Foreword

Comparative Political Process Theory in Japan

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In Japan and elsewhere the political process theory[1] John Hart Ely expounded in his 1980 classic, *Democracy and Distrust* (*D&D*), remains an influential theory of judicial review.[2] Its main prescription is that of *U.S. vs. Carolene Products*'[3] famous footnote four: courts should strictly scrutinize a statute only when it (1) infringes a right that the written constitution either explicitly or intentionally guarantees; (2) closes off channels of political change to outsiders (e.g., by denying them a voice or the vote), or (3) is the product of such severe hostility or prejudice against some outsiders—viz., discrete and insular minorities—that insiders refuse to deal with them no matter what (e.g., racial segregation in schools). Save largely for these three exceptions the courts should give elected lawmakers a large leeway in deciding all public issues.[4]

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* Unless otherwise indicated, all internet links were last accessed on 17 December 2022.

1 Ely called it a "participation-oriented, representation-reinforcing approach to judicial review", or, more simply, a "process-oriented system of review": J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980) 136.Earlier he had called it a 'representation-reinforcing mode of judicial review': J. H. ELY, Toward a Representation-Reinforcing Mode of Judicial Review, Maryland Law Review 37 (1978) 451.

2 R. D. PARKER, In Memoriam: John Hart Ely – John, Fred, and Ginger, Harvard Law Review 117 (2004) 1751, 1752 (D&D is "one of less than a handful of 'great' books about American constitutional law in the twentieth century"); F.R. SHAPIRO, The Most-Cited Legal Books Published Since 1978, The Journal of Legal Studies 29 (2000) 397, 401 (D&D was the most cited legal book [other than treatises and texts] published since 1978); R. DOERFLER/S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review 75 (2022) 769, 770; J. GREENE, The Anticanon, Harvard Law Review 125 (2011) 379, 394, 421.

3 *United States v. Carolene Products Co* (1938) 304 US 144 (US Supreme Court); ELY, Democracy and Distrust *supra* note 1, 75–77.

4 ELY, Democracy and Distrust, *supra* note 1, 102–103. See Bryan Dennis G Tiojanco, 'John Hart Ely would disown Comparative Political Process Theory, Dobbs, and most his other intellectual heirs (or maybe not)' (2024) Global Constitutionalism (Special Issue Article: First View) 1, 29-31 (Ely also admits exceptions based on arguments from constitutional trendline), *https://www.cambridge.org/core/journals/global-constitutionalism/article/john-hart-ely-would-disown-comparative-political-*

Recently the New Comparative Political Process Theory (CPPT) has ventured to bring *D&D* up to date and to a wider audience. The CPPT school buys into Ely's thesis that the purpose of judicial review is to safeguard the political process. As such it shares Ely's focus on systemic malfunctions in the workings of representative democracy,[5] and his premise that placing complete trust in politicians to fix them would be like letting foxes guard the henhouse.[6] This orientation allows CPPT to place seemingly disparate judicial doctrines and decisions from different jurisdictions into a comparative framework of constitutional analysis and diagnosis.[7]

CPPT goes beyond Ely in several ways. First is its breadth: *D&D* theorizes judicial review in a single (though influential) jurisdiction, the United States. In contrast, CPPT theorizes an approach to judicial review that can cast comparative light on different jurisdictions.[8] Second is its worry: political crises across the globe are today threatening the very existence of liberal constitutional democracies, and CPPT joins the spate of scholarship diagnosing these crises and prescribing cures.[9] Ely was worried about political outsiders, CPPT's worry extends to the political system itself.[10] Stephen Gardbaum, for instance, advises courts to scrutinize the failure of legislatures to hold executives accountable, the capture of independent institutions by the government, the capture of the political process by special interests, and even outright dysfunction of the political process.[11] A third way CPPT goes beyond Ely is in its scope: CPPT endorses judicial review of not only what a law says, but also how it was made. This includes the quality of deliberation involved in passing a statute.[12] Hence courts should engage in not

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process-theory-dobbs-and-most-his-other-intellectual-heirs-or-maybe-not/885014891EBC27FC498FECD81FD51432#article, accessed 23 January 2025.

5 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429, 1450.

6 GARDBAUM, *supra* note 5, 1454–1455.

7 GARDBAUM, *supra* note 5, 1451.

8 GARDBAUM, *supra* note 5, 1430; R. DIXON, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023) 2.

9 See J.-W. MÜLLER, Democracy's Midlife Crisis, *https://www.thenation.com/article/archive/how-democracies-dies-how-democracy-ends-book-review/*; M. LOUGHLIN, The Contemporary Crisis of Constitutional Democracy, Oxford Journal of Legal Studies 39 (2019) 435.

10 DIXON, *supra* note 8, 36–43; GARDBAUM, *supra* note 5, 1452–1453; R. GARGARELLA, From "Democracy and Distrust" to a Contextually Situated Dialogic Theory, International Journal of Constitutional Law 18 (2020) 1466, 1466.

11 GARDBAUM, *supra* note 5, 1435–1446.

12 GARDBAUM, *supra* note 5, 1446–1447; DIXON, *supra* note 8, 5, 97; GARGARELLA, *supra* note 10, 1471–1472.

only 'substantive review' (as Ely had proposed)[13] but also 'pure procedural review'[14] or 'semi-procedural review'.[15] Here CPPT tracks the increasing openness from 2010 onwards of courts in different continents to review legislative processes.[16] Fourth is the more variegated remedies CPPT proposes (this is in fact its proponents' most talked about, and perhaps most promising, contribution[17]). Even in the 'second look' approach he broached, Ely still prescribed old-fashioned striking down of the offending statute.[18] In addition to this strong medicine, CPPT scholars also prescribe a suite of 'weak-form',[19] 'strong-weak', and 'weak-strong' remedies;[20] one example is what Rosalind Dixon terms 'engagement-style' remedies, which require government officials to first consult affected citizens before they are, say, evicted from their homes.[21] While CPPT scholars generally prefer such weaker remedies,[22] they also sometimes prescribe remedies much stronger than old-fashioned invalidation. One example is Roberto Gargarella's proposal that courts issue structural injunctions requiring legislators to open up their deliberations to the public.[23] Fifth, and most relevant to Japan: the natural tendency of CPPT is to increase the occasions for strict judicial review, which goes against the aim of Ely's theory, which is to decrease such occasions. This difference can affect how enthusiastically a given judiciary would receive either Ely's or CPPT's model.[24] As Obayashi argues in his contribution to this issue, one reason *D&D* failed to influence Japanese ju-

13 GARDBAUM, *supra* note 5, 1449.
14 GARDBAUM, *supra* note 5, 1448.
15 DIXON, *supra* note 8, 98.
16 S. GARDBAUM, Due Process of Lawmaking Revisited, University of Pennsylvania Journal of Constitutional Law 21 (2018) 1, 28–29.
17 See, e.g., R. DIXON/P. J. YAP, Responsive Judicial Remedies. Global Constitutionalism (Special Issue Article: First View, 2025) *https://www.cambridge.org/core/journals/global-constitutionalism/article/responsive-judicial-remedies/011ABA7262215A51FA1A5D8B37299FC6*, accessed 23 January 2025; S. GARDBAUM, Comparative political process theory II' (Research Article, 2024) *https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0F6069B56EF65A7788187882054F31AE/S2045381724000029a.pdf/comparative-political-process-theory-ii.pdf*, accessed 23 January 2025.
18 ELY, Democracy and Distrust, *supra* note 1, 169.
19 S. GARDBAUM, Comparative Political Process Theory: A Rejoinder, International Journal of Constitutional Law 18 (2020) 1503, 1506.
20 DIXON, *supra* note 8, ch. 7.
21 DIXON, *supra* note 8, 149, 161.
22 GARDBAUM, *supra* note 19, 1510.
23 GARGARELLA, *supra* note 10, 1470–1472.
24 TIOJANCO, *supra* note 4, 14–16.

risprudence is because "the Japanese Supreme Court has been a model of restraint; there is no need for further restraint."

Heretofore CPPT and Japan have remained aloof from each other. Despite its breathtakingly global span, to cite a prominent example, Rosalind Dixon's influential new book, *Responsive Judicial Review*, mentions Japan only twice, first for an aside and second as an example.[25] This relative neglect reflects a curious trend in comparative constitutional studies. Japan is a stable and wealthy liberal democracy. It is the world's third largest economy and eleventh most populated country. It is a paragon of foreign-law borrowing and adaptation,[26] and its constitutional jurisprudence is influenced – although covertly – by foreign (mainly American) precedents.[27] Its written constitution, ratified in 1946, is older than those of most of comparative constitutional law's 'usual suspects'[28] – Germany, India, South Africa, Israel – and is also the oldest unamended constitution in the world.[29] Yet Japan remains an understudied constitutional democracy, and interest in its legal system seems to be waning.[30]

In April 2023 the University of Tōkyō, Transnational Law Center played matchmaker to Japan and CPPT. The occasion was a symposium on CPPT attended by comparative constitutional law scholars from across the globe and comparatively minded constitutional law scholars in Japan.[31] This special issue collects the papers the Japanese scholars presented at the symposium.[32]

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25 DIXON, *supra* note 8, 125, 276.

26 C. MILHAUPT, RIP Japanese Legal Studies? A Comment (2023) 4.

27 A. EJIMA, The Enigmatic Attitude of the Supreme Court of Japan towards Foreign Precedents – Refusal at the Front Door and Admission at the Back Door, Meiji Law Journal 16 (2009) 19.

28 R. HIRSCHL, Comparative Matters: The Renaissance of Comparative Constitutional Law (2014) ch. 5.

29 K. M. MCELWAIN/C. WINKLER, What's Unique about the Japanese Constitution? A Comparative and Historical Analysis, Journal of Japanese Studies 41 (2015) 249, 249.

30 E. FELDMAN, The Death of Japanese Legal Studies? An American Perspective, Penn Carey Law, University of Pennsylvania Public Law & Legal Theory Research Paper Series, Research Paper No. 23-10 (2023).

31 The symposium was held on 24–25 April 2023 at the University of Tōkyō, Law Faculty Bldg 3, 8th Floor Meeting room. For more details: *https://www.transnationallaw.j.u-tokyo.ac.jp/en/seminar/2023/comparative.html*.

32 One of the Japanese scholars, Kobe University Professor Masahiko Kinoshita, opted not to publish his paper in this issue. The papers of the comparative constitutional law scholars are collected in a special issue of Global Constitutionalism (forthcoming).

Few theories could have facilitated the matchmaking better than CPPT, whose proponents consider themselves intellectual heirs to Ely's classic.[33] It is arguable that as early as 1975 the Japanese Supreme Court had already silently adopted the levels-of-scrutiny approach to judicial review outlined in footnote four of *U.S. v. Carolene Products*.[34] The political process theory Ely expounded in *D&D* has also been familiar to Japanese constitutional law scholars since Shigenori Matsui's and Yasuo Hasebe's famous debate on its applicability to Japan some three decades ago.[35] We are very fortunate that they agreed to reprise their debate during the symposium and in these pages.

After studying under Ely in Stanford and obtaining a SJD degree there, Matsui introduced political process theory to Japanese constitutional academia. He co-translated *D&D* in Japanese then published a number of law review articles and monographs that endorsed the application of political process theory (PPT) to the Constitution of Japan. In his contribution to this volume, Matsui carefully reviews the criticisms leveled at PPT in both the U.S. and Japan, offers his defense, and reminds readers of the enduring influence and significance of Ely's theoretical inquiry. For Matsui, Ely's representation-reinforcing theory offered "a very powerful alternative to the predominant constitutional liberalism" in Japan, where constitutional theorists were largely supportive of judicial activism and sanguine about the judiciary's capacity to vindicate constitutional freedoms despite the Supreme Court's consistently anemic approach to judicial review, striking down only 11 statutes in more than seventy years. Renewing his counterargument to his critics, he forcefully insists that Ely's theory still "best explain[s] the need for the constitution and lay[s] out the proper role of the unelected judiciary to play in the democratic structure of the government" without simply relying on the myth that if the political process fails judges would vindicate constitutional claims.

When Matsui advocated for introducing Ely's PPT to Japan, Hasebe offered a fundamental critique in a series of law review articles.[36] He criticized Matsui for failing to give due regard to the Japanese Constitution's substantive commitment to protecting certain rights and liberties, attributing this failure to Matsui's eager and uncritical acceptance of the pluralistic view of American democracy underlying Ely's theory. In his contribu-

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33 Cf. TIOJANCO, *supra* note 4.

34 EJIMA, *supra* note 27, 36–37.

35 For a fascinating account of this history, see Shigenori MATSUI's essay in this issue, John Hart Ely as a Constitutional Theorist: On Introducing Ely to Japan.

36 Y. HASEBE, *Seiji torihiki no bazaar to shihousinsa* [Bazaar of Political Bargaining and Judicial Review], Hōritsu Jihō 67:4 (1995) 62.

tion to this special issue, Hasebe redirects his critical eye to CPPT. While CPPT is now free from Ely's parochial assumption about American-style democracy, Hasebe is still concerned that CPPT's conception of democracy is too thin, too Schumpeterian, to legitimate judicial intervention beyond the protection of democracy's minimum core. He urges Dixon and other proponents of CPPT to rely not merely on the court's social legitimacy, which restricts the judicial role to "making the political branches responsive to people's needs and aspirations," but also endorse Rawlsian political liberalism as a morally legitimate model of democracy. This endorsement entails a judicial role that would "include protecting everyone's right to choose and pursue her own idea of a good way of life." (Dixon demurs in her conclusion to this special issue, suggesting that there is plenty enough 'reasonable disagreement about what counts as necessary for thick democracy' for courts to endorse any single conception of it.) Hasebe also points out that the Japanese Supreme Court may not be as responsive to concerns of representation reinforcement as CPPT would expect, although he concedes that the Court has shown signs of creativity particularly at the sub-constitutional level.

The next four chapters are authored by academics who belong to the generation that follow Matsui and Hasebe. Their contributions offer different perspectives for evaluating Japanese constitutional adjudication. Their insights into academic works following the Matsui-Hasebe debate also inform us of the significance of the theoretical turn from PPT to CPPT and its future potential to influence the practice of judicial review in Japan.

The two contributions by Keigo Obayashi and Nobuki Okano respectively assess PPT's impact on Japanese academia and court practices at a relatively high level of theoretical abstraction. Obayashi starts from a sober assessment of PPT's influence: although it inspired certain quarters of academia, it failed to influence court practices. The Japanese Supreme Court's attitude toward judicial review has remained passive for the entire post-war years, and for a number of reasons: the ruling Liberal Democratic Party has controlled the government, hence judicial appointments, for almost half a century; bureaucratic norms of deference dating back to the Meiji Constitution; the pre-enactment review of bills by the esteemed Cabinet Legislative Bureau; and the low level of judicial scrutiny the Supreme Court conducts under the public welfare doctrine. The Supreme Court's jurisprudence has recognized differentiated levels of constitutional review that give preferential status to certain categories of liberties including the right to free speech and association, the freedom of religion, equal protection and the right to vote. In practice, however, it has been more active in cases involving restrictions on liberty to engage in economic activities. In Obayashi's view, PPT's failure was inevitable because of the very different professional

ethos of the American and Japanese judiciaries. Ely thought that the U.S. Supreme Court's "value imposition"[37] approach to judicial review was democratically indefensible; hence he aimed to limit the constitutional role of courts to the democracy-enhancing judicial activism of the Warren Court. In contrast, Obayashi observes, Japanese endorsers of PPT thought that the Japanese Supreme Court's "fundamental values" approach to judicial review was too restrained; hence they aimed to expand the constitutional role of courts beyond the cramped confines of the public welfare doctrine. He also notes that the process-oriented approach was not a good fit for Japanese constitutional adjudication because Japan's Constitution contains a more elaborate list of guaranteed rights and provides for a more flexible form of parliamentary system than its U.S. counterpart. Nonetheless, Obayashi does note a sign of incremental changes in recent Supreme Court cases, and concludes with certain optimism that CPPT, with its functional focus and broad comparative scope, can make a positive contribution to the study of Japanese judicial review.

While similarly acknowledging the passivist record of the post-war Japanese judiciary, Okano identifies a number of instances where the courts, and particularly the lower courts, had successfully brought about legislative changes of constitutional significance. In his view, Japanese courts have taken a model of dialogical constitutional review known as catalytic review: legislative changes were made possible not by the court's express declaration of unconstitutionality or declaration of rights for the plaintiff; rather the very fact that the case was pending before the court, or that the lower court judgments or concurring and dissenting opinions highlighted the issue, attracted attention by the media and public opinion sufficient to induce changes through the legislative process. CPPT is a useful theory, he says, because it "helps us to comprehend the Japanese catalytic style as one version of representation-reinforcement." Despite this style faring well until the early 1990s, however, Okano doubts that Japanese courts can continue to bring about desired legal changes in this representation-reinforcing manner. In his view, catalytic judicial review has become ineffective since the 2000s after the Diet, with the LDP firmly entrenched as the dominant political party, started refusing to respond to the court's catalytic engagement. This has led the Japanese Supreme Court to itself strike down a few statutes that the Diet refused to repeal despite repeated catalytic-style judicial nudges. Okano worries, however, in general the courts' past successes with the catalytic style despite changes in political conditions that undermine this style's effectiveness ultimately "hinders judicial intervention in political malfunctions", to the point that could "adversely affect the protec-

37 ELY, Democracy and Distrust, *supra* note 1, 73.

tion of constitutional democracy." An egregious example of this that he highlights is the Japanese Supreme Court's refusal to award relief in the face of a blatant rejection by the ruling party to convene a constitutionally mandated extraordinary Diet Session.

The next two contributions focus on more concrete issues to consider CPPT's potential to enhance the Japanese courts' participation-enhancing engagement with the political process. The discussion of the ongoing series of litigation over same-sex marriage by Minori Okochi perhaps sounds the most optimistic note on the Japanese judiciary's capacity to change the status quo and CPPT's potential to make theoretical contributions. As a group, LGBTs constitute a discrete and insular minority whose voice has been neglected due to legislative inertia and the lack of interest or sympathy on the part of other citizens, and their claims present the court with a hard case calling for judicial policy making.[38] After a detailed discussion of the different approaches taken by the lower courts, Okochi observes that these courts, regardless of their conclusion, avoided recognizing the "right to marry" outright. Even those courts that ruled in favor of LGBTs recognized the legislature's broad discretion and took pains to find a narrow area of protection where it cannot transgress, leaving large leeway for legislation. This is a prime example of the judiciary's careful engaging with the legislature as envisaged by CPPT, and Okochi's conclusion that Japanese courts are in need of "a logic that supports the court's active intervention" seems to suggest that the theory could play a positive role in Japanese constitutional adjudication.

Hajime Yamamoto focuses on the constitutional rights of non-citizens, another group that falls into the category of discrete and insular minority.[39] The Japanese legal system poses a number of hurdles on their quest for the right to equal protection and political participation: the Japanese post-war Constitution intentionally excluded non-citizens from the guarantee of equal protection; Japanese legislation does not extend citizenship to those who were born in Japan but to non-Japanese parents unless they naturalize; and yet both the Japanese public and constitutional law scholars appear oblivious to the fact that a substantial number of Korean residents lost their citizenship when Japan regained independence. And yet, the Japanese court has maintained the position declared in the 1978 McLean case where the constitutional guarantee of the freedom of movement was held not to ex-

38 See ELY, Democracy and Distrust, *supra* note 1, 163 ("a combination of the factors of prejudice and hideability […] renders classifications that disadvantage homosexuals suspicious.").

39 See ELY, Democracy and Distrust, *supra* note 1, 161 ("hostility toward 'foreigners' is a time-honored American tradition.").

tend to the entry of non-citizens into Japan. In Yamamoto's view, the Japanese court's failure to address blatant human-rights violations against non-citizens despite the relatively low risks of democratic backlash is deeply troubling. He provocatively suggests that this difficulty poses a challenge not just for Japanese constitutional scholars but serves as a touchstone of CPPT's ability to respond to hard cases.

Finally, Rosalind Dixon concludes this special issue. She reviews all the contributions and makes connections between PPT, both as originally developed by Ely and as received in Japan, and CPPT, both as globally formulated and as applied to the Japanese context. In her view, CPPT (or, as she proposes, comparative representation-reinforcing theory, CRRT) is a better "fit" with the Japanese Supreme Court's approach than Ely's original PPT because it embraces a more differentiated and contextual – or "calibrated" – approach to the intensity of judicial review than Ely's tiered approach. This context-sensitive approach, according to Dixon, jibes with the approach taken by the Japanese Supreme Court, which is generally deferential to political branches but willing to engage in more intensive scrutiny in exceptional cases, such as where voting rights are implicated. She further emphasizes, and this is significant in relation to Hasebe's critique, that CPPT gives a critical role for courts to play even in countries like Japan where elections are consistently dominated by a single party. This role includes safeguarding regular free and fair elections, political rights and freedoms, and institutional pluralism. By way of conclusion, Dixon queries whether the Japanese judiciary is open to CPPT and would actually begin to exercise its constitutional functions in a way that reinforces representation. The jury is still out on this question. We agree with Dixon that the symposium is an important contribution to developing such jurisprudence further and deepening cross-border engagement.

Together, the contributions to this special issue examine whether CPPT and Japanese constitutional review is a good match from a variety of perspectives: some approach PPT and CPPT from a relatively high level of theories, while others start from particular issues and concrete cases; they offer different reading of Japanese court cases and present diverse possibilities of interpretation; views vary as to the proper evaluation of PPT and the form of democracy upon which it is based; assessments also vary as to the extent to which CPPT can meaningfully guide and inform Japanese-style constitutional review. Overall, Japanese courts' demonstrably passivist history and almost constant deference to legislative discretion is common ground to all the contributors. While this appears to present a challenge to CPPT's aim to enhance the judiciary's responsiveness to political representation, that may be, as Dixon emphases, a good reason why CPPT's contextual approach can be effective. In fact, the contributions to this special issue

have identified several areas where CPPT could potentially offer doctrinal foundation on which Japanese courts could rely by way of engaging in a careful dialogue with the legislature and possibly justifying a conclusion that would empower insular minorities and reinforce democratic representation. The contributions also point to potential avenues of further inquiry. Perhaps the role of the media and non-profit organizations briefly touched upon in some of the contributions may be more profitably explored. While Japan and Japanese courts have so far avoided the democratic backsliding and political backlash that motivated the global CPPT movement, we might as well ask if that is and will continue to be the case as courts and political branches around the globe face shifting tensions and new challenges.

As we conclude this introduction, we would like to express our deep gratitude to so many people that made the symposium and this special issue possible and meaningful. In particular our heartfelt thanks go to all the authors for their painstaking research, engaging conference presentations, and efforts to redraft and revise their essays. We thank Ros Dixon for co-organizing with us a conference that brought together leading constitutional authors from around the world. The other part of the conference, which focused on CPPT, is collected in a special issue of Global Constitutionalism. We would be remiss not to acknowledge the indispensable generosity of the symposium's cosponsors: Suenobu Foundation Professorship of Transnational Law and Institute of Business Law and Comparative Law & Politics Graduate Schools for Law and Politics, The University of Tokyo; UNSW Sydney Gilbert + Tobin Centre of Public Law; Egusa Foundation for International Cooperation in the Social Sciences; Nomura Foundation Grant for Social Science; and JSPS Kakenhi 19H01408 (Masayuki Tamaruya and Keigo Obayashi). Lastly, we acknowledge with deep gratitude that all this would not have been possible without the administrative works meticulously and elegantly carried out by Yuko Nakata, Emi Masuta, Yoko Kubokawa, and Maria Ortega.