

# WHY HAS JUDICIAL REVIEW FAILED IN JAPAN?

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## I. INTRODUCTION

Judicial review in Japan can be characterized as a failure in more than one sense. On the one hand, the *Saikō saibansho*, or Supreme Court of Japan (SCJ), strikes down government actions so rarely that the judicial enforcement of constitutional limits on government power exists more in theory than in practice. On the other hand, even on those rare occasions that the SCJ does exercise the power of judicial review, its practical ability to secure government compliance in all but the most trivial of cases is open to question. Over the course of its entire existence—a period spanning over six decades—the SCJ has struck down only eight laws on constitutional grounds<sup>1</sup> and thus cemented its reputation as “the most conservative and cautious in the world” with respect to the exercise of judicial review.<sup>2</sup> By contrast, the German *Bundesverfassungsgericht*, a slightly younger court, has already struck down over six hundred laws,<sup>3</sup> while the United States Supreme Court, with a docket similar in size to that of its Japanese counterpart,<sup>4</sup> has struck down roughly nine hundred laws over the same time frame.<sup>5</sup> Worse still, in the one area where the SCJ has struck down legislation of any political or ideological significance<sup>6</sup>—

1. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1547 (2009); Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375, 1388–92 (2011). Nor has the SCJ made a habit of invalidating executive or administrative action on constitutional grounds. See *id.* at 1392–95.

2. DAVID BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 121 (1995).

3. See *Germany's Constitutional Court: Judgment Days*, ECONOMIST, Mar. 28, 2009, at 59 (reporting that, since its creation in 1951, the German *Bundesverfassungsgericht* has struck down 611 laws).

4. See Law, *supra* note 1, at 1577 & nn.191–92 (noting that both the United States Supreme Court and Japanese Supreme Court typically face a docket of roughly ten thousand cases per year).

5. From the 1953 through 2009 terms, the United States Supreme Court struck down on constitutional grounds a total of 262 acts of Congress, 566 state laws, and 68 local ordinances. See Harold Spaeth et al., *2010 Release 02*, THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/data.php?s=2> (Aug. 26, 2010) (comprising a variable, “UNCON,” that measures declarations of unconstitutionality). At an individual level, a number of Justices vote to strike down over half of the statutes that they confront. See Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1774–76 & tbls.1, 2 (2007) (summarizing the voting records of the members of the Burger and Rehnquist Courts in cases involving the invalidation of statutes).

6. See Law, *supra* note 1, at 1547 (summarizing “the rare and often obscure legislative provisions that the Court has struck down”); Matsui, *supra* note 1, at 1388–92 (describing each case in

namely, the electoral apportionment of the House of Representatives<sup>7</sup>—the government has failed for decades to comply with the Court’s rulings.<sup>8</sup>

This Article surveys and critically evaluates a wide range of historical, cultural, political, and institutional explanations for the effective failure of judicial review in Japan. Some accounts depict the judiciary as an

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which the SCJ has struck down a law, and noting that it has been “rare” for the Court’s holdings of unconstitutionality to have “significant political implications”). In his contribution to this Symposium, Professor Haley reaches a different conclusion. He argues, *inter alia*, that the SCJ cannot accurately be characterized as more deferential to other government actors than its American or European counterparts, and that the SCJ has in fact “reached decisions that are considerably more ‘liberal’ or ‘libertarian’” than those rendered by the U.S. Supreme Court. John O. Haley, *Constitutional Adjudication in Japan: History and Social Context, Legislative Structures, and Judicial Values*, 88 WASH. U. L. REV. 1467, 1470 (2011). In support of his argument that the SCJ has on occasion shown a “considerably more ‘liberal’ or ‘libertarian’” streak than its American counterpart, he cites a case in which the SCJ struck down a law that prevented pharmacies from operating within a certain distance from one another, and another in which the SCJ invalidated limits on the postal service’s liability for losing registered mail. *See id.* Had the SCJ consciously set itself the goal of performing judicial review in a manner that bothers the government as little as possible, however, it would have been hard pressed to find a pair of more obscure or less important laws to invalidate. Nor do these cases begin to establish that the SCJ is anything other than conservative: the only sense in which the pharmacy case might be characterized as “liberal” or “libertarian” is in the sense epitomized by the *Lochner* Court and its reactionary favoritism toward economic liberty. *See Lochner v. New York*, 198 U.S. 45 (1905) (striking down restrictions upon bakery working hours as an unconstitutional infringement upon freedom of contract).

7. *See, e.g.*, Saikō Saibansho [Sup. Ct.] July 17, 1985, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1100 (*Kanao v. Hiroshima Election Mgmt. Comm’n*); Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223 (*Kurokawa v. Chiba Prefecture Election Control Comm’n*).

8. In response to the Japanese Diet’s ongoing failure to keep malapportionment of the House of Representatives within the limits set forth in *Kurokawa*, the Court has reiterated in a string of cases that the apportionment scheme remains unconstitutional, but it has consistently declined to order a remedy. *See, e.g.*, William Somers Bailey, *Reducing Malapportionment in Japan’s Electoral Districts: The Supreme Court Must Act*, 6 PAC. RIM L. & POL’Y J. 169, 178–81, 184 (1997) (discussing both the Court’s malapportionment decisions subsequent to *Kurokawa*, and the ongoing inadequacy of the Diet’s response); Law, *supra* note 1, at 1547–48 & n.11; Shigenori Matsui, *The Reapportionment Cases in Japan: Constitutional Law, Politics, and the Japanese Supreme Court*, 33 OSAKA U. L. REV. 17, 30–36, 40–42 (1986) (noting the “deep frustration” of many judges and commentators at the “continued failure of the Diet” to comply with the Court’s legislative apportionment rulings); *Court Contradictory on Vote Disparity*, JAPAN TIMES, Nov. 18, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20101118a1.html> (describing a pair of conflicting Tokyo High Court rulings on the constitutionality of the apportionment of the Diet’s upper chamber, and noting that vote-value disparities have actually increased since the last election in 2007). Nor is electoral apportionment the only context in which the government has proven uncooperative with judicial rulings of unconstitutionality. *See Law, supra* note 1, at 1587 & n.257 (noting that it took nearly two decades for the Diet to comply with the Court’s decision in the *Parricide* Case, Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265, by repealing the provision that had been held unconstitutional); Craig Martin, *Rule of Law Comes Under Fire: Government Response to High Court Ruling on SDF Operations in Iraq*, JAPAN TIMES, May 3, 2008, available at <http://search.japantimes.co.jp/print/eo20080503a1.html> (describing the government’s public vow to ignore a Nagoya High Court ruling that deemed Japan’s air support operations in Iraq to be a violation of Article 9 but denied relief to the plaintiffs on standing grounds).

ideological ally or servant of a long-ruling conservative government.<sup>9</sup> Other explanations portray the judiciary's behavior as the product of extreme deference to the wishes of the government, or the public, or both.<sup>10</sup> Still other accounts posit that, for reasons that are easily overlooked, the judiciary simply has not been confronted with many laws that are constitutionally suspect.<sup>11</sup> Some of these arguments feature prominently in the existing scholarly literature on Japanese constitutional adjudication; others are not widely discussed and surfaced instead in the course of discussions with academics and off-the-record interviews with judges and other officials in Tokyo.<sup>12</sup> This Article concludes by arguing that the SCJ is unlikely to discharge its responsibility for performing judicial review with greater vigor absent institutional reforms that reduce its dependence upon the bureaucracy for personnel and resources, and it discusses a number of reforms that might have such a liberating effect on the Court.

## II. CULTURAL EXPLANATIONS

### A. *The Culture of the Kan*

Some have suggested that government officials, or *kan*, share a characteristic outlook, and that judges, as *saibankan* or "court officials," are no exception.<sup>13</sup> This shared outlook can be distinguished, moreover, from mere partisanship or conventional left-right ideology. A number of the judges I interviewed were relatively quick to express distaste for the party that has ruled Japan for most of its postwar history, the Liberal Democratic Party (LDP), which they view as corrupt, if not also increasingly incompetent. At the same time, however, they feel a sense of

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9. See *infra* Parts IV.A–IV.B.

10. See *infra* Parts IV.A & IV.C.

11. See *infra* Part V.A (discussing the argument that pre-enactment review of proposed legislation by Japan's Cabinet Legislation Bureau obviates judicial review).

12. The confidential interviews conducted by the author encompassed seven current and former members of the Japanese Supreme Court; two supreme court clerks, or *chōsakan*, who might be more accurately called research judges, see Masako Kamiya, "Chōsakan": *Research Judges Toiling at the Stone Fortress*, 88 WASH. U. L. REV. 1601 (2011); and four current or former lower-court judges, including Yasuaki Miyamoto and Haruhiko Abe, both of whom ran afoul very publicly of the judicial bureaucracy; see Law, *supra* note 1, at 1557 n.63, 1559, and have consented to be identified by name. Because the *Washington University Law Review* cannot verify the contents of the confidential interviews, the author takes sole responsibility for the accuracy of his citations to those interviews.

13. See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99, 126–27 (Daniel H. Foote ed., 2007); Interview with Shinichi Nishikawa, Professor, Meiji University, in Tokyo, Japan (Aug. 20, 2008).

obligation to help maintain stability and have, at least in the past, experienced a reluctance to interfere with the government and bureaucracy that delivered the economic miracle of postwar Japan. Scholars, too, have argued that Japanese judges are imbued by their positions with a sense of both responsibility and restraint.<sup>14</sup>

It may be true that many Japanese judges think this way, but the argument proves too much. The SCJ has not always toed the line. For example, under the leadership of Chief Justice Masatoshi Yokota, the Court rendered pro-labor decisions in the late 1960s that aroused the ire of conservatives and frustrated the government's efforts to prevent the public employee unions from striking.<sup>15</sup> The LDP was, at the time, locked in a fierce political struggle with organized labor, which was a bastion of support for the Communists and Socialists. The Court did not change course until the subsequent appointment of the conservative Chief Justice Kazuto Ishida and several other like-minded justices.<sup>16</sup> Its initial willingness to defy the LDP in a high-stakes struggle over the direction of postwar Japan demonstrates that not all judges possess an outlook that renders them unwilling to defy the government.

### *B. Mainstream Japanese Political Culture*

One might argue that, to the extent that the SCJ approaches judicial review in a conservative manner, it does so simply because Japanese society is conservative, and the Justices who make up the Court are members of that society and share that sensibility. A number of judges suggested that the SCJ's behavior merely embodies the views and values of mainstream Japanese society. Notwithstanding a steady drumbeat of criticism from Japanese constitutional scholars—who tend to be politically progressive—it is plausible that the SCJ may actually be “somewhat in line” with public opinion.<sup>17</sup>

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14. See, e.g., HIROSHI ITOH, *THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN* 280 (2010); Haley, *supra* note 13, at 127–28.

15. See Law, *supra* note 1, at 1592–93; Matsui, *supra* note 1, at 1400–04; Setsuo Miyazawa, *Administrative Control of Japanese Judges*, 25 *KOBE U. L. REV.* 45, 58 (1991); Lawrence Repeta, *Reserved Seats on Japan's Supreme Court*, 88 *WASH. U. L. REV.* 1713, 1728–29 (2011).

16. See Law, *supra* note 1, at 1592–93; Matsui, *supra* note 1, at 1400–04; Miyazawa, *supra* note 15, at 57–58; Repeta, *supra* note 15, at 1735–39.

17. Interview with Takao Tanase, Professor, Chuo Law Sch., in Tokyo, Japan (June 26, 2008); see also, e.g., Haley, *supra* note 6, at 1471 (citing the LDP's dominance of postwar politics as evidence that “the Japanese people overwhelmingly favor center-right political policies”).

There can be no doubt that many judges sincerely believe that their actions merely reflect the views of mainstream Japanese society. And it is both difficult and unrealistic to deny that judges behave in ways that reflect the values of the society to which they belong. Nevertheless, it seems unlikely that the conservatism of the SCJ can be so easily explained. Several interviewees expressed the seemingly contradictory view that Japan's judges are, as one Justice put it, "aloof from daily and political life" and "out of touch with regular people."<sup>18</sup> It is difficult to see how the behavior of judges who are "aloof" and "out of touch" can be explained as the product of affinity with mainstream opinion. Likewise, it is hard to believe that Japanese political culture is so conservative as to entail the rejection of nearly every constitutional claim that comes before the SCJ. As in other countries, some constitutional plaintiffs happen to be highly sympathetic figures, such as the Christian widow who fought in vain to prevent a government-supported veterans' group from enshrining the spirit of her husband in a Shinto shrine.<sup>19</sup> Finally, even if it is true that Japanese judges merely behave in sync with the political mainstream, that begs the question of why their role as guardians of the constitution almost never leads them to defy mainstream sentiment, as judges in other countries more often do.

### C. Cultural Aversion to Open Conflict

A frequently offered explanation for the SCJ's reluctance to strike down laws is the concept of *wa*, which defies precise translation but refers roughly to a Japanese ideal of harmonious coexistence.<sup>20</sup> On this account, one way in which the Japanese avoid conflict is by declining to take language literally, and judges behave in precisely such a manner when faced with seemingly unequivocal constitutional language. One Justice described the SCJ's failure to enforce the letter of Article 9, the pacifist

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18. Interview with Justice E, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

19. Saikō Saibansho [Sup. Ct.] June 1, 1988, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277 (*SDF Joint Enshrinement Case*); see DAVID M. O'BRIEN WITH YASUO OHKOSHI, *TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN* 142–78 (1996).

20. See, e.g., Hideo Chikusa, *Japanese Supreme Court—Its Institution and Background*, 52 SMU L. REV. 1719, 1724 (1999) (arguing that the overcrowded character of Japanese society fosters a desire to avoid conflict and open disagreement, and attributing the preference for conciliation and settlement over litigation to this mindset); Shigenori Matsui, *A Comment Upon the Role of the Judiciary in Japan*, 35 OSAKA U. L. REV. 17, 26 (1988) (describing, and rejecting, the argument that the "Buddhist notion of 'ichimiwagou' (everyone in harmony), an insistence on harmony by dedication of self to the society," renders "Western notions of right and individual" "alien" to Japanese society).

provision of the postwar constitution,<sup>21</sup> as the product of a characteristically Japanese way of dealing with legal principles and their application: the Japanese “do believe in the power of words, but not in the literal meaning of words expressed.”<sup>22</sup> Another Justice offered evidence that such attitudes are deliberately inculcated in the judiciary. This Justice explained that, during his time as an instructor at the Legal Research and Training Institute (LRTI)—which provides mandatory training to everyone who passes the bar, including judges, lawyers, and prosecutors alike<sup>23</sup>—he sought to train would-be judges to value harmony and reconciliation over candor. In his words: “Communication with other people is most important. What is true comes second.”<sup>24</sup>

There are a number of reasons to view *wa*-based explanations for the near-absence of judicial review with suspicion. First, invoking cultural norms is a way for judges to shift responsibility for their own behavior to the culture at large. A judge’s choice to uphold the status quo and avoid rocking the boat at the expense of vindicating constitutional rights is precisely that—a choice. And it is a choice that cannot be reduced to a matter of compliance with cultural norms. Culture does not dictate such choices; Japanese judges are no more slaves to cultural mores than American judges are. Instead, conservatives can be expected to invoke the concept of *wa* precisely because the status quo is already to one’s liking. As one Japanese legal scholar put it, elites invoke the notion of *wa* to discourage others from disagreeing openly with them.<sup>25</sup> To insist upon *wa* is tantamount to rejecting disagreement, and thus to enshrining the status quo. It is therefore convenient and self-serving for conservatives to respond to disagreement by appealing to the notion of *wa*, simply because they are in power; conversely, it is unlikely that the Communists would ever do so as long as they remain out of power.

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21. Nihonkoku Kenpō [Constitution] art. 9; see *infra* notes 92–96 and accompanying text.

22. Interview with Justice E, *supra* note 18. It has been argued that this aversion to literalistic interpretation is rooted not simply in Japanese culture, but in the language itself. Because Japanese characters have multiple meanings and “spoken words change meaning depending on context,” suggests Professor O’Brien, “the Japanese expect less precision.” O’Brien, *supra* note 19, at 29. Moreover, as a matter of culture, “indirection, vagueness, and ambiguity are regarded as polite and respectful.” *Id.* at 30. The result, he argues, is that the Japanese are “tolerant of ambiguity, elasticity, and discretionary applications of legal documents.” *Id.*

23. See Law, *supra* note 1, at 1552.

24. Interview with Justice A, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

25. Interview with Masako Kamiya, Professor, Gakushuin Univ. Law Sch., in Tokyo, Japan (June 27, 2008).

Second, broad-brush cultural explanations of the *wa* variety run the risk of relying upon inaccurate or outdated stereotypes. As scholars have repeatedly observed, it is simply not the case that Japanese political life is characterized by an absence of conflict or a penchant for harmony, as illustrated vividly by the breadth and intensity of the conflict that occurred in the 1960s over Japanese labor relations and security arrangements with the United States,<sup>26</sup> or by the years of armed resistance mounted by local farmers to the construction of Tokyo's Narita Airport.<sup>27</sup> Cultural explanations that essentially rest upon stereotypes about "the Japanese" must be taken with a grain of salt, lest we exoticize behavior in lieu of explaining it.

Third, resort to cultural explanations risks circularity and raises more questions than it answers. Culture is as much a consequence as a cause of behavior: if anything, it is not culture that explains behavior, but rather behavior that defines culture. To say that a cultural norm or consensus drives behavior merely begs the question of why people uphold the norm or consensus instead of destabilizing or subverting it. The patterns of behavior that come over time to be understood as cultural are themselves malleable and contingent. At the turn of the twentieth century, for example, it was possible for Japanese employers to criticize their workers as lazy, spendthrift, and disloyal when compared to American workers.<sup>28</sup> It

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26. See J. PATRICK BOYD & RICHARD J. SAMUELS, *NINE LIVES?: THE POLITICS OF CONSTITUTIONAL REFORM IN JAPAN* 23–25 (2005) (discussing the uproar over the 1960 revision of Japan's mutual security treaty with the United States, which generated "the largest mass protests in Japan's postwar history" and eventually forced Prime Minister Kishi's resignation); MASUMI JUNNOSUKE, *CONTEMPORARY POLITICS IN JAPAN* 361–66 (Lonny E. Carlile trans., 1995) (discussing the Mitsui Miike coal mine strike in March 1960, the biggest labor dispute in Japanese postwar history); John O. Haley, *Waging War: Japan's Constitutional Constraints*, 14 CONST. F. 18, 23–28 (2005) (describing the protracted litigation and power struggles within the judiciary over the constitutionality of Japan's security arrangements); *supra* notes 15–16 and accompanying text (discussing the Court's shifting stance on the politically charged question of the ability of public employees to engage in mass strikes). *Keidanren*, the umbrella organization of Japanese big businesses, collaborated with the management of the mine, while workers from around the country made the pilgrimage to join a picket line that was twenty thousand strong. No less than ten thousand police and fifteen thousand union members faced each other down when Mitsui sought to reopen the mine two months into the strike. See JUNNOSUKE, *supra*, at 365.

27. See DAVID E. APTER & NAGAYO SAWA, *AGAINST THE STATE: POLITICS AND SOCIAL PROTEST IN JAPAN* 79–109 (1984) (describing, *inter alia*, the construction of fortified tunnels, barricades, and moats filled with human feces, and the armed takeover of the airport's control tower, by farmers and militants opposed to the appropriation of land for the airport).

28. Gerald Curtis tells the apt story of Sakutarō Kobayishi, the founder of a company called Tokyo Shibaura Denki, now known as Toshiba. Visiting the United States in 1908, Kobayishi was deeply impressed by the work ethic and company loyalty of American workers as compared to the stubborn, disloyal, inflexible workers with whom he was accustomed to dealing in his native Japan. Comparing them to their American counterparts, a frustrated Kobayishi said of his Japanese workers: "Teaching them anything is like trying to teach a cat to chant the nembutsu [Buddhist prayers]."



is doubtful that anyone would speak of Japanese cultural traits in the same manner now.

*D. The Non-Axial Character of Japanese Society*

It could also be argued that Japanese culture lacks the religious or philosophical foundation necessary for judges to stake out absolute or strongly principled positions on constitutional questions. In this vein, Japan might be characterized as a non-axial society, meaning that the normative regulation of behavior does not rest upon binding moral axioms or claims of higher or transcendental truth.<sup>29</sup> Japanese society is not Christian; nor is it Kantian, or otherwise inclined toward moral absolutism. As a practical matter, the guides to correct action in Japanese society are consensus and relationships of status, not higher truth of the type that one might glean from an authoritative text—be it biblical or constitutional.<sup>30</sup>

The existence of social conditions radically different from those that spawned political liberalism, as well as a legacy of Confucianism, lend support to this account of the character of Japanese social and political reasoning. Western liberal political thought reflects the costly lessons of centuries of religious conflict between Catholics and Protestants. In response, a set of political and legal institutions and mechanisms for the peaceful coexistence of people with irreconcilable beliefs developed under the intellectual umbrella of liberalism.<sup>31</sup> A political system founded on the impossibility of religious consensus does not contemplate consensus as a basis for political decision making. However, in the absence of sizeable and powerful religious, ethnic, or linguistic minorities, it is not surprising

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GERALD L. CURTIS, *THE LOGIC OF JAPANESE POLITICS: LEADERS, INSTITUTIONS, AND THE LIMITS OF CHANGE* 12 (1999). Kobayishi also praised Americans for saving their earnings, unlike his fellow countrymen. *See id.* As Curtis observes, “Americans now have the lowest savings rate of any industrialized country and Japanese are criticized for saving too much.” *Id.*

29. I am originally indebted to Stephen Givens for this insight. John Haley makes a similar point in his contribution to this Symposium. *See Haley, supra* note 6, at 1471 (identifying a “relative lack of a widely shared belief among the Japanese in universally applicable moral imperatives” and observing that “East Asian legal traditions never developed a notion of “natural law” or a notional nexus between law and morality”).

30. *See id.* at 1471 (arguing that “[c]ommunity norms, not transcendental norms, are what matters”).

31. *See, e.g.,* RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 1 (1999) (noting that “political liberalism was partly invented in response to religious claims that some ways of believing should be suppressed”).

that consensus might both prove more attainable and assume greater weight in Japanese society than in most other liberal democracies.<sup>32</sup>

The absence of a sense of higher truth, combined with the corresponding importance of hierarchy and consensus, has political and legal implications. On the one hand, Japanese courts have little moral or intellectual heritage upon which to draw if they wish to resist the wishes of the majority or the government. The absence of religiosity and moral absolutism—and, with it, the absence of the notion of binding commandment or scripture—gives judges little basis to resist a strongly positivistic civil law tradition.<sup>33</sup> On the other hand, that same positivistic civil law tradition, with its narrow conception of the role of judges, firmly places the courts in a hierarchically inferior position to the Diet and the Cabinet when it comes to the creation of legal norms.<sup>34</sup>

Consistent with this line of argument, one Justice did suggest that the SCJ's approach to the interpretation of constitutional principles may in fact be influenced in a deep way by Japan's religious and moral heritage.<sup>35</sup> In explaining why the SCJ has repeatedly allowed the government so much leeway in the area of legislative apportionment, this Justice opined that "equality," in the context of voting rights and elsewhere, is for the Japanese a "relative, not absolute" concept, whereas Christians and Buddhists subscribe to a "more absolute concept of equality" that may make them less inclined to tolerate disparities.<sup>36</sup>

Even if cultural traditions at such a high level of abstraction are relevant to judicial behavior, it is implausible that such traditions can fully account for the SCJ's reluctance to exercise the power of judicial review.

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32. This is not to suggest that Japanese society is wholly homogeneous; Japan certainly has its share of minorities who experience varying degrees of discrimination, such as the historically outcast *burakumin*, indigenous peoples such as the Ainu and native Okinawans, and those of Chinese or Korean descent. Thus far, however, such groups have not proven capable of generating and sustaining large-scale social conflict.

33. See Saïd Amir Arjomand, *Constitutions and the Struggle for Political Order: A Study in the Modernization of Political Traditions*, 33 ARCHIVES EUROPÉENES DE SOCIOLOGIE 39, 43–44 (1992) (suggesting that the notion of inviolable individual rights presumes the "transcendence of justice introduced by Christianity" and foundation of natural law furnished by Christian theology); *id.* at 53 (observing that, as a historical matter, the absence of the "sacred law of a world religion" from the traditional Japanese normative order has resulted in an absence of "tension between man-made and transcendent law").

34. See *supra* note 69 and accompanying text (noting that the civil law tradition does not contemplate a lawmaking role for judges but tends instead to "diminish the judge and glorify the legislator").

35. Interview with Justice D, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

36. *Id.*

The growing global consensus in favor of judicial review<sup>37</sup> and the ubiquity of “rights talk” in legal and political discourse everywhere<sup>38</sup> make it increasingly difficult to argue that judicial review has failed in Japan for lack of an adequate normative foundation. If the Justices of the Japanese Supreme Court have failed to embrace their role as enforcers of the constitution with the same enthusiasm as courts elsewhere, that is because they have chosen not to embrace it, not because the non-axial character of Japanese society prevents them from doing so. The manner in which cultural traditions influence judicial behavior reflects the exercise of “choice by those with the power to make and implement such choices about which traditions to maintain and which to discard and then how to maintain or foster those chosen.”<sup>39</sup> To rely upon a cultural explanation of Japanese judicial behavior is both to excise the role of individual choice from judicial policymaking and to absolve Japanese judges of responsibility for their decisions.

### III. HISTORICAL EXPLANATIONS

#### A. *The Postwar Legacy of the Meiji Era*

A number of judges attributed the present-day conservatism of the Japanese judiciary in part to the legacy of the Meiji era.<sup>40</sup> Under the Meiji Constitution, Japan’s judges were under the direction and control of the *Hōmushō*, or Ministry of Justice, and behaved in a correspondingly cautious, conservative, and bureaucratic way. The postwar constitution freed the judiciary from this outside control and ordained various American-style guarantees of judicial independence.<sup>41</sup> However, unlike officials in other branches of the government, the judges of the ancien

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37. See David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. (forthcoming 2011) (documenting the growing global popularity of judicial review).

38. See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 11–12 (1991) (“In the years since the end of World War II, ‘rights’ have entered importantly into the cultural schemes of meaning of peoples everywhere. . . . All over the world, political discourse is increasingly imbued with the language of rights, universal, inalienable, inviolable.”).

39. FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 221 (1987).

40. E.g., Interview with Justice B, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed) (observing that the Court has failed to make a “clean break” with the “conservative” prewar system); Interview with Haruhiko Abe, Attorney & Retired Judge, in Tokyo, Japan (July 16, 2008); accord Interview with Yoshitomo Ode, Professor of Law, Tokyo Keizai University, in Tokyo, Japan (Aug. 6, 2008).

41. See Haley, *supra* note 13, at 117–19.

régime were not purged following the war.<sup>42</sup> Instead, the liberation of the judiciary from the Ministry of Justice created a power vacuum that these conservative holdover judges were ultimately able to fill. According to one critically minded judge, the “old guard” temporarily lost sway but soon reasserted itself by gaining control over the LRTI and thus over the training and hiring of new judges.<sup>43</sup> A variation on this story is that the judiciary behaves conservatively in order to preserve its hard-won institutional autonomy: on this account, the judges who run the judiciary prize their autonomy so highly that they are careful not to allow anything to happen that might antagonize the government and invite political interference within their fiefdom.<sup>44</sup>

Even on its face, this explanation for the SCJ’s aversion to judicial review does not tell the whole story. The problem lies in the fact that conservatives did, for a brief period, lose their dominance of the judiciary. In order to say that the Court’s current behavior reflects the legacy of the Meiji era, one must first explain how that legacy was restored after it had been disrupted. If conservatives regained control of the judiciary only with the help of political intervention, as Setsuo Miyazawa has suggested,<sup>45</sup> then it is the political intervention, not the shadow of the Meiji era, that truly explains the Court’s behavior. Alternatively, if a fear of jeopardizing the judiciary’s precious independence is what leads the Court to restrain itself, then it must be asked what prompted the Court to rediscover that fear after a liberal interlude—or, indeed, why the Court ever overcame that fear in the first place.

### *B. Judges as “Second-Class Bureaucrats”*

A related explanation for the failure of judicial review is that Japan’s judges have historically been “second-class bureaucrats” who have lacked either the will or the ability to stand up to the executive or legislature. In

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42. See Miyazawa, *supra* note 15, at 57; sources cited *supra* note 40.

43. Interview with Haruhiko Abe, *supra* note 40; see Miyazawa, *supra* note 15, at 57 (observing that postwar changes to Japanese legal education “brought in more independent-minded, liberal judges into the judiciary,” but subsequent changes in “the political climate around 1968 . . . allowed conservative judges to regain control”).

44. See Interview with Hidenori Tomatsu, Professor, Gakushuin Univ. Law Sch., in Tokyo, Japan (July 17, 2008).

45. See Miyazawa, *supra* note 15, at 57–59 (observing that the argument that the current “system of administrative control” reflects “the legacy of prewar organizational culture” “assumes the impact of political factors that allowed [this] legacy . . . to resurface,” and attributing the judiciary’s rightward shift to the appointment of Kazuto Ishida as Chief Justice, following “pressure from conservative politicians” to correct the Court’s liberal trajectory).

the words of one Justice, the judiciary was historically a second-class member of the Japanese bureaucracy: “The cream reached the top, but by and large, judges were second-class bureaucrats.”<sup>46</sup> As startling as it may be to hear a Japanese Supreme Court Justice deride the competence and courage of the Japanese judiciary, these views merely echo those of another prominent jurist, former Chief Justice Kouichi Yaguchi. Yaguchi, who is often credited with raising the quality and prestige of the judiciary, offered these sentiments shortly before his death in 2006:

You folks look at the post-war judiciary, and you say the Japanese judiciary should use its authority and power to declare laws unconstitutional more often. But how can a second-class bureaucracy perform that kind of responsibility, even if given that responsibility by the Constitution? Maybe now the judiciary is in a more spirited position to state its views. There is no future for the Japanese judiciary if it doesn't do that.<sup>47</sup>

When asked specifically whether he agreed that Japanese judges are timid because they are “second-class bureaucrats,” one justice deemed it “kind of true”;<sup>48</sup> another, who had spent his entire working life as a judge, called it “half true.”<sup>49</sup> A number of interviewees opined that the prestige and attractiveness of a career in the judiciary has increased over the last few decades. All agreed, however, that as a historical matter, the top graduates of Japan's top universities have not always favored a career in the judiciary.<sup>50</sup> For several decades, the best and brightest sought jobs either in other government ministries or in top corporations. In the private sector, they favored such companies as Nippon Steel, Tokio Marine, and Mitsubishi Bank. On the government side, high-prestige ministries included Finance, Foreign Affairs, and subsequently MITI (now METI), International Trade, and, after the war, Agriculture as well, while the “residue” went to the judiciary.<sup>51</sup> The prewar domination of the judiciary

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46. Interview with Justice D, *supra* note 35; *see also* ITOH, *supra* note 14, at 31 (citing Louis Favoreu's argument that career judges in civil law countries such as France, Germany, and Japan “often lack the power and skill” to challenge legislative or executive officials).

47. SHINGO MIYAKE, SHIJO TO HO [MARKETS AND LAW] 282 (Nippon Keizai Shimbun, 2007) (quoting Chief Justice Yaguchi). The English version of the quotation given here is a transcription of the oral translation provided by a former Justice.

48. Interview with Justice B, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

49. Interview with Justice G, *supra* note 35.

50. Interview with Justice A, *supra* note 24; Interview with Justice B, *supra* note 48; Interview with Justice D, *supra* note 35.

51. Interview with Justice D, *supra* note 35.

by the Ministry of Justice certainly did not help to enhance the prestige of the judiciary. The net result has been, supposedly, a corps of judges who have been unable or unwilling to challenge legislation devised by elite bureaucrats in other agencies and rubber-stamped by the legislature.

The notion that Japanese judges are “second-class bureaucrats” seems inconsistent with the portrait of the judiciary that some scholars have painted, and in particular with the emphasis that has sometimes been placed upon the educationally elitist character of the judiciary.<sup>52</sup> As many have noted, the judiciary has historically been well stocked with graduates of prestigious universities.<sup>53</sup> Yet relevant differences exist even among the most elite schools. Although the University of Tokyo (“Todai”) and Kyoto University (“Kyodai”) are both highly prestigious universities that produce substantial numbers of judges. Todai’s prestige exceeds that of Kyodai.<sup>54</sup> However, Kyodai’s representation in the judiciary has been disproportionately greater than that of Todai.<sup>55</sup> Notwithstanding Kyodai’s own prestige, its graduates may have perceived themselves to be at a disadvantage relative to Todai graduates in the competition for government employment. This feeling of being “a little lower,” suggested one former judge, may have led them to seek positions in the judiciary, where they may have felt at less of a disadvantage owing to its somewhat less prestigious position in the government hierarchy.<sup>56</sup> Such self-selection has the potential to become self-reinforcing, as old-boy networks facilitate the entry and advancement of future Kyodai graduates (although, as Professor Ramseyer’s contribution to this Symposium demonstrates, school ties may ultimately be no substitute for actual productivity).<sup>57</sup> Meanwhile, certain universities widely considered to be at least as prestigious as Kyodai—in particular, Keio and Waseda—have never placed a graduate on the SCJ, a fact that more than one interviewee found both noteworthy and aberrational.

A number of interviewees, both judicial and academic, opined that the prestige and attractiveness of a career in the judiciary has increased since

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52. Haley, *supra* note 13, at 109, 115.

53. *Id.* at 108; Setsuo Miyazawa, *Legal Education and the Reproduction of the Elite in Japan*, 1 ASIAN-PAC. L. & POL’Y J. 1, 22–24 (2000).

54. See Miyazawa, *supra* note 53, at 23; J. Mark Ramseyer, *Do School Cliques Dominate Japanese Bureaucracies?: Evidence from Supreme Court Appointments*, 88 WASH. U. L. REV. 1681, 1683 (2011) (describing the University of Tokyo as traditionally “preeminent . . . in nearly all academic departments,” with Kyoto University ranking second).

55. Miyazawa, *supra* note 53, at 23.

56. Interview with Haruhiko Abe, *supra* note 40.

57. See Ramseyer, *supra* note 57, at 1682 (finding only “weak” statistical evidence of favoritism toward Kyodai graduates in the judiciary).

the war and, in particular, under Chief Justice Yaguchi's tenure. Yaguchi's views regarding the inferiority of judges, suggested one Justice, rang true for members of Yaguchi's own generation but reflected an "old way of thinking."<sup>58</sup> It is also true that, partly to compensate for its legacy as a second-class bureaucracy, postwar reforms made judges the best paid of all government employees.<sup>59</sup> By all accounts, however, the bench is chronically understaffed, and the recruitment of qualified new judges poses a severe challenge. Indeed, those interviewees with experience in judicial personnel matters uniformly identified recruitment as the most pressing challenge that they faced, and they bemoaned in particular the extent to which increasingly lucrative opportunities in the private sector have made it increasingly difficult to recruit capable new judges. A number of academic interviewees, meanwhile, speculated that, given the range of attractive opportunities available to the elite few capable of passing the bar, those who self-select into a lifelong judicial career are likely to be highly conservative and risk averse in character.

The difficulty of recruiting talented, dynamic judges is only aggravated by the fact that, like most civil law countries, Japan has a career judiciary.<sup>60</sup> The vast majority of its judges join the bench immediately after completing their LRTI training, without an opportunity to first reap the financial benefits of the private sector. The seniority-based career advancement path of Japanese judges, combined with a mandatory retirement age of sixty-five for regular judges (seventy for members of the SCJ), makes it essential for those who wish to reach the highest echelons of the judiciary to embark upon their careers at a young age.<sup>61</sup> As a result, would-be judges face an even starker choice between financial comfort and a judicial career in Japan than they do in the United States or other common law jurisdictions, where judges are often individuals who have already established themselves financially.

Career judges are at more than just a financial disadvantage relative to their common law counterparts. In common law countries, a typical judge has already enjoyed a successful career in private practice or public service (or both) prior to joining the bench and thus possesses a considerable measure of confidence, experience, and personal reputation.

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58. Interview with Justice A, *supra* note 24.

59. See Miyazawa, *supra* note 53, at 22.

60. See Law, *supra* note 1, at 1551–59 (describing the career path for Japanese judges, from their initial training and recruitment to the prospect of promotion to the Supreme Court); David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779, 798 & n.69 (2011) (citing Japan, Chile, France, and Italy as examples of countries with career judiciaries).

61. See Law, *supra* note 1, at 1552 n.26.

Having embarked upon their judicial careers fresh out of school, by contrast, Japanese judges are unlikely to possess such qualities in abundance. One Justice who had himself been a career judge alluded to this fact in explaining why Japanese judges might feel reluctant to substitute their own judgment for that of the government. As he put it, a young judge who has literally just graduated from judge school must ask himself: why should anyone—especially smart, experienced people in other branches of government—listen to me?<sup>62</sup> Even if a particular young judge wants to “change the world,” he added, the judge in question will be “trained to require strong evidence before acting on his wishes.”<sup>63</sup>

### *C. The Alien Character of Judicial Review*

It has suggested that the SCJ has historically exercised the power of judicial review with extreme restraint because judicial review was, from the perspective of the typical Japanese judge, an “alien transplant.”<sup>64</sup> Notwithstanding the efforts of the American occupation authorities to instill a sense of judicial supremacy by way of the postwar constitution, Japanese judges simply were not accustomed to striking down laws on constitutional grounds. One Justice expressed the view that the notions of judicial review and judicial supremacy have, after some time, finally taken hold among the people and the judges alike, and that we should therefore expect to see the SCJ behave in a more active fashion in years to come.<sup>65</sup>

Even on its face, this explanation is not especially persuasive. Other countries have introduced judicial review more recently than Japan did and have reaped much more dramatic results within a much shorter period of time. Canada, for example, did not patriate its Constitution until 1982. Prior to that time, parliamentary sovereignty was the rule in both theory and practice, and there was no precedent for judicial review in the British legal tradition that Canada inherited.<sup>66</sup> Almost immediately, however, the

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62. Interview with Justice G, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

63. *Id.*

64. Interview with Justice A, *supra* note 24; *see also* Matsui, *supra* note 1, at 1400 (describing the unfamiliarity of the SCJ's initial membership with judicial review as the “root cause” of its current “passivism” and observing that the “German positivist jurisprudence” in which the first members of the Court were steeped contained “no tradition” of constitutional review).

65. *See* Interview with Justice A, *supra* note 24.

66. *See* JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 79 (2010) (noting that Canada still retains the principle of parliamentary sovereignty to some extent, in the form of a constitutional provision that allows for legislative override of most rights found in the Canadian Charter of Rights and Freedoms).



Supreme Court of Canada began to strike down important laws at a rate that far outstrips that of its Japanese counterpart.<sup>67</sup> Even more striking is the example of France, which adopted a limited form of judicial review over a decade later than Japan against a backdrop of widespread and longstanding hostility to the idea of *le gouvernement des juges*, or a government of judges.<sup>68</sup> Like Japan, France combines a civil law tradition that minimizes the lawmaking role of judges<sup>69</sup> with pre-enactment review of proposed legislation by an elite administrative agency that might, at least in theory, be expected to reduce the need for further review of a judicial variety.<sup>70</sup> Nevertheless, the French *Conseil Constitutionnel* has historically found constitutional defects in over one-third of the laws that it has reviewed.<sup>71</sup>

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67. See F.L. MORTON & RAINER KNOPFF, *THE CHARTER REVOLUTION & THE COURT PARTY* 30 (2000).

68. See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 23 (1992) (characterizing hostility to judicial review in France as “a dominant ideological dogma of political life”); *id.* at 39–40 (describing the “incredible impact” of Edouard Lambert’s condemnation of American-style judicial review as *le gouvernement des juges*). Until very recently, there was no judicial mechanism in France by which individuals could challenge the constitutionality of a statute: such challenges could be brought only by certain categories of government officials, and only before actual promulgation of the statute in question. See Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as a First Resort in France*, 43 *NYU J. INT’L L. & POL.* 15, 15–22 (2010) (describing the original limits upon the jurisdiction of the *Conseil Constitutionnel* and the implementation in 2010 of a “preliminary reference procedure” that enables it to decide constitutional questions raised by ordinary litigants).

69. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 56 (3d ed. 2007) (observing that the defining characteristics of the civil law tradition—such as “[l]egislative positivism,” a dogmatic approach to the separation of powers, and “the ideology of codification”—“all tend to diminish the judge and glorify the legislator”).

70. See *infra* Part V.A (comparing the Japanese *Naikaku Hōsei Kyoku*, or Cabinet Legislation Bureau, with the French *Conseil d’État*).

71. See STONE, *supra* note 68, at 121 tbl.5.1 (reporting that, from 1974 to 1987, the *Conseil Constitutionnel* annulled or amputated 49 out of the 92 laws that it reviewed); Raphaël Franck, *Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2006*, 25 *J.L. ECON. & ORG.* 262, 265 (2008) (indicating that, from 1959 to 2006, the *Conseil Constitutionnel* found 124 of the 317 laws and treaties that it reviewed to be unconstitutional). When left-leaning governments are in power, the *Conseil Constitutionnel* becomes even more active. See *id.* at 265–67 (noting that the *Conseil Constitutionnel* invalidated 97 out of the 209 laws and treaties that it reviewed during periods of left-wing rule). Between January and May of 1981 alone, the *Conseil Constitutionnel* rejected five of the ten major reforms enacted by the newly elected Socialist government. See F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 *AM. J. COMP. L.* 89, 94–95 (1988).

#### D. *The Impact of the Cold War*

Another historical explanation that deserves attention is the impact of the Cold War. With its written guarantees of a minimum standard of living and public education,<sup>72</sup> the right of workers to organize and bargain collectively,<sup>73</sup> and an explicit commitment to pacifism,<sup>74</sup> the postwar *Nihonkoku Kenpō* might be considered a last monument to New Deal liberalism before the weight of the Cold War settled upon civil liberties in Japan and the United States alike. It is no doubt true, as a number of interviewees argued, that many government elites in Japan felt the suppression of communism to be a matter of national survival, and that many judges, in particular, may have considered it necessary to sacrifice rigorous enforcement of constitutional rights to that end. The United States Supreme Court is often said to have capitulated in the face of McCarthyism and the Red Scare.<sup>75</sup> Yet the threat of communism was, if anything, more palpable in Japan, which found itself in the perilous situation of having the Soviet Union, China, and North Korea for neighbors.

The concern that many senior judges shared with other elite government officials, emphasized one Justice, was the spread of communism. Domestically, the Communist Party had strong ties to an active and powerful labor movement.<sup>76</sup> Beyond Japan's borders, the region was increasingly unfriendly terrain for capitalist democracy. China and North Korea fell under communist control; South Korea and Taiwan were democratic more in name than in practice; Thailand was subject to constant coups. Meanwhile, well into the 1980s, Japanese elites were convinced that they faced a powerful Soviet Union bent on infiltrating and subverting Japan's pro-American government.<sup>77</sup> Through the Cold War, the Japanese judiciary was not ideologically monolithic; it contained both defenders of pacifism and members of the Socialist Party. These judges did not, however, prevail in the judiciary's internal power struggles.<sup>78</sup>

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72. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 25, para. 1 ("All people shall have the right to maintain the minimum standards of wholesome and cultured living.").

73. *Id.* art. 28, para. 1 ("The right of workers to organize and to bargain and act collectively is guaranteed.").

74. *Id.* art. 9.

75. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

76. *See* Interview with Justice D, *supra* note 35.

77. *See id.*

78. *See id.*

The impact of the Cold War on Japanese constitutional jurisprudence may have been greatest in the areas of voting rights and freedom of expression. In the face of massive migration from the countryside to the cities, the Japanese Diet became increasingly malapportioned, and this malapportionment favored rural areas over urban ones. Rural constituencies were largely conservative and formed the electoral power base of the LDP; urban areas, by comparison, were strongholds of the left and prone to unrest.<sup>79</sup> In the name of political “stability,” suggested one Justice, the LDP was “permitted by the people” to benefit from electoral malapportionment that kept it in power at the expense of voting rights.<sup>80</sup> Labor rights and freedom of expression cases, meanwhile, were high-profile battlegrounds between the left and the right. An influential administrative law judge who participated in high-profile cases in the SCJ in his capacity as a senior *chōsakan* admitted that he could not bring himself to sympathize with the plaintiffs in the freedom of expression and political pamphleteering cases that came before him because they were all Communists.<sup>81</sup>

Like the “second-class bureaucracy” explanation, the Cold War geopolitical explanation for the conservatism of the SCJ is an interesting one that most likely contains at least a grain of truth but, at the same time, clearly fails to tell the whole story. Even if it is true that the Cold War helps to explain a substantial portion of the SCJ’s constitutional jurisprudence, the Cold War has by now been over for some time. Nothing could more dramatically underscore the demise of Cold War politics in Japan than the fact that, in 1993, the LDP engineered a coalition government with the head of the Socialist Party as Prime Minister.<sup>82</sup> The

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79. See GERALD L. CURTIS, *THE JAPANESE WAY OF POLITICS* 19–20 (1988) (noting that, “by the end of the 1960s,” Japan was home to “an impressive array of urban protest movements and of local government leaders backed by the opposition parties”); ETHAN SCHEINER, *DEMOCRACY WITHOUT COMPETITION IN JAPAN: OPPOSITION FAILURE IN A ONE-PARTY DOMINANT STATE* 57–58, 162–63 (2006) (discussing the LDP’s reliance on rural and agricultural support, and observing that electoral malapportionment in favor of rural areas “probably even allowed the LDP to win a majority of seats in years when a correctly apportioned system would not have”); Yoshio Sugimoto, *Quantitative Characteristics of Popular Disturbances in Post-Occupation Japan (1952–1960)*, 37 *J. ASIAN STUD.* 273, 278, 281 (1978) (showing statistically that “labor union members were the spearhead of popular disturbances,” which tended to be concentrated in “highly populated prefectures in the ‘industrial belt’ along the Pacific Coast”).

80. Interview with Justice D, *supra* note 35.

81. Interview with Anonymous Source, in Tokyo, Japan (June 27, 2008) (describing a confidential conversation with the judge in question).

82. See CURTIS, *supra* note 28, at 21–22, 195–96 (describing the political machinations by which Tomiichi Murayama, chairman of the Socialist Party, became Prime Minister in coalition with the LDP).

United States Supreme Court discovered a more liberal footing in the aftermath of the McCarthy era; there is no obvious reason why the SCJ could not have done so as well once any plausible threat of communism had passed.

Another problem with the Cold War argument—and, indeed, with all historical explanations of judicial conservatism in Japan—is, quite simply, that the judiciary has not always behaved conservatively. In 1947, when the SCJ was first established, the Socialist Prime Minister Tetsu Katayama and his cabinet appointed the first fifteen justices to serve on the Court, and in its first three years under Chief Justice Mibuchi, the SCJ struck a somewhat liberal tone.<sup>83</sup> Subsequently, under the leadership of Chief Justice Masatoshi Yokota in the late 1960s, the SCJ rendered landmark labor decisions that shielded public employees from prosecution for participating in strikes and greatly bolstered the power of the Socialist-influenced public employee unions, to the outrage of conservatives.<sup>84</sup> Neither the pressures of the Cold War nor the judiciary's supposed status as a “second-class bureaucracy” can explain these liberal interludes; nor, for that matter, can they explain how quickly and dramatically these interludes came to an end.

There is also, it must be said, reason to be leery of historical and cultural explanations in general. To explain individual behavior as the product of collective norms or collective history is to overlook both the importance of individual choice and the extent to which group behavior is itself the product of individual choice writ large.<sup>85</sup> Japanese judges, in particular, are not unthinking automatons, or helpless pawns in a social or historical narrative that they are powerless to resist. They are, on the contrary, rational and sophisticated to a fault. Precisely because they are, like other highly intelligent human beings, capable of critically examining past practice and old ways of thinking, there have been many judges and even members of the SCJ who have been willing to adopt a more progressive stance. The question is why these intrepid souls have not prevailed. History and culture may suggest ways in which the deck has been stacked against them. But history is not destiny, and culture is as much a consequence as a cause of political behavior.

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83. See Interview with Haruhiko Abe, *supra* note 40; Shigenori Matsui, *The History of the Japanese Supreme Court 6–8* (June 14, 2008) (unpublished manuscript) (on file with the author) (discussing the Court's decisions under the leadership of Chief Justice Mabuchi, including the *Placard* case).

84. See *supra* notes 15, 26 and accompanying text.

85. See *supra* notes 28, 37–39 and accompanying text.

## IV. POLITICAL EXPLANATIONS

A. *Political Constraints upon Judicial Review: External or Self-Imposed?*

No one of even modest sophistication and candor can deny that constitutional adjudication by the SCJ is, in some sense, political. It takes no deep understanding of the relationship between judicial politics and electoral politics to realize that a court that has coexisted for decades with a conservative ruling party is likely to behave at least somewhat conservatively. Even from a normative perspective, it is reasonable, if not healthy, for a court to show a degree of respect for political processes and electoral outcomes when interpreting constitutional provisions written in highly abstract language that have potentially profound implications for national policy. The question, therefore, is not whether politics have constrained the exercise of judicial review in Japan, but in what ways.

Specifically, there are two questions to be asked. First, to the extent that the constraint is imposed by other political actors, who imposes that constraint? Second, to the extent that the constraint is self-imposed, what are the reasons for which the Court restrains itself? The distinction between imposed and self-imposed political constraints is, admittedly, an artificial one. A court may choose to restrain itself only because it knows that it will otherwise be constrained by others. Indeed, from a political actor's perspective, there may be no better way to control a court than to induce the court to control itself: in this manner, control is achieved without a formal sacrifice of judicial independence. Nevertheless, the distinction is a useful device for structuring discussion of an otherwise unruly topic.

With respect to the question of who constrains the Court, there are essentially two candidates—the government and the people themselves. Does the Court answer to the wishes of the government, to those of the people, or to some combination of the two? As Frank Upham has astutely observed of the long-running debate between Mark Ramseyer and Eric Rasmusen, on the one side, and John Haley, on the other, both sides actually agree that “conservative political values” dominate Japanese judicial behavior.<sup>86</sup> Where they disagree, instead, is on “who the ultimate master is.”<sup>87</sup> In Haley's view, the judiciary shares the values of the general

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86. Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421, 447 (2005).

87. *Id.* at 446.

public<sup>88</sup> and protects itself from the partisan whims of the government by maintaining the trust of the people,<sup>89</sup> who in turn “overwhelmingly favor center-right political policies.”<sup>90</sup> It is therefore the mood of the public that ultimately drives the conservatism of the courts. In Ramseyer and Rasmusen’s view, by contrast, conservative politicians have for decades employed the potent instrument of judicial appointments to keep the SCJ in line.<sup>91</sup>

One might object that this particular disagreement is academic, in the pejorative sense of the word, because the politicians are themselves elected by the people, with the result that obedience to one is obedience to the other. The problem, however, is that the two masters can and do conflict with one another: the actions of an elected government do not necessarily reflect the wishes of a popular majority. With respect to the meaning of the pacifist provisions found in Article 9 of the Japanese Constitution,<sup>92</sup> for example, one Justice explained that the SCJ is very aware that it is caught between public opinion, on the one hand, and the views of the government and diplomatic pressure from a key ally, on the other hand.<sup>93</sup> A substantial majority of the public currently opposes any amendment of Article 9.<sup>94</sup> Dilution of Article 9 has, however, been a central plank of the LDP platform since the party’s inception and has now become part of the Democratic Party of Japan (DPJ)’s platform as well, at the same time as the United States has pushed Japan to assume greater responsibility for its own security as well as that of the region.<sup>95</sup> It is precisely because the SCJ is aware of the forces arrayed on both sides, this Justice suggested, that the Court has not merely hesitated to wade into the treacherous waters of Article 9, but has also barred the lower courts from doing so.<sup>96</sup> In other words, the Court’s response has been neither to

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88. See Haley, *supra* note 6, at 1485.

89. See Haley, *supra* note 13, at 127–28; Upham, *supra* note 86, at 446.

90. See Haley, *supra* note 6, at 1471.

91. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 333 (2001); Upham, *supra* note 86, at 446.

92. Nihonkoku Kenpō [CONSTITUTION] art. 9 (renouncing “the threat or use of force as means of settling international disputes,” and stipulating, *inter alia*, that “land, sea, and air forces, as well as other war potential, will never be maintained.”).

93. See Interview with Justice E, *supra* note 18.

94. See Editorial, *The Constitution Today*, ASAHI SHIMBUN & INT’L HERALD TRIBUNE (Tokyo), May 5, 2008 (reporting the results of a poll conducted by the Asahi Shimbun in which 66% of respondents expressed opposition to amending Article 9).

95. See BOYD & SAMUELS, *supra* note 26, at 17–19, 21 (describing the history of the pro-amendment faction of the LDP and the subsequent exertion of American pressure on Japan to rearm).

96. See Haley, *supra* note 26, at 24–27 (describing the SCJ’s use of the political question doctrine to render cases involving Article 9 justiciable only in theory).

mediate between the two opposing forces or to chart a middle course between them, but instead to avoid taking a position altogether, with the net result that the government has enjoyed a free hand to pursue its preferred policies. The Court's actions also suggest that there may be merit to both sides of the debate, in the sense that the Court appears reluctant to defy *either* the public *or* the government.

With respect to the second question, it is clear that the SCJ exercises a large measure of self-restraint in the area of judicial review, and especially so where politically sensitive issues are involved,<sup>97</sup> but its reasons for doing so are much less clear. Does it restrain itself out of fear that antagonizing the public or the government will jeopardize its institutional autonomy? Is it afraid that the result of vigorous judicial review will be an embarrassing episode of noncompliance by the government? Or is its reluctance to strike down laws motivated by a sincere, normatively grounded respect for democratic processes? Unfortunately, as any social scientist will attest, motivation can be difficult to ascertain; it is not an empirical phenomenon that can be directly observed, and different motivations can often be inferred from the same behavior.

Consider, for example, one Justice's observation that the Court views constitutional adjudication as "political" in the sense that the Justices feel pressure to decide cases in ways that are consistent with "national sentiment."<sup>98</sup> That observation leaves open the question of why the Court responds to "national sentiment." Do they heed "national sentiment" because they believe, as a normative or ideological matter, that it is the right thing to do? Do they fear that the interests of the Court or judiciary as an institution are threatened by defiance of public opinion? Or do they simply prefer to avoid the disapproval of their friends and neighbors? Simply to observe that the Court follows public opinion begs the crucial question of what its underlying motivation happens to be.

Part IV.B explores the possibility of external constraint and, in particular, the argument that judicial review is rare because the government has used the power of appointment to subdue the Court. Part

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97. See, e.g., HIDENORI TOMATSU, KENPŌ SOSHO [CONSTITUTIONAL LITIGATION] 429 (2d ed. 2008) (observing that the SCJ tries not to get involved in "politically sensitive cases," such as those involving Article 9); Interview with Justice E, *supra* note 18 (indicating that the SCJ's avoidance of Article 9 cases reflects a "political judgment," and that Japanese judges are generally "apolitical" but have little choice in light of national sentiment on certain constitutional issues but to make "very political decisions" on constitutional issues); *supra* notes 92–96 and accompanying text (discussing the controversy surrounding Article 9).

98. Interview with Justice E, *supra* note 18.

IV.C focuses on the question of self-restraint or, more specifically, whether the Court's self-restraint is principled or strategic in character.

*B. External Constraint: Government Influence Via the Appointments Process*

A straightforward political explanation of the SCJ's failure to strike down laws is simply that, for decades, conservative governments have appointed conservative Justices. In Japan, as elsewhere, one way in which a government can ensure that a court does not challenge its desired policies is by appointing ideologically like-minded judges. "The reason Japanese Supreme Court justices uphold LDP positions," Mark Ramseyer and Eric Rasmusen argue, "is straightforward: For most of the postwar period they have been recent LDP appointees."<sup>99</sup>

In response, John Haley has vigorously disputed the notion that the government plays any meaningful role in the selection of Justices, much less that it screens nominees on the basis of their ideological views.<sup>100</sup> Haley argues that the role of the Prime Minister in selecting Justices is, like that of the Emperor, a largely formal one,<sup>101</sup> and that in practice, the Prime Minister simply gives pro forma approval to the recommendations given to him by the Chief Justice, who is in turn guided by a cadre of senior judges in the General Secretariat, the administrative arm of the Supreme Court, in identifying and vetting potential candidates. Haley emphasizes, in particular, that there is no known case in living memory of a Prime Minister rejecting a Chief Justice's recommendation as to who should fill a vacancy.<sup>102</sup> As he depicts it, the Japanese judiciary is a bureaucracy that enjoys virtually complete autonomy from the government

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99. Ramseyer & Rasmusen, *supra* note 91, at 331; *see also* J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 126 (2003) (arguing that LDP leaders "appointed only loyal LDP partisans to the Supreme Court"); J. MARK RAMSEYER & FRANCIS MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 178 (1993) (arguing that "Japanese judges are agents of LDP principals").

100. *See* Haley, *supra* note 13, at 109 (lauding the "absence of partisan or other political influence on Supreme Court appointments" in Japan); *see also* David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 37, 59 (Peter H. Russell & David M. O'Brien eds., 2001) ("[J]udicial appointments are made largely on the recommendation of the chief justice and the General Secretariat. Lower court judges are more the agents of the chief justice and the General Secretariat than they are of the LDP or other political parties.").

101. As a formal matter, the KENPŌ provides that the Emperor appoints the Chief Justice "as designated by the Cabinet," NIHONKOKU KENPŌ, art. 6, para. 2, while the power to appoint the other members of the court is vested directly in the Cabinet, *id.* art. 79, para. 1.

102. *See* Haley, *supra* note 13, at 106-07.



and is trusted to manage its own affairs under the direction of a cadre of “cautious and conservative” senior judges.<sup>103</sup>

The SCJ is indeed part of a conservative bureaucracy,<sup>104</sup> but it is by no means immune from political manipulation via the appointments process. There are several mechanisms by which the government shapes the composition of the Court. One, but only one, of these mechanisms is the Prime Minister’s power to reject the Chief Justice’s recommendations, which casts a long shadow over the selection process regardless of whether it is actually exercised. Unless the Chief Justice relishes the thought of having his recommendations publicly rejected by the Prime Minister, or even jeopardizing his informal power of recommendation altogether, he will take care not to suggest ideologically unacceptable candidates in the first place.<sup>105</sup> Knowing this, the Prime Minister can therefore “safely rubber-stamp” the Chief Justice’s nominees.<sup>106</sup> It becomes especially unnecessary for the government to scrutinize the judiciary’s chosen candidates, moreover, if the leadership of the judiciary already shares the government’s ideology. Once an ideologically reliable leadership is in place, the judiciary’s rigorous internal controls can be relied upon to ensure ideological consistency over time without the need for overt government intervention.<sup>107</sup>

In practice, however, the threat that the Prime Minister may exercise his veto power is rendered moot by the fact that the government has the opportunity to reject candidates long before the Chief Justice submits their names to the Prime Minister for approval. Indeed, in some cases, the government, not the judiciary, is responsible for the initial selection of candidates. This responsibility is in accordance with the longstanding practice of allocating seats on the Court to different constituencies.<sup>108</sup> The

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103. *Id.* at 125; *see id.* at 114 (opining that Japanese judges “enjoy a greater degree of independence from political intrusion than in any other industrial democracy, both with respect to individual cases as well as the composition of the judiciary”); *id.* at 126 (dubbing the Japanese judiciary an “autonomously governed bureaucracy for which there are few if any parallels in the world”).

104. *See* Interview with Justice E, *supra* note 18 (observing ruefully that the SCJ is “just another bureaucratic organization”).

105. *See* RAMSEYER & RASMUSEN, *supra* note 99, at 63 (arguing that the judges responsible for selecting supreme court nominees have in practice “only nominated people they knew the prime minister would approve”).

106. Ramseyer & Rasmusen, *supra* note 91, at 333.

107. *See* Law, *supra* note 60, at 804–05 (arguing that the Japanese judiciary is characterized by “policy stability,” or consistency and predictability over time, “thanks to a combination of lifelong processes of screening and professionalization and fearsome internal disciplinary mechanisms”).

108. *See* Law, *supra* note 1, at 1564–72 (describing the current allocation of seats); Repeta, *supra* note 15, at 1716–39 (describing the evolution and manipulation of the SCJ’s “reserved seats” system).

Chief Justice and General Secretariat select candidates to fill the six seats on the Court that are allocated to the career judiciary, as well as a seventh seat that is typically held by a legal academic,<sup>109</sup> but they are not involved in the initial selection of candidates for the remaining eight seats. Instead, two of these seats are ordinarily filled by the Ministry of Justice,<sup>110</sup> while two more are filled by the Cabinet itself.<sup>111</sup>

Last but not least, the heavy reliance of the selection process upon behind-the-scenes consultation and consensus building—a typically Japanese style of decision making known as *nemawashi*<sup>112</sup>—ensures in a subtle but effective way that the Chief Justice nominates only candidates who are palatable to the government.<sup>113</sup> As a Justice with experience in personnel matters revealed, the Chief Justice’s recommendations to the Prime Minister

are merely the last stage of a process in which potential nominees have already been vetted by the Prime Minister’s office before the Chief Justice makes his recommendations. . . . [T]he Cabinet Secretary, or *Kanbōchōkan*, engages in “negotiations” over potential candidates with the Secretary General, or *Jimusocho*, who is appointed by and works closely with the Chief Justice. . . . Only after these key aides to the Prime Minister and Chief Justice have already arrived at a mutually satisfactory conclusion does the Chief Justice convey his (pre-approved) recommendations to the Prime Minister.<sup>114</sup>

Thus, it is simply wrong to infer from the Prime Minister’s routine acceptance of the Chief Justice’s recommendations that the appointment of Supreme Court Justices is free of political control. The Prime Minister’s power to reject candidates who have already been vetted by his office is

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109. See Law, *supra* note 1, at 1556–64, 1572–74.

110. See *id.* at 1565.

111. See *id.* at 1571–72; *infra* Part V.A (describing the Cabinet Legislation Bureau). Japan’s bar associations nominate private attorneys to fill the four remaining seats. See Law, *supra* note 1, at 1566–69; Repeta, *supra* note 15, at 1737–39.

112. See Seki, *infra* note 130, at 185–86 (describing the Cabinet Legislation Bureau’s use of *nemawashi* to vet proposed legislation).

113. See Law, *supra* note 1, at 1550–51.

114. *Id.* at 1550–51. A Justice with experience in the General Secretariat elaborated that, prior to the negotiations between the Cabinet Secretary and the Secretary General, substantive discussions take place between the assistant to the Cabinet Secretary and the Director of the General Secretariat’s Personnel Division—all of which, in turn, is a prelude to the Chief Justice’s ritual presentation of a final, preapproved list of names to the Prime Minister. See *id.* at 1551; Interview with Justice G, *supra* note 62.

never exercised because it is completely redundant—not to mention more conspicuous and embarrassing than discreet negotiation.

*C. Self-Restraint: Normative or Strategic?*

A number of Justices with whom I spoke attributed the extreme rarity of judicial review to a normative obligation on the part of the judiciary to defer to the wishes of the Cabinet and Diet. This type of argument is certainly familiar to American readers from the endlessly rehashed debate over the so-called “counter-majoritarian dilemma” of judicial review.<sup>115</sup> The theoretical basis of such arguments is not nearly as strong with respect to the SCJ, however, as it is with respect to the United States Supreme Court. It is often argued that American federal judges should defer to the elected branches because they are unelected and lack democratic legitimacy. By contrast, Japanese Supreme Court Justices are constitutionally required to face retention elections after their initial appointment and at ten-year intervals thereafter,<sup>116</sup> and the Court, in turn, enjoys a remarkable degree of control over the rest of the judiciary. Thus, at least in theory, the members of the SCJ enjoy a degree of direct electoral legitimacy that their American counterparts do not, even if the retention elections have little effect in practice.<sup>117</sup>

The argument that respect for democracy leads the SCJ to abstain from striking down laws is perhaps only to be expected, as it casts the timid Japanese approach to judicial review in a highly principled light. But it is also a fact that the SCJ has powerful practical and strategic reasons to refrain from challenging the government. As Takao Tanase aptly puts it, the proposition that judges must defer to the government may be a “normative statement,” but it also happens to be “inseparably linked with

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115. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–22 (2d ed. 1986); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 727–30 (2009) (noting the centrality of the countermajoritarian dilemma to contemporary constitutional theory, and describing the growing scholarly attacks upon the empirical premise that judicial review is countermajoritarian).

116. Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], art. 79, para. 2 (“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.”). As a practical matter, however, the retention elections that are supposed to be held at ten-year intervals are rendered moot by the fact that most justices are first appointed at an age well within ten years of mandatory retirement. See O’Brien & Ohkoshi, *supra* note 100, at 53–54.

117. See Tokuji Izumi, *Concerning the Japanese Public’s Evaluation of Supreme Court Justices*, 88 WASH. U. L. REV. 1769 (2011) (questioning the value and efficacy of the retention elections in light of how little the public knows about the Court).

their strategic options.”<sup>118</sup> Like every court, the SCJ must contend with the fact that it lacks the power of either the purse or the sword, which limits its strategic options.<sup>119</sup> Yet Japanese courts possess even fewer means of coercion and are thus in an even more precarious position than their American counterparts: they lack contempt powers, have relatively little ability to order discovery or compel disclosure, and do not exercise the kind of continuing jurisdiction over parties that would enable them to ensure long-term compliance with their rulings.<sup>120</sup>

Not only is the SCJ mindful that it has no obvious way of imposing its will upon the Cabinet or the Diet, but its impotence has also been on display for some time. When the Court struck down a statutory provision punishing parricide more severely than other forms of homicide, the conservative Diet registered its unhappiness by refusing for decades either to respond to the decision or to amend the law.<sup>121</sup> The Court has insisted for decades that electoral malapportionment has reached unconstitutional levels, yet the LDP has yet to introduce an apportionment scheme that satisfies the standards set forth by the Court.<sup>122</sup> When asked what means the SCJ possesses of forcing or even encouraging legislators and bureaucrats to comply with its decisions, one Justice responded simply: “We don’t have any.”<sup>123</sup> Another Justice likened the Court’s power of judicial review to a *denka no hōtō*, or revered ceremonial sword: one leaves the sword on the mantle and refrains from actually using it for fear of revealing to the world that the sword is in fact dull, thus destroying whatever value the sword may have had in the first place.<sup>124</sup> Not all insiders agree, however, that the SCJ restrains itself for fear of highlighting its impotence. One Justice observed that, although the SCJ is sometimes “disappointed” by Diet inaction in response to its rulings, its

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118. Interview with Takao Tanase, *supra* note 17.

119. THE FEDERALIST No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

120. See Haley, *supra* note 6, at 1484 (contrasting the ability of common law judges to “exercise continuing jurisdiction to ensure compliance with their decrees” and “coercive powers through contempt” with the more circumscribed authority of European and Japanese judges); Matsui, *supra* note 1, at 1413–16 (noting specifically the Japanese judiciary’s lack of contempt powers); Interview with Matt Wilson, Professor, Temple Univ., in Tokyo, Japan (June 20, 2008) (highlighting the limited discovery powers of Japanese courts).

121. See ITOH, *supra* note 14, at 148–49; *supra* note 8 and accompanying text.

122. See *supra* notes 6–8 and accompanying text.

123. Interview with Justice D, *supra* note 35.

124. Interview with Justice E, *supra* note 18.

conservatism ultimately has much more to do with the composition of the Court itself than any strategic calculations regarding the likely reactions of the other branches.<sup>125</sup>

To the extent that judicial self-restraint is responsible for choking off judicial review, there is reason to suspect that the strategic variety is more to blame than the principled variety. A telltale sign is the inconsistency in the judiciary's approach to different types of cases that Frank Upham highlights in his contribution to this Symposium.<sup>126</sup> On the one hand, argues Upham, Japanese courts have played an "activist role" by boldly misusing the general clauses of the Civil Code to regulate private employers and rewrite the law of divorce in ways that were more protective of women and workers than the government might have liked.<sup>127</sup> This "lack of deference to the legislative branch" is difficult to reconcile with the notion that Japanese judges refrain from striking down laws out of principled respect for democratic lawmaking processes.<sup>128</sup> On the other hand, as Professor Upham acknowledges, the courts clearly cannot be accused of "judicial activism" when it comes to exercising the power of judicial review.<sup>129</sup> If one accepts that the judiciary acts strategically out of self-preservation, however, there is no mystery at all to this inconsistency. It is less confrontational, and thus less hazardous for the judiciary as an institution, to regulate private conduct in ways that the government can override, than to impose limits on the government's power to make policy. Adopting policies that target faceless corporations and philandering

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125. Interview with Justice B, *supra* note 48.

126. See Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493 (2011).

127. *Id.* at 1493–94; see *id.* at 1499–1500 (discussing the SCJ's cavalier approach to the language of the Labor Standards Act in the *Sumitomo Cement* line of cases); *id.* at 1502 (observing that the general clauses were intended only to enable courts "to reach justice in cases when the strict application of the legal rules will lead to a result inconsistent with the purpose of the [statute]" and were not intended "to give the courts the power to supplant, even temporarily, the legislature as the institution responsible for establishing fundamental norms").

128. *Id.* at 1498. Nevertheless, it can be argued that Japanese courts evince a form of respect for democratic processes that American courts do not. On Upham's view, the greater willingness of Japanese courts to "change norms openly" is balanced—perhaps favorably—by their greater "willingness to allow the political process to operate after judicial announcement of the law." *Id.* at 1504. To put his argument in colloquial terms, the American brand of judicial activism allows the legislature to have the first word but not the last word, whereas the Japanese brand gives the legislature the last word but not necessarily the first word. Although Upham himself does not say so, the Japanese version of judicial activism might be said to evince greater respect for democratic lawmaking by giving the legislature an opportunity to ratify or reject the judiciary's approach, then leaving the judiciary's response undisturbed.

129. *Id.* at 1494.

husbands, for the benefit of a majority of the public, is one thing; attempting to tie the hands of the Japanese state is another thing entirely.

## V. INSTITUTIONAL EXPLANATIONS

### A. *Pre-Enactment Review by the Cabinet Legislation Bureau*

Another possible explanation for the failure of judicial review in Japan is that some institution other than the judiciary has taken responsibility for evaluating the constitutionality of government action. Some observers have pointed in particular to the existence of the Cabinet Legislation Bureau (CLB), or *Naikaku Hōsei Kyoku*, as an important reason for why the SCJ has so rarely struck down legislation. Modeled after France's elite *Conseil d'État*, the CLB has responsibility for drafting and reviewing prospective Cabinet legislation.<sup>130</sup> By all accounts a prestigious and influential institution, its eighty or so members are elite senior bureaucrats on temporary assignment from other agencies; most possess significant expertise in legal matters.<sup>131</sup> At any given time, approximately ten percent of CLB personnel are judges and lawyers.<sup>132</sup> Former CLB officials, in turn, are often appointed to the SCJ, including many who themselves had never been judges. Assignment to the CLB, for what is typically a three-year term, is strongly indicative of an elite career trajectory that can culminate in appointment to the SCJ, even for those with no prior judicial experience.<sup>133</sup>

Some scholars and judges argue that the CLB reviews government legislation so carefully and expertly prior to enactment that the SCJ is highly unlikely to find constitutional flaws in the final product.<sup>134</sup> The fact that many current and former CLB members are themselves judges, moreover, can only enhance the CLB's ability to anticipate what the courts will find acceptable. Indeed, given the nature of the ties between the CLB

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130. See SHINICHI NISHIKAWA, *RIPPO NO CHUSU SHIRAREIZADU KANCHO: NAIKOKU HŌSEIKYU* [THE MYSTERIOUS CABINET LEGISLATION BUREAU] (2000); Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT'L J. CONST. L. 296, 298–99 (2007); Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 L. IN JAPAN 168 (Daniel H. Foote trans., 1986); Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?* (Japan Policy Research Inst. Working Paper No. 99, 2004), available at <http://www.jpri.org/publications/workingpapers/wp99.html>.

131. See NISHIKAWA, *supra* note 130.

132. See *id.*

133. See *id.* A former CLB official who is not also a career judge will usually assume one of the two seats on the SCJ that are informally allocated to former prosecutors, as discussed below.

134. See, e.g., *id.*; Hideo Chikusa, *Japanese Supreme Court—Its Institution and Background*, 52 SMU L. REV. 1719, 1725–26 (1999); Hasebe, *supra* note 130, at 298.

and the judiciary, members of the SCJ have no doubt found themselves on occasion in the position of deciding upon the constitutionality of legislation that they had previously reviewed and approved as members of the CLB.

It is unduly optimistic to think that pre-enactment review by the CLB has been so thorough and effective that the SCJ is left with practically nothing to do. Comparison of the CLB and the French *Conseil d'État* is instructive. No less than its Japanese equivalent, the *Conseil d'État* is a highly elite, capable, and well-respected institution that performs pre-enactment review and gives influential advice on the constitutionality of legislation.<sup>135</sup> Notwithstanding the longtime presence and formidable reputation of the *Conseil d'État*, however, France's *Conseil Constitutionnel* has struck down much more important laws, and with much greater frequency, than the SCJ has done over a longer span of time.<sup>136</sup> There is no reason to believe that the CLB is vastly more skilled at screening proposed legislation for constitutional defects than the *Conseil d'État*.

It is also doubtful whether the CLB's views carry much weight, if any, with the SCJ. Given that the CLB reviews approximately eighty percent of all legislation before it is enacted,<sup>137</sup> it is certainly possible that preventive work by the CLB may play a role in reducing the number of "bad laws" that are enacted. What the CLB does not appear to enjoy, however, is judicial deference. One Justice deemed it "too extreme" to suggest that the SCJ hesitates to strike down laws simply because they have been reviewed by the CLB,<sup>138</sup> another Justice stated more bluntly that the CLB's views carry "no influence" with the Court.<sup>139</sup> Likewise, the Court's influential *chōsakan*, or law clerks, appear to pay the CLB little heed: those whom I interviewed consistently took the position that they and their fellow clerks

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135. See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 14–24 (5th ed. 1998).

136. See *supra* notes 68–71 and accompanying text (discussing the history of the *Conseil Constitutionnel*, the rate at which it has invalidated legislation, and the importance of the legislation that it has invalidated). An example of *Conseil Constitutionnel* jurisprudence that the SCJ has never rivaled in terms of policy impact was the invalidation in 1981 of Socialist President François Mitterrand's centerpiece economic policy of nationalizing the industrial and financial sectors. See STONE, *supra* note 68, at 158–62.

137. See Interview with Shinichi Nishikawa, *supra* note 13. The CLB is not responsible for reviewing bills introduced by individual members of the Diet, or so-called private member's bills.

138. Interview with Justice B, *supra* note 48.

139. Interview with Justice C, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

place little or no weight upon what the CLB or, indeed, any other government agency has to say.

Nevertheless, even if the notion that judicial review can be rendered largely superfluous by expert bureaucrats who prevent unconstitutional laws from being enacted warrants a degree of skepticism, the CLB is undoubtedly an important part of the political ecosystem within which the SCJ operates and is likely relevant to a complete understanding of the SCJ's behavior. In particular, there is reason to think that CLB has enabled the SCJ to avoid potential difficulties surrounding the interpretation and enforcement of Article 9 by bearing the brunt of political conflict that might otherwise have befallen the SCJ. The CLB has in recent years come under pressure from the LDP for its efforts to adhere to an interpretation of Article 9 that leaves the government less leeway than it might like.<sup>140</sup> The fact that the CLB has staked out a position on Article 9 and, in doing so, served as a lightning rod for past efforts to expand Japan's military capabilities, has perhaps alleviated potential pressure on the SCJ to confront the issue itself.

*B. The Influence of Personnel Exchanges Between the Judiciary and the Ministry of Justice*

Yet another explanation for the failure of judicial review concerns the close relationship between Japanese judges and prosecutors. Even more so than the CLB, the Ministry of Justice regularly exchanges personnel with the judiciary. Under the practice known as *hanken-kōryū*, approximately twenty percent of Japanese judges work at the *Hōmushō* in some capacity during their careers.<sup>141</sup> Participation in the *hanken-kōryū* bodes well for a judge's future career prospects upon returning to the judiciary.<sup>142</sup> Prosecutors on loan to the judiciary, meanwhile, can expect favorable treatment in the form of assignment to major courts in desirable locations.<sup>143</sup> Prosecutors also enjoy the benefit of an informal quota of seats on the SCJ: there are usually two of them on the Court at any given time,<sup>144</sup> a figure that does not include career judges who have prosecutorial experience on account of having spent time in the Ministry of Justice.

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140. See Samuels, *supra* note 130; see also NISHIKAWA, *supra* note 130 (noting that the CLB has encountered difficulty "managing" its interpretation of Article 9 in the face of political pressure).

141. See Miyazawa, *supra* note 15, at 50–51.

142. See *id.* at 50.

143. See *id.*

144. "Prosecutor" is what lawyers in the Ministry of Justice are typically called in English, but it is perhaps a poor translation of the corresponding Japanese term, *kenji* or *shomu-kenji*. In practice,



There are two reasons why the Court's ties to the Ministry of Justice might help to foster an extremely conservative approach to judicial review. The first has to do with the fact that the Ministry of Justice has responsibility for drafting both the Civil Code and the Criminal Code, which amount to a significant portion of the statutory law that the courts are called upon to interpret and apply. It would not be surprising if judges were to exhibit a tendency to uphold legislation drafted by their former colleagues at the Ministry of Justice—or perhaps, indeed, by the judges themselves during their temporary tenure as government attorneys.<sup>145</sup> The second reason is that prosecutorial experience may have the effect of making judges more conservative and sympathetic to the government. The practice of loaning judges to the *Hōmushō* has been criticized on the ground that the judges in question acquire “pro-government attitudes” that influence their behavior upon their return to the bench.<sup>146</sup>

Even if it is true that prosecutorial experience makes judges more conservative, however, it is unclear that the judiciary's close relationship with the Ministry of Justice does much to explain the conservatism of the SCJ in particular. To be sure, the prosecutors who have served on the SCJ have enjoyed a reputation for conservatism, but the fact remains that they make up only a small fraction of the Court's membership. Of the SCJ's current fifteen members, only two are former prosecutors, and only one of the six career judges currently on the Court appears to have spent any time at the Ministry of Justice.<sup>147</sup>

### *C. The Bureaucratic Structure and Internal Discipline of the Judiciary*

A number of scholars have voiced a simple yet powerful explanation for the conservatism of Japan's lower court judges: the judiciary is a tightly controlled bureaucracy, the judges at the top are conservative, and these top bureaucrats favor like-minded conservatives while consigning

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Japanese prosecutors might be better described as general-purpose government attorneys. Like lawyers in the U.S. Department of Justice, they represent the government in all public litigation matters; unlike their American counterparts, however, they also do a significant amount of legislative drafting.

145. See Hasebe, *supra* note 130, at 298–300.

146. Miyazawa, *supra* note 15, at 51. This type of outlook, in turn, appears to be valued and rewarded by the judicial bureaucracy: as Setsuo Miyazawa observes, there is reason to suspect that the General Secretariat has deliberately assigned judges with prosecutorial experience to handle sensitive cases that it wishes to have decided in favor of the government. See *id.* at 51–52.

147. See *Justices of the Supreme Court*, SUPREME COURT OF JAPAN, <http://www.courts.go.jp/english/justices/index.html> (last visited May 13, 2011). As of this writing, the most recent appointee is Itsuro Terada, who also happens to be the only career judge on the SCJ with experience at the Ministry of Justice. See *id.*

those who are liberal or otherwise heterodox to professional oblivion.<sup>148</sup> Professors Ramseyer and Rasmusen, in particular, have amassed statistical evidence that career judges who belong to a left-of-center political group or rule against the government on politically sensitive constitutional questions suffer systematically over the course of their careers: even if one controls for such factors as educational background and productivity, such judges are likely to spend more time at less prestigious courts in less desirable locations and to advance up the pay scale more slowly.<sup>149</sup>

The argument that lower court judges are at the mercy of a conservative bureaucracy is a highly plausible explanation for their reluctance to wield the power of judicial review against a conservative government. But it does little to explain why the Supreme Court fails to exercise that power either.<sup>150</sup> The logic of reward and punishment that applies so forcefully to other Japanese judges simply does not apply to Supreme Court Justices. Having already reached the pinnacle of the judiciary, the Justices of the SCJ are immune to the prospect of promotion or punishment by the General Secretariat; indeed, at least in theory, they are responsible for supervising and directing the General Secretariat. The only career goal that a sitting Justice might conceivably have left to pursue is elevation to the position of Chief Justice.<sup>151</sup> That incentive, in turn, is unlikely to exert much influence over any meaningful number of Justices for any meaningful period of time. In practice, only those who have been career judges are considered for appointment to the position of Chief Justice,<sup>152</sup> and of the five or so justices who meet that requirement at any given time, some will already be too close to mandatory retirement age to be considered viable candidates.<sup>153</sup>

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148. See RAMSEYER & RASMUSEN, *supra* note 99, at 17–25; Law, *supra* note 1, at 1551–64 (describing judicial hiring and promotion practices in Japan); Miyazawa, *supra* note 15, at 57–59; Ramseyer & Rasmusen, *supra* note 99, at 333–34; Upham, *supra* note 86, at 453 (opining that “even readers more familiar with the bureaucratic judiciaries of the civil law world will be surprised by the personnel manipulation and unrelenting supervision of the Japanese judicial system”).

149. See RAMSEYER & RASMUSEN, *supra* note 99, at 26–43; Ramseyer & Rasmusen, *supra* note 99, at 338–41.

150. See O’Brien & Ohkoshi, *supra* note 100, at 39 (faulting Ramseyer and his coauthors for “focus[ing] only on the lower courts and, rather oddly, pay[ing] no attention to the operation of the Supreme Court”).

151. See Law, *supra* note 1, at 1550–51, 1589–92 (describing the unique administrative powers that render the Chief Justice more than merely “first among equals”).

152. See *id.* at 1522–23 n.25. The current Chief Justice, Hironobu Takesaki, is a rare exception to the general rule that Chief Justices are selected from among sitting members of the Court. See *id.* at 1569 n.148.

153. The career judges who are appointed to the Court serve an average of approximately seven years before reaching mandatory retirement age. See Law, *supra* note 1, at 1575. In recent decades, the Chief Justice has almost invariably been a career judge who is elevated to the position after having

In order to account for the SCJ's behavior, Ramseyer and Rasmusen emphasize instead the LDP's ultimate control over the appointment of Supreme Court Justices. They argue that the SCJ is conservative for the "straightforward" reason that "almost all the justices have been recent LDP appointees."<sup>154</sup> A mildly puzzling aspect of this account, however, is that it depicts the conservative tendencies of the SCJ and the conservative tendencies of the lower courts as essentially separate phenomena that call for different explanations<sup>155</sup> when, in fact, the two phenomena are deeply intertwined. Ramseyer and Rasmusen's own statistical evidence suggests, for example, that conservative judges are more likely to receive influential administrative postings in the General Secretariat.<sup>156</sup> They further observe that this same cadre of judges in the General Secretariat is also largely responsible for vetting and nominating Supreme Court candidates. It is safe to assume that conservative judges are inclined to place fellow conservatives throughout the upper reaches of the judiciary, including the SCJ: to advance the career of a fellow judge who shares one's own policy preferences is to advance one's own policy preferences. Thus, the fact that the judges who select SCJ candidates are themselves conservative should tend to ensure that the SCJ will also be conservative. Ramseyer and Rasmusen do not draw this connection explicitly, however, but instead attribute the conservatism of the SCJ to the long shadow cast by the Prime Minister's rarely exercised power to veto ideologically unpalatable nominees.

Other scholars have, by contrast, emphasized how institutional factors link the ideological tendencies of the SCJ with those of the judicial bureaucracy: the bureaucracy, they observe, favors the career advancement

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already served on the Court for two or three years, which places him even closer to mandatory retirement than the average justice. *See id.* at 1522–23 & n.25. The current Chief Justice, Hironobu Takesaki, was appointed to the position at the unusually young age of sixty-four, which will allow him to serve for nearly six years before he faces mandatory retirement. *See Justices of the Supreme Court: Takesaki, Hironobu*, SUPREME COURT OF JAPAN, <http://www.courts.go.jp/english/justices/takesaki.html> (last visited May 30, 2011). More typical was Takesaki's immediate predecessor, Niro Shimada, who was promoted to Chief Justice shortly before his sixty-eighth birthday and consequently served in that position for barely two years before reaching mandatory retirement age. Likewise, Shimada's own predecessor, Akira Machida, faced mandatory retirement within four years of his promotion to Chief Justice.

154. RAMSEYER & RASMUSEN, *supra* note 99, at 63.

155. *See* RAMSEYER & RASMUSEN, *supra* note 99, at 63 (opining that "[t]he real puzzle is not the Supreme Court's conservatism but that of the lower courts," as if to suggest that the two phenomena are distinct).

156. *See* Ramseyer & Rasmusen, *supra* note 99, at 339 (finding statistically that judges who found constitutional violations in Article 9 or electoral malapportionment cases received fewer assignments to the General Secretariat).

of conservative judges who find themselves, as a result, in a position to promote the selection of like-minded Supreme Court nominees.<sup>157</sup> My own view, which is broadly consistent with that of Professors Miyazawa, O'Brien, and others, is that the behavior of the Supreme Court is the product of interaction between the internal organization of the judiciary and the political environment in which the Court operates.<sup>158</sup> The composition of the Court and the resources and incentives surrounding its members are shaped both directly and indirectly by an institutional structure that equips a cadre of judges in administrative positions with a highly effective array of tools for securing conformity and suppressing deviance. The influence of the General Secretariat, nominally an arm of the Supreme Court, extends to the Supreme Court as well: not only is it responsible for grooming and selecting career judges to fill six of the fifteen seats on the Court,<sup>159</sup> but it also exercises complete control over the *chōsakan* upon whom the Court must rely heavily in order to cope with an overwhelming and largely mandatory docket of over ten thousand cases per year.<sup>160</sup> In other words, the Supreme Court commands the General Secretariat, but the General Secretariat pulls the strings.

This centralization of power over both administrative and personnel matters in the General Secretariat, under the leadership of the Chief Justice, has important implications for the ability of a newly elected government to alter the ideological direction of the Court. It suggests, in particular, that in order to make the Court more liberal, the current DPJ government might need to do little more than replace the existing Chief

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157. See, e.g., Miyazawa, *supra* note 15, at 59 (arguing that administrators in the General Secretariat share “the perspective of the dominant political group in the legislative and administrative branches,” “appoint like-minded judges to the [General Secretariat] and other key positions to control other judges,” and “promote[] each other to higher positions”); O'Brien & Ohkoshi, *supra* note 100, at 44–48 (arguing that the Chief Justice and General Secretariat exercise their considerable power over personnel matters and appointments to the Court in a manner that disadvantages judges who are “too independent or too liberal”).

158. See Law, *supra* note 1, at 1587; Miyazawa, *supra* note 15, at 59; O'Brien & Ohkoshi, *supra* note 100, at 59 (“[T]he politics of the judicial bureaucracy, electoral outcomes, and the governmental infrastructure matter a great deal more for establishing judicial independence—both institutional independence and judicial independence on the bench—and for the exercise of constitutional review than the parchment guarantees of Japan's 1947 Constitution.”).

159. See Law, *supra* note 1, at 1557–64 (describing the General Secretariat's control over the judicial career path to a seat on the Court). Moreover, the General Secretariat's influence over the composition of the SCJ has only grown over time, thanks to the allocation of an increased number of seats to the career judiciary at the expense of the private bar. See Repeta, *supra* note 15, at 1735–39 (suggesting that this reallocation of seats had the effect, if not also the intent, of steering the Court to the right); Interview with Justice B, *supra* note 48 (indicating that the reallocation of seats was in fact intended to consolidate conservative control over the Court).

160. See Law, *supra* note 1, at 1577.

Justice and wait a few years. The fact that the Chief Justice is typically appointed to that position when he is already in his mid to late sixties and is subject to a mandatory retirement age of seventy normally ensures that the government will have the chance to replace this key figure within the space of four to five years, at most.<sup>161</sup> Conversely, however, if the DPJ is for some reason unable to replace the Chief Justice, its ability to influence the Court, via the appointments mechanism or otherwise, would presumably be blunted.

The problem for the DPJ is that the LDP appears to have anticipated these possibilities. It is a time-honored strategy for a government that anticipates electoral defeat to seek to entrench itself by appointing friendly judges who cannot easily be removed by the incoming government.<sup>162</sup> In Japan, given the unusual degree of power concentrated in the hands of the Chief Justice, a highly effective way to pursue a judicial entrenchment strategy of this type is to appoint an ideologically reliable Chief Justice who is young enough to outlast the opposition's turn in power. It may be no coincidence that, in the face of imminent and resounding electoral defeat, the outgoing LDP government appointed Hironobu Takesaki to the position of Chief Justice at an uncharacteristically young age.<sup>163</sup> The average length of time that Justices serve before reaching retirement age is only five-and-a-half years,<sup>164</sup> and because the Chief Justice in particular is nearly always selected from among the former career judges who are already on the Court, he is unlikely to serve for more than two to four

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161. See *supra* note 153 and accompanying text.

162. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 22–30 (2003) (offering the “political insurance” thesis that governments facing a future loss of power can and do insure themselves against that prospect by empowering and staffing judicial institutions capable of thwarting and resisting the wishes of a future, hostile government); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11–16 (2004) (offering the “hegemonic preservation thesis” that ruling elites faced with an imminent loss of power seek to preserve their own hegemony by empowering judicial institutions that will share their outlook); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 418–20 (2009) (describing how the Federalists reacted to the massive electoral rout of 1800 by creating new judicial positions and appointing a large number of so-called “midnight judges”); Ramseyer & Rasmusen, *supra* note 91, at 333 (noting that it is optimal strategy for the party in power to appoint Justices close to retirement age in order to minimize the problem of ideological drift by sitting Justices, but the calculus shifts in favor of selecting younger Justices, who may be less predictable over the long run but will also remain in office longer, if the ruling party anticipates that it will soon be out of office).

163. At the time that the LDP broke with convention to select Hironobu Takesaki as Chief Justice in 2008, it was already clear that the party was heading for catastrophic electoral defeat on a scale that it had never before experienced in over fifty years of nearly uninterrupted rule. See *Japan's Crashing Economy: Cold Medicine*, ECONOMIST, Feb. 19, 2009, at 44 (reporting that, with a general election imminent, the LDP government enjoyed approval ratings of less than 10%).

164. See Law, *supra* note 1, at 1574.

years before facing mandatory retirement.<sup>165</sup> At the time of his appointment, however, Takesaki had not previously served as an associate Justice and was nearly six years from mandatory retirement age.<sup>166</sup> Assuming that Takesaki exercises the degree of influence over appointments that Chief Justices are generally thought to enjoy, the result of Takesaki's appointment may be to blunt any efforts that the current government might make to modify the composition and behavior of the Court, at least in the short to medium term.

#### VI. CONCLUSION: BREAKING THE GRIP OF THE BUREAUCRACY

The fact that the Supreme Court of Japan has approached judicial review so conservatively for so long is ultimately unsurprising. Unless one believes that courts can be hermetically sealed from their political environment, it is unrealistic to think that the decades-long dominance of Japanese politics by the right-of-center LDP would not profoundly shape the behavior of the SCJ. Moreover, even though the government has, for the time being, taken a very slight turn to the left, it is unclear how quickly the judiciary will follow its lead. In the long run, the Court is bound to succumb eventually to the effects of an enduring political shift to the left. In the short term, however, the tendency of the judiciary to cling to its old ways should not be underestimated. As previously noted, a temporary but nonetheless serious obstacle to any immediate effort to reshape the Court is the fact that, on its way out of office, the LDP happened to stumble upon the simple but effective entrenchment strategy of appointing a Chief Justice who is young enough to potentially outlast the opposition's time in office.<sup>167</sup>

A more enduring, structural reason why the SCJ seems unlikely to develop a sudden mania for judicial review, however, is its heavy dependence upon a hierarchical bureaucracy for both personnel and resources. As a bureaucratic organization, the Japanese judiciary is ill suited not simply by temperament, but by design, to challenge the government on matters of policy. Form and function, as Mirjan Damaška observes, are symbiotic: the fact that a judiciary is organized in a particular way renders it better suited to performing certain functions than

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165. *See supra* note 153 and accompanying text.

166. *See supra* notes 152–53 and accompanying text.

167. *See supra* notes 162–65 and accompanying text (discussing the political circumstances surrounding the appointment of Hironobu Takesaki as Chief Justice and the ways in which Takesaki was an atypical candidate).

others.<sup>168</sup> The Japanese judiciary, in particular, is what Damaška would call a “hierarchically” organized judiciary that is more suited to “policy-implementing” than to “conflict-solving.”<sup>169</sup> The fact that tremendous power is concentrated in the hands of its leadership, in the form of an abundance of internal mechanisms for securing conformity and punishing deviance, renders the judiciary a stable and predictable mechanism for the transmission and implementation of government policy.

What an organization with such characteristics cannot be expected to cultivate or even tolerate, by contrast, is a penchant for defying authority or exercising independent judgment on matters of policy. Yet it is precisely these qualities that a court must possess if it is to discharge the responsibility of judicial review. An organizational form that inculcates conformity to the wishes of judicial bureaucrats who epitomize conventional thinking is simply not conducive to judicial review, which entails scrutinizing and overturning rather than implementing the wishes of those in power.

The fact that the Supreme Court is nominally in charge of the bureaucracy does not mean that it is independent of the bureaucracy. Instead, to a substantial degree, it is the bureaucracy that literally makes the Court. To turn the Japanese judiciary into something other than a policy-implementing arm of the state—one characterized by consistency, discipline, and fidelity to the sensibilities of those who wield power—will require more radical surgery than the American constitutional interventions of 1946, which may have formally emancipated the judiciary from the Ministry of Justice but did little to alter its fundamental character.

There is more than one way to liberate the exercise of judicial review from the control of a conservative, self-replicating bureaucracy that prizes conformity and orthodoxy over constitutional principle. Some scholars have suggested that the power of judicial review be vested in a specialized constitutional court that is distinct from the regular judiciary,<sup>170</sup> an approach that has been adopted by many other civil law countries and, indeed, is more popular on a global basis than the American-style approach of relying upon courts of general jurisdiction.<sup>171</sup> It is neither

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168. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 182–201 (1986).

169. *Id.* at 11–12, 94–96.

170. See Matsui, *supra* note 1, at 1416–19 (discussing proposals that have circulated in Japan for the creation of a separate constitutional court).

171. See Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMP. POL.* 217, 223–24 & tbl.9.1 (Daniele Caramani ed., 2008) (reporting that countries that have adopted the “European model”

necessary nor sufficient, however, to create a separate court in order to guarantee the vigorous exercise of judicial review. Regardless of whether one creates a separate court with formal autonomy from the regular judiciary, a successful reform strategy must also aim to deprive the bureaucracy of its power over the personnel and resources needed to perform judicial review.

The stifling influence of the bureaucracy could, in theory, be lifted by reforming the existing Supreme Court instead of creating a specialized constitutional court. The first problem to be addressed is that of the bureaucracy's control over the resources available to the Court. As explained previously, the Justices are heavily dependent upon law clerks who are both obsessed with adherence to precedent and beholden to the General Secretariat. Justice Izumi's proposal to assign *chōsakan* to individual Justices would obviously ameliorate this problem by providing the justices with the resources that they need to question and challenge the legal orthodoxy that the bureaucracy fights so hard to maintain.<sup>172</sup> Indeed, one might go further by eliminating the General Secretariat's role in the selection of law clerks altogether and enabling the Justices to select clerks who are not necessarily career judges. Such a reform would give the Justices the opportunity to select law clerks who reflect their own values and priorities, as opposed to those of the bureaucracy.

The second problem to be addressed is that of the membership of the Court. As Justice Izumi observes, the appointment of at least three constitutional law or public law scholars to the Court at any given time—one for each of the three petty benches—would both enhance the Court's substantive expertise in constitutional matters and ensure that such matters are “vigorous[ly] debate[d].”<sup>173</sup> Justice Izumi's view that public law scholars would enhance the quality and quantity of debate is supported, moreover, by empirical evidence: law professors have a proven track record of intellectual independence, as evidenced by the fact that a disproportionately large share of the Court's concurring and dissenting opinions are authored by those Justices who hail from legal academia.<sup>174</sup> One might also add that, absent such expertise and debate, sensitive constitutional issues are too likely to be resolved in practice by law clerks,

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of judicial review outnumber those that have adopted the “American model” by a count of eighty-five to fifty-three, while another thirty-six countries employ a mixture of the two models or some other unique and unclassifiable mechanism).

172. See Izumi, *supra* note 117, at 1779.

173. *Id.* at 1778.

174. See O'Brien & Ohkoshi, *supra* note 100, at 57–58.



or *chōsakan*, handpicked by the bureaucracy for their preoccupation with fidelity to precedent.<sup>175</sup>

The appointment of any number of public law scholars to the Court may be for naught, however, if the responsibility for selecting such candidates remains in the hands of the judicial bureaucracy. Whereas it is generally understood that the appointment of private attorneys to the Court is to proceed on the basis of input from Japan's various bar associations,<sup>176</sup> there is no comparable institutional or procedural constraint on the bureaucracy when it comes to the selection of the Court's lone law professor.<sup>177</sup> Thus, as a practical matter, the bureaucracy is free to select the most conservative law professor that it can find, in any field of its choosing.

Accordingly, it is necessary to devise an institutional mechanism for identifying potential Supreme Court nominees that is largely or wholly independent of the Chief Justice and General Secretariat. The Cabinet must develop or acquire an independent capacity to identify and assess judicial candidates. Along these lines, Justice Izumi suggests the creation of a "selection committee," "consisting of judges, prosecutors, private attorneys, and scholars," that would have responsibility for advising the Cabinet on all appointments to the Court.<sup>178</sup> Such a comprehensive overhaul of the selection system would be desirable for a number of reasons, not least of all that it might break the bureaucracy's grip over the membership of the Court—provided, of course, that the members of the committee are not themselves selected by the Chief Justice or General Secretariat, and that the judges and prosecutors do not dominate the committee.

If the creation of an independent selection committee proves too ambitious, a more incremental approach might be to institute a selection process for law professors that parallels the one already in place for private attorneys by vesting the selection of candidates in a professional organization of legal academics or consortium of law schools. Just as each of Japan's leading bar associations currently feels entitled to some form of quota-based representation on the Court,<sup>179</sup> it is plausible to imagine a system in which Japan's leading law schools would be informally entitled

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175. See Law, *supra* note 1, at 1581.

176. See *id.* at 1566–68.

177. See *id.* at 1572–74 (characterizing the process for identifying candidates from legal academia as "ad hoc and unstructured, with few informal rules or understandings to guide it").

178. Izumi, *supra* note 117, at 1778.

179. See Law, *supra* note 1, at 1567.

on a rotating basis to fill Supreme Court vacancies. Indeed, an authoritative association of law schools or law professors could help to bring about such a system on its own initiative. By publicizing its own list of the most qualified candidates for the Supreme Court, such an organization could put subtle pressure upon the judiciary to choose from that list in order to avoid criticism or disapproval. Recommendations of this type would not necessarily have to be formally binding in order to be effective as a practical matter. To depart altogether from the list of recommended candidates would risk the appearance of ignoring expert consensus for no obvious reason and instead selecting judges on nakedly political or ideological grounds. And by all accounts, Japan's senior judges do care about appearances.