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PREDICTING COURT OUTCOMES THROUGH POLITICAL PREFERENCES: THE JAPANESE SUPREME COURT AND THE CHOAS OF 1993

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Predicting Court Outcomes through Political Preferences: The Japanese Supreme Court and the Chaos of 1993

By J. Mark Ramseyer*

Abstract: Empirical students of the U.S. courts successfully explain some court decisions through the party of the executive or legislature that appointed the judge. Others (including some judges) find these studies offensive. In taking offense, they miss a crucial implication: appointment politics predict judicial outcomes only when courts are independent.

Japanese Supreme Court justices enjoy an independence similar to that of their American peers, but their lower-court colleagues do not. Although the Liberal Democratic Party (LDP) has governed Japan for most of the post-war period, it temporarily lost power in the mid-1990s. Elsewhere, Eric Rasmusen and I ask whether this non-LDP hiatus changed the administration of the lower courts. Here, I ask whether the non-LDP prime ministers appointed Supreme Court justices with different policy preferences than their LDP predecessors. I find that they did not.

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In the universities, we try hard to understand why judges decide cases the way they do. In the U.S., we find that (in some subsets of cases) we can predict the way they decide through proxies for their political preferences. Most obviously, sometimes we can predict their decisions through the party of their appointing president or legislature.[1]

These studies work because judges are independent and human. In conducting them, we use standard social scientific tools. And social science explains how judges act because it concerns human behavior -- and judges are, after all, human beings. As Judge Richard Posner put it, they are "all-too-human workers, responding as other workers do to the conditions of the labor market in which they work."[2] In a 1993 essay, Posner asked What Do Judges Maximize?[3] We in the academy may disagree about the details, but few of us would quarrel with his "bottom line": "The same thing everyone else does."

Other judges have been less sympathetic. When Richard Revesz used the party of the appointing president to predict voting patterns on the D.C. Circuit,[4] Judge Harry Edwards declared war: it was time to "refute the heedless observations of academic scholars who misconstrue and misunderstand the work of ... judges."[5] When Frank B. Cross and Emerson H. Tiller characterized dissenting judges as whistle-blowers,[6] he dismissed their piece as an "absurd" bit "of sheer speculation."[7]

Like the Shakespearian lady, the D.C. judge doth protest too much. He also misses the point. If Edwards thinks attempts to predict judicial votes through political variables demeaning, he misses the way they capture the fundamental independence of the federal courts. Were courts not independent, judges could not costlessly indulge their political biases. And if they could not indulge them at low cost, they would not indulge them often. That they act politically in political cases simply reflects their essential

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[1] E.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, The Median Justice on the United States Supreme Court, 83 N.C. L. Rev. 1275 (2005); Tracey E. George, Developing a Positive Theory of Decision Making on U.S. Courts of Appeals, 58 Ohio St. L.J. 1635 (1998); Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 Am. Pol. Sci. Rev. 557 (1989).

[2] Richard A. Posner, How Judges Think 7 (2008).

[3] Richard A. Posner, What Do Judges Maximize? The Same Thing Everyone Else Does, 3 Sup. Ct. Econ. Rev. 1 (1993).

[4] Richard Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717 (1997).

[5] Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 Va. L. Rev. 1335, 1335 (1998).

[6] Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155 (1998).

[7] Edwards, supra note x, at 1337.

independence. That politics matters should not embarrass. To the extent judicial independence is a good, it should engender pride.

Political preferences matter in federal judicial decision-making only because federal judges face so few other incentives. Among the things people maximize, ideological preferences usually rank low. Not always, to be sure. The steady run of religious violence from the Reformation through the intifada reminds us that ideology is not always a trivial concern. Usually, however, people earn their livelihood first. Many pamper their careers as well, but most leave their political preferences for an on-time-available basis. Not so federal judges. In federal courts, politics do matter -- but only because the judges face no incentives tied to their incomes or careers.

One cannot have it both ways. Either judges are independent, and we can sometimes predict their behavior through their political preferences, or they are not independent. If independent, they can do as they please. After all, such is what independence is all about. Judges may want to follow the law, but they are human. Like other humans, they will want to indulge a variety of other ends as well, and for many judges those other ends will include political preferences. Necessarily, if judges are independent, then scholars will be able to predict their decisions (in a subset of cases) by those political preferences.

By contrast, if judges are not independent, typically they will lack the chance costlessly to indulge their politics. They will face incentives tied to more basic concerns like income and career. If they hope to protect their incomes or careers, they will enjoy less leeway to indulge their political leanings. Conversely, if we cannot predict case outcomes through measures of their political inclinations, then perhaps they lack the insulation from hard-edged incentives we call institutional independence.

As a contrasting example, I take modern Japan. The Japanese lower courts are good courts. On matters quotidian, they are in many ways wonderful courts. They are relatively fast, and honest and predictable besides. But they are not politically independent. Elsewhere, Eric Rasmusen and I find that lower-court judges face incentives that closely tie their career success to the politics they indulge in their decisions.[8]

Unlike lower-court judges in Japan, Japanese Supreme Court justices do enjoy politically independent careers. Once appointed, they serve until age 70 -- and effectively face no incentives tied to their incomes, wealth, or careers. In the article that follows, I explore whether appointment politics explain their opinions.

More particularly, I turn to the few short years in the mid-1990s when three reformist prime ministers briefly broke the hold of what had been the ruling Liberal

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[8] J. Mark Ramseyer & Eric B. Rasmusen, Measuring Judicial Independence: The Political Economy of Judging in Japan (2003) (hereinafter Ramseyer & Rasmusen (2003)); J. Mark Ramseyer & Eric B. Rasmusen, Political Uncertainty's Effect on Judicial Recruitment and Retention: Japan in the 1990s, 35 J. Comparative Econ. 329 (2007) (hereinafter Ramseyer & Rasmusen (2007)); J. Mark Ramseyer & Eric B. Rasmusen, The Case for Managed Judges: Learning from Japan After the Political Upheaval of 1993, 154 U. Pa. L. Rev. 1879 (2006) (hereinafter Ramseyer & Rasmusen (2006)); J. Mark Ramseyer & Eric B. Rasmusen, Why Are Japanese Judges So Conservative in Politically Charged Cases?, 95 Am. Pol. Sci. Rev. 331 (2001) (hereinafter Ramseyer & Rasmusen (2001a)); J. Mark Ramseyer & Eric B. Rasmusen,Why Is the Japanese Conviction Rate so High?, 30 J. Legal Stud. 53 (2001) (hereinafter Ramseyer & Rasmusen (2001b)); J. Mark Ramseyer & Eric B. Rasmusen,Why the Japanese Taxpayer Always Loses, 79 S. Cal. L. Rev. 571 (1999) (hereinafter Ramseyer & Rasmusen (1999)); J. Mark Ramseyer & Eric B. Rasmusen, Judicial Independence in a Civil Law Regime: The Evidence from Japan, 13 J. L. Econ. & Org. 259 (1997) (hereinafter Ramseyer & Rasmusen (1997)).

Democratic Party (LDP). I ask whether these reformist prime ministers tried to transform the courts. Because politicians control the Japanese lower courts only indirectly through the Supreme Court, a premier who hoped to change the courts would have stacked the Supreme Court with justices who shared his reformist instincts. Those instincts, in turn, would have reflected a different set of policy preferences; and given the institutional independence of the Supreme Court, those different policy preferences would have been observable in the opinions the justices wrote.

Put differently, if the non-LDP prime ministers had hoped to transform the courts, they would have appointed justices who wrote different opinions than their LDP predecessors. Before testing whether the opinions differed, I discuss the ties between career incentives and judicial independence (Section I). I explain Japanese court structure (Sections II and III), and the political turmoil of 1993 (Section IV). I conclude by testing whether the LDP and reformist justices wrote different opinions (Section V).

I. Independence

A. Within Markets:

Few scholars would try to use ideological or political variables to predict the way corporate CEOs run their businesses. It is not that CEOs do not hold strong preferences. Like most humans, they hold preferences over a wide range of issues. And like most, they bring these preferences to their jobs.

Nonetheless, scholars seldom try to use ideological or political preferences to explain the way CEOs do their jobs. Even when the CEOs hold such preferences over the precise issues a business faces, scholars ignore them. They ignore them because they do not matter: the preferences do not explain much that CEOs do.

The reason is simple -- CEOs operate under market constraints. There are exceptions, to be sure. Environmentalist executives may locate politically congenial careers in "green" technologies. Leftist financiers may market "social choice" mutual funds. Religiously driven managers may run church non-profits.

Yet within most industries, market competition prevents executives from much indulging their ideological and political biases. Ultimately, CEOs run their firms within the confines of capital, labor, and service and product markets. Choose a strategy for ideological rather than economic reasons, and they risk losing customers. Left on their own, they risk running their firm out of business. Fundamentally, incumbent CEOs do not maximize economic returns because they "believe" in those returns more strongly than they believe in ideology or politics. They maximize economic returns because competitive markets weed them out if they do anything else.

B. Within Institutions:

Scholars find politics similarly irrelevant within tightly run organizations. Even were an organization insulated from economic markets, scholars would find employee political preferences mostly beside the point. Take a think-tank owned by Party A. A maintains the institute to promote its own policies. Obviously, it does not want its research staff using it to promote the policies of rival Party B.

Given this environment, institute employees who championed anything other than Party A policies would find themselves at a dead end. In general, the institute would not promote them as rapidly as their peers. It would not pay them as generously. Should

they complete a study that recommended Party B policies, it would tend not to publish it. Whatever private preferences such an employee might hold, his published work will tend to endorse A's policies. Even if a scholar knew the employee's private preferences, he would seldom find them helpful in predicting what the institute might do.

Crucial to this equilibrium is Party A's power potentially to intervene in internal institute affairs.[9] Whether A actually intervenes matters only if it demonstrates that power. For as long as A can intervene, it will not need actually to do so. Rather than risk A's punishment, incumbent employees will promote A's positions on their own. Were an outspoken follower of Party B to apply for work, incumbent employees likely would not hire him. Knowing that A had the power to intervene in personnel matters, few B partisans would bother applying for the job anyway. They realize the institute will tend not to promote them, not to pay them well, and not to publish the studies they write. Rather than apply at the institute, they will opt for more gratifying work elsewhere.

C. Within Courts:

1. Independence. -- Political preferences explain judicial decisions in the U.S. precisely because -- by Constitution, by statute, and by custom -- politicians have insulated the courts from the usual "high-powered" incentives that ordinary humans face. Edwards' colleagues on the D.C. Circuit can decide cases as they please, and suffer no ill effect. Write an opinion that displeases the President or the Chief Justice or the Attorney General or the Speaker of the House -- write an opinion that flouts convention, and they will not earn a lower salary. They will not miss a promotion, or find their opinions denied publication. Even less will their court go out of business.

Edwards' colleagues can do as they please for a simple reason: politicians have chosen to keep their court independent.[10] And because politicians have kept the court independent, scholars can sometimes predict case outcomes by a judge's political preferences. Precisely because politicians do not punish a judge for indulging private preferences, a scholar can sometimes use those preferences to predict how a judge will decide.

2. Dependence. -- By contrast, suppose a powerful politician (say, the Prime Minister in a parliamentary government) controlled the courts more closely. Suppose he hired subordinates to monitor the way judges behaved. Suppose he controlled resources (like pay scale assignments) that judges valued. And suppose he used that control to promote his own political preferences.

Within this judicial environment, scholars could seldom predict judicial behavior through judicial preferences. In this environment, a heterodox judge who indulged his private preferences would find his career stalled. He might not be appointed to

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[9] Randall Law Calvert, Mathew D. McCubbins & Barry R. Weingast, Congressional Influence over Policy Making: The Case of the FTC, in Mathew D. McCubbins & Terry Sullivan, eds., Congress: Structure and Policy 493, 514-17 (Cambridge: Cambridge University Press, 1987).

[10] For a discussion of why U.S. politicians find it advantageous to do so, see J. Mark Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, 23 J. Legal Stud. 721 (1994); F. Andrew Hanssen, Is There a Politically Optimal Level of Judicial Independence, 94 Am. Econ. Rev. 712 (2004); Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases ch. 1 (Cambridge: Cambridge University Press, 2003).

prestigious posts. He might find his salary frozen. He might not even see his opinions published. Realizing the potential cost of heterodoxy, most such judges would keep their preferences to themselves. And contemplating a life of enforced compliance, many more heterodox jurists would opt for life in the private bar instead.

As a result, a judge's political preferences will help predict judicial decisions only where politicians keep the courts independent of themselves. Should politicians do so, a judge will find it relatively costless to decide cases by his private preferences. In the routine business of court decision-making, he will seldom focus on those preferences. After all, few judges hold heterodox beliefs (whatever those might be) about traffic accident and or consumer debt claims. In the unusual but politically newsworthy cases of constitutional moment, however, judges may indeed disagree with each other about how to decide the case. Those disagreements, in turn, will track their private political preferences.

Hence the moral: where politicians keep the courts independent, court outcomes will tend to track private judicial preferences; where politicians do not do so, those private preferences simply will not matter.

II. The Japanese Courts[11]

A. The Incentives:

Remarkably closely, this account of the Party A think tank captures the internal dynamics of the Japanese courts. For most of the past half-century, the courts recruited their lower-court judges from (what was until recently) the sole national law school, the Legal Research & Training Institute (LRTI). In a typical year, they hired 70-100 new judges. These men and women (in 1998, 81 percent were still men)[12] then served a series of renewable ten-year terms. The courts almost always renewed those terms, and most judges quit a few years before the mandatory retirement age of 65.[13]

During their careers, lower-court judges moved from post to post and city to city, usually at three-year intervals. Some posts carried more prestige than others. Among the most coveted were those with administrative power: chief judgeships, for example, or positions in the judicial administrative headquarters known as the Supreme Court Secretariat. Among the least desirable were the branch offices and family courts.

Similarly, some cities offered more appeal than others. Like other professionals, most Japanese judges preferred to live in the urban centers. There, they found the best preparatory schools for their children and the greatest amenities for themselves. Among those centers, most judges preferred Tokyo, if not Tokyo then Osaka, and if not Osaka then one of the regional centers. Should a Tokyo judge find himself posted to a small town, he typically left his family in Tokyo. He moved there alone, and then prayed for a reassignment to Tokyo three years hence.

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[11] I take the general description below from Ramseyer & Rasmusen (2003), supra note x; an alternative (but largely consistent) general description is available at John O. Haley, The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust, in Law in Japan: A Turning Point 99 (Daniel H. Foote, ed., 2007).

[12] Ramseyer & Rasmusen (2006), supra note, at 1886 tab. 3.

[13] Saibansho ho [Courts Act], Law No. 59 of 1947, Sec. 50 (hereinafter cited as Courts Act).

And some judges earned more than others, even more than others of the same age. Granted, Article 80 of the Constitution declares that "judges of the inferior courts shall receive ... adequate compensation which shall not be decreased."[14] But to protect against pay cuts is one thing. To guarantee uniform increases is quite another. As life-long employees, Japanese judges start their careers at low pay.[15] If they climb the pay scale rapidly they will in time earn attractive salaries, but the Constitution does not guarantee a rapid climb. By controlling the pace at which they climb the scale, the courts can use the highest of the high-powered incentives to control the way their judges behave.

B. Control:

1. Administrative ties. -- These decisions about which judge to post in which position to which city at what pay grade are decisions controlled by the judges in the Secretariat. These judges too hold standard lower-court appointments and serve in the Secretariat for the standard three-year term -- but the Secretariat is not a standard post. Instead, it is among the fairest posts of them all. Judges named to the Secretariat are judges in a hurry. Typically, they will move in and out of the most coveted Tokyo and Osaka jobs, rotate through a series of increasingly prestigious appointments, and cap their careers as a District Court Chief Judge or High (i.e., intermediate appellate) Court President (i.e., chief judge).

At the Secretariat, judges decide the personnel questions that determine their colleagues' careers. In doing so, they answer to the Secretariat's own Secretary General. The Secretary General too is a career judge, typically in his 50s. After running the Secretariat for several years, he will be named President of the Tokyo or Osaka High Court (there are seven high courts, but these presidencies are the most avidly desired). Often, he will then be appointed a justice to the Supreme Court itself.

The Secretary General answers to the Supreme Court Chief Justice. Put conversely, the Chief Justice monitors the Secretary General; the Secretary General supervises the judges staffing the Secretariat; and the Secretariat judges make the decisions that determine the fate of their peers in the lower courts.[16]

2. Political ties. -- The ruling LDP does indeed control the Japanese lower courts. Formally, it controls it indirectly -- through its power to appointment the fifteen Supreme Court justices, including the administratively crucial Chief Justice. The LDP controls the Cabinet, after all, and the Cabinet selects the fifteen justices to the Court.[17] To avoid the "Harry Blackmun problem," it names its justices late in their lives. Appoint a justice in his 40s, and he could change his political believes several times before he retires (though Blackmun himself was over 60). To mitigate this risk, the LDP can and does appoint justices close to their mandatory retirement at age 70. From 1983 through 1992, it named

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[14] Kempo [Constitution], effective May 3, 1947, at Art. 80. (hereinafter cited as Constitution).

[15] For the pay scale as of the late 1980s, see J. Mark Ramseyer & Frances McCall Rosenbluth, Japan's Political Marketplace 155 tab. 8.2 (Cambridge: Harvard University Press, 1993).

[16] Courts Act, supra note x., at Sec. 53.

[17] Constitution, supra note x, at Art. 79; Courts Act, supra note x, at Sec. 39.

26 men to the Supreme court. It named one at age 60, one at 61, one at 62, and the rest between 63 and 67 (mean: 64.3).[18]

Through the Diet, the LDP can also constrain the ability of the judges to make law. Japan maintains a parliamentary system of government. For much of the post-war period, Japanese voters elected enough legislators from the LDP for the party to field cabinets without a coalition. Were a heterodox judge to try to shape the case law, the party stood ready to reverse him through legislation.[19] Even were higher courts not to overturn his opinion on appeal (and usually they would), the legislature could vitiate its prospective impact by statute.

C. Quality and Quantity:

1. Quality control. -- With this control, the LDP does not primarily manipulate the political complexion of judicial opinions. After all, most opinions have no serious political complexion to manipulate. Instead, it offers voters high quality. It routes the rare politically loaded disputes out of the courts, and (through the Secretariat) induces the courts to handle the remaining "ordinary" cases expeditiously, intelligently, honestly, and consistently.[20]

Japanese judges resolve most cases with dispatch. Despite having many fewer judges per capita than the U.S., the Japanese courts decide cases at the pace of the high-quality federal courts in the U.S.[21] According to court insiders, the Secretariat maintains this pace by collecting docket-clearance rates on all judges and using them to reward and punish. Unfortunately, the rates are not public. The (plausibly correlated) rates at which judges write published opinions are indeed public, however, and judges who write more publishable opinions per year do find themselves appointed to the better posts.[22]

Second, Japanese judges decide like cases similarly. Probably, the Secretariat rewards its judges for following precedent. After all, Japanese courts are nothing if not predictable. Curiously, however, judges who publish opinions that are reversed on appeal do not visibly suffer in their careers.[23] In fact, though, the case reporters print only a small minority of decisions, and perhaps a judge who writes publishable opinions that are reversed on appeal is still producing higher-quality output than a judge who publishes nothing at all.

In any event, Japanese courts work hard to maintain consistency across opinions. The Secretariat occasionally operates workshops on frequently litigated legal issues. And,

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[18] Ramseyer & Rasmusen (2006), supra note x, at 1882-83, Tabs. 1 & 2.

[19] See, e.g., McNollgast, Conditions for Judicial Independence, __ J. Contemporary Legal Issues __ (2006).

[20] An evaluation with which Haley apparently agrees. See Haley (2007), supra note x; Frank K. Upham, Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary, 30 L. & Soc. Inquiry 421 (2006).

[21] See, e.g., J. Mark Ramseyer & Minoru Nakazato, Japanese Law: An Economic Approach 140-41 tab. 6.1 (Chicago: University of Chicago Press, 1998).

[22] See, e.g., Ramseyer & Rasmusen (2003), supra note x, at 54 tab. 3.4, 67 tab. 4.2, 71 tab. 4.5, 90 tab. 5.3, 94 tab. 5.5.

[23] See, e.g., Ramseyer & Rasmusen (2003), supra note x, at 76-80.

by way of example, Daniel Foote has nicely documented how judges deliberately engineered consistency to the booming traffic-accident litigation in the 1970s.[24]

2. The returns to talent. -- The Secretariat maintains this high level of quality by rewarding talent. Put most pedantically, it appoints to the most desirable posts and cities those judges who exhibit traits most closely correlated with the diligence and intelligence necessary to run high quality courts. Put more colloquially, it rewards the smart and hard working.

Consider judicial backgrounds. Smart and hard-working judges tend to have been smart and hard working students. And smart and hard-working students tend to do well on important exams. The qualities that enable students to score high on exams, in other words, also enable them as judges to handle cases quickly and accurately. And the judges who succeeded most prominently as students tend to succeed most prominently in the courts.

First, the judges who attended the schools with the most selective entrance examinations enjoy the most successful careers. They begin at the most coveted courts. Throughout their career, they spend more time in prestigious assignments, and more time in the desirable cities. They climb the pay scale more rapidly. And they more likely conclude their careers with an appointment to a Chief Judgeship.[25]

The private market generates an analogous result. Provided they practice in Tokyo, attorneys from the University of Tokyo earn the highest incomes. The university has long maintained the most restrictive entrance exam. Given the prestige of the courts, a high fraction of judges have traditionally come from the University of Tokyo.[26] And just as University of Tokyo graduates on the bench tend to do better than their colleagues, University of Tokyo lawyers in the competitive private market in Tokyo tend to earn higher incomes than their competitors.[27]

Second, the judges who passed the LRTI entrance exam most quickly have the most successful careers. During most of the past half-century, the passage rate on the exam hovered in the 1-3 percent range. Most exam-takers never passed, and the average lawyer finally passed it only after failing 6 or 7 times first.[28] Consistent again with the high prestige of the courts, the average judge passed it more quickly than the average lawyer: the average judge failed it "only" 3 to 5 times.[29] But among the judges, those who failed it fewer times started at the best courts, spent more time in prestigious posts,

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[24] See Daniel Foote, Resolution of Traffic Accident Disputes and Judicial Activism in Japan, 25 L. Japan 19 (1995).

[25] A point described at length throughout Ramseyer & Rasmusen (2003), supra note x.

[26] See Ramseyer & Rasmusen (2007), supra note x, at 355 tab. 1A.

[27] Minoru Nakazato, J. Mark Ramseyer & Eric B. Rasmusen, The Industrial Organization of the Japanese Bar, Harvard Law & Economics Discussion Paper 559 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951622.

[28] See Nakazato, Ramseyer & Rasmusen, supra note x.

[29] See Ramseyer & Rasmusen (2007), supra note x, at 355 tab. 1A.

spent more time in desirable cities, climbed the pay scale more rapidly, and more likely ended their career as a Chief Judge.[30]

Again, the private market generates the same result. Whether in Tokyo or the smaller cities, the lawyers who passed the exam most quickly report the highest incomes later in their careers.[31] Passing exams requires intelligence and hard work, and those qualities are ones that employers and clients value. Whether on the market or in the courts, the smartest and hardest working jurists enjoy the most successful careers.

III. Politics in the Japanese Courts

A. Structure:

This institutional control over the Japanese lower courts may mostly conduce to high quality, but it also involves politics. The Secretariat does not just manipulate the incentives available to it to promote speed and accuracy. It also manipulates them to promote LDP policy. And precisely because the LDP -- through the Secretariat -- controls crucial incentives within the lower courts, scholars will find it hard to use the political preferences of individual lower-court judges to predict their output.

Again, the controls are indirect. The LDP can appoint to the Supreme Court justices who share its political philosophy. Through that Chief Justice, it can monitor and control the Secretary General of the Secretariat. Through the Secretary General, it can set the standards by which the Secretariat staff (judges all) reward and punish individual lower court judges. Through those standards, it can structure a judiciary in which the loyal do well and the heterodox suffer. Through its control over the Diet, it can reverse by statute any case law that a renegade judge might try to make. And because it can do all this, the heterodox will tend to avoid careers in the courts. For a card-carrying Marxist, a career in the Japanese courts is just not a whole lot of fun.

In short, in Japanese lower courts neither judicial output nor expressed judicial preferences will show much political variation. The case law will reflect LDP policies. The sitting judges will express LDP policies publicly. And most of those judges will even hold LDP policies privately. Regress the case law on potential indices of judicial political preference, and insignificant results are a given. Although he characterizes the situation as showing independence, John Haley nicely describes the mechanics at play:[32]

> The potential for partisan or other political intervention motivates the judges assigned to judicial administration to be more vigilant than perhaps they might otherwise be to ensure that the judiciary enjoys the highest levels of public trust. Thus acceptability of judges to politicians has to be viewed in relation to the similar accountability of politicians to the public. ... Individual judges thus function within the shadow of potential political intrusion. They cannot help but be aware that in adjudicating highly publicized, politically sensitive cases, they can be held professionally accountable for their decisions.

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[30] See Ramseyer & Rasmusen (2003), supra note x, at 42 tab. 2.7, 53 tab. 3.3, 54 tab. 3.4, 75 tab. 4.7, 90 tab. 5.3, 92 tab. 5.4, 112 tab. 6.4.

[31] Nakazato, Ramseyer & Rasmusen, supra note x.

[32] Haley, supra note, at 120-21; see also John O. Haley, Book Review, 30 J. Japanese Stud. 235 (2004).

He then concludes:

> Judges themselves, however, exercise the oversight, not politicians directly or indirectly.

In effect, Haley describes "indirect" but straightforward -- and potentially extremely effective -- political oversight.

B. Enforcement:

It was not always so. The LDP and its conservative predecessors did not enforce this control from the start. The current U.S.-imposed (formally Allied-imposed) Constitution took effect on May 3, 1947 under conservative Shigeru Yoshida's first cabinet. Fielding a coalition government, Socialist Tetsu Katayama replaced him a few days later, and held power for about ten months. In August of that year, he appointed the first fifteen justices to the Court.

Back in power in March 1948, Yoshida did not immediately focus on the courts. He had other worries: inflation ran over 50 percent; the Americans had bombed the economy back to the 1930s; his conservative allies stood in disgrace; Allied occupiers were executing the military elite and planning massively to purge the political and business elite; the Americans intended to demand draconian reparations and liquidate the 500 biggest Japanese firms. With crises like these, few prime ministers would have worried about enforcing any orthodoxy in the courts.

Yet with the conservative government probably mandating only haphazard conformity, some jurists on the fringe-left found the courts an attractive career. From the 1950s through the mid-60s, a steady stream of jurists from the Communist-affiliated Young Jurists League (YJL) joined the courts. By 1968, about 12 percent of the incoming judges were League members.[33] Only as the LDP extended its hold into the courts did leftist jurists begin to find them uncongenial.

In time, the YJL judges would suffer career penalties. As the LDP strengthened its control over personnel matters, Eric Rasmusen and I find that the YJL judges began to find themselves posted to inferior positions. Talent and effort held constant, they found themselves named to less prestigious positions, and sent to less attractive cities.[34]

When these politically heterodox judges tried to express their personal preferences in their work, they suffered. Granted, they seldom had reason to express those preferences. Most litigation involved no political issues of moment. But over the politically most sensitive disputes, the judges did have reason to indulge their politics. And when they wrote opinions that deviated from the position held by the LDP leadership, they suffered in their careers. For example, Rasmusen and I find penalties in the careers of judges who:

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[33] Ramseyer & Rasmusen (2006), supra note x, at 1886 tab. 3.

[34] Ramseyer & Rasmusen (2003), supra note x, at 42 tab. 2.7, 54 tab. 3.4, 90 tab. 5.3, 94 tab. 5.5, 112 tab. 6.4, 115 tab. 6.5. We also find that they climbed the pay scale more slowly than equally qualified conservative peers. Ramseyer & Rasmusen (2003), supra note x, at 41 tab. 2.6. This claim is disputed in Kentaro Fukumoto & Mikitaka Masuyama, Measuring Judicial Independence Reconsidered: Survival Analysis of Judicial Careers, unpublished (2008).

a. Acquitted leftist political candidates prosecuted for violating the statutory ban on door-to-door canvassing.[35]
b. Upheld apportionment-based attacks on LDP electoral victories, during the years when the LDP relied on a rural base.[36]
c. Upheld constitutional challenges to the Japanese military.[37]
d. Enforced politically motivated injunctions against the government.[38]

Disproportionately, these judges spent more time during the decade after the opinion in undesirable positions, and less time in the more attractive ones.

IV. 1993

A. Change:[39]

It was the worst of times -- at least for the LDP.

After dominating politics for nearly four decades, the LDP entered the 1990s with a wide range of problems. To pay for its lavish pork-barrel projects, it had enacted a sales tax that alienated a broad swath of voters. Under U.S. pressure, it had imposed trade and investment controls that threatened key constituents. With the end of the Cold War, it had lost any urgency to its anti-communist agenda. As rural families migrated to the cities, it found its agricultural base in increasing disarray. When its famously relaxed approach to matters financial generated a series of bribery scandals, it lost key leaders. And as the country spiraled into recession, it could no longer even promise prosperity.

Within this crisis, in 1993 old rivals decided to settle scores. One-time LDP prime-ministerial candidate Ichiro Ozawa engineered a no-confidence vote, quit the party, and organized a new organization around his old-time protégés. In the election that followed, he and his allies did well, while the rump LDP lost badly. The party's rivals regrouped around Ozawa and another renegade LDP, politician Morihiro Hosokawa, and threw it out of power.

Championing a reformist agenda, Hosokawa took control. Ozawa remained the kingpin, however, and even as prime minister Hosokawa never escaped his influence. Within months, his coalition unraveled. His successor (ex-LDP politician Tsutomu Hata) lasted barely two months.

In this chaos, the Socialists struck a deal with the LDP. Their leader Tomiichi Murayama became Prime Minister -- for the first time since Katayama. Murayama governed through a coalition that included the LDP, however, and even this arrangement quickly disintegrated. He implemented little of the Socialist agenda, and by 1996 the LDP was back in power. It has controlled the Cabinet ever since.

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[35] Ramseyer & Rasmusen (1997), supra note x; Ramseyer & Rasmusen (2003), supra note x, at ch 3

[36] Ramseyer & Rasmusen (2001a), supra note x; Ramseyer & Rasmusen (2003), supra note x, at ch 4

[37] Ramseyer & Rasmusen (2001a), supra note x; Ramseyer & Rasmusen (2003), supra note x, at ch 4

[38] Ramseyer & Rasmusen (2001a), supra note x; Ramseyer & Rasmusen (2003), supra note x, at ch 4

[39] See generally Ramseyer & Rasmusen, supra note (2006), at 1892-93; Ramseyer & Rasmusen (2007), supra note x, at 332-333.

B. The Lower Courts:

Elsewhere, Rasmusen and I explore the effect of the 1993-96 turmoil on the lower courts. We find little to report. On the one hand, the courts retained their bias against leftist judges.[40] Some of the YJL judges from the 1960s, for example, still served in the courts. During the decades leading up to 1993, they endured career penalties. Relative to their more conservative colleagues, they languished in less prestigious posts in less desirable cities.

Much as the Hosokawa-Murayama cabinets might -- hypothetically -- have tried to abolish this anti-left penalty, the bias survived the 1993 crisis. Had the reformists intervened in judicial personnel matters (or had the courts anticipated their intervention), the courts might have changed their relative treatment of YJL and non-YJL judges. They did not: indices of industry and intelligence held constant, after 1993 YJL judges continued to languish in less attractive posts.

On the other hand, the post-1993 courts may have found it marginally harder to retain and recruit the most talented jurists. If incumbent judges believed that nothing had changed in the wake of 1993, then (economic circumstances held constant) the courts should not have found it harder to retain them. If potential applicants believed that nothing had changed, then the courts should not have found it harder to recruit talent.

Yet some evidence -- weak to be sure -- suggests that after 1993 the courts did find it harder to retain and recruit the most talented jurists.[41] Apparently, conservative jurists saw too great a risk that reformist politicians might begin to restructure the courts to stay. Their leftist peers saw too small a chance to apply.

V. 1993 and the Supreme Court

A. The Issue:

The anti-leftist bias in the lower courts survived the 1990s. Apparently, the reformists did not successfully transform the courts. Did they try?

Had the reformists wanted to reform the lower courts, they would have needed to work through the Supreme Court. They would have found it hard. Although the cabinet controls the lower courts, it controls them only through its power to appoint the Supreme Court associate justices (who police the case law through their power to reverse) and the Chief Justice (who supervises the Secretary General). Not until September 1995 had the reformers named a majority to the Court. And not until November 1995 had they named a Chief Justice. By January 1996, the LDP was back in power.

Perhaps, however, the reformists never seriously attempted to reform the courts. Any transformation in the lower courts would have occurred only if they had appointed transformative justices to the Supreme Court. Did they appoint any?

Because Supreme Court justices serve until mandatory retirement at age 70, they face few (if any) of the incentives that structure lower court careers. Once elected -- to put it most bluntly -- they are independent. Because of that independence, any political differences among them could appear in their opinions.

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[40] See Ramseyer & Rasmusen (2006), supra note x.

[41] See Ramseyer & Rasmusen (2007), supra note x.

To test whether Hosokawa and Murayama tried to transform the lower courts, we thus can ask whether the justices they appointed wrote different opinions than their predecessors. In the section below, I first outline the work of the Court (Section B). I then examine the opinions that the justices wrote (Section C), and the voting patterns they exhibited (Section D).

B. Introduction:

1. Workload. -- a. Panels. By statute, the Japanese Supreme Court hears most appeals in one of three five-justice panels. When a dispute raises the constitutionality of a statute or regulation, the Court handles it en banc. When it concerns only legal (rather than constitutional) issues, the Court handles it on one of the three panels.[42]

Such is what the law requires, but such is not what the data suggest.[43] The Japanese Supreme Court hears virtually no cases en banc. In 1990, it published no en banc opinions at all. In 1995 it filed two and in 2000 one (Table 1 Panel A). Whatever the statutory pretext, the Japanese Supreme Court disposes of nearly all its cases through its five-justice panels.

[Insert Table 1 about here.]

b. Discretionary appeals. According to the Civil Procedure Code, the Supreme Court's work fell dramatically in 1998. Until that year, the Court heard all appeals -- it exercised no certiorari-like discretion to decline a case.[44] Since 1998, it can refuse to hear cases that raise merely legal -- rather than constitutional -- issues.[45] Only constitutional cases can it refuse to decline, and the data on en banc decisions suggest such constitutional cases simply do not exist.

But if such is what the law implies, such is not what common sense demands. Before 1998 the Court may not have had the discretion to dismiss an appeal, but it could (and apparently often did) simply opine: "Affirmed for reasons given by the court below." After 1998 the Court may have the discretion not to hear an appeal, but it must (if it hopes to exercise that discretion intelligently) still review an appeal to decide whether it wants to dismiss it. Pre- or post-1998, the amount of work involved in deciding whether to write a serious opinion should have remained roughly unchanged. And pre- or post-1998, the amount of work in actually writing the opinion about the disputes it does treat seriously should have remained unchanged as well.

And indeed, the number of cases where the Court writes a serious opinion has stayed approximately constant. From 1990 to 1995, litigants increased the number of appeals they filed by about 20 percent. From 1995 to 2000, they increased it by over 50

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[42] Courts Act, supra note x, at Sec. 10.

[43] I take the number of opinions from a search of the Hanrei Taikei database. The database compiles the opinions published in all major private and public case reporters. It remains theoretically possible that the Court published other en banc opinions that no reporter bothered to compile. Given that most en banc Supreme Court opinions would be among the most newsworthy opinions in courts, this is highly unlikely.

[44] Minji sosho ho [Code of Civil Procedure], 29 of 1890, Sec. 394.

[45] Minji sosho ho [Code of Civil Procedure], Law No. 109 of 1996, effective Jan. 1, 1998, sec. 312(a), 317(b), 318.

percent. Despite the fact that the Court had new legal authority to refuse their appeal, they filed half again as many appeals (Table 1 Panel B).

In fact, however, the Court did not substantially change the number of serious opinions it issued. In 1990, it published about 200 cases (some of those very short). It published about 170 in 1995, and about 170 in 2000 (Table 1 Panel A). The number of appeals filed may have risen -- but not the number of opinions published.

c. Dissents. Supreme Court justices rarely write dissenting or concurring opinions. Lower court judges never do, but even Supreme Court justices write them only rarely. Of the 168 opinions in 1995, only three included any dissents. Of the 174 opinions in 2000, only 10 did (Tab. 1 Pan. A).

What is more, the justices who did not come from careers in the lower courts or prosecutorial office wrote most of the dissents. Of the 37 justices appointed between 1983 and 1995, the former lawyers wrote a mean 2.38 dissents and 1.62 concurrences during their first 3 years on the bench; the former prosecutors wrote a mean 0.40 dissents and 1.20 concurrences, and the former lower-court judges wrote a mean 0.75 dissents and 0.92 concurrences (Tab. 2, Panel A; for statistical significance, see Panel B).

[Insert Table 2 about here.]

2. Background careers. -- The reformist governments of Hosokawa and Murayama appointed justices with the same backgrounds as did their predecessors. Fundamentally, they continued the customary (but not-legally-mandated) practice of maintaining professional "slots." Justices who came from the professional judiciary they replaced with other professional judges. Former prosecutors they replaced with other prosecutors. And career lawyers they replaced with other lawyers (Table 1 Panel C).

A government intent on reforming the courts would have done otherwise. Under the nearly four-decade-long LDP rule, jurists sharing LDP policy preferences disproportionately would have self-selected into the bureaucracy and the courts. Those with opposition sympathies would have taken (and did take) jobs in the bar or on university faculties. A reformist hoping to stack the Court with like-minded judges might have named more lawyers or professors. According to Table 1 Panel C, neither Hosokawa nor Murayama did.

3. Age at appointment. -- Had the reformists hoped to extend their influence in the courts beyond their expected tenure, they might have appointed young justices. American Presidents do this routinely, of course. John Roberts, Jr., was 50 when appointed in 2005; Samuel Alito was 55 when appointed in 2006. Even Socialist Katayama in 1947 appointed some justices as young as 53 (mean age 59).

Hosokawa and Murayama did not do this. Hosokawa appointed his four at a mean age of 63.0 (range 61-66), and Murayama his five at 62.2 (range 60-64; Tab. 1, Pan. C). Given that Supreme Court justices face mandatory retirement at age 70, all reformist appointees were gone by 2005.

4. University background. -- University background says nothing about politics, of course. Among University of Tokyo alumni, reformist prime ministers could have chosen either capitalists or communists. The University of Tokyo regularly sends its

graduates to the bureaucracy and the exchange-listed corporate ranks. But it counts many Marxists among its faculty and alumni as well -- even the current (as of late 2008) chair of the Japan Communist Party Central Committee, Kazuo Shii.

In any event, Hosokawa and Murayama continued the meritocratic emphasis of their predecessors. Hosokawa chose all of his justices from the University of Tokyo. Of the four appointees on whom university background is public, Murayama took one from the University of Tokyo, and two from generally-second-ranked University of Kyoto (Table 1 Panel C).

C. Opinions Published:

In Panel B of Table 2, I ask whether the reformist-appointed justices wrote different opinions than their LDP-appointed colleagues did. Again, I take the 37 justices named between 1983 and 1995: 28 were appointed by LDP prime ministers, four by Hosokawa, and five by Murayama. Because of their greater administrative workload, I exclude the two Chief Justices. For each justice, I examine the opinions he published during his first three years on the bench.

In Column (1), I regress the number of dissents a justice published against the cabinet that appointed him (the omitted category is appointment by Hosokawa or Murayama). I add additional variables for his professional background (the omitted category is judge) and the total number of decisions in which he participated.

If the reformist-appointed justices decided cases differently than their LDP colleagues, they should have written more dissents. They did not: the coefficient on LDP appointment is insignificantly different from 0. In a second set of regressions, I use as dependent variable the percentage (rather than number) of dissents a justice wrote (among his total output). The coefficient on LDP remains insignificant: reformist-appointed justices did not dissent more often than their predecessors.

The LDP justices would have dominated the Court most strongly during the first years of the Hosokawa administration. After all, they constituted the largest block during those early years. In other regressions (not reported), I disaggregate the Hosokawa and Murayama justices, and ask whether the former were most likely to dissent. They were not.

In Column (2), I regress the number of concurrences (and percentage of concurrences) against a justice's appointing cabinet. Again, the coefficient on LDP appointment is insignificant: the reformist appointees did not write more concurrences than the LDP appointees.

The private case reporters print opinions their publishers find newsworthy, while the official reporters print opinions selected by Secretariat staff. During the reformist cabinets, LDP-appointed lower-court judges still controlled the Secretariat. Suppose reformist-appointed justices wrote opinions that flouted LDP preferences. If they did, (a) the major private reporters would have found them newsworthy, while (b) the official reporters would have hesitated to grant them their imprimatur.

In Column (3) I take as my dependent variable the number of opinions published in at least one of the two principal private reporters (Hanrei taimuzu or Hanrei jiho) but not in any of the official reporters. I then regress this count against the party that appointed the justice. Curiously, the coefficient on LDP-appointment is significantly

positive: the LDP appointed justices were more likely than their reformist colleagues to have opinions published by the major private but not official reporters.

In Column (4), I regress the number of opinions published in an official reporter against the party that appointed the justice. The coefficient on the justice's appointing party is insignificant: LPD-appointed justices were no more likely than their reformist colleagues to obtain the imprimatur of official publication.

D. Voting Alignments:

If the reformist-appointed justices brought a distinctive policy perspective to their work, they should have tended to vote as a block. Disproportionately, they should have voted with each other and against their LDP-appointed colleagues.

To explore this hypothesis, in Table 3 I take all 12 en banc opinions published between January 1, 1993 and December 31, 2002 that included a dissenting or concurring opinion. As Panel A shows, both the LDP and the "reform" blocks of justices routinely split their votes. In general, a justice appointed by Hosokawa or Murayama seems as likely to have voted with the LDP justices as with the other Hosokawa-Murayama appointees.

In Panel B I report the correlation coefficients (and p-values) for a given justice's vote and the percentage of other LDP-appointed or reform-appointed justices voting in the same direction.[46] According to Panel B.1., any given LDP justice's vote may be more strongly correlated with the votes of the reformist-appointed justices than with the other LDP appointees. According to B.2, the correlation coefficients between any reformist-appointee's vote and the percentage of LDP-appointees and reform-appointees voting in the same direction are indistinguishable.

[Insert Table 3 about here.]

E. Significance:

1. Introduction. -- The reformist-appointed justices did not write more dissents. They did not write opinions that the commercial press found unusually newsworthy. They did not write opinions that Secretariat editors shunned. They did not vote as a block.

The data tell us all this. But they do not tell us why. In this regard, consider the following four possibilities.

2. Judicial ideology. -- At one level, the data suggest that the justices (both LDP and reformist) may see their job as voting the law. Indulging their political preferences they perhaps think illegitimate. If they shun politics and follow the law, the results above follow.

And at some level, the point is surely true. The Japanese public sees a judge's job as enforcing the law. Probably, so do the judges.

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[46] For example, the correlation coefficient between a given LDP appointee's vote for the majority and the percentage of other LDP justices who voted for the majority was -.04 (p value = .7). The correlation coefficient between his vote for the dissent and the percentage of other LDP justices who voted for the dissent is -.05 (p value = .6). The discrepancy between the two correlation matrices comes from the fact that the percentages are of the other LDP justices, not all LDP justices. A concurrence is counted as a vote for the majority.

For a U.S.-Japan comparison, however, the point is also irrelevant. American voters, too, see the judicial job as that of voting the law. Obviously, so does Harry Edwards. When he writes what he does, he confirms an ethic as deeply held in the U.S. as in Japan. Many Japanese judges do indeed see political judging as improper -- but so do many American judges.

3. Strategic voting. -- A justice' public votes may also reflect private log-rolls. Rather than reflect his true preferences, the votes a justice casts in public could also reflect the deals he cuts in private. Because the deals involve multiple opinions ("you vote my way on this case, I'll vote your way on the other"), how he votes in any one case may say little about what he actually prefers.[47]

This "strategic voting" could easily lie behind the hundreds of unanimous five-judge panel cases (Table 1 Panel A). Opinionated jurists do routinely disagree, after all -- even in Japan, and even on non-political questions. Poll any five jurists even from the same political party on any 174 random legal questions, and they will seldom agree on 164.

Whatever the case in the five-judge panel cases, the justices in the en banc cases (of Table 3, Panel A) are not cutting their deals within political blocks. Instead, if they make any explicit or implicit trades, they seem to make them on their own. After all, in most of these cases they split their votes within both the LDP and the reformist blocks. Just as legislative vote trading most often occurs within political parties, one might expect vote trading on the court to occur among ideological compatriots.[48] At least in the en banc cases of the Japanese Supreme Court, however, that apparently does not occur: if justices swap votes, they swap them individually.

4. Bland cases. -- Bear in mind that Japanese courts do not handle as politically charged a set of disputes as the courts in the U.S. Japanese courts have not been as receptive to "innovative" claims as some American courts, and -- as a result -- litigants have not been as eager to bring them. This is of course endogenous to the character of the judges. As long as the LDP appointed the justices and they in turn managed the lower courts, politically inclined disputants justifiably saw the courts as unreceptive. Once Hosokawa and Murayama began appointing justices, however, they might have begun to consider bringing some of the claims we see in the U.S.

For the voting patterns in Table 3, however, all this is as irrelevant as it is true. The cases in Table 3 are not a random sample of cases. Instead, they are the cases heard en banc. By definition, they are the politically most highly charged disputes of all: cases where one of the parties challenged the constitutionality of a statute or regulation. Judicial hostility to political litigation may help explain why the Court hears so few disputes en banc. It does not explain why the justices voted as they did in the few cases they did hear en banc.

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[47] As a normative matter, vote trading on the bench is roundly condemned. E.g., Evan H. Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297 (1999).

[48] E.g., Keith T. Poole & Howard Rosenthal, Patterns of Congressional Voting, 35 Am. J. Pol. Sci. 228 (1991).

4. Tenuous hold. Fundamentally, perhaps Hosokawa and Murayama never tried to change the character of the courts. As a LDP politician who had only recently quit the party, Hosokawa did not hold radically different policy preferences from his predecessors. Neither did the other politicians in his coalition. As a Socialist, Murayama did, but he governed through a coalition that included the LDP.[49] Within this coalition, he negotiated from a fundamentally weak position. In the July 1993 lower house election, the LDP had had captured 223 of the 511 seats. His Socialists had taken only 70.

As a result, Hosokawa and Murayama apparently put judicial reform on low priority. With only a tenuous hold on power, perhaps strategic considerations pushed them to focus their attention on the areas with the quickest and greatest return. They could not reform the courts except through Supreme Court appointments. But they had not finally appointed a majority of the justices until September 1995. They could not appoint the administratively crucial Chief Justice until November 1995. Two months later, the LDP re-took control.

It stands to reason that the lower courts would not have changed. Given the tenuous reformist hold on government, jurists interested in radical change would have hesitated to join the courts. The government could not credibly have assured them a stable career, even had it tried. For exactly the same reason, those sitting judges with reformist preferences would have hesitated to shift their behavior toward reformist positions. The LDP could return, after all -- as it soon did. The resurgent conservatives in the courts could then punish them in their careers, and the conservatives in the Diet would reverse their case law by statute.

Even had Murayama hoped to accomplish substantial change, perhaps he would not have worked through the courts anyway. He might have tried to pass the statutes necessary to implement the Socialist agenda. He might have tried to shift the large bureaucratic apparatus (stacked with three decades of LDP appointees) in a more reformist direction. And within the bureaucracy, he might have focused on those ministries most central to his Socialist reform.[50] Among the ministries, the Ministry of Justice was most closely tied to the courts. Apparently, however, it was not a ministry about which he much cared. Over the course of his short tenure, he cycled three men through the Minister of Justice slot. All three were LDP politicians.

VI. Conclusion

Japanese Supreme Court justices enjoy an institutional independence that their lower-court brethren lack. Lower-court judges work within a career structure that rewards them for following the political preferences of the long-time ruling LDP. That LDP briefly lost power in the mid-1990s, but for the lower-court judges little changed.

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[49] Indeed, he abandoned two long-time Socialist positions -- opposition to the Self-Defense Force and the defense treaty with the U.S. -- immediately upon taking office.

[50] Consistent with that principle, he did save the Cabinet Secretariat, the Management & Coordination Agency, the Ministry of Labor, and the Ministry of Health & Welfare for Socialist politicians. Beyond those posts, though, he seems mostly to have focused on pork. At various times, he assigned Socialist politicians to the post office, the Ministry of Construction, and the Ministry of Land and Infrastructure.

Had the reformist premiers who temporarily replaced the LDP in the 1990s hoped to change the courts, they would have begun with the appointments to Supreme Court. As the LDP-appointed justices retired, they would have named jurists who shared their reformist instincts. Given the institutional independence of the Court, those changed appointments would have generated changed opinions: the new justices with reformist policy preferences would have written opinions different from those of their LDP predecessors.

Yet the reformist-appointed justices did not write different opinions. They did not write more dissents. They did not write more newsworthy decisions. They did not write opinions that antagonized Secretariat editors. And they did not vote as a block. Apparently, the reformist premiers did not appoint justices with different political preferences from their predecessors.

Empirically inclined scholars routinely conduct analogous studies of the U.S. courts. In various subsets of cases, they find that they can explain court outcomes through the party of the executive or legislature that appointed the judge. Democrats appoint judges who decide cases differently from those whom Republicans appoint.

Critics sometimes find this offensive. Judging, they seem to imply, is not a political activity. And about many disputes judging is indeed non-political. George runs a red light, and totals Fred's mini-van. George is liable to Fred. Damages for pain and suffering, questions of comparative negligence -- details like this aside, the law is clear. End of story.

Yet not all disputes are so clear, and sometimes a dispute implicates political preferences. When it does, the critics of the empirical exercise miss a crucial implication: appointment politics predict federal judicial outcomes in these cases precisely because federal judges are independent. Nothing (well, almost nothing) a judge writes can lower his income or harm his career.

One cannot have it both ways. If judges are independent, they can (by the very definition of independence) decide cases as they wish without cost to their career. Even if they hold dear (as most judges hold dear) the notion that they should follow the law, they hold other values dear as well. Where the law seems less than clear or where the dispute touches important other values, independent judges may choose to decide the case according to those other values. Regress court outcomes on policy preferences, and statistically significant coefficients on appointment politics will ensue.

By contrast, if the party of the appointing executive or legislature does not predict the opinions a judge writes, two possibilities suggest themselves. Like the lower-court judges in Japan, perhaps the judge is not independent. Perhaps he follows the policy preferences of the ruling party because the ruling party would penalize his career if he did anything else. Alternatively, like the reformist premiers in mid-1990s Japan, perhaps the executive simply did not try to shape judicial appointments. The judge may not have faced career incentives, but the executive may not have invested political capital on judicial appointments.

Critics complain about empiricists who find a political complexion to judicial outcomes. They would do well to remember that the complexion results -- straightforwardly -- from the independence of the courts.

Table 1: Selected Summary Statistics

A. Opinions Published by Supreme Court:

	Court Opinions.			Cases with at least one Dissent			Concurrence		
	1990	1995	2000	1990	1995	2000	1990	1995	2000
Panel 1	76	42	56	1	1	7	0	0	3
Panel 2	60	56	64	3	1	1	1	0	4
Panel 3	67	70	54	3	0	1	2	5	3
En banc	0	2	1	0	1	1	0	1	0
Total	203	168	174	7	3	10	3	6	10

B. Appeals filed with the Supreme Court:

	1990	1995	2000
Civil & Adm	3109	4219	6476
Criminal	1913	1858	2901
Total	5022	6077	9377

C. Reformist Appointees to the Supreme Court

Justice	Appointed	Age	University	Career	Predecessor Career
Hosokawa Cabinet					
Hideo Chigusa	9/93	61	Tokyo U	Judge	Judge
Shigeharu Negishi	1/94	61	Tokyo U	Prosecutor	Prosecutor
Hisako Takahashi	2/94	66	Tokyo U	Bureaucrat	Bureaucrat
Yukinobu Ozaki	2/94	64	Tokyo U	Lawyer	Lawyer
Murayama Cabinet					
Shin'ichi Kaai	7/94	62	Kyoto U	Lawyer	Lawyer
Mitsuo Endo	2/95	64	Hosei U	Lawyer	Lawyer
Kazutomo Ijima	8/95	62	N.A.	Prosecutor	Prosecutor
Hiroshi Fukuda	9/95	60	Tokyo U.	Bureaucrat	Bureaucrat
Masao Fujii	11/95	63	Kyoto U	Judge	Judge

Sources: Hanrei taikei [Case Compendium] CD-ROM (Tokyo: Daiichi hoki, updated); Saiko saibansho jimuso kyoku, ed., Shiho tokei nempo [Legal Statistics Annual] (Tokyo: Hosokai, various years); Nihon minshu horitsuka kyokai, ed., Zen saibankan keireki soran [Overview of Careers of All Japanese Judges] (Tokyo: Nihon minshu horitsuka kyokai, 4th ed., 2004).

Table 2: Opinions by LDP and Reformist Justices: All Panels

A. Summary Statistics:

	n	Mean Maj Ops	Mean Dissents	Mean Concur	Private Reporter %	All Off'l Reporters %
Appointed by:						
LDP	28	161.14	1.43	1.36	9.46	69.47
Hosokawa	4	173.25	1.25	1.50	6.32	72.36
Murayama	5	191.40	1.60	1.80	2.84	62.36
Background:						
Lawyer	13	159.46	2.38	1.62	8.21	68.91
Prosecutor	5	178.60	.40	1.20	5.64	67.73
Judge	12	163.33	.75	.92	9.45	70.31
Other backgrd	7	176.57	1.57	2.14	8.00	66.88

B. Regressions

	(1)	(2)	(3)	(4)
Dependent Variable	Total Dissents	Total Concurrences	Total Private Rptr	Total Official Rptr
LDP Appointee	-.099 (0.17)	-.333 (0.46)	7.397 (3.10)***	3.292 (0.74)
Lawyer	1.658 (2.60)**	.359 (0.46)	-.440 (0.17)	-3.480 (0.73)
Prosecutor	-.317 (0.39)	.049 (0.05)	-2.997 (0.91)	-3.754 (0.61)
Other backgrd	.863 (1.18)	1.012 (1.12)	-.756 (0.26)	-5.078 (0.93)
Decisions	-.001 (0.18)	-.008 (0.94)	.042 (1.43)	.674 (12.33)***
Adj. R2	.13	-.08	.17	.83

Dependent Variable	Dissent %	Concur %	Priv Rptr %	Off Rptr % .
LDP Appointee	.017 (0.05)	.219 (0.33)	4.405 (2.97)***	2.351 (0.79)
Lawyer	1.146 (3.06)***	.810 (1.15)	.159 (0.10)	-1.366 (0.43)
Prosecutor	-.173 (0.35)	.156 (0.17)	-1.671 (0.80)	-2.148 (0.51)
Other backgrd	.678 (1.54)	.742 (0.90)	.190 (0.10)	-3.262 (0.87)
Adj. R2	.21	-.07	.17	-.08

Notes: The regressions include the 37 justices appointed between 1983 and 1995 other than the two Chief Justices (who have greater administrative responsibilities). For each Justice, I include all opinions published during his or her first three years on the bench.

"Official Reporter" figures include all opinions published in any official reporter. "Private Reporter" figures include those opinions published in either of the two principal private reporters (Hanrei jiho or Hanrei taimuzu) but not in an official reporter.

For appointments, the omitted variable is an appointment by one of the two reformist cabinets. For the background variables, the omitted variable is a background as a career judge.

n = 35. *, **, ***: significant at the 10, 5 and 1 percent levels, respectively. All regressions include a constant term.

Regressions are OLS, with t-statistics in parenthesis.

Sources: See Table 1.

Table 3: Opinions by LDP and Reformist Justices: En Banc Panels

A. Summary Statistics:

Hanrei taikei ID Number	LDP Justices	Reform Justices	LDP Maj votes	Reform Maj votes
28020801	6	9	4	9
28011240	6	9	5	4
28011109	6	9	6	9
27827501	9	6	7	3
28072380	12	3	12	3
28060668	10	5	8	4
28060669	10	5	6	3
28051944	9	6	7	3
28042712	9	6	9	6
28042663	8	6	6	3
28042637	8	6	6	3
28033415	8	7	6	4

B. Correlation Catrices

1. LDP appointed justices

	Majority vote	Oth LDP maj %	Reform maj %		Dissent vote	Oth LDP diss %	Reform diss %
Majority vote	1.00			Dissent vote	1.00		
Oth LDP maj %	-.04 (.70)	1.00		Oth LDP dis %	-.05 (.61)	1.00	
Reform maj %	.25 (.01)	.57 (.00)	1.00	Reform dis %	.25 (.01)	.57 (.00)	1.00

2. Reform appointed justices

	Majority vote	LDP maj %	Oth Reform maj %		Dissent vote	LDP diss %	Oth Ref diss %
Majority vote	1.00			Dissent vote	1.00		
LDP maj %	.23 (.04)	1.00		LDP dis %	.23 (.04)	1.00	
Oth Ref maj %	.23 (.04)	.37 (.00)	1.00	Oth Ref dis %	.24 (.04)	.40 (.00)	1.00

Notes: The dataset includes all en banc decisions published between January 1, 1993 and December 31, 2002, that included either a dissenting or a concurring opinion.
P-values in parentheses.

Sources: See Table 1.