

1996

Indigenization of Constitutionalism in the Japanese Experience, The

Christopher A. Ford

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Christopher A. Ford, *Indigenization of Constitutionalism in the Japanese Experience, The*, 28 Case W. Res. J. Int'l L. 3 (1996)
Available at: <https://scholarlycommons.law.case.edu/jil/vol28/iss1/2>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

ARTICLES

THE INDIGENIZATION OF CONSTITUTIONALISM IN THE JAPANESE EXPERIENCE

*Christopher A. Ford**

SINCE ITS OPENING TO THE WORLD in the middle decades of the 19th century, Japan has distinguished itself by its receptivity to foreign legal ideas, adopting from European models not only the very concept of a written constitution but also an elaborate system of cabinet governance, an extensive regime of codified general law, and (more recently) a scheme of constitutional rights and judicial review modeled on the United States Constitution and American judicial precedents. This essay seeks to explore Japan's process of legal adoption and adaptation, with particular emphasis upon how the American-inspired scheme of court-policed constitutional liberties has grown and developed in the soil of its new home.

Japan's adoption of foreign legal models — and especially of foreign approaches to constitutional jurisprudence — has displayed characteristic patterns of alteration and adaptation. In particular, the case law of the Japanese Supreme Court represents a distinctly indigenous “take” on American ideas of constitutional rights and judicial review: one characterized by the robust extension of continental civilian ideas of “abuse of rights” into the realm of fundamental constitutionally-guaranteed freedoms and by the development of a conciliatory approach to constitutional adjudication modeled generally upon Japan's distinctive practices of “administrative guidance.” Fundamental to these innovations has been the Court's adherence to an ideal of “balance” and “harmony” in matters of constitutional propriety, devoting itself quietly and implicitly — but steadfastly — to the ideal of a society in which both governors and governed know their “place” and limit their constitutional claims against each other to such a degree that competing claims of right require no

* Associate, Shea & Gardner, Washington, D.C.; A.B., Harvard 1989; D.Phil., Oxford University (Christ Church) 1992; J.D., Yale Law School 1995; Junior Research Fellow, Wolfson College, Oxford, 1991-92. The author is grateful to Professor James V. Feinerman of the Georgetown University Law Center for his support and encouragement. Most of all, however, he is grateful to his wife Jennifer Lynn Davis-Ford, for her boundless love, kindness, and patience. *Je n'ai besoin de plus.*

mediation by the ugly and adversarial mechanisms of formal legal coercion.

I. THE MEIJI ERA

Japan's process of adopting and adapting Western legal models began in the late 19th century when, with the collapse of the Tokugawa Shogunate and the shock of exposure to Western technological and economic superiority, Japan adopted a more Emperor-centered form of government and set about trying to modernize itself. This remarkable period, that of the Meiji Restoration — in which was adopted a governmental system built around the authority of the *Tennō*, or Emperor — saw Japan emerge from a regime of agrarian feudal oligarchy to a powerful modern industrialized state. It is beyond the scope of this essay to attempt to sketch the role played in this process by the adoption of Western legal forms and their partial indigenization, but if we are to understand the patterns and themes of Japanese constitutional law in the modern era, it will first be necessary to understand some of its antecedents.

A. *The Meiji Constitution*

The Japanese had been exposed to Western models of constitutionalism since at least the 1840s, when the Dutch constitution was translated into Japanese¹ and become part of the canon of the so-called "Dutch Studies" movement. After the translation of the French constitution in 1873 — just six years after the shogunate had been supplanted by the Meiji Imperial government — the new Japanese leadership set about looking for a suitable model upon which to base a constitution of its own. As early as 1876, the newly-organized Japanese Senate had drafted a constitution commissioned by the Emperor, but this document was abandoned before its adoption.

Constitutional models became an important focus of political debate in Japan, with the Popular Rights Movement (a group promoting a more parliamentary form of government) proposing private constitutional drafts in opposition to those similarly put forward by groups favoring a powerful Imperial system.² The climax of this process of debate came with the dispatch to Europe in 1882 of Count Hirobumi Itoh — who was then president of the Privy Council and would later be Japan's first prime minister under the cabinet system — for the purpose of choosing the most suitable constitutional model for Japan. Count Itoh, significantly, was sympathetic to the more Emperor-centered schools of constitutional

¹ See HIROSHI ODA, *JAPANESE LAW* 28 (1992).

² *Id.* at 28.

thought in Japan, and appraised European models accordingly.

Though well aware that "the merit of modern constitutionalism consists of limiting the power of kings and of guaranteeing the rights of their subjects . . . he focused his efforts upon preserving the power of the *Tennô*, which he conceived to be 'the fundamental pivot' of the constitution."³ For these purposes, the Prussian Constitution of 1850 — developed in reaction to Europe's revolutionary crises of 1848-49 as a re-consolidation of monarchical power and institutionalization of the bureaucratic state — seemed ideal. German governmental forms, already popular in Japanese universities,⁴ represented a statist response to American democratic and English parliamentary models that was enormously attractive to the "group of bureaucrats, led by Prince Hirobumi Ito, who believed both in imperial sovereignty and in authoritarian administration."⁵

The German model was doubly attractive by virtue of Prussia's success in transforming itself from a feudal agricultural state into a powerful modern economic and military power, a process which sparked an understandable interest among Japanese leaders eager to accomplish the same thing.

The leaders of the Japanese government in the Meiji era well understood the exact coincidence between the German constitutional model and their own agenda: the consolidation of the Imperial regime, a powerful and stable government capable of leading the nation to riches and independence, and an efficient bureaucratic system. This is the reason for the decision [to adopt the Meiji Constitution].⁶

³ TADAKASU FUKASE & YOICHI HIGUCHI, *LE CONSTITUTIONALISME ET SES PROBLÈMES AU JAPON: UNE APPROCHE COMPARATIVE* 64-65 (1984) (Though well aware that "le mérite du constitutionalisme moderne tient à la limitation du pouvoir de monarque ainsi qu'à garantie des droits des sujets . . . il consacre ses efforts à ne point détériorer le pouvoir du *Tennô*, conçu comme «le pivot fondamental» de la Constitution.") (author's translation).

⁴ See, e.g., RICHARD H. MINEAR, *JAPANESE TRADITION AND WESTERN LAW* 16 (1970) (recounting the move by Japanese law faculties, away from reliance upon English and American models, and growing interest in German systems and in a deeper understanding of Japan's own legal traditions).

⁵ Nobushige Ukai, *The Significance of the Reception of American Constitutional Institutions and Ideas in Japan*, in *CONSTITUTIONALISM IN ASIA* 114-115 (Lawrence W. Beer ed., 1979).

⁶ FUKASE & HIGUCHI, *supra* note 3, at 64 ("Les dirigeants du Gouvernement japonais de Meiji ont compris tout de suite la coïncidence exacte de ce régime allemand avec l'impératif qu'ils poursuivaient: la ferme consolidation du régime de tenno, un pouvoir gouvernemental stable et puissant capable de rendre la Nation riche et indépendante, et un système bureaucratique très efficace. C'est là, la raison de la

Returning to Japan, Itoh proceeded to draft for his country a constitution modeled on these Prussian precedents, aided in his work by a German advisor, Hermann Roesler.⁷

During this period, Japan also sought European models for sub-constitutional law, seeking a system of codified law to underpin its modernization program after a short-lived experiment with Chinese law and an effort to revive Japan's old *ritsuryo* codes (themselves transplanted from China in the late 7th century A.D.) — both of which were considered to be unsatisfactory.⁸ Japan's first effort to adopt a European code system began in 1878 with the verbatim translation of the French Civil Code and its unaltered application in Japan. A somewhat modified, and hence more successful, version of the French code was promulgated in 1890, but by the last years of the century this too had come to be felt inadequate.

Japanese scholars of German and English law had by this point adopted a more historicist theory of jurisprudence, which stressed the need to ensure that transplanted legal systems were compatible with Japanese historical and social circumstances.⁹ Partly as a result of the dominance of this Anglo-German-derived school and partly due to the increasing interest of Japanese leaders in the success of late-19th century German industrialization, Japan adopted a new civil code in 1898 that was influenced heavily (but not exclusively) by the German *Bürgerliches Gesetzbuch* (BGB)¹⁰ and has formed the core of the Japanese code system ever since. The influence of German models upon Japan's Code of Civil Procedure (1890), Commercial Code (1890), Law on Court Organization (1890), and Criminal Code (1907) was also significant.¹¹

décision [d'adopter la Charte Meiji.]” (author's translation).

⁷ ODA, *supra* note 1, at 29. Roesler, who had been in Japan since 1878, had also been lobbied for the emulation of the German constitutional model, being influential in convincing officials like Itoh and Tomomi Iwakura of its merits. See FUKASE & HIGUCHI, *supra* note 3, at 63.

⁸ ODA, *supra* note 1, at 26.

⁹ *Id.* at 135.

¹⁰ Indeed, the Japanese code was so swiftly promulgated that it made its way into law two years *before* the BGB, and fully nine years before the Swiss Civil Code. *Id.* at 136.

¹¹ *Id.* at 27. As Oda recounts, however, many provisions from the original French-inspired Japanese code were carried over into subsequent German-inspired drafts, with the result that although the code revisions of the 1880s and 1890s were primarily interested in adopting German ideas, the resulting code system was a mixture of the French and the German systems. *Id.* at 136-37.

On the surface, therefore, the Japanese legal system was patterned upon European models, both at the constitutional and the statutory/code levels. Nevertheless, it should not be surprising that, in undertaking such an extensive transplantation of legal regimes, the end result was the at least partial indigenization of the models thus adopted. Particularly at the constitutional level, the adoption of the European systems did not simply make Japan into an Asian incarnation of Wilhelmine Germany. Indeed, late 19th-century and early 20th-century Japan developed — quite self-consciously — its own unique national governmental system, or constitutional *kokutai*.¹²

B. *Development of the Japanese Kokutai*

The traditional Japanese view of the state bore marked similarities to that embodied in the 19th-century German constitutional model largely adopted by the Meiji Constitution: a focus upon collective solidarity which favored the community over the individual and permitted the exercise of individual freedom only insofar as it did not threaten the maintenance of proper order within that group.¹³ Thorstein Veblen, for example, described this conception of the state — which he saw as a sharp contrast to Anglo-American ideas of the state-as-commonwealth — as giving the nation an almost personal identity, possessing rights and claims both superior and anterior to those of its subjects.¹⁴ Such themes were also prominent in Japanese constitutional scholarship,¹⁵ which in this respect echoed the continental European mainstream of the time.¹⁶

Where the late-19th century and early-20th century Japanese theorists differed from their German counterparts, however, was in rejecting the secularism of statist German constitutionalism, preferring instead a quasi-theocratic constitutional enshrinement of the Emperor (*Tennô*) as the incarnation of national sovereignty — a semidivine figure embodying both the highest political and the highest moral or ethical authority for the

¹² The word *kokutai* is traditionally used to mean some specific, unique character of a nation (and particularly of Japan). Some Japanese legal scholars of the late Meiji period, such as Hozumi Yatsuka, used the term to refer specifically to the location of sovereignty in a political system (e.g., “the people” or “the monarch”), but its more common usage was in the more general sense. See MINEAR, *supra* note 4, at 66-69.

¹³ *Id.* at 33.

¹⁴ *Id.* at 32-33.

¹⁵ *Id.* at 25 (quoting, Hozumi Yatsuka, for example, as stating that while freedom of expression and assembly were . . . important values deserving some protection, “[i]t is also clear . . . that there necessarily arise cases in which the liberty of the individual must be sacrificed for the sake of society as a whole”).

¹⁶ *Id.* at 29.

nation. As much as Count Itoh and his advisor Hermann Roesler agreed on the basic outlines of Japan's adoption of the German constitutional model, they differed sharply about the role that should be played by the Emperor, as set out in the first article of the Meiji Constitution.¹⁷ Where German theorists like Paul Laband had seen the secular state as being a *legal* person, Japanese scholars such as Hozumi Yatsuka (1860-1912) — a professor at the Tokyo Imperial University and leading exponent of a school of constitutional thought that became enormously influential during the period of Japanese imperial expansion in the 1920s and 1930s — took this idea one step further, suggesting that the state was in a meaningful sense an *actual* person, the *Tennô* himself.¹⁸ Fusing law and ethics in a way that went far beyond European continental models, Imperial Japanese constitutionalism claimed a distinctive *kokutai* for itself.¹⁹

This quasi-theocratic *Tennô*-centric approach, it should be noted, did not enjoy a monopoly of Japanese constitutional thought during the Meiji period. Tatsukichi Minobe (1873-1948), for example, propounded a more secularized (more German) vision of the Emperor as an organ of the state — arguing that absolute Imperial rule was wholly *inconsistent* with Japanese traditions.

Some of the so-called *kokutai* theorists argue as though monarchical despotism were the *kokutai* of Japan. But this is a most serious mistake. Indeed, it may be said that nothing could be farther from the truth. Contrary to this view, I hold the view that throughout the history of Japan there has been no monarchical despotism, and that in this fact lies

¹⁷ *Id.* at 33. The preamble to the Meiji Constitution invoked the “virtue of the glories of Our Ancestors, ascended to the Throne of a lineal succession unbroken for ages eternal” and the importance of “giv[ing] development to the moral and intellectual faculties of Our beloved subjects.” KENPO [Constitution] of 1890, preamble (Japan), reprinted in SHINICHI FUJII, *THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW* 427 (1940) [hereinafter KENPO [Constitution] of 1890]. Its first chapter established the position of the *Tennô* as the “sacred and inviolable,” *id.* at art. III, “head of the Empire, combining in Himself the rights of sovereignty.” *Id.* at art. IV.

¹⁸ MINEAR, *supra* note 4, at 57; *see also id.* at 63-64 (explaining contrast between Hozumi and German theorists such as Laband). For Hozumi, “[l]aw and society [were] not divorced but united: The emperor *is* the state; and law is his word. Because the state is a legal person only in the most fragile sense and because law is not a science, there is virtually no intermediate stage between emperor and law.” *Id.* at 90.

¹⁹ As Richard Minear has written, “German thinkers might attribute to the state ethical goals, but they did not equate political and ethical orders.” By contrast, increasing numbers of late-19th century Japanese thinkers brought in the Emperor as a semidivine figure in whose person the political/legal and ethical realms were combined. *Id.* at 33.

the wonderful aspect of Japan's *kokutai*.²⁰

Minobe's view was quite influential, and in the 1910s even served as the accepted wisdom for the higher Japanese civil service examinations.²¹

Nevertheless, the "monarchical despotism" approach scorned by Minobe did fit conveniently with some important Japanese intellectual and legal traditions. The period of the Tokugawa shogunate saw the development of a significant school of "neo-Confucian" thought strongly influenced by Chinese scholarship. By the time of the Meiji Restoration, this neo-Confucian school was evaporating, but it left as its precipitate a potent ethic of filial piety and loyalty that later helped feed the Emperor-focused constitutionalism of writers like Hozumi. Outside the neo-Confucian mainstream, Tokugawa Japan had also seen the development of influential schools such as that of "Mito studies" (*mitogaku*), which stressed religious forms of emperor worship by grafting a non-Confucian ideal of imperial rule onto Chinese tradition,²² and the cultural nativism of the *kokugaku* movement, which emphasized religious duties of obedience owed to the Imperial father-figure.²³ These movements contributed powerfully to the intellectual and religious undercurrents of the *Tennō*-based *kokutai*, and helped contribute to its popularity.

After the turn of the century, Hozumi's Emperor-focused theorizing gained increasing prominence. In primary and secondary education, Hozumi's Imperial constitutionalism had already come to "enjoy a virtual monopoly as orthodoxy which it would maintain until as recently as 1945."²⁴ Moreover, the Japanese government itself increasingly stressed the centrality of the Imperial myth in the early 20th century, cultivating reverence for (and obedience to) the *Tennō* in an environment of rapid social and economic change that might otherwise have proven powerfully destabilizing.²⁵ As the Japanese Empire began its campaign of brutal conquest in East Asia in the late 1920s and early 1930s, this *Tennō*centric emphasis reached a fever pitch. During this period — characterized by

²⁰ T. MINOBE, *JJI KENPŌ MONDAI HIHAN* [Critique of Current Constitutional Problems] 67 (1921), quoted in Ryuichi Nagao & Richard H. Minear, *Japanese Tradition and the Law: Emperor State and Law in the Thought of Yatsuka Hozumi*, 5 *LAW IN JAPAN* 209, 222 (1972) (book review).

²¹ Nagao & Minear, *supra* note 20, at 211.

²² See MINEAR, *supra* note 4, at 164-66.

²³ See *id.* at 167-71.

²⁴ Nagao & Minear, *supra* note 20, at 211.

²⁵ Cf., MINEAR, *supra* note 4, at 181-82 (noting that while Tokugawa-era thinkers had assumed the permanence of then-*status quo*, by the early 20th century Japan was in whirlwind of change and the Emperor-focused ideal of filial piety amounted to "an open-ended commitment to follow wherever the emperor might lead").

what Basil Chamberlain called “the invention of a new religion”²⁶ — Japanese constitutional theory articulated a markedly absolutist ideal of the Imperial “Family State.”

C. *Empire and the “Family State”*

The constitutional propagandists of the high-Imperial Japanese system grounded their theorizing in the idea that the Japanese state had enjoyed an “everlasting existence” — ruled by “an ever-unbroken line of Tennō” since time immemorial and characterized by a unique spirit rooted in the promise of the Sun Goddess Amaterasu-O-Mikami that the prosperity of the Imperial Japanese throne would be “coeval with heaven and earth.”²⁷ Indeed, the figure of the Emperor was felt actually to be divine, since the Japanese state had been founded by a grandson of the Sun Goddess and governed ever since by her lineal descendants in the form of the unbroken line of *Tennō*.

This idea was at the core of the high-Imperial ideal of the “Family State,” which extended to the national political level the patriarchal “house” system of Japanese society — a scheme under which an individual biological family was controlled by an all-powerful *paterfamilias* figure against whom the other members of the unit had no rights.²⁸ By analogy, the Empire was itself a single sprawling “family,” with the Imperial Family at its core and the person of the semidivine *Tennō* as the collective national *paterfamilias*.²⁹

The institution of ancestor worship tied this national “family” together, and provided a collective racial link to the celestial divinity Herself. Since the Japanese people were of the same race (the Yamato race) as the *Tennō*, and the *Tennō* himself the direct lineal descendant of the Sun Goddess, ancestor worship provided a link that made “the first Imperial Ancestor . . . to the people none other than their own ancestor-god — the veritable founder of the Grand National Family”³⁰ and *His* descendant in turn the father-figure of all Japanese. In the thinking of

²⁶ *Id.* at 3.

²⁷ FUJII, *supra* note 17, at 40-41. Fujii, absurdly, claimed that the historical origins of the Japanese state lay nearly 1.8 million years ago. *Id.* at 38.

²⁸ See ODA, *supra* note 1, at 232. This “house” system revolved around the legal concept of the *ie*, that is, the extended patriarchal family. After Japan's surrender in 1945, however, the *ie* system was formally abolished as part of an extensive revision of the family law portions of the Japanese Civil Code. See, e.g., JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 104-05 (John M. Maki, trans. 1980) [hereinafter COMMISSION].

²⁹ See, e.g., FUJII, *supra* note 17, at 2.

³⁰ *Id.* at 51.

Imperial *kokutai* theorists like Hozumi and the ideas endorsed by such prominent high-Imperial figures as Count Kentaro Kaneko, privy councillor to the Emperor,³¹

Ancestor worship transforms the nature of the power of the emperor-father. This power is not simply force. It is rather the solicitude of a father for his child. Obedience becomes a sacred obligation, the piety of a filial son. . . . The family is a small state; the state is a large family. The origin of that which links the two, and the power which unites them in the same blood relationship, is belief in ancestor worship. The basic principle [uniting politics, law and ethics] has its origin here.³²

Not all Japanese scholars endorsed Hozumi's dogmatism on the subject of ancestor-worship,³³ but such thinking was at the core of the constitutional theory of the "Family State"³⁴ and underlay the profound reverence and obedience shown the figure of the Emperor throughout the traumas of war and crushing defeat.³⁵

³¹ See, e.g., *id.* at ii (describing Shinichi Fujii's — decidedly Hozumite — book as "embody[ing] the spirit with which Prince Ito drafted the Constitution, based principally upon the national history and fundamental political principle of Japan").

³² MINEAR, *supra* note 4, at 73-74. For Hozumi and his followers, even the European "monarchies" were essentially democratic states compared to this ideal of Imperial *kokutai*. The semi-religious father-figure position of the Emperor — the very matter over which Hermann Roesler had so disagreed with Hirobumi Itoh — was for Hozumi the "foundation of our unique Japanese *kokutai* and national morality." *Id.* at 71.

³³ Anesaki Nasaharu and Hozumi Nobushige, for example, took a somewhat less absolutist position, being less inclined to follow Hozumi Yatsuka in seeing ancestor-worship as creating overarching duties to preserve the value systems inherited from the past. *Id.* at 75-76.

³⁴ Indeed, the idea of national "family" appears to be quite ingrained in Japan, and persists in the literal translation of the Japanese word for the state: *kokka*, or "national family." See THE CONSTITUTIONAL CASE LAW OF JAPAN 4 (Hiroshi Itoh and Lawrence W. Beer eds., 1978) [hereinafter CASE LAW].

³⁵ Fukase and Higuchi, for example, recount that even after Japan's catastrophic defeat in 1945, the man in the street tended to attribute Imperial mistakes and misdeeds to the poor advice of ministers, and some 90 percent of the population favored the retention of the Emperor system. Indeed, after being fanatically mobilized for an apocalyptic to-the-last-child defense of the Homeland, the Japanese population obeyed the Imperial surrender order with astonishing discipline. As Fukase and Higuchi comment, "Quelle discipline! Cet événement est révélateur de l'histoire et du renforcement du régime de Tennô. . . . Quelle étrange, quelle honnête mentalité royaliste!" FUKASE & HIGUCHI, *supra* note 3, at 72 ["What discipline! These events illustrate the compelling character the Imperial regime [had for ordinary Japanese]. . . . What a strange, genuinely royalist mentality!"] (author's translation).

The actual powers of the Emperor as set out in the Meiji Constitution, it should be noted, were not nearly as extensive as this absolutist *paterfamilias* "Family State" analogy might suggest. The *Tennō* was said to exercise legislative power, but He did so only "with the consent" of the national legislature (*Teikoku Gikai*) itself.³⁶ Similarly, He had the power to issue certain emergency ordinances in order "to maintain public safety or to avert public calamities," but only when the legislature was not in session. Moreover, such Imperial Ordinances were subject to disapproval (and consequent invalidation) by the legislature at its next sitting.³⁷

Ordinances "for the carrying out of the laws, for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects" were also within the Imperial prerogative, but "no Ordinance shall in any way alter any of the existing laws."³⁸ And while the Emperor could appoint the prime minister, even this in actual practice was a power shared with the Elder Statesmen (the *Genro*) of the country. The Emperor's signature upon an official document was not even valid unless countersigned by his ministers.³⁹

Thus, in actual practice, the Emperor did not actually rule — his Ministers did — and Japan's constitutionalism looked less unlike that of Imperial Germany than the "Family State" theory might suggest.⁴⁰ But in Japanese constitutional doctrine, the power of the Emperor preceded the establishment of the constitutional state in both the chronological and the theoretical sense: the Meiji Constitution, *granted* by the Emperor to his subjects in 1889, constrained the Emperor's power only in the sense that He chose to abide by its restrictions.

With historical (and divine) antecedents of such antiquity, it was emphasized, the Meiji-era constitutional provisions declaring the *Tennō* to be the sacred and inviolable head of state did not themselves "establish" him so. Rather, the first chapter of that document merely *recognized* a pre-existing state of affairs, serving to confirm what had been the rule since the dawn of history.⁴¹ As we shall see in more detail shortly, in this theoretical context, the power of the collective national *paterfamilias*

³⁶ KENPŌ [Constitution] of 1890, *supra* note 17, at art. V.

³⁷ *Id.* at art. VIII.

³⁸ *Id.* at art. IX.

³⁹ VERINDER GROVER, *THE CONSTITUTION OF JAPAN* 20-21 (1964). The role of the *Genro* was quite significant, and they were a powerful body, but their role was apparently nowhere formally written into law. *See id.* at 27.

⁴⁰ Indeed, it might well be argued that Kaiser Wilhelm II of Germany enjoyed more actual freedom personally to decide national policy than did the Japanese *Tennō*.

⁴¹ *See, e.g.,* FUJII, *supra* note 17, at 2-3, 45, 46.

to bestow necessarily included the power to alter or dissolve.⁴² Thus the centrality of the *Tennō* in the constitutional system went, in principle, far beyond the actual text of the Meiji Constitution.

D. Rights in the Family State

The theoretical cornerstones of the "Family State" also had important implications for the observance of fundamental constitutional rights in Japan during the Meiji era. Not surprisingly, given the character of the "Family State" theories that legitimated the Imperial regime, Meiji-era Japanese constitutional thinking was not characterized by its possession of a strong ethic of inviolable constitutional rights. Western natural law theory had been introduced to Japan late in the Tokugawa period, and had made some inroads in the form of "nature law" thinking and certain conceptions of "heaven-given human rights."⁴³ Nevertheless, the idea of absolute legal rules exercisable by individuals against the greater community did not take deep enough root to influence significantly the Meiji era.⁴⁴ Indeed, by Takeshi Ishida's account, even the late-19th century Movement for Popular Government — which lobbied for more parliamentary-style forms of political organization — possessed only a relatively weak idea of constitutional rights and exhibited a tendency to view rights as having primarily a group or collective (as opposed to an individual) character.⁴⁵

⁴² Where German constitutional theorists like Georg Jellinek entertained theories of "auto-limitation" by which a sovereign monarch might choose forever to confine himself and the state he heads to a particular set of constitutional rules, Hozumi Yatsuka and many other "Family State" theorists subscribed to the view that the Japanese *Tennō* reserved the right to change the constitution at any time. MINEAR, *supra* note 4, at 108-09. Under Article LXXIII of the Meiji Constitution, constitutional amendments required approval of two-thirds of the legislature, but could only be considered by that body if an Imperial Order had been submitted to it for consideration. KENPŌ [Constitution] of 1890, *supra* note 17, at art. LXXIII. As an apparent corollary to this rule — resulting from the assumption that all constitutional changes had to take place with the permission of the Emperor who had promulgated the document in the first place — no modifications could be made to the constitution or to the Imperial House Law during the time of a Regency. *Id.* at art. LXXV. Pursuant to the Imperial House Law, a Regency was defined as being that period during which the *Tennō* is either a minor or is "prevented by some permanent cause from personally governing." See IMPERIAL HOUSE LAW, ch. V, art. XIX (1897), in FUJII, *supra* note 17, at 451.

⁴³ Takeshi Ishida, *Fundamental Human Rights and the Development of Legal Thought in Japan*, 8 LAW IN JAPAN 39, 49-50 (Hiroshi Wagatsuma & Beverly Braverman trans., 1975).

⁴⁴ *Id.* at 51.

⁴⁵ *Id.* at 56-57.

Japanese political thinkers of the Tokugawa period, though otherwise somewhat divided into competing schools of thought, had in common a vision of the state as embodying not just a political and legal order but an ethical one. There did not exist, as Western thinkers had come to believe, a realm of "law" at least partially distinct from that of "morality."⁴⁶ Rather, these elements existed along a continuum, and could not really be separated. This longstanding theme, common to Tokugawa-era neo-Confucian, Buddhist and Shinto partisans alike, tended to imbue conceptions of individual ethical responsibility — ideas of good citizenship and proper devotion to one's responsibilities — with the coercive force of law. This had the effect of both undercutting the inviolability of constitutional "rights" where their exercise went against the grain of community standards⁴⁷ and encouraging the development of legal rules actually penalizing such exercise.

Particularly in the context of a late-Meiji constitutional system increasingly legitimated by reference to theories of the Imperial "Family State," this conception of legalized ethics produced a regime far more interested in the responsibilities and obligations of subjects than in the protection of their rights. For "Family State" ideologues like Hozumi Yatsuka, the role of the individual person in Japan's constitutional scheme was sharply limited. "Its form is the complete obedience of the individual to the sovereignty of the state. Its essence is the enlightenment of public spirit: to abandon private gain and to die a martyr for the public good."⁴⁸ In a regime where law and ethics were not sharply delineated, it was appropriate for the coercive power of the state to help further this process of individual abandonment to the public good.⁴⁹

⁴⁶ MINEAR, *supra* note 4, at 148. As Hozumi wrote, "[l]aw being the right road of social existence, the legal ideal is for ethics and law to form the same body." Quoted, in *id.* at 87-88.

⁴⁷ *Id.* at 57-58. Richard Minear credits Hozumi Yatsuka with the innovation of bringing an explicitly group-centered emphasis to Japanese constitutional law. Unlike contemporary European theorists, Hozumi took pains to spell out a theory of the role of groups in political organization; describing political groups as being necessarily hierarchical in nature and characterized (like the patriarchal family itself) by relations of dominance and subservience. For Hozumi, group life revolved around the pursuit of common goals and the undertaking of common action, and groups were distinguished from each other precisely according to the nature of their collective goals. This principle held true even at the national level: the state, Hozumi felt, was just another hierarchical group, one distinguished by "political" goals. *Id.* This theory, writes Minear, was "very possibly original with Hozumi [and] grew out of a strong awareness of a qualitative difference between Japanese and Western society." *Id.* at 58.

⁴⁸ *Id.* at 91.

⁴⁹ *Id.*

Here, as elsewhere, one should not equate the dogmatism of the Hozumi school with the general consensus of constitutional opinion in Meiji Japan: Tatsukichi Minobe and Sakuzo Yoshino, for example, also competed for influence and offered differing — and somewhat more expansive — accounts of the nature and extent of fundamental constitutional rights. Nevertheless, even these more moderate scholars did not conceive of constitutional rights as rising above the reach of ordinary positive law.⁵⁰ While not all scholars and jurists took the subject's absolute duty of obedience as far as did Hozumi, they all shared a general view of constitutional rights very different from that which has developed in the West; one which elided ethical and legal prohibitions and subjected the exercise of rights to such limitations as the government might see fit to impose.

This view was embodied in the provisions of the Meiji Constitution itself, the second chapter of which set out the "Rights and Duties of Subjects." Indeed, every provision in the Meiji Constitution that sets out a right possessed by Japanese subjects contains some language limiting that right or otherwise expressly tying it to the requirement that its exercise not be inconsistent with the laws of Japan. It is provided, for example, that Japanese subjects "shall have the liberty of abode and of changing the same within the limits of law."⁵¹ They may not be "arrested, detained, tried or punished unless according to law,"⁵² and may be tried only before "the judges determined by law."⁵³ No house may be entered or searched, "[e]xcept in the cases provided for in the law,"⁵⁴ and "the secrecy of letters of every Japanese subject shall remain inviolate" except "in the cases mentioned in the law."⁵⁵ Similarly, the right to property "shall remain inviolate" except where "[m]easures necessary to be taken for the public benefit shall be provided for by law."⁵⁶ Indeed, even the most basic freedoms of expression — "speech, writing, publication, public meetings and associations" — were made contingent upon "the limits of law,"⁵⁷ while personal religious belief was protected only "within limits not prejudicial to peace and order."⁵⁸ Such language may have helped protect subjects against government *officials* acting out

⁵⁰ See Ishida, *supra* note 43, at 43-44.

⁵¹ KENPŌ [Constitution] of 1890, *supra* note 17, at art. XXII.

⁵² *Id.* at art. XXIII.

⁵³ *Id.* at art. XXIV.

⁵⁴ *Id.* at art. XXV.

⁵⁵ *Id.* at art. XXVI.

⁵⁶ *Id.* at art. XXVII.

⁵⁷ *Id.* at art. XXIX.

⁵⁸ *Id.* at art. XXVIII.

of personal and arbitrary caprice, but it could provide no shield against the properly-wielded coercive power of the government as a whole.

The result of this cascade of "subject to the restrictions provided by law" qualifications was that the constitutional guarantees of individual rights embodied in the Meiji Constitution were explicitly contingent upon the goodwill of the legislature: any ordinary "law" had the power to abridge them.⁵⁹ As Shinichi Fujii put it with respect to the freedom of expression, for example, the prevailing approach to constitutional rights granted liberties to the people,

but it does not grant such liberty to those having unpatriotic and other ideas prejudicial to the safety of national life, by being feeble-minded and unsound in thought. Law can put restraint on such persons.⁶⁰

Indeed, should subjects be unhappy with their lot, they enjoyed a constitutionally-protected freedom to petition for redress of grievances — but only as long as they "observe[d] the proper forms of respect, and . . . compl[ie]d with the rules specially provided for the same."⁶¹ Moreover, if this were not enough, in times of war or national emergency, the Constitution expressly provided that none of the provisions of the chapter on the rights of the subject had any power to constrain "the exercise of the powers appertaining to the Emperor."⁶²

Where Western theorists tended to view human rights as deriving from God or natural law and the rights of the state as deriving from the consent of the people thereby governed, the Meiji Constitution embodied "the Japanese notion of heaven-given state rights and state-given human rights."⁶³ Consequently, "the legal ideology connected with fundamental human rights became virtually unobservable after the enactment of the Meiji Constitution."⁶⁴

⁵⁹ See generally GROVER, *supra* note 39, at 21-22; FUKASE & HIGUCHI, *supra* note 3, at 135 ("[S]ous l'ancienne Charte de Meiji, l'expérience ainsi que la formule de «la réserve de la loi» et de la clause générale pour restreindre les droits de sujets japonais ont bien démontré que la loi pouvait devenir oppressive à l'égard des droits de l'homme") ["Under the Meiji Constitution, legal practice and the 'except where provided by law' clauses restraining the rights of Japanese subjects demonstrates how the law could become oppressive and violate fundamental rights"] (author's translation).

⁶⁰ FUJII, *supra* note 17, at 166.

⁶¹ KENPŌ [Constitution] of 1890, *supra* note 17, at art. XXX.

⁶² *Id.* at art. XXXI.

⁶³ Hajime Kawakami, 8 COLLECTED WORKS 190 (1964), *quoted in* Ishida, *supra* note 43, at 43.

⁶⁴ Ishida, *supra* note 43, at 41.

E. The Judiciary and Constitutionalism

Even if the constitution had more emphatically protected individual rights in its actual text, the Japanese system of “theocratico-patriarchal constitutionalism”⁶⁵ lacked the institutional ability to enforce such rights against the government. Where express provisions of the United States Constitution provide for judicial independence,⁶⁶ the official commentary of Hirobumi Itoh — the drafter of the Meiji Constitution — made very clear that the judiciary was part of the executive branch.⁶⁷ Subordinated to the Ministry of Justice, an executive agency, the Japanese courts were subject to government control over judicial budgets, appointments and promotions.⁶⁸

Article LVII of the constitution provided that “[t]he Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.”⁶⁹ While phrasing in the United States Constitution,⁷⁰ no less vague than these provisions, has been famously interpreted to entail a strong power of judicial review,⁷¹ the Meiji document was believed to include no such power. The “Family State” theorists had nothing to say about judicial review for constitutionality, and it is not hard to see why. After all, how could such a thing be permitted? An American court might seek to enforce constitutional provisions — enacted by a sufficient “supermajority” of the sovereign People⁷² — against the will of an ordinary majority as embodied in the votes of elected representatives, but how could a Japanese court exercising power in the name of the Emperor

⁶⁵ Richard Minear attributes this phrasing to a Japanese lawyer in 1912. MINEAR, *supra* note 4, at 1.

⁶⁶ U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

⁶⁷ JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN xvii (1964) [hereinafter COURT AND CONSTITUTION].

⁶⁸ *Id.*; see also CASE LAW, *supra* note 34, at 7.

⁶⁹ KENPŌ [Constitution] of 1890, *supra* note 17, at art. LVII.

⁷⁰ U.S. CONST. art. III, § 1 (“The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *id.* at art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .”).

⁷¹ See *Marbury v. Madison*, 5 U.S. 137 (1803).

⁷² See U.S. CONST. art. V (requiring that constitutional amendments be approved either by both Houses of Congress or by a constitutional convention called for the purpose, and be thereafter ratified by three-fourths of the state legislatures or by conventions in three-fourths of states).

and interpreting a constitution promulgated by the grace of that Emperor seek to stymie the will of the Imperial government?

For the proponents of the Imperial "Family State," if a law were to conflict with the Constitution, "it is proper not to apply it,"⁷³ and such application would be (formally, at least) "illegal." But "[a]gainst such illegality . . . there is no recourse."⁷⁴ Shinichi Fujii, for example, felt that "the three mediums — the Legislature, the Judicature, and the Executive — may be said to have each its own right of [constitutional] interpretation," and if they were to disagree, "there is no means whatsoever by which to settle the divergence."⁷⁵ Ultimately, as Fujii recounted, the *Tennô* should Himself be regarded as "the sole interpreter of the Constitution, most supreme and unchallengeable."⁷⁶ If worse came to worse, the disputing branches must ask the Emperor himself to settle the dispute — and must follow His answer.⁷⁷

II. THE POSTWAR ERA

After Japan's defeat and surrender in 1945, there were many in the victorious Allied coalition who wished to eliminate the Imperial Japanese institution altogether. The governments of the U.S.S.R., Australia, New Zealand, and the Philippines — all members of the Allied commission overseeing Japan's postwar occupation — wanted the Japanese throne abolished and urged the prosecution of Emperor Hirohito as Japan's premier war criminal.⁷⁸ However, the British and (most importantly) the Americans took a more moderate position, allowing the Emperor to survive both literally and figuratively. Never put on trial as a war criminal, Hirohito retained possession of the Three Sacred Treasures⁷⁹ as the powerless figurehead monarch of Japan.

Although they had spared the *Tennô* Himself, the victorious Allies rewrote the Meiji Constitution in its entirety, hoping thereby to create in

⁷³ FUJII, *supra* note 17, at 316.

⁷⁴ MINEAR, *supra* note 4, at 97.

⁷⁵ "Practically speaking," Fujii hoped, "such a divergence may indeed be settled by expedient means according to circumstances." FUJII, *supra* note 17, at 386-87.

⁷⁶ *Id.* at 386.

⁷⁷ *Id.* at 387.

⁷⁸ FUKASE & HIGUCHI, *supra* note 3, at 71-72.

⁷⁹ These reputedly divine objects were said to have been given by the Sun Goddess to her terrestrial grandchild, and consist of the *Yata-no-Kagami* (sacred mirror), the *Yasakani-no-Magatama* (a string of curved gems) and the *Ameno-Murakumo-no-Tsurugi* (a sacred sword allegedly taken from the corpse of an evil serpent-monster slain by Susano-no-Mikoto, the younger brother of the Sun Goddess). See FUJII, *supra* note 17, at 42-44.

Japan a stable and moderate constitutional state that would not again constitute a threat to its neighbors and a danger to world peace.⁸⁰ The resulting document, the 1947 Constitution — or the *Showa* Constitution⁸¹ — came into force on May 3, 1947.⁸²

In order to forestall a reoccurrence of the belligerency and barbarities of the Japanese Empire, the 1947 Constitution embodied three fundamental principles wholly new to Japanese constitutional law: (1) sovereignty rests with the Japanese people and not in the person of the Emperor (who is just a symbol of the nation possessing sharply limited powers); (2) war is renounced as an instrument of policy, and peaceful cooperation with foreign countries is made a constitutional *grundnorm*; and (3) fundamental human rights are to be protected (being written expressly into an elaborate bill of rights and safeguarded by a system of judicial review).⁸³ Where before the Emperor had ruled as a sort of national *paterfamilias*, after 1947 the constitution was itself the supreme law of Japan, and nothing — not the legislature, not the government, not the *Tennō* himself — could violate it.

The Japanese legal codes were far less revised at the hands of the Supreme Commander of the Allied Powers (SCAP), Gen. Douglas MacArthur, but portions of the Civil Code were rewritten as well. For the most part, the Allied occupation left Japan's Criminal Code, Code of Civil Procedure, and Commercial Code untouched,⁸⁴ but the fourth and fifth parts of the Civil Code itself — those provisions dealing with Japan's starkly gender-inequitable family law and succession rules — were dramatically revised. The prewar industrial combines (*zaibatsu*) were also abolished by an American-inspired Anti-Monopoly Law, and labor reforms enacted.⁸⁵ This time the models adopted were the liberal democratic forms of American constitutionalism; Japan thus embarked upon its

⁸⁰ For an account of the negotiations between the surrendered Japanese government and the Supreme Commander of the Allied Powers (SCAP) overseeing the occupation, see COMMISSION, *supra* note 28, at 62-84.

⁸¹ Japanese dates are traditionally numbered from the accession of the Emperor, and Japan's constitutions are often so described as well. The Meiji Constitution was adopted during the reign of the Emperor Meiji. The 1947 Constitution was adopted during the tenure of Emperor Hirohito, eliciting the appellation *Showa* (or "radiant peace"), the name given to his reign. See GROVER, *supra* note 39, at 31 n.1.

⁸² For an account of the adoption of the 1947 Constitution, see COMMISSION, *supra* note 28, at 78-84.

⁸³ See generally Lawrence W. Beer, *Japan's Constitutional System and Its Judicial Interpretation*, 17 LAW IN JAPAN 7, 13 (1984) [hereinafter Beer, *Constitutional System*]; ODA, *supra* note 1, at 39.

⁸⁴ ODA, *supra* note 1, at 33.

⁸⁵ *Id.* at 32-33.

second great experiment with wholesale transplantation from Western legal systems.

Certain fundamental tenets of the constitutional system of the Showa Constitution — namely, the vital textual provisions for Imperial powerlessness and Japanese pacifism and non-belligerence — are clearly ones unique to the circumstances of postwar Japan. Nevertheless, the underlying constitutional architecture of the 1947 system, a scheme of constitutionally-guaranteed individual rights and other inviolable constitutional provisions overseen by a judiciary possessing an explicit power of constitutional review,⁸⁶ was clearly modeled directly on that of the United States. Indeed, so closely is this cognitive genealogy felt to relate the two constitutional systems that “[l]eading U.S. cases which have shaped [various constitutional] theories are often cited by the [Japanese] courts, opposing attorneys, and scholars in both law and political science.”⁸⁷

Thus, we circle slowly in upon the focus of this essay: how has the American model of constitutional law, what Lawrence Beer has called “documentary constitutionalism,”⁸⁸ fared in its new soil? With respect to individual rights, for example, “[n]ever before has the individual [Japanese] citizen enjoyed such extensive rights and freedoms which have been made an integral part of the legal system.”⁸⁹ Yet the document enshrining these rights was taken from a foreign model developed in a very different society several thousand miles away, and was dropped fully-formed, as if out of the blue, into the Japanese socio-political context. Nor was this grounding document even adopted voluntarily, being instead forced upon Japan by the Occupation authorities.⁹⁰ The novelty of these changes might seem to suggest the importance of cultivating a vigorous ethic of judicial review in ensuring the enforcement of the new constitu-

⁸⁶ KENPŌ [Constitution] of 1947, art. 81 (Japan) (“The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”).

⁸⁷ Ukai, *supra* note 5, at 120.

⁸⁸ Lawrence W. Beer, *Constitutionalism in Asia and the United States*, in CONSTITUTIONALISM IN ASIA, *supra* note 5, at 1, 10 [hereinafter Beer, *Constitutionalism in Asia*].

⁸⁹ GROVER, *supra* note 39, at 95 (quoting C. YANAGA, JAPANESE PEOPLE AND POLITICS 352).

⁹⁰ Indeed, a majority of the members of a Japanese government commission appointed some years later to study the alleged need for constitutional revisions felt that the 1947 Constitution had been illegitimately imposed by force. See COMMISSION, *supra* note 28, at 212-13. Nevertheless, most of these commissioners still felt that the document had come to be accepted by the Japanese people and had presumably, therefore, acquired the popular legitimacy it had lacked at birth. *Id.* at 229.

tional scheme,⁹¹ but also to make more difficult the internalization of norms that would encourage such assertiveness. Thus, with the adoption of the 1947 Constitution, therefore, the stage was set for an interesting case study of constitutional development.

The American constitutional model, after all, is but one of a number of distinct traditions that, woven together, make up the textual and social fabric of modern Japanese law and jurisprudence.⁹² As we have seen, premodern and modern indigenous legal traditions affected by Confucianism interacted with European civil law models and specifically German approaches to political organization to produce a distinctively high-Imperial Japanese constitutional *kokutai*. Japan's defeat and the imposition of the Showa Constitution amputated one of the most important grounding principles of this prewar system — Imperial political sovereignty — and grafted a whole new approach to constitutional governance onto the stump that remained. It did not, however, try (indeed, it could hardly have hoped) wholly to supersede the entire traditional legal culture of Japan. How, then, has this transplant fared? How has the 1947 constitutional scheme developed after its arrival in what Tadakazu Fukase and Yoichi Higuchi have called the “psycho-social climate” of Japan?⁹³

The following pages will attempt to sketch how Japanese constitutional law has developed since the Showa Constitution came into force in 1947, with particular focus upon how the American-style constitutional root has developed into a jurisprudential tree in some senses quite differ-

⁹¹ It is for precisely this reason, for example, that Nobushige Ukai argues for an absolutist approach to constitutional freedoms quite at odds with the views of most Japanese courts.

In a country that does not have a tradition of basic freedoms, the people cannot be expected to exercise their rights to the fullest extent immediately. In Japan, even the slightest limitation on these freedoms may cause the people to back away from asserting their rights, thus creating a much greater restrictive effect than is actually applied by the courts.

Ukai, *supra* note 5, at 118; *see also id.* at 116 (“With its many centuries of tradition of strong government, Japan was not prepared for this sudden burst of freedoms. But because of the importance of these rights the Supreme Court’s job of interpreting such fundamental freedoms in the Japanese context has taken on added significance.”).

⁹² *See generally* Beer, *Constitutional System*, *supra* note 83, at 7 (noting also the importance of legal traditions affected by Confucianism, feudal social organizations, and approaches to the use of conciliation).

⁹³ FUKASE & HIGUCHI, *supra* note 3, at 127 (“[Au sujet des droits de l’homme,] le climat psycho-social de l’Est, spécifiquement japonais et traditionnel, n’a-t-il pas affecté le fonctionnement de leur garantie?”) [“[With respect to human rights], has not the psycho-social climate of the East, and specifically that of the Japanese tradition, affected how these rights are protected?”] (author’s translation).

ent from its North American antecedent. By tracing these developments with reference to what Lawrence Beer has called the local "ecology" of constitutionalism⁹⁴ — that is, the history, social environment and legal background of the country for which the textual scheme sets out to provide a fundamental law — we may perhaps be better able to understand the distinctive patterns of Japanese constitutionalism.

III. THE JAPANIFICATION OF THE CIVIL CODE

We will turn first, however, to a brief examination of how Japanese courts have interpreted one other transplanted Western legal idea, the civil law concept of "abuse of rights." Though this concept of abuse is formally embodied merely in the Civil Code and is thus not technically a constitutional provision, the indigenization of this concept in Japanese jurisprudence may suggest broader patterns of some relevance to the development of postwar constitutional law.

A. *Abuse of Rights in the European Civil Law Tradition*

The doctrine of abuse of rights, which may have its roots in nothing more than a passing comment by the Roman legal scholar Gaius in the 2nd century A.D.,⁹⁵ developed in modern continental civil law jurisdictions into a rule prohibiting the exercise of one's rights where the sole purpose of such exercise was to bring harm to another person without benefit to one's self. In the Swiss Civil Code, for example, this doctrine takes the form of an express provision that "every person is bound to exercise his rights and to fulfill his obligations according to the principles of good faith. The law does not sanction the evident abuse of a man's rights."⁹⁶ In French law, no express code rule covers *abus des droits*, but it has been the subject of extensive development by the courts. Classic French abuse-of-rights cases concern such things as non-functional chimneys built on one's house in order to block a neighbor's view,⁹⁷ or the installation of a pump to drain an underground aquifer for no purpose other than to reduce the yield of a neighbor's spring.⁹⁸ Even where the

⁹⁴ Beer, *Constitutionalism in Asia*, *supra* note 88, at 10.

⁹⁵ "[M]ale enim nostro iure uti non debemus." [W]e ought not to make a bad use of our lawful rights.] 1 INST. GAIUS 36 (E. Poste trans., 1925), *quoted in* Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 970 (1984).

⁹⁶ H.C. Gutteridge, *Abuse of Rights*, 5 C.A.M.B. L.J. 22, 32-39 (1933) (quoting the CODE CIVIL SWISSE [CC] art. 2 (Switz.)).

⁹⁷ *See id.* at 32-33.

⁹⁸ *Id.* In that case, it was decided that "where an act is done with the sole and deliberate intention of inflicting harm it is wrongful and cannot be justified by pleading

harmful act is done *primarily* — but not exclusively — for purposes of inflicting harm, French courts have traditionally found the exercise of rights impermissible.⁹⁹ Although the German Civil Code has a provision barring the exercise of a right where “its purpose can only be to cause damage to another,”¹⁰⁰ German law takes a somewhat narrower position, restricting the circumstances of the rule to cases where the exercise was done *solely* for purposes of inflicting harm. Nevertheless, German courts have used other provisions of the Civil Code to accomplish traditional abuse-of-rights purposes, reading provisions aimed at repressing acts against *boni mores*, for example, to similar effect.¹⁰¹

B. Japanese Practice

The Japanese Civil Code did not contain an express provision relating to abuse of rights until 1947, but the courts had long incorporated the concept into Japanese jurisprudence.¹⁰² With the 1947 code revision, a new Section 1 was added, to the effect that “[p]rivate rights shall conform with public welfare. The exercise of rights and the performance of obligations shall be effected in a fair way and in good faith. The abuse of rights is not permitted.”¹⁰³

But Japanese law interpreted the abuse-of-rights concept somewhat differently from the European jurisdictions in which it originated. French law, for example, though generally following an *abus des droits* rule, exempted the exercise of certain wholly “discretionary” rights from its purview: the right of private persons to refuse to contract, the right of parents to refuse consent to the marriage of a minor child, and the right of a party to enforce a contractual penalty clause, for example, could not be abusive.¹⁰⁴ The Greek Civil Code has express provisions regarding

a proprietary right.” *Id.* at 33.

⁹⁹ In one famous 1917 case, for example, a landowner having property next to an airfield at which airships were being built attempted to induce the owners of the business to buy his property by constructing a tall wooden tower covered with spikes — for purposes of tearing the skin of any dirigibles that might fly by. Here, the landowner’s motive was not solely spite (his aim was to coerce the purchase of his land), but the French Court de Cassation found that his dominant motive had been to inflict harm, since this was the means by which he hoped to secure the sale. Consequently, his action was found to be an abuse of rights. Gutteridge, *supra* note 96, at 33-34.

¹⁰⁰ Bürgerliches Gesetzbuch [BGB] (Civil Code) art. 226 (F.R.G.).

¹⁰¹ RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 517 & 523-24 (3d. ed. 1970).

¹⁰² ODA, *supra* note 1, at 138-39.

¹⁰³ MINPŌ (CIVIL CODE) § 1 (Japan), *quoted in* ODA, *supra* note 1, at 137-38.

¹⁰⁴ SCHLESINGER, *supra* note 101, at 518 n.5. As an unadopted proposal for revision

the abuse of rights, but Greek courts treat these provisions as inapplicable to contractual rights and to rights created by so-called cogent rules — that is, rules around which parties are not permitted to contract.¹⁰⁵

The addition of an abuse-of-rights provision to the Japanese Civil Code, however, does not seem to follow this pattern. Unlike the German code, for example, Japan's provisions concerning abuse of rights and principles of good faith and fair dealing are contained in the first book of the Civil Code — the “General Part” — rather than merely in the sections pertaining to obligations. The Japanese Civil Code is generally organized according to the principles of the German *Pandekten* system, in which generally-applicable principles and abstract rules are provided in an initial chapter of the code, while rules related to specific institutions or areas of law are provided in the sections dealing with such institutions or areas as they arise.¹⁰⁶ Whereas European civilian jurisdictions treat certain types of rights or certain categories of law as falling outside the reach of abuse-of-rights principles, therefore, the Japanese code conceives these principles as having *general* applicability across the breadth of

of the French Civil Code restating current French case law put it, for example,

Every act or every fact which, by the intention of its author, by its object or by the circumstances in which it occurred, manifestly exceeds the normal exercise of a right, is not protected by the law and makes its author responsible.

This provision does not apply to rights which can by their nature or by virtue of the law be exercised in a discretionary manner. *Id.* at 518 (emphasis added).

¹⁰⁵ SCHLESINGER, *supra* note 101, at 527. Rules with a *cogent* quality are commonly contrasted with those with the qualities of *ius dispositivum*, which may be altered or waived by contracting parties by express agreement. This formulation generally applies across the civilian tradition, and even into modern international jurisprudence — where, for example, the Vienna Convention on the Law of Treaties declares there to be a special category of rules of *ius cogens* which may not be altered by state-contractual agreement. Any treaty provisions violative of such peremptory norms are said to be null and void *ab initio*. See generally Christopher A. Ford, *Adjudicating Jus Cogens*, 13 WIS. INT'L L.J. 145, 146-49 (1994). In Japanese law, this distinction takes the form of a general rule that a “juristic act” (by which is meant, following German doctrine, an act purposefully directed toward a specific legal effect such as obtaining, relinquishing or altering a right) may not violate certain “mandatory” code provisions — but may contravene certain other “optional” ones. Pursuant to Article 90 of the Japanese Civil Code, moreover, juristic acts may not go against public order or good morals [*boni mores*]. See generally ODA, *supra* note 1, at 145-47. (Furthermore, Japan's Law on the Application of Laws, Law No. 10 (1898), provides that customary practice shall be given an effect equivalent to law where the law provides for such reference (or where there is no law on the issue), unless custom is contrary to public order or good morals. ODA, *supra* note 1, at 60-61.

¹⁰⁶ See generally ODA, *supra* note 1, at 137-38.

Japanese law.¹⁰⁷ Whereas doctrines of good faith and fair dealing are employed where some prior relationship (e.g., a contract) exists between parties, abuse-of-rights principles are applied across the spectrum of social interactions.¹⁰⁸

Moreover, Japanese law tends to interpret abuse-of-rights principles with less emphasis upon the evil *intent* of the actor than upon whether or not the exercise of a right, under the circumstances, was consistent with the community's sense of propriety. While European abuse-of-rights jurisprudence revolves around the malicious intent of the actor,¹⁰⁹ Japanese courts have not found evil intent to be necessary.¹¹⁰

Rather, there is a tendency to equate abuse with an act's inconsistency with "socially accepted standards,"¹¹¹ an index of group acceptance quite different from the internalized *mens rea*-style approach to abuse of rights employed by European law. As the Japanese Supreme Court declared in 1972,

a right must be exercised . . . within a scope judged reasonable in the light of the prevailing social conscience. When conduct by one who purports to have a right to do so fails to show social reasonableness and when the consequential damages to others exceed the limit which is generally supposed to be borne in the social life . . . the exercise of the right is no longer within its permissible scope.¹¹²

These two principal idiosyncrasies of Japanese abuse-of-rights doctrine — the generality of its application and its focus upon standards of group-judged propriety rather than individual malice — suggest broader themes in Japanese jurisprudence, and mirror tendencies in Japan's approach to individual rights under the Showa Constitution as well.

¹⁰⁷ *Id.* at 179.

¹⁰⁸ *Id.* at 139.

¹⁰⁹ See, e.g., *supra* notes 97-101 and accompanying text.

¹¹⁰ As interpreted in Japan, "[e]xercise of one's rights can be regarded as abusive, if it unreasonably infringes upon other persons' rights. *An intention to harm on the part of the holder of the right is not needed.*" ODA, *supra* note 1, at 139 (emphasis added).

¹¹¹ See, e.g., Judgment of April 25, 1975 (Nihon Shokuen Seizo case), Saikōsai [Supreme Court], 29 Minshū 456 (Japan) (finding employer's dismissal of worker to be abuse of rights under §1 of Civil Code where "an objective and reasonable ground does not exist, and cannot be justified by socially accepted standards"), quoted in ODA, *supra* note 1, at 331.

¹¹² Judgment of June 27, 1972 (Mitamura v. Suzuki), Saikōsai [Supreme Court], 26 Minshū 1067, 1069 (Japan), quoted in Young, *supra* note 95, at 970-71 & n.174.

IV. CONSTITUTIONAL RIGHTS IN POSTWAR JAPAN

The central problem in postwar Japanese constitutional law, it has been said, is the dilemma of how to mediate the conflict between individual rights and the public welfare¹¹³ — between Japan's authoritarian and group-subservient traditional culture and the highly individualist rights embodied in the Showa Constitution.¹¹⁴ Significantly, the Japanese answer to this tension has been to extend the idea of *abus des droits* into the constitutional realm. The provisions of the Showa Constitution guaranteeing fundamental individual rights, therefore, have been found subject to findings of abuse — that is, they are expressly said to be limitable by legislation undertaken in the “public welfare.”

A. “Public Welfare” Doctrine

The “traditional approach taken by the [Japanese] Supreme Court” has been that “freedom of speech, press, and other forms of expression and academic freedom can be restricted as a matter of course when it is necessary from the standpoint of the ‘public welfare.’”¹¹⁵ This “public welfare” limit derives only partly from the actual text of the Showa Constitution.

The Japanese Constitution does not saddle all individual rights with an express “public welfare” qualification. Most of the rights provided in Chapter III of the Constitution lack any explicit “public welfare” phrasing: Article 14 (“[a]ll of the people are equal under the law”), Article 15 (“[t]he people have the inalienable right to choose their public officials”), Article 19 (“[f]reedom of thought and conscience shall not be violated”), Article 20 (“[f]reedom of religion is guaranteed to all”), Article 21 (“[f]reedom of assembly and association as well as speech, press and all other forms of expression are guaranteed”), Article 31 (barring deprivation

¹¹³ FUKASE & HIGUCHI, *supra* note 3, at 135 & n.7.

¹¹⁴ *Id.* at 200 (noting tension between “[le] climat cultural spécifiquement japonais, symbolisé par le régime de tenno” and “les principes essentiellement individualistes des droits de l’homme”).

¹¹⁵ Judgment of Oct. 15, 1969 (Ishii v. Japan), Saikōsai [Supreme Court], 23 Keishū 1239 (Japan) (Tanaka, J., dissenting), *reprinted in* CASE LAW, *supra* note 34, at 203; *see generally* COURT AND CONSTITUTION *supra* note 67, at xli-xlii; CASE LAW, *supra* note 34, at 20. Though by the Supreme Court’s own formulation “public welfare” means “the maintenance of order and respect for the fundamental human rights of the individual,” the common use of “public welfare” to qualify individual rights makes clear that the operative part of this definition is “the maintenance of order.” Judgment of Oct. 11, 1950 (Japan v. Sugino), Saikōsai [Supreme Court], 4 Keishū 1012 (Japan), *reprinted in* Beer, *Constitutional System*, *supra* note 83, at 13-14.

of life or liberty or other criminal punishment without due process), Article 36 (torture and “cruel punishments” inflicted by public officers are “absolutely forbidden”), and Article 39 (ban on double jeopardy).¹¹⁶ In fact, Article 11 provides that “[t]he people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.”¹¹⁷

Yet several other of the fundamental rights enshrined in the Showa Constitution *do* contain phrasing limiting their exercise to circumstances not injurious to the public welfare. Article 22, for example, provides that one’s freedom to choose and change residence shall be respected “to the extent that it does not interfere with the public welfare,” while Article 29 guarantees a right to own or hold property only when “in conformity with the public welfare.”¹¹⁸ The seemingly two-tiered structure of constitutional rights thus provided in the Constitution has led some scholars, such as Nobushige Ukai, to suggest a “dual standard” approach to fundamental rights. Those rights expressly qualified with “public welfare” phrasing, he writes, may accordingly be limited by laws serving that public welfare, but those lacking such qualifications should be “more or less absolute, as in the First Amendment to the U.S. Constitution.”¹¹⁹

Nevertheless, Ukai’s “dual standard” view is — as he himself admits — not “generally accepted.”¹²⁰ The prevailing approach, taken by most Japanese scholars and (apparently uniformly) by the courts, is that *all* constitutional rights contain an implicit “public welfare” qualification. Despite the absolutist “eternal and inviolate” language of Article 11,¹²¹ Japanese constitutional law has tended to focus instead upon the language of Article 12:

The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.¹²²

Moreover, Article 13 also provides that citizens’ “right to life, liberty, and the pursuit of happiness shall . . . be the supreme consider-

¹¹⁶ KENPŌ [Constitution] of 1947, arts. 14, 15, 19, 20, 21, 31, 36, 39 (Japan).

¹¹⁷ *Id.* at art. 11.

¹¹⁸ *Id.* at arts. 22, 29.

¹¹⁹ Ukai, *supra* note 5, at 121.

¹²⁰ *Id.*

¹²¹ KENPŌ [Constitution] of 1947, art. 11 (Japan).

¹²² *Id.* at art. 12.

ation in legislation and in other governmental affairs," but only "to the extent that it does not interfere with the public welfare."¹²³

Rather than reading these provisions in light of Article 11 — that is, as exhortations or reminders of more general ethical duties of self-restraint beyond the actual command of a constitutional system whose guaranteed rights are explicitly made "eternal and inviolate" — the Japanese courts have read Articles 12 and 13 as imposing an actual *abus des droits* standard upon even the exercise of fundamental rights guaranteed by the constitutional text.¹²⁴ The Supreme Court

has consistently taken the view that the public welfare, that is, the general good of all the members of society, cannot be interfered with by the unrestricted exercise of a constitutionally guaranteed freedom by an individual or a group. . . . [This doctrine undertakes] to balance the new freedoms of the individual against the requirement of social order.¹²⁵

Thus it has been generally found that constitutional freedoms "are not absolute and without limits." Rather, "their abuse is forbidden, and they are placed under limitations for the public welfare."¹²⁶ Of the freedom of expression guaranteed — without "public welfare" qualification — by Article 21, for example, the Court has said:

[T]his freedom is not at all different from other types of human rights, which the people are not permitted to abuse. People must always be responsible for exercising their rights with due consideration for the public welfare. (Ref. Article 12 of the Constitution of Japan) Pursuant to this fundamental Constitutional concept, the court is assigned the mission of protecting the freedom of expression, preventing its abuse, maintaining harmony with the public welfare, and of drawing a line which would provide a reasonable demarcation between the freedom of the individuals and the welfare of the public with regard to concrete individual cases.¹²⁷

¹²³ *Id.* at art. 13.

¹²⁴ *See, e.g.*, Judgment of May 15, 1963 (Nishida v. Japan), Saikōsai [Supreme Court], 17 Keishū 303 (Japan), *reprinted in* CASE LAW, *supra* note 34, at 225 (citing Articles 12 and 13 in finding restrictions upon freedom of religion).

¹²⁵ Court and Constitution, *supra* note 66, at xlii.

¹²⁶ Judgment of Oct. 15, 1969 (Ishii v. Japan), Saikōsai [Supreme Court], 23 Keishū 1239 (Japan), *reprinted in* CASE LAW, *supra* note 34, at 186.

¹²⁷ Judgment of July 20, 1960, (Judgment Upon Case of the Metropolitan Ordinance), Saikōsai [Supreme Court], 14 Keishū 1243 (Japan) *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 84; *see also, e.g.*, Judgment of March 8, 1989 (Repata v. Japan), Saikōsai [Supreme Court], 43 Minshū 89 (Japan) (noting "the need to protect the public interests in cases where a public interest superior to this freedom

Even members of the Supreme Court bench dissenting from particular cases upholding government restrictions upon the exercise of fundamental freedoms have tended to concede this general point. As Justice Tanaka put it in his dissent from a 1969 obscenity case,

on the premise that those who lay claim to [a] freedom respect among themselves the freedom of others and mutually agree on the coexistence of freedoms, it may be best to construe these freedoms as guaranteed only as freedom attended by discipline, which does not cross over into abuse, and which, using the prevailing ideas of the community as a standard, is not contrary to the sense of justice and morality of society in general in such a manner as to actually endanger that sense. Accordingly, the attendant discipline, as the intrinsic limitation on that freedom, must of necessity be respected in order to guarantee these freedoms to each person, and to violate this discipline is nothing but an abuse of freedom.¹²⁸

Japanese constitutional law, therefore, has incorporated a strong notion of *abus des droits*. The following pages will suggest what this doctrinal innovation has meant in practice.

B. Rights in Practice

1. Freedom of Expression and Association

The Japanese Supreme Court has generally upheld the right of municipalities to regulate political demonstrations, even to the point of approving a sort of "prior restraint" whereby public officials are permitted

exists"), reprinted in 22 LAW IN JAPAN 39, 41 (1989); Judgment of Nov. 24, 1954 (Niigata v. Japan), Saikōsai [Supreme Court], 8 Minshū 1866 (Japan) (Inouye & Iwamatsu, J.J., concurring) ("The Constitution guarantees the freedom of individuals, but this guarantee is not unlimited . . . [and] it may be necessary to impose certain proper restrictions on freedom by law and regulations to maintain public order; this should be permitted without being deemed unconstitutional."), reprinted in COURT AND CONSTITUTION, *supra* note 67, at 81.

¹²⁸ Judgment of Oct. 15, 1969 (Ishii v. Japan), Saikōsai [Supreme Court], 23 Keishū 1239 (Japan) (Tanaka, J., dissenting), reprinted in CASE LAW, *supra* note 34, at 204. See also Judgment of July 4, 1956 (Libel and Public Apology Case), Saikōsai [Supreme Court] 10 Minshū 785 (Japan) (Iriye, J., dissenting in part) ("Of course, the liberties in the Constitution are not absolutely unlimited; in situations where it is recognized as absolutely necessary for the public welfare or to satisfy other constitutional requirements, a limitation thereof up to a certain point would not be considered unconstitutional."), reprinted in COURT AND CONSTITUTION, *supra* note 67, at 47, 58.

to vet proposed gatherings ahead of time, granting approval only to those deemed unlikely to threaten public order.¹²⁹ The first such case under the Showa Constitution came before the Court in 1954, in connection with a demonstration-regulation ordinance in Niigata Prefecture. In that case, the Court upheld the law in question, reasoning that there existed a general "freedom to demonstrate unless the purpose and manner of the demonstration are improper and against the public welfare." The Court concluded that it was permissible to require licenses for or notification of upcoming demonstrations "under reasonable and clear criteria in order to maintain public order and to protect the public welfare against serious harm from such activities."¹³⁰ Subsequent cases saw the Court follow the *Niigata* precedent in upholding demonstration-licensing ordinances in Saga, Saitama and Tokuyama.¹³¹

In 1960, however, the Tokyo District Court found *unconstitutional* a similar ordinance adopted by the Tokyo metropolitan government. The Supreme Court rejected this reasoning and remanded for further consideration, but in doing so altered somewhat the rationale behind the 1954 *Niigata* decision.¹³² Nevertheless, the Court firmly recapitulated the basic doctrine that "the people may not abuse [the freedom of expression, and] have a responsibility at all times to exercise [it] for the public welfare; in this respect [the freedom of expression does] not differ from other fundamental rights."¹³³ It was the Court's job to prevent such abuse and

¹²⁹ During the occupation of Japan after 1945, Allied authorities — concerned about the prominence of Communist sympathizers in Japanese opposition politics — encouraged local Japanese prefectural and municipal governments to require licenses of all public demonstrations. See COURT AND CONSTITUTION, *supra* note 67, at 84-85.

¹³⁰ Judgment of Nov. 24, 1954 (*Niigata v. Japan*), Saikōsai [Supreme Court], 8 Minshū 1866 (Japan) reprinted in COURT AND CONSTITUTION, *supra* note 67, at 70, 75.

¹³¹ COURT AND CONSTITUTION, *supra* note 67, at 84-85 (editorial note).

¹³² *Id.*

¹³³ Judgment of July 20, 1960 (Tokyo Ordinance Decision), Saikōsai [Supreme Court] 14 Keishū 1243 (Japan), reprinted in COURT AND CONSTITUTION, *supra* note 66, at 88.

[E]ven though Article 21, paragraph 2, of the Constitution prohibits censorship — previous restraint — of publication that can be called 'expression' in the strict sense, it is, after all, unavoidable that local authorities, in due consideration of both local and general circumstances, adopt prior to the fact the minimum measures necessary to maintain law and order and to guard against unforeseen situations by means of what are termed "public safety ordinances," but only in respect to expression by means of collective action.

Id. at 89. The Court noted the danger that "a quiet crowd will sometimes become caught up in a vortex of excitement and anger, and in extreme cases it will turn suddenly into a mob whose own momentum impels it toward the violation of law and order, a situation in which both the crowd's own leaders and the police are powerless," and opined that this threat allowed the government to impose restrictions. *Id.*

“strik[e] a balance between [the freedom of expression] and the public welfare.”¹³⁴ In the years since the 1960 *Tokyo* decision, the Japanese Supreme Court has “moved away from preoccupation with its general framework to the task of filling it in with specificity and concreteness in refining judicial reasoning”¹³⁵ — such as focusing upon the circumstances when such laws may permissibly be applied to assemblies — but the basic architecture of the “public welfare” restriction upon freedom of expression has not been changed.¹³⁶

¹³⁴ *Id.*

¹³⁵ Beer, *Constitutional System*, *supra* note 83, at 27.

¹³⁶ The basic principle of “public welfare” restriction has not, in fact, been applied solely to “expression by means of collective action.” Judgment of July 20, 1960 (Tokyo Ordinance Decision), Saikōsai [Supreme Court] 14 Keishū 1243 (Japan), *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 89. The conviction of a man passing out leaflets urging civil disobedience by the police (a crime) was upheld by the Supreme Court in 1951, for example, on the grounds that while “Article 21 of the Constitution guarantees the freedom of speech and publication . . . the freedom of said article is not without restriction” and that as long as there existed any conceivable danger that a police slowdown might take place at the defendant’s urging, his expression might be restrained. Judgment of Aug. 2, 1951 (Abatement of Slowdown case), Saikōsai [Supreme Court], 7 Keishū 1053 (Japan), *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 123, 124-25. *See also* Judgment of Nov. 6, 1974 (Japan v. Ozawa), Saikōsai [Supreme Court], 28 Keishū 393 (Japan) (upholding law prohibiting political activity by public employees), *cited in* Ukai, *supra* note 5, at 125. Nor are individuals’ constitutional protections against restrictions on freedom of expression any more absolute with respect to private activity. *See* Ukai, *supra* note 5, at 122 (noting that Japanese constitutional law lacks theory that would apply constitutional guarantees to “relationship among private citizens”). The Supreme Court, for example, has upheld a private employer’s right to deny job applicants employment because of their thought or creed. Judgment of Dec. 12, 1973 (Takano v. Mitsubishi Jushi K.K.), Saikōsai [Supreme Court], 27 Minshū 1536 (Japan), *cited in* Ukai, *supra* note 5, at 125-26. The *Takano* case was not a constitutional case — it concerned Japan’s statutory labor law, which was deemed not to apply to job *applicants* — but it suggests that the protection of Article 21 does not apply against restrictions by non-public actors. Curiously, despite the apparent inapplicability of constitutional guarantees to private conduct in the first place, in one 1951 case concerning a company’s dismissal of workers who wrote an article about alleged corporate corruption in a union newspaper, the Supreme Court rejected a challenge to the sacking, partly on the grounds that Articles 12 and 13 of the Constitution provided that “the freedoms of speech, press, and all other forms of expression . . . cannot run counter to the public welfare.” Judgment of April 14, 1951 (Slandorous Statements case), Saikōsai [Supreme Court], 5 Minshū 214 (Japan), *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 287. Only “in addition” did the Court refer to the fact that the employees had signed an agreement restricting their freedom of expression as a condition of their employment. *Id.*

2. Workers' Rights

The Supreme Court has also tended to uphold, on "public welfare" grounds, restrictions on workers' rights to bargain collectively and to engage in strike activity — particularly with respect to public employees.¹³⁷ In labor relations cases, the Court has seen itself as having a duty to balance the right to strike against the property rights of owners: the fundamental liberties of one side (*i.e.*, owner's rights in their property) "are not to be completely set aside before the unlimited exercise of the right of workers to strike . . . [and] the latter does not possess an absolute supremacy over the former."¹³⁸

Of course it is desirable to have harmony between these various general fundamental human rights [in property] and the rights of labor; not to disrupt this harmony is a limitation on the propriety of the right to strike. Where must this point of harmony be sought? It is determined by an over-all examination of the spirit of our system of law.¹³⁹

For some years after this "Production Control" case, however, the Court tried to develop an approach that was more "flexible and purpose oriented," so that "the rational constitutional balance would apply restrictions on labor only within a 'necessary minimum.'"¹⁴⁰ In a 1966 case, for example, the Court tried to articulate a more nuanced standard for when restrictions on labor rights were permissible, suggesting the need to confine restrictions "to the necessary and reasonable" minimum, to restrict only those workers whose duties were "strongly imbued with a public interest," to allow such penalties for violations only where "necessary and unavoidable," and to undertake appropriate "compensatory measures" where restrictions were unavoidable.¹⁴¹

¹³⁷ As we have already seen, public employees' rights to engage in political activity have been sharply constrained. *See supra* note 136 and accompanying text.

¹³⁸ Judgment of Nov. 15, 1950 (Production Control case), Saikōsai [Supreme Court], 4 Keishū 2257 (Japan), *reprinted in* COURT AND CONSTITUTION, *supra* note 67 at 273, 275.

¹³⁹ *Id.* In this case, workers' "production control" takeover of a factory was declared to be theft. *Id.* at 277.

¹⁴⁰ Ukai, *supra* note 5, at 123. *See, e.g.*, Judgment of Oct. 26, 1966 (Sotoyama v. Japan), Saikōsai [Supreme Court], 8 Keishū 901 (Japan) (suggesting that "an obstruction caused by a strike [by certain public employees], even if illegal [under prevailing labor statutes] would be justified if it was not accompanied by violence"), *cited in* Ukai, *supra* note 5, at 123-124.

¹⁴¹ Judgment of Oct. 26, 1966 (Toyama v. Japan), Saikōsai [Supreme Court], 20 Keishū 901 (Japan), *reprinted in* CASE LAW, *supra* note 34, at 92. In a 1969 case, the

Nevertheless, the basic doctrine that even those labor rights guaranteed in the Constitution¹⁴² were subject to an abuse-of-rights standard in the name of the “public welfare” remained unaltered.

The fundamental rights of workers, such as the right to organize, to bargain collectively, and to resort to dispute activities, are guaranteed to all classes of workers by Article 28 However, even these rights themselves are not absolute but are subject to restriction. Such rights should be understood to be subject to an inherent restriction, justified from the standpoint that the interests of the nation as a whole have to be protected.¹⁴³

Where the right to strike ran up against owners’ rights in property, it remained the Court’s task to ensure that “a legal interpretation of the substantive law curtailing fundamental rights of workers must be both sound and reasonable when interpreting the statute so as to maintain harmony and balance between these two groups of rights.”¹⁴⁴ Moreover, at least with respect to public employees, the Supreme Court returned in 1973 to a more restrictive approach to workers’ rights that tended to treat them as uniformly subject to legal restrictions.¹⁴⁵

It should be noted, however, that the importance of avoiding “disruption” of the “harmony” between fundamental human rights¹⁴⁶ was not a restriction applied solely to disgruntled proletarians. Owners’ rights in property, for example, were also “by [their] nature to be defined by law

Supreme Court conceded that a literal reading of the National Public Employees Law (NPEL) would “exceed[] the bounds of unavoidable necessity in prohibiting [worker] dispute activities” and be, therefore, unconstitutional. The Court’s majority, however, adopted a narrower reading of the statute that found the NPEL to be reasonable and constitutional. Judgment of April 2, 1969 (*Japan v. Sakane*), Saikōsai [Supreme Court], 23 Keishū 685 (Japan), *reprinted in* CASE LAW, *supra* note 34, at 106.

¹⁴² KENPŌ [Constitution] of 1947, art. 28 (Japan) (“The right of workers to organize and to bargain and act collectively is guaranteed.”).

¹⁴³ Judgment of Oct. 26, 1966 (*Toyama v. Japan*), Saikōsai [Supreme Court], 20 Keishū 901 (Japan), *reprinted in* CASE LAW, *supra* note 34, at 91.

¹⁴⁴ *Id.* at 90.

¹⁴⁵ *See Beer, Constitutional System, supra* note 83, at 25. Oddly, the Court had at one point decided that ordinary statutes could *exempt* public employees from the constitutional protection of Article 28’s guarantee of worker collective action. After 1973, however, the Court adopted the more consistent view that Article 28 *did* cover public employees — and that it was merely that Article’s implicit “public welfare” qualification that permitted their collective-action rights to be restricted. *See ODA, supra* note 1, at 321 (citing Judgment of April 25, 1973, Saikōsai [Supreme Court], 23 Keishū 305 (Japan)).

¹⁴⁶ *See supra* notes 138, 143.

in conformity with the public welfare," so that "in cases in which it is necessary to maintain or to advance the public welfare, the right to utilize, to profit from, or to dispose of said right of property may be limited."¹⁴⁷ This approach of seeking to achieve "balance" or "harmony" in the conflicting exercise of constitutional rights by barring the "abuse" of such rights represents perhaps the most distinctive current of Japanese constitutional jurisprudence.

C. *Themes of Japanese Rights Jurisprudence*

To some extent, the eagerness of the Japanese courts to permit restrictions upon constitutionally-guaranteed rights should not be too surprising. Compared, for example, with the U.S. Constitution whose scheme of powerful rights-guarantees provided the inspiration for Japan's constitutional protection, the Showa Constitution includes an enormously expansive list of provisions — from traditional protection of freedom of conscience (Article 19), expression (Article 21) and religion (Article 20) to such things as "academic freedom" (Article 23), marriage-by-consent (Article 24), the right to an education (Article 26), and "the right to maintain the minimum standards of wholesome and cultured living" (Article 25).¹⁴⁸ With such an ambitious list of freedoms, and one featuring expansive social and economic rights in addition to the traditional canon of civil liberties, it might be surprising if Japanese jurists attempted to enforce them all in as relatively uncompromising a manner as U.S. courts enforce the American Bill of Rights.¹⁴⁹

¹⁴⁷ Judgment of Dec. 23, 1953 (Just Compensation case), Saikōsai [Supreme Court], 7 Minshū 1523 (Japan), reprinted in *COURT AND CONSTITUTION*, *supra* note 67, at 228, 230. In a 1963 case in which a family who had farmed on the banks of a reservoir for generations was prosecuted for violation of a new ordinance prohibiting such activity, the Court declared that

to prevent disaster, it is necessary in the life of our society that a person who possesses a property right to use the bank of a reservoir should be almost completely prohibited from the exercise of the right Everybody who possesses a property right to use the bank of a reservoir is naturally obliged to exercise the same for the public welfare.

Judgment of June 26, 1963 (Japan v. Iida), Saikōsai [Supreme Court], 17 Keishū 521 (Japan), reprinted in *CASE LAW*, *supra* note 34, at 76.

¹⁴⁸ KENPŌ [Constitution] of 1947, arts. 19-26 (Japan).

¹⁴⁹ Indeed, it did not take the Japanese courts long to restrict the meaning of such a vague provision as Article 25's guarantee of "minimum standard of wholesome and cultured living." See Judgment of Sept. 29, 1948 (Minimum Standards case), Saikōsai [Supreme Court], 2 Keishū 1235 (Japan) (finding that Article 25 does not directly confer constitutional rights but is instead only a general declaration of governmental responsibility — the specifics of which are left to normal government social legislation), reprinted in *COURT AND CONSTITUTION*, *supra* note 67, at 253, 255. In a subsequent

Moreover, though building upon a doctrinal foundation which emphasizes the need to prevent "abuses" of constitutionally-guaranteed rights, Japanese courts have in recent years been somewhat more solicitous of individual freedoms. They have, for example, become more interested in requiring of government officials stronger showings of "public welfare" necessity before fundamental rights may be abridged.

Since the late 1960s, the courts have given increasing attention to development of less abstract and more precise standards for constitutional cases. Fewer decisions have justified restraints on freedom by relying primarily on general references to "the public welfare" (articles 12 and 13 [of the Constitution]); rather, the meaning of the public welfare in concrete contexts and specific issue areas has been spelled out more clearly. Through the 1970s and into the 1980s, the developing emphasis has been on . . . case by case (*kesu bai kesu*) and issue-by-issue "comparative consideration" (*hikaku koryo*), or balancing, of interests and values involved in disputes; the need for clarity and the dangers of vagueness in legal provisions and judicial reasoning; the distinction between direct and indirect or attendant restraints on freedom in pursuit of other legislative goals . . . and, in regulating individual rights, formulae such as "clear and present danger" and its variants, "minimum necessary degree" of restraint, and "less restrictive alternatives."¹⁵⁰

While even the most prized constitutionally-guaranteed freedom may yet be abridged by ordinary laws passed in the interests of the "public welfare," the courts' constitutional case law has gradually begun to narrow the parameters in which this governmental discretion may be permitted.

Nevertheless, at least one recent decision suggests that the government still retains a vast discretion to violate constitutional rights. In 1992, the Japanese Supreme Court upheld a 1978 statute that permitted the government to ban the use of buildings near Tokyo's new Narita airport for protest activity against the airport. Despite the obvious impact of the law upon freedom of expression and upon the property rights of neighboring

Article 25 case, the Court declared that it was left to the discretion of the Minister of Health and Welfare to determine what such "minimum standards of wholesome and cultured living" were for purposes of making payments to a sufferer from tuberculosis — "as long as [the Minister] does not deviate from the aims and purposes of the law." Judgment of May 24, 1967 (*Asahi v. Japan*), Saikōsai [Supreme Court], 21 Minshū 1043 (Japan), reprinted in CASE LAW, *supra* note 34, at 135. The *Asahi* case, however, was dismissed because the patient died and his heirs were barred from succeeding to his suit. *Id.* at 134.

¹⁵⁰ Beer, *Constitutional System*, *supra* note 83, at 22 (citations omitted).

landowners, the Court found that preventing the use of nearby buildings for such purposes was “of great and urgent necessity in ensuring the safe establishment and operation, etc., of the new airport, which is highly desirable from a national, socio-economic, public interest and humane point of view.”¹⁵¹ In other words, as one commentator noted ominously, “Japan’s highest court appears to argue that the New Narita Law is constitutional by the very function of the fact that it needed to be enacted.”¹⁵²

The truism here is: because the establishment and safe operation of the airport is important, it is necessary for the public welfare. The unspoken extension of this logic is that import and necessity alone are enough to make the law constitutional. . . . [This] avoids the difficult issue of why this translates into a governmental ability to interfere with property rights and personal freedoms without concern for due process or other individual rights.¹⁵³

In light of the “public welfare” traditions of the Japanese Supreme Court we have discussed above, these comments may overstate the novelty of the *Narita* holding — but they do not overstate its impact upon constitutionally-guaranteed individual rights. *Narita* is not, in this sense, a startling new direction for Japanese constitutional law. Rather, Japan’s courts have long imported abuse-of-rights reasoning into constitutional jurisprudence in ways which tie the exercise of fundamental freedoms to standards of community propriety and government assessments of “public welfare.” The search for the appropriate “harmony” or “balance” between conflicting claims of right goes on.

1. Resistance to Findings of Unconstitutionality

In this respect, it is significant that despite the efforts of Japanese courts to spell out more exacting criteria for determining the “public welfare” for purposes of restricting constitutional rights,¹⁵⁴ the Japanese Supreme Court has proven extraordinarily unwilling to invalidate laws or other official actions for violations of the Constitution. Indeed, out of 186 civil proceedings touching upon issues of constitutionality before the Japanese Supreme Court between 1950 and 1980, only two verdicts of

¹⁵¹ Judgment of July 1, 1992, Saikōsai [Supreme Court], HANTA 76, 80 (Japan) quoted in Colin P.A. Jones, *Narita Airport and the Japanese Constitution: A Case Study*, 24 LAW IN JAPAN 39, 51 (1991).

¹⁵² Jones, *supra* note 151, at 54.

¹⁵³ *Id.* at 55.

¹⁵⁴ See Beer, *Constitutional System*, *supra* note 83, at 22.

unconstitutionality were returned; a rate of only a fraction over one percent.¹⁵⁵ With respect to criminal proceedings touching on constitutionality during the same period, the rate was rather higher, amounting to 256 verdicts of unconstitutionality out of 1,228 cases argued; a rate of nearly 21 percent.¹⁵⁶ The vast majority of these findings of unconstitutionality in criminal cases, however — some 223 out of the 256 — occurred during a brief period in 1954-55 as the result of a flurry of challenges to laws passed during the Occupation period at the insistence of the Allied authorities.¹⁵⁷ Discounting this somewhat anomalous 1954-55 period, therefore, only 33 of 1421 cases (just 2.5%) resulted in verdicts of unconstitutionality.

Moreover, the highly fact-specific nature of criminal proceedings and the Court's greater ability (e.g., on due process grounds) to overturn a particular *conviction* without attacking the underlying penal provision, may have made findings of unconstitutionality in criminal cases seem less like challenges to the prerogatives of the legislature than would comparable verdicts in civil cases expressly challenging a statute.¹⁵⁸ (Indeed, since Japanese law does not permit jury trials,¹⁵⁹ the quashing of a criminal conviction often amounts to no more than one judge telling another that he has exercised poor judgment.) As a rule, therefore, it is *highly* unusual for the Japanese Supreme Court to strike down a law or to invalidate an official government act on grounds of a unconstitutionality. Its deference to the judgment of the government is nearly perfect.

¹⁵⁵ FUKASE & HIGUCHI, *supra* note 3, at 301.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 301-02.

¹⁵⁸ *See, e.g.*, Judgment of April 28, 1965 (Yoshida v. Japan), Saikōsai [Supreme Court], 19 Keishū 203 (Japan) (overturning conviction for violation of Article 29 property-rights guarantee and Article 31 due process guarantee), *reprinted in* CASE LAW, *supra* note 34, at 79.

¹⁵⁹ Proposals for the adoption of a jury-trial system were repeatedly rejected during the late 19th and early 20th centuries. Japan did adopt a weak jury system in 1923 — in which the jury was used as “a mere consultative body” whose decisions were not actually binding upon the court — but this law was suspended in 1943. After the Second World War, the first (American-inspired) draft of the Code of Criminal Procedure included provision for jury trials, but this was deleted. Though further proposals for a jury system continue periodically to be made, none has yet to be adopted. *See generally* ODA, *supra* note 1, at 77-79. Interestingly, Hiroshi Oda attributes the failure of the jury system during the 1923-43 interval, in part, to the tendency of ordinary Japanese “to defer to officialdom while distrusting their peers” — which helped produce a defendants’ waiver rate for jury trials of nearly 90 percent. *Id.* at 78.

2. Some Exceptions that Illustrate the Rule

As a result, there exist but a handful of cases which one may study in order to understand why it is that the Supreme Court *does* finally invalidate decisions of the government. The first of these occurred in 1962, when the Court found a provision of the prevailing Customs Law to violate Articles 29 (property rights) and 31 (due process) of the Constitution because it allowed confiscation of the property of innocent third parties without notice or opportunity to be heard.¹⁶⁰ Another case occurred in 1973, when the Court struck down — as a violation of the equality rule of Article 14¹⁶¹ — Japan's "patricide" law providing especially severe penalties for those who murder a lineal ascendant.¹⁶² Since this law had been challenged some years previously on the same Article 14 grounds, and was upheld by the Supreme Court in 1950,¹⁶³ this was

¹⁶⁰ This, the Court said, was "extremely unreasonable and cannot be tolerated by the Constitution." Judgment of Nov. 28, 1962 (*Nakamura v. Japan*), Saikōsai [Supreme Court], 16 Keishū 1593 (Japan), reprinted in *CASE LAW*, *supra* note 34, at 60. The appeal of the *Nakamura* case from the lower courts was permitted as a *jokoku* appeal — one made to the Supreme Court "on the ground of violation of the Constitution or erroneous interpretation of the Constitution and conflict with the precedents of the Supreme Court," because the confiscation was deemed to be "an additional penalty" against the accused. ODA, *supra* note 1, at 403; See also *Nakamura*, 16 Keishū 1593, in *CASE LAW*, *supra* note 34, at 60; see also *id.* (Irie, J., concurring) at 65. In finding these provisions of the Customs Law unconstitutional, the Supreme Court thus modified its precedents in the Judgment of Oct. 19, 1960 (*Omachi v. Japan*), Saikōsai [Supreme Court], 16 Keishū 1593 (Japan) and Judgment of Oct. 19, 1960 (*Kiyonaga v. Japan*), Saikōsai [Supreme Court], 14 Keishū 1611 (Japan). See *Nakamura*, 16 Keishū 1593, reprinted in *CASE LAW*, *supra* note 34, at 61.

¹⁶¹ KENPŌ [Constitution] of 1947, art. 14 (Japan) ("All people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.")

¹⁶² Judgment of April 4, 1973 (*Aizawa v. Japan*), Saikōsai [Supreme Court] 27 Keishū 256 (Japan), cited in Ukai, *supra* note 5, at 118-19.

¹⁶³ Judgment of Oct 11, 1950 (Patricide case), Saikōsai [Supreme Court], 4 Keishū 2037 (Japan), reprinted in *COURT AND CONSTITUTION*, *supra* note 67, at 129. In this case, the Court found that the protection of lineal ascendants was a particularly important part of the Japanese tradition, and that relations between parents and children were not one of the categories made, in effect, "suspect" under Article 14: such familial relations "do not fit under any of the categories, such as social status, and so forth, which are mentioned therein as impermissible reasons for discriminatory treatment." *Id.* at 132. Moreover, the Court suggested vaguely, it was appropriate to treat the patricide law not as privileging lineal ascendants (the murder of whom was disproportionately harshly punished) but as resulting, rather, from "a special con-

the first time the Court had overturned its own constitutional precedent.¹⁶⁴

In 1975, the Supreme Court again overturned its own precedent,¹⁶⁵ striking down a law regulating the location of pharmacies, deeming it to conflict with the Constitution's Article 22 protection of citizens' freedom to choose an occupation. Significantly, the Article 22 phrasing in question did contain an express "public welfare" qualification,¹⁶⁶ and the Court went out of its way to reiterate the traditionalist notion that one's occupation was "a social activity within which the necessity for some sort of restriction is inherent" in response to the needs of

social and economic policy, the harmonious development of the nation's economy, [the] promotion of social and public convenience and the protection of the economically weak, . . . [and the] guaranteeing the safety of community life and upholding the social order.¹⁶⁷

Nevertheless, the Court still required that the exercise of governmental police powers to regulate this right be "necessary and proper" vis-à-vis

sideration of the antimoral character of the descendent who is the assailant, the occasional protection thus given to lineal ascendants being merely a reflection of this." *Id.* at 132-33.

¹⁶⁴ John Owen Haley has written that the first instance of the Supreme Court overruling its own precedent occurred in 1975 with the *Sumiyoshi* case, John Owen Haley, *The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion*, 8 *LAW IN JAPAN* 188, 189 (1975) [hereinafter Haley, *Freedom to Choose*]; cf. *infra* note 167 (citing the *Sumiyoshi* decision), but this does not appear to be the case. See also CASE LAW, *supra* note 34, at 20 (noting that the Japanese Supreme Court reversed its own 1950 holding on patricide law in 1973).

¹⁶⁵ Or at least it appeared to. See *infra* text accompanying notes 169-70. In Judgment of Jan. 26, 1955 (Public Bathhouses case), Saikōsai [Supreme Court], 9 Keishū 89 (Japan), reprinted in COURT AND CONSTITUTION, *supra* note 67, at 293, 296 the Supreme Court had found public bathhouses "indispensable to the daily life of the majority of the people" and had upheld a law regulating their location in the interests of preventing "maldistribution or excessive numbers . . . counter to the public welfare." *Id.* at 296.

¹⁶⁶ KENPŌ [Constitution] of 1947, art. 22 (Japan) ("Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.")

¹⁶⁷ Judgment of April 30, 1975 (*Sumiyoshi v. Governor of Hiroshima Prefecture*), Saikōsai [Supreme Court], 1 HANJI 60 (Japan), reprinted in 8 *LAW IN JAPAN* 194, 196 (1975). It had long been agreed by the Court that "the provision of Article 22, paragraph 1 of the Constitution clearly stipulates that the freedom of occupation therein is not without limit, but may be restricted by requirement of the public welfare." Judgment of Dec. 4, 1963 (*Koizumi v. Japan*), 17 Keishū 2434 (Japan), reprinted in CASE LAW, *supra* note 34, at 80.

some important public interest — and found that the provisions of the Pharmaceutical Affairs Law regulating the geographical location of pharmacies were not sufficiently related to that act's purpose of "establish[ing] necessary and reasonable regulations for the purpose of preventing the dispensing of substandard drugs" to meet this standard.¹⁶⁸

As John Owen Haley has suggested, this last case may well require no more of the Diet than a greater degree of candor in its findings of "public welfare" necessity.¹⁶⁹ The Pharmaceutical Affairs Law, in other words, might have been found constitutional if its statement of purpose had included not simply preventing the dispensing of substandard drugs but preventing "maldistribution or excess numbers" of pharmacies.¹⁷⁰ Nevertheless, it does illustrate that the Supreme Court is at least *capable* of second-guessing the Japanese legislature even within the permissive "public welfare" framework — and that the trend in Japanese jurisprudence toward a more exacting assessment of governmental findings of "public welfare" necessity¹⁷¹ may well be improving the degree of protection afforded the freedoms guaranteed in the Showa Constitution.¹⁷²

¹⁶⁸ Judgment of April 30, 1975 (*Sumiyoshi v. Governor of Hiroshima Prefecture*), Saikōsai [Supreme Court], 1 HANJI 60 (Japan), reprinted in 8 LAW IN JAPAN at 204.

¹⁶⁹ Haley, *Freedom to Choose*, *supra* note 164, at 194. Nobushige Ukai feels the *Obscenity Case*, Judgment of Oct. 15, 1969 (*Ishii v. Japan*), Saikōsai [Supreme Court], 23 Keishū 1239 (Japan), reprinted in CASE LAW, *supra* note 34, at 186, to be irreconcilable with the *Sumiyoshi* holding. See Ukai, *supra* note 5, at 122. If *Sumiyoshi* is read narrowly as Haley suggests, however, the inconsistency disappears — since by Ukai's own account, *Ishii* upheld restrictions upon the distribution of allegedly obscene materials where the express purpose of the law in question was precisely to control such obscenity. *Id.*

¹⁷⁰ Cf. Judgment of Jan 26, 1955 (Public Bathhouses case), Saikōsai [Supreme Court], 9 Minshū 89 (Japan) (upholding regulation of bathhouse locations to prevent "maldistribution or excessive numbers"), reprinted in COURT AND CONSTITUTION, *supra* note 67, at 293, 296.

¹⁷¹ See *supra* text accompanying note 150.

¹⁷² In 1980, for example, the Supreme Court upheld a lower court decision allowing reporters to refuse to testify in a court of law about their sources of information, finding that such a refusal to testify should generally be permitted unless it obstructs the pursuit of evidence to such a degree as to prevent a fair trial. See Beer, *Constitutional System*, *supra* note 83, at 31. This effectively overturned a prior Supreme Court precedent from 1952, in which a reporter's conviction for refusing to testify was upheld for fear that if newsmen received a special privilege of silence "then all the people would be guaranteed the freedom of sources under Article 21[']s guarantee of freedom of expression[]." The Article 21 guarantee, declared by a unanimous Court in that case, "means that everyone must be allowed to say what he wishes to the extent that it does not interfere with the public welfare." Judgment of Aug. 6, 1952 (*Right of a Reporter to Refuse to Divulge a Source case*), Saikōsai [Supreme Court], 6 Keishū 974 (Japan)

V. CONSTITUTIONALISM AND JUDICIAL REVIEW

Article 81 of the Showa Constitution, which provides that “[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act,”¹⁷³ roots the Court’s powers of judicial review in the express text of the document itself. Though the first draft of the Constitution contained less extensive provisions for judicial review,¹⁷⁴ the present Article 81 — and the Constitution’s general strengthening of judicial independence — has been widely accepted and generally praised by Japanese jurists and constitutional scholars.¹⁷⁵ It is also generally understood that the Constitution’s scheme of judicial review for constitutionality is modeled directly upon the American model,¹⁷⁶ so much so that “Japanese judges often study (even if they do not often cite) precedent of the United States Supreme Court in constitutional cases, and many influential Japanese legal scholars continue to be well-informed about American laws and judicial decisions touching on constitutional issues.”¹⁷⁷ As our discussion of Japanese constitutional case law on the protection of fundamental freedoms should suggest, however, the mere fact of Japan’s formal textual adoption of the American scheme has not prevented a notable indigenization of judicial review.

(unanimous decision), *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 41-42.

¹⁷³ KENPŌ [Constitution] of 1947, art. 81 (Japan).

¹⁷⁴ Gen. Douglas MacArthur’s original draft would have provided judicial review only for laws and other official acts relating to fundamental human rights. For other matters — *e.g.*, separation of powers issues — the Diet would have been given the power to review Court decisions and overturn or revise them by a two-thirds vote. This two-tiered system, however, was eliminated as the original draft was revised prior to adoption. *See* COMMISSION, *supra* note 28, at 158.

¹⁷⁵ Of the commissioners serving on the government’s Commission on the Constitution in the 1950s, “almost all” approved of the Showa Constitution’s strengthening of the judicial branch and provisions for judicial review. While some noted the awkwardness of importing to Japan the U.S. system of judicial review, only one commissioner actually wished to end it. *See id.* at 315-23.

¹⁷⁶ As Justice Masuo Shimoizaka put it, “the Supreme Court of the United States of America . . . is based on a system of review for unconstitutionality that is the same as ours.” Judgment of Nov. 28, 1962 (Nakamura v. Japan), Saikōsai [Supreme Court], 16 Keishū 1593 (Japan) (Shimoizaka, J., dissenting on other grounds), *reprinted in* CASE LAW, *supra* note 34, at 70. *See also* Beer, *Constitutionalism in Asia*, *supra* note 87, at 16-17 (“Judicial review directly inspired by American precedent was written into the 1947 Constitution of Japan during the Occupation”) (citations omitted).

¹⁷⁷ Beer, *Constitutionalism in Asia*, *supra* note 88, at 12.

A. *The Doctrine of Legislative Supremacy*

As we have seen,¹⁷⁸ the Japanese Supreme Court has proven extraordinarily willing to defer to the political branches, and has generally refused to find laws duly enacted by the Diet (or other official acts of the government) to have violated the Constitution. Article 41 of the Constitution provides that “[t]he Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State,”¹⁷⁹ and the Court has traditionally adhered to a “principle of legislative supremacy” that makes it loathe to second-guess the decisions of the legislature except in the most extreme circumstances.¹⁸⁰ Furthermore, the idea that the default mode of governmental power is a *lack* of constraint upon the power of the political branches — a supposition developed under the very different scheme of the Meiji Constitution — is partially reflected even in Japan’s modern Cabinet Law.¹⁸¹

These ideas of legislative supremacy have helped make the Supreme Court extremely deferential to the judgment of the National Diet in enacting legislation and to the discretion of the government in undertaking other official acts. Indeed, as Tadakazu Fukase and Yoichi Higuchi have observed, even the handful of cases in which the Court *has* found a law unconstitutional were far from being “hot” political issues. Rather than a Court moving toward a more vigorous approach to judicial review, they see

a prolongation of the Supreme Court’s attitude of conciliation toward the political branches, essentially playing the role of legitimating even the most doubtful of their constitutional practices.¹⁸²

This deferential attitude — reinforced by the provisions of Article 79, which provides for the periodic review of Supreme Court appointments by popular vote¹⁸³ and thus theoretically subjects every justice to

¹⁷⁸ See *supra* text accompanying notes 155-58.

¹⁷⁹ KENPŌ [Constitution] of 1947, art. 41 (Japan).

¹⁸⁰ See COURT AND CONSTITUTION, *supra* note 67, at xxxviii; Ukai, *supra* note 5, at 118; FUKASE & HIGUCHI, *supra* note 3, at 302.

¹⁸¹ MINPŌ (Civil Code), Law No. 5 of 1947, art. 11 (Japan); see ODA, *supra* note 1, at 45.

¹⁸² FUKASE & HIGUCHI, *supra* note 3, at 311 (They see “un prolongement de l’attitude de la Cour supreme, toujours conciliante à l’égard des organes politiques, et jouant ainsi un role essentiellement légitimateur de leurs pratiques pourtant constitutionnellement douteuses.”) (author’s translation).

¹⁸³ KENPŌ [Constitution] of 1947, art. 79 para. 2 (Japan) (“The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and

the “recurring threat of what amounts to a popular recall”¹⁸⁴ — has powerfully shaped Japanese constitutional law.¹⁸⁵

B. Political Question Doctrine

Given this tradition of deference to the political branches, it is not surprising that Japanese judges have long been enamored of judicial doctrines that legitimate such deference, such as French theories of “act de gouvernement,” British ideas of “act of state,” and (especially) America’s constitutional “political question” doctrine.¹⁸⁶ Most famously,

shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.”); *id.*, at art. 79, para. 3 (“In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.”).

¹⁸⁴ GROVER, *supra* note 39, at 88 (citation omitted). The theory behind these provisions is that the Supreme Court should be “ultimately responsible to the people in whom resides sovereign power.” Hideo Tanaka, *The Appointment of Supreme Court Justices and the Popular Review of Appointments*, 11 LAW IN JAPAN 25, 33 (Koji Ishimura trans., 1978). The method by which this review process is carried out requires voters to place an “X” before the name of a judge they wish to dismiss — with non-responses counted as favorable votes. This procedure was found constitutional in Judgment of Feb. 20, 1952. *Id.* at 35 (citing *Sakai v. Administrative Committee*), Saikōsai [Supreme Court], 6 Minshū 122 (Japan). No judge, however, appears ever to have been dismissed pursuant to an Article 79 recall. *See, e.g.*, COURT AND CONSTITUTION, *supra* note 67, at xx-xxi.

¹⁸⁵ Moreover, though it would hardly seem to have much to complain about, the government has attempted to interfere in the workings of the judiciary on a handful of occasions. In 1949, for example, the Judicial Committee of the House of Councillors (the upper legislative house) attempted to use their power of legislative investigation to challenge a criminal verdict which they considered to be too lenient. This, however, was rebuffed by the Supreme Court as an impermissible infringement upon judicial prerogatives. *See* COURT AND CONSTITUTION, *supra* note 67, at xliii-xliv. In the 1960s and early 1970s, Japan experienced what Hiroshi Itoh and Lawrence Beer have called a sort of “judicial crisis,” in which considerable political pressure was brought to bear — upon judges in the form of investigations into alleged lack of impartiality — who belonged to “reformist” political groups. *See* CASE LAW, *supra* note 34, at 16-18. During this period, as well, the process of appointing judges to the Supreme Court became highly politicized, as the cabinet officials of the Liberal Democratic Party government appointed a series of more conservative judges to the high court bench. *Id.* at 11.

¹⁸⁶ *See, e.g.*, Judgment of Dec. 16, 1959 (Sunakawa Decision), Saikōsai [Supreme Court], 13 Keishū 3225 (Japan) (Fujita & Iriye, JJ., concurring) (citing French “act de gouvernement,” American “political question,” British “matter of state” and German “Regierungsakt” and “Hoheitsakt” doctrines), reprinted in COURT AND CONSTITUTION, *supra* note 67, at 298, 318; *see generally* ODA, *supra* note 1, at 41-42; FUKASE &

the Japanese Supreme Court was confronted in 1959 with a constitutional challenge to the United States-Japan Security Treaty, which permitted the maintenance of formidable U.S. military bases on Japanese soil — allegedly in violation of Japan's famous constitutional war-renunciation clause, Article 9.¹⁸⁷ The Supreme Court dismissed the challenge, arguing that while Article 9 renounced war, it did not deny Japan "the inherent right of self-defense, which our country possesses as a sovereign nation," and did not prevent requesting security guarantees from another country. "[T]he pacifism of our Constitution has never provided for either defenselessness or nonresistance [to aggression]."¹⁸⁸

More importantly, however, the Supreme Court ruled that it had no power to look into the constitutional validity of a government act having the highly "political" character of a security treaty.

[T]he Security Treaty in the present case must be regarded as having a highly political nature which . . . possesses an extremely important relation to the basis of the existence of our country as a sovereign nation. There are not a few points in which a legal decision as to the unconstitutionality of its content is simply the other side of the coin of the political or discretionary decision of the cabinet, which concluded the treaty, or of the National Diet, which gave its consent to it. Consequently, the legal decision as to unconstitutionality has a character which, as a matter of principle, is not adaptable to review by a judicial court, which has as its mission a purely judicial function; accordingly, it falls outside the right of judicial review by the courts, unless there is clearly obvious unconstitutionality or invalidity. It is proper to interpret

HIGUCHI, *supra* note 3, at 299-300.

The Japanese Supreme Court was also quick to follow American precedents and restrict its ability to decide abstract constitutional questions, affirming that its power to render decisions applied only to "concrete legal disputes." *See, e.g.*, Judgment of Oct. 8, 1952 (Suzuki case), Saikōsai [Supreme Court], 6 Minshū 783 (Japan), *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 362.

¹⁸⁷ This provision, which constitutes the entirety of Chapter II of the Showa Constitution, provides:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

KENPŌ [Constitution] of 1947, art. 9 (Japan).

¹⁸⁸ Judgment of Dec. 16, 1959 (*Constitutionality of U.S. Bases* case), Saikōsai [Supreme Court], 13 Keishū 3225 (Japan), *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 303.

this primarily as a matter that must be entrusted to the decision of the cabinet, which possesses the power to conclude treaties, and of the National Diet, which has the power to approve them; and it ultimately must be left to the political review of the sovereign people.¹⁸⁹

Despite the Court's passing comment about the possibility of a contrary finding where "there is clearly obvious unconstitutionality or invalidity" — an idea which imposes an enormously high standard¹⁹⁰ and seems unlikely to have much practical effect — it seems clear that Article 9 is not likely to be a constitutional provision enforced with vigor by the Japanese courts.¹⁹¹

¹⁸⁹ *Id.* at 305-06. This phrasing was that of the terse majority opinion. Several justices provided supplementary (*i.e.*, concurring) opinions that varied somewhat in their lines of reasoning, but the basic point remained the same. *See, e.g., id.* (Fujita & Iriye, JJ., concurring), at 318 (arguing that "such decisions must be left to the political elements . . . and ultimately to the people themselves"); *id.* (Tarumi, J., concurring) ("Treaties that possess a high political content with an extremely urgent relationship to the peace and security of our country . . . differ from ordinary treaties . . . [and] it is not appropriate that the legal judgment of their possible unconstitutionality be made by review of the judicial courts") For Justice Kawamura Daisuke, the key to this result was the lack of judicially-determinable standards: "there exists no objective criterion to be used to determine if one policy is absolute truth or if another policy contains no truth." *Id.* at 334 (Kawamura, J., concurring).

Three justices, in fact, went further than the majority. Justices Fujita Hachiro and Iriye Toshio, for example, argued that treaties with such a high political content ultimately lie entirely "outside both the power of review of the courts and the force of domestic law because they are acts of government." *Id.* at 321 (Fujita & Iriye, JJ., concurring). Justice Tarumi Katsumi did not even feel this principle applied only to treaties: "[C]ertain acts of both Houses of the National Diet and of the [cabinet] government," he wrote, "are regarded as not being appropriately subject to a determination of constitutionality by the courts" *Id.* at 328 (Tarumi, J., concurring).

¹⁹⁰ John M. Maki, who translated the above passage, emphasizes that the phrase "unless there is clearly obvious unconstitutionality or invalidity" is considerably weaker in this English translation than in the original Japanese. He suggests that a more accurate (though much more cumbersome) rendering would be "unconstitutionality and invalidity that are extremely obvious at a glance." COURT AND CONSTITUTION, *supra* note 67, at 306 n.2. As Justice Otani Katsuhige recognized in his dissent in the *U.S. Bases* case, "[w]hat is termed 'clearly obvious unconstitutionality and invalidity' in the majority opinion is something which, by and large, does not exist. It exists only in name." Judgment of Dec. 16, 1959 (Constitutionality of U.S. Bases case), Koto Saibansho [High Court], 13 Hanreishū 3225 (Japan) (Otani, J., dissenting), *reprinted in* COURT AND CONSTITUTION, *supra* note 67, at 349.

¹⁹¹ The 1959 *U.S. Bases* case was reaffirmed ten years later — though in this case the Court used somewhat less exacting language in suggesting how rare the circumstances must be which would merit a finding of unconstitutionality. *See* Judgment of

C. "Warnings of Unconstitutionality" and the Apportionment Cases

The most interesting dynamics of judicial review in the Japanese constitutional system, however, have revolved around the country's continuing problems with electoral malapportionment. The locus of this difficulty is the enormous advantage given to voters in rural areas, whose ballots — because of population differences between urban and rural districts sending the same number of Representatives to the National Diet — have occasionally been more than five times as valuable as the ballots of urban voters.¹⁹² Electoral malapportionment has been described as "Japan's most important unresolved constitutional law problem,"¹⁹³ and the Supreme Court's efforts to deal with these difficulties suggest important themes in Japanese jurisprudence.

The Supreme Court first encountered the apportionment problem in a case arising out of the 1962 House of Representatives elections.¹⁹⁴ It dismissed this Article 14 challenge¹⁹⁵ to Japan's districting law, however, on the grounds that while voter equality was "definitely desirable in terms of the constitutional principle of equality under the law," such matters should generally be left to the policy judgments of the legislature absent "an extreme inequality in the voter's enjoyment of the right to elect."¹⁹⁶ Confronted after the 1972 election, however, with greater vote-

April 2, 1969 (Japan v. Sakane), Saikōsai [Supreme Court], 23 Keishū 685 (Japan) (declaring the treaty to be unreviewable under Article 9 by virtue of its "highly political nature with an important relationship to the basis of our country's existence" but adding that "so long as that treaty is not deemed to be clearly contrary to provisions of the Constitution, it should not unnecessarily be held unconstitutional and invalid"), reprinted in CASE LAW, *supra* note 34, at 111.

¹⁹² Beer, *Constitutional System*, *supra* note 83, at 36. Despite these greatly disproportionate ratios, "neither the legislators, fearful of loss of strength in their constituency territories, nor the courts have taken a decisive stand in favor of rough approximation of equal value in the vote of each elector." *Id.* at 37.

¹⁹³ *Id.* at 36.

¹⁹⁴ The Japanese Supreme Court's malapportionment cases deal primarily with the House of Representatives, since the upper house of the legislature, the House of Councillors, is said to represent people by region rather than by population-proportionality. Vote-value disparities of as much as 5.26:1, for example, have been found constitutional in Councillors elections for this reason. *See, e.g.*, Judgment of April 27, 1983 (Shimizu v. Osaka Election Comm'n), Saikōsai [Supreme Court], 37 Minshū 345 (Japan), cited in Beer, *Constitutional System*, *supra* note 83, at 38.

¹⁹⁵ KENPŌ [Constitution] of 1947, art. 14 (Japan) ("All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.").

¹⁹⁶ Judgment of Feb. 5, 1964 (Koshiyama v. Chairman, Tokyo Metropolitan Election

value discrepancies (as high as 4.99 to 1),¹⁹⁷ the Court declared that apportionment to be in violation of Articles 14, 15 and 44,¹⁹⁸ though it stopped short of invalidating the election results.¹⁹⁹ A similar challenge to a 3.94:1 ratio in 1983 also resulted in a declaration of unconstitutionality, but here again the court refused to actually question the results of the challenged 1980 election — reasoning that the government should be given a “reasonable period” in which to correct the malapportionment problem, and that this time period had not yet expired.²⁰⁰ This “reasonable period” concept, as it turns out, speaks volumes about Japanese constitutional jurisprudence.

D. *Patterns of Judicial Review*

Read in conjunction with the traditional deference of the Japanese Supreme Court to the judgment of the political branches and its tendency to resist finding unconstitutionality in matters having any degree of political sensitivity, the apportionment cases suggest an intriguing pattern in Japanese constitutional law. In these cases, the Supreme Court neither wholly abdicated its responsibility for judicial review nor actually enforced its reading of the Constitution. Rather, as Toshihiko Nonaka has noted, it effectively issued a “warning of unconstitutionality”²⁰¹ — a rhetorical shot across the government’s bow — in the hope that the Diet would soon address the problem thus declared without the unpleasant necessity of the Supreme Court actually having to invalidate a law (or worse, the results of an election).

To some extent, this “warning” approach seemed to work. While the case challenging apportionment in the 1972 elections was working its way

Supervision Comm’n), Saikōsai [Supreme Court], 18 Minshū 270 (Japan), *reprinted in* CASE LAW, *supra* note 34, at 54.

¹⁹⁷ Beer, *Constitutional System*, *supra* note 83, at 37.

¹⁹⁸ Article 15 guarantees the right “to choose . . . public officials and to dismiss them,” while Article 44 provides that in determining the numbers of members of each House of the Diet, “there shall be no discrimination because of race, creed, sex, social status, family, origin, education, property or income.” KENPŌ [Constitution] of 1947, arts. 15, 44 (Japan).

¹⁹⁹ Judgment of April 14, 1976 (Kurokawa v. Chiba Prefecture Election Comm’n), Saikōsai [Supreme Court], 30 Minshū 223 (Japan), *cited in* ODA, *supra* note 1, at 43-44.

²⁰⁰ Judgment of April 27, 1983 (Tokyo Election Comm’n v. Koshiyama), 37 Minshū 1243 (Japan), *cited in* Beer, *Constitutional System*, *supra* note 83, at 37.

²⁰¹ Toshihiko Nonaka, *The Significance of the Grand Bench Decision Concerning Proportional Representation in the House of Representatives and Related Issues*, 18 LAW IN JAPAN 134, 141-42 (David Nelson trans., 1986).

up through the courts, for example, the National Diet revised the Japanese Election Law to correct at least partly the great disproportions in vote values between the country's urban and rural districts. While the maximum vote-value discrepancy in the 1972 contest had been 4.99:1, by the time the Supreme Court had found unconstitutional the 1972 election law, a revised version of that law enabled the 1976 House of Representatives elections to take place with "only" a 2.92:1 ratio.²⁰²

Continuing urban population growth relative to rural areas, however, resulted in the ratios creeping up again — to 3.94:1 in 1979, and to 4.38:1 in 1983²⁰³ — at which point the Court's 1983 "reasonable period" judgment and a subsequent unconstitutionality verdict in 1985²⁰⁴ prompted a further (partial) correction by the Diet.²⁰⁵ Vote-value disparities in Japan remain significant and notoriously inequitable even today, but by this jurisprudence of "warning" the Supreme Court has managed to encourage some political redress of the worst inequalities without ever actually having directly to invalidate the judgment of the legislature or invoke the full authority of its Article 81 powers of judicial review.

This pattern of constitutional prodding — declaring the need for appropriate constitutional behavior but stopping, if possible, short of the formal invocation of coercive legal authority — is quite consistent with broader approaches to legal doctrine in Japan. As John Owen Haley has written, in Japan, "legal principles have meaning beyond their coercive implementation. Legal rules serve as *tatema*, guiding principles, and as such relate directly to the development of social or political consensus."²⁰⁶ The jurisprudential interest in seeking "harmony" and compromise-focused "balance" between competing constitutional claims — so prominent, as we have seen, in Japan's approach to individual free-

²⁰² *Id.* at 134-35

²⁰³ *Id.*

²⁰⁴ Judgment of July 17, 1985, Saikōsai [Supreme Court], 39 Minshū 1100 (Japan), cited in ODA, *supra* note 1, at 44-45.

²⁰⁵ ODA, *supra* note 1, at 45. The Diet, apparently prompted by the 1964 malapportionment case (which, as it happened, ended with the Court's endorsement of the existing apportionment), had also initiated a reapportionment in 1964 that somewhat reduced the disparities existing at that time. See CASE LAW, *supra* note 34, at 19.

²⁰⁶ John Owen Haley, *Introduction: Legal vs. Social Controls*, 17 LAW IN JAPAN 1, 5 (1984) [hereinafter Haley, *Introduction*]. Haley describes this dynamic as operating very clearly in the electoral-apportionment context. He sees "little hope of positive judicial relief to remedy the chronic malapportionment of the Japanese Diet. . . . [T]he Supreme Court is likely to continue simply to issue declaratory judgments, holding that the electoral system is unconstitutional without invalidating elections or requiring action by the Diet." *Id.* at 6.

doms²⁰⁷ — clearly operates here as well.

On those infrequent occasions when the Court has ruled government policies unlawful or unconstitutional (or was felt likely to do so), the Diet has generally been “quick to change the questionable legal provisions, thereby removing the potential for conflict with the courts.”²⁰⁸ The “reasonable period” standard articulated in the 1983 malapportionment case²⁰⁹ seems designed to facilitate precisely this dynamic of “harmonious” legal reform. Indeed, the general vagueness and equivocation of the Supreme Court’s holdings across the spectrum of constitutional issues having significant political salience may be explicable in light of this effort to achieve legal change without the appearance of coercion. As Lawrence Beer has observed, after all, “vagueness has its value and avoidance of issues can be preferable to constitutional confrontations brought on by hasty pursuit of clarity.”²¹⁰

VI. THE “ADMINISTRATIVE GUIDANCE” PARADIGM

If the compromise-focused constitutional “warning” jurisprudence of the apportionment cases — with its tendency to offer what are in effect “suggestions” about proper norms of behavior, its avoidance of formal legal coercion, and its search for “harmony” between competing interests — looks familiar to an observer of contemporary Japanese politics, it should. This is precisely the approach taken by the bureaucratic organs of the modern Japanese state in regulating the private sector. The Japanese Supreme Court, in fact, has developed for itself a constitutional analogue to the processes of “administrative guidance” through which the affairs of the Japanese administrative state are largely conducted.

A. *Administrative Guidance in Japanese Practice*

It is, by now, commonplace to note the role that the administrative bureaucracy has played in Japanese governance and in that country’s remarkable economic development.²¹¹ As James Q. Wilson put it

²⁰⁷ See *supra* text accompanying notes 139-44, 167.

²⁰⁸ CASE LAW, *supra* note 34, at 18; see also ODA, *supra* note 1, at 43. Hiroshi Oda’s account suggests, however, that despite the general expectation that the Diet will respond to the Supreme Court’s constitutional suggestions, this is not always the case. Despite the Court’s declaration that the “patricide” law was unconstitutional, for example, see *supra* text accompanying notes 162-64, no remedial legislative action appears ever to have been taken. ODA, *supra* note 1, at 44.

²⁰⁹ See *supra* text accompanying note 200.

²¹⁰ Beer, *Constitutional System*, *supra* note 83, at 40-41.

²¹¹ It should be noted, however, that some of the most interesting works in the field

in Japan the bureaucracy *is* the government. The bureaucracy drafts the laws, determines the budget, has a near monopoly on the relevant information, enjoys great esteem, recruits the most talented graduates of the best universities, and has remained virtually intact . . . for over a century.²¹²

All the constituent parts of the Japanese governmental system, that is, the bureaucracy, survived World War II mostly intact,²¹³ and — except for the Emperor himself — might be said to represent the most stereotypically “Japanese” of its institutions. It is perhaps not surprising, therefore, that the style of governance favored by Japan’s bureaucratic organs should find itself emulated in constitutional jurisprudence.

The term “administrative guidance” is not a legal term, and in its Japanese translation (*gyosei shido*) is merely an imprecise descriptive phrase.²¹⁴ Nevertheless, it has been defined as

that series of operations by which administrative organs, in those matters which fall within their own specific duties, exercise influence over specific individuals, public and private juristic persons and associations through non-authoritative and voluntary means, and guide parties by means of their own agreement and cooperation toward the formulation of a definite system, the goal which the administrative organs seek. Some of the operations of this nature which are carried on have clear statutory authority; others do not.²¹⁵

take a different tack entirely. Daniel Freidman’s book *The Misunderstood Miracle*, for example, suggests that large, centrally-“guided” corporations characterized by “lifetime employment” and other stereotypically “Japanese” management techniques were *not* in fact the primary engines of modern Japan’s development. Rather, a great deal of Japan’s postwar boom can be attributed to smaller industrial concerns following more stereotypically “Western” practices, and much less subject to centralized government “guidance.” See DANIEL FREIDMAN, *THE MISUNDERSTOOD MIRACLE* (1984).

²¹² James Q. Wilson, *National Differences*, in *FOUNDATIONS OF ADMINISTRATIVE LAW* 323, 335 (Peter Schuck ed. 1994).

²¹³ As Verinder Grover has recounted,

“Of all the branches of the Japanese Government, the civil service was probably the least affected by Occupation-sponsored reforms. This resulted partly from the fact that the Occupation avoided direct military government and instead worked through the existing Japanese government and partly from the fact that the bureaucracy was strongly entrenched, making reforms difficult.”

GROVER, *supra* note 39, at 143 (quoting *MAJOR GOVERNMENTS OF ASIA* 179 (G.M. Kahin ed., 1958)).

²¹⁴ Russell Allen Yeomans, *Administrative Guidance: A Peregrine View*, 19 *LAW IN JAPAN* 125, 133 (1986).

²¹⁵ Yoriaki Narita, *Gyōsēi Shidō* [Administrative Guidance], 4 *Gendaihō* [Con-

Less pleonastically, it may be thought of as “a common Japanese regulatory technique that, although generally nonbinding, seeks to conform the behavior of regulated parties to broad administrative goals”²¹⁶ by means of encouragement or coercion short of formal legal sanction.²¹⁷

When a bureaucrat offers “guidance” under such a system, compliance is theoretically “voluntary,” in that the agency cannot employ the judicial system or administrative enforcement procedures in order to compel the regulated party to obey. Rather, the government agency offering “guidance” may seek to employ other powers at its disposal — e.g., granting or denying licenses or administrative approvals required by the regulated party in other aspects of its affairs — to enforce its suggestions indirectly or collaterally.

Thus, for example, when the Ministry of International Trade and Development (MITI) sought to encourage steel companies to decrease their production of crude steel in 1964, it applied pressure to a company that refused to do so by cutting that company’s official allocation of oil. As a result of this pressure, MITI was able to reach a “compromise” steel-production agreement with the recalcitrant corporation.²¹⁸ Similarly, in order to encourage large-scale shipping mergers in the early 1960s, the Japan Development Bank rewarded obliging corporations with very

temporary Law] 131 (1966) *translated in* 2 LAW IN JAPAN 45, 46 (1968).

²¹⁶ Young, *supra* note 95, at 926.

²¹⁷ “Administrative guidance is an informal instrument of an administration usually addressed to private corporations, designed to influence and steer their behavior in order to achieve a specific policy goal.” ODA, *supra* note 1, at 61; *see also* Hiroshi Shiono, *Administrative Guidance*, in PUBLIC ADMINISTRATION IN JAPAN 204 (K. Tsuji ed., 1984). In an attempt to create a typology of administrative guidance, Yoriaki Narita describes three varieties: (1) that conducted on the authority of statutes providing for bureaucratic suggestions, advice, etc., to regulated parties; (2) that conducted where there is no express statutory authority for it but statutes do give agencies power over licensing or other approvals which can be given or withheld in order to encourage the desired behavior; and (3) that conducted “on the sole basis of the general authority provided by the law establishing the administrative organ” where no statute applies. Narita, *supra* note 215, at 55-57. Kazuo Yamanouchi also divides administrative guidance into “advisory guidance” given for the benefit of the recipient and “regulatory guidance” given for purposes of effecting the policy of the bureaucratic organ. Kazuo Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN 22, 22-23 (Peter Figdor trans., 1974).

²¹⁸ ODA, *supra* note 1, at 61-62. Yamanouchi also distinguishes “encouraging measures” (such as the Japan Development Bank example above) from “punitive measures” (e.g., the MITI example). *See* Yamanouchi, *supra* note 217, at 26.

favorable financing terms.²¹⁹ In a regulatory environment in which corporate “players” exist in long-term relationships on many fronts with their governmental overseers, such pressures have proven to have considerable effectiveness in shaping behavior²²⁰ — making “extralegal” enforcement a prominent feature of Japanese administration.

The prevailing view in Japan is that such administrative guidance does not need to have an express statutory basis. Since obedience is not (technically) compulsory, it is pretended that compliance is “voluntary,” enabling the courts to say that no “real” basis in law need be required.²²¹ A related — though somewhat inconsistent — argument for the statute-independence of administrative guidance suggests that the government’s ability to act pursuant to the “public welfare” allows it the freedom to respond to administrative needs without having to wait for cumbersome legislative action.²²²

Naturally, as the MITI example above suggests, administrative guidance can indeed be quite coercive, but the collateral and extralegal nature of its “enforcement” makes the process highly resistant to legal accountability.²²³

From a legal standpoint, the exercise by an administrative agency of authority granted to it for another administrative purpose in order to bring disadvantage to a person who fails to follow its guidance is an abuse of authority and a violation of the law However, it is not necessarily easy to prove an abuse of authority, and, even if it can be proven, it must be noted that relief can be obtained only after the fact. Hence, informal restrictive measures constitute an actual threat to the person[,] and the administrative agency, through intimating at an abuse of authority, can compel compliance with a regulatory guidance. . . . [I]t is difficult to deny the fact that “supervision” exerted by administrative

²¹⁹ Young, *supra* note 95, at 934.

²²⁰ *See id.* at 952.

²²¹ *See* Yeomans, *supra* note 214, at 147-58; Yamanouchi, *supra* note 216, at 30.

²²² *See* Narita, *supra* note 215, at 52, 62 (arguing the unwisdom of placing administration under “rigid” controls for fear that the bureaucracy would have to “stand by helplessly in the presence of dangers to civil life and the social economy until it has been given statutory authority”); *see generally* Yeomans, *supra* note 2140, at 148.

²²³ Even those proponents of “administrative guidance” who feel statutory authorization to be unnecessary stress piously that “[a]dministrative guidance must not violate laws and ordinances,” Narita, *supra* note 215, at 66, and admit that “because administrative agencies are generally in a superior and domineering position over the people and have behind them all manner of coercive authority based on laws and regulations, it is sometimes easy for administrative agencies to exceed the limits of voluntary action and to engage in actual coercion.” *Id.* at 77.

agencies using [authority in unrelated areas] is powerful security for the effectiveness of regulatory guidance.²²⁴

Indeed, as Michael Young has noted, the informality of administrative guidance allows Japanese administrators to avoid even “constitutional prohibitions on action by statute and political difficulties such as local governments’ inability to take action in certain areas.”²²⁵

B. *Judicial Review of Administrative Guidance*

As the above passages suggest, the general view in Japanese law is that, despite their potential to have genuinely (if unofficially) coercive effects, policies of administrative guidance largely escape judicial review. It has long been the official position of the Japanese government, for example, that

[s]ince so-called administrative guidance does not have the coercive force of law in limiting the rights of the people or imposing obligations on the people, and, it is carried out with the voluntary cooperation of the recipients in the performance by the administrative agencies of the functions given to them under their respective establishment laws and within the limits thereof, a problem of violation of law does not arise.²²⁶

²²⁴ Yamanouchi, *supra* note 217, at 25. Though a Code of Administrative Procedure has been proposed as a private draft in order to regularize decision-making by administrative agencies, it has yet to be enacted. See ODA, *supra* note 1, at 39-40.

²²⁵ Young, *supra* note 95, at 935. The Supreme Court has yet to take a position on whether agencies can undertake “administrative guidance” activities that promote activity that violates the law. In a famous series of cases, the Court was faced with the claim that cartel-building activities undertaken by certain oil producers at the behest of MITI violated Japan’s Anti-Monopoly Law. The Fair Trade Commission was of the opinion that the companies’ behavior would be illegal even if compelled by MITI, but the Supreme Court’s actual decision, Judgment of Feb. 24, 1984 (Oil Cartel case), Saikōsai [Supreme Court], 38 Keishū 1287 (Japan) *cited in* ODA, *supra* note 1, at 354, failed to settle the issue. Instead of addressing the limits of administrative guidance, the Court simply found that MITI had not, in fact, coerced the behavior in question. (In passing, however, the Court seemed to suggest that circumstances might exist whereby the legality of behavior could be negated when undertaken pursuant to agency direction.) See generally Mitsuo Matsushita, *Problems and Analysis of the Oil Cartel Case Decisions*, 15 LAW IN JAPAN 79, 88-89 (James Sameth trans., 1982); ODA, *supra* note 1, at 353-54. Apparently, such “administrative guidance . . . can be justified, if it is made in a reasonable and socially acceptable way and does not contradict the fundamental purpose of the Anti-Monopoly Law.” ODA, *supra* note 1, at 354.

²²⁶ Such was the official response given on March 22, 1974 to a parliamentary inquiry by Representative Kazutoku Tamaoki. Yamanouchi, *supra* note 217, at 30. See

Since the early 1970s, however, Japanese courts have attempted to provide some degree of judicial oversight, articulating what has been called a “reasonable possibility of agreement” standard to help cope with the legal challenge posed by administrative guidance. By this approach, the courts permit agencies to coerce regulated parties to the bargaining table and to police that bargaining for good faith — but only so long as a “reasonable possibility” still exists that an agreement will thereby be reached.²²⁷

C. Themes of Administrative Guidance

The system of “administrative guidance” thus parallels, in significant ways, the Japanese Supreme Court’s constitutional jurisprudence, especially in the malapportionment cases. It is not a perfect fit, of course: in its attempt to exert what might be called “constitutional guidance,” the Supreme Court lacks the array of collateral coercive powers that makes agency “suggestions” so compelling in the administrative context. Nevertheless, the basic dynamics of the two approaches run parallel in many respects. Indeed, the comparative collateral (or even direct) “toothlessness” of the Supreme Court may be in large part why it has proven so reticent, since 1947, to find government acts or enactments to have violated the Constitution. Its position vis-à-vis government malefactors, therefore, is perhaps analogous to that of an administrative agency attempting to undertake administrative guidance without the power to give or withhold favors in ancillary areas of regulation. In a constitutional system permeated by values of legislative supremacy²²⁸ and lacking a strong tradition of judicial review, the Court’s role as constitutional guardian is little more

also Narita, *supra* note 215, at 47 (articulating a similar position).

²²⁷ See, e.g., Judgment of July 16, 1980 (Development Control Case), Saikōsai [Supreme Court], 39 Minshū 989 (Japan) (allowing Tokyo Metropolitan Government to withhold permission for apartment building in order to encourage resolution of dispute between the developer and local inhabitants — but finding it unlawful to continue to withhold permission once the developer had made clear its refusal to comply with recommendation that dispute be settled), *cited in* ODA, *supra* note 1, at 62. See generally Young, *supra* note 95, at 963-65, 977-79. This approach, says Young, provides a fascinating contrast with the formal legalism of many other legal systems: its basic line of inquiry, as to whether it remains “reasonable” to coerce bargaining, is not “whether [agency] actions have been taken in accordance with legally established procedures that permit the government to take authoritative steps against the governed, but rather whether these actions have the more informal sanction of society in general.” *Id.* at 966-67.

²²⁸ See *supra* text accompanying notes 179-82.

than that of the occupant of Theodore Roosevelt's proverbial "bully pulpit" — hearing and deciding certain cases for very much the same reasons that plaintiffs may bring them: as a means of keeping an issue before the public consciousness, appealing to the values of social consensus and harmony while offering a guide to proper behavior, and implicitly pleading for "political" redress.²²⁹

In both administrative guidance and constitutional adjudication, Japanese governance places great emphasis upon "[t]he avoidance of legal regulation and coercive state control."²³⁰ Wherever possible, appeal is made to the values of "harmony" and consensus²³¹ — both from the point of view of settling competing claims of right and in approaching governmental regulation of private affairs — in order that law may less directly "control" than "provide the framework within which consensual ordering occurs or provide a means of legitimating around which a consensus can be formed."²³²

In individual-rights jurisprudence, citizens are expected to realize the imperative that their exercise of constitutionally-guaranteed fundamental rights not be "abusive" and that such rights be "balanced" both with the rights of others and with the demands of the "public welfare." In matters relating more broadly to the constitutional reach of the government's powers, an even more explicit appeal is made to bargaining and consensus, as the Court issues declaratory judgments and exhorts the political system to comply within a "reasonable period" — and allows these obligations to be met by merely partial compliance (*i.e.*, "compromise"). In a system aspiring to "law without [formal] sanctions,"²³³ both administrative guidance and constitutional jurisprudence cultivate bargaining and negotiation between the parties as the principal device for allocating burdens.²³⁴

²²⁹ Cf. Haley, *Introduction*, *supra* note 206, at 6 (describing plaintiffs' role in apportionment cases).

²³⁰ JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER* 166 (1991) [hereinafter HALEY, *AUTHORITY*].

²³¹ Yoriaki Narita stresses, for example, that many of the advantages of administrative guidance derive from its ability to avoid

grim administrative dispositions and prosecution . . . [because] without losing their honor of Social Confidence (*shakaiteki shin'yo*), the people can ascertain the policies and intentions of administrative authorities, attach limited conditions, and assert their personal claims and objections through the process of consulting with administrative agencies.

Narita, *supra* note 215, at 53. See also *supra* notes 139-44, 167.

²³² HALEY, *AUTHORITY*, *supra* note 230, at 168.

²³³ *Id.* at 169.

²³⁴ Cf. Young, *supra* note 95, at 941 (discussing administrative guidance).

VII. CONSTITUTIONAL REVISIONISM

This highly indigenized scheme of rights-based constitutionalism that Japan has built upon the foundation of the American model seems to function well enough to win the general approval of most Japanese scholars and jurists. Indeed, commentators frequently note the remarkable fact that even though postwar Japan was forced to adopt a constitutional system quite alien to its own traditions, the Showa Constitution — as had the Meiji document before it — has survived without even a single amendment.²³⁵ In the early 1950s, many groups across Japan's political spectrum supported the idea of revising the Constitution, and an official "Commission on the Constitution" was appointed to study the issue in 1957.²³⁶ The Commission reported on its investigations in 1964 without any recommendations, however, and since the mid-1960s the issue of formal constitutional revision has faded into the background.²³⁷

The debates over constitutional amendment, however, help to suggest why Japan appears to be so satisfied with the constitutional system forced upon it after the defeat of 1945. The most prominent critics of the 1947 constitution during the period of the most intense revision debates tended to argue that its extensive rights-guarantees were too expansive — that the document made it too easy for individuals to "abuse" their freedoms and too hard for the government to safeguard the "public welfare" where this might result in limitations upon individual liberty.²³⁸ It was the view of many witnesses appearing before the Constitutional Commission, for example, that

in addition to making even clearer the current constitutional responsibilities that accompany human rights, such as the duty to preserve them, the prohibition of the abuse of fundamental rights and the responsibility for their exercise, the following should also be clearly set forth: the duty to defend the country, the prescription of the responsibilities of honesty and loyalty in the execution of duty by public officials, the establishment of responsibility on the part of those who have been protected to support their guardians as a balance to the responsibility of the latter for their care, and the clarification of the duties and responsibilities relating

²³⁵ See, e.g., Ronald G. Brown, *Editorial Note*, in CONSTITUTIONALISM IN ASIA, *supra* note 5, at 111; Beer, *Constitutionalism in Asia*, *supra* note 88, at 18.

²³⁶ See COMMISSION, *supra* note 28, at 16-25.

²³⁷ See, e.g., Isao Sato, *Debate on Constitutional Amendment: Origin and Status*, 12 LAW IN JAPAN 1, 7 & 21 (1979).

²³⁸ See, e.g., COMMISSION, *supra* note 28, at 103, 178, 276-78; Beer, *Constitutional System*, *supra* note 83, at 8-9.

to the freedom of expression.²³⁹

Arguing that the modern Japanese “welfare state” demanded a more qualified set of rights than the “absolute” protection of the 19th century “liberal state,” these critics stressed the importance of moving from a “negative, passive, and defensive” relationship between state and citizen to “a positive and cooperative course,”²⁴⁰ emphasizing “citizens’ obligations under the idea of social solidarity.”²⁴¹

Interestingly, relatively few of the Constitutional Commissioners supported the “absolute” approach to individual rights said to characterize the traditional “liberal state.”²⁴² Rather, a majority of all Commissioners subscribed to the general view that

[r]ights and freedoms do not simply mean freedom from power as in past ages, but possess a positive significance in respect to power and its utilization and must be brought into being with the aim of constructing the welfare state through the maintenance of social order and the advancement of public welfare.²⁴³

Indeed, the predominant response of those who opposed revision of the Constitution to the proponents of the “social solidarity” view was that textual amendment is not needed because the requisite emphasis upon “public welfare” and prohibition of the “abuse” of individual liberties can be achieved without such formal change.

Thus, the anti-amendment school has long argued that “requirements under the principles of the welfare state can be met through the interpretation and implementation of provisions on ‘public welfare’ [H]ence, it would be improper and cavalier to dismiss the Constitution as anachronistic because of its bias in favor of a ‘state of freedom.’”²⁴⁴ The anti-revisionists, therefore, tended to argue *not* that Japan needs *more* vigorous enforcement of fundamental freedoms,²⁴⁵ but that the necessary

²³⁹ COMMISSION, *supra* note 28, at 102.

²⁴⁰ *Id.* at 273-74.

²⁴¹ Sato, *supra* note 237, at 13. See also COMMISSION, *supra* note 28, at 274 (recounting witnesses’ focus upon “the social duties of the people, their solidarity, and their cooperation, as well as on the guarantee of fundamental human rights”).

²⁴² See COMMISSION, *supra* note 28, at 101-02, 274-75.

²⁴³ *Id.* at 274.

²⁴⁴ Sato, *supra* note 237, at 13.

²⁴⁵ Nobishige Ukai is perhaps one exception, being a prominent advocate of an “absolutist” American-style separation of Church and State. Lawrence Beer suggests that this may be on account of Ukai’s Christian faith, which makes him unusually aware of Japan’s pressures for conformity. Beer, *Constitutionalism in Asia*, *supra* note 88, at 15.

restrictions on these freedoms were better obtained through constitutional "interpretation" than through altering the text of the document.

Perhaps for this reason, postwar Japanese constitutional scholars have found quite attractive the theories of "constitutional transformation," articulated by thinkers like Georg Jellinek (1851-1911) and a number of his Japanese followers. In its Japanese incarnation, "constitutional transformation" — *kempo hensen* — is deemed to mean "a change in the meaning of particular constitutional provision[s] brought about through 'reinterpretation' of the provision rather than through formal constitutional amendment."²⁴⁶ To simplify somewhat, the "constitutional transformation" theories of Japanese constitutional scholars such as Asao Odaka, Isao Sato, Naoki Kobayashi, T. Kawazoe and Y. Kiyamiya, revolve around the idea that circumstances may arise in which the accepted meaning of a particular constitutional provision ceases to be "effective" — which is to say that the norms which it embodies either cannot be implemented or for some reason can no longer be implemented without damage to other values prized more highly by society. Sometimes this disjunction between constitutional norm and social reality is so severe that congruence can only be restored by means of formal amendment to the text, but often it will prove possible to rejoin positive and normative through "interpretation" — that is, by re-reading a constitutional provision understood to say "X" and concluding that, in fact, it says "Y."²⁴⁷ The malleability of constitutional provisions that is permitted by this approach, although arguably inconsistent with the idea of a constitutional scheme in which fundamental rights really are "eternal and inviolate,"²⁴⁸ fits well with the tendency of Japanese jurisprudence "balance" competing rights claims, even where such socially-contextual "harmony" is purchased at the cost of restricting individual freedoms in the name of preventing "abuses" of rights.

This idea of "constitutional transformation" is perhaps the key to Japan's ability, after 1947, to assimilate an alien constitutional system with such equanimity. It was not the case, as some have suggested, that the American occupation authorities and the Japanese officials working with them to draft the Showa Constitution simply "talked past" or "duped" each other — each thinking that the other had endorsed a constitutional scheme very different from the one actually envisioned by the other side.²⁴⁹ The investigations of the Constitutional Commission

²⁴⁶ Tomosuke Kasuya, *Constitutional Transformation and the Ninth Article of the Japanese Constitution* 18 LAW IN JAPAN 1 (Paul S. Taylor trans., 1986).

²⁴⁷ See generally *id.* at 13-20.

²⁴⁸ KENPŌ [Constitution] of 1947, art. 11 (Japan).

²⁴⁹ See J. Mark Ramseyer, *Together Duped: How Japanese and Americans Negoti-*

during 1957-64,²⁵⁰ for example, clearly show that Japanese scholars and jurists well understood the American-style rights-privileging mold in which the Showa Constitution had been cast — and that, for the most part, they perceived it to be (in undiluted form, at least) inadequate to the needs of Japanese society. The response to this perception, urged by many scholars and in large part actually adopted by the Japanese Supreme Court, has been to make implicit reference to the idea of “constitutional transformation” and to fashion a new garment out of the constitutional fabric supplied by the Americans in 1947.

CONCLUSION

Thus we find Japan to have powerfully indigenized the constitutional scheme forced upon it in 1947, shaping the American-inspired system of rights-guarantees in characteristic ways and creating, in the process, a distinctively “Japanese” constitutionalism.

As one famous formulation has it, “Law is not liked in Japan.”²⁵¹ By this view,

Japanese generally conceive of law as an instrument of constraint that the State uses when it wishes to impose its will. Law is thus synonymous with pain or penalty. To an honorable Japanese the law is something that is undesirable, even detestable, something to keep as far away as possible. To never use the law, or be involved with the law, is the normal hope of honorable people. To take someone to court to guarantee the protection of one’s own interests, or to be mentioned in court, even in a civil matter, is a shameful thing²⁵²

Such an extreme formulation may well be somewhat exaggerated. Scholars, for example, have begun to question the degree to which Japan’s notorious non-litigiousness is in fact due to an innate “cultural” dislike for the formal invocation of legal sanction.²⁵³ Nevertheless, our examination of Japan’s constitutional jurisprudence would seem to lend some sup-

ated a Constitution Without Communicating, 23 *LAW IN JAPAN* 123, 125-26 (1990) (book review) (discussing KYOKO INOUE, *MACARTHUR’S JAPANESE CONSTITUTION* (1991)).

²⁵⁰ See, e.g., *supra* notes 238-45.

²⁵¹ Professor Noda, who from 1962-63 lectured at the Faculty of Law, University of Paris, *quoted in* FUKASE & HIGUCHI, *supra* note 3, at 316 (author’s translation) (“«On n’aime pas le droit au Japon.»”).

²⁵² Y. NODA, *INTRODUCTION TO JAPANESE LAW* 159-60 (Anthony H. Angelo trans., 1976).

²⁵³ See, e.g., ODA, *supra* note 1, at 5-6, 12, 86-87; HALEY, *AUTHORITY*, *supra* note 230, at 83-119; FUKASE & HIGUCHI, *supra* note 3, at 320.

port to stereotypical accounts of a Japanese eagerness to avoid the "conflict" and "disharmony" inherent in the application of legal sanctions.

In a society generally characterized by a remarkable lack of formal legal constraints and enforcement mechanisms — and a corresponding reliance upon informal and "extralegal" sanctions in order to deter improper behavior²⁵⁴ — Japanese constitutional law appears to be no exception. Building upon a foundation of strongly individualist rights-privileging foundational norms and a system of judicial review imposed by force upon an occupied nation, Japanese jurists have constructed a powerfully indigenized approach to constitutional law. The centerpiece to this legal system is the desire for "balance" and "harmony" between competing claims of right.

Ideally, in this conception, individuals will understand the need to avoid "abusing" their freedoms, and the coercive power of the state will never have to be brought to bear upon them. Similarly, broader constitutional disputes about the proper reach of governmental authority should be decided before they reach the point of awkward formal declarations of "unconstitutionality" that seem to threaten cherished principles of legislative supremacy — although if it comes to this, the courts will permit no more than partial political redress within a "reasonable period" to constitute the government's fulfillment of its constitutional obligations. Where ugly and otherwise irreconcilable clashes are unavoidable, the jurisprudential tendency is to require that claims of individual liberty or constitutional propriety yield to the needs of the group: when push comes to shove, constitutional guarantees must give way to the "public welfare," and major matters of public policy must be left to the discretion of the political branches.

To thus state the undercurrents of Japanese constitutional law is to make the Supreme Court sound very much like the apologist for a markedly unrestrained degree of government power, but this would be somewhat unfair. The saving grace of Japan's constitutionalism, if there is one, lies precisely in how well it really *does* provide a set of guiding principles around which social consensus and societal behavior are structured. The corollary to Japan's relative lack of formal mechanisms of law enforcement — both with respect to "ordinary" law and in matters of constitutional import — is the relative infrequency with which these seemingly repressive legal doctrines actually have to be invoked. "In general, the law of Japan upholds a high degree of [individual freedom];

²⁵⁴ See Haley, *Introduction*, *supra* note 206, at 1-2; HALEY, *AUTHORITY*, *supra* note 230, at 14, 143-44.

societal restraints seem more important than legal restrictions.”²⁵⁵

While to American ears a stark summary of Japan’s comparatively anti-individualist constitutional scheme might seem a license for governmental misconduct, it is the aspiration of Japanese constitutionalism to avoid restrictions upon individual liberty entirely — not because such restrictions are undesirable, but because they should be accomplished by informal, social constraints without the formal invocation of “law” at all.

The group and its welfare — from the family to the firm and the nation as a whole — is accorded influence at the expense of the individual. Coupled with a societal willingness to hold the group and its leaders accountable for the conduct of individual members, the consensus of the collective unit acts as an effective constraint on individual behavior.²⁵⁶

To the extent that this ambition is realized, however much informal constraint may exist, Japanese “law” itself could be said to be formally “non-coercive.”

On the whole, therefore, it may still be possible to conclude that “constitutional rights are exercised freely, commonly honored in official practices, promoted by the education system and mass media, and protected by the courts.”²⁵⁷

As might be expected in a society with the homogeneity, cohesion, and what might be called “social density” of Japan, societal censure has far greater coercive impact than as in so highly mobile and atomistic a society as the United States. Moreover, in Japan, a variety of institutional and cultural factors constantly reinforce the viability of extralegal social sanctions.²⁵⁸

Though — or perhaps, because — the Japanese courts, when left absolutely no alternative, will tend to side with the group (*i.e.*, society) over the individual claimant of rights, the predominant constraints in Japanese constitutional law are less “legal” than “social” and “political.”²⁵⁹

The comparative unimportance of formal legal constraint is perhaps the secret to Japan’s remarkable ability to adopt and assimilate an aston-

²⁵⁵ CASE LAW, *supra* note 34, at 20.

²⁵⁶ Haley, *Introduction*, *supra* note 206, at 3.

²⁵⁷ Beer, *Constitutional System*, *supra* note 83, at 14.

²⁵⁸ Haley, *Introduction*, *supra* note 206, at 3.

²⁵⁹ With respect to freedom of the press, for example, Lawrence Beer has noted the degree to which “[t]he mass media enjoy great freedom under law in Japan; their own self-regulatory mechanisms, such as ‘press clubs’ restrain reporting more than law.” Beer, *Constitutional System*, *supra* note 83, at 29 (citation omitted).

ishing array of alien legal systems in the thirteen decades since it abandoned the insular feudal oligarchy of the Tokugawa shoguns and set off on its remarkable road of economic, legal, and political development. Japan indeed succeeded in adopting a vast corpus of foreign legal rules, from Prussian monarchical forms and French and German codes in the Meiji era to American-style “documentary constitutionalism” in the postwar period. It is hard, in fact, to underestimate the magnitude of the Japanese achievement in digesting this enormous menu of alien schemes, shaping them to their new environment in what this essay has suggested are remarkably consistent ways. With respect to constitutional interpretation in the postwar period, therefore, it would not be inappropriate to describe the Japanese Supreme Court — by extending the principle of “abuse of rights” into the realm of fundamental freedoms and crafting for Japan a doctrine of constitutional “guidance” — to have developed a distinctive form of constitutional jurisprudence all its own.