COMMENT

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Being a political scientist and not a lawyer, I will make remarks that are naive, uninformed, and possibly irresponsible. I would first like to speak from a political scientist's perspective on the two papers that concern elections,[1] and then I will make some general comments about constitutional rulings and the research agenda in Japanese constitutional law.

I usually recoil against any statements that Japan is unique, special, and different. However, in its electoral district system, Japan is in fact unique, special, and different. Japan's multimember single-vote electoral district system builds in intense competition within its large political parties. In Japan the largest party happens to be the conservative Liberal Democratic Party ("LDP"). If, for some reason, the leftist opposition coalesced into one large party, the opposition would acquire the same problem.

The vicious competition inside the LDP promotes a lavish use of money and increases the expense of elections. Thus, because this is *intra*-party competition, the system pulls candidates away from an interest in issues and toward an interest in personal identity. Issues become unimportant because they do not serve to distinguish between candidates who uphold the same party platform. Instead, name recognition becomes all-important. This situation is troubling to most political scientists who study Japan because it makes effective, issue-based voting nearly impossible. The system forces voters who want their votes to be effective to guess which candidates will be near the boundary line between winning and losing,[2] then select from among those candidates the one they dislike least, and hope that in voting for that candidate they have not wasted their vote. It is impossible for voters to gather the information they need (about the preferences and voting strategies of other voters in the district) to make a rational choice among candidates in such an electoral system. It is also, therefore, impossible for candidates to determine with any certainty how to appeal to voters in such an arrangement.

Similarly, the restrictions on campaign activities that Professor Usaki discussed in his paper[3] have perverse and unfortunate effects on the way campaign funds are used in Japan. Vicious electoral competition, which is exaggerated by the uncertainties created by the multimember single-vote

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1. *See* Hata, *Malapportionment of Representation in the National Diet*, LAW & CONTEMP. PROBS., Spring 1990, at 157; Usaki, *Restrictions on Political Campaigns in Japan*, LAW & CONTEMP. PROBS., Spring 1990, at 133.

2. For example, which candidates are likely to come in third or fourth in a three-member district, or fifth or sixth in a five-member district.

3. Usaki, *supra* note 1.

system, makes electoral campaigns expensive. Yet legal restrictions forbid or carefully minimize many of the usual mechanisms for informing voters about issues or even candidates' names. Therefore, money is used instead to buy voter affection or obligation. The results, both quite unfortunate, are institutionalized corruption and personality-based rather than issue-based campaigns.

Perhaps simultaneous reform of the district system itself, which could be combined with a reform of malapportionment, and of restrictive campaign laws would be a good idea. A district system that allowed candidates to compete on issues, and campaign rules that permitted candidates to shower voters with information rather than money, would allow voters to exercise a choice based upon issue preference.

A single-member single-vote system is favored by the LDP because it has been calculated that the LDP would then get 80 percent of the seats.[4] That might not be the case if the lines were drawn around the geographical base (jiban) of sitting politicians. One problem in electoral district reform is that any change has to be voted on by existing politicians, who might therefore be voting themselves out of office. These politicians would almost certainly prefer, over any new system, the system that they have not only learned to live with but have mastered. In order to achieve successful reform of Japan's electoral district system, then, a change that sitting politicians can tolerate must be devised. The LDP is now working quite seriously on precisely this project.

A single-member single-vote system would certainly promote rational voting and issue-based candidacies and campaigns. It would also promote coalition among the opposition parties, because it would become sensible—almost necessary—for them to support jointly one opposition candidate per district and to plan joint campaigns for all of their joint candidates. However, a single-member single-vote system built around existing *jiban* would not solve the severe malapportionment between underrepresented urban districts and overrepresented rural districts. One would need to think further to address this issue.

Another possibility that would be easy to institute immediately is a multimember multivote system where, for example, voters in three-member districts receive three votes and voters in five-member districts receive five votes. This system is not guaranteed to produce streamlined outcomes, however; in fact, it can degenerate into a multimember single-vote system if voters with one or two favorite candidates give those candidates an advantage by not casting any of the remaining votes to which they are entitled for any of the other candidates. I use precisely this strategy in my local election for

4. It has been estimated that in a shift to a "side-by-side" (small constituency plus proportional representation) system the LDP would win 78.9% of the House of Representatives' 511 seats, and in a shift to the pure single-seat constituency system, the LDP would sweep 89% of the seats. Hrebenar, *Rules of the Game: The Impact of the Electoral System on Political Parties*, in THE JAPANESE PARTY SYSTEM: FROM ONE-PARTY RULE TO COALITION GOVERNMENT 47 (R. Hrebenar ed. 1986).

County Commissioners, who are elected in a multimember multivote district, when I am anxious to help a particular candidate get into the winner's circle. Although I have as many as five votes, I may cast only one, so that I do not add to the votes accumulated by my favorite candidate's competitors. This degeneration may not occur because all voters do not vote strategically; it can also be prevented if voters must use all of their votes to cast a valid ballot.

A multimember multivote system allows voters to vote for the slate of representatives they most prefer without worrying as much about who gets above the line into the winner's circle and who falls below. It would eliminate intra-party competition and thus encourage candidates to advertise their positions on issues. Such a system would also preserve Japan's multiparty system, which might be desirable to represent a broad spectrum of public opinion.

One could hypothesize endlessly about new district systems. A fruitful exercise for political scientists and constitutional specialists interested in solving malapportionment problems would be to dream up a system that would promote campaigning that focuses on the issues, that informs voters rather than bribes them, that solves malapportionment problems, and finally that would be acceptable to sitting Diet members. Perhaps that is an impossible task, but it is certainly worth some effort.

The campaign-rule changes that seem to be obvious improvements from an American perspective would allow the substantive exchange of information through more radio and television time, pamphlets, direct mail, posters, door-to-door campaigning, substantive contact between candidates and voters, and substantive discussion of issues. One postcard per voter, one poster per telephone pole, and a couple of minutes of free air time on public television do not permit candidates to transmit any information beyond name, picture, and slogan. On the other hand, I see no need for more megaphone cars; in the interest of preventing noise pollution it probably would be best to eliminate them altogether.

Another improvement would be a longer season for electoral campaigns. The current restricted season on campaigning causes candidates to gain advance publicity through illicit channels, for what is officially referred to as "noncampaigning." In competitive elections, candidates, especially incumbents, try to be engaged in some sort of campaigning months, or even years, before the official season. Extending the period of legal campaigning would increase the flow of issue-related information compared to the content-free contact that constitutes noncampaigning, and would reduce the inherent advantage of incumbents over challengers.

One drawback to these suggestions is that they would give to Japan something more like the American campaigning that never ceases. American citizens have no trouble obtaining plenty of information, but we feel bombarded, and we know that huge resources go into bombarding us. I would not wish the never-ending American-style campaign on anyone else. However, some change in the restrictive campaign procedures that Professor

Usaki describes would perhaps funnel more of the money used in political campaigning into informing and less into procuring voter attachment through, for example, gifts, box lunches, bus excursions, and wedding presents. That too may never go away, however, if voters continue to expect these things from their candidates.

I would like to turn now to the various cases and Supreme Court rulings that the conference has covered. We have spoken in passing about whether the Japanese Supreme Court is active or inactive. My own naive, uninformed, irresponsible, and brutally frank impression is that the Japanese Supreme Court is very creative at forging politically safe solutions and is willing to live with legal contradictions that sometimes border on the nonsensical.

Professor Okudaira said[5] that the ruling in the *Repeta* case[6] seemed like a bad joke to him. The *Repeta* ruling stated that the scope of a judge's authority over conduct in the courtroom was large and would remain large, but that somehow the scope of the judge's authority would no longer include the right to forbid notetaking. In the enshrinement case,[7] the Supreme Court deflected potential political trouble by finding no state involvement and concluding that, because church and state remained properly separated, there was no constitutional problem. Finally, the Supreme Court usually interprets the social rights clauses of the Constitution, such as Articles 25 and 27, as free of substantive content so that they remain judicially unenforceable.

In the malapportionment cases,[8] Professor Hata outlined[9] a fascinating evolution of argument. The Supreme Court has made it clear that extreme malapportionment is unconstitutional, but that it will not automatically invalidate the results of elections conducted on the basis of such unconstitutional malapportionment. The problem here is not really an attempt by the Supreme Court to ignore the merits of the case, rather it is a structural one; if a past election, and therefore the sitting Diet, were declared invalid, what legislative body could pass a new arrangement into law, and how would it design a constitutionally acceptable apportionment scheme and conduct a valid election for a new Diet within the tight deadlines prescribed by the Constitution? Nonetheless, many at this conference would be interested to see the Japanese Supreme Court experiment with the prospective invalidation of future elections as a solution that gives the Diet a realistic deadline by which to alleviate malapportionment.

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5. Okudaira, *Comment*, LAW & CONTEMP. PROBS., Spring 1990, at 129.

6. 43 Minshū 89 (Sup. Ct., G.B., Mar. 8, 1989) (*rev'g* 1222 Hanrei Jihō 28 (Tokyo Dist. Ct., Feb. 12, 1987) *and* 1262 Hanrei Jihō 30 (Tokyo H. Ct., Dec. 25, 1987)).

7. Nakatani v. Japan, 1277 Hanrei Jihō 34 (Sup. Ct., G.B., June 1, 1988) (widow of a Christian war veteran claimed his unrequested Shinto enshrinement violated the constitutional separation of church and state).

8. Tokyo Metropolitan Election Comm'n v. Koshiyama, 37 Minshū 1243 (Sup. Ct., G.B., Nov. 7, 1983) (*rev'g* 984 Hanrei Jihō 26 (Tokyo H. Ct., Dec. 23, 1980)); Shimizu v. Osaka Election Comm'n, 37 Minshū 345 (Sup. Ct., G.B., Apr. 27, 1983); Kurokawa v. Chiba Prefecture Election Comm'n, 30 Minshū 223 (Sup. Ct., G.B., Apr. 14, 1976); Koshiyama v. Tokyo Metropolitan Election Comm'n, 18 Minshū 270 (Sup. Ct., G.B., Feb. 5, 1964).

9. Hata, *supra* note 1.

In the patricide cases,[10] as I have understood them, the Supreme Court says that differential punishment is simultaneously unconstitutional and allowable. With respect to the political activities that Professor Usaki outlined,[11] the Supreme Court and sometimes the Tokyo High Court separate freedom of thought from political activity so that a ban on political activity does not impinge upon constitutionally guaranteed freedom of thought. Similarly, prior restraint is impermissible, but prior notification is constitutional.[12]

With respect to the Self-Defense Forces (jieitai), the Supreme Court's position has evolved toward the view that Japan has the right of self-defense. However, on the trickier question of whether the Forces are purely for self-defense (constitutional) or instead constitute war-making potential (literally unconstitutional), the Supreme Court has come to the interesting conclusion in the Hyakuri case[13] that this is not a constitutional question unless the *jieitai* are so large that it is obviously unconstitutional. Who gets to decide when the *jieitai* are too large remains unsettled. With Japan having, in budgetary terms, one of the world's largest military establishments,[14] perhaps the Supreme Court will soon have to consider whether the *jieitai* are constitutionally small or unconstitutionally large.

I have outlined these inconsistencies because the conclusion that the Japanese Supreme Court is timid and willing to countenance much contradiction is irresistible. These problems are not unique to Japan, however. All supreme courts, given similar politically troubled situations, will try to avoid firm stances through semantic obfuscation and convoluted argument. Nevertheless, there has also been some change over time, and the papers in this conference that presented changes in rulings and similar issues allow one to reach some interesting conclusions.

The Supreme Court is moving toward less timidity in its rulings. For example, we saw reversals in the cases of the bathhouses[15] and the pharmacies.[16] Here the Supreme Court finally threw out its somewhat artificial concern with public welfare (a concern that is in fact invented) and treated these cases as what they always were: patent attempts to exploit the Constitution for special protection, which, as Professor Ramseyer correctly pointed out,[17] is really no more than rent-seeking. The Supreme Court has made clear that where there is a definite conflict between private interest and

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10. *See, e.g.*, Aizawa v. Japan, 27 Keishū 265 (Sup. Ct., G.B., Apr. 4, 1973) (*aff'g* 1 Keisai Geppō 544 (Utsunomiya Dist. Ct., May 29, 1969) *and rev'g* 619 Hanrei Jihō 93 (Tokyo H. Ct., May 12, 1970)).

11. Usaki, *supra* note 1.

12. *See generally id.* at Part IIC.

13. 43 Minshū 385 (Sup. Ct., 3d P.B., June 20, 1989).

14. *See* Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, LAW & CONTEMP. PROBS., Spring 1990, at 171.

15. Shimizu v. Japan (The Fukuoka Bathhouse Case), 9 Keishū 89 (Sup. Ct., G.B., Jan. 1, 1955).

16. Umehara v. Japan, 29 Minshū 572 (Sup. Ct., G.B., Apr. 30, 1975).

17. Ramseyer, *Doctrines and Rents in Japan: A Comment on Professors Osuka and Nakamura*, LAW & CONTEMP. PROBS., Spring 1990, at 29.

public welfare, the Constitution distinguishes between the two and gives priority to public welfare.

There has been similar progress in the evolution of rulings on malapportionment, so that the Supreme Court has now held unconstitutional a 1 to 5 ratio between the least-represented voters and the most heavily overrepresented voters in the lower house. A 1 to 3 ratio is apparently not unconstitutional. A 1 to 4 ratio is difficult to call, and it is all right for the ratio in the upper house to be worse.[18] Despite this confusing delineation, it is still encouraging that the Supreme Court has grappled with this issue and labelled extreme malapportionment unconstitutional.

One of the interesting features of Supreme Court rulings on some of these cases is that the Supreme Court will consider a district court or high court ruling, one which is logically consistent and appears just and reasonable to most constitutional experts, and alter it in the direction of inconsistency to avoid causing political trouble. The Court's avoidance of politically sensitive issues poses an interesting research question that Professors Itoh and Luney have begun to address.[19] It seems clear that the Supreme Court has indeed been timid, or willing to live with great logical contradictions in its rulings. It also appears that the Court has been developing rules of thumb to simplify matters in tricky decisions, as in the *jieitai* and malapportionment cases.

It would be very interesting to determine why this is happening and what the prospects for change are. One question to consider is whether the Supreme Court operates this way because many of its justices are prewar-trained and conservative of mind. If so, we could anticipate generational changes as judges from lower courts and high courts move up the ranks and as crucial new appointments to the Supreme Court are made. A different possibility is that all appointees find themselves beset with similar pressures, that is, similar fears about taking a forthright or politically controversial position. If the political pressures on the Supreme Court are this great, then we should not expect a new boldness in rulings even after considerable generational change.

It would also be interesting to pursue Professor Itoh's line of empirical research on individual votes by judges to draw out explanations of major decisions and make projections about the future. Perhaps there are areas of law where generational change is having great impact and other areas where it is not. Perhaps generational change is visibly affecting district and high courts, but political pressures at the Supreme Court make generational change there less important.

Another possibility is to pursue Professor Luney's line of analysis by looking at the political environment of the Supreme Court to make predictions and comparisons with other countries concerning the fact that the

18. *See* Hata, *supra* note 1 at 160.

19. *See* Itoh, *Judicial Review and Judicial Activism in Japan*, LAW & CONTEMP. PROBS., Winter 1990, at 169; Luney, *The Judiciary: Its Organization and Status in the Parliamentary System*, LAW & CONTEMP. PROBS., Winter 1990, at 135.

Supreme Court is inside the Japanese executive branch rather than separate from it. How are Supreme Court decisions affected by the Court's locus inside the Ministry of Justice and by the Court's composition through political appointments?

It is also interesting to note the importance of carefully drawn definitions in Supreme Court decisions. Professor Auer discusses the distinction between defense and offense in rulings on Article 9.[20] In malapportionment cases, the ratio of 1 to 4 has evolved as a sort of boundary between unconstitutional malapportionment and acceptable malapportionment. In political activity cases[21] and others, the courts have developed the political-question doctrine to avoid trouble. Perhaps if more cases come up on socioeconomic rights, the Supreme Court will begin to change its interpretation of rights embodied in Articles 25 and 27 toward the definition—a mechanical but substantive definition—of minimum standards of wholesome and cultural living.

It would be very nice to see comparative studies of the Japanese Constitution and court decisions. Presumably all courts have political burdens and fears, and therefore rule on constitutional grounds only when all other avenues fail; presumably all courts empowered with judicial review resist using it. Further study could reveal the simplifying techniques that, presumably, all courts, all decisionmakers, and all political bodies develop to make their tasks a little easier and to deal with the political pressures upon them.

20. Auer, *supra* note 14 at Part IVA-C.
21. *E.g.*, Sakata v. Japan (the Sunakawa case), 13 Keishū 3225 (Sup. Ct., G.B., Dec. 16, 1959).