The Judicialization of Japanese Politics?

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Are Japan’s politics judicializing? Certainly Japan has been somewhat of an outlier among advanced industrial democracies, in which scholars have documented a strong trend toward greater scope and authority of judicial decision-making.¹ The largest political and social questions of the day—abortion, gay marriage, the status of religion, even who can take power—are regularly decided by national and supranational courts in North America and Europe,² but studiously avoided by Japan’s Supreme Court. Closer to home, the Korean and Taiwanese constitutional courts routinely decide major issues of social policy, but Japan’s courts seem to be much more quiescent.

At the same time, Japan has just experienced a decade-long period of major reforms of legal institutions. The declared goal of these reforms, as articulated in the 1998 launch of the Justice System Reform Council, was nothing less than the transformation of Japanese society into one that was more law-governed, in which “ex post” judicial remedies replaced “ex ante” planning as a mode of allocating rights and duties. Japan has also experienced major political change, with the emergence, however tentative, of what appears to be a two-party system. These factors would lead one to expect a degree of judicialization, as scholars have long predicted that an alternation in political power is a basic factor underpinning judicial power and independence.³

In this paper we examine the status of judicialization in Japan, showing that, while some areas have experienced an increased role for judicialized governance,

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others have not. Relative to other advanced industrial societies, we find the level of judicialization to be low. We then examine the reasons for this state of affairs, and find that conventional explanations rooted in politics and institutional structure are not fully adequate to account for the phenomenon. Instead, we find that a full understanding requires an inquiry into the institutional self-understanding of Japanese courts, rooted in the nineteenth-century Meiji adaptation of Prussian legal thought. Political theory, rather than political structure, seems to be the key to the puzzle.

Our account is consistent with recent work that emphasizes the role of ideational factors in judicial behavior. Lisa Hilbink, for example, in her recent account of Chilean judicial quiescence during the Pinochet regime, focuses on a particular institutional self-conceptualization of judicial apoliticism. Rooted in a conservative positivism of the nineteenth-century modernizing state, she finds that apoliticism is far from apolitical: indeed, by refraining from getting involved in “political” issues, Chilean judges end up reinforcing the status quo. Similarly, Japan’s relatively limited levels of judicialization mean that the political process gets to play the dominant role in the allocation of rights and responsibilities. This is precisely the idea behind the nineteenth-century theory that we elaborate.

In its emphasis on ideational and institutional factors, our story is also consistent with recent work by David Law, who has provided a thick description of the behavior of the Japanese Supreme Court. But the approach is somewhat at odds with the prevailing views among Western scholars of Japanese law. Western scholars have tended to emphasize institutional factors over ideational ones in understanding Japanese judicial behavior. John Haley, for example, has emphasized the institutional weakness of the Japanese judiciary to explain its particular role in Japanese society. J. Mark Ramseyer has focused on the importance of political pressures from the long-ruling Liberal Democratic Party (LDP), which in his view indirectly controls judicial promotions. These and other scholars have played an important role in providing a corrective to simplistic cultural accounts of Japanese law. But institutional analysis, in particular its sociological variant, also takes into account internal understandings by actors who populate institutions, and so we ultimately see the present argument as complementing the dominant narrative rather than replacing it.

A word is in order on the concept of judicialization, by which we mean the expansion of judicial involvement in the formation and regulation of public policy.

Our emphasis is on decision-making within the direct control of judges, rather than decisions by other political actors made in the shadow of judicial processes. Even focusing on the simple concept of judicialization, it is apparent that it is multidimensional and complex for several reasons. Judicialization may affect different policy areas, institutions and regions differently even within a single country. Judicialization can also ebb and flow, and so we thus should speak of degrees of judicialization, relative to some baseline.

Our chapter is organized as follows. Part I briefly introduces the concept of judicialization. Part II introduces the Japanese judiciary, and proceeds to examine the status of judicialization in Japan, considering historical and contemporary cases. Part III reviews theories that purport to explain the low levels of judicialization, finding that those associated with the rational choice school do a much better job of explaining the long period under LDP rule than the contemporary period. We then turn to the ideational factors that are our primary interest in Part IV. Part V concludes.

I. The Concept of Judicialization

There is a growing literature on the judicialization of politics, defined as an expansion of the role and authority of courts to make and influence policy decisions. By judicialization of governance, we have in mind a broad conception of the expansion of judicial involvement in the formation and regulation of public policy. Expanded judicial power may come at the expense of bureaucratic power, as in the establishment of vigorous systems of judicial review of administrative action and judicially-policed processes of sub-legislative rule formation. It may come at the expense of politicians, so that political decision-making is shaped and constrained by higher order principles articulated by judges. And it may come at the expense of private actors, who find their own freedom to create and organize rules is constrained by judicially created or enforced public policies.

Our emphasis is on decision-making within the direct control of judges, rather than decisions by other political actors made in the shadow of judicial processes. We also do not focus on the alternative concept of juridification, which concerns the penetration of legal discourse and procedure into new realms. Japan

strikes us as a society that is highly juridified but not judicialized, in which legalism and rule-following play an important role, but courts do not.

Even focusing on the simple concept of judicialization, it is apparent that it is multidimensional and complex for several reasons. Judicialization may affect different policy areas, institutions and regions differently even within a single country. Judicialization can also ebb and flow. Notwithstanding Sweet’s triadic model of governance, which seems to imply that judicialization is a one-way street, we can and do observe processes of “dejudicialization” in some times and places.\(^\text{10}\) We thus should speak of degrees of judicialization, relative to some baseline.

In the discussion that follows, we will be comparing the levels of judicialization in Japan longitudinally, that is over time, and also comparatively with other advanced industrial societies. Notwithstanding extended writing on judicialization in Europe and Latin America, there have been few if any previous works explicitly applying the framework to Japan. We turn to that task in the next section.

II. The Status of Judicialization in Japan

The Japanese judiciary consists of some 3000 individual judges. There is a Supreme Court of 15 justices, eight High Courts located around the country, 50 judicial districts and some four hundred summary courts. Most judges join the judiciary as Assistant Judges and are appointed after completing their training at the Legal Training and Research Institute, which is run by the Supreme Court. This Institute is also the gateway to careers as prosecutors and practicing attorneys. Judges spend their careers in a series of jobs, rotating around the country, and occasionally being seconded to other organizations such as the Ministry of Justice. After ten years as an Assistant, a judge is appointed as a full Judge. Formally speaking, judges are subject to reappointment every ten years, though this is generally a routine matter. The members of the Supreme Court are selected by the Cabinet, and will typically include prosecutors and academics as well as career judges.

A key institution in the Japanese judiciary is the General Secretariat of the Supreme Court, staffed by judges themselves. Among other tasks, this body makes the decisions about judicial rotation and promotion. It thus serves as a central institution for internal management and discipline within the judiciary.

In recent years, there has been a push toward including judges appointed from the ranks of practicing attorneys. The Justice System Reform Council, a high

level government commission that recommended a series of major reforms in 2001, called for diversification in the background of judges, greater transparency in systems of appointment and promotion. The major result was the establishment of a lower court nomination commission, a majority of whose members are non-lawyers, with responsibility for approving nominees to join the courts. This body has rejected a small number of candidates in recent years. But the basic bureaucratic structure of the Japanese judiciary has remained intact.

It is a commonplace among English-language scholars of Japanese law that the Japanese judiciary is a relatively weak actor. In his recent analysis of the Supreme Court, David Law, describes it as the most conservative court in the world.\(^\text{11}\) It is seen as passive to a fault, and incapable of enforcing its decisions. This no doubt stems from the low rate of overturning statutes, and some prominent cases in which the political branches seemed to ignore the court. The major exception is John Haley, who sees the judiciary as highly autonomous but not powerful; even Haley acknowledges the conventional wisdom is that it has been seen “as by far the least influential, much less dangerous, branch.”\(^\text{12}\)

There is much disagreement about the sources of institutional quiescence. Shigenori Matsui advances argues the judges of the Supreme Court tend to view the Constitution as being more of an articulation of political principles than as a source of law, and hence are reluctant to enforce it.\(^\text{13}\) J. Mark Ramseyer, writing alone and with various co-authors, has marshaled an array of evidence suggesting that the judiciary conforms to the preferences of the long-dominant Liberal Democratic Party (LDP), which he argued was able to influence the Supreme Court Secretariat.\(^\text{14}\) Haley has challenged this view, arguing instead that Japanese judges “are among the most honest, politically independent, and professionally competent in the world today.”\(^\text{15}\)


We do not want to wade into this debate directly, but rather to examine the evidence. As Haley’s comments suggest, statements about the Japanese judiciary tend to involve, at least implicitly, a comparative metric. Typically this is the courts of the United States, especially those of the activist Warren Court era, which is perhaps an unfair vantage point for any constitutional court. Even if one broadens the comparative metric, however, it is apparent that Japanese courts are relatively insulated from major issues of social and political controversy. This section traces a number of the major cases in Japanese history.

Courts in The Meiji and Taisho Era

The Japanese judiciary has its origins in the nineteenth-century Meiji modernization of Japan. Because the lack of independent adjudication was one of the main criticisms of the foreign powers that imposed unequal treaties on Japan, modernizers made the legal system a focus of reform, and within two decades had created a judicial system that was formally autonomous of the Ministry of Justice. In the famous incident at Ōtsu in 1891, the Supreme Court resisted political pressure to sentence a rogue policeman to death for his attempt on the life of the Russian crown prince, a crime punishable only by life in prison. This ruling established the principle of judicial independence in the Japanese context, and remains a touchstone of the traditions of institutional autonomy.¹⁶

Autonomy, however, is hardly equivalent to the exercise of power. Indeed, reviewing the history of the Japanese courts in the pre-World War II era, one sees relatively limited involvement with the major social and political issues of the day. It was not that there were no problems to solve: Japan’s industrialization and social change threw up a host of new and novel issues. Furthermore there were intra-elite struggles to resolve. But Japanese courts did not adjudicate disputes among the ruling elites known as the genrō, and hosei-kanryo who were the lawmaking bureaucrats in Sumitsuin [the Privy Council] and the Cabinet,¹⁷ even though courts in other authoritarian have played such a role.¹⁸ Nor did the courts play much of a role in resolving major social struggles, even if they were willing to uphold individual rights in some cases.


Take the issue of rural landlord-tenant disputes caused by rapid urbanization, one of the major issues in the early twentieth century in Japan. Landlords and tenants had historically negotiated their relationships in the context of semi-autonomous villages, which served both to reinforce social hierarchies but also to place limits on landlord exploitation. With urbanization, the landlords were less frequently in ongoing relationships with tenants; the social pressures that restrained their exercise of formal rights were breaking down, and there was a concomitant increase in exploitative behavior and formal assertion of rights. The courts’ role in these cases, as in others involving ongoing relationships, was to encourage private bargaining, sometimes by invoking the “consensus of the community” in the place of the formal requirements of the Civil Code. But the courts were not sufficient. Instead, the political leadership set up an alternative conciliation system to encourage the traditional values of harmony, and this became the major channel for adjudication of disputes. Gradually, this conciliation system evolved from being an option to be suggested by the judge into a mandatory system in which parties had little power. The pattern was clear: the courts were not a proper forum for major social and political disputes. This pattern of channeling disputes away from the courts was to continue in the postwar era.

Courts in the Postwar Era

The postwar courts continued to refrain from involvement in major social and political disputes. This was the case despite major issues of constitutional interpretation. One pattern was lower courts being relatively more aggressive, but then to be overruled by the more conservative Supreme Court. This was certainly the case in two of the more contentious issues in postwar Japanese politics, the interpretation of Article Nine of the Constitution of Japan, and the electoral malapportionment cases.

Article Nine. Perhaps the most well-known clause of the Japanese Constitution is the Article prohibiting the use of war materiel. The provision, drafted by the American bureaucrats of SCAP and modified by their Japanese interlocutors, was...
in place only a short time before the Korean War forced a revisiting of its provisions. Notwithstanding a clear provision on armed forces, the government has continuously sought to expand the role and responsibility of Japan’s Self Defense Forces. In turn, constitutional literalists have sought to prevent Japan’s rearmament.

Japan’s Supreme Court was, early on, called to adjudicate between these positions in the 1959 Sunakawa Case. The case concerned demonstrators who sought to challenge a special law regulating U.S. base facilities under the 1952 Security Treaty. A lower court had decided that the treaty and the presence of U.S. forces in Japan were unconstitutional under Article Nine. In deciding that only “obvious” constitutional violations should be overturned by the Court, the majority stated that “there is a certain element of incompatibility in the process of judicial determination of its constitutionality by a court of law which has as its mission the exercise of the purely judicial function.” This abdication of judicial involvement in political questions set the tone for subsequent adjudication of Article Nine cases. Sometimes the courts relied on standing concerns to avoid reaching the constitutional questions. This was the approach of the Supreme Court in the Naganuma Nike Missile Site Case (1982), which reversed a lower court finding that SDF unconstitutional.

The language of Sunakawa is telling on another dimension as well however. The Court’s insistence on preserving its ability to exercise purely judicial functions suggests that it had, in its internal understanding, a concept of “pure” judging. We will return to this concept later on in Part III.

Electoral Malapportionment. Another prominent series of cases was that concerning the apportionment of electoral districts in Japan. Indeed, two out of the eight Japanese Supreme Court decisions holding legislative acts unconstitutional concern elections. The ruling Liberal Democratic Party (LDP) had long relied on a base of voters in the countryside and so sought to overweight rural votes. An early challenge to the malapportionment on equality grounds was rejected in a 1964 ruling by the Supreme Court in the Koshiyama case.

The Koshiyama court rejected the appeal before it and adopted language of deference to the Diet as the

The Judicialization of Japanese Politics?  

The political body best able to balance competing considerations. In 1976 the question of the constitutionality of malapportionment was again an issue before the Court in *Kurokawa v. Chiba.* In an election for the House of Representatives, the Grand Bench looked at the disparity in the malapportionment, which amounted to nearly 5 to 1 in the Chiba district in question, and decided that it constituted an unreasonable level of malapportionment proportion. In its decision the court asserted that “voting is a historically significant popular political struggle and equal protection under the constitution was aimed at equal voting rights.” The Court, however, refused to set a precise allowable ratio for future cases, nor did it void the contested election in question.

The *Kurokawa* decision strongly implied that the Diet should correct the malapportionment, but by most accounts it failed to do so. The LDP continued to rely on small farmers as a core constituency, and had little incentive to equalize rural and urban vote strength. This again became an issue in 1986, in *Kanao v. Hiroshima.* The Diet had not made any changes to the ratio since the *Kurokawa* decision, and the question of a 4 to 1 ratio was discussed. This time the court looked at two questions: first, had there been a reasonable time for the Diet to make adjustments in the ratio? And second, was the ratio reasonably within the Diet’s discretionary power? Because it had been several years since *Kurokawa,* the court reached the conclusion that the Diet had had sufficient time to revise the system. Still, the Court declined to establish a specific level to be deemed reasonable. Furthermore, as in the *Kurokawa* case, the election was not invalidated. This gave rise to the possibility of what was called a “circumstance decision,” which allowed the election to stand, even if the election rules were held unconstitutional.

Since then, there have been several cases discussing the constitutionally appropriate or allowable ratio of malapportionment, but no definitive answer has been provided by the courts. The pattern here is an apparent hesitancy on the part of the Court to order the Diet to act. Rather, the Court has preferred to set loose standards for the Diet to follow and wait for cases to be brought. A major electoral reform by the Diet in 1994 reduced the number of districts, and suggested that the revised redistricting plan should achieve a ratio of no more than 2:1 between largest and smallest districts. But in a subsequent case, the Supreme Court held that, although the law sought to establish a 2:1 ratio of malapportionment, in the instant

election a greater ratio was allowable, in part because of concern that residents of sparsely populated prefectures continue to have their views reflected in national politics.\textsuperscript{30} It thus justified malapportionment on a theory of representation.

**Corporate Donations Case.** In 1970, in the Yahata Steel Company case, the Court rejected a derivative suit brought by a shareholder against two directors of Yahata Steel who contributed money to the LDP.\textsuperscript{31} The argument was that the donation to political parties deviated from the business purpose prescribed in the company charter and violated the duty of loyalty and the duty of care. The court held that there was no distinction between these duties and that corporate contributions to political campaigns were legal. Companies like natural persons, had a right to participate in politics. This decision, which anticipated the U.S. Supreme Court case of *Citizens United* forty years later, was grounded in private rights of participation, and framed as a conflict among those rights.\textsuperscript{32} This is an example of a case that appears to uphold liberty, but does so in a way that reinforced the existing political structure in Japan so as not to challenge political authorities.\textsuperscript{33}

In short, Japan’s courts have tended to reinforce the status quo in politically charged cases during much of the postwar era. It is not that law played no role in underpinning economic growth and ordering private affairs; on the contrary, the particular vision of law that Japan adopted facilitated the developmental state model by insulating the administration from private lawsuits and by rarely exercising the power of judicial review of legislation. At the same time, the courts were by all accounts fair and unbiased in resolving civil disputes among private parties. Contracts were enforced and property rights protected, key factors for contemporary understandings of the legal bases of economic development.\textsuperscript{34} Indeed, there was substantial judicial creativity in these private realms, generally involving issues such as landlord-tenant relations or family law that did not enter the explicitly political sphere.


\textsuperscript{32} *Citizen United v. FEC*, 130 S Ct 876 (2010).

\textsuperscript{33} Yoichi Higuchi, *Kenpō toiu Sakui* [Constitution as Artificiality] (Tokyo, 2009), 157, 160 (arguing that the Court is active in upholding government policies).

The Judicialization of Japanese Politics?

Courts in the Heisei Era

The Heisei era (1989–present) has been one of major institutional change in Japanese law. Beginning in the early 1990s and accelerating toward the second half of the decade, there has been a major movement in Japanese society to expand the role of law and, by extension, the courts in society. Much of this responded to a sense that the earlier developmental model had run its course, as Japan entered a long period of recession. As put by the Justice System Reform Council, Japan needed to move from an “ex ante planning society to an ex post, remedies society.”\(^{35}\) By this it was meant that the society should develop a more liberal basis, in which firms and individuals could pursue their vision of the good, subject only to limits imposed by the freedoms of others. When interests clashed, it would be up the courts, and the legal system with its expanded capacities, to resolve disputes. This vision was the basis of major reforms of Japanese legal institutions, including the establishment of a system of lay participation in criminal cases (*saiban-in seido*), the creation of a new system of legal education, the expansion of prosecutorial review commissions, and many reforms to substantive law. For our purposes, changes to the system of appointing judges to encourage more practicing lawyers to enter the profession was a central one, as it seemed designed to ensure more links between the judiciary and society and to partially undermine the conservatism induced by the judicial hierarchy.

It has now been a decade since the reform process was blessed by the Justice System Reform Council, and many changes have been achieved. Have they been accompanied by judicialization? In the section below, we review many of the major cases of this era. Our argument is that Japanese courts systematically distinguish between issues involving statutory and constitutional rights, which are the proper province of judicial decision-making, from cases involving public policy issues. What we show is that the courts are independent and even activist as far as rights issues are concerned, but are systematically averse to any issue that potentially involves the court in “political” issues.\(^{36}\) It is this pattern that marks the distinct approach of Japanese courts, and distinguishes them from other judiciaries that have willingly taken on a greater role in public policy.


\(^{36}\) We recognize that the distinction between political and non-political issues, like that between public policy and the private sphere, is hardly self-evident. We are not arguing that the distinction is a real one; rather it is an artifact of positivist legal theory, which has influenced Japan among other states. Our contention is that Supreme and Constitutional Courts in other jurisdictions have been willing to decide against the government in the kinds of cases we consider.
The Shrine Visit Cases. Tokyo’s Yasukuni Shrine, where Japan’s war dead are enshrined, has long provoked controversy among Japan’s Asian neighbors. With the rise of the revisionist faction of the Liberal Democratic Party, politicians have sought to visit the shrine in their “private capacity” to honor the war dead. These controversies came to the fore after the election of Junichiro Koizumi as Prime Minister in 2001, and his visits in 2001 and 2002 provoked serious challenges in relations with Korea, China and other countries.

The shrine visits led to several legal cases. A group of citizens joined by Shin Buddhists, Protestants and the war bereaved sought to enjoin the visit as a violation of the separation of church and state guaranteed by Article 20 of the Constitution. The Supreme Court held, on the merits, that the Prime Minister’s visit alone did not constitute a tort, as the plaintiff could not show that his claim was within the zone of legally protected interests. The Court thus decided the issue on a non-constitutional basis, even though it raised interesting questions about the liberty of a politician to act in his private capacity. Justice Shigeo Takii suggested in his concurrence that the case might implicate Article 20, but the Court did not reach the issue, instead framing it as a private matter and using a civil law “zone of interest” test to dismiss the case.37

Several other cases were brought in district courts surrounding these visits, many by survivors of Japan’s wartime atrocities in other Asian countries. In only one of six cases, the Yamaguchi Case heard in Fukuoka, did the judges rule in April that the pilgrimages were unconstitutional. But the court dismissed the suit.

Recent SDF Cases. The first Gulf War marked the beginning of renewed pressure, both within Japan and from abroad, for its Self Defense Forces to participate in collective self-defense efforts. Recent deployments in Iraq and Afghanistan have stretched the limits even further. The Cabinet Legislation Bureau, which has a formal role in issuing constitutional interpretations for the government, has taken the lead, and its decisions have generated constitutional challenges.

Even when the lower courts have become involved in determinations of the constitutionality of military operations, they have shied away from major constraints on government. For example, when the Nagoya High Court heard a 2008 challenge to SDF deployment in Iraq, it denied relief based on the lack of ripeness, even though it found in dicta a violation of Article Nine.38 In short, the courts

The Judicialization of Japanese Politics?

have made some suggestive statements but have played no effective role in shaping policy in this central area, in which constitutional language is fairly clear.

Adjudicating History. Japan’s war legacy continues to be a major issue in Asian politics, and there have been attempts by some victims to pursue legal claims. These include challenges from foreign “comfort women,” from Chinese forced laborers and from Taiwanese soldiers. In the cases brought by Chinese citizens who had been forced to labor in wartime Japan, lower courts refused the plaintiffs’ claims for compensation on the grounds that the claims were barred by the Joint Communique between Japan and the People’s Republic of China, but acknowledged the victims’ suffering at the hands of the Japanese authorities.39 The Supreme Court ultimately rejected the appeals. In the “comfort women” cases, several lower court rulings found that the Japanese government ought to bear responsibility but concluded that the postwar peace treaties bar the victims who are now Korean or Chinese citizens from suing the Japanese government in Japan. The rationale of the Court’s 2007 decision on Chinese forced labors applied.40 On the other hand, Taiwanese soldiers who had served in the Japanese military were successful in obtaining compensation after the Court ruled that the Diet should indeed pay their pensions.

Hansen’s Disease. Japan retained very severe policies toward those with Hansen’s disease, commonly known as leprosy, late into the twentieth century. Mandatory quarantine laws were only repealed in 1996, long after similar policies disappeared from Europe.41 Victims were kept isolated from society, and many forced to undergo sterilization, even though reliable treatments were available by the end of the 1950s. The victims sought greater inclusion in society, and began to use the courts in the late 1990s, seeking compensation for denial of constitutional rights.42 In 2001, a large group of Hansen’s disease sufferers won a district court case against the government in Kumamoto. The court ruled that the 1953 Leprosy Prevention Law had encouraged discrimination, and that the government should have encouraged integration of Hansen’s patients after drug therapy became available in

40. See Nagoya High Court ruling May 31, 2007, 54 Shomu Geppo 287. The Supreme Court refused to hear the appeal (Sup Ct decision Nov. 11, 2008).
41. The 1996 repeal was pushed by later Prime Minister Naoto Kan during his time as Minister of Health and Welfare.
42. Jeffrey Kingston, Japan’s Quiet Transformation (London, 2004), 188.
the 1950s. To the surprise of many, the government of Prime Minister Koizumi decided not to appeal, even though line bureaucrats had hoped that it would. Koizumi also apologized, helping to establish his reputation as a reformer. This represented a very different tack from that taken with the prominent AIDS related-litigation by hemophiliacs, which had led to settlements without a government admission of wrongdoing. The Diet subsequently passed a compensation bill, and concluded settlements with various victims not directly covered.

These cases generated some litigation in Korea and Taiwan from people who thought they should also be eligible for abuses that had taken place during the colonial period. These cases were encouraged by members of the Japanese bar, but they had different levels of success. The Japanese colonial regime had not directly applied Japanese law in Korean territory and so the hospital statute did not apply there. In Taiwan, in contrast, there was direct application of some Japanese rules, and the court held that a reasonable reading of the statute, which gave coverage to "any establishment" set up under the law, would include a Taiwanese hospital. The Diet subsequently amended the compensation law to cover Korea as well, and both Taiwanese and Korean victims were compensated.

**Equality Cases.** Two recent Supreme Court cases regarding equality are worth mentioning. In 2005, Japanese citizens living abroad won the right to vote in national elections. In 2008, the Supreme Court invalidated a provision in the Nationality Law that effectively disqualified children who were born by Japanese

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43. Ibid., 192.
45. Tokyo District Court Ruling, Oct. 25, 2005, 1910 Hanrei Jiho 69; see also 1910 Hanrei Jiho 36 (on Korea).
47. In 1998, the Diet amended the Public Offices Election Act to make it possible for Japanese nationals living overseas to vote in Diet elections. However, a Supplementary Provision allowed overseas voters to vote only in the proportional representation component of the lower house electoral system, and not in the single-member elections for the House of Representatives or for councilors elected from prefectures. See Case to seek declaration of illegality of deprivation of the right to vote of Japanese citizens residing abroad, 2001 (Gyo-Tsu) No. 82, 2001 (Gyo-Hi) No. 76, 2001 (Gyo-Tsu) No. 83, 2001 (Gyo-Hi) No. 77, 2005.09.14. For the text in English, see http://www.courts.go.jp/english/judgments/text/2005.09.14-2001.-Gyo-Tsu-.No..82,.2001.-Gyo-Hi-.No..76,.2001.-Gyo-Tsu-.No..83,.2001.-Gyo-Hi-.No..77.html.
father and non-Japanese mothers from acquiring Japanese nationality. After the Supreme Court decision, such children now are recognized as Japanese. This decision has been described as “epoch-making.” In reviewing the decision, it is clear that the Japanese justices take the rights of individuals seriously. The interpretive statement of the chosakan (the staff judge who serves as a clerk in the case) cited other countries’ jurisprudence, and Justice Izumi’s concurring opinion sought to articulate a kind of intermediate scrutiny standard in the case, which if adopted might have more widespread implications of equality jurisprudence. The case was significant in that issues of nationality go to the core of Japan’s self-conception as a nation. The Diet was somewhat reluctant to amend the law after the case, though it eventually did so to excise the unconstitutional provisions.

Other Constitutional Rights. Courts in Japan have been willing to find violations of individual rights when the violations are clear. A major issue in involving free expression concerned schoolteachers who refuse to honor the Japanese flag or sing the national anthem, the kimigayo, because of its association with wartime militarism. With the election of nationalist demagogue Shintaro Ishihara in 1999, the Tokyo City Government became more vigorous in pressuring teachers to participate in such activities. In September 2006, the Tokyo District Court found that the city had violated the constitutional guarantee of freedom of thought, but the decision was recently reversed by the Tokyo High Court. In February 2008, the same District Court found that the city had exceeded its discretion in punishing a set of activist teachers. Relying on their past refusal to honor the flag and anthem at graduation ceremonies, the City had cut their pay and refused to re-hire them on a part-time basis after they had retired. The Court held that, although its directive making the patriotic displays mandatory was constitutional, the City had exceeded its discretion in punishing the plaintiffs and awarded roughly US$258,000


51. Ibid.
in damages. But this case too was reversed by the High Court, in January 2010.\(^{52}\) Similar lawsuits elsewhere have failed or been overturned on appeal.

**Are There Any Signs of Judicialization?** There has not been a major shift toward judicialization in the Heisei era, which is somewhat puzzling given the major social and political effort to expand the role of courts. We should perhaps expect this self-conscious effort at institutional design to bear some fruit in the form of a higher profile for the judiciary. But to date there have been relatively few appointments from outside the judiciary. Material incentives keep the best private attorneys from seeking to join the courts, and so the traditional structures remain intact.

There are some tentative hints that increasing public involvement in the judicial system may affect the decisions of legal actors. One example comes from Prosecutorial Review Commissions (PRC), in which 11 citizens review decisions of non-prosecution, and have the power to recommend prosecution. Japanese prosecutors have always been willing to go after corrupt politicians: indeed, some of the major figures of postwar politics, such as Tanaka Kakuei and Kanemaru Shin, have felt the sting of criminal prosecution. This speaks to the integrity of the judicial process and the rule of law, and suggests that the view that Japanese judicial actors “avoid politics” is too simple a formulation. In this regard, one recent case of significant interest concerns Ozawa Ichiro, the opposition kingpin who stepped down from his position with the Democratic Party of Japan in summer 2010 after a financial scandal. Prosecutors initially decided that there was not enough evidence to indict him; but a prosecutorial review committee (PRC), a subgroup of eleven anonymous citizens that examines cases of non-prosecution, recommended another look.\(^{53}\) At the end of January 2011, Ozawa was indicted by private attorneys—recommended by the second Tokyo Bar Association and appointed by the Tokyo District Court to represent the PRC—for misreporting political funds.\(^{54}\) The story suggests that public pressure can, on occasion, lead to action on the part of judicial actors. Increasing transparency of the legal system might lead to renewed pressures in this regard. But it is far from a sure thing, notwithstanding the major reform process.

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\(^{52}\) [http://search.japantimes.co.jp/cgi-bin/ed20110208a1.html](http://search.japantimes.co.jp/cgi-bin/ed20110208a1.html).

\(^{53}\) NHK World, 27 April 2010.

Another sign on the horizon are certain statements by ex-Justices that the court should play a more active role in electoral cases. Finally, it is worth noting that in March 2011, the Supreme Court ruled that the 1994 electoral system was “in a state of unconstitutionality” because of vote disparities and called on the legislature to fix it. This was the first time the Court had issued such a ruling on the 1994 electoral reform, having previously upheld the system on three occasions. Because the unconstitutional vote disparity of 2.3 was in the range that had previously been ruled constitutional, one has a quantitative indication of creeping expansion of the court’s doctrine in this area, though it is too early to say if it constitutes a trend.

III. Explanations for Limited Judicialization

The overall picture of this survey is one of relatively limited judicialization. What might explain this pattern? One might attribute the limited level of judicial involvement to the non-existence of a Japanese Constitutional Court, which can authoritatively restrain political actors in the name of higher law. Yet this explanation is clearly insufficient. Other countries with a unified judicial system have been part of the trend toward judicialization. And the Japanese Supreme Court does have the formal power of constitutional review. To be sure, it has used the power sparingly, striking government action in a total of eight cases on constitutional grounds since 1946. But judicialization involves more than constitutional review; and so the claim that timidity in constitutional adjudication limits the courts in other areas is not convincing.

Furthermore, the claim that constitutional timidity drives the courts ignores the significant gap between lower courts and the Supreme Court on various matters. Lower courts have at times been willing to make controversial anti-government rulings, though these are with some frequency overturned by the courts of appeals.

Other conventional explanations do not seem to fully account for the pattern. In recent years, political explanations rooted in rational choice theory have had a good deal of influence in comparative understandings of judicialization. J. Mark Ramseyer, who pioneered these theories in the Japanese case, emphasized

57. Japan Const., Art. 81.
electoral alternation as a key factor.\textsuperscript{58} Ran Hirschl has a theory of judicial empowerment that he calls “hegemonic preservation” focusing on departing elites who want to preserve their policies into the future.\textsuperscript{59} One of us has a version of this argument that he calls political insurance.\textsuperscript{60} All of these influential theories have a common flaw in the Japanese case: they all predict that the decline of the LDP would lead to significant judicial empowerment. And although we have observed some increased resources devoted to the judiciary, the judges have not fundamentally changed their passive approach to deciding public policy issues. Hirschl’s theory would predict a major effort by the LDP to empower the courts to preserve its policies in the future; Ginsburg and Ramseyer would predict that both major parties would have a shared interest in such a policy. It may indeed be the case that such an effort has been made. But without a court willing to take the football, it is hardly worth trying to make the pass. As such, the insurance and hegemonic preservation theories do not seem to fit well in understanding contemporary Japan. And it appears that judicial attitudes may form a key constraint.

We also have theories that focus on institutional structure. It is certainly the case that the hierarchical structure of the Japanese judiciary discourages public policy innovation. But this is, in many ways, an outcome to be explained rather than an independent reason for non-judicialization. Why is it that Japanese judges stay away from public policy issues even when they might be able to be more involved? The next section focuses on a particular legal theory as the key factor.

IV. The Role of Ideas

The Organ Theory: Prussian Origins

Like other recent accounts of Japanese judicial conservatism, we emphasize the importance of ideas and institutional self-understandings.\textsuperscript{61} We differ from other accounts in our emphasis on a particular set of ideas, German in origin, which have received greatest institutional expression in Japanese constitutionalism. These are the ideas underlying the so-called “organ theory” of Japanese constitutional interpretation. Western scholars of Japan may be familiar with the organ theory in light of debates over the constitutional status of the emperor that arose in the drafting of the 1946 Constitution.\textsuperscript{62} But the theory extends beyond the question

\begin{itemize}
  \item 58. Ramseyer, “Puzzling (In)dependence.”
  \item 61. Law and Matsui, “Why is the Japanese Supreme Court so Conservative?”
\end{itemize}
of whether or not the emperor was the embodiment of sovereignty or an organ of
the constitution itself.

The organic theory draws on a broader set of nineteenth-century German ideas that saw the state as an inherent central part of the constitutional order. The purpose of constitutionalism was not so much a political movement to guarantee democratic self-governance so much as a set of auto-limitations established by the state in the name of the Rechtstaat. Within the constitutional state, the polity is analogized to a body composed of different organs, each of which must exercise its proper role to ensure proper functioning of the system. Power in this conception is spread throughout the system, and not dependent on a higher authority. Just as the brain cannot order the heart not to beat, so it is impossible for coequal organs to be superior to each other. Instead, each organ receives its power from the source of constitutional authority, whether the emperor as in the Meiji Constitution, or the people under the theory of the 1946 document.

This approach is quite distinct from French and American theories of the separation of powers. In the American tradition, the separation of powers jurisprudence focuses heavily on drawing the line between executive and legislative activities, and many of the cases concern legislative over-reach.63 In the French tradition, the separation of powers was targeted differently;64 after the Revolution, it has historically been targeted at the judiciary and the historically rooted fear of government du juges. Under the Fifth Republic, there has been the additional twist of seeking to ensure, through the creation of the Conseil Constitutionnel, that legislative lawmaking power does not interfere with that of the executive. In each case, the conception of power is essentially Montesquiean in character. Power comes in three flavors, and only three, and there is little room for the modern administrative state. In each case, a neutral third party—the courts in the U.S. case, the Conseil in the French—is set up as a guardian of the separation of powers scheme.

The German tradition is quite different. As a late-developing state, Germany (and Japan) was in the position of organizing a state before it really had a modern economy, and so there was a sense of necessity to the state-building enterprise. Naturally, this led to interest in providing constitutional legitimacy to the administrative apparatus. As one of us has written elsewhere, “Prussian-German constitutionalism is an imitation of, and reaction against, its French counterpart.

63. See, for example, Bowsher v. Synar; Buckley v. Valeo; INS v. Chadha (Opinion of Powell).
Its basic concern is the creation, not the division, of a sovereign power. Instead of viewing society as the ultimate legitimator of the state, the state has an independent organic vitality and is a proper bearer of rights and duties within the polity. The ultimate right of the state is to govern. There is room in the theory for the existence of rights and liberties of citizens, but rights are not the starting point or ultimate criteria of constitutional legitimacy, and indeed democracy is in some tension with the statist theory. The people are not the source of rights. Instead, private rights and duties are granted by the state, rather than the other way around. For example, property rights are interpreted not as delegations of sovereign power to individuals by the state, but as rights of acquisition and utilization granted to citizens. This is not to say that the state dominates private life; instead it must respect the public-private distinction. In the realm of private law the state can distribute rights to citizens, in accordance with what Carl Schmitt called as “principle of distribution.” If the government violates that principle, the proper redress for a politically powerless citizen is the judicial enforcement of his or her rights. Thus, depoliticized private law empowers zones of pluralistic autonomy, and the state too is strictly limited by the Rechtstaat concept.

Courts are not central in this tradition. Whereas the Anglo-American tradition of the rule of law emphasizes the common law heritage of external judicial controls on administrative action, the Rechtstaat tradition focuses more on internalization of norms by government officials and structural constraints. The state itself is defined and empowered through law, and law is the tool to structure its internal relationships, strictly limiting the role of any one actor.

As mentioned above, this organic theory of constitutionalism has its origins in nineteenth-century German thought and fit the needs of developmental Meiji authoritarian state. In the Japanese context, the most influential thinkers were Otto von Gierke and Georg Jellinek. Gierke’s great book, Das Genoßenschaftsrecht, was an exploration of the law of communal associations. As part of the historical school associated with Friedrich von Savigny, von Gierke sought to develop normative theory out of historical inquiry into the development of German legal

67. Ibid.
68. Ibid.
70. Sobei Mogi, Otto von Gierke: His Political Teachings and Life (London, 1932); Rupert Emerson, State and Sovereignty in Modern Germany (New Haven, 1928), 129–42.
institutions. According to von Gierke, it was in the possibility of forming collective organizations that human society flourished, and the state emerged only out of a very long process of evolution of such associations. Though rooted in a logic of voluntary associations, the state had distinctive qualities as it encompassed all other collectivities. As he put it, “the state alone cannot be subordinate as sovereign collective person to any organized will power external to and above it, and consequently it cannot be limited in its will and action by a higher community participating in its decisions.”

This theory was organic in that it did not rest on a fundamental opposition between individual and state. While the concept of the Genoßenschaft focused on the state qua state, as opposed to the government, the theory was quite compatible with a meritocratically selected, insulated government bureaucracy. Of course, that institution has a long history in East Asia, and provided some means for people of ordinary birth to influence government in the absence of democratic legitimation. The emergence of the modern civil service in Germany and Japan fit well with the organ theory: the bureaucrats had a legitimate role to play in national affairs, in contrast with an Anglo-American distrust of the modern administrative state. The bureaucracy was not seen as sovereign or dominant in the organ theory, but within its realm of expertise, was an autonomous actor free from the vagaries of democratic politics. Meritocracy is itself representative in that it is anti-aristocratic, and this provided some mode of participation.

The theory was attractive to Japanese thinkers who found themselves in a similar developmental imperative to that of Germany. The bottom-up character of von Gierke’s theory and its communitarian focus fit well with the Japanese tradition of the self-regulating village or mura. The romantic overtones of ethnic solidarity were also a better fit than, say the French ideas of equality of citizenship and natural rights. The Chinese tradition, in which the state was itself seen as a natural phenomenon, and in theory unlimited by higher authority, was powerful in the Japanese consciousness in the early years of Meiji, which had adopted the Ritsuryo structure as a stopgap before Western structures could be effectively imported. The German model became even more attractive after the defeat of France in 1871, imbuing the theoretical compatibilities with an aura of objective superiority as well.

The organic theory entered the Japanese academic context through Ichiki Kitokuro, who was a bureaucrat and Professor of Law at Tokyo University. He

in turn was the mentor of the great constitutional theorist Tatsukichi Minobe.\footnote{72}{Miller, Minobe Tatsukichi.} Minobe tried to rationalize the popular concept of the *kokutai*, or national polity. Under this theory, the emperor himself was only an “organ of the State” rather than himself being an embodiment of sovereignty beyond the state itself. The relevant provisions of the Meiji Constitution held that the Emperor was “sacred and inviolable” (Article 3) but also “the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution” (Article 4). This latter provision, according to Minobe, brought the emperor within rather than outside the constitutional framework. He drew on the analogy of the head of the human body to describe the role of the emperor: the Emperor was the supreme organ, but an organ nonetheless.

Minobe’s view was opposed by imperial absolutists like Shinkichi Uesugi, a student of Jellinek and the Japanese scholar Hozumi Yatsuka, whose views diverged. Rooted in the German historical school, Uesugi promoted ideas of imperial supremacy and absolute monarchy that proved attractive to the militarists who seized power in the 1930s. As Minobe summarized the differences between the two views: “Among scholars who explain our state law there are those who frequently assert that the monarch is the subject of governmental power. This is an inadmissible error... the state alone is the subject of governmental power, and the monarch is an organ of the state.”\footnote{73}{Ibid., 27.} Minobe himself was subjected to withering criticism, including investigation on charges of *lèse majesté* and political attacks in the Diet in 1935.\footnote{74}{Ibid., 196–253.} This led to his total withdrawal from public discourse. But in the aftermath of the military defeat, the organ theory again proved useful to understand how a formerly divine emperor could become a constitutional monarch. Minobe’s theory was redeemed during debates over the 1946 Constitution.\footnote{75}{Moore and Robinson, Partners for Democracy.}

Even before the militarist interlude, the organic theory developed deep roots in Japanese institutions. The organ theory served as theoretical basis for the fights among the different services in World War II. Each of these claimed responsibility for its own domain. Indeed, this was the source of some backlash against General Tojo, the military leader hanged after the Tokyo War Crimes Trial. Tojo was chosen as Prime Minister by Hirohito in late 1941, just before Pearl Harbor, after serving as Army Minister. During his tenure, he retained the post of Army Minister and also served at various points as the Minister of Home Affairs, Foreign Affairs, Education and Commerce. This embodiment of multiple posts was incompatible
The Judicialization of Japanese Politics?

with the notion that each body had its own designated role, and this hastened Tojo’s downfall in July 1944. Even a strongman like Tojo failed to concentrate organically distinct powers into a single person.

What did the organ theory mean for the judiciary? Recall that the modern judiciary is a creation of the Meiji era, a defensive move to free Japan from the yoke of the unequal treaties, rather than a long-standing institution with deep cultural roots. Yet, like any constitutional organ, it had a defined role to play. In the Japanese conception, this was mainly the realm of private law. The courts’ role was to adjudicate private disputes involving legal rights; but it was not conceived of as enforcing a social contract or serving to protect the people from an overbearing state. The courts in the colonies played a similar role. Professor Wang Tay-sheng finds that the prewar courts in Taiwan tended to be fairly high quality with regard to ordinary civil cases, but were very reluctant to make any holdings that appeared to constrain Imperial authority. The judges found the “Movement for a Taiwan Parliament” not guilty.

Under the organ theory the state’s legislative power was to be carried out first and foremost by the legislature, so the theory would sit uncomfortably with judicial review by ordinary judges. This was not an issue under the Meiji Constitution, which did not provide judges with explicit power to supervise the parliament. But it may have hampered the postwar attempt to create a vigorous judicial oversight.

The Postwar Retention of the Organ Theory

Precisely because of their notion of avoiding constraint of public authority, Japanese judges were relatively quiet during the militaristic period. At the same time, the military regime did not rely heavily on courts to carry out its policies. Rather, they seemed content to allow the courts to continue to operate in their own autonomous realm of governing private law.

Precisely because the courts had stayed out of public affairs, they were not targeted for purges after the war, as were the military and political organs. Like the rest of the Japanese bureaucracy, there was a good deal of continuity between prewar and postwar personnel, and hence no sharp ideological break. Nineteenth-century German positivism survived intact, and with it the organ theory. (To be sure, there was a large break in terms of the treatment of the Emperor, who we have already described as being outside the organic structure in the views of the militaristic faction. But with the triumph of Minobe’s ideas after World War II, the organ theory encompassed the entire Japanese state structure.

76.
This continuity has profound implications for the relationship of government, people and judiciary. The central government, representing the Japanese nation-state, still monopolizes all sources of political legitimacy and exercises powers with the presumption of constitutionality.\(^\text{77}\) The state strips individuals and groups of powers, reassigning to them rights in return.\(^\text{78}\) Property rights are interpreted not as delegations of sovereign power to individuals by the state, but as guarantees of freedom to citizens through juristic institutions in compensation for their de-politicization. By contrast, the self-binding state is free to meddle in the periphery of private autonomy so long as it does not disproportionately infringe on rights of citizens. The de-politicized citizenry enjoys private rights, but cannot rely on judicial enforcement of rights to displace political decisions.

Japan is now a democracy, so that citizens can assume public office and participate in the selection of representatives; but the Diet is also just one organ of the state among many, not in principle superior to the bureaucracy, the emperor, or any other within their own zones of constitutionally granted authority. The political and administrative branches possess authority that is presumptively constitutional, and the judicial branch will overturn that action only when the government action immoderately violates rights of the citizen. U.S.-style judicial review fits uneasily with such a conception, though there is a vein of American constitutional scholarship that promotes a somewhat analogous view that legislative activity is presumptively constitutional.\(^\text{79}\)

Postwar Japanese democracy creates no incentive for the high court to judicialize politics. Instead, the Court falls back on its traditional conception of a distinction between public political authority and a pluralistic private realm by ensuring that citizens enjoy their economic freedoms and equality of suffrage. When citizen’s subjective rights are under serious and direct threat, as in the equality cases and many private law matters, the courts will respond. When, on the other

\(^{77}\) Japan Const., Art. 41 (making the Diet “the highest organ of state power”).
\(^{79}\) James B. Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law,” Harvard Law Review 7 (1893): 129–156 (courts “can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, —so clear that it is not open to rational question... This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.”)
The Judicialization of Japanese Politics?

While citizens are claiming to represent an objective interest common to anyone in the society, such as in the Article Nine cases, the court tends to find the case not justiciable.\(^2\)

The persistence of the organ theory is nowhere better illustrated than in the Final Report of the Justice System Reform Council itself:

When likened to the human body, if the political branches constitute the heart and arteries, the judicial branch shall be said to be the veins. The series of reforms... such as political reform and administrative reform, are, so to speak, an effort to restore and strengthen the functions to make blood flow swiftly by removing extraneous crudescence in the heart and arteries. According to this metaphor, justice reform shall be considered to be aiming at harmonizing the body and improving its health by expanding and strengthening the scale and function of the justice system as part of what the “shape of our country” should be in the twenty-first century, with fundamental reflection on whether or not the existing veins were excessively small.\(^1\)

We see these ideas, essentially principles of legal theory, as being at the root of the judicial self-conception in Japan. Japan’s judges surely are independent when judged by formal criteria, and their record in this regard is admirable. There are no credible reports of judicial corruption; and there has been no overt influence by members of the political class (notwithstanding Professor Ramseyer’s convincing evidence about implicit influence through the process of appointment and promotion).\(^2\) At the same time the reverse is also true: just as politicians do not interfere with judges, judges do not interfere with politicians. The organ theory goes a long way toward explaining both phenomena, while previous work has tended to focus only on one or the other aspect of this relationship.

The organ theory has been challenged by various others at different points in modern Japanese history, but is remarkably persistent. In the prewar era, it was challenged by Uesuki and Hozumi from the right as being too liberal, and by the liberal left for being too conservative. In the postwar era, liberal academics have challenged it as well. In the political sphere, one of the recent challengers was Ozawa Ichiro, the now disgraced DPJ politician. Ozawa sought to revolutionize Japanese politics after the DPJ took over. His basic theme was to make political practice match the actual text of Japanese constitution. For example, he argued that the cabinet was superior to the bureaucracy, surely a radical position from

\(^{80}\) See also Upham, Law and Social Change.

\(^{81}\) Justice System Reform Council, Final Report, Ch. I, Part 2.1

\(^{82}\) Ramseyer and Rasmusen, Measuring Judicial Independence.
the point of view of the theory that sees each constitutional organ playing its own role. He also argued for the supremacy of the Diet in forming the cabinet, in accordance with classical parliamentarism.

Ozawa and the DPJ also argued that the Emperor (or rather Imperial Household Agency) did not have independent authority to refuse a visit of the Chinese Vice President Xi Jinping in December 2009, so long as he was requested to accept by the cabinet. Xi had requested the visit on very short notice, not within the traditional thirty day period demanded by the Agency. The Agency viewed the Constitution’s provision that the Emperor “shall not have powers related to government” (Article 4) as insulating the Emperor from political requests from the government. In contrast, Ozawa argued that this provision meant that the Emperor had no independent authority to refuse a government request, for a refusal would be the exercise of a governmental power. This was, of course, consistent with the organ theory as reinterpreted for the postwar constitutional monarchy. After some political wrangling, the Emperor did accede to the request, leading to significant protest in Japan.

With the fall of Ozawa, however, it seems that the organ theory remains the dominant one. Until a suitable rival is found, Japan will remain an outlier among industrial nations: it simply does not have a judiciary that is interested in judicialization. And it has no prospect of getting one.

Conclusion

Compared to other advanced industrialized nations, including its close neighbors in Taiwan and Korea, Japan has experienced relatively little judicialization. The Japanese Supreme Court is not adjudicating issues related to who can serve as the head of government, as are its counterparts in Taiwan and Korea. It is not considering major issues of social policy, as are constitutional courts in Germany and Latin America. It is not setting aside major programs of the legislature, as has the Conseil Constitutionnel in France.

Why this situation obtains has been the subject of some controversy. Some point to cultural factors, including the preference for harmony that is often invoked in discussions of Japan. Others emphasize the lack of a constitutional court; and the system of appointments and promotion, through which those who rise in the judiciary tend to reinforce the cautious approach. A related category of explanation emphasizes political controls. Because of continuity in the rule of the

83. See Law and Matsui, "Why is the Japanese Supreme Court so Conservative?,” 23 (discussing views of former Justice Masami Itoh).
Liberal Democrats, and their ability to communicate with the Supreme Court Secretariat at the apex of the judicial branch, lower court judges tended to uphold policies that are consistent with the preferences of the Diet. But the current situation, in which Japan is governed by the Democratic Party of Japan, poses a direct challenge to these theories. We should be witnessing at least tentative steps toward judicialization if the political theories are correct.

This chapter has argued that we are not yet seeing these signs. Despite a major program of judicial reform, continuity rather than change is the theme. We join recent analysts in emphasizing ideational factors as providing the explanation. But we focus on different ideas. While Professor Matsui’s account relies on general ideas of positivism and a belief among judges that the constitution is more a political rather than legal document. In our view, regardless of political structure or positivism per se, Japanese judges are heir to a particular conception of law and the state that provides a limited role for the judiciary. This view survived the constitutional transformation of the Allied Occupation. As a discrete organ exercising the state’s judicial power, Japanese judges are independent, but they are cabined within a small zone of activity, mainly the adjudication of private rights. The judges police other branches only when their violations of individual rights are truly egregious and when the violation does not reflect a strong interest of the state, in conformity with the organ theory. This zone of violations is small indeed.

This is not to say that the nineteenth-century German ideas are uncontested. There are bureaucrats and politicians in Japan who do want to move to a more liberal model, which presumably would facilitate a larger role for judicial protection. But even after a self-conscious effort to change the system, the ideas remain deeply rooted.

Japan is exceptional within advanced industrial democracies in its low level of judicialization. It illustrates that the general association between divided politics and judicial empowerment is a matter of tendency, not an iron law. Even when they have room to exercise power over important policy matters, judges may not always choose to do so if they do not conceive of the judicial role as a policymaking one. A self-conception of an activist role seems to be a necessary, if not sufficient, condition for judicialization.