Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary

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J. Mark Ramseyer and Eric B. Rasmusen. 2003. *Measuring Judicial Independence: The Political Economy of Judging in Japan*. Chicago: University of Chicago Press. Pp. 213.

John Owen Haley. 1998. *The Spirit of Japanese Law*. Athens: University of Georgia Press. Pp. 273.

John Owen Haley. 2003. The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust. Lectures and Occasional Papers, Whitney R. Harris Institute for Legal Studies, no. 3. Washington University School of Law.http://law.wustl.edu/igls/lecturespapers/2003-3HaleyJapaneseJudiciary.html

Judicial independence is a central element of the orthodoxy that animates contemporary rule-of-law reforms. Virtually all institutions engaged in law and development activities, from the U.S. Congress to the World Bank, argue that poor countries need an independent judiciary to create a market economy and a democratic society. They do so on the assumptions that today's industrial democracies enjoy independent judiciaries and have developed economically and politically in part because they have historically enjoyed the rule of law. The Japanese experience casts doubt on these assumptions. By the conventional definition of judicial independence—individual judges deciding cases bound

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only by the law and their conscience—Japanese judges are not independent and never have been. On this, all observers of Japanese law and society agree. They disagree, however, on the broader question of whether the judiciary as an institution, as opposed to individual judges, is independent of direct political control. Some argue that the judiciary since World War II has followed the dictates of the Liberal Democratic Party (LDP); others claim that the judiciary has independently created its own set of political preferences that reflects the views of the Japanese people. This essay uses the recent work of two scholars on each side of this debate to discuss the nature of the Japanese judiciary and its relevance to contemporary efforts to create effective judiciaries in developing countries.

The scholars are John O. Haley and J. Mark Ramseyer of Washington University and Harvard Law Schools, respectively. The latest round in their debate was occasioned by Ramseyer's publication, with economist and game theorist Eric B. Rasmusen, of *Measuring Judicial Independence: The Political Economy of Judging in Japan*,[1] in which he uses rational choice and principal-agent theories and regression analysis to argue that Japanese judges have been directly under the thumb of the perennially dominant LDP since World War II. According to Ramseyer, the Secretariat of the Supreme Court punishes judges who decide against the interests of the LDP either by nonrenewal of their appointments or, more commonly, by assignment to unattractive posts in the boondocks. It does so, Ramseyer argues, because the LDP wants it to, and when the LDP changes its political preferences, so does the Secretariat.

Ramseyer's conclusion has been consistently and vigorously disputed by Haley, initially in his book *The Spirit of Japanese Law* and more recently in "The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust," where he uses an institutional history of the judiciary from the 19th century to the present to characterize the claim of partisan control as "barely plausible" and "a playful overstatement" by a scholar "overly enamored with a theory," presumably principal-agent theory, which he dismisses as "nearly tautological in effect."[2] Haley agrees that the Secretariat tightly controls lower court judges in order to create a consistently conservative judiciary, but he claims that the Secretariat does so in order to retain the faith of the Japanese public. If there are personal values being promoted in the process,

1. Because Ramseyer has made similar arguments with different coauthors beginning in 1993 and because he is better known in comparative law and Japanese studies circles than Rasmusen, I refer to Ramseyer to represent this viewpoint except where discussing *Measuring Judicial Independence* itself.

2. *The Spirit of Japanese Law*, particularly chapter 5, pp. 90–122, is Haley's most fully developed portrait of the Japanese judiciary. "The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust," on the other hand, is narrowly focused on the question of judicial independence and directed specifically at Ramseyer's argument in *Measuring Judicial Independence*. Haley's argument has remained consistent throughout, however, and I rely on both works in this essay.

they are those of the senior judges who control the Secretariat, not those of the leaders of the LDP.

These scholars' detailed analyses of the Japanese judiciary from contrasting theoretical and methodological starting points present a rare opportunity to address both the nature of judicial independence and the consequences of theoretical and methodological assumptions in comparative law scholarship. Although this essay breaks no new ground in the disciplinary wars over theory and methodology, it attempts to illuminate methodological issues often overlooked or dismissed in area studies and comparative law scholarship within the context of an analysis of the Japanese judiciary. With these goals in mind, part I presents the situation of the Japanese judiciary and summarizes Ramseyer's argument and methodology. It closes with a brief assessment of its strengths and weaknesses. Part II presents Haley's methodology and his dramatically different evaluation of the political place of Japanese courts. Part III speculates on the possible role of methodology in explaining how these scholars come to such different conclusions and argues that the strengths and weaknesses of each approach may not be those ordinarily attributed to them. In the conclusion the essay briefly returns to the relevance of the Japanese judiciary to contemporary law and development ideology.

I. MEASURING JUDICIAL INDEPENDENCE: JAPANESE JUDGES AS POLITICAL AGENTS

Ramseyer's central claim is simple: Japanese judges do the bidding of the Liberal Democratic Party. The LDP uses the appointment power of the Cabinet to ensure a politically reliable Supreme Court and Secretariat, which in turn polices the individual judges. When a judge rules against the interests of the LDP, the Secretariat makes life miserable for him, usually by assignment to a family or branch court in the hinterlands. Deterrent effect being what it is, enforcement is seldom required but generally effective nonetheless.

The Japanese Judiciary

The Japanese Constitution is ambivalent on judicial independence. Article 76 codifies the standard rule of law rhetoric: "all judges shall be independent in the exercise of their conscience and shall be bound only by this constitution and the law." Articles 78 and 80 guarantee adequate compensation and security of tenure during judicial terms, but with the crucial limitation that terms are for ten years, not life. The Cabinet has the power to appoint and reappoint career judges at all levels, which means that judges are dependent on the executive not only for their initial position but also for renewal every ten years. In addition, articles 64 and 79 give the Diet

impeachment power and the electorate the power to remove Supreme Court justices through periodic electoral reviews.

More immediate for our purposes than formal rules is institutional structure. The Japanese judiciary is unitary, highly bureaucratic, and centrally controlled. At the top are the 15-justice Supreme Court and its Secretariat staffed by more than 100 career judges. Under the Supreme Court are eight High Courts, 50 district courts of general jurisdiction with 203 branches, and 50 family courts. Approximately 2,000 judges staff these courts, and the prestige and circumstances of the assignments vary greatly. The Tokyo District Court is the largest and most prestigious, and the assumption is that it gets a disproportionately high percentage of important and interesting cases. By contrast, 77 of the provincial branch courts have only one permanent judge, and many branches have none. As a result, and of paramount importance to both Ramseyer and Haley, Japanese judges dread assignment to an obscure court, with the ultimate career dead end being assignment as a single judge in a branch court.

Japanese judges enter the judiciary after graduating from the government-run Legal Training and Research Institute (LTRI), which also trains private lawyers and the government procurators who prosecute crimes and represent the state in civil cases. Entry into the LTRI is extremely difficult, with fewer than 2 percent of takers passing for most of the period in question. Those LTRI trainees who wish to enter the judiciary apply to the Supreme Court Secretariat, which then submits its list to the Cabinet for approval, as required by the Constitution. As is true for most large institutions in Japan, those chosen are rotated through family, administrative, and criminal law divisions in high, district, branch, and family courts around the country. Assignment is not random. The Secretariat differentially gives favored judges prestigious postings and reserves slots within the Secretariat itself for the most favored.

No one disputes that the Secretariat closely monitors judges' performance for both competence and political reliability. The issue that divides Ramseyer and Haley is whether the Secretariat considers the partisan interests of the LDP in the calculus of reward and punishment or uses its own criteria for political correctness. Ramseyer does not deny that other factors matter, but if a judge decides a case against the desires of the LDP, even the most promising young judge will suffer. He may not end up in a branch court in Okinawa, but he will not do as well as similarly situated judges who toe the line.

In *Measuring Judicial Independence* Ramseyer and Rasmusen ultimately rest this claim on regression analysis of judicial careers, but they set the quantitative stage with a description of the purge of judges who were members of the leftist Young Jurists League (YJL) in the 1960s. The story begins in 1973 when YJL member Shigeo Fukushima declared Japan's Self Defense Forces in violation of article 9 of the Constitution, which states that "land, sea, and air

forces, as well as other war potential, will never be maintained." He did so not only in the face of Supreme Court precedents that had interpreted article 9 as permitting national self-defense, but also in defiance of a memo from his chief judge, Kenta Hiraga. The Diet initiated impeachment proceedings against both judges, Hiraga for inappropriate interference in another judge's case and Fukushima for disclosing the memo to fellow judges. The Diet eventually dismissed the charges against Hiraga, who was subsequently promoted to the Tokyo High Court. Fukushima, on the other hand, was found to have violated judicial ethics, and the Secretariat exiled him to provincial family courts for the rest of his career. Controversy ensued, and several judges defended Fukushima and argued for judicial insulation from political interference. They too were banished to branch and family courts. Ultimately, the LDP announced that judges could not be YJL members, and the Supreme Court Chief Justice declared that "the judiciary should exclude political extremists" (p. 22). Many YJL member judges then resigned from the organization and sent copies of their resignation letters to the Secretariat.

Establishing the Methodology

Opposition parties have long cited this sequence of events as proof of a pervasive bias against liberal judges, but when Ramseyer and Rasmusen used regression analysis to evaluate the careers of the more than 200 YJL judges, they discovered that they generally fared as well or better than nonmembers and that some went on to hold "exceptionally prestigious and sensitive posts" (p. 23). For Ramseyer and Rasmusen, this result presented an empirical puzzle and a methodological challenge.[3] First, was there a consistent political bias against liberal judges? Second, given the contradictory evidence, how could the question be answered? No recounting of further anecdotes could provide conclusive answers because "[a]necdotes seldom do" (p. 26). So they turned to regression analysis in order to test whether a judge jeopardizes his career "if he decides cases in ways that reject the government's position" (p. 48). This is not a simple or straightforward task. The number of factors potentially

3. Because Ramseyer and Rasmusen are intent on making a methodological point with Japanese studies scholars who are likely to prefer more qualitative methods, they devote an entire chapter to enlightening "those mathematically challenged verbal whizzes that spent their university careers talking and writing their way out of their SAT and GRE scores." This section is witty and unsparing to the quantitatively unwashed. See the perhaps inevitable word play at page 28 on "dummy" as in "dummy variable" and "dummies" as in the readers whom they are trying to instruct. I found this section generally successful, but with limits. I understood the meanings of "R^2" and "tobit regressions" and could follow "$Pay = a + b_1*Sex_i + b_2*IQ_i + b_3*Hours_i + b_4*Seniority_i + e_i$" as they were explained, but once I got to the data and analysis in later chapters, I just trusted the authors' interpretations, never going back to be sure that they were not cheating on one of the factors. (I feel impelled at this point to note that my math SAT was 790 out of 800. I did not take the GRE. Ramseyer and Rasmusen do not give their scores.)

influencing a judge's career is myriad, and the causal connection between a particular decision and the trajectory of a single career is often long and convoluted.

Isolating the Politically Dangerous from the Merely Routine

The first step was identifying what will irritate the LDP. The authors initially cast their net broadly, hypothesizing that the Secretariat punished judges who ruled against the government in all labor, administrative, tax, and criminal cases. Eventually concluding that judicial bias did not extend to routine cases against the government, they next proceeded to analyze the careers of judges who made anti-LDP rulings on issues of particular interest to the party. Some of these were obvious. It will surprise no one that holding the Self-Defense Forces unconstitutional will get a judge in trouble. Also relatively easy was a ruling that a statute prohibiting door-to-door canvassing during elections, which Ramseyer and Rasmusen consider favorable to incumbents, was unconstitutional. Other issues were not so straightforward: equality in voting power, for example. At the beginning of the period, the LDP depended heavily on agricultural interests and allowed a statute allocating Diet seats to become progressively more imbalanced in favor of rural voters. Ramseyer and Rasmusen hypothesize that during this period the Secretariat would punish any judge who found that rural overrepresentation violated the equality provision of article 14 of the Constitution. In the 1970s, however, the LDP began a shift to urban voters that became complete by 1985. The authors, therefore, had to differentiate between judges who invalidated rural overrepresentation before and after the shift in LDP electoral strategy.

Other choices relate less directly to LDP partisan interests and require elaborate explanation and justification. One such choice includes all injunctions issued against the national government. The authors hypothesize that any judge who enjoined any action by the national bureaucracy would be in peril. The authors' reasoning in distinguishing national injunctions both from other decisions against the national government and from injunctions against other levels of government illustrates their reasoning well:

> [W]e would not expect a judge to find his career jeopardized if he decides a routine administrative case against the government. Injunctions against the government, however, can be decidedly nonroutine. It is one thing to hold that a taxpayer owes only X in back taxes rather the 2X claimed by a dishonest bureaucrat. It is quite another to block government policy. Given that national bureaucrats answer to the Cabinet, if LDP leaders want a national agency to stop taking action Y they can simply tell it to stop, and fire the agency head if he refuses. Suppose a dispute raises significant enough issues that elected

> officials would have found it worthwhile to intervene themselves if they had wished to do so. For a court in such a dispute to order the agency to desist from doing Y would now directly jeopardize LDP-mandated policy. Given all this, one might plausibly suspect that a judge who readily enjoins the national government jeopardizes his career.[4] (p. 73)

In other words, because the LDP controls the Diet and the Diet controls the Cabinet and the Cabinet controls the bureaucracy, any bureaucratic action implementing national government policy benefits the LDP. It further follows that any injunction against the national government injures the LDP and that the Cabinet will order the Supreme Court Secretariat to punish any judge who issues one. This not only explains the dearth of injunctions against the national government but also the relative frequency of injunctions against local governments, which were frequently controlled by opposition parties during the period.[5]

Tracing judicial careers

After deciding what cases will put a judge on the LDP's hit list, Ramseyer and Rasmusen select several variables that will enable them to isolate the

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4. Ramseyer and Rasmusen do not explain why a "dishonest" bureaucrat would be likely to cheat on the side of the government in tax cases, in which instances he would receive nothing, rather than cheating on behalf of the taxpayer in response to a bribe. Nor are they troubled by an apparent inconsistency between their treatment of tax office decisions and national injunctions. They assume that tax officials will overcharge taxpayers and that the LDP will welcome judicial oversight and correction of mistakes. They do not hold a similar view of national injunctions, i.e., they do not see any need for the judiciary to monitor and enjoin mistaken policy or the mistaken implementation of correct policy. They apparently assume that the LDP can monitor the implementation of national policy itself by simply firing errant bureaucrats, while the volume of wrong tax assessments is too high and the level of decision making too low for them to monitor directly. While ostensibly plausible, this reasoning depends on a clear distinction between the bureaucratic formation of national policy and its subsequent implementation of the policy. It is entirely possible that LDP politicians will follow closely the former, but is it likely that the Party will be any more able to monitor wrongful implementation of policy any better than it can the wrongful application of the tax statutes? An example may help. Assume that the LDP passes a statute that requires the Ministry of Transportation to consider historical preservation in its choice of routes for new highways and that the Ministry formulates a policy that will consider trees "with historical significance" to be covered by the statute. One can imagine the Party intervening at this point depending on whether the Party wants trees included, but if they decide not to intervene, is it likely that they will punish every judge who enjoins the regional branch of the Ministry for wrongly deciding that a given tree lacks historical value? The authors give no reason why an injunction based on the evaluation of a tree's historical value would be any more politically threatening or, conversely, less valuable as a monitoring device than a judicial decision that a tax official has made an error in the characterization of a business expense.

5. The subject of the local government injunctions was informal administrative guidance created by opposition governments to limit the height and density of construction in their municipalities. Such administrative guidance was ubiquitous during this period and is best known in the context of industrial policy by the Ministry of International Trade and

effect of nonpolitical factors on judicial careers. First is "flunks," the number of times that the judge failed the entrance exam for the LTRI, which serves as a proxy for intelligence. Second is alma mater, with controls for graduating from Tokyo, Kyoto, and Chuo universities. Tokyo was the top law faculty in Japan during this period, and Kyoto was close behind. Graduation from either does double duty as another proxy for intelligence and as a test for an "old boy" network. Chuo produced a disproportionately large number of judges relative to its position in the academic hierarchy and hence presents the possibility of a second "old boy" network. Third is sex and fourth is the number of published opinions written annually by each judge (only noteworthy opinions are published), a proxy for hard work.

Ramseyer and Rasmusen then measure the success of judges' careers. Because they make the questionable assumption that passage of the LTRI exam alone, even after many flunks, is proof of extraordinary talent and diligence, they conclude that Japanese judges have turned their backs on what would have been more lucrative careers in business or private practice. To capture the motivations of judges, therefore, they rely on nonpecuniary criteria that Rasmusen had previously employed to measure the motivation of central bankers, who have similarly turned their backs on more financially rewarding private-sector careers. Although their analysis is elaborate, the result is simply to measure success by bureaucratic position within the judiciary: the quality, location, and timing of a judge's postings during his or her career. They assume that a judge who is promoted more slowly, spends a lot of time in the provinces, and is limited to ruling on divorces in a family court will

(MITI). Local land use guidance threatened the LDP in two ways. First, height and density restrictions were enormously popular with urban and suburban residents, at least if we can take electoral results as an indication. To the extent that opposition local governments were able to institute and enforce controls, the opposition parties would gain credibility with voters. Second, the construction industry was one of the LDP's most generous financial supporters. If the LDP could not prevent restrictions on their activity, they might decide to lower their contributions or even shift their financial support to the opposition. It is not surprising, therefore, that the LDP welcomed injunctions frustrating their opponents' ability to implement their policies at the local level. It is therefore consistent with Ramseyer and Rasmusen's argument that the same Japanese courts that are loath to enjoin the national government jumped to do their putative master's bidding and enjoin local ones.

However logical, this interpretation of Japanese courts' treatment of governmental injunctions directly contradicts the position Ramseyer has taken elsewhere. In *Japanese Law: An Economic Approach*, an overview of Japanese law written with Minoru Nakazato (1999), he argued that courts enjoined informal land use guidance because such restrictions were informal and illegal. He made no mention of political bias and implied that courts would enjoin similar behavior at any level of government. Indeed, Ramseyer (2003) continues to argue that courts were immediately available to companies wishing to defy MITI administrative guidance. There, Ramseyer uses the courts' (hypothetical) willingness to enjoin MITI as evidence that Japanese bureaucracies were never powerful enough to implement industrial policy in the face of corporate opposition. In other words, in *Measuring Judicial Independence* Ramseyer claims that Japanese courts are loath to enjoin national policy because it will offend the LDP, but he contends elsewhere that the same courts were perfectly willing to enjoin national industrial policy whenever its implementation strayed from statutory norms. Nowhere does Ramseyer explain this apparent contradiction.

be less satisfied with her career than her colleague with frequent postings in Tokyo or Osaka and an opportunity to rule on the important issues of the day in the district or high courts. As they put it, "A judge who spends most of his career in a branch office has less power to relish or to use for policy purposes, less opportunity to show his talent, and less prestige attached to his posting" (p. 46). They acknowledge that a desire to act in a principled manner may also motivate LTRI graduates, but conclude that few such people will enter the judiciary because they will know that the Secretariat is likely to punish any judge with the temerity to place principle over LDP preferences. With this general proxy in place, Ramseyer and Rasmusen were able to evaluate the careers of judges who had issued rulings that specifically offended the LDP, controlling for sex, school, flunks, and productivity, to see if they had less successful careers than those who followed the Party line.

The Results

Regardless of the question of political control, many of the authors' results are worth noting for their insight into the nature of the Japanese judiciary. The Secretariat favors men over similarly qualified and accomplished women; Tokyo graduates over Kyoto graduates, who in turn do better than Chuo graduates; and judges who write a lot of published opinions. The strongest factor in determining the quality of a judge's first assignment is the number of times he or she flunked the LTRI exam, and this factor continues to have an independent negative influence on judicial careers for decades thereafter.[6] Ramseyer and Rasmusen checked membership in the Japanese equivalent of the *Social Register* and *Who's Who*, although eventually not used as a variable, to determine whether family status affected judicial success. Not a single judge in the sample appeared, indicating that the judiciary appears not to be a career for the socially prominent.

Political Rulings, Legal Accuracy, and Professional Consequences

The results on political control are consistent with expectations: judges who "flout the preferences of the LDP . . . potentially pay with their careers" (p. 81). This begins with YJL membership. As noted above, members had slightly better careers than nonmembers, but this turns out to be explained

6. Ramseyer and Rasmusen conclude that the continuing importance of "flunks" suggests that "interest in the law, intelligence, and drive matter" to the Secretariat and that a high number of flunks indicates less of these desirable qualities (pp. 53–54). This conclusion seems contrary to common sense. Although a persistent failure is likely to be less intelligent than an early passer, it does not follow that a person who continues to take the exam lacks drive or an interest in law. It is more likely, therefore, that the Secretariat considers a high number of flunks as virtually irrefutable evidence of both less intelligence and judicial ability than an indication of the individual's interests or drive.

by the fact that the YJL attracted disproportionately talented judges. YJL members did well but not as well as they would have done had they not been members. This is also true for judges who ruled against the government in any labor, administrative, tax, or criminal case. The number of anti-government opinions inversely correlated with postings in attractive cities, and writing even one antigovernment opinion inversely correlated with receiving a high-status post in the judiciary (p. 57). Although they later inexplicably retreat from the full implications of these results, they initially conclude that the LDP had a "straightforward punishment strategy: if a judge decides cases against the government . . . [he will be assigned to] less attractive posts."

The results for judges who ruled against the government in the specially selected cases were similar. The Secretariat punished judges who held either the SDF or the ban on door-to-door campaigning unconstitutional. Those who struck down the malapportionment during the period when the LDP depended on the rural vote suffered, while there was no punishment of those who did so after the LDP had shifted its strategy, and those who enjoined the national government suffered, but not those who enjoined local governments (pp. 71–72). As they put it: "In politically sensitive cases, judges seem to indulge their true political preferences at their peril" (p. 81). These results are consistent with Ramseyer and Rasmusen's hypothesis that the judiciary is systematically biased in favor of the LDP, but they are also consistent with Haley's interpretation that the Secretariat has its own pro-government bias that it has developed independently of the LDP. To determine which it is, Ramseyer and Rasmusen turn to "routine" tax and criminal cases.

The government wins 90–95 percent of all tax cases, but before Ramseyer and Rasmusen were willing to accept this statistic as proof of a general pro-government bias, they had to ask *why* the government wins. It might be because of bias, but it could be for other reasons, and when they traced the careers of judges who found for taxpayers, they found no punishment and hence no evidence of bias. What did matter was being reversed on appeal, a result that Ramseyer and Rasmusen equate with professional quality control. Judges who get reversed have made doctrinal or other legal mistakes and are punished because they are professionally deficient, not because they are politically deviant. So far, so good, but when they went the next step and disaggregated the careers of judges who were reversed, they discovered a striking anomaly. Among judges who are reversed on appeal, only those who mistakenly find for the government are punished. Judges who mistakenly find for the taxpayer not only escape unscathed, but actually do better than judges who have a pro-government opinion affirmed.

This result directly contradicts Ramseyer and Rasmusen's hypothesis that the Secretariat is actively involved in judicial quality control, and they struggled to find an explanation:

> We speculate that perhaps the Secretariat noted the talent it took for a judge to spot the unusual case in which the merits arguably favored the taxpayer. Indeed, not only were the cases unusual, but given the government's decision to appeal them, they probably involved complex and difficult legal or factual questions as well. (p. 94)

In other words, it is all about professional quality or what they call legal accuracy. Although they never specify what legal accuracy means, being reversed is bad, except perhaps when it illustrates an unusual talent that somehow correlates with spotting taxpayer-favored cases, even incorrectly (p. 94 n. 12). After taking satisfaction in the fact that at least "the regressions more than confirm the absence of pro-government bias in mundane administrative cases" (p. 94), they put the Secretariat's quality control role in a broader context:

> These results illustrate the potential benefits to bureaucratic judiciaries, in contrast to the less savory aspects [i.e., political subservience]. The Secretariat's ability to reassign and manipulate the promotion of judges does facilitate exerting political pressure. In simple routine cases, however, it also facilitates pressure toward enhancing quality: judges who are talented and hard working and who decide difficult cases correctly receive better jobs and greater responsibilities. (p. 95)

It takes a certain amount of courage to go from results showing that judges who rule incorrectly for taxpayers do better than those who rule correctly for the government directly to the conclusion that it is all about quality control. Getting hard cases wrong may not be as damning as getting easy ones wrong, but it is in no way evidence that the judges were in any way unusually talented. After all, stupid judges are likely to get the hard cases wrong at least as often as smart, diligent ones do. The authors' conjecture that the government would appeal only the difficult cases is equally shaky given that it is at least equally likely that the government would appeal those cases that seemed easiest to win on appeal rather than those with a chance of producing an unfavorable precedent. Although Ramseyer and Rasmusen's general speculation that the Secretariat would like to reward high quality work is plausible, these data do not prove their point, and their speculations to the contrary are unconvincing.

Criminal Cases and the Puzzle of Japanese Conviction Rates

The data in criminal cases point even more strongly toward a progovernment bias: Japanese District Courts convict 99.9 percent[7] of all defendants

7. Like most judicial statistics, this one is unreliable. The most comprehensive treatment of Japan's conviction rates is by Johnson. He concludes that the commonly cited 99 percent rate is

and a staggering 98.8 percent of the few (7 percent) defendants who actively contest their cases at trial (p. 101). Although most defendants everywhere end up being adjudicated guilty, the rate of conviction in contested trials in American federal courts is 30.9 percent and somewhat lower in state courts. Again, Ramseyer and Rasmusen run elaborate regression analyses to determine if these rates are a result of proprosecution judicial bias, and again they conclude there is no general bias and that the results accurately reflect the innocence and guilt of the defendants. In other words, their analysis convinced them that 99.9 percent of all Japanese defendants are guilty. Their reasons are simple: prosecutors almost never indict the innocent and judges rarely make mistakes. How they reach these conclusions illustrates both the power and weakness of their methodology.

The first step is to assume that defendants, prosecutors, and judges generally act in their self-interest. Add the structure of the Japanese judiciary that closely monitors performance and punishes not only political deviance but also professional mistakes, and you have judges who are eager to convict the guilty and acquit the innocent (except in political cases—more on that later). Their ability to do so is enormously enhanced by Japanese criminal procedure, which eliminates juries and provides for discontinuous trials that give the lawyers repeated chances to reassess their chances. The result is a criminal process of great transparency where both sides can predict the result of trial with much greater certainty than their American counterparts can.

Although these characteristics explain why Japanese trials are likely to be more predictable than American ones, it says little about whether Japanese defendants are guilty. For that, Ramseyer and Rasmusen look to institutional dynamics: there are so few Japanese prosecutors that they have time and resources to try only the most obviously guilty suspects. In their words, "One need not posit differences in prosecutorial clairvoyance or scruples to suggest that Japanese and American courts might differ in their ratios of innocent to guilty defendants. Instead, one need only show a difference in budgets" (p. 103). The United States has almost 25 times as many prosecutors as Japan. Even with twice the population and a higher crime rate, American prosecutors have a much lighter load: 438 versus 1,166 cases per prosecutor (p. 104). Facing this reality, it is hardly surprising that Japanese prosecutors who allow acquittals face the same professional oblivion within the Ministry of Justice as judges who cross the LDP do within the judiciary. As a result, according to Ramseyer and Rasmusen, only the suspects whose guilt is easiest to demonstrate are tried. The rest are simply released. Once one realizes that the appearance of guilt is invariably overwhelming, the 99.9 percent (total adjudications) and 98.8 percent (contested trials) conviction rates no longer

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inflated but that the rate remains comparatively high. He estimates that the conviction rate is eight times higher in Japan than in the United States and that the average Japanese prosecutor will experience an acquittal only once every 13 years of service (2002, 216–18).

seem remarkable or, most important for our purposes, any indication of judicial bias.

The authors' hypothesis is straightforward and intuitively attractive.[8] Supporting it empirically, however, proved more difficult, partly because the practice of judges' sitting individually and in panels complicates the data.[9] To get through this difficulty, they focused on appeals, using four variables (acquittals reversed and affirmed and convictions reversed and affirmed) to see which engendered Secretariat punishment. The results did not support their hypothesis of a Secretariat interested primarily in legal accuracy. Although judges whose acquittal was reversed were punished, those whose conviction was reversed were not. Moreover, although the results were statistically significant only for reversed acquittals, the direction was diametrically opposed to the idea of policing judicial quality: the Secretariat punished judges whose acquittals were reversed most often, followed by those whose acquittals were affirmed, then those whose convictions were affirmed, and finally those whose convictions were reversed. In other words, there is no evidence whatsoever of discipline of judges who have wrongly convicted and substantial evidence of the punishment of judges who have acquitted, even when that acquittal has been upheld on appeal (pp. 114–16, table 6.5). When combined with their only other statistically robust finding—that judges who acquit while sitting singly are punished (whether or not appealed)—these results point toward a Secretariat that is content with incorrect convictions but punishes any kind of acquittal.

Ramseyer and Rasmusen were, nonetheless, not yet ready to conclude that a bias toward convictions exists. To support their hypothesis of a Secretariat concerned only with legal accuracy, however, they had to abandon regression analysis and resort to case analysis, which was possible because they were dealing with a sample of only twenty-seven acquittals.[10] They

8. Although Ramseyer and Rasmusen's portrait of an overworked procuracy was the accepted interpretation when written, Johnson's later study of the procuracy rejects the idea that prosecutors are overextended. Once he removed minor offenses handled entirely by clerical staff from prosecutors' workload, caseloads dropped by a factor of ten, making Japanese prosecutors substantially less busy than their American counterparts. Fortunately for Ramseyer and Rasmusen's argument concerning Japan's criminal process, however, Johnson agrees that prosecutors are extremely—he would argue pathologically—careful in their charging practices. Although based on entirely different factual premises and reasoning, therefore, Johnson's interpretation does not disturb Ramseyer and Rasmusen's basic contention that Japanese prosecutors bring only cases that they are confident of winning (2002, 24–28).

9. In somewhat less than 10 percent of all cases, judges sit in panels of three where dissents are not published, which makes determining responsibility for acquittals in such cases impossible for outside researchers to determine. Ramseyer and Rasmusen found no statistically significant punishment of panel judges for acquittals, but a clear practice of punishment of judges who had acquitted while sitting singly.

10. Such switching of methodologies to check anomalous or important results is standard practice, and the authors wanted to be sure of their data before asserting the Japanese judiciary routinely and heedlessly convicts the innocent. Nonetheless, the switch without explanation is abrupt in the context of a book extolling the relative virtues of quantitative methodologies.

analyzed each acquittal and concluded that there was no punishment when the acquittal was based on factual innocence, what they termed "whether the police and prosecutor found the right defendant" (p. 119). Judges were punished only when they acquitted either on politically sensitive grounds, for example, by declaring the door-to-door canvassing ban unconstitutional or by interpreting the statute of limitations to dismiss a prosecution. The authors go on to a conclusion identical both to that reached by their analysis of tax cases and to their original hypothesis:

> Are Japanese courts unbiased? Initially, Japanese judges seem to face significantly skewed incentives: judges who acquit seem more likely to suffer a career penalty than those who convict. Yet a closer look at the judges punished for their acquittals suggests a classic omitted-variable problem, and returns us to our hypothesis about prosecutorial resources. The acquittals that generate apparent punishment are sometimes cases in which judges sided with opposition parties in politically charged cases, and otherwise cases in which the judges simply misinterpreted the law. Never is it a case in which the judge decided that the prosecutors had brought charges against the wrong man. Instead, we know from [earlier analyses on constitutional and tax cases] that the Japanese courts generally reward political reliability and legal accuracy—and the observed punishment simply reflects that broader phenomenon. (p. 121)

The boldness of this conclusion is typical of the book, and while well founded in many other instances, it seems misplaced here. Not only do their data offer only weak support, but they also neglect a great deal of evidence that should have undermined their confidence in the impartiality of Japanese courts. We return to this question in the next section.

Methodological Anomalies

The simplicity of rational choice assumptions and the analytical power of regression analysis can take a researcher beyond conventional wisdom to a more complete model of the way the world operates. These same qualities of simplicity and objectivity, however, can lead to implausible conclusions and leave troubling gaps in our understanding of social phenomena. *Measuring Judicial Independence* is not free from these anomalies.

Anomalous Conclusions

One should not take the logic of a theory to extremes, but doing so may lead to insights into the plausibility of the initial analysis. To illustrate, let's look at Ramseyer and Rasmusen's basic argument, that the Secretariat

simultaneously promotes judicial craft and political fidelity to the LDP. With the noted exceptions, they back up this conclusion with solid analysis and rich data, but when one thinks about the implications, it leads to the troubling conclusion that Japanese judges are thoroughly socialized to take law and legal doctrine seriously and yet are also quite willing to ignore the rules completely when applying them would offend their political masters.

To give the point context, let's return to the malapportionment cases and the injunctions against the national government, where the conflict between fealty to doctrine and the requirements of LDP partisan interests is most directly presented. Constitutional equality doctrine did not vary between 1975 and 1985. Nor are we told of any doctrinal difference between injunctions against local governments and ones against the national government. Nor do Ramseyer and Rasmusen offer any other explanation for the courts' change in constitutional interpretation or their willingness to apply injunctive doctrine selectively depending on the political affiliation of the government.[11] These results are troubling. Although their data and analysis seem reasonable, the picture they draw seems contrary to human nature: judges who are highly skilled and fiercely faithful to doctrine and precedent 99 percent of the time are perfectly willing to betray their professional identity when the Secretariat puts out the word that the LDP would like them to do so.

Another implication of the judicial craft/political malleability puzzle is equally disturbing when one considers what a judge does for a living—that is, decide conflicts with substantial importance to the parties (and occasionally to society). Ramseyer argues that the threat of future reassignment to a distant family or branch court is enough to persuade a Japanese judge to change his or her mind in a case. To anyone with any faith in the strength of judicial ethics, this is alarming. This is all the more true because the threat of reassignment is much weaker than it appears. For one thing, the judge's relatively high salary and general working conditions will not change. More important, simply resigning from the judiciary to become a private lawyer would seem a rather attractive option, at least by the terms of the authors' own assumptions. Resignation will mean more money, permanent residence in Tokyo, and more career choices. Although Ramseyer and Rasmusen seem to conclude

11. If Ramseyer argued only that the LDP ordered the Supreme Court to change the law, it might work in the apportionment cases. Lower court judges would continue to rule that rural overrepresentation was constitutional until the Supreme Court issued a new interpretation. This would be consistent with a practice of political manipulation of the Supreme Court and analogous to the way U.S. presidents use the appointment power to change the political direction of the American Supreme Court, but that is not Ramseyer and Rasmusen's argument. They claim that Secretariat discipline, not Supreme Court precedent, led to the shift in lower court decisions. The variables that they use to test postjudgment retaliation do not use the dates of the Supreme Court cases, *Kurokawa* in 1979 and *Kanao* in 1985, but instead the dates of the trial court decisions in those two cases. Indeed, they must do so if they want to claim that it is Secretariat discipline in response to LDP fiat that drives lower-court decisions. The injunction cases make the point even more harshly because there are no shifts in Supreme Court jurisprudence at all.

otherwise, it is also likely to lead to higher prestige within the profession. They assume that judges enjoy prestige within the profession, but it is hard to see how that could be possible under their assumption that Japanese judges throw principle and judicial craft overboard whenever the Secretariat instructs them to rule in the LDP's favor. Since by definition all judges and LDP politicians will know that this is the case, so will all other members of the legal profession. In that situation, how likely is it that judges will be considered lions of the profession rather than simply opportunistic lackeys of the LDP? Nor does it seem that judges would give up much power by resigning. According to Ramseyer and Rasmusen, judges have little or no autonomy to exercise individual power until they reach the Secretariat, and then they simply become the lapdogs of the LDP. Private lawyers may not exercise much power over policy, but at least they are able to choose which policy to try to achieve. Judges do not even have that choice.

Even if judges who are thrown off the career fast track suffer significantly in some way that is not clear and I have missed some disadvantage to becoming a lawyer, the threat of reassignment cannot be considered draconian when one considers the deviation from judicial ethics required.[12] If judges can be bought this cheaply by the LDP, wouldn't they be corrupt in more pecuniary ways as well? There must be plenty of litigants before Japanese courts who could make offers or threats that equal or surpass reassignment in appeal or impact, and yet no one disputes the Japanese judiciary's reputation for honesty. Just as one wonders why Japan can escape a crime wave if the prosecutors let the vast majority of arrested suspects walk, one wonders why judges remain so free from nonpolitical forms of corruption if they are so easily intimidated. Of course, both Ramseyer and Haley stress the intense socialization and supervision that Japanese judges undergo, but to train highly motivated and intelligent graduates of Japan's best universities to respond to such weak stimuli as reassignment and for such an ignominious cause as the narrow interests of a particular political party would seem beyond even the power of the most Machiavellian judges of the Secretariat.

It is unclear why the authors do not address these sharply contrasting images of judges who are easily corrupted in one sense and so dutiful in another. It is certainly not because they could not paint a fuller picture; Ramseyer knows as much about Japanese law and society as any foreign scholar. It may be instead that quantitative methodologies, especially ones based on rational choice assumptions, encourage or even require a narrow focus on hypotheses where data can be brought to bear, often to the detriment of a broader perspective that could explain more fully the phenomena under examination.

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12. Haley suggests that expulsion from the judiciary will have significant psychological effect on the expelled judge and harm the judicial community (*Spirit of Japanes Law*, p. 123) Ramseyer and Rasmusen do not mention this consideration and it would seem generally outside the parameters of their rational choice approach.

Many Trees, No Forest

In their chapter on criminal justice Ramseyer and Rasmusen are ostensibly interested only in whether Japanese judges have institutional incentives to convict the innocent, and they could have left the complex questions of judicial accuracy and conviction rates to another day. Instead, they spend most of the chapter trying to prove that the conviction rate approaches 100 percent because the defendants are virtually all guilty. In doing so, however, they entertain only two possible reasons why a criminal justice system might have very few acquittals: biased judges or guilty defendants.

They dismiss the possibility that other aspects of Japanese criminal process might have a role to play in a few sentences:

> Procedural protections for defendants in Japan loosely track those in America. Although courts hesitate to mandate a blanket exclusionary rule, they do exclude coerced confessions on reliability grounds, they impose a presumption of innocence, and they demand proof at levels close to the reasonable doubt standard in U.S. trials. They enforce a right to counsel at trial (with state-appointed counsel for the poor), a right to remain silent, and a right to interrogate witnesses, and they require warrants for searches and seizures. (p. 99)

None of these statements is untrue, but they hardly paint a full picture of the situation of a person entangled in the Japanese criminal justice system. To cite one example, during the period under study, the Japanese police could and did keep suspects in custody for up to 23 days without effective access to an attorney. This fact alone puts the rights to silence and to an attorney at trial into context; by trial virtually all defendants have confessed. A second example is the pressure to confess and the nature of police interrogation. Among the many reasons a defendant might confess after three weeks of detention, Ramseyer and Rasmusen consider only an arms length bargain:

> Absent an explicit or implicit bargain, a rational defendant gains little by confessing. In Japan as in the United States, some defendants do confess or plead guilty without a promise of a lower penalty. Exceptions do not prove rules, however.... If Japanese defendants routinely file confessions, that very fact suggests that they routinely receive lower sentences. (p. 99)[13]

They do so despite the express illegality of formal plea bargains in Japan, which they acknowledge only to dismiss with "so goes the theory" (p. 98).

13. Johnson presents a fuller discussion of confessions in the Japanese context (2002, 38–42, 214–42, 265; and 2004, 8).

Although many readers may wonder whether other factors are at work, let us assume that Ramseyer and Rasmusen are correct when they argue that Japanese defendants confess only after they have received a quid pro quo and that the bargaining process is substantially enhanced by the predictability of Japanese trials. A predictable process is not necessarily an accurate one. Given that judges and prosecutors have strong incentives to process cases quickly, there is no reason to believe that accuracy per se is a concern for anyone in the system except innocent defendants. If the police send prosecutors easy cases that can be quickly processed, prosecutors will proceed without any concern for guilt or innocence absent incentives to do otherwise. Judges are also concerned with volume but even more with avoiding reversal on appeal, especially of an acquittal. The ideal cases for both judges and prosecutors, therefore, will be confessions, which will be fast and rarely appealed. To the extent that Ramseyer and Rasmusen are correct in their portrayal of Japanese defendants, they too will want to confess unless they have some expectation of being acquitted. For innocent defendants to have such an expectation, however, there must be some institutional player that will consistently go beyond the superficial "obviousness" of cases. Only when there is a significant chance of a mistaken guilty verdict being exposed on appeal will judges have an incentive to acquit the innocent.

It is difficult to imagine who these institutional players might be in the world that Ramseyer and Rasmusen paint for us. It will not be judges. As Ramseyer and Rasmusen say in describing principal-agent theory in a government setting, bureaucrats such as Japanese judges "care more about the smooth running of their bureaucracies and their careers than about particular policy outcomes" (p. 17). Independently searching for or demanding exculpatory evidence will not contribute to the smooth running of the courts. On the contrary, it will offend the procuracy and the police, take time, cause dissension within the judiciary, and decrease productivity. And, if they do happen across reasons to acquit and actually do so, regression analysis demonstrates that they are likely to be punished for their trouble, even if they acquit correctly.[14] On the other hand, if the judges rubber-stamp the prosecution, they can process more cases and rest assured, as Ramseyer and Rasmusen demonstrate, that even if by some quirk they are reversed on appeal, they will not suffer professionally. This holds even if we accept the claim that judges are punished only in politically sensitive cases. No one claims that judges who accurately acquit are rewarded, simply that they are not punished. Since incorrectly convicting will not hurt one's career and correctly acquitting

14. As stated in the previous section, the data show that the Secretariat is likely to punish any judge who acquits while sitting singly whether her judgment is appealed or not and whatever the result on appeal. Furthermore, although not statistically significant, the data show a tendency to punish all judges, whether sitting singly or on a panel, whose acquittals are appealed, even if affirmed. There is no evidence of punishment of judges whose convictions are reversed.

will not help, there is no incentive whatsoever to be accurate when accuracy means an acquittal.

So, we can eliminate judges as the defendants' champions. That pretty much leaves defense lawyers, but we know nothing about them beyond the legal rule that defendants have a right to one at trial. We are given a list of the procedural safeguards that defense attorneys might use, but no institutional context for how or whether they do or could use them. Since the effective lack of counsel during detention greatly weakens the right to counsel at trial, the reader may be excused for thinking that the procedural protections that "loosely track" those of the United States may not in practice give the same degree of protection. When faced with a legal ban on plea bargaining, the authors dismissed it with "so goes the theory" and proceeded with a rational choice analysis of constrained prosecutors and cunning defendants to demonstrate why plea bargaining is likely to be even more prevalent in Japan than in the United States. One wishes that they had engaged in a similar inquiry into the strength of procedural safeguards and the role of defense attorneys, but here they willingly accept "the theory" as an accurate description of practice. Without a defense bar with incentives to press for acquittals and procedural tools to pursue them, it is very hard to accept Ramseyer and Rasmusen's claim that virtually only the guilty are convicted.

My point is not that there are masses of innocent Japanese heading for prison or even that the authors' assumptions or data are wrong. It is that their analysis narrowly focuses on only a few possible explanations for the phenomena they seek to explain. Of course one cannot address every possible explanation for social phenomena. Since the authors are open with their data and analysis and Ramseyer is eminently capable of a nuanced institutional analysis, however, the failure to pursue other interpretations is puzzling. I would, nonetheless, like to suggest that their methodology may have encouraged a focus that leaves a reader seeking a fuller picture unsatisfied. However simple and straightforward regression analysis may seem when presented, it is extremely demanding of data. It is difficult, for example, to envision what data could have been used to probe the role of defense attorneys. But it is not just a question of data collection; rational choice assumptions married to quantitative analysis demand the myriad of small but crucial judgments that may narrow one's focus to a range of phenomena and interpretations that can be explained and managed only through quantitative methods.

Mysterious Connections

If one accepts that Japanese courts vary their rulings to protect LDP interests, it raises the immediate question of how that control is exercised. As we will see shortly, John Haley argues forcefully that there is no direct evidence of the Cabinet influencing the judiciary at any level after the YJL purge of the 1960s and 1970s. Of course Ramseyer's response throughout

their debate has been that principal-agent theory does not require constant intervention, simply an agent sensitive to his principal's wishes and a principal capable of punishing deviance and mistakes. As Ramseyer might put it, once your colleague is banished to a family court in Kyushu for holding the SDF unconstitutional, it does not take a genius to figure out that a certain level of armed forces does not violate the constitution no matter what the text of article 9 may be. It is clear, in other words, how the Secretariat controls the judges. What remains unclear is how the LDP controls the Secretariat.

For that task, Ramseyer offers the judicial appointment power of the Cabinet, the LDP's role in the purge of the YJL, and a recitation of the problem of observational equivalence in principal-agent theory. The idea is simple: If the judiciary is totally independent, the politicians will not waste time trying to order them around. Conversely, if the judiciary is totally dependent, the judges will eagerly anticipate the every wish of the politicians, and the politicians will not have to order them around. These two judiciaries will appear to observers as identical; in neither case is anyone ordering judges around. Before unconvinced readers conclude that this is all too facile, consider that the Secretariat has only once, in 1971 with YJL member Miyamoto Yasuaki, refused to reappoint a judge at the end of a ten-year term for what could even be argued to be political grounds. Does that mean that the power to refuse to reappoint plays no role in the Secretariat's control of rank-and-file judges? Of course not, but if Ramseyer and Rasmusen had not shown that the Secretariat punished politically incorrect decisions, the Secretariat's refusal to reappoint one time in doubtful circumstances would convince no one that it was actively controlling the political content of its judges' opinions. All the data and tracing of judges' careers were necessary to convince the reader of the meaning of Miyamoto's fate.

Since Ramseyer and Rasmusen have not shown a single instance of Cabinet reprisal against the judiciary or even a controversy over Supreme Court appointments, they are put in an analogous position in regard to the LDP's control of the Secretariat. The power of appointment gives the LDP the power to control the courts, but one would feel better about accepting the actuality of LDP control if the authors had addressed this doubt rather than dismissing it with the recitation of observational equivalence. This issue becomes acute when one tries to imagine how principal-agent theory might work in a concrete instance. It is not difficult to believe that the judges in the Secretariat can surmise the LDP's position on the SDF or door-to-door canvassing, but when it comes to issues that are contentious within the Party or where the Party claims a certain position for electoral purposes but may not want that policy implemented through the courts, the reappointment power seems an inadequate means of communication.

The courts' malapportionment rulings can illustrate. The LDP's electoral strategy was not changed overnight by a public vote, but somehow the judiciary knew just when and how to meet the LDP's needs. Ramseyer and

Rasmusen state that "the Supreme Court wrote opinions that generally tracked the positions of the LDP leaders" and just a few lines later talk of the Supreme Court "switching sides" in *Kurokawa* and "aiding LDP leaders who would have found it more difficult to force LDP Diet members to redistrict themselves out of jobs without judicial pressure" (p. 68). Apparently the Supreme Court justices were not only very familiar with internal LDP conflicts, but they also played an active role in the struggle. Such political involvement might be plausible in the case of American Supreme Court justices for whom partisan political experience is a common prerequisite for appointment, but it seems less likely for Japanese justices, not a one of whom has been politically active and most of whom have been buried in the insular world of the bureaucracy their entire professional lives.

Even if we discount this instance of the Supreme Court taking sides in internal LDP debates and focus only on simply obeying the Party, either the Supreme Court or the Secretariat needs to know which leaders are reliable guides to Party opinion and what the Party's "real" positions on issues are. Ramseyer and Rasmusen do not mention how judges get this information, and their methodology gives the reader no hint on how to find out. Nor do they give any indication exactly how the Supreme Court justices settle these questions among themselves or how they communicate their interpretation to the senior judges in the Secretariat. Perhaps it is as simple as the prime minister informing the chief justice that certain local governments' land use practices had to be stopped or that henceforth malapportionment cases are to be handled differently and the chief justice simply calling in the head of the Secretariat and conveying the message that the next district court judge to defer to local government practices or to uphold the overrepresentation of rural voters was to be sent on a research mission to Tajikistan. Or maybe it is more subtle and indirect. Unfortunately, beyond the recitation of the Cabinet's power of judicial appointment and the assurance that an absence of evidence of direct intervention is not important, Ramseyer and Rasmusen provide no guidance on this issue.

II. "MAINTAINING INTEGRITY": THE JAPANESE JUDICIARY AS INSTITUTIONAL STATESMAN

John Haley begins "The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust" with the following statement: "Japanese judges are among the most honest, politically independent and professionally competent in the world today." Just in case you missed his point, a few lines later he states his goal in "Maintaining Integrity" as "an evaluation of two of the most significant features of the Japanese judiciary—its extraordinary record of integrity and its equally remarkable record of political independence." As he had earlier in *The Spirit of Japanese Law*, Haley goes on to define judicial

independence as the political independence of the judiciary as an elite bureaucracy, not the autonomy of individual judges to be free from control by the judiciary itself. Nonetheless, Haley insists that individual Japanese judges "enjoy a greater degree of independence from political intrusion both with respect to individual cases as well as the composition of the judiciary" than in any other industrial democracy (pp. 15–16).

Haley is clearly aiming at Ramseyer's portrait of Japanese judges as political lackeys, but what makes Haley's position interesting is that he does not fundamentally challenge Ramseyer's evidence or even disagree frequently with the analysis. Instead, he gives a narrative account of the political history of the Japanese judiciary, with more detail, more names and dates, and more frequent conclusions about the meaning of events and the motivations of actors. Where Ramseyer gives a hypothesis, data, analysis, and conclusion, Haley gives us a portrait of an institution with a history that constrains its present and heroes that are, although faceless and bureaucratic, faithful to their public trust. The result is a paean that is at times as reverent of Japanese judges' personal and political integrity as Ramseyer is scornful of their subservience to the LDP's partisan demands.

Although Haley provides a more complete and detailed picture of Japanese judges, much of his argument covers ground that we have already explored, and it is unnecessary to repeat most of his description. What is important is to focus on those areas that best explain his different conclusions regarding judicial independence. The next section therefore summarizes Haley's account and evaluation of the judiciary's institutional structure, focusing on the areas that he believes give the judiciary the strength and motivation to resist political interference. In the following section, we briefly look at one negative implication of Haley's institutional argument—that the judiciary may be so strong as an institution that it may have lost some of its ability to function as a judiciary in the traditional sense. Here we find that Haley is on common ground with Ramseyer in casting doubt, perhaps unintentionally, on Japanese judges' ability or opportunity to develop themselves as judges with pride in the judicial craft of legal reasoning and achieving justice in individual cases.

A Judicial Army Implementing the Public Will

As any good institutional argument should, Haley's begins with history. Unlike most scholars, who would consider the 1947 Constitution as the beginning of any real degree of judicial independence, Haley begins with the creation of Japan's elite bureaucracies to the late-19th century:

> Popular belief and scholarly claims to the contrary notwithstanding, judicial independence has in fact long been an established norm of Japanese governance. In terms of separation of powers, freedom from

> intervention in the adjudication of particular cases, and the personal security of judges, judicial independence was secured in the late 19th century by constitution and statute. Judicial independence from the political branches was emphatically established as a fundamental principle of governance in article 57 of the 1889 Constitution. Of all branches of government only the courts exercised authority "in the name of the emperor." This exclusive reservation of authority to act in the emperor's name ... insulated the courts from any direct political intervention in the adjudication of cases by either legislative or administrative organs. (Haley, Maintaining Integrity, p. 16; see also Haley, *Spirit of Japanes Law*, pp. 98–99)

Statutes buttressed the constitutional protections. Article 58 of the first comprehensive court law provided for appointment until mandatory retirement at age 63 and stipulated that judges could not be removed to a different office or court, be suspended or dismissed, or have their salary reduced against their will. The statute did, however, place judges under the general authority of the Minister of Justice, who had the power to nominate judges for imperial appointment and to supervise their promotion and performance.

Prewar Japanese judges, therefore, enjoyed a significant degree of formal protection, but Haley stresses that what made the judiciary politically independent in practice, despite their bureaucratic position under the Ministry of Justice, was their institutional strength and coherence, traits that he argues remain the ultimate guarantor of judicial independence. Institutional independence from direct political control was achieved by means of the construction of the judiciary (and the procuracy) as an elite professional bureaucracy selected by rigorously competitive examinations and subjected to intensive training and supervision. Statute also prohibited virtually all involvement of active judges in any political activity whatsoever, beginning with membership in political parties but extending to a ban on interesting "themselves publicly in political affairs" (*Spirit of Japanese Law*, p. 99).

The above not only states Haley's historical argument succinctly, but it also identifies themes that characterize his analysis of the postwar judiciary. Although there is no necessary connection between passing exams and political independence, Haley believes that homogeneity of background, especially when based on the meritocratic standards of Japanese imperial universities, was the prerequisite to the creation of an elite and professional judiciary. It is also clear that Haley takes "formal security" seriously. He recognizes that judicial independence under the prewar regime was incomplete, citing the arrest and prosecution of judges under the Peace Preservation Law in the 1930s, but the "law on the books" still matters for him.

Also worth noting is Haley's identification of the separation of powers as the foundation of judicial independence. When he claims that the courts were insulated from "direct political intervention in the adjudication of cases

by either legislative or administrative organs," he means that they were safe from direct intervention in particular cases by Diet politicians or their bureaucratic agents, not that they were left alone to make decisions based on the law or their conscience. He makes clear that in important ways the judiciary was dominated by the Ministry of Justice and the procuracy, which was a second, distinct, but intertwined bureaucratic track within the ministry. As Haley notes, the procuracy had "an often determinative voice" in judicial administration, often over the objections of the judiciary. For Haley, in other words, the bureaucratic influence of the procuracy over the careers of the judges before whom they appeared was troubling, but did not amount to "political" interference, which he limits to what he refers to as "democratic political forces" (Maintaining Integrity, p 19). Despite the Ministry's role, therefore, he concludes that "judicial independence remained intact and judges were considered the most trustworthy of all government officials" (*Spirit of Japanese Law*, p. 101).

Haley's description of the postwar judiciary is essentially the story of the triumph of judicial autonomy and its union with the preexisting elite judicial bureaucracy to create an institution that is effectively immune from outside interference. He agrees fully with Ramseyer's and others' portrait of a tightly controlled bureaucracy, but he puts a great deal more stress on the way that the bureaucracy reproduces itself, especially in the appointment of Supreme Court justices. He points out that there has not been a single instance of a politically controversial appointment and implies that it would be virtually impossible for there to be one because the prime minister and Cabinet do not consider it necessary to monitor the judiciary closely enough to make an intelligent choice. As evidence, he describes the appointment of the twelfth chief justice in 1990:

> Two months before the appointment, soon-to-retire Chief Justice Kyouichi Yaguchi visited the official residence of then Prime Minister Kaifu. The purpose was to inform the prime minister of the judiciary's choice for his replacement, a choice made with the participation of the principal administrators of the judicial branch—all career judges themselves. Kaifu did not object. As one official is quoted to have said (translated into idiomatic English), "We wouldn't have the vaguest idea who anyone they might suggest was, and we wouldn't have any way of finding out whether they would be suitable. The Supreme Court people have researched this. We trust their judgment." (Maintaining Integrity, p. 8, nn. deleted)

Haley stresses that this ignorance and trust holds for all appointments, beginning with the fifteen slots on the Supreme Court, which the Secretariat carefully allocates to various interest groups according to an implicit but rigidly adhered to pattern. Fifteen of the 19 postwar chief justices have been career judges, often a former secretary general of the Secretariat. Of the other

14 justices, five or six come from the career judiciary, usually having served as chief judge of the Tokyo or Osaka High Court and as a senior official in the Secretariat. Another third comes from the private bar and the remainder, from the procuracy, legal academe, and other national ministries. Each of these appointments is made only after careful consultation by the Secretariat with the affected groups. In no appointment that Haley is aware of has political affiliation been an issue. This is particularly noteworthy in the case of private attorneys. The bar is not a tightly disciplined bureaucracy and being a prominent lawyer is no guarantee of fidelity to LDP interests, but party politics do not seem to matter. Nor did appointments change between 1993 and 1995 when the LDP was initially excluded from the government and then had to share the Cabinet with the Socialists. With the exception of the appointment of the first woman, the nine justices appointed generally followed the previous pattern without any political controversy (Maintaining Integrity, p. 11).

Haley's argument is that the process of Supreme Court appointments is so institutionally constrained by the necessity to consult and bargain with various factions that partisan political control is impossible. Each faction, especially the bureaucratic judiciary and procuracy but also the private bar, wants to ensure not only that they will continue to receive their share of appointments, but also that any choice from their membership is acceptable to the leadership. For example, if the retiring academic was from Tokyo University, the replacement will be from Kyoto. The result is a process where partisan considerations are replaced with bureaucratic determination, unrelated to the interests of the LDP, to reward those who have served faithfully and well (Maintaining Integrity, p. 11). Haley further argues that the choices made by the Secretariat as it recruits junior judges from the LTRI and makes up the annual lists of renewals of those whose ten-year terms are up are similarly insulated from partisan politics.

Unfortunately for his argument, this pattern also fits Ramseyer's principal-agent hypothesis that the Secretariat and Supreme Court are appointing exactly whom the LDP leaders would appoint if they had to make the choices themselves. Haley recognizes this but he finds Ramseyer and Rasmusen's evidence sorely deficient:

> Their case for political control is barely plausible.... They [do not] find or at least do not offer any evidence of direct or indirect intervention by any politician in any decision made by the General Secretariat in appointing, assigning or promoting any judge during the entire thirty year period they studied (1959–1989). They excuse this lack of proof as unnecessary. Instead they rely on a theory that is almost impossible to prove or disprove, nearly tautological in effect. Because of, they argue, the uninterrupted period of Liberal Democratic Party rule between 1955 to July 1993, senior judges assigned to the General Secretariat of the Supreme Court, could discern (as "agents") without any instruction—like, they say, an accomplished English

> butler—just what their political masters wanted. Hence no evidence of actual intervention—direct or indirect—is necessary. (Maintaining Integrity, p. 24)

Haley's views have not tempered. In a 2004 review, he described Ramseyer's central claim as "an academic folktale [that] ends in tautology" (2004, 237).

Haley's interpretation of the anecdotal accounts presented at the beginning of *Measuring Judicial Independence* is equally interesting. Ramseyer reads the refusal of the Secretariat to reappoint YJL member Miyamoto Yasuaki as a warning shot for all other judges who might cross the LDP. Haley focuses instead on the aftermath:

> Missing in almost all accounts are the consequences. . . . The protests from Japan's judges were immediate and widespread. Over a third openly protested in one form or another, and many others quietly made their objections known. The judiciary became the center of a political storm. Miyamoto received nationwide media attention. Articles and books condemning the action poured forth. Since the Miyamoto incident, no judge has been denied reappointment. Denial of tenure was no longer a viable sanction. Instead, the career judges who persisted in continuing their membership in radical organizations became subject to discriminatory treatment in court assignments and promotions. Control in this form, however, has not provoked public outcry. (*Spirit of Japanese Law*, p. 108)

To state the obvious: Ramseyer sees no further denials of reappointment and concludes that deterrence is working. Haley sees exactly the same phenomenon and concludes that the Secretariat was so scarred by the controversy that they no longer dare use their ultimate weapon.

Despite radically different interpretations of the same event and diametrically opposed conclusions on the ultimate question of judicial independence, the difference between Haley and Ramseyer is remarkably small. As the last quoted passage indicates, Haley does not deny the Secretariat's ideological control over the judiciary and agrees with Ramseyer that reassignment is a sufficient deterrent to ensure acquiescence with Secretariat views. He even agrees that the Secretariat governs with one eye on the Cabinet's appointment power. He just disagrees on who the ultimate master is: "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 the judiciary enjoys the highest levels of public trust" (Maintaining Integrity). According to Haley, the judiciary is conscious of the power of the LDP and Cabinet, but it deals with it not by submitting, but by going over their heads to the Party's political masters, the electorate. By maintaining a high degree of public trust, Japanese judges make it too politically dangerous for the LDP to interfere. If, for example, the LDP were to be

caught directly demanding a particular result, the voters, outraged at this weakening of judicial independence, would vote the scoundrels out. What Haley is doing here is making a principal-agent end run around Ramseyer, claiming that his principal, the electorate, is more powerful than Ramseyer's, the LDP. To illustrate this point, Haley collapses voter, LDP, and judicial opinion, says that they are all the same, and argues that Ramseyer and Rasmusen's own data support his position as much as theirs:

> In the selection of decisions and the assumptions regarding LDP preferences, Ramseyer and Rasmusen in effect conflate the policy preferences of LDP politicians with those of Japan's senior judges and by all accounts the majority of Japanese voters. They do not ask whether the preferences they identify were in fact peculiar to the LDP. For example, they identify judicial decisions holding unconstitutional statutory prohibition of door-to-door campaigning as "politically charged" and "anti-government" inasmuch as such restrictions would presumably favor better known incumbent LDP politicians. However, one can reasonably surmise that the vast majority of Japanese voters, not wanting to be bothered at home by eager politicians and their advocates, also favored the ban. Moreover, the Supreme Court had repeatedly upheld the prohibition. Thus the judges who held the ban to be invalid were flouting voter opinion and the courts at least as much as LDP politicians. (Maintaining Integrity, pp. 24–25)

Haley claims here that the Japanese electorate, the LDP, and Japanese judges, or at least those in the Secretariat, all had the same conservative political values. This unity of values explains the maintenance of a strong political line inside the judiciary, what Haley refers to as the "weeding of the judicial garden" (Maintaining Integrity, p. 23). He agrees that a particular political position dominates judging in Japan. He would simply modify the chain of command: the people elect the LDP, the LDP legislates and implements policy, and the judiciary, with the same political masters in mind, refuses to stand in their way unless the LDP has strayed from its mandate, which apparently happens only rarely.

Mentoring and Monitoring

Reading Haley in this way allows us the ironic pleasure of collapsing the supposedly dramatic differences between him and Ramseyer to one empirical issue within principal-agent theory, but doing so also caricatures his forceful institutional argument and belittles the respect and admiration that he clearly holds for the Japanese judiciary. It is undeniable, however, that a close reading of either *The Spirit of Japanese Law* or "Maintaining Integrity" leaves the reader with a disquieting picture of judges who have little room to act with

individual initiative and a conformist institution thoroughly under the bureaucratic thumb of the Secretariat. Socialization begins with the careful recruitment of politically acceptable graduates of the LTRI and intensifies during the frequent transfers around the country and rotations through various judicial specialties, both of which "ensure the continuous and pervasive influence of senior judges as monitors and mentors":

> Intended or not, consistency and a significant degree of uniformity are fostered by the process of intensive judicial socialization.... The values, expectations, and underlying assumptions of senior judges are inexorably passed down, in the process of three-year rotations to a wide variety of courts nationwide, to assistant judges during their service on three-judge panels in combination with periodic training programs. (*Spirit of Japanese Law*, pp. 117–18)

Secretariat control is reinforced by stringent prohibitions on any forms of political expression or affiliation and an insular environment that makes the judiciary not only a Japanese judge's professional home, but to some extent his social and psychological home as well.

This picture should not be overdrawn. Japanese judges are not automatons, and Haley rightly points out that the socialization also works to familiarize senior judges with the values of their junior colleagues. But it would be a mistake to portray this level of supervision as simply quality control, what Ramseyer and Rasmusen call legal accuracy, or to consider junior judges as fully formed individuals capable of withstanding the pervasive influence of the Secretariat. Entering judges rarely have done anything in their lives except study for the bar exam. Most begin going to legal cram schools in college and continue to do so until they pass the exam, usually a few years after graduation. Some tutor more junior aspirants, but few have full-time jobs outside of the cram school environment, which means that many are as inexperienced socially as they are professionally. Although Haley takes pains to note that the bureaucratic nature of the Japanese judiciary is not unusual in Japan, the only American organization that he believes even approaches it in bureaucratic rigor is the military. Even in the American military, however, there is a great deal of turnover. Not so in the Japanese judiciary, where almost everyone is a "lifer."

If Haley's analogy is apt, there may be a great deal more to be said for military style regimentation and discipline in the judiciary than most Americans would imagine. The predictability claimed by Ramseyer for Japanese trials depends on "homogeneous" judges, and tight control and close supervision greatly facilitate the integrity that Haley celebrates. These virtues notwithstanding, the one certainty in such a hierarchical structure is responsiveness to institutional needs, and although Haley strongly disagrees with Ramseyer's claim of subservience to the LDP, what he offers as an alternative

is far from the image that most Americans hold of an ideal judiciary. According to Haley, Japanese courts face such staggering caseloads that processing cases has become their main concern to the extent that "judicial management and efficient disposition of cases are given considerable priority over other matters, including the appropriate direction of a particular doctrine or nationwide uniformity of judgments in like cases. Such issues, along with the social consequences of the courts' interpretation of particular legal rules and principles, are of course considered by judges, but these are rarely more than minor concerns" (Maintaining Integrity, p. 4).

Although his overall tone is extremely positive, nowhere does Haley draw back from the negative implications of this statement. Indeed, his picture of the Japanese judiciary may be even harsher than that of Ramseyer and Rasmusen. The latter, after all, argue that judicial craft plays a determinative role in Secretariat decisions to favor one judge over another whenever LDP political needs are absent. However contradictory it may be for the Secretariat simultaneously to emphasize judicial accuracy and political expedience, Ramseyer and Rasmusen at least praise Japanese judges for their consistency and predictability. Indeed, these desirable qualities are part of the foundation of their claim that few innocent defendants are convicted. Haley, on the other hand, argues not only that "social consequences" receive short shrift but also that consistent interpretation of rules and national uniformity are only "minor concerns." If we combine this unconcern with rules with the Secretariat's supposed attention to maintaining public trust, we end up with a judiciary whose primary goal is moving cases through the system with little regard for anything else except regularly "weeding the judicial garden" (Maintaining Integrity, p. 23) of any judges whose decisions might deviate from what its highly insular and bureaucratic leadership considers politically correct.

III. PONDERING METHODOLOGY

We now return briefly to methodology. It is of course true that no single piece of scholarship can fairly represent a methodology much less exhaust its possibilities, and no analysis of such a limited body of work, especially by an observer with no training in quantitative approaches, is likely to add anything new in such well trodden territory. Nonetheless, to fail to comment on the effect of methodology would miss a significant aspect of these authors' debate. Ramseyer and Rasmusen wrote *Measuring Judicial Independence* partly to make a methodological statement to area studies and comparative law scholars, two groups that have historically preferred qualitative cultural and historical analysis to equations. They devoted a significant part of the book to explaining how regression analysis works and missed few opportunities to impress on the reader the view that "anecdotes" or "irrational exceptions" are a

weak foundation on which to rest academic conclusions. Nor did Haley shy from the challenge. On the contrary, he took considerable pleasure in dismissing Ramseyer's conclusions as being driven by methodology rather than good sense. So I proceed with the hope that the two observations that follow might be of some interest not only to readers hitherto unable or unwilling to deal with "tobit models" and "R^2's" but also to anyone interested in the role of methodology in contemporary social science.

Individuals vs. Institutions

We look first at the fundamentally different power that these scholars attribute to individuals versus institutions. At the most fundamental level, rational choice assumptions rest on individual choices, and it is the choice of an individual judge to seek advancement or avoid punishment on which Ramseyer and Rasmusen base their conclusions. Because they aggregate these choices within a framework of institutional incentives and then present them in a quantitative form, it is easy to forget that individual choice is their unit of analysis and that they pay very little attention to the institution of the judiciary except as it establishes a set of incentives within which the judges make their choices. It follows that the current subservience of the judiciary to the LDP could quickly change should judges change their choices. Should there be, in other words, a shift in judges' utility curves so that hewing to judicial ethics became more important than advancing up the judicial hierarchy, the ability of the Secretariat to control judicial behavior would immediately suffer. Because Ramseyer and Rasmusen do not discuss where judges' preferences come from, the implication is that they emerge independently of the judiciary as an institution. Under this interpretation, judges' behavior is structured by institutional incentives, but they react to those incentives according to their own individually held preferences.

Although it will not seem so to most readers of *The Spirit of Japanese Law*, Haley attributes more power to the institution of the judiciary than to its members. He emphasizes the judges' human side, mentioning many more names and providing short biographies of several judges, but when it comes to the exercise of power, Haley focuses almost entirely on the institution. His basic claim is that individual choice is supplanted by institutional socialization that thoroughly molds judges' preferences. The emphasis on the intensive and continuous process of mentoring and monitoring implies a norm formation project that goes well beyond setting up incentives and allowing judges to make their choices accordingly. Japanese judges, in other words, are not simply subjects of the institution, they are its creations. Although the casual reader may come away from these two accounts with the impression that Haley has a higher opinion of the integrity and strength of character of Japanese judges, on a fundamental level he has erased them as individuals.

For Ramseyer, individual judges decide for the LDP because the senior judges of the Secretariat will punish them if they do not. The senior judges in turn do so because they are appointed and rewarded by the LDP. Individuals on all levels are constantly engaging in cost-benefit analysis to maximize their preferences. For Haley, the judicial bureaucracy plays a significant role in determining the content of those preferences. As a consequence, the judiciary as an institution is too united and too politically strong to be pushed around by the LDP. In contrast to Ramseyer's portrait of the LDP indirectly creating a set of incentives within which each individual judge can make his or her own choices, Haley sees the dynamic as between two institutions, the LDP and a united and independent bureaucracy with its own institutional authority.

Comprehensive Description vs. Methodological Rigor

At the end of part I, I listed areas of inquiry where I felt that Ramseyer and Rasmusen's methodology had prevented them from giving a description of the Japanese judiciary comprehensive enough to explain some of the implications of their data and analysis. My argument was that combining regression analysis and rational choice assumptions produced an account too focused on specific data for the reader to acquire a sense of competence with the subject. My discussion of Haley's account, on the other hand, suggests that his traditional comparative law approach will provide the reader with the fuller description necessary to make an informed judgment on the question of judicial independence in Japan.

Even in "Maintaining Integrity" where Haley focused on the specific question of judicial independence, his institutional approach requires a more nuanced description of Japanese judges, of the structure and practices of the judiciary as an institution, and of related institutions such as the procuracy or bar association than does Ramseyer's regression analysis, and this more comprehensive picture gives the reader more confidence that she can judge the author's argument. Haley creates an institutional world that the reader can imagine being a part of, and as a consequence, the reader feels as if she were making her own judgments and reaching her own conclusions, both as to the ultimate question of judicial independence and along the way as Haley describes the judiciary's history. Since one is drawn into the judges' world, there is no need to make explicit the myriad incremental judgments I criticized in my section "Methodological Anomalies." Ramseyer and Rasmusen's methodology, in contrast, requires the researcher to follow a trail of data and analysis that can lead into very narrow places where the average reader will feel at the mercy of the authors' choices. As the reader follows the authors down these trails, the big picture begins to fade and two things may happen. First, the reader may simply relax and enjoy the ride, accepting uncritically the authors' incremental but crucial judgments along the way. Alternatively,

the reader may begin to focus on one or two of these judgments, like how "freer access to attorney" could be less politically sensitive than "negligence not shown" or whether all national injunctions should be considered directly offensive to the LDP. In other words, as you read *Measuring Judicial Independence*, you begin to suspect that you are being asked to make judgments based only on the perspective that the authors have chosen, whereas Haley makes you feel as if you are getting the full picture.

This feeling, however, may be an illusion. Haley tells us stories, like the appointment of Court Chief Justice Yaguchi or the recitation of the judges' reaction to Miyamoto's nonrenewal, which we immediately put into a familiar frame of reference. Once we are comfortable, we unconsciously supply lots of details in the author's story, and this is likely the reason that Haley's account seems more satisfying. A close analysis, however, reveals that it too has some "anomalies." Ramseyer and Rasmusen claim that the Secretariat or Supreme Court monitor the LDP and anticipate its wishes, but they fail to explain the mechanism by which those wishes are conveyed. Haley claims that Japanese judges closely monitor public opinion to be sure that their decisions retain the public trust that protects them from LDP interference, but he is silent on how it is done. Obviously, the Secretariat does not have a special unit dedicated to discerning the median voter's position on relevant issues, but does that mean that the senior judges of the Secretariat just intuit public opinion? If so, how have they been so accurate over so long a period? Japanese judges may constitute the most insulated and ingrown bureaucracy in Japan, and the senior judges of the Secretariat are likely to be overwhelmingly male graduates of elite universities who have no experience outside the judiciary and who have worked extremely hard to please their superiors for decades before reaching the level where they can begin to exercise power. Why would they be in a position to gauge accurately what the average Japanese wants from its courts? Haley also criticizes Ramseyer for not dealing with a range of activist decisions made by Japanese courts during this period. The best known examples were the series of antipollution judgments against large corporations that cumulatively contributed to a backlash against the LDP in the late 1960s and 1970s. I agree that explaining how those decisions came about would strengthen Ramseyer's account, but it would also strengthen Haley's. His description of intense socialization leaves the reader as mystified by these rulings as Ramseyer and Rasmusen's story of reward and punishment.

My point is not that because Haley chose a more narrative approach he should answer every question. But Ramseyer has a rhetorical advantage here because the whole point of regression analysis is that it does not deal in stories and can therefore dismiss gaps in the narrative as irrelevant to the enterprise. Instead, it asks relevant questions and tries to answer them. Through the posing and testing of incremental questions, such as whether YJL members' careers suffered, a story can emerge, but a narrative is neither the means nor

the goal of the methodology. In fact quantitative methodology may work against a coherent and comprehensive account of social phenomena. Regression analysis is extremely demanding of standardized data. Every datum must be simplified and codified, and there must be enough of them that statistical analysis is reliable. The process of collecting and standardizing data requires a myriad of judgments about the nature of particular facts or events, and each one of them threatens to distract the researcher and his audience from the main event. Furthermore, once the series of judgments is made and the regressions run, the honest researcher has no control over the data or the results. If they do not coincide with her hypothesis, she must explain them or modify the hypothesis. In doing either, she may again distract the reader with subsidiary issues. More flexible methodologies, on the other hand, can avoid these side excursions and more easily present the appearance of a coherent argument, although at the cost of the testing and modification of the author's hypothesis that is at the heart of quantitative approaches.

IV. CONCLUSION

Although one's own methodological and political prejudices are liable to determine which view of judicial independence one will favor, perhaps the most notable aspect of Haley's and Ramseyer's accounts is what they agree on, and it may be useful to reiterate the portrait of Japanese judges that they give us. The most striking aspect of the Japanese judiciary is its tightly disciplined and hierarchical nature. Americans accustomed to the imagery of the individual judge standing tall for justice in the face of political or popular pressure are likely to be struck by the total disappearance of individuals from Haley's version and Ramseyer's depiction of them as self-serving careerists responding to partisan stimuli, but even readers more familiar with the bureaucratic judiciaries of the civil law world will be surprised by the personnel manipulation and unrelenting supervision of the Japanese judicial system. By any standard, even that of Japan, a country known for its strong and competent bureaucracies, Japanese judges appear embedded in a tight web of professional and social relationships. According to these accounts Japanese judges put a relatively low emphasis on following the law and are prepared to change, manipulate, or distort the law when necessary for professional advancement and survival.

Although in conflict with American notions of judicial independence, the hierarchical discipline of the Japanese judiciary may present an attractive model to poor countries that are attempting to increase the size and effectiveness of their judiciaries. Such countries typically not only suffer from a shortage of legal professionals, but also face the fact that the best trained of them would prefer more financially rewarding careers as private attorneys. In these circumstances, the bureaucratic discipline of the Secretariat may appear

as a means of rapidly improving judicial quality, including not only technical ability—what Ramseyer calls legal accuracy—but also the institution's ability to resist corruption and other forms of favoritism that are antithetical to an effective rule of law however defined. China is one such developing country where some scholars (Su Li 2000, 88–145) argue that bureaucratic discipline and what the Chinese call collective judging can overcome the problems of low professionalization and ubiquitous corruption better and quicker than the individualistically premised American model. Although the Japanese judiciary has not become an explicit model in these discussions, the Japanese experience, including the history of institutional strength cited by Haley, appears to establish its practical possibility and political legitimacy.

Before we become too optimistic, however, an important caveat is necessary. The Japanese judiciary has functioned at least since World War II within the framework of an effective democracy where virtually all controversial issues of public policy have been decided by a popularly accountable government. Although consistently adopting the LDP's position on issues like the constitutionality of the SDF or the apportionment of Diet seats, they have usually given lip service to the constitutional values advocated by the plaintiffs, and in routine administrative cases the courts have avoided directly approving government action in most cases by using threshold doctrines such as standing and ripeness to stay out of political controversy. In other words, the apparently passive stance of the judiciary has made its political biases much less visible than would have been the case if the courts had taken the many opportunities to intervene more openly in Japanese political life. The same deference to political processes cannot be assumed for the judiciaries in most developing countries, and there is a profound difference between a tightly disciplined judiciary that answers to the political needs of the Liberal Democratic Party and one that answers to the needs of the Chinese Communist Party or the dictates of a Pinochet or Mugabe.

This is not meant to deny the substantial benefits of a bureaucratic judiciary. In the absence of a corps of accomplished professionals available for judicial positions, bureaucratic or collective judging can compensate for technical deficiencies in individual judges, and a centrally controlled judiciary with strong political connections at the top may be able to give the institution the strength to resist both the venal corruption of individual judges and the low-level political interference of local governments or party hacks. When one considers these advantages and the potential emergence of the Japanese judiciary as a law and development model for developing countries, however, one would be well advised to remember that the political role of the Japanese judiciary has always been determined by the political and bureaucratic culture of which it is a part. Despite the technical imagery of "legal transplant," perhaps the strongest lesson to be taken from the Japanese experience is that all judiciaries are profoundly political and their performance entirely contingent on both their own institutional culture and the political culture in which they operate.

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