice and then as a Tokyo judge. After a stint in Germany, he returned to Japan in 1910 as a prosecutor. By 1914, he had endeared himself to a Seiyūkai-affiliated senior bureaucrat. With his patronage, he moved into a series of important posts, and by 1925 headed the Criminal Bureau. Then, under a Kenseikai cabinet, the minister of justice summarily placed him on inactive status. Legal commentators complained that politicians were politicizing the judiciary, but Yamaoka was graceful to a T. ‘‘I do think I’ve been impartial, . . . but if you look at the Ministry of Justice from the Kenseikai’s perspective, you’ll see it’s just about completely stacked with Seiyūkai people. It’s true that Mr. Ozaki was Minister of Justice for a while under the [1914] Ōkuma Cabinet, but he stayed almost totally aloof from these things. As a result, there’s hardly any trace of the Kenseikai there.’’

Whatever modest independence the judiciary had in the 1920s, it lost it completely when Inukai became Seiyūkai prime minister in 1931. Because the military usurped the government in 1932, he was the last of the prime ministers to take office as a party politician. He dominated the courts straightforwardly. Even before he took office, some observers predicted he would make massive changes. He did indeed. Within four months of taking office on December 13, 1931, he appointed thirteen justices to the twenty-nine-member Supreme Court and fired twenty-nine judges (Table 2). A day later (on April 14, 1932), he announced yet another massive series of personnel changes. The legal press called it ‘‘The Great Judicial Office Shuffle.’’ In one day, he transferred 213 judges and prosecutors.

V. A THEORY OF JUDICIAL INDEPENDENCE

A. Introduction

It is a tale of three courts: a relatively independent modern American judiciary, a relatively nonindependent modern Japanese judiciary, and a

78 See generally Yoshihi Hosojima, Ningen Yamaoka Mannosuke den [An account of Yamaoka Mannosuke, the man] 45–95 (1964); Shihō shō, supra note 77.

79 Shihō shō, supra note 77.

80 The claim in Taiichirō Mitani, Gendai Nihon no shihōken to seito [The modern Japanese judiciary and political parties] 18–19 (1980), that the judiciary remained independent from the political parties misses some of what happened in the 1920s and almost all of what happened in 1931.

81 3352 Hōritsu shimbun 17 (1931).

82 3396 Hōritsu shimbun 19 (1932).
relatively nonindependent imperial Japanese judiciary. These differences do not derive from constitutional texts. Neither do they obviously derive from any stronger American "taste" for independent courts. After all, many thoughtful Japanese observers react to judicial career manipulation with the same consternation that many thoughtful Americans would show. 83

Nor does modern theory explain the differences. To date, most scholars try to explain why rational politicians necessarily find it advantageous to use independent courts. They do not ask why some politicians might find it advantageous while others might not. In perhaps the most original modern article on point, William Landes and Richard Posner advanced independent courts as a way for politicians to make long-term bargains with their constituents. 84 Without independent courts, they argued, politicians would have an incentive to cheat on any deals their predecessors made. Knowing they had that incentive, constituents would pay less for any advantageous statutes ex ante.

Independent judges, Landes and Posner suggested, mitigated this problem. Precisely because of their independence, they could enforce legislative deals by their initial terms. By stopping successor parties from reneging on their predecessors' deals, they would help all legislators extort money. Douglass North and Barry Weingast seem implicitly to find evidence for the theory in seventeenth-century England. 85 And placed in a broader theoretical framework, the theory fits within what Oliver Williamson and others have since described as purposefully inefficient bureaucracies. "Incumbent politicians who create and design bureaus are aware that the opposition can be expected to win and take control in the future," notes Williamson. "A farsighted majority party will therefore

83 Because of the simple game-theoretic explanation for the different patterns of judicial manipulation in the United States and Japan, I table the question of whether Japanese and Americans do have different "tastes" for independent courts. See George J. Stigler & Gary S. Becker, De Gustibus Non Est Disputandum, 67 Am. Econ. Rev. 76 (1977).

In this respect, several readers have rightly noted two points. First, according to this discussion, judicial independence is only one of an infinite number of equilibria in an indefinitely repeated Prisoner's Dilemma. It remains possible that "tastes" (cultural norms, for example) may account for the prominence of independence in the United States as a focal point among the multiple equilibria. Second, tastes (at least those commonly denominated "traditions") may in part be endogenous to the game. Some such tastes may thus represent path-dependent historical contingencies.

84 Landes & Posner, supra note 5. Problems with this theory, as well as with the McCubbins-Schwartz theory outlined below, are explored in more detail in Ramseyer & Rosenbluth, supra note 6, ch. 8.

design some degree of (apparent) inefficiency into the agency at the outset—the effect of which will be to frustrate the efforts of successor administrations to reshape the purpose served by the agency.  

Mathew McCubbins and Thomas Schwartz advance a hypothesis with a different twist. They argue that independent judges help politicians monitor the people they appoint to bureaucratic posts. Monitoring them routinely, McCubbins and Schwartz claim, would entail resources politicians do not have. Politicians instead keep bureaucrats in line by giving constituents a right to sue them in independent courts.

For both Landes and Posner and McCubbins and Schwartz, competitive electoral markets should lead to one equilibrium: independent courts. Perhaps politicians who keep courts independent will more successfully raise money (Landes and Posner), or perhaps they will more successfully monitor their bureaucrats (McCubbins and Schwartz). In either case, politicians who keep courts independent should compete more successfully in electoral markets than those who do not. In either case, over time, independent courts should follow.

Not so, the Japanese example suggests. Rational politicians in competitive electoral markets do not necessarily maintain independent courts. To date, it seems, we have asked the wrong question. We have asked why rational politicians would want independent courts, when many rational politicians do not want them. Which politicians will want them, we should ask instead, and which will not?

Consider, therefore, the possibility that the differences in judicial monitoring result from different exigencies in the electoral markets. Those exigencies are twofold: (a) the long-term electoral dominance of the LDP in modern Japan compared to the erratic electoral performance of American political parties; and (b) the long-term likelihood of continued democratic elections in the United States, compared to the short-term time horizons in imperial Japan.

B. A General Theory of Comparative Independence

Although modern Japanese elections are highly competitive affairs, for forty years the LDP consistently won them. Partly by shifting its


88 Japanese incumbents face a higher risk of losing office than incumbents in either Britain, (the former) West Germany, or the United States. Kent E. Calder, Crisis and Compensation: Public Policy and Political Stability in Japan 68 (Princeton Univ. Press 1988).
policies with the shifting median voter, and partly by using its control over government to give constituents generous private goods, it dominated the political marketplace.\textsuperscript{89} By contrast, American parties win erratically at best. As a result, LDP leaders could reasonably expect that they would continue to control the government.\textsuperscript{90} No American leader of either party can do so.

If rational politicians face significant odds of being in the minority party, however, they will try to reduce the variance to their political returns. In part, they can do this by insulating the judicial system from political control. Suppose the party in power has relatively little control over judges. It will earn a smaller advantage to electoral victory, but will incur a smaller cost to electoral loss. American political leaders have chosen this option.

Liberal Democratic Party leaders had less reason to insulate their judges. Because they could realistically expect to stay in power indefinitely, they faced smaller expected future costs to a nonindependent judiciary. Consequently, they could rationally elect to monitor judges instead, and thereby obtain greater control over policy.\textsuperscript{91} Although they increased their costs to electoral losses, they were less likely to care ex ante—since they were less likely to lose.\textsuperscript{92}

At stake is an intertemporal calculus. American political leaders agree to increase their control over the judiciary \textit{into the future}, by decreasing their control over the judiciary \textit{in the present}. They do freely politicize appointments, for they routinely name party loyalists. By insulating these judges (once appointed) from political control, though, they increase the impact that they will have (through these appointments) after they have

\textsuperscript{89} This LDP electoral dominance is \textit{not} exogenous to the model, even if (for reasons of length) it is beyond the scope of this essay. The institutional reasons for the LDP's long dominance appear in detail in Ramseyer & Rosenbluth, \textit{supra} note 6, chs. 2–5.

\textsuperscript{90} This conclusion is not affected by the LDP's loss in the summer of 1993. The point is not that the LDP had odds of winning of 1. Rather, the point is that its odds were extremely high. \textit{Very} few observers predicted the 1993 LDP loss.

\textsuperscript{91} The point of this essay is \textit{not} that Japanese voters do not have a preference for independent courts. Many Japanese voters do, just as many American voters do. Notwithstanding, they also have preferences for other policies and wish to have them implemented effectively. If a party in power controls the courts, it necessarily gains a greater ability to implement those other policies. The point here is that, given the same tastes for independent courts in Japan and the United States, the contours of the electoral market will more likely cause politicians to maintain independent courts in the United States than in Japan.

\textsuperscript{92} This result is not affected by the factional composition of the LDP. Granted, until its unexpected fracture in 1993, various LDP factions circulated in and out of power. Nonetheless, the party itself remained firmly under the control of a leadership that set goals for the party as a whole and tightly restricted factional competition. See Ramseyer & Rosenbluth, \textit{supra} note 6, chs. 4–5.
lost office. By politicizing appointments but depoliticizing control, in short, they augment their influence during periods when they are out of power. All this they do, of course, at the cost of decreasing their influence over policy while in power: because politicians will have to run the country with independent judges that their predecessors appointed, they will necessarily have less impact over policy while in office.

Liberal Democratic Party politicians adopted the opposite tactic: they increased their control over judges in the present by decreasing their control over them into the future. By giving the party in power control over judges, they increased the electoral stakes. As long as they stayed in power, they kept tight control over policy. Once they lost an election, however, they sacrificed more power than a losing American party would sacrifice. Because LDP leaders rationally expected not to lose, they rationally took the risk.

The American equilibrium rests on nothing more than mutual cooperation. American politicians do not adopt LDP tactics. Yet they avoid them only by implicitly agreeing to use cooperative strategies in what they all recognize as a game that closely resembles an indefinitely repeated Prisoner's Dilemma. In such repeated games, however, implicit cooperation is fragile at best. Parties to indefinitely repeated Prisoner's Dilemmas do not necessarily cooperate. At least theoretically, they may do anything at all. They might agree to insulate their courts. Then again, they might not.

Yet one thing is certain, and that is that rational politicians will not cooperate if they cannot expect their rivals to do the same. The battle over the 1801 Judiciary Act illustrates the problem. Under the new Constitution, the transition in 1801 was the first. At the time, the Federalists had no idea what shape a Republican government would take. Given the French bloodbath and Jefferson's Francophilia, they could easily fear the worst. In that world, to exercise self-restraint out of a hope that the Republicans might reciprocate struck many Federalists as insane. Given that the Federalists showed no self-restraint, neither were the Republi-

---

93 Restated, American politicians politicize appointments but depoliticize control. Japanese politicians politicize control and therefore need not (because of the self-selection among judicial candidates) politicize appointments as strongly.


95 See Eric B. Rasmusen, Games and Information: An Introduction to Game Theory 92 (Basil Blackwell 1989); Drew Fudenberg & Eric Maskin, The Folk Theorem in Repeated Games with Discounting or with Incomplete Information, 54 Econometrica 533 (1986). On the possibility that different “tastes” for judicial independence may explain the choice of different focal points, see note 83 supra.
cans inclined to restrain themselves. Only as the decades passed and the parties alternated in power regularly did cooperation (and greater judicial independence) eventually evolve.

Although two parties alternated in power in imperial Japan, by 1931 they also intervened in the courts. Here, the explanation lies in the fear of a military takeover. Parties to a repeated Prisoner's Dilemma will often defect if they expect the game to end soon. The higher the odds that it will end, the higher the odds they will defect. By the late 1920s, few Japanese expected democracy to continue. The military had almost entirely removed itself from civilian control. Abroad, it was aggressively expanding onto the continent. Domestically, it was beginning to threaten coups d'état. Democracy was on borrowed time, and most Japanese knew it. For just that reason, rational politicians increasingly adopted endgame tactics.

If all this be true, then whether any coalition of rational voters will provide independent courts depends primarily on electoral probabilities. At root, it involves three possibilities.

1. Coalition X is in power but expects to alternate in power with Coalition Y indefinitely (the modern American parties). Coalition X may rationally decide to keep judges independent, but nothing in game theory says it necessarily will do so.

2. Coalition X is in power and expects to stay in power indefinitely (the postwar LDP). Coalition X may manipulate the courts. Coalition X earns the greatest return from a hand-off-the-courts strategy if it expects to be out of power periodically. If it does not expect to lose power, it has less incentive not to monitor and discipline its judges.

3. Coalition X is in power but expects soon to lose power indefinitely (the prewar Japanese parties). Necessarily, Y is about to take its place indefinitely. Since Y (given the logic in 2) may not find independent courts advantageous, X may expect Y to manipulate the courts. Expecting Y to manipulate them soon, X may find it advantageous anticipatorily to manipulate them itself.

VI. Judges and Bureaucrats

By its own terms, this analysis applies to bureaucrats as much as to judges. While the LDP does control both the bureaus and the courts,

---

97 We explain the political reasons for this in Ramseyer & Rosenbluth, supra note 71, ch. 7.
98 See Ramseyer & Rosenbluth, supra note 6, chs. 6–7.
the same has been not been true of the United States. Although American politicians do not control the courts, they often tightly control their bureaus. Granted, they rarely intervene in them directly. Yet they do not directly intervene only because bureaucrats anticipate what they want. Knowing politicians can intervene, bureaucrats administer according to the political preferences of the party in power—and the politicians have no reason to intervene. The logic follows the principal-agent analysis in industrial organization; the empirical evidence is overwhelming.99

Politicians in 1920s Japan likewise controlled the bureaus. Table 3, for example, illustrates the ties between staff turnover and political control. Take Table 3A: changes in personnel at the Ministry of Home Affairs at the posts of section chief or higher each year. During the five years when the party controlling the cabinet changed, an average (mean) of 79.4 people changed office. In the six years when the party did not change, an average of 35.2 people changed office. Whenever a cabinet succeeded a rival party cabinet, mid- and senior-level turnover doubled.

Similarly, take Table 3B: changes in the governorships. These posts too were under the Ministry of Home Affairs. On the two occasions when a cabinet succeeded another cabinet from the same party, the new cabinet replaced almost no governors. When a cabinet succeeded a rival party cabinet, it immediately replaced almost all governors.

These data raise a further puzzle: why did the prewar Japanese politicians manipulate the bureaus earlier and more aggressively than the courts? The answer probably lies in electoral advantage. By the 1920s, party politicians realized that they were in an endgame and abandoned any cooperative strategies they might have played. Once they had decided to renege, however, they had to decide where to concentrate their resources. If we can validly assume (as is customary in political science) that politicians maximize their reelection chances, then the prewar politicians would have decided to manipulate first those institutions with the most immediate electoral effect.

In imperial Japan, the bureau with the most immediate electoral implications was the Ministry of Home Affairs. The Home Ministry controlled

---

TABLE 3
PERSONNEL CHANGES IN THE MINISTRY OF HOME AFFAIRS

<table>
<thead>
<tr>
<th>Year</th>
<th>Cabinet Shift</th>
<th>No. of Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1921</td>
<td>S to S</td>
<td>13</td>
</tr>
<tr>
<td>1922</td>
<td>S to N</td>
<td>51</td>
</tr>
<tr>
<td>1923</td>
<td>N to N</td>
<td>48</td>
</tr>
<tr>
<td>1924</td>
<td>N to N and N to K</td>
<td>80</td>
</tr>
<tr>
<td>1925</td>
<td>None</td>
<td>38</td>
</tr>
<tr>
<td>1926</td>
<td>K to K</td>
<td>46</td>
</tr>
<tr>
<td>1927</td>
<td>K to S</td>
<td>73</td>
</tr>
<tr>
<td>1928</td>
<td>None</td>
<td>39</td>
</tr>
<tr>
<td>1929</td>
<td>S to M</td>
<td>77</td>
</tr>
<tr>
<td>1930</td>
<td>None</td>
<td>27</td>
</tr>
<tr>
<td>1931</td>
<td>M to S</td>
<td>116</td>
</tr>
</tbody>
</table>

B. Governorship Turnover

<table>
<thead>
<tr>
<th>Cabinet Date</th>
<th>Prime Minister</th>
<th>Party</th>
<th>Turnover Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 11, 1924</td>
<td>Katō</td>
<td>K</td>
<td>27/45</td>
</tr>
<tr>
<td>June 30, 1926</td>
<td>Wakatsuki</td>
<td>K</td>
<td>0/45</td>
</tr>
<tr>
<td>April 20, 1927</td>
<td>Tanaka</td>
<td>S</td>
<td>40/45</td>
</tr>
<tr>
<td>July 2, 1929</td>
<td>Hamaguchi</td>
<td>M</td>
<td>35/45</td>
</tr>
<tr>
<td>April 14, 1931</td>
<td>Wakatsuki</td>
<td>M</td>
<td>6/45</td>
</tr>
<tr>
<td>December 13, 1931</td>
<td>Inukai</td>
<td>S</td>
<td>41/45</td>
</tr>
</tbody>
</table>

SOURCE.—Calculated from data found in Ikuhiko Hata, Senzenki Nihon kanryōsei no seido, soshiki, jinji [The system, organization, and personnel of the pre-war Japanese civil service] (1981).

NOTE.—By “major personnel” changes, I refer to the number of changes in personnel at the level of section chief (kachō) or higher during the calendar year. S is a Seiyūkai cabinet, N is a nonparty cabinet, K is a Kenseikai cabinet, and M is a Minseitō cabinet. By turnover in governorships, I refer to new governors appointed within one month after the change in cabinet.

depende of courts.

the police, and the police supervised electoral campaigns. Through the police, the party in power could harass its opponents. Five days before the 1928 general election, for instance, the police had already filed electoral law charges against 638 people, and almost all were opposition party supporters.100 “The police only reported the actions of the parties out of power,” onetime prime minister Takashi Hara had once observed. They largely “left the government party alone to do as it pleased.”101

Even if courts mattered in elections, they mattered less directly. Con-

100 Tōkyō Asahi Shimbun [Tokyo Asahi Newspaper], February 15, 1928.
sequently, party politicians did not begin to manipulate them until they had learned how to manipulate the more immediately relevant institutions. They had, after all, only recently taken control of the government. Before they could manipulate any government institution, they needed first to learn how it worked. Accordingly, they concentrated their resources first on the institutions with the greatest electoral impact. They turned to courts only later.

The American phenomena remain a puzzle. With respect to the courts, the theory above suggests that American politicians play the cooperative equilibrium in what resembles an indefinitely repeated Prisoner’s Dilemma. With respect to the bureaus, it suggests they do not. The apparent contradiction is consistent with game theory, however, for in indefinitely repeated games, any outcome is an equilibrium. Just as parties alternating in power indefinitely might leave courts or bureaus independent, they might not. In one equilibrium, they might leave both courts and bureaus independent. In another, they might leave the courts independent and manipulate bureaus.

Although this theory thus fails to explain why American parties treat bureaus and courts differently,\(^\text{102}\) the other principal theories of judicial independence do not explain it either. Landes and Posner seem implicitly to predict that bureaucracies will be as independent as courts—an outcome the modern American experience contradicts.\(^\text{103}\) McCubbins and Schwartz predict that courts should always be independent and bureaus never—an outcome the Japanese experience contradicts. Under any of these theories, part of the data remains a puzzle.

**VII. Conclusion**

Judicial independence is not primarily a matter of constitutional text. Both the modern Japanese and the modern American constitutions purport to insulate judges from political leaders. Yet modern American politicians do insulate their judges, while Japanese politicians do not. American politicians appoint party loyalists, but once they appoint them intervene no further. Japanese politicians intervene regularly to ensure that their judges stay loyal. American politicians could restructure their courts to enable them to intervene as Japanese politicians do. Notwithstanding, they do not.

Instead, judicial independence may be a matter of electoral exigency.

---

\(^{102}\) One way to "solve" this problem, of course, is to turn to tastes: stronger voter tastes for independent courts than for independent bureaus. See generally note 83 supra.

\(^{103}\) Although Landes & Posner, supra note 5, at 887–88, contrast courts with agencies, they do not explain why rational politicians would not keep agencies independent.
Although both American and Japanese political leaders must compete in electoral markets, LDP leaders competed far more successfully than the leaders of either the Democratic or the Republican parties. As a result, LDP leaders had better odds of retaining control. Having better odds, they faced lower risk-adjusted costs to nonindependent judicialities. With lower costs, they opted for nonindependent judges and closely monitored their judicial agents.

Effectively, independent courts may represent a cooperative equilibrium to a game that closely resembles an indefinitely repeated Prisoner's Dilemma. As such, they represent one outcome—but not a unique one. In indefinitely repeated Prisoner’s Dilemmas, any outcome is an equilibrium. Only if a repeated Prisoner’s Dilemma is about to end do the outcomes become more predictable. Where one party expects to win elections consistently, for example, it may well decide not to keep courts independent. Similarly, when both parties expect the electoral market to end soon, they will not keep courts independent. Landes and Posner nicely captured the electoral logic behind the American judicial system. In doing so, however, they captured a special case—a result peculiar to electoral markets where all parties perform erratically. In this paper, I generalize the theory to a broader range of competitive electoral markets.

Potentially, the fifty American states present a more systematic test of this theory. The various states maintain courts with a wide range of institutional independence. In some states, politicians and voters keep close control over judicial careers; in others, they offer judges an independence akin to that of federal judges. Over the past century, the fifty states have also presented electoral markets with a wide range of political variability. In some states, one party maintained a lock on power for decades; elsewhere, the parties alternated regularly in office. The theory above suggests (a) that states with alternating parties may or may not maintain independent courts but (b) that states where one party regularly wins elections will be far less likely to maintain independent courts.

I have not performed that systematic test. Instead, I offer here a more modest essay—one with three archetypal examples. In the modern United States, neither party controls either the legislature or the presidency. The parties maintain a strict hands-off-the-courts rule. In postwar Japan, one party dominated the electoral market. It consistently offered nonindependent courts. In prewar Japan, both parties knew that the military would likely usurp government soon. They too eventually offered nonindependent courts. Despite most of what we teach in law schools, I suggest, judicial independence has had less to do with constitutional texts. It has had more to do with elections.