Comparative Representation-Reinforcement in Japan

Rosalind DIXON

I. INTRODUCTION

In 1990, Professor Shigenori Matsui published an authoritative Japanese translation of John Hart Ely's *Democracy and Distrust*.[1] Matsui was uniquely well placed to 'translate' Ely's ideas for a Japanese audience: not only is he a leading Japanese public law scholar. He completed his JSD under Ely, and his doctoral work focused on the relevance of Elyian ideas for Japan.[2] He also presented a compelling account of why Ely had relevance for Japan: Japan is a consolidated democracy with a written constitution, which includes strong protections for rights and the separation of powers.[3] It also has a long tradition of independent judicial review, the appropriate strength and scope of which is often debated.[4]

There are also aspects of the Japanese Supreme Court's jurisprudence that support the relevance of Ely-style political process ideas in Japan. The Supreme Court has issued several important opinions regulating electoral districting and expanding rights of access to the franchise.[5]

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1 K. SATO/S. MATSUI. Translation: J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980).

2 S. MATSUI, Judicial Review v. Democracy: An Inquiry into the Nature and Limits of Legitimate Constitutional Interpretation by the Judiciary (JSD Thesis, 1986). See S. MATSUI, John Hart Ely as a Constitutional Theorist: On Introducing Ely to Japan, In this issue, p. 11.

3 See The Constitution of Japan.

4 See, e.g., J. SATOH, Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight, Layola of Los Angeles Law Review 41 (2008) 603; N. KAWAGISHI, The Birth of Judicial Review in Japan, International Journal of Constitutional Law 5 (2007) 308.

5 Supreme Court, 24 May 1978, 判例時報 Hanrei Jihō 27, 888; H. ITOH, Judicial Review and Judicial Activism in Japan, Law and Contemporary Problems 53 (1990) 169.

Matsui's ideas have also generated rich debate over the last 30 years. Another leading Japanese constitutional expert, Professor Yasuo Hasebe, famously noted the criticisms of Ely's theory in the US and questioned whether Ely provided an adequately nuanced – or thick – account of democracy to offer a normatively attractive guide to the scope and intensity of judicial review in either the US *or* Japan.[6] Hasebe and other leading Japanese scholars have likewise questioned the degree to which Ely's ideas 'fit' within a Japanese constitutional context.[7]

In this short essay, I turn to a related question: whether more modern forms of *comparative* political process theory (CPPT) or 'representation-reinforcing' theory (CRRT) offer useful, and relevant, insights for Japanese constitutional jurisprudence. The term 'comparative political process theory' was first coined by Professor Stephen Gardbaum in his 2020 article by that name in the *International Journal of Constitutional Law*.[8] In recent work, I have identified the idea of *comparative representation-reinforcement* as another way of conveying neo-Elyian ideas about the capacity of courts worldwide to protect and promote democratic constitutional processes.[9]

Both CPPT and CRRT have important normative advantages compared to Ely's original process-based theory. They reject a sharp distinction between constitutional procedure and substance. They acknowledge the scope for reasonable disagreement about what counts as a "discrete and insular minority" in a diverse and pluralist society. And they respond more fully to the variety of current threats to democracy, including the threats of democratic backsliding or "abusive" constitutional change.[10]

CRRT approaches are also part of a growing sub-field within comparative constitutional studies about the role of courts in fragile or at-risk democracies – a field that includes work by Sam Issacharoff on 'hedging' by

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6 Y. HASEBE [長谷部恭男], 政治取引のバザールと司法審査 [A Bazaar of Political Bargaining and Judicial Review], 法律時報 Hōritsu Jihō 67(4) (1995) 62; Y. HASEBE, The New Comparative Political Process Theory: Its Legitimacy and Applicability in Japan, in this issue, p. 45.

7 On fit, see R. DWORKIN, Law's Empire (1986). On Hasebe's application of Dworkinian ideas in this context, see HASEBE, The New Comparative Political Process Theory, *supra* note 6.

8 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18(4) (2020) 1429.

9 R. DIXON, A New Comparative Political Process Theory?, International Journal of Constitutional Law 18(4) (2020) 1490.

10 See A. Z. HUQ/T. GINSBURG, How to Save a Constitutional Democracy (2018); W. SADURSKI, A Pandemic of Populists (2022); D. LANDAU, Abusive Constitutionalism, University of California Davis Law Review 47(1) (2013) 189; R. DIXON/D. LANDAU, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy (2021).

courts, Niels Peterson on political market failure, Katie Young and Malcolm Langford on social rights, David Landau and Manuel Cepeda on representation-reinforcement and state capacity building, Michaela Hailbronner on courts and democratic institutional failure, and my own work on "responsive judicial review".[11]

Perhaps most important, in a Japanese context, CRRT theories have a number of features that give them a higher degree of "fit" with existing Japanese constitutional traditions than Ely-style theories of representation reinforcement.[12] They embrace differentiated and contextual – or "calibrated" – approaches[13] to the intensity of review that is far closer to the Japanese Supreme Court's current approach than Ely's tiered approach to constitutional scrutiny. They also contemplate a mix of strong and weak review, which leaves scope for a reliance on sub-constitutional as well as capital "C" constitutional review, in ways that are again far more consistent with existing Japanese constitutional traditions.

A key challenge for both Ely-style judicial review and CRRT is the current role conception of the Japanese Supreme Court. But this challenge is greater for Ely-style process theory than CRRT, and one that is contested and open to change, in part through academic symposia such as this one.

The remainder of the essay is divided into three parts. Part II outlines Ely's theory and its relevance to Japan. Part III outlines CPPT as a more modern, comparative, and normatively desirable version of process-based theory, and its potential fit with the Japanese constitutional context. Part IV offers a brief conclusion on the likely limits but also promise of CRRT or responsive judicial review in Japan.

II. Ely in Japan

In *Democracy and Distrust*, John Hart Ely offered what is now a famous account of the proper role of the US Supreme Court in interpreting and

11 S. Issacharoff, Constitutional Courts and Democratic Hedging, Georgetown Law Journal 99 (2011) 961; N. Peterson, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa (2017); M. Langford/K. G. Young (eds.), The Oxford Handbook of Economic and Social Rights (2022); M. J. Cepeda Espinosa/D. Landau, A Broad Read of Ely: Political Process Theory for Fragile Democracies, International Journal of Constitutional Law 19 (2021) 548; M. Hailbronner, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law 65 (2017) 527; R. Dixon, Responsive Judicial Review Democracy and Dysfunction in the Modern Age (2013).

12 On fit, see R. Dworkin, Law's Empire (1986).

13 R. Dixon, Calibrated Proportionality, Federal Law Review 48(1) (2019) 92. See also Dixon, *supra* note 11; Hailbronner, *supra* note 11.

enforcing the US Constitution. Echoing *Carolene Products* footnote four, Ely suggested that the Court should engage in strong, active review in three sets of cases: where there was a clear violation of the text of the Constitution, where legislation threatened to block or undermine "the channels of political change", and where legislation affected the rights and interests of "discrete and insular minorities".[14] In other cases, Ely argued, courts should adopt a restrained role that left decisions about controversial questions of constitutional morality to Congress and state legislatures. Doing so, he seemed to suggest, would allow the Court to maintain a largely neutral, procedural role in adjudicating controversies within American democracy.

This reinforced the retreat by the Court, post 1937, from rigorous *Lochner*-style review of legislation limiting the enjoyment of economic rights and freedoms. But it also suggested a further retreat by the Court from its then role in protecting personal rights and freedoms, such as rights of access to abortion and contraception, as implicit in the Constitution's protection of "ordered liberty" or penumbral rights to privacy.[15]

Ely's theory was criticised in part on these grounds. But the most sustained objections to the theory were two-fold: first, that Ely vastly overstated the "neutral" or procedural character of his theory. Indeed, leading scholars such as Laurence Tribe argued that any judgment about the nature and requirements of democracy involved the application of an inherently contested, substantive set of evaluative criteria.[16]

In addition, a range of US scholars challenged the idea that the Court's role in upholding the Constitutional guarantee of Equal Protection could be neatly divided into the protection of "discrete and insular" versus other minorities. A key concern underlying a constitutional commitment to equality is the protection and promotion of equal dignity and substantive equality of opportunity for all citizens, as well as the elimination of historical forms of group-based disadvantage or subordination. And many groups may be subject to historical disadvantage and marginalization without being either discrete or insular: historical vote dilution and residential segregation meant that the "discrete and insular" concept worked quite well as a description of the legal and political vulnerability of African Americans in the late 1970's in the US. But the same could not be said for many other groups

14 ELY, *supra* note 1, 103.

15 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973). The US Supreme Court has now followed this Elyian call, via its recent decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). For criticism, including on democratic or neo-Elyian grounds, see D. LANDAU / R. DIXON, Dobbs, Democracy, and Dysfunction, Wisconsin Law Review 5 (2023) 1569.

16 L. TRIBE, The Puzzling Persistence of Process-Based Constitutional Theories, Yale Law Journal 89 (1980) 1063.

affected by historical prejudice, legal discrimination, and social and economic disadvantage. Women, for instance, have long experienced legal, political, and economic disadvantage, and yet live and work side-by-side with men. The same is true for young and old people, and many of those with mental and physical disabilities.

This has also led many past and current US scholars to challenge the usefulness of Ely's theory as a complete guide to constitutional construction, and especially to judicial restraint, even though many US scholars still rely on Ely-style ideas about the value of courts as protectors of democracy.[17]

In Japan, there are a range of *additional* obstacles or objections to the application of Ely-style ideas. First, there are strong – some suggest 'natural law' – rights protections in the Japanese Constitution that seem to go beyond the minority rights protections envisaged by Ely in *Democracy and Distrust*.[18] To some extent, this may reflect the distinctive origins of the Japanese Constitution as a post-War constitution with significant external influences.

Second, there are a range of doctrines in Japanese constitutional law that are in tension with Ely's ideas. Ely argued for the kind of tiered scrutiny associated with Justice Stone's approach in *Carolene Products* footnote four,[19] namely: strict scrutiny in cases involving threats to the channels of political change or to discrete and insular minorities, but rational basis review in all other cases, and especially cases involving economic rights and freedoms.[20] This does not, however, fit well with the Japanese tradition of differentiated review involving a variable standard of heightened scrutiny across a range of different cases.[21] Indeed, as scholars such as Obayashi note, the Court has at times taken a *more* demanding approach to the protection of economic rights than certain personal freedoms, and even certain rights to political free speech (and hence cases involving the channels of political change).[22] Nor does Ely's theory account for the way in which the

17 See R. D. DOERFLER/S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review, 75(3) (2022) 769 for its ongoing relevance and citation. See also MATSUI, John Hart Ely, *supra* note 2, 17; B. ACKERMAN, Beyond Carolene Products, Harvard Law Review 98(4) (1985) 713.

18 B. R. INAGAKI, The Constitution of Japan and the Natural Law (2010). See also Y. HASEBE, Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism [早稲田大学学術叢書] (2021).

19 ELY, *supra* note 1, 75–76.

20 ELY, *supra* note 1; *United States v. Carolene Products Company,* 304 US 144 (1938). See K. OBAYASHI, Political Process Theory Is Not a Utility Knife: Comparative Political Process Theory and Judicial Review in Japan, in this issue, p. 61.

21 OBAYASHI, *supra* note 20.

22 OBAYASHI, *supra* note 20.

Japanese Supreme Court seeks to balance competing rights, and interests, such as through the public welfare doctrine.[23]

Third, there are real questions as to the degree to which the Japanese social and political context is sufficiently pluralist and competitive to fit Ely's theory. There are clearly minorities in Japan who have experienced historical disadvantage and dignitarian harms, including non-citizens, religious minorities, and LGBTQI+ citizens.[24] But it is a less pluralist society than most modern democratic societies.[25]

And there is a limited history of political competition in Japan: With the exception of a brief period between 1993 and 1994, and from 2009 to 2012, it has been the Liberal Democratic Party (LDP) which has been the governing party with power to not only form government but also appoint members of almost all key governmental institutions, including fourth branch institutions such as the Cabinet Legal Bureau (CLB) and the Supreme Court itself.[26] This also affects both the likelihood and desirability of strong forms of judicial review of the kind envisaged by Ely.[27]

Fourth, there are real questions as to whether the Supreme Court of Japan has the willingness or capacity to engage in Ely-style process-based review. The Court is appointed by the government on the advice of the CLB[28] – a process that reinforces the existing tendency of the Court to prefer judicial restraint and minimalism over Ely-style robust protections of the political process and minority rights. Indeed, the Court has a long track record of *avoiding* constitutional questions, and of engaging in sub-constitutional as opposed to constitutional review.[29] In the course of its history, the Court has invalidated only eleven statutes, although it has engaged in much broader forms of statutory interpretation, and six of those cases were decided after 2000.[30]

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23 See J. KOSHIKAWA, Principles of Equity in the Japanese Civil Law, The International Lawyer 11(2) (1977) 307.

24 N. OKANO, Function and Dysfunction of the Catalytic Judicial Review in Japan, in this issue, p. 77; M. OKOCHI, A Constitutional Analysis of Same-Sex Marriage Cases: Litigation for Social Change in Japan, in this issue, p. 97.

25 HASEBE, The New Comparative Political Process Theory, *supra* note 6.

26 "How the LDP Dominates Japan's Politics", The Economist, 28 October 2021.

27 See R. DIXON/M. TUSHNET, Weak-Form Review and Its Constitutional Relatives: An Asian perspective, in: Dixon/ Ginsburg (eds.), Comparative Constitutional Law in Asia (2014) 103. OKANO, *supra* note 24.

28 G. CARNEY/S. STELLE, The Japanese Judicial System: Introduction and Contemporary Issues, University of Melbourne, Briefing Paper 14 (2021).

29 D. S. LAW, The Anatomy of a Conservative Court: Judicial Review in Japan, Texas Law Review 87 (2009) 1545; DIXON/TUSHNET, *supra* note 27, 107. On comparative judicial avoidance, see, *e.g.*, E. F. DELANEY, Analyzing Avoidance: Judicial Strategy in Comparative Perspective, Duke Law Journal 66(1) (2016) 1.

A[30] potential reason for this could be an intrinsic commitment to restraint and to promoting the democratic legitimacy of judicial review. But another could be a concern to avoid damaging forms of conflict with the LDP government or the CLB. The LDP has been the dominant party in Japan for almost all of Japan's history as a democracy.[31] And the party has a history of prioritizing stability, harmony, and conservative social values.[32] This also imposes clear limits on what Lee Epstein *et al.* call the "tolerance interval" for judicial review in Japan.[33]

The CLB is another important part of the context for the exercise of judicial review in Japan.[34] It exercises an important form of executive constitutional function, engaging in *ex ante* review of the constitutionality of proposed legislation. It is in this sense an extremely powerful and important "fourth branch" institution – indeed, its combined functions make it a candidate for the status of "super fourth branch", with enormous influence over the trajectory of Japanese constitutional law, and which the Supreme Court may have good *instrumental* reasons for seeking to keep on its side.

These concerns about backlash may also intersect with Japanese cultural commitments to harmony, over conflict and contestation. There is no necessary conflict between the CLB and the Court in a finding by the Court of legislative unconstitutionality. The CLB may view a law as constitutional, but social conditions and attitudes may change by the time a case is brought to the Court in ways that make it constitutional at the time of adoption, but unconstitutional at the time of constitutional challenge. But if a law is recent in origin, there will be much greater scope for conflict between the CLB and the Court in ways that raise more significant cultural concerns.

III. From Ely to CRRT

How, then, is CPPT or CRRT different from Ely's account? The idea of comparative political process theory (CPPT) was the original way of de-

30 "Japan's 'Hostage Justice' System: Denial of Bail, Coerced Confessions, and Lack of Access to Lawyers", Human Rights Watch, 25 May 2023.

31 See "How the LDP Dominates Japan's Politics", *supra* note 26.

32 See e.g., former Prime Minister Suzuki's "politics of harmony": "A History of the Liberal Democratic Party. Chapter 10: Period of President Suzuki's Leadership", Liberal Democratic Party of Japan, *https://www.jimin.jp/english/about-ldp/history/104290.html.*

33 L. Epstein and others, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, Law and Society Review 35(1) (2001) 117. See discussion in T. Roux, Comparative Constitutional Studies: Two Fields or One?, Annual Review of Law and Social Science 13 (2017) 123.

34 See, e.g., Satoh, *supra* note 4. Cf. Obayashi, *supra* note 20.

scribing this new comparative constitutional sub-field, and draws off Ely's own use of the term "political process" theory.[35] But the language of process has two difficulties in this context: first, it might be seen to suggest a sharp distinction between procedural and substantive forms of review in ways that do not actually reflect the breadth of most modern CPPT theories, and the ways in which they involve a mix of substantive and semi-procedural judicial review.[36] Second, it attracts unnecessary controversy – in that it might be seen to imply a claim about the substantive neutrality of courts' role, when there was significant criticism of this claim in relation to Ely's own work.[37] For this reason, though they have substantial similarities, it is perhaps more useful to describe this emerging school of neo-Elyian, comparative work as a form of comparative representation-reinforcing theory- or CRRT.

CRRT has two important similarities to Elyian thought. It starts with the idea that judges must make a series of *choices* about the scope and meaning of constitutional provisions. And it suggests that a central concern in making these judgments should be a concern to protect and promote democracy. But as the next part shows, it also differs in key respects – in ways that arguably make it more, not less, suited to application in a Japanese context.

1. CRRT Globally

Perhaps most importantly, CRRT focuses on a broader range of risks to democracy than were Ely's focus in 1980. Stephen Gardbaum, for instance, suggests that four sources of democratic failure may provide a basis for judicial representation-reinforcement: non-deliberativeness on the part of the legislature; legislative failures to hold the executive accountable; government capture of independent institutions; and capture of the political process by special interests.[38] Niels Petersen has proposed a version of CRRT that embraces the role Ely envisaged for courts but also gives courts a role in 'safeguarding the integrity of the legislative process', protecting against 'legislative capture' and 'correcting [for] external effects'.[39] Manuel Cepeda and David Landau point to three broad forms of democratic dysfunction as grounds for judicial representation-reinforcement beyond those

35 GARDBAUM, *supra* note 8.

36 R. DIXON, Courts and Comparative Responsive-Reinforcement Theory, (*work in progress*). On semi-procedural, see I. BAR-SIMAN-TOV, Semiprocedural Judicial Review, Legisprudence 6(3) (2012) 271. Cf. S. GARDBAUM, Comparative Political Process Theory: A Rejoinder, International Journal of Constitutional Law 18(4) (2020) 1503.

37 See, e.g., TRIBE, *supra* note 16.

38 GARDBAUM, *supra* note 8.

39 GARDBAUM, *supra* note 8.

identified by Ely: the risk of full-scale democratic breakdown; poor quality democratic institutions or decision-making processes; and the failures of political institutions to respond to majoritarian groups.[40] Finally, my own version of CRRT – "responsive judicial review" ('RJR')– points to three broad sources of democratic failure as grounds for judicial intervention: the actual or attempted accumulation of electoral or institutional monopoly power; democratic blind spots; and democratic burdens of inertia.

This broader role for courts in democratic representation-reinforcement is hardly surprising: Ely's theory was explicitly understood by both Ely and most readers as a US-focused theory, or a theory that sought to justify key aspects of the jurisprudence of the US Supreme Court during the Warren Court era.[41] It was in no way comparative in scope or origin, and did not seek to account for comparative constitutional developments, or the variety of ways in which other countries have witnessed threats to democratic representation. It was also a theory of its time: the threats to democracy in the US in the late 1970's were quite different in scope and kind to the threats to American democracy today.

Comparative representation-reinforcing theory, however, seeks to account for the full range of contemporary threats to democracy in the US and globally. It also builds on the growing social science understanding of the scope of – and limits to – courts' capacity to counter threats to democracy. Thus, in arguing for robust judicial intervention to counter various sources of democratic dysfunction, CRRT scholars simultaneously caution against the dangers of overly strong judicial review in certain cases.

For instance, in my own work on RJR I suggest that in intervening to protect and promote democracy, courts must be mindful of the risk of creating three new sources of democratic dysfunction, including forms of democratic backlash, "reverse burdens of inertia", and democratic debilitation, and because of this adopt a mix of "strong" and "weak"[42] – rather than wholly strong or weakened approaches to judicial review.

Democratic backlash can be understood in a variety of ways and involves a mix of electoral and institutional consequences of an unpopular court decision. Unpopular decisions, for example, may motivate opponents of the decision to make constitutional change an electoral priority, in ways that encourage certain voters to turn up to vote or change their vote because

40 CEPEDA ESPINOSA/LANDAU, *supra* note 11.

41 OBAYASHI, *supra* note 20.

42 M. TUSHNET, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (2008); R. DIXON, The Forms, Functions and Varieties of Weak(ened) Judicial Review, International Journal of Constitutional Law 17(3) (2019) 904.

of a desire to support this change. In this sense, they can have broad-ranging and potentially quite counter-productive effects for the achievement of certain forms of constitutional justice. But changes of this kind are often hard to predict, and the very act of attempting to make these predictions can take judges into troubling waters from a separation of powers perspective. For this reason, a theory of RJR also suggests that courts should not seek to consider them, as part of engaging in the process of constitutional constructional choice.

At the same time, in some cases, democratic backlash may have a narrower, more institutional focus. Disagreement with a court decision may lead the public or political elites directly to attack a court and its institutional role and legitimacy, in ways that undermine a court's capacity to uphold even the most basic constitutional commitments to the rule of law (not to mention constitutional democracy). Because of this, and courts' greater ability to judge risks to their own independence, RJR suggests that courts should also take this risk into account as part of the process of judging – including, if needed, by forms of "weakened review" that involve delaying the effect of certain court orders or narrowing the scope of judicial reasoning.[43]

To cause backlash, popular disagreement with a court decision need not be reasonable. Indeed, quite often it may not be – and go directly against basic commitments to reasoned deliberation on terms of mutual respect among citizens in a democracy. But in some cases, democratic majorities may disagree with a court in ways that are reasonable from a democratic perspective – and the product of what John Rawls called "democratic burdens of judgment".[44] And in this case, there will be principled as well as pragmatic arguments for courts exercising a mix of strong and weakened forms of review – or crafting their reasoning and remedies in ways that are designed to allow scope for reasonable democratic disagreement and dialogue.[45] If they do not, the danger is that instead of overcoming democratic inertia and promoting greater responsiveness, court decisions may ultimately contribute to creating new forms of "reverse" democratic inertia.[46]

Finally, active forms of judicial review can sometimes create what Mark Tushnet calls a form of "democratic debilitation".[47] That is, rather than

43 TUSHNET *supra* note 42.

44 J. RAWLS, Political Liberalism (1993). See also discussion in J. WALDRON, Law as Disagreement (1999); F. I. MICHELMAN, Constitutional Essentials: On the Constitutional Theory of Political Liberalism (2022).

45 DIXON, *supra* note 11.

46 DIXON, *supra* note 11.

47 M. TUSHNET, Taking the Constitution Away from the Courts (1999) 66.

improving democratic deliberation and outcomes, they may in fact undermine the incentives for legislative and executive actors to improve their own democratic performance. And where this occurs, judicial review may offer net losses rather than gains to democratic responsiveness.

Risks of this kind, however, are much greater if courts engage in review that is "strong" in nature, or involves courts deciding on the minimum content of constitutional norms and actively supervising the enforcement of these decisions. Court intervention of this kind leave little space – or indeed need – for political action other than that supervised by courts.

But the risk of political inaction is much less where courts engage in a form of weakened, "dialogic" review: by limiting the breadth of their substantive reasoning, or the time-frame or coerciveness of their remedies, court decisions of this kind leave explicit space for legislative and executive involvement in defining the scope of constitutional norms. This involvement may itself also contribute to building, rather than weakening, the "muscle" of good democratic governance.

For all these reasons, CRRT also consistently embraces the idea of a mix of weak and strong review, rather than an across-the-board preference for *either* judicial restraint and weakness *or* strong-form judicial review. Because of this, the logic of CRRT also arguably makes it far better suited than Ely's original version of representation-reinforcement to a Japanese context.

2. CRRT in Japan

CRRT does not address every difficulty of an Ely-style theory as applied to Japan. Like Ely's own theory, CRRT starts from the idea that there is often reasonable interpretive disagreement about the meaning of constitutional provisions. Even as a matter of positive law, it rejects the idea that there are often clear "right" answers to issues of constitutional construction. And it certainly does not suggest that answers of this kind can be derived from natural law.

Some versions of CRRT retain a focus on the protection of "discrete and insular minorities",[48] a concept that several Japanese scholars, including most notably Professor Yasuo Hasebe, have noted is difficult to apply in Japan.[49] And while CRRT speaks to the control of executive decision-

48 See e.g. PETERSON, *supra* note 11.

49 HASEBE, The New Comparative Political Process Theory, *supra* note 6; OBAYASHI, *supra* note 20. For a defence of the relevance of the concept to non-citizens, see H. YAMAMOTO, CPPT & Human Rights from Japanese Experience, in this issue, p. 113.

making, it does not always do so in a way that speaks directly to the specific relationship between the Diet and the executive in Japan.[50]

Compared to Elyian theory, however, CRRT has three key benefits. First, as foreshadowed above, CRRT contemplates a mix of strong and weak review, which could involve courts weakening their decisions in a range of ways – including through narrowed reasoning, delayed or non-coercive remedies, weakened doctrines of stare decisis, or some combination of the above. Reliance on statutory interpretation is also a classic form of[51] weakened review of this kind: it necessarily involves narrower reasoning (it does not suggest that different legislation could not be passed), and the grant of a weakened interpretive as opposed to invalidation remedy. This also fits with the Japanese tradition of reliance on statutory or small-c constitutional as opposed to capital "C" grounds in the resolution of many constitutional controversies.[52]

Second, CRRT sets out a *broad range* of democratic "market failures" as guides to the construction of constitutional provisions – and failures that are clearly a question of degree, rather than kind.[53] Logically, this points to an understanding of the intensity of judicial review that is inherently variable and context-sensitive. Further, from a doctrinal standpoint, this points to the desirability of a contextual approach to questions of judicial scrutiny, informed by the presence or absence of various sources of democratic dysfunction in the specific case and context.

This also effectively equates to a form of "calibrated" approach to proportionality, rather than a more rigid, categorial or US-style "tiered" approach to assessing the constitutionality of legislation.[54] And again, this accords with the existing approach of the Japanese Supreme Court. While the Court is often quite deferential to the political branches in assessing the justifiability of limitations on constitutional norms, the Court generally does so by applying a test of reasonableness or the "public welfare", rather than more categorical forms of "strict" or "intermediate" scrutiny.[55]

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50 OBAYASHI, *supra* note 20.

51 See discussion in OBAYASHI, *supra* note 20.

52 See DIXON/TUSHNET, *supra* note 27; LAW, *supra* note 29; S. MATSUI, Why Is the Japanese Supreme Court so Conservative?, Washington University Law Review 88(6) (2011) 1375; J. O. HALEY, Constitutional Adjudication in Japan: Context, Structures, and Values, Washington University Law Review 88(6) (2011) 1467.

53 See DIXON, *supra* note 9.

54 DIXON, *supra* note 11. See also C. CHAN, Proportionality and Invariable Baseline Intensity of Review, Legal Studies 33(1) (2013) 1; M. HAILBRONNER, Traditions and Transformations: The Rise of German Constitutionalism (2015) 117–122; DIXON, Calibrated Proportionality, Federal Law Review 48(1) 2020 92.

55 Justice Chiba; OBAYASHI, *supra* note 20.

The exception in Japanese constitutional case-law concerns voting rights: here, the Court has tended to adopt a more demanding test, which is closer to a form of "strict scrutiny" or true proportionality test. Again, however, this exception fits with CRRT: according to CRRT, the most demanding forms of judicial scrutiny should be reserved for cases involving threats to the "democratic minimum core" of democracy. This includes the existence of regular, free and fair multi-party elections conducted on the basis *of universal adult suffrage*.

In this sense, CRRT proposes a quite demanding standard of review in cases involving voting rights and electoral districting, and cases involving political freedom of expression, but a more variable approach in other cases. This is consistent with the Japanese Court's application of heightened scrutiny to cases involving electoral districting and apportionment (Grand bench decision of 4 April 1976, Minshū 30, 233), the voting rights of foreigners and those with mental illness (the *Zaigaihojin* and *Seshinshogaisha-no-Zaitakutohyo* cases), and robust (if sub-constitutional) approach to the protection of political expression (the *Horikoshi case*).[56]

Third, CRRT does not directly link a court's role to a high degree of existing political competition. Instead, courts have a critical role to play in CRRT in protecting regular, free and fair multi-party elections, but also political rights and freedoms and institutional pluralism. This means that courts have a critical role to play in protecting democracy even in the absence of robust electoral competition. And in this respect, CRRT arguably has greater congruence with Japanese experience than Ely's conception of the marketplace for political control.

For all these reasons, CRRT has greater potential to guide and inform Japanese-style constitutional review than Ely's original version of judicial representation-reinforcement.

Some *versions* of CRRT also go further – in rejecting the idea of discrete and insular minorities, and instead suggesting a more contextual approach to protecting and promoting constitutional commitments to dignity and equality.

In RJR theory, for example, there are three distinctive sources of minority rights protection: textual guarantees of equality in specific national constitutions; a theoretical commitment to ensuring that all laws reflect notions of mutual respect among citizens, not simply animus or contempt toward certain groups of citizens; and a commitment to ensuring that laws reflect the maximum possible individual rights protections consistent with (rea-

56 See cites in and discussion in OBAYASHI, *supra* note 20; HASEBE, The New Comparative Political Process Theory, *supra* note 6, 57–58; YAMAMOTO, *supra* note 49.

sonable) democratic majority opinion.[57] This is a core part of the logic of judicial representation-reinforcement – or the role of courts as agents of overcoming democratic blind spots and burdens of inertia, which can otherwise affect the enjoyment of individual rights. This notion of individual rights protection, however, does not depend on there being any distinct or identifiable minority group: instead, it extends to the human rights of all citizens.

The question still remains whether RJR or similar CRRT theories offer a normatively attractive account of judicial review, and are likely to be followed by courts for that reason. Professor Hasebe could be read as suggesting that RJR assumes too thin a conception of democracy, or one too focused on the idea of the democratic minimum core as compared to broader commitments to rights and (Rawlsian-style) public reason giving.[58] This may be too strong a version of the objection: RJR aims to combine thin and thick understandings of democracy, but suggests that there is quite broad scope for reasonable disagreement about what counts as necessary for thick democracy in this context. But one might still disagree with this claim, as Hasebe does,[59] and reject both the desirability and likely adoption of RJR on that basis.

IV. Conclusion

The harder question is whether the Japanese judiciary is ever likely explicitly or implicitly to embrace this kind of understanding in the exercise of its constitutional functions. On one view, an approach of this kind is quite foreign to the Japanese legal tradition, and the Supreme Court's self-conception as a restrained, legalist institution.[60] Hence, only a true "exogenous" shock to Japanese legal and political tradition is likely to change this approach.[61]

Yet on another view, an approach of this kind is already nascent within certain Supreme Court decisions. Understanding this requires a focus on statutory as well as capital "C" constitutional cases or decisions, so that the

57 Dixon, *supra* note 11.

58 Hasebe, The New Comparative Political Process Theory, *supra* note 6, 53–54.

59 Hasebe, The New Comparative Political Process Theory, *supra* note 6.

60 Hasebe, The New Comparative Political Process Theory, *supra* note 6, 11 ("the main reason the SCJ is reluctant to invalidate state actions residents in its self-image as a judicial body"), and citing with approval T. Fujita, The Supreme Court of Japan: Commentary on the Recent Works of Scholars in the United States, Washington University Law Review 88 (2011) 1508, 1521−22.

61 Cf T. Roux, Principle and Pragmatism on the Constitutional Court of South Africa, International Journal of Constitutional Law 7(1) (2009) 106.

full range of ways in which the Court has protected the democratic minimum core comes into view.[62] It may also require us to view the Court's decisions through a mixed prism – of express reasoning and implicit correspondence with CRRT ideas. But there are certainly decisions of the Japanese Supreme Court and lower courts that can be seen as helping overcome various sources of democratic dysfunction, including democratic blind spots and burdens of inertia.[63]

As Professor Hasebe and Dr Nobuki Okano both note, a recent example involves the decision of the Court in relation to the inheritance rights of illegitimate children in intestate succession under the Civil Code: after a series of more limited, restrained decisions, the Court in 2013 issued a decision prospectively invalidating the discriminatory provisions of the Code.[64] The justification also clearly lay in the mix of evolving public opinion on the issue[65] and the failure of the Diet to respond, or persistent legislative burdens of inertia.[66]

One aim of the symposium is also to encourage the further development of a jurisprudence of this kind. I may have been wrong to suggest that development of this kind necessarily marks or requires a radical break from the Court's existing caselaw.[67] Indeed, engaging with the important work of Japanese colleagues has helped reveal that there are already far greater intimations of RJR in Japan than I had previously appreciated.

That does not mean, however, that there is no scope to expand a commitment to responsiveness within Japanese constitutional law and practice. Clearly there is; and one of the aims of this symposium, and the translation of RJR into Japanese, is to do just that. The upcoming litigation around the rights of same-sex couples will also be a key test of this expansion.[68]

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62 R. DIXON/M. TUSHNET, Competitive Democracy and the Constitutional Minimum Core, in: Ginsburg/ Huq (eds), Assessing Constitutional Performance (2016) 268; HASEBE, The New Comparative Political Process Theory, *supra* note 6, 57–58.

63 For the role of lower courts, especially in responding to injustices caused by past democratic burdens of inertia, see e.g. OKOCHI, *supra* note 24 (discussing suits in relation to Kumamoto Minamata disease, Hep 2 and the previous Eugenic Protection Act).

64 Minshū 59, 2087. See discussion in HASEBE, The New Comparative Political Process Theory, *supra* note 6, 57–58; OKANO, *supra* note 24.

65 S. MATSUI, "Never Had a Choice and Had No Power to Alter": Illegitimate Children and the Supreme Court of Japan, Georgia Journal of International & Comparative Law 44 (2016) 577.

66 HASEBE, The New Comparative Political Process Theory, *supra* note 6, 58.

67 I am indebted to Professor Hasebe and his work for clarifying this point.

68 See, e.g., M. OKOCHI, *supra* note 24 (noting burdens of inertia in this area in Japan).