STEALTH ACTIVISM: NORM FORMATION BY JAPANESE COURTS

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As we consider the political and social roles of the Japanese Supreme Court and specifically whether it has a conservative influence, we need not only to define "conservative" but also to think of what roles a court may play in a democratic society. One role that has received a lot of attention in this symposium is constitutional judicial review. Both Professors Haley[1] and Law[2] agree that the Japanese judiciary has exercised a conservative influence in this respect, and Law would probably agree with Haley's summary statement that Japanese courts "do not seek to be the catalysts of social change."[3]

I disagree with the sweeping nature of such characterizations and believe that there are substantial and important exceptions. I have no knowledge of the personal motivations of Japanese judges, so I cannot assert that they seek to change Japanese society, but I do argue that they have done precisely that and, furthermore, that they have done so in a manner that goes beyond what American courts have been willing or able to do. I disagree with Law's argument that Japanese judges are trapped in a bureaucratic cage, I disagree with the assertion that they are the political lackeys of the Liberal Democratic Party as Ramseyer and Rasmusen argue,[4] and I disagree with Haley's argument that they are cautious reflectors of social consensus. Instead, I contend that Japanese judges have played a much more activist role in Japanese society than the American federal judiciary has done in American society, despite the fact that the American judiciary is frequently touted as a paradigmatic example of

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1. John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88 WASH. U. L. REV. 1467 (2011).

2. David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011).

3. Haley, *supra* note 1, at 1491.

4. J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 331 (2001).

judicial activism.[5] Perhaps most surprising, given the apparent consensus at this conference, they have done so in a "liberal" direction that has contradicted the apparent desires of the Liberal Democratic Party and the prevailing consensus of Japanese society. No one has noticed, however, for two reasons. First, they have not done so in judicial review, where American observers of judicial activism are trained to look, but in the interpretation of the general clauses of the Civil Code, an area of law that is less clearly in the political spotlight. Second, Japanese courts have not used their injunctive powers to intervene in the operation of governmental bureaucracies and civil society institutions as American courts have in instances such as the affirmative action cases discussed briefly below.

To make this argument, I look at judicial decisions in the areas of employment, divorce, and protection against discrimination.[6] My argument is that Japanese courts are willing to deviate from established doctrine, including statutory provisions, to create social norms that they consider desirable and that they do so under circumstances where American courts would refrain because of considerations of the appropriate judicial role.

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5. The Japanese courts' use of general clauses is not so remarkable when the comparison is to other civilian jurisdictions. In 1989, for example, the Taiwanese judiciary made a finding that requirements in labor contracts that female employees must remain unmarried violated Article 72 of the Civil Code of the Republic of China, the equivalent of Article 90 of the Japanese Civil Code. *See* Ku Yen-lin, *The Feminist Movement in Taiwan, 1972–87*, 21 BULL. CONCERNED ASIAN SCHOLARS 12 (1989). For a more general discussion, see JOHN P. DAWSON, THE ORACLES OF THE LAW 461–79 (1968). Nor is the role entirely absent from the American scene once one looks beyond the federal judiciary and judicial review of governmental action. Professor Helen Hershkoff has demonstrated that American state courts will draw on state constitutional norms to create new common law norms in the private law areas of tort, contract, and property. *See* Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS (James A. Gardener & Jim Rossi eds., 2010). While the actions of the Japanese courts described herein do not always explicitly draw on constitutional norms, at times they do, and when they do, the similarity to the cases described by Hershkoff is striking. See, e.g., the description of the *Sumitomo* line of gender discrimination cases, *infra* text accompanying notes 21–22.

6. I am not the only one to have remarked on this phenomenon. *See* DANIEL H. FOOTE, SAIBAN TO SHAKAI: SHIHÔ NO "JÔSHIKI" SAIKÔ [THE COURTS AND SOCIETY: RECONSIDERING "COMMON KNOWLEDGE" REGARDING JUSTICE] (Masayuki Tamaruya trans., 2006). For an English discussion of the courts' role in the labor area, see Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?*, 43 UCLA L. REV. 635 (1996) [hereinafter Foote, *Judicial Creation*]. Although I argue here that Japanese courts play an active role in the formation of the norms governing private relationships, I do not deny that they have been extremely deferential to the government when citizens have tried to use litigation to challenge bureaucratic actions or policy. *See generally* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987).

I. JUDICIAL SHAPING OF RELATIONSHIPS IN EMPLOYMENT AND MARRIAGE

Perhaps the best way to illustrate the role of the courts in the employment relationship is the story of Mr. Shioda and his struggle with his employer, Kochi Broadcasting.[7] Shioda was assigned to read a ten-minute news segment at 6 a.m. On February 23, 1967, he did not awake until 6:20, missing the entire broadcast. Two weeks later, on March 8, he again overslept but managed to get to the microphone by 6:05 to read half of the broadcast. Remarkably, since his failure had literally been broadcast to the world, Shioda did not report the second incident. Not surprisingly, the company discovered the facts and fired him. Shioda sued for wrongful discharge.

To win, he had to overcome statutory language in both the Civil Code and the Labor Standards Law that gives both parties in an employment relationship the freedom to terminate without any reason.[8] To make the task even more difficult, he was hardly blameless. Within two weeks, Shioda had twice failed to perform a simple and fundamental duty for the company, one that had an immediate effect on the company's reputation, without the slightest excuse or extenuating circumstance. Then he had lied about it.

Nonetheless, the district court, high coFurt, and Supreme Court all agreed with Shioda and ordered his reinstatement. The Supreme Court did not shy away from the facts. It recognized that the company had not disciplinarily discharged Shioda; that he had violated work rules without a satisfactory reason; that the company had suffered therefrom; and that Shioda had not dealt with the incident honestly. "However," the Court continued,

> his [Shioda's] failures were not caused by malice or intent but rather by negligence, namely oversleeping. It is rather too harsh to blame only the plaintiff since in both instances the reporters who were supposed to wake him also overslept and failed to give him the script of the broadcast. The plaintiff apologized immediately after his first failure, and in the second instance he tried to start work as

7. Saikō Saibansho [Sup. Ct.] Jan. 31, 1977, 268 RŌDŌ HANREI 17.

8. Article 627 of the Civil Code reads as follows: "If no period for the service has been fixed by the parties, either party may at any time give notice to the other party to terminate the contract; in such case the contract of service shall come to an end upon the expiration of two weeks after such notice." MINPŌ [MINPŌ] [CIV. C.] art. 627 (Supreme Court translation 1959) The Labor Standards Act extends the notice period to 30 days.

> soon as he woke up. In neither case was the missed period of broadcasting too long. . . . His submission of a coverup report was partly the result of . . . his awkwardness over his repeated mistakes in a short period. Considering all these points, he is not to be blamed too much.[9]

The Court went on to note that Shioda's job performance up to this point had not been "particularly bad" and that he had eventually apologized for the second incident.[10] These circumstances made the company's reaction appear unreasonably severe in the eyes of the Court, and it declared the dismissal null and void as inconsistent with the "common sense of society" as stipulated in the general clauses of the Civil Code.[11]

It is important here to restate what is remarkable about the Supreme Court's decision and opinion. It is not its solicitude for the employee. Many developed countries have made it very difficult to fire employees, but they have done so via legislation, not via the judiciary's total rewriting of the statutes governing the employment relationship.[12] Nor have Japanese courts limited their activism in the employment sphere to discharges. They have systematically narrowed companies' discretion across a wide range of areas including discipline, transfers, and the termination of temporary employment.[13] In doing so, they have relied on the general clauses of the Civil Code, extremely vague provisions that allow interventionist courts to use phrases like "good public order," "good faith," or "the common sense of society" to effectively nullify legislation. This pattern has been repeated in the area of private gender discrimination in employment, but before we reach these cases, it is worth briefly recounting the courts' role in contested divorce, where it did not have to resort to the general clauses but innovatively interpreted the language of a

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9. Frank K. Upham, *Visions of Justice in Postwar Japan: A Preliminary Inquiry*, *in* LAW IN EAST AND WEST / RECHT IN OST UND WEST 145, 150 (Inst. of Comparative Law, Waseda Univ. ed., 1988).

10. *Id.*

11. *Id.*

12. *But see* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1559–63 (2010) (discussing the judicial development of a tort cause of action for wrongful discharge by state courts drawing on constitutional norms). These cases, although similar in many respects to the *Shioda* line of cases, were in one important sense less intrusive into the democratic process. They were revising an at-will employment doctrine that the courts had themselves created as part of state common law. In Japan, the judiciary revised statutory language created by the national legislature, rather than their own previous decisions.

13. *See* Foote, *Judicial Creation*, *supra* note 6.

specific statute to make marriages almost as difficult to sever unilaterally as the employment relationship.[14]

If they agree, Japanese spouses need only register with local government to get a divorce. If it is contested, however, judicial action is required, and Civil Code Article Section 770(1), as amended in 1947, lists the permissible grounds. The first four restate prewar fault-based grounds such as adultery, but the fifth, "any other grave reason for which it is difficult for the [plaintiff/spouse] to continue the marriage," transformed the prewar fault regime with what has been called an "incompatibility" regime.[15] The 1947 amendment was part of the Occupation reform of the family law and was intended to eliminate the patriarchal household system that reformers saw as a pillar of militarism and the oppression of women.

In 1952, however, the Supreme Court essentially reinstated the fault regime by interpreting the fifth ground to reject any divorce petition by a spouse who was morally culpable. Although the Court portrayed its reason as the protection of morality, stating that "the primary role of the courts is the protection of good morals," they were not looking to revive the prewar system. On the contrary, since at that time it was usually the husband seeking a divorce, the practical effect of this interpretation was to deny a divorce to a husband who had committed any transgression against the marriage—adultery was the likely one—no matter how total the breakdown of the marriage, a move interpreted as an attempt to protect the married status of women or at least give them a chip in the bargaining over property division. Whatever the Court's motivation, however, its action is difficult to understand as anything other than the favoring of the Court's interpretation of the social conditions of the age over that of conservative male legislators.

Just in case anyone might have thought that the 1952 Court's action was aberrational—perhaps explainable as a one-time rejection of Occupation norms imposed on the citadel of traditional Japanese values—the Court in 1987 again unilaterally changed the rules for contested divorce in a decision that at least has the virtue of candor in that this time the Court explicitly overruled its prior decisions.[16] By this time, the financial position of Japanese women had improved dramatically, and the

14. Saikō Saibansho [Sup. Ct.] Feb. 19, 1952, 6 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 110. The case is available in English in THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 74 (Hideo Tanaka ed., 1976).

15. THE JAPANESE LEGAL SYSTEM, *supra* note 14, at 78.

16. Saikō Saibansho [Sup. Ct.] Sept. 2, 1987, 41 SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 1423. This case is available in English in THE JAPANESE LEGAL SYSTEM 531 (Milhaupt, Ramseyer & West eds., 2006).

Court significantly liberalized the fifth ground of Article 770(1) by allowing an adulterous husband to pursue a divorce. In reversing course, without any change in the statutory language, the Court established a set of factors that should be considered when judges contemplate granting divorces to "responsible spouses," and the judiciary has been tinkering with the meaning and weight of these factors ever since.[17] In the meantime, the Diet has not been totally inactive, considering legislation on this precise point at least since 1995. The fact that the Diet has actively discussed amendments to Article 770-1-5 but has not acted underscores the Court's lack of deference to the legislative branch.

II. TACKLING INVIDIOUS DISCRIMINATION

Whatever causal power one attributes to the courts' remaking of labor and divorce law, it is undeniable that both Japanese labor and marriage practices subsequently conformed to the norms espoused by the courts in these areas. In contrast to prewar patterns, postwar Japan enjoyed extremely low divorce rates and became famous for the practice of long-term "permanent employment" and a legal regime that made it extremely difficult to discharge employees. The courts' equally aggressive interpretations of the doctrines concerning private discrimination, on the other hand, have been met with less wholehearted acceptance by the government and people of Japan. We look here at the issue of gender discrimination in employment.

Japanese women share the judiciary's reputation for passivity in this period. While certainly given credit for contributing to social stability, their role is generally portrayed as being good wives and mothers. They are seldom seen as demanding their legal rights, but instead as remaining quietly in their place, but there is at least one important exception to this picture. Starting in the late 1950s, Japanese women began to sue their employers for sex discrimination and have continued to do so up to the present.[18] At the beginning, the courts not only supported them, but also did so in the face of contrary statutory language and virtually universal social practice.

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17. *See*, *e.g.*, Saikō Saibansho [Sup. Ct.] Nov. 18, 2004, 1881 HANREI JIHŌ [HANJI] 90. This case is available in English in THE JAPANESE LEGAL SYSTEM 533 (Milhaupt, Ramseyer & West eds., 2006).

18. For the history, see UPHAM, *supra* note 6. For an example of more recent litigation, see Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 5, 2003, 1846 HANREI JIHŌ [HANJI] 116, *rev'd*, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Jan. 31, 2008, 2005 HANREI JIHŌ [HANJI] 92. Both parties appealed to the Supreme Court, but both appeals were rejected by the Third Petty Bench Judgment of October 20, 2009.

When these cases began, the statutory basis for protection against sex discrimination in employment was thin; perusal of the statutes might have led one to the conclusion that sex discrimination was not only tolerated, but fully anticipated. It is true that Article 14 of the Constitution flatly prohibits sex discrimination, but the Constitution applies directly only to state action. Other constitutional provisions reinforce the equality principle in the area of family law, but until the promulgation of the Equal Employment Opportunity Act in 1985, the only statutory provision covering sex discrimination was Article 4 of the Labor Standards Act (LSA), which prohibited wage discrimination on the basis of sex. Sex is conspicuously absent from LSA Article 3, which outlaws discrimination on the basis of citizenship, religion, and social origin. Other sections of the LSA expressly required gender discrimination by granting female workers protection from certain types of work. Furthermore, employment practices at the time routinely discriminated against women in almost all terms of employment.

This left the prospective plaintiff with the provisions of the Civil Code. Article 1-2 provides that the Code is to be interpreted "from the standpoint of the dignity of the individual and the essential equality of the sexes," language added as part of Occupation reforms aimed at improving the legal status of women.[19] Article 1-2 is supplemented by Article 90, which provides that any "juristic act whose object is such as to be contrary to public order or good morals is null and void."[20] Neither Article, however, was meant to apply directly to routine cases or as an obvious basis for courts or litigants to employ against discriminatory practices that were not only ubiquitous but also socially legitimate. Nonetheless, it is this basis that courts used to prohibit a range of personnel practices beginning with forced retirement upon marriage and continuing on to sex harassment on the job.

As with the transformation of the LSA's at-will employment regime, perhaps the best way to illustrate the courts' approach is with an example, such as the *Sumitomo Cement* case decided by the Tokyo District Court on December 20, 1966. Suzuki Setsuko went to work for Sumitomo Cement in 1960, when Sumitomo's employment regulations required women to retire upon marriage. Three years later, she married, refused to resign, and was fired. The Tokyo District Court, in an approach confirmed later by the Supreme Court, noted the economic hardship imposed on women forced to

19. MINPŌ [MINPŌ] [CIV. C.] art. 1-2.
20. *Id.* art. 90.

retire upon marriage and concluded that such hardship was a substantial restriction of the freedom to marry guaranteed in Article 24 of the Constitution. Since the Constitution was not directly applicable to private behavior, the court turned to Article 90 and the definition of "public order and good morals" in the context of private employment discrimination. Sumitomo pointed out that similar practices were virtually universal in Japanese employment; that they were expected and accepted as natural and fair by workers, unions, and employers; and that they were consistent with Japanese values and traditions. The court rejected this invitation to ratify social practice and instead referred to the ideals that they found embodied in the Constitution: "The essential equality of the sexes must be realized. The prohibition of unreasonable discrimination not just in relationships between the state and private individuals, but also in relationships wholly within the private sector, is a fundamental principle of the law."[21] The court brushed aside the provisions of the LSA and ridiculed Sumitomo's argument that women were inherently inefficient, declaring that unlike the shrine maidens of Shinto ritual, where religious doctrines require virginity, there was no reason for requiring Sumitomo's female employees to be single.

This general doctrinal approach was extended in case after case over the next two decades to mandatory retirement of women at pregnancy or childbirth, at a young age (often thirty), at a mature age younger than men (often fifty versus fifty-five), and to the singling out of women for layoff during hard economic times. Although the plaintiffs and others resisted these practices, they were, as Sumitomo had argued, the norm and not the exception, and yet Japanese courts struck them down without any specific statutory basis and, ironically, justified their actions on general clauses that are themselves premised on social norms. Unless we give to the judiciary the right to define public morality on its own, one would think that doctrine, predominant social practice, and legislative acceptance of the status quo would be the dominant sources to which courts would turn for the social norms referenced in Articles 90 and 1-2. Instead, the court relied almost entirely on the Constitution, which, of course, the court itself had already declared did not apply to private behavior.

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21. UPHAM, *supra* note 6, at 132–33. Although in a somewhat different context, the Illinois Supreme Court used strikingly similar language in 1981 to find a public policy exception to the at-will doctrine: "In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions." Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

What is remarkable about this process from the point of view of comparative law, however, is not solely the assertiveness of the Japanese judiciary; it is also the almost universal invisibility of this assertiveness to the rest of Japanese society and to academic observers. When Japan eventually passed the Equal Employment Opportunity Law (EEOL) in 1985, its provisions essentially codified the doctrines that the Court had developed judicially over the previous twenty years. Despite what to an outside observer would appear to be a clear causal connection between a series of cases outlawing certain practices and a statute that outlawed exactly the same practices and effectively no others, I know of no Japanese commentator on the EEOL who mentioned the courts when discussing the origins of the Act. Instead, they focused on *gaiatsu* (external pressure), an American-led foreign assault on Japanese traditions and values. Even as late as 2000, when the Japanese concern over *gaiatsu* had abated, a leading Japanese labor law scholar ignored the *Sumitomo* line of cases entirely and explained the passage of the EEOL as follows: "In 1980, the Japanese government signed the Convention Concerning the Elimination of All Forms of Discrimination Against Women adopted by the UN in 1979. In order to ratify the Convention, the government needed to make necessary adjustments in national legislation."[22]

Most of the commentators (and all of the legal ones) knew of the *Sumitomo* line of cases, but they apparently gave them no causal power. The 1980s was a time when the Japanese found themselves under constant foreign pressure to reform their economic practices, and a sense of being bullied by the West may explain why they found it more congenial to blame the Americans than their own courts for what many may have seen as an attack on "traditional" practices. Cultural nationalism does not explain, however, the continuation of this view into the twenty-first century as exemplified by the quotation of the labor law scholar above. Nor does it help with the bewilderment of Americans who find it hard to understand how the Reagan administration, not known for its advocacy of women's rights at home, became such a strident advocate of them abroad. But the important point here is that if the courts were not seen as a significant cause of the change in social and employment practices, the question of whether the judiciary was exceeding its appropriate role in a democracy was literally inconceivable.[23]

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22. Takashi Araki, *Equal Employment and Harmonization of Work and Family Life: Japan's Soft-Law Approach*, 21 COMP. LAB. L. & POL'Y J. 451, 452 (2000) (emphasis added).

23. The discrimination story does not end with female employees. Although there is even less visibility and impact, the courts have often been ahead of social practice in status and racial

It is important not to understate the boldness of the Japanese courts here, at least from an American perspective. First, the general clauses were meant to provide a means to reach justice in cases when the strict application of the legal rules will lead to a result inconsistent with the purpose of the norm, not to give the courts the power to supplant, even temporarily, the legislature as the institution responsible for establishing fundamental norms. Second, these decisions went directly against the interests of the Liberal Democratic Party (LDP). Frustrating aging businessmen wishing to marry their mistresses, forcing companies to retain lazy workers, and preventing employers from utilizing female employees as they wished were not normally considered part of the LDP platform. Nor is it likely, given that the LDP was repeatedly reelected during this period, that the courts' values were strongly held by the majority of Japanese.[24] It is, of course, possible to argue that the judiciary's actions were one part of a larger evolution of social attitudes, but that does not explain or justify why it was the courts that determined the specific direction and pace of change. Wherever one might put the causal weight, the boldness and the "liberal" direction of the courts' interventions are clear, even when we compare them to what most observers would say is the most interventionist judiciary in the world, that of the United States.

III. JAPANESE JUDICIAL ACTIVISM FROM AN AMERICAN PERSPECTIVE

Whatever one thinks of the activism of Japanese judges, their role generally ends with the statement of norms via doctrinal interpretation. Thereafter, the initiative returns to the legislature and cabinet and ultimately to the society at large. They may chose to validate the judicially created rule, or they may find ways to circumvent or contain it, or they may simply ignore it, but whatever other political actors do, the courts tend to leave them alone to make of the judicially created norms what they will.[25] American courts behave very differently. Although reluctant to defy

discrimination as well, drawing on a variety of doctrinal sources to do so. *See* UPHAM, *supra* note 6, at 97–103 (discussion of the courts' treatment of the *Burakumin*).

24. It is true that the Diet never repudiated the courts' actions, but to interpret legislative silence as evidence that the courts had been simply reiterating preexisting dominant social attitudes seems improbable.

25. This approach was captured well by a concurring opinion by Justice Saito Kitaro in the *Koshiyama* electoral malapportionment case where he discussed Justice Frankfurter's dissenting opinion in *Baker v. Carr* and concluded that the Japanese Supreme Court would better play its constitutional role by putting the court's "trust in the power of public opinion and in the conscience of the legislative and administrative organs." KENNETH L. PORT & GERALD PAUL MCALINN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 191 (2d ed. 2003).

statutory language, once they are involved, they do not relinquish control. On the contrary, in most cases, they doggedly pursue compliance and are willing to use their injunctive power to compel it when necessary, including against the democratically elected branches of government.[26] It is this direct intrusion into day-to-day governance, rather than any boldness in making law, that is likely the main cause of American courts' reputation for judicial activism. A brief review of the two courts' roles in sex discrimination will illustrate.

The constitutions of both countries contain provisions prohibiting invidious discrimination based on certain categories, with the Japanese Constitution including sex as well as the American categories of race, religion, and national origin. Both Supreme Courts have interpreted these prohibitions to apply only to discrimination based on state action.[27] Consistent with doctrine, American courts refused to find sex discrimination actionable in any context, even when committed by the government itself,[28] until its inclusion in the civil rights acts of the 1960s, despite a social history of fairly strong feminist politics. This reticence is in contrast to Japanese courts, which, as we have seen, acted without any specific statutory basis and in a society with a much weaker feminist movement.

Although American courts may not be so bold as Japanese ones in terms of creating social norms, once they are given a norm through the political process, American courts are resolute in enforcing them. Affirmative action is an example. Most Americans equate affirmative action with judicial decrees that businesses, universities, governments, etc., must take "affirmative action" to hire or admit a certain number of women, minorities, or other previously disadvantaged groups. This popular perception is true only in the narrowest sense: It is indeed judicial orders that mandate specific quotas, require specific remedial action, or establish elaborate monitoring and reporting procedures, but the phrase "affirmative action" did not emerge from a judicial opinion written by a liberal court determined to remake the world as most of us blithely assume. Affirmative action was brought into the American lexicon by the Civil Rights Act of 1964, section 706(g).[29] It was, in other words, the

26. *See* Haley, *supra* note 1 (discussing judicial powers).

27. UPHAM, *supra* note 6, at 130.

28. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 62–63 (1961) (limitations on female jury duty), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

29. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

product of the democratic process, and all that the courts have been doing since 1964 is enforcing the legislative mandate.

To leave the comparison here, however, would be disingenuous, implying that the views that Americans and Japanese have of their courts' roles are wildly out of touch with reality. In fact, popular perceptions are solidly based on real differences, including the respective injunctive reach discussed above, that make American courts seem all powerful and that conversely render their Japanese counterparts virtually invisible. My point is not so much that the stereotypes are wrong, but that the attention to the dramatic clashes between American branches of government inherent in constitutional judicial review obscures what is occurring at deeper structural levels in both societies. American courts are reluctant to change norms openly, especially if those norms have been legislatively created. There are exceptions, of course, even on the federal level, and *Roe v. Wade*[30] may be the most famous, but most of the instances that we think of as judicial activism, such as *Brown v. Board of Education*[31] declaring school segregation unconstitutional, have been firmly based on statutory or constitutional text. Even when that text is open textured, it is rarely as capacious as the "good public order," "good faith," and "the common sense of society" language that the Japanese courts rely on with such ease. One of the most remarkable aspects of the place of courts in Japanese society and politics is their almost total invisibility until the late twentieth century when they were criticized, paradoxically, not for being too assertive but for being out of touch with Japanese society.[32] Despite full media coverage of judicial decisions, judicial activism is rarely mentioned in political debate, academic commentary, or among the very lawyers who induce the courts to rewrite legislation. The only exception is the reaction of progressive lawyers, who often bemoan the conservatism of the courts when they lose. Otherwise, it appears as if most Japanese think of the judiciary as "the law," not as an institution with its own identity and agenda, even when the Supreme Court aggressively interprets the divorce, discrimination, or employment laws to protect vulnerable segments of society and then, years later, reinterprets them.

There are undoubtedly many reasons the social role of Japanese courts remains politically invisible: the apolitical judicial selection process, the absence of federalism, the bureaucratic nature of the judiciary, the historical lack of attention to the separation of powers, and the nature of

30. 410 U.S. 113 (1973).

31. 347 U.S. 483 (1954).

32. *See* LAW IN JAPAN: A TURNING POINT, at xxii (Daniel H. Foote ed., 2007) (discussion of the Justice System Reform Council and subsequent reforms to the Japanese legal system).

Japanese politics itself. To this list I would add their willingness to allow the political process to operate after judicial announcement of the law, especially when contrasted with the opposite tendency of American courts. But these institutional explanations may miss the true source of our vastly different perceptions of these two judiciaries: a deep and abiding inability to overcome our stereotypes about the two legal systems, which may be best illustrated by an incident that occurred at the conference on which this volume is based.

When two American law professors learned that I was about to assert that "affirmative action" was a creature of statute, not of judicial overreaching, they vigorously assured me that I was mistaken. That two law professors could be so confidently mistaken about the origin of such a controversial and central topic in American legal politics as affirmative action is itself remarkable, but what really demonstrates the tenacity of our stereotypes is my reaction. Despite having consulted the United States Code Annotated less than a month before to confirm the presence there of "affirmative action," I immediately deleted the assertion from my presentation. Part of my reaction was respect for my colleagues, but the real reason was that my own deeply held stereotype of aggressive American courts simply overwhelmed the facts—facts that I had confirmed myself just weeks before.