Political Process Theory Is Not a Utility Knife

Comparative Political Process Theory and Judicial Review in Japan

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I. INTRODUCTION

Political process theory still remains well known in the United States.[1] Whether for or against it, political process theory has been the subject of considerable analysis.[2] Most recently, this theory has been widely studied from the perspective of comparative law, a key example being Rosalind Dixon and Michaela Hailbronner's article, "Ely in the World."[3] Other scholars have also examined the influence of political process theory on

1 J. S. SCHACTER, Glimpses of Representation-Reinforcement in State Courts, Constitutional Commentary 36 (2021) 349.

2 See, e.g., R. D. DOERFLER and S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review 75 (2022) 769 (2022); A. TANG, Reverse Political Process Theory, Vanderbilt Law Review 70 (2017) 1427; M. A. SELIGMAN, Neutral Principles and Political Power: A Response to Reverse Political Process Theory, Vanderbilt Law Review En Banc 70 (2017) 301.

3 R. DIXON/M. HAILBRONNER, Ely in the World: The Global Legacy of Democracy and Distrust Forty Years On, International Journal of Constitutional Law 19 (2021) 427.

particular countries, with these academic concerns being termed "comparative political process theory."[4]

The degree of political process theory's impact varies from country to country. Regarding the 1982 Canadian Charter, Geoffrey T. Sigalet[5] notes that while there is no evidence that political process theory was referred to in the drafting of the Charter, Art. 15 para. 1, stipulates equal protection without discrimination against any particular group.[6] This provision is concerned with the idea of protecting discrete and insular minorities. In fact, the plurality opinion in Andrews v. Law Society of British Columbia[7] held that the citizenship requirement to be a lawyer in British Columbia violated Art. 15, considering groups analogous to vulnerable groups, because non-citizen residents lacked political power. Ely's "Democracy and Distrust" was referred by the opinion in this context.[8] In contrast, James Fowkes observed that political process theory has received little attention in South Africa.[9] As South Africa's Constitution already provides specific individual rights compared to the US Constitution, it is not necessary to limit constitutional interpretation by the judiciary.

Japan was one of the countries that discussed political process theory.[10] In the 1960's, some Japanese constitutional law scholars attempted to transform

4 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429; A. KAVANAGH, Comparative Political Process Theory, International Journal of Constitutional Law, 18 (2020) 1483.

5 G. T. SIGALET, Dialogue and Distrust: John Hart Ely and the Canadian Charter, International Journal of Constitutional Law 19(2) (2021) 1.

6 Art. 15 para. 1 provides "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

7 [1989] 1 SCR 143.

8 The plurality opinion by Justice Wilson stated that "Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated." They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. ELY, Democracy and Distrust (1980), at 151.

9 J. FOWKES, A hole where Ely could be: Democracy and trust in South Africa, International Journal of Constitutional Law 19(2) (2021) 476.

10 Professor Matsui is a proponent of political process theory. He published a book discussing and introducing political process theory to Japan. S. MATSUI [松井茂記], 司法審査と民主主義 [Judicial Review and Democracy] (1991); S. MATSUI [松井茂記], 二重の基準論 [Double Standard Theory] (1994). It was reviewed by some constitutional scholars and caused controversy. H. TOMATSU [戸松秀典], 書評 [Book Review], ジュリスト Juristo 1052 (1994) 176; T. NONAKA [野中俊彦], 書評 [Book Review], in: Kenporironkenkyukai (ed.), Human Rights Protection and Modern

the country's judicial passivism in constitutional law cases by referring to the case law of the Warren Court and political process theory in the US[11] While certain Japanese scholars adjusted these theories to suit the national context, others were interested in keeping the theory in its original form.[12] Although this caused controversy at the time, it has recently not been paid attention to as before. In fact, this indifference has been promoted since Japan's Law School system began in 2004, because students demand a more practical theory. As a result, recent scholars have sought recent case laws focusing on domestic analysis, rather than using comparative approaches.

However, political process theory's influence in Japan was not adequately analyzed earlier, given the ambiguity regarding the Supreme Court's adoption of those ideas at the time. As such, this article considers the influence of political process theory on Japanese case law, and examines why this approach has not yet succeeded. First, the article clarifies how Japanese constitutional law scholars introduced political process theory to Japan, suggesting the "double standard" as the framework of constitutional judgement referring to US case law. Second, the article determines the Japanese Supreme Court's response. Finally, why this attempt was unsuccessful is examined.

II. A Prior Japanese Scholar's Concern

A few decades ago, some Japanese constitutional law scholars were impressed with judicial activism in the Warren Court and US constitutional law theories defending it. In particular, they were interested in the judicial role and constitutional tests, such as strict scrutiny when policing the political process. As such, Japan has been most affected by political process theory's judicial review component.

The Japanese Supreme Court has been conservative and judicially passive since the current Constitution was enacted in 1946. The Court tends to uphold the law by simply reviewing the structure of the regulation. In short, the Court does not explain how it decides on the constitutionality of the law in detail, or how the regulation justifies the constraint on individual rights. Scholars have tried to find a method to clarify these factors by referring to US case law and constitutional theory. However, their suggested framework for constitutional judgement has yet to be accepted widely in case law.

State (1995), H. Asano [淺野博宣], プロセス理論へ [Toward process theory], 法学教室 Hogakukyoshitsu 327 (2007) 14.

11 N. Ashibe [芦部信喜], 憲法訴訟の理論 [The Theory of Constitutional Case Law] (1973).

12 Matsui [Double Standard Theory], *supra* note 10, 304–357.

III. The Idea of Political Process Theory

To begin the overview of political process theory, it is well known that *Marbury v. Madison*[13] established the concept of judicial review in 1803. However, as the US Constitution does not explicitly provide for judicial review, its legitimacy must always be confronted, which was a fundamental issue faced by the Warren Court, famous for its judicial activism. Examining this issue in 1962, Alexander Bickel proposed it as a "counter-majoritarian difficulty,"[14] in his attempt to reconcile judicial review with democracy.

According to Bickel, the judicial role is limited to promoting fundamental principles. However, the concept of principle is abstract. Ely dealt with the same issue with regard to the Warren Court's activism, arguing for political process theory. This theory is based on a representation reinforcement approach. In considering how to reconcile judicial review with functional democracy, Ely distinguished between process and substance in terms of comparative institutional advantage. While the political branch, as elected representatives, has the authority to determine the substance of democracy, the judicial role is limited to ensuring the conditions of democracy; a Court cannot decide what are fundamental values. At the same time, it is critical for the Court to protect discrete and insular minorities, given that the Court is to make decisions independent of majoritarian pressure. If the political process is disturbed, the court should carefully review the constitutionality of the government's action; in these cases, the Court should apply strict scrutiny.

At first glance, this theory seems to encourage judicial restraint because it notes a limited judicial role. However, Ely was concerned about defending the Warren Court's judicial activism; In fact, judicial review was performed to protect minority rights in the Warren court. Even if the judicial role is limited to maintaining the political process, this theory cannot be considered as judicial passivism. In short, political process theory was intended to legitimize judicial activism by pretending judicial passivism.

IV. The Prior Situation in Japan

Japan's Supreme Court has been regarded as embodying judicial passivism. To change this situation, leading Japanese constitutional law scholars studied US constitutional law and introduced it to Japan in the 1960's. Many

13 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

14 A. M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) 16.

constitutional scholars were interested in the Warren court in the US, and in a theory to defend judicial activism, such as political process theory. Simultaneously, tests for constitutionality attracted many Japanese constitutional law scholars because of their attempt to change the presumption of constitutionality based on the public welfare doctrine used in case law.

1. The Appointment System

Despite the introduction of political process theory to Japan, there are several reasons why judicial restraint has continued. Art. 79 para. 1 of the Constitution gives the Cabinet the power to appoint Supreme Court Justices.[15] The Liberal Democratic Party (LDP) has controlled the government for almost about half a century after World War II. With the government ruling party appointing Supreme Court Justices, it is inevitable that many Justices would share similar ideas as the government. Consequently, the Japanese Supreme Court has upheld the law in most constitutional cases.

Furthermore, the practice of the Meiji Constitution era remains unchanged. During this era, the emperor controlled the government, and all people were subjects of the emperor. All public officers, including judges, followed the government under the emperor. This bureaucratic system remains the norm within the judiciary under the current Constitution. The court tends to uphold the legality of government actions, and each judge follows the judicial administration's policy for promotion.

2. The Cabinet Legislative Bureau

This is a government institution that promotes judicial passivism. Its role is to review the constitutionality of any bill before it is submitted to the Diet. Its members are selected from among excellent bureaucrats across several government departments. Their job is to carefully scrutinize the text in terms of its construction, reasonableness, necessity, conflict with other statutes, and repugnancy with constitutional provisions. If the bill's constitutionality is even slightly in doubt, it cannot pass review. In other words, this system functions as a prior constitutional review. Consequently, the Supreme Court has rarely struck down laws as unconstitutional. Furthermore, certain Supreme Court Justices have previously worked for the Cabinet Legislative Bureau; it would be highly improbable for them to hold a statute unconstitutional after previously deeming it constitutional. Therefore, this system promotes judicial passivism.

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15 Art. 79 para. 1 provides that "All such judges excepting the Chief Judge shall be appointed by the Cabinet."

3. The Black Box and Public Welfare Doctrine

The method of constitutional judgement used by the Japanese Supreme Court is the public welfare doctrine. Used in place of a test for constitutionality, this doctrine is one reason most cases are judged as constitutional.

The Japanese Constitution has some provisions regarding public welfare, stipulating the exercise of individual rights should be respected as long as it conforms to public welfare. Art. 13 provides that, "Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."[16] Similarly, Art. 22 guarantees economic freedom to the extent that it does not interfere with public welfare.[17]

Using the public welfare doctrine in constitutional cases, Japan's Supreme Court examines whether the law conforms to public welfare. If a law is in accordance with public welfare, then it is regarded as constitutional. This method seems curious because the Court does not examine whether the law violates individual rights, but examines whether the law conforms with public welfare. Furthermore, the Court mainly focuses on compatibility with public welfare rather than judging the constitutionality of the law.

In practice, the Court simply overviews the construction of the law, leading to its reasonableness, and concludes its accordance with public welfare in most cases. The Court does not discuss its judgement of the constitutionality of the law in detail. We are unsure how the court upholds the law, and why it is seen as constitutional. It is equally unclear how various regulations may justify the constraints of individual rights.

V. Proposing the "Double Standard"

1. The Idea of the "Double Standard" and Political Process Theory

Having studied US case law and constitutional law theories, Japanese scholars were keen to introduce these to Japan. In particular, they focused on judicial review and the constitutionality test using footnote four in *United States v. Carolene Products* (1938)[18] and political process theory. Scholars suggested a constitutional framework referring to U.S case law and constitutional theory.[19] Closer to the basic format of a constitutional judge-

16 Art. 13.

17 Art. 22 provides "Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."

18 *United States v. Carolene Products Company,* 304 U.S. 144 (1938).

19 N. Ashibe [芦部信喜], 憲法 [Constitutional Law] (8th ed., 2023) 106.

ment rather than a test of constitutionality test, it was termed the "double standard".

This idea generally derives from footnote four in the *Carolene Products* case, in which the US Supreme Court applied the rational basis test to economic legislation, given that political branches have broad discretion. The Court ruled that strict scrutiny should be applied if the law facially violates the bill of rights, restricts political processes concerned with civil rights, and discriminates against minorities. Political process theory is similar to this doctrine. According to political process theory, the judiciary should guarantee a political process that coordinates fundamental values. In other words, the role of the judiciary is not to decide what the fundamental values are, but to protect the political process and public participation in it. It was exactly the Warren Court's attempt to keep the political process open and guarantee participation in it that political process theory sought to justify.

The double standard distinguishes between "spiritual freedoms/ mental freedom" concerned with civil, political, and personal rights, and "economic freedoms."[20] Strict scrutiny should be applied to spiritual freedoms, as it is necessary to maintain proper political processes within a constitutional democracy. Mitigated standards of review, such as a rational basis review, can be applied to economic freedoms because it is more appropriate for the court to defer to the judgment of political branches on issues of socioeconomic policy issues that constitute the outcome of the political process. Arguing that courts should make constitutional judgements by applying a double standard, scholars expected judicial passivism in the Japanese Supreme Court to hence change.

2. Underway

Although political process theory has made an impact on constitutional theory in Japan, attempts to change judicial behavior have not yet succeeded. While the Court has occasionally referred to a concept similar to the double standard, it is uncertain whether the Court directly took this approach. For example, the *Kourishijo* case [The distance restriction on retail market case][21] regarding the constitutionality of the distance regulation against new retail markets referred to a concept similar to the double standard. This regulation aimed to protect existing retail markets by preventing them from falling together because their management bases were weak. According to the Court, a less rigorous test should apply to cases of eco-

20 Spiritual freedom matters individual internal such as freedom of expression, academic freedom and religious freedom etc. It sometimes refers to a kind of fundamental rights. Economic freedom refers to right to business and property right.

21 Supreme Court, 22 November 1972, 刑集 Keishū 26, 586.

nomic freedom than to cases of fundamental rights. As a result, the Court applied a clear reasonableness test that highly deferred to the political branches and upheld the distance regulation. In the *Yakujiho* case [The distance restriction on the pharmacy case][22] three years later, the Court also mentioned that "Indeed, because occupation, as previously stated, is in essence a social and, moreover, principally an economic activity, and by its nature something in which mutual social relations are great; in comparison to other constitutionally guaranteed freedoms, especially the so-called "mental" freedoms, the demand for regulation by public authority is stronger."[23] The *Izumisano* case [The denial of facility use for the assembly case][24] followed this idea by referring to the *Yakuhijo* case. The plaintiffs applied to the City Community Hall for permission to hold an assembly there, the purpose of which was to oppose the construction of a new airport. Izumisano City denied the use of the City Community Hall, based on the risk to public safety caused by potential conflict between plaintiff's group and other hostile groups in this assembly. However, this risk is not attributable to the plaintiff and is too probable. The plaintiffs challenged the constitutionality of this disposition and the Izumisano City Ordinance for its provisions detailing the use of the City Community Hall, for infringing on their freedom of expression. The Court stated that "Considering that to restrict freedom of assembly is to restrict mental freedom, which falls within the scope of fundamental human rights, said comparison should be made in accordance with criteria that are stricter than those applicable when restricting economic freedom."[25]

At first, the Japanese Supreme Court appears to consider the idea of a double standard. However, it is unclear how serious this consideration is; the Court has never applied strict scrutiny to fundamental rights cases involving free speech, religious freedom, or academic freedom. For example, in the *Sarufutsu* case [The political activity of post officer case],[26] the Court applied a rational basis test to the National Public Service Act prohibiting the political activity of national public servants and upheld the law.

Moreover, the Court has never struck down a law as unconstitutional in these cases. Even when applying scrutiny such as in the *Izumisano* case, the Court upheld the law through a constitutional-compatible interpretation.[27]

22 Supreme Court, 30 April 1975, 民集 Minshū 29, 572.

23 *Yakuhijo* case, at 575.

24 Supreme Court, 7 March 1995, 民集 Minshū 49, 687.

25 *Izumisano* case, at 697.

26 Supreme Court, 6 November 1974, 刑集 Keishū 28, 393.

27 Constitutional-compatible interpretation is the method to uphold the law through removing the dubious unconstitutional part in the provision of the statute.

Similarly, although the *Horikoshi* case [The delivering of political leaflets by Social Insurance Agency staff case],[28] in which the defendant challenged the constitutionality of the regulation against political activity by government employees, ruled that the defendant was not guilty, the Court did not invalidate the regulation on constitutional grounds. Despite the fact that there was a chance to hold it unconstitutional *as applied*, the Court simply held that the activity of the defendant did not breach the National Public Service Act.

In contrast, the Court applied a more rigorous test in the case of economic freedom and held it unconstitutional. The *Yakujiho* case stated that "it is necessary to find that the above purpose could not be fully achieved through regulation of simply the form and content of the occupational activities, which is, in comparison with a licensing system, a looser restriction upon freedom of occupation." In short, the Court required a less restrictive alternative test. As a result, the Court deemed it unconstitutional. Similarly, in the *Shinrinho* case,[29] the Court found Art. 186 of the Forest Act, regulating property in co-ownership, to be unconstitutional because it violated property rights under Art. 29 of the Constitution.[30]

Therefore, the Supreme Court has not clearly or fully adopted a double standard. At the same time, the Court has also hardly adopted the pure version of political process theory. For example, the Court tends to protect certain fundamental rights that are irrelevant to the political process, such as the right to privacy. As for economic freedom cases, the Court has used the intermediate scrutiny or the rational basis test depending on the cases while Matsui, the leading Japanese advocate for political process theory, argues that the Court should apply the rational basis test in all economic freedom cases based on political process theory.[31]

Regarding voting rights, the Court repeatedly held malapportionment cases unconstitutional.[32] The one-person-one-vote principle relates to the political process, given that it has to do with participation in democracy. While this seems to illustrate that the Court has adopted political process theory, the Court did not invalidate the election. If the Court seriously considers one person's vote from the perspective of political process theory, malapportionment cannot be left to the political branches.

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28 Supreme Court, 7 December 2012, 刑集 Keishū 66, 1337.

29 Supreme Court, 22 April 1987, 民集 Minshū 41, 408.

30 Art. 29-1 provides that "The right to own or to hold property is inviolable."

31 MATSUI [Double Standard Theory], *supra* note 10, 314.

32 See, e.g., Supreme Court, 14 April 1976, 民集 Minshū 30, 223; Supreme Court, 17 July 1985, 民集 Minshū 39, 1100.

3. Reasons for the Failure

There are several possible reasons for the failure of Japan to adhere to political process theory. First, the theory and its proponents have been criticized. In particular, Professor Yasuo Hasebe criticized Matsui's attempt. As for the proponents of the original political process theory such as Professor Shigenori Matsui, there has been some controversy regarding Matsui's approach. For instance, Professor Yasuo Hasebe criticized the attempt to introduce political process theory to Japan because the concept of pluralism was different from that of the Japanese Constitution.[33] The dominant theory was clearly different from Matsui's idea of applying standards to economic freedom.[34] Matsui proposes that the same rational basis test should be applied in all case of economic freedom, whereas case law and most academic theories apply a separate test depending on each case. Furthermore, even if participation in democracy is ensured, it is not sufficient for democracy to function well.[35] Moreover, democracy does not guarantee fairness. Even if a political decision was made through a proper political process, it would not always be a fair outcome. If the result is unfair and causes any constitutional problems, particularly if it infringes on an individual's rights, even an economic right, a judicial review should be requested.

These past controversies are beyond the scope of this paper, however, which instead examines why the court does not use the political process theory approach.

First, it is important to note that the situation and the construction of individual rights in Japan and the US were different; Ely's original political process theory aimed to defend the judicial activism of the Warren Court by limiting the judicial role. In contrast, the Japanese Supreme Court has been a model of judicial restraint; there is no need for further restraint. Furthermore, the tension between judicial review and democracy in Japan is not as strong as in the United States because Art. 81 of the Constitution explicitly provides for judicial review.[36] Although the Japanese judiciary also faces the problem of the counter-majoritarian difficulty, this tension is only theoretical. Japan does not have to legitimize judicial review itself or restrain judicial review, as the United States. Therefore, political process theory does not fit Japan as well as it does in the United States.

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33 Y. HASEBE [長谷部恭男], 政治取引のバザールと司法審査 [The Bazaar Political Transaction and Judicial Reivew], 法律時報 Horitsujiho 825 (1995) 62F.

34 M. ICHIKAWA [市川正人], 司法審査の理論と現実 [Theories and Actualities of Judicial Review System in Japan] 121 (2020).

35 I. SHAPIRO, The State of Democratic Theory (Nakamichi trans., 2010) 96–100.

36 Art. 81 provides "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

The second reason is the different construction of individual rights and views on fundamental rights. Compared to the US Constitution, the Japanese Constitution explicitly provides many individual rights such as equal protection, voting rights, freedom of idea, free speech, economic freedom, academic freedom, freedom of marriage, social rights, property rights, and several criminal procedures. As each provision protects each right, the Japanese Supreme Court does not need to extract any necessary rights from an abstract clause such as the due process clause in the US Constitution. Under these circumstances, there is less fear of broad interpretation and judicial overarching compared with the US.

When a new right needs to be recognized, the court interprets the general provision of comprehensive fundamental rights, Art. 13. This Article guarantees the "right to life, liberty, and the pursuit of happiness." The Japanese Supreme Court has recognized various fundamental rights, such as the right to privacy, based on Art. 13. The right to privacy was recognized in the *Kyotofugakuren* case [Police photographing an assembly without permission case].[37] Although the Court did not directly use the word privacy, the right to privacy was recognized as substantive in this case. The Court also recognized the right to self-determination regarding medical choice in the *Jehovah's Witness* case [Refusing blood transfusion case].[38] While the case did not mention the right to self-determination based on Art. 13 of the Constitution, it derived the right to choose medical measures from the right to personality.[39]

Thus, the Japanese Supreme Court is more familiar with the fundamental rights approach rather than the process-oriented approach. In contrast, political process theory discourages judicial determination of fundamental values, considering that the judiciary should not decide fundamental rights, but should rather ensure that the political process is able to determine fundamental rights.

The third concerns the system of government. Japan's parliamentary system is more flexible than presidential systems such as the United States. The leader of the governing party that wins the majority in the House of Representatives will be elected as prime minister. If it is necessary to change the cabinet, the prime minister could be changed through elections in the governing party, and not in the general election. In contrast, the presidential system, such as the United States, is more rigid. Even if the approval rating is extremely low, and people demand a change in the presi-

37 Supreme Court, 24 December 1969, 刑集 Keishū 23, 1625.

38 Supreme Court, 29 February 2000, 民集 Minshū 54, 582.

39 The Court did not explain what the right to personality is. Therefore, it is unclear whether the right to personality derives from the Constitution.

dent, the US Constitution stipulates that no change is possible until the term ends except for impeachment or resignation.[40] Considering both systems, maintaining the political process in elections is key in the US because it directly changes the government, reflecting the plural popular will. The court is required to ensure that the political process is open to the people and enabled according to the Constitution. In contrast, while the political process is also important in Japan, it is not necessarily the highest claim, given that the system of government is not as rigid as in the United States.

When it comes to controlling governmental power from the perspective of plural interests, controlling the bureaucracy is more important in Japan. Japan's government agencies are vertically divided organizations, with bureaucrats in each ministry supporting the foundation of the government. The bureaucrats remain in their ministries even after a change of government because of the merit system for hiring public servants, and thus continue to hold power as representing the interests of each ministry. As the bureaucrats are responsible for drafting legislation, the law may represent the interests of various ministries. If the objective of the law is in doubt, the court should apply strict scrutiny to uncover its actual purpose; there are potentially interests reflective of many agencies.

The fourth is the priority of individual rights. According to political process theory, the court should apply strict scrutiny to civil rights cases such as freedom of speech and the protection of discrete and insular minorities to protect the political process and guarantee participation in democracy. On the other hand, the court should apply a mitigated test, such as a rational basis test, to other rights such as self-determination and privacy.

Unlike the United States, the Japanese Supreme Court strongly protects personal rights rather than free speech. As Art. 13 stipulates, "All of the people shall be respected as individuals." The Japanese Constitution explicitly protects individual dignity. When privacy conflicts with free speech, the court tends to prioritize privacy over free speech as a result of balancing.[41] Furthermore, it is said that Japan has been a highly homogeneous society; a discrete and insular minority in terms of race does not exist in Japan, compared to the United States.

Finally, the fifth reason is the constitutionality test. Rather than using a test of constitutionality, as suggested by the double standard and political process theory, the Japanese Supreme Court basically uses the public welfare doctrine and a balancing approach. As former Justice Chiba said, the Court tends to avoid using the constitutionality test so as to be flexible for

40 Art. II para. 1 clause 1 provides "He shall hold his Office during the Term of four Years".

41 See, e.g., *Hoppo Journal* case, Supreme Court, 11 June 1986, 民集 Minshū 40, 872.

each case.[42] According to him, when the Court refers to any kind of constitutionality test, it is simply one factor in a balancing consideration.

Even if the Court takes the double standard, it may maintain the judicial passivism because political process theory originally had a different intention from that of the theory's Japanese proponents. Political process theory was originally intended to justify judicial activism in the Warren Court through restraint. In contrast, Japanese constitutional scholars endeavored to change judicial passivism to judicial activism using political process theory.

VI. Incremental Change?

The Japanese experience with political process theory indicates that the theory may not be useful in other countries. It can be said that for countries where judicial activism exists, political process theory will be suitable because it defends judicial activism by limiting judicial roles. In countries where judicial passivism exists, while political process theory may perform a function to improve the judicial role in cases concerning the political process, it is likely not the most suitable theory.

In judicially restrained countries, such as Japan, if the court takes slight steps toward judicial activism in cases of the political process, there is room to relate political process theory. In fact, recent cases in the Japanese Supreme Court have shown incremental judicial activism in voting rights cases.

The *Zaigaihojin* case [Voting rights of Japanese residing abroad case][43] in 2005 is a typical example. Given that the voting rights of Japanese citizens residing abroad are denied under the Election Act, the plaintiffs in the case, Japanese citizens living abroad, claimed that the Act violated their voting rights. The Supreme Court applied strict scrutiny and held that this violation was unconstitutional. The Court ruled that the government cannot restrict voting rights without unavoidable reasons. Considering the possibility of voting by citizens residing abroad, the Court held that there were no unavoidable reasons preventing the establishment of an overseas voting system in light of current technological developments, such as of information transmission through the Internet.

A year later, the *Seishinshogaisha-no-Zaitakutohyo* case [Vote at Home System for Mental Illness case][44] also applied strict scrutiny. The plaintiff,

42 K. Chiba [千葉勝美], 憲法判例と裁判官の視線 [The Constitutional Theory and the Judge's View] (2019) 11–27; *Horikoshi* case, 刑集 Keishū 66, at 1733–1734 (Chiba, J., concurring).

43 Supreme Court, 14 September 2005, 民集 Minshū 59, 2087.

44 Supreme Court, 13 July 2006, 判例時報 Hanrei Jihō 1946 (2006) 41.

who had been mentally ill and socially reclusive, argued that the current election system violated the voting rights of people with mental illnesses, because the system did not allow them to vote at home. Examining whether the government had unavoidable reasons for not allowing persons suffering from mental illness to vote from home, the Court found that the level of difficulty with in-person voting depended on mental conditions and the type of mental illness. Therefore, the Court upheld the Election Act for unavoidable reasons in the current system. Although this restriction was held to be constitutional, the Court carefully reviewed the constitutionality of the limitations on the right to vote.

Protecting voting rights through applying strict scrutiny is customary in political process theory, because voting rights are important for participating in political processes. However, in Japan, this tendency is justified from the perspective of substantive rights rather than political process theory because the Japanese Constitution explicitly provides voting rights and the judiciary is tasked with protecting them. Even if it could be regarded as one of the implementations of political process theory, it is only one of factors in the constitutional judgement. Given that political process theory affects case law, evidence of adopting it is needed.

VII. Conclusion

Political process theory has certainly been influential in Japan from the perspective of constitutional law academia. However, the Court has not yet accepted it, and it has not gained support from other scholars. Political process theory remains influential as a concept, but we should recognize that it is not always applicable to other countries.

In terms of comparative political process theory, this article is a focused analysis on whether the theory affects practical cases in Japan. If the study expanded its scope to other countries' responses to political process theory, similar to the work of Gardbaum,[45] a broader picture and better understanding regarding its impact and effectiveness could be developed. In fact, there is considerable room to consider the potential values of political process theory.

Dixon's idea of "Responsive Judicial Review" could help to develop and expand the original political process theory from the perspective of comparative study.[46] She examines the role of the judiciary in an age of democratic dysfunction and suggests a responsive judicial review to promote

45 Gardbaum, *supra* note 4.

46 R. Dixon, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age 2023, 1–21.

political response partly derived from political process theory. Weak judicial review,[47] such as in Japan, could support this idea.

This article also does not deny the future possibility of applying political process theory. Considering the recent situation of increasing numbers of foreigners residing in Japan, voting difficulties of elderly persons and patients with infectious diseases, and equal protection for sexual minorities including same sex marriage, they could constitute discrete and insular minorities.

If the political branches do not respond to protect them, the courts may judge the constitutionality of their inaction considering political process theory. In fact, these issues are already being studied.[48]

47 DIXON, *supra* note 46, 204–241.

48 Minori OKOCHI's article, A Constitutional Analysis of Same-Sex Marriage Cases. Litigation for Social Change in Japan in this issue, p. 97, concerns same sex marriage issue from the point of view of political process theory.