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Citation: 88 Wash. U. L. Rev. 1467 2010-2011

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This work was originally published as John O. Haley, Constitutional Adjudication in Japan: Context, Structures, and Values, 88 Wash. U. L. Rev. 1467 2010-2011.

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# CONSTITUTIONAL ADJUDICATION IN JAPAN: CONTEXT, STRUCTURES, AND VALUES

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Judicial decision making in Japan has become a topic of considerable interest for at least the cadre of comparative lawyers whose primary concern is constitutional law. Such interest is to be applauded. Comparisons with Japan are always beneficial, in that they require a departure from the prevailing focus on the United States and Western Europe. Broadening the scope of comparison to include Japan, the premier non-Western industrial democracy for over a century, avoids at least some of the significant pitfalls of Eurocentric analyses that too often tend to mislead as much as to edify. The inclusion of Japan in comparative legal analyses forces explicit recognition of assumptions and premises related to legal systems that are frequently left unstated and merely, mistakenly, assumed as universally valid. Japan's inclusion thus leads to a more complete and arguably more accurate appraisal of factors and issues that should be included but might otherwise be ignored.

Many, if not most, accounts of decision making by courts in Japan—especially in cases involving constitutional questions—describe the outcomes as “conservative” and so label the judiciary.<sup>1</sup> The most frequently noted support for such conclusions is the relative dearth of cases in which the Japanese courts have held legislative and other state actions to be unconstitutional.<sup>2</sup> Rarely if ever do critics engage in any in-depth comparative analysis of constitutional cases and their context in other industrial democracies. The relative paucity of decisions invalidating legislation and other state actions as unconstitutional has been the principal, if not exclusive, point of departure in attempts to explain the now apparent “conservatism” or, indeed, the proclivity of judges, particularly the fifteen Justices who occupy the bench of the Supreme

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1. See, e.g., HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* (1989); *id.* at 221–47 (chapter six entitled “The Conservative Supreme Court,” in which Itoh offers an insightful analysis of judicial decision making by the Supreme Court).

2. See, e.g., HIROYUKI HATA & GO NAKAGAWA, *CONSTITUTIONAL LAW OF JAPAN* 78 (1997); David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *TEX. L. REV.* 1545 (2009); Percy R. Luney, Jr., *The Judiciary*, in *JAPANESE CONSTITUTIONAL LAW* 145 (P.R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

Court, to defer to the political and administrative branches of government. I disagree.

I do not take issue with the ultimate conclusion that judges in Japan are “conservative.” Indeed, I have previously described the judiciary in similar terms.<sup>3</sup> My quibble is with the meanings given the terms and the explanations of the cases and their outcomes. In other words, I question the prevailing—or at least the most widely disseminated and influential—analyses of judicial decision making in Japan. The assertion that Japanese judges in constitutional cases are more likely than their counterparts in the United States or Western Europe to defer to the legislature or to administrative agencies requires painstaking comparative analyses of the outcomes of like cases—instances in which career judges and Justices in Japan have refused to invalidate legislation or administrative actions that have or would have been deemed unconstitutional in the United States and Western Europe. Citing mere numbers does not suffice. A threshold problem, as explained below, is that there are few, if any, truly like cases. A principal aim in this essay is to show why this is so and, in so doing, why invalidation of legislation or administrative regulations on constitutional grounds has been relatively rare in Japan. In the process, I hope to add some additional thoughts to the discussion of constitutional adjudication in Japan.

The starting point for any comparative study of constitutional adjudication must be the constitutions themselves. Differences in constitutional provisions—particularly constitutional guarantees and protections of individual rights—must first be taken into account. Three provisions of the Japanese Constitution well illustrate this point. The first is the freedom of occupation guarantee of Article 22, which provides that “Every person shall have freedom . . . to choose his occupation to the extent that it does not interfere with the public welfare.”

The provision is a German law borrowing from the “freedom of occupation” (*berufsfreiheit*) provisions of articles 111(1) and 151(3) in the Weimar Constitution, currently incorporated in article 12(1) of the 1949 Bonn Basic Law. It was included, despite the lack of any U.S. counterpart, in the draft of the steering committee, chaired by Charles L. Kades and delegated by the Supreme Commander of the Allied Occupation (SCAP), that was charged with writing a “model” constitution for postwar Japan. A second provision, which not only has no U.S. parallel but was initially rejected by Kades and later inserted as an amendment during Diet

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3. See JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 90–122 (1998).

deliberations,<sup>4</sup> is Article 17, which provides: “Any person who has been injured [damaged] by a delict [tortious act] of a public official shall be able to claim compensatory damages from the state or a public entity as provided by law.”<sup>5</sup>

Equally significant for comparative purposes, no industrial democracy has any equivalent to Article 9 of the postwar Constitution, which provides:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. 2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Personally drafted by Kades, the provision as enacted includes prefatory language added during the deliberations in the Diet.<sup>6</sup> Over the past six decades, hardly any constitutional provision has been as contentious or subject to as many judicial decisions. The constitutionality of the U.S.-Japan Security Treaty, of U.S. bases in Japan, and of the Self-Defense forces have been among the most frequently litigated constitutional issues of postwar Japan.

Routinely ignored by Western critics of the “conservatism” of the judiciary are cases in which at least the first two of these provisions have been applied. The first is the *Pharmacy* case,<sup>7</sup> in which the Court in effect—but without explicit acknowledgement—overruled a 1955 Grand Bench decision in the so-called *Bathroom* case.<sup>8</sup> The 1975 decision invalidated a licensing standard for the location of a pharmacy as an

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4. For a more detailed discussion, see John O. Haley, *Toward a Reappraisal of the Occupation Legal Reforms: Administrative Accountability*, in EIBEIHO RONSHU (ESSAYS ON ANGLO-AMERICAN LAW) (Hideo Tanaka Festschrift) 543, 550 (Fujikura K. ed., 1987).

5. This text constitutes the author's own translation of the constitutional provision.

6. Interview with Charles L. Kades & John O. Haley, Henry M. Jackson Sch. of Int'l Studies, World Focus: Making of the Japanese Constitution Part I (May 23, 1989) (transcript of taped interview on file with author); see also John O. Haley, *Waging War: Japan's Constitutional Restraints*, 14 CONSTITUTIONAL FORUM CONSTITUTIONNEL, no. 2, 2005, at 18.

7. Saikō Saibansho [Sup. Ct.] Apr. 30, 1975, Showa 50 no. 665, SAIBANSHO JIHŌ (*K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*); see also John O. Haley, *Comment: The Freedom to Choose an Occupation and the Constitutional Limit of Legislative Discretion—K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*, 8 LAW IN JAPAN: AN ANNUAL 178 (1975).

8. Saikō Saibansho [Sup. Ct.] Jan. 26, 1955, 9 SAIKŌ SAIBANSHO KEJI HANREISHŪ [KEISHŪ] 89 (*Shimizu v. Japan*, or the “*Bathroom*” case), translated in JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN 293 (1964).

infringement on the “freedom of occupation” of Article 22. A more recent case is the Grand Bench 2002 decision in *Nanafuku Sangyō K.K. v. Japan*,<sup>9</sup> in which the Court unanimously held unconstitutional provisions of the Postal Services Law exempting or limiting the tort liability of the state for registered mail where a loss has occurred as a result of the intentional acts or gross negligence of a postal worker.<sup>10</sup> The decisions in both cases serve as telling reminders that the Court has reached decisions that are considerably more classically “liberal” or “libertarian” than those by its U.S. counterpart.<sup>11</sup> Discussed below are the Article 9 cases on which much of the commentary regarding the “conservatism” of the courts hangs.

In addition to such substantive constitutional differences, three clusters of fundamental factors, in my view, best explain national contrasts in constitutional adjudication. The first and broadest is *historical context*. Societal differences in historically evolved, broadly shared values and beliefs surely account for the dearth of state regulation—much less constitutional cases—in Japan (and East Asia in general) on abortion and in the West on enhanced penalties for crimes against lineal ascendants.<sup>12</sup> Fundamental differences in historical experience—particularly violent social and political conflict—since at least the sixteenth century, have created equally profound differences between Japan and the West with respect to the nature and extent of contentious contemporary social and political issues. Not since the sixteenth century has Japan experienced anything akin to the social and political strife that engulfed Western Europe from the late eighteenth century through the mid-twentieth century. Nor has Japan ever experienced chattel slavery. Many of the

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9. Saikō Saibansho [Sup. Ct.] Sept. 11, 2002, 56 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1439.

10. In the United States, such suits would be dismissed on the basis of sovereign immunity and debilitating construction of the Federal Torts Claims Act. *See, e.g., Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006).

11. With respect to occupational licensing restrictions, *see, for example, Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); and *United States v. Carolene Prods.*, 304 U.S. 144 (1938). For a recent and more comparable case, *see Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). Statutes restricting the liability of the state for damages for a postal worker’s intentional or gross negligence would undoubtedly be upheld. Indeed, such statutes are unnecessary. Suits claiming such liability would be easily dismissed on the basis of sovereign immunity and debilitating construction of the Federal Torts Claims Act. *See, e.g., Dolan*, 546 U.S. 481.

12. *See, e.g., Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 48 [keishū]*, 27 SAIKŌ SAIBANSHO KEIJI HANREISHU [KEISHŪ] 265 (*Aizawa v. Japan*) (one of three cases decided together, holding unconstitutional the provision of Article 200 of the Criminal Code for aggravated penalties for the crime of the murder of a lineal ascendant).

constitutional issues adjudicated in contemporary Europe and the United States reflect the legacy of these conflicts and their underlying causes.

Distinctive features of Japan's historical experience also explain the relative lack of a widely shared belief among the Japanese in universally applicable moral imperatives. The East Asian legal traditions never developed a notion of "natural law" or a notional nexus between law and morality. The word *seigi* in Japanese (as well as Chinese and Korean), translated into English as "justice," has no legal meaning or connotation in its historical context. Nor, as a European legal transplant, has natural law theory held much sway in Japan. In political discourse, contested social and political issues from property rights to human rights are rarely if ever cast in terms of overlapping moral and legal imperatives. Instead of any shared belief in universally applicable, transcendental absolutes, Japan is notable for its distinctively contextual communitarian orientation and emphasis on consensus as a shared social value. Community norms, not transcendental norms, are what matters.<sup>13</sup> These cultural attributes are, as indicated below, particularly significant in an analysis of judicial decision making.

In addition, unless we are willing to challenge the efficacy of the democratic political structures of postwar Japan, we surely must concede that the Japanese people overwhelmingly favor center-right political policies. Center-right political parties (and party factions) have governed Japan almost continuously during the six-and-a-half decades since World War II. The only arguable exception was the ill-fated Katayama Cabinet, formed in 1948, that remained in office for only six months. Judges whose political inclinations lie well to the left of center are necessarily relatively few in number, unless, of course, one surmises (tacitly) that elites in Japan, including judges, are likely to be more ideologically to the left than the mainstream. Personally, I question such an assumption and tend to attribute it again to a Eurocentric projection of majoritarian governance onto Japan—a projection that emphasizes the role of constitutional courts in protecting minority interests and "rights" that have been sacrificed or denied in the process.

Many of the most contentious constitutional issues of post-World War II Japan simply have no counterpart in other industrial democracies. The war itself constituted the single most significant upheaval of modern Japanese history. Unlike Europe or the United States, Japan had never

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13. For a fuller explanation of each of these features of historical context, see JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991).

before experienced “total” war or foreign conquest. Unlike Europe, World War II was not a more devastating continuation of the Great War. Nor has Japan ever experienced an internal total war on the scale of the Civil War in the United States. The devastation of World War II helps to explain why the issue of a military establishment in Japan—either foreign or native—remains one of the two dominant constitutional issues of the postwar era.

Since 1947, Japanese courts have adjudicated at least two dozen cases related to the constitutionality of various measures under Article 9. They have included direct challenges to the U.S.-Japan Security Treaty, the presence of U.S. military bases, and the Self-Defense Forces. The Supreme Court has decided at least seven on appeal. Not included in this count are the closely related establishment and freedom of religion cases involving war memorials, the Yasukuni Shrine, as well as other *Gokoku* (Protect-the-Nation) shrines with historical ties to the military. The Court’s decision in the *Sunakawa* case<sup>14</sup> remains to date the principal Grand Bench decision on Article 9. There are only two other Grand Bench decisions on Article 9, both of which reaffirmed *Sunakawa* as precedent.<sup>15</sup> All three decisions involved the constitutionality of the U.S.-Japan security arrangements and the maintenance of U.S. military bases in Japan.<sup>16</sup>

Despite multiple supplementary opinions in *Sunakawa*, all fifteen Justices agreed that, under Article 9, Japan retained a fundamental right of self-defense and could enter treaties for mutual security. Equally significant, the decision established the extant parameters for judicial review and the scope of legislative and administrative discretion. Except in the event of a “clear” and unmistakable violation of Article 9, the courts are to defer to the judgment of the Diet and the Cabinet. Left to the courts, however, is the ultimate determination of such a manifest violation. Needless to say, the Court’s stance has pleased neither pacifists on the left nor those on the right who favor a more active and prominent military establishment. The Court has thus managed to remain close to the center of the controversy and to express what appears to be the preference of the vast majority of Japanese—that the courts, not the political branches

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14. Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, Showa 34(A) no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (*Sakata v. Japan*).

15. See Saikō Saibansho [Sup. Ct.] Aug. 28, 1996, Heisei 8 [gyo-tsu] no. 90, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1952 (*Ota v. Hashimoto*); Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, Showa 44, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1952 (*Japan v. Sakane*).

16. For a fuller discussion of these cases and other Article 9 decisions, see Haley, *supra* note 6, at 23.

(much less a military establishment), ultimately have the last word. Like an ace of trumps yet to be played, recognition that the Court has the winning hand and thus the ultimate say helps to explain why amendment of Article 9 has continuously been such a contentious issue. If, as some apparently believe, the Court's decisions have rendered Article 9 meaningless and thereby leave the legislature with unlimited discretion to do what it wishes, why do so many Japanese so ardently defend Article 9 against its critics, and why do so many of its critics who wish to see Japan play a more active military role in Asia and the world so ardently seek its revision? My answer is that Article 9 functions as both an effective political and at least potential judicial constraint on legislative discretion.

More complex are the series of cases that ostensibly relate to the separation of religion and the state, and the guarantee of freedom of worship. Comparable cases on both the establishment and freedom of religion, at least between Japan and the United States, do exist. Japan's Supreme Court has decided at least two Jehovah's Witness cases that parallel U.S. Supreme Court decisions. Neither case supports the claim that, *in like cases*, the Japanese Supreme Court is *more conservative* than its U.S. or European counterparts. One involved a technical college student who had been held back for two years and then denied graduation for having refused on religious grounds to participate in compulsory *kendo* (Japanese sword) practice.<sup>17</sup> The Second Petty Bench unanimously upheld the student's claim, stating that the school's decisions should be judged as "lacking in appropriateness compared with the view commonly accepted in society [*shakai tsūnen*] and . . . illegal beyond the scope of discretionary authority."<sup>18</sup> In the second, another tort case, the Third Petty Bench unanimously found in favor of the plaintiff, Misae Takeda, also a Jehovah's Witness, in her claim for damages against physicians who, knowing of her religious objections to blood transfusions, failed to explain that they might give her a blood transfusion during the operation if they deemed it necessary, thus depriving her of the right to decide whether to accept or reject the blood transfusion.<sup>19</sup> Critics of the "conservative" judiciary rarely, if ever, cite these cases, which are hardly distinguishable

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17. Saikō Saibansho [Sup. Ct.] Mar. 3, 1996, Heisei 7 [gyo-tsu] no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (*Kobayashi v. Kobe Mun. Indus. Technical Coll.*).

18. *Id.*, translated in *Judgments of the Supreme Court*, COURTS IN JAPAN, <http://www.courts.go.jp/english/judgments/text/1996.3.8-1995.-Gyo-Tsu-.No..74.html> (English Translation of Section 4 (Summary)) (last visited May 10, 2011).

19. Saikō Saibansho [Sup. Ct.] Feb. 29, 2009, Heisei 10(0) no. 1081–1082, 54 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 582 (*Hosokawa v. Takeda*).



from their U.S. counterparts.<sup>20</sup> Rather, they point to cases that are inexorably entwined with World War II.

The leading decision on Japan's establishment clauses, prohibiting state support of religion as well as "any religious acts" by the state (Art. 20(1) and (3)), is the 1977 Grand Bench decision in the *Tsu City Ground-Purification Ceremony* case.<sup>21</sup> In the decision, reversing a 1971 Nagoya High Court decision, the Court by a ten-to-five majority upheld the constitutionality of a municipal expenditure for Shinto priests to perform a purification ritual as part of a ground-breaking ceremony for the construction of a public gymnasium. The majority viewed the ceremony as more of a folk ritual than a religious activity:

[A]lthough the groundbreaking ceremonies (known as *jichinsai*, among other names) that are traditionally performed at the start of construction work to pray for a stable foundation and workers' safety had religious origins in their intent to pacify the gods of the land, there can be no doubt that this religious significance has gradually waned over time. In general, although the ceremony includes prayer for safety and a firm foundation at the start of construction, the proceedings have become a formality perceived as almost completely devoid of religious meaning. Even if the ceremony is performed in the style of an existing religion, as long as it remains within the bounds of well-established and widely practiced usage, most people would perceive it as a secularized ritual without religious meaning, a social formality that has become customary at the start of construction work.<sup>22</sup>

While the *Tsu City Ground-Purification Ceremony* case is admittedly "conservative" in outcome, it is hardly more so than U.S. decisions such as *Lynch v. Donnelly*,<sup>23</sup> which allowed a Christmas crèche to be included as part of a municipally sponsored Christmas display, or *Marsh v. Chambers*,<sup>24</sup> which upheld the constitutionality of state-paid, legislative chaplains. Indeed, the Court's rationale that the Shinto ceremony was generally perceived as "a secularized ritual without religious meaning" is

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20. See, e.g., *Stamford Hosp. v. Vega*, 674 A.2d 821 (Conn. 1996) (upholding the right of a Jehovah's Witness to refuse a blood transfusion).

21. Saikō Saibansho [Sup. Ct.] July 13, 1977, Showa 46 [gyo-tsu] no. 69, 31 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (*Kakunaga v. Sekiguchi*).

22. *Id.*, translated in *Judgments of the Supreme Court*, COURTS IN JAPAN, <http://www.courts.go.jp/english/judgments/text/1977.7.13-1971.-Gyo-Tsu-.No..69.html> (last visited May 10, 2011).

23. 465 U.S. 668 (1984).

24. 463 U.S. 783 (1983).

echoed by Chief Justice Burger, writing for the five-Justice majority in both *Lynch* and *Marsh*.

Not comparable, however, are the religious establishment and freedom cases involving government-sponsored or government-supported war memorials and official visits and contributions to the national Yasukuni shrine, as well as prefectural *gokoku* shrines.<sup>25</sup> In an equally landmark decision, in 1997, a thirteen-to-two majority of the Supreme Court held that contributions by a prefectural governor from public funds to the national Yasukuni shrine, as well as the affiliated prefectural *gokoku* shrine, violated Article 20(3) of the Constitution.<sup>26</sup> In the 1988 *Self-Defense Force Officer Enshrinement* case, another well-known Grand Bench decision, the Court dismissed the constitutional claims of a Christian widow of a Ground Self-Defense Force lieutenant that “deification” or enshrinement by the Yamaguchi Gokoku Shrine at the request of the local SDF Friendship Association—both of which were admittedly private organizations—violated the Article 20 prohibition of state involvement in religion and guarantee of religious freedom.<sup>27</sup> Minimizing evidence of official SDF involvement, the Court rejected the widow’s claims for lack of state action.<sup>28</sup> In 1993, the Third Petty Bench similarly ruled that the provision of land for a Shinto *chūkōni* war memorial did not constitute an unconstitutional involvement with religion. In the words of the opinion, the memorial is

basically recognized as a monument in memory of the war dead, the primal object of the association of the bereaved families of the war dead is not religious activity, and the head participated in memorial services with exclusive intention of conforming to common courtesy for the bereaved families of the war dead.<sup>29</sup>

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25. For an excellent study of the principal cases of this genre through 1995, see DAVID M. O'BRIEN WITH YASUO OHKOSHI, *TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN* (1996).

26. Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (*Anzai v. Shiraishi*).

27. Saikō Saibansho [Sup. Ct.] June 1, 1998, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277 (*Japan v. Nakaya*).

28. The lieutenant’s presumably non-Christian parents, it might be noted, favored the enshrinement.

29. Saikō Saibansho [Sup. Ct.] June 1, 1998, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277 (*Japan v. Nakaya*), translated in *Judgments of the Supreme Court*, COURTS IN JAPAN, <http://www.courts.go.jp/english/judgments/text/1993.2.16-1987-Gyo-Tsu-No.148.html> (last visited May 10, 2011).

Any visitor to a national cemetery in the United States today might note the use of crosses and the Star of David to mark burial sites.

Suffice it to say that these cases illustrate the profound differences between Japan and industrial democracies in the West in historical experience and thus the forms of state action and constitutional issues that arise. Any meaningful comparison of constitutional adjudication that includes Japan must first take into account such fundamental contrasts of history and social context.

The law-making structures of postwar Japan constitute a second category of factors relevant to analysis of judicial decision making in constitutional adjudication. In comparison with the principal states of Western Europe and the United States, the political structure of Japan is remarkably exceptional as a fully unitary parliamentary system. Only France, despite its hybrid presidential form of government, is comparable in terms of the law-making consequences. First, Japan lacks the inherent conflicts of federal or quasi-federal systems. No prefecture or local government has law-making functions as extensively shared with the national government as an American state, a German *Land*, an Italian or Spanish autonomous region, or even the regional governments of the United Kingdom. Absent in Japan as a result are a host of issues related to federalism and regional autonomy that prevail in comparable industrial democracies. Similarly, nationally supervised professional police forces and a national professional procuracy minimize, in relative terms, conflicts and constitutional litigation over issues of criminal law and procedure. By the same token, a nationally supervised system of public education, with a corps of educators equally subject to national standards, minimizes constitutional adjudication related to education. Also absent are the conflicts between the legislature and the executive of presidential and some quasi-presidential systems that require or induce judicial resolution (South Korea, for example).<sup>30</sup>

Moreover, political structures, including the electoral system, have produced six decades of continuous center-right governance. No other industrial democracy has a comparable record of stable postwar governance. For constitutional litigation, the consequence is a dearth of legislation reflecting political extremes and a consequent dearth of constitutional challenges.

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30. See, e.g., Constitutional Court [Const. Ct.], May 14, 2004 (16-1 KCCR, 609) (*Impeachment of the President (Roh Moo-hyun) Case*), translated in 1 CONSTITUTIONAL COURT OF KOREA, CONSTITUTIONAL COURT DECISIONS 1998–2004, at 281 (2006).

The lack of contestable legislation and administrative regulation is due in part to another structural variant: the formal processes for drafting legislation and administrative regulations. The role of law-trained administrative officials, especially those selected to staff the Cabinet Legislation Bureau, ensures that government-sponsored legislation and administrative regulations deemed by the Cabinet Legislation Bureau to be unconstitutional, at least facially, are rarely, if ever, enacted. Again, such a process of review is totally absent in the United States and may not even be structurally feasible in a presidential system. In Western Europe, only the French Council of State performs fully comparable functions.

Features of Japan's political structure have led, however, to one of the most contentious sets of constitutional cases of the postwar era: repeated constitutional challenges to elections based on the malapportionment of seats for both the House of Representatives (*Shugiin*) and the House of Councillors (*Sangiin*). Electoral malapportionment has been almost as frequently litigated an issue as Article 9. The first case was the 1964 Grand Bench decision in *Koshiyama v. Chairman, Tokyo Metropolitan Election Supervision Commission*, in which the Court for the first time held the issue to be justiciable under a provision for administrative (*kokoku*) appeals from decisions by election commissions under Article 204 of Public Office Election Law, but determined that the apportionment among election districts of seats in the House of Councillors did not violate the constitutional guarantee of equality under Article 14(1), nor the provisions of Article 15(2), 43(1), and the proviso of Article 45, which collectively affirm that members of the Diet represent the "whole community" "without discrimination."<sup>31</sup> The allocation of seats per district for House of Councillors elections had not been revised since initially determined in 1947<sup>32</sup> and thus failed to take into account significant demographic changes and resulting disparities in the ratio of voters to allocated seats among electoral districts. The 1964 judgment did not fully discuss the extent of the disparity in the ratio of voters in the districts in question, but instead, in language echoing the *Sunakawa* decision on the limits of legislative discretion and reviewability (as noted by Justice Saitō Kitarō in his supplementary opinion), reasoned that

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31. Saikō Saibansho [Sup. Ct.] Feb. 5, 1964, 18 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 270.

32. House of Councillors Law, Law No. 11 of 1947) (left unchanged in 1950 by the Public Offices Election Law, Law No. 100 of 1950).

except in a case in which the number of Diet members in an election district creates an extreme inequality in the voter's enjoyment of the right to elect, the percentage of seats apportioned to each district is a matter of legislative policy subject to the Diet's authority as the legislative branch.<sup>33</sup>

In contrast, twelve years later, in the 1976 *Kurokawa* case, the Court concluded that the allocation of seats for the House of Representatives under the applicable election law did violate the Constitution.<sup>34</sup> The Court did not overrule or reject its 1964 decision. Nor, notably, did it distinguish *Koshiyama* as a challenge to the election for the House of Councillors rather than the House of Representatives. Instead, it defined a constitutional standard as if applicable for elections for both chambers, emphasizing that, by the time of the challenged House of Representatives election in December 1972, the disparity among districts had "without reasonable grounds" reached the point of extreme. The maximum number of voters per representative was nearly five times greater than the minimum number of voters.<sup>35</sup> Moreover, in both decisions, a majority of the Court refused to invalidate the elections in contention, which had been held two years prior to the decision in the *Koshiyama* case and four years earlier in *Kurokawa*. Six Justices in *Kurokawa* did favor nullifying the election. One, Justice Amano Buichi, urged dismissal, arguing that Article 204 of the Public Official Election Law should not be construed to provide for an administrative *kokoku* appeal from a decision by an election administration commission. He urged that precedents to the contrary, including *Koshiyama*, be overruled.

Since *Kurokawa*, the Supreme Court has ruled on appeals involving similar challenges to separate national elections for the House of Representatives and the House of Councillors based on malapportionment of seats in at least eleven Grand Bench decisions.<sup>36</sup> The patterns were the

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33. *English Translation of Koshiyama v. Chairman, Tokyo Metropolitan Election Supervision Comm'n*, in HIROSHI ITOH & LAWRENCE WARD BEER, *THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70*, at 53, 54 (1978) (emphasis added).

34. Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, Showa 79 [gyo-tsu] no. 75, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223 (*Kurokawa v. Chiba Prefecture Election Comm'n*).

35. *Id.*, translated in *Judgments of the Supreme Court*, COURTS IN JAPAN, <http://www.courts.go.jp/english/judgments/text/1976.04.14-1974-Gyo-Tsu-No.75.html> (last visited May 10, 2011).

36. Saikō Saibansho [Sup. Ct.] Sept. 30, 2009, Heisei 20 [gyo-tsu] no. 209, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1520 (*Yamaguchi v. Tokyo Prefecture Election Comm'n*) (House of Councillors election of 2007); Saikō Saibansho [Sup. Ct.] June 13, 2007, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1617 (*Takemura v. Tokyo Prefecture Election Comm'n*) (House of Representatives election of 2005); Saikō Saibansho [Sup. Ct.] Oct. 4, 2006, Heisei 17 [gyo-tsu] no. 247, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2696 (*Yamaguchi v. Tokyo Prefecture*

same. In each case, plaintiffs filed suit to have either a special or general election invalidated on the basis of the unconstitutionality of the allotment of seats to election districts under statutory law at the time of the challenged election. Most of the early cases took several years to reach the Supreme Court, and from one to two years for the Court to decide. For example, the contested election in *Shimizu v. The Osaka Prefecture Election Commission* occurred six years prior to the Grand Bench decision, and the election in the 2004 *Yamaguchi v. Tokyo Prefecture Election Commission* case was held nine years earlier. In each of the three cases decided since 2005, two years had elapsed between the election and the Supreme Court decision. Whatever the lapse of time, in the meantime, as is routine in a parliamentary system, governments had been formed, prime ministers selected, cabinet posts filled, government-sponsored legislation enacted, cabinet orders issued—the legal validity of all of which would be in question had the elections been invalidated by virtue of their constitutional defects. Moreover, since elections for the House of Representatives do not occur at prescribed times, the Diet could not, in any event, ensure that, prior to any election, shifts in population were accounted for in the distribution of seats by district. Some lag in the allocation of seats per district, with resulting disparities in ratio of voters per seat, was inevitable.

Until the 1994 reform of the electoral system for the House of Representatives from multi-member single districts to single-member districts combined with proportional representation, the new Diet responded by adding seats to districts that were underrepresented, while reducing the number of seats in those that were overrepresented, until the

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*Election Comm'n*) (House of Councillors election of 2004); Saikō Saibansho [Sup. Ct.] Jan. 14, 2004, 58 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 56 (*Yamaguchi v. Tokyo Prefecture Election Comm'n*) (House of Councillors election of 1995); Saikō Saibansho [Sup. Ct.] Nov. 10, 1999, Heisei 11 [gyo-tsu] no. 35, 53 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1704 (*Nonoyama v. Tokyo Prefecture Election Comm'n*) (House of Councillors election of 1996); Saikō Saibansho [Sup. Ct.] Sept. 2, 1998, Heisei 9 [gyo-tsu] no. 104, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1373 (*Yamaguchi v. Tokyo Prefecture Election Comm'n*) (House of Councillors election of 1995); Saikō Saibansho [Sup. Ct.] Sept. 11, 1996, Heisei 6 [gyo-tsu] no. 59, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2283 (*Osaka Prefecture Election Comm'n v. Kawazoe*) (House of Councillors election of 1992); Saikō Saibansho [Sup. Ct.] Jan. 20, 1993, Heisei 3 [gyo-tsu] no. 111, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 67 (*Kawano v. Tokyo Prefecture Election Comm'n*) (House of Representatives election of 1990); Saikō Saibansho [Sup. Ct.] July 17, 1985, Showa 59 [gyo-tsu] no. 339, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1100 (*Kaneo v. Hiroshima Prefecture Election Comm'n*) (House of Representatives election of 1983); Saikō Saibansho [Sup. Ct.] Nov. 7, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1243 (*Kamuta v. Tokyo Prefecture Election Comm'n*) (House of Representatives election of 1980); Saikō Saibansho [Sup. Ct.] Apr. 27, 1983, Showa 54 [gyo-tsu] no. 65, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 345 (*Shimizu v. Osaka Prefecture Election Comm'n*) (House of Councillors election of 1977).

maximum number that could be accommodated was reached, by increasing the number of members (from 466 in 1948 to 480 today). In 1994, the electoral system was reformed. Of the 480 total seats in the Lower House, 300 are elected from single-member constituencies, and 180 are elected from eleven multi-member constituencies by a party-list system of proportional representation. The single-member districts are established on the basis of population. The initial districting measures had a maximum two-to-one disparity in the ratio of voters per representative.

The electoral system for the House of Councillors was not changed in 1994. The Upper House continued to comprise 252 members, elected for six-year terms. In the first major electoral reform under the postwar Constitution in 1982, two types of constituencies were established for upper house seats. First, a national "proportional representation" constituency, represented by 127 councillors, was introduced. Thirteen prefectural constituencies for the forty-seven prefectures and districts, apportioned according to the district populations, were also established. For the national constituency, voters do not select candidates as individuals, as had previously been the case, but instead cast ballots for parties. Individual councillors, listed officially by the parties before the election, are selected on the basis of the parties' proportions of the total national constituency vote. Between two and eight councillors are allotted by law to each of the thirteen prefectural constituencies. The allotments are based on the population of the districts. In 2000, the total number of seats in the House of Councillors was reduced to 242—with the elimination of six seats elected by individual constituencies and four by proportional representation. The 2000 revision of the Public Office Election Law,<sup>37</sup> for the first time since 1947, also adjusted the number of seats per House of Councillors constituency.

Prior to 1994, the fundamental issue of malapportionment was the same for both houses: significant disparities in the ratio of seats to the population in multimember lower and upper house electoral districts (constituencies). The solution was to add or to subtract seats to equalize the ratios. Adding seats was politically the easier to achieve, but this approach could continue only as long as the Diet could accommodate the additions. The alternative—to reduce the number of seats—was obviously a more difficult approach. Adding seats enabled new candidates. Subtracting seats put incumbents at risk. The creation of single-member districts for Lower House elections transformed the issue from the number

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37. Law No. 118 of 2000.

of seats per district to the population of the district as defined by law—in other words, the issue became the politically more complex problem of defining the geographical boundaries of electoral districts rather than simply the number of representatives per district. However, for the Upper House, the problem remained how many seats to allocate to each constituency based on population. The underlying cause of the problem is, of course, continuous demographic change—particularly the growth of suburban areas and the transformation of less densely populated agricultural areas surrounding major cities into densely populated bedroom communities that improved mass transit and the automobile have enabled.

The first major case following the *Kurokawa* decision was *Shimizu v. Osaka Prefecture Election Commission*.<sup>38</sup> The petitioners in the case had challenged the July 1977 election of members of the House of Councillors on the grounds that the number of seats allotted to the prefectural constituencies, both prior to and after the 1982 reform, violated the provisions related to election of members of the Diet of Articles 14(1), 15(2), 43(1), and 44 of the Constitution. At the time of the election, the disparity in the ratio of voters per member of the House of Councillors to be elected among the electoral districts had reached 1 to 5.26, exceeding the disparity determined to be unconstitutional in *Kurokawa*. Moreover, some less populated constituencies were allotted more seats than others with a larger population—the “reverse phenomena.” By a thirteen-to-two majority, the Court dismissed the appeal in April 1983, affirming a 1979 decision by the Osaka High Court that the apportionment of seats at issue did not violate the Constitution. In the decision, the Court distinguished the House of Councillors from the House of Representatives. Standards for the equality among voters necessarily differed between the two houses. The eight-Justice majority then noted:

[T]he apportionment provision should be held unconstitutional only when the change of population brings forth such excessive inequality of the weight of each vote as might be regarded unjustifiable in the light of the importance of equality of the weight of each vote under the mechanics of election, and when the inequality has continued for a long period and therefore, when it is judged to be beyond the permissible limit that no countermeasures for the inequality are taken even if it is taken into account that it

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38. Saikō Saibansho [Sup. Ct.] Apr. 27, 1983, Showa 54 [gyo-tsu] no. 65, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 345.



depends on the discretionary power of the Diet exercised based on complex and highly political consideration and judgment.<sup>39</sup>

Five Justices wrote or joined concurring opinions (Justice Masami Ito, joined by Justice Goichi Miyazaki, Justice Susumu Ohashi, Justice Daizo Yokoi, and Justice Masataka Taniguchi). Only two dissented (Justice Shigemitsu Dando and Justice Masato Fujisaki). Emphasizing the failure of the Diet to adjust the number of seats per electoral district for the House of Councillors for twenty-seven years despite major changes in population, Justice Dando concluded:

I cannot but recognize that the apportionment provision at issue was as a whole unconstitutional at the time of the election at issue. However, further consideration is needed to decide how it will affect the validity of the election at issue. I, as a member of the court who participated in the grand bench judgment of 1976, avail myself of the gist of the reasoning of the judgment as it is. Therefore, I think that in this case the judgment of the court below should be altered to dismiss the demand of the Appellants and to declare in the main text that the election at issue is illegal.<sup>40</sup>

Meanwhile, a related case was being adjudicated in the Tokyo High Court. In that action, the constitutionality of the apportionment of seats to electoral districts for members of the House of Representatives was at issue with a petition for invalidation of the 1980 House of Representatives general election. In a November 1983 judgment in *Kamuta v. Tokyo Prefecture Election Commission*,<sup>41</sup> the Supreme Court reaffirmed the *Kurokawa* decision. The Court unanimously held that the apportionment of seats in the electoral districts was unconstitutional at the time of the election but refused to invalidate the election itself.

Only two of the subsequent cases—*Kaneo v. Hiroshima Prefecture Election Commission*<sup>42</sup> and *Yamaguchi v. Tokyo Prefecture Election Commission*<sup>43</sup>—followed *Kurokawa* in finding that, at the time of the election at issue, the maximum disparity in the ratio of seats allocated per

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39. *Id.*, translated in *Judgments of the Supreme Court*, COURTS IN JAPAN, <http://www.courts.go.jp/english/judgments/text/1983.04.27-1979-Gyo-Tsu-No.65-154836.html> (last visited May 10, 2011).

40. *Id.*

41. Saikō Saibansho [Sup. Ct.] Nov. 7, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1243.

42. Saikō Saibansho [Sup. Ct.] July 17, 1985, Showa 59 [gyo-tsu] no. 339, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1100.

43. Saikō Saibansho [Sup. Ct.] Sept. 2, 1998, Heisei 9 [gyo-tsu] no. 104, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1373.

voter among districts was constitutionally impermissible.<sup>44</sup> All, however, have adhered to *Kurokawa's* denial of relief. No election has yet been invalidated. To do so within a parliamentary system would at least call into question the governments that had been formed thereafter and all legislation and cabinet actions thereunder, thereby creating a political and legal crisis of extraordinary proportions.

Few, if any, constitutional courts in any country, I submit, would be willing to impose such legal, political, social, and economic costs on their national communities notwithstanding apparent constitutional mandates.<sup>45</sup> Wise and politically neutral judges are highly reluctant to venture into such partisan political thickets. The Justices of Japan's Supreme Court should thus hardly be deemed exceptionally "conservative" in their efforts to promote compliance with constitutional ideals while maintaining a stable political order. Their approach has been didactic—to instruct the legislature to make necessary changes in the allocation of seats to redress the problem. Failure to do this inexorably produces extreme frustration among the Justices, resulting in cases like its 2009 decision in *Yamaguchi v. Tokyo Prefecture Election Commission*,<sup>46</sup> in which a majority of nine Justices (five dissenting) openly admonished the legislature for its failures and, by their numbers, increasingly threaten to return to *Kurokawa* with the possibility of a more drastic declaration.

The palatable frustration of the Justices in recent malapportionment cases evidences the independence of the judiciary from any overdeference to the Diet or the Cabinet Legislation Bureau. The problem for the Justices, including those in dissent, is not overdeference to the Diet, but rather the limits of judicial capacity. As the malapportionment decisions demonstrate, equally significant for constitutional decision making is a third category of factors—the structure and shared values of the judiciary.

Missing from many comparative analyses of constitutional adjudication is an appraisal of the often unstated premises related to judicial authority and competence. Concepts of judicial jurisdiction and the authority of judges over the parties—and, in common law jurisdictions, the "thing" (*res*)—differ fundamentally in common law as compared to civil law systems. Unlike their continental European and Japanese counterparts,

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44. The Court in its 1998 decision in *Yamaguchi v. Tokyo Prefecture Election Commission* refrained, however, from formally holding the legislative action to be unconstitutional in light of subsequent efforts to reduce the disparity.

45. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Bush v. Gore*, 531 U.S. 98 (2000).

46. Saikō Saibansho [Sup. Ct.] Sept. 30, 2009, Heisei 20 [gyo-tsu] no. 209, 63 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 203.

common law judges, for example, have broad authority over the parties that may continue, as typical in family matters, beyond the particular action they have adjudicated. Thus, they exercise continuing jurisdiction to ensure compliance with their decrees. Without such broad jurisdictional authority, at least until recently, Japanese judges have avoided awarding continuous payments over time, such as alimony or child support.

Jurisdiction in civil law systems, in contrast, is conceived of in terms of the subject matter of the case with the allocation of the appropriate court—what in common law jurisdictions is generally conceived of as venue—is determined by the defendant’s domicile and not by presence or, for that matter, where he is “seized” by service. Common law judges also exercise coercive powers through contempt. It is almost unthinkable in Japan and continental Europe to have police in regular attendance at court in family and civil cases, ready at the presiding judge’s command to shackle and imprison anyone in the courtroom judicially deemed to be in contempt of court. Thus, among the often unstated premises of the malapportionment cases are limitations on what the courts can legally do that simply do not apply in the United States or other common law systems. Because the authority of the courts is limited to the adjudication and review of justiciable cases, they cannot adjudicate *ex ante*, before the elections and some administrative action against which the petitioners may lodge an appeal have taken place. The Court’s 1964 decision in the *Koshiyama* case is most significant for construing Article 204 of the Public Offices Election Law to allow appeals from certifications by election commission officials in which the constitutionality of the election itself could be challenged. This was, as noted, a landmark holding that for the first time enabled the courts to adjudicate such claims. Nor do the judges have the authority to declare an election prospectively invalid and then proceed directly to oversee corrective legislative proposals. In constitutional adjudication, they are limited to *ex post* adjudication and review of petitions claiming particular, past infringements of constitutional rights. Moreover, in many, if not most, of the cases, the allocations had been revised by the time of the decision. Thus, the Court was reviewing seat allotments or district configurations that had already been changed by the time of the decision.

One potential consequence in cases like the malapportionment ones may ultimately be some sort of finagling, such as suggested by Justice Tahara in his dissent in the 2009 decision in *Yamaguchi v. Tokyo Prefecture Election Commission*, to declare the election illegal but not to invalidate it. Only by the creation of special constitutional courts, with expressly legislated competence to render advisory opinions or to retain

authority over cases and the like, have other civil law jurisdictions managed to deal with what to a common law judge would be surely viewed as remarkable limitations of judicial authority and power in constitutional adjudication.

Critics are correct, however, to assert that structural features for the appointment of both Supreme Court Justices as well as career judges foster political accountability. Such was the intention of the American drafters of the postwar Constitution and system for career judicial appointment. Indeed, Kades, chairing the committee assigned the task of writing a model constitution for Japan, personally insisted that judges be subject, as in the United States, to political appointment.<sup>47</sup> Formally, therefore, all career judges are appointed by the Cabinet—first their initial appointment as assistant judges and subsequently, ten years later, their appointment as full judges. Judges are by law denied the privilege of partisan political identification. They can belong to no party or political faction. Quite properly, knowledgeable critics ignore such structural features by at least tacit acknowledgment that postwar cabinets have routinely approved for appointment and promotion judges on lists prepared and submitted by the Personnel Office of the General Secretariat of the Supreme Court, which itself is staffed by senior career judges. In view of this structure, those who question the political independence of the courts neglect the more interesting issue of *why* the judiciary is not *more* politically influenced.

Values, as well as institutional design, matter. Deference to those who govern politically does not determine the “conservatism” of the Japanese judiciary. First and foremost, judges—both the career judges who staff all of the lower courts as well as the Justices of the Supreme Court—share, as noted, the most widely held values of the Japanese population. They too function within the same historical and social contexts as other members of the society. History and shared experience similarly shape their values and beliefs. Individual political ideologies surely differ, but it would be remarkable for career judges generally to be less or more “center-right” in their personal predilections than the Japanese electorate as a whole.

Judges also acquire, over the course of their careers, values that are more particular to their office. The adjudication of constitutional cases with merit that do reach the courts requires judges in all legal systems to make determinations of fact, law, and values. The perceived fairness and sensibility of outcomes are significant for judicial decision making in all

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47. See 1 TAKAYANAGI KENZŌ, OHTOMO ICHIRŌ & TANAKA HIDEO, *NIHON KOKU KEMPŌ SEITEI NO KATEI* (THE MAKING OF THE CONSTITUTION OF JAPAN), at xx (1972).

developed legal systems. Few, if any, judges in any legal system are likely to hand down decisions that, given the facts, they believe are dictated by legal rules or principles but, in their view and by their values, are unjust and contrary to common sense. Experienced advocates understand this truism and will make every effort to present cases for decision in which the alleged facts and applicable law lead to fair and sensible decisions that favor their clients. For career judges in Japan, shared judicial values are also created and reinforced by the organization of a community of judges as a carefully selected, nurtured, and monitored national corps. Senior judges—as administrators in the personnel office of the General Secretariat, as colleagues on the bench in all courts at all levels, and even as neighbors in specially provided housing complexes—are involved at all stages and in nearly all facets of a judge’s career. No judiciary has such continuing and intense nurturing and oversight, or comparable means of instilling a particularized judicial ethos or set of judicial values.<sup>48</sup>

Among the most salient of these judicial values is concern for consistency and predictability. Such concern further buttresses a notable adherence to precedent as a fundamental feature of the legal system. In all fields of law, decisions by the highest court, including century-old decisions of the *Dai-shin'in*, are routinely followed or carefully distinguished. They are seldom, if ever, overruled. The decision in *Aizawa v. Japan*,<sup>49</sup> holding unconstitutional the provision for more severe penalties for the murder of a lineal ascendant under Article 200 of the Criminal Code, is a prominent example. The Court in *Aizawa* pointedly declined to overrule its 1952 decision in *Japan v. Yamato*,<sup>50</sup> in which it upheld a similar provision for enhanced penalties for the crime of inflicting bodily injury resulting in death of Article 205, despite obvious inconsistency in both outcome and rationale.<sup>51</sup> From contract to criminal

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48. See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99 (Daniel H. Foote ed., 2007).

49. See *supra* note 12.

50. Saikō Saibansho [Sup. Ct.] Oct. 11, 1952, 4 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1520.

51. In contrast, in 2002, the Korean Constitutional Court upheld a similar provision in the South Korean Criminal Code on the grounds that the provision for a more severe penalty for causing the death of a lineal ascendant was justified in that such a crime is “contrary to the universal social order, and morality.” Constitutional Court [Const. Ct.], 2000Hun-Ba53, March 28, 2002 (9 14-1 KCCR, 159) (S. Kor.) (*Manslaughter of a Lineal Ascendant of the Offender or His Spouse Resulting from Bodily Injury Case*), reprinted in 1 *THE CONSTITUTIONAL COURT OF KOREA, CONSTITUTIONAL COURT DECISIONS* 882 (2006), available at <http://www.ccourt.go.kr> (last visited May 10, 2011). In 1995, the Diet finally amended the Criminal Code to abolish the disparity in penalties for crimes against lineal ascendants.

law, the continuity of legal rules and principles articulated by the highest court is extraordinary.<sup>52</sup>

The reluctance of the Court in *Aizawa* to overrule its 1952 decision was not exceptional. In the two other landmark cases of the 1970s—the 1975 *Pharmacy Licensing* case (*Sumiyoshi*) and the 1976 *Kurokawa* malapportionment decision—the Court simply ignored or distinguished decades-old precedents. In *Sumiyoshi*, the Court did not mention its 1955 Grand Bench decision in the *Bathroom* case,<sup>53</sup> in which the Court rejected a similar challenge under Article 22 to the location standards established pursuant to a licensing statute for bathhouses, notwithstanding inconsistent reasoning as well as result. The headnote to the case in the official commentary (authored presumably by the *chōsakan* assigned to the case) does, however, note that the 1955 decision was effectively reversed.<sup>54</sup> *Kurokawa*, as discussed above, was more ambivalent with respect to precedent. In outcome on the constitutional issues, *Kurokawa* is arguably inconsistent with *Koshiyama*. However, the Court did not explicitly reject its 1964 Grand Bench decision but rather provided grounds for distinguishing it. Nonetheless, the subsequent Grand Bench decisions—all of which, as noted, have rejected the *Kurokawa* outcome and appear, at least in result, to be more in line with *Koshiyama*—cite *Kurokawa*, not *Koshiyama*, as controlling precedent.

For career judges, including those Supreme Court Justices appointed to the highest court upon or soon after their retirement, legal consistency and predictability are primary values. As explained by a senior judge currently on the Tokyo High Court:

career judges tend to formulate conservative opinions that maintain and preserve the law (*hōshū-teki keikō*); as such, career judges do not favor radical opinions, and tend to prefer decisions that protect precedents and judicial order. In short, career-judge justices do not generally try to create decisions that greatly alter the society.<sup>55</sup>

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52. See, e.g., John O. Haley, *Japan*, in *The HANDBOOK OF COMPARATIVE CRIMINAL LAW* 393 (Kevin Jon Heller & Markus D. Dubber eds., 2010); John O. Haley, *Rethinking Contract Practice and Law in Japan*, 1 J. E. ASIA & INT'L L. 47 (2008).

53. Saikō Saibansho [Sup. Ct.] Jan. 26, 1955, 9 SAIKŌ SAIBANSHO KEJI HANREISHŪ [KEISHŪ] 89 (*Shimizu v. Japan*); see *supra* note 7 and accompanying text.

54. See Haley, *supra* note 7, at 194.

55. Summary of Interview by Kyotaro Hemmi with Judge Inoue Shigeki, Tokyo High Court, Presiding Judge of Civil Div. 15 (July 22, 2010).

Only Grand Bench decisions are explicitly, by law, binding on all courts.<sup>56</sup> Nonetheless, career judges who ignore even Supreme Court Petty Bench decisions put their careers at risk.<sup>57</sup>

Grand Bench decisions remain infrequent. Most cases that reach the Supreme Court today are adjudicated by one of the three five-member petty benches. These panels, like the Court as a whole, are dominated by former career judges. The fifteen-Justice Court generally comprises no fewer than five (usually six) former career judges, two to three retired prosecutors, up to five practicing lawyers, usually one Justice appointed from a leading law faculty, and one or two former administrative officials, predominately from the ranks of those who had served on the Cabinet Legislation Bureau. Because the average age of justices upon appointment hovers around sixty-four, and retirement is mandatory at seventy, few Justices ever serve longer than eight or nine years. Turnover is consequentially frequent. For example, no Justice on the Court today has served longer than five years. The current Justices include five former career judges, all of whom served much of their careers in the General Secretariat. Both the Chief Justice (Takesaki Hironobu) and the most recently appointed Justice (Otani Takehiko) had served as General Secretary of the Supreme Court, the highest administrative position of the judiciary. Also recently appointed (April 2010) is Justice Okabe Kiyoko. She is one of two women—the third ever to serve on the Court—and, at sixty-one years of age, the youngest. Justice Okabe is also exceptional in that she served as a career judge for seventeen years (1976–93), registered as a lawyer and presumably engaged in practice for about four years (1993–97), and then began a third career as a Professor of Law at Toyo University (1997–2007). In 2007, she joined the Keio Law School faculty. Of the nine remaining Justices, four were practicing lawyers (three in Tokyo, one in Osaka), two former prosecutors, one former diplomat (Ministry of Foreign Affairs), and one—the second woman on the Court—a Ministry of Labor official. In other words, only four Justices born after the end of World War II—all recent appointees—have ever served on the Court.

The backgrounds of the Justices also matter. Career judges, especially those who have had primary responsibility for the administration of the judiciary, bring to the Court a set of values related to judicial decision

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56. See Court Organization Law, Law No. 99 of 1947, art. 4.

57. See John O. Haley, Book Review, 30 *J. JAPANESE STUD.* 235, 239 (2004) (reviewing J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003)).

making appropriately described as “conservative” in their emphasis on decisional stability and adherence to precedent. Rarely, if ever, does the Court explicitly overrule a prior constitutional decision. Rather, as illustrated by a series of constitutional decisions decided in the 1970s ranging from electoral malapportionment to the killing of a lineal ascendant, the Court ignores or merely distinguishes apparently inconsistent prior decisions of a decade earlier. The lawyers on the Court are considered to form the most progressive bloc, but as elite members of the bar who have all held prominent bar association offices and have served on various government commissions, they too share values labeled politically “conservative” by most observers.

Another group of career judges are also influential. These are the *chōsakan*, the thirty-seven research judges selected from the most highly regarded and credentialed career judges to serve for a term of years to assist the Justices. Seventeen are assigned to civil cases, nine to administrative cases, and nine to criminal cases. They conduct research and make recommendations. The Justices need not adhere to the conclusions reached or the outcomes suggested, but their influence is apparent in the summaries of the cases they write and publish as official commentary on each significant decision. Three of the five (or six) career judges on the Court today are former *chōsakan*.

Almost by definition, constitutional adjudication requires more than simply an analysis of constitutional language and the relevant legal issues. Were judicial decision making in constitutional cases merely a matter of construing language in some formalistic fashion, the task in most cases could, and perhaps should, be properly left to career judges. Constitutional adjudication, however, differs in that the decisions commonly involve basic questions of policy and judicial choice for which formal legal analysis and statutory construction often provide little help.

The decision of whether the Constitution allows an illegitimate child to receive only half of the mandated child’s inheritance portion under the Civil Code (*legitim*) can hardly be determined by the language of the Constitution alone. Nor in cases involving the provisions of codes can courts simply defer to the wisdom of the legislators who enacted them, in most instances over a century ago in a social context that has drastically changed. Constitutional adjudication in all legal systems involves often unstated assumptions of the judges themselves as to their appropriate role, as well as the standards for selecting the most appropriate outcomes. Judges in deciding at least the contentious “hard” cases necessarily transform the “ought to be” to the “is” of law.



The standards used by Justices—both to define their appropriate role as well as to reach the most appropriate outcome—differ, and more often than not remain implicit. Judges and Justices seem to agree, however, that reaching a “sensible” decision is paramount. As expressed by former Justice and Tohoku University law professor Fujita Tokiyasu in a recent interview for the Hōsō University:

[T]he question that begs to be asked is why do we need the Supreme Court if the legal issues are resolved at the High Court level? The answer is that the Supreme Court is expected to provide the highest form of “common sense” (*saido na jōshiki*). For example, if there is a split among two high courts, it signifies that—on the highest level—both decisions are [legally] acceptable. In such instances it is *jōshiki* that determines what the right decision truly is.<sup>58</sup>

Justice Fujita concedes that what “makes sense” to one judge or Justice may not for another. In his words, “the meaning of this *jōshiki* can (or perhaps, may be) different depending on the type of career path a Justice had formerly treaded.”<sup>59</sup>

Tokyo High Court Judge Inoue Shigeki seconds such views. Judges in practice, he believes, rely on their “sixth” sense of the appropriate outcome, a perception or “feeling” (*kan*) based on their backgrounds as career judges, lawyers, prosecutors, legal scholars, or administrative officials. In his words, “Justices then will try to formulate their decisions in ways that parallel the ‘sense of society’ (*shakai tsūnen*).”

Indeed, the phrase “sense of society” (*shakai tsūnen*) has long been the most commonly used rationale for judicial decisions. Scholars both within and outside of Japan have long questioned what it means,<sup>60</sup> whether judges merely use the phrase to justify decisions based principally on their personal preferences or whether reliance on their collective perceptions of the “sense of society” represents an analytically meaningful effort to reach decisions that are compatible at least with the judge’s “sense” of community preference and consensus. Whatever their implicit motivation, in any event, judges do not explicitly define their role in choosing or determining what is the best or most appropriate outcome with rationales

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58. Interview by Hōsō University with Fujita Tokiyasu (Spring 2010) (DVD made available to author by Nomi Hirota, translated by Research Assistant Kyotaro Hemmi, a second-year Washington University law student).

59. *Id.*

60. Interview by Kyotaro Hemmi with Inoue Shigeki (June 17, 2010) (memo to author dated August 4, 2010).

based on their view of the most “reasonable” or morally appropriate outcome.

In conclusion, in my view, judges in Japan share the prevailing communitarian orientation of their society, an orientation that rejects Manichean choices and moral or “scientific” absolutes, but instead relies on their collective and individual perceptions of community values—including the global community—shared by peers. They also, I believe, accept an unstated premise that legislative and administrative decisions reflect a consensus among the participants—not a simple majority. The issue remains as to who participates—who sits at the table—but the political and administrative processes do not routinely require merely fifty-one out of a hundred votes. As a consequence, judges are cautiously conservative. They adhere to precedent and endeavor to maintain, as best they can in a changing society, a legal order that is predictable and consistent. Stability is a virtue, not a vice. They do not seek to be the catalysts of social change. They believe in democratic institutions and thus defer to the democratic institutions of governance while maintaining, indeed reinforcing in their priority of values, the rule of law.

