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The Chrysanthenum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression

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ARTICLES

THE CHRYSANTHEMUM, THE SWORD, AND THE FIRST AMENDMENT: DISENTANGLING CULTURE, COMMUNITY, AND FREEDOM OF EXPRESSION

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> At one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach was not tried out here, there was no place else to look. That situation no longer holds. . . . [M]any countries have adopted forms of judicial review. . . . These countries are our "constitutional offspring" and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wisc parents do not hesitate to learn from their children.[1]

The First Amendment has proven to be one of the United States's most successful legal exports. Most constitutions now guarantee to their citizens the freedom of speech.[2] Not only has the First Amendment's

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1. United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring); *see also* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 519-20 (1992) ("My goal is rather to advance the proposition that American thinking about rights and welfare would benefit from examining the experiences of other liberal democracies, and to speculate about the insights that might emerge from such a comparative analysis.") (footnote omitted); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 249 & n.13 (1995) (noting the potential benefits and pitfalls associated with comparative constitutional inquiries). In addition, Justice Breyer recently endorsed the use of comparative constitutional analysis when faced with difficult questions of constitutional interpretation. *See* Printz v. United States, 117 S. Ct. 2365, 2404-05 (1997) (Breyer, J., dissenting).

2. *See, e.g.*, DANMARKS RIGES GRUNDLOV [Constitution] art. 77 (Den.) ("Any person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in a court of justice."); CONSTITUTION DE LA

free speech guarantee found its way into most modern constitutions, it has even been enshrined in various international instruments, notably the Universal Declaration of Human Rights[3] and the European Convention on Human Rights and Fundamental Freedoms.[4]

The value of such constitutional and quasi-constitutional promises correlates, of course, with the strength of the rule of law in a particular nation. For example, China's current constitution promises respect for

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REPUBLIQUE GABONAISE art. 1 (Gabon) ("[T]he freedom of conscience, thought, opinion, expression, communication, the free practice of religion, are guaranteed to all, under the reservation of respect of public order . . . ."); GRUNDGESETZ [Constitution] [GG] art. 5 (F.R.G.) ("Everyone shall have the right to freely express and disseminate his opinion by speech, writing, and pictures and freely to instruct himself from general sources."); INDIA CONST. art. 19 ("All citizens shall have the right . . . to freedom of speech and expression . . . ."); NIG. CONST. (Constitution of the Federal Republic of Nigeria) § 38(1) ("Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference."); SRI LANKA CONST. ch. III, § 14(1) ("Every citizen is entitled to . . . the freedom of speech and expression including publication; the freedom of peaceful assembly; the freedom of association . . . ."); REGERINGSFORMEN [Instrument of Government] ch. 2, art. 1 (Swed.) ("All citizens shall be guaranteed the following in their relations with the public administration: . . . freedom of expression: the freedom to communicate information and to express ideas, opinions and emotions, whether orally, in writing, in pictorial representations, or in any other way . . . ."). Of course, merely enshrining rights on a piece of paper titled a constitution does not ensure that those rights will be enjoyed. *See* Ronald J. Krotoszynski, Jr., Brind & Rust v. Sullivan*: Free Speech and the Limits of a Written Constitution*, 22 FLA. ST. U. L. REV. 1 (1994); *see also* Glendon, *supra* note 1.

3. *Universal Declaration of Human Rights*, U.N. GAOR, 3d Sess., 183d mtg., G.A. Res. 17, U.N. Doc. A/810 (1948), art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

4. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222 (1955). Article 10 provides that:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

freedom of speech,[5] but the specter of Tiananmen Square provides powerful testimony against placing any stock in this ersatz guarantee.[6]

One might well ask how these constitutional children are faring. After all, adoption of a free speech guarantee in nations observing the rule of law should restrict the government's ability to censor or otherwise restrict expressive activity; constitutional guarantees of free speech should significantly expand the protection afforded to expressive activities.[7] At the same time, however, there exists a constant danger of cultural essentialism: One should not arbitrarily assume that the U.S. conception of a particular human right necessarily has transnational significance—that it somehow epitomizes the universal or *a priori* nature of that right.[8]

Culture informs both law and morality;[9] it would require hubris of the highest order to assume that the exposition of a right by the United States Supreme Court represents the only possible, much less the "best," iteration of a particular right.[10] Even granting the relevance and importance of legal and cultural differences, however, the experience of a foreign nation "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."[11]

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5. *See* ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution] art. 35 (P.R.C.) (1982) (providing guarantee to citizens of "freedom of speech, of the press, of assembly, of association, of process, and of demonstration").

6. *See* Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM. L. & POL'Y J. 361, 377 (1997). The former Soviet Union's constitution likewise protected freedom of expression. *See* KONSTITUTSIIA SSR arts. 47, 50 & 51. Of course, it too was a worthless promise. A constitutional guarantee generally requires the rule of law to be enforceable. *See* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 47-49 (1984) [hereinafter VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT]; *see also* WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 7-8 (2d ed. 1995).

7. *See* Krotoszynski, *supra* note 2, at 31-34 (arguing that constitutional guarantees of rights legitimize judicial protection of the enumerated interests, but noting that good-faith application by the judiciary is essential to the effectiveness of such guarantees).

8. *See* Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309 (1987); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

9. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 62-68 (1990); *see also* Ronald J. Krotoszynski, Jr., *Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change*, 47 CASE W. RES. L. REV. 423, 432-36, 442-44 (1997).

10. *See* L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 276-84 (1997).

11. Printz v. United States, 117 S. Ct. 2365, 2405 (1997) (Breyer, J., dissenting).

Thus, as Judge Calabresi admonishes, we should be willing to learn from those who have come to share our constitutional values.

In the case of the free speech guarantee of the First Amendment, the constitution of Japan presents perhaps the best candidate for cross-cultural study.[12] This is because Japan intentionally and self-consciously (though perhaps not voluntarily[13]) decided to guarantee freedom of speech from government abridgment.[14] Japan did so in the aftermath of the Second World War by adopting the Constitution of 1947, which contains a provision that explicitly protects freedom of expression.[15] Prior to the adoption of the Constitution of 1947, Japanese citizens did not enjoy an effective generalized right of freedom of expression.[16] On the contrary,

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12. *Cf.* Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639 (noting the relative lack of interest in Japan among American comparative law scholars and positing the possible explanations for this state of affairs).

13. *See* JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 24-31, 207-44 (John M. Maki ed. & trans., 1980); *see also* KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 6-37 (1991). Notwithstanding the historical circumstances surrounding the adoption of the Constitution of 1947, the Japanese people have never amended it and today the Constitution enjoys a very high degree of popular legitimacy. *See* John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, *in* JAPANESE CONSTITUTIONAL LAW 39, 52-53 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993); *see also* Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, *in* JAPANESE CONSTITUTIONAL LAW, *supra*, at 1, 6-20, 25-32.

14. *See infra* notes 106-126 and accompanying text.

15. *See* NIHONKOKU KENPŌ [Constitution] [KENPŌ] art. 21, para. 1 ("Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed."). Canada, like Japan, has adopted a constitutional analog to the First Amendment. *See* CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), § 2 ("Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication . . . ."). It too would present an excellent candidate for a comparative study in freedom of expression. Although Japan and Canada could be well-paired in a study of freedom of expression, such a project would easily exceed the scope of a single law review article. Accordingly, this article will focus exclusively on the Japanese free speech tradition, leaving for another day an analysis of freedom of expression in Canada.

16. In Japan, although the Meiji Constitution of 1889 ostensibly guaranteed the citizenry certain basic rights, in practice these guarantees were generally not judicially enforceable and even when nominally enforceable, the judiciary lacked the power to provide meaningful remedies to successful litigants. *See* CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 135-40, 156, 225, 230 (Lawrence W. Beer ed., 1992); J.W. DOWER, EMPIRE AND AFTERMATH 52-54, 318-29, 349-57 (1988); JOHN W. DOWER, *Sensational Rumors, Seditious Graffiti, and the Nightmares of the Thought Police*, *in* JAPAN IN WAR AND PEACE 101, 101-54 (1993); JOHN OWEN HALEY, AUTHORITY

from the Meiji Restoration in 1868 to Emperor Hirohito's surrender on General MacArthur's battleship in Tokyo Bay in 1945, constitutional rights under the Meiji Constitution were subject to legislative abrogation.[17] As a general matter, the relationship of imperial subjects to the Emperor and his government revolved around the duties and obligations that the former owed to the latter. The idea of asserting formal legal rights against the Chrysanthemum Throne was a theoretical possibility, but even in the absence of legislative abrogation had little, if any, cultural salience.[18]

Japan also presents a good candidate for a case study because it, like the United States, is an industrialized democracy.[19] Both the United States and Japan have enjoyed a long period of economic prosperity in the latter half of the twentieth century.[20] To the extent that differences exist

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WITHOUT POWER: LAW AND THE JAPANESE PARADOX 77-80, 134 (1991); THE JAPANESE LEGAL SYSTEM 637-41 (Hideo Tanaka ed., 1976); Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, 53 LAW & CONTEMP. PROBS. 39, 45 (1990); Takeshi Ishida, *Fundamental Human Rights and the Development of Legal Thought in Japan*, 8 LAW IN JAPAN 39, 62-66 (Hiroshi Wagatsuma & Beverly Braverman trans., 1975). One should keep in mind, however, that the Meiji Constitution on its face made the rights of the citizenry subject to legislative abrogation. In this sense, then, the failure to respect constitutional rights was less a failure of the Japanese judiciary than of the foundational document itself.

17. For an excellent history of the framing of the Japanese Constitution of 1947, see KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (Ray A. Moore ed. & trans., 1997).

18. *See* INOUE, *supra* note 13, at 53-54. At the same time, however, the rule of law did exist during the Meiji period. Courts of law applied the statutes and regulations issued in the Emperor's name and, in some instances, exhibited a fair amount of independence. For example, judicial review of administrative regulations for consistency with legislative delegations took place, with the courts of law striking down regulations that departed from legislative mandates or general principles of statutory construction. *See* HALEY, *supra* note 16, at 83-104; John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 373-78 (1978). Indeed, even in the years of the Tokugawa Shogunate, the idea of enforcing formal duties, as opposed to rights, existed. *See* RUTH BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE 70-71 (1946). On the other hand, actually lodging a formal claim with the Shogun against a superior could have dire consequences. *See id.* at 65-67 (describing how a Tokugawa Shogun granted a farmers' petition for relief against their local *daimyo*, or overlord, only to then order the farmers put to death for insubordination).

19. One could study the free speech tradition in Sri Lanka or Gabon, but basic differences from the United States in both culture and economic development would make such comparisons less useful.

20. Notwithstanding Japan's current economic difficulties, the Japanese economy remains the second largest in the world, and the vast majority of Japanese citizens continue to enjoy a high standard of living. *See* Nicholas D. Kristof, *Shrugging off Doom*, N.Y. TIMES, Apr. 21, 1998, at A1; *President Praises Japan's Economic Reforms*, WASH. POST, Oct. 18, 1998, at A7.

in legal norms, they are not the products of radically different economic circumstances.

On the other hand, many commentators have argued that Japanese society is radically different from the United States in myriad ways: Japan is much more homogeneous, Japanese are inherently conformists, Japanese place much less reliance on lawyers and formal legal institutions than do Americans, and so forth.[21] Accordingly, one would not expect the Japanese version of the First Amendment to bear much resemblance to its American cousin. As it happens, one would be wrong to harbor such an assumption. In fact, the Japanese Supreme Court seems to share many of the same theoretical assumptions about the role and importance of free speech that the United States Supreme Court has articulated over the past half century. At the same time, however, the Supreme Court of Japan has failed to use its power of judicial review to vindicate consistently these shared ideological commitments. The Supreme Court of Japan, for example, has framed free speech questions in terms immediately familiar to students of the First Amendment, routinely linking free speech values with the project of democratic self-government. Nevertheless, the Supreme Court largely has failed to strike resounding blows in favor of freedom of speech, principally for reasons related to the Japanese Supreme Court's view of its proper institutional role within the

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21. *See* Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, *in* JAPANESE CONSTITUTIONAL LAW 221, 224-26, 245-47 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993) [hereinafter Beer, *Freedom of Expression*]; Lawrence W. Beer, *The Public Welfare Standard and Freedom of Expression in Japan*, *in* THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, at 205, 210-20 (Dan Fenno Henderson ed., 1968) [hereinafter Beer, *Public Welfare*]; CHIN KIM, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, *in* SELECTED WRITINGS ON ASIAN LAW 41, 48 (1982); CHIE NAKANE, JAPANESE SOCIETY 26-40, 83-84, 103, 147-51 (1970); CLYDE V. PRESTOWITZ, JR., TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD 82-86 (1988); Paul Lansing & Tamra Domeyer, *Japan's Attempt at Internationalization and its Lack of Sensitivity to Minority Issues*, 22 CAL. W. INT'L L.J. 135, 139-40 (1991); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1906-10 (1991); Richard B. Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179, 183-93 (1989); Note, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 709-11 (1992); *cf.* HALEY, *supra* note 16, at 108-18, 170-91, 196-200 (rejecting traditional view that Japanese citizens are inherently conformists in favor of view that complex and highly evolved systems of economic and social interdependence cabin the ability of individuals to engage in iconoclastic behavior and arguing that Japan enjoys "a special type of pluralism" characterized by active competition and interplay between well-defined social, political, and economic interest groups); Haley, *supra* note 18, at 378-90 (arguing that institutional incapacity and limited authority to provide relief, rather than a general social aversion to litigation, best explains Japan's relatively low per capita incidence of law suits).

Japanese constitutional framework and within Japanese society more broadly.[22]

Perhaps most importantly, an examination of the emerging Japanese free speech tradition offers important insights into the theoretical justifications mustered in support of protecting freedom of expression in the United States. Professor Alexander Meiklejohn pioneered the argument that the central purpose of the First Amendment is to facilitate democratic self-governance.[23] The principal competing theory of the First Amendment is the Holmesian "marketplace of ideas" metaphor, which trusts in the good sense of the citizenry, rather than in the abilities of government censors, to determine the relative merit of an idea.[24] As it happens, the Japanese Supreme Court largely has rejected the marketplace metaphor in its free speech decisions.[25] To a considerable degree, however, it appears to have embraced Meiklejohn's theory of freedom of speech. Although this state of affairs suggests the existence of an important link between culture and the rationales supporting the protection of free expression, it also demonstrates that the relationship between freedom of expression and democratic self-government can transcend both political and cultural boundaries.

An examination of the principal free speech decisions of the Supreme Court of Japan reveals that the Meiklejohn theory of free expression has a distinctly communitarian cast. Unlike the marketplace of ideas metaphor, the Meiklejohn theory necessarily presupposes general social consensus regarding the proper modalities of free expression.[26] In a relatively homogeneous society, such a consensus *might* conceivably exist.[27] Social pluralism, on the other hand, appears to raise troublesome issues for adherents of the Meiklejohn approach.[28] In many respects, this is the most important lesson that the United States legal community can take from the Japanese experience with free speech as a core constitutional value.

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22. *See infra* notes 354-399 and accompanying text.

23. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 1-27 (1948).

24. *See* Abrams v. United States, 250 U.S. 616, 629-31 (1919) (Holmes, J., dissenting).

25. *See infra* notes 289-353 and accompanying text.

26. *See infra* notes 52-73 and accompanying text; *see also* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 268-76 (1995).

27. On the other hand, one could still raise the objection that a minority should not be denied voice within the community merely because it is particularly small and relatively invisible.

28. *See infra* notes 410-425 and accompanying text; *see also* POST, *supra* note 26, at 274-75.

Part I of this Article explores the two basic theories of the First Amendment that have predominated in the United States this century: the marketplace of ideas metaphor and the democratic self-governance paradigm. Examination of the underlying themes of the First Amendment in the United States will facilitate a more nuanced and, therefore, more enlightened examination of the decisions of the Japanese Supreme Court. Part II examines the constitutional text and the constitutional style of the Supreme Court of Japan.[29] Part III surveys the treatment of political speech in Japan, including consideration of how evolving theories of free speech relate to their American counterparts. Part IV considers the case of defamation and the question of seditious libel in Japan. Classic free speech doctrine in the United States holds that libel against the state is fundamentally inconsistent with democracy;[30] this Part considers Japan's response to the problem of balancing protection of individual reputation against freedom of expression. Part V then takes up the regulation of sexually explicit speech in Japan, which demonstrates quite clearly the limitations of the Meiklejohn theory of free expression. In Part VI, the Article offers an explanation of the Supreme Court of Japan's overall approach to protecting freedom of expression and the larger question of the Japanese approach to judicial review. Finally, in Part VII, this Article suggests that the Japanese conception of the importance of free speech in a democratic society is largely consistent with Alexander Meiklejohn's democratic self-government paradigm for freedom of expression. Part VII also argues that the Japanese experience can and should inform our domestic conception of the theoretical underpinnings of freedom of expression and the proper scope and relative importance of freedom of speech in a democratic society.

The Article concludes that while free speech plays an important, indeed vital, role in both Japan and the United States, the relative importance of free speech—and the protection accorded various types of speech and the rationales offered to justify that protection—vary considerably. In particular, the Japanese experience provides valuable lessons about the potential for successful line-drawing based on the relationship of speech to democratic self-governance. Moreover, Japan

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29. My citation conventions for decisions of the Supreme Court of Japan are as follows: (1) whenever available, I have cited to the official English language translation of the decisions of the Supreme Court of Japan, which are published by the General Secretariat of the Supreme Court of Japan; (2) when official translations are not available, I have cited to unofficial translations prepared and published by legal academics and have provided a parallel citation to the official Japanese reporter in which the case may be found.

30. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205.

also offers a cautionary note on the potential importance of non-governmental restrictions on freedom of speech.[31] At the end of the day, Judge Calabresi's observation[32] about the value of comparative constitutional inquiry proves prescient: Examination of freedom of speech in Japan leads to a more insightful understanding of our domestic speech rights and a heightened awareness of the implicit costs and benefits associated with maintaining these rights.

I. COMPETING THEORIES OF THE FIRST AMENDMENT

Over the course of twentieth century, two basic models of the First Amendment's Free Speech Clause have emerged: the marketplace of ideas metaphor and the democratic self-government paradigm. Both models have appeared in decisions of the United States Supreme Court, and both models enjoy significant support within the academic community. The models differ in material respects, however, and these differences in theory should lead to differences in results.

A. The Marketplace of Ideas

Justice Oliver Wendell Holmes's great dissents in *Abrams*[33] and *Gitlow*[34] evoked the metaphor of a "marketplace of ideas" in which various ideas compete for acceptance within the community. Justice Holmes best expressed this iteration of the underlying values behind the First Amendment in *Abrams*:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground

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31. *See generally* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 20-30 (1996) (arguing that non-governmental constraints on speech activity can be just as harmful to meaningful public discourse as ham-handed attempts at state-imposed censorship).

32. *See supra* note 1 and accompanying text.

33. *See* Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

34. *See* Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

> upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[35]

The marketplace of ideas understanding of free speech embraces an evolutionary process, not one predetermined by social, economic, or political results. As Justice Holmes explained, "[e]very idea is an incitement," and "[e]loquence may set fire to reason."[36]

The Holmesian marketplace of ideas conception of the First Amendment broadly embraces John Stuart Mill's liberty ethic[37] and reflects an abiding faith in the capacity of reason to facilitate the sifting of wheat from chaff.[38] Citizens are both free to speak and to listen as they think best; truth is served by a free and full competition of ideas within the community, rather than by paternalistic state-sponsored efforts to protect citizens from the ill effects of bad ideas. At its best, the Holmesian view ensures that non-dominant views are not squelched simply because they are different; thus, the Heaven's Gate cult[39] must enjoy the same right to hold and disseminate its beliefs as the Republican National Committee. Moreover, the competition of ideas within the marketplace of public opinion may result in virtually *any* set of social, economic, or political outcomes: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[40]

The principal objection to this conception of the First Amendment is that in practice it proves to be both overinclusive and underinclusive. It is overinclusive because it mandates the protection of "low value" speech, including both racist and sexually explicit speech activities.[41] The marketplace metaphor is also underinclusive because it permits the marginalization of speakers who lack the financial or political wherewithal

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35. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). Justice Brennan coined the phrase "marketplace of ideas" in Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965). *See* FISS, *supra* note 31, at 160 n.25.

36. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

37. *See* JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

38. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-34 (1982); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6-11 (1992).

39. *See* Joel Achenbach et al., *Group Awaited Spacecraft Behind Comet*, WASH. POST, Mar. 28, 1997, at A1; Frank Bruni, *Death In a Cult: The Personality*, N.Y. TIMES, Mar. 28, 1997, at A1; Todd S. Purdum, *Death In a Cult: The Scene*, N.Y. TIMES, Mar. 30, 1997, § 1, at 1.

40. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

41. *See* SMOLLA, *supra* note 38, at 6-7; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 17-22, 34-38, 72-73, 249-52 (1993).

to disseminate their views; market forces will drown out voices that deserve to be heard.[42]

Notwithstanding these objections, the marketplace metaphor has proven durable, both at the Supreme Court and within the legal academy.[43] The theory has an intrinsic appeal because it is completely viewpoint neutral: The marketplace metaphor denies government the power to pick and choose which speakers shall be heard and which shall be silenced.[44] In a pluralistic nation populated by persons hailing from all points of the compass, government neutrality regarding the modalities and content of free expression serves the citizenry very well. The marketplace of ideas metaphor generally requires government to avoid making subjective value judgments about either the specific content of speech or the means of communication.[45] Alternative theories of the First Amendment require government officials (whether legislators, executive branch personnel, or judges) to make inherently subjective determinations about the nature of particular speech activity: For instance, is the speech political, and does it properly relate to the project of democratic self-governance?[46]

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42. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410-21 (1986).

43. *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329 (1997); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341, 348 n.11 (1995); Texas v. Johnson, 491 U.S. 397, 418, 429 (1989); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1976); *id.* at 781 (Rehnquist, J., dissenting); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248, 251 (1974); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 45-48 (1984).

44. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (arguing that government has neither the right nor the responsibility to control the free flow of information within the marketplace of ideas, whatever the motivations of the speaker).

45. *See, e.g.*, Cohen v. California, 403 U.S. 15, 22-26 (1971). *See generally* Ronald J. Krotoszynski, Jr., Cohen v. California: *"Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251 (1996).

46. *See* POST, *supra* note 26, at 272-89 (arguing that "collectivist" theories of freedom of expression, including the Meiklejohn theory, "impl[y] managerial control" and, at least to some degree also entail the "discard [of] our commitment to democracy"); Kozinski & Banner, *supra* note 44, at 631-34, 651-53 (arguing that the problems associated with the subjectivity inherent in non-market based approaches to protecting freedom of speech cannot be overcome and that a unitary theory of the First Amendment would avoid these difficulties); Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 932-33 (1990) (noting the various definitional difficulties associated with Meiklejohn theory of the First Amendmcnt).

To be sure, definitional difficulties haunt the marketplace metaphor. Is flag burning speech or conduct?[47] Does nude dancing come within the protection of the First Amendment?[48] Should commercial speech enjoy the same First Amendment protection as non-commercial speech?[49] The resolution of these questions involves the exercise of judgment, which necessarily includes an element of subjectivity.[50] Even if one makes this concession, however, the marketplace metaphor offers a powerful and internally coherent account of the First Amendment and its role in facilitating the free exchange of ideas and information.[51]

B. Enhancing Democracy

Alexander Meiklejohn forcefully articulated the primary alternative account of the First Amendment.[52] In his view, the free speech guarantee of the First Amendment exists principally to facilitate democratic self-governance. Invoking the metaphor of the town hall, Meiklejohn argued that the First Amendment required not that all opinions

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47. *Compare* Texas v. Johnson, 491 U.S. 397, 403-10 (1989) (holding a Texas flag desecration statute unconstitutional on First Amendment grounds, at least as applied to a political protest at which the protestors burned a United States flag) *with* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (upholding a statutory prohibition against the destruction of Selective Service registration certificates on the theory that the statutory prohibition against destroying the certificates was totally unrelated to the suppression of a particular viewpoint and was necessary to facilitate administration of the Selective Service system).

48. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

49. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

50. *See* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 333-35, 342-46 (1995).

51. *See* Reno v. ACLU, 117 S. Ct. 2329, 2351 (1997) (invoking the marketplace metaphor); *44 Liquormart, Inc.*, 517 U.S. at 495-98, 503-04 (applying the marketplace metaphor to protect alcohol advertising); *id.* at 518-23 (Thomas, J., concurring in part and concurring in the judgment) (embracing marketplace metaphor and arguing for equal treatment of all speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-65 (1976) (invoking and applying the marketplace metaphor to justify affording commercial speech significant First Amendment protection); SMOLLA, *supra* note 38, at 6-8, 236-39 (describing merits of a market-based system of speech regulation and noting consanguinity of such an approach with a free market economy); Kozinski & Banner, *supra* note 44, at 651-53 (applying the marketplace metaphor to support an argument in favor of treating commercial speech no less favorably than non-commercial speech).

52. *See* MEIKLEJOHN, *supra* note 23; ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) [hereinafter MEIKLEJOHN, POLITICAL FREEDOM]; Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245.

be heard, but rather "that everything worth saying shall be said."[53] Meiklejohn's theory of the First Amendment has attracted a distinguished following of legal scholars, including Professors Harry Kalven, Owen Fiss, and Cass Sunstein.[54]

Meiklejohn's theory of the First Amendment tolerates government action aimed at ensuring that "everything worth saying" gets said. For example, if concentrations of wealth or limited access to the electronic media muzzled important voices within the community, the government could adopt measures aimed at leveling the playing field, including limitations on the use of wealth to disseminate a particular idea or advocate the election of a particular candidate.[55] Likewise, government could adopt regulations aimed at enhancing the relative voice of minorities within the community to ensure that all relevant viewpoints are heard and considered.[56]

The Meiklejohn theory of the First Amendment emphasizes Justice Brandeis's linkage of the First Amendment to free and open democratic deliberation in his concurring opinion in *Whitney v. California*.[57] Unlike Holmes, Brandeis espoused a functional view of free speech:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them,

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53. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 52, at 26.

54. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 15-26 (1996) [hereinafter FISS, IRONY]; FISS, *supra* note 31, at 83-87, 117-20; HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 150-78 (Jamie Kalven ed., 1988); SUNSTEIN, *supra* note 41, at 28, 34-43, 48-51, 121-29; Kalven, *supra* note 30, at 207-13, 221 & n.125; *cf.* POST, *supra* note 26, at 278-89 (rejecting both Meiklejohn and his contemporary followers because so-called "collectivist" theories of free expression grossly overestimate the abilities of government to establish truly viewpoint neutral, non-culturally contingent speech regulations and faulting the Meiklejohn camp for disregarding the value of individual autonomy, which traditional free speech theories greatly facilitate).

55. *Cf.* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (striking down state-imposed restrictions on the use of corporate monies to influence the outcome of elections); Buckley v. Valeo, 424 U.S. 1 (1976) (striking down federal spending limits on independent expenditures to influence the outcome of elections for federal office).

56. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-91 (1969); Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373 (1993).

57. 274 U.S. 357 (1927).

> discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[58]

For Brandeis, "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies" and "the fitting remedy for evil counsels is good ones."[59] In Justice Brandeis's view, freedom of speech facilitates democratic self-government by generating open discussion of matters of public concern.[60]

Under the Brandeis approach, the deliberative process is a means toward the end of effective self-government. Accordingly, bad ideas or proposals should receive a full and free airing unless they present an immediate and palpable threat to the community. As Brandeis puts it, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[61]

This instrumentalist view of freedom of speech differs significantly from the Holmesian marketplace paradigm.[62] For Holmes, free speech is an end in itself, not a means to some other good.[63] Although Holmes's approach ostensibly seeks truth, "truth" in the Holmesian tradition is socially constructed by operation of the market; hence, if Marxist socialism proves sufficiently persuasive to enough voters, its

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58. *Id.* at 375 (Brandeis, J., concurring).

59. *Id.*

60. *See id.* at 377:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

See also De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937):

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

61. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

62. As Professor Cass Sunstein has noted, "[i]n Brandeis' conception, free speech is emphatically 'a means' insofar as it is connected to the achievement of a certain conception of democratic government." SUNSTEIN, *supra* note 41, at 27-28.

63. *See* Ahrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

tenets must be true.[64] In addition, socially constructed truth is valid only within a community that shares a common set of premises. Thus, for members of the Heaven's Gate cult, the Hale-Bopp Comet represented an intergalactic taxi cab—although the general population did not concur in this assessment of the available data.

Under the Holmesian approach, the First Amendment requires tolerance of speech activity literally "fraught with death" absent a clear and present danger of serious harm, harm so grave that "an immediate check is required to save the country."[65] To the extent that Holmes endorsed a functional role for free speech, it is the relation of free speech to the search for truth that is paramount, not the relation of free speech to good government.[66]

Although the primary exponents of the Meiklejohn theory of the First Amendment tend to be Civic Republicans (like Professor Cass Sunstein) or traditional liberals (like Professor Owen Fiss), the theory has attracted an eclectic following. For example, former Judge (and then-Professor) Robert Bork embraced Meiklejohn's argument that the First Amendment should protect only political speech.[67] Needless to say, Bork is far from liberal in his views.[68]

The principal attraction of Meiklejohn's theory is that it provides a plausible rationale for protecting speech over other important values, such as equality. When the Ku Klux Klan marches down the streets carrying banners proclaiming racist, sexist, or homophobic messages, the community's commitment to equality suffers.[69] The Meiklejohn theory

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64. *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

65. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

66. Professor Cass Sunstein has noted the dichotomy between the Holmes and Brandeis approaches to freedom of expression and endorsed Justice Brandeis's point of view because it is consistent with the Madisonian Civic Republican tradition. *See* SUNSTEIN, *supra* note 41, at 23-28.

67. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); *see also* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 98-102, 146-50 (1996) [hereinafter BORK, SLOUCHING TOWARDS GOMORRAH]; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 333-36 (1990) [hereinafter BORK, THE TEMPTING OF AMERICA].

68. *See* BORK, SLOUCHING TOWARDS GOMORRAH, *supra* note 67, at 193-225 (attacking modern feminism as anti-family and elitist); *id.* at 123-29 (denouncing modern culture and art as violent, scatological, and obscene); BORK, THE TEMPTING OF AMERICA, *supra* note 67, at 110-26 (decrying substantive due process as a form of unjustifiable judicial activism).

69. In this regard, consider Title VII, 42 U.S.C. § 2000e-2, which prohibits discrimination in the workplace. The federal courts have held that Title VII prohibits the creation or maintenance of a "hostile environment" in the workplace. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981);

supports the Klan's right to speak not on a libertarian basis (i.e., people have the right to be racists if they so choose), but rests instead on the notion that such activity assists the community in deciding who should govern and what rules should apply to the community (i.e., given the existence of these racist viewpoints, perhaps affirmative action remains a necessary social policy).

The Meiklejohn theory both recognizes and celebrates the inexorable connection between a functioning democracy and freedom of expression. As Professor Robert Reich explained in his recent memoir documenting his service as Secretary of Labor, representative government requires an active and ongoing debate to legitimate the public policy choices advanced by those holding office:

> Democracy requires deliberation and discussion. It entails public inquiry and discovery. Citizens need to be actively engaged. Political leaders must offer visions of the future and arguments to support the visions, and then must listen carefully for the response. A health-care plan devised by Plato's philosopher-king won't wash.[70]

The Meiklejohn theory is both optimistic (for it posits that meaningful self-government is possible) and pragmatic (for it acknowledges that achieving and maintaining a participatory democracy will not be an easy task).

The Meiklejohn theory's most significant drawback is its inability to provide a cogent rationale for protecting speech unrelated to politics or self-governance.[71] Meiklejohn himself argued that scientific and artistic

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Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971); *see also* Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1362-63. This obviously has an impact on the ability of individuals in a given workplace to express themselves; automobile mechanics might wish to festoon their workplace with sexually explicit photographs and muse about the relative desirability of sexual relations with their female colleagues. If this conduct were sufficiently pervasive, it could give rise to liability under Title VII. Thus, Title VII constitutes a kind of content-based, government-imposed restriction on free speech in the nation's workplaces. Nevertheless, it is quite doubtful that the Supreme Court would sustain a First Amendment challenge to Title VII. We have decided as a society not to tolerate unfettered freedom of speech in the workplace. Logically, we could value equality above free expression in other contexts, such as college and university campuses. *See* CATHERINE A. MACKINNON, ONLY WORDS (1993); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994).

70. ROBERT B. REICH, LOCKED IN THE CABINET 108 (1998).

71. *See* Stern, *supra* note 46, at 933. Professor Robert Post has suggested that another significant drawback of the Meiklejohn theory is a failure to appreciate the important role free speech plays in facilitating individual autonomy. *See* POST, *supra* note

expression is necessary to enable people to make wise political decisions and therefore should be deemed protected.[72] However, the arts and sciences themselves constitute positive social goods and ought to be (and are) valued for themselves.[73]

C. The Supreme Court's Choice

Despite the ardor of the Meiklejohn adherents and the cogency of their arguments, it is rather plain that the Supreme Court has not accepted their vision of the First Amendment. Take, for example, the case of dial-a-porn services. It is difficult to fathom how the dial-a-porn industry or its services further democratic self-governance. On the contrary, one could make powerful arguments that pornography—regardless of its precise form—debases society and inhibits the creation of a polity capable of rational self-governance.[74]

Nevertheless, in *Sable Communications v. FCC*,[75] the Supreme Court held that dial-a-porn services enjoy significant First Amendment protection.[76] This result is inconsistent with the Meiklejohn theory of the First Amendment, whether explicated by Fiss, Sunstein, Bork, or Meiklejohn himself.[77] On the other hand, the result comports nicely with the Holmesian marketplace of ideas model. If citizens wish to talk dirty to each other over the telephone, so be it; the government cannot prohibit such communications, however meager the civic value of such speech activity.[78]

26, at 274-76, 282-86, 288-89.

72. *See* Meiklejohn, *supra* note 52, at 256-57.

73. *See* U.S. CONST. art. I, § 8, cl. 8 (conferring upon Congress the power to encourage "science and useful arts").

74. *See* BORK, THE TEMPTING OF AMERICA, *supra* note 67, at 128; ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1989); MACKINNON, *supra* note 69, at 71-110; SUNSTEIN, *supra* note 41, at 210-26; Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985).

75. 492 U.S. 115 (1989).

76. *See id.* at 126-31. One might cynically conclude from this result that, although there may not be a constitutional right to engage in consensual sodomy, citizens of the United States do enjoy a First Amendment right to masturbate. *Compare* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the First Amendment protects the viewing of pornographic materials within the confines of a person's home), *with* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that the substantive aspect of the Due Process Clause does not protect consensual sodomy between adults).

77. *See, e.g.*, BORK, THE TEMPTING OF AMERICA, *supra* note 67, at 128; FISS, *supra* note 31, at 83-87; MEIKLEJOHN, *supra* note 23, at 22-27; SUNSTEIN, *supra* note 41, at 215-26.

78. *See* REDISH, *supra* note 43, at 68-76, 259-64; VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT, *supra* note 6, at 21-22, 40-49.

The Meiklejohn theory of the First Amendment is also difficult to square with the result in *44 Liquormart, Inc. v. Rhode Island*.[79] In *44 Liquormart*, the Supreme Court held that the First Amendment protected the right of liquor stores to advertise their prices, notwithstanding Rhode Island's objection that price-based advertising would tend to promote active price competition among retailers, result in lower prices to consumers, and thereby increase the consumption of alcohol among its citizens.[80]

Rhode Island asserted, reasonably enough, that the social ills associated with the consumption of alcohol justified restrictions on alcohol advertising.[81] Under the Meiklejohn theory of the First Amendment, Rhode Island should have prevailed: Advertising alcohol does nothing to enrich civic life, encourage active citizenship, or otherwise improve the overall state of well-being of the community. On the contrary, alcohol advertising, like cigarette advertising, is likely to impose significant social costs on the community. Advertising of this sort tends to generate increased consumption of alcohol, both because of increased public awareness of its availability and lower prices.[82]

In this respect, the Supreme Court's decision in *Posadas de Puerto Rico Ass'n. v. Tourism Co.*,[83] which sustained Puerto Rico's ban on casino advertising, better comported with the Meiklejohn theory of the First Amendment. Speech that does not directly or indirectly benefit the

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79. 517 U.S. 484 (1996).

80. *See id.* at 489, 506-16.

81. *See id.* at 502-08.

82. *See* 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7-8 (1st Cir. 1994), *rev'd*, 517 U.S. 484 (1996); Dunagin v. City of Oxford, 718 F.2d 738, 747-51 & 748 n.8 (5th Cir. 1983) (en banc). *See generally* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). I suppose one could argue that virtuous Civic Republican citizens might use the savings realized through lower alcohol prices resulting from active price competition to underwrite political causes they support or perhaps to go to an ennobling form of entertainment, such as the opera or ballet. If one could make this argument with a straight face, *44 Liquormart* could be brought within the Meiklejohn vision of the First Amendment. Of course, it seems far more likely that most consumers will simply buy more alcohol, or cigarettes, or perhaps both. Indeed, advertising not only promotes competition between suppliers of a good or service, but also promotes consumption of the good or service being advertised. *See* Penn Advertising, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1321, 1325-26 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575 (1996), *modified*, 101 F.3d 332 (4th Cir. 1996), *and cert. denied* 117 S. Ct. 1569 (1997); Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1309-10, 1314-17 (4th Cir. 1995); *Dunagin*, 718 F.2d at 748 n.8; *see also* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (to be codified at 26 C.F.R. § 801).

83. 478 U.S. 328 (1986).

community by facilitating its ability to oversee the government is outside the First Amendment's free speech guarantee.

Notwithstanding its earlier precedent in *Posadas*, the Supreme Court struck down the Rhode Island prohibition on price advertising, noting that Rhode Island could directly regulate the sale of alcohol but could not regulate speech associated with the sale of alcohol: "[A] state legislature does not have the broad discretion to suppress truthful, nonmisleading information for the paternalistic purposes that the *Posadas* majority was willing to tolerate."[84] Speaking for a plurality of four justices, Justice Stevens emphasized that "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends."[85] This approach to protecting commercial speech incorporates and reflects the Holmesian speech ethic.

All of this is not to say that the Meiklejohn theory of the First Amendment has failed to influence the Supreme Court. On the contrary, the Supreme Court has embraced Meiklejohn's assertion that freedom of speech is intertwined inextricably with the project of democratic self-government; thus, the Supreme Court has repeatedly noted that political speech is at the "center" or "core" of the First Amendment. In *New York Times Co. v. Sullivan*, for example, Justice Brennan's opinion for the majority essentially embraced Meiklejohn's argument that freedom to criticize the government is crucial to the proper functioning of a democracy.[86] Similarly, in cases involving "low value" speech, such as nude dancing or dial-a-porn, the Supreme Court has carefully distinguished marginal speech activities that lie at the "outer perimeters of the First Amendment"[87] from political, artistic, and scientific speech.

The Supreme Court's approach essentially adopts both the Holmesian and Meiklejohn theories of the First Amendment. The Supreme Court has embraced both the marketplace metaphor and the notion that political

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84. *44 Liquormart*, 517 U.S. at 510.

85. *Id.* at 512.

86. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964); KALVEN, *supra* note 54, at 162-63; Kalven, *supra* note 30, at 208-10. Justice Brennan was more explicit in his later opinions and writings. *See* Board of Educ. v. Pico, 457 U.S. 853, 867 n.20 (1982) (plurality opinion); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Other members of the Supreme Court have also invoked Meiklejohn's theory from time-to-time. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 n.3 (1980); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973).

87. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991); *see also* Sable Communications v. FCC, 492 U.S. 115, 128 (1989); First Nat'l Bank v. Bellotti, 435 U.S. 765, 777-78 (1978); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975); California v. LaRue, 409 U.S. 109, 118 (1972).

speech is a special concern of the First Amendment. Its decisions also have recognized that the First Amendment protects individual autonomy, even when individuals or corporations elect to exercise that autonomy in ways inconsistent with the best interests of the community (or, for that matter, their own best interests). Cases like *Stanley v. Georgia*,[88] *Sable Communications*,[89] and 44 *Liquormart*[90] reflect the Supreme Court's willingness to vindicate individual liberty, even at the expense of the community. In this way, it has maintained the Holmesian tradition of liberty.

At the same time, the Supreme Court has signalled its basic agreement with Meiklejohn's larger thesis. While embracing the marketplace metaphor, the Supreme Court has endorsed the proposition that political speech and speech that otherwise facilitates democratic self-governance enjoys the most robust First Amendment protection; a degree of protection more demanding than that applied to other forms of speech activity. Unlike Judge Alex Kozinski and others in the law and economics movement,[91] the Justices have rejected the argument that all speech is of equal value for First Amendment purposes. Under a pure market-based approach to the First Amendment, speech should be treated the same regardless of its content. Its success or failure would be a function of its ability to persuade. A flyer for a Macy's Labor Day sale should receive no more, and no less, First Amendment protection than a flyer for a candidate for political office.[92] To date, however, the Supreme Court has maintained a dichotomy between political speech and other kinds of speech activity.[93]

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88. 394 U.S. 557 (1969) (holding that the First Amendment, in conjunction with other provisions of the Bill of Rights, protects the possession and display of obscene materials for non-commercial purpose within a private residence).

89. 492 U.S. 115 (holding unconstitutional on First Amendment grounds a statutory provision criminalizing the distribution of certain indecent communications over telephone systems).

90. 517 U.S. 484 (holding unconstitutional on First Amendment grounds a state law prohibiting price advertising for alcoholic beverages).

91. *See, e.g.*, R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 32-33 (1977); R.H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974); Kozinski & Banner, *supra* note 44.

92. *See* Kozinski & Banner, *supra* note 44, at 628; Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216 (1983); *cf.* William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1638-48 (1996) (arguing that political speech deserves a higher degree of First Amendment protection than commercial speech).

93. *See* Van Alstyne, *supra* note 92, at 1638-40, 1654-57.

There is, to be sure, a trend toward the marketplace metaphor in contemporary Supreme Court cases. Increasingly, the Holmesian view seems to be in ascendancy.[94] But the defenders of the Meiklejohn theory have not ceded the field just yet.[95]

As Professor Sunstein has noted, the Holmesian and Meiklejohn theories of free expression reflect a genuine dichotomy: Results in concrete cases will differ depending on which theory one embraces.[96] The Supreme Court's failure to make a firm choice may reflect an ambivalence about the proper role of freedom of speech in a pluralistic society. At the same time, an examination of the Japanese Supreme Court's free speech case law shows that a society's choice between the Holmesian and Meiklejohnian visions of the First Amendment may well be a function of its sense of community and shared values.

Professor William Van Alstyne has suggested the metaphor of a system of concentric circles to describe the First Amendment, with political speech at its core and indecent speech at its periphery.[97] This metaphor aptly captures the course the Supreme Court has charted in its decisions: The First Amendment is concerned principally with political speech, but it also provides protection to speech unrelated to democratic self-governance.

D. Setting the Stage for a Comparative Adventure

An examination of the case law arising under Article 21, the Japanese analog to the Free Speech Clause of the First Amendment, should shed light on the relative strength of the Holmesian and Meiklejohnian accounts of freedom of speech. Moreover, this exercise should lead to a better understanding of the implicit values reflected in the United States Supreme Court's embrace of both theories. It might even suggest a proverbial "third way," an approach to freedom of speech that rejects both accounts in favor of some other set of values.

Socrates admonished that an unexamined life is not worth living.[98] So too, a circular jurisprudence that offers up its own conclusions as

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94. *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329 (1997); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). *See generally* Van Alstyne, *supra* note 92, at 1638-48.

95. *See* FISS, IRONY, *supra* note 54, at 1-26; SUNSTEIN, *supra* note 41, at 17-51, 241-52.

96. *See* SUNSTEIN, *supra* note 41, at 23-28.

97. *See* VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT, *supra* note 6, at 40-49.

98. *See* PLATO, *The Apology*, *in* FIVE DIALOGUES 23, at 41, para. 38 (G.M.A. Grube trans., 1981).

justifications is intellectually indefensible. With the onslaught from both the left and the right,[99] traditional free speech advocates in the United States must be prepared to make their case persuasively within the academy, to the courts, and to the citizenry.[100] In the end, advocates of strong First Amendment protection for free expression will prevail only if we can offer compelling rationales for elevating speech over other important (constitutional) values, such as equality or comity within the community. Consideration of free speech traditions in industrial democracies that have self-consciously embraced freedom of speech as a core social value will better prepare those who support freedom of speech to meet both the present challenges and those that lie ahead.

Before embarking on an examination of the Japanese approach to freedom of expression, a caveat or two about the limitations of comparative legal scholarship is in order. Every culture—including legal cultures—has its own *patois*, its own unique cadence. Those who grow up within the culture learn these shorthands and master the iconography of the legal landscape.[101] On the other hand, those from outside a

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99. *See, e.g.*, BORK, THE TEMPTING OF AMERICA, *supra* note 67, at 333-36 (arguing that the Supreme Court's free speech case law is grossly overprotective of speech unworthy of even minimal protection); MACKINNON, *supra* note 69, at 71-110 (arguing that a genuine commitment to the principle of equality precludes the protection of sexist and racist speech); SUNSTEIN, *supra* note 41, at 241-52 (arguing that government should be permitted to enact viewpoint neutral laws aimed at improving the social and political culture of the United States).

100. Notwithstanding the current vogue of balancing away the intrinsic value of freedom of expression, a number of distinguished scholars have continued to advocate broad protection for expressive activity, even expressive activity that is offensive or hurtful to particular segments of the community. *See, e.g.*, REDISH, *supra* note 43, at 259-64; SCHAUER, *supra* note 38, at 154-63, 184-88; SMOLLA, *supra* note 38, at 15-17, 43-65, 330-42; NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 14-15, 244-50 (1995); VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT, *supra* note 6, at 40-49.

101. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 305-321, 328-34, 338-55 (1980) [hereinafter FISH, TEXT IN THIS CLASS] (arguing that words derive their meaning within interpretative communities and that this meaning inheres not from any objective connection between words and things or ideas, but rather from a set of shared assumptions that confer meaning on symbols); *see also* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 120-60 (1989) [hereinafter FISH, DOING WHAT COMES NATURALLY]. For analysis and criticism of Professor Fish's theories, see Peter Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815, 830-37 (1990); Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 42-45 (1987).

particular legal culture do not possess this information; in a very real sense, they cannot effectively "talk the talk."[102]

Accordingly, any comparative law exercise comes with the inherent danger of reading culturally-contingent meaning into legal terms of art. For example, if a foreign court uses the term "consideration" to describe a necessary prerequisite to the formation of a binding contract, an American lawyer is apt to read into that term a host of rules and ideas learned in the first semester of law school. Moreover, this conferral of specific meaning on an otherwise general term largely occurs subconsciously: The reader approaches the text and incorporates meaning reflexively, without, as it were, skipping a beat.[103] Of course, in a comparative context this assumed meaning may not—indeed probably does not—apply.

If it were possible to remove one's cultural blinders at will, these difficulties could be overcome quite easily.[104] Sadly, cultural blinders are not like sunglasses: One cannot simply remove them and store them in a convenient case. Instead, the comparativist must attempt to avoid doing that which comes naturally, assuming the universality of culturally-contingent meaning.

Notwithstanding the potential pitfalls, it is possible to examine profitably a foreign legal system. The trick is to discern meaning by reference to the foreign texts themselves; one must double-check unstated assumptions by reference to other materials from the relevant legal culture. In this fashion, one can avoid overreading, or underreading, foreign legal texts.[105]

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102. By way of example, consider the culturally-specific nature of various speech idioms, e.g., "We had a ball last night." Taken literally, this sentence could convey any number of meanings: (1) the group possessed a round, spherical object of some sort, but lost it, (2) the group put on an elaborate dance, (3) it could constitute a kind of scatological reference, (4) it could mean something else. As it happens, most users of American English would select option four (4); the sentence means that the group had a pleasant evening, without any reference to precisely what the group did. Legal language is no different and is, therefore, culturally contingent. *See* Dan F. Henderson, *Japanese Law in English: Reflections on Translation*, 6 J. JAPANESE STUD. 117 (1980) (noting that problems of comparative legal studies include not only difficulties of connotation and denotation of particular terms, but also encompass systemic difficulties associated with differing views about the nature of precedent and the proper operation of the rule of law).

103. *See* FISH, DOING WHAT COMES NATURALLY, *supra* note 101, at ix, 436-67; FISH, TEXT IN THIS CLASS, *supra* note 101, at 13-17; *see also* Stanley Fish, *Still Wrong After All These Years*, 6 LAW & PHIL. 401, 405-07 (1987); Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 562 (1982).

104. *See* BENEDICT, *supra* note 18, at 13-16; *see also* Daniel H. Foote, *The Roles of Comparative Law*, 73 WASH. L. REV. 25 (1998).

105. I would be seriously negligent if, in this context, I failed to note the difficulties inherent in translation. With respect to Japanese legal materials, those without

II. AN INTRODUCTION TO JAPANESE CONSTITUTIONAL LAW

Although there are a number of surprising congruities between the free speech jurisprudence of the United States and Japanese Supreme Courts, the Japanese Supreme Court has charted its own unique approach to the vindication of the Japanese Constitution's guarantee of freedom of expression, an approach that differs significantly in a number of material respects from that of the United States. As demonstrated more fully below, these differences probably have much to do with differences in institutional roles and perceived judicial competence. That said, there is a difference in the scope of constitutionally protected free expression, in part because of differences in core values about the importance and role of free expression in a democratic polity. The free speech decisions of the Supreme Court of Japan are much more consistent with Meiklejohn's vision of freedom of expression than comparable decisions of the United States Supreme Court. In fact, the Supreme Court of Japan has firmly and consistently demanded a clear nexus between expressive activity and the project of democratic self-government before affording speech activity constitutional protection under Article 21.[106]

Although the Japanese Supreme Court generally has proven unwilling to interpose the constitutional guarantee of freedom of expression over legislative or executive acts,[107] it has exhibited a strong and abiding

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reading ability in Japanese (whether in Konji or romanized form) must rely upon the copious English-language translations of Japanese legal materials. Obviously, reading foreign law in translation simply compounds the difficulties associated with understanding the meaning of the legal text. *See* Henderson, *supra* note 102, at 140-51. With respect to this article, I have enjoyed the good fortune of having the benefit of assistance from some of the foremost American experts in Japanese law: Professor John Haley, Professor Dan Foote, and Dean Percy Luney. Hopefully, with such invaluable assistance and reasonable diligence on my own part, I have managed to avoid the worst of the dangers associated with attempting to understand foreign legal concepts in translation.

106. *See infra* notes 154-288 and accompanying text.

107. This observation does not hold true for the lower Japanese courts. Japanese district and intermediate appellate courts have struck down both local and federal regulations based on Article 21's guarantee of freedom of expression. *See, e.g.*, Judgment on the Enshrinement of a Dead SDF Officer to Gokoku Shrine, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 25*, at 1 (General Secretariat, Supreme Court of Japan, 1991) (decided June 1, 1988) (reversing district and high eourt rulings that Shinto enshrinement of a dead SDF officer violated Article 20's prohibition of mandatory religious observances); Judgment Upon Case of Constitutionality on Customs Inspection, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 20*, at i (General Secretariat, Supreme Court of Japan, 1985) (decided Dec. 12, 1984), 38 MINSHŪ 12, at 1308, *reprinted in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 at 453 (1996) [hereinafter Customs Inspection Case]

appreciation for the importance of free speech in a participatory democracy. Moreover, the Supreme Court consistently has read statutory and administrative restrictions on freedom of expression narrowly in order to minimize their impact.[108] At the same time, government authorities have not attempted to censor speech activities on any wide-spread basis. Indeed, Japanese political parties offer voters a much broader political spectrum from which to choose than United States citizens presently enjoy[109] and Japanese elections are usually highly competitive.[110]

(reporting and later reversing district court's holding that certain customs inspection laws violated freedom of speech); Judgment Upon Case of the So-Called "Popolo Theatrical Group Case," *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 8*, at 1 (General Secretariat, Supreme Court of Japan, 1965) (decided May 22, 1963) (reversing district court ruling that academic freedom justified students' decision to beat undercover police who had infiltrated their organization); Judgment Upon Case of the Metropolitan Ordinance, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 5*, at 1-2 (General Secretariat, Supreme Court of Japan, 1962) (decided July 20, 1960) (reversing the initial decision of the district court striking down Tokyo's mass demonstration ordinance); *see also* LAWRENCE WARD BEER, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY 377-78 (1984) (reporting the split among the lower courts regarding the constitutionality of various provisions of the Election Law's speech restrictions). There are at least two possible explanations for this phenomenon. Because the lower courts do not have the last word, they may feel less of an institutional constraint on exercising the power of judicial review. *See, e.g.*, Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997); Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997). There are also age differences at work. Supreme Court Justices are usually in their sixties when appointed, whereas lower court judges are often appointed at a considerably younger age. *See* Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, *in* JAPANESE CONSTITUTIONAL LAW, *supra* note 13, at 123, 129-37. Thus, "youthful exuberance" may also help to account for the Japanese lower courts' relatively bold approach to constitutional adjudication.

108. *See, e.g.*, Customs Inspections Case, *supra* note 107, at 6-10 (reading an authorization to prohibit the import of materials that injure "the public morals" to restrict only obscene materials); Judgment Upon Case of Defamation, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 11*, at 2 (General Secretariat, Supreme Court of Japan, 1970) (decided June 25, 1969) (interpreting broadly an exemption to liability for defamatory statements regarding matters of public concern when such statements, although false, are made without reckless disregard for truth); Judgment Upon Case of the Metropolitan Ordinance, *supra* note 107, at 4 (reading Tokyo ordinance to require issuance of permission for mass demonstrations absent a clear and present danger of imminent lawlessness).

109. As George Wallace once wryly remarked in his 1968 independent presidential quest, at least arguably "there ain't a dime's worth of difference" between Democrats and Republicans. JOHN H. ALDRICH, WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 11 (1995). To a large extent, this is true. *See* REICH, *supra* note 70, at 59-65, 118-19, 146-48 (describing the Clinton Administration's

To the extent freedom of speech faces serious threats in Japan, these threats are much more a function of *privately* imposed constraints than of official government repression or censorship.[111] In this regard, the Japanese experience offers a cautionary tale for the United States. It is not always the government that is the enemy of freedom of expression;[112] corporations, churches, and communities can be far more

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decision to pursue policies endorsed by Wall Street investment firms rather than the human capital and physical infrastructure investment programs set forth by then-candidate Bill Clinton during the 1992 election campaign). Consider, for example, the 1996 presidential election. The policy differences between President Clinton and Senator Dole were not pronounced; both endorsed fiscal responsibility and sustainable growth as the paramount national objectives. Notwithstanding Ross Perot's "success" in 1992 and with the possible exception of Theodore Roosevelt's "Bull Moose" party in 1912, third parties have not enjoyed significant support in the United States for over one hundred years. By way of contrast, "marginal" parties in Japan, like the Communists, regularly elect members to the Diet. *See* HITOSHI ABE ET AL., THE GOVERNMENT AND POLITICS OF JAPAN 115-38 (James W. White trans. 1994); GERALD L. CURTIS, THE JAPANESE WAY OF POLITICS 18-44, 174 (1988); *see also* T.R. Reid, *Maverick Takes Over in Japan*, WASH. POST, Aug. 7, 1993, at A14. On the other hand, the Liberal Democratic Party's historic dominance in the Diet, coupled with a parliamentary system of government, significantly mutes the real-world impact of Japan's multi-party electoral system. *See* ABE ET AL., *supra*, at 115-71, 182-89; Maki, *supra* note 13, at 44-46; Okudaira, *supra* note 13, at 29-31, 33; *see also* NORMA FIELD, IN THE REALM OF A DYING EMPEROR 27 (1993) ("Thus, the great Socialist victory in the upper house elections of July 1989 created a painfully hopeful moment when it almost seemed as if one-party rule, which had already blanketed four decades, did not have to stretch into infinity.").

110. *See* J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 740-41 (1994).

111. As one commentator has put it, "[t]he status of the freedom of expression in Japan may be explained by the statement that 'Japan is politically free, but socially not free.'" Okudaira, *supra* note 13, at 10; *see also* HALEY, *supra* note 16, at 183-86; James J. Nelson, *Culture, Commerce, and the Constitution: Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry*, 15 UCLA PAC. BASIN L.J. 45 (1996). Professor Lawrence Beer, a noted expert on freedom of expression in Japan, has offered similar observations: "In Japan . . . homogeneity, group orientation, social hierarchy, quasi-parental-filial relationships (*oyabun-kobun*), reciprocal dependency patterns (*amae*), and ethnic separatism join the civil law, common law, and conciliation traditions to affect freedom and restraint of expression." Beer, *Freedom of Expression*, *supra* note 21, at 224; *see also* John O. Haley, *Introduction: Legal vs. Social Controls*, 17 LAW IN JAPAN 1, 3-5 (1984).

112. *See* Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1, 2-3, 14-20 (1992) (arguing that the Supreme Court's public forum decisions fail to provide sufficient public space for speech activities by those who lack access to private property or capital); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787-89, 793-94 (1987) [hereinafter Fiss, *Why the State*] (noting the ability of wealthy and powerful interests to limit meaningful public debate and arguing in favor of state efforts to ameliorate these untoward effects in order to ensure full and robust public debate on matters of community concern); *see also* THE JAPANESE LEGAL SYSTEM, *supra* note 16,

effective at stifling dissent than bureaucrats and misguided police chiefs.[113]

A. The Constitutional Text

As in the United States, freedom of expression in Japan enjoys constitutional protection. Article 21 of the Japanese Constitution guarantees to all citizens "[f]reedom of assembly and association as well as speech, press and all other forms of expression."[114] In addition, it provides that "[n]o censorship shall be maintained, nor shall the secrecy of any means of communication be violated."[115]

Like the United States's First Amendment, the right to freedom of expression is unqualified as written; Article 21 does not invite the judiciary to balance the right of freedom of expression against other public interests. The textually unqualified nature of the right notwithstanding, the Supreme Court of Japan routinely has balanced the individual's interest in freedom of expression against other private interests[116] and public interests.[117] The Supreme Court of the United States has, of course, also engaged in similar balancing exercises.[118]

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at 758 (noting that in Japan "every motion picture" is subject to review by a "Committee for the Maintenance of Ethics in Motion Pictures"and explaining that this system of film censorship "is maintained by motion picture companies without any government participation").

113. *See* FIELD, *supra* note 109, at 44-47, 132-36 (describing the informal social pressure placed on dissidents in Japanese society); FISS, IRONY, *supra* note 54, at 1-4, 15-26 (describing the dangers that concentrations of wealth and media power can pose to deliberative democracy); EDWIN M. REINGOLD, CHRYSANTHEMUMS AND THORNS: THE UNTOLD STORY OF MODERN JAPAN 162-63 (1992) (describing the censorial efforts of the Burakumin Liberation League). *See generally* Bill Carter, *TV Sponsors Heed Viewers Who Find Shows Too Racy*, N.Y. TIMES, Apr. 23, 1989, § 1, at 1; Allen R. Myerson, *Southern Baptist Convention Calls for Boycott of Disney*, N.Y. TIMES, June 19, 1997, at A18; Allen R. Myerson, *Baptists Boycott the Magic Kingdom*, N.Y. TIMES, June 22, 1997, § 4, at 2; Bruce Selcraig, *Reverend Wildmon's War on the Arts*, N.Y. TIMES, Sept. 2, 1990, § 6, at 22.

114. KENPŌ, art. 21, para. 1.

115. *Id.* at art. 21, para. 2.

116. *See, e.g.*, Judgment Upon Case of Defamation, *supra* note 108 (balancing interest in freedom of expression and a free press against private interest in preserving good name and reputation).

117. *See, e.g.*, Customs Inspection Case, *supra* note 107, at 8 (balancing right to freedom of expression against community interest in "sexual order and maintenance of a minimum sexual morality").

118. *See* Meiklejohn, *supra* note 52, at 251-52; *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2438-44 (1996) (discussing the uses and abuses of balancing in the Supreme Court's First Amendment strict scrutiny analyses).

The Japanese Supreme Court's balancing is, to a large extent, unavoidable. From time to time, rights collide and courts are forced to establish a proper boundary line between competing constitutional interests.[119]

Moreover, the Japanese Constitution invites balancing, although it does not require it. Article 12 provides that "[t]he freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare."[120] This notion of "abuse of rights" establishes a textual justification for weighing the costs of an individual's or group's exercise of a particular right against the relative cost of such exercise to the community as a whole.[121] As in the United States, however, this balancing of interests does not necessarily redound in favor of the state.[122] Indeed, the mandate to balance has proven far less deadly to the protection of constitutional rights in Japan than in Canada, where textually-mandated balancing has led the Canadian Supreme Court to reject speech claims routinely, sometimes in favor of other rights (such as equality) and other times in favor of generalized social interests.[123]

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119. Consider, for example, the right to a fair trial and the right of the press to report on pending cases. *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 611 n.354 (1997).

120. KENPŌ, art. 12; *see* Judgment Upon Case of Translation and Publication of Lady Chatterly's Lover and Article 175 of the Penal Code, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 2*, at 11-12 (General Secretariat, Supreme Court of Japan, 1958) (decided Mar. 13, 1957) [hereinafter Lady Chatterly's Lover] (discussing and applying Article 12); Beer, *Public Welfare*, *supra* note 21, at 207-10 (discussing the operation of Article 12).

121. *See* Judgment Upon Case of the Metropolitan Ordinance, *supra* note 107, at 2-3, 5-6 (invoking Article 12 incident to a balancing analysis that weighed the interest of the general public in using streets and other public spaces for their intended uses against interest of protestors in using such properties for their speech-related activities); *see also* Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 22-29 (1996) (discussing and analyzing Japan's evolving "abuse of rights" doctrines).

122. *See, e.g.*, Japan v. Kanemoto, 396 HANREI JIHŌ 19 (Sup. Ct., Dec. 21, 1964), *reprinted in* HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70, at 242 (1978) (rejecting State's argument that Article 12 balancing justified suppression of allegedly subversive political tracts).

123. *See* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 12-16, 64-70 (1995); MACKINNON, *supra* note 69, at 97-107; STROSSEN, *supra* note 100, at 229-46; *see also* Franklin R. Liss, Comment, *A Mandate to Balance: Judicial Protection of Individual Rights Under the Canadian Charter of Rights and Freedoms*, 41 EMORY L.J. 1281, 1283-92, 1296-1306 (1992).

Significantly, the Japanese Constitution, unlike its American counterpart, directly vests the judiciary with the power of judicial review. "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."[124]

Finally, the Supreme Court of Japan, like the United States Supreme Court, has required a showing of state action as a prerequisite to invoking successfully a constitutional right. Thus, a private company's decision to fire three employees who circulated to their fellow employees communist tracts critical of the company and its policies did not implicate Article 21's guarantee of freedom of speech.[125] Government played no role in the decision, and therefore Article 21 simply did not apply; the dispute was purely a private matter.[126]

B. The Japanese Constitutional Style

Although the Japanese Supreme Court enjoys a textual mandate to protect freedom of expression and a textual right to exercise the power of judicial review, it has never struck down a local, prefectural, or national ordinance or law on free speech grounds.[127] It has, however, recently

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124. KENPŌ, art. 81; *see* Hanreishū, VI, No. 9, at 783 (The Suzuki Decision) (Sup. Ct., Oct. 8, 1952), *reprinted in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, at 362, 363-64 (Ikeda Masaaki et al. trans., 1964); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (discerning a power of judicial review in the system of separated and divided powers created by the United States Constitution).

125. *See* Hanreishū, V, No. 5, at 214 (Sup. Ct., Apr. 4, 1951), *reprinted in* MAKI, *supra* note 124, at 285, 287 (holding that "limitations on such freedoms by obligations freely contracted under special public or private law are unavoidable"); *see also* Judgment on the Enshrinement of a Dead SDF Officer to Gokoku Shrine, *supra* note 107, at 8-11 (rejecting Article 20 claim against state-sponsored religious observances because ostensibly private veterans' association maintained shrine and oversaw Shinto ceremony); *id.* at 18-21 (Nagashima, J., concurring) (arguing that nexus between veterans' association and government officials was too attenuated to attribute Shinto enshrinement ceremony to government).

126. *Cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (holding that a private utility company's decision to terminate services to customer for non-payment of bills did not constitute state action and, therefore, the customer could not claim a deprivation of due process incident to the termination).

127. *See* BEER & ITOH, *supra* note 107, at 49-52; HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES 186 (1989); Itsuo Sonobe, *Human Rights and Constitutional Review in Japan* (Masako Kamiya trans.), *in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 135, 174 n.60 (David M. Beatty ed., 1994). Professor Haley suggests the Japanese Supreme Court's failure to enforce Article 21 through the exercise of judicial review could reflect a dearth of cases rather than a lack of institutional commitment to freedom of expression. *See* Interview with Professor John O. Haley, University of Washington (July 9, 1998). Professor Haley posits that because

signalled that it will not sustain *every* governmental program abridging academic freedom. A panel of the Supreme Court of Japan has held that the Ministry of Education's program of approving textbooks for use in the public schools violates the academic freedom of an author whose works were rejected on purely ideological grounds.[128] Whether this decision reflects a new trend or simply an additional datum on the pre-existing free speech jurisprudential framework remains to be seen. Indeed, given that the Japanese Supreme Court has struck down national legislation only five times in as many decades,[129] something more than a single five-Justice

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instances of the government directly restricting or censoring speech activities are relatively uncommon in Japan, litigation asking the Supreme Court of Japan to enforce Article 21 has been correspondingly infrequent. *See id.* This theory certainly provides a partial explanation for the lack of Supreme Court decisions enforcing Article 21 by striking down legislative or executive actions that burden speech activity. On the other hand, seeking out judicial decisions featuring unqualified rejections of legislative or executive actions might be the wrong inquiry. Many Supreme Court opinions nominally rejecting free speech claims actually feature the judiciary imposing substantial restrictions on the government's discretion to restrict speech activity. *See infra* notes 166-187, 213-222, 391-399 and accompanying text. In such circumstances, the Supreme Court of Japan's technical refusal to find a violation of Article 21 arguably is a matter of semantics rather than substance.

128. *See* Japan v. Ienaga, 51 MINSHŪ 2921-3618 (Sup. Ct., Aug. 29, 1997); Sonni Efron, *Japan's High Court Rules Government May Not Tamper With Truth in Textbooks*, WASH. POST, Aug. 30, 1997, at A28; Nicholas D. Kristof, *Japan Bars Censorship of Atrocities in Texts*, N.Y. TIMES, Aug. 30, 1997, at A4. For additional background on Professor Ienaga's travails in the Japanese court system, see REINGOLD, *supra* note 113, at 54, 56-57 (describing Japanese history textbooks' "whitewashing" of "Japanese colonial depredations in China and Korea, Singapore, and elsewhere"); Ginko Kobayashiu et al., *Changing Screening System*, DAILY YOMIURI (Tokyo), Sept. 15, 1997, at 16; Sayuri Saito, *Reconsidering History Education*, DAILY YOMIURI (Tokyo), Sept. 18, 1997, at 3. For a history of Professor Ienaga's battles against the Ministry of Education's censors, see Lawrence W. Beer, *Education, Politics and Freedom in Japan: The Ienaga Textbook Review Cases*, 8 LAW IN JAPAN 67 (1975); *see also* SABURO IENAGA, JAPAN'S LAST WAR: WORLD WAR II AND THE JAPANESE, 1931-1945, at 247-56 (1979).

129. *See* Hiraguchi v. Hiraguchi, 41 MINSHŪ 3, at 408 (Sup. Ct., Apr. 22, 1987), *reprinted in* BEER & ITOH, *supra* note 107, at 327 (invalidating restriction on the division of real property based on Article 29's protection of private property rights); Judgment Upon Case of the Constitutionality of the Provisions of the Public Offices Election Law on Election Districts, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 17* (General Secretariat, Supreme Court of Japan, 1981) (decided Apr. 14, 1976) (striking down the apportionment of seats in the Diet on equal protection grounds); Judgment Upon Case of Constitutionality of the Act to Regulate Location of Pharmacies, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 16* (General Secretariat, Supreme Court of Japan, 1976) (decided Apr. 30, 1975) (holding unconstitutional legislation proscribing the operation of unapproved pharmacies as violative of the Article 22's guarantee of freedom of choice of occupation); Judgment Upon Case of Constitutionality of Article 200 of the Penal Code Providing Killing an Ascendant, *Series of Prominent Judgments of the*

panel decision will be needed to establish the existence of a new, more activist tradition. As the saying goes, one swallow does not a summer make.

In its boldest line of cases to date, the Supreme Court declared the Diet's electoral districts to be so badly malapportioned as to violate the Japanese Constitution's guarantee of equal protection of the laws.[130] Even in this series of decisions, however, the Supreme Court declined to void the election results, preferring instead to allow the (malapportioned) legislative bodies at issue to take corrective action.[131]

Although the Japanese Supreme Court has proven exceedingly reluctant to strike down legislative work product, it has given concrete meaning to the Constitution's various guarantees, most often by describing the contours of a constitutional right and the limits of legislative discretion without holding that a particular law transgresses the

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Supreme Court of Japan upon Questions of Constitutionality No. 13 (General Secretariat, Supreme Court of Japan, 1975) (decided Apr. 4, 1973) (striking down on equal protection grounds a provision of the Japanese criminal code that made the killing of a lineal ascendant an aggravating factor for purposes of punishment and overruling its earlier decision upholding this provision against an equal protection challenge); Nakamura v. Japan, 16 KEISHŪ 11, at 1593 (Sup. Ct., Nov. 28, 1962), *reprinted in* ITOH & BEER, *supra* note 122, at 58 (invoking Article 31 due process guarantee and Article 29 protection of property rights to strike down legislation permitting, without prior notice or hearing, government seizure of innocent third-party's goods or property when such goods or property are used in an illegal smuggling operation); *see also* BEER & ITOH, *supra* note 107, at 24 (noting five instances of judicial invalidation of legislative work product); Sonobe, *supra* note 127, at 167-68, 172-73; *cf.* BEER & ITOH, *supra* note 107, at 50-51 (arguing that there have been only "three instances of judicial activism" in which the Supreme Court struck down legislation on constitutional grounds).

130. *See* Judgment Upon Case of Constitutionality of the Provisions of the Public Offices Election Law, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 21*, at 8-9 (General Secretariat, Supreme Court of Japan, 1986) (July 17, 1985) (holding apportionment ratios for seats in the Diet to be unconstitutional); Judgment Upon Case of Constitutionality of the Provisions of the Public Offices Election Law on Election Districts, *supra* note 129, at 8-10 (same); Koshiyama v. Chairman, Tokyo Metro. Election Supervision Comm'n, 18 MINSHŪ 2, at 270 (Sup. Ct., Feb. 5, 1964), *reprinted in* ITOH & BEER, *supra* note 122, at 53; *see also* BEER & ITOH, *supra* note 107, at 38-41 (describing the series of cases in which the Japanese Supreme Court found malapportioned electoral districts to be unconstitutional, but in each instance declining to void the election results).

131. *See* Judgment Upon Case of Constitutionality of the Provisions of the Public Offices Election Law, *supra* note 130, at 9-11; Judgment Upon Case of the Constitutionality of the Provisions of the Public Offices Election Law on Election Districts, *supra* note 129, at 10-13; *see also* HALEY, *supra* note 16, at 189; *Koshiyama*, 18 MINSHŪ 2, at 270, *reprinted in* ITOH & BEER, *supra* note 122, at 53, 54-55. For an examination of the Supreme Court's ineffective remedial efforts and the practical and institutional constraints under which the Supreme Court of Japan operated, see Haley, *supra* note 18, at 387-88.

line established by the Court.[132] Lower Japanese courts, including both district courts and the high courts (the intermediate courts of appeal), have not proven so reticent: A number of the Supreme Court's free speech decisions reverse lower court decisions that held in favor of the litigants challenging the government behavior at issue.[133]

One could conclude that the Japanese Supreme Court's unwillingness to hold unconstitutional legislative work product or executive branch behavior demonstrates the weakness of Article 21's guarantee of freedom of expression. Although this interpretation is tenable, it is too simplistic and fails to appreciate the effect of the Supreme Court's line drawing efforts.[134] Moreover, to the extent that it implies a lack of appreciation for the value of freedom of expression on the part of the Japanese Supreme Court, it is also quite inaccurate.

Before the promulgation of the Constitution of 1947, the Japanese courts did not enjoy the power of judicial review over properly promulgated legislative enactments that specifically overrode particular constitutional guarantees.[135] Japan's Meiji Constitution borrowed heavily from the German and French civil law traditions. These traditions largely relegated the judiciary to enforcing the code provisions adopted by the Diet and approved by the Emperor;[136] as in the present-day United Kingdom, the courts did not possess the constitutional authority to strike down legislation or executive action.[137]

The Constitution of 1947 modified this scheme. Japan currently maintains a parliamentary system of government with an independent judiciary that enjoys the power of judicial review.[138] To date, however,

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132. *See, e.g.*, Judgment Upon Case of the Metropolitan Ordinanee, *supra* note 107, at 3-6 (upholding Tokyo ordinancc requiring notification of police before engaging in mass parades or demonstrations).

133. *See supra* note 107; *see also* THE JAPANESE LEGAL SYSTEM, *supra* note 16, at 772-74.

134. *See* HALEY, *supra* note 16, at 189.

135. *See* BEER & ITOH, *supra* note 107, at 7-8; THE JAPANESE LEGAL SYSTEM, *supra* note 16, at 686-87; *cf.* John O. Haley, *Comment*, 53 LAW & CONTEMP. PROBS. 201-02 (1990).

136. *See* Okudaira, *supra* note 13, at 2-4.

137. *See* ITOH, *supra* note 127, at 9-12, 204-12; Luney, *supra* note 107, at 125-26; Okudaira, *supra* note 13, at 7-9.

138. *See* KENPŌ, art. 81; *see also* ITOH, *supra* note 127, at 159-62; Percy R. Luney, Jr., *Introduction* to JAPANESE CONSTITUTIONAL LAW, *supra* note 13, at viii, x-xi; John O. Haley, *Judicial Independence in Japan Revisited*, 25 LAW IN JAPAN 1, 17-18 (1995). As Professor Merryman has put it, "[b]oth the civil law and the common law traditions, to the extent that they are in force in Japan, are of course imposed on a prior legal tradition that retains some force but is in no way related to either the civil law or the common law." JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 5

the judiciary has proven to be extremely deferential to the political branches of government.[139] In a functioning participatory democracy, this deference makes a great deal of sense: the political branches are directly accountable to the people, and their actions therefore deserve a presumption of legitimacy.[140] Thus, that the Japanese Supreme Court has not routinely struck down laws or executive actions that burden the exercise of speech rights reflects less a lack of respect for freedom of expression than a lack of comfort with interposing the judiciary's will over that of elected officials.[141]

This deference is hardly unique to speech rights. Across the board, the Japanese Supreme Court has strained to sustain government actions that appear to conflict with constitutional restrictions.[142] The question naturally arises: Of what value are constitutional rights if the Supreme Court generally refuses to enjoin legislative or executive actions that abridge them?

It is difficult to offer any simple responses. Litigants continue to press the constitutional guarantees before both the Supreme Court and the

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(2d ed. 1985).

139. This may be something of an understatement, given that the Supreme Court of Japan has directly overturned legislative work-product on constitutional grounds on only five occasions. *See supra* note 129.

140. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

141. *See* BEER & ITOH, *supra* note 107, at 49-53; ITOH, *supra* note 127, at 278-79.

142. As Professor Hiroshi Itoh has put it, "[i]n the vast majority of constitutional cases, the Court has upheld governmental actions." BEER & ITOH, *supra* note 107, at 49; *see, e.g.*, Judgment Upon Case of the So-Called "Sunakawa Case," *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 4* (General Secretariat, Supreme Court of Japan, 1960) (decided Dec. 16, 1959) (sustaining United States/Japan mutual defense treaty arrangements, including military bases on Japanese soil, against challenge pursuant to Article 9's renunciation of "war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes"). Moreover, the Japanese Supreme Court "has also sustained administrative discretion in sublegislation in most cases." BEER & ITOH, *supra* note 107, at 49. This behavior may reflect a calculated effort at self-preservation: "The Supreme Court might have acted the way it did as self-defense and self-preservation against the much stronger political branches." ITOH, *supra* note 127, at 278; *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (featuring amusing and important intellectual acrobatics by Chief Justice Marshall to avoid finding that Madison had a duty to present Marbury with his commission, perhaps because Marshall feared that Madison would simply ignore such an order); DONALD O. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON 97-99 (1970) (describing Madison's failure to respond to Marbury's suit). Professor Itoh has argued that by "minimiz[ing] conflicts with the Diet and the executives" the Supreme Court of Japan has "consolidated itself in the Japanese political system." ITOH, *supra* note 127, at 278.

lower courts; if Japanese citizens viewed their constitutional rights as empty, they would probably not bother to assert them at all.[143] Moreover, the Japanese Supreme Court routinely selects "prominent" cases for translation into English. Even a cursory perusal of these documents reflects the perceived importance of Article 21 cases: Of the twenty-seven cases selected for translation into English, ten involve claims arising under Article 21.[144]

It is unthinkable that the Justices of the Japanese Supreme Court would undertake special efforts to make these decisions more widely available outside of Japan if they thought these decisions would reflect badly on the Japanese Supreme Court or the Japanese legal system as a whole.[145] Thus, it seems likely that the Supreme Court's efforts to circulate these decisions in the United States and other English-speaking jurisdictions reflects pride in its work product and an implicit assumption that the decisions will wear well in foreign jurisdictions.

Perhaps most importantly, Japanese citizens continue to press claims premised on Article 21's guarantee of freedom of expression. In Japan, "the threat of a lawsuit or criminal complaint may produce a positive reaction" because of concerns that lawsuits, whether civil or criminal in nature, "damage reputation."[146] According to Professor John Haley, "[t]he social stigma of the disclosure of wrongdoing can function as an

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143. As Norma Field has explained, to undertake civil rights or civil liberties litigation in contemporary Japan requires great fortitude. *See* FIELD, *supra* note 109, at 132-34; *see also* Rokumoto Kahei, *The Law Consciousness of the Japanese*, 9 JAPAN FOUNDATION NEWSLETTER 5, 9-10 (1982) (describing a community's hostile reaction to a lawsuit challenging restrictions on student hairstyles in the local public school). Field explains that, "[t]o create an awkward moment is a sin in Japan; to cause disruption puts one beyond the pale." FIELD, *supra* note 109, at 75. On the other hand, as Professor Haley has noted, so-called "cause" lawyers do not hesitate to take cases designed to challenge the status quo ante through litigation intended to embarrass the government and promote soeial change. *See* HALEY, *supra* note 16, at 189; Haley, *supra* note 111, at 5-6.

144. Of course, this could be more reflective of the Japanese Supreme Court's assumption about what rights matter most to American lawyers; that is to say, the Supreme Court has translated its major freedom of expression cases based on the assumption that Americans care most about this right. Even if this rationale explains the Supreme Court's decision to publish Article 21 cases in English, it does not explain why litigants continue to expend time and money pressing such claims under Article 21.

145. Both individuals and organizations in Japan view the loss of face, or *kao*, as a very serious matter, to be avoided if at all possible. *See* MARK ZIMMERMAN, HOW TO DO BUSINESS WITH THE JAPANESE 65-67 (1985); *see also* HALEY, *supra* note 16, at 176, 183; John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265, 275-76 (1982).

146. HALEY, *supra* note 16, at 183; *see also* Haley, *supra* note 145, at 275-76 (describing the importanee of reputation to both private and government entities in Japan).

equally effective and far more efficient substitute for state coercion."[147] Thus, whether a litigant prevails before the Supreme Court may not be as important as the fact of the lawsuit itself; to the extent that a lawsuit brings a government agency into direct conflict with members of the community, it detracts from the agency's standing within the community. In contemporary Japan, lawsuits constitute a powerful form of political action.[148]

This explanation of the existence and frequency of "hopeless" lawsuits raising constitutional claims also makes sense in a society that prizes social harmony, or *wa*, and consensus-based decision making.[149] In traditional Japanese villages, decision making took place through an informal system of give-and-take aimed at reaching a unanimous decision.[150] Professor Nakane explains that in such villages, "[i]t is most important that a meeting should reach a unanimous conclusion; it should leave no one frustrated or dissatisfied, for this weakens village or group unity and solidarity."[151] Such an ethic empowers dissenters while at the same time imposing a high opportunity cost on persistent dissent—simply put, dissent is both effective and disfavored.

It is difficult to overstate the importance of consensus. For example, Professor Benedict has reported that, even during World War II, prominent Japanese leaders recognized the importance of free speech to building consensus and to maintaining group commitment to a particular objective or task.[152]

On balance, it seems that the Supreme Court's reticence to strike down legislative and executive actions burdening speech rights has much less to do with the level of solicitude the Supreme Court grants freedom

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147. HALEY, *supra* note 16, at 183.

148. *See id.* at 189. As Professor Haley explains in the context of "hopeless" litigation challenging the constitutionality of Japan's military "self-defense" forces, "[s]o long as the issue continues to be litigated in well-publicized cases, a political consensus against the Self-Defense Forces may be forged or at least one favoring their legitimacy remains in doubt." *Id.*; *see also* FIELD, *supra* note 109, at 97, 131-36.

149. *See* NAKANE, *supra* note 21, at 49-50, 65, 144-46.

150. *See id.* at 145.

151. *Id.*

152. *See* BENEDICT, *supra* note 18, at 34-35. She quotes the following illustrative newspaper editorial, which appeared in print in July 1944:

> In these few years, the people have not been able to say frankly what they think. They have been afraid that they might be blamed if they spoke certain matters. They hesitated, and tried to patch up the surface, so the public mind has really become timid. We can never develop the total power of the people in this way.

Id. at 34. Another contemporaneous speaker noted that under the wartime miliary government, "[f]reedom of speech has been denied" and opined that "[t]his is certainly not a proper way to stimulate [the Japanese people's] will to fight." *Id.*

of expression than with the Supreme Court's own view of its proper constitutional role. Moreover, considered in cultural context, this reticence may prove to be a distinction without a difference: "Protracted litigation calls into question the legitimacy of the political system with consequently greater likelihood—albeit no certainty—of a political response."[153] To the extent that litigation demonstrates the absence of social consensus, it undercuts the legitimacy of the government's objectives and impedes the government's ability to implement contested policy objectives.

III. FREEDOM OF SPEECH IN JAPAN: RHETORIC, REVISION, AND MEIKLEJOHN'S THEORY OF FREEDOM OF SPEECH

The Japanese Supreme Court has recognized and broadly endorsed the proposition that freedom of speech is a necessary condition for democratic self-government. As Justice Ito Masami of the Supreme Court of Japan has explained, "[c]onstitutionally guaranteed freedom of expression forms the central pillar of a state based on liberalism, and the United States and Japan have constitutional systems that provide the strongest guarantees of this freedom in the world."[154] Sadly, however, the decisions of the Japanese Supreme Court do not entirely support Justice Masami's assertion that freedom of speech is a "central pillar" of Japanese constitutional law.

A. Canvassing the Voters

Consider, for example, the severe restrictions that limit political speech incident to elections.[155] Japan maintains a pervasive system of restraints that restrict the time, place, and manner of canvassing the electorate for support; not only are candidates' activities restricted, but the press is also subject to strict limitations on its coverage of candidates and

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153. HALEY, *supra* note 16, at 189.

154. Ito Masami, *Foreword* to BEER, FREEDOM OF EXPRESSION IN JAPAN, *supra* note 107, at 13, 14.

155. *See* Koshokū senkyohō [Public Offices election law], Law No. 100 of 1950; *see also* Takatsu v. Japan, 35 KEISHŪ 5, at 568 (Sup. Ct., July 21, 1981), *reprinted in* BEER & ITOH, *supra* note 107, at 598; Nonaka v. Japan, 33 KEISHŪ 7, at 1074 (Sup. Ct., Dec. 20, 1979), *reprinted in* BEER & ITOH, *supra* note 107, at 604; Taniguchi v. Japan, 21 KEISHŪ 9, at 1245 (Sup. Ct., Nov. 21, 1967), *reprinted in* ITOH & BEER, *supra* note 122, at 149; BEER, *supra* note 107, at 372-78; Taisuke Kamata, *Adjudication and the Governing Process: Political Questions and Legislative Discretion*, *in* JAPANESE CONSTITUTIONAL LAW, *supra* note 13, at 151, 154-56.

candidate activities.[156] The Supreme Court of Japan has both sustained convictions and overturned reversals of acquittals for violations of the Election Law's ban on door-to-door canvassing.[157] These results contrast vividly with the United States Supreme Court's treatment of door-to-door canvassing in cases such as *Cantwell v. Connecticut*[158] and on the First Amendment right of individuals to support or oppose candidates for political office set forth in *Buckley v. Valeo*.[159]

Although a number of American legal academics have advocated public financing of political campaigns, limits on campaign spending, and similar measures to level the playing field and reduce the influence of special interest contributions,[160] all of these proposals pale in comparison to the restrictions imposed by the Election Law, such as prohibitions on door-to-door canvassing by candidates for office and strict limits on candidates' purchase of television and radio time for promotional advertisements.[161] To be sure, Japan conducts meaningful elections and voters have access to information about candidates for political office from myriad sources.

Professor Curtis has explained that:

> [t]he result of this system of legal restraints and the institutionalization of modes for circumventing them has been to turn the election law into a kind of obstacle course through and around which candidates move in their search for votes, rather than an accepted and respected framework within which campaigns are conducted.[162]

Thus, the net effects of the Election Law may be somewhat less Draconian than one would otherwise expect. Essentially, Curtis is asserting that the Election Law constitutes *tatemae*, or the official line,

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156. *See* BEER, *supra* note 107, at 373-74; Kamata, *supra* note 155, at 154-56; Okudaira, *supra* note 13, at 35 n.52. For a description of the operation of the Election Law and its attempt to establish a line of demarcation between "political activities," which are largely unregulated, and "election activities," which are highly regulated, see CURTIS, *supra* note 109, at 165-75.

157. *See* BEER, *supra* note 107, at 377-78 & nn.100-04 (citing cases reported in Japanese language source materials).

158. 310 U.S. 296 (1940).

159. 424 U.S. 1 (1976).

160. *See* FISS, IRONY, *supra* note 54, at 79-83; FISS, *supra* note 31, at 18-23, 28-30; SUNSTEIN, *supra* note 41, at 85, 97-101; O. Fiss, *Money and Politics*, 97 COL. L. REV. 2470, 2476-83 (1997).

161. *See* CURTIS, *supra* note 109, at 167-69.

162. *Id.* at 174.

rather than *honne*, or the actual situation.[163] The problem, as seen through American eyes, is that the theoretical proposition that there can be too much political speech is fundamentally inconsistent with the guarantee of freedom of expression. Nevertheless, neither legislative nor judicial change is in the air. "Although deregulation in other areas of Japanese life has become a major thrust of recent government policy and has been forced on often reluctant bureaucrats, there is no strong constituency advocating the deregulation of election campaigning."[164]

The Election Law reflects a desire to minimize the disruptive impact of elections, even at the cost of squelching speech and limiting the channels through which candidates can reach the voters.[165] This elevates civility over speech and limits deliberation to protect privacy. Simply put, the Japanese have struck a radically different balance between the respective rights of would-be speakers and their potential audience: In Japan, the interests of the audience in being free from unwanted speech in no small measure outweigh the interests of the speaker in being heard.

B. Time, Place, and Manner Regulations

In a series of cases beginning in the 1950s, the Japanese Supreme Court has sustained a variety of time, place, and manner restrictions on speech activities on public property. The United States Supreme Court has, of course, endorsed the creation and enforcement of content neutral, reasonable time, place, and manner restrictions on the use of public property for speech activities.[166] This basic framework has been supplemented with a "public forum" gloss that permits government to further restrict access to certain public property: non-public and limited purpose public forums.[167] Thus, in the United States, a citizen does not enjoy an unfettered right of access to public spaces for the purpose of engaging in speech activity. That said, unpopular political minorities do have a right to use public spaces under the same terms and conditions as other citizens; moreover, government may not unreasonably withhold its

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163. *See* HALEY, *supra* note 16, at 186-90; ZIMMERMAN, *supra* note 145, at 26, 90-94.

164. CURTIS, *supra* note 109, at 171.

165. Again, the effectiveness of the non-media restrictions is very much open to question; Curtis reports that "there has been a virtual institutionalization of patterns of evasion and circumvention of many of the law's restrictions." *Id.* at 173.

166. *See* Hague v. CIO, 307 U.S. 496 (1939).

167. *See* United States v. Kokinda, 497 U.S. 720 (1990); *see also* Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411 (1995).

permission or impose less favorable terms and conditions on disfavored groups for the use of public forums for speech activities.[168]

The Japanese Supreme Court has sustained local ordinances that, on their face, confer effectively unfettered discretion on local authorities to grant or withhold permission for the use of public property for speech activity. Cases involving local ordinances from Niigata and Tokyo provided the vehicles for the Supreme Court's review of the issue.

In the *Niigata Ordinance Decision*,[169] a Niigata prefectural ordinance prohibited citizens from engaging in public demonstrations without first obtaining the permission of local police authorities.[170] These officials could refuse permission or place restrictions on the protest activity in order to protect the public safety or welfare.[171] However, if they failed to respond to a request within twenty-four hours of a planned march, the speech activity could proceed as though permission had been granted.[172]

The Japanese Supreme Court sustained the ordinance, reasoning that it really required little more than advance notice of the planned speech activity.[173] The Court emphasized the limited nature of the local authorities' discretion to deny a permit and suggested that permission could be denied only "if it is foreseen that [the activity] may involve a clear and present danger to the public safety."[174] Essentially, the Supreme Court saved the local ordinance by imposing a limiting interpretation on the law enforcement authorities' discretion.[175]

The Court had occasion to revisit its holding in the *Niigata Ordinance Decision* in the *Tokyo Ordinance Decision*.[176] Like the

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168. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

169. Hanreishū, VIII, No. 11, 1866 (Sup. Ct., Nov. 24, 1954), *reprinted in* MAKI, *supra* note 124, at 70.

170. *See id.* at 71. Article I of the ordinance provided that "Parades, processions, and mass demonstrations . . . shall not be conducted without obtaining a license from the public safcty commission which exercises jurisdiction over the area concerned." *Id.*

171. *See id.* at 71-72.

172. *See id.* at 72 (Article 4 of the Ordinance).

173. *See id.* at 74-75.

174. *Id.* at 75.

175. *See id.* at 76-77. The United States Supreme Court maintains a similar tradition of using limiting constructions of statutes and regulations to avoid holding such enactments unconstitutional. *See* Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); *id.* at 204-07 (Blackmun, J., dissenting); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); Haynes v. United States, 390 U.S. 85, 92 (1968). For a discussion of the reasons supporting this policy, see *Rust*, 501 U.S. at 223-25 (O'Connor, J., dissenting); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). *See generally* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997) (discussing and analyzing the federal judiciary's use of saving constructions and question avoidance).

176. Judgment Upon Case of the Metropolitan Ordinance, *supra* note 107.

Niigata prefecture, the City of Tokyo adopted an ordinance requiring notification and permission for mass marches and demonstrations.[177] The ordinance required the permission of the local public safety commission before engaging in meetings or mass parades on public property and for mass demonstrations, whether on public or private property.[178] Article 3 of the ordinance required local police officials to grant permission unless the proposed speech activity "is recognized as clearly and directly dangerous to the maintenance of public peace."[179] Unlike the Niigata ordinance, affirmative permission was required prior to any covered speech activity; silence on the part of local officials did not imply consent.

A group of protestors violated the ordinance, engaging in unapproved protest activity. Following their arrest, the Tokyo district court acquitted them of wrongdoing based on Article 21's guarantee of freedom of expression and assembly.[180] The public prosecutor then took a direct appeal (or "jokoku" appeal) to the Supreme Court, based on the constitutional issues presented in the case.

The Supreme Court began its opinion by recognizing the importance of the interest at stake:

> There is no need to dwell upon the fact that the freedom of assembly and association, as well as the freedom of speech, press and all other forms of expression provided for in Article 21 of the Constitution of Japan, belongs to eternal and inviolate rights, the basic human rights and that the absolute guarantee of the above is one of the fundamental rules and characteristics of democratic form[s] of government which distinguishes democracy from totalitarianism.[181]

Nevertheless, Article 21 rights were subject to "abuse," and the Supreme Court viewed its task as "protecting the freedom of expression, preventing its abuse, maintaining harmony with the public welfare, and of drawing a line which would provide a reasonable demarcation between the freedom of the individuals and the welfare of the public with regard to concrete indi[v]idual cases."[182]

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177. *See* Metropolitan Ordinance, Law No. 44 of 1950, *reprinted in id.* at 38-39.

178. *See id.* at art. 1.

179. *Id.* at art. 3.

180. *See* Judgment Upon Case of the Metropolitan Ordinance, *supra* note 107, at 1-2.

181. *Id.* at 2.

182. *Id.*

Noting the dangers associated with mass protest and movements, the Court observed that "a local entity may be justified in imposing certain restrictions with respect to the freedom of expression, involving group demonstration notwithstanding the clear prohibition of pre-control, the censorship of publications, etc."[183] The majority then went on to adopt a restrictive interpretation of the Tokyo ordinance. Although the text seemed to adopt a permissive system of regulation, vesting substantial autonomy with local officials to grant or deny requests, "in its substance and in operation," the ordinance really "differs little from a notification system."[184] The Court held that the "granting of permission is almost imperative, and rejection, under strict restriction only under very rare circumstances," namely, when a clear and present danger of public harm exists.[185] The majority also rejected objections to the regulation of speech activity on non-public property, noting that the harms associated with mass demonstrations did not differ based on the ownership of the property.[186]

The Japanese Supreme Court was comfortable vesting significant discretion with local authorities, subject to the admonition that this discretion should not be exercised absent an immediate threat of substantial harm. Thirteen of the Supreme Court's fifteen justices endorsed the opinion of the Court; two justices dissented. The decision represented a major expansion of the limitations upheld in the *Niigata Ordinance Decision*. It is also doubtful that the United States Supreme Court would have reached a similar conclusion on the facts presented.[187]

In dissent, Justice Hachiro Fujita emphasized that "the full guarantee of the freedom of expression provided in Article 21 . . . is one of the

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183. *Id.* at 3.

184. *Id.* at 4.

185. *Id.*

186. *See id.* at 5-6; *cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the Free Speech Clause of the First Amendment absolutely protects political or ideological speech activity on private property from governmental abridgement absent direct advocacy of lawlessness coupled with a clear and present danger of such lawlessness occurring and causing social harms of the highest order).

187. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133-36 (1992) (holding that a permitting system for speech activities cannot vest unrestricted discretion with local police authorities and that the exercise of viewpoint and content neutral, properly channelized discretion by local authorities must be subject to prompt judicial review). On the other band, reflexive distrust of government is not a Japanese cultural trait. "The State, in all its domestic functions, is not a necessary evil as it is so generally felt to be in the United States." BENEDICT, *supra* note 18, at 86. Instead, "[t]he State comes nearer, in Japanese eyes, to being the supreme good." *Id.* Accordingly, the idea of vesting substantial discretion with local police officials to regulate speech activities is less objectionable in Japan than in the United States.

most important basic principles of [a] democratic form of government."[188] Fujita noted that the majority in the *Niigata* decision only had sanctioned a system of prior notification, not a "general permissive system."[189] In his view, Article 21 precluded local authorities from assuming a censorial role, even if that role were strictly limited.[190] He went on to cite *Hague v. CIO*[191] and *Saia v. New York*[192] for the proposition that freedom of speech is inconsistent with discretionary permitting schemes administered by local functionaries.[193]

Justice Katsumi Tarumi also authored a dissent.[194] Tarumi objected to the ordinance's attempt to regulate speech on both public and private property,[195] and to the drafters' use of vague standards[196] and definitions.[197] He also objected to the majority's attempt to place a limiting construction on the Tokyo ordinance in order to save it from being declared unconstitutional: "As long as it relates to the control of freedom of expression, it seems highly improper to render construction in such a way as to make it constitutional as . . . was done in the majority opinion."[198]

Notwithstanding the significant cultural differences that separate the United States and Japan, Justice Tarumi's dissent echoes the main themes of Justice Holmes's dissent in *Abrams*[199]:

> Every individual is capable of thinking freely of what is true, good and beautiful through his concept in the fields of religion, creed, morals, sciences, the world, and human existence; or in his respective fields of endeavor in society, such as in politics, economics, culture and arts. . . . If law and the government do not exercise control over speech, and permit free competition of expression, truth would finally prevail, and it may even be possible for all the varieties of flowers to bloom in profusion

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188. Judgement Upon Case of the Metropolitan Ordinance, *supra* note 107, at 6 (Fujita, J., dissenting).

189. *Id.* at 7.

190. *See id.* at 8-10.

191. 307 U.S. 496 (1939).

192. 334 U.S. 558 (1948).

193. *See* Judgment Upon Case of the Metropolitan Ordinance, *supra* note 107, at 11 (Fujita, J., dissenting).

194. *See id.* at 11-30 (Tarumi, J., dissenting).

195. *See id.* at 12, 25-26.

196. *See id.* at 27-30.

197. *See id.* at 18-22.

198. *Id.* at 13.

199. *See supra* notes 33-36 and accompanying text.

> and bear fruits in amity. A complete unanimity of mind should be rejected.[200]

Justice Tarumi plainly embraced Holmes's marketplace of ideas metaphor. In turn, this intellectual commitment led him to reject the majority's decision to leave the Tokyo ordinance in place. Any doubts in this regard can be resolved by reference to his subsequent argument that freedom of speech does not guarantee any particular outcomes.

After setting forth the litany of horrors associated with Soviet-style communism, Justice Tarumi concluded that freedom of speech required the government to tolerate those who advocated such a system.[201] As Justice Tarumi explained, in Japan "[p]eople may listen to such a talk to their heart's content. Such is the tolerance of thought embodied in the liberal Constitution."[202]

Both the majority and dissenting justices in the *Tokyo Ordinance Decision* fully embraced freedom of expression. Moreover, both sides defined the debate about the proper scope of Article 21 in terms immediately familiar to students of the First Amendment. The majority embraces Meiklejohn's community-based vision of the freedom of expression, justifying the protection of freedom of speech by reference to its role in facilitating democratic self-governance. Justice Tarumi's dissent, on the other hand, invokes the Holmesian marketplace of ideas metaphor. Notwithstanding the significant differences in culture, the Justices framed the free speech issues in largely the same terms that the United States Supreme Court would have used if faced with deciding the case.

Unlike the United States Supreme Court, however, the Supreme Court of Japan more fully embraced a community-based theory of freedom of speech. It is not the individual's interest in self-expression, but rather the community's interest in overseeing the government, which is paramount. One could draw a preliminary conclusion that the Meiklejohn theory of free speech better accommodates a communitarian social ethic, whereas the marketplace metaphor presupposes a more individualistic legal and cultural milieu.

Turning from theory to doctrine, the majority's opinion in the *Tokyo Ordinance* case places free expression at risk by trusting in the good faith of local authorities to grant permission absent a clear and present danger of public harm. The Japanese Supreme Court's rejection of a "bad

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200. Judgment Upon Case of the Metropolitan Ordinance, *supra* note 107, at 15 (Tarumi, J., dissenting).

201. *See id.* at 16-17.

202. *Id.* at 17.

tendency" test, however, is far more intriguing than the inconsistency of the majority's result with *Hague* and *Saia*. That is to say, not a single justice endorsed the proposition that government may regulate speech deemed potentially harmful to the public because of its ideological content. Yet, less than a century ago, the United States Supreme Court sustained criminal convictions on just such a theory.[203] As recently as 1951, the Supreme Court sustained the conviction of a group of communists based on a perilously overbroad "bad tendencies" theory of the First Amendment.[204]

The *Tokyo Ordinance* majority's formulation of the problem also implicitly reflects a commitment to the project of viewpoint neutrality. Only danger to the public—not hostility toward the content of a particular speaker's message—can serve as a basis for denying access to public property for speech-related activities. As Professor Sunstein has explained, "[w]hen government regulates on the basis of viewpoint, it will frequently be acting for objectionable reasons."[205] By prohibiting local officials from refusing permission for speech activities based on the viewpoint or content of the speaker's message, the Supreme Court of Japan conferred substantial protection on would-be speakers.[206]

Indeed, rather than snipe at the Japanese Supreme Court's work-product, one should marvel at the fundamental transformation worked by the Constitution of 1947: In the space of less than two decades, a nation that had never recognized an unqualified legal right to freedom of expression or participatory democracy embraced both concepts.[207] This

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203. *See* Abrams v. United States, 250 U.S. 616, 623-24 (1919); *see also* VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT, *supra* note 6, at 29-37.

204. *See* Dennis v. United States, 341 U.S. 494, 510 (1951).

205. SUNSTEIN, *supra* note 41, at 169.

206. *See* SMOLLA, *supra* note 38, at 45-54; 184-85, 208-11; *cf.* SUNSTEIN, *supra* note 41, at 239-40 (arguing that other values may, from time to time, justify departures from content, or even viewpoint, neutrality in government regulation of speech activity). Of course, the clear and present danger test affords meaningful protection to speech activity if—and only if—the fact of public hostility to the speaker's message, the so-called "heckler's veto," does not count as a condition that satisfies the test. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133-36 (1992); *see also* Gooding v. Wilson, 405 U.S. 518 (1972); Terminiello v. Chicago, 337 U.S. 1 (1949). The *Tokyo* and *Niigata* cases do not speak to the problem of the heckler's veto. Accordingly, further guidance from the Supreme Court will be necessary to ascertain the robustness of the clear and present danger test in Japan.

207. Of course, adoption of the Constitution of 1947 did not, as if by magic, alter the public values of the Japanese people. *See generally* Krotoszynski, *supra* note 9, at 424-32. Instead, the Constitution of 1947 provided a legal framework through which the transformation of Japan from a totalitarian regime in which the citizenry enjoyed its rights at the pleasure of the Emperor was replaced by a system of participatory democracy and constitutional rights. *See* ABE ET AL., *supra* note 109, at 3-13; Okudaira, *supra* note 13,

represents a remarkable accomplishment. By way of comparison, the United States Congress passed the Alien and Sedition Act of 1798 only seven years after the adoption of the First Amendment, and the Supreme Court did not definitively reject the view that the state could punish seditious libel until 1964, in *New York Times Co. v. Sullivan*.[208] In relative terms, then, the Japanese free speech tradition should be viewed as a success.

C. Democratic Self-Government and the Meiklejohn Theory in Other Political Speech Decisions of the Supreme Court of Japan

The Japanese Supreme Court, like its United States counterpart, has tied freedom of expression to the project of democratic self-governance in contexts other than public forum cases. Take, for example, *Japan v. Kanemoto*,[209] also known as the "Kanemoto Pamphlet Case." A number of radicals distributed pamphlets advocating the violent overthrow of the Japanese government and were arrested, tried, and convicted of violating the Subversive Activities Prevention Law.[210] The Nagoya High Court, the intermediate appellate court, reversed the convictions on the ground that mere advocacy of the violent overthrow of the government was not a criminal act in the absence of a clear and present danger of concrete acts against the state.[211] The prosecutor appealed this reversal to the Supreme Court of Japan.

The Supreme Court affirmed the Nagoya High Court's decision, holding that the mere advocacy of insurrection against the government was not a criminal act. In so doing, the Court expressly rejected the prosecutor's argument that "speech whose very contents are contrary to the public welfare . . . clearly constitute notable abuse of freedom of expression beyond the bounds of Article 21 guarantees."[212] This ruling

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at 1-32; Nobushige Ukai, *The Significance of the Reception of American Constitutional Institutions and Ideas in Japan*, *in* CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE 111, at 114-15 (Lawrence Ward Beer ed., 1979). As Professor Benedict predicted, the Japanese have embraced rules of the new social order as reflected and embodied in the Constitution of 1947, albeit not in precisely the same forms as these rights existed (or presently exist) in the United States. *See* BENEDICT, *supra* note 18, at 295-96, 302-04.

208. 376 U.S. 254, 273-76, 282 (1964); *see* Kalven, *supra* note 30, at 204-10.

209. 396 HANREI JIHŌ 19 (Sup. Ct., Dec. 21, 1965), *reprinted in* ITOH & BEER, *supra* note 122, at 242.

210. *See id.* at 242.

211. *See id.*

212. *Id.* at 243. In this regard, the case represents a change of position from that reflected in Hanreishū, VI, No. 8, 1053 (Sup. Ct., Aug. 2, 1951), *reprinted in* MAKI, *supra* note 124 at 123. In this case, a communist protestor distributed handbills urging

is consistent with the Supreme Court's rejection of the "bad tendency" test in the *Niigata Ordinance* and *Tokyo Ordinance* cases.

A more recent decision involving the use of the Narita Airport for protest activities demonstrates the Supreme Court's continuing embrace of the clear and present danger standard for the restriction of protest activity. In *Sanrizuka-Shibayama Anti-Airport League v. Okuda*,[213] the Supreme Court sustained a statute limiting protest activities at the new Tokyo International Airport.[214] The new airport had proven controversial and radical elements had attempted to impede its progress; these efforts included acts of violence, such as driving a blazing vehicle into the airport, throwing Molotov cocktails into the airport, and destroying equipment inside the airport.[215] In response to these acts of terrorism, the Diet enacted a law to prohibit violent protest activities at the new airport.[216] Entitled "Law on Emergency Measures for the Security of the New Tokyo International Airport," the measure empowered the Minister of Transport to prohibit speech activity at the airport when "violent and destructive activities" might be imminent.[217] Would-be anti-airport protestors challenged the constitutionality of this law, arguing that it infringed their Article 21 right to freedom of expression.

The Japanese Supreme Court sustained the law, but imposed a limiting construction on its rather open-ended terms. Although the provisions of the law did not specify the level of danger required to close the airport to speech activities, the majority read the law to require a clear and present danger of violence: "[I]t can be inferred that the phrase 'anyone who engages in, or is suspected of engaging in, violent and

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police to strike or "slowdown" the performance of their duties. *See id.* at 123-24. He was convicted of violating a provision of the Local Public Service Law and appealed his case to the Supreme Court of Japan. The Supreme Court affirmed the conviction, holding that "abetment of this kind must be said to go beyond the limits of freedom of speech as guaranteed by the Constitution." *Id.* at 125. In order to avoid criminal liability, the defendant would have to offer proof that there was "absolutely no danger" that the police would adopt the course of action suggested in the handbill. *See id.* Obviously, this result is inconsistent with the result in the *Kanemoto* case. One can infer from the result in this earlier case that between the early 1950s and the early 1960s, freedom of expression gained significant ground in the Supreme Court of Japan.

213. Judgment Upon Case of Constitutionality of the Provisions of the New Narita Airport Law, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 26* (General Secretariat, Supreme Court of Japan, 1993) (decided July 1, 1992).

214. *See id.* at 1-2.

215. *See id.* at 3-4.

216. *See id.* at 4.

217. *Id.* at 5.

destructive activities' in Article 2(2) of the Law should be interpreted as 'anyone who actually engages in, or is highly likely to engage in, violent and destructive activities'."[218] In addition, the Supreme Court read the phrase "when the structure is used, or is suspected of being used" for prohibited activities to mean "when the structure is actually used, or is found highly likely to be used" for such activities.

As written, the law appeared to confer virtually limitless discretion on the Minister of Transport. The Supreme Court's gloss, however, adroitly avoided a conflict between the law and Article 21 by strictly limiting the Minister's authority to restrict speech activity under the law's provisions. Though the United States Supreme Court would probably have insisted on a system of independent review to ensure that the Minister did not arbitrarily apply the law to discriminate against a particular group or viewpoint,[219] it is virtually certain that it would sustain a statute aimed at ensuring that airports remain open and accessible for those wishing to travel (which would necessarily imply an airport free of protestors tossing about Molotov cocktails).[220]

Perhaps more important than the Japanese Supreme Court's limiting construction of the statute was its frank recognition of the importance of freedom of speech in a democratic society. The Supreme Court began its analysis of the protestors' Article 21 claim by acknowledging the linkage of freedom of speech to a functioning democracy:

> In a modern democratic society, assembly by the people is needed in order for them to develop and form their views and personalities by being exposed to a variety of opinions and information, and by conveying and exchanging opinions, information and the like. It is also an effective means by which they may make their views known to the general public. Hence, the freedom of assembly guaranteed by Article 21(1) of

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218. *Id.*

219. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 132-36 (1992); Cox v. New Hampshire, 312 U.S. 569, 574-78 (1941); *see also* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 992-1007 (1983); Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1536-52 (1970). *But see* Freedman v. Maryland, 380 U.S. 51 (1965) (holding that procedural safeguards must be available to ensure fair application of licensing scheme for motion pictures).

220. *See* International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (upholding ban on solicitation in airports under a "reasonableness" standard of review, but striking down a prohibition on mere leafletting in airports, again relying on a "reasonableness" standard of review).

> the Constitution should be especially respected as one of the fundamental human rights in a democratic society.[221]

Alexander Meiklejohn himself could have authored these words; they embrace and embody his conception of freedom of speech.[222] The *New Narita Airport Decision* not only demonstrates the extent to which the Japanese judiciary has embraced freedom of expression as a preferred freedom under the Japanese Constitution, but also reflects the justices' essentially communitarian conception of the right.

D. The Importance of Community

Although recognizing the importance of the free flow of ideas and information to democratic self-government,[223] the Japanese Supreme Court has been very solicitous of communal interests. This is reflected, in part, in its case law considering the constitutionality of the Election Law's restrictions on candidate canvassing.[224] It is also reflected in *Yamagishi v. Japan*,[225] a case involving the use of public utility poles for posters promoting a conference supporting a nuclear weapons ban.[226] The protestors were charged and convicted of a misdemeanor for hanging the posters without obtaining prior permission from the owners.[227] They appealed their conviction to the Supreme Court, arguing that the convictions violated their Article 21 right to free

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221. Judgment Upon Case of Constitutionality of the Provisions of the New Narita Airport Law, *supra* note 213, at 2-3.

222. *See* MEIKLEJOHN, *supra* note 23, at 10-14, 25-27; MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 52, at 115-20.

223. *See, e.g.*, Judgment Upon Case of Constitutionality of the Provisions of the New Narita Airport Law, *supra* note 213, at 2-3.

224. *See supra* notes 155-165 and accompanying text.

225. 24 KEISHŪ 6, at 280 (Sup. Ct., June 17, 1970), *reprinted in* ITOH & BEER, *supra* note 122, at 244.

226. *See id.* at 244-45. Yamagishi and his colleagues glued 84 posters to utility poles owned by the local telephone companies and located on public rights of way; the posters were emblazoned with messages such as "Let's Make A Great Success of the Tenth World Conference to Ban Nuclear Weapons! Aichi Gensuikyo." *See id.*

227. The utility poles at issue belonged to both publicly and privately owned utility companies. *See id.* at 245. With respect to the privately held utility poles, no state action existed and Article 21 simply would not apply, unless the Supreme Court construed Article 21 to create a free speech easement on privately owned property. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). On the other hand, access to publicly-owned utility poles presented a legitimate Article 21 question. *See, e.g.*, City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

expression.[228] Because the antiwar activists had not sought permission to use the poles, the question of what standard to apply to a state actor's denial of permission to use the poles for posting political messages was not presented for decision. Rather, the issue before the Supreme Court was whether publicly and privately owned poles could be unilaterally commandeered for speech activity.

The Supreme Court affirmed the convictions, observing that "a means for outwardly expressing one's ideas has never been permissible if that means is such as to do unfair damage to the property rights of other persons."[229] Accordingly, the appellants failed to state a viable Article 21 claim. The *Yamagishi* decision reaches the same result as a similar United States Supreme Court decision, *City Council v. Taxpayers for Vincent*.[230] Moreover, it does so for similar reasons: freedom of speech does not imply an unqualified right of access to public or private property for use incidental to speech activities.

IV. THE CASE OF DEFAMATION: BALANCING THE PERSONAL AND THE POLITICAL

Defamation provides another area of law in which the Japanese Supreme Court has borrowed, at least to some extent, from the United States. In *Judgment Upon Case of Defamation*,[231] the Supreme Court broadly construed an exceptions clause to create a right of fair comment concerning matters of public concern. The defendant, Katsuyoshi Kawachi, published a newspaper, the *Yukan Wakayama Jiji*. On February 18, 1963, he accused the publisher of a rival publication of extorting monies from local officials.[232]

The Japanese law at issue, which dated from the turn of the century, punished defamation strictly: "A person who defames another by publicly alleging facts shall, regardless of whether such facts are true or false, be punished with imprisonment at forced labor or imprisonment for not more

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228. *See Yamagishi*, 24 KEISHŪ 6, *reprinted in* ITOH & BEER, *supra* note 122, at 244-45.

229. *Id.* at 245.

230. 466 U.S. 789 (1984).

231. *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 11* (General Secretariat, Supreme Court of Japan, 1970) (decided June 25, 1969).

232. *See id.* at 1. The story, entitled "Wicked Acts of Tokuichiro Sakaguchi, the Blood-sucker," reported that the publisher told an official in the public works section of the Wakayama City Office that "[i]f you made a due offer, we should shut our eyes to your deed." *Id.* Failing such an offer, Sakaguchi allegedly promised to publish allegations of corruption involving the public works office. *See id.*

than three years or a fine of not more than 1,000 yen."[233] However, if a trial court found that the otherwise defamatory statement had been "committed solely for the benefit of the public and regarding matters of public concern and when, upon inquiry into the truth or falsity of the facts, the truth is proved, punishment shall not be imposed."[234] Thus, the exceptions clause appears to require a defendant to establish the literal truth of the allegedly defamatory statement in order to avoid liability; however, the Supreme Court of Japan saw it differently.

Reversing the judgments of the trial and appellate courts, the Supreme Court opined that freedom of expression and protection from defamation had to be balanced in order to protect both "personal security to honour of an individual and the freedom of speech provided for in Article 21 of the Constitution."[235] Accordingly, the Supreme Court construed the exceptions clause broadly to protect commentary on matters of public concern:

> Giving thought to the reconciliation and balance of these two interests, it should be construed that, even if there is no proof of the existence of the facts . . . , no crime of defamation was committed because of the absence of *mens rea*, when the publisher believed mistakenly in the existence of the facts and there was good reason for his mistaken belief on the basis of reliable information and grounds.[236]

Because the record showed that the publisher had established a reasonable basis in fact for believing the allegations to be true, he could not be held liable for defamation.[237]

Significantly, the Supreme Court did not declare any part of Article 230 of the Penal Code contrary to the Japanese Constitution; instead, it simply rewrote the exceptions clause to make it compatible with Article 21's guarantee of freedom of speech. In so doing, it was able to achieve two seemingly incompatible goals: protecting and enforcing freedom of expression without upsetting harmonious relations between the judicial and legislative branches. Of course, one could object to the Supreme

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233. Penal Code of Japan, Law No. 45 of 1907, art. 230-1, *reprinted in* Judgment Upon Case of Defamation, *supra* note 108, at 6.

234. *Id.* at art. 230-2, para. 1. A second exceptions clause excused liability when the statement at issue concerned "a public servant or a candidate for public office, and when, upon inquiry into the truth or falsity of facts, the truth is proved." *Id.* at art. 230-2, para. 3.

235. Judgment Upon Case of Defamation, *supra* note 108, at 2.

236. *Id.*

237. *See id.* at 2-3.

Court's decision to revise unilaterally the text of the statute's exemptions clause. This course of action arguably constituted a more aggressive—and less legitimate—form of judicial activism than simply declaring Article 230 unconstitutional on its face.

Although the Japanese Supreme Court has recognized that freedom of expression must at times take precedence over protection of an individual's reputation, it has drawn the boundary between these two interests decidedly in favor of protecting reputation. In *Hoppo Journal Co. v. Japan*,[238] a divided Supreme Court affirmed an injunction against the distribution of the *Hoppo Journal*.[239] The trial court issued the injunction because the magazine contained defamatory statements about Kozo Igarashi, a local mayor who was preparing to run for Governor of Hokkaido.[240] The April 1979 issue of the magazine contained a story entitled "An Authoritarian's Temptation," which described Igarashi as "skillful at lying, bluffing and cheating," "a born liar," "an opportunist without scruples, doing anything for his own interest and his own success."[241] With regard to Igarashi's personal life, the article asserted that "he divorced his innocent wife by dastardly means and caused her to commit suicide in order to win a new woman."[242] Nor were the editors content to malign poor Kozo: they also went after his family: "His father was a bold businessman famous in Asahikawa who had once been a roadhorse man. He blindly loved a young beautiful young prostitute in his old age and the masterpiece of the two was [Igarashi]."[243] Suffice it to say that the *Hoppo Journal* pulled no punches.

Igarashi sought and obtained, on an ex parte basis, an injunction against the distribution of the magazine. Igarashi argued that the statements were defamatory per se as a matter of law and, if released, would cause him irreparable harm. The Sapporo High Court affirmed and the *Hoppo Journal* brought an appeal to the Supreme Court. Before the Supreme Court, the *Hoppo Journal* argued that the injunction constituted an unlawful form of censorship and that the magazine enjoyed the right to publish its news story on Igarashi under Article 21.

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238. Judgment Upon Case of Constitutionality of the Advance Injunctions Against Publication of a Magazine in Relation to the Freedom of Expression, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 22* (General Secretariat, Supreme Court of Japan, 1988) (decided June 11, 1986) [hereinafter Judgement Upon Case of Constitutionality No. 22].

239. *See id.* at 8-10.

240. *See id.* at 1, 7.

241. *Id.* at 7-8.

242. *Id.* at 8.

243. *Id.* at 24 (Nagashima, J., concurring).

The Supreme Court rejected the magazine's argument that the injunction constituted "censorship" for purposes of Article 21's prohibition against government censorship. It emphasized that censorship, for purposes of Article 21, constituted viewpoint discrimination based on ideological or political grounds.[244] Because the magazine contained materials that were defamatory as a matter of law, the lower court simply had vindicated Igarashi's preexisting legal right without regard to the magazine's motivations for writing the story.[245]

This approach differs significantly from *New York Times Co. v. Sullivan*.[246] Alabama argued that application of its common law of torts did not constitute state action; accordingly, the First Amendment simply did not apply to the dispute between Commissioner Sullivan and the newspaper. Justice Brennan rejected this argument, explaining that "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[247] Similarly, the fact that the injunction issued was based on a finding that Igarashi's legal rights were in jeopardy should not have resolved the issue of censorship.

Instead, the Japanese Supreme Court should have directly addressed the conflict between the censorial effect of the injunction and the legal claim at issue. At bottom, the *Hoppo Journal* was arguing that Article 21 protects defamatory statements. The Supreme Court could have rejected this argument directly: prohibiting the distribution of defamatory materials is not censorship because defamatory statements are not protected under Article 21 unless made in good faith and with a reasonable basis for belief in their veracity.[248]

Turning to the magazine's generalized claim of Article 21 protection, the Supreme Court noted that freedom of speech is critical to the survival of democracy:

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244. *See id.* at 2-3.

245. On the other hand, had the *Hoppo Journal* published a complimentary story that grossly overstated Igarashi's merits for office, one wonders if the same result would have been obtained. Would the Supreme Court's solicitude for protecting the electorate from falsehoods extend to falsely *positive* news stories? As a matter of logic, a candidate competing with Igarashi for the prefectural governorship should enjoy the same right to an injunction on a theory that a false story praising Igarashi also constitutes a kind of fraud on the electorate. It is, however, rather doubtful that a magazine featuring a false, but positive, story on Igarashi would in fact be enjoined.

246. 376 U.S. 254 (1964).

247. *Id.* at 265.

248. *See* Judgment Upon Case of Defamation, *supra* note 108, at 2-3.

> In a democratic nation where sovereign power resides with the people[249] the following is the foundation of its existence. That is, the people as constituents of that nation may express any doctrine, advocacy of doctrine and the like as well as receive such information from each other, and by taking whatever he believes rightful from among them of his own free will, majority opinion is formed, and government administration is determined through such process.[250]

Thus, when matters of public interest are at issue, speech must be protected even if false, provided that the speaker reasonably believes the speech to be truthful.[251] Consistent with the Meiklejohn approach, speech associated with the project of democratic self-government must be protected from government abridgment—not because everyone "has an unalienable right to speak whenever, wherever, however he chooses" but rather because "[t]he welfare of the community requires that those who decide issues shall understand them."[252] In the case at hand, however, the Justices concluded that the magazine had intended to publish the statements without the requisite good faith belief in their truth. Accordingly, the magazine could be enjoined, on an ex parte basis, from distributing the magazines containing the defamatory materials.

Returning to the theme of prior restraint, the Court noted that "it should be said that in light of the purport of Article 21 of the Constitution which guarantees the freedom of expression and prohibits censorship, prior restraint on acts of expression is allowed only under strict and definite requirements."[253] The Court later spelled out these requirements: "[A]n injunction should be exceptionally allowed only when it is obvious that the contents of expression are not true or its objectives are not solely in the public interest, and, moreover, when the victim may suffer serious and irreparable damage."[254] Igarashi satisfied these conditions and the Court therefore affirmed the district court's injunction.[255]

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249. This, incidently, reflects a major conceptual shift away from the Meiji Constitution. *See* ABE ET AL., *supra* note 109, at 3-13; ANN WASWO, MODERN JAPANESE SOCIETY 1868-1994, at 8-34 (1996).

250. Judgment Upon Case of Constitutionality No. 22, *supra* note 238, at 4 (footnote added).

251. *See id.* at 5 ("Even if the truth is not proved, when there is good reason for the perpetrator of the act to have mistakenly believed that the article was true, the foregoing act should be construed to be not malicious or negligent.").

252. MEIKLEJOHN, *supra* note 23, at 24-25.

253. Judgment Upon Case of Constitutionality No. 22, *supra* note 238, at 5.

254. *Id.* at 6.

255. *See id.* at 6, 9-10.

For the most part, the Supreme Court's logic is sound. To the extent that defamatory statements are not protected under Article 21, it is perfectly appropriate to provide injunctive relief burdening the publication of such statements. The problem lies in the Court's argument that the statements were obviously defamatory: if the statements were so obviously false, then no one would believe them; if no one believes the statements, then Igarashi suffers no harm. Indeed, the *Hoppo Journal*'s exercise in attack journalism compares favorably with news stories in the United States taking up the public and private character of prominent national officials, such as Presidents Nixon and Clinton, and Speakers of the House Newt Gingrich and Jim Wright.

Arguably, the United States case most directly on point is *Hustler Magazine v. Falwell*.[256] In the now-infamous "Campari Ad," Larry Flynt's pornographic magazine suggested that Jerry Falwell, a prominent Baptist minister, first experienced sexual intercourse "during a drunken incestuous rendezvous with his mother in an outhouse."[257] In addition, the "ad" suggested that Falwell abused alcohol regularly and preached only when intoxicated. Falwell sued and a jury found Hustler Magazine liable for intentional infliction of emotional distress.[258] The U.S. Court of Appeals for the Fourth Circuit affirmed.[259]

The United States Supreme Court reversed, holding that *Hustler*'s parody of Falwell came within the protection of the First Amendment. Writing for a unanimous court, Chief Justice Rehnquist observed:

> The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[260]

In a fit of understatement, he then noted that "[s]uch criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to vehement, caustic, and sometimes unpleasantly sharp attacks."[261]

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256. 485 U.S. 46 (1988).

257. *Id.* at 48.

258. *See id.* at 49.

259. *See* Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).

260. *Falwell*, 485 U.S. at 51 (quoting Associated Press v. Walker, 388 U.S. 130, 164 (1967)) (Warren, C.J., concurring).

261. *Id.* (internal quotation marks and citation omitted).

The United States Supreme Court repeated its prior holding that false statements made with knowledge of their falsity or with reckless disregard for their truth or falsity remain actionable.[262] Speech aimed at inflicting emotional harm or holding an officeholder up to public ridicule, however, enjoys First Amendment protection. "[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment."[263] In order to recover against a publisher, a plaintiff must show "that the publication contains a false statement of fact which was made with 'actual malice.'"[264]

If one read the *Hoppo Journal* story literally—and the Japanese Supreme Court so read the story—the result in the *Hoppo Journal Co.* case is not inconsistent with *Hustler Magazine* and *New York Times Co.* It is difficult, however, to understand *how* the Supreme Court of Japan could have read the story literally. The story made no attempt to be objective or to justify its wildest assertions; moreover, it was sprinkled with political invective: Igarashi is "an ugly character hiding behind a beautiful mask," a "cockroach," an "opportunist," a "magician with words and a street vendor quack," "a born liar," a "mayor like the rump of the bitch," and a "viperous Dosan." The imagery is fantastical, not factual.[265] Perhaps most importantly, the main point of the piece is political, not personal: Igarashi is "a useless and pernicious person to Hokkaido" and "the Japan Socialist Party should change the candidate for governorship immediately if reform is earnestly sought."[266]

No reasonable person reading the *Hoppo Journal*'s attack on Igarashi would take it literally. Although in the form of a news story, in substance the piece is an editorial. Nevertheless, the Supreme Court took the article at face value. "This issue of [the] magazine, having an expected first issue circulation of twenty-five thousand, was considered to be capable of seriously and almost irreparably defaming the said Appellee [Igarashi] . . . ."[267]

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262. *See id.* at 51-52, 55-57; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

263. *Falwell*, 485 U.S. at 53.

264. *Id.* at 56.

265. *See* Judgment Upon Case of Constitutionality No. 22, *supra* note 238, at 8 ("A goblin named Kozo is now wriggling on the earth of Hokkaido. It turns into a butterfly by day and a hairy caterpillar by night crying that (he) wants to live in the red brick (prefectural office) building.").

266. *Id.*

267. *Id.* at 9; *cf.* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14-16, 20-21 (1990); *Falwell*, 485 U.S. at 50; Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13-14 (1970).

One is left with the firm conclusion that something in the *Hoppo Journal*'s catalog of insults and epithets truly irked the Justices. Yet, it is difficult to identify a specific statement that explains the result.[268]

It is certainly true that the Japanese traditionally have placed a very high premium on their good name and honor.[269] Professor Benedict argues that *giri* (or duty) to one's name is a core component of Japanese social ethics. Although Japanese society is highly structured and marked by strong hierarchical patterns, personal insult invites—and perhaps even demands—revenge, even at the cost of breaching pre-existing duties to social superiors.[270] Perhaps the Supreme Court's decision simply reflects an implicit recognition of the salience of *giri* to one's name and an assumption that a less protective rule would merely encourage resort to extra-legal means of obtaining satisfaction. Whatever the precise motivations for the decision, it is difficult to believe that any reasonable reader would have taken the accusations against Igarashi literally.

Even the concurring Justice with the most expansive vision of freedom of speech joined the majority's conclusion that the article was not protected speech. Justice Masataka Taniguchi argued that in the context of an election, "the circulation of information which is necessary and useful to decision-making has priority over protection of reputation of the public servants or the candidates for elective public offices."[271] In order to avoid self-censorship and "to enable debate and decision-making on public matters, it is necessary to permit false speech as well."[272]

For Justice Taniguchi, as a general proposition, the solution to the problem of false speech is not censorship, but counterspeech:

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268. *See* Beer, *Freedom of Expression*, *supra* note 21, at 234-35 (acknowledging that the *Hoppo Journal*'s article on Igarashi was "so extreme in its insults, vulgarity, and personal attack as obviously to lack credibility on a first reading," but arguing that the Supreme Court's resolution of the case was not entirely unreasonable because "[t]o the Court, character assassination trumped the public interest value of comment on a candidate for public office"); *cf.* Texas v. Johnson, 491 U.S. 397, 436-37 (1989) (Stevens, J., dissenting). Justice Stevens has generally been a strong supporter of broad and comprehensive First Amendment rights; his vote in *Johnson* is utterly inconsistent with his record in this area. *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329 (1997) (striking down portions of the Internet Decency Act on First Amendment grounds); *see also* Krotoszynski, *supra* note 45, at 1253-56.

269. *See* BENEDICT, *supra* note 18, at 145-76.

270. *See id.* at 146-48, 159-64, 199-205. The Koreans apparently have a similar social ethic and an even more protective rule of law regarding damaging truthful statements. *See* Nicholas D. Kristof, *News in U.S. Can Be 'Rumor' in Seoul, and Lead to Jail*, N.Y. TIMES, Jan. 7, 1998, at A3.

271. Judgment Upon Case of Constitutionality No. 22, *supra* note 238, at 27 (Taniguchi, J., concurring).

272. *Id.* at 28.

> [E]ven if the contents of speech are false and statement of opinion is based on such false facts, presentation of the opinion and free debate will only compel reconsideration and re-examination of the dissenting opinion, and bring about deeper recognition of the reason to support such opinion and better understanding of the meaning of it.[273]

If false speech is made with actual malice (e.g., knowledge of its falsehood), however, it loses its protected status. Justice Taniguchi agreed with the majority that the *Hoppo Journal*'s article included knowingly false statements and was, therefore, not protected by Article 21.[274]

The defamation cases establish at least two important points: (1) the Japanese Supreme Court views freedom of speech as an essential corollary of democratic self-governance, and (2) the Justices are prepared to draw clear lines between protected and unprotected speech activity. The two positions need not be contradictory. In the United States, the Supreme Court's commitment to viewpoint neutrality and its related anti-censorship project have led the Justices to afford even marginal speech activity significant First Amendment protection.[275] The United States Supreme Court has essentially overprotected marginal speech activities in order to avoid creating a "chilling effect"[276] on protected speech activities.

The Japanese Supreme Court has taken the opposite tack. Although embracing freedom of expression insofar as speech relates to self-governance, it has refused to protect speech that does not directly further this effort. From the Supreme Court's perspective, a gross parody of a candidate for political office does not facilitate considered debate of his relative merits for office. In consequence, the parody should not enjoy Article 21 protection. Conversely, a newspaper reporting a story about corruption in city hall should be immune from liability if the story turns out to be false—provided that the newspaper had a good faith belief in the truth of the story at the time it made its decision to publish it.

Implicit in the Japanese position is a rejection of the Holmesian marketplace model of free expression in favor the Meiklejohn and Brandeis conception of the town hall. If a person behaves in a rude, obnoxious, or obscene fashion during a town hall meeting, the person is

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273. *Id.*

274. *See id.* at 29-31.

275. *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115 (1989); Miller v. California, 413 U.S. 15 (1973).

276. Reno v. ACLU, 117 S. Ct. 2329, 2332 (1997); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); Dombrowski v. Pfister, 380 U.S. 479, 487 (1965); New York Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring).

escorted from the chamber, not tolerated.[277] Such behavior is antithetical to the consideration of the issues facing the community.

The marketplace of ideas, by way of contrast, potentially belongs to those with the deepest lungs or the fattest wallets, regardless of the merits of their contributions. In a true marketplace, Larry Flynt is as free to peddle his pornographic and scatological wares as a candidate for political office is to distribute her position papers. Government may not restrict Flynt's speech in order to enhance the relative voice of other speakers[278] nor may it do so because Flynt's speech is genuinely perceived to present a threat of harm to the community.[279] Under this view, as Justice Holmes explains, freedom of speech "is an experiment, as all life is an experiment."[280] It implies toleration of speech, including "the expression of opinions that we loathe and believe to be fraught with death."[281] The Supreme Court of Japan has protected the expression of ideas that it probably "loathes,"[282] but has been unwilling to prohibit government action aimed at restricting speech that is demonstrably harmful to the community or potentially disruptive of normal political processes.

The Japanese Supreme Court's defamation cases seem to reflect Meiklejohn's observation that "[t]he town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless [disruptive and counterproductive] speech were thus abridged."[283] For the Supreme Court of Japan, as for Meiklejohn, freedom of speech is not "a dialectical free-for-all" but rather is "self-government."[284]

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277. As Meiklejohn put it, in the context of democratic deliberation about matters of self-governance, "the talking must be regulated and abridged as the doing of the business under actual conditions may require." MEIKLEJOHN, *supra* note 23, at 23. Should a speaker "wander[] from the point at issue" or prove "abusive or in other ways threaten[] to defeat the purpose of the meeting, he may and should be declared 'out of order.'" *Id.* Ultimately, a disruptive person who persists in obstreperous conduct "may be 'denied the floor' or, in the last resort, 'thrown out' of the meeting." *Id.*

278. *See* SMOLLA, *supra* note 38, at 220-39; *cf.* SUNSTEIN, *supra* note 41, at 93-105 (arguing that government attempts to limit the influence of wealth in elections should not be deemed unconstitutional); FISS, *supra* note 31, at 5-6, 19-23, 42-45 (same); Fiss, *supra* note 160, at 2478-80 (same).

279. *See* MACKINNON, *supra* note 69, at 97-110.

280. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

281. *Id.*

282. *See* Japan v. Kanemoto, 396 HANREI JIHŌ 19 (Sup. Ct., Dec. 21, 1964) *reprinted in* ITOH & BEER, *supra* note 122, at 242.

283. MEIKLEJOHN, *supra* note 23, at 23.

284. *Id.*

Indeed, community values permeate the Japanese Supreme Court's Article 21 jurisprudence. That is not to say that the Supreme Court has stood idly by while government officials silenced unpopular political minorities. Rather, the Supreme Court consistently has demonstrated a concern for public values when articulating the scope of Article 21 rights.

Both the defamation and political speech cases reflect a strong commitment to freedom of expression as it relates to democratic self-governance, but not as a means of individual self-actualization or liberty. The community's interest in self-government justifies protecting speech related to self-government, but not ancillary—much less wholly-unrelated—speech. Thus, the Justices of the Supreme Court of Japan would undoubtedly agree with Meiklejohn's assertion that:

> [a]nyone who would . . . irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, a classroom, a football field, or a home, does not thereby exhibit his freedom. Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.[285]

The Supreme Court of Japan has permitted government to "abate" such free speech "nuisances," whether in the form of pesky candidates canvassing door-to-door or, rather, in the form of a hyperbolic, counter-factual attack in a local magazine.

In short, the Justices of the Supreme Court of Japan have embraced Meiklejohn's vision of freedom of speech as a means and not an end. In so doing, they have laid bare some of the implicit costs and benefits associated with Meiklejohn's theory of freedom of expression. Perhaps most importantly, they have demonstrated the communitarian, group-oriented cast of Meiklejohn's philosophy of free speech.[286]

In a society that can reach basic agreement about who shall serve as the "parliamentarian" and what the rules of the debate shall be, Meiklejohn's democratic self-government theory of free expression seems to function effectively. The question remains, however, whether a pluralistic society could agree on a common set of "floor rules." To the extent that the Japanese experience demonstrates the viability of the Meiklejohn theory for a group-oriented society that functions on the basis of establishing community consensus,[287] it should lead one to question the viability of such a theory in a society committed to individualism and respect for cultural pluralism.

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285. *Id.* at 24.
286. *See* Post, *supra* note 26, at 268-78, 288-89.
287. *See* NAKANE, *supra* note 21, at 65-66, 143-51.

At the same time, one should not underestimate the costs associated with government regulation of the modalities of speech—small, unpopular minorities may be effectively silenced. Arguably, minority rights should not be subjugated solely because the minority is *really* small. Yet, a truly communitarian speech ethic will be hard pressed to avoid just such a result.[288]

It also requires something of a leap of faith to assume that communitarian speech regulations will relate solely to the modalities of speech without bleeding over into issues of content and viewpoint. A small, unpopular minority committed to engaging in highly offensive forms of speech activity is unlikely to find the Japanese courts particularly receptive to its Article 21 claims. The communitarian impulse that justifies the regulation of how one engages in speech activity is likely also to affect judicial consideration of the *content* of speech activity.

V. THE PROBLEM OF OBSCENITY

Although the First Amendment has made strong inroads in Japan, the Japanese High Court has certainly established a distinctly Japanese free speech tradition. As noted above, one common theme is a concern for the tranquility of the community and the protection of its values.

In this regard, the Japanese Supreme Court's treatment of obscenity reflects a strong concern for maintaining the viability of Japanese cultural values related to sexuality and gender relations. In a series of cases beginning in the 1950s, the Japanese Supreme Court has endorsed government efforts to restrict salacious materials—even when these materials have significant and well-recognized artistic or literary value.

Beginning with its opinion in the *Lady Chatterly's Lover Decision*,[289] the Supreme Court of Japan has adopted the position that obscene materials fall outside the scope of Article 21.[290] The facts of the case are straightforward. Local prosecutors sought to suppress the sale and distribution of a Japanese translation of D.H. Lawrence's *Lady Chatterly's Lover*. Citing Article 175 of the Penal Code of Japan, which

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288. *See generally id.* at 103, 147-48; BENEDICT, *supra* note 18, at 219-20.

289. Judgment Upon Case of Translation and Publication of Lady Chatterly's Lover and Article 175 of the Penal Code, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 2* (General Secretariat, Supreme Court of Japan, 1958) (decided Mar. 13, 1957), *reprinted in* MAKI, *supra* note 124, at 3; *see also* BEER, *supra* note 107, at 347-49 (describing and discussing the Lady Chatterly's Lover Decision); *cf.* Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 688-89 (1959) (holding non-obscene as a matter of law a film version of *Lady Chatterly's Lover*).

290. *See* Lady Chatterly's Lover, *supra* note 120, at 10-13.

prohibits the distribution, sale, or public display of an "obscene writing, picture, or other object,"[291] the prosecution argued that the translator and publisher of *Lady Chatterly's Lover* should be punished for disseminating an obscene writing.[292] The trial court found the novel obscene as a matter of law and convicted the defendants. On appeal, the defendants argued that *Lady Chatterly's Lover* was not obscene because it had significant and well-recognized literary value, that Article 21 privileged their sale and distribution of the work, and that even if the novel was obscene and did not enjoy Article 21 protection, they could not be convicted because they did not know that the novel was obscene. The Supreme Court rejected all three contentions.

With respect to the definition of obscenity, the Supreme Court cited the earlier holdings of its predecessor, the Court of Cassation, interpreting Article 175. Under these precedents, the term "obscene writings" as used in Article 175 "refers to a writing, picture, and everything else which tends to be an obscene matter" and "it must be such that it causes man to engender feeling[s] of shame and loathsomeness."[293] The Court of Cassation later refined this rather circular and vague definition: obscenity includes any material "'which unnecessarily excites or stimulates sexual desire, injures the normal sense of embarrassment commonly present in a normal ordinary person, and runs counter to the good moral concept pertaining to sexual matters.'"[294]

The Supreme Court then concluded that *Lady Chatterly's Lover* met this definition of obscenity, based on twelve sexually-explicit passages.[295] The Court explained that "the translation of the passages under consideration far exceeds the bound of propriety generally accepted in society."[296] This conclusion stood, notwithstanding the fact that "unlike the usual type of pornographic writings, it [the novel] is not entirely without literary characteristics."[297] Describing the passages at issue as "too bold, detailed, and realistic," the Court tossed out the baby with the bath water, noting that "[a]rt, even art, does not have the special privilege of presenting obscene matters to the public."[298]

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291. Japanese Criminal Code, art. 175, *reprinted in* Lady Chatterly's Lover, *supra* note 120, at 36.

292. *See* Lady Chatterly's Lover, *supra* note 120, at 1-3.

293. *Id.* at 3.

294. *Id.*

295. *See id.* at 3-9.

296. *Id.* at 7.

297. *Id.*

298. *Id.* at 7, 8. In a very similar case, the Supreme Court of the United States reached the opposite conclusion. *See* Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 688-90. (1959). Writing for the majority, Justice Stewart characterized New York's effort to suppress a film version of *Lady Chatterly's Lover* as

Moreover, the fact that the defendants did not have prior knowledge that the novel violated Article 175 did not insulate them from liability.[299] "Whether the writer had a complete knowledge as to the obscene nature of his work or had only a vague recognition, or whether he had no knowledge whatsoever, merely goes to the question of mitigation."[300]

Finally, the Justices turned to Article 21. They squarely rejected any suggestion that Article 21 protects legally obscene materials. Invoking Article 12's "public welfare" limitation, the Supreme Court characterized the production and sale of obscene materials as an "abuse" of freedom of expression.[301] Nor did the prohibition of obscene material constitute a form of censorship, also prohibited by Article 21.[302] Although a number of Justices penned concurring opinions, not a single member of the fifteen Justice Supreme Court dissented from the view that *Lady Chatterly's Lover* constituted obscenity.

In 1969, the Supreme Court revisited the issue of obscenity in *Ishii v. Japan*,[303] also known as *the de Sade Case*. The defendants argued that the work in question, the Marquis de Sade's *In Praise of Vice*, was not obscene because it had significant literary value. Restating its prior holding in the *Lady Chatterly's Lover Case*, the Supreme Court held that the book in question was legally obscene, even though de Sade's work possessed significant literary value.[304] "When writings of artistic and intellectual merit are obscene, then to make them the object of penalties in order to uphold order and healthy customs in sexual life is of benefit to the life of the whole nation."[305] Thus, the Supreme Court strongly

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an attempt "to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior." *Id.* at 688. Justice Stewart immediately rejected that proposition because "the First Amendment's basic guarantec is of freedom to advocate ideas." *Id.*

299. *See* Lady Chatterly's Lover, *supra* note 120, at 9-10; *cf.* Smith v. California, 361 U.S. 147 (1959) (holding that knowledge of a work's obscene nature was a prerequisite to prosecution of a book store owner because permitting California to impose liability without knowledge of a book's obscene content would unduly chill the availability of books to the public).

300. Lady Chatterly's Lover, *supra* note 120, at 10.

301. *See id.* at 11.

302. *See id.* at 12-13.

303. 23 KEISHŪ 10, at 1239 (Sup. Ct., Oct. 15, 1969), *reprinted in* ITOH & BEER, *supra* note 122, at 183.

304. *See id.* at 184-85 ("[T]here is no obstacle to holding obscene a literary work with artistic and intellectual value.").

305. *Id.* at 186; *cf.* Miller v. California, 413 U.S. 15 (1973) (holding that works possessing serious artistic, literary, scientific, or other social value may not banned as obscenity, notwithstanding sexually explicit content). *But see* Susan Paynter, *Two Police Chiefs, Two Views of Obscenity*, SEATTLE POST-INTELLIGENCER, July 18, 1997, at C1

reaffirmed its position that the fact that a work has significant literary, artistic, or scientific value does not save it from prohibition under Article 175 of the Penal Code.

Commentators, both in Japan and abroad, have been highly critical of these decisions.[306] Some have even predicted that the Supreme Court would eventually reverse itself, at least insofar as it has sanctioned the prohibition of works that possessed serious social value.[307] Nevertheless, the Supreme Court has declined to oblige these critics. On the contrary, the Court reaffirmed the validity of *Lady Chatterly's Lover* and *de Sade* scarcely more than a decade ago,[308] citing its earlier precedents and again reiterating its position that "[w]hen viewed from the standpoint of maintaining and securing sound sexual morals in our country, prevention of the unnecessary influx of matters of obscene expression from abroad is in conformity with the public welfare."[309]

What should one take from *Lady Chatterly's Lover* and its progeny? Plainly, the Supreme Court's decisions do not fit into an overall governmental commitment to protect the community from erotic or sexually explicit speech—the commodification of sex is a *fait accompli* in Japan.[310] Nor has the Japanese Supreme Court, like its Canadian

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(describing Oklahoma City police chief's decision to prosecute video rental stores offering customers *The Tin Drum* because of single scene involving attempted sexual activity between minors).

306. *See* BEER, *supra* note 107, at 233, 354-55; Masami Itoh, *The Rule of Law: Constitutional Development*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 205, 228 (Arthur Taylor von Mehren ed., 1963); Nathaniel L. Nathanson, *Human Rights in Japan: Through the Looking-Glass of Supreme Court Opinions*, 11 HOW. L.J. 316, 322-23 (1965).

307. *See* Itoh, *supra* note 306, at 228; Interview with Professor John Haley, University of Washington (July 11, 1996).

308. *See* Customs Inspection Case, *supra* note 107, at 8. In this decision, the Supreme Court upheld the Customs Service's decision to seize certain 8mm films under a provision of the Customs Tariff Law prohibiting the importation of books or drawings that "injure the public morals." Unlike the *Lady Chatterly's Lover* and *de Sade* cases, however, the Supreme Court was divided. Four Justices of the 15 sitting issued a joint dissent, arguing that the "public morals" standard was too vague to survive Article 21 scrutiny. *See id.* at 18 (Ito, Taniguchi, Yasuoka, & Shimatani, JJ., dissenting).

309. *Id.* at 8.

310. In Japan, erotic materials are ubiquitous: "spring books" and "spring movies" are readily available, not to mention pornographic comic books. *See* BEER, *supra* note 107, at 339-40, 345-47 (discussing prevalence of sexually explicit films and books in Japan); REINGOLD, *supra* note 113, at 92-101 (describing the irony of the Japanese government's active censorship efforts against foreign erotica given the ubiquity of domestically produced smut); John Burgess, *Prostitute's Death From AIDS Alarms Japan*, WASH. POST, Feb. 9, 1987, at A1 ("Pornographic comic books are standard fare for men commuting on subways."); David Remnick, *Tokyo After Dark*, WASH. POST, June 16, 1985, Book World, at 7 (describing the Japanese sex industry). Beyond dirty pictures,

counterpart, made a conscious decision to elevate gender equality above freedom of expression.[311] Although Japanese women increasingly are challenging traditional stereotypes[312] about their proper role in society,[313] the Supreme Court's decisions do not invoke the equal protection guarantee contained in Article 14, nor has the Court framed its decisions in terms of avoiding the degradation of women. Perhaps this is just as well, given the widespread availability of socially-correct pornography in Japan—pornography that is thoroughly Japanese in its outlook on proper sexual behaviors.[314]

If the *Lady Chatterly's Lover* line of cases cannot be explained in terms of a general social concern about pornography, nor in terms of a commitment to gender equality that supercedes the protection of freedom of expression, what then explains the Japanese Supreme Court's willingness to turn a blind eye to state-sponsored censorship? Why has the Japanese Supreme Court given its blessing to the state's efforts to bowdlerize pornography (an oxymoronic task, to be sure)?

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movies, and books, one can readily obtain the real thing in Japan; prostitution is not uncommon and while not officially sanctioned, is an established fact. *See* Burgess, *supra*; Mary Jordan, *In Okinawa's Whisper Alley, GIs Find Prostitutes Are Cheap and Plentiful*, WASH. POST, Nov. 23, 1995, at A31. "Prostitution is so imbued in society that late-night TV programs feature live visits to establishments selling sex and interviews with the women there." Burgess, *supra*. In fact, recent press reports describe a disturbing trend of very young women selling their bodies in order to obtain the cash necessary to keep up with the latest in fashion trends. *See* Nicholas D. Kristof, *A Plain School Uniform as the Latest Aphrodisiac*, N.Y. TIMES, Apr. 2, 1997, at A4.

311. *See* Regina v. Butler [1992] S.C.R. 452 (Can.); GREENAWALT, *supra* note 123, at 113-23; MACKINNON, *supra* note 69, at 100-05.

312. *See, e.g.*, BENEDICT, *supra* note 18, at 279-80 (describing the differences both in education and in formal and informal social status that stamp females as vastly inferior to males in traditional Japanese society).

313. *See* REINGOLD, *supra* note 113, at 103; FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 124-65, 215-18 (1987); WASWO, *supra* note 249, at 147-55; *see also* Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed By the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83 (1995) (describing women's historical roles in Japanese society and their recent willingness to challenge traditional limitations and stereotypes); Andrew Pollack, *It's See No Evil, Have No Harassment in Japan*, N.Y. TIMES, May 7, 1996, at D1 (describing increasing willingness of Japanese women to resist work-based sexual harassment and other forms of gender-based discrimination).

314. This presumably includes such publications as "Anatomical Illustrations of Junior High School Girls," and "V-Club" that feature "pictures of naked elementary school girls." *See* Kristof, *supra* note 310. *Cf.* New York v. Ferber, 458 U.S. 747 (1982) (holding that, consistent with the First Amendment, government may ban any materials featuring nude pictures of children, regardless of their artistic or scientific value).

Arguably, the *Lady Chatterly's Lover* line of cases reflects a rather clumsy and half-hearted attempt to protect the community from "bad ideas" about sex and sexual relationships. It is not the sexually explicit nature of the materials that caused the state to prohibit them, rather it was their un-Japanese world view coupled with their primal subject matter.[315] The Supreme Court's approach seems to embrace the logic that the average Japanese citizen can safely be exposed to foreign political ideas, and even to foreign cultural materials; these materials can be incorporated into Japanese society without altering its basic chemistry. Foreign ideas about sex and gender relations are another matter entirely. The Justices of the Japanese Supreme Court apparently believe that foreign ideas about sex and gender relations are somehow potentially more dangerous to the community; not only foreign pornography, but even foreign works containing a substantial erotic element need not be tolerated.[316] Traditional taboos and social mores must be maintained.[317]

Needless to say, this kind of censorship is hardly consistent with the marketplace of ideas model of freedom of speech. Moreover, it is also inconsistent with most iterations of the Meiklejohn theory of the First Amendment. Alexander Meiklejohn himself argued that art, literature, and science are needed to make the citizenry capable of meaningful participation in democratic self-governance.[318] Such works also help to

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315. *See, e.g.*, REINGOLD, *supra* note 113, at 92-97 (describing the irony of active government censorship of foreign sexually explicit materials while turning a blind eye on domestic, socially-conforming erotica).

316. *Cf.* Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 689 (1959) ("[The First Amendment's free speech guarantee] is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.").

317. This approach is at least arguably consistent with the writings of Robert Bork, who argues that communities have a right to maintain minimum standards of decency, if necessary through projects of governmental censorship. *See* BORK, SLOUCHING TOWARDS GOMORRAH, *supra* note 67, at 140-53. It also comports with Justice Scalia's view that communities should be free to prohibit speech activity that is "*'contra bonos mores,' i.e.*, immoral." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring).

318. *See* Meiklejohn, *supra* note 52, at 256-57. Subsequent critics have argued that this expansion of protected speech is not entirely justifiable. *See* Stern, *supra* note 46, at 932-33 (arguing that this rationale proves both too much and too little and suggesting that it lacks a logical limiting principle).

frame the terms of public debate.[319] He also disapproved of viewpoint-based censorship.[320]

Professor Meiklejohn's attempts to extend his democratic self-government paradigm to encompass artistic, literary, and scientific expression produced recurring criticism. As Professor Marty Redish explained, "[a]lthough Meiklejohn in later years appeared to soften the rigidity of his lines of demarcation by effectively extending his doctrine—in a somewhat less than persuasive manner—to many forms of apparently nonpolitical speech, other commentators have adopted his initial premise and kept within its logical limits."[321] Meiklejohn's attempt to expand his theory led to attacks from "those who believe that the first amendment has no special political basis and by political 'purists' who accept Meiklejohn's initial premise about the relationship between the first amendment and the political process, but question the logic of his extension."[322]

The Japanese Supreme Court's free speech jurisprudence amply demonstrates that it is possible to protect political speech without protecting non-political speech and, moreover, that such an approach is not inconsistent with the maintenance of a functioning democratic polity. Viewed in this light, the *Lady Chatterly's Lover* line of decisions demonstrates the limits of Meiklejohn's theory of the proper scope of freedom of expression.

On the other hand, most of Meiklejohn's intellectual descendants have not endorsed the proposition that the government can attempt to protect the citizenry from dangerous ideas about sex or gender roles.[323]

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319. *See* Meiklejohn, *supra* note 52, at 257.

320. *See id.* at 261 ("Now if such ordinances are based upon official disapproval of the ideas to be presented at the meeting, they clearly violate the First Amendment. But if no such abridgment of freedom is expressed or implied, regulation or prohibition on other grounds may be enacted and enforced."); *see also* MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 52, at 118-19:

> [W]hen we speak of the Amendment as guarding the freedom to hear and to read, the principle applies not only to the speaking or writing of our own citizens but also to the writing or speaking of everyone whom a citizen, at his own discretion, may choose to hear or to read.

321. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 592 (1982) (footnote omitted); *see also* Stern, *supra* note 46, at 932-33.

322. Redish, *supra* note 321, at 597 (footnotes omitted).

323. *See* SUNSTEIN, *supra* note 41, at 224-26; Owen M. Fiss, *Freedom and Feminism*, 80 GEO. L.J. 2041, 2044, 2056-57 (1992); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2091-92, 2103-04 (1991); *cf.* BORK, SLOUCHING TOWARDS GOMORRAH, *supra* note 67, at 99-102, 140-53 (arguing that some ideas are fundamentally inconsistent with democracy and therefore may be suppressed); Bork, *supra* note 67, at 20-35 (arguing that the state may suppress non-political speech without violating the First Amendment).

Even Catherine MacKinnon, who endorses the proposition that the state should be permitted to punish the advocacy of certain bad ideas,[324] does not embrace the view that government can attempt to impose orthodoxy in matters of intimate human relationships and gender roles.[325]

The Japanese Supreme Court's approach is perhaps consistent with Robert Bork's theory of the First Amendment. Former Judge Bork seems to subscribe to cultural *jihad* thesis recently set forth by Justice Scalia;[326] he has argued that communities should be permitted to determine the level of deviancy that they will tolerate,[327] and to impose punishments on those who insist on transgressing the established limits.[328]

Ironically, however, Japanese sexual mores have not been static; they have evolved and changed over time. One concurring Justice in the *Lady Chatterly's Lover Case* notes that once upon a time, Japanese men and

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324. *See* MACKINNON, *supra* note 69, at 103-07. MacKinnon embraces the Canadian Supreme Court's apparent rejection of the notion that "under the First Amendment, there is no such thing as a false idea." *Id.* at 106. According to MacKinnon, "[p]erhaps under equality law, in some sense there is." *Id.* In fairness, she attempts to create space for public discussion about the proper ordering of social relations, noting that the embrace of a First Amendment doctrine that permits the prohibition of the expression of hostile attitudes toward women and racial minorities should not preclude debate about or expression of "ideas to the contrary." *Id.* However, the terms of this debate would be delimited by the community's commitment to the equality ethic: debate or expression of ideas cannot impose "social inferiority." *Id.* Yet, as she describes the relationship of ideas and actions, see *id.* at 25-29, 33-41, 74, 82-86, 98-100, the mere expression of viewpoints endorsing inequality based on gender, race, or religion both causes and helps to maintain social inferiority. Accordingly, MacKinnon's logic inexorably leads one to the conclusion that bad ideas exist and the state should be free to prohibit their dissemination as part of a larger project of ensuring social equality.

325. *See* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 155-57, 165-66, 212-13 (1987).

326. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite."); *id.* at 652 ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

327. *See* BORK, SLOUCHING TOWARDS GOMORRAH, *supra* note 67, at 3-4 (arguing that societies should be permitted to establish and maintain moral norms regarding acceptable behavior, with the assistance of state power if necessary).

328. *See id.* at 140-53 (arguing that government imposed censorship is necessary *right now* if Western civilization is to avoid moral ruination accompanied by total social, economic, and political collapse). In fairness to the Supreme Court of Japan, none of their decisions regarding the regulation of "obscenity" come anywhere close to justifying broad-based restrictions on speech based upon a Borkian "society is going to hell in a handbasket" thesis.

women regularly engaged in orgies at a sacred mountain.[329] He even notes references to the practice in traditional folk songs: "[i]n regard to this 'utagaki,' there is a song in Mannyoshu which goes, 'in kagau-kagai, may I also participate in intercourse with another's wife, and let others commune with my wife.'"[330] Of course, "it must be remembered that these functions were regular affairs practiced in the spring and autumn in the sacred compound with divine permission."[331]

Rather than demonstrating hypocrisy (or senility) on the part of Justice Mano, I think that these observations tend to confirm that the Supreme Court's principal concern in this line of cases is preserving Japanese attitudes and mores regarding sexuality and gender roles. Indeed, Justice Mano explained that the ancient practices he described "must be considered as revealing a glimpse of ancient marriage customs based upon group sentiment and group conscience of that time;" accordingly "it cannot be adjudged simply by the concept of eroticism or obscenity as we understand it today."[332] What Justice Mano is really saying is that unlike *Lady Chatterly's Lover* or the writings of the Marquis de Sade, erotic Japanese literature may not reflect contemporary social values or morals, but still retains its Japanese essence; because it is Japanese it can be tolerated, if not embraced, notwithstanding its eroticism.

Before assuming the mantel of cultural/legal superiority, would-be American critics should take care to remember that the United States Supreme Court has not been consistently vigilant against efforts to enforce orthodoxy through government actions designed to suppress ideas or doctrines that it disfavors. In fact, the Supreme Court has from time to time turned a blind eye on efforts to enforce *political* orthodoxy, by

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329. As Justice Mano describes it:

> According to the marriage customs and practices of old Japan, as may be perceived from such classic literature as Kojiki, Nihon, Shoki, Mannyohsu, Fudoki, etc., the method of selecting one's mate apparently was extremely liberal and completely incompatible with the punctilious method adopted later in the feudal period. In one particular, according to an ancient custom called "utagaki" or "kagai," it is said that a group of young men and women went, hand in hand, up into a mountain, normally regarded as sacred, and there they feasted, sang, and danced; and at the height of pleasure, they engaged openly in indiscriminate group sex acts and indulged in the state of ecstasy.

Lady Chatterly's Lover, *supra* note 120, at 15 (Mano, J., concurring); *cf.* REINGOLD, *supra* note 113, at 103-04 (describing contemporary community enthusiasm for erotica and noting that "[t]oday, at the Tagata Shrine near Nagoya, regular festivals are held in which models of male and female genitals are paraded and genitalia-shaped souvenirs are sold to visitors").

330. Lady Chatterly's Lover, *supra* note 120, at 15-16.

331. *Id.*

332. *Id.*

discouraging—if not prohibiting—access to persons and materials deemed dangerous. In the 1970s, for example, the Supreme Court sustained legislation prohibiting the issuance of visas to foreign nationals who had been identified as advocates of communism.[333] In practice, of course, this meant persons who identified with Soviet-style socialism.[334] Surely Justice Marshall was correct in observing that "[n]othing is served—least of all our standing in the international community—" by excluding foreign writers and scholars based on their political views.[335]

More recently, the United States Supreme Court sustained the Reagan Justice Department's efforts to discourage the dissemination of foreign books and films deemed undesirable by the government.[336] Invoking a law passed in the 1930s in response to the perceived dual threats of communism and nazism and recodified during the Red Scare of the 1950s, the Justice Department required a would-be distributor of foreign films designated "political propaganda" by the Department to warn potential recipients of the films that they had been disseminated by "agents" of "foreign principals."[337] A would-be distributor challenged the labelling and notification requirements, arguing that he did not wish to be tagged with distributing "foreign political propaganda" at the behest of the agents of foreign principals.[338]

The Supreme Court concluded that the labelling requirement did not constitute a prior restraint or undue burden on the dissemination of the materials in question.[339] Instead, the majority opined, the law at issue simply required would-be distributors to share the government's official view that the materials in question might reflect a foreign government's official party line.

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333. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972); *see also* 8 U.S.C. §§ 1182(a)(28)(D), (G)(v), & (d)(3)(A).

334. *See Mandel*, 408 U.S. at 771 (Douglas, J., dissenting); *see also* Dennis v. United States, 341 U.S. 494 (1951) (affirming convictions of communist party members for advocating violent overthrow of the United States government, notwithstanding the complete absence of any concrete actions to implement this point of view).

335. *Mandel*, 408 U.S. at 785 (Marshall, J., dissenting). Justice Marshall also lamented the Supreme Court's "depart[ure] from its own best role as the guardian of individual liberty in the face of governmental overreaching." *Id.* The excluded alien, Ernest E. Mandel, a prominent Belgian journalist and Marxist scholar, concluded that the government's decision demonstrated "'a lack of confidence' on the part of our Government 'in the capacity of its supporters to combat Marxism on the battleground of ideas.'" *Id.* at 784.

336. *See* Meese v. Keene, 481 U.S. 465 (1987). The particular films at issue in *Keene* hailed from Canada and addressed the subjects of nuclear war and acid rain; one even received the 1983 Oscar for best documentary. *See id.* at 467-68, 475.

337. *See* 22 U.S.C. §§ 611, 614 (1994); *Keene*, 481 U.S. at 467-68.

338. *See Keene*, 481 U.S. at 467-68.

339. *See id.* at 480-85.

In many respects, attempts to fence out political ideas are more reprehensible than attempts to preserve common cultural understandings. As Justice Douglas observed in *Mandel*, "[t]hought control is not within the competence of any branch of government."[340] Yet, the results in *Mandel* and *Keene* are hard to square with this proposition.

The Japanese Supreme Court's odd obscenity decisions will probably do little harm in the long run because Japan maintains a viable system of political pluralism. If political pluralism exists, cultural pluralism should necessarily follow. As Professor MacKinnon and other feminists have noted, the personal is political; one cannot divorce civic life from social life.[341] On the other hand, cultural pluralism *can* be suppressed in a society that lacks political pluralism. A totalitarian regime that prohibits the free exchange of political ideas can easily annex efforts to control popular culture to its program of repression.[342]

The Japanese effort to maintain a sexual Maginot line is silly and probably ineffectual, but it is hardly the stuff from which dictatorships are forged.[343] Moreover, the Japanese government does not maintain active and ongoing censorial efforts—with the possible exception of aggressive customs inspectors bent on ferreting out the latest copy of *Hustler*.[344] Whatever its precise motivations, the Japanese Supreme Court obviously views governmental efforts to preserve Japanese cultural norms as constitutionally permissible in some instances, even if such efforts ultimately prove to be largely unsuccessful.

Turning from the theoretical to the practical, the obscenity doctrine set forth by the Supreme Court of Japan potentially yields bizarre results. Consider, for example, Milos Forman's film, *The People Versus Larry Flynt*. Although the movie is about freedom of expression and Larry Flynt's colorful publishing career, it features erotic dancing, explicit

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340. *Mandel*, 408 U.S. 753, 772 (Douglas, J., dissenting).

341. *See* MACKINNON, *supra* note 325, at 100; *see also* Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1537 n.18; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 601-02 (1986). As Professor MacKinnon puts it, "[t]he private is the public for those for whom the personal is the political." MACKINNON, *supra* note 325, at 100.

342. China under Mao provides a case study of the potential for success in such efforts. Not only did Mao control and define Chinese political life, he also kept tight control of Chinese cultural life. North Korea under Kim Il Sung provides a second example of this phenomenon.

343. In a rough sort of way, it parallels the French government's attempts to keep the French language pure and exclusive. *See, e.g.*, Anne Swardson, *French Groups Sue to Bar English-Only Internet Sites*, WASH. POST, Dec. 24, 1996, at A1.

344. *See* REINGOLD, *supra* note 113, at 92-104; *see also* BEER, *supra* note 107, at 335-37; Kristof, *supra* note 310.

sexual scenes, rampant drug use, and nudity associated with the preparation of photographs for publication in *Hustler*. It would flunk the *Lady Chatterly's Lover/de Sade/Customs Inspection* test.[345] Any work, however otherwise meritorious, featuring un-Japanese sexual materials, potentially can be labelled "obscene" and banned.

If the Supreme Court were to broaden the scope of its censorial project to include *all* erotic materials, the *Lady Chatterly's Lover* line of cases could be made consistent with the "purist" version of the Meiklejohn theory of freedom of expression.[346] As former-Judge Bork once put it, the objection to excluding non-political speech from constitutional protection arguably "confuses the constitutionality of laws with their wisdom."[347] The absolutist approach to applying Meiklejohn's theory of free expression relies upon "the enlightenment of society and its elected representatives" to protect non-political speech, a state of affairs that Bork characterizes as "hardly a terrible fate."[348] Thus, at a minimum, should the Supreme Court ultimately elect to maintain its stance that erotic speech does not merit Article 21 protection, it should apply this rule to both foreign and domestic materials: "spring books," "spring movies," and similar fare should not enjoy formal legal privilege based solely on their domestic origins.[349]

On the other hand, it is difficult not to be sympathetic toward Meiklejohn's attempt to extend his theory to encompass artistic, literary, and scientific speech.[350] Can a people be politically free but intellectually and culturally repressed? Even if one posits the arts, sciences, and humanities as independent social goods,[351] their relationship to democracy cannot be denied: a society of illiterates will prove incapable of self-governance.[352] Indeed, Thomas Jefferson

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345. Indeed, even the movie *Carnal Knowledge*, held non-obscene as a matter of law in an opinion authored by Chief Justice Rehnquist in Jenkins v. Georgia, 418 U.S. 153 (1974), would constitute obscenity as a matter of law in Japan.

346. *See* BORK, SLOUCHING TOWARDS GOMORRAH, *supra* note 67, at 99-102; Bork, *supra* note 67, at 27-28.

347. Bork, *supra* note 67, at 28.

348. *Id.*

349. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that principled constitutional decision-making requires even-handed application of doctrines across all cases involving similar facts).

350. *See* Meiklejohn, *supra* note 52, at 262-63.

351. *See* Stern, *supra* note 46, at 932-33.

352. *See* THOMAS JEFFERSON, *Notes on Virginia*, *in* 4 THE WORKS OF THOMAS JEFFERSON 64-65 (Paul Leicester Ford ed., 1904); *see also* ALEXANDER MEIKLEJOHN, *Education as a Factor in Post-War Reconstruction*, *in* ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM 185-89 (Cynthia Stokes Brown ed., 1981); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A*

repeatedly drew the connection between education, enlightenment, and democratic self-government.[353]

Democracy presupposes the wisdom, intelligence, and humanity to make meaningful and informed decisions about who shall govern and what they shall do. To protect political speech without affording broad protection to artistic, literary, and scientific speech necessarily constitutes an incomplete and imperfect project; Alexander Meiklejohn came to recognize this and, accordingly, modified his democratic self-government paradigm. One would hope that the Justices of the Japanese Supreme Court, like Alexander Meiklejohn, will one day come to eschew the Borkian approach and instead embrace Meiklejohn's "new and improved" democratic self-governance paradigm for freedom of expression.

VI. FREEDOM OF EXPRESSION, SOCIAL CONSENSUS, AND JUDICIAL REVIEW

Examination and analysis of the Japanese Supreme Court's principal decisions involving freedom of speech presents a mixed picture. The Supreme Court has been moderately protective of political speech and the use of public property for mass demonstrations. At the same time, however, it has proven extremely deferential to governmental authorities—whether local or national, whether legislative or executive. An American observer cannot help but wonder why the Supreme Court of Japan has failed to enforce Article 21 more aggressively. What explains the reluctance of the Supreme Court to challenge directly legislative and executive branch actions that burden freedom of expression?

It would be impossible to demonstrate conclusively that a single reason, or even a group of reasons, explains this pattern of behavior. There are, however, at least four possible explanations that merit consideration. Even if they cannot provide a conclusive resolution to the

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Beginning to the End of the National Educations Crisis, 86 NW. U. L. REV. 550, 550-51, 588, 628-30 (1992); Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1153-54, 1153 n.94 (1993).

353. *See* Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), *in* THE BEST LETTERS OF THOMAS JEFFERSON 208-12 (J.G. de Roulhac Hamilton ed., 1926); Letter from Thomas Jefferson to Joseph C. Cabell (Sept. 9, 1817), *in* 17 THE WRITINGS OF THOMAS JEFFERSON 417, 423-24 (Andrew A. Lipscomb ed., 1904); Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 160 (Paul Leicester Ford ed., 1899); Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge*, *in* THE COMPLETE JEFFERSON 1048 (Saul K. Padover ed., 1943); *see also* Bitensky, *supra* note 352, at 628-29.

question, considered individually and collectively they provide plausible rationales for the Japanese Supreme Court's course of action.

First, the ghost of Japan's civil law past haunts the common law constitution and its ostensible guardian, the Supreme Court. Strong judicial review simply was not a part of the civil law system that existed prior to 1945. Moreover, since 1945, the Supreme Court has failed to assert routinely its authority to "say what the law is."[354] No strong Chief Justice has articulated a clear vision of a robust form of judicial review. Nor has the Supreme Court collectively attempted to carve out a co-equal constitutional status with the Diet and Ministries. On the contrary, "[t]he Court has never played the unique role in the country's political and social life that the United States Supreme Court has played."[355]

The civil law tradition historically has not placed judges at the apex of government structure. Instead, most civil law traditions include a healthy dose of legislative supremacy as a core constitutional precept.[356] Thus, even the adoption of written constitutions in many civil law jurisdictions did not necessarily affect the relative authority of judges vis-a-vis legislatures because "[l]egislative supremacy and a flexible constitution are companion concepts."[357] It is possible to maintain a constitutional system in which the legislature, rather than the courts, retains primary responsibility for considering and implementing constitutional values.[358] In many respects, this was the situation that obtained in Japan under the Meiji Constitution.

Professor Merryman reports that although "[t]he trend toward judicial review of the constitutionality of legislation in the civil law world has been strong, particularly in this century,"[359] the results have not been particularly encouraging in many jurisdictions. "The tendency has been for the civil law judge to recoil from the responsibilities and opportunities of constitutional adjudication."[360] Indeed, Professor Merryman questions whether it is possible for civil law judges to raise their sights because "[t]he tradition is too strong, the orthodox view of the

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354. *See* Okudaira, *supra* note 13, at 25 ("In Japan . . . there has been no tradition of judicial supremacy and no history of Supreme Court achievements."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

355. Okudaira, *supra* note 13, at 25; *see also* Luney, *supra* note 107, at 123, 144-45; Nathanson, *supra* note 306, at 323-24; Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339, 349-50 (1982).

356. *See* MERRYMAN, *supra* note 138, at 22-25, 28-38, 133-37.

357. *Id.* at 134-35.

358. *See id.* at 135.

359. *Id.* at 139.

360. *Id.*

judicial function too deeply ingrained, the effects of traditional legal education and career training too limiting."[361] All that said, however, the trend within civil law jurisdictions is toward the adoption of what Merryman characterizes as "formal, rigid constitutions" that vest a power of judicial review in a judicial or quasi-judicial organ.[362]

Through its cases taking up freedom of expression, one can see how the Supreme Court of Japan has experienced the difficulties associated with making a transition from a civil law to a common law model. Given the limited role posited for courts in traditional civil law constitutionalism, it is not at all surprising that the Supreme Court of Japan has not adopted an aggressive posture with respect to its relatively new powers of judicial review.

Professor Okudaira has argued that the Supreme Court's reticence is self-reinforcing: "Because the Court does not venture to challenge another branch of the government, its authority is not augmented and its prestige does not increase."[363] He labels this state of affairs a kind of "vicious circle."[364] Thus, one explanation for the Supreme Court's relative quiescence is a lack of raw political power coupled with a lack of social consensus regarding the legitimacy of a strong, perhaps confrontational, form of judicial review. As Professor Okudaira has put it, "[p]erhaps our Court knows it has neither enough authority nor enough prestige to hand down decisions such as *INS v. Chadha* or *Texas v. Johnson*, which strike hard blows at the U.S. Congress or at the executive administration."[365]

A perceived lack of power or concerns about the legitimacy of judicial review in a democratic polity could support a general posture of deference.[366] This explanation, however, is plainly incomplete. The fact of the matter is that the Japanese Supreme Court *has* struck down legislation from time to time; indeed, one commentator has noted that in comparative terms, the Japanese Supreme Court has proven far more aggressive in its exercise of judicial review than did the United States Supreme Court in its early years of existence.[367] The Court not only

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361. *Id.*

362. *Id.* at 133-41.

363. Okudaira, *supra* note 13, at 25.

364. *Id.*

365. *Id.* (footnotes omitted).

366. *See, e.g.*, Sonobe, *supra* note 127, at 167-74.

367. *See* See, *supra* note 355, at 350 ("Whereas the United States Supreme Court used its power of judicial review to invalidate congressional acts only twice in its first sixty-eight years of existence, the Japanese Supreme Court has held five statutes unconstitutional in only half that time."). Of course, the utility of this observation should not be overstated. The United States Supreme Court had no pre-existing role model to which it could look for guidance in articulating a meaningful vision of judicial review (other than perhaps the pre-existing state supreme courts). In the latter half of the

possesses, but actually exercises the power of judicial review; its scruples about overriding the decisions of the political branches have not proven to be a controlling consideration in all cases.[368]

A second possible explanation for the Supreme Court's cautious nature relates to the selection process for members of the Japanese Supreme Court. Dean Luney reports that most scholars attribute the Supreme Court's "conservative trend to the political dominance in postwar Japan of the Liberal Democratic Party (LDP) and to the Supreme Court appointment process."[369] No doubt, the composition of the Supreme Court and the manner in which Justices are selected contributes to the Supreme Court's institutional conservatism.

The LDP selects the persons (to date always men) to be appointed to the Supreme Court of Japan. More often than not, the nominees share a common understanding of the institutional role of the Supreme Court and its proper place in Japan's constitutional scheme. This is not to say that they are ideological clones, nor that they have identical backgrounds. Obviously, individual Justices have different philosophical and jurisprudential leanings. Moreover, the LDP historically has selected Justices from a variety of constituencies within the legal community,

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twentieth century, the United States Supreme Court itself could be seen as such a model. Moreover, other post-World War II constitutional courts in industrial democracies vested with the power of judicial review have not exhibited the Supreme Court of Japan's extreme form of judicial self-restraint. *See* Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure*, 10 AM. U. J. INT'L L. & POL'Y 1295, 1317-20 (1995); Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 837-45 (1991). The Constitutional Court of the Federal Republic of Germany provides perhaps the best example in this regard, especially given Germany's civil law tradition—indeed, the very civil law tradition Japan appropriated during the early years of the Meiji Restoration. *See* HALEY, *supra* note 16, at 67-80; INOUE, *supra* note 13, at 56-67; DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 57-66 (1989).

368. Nor, for that matter, have Professor Nathanson's concerns about the lack of use of the power of judicial review leading to its "atrophy" come to pass. *See* Nathanson, *supra* note 306, at 324. At the same time, the Supreme Court's general posture of extreme deference to the political branches cannot be gainsaid. *Cf.* HALEY, *supra* note 16, at 83-104 (arguing that, even during the Meiji and pre-war periods, Japanese judges exhibited significant independence and worked successfully to maintain the rule of law).

369. Luney, *supra* note 107, at 145; *see also* Okudaira, *supra* note 13, at 24-25; Ramseyer, *supra* note 110, at 724-28, 734-38, 743-46. Indeed, Professor Ramseyer argues that politics not only influences the *selection* of judges in Japan but also affects their *behavior* once in office. *See id.* at 724-28. *But cf.* Haley, *supra* note 138 (arguing that the LDP does not maintain any effective system of control over members of the Japanese judiciary and that judicial selection is not really a function of LDP politics).

including academia, the lower courts, prosecutor's offices, and the practicing bar.[370]

Nevertheless, as in Great Britain, persons appointed to the Supreme Court tend to share a common understanding of Japan's courts and their proper role in the political system.[371] "Most Supreme Court justices have been appointed by the leadership of the LDP or its conservative forerunners and, for the most part, reflect the social, economic, cultural, and political values of the party membership."[372] Just as federal judges appointed during the Reagan and Bush years tended to share a common ideological point of view,[373] so too judges selected by the LDP's leadership are likely to have common attitudes and approaches to constitutional interpretation.

At the same time, however, this explanation seems too thin to explain the astonishing consistency in the Supreme Court's behavior over the last fifty years. Even the most zealous ideological selection process occasionally goes awry.[374] The Justices have maintained a unanimity of style and approach that cannot be attributed to a remarkable string of "good picks" by the LDP. Something more is afoot here. Perhaps a more complete explanation is that the Justices' attitudes are generally indicative not only of the LDP, but also of Japanese society more broadly.

A perceived lack of relative authority provides a third potential explanation for the Japanese Supreme Court's caution. Simply put, the Japanese Supreme Court does not perceive itself to be a powerful institution vis-a-vis the Diet or bureaucracy—with good reason. As noted

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370. *See* Haley, *supra* note 138, at 8-12 (describing the selection process); Luney, *supra* note 107, at 132-36 (same).

371. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 45-47, 61-63, 222-39, 269-71 (1987).

372. Luney, *supra* note 107, at 145; *see also* Okudaira, *supra* note 13, at 24-25.

373. *See* Joan Biskupic, *Clinton Avoids Activists in Judicial Selections*, WASH. POST, Oct. 24, 1995, at A1; David Johnston, *Bush Appears Set to Follow Reagan By Putting Conservatives on Bench*, N.Y. TIMES, May 31, 1989, at B5; Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20; Neil A. Lewis, *Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13; *see also* Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137 (1995).

374. Consider, for example, the examples set by Justices David Souter, appointed by President Bush, and Harry Blackmun, appointed by President Nixon. Perhaps the most famous example of this phenomenon was President Eisenhower's decision to appoint then-New Jersey Supreme Court Justice William Brennan to the United States Supreme Court. Even if President Eisenhower realized that William Brennan was not a judicial conservative, it is doubtful that he realized just how liberal Brennan would prove to be. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 78-84 (1995); DWIGHT D. EISENHOWER, MANDATE FOR CHANGE 1953-1956, at 230 (1963).

above, historically, the Japanese courts have simply enforced the legal rules established by others.[375] In the Meiji period, this meant the edicts of the Emperor and his ministers. In the post-war era, this means the laws promulgated by the Diet and the rules and regulations established by the career bureaucrats in the various government ministries. Neither the Diet nor the bureaucracy would take kindly to more active interventions by the Supreme Court in their affairs. Dean Luney goes so far as to argue that "[t]he judiciary is not in a position to be an instrument for social, economic, or political change; instead, it performs the conservative task of preserving basic civil liberties guaranteed by the Constitution and recognized by the Diet and a majority of the population."[376]

Moreover, the Justices' professional behavior tends to reinforce their relative lack of power vis-a-vis the political branches. The Justices of the Japanese Supreme Court keep a low profile; they do not seek out confrontations with the political branches of government.

Before condemning the Japanese Supreme Court's lack of institutional chutzpah,[377] one would do well to bear in mind that the United States Supreme Court has not always stepped willingly and boldly into the breach.[378] In fact, United States history is littered with instances in which the United States Supreme Court walked to the edge of the abyss, peeked over, and quickly stepped back. *Marbury v. Madison*,[379] Andrew Jackson's defiance of the Supreme Court's decision in *Worcester v. Georgia*,[380] the *Legal Tender Cases*,[381] and the *Gold*

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375. *See supra* notes 127-153 and accompanying text.

376. Luney, *supra* note 107, at 145.

377. *Cf.* Obiora, *supra* note 10, at 275, 276-78, 284-85 (arguing that universalist assumptions regarding the transnational content and meaning of human rights and the proper roles of legal institutions in securing social reforms often reflects unjustifiable cultural elitism, if not a form of cultural imperialism).

378. *See, e.g.*, Vacco v. Quill, 117 S. Ct. 2293 (1997) (refusing to recognize a constitutional right to physician assisted suicide and opining that this question belongs more properly to the state legislatures); Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (same).

379. 5 U.S. (1 Cranch) 137 (1803).

380. 31 U.S. (6 Pet.) 515 (1832). President Jackson is reputed to have said of this decision that "John Marshall has rendered his decision, now let him enforce it." GRANT A. FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF FIVE CIVILIZED TRIBES OF INDIANS 235 (2d ed. 1953); *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1363-64 (1997); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 602 (1983); Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Iudian Gaming? "A Few Pages of History Are Worth a Volume of Logic,"* 1996 BYU. L. REV. 407, 423-24.

381. 79 U.S. (12 Wall.) 457 (1870); *see* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 320-39 (1985).

Clause Cases[382] all provide instances of artful dodging by the Supreme Court to avoid crossing the President or Congress. Indeed, to some extent, even *Brown v. Board of Education*[383] fits into this overall pattern: in *Brown I*, the Court punted away the question of the proper remedy[384] and, in *Brown II*, the Supreme Court adopted its infamous "all deliberate speed" mandate to dismantle *de jure* segregation in the public schools.[385] The lack of a firm remedy, the lack of a definite timetable for implementation, and the Court's subsequent unwillingness to fill in these blanks significantly muted the social and political impact of the decision.[386] Thus, after some reflection, its seems clear that the United States Supreme Court has established a relatively consistent pattern, if not a practice, of attempting to avoid creating constitutional crises.[387]

In some circumstances, this strategy of prudent avoidance can make a great deal of sense. Consider that, just twenty-five years ago, there was more than a little doubt about whether then-President Nixon would comply with the Supreme Court's order—should it decide to affirm the district court's subpoena requiring him to hand over the tape recordings of his oval office conversations.[388] Lacking both power of purse and power of sword, the judiciary is by nature the "least dangerous branch" in a constitutional democracy.[389]

The Japanese Supreme Court's efforts to avoid direct confrontation with the political branches probably reflect, at least in part, concerns about the ability of the Court to enforce its will. The malapportionment

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382. Perry v. United States, 294 U.S. 330 (1935); *see also* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 806 n.178 (1994); Kenneth W. Dam, *From the* Gold Clause Cases *to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504 (1983); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 379 (1992).

383. 349 U.S. 294 (1955) & 347 U.S. 483 (1954) [hereinafter *Brown II*].

384. *See Brown*, 347 U.S. at 495-96.

385. *Brown II*, *supra* note 383, at 301.

386. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

387. *See* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). As Professor Neal Devins has put it, "[m]ost landmark Supreme Court decisions cannot be understood without paying attention to the politics surrounding them." Neal Devins, *Foreword*, 56 LAW & CONTEMP. PROBS. 1, 2 (1993).

388. *See* United States v. Nixon, 418 U.S. 683 (1974); *see also* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 3-9 (1976); Alexander & Schauer, *supra* note 380, at 1364-65; Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 397 (1987).

389. *See* THE FEDERALIST NO. 78, at 522-23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

cases are telling in this regard. Over a period of thirty years, the Supreme Court has demanded that the Diet reduce the relative disparity that existed in citizens' voting power. Ultimately, it settled upon a ratio of 3:1 as a constitutional standard.

When presented with a challenge to a district with a 3.18:1 ratio, however, it indicated that the 3:1 ratio was not set in stone and that its application would be flexible enough to accommodate shifts in population.[390] Once again, the Supreme Court of Japan demonstrated its willingness to compromise principles in order to avoid interbranch conflict.

Fourth, and perhaps most importantly, conflict avoidance is an important Japanese cultural norm. Thirty years ago, Professor Nathanson severely criticized the Supreme Court of Japan, arguing that "[w]hile it has generally paid lip service to the principles of Chapter III of the Constitution, it has not struck any resounding blows for their effective implementation."[391] This observation reflects a gross misconception of the fundamental nature of Japanese society; "striking resounding blows," thereby rushing into direct and open conflict with other branches of the government, would be profoundly *un*-Japanese. Neither institutions nor individuals gain much ground in Japan by rocking the *wa*, or social harmony.[392] Direct confrontation is to be avoided and mediation of disputes is to be preferred over formal court adjudication.[393]

In many respects, the Japanese Supreme Court attempts to mediate, rather than decide, constitutional disputes. As Justice Sonobe of the Japanese Supreme Court has explained "there is a tendency to emphasize the aspect of balance, that is, of harmony and collaboration, in applying the principle of checks and balances."[394] Rather than broadly endorsing the positions of either the government or the challengers, it often finds a

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390. *See* Judgment Upon Case of Constitutionality of the Provisions of the Public Offices Election Law on Electoral Districts and the Apportionment of Seats, *Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality No. 27* (General Secretariat, Supreme Court of Japan, 1996) (decided Jan. 20, 1993).

391. Nathanson, *supra* note 306, at 323. Professor Nathanson's language calls to mind the advice Lady Macbeth offered her husband Lord Macbeth: "screw your courage to the sticking-place." WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH, act 1, sc. 7. She predicted that if he did so, good things would follow for both. *See id.* Lord Macbeth decided to take Lady Macbeth's advice, struck a "resounding blow" against his Lord and Liege Duncan, and ultimately suffered terrible consequences as a result.

392. *See* JOHN L. GRAHAM & YOSHIHIRO SANO, SMART BARGAINING: DOING BUSINESS WITH THE JAPANESE 25-27 (rev. ed. 1989); KIM, *supra* note 21, at 49-50, 52-53; NAKANE, *supra* note 21, at 49-50; ROSALIE L. TUNG, BUSINESS NEGOTIATIONS WITH THE JAPANESE 46-49 (1984).

393. *See* REINGOLD, *supra* note 113, at 63.

394. Sonobe, *supra* note 127, at 138.

third way that splits the difference: "[a]s to the specific exercise of the power of judicial review, the courts have been keen to balance many competing claims."[395] The *Tokyo* and *Niigata Ordinance* decisions reflect this sort of approach, as do the Court's cases on defamation.

A radically revisionist account of the Supreme Court of Japan's behavior is also tenable. One could view the Supreme Court's practice of providing limiting constructions as a form of judicial activism, rather than as the product of extreme judicial deference.[396] At least arguably, the Supreme Court has a bad habit of simply rewriting constitutionally problematic laws to suit its liking. Perhaps the Diet or, for that matter, the general electorate, would prefer no law to the watered-down statute that the Supreme Court has drafted. If a statute lacks a constitutionally necessary limiting principle, then arguably the Supreme Court should simply strike down the legislation and tell the Diet to try again.

The revisionist account accurately identifies a substantial activist streak in the Supreme Court of Japan's overall posture of deference. It misplaces, however, the proper point of emphasis.

The Supreme Court of Japan wishes to avoid interbranch conflict and the use of limiting constructions provides a convenient means of enforcing constitutional limitations without ever having to declare specific legislative work product invalid. The Court's motivation is not the covert exercise of legislative power, but rather an escape from what the Justices view as a Hobson's choice: abandoning constitutional principles or directly challenging the authority of the political departments of government.

As it happens, Professor Merryman predicts just such judicial behavior in his seminal work on the civil law. In jurisdictions featuring a "flexible" constitution, Merryman posits that "[w]here a possible conflict between a constitutional provision and a statute appears to have occurred without conscious legislative consideration, the tendency of the courts will be to interpret the provision and the statute in such a way as to avoid the conflict."[397] According to Merryman, this and similar kinds of devices permit the courts in a civil law system to respect constitutional commitments without upsetting settled understandings of the proper relationship between the courts and the political branches of government.[398]

In the final analysis, the Japanese Supreme Court probably knows its institutional limitations much better than an American observer. Undoubtedly, the Japanese Supreme Court's non-confrontational approach

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395. *Id.* at 173.
396. *See supra* notes 169-222, 231-237 and accompanying text.
397. MERRYMAN, *supra* note 138, at 135.
398. *See id.* at 134-35.

stems from more than one source or rationale, but the end result seems to reflect an institutional reality rather than a consistent and endemic lack of courage or fortitude on the part of the Justices.[399]

VII. CONCLUSION

Notwithstanding the Supreme Court's "careful and cautious"[400] approach to enforcing Article 21, freedom of speech is a meaningful reality in Japan. This observation has been almost universally endorsed for the last twenty-five years.[401] Simply put, the Japanese government does not engage in regularized attempts to squelch freedom of expression. Accordingly, the Supreme Court's failure to issue opinions striking "resounding blows" in favor of freedom of expression has not adversely affected the social landscape, even if it has left more constitutional questions dangling than some commentators think wise.[402] Even in the case of pornography, the Supreme Court's failure to protect serious literary or artistic works featuring erotic themes has not seriously impeded access to such materials.[403]

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399. *See, e.g.*, Sonobe, *supra* note 127, at 172 ("To my understanding, the description that the Japanese courts are taking 'a very careful and cautious approach' toward constitutional review seems to be more preferable and appropriate [than descriptions such as judicially passivist or restrained].") (footnote omitted).

400. *Id.* The judiciary's "cautious" approach may also reflect the lack of an effective and easily accessed system of formal enforcement of legal rules. As Professor Haley has explained, under such a system the effectiveness of new legal norms may "depend upon consensus and thus, as 'living' law, become nearly indistinguishable from nonlegal or customary norms." Haley, *supra* note 145, at 276. The Supreme Court may wish to avoid articulating legal norms that are unlikely to receive community support, for such rules are more likely to be honored in the breach than in the observance. *See id.* at 276-79.

401. *See, e.g.*, Beer, *Freedom of Expression*, *supra* note 21, at 246-47 ("[I]rrepressible group actions involving workers, media companies, students, housewives, farmers, and other components of society seem as perennially essential to the nation's constitutional democracy as periodic elections and restraints on government power under law."); Masao Horibe, *Press Law in Japan*, *in* PRESS LAW IN MODERN DEMOCRACIES 315, 316 (Pnina Lahav ed., 1985) (arguing Japanese citizens enjoy a high degree of personal freedom); Nathanson, *supra* note 306, at 323-24 (noting that "freedom of association and assembly, including demonstrations of social and political protest, have not been banished from the Japanese scene" and observing that "vigorous political debate and outspoken criticism of public officials continue"); Okudaira, *supra* note 13, at 26 ("[P]olitical freedom is greatly safeguarded and subjected to almost no direct restraint by the government. There is no legal impediment to criticism of the government, politicians, and bureaucrats.").

402. *See* Sonobe, *supra* note 127, at 173-74, 174 n.60.

403. *See* Burgess, *supra* note 310; Kristof, *supra* note 310; *see also* BEER, *supra* note 107, at 339-40, 345-47.

The Japanese Supreme Court's Article 21 cases are, nonetheless, quite important. Time and again, the Supreme Court has drawn the connection between democratic self-governance and freedom of expression; indeed, it is almost a reflexive gesture. Given the Court's inherent caution, it would not repeatedly invoke this observation were it not consistent with the prevailing views of the political branches of government and the general public. Thus, one can view the Supreme Court of Japan's free speech opinions as both reflecting and ratifying the Japanese people's embrace of free expression as a necessary incident of democracy. The government's general laissez faire approach to regulating speech and speech-related activities also seems consistent with this conclusion.

To the extent that freedom of speech faces challenges in Japan, they tend to stem from non-governmental sources. As Professor Beer has noted, strong social traditions and cultural values mitigate against the expression of individualism.[404] "Japanese culture values individual reticence and, in many contexts, views aggressive assertion of personal opinion as reprehensible."[405] Professor Haley argues that this "groupism" is not genetic, but rather stems from the complex systems of mutual interdependence that characterized both traditional Japanese villages in the past and modern Japanese corporations in the present.[406]

Once again, it is possible to learn from the Japanese example. Although the United States is undoubtedly a more individualistic society than is Japan, freedom of speech in the United States also suffers from informal economic and social forms of control. A worker employed by Lockheed-Martin probably will not march in a mass protest demanding an immediate nuclear freeze and unilateral disarmament. Similarly, a teacher in a Catholic high school may be more than a little reticent to share her view that abortion on demand should remain legal, not only with her students and colleagues, but also with members of the general community. To speak out on this issue would jeopardize her social standing within her workplace—if not her job. To be sure, these informal mechanisms of control are less pervasive and operate less effectively in the United States than in Japan. They do, however, exist.

In conceptualizing freedom of expression, American commentators tend to ignore non-governmental pressures. As a matter of formal legal

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404. *See* Beer, *Freedom of Expression*, *supra* note 21, at 224-26.

405. *Id.* at 225; *see also* NAKANE, *supra* note 21, at 34-35, 102-03, 146-51. These cultural traits are also reinforced though active interest group efforts to restrict speech deemed inimical to a particular group's interests. *See* Nelson, *supra* note 111, at 71-84.

406. *See* HALEY, *supra* note 16, at 170-91, 195-97; *see also* NAKANE, *supra* note 21, at 58-61, 120-24.

analysis, this is entirely understandable, given the state action doctrine.[407] Because the federal courts have cast the Constitution as a charter of negative rights, that is a set of freedoms *from* rather than affirmative rights *to* particular things, Americans naturally overlook corporate and community power over freedom of speech.[408] Professor Owen Fiss has questioned the rationality of this approach, arguing that the state could be seen as the friend of free speech rather than its enemy: "At the core of my approach is a belief that contemporary social structure is as much an enemy of free speech as is the policeman."[409] I would argue that the Japanese example demonstrates the salience of Fiss's concerns about the dangers of defining the free speech project solely in terms of prohibiting governmental censorship.

A second, and arguably more important, potential lesson from this exercise in comparative law relates to the vitality and power of Alexander Meiklejohn's theory of the First Amendment. In the space of a half-century, the Supreme Court of Japan has articulated a clear and coherent vision of freedom of expression. For the most part, it embodies Alexander Meiklejohn's vision of freedom of speech as a necessary corollary of democratic self-governance. The Supreme Court of Japan also has extended this vision of freedom of speech beyond the obvious examples of direct government censorship to include elements of private law, such as tort, that burden the free exchange of information and ideas.

On the other hand, the Holmesian "marketplace of ideas" model has not really taken hold in Japanese legal thought. The Supreme Court of Japan consistently relates free expression to matters of self-governance, not individual freedom or autonomy. Moreover, it has observed that restrictions on commercial speech "do not *ipso facto* impair freedom of thought and freedom of conscience."[410] This result comports with the Meiklejohn theory of the First Amendment, but not with the contemporary understanding of Holmes's marketplace of ideas.[411]

The Japanese Supreme Court's apparent rejection of the marketplace of ideas paradigm may in part reflect cultural values that emphasize community over individualism.[412] Political pluralism requires that

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407. *See* Krotoszynski, *supra* note 50.

408. *See generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

409. FISS, *supra* note 31, at 20; *see also* Fiss, *Why the State*, *supra* note 112, at 787, 793-94.

410. Ono v. Japan, 15 KEISHŪ 2, at 347 (Sup. Ct., Feb. 15, 1961), *reprinted in* ITOH & BEER, *supra* note 122, at 217, 219.

411. *See supra* notes 34-73 and accompanying text.

412. *See* NAKANE, *supra* note 21, at 143-51; *cf.* UPHAM, *supra* note 313, at 223-24 (arguing that U.S. legal formalism, with its reliance on value and content neutral rules,

citizens be permitted to meet and discuss issues of civic concern. It does not require the community to tolerate speech activities unrelated to democratic self-governance, such as dial-a-porn services or hard-core pornography.[413] Given the importance of consensus and harmony in contemporary Japanese society, it is easy to see why the notion of an open and unregulated marketplace does not fit: the community both wants and expects the ability to maintain decorum.[414]

The Japanese Supreme Court's concern for community potentially explains not only its embrace of Meiklejohn's essentially communitarian vision of freedom of expression,[415] but also its relatively sparing use of the power of judicial review. In a democratic state, the elected branches of government should generally establish major social policies. Moreover, judicial review need not inexorably lead to a state of constant conflict between the judiciary and the citizen's elected representatives.

Over one hundred years ago, Harvard law professor James Thayer argued that judicial review should be limited to instances of "clear error," in which the legislature has not only transgressed, but has badly transgressed, a particular constitutional limitation.[416] Professor Mark Tushnet has noted that Thayer's vision of limited or "minimalist" judicial

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reflects and incorporates the core social values of pluralism and individual autonomy).

413. Indeed, the Supreme Court of Japan could place its obscenity jurisprudence on a sounder philosophical footing by shifting its justification for upholding restrictions from the foreign nature of particular ideas to the lack of a concrete relationship between the speech activity at issue and the project of democratic self-governance. Of course, the results in *Lady Chatterly's Lover* and *de Sade* would still be problematic, because these works advance ideas—albeit unconventional ideas—about proper social valucs. *See* Kinglsey Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 688-89 (1959).

414. This value could be seen as related to Meiklejohn's analogy of a town meeting in which a parliamentarian enforces rules to keep order. *See* MEIKLEJOHN, *supra* note 23, at 22-27. As Meiklejohn puts it, "[t]he First Amendment, then, is not the guardian of unregulated talkativeness." *Id.* at 25. On the other hand, "unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American." *Id.* at 26.

415. *See supra* notes 52-73 and accompanying text.

416. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); *see also* Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993). As Thayer put it, a reviewing court "can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." Thayer, *supra*, at 144; *see also id.* at 148:

> The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.

review has not proven persuasive in the United States.[417] Thayer's argument, however, has more than little logic: if courts exercise restraint in exercising judicial review, then legislative and executive branch personnel should be more attuned to constitutional values; they will not be able to rely on the judiciary to correct their constitutional transgressions.[418] To some extent, Great Britain's system of parliamentary supremacy, coupled with a limited (if not non-existent) system of judicial review resembles Thayer's model.[419] It may be overly optimistic, however, to expect individual legislators to elevate constitutional responsibilities over short-term political opportunities.

One could view the Japanese Supreme Court's approach to judicial review as largely consistent with Thayer's "minimalist" approach. The Japanese Supreme Court works to avoid finding incompatibility between legislative or executive work product and the Constitution because of a strong belief that this approach will best protect community values—if not constitutional values. Moreover, this approach also respects the community's decision to vest legislative and executive responsibilities with a particular set of officeholders. As Professor Tushnet has put it, "[m]inimal judicial review does, almost by definition, provide a wider domain within which legislators and the public have an opportunity to articulate constitutional norms."[420] The exercise of judicial review to strike down legislative work product or an executive action necessarily entails displacing decisions made by persons elected by the community to make precisely those decisions. Although a written constitution should cabin the discretion of elected officials, the question of an appropriate balance of power remains open.[421]

In a fashion consistent with Thayer's maxim, the Supreme Court of Japan simply declines to interpose its will over the will of the Diet absent an extraordinarily compelling reason for doing so. This is not to say that the Supreme Court makes no effort to protect or defend constitutional rights. On the contrary, the Supreme Court has repeatedly used interpretative devices, such as limiting constructions, to minimize the

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417. *See* Tushnet, *supra* note 1, at 245-47.

418. *See* Thayer, *supra* note 416, at 151-56; *see also* Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 910-12 (1979) (arguing that the best way to avoid instances of "judicial activism" is to encourage "legislative activism" in defense of civil liberties); Frank M. Johnson, *The Alabama Punting Syndrome*, JUDGES' J., Spring 1979, at 5-7, 53-54 (arguing that judges cannot turn a blind eye on legislative intransigence in the face of proven constitutional violations if constitutional guarantees are to have any real meaning).

419. *See* Krotoszynski, *supra* note 2, at 4-10.

420. Tushnet, *supra* note 1, at 300.

421. *See id.* at 299-301.

impact of government regulation on constitutionally protected rights.[422] This approach to the judicial function does not reflect contemporary practice in the United States federal courts, but it is certainly a defensible theory of judicial review.[423]

At the same time, the Supreme Court of Japan's approach to enforcing Article 21 also reflects a communitarian cast. By locating freedom of expression as an incident of democratic self-government, the justices have effectively linked freedom of speech to the citizenry's sovereign status. The Japanese Constitution makes it quite plain that the "sovereign power" resides with the people.[424] As Alexander Meiklejohn explained almost fifty years ago, effective popular sovereignty necessarily entails the ability to discuss and debate questions regarding who should hold office and the policies that those persons should pursue once in office.[425] Consistent with this approach, it is not the individual's interest in self-expression, but rather the community's interest in a full and robust debate, that undergirds Japanese society's protection of freedom of expression.

The Japanese Supreme Court and the other branches of the Japanese government have achieved remarkable success at incorporating freedom of expression as a basic tenet of Japan's civic faith.[426] When one considers the near complete absence of rights-consciousness among the

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422. *See supra* notes 166-208 and accompanying text.

423. *See* Thayer, *supra* note 416, at 153-56; Tushnet, *supra* note 1, at 299-301.

424. KENPŌ, art. 1 ("The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power."); *see* Okudaira, *supra* note 13, at 1-8 (discussing the Constitution of 1947's shift in paradigm from a sovereign emperor to a sovereign electorate).

425. *See* MEIKLEJOHN, *supra* note 23, at 1-27.

426. *See* ABE ET AL., *supra* note 109; BEER, *supra* note 107, at 393-99; BEER & ITOH, *supra* note 107, at 7-12; ITOH & BEER, *supra* note 122, at 20; MAKI, *supra* note 124, at xli; Beer, *Public Welfare*, *supra* note 21, at 210-20; John M. Maki, *Japanese Constitutional Style*, *in* THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, *supra* note 21, at 13, 16-18, 35-39; Okudaira, *supra* note 13, at 25-32.

Japanese citizenry in pre-war Japan,[427] this achievement seems all the more amazing.

Moreover, it would be wrong of Americans to expect the Japanese people to have incorporated U.S. constitutional values in a lockstep fashion. As Professor Ruth Benedict cautioned in the immediate aftermath of World War II, "[i]t is not easy to work out new assumptions and new virtues."[428] Accordingly, she concluded, "[t]he Western world can neither suppose that the Japanese can take these [new democratic values] on sight and make them truly their own, nor must it imagine that Japan cannot ultimately work out a freer, less rigorous ethics."[429] History has borne out Professor Benedict's prophecy. Although the United States could not "create by fiat a free, democratic Japan,"[430] the Japanese people themselves have elected to establish and maintain such a polity, a polity in which freedom of speech is an integral component of their experiment in democratic self-government.

Seven years after the adoption of the First Amendment, Congress passed the Alien and Sedition Act.[431] Needless to say, this marked an inauspicious beginning for the United States's experiment with freedom of expression. It took the better part of two hundred years (166 years to be exact) for the Supreme Court of the United States to hold that good-faith criticism of government officials could not be made actionable in

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427. Indeed, for many years the Japanese language did not even contain a word that expressed the concept of rights against the state. *See* KIM, *supra* note 21, at 53-54 (arguing that *giri*, or "duty," is far more important to dispute resolution in Japan than any notion of individual rights); Yosiyuki Noda, *Nihon-Jin No Seikaku To Sono Ho-Kannen [The Character of the Japanese People and Their Conception of Law]*, *in* THE JAPANESE LEGAL SYSTEM 295, 305 (H. Tanaka ed., 1976) (describing selection of word *kenri* to describe the concept of rights); Kevin Yamaga-Karns, Note, *Pressing Japan: Illegal Foreign Workers Under International Human Rights Law and the Role of Cultural Relativism*, 30 TEX. INT'L L.J. 559, 572 (1995) (discussing etymology of words to describe human rights in Japan); BEER, *supra* note 107, at 45-46, 110-11 (same); *see also* Beer, *Public Welfare*, *supra* note 21, at 211-18; Ford, *supra* note 121, at 13-16; Okudaira, *supra* note 13, at 8; *cf.* Okudaira, *supra* note 13, at 27 (describing the enthusiastic and varied use of the term "human rights" in contemporary Japan). Similarly, the word used to express the ideas of liberty and freedom, *jiyu*, has "overtones of selfishness and license." ABE ET AL., *supra* note 109, at 207-08; *see* INOUE, *supra* note 13, at 51-55; Kahei, *supra* note 143, at 5, 7-8.

428. BENEDICT, *supra* note 18, at 295.

429. *Id.*

430. *Id.* at 314.

431. *See* ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 1-39 (1920); ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 27-30, 497-505 (1946); LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 236-48, 258-309 (1960); *see also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

tort.[432] The Japanese Supreme Court reached this conclusion a scant twenty-two years after Article 21 came into effect.

In the case of freedom of expression, Judge Calabresi's admonition that Americans should take the time to learn from the constitutional experiences of other nations that have come to share our constitutional values makes a great deal of sense. We can learn from the example of Japan—not only by avoiding some of the pitfalls that have hampered the Japanese Supreme Court's efforts to articulate a coherent and meaningful doctrine of freedom of expression,[433] but also by recognizing some of the limitations and implicit assumptions that underlie free speech jurisprudence in the United States. Indeed, if the Japanese people and their legal institutions make as much progress in the next fifty years as they have in the preceding half-century, the constitutional "child" may well come to surpass the constitutional "parent" in wisdom and understanding.

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432. *See New York Times Co.*, 376 U.S. at 273-75, 282; Kalven, *supra* note 30, at 204-10.

433. *See supra* notes 306-353 and accompanying text.