

Berkeley Law

From the SelectedWorks of Robert Cooter

September 1998

Comparative Judicial Daring: Constitutional Powers and Dominant Parties

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work



Available at: http://works.bepress.com/robert_cooter/65

Comparative Judicial Daring: Constitutional Powers and Dominant Parties

by

Robert Cooter
Professor of Law, University of California at Berkeley
792 Simon Hall
Berkeley, CA 94720
e-mail: rdc@uclink.berkeley.edu

Tom Ginsburg
Ph.D. Candidate, Jurisprudence and Social Policy
University of California at Berkeley
2240 Piedmont
Berkeley, CA 94720
e-mail: ginsburg@law.kyushu-u.ac.jp

Revised March 1998

John M. Olin Working Papers in Law, Economics, and Institutions 96/97-9.

Abstract:

Positive political theory has developed important predictive insights into judicial interpretation of statutes, specifically what structural conditions lead judges to defer to the preferences of the legislature. Where the legislature can easily reverse judicial decisions, “strategic” judges are more constrained in interpreting statutes. This paper extends the structural model to include political factors. It then develops a comparative empirical test of the model and shows the model has explanatory power.

Comparative Judicial Daring: Constitutional Powers and Dominant Parties

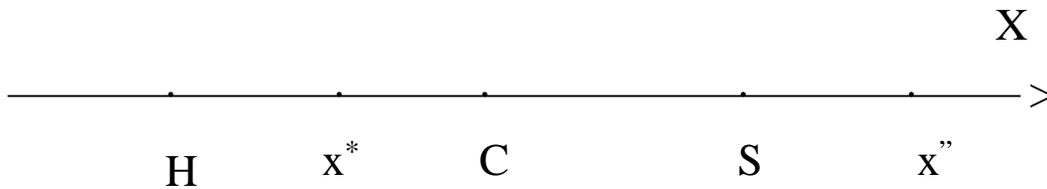
The interpretation of statutes inevitably involves discretion on the part of judges (Cappelletti 1989, Barak 1989). The judge can follow the intentions of the legislature, or adopt an alternative reading of the statute that is closer to the judge's own preferences. The ability of judges to diverge from the instructions of the legislature varies across political systems, as evidenced by variation in the extent of judicial activism across countries (Holland 1991). Several factors may contribute to the relative amount of discretion available to judges in a particular legal system. These factors include traditional conceptions of the proper role of judges, the organization of the judicial profession,¹ and its degree of structural independence from political branches of government (Merryman 1985).

Taken on their own, these factors cannot explain why judicial activism and creativity vary across countries. The examples of the United Kingdom and the US should serve to illustrate the point. Both countries share a common law tradition, prize judicial independence, and have a "status" (as opposed to civil service) judiciary. Both judiciaries are staunchly independent of their respective political systems. Yet American judges are usually considered far more adventurous than their British cousins (Holland 1991). For this reason, American judges are more important political actors than British judges.

In recent years, political scientists and law scholars have related the exercise of judicial discretion to the separation of powers in the constitutional system.² The separation-of-powers theory shows how the Court's range of possible interpretations of a

statute is constrained by the preferences of other actors in a constitutional system. It posits that for any given issue, each lawmaking institution in a constitutional system has a most-preferred interpretation along a line representing a single dimension of preferences. Suppose for example a system requires that new bills be passed by two bodies, which we will call the house and the senate. Suppose also that for a particular bill involving the provision of public good X, the house and senate have different substantive preferences on the amount of X that is desirable. These preferences are marked H and S respectively on Figure 1 below.

Figure 1: Separation of Powers Model



Suppose further that a bill is passed involving the provision of x^* . The Court now has a chance to interpret the statute. If the Court's preferred point C falls within the range of {H,S}, the Court's position will be safe. Any effort by the senate to propose a new bill providing for a rightward movement in x will fail to secure the necessary cooperation of the house, which will prefer the existing judicial interpretation C to any point closer to S. Conversely, any effort by the house to move C towards H will be

effectively vetoed by the senate, which prefers C to S. Thus within the range of {H,S} the Court has discretion in interpreting the statute.

Note that this discretion is limited to points between {H,S}. If the Court adopts an interpretation outside the range, for example at x", both the senate and house will prefer point S to the new point. Thus the two legislative bodies will cooperate in passing a new bill to overrule the Court and thereby inhibit the exercise of its discretion.

The separation-of-powers theory has been used to explain the discretionary power of the U.S. Supreme Court in civil rights law and in other historical contexts.³ Thus far, however, there has been little comparative application of the theory, despite the fact that legislatures in many countries overturn court decisions with new legislation.⁴ Furthermore, as conventionally stated, the separation of powers theory understates the role of politics by assuming that legislation is cost-free. In the real world, legislatures vary in their ability to over-ride judicial interpretations.

One way politics conditions legislative ability to overrule judicial interpretations through new statutes is through political parties. The greater the degree of party discipline, the more party leadership can influence outcomes in a predictable way. Legislative systems with undisciplined parties may require more negotiation to form coalitions to enact legislation. The need for legislative bargaining to enact legislation may give courts more space to interpret statutes.⁵

Besides party discipline, the number of member parties in the governing coalition and its stability may affect the difficulty of passing legislation. If there are many

political parties in the governing coalition, new legislation requires more extensive inter-party negotiation than in a system where there is a single disciplined party.⁶ Again this increases room for judicial action. By contrast, a single dominant party with discipline can easily impose its preferences upon the legislature. Furthermore a stable coalition can clearly communicate its preferences to courts, and reduce uncertainty about the possibility of legislative over-rides.

This paper attempts to extend the separation of powers model by adding a party discipline dimension to the model. We then develop a comparative test of the model and run it on data from twenty countries. Part One describes the theory. Parts Two and Three test the model. First we quantify two variables affecting the probability of legislative repeal of the judicial interpretation of statutes. One of these variables concerns the constitution and the other variable concerns political parties. Next we develop a series of indicators for how adventurous courts are in different countries. Finally, we regress the latter variables on the former variables.

I. THE STRUCTURE OF JUDICIAL POWER

What factors encourage judges to be daring? We approach this problem from the perspective of game theory. We think of judges as participating in a game of power against other officials. We assume that judges have their own preferences about the political order. The court has a range of possible interpretations of any statutory language. The judges can satisfy their political preferences by exercising their power to

interpret statutes. Judges are constrained, however, by the countervailing power of other officials. A judicial interpretation of a statute can be overturned by fresh legislation that explicitly stipulates the preferred interpretation of the legislators. The judges are constrained by the possibility of legislative repeal of their decisions, so the space of judicial discretion expands as overriding the court becomes more difficult. Separation of Powers Games have thus suggested the following prediction: *Courts will be more adventurous in interpreting statutes when the probability decreases of legislative repeal of their decisions.*

An obvious way to test this theory may come to mind: When the preferences of court and legislators diverge, legislatures should frequently enact fresh legislation to repeal the judicial interpretation of statutes. Research has discovered some illuminating examples that confirm this prediction.⁷ The relative frequency of legislative overrides of judicial decisions would appear to be a useful variable for the comparative analysis of judicial discretion. This obvious empirical test, however, is incomplete. To understand why, consider the analogy to bargaining games. The players in a bargaining game seldom carry out their threats, yet their relative power determines the terms of their cooperation. Similarly, judges seldom go so far as to provoke legislative repeal of interpretations, even though the possibility of repeal may determine how far the judges go in pursuing their own political preferences. When the political vision of judges conflicts with legislators, prudent judges pursue their own preferences to a point that stops short of provoking

legislative repeal. Thus the relative power of officials controls their behavior, even though they seldom exercise their power against each other.

The division of powers in the constitution provides one determinant of the probability that fresh legislation will repeal the judicial interpretation of a statute. This determinant is central to models in the existing literature.⁸ Other things being equal, the more legislative bodies required to pass new legislation, the higher the transaction costs involved in the legislative process. If this is true, a court's ability to diverge from legislative preference is in part a function of the number of independent vetoes on passing overriding legislation. Thus, a constitutional system like the American, which requires two independent houses of the legislature and the president to agree before a bill can become law, provides more room for judicial creativity than the British parliamentary system, wherein one house of parliament can pass most bills on its own. By imposing three independent vetoes on new legislation, the American system allows the court to diverge further before provoking a legislative correction.

As conventionally stated, however, the model does not adequately reflect politics. The difficulty of the legislative process, which we call "legislative resistance," is also affected by politics. We believe that the underlying point of the model, namely that judicial discretion expands with the difficulty of passing legislation, to be a valid one, but politics is as important as the constitution in determining the degree of difficulty involved in passing legislation.

The number of independent vetoes on fresh legislation provided in the constitution of a nation can be counted. Similarly, the stability of the governing coalition can be quantified. We will explain how we quantify these variables for purposes of our statistical analysis.

LEGISLATIVE VETOES

Narrowly interpreted, "legislative veto" refers to the formal power to veto legislation. Broadly interpreted, any body whose assent is required to create new law has a veto, because such a body may choose **not** to allow the legislation to proceed. We will describe the number of vetoes in various political systems, broadly interpreted. This description is stylized because certain kinds of exceptional legislation, like the budget, may require special procedures involving otherwise dormant upper houses. In some countries, such as Germany and Israel, legislation requires a Presidential signature, but this is a ceremonial and not a real veto. Furthermore, in some countries the drafting of legislation is performed by the civil service, which may itself have an independent policy preference. For simplicity, these factors are not fully taken into account. Our model concerns only ordinary legislation, and only counts vetoes that are regularly exercised.

The Constitution determines the number of legislative vetoes in a political system. In unicameral parliamentary systems, where the government is formed by the majority coalition in the legislature, there is essentially one veto on legislation.⁹ This

describes the situation in the United Kingdom, Sweden, Israel before Constitutional amendments that mandated direct election of the Prime Minister after 1996, and Japan.¹⁰

Other systems have two vetoes on new legislation. Such is the case in either a bicameral parliamentary system (as in Germany)¹¹, or an essentially unicameral parliamentary system with a strong President (as in France.)¹² Finally, as described above, the United States is exceptional in that it has three legislative vetoes: the two independent houses of the legislature and the President. The column labeled "Vetoes" records these facts in table 1 on page 13.

DOMINANT DISCIPLINED PARTY AND COALITION DURATION

The exercise of legislative vetoes depends on the party system. For example, if a single coalition holds both houses of parliament in a bicameral parliamentary system, the key determinants for whether a particular bill will be passed lie within that coalition. Bargaining will first take place within the governing coalition, and only later between the two houses of the legislature. The most important bargaining involves developing the proposal.¹³

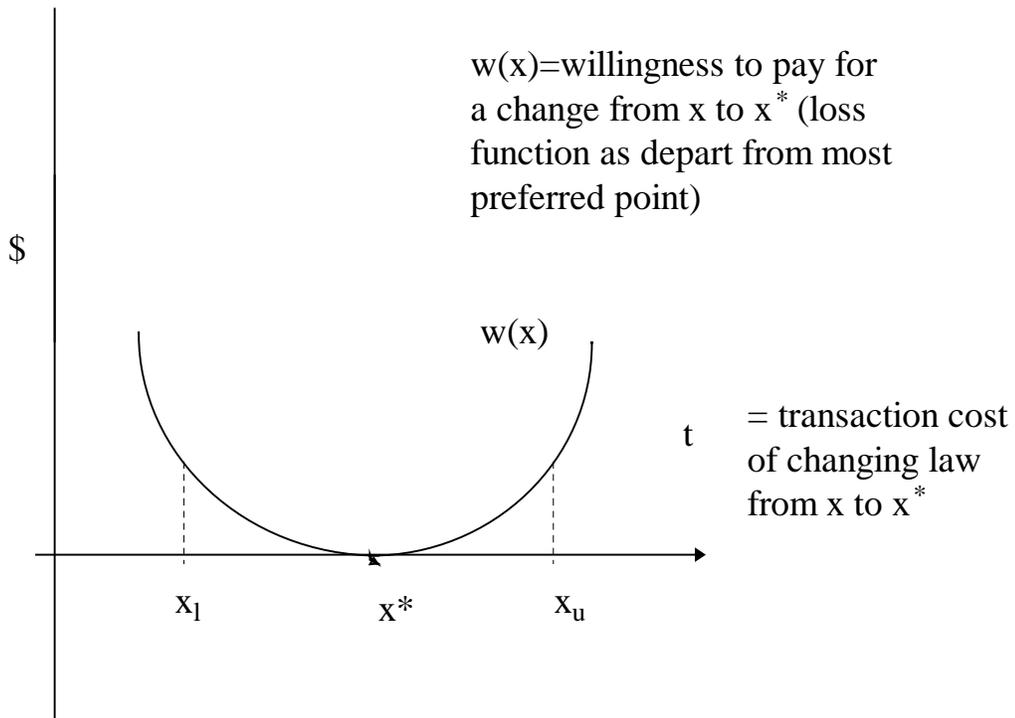
Several factors can minimize the salience of institutional vetoes. If parties are disciplined so that individual members seldom defect from bargains, party leadership can control the votes of backbenchers. This means that party leaders in a coalition can bargain on a given proposal with relative certainty that they will be able to deliver their

votes. Once such a bargain is struck, it does not much matter how many legislative vetoes exist, as long as they are all controlled by the coalition.

If the governing coalition consists of a single disciplined party, bargaining over the proposed bill takes place entirely within that party. This is the case, for example, in the United Kingdom, which has well-disciplined parties and a unicameral legislature that is controlled for long periods by a single party. We characterize this situation as the Dominant Disciplined Party, because the position of the Party and its internal discipline mean that any proposal it wishes to impose on the country can be passed with relatively little resistance from the legislature.

A formal model of how a disciplined party affects judicial discretion is presented in Figure 2. Let x^* = the DDP's most preferred point of a good x . A Court can interpret a statute providing for a value of x anywhere on line x . The DDP can then choose to overturn the judicial interpretation with fresh legislation; however such action is costly. Assume that the DDP's willingness to incur costs to change the interpretation of a law increases as a function $w(x)$ of the distance from its preferred point.

Figure 2: Party Discipline Model



The court's zone of discretion will be bounded by point x_l on the lower end and x_u on the upper end where x_l and x_u satisfy $w(x) = t$. This is because at any point below x_l or above x_u , the DDP's willingness to incur costs of overriding legislation will exceed the transaction costs of doing so. The key factor in determining these points will be the degree of transaction costs required to pass new legislation by the DDP. By hypothesis, these transaction costs will be higher where there are more parties in a coalition or where the ruling party is weaker.

To test this proposition comparatively we need an indicator for the extent to which there is a DDP in various political systems. There are several possible variables

which might indicate the presence or absence of a DDP. Ideally we would like to have a measure of the ability of a party to impose its substantive preferences through the political process. One measure would be the success rate of party proposals. However, counting every instance where a party proposes legislation requires extensive information not easily available for comparative research. Furthermore, such a measure would miss those instances where a relatively weak ruling party wants to propose legislation but does not do so because it anticipates failure. Conventional measures of the effective number of parties are not theoretically appropriate here because they capture diffusion among parties rather than the strength of the dominant party, which if disciplined is the only relevant party for judges to consider.

In a parliamentary system, where the government serves at the pleasure of the legislature, the average duration of the cabinet is one possible indicator of party dominance. As long as the governing coalition commands the support of the parliament, the cabinet continues in office. When the parliament withdraws its support (for example, by rejecting an important government bill) the government falls. A DDP should be able to maintain cabinets for longer than weaker parties.

Cabinet duration, however, is affected by constitutional rules about elections as well as by the party system. This is because elections mandate a formal change in government even if the ruling party stays in power, and all democratic constitutions provide for a maximum duration between parliamentary elections. Thus a dominant party

in a system which requires elections at least every five years will have longer cabinets than an equally dominant party in a system with triennial elections.

A simpler indicator of party dominance is coalition duration. A dominant party will be able to hold power through multiple elections. An extreme example is the Liberal Democratic Party of Japan, which formed 14 consecutive governments and ruled from its formation in 1955 until 1993. Similarly, the United Kingdom was ruled by disciplined Conservatives from 1979 to 1997. Systems where party discipline is low or where no dominant party holds sway will tend to have shorter coalitions.¹⁴

We counted the number of changes in the party composition of the governing coalition for each of twenty countries and then divided by the number of years to determine the average coalition duration.¹⁵ For most countries the period of study was 1945-1993, but in certain cases we adjusted the period to reflect constitutional change. Thus in France, we began with the founding of the Fifth Republic in 1958. In Germany, we began with the founding of the Federal Republic in 1949. The details are given in the Appendix.

One theoretical problem comes in applying this indicator to countries such as the U.S. with a Presidential system or countries like France with a mixed system. In both cases, there is the possibility of divided government wherein one party controls the legislature and another the presidency. For example, from 1981 until the most recent elections in 1995, France has enjoyed mainly socialist rule under a socialist President with brief periods of Guallist government. In the U.S., divided government is the norm.¹⁶

We used the party composition of the cabinet as the indicator for both kinds of systems. Thus in the U.S., the composition of the cabinet changes whenever there is a change in the party controlling the Presidency. In France, the Prime Minister is typically drawn from the majority coalition in the legislature, so control over the legislature becomes the basic indicator of coalition duration.

Some countries have political systems wherein one party is at the center of coalitions but must rely on smaller parties to govern. We believe our coalition duration variable captures the relative stability of these systems. For example, the Christian Democrats have been at the center of almost every postwar Italian government, much as the Social Democrats have been in Sweden. The Christian Democrats have been unable to form stable coalitions however, and have had to adjust the composition of the cabinet almost annually since World War II.

According to our hypothesis, longer coalitions would tend to correlate negatively with legislative resistance. This is because longer coalitions indicate a government's ability to maintain discipline and enact its legislative program. The average cabinet duration for twenty countries is presented below in Table 1.

Table 1: Legislative Resistance

<u>Country</u>	<u>Vetoes</u>	<u>Avg.Coalition Duration</u> (in years)
Australia	2	9
Austria	2	8
Belgium	2	4.8
Canada	2	8
Denmark	1	8
Finland	2	4.8
France	2	6.8
Germany	2	6.3
Ireland	1	6.4
Israel	1	2.4
Italy	2	1.3
Japan	1	9.4
Luxembourg	2	4.4
Netherlands	2	2.5
New Zealand	1	6
Norway	1	4
Spain	1	6
Sweden	1	4.2
United Kingdom	1	8
United States	3	6.9
mean	1.6	5.9

Sources: E. Browne and J. Dreijmanis, eds., Government Coalitions in Western Democracies (1982); A. Lijphart, Democracies (1984); Keesing's Contemporary Archives; A. Blaustein, ed. Constitutions of the World.

Table 1 predicts that judicial discretion is lowest in those countries with a low number of vetoes and a high average coalition duration, such as Japan and the United Kingdom. Judicial discretion will be highest in countries with either a large number of vetoes, such as the US, or low average cabinet duration, such as Italy and Israel. Other countries in the middle include Germany and France.

The next sections of the paper test this prediction. The first test consists of a simple questionnaire of experts. The second consists of a study of one area of law which has been especially suited to judicial daring, namely the move to strict liability for tort claims dealing with defective products.

II. TEST ONE: EXPERTS VIEWS

As a first test, we asked a small number of comparative law scholars for their views on the degree of judicial daring in the various countries. Daring was defined as willingness to make new law through interpretation or willingness to adopt interpretations contrary to government preferences. The questionnaire asked experts to rate the adventurousness of courts in different countries on a five point scale. For example, one expert assigned the U.S. courts a 5 to indicate they were the most daring, courts in the UK a 1, and German and French courts a 3. The various experts' ratings were then averaged so that each country had a single number. Table 2 shows the average ratings for each country.

Table 2: Experts Rating of Judicial Daring

<i>Country</i>	<i>Average Rating</i>
United States	4.50
Israel	4.25
Netherlands	4.00
Belgium	3.50
France	3.42
Italy	3.30
Germany	3.25
Sweden	2.50
Australia	2.38
Canada	2.30
Japan	2.14
Spain	2.14
New Zealand	2.11
United Kingdom	2.09
Mean	2.99

Note: Only countries for which three or more responses were gathered are included. Total number of experts was 23.

Table 3 shows the results of regressing the expert ratings on the two variables in Table 1.

The explanatory variables have the predicted signs. Both variables are significant at

the 5% level. The two variables explained over 50% of the variation.¹⁷

**Table 3: Expert Ratings of Judicial Daring
Regressed on Two Determinants of Legislative Resistance**

<u>variable</u>	<u>coefficient</u>	<u>std. error</u>	<u>t-stat.</u>	<u>2-tail sig.</u>
constant	2.63	0.63	4.16	0.002
Vetoes	0.76	0.27	2.84	0.016
Coalition Duration	-0.16	0.07	-2.31	0.040
R-squared = 0.56				
Prob (F-statistic) = 0.009		N = 14		

To illustrate these results, an increase of one veto in a constitutional system would move the courts .76 units on our five point scale, equivalent to the move from the position of German courts to the position of the allegedly more adventurous Dutch courts, or from the position of Swedish courts to the position of German courts. Similarly, a one year increase in average coalition duration would lower a country .16 units, or from the position of the Canadian courts to that of the less adventurous Japanese courts. A five year decrease in average coalition duration would increase the courts adventurousness from the level of Swedish courts to those of the Italy.

Another way of illustrating these results is to look at the elasticities.¹⁸ We computed the mean of the elasticities at the different data points. The mean elasticity for experts' ratings relative to vetoes was .42. This means that a 50% increase in vetoes (say by adding a presidential veto to a bicameral legislative process) will result in an approximately 21% increase in judicial daring. The mean elasticity for experts' ratings relative to coalition duration was -0.36. A doubling of coalition duration would result in approximately a 36% reduction in judicial daring in our model.¹⁹

III. TEST TWO: THE MOVE TO STRICT LIABILITY

To test further our prediction of judicial daring, we examined one area of law as a case study, the adoption of strict liability for consumer product injuries. We found that courts with high predicted daring were willing to innovate in this area of private law more than other courts. Courts with low predicted daring, by contrast, were content to wait for legislative adoption of the new standard.

Before the move to strict liability for product defects, liability had usually been based on traditional standards of negligence in tort doctrine. Traditional doctrine required the plaintiff to prove the defendant's negligence caused the sale of a defective product. Alternatively, many jurisdictions had a contract law doctrine which allowed buyers to sue sellers for breach of contract (sometimes using an "implied term" or warrant of merchantability.) Contract liability was strict, but when narrowly construed the doctrine had limited utility in product liability cases. For example, contract liability is usually restricted to the actual seller of the product, so it does not extend easily back to the manufacturer.

As the number and type of consumer products have expanded with the modern economy, most wealthy countries have moved to strict liability for injuries cause by defective products. (A large debate concerns whether this change increases or decreased economic efficiency.²⁰)

The key question for our model is whether the jurisdiction adopted strict liability through judicial or legislative mechanisms. We hypothesize that more daring courts would sooner overturn a traditional tort law standard than would more conservative courts. Conservative courts may be more likely to defer to strict terms of legislative doctrine.

The first jurisdiction to move to a strict liability standard was California, and some form of its rule was adopted by all US jurisdictions.²¹ The first European jurisdiction to move to a strict liability standard for product liability claims was France. Product liability claims were traditionally based on either contract or tort provisions in the French code. The Cour de Cassation gradually unified the remedies available to consumers.²² While the French system of consumer protection is extremely complicated, the main point is that in the US and France courts led the way in changing liability law.

There are three possible ways in which strict liability could be adopted. In some jurisdictions, as described above, courts moved to a strict liability standard before the legislature mandated it, overturning traditional doctrine (and sometimes the explicit text of the codes.) This was the case in France and the US.²³ In other countries, such as in Germany, Italy and Israel, courts went part of the way by reversing the burden of proof. Under traditional law in product liability cases, the plaintiff must prove that the defendant was negligent, whereas under revised law the defendant must prove that he was not negligent. Reversing the burden of proof helps plaintiffs overcome evidentiary problems and thereby significantly expands liability for manufacturers. Finally, certain courts

neither moved to strict liability nor reversed the burden of proof, and the move to strict liability was initiated by the legislature (as in the United Kingdom and Sweden).

These facts provide a basis for quantifying judicial daring in the area of consumer products liability. Countries where courts moved to strict liability without legislative construction are assigned a 3. Countries where courts went part-way, a lesser but still significant judicial innovation, are assigned a 2. Finally, courts which refused to innovate are assigned a 1.

Table 4: Judicial Role in Developing Strict Liability			
<u>country</u>	<u>Judicial</u> <u>role in</u> <u>S.L.*</u>	<u>Vetoes</u>	<u>Coalition Duration</u>
Australia	1	2	9
Austria	2	2	4.8
Belgium	3	2	4.8
Canada	2	1+	8
Denmark	1	1	8
Finland	1	2	4.8
France	3	2	6.8
Germany	2	2	6.3
Ireland	1	1	6.4
Israel	2	1	2.4
Italy	2	2	1.3
Japan	2	1	9.4
Luxembourg	3	2	4.4
Netherlands	2	2	2.5
New Zealand	1	1	6
Norway	1	1	4
Spain	1	1	6
Sweden	1	1	4.2
United Kingdom	1	1	8
United States	3	3	6.9
KEY: *3 = judicial move to strict liability	*2 Cts. reverse burden	*1 leg. adopts SL	+: In Canada products liability is a matter of provincial law.

SOURCES: W. Freedman, Product Liability: An International Manual of Practice (1990); P. Kelly and R. Attree, European Product Liability (1992); G. Howells, Comparative Product Liability (1993); A. Mottur "European Product Liability", Law and Policy in International Business (1994).

Table 5 shows what happens when we use a multivariate statistical procedure to explain these results with our two variables indicating legislative resistance. Because the dependent variable in the equation represents an ordinal rather than a continuous variable, we apply an ordered probit model to estimate the equation.

Table 5: Ordered Probit Model Relating Consumer Products Liability to Two Determinants of Legislative Resistance

<u>variable</u>	<u>coefficient</u>	<u>std. error</u>	<u>z-stat.</u>	<u>P > z</u>
Vetoes	2.28	0.73	3.15	0.002
Coalition Duration	-0.20	0.13	-1.36	0.172
pseudo R-squared = 0.40				
chi ² = 16.12				
Prob > chi ² = 0.0003				
Log likelihood = -12.531				

The results of the equation in Table 5 are similar to the results in Table 3 using ordinary least squares. Specifically, the two explanatory variables have the predicted sign, Vetoes is highly significant, and Cabinet Duration marginally significant as well. The equation explains 40% of the variation in the dependent variable. Although the results are less significant than in the ordinary least squares model, this is to be expected since we lose information by using an ordinal rather than a continuous variable.

Of the countries in our study, only France, Belgium, Luxembourg and the US had judicially created strict product liability. The other countries moved legislatively to strict liability, although courts in Germany, Italy, Israel and other countries had gone part way

by reversing the burden of proof. UK, and Swedish courts had not reversed the burden. The nine countries from our sample which fell into the latter group had, on average, less vetoes and longer cabinet duration than the ten in the other two groups.²⁴

IV. OMITTED VARIABLES

We should mention two variables not taken into account in our model. The first is the material independence of the courts from the political process. Where judges are dependent on politicians for their budget, promotions, and other assignments, they are likely to decide cases in accordance with the wishes of the politicians who control their purse strings. We do not include this variable because we believe it may be congruent with our measure of Dominant Disciplined Party. Dominant parties can easily impose their preferences on judges because judges know that the party is likely to continue to be in power and there is little to be gained from defying it. Where parties alternate in power, any attempt to coerce the judiciary through manipulation of material incentives will likely provoke the other political parties to do the same. It is therefore in neither party's interest to begin to politicize the judiciary. Furthermore, without a DDP, individual judges may resist such attempts, since they know that eventually the other party will "rescue" them from the imposition of a particular political viewpoint. Where a DDP holds power for a long period, judges are likely to be shaped during formative periods of their careers in directions consistent with DDP views. Finally, a DDP will gain a sophisticated understanding of mechanisms to control judges through long experience. For these

reasons, material dependence on politicians is more salient when there is a DDP than where there is not.

The second omitted variable concerns the bureaucracy. In many systems it is the bureaucracy and not the legislature which actually drafts laws. The administration might be argued to constitute another legislative veto. But the bureaucracy also can veto judicial decisions in other ways, for example by failing to enforce judgments or judicial orders. For simplicity, we leave the bureaucracy out of the model, and assume that it acts as an agent of the legislature.

Conclusion

We have argued that the presence of a Dominant Disciplined Party limits judicial discretion and therefore limits judicial daring. Conversely, judicial daring expands as the number of vetoes on fresh legislation increases. We have demonstrated that experts' subjective perceptions of judicial daring correspond to our predictions.²⁵ Next, we showed that the pattern of countries' adoption of new standards of producer's liability in tort reflected our predictions for how daring courts would be. The party discipline model of judicial discretion is an important complement to existing separation of powers models.

APPENDIX
Coalition Duration

Country	Start year ²⁶	End year	total yrs.	# of coalitions ²⁷	avg. duration (years)
Australia	1958	1994	36	4	9
Austria	1945	1993	48	10	4.8
Belgium	1945	1993	48	10	4.8
Canada	1945	1993	48	6	8
Denmark	1945	1993	48	6	8
Finland	1945	1993	48	10	4.8
France	1958	1992	34	5	6.8
Germany	1949	1993	44	7	6.3
Ireland	1948	1993	45	7	6.4
Israel	1948	1993	45	19	2.4
Italy ²⁸	1948	1993	45	34	1.3
Japan	1946	1993	47	5	9.4
Luxembourg	1958	1993	35	8	4.4
Netherlands	1945	1993	48	19	2.5
New Zealand	1945	1993	48	8	6
Norway	1957	1993	36	9	4
Spain	1976	1994	18	3	6
Sweden	1951	1993	42	10	4.2
United Kingdom	1945	1993	48	6	8
United States ²⁹	1945	1993	48	7	6.9

REFERENCES

- Barak, Aharon. 1989. *Judicial Discretion*. Cambridge: Harvard University Press.
- Capelletti, Mauro. 1989. *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press.
- Cooter, Robert and Thomas Ulen. 1996. *Law and Economics*. 2nd ed. New York: Addison Wesley.
- Epstein, Lee and Thomas Walker. 1995. "The Role of the Supreme Court in American Society: Playing the Reconstruction Game" in *Contemplating Courts* ed. Lee Epstein. Washington: CQ Press.
- Escola v. Coca-Cola Bottling Co.* 24 Cal.2d 453 (1944).
- Eskridge, William. 1991. "Overriding Supreme Court Statutory Interpretation Decisions" *Yale Law Journal* 101 (March): 331-459 (1991).
- Ferejohn, John, and Barry Weingast, 1992a. "A Positive Theory of Statutory Interpretation." *International Review of Law and Economics* 12 (June) 263-279.
- Ferejohn, John, and Barry Weingast. 1992b. "Limitation of Statutes: Strategic Statutory Interpretation." *Georgetown Law Journal* 80 (November): 565-582.
- Gely, Rafael, and Pablo T. Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases." *Journal of Law, Economics and Organization* 6 (Fall) 263-300.

Gunlicks, Arthur. 1994. "German Federalism After Unification: the Legal/Constitutional Response" *Publius* 24: 81-98.

Holland, Kenneth, ed. 1991. *Judicial Activism in Comparative Perspective*. New York: St. Martin's Press.

Jacobson, Gary. 1990. *The Electoral Origins of Divided Government*. Boulder: Westview Press.

Laakso, M. and Rein Taagepera. 1979. "Effective Number of Parties: A Measure with Application to West Europe" *Comparative Political Studies* 12: 3-15.

Merryman, John. 1985. *The Civil Law Tradition*. 2nd ed. Stanford: Stanford University Press.

Mikva, Abner, and Jeffrey Bleich. 1991. "When Congress Overrules the Court" *California Law Review* 79 (May): 729-751.

O'Brien, David M. 1993. *Storm Center*. 3rd ed. New York: Norton.

Priest, George. 1985. "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law." *Journal of Legal Studies* 14: 461.

Segal, Jeffrey. 1997. "Separation of Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91 (March): 28-44.

Shavell, Steven. 1987. *An Economic Analysis of Accident Law*. Cambridge: Harvard University Press.

Spiller, Pablo, and Rafael Gely. 1992. "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988." *Rand Journal of Economics* 23 (Winter): 463-492.

Stone, Alec. 1992. *The Birth of Judicial Politics in France*. New York: Oxford University Press.

Taagepera, Rein, and Matthew Shugart. 1989. *Seats and Votes: The Effects and Determinants of Electoral Systems*. New Haven: Yale University Press.

Endnotes

¹A key variable here is whether the judiciary is organized along the lines of a hierarchical civil service model, in which judges enter the profession at a relatively young age and advance through adherence to internally maintained professional norms. In the common law tradition, entry to the judiciary is a prestigious appointment which comes at the end of a distinguished legal career. Advancement is less of a concern, and the upper echelons of the profession have fewer collateral means of controlling the incentives of lower-court judges, (though they do maintain control over legal norms through the appeals process.)

² See e.g., J. Ferejohn and B. Weingast, "A Positive Theory of Statutory Interpretation," 12 International Review of Law and Economics 263-279 (1992), J. Ferejohn and B. Weingast, "Limitation of Statutes: Strategic Statutory Interpretation," 80 Georgetown Law Journal 565-582 (1992), and W. Eskridge, "Overriding Supreme Court Statutory Interpretation Decisions" 101 Yale Law Journal 331 (1991). For the same model with an administrative agency, see B. Weingast and M. Moran, "Bureaucrats vs. Voters: On the Political Economy of Resource Allocation," 93 Q.J.Econ 143 (1979), J. Ferejohn and C. Shipan, "Congressional Influence on Bureaucracy," 6 J.Law, Economics, & Organization 1-20 (1990), M. Spitzer, "Extensions of Ferejohn and Shipan's Model of Administrative Agency Behavior," 6 J.Law, Economics, & Organization 29-43 (1990), and S. Rose-Ackerman, "Comment on Ferejohn and Shipan's 'Congressional Influence on Bureaucracy'," 6 J. Law, Economics, & Organization 21-27 (1990).

³ William Eskridge, Dynamic Statutory Interpretation (1994); L. Epstein and T. Walker, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game" in Contemplating Courts ed. Lee Epstein (Washington: CQ Press 1995).

⁴ Jeffrey Segal, "Separation of Powers Games in the Positive Theory of Courts and Congress", 91 American Political Science Review 28 (1997), 42. For discussion of these dynamics in various political systems, see Shimon Shetreet and Jules Deschênes, eds., Judicial Independence: the Contemporary Debate, (Boston: Martinus Nijhoff, 1985), pp. 13 (Australia), 46 (Belgium), 80 (Germany), 144 (UK), 180 (Israel), 199 (Italy), 208 (Japan) and 247 (Netherlands).

⁵Note it could also mean that courts have less information about stable legislative preferences, which may lead the court to be cautious for fear of over-reaching. Alternatively, courts may underestimate legislative concern, in which case their innovation could provoke legislative correction **because** of the uncertainty of legislative preferences. Current demands for tort reform in the United States may reflect such dissatisfaction with judicial innovation.

⁶The structure of the party system itself is heavily influenced by electoral laws. For an empirical study, see R. Taagepera and M. Shugart, Seats and Votes: The Effects and Determinants of Electoral Systems (New Haven: Yale, 1989). Also see B. Grofman and A. Lijphardt, Electoral Laws and Their Political Consequences (1986).

⁷The model is developed in Gely and Spiller, "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases." 6 Journal of Law, Economics and Organization 263 (1990). For a discussion of the U.S. Congress correcting judicial interpretation of civil rights

legislation, see Abner Mikva and Jeffrey Bleich, "When Congress Overrides the Court" 79 *Cal. L. Rev.* 729 (1991). Statistics on the increasing frequency of congressional over-rides of judicial interpretation of statutes can be found in David M. O'Brien *Storm Center* (3rd ed. 1993) at 398-400. See also Shetreet, *supra* note 4.

⁸ For an empirical study of American court decisions based on the model, see Spiller and Gely, "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988," 23 *Rand J. Economics* 463 (1992). The framework is developed in Gely and Spiller, *supra* note 6.

⁹This is the case whether proposals for new legislation originate in the government or the legislature.

¹⁰Note that in Japan and England, there is an upper house of parliament, but their assent is only required for the budget and not for most ordinary legislation. Israel recently modified its Basic Law so that beginning in 1996, the Prime Minister will be directly elected rather than simply the head of the leading party in the parliamentary coalition. This has increased the number of legislative vetoes to two.

¹¹Technically the *Bundesrat* is not an upper house but a distinct institution. However, it can impose an absolute veto on any legislation affecting the *lander*. See Arthur Gunlicks, "German Federalism After Unification: the Legal/Constitutional Response" 24 *Publius* 81, 84. Since such legislation constitutes well over 50% of the total, we treat the German system as bicameral. Although the Chancellor and President must also sign legislation, the President's signature is ceremonial and the Chancellor's veto is not exercised independently of the parliamentary majority.

¹²The French system is formally bicameral, but in fact the Senate is indirectly elected and can only delay lower house legislation and not block it. While this has the effect of imposing additional transaction costs and thereby increasing legislative resistance, for simplicity such partial vetoes are not counted in our model. Another partial veto in the French system is exercised by the Conseil Constitutionnel, which can render an abstract opinion of unconstitutionality that in reality tends to cause the legislature to modify its legislation. This has been increasingly important since a constitutional amendment in 1974 allowed a minority bloc of legislators in either house of the legislature to request a Conseil Constitutionnel opinion. See Alec Stone, *The Birth of Judicial Politics in France* (1992).

¹³Nelson Polsby characterizes these kind of legislatures as arenas, in contrast with transformative legislatures which regularly modify the legislation in substantial ways. Polsby, "Legislatures" in F. Greenstein and N. Polsby, eds. *Encyclopedia of Political Science*, (Redding, MA: Addison Wesley, 1975), volume 1.

¹⁴Another possible indicator we could have used was developed by political scientists and is called the Effective Number of Parties. See M. Laakso and R. Taagepera, "Effective Number of Parties: A Measure with

Application to West Europe" 12 *Comparative Political Studies* 3 (1979), and R. Taagepera and M. Shugart, Seats and Votes (New Haven: Yale, 1989). This index expresses the degree of party fragmentation and is captured by the formula $N = 1/\sum p_i^2$ where p_i is = percentage of seats of the i th party. Alternative regression results for this indicator are given at note 17.

¹⁵ For purposes of this paper, changes in composition occur only when a party is added or dropped from the coalition, and not when the cabinet seats are merely reshuffled among existing coalition members. Nor is there a change when the same coalition continues in power after new elections.

¹⁶Gary Jacobson, The Electoral Origins of Divided Government (1990).

¹⁷We also ran the regression with an alternative indicator for DDP, the Effective Number of Parties discussed above at note 16. The predicted sign for this indicator is positive, whereas that for Coalition Duration is negative. (Legislative resistance increases with the number of effective parties in the legislature, but decrease as a single coalition holds extended power.) The results for this alternative indicator were also good, though not statistically significant.

<u>variable</u>	<u>coefficient</u>	<u>std. error</u>	<u>t-stat.</u>	<u>2-tal sig.</u>
constant	1.01	0.73	1.37	0.20
Eff. # Parties	0.23	0.15	1.55	0.15
Vetoes	0.79	0.33	2.39	0.03

R-squared = 0.43

Prob (F-statistic) = 0.043

N = 14

¹⁸ The formula for the elasticity of y relative to x_1 is $a(x_1/y)$ where a is the coefficient of x in the model $y = ax_1 + bx_2 + c$.

¹⁹ We also computed the elasticity at the mean. The elasticity of the experts' ratings relative to vetoes is .41 at the mean. The elasticity of the experts' ratings relative to coalition duration is -0.32. Using the mean elasticity is preferable to using the elasticity at the mean because it better reflects the fact that the elasticity is not constant throughout the model.

²⁰ See discussion in R. Cooter and T. Ulen, Law and Economics 2nd ed. (Addison Wesley, 1996) 421-462, and S. Shavell, An Analysis of Accident Law (Cambridge: Harvard University Press, 1987). George Priest argues that the use of tort rather than contract doctrine in products liability cases is inefficient, Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law" 14 J. Legal Std. 461 (1985). W. Landes and R. Posner take a slightly different view in "A Positive Economic Analysis of Products Liability" 14 J. Legal Stud. 529 (1985).

²¹The standard was first proposed by Justice Traynor in his concurrence in *Escola v. Coca-Cola Bottling Co.* 24 Cal.2d 453 (1944). The rule did not become law in California until almost twenty years later, but thereafter rapidly spread to other states.

²²See Art 1641 of the Civil Code, which provides that the seller is liable in respect of hidden defects which render the product unsuitable for its intended use. A good general discussion of products liability in European jurisdictions is H. Kötz, *An Introduction to Comparative Law*, 2nd ed. (1994) pp. 712-723.

²³The strict liability standard is a feature of state, not federal, law in the U.S. This is a minor but not insurmountable problem for our model, since our assessments of DDP and Vetoes in the various countries were made at the national level. We believe that the constitutional framework of most states is consistent with the federal scheme, since all states but Nebraska have bicameral legislatures. Furthermore, fragmented national parties may be replicated at the state level.

²⁴The mean number of vetoes for the latter group was 1.3, compared with 2.0 for the first two groups combined. The mean coalition duration was 7.18, compared with 4.62 for the first two groups.

²⁵This regression only concerns subjective **perceptions** of discretion by comparative law experts. After eliciting their opinions, we explained the model to them. They typically expressed skepticism that such a simple model could work. Apparently, the comparative law experts should find the strength of the regression results to be counter-intuitive.

²⁶The start year usually begins with 1945 or with the subsequent establishment of a new constitutional order. Occasionally, problems in gathering the data forced us to modify the original start date.

²⁷A coalition change only occurs when the party composition of the cabinet changes. A simple reshuffling of seats among existing coalition partners is not counted as a change.

²⁸Although Italy has had over 50 governments in the postwar period, some of these cabinets replaced earlier cabinets of exactly the same party composition. For purposes of our calculations we did not count such instances as a break in the coalition.

²⁹For the U.S., the only changes in coalition occur when the Presidency changes hands. Hence the average duration is higher than the constitutionally-mandated four-year Presidential term. Sometimes one party controls the Presidency for more than two terms, as did Republicans from 1980-92.