Comparative Political Process Theory in Japan

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Foreword

Comparative Political Process Theory in Japan

Bryan Dennis Gabito TIOJANCO/Masayuki TAMARUYA*

In Japan and elsewhere the political process theory[1] John Hart Ely expounded in his 1980 classic, *Democracy and Distrust* (*D&D*), remains an influential theory of judicial review.[2] Its main prescription is that of *U.S. vs. Carolene Products*'[3] famous footnote four: courts should strictly scrutinize a statute only when it (1) infringes a right that the written constitution either explicitly or intentionally guarantees; (2) closes off channels of political change to outsiders (e.g., by denying them a voice or the vote), or (3) is the product of such severe hostility or prejudice against some outsiders—viz., discrete and insular minorities—that insiders refuse to deal with them no matter what (e.g., racial segregation in schools). Save largely for these three exceptions the courts should give elected lawmakers a large leeway in deciding all public issues.[4]

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* Unless otherwise indicated, all internet links were last accessed on 17 December 2022.

1 Ely called it a "participation-oriented, representation-reinforcing approach to judicial review", or, more simply, a "process-oriented system of review": J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980) 136.Earlier he had called it a 'representation-reinforcing mode of judicial review': J. H. ELY, Toward a Representation-Reinforcing Mode of Judicial Review, Maryland Law Review 37 (1978) 451.

2 R. D. PARKER, In Memoriam: John Hart Ely – John, Fred, and Ginger, Harvard Law Review 117 (2004) 1751, 1752 (D&D is "one of less than a handful of 'great' books about American constitutional law in the twentieth century"); F.R. SHAPIRO, The Most-Cited Legal Books Published Since 1978, The Journal of Legal Studies 29 (2000) 397, 401 (D&D was the most cited legal book [other than treatises and texts] published since 1978); R. DOERFLER/S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review 75 (2022) 769, 770; J. GREENE, The Anticanon, Harvard Law Review 125 (2011) 379, 394, 421.

3 *United States v. Carolene Products Co* (1938) 304 US 144 (US Supreme Court); ELY, Democracy and Distrust *supra* note 1, 75–77.

4 ELY, Democracy and Distrust, *supra* note 1, 102–103. See Bryan Dennis G Tiojanco, 'John Hart Ely would disown Comparative Political Process Theory, Dobbs, and most his other intellectual heirs (or maybe not)' (2024) Global Constitutionalism (Special Issue Article: First View) 1, 29-31 (Ely also admits exceptions based on arguments from constitutional trendline), *https://www.cambridge.org/core/journals/global-constitutionalism/article/john-hart-ely-would-disown-comparative-political-*

Recently the New Comparative Political Process Theory (CPPT) has ventured to bring *D&D* up to date and to a wider audience. The CPPT school buys into Ely's thesis that the purpose of judicial review is to safeguard the political process. As such it shares Ely's focus on systemic malfunctions in the workings of representative democracy,[5] and his premise that placing complete trust in politicians to fix them would be like letting foxes guard the henhouse.[6] This orientation allows CPPT to place seemingly disparate judicial doctrines and decisions from different jurisdictions into a comparative framework of constitutional analysis and diagnosis.[7]

CPPT goes beyond Ely in several ways. First is its breadth: *D&D* theorizes judicial review in a single (though influential) jurisdiction, the United States. In contrast, CPPT theorizes an approach to judicial review that can cast comparative light on different jurisdictions.[8] Second is its worry: political crises across the globe are today threatening the very existence of liberal constitutional democracies, and CPPT joins the spate of scholarship diagnosing these crises and prescribing cures.[9] Ely was worried about political outsiders, CPPT's worry extends to the political system itself.[10] Stephen Gardbaum, for instance, advises courts to scrutinize the failure of legislatures to hold executives accountable, the capture of independent institutions by the government, the capture of the political process by special interests, and even outright dysfunction of the political process.[11] A third way CPPT goes beyond Ely is in its scope: CPPT endorses judicial review of not only what a law says, but also how it was made. This includes the quality of deliberation involved in passing a statute.[12] Hence courts should engage in not

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process-theory-dobbs-and-most-his-other-intellectual-heirs-or-maybe-not/885014891EBC27FC498FECD81FD51432#article, accessed 23 January 2025.

5 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429, 1450.

6 GARDBAUM, *supra* note 5, 1454–1455.

7 GARDBAUM, *supra* note 5, 1451.

8 GARDBAUM, *supra* note 5, 1430; R. DIXON, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023) 2.

9 See J.-W. MÜLLER, Democracy's Midlife Crisis, *https://www.thenation.com/article/archive/how-democracies-dies-how-democracy-ends-book-review/*; M. LOUGHLIN, The Contemporary Crisis of Constitutional Democracy, Oxford Journal of Legal Studies 39 (2019) 435.

10 DIXON, *supra* note 8, 36–43; GARDBAUM, *supra* note 5, 1452–1453; R. GARGARELLA, From "Democracy and Distrust" to a Contextually Situated Dialogic Theory, International Journal of Constitutional Law 18 (2020) 1466, 1466.

11 GARDBAUM, *supra* note 5, 1435–1446.

12 GARDBAUM, *supra* note 5, 1446–1447; DIXON, *supra* note 8, 5, 97; GARGARELLA, *supra* note 10, 1471–1472.

only 'substantive review' (as Ely had proposed)[13] but also 'pure procedural review'[14] or 'semi-procedural review'.[15] Here CPPT tracks the increasing openness from 2010 onwards of courts in different continents to review legislative processes.[16] Fourth is the more variegated remedies CPPT proposes (this is in fact its proponents' most talked about, and perhaps most promising, contribution[17]). Even in the 'second look' approach he broached, Ely still prescribed old-fashioned striking down of the offending statute.[18] In addition to this strong medicine, CPPT scholars also prescribe a suite of 'weak-form',[19] 'strong-weak', and 'weak-strong' remedies;[20] one example is what Rosalind Dixon terms 'engagement-style' remedies, which require government officials to first consult affected citizens before they are, say, evicted from their homes.[21] While CPPT scholars generally prefer such weaker remedies,[22] they also sometimes prescribe remedies much stronger than old-fashioned invalidation. One example is Roberto Gargarella's proposal that courts issue structural injunctions requiring legislators to open up their deliberations to the public.[23] Fifth, and most relevant to Japan: the natural tendency of CPPT is to increase the occasions for strict judicial review, which goes against the aim of Ely's theory, which is to decrease such occasions. This difference can affect how enthusiastically a given judiciary would receive either Ely's or CPPT's model.[24] As Obayashi argues in his contribution to this issue, one reason *D&D* failed to influence Japanese ju-

13 GARDBAUM, *supra* note 5, 1449.
14 GARDBAUM, *supra* note 5, 1448.
15 DIXON, *supra* note 8, 98.
16 S. GARDBAUM, Due Process of Lawmaking Revisited, University of Pennsylvania Journal of Constitutional Law 21 (2018) 1, 28–29.
17 See, e.g., R. DIXON/P. J. YAP, Responsive Judicial Remedies. Global Constitutionalism (Special Issue Article: First View, 2025) *https://www.cambridge.org/core/journals/global-constitutionalism/article/responsive-judicial-remedies/011ABA7262215A51FA1A5D8B37299FC6*, accessed 23 January 2025; S. GARDBAUM, Comparative political process theory II' (Research Article, 2024) *https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0F6069B56EF65A7788187882054F31AE/S2045381724000029a.pdf/comparative-political-process-theory-ii.pdf*, accessed 23 January 2025.
18 ELY, Democracy and Distrust, *supra* note 1, 169.
19 S. GARDBAUM, Comparative Political Process Theory: A Rejoinder, International Journal of Constitutional Law 18 (2020) 1503, 1506.
20 DIXON, *supra* note 8, ch. 7.
21 DIXON, *supra* note 8, 149, 161.
22 GARDBAUM, *supra* note 19, 1510.
23 GARGARELLA, *supra* note 10, 1470–1472.
24 TIOJANCO, *supra* note 4, 14–16.

risprudence is because "the Japanese Supreme Court has been a model of restraint; there is no need for further restraint."

Heretofore CPPT and Japan have remained aloof from each other. Despite its breathtakingly global span, to cite a prominent example, Rosalind Dixon's influential new book, *Responsive Judicial Review*, mentions Japan only twice, first for an aside and second as an example.[25] This relative neglect reflects a curious trend in comparative constitutional studies. Japan is a stable and wealthy liberal democracy. It is the world's third largest economy and eleventh most populated country. It is a paragon of foreign-law borrowing and adaptation,[26] and its constitutional jurisprudence is influenced – although covertly – by foreign (mainly American) precedents.[27] Its written constitution, ratified in 1946, is older than those of most of comparative constitutional law's 'usual suspects'[28] – Germany, India, South Africa, Israel – and is also the oldest unamended constitution in the world.[29] Yet Japan remains an understudied constitutional democracy, and interest in its legal system seems to be waning.[30]

In April 2023 the University of Tōkyō, Transnational Law Center played matchmaker to Japan and CPPT. The occasion was a symposium on CPPT attended by comparative constitutional law scholars from across the globe and comparatively minded constitutional law scholars in Japan.[31] This special issue collects the papers the Japanese scholars presented at the symposium.[32]

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25 DIXON, *supra* note 8, 125, 276.

26 C. MILHAUPT, RIP Japanese Legal Studies? A Comment (2023) 4.

27 A. EJIMA, The Enigmatic Attitude of the Supreme Court of Japan towards Foreign Precedents – Refusal at the Front Door and Admission at the Back Door, Meiji Law Journal 16 (2009) 19.

28 R. HIRSCHL, Comparative Matters: The Renaissance of Comparative Constitutional Law (2014) ch. 5.

29 K. M. MCELWAIN/C. WINKLER, What's Unique about the Japanese Constitution? A Comparative and Historical Analysis, Journal of Japanese Studies 41 (2015) 249, 249.

30 E. FELDMAN, The Death of Japanese Legal Studies? An American Perspective, Penn Carey Law, University of Pennsylvania Public Law & Legal Theory Research Paper Series, Research Paper No. 23-10 (2023).

31 The symposium was held on 24–25 April 2023 at the University of Tōkyō, Law Faculty Bldg 3, 8th Floor Meeting room. For more details: *https://www.transnationallaw.j.u-tokyo.ac.jp/en/seminar/2023/comparative.html*.

32 One of the Japanese scholars, Kobe University Professor Masahiko Kinoshita, opted not to publish his paper in this issue. The papers of the comparative constitutional law scholars are collected in a special issue of Global Constitutionalism (forthcoming).

Few theories could have facilitated the matchmaking better than CPPT, whose proponents consider themselves intellectual heirs to Ely's classic.[33] It is arguable that as early as 1975 the Japanese Supreme Court had already silently adopted the levels-of-scrutiny approach to judicial review outlined in footnote four of *U.S. v. Carolene Products*.[34] The political process theory Ely expounded in *D&D* has also been familiar to Japanese constitutional law scholars since Shigenori Matsui's and Yasuo Hasebe's famous debate on its applicability to Japan some three decades ago.[35] We are very fortunate that they agreed to reprise their debate during the symposium and in these pages.

After studying under Ely in Stanford and obtaining a SJD degree there, Matsui introduced political process theory to Japanese constitutional academia. He co-translated *D&D* in Japanese then published a number of law review articles and monographs that endorsed the application of political process theory (PPT) to the Constitution of Japan. In his contribution to this volume, Matsui carefully reviews the criticisms leveled at PPT in both the U.S. and Japan, offers his defense, and reminds readers of the enduring influence and significance of Ely's theoretical inquiry. For Matsui, Ely's representation-reinforcing theory offered "a very powerful alternative to the predominant constitutional liberalism" in Japan, where constitutional theorists were largely supportive of judicial activism and sanguine about the judiciary's capacity to vindicate constitutional freedoms despite the Supreme Court's consistently anemic approach to judicial review, striking down only 11 statutes in more than seventy years. Renewing his counterargument to his critics, he forcefully insists that Ely's theory still "best explain[s] the need for the constitution and lay[s] out the proper role of the unelected judiciary to play in the democratic structure of the government" without simply relying on the myth that if the political process fails judges would vindicate constitutional claims.

When Matsui advocated for introducing Ely's PPT to Japan, Hasebe offered a fundamental critique in a series of law review articles.[36] He criticized Matsui for failing to give due regard to the Japanese Constitution's substantive commitment to protecting certain rights and liberties, attributing this failure to Matsui's eager and uncritical acceptance of the pluralistic view of American democracy underlying Ely's theory. In his contribu-

33 Cf. TIOJANCO, *supra* note 4.

34 EJIMA, *supra* note 27, 36–37.

35 For a fascinating account of this history, see Shigenori MATSUI's essay in this issue, John Hart Ely as a Constitutional Theorist: On Introducing Ely to Japan.

36 Y. HASEBE, *Seiji torihiki no bazaar to shihousinsa* [Bazaar of Political Bargaining and Judicial Review], Hōritsu Jihō 67:4 (1995) 62.

tion to this special issue, Hasebe redirects his critical eye to CPPT. While CPPT is now free from Ely's parochial assumption about American-style democracy, Hasebe is still concerned that CPPT's conception of democracy is too thin, too Schumpeterian, to legitimate judicial intervention beyond the protection of democracy's minimum core. He urges Dixon and other proponents of CPPT to rely not merely on the court's social legitimacy, which restricts the judicial role to "making the political branches responsive to people's needs and aspirations," but also endorse Rawlsian political liberalism as a morally legitimate model of democracy. This endorsement entails a judicial role that would "include protecting everyone's right to choose and pursue her own idea of a good way of life." (Dixon demurs in her conclusion to this special issue, suggesting that there is plenty enough 'reasonable disagreement about what counts as necessary for thick democracy' for courts to endorse any single conception of it.) Hasebe also points out that the Japanese Supreme Court may not be as responsive to concerns of representation reinforcement as CPPT would expect, although he concedes that the Court has shown signs of creativity particularly at the sub-constitutional level.

The next four chapters are authored by academics who belong to the generation that follow Matsui and Hasebe. Their contributions offer different perspectives for evaluating Japanese constitutional adjudication. Their insights into academic works following the Matsui-Hasebe debate also inform us of the significance of the theoretical turn from PPT to CPPT and its future potential to influence the practice of judicial review in Japan.

The two contributions by Keigo Obayashi and Nobuki Okano respectively assess PPT's impact on Japanese academia and court practices at a relatively high level of theoretical abstraction. Obayashi starts from a sober assessment of PPT's influence: although it inspired certain quarters of academia, it failed to influence court practices. The Japanese Supreme Court's attitude toward judicial review has remained passive for the entire post-war years, and for a number of reasons: the ruling Liberal Democratic Party has controlled the government, hence judicial appointments, for almost half a century; bureaucratic norms of deference dating back to the Meiji Constitution; the pre-enactment review of bills by the esteemed Cabinet Legislative Bureau; and the low level of judicial scrutiny the Supreme Court conducts under the public welfare doctrine. The Supreme Court's jurisprudence has recognized differentiated levels of constitutional review that give preferential status to certain categories of liberties including the right to free speech and association, the freedom of religion, equal protection and the right to vote. In practice, however, it has been more active in cases involving restrictions on liberty to engage in economic activities. In Obayashi's view, PPT's failure was inevitable because of the very different professional

ethos of the American and Japanese judiciaries. Ely thought that the U.S. Supreme Court's "value imposition"[37] approach to judicial review was democratically indefensible; hence he aimed to limit the constitutional role of courts to the democracy-enhancing judicial activism of the Warren Court. In contrast, Obayashi observes, Japanese endorsers of PPT thought that the Japanese Supreme Court's "fundamental values" approach to judicial review was too restrained; hence they aimed to expand the constitutional role of courts beyond the cramped confines of the public welfare doctrine. He also notes that the process-oriented approach was not a good fit for Japanese constitutional adjudication because Japan's Constitution contains a more elaborate list of guaranteed rights and provides for a more flexible form of parliamentary system than its U.S. counterpart. Nonetheless, Obayashi does note a sign of incremental changes in recent Supreme Court cases, and concludes with certain optimism that CPPT, with its functional focus and broad comparative scope, can make a positive contribution to the study of Japanese judicial review.

While similarly acknowledging the passivist record of the post-war Japanese judiciary, Okano identifies a number of instances where the courts, and particularly the lower courts, had successfully brought about legislative changes of constitutional significance. In his view, Japanese courts have taken a model of dialogical constitutional review known as catalytic review: legislative changes were made possible not by the court's express declaration of unconstitutionality or declaration of rights for the plaintiff; rather the very fact that the case was pending before the court, or that the lower court judgments or concurring and dissenting opinions highlighted the issue, attracted attention by the media and public opinion sufficient to induce changes through the legislative process. CPPT is a useful theory, he says, because it "helps us to comprehend the Japanese catalytic style as one version of representation-reinforcement." Despite this style faring well until the early 1990s, however, Okano doubts that Japanese courts can continue to bring about desired legal changes in this representation-reinforcing manner. In his view, catalytic judicial review has become ineffective since the 2000s after the Diet, with the LDP firmly entrenched as the dominant political party, started refusing to respond to the court's catalytic engagement. This has led the Japanese Supreme Court to itself strike down a few statutes that the Diet refused to repeal despite repeated catalytic-style judicial nudges. Okano worries, however, in general the courts' past successes with the catalytic style despite changes in political conditions that undermine this style's effectiveness ultimately "hinders judicial intervention in political malfunctions", to the point that could "adversely affect the protec-

37 ELY, Democracy and Distrust, *supra* note 1, 73.

tion of constitutional democracy." An egregious example of this that he highlights is the Japanese Supreme Court's refusal to award relief in the face of a blatant rejection by the ruling party to convene a constitutionally mandated extraordinary Diet Session.

The next two contributions focus on more concrete issues to consider CPPT's potential to enhance the Japanese courts' participation-enhancing engagement with the political process. The discussion of the ongoing series of litigation over same-sex marriage by Minori Okochi perhaps sounds the most optimistic note on the Japanese judiciary's capacity to change the status quo and CPPT's potential to make theoretical contributions. As a group, LGBTs constitute a discrete and insular minority whose voice has been neglected due to legislative inertia and the lack of interest or sympathy on the part of other citizens, and their claims present the court with a hard case calling for judicial policy making.[38] After a detailed discussion of the different approaches taken by the lower courts, Okochi observes that these courts, regardless of their conclusion, avoided recognizing the "right to marry" outright. Even those courts that ruled in favor of LGBTs recognized the legislature's broad discretion and took pains to find a narrow area of protection where it cannot transgress, leaving large leeway for legislation. This is a prime example of the judiciary's careful engaging with the legislature as envisaged by CPPT, and Okochi's conclusion that Japanese courts are in need of "a logic that supports the court's active intervention" seems to suggest that the theory could play a positive role in Japanese constitutional adjudication.

Hajime Yamamoto focuses on the constitutional rights of non-citizens, another group that falls into the category of discrete and insular minority.[39] The Japanese legal system poses a number of hurdles on their quest for the right to equal protection and political participation: the Japanese post-war Constitution intentionally excluded non-citizens from the guarantee of equal protection; Japanese legislation does not extend citizenship to those who were born in Japan but to non-Japanese parents unless they naturalize; and yet both the Japanese public and constitutional law scholars appear oblivious to the fact that a substantial number of Korean residents lost their citizenship when Japan regained independence. And yet, the Japanese court has maintained the position declared in the 1978 McLean case where the constitutional guarantee of the freedom of movement was held not to ex-

38 See ELY, Democracy and Distrust, *supra* note 1, 163 ("a combination of the factors of prejudice and hideability […] renders classifications that disadvantage homosexuals suspicious.").

39 See ELY, Democracy and Distrust, *supra* note 1, 161 ("hostility toward 'foreigners' is a time-honored American tradition.").

tend to the entry of non-citizens into Japan. In Yamamoto's view, the Japanese court's failure to address blatant human-rights violations against non-citizens despite the relatively low risks of democratic backlash is deeply troubling. He provocatively suggests that this difficulty poses a challenge not just for Japanese constitutional scholars but serves as a touchstone of CPPT's ability to respond to hard cases.

Finally, Rosalind Dixon concludes this special issue. She reviews all the contributions and makes connections between PPT, both as originally developed by Ely and as received in Japan, and CPPT, both as globally formulated and as applied to the Japanese context. In her view, CPPT (or, as she proposes, comparative representation-reinforcing theory, CRRT) is a better "fit" with the Japanese Supreme Court's approach than Ely's original PPT because it embraces a more differentiated and contextual – or "calibrated" – approach to the intensity of judicial review than Ely's tiered approach. This context-sensitive approach, according to Dixon, jibes with the approach taken by the Japanese Supreme Court, which is generally deferential to political branches but willing to engage in more intensive scrutiny in exceptional cases, such as where voting rights are implicated. She further emphasizes, and this is significant in relation to Hasebe's critique, that CPPT gives a critical role for courts to play even in countries like Japan where elections are consistently dominated by a single party. This role includes safeguarding regular free and fair elections, political rights and freedoms, and institutional pluralism. By way of conclusion, Dixon queries whether the Japanese judiciary is open to CPPT and would actually begin to exercise its constitutional functions in a way that reinforces representation. The jury is still out on this question. We agree with Dixon that the symposium is an important contribution to developing such jurisprudence further and deepening cross-border engagement.

Together, the contributions to this special issue examine whether CPPT and Japanese constitutional review is a good match from a variety of perspectives: some approach PPT and CPPT from a relatively high level of theories, while others start from particular issues and concrete cases; they offer different reading of Japanese court cases and present diverse possibilities of interpretation; views vary as to the proper evaluation of PPT and the form of democracy upon which it is based; assessments also vary as to the extent to which CPPT can meaningfully guide and inform Japanese-style constitutional review. Overall, Japanese courts' demonstrably passivist history and almost constant deference to legislative discretion is common ground to all the contributors. While this appears to present a challenge to CPPT's aim to enhance the judiciary's responsiveness to political representation, that may be, as Dixon emphases, a good reason why CPPT's contextual approach can be effective. In fact, the contributions to this special issue

have identified several areas where CPPT could potentially offer doctrinal foundation on which Japanese courts could rely by way of engaging in a careful dialogue with the legislature and possibly justifying a conclusion that would empower insular minorities and reinforce democratic representation. The contributions also point to potential avenues of further inquiry. Perhaps the role of the media and non-profit organizations briefly touched upon in some of the contributions may be more profitably explored. While Japan and Japanese courts have so far avoided the democratic backsliding and political backlash that motivated the global CPPT movement, we might as well ask if that is and will continue to be the case as courts and political branches around the globe face shifting tensions and new challenges.

As we conclude this introduction, we would like to express our deep gratitude to so many people that made the symposium and this special issue possible and meaningful. In particular our heartfelt thanks go to all the authors for their painstaking research, engaging conference presentations, and efforts to redraft and revise their essays. We thank Ros Dixon for co-organizing with us a conference that brought together leading constitutional authors from around the world. The other part of the conference, which focused on CPPT, is collected in a special issue of Global Constitutionalism. We would be remiss not to acknowledge the indispensable generosity of the symposium's cosponsors: Suenobu Foundation Professorship of Transnational Law and Institute of Business Law and Comparative Law & Politics Graduate Schools for Law and Politics, The University of Tokyo; UNSW Sydney Gilbert + Tobin Centre of Public Law; Egusa Foundation for International Cooperation in the Social Sciences; Nomura Foundation Grant for Social Science; and JSPS Kakenhi 19H01408 (Masayuki Tamaruya and Keigo Obayashi). Lastly, we acknowledge with deep gratitude that all this would not have been possible without the administrative works meticulously and elegantly carried out by Yuko Nakata, Emi Masuta, Yoko Kubokawa, and Maria Ortega.

John Hart Ely as a Constitutional Theorist

On Introducing Ely to Japan

Shigenori MATSUI

I. INTRODUCTION

Professor John Hart Ely is kind of a legend in the constitutional law scholarship in the United States during the 1980s. His landmark book, entitled *Democracy and Distrust: A Theory of Judicial Review*,[1] was published in 1980. It was a culmination of his previous works during the 1970s on the theory of judicial review. This book caused huge controversies among constitutional law academics and had a lasting impact on the direction of the academic discourse in constitutional law, not only in the United States but also in other countries.

1 J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980).

As one of his graduate students who had studied theory of judicial review in Stanford under his supervision,[2] and as an academic who introduced his theory to Japan and endorsed it, it is my great privilege to participate in this conference and comment on Ely's theory. I would like to explain the background of his theory (part II), its outline (part III), its response from academics (part IV), reasons why I decided to introduce his theory to Japan and endorsed it (part V), and the lasting importance of Ely's theory (part VI).

II. Background for Ely's Theory

1. Path to Roe v. Wade

The power of judicial review, first exercised by the Supreme Court of the United States (SCOTUS) in *Marbury v. Madison*,[3] totally changed the discourse of constitutional law in the United States. Although it was a very controversial decision and the arguments for the power of judicial review were not perfectly satisfactory for all, it came to be widely accepted. As a result, the Constitution became a judicial norm to be enforced by the judiciary against the political branches. It was only a particular exercise of the power of judicial review in each specific case that could be subjected to debate but not the legitimacy of the power of judicial review itself.

The power of judicial review had not received such serious attention in the US in the 19th century because the SCOTUS had not used this power often to strike down legislation passed by Congress.[4] After all, Congress had not enacted many statutes affecting the general public at that time. It was only the later 19th century and early 20th century that brought a huge number of state statutes regulating the economy and social conditions aimed at protecting workers. Frustrated by these moves, corporations came to rely on the Due Process Clause of the Fourteenth Amendment to chal-

2 I was a JSD student from 1983 to 1986 at Stanford Law School under his supervision and obtained a JSD in 1986, submitting a thesis entitled Judicial Review v. Democracy: An Inquiry into the Nature and Limits of Legitimate Constitutional Interpretation by the Judiciary.

3 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

4 It was *Dred Scott v. Sandford*, 60 (19 How.) U.S. 393 (1857) that allowed the SCOTUS to exercise the power of judicial review for the first time since Marbury. It held that black slaves were not the United States citizens, denying their right to file a lawsuit in courts, and struck down the Missouri Compromise which banned slavery in the north, triggering the huge public anger and ultimately leading to the Civil War. However, the Dred Scott was reversed after the end of Civil War by the Fourteenth Amendment and the power of judicial review survived the most heated criticisms.

lenge these economic regulations and social legislations.[5] In response, the SCOTUS came to gradually interfere with the economic regulations and social legislations to see whether contested restrictions of the "liberty of contract", nowhere specifically provided in the Constitution but was found to fall within the "liberty" protected by the Due Process Clause of the Fourteenth Amendment, were reasonable. The SCOTUS subjected them to close scrutiny and struck them down when the Court found them unreasonable. This economic Substantive Due Process doctrine, typically shown in *Lochner v. New York*,[6] which struck down the maximum-working-hour legislation for bakery workers, raised very significant questions about the legitimacy of the power of judicial review.

In the old days, constitutional interpretation and adjudication was believed to be a value-neutral ascertainment of the right answer hidden in the provisions of the Constitution. Judges were merely discovering the answer from the Constitution already made by its framers and applied it to the case at hand. They were not creating law. Yet these decisions cast serious doubt on the appropriateness of this picture. The realists came to criticize this approach as mechanical jurisprudence and myth. Instead, they advocated for focusing on the reality; judges were creating law and constitutional interpretation and adjudication is filled with value judgments. This new understanding could totally destroy faith in the traditional justification for judicial review. If judges are creating answers with their own value judgments, why on earth could the judiciary assert superiority over the elected legislature and claim legitimacy?

Indeed, the SCOTUS faced significant backlash from both the political branches and the public. Especially when the SCOTUS struck down various New Deal statutes aimed at overcoming the Great Depression, strongly supported by the government and by the public, the SCOTUS was subjected to utterly aggressive attacks. President Roosevelt even proposed the idea of packing the SCOTUS to change the course of its decisions. Although this proposal was not accepted by many, the fear of political retaliation must have been felt by the Justices. As a result, the SCOTUS retreated from its active vindication of the liberty of contract. It simply came to defer to the judgments of the political process on matters of economic and social issues in the late 1930s.[7] This experience left the people the important lesson that the judiciary could block the majority will of the people and left the serious question of whether the power of judicial review could have any chance of survival.

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5 The Constitution of the United States, 14th amendment, clause 1.

6 *Lochner v. New York*, 198 U.S. 45 (1905).

7 *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

Nevertheless, during 1950s and 1960s, the SCOTUS led by Chief Justice Earl Warren, generally known as the Warren Court, came to closely scrutinize and strike down various restrictions on individual rights, especially freedom of expression, religious freedom, equality rights, and rights of suspects and defendants.[8] These decisions triggered heated debates about the proper role of the judiciary. Two opposing views were generally contrasted: theory of judicial restraint and theory of judicial activism. Theory of judicial restraint called for a much restrained judiciary, limiting its active exercise of power only when the legislation is evidently unreasonable. Mostly they called for reliance on "neutral principles" and criticized the decisions of the Warren Court as too unprincipled or result-oriented. On the other hand, the theory of judicial activism allowed for a much activist judiciary, justifying its active intervention when civil rights and civil liberties are concerned. Many of them believed that the Constitution is not a fixed document and embodies substantive values to be realized. They also believed that it needed to be updated and realized by the SCOTUS according to the changing society. The idea of a "living Constitution" was a very popular idea among them. But it must be noted that even the advocates for judicial activism generally did not endorse revitalization of *Lochner*. In that sense, advocates for judicial activism only partially embraced judicial activism for so-called civil rights and civil liberties but not economic liberties.

All these academics in a sense were attempting to solve the "countermajoritarian difficulty of judicial review" defined by Alexander Bickel.[9] American society is strongly committed to majority rule under a democracy. It is the people who elect their representative and choose the President, and the government is run based on majority rule in Congress. However, the SCOTUS Justices are not elected and do not face reelection, although they need to be nominated by the President and confirmed by the Senate, one branch of the Congress. When the SCOTUS strikes down legislation passed by Congress, it is in one sense throwing away the choice made by the people through the majority. In short, they were thus debating how the exercise of judicial review by the unelected SCOTUS could be justified in a majoritarian democratic society under the Constitution. This debate was mostly focused on cases where the SCOTUS went beyond the Constitution's text and history: cases where the SCOTUS could not find sufficient

8 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Gideon v. Wainwright* 372 U.S. 335 (1963). Indeed, during his law school years in Yale, Ely joined the teams of Abe Fortas, which contributed to the landmark decision in Gideon and Fortas later became an Associate Justice of the SCOTUS. Ely himself later served Chief Justice Earl Warren as a law clerk.

9 A. BICKEL, The Least Dangerous Branch (1962) 16.

textual sources or historical evidence on the original intent of the framers. The Warren Court in the 1950s and 1960s looked like it was acting without principle and without such sufficient textual or historical support when it struck down many statutes enacted by the legislatures elected by the people. These decisions looked too result-oriented.

2. Roe v. Wade

When Chief Justice Warren was replaced by the conservative Chief Justice Warren Burger in 1969, many anticipated a retreat from judicial activism. Yet, in 1973, in a landmark decision in *Roe v. Wade*,[10] the SCOTUS struck down a Texas anti-abortion statute which prohibited abortion except to save the life of a pregnant mother. In the United States, abortion was prohibited in almost all states before the 1970s except to save the life and health of pregnant mothers. Gradually, an increasing number of states started liberalizing abortion in early pregnancy but still the majority of states were reluctant to liberalize it. Texas was one of such reluctant states. The SCOTUS in this case found the woman's right to an abortion within the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. It then reviewed whether the restriction on abortion could be justified. The SCOTUS refused to hold the right to an abortion an unbridled absolute right. But the SCOTUS viewed it as a "fundamental right", triggering strict scrutiny on its restriction. The SCOTUS believed that abortion could be regulated after the first trimester for the protection of pregnant women and could be banned after the fetus became viable outside of the mother's womb for the protection of the potential life of the fetus. As a result, the SCOTUS struck down the Texas abortion law which practically prohibited abortion except to save the life of mothers as overbroad, thereby practically wiping out almost all abortion regulations that existed at that time in other states.

This decision was so controversial in the United States and triggered serious debates as to its appropriateness. Those who were in favor of women's abortion right welcomed it and started the Pro-Choice movement to vindicate the *Roe* holding and expand the abortion right. Those who were opposed to abortion were seriously upset and started the Pro-Life movement to call for the reversal of *Roe* and the introduction of various abortion restrictions to save the life of fetuses. This decision also caused heated controversies among constitutional academics as well. Ely, who was a political liberal, supported the outcome of the decision if he were a member of the legislature.[11] As a constitutional academic, however, he was not happy with the fact that it was

10 *Roe v. Wade*, 410 U.S. 113 (1973).

the[11] judiciary that brought about that change.[12] He feared that *Roe* may be Lochnerizing again. Basically, the SCOTUS once again found the unlisted right to an abortion in the Due Process Clause, found that right to be fundamental, triggering strict scrutiny, and struck down legislation still quite common in many states. *Roe* could be seen as the most typical decision that manifested the countermajoritarian difficulty of judicial review.[13]

III. Ely's Representation Reinforcing Theory of Judicial Review

In his book, he examined the two opposing views on constitutional interpretation: interpretivism and non-interpretivism. Interpretivism holds that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," while noninterpretivism holds that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."[14] He found interpretivism quite alluring but ultimately concluded that the standard form of it was impossible since there are some clauses such as the Ninth Amendment that are open-ended and called for much active enforcement.[15] Ely claims that the commentators thus started asking "Which values […] qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them?"[16]

However, when he closely examined noninterpretivism, he also found it unsatisfactory. All the sources each advocate attempts to draw constitutional interpretation, such as natural law, neutral principles, reason, tradition, consensus, and the predicted values of the future, lack objective standards and end up allowing unelected judges to subjectively enforce their own value judgments against the society.[17] Ely concluded that

11 J. H. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, Yale Law Journal 82 (1973) 920, 926.

12 Ely, *supra* note 1, 2–3, 248.

13 For the origin and history of academic obsession with the counter-majoritarian difficulty, see B. Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, New York University Law Review 73 (1998) 333; B. Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, Yale Law Journal 112 (2002) 153.

14 Ely, *supra* note 1, 1.

15 Ely, *supra* note 1, 14.

16 Ely, *supra* note 1, 43, quoting Bickel.

17 Ely, *supra* note 1, 44–72.

"now I can see how *someone who started with Bickel's premise*, that the proper role of the Court is the definition and imposition of values, might well after a lifetime of searching conclude that since nothing else works – since there isn't any impersonal value source out there waiting to be tapped – one might just as well 'do the right thing' by imposing one's own values. It's a conclusion of desperation, but in this case an inevitable desperation. No answer is what the wrong question begets."[18]

Then, he found an alternative theory in the judgments of the Warren Court. Although

"the commentators of the Warren era were talking about ways of discovering fundamental values, the Court itself was marching to a different drummer […]. These were certainly interventionist decisions, but the interventionist was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process […] was open to those of all viewpoints on something approaching an equal basis."[19]

This is the theory of a "participation-oriented, representation-reinforcing approach to judicial review."[20] He turned his attention to footnote four of the *Carolene Products* decision.[21] The *Carolene Products* decision applied a strong presumption of constitutionality to economic regulation and upheld the constitutionality of a statue which prohibited filled milk despite serious doubt on its reasonableness. Yet, in footnote four, the SCOTUS suggested that such a presumption might not be applied in certain circumstances:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. […]

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more ex- acting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. […]

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, […] or national, […] or racial minorities […]: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to searching judicial inquiry."[22]

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18 ELY, *supra* note 1, 72.

19 ELY, *supra* note 1, 73–74.

20 ELY, *supra* note 1, 87.

21 *U.S. v. Carolene Products Co., supra* note 7. For its historical background, see R. M. COVER, The Origins of Judicial Activism in the Protection of Minorities, Yale Law Journal 91 (1982) 1287.

22 *U.S. v. Carolene Products Co., supra* note 7, footnote 4.

The first paragraph allowed the SCOTUS to actively vindicate individual rights specifically enumerated in the Bill of Rights, pure interpretivism.[23] Ely noted that this first paragraph was added after the draft of the decision was circulated and somewhat different from second and third paragraphs. The second and third paragraphs were both "concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."[24] The majoritarian theme of paragraph two and the egalitarian theme of paragraph three, despite their apparently inconsistent impulses, fit together in a coherent political theory of representative democracy – a republican theory of representation of the whole people, with actual representation of the majority and "virtual representation" of minorities.[25] Ely thus argued that contrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," in fact "the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large – with ensuring broad participation in the processes and distributions of government."[26] Adopting the *ejusdem generis* way of thinking, he thus allows the courts to enforce open-ended provisions in the Constitution to enhance representation and to enable excluded minorities to join in the process of participation.

Therefore, he argued:

> "In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system."[27]

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23 ELY, *supra* note 1, 76.

24 ELY, *supra* note 1, 77.

25 ELY, *supra* note 1, 77–88.

26 ELY, *supra* note 1, 87.

27 ELY, *supra* note 1, 103. He viewed his own theory "ultimate interpretivism." ELY, *supra* note 1, at 88.

In other words, the SCOTUS should in American representative democracy be "policing the process of representation" by "clearing the channels of political change" and "facilitating the representation of minorities."

Upon endorsing such middle ground, he chose to justify a limited judicial activism. Apparently, he could accept most of the decisions of the Warren Court because his theory could justify most of its decisions. On the other hand, he could not defend *Roe*. Evidently, *Roe* represented the attempt to enforce "fundamental values" beyond text and history, which could not be justified under his representation-reinforcing theory, and, just like *Lochner*, was an illegitimate exercise of the power of judicial review.

IV. IMPACTS OF ELY'S THEORY

1. Reactions to Ely's Theory

His book triggered a huge number of book reviews. And his theory has been subjected to searching examinations by constitutional academics.

Surely, his theory, which later came to be known as a "political process theory," would be able to justify most of the Warren Court precedents and allows the public to participate in the political process with much ease.[28] He provided us perhaps the most powerful defense of the power of judicial review when various blocks are hindering the public from participating in the political process and when the majority are shielding off public scrutiny and criticism, undermining the process of political change. His theory also would be able to justify the Warren Court's vindication of racial minorities which have been excluded by prejudice. In this sense, Ely was the most successful (belated) defender of the Warren Court decisions.

Nevertheless, overall voices in the United States are critical. Surely, there are a small number of conservative academics who were not convinced by his theory of going beyond the text and history of the Constitu-

28 D. A. STRAUSS, Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely, Stanford Law Review 57 (2004) 761; W. N. ESKRIDGE JR., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, Yale Law Journal 114 (2005) 1279. But see D. R. ORTIZ, Pursuing a Perfect Politics: The Allure and Failure of Process Theory, Virginia Law Review 77 (1991) 721, 722 (Ely fails in his descriptive project); M. V. TUSHNET, Foreword, Virginia Law Review 77 (1991) 631, 634 (difficulty of understanding some decisions, such as Griswold, as representation-reinforcing way). If Ely wanted to defend these decisions, maybe Ely's understanding of democracy is quite broad and may raise the possibility that his theory is motivated by his right-based metatheory, superior to other rights, and might face the same destination as all theories he criticizes. Ibid., at 635–636. See also R. A. POSNER, Democracy and Distrust Revisited, Virginia Law Review 77 (1991) 641.

tion.[29] They believed that Ely went too far to allow judicial activism beyond text and history. Most of the constitutional academics in the United States were critical against his theory, however, believing that his dichotomy between interpretivism and noninterpretivism is flawed,[30] arguing instead that all are trying to interpret the Constitution, and concluded that his theory is too narrow and will not justify much activist exercise of judicial review in the post-Warren Court era, such as *Roe*.[31]

2. Some Representative Criticisms of the Academics

Professor Laurence H. Tribe[32] criticized Ely, for instance, since

> "the constitutional theme of perfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values – the very sort of theory the process-perfecters are at such pains to avoid."[33]

He wondered why Ely and other process theorists "continue to put forth process-perfecting theories as though such theories could banish divisive controversies over substantive values from the realm of constitutional discourse by relegating those controversies to the unruly world of power."[34] For Tribe, the Constitution embodies stubborn substantive commitments, and

> "the Constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state – a theory whose derivation demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives."[35]

Perhaps, therefore, Ely and process theorists might be viewing the process value as a core value to be realized by the judiciary,[36] since any identification of minorities to be protected or any identification of prejudice to eradi-

29 R. BERGER, Ely's "Theory of Judicial Review", Ohio State Law Journal 42 (1981) 87.

30 L.A. ALEXANDER, Modern Equal Protection Theories: A Metatheoretical: Taxonomy and Critique, Ohio State Law Journal 42 (1981) 3.

31 Probably, the only substantive rights which would not receive any constitutional protection will be the right to privacy and the personal autonomy right. T. GERETY, Doing without Privacy, Ohio State Law Journal 42 (1981) 143.

32 L. H. TRIBE, The Puzzling Persistence of Process-Based Constitutional Theories, Yale Law Journal 89 (1980) 1063.

33 TRIBE, *supra* note 32, 1064.

34 TRIBE, *supra* note 32.

35 TRIBE, *supra* note 32, 1066–1067.

36 TRIBE, *supra* note 32, 1072.

cate could not be accomplished without looking "beyond process to identify and proclaim fundamental substantive rights."[37] Then, Ely's whole theory stumbles.

Professor Chemerinsky[38] also criticized that the very "inquiry into the legitimacy of judicial review is futile and dangerous. The inquiry is futile because, if democracy is defined to require that all value choices be made by electorally accountable officials, then noninterpretive judicial review by definition is not acceptable in a democracy. The inquiry is dangerous because it accepts the conservative critics' definition of democracy and thereby legitimizes their premise that judicial review is unjustified unless it is made consistent with majority rule. The inevitable failure to reconcile noninterpretive court review with this definition of democracy undermines the legitimacy of countless Supreme Court decisions".[39] He also commented that the contention that judicial review is undemocratic is "disingenuous at best",[40] since any judicial invalidation of legislation passed by the majority is undemocratic, even based on interpretivist grounds. He rather argued that it is essential to

> "recognize that a purely procedural definition of American democracy as majority rule is grossly incorrect. A correct definition of American democracy must add to majority rule the protection of substantive values from tyranny by social majorities – an addition with crucial implications for the debate over the legitimacy of judicial review."[41]

His position is that the ultimate question should be how much discretion the Court should have in interpreting the Constitution and that "the choice must be based upon substantive values, upon a political theory that examines how our government should be structured and identifies which values are so important that they must be shielded from majority rule."[42]

On the other hand, Mark Tushnet[43] argued that Ely's attempt to satisfy three pillars of modern constitutionalism will be destined to be failure. Three pillars he referred to are the justification principle, which attempts to justify judicial intervention, the constraint principle, what dictates the judi-

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37 TRIBE, *supra* note 32, 1077. He later came to claim that it is futile to search for legitimacy. L.H. TRIBE, Constitutional Choices (1985) 3. See also L. H. TRIBE/ M. C. DORF, On Reading the Constitution (1993).

38 E. CHEMERINSKY, The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, Texas Law Review 62 (1984) 1207.

39 CHEMERINSKY, *supra* note 38, 1209.

40 CHEMERINSKY, *supra* note 38, 1209.

41 CHEMERINSKY, *supra* note 38, 1210.

42 CHEMERINSKY, *supra* note 38, 1210.

43 M. TUSHNET, Darkness on the Edge of Town: The Contributions of John Hart ELY to Constitutional Theory, Yale Law Journal 89 (1980) 1037.

ciary to constrain in the name of democracy, and the principle of value-free adjudication.[44] While Ely's theory could justify the last two principles, Tushnet argued that it would not support the first principle and "the incompatibility of the three principles reflects the incoherence of modern liberal theory."[45] In particular, he argued that, although Ely succeeded in destroying his rival theories, Ely's criticisms against them ended up destroying his theory as well:

> "Ely's critique of the prevailing theories can be turned, point for point, against his own theory; in particular, representation-reinforcing review necessarily involves judicial displacement of citizens' choices between political and other kinds of activity, in the name of the objective value of political participation."[46]

Yet, the fundamental difficulty with Ely's theory is that "its basic premise, that obstacles to political participation should be removed, is hardly value-free."[47] He was thus suggesting that any attempt to find a constitutional theory of judicial review that justifies judicial review while at the same time placing limits on it is doomed to failure in a liberal democracy.

3. The Impossibility of Avoiding Value Judgments and the Primacy of Substantive Values

Many other liberal constitutional academics similarly criticized Ely's theory as having failed.

Firstly, they claim that Ely's theory failed because it is impossible to avoid substantive value judgements.[48] Value judgments on substantive values is unavoidable. Moreover, they argue that the constitution is overwhelmingly a declaration of substantive values and Ely is wrong to argue

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44 TUSHNET, *supra* note 43, 1037–1038.

45 TUSHNET, *supra* note 43, 1038.

46 TUSHNET, *supra* note 43, 1038.

47 TUSHNET, *supra* note 43, 1045. See also M. TUSHNET, The Dilemmas of Liberal Constitutionalism, Ohio State Law Journal 42 (1981) 411; P. BREST, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, Yale Law Journal 90 (1981) 1063 (controversy over the legitimacy of judicial review in a democratic polity – the historic obsession of normative constitutional law scholarship' – is essentially incoherent and unresolvable).

48 J.E. FLEMING, A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy, Michigan Law Review 80 (1982) 634; ORTIZ, *supra* note 28, 722 (Ely's theory succumbs to the same difficulties he so ably identifies in other theories and his arguments cannot wipe out the reliance on substantive commitments). See also R. D. PARKER, The Past of Constitutional Theory – And Its Future, Ohio State Law Journal 42 (1981) 223.

that the Constitution is mostly a procedural document.[49] Even if most of the constitutional provisions are concerned with procedures, as Ely claimed, that may not mean that all open-ended provisions need to be viewed as protecting procedural rather than substantive values.[50] Furthermore, as Tribe argued, the procedural provision of the Constitution may not be properly understood without referring to the substantive values they serve.[51] Thus, they claim that Ely's theory is doing the same thing as a noninterpretivist Court, enforcing one "ideal conception of the requirements of 'true democracy'" as a particular value to be enforced.[52] And he failed to prove that his "participational values" are more important or fundamental than the other substantive values.[53]

Ely's reliance upon footnote four of *Carolene Products* to support limited judicial activism also attracted criticism for being too narrow. His reading of footnote four especially focused on the second and third paragraphs but pretty much ignored the first paragraph. His reading may be criticized as too narrow for neglecting the first paragraph, which could explain why certain values are fundamental in the constitution, and thus could justify the active exercise of judicial review to vindicate unnamed fundamental values in the name of the constitution.[54] It is also claimed that it is not "discrete

49 M.C. DORF, The Coherentism of Democracy and Distrust, Yale Law Journal 114 (2005) 1237, 1239.

50 FLEMING, *supra* note 48, 638.

51 Probably, it would be better to contrast process with outcome. D. LYONS, Substance, Process, and Outcome in Constitutional Theory, Cornell Law Review 72 (1987) 745.

52 S. ESTREICHER, Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture, New York University Law Review 56 (1981) 547, 551. See also M. L. BENEDICT, To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage, Ohio State Law Journal 42 (1981) 69, 73; D. J. RICHARDS, Moral Philosophy and the Search for Fundamental Values in Constitutional Law, Ohio State Law Journal 42 (1981) 319.

53 ESTREICHER, *supra* note 52, 551–552; M. J. PERRY, Interpretivism, Freedom of Expression, and Equal Protection, Ohio State Law Journal 42 (1981) 261. See also BENEDICT, *supra* note 52, 78–85 (historically, both representative democracy and judicial review developed as means to secure a greater end – protection of rights and there is no historical basis for the worry that judicial protection of rights somehow violates a deeper commitment to democracy).

54 F. GILMAN, The Famous Footnote Four: A History of the Carolene Products Footnote, South Texas Law Review 46 (2004) 163, 172 (claiming that Ely's centering of Carolene Products "create[d] the modern view of footnote four"); P. LINZER, The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, Constitutional Commentary 12 (1995) 277 (arguing that Ely's interpretation of footnote four is unduly narrow); J. M. BALKIN, The Footnote, Northwestern University Law Review 83 (1989) 275,

and insular minorities" that need special protection because such groups could be highly organized to exercise political power. It is rather anonymous and diffuse powerless groups that need much active judicial protection.[55] In short, his reading of footnote four is too narrow in focusing only on "discrete and insular minorities" and its exclusive reliance upon it to justify judicial review is misguided to deny more active judicial review in other contexts.[56]

4. Questioning the Majoritarian Difficulty and Commitment to Democracy

Secondly, some went on to question whether there is a countermajoritarian difficulty in the first place. Ely simply assumed that the Constitution mandates "representative democracy" and attempted to justify judicial review against this democracy on the assumption that the political process is majoritarian.[57] However, one can question whether the structure of the government established by the Constitution is actually consistent with majoritarian democracy. Congress, the national legislature, is supposed to be representative of the majority will of the voters. However, Congress consists of two houses and one of the houses is the Senate, which is a representative of each state. As a result, each state has two Senators regardless of its population. There is a significant imbalance among states as to the impact of one vote. Moreover, the Senate has the same power as the House of Representatives in passing law. It is impossible to pass a statute without the support of the Senate. This makes the Congress seriously less majoritarian than it could appear. Furthermore, the President has a power of veto. The President needs to be elected by the indirect election of the people, but the number of electors is decided by the number of House of Representative members plus two Senators. Thus, smaller states have some advantage over more populous states. Moreover, since most of the states adopt the winner-takes-all approach to selection of electors, there could be a discrepancy between the

316–317 (advocating for a deconstructivist approach to defining "discrete and insular" minorities); COVER, *supra* note 21 (contending that a generalized approach cannot adequately grapple with inherently "contingent instances of prejudice").

55 B. ACKERMAN, Beyond Carolene Products, Harvard Law Review 98 (1985) 713, 745.

56 But see D. T. COENEN, The Future of Footnote Four, Georgia Law Review 41 (2007) 797 (the necessity of protecting discrete and insulated minorities leads to unempoweredness principle to justify protection of those unempowered); D. A. STRAUSS, Is Carolene Products Obsolete, University of Illinois Law Review 2010 (2010) 1251 (still showing the viable future).

57 ELY, *supra* note 1, 6–7.

number of electors a candidate obtains and the popular vote. Indeed, during past Presidential elections, some winning candidates obtained less popular votes than the losing candidates. The election of the President is hardly majoritarian. Besides, the actual operation of the Congress is far from the majoritarian.[58] There are countless examples where Congress failed to act in accordance with the majority will.

Moreover, one can also question whether judicial review is totally countermajoritarian. For instance, the Justices of the SCOTUS are nominated by the elected President and need to be confirmed by the Senate.[59] Unelected Justices might be mindful of the public opinion when they make a decision. Indeed, in some cases, unelected judges might be much in better position to enforce majoritarian control over a political process that is impeding majoritarian control.[60]

Furthermore, although the countermajoritarian difficulty argument holds that judicial review of laws enacted by legislatures is problematic because it subverts the will of electoral majorities, this assumption may not be appropriate. David Strauss argues thus that judicial review could "identify areas where the laws on the books no longer reflect popular opinion" and "invalidate statutes in the expectation that they are in fact carrying out the will of the people."[61] The SCOTUS might be viewed as reinforcing representation in these cases, therefore not necessarily acting against the majority will. Ilya Somin[62] claims, on the other hand, that the countermajoritarian theory rests on the assumption that a majority of voters have at least a basic level of political knowledge, but that several decades of political science research has found that the political knowledge levels of the American electorate are uniformly low. As a result, it is claimed that average levels of voter knowledge are so low that they fall well below the thresholds re-

58 C. B. LAIN, Upside-Down Judicial Review, Georgetown Law Journal 101 (2012) 113, pointing out huge structural impediments, functional impediments and political impediments for public participation to allow majoritarian control.

59 But see J.P. ZOFFER / D.S. GREWAL, The Counter-Majoritarian Difficulty of a Minoritarian Judiciary, California Law Review Online 11 (2022) 437 (casting doubt on the degree of control over the Justices through appointment and confirmation process by the people).

60 LAIN, *supra* note 58 (the judiciary might be filling the gap left behind by the political process that is impeding the majoritarian control).

61 STRAUSS, *supra* note 28, 762. See also F. SCHAUER, The Calculus of Distrust, Virginia Law Review 77 (1991) 653 (although Ely's theory is premised upon the distrust on the judiciary, this distrust may be merely speculative).

62 I. SOMIN, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the 'Central Obsession' of Constitutional Theory, Iowa Law Review 89 (2004) 1287.

quired by even the least demanding theories of democratic representation. For this reason, judicial review has far less countermajoritarian effect, in most cases, than is usually supposed. Moreover, to the extent that judicial review limits the scope of government power, it may actually strengthen majoritarian democracy by reducing the knowledge burden on voters.

5. Questioning the Finality of the Constitutional Judgment of the SCOTUS

Thirdly, some went even further and argued that we don't have to worry much about the countermajoritarian difficulty of judicial review since the judiciary could never be able to block the majority of the people from accomplishing what they want forever. When the SCOTUS renders an unpopular decision, the decision often triggers negative responses and doubt as to the legitimacy of power of judicial review. But what would happen thereafter? For a time, "the Court can disregard such criticism, but if public opinion does not eventually come in line with the judicial view, constitutional amendment, changes in judicial personnel, and/or changes in judicial doctrine will typically bring judicial understandings closer to public opinion. Consequently, American courts have not, over the long run, acted as strongly counter-majoritarian bodies."[63] If this is indeed the case, the countermajoritarian difficulty may be nothing to worry about.[64]

Some even invoked the possibility of dialogue as a justification for much activist judicial review.[65] If the invalidation of legislation by the SCOTUS is the first step for such a dialogue, the ensuing public reactions and legislative responses are surely the second step. Then, the SCOTUS may have to reconsider, back down, or even overturn their decisions. Others argue that historically the so-called countermajoritarian difficulty came to attract so much attention because the Court's decisions are regarded as binding – not only upon the parties to the case at bar, but upon future litigants and the

63 M. C. DORF, The Majoritarian Difficulty and Theories of Constitutional Decision Making, Journal of Constitutional Law 13:2 (2010) 283, 283-84.

64 B. FRIEDMAN, The will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009) (arguing that the SCOTUS often follows public opinion). He argues that the chief function of judicial review in the modern era is "to serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of the Constitution." Ibid., 16.

65 B. FRIEDMAN, Dialogue and Judicial Review, Michigan Law Review 91 (1993) 577 (the process of constitutional interpretation that actually occurs does not set electorally accountable (and thus legitimate) government against unaccountable (and thus illegitimate) courts. Rather, the everyday process of constitutional interpretation integrates all three branches of government: executive, legislative, and judicial).

other branches of the state and national government as well. But this assumption may be wrong.[66] Then, the countermajoritarian difficulty of judicial review may not be worrisome.

6. Questioning the Majoritarianism

Fourthly, one can question whether majoritarianism itself deserves to be enhanced. Ely simply took it granted that the US Constitution is a "representative democracy."[67] He did not attempt to justify why majoritarianism is a basic requirement for democracy but apparently assumed that enhancing the majoritarian principle is appropriate.

However, his implied acceptance of majoritarianism as a mandate of democracy and endorsement of majoritarian control is subject to criticisms from liberal critics.[68] They generally argued that the American government is a "constitutional democracy" and not a majoritarian democracy and the protection of fundamental values is integral to constitutional democracy, thus casting doubt on Ely's premise of necessity to justify judicial review in light of majoritarian democracy.[69] These liberal critics thus argue that the vindication and realization of underlying substantive values is more important than procedural issues, including representative democracy.[70] To the extent judicial review will vindicate and promote these substantive values,

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66 FRIEDMAN, *supra* note 65.

67 ELY, *supra* note 1, 88.

68 J. S. SCHACTER, Ely and the Idea of Democracy, Stanford Law Review 57 (2004) 737, 738. The most influential political science scholar Robert Dahl, for example, defined "democracy" as "the freedom of self-determination in making collective and binding decisions: the self-determination of citizens entitled to participate as political equals in making the laws and rules under which they will live together as citizens." R. DAHL, Democracy and Its Critics (1989) 326. See also R. A. DAHL, On Democracy (2000); R. A. DAHL, How Democratic Is the American Constitution? (2001). Of course, his definition does not provide much for constitutional theorists.

69 FLEMING, *supra* note 48, 643; M. J. PERRY, The Legitimacy of Particular Conceptions of Constitutional Interpretation, Virginia Law Review 77 (1991) 669. Indeed, Ely realized that democracy was not equal to allowing the majority to decide whatever they like. His equal protection prong of political process theory thus precludes an attempt to exclude certain minorities due to prejudices. Yet, these liberal critics generally argue that Ely failed to understand the full implications of accepting the possibility of social exclusion and inequality as distorting the process Ely attempted to endorse. See, e.g., SCHACTER, *supra* note 68, 753 (insufficient examination on various hurdles for holding the representatives accountable to the people).

70 DORF, *supra* note 49, 1239; L. G. SAGER, Rights Skepticism and Process-based Responses, New York University Law Review 56 (1981) 417. See also M.J. PERRY, The Legitimacy of Particular Conceptions of Constitutional Interpretation, Virginia Law Review 77 (1991) 669; ACKERMAN, *supra* note 55, 746.

then, they would argue, judicial review would be justified. There is no need to worry about the countermajoritarian difficulty of judicial review.[71]

7. Could the Judiciary Act as a Guardian of Minorities?

The doubt on the ability of the SCOTUS to block attempts of the majority to restrict public participation and to exclude certain minorities from the political process forever raises, on the other hand, the opposite question. Despite the "almost-obsessive focus on the supposed counter-majoritarian difficulty" of judicial review, the people might not realize the "real, and exactly opposite danger – that the Supreme Court is insufficiently counter-majoritarian to protect minority rights when they are really threatened."[72]

Indeed, one can question whether Ely successfully defended the role of the judiciary as a guardian of the political process by removing blockages to political participation by minorities.[73] It may be also doubtful surely why the

71 E. CHEMERINSKY, In Defense of Judicial Supremacy, William & Mary Law Review 58 (2017) 1459 (arguing that, "in deciding who should be the authoritative interpreter of the Constitution, the answer is the branch of government that can best enforce the Constitution's limits against the desires of political majorities" and it should be judiciary); M. J. PERRY, Noninterpretive Review in Human Rights Cases: A Functional Justification, New York University Law Review 56 (1981) 278; R. DWORKIN, The Forum of Principle, New York University Law Review 56 (1981) 469. These critics generally don't find any value on relying upon public participation to vindicate the rights of the people. J.H. WILKINSON III, Cosmic Constitutional Theory: Why Americans are Losing Their Inalienable Right to Self-Governance (2012) 60. Such an over-emphasis on rights and freedoms of individual citizen may run the risk of depriving the sense of governing together. See R. H. PILDES, Romanticizing Democracy, Political Fragmentation, and the Decline of American Government, Yale Law Journal 124 (2014) 804, 815 (noting the decline of the American government and arguing for an institutional and organizational approach to democracy instead of rights-oriented approach). In one sense, these critics assume that the Constitution is embodying the mandate to achieve justice or mandates the government, including the judiciary, to pursue the moral ideal or aspiration. See also H. P. MONAGHAN, Our Perfect Constitution, New York University Law Review 56 (1981) 353 (the constitution may not be perfect); J. H. ELY, Democracy and the Right to be Different, New York University Law Review 56 (1981) 397 (the Constitution does not guarantee the right to be different); T. SANDALOW, The Distrust of Politics, New York University Law Review 56 (1981) 446 (distrust of politics, with to remove certain issues out of politics, of the liberals rises mostly from the disagreement with substantive results).

72 R. D. DOERFLER/S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review 75 (2022) 769.

73 P. BREST, Substance of Process, Ohio State Law Journal 42 (1981) 131.

judiciary is better at protecting excluded minorities in light of its history of long-standing failure to protect so many vulnerable minorities in the past.[74]

8. The Importance of Ely's Theory Despite all These Criticisms

An overwhelming number of liberal constitutional academics thus denies any necessity to limit judicial activism to representation-enhancing and facilitating participation in the US, thus defending the much active role for the SCOTUS to support *Roe* and the active vindication of an unwritten right to an abortion.[75]

However, despite all criticisms against Ely's theory, these critics still fail to show what are the most important substantive values to be vindicated and realized and why these substantive values are more important than others. Many liberal critics probably seems to assume that the values vindicated by liberal scholars, such as John Rawls and Ronald Dworkin, are the most important values to be realized by the US Constitution.[76] But we are not offered any persuasive explanation why the US Constitution could be viewed as embodying the theories of Rawls or Dworkin or why their theories are right or the best ones to vindicate.[77] Even if they were the right one or the best one, we are not sure why it should be the unelected judiciary that is supposed to accomplish these theories instead of the political process, i.e., ultimately we the people themselves.[78]

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74 DOERFLER/MOYN, *supra* note 72. These authors thus argued that the "ghost" of Ely thus needs to be buried to raise any hope that the judiciary could be trusted against legislative and majoritarian attacks on minorities.

75 L. H. TRIBE, Abortion: The Crash of Absolutes (1990); R. B. SAPHIRE, The Search for Legitimacy in Constitutional Theory: What Price Purity?, Ohio State Law Journal 42 (1981) 335; E. CHEMERINSKY, In Defense of Roe and Professor Tribe, Tulsa Law Review 42 (2013) 833; T. GERETY, Doing without Privacy, Ohio State Law Journal 42 (1981) 143.

76 J. RAWLS, A Theory of Justice (1971); R. DWORKIN, Taking Rights Seriously (1977).

77 Initially, their theories looked like just moral theories and, as a result, many questioned why their moral theories are the correct or best one to vindicate. Later Rawls came to defend his theory as "political liberalism" based on overlapping consensus. J. RAWLS, Political Liberalism (1993). One can then question whether there is indeed an overlapping consensus to support his theory of justice.

78 But see F. I. MICHELMAN, The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory, Tulsa Law Review 42 (2007) 891 (distinguishing democratic process-based constitutional theories like Ely and liberal proceduralist constitutional theory such as Rawls). Most liberal academics believe that Lochner was wrong. But rarely do we encounter the argument why Roe was appropriate but Lochner was wrong. But see D. NEJAIME/R. B. SIEGEL, Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a De-

Moreover, despite such overwhelming criticisms against Ely, his theory left a tremendous impact on American constitutional law.[79] There is no wonder why Ely' book was ranked as the most cited scholarly work between 1978 to 2000.[80]

Indeed, there are a number of academics who are deeply influenced by Ely's theory.[81] There are also a number of scholarly works in specific related fields of constitutional law receiving strong influence from his theory.[82] In this sense, his theory has had a huge impact on constitutional law academics in the United States. Furthermore, his theory could still provide the strongest endorsement for judicial intervention in order to clear the political process and to abolish the exclusion of discrete and insular minorities from political participation.[83]

On top of these, over the years, we came to see the rise of republican constitutionalism against liberal constitutionalism. Republican constitution-

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mocracy, New York University Law Review 96 (2021) 1902 (reconsideration of Lochner may be appropriate).

79 NEJAIME/SIEGEL, *supra* note 78, 1907. It is true that there are not much judicial decisions explicitly citing his theory. S. ISSACHAROFF, The Elusive Search for Constitutional Integrity: A Memorial for John Hart Ely, Stanford Law Review 57 (2004) 727, 734–735. However, the theory's impact should not be evaluated only by the number of decisions where it was cited, although recent SCOTUS's emphasis on federalism and separation of powers cases may be seen as an endorsement of this concern on structure of the government. S. G. CALABRESI, Textualism and the Countermajoritarian Difficulty, George Washington University Law Review 66 (1998) 1373. Although Ely cast doubt on Roe, he could have supported *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a sodomy ban only on homosexual couple, on equal protection ground. K. M. SULLIVAN/P. S. KARLAN, The Elysian Fields of the Law, Stanford Law Review 57 (2004) 695, 703–713. Similarly, probably he could strike down the exclusion of same-sex marriage on equal protection ground as well. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

80 F. R. SHAPIRO, The Most-Cited Legal Scholars, Journal of Legal Studies, 29 (2000) 409.

81 M. J. KLARMAN, The Puzzling Resistance to Political Process Theory, Vanderbilt Law Review 77 (1991) 747.

82 C. MORSE, A Political Process Theory of Judicial Review under the Religion Clauses, Southern California Law Review 80 (2007) 793.

83 J. D. GRANO, Ely's Theory of Judicial Review: Preserving the Significance of the Political Process, Ohio State Law Journal 42 (1981) 167. See also M. J. KLARMAN, The Supreme Court, 2019 Term – Foreword: The Degradation of American Democracy – and the Court, Harvard Law Review 134 (2020) 1, 178–187; J. WEINSTEIN, Participatory Democracy as the Central Value of American Fee Speech Doctrine, Virginia Law Review 97 (2011) 3 (although not relying upon Ely); E. B. SMITH, Representation Reinforcement Revisited: Citizens United and Political Process Theory, Vermont Law Review 38 (2013) 445.

alism emphasizes the republican thoughts underlying the United States Constitution and attempts to revitalize these thoughts in the theory of judicial review. Cass Sunstein[84] and Bruce Ackerman[85] are among them.[86] Republicanism aims to accomplish the public good instead of individual personal fulfillment and they generally emphasize the importance of public participation in politics as citizens and the significance of "public virtue." The primary purpose of society and the government is the achievement of public good, and not the protection of a personal private sphere for individuals to enjoy freedom.

Furthermore, we came to see the rise of populist constitutional theory in the United States, viewing the Bill of Rights as a safeguard of popular majority rule against the usurpation of power by a minority of elites. This trend now includes constitutional scholars such as Mark Tushnet,[87] Larry Kramer,[88] and Richard Parker.[89] Although their views are quite different, they are united in attacking liberal jurisprudence in favor of a more active people's participation for the vindication of individual rights.[90] They don't view the individual rights protected by the Constitution as a protection of private spheres where the government is excluded and strongly oppose the liberal view.

Ely's theory might be viewed as a precursor to this new emphasis on public participation and the public role of citizens in vindicating individual rights.[91]

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84 C. R. SUNSTEIN, Beyond the Republican Revival, Yale Law Journal 97 (1988) 1539.

85 B. ACKERMAN, We the People I: Foundations (1993).

86 M. SELLERS, Republicanism, Liberalism, and the Law, Kentucky Law Journal 86 (1997–98) 1 (properly understood, republicanism and liberalism do not conflict).

87 M. V. TUSHNET, Taking the Constitution Away from the Courts (2000). M. TUSHNET, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, Michigan Law Review 94 (1995) 245.

88 L. D. KRAMER, The Supreme Court, 2000 Term – Foreword: We the Court, Harvard Law Review 115 (2001) 4.

89 R. D. PARKER, Here the People Rule: A Constitutional Populist Manifesto (1998). See also A. AMAR/A. HIRSCH, For the People (1999); A. AMAR, The Bill of Rights: Creation and Reconstruction (1998); A. AMAR, America's Constitution: A Biography (2006); A. R. AMAR, The Consent of the Governed: Constitutional Amendment Outside Article V, Columbia Law Review 94 (1994) 457, 495-96.

90 P. BLOKKER, Populism as a Constitutional Project, International Journal of Constitutional Law 17:2 (2019) 536 (discussing on the rise of populism in Europe and, while accepting populism as an alternative candidate as a constitutional theory, ultimately concluding that it failed up to its premises). For a liberal countercriticism against populist theories, see E. CHEMERINSKY, In Defense of Judicial Review: The Perils of Popular Constitutionalism, University of Illinois Law Review 2004, 673.

91 Although Ely himself was not explicit, his theory surely sounds like leaning toward republicanism. See *infra* note 111–113.

V. INTRODUCING ELY'S THEORY TO JAPAN

1. Why I Believed that Ely's Theory is Vital to Japan

When his landmark book was published, I was struck by his effort to ground the theory of judicial review on the democratic ideal of the US constitution. I translated his book into Japanese together with my mentor, Professor Koji Sato, of Kyoto University[92] and wrote several law review articles and several books on the theory of judicial review.[93] I strongly believed that his understanding could be applied to the Constitution of Japan and endorsed his theory as a powerful and most persuasive theory.

As many of you know, the idea of constitutionalism came to Japan during the Meiji period and the Meiji government established the Meiji Constitution, in 1889, following the steps of Prussia's Constitution. Although it was called the constitution, it was totally undemocratic, and it did not deserve to be called a constitution. It was enacted by the sovereign power of the Emperor and the Emperor had all the government powers under the constitution. He merely declared to abide by it by his own voluntary decision. The people were treated as subjects of the Emperor. Although certain rights were admitted in the constitution, they were granted by the benevolent grace of the sovereign Emperor, and they were only protected within the confines of law. Furthermore, there was no provision of judicial review, and the courts were precluded from reviewing the constitutionality of legislation.

The Constitution of Japan, promulgated in 1946, right after the devastating loss caused by the Pacific War, was totally different. It was enacted based on the draft crafted in the General Headquarters of the Allied Powers (GHQ), which was at that time occupying Japan, under the leadership of General Douglas MacArthur. The GHQ believed since the start of its occupation that the radical reform of the Meiji Constitution was necessary. As a result, it urged the Japanese Government to start the reconsideration of the Constitution. However, the Japanese government was reluctant, and even after it was practically forced to reconsider the Meiji Constitution, the revisions they endorsed were so minor. The GHQ feared that the Japanese plan might lead to serious backlash against the GHQ for its non-intervention. Therefore, the GHQ decided to draw the draft and hand it over to Japan for consideration. A committee was created inside the GHQ, including several American attorneys, to create the draft and the final draft was handed over to Japan when their representatives came to the GHQ anticipating its opin-

92 J. H. ELY, *Minshushugi to Shihoushinsa* [Judicial Review and Democracy] (Sato/Matsui trans., 1990).

93 S. MATSUI, *Shihonshinsa to Minshushugi* [Judicial Review and Democracy] (1991); S. MATSUI, *Niju no kijunron* [Constitutional Double Standards] (1994).

ion on the draft they had submitted earlier. It was a total shock to the Japanese side especially since it was totally different from the Meiji Constitution. However, their effort to revive their original draft didn't work out and the Japanese government ultimately decided to accept the draft handed over by the GHQ and start the official revision process. After four months of review and examinations, the Constitution of Japan was finally adopted and promulgated. It was a radically different constitution, based on the popular sovereignty principle: it was the people of Japan who enacted the Constitution.[94] Moreover, it established representative democracy, establishing the national legislature, the Diet, and created the central executive body, the Cabinet, from the Diet. It adopted the Westminster system of parliamentary democracy. It also constitutionally declared "fundamental human rights" as inherent and enduring constitutional rights of the people.[95] Furthermore, it specifically granted the power of judicial review to the judiciary.[96] The Constitution of Japan is now binding upon all branches of the government, and it became a judicial norm to be enforced by the judiciary against the political branches.

Faced with the enactment of this new constitution, the constitutional academics in Japan came to endorse the liberal understanding of the constitution and the protection of individual rights.[97] The predominant aim of the constitution, they claim, is the protection of individual freedoms and liberties. The structure of the government is and should be designed to serve this predominant aim. The fundamental human rights declared by the constitution are natural rights of all individuals as human beings and they deserved to be protected even before the enactment of the Constitution. The power of judicial review, granted by the constitution to the judiciary, also needs to serve this aim. In other words, they expect the judiciary to play an active role in vindicating the fundamental human rights protected by the Constitution. This was the predominant constitutional liberalism in Japanese style.

I share the commitment to individualism and liberalism of this predominant academic view. Unlike conservative academics who still believed that the Constitution of Japan was not legitimately enacted and that the Meiji Constitution was the only legitimate constitution in Japan or who believed that the Emperor should be granted the status of sovereign and Japan should be a monarch, I strongly believe that the Constitution of Japan created a totally new Constitution, based on the popular sovereignty principle.

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94 *Nihonkoku kenpo* [Constitution of Japan], promulgated in 1946, preamble.

95 Constitution of Japan, ch. 3.

96 Constitution of Japan, Art. 81.

97 S. MATSUI, Constitution Americanized?: Constitutional Liberalism, the Japanese Style (forthcoming).

However, despite the strong endorsement of the constitutional liberalism of the predominant academics, I was a kind skeptical of the over-emphasis on the protection of freedom and liberty and the unbridled support for judicial activism. If all that matters is the protection of individual freedom and liberty, then it would be immaterial whether the government decision-making process is a democratic one. All that matters may be to find just one very brilliant wise leader, a philosopher king, who can protect individual freedom and liberty as much as he or she can. Then, why do we need a democracy and grant the right to vote to everyone?

I also came to have a serious concern with the unlimited endorsement of the power of the judiciary to vindicate these freedoms and liberties. In a democratic society, the people are represented by the representatives they chose, and it is these representatives who decide government affairs by majority vote. When the representatives make bad choices or errors, the people can correct them in the next election. Then, it is the people that is vindicating the constitution and individual rights. However, when judges declare the choice of the representatives as unconstitutional and strike it down, they basically deny the people the right to decide through their representatives on government affairs by majoritarian vote. I came to question on what basis could judges be allowed to do this. It looks like a legitimate question for me since judges are not elected and will not be subject to election. They are trained in law, and they are appointed ultimately by the Cabinet (although there is room for public review of the appointment of the Supreme Court Justices, it is totally ineffective and almost meaningless). How can we expect them to stand against the government and to vindicate individual rights when the government believes the restriction and deprivation justified. Moreover, there is a risk that the unelected judges might err in constitutional judgment and thwart the democratic decision-making process and become a "government by the judiciary." What is the appropriate role for the judiciary to play in a democracy?

Ely's theory of judicial review provided me with a very powerful alternative to the predominant constitutional liberalism. Instead of placing the protection of individual freedom and liberty at the forefront, it could provide us a theory of why we need to establish a democratic government, granting the right to vote to every citizen and guaranteeing freedom of expression and other freedoms to participate in government decision-making. At the same time, it could provide us with much persuasive explanation of how the judiciary, an unelected and politically irresponsible branch of the government, can play an appropriate role in a democracy. Sure, it would place limits on what we can expect from the judiciary: we cannot and should not expect the judiciary to play ultimate guardian of all individual freedom and liberty and safeguard the people from all errors and

mistakes the government would make. It is only when the government tries to thwart the participation of the people and exclude certain minorities from coalitions that the judiciary is most aptly to play the role of guardian.

I was especially attracted by the fact that Ely's theory can be viewed as an elaboration of James Madison's original design of the United States Constitution. Madison, well known as the father of the United States Constitution, introduced a plan for the constitution in order to build much stronger Nation. In designing the new federal government, he was particularly concerned with the vices of "factions."[98] He viewed the people not as isolated and autonomous individuals. He rather viewed the people as belonging to various groups and associations. But he wanted to avoid the pitfall of allowing the people to advance their private interests by ignoring the public good. His vision of a "large republic" was a clue to solve this vice: by envisioning such a large republic, it is unlikely that any particular group or organization can dominate the whole government and the people would be able to choose better candidates for leaders. His vision was a republic where the public can participate in politics with so many differences in cooperation with others.[99]

The United States Constitution was an embodiment of his vision. Although the Constitution was filled with compromises, its basic tenet was clear from the beginning. Ely's theory of judicial review could be seen as an attempt to expand and elaborate the proper role for the judiciary in this overall constitutional design. If that was the founding vision of the United States Constitution, then the Constitution of Japan, definitely a follower of these modern attempts to declare a constitution, especially receiving strong influence from the United States Constitution throughout its drafting process, would have much in common with his vision. Therefore, I believed that Ely's theory would fit the Constitution of Japan more comfortably than the predominant liberal theory.

2. Major Obstacles

It is true that the Constitution of Japan has more overtones of natural rights theory and much substantive value orientation. The use of the term "fundamental human rights" to refer to individual rights of the citizens rather than "civil rights or liberties" is a good illustration of the natural rights overtone. Also, a similar kind of commitment to natural law theory can be found in the body of the Constitution.[100]

98 A. HAMILTON/J. MADISON/J. JAY, The Federalist Papers, No. 10 (James Madison) (2016, originally published in 1878).

99 ELY, *supra* note 1, 80–81 (referring briefly to Madison).

100 Constitution of Japan, *supra* note 94, Art. 97.

Moreover, it has several clauses which look like they impose significant substantive restrictions on the democratic decision-making process. For instance, the pacifism clause of article 9, by renouncing the power of war and prohibiting the maintenance of armed forces, looks like it imposes a substantive restraint on the democratic decision-making process.[101] Moreover, the right to welfare in article 25, added to the Constitution during the legislative examination process, looks like it mandates the adoption of a welfare state and provides for a substantive restraint on the democratic decision-making process.[102] Therefore, it is utterly understandable that an overwhelming number of constitutional academics believe that the constitution embodies the substantive goals to be achieved and that these substantive restraints work to restrain the democratic decision-making process.

They thus criticized my view for its misunderstanding of the nature of the constitution: it is impossible to wipe out substantive values from constitutional adjudication. And for them, the constitution is rather substantive rather than procedural. They also adopted the same kind of criticisms we saw in the United States against Ely's theory also against my view. They questioned whether the political process is in reality majoritarian and the judiciary needs to overcome some counter-majoritarian difficulty. They had a deep distrust of the political process and rather had a deep devotion to the unelected judges. The predominant aim of the constitution is to protect freedoms and liberties of the people and not to adopt democratic government. Constitutionalism trumps, they claim, democracy. Or true democracy needs to embrace the predominant protection of freedoms and liberties, and so long as this goal is achieved, democracy is secured.

Despite these criticisms, I am still convinced that Ely's theory will best explain the need for the constitution and lay out the proper role of the unelected judiciary to play in the democratic structure of the government. The Constitution of Japan is evidently based on the popular sovereignty principle, and it is "we the Japanese people" who established the Constitution and provided for the government structure. It is an attempt to establish a more stable and orderly government. Moreover, chapter 3 in listing the individual rights, stipulated that they are rights of the "people" and not all individuals or all persons. It implies that the Constitution meant to protect them as rights of "citizens". I doubt the deep distrust on political participation and the power of the people and naïve trust and reliance upon the unelected judiciary by the liberal academics are hardly justifiable. Unlike the US Constitution, the Constitution of Japan explicitly grants the power of judicial review to the judiciary. The legitimacy of the power of judicial review

101 Constitution of Japan, Art. 9.
102 Constitution of Japan, Art. 25.

cannot be doubted. But in light of the overwhelming purpose of the project to establish representative democracy in Japan, we need to find a proper role for the judiciary. The judiciary cannot be authorized to rule as it believes or interpret the Constitution as they see fit according to their own personal views.[103]

It is undeniable that the Supreme Court of Japan (SCOJ) has been very passive and the SCOJ may be said to be the most conservative Court in the world.[104] During more than 70 years of its history, it has only been 13 times that the SCOJ declared a statute passed by the Diet, the national legislature, as unconstitutional, and two of them refused to strike down the legislation.[105] It has twice struck down economic legislation[106] but never ever reviewed the constitutionality of a statute restricting the freedom of expression closely let alone to strike it down. With respect to election speech, there are so many tight regulations on election speech, including the very tight and short election campaigning period, the total ban on door-to-door canvassing, and an almost total ban on the distribution of election documents. However, the SCOJ sustained all these regulations because of its belief in the necessity of securing the fairness of elections.[107]

The strong urge to vitalize the SCOJ among liberal academics is, therefore, utterly understandable. However, they don't really understand the risks and the importance that it is ultimately the people themselves who need to stand up and correct wrong decisions and mistakes of their representatives. Moreover, liberal academics are expecting too much from the judiciary, more than can be expected or could be justified. A blanket endorsement of judicial activism by liberal academics in Japan is highly unrealistic and illusionary.[108] I did not want to help create a myth that, if the

103 If the liberal critics are right, it is natural to expect that the candidate who shared substantive value judgement with the government will likely be appointed and that the judgment of the Supreme Court will become a numbers game: which camp outnumbers the rival camp. J. H. ELY, Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures, Virginia Law Review 77 (1991) 833.

104 S. MATSUI, Why is the Japanese Supreme Court so Conservative?, Washington University Law Review 88 (2011) 1375.

105 See S. MATSUI, Constitution of Japan: A Contextual Analysis 145 (2011).

106 MATSUI, *supra* note 105.

107 MATSUI, *supra* note 105. See S. MATSUI, Election Campaign Regulation and the Supreme Court of Japan, in: Po Jen Yap ed., Judicial Review of Elections in Asia (2016).

108 Most Japanese constitutional academics want the judiciary to actively vindicate the pacifism principle of Art. 9 as a constitutional vindication of the right to live in peace, review the reasonableness of all economic regulations or restriction on economic freedoms, actively protect the welfare right, and review all legislation to see

political process does not provide help, judges could be counted on to vindicate citizens' claims. Such a myth would deprive the most important lesson in a democracy: it is the people themselves who need to stand up and correct any unwise or mistaken errors of the representatives and there is no one else to count on.

A fierce critic of my view accuses Ely and my view as idolizing the pluralist political process that does not deserve to be honored since the pluralist political process merely honors the bargaining judgment made by the majority of the society.[109] Surely, I believe that the political process needs to be understood as a pluralist process. Yet, although Ely referred to "pluralist,"[110] Ely was explicitly referring to the "republican ideal" that representatives would govern in the interest of the whole people."[111] He also invoked the concept of "virtual representation," to tie the fate of the governed with the fate of those possessing political power.[112] He thus argued that two ideals, i.e., the protection of popular government on the one hand, and the protection of equal concern and respect of minorities on the other, can be understood as arising from the common duty of representation.[113] Apparently, we are not supposing the representatives are free to pursue private interest and the political process is merely a bargaining process of all self-interested participants.

Similarly, these critics assume that any exercise of government power needs to conform to the public welfare. In other words, all government action needs to be reasonable. But there is no constitutional mandate for the legislature to be reasonable or to conform to public welfare. Even if there is, this does not mean that all exercise of government powers needs to be subjected to judicial review. There has to be a unique role for the judiciary to play and the judiciary is not an ultimate guardian against all governmental mistake and errors.

VI. LASTING IMPORTANCE OF ELY'S THEORY

Forty years have passed since Ely published his landmark book, and we came to see a growing number of changes.

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whether they are reasonable and strike it down if it was found to be unreasonable regardless of whether the legislation infringes on constitutional rights. To me, this is asking unelected judges too much.

109 Y. HASEBE, *Seiji torihiki no bazaar to shihousinsa* [Bazaar of Political Bargaining and Judicial Review], Horitsu jiho 67:4 (1995) 62.

110 ELY, *supra* note 1, 80.

111 ELY, *supra* note 1, 79.

112 ELY, *supra* note 1, 82–86.

113 ELY, *supra* note 1, 86–87.

Now, Pamela Karlan argues, for example, that there are significant changes in demography "becoming more racially and ethnically diverse, more geographically concentrated and homogeneous, and more divided, not only in its partisan affiliations, but in its values and its prospects for the future", but some fundamental, hard-wired features of our Constitution, especially the Senate and the Electoral College, are "assisting a shrinking white, conservative, exurban numerical minority to exert substantial control over the national government and its policies." She views that

> "the current Supreme Court is countermajoritarian in a way that enables this entrenchment. Far from engaging in representation-reinforcing judicial review, the Court's decisions contribute to 'the ins […] choking off the channels of political change to ensure that they will stay in and the outs will stay out' regardless of what the people would choose."[114]

Her criticism is that SCOTUS is not failing to enhance participation but rather actively hindering the increased participation.[115] This argument shows that there is more to be done to promote public participation.

Scott E. Lemieux and David J. Watkins[116] still believe, however, that judicial review could contribute to democracy. Virtually all sophisticated approaches to democratic theory do not simply equate democracy with majoritarianism, although this is often forgotten when discussing judicial review. Using the "democracy-against-domination" approach, they assess the democratic status of judicial review, and conclude that judicial review has the potential to make a modest and contingent positive contribution to democracy. Such contribution may be especially important in the modern world, where the people's views are highly fragmented and highly split. The US may be now totally divided and judicial review might be needed to overcome such division. Their argument is one response to the highly fragmented and highly divisive contemporary society. This argument might show that judicial review can do more than just facilitate public participation and can contribute to the integration of divided society.

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114 P. S. KARLAN, The New Countermajoritarian Difficulty, California Law Review 109 (2020) 2323, 2325.

115 See also F. TOLSON, Democratizing the Supreme Court, California Law Review 109 (2021) 2381 (our political institutions, politics, and the U.S. Constitution have a number of countermajoritarian elements that make it impossible to frame the difficulty as a problem specific to judicial review in any principled way). However, the Constitution may be flawed and hard to amend, and the Supreme Court may not be able to fix it, but it may not be the Supreme Court's job to fix the Constitution: it may be ours. W. BAUDE, The Real Enemies of Democracy, California Law Review 109 (2021) 2407.

116 S. E. LEMIEUX/D. J. WATKINS, Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory, Polity 41 (2009) 30.

Aaron Tang also found in the SCOTUS's tendency to ignore whether the parties are powerless minorities or not and afford special protection when the case involves fundamental values problematic: a theory he calls "Reverse Political Process Theory."[117] He criticizes this ignorance and argues that "political process theory ought to retain force as a negative command. That is to say, even if one believes judges cannot avoid substantive value judgments when deciding which groups are so powerless as to warrant extraordinary protection from the democratic bazaar, attention to the political process should still require judges to stay their hand before granting special constitutional treatment to entities that are powerful enough to look out for themselves."[118] This argument suggests that there is a need for more fine-grained tests for determining which powerless groups require stronger judicial support.

Ben Kabe emphasizes the difference between Ely and Justice Brandeis, who,

> "like Ely, thinks that judicial nondeference is appropriate only if the legislature is impairing the democratic process. But while Ely primarily addresses the process of democracy, Brandeis is preoccupied with the precursors to democracy. Speech is a necessary input to a functional democratic process because it creates a citizenry capable of truly participating in that process."[119]

He finds blind spots for both of them:

> "Ely largely ignores or takes for granted that people with access to the democratic process will be capable of participating vigorously and intelligently. Brandeis does not appear to notice that some groups, most obviously African-Americans, may be discriminated against and prevented from participating in the democratic process altogether."[120]

He argues for the integration of both into "a more complete democracy-based justification for and theory of judicial review than either can offer alone," which he calls a "democratic republican" form of judicial review.[121] This argument suggests that there is further need to pay more attention to the ability and capacity of people to participate, and not only to the process of participation.

Surely, Ely's theory needs to be re-evaluated and re-formulated in light of these changing circumstances. However, Ely's theory could still remain the centerpiece of theory of judicial review to provide an impetus to facili-

117 A. TANG, Reverse Political Process theory, Vanderbilt Law Review 70 (2019) 1427.
118 TANG, *supra* note 117, 1428.
119 B. KABE, Democracy and Civic Duty: A Brandeisian Theory of Judicial Review, Dartmouth Law Journal 19 (2021) 51, 52.
120 KABE, *supra* note 119, 52.
121 KABE, *supra* note 119, 52.

tate the judiciary to vindicate the political process and public participation. This should not be forgotten.

Moreover, such impetus could be equally or more important in other countries, such as Canada[122] as well as Germany[123] and others.[124] Even in the U.K. where there is no judicial review of the constitutionality of statutes enacted by the Parliament, still some sorts of judicial review might be vindicated in light of his political process theory.[125] Indeed, the research into comparative political process around the world can provide much useful insight into the proper role for the courts. Especially, his theory could provide valuable lessons to the world, in countries where the people are struggling to build democracy in their own countries.[126]

122 P. J. MONAHAN, Judicial Review and Democracy: A Theory of Judicial Review, U.B.C. Law Review 21:1 (1987) 87; G. T. SIGALET, Dialogue and Distrust: John Hart Ely and the Canadian Charter, International Journal of Constitutional Law 19:2 (2021) 569.

123 M. HAILBRONNER, Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory, International Journal of Constitutional Law 19:2 (2021) 495.

124 R. DIXON/M. HAILBRONNER, Ely in the World: The Global Legacy of Democracy and Distrust Forty Years on, International Journal of Constitutional Law 19:2 (2021) 427. See also A. LOUGHLAND, Taking Process-Based Theory Seriously: Could 'Discrete and Insular Minorities' Be Protected Under the Australian Constitution?, Federal Law Review 48:3 (2020) 324; C. GEIRINGER, When Constitutional Theories Migrate: A Case Study, American Journal of Comparative Law 67 (2019) 281; R. DIXON/A. LOUGHLAND, Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia, International Journal of Constitutional Law 19 (2021) 455. Even in EU countries, it looks like there is a huge interest in the political process theory Ely has developed. See A. WOODHOUSE, Process Review as Panacea: A Critique of Process Review Advocacy in the European Union, European Law Journal 45 (2020) 373. See generally R. DIXON, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023).

125 Compare J. WALDRON, The Core of the Case Against Judicial Review, Yale Law Journal 115 (2006) 1346, with R. DIXON, The Core Case for Weak-Form Judicial Review, Cardozo Law Review 38 (2017) 2193. See also D. LANDAU/R. DIXON, Abusive Judicial Review: Courts against Democracy, UC Davis Law Review 53 (2020) 1313.

126 R. DIXON, A New Comparative Political Process Theory?, International Journal of Constitutional Law 18 (2020) 1490; S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429. See also M. J. CEPEDA ESPINOSA/D. LANDAU, A Broad Read of Ely: Political Process Theory for Fragile Democracies, International Journal of Constitutional Law 19 (2021) 548.

VII. CONCLUSION

Professor Ortiz once remarked:

"Few, if any, books have had the impact on constitutional theory of 'John Hart Ely's Democracy and Distrust'. […] In some ways, Democracy and Distrust has proven the most influential as well. Although Ely has persuaded few theorists and gained few adherents, he did change the territory and define the arguments to which most constitutional theorists now feel obliged to respond. If he did not win the game, he at least forced the play onto his own court. And despite the great amount of criticism the book has drawn, Democracy and Distrust still fascinates the academy."[127]

Skeptics doubt whether any constitutional theory may not matter a lot any more since it is hard to believe that any of them could have any material impact on constitutional adjudication by the judiciary.[128] However, for constitutional academics, it does matter a lot since it would potentially constrict the activities of the courts.[129]

In overruling *Roe* after almost a half century later in *Dobbs v. Jackson Women's Health Organization*,[130] in 2022, the SCOTUS specifically referred to Ely as one of the critics of *Roe*[131] and concludud:

"We therefore hold that the Constitution does not confer a right to abortion. Roe […] must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[132]

Many liberal critics were outraged and strongly argued for the constitutional enshrinement of right to an abortion. It is true that sex, sexuality, and sexual autonomy, including abortion, require the special constitutional protection since they are essential for liberal democracy to survive.[133] To

127 ORTIZ, *supra* note 28, 721–722.

128 L. A. GRAGLIA, "Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program, Texas Law Review 65 (1987) 789; M. V. TUSHNET, Does Constitutional Theory Matter?: A Comment, Texas Law Review 65 (1987) 777.

129 D. LAYCOCK, Constitutional Theory Matters, Texas Law Review 65 (1987) 767; J. GREEN, How Constitutional Theory Matters, Ohio State Law Journal 72 (2011) 1183.

130 *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

131 "One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of Roe was memorable and brutal: Roe was "not constitutional law" at all and gave "almost no sense of an obligation to try to be." *Dobbs*, 597 U.S. 215 (2022), *supra* note 130, at 228 (referring to Ely). See also ibid., at 278.

132 *Dobbs*, 597 U.S. 215 (2022), *supra* note 130, at 292.

133 The Constitution of Japan has a provision which mandates the respect for individual dignity and equality when it comes to sex and family affairs. Constitution of Japan,

that extent, these critics are right. However, with respect to other privacy rights, they are simply too much overreacted. After all, in almost all countries in the world, many of the privacy issues are handled as one of legislative choice and the people came to demand much freedom with respect to them. There is of course nothing to prevent the people from changing the law if they want to.

Once Judge Learned Hand remarked:

> "For myself it would be most irksome to be ruled by Platonic Guardians. even if I know how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything: but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture."[134]

It is not only a small satisfaction that participation in political decision-making can bring to us. Participation in political decision-making is vital in a democracy. And it should be the most important means to secure that the government will not try to silence us or to exclude us and to secure our precious freedoms and liberties. Ely's theory keeps reminding us the importance of this teaching.

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supra note 94, Art. 24. I believed that this provision gives constitutional protection to sexual autonomy. Initially I didn't believe this right was essential for political process and did not deserve strong protection from the courts just like Ely did. However, now I came to realize that sex, sexuality and sexual autonomy is vital for democracy to survive and sustain the civil society and maintain the liberal democracy and they deserve strong judicial protection just as other political process rights such as freedom of expression. S. MATSUI, *Nihonkoku kenpo* [Japanese Constitutional Law] (4th ed., 2022); S. MATSUI, Sex, Sexuality and the Constitution (2023). See also NEJAIME/SIEGEL, *supra* note 78, at 1946, 1959 (unlike Lochner, the modern substantive due process cases do not involve "ordinary commercial transactions," and that the claimants in the cases faced "conditions of stigma, denigration, and inequality that impeded their democratic participation. They faced "prejudice [… that] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" such that the turn to courts can be justified within the Carolene Products framework. From this stand-point, the substantive due process cases can be understood as exercises of democracy-promoting review").

134 L. HAND, The Bill of Rights (1958) 73–74.

The New Comparative Political Process Theory

Its Legitimacy and Applicability in Japan

Yasuo HASEBE*

> "Hence one may infer that judicial review, although not responsible, may have ways of being responsive."
>
> Alexander M. Bickel, The Least Dangerous Branch[1]

In this paper, I briefly analyse (I) John Hart Ely's process-based approach to judicial review, (II) the relationship between democracy's minimum core and Schumpeterian elitist democracy, (III) the moral legitimacy of responsive judicial review, and (IV) the extent to which the Supreme Court of Japan has carried out responsive judicial review.

I. JOHN HART ELY'S PROCESS-BASED APPROACH

The process-based approach to judicial review was first formulated by John Hart Ely in his *Democracy and Distrust*[2] and was introduced to Japan by Shigenori Matsui.[3] According to Ely, the US Constitution is concerned with processes writ small and large.[4] The former concerns procedural fairness in the resolution of individual disputes. The latter is itself subdivided. First, there are constitutional provisions intended to open channels for political change. Clauses guaranteeing the rights of political expression, association,

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1 A. BICKEL, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) 19.

2 J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980).

3 S. MATSUI [松井茂記], 二重の基準論 [A Double Standard Theory] (1994).

4 ELY, *supra* note 2, 87.

and participation fall within this subdivision. Second, there are aspects of the US Constitution that endeavour to restrain a majority's ability to systematically outvote under-represented minorities.

More than a decade after Ely's publication, I wrote a critical review of the theory,[5] questioning mainly whether its conception of democracy was sufficiently legitimate to offer secure ground for judicial review in Japan. Essentially, Ely introduced the pluralist model of democracy from American political science, and argued that the proper role of judicial review is to maintain and reinforce such a democracy. He argued that the predominant theme underlying the US Constitution is pluralist:

> "The original Constitution's more pervasive strategy, however, can be loosely styled a strategy of pluralism, one of structuring the government, and to a limited extent society generally, so that a variety of voices would be guaranteed their say and no majority coalition could dominate."[6]

According to the pluralist model, democracy is an arena where manifold interest groups endeavour to influence the political process to achieve their respective interests. The transactions and compromises between interest groups bring about statutes and regulations as balance points for sundry forces. So-called "public interests" are these amalgams of particular interests and nothing more.[7] A claim that a given policy promotes public interests is merely an "effective device" to "reduce or eliminate opposing interests".[8]

Behind these dry and scientistic analyses, we can detect deep scepticism about the objectivity of value judgment.[9] Though the extent to which Ely

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5 Y. HASEBE [長谷部恭男], 政治取引のバザールと司法審査 [A Bazaar of Political Bargaining and Judicial Review], 法律時報 67(4) (1995) 62.

6 ELY *supra* note 2, 80.

7 A. F. BENTLEY, The Process of Government: A Study of Social Pressures (1995, originally published in 1908) 211−213. According to Bentley, 'objective utility' is 'like the undiscovered and unsuspected gold under the mountain, a social nullity' (*ibidem* 213). For a similar observation about the current US legislative decision-making, see M. TUSHNET, Making Easy Cases Harder, in: Jackson/Tushnet (eds.), Proportionality: New Frontiers, New Challenges (2017) 303. According to Tushnet, 'To require that every provision in a complex regulatory scheme be fully defensible solely on the ground of principle is to place excessive demands on the legislative process' (*ibidem*, 320).

8 D. B. TRUMAN, The Governmental Process: Political Interests and Public Opinion (1951) 50. It is noteworthy that A. M. BICKEL, Ely's teacher and colleague at Yale Law School, refers to Truman's and Robert A. Dahl's understanding of democratic process in his The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2nd ed., 1986) 18−19. This may suggest that when Bickel raised the issue of 'counter-majoritarian difficulty' (*ibidem* 16−23), he also presupposed a pluralist model of democracy.

himself[9] committed to the scientism of pluralist political theorists is uncertain, he obviously shared scepticism about the objectivity of value judgment in general.[10] In his view:

"[T]he selection and accommodation of substantive values is left almost entirely to the political process and instead [the Constitution] is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (writ small), and on the other, with what might capaciously be designated process writ large – with ensuring broad participation in the processes and distributions of government."[11]

However, the assertion that it is better to avoid value judgments in judicial review is itself a value judgment, which is barely defensible. If democracy is nothing but a pluralist arena where manifold interest groups compete to attain their aims, it is difficult to see any point in policing and sustaining such a bargaining bazaar for particular interests. It is useless to argue that, although "interests" and "pressure groups" are deprecating words,[12] particular interests may include noble goals, because the distinction between noble and base interests is also a value judgment that has no place in Ely's process theory.

Moreover, such a pluralist model of democracy may be unique to a large-scale case such as the US, in which individuals belong to multiple associations where they may lose in one political decision and win in another. As James Madison indicates,[13] when the electorate is sufficiently large, a solid majority faction is less likely to emerge. However, if winners and losers are fixed according to some demarcation and a minority faction remains oppressed, the political arena will soon implode.

Ely perceived such a risk and advocated active interventions by the Court to secure the interests of "discrete and insular" minorities.[14] According to Ely, in the famous *Carolene Products* footnote,[15] Justice Stone refers to "the sort of 'pluralist' wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests", with "insular and discrete" minorities being those "for which such a system

9 P. CRAIG, Public Law and Democracy in the United Kingdom and the United States of America (1990) 60.

10 ELY, *supra* note 2, 58, 65, and 67.

11 ELY, *supra* note 2, 87.

12 BICKEL, *supra* note 8, 18.

13 J. MADISON, The Federalist Papers, No. 10, which Ely cites in *supra* note 2, 80. This Madisonian pluralist conception may be backed by the unique American political culture that promotes the emergence of a number of associations. See A. DE TOCQUEVILLE, *De la démocratie en Amérique, tome II* [Democracy in America, vol. II] (1961) 154−158 [II.V].

14 ELY, *supra* note 2, 81−82, 103, and 151.

15 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

of 'defense pact' will prove recurrently unavailing".[16] However, it is doubtful whether this American pluralist culture can be transported to other countries, where a limited number of interest groups may continuously dominate the political process. Furthermore, society is full not only of "discrete and insular" minorities but also dispersed and diffused losers, who have difficulties in mobilising political resources due to collective action problems.[17]

Reflecting on my review of the process-based theory almost 30 years later, I now suspect I assumed too strong a link between the rationale for judicial review and its scope and strength. The process-based approach has recently been revived and expanded as comparative political process theory (CPPT),[18] prominent scholars of which worldwide participate in this symposium. One of the merits of CPPT is to highlight that the link between the rationale for judicial review and its scope and strength is not straightforward. Judicial review can and should be responsive to various contingent factors, and their tools should be tailored on a case-by-case basis.[19]

II. Democracy's Minimum Core and Schumpeterian Elitist Democracy

Per the process-based approach, the main function of judicial review is maintaining and reinforcing democracy. Its legitimacy is derivative, and depends on that of the democratic political process, which judicial review aims to guarantee. Though Ely's conception was problematic, as I described, we do not have to fixate on his model of democracy, particularly if it is unique to the American political process. Thus we ask, which model of democracy should we choose as sufficiently legitimate to indicate an appropriate and realistic scope and strength for judicial review?

As Rosalind Dixon points out in her landmark book *Responsive Judicial Review*,[20] democracy can be understood both thinly and thickly. At the

16 ELY, *supra* note 2, 151.

17 See B. ACKERMAN, Beyond Carolene Products, Harvard Law Review 98 (1985) 713; S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2021) 1429, 1443.

18 See GARDBAUM, *supra* note 17, which argues that the courts should not only perform the roles Ely advocates but also counter various political market failures, such as, legislative failures to hold the executive accountable, government capture of independent institutions, capture of the political process by special interests, outright dysfunction of the political process, and non-deliberativeness of the legislature (*ibidem*, section 3).

19 GARDBAUM, *supra* note 17, 1456.

20 R. DIXON, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023) 60–61.

thinnest, constitutional courts should safeguard the minimum core of constitutional democracy. This seems equivalent to Schumpeterian democracy, where political leaders endeavour to acquire and maintain political power by means of a competitive struggle for the people's vote; on the flip side, the populace is equipped with political rights to remove leaders they disapprove of at regular, free, and fair multiparty elections.[21] There is no monopoly on political power, and institutional checks and balances guarantee these conditions.

Joseph Schumpeter's idea of democracy was influenced by Max Weber,[22] whose conception of it was sober and bleak. Weber did not take the principle of popular sovereignty at face value. For him, "the will of the people" was merely a fiction.[23] In a *Machtstaat* [major state] like Britain, the US, and Germany, every social section, including the government, is inevitably and increasingly bureaucratised. Political parties are generally transformed into organised parties, in which members blindly follow their charismatic leaders, who agitate the masses to acquire political power. According to Weber, "The 'mass' as such (no matter which social strata it happens to be composed of) thinks only as far as the day after tomorrow". As we know from experience, the masses are always exposed to monetary, purely emotional, and irrational influences.[24]

Therefore, in a *Machtstaat*,

> "the only choice lies between a leadership democracy with a 'machine" and democracy without a leader, which means rule by the 'professional politician" who has no vocation, the type of man who lacks precisely those inner, charismatic qualities which make a leader".[25]

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21 DIXON, *supra* note 20, 3 and 28. When GARDBAUM describes government capture of independent institutions or outright dysfunction of the political process, he seems to presuppose a similar conception (GARDBAUM, *supra* note 17, section 3). For the concept of Schumpeterian democracy, see J. A. SCHUMPETER, Capitalism, Socialism, and Democracy (3rd ed., 1975) 269. A typical example of judicial review defending the democratic minimum core is the Taiwan Constitutional Court's Interpretation No. 261 (1991) holding that old representatives, who had retained their seats since the authoritarian era, should retire by the end of 1991 and that the government should schedule a nation-wide election.

22 A. ANTER, Max Weber's Theory of the Modern State: Origins, Structure and Significance (Tribe trans., 2014) 74.

23 M. WEBER, Letter to Robert Michels, 4 August 1908, in: Briefe 1906−1908, Max Weber-Gesamtausgabe II/5 (ed. by Lepsius/Mommsen, 1990) 615. He wrote that "‚Wille des Volkes' ‚*wahrer* Wille des Volkes' […] sie sind *Fiktionen*" (*ibidem*) (original emphases).

24 M. WEBER, Parliament and Democracy in Germany under a New Political Order, in: Weber, Political Writings (ed. by Lassman/Speirs, 1994) 230.

Thus, only a small number of charismatic leaders can be free and autonomous in a large-scale democracy, while other agents such as bureaucrats, party members, and ordinary citizens are merely objects of command or manipulation.[26]

The Weberian view of democracy is not pluralist, but elitist, and at most elite pluralist. However, acute scepticism similar to that behind pluralism underlies his democratic model. Weber observed that as the old Christian worldview was utterly destroyed and fractured, multiple worldviews now fiercely conflict with each other. As objective value judgments become impossible, any value judgment is inevitably subjective. In this disenchanted world, each person must choose which daemon they should follow and construct their own system of values on its basis.[27] This is the destiny of modern individuals. Weber states that:

> "Admittedly, the assumption that I am putting forward here is always based on this one fundamental fact: a life that is self-contained and understood on its own terms can only acknowledge that those gods are forever warring with each other – or, in non-figurative language: [it must acknowledge] that the ultimate *possible* standpoints towards life are irreconcilable, and that the struggle between them can therefore never be bindingly resolved; – in other words, that it is necessary to *decide* which one to choose."[28]

As Alasdair MacIntyre mentions,[29] Weber is evidently influenced by Friedrich Nietzsche, who bombarded Germany and the rest of Europe with his argument that no objective knowledge of good and evil is possible and that all values are human creations, the recognition of which results in a "revaluation of all values", a liberation from all traditional moral values.[30] Individuals cannot but consciously create their own value system from scratch, but only a few "aristocratic" great men with "the will to power" actually accomplish this.[31] Thus, Weber observes that in the political sphere of a

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25 M. WEBER, The Profession and Vocation of Politics, in: Political Writings, *supra* note 24, 351.

26 WEBER, *supra* note 24, 220–221.

27 M. WEBER, The Meaning of 'Value Freedom' in the Sociological and Economic Sciences, in: Weber, Collected Methodological Writings (ed. by Bruun/Whimster, trans. by Bruun, 2012) 314–315. See also M. WEBER, Between Two Laws, in: Political Writings, *supra* note 24, 78–79; M. WEBER, Science as a Profession and Vocation, in: Collected Methodological Writings, this note, 2012) 348.

28 WEBER, Science as a Profession and Vocation, *supra* note 27, 350 (original emphases).

29 A. MACINTYRE, After Virtue (3rd ed., 2007) 26 and 113–114.

30 See, for example, F. NIETZSCHE, Ecce homo (4th ed., 2019) 100 [Morgenröte 1].

31 See, for example, F. NIETZSCHE, Also sprach Zarathustra (1994) 299–310 [Vom höheren Menschen].

Machtstaat, only a limited number of leaders can choose which daemons they should follow.

III. Moral Legitimacy of Responsive Judicial Review

Without doubt, constitutional courts should protect the constitutional minimum core. As saving a patient's life is more critical than improving her health, courts should intervene when the preservation of the minimum core is in jeopardy. However, this is an extreme case. Under ordinary circumstances in normal societies, a more enhanced, thicker model of democracy seems appropriate to support the courts' activities.

Dixon's responsive judicial review seems to require the model of democracy that is responsive to people's needs and aspirations, and that does not close its doors to not only discrete and insular minorities but also historically oppressed, dispersed losers, who have faced many difficulties in achieving their interests in the political process. Because in this non-ideal world elected officials sometimes have no interest in attending to the needs and wishes of such people,[32] the courts should oblige officials to realise people's needs and wishes.

Thus, responsive democracy is the ultimate object and judicial review is the instrument or mechanism to actualise it. To carry out this task, the courts should be sufficiently prudent and pragmatic to consider the various contingent factors, including political configurations, racial and religious compositions, and the historical experiences of a given society.

Is this idea of democracy and judicial review sufficiently legitimate? It depends on how we understand the legitimacy of both these concepts. In terms of the legitimacy of judicial review, following Richard Fallon,[33] Dixon distinguishes "legal", "sociological", and "moral" legitimacy.[34] Legal legitimacy "refers to the degree to which judicial decisions conform with existing legal norms or constraints".[35] This definition provides little in the way of guiding our quest to determine whether responsive judicial review is legitimate, if "legal norms and constraints" here include constitutional norms and constraints. In this case, if judicial review is legitimate, it is legally legitimate. This is tautological. On the other hand, if "the legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questiona-

32 Ely, *supra* note 2, 151.

33 R. H. Fallon Jr., Legitimacy and the Constitution, Harvard Law Review 118 (2005) 1787, 1790.

34 Dixon, *supra* note 20, 97. Fallon, *supra* note 33, 1790−1791 and 1794−1801.

35 Dixon, *supra* note 20, 97. Fallon, *supra* note 33, 1794−1795.

ble) legality of its formal ratification",[36] the legal legitimacy will be largely reduced to the sociological legitimacy.

Sociological legitimacy, which is "closely linked to Weberian notions of legitimacy", signifies "an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest".[37] In other words, when citizens believe that a judicial decision is legitimate, it is sociologically legitimate. Stating that there are three kinds of legitimacy for rulership, Weber denies that any of them is warranted by substantive reason. Any judgment about whether substantive reason exists would be a value judgment that should be excluded from Weber's social science. All rule is "founded on a *belief*: the 'prestige' attributed to the ruler or rulers".[38]

Such beliefs and perceptions are important factors for the courts when considering whether to avoid or exercise judicial review or what remedies should be provided. For the courts to survive political contingencies, they must pragmatically consider their sociological legitimacy.

However, this cannot be the deepest ground on which judicial review stands. Beliefs or perceptions may be erroneous and not warranted by sufficient reason. From the Weberian view of democracy, most members of society are soulless followers of charismatic leaders and the object of their manipulation and agitation. However, judicial courts are not supposed to be Machiavellian rhetoricians, but deliverers of justice founded on law and reason. The courts should be regarded by citizens as autonomous moral agents whose activities are not only perceived to be just but are indeed just. Any underlying pretention will eventually be exposed.

Moral legitimacy is the degree to which a legal decision is "morally justifiable or respect-worthy".[39] Dixon states that a responsive judicial review focuses on the Rawlsian "minimal, political conception of legitimacy". She is not as sceptical as Ely about the applicability of John Rawls's philosophy to the theory of judicial review.[40] As she acknowledges, this conception of legitimacy is a moral one "that is largely *politically liberal* in nature".[41]

Rawls's political conception of justice stems from the recognition that this world is divided into myriad conflicting value systems, which are mutually opposing and irreconcilable.[42] He was post-Nietzschean, like Weber.

36 FALLON, *supra* note 33, 1792.

37 DIXON, *supra* note 20, 97. See also FALLON, *supra* note 33, 1795.

38 M. WEBER, Economy and Society: A New Translation (ed. and trans. by Tribe, 2019) 401 [III.6. §13] (original emphasis).

39 DIXON, *supra* note 20, 98. See FALLON, *supra* note 33, 1796−1797.

40 Compare ELY, *supra* note 2, 58.

41 DIXON, *supra* note 20, 98 and note 13 (emphasis added).

42 J. RAWLS, Political Liberalism (1993) 3−4.

There is no mystery here because, as MacIntyre says, "The contemporary vision of the world […] is predominantly […] Weberian".[43] However, unlike Weber, Rawls does not simply allow multiple conflicting values to fiercely quarrel; instead, he advocates construction of a fair social structure in which individuals with conflicting conceptions of good nevertheless cooperate and live in harmony.

For such a structure to function, it should be freestanding from the many comprehensive moral doctrines that instruct people on the meaning of this world, the value of human life, or ideal ways to live. Many religious and philosophical doctrines aspire to greater comprehensiveness. Instead, Rawls argues that a fair structure should be concerned exclusively with basic political, social, and economic institutions that sustain fair collaboration among the people. While society as a whole aims to reach consensus on the basic structure enabling such social cooperation, individuals are privately allowed to choose and pursue their own idea of a good way of life. In this sense, it is "political".[44] If the basic structure is committed to a particular comprehensive worldview, it will unfairly favour those embracing that worldview and consequently cause grave social schisms.

The role of responsive judicial review based on Rawlsian political liberalism would not be restricted to making the political branches responsive to people's needs and aspirations. It would include protecting everyone's right to choose and pursue her own idea of a good way of life. If a majority attempts to systematically impose their values upon all of society, for example, a widely but not universally held moral view about how to live one's life is enforced by legislation, the court should at least discourage such imposition, and in some cases invalidate it, though the concrete means the court employs might vary according to the politico-sociological environment.[45]

In other words, responsive judicial review should police the boundaries of public reasons that justify state action (or inaction) in a society where multiple incommensurable worldviews conflict with each other,[46] and such an understanding would be naturally reflected in how to calibrate standards of scrutiny applied to state actions. When Dixon addresses concrete cases

43 MACINTYRE, *supra* note 29, 109.

44 RAWLS, *supra* note 42, 12−13.

45 The reason Japan's current administration is reluctant to legalise same-sex marriage may be fear of alienating the right-wing faction of the ruling party, the Liberal Democratic Party (LDP), which embraces traditional family values.

46 Democratic decisions should be within the range of reasonable disagreement. See M. KUMM, Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review, European Journal of Legal Studies 1 (2007) 153, particularly 167−168 (discussing the ECHR case relating to gays in the military from the Rawlsian conception).

of abortion, sexual privacy, same-sex marriage and others in different countries, she seems to treat these questions not from the perspective of political liberalism but that of sustaining the court's sociological legitimacy.[47]

I believe she has yet to fully develop the implications of political liberalism for responsive judicial review. She may think that Rawlsian political liberalism has not yet become "an overlapping consensus among democratic theorists about what democracy requires *and* extant practices among democratic systems."[48] However, if such overlapping consensus and extant practices are the prerequisite for a conception to become a secure foundation for the moral legitimacy of judicial review, that conception will dangerously approach democracy's minimum core. In other words, the thick conception of democracy is reduced to nothing more than its thin conception.

IV. The Extent and Point at Which the Supreme Court of Japan Is Responsive

The Supreme Court of Japan (SCJ) has been known to be quite deferential to the political branches in exercising its power of constitutional review, for which various explanations are offered. Since performing actual experiments is challenging, we cannot ascertain the determinant factor. Thus, only conjectures can be made.

Some scholars believe that the dominant Liberal Democratic Party (LDP) has long managed to populate the SCJ with conservative-minded justices.[49] Even if justices do not embrace ideologies that align with the LDP's, the SCJ may fear democratic backlash[50] if it delivers decisions that are incompatible with such ideologies. Courts cannot freely choose their political and social environments; instead, environments are usually imposed on them. However, the LDP itself was not always ideologically monolithic, although it recently became so under Prime Minister Abe's administration. For a long period, it was a coalition of various factions whose sole objective was remaining in power.[51]

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47 Dixon, *supra* note 20, 102−127. She refers to the "political and legal legitimacy" and "political and sociological legitimacy" of the courts (*ibidem*, 102 and 185); however, the "political" here seems sociological rather than moral.

48 Dixon, *supra* note 20, 62 (original emphasis). The Rawlsian idea of political liberalism would necessitate reaching an overlapping consensus to stabilise a coexistence between conflicting comprehensive moral doctrines. But is finding overlapping consensus among academic doctrines in fact necessary to construct a secure foundation for the moral legitimacy of judicial review?

49 See, for example, P. J. Yap and C.-C. Lin, Constitutional Convergence in East Asia (2022) 51−56.

50 As for democratic backlash, see Dixon, *supra* note 20, 194−199.

While[51] there are other possible explanations,[52] I basically subscribe to former Justice Tokiyasu Fujita's hypothesis that the main reason the SCJ is reluctant to invalidate state actions resides in its self-image as a *judicial* body.[53] According to Justice Fujita, the SCJ's primary task is regarded not as wielding the power of constitutional review or constructing a coherent jurisprudential doctrine, but offering appropriate solutions to each case at hand. It should be added that since the SCJ is not a Kelsenian-type constitutional court but the supreme judicial body of the land, constitutional review power is only one of the tools in its repository for delivering solutions appropriate to each case. In sum, the SCJ considers itself as a judicial rather than a constitutional court.[54]

Let me explain some of the theoretical background.[55] Laws are convenient instruments for both courts and citizens to dispense with autonomous practical reasoning when they encounter social problems or disputes. If they rely on laws instead of trying to reach appropriate solutions on their own, they can quite often easily solve problems and disputes. However, laws sometimes malfunction and provide unjustifiable answers. Even com-

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51 See, e.g., Y. HIGUCHI, *Entretien avec le professeur Higuchi: Le parcours de l'homme, la pensée du savant,* in*:* Higuchi, *Valeurs et technologie du droit constitutionnel: Recuil d'articles* (2022) 151−152. HIGUCHI states that the LDP in the 1970s was divided into five factions, which were actually five political parties. For a similar observation, see K. NEMOTO, Japan's Liberal Democratic Party: Changes in Party Organization under Shinzô Abe, in: Pekkanen/Pekkanen (eds.), The Oxford Handbook of Japanese Politics (2022) 160, 163−170.

52 For a brief overview, see Y. HASEBE, Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism (2021) 256−58.

53 T. FUJITA, The Supreme Court of Japan: Commentary on the Recent Works of Scholars in the United States, Washington University Law Review 88 (2011) 1508, 1521−1522. FUJITA was appointed a SCJ justice in 2002 and retired in 2010. The importance of the role of the court as understood by itself is emphasised by Katharine YOUNG (K. G. YOUNG, Constituting Economic and Social Rights (2012) 168−172).

54 As Mark TUSHNET and Rosalind DIXON point out, "a fair amount of sub-constitutional adjudication" by the SCJ "results in substantively liberal decisions". See M. TUSHNET/R. DIXON, Weak-form Review and Its Constitutional Relatives: An Asian Perspective, in: Dixon/Ginsburg (eds.), Comparative Constitutional Law in Asia (2014) 107−08. And at least until the first decade of the 21st century, the political branches were substantially responsive to such judicial initiatives. See, on this point, Nobuki OKANO's paper for this conference, Function and Dysfunction of Catalytic Judicial Review in Japan, in this issue, p. 77.

55 I here summarise my explanation given in HASEBE, *supra* note 52, ch. 18. My view draws heavily on Joseph RAZ's theory on the authority of law. See his The Morality of Freedom (1986) ch. 2 and 3 and Ethics in the Public Domain: Essays in the Morality of Law and Politics (revised ed., 2001) ch. 10.

petent legislators inevitably overlook some unforeseen elements when producing legislation in universal terms.[56] In such hard cases, the courts must make recourse to their own practical reasoning, although they disguise this as interpretations of laws, including constitutional laws.[57] In other words, they usually feign exercise of exclusively judicial power; that is, they apply pre-existing laws to concrete cases. H.L.A. Hart states that:

There is no doubt, the familiar rhetoric of the judicial process encourages the idea that there are in a developed legal system no legally unregulated cases. But how seriously is this to be taken? There is of course a long European tradition and a doctrine of the division of powers which dramatises the distinction between Legislator and Judge and insists that the Judge always is, what he is when the existing law is clear, the mere "mouthpiece" of a law which he does not make or mould. But it is important to distinguish the ritual language used by judges and lawyers in deciding cases in their courts from their more reflective general statements about the judicial process.[58]

A Kelsenian-type constitutional court must make recourse to constitutional judgments in such cases because constitutional review power is its only tool to wield. However, since the SCJ is the supreme judicial body of a unitary, not federated, country, it can give authoritative interpretations to all sub-constitutional laws in solving hard cases, delivering new constitutional judgments only when necessary. Other institutional factors, including the SCJ having the final word on legislation's constitutionality[59] and how difficult it is to amend Japan's Constitution,[60] may also account for the SCJ's cautious approach. Thus, the SCJ is responsive to its self-image as well as its competence. We may assume a close correlation between the SCJ's self-image and its competence because the competence of the highest court is

56 ARISTOTLE, Nicomachean Ethics (ed. and trans by, 2000) 100 [1137b].

57 Mattias KUMM points out that judicial assessment of "the justification for rights infringements is to a large extent an exercise of an institutionally situated form of general practical reasoning. […] Given the structure of human rights norms, there is something misleading in the idea that judges *interpret* rights. Judges do not interpret rights, they assess justifications" (M. KUMM, Is the Structure of Human Rights Practice Defensible?, in: Jackson/Tushnet (eds.), Proportionality: New Frontiers, New Challenges (2017) 65 (original emphasis).

58 H.L.A. HART, The Concept of Law (3rd ed., 2012) 274.

59 Art. 81 of the Constitution of Japan states that "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act". The SCJ exercises what Stephen GARDBAUM calls strong-form judicial review. See S. GARDBAUM, The New Commonwealth Model of Constitutionalism: Theory and Practice (2013).

60 See Art. 96 of the Constitution of Japan.

what the said court declares it is. There is a reciprocity between the two variables.[61]

To Dixon, the idea of responsive judicial review "may be understood as a call for quite a radical expansion in judicial power or notions of judicial creativity" for Japan.[62] For the reason stated, the SCJ may not radically expand the scope of its constitutional review power on learning about her theory, though it may encourage the SCJ's activism at a sub-constitutional level. On the other hand, the SCJ has already shown signs of creativity.

In cases regarding malapportionment of MP seats, the SCJ has hitherto only declared that the statute in question is incompatible with the constitutional principle of "one person, one vote", but has not invalidated elections held under it. The SCJ obviously tried to avoid clashing head on with political branches.[63] However, such passivity risks the SCJ being regarded as perpetually avoidant of invalidating elections held under unconstitutionally distributed seats. In a subsequent decision, several justices stated in their concurring opinions that if the statute declared unconstitutional were not rectified and the next general elections were held under it, such elections would be invalidated immediately or after a certain period.[64] These decisions indicate that the SCJ has endeavoured to open the process of political change with weak instruments accompanied by warnings of stronger ones.[65]

In the 4 September 2013 decision regarding unequal treatment of illegitimate children in intestate succession under the Civil Code, the SCJ employed the device of prospective effect to avoid radically destabilising the already established legal status quo.[66] Until then, the SCJ held that the relevant statute of the Civil Code was not unconstitutional, but several concur-

61 See M. TROPER, *Le problème de l'interprétation et la théorie de la supralégalité constitutionnelle,* in: Troper, *Pour une théorie juridique de l'État* (1994) 293, 305−306.

62 DIXON, *supra* note 20, 276.

63 The Grand Bench decision of 4 April 1976, Minshū, 30, 223. The SCJ made recourse to the device of pure prospective effect when it did not invalidate the disputed elections.

64 The Grand Bench decision of 17 July 1985, Minshū, 39, 1100.

65 As to the balance one should strike between weak and strong remedies, see DIXON, *supra* note 20, 204−241.

66 Minshū, 67, 1320. In this ruling, the SCJ deemed unconstitutional the unequal treatment of illegitimate heirs under Art. 900 of the Civil Code, under which an illegitimate child could inherit by intestate succession from their parent's estate only half of the portion inherited by a legitimate child. However, the ruling added that legal decisions and arrangements already settled under Art. 900 up to the judgment date remained valid, to avoid overturning established legal situations that retroactive effects of the ruling as a precedent could have brought about. See HASEBE, *supra* note 52, 240−241.

ring opinions manifested the latent view that this statute had already lost its rational grounds;[67] the SCJ preferred that the parliament change the law because a parliamentary statute would respond more flexibly to various contingent factors and not arouse issues around destabilising the established legal status quo. However, since the parliament did not move to rectify this problem, the SCJ eventually invalidated the statute. The SCJ reversed the burden of legislative inertia.

In some cases, the SCJ held that the Constitution imposed positive obligations on the parliament to secure the effective enjoyment of basic rights. In a 14 September 2005 ruling,[68] the Grand Bench held that the parliament negligently failed to enable Japanese nationals living overseas to participate in national elections and that the parliament should provide a legal institution allowing them to vote in future elections. In the Grand Bench decision of 15 March 2017,[69] the SCJ not only found a criminal investigation using a Global Positioning System without a judicial warrant to be illegal, but also expressly requested the parliament to enact a suitable statute for such investigations, which reflects the contents of the ruling. These decisions also indicate that the SCJ has tried to overcome democratic inertia[70] through various instruments.

Furthermore, in many cases the SCJ restricted the scope of applicability of statutes to save them from invalidation.[71] This restrictive saving construction has been effective for the court to restrain overstepping by the democratic majority. In several recent cases, the SCJ utilised the technique of "qualitative partial invalidation" of a statute, transforming the meaning of a statute to restore it to the pre-existing legal baseline the court assumed. When the SCJ believes there is a legal baseline that constitutes a focal point for the legal community, it considers whether the government offers sufficient justi-

67 See the Grand Bench decision of 5 July1995, Minshū 49, 1789.

68 Minshū 59, 2087. See HASEBE, *supra* note 52, 247−248.

69 Keishū 71, 13.

70 As to democratic inertia, see DIXON, *supra* note 20, 84−87.

71 See, for example, the Second Petty Bench decision of 7 September 2012, Keishū 66, 1337. In its ruling, the SCJ held that political expression by public officials prohibited under Art. 102 of the Government Officials Act should be understood to have the 'substance of actually eroding the political neutrality of public duties' and should not include actions that only 'notionally' erode it. See HASEBE, *supra* note 52, 261−267. In another example, the Grand Bench decision of 10 September 1975, in which the constitutionality of a local government's edict prohibiting demonstrators on a public road from "disturbing traffic order", the court held that while the wording of the edict was vague and unfortunate, as it could be reasonably interpreted to prohibit only such demonstrations intending to grossly disturb traffic order, such as meandering, it was still constitutional.

fication for the deviation of the statute in question from the baseline. If the government fails to offer it, the statute should be qualitatively invalidated to provide the party with a legal status resulting from the baseline.[72]

These precedents indicate that the SCJ has already exhibited its judicial creativity and accumulated not a few tools in its depot to respond to its politico-sociological environment and competence. Indeed, it has endeavoured to counter democratic dysfunction in Japan by calibrating its responses to political branches.

Assuming that the SCJ has simply been a lackey to the LDP-dominated administration is somewhat simplistic. Such an observation from a totally external perspective will merely exempt the SCJ from the responsibility of being a responsive judicial court. Japanese constitutional scholars cannot and should not take such an irresponsible view.[73]

V. CONCLUSION

In *Responsive Regulation*, Ayres and Braithwaite advocated, among others, a "tit-for-tat" strategy as a means of effective regulation.[74] They argue that regulatory agencies can best secure compliance if they have various regula-

72 See, for example, the Grand Bench decision of 11 September 2002, Minshū 56, 1439. In this case, the issue was the constitutionality of the Postal Act, which greatly restricted the amount of damages to be awarded when the loss was caused by negligence of Post Office officials. The court stated that since common carriers in general should compensate the entirety of damages in case the loss was caused by their grave negligence (see, for example, Art. IV*bis* para. 4 of the Hague-Visby Rules, amended by the SDR Protocol of 1979), and there was no reason why the postal service was unsustainable under this principle, the unconstitutional statute should be partially invalidated to return to this legal baseline – that is, the entirety of damages should be compensated if the loss was caused by grave negligence of Post Office officials.

In another decision of 16 December 2015, Minshū 69, 2427, in which the constitutionality of Art. 733 of the Civil Code stipulating that women had to wait for six months after their divorces before they could remarry was the issue, the SCJ held that because the purpose of this clause was to avoid the overlapping presumptions of legitimacy of children from two consecutive marriages, the waiting period should be reduced to 100 days, given that children born 200 days after the time of marriage, as well as those born within 300 days of the dissolution of a marriage, were presumed to be legitimate children born from the lawful wedlock (Art. 772 of the same Code). The Court therefore held that the clause should be partially invalidated to return to the baseline – that is, women could remarry after 100 days passed since the separations of their previous marriages.

73 This is of course a value judgment (HASEBE, *supra* note 52, 241−242).

74 I. AYERS/J. BAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate (1992) ch. 2.

tory tools, from severe punishments to soft persuasions. While a strategy based entirely on persuasion and self-regulation will be exploited by economically rational actors, a strategy based mostly on punishment will undermine the goodwill of actors, who are primarily motivated by a sense of responsibility. As the motivations of the regulated are multiple and composite, regulatory agencies should employ different tools according to such motivations, thus inducing them to act responsibly. In sum, regulation should be interactive and responsive to the motivations and activities of the regulated.

Responsive judicial review seems to embrace a similar idea. The courts should undertake dialogue with the political branches by means of various remedies, from strong invalidation to weak persuasion, to induce the political branches to be responsive to people's needs and wishes.[75] In a society of a post-Nietzschean pluralism of values, responsive judicial review based on Rawlsian political liberalism rather than the perpetual and fierce Weberian struggles between gods would be more morally legitimate.[76] However, it remains to be seen if this approach succeeds in realising responsive democracy under the LDP administration, which has become increasingly monolithic and stiff-necked about politically sensitive issues, in particular since the Abe administration.

75 There are differences, too. While the courts sometimes have to concede deference to political institutions, regulatory agencies have ultimately the upper hand over the regulated. The relationship between the courts and political institutions is horizontal, not vertical.

76 See Y. HASEBE/C. PINELLI, Constitutions, in: Tushnet/Fleiner/Saunders (eds.), Routledge Handbook of Constitutional Law (2013) 9, 12–14; HASEBE *supra* note 52, 94–97.

Political Process Theory Is Not a Utility Knife

Comparative Political Process Theory and Judicial Review in Japan

Keigo OBAYASHI

I. INTRODUCTION

Political process theory still remains well known in the United States.[1] Whether for or against it, political process theory has been the subject of considerable analysis.[2] Most recently, this theory has been widely studied from the perspective of comparative law, a key example being Rosalind Dixon and Michaela Hailbronner's article, "Ely in the World."[3] Other scholars have also examined the influence of political process theory on

1 J. S. SCHACTER, Glimpses of Representation-Reinforcement in State Courts, Constitutional Commentary 36 (2021) 349.

2 See, e.g., R. D. DOERFLER and S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review 75 (2022) 769 (2022); A. TANG, Reverse Political Process Theory, Vanderbilt Law Review 70 (2017) 1427; M. A. SELIGMAN, Neutral Principles and Political Power: A Response to Reverse Political Process Theory, Vanderbilt Law Review En Banc 70 (2017) 301.

3 R. DIXON/M. HAILBRONNER, Ely in the World: The Global Legacy of Democracy and Distrust Forty Years On, International Journal of Constitutional Law 19 (2021) 427.

particular countries, with these academic concerns being termed "comparative political process theory."[4]

The degree of political process theory's impact varies from country to country. Regarding the 1982 Canadian Charter, Geoffrey T. Sigalet[5] notes that while there is no evidence that political process theory was referred to in the drafting of the Charter, Art. 15 para. 1, stipulates equal protection without discrimination against any particular group.[6] This provision is concerned with the idea of protecting discrete and insular minorities. In fact, the plurality opinion in Andrews v. Law Society of British Columbia[7] held that the citizenship requirement to be a lawyer in British Columbia violated Art. 15, considering groups analogous to vulnerable groups, because non-citizen residents lacked political power. Ely's "Democracy and Distrust" was referred by the opinion in this context.[8] In contrast, James Fowkes observed that political process theory has received little attention in South Africa.[9] As South Africa's Constitution already provides specific individual rights compared to the US Constitution, it is not necessary to limit constitutional interpretation by the judiciary.

Japan was one of the countries that discussed political process theory.[10] In the 1960's, some Japanese constitutional law scholars attempted to transform

4 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429; A. KAVANAGH, Comparative Political Process Theory, International Journal of Constitutional Law, 18 (2020) 1483.

5 G. T. SIGALET, Dialogue and Distrust: John Hart Ely and the Canadian Charter, International Journal of Constitutional Law 19(2) (2021) 1.

6 Art. 15 para. 1 provides "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

7 [1989] 1 SCR 143.

8 The plurality opinion by Justice Wilson stated that "Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated." They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. ELY, Democracy and Distrust (1980), at 151.

9 J. FOWKES, A hole where Ely could be: Democracy and trust in South Africa, International Journal of Constitutional Law 19(2) (2021) 476.

10 Professor Matsui is a proponent of political process theory. He published a book discussing and introducing political process theory to Japan. S. MATSUI [松井茂記], 司法審査と民主主義 [Judicial Review and Democracy] (1991); S. MATSUI [松井茂記], 二重の基準論 [Double Standard Theory] (1994). It was reviewed by some constitutional scholars and caused controversy. H. TOMATSU [戸松秀典], 書評 [Book Review], ジュリスト Juristo 1052 (1994) 176; T. NONAKA [野中俊彦], 書評 [Book Review], in: Kenporironkenkyukai (ed.), Human Rights Protection and Modern

the country's judicial passivism in constitutional law cases by referring to the case law of the Warren Court and political process theory in the US[11] While certain Japanese scholars adjusted these theories to suit the national context, others were interested in keeping the theory in its original form.[12] Although this caused controversy at the time, it has recently not been paid attention to as before. In fact, this indifference has been promoted since Japan's Law School system began in 2004, because students demand a more practical theory. As a result, recent scholars have sought recent case laws focusing on domestic analysis, rather than using comparative approaches.

However, political process theory's influence in Japan was not adequately analyzed earlier, given the ambiguity regarding the Supreme Court's adoption of those ideas at the time. As such, this article considers the influence of political process theory on Japanese case law, and examines why this approach has not yet succeeded. First, the article clarifies how Japanese constitutional law scholars introduced political process theory to Japan, suggesting the "double standard" as the framework of constitutional judgement referring to US case law. Second, the article determines the Japanese Supreme Court's response. Finally, why this attempt was unsuccessful is examined.

II. A Prior Japanese Scholar's Concern

A few decades ago, some Japanese constitutional law scholars were impressed with judicial activism in the Warren Court and US constitutional law theories defending it. In particular, they were interested in the judicial role and constitutional tests, such as strict scrutiny when policing the political process. As such, Japan has been most affected by political process theory's judicial review component.

The Japanese Supreme Court has been conservative and judicially passive since the current Constitution was enacted in 1946. The Court tends to uphold the law by simply reviewing the structure of the regulation. In short, the Court does not explain how it decides on the constitutionality of the law in detail, or how the regulation justifies the constraint on individual rights. Scholars have tried to find a method to clarify these factors by referring to US case law and constitutional theory. However, their suggested framework for constitutional judgement has yet to be accepted widely in case law.

State (1995), H. Asano [淺野博宣], プロセス理論へ [Toward process theory], 法学教室 Hogakukyoshitsu 327 (2007) 14.

11 N. Ashibe [芦部信喜], 憲法訴訟の理論 [The Theory of Constitutional Case Law] (1973).

12 Matsui [Double Standard Theory], *supra* note 10, 304–357.

III. The Idea of Political Process Theory

To begin the overview of political process theory, it is well known that *Marbury v. Madison*[13] established the concept of judicial review in 1803. However, as the US Constitution does not explicitly provide for judicial review, its legitimacy must always be confronted, which was a fundamental issue faced by the Warren Court, famous for its judicial activism. Examining this issue in 1962, Alexander Bickel proposed it as a "counter-majoritarian difficulty,"[14] in his attempt to reconcile judicial review with democracy.

According to Bickel, the judicial role is limited to promoting fundamental principles. However, the concept of principle is abstract. Ely dealt with the same issue with regard to the Warren Court's activism, arguing for political process theory. This theory is based on a representation reinforcement approach. In considering how to reconcile judicial review with functional democracy, Ely distinguished between process and substance in terms of comparative institutional advantage. While the political branch, as elected representatives, has the authority to determine the substance of democracy, the judicial role is limited to ensuring the conditions of democracy; a Court cannot decide what are fundamental values. At the same time, it is critical for the Court to protect discrete and insular minorities, given that the Court is to make decisions independent of majoritarian pressure. If the political process is disturbed, the court should carefully review the constitutionality of the government's action; in these cases, the Court should apply strict scrutiny.

At first glance, this theory seems to encourage judicial restraint because it notes a limited judicial role. However, Ely was concerned about defending the Warren Court's judicial activism; In fact, judicial review was performed to protect minority rights in the Warren court. Even if the judicial role is limited to maintaining the political process, this theory cannot be considered as judicial passivism. In short, political process theory was intended to legitimize judicial activism by pretending judicial passivism.

IV. The Prior Situation in Japan

Japan's Supreme Court has been regarded as embodying judicial passivism. To change this situation, leading Japanese constitutional law scholars studied US constitutional law and introduced it to Japan in the 1960's. Many

13 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

14 A. M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) 16.

constitutional scholars were interested in the Warren court in the US, and in a theory to defend judicial activism, such as political process theory. Simultaneously, tests for constitutionality attracted many Japanese constitutional law scholars because of their attempt to change the presumption of constitutionality based on the public welfare doctrine used in case law.

1. The Appointment System

Despite the introduction of political process theory to Japan, there are several reasons why judicial restraint has continued. Art. 79 para. 1 of the Constitution gives the Cabinet the power to appoint Supreme Court Justices.[15] The Liberal Democratic Party (LDP) has controlled the government for almost about half a century after World War II. With the government ruling party appointing Supreme Court Justices, it is inevitable that many Justices would share similar ideas as the government. Consequently, the Japanese Supreme Court has upheld the law in most constitutional cases.

Furthermore, the practice of the Meiji Constitution era remains unchanged. During this era, the emperor controlled the government, and all people were subjects of the emperor. All public officers, including judges, followed the government under the emperor. This bureaucratic system remains the norm within the judiciary under the current Constitution. The court tends to uphold the legality of government actions, and each judge follows the judicial administration's policy for promotion.

2. The Cabinet Legislative Bureau

This is a government institution that promotes judicial passivism. Its role is to review the constitutionality of any bill before it is submitted to the Diet. Its members are selected from among excellent bureaucrats across several government departments. Their job is to carefully scrutinize the text in terms of its construction, reasonableness, necessity, conflict with other statutes, and repugnancy with constitutional provisions. If the bill's constitutionality is even slightly in doubt, it cannot pass review. In other words, this system functions as a prior constitutional review. Consequently, the Supreme Court has rarely struck down laws as unconstitutional. Furthermore, certain Supreme Court Justices have previously worked for the Cabinet Legislative Bureau; it would be highly improbable for them to hold a statute unconstitutional after previously deeming it constitutional. Therefore, this system promotes judicial passivism.

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15 Art. 79 para. 1 provides that "All such judges excepting the Chief Judge shall be appointed by the Cabinet."

3. The Black Box and Public Welfare Doctrine

The method of constitutional judgement used by the Japanese Supreme Court is the public welfare doctrine. Used in place of a test for constitutionality, this doctrine is one reason most cases are judged as constitutional.

The Japanese Constitution has some provisions regarding public welfare, stipulating the exercise of individual rights should be respected as long as it conforms to public welfare. Art. 13 provides that, "Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."[16] Similarly, Art. 22 guarantees economic freedom to the extent that it does not interfere with public welfare.[17]

Using the public welfare doctrine in constitutional cases, Japan's Supreme Court examines whether the law conforms to public welfare. If a law is in accordance with public welfare, then it is regarded as constitutional. This method seems curious because the Court does not examine whether the law violates individual rights, but examines whether the law conforms with public welfare. Furthermore, the Court mainly focuses on compatibility with public welfare rather than judging the constitutionality of the law.

In practice, the Court simply overviews the construction of the law, leading to its reasonableness, and concludes its accordance with public welfare in most cases. The Court does not discuss its judgement of the constitutionality of the law in detail. We are unsure how the court upholds the law, and why it is seen as constitutional. It is equally unclear how various regulations may justify the constraints of individual rights.

V. PROPOSING THE "DOUBLE STANDARD"

1. The Idea of the "Double Standard" and Political Process Theory

Having studied US case law and constitutional law theories, Japanese scholars were keen to introduce these to Japan. In particular, they focused on judicial review and the constitutionality test using footnote four in *United States v. Carolene Products* (1938)[18] and political process theory. Scholars suggested a constitutional framework referring to U.S case law and constitutional theory.[19] Closer to the basic format of a constitutional judge-

16 Art. 13.

17 Art. 22 provides "Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."

18 *United States v. Carolene Products Company,* 304 U.S. 144 (1938).

19 N. ASHIBE [芦部信喜], 憲法 [Constitutional Law] (8th ed., 2023) 106.

ment rather than a test of constitutionality test, it was termed the "double standard".

This idea generally derives from footnote four in the *Carolene Products* case, in which the US Supreme Court applied the rational basis test to economic legislation, given that political branches have broad discretion. The Court ruled that strict scrutiny should be applied if the law facially violates the bill of rights, restricts political processes concerned with civil rights, and discriminates against minorities. Political process theory is similar to this doctrine. According to political process theory, the judiciary should guarantee a political process that coordinates fundamental values. In other words, the role of the judiciary is not to decide what the fundamental values are, but to protect the political process and public participation in it. It was exactly the Warren Court's attempt to keep the political process open and guarantee participation in it that political process theory sought to justify.

The double standard distinguishes between "spiritual freedoms/ mental freedom" concerned with civil, political, and personal rights, and "economic freedoms."[20] Strict scrutiny should be applied to spiritual freedoms, as it is necessary to maintain proper political processes within a constitutional democracy. Mitigated standards of review, such as a rational basis review, can be applied to economic freedoms because it is more appropriate for the court to defer to the judgment of political branches on issues of socioeconomic policy issues that constitute the outcome of the political process. Arguing that courts should make constitutional judgements by applying a double standard, scholars expected judicial passivism in the Japanese Supreme Court to hence change.

2. Underway

Although political process theory has made an impact on constitutional theory in Japan, attempts to change judicial behavior have not yet succeeded. While the Court has occasionally referred to a concept similar to the double standard, it is uncertain whether the Court directly took this approach. For example, the *Kourishijo* case [The distance restriction on retail market case][21] regarding the constitutionality of the distance regulation against new retail markets referred to a concept similar to the double standard. This regulation aimed to protect existing retail markets by preventing them from falling together because their management bases were weak. According to the Court, a less rigorous test should apply to cases of eco-

20 Spiritual freedom matters individual internal such as freedom of expression, academic freedom and religious freedom etc. It sometimes refers to a kind of fundamental rights. Economic freedom refers to right to business and property right.

21 Supreme Court, 22 November 1972, 刑集 Keishū 26, 586.

nomic freedom than to cases of fundamental rights. As a result, the Court applied a clear reasonableness test that highly deferred to the political branches and upheld the distance regulation. In the *Yakujiho* case [The distance restriction on the pharmacy case][22] three years later, the Court also mentioned that "Indeed, because occupation, as previously stated, is in essence a social and, moreover, principally an economic activity, and by its nature something in which mutual social relations are great; in comparison to other constitutionally guaranteed freedoms, especially the so-called "mental" freedoms, the demand for regulation by public authority is stronger."[23] The *Izumisano* case [The denial of facility use for the assembly case][24] followed this idea by referring to the *Yakuhijo* case. The plaintiffs applied to the City Community Hall for permission to hold an assembly there, the purpose of which was to oppose the construction of a new airport. Izumisano City denied the use of the City Community Hall, based on the risk to public safety caused by potential conflict between plaintiff's group and other hostile groups in this assembly. However, this risk is not attributable to the plaintiff and is too probable. The plaintiffs challenged the constitutionality of this disposition and the Izumisano City Ordinance for its provisions detailing the use of the City Community Hall, for infringing on their freedom of expression. The Court stated that "Considering that to restrict freedom of assembly is to restrict mental freedom, which falls within the scope of fundamental human rights, said comparison should be made in accordance with criteria that are stricter than those applicable when restricting economic freedom."[25]

At first, the Japanese Supreme Court appears to consider the idea of a double standard. However, it is unclear how serious this consideration is; the Court has never applied strict scrutiny to fundamental rights cases involving free speech, religious freedom, or academic freedom. For example, in the *Sarufutsu* case [The political activity of post officer case],[26] the Court applied a rational basis test to the National Public Service Act prohibiting the political activity of national public servants and upheld the law.

Moreover, the Court has never struck down a law as unconstitutional in these cases. Even when applying scrutiny such as in the *Izumisano* case, the Court upheld the law through a constitutional-compatible interpretation.[27]

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22 Supreme Court, 30 April 1975, 民集 Minshū 29, 572.

23 *Yakuhijo* case, at 575.

24 Supreme Court, 7 March 1995, 民集 Minshū 49, 687.

25 *Izumisano* case, at 697.

26 Supreme Court, 6 November 1974, 刑集 Keishū 28, 393.

27 Constitutional-compatible interpretation is the method to uphold the law through removing the dubious unconstitutional part in the provision of the statute.

Similarly, although the *Horikoshi* case [The delivering of political leaflets by Social Insurance Agency staff case],[28] in which the defendant challenged the constitutionality of the regulation against political activity by government employees, ruled that the defendant was not guilty, the Court did not invalidate the regulation on constitutional grounds. Despite the fact that there was a chance to hold it unconstitutional *as applied*, the Court simply held that the activity of the defendant did not breach the National Public Service Act.

In contrast, the Court applied a more rigorous test in the case of economic freedom and held it unconstitutional. The *Yakujiho* case stated that "it is necessary to find that the above purpose could not be fully achieved through regulation of simply the form and content of the occupational activities, which is, in comparison with a licensing system, a looser restriction upon freedom of occupation." In short, the Court required a less restrictive alternative test. As a result, the Court deemed it unconstitutional. Similarly, in the *Shinrinho* case,[29] the Court found Art. 186 of the Forest Act, regulating property in co-ownership, to be unconstitutional because it violated property rights under Art. 29 of the Constitution.[30]

Therefore, the Supreme Court has not clearly or fully adopted a double standard. At the same time, the Court has also hardly adopted the pure version of political process theory. For example, the Court tends to protect certain fundamental rights that are irrelevant to the political process, such as the right to privacy. As for economic freedom cases, the Court has used the intermediate scrutiny or the rational basis test depending on the cases while Matsui, the leading Japanese advocate for political process theory, argues that the Court should apply the rational basis test in all economic freedom cases based on political process theory.[31]

Regarding voting rights, the Court repeatedly held malapportionment cases unconstitutional.[32] The one-person-one-vote principle relates to the political process, given that it has to do with participation in democracy. While this seems to illustrate that the Court has adopted political process theory, the Court did not invalidate the election. If the Court seriously considers one person's vote from the perspective of political process theory, malapportionment cannot be left to the political branches.

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28 Supreme Court, 7 December 2012, 刑集 Keishū 66, 1337.

29 Supreme Court, 22 April 1987, 民集 Minshū 41, 408.

30 Art. 29-1 provides that "The right to own or to hold property is inviolable."

31 MATSUI [Double Standard Theory], *supra* note 10, 314.

32 See, e.g., Supreme Court, 14 April 1976, 民集 Minshū 30, 223; Supreme Court, 17 July 1985, 民集 Minshū 39, 1100.

3. Reasons for the Failure

There are several possible reasons for the failure of Japan to adhere to political process theory. First, the theory and its proponents have been criticized. In particular, Professor Yasuo Hasebe criticized Matsui's attempt. As for the proponents of the original political process theory such as Professor Shigenori Matsui, there has been some controversy regarding Matsui's approach. For instance, Professor Yasuo Hasebe criticized the attempt to introduce political process theory to Japan because the concept of pluralism was different from that of the Japanese Constitution.[33] The dominant theory was clearly different from Matsui's idea of applying standards to economic freedom.[34] Matsui proposes that the same rational basis test should be applied in all case of economic freedom, whereas case law and most academic theories apply a separate test depending on each case. Furthermore, even if participation in democracy is ensured, it is not sufficient for democracy to function well.[35] Moreover, democracy does not guarantee fairness. Even if a political decision was made through a proper political process, it would not always be a fair outcome. If the result is unfair and causes any constitutional problems, particularly if it infringes on an individual's rights, even an economic right, a judicial review should be requested.

These past controversies are beyond the scope of this paper, however, which instead examines why the court does not use the political process theory approach.

First, it is important to note that the situation and the construction of individual rights in Japan and the US were different; Ely's original political process theory aimed to defend the judicial activism of the Warren Court by limiting the judicial role. In contrast, the Japanese Supreme Court has been a model of judicial restraint; there is no need for further restraint. Furthermore, the tension between judicial review and democracy in Japan is not as strong as in the United States because Art. 81 of the Constitution explicitly provides for judicial review.[36] Although the Japanese judiciary also faces the problem of the counter-majoritarian difficulty, this tension is only theoretical. Japan does not have to legitimize judicial review itself or restrain judicial review, as the United States. Therefore, political process theory does not fit Japan as well as it does in the United States.

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33 Y. HASEBE [長谷部恭男], 政治取引のバザールと司法審査 [The Bazaar Political Transaction and Judicial Reivew], 法律時報 Horitsujiho 825 (1995) 62F.

34 M. ICHIKAWA [市川正人], 司法審査の理論と現実 [Theories and Actualities of Judicial Review System in Japan] 121 (2020).

35 I. SHAPIRO, The State of Democratic Theory (Nakamichi trans., 2010) 96–100.

36 Art. 81 provides "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

The second reason is the different construction of individual rights and views on fundamental rights. Compared to the US Constitution, the Japanese Constitution explicitly provides many individual rights such as equal protection, voting rights, freedom of idea, free speech, economic freedom, academic freedom, freedom of marriage, social rights, property rights, and several criminal procedures. As each provision protects each right, the Japanese Supreme Court does not need to extract any necessary rights from an abstract clause such as the due process clause in the US Constitution. Under these circumstances, there is less fear of broad interpretation and judicial overarching compared with the US.

When a new right needs to be recognized, the court interprets the general provision of comprehensive fundamental rights, Art. 13. This Article guarantees the "right to life, liberty, and the pursuit of happiness." The Japanese Supreme Court has recognized various fundamental rights, such as the right to privacy, based on Art. 13. The right to privacy was recognized in the *Kyotofugakuren* case [Police photographing an assembly without permission case].[37] Although the Court did not directly use the word privacy, the right to privacy was recognized as substantive in this case. The Court also recognized the right to self-determination regarding medical choice in the *Jehovah's Witness* case [Refusing blood transfusion case].[38] While the case did not mention the right to self-determination based on Art. 13 of the Constitution, it derived the right to choose medical measures from the right to personality.[39]

Thus, the Japanese Supreme Court is more familiar with the fundamental rights approach rather than the process-oriented approach. In contrast, political process theory discourages judicial determination of fundamental values, considering that the judiciary should not decide fundamental rights, but should rather ensure that the political process is able to determine fundamental rights.

The third concerns the system of government. Japan's parliamentary system is more flexible than presidential systems such as the United States. The leader of the governing party that wins the majority in the House of Representatives will be elected as prime minister. If it is necessary to change the cabinet, the prime minister could be changed through elections in the governing party, and not in the general election. In contrast, the presidential system, such as the United States, is more rigid. Even if the approval rating is extremely low, and people demand a change in the presi-

37 Supreme Court, 24 December 1969, 刑集 Keishū 23, 1625.

38 Supreme Court, 29 February 2000, 民集 Minshū 54, 582.

39 The Court did not explain what the right to personality is. Therefore, it is unclear whether the right to personality derives from the Constitution.

dent, the US Constitution stipulates that no change is possible until the term ends except for impeachment or resignation.[40] Considering both systems, maintaining the political process in elections is key in the US because it directly changes the government, reflecting the plural popular will. The court is required to ensure that the political process is open to the people and enabled according to the Constitution. In contrast, while the political process is also important in Japan, it is not necessarily the highest claim, given that the system of government is not as rigid as in the United States.

When it comes to controlling governmental power from the perspective of plural interests, controlling the bureaucracy is more important in Japan. Japan's government agencies are vertically divided organizations, with bureaucrats in each ministry supporting the foundation of the government. The bureaucrats remain in their ministries even after a change of government because of the merit system for hiring public servants, and thus continue to hold power as representing the interests of each ministry. As the bureaucrats are responsible for drafting legislation, the law may represent the interests of various ministries. If the objective of the law is in doubt, the court should apply strict scrutiny to uncover its actual purpose; there are potentially interests reflective of many agencies.

The fourth is the priority of individual rights. According to political process theory, the court should apply strict scrutiny to civil rights cases such as freedom of speech and the protection of discrete and insular minorities to protect the political process and guarantee participation in democracy. On the other hand, the court should apply a mitigated test, such as a rational basis test, to other rights such as self-determination and privacy.

Unlike the United States, the Japanese Supreme Court strongly protects personal rights rather than free speech. As Art. 13 stipulates, "All of the people shall be respected as individuals." The Japanese Constitution explicitly protects individual dignity. When privacy conflicts with free speech, the court tends to prioritize privacy over free speech as a result of balancing.[41] Furthermore, it is said that Japan has been a highly homogeneous society; a discrete and insular minority in terms of race does not exist in Japan, compared to the United States.

Finally, the fifth reason is the constitutionality test. Rather than using a test of constitutionality, as suggested by the double standard and political process theory, the Japanese Supreme Court basically uses the public welfare doctrine and a balancing approach. As former Justice Chiba said, the Court tends to avoid using the constitutionality test so as to be flexible for

40 Art. II para. 1 clause 1 provides "He shall hold his Office during the Term of four Years".

41 See, e.g., *Hoppo Journal* case, Supreme Court, 11 June 1986, 民集 Minshū 40, 872.

each case.[42] According to him, when the Court refers to any kind of constitutionality test, it is simply one factor in a balancing consideration.

Even if the Court takes the double standard, it may maintain the judicial passivism because political process theory originally had a different intention from that of the theory's Japanese proponents. Political process theory was originally intended to justify judicial activism in the Warren Court through restraint. In contrast, Japanese constitutional scholars endeavored to change judicial passivism to judicial activism using political process theory.

VI. INCREMENTAL CHANGE?

The Japanese experience with political process theory indicates that the theory may not be useful in other countries. It can be said that for countries where judicial activism exists, political process theory will be suitable because it defends judicial activism by limiting judicial roles. In countries where judicial passivism exists, while political process theory may perform a function to improve the judicial role in cases concerning the political process, it is likely not the most suitable theory.

In judicially restrained countries, such as Japan, if the court takes slight steps toward judicial activism in cases of the political process, there is room to relate political process theory. In fact, recent cases in the Japanese Supreme Court have shown incremental judicial activism in voting rights cases.

The *Zaigaihojin* case [Voting rights of Japanese residing abroad case][43] in 2005 is a typical example. Given that the voting rights of Japanese citizens residing abroad are denied under the Election Act, the plaintiffs in the case, Japanese citizens living abroad, claimed that the Act violated their voting rights. The Supreme Court applied strict scrutiny and held that this violation was unconstitutional. The Court ruled that the government cannot restrict voting rights without unavoidable reasons. Considering the possibility of voting by citizens residing abroad, the Court held that there were no unavoidable reasons preventing the establishment of an overseas voting system in light of current technological developments, such as of information transmission through the Internet.

A year later, the *Seishinshogaisha-no-Zaitakutohyo* case [Vote at Home System for Mental Illness case][44] also applied strict scrutiny. The plaintiff,

42 K. CHIBA [千葉勝美], 憲法判例と裁判官の視線 [The Constitutional Theory and the Judge's View] (2019) 11–27; *Horikoshi* case, 刑集 Keishū 66, at 1733–1734 (Chiba, J., concurring).

43 Supreme Court, 14 September 2005, 民集 Minshū 59, 2087.

44 Supreme Court, 13 July 2006, 判例時報 Hanrei Jihō 1946 (2006) 41.

who had been mentally ill and socially reclusive, argued that the current election system violated the voting rights of people with mental illnesses, because the system did not allow them to vote at home. Examining whether the government had unavoidable reasons for not allowing persons suffering from mental illness to vote from home, the Court found that the level of difficulty with in-person voting depended on mental conditions and the type of mental illness. Therefore, the Court upheld the Election Act for unavoidable reasons in the current system. Although this restriction was held to be constitutional, the Court carefully reviewed the constitutionality of the limitations on the right to vote.

Protecting voting rights through applying strict scrutiny is customary in political process theory, because voting rights are important for participating in political processes. However, in Japan, this tendency is justified from the perspective of substantive rights rather than political process theory because the Japanese Constitution explicitly provides voting rights and the judiciary is tasked with protecting them. Even if it could be regarded as one of the implementations of political process theory, it is only one of factors in the constitutional judgement. Given that political process theory affects case law, evidence of adopting it is needed.

VII. Conclusion

Political process theory has certainly been influential in Japan from the perspective of constitutional law academia. However, the Court has not yet accepted it, and it has not gained support from other scholars. Political process theory remains influential as a concept, but we should recognize that it is not always applicable to other countries.

In terms of comparative political process theory, this article is a focused analysis on whether the theory affects practical cases in Japan. If the study expanded its scope to other countries' responses to political process theory, similar to the work of Gardbaum,[45] a broader picture and better understanding regarding its impact and effectiveness could be developed. In fact, there is considerable room to consider the potential values of political process theory.

Dixon's idea of "Responsive Judicial Review" could help to develop and expand the original political process theory from the perspective of comparative study.[46] She examines the role of the judiciary in an age of democratic dysfunction and suggests a responsive judicial review to promote

45 Gardbaum, *supra* note 4.

46 R. Dixon, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age 2023, 1–21.

political response partly derived from political process theory. Weak judicial review,[47] such as in Japan, could support this idea.

This article also does not deny the future possibility of applying political process theory. Considering the recent situation of increasing numbers of foreigners residing in Japan, voting difficulties of elderly persons and patients with infectious diseases, and equal protection for sexual minorities including same sex marriage, they could constitute discrete and insular minorities.

If the political branches do not respond to protect them, the courts may judge the constitutionality of their inaction considering political process theory. In fact, these issues are already being studied.[48]

47 DIXON, *supra* note 46, 204–241.

48 Minori OKOCHI's article, A Constitutional Analysis of Same-Sex Marriage Cases. Litigation for Social Change in Japan in this issue, p. 97, concerns same sex marriage issue from the point of view of political process theory.

Function and Dysfunction of Catalytic Judicial Review in Japan

Nobuki OKANO*

I. INTRODUCTION

In *Against Settlement*, the seminal article published in 1984, Owen M. Fiss famously contrasted justice with peace, and attached the former to "adjudication American-style."[1] According to his later formulation, "the animating idea" was "that the purpose of adjudication is not the resolution of a dispute, not to produce peace, but rather justice."[2] And he named Japan as the epitome of the alternative to "adjudication American-style." Hence his justice/peace dichotomy roughly overlaps the contrast between the US and Japan[3]. If left unqualified, this is an oversimplification. But I plan to make this dichotomy the backbone of this paper, for it touches upon an important point and sheds light on the reception of political process theory in Japan.

In this article, I argue that the Japanese judiciary has developed a peculiar style of representation-reinforcement that pursues peace at a considerable cost to justice. In order to situate it in comparative literature, I borrow the

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1 O. M. FISS, Against Settlement, Yale Law Journal 93 (1984) 1073, 1085–1090.

2 O. M. FISS, The History of an Idea, Fordham Law Review 78 (2009) 1273, 1273.

3 FISS, *supra* note 1, 1089–1090.

"catalyst" metaphor from the insightful study of Katharine G. Young.[4] By expanding the scope of the existing process theory, CPPT helps us to comprehend the Japanese catalytic style as one version of representation-reinforcement.

I hasten to add that my story contributes quite little to the main project of CPPT: to explore the way courts protect constitutional democracy. It is not that Japanese democracy has had no opportunity to face malfunctions or threats – quite the opposite – but that the Japanese judiciary has failed to embark on effective intervention to address recent flaws in the political process (at least for now). That said, this paper attempts to learn from Japan's experience indirectly. After depicting the "catalytic" model in Japan, I argue that it was a factor that led to recent failures of the intervention. In other words, the "catalyst" metaphor connotes not only the Japanese judiciary's achievements but also its limits. After all, all catalysts can do is make something change faster. The focus of change needs to lie elsewhere.

This article is divided into 6 parts. Section II considers the differences between CPPT and Ely's theory and sets the stage for the following inquiry. Section III summarizes Japan's current situation, focusing on the failure of judicial intervention in democratic malfunctions. After tracing the development of the Japanese judiciary's "catalytic" function in Section IV, Section V examines its relationship with the recent reluctance to intervene in political process malfunctions. Section VI offers a brief conclusion.

II. ELY, CPPT, AND JAPAN

As Gardbaum pointed out, "Ely's book is self-consciously parochial."[5] Moreover, "many of the threats to democracy around the world today look quite different from the way they did four decades ago in the United States."[6] To fill these gaps, it seems that we need to face more challenges than comparative study would generally deal with.

In hindsight, what differentiates Ely's original version from recent attempts of CPPT is the trust he placed in the democratic process. The nuanced position he took concerning legislative purpose provides a good

4 K. G. YOUNG, A typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review, International Journal of Constitutional Law 8 (2020) 385.

5 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429, 1430.

6 R. DIXON, A New Comparative Political Process Theory?, International Journal of Constitutional Law 18 (2020) 1490, 1490.

illustration.[7] It is extremely difficult to adapt a theory that presumes a trustworthy democratic process to other situations where such a premise does not necessarily hold true.

It is worth noting that the effort to receive Ely's process theory in Japan lacked *this* sense of difference. Culminating in the middle of the 1990s, the academic debate focusing on Ely's theory shared his presupposition: the basically trustworthy quality of the democratic process. In my opinion, it was not without reason in the context of Japan. At least, it was less problematic in the 1990s than it is in the 2020s.

Unfortunately, the current situation in Japan is not exceptional in that political process malfunctions are pervasive. Consequently, Ely's typology of political process failures proves to be insufficient in comprehending recent developments in Japanese constitutional politics. As in other jurisdictions, attempts at expansion are warranted in Japan. Indeed, out of the five failures Gardbaum proposed to add, four have been discerned in the past decade: legislative failure to hold the executive accountable, government capture of independent institutions, capture of political process by special interests, and non-deliberativeness of the legislature. Amidst a myriad scandals, the Moritomo scandal is most interesting for the present purpose because it involves three of the aforementioned failures[8] and serves as a pivotal background for the convocation of the extraordinary session case. The intricacies of the scandal and these cases will be explored in Section III below.

Before getting into that, some mention should be made about another expansion of scope by CPPT. While Ely's version was a theory confined to judicial review, advocates of CPPT also consider diverse other actors and mechanisms. Among them, the most important to this paper is the media, for it plays an important role in the "catalytic" model. I will return to this point in Section IV.

III. Political Process Malfunctions and Failure of Judicial Intervention in Japan

Since the 1955 system, under which the Liberal Democratic Party (LDP) had held a majority uninterruptedly until 1993, the weakness of political

7 J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980) 125–131, 136–148.

8 The remaining one failure that the *Moritomo* case does not cover is government capture of independent institutions. Examples of this failure includes intervention in the appointment of the Director of the Cabinet Legislative Bureau in August 2013, which was closely related to constitutional politics concerning interpretation of Art. 9. See Y. Hasebe, Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism (2021) 214.

competition and opposition has been an intrinsic feature of Japanese politics. The 2009 election, wherein the Democratic Party of Japan (DPJ) won a landslide victory, was not a turning point in the overarching trajectory. Subsequent to the LDP's resurgence to power in 2012, we observed augmented, rather than diminished, dominance of the LDP. Scheiner and Thies characterized the current situation as "opposition as irrelevance."[9] Indeed, some Diet members of the LDP show their arrogance and hostility toward the opposition without hesitancy. To take just one recent illustration, during the campaign for the House of Councillors election held in 2022, Daishiro Yamagiwa said, "We, officials of the government, don't lend a single ear to proposals that come from people in the opposition." This remark didn't undermine his standing. A month later, he was appointed as Minister of State by Prime Minister Kishida.[10]

Concerning antagonism against the opposition, Shinzo Abe demonstrated resolute leadership. A noteworthy event occurred on the eve of the Tōkyō metropolitan assembly election held in July 2017. Then, the Japanese political scene was amid turmoil precipitated by several scandals, some facets of which I will have an occasion to return to in this Section. Abe conspicuously refrained from delivering a speech on the streets during the campaign. The event unfolded when he delivered his first street speech on the concluding day of the campaign. Facing a chorus of chants calling for his resignation, he hysterically shouted, "We cannot afford to be defeated by such people." But who were "such people?" Although his remark was impulsive and somewhat ambiguous, the opposition parties and their supporters certainly composed the core of "such people." Indeed, he repeatedly referred to the years of the DPJ administration as a "nightmare."[11]

Only against this background of the plight of the alienated opposition can we fully comprehend the significance of *Konishi v. Japan.*[12] After six years of protracted litigation initiated by opposition party politicians, the Supreme Court of Japan (SCJ) rendered a decision regarding the constitutionality of the Cabinet's failure to convene an extraordinary Diet Session[13] in *Konishi* last year. This case is illuminating for three reasons. First, it

9 E. SCHEINER and M. F. THIES, The Political Opposition in Japan, in: Pekkanen/Pekkanen (eds.), The Oxford Handbook of Japanese Politics (2022) 223, 235–238.

10 "山際経済再生相、発言を陳謝" [Cabinet-member Yamagami Apologizes for His Remark], 朝日新聞 Asahi Shinbun, 6 October 2022 (evening edition), 8.

11 "首相、初の街頭応援演説" [Prime Minister Delivers His First Street Speech], 朝日新聞 Asahi Shinbun, 2 July 2017, 2; "「民主党政権は悪夢」首相撤回せず" ['The DPJ's administration was a nightmare,' Prime Minister Refused to Retract His Remark], 朝日新聞 Asahi Shinbun, 13 February 2019, 4.

12 Supreme Court, 3rd petty bench, 12 September 2023, LEX/DB25573040.

involves[13] a blatant disregard for constitutional obligation by the Cabinet, revealing how serious the crisis of Japanese constitutional democracy is. Second, it provides a good example of the typical way constitutional challenges reach courts in Japan. Third, the cautious stance the Court's ruling adopts in the face of political process failure is characteristic of the Japanese judiciary.

The plaintiff, a member of the House of Councillors affiliated with the largest opposition party, alleged that the Cabinet violated Art. 53 of the Constitution[14] by failing to convene the extraordinary session of the Diet in a timely manner in response to a request by opposition members. On 22 June 2017, 120 (of 475) members of the House of Representatives and 72 (of 242) members of the House of Councillors, including the plaintiff, submitted the request for convocation. The Abe cabinet did not convene an extraordinary session until 28 September. Furthermore, on the very day an extraordinary session was convened, the Abe Cabinet dissolved the House of Representatives.

Those Diet members who requested convocation mainly aimed to investigate political scandals, notably the *Moritomo* case. It pertained to the acquisition of government-owned land by an educational institution, Moritomo Gakuen group, which was known for its extreme right-wing views. The group's leader, Yasunori Kagoike, had personal links with some conservative Diet members and the wife of the then Prime Minister, Ms. Akie Abe. Suspicions abounded that the Moritomo Gakuen group received undue favors in the purchase of government-owned land because their pressure influenced official dealings. Several days after the revelation of the scandal, Mr. Abe stated during the parliamentary debate that if the allegations of his or his wife's involvement were true, he would step down as both Prime Minister and Diet member.[15] While distortion of the decision-making process and subsequent concealment were continuously alleged, Abe did almost everything to avoid being questioned squarely. (Note that it was around the same time that he was reluctant to deliver a campaign speech on the streets.) Through protracted denial of the request for session convoca-

13 The Diet is convened only during "sessions". The Constitution distinguishes three different types of sessions, one of which is "extraordinary sessions." The other two types are ordinary sessions (Art. 52) and special sessions (Art. 54 sec. 1).

14 Art. 53 provides: "The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation."

15 H. MURAKAMI [村上裕章], 森友学園事件から見えてくる法的問題 [Legal Issues Emerging from the *Moritomo-gakuen* Case], 法律時報 Hōritsu Jihō 1121 (2018) 64; "首相「売却、関係あれば辞める」" [Prime Minister's Remark: 'If the Scandal is True, I will Quit'], 朝日新聞 Asahi Shinbun, 18 February 2017, 2.

tion for more than 3 months and precipitate dissolution at the beginning of the session, the Abe Cabinet effectively precluded the opposition parties from holding the government accountable.

The text of Art. 53 is far from ambiguous. It clearly prescribes that the Cabinet must convene an extraordinary session if demanded by more than a quarter of either House. Moreover, according to the prevailing view, the purpose of Art. 53 is to secure a minority of Diet members an opportunity to make their opinions reflected in the Diet.

So far, the SCJ agreed. The opinion of the Court explicitly acknowledged that "the Cabinet is obliged to make a decision to convene an extraordinary session when there is a request to convene in accordance with the second sentence of Article 53." However, the SCJ denied all relief sought by the plaintiff: declaratory relief and damages. When dismissing the former, the Court reasoned that the plaintiff's claim fails at the threshold for lack of ripeness. The plaintiff sought a declaration that the next time a request is made to convene an extraordinary session, in which he participates, the Cabinet is obliged to make a decision within 20 days. *Konishi* held that it is uncertain whether a request for an extraordinary session will be made in the future by Diet members including the plaintiff, and if so, when the Cabinet's decision to call an extraordinary session will be made, so the plaintiff failed to show that the injury to him is imminent. Consequently, the Court continued, the plaintiff's claim for declaratory relief does not represent a ripe controversy. On the other hand, the SCJ reached the merits with regard to the damages claim and affirmed the judgment of the court below against the plaintiff. The majority opinion argued that Art. 53 of the Constitution, while obligating the Cabinet, does not guarantee the right of *individual Diet members*. Therefore, regardless of whether the Cabinet violated the Constitution, the plaintiff's claim for compensation should be dismissed. In this way, the SCJ avoided the question of the constitutionality of the specific failure by the Abe Cabinet. Effectively, in spite of the acknowledgement of the Cabinet's obligation, *Konishi* left minimal, if any, room for the judiciary to enforce it or impose sanctions for its breach.

It is relatively easy to discern that the SCJ cautiously chose the mode of decision. The *Konishi* case had two companion cases, and lower court decisions[16] had prepared multiple pathways to follow when *Konishi* came before the SCJ. With the sole exception of the Naha District Court decision, all

16 Naha District Court, 10 June 2020, 判例時報 Hanrei Jihō 2473 (2021) 93; Fukuoka High Court, Naha Branch, 17 March 2022, LEX/DB25572061; Okayama District Court, 13 April 2021, LEX/DB25569359; Hiroshima High Court, Okayama Branch, 27 January 2022, LEX/DB25591582; Tōkyō District Court, 24 March 2021, LEX/DB15569113; Tōkyō High Court, 21 February 2022, LEX/DB25591726.

lower court decisions avoided even discussing this matter directly. Put in this context, the SCJ demonstrated a steadfast commitment to its role to say what the law is by acknowledging the Cabinet's obligation explicitly in *Konishi*.

Using the distinction proposed by Professors Dixon and Issacharoff, which distinguishes "first" and "second" order judicial deferral, the *Konishi* decision can be seen as a typical example of the "implicit, or 'second-order'" mode of deferral. It "allow[s] courts to assert themselves short of a frontal confrontation with the political branches."[17] While the SCJ secured its role to declare the law in *Konishi*, it avoided a decisive confrontation with the ruling parties by refraining from making an overt accusation against the particular action of the Cabinet.

Serving a strategic and inherently political aim of increasing the effectiveness of judicial review, the idea of second-order deferral "applies only for so long as courts lack the political or legal support necessary to deliver decisions that they can reliably predict will be complied with."[18] Considering the accumulation of over 75 years of judicial review in Japan, the fact that the Japanese judiciary has confronted such a predicament requires a certain explanation.

The immediate problem for the SCJ was the recurrent political malpractices. While the *Konishi* case was pending before the Tōkyō High Court, the succeeding cabinet followed the path Abe had laid out. On 17 July 2021, the opposition parties demanded an extraordinary session be convened under Art. 53. Two months passed without the cabinet responding to repeated similar requests, and in September, then Prime Minister Suga announced his resignation. Finally, an extraordinary session was convened on 4 October. However, it was devoted to the purpose of nominating Kishida as prime minister following the result of the LDP leadership election held at the end of September and was adjourned due to the dissolution of the House of Representatives just 10 days after the convening. Thus, the SCJ confronted the situation where faits accomplis had increased the risk of direct confrontation with the political branches that a finding of unconstitutionality would endanger, whereas acquiescence would significantly weaken, judicial authority. The implicit deferral that the *Konishi* decision adopted was a response to such a plight. The irony is that the decision that resorted to the deferral was itself justice delayed. For judicial interventions into political process malfunctions to be effective, they must be timely. In Japan, however, the timing of court decisions tends to be late, as exemplified in the *Konishi* case.

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17 R. DIXON/S. ISSACHAROFF, Living to Fight Another Day: Judicial Deferral in Defense of Democracy, Wisconsin Law Review 2016, 683, 687.

18 DIXON/ISSACHAROFF, *supra* note 17, 723.

Furthermore, far beyond the context of the convocation of extraordinary session case, the Japanese judiciary has been faced with a broader problem that the dialogical model it built has ceased to function effectively. The next two Sections will explore the formation and recent dysfunction of that model, or the "catalytic" review in Japan.

IV. The Development of the Catalytic Function of the Japanese Judiciary

The SCJ is a creation of the current Constitution, which has been in force since 1947. Roughly at the halfway point of its history, Yasuhiro Okudaira presented an interesting observation.[19] He focused on the contrast found between what the SCJ did and what the Justices said.

> "While some Supreme Court justices are usually extremely reluctant to declare laws unconstitutional, some of them are willing to express an advisory comment in their concurring opinions suggesting that the legislation in dispute be revised."

The factor which blurred the distinction was the involvement of mass media, which he paid much attention to as well.

> "Interestingly, the mass media are often inclined to highlight such advisory comments. Neither the press nor the general public is ready to distinguish between the authoritative opinion of the Court and the more extrajudicial comments of individual justices."[20]

The scope of his argument can be expanded far beyond "concurring opinions" of Supreme Court Justices. Dissenting opinions and obiter in majority opinions of the SCJ can be examined in the same way. Moreover, Okudaira implicitly took a similar approach to obiter in decisions of lower courts and even to the presence of pending lawsuits. He referred to the effects of those factors as "the extrajudicial effects."[21]

Below, I argue that the extrajudicial effects observed in Japan can be evaluated as a form of representation-reinforcement. In Subsection IV.1, I attempt to situate it in comparative literature by borrowing the concept of "catalytic function" from Katharine M. Young. Subsection IV.2 offers a case study of the catalytic function. After describing a lawsuit that ended with the SCJ's decision of 21 November 1985, the *At-Home Voting* case, I analyze some factors which contribute to the development of the catalytic style.

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19 Y. Okudaira [奥平康弘], 憲法裁判の可能性 [The Potential of Constitutional Litigations] (1995) 135–154. For an English discussion in a similar vein, Y. Okudaira, Forty Years of the Constitution and Its Various Influences: Japanese, American, and European, Law and Contemporary Problems 53 (1990) 17, 43–48.

20 Okudaira, Forty Years, *supra* note 19, 47.

21 Okudaira, [Potential of Constitutional Litigations], *supra* note 19, 136.

1. Extrajudicial Effects and the Catalytic Function of Judicial Review

From the South African Constitutional Court's experience with economic and social rights, Young extracted a five-part typology of judicial review. The five types are as follows: deferential review, conversational review, experimentalist review, managerial review, and peremptory review. The catalyst metaphor relates to this typology in two ways. First, courts can fulfill the catalytic function within a type of judicial review. Explaining the type of experimentalist review, the most insightful category of the five for the purpose of this paper, Young mentioned the metaphor of "catalysts." In the experimentalist review, "[t]he political project is achieved not by prescribing the immediate steps toward a solution but by "nudging," "linking," and "destabilizing" public institutions." It is "more proactive" than the conversational review, "insisting on a different prioritization of interests and the input of a new set of actors within the legislative scheme."[22]

Second, and the more important point for her argument is that the catalytic metaphor captures "certain criteria" which guide the "deliberate choice" of the five forms of judicial review. According to her, the South African Constitutional Court "acts to lower the political energy that is required in order to change the way in which the government responds to the protection of economic and social rights."[23]

Although the main focus of her argument is development in the area of economic and social rights, the catalyst concept is useful to examine the experience of judicial review in Japan generally. The catalytic function, in its first sense distinguished above, fits many features of Okudaira's extrajudicial effects both inside and outside of the economic and social rights context. On the other hand, its second sense indicates important differences between South Africa and Japan. While the South African Constitutional Court uses all of the five types eclectically according to the general conception of the catalytic role, the options for Japanese courts are more limited. Although it is my point that an important part of judicial practice in Japan can be grasped as experimentalist review, Japanese courts clearly overuse deferential review on the whole. Relatedly, the choice of forms is made in different ways. The use of extrajudicial effects by Japanese courts is functionally equivalent to the combination of "the interpretation of the right at hand, the evaluation of the government's actions, and the design of a remedy"[24] in South Africa.

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22 YOUNG, *supra* note 4, 398–401.

23 YOUNG, *supra* note 4, 387, 412.

24 YOUNG, *supra* note 4, 387.

In spite of these differences, the catalytic styles in South Africa and Japan share a crucial feature: the representation-reinforcing role. Young explicitly asserted that the catalytic function has linkages with Ely's representation-reinforcing role. Moreover, she extracted another two implications "that were underemphasized in Ely's account" from the South African experience: the interrelationship between "procedural protections" and "substantive interpretations of constitutional democracy" and the risks of "the pitfalls of judicial overreach and public backlash."[25] In order to examine the development of judicial review in Japan on these three points, the next Subsection offers a case study.

2. The Development of Catalytic Judicial Review and its Background

At issue in *Sato v. Japan*[26] was the constitutionality of the failure to enact laws to establish an At-Home Voting System. The plaintiff was a Japanese citizen living in Otaru City. In 1931, he incurred a back injury in a fall from the roof of his house while shoveling snow. Around 1955, the stiffness in the lower half of his body deteriorated to the extent that even using a wheelchair became very difficult. As a result, the plaintiff was unable to vote in eight elections for the Diet, the Governor, the Prefectural Assembly, the Mayor, and the Municipal Assembly that were held between 1968 and 1972. The At-Home Voting System, once introduced to enable severely handicapped voters to cast votes at home, had been repealed in 1951 on the grounds that it was abused in the local elections of April 1951. The plaintiff brought a state compensation action challenging the unconstitutionality of legislative failure to reestablish such a system.

As the final product of the prolonged litigation, the SCJ flatly rejected the plaintiff's argument. It introduced a distinction between the question of "whether a legislation itself is unconstitutional" and that of "whether the legislative act by the Diet is deemed illegal for the purpose of applying the Law Concerning State Liability for Compensation." In the latter context, according to the SCJ, it is only "in the exceptional events such as enactment of laws clearly contravening the fundamentals of the Constitution" that legislative acts are deemed illegal.[27] The SCJ held that this case cannot be construed as such an exceptional case and the claim should be dismissed. By thus adhering to what Richard Pildes calls "institutional formalism,"[28] the unanimous opinion of the Court did not proceed to the question of "whether a legislation itself is unconstitutional."

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25 YOUNG, *supra* note 4, 417–418.

26 Supreme Court, 1st petty bench, 21 November 1985, 民集 Minshū 39, 1512.

27 20 years later, this doctrine was substantially modified by *Takase et al. v. Japan* (Supreme Court, grand bench, 14 September 2005, 民集 Minshū 59, 2087).

However,[28] such extreme passivism observable in the decision of the SCJ does not matter so much for the purpose of this paper. The preceding rulings of unconstitutionality by the lower courts,[29] despite their refutation by the SCJ, are far more important because of their *de facto* influence. In 1974, the Otaru branch of the Sapporo District Court held that the abolition of the At-Home Voting System was unconstitutional and awarded damages to the plaintiff. Though the judgment of the district court was reversed on appeal, the Sapporo High Court also said explicitly that the legislative inaction was unconstitutional. As the result was not substantially different from what the plaintiff sought – a judicial declaration of unconstitutionality of legislative failure – an attorney for the plaintiff reportedly stated that 90% of the objectives were achieved.[30]

Interestingly, the government took some action as early as 1974. The Diet amended the Public Offices Election Act and instituted the postal voting system just after the decision of the district court. The submission of the bill by the Cabinet even predated it. What prompted such response? It is worth noting that a petition campaign in 1967 had made no sense. It is reasonable to infer that the government wouldn't have been so responsive without the pending lawsuit. Moreover, the tone of the media was remarkable. As Okudaira pointed out, "[g]enerally, the media world is very much in favor of protecting citizens' rights."[31] In the At-Home Voting case, most of the media took a pro-plaintiff stance and condemned the legislature rather directly.[32]

As illustrated above, the accumulation of many informal factors closely linked with the unauthoritative message of courts (or Supreme Court Justices) has a certain influence on decision-making in the political process in Japan. This is the Japanese-style catalytic judicial review. Indeed, the Japanese judiciary very often pursues medium-term equilibrium by "insisting on a different prioritization of interests and the input of a new set of actors within the legislative scheme."

Brief comments about the background of the development of this style are in order. Two points are worth considering. First, the emergence of

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28 R. H. PILDES, Political Process Theory and Institutional Realism, International Journal of Constitutional Law 18 (2020) 1497, 1500.

29 Sapporo District Court, Otaru Branch, 9 December 1974, 民集 Minshū 39, 1550; Sapporo High Court, 24 May 1978, 民集 Minshū 39, 1590.

30 "目的の九割は達成" [90% of the Objectives are Achieved], 朝日新聞 Asahi Shinbun, 24 May 1978 (evening edition), 1.

31 OKUDAIRA, Forty Years, *supra* note 19, 47.

32 E.g., "在宅投票制度" [At-Home Voting System], 朝日新聞 Asahi Shinbun, 25 May 1978 (evening edition), 1; "社説 在宅投票制度の整備と「選挙権」" [Editorial: Reestablishment of the At-Home Voting System and 'rights to vote'], 読売新聞 Yomiuri Shinbun, 26 May 1978, 5.

policy-oriented litigation set the stage for the development of the catalytic style. Japan adopts a decentralized judicial review system, so ordinary courts exercise the power of judicial review. Although policy-oriented litigation originally appeared mainly in the context of pollution litigations around 1970, it caused so profound a transformation to the civil procedure as a whole that it affected the style of judicial review. Among many points, the most important for the purpose of this paper is the triumph of settlements. Policy-oriented litigation in Japan was correctly compared with "public law litigation"[33] in the US by contemporary scholars, which revealed several differences between them. Some important aspects of public law litigation such as structural remedies and the managerial role of judges were hardly ever observed in Japan's policy-oriented litigation.[34] It was difficult for Japanese courts to assume them as a matter of institutional design. Relatedly, the function expected of settlements was different between the US and Japan. To the extent that the formal structure of the Japanese judiciary was less flexible, settlements bore a heavier burden in Japan.[35] Judge Kusano classified settlements into three types, one of which was symbolically presented as "settlements as a better solution than judgments." Putting an emphasis on this type, he explicitly acknowledged that justice was ranked inferior to "appropriate resolution of concrete disputes" through bargained-for agreements.[36] His view was a lucid manifestation of the influential trend among judges. Thus, Japanese judges had already been accustomed to pursuing proper resolution outside the formal process leading to judgments by the time the catalytic judicial review emerged.

Second, the response of the legislature to *Sone v. Japan*[37] might have some relevance. Delivered in 1973, it was the first apex court decision that held statutory provisions unconstitutional. The provision at issue was Art. 200 of the Criminal Code, which imposed the death penalty or imprisonment for life for parricide. The SCJ held that it was unconstitutional and applied the regular homicide provision to the accused. At that time, more than 15 years had passed since the creation of the SCJ in 1947. In spite of such cautiousness by the SCJ, the *Sone* decision did not enjoy due respect

33 A. CHAYES, The Role of the Judge in Public Law Litigation, Harvard Law Review 89 (1976) 1281.

34 H. ŌSAWA [大沢秀介], 現代型訴訟の日米比較 [A Japan-U.S. Comparison of Contemporary Litigation] (1988) 112–118, 138–143.

35 For a critical comment, ŌSAWA, *supra* note 34, 195–197.

36 Y. KUSANO [草野芳郎], 訴訟上の和解についての裁判官の和解観の変遷とあるべき和解運営の模索 [Transforming Images of Settlements in Court among Judges and the Pursuit of Proper Judicial Management], 判例タイムズ Hanrei Taimuzu 704 (1989) 28, 29–30.

37 Supreme Court, grand bench, 4 April 1973, 刑集 Keishū 27, 265.

from the legislature. Although prosecutors ceased to apply Art. 200 just after the decision and such a policy was observed afterward as a matter of convention, it was not until 1995 that the Diet abolished the provision. Facing such difficulty, it was admittedly reasonable for the Japanese judiciary to search for a way to cope with constitutional litigations while avoiding direct confrontation with the political branches.

Against the background, we can discern the achievement and problems of catalytic judicial review in Japan. The catalytic style is an ingenious device to fulfill the representation-reinforcement role without risking the authority of courts. In the At-Home Voting case, the Japanese judiciary effectively removed a distortion in the electoral process. Other similar accomplishments were observable in the area of social rights.[38] In still another case, the dispute over the Foreigners' Registration Law, the catalytic review even succeeded in providing a remedy to aliens, a typical example of discrete and insular minorities, without a formal judicial holding of unconstitutionality. Facing the constitutional challenge to the statutory requirement that fingerprints be retaken every five years, the lower courts' decisions showed little sympathy. But the presence of several lawsuits in itself attracted public attention and prompted the Diet to delete the requirement.[39] In most of these cases, a judicial declaration of unconstitutionality would have produced hostility between the courts and the political branches, leading to less favorable results for the political process.

However, what was lost should not be overlooked. Without formal decisions, the development of constitutional precedent is inevitably hindered. As Young pointed out, there is an interrelationship between "procedural protections" and "substantive interpretations of constitutional democracy." If realized at too much cost of the latter, the former cannot be sustainable.

V. The Transformation and Dysfunction of Catalytic Judicial Review

The catalytic style worked fairly well until the early 1990s. Thereafter, it experienced a transformation and dysfunction became prominent, which will be discussed in Subsection V.1. Next, Subsection V.2 returns to the current failure to intervene in malfunctions described in Section II, and attempts to situate it on the development of the catalytic function.

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38 Supreme Court, grand bench, 24 May 1967, 民集 Minshū 21, 1043; Supreme Court, grand bench, 7 July 1982, 民集 Minshū 36, 1235.

39 For an illuminating comment on the development up to 1990, Okudaira, Forty Years, *supra* note 19, 45–46.

1. Dysfunction of the Catalytic Review since Circa 2000

Though the transformation of catalytic review occurred around 2000, it is difficult to specify the case which marked a clear turning point. In order to discern the change, it is necessary to consider more than one case as a unit and situate it in a broader context. That's because judicial behavior itself was less important than the responses (or their absence) from the political branches as the cause of the transformation. Indeed, the Japanese judiciary has mainly clung to the behavioral pattern formed in the 1980s.

With such reservations in mind, a series of cases involving the unequal treatment of illegitimate children under the Civil Code is a useful lens through which to analyze the transformation of the catalytic style. Two decisions of the Grand Bench of the SCJ are especially important: the 1995 decision[40] and the 2013 decision.[41] The statutory provision at issue was Art. 900 of the Civil Code, which set out the intestate share of an illegitimate child at only half of the share of a legitimate child. While eventually struck down by the SCJ in the 2013 decision, it outlived many cases dealing with its constitutionality. The most prominent judicial endorsement of the provision was the 1995 decision, where the SCJ held that the unequal treatment was reasonable and not contrary to the Equal Protection Clause of the Constitution (Art. 14). From the perspective of catalytic judicial review, however, the focus should be on the fact the 1995 decision prompted a strong dissent within the SCJ. Five dissenters expressed their views that Art. 900 of the Civil Code discriminated against illegitimate children in violation of the Equal Protection Clause. Moreover, the newspapers pointed out that another four Justices raised some questions about the reasonableness of the provision in their concurrent opinions and emphasized the importance of a legislative response.[42]

Thereafter, the behavioral pattern of the SCJ was true to the catalytic style, for not just the 1995 decision contained 5 Justices' dissenting opinion, but also as many as 5 decisions of the SCJ[43] that followed the 1995

40 Supreme Court, grand bench, 5 July 1995, 民集 Minshū 49, 1789.

41 Supreme Court, grand bench, 4 September 2013, 民集 Minshū 67, 1320.

42 "社説 民法改正の流れを止めるな" [Editorial: Do not stop the momentum for revision of the Civil Code], 朝日新聞 Asahi Shinbun, 8 July 1995, 5; "非嫡出子の最高裁決定" [The Supreme Court Decision on the Status of Illegitimate Children], 読売新聞 Yomiuri Shinbun, 7 July 1995, 38.

43 Supreme Court, 1st petty bench, 27 January 2000, 判例時報 Hanrei Jihō 1707 (2000) 121; Supreme Court, 2nd petty bench, 28 March 2003, 判例時報 Hanrei Jihō 1820 (2003) 62; Supreme Court, 1st petty bench, 31 March 2003, 判例時報 Hanrei Jihō 1820 (2003) 64; Supreme Court, 1st petty bench, 14 October 2004, 判例時報 Hanrei Jihō 1884 (2005) 40; Supreme Court, 2nd petty bench, 30 September 2009, 判例時報 Hanrei Jihō 2064 (2010) 61.

decision were accompanied by dissenting opinions without a single exception. Those dissenting opinions all shared the basic direction of the dissenting opinion in the 1995 decision. But there gradually appeared the tone of irritation in some relatively late opinions. Justice Saiguchi's dissent in the 2004 decision is a good example. He argued that "the disadvantages suffered by illegitimate children should be remedied by amendment of the statute at the earliest possible time, in accordance with the basic principles of the Constitution, but even without waiting for such amendment, judicial remedies are also necessary."[44] Despite such consistent messages from the judiciary by way of dissenting opinions, the legislature took no action until the unconstitutionality was formally held by the SCJ in 2013. Therefore, the 2013 decision can be understood as the result of the dysfunction of the catalytic style.

Moreover, it is worth noting that the SCJ, even in the 2013 decision, hesitated to overrule the 1995 decision, paying formidable attention to avoid condemning the legislature directly. Instead, the SCJ held that the unequal treatment had lost reasonable ground and became unconstitutional at the latest in July 2001, when the petitioner's inheritance commenced. According to the SCJ, matters to be considered (such as social conditions and public sentiments) changed with time. But the decision did not identify the decisive factor, leaving it ambiguous as to how the legislature failed to address the problem. Some commentators criticized and lamented the SCJ's disregard for the doctrine of stare decisis.[45] Despite the formal holding of unconstitutionality, the development of constitutional precedent was sacrificed again.

Similar patterns of persistent and unsuccessful dissents by some Supreme Court Justices are observable in other issue areas. Dissenting opinions that strongly urged the political branches to take some action appeared in the surname of husband and wife cases[46] and the gender reassignment case.[47] If we extend the corpus to lower courts' decisions, the same-sex

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44 Hanrei Jihō 1884, at 41 (Saiguchi, J., dissenting). See, "「非嫡出子の相続差別、救済を」 最高裁 2 判事「違憲」と表明" ['Discrimination against Illegitimate Children should be Remedied,' Two Supreme Court Justices Find 'Unconstitutionality'], 朝日新聞 Asahi Shinbun, 15 October 2004, 37.

45 See, e.g., K. ISHIKAWA [石川健治], ドグマーティクと反ドグマーティクのあいだ [Between Dogmatik and Anti-Dogmatik], in: Ishikawa [石川] and others (eds.), 憲法訴訟の十字路 [Constitutional Adjudications at a Crossroad] (2019) 299, 330–332.

46 *Tsukamoto et al. v. Japan*, Supreme Court, grand bench, 16 December 2015, 民集 Minshū 69, 2586; Supreme Court, grand bench, 23 June 2021, 判例時報 Hanrei Jihō 2501 (2022) 3.

47 Supreme Court, 3rd petty bench, 30 November 2021, 判例時報 Hanrei Jihō 2523 (2022) 5. The SCJ rendered two other important judgments addressing a different

marriage cases[48] can be seen as another example. However, none of them has succeeded in prompting a meaningful legislative response.

Notably, the two most recent SCJ's invalidation of statutory provisions are the result of the dysfunction of catalytic review: the third gender reassignment case and the overseas national review case. In the decision rendered on 25 October 2023,[49] the SCJ held unconstitutional a provision requiring gonadectomy for gender reassignment. Just four years before, the SCJ had confirmed the constitutionality of the same provision.[50] However, true to the catalytic style, the 2019 decision suggested that the constitutionality of the provision requires constant examination. In this case, this warning was embedded within the opinion of the Court. Thus, Justices Onimaru and Miura could add a more assertive call for legislative action in their concurring opinion. They pointed out that the constitutionality of the provision at issue, while confirmed at the time, was coming under suspicion.[51] Nevertheless, the legislature did not show any response, and eventually, the SCJ changed its precedent in 2023.

Hirano et al. v. Japan[52] is another product of the political branches' reluctance to heed the judiciary's voice. *Hirano* held the National Review Act unconstitutional "in that it completely precludes Japanese nationals overseas from exercising the right to review." As early as 2011, the Tōkyō District Court pointed out in a different case that "there were serious doubts about whether it was compatible with the Constitution that the failure to take legislative measures to establish an overseas review system had created a situation in which overseas nationals were unable to exercise their right to review."[53] When the *Hirano* case came before the Tōkyō District Court, it went one step further by arguing that the Act was unconstitutional,[54] to which the media paid close attention.[55] This part of the district court

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statutory requirement for the gender reassignment, which I will discuss in the next paragraph of the text.

48 Sapporo District Court, 17 March 2021, 判例時報 Hanrei Jihō 2487 (2021) 3; Tōkyō District Court, 30 November 2022, LEX/DB25593967; Nagoya District Court, 30 May 2023, LEX/DB25595224; Hukuoka District Court, 8 June 2023, LEX/DB 25595450. But see Ōsaka District Court, 20 June 2022, 判例時報 Hanrei Jihō 2537 (2023) 40. For an analysis of these cases, see Minori Ōkochi's essay in this special issue: A Constitutional Analysis of Same-Sex Marriage Cases: Litigation for Social Change in Japan.

49 Supreme Court, grand bench, 25 October 2023, LEX/DB25573119.

50 Supreme Court, 2nd petty bench, 23 January 2019, 判例時報 Hanrei Jihō 2421 (2019) 4.

51 Hanrei Jihō 2421, at 9 (Onimaru and Miura, JJ., concurring).

52 Supreme Court, grand bench, 25 May 2022, 民集 Minshū 76, 711.

53 Tōkyō District Court, 26 April 2011, 判例時報 Hanrei Jihō 2136 (2012) 13.

54 Tōkyō District Court, 28 May 2019, 民集 Minshū 76, 833.

decision was later affirmed by both the Tōkyō High Court[56] and the SCJ. The Diet failed to respond to such persistent criticism from the judiciary. The Tōkyō District Court decision in the *Hirano* case was bold enough to attack the legislature's disregard of the preceding 2011 Tōkyō District Court decision. However, even this decision ended up highlighting the dysfunction of the catalytic style, because it did not prompt any legislative response. The SCJ omitted the straightforward attack on the Diet from its decision and adopted a fairly mild tone. It seems that the SCJ became extremely cautious to ensure that the political branches respect its decision.

2. The Catalytic Review and Political Competition[57]

One possible interpretation of the transformation explored above is that it has a close relationship with the decline of competitiveness in the political process. Tushnet and Dixon argued that "background political conditions, or political party competition, are likely to matter to both the desirability and stability of any attempt actually to design a system of weak-form review."[58] This view holds true, *mutatis mutandis*, to the catalytic review.

The insight of Tushnet and Dixon resulted from their approach which puts emphasis on substance and function (as opposed to form and structure). They pointed out that the Japanese judiciary developed "sub-constitutional review" by way of statutory construction and administrative review. According to them, this is "more or less the equivalent to weak-form review that has developed in Japan." While the formal structure of the Japanese Constitution "established a system of strong-form review," their approach revealed functional similarities between the practice of Japanese judicial review and weak-form review.[59]

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55 "社説 国民審査 怠慢が招いた違憲判決" [Editorial: National Review, Negligence Resulted in a Judicial Declaration of Unconstitutionality], 朝日新聞 Asahi Shinbun, 4 June 2019, 12; "国民審査に違憲判断 国に立法促す「最後通牒」" [Court's Ruling on the Unconstitutionality of the National Review System: An Ultimatum Urging the Government to Take Legislative Action], 読売新聞 Yomiuri Shinbun, 29 May 2019, 29.

56 Tōkyō High Court, 25 June 2020, 民集 Minshū 76, 887.

57 I suspect that incorporating the argument in this subsection back into the comparative analysis could make the comparison between the South African catalytic review and its Japanese counterpart more fruitful. But it is a larger task than this paper can pursue. For the political context of judicial review in South Africa, see R. DIXON/T. ROUX, The Law and Politics of Constitutional Implementation in South Africa, in: Ginsburg/Huq (eds.) From Parchment to Practice: Implementing New Constitutions (2020) 53.

58 M. TUSHNET/R. DIXON, Weak-form Review and its Constitutional Relatives: An Asian Perspective, in Dixon and Ginsburg (eds.) Comparative Constitutional Law in Asia (2014) 102, 116–117.

Recognition[59] of such continuity in substance raised a new question about the relationship between judicial review and political competitiveness. In this context, Tushnet and Dixon noted the importance of the judicial appointment process. "Judges are chosen in ways that ensure in practice that they will understand their role to be enforcing a national consensus represented concretely by legislation. They see themselves as faithful agents of the nation and its dominant political party." Tushnet and Dixon drew attention to the differences between competitive party politics and dominant-party systems. In the latter, unlike the former, "the dominant party can be completely opportunistic about the constitution, forcing through whatever policies they prefer and changing the constitution if necessary. Weak-form review is thus generally unsuitable for dominant-party political systems."[60]

My examination of the catalytic review shares this interest in function. By placing it against the background set up by Tushnet and Dixon, two supplementary points can be drawn. First, to the extent that catalytic review fulfills the representation-reinforcement function, the Japanese judiciary retains a little more latitude in how they should be faithful to "the nation." It is worth noting that the SCJ once relied on the pluralist conception of democracy, though such phenomena were unique to the 1980s. The *Sato* decision was typical and eloquent: The SCJ argued that "[u]nder the system of parliamentary democracy adopted under the Constitution, the role of the Diet is to ensure that the legislative process fairly reflects the many opinions and diverse interests that exist among the people, to reconcile those opinions and interests through free debate among the Diet's members, and ultimately to form a unified national will by applying the principle of majority rule."[61] With this regard, it is not wrong to call the SCJ Elyean. Through the catalytic style, the Japanese judiciary has made a substantial contribution to respond to "the many opinions and diverse interests that exist among the people."

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59 TUSHNET/DIXON, *supra* note 58, 104–108.

60 TUSHNET/DIXON, *supra* note 58, 113–115.

61 Minshū 39, at 1515–1516. See also, *Ishiduka et al. v. Japan*, Supreme Court, 3rd petty bench, 20 Jun 1989, 43 Minshu 385, 403 (Ito, J., concurring). In this case, at issue was whether Art. 9 of the Constitution was directly incorporated into the substance of "public order" in the meaning of Art. 90 of the Civil Code, which the SCJ ruled in the negative. Justice Ito, in his concurring opinion, contrasted actual social conditions including "the ways in which people in all walks of life interpret" Art. 9 with an authoritative determination of "which of the many conflicting interpretations of Article 9 is correct," and finding the former relevant to the interpretation of "public order".

Second, the transformation and dysfunction of catalytic review imply the necessity of being sensitive to the degree to which the political process is competitive within the framework of the dominant-party system. Probably, the achievement of the catalytic style up to the 1980s was supported by the relatively competitive character of the political process at that time. Under the 1955 system, the opposition parties (except the Japanese Communist Party) retained a certain amount of influence, either by protest or by accommodation, vis-à-vis the dominant LDP.[62] Factions within the LDP were once engaged in fierce competition, whereas their traditional functions have been seriously undermined since 2012.[63]

My concern is that the experience with catalytic review hinders judicial intervention in political malfunctions. As a matter of psychology, it might be said that judges tend to be stuck in past successes through the relatively well-functioning catalytic style. However, the problem is more serious and fundamental. At present, courts should be conscious of the possibility that they are facing litigations whose stakes are a precondition of the well-functioning catalytic review. If that is the case, adhering to catalytic review could be a ridiculous policy. As Dixon noted, "[i]f courts wait too long to intervene […], it will often be too late for judicial review to play any role in protecting democracy."[64] Allowing for the political branches' perennial reluctance to respond rather leniently, the catalytic style might adversely affect the protection of constitutional democracy.

VI. Conclusion

What is striking about the development of catalytic review in Japan is that its formation preceded the acceptance of Ely's theory by scholars (and even the publication of *Democracy and Distrust*). It is possible to point out the similarity to the situation in the US, where "[t]he early 1970s were a tide-mark point for political process theory at the Supreme Court" and "by the time [*Democracy and Distrust*] was published, political process theory was already on the decline."[65]

Political process theory is rejoined to the stream of case law by CPPT studies, this time on a worldwide scale. My aim is to take part in this pro-

62 Scheiner/Thies, *supra* note 9, 225–227.

63 K. Nemoto, Japan's Liberal Democratic Party: Changes in Party Organization under Shinzo Abe, in: The Oxford Handbook of Japanese Politics, *supra* note 9, 161, 163–170.

64 R. Dixon, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023) 156.

65 A. Tang, Reverse Political Process Theory, Vanderbilt Law Review 70 (2017) 1427, 1439.

ject by making use of the Japanese experience. However, the main subject of this paper is sought in cases up to the 1980s, which are contrasted with the scarcity of useful material in this century.

From this contrast, it's fair to draw such a lesson as the following: Even if a certain degree of competitiveness is maintained at a given point in time, it is dangerous for courts to take this as a given that will continue into the future. Again, the *Sato* case is suggestive. While it pronounced eloquently the pluralist conception of democracy, it did nothing to preserve, let alone improve, political competitiveness. More generally, though I don't have any occasion to explore it in this paper, it should not be overlooked that the Japanese judiciary has been rather indifferent to the protection of freedom of speech.[66]

Herein lies the limit of the catalytic review. It inevitably requires the courts to make a degree of compromise. I do not mean to undervalue the achievements of the Japanese judiciary in fulfilling the representation-reinforcement function through peaceful compromises. However, without the bulwark of "uninhibited, robust, and wide-open"[67] debate on public issues, there is no guarantee that compromises will not damage the core of constitutional democracy.

66 S. MATSUI, The Constitution of Japan: A Contextual Analysis (2011) 210–211.

67 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

A Constitutional Analysis of Same-Sex Marriage Cases

Litigation for Social Change in Japan

Minori OKOCHI*

This essay attempts to analyze Japanese judicial decision-making through political process theory, focusing on the same-sex marriage recognition cases currently being heard in several courts. I will first reveal the uniqueness of this litigation and then the importance of addressing it through process theory. Next, I will outline how the courts have interpreted the Constitution in each of the five cases currently being handed down, and identify the characteristics of Japanese judicial decision-making.

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* After the manuscript of this article was completed, three High Courts declared the current law unconstitutional for failing to recognize same-sex marriage: Sapporo High Court, 14 March 2024, 判例タイムズ Hanrei Times 1524, 51; Tōkyō High Court, 30 October 2024, 2024WLJPCA10306001; Fukuoka High Court, 13 December 2024 [citation unknown]. These three High Courts ruled that the current law violates not only Art. 24 para. 2 but also Art. 14, making them even more proactive than the district courts, whose rulings are discussed below.

I. INTRODUCTION

1. Same-Sex Marriage Cases in Japan

Marriage equality has changed rapidly around the world in the last two to three decades. Since the 1990s, some European countries have begun to give legal recognition to same-sex couples, as in the case of civil unions. Now, at the beginning of the twenty-first century, the trend – particularly in Europe and North America – has been to allow open marriage, traditionally reserved for heterosexual couples, for same-sex couples. At the end of 2023, the number of countries recognizing same-sex marriage has risen to 35.

Japan, however, has moved slowly. The first local government recognition of partnerships appeared in 2015, and the first bill recognizing same-sex marriage was submitted to the Diet in 2019 – approximately 20 to 30 years behind leading countries. In other countries where change has not come from the political sector, litigation has played a major role in overcoming political stagnation. In Japan, however, human-rights guarantees for sexual minorities were not discussed in the courts until 2019, except for a few lawsuits filed by transgender parties.[1]

In 2019, class-action lawsuits were filed in five courts across the country to address this stagnant situation. The lawsuits sought damages on the ground that the 民法 (*Minpō*, Civil Code),[2] 戸籍法 (*Koseki hō*, Family Registration Law),[3] and other laws restricting marriage to heterosexual couples violate the Constitution and that the National Assembly's failure to enact legislation to resolve this situation is illegal under the 国家賠償法 (*Kokka baisyō hō*, National Compensation Law)[4].

In March 2021, the Sapporo District Court issued the first ruling.[5] Although no damages were awarded because the Diet's legislative inaction was not deemed illegal, the court clearly stated that the lack of any legal protection for same-sex couples violated Art. 14 para. 1 of the Constitution. This decision was widely reported in newspapers and other media and attracted a great deal of attention.

These same-sex marriage cases are currently being heard in five high courts and one district court.[6] There have been five district court rulings:

1 E.g., Supreme Court, 23 January 2018, 集民 Shūmin 261, 1; Supreme Court, 10 December 2013, 民集 Minshū 67, 1847.
2 Law No. 89/1896.
3 Law No. 224/1947.
4 Law No. 125/1947.
5 Sapporo District Court, 17 March, 判例時報 Hanrei Jihō 2487 (2021) 3.
6 The lawsuit, which has been heard by the district court now, was additionally filed in 2021.

two of them declared that the law as it stood was unconstitutional,[7] one upheld the constitutionality of the legislation,[8] and the remaining two rendered what are known as unconstitutional status rulings[9] pointing out that the status quo is in violation of the Constitution.[10] Each of these cases is unique in that they deal, in depth, with the constitutional compatibility of situations in which same-sex marriage is not legally recognized. Of course, the litigation has only just begun, and it remains to be seen what the higher courts – especially the Supreme Court – will decide. However, the behavior of these lower courts in same-sex marriage cases is a rarity in Japanese judicial practice, which is noteworthy not only from a practical point of view but also from a theoretical one.

2. Underdevelopment of Political Process Theory and Judicial Passivism in Japan

Moreover, these lawsuits can reaffirm the role of political process theory in Japan. Political process theory is not a new concept in the study of constitutional law in Japan. In the early 1990s, the political process theory advocated by John Hart Ely was introduced by Professor Shigenori Matsui and others, and it became widely known in Japan.[11] In Japan, however, the theory was generally understood as emphasizing the role of the democratic process in lawmaking and relatively limiting the role of the judiciary. While this theory offered a revolutionary perspective to Japanese constitutional law studies, which had been primarily concerned with finding ways to control democratic decision-making, it has not fully developed as a theory of judicial review. One reason for this may be that Japanese judicial practice has traditionally taken a passive stance toward lawmaking.

The Japanese judiciary – particularly the Supreme Court – is known for its reluctance in exercising judicial review. This is not simply because the Japanese Supreme Court has rendered only 11 decisions on the unconstitutionality of statutes in the 75 years since it acquired the power to review unconstitutionality. More broadly, this trend is attributed to an attitude of

7 Sapporo District Court, 17 March, 判例時報 Hanrei Jihō 2487 (2021) 3; Nagoya District Court, 30 May 2023, 2023WLJPCA05306001.

8 Ōsaka District Court, 20 June 2022, 判例時報 Hanrei Jihō 2537 (2023) 40.

9 "Unconstitutional status ruling" is a ruling that acknowledges that the situation in question violates the Constitution but does not declare it unconstitutional. It is often used in election litigation.

10 Tōkyō District Court, 30 November 2022, 判例時報 Hanrei Jihō 2547 (2023) 45; Fukuoka District Court, 8 June 2023, 2023WLJPCA06089003.

11 E.g., S. MATSUI [松井茂記], 司法審査と民主主義 [Judicial Review and Democracy] (1991).

excessive avoidance of intervention in the decisions of political branches, such as the broad recognition of legislative and administrative discretion. The substantive value judgements of judges and judicial activism based on them, which was the subject of criticism in political process theory, did not exist in Japan to begin with.

However, recent studies have shown that Japanese judicial practice is not necessarily passivist. Some have also highlighted that the attitude of the courts has been changing since the 2000s,[12] and same-sex marriage litigations are examples of this change. If Japanese judicial practice is changing, it is not surprising that views on political process theory are also changing.

Therefore, in the next section, I will address the attitude of Japanese courts toward social reform litigation.

II. Litigation for Social Change in Japan

1. Overview of Litigation for Social Change in Japan

It is true that Japanese judicial practice has often shown a reluctance to interfere with political decision-making. However, Japanese courts have also guaranteed and realized human rights to a considerable extent because their rulings nudged the political branches to legislate solutions to problems. This has already been indicated in various socio-legal studies, especially those on policy-making litigation or modern litigation. These studies often cite environmental litigation such as the Minamata Disease litigation and airport noise lawsuits, drug litigation such as the Hepatitis C litigation, and lawsuits raising the issue of segregation policies for leprosy patients as examples.

In fact, in the Kumamoto Minamata Disease Litigation, which challenged the responsibility of a company that emitted the substance that caused Minamata Disease, a series of court decisions from the district court stage recognized the company's responsibility,[13] leading to a compensation agreement with the company and the enactment of compensation legislation by the government. In the hepatitis C lawsuit, people infected with the hepatitis C virus through blood products approved by the Ministry of Health, Labor, and Welfare raised the illegality of the insurance medical administration, including the approval of the blood products. The court ruled that the administration was responsible,[14] which was apparently diffi-

12 E.g., H. Tomatsu [戸松秀典], 違憲・合憲の審査の動向 [The Trend of Constitutional Review], ジュリスト Jurist 1414 (2011) 21, 21–23.

13 E.g., Kumamoto District Court, 20 March 1973, 判例時報 Hanrei Jihō 696 (1973) 15; Fukuoka High Court, 16 August 1985, 判例時報 Hanrei Jihō 1163 (1985) 11.

14 E.g., Ōsaka District Court, 21 June 2006, 判例時報 Hanrei Jihō 1942 (2006) 23; Fukuoka District Court, 30 August 2006, 判例時報 Hanrei Jihō 1953 (2007) 11;

cult to accept at the district-court level. Subsequently, as settlement discussions at the high-court level were difficult, a resolution was reached through the enactment of remedial legislation. Several ongoing lawsuits were filed by people sterilized without their consent under the 優生保護法 (*Yusei hogo hō*, Eugenics Protection Act)[15], seeking state compensation.[16] These decisions were highly praised.

However, most of these lawsuits did not seek changes in policies that were still in place but rather sought compensation for injuries that had already occurred after the causes had been eliminated. The Kumamoto Minamata Disease lawsuit was filed in 1967, the year after companies stopped releasing the causative agent; in the Hepatitis C lawsuit, the blood products that caused the drug-induced hepatitis had not been manufactured and sold since about 1994, and the first lawsuit was filed eight years later, in 2002. The Eugenics Protection Act was substantially amended in 1996, and the relevant provisions had already been repealed. While it is true that the lawsuits provided an opportunity to advance political remedies that had been stalled, they should be distinguished from public lawsuits of the type that press for policy change, such as in the case of same-sex marriage.

2. Easy Cases/Hard Cases

In the leading Japanese studies of policy-making litigation, policymaking litigation are grouped into three categories: (1) human relations suits; (2) large-scale damage suits; and (3) public policy suits.[17] Same-sex marriage lawsuits fall under public policy suits, and most existing lawsuits fall under large-scale damage suits. In public policy suits, courts have not been as aggressive as in large-scale damage suits, where the difficulties generally associated with policymaking litigation are relatively mitigated.

Some have praised the effectiveness of policy formation litigation. Nevertheless, several issues have been raised, including the effectiveness of policy formation by courts,[18] the courts' ability to make decisions,[19] and the

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Tōkyō District Court, 23 March 2007, 判例時報 Hanrei Jihō 1975 (2007) 2; Nagoya District Court, 31 July 2007, 訟務月報 Shōmu Geppō 54 (2007) 2143.

15 Law No. 156/1948.

16 Tōkyō High Court, 11 March 2022, 判例時報 Hanrei Jihō 2554 (2023) 12; Kumamoto District Court, 24 January 2023, 2023WLJPCA01239004; Shizuoka District Court, 24 February 2023, 2023WLJPCA02249002.

17 See, K. ROKUMOTO [六本佳平], 「現代型訴訟」とその機能 [The Contemporary Type Litigations and Their Functions], 法社会学 The Sociology of Law 43 (1991) 2, 6–8.

18 See, Y. WADA [和田仁孝], 裁判モデルの現代的変容 [Contemporary transformation of Trial model], in: Tanase [棚瀬] and others (eds.), 現代法社会学入門 [Introduction of the Sociology of Law] (1994) 129, 145–147. See also, G. ROSENBERG, The Hollow Hope: Can Courts Bring About Social Change? (2008).

relationship of judicial policy formation to democracy and legal ethics.[20] All of these issues overlap with political process theory's critique of judicial-centered jurisprudence, though their severity is greatly reduced in large-scale damage suits, especially in cases where, as noted above, the actual cause of harm has already been eliminated. The court's decision is limited to what the remedy should be, and it includes a group of lawsuits in which the judiciary can claim high institutional competence.

From the political sector's perspective, this group of lawsuits, where the issues are narrowly focused on remedies, offer relatively easy areas for compromise. In fact, in this group, a cooperative resolution is often achieved through settlements or political agreements after the lawsuits have progressed to some degree. This group of lawsuits can be considered easy cases.

In contrast, same-sex marriage litigation is a typical hard case. As same-sex marriage litigation seeks to force policy changes that affect an important part of the family system, it is impossible to avoid the difficulties inherent in policy-making litigation. Moreover, same-sex marriage litigation is not a clear-cut remedy for the harm, and it is difficult to expect the political side to compromise.

In hard cases, such as same-sex marriage, more persuasive argument is needed to justify the judiciary in daring to act aggressively instead of leaving the decision to politicians.

III. How Should the Judiciary Behave in Hard Cases?

1. Exceptional Cases for Judicial Activism

Under what conditions would judicial intervention be justified in social change lawsuits that are hard cases? One is to focus on the character of the case and identify exceptional cases in which the judiciary should act aggressively. Indeed, theorists committed to political process theory have called for judicial intervention in cases involving prejudice against discrete and insular minorities and in those where it is necessary to maintain the democratic process.

Four of the few Japanese Supreme Court decisions that have declared a law unconstitutional have concerned the right to vote or similar rights of sovereign citizens.[21] This can be explained in terms of preserving the dem-

19 See, S. Tanaka [田中成明], 裁判をめぐる法と政治 [Law and Politics of Trial] (1979).

20 See, T. Akiba [秋葉], 国籍法違憲判決と政策形成型訴訟 [Japanese Nationality Case and Judicial Policymaking], 法社会学 The Sociology of Law 80 (2014) 243, 251.

21 Supreme Court, 14 April 1976, 民集 Minshū 30, 223; Supreme Court, 17 July 1985, 民集 Minshū 39, 1100; Supreme Court, 14 September 2005, 民集 Minshū 59, 2087; Supreme Court, 25 May 2022, 民集 Minshū 76, 711.

ocratic process. However, the 2008 decision[22] that declared unconstitutional the 国籍法 (*Kokuseki hō*, Nationality Act),[23] which did not allow illegitimate children born to foreign mothers to acquire Japanese nationality if they were not acknowledged by their Japanese father before birth, falls under the category of guaranteeing the rights of minority groups.

With regard to the Nationality Act case, the fact that the issue was not unrecognized in the political process – and that, even though it was recognized, no political measures were taken to deal with it – could also support the judiciary's active intervention. The Nationality Act case was filed in 2005 with the active support of the JFC (Japanese-Filipino-children) Network, a non-profit organization established in 1994 to support children born to a Japanese father and Filipino mother. However, even before the lawsuit was filed, the issue was already being debated in the political process. For example, the Nationality Act was amended in 1984 in preparation for Japan's ratification of the Convention on the Elimination of All Forms of Discrimination against Women. During the deliberation process of this amendment, this issue was raised by a member of the Legislative Council of the Ministry of Justice, and organizations involved in family registration submitted a written opinion that the Nationality law should be revised. Therefore, the political process intentionally refrained from amending this article,[24] and the plaintiff's lawyers also felt that the political process could not be counted on; thus, they decided to file a lawsuit.[25]

The granting of nationality is an issue that requires professional and policy judgement and allows for broad legislative discretion. However, the political sector's deliberate avoidance of a resolution can be interpreted as a calculated exclusion of a minority from the political debate, albeit passively.[26] In such cases, active intervention by the judiciary is more likely to be called for.

Same-sex marriage lawsuits are also necessary for safeguarding the rights of sexual minorities and can be viewed similarly. In Japan, the discussion regarding the rights of sexual minorities has been limited until recently, in contrast to the emergence of the sexual minority rights movement in Europe and the United States during the 1970s. One reason for this could be attributed to the presence of Japanese-style homophobia, which differs from that of

22 Supreme Court, 4 June 2008, 民集 Minshū 62, 1367.

23 Law No. 147/1950.

24 AKIBA, *supra* note 20, 268.

25 AKIBA, *supra* note 20, 269.

26 See Bhagwat's argument, which finds the significance of the Equal Protection Clause of the U.S. Constitution in prohibiting the exclusion of hostile minorities from the political debate. See, A. BHAGWAT, The Myth of Rights: The Purpose and Limits of Constitutional Rights (2010) 220.

Western countries.[27] Japanese-style homophobia is a type of oppression in which same-sex attraction is seldom "openly despised or eradicated" but instead exists in a "concealed" form.[28] In contrast, some Western countries had punished same-sex sexual relationships until the 1980s, which ignited the rights movement of sexual minorities. Conversely, throughout Japan's history, instances of penalizing same-sex sexual acts have been few. This is believed to have led to a form of homophobia unique to Japan that has hindered the organization of sexual minorities. Under these circumstances, intervention by the judiciary could be justified in same-sex marriage cases to raise the issue of discrimination against sexual minorities.

Nevertheless, discussion in the political process surrounding same-sex marriage before the lawsuit was filed had been limited, in contrast to the Nationality Act case. Some have argued that the court should intervene at the appropriate time in light of developments in the political debate and legislation.[29] With little discussion to begin with, the court cannot even determine whether it is appropriate to intervene. This may be one reason why the Ōsaka District Court questioned the constitutionality of the issue but ultimately decided that it should be left to the political process to resolve.

Although a bill has yet to be proposed in the Diet, inquiries pertaining to sexual minorities have been posed to the government multiple times since around 2015 through parliamentary questioning. On each occasion, the government has repeatedly replied that "cautious contemplation is necessary." In light of the operation of Japan's parliamentary cabinet system, the plaintiffs argued that "there is no realistic prospect that the Diet, in cooperation with the government, will promptly begin considering the introduction of same-sex marriage in the future."[30] If so, there seems to be little difference between this case and the Nationality Act case.

2. Constitutional Interpretation

Another approach to justifying judicial activism in hard cases is to utilize an interpretive or applicable method that minimizes conflicts with politics. Interpretive methods that show judicial restraint, such as avoiding expansive

27 H. NAKAZATOMI [中里見博], 「同性愛」と憲法 [Homosexuality and Constitution], in: Mitsunari [三成] and others (eds.), 同性愛をめぐる歴史と法 [History and Law concerning on the homosexuality] (2015) 70, 81–83.

28 K. VINCENT [キースヴィンセント]/T. KAZAMA [風間孝]/K. KAWAGUCHI [河口和也], ゲイスタディーズ [Gay studies] (1997) 109–111.

29 J. ABE [阿部純子], 「プロセス」による自由の追求 [Pursuit of Freedom through "Process"] (2019) 431–432.

30 Brief no. 16 submitted by the plaintiffs to the Tōkyō District Court on 2 December 2020, at 19.

constitutional interpretations or avoiding constitutional judgement per se, are one of these devices. However, I would refer here to Bhagwat's argument, which was influenced by the political process theory of J. H. Ely.[31] As is well known, the Obergefell case, which gave legal recognition to same-sex marriage in the United States, was based on the violation of the right to marry recognized by the 14th Amendment's Due Process Clause and the Equal Protection Clause. Of these, the right to marry appears to be based on substantive rights. However, according to Bhagwat's approach, this case can be read as a remedy for the dysfunction of republicanism or democracy. This is because the lack of recognition of marriage as the foundation of society leaves no hope for choice based on individual autonomy and consequently no guarantee of participation in the legitimate political process.[32]

A reading of the Obergefell decision will not be discussed in this article. It is important to point out here that an approach that appeals to equality or individual autonomy is more compatible with process theory than one that appeals to substantive rights. This has implications for how the judiciary should behave in hard cases.

IV. Constitutional Interpretation in Same-Sex Marriage Cases

1. Four Types of Approaches to Same-Sex Marriage

The constitutionality of legal marriage being limited to opposite-sex relationships is particularly problematic with regard to three articles of the Japanese Constitution: Arts. 13, 14, and 24. In the aforementioned lawsuits, each of these articles was cited as a basis for claiming unconstitutionality.

Art. 13 establishes "the right of the people to life, liberty, and the pursuit of happiness." This article has been used in the past as the foundation for new rights not enumerated in the Constitution, including privacy and the right to self-determination. Consequently, the first approach is to seek the "right to marry" based on Art. 13. This approach can be characterized as appealing to substantive rights.

Art. 14 para. 1 guarantees equal treatment under the law. Although the lack of intensive constitutional review of equality clauses in past legal cases is an issue,[33] a possible argument is that the different treatment of individuals based on their sexual orientation cannot be justified.

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31 BHAGWAT, *supra* note 26. In Japan, Junko Abe provided a detailed reading of Bhagwat's book. ABE, *supra* note 29.

32 ABE, *supra* note 29, 442, 444.

33 In general, Japanese courts do not use the strict scrutiny test to review laws that utilize classifications based on specific classifications, as is the case in the United

Art. 24 pertains to marriage and family. Para. 1 holds that marriage shall be based solely on the consent of both sexes and is understood to guarantee the freedom to marry. Para. 2 states that the laws on marriage and family should be based on the dignity of the individual and the essential equality of the two sexes. However, historically, both academics and practitioners have thought that this provision cannot be relevant in a meaningful way. Issues such as the legal age of marriage and the prohibition period on remarriage have been considered under Art. 14 para. 1 and Art. 13. The interpretation of Art. 24 has never been disputed in courts. The Supreme Court first discussed the scope of Art. 24 guarantees in 2015,[34] arguing that Art. 24 para. 2 leaves "the establishment of the specific systems for the matters concerning marriage and family […] primarily to the Diet's reasonable legislative discretion" and defined the limits of the Diet's discretion by indicating the requirement of "individual dignity and the essential equality of the two sexes."

Two approaches are available according to Art. 24: one is based on Art. 24 para. 1 and affirms the freedom to marry. This has been generally understood to prohibit anything other than the consent of both parties – specifically, that of the head of the household, which was required under the former Civil Code as a requirement for marriage. This approach interprets the "freedom to marry" expansively and asserts that the Civil Code's requirement of heterosexual couples for marriage limits this freedom.

The other is to appeal to Art. 24 para. 2's reference to "the dignity of the individual" as a limit to legislative discretion using the Supreme Court's ruling in 2015. This approach is based on the premise that broad legislative discretion is allowed in family matters and that judicial intervention is justified, in exceptional cases, when it would be detrimental to individual dignity. This approach, which I refer to here as the dignity approach, may also be based on Art. 13, which refers in its first sentence, to "respect as individuals." Traditionally, it has not been common to derive special legal guarantees from this language, but the Defense Lawyers added this argument after the Sapporo District Court decision.

2. Summary of the Court Decisions

A summary of the constitutional arguments in the five decisions is as follows. Claims of substantive rights under Art. 13 and claims of freedom to marry under Art. 24 para. 1 were not recognized by any court; the basis for finding unconstitutionality was Art. 14 or Art. 24 para. 2.

States. However, as discussed below, in certain situations, they may state that they will "deliberately consider" the issue.

34 Supreme Court, 16 December 2015, 民集 Minshū 69, 2586; Supreme Court, 16 December 2015, 民集 Minshū 69, 2427.

a) Substantive rights based on Art. 13

Three district courts, namely Sapporo, Ōsaka, and Fukuoka, have issued judgements of constitutionality concerning the freedom to marry under Art. 13. The plaintiffs in the Tōkyō and Nagoya District Courts did not allege any substantive rights under Art. 13.

The Sapporo District Court stated that marriage is a juridical act that produces complex legal effects related to the status of individuals, making it hard to infer the right to same-sex marriage solely based on an interpretation of Art. 13 of the Constitution. The court explained that this is because, in certain aspects, it may be necessary to recognize that same-sex marriage creates a different legal status from heterosexual marriage. This would presuppose the understanding that marriage is an institution constructed by law. The Ōsaka District Court stated, more directly, that "freedom to marry is a freedom based on the institution of law, not a natural right."

The Fukuoka District Court went even further in its ruling. Unlike the Sapporo and Ōsaka district courts, the Fukuoka District Court affirmed that deciding whether to marry and with whom to marry at one's own will is a personal interest that should be respected for LGBTs as well. However, this interest does not constitute a personal autonomy right to form a family through marriage, which is a constitutional right guaranteed by Art. 13; rather, it implies only a personal moral interest. The court's decision also recognizes marriage as a legally constructed institution, therefore, LGBTs' freedom of marriage and their right of personal autonomy to form a family through marriage cannot go as far as being interpreted to be a constitutional right guaranteed by Art. 13.

b) Substantive rights based on Art. 24 para. 1

All five courts also displayed institution-oriented reasoning in their interpretation of Art. 24 para. 1. They focused on the term "both sexes" in Art. 24 para. 1, and its legislative history, leading them to hold that the term "marriage" in Article 24 refers exclusively to heterosexual marriages, and the right to marry does not apply to same-sex marriages.[35]

The plaintiffs contended that the understanding of "marriage" has evolved due to social changes and other factors; however, this argument was also dismissed by the courts. Three district courts, namely Tōkyō, Nagoya, and Fukuoka, held that it is not possible – at least for the time being – to interpret

35 The courts also denied that the constitution prohibits same-sex marriages. Even Ōsaka District held that it is not enough to say that the word "both sexes" should immediately be interpreted as meaning that the section positively prohibits marriage between persons of the same sex.

same-sex marriage as included in marriage under Art. 24 para. 1. According to the Nagoya District Court, it is still difficult to conclude that eliminating the possibility of opting for an alternative approach to realize the interests of same-sex couples and extending the existing legal marriage system to LGBTs is required by Art. 24 para 1 unambiguously.

c) Equality based on Art. 14

The Sapporo District Court based its judgement of unconstitutionality on Art. 14. The court stated that since the discriminatory treatment was based on sexual orientation, which is not a matter that can be chosen or changed by an individual, it requires careful consideration to determine whether the distinction has a rational basis. Such a reference that the concerned classification is based on something that cannot be changed at one's will is frequently employed by Japanese courts to heighten the level of scrutiny for judicial review. The Sapporo District Court ruled that the ability to enjoy the legal benefits of marriage is a great benefit that should be equally available to all people regardless of their sexual orientation. The legislature did not immediately lack a rational basis for not extending this provision to same-sex couples, but the fact that same-sex couples are denied the legal means to enjoy any of the legal benefits of marriage falls outside of the scope of the legislature's discretionary power, even if the legislature has broad legislative discretion.

Nevertheless, the Ōsaka, Tōkyō, and Fukuoka District Courts, while also referring to the classification, dismissed claims of unconstitutionality based on Art. 14 by plaintiffs. These three courts viewed the inequality as the inability of same-sex couples to use the institution of marriage rather than the lack of benefits associated with marriage. Since marriage under current law is an institution for heterosexuals only, it implies a rationale for distinguishing people based on sexual orientation.

The Nagoya District Court determined that the existing situation was in violation of Art. 14. Compared to the Sapporo District Court, the Nagoya District Court regarded the plaintiffs' Art. 14 concern regarding equality in the legal system pertaining to the family as a matter to be considered under Art. 24 para. 2. As a result, it concluded that it was a breach of not only Art. 24 but also Art. 14.

d) Dignity based on Art. 24 para. 2 or Art. 13

In the Sapporo District Court, the plaintiffs did not make a claim under Art. 24. para. 2; however, the other four courts examined this article. All four courts recognized the existence of the following important personal interests, though they are not constitutional rights: to form a family with a partner,

receive legal protection for living together, and gain social authorization (Tōkyō District Court); to be publicly recognized as a couple in society and be able to live together (Ōsaka District Court); to live together with a sincere intention for the purpose of permanent spiritual and physical union (Nagoya District Court); to determine on one's own whether or not to marry and whom to marry for the purpose of forming a family (Fukuoka District Court). Furthermore, the lack of recognition of same-sex couples as families and the absence of legal standing to enjoy the rights and benefits that come with marriage create a significant disadvantage for them. This infringes upon their individual dignity, which should be respected under Art. 24 para. 2.

The District Courts in Tōkyō, Nagoya, and Fukuoka have determined that same-sex couples were not provided with the necessary framework to obtain these important interests, in breach of Art. 24 para. 2. The Tōkyō and Fukuoka District Court did conclude that the current situation of same-sex couples was unconstitutional; however, they did not go as far as to rule that current laws limiting marriage to heterosexual couples were unconstitutional. The court's respect for legislative discretion is once again evident as alternative methods may alleviate the disadvantages experienced by same-sex couples, rather than simply expanding the institution of marriage.

The Ōsaka District Court acknowledged these problems faced by same-sex couples, but it found no breach of Art. 24 para. 2 because the discussion in the democratic process to address this issue had been inadequate. Though the Osaka District Court's stance differed from that of Tōkyō and Fukuoka District Courts, the disparity in viewpoints seems to be little.

3. Approaches from which the Courts Refrained

The five decisions commonly assumed the existence of broad legislative discretion on matters related to marriage. They stated that thorough judgement is required for matters related to marriage and family, taking into account various social factors such as national tradition and public sentiment, necessitating broad legislative discretion, and that the freedom to marry is based on the system established by the Diet. Therefore, the freedom to marry is only granted within the framework of the current system. This argument has been consistently applied in past Supreme Court decisions related to family matters,[36] resulting in judicial passivism.

It is worth noting that the Supreme Court's 2021 ruling, which rejected the claim that the current Civil Code is unconstitutional for not allowing room for married couples to take different surnames, was followed by a

36 Supreme Court, 16 December 2015, 民集 Minshū 69, 2427.

dissenting opinion by four judges;[37] their conclusion of unconstitutionality was based primarily on one's personal interest in their surname. While the majority opinion viewed the treatment of the surname as part of the system of marriage, the dissent recognized the existence of the personal interest involved in the surname that preceded the system and declared that marriage itself is not a service provided by the State but a human behavior that has been naturally established in society as a combination aimed at the lifetime cohabitation of both parties and recognized in society with a certain form. The dissenting opinion then argued that a system that impairs the freedom to "marry" in that sense is unconstitutional.

Thus, following this dissenting opinion, it would have been possible to reach a conclusion of unconstitutionality in same-sex marriage cases by viewing marriage as a natural act rather than an institution; however, the four courts which decided that the current situation, in which same-sex marriage is not recognized, is not in conformity with the Constitution, did not take this approach. As described below, they took the approach of maintaining the premise that marriage is a legally constructed institution, but limiting the legislative discretion over its institutional design.

Another way that the five courts did not go is to argue that the concept of marriage had changed because of a change in legislative facts. The results of polls conducted by media companies[38] show that, currently, public opinion in Japan regarding same-sex marriage is changing. The plaintiffs argued that the change in the popular concept of marriage entailed a new substantive right to same-sex marriage. However, courts held that the concept of marriage had never changed even considering these facts.

The courts have used legislative facts more modestly, relying on a change in legislative facts to conclude unconstitutionality on only two occasions. The first is the change in medical and scientific knowledge of same-sex attraction, which was considered a mental disorder until around the 1980s and is now recognized as a kind of inherent characteristic of a person that is determined irrespective of one's own will, as in the case of sex, race, and so on. This change in medical findings was commonly recognized by five courts and was used effectively to argue for equality violations in two courts. The other is the situation of control of the Diet's discretion under Art. 24 para. 2, which is discussed in the next section. The courts, in both ways, did not use legislative facts to make their own policy

37 Supreme Court, 23 June 2021, 集民 Shūmin 266, 1.

38 E.g., K. ISODA, Same-sex marriage "should be recognized by law," Asahi Shinbun, 21 February 2023, 3; "Same-sex marriage is 'unconstitutional'", Nihon Keizai Shinbun, 31 May 2023, 39.

judgements on behalf of the legislature, but to determine whether legislative discretion has been reasonably exercised.

4. Approaches Adopted by the Courts

What approach did the four courts of the same-sex marriage cases that found the status quo unconstitutional employ? The Sapporo District Court concluded that the matter was unconstitutional through the interpretation of Art. 14, which was obtained from prior precedents and theories, thereby intensifying the scrutiny on constitutional grounds. When assessing whether a violation of the equality principle has occurred, the court will consider the basis of the classification. If this is based on a characteristic that cannot be altered by an individual's own will, as enumerated in Art. 14, then the court must scrutinize its constitutionality more strictly.

The Supreme Court partially relied on this interpretation of Art. 14 in its 2008 ruling on the Nationality Act. In this case, the Supreme Court declared that the acquisition of the status of a child born in wedlock due to his or her parents' marriage is determined by an act relating to the parents' personal status, which cannot be influenced by the child's own intentions or efforts. In addition, the court emphasized the need to deliberately consider any reasonable grounds for distinguishing the requirements for acquiring Japanese nationality based on such matters. Although Japanese courts interpret the equality clause flexibly depending on the case, this ruling is understood to indicate one of the requirements for a strict screening of the clause. By stating that the exceptional conditions set forth by this precedent were met, the Sapporo District Court allowed for a more stringent review.

The other three district courts utilized the Supreme Court's 2015 ruling on the remarriage prohibition period, which held that Art. 24 para. 2 describes the limits of legislative discretion. As aforementioned, the Supreme Court's 2015 ruling indicated that a statute may be unconstitutional as a deviation or abuse of legislative discretion, even if does not violate Arts. 13 or 14, if it undermines "individual dignity and the essential equality of both sexes."

Three district courts emphasized original intent in interpreting the term "marriage" in Art. 24 para. 1 and held that the "right to marry" could not encompass same-sex marriages. However, they recognized that forming one's own family or receiving public approval for intimate bonding is of critical personal interest to all people regardless of their sexual orientation and is separate from the "right to marry." They argued that the absence of a legal system and the denial of access to these interests for LGBTs violated individual dignity and was unconstitutional.

These three courts relied on the legislative fact of social change to assess whether legislative discretion had been exceeded. The legislature is primar-

ily responsible for amending or creating laws to accommodate social changes; thus, the courts examined only whether its legislative discretion was abused in light of the new legislative facts.

In summary, the courts refrained from deriving the substantive right of same-sex marriage directly from the right of self-determination in Art. 13 or Art. 24 para. 1. Instead, they based their constitutional judgements on a theory narrowing the scope of legislative discretion. As a result, the ruling only deemed it unconstitutional to deny any and all legal protection to same-sex couples, leaving wide room for legislative action. Although these decisions appear to be extremely judicially positive when one looks at their conclusions, when one looks at the method of interpretation that leads to their conclusions, one can see that the courts are careful not to unduly interfere with the policy-making of the legislative branch.

5. Analysis

These courts' attitudes are met with some reluctance. When the same-sex marriage cases were filed in 2019, the core of the plaintiffs' claim was the freedom to marry under Art. 24 para. 1 and equality under Art. 14. In the court claim, the term "respect for the individual" appeared only in the context of a call for the recognition of the diversity of sexual orientations, and "dignity" was mentioned only in passages that laid the foundation for the egregiousness of the violation of Art. 14.[39] The parties who sought the right to marry were undeniably disappointed because the courts denied them this right.

However, in policy-making litigation, the court's ability to make judgements and respect for democracy is always in question. The courts' creation of substantive rights increases the tension in both aspects, and this is especially true in the case of rights that are deeply tied to institutions, such as marriage. Therefore, the fact that the courts struck a balance with democracy by taking the path of contracting legislative discretion rather than taking the approach of appealing to substantive rights can be positively evaluated. This attitude of the courts is close to the desirable judicial attitude based on political process theory.

Since same-sex marriage is a matter that involves guaranteeing the rights of minorities, who are always exposed to the danger of underrepresentation, it is important to build a logic that supports the court's active intervention more easily. Developing political process theory in Japan, in the current context, would also provide the courts with a time and method to act more proactively.

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39 Complaint filed with Tōkyō District Court on February 14, 2019.

CPPT & Human Rights from Japanese Experience

Hajime YAMAMOTO*

I. INTRODUCTION

From our organizers, the theme "CPPT & Human rights" was given to me. Due to constraints of my knowledge on comparative constitutional law, I apologize that I will be reflecting on the theme only from the Japanese constitutional perspective, based on its own experience.

I am convinced that Rosalind Dixon's latest and fascinating book, *Responsive Judicial Review,*[1] constitutes an epoch-making milestone for the further development of judicial review theory around the world. I share with the author the basic idea that "responsive" or "responsiveness" is an indispensable and crucial concept for any contemporary democratic constitutional project. It is particularly so when it works to ameliorate our living society to make it worth protecting and developing, from constitutional law perspectives, for the future.

Obviously, one of the most important features of this book is that, using the term "constitutional court," it attempts to integrate numerous constitutional cases in various jurisdictions around the world whose legal traditions are both Anglo-American and Civil Law. Furthermore, this book is a very challenging one: while it presents a comprehensive framework of every important aspect of the judicial review system, such as its justification, role

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The links given were last checked on 2 January 2024.

1 R. DIXON, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023).

and function, dysfunction, and so on, it is perfectly open to further, rich development. In fact, the author remarks as follows: "for any small-*n* qualitative work in the field, we should be appropriately provisional and tentative about the conclusions reached, and open to those conclusions being revisited considering the work of other scholars on a broader range of jurisdictions."[2] Thus, Dixon is welcoming "revision and refinement by others"[3] and emphasizes the importance of "dialogue and collaboration."[4] That's why we are here!

So, as a Japanese constitutional scholar and as a part of the "dialogue and collaboration" to be realized, I would like to offer some constitutional materials to consider the significance of *Responsive Judicial Review* in relation to the protection of human rights in contemporary Japanese society.

II. "DISCRETE AND INSULAR MINORITY" IN ELY'S THEORY AND NON-CITIZENS

Theoretically, Dixon's book is based on a very persuasive well-balanced position between trust in the good functions of democracy and heeding caution about its deteriorations caused by various reasons, through adopting a diversified analysis of its operations. It stands in opposition to the formalistic approach, and is "a values-based and substantive approach"[5] to these questions. On this occasion, I will discuss the problem regarding the protection of human rights in Japan in relation to the practice of judicial review there. Ely's political process theory emphasized the mission of constitutional judges to protect "discrete and insular minorities."[6] In Japan, as well as in other contemporary societies, there live many minorities, such as ethnic, religious, and various sexual minorities, and incidents of discrimination occur against them repeatedly.

Whereas it seems very natural to count non-citizens as a "discrete and insular minority," it was slightly surprising that the book made only a few mentions of issues concerning non-citizens. It is worth bringing to attention the Canadian Supreme Court decisions that invoked Ely's political process theory for their justification from this point of view to protect non-citizens.

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2 DIXON, *supra* note 1, 17.
3 DIXON, *supra* note 1, 17.
4 DIXON, *supra* note 1, 17.
5 DIXON, *supra* note 1, at 135.
6 J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980), especially, ch. 6, 135 ff.

In the case of *Andrews v. Law Society of British Columbia*[7] in 1989, the Law Society of British Columbia did not admit a Canadian permanent resident non-citizen to the British Columbia bar although he met all the other requirements for his admission. Section 15 (1) of the *Canadian Charter of Rights and Freedoms* provides that

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The Supreme Court of Canada declared the non-admission by the Law Society as a violation of the Charter 15(1). In fact, the SCC explained that "The grounds of discrimination enumerated in section 15(1) are not exhaustive." Invoking expressly Ely's *Democracy and Distrust*, Justice Bertha Wilson mentioned "non-citizens permanently resident in Canada forming the kind of 'discrete and insular minority'" formulated in *United States v. Carolene Products Co,* 1938 footnote four, and wrote

"non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'."

In this way, non-citizens must be considered as one of the most important "discrete and insular minorities" in contemporary democratic society.

III. Non-citizens in Japanese Society as a "Discrete and Insular Minority" and Japanese Constitutional Law

Like in many other developed countries, the protection of the human rights of non-citizens is a very important issue in Japanese society. The number of non-citizens living in Japan has increased considerably from the late 1980s. In considering the protection of human rights for non-citizens in Japan, there is an intriguing historical fact that warrants an exploration. In the draft of the Constitution of Japan[8] that was presented to the Japanese government on 13 February 1946 by the General Headquarters, Supreme Commander for the Allied Powers, there were two articles related to the guarantee of equality for non-citizens: "All natural persons are equal before

7 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. cf. G. T. Sigalet, Dialogue and distrust: John Hart Ely and the Canadian Charter, International Journal of Constitutional Law 19 (2021) 569.

8 Constitution of Japan, *https://www.ndl.go.jp/constitution/shiryo/03/076a_e/076a_etx.html*.

the law" (Art. XIII), and "Aliens shall be entitled to the equal protection of law" (Art. XVI). However, the Japanese government did not wish to treat the colonized Korean and Taiwanese peoples (at that time, they were Japanese nationals but became non-citizens after the decolonization of the Korean Peninsula through independence and the return of Taiwan to the Chinese government) who lived in Japan equally, and finally succeeded in eliminating these articles. Due to the "hard work" of Japanese conservative bureaucrats in their negotiations with GHQ, the *Draft Constitution of Japan accepted by the Cabinet*[9] publicly announced on March 6 had succeeded in removing the provision for equal protection of non-citizens. In fact, this provision did not see a revival during the subsequent deliberations in the constitutional amendment process.

Art. 14 of the current Constitution of Japan established on 3 November 1946 provides that "all nationals [すべて国民] are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." Accordingly, there is no mention of non-citizens in the Constitution of Japan. Nowadays, both Japanese majoritarian jurisprudence[10] and doctrines[11] adopt the so-called "nature-theory [性質説]" to clarify the scope and intensity of the guarantee of non-citizens' constitutional rights. This theory asserts that constitutional rights guaranteed by the Constitution should be granted to non-citizens, including those who entered illegally, to the extent that the nature of each constitutional right permits. According to this theory, for instance, it is constitutionally justified that non-citizens do not have the rights to vote and to engage in public services that impose duties on the public or are involved in important policy-making service, considering the principle of popular sovereignty on the ground that popular sovereignty should be understood as self-governance by those holding national citizenship. In contrast, freedom of thought and conscience, freedom of expression, and freedom of religion of non-citizens should be guaranteed without reservation, together with those of Japanese citizens.

There are two different types of serious human rights issues in such a constitutional framework. One is very particular to Japanese contemporary society and the other is derived from the Japanese immigration control system.

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9 Draft Constitution of Japan accepted by the Cabinet on 6 March 1946, *https://www.ndl.go.jp/constitution/shiryo/03/093a_e/093a_etx.html.*

10 マクリーン事件 [*McLean* case]: Supreme Court, 4 October 1978, 民集 Minshū 32, 1223.

11 E.g. N. ASHIBE [芦部信喜], 憲法（第 8 版） [Constitutional Law, 8th ed.] (2023) 94, K. SATO [佐藤幸治], 日本国憲法論（第 2 版） [Textbook on the Constitution of Japan, 2nd ed.] (2020) 163, Y. WATANABE and others [渡辺康行他], 憲法 I（第 2 版） [Constitutional Law, 2nd ed.] (2023) 37–38.

IV. Human Rights Issues of Non-citizens as a Particular Problem in Contemporary Japanese Society

Traditionally, Japan has been an emigration country; it is different from countries such as Australia, the United States, and Canada, which have all been formed through immigration. Therefore, Japanese nationality law adopts the principle of *jus sanguinis*.[12] This means that descendants of non-citizens will never obtain Japanese citizenship even if they were born and grew up in Japan unless they apply for permission to naturalize. The principle of *jus sanguinis* has been maintained without major political and social opposition. In addition, another important aspect is as follows: the Nationality Law prohibits the retention of multiple nationalities. Specifically, it states that "A Japanese national shall lose Japanese nationality when he or she acquires a foreign nationality by his or her own choice" (Art. 11, para. 1), and "A Japanese national having a foreign nationality shall lose Japanese nationality if he or she chooses the foreign nationality in accordance with the laws of the foreign country concerned" (Art. 11, para. 2). To eliminate dual nationality, the law requires the government to issue a "by written notice" to individuals with dual nationality, prompting them to choose whether to maintain Japanese nationality or renounce it (Art. 15, para. 1).[13]

In fact, such a principle causes serious problems for Korean residents in Japan (so called *Zainichi* [在日]). They are Koreans who were forcibly recruited and sent to Japan during the Second World War, as well as their

12 Cf. Art. 2 of Nationality Law (国籍法 *Kokusekihō*) No. 147/1950.

13 In practice, the number of individuals holding dual nationality has been increasing in Japan and various other countries, with a growing number of nations accepting this situation. Against this backdrop, a lawsuit challenging the constitutionality of relevant articles of the Nationality Law have been filed, invoking Arts. 13, 22 para. 1, and 10 of the Constitution, claiming that these provisions infringe upon the "freedom not to renounce Japanese nationality" or the "right to maintain Japanese nationality" for Japanese nationals who wish to hold or acquire another nationality. However, the Tokyo High Court ruled the provisions as constitutional (Tōkyō High Court, 21 February 2023, *https://www.courts.go.jp/app/files/hanrei_jp/937/091937_hanrei.pdf* (in Japanese)), and subsequently, the decision became final after the dismissal of an appeal on 28 September of the same year by the Supreme Court *https://news.yahoo.co.jp/articles/796a955aabc3d51e73e099152b2423d75cd3bc33*. The Tōkyō High Court emphasized the wide legislative discretion entrusted to the National Diet by Art. 10 of the Constitution, stating that "in establishing requirements for the acquisition or loss of nationality, it is necessary to consider various factors, including the historical circumstances, traditions, political, social, and economic conditions of each country". The court affirmed the legitimacy of the legislative purpose, reflecting "the principle of sole nationality" in international law, which had been traditionally dominant, aiming to prevent the occurrence of dual nationality, and upheld the constitutionality of the current relevant nationality law provisions.

descendants. In 2022, there were about 290,000 Koreans – "Special permanent residents" according to the Immigration Law – living in Japan, representing 10% of the foreign population in Japan. On 2 May 1947, the day before the current Constitution went into effect, an edict on alien registration counted Korean residents in Japan as non-citizens for the time being. And in 1952, by an administrative circular, just before the San Francisco Peace Treaty came into force restoring the sovereignty of the Japanese state, the former colonized peoples immediately lost their Japanese citizenship definitively without any confirmation of the presence or absence of their own intentions. This led to their complete loss of political rights. Thus, because of their lack of Japanese citizenship, they constitute a large group of non-citizens. Moreover, they still retain more or less a Korean ethnicity despite the growth of Japanese naturalized people and their increasing assimilation into Japanese society. There is still a traditional Japanese discriminatory consciousness towards these Korean residents, and the discriminatory nature of this behavior persists in everyday life. Korean residents should qualify as a "discrete and insular minority."

Furthermore, there is an assumption in the Japanese Constitution that citizens are homogenous individuals, which is also part of the broader framework of thought in Japanese constitutional law scholarship. Therefore, while initially showing the possibility of recognizing a plurality of peoples, as evident in the foundational works of two leading constitutional scholars of the post-war period, Toshiyoshi Miyazawa and Shiro Kiyomiya,[14] due to the aforementioned assumption constitutional law later became dominated by a binary scheme of Japanese citizens/non-citizens = foreigners. As a result, Japan's past as imperial colonizers was erased from constitutional discourse. Consequently, despite the evident and significant human rights issues faced by people from the former colonies (外地 [overseas territories]) who had lost their citizenship but continued to reside in Japan (外地人 [former residents of overseas territories]) as well as their descendants born in Japan, interest in these issues in constitutional scholarship remained subdued.[15]

14 Cf. T. MIYAZAWA [宮沢], 憲法II(新版) [Constitutional Law II, new ed.] (1974) 313; S. KIYOMIYA [清宮], 憲法I [Constitutional Law I], (3rd ed., 1979) 125–126.

15 Jun FURUKAWA argued, considering such historical context, that repositioning the former "residents of overseas territories" not as general foreigners but as "potential Japanese nationals" is to be required. He contended that concerning post-war compensation issues, compensation for these former residents of overseas territories should be clearly distinguished from compensation for people in China and the former Allied nations. Regarding the debate on political participation rights for settled non-citizen residents, he asserted that the political participation rights of former residents of "overseas territories" should be approached theoretically and policy-

V. HUMAN RIGHTS ISSUES DERIVED FROM JAPANESE IMMIGRATION CONTROL SYSTEM

Based on the abovementioned "nature-theory," Japanese jurisprudence and majoritarian constitutional doctrine assert that, whereas the constitutional right to enter Japanese territory and the right to stay there are fully granted to Japanese citizens, non- citizens do not have such rights. Art. 22, paragraph 1 of the Constitution of Japan provides that "Every person shall have freedom to choose and change his residence […] to the extent that it does not interfere with the public welfare." The Supreme Court of Japan held in the *McLean* case[16] in 1978 that this paragraph "merely provides for the guarantee of freedom of residence and movement within Japan and has nothing to do with the entry of a non-citizen into Japan. This is based upon the same view that under customary international law, the state has no duty of accepting a non-citizen, and unless there is a specific treaty, the state may freely decide whether to accept a non-citizen into the country, and if a non-citizen is to be accepted, on what condition this should be allowed. Therefore, it goes without saying that non-citizens are not guaranteed the right to enter Japan, but also are not guaranteed the right to stay or continue to stay in Japan as the appellant argues."

A significant issue in Japanese judicial precedent is that the framework established in the *McLean* case decision of the Supreme Court continues to serve as the fundamental idea for judicial control over the immigration system for non-citizens.[17] This decision rendered by the Supreme Court is

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wise not as a general issue for settled non-citizen residents but as an issue related to the political participation rights of potential "Japanese nationals". J. FURUKAWA [古川], 〔高見勝利との対談〕「外地人」とは何か [Dialogue with K. TAKAMI [高見]: What is the "Residents of Overseas Territories"?], in: Ōishi and others (eds.), 対談集 憲法史の面白さ [Collection of Dialogues: The Fascination of Constitutional History] (1998) 240.

16 *McLean* case, *supra* note 10.

17 Cf. T. IZUMI [泉徳治], マクリーン判決の間違い箇所 [Mistakes in McLean Decision], 判例時報 Hanrei Jihō 2434 (2020), 133; A. KONDŌ [近藤敦], マクリーン判決を超えて [Beyond the McLean Decision], 法律時報 Hōritsu Jihō, 93:7 (2021) 54; A. KONDŌ 近藤敦, マクリーン判決の抜本的な見直し [A fundamental reconsideration of McLean Decision], 名城法学 Meijō Hōgaku, 70 (2021) 1; K. OBATA [小畑郁], 戦後日本外国人法史のなかのマクリーン「判例」[McLean 'Precedent' in the History of Post-War Japanese Non-citizen Law] 法律時報 Hōritsu Jihō, 93:8 (2021) 81; Y. NEGISHI [根岸陽太], マクリーン判例を支える信念体系 [Belief System Supporting the McLean Decision], エトランデュテ Étrangeté 4 (2022) 103; Y. NEGISH [根岸陽太], 人権条約の枠内に留まる外国人在留制度 [Residence Systems for Foreigners within the Framework of Human Rights Treaties] エトランデュテ Étrangeté 4 (2022) 139. M. SAITŌ [齊藤正彰] present a different perspective from the above-cited recent critical readings of *McLean* case decision, offering alternative view-

based on a historical approach to state sovereignty on immigration control. However, it is noteworthy that until the 19th century, immigration control was not considered to be absolute. Moreover, customary international law has developed from the time of the McLean case, because one can say for example that the principle of non-refoulement is integrated into today's customary international law. Furthermore, Japan ratified the "Agreement between Japan and the Republic of Korea Concerning the Legal Status and Treatment of the People of the Republic of Korea Residing in Japan" in 1965 as a "specific treaty" referred to in the *McLean Case* decision. Their legal status as special permanent residents in Japan are guaranteed to a certain extent. While Japan has adopted important international human rights treaties since the *McLean Case* decision, such as the International Covenant on Civil and Political Rights (ratified by Japan in 1979), International Covenant on Economic, Social and Cultural Rights (ratified by Japan in 1979), Convention on the Rights of the Child (1994), Convention on the Elimination of All Forms of Discrimination Against Women (1985), International Convention on the Elimination of All Forms of Racial Discrimination (1995), Convention on the Rights of Persons with Disabilities (2014), United Nations Convention Against Torture (1999), and so on, recent jurisprudence still follows an important part of the *McLean* decision, which is as follows:

"Guarantee of fundamental rights to non-citizens by the Constitution should be understood to be granted only within the scope of such a system of the sojourn of non-citizens and does not extend so far as to bind the exercise of discretionary power of the state […]".

It should be confirmed that Japanese authorities owe a duty to respect *today's* customary international law and relevant international treaties in exercising its discretionary power concerning cases related to non-citizens' entry and stay in Japan, in addition to *traditionally established* customary international law. For instance, when the Minister of Justice exercises his or her discretionary power to give "Special Permission to Stay in Japan" to an illegal immigrant, he or she must take into consideration the forementioned treaties and opinions and recommendations issued by these treaty bodies. However, in general, regrettably, Japanese judges are reluctant to invoke or refer to such international human rights norms and standards and tend to maintain the constitutional framework of the *McLean* case even now. In addition, the Japanese detention and deportation procedures for non-

points. cf. M. SAITŌ [齊藤正彰], 多層的立憲主義と日本国憲法 [Multilayered Constitutionalism and the Constitution of Japan] (2022) 220.

citizens are very problematic in light of the due process of law clause in the Japanese Constitution, and especially so in long-term detention cases.

Based on such discussions, a recent influential constitutional doctrine argues that it is more appropriate to consider that "the discretion related to the residency control system is constrained by international human rights treaties, rather than considering the international human rights treaties within the framework of the residency control system."[18] Additionally, the nature-theory that presupposes the framework of a political community formed by national citizenship holders has faced criticism, stating that it only serves the function of justifying various unfavorable treatments of actual non-citizens.[19]

VI. Japanese 'Homogeneous' Society and the Judiciary

One cannot say that Japanese society is very sensitive to the protection of minorities' rights because Japanese society is a relatively homogeneous society compared with other industrialized countries. It is not rare that discriminatory acts, including hate speech, occur against Asian non-citizens. In addition, Japanese financial circles are interested only in economic interests when they face non-citizen issues. It means that they consider foreign labor essential and are proactive in welcoming foreign workers to Japan. However, there is a tendency not to pay sufficient attention to human rights issues of these foreign workers during their stay.

As Japan is not an immigration country, Japanese people generally tend to be quite indifferent to the human rights conditions of non-citizens, and there are xenophobic people as well, as in other countries. It is sometimes reported that the treatment of non-citizens in Japanese immigration facilities has many issues, including alleged torture and death cases. A recent tragedy is the Wisuma Incident. A Sri Lankan national in the custody of the Nagoya Immigration Bureau died on 6 March 2021. It was reported that she died despite having repeatedly complained about her deteriorating health without receiving appropriate medical treatment. Japanese prosecution authorities have denied suspicion of criminal responsibility for personnel associated with the Immigration Bureau in the case. This incident has raised a lot of questions about the entire structure of the current Japanese immigration control system.

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18 M. Sogabe [曽我部], 外国人の基本権保障のあり方 [Protection of Fundamental Rights for Non-citizens], 法学教室 Hōgaku Kyōshitsu 483 (2020) 76.

19 K. Yanai [柳井], 外国人の人権論 [Human Rights Theory for Non-citizens], in: Aikyō [愛敬] (ed.), 講座　人権論の再定位 2 人権の主体 [Lectures: Re-positioning of Human Rights Theory 2: Subjects of Human Rights] (2010) 158.

Politically, the major Japanese conservative party, the Liberal Democratic Party (LDP), has been the ruling party for almost 65 years since 1955 and has succeeded in dominating Japanese politics. Hereditary politicians in this conservative party tend to occupy important political posts, including the post of Prime Minister. In the LDP, extreme-right wing groups are quite influential in policy making, and they are very hostile to the protection of human rights in Japan, based on narrow and exclusionary nationalistic sentiments and ideology. The LDP has firmly opposed granting the right to vote at the local level to non-citizens, although many Korean residents in Japan wish to have it.

Furthermore, it is well known that the Japanese judiciary has not been active in adjudging any state act unconstitutional. In fact, since 1947, only 12 stipulations have been struck down by the Supreme Court of Japan as unconstitutional and lower courts tend to follow this stance, though with some exceptions.[20] In such circumstances, it is probably inappropriate to have trust in legislative power and expect a "reasonable democratic disagreement" in it. Professor Dixon wrote that "In some cases, commitments to majority rule may appropriately give way to other conflicting constitutional norms and values such as the rule of law, or the redress of historical disadvantage or injustice."[21] In the Japanese case, commitment to majority rule should give way to international human rights norms and values. As Dixon suggests, it is certain that "historical vulnerability will be a product of a group's social, economic, and political power; and these may vary over time, or point in different directions."[22] Therefore, one must always review the "vulnerability" of a given group in a society to make judicial review appropriately responsive.

How about the concern over democratic backlash if Japanese judicial review intervenes much more actively than now to protect non-citizens' human rights and to guarantee their constitutional rights? It is true that the Supreme Court experienced a rather harsh backlash around 1970, provoked by the political branches, when it rendered a series of constitutional judgements favorable to the protection of the freedom of political expression and that of labor union activities of government employees. At that time, most of them were supporting the Japan Socialist Party, the largest political rival of the LDP. The LDP criticized these judgments and succeeded in having

20 As part of my analysis on this matter, see the following article: H. YAMAMOTO [山元], 司法制度改革と憲法学 [Judicial System Reform and Constitutional scholarship], in: Suami [須網] (ed.), 平成司法改革の研究 [Studies on Heisei Judicial Reform] (2022) 67.

21 DIXON, *supra* note 1, 64.

22 DIXON, *supra* note 1, 135.

the majority of Supreme Court justices radically change the political direction of constitutional jurisprudence in 1973 (Zen-Nōrin Police Duties Execution Law Case)[23]. Such designs were institutionally possible because the Cabinet has the constitutional authority to nominate Supreme Court justices without any intervention from other institutions, political or judicial.[24] Therefore, one can only wonder whether a serious backlash would occur from political circles or from public opinion in Japan today if the Supreme Court of Japan were to act actively for ameliorations of human rights conditions. I think, in general, controversies concerning human rights issues of non-citizens in Japan are not as grounded in the logic of partisan politics than those of the abovementioned issues of protection of government employees' constitutional rights. On this point, human rights issues of non-citizens seem quite similar to the issue of the constitutional protection of same-sex marriage, although one has to remark that some issues, for example the deportation problem of non-citizens and that of the right to vote at the local level of non-citizens, are very controversial subjects between the ruling coalition and opposition parties.

What is noteworthy on this matter is the most recent judgment of unconstitutionality rendered by the Supreme Court regarding the law on special provisions for the treatment of gender identity disorder in Japan.[25] For individuals with gender identity disorder who meet specific criteria, a family court judgment can change their legally recognized gender and gender entry in the family register. One of the criteria was the requirement of "being without reproductive glands or being in a state of permanently lacking reproductive gland function." On October 25, 2023, by reversing the previous Supreme Court precedent in 2019, the Supreme Court judged that this requirement is unconstitutional and invalid under Art. 13 of the Constitu-

23 全農林警職法事件 [Zen Nōrin Police Duties Execution Law Case]: Supreme Court, 25 April 1973,刑集 Keishū 27, 547.

24 However, the following should not be overlooked: Art. 79, para. 2 and 3 provide that "The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter" and "In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed". While there is such a constitutional mechanism for the citizens to directly check nominations by the Cabinet after the appointment, public interest is low, and there has been no Supreme Court justice removed from office so far.

25 性同一性障害者の性別の取扱いの特例に関する法律 *Sei dōitsusei shōgaisha no seibetsu no toriatsukai no tokurei ni kansuru hōritsu* [Law on special provisions for the treatment of gender identity disorder], Law No. 111/2003.

tion.[26] It had compelled individuals who do not require reproductive gland removal surgery to either forfeit the freedom from physical intrusion by accepting intense physical intrusion or to relinquish the crucial legal benefit of having their legally recognized gender aligned with their gender identity. Considering social changes and evolving medical knowledge, the justices of the Court judged unanimously that the constraints on the freedom from physical intrusion guaranteed by Art. 13 of the Constitution[27] were excessive in this context. Generally, this article is interpreted as a provision that comprehensively and supplementally guarantees various significant rights not explicitly protected by other articles.[28] The LDP, as a party, has not issued any criticism in response to this verdict. Therefore, there is a possibility that backlash against this judgment based on political motives may not emerge, at least regarding issues related to sexual diversity.

VII. Conclusion

If the Responsive Judicial Review theory desires to be truly responsive from the perspective of Japanese contemporary society, non-citizens should be clearly recognized as a "discrete and insular minority" and a strong form of judicial review should be applied in cases where the scope of protection of non-citizens' fundamental rights are put into question. I hope that Responsive Judicial Review theory will develop further by incorporating rich constitutional experiences worldwide, including the Japanese one.

26 *https://www.courts.go.jp/app/files/hanrei_jp/527/092527_hanrei.pdf* (in Japanese).

27 It provides that "Their[all of the people] right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."

28 N. Ashibe [芦部信喜], 憲法（第 8 版）[Constitutional Law, 8th ed.] (2023) 122, K. Sato [佐藤幸治], 日本国憲法論（第 2 版）[Textbook on the Constitution of Japan, 2nd ed.]（2020 年）196.

Comparative Representation-Reinforcement in Japan

Rosalind DIXON

I. INTRODUCTION

In 1990, Professor Shigenori Matsui published an authoritative Japanese translation of John Hart Ely's *Democracy and Distrust*.[1] Matsui was uniquely well placed to 'translate' Ely's ideas for a Japanese audience: not only is he a leading Japanese public law scholar. He completed his JSD under Ely, and his doctoral work focused on the relevance of Elyian ideas for Japan.[2] He also presented a compelling account of why Ely had relevance for Japan: Japan is a consolidated democracy with a written constitution, which includes strong protections for rights and the separation of powers.[3] It also has a long tradition of independent judicial review, the appropriate strength and scope of which is often debated.[4]

There are also aspects of the Japanese Supreme Court's jurisprudence that support the relevance of Ely-style political process ideas in Japan. The Supreme Court has issued several important opinions regulating electoral districting and expanding rights of access to the franchise.[5]

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1 K. SATO/S. MATSUI. Translation: J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980).

2 S. MATSUI, Judicial Review v. Democracy: An Inquiry into the Nature and Limits of Legitimate Constitutional Interpretation by the Judiciary (JSD Thesis, 1986). See S. MATSUI, John Hart Ely as a Constitutional Theorist: On Introducing Ely to Japan, In this issue, p. 11.

3 See The Constitution of Japan.

4 See, e.g., J. SATOH, Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight, Layola of Los Angeles Law Review 41 (2008) 603; N. KAWAGISHI, The Birth of Judicial Review in Japan, International Journal of Constitutional Law 5 (2007) 308.

5 Supreme Court, 24 May 1978, 判例時報 Hanrei Jihō 27, 888; H. ITOH, Judicial Review and Judicial Activism in Japan, Law and Contemporary Problems 53 (1990) 169.

Matsui's ideas have also generated rich debate over the last 30 years. Another leading Japanese constitutional expert, Professor Yasuo Hasebe, famously noted the criticisms of Ely's theory in the US and questioned whether Ely provided an adequately nuanced – or thick – account of democracy to offer a normatively attractive guide to the scope and intensity of judicial review in either the US *or* Japan.[6] Hasebe and other leading Japanese scholars have likewise questioned the degree to which Ely's ideas 'fit' within a Japanese constitutional context.[7]

In this short essay, I turn to a related question: whether more modern forms of *comparative* political process theory (CPPT) or 'representation-reinforcing' theory (CRRT) offer useful, and relevant, insights for Japanese constitutional jurisprudence. The term 'comparative political process theory' was first coined by Professor Stephen Gardbaum in his 2020 article by that name in the *International Journal of Constitutional Law.*[8] In recent work, I have identified the idea of *comparative representation-reinforcement* as another way of conveying neo-Elyian ideas about the capacity of courts worldwide to protect and promote democratic constitutional processes.[9]

Both CPPT and CRRT have important normative advantages compared to Ely's original process-based theory. They reject a sharp distinction between constitutional procedure and substance. They acknowledge the scope for reasonable disagreement about what counts as a "discrete and insular minority" in a diverse and pluralist society. And they respond more fully to the variety of current threats to democracy, including the threats of democratic backsliding or "abusive" constitutional change.[10]

CRRT approaches are also part of a growing sub-field within comparative constitutional studies about the role of courts in fragile or at-risk democracies – a field that includes work by Sam Issacharoff on 'hedging' by

6 Y. HASEBE [長谷部恭男], 政治取引のバザールと司法審査 [A Bazaar of Political Bargaining and Judicial Review], 法律時報 Hōritsu Jihō 67(4) (1995) 62; Y. HASEBE, The New Comparative Political Process Theory: Its Legitimacy and Applicability in Japan, in this issue, p. 45.

7 On fit, see R. DWORKIN, Law's Empire (1986). On Hasebe's application of Dworkinian ideas in this context, see HASEBE, The New Comparative Political Process Theory, *supra* note 6.

8 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18(4) (2020) 1429.

9 R. DIXON, A New Comparative Political Process Theory?, International Journal of Constitutional Law 18(4) (2020) 1490.

10 See A. Z. HUQ/T. GINSBURG, How to Save a Constitutional Democracy (2018); W. SADURSKI, A Pandemic of Populists (2022); D. LANDAU, Abusive Constitutionalism, University of California Davis Law Review 47(1) (2013) 189; R. DIXON/D. LANDAU, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy (2021).

courts, Niels Peterson on political market failure, Katie Young and Malcolm Langford on social rights, David Landau and Manuel Cepeda on representation-reinforcement and state capacity building, Michaela Hailbronner on courts and democratic institutional failure, and my own work on "responsive judicial review".[11]

Perhaps most important, in a Japanese context, CRRT theories have a number of features that give them a higher degree of "fit" with existing Japanese constitutional traditions than Ely-style theories of representation reinforcement.[12] They embrace differentiated and contextual – or "calibrated" – approaches[13] to the intensity of review that is far closer to the Japanese Supreme Court's current approach than Ely's tiered approach to constitutional scrutiny. They also contemplate a mix of strong and weak review, which leaves scope for a reliance on sub-constitutional as well as capital "C" constitutional review, in ways that are again far more consistent with existing Japanese constitutional traditions.

A key challenge for both Ely-style judicial review and CRRT is the current role conception of the Japanese Supreme Court. But this challenge is greater for Ely-style process theory than CRRT, and one that is contested and open to change, in part through academic symposia such as this one.

The remainder of the essay is divided into three parts. Part II outlines Ely's theory and its relevance to Japan. Part III outlines CPPT as a more modern, comparative, and normatively desirable version of process-based theory, and its potential fit with the Japanese constitutional context. Part IV offers a brief conclusion on the likely limits but also promise of CRRT or responsive judicial review in Japan.

II. ELY IN JAPAN

In *Democracy and Distrust*, John Hart Ely offered what is now a famous account of the proper role of the US Supreme Court in interpreting and

11 S. ISSACHAROFF, Constitutional Courts and Democratic Hedging, Georgetown Law Journal 99 (2011) 961; N. PETERSON, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa (2017); M. LANGFORD/K. G. YOUNG (eds.), The Oxford Handbook of Economic and Social Rights (2022); M. J. CEPEDA ESPINOSA/D. LANDAU, A Broad Read of Ely: Political Process Theory for Fragile Democracies, International Journal of Constitutional Law 19 (2021) 548; M. HAILBRONNER, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law 65 (2017) 527; R. DIXON, Responsive Judicial Review Democracy and Dysfunction in the Modern Age (2013).

12 On fit, see R. DWORKIN, Law's Empire (1986).

13 R. DIXON, Calibrated Proportionality, Federal Law Review 48(1) (2019) 92. See also DIXON, *supra* note 11; HAILBRONNER, *supra* note 11.

enforcing the US Constitution. Echoing *Carolene Products* footnote four, Ely suggested that the Court should engage in strong, active review in three sets of cases: where there was a clear violation of the text of the Constitution, where legislation threatened to block or undermine "the channels of political change", and where legislation affected the rights and interests of "discrete and insular minorities".[14] In other cases, Ely argued, courts should adopt a restrained role that left decisions about controversial questions of constitutional morality to Congress and state legislatures. Doing so, he seemed to suggest, would allow the Court to maintain a largely neutral, procedural role in adjudicating controversies within American democracy.

This reinforced the retreat by the Court, post 1937, from rigorous *Lochner*-style review of legislation limiting the enjoyment of economic rights and freedoms. But it also suggested a further retreat by the Court from its then role in protecting personal rights and freedoms, such as rights of access to abortion and contraception, as implicit in the Constitution's protection of "ordered liberty" or penumbral rights to privacy.[15]

Ely's theory was criticised in part on these grounds. But the most sustained objections to the theory were two-fold: first, that Ely vastly overstated the "neutral" or procedural character of his theory. Indeed, leading scholars such as Laurence Tribe argued that any judgment about the nature and requirements of democracy involved the application of an inherently contested, substantive set of evaluative criteria.[16]

In addition, a range of US scholars challenged the idea that the Court's role in upholding the Constitutional guarantee of Equal Protection could be neatly divided into the protection of "discrete and insular" versus other minorities. A key concern underlying a constitutional commitment to equality is the protection and promotion of equal dignity and substantive equality of opportunity for all citizens, as well as the elimination of historical forms of group-based disadvantage or subordination. And many groups may be subject to historical disadvantage and marginalization without being either discrete or insular: historical vote dilution and residential segregation meant that the "discrete and insular" concept worked quite well as a description of the legal and political vulnerability of African Americans in the late 1970's in the US. But the same could not be said for many other groups

14 ELY, *supra* note 1, 103.

15 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973). The US Supreme Court has now followed this Elyian call, via its recent decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). For criticism, including on democratic or neo-Elyian grounds, see D. LANDAU/R. DIXON, Dobbs, Democracy, and Dysfunction, Wisconsin Law Review 5 (2023) 1569.

16 L. TRIBE, The Puzzling Persistence of Process-Based Constitutional Theories, Yale Law Journal 89 (1980) 1063.

affected by historical prejudice, legal discrimination, and social and economic disadvantage. Women, for instance, have long experienced legal, political, and economic disadvantage, and yet live and work side-by-side with men. The same is true for young and old people, and many of those with mental and physical disabilities.

This has also led many past and current US scholars to challenge the usefulness of Ely's theory as a complete guide to constitutional construction, and especially to judicial restraint, even though many US scholars still rely on Ely-style ideas about the value of courts as protectors of democracy.[17]

In Japan, there are a range of *additional* obstacles or objections to the application of Ely-style ideas. First, there are strong – some suggest 'natural law' – rights protections in the Japanese Constitution that seem to go beyond the minority rights protections envisaged by Ely in *Democracy and Distrust*.[18] To some extent, this may reflect the distinctive origins of the Japanese Constitution as a post-War constitution with significant external influences.

Second, there are a range of doctrines in Japanese constitutional law that are in tension with Ely's ideas. Ely argued for the kind of tiered scrutiny associated with Justice Stone's approach in *Carolene Products* footnote four,[19] namely: strict scrutiny in cases involving threats to the channels of political change or to discrete and insular minorities, but rational basis review in all other cases, and especially cases involving economic rights and freedoms.[20] This does not, however, fit well with the Japanese tradition of differentiated review involving a variable standard of heightened scrutiny across a range of different cases.[21] Indeed, as scholars such as Obayashi note, the Court has at times taken a *more* demanding approach to the protection of economic rights than certain personal freedoms, and even certain rights to political free speech (and hence cases involving the channels of political change).[22] Nor does Ely's theory account for the way in which the

17 See R. D. DOERFLER/S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review, 75(3) (2022) 769 for its ongoing relevance and citation. See also MATSUI, John Hart Ely, *supra* note 2, 17; B. ACKERMAN, Beyond Carolene Products, Harvard Law Review 98(4) (1985) 713.

18 B. R. INAGAKI, The Constitution of Japan and the Natural Law (2010). See also Y. HASEBE, Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism [早稲田大学学術叢書] (2021).

19 ELY, *supra* note 1, 75–76.

20 ELY, *supra* note 1; *United States v. Carolene Products Company,* 304 US 144 (1938). See K. OBAYASHI, Political Process Theory Is Not a Utility Knife: Comparative Political Process Theory and Judicial Review in Japan, in this issue, p. 61.

21 OBAYASHI, *supra* note 20.

22 OBAYASHI, *supra* note 20.

Japanese Supreme Court seeks to balance competing rights, and interests, such as through the public welfare doctrine.[23]

Third, there are real questions as to the degree to which the Japanese social and political context is sufficiently pluralist and competitive to fit Ely's theory. There are clearly minorities in Japan who have experienced historical disadvantage and dignitarian harms, including non-citizens, religious minorities, and LGBTQI+ citizens.[24] But it is a less pluralist society than most modern democratic societies.[25]

And there is a limited history of political competition in Japan: With the exception of a brief period between 1993 and 1994, and from 2009 to 2012, it has been the Liberal Democratic Party (LDP) which has been the governing party with power to not only form government but also appoint members of almost all key governmental institutions, including fourth branch institutions such as the Cabinet Legal Bureau (CLB) and the Supreme Court itself.[26] This also affects both the likelihood and desirability of strong forms of judicial review of the kind envisaged by Ely.[27]

Fourth, there are real questions as to whether the Supreme Court of Japan has the willingness or capacity to engage in Ely-style process-based review. The Court is appointed by the government on the advice of the CLB[28] – a process that reinforces the existing tendency of the Court to prefer judicial restraint and minimalism over Ely-style robust protections of the political process and minority rights. Indeed, the Court has a long track record of *avoiding* constitutional questions, and of engaging in sub-constitutional as opposed to constitutional review.[29] In the course of its history, the Court has invalidated only eleven statutes, although it has engaged in much broader forms of statutory interpretation, and six of those cases were decided after 2000.[30]

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23 See J. KOSHIKAWA, Principles of Equity in the Japanese Civil Law, The International Lawyer 11(2) (1977) 307.

24 N. OKANO, Function and Dysfunction of the Catalytic Judicial Review in Japan, in this issue, p. 77; M. OKOCHI, A Constitutional Analysis of Same-Sex Marriage Cases: Litigation for Social Change in Japan, in this issue, p. 97.

25 HASEBE, The New Comparative Political Process Theory, *supra* note 6.

26 "How the LDP Dominates Japan's Politics", The Economist, 28 October 2021.

27 See R. DIXON/M. TUSHNET, Weak-Form Review and Its Constitutional Relatives: An Asian perspective, in: Dixon/ Ginsburg (eds.), Comparative Constitutional Law in Asia (2014) 103. OKANO, *supra* note 24.

28 G. CARNEY/S. STELLE, The Japanese Judicial System: Introduction and Contemporary Issues, University of Melbourne, Briefing Paper 14 (2021).

29 D. S. LAW, The Anatomy of a Conservative Court: Judicial Review in Japan, Texas Law Review 87 (2009) 1545; DIXON/TUSHNET, *supra* note 27, 107. On comparative judicial avoidance, see, *e.g.*, E. F. DELANEY, Analyzing Avoidance: Judicial Strategy in Comparative Perspective, Duke Law Journal 66(1) (2016) 1.

A[30] potential reason for this could be an intrinsic commitment to restraint and to promoting the democratic legitimacy of judicial review. But another could be a concern to avoid damaging forms of conflict with the LDP government or the CLB. The LDP has been the dominant party in Japan for almost all of Japan's history as a democracy.[31] And the party has a history of prioritizing stability, harmony, and conservative social values.[32] This also imposes clear limits on what Lee Epstein *et al.* call the "tolerance interval" for judicial review in Japan.[33]

The CLB is another important part of the context for the exercise of judicial review in Japan.[34] It exercises an important form of executive constitutional function, engaging in *ex ante* review of the constitutionality of proposed legislation. It is in this sense an extremely powerful and important "fourth branch" institution – indeed, its combined functions make it a candidate for the status of "super fourth branch", with enormous influence over the trajectory of Japanese constitutional law, and which the Supreme Court may have good *instrumental* reasons for seeking to keep on its side.

These concerns about backlash may also intersect with Japanese cultural commitments to harmony, over conflict and contestation. There is no necessary conflict between the CLB and the Court in a finding by the Court of legislative unconstitutionality. The CLB may view a law as constitutional, but social conditions and attitudes may change by the time a case is brought to the Court in ways that make it constitutional at the time of adoption, but unconstitutional at the time of constitutional challenge. But if a law is recent in origin, there will be much greater scope for conflict between the CLB and the Court in ways that raise more significant cultural concerns.

III. FROM ELY TO CRRT

How, then, is CPPT or CRRT different from Ely's account? The idea of comparative political process theory (CPPT) was the original way of de-

30 "Japan's 'Hostage Justice' System: Denial of Bail, Coerced Confessions, and Lack of Access to Lawyers", Human Rights Watch, 25 May 2023.

31 See "How the LDP Dominates Japan's Politics", *supra* note 26.

32 See e.g., former Prime Minister Suzuki's "politics of harmony": "A History of the Liberal Democratic Party. Chapter 10: Period of President Suzuki's Leadership", Liberal Democratic Party of Japan, *https://www.jimin.jp/english/about-ldp/history/104290.html.*

33 L. EPSTEIN and others, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, Law and Society Review 35(1) (2001) 117. See discussion in T. ROUX, Comparative Constitutional Studies: Two Fields or One?, Annual Review of Law and Social Science 13 (2017) 123.

34 See, e.g., SATOH, *supra* note 4. Cf. OBAYASHI, *supra* note 20.

scribing this new comparative constitutional sub-field, and draws off Ely's own use of the term "political process" theory.[35] But the language of process has two difficulties in this context: first, it might be seen to suggest a sharp distinction between procedural and substantive forms of review in ways that do not actually reflect the breadth of most modern CPPT theories, and the ways in which they involve a mix of substantive and semi-procedural judicial review.[36] Second, it attracts unnecessary controversy – in that it might be seen to imply a claim about the substantive neutrality of courts' role, when there was significant criticism of this claim in relation to Ely's own work.[37] For this reason, though they have substantial similarities, it is perhaps more useful to describe this emerging school of neo-Elyian, comparative work as a form of comparative representation-reinforcing theory- or CRRT.

CRRT has two important similarities to Elyian thought. It starts with the idea that judges must make a series of *choices* about the scope and meaning of constitutional provisions. And it suggests that a central concern in making these judgments should be a concern to protect and promote democracy. But as the next part shows, it also differs in key respects – in ways that arguably make it more, not less, suited to application in a Japanese context.

1. CRRT Globally

Perhaps most importantly, CRRT focuses on a broader range of risks to democracy than were Ely's focus in 1980. Stephen Gardbaum, for instance, suggests that four sources of democratic failure may provide a basis for judicial representation-reinforcement: non-deliberativeness on the part of the legislature; legislative failures to hold the executive accountable; government capture of independent institutions; and capture of the political process by special interests.[38] Niels Petersen has proposed a version of CRRT that embraces the role Ely envisaged for courts but also gives courts a role in 'safeguarding the integrity of the legislative process', protecting against 'legislative capture' and 'correcting [for] external effects'.[39] Manuel Cepeda and David Landau point to three broad forms of democratic dysfunction as grounds for judicial representation-reinforcement beyond those

35 GARDBAUM, *supra* note 8.

36 R. DIXON, Courts and Comparative Responsive-Reinforcement Theory, (*work in progress*). On semi-procedural, see I. BAR-SIMAN-TOV, Semiprocedural Judicial Review, Legisprudence 6(3) (2012) 271. Cf. S. GARDBAUM, Comparative Political Process Theory: A Rejoinder, International Journal of Constitutional Law 18(4) (2020) 1503.

37 See, e.g., TRIBE, *supra* note 16.

38 GARDBAUM, *supra* note 8.

39 GARDBAUM, *supra* note 8.

identified by Ely: the risk of full-scale democratic breakdown; poor quality democratic institutions or decision-making processes; and the failures of political institutions to respond to majoritarian groups.[40] Finally, my own version of CRRT – "responsive judicial review" ('RJR')– points to three broad sources of democratic failure as grounds for judicial intervention: the actual or attempted accumulation of electoral or institutional monopoly power; democratic blind spots; and democratic burdens of inertia.

This broader role for courts in democratic representation-reinforcement is hardly surprising: Ely's theory was explicitly understood by both Ely and most readers as a US-focused theory, or a theory that sought to justify key aspects of the jurisprudence of the US Supreme Court during the Warren Court era.[41] It was in no way comparative in scope or origin, and did not seek to account for comparative constitutional developments, or the variety of ways in which other countries have witnessed threats to democratic representation. It was also a theory of its time: the threats to democracy in the US in the late 1970's were quite different in scope and kind to the threats to American democracy today.

Comparative representation-reinforcing theory, however, seeks to account for the full range of contemporary threats to democracy in the US and globally. It also builds on the growing social science understanding of the scope of – and limits to – courts' capacity to counter threats to democracy. Thus, in arguing for robust judicial intervention to counter various sources of democratic dysfunction, CRRT scholars simultaneously caution against the dangers of overly strong judicial review in certain cases.

For instance, in my own work on RJR I suggest that in intervening to protect and promote democracy, courts must be mindful of the risk of creating three new sources of democratic dysfunction, including forms of democratic backlash, "reverse burdens of inertia", and democratic debilitation, and because of this adopt a mix of "strong" and "weak"[42] – rather than wholly strong or weakened approaches to judicial review.

Democratic backlash can be understood in a variety of ways and involves a mix of electoral and institutional consequences of an unpopular court decision. Unpopular decisions, for example, may motivate opponents of the decision to make constitutional change an electoral priority, in ways that encourage certain voters to turn up to vote or change their vote because

40 CEPEDA ESPINOSA / LANDAU, *supra* note 11.

41 OBAYASHI, *supra* note 20.

42 M. TUSHNET, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (2008); R. DIXON, The Forms, Functions and Varieties of Weak(ened) Judicial Review, International Journal of Constitutional Law 17(3) (2019) 904.

of a desire to support this change. In this sense, they can have broad-ranging and potentially quite counter-productive effects for the achievement of certain forms of constitutional justice. But changes of this kind are often hard to predict, and the very act of attempting to make these predictions can take judges into troubling waters from a separation of powers perspective. For this reason, a theory of RJR also suggests that courts should not seek to consider them, as part of engaging in the process of constitutional constructional choice.

At the same time, in some cases, democratic backlash may have a narrower, more institutional focus. Disagreement with a court decision may lead the public or political elites directly to attack a court and its institutional role and legitimacy, in ways that undermine a court's capacity to uphold even the most basic constitutional commitments to the rule of law (not to mention constitutional democracy). Because of this, and courts' greater ability to judge risks to their own independence, RJR suggests that courts should also take this risk into account as part of the process of judging – including, if needed, by forms of "weakened review" that involve delaying the effect of certain court orders or narrowing the scope of judicial reasoning.[43]

To cause backlash, popular disagreement with a court decision need not be reasonable. Indeed, quite often it may not be – and go directly against basic commitments to reasoned deliberation on terms of mutual respect among citizens in a democracy. But in some cases, democratic majorities may disagree with a court in ways that are reasonable from a democratic perspective – and the product of what John Rawls called "democratic burdens of judgment".[44] And in this case, there will be principled as well as pragmatic arguments for courts exercising a mix of strong and weakened forms of review – or crafting their reasoning and remedies in ways that are designed to allow scope for reasonable democratic disagreement and dialogue.[45] If they do not, the danger is that instead of overcoming democratic inertia and promoting greater responsiveness, court decisions may ultimately contribute to creating new forms of "reverse" democratic inertia.[46]

Finally, active forms of judicial review can sometimes create what Mark Tushnet calls a form of "democratic debilitation".[47] That is, rather than

43 TUSHNET *supra* note 42.

44 J. RAWLS, Political Liberalism (1993). See also discussion in J. WALDRON, Law as Disagreement (1999); F. I. MICHELMAN, Constitutional Essentials: On the Constitutional Theory of Political Liberalism (2022).

45 DIXON, *supra* note 11.

46 DIXON, *supra* note 11.

47 M. TUSHNET, Taking the Constitution Away from the Courts (1999) 66.

improving democratic deliberation and outcomes, they may in fact undermine the incentives for legislative and executive actors to improve their own democratic performance. And where this occurs, judicial review may offer net losses rather than gains to democratic responsiveness.

Risks of this kind, however, are much greater if courts engage in review that is "strong" in nature, or involves courts deciding on the minimum content of constitutional norms and actively supervising the enforcement of these decisions. Court intervention of this kind leave little space – or indeed need – for political action other than that supervised by courts.

But the risk of political inaction is much less where courts engage in a form of weakened, "dialogic" review: by limiting the breadth of their substantive reasoning, or the time-frame or coerciveness of their remedies, court decisions of this kind leave explicit space for legislative and executive involvement in defining the scope of constitutional norms. This involvement may itself also contribute to building, rather than weakening, the "muscle" of good democratic governance.

For all these reasons, CRRT also consistently embraces the idea of a mix of weak and strong review, rather than an across-the-board preference for *either* judicial restraint and weakness *or* strong-form judicial review. Because of this, the logic of CRRT also arguably makes it far better suited than Ely's original version of representation-reinforcement to a Japanese context.

2. CRRT in Japan

CRRT does not address every difficulty of an Ely-style theory as applied to Japan. Like Ely's own theory, CRRT starts from the idea that there is often reasonable interpretive disagreement about the meaning of constitutional provisions. Even as a matter of positive law, it rejects the idea that there are often clear "right" answers to issues of constitutional construction. And it certainly does not suggest that answers of this kind can be derived from natural law.

Some versions of CRRT retain a focus on the protection of "discrete and insular minorities",[48] a concept that several Japanese scholars, including most notably Professor Yasuo Hasebe, have noted is difficult to apply in Japan.[49] And while CRRT speaks to the control of executive decision-

48 See e.g. PETERSON, *supra* note 11.

49 HASEBE, The New Comparative Political Process Theory, *supra* note 6; OBAYASHI, *supra* note 20. For a defence of the relevance of the concept to non-citizens, see H. YAMAMOTO, CPPT & Human Rights from Japanese Experience, in this issue, p. 113.

making, it does not always do so in a way that speaks directly to the specific relationship between the Diet and the executive in Japan.[50]

Compared to Elyian theory, however, CRRT has three key benefits. First, as foreshadowed above, CRRT contemplates a mix of strong and weak review, which could involve courts weakening their decisions in a range of ways – including through narrowed reasoning, delayed or non-coercive remedies, weakened doctrines of stare decisis, or some combination of the above. Reliance on statutory interpretation is also a classic form of[51] weakened review of this kind: it necessarily involves narrower reasoning (it does not suggest that different legislation could not be passed), and the grant of a weakened interpretive as opposed to invalidation remedy. This also fits with the Japanese tradition of reliance on statutory or small-c constitutional as opposed to capital "C" grounds in the resolution of many constitutional controversies.[52]

Second, CRRT sets out a *broad range* of democratic "market failures" as guides to the construction of constitutional provisions – and failures that are clearly a question of degree, rather than kind.[53] Logically, this points to an understanding of the intensity of judicial review that is inherently variable and context-sensitive. Further, from a doctrinal standpoint, this points to the desirability of a contextual approach to questions of judicial scrutiny, informed by the presence or absence of various sources of democratic dysfunction in the specific case and context.

This also effectively equates to a form of "calibrated" approach to proportionality, rather than a more rigid, categorial or US-style "tiered" approach to assessing the constitutionality of legislation.[54] And again, this accords with the existing approach of the Japanese Supreme Court. While the Court is often quite deferential to the political branches in assessing the justifiability of limitations on constitutional norms, the Court generally does so by applying a test of reasonableness or the "public welfare", rather than more categorical forms of "strict" or "intermediate" scrutiny.[55]

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50 OBAYASHI, *supra* note 20.

51 See discussion in OBAYASHI, *supra* note 20.

52 See DIXON/TUSHNET, *supra* note 27; LAW, *supra* note 29; S. MATSUI, Why Is the Japanese Supreme Court so Conservative?, Washington University Law Review 88(6) (2011) 1375; J. O. HALEY, Constitutional Adjudication in Japan: Context, Structures, and Values, Washington University Law Review 88(6) (2011) 1467.

53 See DIXON, *supra* note 9.

54 DIXON, *supra* note 11. See also C. CHAN, Proportionality and Invariable Baseline Intensity of Review, Legal Studies 33(1) (2013) 1; M. HAILBRONNER, Traditions and Transformations: The Rise of German Constitutionalism (2015) 117–122; DIXON, Calibrated Proportionality, Federal Law Review 48(1) 2020 92.

55 Justice Chiba; OBAYASHI, *supra* note 20.

The exception in Japanese constitutional case-law concerns voting rights: here, the Court has tended to adopt a more demanding test, which is closer to a form of "strict scrutiny" or true proportionality test. Again, however, this exception fits with CRRT: according to CRRT, the most demanding forms of judicial scrutiny should be reserved for cases involving threats to the "democratic minimum core" of democracy. This includes the existence of regular, free and fair multi-party elections conducted on the basis *of universal adult suffrage*.

In this sense, CRRT proposes a quite demanding standard of review in cases involving voting rights and electoral districting, and cases involving political freedom of expression, but a more variable approach in other cases. This is consistent with the Japanese Court's application of heightened scrutiny to cases involving electoral districting and apportionment (Grand bench decision of 4 April 1976, Minshū 30, 233), the voting rights of foreigners and those with mental illness (the *Zaigaihojin* and *Seshinshogaisha-no-Zaitakutohyo* cases), and robust (if sub-constitutional) approach to the protection of political expression (the *Horikoshi case*).[56]

Third, CRRT does not directly link a court's role to a high degree of existing political competition. Instead, courts have a critical role to play in CRRT in protecting regular, free and fair multi-party elections, but also political rights and freedoms and institutional pluralism. This means that courts have a critical role to play in protecting democracy even in the absence of robust electoral competition. And in this respect, CRRT arguably has greater congruence with Japanese experience than Ely's conception of the marketplace for political control.

For all these reasons, CRRT has greater potential to guide and inform Japanese-style constitutional review than Ely's original version of judicial representation-reinforcement.

Some *versions* of CRRT also go further – in rejecting the idea of discrete and insular minorities, and instead suggesting a more contextual approach to protecting and promoting constitutional commitments to dignity and equality.

In RJR theory, for example, there are three distinctive sources of minority rights protection: textual guarantees of equality in specific national constitutions; a theoretical commitment to ensuring that all laws reflect notions of mutual respect among citizens, not simply animus or contempt toward certain groups of citizens; and a commitment to ensuring that laws reflect the maximum possible individual rights protections consistent with (rea-

56 See cites in and discussion in OBAYASHI, *supra* note 20; HASEBE, The New Comparative Political Process Theory, *supra* note 6, 57–58; YAMAMOTO, *supra* note 49.

sonable) democratic majority opinion.[57] This is a core part of the logic of judicial representation-reinforcement – or the role of courts as agents of overcoming democratic blind spots and burdens of inertia, which can otherwise affect the enjoyment of individual rights. This notion of individual rights protection, however, does not depend on there being any distinct or identifiable minority group: instead, it extends to the human rights of all citizens.

The question still remains whether RJR or similar CRRT theories offer a normatively attractive account of judicial review, and are likely to be followed by courts for that reason. Professor Hasebe could be read as suggesting that RJR assumes too thin a conception of democracy, or one too focused on the idea of the democratic minimum core as compared to broader commitments to rights and (Rawlsian-style) public reason giving.[58] This may be too strong a version of the objection: RJR aims to combine thin and thick understandings of democracy, but suggests that there is quite broad scope for reasonable disagreement about what counts as necessary for thick democracy in this context. But one might still disagree with this claim, as Hasebe does,[59] and reject both the desirability and likely adoption of RJR on that basis.

IV. CONCLUSION

The harder question is whether the Japanese judiciary is ever likely explicitly or implicitly to embrace this kind of understanding in the exercise of its constitutional functions. On one view, an approach of this kind is quite foreign to the Japanese legal tradition, and the Supreme Court's self-conception as a restrained, legalist institution.[60] Hence, only a true "exogenous" shock to Japanese legal and political tradition is likely to change this approach.[61]

Yet on another view, an approach of this kind is already nascent within certain Supreme Court decisions. Understanding this requires a focus on statutory as well as capital "C" constitutional cases or decisions, so that the

57 DIXON, *supra* note 11.

58 HASEBE, The New Comparative Political Process Theory, *supra* note 6, 53–54.

59 HASEBE, The New Comparative Political Process Theory, *supra* note 6.

60 HASEBE, The New Comparative Political Process Theory, *supra* note 6, 11 ("the main reason the SCJ is reluctant to invalidate state actions residents in its self-image as a judicial body"), and citing with approval T. FUJITA, The Supreme Court of Japan: Commentary on the Recent Works of Scholars in the United States, Washington University Law Review 88 (2011) 1508, 1521–22.

61 Cf T. ROUX, Principle and Pragmatism on the Constitutional Court of South Africa, International Journal of Constitutional Law 7(1) (2009) 106.

full range of ways in which the Court has protected the democratic minimum core comes into view.[62] It may also require us to view the Court's decisions through a mixed prism – of express reasoning and implicit correspondence with CRRT ideas. But there are certainly decisions of the Japanese Supreme Court and lower courts that can be seen as helping overcome various sources of democratic dysfunction, including democratic blind spots and burdens of inertia.[63]

As Professor Hasebe and Dr Nobuki Okano both note, a recent example involves the decision of the Court in relation to the inheritance rights of illegitimate children in intestate succession under the Civil Code: after a series of more limited, restrained decisions, the Court in 2013 issued a decision prospectively invalidating the discriminatory provisions of the Code.[64] The justification also clearly lay in the mix of evolving public opinion on the issue[65] and the failure of the Diet to respond, or persistent legislative burdens of inertia.[66]

One aim of the symposium is also to encourage the further development of a jurisprudence of this kind. I may have been wrong to suggest that development of this kind necessarily marks or requires a radical break from the Court's existing caselaw.[67] Indeed, engaging with the important work of Japanese colleagues has helped reveal that there are already far greater intimations of RJR in Japan than I had previously appreciated.

That does not mean, however, that there is no scope to expand a commitment to responsiveness within Japanese constitutional law and practice. Clearly there is; and one of the aims of this symposium, and the translation of RJR into Japanese, is to do just that. The upcoming litigation around the rights of same-sex couples will also be a key test of this expansion.[68]

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62 R. DIXON/M. TUSHNET, Competitive Democracy and the Constitutional Minimum Core, in: Ginsburg/ Huq (eds), Assessing Constitutional Performance (2016) 268; HASEBE, The New Comparative Political Process Theory, *supra* note 6, 57–58.

63 For the role of lower courts, especially in responding to injustices caused by past democratic burdens of inertia, see e.g. OKOCHI, *supra* note 24 (discussing suits in relation to Kumamoto Minamata disease, Hep 2 and the previous Eugenic Protection Act).

64 Minshū 59, 2087. See discussion in HASEBE, The New Comparative Political Process Theory, *supra* note 6, 57–58; OKANO, *supra* note 24.

65 S. MATSUI, "Never Had a Choice and Had No Power to Alter": Illegitimate Children and the Supreme Court of Japan, Georgia Journal of International & Comparative Law 44 (2016) 577.

66 HASEBE, The New Comparative Political Process Theory, *supra* note 6, 58.

67 I am indebted to Professor Hasebe and his work for clarifying this point.

68 See, e.g., M. OKOCHI, *supra* note 24 (noting burdens of inertia in this area in Japan).

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