

# WHY IS THE JAPANESE SUPREME COURT SO CONSERVATIVE?

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## INTRODUCTION

The Constitution of Japan, enacted on November 3, 1946, and effective as of May 3, 1947, gave the judicial power to the Supreme Court and the inferior courts established by the Diet, the national legislature, and gave the power of judicial review to the judiciary.

Equipped with the power of judicial review, the Japanese Supreme Court was expected to perform a very significant political role in safeguarding the Constitution, especially its Bill of Rights, against infringement by the government. Yet, it has developed a very conservative constitutional jurisprudence ever since its establishment.<sup>1</sup> It has refused to decide many constitutional questions by insisting on rigid threshold requirements for constitutional litigation and has rejected almost all constitutional attacks by accepting the arguments of the government or by paying almost total deference to the judgment of the Diet and the government. It is quite appropriate to claim that the Japanese Supreme Court has developed a very conservative, noninterventionist constitutional jurisprudence.<sup>2</sup>

This Article examines why the Japanese Supreme Court has developed such a conservative constitutional jurisprudence. First, the Article will examine the power of judicial review and the system of judicial review in Japan. Second, it will show how the Japanese Supreme Court is reluctant to entertain constitutional litigation and how the Japanese Supreme Court is unwilling to apply close scrutiny or strike-down statutes. Then the

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1. See, e.g., Herbert F. Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HASTINGS INT'L & COMP. L. REV. 87 (1980); Dan Fenno Henderson, *Japanese Judicial Review of Legislation: The First Twenty Years*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, at 115 (Dan Fenno Henderson ed., 1968); David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009); Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 LOY. L.A. L. REV. 603 (2008); see also HIROSHI ITOH, THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN (2010).

2. In this Article, I use the word "conservative" to mean the unwillingness to change the status quo, i.e., the unwillingness of the Supreme Court to scrutinize and overturn statutes and to restrict other government conduct.

Article will explore the historical, organizational, institutional, and strategic reasons for the conservative constitutional jurisprudence. This Article argues, however, that the most fundamental reason lies in the reluctance of Japanese judges to view the Constitution as a source of positive law to be enforced by the judiciary.

How can we change the constitutional jurisprudence of the Japanese Supreme Court? Is there any way to make the Supreme Court more active? This Article will critically examine the proposal to establish a Constitutional Court by amending the Constitution. It proposes rather drastic changes to the appointment practices and institutional design of the Supreme Court in order to allow the Supreme Court to exercise the power of judicial review more actively. It is important to make judges aware of both their obligation to enforce the Constitution and the unique demands of constitutional interpretation. On the one hand, the Japanese judiciary must come to view the Constitution as positive law that the judiciary is obligated to enforce, no less than it is obligated to enforce ordinary statutes. On the other hand, judges must be reminded as a matter of interpretive methodology that it is not merely a statute, but a *constitution*, that they are construing.<sup>3</sup> In light of the democratic principle underlining the Constitution, the judiciary is better off if it exercises the power of judicial review to promote the representative democracy.

## I. THE JAPANESE CONSTITUTION AND THE SUPREME COURT

### A. *The Supreme Court*

The Japanese Constitution, enacted in 1946 during the occupation after the defeat in the Pacific War,<sup>4</sup> proclaims the popular sovereignty principle and declares itself as the supreme law of the land.<sup>5</sup> It is a constitution enacted based on the draft prepared by the Supreme Commander of Allied Powers (SCAP), General Douglas MacArthur,<sup>6</sup> and it reflects a very strong American influence. The Constitution vests “whole judicial power” in the

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3. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“In considering this question, then, we must never forget that it is a *constitution* we are expounding.”).

4. SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 13–16 (2010).

5. Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], art. 98, para. 1 (“This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.”).

6. JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 360–404 (1999); KOSEKI SHŌICHI, *THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION* 68–164 (Ray A. Moore trans., 1998).

Supreme Court and the lower courts established by the Diet in Article 76<sup>7</sup> and grants the power of judicial review to the Supreme Court in Article 81.<sup>8</sup> The Diet enacted the Judiciary Act in 1947 to establish the Supreme Court, as well as lower courts.<sup>9</sup>

The Supreme Court consists of the Chief Justice, who is to be designated by the Cabinet and appointed by the Emperor,<sup>10</sup> and the Associate Justices to be appointed by the Cabinet.<sup>11</sup> The Judiciary Act stipulates that the number of Associate Justices should be fourteen.<sup>12</sup> A Supreme Court Justice has to be over the age of forty and have an intellectual grasp of the law,<sup>13</sup> but there is no requirement that a Supreme Court Justice be a lawyer.<sup>14</sup> However, at least ten out of fifteen Supreme Court Justices must have either a combined ten years of experience as chief judges of the High Court or judges, or a combined twenty years of experience as chief judges of the High Court, judges, Summary Court judges, prosecutors, attorneys, or university law professors.<sup>15</sup> The appointment is not lifelong; Justices are supposed to retire at the age set by statute,<sup>16</sup> which is currently seventy.<sup>17</sup> There is a system of public review for the appointment of the Supreme Court Justices:

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 (10) years, and in the same manner thereafter. . . . [W]hen the majority of the voters favors the dismissal of a judge, he shall be dismissed.<sup>18</sup>

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7. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76, para. 1 (“The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.”).

8. *Id.* art. 81 (“The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”).

9. Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, in JAPANESE CONSTITUTIONAL LAW 123, 129 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

10. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 6, para. 2 (“The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.”).

11. *Id.* art. 79, para. 1 (“The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.”).

12. Saibanshohō [Judiciary Act], Law No. 59 of 1947, art. 5, para. 3.

13. *Id.* art. 41, para. 1.

14. *Id.*

15. *Id.*

16. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 79, para. 5.

17. Saibanshohō [Judiciary Act], Law No. 59 of 1947, art. 50.

18. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 79, paras. 2–3.

As a formal matter, Supreme Court Justices are selected at the discretion of the Cabinet. Although the initial appointments of Justices were based on recommendations of an advisory board,<sup>19</sup> no permanent advisory board was established thereafter.<sup>20</sup> The Prime Minister has unbridled discretion to make appointments from candidates who satisfy the legal requirements.

*B. The Power of Judicial Review*

According to Article 81, the “Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”<sup>21</sup> What is the nature of this power to determine the constitutionality of law?

This issue was raised in the *National Police Reserve Case*,<sup>22</sup> which dealt with the Japanese Constitution’s very unique pacifism clause. In Article 9, the Constitution abandoned the war power and prohibited maintenance of any armed forces.<sup>23</sup> At the time of the enactment, it was believed that Article 9 prohibited armed forces even for the purpose of self-defense.<sup>24</sup> Therefore, after the SCAP dismantled the Imperial Army and Navy during the occupation, there were no Japanese armed forces. Yet, when the Korean War erupted in 1950, MacArthur had to move American troops stationed in Japan to Korea and was worried about the reduced defense capability of Japan.<sup>25</sup> He thus allowed Prime Minister Shigeru Yoshida to establish the National Police Reserve.<sup>26</sup> Although it was called as a police reserve, it was apparent that the National Police Reserve was in fact an armed force. The decision of the government to establish the National Police Reserve triggered very strong objections from the opposition parties. In this case, Diet member Mosaburou Suzuki, practically representing the opposition, the Japan Socialist Party (JSP), filed a suit directly with the Supreme Court. He sought a declaration of unconstitutionality and an injunction against the establishment and maintenance of the National Police Reserve. He argued that Article 81

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19. JIROU NOMURA, SAIKŌ SAIBANSHO [SUPREME COURT] 51–53 (1987).

20. *Id.*

21. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81.

22. Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, 6 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 783 (grand bench).

23. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9.

24. MATSUI, *supra* note 4, at 235–37.

25. RICHARD B. FINN, WINNERS IN PEACE: MACARTHUR, YOSHIDA, AND POSTWAR JAPAN 263 (1992).

26. *Id.* at 263–65.

gave the Supreme Court dual roles: roles as both a judicial and a constitutional court. According to Suzuki, the Supreme Court could accept a suit without any case or controversy and review the constitutionality of the law as a constitutional court.

Yet, the Supreme Court had already held in a previous decision that Article 81 merely affirmed the power of a judicial court to review the constitutionality of a statute in adjudicating a case or controversy, as had been the practice of the United States Supreme Court.<sup>27</sup> In the *National Police Reserve Case*, the Japanese Supreme Court reaffirmed this previous holding and rejected Suzuki's argument.<sup>28</sup> The Supreme Court held that Article 81 merely confirmed the power of the Supreme Court to review the constitutionality of a statute as a court of last resort when exercising judicial power.<sup>29</sup> This means that there must be a case or controversy that satisfies the requirements for the exercise of judicial power in order for the Supreme Court to exercise the power of judicial review. Believing that this suit was filed without satisfying the case or controversy requirement, the Supreme Court dismissed it.<sup>30</sup>

As a result of this decision, it was established that in order for the Supreme Court to review the constitutionality of a statute, there must be a case or controversy. The Supreme Court exercises the power of judicial review only incidentally to its exercise of judicial power. This also means that not only the Supreme Court but also all the judicial courts have a power of judicial review. The Supreme Court therefore held that the Supreme Court and all lower courts can exercise the power of judicial review.<sup>31</sup>

The Supreme Court's view is generally supported by academics.<sup>32</sup> But the Supreme Court in the *National Police Reserve Case* never elaborated why this case lacked the case or controversy requirement. It may be because the plaintiff did not have necessary standing. However, as a result of this decision, I suspect, the courts came to believe that in Japan a suit seeking declaration of the unconstitutionality of a statute and injunction

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27. See Saikō Saibansho [Sup. Ct.] July 8, 1948, 2 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 801 (grand bench).

28. Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, 6 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 783 (grand bench).

29. *Id.*

30. *Id.*

31. Saikō Saibansho [Sup. Ct.] Feb. 1, 1950, 4 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 73 (grand bench).

32. NOBUYOSHI ASHIBE, KENPŌ [CONSTITUTION] 362 (4th ed. 2007); KOUJI SATŌ, KENPŌ [CONSTITUTION] 333 (3d ed. 1995).

against its enforcement will fail to meet the case or controversy requirement.<sup>33</sup>

### C. *The Process of Judicial Review*

The Supreme Court has repeatedly held that the Constitution gives the Diet the power to define the jurisdiction of the courts, the appeal jurisdiction of the courts, and the permissible reason for appeal, with the exception that the Supreme Court must be assured the power to decide constitutional issues as a court of last resort under Article 81.<sup>34</sup> The Diet has granted only limited original jurisdiction to the Supreme Court<sup>35</sup> and, therefore, the Supreme Court mostly has appellate jurisdiction.

With respect to civil cases, the parties can appeal to the Supreme Court only when the judgment below involves a constitutional violation or an error in constitutional interpretation.<sup>36</sup> An appeal to the Supreme Court used to be granted also when there was a violation of Supreme Court precedent or any violation of law that would affect the outcome of the judgment, but this was amended in 1996 so that now the parties can merely petition the Supreme Court to accept to hear the case in such circumstances.<sup>37</sup> Therefore, parties sometimes file an appeal and also petition the Supreme Court to hear the case.

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33. Saikō Saibansho [Sup. Ct.] June 9, 1953, 4 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 1542 (3d petty bench) (holding a suit seeking nullity of amendment to the Local Government Act unjusticiable); Saikō Saibansho [Sup. Ct.] May 20, 1953, 4 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 1229 (grand bench) (dismissing a suit seeking declaration of unconstitutionality of the imperial prescript entitled “Order on exceptional treatment of the Pension Act” unjusticiable); *see also* Saikō Saibansho [Sup. Ct.] Nov. 17, 1953, 4 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 2760 (3d petty bench) (dismissing the suit seeking declaration of the unconstitutionality of a House of Representatives resolution confirming the invalidity of the Imperial Prescript for Education, which declared moral principles for students to become royal subjects to the Emperor, because there was a lack of infringement of rights or legal interests); Osaka Kōtō Saibansho [Osaka High Ct.] Nov. 29, 1985, 36 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 1910 (dismissing a suit seeking declaration of nullity of the Kyoto Ancient City Cooperation Tax Ordinance, which imposed the obligation on shrines and temples in Kyoto to collect admission tax from visitors to cooperate with the city to maintain the ancient city).

34. Saikō Saibansho [Sup. Ct.] Oct. 13, 1954, 8 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1846 (grand bench); Saikō Saibansho [Sup. Ct.] Mar. 10, 1948, 2 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 175 (grand bench).

35. Kokka kōmuinhō [National Public Workers Act], Law No. 120 of 1947, art. 9 (indicating that the Supreme Court has original jurisdiction on impeachment against commissioners of the National Personnel Authority, an independent administrative commission to supervise national public workers).

36. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, art. 312, para. 1. The appeal is also allowed when there is a procedural violation in the court below. *Id.* art. 312, para. 2.

37. *Id.* art. 318, para. 1.

With respect to criminal cases, the defendant, as well as the prosecutor, can appeal to the Supreme Court when the court below has committed a violation of the Constitution or an error interpreting the Constitution, or when there was a violation of Supreme Court precedent.<sup>38</sup> The Supreme Court can also accept the case when the case presents important issues in the interpretation of law.<sup>39</sup> The Supreme Court must vacate the judgment below if there is a violation of the Constitution.<sup>40</sup> But it can also vacate the judgment below if the Supreme Court found a violation of the law affecting the outcome of judgment, a grossly improper sentence, or a gross error in finding of fact affecting the outcome of the judgment.<sup>41</sup> Therefore, sometimes the parties file a petition for acceptance of appeal.<sup>42</sup> Yet, the defendant, most of the time, files an appeal with the Supreme Court alleging some kind of constitutional violation, hoping that the Court *ex officio* accepts the case and reviews the finding of facts or sentencing.

The Supreme Court reviews a case either by grand bench or petty bench.<sup>43</sup> The case is reviewed first by one of the three five-member petty benches.<sup>44</sup> It is only when the Supreme Court reviews the constitutionality of a statute or regulation based upon a party's argument, when the Supreme Court finds the statute or regulation unconstitutional, or when the Supreme Court departs from its precedent with respect to constitutional interpretation that the case must be sent to the grand bench.<sup>45</sup> Otherwise, the Supreme Court has discretion to review the case by grand bench.

In order to assist the Supreme Court, some thirty law clerks or research judges are working in the Supreme Court. Unlike law clerks in the United States, they are veteran judges who have more than ten years of experience as judges and are not assigned to individual Justices.<sup>46</sup>

When a case is appealed or a petition is filed, the case will be assigned to one of three petty benches and to one Justice who will have primary

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38. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 405.

39. *Id.* art. 406.

40. *See id.* art. 410, para. 1.

41. *Id.* art. 411.

42. Keijisoshō kisoku [Rules of Criminal Procedure], Sup. Ct. Rule No. 32 of 1948, art. 257; Saikō Saibansho [Sup. Ct.] July 10, 2003, 57 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 903 (1st petty bench).

43. Saibanshohō [Judiciary Act], Law No. 59 of 1947, art. 9, para. 1.

44. SHIGEO TAKII, SAIKŌ SAIBANSHO WA KAWATTAKA [HAS THE SUPREME COURT CHANGED?] 28 (2009).

45. Saibanshohō [Judiciary Act], Law No. 59 of 1947, art. 10. The petty bench can uphold, however, the constitutionality of a statute based on the precedent of the grand bench. Saikō saibansho jimu shori kisoku [Supreme Court Case Handling Rule], Sup. Ct. Rule No. 6 of 1947, art. 9, para. 5.

46. Saibanshohō [Judiciary Act], Law No. 59 of 1947, art. 57; *see* Masako Kamiya, "Chōsakan": *Research Judges Toiling at the Stone Fortress*, 88 WASH. U. L. REV. 1601 (2011).

responsibility for that case. Then the law clerk assigned to that case will read all the documents, research the academic doctrines, and recommend to the Justice who has primary responsibility for the case whether to dismiss the appeal, affirm the decision of the court below, or reverse it. The Supreme Court will examine the case based on the explanation given by this Justice. Most of the appeals are dismissed without deliberation, based on the recommendation of the Justice who has primary responsibility of the case. Only a small portion of the appeals will be discussed in conference.<sup>47</sup>

During deliberations in conference, each Justice will state his or her opinion. When there is a majority, the law clerk will prepare a draft of the opinion. During subsequent conferences, that draft will be further revised, and a final decision will be made on the judgment. A majority of eight Justices is required to strike down a statute.<sup>48</sup> Unlike an opinion issued by the United States Supreme Court, a judgment of the Japanese Supreme Court will be delivered in the name of the Court, without indicating who wrote the opinion, while individual Justices can file concurring or dissenting opinions.<sup>49</sup>

## II. RELUCTANCE OF THE SUPREME COURT TO ACCEPT CONSTITUTIONAL LITIGATION

### A. *Demanding Case and Controversy Requirement*

The conservative stance of the Supreme Court can first be found in its reluctance to accept constitutional cases. In order to challenge the constitutionality of a statute passed by the Diet, there must be a case or controversy that satisfies Article 76.<sup>50</sup> The most common constitutional litigation in Japan is for criminal cases, where a defendant challenges his or her conviction based upon the unconstitutionality of the underlying statute.

There are primarily two types of procedures to be followed when filing a suit challenging the constitutionality of a statute. One method is to file a suit according to the Administrative Case Litigation Act as an administrative case challenging the enforcement of the statute by the

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47. See TAKII, *supra* note 44, at 20–25, 28–31.

48. Saikō saibansho jimu shori kisoku [Supreme Court Case Handling Rule], Sup. Ct. Rule No. 6 of 1947, art. 12.

49. Saibanshohō [Judiciary Act], Law No. 59 of 1947, art. 11 (mandating that each Supreme Court Justice express his or her opinion in the judgment).

50. *Supra* notes and text accompanying notes 29–30.



administrative agency.<sup>51</sup> The other method is to file a damage suit against the government under the Government Liability Act as a civil action.<sup>52</sup> The procedure for these civil cases is set forth in the Code of Civil Procedure.<sup>53</sup>

In order to file an administrative action under the Administrative Case Litigation Act, one must file a suit seeking judicial revocation against “administrative order,” and the plaintiff must show a “legal interest” as standing to file such a suit.<sup>54</sup> The Supreme Court has interpreted the term “administrative order” narrowly so that preenforcement suits are not allowed.<sup>55</sup> Furthermore, the Supreme Court held in the *Osaka International Airport Case* that a citizen could not seek an injunction against the government through a civil suit.<sup>56</sup> This means that the citizen had to file an administrative suit to seek an injunction against the government.<sup>57</sup> Yet, since there used to be no provision for injunctive suits in the Administrative Case Litigation Act, the courts were extremely reluctant to accept injunction suits against the government.<sup>58</sup>

The Supreme Court has also construed the standing requirement as mandating that the plaintiff have a legal right or legal interest protected by a statute passed by the Diet.<sup>59</sup> Therefore, when the government regulates industries for the protection of the general public, the Supreme Court tends to deny standing to individual citizens because regulatory statutes are not intended to vest rights or legal interests to individual citizens.<sup>60</sup> Although the Supreme Court looks into all the relevant statutes to find out whether a

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51. Gyousei jiken soshōhō [Administrative Case Litigation Act], Law No. 139 of 1962, art. 3.

52. Kokka baishōhō [Government Liability Act], Law No. 125 of 1947, art. 1.

53. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996.

54. Gyousei jiken soshōhō [Administrative Case Litigation Act], Law No. 139 of 1962, art. 9, para. 1.

55. Saikō Saibansho [Sup. Ct.] Feb. 23, 1966, 20 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 271 (grand bench). Yet, the Supreme Court recently overruled this judgment and expanded the scope of administrative order. Saikō Saibansho [Sup. Ct.] Sept. 10, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2029 (grand bench).

56. Saikō Saibansho [Sup. Ct.] Dec. 16, 1981, 35 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1368 (grand bench).

57. The majority, however, did not rule on whether such an injunction suit could be acceptable as an administrative case.

58. As a result of the 2004 amendment, an injunction suit against the administrative agency and a suit to mandate an administrative agency to act as directed are now explicitly permitted. Gyousei jiken soshōhō [Administrative Case Litigation Act], Law No. 139 of 1962, art. 3, paras. 6–7, art. 37-2, art. 37-3, art. 37-4. Yet, so far, the courts have been extremely reluctant to issue injunctions or orders to mandate an administrative agency to act as directed.

59. Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (1st petty bench) (*Naganuma Case*).

60. Saikō Saibansho [Sup. Ct.] Mar. 14, 1978, 32 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 211 (3d petty bench) (*Juice Regulation Case*).

right or legal interest is protected as an individual right or legal interest,<sup>61</sup> the Supreme Court's standing requirement is still demanding.

In contrast to the United States Supreme Court, which similarly requires standing but allows suits against administrative agencies where there was an "injury in fact,"<sup>62</sup> the Japanese Supreme Court has clung to the doctrine that requires proof of infringement of rights or individual legal interests. Even when the citizen suffers from an injury in fact, he or she cannot challenge the administrative action unless he or she can rely upon some of the statutes that could be construed as protecting the interest of the citizen as an individual right or legal interest. Since most of the administrative law statutes enacted by the Diet have no explicit clauses allowing the citizen to file a suit in court or any provision about judicial review, the citizen has difficulty in persuading the courts to construe regulating provisions as protecting the interests of the citizen as a legal right or legal interest.<sup>63</sup> As a result, the standing requirement has prevented citizens from challenging the constitutionality of administrative actions.<sup>64</sup>

Even when the plaintiff has a genuine interest in the constitutional issue and no one else will be able to challenge the issue in court, courts tend to deny standing. Courts have thus held that protesting citizens do not have standing under Article 9 to challenge the government's decision to support the 1991 Gulf War and to send mine sweepers to the Persian

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61. Saikō Saibansho [Sup. Ct.] Feb. 17, 1989, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 56 (2d petty bench) (*Niigata Airport Case*).

62. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 51–69 (15th ed. 2004).

63. See, e.g., Saikō Saibansho [Sup. Ct.] Mar. 17, 2000, 1708 HANREI JIHŌ [HANJI] 62 (2d petty bench) (holding that local residents do not have standing to challenge the government grant of a permit to operate a graveyard); Saikō Saibansho [Sup. Ct.] Dec. 17, 1998, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1821 (1st petty bench) (holding that local residents do not have standing to challenge the government grant of a permit to operate an entertainment business); Saikō Saibansho, [Sup. Ct.] Apr. 13, 1989, 1313 HANREI JIHŌ [HANJI] 121 (1st petty bench) (holding that users of the private railroad do not have standing to challenge the government approval of a fare raise).

64. As a result of reforms in 2004, Article 9 of the Gyousei jiken soshōhō was amended and a new paragraph was added. See Gyousei jiken soshōhō [Administrative Case Litigation Act], Law No. 139 of 1962, art. 9. Now, Article 9, paragraph 1, maintains the traditional definition of the standing requirement, while the new paragraph 2 makes clear that the existence of standing can be found after examination of various statutes and regulations relevant to the decision. *Id.* This paragraph was meant to clarify the meaning of the standing requirement after the *Niigata Airport Case*, Saikō Saibansho [Sup. Ct.] Feb. 17, 1989, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 56 (2d petty bench), and was not meant to expand the scope of standing.

Gulf,<sup>65</sup> nor do they have standing to seek an injunction against sending Self-Defense Force (SDF) troops to Iraq.<sup>66</sup>

Moreover, the Supreme Court has applied the mootness doctrine to dismiss many administrative cases, including constitutional challenges. The Supreme Court, for instance, dismissed suits for being moot when the plaintiff died during litigation,<sup>67</sup> when the criteria for administrative orders were modified,<sup>68</sup> or when alternative measures were adopted to prevent harm.<sup>69</sup>

The Supreme Court has also dismissed administrative cases by applying the mootness doctrine even when parties were challenging time-sensitive decisions. In the *May Day Parade Case*, the Supreme Court held, for instance, that the action of a union organizer of a May Day gathering who was seeking judicial revocation of the Welfare Minister's decision to refuse to issue a permit for the use of the Exterior Garden of the Imperial Palace for a May Day Parade, became moot when the planned date of gathering passed during the trial.<sup>70</sup>

With respect to damage suits against the government under the Government Liability Act, a citizen must prove the illegality of the governmental action, intent to cause damage or negligence, causation, and damage.<sup>71</sup> The citizens can recover damages from the government by challenging the constitutionality of a legislative action, but the Supreme Court once seriously limited this possibility. In the *Voting at Home Case*, a physically disabled voter sought damages against the government, insisting that the Diet had unconstitutionally abolished the system that had allowed physically disabled voters to cast votes at home and had failed to reintroduce such a system, thereby, in essence, depriving physically

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65. Ōsaka Kōtō Saibansho [Ōsaka High Ct.] Oct. 29, 1991, 38 SHŌMU GEPPŌ [SHŌMU GEPPŌ] 761.

66. Nagoya Kōtō Saibansho [Nagoya High Ct.] Apr. 17, 2008, 2056 HANREI JIHŌ [HANJI] 74. The court declared, however, in dictum, that sending the SDF to Iraq was unconstitutional.

67. See, e.g., Saikō Saibansho [Sup. Ct.] May 24, 1967, 21 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1043 (grand bench) (*Asahi Case*). Nevertheless, the Supreme Court went on to issue its opinion on the merits, holding the decision of the Welfare Minister to reduce the amount of welfare payment as constitutional. *Id.*

68. See, e.g., Saikō Saibansho [Sup. Ct.] Apr. 8, 1972, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 594 (1st petty bench) (the second *Ienaga School Textbook Censorship Case*).

69. See, e.g., Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (1st petty bench) (*Naganuma Case*).

70. Saikō Saibansho [Sup. Ct.] Dec. 23, 1953, 7 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1561 (grand bench). Nevertheless, the Supreme Court went on to issue its opinion on the merits, holding the refusal to grant the permit as constitutional. *Id.*

71. Kokka baishōhō [Government Liability Act], Law No. 125 of 1947, art. 1.

disabled voters of their right to vote.<sup>72</sup> The Supreme Court admitted that a citizen could seek damages based on action of the Diet.<sup>73</sup> Yet, it held that the government should be liable only when the Diet violates the unequivocal language of the Constitution, a situation hard to imagine. It concluded that no such violation had occurred in this case.<sup>74</sup> This holding was widely criticized for resulting in the preclusion of tort actions against the government based on the action of the Diet.<sup>75</sup>

There is a further hurdle for damage actions. In order to seek damages, the citizen must prove that the government infringed upon his or her rights or legal interests. The failure to prove the infringement of rights or legal interests thus leads to the dismissal of the damage action. The Supreme Court, for instance, dismissed a damage action against the government that attacked the prime minister's official visit to the Yasukuni Shrine as a violation of separation of religion and state, because the plaintiffs failed to show any infringement of a right or legal interest.<sup>76</sup> The separation of religion and state is merely an institutional guarantee and is not meant to protect any individual right or legal interest.<sup>77</sup> Therefore, one cannot seek damages against the government even if the government violated the separation of religion and state.<sup>78</sup> Moreover, even when the statute is held unconstitutional, the damage award will not be granted unless the state officials were intentional or negligent in causing damage to the citizen.<sup>79</sup>

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72. Saikō Saibansho [Sup. Ct.] Nov. 21, 1985, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1512 (1st petty bench).

73. *Id.*

74. *Id.*

75. ASHIBE, *supra* note 32, at 369. The Supreme Court has alleviated the difficulty of seeking damages in the *Overseas Voters Case*, Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2087 (grand bench). The Supreme Court held that the government was liable when the Diet failed to provide an opportunity for voting to overseas voters and then failed to provide an opportunity to vote in election districts as opposed to via proportional representation. *Id.* The Supreme Court reasoned that the government should be liable when the Diet clearly infringes constitutional rights or when the Diet fails to adopt essential measures to provide opportunities for citizens to exercise their constitutional rights. *Id.* This holding expanded the possibility of seeking damages when challenging the unconstitutionality of legislative actions.

76. Saikō Saibansho [Sup. Ct.] June 23, 2006, 220 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 573 (2d petty bench).

77. Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (grand bench) (*Tsu City Ground-breaking Ceremony Case*).

78. The plaintiffs claimed the infringement of the right to decide how to remember one's family members without government interference, but the Supreme Court found no coercion against the plaintiffs from the prime minister's official visit to the Yasukuni Shrine and concluded that there was no infringement of right or legal interest. Saikō Saibansho [Sup. Ct.] June 23, 2006, 220 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 573 (2d petty bench).

79. Saikō Saibansho [Sup. Ct.] July 9, 1991, 45 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1049 (3d petty bench) (holding the Prison Regulation, which banned inmates waiting for trial from

### B. Political Questions

Moreover, the Supreme Court has refused to review the constitutionality of governmental action when the suit raises highly political questions. In the *Sunagawa Case*, the Supreme Court held that the challenge to the constitutionality of the Japan–United States Security Treaty and the stationing in Japan of American military forces in violation of Article 9 was a highly political issue and was related directly to the national security of the country.<sup>80</sup> Such questions were not suitable for judicial decision, said the Supreme Court, unless the impugned actions were clearly unconstitutional.<sup>81</sup> The Supreme Court concluded that the stationing of the American military forces was not clearly against the Constitution and therefore the Supreme Court should not address the constitutional issue.<sup>82</sup> This decision has been interpreted as a refusal to rule on the merits of a case by invoking the political question doctrine.<sup>83</sup> After this decision, lower courts have tended to invoke the political question doctrine to avoid deciding issues such as the constitutionality of the SDF.<sup>84</sup>

The Supreme Court once again invoked the political question doctrine in the *Tomabechi Case*, where one of the members of the House of Representatives challenged the dissolution of the House without a no-confidence vote as stipulated in Article 69, and allegedly without a Cabinet decision to give advice and approval to the Emperor.<sup>85</sup> The Supreme Court held that the dissolution of the House of Representatives raised a question of such a political nature, directly implicating basic questions regarding government, that the courts should not decide such a

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seeing a minor under the age of fourteen, ultra vires, but dismissing a damage claim because the prison chief was not negligent in light of the fact that this regulation used to be firmly established before this case).

80. Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (grand bench).

81. *Id.*

82. *Id.*

83. See Hidenori Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 251, 258 (Yoichi Higuchi ed., 2001). See generally Kisaburō Yokota, *Political Questions and Judicial Review: A Comparison*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947–67, *supra* note 1, at 141, 148.

84. See, e.g., Sapporo Kōtō Saibansho [Sapporo High Ct.] Aug. 5, 1976, 27 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 1175 (*Naganuma Case*), *aff'd*, Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (1st petty bench).

85. Saikō Saibansho [Sup. Ct.] June 8, 1960, 14 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1206 (grand bench).

case.<sup>86</sup> This decision is more straightforward in relying upon the political question doctrine. These cases show the unwillingness of the Supreme Court to intervene in politically volatile cases.<sup>87</sup>

### III. UNCONSTITUTIONAL HOLDINGS

#### A. *Statutes Held Unconstitutional by the Supreme Court*

There is no doubt that the Japanese Supreme Court has developed a highly conservative constitutional jurisprudence in its sixty years of history, as it has held only eight statutory provisions unconstitutional since its beginning.

In the *Parricide Case*, the Supreme Court held by a vote of fourteen to one that the parricide provision of the Criminal Code—which imposed the death penalty or imprisonment for life for parricide in contrast to regular homicide, which could be punished by death penalty, imprisonment for life, or imprisonment for a term of not less than three years—was both an unreasonable and unconstitutional violation of the right to equality protected under Article 14.<sup>88</sup> Six Justices believed that treating parricide differently from other forms of homicide by imposing heavier sentences was itself unreasonably discriminatory.<sup>89</sup> Eight Justices believed, however, that the sentences imposed on those convicted of parricide were unreasonably burdensome in comparison with the sentences imposed on those found guilty of general homicide, even though the fact that the punishments for parricide and homicide were different was not in itself unreasonable.<sup>90</sup> These eight Justices were troubled by the fact that the courts could not suspend the enforcement of sentences in the parricide cases despite the existence of strong mitigating factors.<sup>91</sup>

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86. *Id.*

87. Some commentators argue that the Supreme Court was rather eager to rule on the merits in order to sustain the constitutionality of a statute or a government action. YOICHI HIGUCHI, *KENPŌ I* [CONSTITUTION I] 540 (1998). They cite the *Asahi Case*, Saikō Saibansho [Sup. Ct.] May 24, 1967, 21 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1043 (grand bench), and the *May Day Parade Case*, Saikō Saibansho [Sup. Ct.] Dec. 23, 1953, 7 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1561 (grand bench), as such examples, since in both cases the Supreme Court dismissed the case as being moot but nevertheless registered its opinions in dicta sustaining the constitutionality of the government actions. Yet, these cases are exceptional, and the Supreme Court is generally reluctant to state its opinion on the merits when the threshold requirements are not met.

88. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 27 SAIKŌ SAIBANSHO KEJI HANREISHŪ [KEISHŪ] 265 (grand bench).

89. *Id.*

90. *Id.*

91. *Id.* The judge will choose a specific sentence after considering aggravating factors and

In the *Pharmaceutical Act Case*, the Supreme Court inquired whether the proper distance requirement for obtaining a permit to operate a new pharmacy or drug store under the Pharmaceutical Act was a rational means to achieve an important public interest.<sup>92</sup> The government argued that if new pharmacies or drugstores were allowed to open too close to existing pharmacies or drugstores, rival businesses might engage in fierce competition, even ignoring consumer safety, resulting in harm to consumers. The Supreme Court was not persuaded by this argument. It held that there was no danger of compromising the safety of consumers, since drugs are heavily regulated by the government and the proper distance requirement was not necessary to protect public safety.<sup>93</sup> It thus concluded that the permit denial was unreasonable and an unconstitutional infringement of the freedom to choose an occupation protected under Article 22.<sup>94</sup>

In the *Forest Act Case*, the Supreme Court held that the provision in the Forest Act, which precluded a division claim of a jointly owned forest unless the claimant had more than half of the share of the forest, was unreasonable.<sup>95</sup> The provision was intended to prevent balkanization of the forest, thus contributing to the healthy management of the forest. Yet, the Supreme Court doubted whether a restriction on division claims could actually contribute to the effective management of the forest, because it could simply prolong the joint owners' management dispute.<sup>96</sup> It thus concluded that the provision was unreasonable and an unconstitutional infringement of the property rights protected under Article 29.<sup>97</sup>

In the *Postal Act Case*, the Supreme Court struck down a limitation on government liability for mishandling of mail in the Postal Act.<sup>98</sup> At issue was the constitutionality of immunity granted to the government with

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mitigating factors from these options. When there are strong mitigating factors, the judge can choose the sentence of imprisonment for a term of not more than three years for regular homicide and then suspend the enforcement of the sentence. Yet, with respect to a defendant convicted for parricide, the minimum sentence would be three-and-a-half years even if there were very strong mitigating factors, and therefore the judge could not suspend the enforcement of the sentence. The defendant convicted of parricide had to be sent to jail. *See infra* note 124.

92. Saikō Saibansho [Sup. Ct.] Apr. 30, 1975, 29 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 572 (grand bench).

93. *Id.*

94. *Id.*

95. Saikō Saibansho [Sup. Ct.] Apr. 22, 1987, 41 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 408 (grand bench).

96. *Id.*

97. *Id.*

98. Saikō Saibansho [Sup. Ct.] Sept. 11, 2002, 56 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1439 (grand bench).

respect to handling of special delivery mail, a peculiar kind of registered mail, by postal workers. The Postal Act gave immunity to the government even when the postal office intentionally caused damage or was grossly negligent in handling registered mail, while imposing limited liability only when the registered mail is lost or damaged and the Supreme Court found this immunity unreasonable.<sup>99</sup> The Court decided that in light of the nature of the service, the government can grant immunity when the postal workers are negligent, but the grant of immunity when they are intentional or grossly negligent is inappropriate. Moreover, a special delivery mail, a peculiar kind of registered mail service, is often used to deliver court documents. In light of the essential nature of this service, the Supreme Court concluded that the grant of immunity with respect to handling of special delivery mail when postal workers are negligent was unreasonable and an unconstitutional violation of the right to seek damages from the government protected under Article 17.<sup>100</sup>

In the *Overseas Voters Case*, the Supreme Court struck down the exclusion of overseas voters from participation in national elections under the Public Office Election Act.<sup>101</sup> The Supreme Court held that the right to vote is an integral part of parliamentary democracy and must be granted to all adult citizens.<sup>102</sup> Except for disenfranchisement for violating the election law, any other disqualification from voting or limitation on the right to vote should not be allowed unless it is necessary for compelling reasons and indispensable to secure the fairness of elections.<sup>103</sup> The Supreme Court concluded that there were no compelling reasons to exclude overseas voters altogether from elections before 1998.<sup>104</sup> It also found no compelling reasons to exclude overseas voters from elections in the election district even after 1998.<sup>105</sup> It thus concluded that the deprivation was unreasonable and an unconstitutional infringement of the right to vote protected under Article 15.<sup>106</sup> The Supreme Court affirmed the eligibility of those overseas voters in the coming election and also ordered the government to pay 5000 yen in damages to each plaintiff.<sup>107</sup>

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99. *Id.*

100. *Id.*

101. Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2087 (grand bench).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*



In the *Illegitimate Children Nationality Discrimination Case*, the Supreme Court invalidated a provision of the Nationality Act, which was discriminatory against illegitimate children in granting Japanese nationality.<sup>108</sup> According to Article 2 of the Nationality Act, a child born to a Japanese father or mother was granted Japanese nationality at birth.<sup>109</sup> Yet, under Article 3, paragraph 1, an illegitimate child born to a foreign mother and a Japanese father could obtain Japanese nationality only after his or her parents got married. While the Supreme Court held that it was reasonable to require marriage as evidence of the connection between the father and the child at the time this provision was adopted, it came to the conclusion that the times had changed and there were no longer reasonable grounds to require marriage of the parents as exclusive evidence for such connection.<sup>110</sup> As a result, the Supreme Court struck down the provision as being unreasonable and in violation of the right to equality protected under Article 14, and it granted Japanese nationality to the child.<sup>111</sup>

There are two other cases in which the Supreme Court declared statutory provisions unconstitutional but refused to invalidate them. They are two *Reapportionment Cases*, which involve gross disparity between overrepresented and underrepresented election districts. In both cases, voters in the underrepresented districts filed suits seeking the invalidation of the election results, attacking the constitutionality of the underlying apportionment provisions of the Public Office Election Act. In the first *Reapportionment Case*, decided in 1976, the Supreme Court admitted that the equality of effect or worth of each vote is also constitutionally guaranteed under Articles 14, 15, and 43.<sup>112</sup> Gross discrepancy between underrepresented districts and overrepresented districts was thus condemned as unconstitutional unless readjusted within a reasonable period of time.<sup>113</sup> In this case, the maximum discrepancy was 1 to 4.9, and the Supreme Court held that this was an unconstitutional violation.<sup>114</sup> Yet,

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108. Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (grand bench).

109. Kokusekihō [Nationality Act], Law No. 147 of 1950, art. 2.

110. Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (grand bench).

111. *Id.* The Nationality Act was amended to allow an illegitimate child acknowledged by his or her Japanese father to acquire Japanese nationality if his or her father was Japanese at the time of his or her birth and remained Japanese at the time of application. Kokusekihō [Nationality Act], Law No. 147 of 1950, art. 3.

112. Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223 (grand bench).

113. *Id.*

114. *Id.*

the Supreme Court faced a dilemma in providing a remedy. The Supreme Court believed that not only the apportionment in the underrepresented district at issue but also the whole apportionment scheme must be declared unconstitutional. If the Supreme Court invalidated the apportionment provision and the election result, the Supreme Court feared, the legal status of all elected representatives might be undermined, thus casting doubt on the legality of the legislation passed by them and precluding them from amending the election statute. The Supreme Court refused to invalidate the apportionment provision and election result, thus merely declaring the apportionment provision unconstitutional.<sup>115</sup> This holding was confirmed in the second *Reapportionment Case*, in which the Court held that the maximum discrepancy of 4.4 to 1 was unconstitutional.<sup>116</sup> The Supreme Court, however, once again refused to invalidate the provision and election result.<sup>117</sup>

It must be noted that aside from the two *Reapportionment Cases* and the *Overseas Voters Case*, the Supreme Court has not struck down any statutes for infringement of political freedoms: freedom of thought, freedom of religion, or freedom of expression. Most of the statutes struck down were quickly revised without any political controversy, except for the parricide provision of the Criminal Code, which took almost twenty years for the Diet to delete because of opposition from the conservative members of the ruling party.<sup>118</sup> It is rare for the unconstitutional holdings of the Supreme Court to have significant political implications.

### B. Unconstitutional Rulings

The Supreme Court has also held government actions unconstitutional in several other cases. In the *Cabinet Order 325 Case*, the Supreme Court held unconstitutional the criminal punishment of a defendant under the Cabinet Order 325, which prohibited any conduct that prevented the implementation of the occupation policy, after the end of the occupation.<sup>119</sup> The defendant in this case was prosecuted for violating the SCAP order, which prohibited the publication of Red Flag, a communist paper, and similar papers. The question presented was whether the

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115. *Id.*

116. Saikō Saibansho [Sup. Ct.] July 17, 1985, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1100 (grand bench).

117. *Id.*

118. MATSUI, *supra* note 4, at 145.

119. Saikō Saibansho [Sup. Ct.] July 22, 1953, 7 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1562 (grand bench).

government could punish the defendant after the end of occupation. Six members of the Supreme Court believed that the Cabinet Order lost effect when the occupation ended and that it was unconstitutional for the Diet to extend its validity after the occupation in violation of Article 39, which prohibits retroactive punishment on legal conduct.<sup>120</sup> Four members of the Supreme Court believed that not all prosecution after the end of occupation was prohibited under the Cabinet Order 325.<sup>121</sup> Yet, they believed that the SCAP order at issue was an unconstitutional infringement of freedom of expression protected by Article 21, and criminal punishment for violation of this order after the end of occupation was thus unconstitutional.<sup>122</sup>

In the *Mandatory Debt Adjustment Case*, the Supreme Court held that applying the Mandatory Debt Adjustment Act to a dispute about a house and reaching a decision without conducting an open trial were both unconstitutional violations of the right of access to the courts protected under Article 32, as well as the guarantee to an open trial protected under Article 82.<sup>123</sup>

In the *Confiscation of Third-Party Property Case*, the Supreme Court held that the confiscation of third-party property without affording an opportunity for hearing was unconstitutional.<sup>124</sup> In Japan, the confiscation of property is imposed upon the defendant as an additional penalty.<sup>125</sup> The defendant challenged the confiscation penalty on the property of a third party on the grounds that it was unconstitutional since the third-party owner was not provided with an opportunity for a hearing. The Supreme Court held that the confiscation had the effect of depriving the owner of the property right even though it was imposed upon the defendant.<sup>126</sup> Then, the Supreme Court concluded that the confiscation of property without affording the third-party owner an opportunity for a hearing was unconstitutional in light of the property rights of Article 29 and the right to due process of Article 31.<sup>127</sup>

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120. *Id.*

121. *Id.*

122. *Id.*

123. Saikō Saibansho [Sup. Ct.] July 6, 1960, 14 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1657 (grand bench).

124. Saikō Saibansho [Sup. Ct.] Nov. 28, 1962, 16 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1577 (grand bench).

125. KEIHŌ [KEIHŌ] [PEN. C.] art. 9.

126. Saikō Saibansho [Sup. Ct.] Nov. 28, 1962, 16 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1577 (grand bench).

127. *Id.*

The fourth and fifth unconstitutional decisions are concerned with the principle of separation of religion and state under Article 20. In the *Ehime Tamagushi Case*, the Supreme Court held that public spending on *tamagushi* offerings at the Yasukuni Shrine and contribution of religious offerings to the local Gokoku Shrine by the governor of the Ehime Prefecture were unconstitutional violations of the principle of separation.<sup>128</sup> *Tamagushi*, a religious offering consisting of a twig of the *sakaki* tree, covered with folded white paper, is a symbol of sacredness in *Shinto*. In the *Tsu City Ground-Breaking Ceremony Case*, the Supreme Court established the purpose and effect test to decide whether the government's involvement with religion violated the principle of separation of religion and state and held that the municipal hosting of a ground-breaking ceremony before the construction of a gym and inviting of *Shinto* priests did not have any purpose and effect of promoting *Shinto*.<sup>129</sup> Apparently, however, the Supreme Court believed that paying for *tamagushi* had a stronger religious connection than the ground-breaking ceremony.<sup>130</sup> Applying the purpose and effect test, the Supreme Court concluded that public spending for *tamagushi* had the purpose of promoting *Shinto* and had the effect of giving the impression to the public that the *Shinto* shrines in question were special, thus violating the separation principle.<sup>131</sup>

The Supreme Court also held in the *Sorachibuto Shrine Case* that the free offering of public land for the maintenance of a shrine is unconstitutional.<sup>132</sup> The Supreme Court held that the permissibility of free offering of public property for the use of religious facilities should be decided by considering various factors, such as the nature of the religious facility, the historical background of the offering, the specific manner of the offering, and commonsense evaluation by the general public.<sup>133</sup> The Supreme Court held that the Sorachibuto Shrine was a *Shinto* religious facility and the free offering of public property for its use was to be

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128. Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (grand bench).

129. Saikō Saibansho [Sup. Ct.] July 13, 1977, 31 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (grand bench).

130. Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (grand bench).

131. *Id.*

132. Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, 64 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (grand bench).

133. *Id.*

viewed as providing special benefit to a particular religion beyond the permissible limit.<sup>134</sup>

What is the political ramification of these decisions? Did the Supreme Court provoke strong political reaction from the political process? The answer is no. The *Cabinet Order 325 Case* probably has only historical significance. Aside from the two unconstitutional holdings under the principle of separation of religion and state, the two other unconstitutional holdings did not have much political implications. In general, these cases further show the tendency of the Japanese Supreme Court to stay away from politics.

### *C. Acceptance of Government Arguments and Deference to the Legislature*

In all other cases, the Supreme Court rejected constitutional challenges by readily accepting the arguments of the government or paying almost total deference to the judgments of the legislature.

With respect to equality rights, the Supreme Court has applied a very lenient standard of review and upheld all the challenged discrimination except for the *Parricide Case* and the *Illegitimate Children Nationality Discrimination Case*. The Supreme Court upheld, for example, a six-month waiting period for divorced women to get remarried after divorce against a sexual discrimination challenge, holding that the waiting period was necessary for the presumption of the father of a child born after divorce.<sup>135</sup> The Supreme Court also rejected the challenge against discrimination against illegitimate children by allowing the statutory inheritance share of an illegitimate child at one-half of the legitimate child.<sup>136</sup> The Supreme Court believed that this was a reasonable measure to protect the legal marriage.<sup>137</sup>

With respect to freedom of thought, the Supreme Court has rejected the constitutional attack against disciplinary action on a public school music teacher who refused to play piano for *kimigayo*, the national anthem, as ordered by the school principal.<sup>138</sup> Although she refused the order based

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134. *Id. But see* Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, 64 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 128 (grand bench).

135. Saikō Saibansho [Sup. Ct.] Dec. 5, 1995, 1563 HANREI JIHŌ [HANJI] 81 (3d petty bench).

136. Saikō Saibansho [Sup. Ct.] July 5, 1995, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1789 (grand bench).

137. *Id.*

138. Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 291 (3d petty bench).

on her belief that *kimigayo* was a symbol of the aggression of the Japanese military forces during the Pacific War and that she did not want to cooperate with the indoctrination of her students by playing piano for *kimigayo*, the Supreme Court held that her freedom of thought was not infringed.<sup>139</sup>

With respect to freedom of religion and the separation of religion and state, the Supreme Court has established the purpose and effect test, which permits government involvement with religion so long as the involvement remains within the reasonable limit in light of its purpose and effect.<sup>140</sup> The Supreme Court applied this test to uphold the *Shinto*-style ground-breaking ceremony in the *Tsu City Ground-Breaking Ceremony Case*.<sup>141</sup> Thereafter, the Supreme Court sustained all government involvement with *Shinto* until the *Ehime Tamagushi Case*.<sup>142</sup>

With respect to freedom of expression, the Supreme Court, for instance, upheld the punishment on advocacy of illegal action when the Diet believed that the violation of law could be brought about, without regard to what exactly the defendant had said and whether there was a real and substantial danger that the violation of law would be brought about.<sup>143</sup>

The Supreme Court has also upheld the constitutionality of punishment for defamation and imposition of civil liability for defamation, even though it is always the defendant who must prove that the statement was concerned with matters of public interest, the statement was made solely for the public purpose, and the statement was true or at least there were reasonable grounds to believe it to be true.<sup>144</sup> Moreover, the Supreme Court has upheld a judicial injunction against defamatory publication.<sup>145</sup> It also upheld the ban on publication and distribution of obscene materials

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139. *Id.*

140. Saikō Saibansho [Sup. Ct.] July 13, 1977, 31 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (grand bench).

141. *Id.*

142. Saikō Saibansho [Sup. Ct.] Oct. 21, 1999, 1696 HANREI JIHŌ [HANJI] 96 (1st petty bench); Saikō Saibansho [Sup. Ct.] Feb. 16, 1993, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1687 (3d petty bench); Saikō Saibansho [Sup. Ct.] June 1, 1988, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277 (grand bench).

143. Saikō Saibansho [Sup. Ct.] May 18, 1949, 3 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 839 (grand bench).

144. Saikō Saibansho [Sup. Ct.] Apr. 10, 1968, 12 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 830 (1st petty bench); Saikō Saibansho [Sup. Ct.] July 4, 1956, 10 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 785 (grand bench).

145. Saikō Saibansho [Sup. Ct.] June 11, 1986, 40 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 872 (grand bench).

for the protection of “minimum sexual morality” and upheld the conviction of the publisher and translator of *Lady Chatterley’s Lover*.<sup>146</sup>

In addition, the Supreme Court upheld the total ban on political activities of public workers and criminal punishment regardless of the ranks of the public workers or the nature of their work.<sup>147</sup> The Supreme Court upheld the total ban on door-to-door canvassing during the election campaign, holding that the ban was reasonable and necessary to prevent fixing and economic burden to the candidates and to protect the residents’ privacy.<sup>148</sup> The Supreme Court further upheld the almost total ban on the distribution of materials during an election campaign, holding that such a ban was reasonable and necessary to secure the fairness of an election.<sup>149</sup>

Furthermore, the Supreme Court upheld a local public safety ordinance, which requires demonstrators to obtain prior permits for a public demonstration and prohibits any demonstration if there is a danger that the public safety might be jeopardized.<sup>150</sup> It also gave almost unbridled discretion to the government to refuse the use of public parks for large gatherings.<sup>151</sup> In addition, it upheld an almost total ban on putting up posters on public facilities, trees, or electricity poles on public streets.<sup>152</sup> It further upheld the conviction of pamphleteers for trespassing when they entered apartment premises for distribution of pamphlets despite the ban on pamphleteering.<sup>153</sup>

Despite the *Pharmaceutical Act Case* and the *Forest Act Case*, the Supreme Court has rejected all other challenges against infringement of economic freedoms. The Supreme Court has, for instance, upheld the

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146. Saikō Saibansho [Sup. Ct.] Mar. 13, 1957, 11 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997 (grand bench).

147. Saikō Saibansho [Sup. Ct.] Nov. 6, 1974, 28 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 393 (grand bench).

148. Saikō Saibansho [Sup. Ct.] June 15, 1981, 35 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 205 (2d petty bench); Saikō Saibansho [Sup. Ct.] Apr. 23, 1969, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 235 (grand bench); Saikō Saibansho [Sup. Ct.] Sep. 27, 1950, 4 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1799 (grand bench).

149. Saikō Saibansho [Sup. Ct.] Mar. 23, 1982, 36 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 339 (3d petty bench); Saikō Saibansho [Sup. Ct.] Apr. 6, 1955, 9 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 819 (grand bench).

150. Saikō Saibansho [Sup. Ct.] July 20, 1960, 14 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1243 (grand bench).

151. See Saikō Saibansho [Sup. Ct.] Dec. 23, 1953, 7 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1561 (grand bench) (dictum).

152. Saikō Saibansho [Sup. Ct.] Dec. 18, 1968, 22 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1549 (grand bench).

153. Saikō Saibansho [Sup. Ct.] Nov. 30, 2009, 63 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1765 (2d petty bench); Saikō Saibansho [Sup. Ct.] Apr. 11, 2008, 62 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1217 (2d petty bench).

proper distance requirement for a permit to operate a public bathhouse,<sup>154</sup> a permit requirement to operate a public marketplace and a distance requirement to prevent excessive competition,<sup>155</sup> and a permit requirement for a liquor store.<sup>156</sup>

Despite the constitutional guarantee of the right to welfare, the Supreme Court held in the *Asahi Case* that the Constitution did not mean to grant an individual right to seek welfare, and the government must be granted the broadest discretion to decide the shape of the welfare programs.<sup>157</sup>

Overall, except for a dozen unconstitutional holdings, the Supreme Court has sustained all restrictions on the rights and freedoms protected by the Constitution. The Supreme Court never applied strict scrutiny to require that the restriction of those rights and freedoms be narrowly tailored to serve compelling state interests. It rather inquired whether the restrictions can be said to be reasonable and necessary and easily concluded that they were. The Supreme Court has never struck down any statutes restricting political freedom, such as freedom of expression. Of course, the small number of unconstitutional rulings alone does not prove the extreme conservatism of the Supreme Court of Japan. Yet, some of the restrictions on the rights and freedoms upheld by the Supreme Court of Japan would surely be invalidated by the United States Supreme Court, the German Federal Constitutional Court, or the Supreme Court of Canada.

Without a doubt, this does not mean that the Japanese Supreme Court is totally insensitive to claims of infringement of fundamental human rights. The Supreme Court has showed its willingness to protect fundamental human rights by giving a narrow construction to prohibited conduct. For instance, in the *Prison Inmates Newspaper Deletion Case*, the Supreme Court narrowly construed a provision in the Prison Act, which broadly authorized a prison chief to delete inappropriate articles when he or she provided newspapers to prison inmates.<sup>158</sup> The Supreme

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154. Saikō Saibansho [Sup. Ct.] Mar. 1, 1989, 1308 HANREI JIHŌ [HANJI] 111 (3d petty bench); Saikō Saibansho [Sup. Ct.] Jan. 20, 1989, 43 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1 (2d petty bench); Saikō Saibansho [Sup. Ct.] Jan. 26, 1955, 9 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 89 (grand bench).

155. Saikō Saibansho [Sup. Ct.] Nov. 22, 1972, 26 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 586 (grand bench).

156. Saikō Saibansho [Sup. Ct.] Dec. 15, 1992, 46 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2829 (3d petty bench).

157. Saikō Saibansho [Sup. Ct.] May 24, 1967, 21 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1043 (grand bench) (dictum).

158. Saikō Saibansho [Sup. Ct.] June 22, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 793 (grand bench).



Court held that the deletion was authorized only when there was a high likelihood that the order and safety of the prison would be jeopardized or the rehabilitation goals of prisoners would be undermined.<sup>159</sup> Similarly, in the *Fukuoka Prefecture Youth Protection Ordinance Case*, the Supreme Court narrowly construed the unbridled ban on sexual intercourse with youth as authorizing criminal punishment only when defendants deceived youth into sexual intercourse or when defendants had sexual intercourse with youth simply to gratify their sexual desires.<sup>160</sup>

The Supreme Court has also showed its willingness to protect individual rights by employing the abuse of discretion doctrine on a nonconstitutional basis. For instance, in the *Jehovah's Witness Kendo Refusal Case*, the Supreme Court held that a public high school was not allowed to expel a student who refused to practice *kendo*, Japanese fencing, as a part of a physical education class because of his religious belief against fighting.<sup>161</sup> The Supreme Court believed that the expulsion should be a means of last resort and that the school abused its discretion when it refused to provide the student alternative means to receive credit.<sup>162</sup> The Supreme Court also held, in the third *Ienaga School Textbook Censorship Case*, that an order of the Education Minister to delete the description of biochemical experiments by Japanese military forces in China during the Pacific War as a condition to approve the history textbook submitted for review was an abuse of discretion and illegal, although it rejected the constitutional attack on the school textbook review system.<sup>163</sup> The Supreme Court believed that the incident was common knowledge among historians and there was no reason for ordering its deletion.<sup>164</sup>

Yet, the fact remains that the Japanese Supreme Court has been extremely reluctant to strike down legislation or other governmental actions on constitutional grounds. Why has the Japanese Supreme Court developed such a conservative constitutional jurisprudence? Is such extreme judicial passivism justified?

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159. *Id.*

160. Saikō Saibansho [Sup. Ct.] Oct. 23, 1985, 39 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 413 (grand bench).

161. Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (2d petty bench).

162. *Id.*

163. Saikō Saibansho [Sup. Ct.] Aug. 29, 1997, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2921 (3d petty bench).

164. *Id.*

#### IV. WHY HAS THE JAPANESE SUPREME COURT DEVELOPED A CONSERVATIVE CONSTITUTIONAL JURISPRUDENCE?

##### A. *Cultural Reasons*

Former Justice Masami Itoh, who was also a professor of Anglo-American Law at the Tokyo University Faculty of Law, pointed out several factors that he believed might have contributed to the extreme judicial passivism of the Supreme Court.<sup>165</sup> One of these factors is the philosophy of respect for harmony in Japanese culture.<sup>166</sup> According to Itoh, in Japanese society, harmony of a group is much respected, and even the Supreme Court is inclined to respect the judgment of the Diet and administrative agencies out of respect for harmony.<sup>167</sup> Or one may say, because of the emphasis on harmony, it might be difficult for the minority members on the bench to strongly disagree with the majority.

Yet, it is doubtful whether such a cultural reason plays a significant role in the extreme conservatism of the Supreme Court of Japan. Even though harmony should be respected, there are strong dissents among the Justices, and there is no reason to believe that the Supreme Court is upholding the statutes for the sake of harmony. After all, there is no reason why it is always the Supreme Court that must back off in order to pay respect to the political branch. I believe that the historical, organizational, institutional, and strategic reasons play much greater roles than the cultural reason.

##### B. *Historical Reasons*

I believe that the root cause of judicial passivism of the Supreme Court is the lack of understanding of the power of judicial review among Justices who were initially appointed to the Supreme Court. Although many public officials who cooperated with the government during the Pacific War and had an ultraconservative or militarist ideology were expelled from the government during the occupation, no judges were expelled from their jobs even though most of them cooperated with the government under the Meiji Constitution to punish citizens for their refusal to cooperate with the

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165. MASAMI ITOH, SAIBANKAN TO GAKUSHA NO AIDA [BETWEEN A JUSTICE AND A SCHOLAR] (1993).

166. *Id.* at 116–18.

167. *Id.*

government in its war effort.<sup>168</sup> Moreover, judges, prosecutors, and attorneys who were accustomed to the traditional German constitutional philosophy staffed the initial Supreme Court.<sup>169</sup> One of the hallmarks of prewar judges is their positivism. The judges were supposed to apply the statutes, and there was no tradition in German positivist jurisprudence that allowed judicial judges to strike down statutes in the name of the Constitution. They simply brought their traditional positivist constitutional philosophy to the newly created Supreme Court. Furthermore, they did not know the practice of judicial review in the United States. It is no wonder that the Supreme Court simply rejected all constitutional challenges filed by citizens after the adoption of the current Japanese Constitution, since it had no experience with enforcing the Constitution against the Diet.

Moreover, after the establishment of the Supreme Court, defendants were not allowed to challenge the finding of fact and improper sentencing before the Supreme Court,<sup>170</sup> unlike before the Supreme Court of Judicature. They thus filed appeals insisting on constitutional violations in order to attract the Supreme Court's attention to the erroneous finding of fact or improper sentencing. Some of their arguments were poorly crafted and utterly ridiculous. Some defendants challenged their convictions as a violation of Chapter 3 of the Constitution, a Bill of Rights, without specifying which rights were infringed. Some defendants challenged their convictions as a violation of renunciation of war and prohibition of armed forces provided in Article 9. Some defendants challenged their convictions as a violation of the welfare right protected in Article 25, arguing that, if convicted, their families would not be able to live a decent living.

Unfortunately, since the Supreme Court did not have discretion to refuse appeals, the Supreme Court simply accepted them and rejected all of them on the merits, thus creating a jurisprudence of upholding the constitutionality of various statutes. The conservative constitutional jurisprudence was thus established. There is an old saying in Japan: A drowning man will catch at a straw. A desperate person indeed attempts the hopeless thing. A constitutional argument perhaps looked for the

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168. JIRO NOMURA, *NIHON NO SAIBANKAN* [JAPANESE JUDGES] 172 (1994).

169. NOMURA, *supra* note 19, at 156. For a process of initial appointment and the behind-the-scenes battle between judges who planned for a radical reform and judges who were opposed to a radical reform, see D.J. Danelski, *Saikō saibansho no seitan* [*The Creation of the Japanese Supreme Court*], translated by Takeo Hayakawa in *KON-NICHI NO SAIKŌ SAIBANSHO: GENTEN TO GENTEN* [THE SUPREME COURT TODAY: ORIGINS AND THE PRESENT] 183 (Hogaku Seminar Special Issue 1988).

170. *Supra* note 38.

Justices as a meaningless last straw the defendant catches when he or she cannot make other, more solid legal arguments under the statute.<sup>171</sup>

Of course, with the change of time, the Supreme Court could have changed its constitutional philosophy. Indeed, the Supreme Court showed some indication of change in the 1960s. The majority of Justices came to review the constitutionality of infringement of individual rights more carefully, as it did in the *All Postal Workers, Tokyo Central Post Office Case*.<sup>172</sup> In Japan, all public workers, regardless of the nature of their jobs or their ranks, are prohibited from striking,<sup>173</sup> despite the constitutional guarantee of the right to strike in Article 28 of the Constitution. There is also a criminal punishment on those who conspire, solicit, advocate, or plan such illegal strikes.<sup>174</sup> Postal workers were employees of a public corporation, and strikes were prohibited under the Public Corporation and State Managed Company Workers Labor Relations Act.<sup>175</sup> Yet, there was no criminal punishment for organizing illegal strikes. The defendants, union leaders, were prosecuted for violating the Postal Act, which penalized postal workers with criminal punishment for refusing to provide postal service,<sup>176</sup> when they urged other members to attend a gathering during work hours. The Supreme Court believed that public workers were also entitled to the rights of workers under Article 28 of the Constitution.<sup>177</sup> Although it allowed the restriction of these rights in light of the public interest, it limited the permissible scope of restriction to a reasonable minimum after balancing the rights of workers against securing the public interest.<sup>178</sup> It also held that criminal punishment for the

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171. ITOH, *supra* note 165, at 124–25.

172. Saikō Saibansho [Sup. Ct.] Oct. 26, 1966, 20 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901 (grand bench).

173. Kokka kōmuinhō [National Public Workers Act], Law No. 120 of 1947, art. 98, para. 2; Chihō kōmuinhō [Local Public Workers Act], Law No. of 261 of 1950, art. 37.

174. Kokka kōmuinhō [National Public Workers Act], Law No. 120 of 1947, art. 110, para. 17; Chihō kōmuinhō [Local Public Workers Act], Law No. of 261 of 1950, art. 61, para. 4.

175. Kōkyōkigyōtāitō rōdōkankeihō [Public Corporation and State Managed Company Workers Labor Relations Act], Law No. 257 of 1948, art. 17. This statute was originally enacted as Kōkyōkigyōtāi rōdōkankeihō [State Managed Company Workers Labor Relations Act] in 1948. In 1986, it was renamed as Kokueikigyō rōdōkankeihō [State Managed Company Workers Labor Relations Act]. In 2001, it was again renamed as Kokueikigyō oyobi tokutei dokuritsugyōseihōjin no rōdōkankei nikansuru hōritsu [Act Concerning Labor Relations in State Managed Company and Specified Independent Administrative Corporation], and in 2003, it became Tokutei dokuritsugyōseihōjintō no rōdōkankei nikansuru hōritsu [Act on Labor Relationship of Specified Independent Administrative Corporation].

176. Yūbinhō [Postal Act], Law No. 165 of 1947, art. 79, para. 1.

177. Saikō Saibansho [Sup. Ct.] Oct. 26, 1966, 20 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901 (grand bench).

178. *Id.*

violations should be limited to a minimum and narrowly construed the Postal Act as criminalizing only seriously illegal conduct such as violent strikes, strikes for purposes other than legitimate union activity, or improperly prolonged strikes.<sup>179</sup>

Although the Supreme Court upheld the ban on strikes by public corporation workers, it gave a landmark decision that showed its willingness to narrow the permissible scope of the ban on strikes and the criminal punishment. In later cases, the Supreme Court applied this judgment to local public workers<sup>180</sup> and national public workers.<sup>181</sup>

However, this decision triggered tremendous backlash from conservative politicians. The Japanese government had been long dominated by the conservative Liberal Democratic Party (LDP) ever since its creation in 1955, except for a short period of time in 1993 and 1994, until it was finally defeated by the Democratic Party of Japan (DPJ) in 2009.<sup>182</sup> Conservative politicians of the LDP were deeply upset by the *All Postal Workers, Tokyo Central Post Office Case* decision and other decisions of the lower courts that refused the detention of radical students who participated in student movements.<sup>183</sup> Conservative politicians criticized the Supreme Court as politically biased and demanded that the government use more careful screening before making an appointment to the Supreme Court.<sup>184</sup>

With increasing criticism from the ruling party and conservative critics, the Supreme Court, under Chief Justice Kazuto Ishida, came to maintain its independence mainly through keeping distance from politics. The Supreme Court practically overturned the *All Postal Workers, Tokyo Central Post Office Case* in the *All Forest and Agricultural Workers, Police Office Act Amendment Opposition Case*.<sup>185</sup> Defendants were union leaders of all national agricultural and forest public workers and were prosecuted under the National Public Workers Act for soliciting an illegal strike by urging other members to participate in a gathering during work

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179. *Id.* It must be noted that the postal service is now privatized and the postal workers are no longer public workers. Their strike is no longer prohibited.

180. Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 305 (grand bench).

181. *Id.*

182. For the dominance of the LDP in the postwar history of Japan, see generally LOUIS D. HAYES, INTRODUCTION TO JAPANESE POLITICS 71–85 (5th ed. 2009); J.A.A. STOCKWIN, GOVERNING JAPAN: DIVIDED POLITICS IN A RESURGENT ECONOMY 63–134 (4th ed. 2008).

183. NOMURA, *supra* note 19, at 172.

184. *Id.* at 77–78.

185. Saikō Saibansho [Sup. Ct.] Apr. 25, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 547 (grand bench).

hours against the then-proposed amendment to the Police Office Act. The Supreme Court held that strikes by public workers were incompatible with the public nature of their jobs and seriously affected the common interest of the public, regardless of the workers' jobs or ranks.<sup>186</sup> Moreover, since the labor relationship between the government and public workers had to be regulated by statute, strikes by public workers would undermine the process of representative democracy, forcing the Diet to bow to the demands of unions through the threat of strikes.<sup>187</sup> Finally, the Supreme Court stated that there was no limitation on strikes by public workers based on market mechanisms.<sup>188</sup> As a result, the Supreme Court upheld the total ban on strikes.<sup>189</sup> It further rejected the limiting construction of the *All Postal Workers, Tokyo Central Post Office Case* on the scope of criminal punishment as violating the principle of Article 31, which requires a clear definition of any crime.<sup>190</sup> It thus concluded that it was constitutional to impose criminal punishment on those who organized, solicited, or assisted illegal strikes, regardless of the severity of illegality.<sup>191</sup>

The Supreme Court applied this reasoning to local public workers<sup>192</sup> and public corporation workers<sup>193</sup> to explicitly overrule the *All Postal Workers, Tokyo Central Post Office* judgment. As a result, all public workers, including public corporation workers, have been deprived of the right to strike, and union leaders might be punished for organizing and soliciting the strike.

The Supreme Court has simply come to stay away from interfering with politics under the name of the Constitution. The conservative, noninterventionist constitutional jurisprudence of the Supreme Court may be seen as an attempt to preserve judicial independence from political accusation by introducing self-restraint.<sup>194</sup>

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Saikō Saibansho [Sup. Ct.] May 21, 1976, 30 SAIKŌ SAIBANSHO KEJI HANREISHŪ [KEISHŪ] 1178 (grand bench).

193. Saikō Saibansho [Sup. Ct.] May 4, 1977, 31 SAIKŌ SAIBANSHO KEJI HANREISHŪ [KEISHŪ] 182 (grand bench). The Supreme Court, while giving immunity from criminal punishment for mere participants in an illegal strike, concluded that the solicitation of leaders is punishable.

194. The Supreme Court has also adopted the attitude of controlling the lower court judges to make sure that they stay away from politics. *Infra* note 205 and accompanying text. For an argument that the tight control of the lower court judges by the Japanese Supreme Court may be viewed as an attempt to secure the independence of the judiciary, see generally John O. Haley, *The Japanese*

### C. Organizational Reasons

Of course, the fact that until 2009 there had been practically no change of government since 1955 when the ruling LDP was formed might have a strong influence upon the composition of the Supreme Court. Almost all the Justices were appointed by the conservative LDP government. It is no wonder that the Supreme Court, made up of appointees chosen by the conservative LDP, came to adopt a highly conservative, noninterventionist constitutional jurisprudence.

However, it is noteworthy that a custom has developed for the Chief Justice to recommend his successor to the Prime Minister and for the Prime Minister to follow that recommendation.<sup>195</sup> The Chief Justice also recommends to the Prime Minister which candidates should succeed the retiring ten Associate Justices.<sup>196</sup> Therefore, the Cabinet cannot just pick a candidate who shares a political ideology with the ruling party. The influence of the political ideology of the LDP upon the Justices is thus not direct. Yet, ever since the *All Agricultural and Forest Workers, Police Office Act Amendment Opposition Case*, the Supreme Court has basically clung to a conservative ideology and has adopted a policy of staying away from politics in order to maintain political independence. Therefore, the LDP Cabinet could simply trust the Supreme Court and accept its recommendations without worry.

Of course, this custom probably best serves the interests of the ruling party, regardless of whether it is a conservative party or a liberal party. If the Prime Minister respects the recommendation of the Chief Justice, then the new appointees will probably be conservative noninterventionist Justices, without bringing any fear for the government that the Supreme Court might interfere with their public policy, no matter how conservative or liberal it may be. It is significant that when the JSP joined LDP to

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*Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99 (Daniel H. Foote ed., 2007).

195. NOMURA, *supra* note 19, at 54–56; MAINICHI SHIMBUN SHAKAIBU, KENSHO—SAIKŌ SAIBANSHO [THE SUPREME COURT RECONSIDERED] 263 (1991).

196. As we will see later, the composition of the Supreme Court is divided into three groups: six former judges, four attorneys, and five others, including two prosecutors, two bureaucrats, and one academic. With respect to the six former judges, the Supreme Court has broad discretion to recommend successors. TAKII, *supra* note 44, at 5. With respect to the four attorneys, the Supreme Court will make recommendations based on the recommendations of the Japan Federation of Bar Association, the national organization of all local bar associations. TAKII, *supra* note 44, at 8–9; *see also* SHAKAIBU, *supra* note 195, at 275–79. With respect to the five remaining members, the discretion of the government is much wider, although the Cabinet will make the appointment of Justices from the two prosecutors based on the recommendation from the Prosecutors' Office.

create a coalition government in 1994, the socialist Prime Minister Tomiichi Murayama appointed the very conservative Chief Justice Touru Miyoshi, who was one of two dissenters in the *Ehime Tamagushi Case*, as recommended by the Chief Justice.<sup>197</sup> It did not matter whether the appointee shared the same political ideology of the Prime Minister. Even after the change of government in 2009, the DPJ Prime Minister Yukio Hatoyama accepted the recommendations of the Chief Justice as to the appointment of new Associate Justices.<sup>198</sup> If the Supreme Court wants to maintain its current attitude, then the Chief Justice can simply recommend the candidate who will stick to the current philosophy. So long as this custom is followed, it is likely that the Supreme Court will remain passive, regardless of who is controlling the government.

Moreover, ever since the initial appointment, Justices of the Supreme Court have been divided into three different groups: lower court judges, attorneys, and others. Now, it is a custom to appoint six lower court judges, four attorneys, and five others, including two prosecutors, two government bureaucrats, and one scholar.<sup>199</sup> As a result of this division, the majority of the Justices—eight out of the fifteen—are to be appointed from lower court judges and prosecutors. This will make sure that judges and prosecutors control the Supreme Court.

In order to become a Supreme Court Justice from a lower court judge, one must pass the Bar Examination with a good grade, finish one's legal training at the Legal Research and Training Institute of the Supreme Court with good marks, show the ability to make decisions as a judge and the amenability to work inside the judiciary, and be initially appointed as an

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197. *Saikō saibansho hanji ichiranhō* [List of the Supreme Court Justices], SAIKŌ SAIBANSHO, [http://www.courts.go.jp/saikosai/about/saibankan/hanzi\\_itiran.html](http://www.courts.go.jp/saikosai/about/saibankan/hanzi_itiran.html) (last visited May 5, 2011) (indicating that Chief Justice Miyoshi was appointed on Nov. 7, 1995, while Murayama was prime minister); see also Law, *supra* note 1, at 1550–51. Professor Law argues that the Chief Justice practically has “little or no say” in the selection of the Supreme Court Justices, since the selection is made based on the negotiation between the Cabinet Secretary and the Secretary General of the Supreme Court. *Id.* However, at least the Supreme Court has significant room to recommend candidates who do not share a political ideology with the Prime Minister.

198. Press Release, Cabinet Secretary (Nov. 27, 2009), available at [http://www.kantei.go.jp/jp/tyoukanpress/rireki/2009/11/27\\_a.html](http://www.kantei.go.jp/jp/tyoukanpress/rireki/2009/11/27_a.html) (announcing the appointment of three new Justices following the tradition); see also Press Release, Cabinet Secretary (Mar. 19, 2010), available at [http://www.kantei.go.jp/jp/tyoukanpress/201003/19\\_a.html](http://www.kantei.go.jp/jp/tyoukanpress/201003/19_a.html) (announcing the appointment of the second female justice on the Supreme Court, Justice Kiyoko Okabe, as a successor to Justice Tokiyasu Fujita, who was appointed from academics). Justice Okabe was a law school professor when she was appointed to replace Justice Fujita, but she served as a judge for more than fifteen years before she became an academic. Therefore, we might say that there are currently seven former judges, including Justice Okabe, while the academic spot was lost.

199. See *supra* note 196; see also TAKII, *supra* note 44, at 5–6.



assistant judge.<sup>200</sup> To be reappointed after the ten-year term, the judge must show efficient management ability and abide by precedent.<sup>201</sup> The judge must be promoted to a higher position through rotation across Japan, preferably working as an administrator in the General Secretariat or as a law clerk of the Supreme Court.<sup>202</sup> The judge must then be appointed as Chief Judge of the High Court.<sup>203</sup>

The image of judges, following the civil law tradition, is faceless judges who prefer to solve disputes by mechanically applying the law.<sup>204</sup> Judicial activism is not suited to this image of judges. Moreover, ever since the political backlash from conservative politicians against the Supreme Court's willingness to limit criminal punishment on union leaders for solicitation of illegal strikes, the Supreme Court has demanded that judges keep away from politics. Through initial selection, subsequent promotion, and reappointment, the Supreme Court made clear that only conservative judges who are willing to follow the conservative decisions of the Supreme Court would be promoted and may play a managerial role inside the courts.<sup>205</sup> In essence, it would be hard for liberal judges to climb this ladder up to the Supreme Court.<sup>206</sup>

It is true that four members are chosen from attorneys, and it is a custom to accept the recommendation of the Japan Federation of Bar Associations (JFBA) as to their successors.<sup>207</sup> It has been the custom to recommend a former president or vice president of one of the major bar associations, such as the three Tokyo Bar Associations or the Osaka Bar Association.<sup>208</sup> Yet, in some cases, the Prime Minister has ignored the recommendation and selected an Associate Justice from among the conservative members of the bar.<sup>209</sup> Moreover, the JFBA has to worry

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200. Law, *supra* note 1, at 1551–54, 1556–58.

201. The lower court judges are appointed by the Cabinet from a list of persons nominated by the Supreme Court. “All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.” Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], art. 80. The Supreme Court has viewed nomination for appointment and reappointment as wholly discretionary.

202. NOMURA, *supra* note 19, at 58; Law, *supra* note 1, at 1558.

203. NOMURA, *supra* note 19, at 58.

204. ITOH, *supra* note 165, at 132.

205. See generally J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 142–81 (1993).

206. ITOH, *supra* note 165, at 1551–64.

207. See *supra* note 196. See generally Lawrence Repeta, *Reserving Seats for Attorneys and Scholars on Japan's Supreme Court*, 88 WASH. U. L. REV. 1713 (2011).

208. MAINICH SHIMBUN SHAKAIBU, *supra* note 195, at 279.

209. NOMURA, *supra* note 19, at 54 (indicating that when Justice Koutarou Irokawa was to retire, the JFBA recommended three candidates to succeed him, yet the Cabinet chose Kiichiro Otsuka, who was not recommended by the JFBA).

about losing its seats on the Supreme Court if it recommends liberal candidates.<sup>210</sup> Naturally, in consideration of this possibility, the JFBA might be inclined to recommend conservative attorneys to the Supreme Court.<sup>211</sup> Even if a liberal attorney is appointed, such a Justice will be easily outnumbered by conservative Justices appointed from judges and prosecutors.

It is more difficult to find an appointment of a liberal Justice from the prosecutors and bureaucrats.<sup>212</sup> Prosecutors are career government lawyers, and most of the appointees have occupied high-ranking managerial positions inside the Prosecutors' Office.<sup>213</sup> Occasionally, some of the former bureaucrats, especially former diplomats, may play a somewhat liberal role. But most appointees were former high-ranking bureaucrats in the government or members of the Cabinet Legislation Bureau.<sup>214</sup> It is highly unlikely for the Cabinet to appoint liberal academics to the Supreme Court.<sup>215</sup> No constitutional academics have ever been appointed to the Supreme Court.

Furthermore, although the minimum age for the appointment is forty years of age, a practice has developed to appoint candidates at the ages of sixty-four or sixty-five. This practice made the appointment to the Supreme Court a final honor for successful lower court judges after retirement, who must retire at the age of sixty-five. Moreover, there is some evidence to show that attorneys are generally appointed at a slightly higher age to make sure that liberal Justices, if appointed, would not stay on the bench for a long time.<sup>216</sup> The fact that each Justice, including the Chief Justice, will stay in the office for only four or five years, is surely preventing the development of a more activist constitutional jurisprudence. Simply put, the appointment process of Supreme Court Justices is not designed to appoint Justices who are willing to actively exercise the power of judicial review.

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210. There used to be five attorneys on the Supreme Court, but now there are only four. It is widely speculated that attorneys lost one spot because the Supreme Court wanted to make sure that conservative professional judges could dominate the Supreme Court. Law, *supra* note 1, at 1570.

211. See Law, *supra* note 1, at 1567–68. Recently, the JFBA introduced a reform to its recommendation procedure. See Repeta, *supra* note 207, at 1738.

212. See Law, *supra* note 1, at 1564–65.

213. See *id.* at 1565–66.

214. See *id.* at 1571–72.

215. See *id.* at 1572–74.

216. See *id.* at 1574–77.

#### *D. Institutional Reasons*

There are also institutional reasons for the Supreme Court's conservative constitutional jurisprudence. Japanese courts tend to believe that courts cannot hear cases unless they are granted jurisdiction by statutes passed by the Diet. Moreover, Japanese courts tend to assume that the remedy they could grant must be specified by statutes passed by the Diet. Since there is no statutory provision authorizing suits seeking declaration of unconstitutionality of a statute or an injunction before it is applied, and since there is doubt whether such suits satisfy the case or controversy requirement, courts have not accepted such suits. The absence of effective remedial power has surely significantly hurt the ability of the Supreme Court to effectively exercise the power of judicial review.

In the United States, suits seeking declaratory relief and injunctions are very common in constitutional litigation.<sup>217</sup> Therefore, civil rights organizations can seek the best case to test the constitutionality of a statute. Since no such preenforcement suits are allowed in Japan, most of the constitutional challenges are raised by criminal defendants. Often, they are not the best litigants to challenge the constitutionality of statutes, and judges generally tend to view constitutional challenges as meaningless last straws for criminal defendants. Judges are extremely reluctant to let criminals go free because of the unconstitutionality of a statute. It is thus difficult to expect unconstitutional rulings in such cases.<sup>218</sup>

Moreover, as noted above, because of the difficulty of challenging administrative orders, it is also difficult to challenge administrative actions on constitutional grounds. It is noteworthy that the number of administrative cases filed each year is somewhere between 3000 and 4000,<sup>219</sup> a very small number, and in more than ninety percent of those cases, the government wins the litigation.<sup>220</sup>

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217. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113 (1973) (a suit filed by a pregnant woman seeking a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant, a district attorney, from enforcing the statutes).

218. *The Parricide Case*, Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265 (grand bench), is exceptional. The defendant was raped by her father and was forced to live like his wife, bearing five children. When she fell in love with another man and told her father that she wanted to marry that man, her father was so angry that he imprisoned her for ten days, intimidating and abusing her. In desperation, she strangled her father to death and went to the police. Many believe that it was her father who was to be blamed and that she should not be sent to jail.

219. SUPREME COURT OF JAPAN, JUDICIAL STATISTICS, CIVIL AND ADMINISTRATIVE CASES 5 (2009), available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B21DMIN1-2.pdf>.

220. *See Proposals for Judicial Reform*, JAPAN FEDERATION OF BAR ASSOCIATION (1990),

It is also true that the caseload of the Supreme Court and the absence of discretion on the part of the Supreme Court to choose what appeals it will hear have contributed to judicial passivism. Despite the fact that parties can no longer appeal erroneous findings of facts or improper sentencing to the Supreme Court,<sup>221</sup> many criminal defendants file appeals with the Supreme Court alleging constitutional error in the rulings below just for the purpose of attracting Supreme Court review.<sup>222</sup> Moreover, before the 1996 amendment, parties to a civil litigation could appeal to the Supreme Court whenever there was an error of law.<sup>223</sup> Although the 1996 amendment revised the Code of Civil Procedure to only allow the acceptance of a case through a petition, still a significant number of civil cases are appealed or petitioned. As a result, the number of civil cases filed with the Supreme Court reached 5000, and new criminal cases reached 4000.<sup>224</sup> Each Justice thus must handle some 600 cases as the responsible Justice and participate in some 3000 cases as a member of the petty bench every year. This is an overwhelming number of cases for Justices over the age of sixty-five.<sup>225</sup> This inhibiting caseload has also prevented the Supreme Court from concentrating on constitutional cases. This is especially true since the constitutional cases occupy a small portion of the caseload, and therefore Justices cannot devote their energy to the constitutional cases.<sup>226</sup>

This caseload also makes it difficult to hold grand bench review. During the early days, almost all cases were decided by the grand bench. Gradually, however, the number of grand bench decisions declined, and nowadays the grand bench reviews only one or two cases per year.<sup>227</sup> Since Justices are simply very busy with their petty bench reviews, and since it would take extraordinary effort to schedule a grand bench review, Justices are more willing to dismiss the case based on precedent rather than send the case to the grand bench.<sup>228</sup>

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available at [http://www.nichibenren.or.jp/ja/opinion/ga\\_res/1990\\_3.html](http://www.nichibenren.or.jp/ja/opinion/ga_res/1990_3.html).

221. *Supra* note 36, 38.

222. TAKII, *supra* note 44, at 24.

223. *Supra* note 37.

224. SUPREME COURT OF JAPAN, JUDICIAL STATISTICS, CIVIL AND ADMINISTRATIVE CASES 2 (2009), available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B21DMIN1-1.pdf>; SUPREME COURT OF JAPAN, JUDICIAL STATISTICS, CRIMINAL CASES 2 (2009), available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B21DKEI01.pdf>.

225. *See* Law, *supra* note 1, at 1577–79.

226. ITOH, *supra* note 165, at 124.

227. TAKII, *supra* note 44, at 28.

228. ITOH, *supra* note 165, at 129–30; TAKII, *supra* note 44, at 44–45. The *Gifu Youth Protection Ordinance Case*, Saikō Saibansho [Sup. Ct.] Sept. 19, 1989, 43 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 785 (3d petty bench), is a good example. Although the Supreme Court rejected the

This inhibiting caseload makes it imperative to allow law clerks to review the files and make recommendations for the Supreme Court. It also makes it practically inevitable that the Supreme Court will allow law clerks to write draft opinions. Law clerks, who are all veteran judges, thus play a significant role in the Japanese Supreme Court. Some have criticized the excessive influence of these law clerks on the opinions of the Supreme Court.<sup>229</sup>

### *E. Strategic Reasons*

There may be strategic reasons for the conservativeness of the Supreme Court as well. The Supreme Court might have believed that it needed more time to accumulate prestige for the Supreme Court before striking down statutes passed by the legislature, elected by the public. Even in the United States, it took some fifty years to strike down another federal law after the United States Supreme Court had established the power of judicial review.<sup>230</sup> The Supreme Court of Japan might have believed that it needed to wait a while before actively exercising the power of judicial review granted by the Constitution in 1946.

The Supreme Court might have opted to encourage a political solution rather than strike down government actions. Striking down statutes requires tremendous energy on the part of Justices and might lead to outright confrontation between the political branch and the judiciary. Therefore, Justices are often more willing to express a wish for the political process to solve the issue or strongly encourage it to do something, rather than attack the government action.<sup>231</sup>

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constitutional attack by citing precedent, none of them directly related to the constitutionality of the restrictions on freedom of expression for the protection of youth. *Id.* See Shigenori Matsui, *Constitutional Precedents in Japan: A Comment on the Role of Precedent*, 88 WASH. U. L. REV. 1669 (2011). It is believed that the third petty bench did not want to transfer the case to the grand bench. TAKII, *supra* note 44, at 52–53.

229. For the strong influence of the law clerks, see NOMURA, *supra* note 19, at 47–48; Law, *supra* note 1, at 1579–86.

230. The United States Supreme Court established the power of judicial review in 1803 in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and it took almost fifty years before it exercised this power of judicial review to strike down another federal law in *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

231. YASUHIRO OKUDAIRA, *KENPŌ SOSHŌ NO KANOUSEI* [THE POSSIBILITY OF CONSTITUTIONAL LITIGATION] 135–50 (1995). For example, in the *Discrimination Against Illegitimate Child Case*, Saikō Saibansho [Sup. Ct.] July 5, 1995, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1789 (grand bench), four Justices rejected the constitutional attack but suggested the possibility of legislative reconsideration by doubting the reasonableness of the discrimination against illegitimate children. Five dissenters held the discrimination unreasonable and would have invalidated the provision. *Id.*

Litigants also know the difficulty of asking the Supreme Court to strike down statutes. Although they ask the Supreme Court to strike down statutes, they expect the constitutional litigation to become a means of attracting media attention and mobilizing the public to force the government to change the law or its policy. Sometimes lawyers argue the case, not to the judges, but to the supporters and media reporters sitting in the courtrooms. They tend to make the arguments most acceptable to the supporters and the public and not the most powerful legal arguments to convince the judges. It would be a relief to those lawyers if the Supreme Court encouraged support through the political process even when it rejects the suit.

This strategy occasionally works. The government is sometimes forced to change its practice under pressure from the public and media as a result of litigation.<sup>232</sup> The outcome of the litigation does not matter. This strategy surely prevents the effort to win the case before the courts.

Moreover, in Japan, the bills submitted by the government to the Diet must be scrutinized by legal experts of the Cabinet Legislation Bureau before submission.<sup>233</sup> The Supreme Court must feel that, since the bills were already examined by these legal experts, it is unlikely that the Diet will pass such manifestly arbitrary legislation.<sup>234</sup> Professor Yasuo Hasebe also points out that, in addition to the existence of the Cabinet Legislation Bureau, the peculiar staffing of the Ministry of Justice may have contributed to judicial passivism.<sup>235</sup> Hasebe points out that the Ministry of Justice, which is in charge of much legislation, including the Civil and Criminal Code, is actually staffed by judges, who are seconded by the Supreme Court to serve as government attorneys and who are supposed to

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232. For instance, many municipalities stopped spending public funds on ground-breaking ceremonies after a citizen filed a suit in the *Tsu City Ground-Breaking Ceremony Case*, Saikō Saibansho [Sup. Ct.] June 13, 1977, 31 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (grand bench), even though the Supreme Court ultimately upheld the public spending. Similarly, the Ministry of Welfare significantly raised welfare assistance when it was challenged in the *Asahi Case*, Saikō Saibansho [Sup. Ct.] May 24, 1967, 21 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1043 (grand bench), even though the Supreme Court dismissed the suit and upheld the decision of the Welfare Minister in dictum. Furthermore, the government decided to stop evening flights at the Osaka International Airport, even though the Supreme Court rejected a suit for injunctive relief against evening flights in the *Osaka International Airport Case*, Saikō Saibansho [Sup. Ct.] Dec. 16, 1981, 35 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1368 (grand bench).

233. ITOH, *supra* note 165, at 126; *About the Cabinet Legislation Bureau*, CABINET LEGISLATION BUREAU, <http://www.clb.go.jp/english/about.html> (last visited May 5, 2011).

234. ITOH, *supra* note 165, at 126.

235. Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT'L J. CONST. L. 296, 298–300 (2007).

return to the courts as judges after their service.<sup>236</sup> It is natural for judges, according to Hasebe, to respect the legislation that their colleagues have made.<sup>237</sup> Or the Supreme Court may be making a strategic decision to elevate the status of the judiciary by paying high respect to the legislation drafted by the judges it sent to the Ministry of Justice.

*F. Constitutional Positivism and the Reluctance to View the Constitution as a Positive Law*

It is hard to pick a single reason for the conservatism of the Supreme Court of Japan. All these reasons combined have probably contributed to the conservatism. What is most alarming, though, is the fact that the Constitution is regarded with distrust, or at least with caution, by the Justices. Many Justices tend to view the Constitution not as a law, but more as a political document stipulating political principles.<sup>238</sup> The fact that the Constitution has not been regarded as law to be applied by judges is the most unfortunate reason for judicial passivism.

It is true that the language of the Constitution is rather general and abstract. Many of the constitutional provisions can be seen as embodying principles and not rules. For judges trained in the civil law tradition, this will present a difficulty when having to specify the rules in the Constitution and apply them in specific cases. The use of judicial creativity to give concrete meaning to the text of the Constitution or to give shape to constitutional values is something alien to judges trained in the civil law tradition. Yet, the Constitution is a law enacted by the people to be applied by the judges. It is not a document simply proclaiming political principles. The most disturbing factor behind judicial passivism has been the failure of many judges to treat the Constitution as law to be enforced by the courts.

Related to this thinking is the positivism of judges in Japan. Even though the judicial power is vested in the courts by the Constitution, most of the judges tend to view statutes passed by the Diet as the only source of law within their power. As a result, most judges are reluctant to assert power that cannot be found in statutes.

For instance, there used to be no provisions in the Code of Civil Procedure or the Administrative Case Litigation Act that authorized courts to issue injunctions against administrative agencies to restrain them from

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236. *Id.* at 299–300.

237. *Id.* at 300.

238. ITOH, *supra* note 165, at 127–28.

enforcing unconstitutional statutes. As a result, Japanese courts have been very reluctant to entertain suits for injunctive relief against the enforcement of allegedly unconstitutional statutes. There is no provision in Japan authorizing judges to punish disobedience of a court order as contempt of court, and, as a result, Japanese judges tend to believe that there is no effective remedy even when their injunctions are not followed by the parties except to impose monetary sanctions for disobedience. They do not believe that the Constitution, by vesting judicial power in the judiciary, gave judges the constitutional power to either grant appropriate remedies regardless of the statutes or to punish contempt of court as an inherent power. Thinking of this kind has seriously impaired the power of the judges and courts.

This kind of positivism and the reluctance of Justices to view the Constitution as positive law are quite noteworthy, since the Japanese Supreme Court has showed its creativity and flexibility in fashioning unwritten principles in other fields of law. For instance, the Labor Standards Act demands that the employer give a thirty-day advance notice of dismissal to the employee and requires the employer to pay thirty days' salary if no advance notice is given.<sup>239</sup> This provision might indicate that the employer could terminate the employment contract if he or she pays thirty days' salary. Yet, in reality, the Supreme Court has developed a judicial doctrine demanding compelling reasons to dismiss an employee and requiring that the dismissal be the last resort.<sup>240</sup> This means that even when a company is in financial trouble, the company cannot fire its employees unless the dismissal is necessary to save the company and the company exhausted all other alternatives before dismissal. These decisions are very liberal in the sense that they protect the rights of workers.

The Interest Limitation Act places a limit on the interest rate loan companies can charge to consumers (fifteen to twenty percent per year depending upon the amount of the loan) and provides that any contract that charges a higher interest rate is invalid.<sup>241</sup> Yet, one could not claim reimbursement once one made a voluntary payment at a higher interest.<sup>242</sup> Moreover, the Loan Company Act had a provision viewing the voluntary

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239. Rōdō kijunhō [Labor Standards Act], Law No. 49 of 1947, art 20, para. 1.

240. Saikō Saibansho [Sup. Ct.] Jan. 31, 1977, 120 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 23 (2d petty bench). The Diet enacted the Rōdō keiyakuhō [Labor Contract Act] in 2007 and codified this requirement. Rōdō keiyakuhō [Labor Contract Act], Law No. 128 of 2007, art. 16.

241. Risoku seigenhō [Interest Limitation Act], Law No. 100 of 1954, art. 1.

242. *Id.* art. 1, para. 2 (provision at issue deleted in 2006); Saikō Saibansho [Sup. Ct.] June 13, 1962, 16 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1340 (grand bench).



payment of a higher interest rate as a payment for interest even if the contract is invalid.<sup>243</sup> This means that the original loan amount would not be reduced even if the consumer paid a higher interest. The Investment Act limits the permissible interest rate to 29.2% per year and imposes criminal punishment on those who violate this limit.<sup>244</sup> As a result, many loan companies charged interest rates higher than those stipulated in the Interest Rate Limitation Act, but lower than the limits imposed by the Investment Act, and accepted voluntary payment for a higher interest rate as a payment of interest. Many consumers were thus forced to pay the higher interest rate.

The Supreme Court interpreted these provisions, however, as allowing consumers to pay the original amount of the loan even if they intended to pay a higher interest.<sup>245</sup> The consumers who paid off all of the original loan amount could claim reimbursement of payment for the additional higher interest.<sup>246</sup> Moreover, if the consumers are practically forced to pay the higher interest, then the payment should not be viewed as a voluntary payment.<sup>247</sup> This holding forced loan companies to prove that the payment of higher interest is truly voluntary, an almost impossible task. The practical result of these holdings is to force loan companies to stick to the limits imposed by the Interest Rate Limitation Act and to return the money they received from customers for impermissibly high interest rates. These holdings are creative and flexible uses of judicial power to protect consumers and could be viewed as very liberal.

Yet, the Supreme Court has never applied the same kind of liberal attitude in constitutional cases. The reason for this difference may be found in the relative difficulty of changing constitutional holdings compared with changing statutory interpretations. If dissatisfied with a judicial interpretation of a statute, the Diet can simply pass another piece of legislation to deny the interpretation of the Supreme Court; however, it

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243. Kashikingyō no kiseitō ni kansuru hōritsu [Act on Regulating Loan Companies], Law No. 32 of 1983, art. 43 (renamed as Kashikingyōhō [Loan Company Act]; Article 43 was deleted and replaced with another provision in 2006 after the decisions of the Supreme Court).

244. Shusshi no ukeire, azukarikin oyobi kinritō no torishimari ni kansuru hōritsu [Act Concerning Regulation of Acceptance of Investment, Deposit and Interest, Investment Act for short], Law No. 195 of 1954, art. 5. The limit was eventually lowered to 20% for loan companies who lend money as a business. *Id.* art. 5, para. 2.

245. Saikō Saibansho [Sup. Ct.] Nov. 18, 1964, 18 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1868 (grand bench).

246. Saikō Saibansho [Sup. Ct.] Nov. 13, 1968, 22 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2526 (grand bench).

247. Saikō Saibansho [Sup. Ct.] Jan. 13, 2006, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (2d petty bench).

would require the approval of a two-thirds majority in each of the two Houses of the Diet and the majority approval of the public to amend the Constitution to overturn a judicial interpretation of the Constitution.<sup>248</sup> The Supreme Court might worry that a flexible and creative constitutional interpretation might undermine the parliamentary democracy and lead to an intolerable limitation on the majority's will.

This concern is surely justified. But it does not dictate the extreme judicial conservatism that the Supreme Court has created during the past sixty years. Careful exercise of the power of judicial review is one thing, but it is a totally different thing to practically abandon any active role in controlling the Diet. The existence of a system of public review of Supreme Court Justices could function as an effective check against possible abuses of the power of judicial review by the Supreme Court.<sup>249</sup> There must be some room for the Supreme Court to play a far more active role.

## V. SOLUTIONS

### A. *Establishment of a Constitutional Court*

One solution, which has attracted much support, is a constitutional amendment that introduces a Constitutional Court, similar to the Federal Constitutional Court of Germany. Justice Itoh has supported this proposal.<sup>250</sup> The introduction of a Constitutional Court is also included in many proposals for constitutional amendment.<sup>251</sup> For instance, the proposal for constitutional amendment by the Yomiuri Newspaper would establish the Constitutional Court in addition to the Supreme Court and lower courts.<sup>252</sup> It would grant to the Constitutional Court the power of reviewing the constitutionality of legislation based upon reference by the

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248. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96, para. 1.

249. Currently, the system of public review has not functioned as anticipated. Since the public must evaluate the Justices soon after their appointment, the public does not have sufficient information as to what kind of opinions the Justices might have. Moreover, most of the Justices are appointed at the age of sixty-four or sixty-five and retire at the age of seventy. No Justice will likely face another public review. In fact, no Justice has ever been dismissed. There is surely a risk that this system can be used to expel unpopular Justices. Yet, so long as the Court is performing its appropriate role, we must trust the public not to abuse this system.

250. ITOH, *supra* note 165, at 134–37.

251. *Some Important Points on Constitutional Amendment*, LIBERAL DEMOCRATIC PARTY, [http://www.jimin.jp/jimin/jimin/2004\\_seisaku/kenpou/index.html](http://www.jimin.jp/jimin/jimin/2004_seisaku/kenpou/index.html) (last visited Apr. 9, 2011); see YOMIURI SHIMBUN, KENPŌKAISEI—YOMIURI SHIAN 2004 [CONSTITUTIONAL AMENDMENT—YOMIURI PROPOSAL IN 2004] (2004) [hereinafter YOMIURI PROPOSAL].

252. YOMIURI PROPOSAL, *supra* note 251, art. 86.

Cabinet or one-third of the members of the House of Representatives or the House of Councillors, the power of reviewing specific constitutional questions referred to the Constitutional Court by the Supreme Court or lower courts, and the power of reviewing the constitutional judgments of the Supreme Court based upon petition from the parties.<sup>253</sup> It would also grant legal binding effect to an unconstitutional judgment for all the agencies and departments of the national government, as well as local governments.<sup>254</sup> The Constitutional Court would consist of one Chief Justice and eight Associate Justices.<sup>255</sup> Based upon the decisions of the House of Councillors, the Emperor would appoint the Chief Justice,<sup>256</sup> and the Cabinet would appoint the Associate Justices.<sup>257</sup> The term of office for the Justices would be eight years, and no reappointment could be made.<sup>258</sup> Justices would also retire at an age designated by the statute.<sup>259</sup>

Yet, is the introduction of a Constitutional Court capable of overcoming judicial passivism in Japan? Would it be desirable? I personally doubt both the possibility and desirability of such change. First of all, the current judicial passivism of the Supreme Court is not caused by the institutional design of judicial review. The United States Supreme Court, equipped with the power of judicial review in specific cases or controversies, invalidates several statutes every year,<sup>260</sup> and similarly nothing prevents the Japanese Supreme Court from exercising its own power of judicial review more actively.

Second, the introduction of a Constitutional Court would surely make it much easier for citizens to challenge the constitutionality of legislation and other governmental acts, especially if they are allowed to file suits directly in the Constitutional Court when their rights and liberties are infringed.<sup>261</sup> Moreover, if one-third of the members of either House can refer a matter to the Constitutional Court, it is likely that any legislation passed despite the opposition will end up before the Constitutional Court.

Yet, even if it becomes much easier for the citizens to file a suit in the Constitutional Court or all legislation ends up challenged before the

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253. *Id.* art. 87.

254. *Id.* art. 88.

255. *Id.* art. 89, para. 1.

256. *Id.* art. 8, para. 2.

257. *Id.* art. 89, para. 1.

258. *Id.* art. 89, para. 2.

259. *Id.* art. 89, para. 3.

260. *The Supreme Court Database*, WASHINGTON UNIV. IN ST. LOUIS, <http://scdb.wustl.edu/analysis.php> (last visited May 5, 2011).

261. It is significant that the proposal of the Yomiuri Newspaper does not grant citizens the right to file a suit directly in the Constitutional Court when their rights are infringed.

Constitutional Court, the Constitutional Court might reject all these challenges by paying the same kind of deference to the Diet as the Supreme Court does now, in which case the same judicial passivism will continue. It is important to appoint judges to the Constitutional Court who are more willing to scrutinize legislation and governmental actions and are more willing to strike them down. If we can make sure that the appointment would require the support of a two-thirds' majority of each House, for instance, as in Germany, then maybe we could secure the appointment of a diversified group of judges. Perhaps, it may be possible to appoint university professors who are experts in constitutional law to serve as judges of the Constitutional Court, as has been the case in Germany.<sup>262</sup> However, there is no guarantee that such an appointment system would accompany the introduction of a Constitutional Court. There is no incentive on the part of the government to support such an appointment system, even if it were to agree to introduce a Constitutional Court.

Even though the Yomiuri proposal would grant the power of selection to the House of Councillors, the House of Councillors is likely to choose judges who share its political ideology when it is controlled by the same political party as the House of Representatives. In that case, the judges would be unwilling to subject statutes passed by the Diet with the support of the majority of the ruling party to close scrutiny. If the opposition parties control the House of Councillors, then there is surely a possibility that the judges selected by the House of Councillors would be willing to engage in a more active judicial review against the majority in the House of Representatives. Giving the power of selection to the House of Councillors does not guarantee that the Constitutional Court will be staffed with judges who are willing to exercise the power of judicial review more actively.

Furthermore, the existing judicial review system, which allows all courts to review the constitutionality of legislation and other governmental actions but requires the existence of an actual case or controversy in order to decide a constitutional question, has some merit compared with the Constitutional Court system. It allows the courts to review the constitutionality of legislation and other governmental action in light of specific factual situations and allows judges to decide constitutional questions in light of a sincere and robust dialogue between two adversarial

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262. *Justices of the Federal Constitutional Court*, BUNDESVERFASSUNGSGERICHT [FEDERAL CONSTITUTIONAL COURT OF GERMANY], <http://www.bundesverfassungsgericht.de/en/judges.html> (last visited May 5, 2011).

parties. The Constitutional Court, however, will decide the constitutionality without any specific case or controversy. It would review the constitutionality based upon the text of the statute in its totality. Such a review would be difficult and may lose sight of the problems, which might appear only after the statute is actually applied in a specific case. It is undesirable to abandon these advantages in exchange for easy access to the courts.

What would be the best solution then?

### *B. The Possibility of Reform*

I agree that relaxation of threshold requirements to seek judicial review is necessary. The Supreme Court must be allowed to exercise the power of judicial review more broadly, and it must be granted the power to use more effective remedies. The Administrative Case Litigation Act should be radically amended or abolished to make it easier for the public to file a suit against the government and to seek effective remedies. Moreover, the suit to seek declaration of unconstitutionality of a statute and injunction against its application should be admitted. The government should be liable for damages when the Diet enacts unconstitutional statutes. These changes could be brought by an explicit statutory amendment or enactment, but could be similarly brought by the change in interpretation.

How can we make the Supreme Court exercise the power of judicial review more actively? I concede that the absence of change in the government has surely contributed to the conservative jurisprudence of the Supreme Court. Yet, the Cabinet has developed the custom of respecting the wishes of the Supreme Court regarding the appointment of replacement Justices. So long as this tradition is followed, even if there is a change of government, the new government will simply follow this tradition and appoint recommended successors to the Supreme Court. Then, there would be no significant change in the constitutional jurisprudence of the Court.

In order to make the Supreme Court actively exercise the power of judicial review, the appointment process must be radically modified. First, the tradition of respecting the wishes of the Chief Justice of the Supreme Court must be discarded. The Cabinet must be more actively involved in the search for Supreme Court Justices. Moreover, the traditional quota among Justices must be abandoned. There is no need to keep the quota of six former judges, four former attorneys, and five others, including two prosecutors, two bureaucrats, and one university professor. The Cabinet should select the most appropriate candidates for the Supreme Court.

Furthermore, the Cabinet should choose much younger Justices. The term of office is too short for a Justice to develop his or her own constitutional jurisprudence. Moreover, as a result, the position of Supreme Court Justice has become a final honorary position to former chief judges of the High Court, former presidents or vice presidents of the major bar associations, and former high-ranking public prosecutors and bureaucrats. If they are appointed in their forties or fifties, they can stay on the Supreme Court for more than ten or twenty years and will have sufficient time to develop their own constitutional jurisprudences. This will prevent Justices from treating their positions as final honorary positions after retirement.

This scenario naturally raises the possibility of the appointment of Justices based partly on political considerations. The Prime Minister would choose the Justices based on the political ideology of judges. There is surely a possibility that the Supreme Court would be staffed with Justices sharing the same political ideology as the government. Yet, so long as there is an occasional change of government, such danger would be kept to a minimum. If there were a frequent change of government, members of the Supreme Court would be divided into different groups of different political ideologies. Moreover, the Justices selected by the same government would not necessarily share the same legal or constitutional philosophy on every issue. Of course, some mechanism for obtaining the expert opinions of judges, prosecutors, attorneys, and academics might be useful for the appointment process. An advisory board for appointments was used when the Court was first established but has not been used since. Some type of advisory board might be useful.

At the same time, the caseload of the Supreme Court must be significantly reduced to allow the Supreme Court to focus on constitutional issues. Giving the Supreme Court total control over its own docket would be the best way to reduce the caseload and allow the Supreme Court to choose constitutional cases and cases that implicate significant legal questions that divide the High Courts.<sup>263</sup> If the caseload were significantly reduced, the Justices might be able to write the opinions

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263. Eiji Sasada doubts the constitutionality of giving total discretion to the Supreme Court on whether or not to accept appeals. He proposes instead the establishment of a Special High Court to hear appeals from the High Court and the change to the Supreme Court consisting of one bench of nine members, which would accept constitutional cases—cases which would necessitate alteration of precedent and cases which present significant new legal issues. EIJI SASADA, SHIHOU NO HEN-YOU TO KENPŌ [CHANGES IN JUDICIARY AND THE CONSTITUTION] 15 (2008). So long as the Supreme Court has discretion to decide whether or not to accept an appeal, however, the right of access to justice guaranteed in Article 32 would not be infringed.

personally. In any case, it is important for the Justices to realize that they cannot correct all of the injustices committed in the lower courts.<sup>264</sup>

If their caseload was reduced, the number of Justices could be reduced from fifteen to nine, and the division between the grand bench and petty benches could also be abolished. The Supreme Court could hear and decide cases as a single bench. The current petty bench system is not well designed to facilitate constitutional review. The petty bench system precludes Justices from hearing constitutional cases. It prevents all the Justices from hearing and arguing constitutional questions as a single court. Abolishing the division between the grand and the petty benches and allowing nine Justices to sit together in all cases would significantly contribute to the collective effort to solve constitutional issues as a single court.

Finally, the Supreme Court should treat the Constitution as law to be applied by judges.<sup>265</sup> Even though its provisions are general and abstract, they embody legal principles that are entitled to judicial application. If the Supreme Court began to treat constitutional provisions as another form of positive law, then there would be no hurdles for the courts to apply them in specific disputes.

Of course, it is the Constitution, rather than a statute passed by the Diet, that the Supreme Court must interpret in adjudicating a constitutional attack. Compared with statutory interpretation, constitutional interpretation is more difficult to overturn. Based upon the popular sovereignty principle, the Constitution gave the legislative power to the Diet, as “the highest organ of state power” and “the sole law-making organ of the State.”<sup>266</sup> Although total deference toward the Diet is unjustified, elevating the Supreme Court over the Diet as a super-legislature is also unjustified. There must be a legitimate role for the Supreme Court to play in a representative democracy established by the Constitution.

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264. *But see* TAKII, *supra* note 44, at 41 (arguing that it is difficult for the Supreme Court to turn a blind eye to injustices committed in the lower courts and refuse review).

265. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”).

266. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 41.

It is well established among academics that the courts should adopt constitutional double standards: the courts should distinguish economic freedom from personal freedom, including freedom of expression, and employ a more stringent standard of review for restrictions on personal freedom.<sup>267</sup> Yet, many constitutional academics expect the Supreme Court to play a much larger role.<sup>268</sup> They want the Supreme Court to vindicate the pacifism clause of Article 9 and protect economic freedoms as well as the welfare right. I believe, however, that they are simply asking too much from the Supreme Court. They are expecting the Supreme Court to play a role far beyond that justified under the Constitution.

In this sense, the direction showed by the Japanese Supreme Court in the two *Reapportionment Cases*, the recent *Overseas Voters Case*, and the *Illegitimate Children Nationality Discrimination Case* might prove to be justified. The Supreme Court might as well protect the democratic process based upon the popular sovereignty principle, while paying respect to the outcome of the political process.<sup>269</sup> Such direction might be the best way for the Japanese Supreme Court to engage in limited activism, while avoiding the charge that the undemocratic institution is unduly restricting the political process. After all, the Supreme Court is not an elected institution, and its power must be justified in light of democratic principles. In order to do that, the Supreme Court must employ heightened scrutiny in freedom of expression and voting rights cases. If such hurdles to citizen participation in politics can be lifted, then we are likely to see changes of government more often. Then, the Supreme Court would not have to keep such a distance from politics.

#### CONCLUSION

Without doubt, the constitutional jurisprudence developed by the Japanese Supreme Court is very conservative. Judges are conservative in their nature, especially in civil-law countries. Yet, equipped with the power of judicial review, Japanese judges are entrusted to enforce the Constitution against the Diet and the Cabinet. It is surely an appropriate time to reconsider whether the judicial conservatism of the Japanese

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267. ASHIBE, *supra* note 32, at 101–02, 181–84; SATŌ, *supra* note 32, at 514.

268. ASHIBE, *supra* note 32, at 61, 214, 255; SATŌ, *supra* note 32, at 558–59, 623; HIDEKI SHIBUTANI, KENPŌ [CONSTITUTION] 67–68, 262, 275–76 (2007).

269. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); SHIGENORI MATSUI, NIHONKOKU KENPŌ [JAPANESE CONSTITUTION] 96–98 (3d ed. 2007); SHIGENORI MATSUI, NIJŪNO KIJUNRON [CONSTITUTIONAL DOUBLE STANDARDS] (1994).



Supreme Court is justified and what role the Supreme Court ought to play in constitutional democracy in Japan.