THE AUTHORITY OF LAW IN THE UNITED STATES AND IN JAPAN

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The United States is unique in the world as a society organized around its legal system. Japan is equally unique as a large industrial society in which law plays a peripheral role. The Japanese judiciary has much less power and authority than does the American judiciary. This essay will set out some of the general causes for this fundamental difference between Japan and the United States, but first, a note on method.

I. Generalizations and Stereotypes

This essay is a set of abstract generalizations which are, at best, only statistically or generally true, as in the example, Japanese are more polite than Americans. Because abstract generalizations are often used to stereotype, for example, all Japanese as polite, such generalizations, even when statistically true, have a bad reputation. They are often dismissed as "sweeping generalizations." But abstract generalizations can be very useful to Japanese and Americans trying to come to grips with something as difficult and alien as the United States or Japan. Abstract generalizations can function as tentative hypotheses around which people can organize their experience and understanding of the other culture and compare that culture with their own. An example is the current debate over whether the Japanese file fewer lawsuits than Americans because of (1) their cultural inhibitions against confrontation or (2) artificial economic barriers such as the high cost of litigation and the low damages traditionally awarded by Japanese courts. The correct answer is certainly some complex mix of these factors plus many more, but the participants in the debate successfully use the competing abstractions about culture versus

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artificial barriers to structure inquiry about Japan.[1]

Assessing the weight of competing abstract generalizations gives meaning and direction to conversations between Japanese and Americans and enables both Japanese and Americans to test continually their understanding of the other culture. The reader should keep in mind the tentative hypothetical spirit in which I intend the generalizations in this essay.

We Americans seem peculiarly susceptible to a fallacy that is the opposite of stereotyping. Rather than fixing on differences between ourselves and other peoples which are then erected into stereotypes, we often commit the opposite error of believing that the rest of the world's peoples are really just like us. The Japanese are more comfortable with the belief that they are an absolutely unique people who cannot be understood by the rest of the world. They protect that illusion with stereotypes of themselves and others which reinforce their belief that the Japanese are unique. We Americans are more comfortable with the illusion that we are just plain folks whose motivations and values are shared by everyone around the world. We protect that illusion by assimilating the behavior of the Japanese to categories that would make sense in the United States. "It's too expensive to sue, so I'll accept mediation instead." Generalizations about cultural differences are highly suspect to Americans because we are trained in accord with our American political heritage that it is "the individual" and not his ethnic background that counts. In the debate mentioned above, I tend to side with those who view Japanese culture as the cause and the high cost of litigation the effect. The argument boils down to questions about the personality of the average Japanese. The position that artificial economic barriers are the major explanation for the relatively small number of lawsuits in Japan is attractive in part because it allows we Americans to assume that the Japanese are really just like us and do not sue for reasons that would also discourage Americans from suing. Our American tendency is to try to reduce the Japanese to American terms. But when I think of the Japanese people I know personally, one at a time, it becomes clear that economics is not the main reason that they would not sue. For most of them, the idea of filing a law suit to advance their own private interests would be too outlandish to consider seriously.

1. For arguments for position (1), see Takayoshii Kawashima, "Dispute Resolution In Contemporary Japan," in *Law In Japan: The Legal Order in a Changing Society*, pp. 41-72 (A. von Mehren, ed. 1963) and Yosiyuki Noda, *Introduction to Japanese Law* (A. Angelo, trans. 1976). The classic statement of position (2) is John Haley, "The Myth of the Reluctant Litigant and the Role of the Judiciary in Japan," 4 *Journal of Japanese Studies* 350-389 (1978). For a recent summary of the dispute and a defense of the middle ground, see Hideo Tanaka, "The Role of Law In Japanese Society: Comparison with the West," 19 *University of British Columbia Law Review* 375-388 (1985).

II. Some Important Facts About Japan and The United States

Japan is in fundamental ways different from the rest of the world, and radically different from the United States. Japan is an isolated homogeneous island society. For more than 1000 years, there has been no significant migration of people to its shores. From the early 1600s until the middle of the nineteenth century, Japan cut itself off from the rest of the world, thereby preserving a feudal society into modern times. Except for the brief American occupation after the Second World War, Japan has never been conquered.

Japan is a great tribe of 120 million people which has held on to its ancestral tribal lands. A parallel would be the Biblical Jews or the North American Navahoes having managed to retain control of their ancestral lands and then having grown to be one of the largest nations on earth. What is most remarkable about the Japanese is that their strong tribal traditions have prevailed over the social forces of industrialization and modernization and still govern the daily life of the Japanese people. It is no wonder that most Japanese believe that they cannot be understood by foreigners.

Americans in particular have difficulty understanding the Japanese because our history is one of groups of immigrants giving up their ancestral traditions and learning to live in a society where the only common denominator is the political and legal system. Being an American is now little more than having the legal status of American citizen, speaking English with one of a number of characteristic accents, and having some allegiance to American political values and American political institutions. Substract allegiance to the American political system, and Boston has more in common culturally with London than it does with New Orleans or Los Angeles. Honolulu has more in common with Tokyo than with Detroit. San Antonio resembles Mexico City more than Des Moines. Even an area as old as New England has no single governing culture. The traditions inherited from the Yankees, Irish, Greeks, Italians, French, Portuguese, or other peoples do not control the shapes of people's lives. Such traditions no longer tell people whom to marry, what to aspire to, or how to die, nor do they govern the details of daily human relationships.

What is unique about Americans is that they can live, work, and thrive in the absence of cultural traditions which tell them how to live. Individual autonomy and emotional self-sufficiency are necessary for survival in a society of diverse and weak cultural traditions, and Americans encourage these traits in their children to a

degree that most of the rest of the world regards as unnatural and even pathological. Because Americans have no cultural traditions in common except their political and legal system, they use law and politics, and lawyers and politicians, to order all facets of their lives, including their business dealings and their domestic relations. Law and politics are central to the lives of Americans to a degree that most of the world's peoples, and especially the Japanese, find difficult to comprehend.

III. America's Double Perspective: Social Roles vs. Universal Morality

From the point of view of the Japanese, Americans have the curious habit of viewing themselves and judging themselves from a perspective outside of the society in which they live. We Americans constantly view ourselves and judge ourselves from the perspective of an omniscient personal God who is outside and above all human history. Even if each of us does not believe in a personal judging God, each of us does usually believe in a universal morality applicable to all human beings in every society at any time in human history. Even if we do not believe in a personal God who keeps score, we still believe in a moral scorecard. And we feel bound to keep the moral score in the same way wherever we are in the world and whatever our circumstances. It is only from this point of view outside of history that it makes sense to say that we are all created equal and endowed by our Creator with certain inalienable rights, or that we are all morally equal and should therefore be equal before the law. The importance of human equality in American legal and political tradition is due to our habit of viewing ourselves and judging ourselves from the point of view of God.

We Americans also each see ourselves as particular persons of a given sex, race, and social and economic position in a particular community. From this point of view, the responsibilities and duties we have to others depend on who and what we are in that community. Mother, father, son, daughter, friend, employer, and citizen are all roles to which various responsibilities and duties are attached.

The double perspective we Americans each have of ourselves opens up the possibility of conflict between our social roles and what God or universal morality command. The political and legal traditions of the United States result from this double perspective. The American insistence on freedom of conscience and the value we place on personal freedom arise out of our need to follow the commands

of God or morality when they conflict with social roles since our immortal souls or at least our moral integrity depend upon it.

It is this double perspective on ourselves that is the heart of what the Japanese see as our extreme individualism. We are "individualistic" because we see ourselves as both part of and apart from society, as able to choose to fulfill or refuse to fulfill the social roles assigned to us, and able in alliance with others to evaluate and redefine social roles. Only from this double perspective does it make sense to say that the individual comes before society and that society is nothing but a deal—a social contact—between persons who can conceive of themselves as existing independently of society.

Because of our double perspective on ourselves, we Americans value social and political freedom to a degree that the rest of the world regards as extravagant. The value of voluntary choice, of keeping one's options open, and of determining one's own style of life are taken for granted by Americans. American practices such as serial marriage, changing careers in mid-life, or moving to a different section of the country and beginning over again are strange phenomena in the eyes of most of mankind.

Given the extraordinary personal freedom which American society allows the individual, the system of reciprocal rights and duties which makes up our legal and political order is the only barrier to anarchy and chaos. Without the rule of law, the United States could not exist. It is no wonder that Americans identify law with order, and regard law as the only alternative to violence.

IV. Japanese Self Identity & Social Harmony

The Japanese do not share the American conception of the person. They have no tradition of a judging omniscient God or of a universal morality. The only self is the social self. The Japanese do not constantly judge themselves from a point of view outside of Japanese society. There is no possibility of sinning before an omniscient God, nor of feeling guilty for failing to live up to a universal morality. There is no felt need in Japan for institutions which guarantee personal freedom to act in accord with one's conscience. A Japanese person cannot depend on God or a universal morality as justification for behavior which is contrary to prevailing social standards. He neither needs nor wants to be different from his fellow Japanese.

The self-identity of the average Japanese, as compared to the average

American, is more a function of his or her social roles, and these roles are determined by factors largely beyond his or her control. Even for those in the upper half of the Japanese economy, one's future is determined early in life by one's performance on university entrance examinations and by decisions, often made by one's parents and teachers, concerning whom one should marry and what one's career shall be.

Quite apart from these institutional restraints on freedom, there are other features of Japanese life which restrict freedom. Tribal standards of appropriate conduct govern all important social relationships. These standards cannot be altered by the individual nor legislated in or out of existence by the tribe as a whole. They are simply the "natural" standards for the way a truly Japanese person should act.

For the Japanese, it is important not only to act in the correct way, but also to have the correct feelings when acting. The American attitude towards mother love provides a parallel. We expect that a mother will fulfill her duties towards her child with love and affection for her child. It would be "unnatural" if she did not feel love and affection. In the same way, the Japanese expect other Japanese to feel the natural emotion which should accompany every appropriate act in every social relationship. Acting in accord with tribal standards with the appropriate feelings is what makes a person Japanese. Being a member of the Japanese tribe is the major ground of self-identity for most Japanese. To be regarded as not Japanese by other Japanese is a sanction which most Americans can grasp only by remembering how awful it was to be rejected by one's peers during adolescence.

There is also tremendous positive reinforcement in acting in accord with the tribal standards with the correct feelings, even when one is a foreigner in Japan. I take my dirty shirts to the laundry lady. I am her regular customer and she's glad to see me back. We exchange customary greetings. I feel good about giving her my shirts and she is pleased to have me there. I am acting as a customer should and she is acting as a shopkeeper should. A sense of harmony, of participating in a well choreographed ritual, pervades daily life. When everything is going well, when people are acting and feeling as they should, there is a kind of lift in life's daily routines. When everything is going well, Japan is an amazingly comfortable place to live.

With the image in mind of a society ordered by tribal standards of correct behavior and feeling we can understand why the Japanese do not value law. For the

Japanese, resort to law by private citizens presupposes a total breakdown in social harmony, a confession by all parties concerned that they have not been able to act like true Japanese. Litigation is always a disgrace to all of the parties concerned. Rather than seeing law as the only alternative to violence, the Japanese regard a resort to law as virtually the equivalent of violence.

Americans identity law with order and view law as the only alternative to violence. The Japanese view a resort to law as virtually the equivalent of violence. It is no wonder that the Japanese do not feel pressed to increase the numbers of Japanese judges and lawyers in order to increase the people's access to Japanese courts.

V. Government, Law, Morality, and Society in the United States

Americans take the power and the authority of the American judicial decision for granted, forgetting how strange that power and authority seems not only to the Japanese, but to most of the other peoples of the world, even the English. Only in the United States is the judiciary a serious check on the power of the executive. This power rests on the unique views which Americans hold on the relations between government, law, morality, and society.

The centuries long experience of Japan and the nations of Europe is that law and the courts are the tools of government. The prestige and authority of law and of the courts can never be greater than the prestige and authority of government because law and courts have always been part of the apparatus of the State.

In contrast, Americans make a sharp distinction between law and government. Americans have never known a hereditary aristocracy which constituted the government and which used law and the courts to enforce its dominion. From the beginning, power in the United States was so dispersed and traditions of self-government so strong that what government there was had none of the prestige or power that government enjoyed in Europe or Japan. Society was local and was by and large self-governing. Unlike Japan, there was no tradition in the United States of looking to central authority for political leadership. The legislatures of the states were seldom-convened bodies of local lawyers, businessmen, and farmers. Taxes were low. Most of the normal functions of government such as education and maintaining public order were handled by citizens personally or by local school boards and town and county officials elected locally from among ordinary citizens. Law enforcement was by the citizenry itself or by police hired by local elected

officials. Minor offences were tried before a local magistrate or justice of the peace who was always a leading local citizen. Serious crimes and important civil cases were heard before a judge who usually came riding on circuit to the largest local village. Both civil and criminal cases were decided by local juries before an audience of local citizens. Even in urban areas, the government was a group of local politicians, often recent immigrants. In consequence, Americans have never held government in much esteem or respect, or looked to it for leadership. Americans are used to being governed by amateurs.

Many of these amateurs have traditionally been lawyers. In the absence of an aristocracy, lawyers have been prominent in all aspects of public life in the United States since its founding. Unlike Europe, or Japan after the Meiji Restoration, the bar in the United States was never an upper class professional elite. It has always been relatively easy to become a lawyer in the United States. In rural areas, the lawyer, the doctor, and the minister were often the only educated men available as community leaders. In urban areas, sons of immigrants became lawyers and integrated immigrant groups into American life by gaining local political control.

These local amateurs in government, with no direction from any national elite, looked to ordinary commonsense morality for standards by which to settle disputes in the courts and provide what little governance people thought necessary. This application of local moral standards was dressed up with some references to Blackstone's *Commentaries* and a few old cases, but the authority of the courts depended on the judge settling disputes in ways that satisfied local custom and practice and the local sense of justice. In many cases, especially ones of major interest to the community, the judge merely presided at a jury trial. The final decision of the case was made by a jury of the local citizens with the judge playing the role of umpire in the contest which the two attorneys waged for the benefit of the jury and the courtroom audience of local citizens. (Before moving pictures, the trials at the local courthouse were often a major source of popular entertainment, a kind of moral theater in which the values of the community were reaffirmed.)

State and federal trial court judges in the United States were usually chosen from the ranks of the senior politically well-connected trial attorneys of the local bar. The selection of judges has always been a very political process in the United States, but their appointment for life or their election for relatively long terms of office insulated them from daily political pressures. A successful judge was one who was perceived by the local community as an impartial umpire at jury trials and impartial in his application of the law. "The law" itself was seen by all participants

in the legal process and in the courtroom audience not as commands from a central government, but as the traditional moral principles by which cases were justly decided. Over time, a judge became a more respected figure than a governor, bureaucrat, or legislator. The American judiciary, at both the state and federal levels, became thought of as not part of "the government." That often derogatory title came to be reserved for the executive and legislative branches of state and federal government. In sum, Americans came to identify "the law" with morality and came to see the judiciary as the upholder of "the law" against "the government." Only in the United States do ordinary citizens regard the law as their best protection *against* the government. Since it is the judiciary which upholds the law against the government, the judiciary shares with the law the status of being above and superior to the government, of governing the government.

It is difficult to underestimate the role of the jury system in reinforcing the distinction between the government on the one hand and law, morality, and the judiciary on the other. Under the jury system, some of the most important decisions made in the courts are made by six or twelve randomly selected citizens, who, although they are instructed in the law by the judge, must make the final decision in accord with their own views of justice and fairness. Both in fact and in popular imagination, the jury system keeps both the civil and criminal law closely in line with common morality. Because the jury is literally the voice of the people, the fact that many judicial decisions are supported by a jury verdict enhances the authority of all judicial decisions and furthers the identification of the judiciary with the people.

One result of the American pattern of distinguishing government from law, and identifying law with morality, is that the legislative and executive branches of government in the United States have less power and authority than in any major industrial society. The executive and legislative branches of government in the United States, especially at the federal level, are much weaker and more ineffectual than is generally realized in Japan. Government, excluding the judiciary, has nothing like the power and prestige it enjoys in Japan.

VI. Government, Law, Morality, and Society in Japan

The arrangement of law, morality, society, and government is very different for the Japanese. Americans regard government as a necessary evil distinct from society to be held in check by the Constitution as interpreted by an independent

judiciary. The Japanese do not make a sharp distinction between society and government. Traditionally, the government is the top and best part of society with the duty of leading and educating the rest.

Americans closely identify their Constitutions and basic principles of law with morality. If we define morality as the popularly accepted view of the way disputes are to be settled and opposing interests reconciled, then the Japanese regard morality and law as mutually exclusive, except in so far as law is co-extensive with administrative directives from the government. Statutes in Japan are normally drafted by government ministries and rubberstamped by the Diet. Statutes express government policy and have something of the authority that both statutes and court decisions do in the United States in that corporations and others will comply without being directly ordered to do so. However, the authority of Japanese statutes is due to their status as directives from the government, not their status as law passed by a democratically elected Diet. Law as a way of settling private disputes is still thought of in Japan as essentially a foreign import, a non-Japanese system of rigid rules administered by the courts which share its stigma.[2]

The top part of Japanese society has traditionally been charged with the moral education of the rest of society. Thus "government," "morality," and "society" are fused in Japan. The courts are extraneous and command little popular respect. Court decisions on major questions of social policy are not causally efficacious in Japan; they are simply an epiphenomenon reflecting changing social consensus. Western observers are often misled by the fact that the Supreme Court of Japan decides cases. In fact, the Supreme Court of Japan has never seriously challenged the Japanese government directly on any major issue and would lose if it did. Lawsuits in Japan on major question of public policy function something like political demonstrations in the United States. Court decisions may call attention to some social problem and bring to light public concerns on some matter. In that sense, the courts have the ability to put issues on the government's agenda for discussion, but the judiciary has no power to speak dispositively on any major social policy issue. The cases on pollution, reapportionment, and women's rights most often cited as evidence of the real authority of Japanese courts in fact support the opposite conclusion when studied in their social context.[3] From the point of view of

2. Mitsukuni Yasaki, "Legal Culture in Japan, Modern-Traditional," *Archiv fur Rechts-und Sozialphilosophie, Beiheft Neue Folge No. 12* 191-195 (1985).

3. On the issue of reapportionment, see Shigenori Matsui, "The Reapportionment Cases in Japan: Constitutional Law, Politics, and the Japanese Supreme Court," 33 Osaka University Law Review 17(1986). The best recent description I have read of the pollution and sex discrimination cases in their social context is contained in a manuscript by Professor Frank C. Upham of Boston College Law School which I believe is scheduled for publication in 1986.

the American lawyer and legal scholar, the closer the Japanese judiciary is examined, the less power it is seen to have. The root of its weakness is that it has no moral standing with the Japanese people.[4]

The Japanese Constitution is a symbol of the nation. It has never been amended and, I am told, probably never will be. It is not conceived of by the Japanese people as a document embodying the will of the people or a higher morality which the courts should use to hold the government in check. Like the Emperor, the Constitution is a symbol which parties or factions may try to appropriate for their own purposes, but neither the Emperor nor the Constitution are consulted on difficult policy questions. The Japanese Constitution is simply not an authoritative text for the Japanese people. In order to make this assertion more plausible, I must describe in greater detail the authority of the United States Constitution for the American people.

VII. The Authority of the United States Constitution

My starting point is that in the United States, it is not the judiciary that has the final word on what the Constitution says; it is the individual citizen. It is in fact often the duty of American citizens other than judges to interpret the Constitution. Legislators and lawyers and many others take an oath to support and defend the Constitution. Americans do not generally believe that such an oath requires complete acquiescence to the opinions of Supreme Court justices concerning what the Constitution requires of us. In the same way that we can never surrender our freedom of conscience to a court or to anyone else, we cannot surrender our right and duty as American citizens to interpret the Constitution for ourselves, although in the interest of social stability and the health of the political community, we must give great weight to the views of the courts on what the Constitution says.

The parallel between an individual's ultimate right and duty to decide the meaning of the Constitution and his ultimate right and duty to decide fundamental moral questions is one of the most striking and unusual characteristics of the way Americans think about law and morality. Deep in the American imagination is the

4. Professor John Haley, in his article, "Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions," 8:2 *Journal of Japanese Studies* 265-281 (1982), has concluded that any major change in the real power of the courts would have a major impact on Japanese society. He says the following:

"To strengthen legal sanctions, to make the courts more efficient and judicial remedies more effective, or by any means to broaden the enforcement of law through the legal process, would inevitably corrode the social structure that now exists. What the Tokugawa shogunate did for Japan, a Henry II could undo," p. 281.

No wonder the Japanese government, as a matter of policy, restricts the number of lawyers.

image of the naked soul before God on the Day of Judgment. On that individual soul rests the final reponsibility for having lived his or her life in accord with God's will. He cannot excuse himself by saying that he did as others did, or as political or church authorities commanded. The individual must bear the ultimate reponsibility before God for his own life, with his eternal damnation or salvation as the stake. Therefore the individual can never surrender his right and duty to decide finally how his own life should be lived. Any truly American political or social or religious community must in the last analysis acknowledge the individual's right to live according to his own conscience. Freedom of conscience means that each individual reserves for himself the final determination of what God demands, or what morality demands, which is what the Constitution, when correctly interpreted, demands. This does not mean that Americans always allow any individual to act out his view of what morality, God, and the Constitution demand when such acting out affects others. But it is fundamental to American political traditions that the individual's freedom of belief can never be encroached upon and his constitutional rights must be honored even to the point of diminishing the general welfare. This identification of fundamental constitutional rights with the demands of morality is perhaps the most extraordinary feature of American political life. Americans view their Constitution as sacred scripture and their political system of individual rights as ordained by universal morality or by God.

The United States is in this sense a theocracy. The commands of God are embodied in the Constitution which is viewed as a sacred text. In so far as Americans are also Methodists or Jews or Catholics, or members of some other religion, they believe other things as well about the commands of God. But those commands of the Methodist, or Jewish, or Catholic God are set aside by many Americans if they conflict with the commands of the God of the United States Constitution.

The issue of abortion provides an illustration. The Supreme Court has said that women have a constitutional right not to be prosecuted as criminals if they choose to have an abortion. The Catholic Church has said that an abortion is a murder, a mortal sin forbidden by God. An astounding number of American Catholics have agreed with the interpretation by the Supreme Court of the commands of the God of the Constitution and have agreed that a woman must have freedom to decide the question of abortion for herself, even though they themselves believe that abortion is murder. Even those Catholics unwilling to accept the decision of the Supreme Court do not challenge the Constitution itself. They may attack the Justices'

interpretation of the sacred text of the Constitution, but they do not attack the authority of the text itself.

Another striking example of the authority of the Constitution occurred when the Warren Court was holding unconstitutional governmental support of discrimination against blacks. Billboards in the American South called for the impeachment of Chief Justice Earl Warren, but no one attacked the Constitution. The cry of those opposed to desegregation was that the Constitution's meaning was being misconstrued; "strict construction" of the Constitution was what was called for by opponents of the Warren Court. Those opposed to desegregation never challenged the authority of the Constitution. They challenged only the Court's interpretation of the Constitution.

Serious political argument in the United States always takes the form of argument over interpretations of the Constitution. Any political party or movement which challenges the legitimacy of the Constitution itself is never taken seriously by Americans. The largest and most difficult political questions in America manifest themselves as struggles over amendments to the Constitution. Over the last two hundred years, hundreds of amendments to the Constitution have been proposed, but very few accepted. Most amendments of the Constitution have reflected a major victory of a substantial majority of the American people over a determined minority concerning a social question which has divided the country for decades before the amendment finally passes.

VIII. The Lack of Authority of the Japanese Constitution

In contrast, as mentioned above, the Japanese Constitution of 1947 has never been amended and probably never will be amended. The Japanese value their Constitution as a symbol of the State, but the idea central to American political life of the Constitution as the authoritative statement of American political morality is not shared by the Japanese with regard to the Japanese Constitution. What then is the relation between the Japanese people and the Japanese Constitution?

First, no constitution can be authoritative for the Japanese in the way that the United States Constitution is authoritative for Americans because the Japanese do not really believe that any document, or any text, should have an independent authority to control important decisions. The idea of an authoritative text in the sense that the Bible or the United States Constitution or even an old legislative statute is authoritative for Americans is not shared by the Japanese. Courts enforce

laws in Japan because they are the clear directives of the ministry that wrote them for passage by the Diet. A situation such as the Indian land claims in the Eastern United States where a statute nearly two hundred years old was the basis for serious claims by Indian tribes to millions of acres of land could not occur in Japan.[5] Statutes by themselves simply do not carry enough weight. The Japanese Constitution, in Article 81, specifically provides for judicial review, but the practice of judicial review based on a constitution can take place only in a culture used to sacred texts and to prophets who interpret those texts. In Japan there are no sacred texts or a prophetic tradition.

Second, the Japanese Constitution of 1947 does not express the fundamental moral values of the Japanese people. Popular sovereignty, the idea of the people ruling themselves, does not have a basis in morality or theology in Japan. The Japanese have taken over the forms of parliamentary government, but much of the political organization is still feudal in the sense of relying on retainers' traditional ties of loyalty to a small group of powerful lords or daimyos at the top of government and industry. (This is why Japan is unique among parlimentary democracies in the political power that ex-prime ministers retain after they surrender the office.) As in the assimilation and use of Western technology to advance traditional tribal goals, political forms seem to have been adapted to serve traditional tribal authority structures.

It is true that many of the specific doctrines of the 1947 Constitution do express the current consensus of the Japanese. Universal suffrage is one example. But allegiance to universal sufferage may be only a pragmatic acknowledgement that it contributes to political stability and social harmony. The Japanese admiration for democratic political institutions and their willingness to continue to use those institutions in governing themselves is not founded in an acceptance of democratic political morality. It is rather that the Japanese have discovered that democratic forms of government are sophisticated and successful devices for balancing the tensions and pressures of a dynamic industrial society. The Japanese have no deep quasi-religious commitment to the notion of individual rights, freedom of conscience, or even universal suffrage. These concepts are simply useful in organizing and directing the activity of the Japanese nation in the modern world. If the present Japanese Constitution, courts, and parlimentary forms of government

5. A law review article available in Japan which provides a good introduction to the legal issues involved is David M. Crane, "Congressional Intent or Good Intentions: The Inference of Private Rights of Action under The Indian Trade and Intercourse Act," 63 *Boston University Law Review* 853-915 (1983).

were to vanish tomorrow, there would be some turmoil, but the identity of the Japanese as a single nation would scarcely be affected. It is no wonder that the Japanese Constitution has so little authority for the Japanese people.[6]

IX. Conclusion

The great difference between the authority of the judiciary in Japan and in the United States, despite the similarities in the Constitutions of the two nations, has many causes. Cultural psychology, religious traditions or their absence, the extraordinary history of both countries, all play a part. Without repeating in even more summary form the summary statements comprising this essay, I would like to make one additional point. With respect to the authority of its judiciary, Japan is much more like the rest of the world than is the United States. Even England seems more similar to Japan than to the United States. It is only the Americans who have so strongly distinguished law from government and whose national identity is so closely tied to their Constitution. It is only the Americans who have invested their judiciary with a peculiar, almost supernatural authority.

6. In this essay, I stress the absence in Japan of elements essential to democracy in America. There are elements inherent in Japanese culture which support democratic institutions. A complete picture of the roots of democracy in Japan would include them.