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THE SUPREME COURT OF JAPAN: COMMENTARY ON THE RECENT WORK OF SCHOLARS IN THE UNITED STATES

TOKIYASU FUJITA*

For this symposium, I was invited to serve on two panels. For Panel 2, I was asked to provide commentaries on three papers, namely: (1) John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*;¹ (2) David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*;² and (3) John O. Haley, *Is Japanese Supreme Court Conservative?*³ For Panel 6, I was asked to comment on the gap between scholarly perception and reality with respect to the Japanese Supreme Court, from the perspective of a former professor who has observed the Japanese judiciary from both the outside and the inside.

Reading the participants' papers, I have noticed that a heavy focus is placed on (1) determining the precise definition of the term "conservative," and (2) the degree to which the Japanese Supreme Court is "conservative," as the term is used among scholars. Furthermore, it has come to my attention that scholars refer to a particular *image of the Supreme Court*, which has frequently served as a foundation for their subsequent arguments. To address these points, I would like to discuss jointly the three papers and other related works, including Professor Daniel Foote's recent publications in 2006⁴ and 2007,⁵ and to talk simultaneously about my own impressions of the Court.

It should be noted that, unlike the other individuals gathered for this symposium, I am not principally motivated by academic endeavors to verify whether these scholarly interpretations are indeed valid. Nor have I reached my conclusions by subjecting my observations to academic

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

2. David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *TEX. L. REV.* 1545 (2009).

3. John O. Haley, *Is The Japanese Supreme Court Conservative?*, 88 *WASH. U. L. REV.* 1467 (2011).

4. DANIEL H. FOOTE, *SAIBAN TO SHAKAI: SHIHOU NO JOUSHIKI SAIKOU* [THE JUDICIARY AND SOCIETY: RECONSIDERING THE LEGAL COMMONSENSE] (NTT, 2006).

5. DANIEL H. FOOTE, *NAMONAI KAOMONAI SHIHOU: NIHON NO SAIBAN WA KAWARUNOKA* [THE NAMELESS AND FACELESS JUDICIARY: WILL THE JAPANESE JUDICIARY CHANGE?] (NTT, 2006).

scrutiny. Rather, the opinions that I provide are simply based on my personal experience of serving as a Justice for seven-and-a-half years.

While my impressions have not been tested with academic rigor, my experience of transitioning from being a professor to being a Justice, and thereby influencing the present Japanese Supreme Court, may in itself be of some interest to readers. It is my hope that such is the case, and it is for this particular reason that I have agreed to accept the invitation to participate in this symposium.

I. THE STEREOTYPICAL PORTRAYAL OF THE JAPANESE SUPREME COURT, AS PRESENTED IN BOTH TRADITIONAL ENGLISH AND JAPANESE WORKS

Among the traditional literature that discusses the structure of the Japanese Supreme Court, a particular view of the Court and its functions appears widespread. This widespread image of the Court (hereafter referred to as the “Perceived Image”) may be summarized as follows. Since the authority to appoint the Justices of the Supreme Court, including the Chief Justice, lies within the grasp of the government, it must be the case that the Supreme Court—at the very least—has been indirectly influenced by the political ideologies of the particular party in power.⁶ This effect explains why the Supreme Court has frequently rendered decisions that appear conservative. Furthermore, the use of bureaucratic structures, and the power of the Human Resources Division of the General Secretariat to control the promotion of lower-court judges, have stripped Japanese judges of their judicial freedom. At minimum, it must be acknowledged that these bureaucratic restrictions restrain judges, restricting their abilities to function as independent decision-makers.⁷

6. For the majority of the post-war period, the Liberal Democratic Party (LDP) has held political power in Japan. Specifically, aside from the Katayama Administration (Democratic Socialist Party) following World War II, the Hosokawa Administration (New Party) in 1993, and the short period following Prime Minister Hosokawa’s resignation in 1994 when Prime Minister Hata was installed by default, the LDP had held power until their defeat in the September 2009 General Election.

7. In response to Professor Ramseyer’s assertion that the LDP-run government has politically influenced the Supreme Court, Professor Haley offers a powerful and persuasive criticism, which—at the very least—proves that the LDP has not directly influenced the judiciary. Moreover, there is scholarly literature that casts doubt on, and perhaps even refutes, Professor Ramseyer’s assertion. *See, e.g.*, FOOTE, *supra* note 5, at 131. Notwithstanding this literature, I believe that scholars continue to adhere to the notion that (1) the General Secretariat has restrained itself precisely for the purposes of accommodating the government’s policies and objectives, and (2) such political leeway has made it possible for political parties to impose their ideology onto the judiciary, effectively allowing the political parties to indirectly control the Supreme Court. *See, e.g.*, LAW, *supra* note 2. For recent Japanese scholarship expressing this view, see MUNIYUKI SHINDOU, SHIHOU KANRYOU [THE JUDICIAL BUREAUCRACY] (Iwanami Shoten, 2009).

In order to investigate the validity of the Perceived Image, it is necessary to keep in mind the following inquiries.

First, an investigation should be made into whether a gap exists between (1) the institutional and theoretical possibility of how the Supreme Court *may* function, and (2) the Court as it *actually* functions. Second, as a way of understanding the first consideration, it is necessary to analyze how the Court has adapted to the generational changes. To expand on this point, it is important to ask whether the generational changes have fundamentally shifted the Justices' views on what they precisely characterize as representing the societal values, as these values may be specific to particular time-periods. If such fundamental shifts have indeed taken place, a survey should also be made into the degree to which such shifts have taken place. Third, an examination into the precise meaning of the term "conservative" is necessary. Noting an absence of an analysis containing the above three inquiries, I believe that the Perceived Image has not been subjected to a rigorous enough examination to test its validity.

II. THE GAP BETWEEN THE PERCEIVED IMAGE AND THE REALITY OF THE JAPANESE SUPREME COURT

A. *Selection of New Justices*

The Japanese Cabinet is formally assigned the duties to select new Justices. Putting aside questions concerning the degree to which the Cabinet actually influences the appointment process, a ruling party may be said—in theory—to possess the potential to steer the Supreme Court's judicial course. That is, assuming that the ruling party is able to appoint Justices who are sympathetic to its political ideology, a possibility exists for the ruling party to influence, if not control, the Supreme Court's judicial course.

The above conjecture is not entirely improbable. As a matter of fact, there may actually have been instances where the ruling party at least appeared to control the Supreme Court's decision-making capabilities. Concretely speaking, cases from the Showa 40s⁸ may possibly serve as examples of such occasions.

8. The cases, which were decided during the 1960s, involved lawsuits stemming from movements to expand the basic rights of government employees. See *Justices of the Supreme Court*, COURTS IN JAPAN, <http://www.courts.go.jp/saikosai/about/saibankan/index.html> (last visited May 6, 2011). [Editor's note: In Japan, for official purposes, years are numbered not according to the Roman calendar, but instead according to the year of the Emperor's reign. The "Showa 40s" correspond roughly to the 1960s.]

However, this does not by itself conclusively prove that the Japanese Supreme Court has constantly been controlled, and thereby has its decision-making responsibilities compromised, by the ruling party. Rather, the concept of judicial independence has been one of the fundamental cornerstones of the Supreme Court.⁹ In fact, those serving on the Court have dedicated themselves utterly to, and staked their reputations upon,¹⁰ shielding the Court from political influence.¹¹ Moreover, as Professor Haley has precisely and—in my opinion—correctly pointed out,¹² it appears that Japan’s political bodies have not only recognized the concept of judicial independence, but also affirmatively taken measures to display their respect for the independence of the Japanese courts.

In Japan, Justices have traditionally been appointed after reaching the age of sixty or higher.¹³ Perhaps, as a consequence, the average tenure of the Justices is comparatively shorter than those of their counterparts on the Supreme Court of the United States.¹⁴ One possible interpretation of this practice is that the ruling party has implemented short terms of office to facilitate the replacement of Justices who fail to embrace the ruling party’s political ideology.

However, I believe that this line of reasoning prematurely infers—or perhaps hastily equates—a theoretical possibility for the state as it actually exists. Alternatively speaking, it may be said that the validity of the above criticism hinges on the assumption that the same conditions that exist in the United States also exist in Japan. In fact, I believe that the observed “minimum-age” trend simply reflects the advantages of such a practice for the Supreme Court—particularly when viewed from the perspectives of the individual Justices serving the Bench.

Take, for instance, the following two considerations. First, for former career judges, the Supreme Court marks the final and ultimate point of their judicial careers. Second, within the Japanese judiciary, those

9. This point has previously been acknowledged by scholars in the United States. *See, e.g.*, Haley, *supra* note 1, at 113 (explaining the independence of human resourcing from political influence). Additionally, an examination of the Supreme Court’s history will reveal a specific incident where the Supreme Court resisted an attempt by the Diet to interfere with the Court’s independence. *See id.* at 119 (discussing the details of the 1948 Urawa Incident).

10. Translator’s note: The author, in the original Japanese paper, used the term “kenmei,” which literally translates to “the act of staking one’s life and reputation for the cause of.”

11. Haley, *supra* note 1.

12. *See id.*

13. *See, e.g., id.* at 111.

14. Unlike the Justices of the Japanese Supreme Court, the Justices of the United States Supreme Court do not face mandatory retirement when they reach seventy years of age. Moreover, in the United States, there are no minimum-age restrictions; in fact, one Justice was appointed at the very young age of thirty years. *See FOOTE, supra* note 5, at 114.

determining judicial promotions take into account not only the merits of the judges but also the seniority of the judges undergoing their reviews.

Based partly on these two considerations, it has traditionally been the practice for former career judges to be appointed to the Court immediately before reaching their mandatory retirement age. In this respect, appointing career judges to the Court, before they have reached the age of sixty, would upset the established seniority system that has long existed within the Japanese judiciary. And, assuming the continued implementation of the judiciary's seniority-based system, a conspicuous age-based imbalance would result if the Justices selected from other professional backgrounds¹⁵ are appointed at a significantly younger age than their former career-judge colleagues.

Note that the judiciary is not the only group to use a system based partially on seniority. Other legal communities, including those specific to prosecutors and lawyers, likewise identify people according to their Legal Training and Research Institute (LTRI) cohort¹⁶ and treat their cohort membership as a major factor during promotional reviews. As all of these groups form the pool from which future Justices are selected, it is possible to argue that the statistically observed minimum age simply reflects the seniority-based system that the Justices were exposed to in their prior careers.

B. *The General Secretariat's Involvement in the Appointment of Lower-Court Judges*¹⁷

Every ten years, newly appointed judges go through a performance review that is administered by the Advisory Committee for the Lower Court Judges ("Advisory Committee"). As far as I am aware, and at least during my tenure on the Bench, the Advisory Committee's recommendations have been followed without fail. Based on these reviews, there are at least one or two individuals during each promotional cycle who are denied reappointment, having been deemed unfit to continue serving as judges.

15. Editor's note: Traditionally, more than half of the Japanese Supreme Court's members are drawn from other segments of the Japanese legal community, such as the bar, the Ministry of Justice, and the legal academy. See Law, *supra* note 2, at 1568–69.

16. Translator's note: The LTRI is a mandatory, judicially administered training program attended by those who pass the "shihou-shiken," the equivalent of the bar examination in Japan.

17. "General Secretariat" refers to the General Secretariat of the Supreme Court, an administrative body located within the judiciary.

The reasons for the rejections are grounded solely on one or more of the following shortcomings: (1) lack of fundamental knowledge of the law, (2) lack of proper abilities to manage and oversee litigation, and (3) lack of common sense in dealing with other personnel. I would like to emphasize that these three reasons are all based on a type of conspicuous lack of judicial aptitude and are not based on politically motivated incompatibilities. Nevertheless, since the reasons for the actual dismissals are not revealed to anyone except for those being denied reappointment, scholars cannot be entirely faulted for misattributing this lack of public disclosure as an indication that judges are dismissed for political reasons.¹⁸

C. Functions of the General Secretariat

Let us now examine the precise functions of the General Secretariat, with special emphasis on the office's role as a human resources department. This analysis is particularly important in light of the prevalent misconception that lower-court judges, fearing retaliation for straying from the "accepted principles" of the General Secretariat, are effectively stripped of their judicial independence.¹⁹

However, prior to analyzing the precise functions of the General Secretariat, it would be helpful to examine two different types of promotion systems.

In a system where status-based gradients exist, occupants of lower offices will be—in one way or another—conscientious of the ways their actions are perceived by those controlling the higher posts. Naturally, in such a system, we would expect the junior judges to show some degree of deference to their superiors. By contrast, in a system where the promotion of lower-court judges is fully within the control of the general public, we would quite naturally expect these judges to carefully consider the will of the public and to tailor their actions accordingly. In fact, it is not altogether inconceivable that judges in the second type of system might sometimes resort to bending their will in order to better align their positions with those wielding the public's power. The question as to which of these two systems represents the lesser evil is a relative one: that is, the answer depends on the particular judicial system under which the observer bases the notion of what is just, which in turn is likely to depend on the particular political environment in which the judiciary must operate.

18. See FOOTE, *supra* note 5, at 218 (discussing the generally-perceived sense of opacity as to what exactly takes place at the Committee Reviews).

19. See SHINDOU, *supra* note 7; Law, *supra* note 2, at 2.

In Japan, it has become clear that, where it comes to human resources, our nation has chosen to embrace a bureaucratic model. In so proceeding, the Japanese judiciary has rejected both a structure that would allow political intervention and a system that is principally driven by populist demands. In this respect, the Japanese courts have accepted a particular management practice, where judges are entrusted to manage and to oversee the actions of other judges. This system appears most appropriate when an emphasis is placed on requiring the evaluators to possess the highest level of judgeship-based aptitudes. Note that similar practices are also observed within academic circles. Specifically, there is a common understanding among scholars that professors are best situated to evaluate the performance of other professors; this understanding justifies self-governance by professors in university settings.

Since I have not been part of the General Secretariat, I can only pose conjectures as to the precise manner in which the office runs its human-resources department. While my impressions are principally based on my interactions with the General Secretariat during my tenure on the bench, there are some points that I can state with certainty. For instance, I cannot deny that, in addition to legal knowledge and litigation-based management skills, two other factors also play some role in the evaluation process: (1) the individual's "personality," and (2) the individual's ability to function cooperatively within the judicial system.

While criticisms may be voiced over the judiciary's implementation of the latter two considerations, it is unlikely that this type of review is unique to the Japanese courts. Rather, I believe that a similar, if not the same, review process is practiced by many type of organizations, not only in Japan but also in the world at large.

While there remains the question of how and to what degree a candidate's political preferences can be assessed in the course of evaluating his or her "aptitudes" and "personality," it is unlikely that such political considerations will play any significant part in the absence of some extreme views. More precisely, assuming *arguendo* that the promotional reviews are not completely devoid of political considerations, it is unlikely that—in today's judiciary—an individual's ideological preferences will cause problems, unless these ideologies are situated either to the *extreme political right* or to the *extreme political left*.

It may be stated that the General Secretariat's understanding of the outlook that a judge should have is rooted in its emphasis on maintaining judicial neutrality and fairness. In this respect, the focus should be directed to understanding (1) what exactly is embodied by the General Secretariat's notions of "neutrality" and "fairness," (2) the types of perspectives that the

office would characterize as endangering these notions of “neutrality” and “fairness,” and (3) the reasons that motivate the General Secretariat to make such characterizations.

On this point, it cannot be denied that there once was a time when courts reacted excessively against “left-leaning” movements.²⁰ But, merely inferring from the past that such negative responses continue to find a place in today’s judiciary would require a giant factual leap.

Based on what I have observed, today’s judiciary embraces a system that encourages judicial independence, even within the judiciary itself. Specifically, the Court has taken special measures to encourage lower-court judges to express their opinions without being preoccupied by fears of upsetting the Supreme Court. This behavior is evidenced by how the Court proceeds through various official “meetings.”²¹

Several years ago, former Chief Justice Machida gave the following initiation speech to newly appointed judges: “Do not become a flounder judge, a type of judge who is always looking up.” The central purpose of this speech was to convey to newly appointed judges that judicial responsibilities cannot be fully realized if a judge is preoccupied with concerns of how his or her opinions will be perceived by the higher courts. Chief Justice Machida strongly emphasized this point, and I believe that today’s Court very much embraces his sentiments. For example, with respect to the current amendment process involving the Administrative Litigation Act,²² I had suggested to the director of the Administrative Division about the creation and organization of a research committee that would be responsible for evaluating the possible interpretations and consequences of proposed amendments. More precisely, I suggested that the research committee be tasked with identifying ways to ease the burdens that would fall upon the front-line judges, who would principally encounter any new problems associated with the enactment of such amendments. In response, the director told me that my suggestion would not be heeded because its implementation could be interpreted as creating

20. Examples of these instances can be observed in the tension between the Young Lawyer’s Association and the Supreme Court, which took place during the 1960s through the 1970s. *See, e.g.*, Law, *supra* note 2, at 1560; *see also* FOOTE, *supra* note 5, at 127.

21. In the past, these meetings served as a place for receiving the Supreme Court’s messages. Today, the meetings serve as a forum for critically deliberating and discussing the methods of processing cases that are brought before the Court.

22. For a detailed account and chronology of the amendment process, see MITSURO KOBAYAKAWA & SHIGERU TAKAHASHI, SHOKAI KASEIGYOUSEIJIKENSOSHOUHOU [DISCUSSION OF THE AMENDMENT PROCESS WITH RESPECT TO THE ADMINISTRATIVE LITIGATION ACT] (Daiichihouki, 1st ed. 2004).

a way for the Supreme Court to force its interpretations onto lower-court judges.

III. GENERATIONAL CHANGES AND THEIR RELATIONSHIP TO THE COMPOSITION OF THE SUPREME COURT

Currently, there are fifteen Justices on the Japanese Supreme Court.²³ At the time of my retirement in 2010, there already was one Justice who was born after World War II.²⁴ Today, there are five members of the Court who were born after 1945.²⁵

The generations subsequent to my own have all received their education under the modern Japanese Constitution.²⁶ As a result, their perspectives differ greatly from those of the Justices presiding during the historical moments of the 1960s and 1970s when events such as the movements led by the Young Lawyer's Association²⁷ and the Miyamoto Incident²⁸ took place.

These types of differences, an aspect that may partly be explained by differences in the educational backgrounds, reflect the generational changes that our society has experienced over time. These generational changes have, in turn, changed our understanding and evaluation of societal values.

For instance, I sometimes hear comments suggesting that career judges, and especially those who had served as Secretary General, are frequently (1) conservative, (2) on the side of ruling for the constitutionality of matters at stake, and (3) deciding in ways that would not disadvantage administrators implementing the Administrative Law. However, it will become clear that this critical stereotype of career judges cannot be sustained if one reads the individual opinions of the Justices in recent Grand Bench Decisions.²⁹

23. *Justices of the Supreme Court*, COURTS IN JAPAN, <http://www.courts.go.jp/saikosai/about/saibankan/index.html> (last visited May 6, 2011).

24. *Id.* Specifically, see the profile of Justice Ryūko Sakurai.

25. The five individuals are Justices Sakurai, Chiba, Shiraki, Ootani, and Terada. *See id.*

26. The Modern Japanese Constitution—which embraces the principles of freedom, equality, democracy, basic human rights, and the maintenance of peace—was put into effect on May 3, 1947. Excluding the Justices who are two years my senior, all Justices have had their *entire* education under the framework of the Modern Japanese Constitution.

27. *See* Law, *supra* note 2, at 1560.

28. *See* Haley, *supra* note 1, at 121.

29. For example, in the 2009 decision concerning the challenge to the apportionment of Lower House seats, Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367, my colleague Justice Tokuji Izumi (former Secretary General) and Justice Isao Imai (former Chief Judge of the Tokyo High Court) determined that the status quo violated the equality

Even with judges who had previously served as Secretary Generals, the above stereotype does not automatically apply. In fact, it is possible to produce a counterexample so recent that it postdates Justice Izumi's retirement from the Court.³⁰ Specifically, the very recent *Hokkaido Sunakawa-city Sorachibuto Shrine Incident*³¹ provides an appropriate illustration. In its relevant details, the case involved a dispute over the constitutionality of allowing a shrine to use public land without paying rent. The case was ultimately decided on the constitutional provision of the separation of church and state. Although former Justice Horigome issued a right-leaning dissent, current Chief Justice Takesaki—who had previously served as a vice Secretary General under then-Secretary General Horigome and subsequently went on to head the division himself—actively participated in the majority opinion that ruled the disputed practice unconstitutional, even though numerous other Justices declined to join the opinion.

In summary, the sweeping implication behind the three stereotypical charges against career judges is arguably an unfair generalization, particularly when there remains a strong likelihood that the actual root of the issue may have more to do with the specific judicial-postures taken by particular judges, rather than with the characteristics held by the collective group of career judges as a whole. I strongly urge observers of the Supreme Court not to lose sight of the above considerations in the future when analyzing the Court's composition.

principle. Moreover, in the recent March 23, 2011 Grand Bench Decision, Saikō Saibansho [Sup. Ct.] March 23, 2011 (pending publication in SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ]), which concerned the apportionment of the Lower House seats, Chief Justice Hironobu Takesaki (former Secretary General) wrote the majority opinion, which was joined by all of the career-judge Justices currently on the Court. In relevant parts, the Court held that the status quo was *in a state of unconstitutionality*. Illustrations that counter the above-mentioned stereotype may also be found outside the electoral malapportionment context. For example, in the 2008 decision that determined the unconstitutionality of Article Three of the Nationality Act, Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (*The Unconstitutionality of Article III of the Japanese Nationality Act*), Chief Justice Nirō Shimada garnered the votes of five out of six career-judge Justices en route to issuing the Court's decision. And, with respect to the 2010 decision that found a violation of the separation of church and state, Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, 64 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] (*The Sunakawa-shi Sorachibuto Shrine Incident*), Chief Justice Takesaki led the majority opinion, which was joined by four career-judge Justices.

30. Translator's note: Justice Izumi, who served as Secretary General from November 1996 to March 2000, retired from the Japanese Supreme Court in January of 2009.

31. Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, 64 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] (*The Sunakawa-shi Sorachibuto Shrine Incident*).

IV. DETERMINING THE PRECISE MEANING OF THE TERM “CONSERVATIVE”

If the term “conservative” refers to the Japanese judiciary’s emphasis on preserving the existing legal framework rather than radically altering that framework with new lawmaking, then I would concur that the Japanese courts are indeed conservative. On the other hand, the Japanese judiciary fully acknowledges and embraces the practice of judicial lawmaking within the theoretical bounds of the existing framework. This point, I believe, has been appropriately and correctly identified by Professor Foote.³² Furthermore, while close adherence to precedent is typical of the Japanese Supreme Court and might be characterized as a form of conservatism, it is not unusual or unique to the Japanese Supreme Court.

Depending on its context, the word “conservative” can have various meanings, including a reference to the political opposite of liberalism. As applied in Japan, and in the manner used by the critics of the Court, the word “conservative” has been used to suggest that the Liberal Democratic Party (LDP) somehow has managed to exercise significant influence over the Japanese Supreme Court.³³ On this charge, I would like to reiterate that the Court does not blindly follow the ruling party’s ideologies, and the extent of the Court’s political involvement is limited to the task of filtering out views that fall under either the *extreme political right* or the *extreme political left*. Additionally, I do not believe that the Court will go to the extreme of sacrificing individual rights protections in order to preserve public order.

For these reasons, Professor Law’s attribution of the fate of Mr. Hidari (Left) would be equally applicable to Mr. Migi (Right).³⁴ The crucial inquiry lies in determining what exactly the Justices perceive as the “extreme right” or the “extreme left,” a perception which may vary with respect to the generational changes that the Court undergoes.

The term “conservative” is often used to refer to the Court’s handling of constitutional issues.³⁵ And, as it turns out, it appears that the

32. See FOOTE, *supra* note 4.

33. See the discussion and definition of the “Perceived Image” in Part II.

34. See Law, *supra* note 2.

35. To be precise, Japanese constitutional scholars rarely refer to the Japanese Supreme Court as being “hoshuteki,” which is the literal and strict translation of the term “conservative”; rather, as is most often the case, these scholars criticize the Court for its perceived “judicial passivity,” specifically arguing that the Court is seemingly embracing “shihoushoukyokushugi,” or “judicial passivism.” See, e.g., HIDENORI TOMATSU, KENPOUSOSHOU [CONSTITUTIONAL LITIGATION] 416 (Yuuhihaku, 2d ed. 2008); YOUICHI HIGUCHI, HIKAKUKENPOU [COMPARING CONSTITUTIONS] 467 (Seirin Publishing House, 3d rev. ed. 1992).

participants' papers often use the term "conservative" in this very sense.³⁶ As critics rightly point out, it cannot be denied that the Japanese Supreme Court has had fewer instances where it has issued unconstitutional rulings—especially when compared to other constitutional courts.³⁷ Nevertheless, it is important to analyze this numerical data in light of the following points.

First, to conclude from a dearth of unconstitutional rulings that the Court is unsympathetic to protecting individual rights is truly a giant leap. Obviously, if there are fewer challenges to clearly unconstitutional actions, it would only be natural for there to be fewer rulings of unconstitutionality. Furthermore, consider the following illustrations.

Regarding the 99% conviction rate in Japan, media and scholars have critically charged that this statistic signifies the Japanese courts' excessive deference to the prosecutors' offices.³⁸ However, what this criticism fails to take into account—amounting to what I feel is an inexcusable practice—is that the prosecutors have the ability to exercise prosecutorial discretion, and therefore prosecutors often stop pursuing crimes that they feel cannot be proven in the courts.³⁹ Additionally, with respect to cases hinging on the constitutionality of legislation, it must be kept in mind that the Cabinet Legislation Bureau, in examining bills prior to their actual enactment, cuts out many, if not all, blatantly unconstitutional provisions.⁴⁰

36. See, e.g., Law, *supra* note 2; Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011).

37. Since its inception, the Japanese Supreme Court has overturned itself in only eight cases. This number is comparatively less than those of the other nations' courts, an observation repeatedly pointed out by various scholars. See, e.g., Law, *supra* note 2, at 2; Matsui, *supra* note 36.

38. See, e.g., YOZOU WATANABE, HIROSHI ETOH & TOSHIKI ODANAKA, NIHON NO SAIBAN [THE JAPANESE TRIAL-SYSTEM] 88 (Iwanami Shoten, 1995). With respect to the 99.9% conviction rate, see FOOTE, *supra* note 5, at 261 (discussing how the high conviction rate had motivated the implementation of lay juries in criminal cases).

39. See Haley, *supra* note 1, at 125; WATANABE, ETOH & ODANAKA, *supra* note 38.

40. See, e.g., JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW (1998); Makoto Ooishi, *Ikenshinsakinou no Bunsan to Tougou* [The Integration and Decentralization of Judicial Review], in KAKUKOKU KENPOU NO SAI TO SETTEN: SHIYAKE MASANORI SENSEI KANREKIKINENRONBUNSHUU [COMPARATIVE STUDIES OF VARIOUS CONSTITUTIONS: PROFESSOR MASANORI SHIYAKE'S 60TH BIRTHDAY COMMEMORATIVE COMPILATION] (Seibundoh, 2010); see also MASAMI ITOH, SAIBANKAN TO GAKUSHA NO AIDA [THE GAP BETWEEN JUDGES AND SCHOLARS] 125–26 (Yuuhihaku, 1993). It is extremely important to emphasize that there is a clear distinction between the issues that scholars are apparently asking in connection with the precise scope of the Cabinet Legislation Bureau's duty to engage in preliminary screening of statutes. That is, the two questions that are being asked—namely, (1) the issue of whether the Cabinet Legislation Bureau properly engages in preliminary review to fix clearly unconstitutional statutory language, and (2) the question of whether the Supreme Court is bound by, or even needs to defer to, the Cabinet Legislation Bureau's constitutional interpretation—are inquiries that lie on two completely different dimensions and should therefore not be confused or

As Professor Matsui points out in his paper, the Supreme Court has often “narrowed down” statutes by cutting out ambiguous and potentially problematic terms, rather than invalidating statutes in their entirety.⁴¹ This practice is indicative of the Japanese Supreme Court’s willingness to exercise judicial review if and when it becomes necessary to do so.

Second, despite the points discussed above, it nonetheless cannot be denied that there have only been a few cases where the Court has: (1) ruled in favor of plaintiffs asserting individual rights infringements, and (2) taken the further step of invalidating statutes.⁴² However, with respect to this criticism, it is equally important to keep in mind the following points.

As a starting point, it is important to understand that judicial self-restraint is principally motivated by the consideration that the judiciary lacks direct democratic grounds for opposing legislation that is passed by the Diet, which represents and is directly chosen by the people. In short, the principle of democratic representation explains the judiciary’s hesitation to engage in judicial activism.

Most importantly, this reservation is not due to the judiciary’s deference to the political ideology of the ruling party, which in Japan has principally been the LDP. Rather, even if a majority of the Diet were to become “progressive,” thereby resulting in frequent passage of progressive statutes, we would still not expect the number of rulings of unconstitutionality to significantly increase.

While this type of “conservatism” characteristic has been historically pronounced, recent developments support the conclusion that minor changes are taking place in the Court’s decisional trend.⁴³ Moreover, divergence from the “conservative” tradition is also evident in the Court’s rationales.⁴⁴

interchanged with one another. As to the second issue, I would like to unequivocally answer in the negative.

41. See Matsui, *supra* note 36.

42. See, e.g., Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (grand bench); Saikō Saibansho [Sup. Ct.] Sept. 11, 2002, 56 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1439 (grand bench); Saikō Saibansho [Sup. Ct.] Apr. 22, 1987, 41 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 408 (grand bench); Saikō Saibansho [Sup. Ct.] Apr. 30, 1975, 29 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 572 (grand bench); Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265 (grand bench).

43. See, e.g., Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (*The Unconstitutionality of Article III of the Japanese Nationality Act*); Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2087 (*The Voting Rights of Japanese Nationals Living Abroad*).

44. See, e.g., Saikō Saibansho [Sup. Ct.] Sept. 30, 2009, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1520 (Sup. Ct., Sept. 30, 2009) (grand bench); Saikō Saibansho [Sup. Ct.] Oct. 4, 2006, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2696 (Sup. Ct., Oct. 4, 2006) (grand bench).

In malapportionment cases, the Court has traditionally upheld the constitutionality of the “disparity in the people’s voting powers” on the very rough rationale that the population-per-constituency ratio should be “determined by and left to the broad discretion of the Diet.”⁴⁵ Recently, however, the majority opinion, despite dismissing the constitutional challenge, took great care and effort to distinguish the past malapportionment cases.⁴⁶ In particular, the Court expressly acknowledged that there are limits to the Diet’s discretionary powers, but reasoned and thoroughly explained why the particular level of vote disparities—at the time of the lawsuit—had not exceeded the permissible scope of the Diet’s discretion.⁴⁷ In the interest of completing a comprehensive and accurate analysis of the modern Court, these new trends should not be neglected or ignored without due consideration.

Next, there have been criticisms that the Supreme Court decides cases in ways that favor the public interest or the public welfare, even at the expense of protecting individual rights, and that the Court is failing to fulfill its proper role as the last bastion of individual rights.⁴⁸ To this criticism, I would like to respond with the following points.

45. See Saikō Saibansho [Sup. Ct.] Apr. 27, 1982, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 345 (grand bench) (holding that matters concerning the seats of both the Upper and the Lower House are “within the broad discretion of the Diet”). The phrase “within the broad discretion of the Diet” was cited by subsequent Grand Bench opinions; as such, the April 27, 1982, decision has become a well-known precedent. See, e.g., Saikō Saibansho [Sup. Ct.] Sept. 2, 1998, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1373 (*The Constitutionality of Article 14 and Appended Table 3 of the Public Offices Election Act with respect to the Apportionment of the Upper-House Seats*) (grand bench) (permitting the Diet’s “broad discretionary powers”); Saikō Saibansho [Sup. Ct.] Nov. 10, 1999, 53 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1704 (*The Constitutionality of the Small-Constituency System for the Election of the Lower House*) (grand bench) (noting that decisions concerning the implementation of the election system is within the “broad discretion of the Diet”); Saikō Saibansho [Sup. Ct.] Jan. 14, 2004, 58 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (*The Constitutionality of Article 14 and Appended Table 3 of the Public Offices Election Act with Respect to the Apportionment of the Upper-House Seats Under the Constituency System*) (grand bench) (reading Articles 43 and 47 of the Constitution of Japan as conferring the Diet with “broad discretion” over matters concerning “the fair and effective administration” of the electoral system).

46. In resolving the issue of whether a particular apportionment level “is beyond the limit that the Diet could set pursuant to its statutory authority,” the Supreme Court has extensively inquired and investigated into the specific ways that the Lower House has acted on its authority *prior to* issuing the Court’s rulings. See, e.g., Saikō Saibansho [Sup. Ct.] Sept. 30, 2009, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1520 (Sup. Ct., Sept. 30, 2009) (grand bench); Saikō Saibansho [Sup. Ct.] Oct. 4, 2006, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2696 (Sup. Ct., Oct. 4, 2006) (grand bench).

47. Saikō Saibansho [Sup. Ct.] Oct. 4, 2006, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2696 (*The Constitutionality of the Allocation of the Upper-House Seats*).

48. Numerous Japanese scholars have taken this position. See, e.g., WATANABE, ETOH & ODANAKA, *supra* note 38.

Many people recognize that individual rights are important to society and therefore cannot be and should not be denied. With respect to this sentiment, the Supreme Court is no different in embracing such ideals. However, individual liberties do not exist without regard to the rights of the public, and the two sometimes-competing sets of rights must be assessed in relation to one another. Consequently, we cannot formulate rights in an absolute and universally agreed manner, a fact that is undoubtedly understood by the general public. Even with respect to issues involving basic rights, there is no denying that the public acknowledges the existence of tensions between different rights—such as the tension between the competing values of the freedom of the press and the freedom of association against the right to individual privacy; or the tension between business and employment rights, on the one hand, and individual and property rights, on the other. If it is clear that a ruling in favor of a particular party is clearly justified even after balancing the competing rights, the story would indeed be a simple one to tell. However, cases that reach the Court are not so simple; they reach the Supreme Court precisely because there are no clear answers. In light of these difficulties under which the Supreme Court operates, it cannot be denied that the Court has taken great care to try to resolve matters by carefully determining the types of resolution that would be most appropriate for the case at hand. As such, a proper inquiry into whether a decision was rationally decided, or whether a decision lacked adequate regard for individual rights considerations, demands careful alignment of the particular facts of the case with the resulting decision. In this spirit, I believe that concluding, without more, that the Japanese Supreme Court is unsympathetic towards individual rights claims—simply because there are few cases involving successful rights claims—is, indeed, a giant leap to take.

In light of these concerns, I also feel that it is premature to conclude that the Court is “conservative,” simply from quantitatively analyzing the number successful individual rights suits.⁴⁹

Based on traditional trends in the Supreme Court’s jurisprudence and the manner in which the Court has historically drawn the line between competing considerations, some Japanese scholars—and particularly

49. Professor Haley identifies a similar point in his paper, and the professor has supported his position with relevant case citations. *See* Haley, *supra* note 3, at 1468 (arguing that (1) fewer instances of unconstitutional rulings in Japan do not automatically justify the conclusion that the Japanese Supreme Court is, in fact, more conservative than its American or European counterparts, and (2) a proper comparative study would necessarily take into account the *qualitative comparisons*, and thereby advocating that scholars should engage in factual case-to-case comparisons in order to better understand the rationales that drive the various opinions).

constitutional law specialists—strongly criticize the Court, maintaining with high intensity that the Court is conservative-leaning.⁵⁰ I, myself, must acknowledge that—when analyzed without regard to the significant facts driving each of the opinions—some of the Court’s individual rights decisions may be difficult to come to terms with.

However, the Supreme Court, at least in its own assessment of its duties, firmly believes that the Court has rendered its decisions based on both fairness and neutrality; it has not been the agenda of the Court to ignore the rights of the individuals or to pander to the ideology of the ruling party.

With respect to the methods for line drawing, it is entirely possible that the generational changes have brought changes in the methodologies employed by the Justices. Recent examples reflecting such changes that warrant particular attention are the case of the unconstitutionality of Article 3 of the Japanese Nationality Act,⁵¹ and the Mapplethorpe Photo Album Case.⁵²

V. THE SUPREME COURT OF JAPAN, AS VIEWED FROM THE OUTSIDE AND THE INSIDE

In my opinion, the matters hereafter presented are highly related to the topics discussed in Panel 2. However, for completeness and precision, I would like to take this opportunity to focus my discussion on two central points.

First, while it is readily expected and fully acknowledged that there are principle differences between what is expected of scholars and judges, I would like to nonetheless expressly emphasize these important differences.

Scholars, when facing issues shrouded with unresolved uncertainties, have the luxury of waiting to present their legal conclusions at a later time. In fact, I feel that the values of good scholarship should discourage

50. For illustrations of how the Supreme Court has generally been criticized as being “conservative-leaning,” see ITOH, *supra* note 40. For illustrations of specific criticisms of the Supreme Court, see, for example, TOSHIO FUJII, SHIHOUKEN TO KENPOUSOSHOU [JURISDICTION AND CONSTITUTIONAL LITIGATIONS] 129–30 (Seibundoh, 2007); MASAHITO ICHIKAWA, TADASU SAKAMAKI & KAZUHIKO YAMAMOTO, GENDAI NO SAIBAN [THE CURRENT TRIAL-SYSTEM] 248–49 (Yuuhihaku, 5th ed. 2008); WATANABE, ETOH & ODANAKA, *supra* note 38.

51. Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (*The Unconstitutionality of Article III of the Japanese Nationality Act*).

52. Saikō Saibansho [Sup. Ct.] Feb. 19, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 445 (*The Mapplethorpe Photoalbum Case*).

scholars from asserting premature legal conclusions.⁵³ In contrast, judges shoulder a unique burden: they must make their decisions at the very moment that the issues are presented to them, even if there remain key uncertainties that have yet to be fully resolved. Furthermore, while scholars are expected to investigate the “justifications for a particular decision” (the question of “why”), judges are principally expected to determine how conflicts will be resolved (the question of “how”). As a result, they cannot be guided just by logic but must also take into account what the proper resolution of the controversy should be.

Several of the papers circulated at this symposium have suggested that the Japanese Supreme Court has frequently overstepped its constitutional bounds by engaging in policymaking in the absence of democratically enacted amendment to the law.⁵⁴ This position is understandable, but I ask scholars to keep in mind that a fair assessment and criticism of the Court would take into account the above-mentioned differences between the two occupational fields, namely, that scholars and judges are held to different expectations.

In the context of criminal law, scholars have entreated us to ask whether and how particular laws conform to the principle of *nulla poena sine lege* (*Nulla Principle*).⁵⁵ These types of inquiries, indeed, are highly important and should be carefully performed. In fact, there once was a case where I agreed with the judgment of the case but became concerned with my inability to see—in the strictest sense—the precise relationship between the decision and the *Nulla Principle*.⁵⁶ On this point, I asked a fellow Justice, who had formerly been a career judge, what his thoughts were. The response that I received was, “If a scholar like Justice Fujita

53. As used, the term “academic policies” encompasses the academic endeavors to promote meaningful progress.

54. See, e.g., Daniel H. Foote, *Policymaking by the Japanese Judiciary in the Criminal Justice Field*, 74 SOC. OF LAW 6 (2010); Stephen Givens, *Looking Through the Wrong End of the Telescope: The Japanese Judicial Response to Steel Partners, Murakami, and Horie*, 88 WASH. U. L. REV. 1571 (2011); Frank Upham, *Stealth Activism: Norm Formation by the Japanese Courts*, 88 WASH. U. L. REV. 1493 (2011).

55. This is in reference to the Japanese equivalent of the principle of *nulla poena sine lege*, which means that “no punishment can be rendered in absence of a statute on point.”

56. Having participated in the decision, I am prohibited from disclosing the exact nature of the case. Yet, the point that I have mentioned can nonetheless be illustrated by examining the legal issue that was prosecuted in the case. In relevant parts, the issue was whether a defendant could be criminally punished for a drug-trafficking charge, even though the criminal statute did not specifically enumerate such charge. As decided, the Court looked to the then-existing regulations, subsequently holding that the proper interpretation of the statute required the defendant to be charged with a criminal offense.

asks me about the precise relationship between our decision and the *Nulla Principle*, I am afraid that I am unable to add more to the subject at hand.”

Second, I would like to discuss the definition of the term “conservative” as it is used to describe the Supreme Court.

Prior to my appointment, my understanding of the Supreme Court, and specifically matters concerning the intimate details of the Court, was rather obscure. In fact, based partly on this lack of clarity, I cannot deny that my view of the Court was formed under a somewhat rigid and, perhaps, forced construction—much like the Perceived Image discussed in Panel 2.

It is quite possible that my initial views of the Court were formed through the influences of my mentor, Professor Jiro Tanaka, whose perception was based off of his experience as a former Supreme Court Justice during the 1960s to 1970s. Or, perhaps, my perception of the Supreme Court may have paralleled those of the majority of the Public Law Association, who—more or less—believed that the Court obstinately acted in ways to adhere to the precedent—an outlook that seemed to explain the Court’s reluctance to uphold challenges to administrative action. On this note, as members of the Public Law Association assumed that the Court’s decision-making trends would not easily change, many of my Association colleagues, following my appointment to the Bench, approached me by saying, “We look forward to reading Professor Fujita’s dissenting opinions.”

With these images in my mind, I had anticipated to face—and even resolved myself to encounter—various difficulties upon my joining the ranks of the Justices, who were *reputed* to be infamous for strongly favoring preservation of the status quo. However, after actually sitting on the bench, I realized that the environment was far more moderate than what I had originally imagined, and that the members of the Supreme Court were more liberal and prudent than I had ever anticipated. For instance, during my tenure, the Supreme Court overturned a precedent concerning land-readjustment projects⁵⁷ that had been previously stood for forty-four years.⁵⁸

On its face, it may appear that the efforts to overturn the precedent began with my joining the Court and that I had led—and thereby initiated—such a movement during our panel discussions. This perception,

57. Translator’s note: The Japanese term, in its original form, is “tochikukakuseirijigyou.”

58. Saikō Saibansho [Sup. Ct.] Sept. 10, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2029 (permitting a filing of suit demanding the annulment of a planning decision of a land readjustment project).

however, is not entirely correct. What actually took place was far more complex: the overturning represented a collective and gradual effort that spanned across generations of Justices, and the reversal itself amounted to an event that may be analogized by an object that, in patiently remaining underwater, had waited for the right opportunity to once again resurface above water. These types of collective efforts were aspects of the Court that I was unaware of prior to my appointment as a Justice.

A problem, nevertheless, remains: insofar as the above explanations are not communicated by the Supreme Court to the outside world, it is understandable (and even undeniable) that the public finds it difficult to understand the inner-workings of the Court.

It has traditionally been perceived that the Supreme Court regularly discourages two particular practices, namely, (1) having the Justices explain too much, and (2) supplementing majority opinions with additional individual opinions, and thus sacrificing opportunities to render unanimous decisions.⁵⁹ As far as their justifications go, it has been suggested that these practices negatively impact the public's trust in the judiciary.⁶⁰ This perception, if I understand correctly, was described by Professor Foote in his recent work, *The Nameless and Faceless Judiciary*.⁶¹

It is natural to anticipate disagreement among the Justices as to what precisely should constitute the official rationale of the Court's opinion. Along this line of reasoning, I frankly feel that concurring opinions—and even dissenting opinions—should not be suppressed. The practice of encouraging Justices to write greater numbers of independent opinions, I believe, is the best way to win the public's trust.

Today, I sense that this way of thinking is being widely embraced by the Justices of the Supreme Court.

In bringing to the table the “preconception” that “the Supreme Court is (1) “conservative,” (2) bureaucratically structured, and (3) “anti-liberal,” there may be a possibility, or even an impulse, to selectively gather and

59. See FOOTE, *supra* note 5, at 14 (noting that, at minimum, the concepts of “stare decisis” and “the philosophy of the Japanese judiciary’s emphasis on stare decisis” are influenced by considerations for maintaining uniform opinions). In contrast to Professor Foote’s view, which is based on a comparative study of the Japanese Supreme Court with respect to the *American* jurisprudence, scholars have also interpreted the apparent avoidance of practices noted in (1) and (2) as signifying the influences that the *European* courts have had on the Japanese Supreme Court. See, e.g., ITOH, *supra* note 40, at 70.

60. See ITOH, *supra* note 40, at 70.

61. FOOTE, *supra* note 5.

interpret sources in ways that appear to verify this preconception.⁶² However, it is generally accepted that the same fact can be understood in different ways depending on what we take as our baseline assumptions. Therefore, in critically examining the Court's decision-making process, we, too, should keep in mind the subjective tendencies that follow from strictly adhering to, or overly committing ourselves to, preconceptions before engaging in actual analytical studies.

For future endeavors, I respectfully ask scholars to put aside the Perceived Image prior to inquiring into what the Supreme Court's focus and goals should be. Moreover, in so proceeding, and in the spirit of objectively analyzing the Supreme Court, I believe that it may perhaps be necessary for scholars not only to examine these inquiries from a purely academic perspective, but also to place themselves in the shoes of the Justices when considering these important points.

62. It is evident that facts—such as the lack of unconstitutional rulings; the methods by which the Cabinet selects the Justices of the Supreme Court; and the General Secretariat's monopoly over matters concerning human resourcing—have widely been cited as conclusive proof that the Japanese Supreme Court is extremely “conservative.”