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DECISION MAKING ON THE JAPANESE SUPREME COURT

INTRODUCTION

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The Supreme Court of Japan (SCJ), and the Japanese judiciary as a whole, possess a number of institutional and behavioral characteristics that render them worthy of attention for those who study law and courts, judicial politics, or comparative constitutional law. To name but a few, these characteristics include the extensive degree of bureaucratic control that the Japanese judiciary exercises over its own members;¹ the manner in which the organization of the Japanese judiciary combines a tightly run, European-style career judiciary with a decentralized, American-style approach to judicial review that gives all courts the power to strike down laws on constitutional grounds;² and the fact that the Supreme Court itself has almost never exercised this power.³ What the broader scholarly

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1. See Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421, 453 (2005) (noting that “even readers more familiar with the bureaucratic judiciaries of the civil law world will be surprised by the personnel manipulation and unrelenting supervision of the Japanese judicial system”).

2. See David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779, 794–95 (2011) (describing the Japanese judiciary as “a hybrid of the American and European models” of judicial organization).

3. A number of the contributions to this Symposium seek to explain or otherwise acknowledge this very phenomenon. See, e.g., John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88 WASH. U. L. REV. 1467, 1467 (2011) (criticizing the manner in which other scholars use “the relative paucity of decisions invalidating legislation and other state actions” as “the principal if not exclusive point of departure” for attempts to explain the “conservatism” of the SCJ); David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1426 (2011)

community has mostly lacked, however, is an accessible (English-language) collection of scholarship that explores the SCJ in depth and from a wide variety of perspective—including, not least of all, the perspective of individuals who have actually served on the Court and can speak from personal experience.

In September of 2010, the Center for Empirical Research in the Law (CERL) at Washington University in St. Louis sponsored an interdisciplinary gathering of experts on the Japanese judiciary for a conference on the topic of “Decision Making on the Japanese Supreme Court.” John Haley and I had the privilege of playing host to this distinguished group, which included two former members of the Court itself as well as legal scholars and political scientists from Japan, Canada, and the United States. The result was two days of lively debate over how best to describe and explain the behavior and impact of the SCJ across a range of policy areas. This symposium issue of the *Washington University Law Review* features the original papers and critical responses that were presented at the conference. It is hoped that this broad-ranging volume will prove valuable not only to those with a specific interest in the Japanese judiciary or Japanese law, but also to scholars of judicial behavior, constitutional politics, and comparative law more generally.

The conference opened with a clash of opposing views on the politics of Supreme Court adjudication and the policy impact of the Court. The SCJ has earned a reputation among scholars for being highly conservative (in a prudential, if not also ideological, sense) and is especially notorious for how rarely it strikes down laws on constitutional grounds. Some of the symposium participants sought to explain the Court’s reluctance to exercise the power of judicial review; others directly challenged the conventional scholarly wisdom that judicial review in Japan has been a failure, and that the SCJ itself is conservative.

Shigenori Matsui’s Article, *Why Is the Japanese Supreme Court So Conservative?*, combines a concise history of sixty years of constitutional jurisprudence with a review of various explanations for why the SCJ has “practically abandon[ed]” the task of performing judicial review.⁴ Matsui

(observing that, over the last six decades, the German Constitutional Court has struck down over 600 laws and the U.S. Supreme Court has struck down roughly 900, whereas the Japanese Supreme Court has struck down only 8 laws, most of which were of little or no political significance); Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011) (seeking to explain why the SCJ has “refused to decide many constitutional questions,” paid “almost total deference to the judgment of the Diet and the government,” and developed “a very conservative non-interventionist constitutional jurisprudence”).

4. Matsui, *supra* note 3, at 1416.

criticizes the Court for its failure to “treat the Constitution as law to be applied by judges” and evaluates a number of possible reforms that might have the effect of transforming its approach to constitutional cases, including the creation of a specialized constitutional court and reforms of the appointments process that would increase the direct involvement of the Cabinet while curtailing the influence of the Chief Justice. Professor Matsui’s Article is the subject of commentary by Craig Martin and Tokujin Matsudaira: Martin argues that it is more effective as a normative matter to critique the Supreme Court’s constitutional jurisprudence for lacking legitimacy than for being too conservative,⁵ while Matsudaira suggests that the SCJ’s passivity in the face of constitutional claims and its penchant for turning constitutional claims into nonjusticiable political questions reflect a German-influenced conception of the state that leaves little room for the “judicialization of politics.”⁶

In a similar vein, my contribution to this symposium, entitled *Why Has Judicial Review Failed in Japan?*, critically examines a wide range of possible reasons—cultural, historical, political, and institutional—for the virtual absence of judicial review.⁷ It suggests that cultural and historical explanations, in particular, are inadequate to account for the virtual absence of judicial review, and it endorses institutional reforms of the type proposed by Justice Tokuji Izumi in his contribution to this symposium⁸ as a means of combating the conservative influence of the judicial bureaucracy.

Taking the opposite perspective, John Haley argues in *Constitutional Adjudication in Japan: Context, Structures, and Values* that Japanese courts can be understood as “conservative” only in the very limited and unremarkable sense of sharing the same “prevailing communitarian orientation” and “center-right” ideology of Japanese society as a whole, and perhaps also in adhering strictly to precedent.⁹ Frank Upham goes further with the provocative argument, based on developments in the areas of employment and family law, that Japanese judges engage in “stealth activism” and have in fact “played a much more activist role in Japanese

5. Craig Martin, *The Japanese Constitution as Law and the Legitimacy of the Supreme Court’s Constitutional Decisions: A Response to Matsui*, 88 WASH. U. L. REV. 1527 (2011).

6. Tokujin Matsudaira, *Judicialization of Politics and the Japanese Supreme Court*, 88 WASH. U. L. REV. 1559, 1561 (2011).

7. Law, *supra* note 3.

8. Tokuji Izumi, *Concerning the Japanese Public’s Evaluation of Supreme Court Justices*, 88 WASH. U. L. REV. 1769 (2011).

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

society than the American federal judiciary has in American society.”¹⁰ To explain why the Japanese judiciary appears so reluctant to shape policy in some contexts (most notably, judicial review) yet active in others (namely, employment and family law), Professor Upham draws a distinction between two types of judicial policymaking. The Japanese judiciary, he argues, is more willing to create new legal norms in the first place but does so in ways that leave “other political actors” free to revise these norms as they wish.¹¹ The American federal judiciary, by contrast, is less “bold” when it comes to creating social norms in the first place but is subsequently “resolute in enforcing them.”¹²

In his contribution to this symposium, Justice Tokiyasu Fujita answers the recurring criticisms made by a number of participants in this symposium with a vigorous defense of both the Supreme Court and the Japanese judiciary more generally.¹³ He also draws upon his experience as both a distinguished legal academic and a retired Justice to comment on the gap between how scholars perceive the Court and how it actually operates. Justice Fujita argues, *inter alia*, that the judiciary’s appointment and promotion processes are effectively shielded from political influence; that career judges are not biased in favor of the status quo or the government; and that the judiciary is characterized not by conservatism, but rather by moderation and prudence in the face of uncertainty.

Turning the focus from public to private law, the contribution by Stephen Givens delivers a stinging critique of recent high-profile decisions in the area of corporate law and hostile takeovers as combining subservience to dominant consensus and the “corporate establishment” with disinterest in theory, principle, or legislative purpose.¹⁴ These dysfunctions are, he argues, “endemic to Japanese legal education itself.”¹⁵

To understand how a court makes decisions, one must examine its internal practices, and several of the papers in this issue do precisely that. Hiroshi Itoh’s Article, *The Role of Precedent at Japan’s Supreme Court*, contains an empirical analysis of the effect of precedent and other factors

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

11. *Id.* at 1502.

12. *Id.* at 1503.

13. Tokiyasu Fujita, *The Supreme Court of Japan: Commentary on the Recent Work of Scholars in the United States*, 88 WASH. U. L. REV. 1507 (2011).

14. Stephen Givens, *Looking Through the Wrong End of the Telescope: The Japanese Judicial Response to Steel Partners, Murakami, and Horie*, 88 WASH. U. L. REV. 1571, 1571 (2011).

15. *Id.* at 1572.

on decision making by the SCJ.¹⁶ His analysis pays particular attention to the ways in which the composition of the Court and the professional background of the Justices has influenced their use of precedent and their voting behavior in electoral malapportionment cases. Shigenori Matsui's response to Professor Itoh accepts Professor Itoh's premise that the Court's use of precedent reflects the "deeply ingrained attitudes" of the Justices and is result-oriented to some extent.¹⁷ He cautions, however, that the threat of criticism from within and outside the Court imposes at least a limited form of restraint by forcing the Court to "persuasively explain" departures from precedent.¹⁸

Masako Kamiya's Article, "Chōsakan": *Research Judges Toiling at the Stone Fortress*, examines the contours and practical implications of the *chōsakan* system, wherein the Court's "law clerks" are themselves experienced judges and, indeed, often possess more judicial experience than the Justices whom they ostensibly serve. Professor Kamiya's Article may be of particular interest to scholars who study either law clerks in particular or the impact of institutional variables on judicial decision making more generally.

A number of contributions to the symposium focused on the topic of judicial recruitment and promotion. In his Article, Mark Ramseyer subjects to close empirical scrutiny the widely held suspicion that graduates of elite universities reap the benefits of membership in influential university cliques in the form of professional advancement.¹⁹ Professor Ramseyer's statistical analysis of several decades of data suggests the contrary: controlling for productivity and other variables that capture actual judicial performance and ability as opposed to mere educational pedigree, he concludes that judges who graduated from the University of Tokyo and Kyoto University are no likelier to receive prestigious positions than graduates of other schools. Shin-ichi Nishikawa's response to Professor Ramseyer raises methodological questions about the measurement of certain variables and the scope of the data upon which the statistical analysis relies.²⁰

16. Hiroshi Itoh, *The Role of Precedent at Japan's Supreme Court*, 88 WASH. U. L. REV. 1631 (2011).

17. Shigenori Matsui, *Constitutional Precedents in Japan: A Comment on the Role of Precedent*, 88 WASH. U. L. REV. 1669 (2011) (quoting Itoh, *supra* note 16, at 1666).

18. *Id.* at 1680.

19. J. Mark Ramseyer, *Do School Cliques Dominate Japanese Bureaucracies?: Evidence from Supreme Court Appointments*, 88 WASH. U. L. REV. 1681 (2011).

20. Shin-ichi Nishikawa, *Judicial Recruitment and Promotion: Responses to Professors Ramseyer and Repeta*, 88 WASH. U. L. REV. 1765 (2011).

Lawrence Repeta's Article, *Reserved Seats on Japan's Supreme Court*,²¹ delves deeply into the evolution and impact of the informal quota system by which seats on the Court are allocated in fixed numbers to different professional groups, including not only the career judiciary but also the private bar, the bureaucracy, and the legal academy. Professor Repeta's account draws attention to the importance of the efforts made by Occupation officials both to establish the independence of the bar and to ensure that private attorneys would be represented on the Court. His review of the historical evidence suggests that alteration of this "reserved seat system" in the early 1970s, in the form of a reduction in the number of seats allocated to the bar, was ideologically motivated and produced a noticeably rightward shift in the direction of the Court.

Dan Foote's contribution to this symposium, *The Supreme Court and the Push for Transparency in Lower Court Appointments in Japan*, takes a hard look at the Court's bureaucratic decision-making mechanisms in the area of personnel matters.²² In particular, he describes and evaluates recent reforms of the judicial selection and promotion process that were ostensibly intended to promote greater transparency. The newly instituted committee responsible for making recommendations to the Supreme Court on personnel matters operates in such secrecy, he argues, that the judiciary remains effectively "nameless" and "faceless."

Rounding out the symposium is a thought-provoking essay by Justice Tokuji Izumi on the subject of judicial accountability to the public, in which he explains his post-retirement participation in a public campaign to encourage voters to strip two of his former colleagues, Justices Wakui and Nasu, of their seats on the Court.²³ The explanation lies in the connection between Japan's long-festering problem of electoral malapportionment, on the one hand, and the failure of the evaluation system by which voters can remove sitting Justices from office, on the other hand. At the time that they faced voter evaluation, Justices Wakui and Nasu had joined an opinion that had approved a high degree of electoral malapportionment. The constitutionally mandated evaluation of these two Justices thus provided voters with a much needed opportunity to encourage the Court to take a stronger stance against malapportionment. Because the public knows so little about the SCJ, however, the evaluations ordinarily serve no

21. Lawrence Repeta, *Reserved Seats on Japan's Supreme Court*, 88 WASH. U. L. REV. 1713 (2011).

22. Daniel H. Foote, *The Supreme Court and the Push for Transparency in Lower Court Appointments in Japan*, 88 WASH. U. L. REV. 1745 (2011).

23. Izumi, *supra* note 8.

practical purpose. Justice Izumi concludes by proposing various institutional reforms that would increase public awareness of the Court and thus the effectiveness of the evaluation system. Such reforms include instituting a transparent appointments process and ensuring that Justices possess both the resources and the experience needed to articulate and debate constitutional issues in a way that engages and educates the public.

Neither the conference nor this issue would have been possible without the enthusiastic support and thankless labor of many at Washington University School of Law. From start to finish, Andrew Martin played a pivotal role, first by encouraging me as his colleague to pursue the idea of this conference, and then by sponsoring the symposium in his capacity as director of CERL. It is hard to imagine a more supportive colleague. Our dean, Kent Syverud, is to thank not only for supporting my scholarly interest in East Asia, but also for his leadership in cultivating and embracing the countless opportunities that international scholarly collaboration and exchange hold for the law school and the university as a whole. Pauline Kim, then associate dean, labored thanklessly behind the scenes to troubleshoot countless issues; her return to civilian life and a semblance of normality has been well earned.

We were truly fortunate to have exceptionally capable and dedicated administrative and logistical support from CERL and the school's event planning specialists. Undaunted by language barriers or any of the other challenges of hosting a truly international conference, Jeanne Heil-Chapdelaine, Kate Hoops, and Beth Vogl masterfully orchestrated order from chaos and did so tirelessly and without complaint. The traditional expression of appreciation could not be more fitting, either figuratively or literally: *otsukare sama deshita*.

Translation was obviously essential for this symposium. Luckily, Kyotaro Hemmi (who also spent countless hours painstakingly translating the papers by Justices Fujita and Izumi for publication) and Aori Inoue were not just translators, but also caring hosts who took responsibility for ensuring that our overseas guests enjoyed their stay. Several of the participants—most notably, Masako Kamiya and Setsuo Miyazawa—also volunteered their exceptional talents and did double-duty as translators.

It is difficult to give enough thanks to the *Washington University Law Review* for devoting so much time and effort, and so many pages, to hosting the participants and producing an issue that will hopefully be the leading collection of English-language scholarship on the Japanese judiciary for years to come. It is the rare journal that appreciates the value of comparative scholarship and is both willing and able to make such a commitment. The dedication of its editors—including not least of all

Amanda Katz, the outgoing Editor in Chief—has been nothing short of remarkable. To work with Amanda is to observe patience, conscientiousness, and hard work of the highest order. The editors, in turn, could not have done their work without the help of a team of translators, including not only Kyotaro Hemmi, but also Caitlin Argyros; Judge Yusuke Hirose, who also participated in the conference; Arisa Hirose; and Jonghyun Kim.

It is rare for the *Washington University Law Review* to publish a symposium issue, and all readers must be grateful that its editors chose to honor this conference in this way. But it is rarer still—indeed, practically unheard of—for one of the nation’s leading student-edited law journals to take on the challenge of publishing an unusually lengthy issue in which the vast majority of the contributions were written by foreign scholars and rely heavily on foreign-language sources that cannot always be verified. The *Law Review* deserves thanks for its commitment to comparative legal scholarship and doing the best that it could without professional translation assistance; under the circumstances, it cannot and should not be faulted for remaining translation errors.

Last but certainly not least, there would be no conference and nothing to introduce without the participants themselves, many of whom crossed an ocean and half a continent and endured a fourteen-hour time difference to take part in a two-day scholarly conversation. Special thanks are due to Justice Tokiyasu Fujita and Justice Tokuji Izumi for traveling such a distance in order to share their personal knowledge and experiences with complete candor in an intimate setting. This was, to put it mildly, a precious treat, and thanks to their participation, much was learned about the Japanese Supreme Court that scholars had not known before.

Both a tribute and a dedication are in order. By design, the conference coincided with the celebration of John Haley’s retirement as professor emeritus from Washington University. It was this planned coincidence that enabled two of the conference participants who had known him for many years and had traveled from Japan for the conference—Dan Foote and Tokiyasu Fujita—to offer their reminiscences and well wishes at the retirement banquet held at the close of the conference proceedings. John is truly a scholar and a gentleman and has done more than anyone else in the American legal academy—if not more broadly—to make the study of Japanese law intellectually exciting and rich. All who have been stimulated and provoked by his work and benefited from his guidance owe him a debt of gratitude. He will be sorely missed, but the blow is cushioned by the knowledge that he remains just a short drive away and will continue to enrich the lives of students and the study of Japanese law,

in the way that only he can, from his new position at Vanderbilt, where he now spends much of his time with the other woman in his life—namely, his granddaughter.

Finally, we dedicate this issue to the people of Japan. The recent earthquake, tsunami, and subsequent nuclear crisis of early 2011 have created a tragedy that continues to unfold. Scholarly objectivity aside, it is impossible to study Japan without experiencing kinship with Japan. We wish to express deep sorrow and sympathy for all those whose lives have been affected and indeed for the entire nation, yet also great affection and admiration for the Japanese people and complete confidence that they will endure and overcome all that they face. In times such as these, we are all Japanese. Those of us who adopt a critical stance in our scholarship toward the Japanese judiciary do so in a constructive spirit, with great respect for the dedication and integrity of Japan's judges, and in the sincere hope of strengthening the judiciary's ability and resolve to meet the kinds of challenges that lie ahead. In the months and years to come, many in Japan will surely be looking to the judiciary not only for competence and incorruptibility, but also for justice.