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THE ROLE OF PRECEDENT AT JAPAN'S SUPREME COURT

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I. JUDICIAL OPINIONS IN JUDICIAL DECISION MAKING

The question of how a judge decides a case has long captivated judges and court observers. Conceptualists of various kinds have long dominated inquiry in this question in Japan.[1] They construct judicial process in a syllogistic deduction of conclusions by applying law as a major premise to fact as a minor premise. They are also convinced that judicial opinions explaining a judicial holding contain *ratio decidendi* and sometimes *obiter dicta*, and critically comment on the propriety of judicial opinions on the basis of their own value judgments. Given the fact that precedent emerges out of judicial decisions, they would argue that judicial interpretations of legal issues, applied to judicially ascertained facts of legal disputes, become the source of precedent for later cases of the same facts.

The behavioral model of judicial decision-making analysis conceptualizes the judicial process to proceed in the order of fact finding, tentative holding, and rationalization and justification thereof. This model also conceptualizes that this three-stage process continues until a justice has finalized his or her holdings.[2] While justices write their opinions in the most convincing way, the behavioral approach would not assume that written opinions necessarily reveal actual reasons for final decisions in a case.

The behavioral approach of judicial decision-making analysis has several paradigms.[3] The attitudinal model puts judicial attitude such as liberalism and conservatism as an intervening variable with a legal issue as an independent variable, and judicial voting as a dependant variable. The attribute paradigm puts judicial backgrounds and judicial culture as other important intervening variables. The strategic and rational paradigm focuses on dynamic judicial interactions and probes psychological and sociological determinants in a small group decision-making process. Especially, judicial interactions with their research judges (*chosakan*)

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1. HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES 49 (1989).
2. *Id.* at 58.
3. A.P. MELONE & A. KARNES, THE AMERICAN LEGAL SYSTEM: PERSPECTIVES, POLITICS, PROCESS, AND POLICIES 150–61 (2008).

become a major factor in the judicial output. Neo-institutionalism examines the influence of institutional norms and practices within the judiciary, such as gate keeping and procedural norms on court decisions. Finally, the role paradigm puts judicial perceptions of the roles that ustices are expected to play in conflict resolution. The judicial role manifests itself as activism and self-restraint. It also differentiates ustices who frequently invoke precedents and those who sparingly use precedents.

As applied to the Supreme Court of Japan, these various models have proven to be useful. Relatively large numbers of divided fifteen-member grand bench decisions have enabled researchers to identify bloc formation along the ideological lines of liberalism and conservatism. They have also produced some significant correlation between judicial backgrounds and their voting behavior, as well as the effect of judicial conferences on judicial decision making. Judicial role analysis has discovered predominantly self-restraining grand and petty benches.[4] The present research will examine the effect judicial role has on the use of judicial precedent, as revealed in judicial opinions. Some judges consider it their role to be faithful to precedent, while others would consider it their role not to be strictly bound by precedent. It will focus on the complexity of judicial perceptions and their use of precedents as a means of justifying and rationalizing their reasoning. Thus, it becomes worthwhile to closely examine and differentiate the nature and functions of judicial precedent, as seen in the written opinions of the Supreme Court.

All *jokoku* appeals to the Supreme Court are decided in one of the three five-member petty benches. Over ninety percent of appeals are easy cases and are dismissed with a few sentences of reasoning, almost like *per curiam* opinions written by the United States Supreme Court. Unlike the United States Supreme Court, however, the Japanese Supreme Court does not have *certiorari*, decides each case on the merits, and writes highly simplified explanations for its judicial holdings. Despite this, occasionally a petty bench writes a very brief majority opinion because it cannot reconcile different reasonings. Furthermore, that bench writes a very brief majority opinion because it does not wish to have its decisions relied on as precedent in the future.

4. HIROSHI ITOH, THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN 263 (2010).

II. JUDICIAL PRECEDENT

A judicial decision at the Supreme Court of Japan consists of a judicial holding and judicial reasoning. Judicial holdings may uphold judgments below, reverse and remand for retrials, or reverse and decide at the Supreme Court itself. In addition to the majority opinion, there may be an opposition opinion, supplementary opinion, minority opinion, or just an opinion. An opposition opinion is a Japanese equivalent to a dissenting opinion in the American practice. A supplementary opinion in Japan would be a concurring opinion in the United States. An opinion and a supplementary opinion would come closest to a concurring opinion in America. Subsequently, a precedent emerges out of the majority opinion of a case.

Theodore Becker regards judicial precedent as one of the most important determinants in judicial decision making.[5] Indeed, the common-law belief that law is what a judge or a court says it is reinforces judicial precedent as a source of law. In contrast, Japan is a civil law nation, and judges are expected and required to rely on the codified law. Yet, a selective incorporation of the American legal and judicial system after 1945 has accelerated the use of judicial precedent in the judicial process. It has been believed that precedents, when followed repeatedly, would become a rule of law, contribute to legal stability, and increase the capability to predict future decisions among litigants and lawyers. Conversely, a change in precedent would disturb judicial consistency and harm law and order. Many ustices also feel that a change in judicial precedent would adversely impact legal interests of litigants who acted on the basis of the existing precedent, unless such a change were not to be retroactively applied to business practices. Indeed, judges at all levels would feel safe and comfortable by going along with Supreme Court precedents instead of standing up against them, only to be overruled upon appeal.

The perceptions and attitudes among Justices regarding precedent are elusive and far from clear. On the one hand, there is no statutory doctrine of *stare decisis*, and each judge is independent in reaching his or her decisions. Each judge is guaranteed judicial independence in reaching his or her decisions and is bound only by the Constitution, statutes, and his or her conscience. In theory, a lower court is not bound by the Supreme

5. THEODORE L. BECKER, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS (1970)*; see also* R. CROSS, PRECEDENT IN ENGLISH LAW (1961).

Court precedents and is allowed to contradict the latter's decision. On the other hand, the court law in rticle 4 allows a higher court, especially the Supreme Court, to control a lower court and reverse the latter's judgments. The Court has, from time to time, reversed lower court rulings that rule contrary to its own precedents. Even under the Meiji Constitutional order, the Great Court of Cassation reversed judgments of lower courts. In practice, therefore, judicial precedent has strongly bound not only the judgments of all lower courts, but also the Great Court of Cassation itself. The Supreme Court binds its own decision making through its own precedents, and yet seldom does it explicitly change its own precedents.

Supreme Court precedent poses problems for litigants, as well as lower court judges. The Court sometimes justifies its own rulings solely on the basis of the precedents it cites, without showing how they are relevant to the instant case. It often simply states that "this interpretation and legal construction derive from the existing precedents of this Court." This practice makes it difficult for litigants and lower court judges to understand how the Court relates the present case to its grand bench precedents. Consequently, a litigant often interprets such a precedent—that is, judicial interpretations of legal issues—in such a way as to serve its own interests. In contrast, a litigant's opponent simply states that the ascertained facts in a case are different from those of the precedent, without adequately explaining how the case might be different from the precedent.

More importantly, judges might use a precedent as a means to justify and rationalize the conclusions that they prestructured. A judicial precedent enables judges to limit, extend, ignore, or overrule a precedent by distinguishing facts and interpreting and applying a precedent in a new case. A reading of a case summary of legal judgments in the collections of Supreme Court precedents might make one believe that the Court states its judicial precedent more broadly than is needed to settle a dispute.

The *Hanreishū* [*An Abridged Collection of the Supreme Court Decisions*] starts with *legal issues* decided in a case and a *summary of the Court's interpretations* on each issue. A judicial precedent, as a rule, emerges from the concluding part of the majority opinion of the Court. The Court first responds to the appellant's arguments on fact finding and legal issues. Then, it gives its holdings and, finally, the rationales for its holdings. To Justice Sonobe, the final portion of the majority opinion presents the Court's definitive authoritative interpretations of legal issues raised by the appellant. On the margins of the majority opinion are found the majority's own notations of such legal interpretations. According to Sonobe, the Court, as a rule, leaves it to individual ustices to present *obiter*

dicta in their judicial opinions. Research judges, out of courtesy, refrain from using definitive comments on court opinions, but they never make case commentaries merely on the basis of their conjectures.

Legal issues decided in a case and a summary of the Court's interpretations of them are often cut and dry. Legal issues decided may read like this:

> Article 15, paragraph 1 and Article 93, paragraph 2 of the Constitution in relation to Article 9, paragraph 2 of the Public Office Election Law (POEL) and Articles 11 and 18 of the Local Autonomy Law (LAL), which allow only the Japanese national to vote in elections of the chief and assembly members of the local autonomous entities.

Likewise, the summary of decisions looks like this:

> Neither Articles 11 and 18 of the LAL, which allow only the Japanese national to vote in elections for the chief and assembly members of the local autonomous entities, nor Article 9, paragraph 2 of the POEL, violate Articles 15(1) and Article 93, paragraph 2 of the Constitution. Judges in later cases with similar facts are likely to cite a summary of judicial decisions, as stated above, as precedent.

For example, the 1960 grand bench decision would limit the constitutional right, seen in article 15, paragraph (1), of selecting and dismissing public employees to only the Japanese citizen.[6] Sonobe derives this construction from the principle of popular sovereignty.[7] *McLean v. Minister of Justice*[8] would also restrict this guarantee of voting right to the Japanese citizen and exclude foreigners living in Japan. However, the Grand Bench decision[9] would stress local residents' autonomy guaranteed in the constitutional protection of local autonomy. In light of this precedent, stressing the principle of local autonomy, the Constitution would not prohibit having opinions of foreigners residing in a particular locality reflected in administrative decisions of their local public entities. Finally,

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6. Saikō Saibansho [Sup. Ct.] Dec. 14, 1960. 14 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3037.

7. ITSUO SONOBE, SAIKOSAIBANSHO JUNEN: WATASHI NO MITAKOTO KANGAETAKOTO 142 (2001).

8. Saikō Saibansho [Sup. Ct.] Oct. 4, 1978, 32 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1223.

9. Saikō Saibansho [Sup. Ct.] Mar. 27, 1963. Saikō Saibansho [Sup. Ct.] Mar. 27, 1963, 17 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 121.

the 1960 grand bench decision,[10] *Kurokawa v. Chiba Election Commission*[11] and *Shimizu v. Osaka Election Commission*,[12] would lead to the judgment that it is up to legislative policy to decide electoral procedures. The Court tends to render the qualification of voting rights subject to legislative discretion as if it were a nonjusticiable act of state governance.

The Supreme Court plays a decisive role in judicial precedent. The Court, in its committee of judicial precedents, identifies and specifies legal issues decided in a case and summarizes its decisions on these issues. The committee is made of two ustices from each of the three petty benches. All research judges meet to review all decisions of the Supreme Court and to select the cases to be submitted to the judicial committee. With the help of research judges, the committee scrutinizes each of both grand and petty bench decisions before making its final decision for inclusion in the *Collections of the Supreme Court Judicial Precedents*. It spends a great deal of time and effort paying minute attention to the opinion of the Court in each case, lest judges in later cases misinterpret and misconstrue what it designates as a judicial policy applicable to other cases involving the same facts. Thus, the committee's work has a great bearing on the role that precedents play in judicial decision making, and the committee is fully aware of the importance of its work.

In spite of the meticulous work of the committee on precedents, those portions in a majority opinion that are neither legal issues nor a summary of the judicial interpretations thereof sometimes become precedent and affect later cases. Justice Ito illustrates this problem in *Yoshimura v. Tanabe*.[13] Under this case, a worker can lawfully state a claim for damage compensation from a third party that is responsible for his accident. If the worker contributes to the negligence leading to the accident, however, the amount of compensation varies, depending on which method a court uses to compute the amount of compensation. According to one method, a claimed amount is first reduced on account of one's own negligence, and is further reduced by the Workman's Accident Insurance Coverage (WAIC). If, for instance, he claims ten million dollars of damage

10. Saikō Saibansho [Sup. Ct.] Dec. 14, 1960, 14 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3037.

11. Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223.

12. Saikō Saibansho [Sup. Ct.] Apr. 27, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 345.

13. Saikō Saibansho [Sup. Ct.] Apr. 11, 1989, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 209.

compensation and is responsible for forty percent, then his claim will be six million dollars, which is fully covered by WAIC. Therefore, he would not get anything from the defendant. According to another method, his claim is first reduced by WAIC, and then is reduced by his own comparative responsibility. He could still claim four million dollars in damages—that is, ten million dollars less six million dollars. Then, sixty percent of four million is 2.4 million dollars, which one can still claim against the defendant. The majority in *Yoshimura v. Tanabe* used the first computational method and cited as reference *Kamimura v. Kashima Construction Co.*[14] However, the majority opinion in *Kamimura* mentioned the first method merely as a method of computation, and cited it neither as the main legal issue nor its authoritative interpretations. Yet, the majority in the present case alluded to the first computation as if it had been binding.[15]

A relatively small number of Supreme Court decisions are selectively published in the *Hanreishū*, and are widely used by jurists and executive and legislative branches at the national and local levels. Many other decisions are published for internal use of the judiciary in the *Saibanshū* [*An Unabridged Collection of the Supreme Court Decisions*], which are not easily accessible for foreigners. The *Saibanshū* covers most decisions and contains less important legal interpretations of the Court. Notable decisions in it are published in commercial journals—such as *Hanrei Jiho* and *Hanrei Times*—with useful comments. Special journals publish Supreme Court decisions on labor, commerce, taxes, and other special issues. Thus, the Supreme Court can impact the precedential value of its own judicial decisions by using different reporters. Justices think these cases in the *Saibanshū*, or the unabridged reporter, follow established precedents and do not treat them as much as binding precedent as those in the *Hanreishū*, or the abridged reporter.

The ramifications of this distinction are not insignificant. A petty bench hands down its decisions by citing the *Saibanshū* rather than *Hanreishū* because it does not want its rulings to set a precedent for later cases. A justice follows a decision by faithfully following precedent, but does not cite the precedent in his opinions as if he has ignored the precedent. Or, he would, if possible, make it applicable only to a case specifically illustrated by the precedent (*reibun hanketsu*). The Supreme Court occasionally limits its legal interpretations to some specific factual relationships. Such

14. Saikō Saibansho [Sup. Ct.] Dec. 18, 1980, 34 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 888.

15. MASAMI ITO, SAIBANKAN TO GAKUSHA NO AIDA 58 (1993).

precedents applicable to particular sets of facts are expected to be interpreted and applied to later cases, as they are inseparably tied to the specific facts of a case. Yet, ustices may maneuver to interpret facts in a new case in such a way that the facts in both the precedent and the new case look the same, and apply the precedent in a new case that contains different sets of facts in it.

The legal principles, interpreted and constructed in a precedent, are usually applicable only to the same specific sets of facts ascertained by the court. Yet, no two cases have the exact same set of facts, and one case can never be a precedent to another case. A practical consideration for judges is determining a tolerable limit of differences between two cases. This raises the question of how far a judicial precedent can be applied in later cases without deviating from the original decision when it is taken out of the case that produced it. Generally, a precedent occupies a very large portion of judicial thinking in Japan. The more often a precedent is cited, the more binding it becomes on later cases because its repeated use reinforces the value and binding force of that precedent.

For instance, while upholding the general principle that not all union activities are illegal, the Court upheld a management's disciplinary actions against the defendants by taking into account the public versus private distinction of their employment, the nature of the worker's job assignment, and the content and behavior of the alleged wrongdoing. After finding that employees in the public sector wore tags during their work hours with political slogans that had nothing to do with their union activities, the Court held it appropriate for the management to discipline those workers for having violated their duty to devote themselves to assigned work. Thus, the Court in the present case narrowly construed the summary of legal judgments in the reporter, which was stated more broadly than was needed to settle the dispute, and broadly interpreted the workers' duty to devote themselves to assigned work.[16]

A precedent is sometimes extended and stretched beyond what is necessary to draw a judgment on the basis of ascertained facts of the instant case. In this circumstance, a judicial interpretation is divorced from ascertained facts and is applied beyond its original scope and extent, only to inadequately settle a dispute. *Japan Railroad Corp. v. Ikeoka*[17] held it an improper act of a labor union for the national railroad labor union members to paste fliers on office lockers listing its union demands. The

16. *Id.* at 68.

17. Saikō Saibansho [Sup. Ct.] Oct. 30, 1979, 33 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 647.

Court was of the opinion that the union had violated the employer's right to own and manage its lockers, disrupting the order of the railroad enterprise, unless a special circumstance deemed it an abuse of the employer's right not to allow its lockers for activities of the labor union or its members. However, the Court might have stretched this general principle too far when it applied this precedent to a private enterprise's labor union activities because workers of private enterprises[18] might not have needed to use their company's lockers as strongly as workers of the national railroad corporation, and might not have objected to such fliers pasted on their lockers.[19]

Cases raising the question of nonjusticiability of religious disputes illustrate the judicial practice of stretching precedent. In *Sokagakkai v. Matsumoto*,[20] the plaintiffs made monetary donations to a Buddhist temple for the construction project of a building to house the Buddha's statue and a wooden mandala. Upon discovery of the Mandala's unauthenticity, however, they rescinded their donations and sued to recover illegal profit the temple had made out of their donations. The Supreme Court dismissed this suit as a nonlegal dispute and gave its opinion that the value of an object of faith or religious teaching is disputed to determine the concrete right and duty of legal relations, and accordingly become nonjusticiable under Article 3 of the court law. However, in *Renkaji v. Kubokawa*,[21] a religious group disciplined and dismissed its resident monk and demanded he vacate the adjacent temple's residence where he resided. The Court applied the *Sokagakkai* precedent, dismissed the case, gave its opinion that the entire dispute depended on the reasons for disciplinary dismissal of the monk, and held that the case was not suitable for judicial adjudication. But, in Justice Ito's opinion, *Sokkagakkai* involves the strongly religious issue of the devotees' donations to build a temple to house the Buddha's statue and a holy mandala. *Renkaji v. Kubokawa* is a suit to evict a monk from the temple's residence and regards an ordinary civil matter. Accordingly, it could be judged separately from its underlying premise of disciplinary actions pertaining to religious teaching. Thus, in spite of differences in the facts of both cases, the principle of nonjusticiability of religious disputes was stretched, rendering the instant case nonjusticiable.

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18. The Ikegami Tsushinki case. Saikō Saibansho [Sup. Ct.] July 19, 1988,154 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 373.

19. ITO, *supra* note 15, at 25–26.

20. Saikō Saibansho [Sup. Ct.] Apr. 7, 1981, 35 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 443.

21. Saikō Saibansho [Sup. Ct.] Sept. 8, 1989, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 889.

The 1980 Supreme Court decision[22] remains an example of narrowly interpreting legal precedent. The Court construed Article 266(3) of the commerce law in such a way as to hold a nominal member of the board of directors in a private company liable for negligent supervision of his board's chairperson and responsible for damages caused to a third party due to the chairperson's wanton management. However, the Court in a later case[23] denied that similar supervisory responsibilities of a board member did not constitute negligence, even though the board member had more than a small influence over his board's chairperson. He was a board member of a company with which the company in question had business relations, and he became a large shareholder and a board member at the request of the latter company. He would have probably been held responsible for misconduct of his board chairperson had the Court applied the precedent of the first case. By distinguishing the precedent from the case at bar, the Court decided the precedent was inapplicable.

It is extremely difficult to change the Supreme Court precedents. Many Justices so strongly believe in the binding force of precedents that they sometimes abide by weak precedents. A Justice often supports a precedent even if he has some doubt regarding its value and raises the issue at a judicial conference. He would go along with the status quo, hoping that the Court will take up the same issue later in a more suitable case. A Justice initially defers to the legislative actions for policy changes, but legislative inaction would usually make them follow existing precedents until the grand bench denies or changes them. A dissenting opinion in Japan seldom becomes a majority opinion in later cases because dissenting ustices lose their momentum when more and more ustices join the majority that believes in the binding force of precedents per se, therefore rendering dissenting opinions weaker and weaker. A Justice often finds it formidable to convince his or her colleagues on the bench of the need to change a precedent, and may give up his efforts and go along with the majority or opt for writing a dissenting opinion of his own.

As a rule, a dissenting opinion has no value as precedent. Yet, it may nonetheless weaken the effects of majority opinions. While upholding the constitutionality of a statute that the precedent sustained, a Justice argued that the statute as it was applied to the ascertained facts in the present case became unconstitutional. *Matsuei v. Hokkaido Customs Director*[24]

22. Saikō Saibansho [Sup. Ct.] Mar. 18, 1980, 18, 61–101. 971 Hanji 373.

23. ITO, *supra* note 15, at 36.

24. Saikō Saibansho [Sup. Ct.] Dec. 12, 1984, 38 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1308.

challenged the constitutionality of the law banning not only the importation of writings and drawings harmful to manners and decency, but also the customs inspection of them. Justice Ito was fully aware that the customs inspection, once declared unconstitutional, would disrupt the ongoing practice of customs work. He also suspected that if he insisted that Article 22(2), section 1 of the Constitution would absolutely ban a customs inspection—however narrowly it might be interpreted to protect public welfare—he might force the majority of justices to formally uphold the constitutionality of the practice of customs inspection. So, Ito, and other Justices worked out a strategy of softening their own opposition and wrote the dissenting opinions asserting that the provisions of Article 21(1) of the customs law lacked clarity and were too broad to be constitutional. This case illustrates judicial maneuvering that limits the impact of judicial precedent on later cases.

Persistent deviations from the Supreme Court precedents sometimes induce a change. It is well known that continued district court judgments contrary to Supreme Court precedent led to the abolition of unreasonably heavy penalties in patricide.[25] Similarly, a continued recurrence of minority opinions among the Supreme Court ustices occasioned a change in the grand bench precedents.[26]

More often than not, a change in precedent results from change in the composition of the Supreme Court. Justice Jiro Tanaka wanted to keep liberal policies toward labor activities of public enterprises in the *Tokyo Central Post Office* case[27] and strongly argued that the grand bench should dismiss an appeal in the *Tsuruzono* case.[28] He was of the opinion that the accused labor union members of the public enterprises had been engaged in illegal labor strikes for political purposes. A large majority of Justices decided, however, to change the liberal precedent by flatly stating that the Tokyo Central Post Office decision was wrong. Following the new conservative precedent, effected by newly appointed conservative Justices, the *Iwate Teachers* case[29] and the *Nagoya Postal* case[30] both held it illegal

25. ITOH, *supra* note 4, at 149.
26. ITOH, *supra* note 4, at 78.
27. Saikō Saibansho [Sup. Ct.] Oct. 26, 1966, 20 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901.
28. Saikō Saibansho [Sup. Ct.] Apr. 25, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 547.
29. Saikō Saibansho [Sup. Ct.] May 21, 1976, 30 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1178.
30. Saikō Saibansho [Sup. Ct.] May 4, 1977, 31 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 182.

for government employees to be engaged in labor disputes. While this precedent was limited to criminal cases of national and local employees of public corporations in the post-*Tsuruzono* period of time, it has been questionable as to whether this precedent would extend to similar labor disputes by manual laborers of local public enterprises.[31] Be that as it may, an early retirement of Justice Tanaka and a subsequent conservative domination of the Court after the mid-1970s created a long lasting impact on judicial precedents on this issue.

Changes in the precedent on divorce partly emerged from new judicial perceptions and attitudes toward changing social customs in Japan. On the strength of the precedent of *Inoue v. Inoue*,[32] the Supreme Court long denied divorce petitioned for by a spouse (who is often male) responsible for a failed marriage, even if a marriage had been totally damaged beyond restoration. This precedent was limited to a spouse who was solely responsible for its failed marriage. Yet, later, lower courts began to compare disputed causes of both spouses and granted a divorce filed by a party with fewer faults.[33] Even if a marriage failed due to incompatibilities of character and personality and neither spouse was responsible, a spouse with contributory negligence slightly greater than the other spouse came to be denied petition for divorce. In practice, when it deemed it advisable to grant divorce, a court sometimes reconstructed past events in such a way as to hold both parties responsible for their failed marriage. Other times, a court reconstructed disputed facts to conclude that a spouse committed wrongdoing after their marriage had failed. The courts even refused to find any connection between the marriage failure and a wrongdoing of one spouse in order to grant divorce.

K v. O[34] was to changing a precedent because there was no hope for restored marriage between spouses of over seventy years old after thirty-six years of separation. Justice Ito seized an opportunity when he was assigned the case. He was able to have his third petty bench agree to transfer the case to the grand bench, which dropped the premises of dismissing a divorce claim solely based on his or her faults.

An existing precedent may be extended to a new legal issue where there is no precedent. Justices, when they cannot reach a decision among

31. ITO, *supra* note 15, at 48.

32. Saikō Saibansho [Sup. Ct.] Feb. 29, 1952, 6 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 110.

33. ITO, *supra* note 15, at 52–53.

34. Saikō Saibansho [Sup. Ct.] Sept. 2, 1987, 41 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1423.

themselves, have a research judge look very meticulously in all reporters for precedent that would come as close as possible to a pending legal issue or any precedent seemingly applicable to the instant case. If the research judge unearthed an even remotely relevant precedent from sources, which are neither published nor made available outside the judiciary, they would rely on them in reaching a decision without thoroughly examining its applicability to the new issue or without citing such sources.

The difficulty and rarity of the Supreme Court explicitly changing its own judicial precedents is offset by occasional practices of a petty bench changing a grand bench precedent without referring to it in its written opinion. The law authorizes only the grand bench to change the grand bench precedents, and yet a petty bench has drawn its judgments on the basis of what the grand bench might presumably have intended even where the precedent did not seem to cover the facts ascertained in a new case. A dissenting judge may distinguish facts in the precedent and a present case and accuse the majority of having stretched the precedent too far by applying the precedent to the new case with substantially different facts.[35]

The Court tends to follow legal interpretations of its own precedent rather than interpreting them anew. *Yoshioka v. Japan*,[36] or the *Minamata* case, raised the difficult task of determining the type of crime committed when a baby died after birth due to a worsening illness that had started when the baby was a fetus. The Supreme Court judged that the industrial polluter committed involuntary harm at the time when the fetus got ill due to the poisonous substances with which it had been in contact. In the opinion of the Court, the fetus was part of its mother's body, harm to the fetus was harm to its mother, and the involuntary harm became an involuntary homicide of the fetus at the time of its birth.

Both the district and high courts took the view that it was not necessary for a fetus to be born to qualify as a "person," as did Justice Nagashima of the lower courts in his supplementary opinion. However, the majority might have thought its own reasoning would better align with the precedent after reviewing prevailing theories of criminal law on the act of inflicting harm, crimes against a fetus, and a pregnant woman's actions leading to the death of her fetus. Consequently, it decided the case along the line of its own precedent instead of adopting the lower courts' reasoning.

35. ITO, *supra* note 15, at 35–36.

36. Saikō Saibansho [Sup. Ct.] Feb. 29, 1988, 42 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 314.

Furthermore, a precedent may be abused when a lower court decides along the lines of the Supreme Court precedent on an important legal issue, even if ascertained facts are different. In *Osaka v. Asano*,[37] or the *Daito Flood Damage* case, the Supreme Court dismissed damage claims and gave its opinion that so long as the defendant had ensured the safety of the river dikes while undertaking its repair work, the defendant was not responsible for damage resulting from flooding over the dikes under repair in the absence of inadequate management of repair work or design flaws. The *Kajigawa Flood Damage* decision[38] followed this precedent. Yet, in the *Tamagawa Flood Damage* case,[39] a lower court dismissed damage claims in spite of different facts in the two cases only to be reversed by the Supreme Court. In the opinion of the Supreme Court, the *Daito* precedent was not intended to cover flood damage claims of completed repair work in which the flood did not go over the highest water level in a river dike that had already been repaired, and the lower court wrongly applied the *Daito* precedent to a case in which underlying facts were no longer identical to those in the precedent.

Moreover, a lower court judgment, sustained by a few sentences of the Supreme Court petty bench, may bind future decisions, thereby creating precedential value of its own. A court and litigants in a later case may scrutinize the opinions of the court below, sustained by the Supreme Court in the precedent case; interpret them as reflecting the Supreme Court opinions; and cite them as precedent. Thus, the lower court decision binds subsequent cases. A Supreme Court ustice who wants to deny, or at least minimize, the effect of a lower court ruling as precedent may hold the lower court's reasons unjust or even unacceptable, while sustaining the lower court's precedent. A Justice denies the applicability of the precedent that the majority cites in justifying its existing ruling. For instance, a Justice would consider the ruling of a high court, sustained by the majority, as unworthy as Supreme Court precedent. In the words of Justice Dando:

> A kind of King Solomon's trial is not altogether absent at the Supreme Court. Strictly speaking, the judgment below was not quite right. But, after reading the facts ascertained by the court below, all justices strongly felt that the judgment below was based on duly

37. Saikō Saibansho [Sup. Ct.] Jan. 25, 1984, 38 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 53.

38. ITO, *supra* note 15, at 49.

39. *Id.*

> ascertained facts, and that they looked much more satisfactory than any other ways of settling the disputes. So, my bench sustained the judgment below but had a hard time in justifying and rationalizing the judgment below, which was after all based more on the sense of justice than law, as in the fabled King Solomon's trial. At the same time, my bench did not want to make this lower court's judgment a precedent for later cases and decided not to include this case in the Hanreishū.[40]

III. PRECEDENT IN MALAPPORTIONMENT CASES AFTER THE 1990S

We shall next examine the judicial role regarding precedents through a series of Supreme Court decisions involving malapportionment after the 1990s. It is appropriate to briefly trace the nature of elections and the evolution of universal adult franchise as they influence the system of apportioning the election district for the national Diet.

The nature of election was actively debated in the course of reforming general elections in the Taisho era.[41] The principle of imperial sovereignty did not allow the unfettered right of individuals to participate in the process of electing the people's representatives to public offices. Even Tatsukichi Minobe, a liberal-minded professor of administrative law, viewed elections as public functions and official duties. In his opinion, an election was an official function undertaken by the national organ, and all public employees equally enjoyed what might be called a claim against the state to conduct elections to become civil servants. Ordinary citizens did not enjoy such claims against the state. Tax requirements restricted franchise until 1925, and a voter's socioeconomic status differentiated eligibility in different elections until 1945. Furthermore, females were franchised in 1945 under the Occupation. To Shiro Kiyomiya, a constitutional law specialist, voting was both a right and a duty: a citizen has the right to vote and the duty to participate in elections.

With the introduction of popular sovereignty after the War, the right to vote has come to be viewed as something that is indelibly and inherently attached to popular sovereignty. Academic debates shifted from the nature of election to the nature of voting rights and the *right* to participation in elections. Kazuhiro Hayashida considers that the 1947 Constitution has conferred the voting right upon individual citizens as a means to defend

40. SHIGEMITSU DANDO, HANREI TO IU MONO NI TSUITE 76 (1984).
41. YOSHIAKI YOSHIDA, GIKAI, SENKYO, TEN'NO SEI KEMPORON 99 (1990).

their civil rights. Accordingly, he treats the right to vote as a political or a civil right. The Japanese Supreme Court has followed this line of arguments when it states in a supplementary opinion, "Under the Constitution based on popular sovereignty, the voting right of public offices is undoubtedly one of the most important basic rights pertaining to the Diet."[42] Voting rights oblige individual citizens to participate in the public function of selecting public employees, and enables them to express their opinions on national governance.

However, voting has sometimes been viewed more as a duty than a right. The Public Office Election Law strictly regulates elections, election campaigning, and violations thereof.[43] Many provisions in the law reflect the government's preoccupation with law and order when they regulate campaigning, including distribution of election campaign materials, and candidates' preelection activities. In particular, prohibition of solicitation of votes by door-to-door canvassing in Japan is seldom seen among the Western countries.[44] This prohibition reflects the Meiji constitutionalism that emphasized law and order in society and can be traced back to the enactment of the General Elections Law of 1925. Its legislative intent was to maintain the solemn ceremony of elections as a state function and to prevent those without property from undertaking unfair acts of bribery and corruption.[45] Legislators intended to thoroughly simplify and liberalize regulating provisions of election campaigning rights after the end of the War, but the provisions banning the door-to-door canvassing remained intact in the course of revising the election law for the House of Representatives elections. In the end, those provisions still remain in the Public Office Elections Law of 1950.

The conservative views on the constitutional right to vote for public offices have manifested themselves among the judicial minds in a series of malapportionment cases. The statutory regulations on the size, qualifications of legislative members, electoral systems, and methods of voting[46] have become problematic, especially in relation to the equality clause of the Constitution.

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42. Saikō Saibansho [Sup. Ct.] Feb. 9, 1955, 9 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 217.

43. *Id.* This case also noted that an election law violator impaired fairness in elections, harmed public fairness, should be excluded from public office elections for certain periods of time, and that reasons for exclusions differ from common criminals who are denied the right to vote and run for public offices, such as repentance.

44. YOSHIDA, *supra* note 41, at 199.

45. *Id.* at 197.

46. Article 44 requires each voter to present himself or herself at a polling station. This provision

In the wake of *Baker v. Carr*,[47] the Japanese Supreme Court made its first decision on the issue of malapportionment in the elections of the National Diet. It dismissed a suit against the alleged malapportionment in *Koshiyama v. Tokyo Election Commission*,[48] or the *Koshiyama* malapportionment case. The Court has seldom cited its rulings in this case.

Kurokawa v. Chiba Prefecture Election Commission[49] has become one of the most important precedents, as it successfully challenged for the first time the alleged malapportionment in the elections of the Lower House. Comparing with the least-populated districts, the majority of Justices in this case held that the 5 to 1 ratio of voters per delegate in the first election district of Chiba Prefecture violated the principles of equality under the law, unless otherwise justified by rational election policy. However, the Court declined to invalidate the election results and gave its opinion that election results, if judicially nullified, would not immediately correct damages resulting from malapportionment and might even bring about unintended unconstitutional consequences.

The Court dismissed the challenge to alleged malapportionment in the election of July 1977 in *Shimizu v. Osaka Election Commission*,[50] or the House of Councillors' malapportionment case. It squarely based its dismissal of the requested invalidation of the election results on the statutory strength of the administrative litigation procedural law.[51] Likewise, the Court in *Tokyo Election Commission v. Koshiyama*[52] upheld

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was challenged in connection to a handicapped voter unable to go to a polling place.

47. 369 U.S. 186 (1962).

48. In *Koshiyama v. Tokyo Election Commission*, the *Koshiyama* malapportionment case, the Supreme Court unanimously endorsed the election results in the 1962 elections for the House of Councillors or the Upper House. Upholding the election law and its apportionment schedules based on a 1946 census, the grand bench was of the opinion that "inequality to the extent it exists today is still only a problem of the propriety of legislation." Justice S. Saito even questioned standing to sue for individuals seeking judicial nullification of election results.

49. Saikō Saibansho [Sup. Ct.] Apr. 4, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223. The majority declared the 1972 general election for the House of Representatives unlawful. It was of the opinion that an unequal value of each vote, unless otherwise justified by some national election policy, would violate equality under law. The majority did not invalidate the election results, but six concurring Justices would have invalidated them.

50. Saikō Saibansho [Sup. Ct.] Apr. 27, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 345. Only Justice Dando dissented, holding both the apportionment schedules and the election results unconstitutional and invalid.

51. A court may dismiss a suit seeking to have an unlawful action of government judicially annulled if it deems that such a nullification would seriously harm public interests and public welfare. In making this determination, a court must carefully assess the extent of damages that such nullification might cause, the compensation coverage of damages, preventive measures, and all other consequences.

52. Saikō Saibansho [Sup. Ct.] Nov. 7, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1243. In dissenting, Justice Dando declared that the Diet's reapportionment in 1975 was not good

the constitutionality of the apportionment schedules at the time of the 1980 elections for the House of Representatives. In spite of its own observations that such apportionment was no longer rational, tolerable, or justifiable in light of the constitutional protection of equal voting rights, the majority of justices granted the Diet a grace period to rectify its methods of apportionment.

The Court once again held the apportionment schedules unconstitutional in *Kanao v. Hiroshima Election Commission*,[53] which challenged the disparity of as much as 4.4 to 1 in the 1983 elections for the Lower House. At the same time, it declined by 13 to 1 to invalidate the election results for the same reason as in the *Shimizu* case.

Kawahara v. Tokyo Election Commission[54] was the first malapportionment case that the Supreme Court decided in the 1990s. This case challenged the apportionment schedules revised in 1986 and its 1990 election results in the fifth election district of Tokyo for the House of Representatives. Whereas the worst disparity was reduced to 2.99 to 1 as a result of legislative reapportionment, it was back to 3.18 to 1 at the time of the 1990 elections. The divided Court, while admitting the irrationality of the ratio of 3.18 to 1 in the value of vote, upheld the constitutionality of the apportionment schedules as a whole, as well as the election results. The eight-member majority (five judges, two prosecutors, and one attorney) cited the *Kurokawa* case, the *Koshiyama* case, and the *Kanao* case to justify their holding that the 1986 apportionment schedules, which the legislature had viewed as provisional measures, were constitutional at the time of the elections under dispute. Two justices (an academic and a prosecutor) wrote separate (concurring) opinions. Justice Sonobe found it insufficient for the Court to invalidate the election results because such a ruling would also invalidate the legislation empowering the election commission to undertake new elections.[55] In his view, the Court should

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enough. Also, observing the disparity of 2.92 to 1 in the worst malapportioned district, Justice Nakamura, in dissent, thought it more important for each election district to be apportioned strictly in proportion to the size of eligible voters for the Lower House, rather than the Upper House.

53. Saikō Saibansho [Sup. Ct.] July 17, 1985, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1100. Justice Taniguchi was the only dissenter: he favored having election results of specific election districts invalidated through concrete litigations filed by voters in malapportioned districts instead of invalidating all election results across the country.

54. Saikō Saibansho [Sup. Ct.] Jan. 20, 1993, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 67.

55. Justice Sonobe cited Justice Nakamura's dissenting opinion in the *Koshiyama* case and Justice S. Kishi's dissenting opinion in the *Kurokawa* case. *See* Saikō Saibansho [Sup. Ct.] Nov. 7, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1243, (the *Koshiyama* case); Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223 (the *Kurokawa* case).

either direct the legislature to immediately revise the apportionment schedules or to empower the commission to administer new elections. However, he thought it premature for the judiciary to devise judicial measures to correct malapportionment. Justice Mimura would compute the numbers of voters per delegate averaged between the most underrepresented and most overrepresented election districts and then compare the contested disparities and the apportionment schedules under challenge.[56] In his opinion, the Diet did not exceed its legislative discretion when its apportionment schedules produced the greatest disparity of 2.13 to 1 between the fifth Tokyo district and the second district of Miyazaki Prefecture, and the smallest disparity of 0.67 to 1 between the fifth Tokyo district and the fifth Kanagawa district.

Five dissenting ustices (three attorneys, one career judge, and one diplomat) held the elections unlawful, inasmuch as the Diet had failed to correct apportionment schedules within a reasonable time period. Justice Ono found the 1986 reapportionment that produced the disparity of 2.99 to 1 inadequate as a temporary measure because the Diet should have anticipated that malapportionment would sooner or later exceed the ratio of 3 to 1, and a reasonable grace period had elapsed since the *Kanao* case.[57] Justice Hashimoto did not consider the 1986 reapportionment sufficient to correct the continuing malapportionment since 1970.[58] Justice Nakajima thought that the legislators found it necessary to update apportionment schedules every five years in order to avoid gross inequality, and held the 1986 revision, however temporary it might have been, to be too little and too late.[59] Justice Kisaki considered it necessary to set the maximum tolerance level at the ratio of 2 to 1 and did not see any need to allow legislative discretion to take into account nonpopulation factors. He would declare it unlawful for any district to exceed the ratio of 2 to 1 and invalidate election results should the Diet fail to correct injustice within one year or a reasonable time limit. Citing the *Kurokawa* case, Justice Sato would consider it unconstitutional as a violation of equality to exceed the ratio of 2 to 1 and make the legislature anticipate

56. Justice Mimura cited the dissenting opinion of Justice Okahara and six other Justices, as well as Kishi's opinion in the *Kurokawa* case.

57. Justice Ono cited the *Koshiyama* and *Kanao* precedents, as well as the 1988 second petty bench decision. Saikō Saibansho [Sup. Ct.] Oct. 21, 1988, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 644.

58. Justice Hashimoto cited the *Koshiyama* and *Kanao* precedents, as well as the 1988 second petty bench decision. Saikō Saibansho [Sup. Ct.] Oct. 21, 1988, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 644.

59. Justice Nakajima and Justice Kisaki cited the *Kurokawa*, *Koshiyama*, and *Kanao* cases.

and prevent any violation of the ratio and correct malapportionment within two sessions of the Diet.

A series of persistent litigation by concerned citizens and repeated judicial warnings called for extensive overhauls in the Public Office Election Law and accompanying apportionment schedules. In December 1991, the Diet added nine seats and eliminated ten seats, reducing the discrepancy to 2.81 to 1.

JUSTICES' VOTING IN *KAWAHARA V. TOKYO ELECTION COMMISSION* REGARDING THE LOWER HOUSE ELECTION

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Kusaba	Career Judge	Conservative
Teika	Career Judge	Conservative
Kabe	Career Judge	Conservative
Onishi	Career Judge	Conservative
Miyoshi	Career Judge	Conservative
Oohori	Prosecutor	Conservative
Fujishima	Prosecutor	Conservative
Mimura	Prosecutor	Conservative; opinion
Sonobe	Academic	Conservative; opinion
Sakagami	Attorney	Conservative
Hashimoto	Attorney	Liberal; dissenting
Ono, Motoo	Attorney	Liberal; dissenting
Sato, Shoichro	Attorney	Liberal; dissenting
Kisaki	Attorney	Liberal; dissenting
Nakajima	Diplomat	Liberal; dissenting
Total		Lib (5); Con (10)

The case of *Osaka Election Commission v. Kawazoe*[60] challenged the 1992 Upper House elections that created a glaring discrepancy in the value of each vote. The majority cited several precedents.[61] It also cited three

60. Saikō Saibansho [Sup. Ct.] Sept. 11, 1996, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2283.

61. Saikō Saibansho [Sup. Ct.] Jan. 20, 1993, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 67 (the *Kawahara* case); Saikō Saibansho [Sup. Ct.] July 17, 1985, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1100 (the *Kanno* case); Saikō Saibansho [Sup. Ct.] Nov. 7, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1243; Saikō Saibansho [Sup. Ct.] Apr. 27, 1983, 37 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 345 (the *Shimizu* case); Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223.

Supreme Court petty bench decisions reported in the *Saibanshū*.[62] The nine-member majority (six career judges, two prosecutors, and one scholar) sustained the constitutionality of the apportionment schedules and the election results. While admitting the extreme degree of disparity of 6.59 to 1, raising a serious problem of violating the equality clause, they did not consider that legislative failure to rectify such a glaring malapportionment would warrant judicial condemnation of excessive legislative discretion. In his concurring opinion, Justice Sonobe acknowledged the peculiar nature of the Upper House that makes it especially difficult to apply equal voting rights to the two-member local election districts.[63] Viewing the fact that some four-member districts had exceeded a 4-to-1 ratio was unconstitutional, he thought it better for the Court to urge the Diet to correct malapportionment instead of invalidating election results.

The six dissenters (four attorneys, one bureaucrat, and one diplomat) wrote a joint dissenting opinion.[64] While holding the apportionment schedules unconstitutional, they did not void the election results in spite of their opinion that the Diet had knowingly failed to rationally and expeditiously rectify malapportionment at the time of the present elections. Justice Ozaki cited *Kurokawa* in his separate dissenting opinion and held the constitutional equality clause to be paramount. He concluded that the disparity of 6.59 to 1 had gone unreasonably beyond the generally accepted disparity of 2 to 1. Similarly, without citing any precedent, Justice Fukuda in his separate dissenting opinion placed the constitutional requirement of equal value of voting rights ahead of any other considerations due to the peculiar nature of the Upper House. Justice Endo did not cite any precedent in his separate dissenting opinion, failed to see any fundamental rectification of malapportionment in some districts with more than four representatives, and characterized revised apportionment schedules as a patchwork of convenience.

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62. Saikō Saibansho [Sup. Ct.] Oct. 21, 1988, 155 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 65; Saikō Saibansho [Sup. Ct.] Sept. 24, 1987, 151 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 711; Saikō Saibansho [Sup. Ct.] Mar. 27, 1986, 147 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 431.

63. Justice Sonobe cited *Shimizu*, *Kurokawa*, and his own opinion in *Kawahara*, as well as Jiro Nakamura's dissenting opinion in the *Koshiyama* case.

64. The dissenters cited *Kurokawa* and *Shimizu*.

JUSTICES' VOTING IN *KAWAZOE V. OSAKA ELECTION COMMISSION* REGARDING THE UPPER HOUSE ELECTION

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Miyoshi	Career Judge	Conservative
Fujii	Career Judge	Conservative
Kabe	Career Judge	Conservative
Onishi	Career Judge	Conservative
Ono, Motoo	Career Judge	Conservative
Chigusa	Career Judge	Conservative
Negishi	Prosecutor	Conservative
Ijima	Prosecutor	Conservative
Sonobe	Scholar	Conservative; opinion
Ozaki	Attorney	Liberal; dissenting
Kawai	Attorney	Liberal; dissenting
Endo	Attorney	Liberal; dissenting
Ohno, Masao	Attorney	Liberal; dissenting
Fukuda	Diplomat	Liberal; dissenting
Takahashi, H.	Bureaucrat	Liberal; dissenting
Total		Lib (6); Con(9)

In *Yamaguchi v. Tokyo Election Commission*,[65] involving the 1995 elections for the Upper House, the ten-member majority (six judges, two prosecutors, one bureaucrat, and one academic) upheld the apportionment schedules revised in 1994 and the subsequent election results. In its opinion, the Court observed that the revised apportionment schedules either added or subtracted a total of four seats in seven districts without changing the overall electoral framework for the Upper House, thereby decreasing the disparity at the time of the present elections. The Diet, through this revision, did not go beyond its discretion and did not violate the equality clause, even though the revised schedules still left disparities between 4.81 to 1, and 4.99 to 1.[66] Justice Sonobe upheld the apportionment schedules inasmuch as the disparity (3.4333 to 1 between

65. Saikō Saibansho [Sup. Ct.] Sept. 2, 1998, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1373.

66. The majority cited *Kurokawa*, *Shimizu*, *Koshiyama*, *Kanao*, *Kawahara*, and *Kawazoe*. It also cited three petty bench decisions cited in the *Kawazoe* case, namely, Saikō Saibansho [Sup. Ct.] Oct. 21, 1988, 155 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI]; Saikō Saibansho [Sup. Ct.] Sept. 24, 1987, 151 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 711; Saikō Saibansho [Sup. Ct.] Mar. 27, 1986, 147 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 431.

the cities of Kagoshima and Tokyo) in this election was less than 4 to 1, which he had set as a tolerable limit.[67]

Five dissenting ustices (four attorneys and one diplomat) wrote a joint dissenting opinion.[68] Critical of the Diet for its cosmetic reapportionment in a few election districts, they argued that the legislative rationale to allocate seats on the basis of the size of a prefecture had no constitutional foundation, could not make up for the constitutional imperative of the right to equality of voting, and that the legislative decision to allocate a minimum of two seats to each district had ignored the equality clause. While the dissenter held the apportionment schedules unconstitutional, they refrained from voiding the election results.

Justices Ozaki and Fukuda wrote a separate dissenting opinion, citing Ozaki's dissenting opinion in *Kawazoe*. In their opinion, the premise of assigning each electoral district for the Upper House more than two even numbers of seats was a measure of expediency and would have to be changed or even abolished should it violate the equality clause. In wrote another dissenting opinion of his own without citing any precedent. Justice Endo held that the revised apportionment, which added eight seats in four districts and eliminated eight seats in three districts, did not conform to the principle of apportioning seats in proportion to the size of voters in an electoral district.

JUSTICES' VOTING IN *YAMAGUCHI V. TOKYO ELECTION COMMISSION* REGARDING THE UPPER HOUSE ELECTION

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Yamaguchi	Career Judge	Conservative
Kanatani	Career Judge	Conservative
Onishi	Career Judge	Conservative
Ono, Motoo	Career Judge	Conservative
Chigusa	Career Judge	Conservative
Fujii	Career Judge	Conservative
Ijima	Prosecutor	Conservative
Negishi	Prosecutor	Conservative
Oide	Bureaucrat	Conservative
Sonobe	Academic	Conservative; opinion

67. Justice Sonobe wrote a concurring opinion, citing his own concurring opinion in the *Kawazoe* case.

68. They cited *Kurokawa* and *Kanao*.

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Ozaki	Attorney	Liberal; dissenting
Endo	Attorney	Liberal; dissenting
Motohara	Attorney	Liberal; dissenting
Kawai	Attorney	Liberal; dissenting
Fukuda	Diplomat	Liberal; dissenting
Total		Lib (5); Con (10)

The Supreme Court in *Koshiyama v. Tokyo Election Commission*[69] and its companion case, *Yamaguchi v. Tokyo Election Commission*,[70] sustained the constitutionality of the Public Office Election Law, as revised in 1994, to provide for single-member election districts for the House of Representatives, and upheld the election results in Tokyo's fifth election district, which had been held in October 1996 in accordance with the revised law.

The nine-member majority (six judges, two prosecutors, and one academic) focused on two counts. First, the majority held that the Diet neither violated the constitutional principle of popular sovereignty and parliamentary democracy nor exceeded its discretion in legislating the single-member election districts through revising the Public Office Election Law for the Lower House. The majority considered the Diet to have been authorized to take into consideration not only the parity in the value of vote, but also other nonhuman factors. The majority also considered that the single-member election district system was one of the rational methods of electing lawmakers inasmuch as they could reflect the people's preferences and opinions. Therefore, the apportionment schedules, which created the disparity of 2.3 to 1 at the time of the present elections, would not immediately violate the constitutionally tolerable disparity of 2 to 1. Second, restrictions on candidacy and different treatments between a party-endorsed candidate and an independent candidate might have provided an independent candidate with less government support in broadcasting election campaign speeches and other forms of assistance, but such differences would not have so grossly violated the equality clause in electing Diet members.[71]

69. Saikō Saibansho [Sup. Ct.] Nov. 10, 1999, 53 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1704.

70. Saikō Saibansho [Sup. Ct.] Nov. 10, 1999, 53 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1441.

71. The majority cited *Kurokawa*, *Shimizu*, *Koshiyama*, *Kanao*, *Kawahara*, *Kawazoe*, and *Yamaguchi*.

Four dissenters (all attorneys) held the single-member election district system unconstitutional and the present election results based thereupon unlawful, while declining to invalidate their elections.[72] In their opinions, the findings of the census, taken shortly after the elections, that as many as sixty election districts had produced disparities of more than 2 to 1 would not have allowed the Diet any more grace periods to correct such a gross disparity that had existed ever since the inception of the law. Justice Fukuda, a diplomat, found the single-member district system to have failed to achieve representative government because many people felt that the Diet did not properly balance the problem of representation from underpopulated districts and the constitutional equality clause. Furthermore, all five dissenters were of the opinion that an independent candidate was disadvantaged in comparison with a political party-endorsed one in terms of the government-sponsored broadcasting of election campaign speeches and other forms of campaign subsidies.

JUSTICES' VOTING IN *KOSHIYAMA V. TOKYO ELECTION COMMISSION* AND *YAMAGUCHI V. TOKYO ELECTION COMMISSION* REGARDING THE UPPER HOUSE ELECTIONS

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Yamaguchi	Career Judge	Conservative
Ono, Motoo	Career Judge	Conservative
Chigusa	Career Judge	Conservative
Kanatani	Career Judge	Conservative
Kitagawa	Career Judge	Conservative
Fujii	Career Judge	Conservative
Ijima	Prosecutor	Conservative
Kameyama	Prosecutor	Conservative
Okuda	Scholar	Conservative
Kawai	Attorney	Liberal; dissenting
Endo	Attorney	Liberal; dissenting
Motohara	Attorney	Liberal; dissenting
Kajitani	Attorney	Liberal; dissenting
Fukuda	Diplomat	Liberal; dissenting
Total		Lib (5); Con (9)

72. Four dissenters (all attorneys) cited no precedents, and only Fukuda, a diplomat, cited his own dissenting opinion and a joint dissenting opinion with Ozaki, Endo, Kawai, and Motohara in the *Yamaguchi* case.

In *Yamaguchi v. Tokyo Election Commissio*n,[73] the ten-member majority (six judges, two prosecutors, one bureaucrat, and one academic) upheld the apportionment schedules and election results of the 1998 elections for the Upper House. Based on its findings that the 1995 census had registered an improvement in the worst disparity to 4.79 to 1 and that the actual disparity per seat had slightly declined from 4.99 to 1 at the time of the revision to 4.97 to 1, the majority concluded that the degree of disparity, which still continued in the revised apportionment schedules, had not reached the level where the Court would have held the Diet responsible for its abuse of legislative discretion.[74]

Five dissenters (four attorneys and one diplomat) wrote a joint dissenting opinion.[75] Noting diminishing regional differences and an increase in the ability to represent residents' opinions without having a lawmaker from a particular district, they argued that the prefecture had diminished its justification for retaining a minimum of two seats irrespective of the number of its voters, and had become much less important than the constitutional requirement for the numerical equality of voting right. They were critical of the Diet that had worsened the disparity by apportioning the number of seats to each election district by neglecting to allocate seats in proportion to the number of voters. Justice Endo wrote an additional dissenting opinion of his own without citing any precedent, arguing that the present apportionment was ill conceived in that the Upper House election law allocated each and all prefectures two seats or sixty percent of a total of 150 local representatives, and then assigned even numbers of the remaining fifty-eight seats to some districts without strictly following the number of voters. While acknowledging that the constitutional provision of electing half of the Upper House members every three years presumably necessitated the allocation of even numbers of representatives to prefectures, Justice Endo would construe this provision to mandate a third-year election on a nationwide, rather than single-district, basis, and would allocate the remaining fifty-eight seats in proportion to the number of voters in each election district.

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73. Saikō Saibansho [Sup. Ct.] Sept. 6, 2000, 54 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1997.

74. In support of this decision, it cited *Shimizu*, *Kawazoe*, and *Yamaguchi*, as well as the petty bench decision of Saikō Saibansho [Sup. Ct.] Oct. 21, 1988, 155 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 77.

75. They cited the *Kurokawa* case and the *Kanao* case.

Justice Fukuda wrote another dissenting opinion of his own.[76] He also cited the *Aizawa* patricide case[77] to illustrate the need for an occasional change in judicial precedent such as in malapportionment cases. He was even critical of the judiciary for having neglected to oversee the legislative discretion of the Diet that had put political expediency above the constitutional mandate of equal voting rights.

Justice Kajitani also wrote a separate dissenting opinion.[78] In his opinion, the Upper House could control the tyranny of the majority in the Lower House, inject a variety of public opinions in legislation, undertake thoughtful policy deliberations, and offer supportive roles against political alienation and abrupt political changes. He concluded that any measures to achieve these democratic and supportive functions of the Upper House and to differentiate electoral processes of the members of two chambers should not violate the constitutional right to equality in voting, and would not tolerate any device that exceeds the ratio of 2 to 1. He was also critical of the majority, which negated the constitutional duty of the judiciary to check an excessive legislative discretion.

JUSTICES' VOTING IN *YAMAGUCHI V. TOKYO ELECTION COMMISSION* REGARDING THE UPPER HOUSE ELECTION

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Yamaguchi	Career Judge	Conservative
Chigusa	Career Judge	Conservative
Kanatani	Career Judge	Conservative
Kitagawa	Career Judge	Conservative
Fujii	Career Judge	Conservative
Machida	Career Judge	Conservative
Ijima	Prosecutor	Conservative
Kameyama	Prosecutor	Conservative
Ooide	Bureaucrat	Conservative
Okuda	Academic	Conservative
Kajitani	Attorney	Liberal; dissenting
Kawai	Attorney	Liberal; dissenting

76. He cited his own dissenting opinion with Ozaki in *Yamaguchi v. Tokyo Election Commission*, and his own dissenting opinion in the *Yamaguchi* case.

77. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265.

78. He cited the dissenting opinion of Ozaki and Fukuda in the 1998 *Yamaguchi* case and the dissenting opinion of Fukuda in the 1999 *Yamaguchi* case.

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Endo	Attorney	Liberal; dissenting
Motohara	Attorney	Liberal; dissenting
Fukuda	Diplomat	Liberal; dissenting
Total		Lib (5); Con (10)

The nine-member majority (five judges, two prosecutors, one bureaucrat, and one academic) in *Koshiyama v. Tokyo Election Commission*[79] handed down its opinion in two sentences without citing any precedent whatsoever. It appears that they could not agree on writing the majority opinion of the Court, except for upholding the constitutionality of the 2001 elections for the Upper House and their election results. This almost *per curiam* decision of the Court was followed by many concurring and dissenting opinions, some of which were highly elaborate.

Justices Machida, Kanatani, Kitagawa, Ueda, and Shimada wrote a joint supplementary, or concurring, opinion.[80] They interpreted the present revision to have been intended to prevent a further aggravation of disparities among different districts by cutting two out of four seats from three underpopulated districts. They also felt that had the most underrepresented districts not been allotted an even number(s) of seats, the disparities would have been extensive between the districts with more than four seats and those with only one seat. They also conjectured that redistricting in proportion to the size of voters would have considerably worsened an opportunity to vote and would have made it difficult for the Upper House to reflect the interests and opinions of the people. Citing the *Kawazoe* case, Justice Shimada, in his separate supplementary opinion, noted some technical limits of achieving the right to equality in voting and tolerated the level of inequality under the present circumstances of mass migration of people to metropolitan areas.

Justices Kameyama, Yokoo, Fujita, and Kainaka wrote a joint supplementary opinion without citing any precedent. They interpreted the present revision to have been intended not so much to reduce as to prevent worsening disparities among electoral districts. They were hopeful of an ample chance at the next elections to declare unconstitutional the continuing negligence to reform the electoral system.

79. Saikō Saibansho [Sup. Ct.] Jan. 14 2004, 58 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 56.

80. They cited *Shimizu*, *Kawazoe*, and both *Yamaguchi* cases.

Likewise, Justices Kameyama and Yokoo wrote additional supplementary opinions respectively without citing any precedent. They valued highly special considerations given to electoral systems for the Upper House due to the existing constraint imposed by the constitutional requirement of a triennial election and the prefecture-based apportionment, as well as unique functions of the House. They thought the present apportionment schedules reflecting these special considerations would fare well in relation to the equality clause and would not raise the issue of excessive legislative discretion.

Six ustices wrote separate dissenting opinions respectively without citing any precedent. They were of the opinion that the apportionment schedules that had produced the disparity of 5.06 to 1 would grossly violate the equality clause and render the present elections unlawful. They were highly critical of the majority's judicial restraint failing to adequately discharge its constitutional duty of overseeing the electoral system and democracy.

Justice Fukuda wrote a separate dissenting opinion by marshalling out precedents from the dissenting opinion of Justice M. Ohno and five others, his own dissenting opinion in the *Kawazoe* case, dissenting opinions of Ozaki and four others, and his own dissenting opinions in the 1998 *Yamaguchi* case and the 1999 and 2000 *Yamaguchi* cases, and the dissenting opinion of Kawai and four others in the 2000 *Yamaguchi* case. Reiterating the unconstitutionality of the apportionment schedules, Justice Fukuda felt that confusion might arise had the court nullified the disputed elections held two-and-a-half years earlier. However, he seemed determined to call for a judicial ruling holding the next elections unconstitutional and unlawful.

Justice Kajitani wrote his own dissenting opinion and cited several precedents.[81] He would not tolerate any disparity over the ratio of 2 to 1 and was critical of the majority's pretext of judicial restraint, under which the judiciary had sustained malapportioned schedules and had impaired representative democracy.

Justice Hamada, in his dissenting opinion, cited the *Kurokawa* case and the *Shimizu* case, going even further by deploring that the judiciary had betrayed the people's trust. Similarly, in the words of Justice Takii (who cited no precedents), the judiciary failed to deny the Diet a wide discretion and instead contributed to the tardy and indecisive electoral reforms.

81. He cited the dissenting opinion of Justice Kawai and four others in the *Yamaguchi* case, and the dissenting opinion of Justice Kawai and four others, as well as his own dissenting opinion in the *Yamaguchi* cases.

Justice Fukazawa wrote an additional dissenting opinion and cited opinions of Fukazawa and Fukuda in *Shichifuku Sangyo Co. v. Japan*.[82] In his view, the prefecture-based apportionment, which would allot at least two seats to any prefecture, had not been constitutionally required, and the Diet should not have compromised the equality clause. He also reiterated that the Diet had failed to rectify the problems within reasonable grace periods.

Finally, Justice Izumi wrote his own dissenting opinion, without citing any precedent, in which he proposed to undertake substantive reviews of the apportionment schedules and to declare such an apportionment unconstitutional if it were a deprivation of the people's right to vote.

JUSTICES' VOTING IN *KOSHIYAMA V. TOKYO ELECTION COMMISSION* REGARDING THE UPPER HOUSE ELECTION

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Machida	Career Judge	Conservative
Ueda	Career Judge	Conservative
Kanatani	Career Judge	Conservative
Kitagawa	Career Judge	Conservative
Shimada	Career Judge	Conservative
Kameyama	Prosecutor	Conservative
Kainaka	Prosecutor	Conservative
Yokoo	Bureaucrat	Conservative
Fujita	Academic	Conservative
Fukazawa	Attorney	Liberal
Takii	Attorney	Liberal
Hamada	Attorney	Liberal
Kajitani	Attorney	Liberal
Fukuda	Diplomat	Liberal
Izumi	Career Judge	Liberal
Total		Lib (6); Con (9)

Finally, in *Takemura v. Tokyo Election Commission*,[83] the twelve-member majority reaffirmed the constitutionality of the newly enacted

82. Saikō Saibansho [Sup. Ct.] Sept. 1, 2002, 56 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1439.

83. Saikō Saibansho [Sup. Ct.] June 13, 2007, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1617.

single-member election district system and the revised apportionment schedules that had allotted at least one seat to each prefecture, as applied to the elections for the Lower House in 2005.[84] It also held it permissible under the equality clause to distinguish and treat differently a party-endorsed candidate and an independent candidate in terms of public support for election campaigning in the single-member districts.

Justices Saiguchu, Tsuno, Fujita, and Nasu wrote supplementary opinions respectively, while Fujita, Imai, and Nakagawa wrote concurring opinions. Citing his dissenting opinion in the 2006 decisions, Saiguchi differentiated the disparity of 5.13 to 1 in these precedents in comparison to 2.064 to 1 in the present case, and held the latter constitutionally tolerable.[85] Tsuno cited his supplementary opinion in *Koshiyama v. Tokyo Election Commission*[86] and thought it more in conformity with the electoral institution for the Lower House to evaluate the constitutional imperative of equal value of vote by combining the single-member district system and the proportional representation system, than by scrutinizing only the single-member election districting system. Similarly, citing his own concurring opinion in the *Koshiyama* case, Justice Nasu favored combining disparities in the single-member and proportional representation methods.[87] In his opinion, given the census findings in 2000 that the combined disparity decreased from 2.064 to 1 to 1.613 to 1 in the single-member district, the 2005 election results would have been within the constitutionally tolerable level of 2 to 1. Without citing any precedent, Justice Fujita did not consider that the deviation from 0.64 to 1.32 in the average numbers of representatives per district would render the Diet abusive of its legislative discretion.

Justice Fujita wrote a concurring opinion, casting serious doubt about the constitutionality of the single-member electoral system, which might have compromised equality in voting rights. Given the grand bench's decision upholding the constitutionality of the 1999 Lower House elections in spite of ample arguments to the contrary, Justice Fujita

84. It cited the *Kurokawa* case, the *Koshiyama* case, the *Kanao* case, the *Kawahara* case, the *Koshiyama* case, and the *Yamaguchi* case.

85. Saikō Saibansho [Sup. Ct.] Oct. 4, 2006, 18, 247, 249, 250, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2696.

86. Saikō Saibansho [Sup. Ct.] Oct. 4, 2006, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2696.

87. In *Koshiyama v. Central Election Commission*, the Supreme Court Grand Bench unanimously sustained the constitutionality of the proportional representation for the House of Councillors in cases in which those votes cast to a successful candidate that had exceeded his minimally required votes for victory would automatically be shifted and added to another candidate's votes on the same list, submitted by the same political party.

considered it difficult to rule that the legislature had exceeded its discretion in creating the present electoral systems and holding the apportionment and the present election results unconstitutional and invalid. He also found it troublesome that the Diet had neglected to remove discriminatory treatments of independent candidates in according public support for their election campaigning, but was hesitant to hold the election campaigning so gross as to hold the elections unlawful. In Fujita's opinion, he cited his past opinions in the *Koshiyama* cases of 2004 and 2006.[88] He also cited *Koshiyama*, the 1999 *Yamaguchi* case, and the 2001 *Yamaguchi v. Central Election Commission* case.[89]

Justice Yokoo wrote a dissenting opinion without citing any precedent. She held the apportionment schedules unconstitutional because she did not see any legislatively rational reasons for justifying more than 2-to-1 disparities in nine election districts. She also found it unconstitutional for the Public Office Election Law to differentiate the treatment of election campaigning, thereby discriminating against independent candidates.

Interestingly, Justice Izumi cited the *Takase* case in his dissenting opinion.[90] To him, it was a matter of public policy to deal with the steady depopulation of rural districts and devolution, and it would violate parliamentary democracy for the Diet to intervene in the manner of selecting public policy makers at the prefectural level. To Izumi, an adoption of the single-member districts was a legislative tampering of electoral methods, and a violation of the constitutional principle of parliamentary democracy—as well as the equality of voting—because a single-member districting would jeopardize legislative objectives of electing lawmakers who would represent the people to deliberate these public policy issues. An apportionment for single-member districts, Izumi continued, anticipated nine districts with disparities of more than a 2-to-1 ratio of the number of population to seats, and yet the 2005 elections actually produced thirty-two districts with more than 2-to-1 disparities. While hesitating to invalidate the election results in these districts, Izumi

88. Saikō Saibansho [Sup. Ct.] Oct. 4, 2006, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2696.

89. Saikō Saibansho [Sup. Ct.] Dec. 18, 2001, 55 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1713.

90. *Takase v. Japan* and *Okamura v. Japan* sustained the voting rights of those Japanese citizens who resided overseas in proportional representation elections and in the single-member elections of the both Houses. In dissenting, three justices—Yokoo, Ueda, Izumi—did not think the Diet had exceeded its legislative discretion in denying monetary compensation for overseas voters because they were not entitled to compensation for their pain and suffering any more than those domestic voters in malapportioned districts.

held the apportionment schedules unconstitutional. Furthermore, he would consider it against parliamentary democracy for the Public Office Election Law to give preferential treatments to party-endorsed candidates in terms of election campaigning. He would not consider the judiciary to have discharged its constitutional duties if the courts neglected their oversight over wide legislative discretion, which the Constitution delegates in deciding concrete election procedures only within the purview of equal voting rights and parliamentary democracy.

In Justice Tahara's view, grossly discriminatory regulations of independent candidates' election campaigning would restrict voters' access to political information and policy opinions of all candidates, and would also far exceed rational objectives of focusing the methods of electing people's representatives based on political party and public policy.[91]

Finally, Justices Fujita, Kainaka, Nakagawa, and Tahara offered a joint concurring opinion regarding apportionment schedules. They found that the census taken shortly before the introduction of the single-member election districting had identified nine districts in which the disparity had exceeded 2 to 1, but that the number had increased from nine to thirty-three at the time of the present elections. They attributed worsened disparities in the value of the vote to the single-member districting. Yet, conceding that the grand bench and the third petty bench upheld the constitutionality of the single-member system and sustained that the Diet acted in accordance with these judicial decisions, they found themselves hard pressed to hold the legislative discretion not so abusive as to become unconstitutional.

JUSTICES' VOTING IN *TAKEMURA V. TOKYO ELECTION COMMISSION* REGARDING THE LOWER HOUSE ELECTION

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Shimada	Career Judge	Conservative
Horigome	Career Judge	Conservative
Ueda	Career Judge	Conservative
Imai	Career Judge	Conservative; opinion
Kainaka	Prosecutor	Conservative
Furuta	Prosecutor	Conservative; supplementary

91. In his dissenting opinion, Justice Tahara cited the *Koshiyama* case and *Yamaguchi v. Central Election Commission*.

JUSTICE	FORMER CAREER	IDEOLOGY; OPINION
Tsuno	Bureaucrat	Conservative; supplementary
Fujita	Academic	Conservative; opinion
Nasu	Attorney	Conservative; supplementary
Saiguchi	Attorney	Conservative; supplementary
Nakagawa	Attorney	Conservative; opinion
Wakui	Attorney	Conservative
Yokoo	Career Judge	Liberal; dissenting
Izumi	Career Judge	Liberal; dissenting
Tahara	Attorney	Liberal; opinion, dissenting
Total		Lib (3); Con (12)

In all eight post-1990 malapportionment cases in which the grand bench was divided, the Supreme Court was conservative. It held apportionment schedules unconstitutional in contravention of the equality under law principle in the *Kurokawa* case and the *Kanao* case. So it appeared that the court had switched from conservatism to liberalism on the issue of apportioning electoral districts for the Diet after the mid-1970s. Subsequently, it has reverted to conservatism after the mid-1980s.

Analysis of malapportionment disputes makes it necessary to refine the conventional definitions of the liberal and conservative judicial ideology. If the constitutional notion of public welfare or public interests, especially law and order, is juxtaposed with individual rights and freedoms, then the conservatives would favor public welfare and the liberals civil rights and liberties. Accordingly, a judge who agrees with the complaint of malapportionment and who holds apportionment schedules unconstitutional would be liberal, while a judge who dismisses such a complaint would be conservative. Following this logic, we have classified the Supreme Court decisions in the *Kurokawa* case and the *Kanao* case as liberal.[92] This would conform to Justice Sonobe's view that the purpose of a lawsuit involving malapportionment is to urge the Diet to rectify malapportionment and not to seek new elections. Then, the Court's ruling that the legislative apportionment schedule violated the equality clause, without subsequent invalidation of the election results, could be liberal.

Neither the majority nor most dissenting ustices in these cases invalidated the election results for fear of serious consequences and ramifications stemming from judicial nullification of election results and subsequent new elections. Former high court judge Toshio Yokokawa

92. ITOH, *supra* note 4, at 151–55.

reflects prevailing judicial inclination toward elitist conservatism when he specifies national defense and national security as the single most important public welfare and accommodates human rights within the purview of the need for national defense.[93] He does not seem to offer the masses the same level of care and protection as national defense and other public interests. To him and many other governing elites, the choice seems to be between national security and law and order on the one hand, and an absence of national security, lawlessness, and chaos, on the other. This type of juxtaposition would cause the people to immediately and instinctively choose the former. The Supreme Court has never invalidated election results even in those cases in which it held the election law or apportionment schedules unconstitutional. By invoking the so-called "circumstantial judgments" in the administrative litigation procedural law, the Court, out of the fear of chaos and confusion among voters, has never called for new elections, as sought by the frustrated voters. The procedural requirement of standing to sue demands more than a judicial declaration of an unconstitutional election law. It would require the judiciary to nullify election results stemming from such unlawful elections and order new elections to meet personal interests of plaintiffs. As it was, the Court went only halfway in meeting the legal interests of the plaintiffs and neither disqualified successful candidates nor ordered new elections, as demanded by the parties. In this sense, the Court might not be classified as being liberal in either *Kurokawa* or *Kanao.*

Apart from the issue of the liberal or conservative nature of the Court, the Supreme Court was predominantly self-restrained in relation to the Diet in upholding the constitutionality of the election law and apportionment schedules. The Court was also self-restrained in relation to the election commissions by sustaining the lawfulness of election results. Conversely, those dissenters who held the apportionment unconstitutional and invalidated the election results would be classified as activist judges.

Judicial conservatism and judicial self-restraint would make the Supreme Court an integral part of the governing elites who aspire to achieve conservative democracy rather than liberal democracy.

Finally, career judges, prosecutors, and academics on the bench have been conservative with heavy use of judicial precedents, while private attorneys and diplomats have been predominantly liberal with much less use of them. Judicial perceptions of the role precedents play influence a

93. TOSHIO YOKOKAWA, JUSUTESU: SAIBAN NIOKERU NINGEN SHOGAI NO MONDAI NITSUTE 74–77 (1980).

judge's use of precedents. Furthermore, judicial attributes seem to have something to do with judicial attitudes toward precedents. Unlike a career judge, a former private attorney does not seem to perceive judicial precedents as having strong control over his decision making. Rather, he has a great deal of experiences in legal practice and has developed sharp instincts of finding what is at issue and coming up with an appropriate resolution of legal conflicts in many cases. So, he would not hesitate to differ from his earlier thinking or precedent and finds a solution first, and reason second. To him, a trial is meant to settle an actual dispute rather than finding the most appropriate reasoning or theory, and he senses that he might rule contrary to the legal interests of his clients if he were to be consistent with his earlier thinking or precedent.[94] Overall, however, justices perceive judicial precedents as a very important factor in their decision making.

CONCLUSION

This Article has viewed judicial precedent as another means by which the judiciary attempts to justify and rationalize conclusions prestructured by its deeply ingrained attitudes. Even though the facts of two cases are never identical in the strict sense, ustices are in a position to compare and distinguish precedent and present cases and demonstrate that the judicial interpretations of legal issues in an earlier case, when correctly interpreted, are applicable or inapplicable to the present legal problems. Even though Japanes ustices are not so experienced and trained in the practice of distinguishing precedents, they have manipulated precedents by stretching, narrowing, ignoring, or overriding precedents, as we saw in Part II above.

At the same time, judicial precedent has strongly influenced some ustices who do not have clear opinions on legal issues confronting them. Given the relatively short (approximately six years on the average) tenures and diversified career backgrounds of Japanese ustices on the bench, the impact of judicial precedents must be substantial. Furthermore, given a numerical dominance of career judges at the Supreme Court, a strong inclination among career judges to adhere to precedents will continue to influence judicial decision making on the Court as a whole. In the end, a precedent will generally play two roles: ustices will use that precedent as a means to rationalize and justify their conclusions, or that precedent will strongly influence their decision making.

94. ITO, *supra* note 15, at 37–38.

As applied to malapportionment, our review of precedents in the eight divided grand bench decisions after the 1990s seems to indicate continuing judicial conservatism and judicial restraint in Japan. The Court will continue to invoke conservative precedents in order to uphold the constitutionality of the election law as the legislators revise electoral procedures and apportionment schedules. Voters are likely to challenge legislative actions and inactions on the strength of the equality clause without much success. Finally, legislators will be very slow to undertake wholesale reforms that would jeopardize their status quo as members of governing elites.