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REDUCING MALAPPORTIONMENT IN JAPAN'S ELECTORAL DISTRICTS: THE SUPREME COURT MUST ACT

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Abstract: Japan's Constitution does not expressly mandate periodic census and reapportionment of electoral districts. The Election Law only suggests reapportionment. Consequently, rapid population shifts in postwar Japan created endemic voter imbalances. The Japanese Supreme Court has made some attempts to prod the national parliament to take ameliorative action, but the result has always been "too little, too late." Nevertheless, the evidence shows that the parliament does heed the Court's decisions. This Comment urges the Court to tighten the three to one ratio it has developed for allowable voter imbalances to two to one or better, and to abandon doctrines like the "reasonable period" that postpone declarations of unconstitutionality and subsequent legislative action.

I. INTRODUCTION

On June 8, 1995, a five-justice panel of the Supreme Court of Japan dismissed the equal protection claims of voters from eight prefectures.[1] The voters asserted that it took nearly three votes in the worst-represented district to have a voice in the Diet equal to only one vote in the best-represented district in the July 1993 House of Representatives election.[2] This, they claimed, violated the guarantee of equality under article 14 of the Japanese Constitution.[3] In affirming the decisions of the High Courts the Supreme Court stated: "The inequality at the time of the election was

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[1] Kasuga v. Tokyo Election Commission, 1538 HANREI JIHŌ 185, 185-86 (Sup. Ct., P.B., June 8, 1995). There were 26 suits by voters in 21 electoral districts in Tokyo, Osaka, Kyoto, and five prefectures. *Id.* at 185. Japan is split into 47 major administrative subdivisions. Generally, all are referred to herein as prefectures, the usual translation of *ken*, but for historical reasons, Hokkaido is called *dō*, Tokyo, *to*, and Osaka and Kyoto, *fu*. Japan has a unitary central government so prefectures lack many of the powers of states in the United States.

[2] *Kasuga*, 1538 HANREI JIHŌ at 187. The two districts compared were the seventh district of Tokyo and the third district of Ehime prefecture. The actual disparity was 2.82 to one. *Id.*

[3] "All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin." NIHONKOKU KENPŌ (Constitution of Japan), art. 14, *translated in* MINISTRY OF JUSTICE, The Constitution of Japan and Criminal Statutes (1958) [hereinafter KENPŌ].

constitutional because it did not exceed the reasonable limits of discretion of the national Diet."[4]

The chronic malapportionment of Japan's electoral system was partially corrected in 1994, but on-going population shifts combined with legislative inaction and the Supreme Court's unwillingness to demand a more equitable election system ensure that the malapportionment problem will continue.

The negative impact of these disparities affects more than just the theoretical equality interests of those disadvantaged. The legislatures so elected have, for example, over-represented the farm districts. One apparent result is that Diet-passed laws have mandated a very costly rice production and distribution system to the detriment of the general consumer, who must pay about six times the U.S. price for rice.[5] In addition, the protection of rice and other agricultural commodities has caused great problems with Japan's trading partners, especially the United States.[6]

This Comment first describes the background and development of the vote disparity problem. Second, it describes the inadequate attempts by the Supreme Court and by the Diet to deal with the issue. Third, it discusses solutions. Finally, it will show that the Court can and should implement a simple solution with future malapportionment cases to end more than three decades of grossly inequitable representation.

II. BACKGROUND

A. The Japanese Malapportionment Problem

Japanese voters in under-represented electoral districts are disadvantaged because they are given only one vote while their compatriots in better-represented districts have, in effect, two or more votes. The disparity ratio is calculated by dividing the number of voters in a district by the number of seats allocated to the district. This quotient is then compared

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[4] *Kasuga*, 1538 HANREI JIHŌ at 187. The national parliament (*kokkai*) is called the "Diet" in English.

[5] Mayumi Itoh, *Kome Kaikoku and Japanese Internationalism*, 34 ASIAN SURV. 991, 997 (1994).

[6] Japan finally agreed in the recent World Trade Organization agreement to allow four percent of its rice market to be filled by foreign rice. Hisane Masaki, *Realism vs. APEC Free-Trade Idealism*, JAPAN TIMES WKLY (int'l ed.), Oct. 9-15, 1995, *available in* LEXIS, WORLD Library, CURNWS File. The ratio is to rise to eight percent in 2000. *Total Overhaul Needed to Save Rice Farming*, THE NIKKEI WKLY, Sept. 19, 1994, *available in* LEXIS, NEWS Library, PAPERS File.

to similar quotients from other districts to derive the imbalance ratio. For example, if prefecture X has 4,000,000 voters and four seats, while prefecture Y has 400,000 voters and two seats, the imbalance ratio would be 1,000,000:200,000 or 5:1. Consequently, one vote in prefecture Y has the weight or effect of five votes in prefecture X, so voters in prefecture Y are advantaged. The overall imbalance used in the malapportionment cases compares the worst represented of all districts with the best.

1. The Constitution, the Civil Law, and the Election Law

After its defeat in the Second World War, Japan adopted a new, democratic Constitution drafted by the Allied Occupation led by the United States.[7] The original draft was revised somewhat to fit Japanese custom before it was submitted to the Diet for approval.[8] This new Constitution mandated that there would be only one court system[9] and that it would have the power to review and rule on the constitutionality of law and regulation.[10] The Constitution also provided for a legislative branch consisting of a House of Councillors and a House of Representatives.[11]

It is particularly germane to the vote disparity problem that the new Constitution does not contain a clause mandating allocation of legislators and periodic reapportionment of the nation's electoral districts by population or otherwise. It provides only that these matters be decided by law.[12]

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[7] *See, e.g.*, Charles L. Kades, *The American Role in Revising Japan's Imperial Constitution*, 104 POL. SCI. Q. 215, 223-28.

[8] *Id.* at 235-41. Kades describes the process as "[t]he bilateral making of the Japanese Constitution" but "[n]ot entirely a voluntary enactment." *Id.* at 228. (One can understand the possibility of understatement by Kades if one remembers that Japan was under a military occupation led by the nation that had just defeated Japan at war.) The new constitution passed the House of Representatives by a vote of 342 to five. *Id.* at 241. The vote in the House of Peers was 298 to two per General Whitney, chief of the Government Section under General MacArthur. Lawrence W. Beer, *Japan: II. The Present Constitutional System of Japan*, *in* CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 175, 180 (Lawrence W. Beer ed., 1992).

[9] "The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law." KENPŌ, art. 76, para. 1. "No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power." Art. 76, para. 2.

[10] "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." KENPŌ, art. 81.

[11] KENPŌ, art. 42.

[12] The Japanese Constitution addresses neither the allocation of Diet seats nor enumeration (census). It states only that "[e]lectoral districts, method of voting and other matters . . . shall be fixed by law." KENPŌ, art. 47. As we shall see, this is a case of setting the foxes to guard the hen house. *Cf.* U.S. CONST.

The central legal codes adapted from the civil law tradition of continental Europe[13] were maintained after the war, albeit with some significant changes.[14] Thus, although the Constitution was primarily inspired by the common law tradition, the special regard for positive, or enacted law, remained. In this tradition, judicial remedies are mostly limited to those set forth in law. Common law judicial remedies such as mandamus, injunction, and contempt are not available unless the enacted law so provides.[15]

The election law passed by the legislature under the authority delegated to it by the Constitution, the Public Officials Election Law ("Election Law"),[16] stipulates the number of members to be elected to the House of Representatives and to the House of Councillors. Until the 1994 reform, Schedule I of the Law divided the country into districts and allocated seats for Representatives.[17] Schedule II did the same for Councillors.[18]

Under the current law, one hundred of the 252 Councillors are elected from a single nationwide district.[19] The remaining seats are allocated to the

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art. I, § 2 cl. 3. ("Representatives shall be apportioned among the several states . . . according to their respective numbers . . . . Enumeration shall be made . . . every . . . ten years . . . . The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative.").

[13] Between 1896 and 1907, Japan promulgated legal codes based primarily on German law. JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 510-11 (1994).

[14] All five major codes were revised. DAN FENNO HENDERSON, FOREIGN ENTERPRISE IN JAPAN: LAW AND POLICIES 170 (1973). The five major codes are the Criminal Code, the Code of Criminal Procedure, the Civil Code, the Code of Civil Procedure, and the Commercial Code. *Id.* at 171.

[15] Yasuhiro Okudaira, *Forty Years of the Constitution*, 53 LAW AND CONTEMP. PROBS. 17, 35 (Fall 1990).

[16] *Kōshoku senkyohō* (Law No. 100 of 1950), § 4(1), currently fixes the number of Representatives at 500; § 4(2) fixes the number of Councillors at 252 (*Kōshoku senkyohō* as amended through Law No. 91 (1995)). The Constitution, art. 45, makes the term of office of members of the House of Representatives four years, or less if that house is dissolved. Article 46 makes the term of office of the House of Councillors six years, with election of half the members every three years. The two houses are not equal: Article 59(2) states that a two-thirds majority in the House of Representatives can override a contrary vote by the House of Councillors. Article 67 requires the Prime Minister to be designated from among the members of the Diet by a resolution of the Diet.

[17] *Kōshoku senkyohō*, Sched. I. See *infra* note 118 for description of changes under the new law. The first general election under the new law was held on October 20, 1996. Therefore, no court case has been tried under the 1994 revision of the law, and all case discussion here involves the Election Law prior to 1994. *See infra* note 197.

[18] *Id.* at Sched. II. Now Schedules I and II cover the House of Representatives, while Schedule III covers the House of Councillors. *Kōshoku senkyohō* (as amended in 1994).

[19] *Id.* § 4(2).

prefectures.[20] Because the Constitution sets six-year terms for Councillors, with half elected every three years,[21] each prefecture is allocated at least two Councillors.[22] As a result, sparsely populated prefectures that would have deserved only one seat based on population received two seats. Thus, from the beginning, there was an imbalance of almost two to one between the worst- and best-represented prefectures.[23]

In contrast, seats in the House of Representatives were initially allocated strictly on the basis of population so that there was no major imbalance in the House at the outset.[24] However, like the Constitution, the Election Law does not mandate reapportionment. Although the original Election Law anticipated the need to reapportion, it stated merely that the allocation schedule for the House of Representatives was suggested to be revised every five years.[25] It is instructive that the phrase was *is suggested to be revised (o rei to suru)*, not *must be revised,* which in the original Japanese makes redistricting a recommended practice instead of a legal commandment.[26]

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[20] *Id.* § 4(2) and Sched. II (Sched. III after the 1994 reform). These schedules simply list the electoral districts and the number of seats allocated to each district.

[21] "The term of office of members of the House of Councillors shall be six years, and election for half the members shall take place every three years." KENPŌ, art. 46. *Cf.* U.S. CONST. art. I, § 3, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, chosen . . . for six years." Section 3 clause 2 requires one third of the senators to be chosen every second year.

[22] The Constitution does not require two members from each prefecture. This is an interpretation implemented through the Election Law. Prefectures lacking the population to warrant two or more Councillors could have been given only one. The Constitution requires only that half of *all* Councillors be elected every three years. It does not require that each prefecture have a seat contested in every election. KENPŌ, art. 46.

[23] The ratio was 1.88 to one based on the 522,884 population of Tokyo compared to 278,715 in Tottori. Both got two seats. Teruya Abe, *Ippyō no kakusa to hō no moto no byōdō [The Difference in One Vote and Equality under the Law]*, 830 JURISUTO 49 (1985).

[24] Hiroyuki Hata, *Malapportionment of Representation in the National Diet*, 53 LAW AND CONTEMP. PROBS. 157, 158 (Spring 1990). In April 1950, the imbalance ratio was 1.51 to one. Koshiyama v. Tokyo Election Commission (*Koshiyama II*), 37 Minshū 1243, 1271 (Sup. Ct., G.B., Nov. 7, 1983)(Dandō, J., dissenting).

[25] *Kōshoku senkyohō* [Public Officials Election Law], Schedule I (Law No. 100 of 1950). A national census (*kokusei chōsa*) is carried out every five years, e.g., 1980, 1985, 1990. *See also infra* note 128.

[26] *Id.* Schedule I. The full sentence is *Honpyō wa kono hōritsu shikō no hi kara gonen goto ni chokkin ni okanawareta kokusei chōsa ni yotte, kōsei suru no o rei to suru* [This schedule is suggested to be revised, based on the most recent national census, every five years from the day of promulgation of this law]. There was no such statement in the allocation schedule for the House of Councillors. *Id.* Schedule II (now Schedule III).

2. *Demographics: Disparities Caused by Population Shifts*

As Japan recovered from the devastation of the Second World War and the industrialization of the economy accelerated, the population shifted massively toward urban areas.[27] Tokyo more than doubled in size during a nationwide population shift of thirty per cent in favor of the cities from 1950 to 1975.[28] During this period vote weight disparities in the House of Representatives rose to 3.21 to one in 1960 and to 4.99 to one in 1972, despite reapportionment under the Election Law in 1964.[29] Disparities of over three to one have been endemic. In 1985, the ratio hit 5.12 to one, despite another revision of the Law in 1975.[30] The Law was revised again in 1986, yet by 1990, the ratio had reached 3.38 to one.[31] Reapportionment has clearly not kept pace with shifts in the population. As discussed above, neither the Constitution nor the Election Law mandates regular periodic reapportionment. Thus, given that the self-interest of the individual legislator and the interest of the ruling political party normally benefit from the status quo, the system is left without an automatic correction mechanism. As discussed later, some of these revisions came under influence from court decisions that were helpful, if inadequate.[32]

B. *Affected Citizens and the Supreme Court Attempt to Deal with the Disparity*

Although in theory courts in the civil law tradition give complete deference to the written law and to the legislatures that enact the law, Japanese courts have not invariably limited themselves to a literal reading of the letter of the law.[33] The malapportionment suits also involve a broad

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[27] Hata, *supra* note 24, at 159.

[28] *Zadankai—Giin teisū iken hanketsu o megutte* [*Panel Discussion of the Decision on the Unconstitutionality of Diet Seat Apportionment*], 617 JURISUTO 14, 33 (1976), *cited in* 9 LAW IN JAPAN 151, 151 (1976).

[29] *See infra* notes 166-69 and accompanying chart.

[30] *See infra* note 170 and accompanying chart.

[31] *See infra* note 170 and accompanying chart.

[32] *See infra* text accompanying note 173.

[33] *See, e.g.*, discussion of the expansive use of the abuse of right doctrine in Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 LA. L. REV. 1037, 1037-40, 1043-46 (1975). *See also* Shoji Kawakami, *Precontractual Liability: Japan*, *in* PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 205-21 (E.H. Hondius ed. 1990), excerpted in MERRYMAN, *supra* note 13, at 1227-30. Kawakami thinks it "[r]emarkable that the judiciary has been imposing new duties on precontractual bargaining despite the

reading of Constitution and statute. In hearing these lawsuits as well as in determining the allowable level of disparity, the Court has, in effect, created law.

Two landmark cases established the right to bring malapportionment suits and began to set a limit on the level of disparity that would be allowed by the Japanese Supreme Court. In 1964, the first malapportionment case, *Koshiyama v. Chairman of the Tokyo Election Commission ("Koshiyama I")*,[34] established the right of voters to bring malapportionment suits under section 204 of the Election Law. Yet, section 204 is meant to be applied to irregularities in the election procedure at the level of the local election commission.[35] *Koshiyama I* also established that the Court would, at some (unspecified) level of extreme inequality of the vote, decide that the Diet had exceeded its discretionary limits regarding apportionment.[36]

In 1976, *Kurokawa v. Chiba Election Commission*[37] found that an unconstitutionally extreme level of inequality had been reached,[38] and that the Diet failed to correct the imbalance within a "reasonable period" of time.[39] Thus, the imbalance was declared unconstitutional.[40] However, the Court avoided the disruptive effect of invalidating a national election by borrowing an administrative law principle (the *jijō hanketsu* or "circumstances decision") that allows courts to declare a law or an act illegal but refuse to reverse or invalidate it.[41]

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absence of specific legislation in the Civil Code." *Id.* at 1228. *See also* HIDEO TANAKA, JITTEI HŌGAKU NYŪMON [INTRODUCTION TO THE STUDY OF POSITIVE LAW] (3d ed., 1974). Tanaka cites as a "remarkable example" the decision of the Great Court of Cassation (predecessor to the Supreme Court) to allow a tenant's hardship to be considered even though both the law itself and the legislative record said not. *Id.* at 99-102. In that situation, so much of the housing stock had been destroyed during the war that evicted tenants would have had no place to live. Thus, Japan's legal tradition allows equitable action by the courts in fact if not in theory.

[34] Koshiyama v. Chairman of the Tokyo Election Commission, 18 Minshū 270 (Sup. Ct., G.B., Feb. 5, 1964), *translated in* HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1961 THROUGH 1970 53 (1978).

[35] *Id.* at 276 (Saitō, J., dissenting).

[36] *Id.* at 273.

[37] Kurokawa v. Chiba Election Commission, 30 Minshū 223 (Sup. Ct., G.B., Apr. 14, 1976), *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 355 (1996).

[38] *Id.* at 248.

[39] *Id.* at 249.

[40] *Id.* Note that the Court is distinguishing between an "unconstitutionally extreme" level of inequality and an actual declaration of unconstitutionality. For examples of cases in which the imbalance was found unconstitutionally extreme, but the imbalance was not declared unconstitutional, see *infra* note 99.

[41] 30 Minshū at 254.

1. The Seminal Case: The Justiciability Principle in Koshiyama I

On July 19, 1962, Yasushi Koshiyama, a young University of Tokyo law graduate, sued to invalidate the House of Councillors election held on July 1, 1962.[42] At the time of the election, Schedule II allocated eight seats to 5,922,100 voters in the Tokyo district and two seats to 362,182 voters in Tottori. Thus the number of voters per Councillor was 740,263 in Tokyo, versus only 181,091 in Tottori, a ratio of 4.09 to one.[43] The Tokyo High Court dismissed the case.[44]

Koshiyama appealed to the Japanese Supreme Court, which dismissed the suit. Yet the Court broke new constitutional ground when it commented on the threshold issue of justiciability.[45] The Court observed that the Constitution does not specify that the number of voters per Diet seat be equal.[46] It stated that "absent an extreme inequality" in the allocation of seats, apportionment was a matter within the discretionary powers of the legislature.[47] The obvious implication was that malapportionment suits would be entertained if such extreme inequality arose.[48] The Court ruled

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[42] Yasushi Koshiyama et al., IPPYŌ NO KACHI, GIIN TEISŪ TO KOKUMIN NO KENRI [THE VALUE OF ONE VOTE, DIET SEATS AND THE RIGHTS OF THE PEOPLE] 7, 179 (1985). The case was Koshiyama v. Chairman of the Tokyo Election Commission, 18 Minshū 303, 308 (Tokyo High Ct., Jan. 30, 1963). Koshiyama had read about how the U.S. courts could decide whether legislative seats had been apportioned equally based on proportionality to population. Koshiyama, *supra*, at 7. Baker v. Carr was decided on March 26, 1962. The U.S. Supreme Court held that allegations that the debasement of the vote caused by failure of the Tennessee legislature to reapportion constituted a justiciable cause of action under the equal protection clause of the Fourteenth Amendment. 369 U.S. 186, 194, 237 (1962). Koshiyama freely cited Baker v. Carr and other American sources in his brief for the Japanese Supreme Court. 18 Minshū 270, 300.

[43] 18 Minshū 270, 271, 312. The number of seats actually contested at the election was half the number allocated, following Article 46 of the Constitution.

[44] 18 Minshū at 303, 311. The High Court held that apportionment was left to the discretion of the legislature. However, the court also said in dictum that if the imbalance were so great as to exceed the limits of allowable discretion, then the law should be interpreted as being in violation of the Constitution. Importantly also, the court explicitly rejected the defendant's argument that the claim was not justiciable. *Id.* at 309-10.

[45] *Id.* at 273. Black's Law Dictionary states that a justiciable controversy is a "real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character." BLACK'S LAW DICTIONARY 599 (Abridged 6th ed. 1991).

[46] 18 Minshū at 272.

[47] *Id.* at 273.

[48] It is, of course, what the Court implied that broke new constitutional ground, not what it decided.

that the inequality in this case did not rise to the level of a violation of Article 14(1) of the Constitution.[49]

In a concurring opinion, Justice Kitarō Saitō strongly doubted that the Court could both declare the issue to be outside the scope of judicial review and yet reserve for itself the power to entertain extreme cases.[50] He argued that the courts should not intervene in such a quintessentially political matter, and quoted from Justice Frankfurter's dissent in *Baker v. Carr*:[51]

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[52]

In 1976, *Kurokawa*[53] explained the rationale for finding justiciability in malapportionment suits. The Court stated that although there was doubt that section 204 of the Election Law was meant to cover such suits, there was no other way to contest a violation of this fundamental right.[54] The Court thus settled that malapportionment could be litigated under both the Constitution and the Election Law.

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[49] *Id.* KENPŌ, art. 14. *See also* Hata, *supra* note 24, at 161. Hata states that the *Koshiyama I* Court was influenced by Reynolds v. Sims, 377 U.S. 533 (1964), but *Reynolds* was decided in June, more than four months after *Koshiyama I*. The more likely influence was *Baker*.

[50] 18 Minshū at 273-74 (Saitō, J., dissenting).

[51] *Koshiyama I*, 18 Minshū at 274-75. In Baker v. Carr the U. S. Supreme Court stated that "the complaint's allegations of a denial of equal protection present a justiciable [Federal] constitutional cause of action upon which appellants are entitled to a trial and a decision." 369 U.S. at 237. Despite an increase of more than four times in the number of eligible voters from 1901 to 1961, Tennessee had not reapportioned its legislature. 369 U.S. at 192-93. "[A] single vote in Moore County, Tennessee, is [said to be] worth 19 votes in Hamilton County . . . ." 369 U.S. at 245 (Douglas, J., concurring).

[52] Baker v. Carr, 369 U.S. at 267 (Frankfurter, J., dissenting).

[53] *Kurokawa*, 30 Minshū 223.

[54] *Id.* at 251-52. The Court also stated that the Constitution, arts. 14(1) (equality), 15(1) (right to choose public officials), 15(3) (universal suffrage), and 44 (no discrimination in voter qualifications), meant that the value of each vote should be equal. *Id.* at 243.

2. Koshiyama I, Kurokawa, *and Progeny: How Much Inequality is Too Much?*

In *Koshiyama I*, the Court reasoned that apportionment was a matter of legislative policy. The Constitution provides that the number of seats in the two houses, districting, and voting regulations be fixed by law.[55] The Court stated that it was desirable from the principle of equality that the apportionment of Diet seats to electoral districts be proportional to population.[56] However, the Court said, there are other factors that affect the apportionment decision such as the history, physical size and administrative divisions of the districts,[57] as well as the constitutional requirement that only half of the Councillors be elected per election.[58] The Court then ruled that a ratio of 4.09 to one was not the extreme inequality that would spur the Court into action.[59]

In 1976, the Court revisited the malapportionment issue in the landmark *Kurokawa* case. Here, the Court confronted an imbalance between the best-represented Hyōgo Fifth District and the worst-represented Osaka Third District of 4.99 to one in a House of Representatives election.[60]

The Court reasoned that the right to vote was a fundamental right that guaranteed the opportunity for the people to participate in the national government.[61] The majority also stated that vote equality meant eliminating barriers to voter eligibility and giving each voter an equal voice in the outcome of an election.[62] At the same time, the Court stated that complete equality of the vote could not be assured in the voting system.[63] The Court indicated that the legislature has the discretion to take into account various

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[55] KENPŌ, art. 47, states: "Electoral districts, method of voting and other matters . . . shall be fixed by law." KENPŌ, art. 43, para. 2, states: "The number of the members of each House shall be fixed by law." *Koshiyama I*, 18 Minshū at 272.

[56] 18 Minshū at 272-73.

[57] *Id.* at 273.

[58] KENPŌ, art. 46.

[59] 18 Minshū at 273. The Court did not mention any numbers. It merely said that the level complained of was within the bounds of legislative discretion. *Id.* For the statistics, *see supra* note 43 and accompanying text.

[60] 30 Minshū at 248, 280. Thus it took almost five Osaka voters to equal the voice of one Hyōgo voter in their respective representation in the Diet.

[61] *Id.* at 242.

[62] *Id.*

[63] *Id.* at 243-44.

factors to create an election system that provides fair and effective representation.[64]

Nonetheless, the Court found that in this case the 4.99 to one imbalance in the value of the vote in Hyōgo versus Osaka had surpassed a level that generally could be thought reasonable.[65] Since the Court saw no "special reason" to justify such an imbalance,[66] it held that the imbalance violated the constitutionally guaranteed equality of the vote.[67]

In 1983, in *Shimizu v. Osaka Election Commission*,[68] the Court considered the July 1977 House of Councillors election, in which the imbalance ratio had reached 5.26 to one.[69] The Court summarized its *Kurokawa* reasoning on general principles, concluding, "[w]e see no need to change this now."[70]

Following the specific *Kurokawa* holding exactly would have obligated the Court to find the imbalance unconstitutional because the *Shimizu* imbalance exceeded the imbalance in *Kurokawa*. However, the Court distinguished between the House of Councillors and the House of Representatives.[71] The opinion spoke of the historical, political, and economic significance of the representation by Councillors elected from local districts.[72] It also noted that the national constituency of the House of Councillors[73] facilitates the election of professional people of experience and knowledge who represent the different professions in some degree.[74]

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[64] *Id.* at 244. The Court referred to Constitution arts. 43(2) and 47, which stipulate that the Diet determine by law the number of legislators, the districts, and voting regulations. *Id.*

[65] *Id.* at 248.

[66] *Id.* There is no indication of what might constitute a "special reason."

[67] *Id.*

[68] Shimizu v. Osaka Election Commission, 37 Minshū 345 (Sup. Ct., G.B., April 27, 1983), *translated in* BEER & ITOH, *supra* note 37, at 375.

[69] *Id.* at 348. Kanagawa prefecture had 2,226,926 voters, compared to Tottori prefecture's 423,014. *Id.* at 377 (Appellant's brief). Also in this election there were instances of *gyakuten* [reversal], where a prefecture with fewer eligible voters had more Diet seats than a more populated prefecture; e.g., Hokkaido had 371,000 eligible voters, with eight Diet seats, while Kanagawa, with 445,000 voters, had only four seats, and Osaka, with 560,000 voters, had only six seats. *Id.* at 368 (Taniguchi, J., dissenting).

[70] *Id.* at 349.

[71] *Id.*

[72] The Court did not give examples of what it meant. There are 152 Councillors elected from local districts, two from each of the 47 prefectural units, with the remaining 58 allocated to the prefectures on the basis of population and other factors. *Kōshoku senkyohō* § 4(2) and Sched. II (at the time of *Shimizu*, now Sched. III).

[73] There are 100 Councillors elected from the national constituency, which treats the entire nation as one proportional representation voting district. *Kōshoku senkyohō* § 4(2).

[74] 37 Minshū at 350. This is a curious comment by the Court, for the professionals elected, aside from professional politicians, have tended to be *tarento* (pop culture icons), mainly famous movie and television actors, announcers, and authors of popular novels.

The Court also pointed out that, under the Constitution, Diet members from local districts provide national as well as prefectural representation.[75]

The Court held that because of the special nature of the House of Councillors, the 5.26 to one vote imbalance wrought by the apportionment provision was not extreme, did not exceed the discretionary powers of the Diet, and therefore, did not violate the Constitution.[76] On September 11, 1996, the Court finally found a 6.59 to one imbalance to be extreme.[77]

Just seven months after *Shimizu,* the Court issued a ruling in *Koshiyama II,*[78] which involved a plea to invalidate the House of Representatives election of June 1980.[79] Following *Kurokawa,*[80] the Court found that the imbalance of 3.94 to one at the time of the election violated the Constitution.[81]

In 1985, in *Kanao*, the Court cited both *Kurokawa* and *Koshiyama II*[82] in deciding that an imbalance of 4.4 to one in a House of Representatives election was unconstitutional.[83] In 1988, a Supreme Court panel found an imbalance of 2.92 to one constitutional.[84] In 1993, in *Kawabara*, the full Court found an imbalance of 3.18 to one at the 1990 House of Representatives election unconstitutional.[85] Finally, the 1995 *Kasuga* panel ruled that an imbalance of 2.82 to one was constitutional.[86]

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[75] *Id.* at 351. Article 43(1) of the Constitution states: "Both Houses shall consist of elected members, representative of all the people."

[76] *Id.* at 354. Between *Kurokawa* and *Shimizu* the Court had almost completely turned over. Justice Shigemitsu Dandō was the only justice to participate in both decisions. 30 Minshū at 279; 37 Minshū at 376. He was with the majority in *Kurokawa*, but would have found the *Shimizu* imbalance unconstitutional. 30 Minshū at 254. 37 Minshū at 370, 373. (Dandō, J., dissenting). Supreme Court justices are usually appointed in their early sixties and must retire at seventy, so the turnover here is not unusual for this Court. HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM, INTRODUCTORY CASES AND MATERIALS 694 (Hideo Tanaka ed., 1976)

[77] *Kakusa 6.59 bai wa iken jōtai,* NIHON KEIZAI SHIMBUN, Sept. 12, 1996, at 1. *See infra* note 193 for discussion. Contrast the U.S. Senate: The inequality ratio in 1993 between California and Wyoming was 66 to one. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 27 (114th ed. 1994). However, the U.S. Constitution requires that there be two Senators per state. The Japanese Constitution simply requires "elected members, representative of all the people." KENPŌ, art. 43.

[78] 37 Minshū 1243.

[79] *Id.* at 1257-59.

[80] *Id.* at 1262.

[81] *Id.* at 1262-63.

[82] 39 Minshū at 1120.

[83] *Id.* at 1120-22.

[84] 42 Minshū 644, 663.

[85] 47 Minshū at 86-87.

[86] *Kasuga*, 1538 HANREI JIHŌ 185.

These subsequent cases have added little to the doctrine. Nevertheless, the cases have played an important role in defining the level of inequality at a House of Representatives election that could be found unconstitutional by the Court. As the following chart reflects, the Court implicitly has settled on a ratio of three to one as the boundary between constitutional and unconstitutional levels of imbalance.

Decision	Year	Imbalance	Constitutional?
Kurokawa	1976	4.99:1	No
Koshiyama II[87]	1983	3.94:1	No
Kanao[88]	1985	4.40:1	No
Miyakawa[89]	1988	2.92:1	Yes
Kawabara[90]	1993	3.18:1	No
Kasuga[91]	1995	2.82:1	Yes

3. *The Reasonable Period Doctrine*

One might expect that once the Supreme Court had found an unconstitutional imbalance in the value of the vote, the Court would take action to force reapportionment. Instead, judicial restraint and deference to the legislature are apparent again. The Court uses the "reasonable period"[92] doctrine to determine whether the Diet has acted in a timely manner once an unconstitutional level of imbalance has been reached. If the "reasonable period" had not expired at the time of the contested election, the Court will not declare the apportionment provision of the Election Law unconstitutional.[93]

The *Kurokawa* Court reasoned that a law that loses its constitutionality due to gradually changing conditions must be considered with circumspection.[94] In this case, the Court considered the movements of population and the impracticality of rapid changes in the apportionment of

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[87] *Koshiyama II*, 37 Minshū at 1243.

[88] Kanao v. Hiroshima Election Commission, 39 Minshū 1100 (Sup. Ct., G.B., July 17, 1985), *translated in* BEER & ITOH, *supra* note 37, at 394.

[89] Miyakawa v. Chiba Election Commission, 42 Minshū 644 (Sup. Ct., P.B., Oct. 21, 1988).

[90] Kawabara v. Tokyo Election Commission, 47 Minshū 67 (Sup. Ct., G.B., Jan. 29, 1993).

[91] *Kasuga*, 1538 HANREI JIHŌ 185.

[92] *Kurokawa*, 30 Minshū at 248-49.

[93] *Id.* at 248.

[94] *Id.*

Diet seats. It stated that only when constitutionally required reforms are not carried out within a reasonable period can the law be determined to be unconstitutional.[95]

The Court then referred to the provision in the Election Law that Schedule I was suggested to be revised every five years based on the most recent National Census.[96] Based on the fact that eight years had passed between the contested election of 1972 and the prior Schedule I reform of 1964, the Court found that the reasonable period had passed.[97] Therefore, it held that the apportionment scheme in *Kurokawa* violated the constitutional requirement of equal voting rights.[98] This reasonable period test has been applied to the three subsequent cases where vote imbalances in House of Representatives' elections were found to be at an unconstitutional level.[99]

4. *The* Jijō Hanketsu *or "Circumstances Decision": Prior Elections Will Not Be Invalidated*

For the malapportionment litigant who can prove both an unconstitutional imbalance level and a passage of time beyond the reasonable period, the Court has created one last barrier to relief: the *jijō hanketsu* or "circumstances decision."[100]

After the *Kurokawa* Court declared the apportionment unconstitutional,[101] it discussed the ramifications of invalidating the contested election.[102] According to the Court, such an action would invalidate all the laws passed since that election.[103] In addition, the Court stated that without a House of Representatives, it would be impossible to

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[95] *Id.* at 248-49.

[96] *See supra* notes 25, 26 and accompanying text.

[97] 30 Minshū at 249. The election contested in *Kurokawa* was held in 1972. *Id.* at 224.

[98] *Id.* at 249. But the Court did not invalidate the election. *See infra* note 110 and accompanying text.

[99] *Koshiyama II*, 37 Minshū at 1264-65 (within reasonable period, so no constitutional violation); *Kanao*, 39 Minshū at 1122 (reasonable period exceeded); *Kawabara*, 47 Minshū at 87-88 (within reasonable period).

[100] 30 Minshū at 252-54. The Court does not use the term *jijō hanketsu* here, but the idea is clearly discussed.

[101] *Id.* at 249.

[102] *Id.* at 250-52.

[103] *Id.* at 250-51.

reform the Election Law itself.[104] The Court declared such a situation neither desirable under nor anticipated by the Constitution.[105]

The Court extracted from the Administrative Case Litigation Law ("ACLL") the basic general legal principle that judgments against an administrative entity may be set aside in certain situations of great public consequence.[106] The Court recognized that normal suits under section 204[107] of the Election Law may not be defeated by the use of the *jijō hanketsu.*[108] However, the Court found it appropriate to borrow the principle for malapportionment cases, where there was no other method of contesting an election, but the remedy, setting aside an election, would greatly harm the public interest.[109] The Court then applied the *jijō hanketsu* doctrine to this case. Although the Court had declared the election illegal, the election was allowed to stand.[110]

Only one subsequent case has seen the application of the *jijō hanketsu,* but it would appear to present an impenetrable barrier to the malapportionment litigant's desire to have a contested election overturned.[111]

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[104] *Id.* KENPŌ, art. 41, states: "The Diet . . . shall be the sole law-making organ of the State."

[105] 30 Minshū at 250.

[106] *Id. Gyōsei jiken soshōhō* [Administration Case Litigation Law], Law No. 139 (1962), § 31(1), allows the setting aside of a ruling of illegality against an administrative disposition or ruling if not setting it aside would result in great damage to the public interest. In such a case, this law requires the court to declare in its holding (*shubun*) that the disposition or ruling was illegal.

[107] *Kōshoku senkyohō,* § 204, allows a voter or candidate to bring suit against the relevant election commission in High Court to dispute the validity of the election in his or her district. The Court said that it had doubts about the appropriateness of the use of section 204 for objections to the entire apportionment scheme, but that it was the only way for voters to protest the constitutionality of the apportionment. 30 Minshū at 251. Fraudulent voting or counting of votes is the type of infraction section 204 was designed to handle.

[108] 30 Minshū at 253. *Kōshoku senkyohō,* § 219, says that the *jijō hanketsu* provided in ACLL, § 31(1), may not be used in suits brought under the Election Law.

[109] 30 Minshū at 251-54.

[110] *Id.* at 254. Although the Court said it was just borrowing the principle, it included the declaration of illegality of the election in its *shubun,* just as though it were following the letter of ACLL, § 31(1), which requires such action. *Id.* at 240-41.

[111] In *Kanao,* again facing an unconstitutional apportionment law, the Court used the *Kurokawa* logic to apply the *jijō hanketsu,* declaring the election illegal, but not invalidating it. 39 Minshū at 1122-24. None of the subsequent cases has had to address this issue. *Miyakawa,* 42 Minshū at 663 (imbalance not unconstitutional); *Kawabara,* 47 Minshū at 86-88 (imbalance unconstitutional but within reasonable period); *Kasuga,* 1538 HANREI JIHŌ at 187 (imbalance not unconstitutional).

C. *Election Law Revisions: Too Little, Too Late*

The Diet has revised the apportionment of the House of Representatives only five times since the Election Law was passed in 1950. In 1964, the first revision of the 1950 Election Law reduced the apportionment imbalance to 2.19 to one by adding nineteen seats to the House of Representatives.[112] The 1975 revision, which added twenty seats,[113] brought the ratio to 2.92 to one.[114] The 1986 revision, which added a total of eight seats to certain districts while subtracting seven seats from others,[115] brought the ratio to 2.99 to one.[116] The 1992 revision, which added nine and subtracted ten, reduced the imbalance to about 2.8 to one.[117] Finally, the major system revision of 1994[118] reduced the ratio to 2.137 to one.[119]

Although the Diet made extensive changes to the election system in 1994, the need for reform has not been fully satisfied. The House of Councillors was not adequately reapportioned.[120] Redistricting continues to be discretionary, but the suggested frequency was reduced to ten years from five years.[121] As a result, the tendency of the system to go out of balance and stay that way for long periods will continue unless something new is done.[122]

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[112] Abe, *supra* note 23, at 49.

[113] *Id.*

[114] 47 Minshū at 100 (Hashimoto, J., dissenting).

[115] Toshihiko Nonaka, *Senkyo hōsei [The Election System]*, 1073 JURISUTO 26, 31 (1995).

[116] 47 Minshū at 100 (Hashimoto, J., dissenting).

[117] Nonaka, *supra* note 115.

[118] Under the new system, the 500 House of Representatives seats are allocated 200 to 11 regional blocks using proportional representation, and 300 to single seat districts in the prefectures. *Kōshoku senkyohō* §§ 4(1), 13(1)(2) and Schedules I, II.

[119] *See infra* note 172.

[120] The only revisions in *Kōshoku senkyohō*, Schedule II, which apportioned the seats of the House of Councillors, were in 1972, to add two seats upon the reversion of Okinawa to Japan, and in 1994, to reallocate eight seats. At the 1992 election, the imbalance was 6.59 to one. This was ruled unconstitutional by one High Court (Tanoue v. Osaka Election Commission, 838 HANREI TAIMUZU 85 (Osaka High Ct., Dec. 16, 1993)) but the Supreme Court overruled. *See infra* note 193. The 1994 reallocations brought the ratio down to 4.81 to one. Nonaka, *supra* note 115, at 31. With the 1994 Election Law reform, Schedule II was redesignated Schedule III.

[121] *Kōshoku senkyohō*, Schedule I, now states: "This schedule is suggested to be revised according to the result of the National Census [that is carried out every ten years] . . . ." One would hope the Court will not now use ten years as the yardstick for its "reasonable period" analysis.

[122] Nonaka, *supra* note 115, at 31. As indicated *infra* note 172, the imbalance apparently slipped from 2.137 to one, to 2.22 to one between August and December 1994.

III. ANALYSIS

The malapportionment problem could be rectified in many ways. For instance, the Constitution could be amended to make reapportionment mandatory; the Election Law could be similarly amended; or the Court could make its rulings more quickly and reduce the "constitutionally acceptable" level of imbalance. Constitutional and Election Law reform face formidable obstacles, but the Court can and should act to cut this Gordian knot.

A. Constitutional Amendment: Effective But Unlikely

The most effective solution to the chronic malady of malapportionment is also the most difficult to implement. The Japanese Constitution should be amended to require redistricting and reapportionment as indicated by a periodic census. Although the amendment process is not particularly onerous, the Constitution has never been amended.[123] From its inception, revision of the new Constitution has been such a sensitive issue between the political left and right that many have taken a firm stand against any amendment whatsoever.[124] A two-thirds vote in each House followed by a majority vote of the people is required.[125] A recent national poll showed fifty percent of respondents in favor of and forty-three percent against amending the Constitution.[126] Although this suggests a vote on a constitutional amendment might succeed with the voters, the two-thirds requirement in the Diet on this issue is problematic. Revision of the electoral system is against the interests of sitting Diet

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[123] The post-war Constitution was adopted as an amendment replacing the entire Meiji Constitution. With that special exception the Meiji Constitution was also never amended. Tanaka, *supra* note 76, at 638. *See also* Beer, *supra* note 8, at 197.

[124] Tanaka, *supra* note 76, at 665-66.

[125] KENPŌ, art. 96(1). ("Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify."). *Cf.* the U.S. CONST. art. V. ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments . . . , or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid . . . when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . .").

[126] *Nihon no sengo: 76% ga hyōka* [*Seventy-six Percent Give Good Marks to Postwar Japan*], NIHON KEIZAI SHIMBUN, Aug. 15, 1995, at 1. Almost 22 percent felt the constitutional articles concerning the Diet, including the bicameral system, no longer matched the times.

members who typically have nothing to gain by reapportionment and their own seats, or careers, to lose. Thus, while a constitutional amendment could be the best long-term solution to the malapportionment problem, other solutions that are more likely to be implemented must be considered.[127]

B. Mandating Reapportionment in the Election Law: Also Unlikely

The next-best solution would be for the Diet to amend the Election Law to mandate redistricting and apportionment based on the regular National Census.[128] The amendment should also provide powers of injunction and mandamus to the courts for the enforcement of apportionment.[129] As with a constitutional amendment, the self-interest of sitting Diet members makes mandating reapportionment under the Election Law an unlikely exercise. Nor is the Diet likely to provide enforcement powers to the courts, for these powers necessarily trench upon the powers of the Diet itself.

C. The Keikoku Hanketsu*: Warn, Then Invalidate If No Action*

Several of the justices in the malapportionment cases have suggested a solution in the form of a *keikoku hanketsu*, or warning decision.[130] Under this decision, the Court would rule the apportionment illegal and invalidate the protested election as of a future date in order to give the Diet time to

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[127] Discussion of such an amendment to the Constitution might also stimulate debate on the important question of regional representation. Should the Japanese people want every prefecture to have at least two Councillors and at least one Representative, then it should be written into the Constitution.

[128] The census could be the full census every ten years or that plus the shorter form census at intervening five-year intervals. Absent massive shifts like that from 1950 to 1975, the longer interval would suffice if reapportionment were mandatory. *See supra* Part II.A.2.

[129] As courts in a primarily civil law country, Japanese courts do not have the equitable powers of a common law court and can exercise these powers only if written into the positive law. Positive law means written law as opposed to judge-made law. Civil laws systems, in principle, do not consider case precedent a source of law. *But see* Hiroyuki Hata, *Iken rippō shinsasei* [*Judicial Review*], 1073 JURISUTO 33, 36 (1995)(Japanese court has made law under its U.S.-style system of judicial review).

[130] *See, e.g.*, *Kanao*, 39 Minshū at 1125-26 (Terada, Kinoshita, Ito, and Yaguchi, JJ., concurring); *Kawabara*, 47 Minshū at 91, 111, 114 (Sonobe, J., concurring; Nakajima, Satō, JJ., dissenting). The Court does not use the term *keikoku hanketsu* here, but the idea is clearly discussed. This idea may have been borrowed from the German Federal Constitutional Court. Hata, *supra* note 24, at 168. But a significant difference with Japan is that the Federal Constitutional Court is given by law the power to ameliorate malapportionment, including drawing up an apportionment plan and enforcing it. *Id.* at 170 (citing Federal Constitutional Court Act, art. 35).

reapportion.[131] This approach contains a fatal logical flaw in that an unconstitutionally elected Diet would be allowed to create a constitutionally correct apportionment.[132] Nevertheless, it is one practical way for the Court to invalidate elections under the Election Law without disbanding a sitting Diet and making impossible any solution to the malapportionment problem.[133] The difficulty remains that in a primarily civil law system, absent a statute, the Court lacks the power to make such a ruling.[134] Furthermore, in Japan, the Diet is unlikely to provide such a statute. Of course, the Court might declare that it has the inherent power to invalidate and will do so if the Diet does not respond appropriately. No Court so far has felt empowered to do so.

D. Separability: Untenable Denial of Representation

Another malapportionment solution suggested in several concurring and dissenting opinions is to treat malapportionment as affecting only the district of the disadvantaged voter who brings the suit.[135] Only the election in that district would be invalidated. Unfortunately, this theory of separability is untenable because it is the entire apportionment schedule that is challenged and held to be unconstitutional.[136] In addition, a major

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[131] *Kanao*, 39 Minshū at 1125-26 (Terada, J., concurring).

[132] KENPŌ, art. 98(1), states: "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity."

[133] Professor Nobuyoshi Ashibe, the dean of Japanese constitutional scholars, said, commenting on *Kurokawa*, that given the special nature of elections, the American courts' practice of handing down decisions affecting future elections should be considered [for Japan]. Nobuyoshi Ashibe, *Giin teisū haibun kitei iken hanketsu no igi to mondaiten [The Significance and Problems of the Ruling of Unconstitutionality of the Diet Seat Apportionment Provision]*, 617 JURISUTO 36, 52 (1976). However, in Japan, if the Diet did not react within the warning period, the Court would be faced with the same dilemma that brought forth the *jijō hanketsu*.

[134] Just such a warning decision was given by the German Constitutional Court in 1963, but that court is given the power by law to draw up its own apportionment plan. Hata, *supra* note 129, at 37. However, Hata also states that a number of influential scholars have pointed to the U.S.- and U.K.-influenced Japanese Constitution and the law-making function of many Japanese court decisions, and urged that the courts draw up apportionment plans and order elections if the Diet does not promptly react to Court rulings of unconstitutionality. *Id.* at 36-37.

[135] *See, e.g.*, *Kurokawa*, 30 Minshū at 254-62, 272-73 (Okahara, J., dissenting; Kishi, J., dissenting); *Kawabara*, 47 Minshū at 94-95 (Mimura, J., concurring).

[136] The Election Law fixes the total number of Representatives, then allocates the seats to the electoral districts. Thus, a malapportionment suit will always challenge the overall provision, since any increase to an under-represented district will require legislation to reduce seats of other districts or to increase the overall number of seats.

practical objection to this method is that under the Election Law a new election must be held within forty days.[137] The Diet must revise the apportionment schedule of the Election Law to add representation to the one district before the new election can be called.[138] This method would result in a revision directly affecting a district without that district being represented in the deliberations. For the litigant protesting that he or she is under-represented, taking away *all* representation would be the ultimate irony. This is not a solution.[139]

E. The Cases and Controversies Requirement: Likely to Persist

The *jijō hanketsu* problem would not arise if the Court could declare an apportionment provision unconstitutional before an election is held. Article 81 of the Japanese Constitution gives the Supreme Court the "power to determine the constitutionality of any law, order, regulation or official act."[140] Furthermore, the Japanese Constitution does not on its face restrict the Court's jurisdiction to cases and controversies.[141] Consequently, some Japanese scholars formerly argued that a literal reading of article 81 gave the Japanese Court power similar to that of European constitutional courts to review legislation in the abstract.[142]

However, the Japanese Supreme Court refused to become a constitutional court.[143] In the 1952 case, *Suzuki v. Japan*,[144] the Court held

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[137] *Kōshoku senkyohō*, § 34(1).

[138] Invalidations of elections for irregularities in campaigning, voting, etc. under section 204 do not require legislative action, so a new election can be held within such a deadline.

[139] Simply increasing the deadline for a new election sufficient to give the Diet time to act would solve the time problem, but would leave the issue of non-representation. Also, if the Diet then chose just to reallocate seats, not to increase the total number of Representatives, one or more sitting Diet members from other districts would have to be "fired" after having properly taken their seats.

[140] KENPŌ, art. 81. Quoted in full, *supra* note 10.

[141] In this sense it is unlike the United States Constitution. *See* U.S. CONST. art. III, § 2, cl. 1. ("The judicial power shall extend to all cases . . . [and] to controversies . . . ").

[142] DAN FENNO HENDERSON, THE CONSTITUTION OF JAPAN, ITS FIRST TWENTY YEARS, 1947-1967, 119-20 (Dan F. Henderson ed., 1968). In some civil law countries, but not Japan, there are constitutional courts that allow for constitutional review of laws. For example, France, Germany, Italy, Spain, and Austria have separate constitutional courts that can entertain constitutional challenges to statutes, even when there is no specific judicial case or controversy involved. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 136-40 (2d ed., 1985).

[143] HENDERSON, *supra* note 142, at 121.

[144] 6 Minshū 783 (Sup. Ct. G.B., Oct. 8, 1952). The case challenged the constitutionality of the National Police Reserve. HENDERSON, *supra* note 142, at 121.

that article 81 makes the Supreme Court the court of last resort in cases involving the Constitution and requires a concrete legal dispute.[145]

Although *Suzuki* raised an abstract claim under article 9 of the Constitution,[146] the decision in *Suzuki* greatly affects the malapportionment issue. The cases and controversies requirement established in *Suzuki* prevents the Court from invalidating illegal apportionment prior to elections. If, instead of waiting for an election, the Court could act as soon as an inequality occurred, the Diet would usually have ample time to respond prior to the election. This would avoid the confusion that would be caused by invalidating the only body that had the power to rectify the situation and would prevent subsequent elections under malapportionment.

However, it is unlikely that the Court would reverse or distinguish *Suzuki* to allow judicial review of pre-election malapportionment. Despite the emphasis on positive law in the civil law tradition, the Japanese courts are greatly reluctant to overturn case precedent.[147] Also, although the Diet has reacted to past declarations of unconstitutional apportionment, how the Diet would react to action by the Court in the absence of a particular case is not clear.[148] In any case, this is a significant, and unlikely, constitutional step for a highly deferential Court to take.[149]

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[145] 6 Minshū at 784-85, *quoted in* HENDERSON, *supra* note 142, at 121-22.

[146] KENPŌ, art. 9, states: "(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes. (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."

[147] The positive law emphasis, in theory, requires the court to go back to the written law in every case so that case law merely interprets the statute, but does not "make" new law. Scholarly opinion also now accepts the cases and controversies interpretation of article 81 of the Constitution. Hata, *supra* note 24, at 33. Ashibe says that because article 81 does not exclude constitutional court powers, the Supreme Court could act as a constitutional court if the Diet established the appropriate procedural laws. Nobuyoshi Ashibe, *Human Rights and Judicial Power*, *in* CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 238-39 (Lawrence W. Beer ed., 1992).

[148] The American Supreme Court's right of judicial review flowed from just such an assumption of power, backed by Chief Justice Marshall's arguments in dicta, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). (The dispute with the government was avoided on narrow technical grounds. Mr. Marbury did not get his commission.) The Madison Administration might have not complied had the Court ordered the government to deliver the commission. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 30 (2d ed. 1991).

[149] Ashibe reckons that U.S. constitutional theories and judicial decisions have "drastically turned Japan away from the legal positivism of prewar Japan." Nevertheless, he thinks "[t]oo much modesty has been shown and too much deference has been paid to . . . the legislative and executive branches. More deference could be shown to the Constitution's mandate for full protection of human rights." Ashibe, *supra* note 147, at 260-61.

Thus, *jijō hanketsu* are apt to occur again in the future. However, there is a major constitutional problem with the Court's use of this method to get itself out of the "political thicket"[150] of apportionment.[151] The Constitution clearly states: "This Constitution shall be the supreme law of the nation and no law . . . contrary to the provisions hereof[,] shall have legal force or validity."[152] When the apportionment provision of the Election Law is declared unconstitutional by the Supreme Court exercising its article 81 power, the provision should fall lifeless from the books.

Therefore, the *jijō hanketsu* fails constitutionally and fails as a device to correct the malapportionment problem. The *jijō hanketsu* is merely a solution to the court's problem.[153] It is not a solution to the vote imbalance problem.

Nevertheless, there is every reason to expect the *jijō hanketsu* to be applied in future malapportionment cases, including those involving House of Councillors' vote imbalances so egregious that the Court cannot continue to defer to legislative discretion.[154]

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[150] Colegrove v. Green, 328 U.S. 549, 556 (1946)("Courts ought not to enter this political thicket."). The Japanese Court and legal scholars have observed the development of U.S. constitutional law in this area. Justice Frankfurter's opinion warning against court involvement in the political function of districting is quoted, for example, by Hiroyuki Hata. Hata, *supra* note 129 at 36.

[151] Ashibe, writing about *Kurokawa*, said he had doubts about the logic of the *jijō hanketsu*, but that he gave it high marks as a practical way out of a constitutional impasse. Ashibe, *supra* note 133, at 51. Ashibe also commented that Professor Hideo Wada had warned that one wrong step and the *jijō hanketsu* would be used to ratify unconstitutional fait accompli. *Id.*

[152] KENPŌ, art. 98. The Court recognizes that "laws which violate the Constitution are, in principle, void ab initio and the effect of acts carried out thereunder is denied." 30 Minshū at 250. The Court reasons further that such an interpretation ordinarily applies to prevent an unconstitutional result or to repair an unconstitutional result. *Id.* The Court then accepts the necessity of ignoring article 98, stating that in the malapportionment situation, invalidating the law would neither prevent nor repair the unconstitutional condition. *Id.* The Court usually cites constitutional articles to which it is referring. Here there is no mention of article 98. Also, the Court inserted the phrase, "in principle," in its paraphrase of the article although no such loophole is available in article 98. *Id.* The phrase, "in principle," therefore means nothing other than that the requirement is to be honored in the breach thereof!

[153] The Court lacks the legal power to draw up an apportionment scheme, so it cannot turn out those who, collectively, do have such power; i.e., the dilemma remains if in the Diet's absence, no organ of government has the power to reapportion.

[154] *See infra* note 193.

F. A Workable Solution: The Supreme Court Can and Should Act

1. Tighten Target Ratio to Two to One

The decisions of the Supreme Court have been important because the revisions of the Election Law, albeit belated, have carefully brought the voter imbalance within the target ratio suggested by the Court.[155] Thus, given the actual impact of the Court's decisions, the most practical solution to the malapportionment problem is for the Court to tighten its target ratio for unconstitutionality to two to one. There is excellent reason to expect the Diet to respond.[156] This is a ratio long called for by certain justices on the court.[157] Also, scholarly opinion has long called for the application of a two to one ratio as the imbalance closest practically possible to the equality mandated by the constitution.[158]

The Court certainly has the ability to change the ratio it established,[159] but it has never explained why that ratio was chosen over some other ratio.[160] Additionally, the Court has avoided announcing its exact standard

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[155] *See* chart and discussion *infra* page 24 ff.

[156] *See* chart and discussion *infra* page 24 ff.

[157] For example, dissenting in *Koshiyama II,* Justice Yokoi argued that any imbalance worse than two to one should not be permitted. 37 Minshū at 1289 (Yokoi, J., dissenting). Also, Justice Dandō said he had full respect for Justice Yokoi's view. *Id.* at 1270 (Dandō, J., dissenting). In *Kawabara,* Justices Sonobe, Satō, and Kizaki argued for a two to one standard. 47 Minshū at 93 (Sonobe, J., concurring); *Id.* at 111-12 (Satō, J., dissenting)(constitutional duty to make imbalance as close to zero as possible, but perfect equality impossible); *Id.* at 116 (Kizaki, J., dissenting). Justice Hashimoto argued that any ratio over two to one strongly implied unconstitutionality. *Id.* at 99 (Hashimoto, J., dissenting).

[158] For example, Ashibe says that a ratio of more than two to one should not be allowed, no matter how much consideration were given to non-population factors. Ashibe, *supra* note 133, at 43. Any migration between the time of census and election and any consideration of geographic boundaries or traditional political subdivisions in districting and apportionment inevitably results in some distortion. So while one person, one vote, is the ideal, two, or less-than-two, to one is generally considered a reasonable approximation.

[159] Although there is no doctrine of stare decisis in Japan, precedent is usually followed. "[C]ourts on all levels follow their own decisions in Japan and overrule their own prior [sic] precedents only for strong reasons and with reluctance." John Owen Haley et al., *Law and the Legal Process in Japan: Materials for an Introductory Course on Japanese Law,* Part II (Seattle: University of Washington School of Law, 1994 ed.), at 75-78, *in* LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS 49 (Yukio Yanagida et al. eds., 1994).

[160] Indeed, while homing in on three to one, the Court studiously refused to say it had a specific ratio in mind. Thus, for example, we find the plea in *Kawabara* that the Court make its implied three to one ratio explicit. 47 Minshū at 107 (Nakajima, J., dissenting). Justice Nakajima complained that avoiding a clear statement of the ratio was unacceptable, for it opened the Court to the criticism of inconsistency. *Id.*

for "extreme inequality."[161] In theory, therefore, a tightening of the ratio does not involve overturning a precedent. In any case, the Supreme Court meeting en banc has the explicit authority to overrule its own precedents.[162] Should support for a two to one standard command a majority, the Court has the ability to significantly increase its protection of the equality rights of the Japanese voter.[163]

The Japanese Supreme Court has been called the "yes, but" court: "*Yes* the apportionment is unconstitutional, *but* we will [do nothing] about it."[164] Certainly the frustration of dissenting justices and plaintiffs is palpable.[165] However, the conclusion that the Court has little persuasive power or has done nothing to remedy the problem would be incorrect. As the following chart shows, the extent of revision, even if belated, demonstrates that the Court has clearly affected the Diet's actions.

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[161] Nevertheless, the Court was clearly converging in these decisions on an imbalance of three to one as the boundary between constitutionally allowed and disallowed imbalances. *See supra* chart accompanying notes 87-91.

[162] The Japanese Supreme Court has fifteen justices, including the Chief Justice. The Court meeting en banc is referred to as the Grand Bench; the three panels of five justices each are called Petty Benches. The Grand Bench decides matters of greatest importance, including situations where a precedent may be overruled. TANAKA, *supra* note 76, at 48, 59. *See also Saibanshohō [Court Organization Law]*, §§ 5(1) and (3), 10(i-iii) (Law No. 59, 1947).

[163] *See supra* note 158.

[164] Frank K. Upham, *Comment*, 53 LAW AND CONTEMP. PROBS. 125, 126 (Spring 1990) (emphasis added).

[165] *See, e.g.*, 47 Minshū at 120 (Kizaki, J., dissenting)(based on two to one standard, an unconstitutional condition had already been reached at 1960 census) and 39 Minshū at 1135 (Appellant's brief)(Court's repetitive use of *jijō hanketsu* is just a ratification of the Diet's negligence).

Imbalance in Vote Value and Election Law Revisions
House of Representatives

Date	Occasion	Based On	Ratio X:1
4/50	Election Law	1946 Census	1.51[166]
10/60	Census	1960 Census	3.21
7/64	**Law revised**	**1960 Census**	**2.19**[167]
10/65	Census	1965 Census	3.22[168]
12/72	Election	No. of Voters	4.99[169]
7/75	**Law revised**	**1970 Census**	**2.92**
10/75	Census	1975 Census	3.71
6/80	Election	No. of Voters	3.94
10/80	Census	1980 Census	4.54
12/83	Election	No. of Voters	4.40
10/85	Census	1985 Census	5.12
5/86	**Law revised**	**1985 Census**	**2.99**
7/86	Election	No. of Voters	2.92
2/90	Election	No. of Voters	3.18
9/90	Election	No. of Voters	3.34
10/90	Census	1990 Census	3.38[170]
1992	**Law revised**		**~2.8**[171]
1994	**Law revised**	1990 Census	**2.137**[172]

This table reveals two remarkable facts. First, for most of the period represented, the imbalance ratio has exceeded three to one. Second, each time the Diet has revised the Election Law to reapportion the House of

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166 *Miyakawa*, 42 Minshū at 665 (Shimatani, J., concurring).

167 47 Minshū at 120 (Kizaki, J., dissenting).

168 42 Minshū at 668 (Okuno, J., dissenting).

169 *Kurokawa*, 30 Minshū at 241.

170 Information for July 1975 to October 1990 is from 47 Minshū at 100 (Hashimoto, J., dissenting).

171 Nonaka, *supra* note 115, at 31.

172 *Reform Hits Final Phase: Redistricting Plan Keeps Wide Vote Disparities*, JAPAN TIMES, Aug. 12, 1994, at 1. *See also Vote-value Disparity Persists: New Electoral System Does Little to Alleviate Problem*, JAPAN TIMES, Dec. 30, 1994, at 2 (new system went into effect December 25, 1994, with disparity at 2.22 to one).

Representatives, the vote imbalance has come within the Court's three to one ratio, its outer limit for constitutionality.[173]

Indeed, some justices have argued that the primary purpose of apportionment suits should be to warn the Diet to promptly and earnestly fulfill its Constitutional duty to keep the value of the vote equal.[174] Certainly the Diet was aware of the Court's view during the past three revisions, for at the time of the 1986 revision, the Diet announced, "[t]his is merely] a temporary measure to urgently revise the current apportionment, which has been ruled unconstitutional. When the 1985 National Census results are announced,[175] the Diet will promptly explore thorough reform."[176]

The fact that the revisions have all resulted in imbalances less than three to one, but greater than two to one, is not surprising. Redistricting is a highly political exercise when seats must be taken away from sitting Diet members. Thus, it is natural that the Diet would usually arrive at solutions that just barely clear the constitutional hurdle. After all, if the Supreme Court indicates that any number below a certain ratio is constitutional, a rational actor would not gratuitously risk her party members' seats (or her own) in order to achieve a "more constitutional" result. Reducing the imbalance to just 2.99 to one[177] shows the Diet members' awareness of and recognition of the role of the Supreme Court.

Given this background, the 1994 revision would appear to be an anomaly because it significantly improved on the "constitutional requirement" of three to one. The anomaly is explained by the events of the immediately preceding years. In 1989, the Liberal Democratic Party ("LDP"), which had ruled Japan for most of the post-war period, lost its majority in the House of Councillors.[178] In 1993, the LDP lost its control of

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[173] It would be anachronistic to claim that the Diet knew of the Supreme Court's three to one standard prior to *Koshiyama II* in 1983. The standard became relatively clear there because the Court found that the Election Law revision of 1975 had brought the ratio to a constitutional 2.92 to one, but the 3.94 of *Koshiyama II* was found to be at an unconstitutional level. 37 Minshū 1263-64.

[174] *See, e.g.*, *Kawabara*, 47 Minshū at 91 (Sonobe, J., concurring).

[175] Results are usually announced in November of the year following the census. Telephone Interview with Tōru Shindō, Population Census Division, Management and Coordination Agency (Jan. 15, 1997).

[176] *Quoted in Kawabara*, 47 Minshū at 109 (Nakajima, J., dissenting). Justice Nakajima expressed his displeasure that the Diet actually did nothing, much less "prompt, thorough" reform, after the Census was announced. *Id.*

[177] As in 1986. *See supra* chart accompanying note 170.

[178] Raymond V. Christiansen, *Electoral Reform in Japan*, 34 ASIAN SURV. 589, 590 (1994).

the House of Representatives.[179] The resulting need for political realignment and the public clamor for real electoral reform after many years of scandals and corruption,[180] forced the Diet to pass more rigorous changes to the Election Law.[181] The LDP, whose policies had brought Japan ever-increasing economic success out of the ashes of war, had finally lost power. The biased election system which had helped maintain this political regime was no longer acceptable to the Japanese people.[182] Nevertheless, the 1994 revision did not produce a final solution to the imbalance problem. The imbalance ratio in the local districts is still greater than two to one and the new ten-year frequency suggested for reapportionment means that imbalance levels are only likely to worsen.

2. *Reject the Reasonable Period Doctrine*

In addition to adopting a two to one imbalance standard, the Court should reject the reasonable period doctrine. Apparently derived from the five-year frequency suggested by the former Election Law, the reasonable period is a mistake. First, a basic logical flaw in the reasonable period analysis is that the Court considers an unconstitutional level of imbalance to be, in effect, not unconstitutional. An unconstitutional imbalance should trigger invalidation of the apportionment provision. Second, the reasonable period doctrine gives precedence to a law passed by the Diet over the equality clause in the Constitution. However, the Constitution is manifestly the supreme law of the land and takes precedence over statutes.[183]

Third, the Court measures the reasonable period from the occurrence of the unconstitutional imbalance to the date of the contested election.[184] Although this may be consistent with the case and controversy focus on the contested election, it ignores the law, which suggests revision at specified intervals. Certainly the only reasonable period to consider should start at

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[179] *Id.* at 589.

[180] *Id.* at 590-91.

[181] The previous system of multiple-seat districts was scrapped in favor of single-seat districts for 300 of the 500 seats. The remaining 200 seats are elected by proportional representation from eleven large regional districts. *Kōshoku senkyohō*, § 4(1).

[182] See *Obituary: Shin Kanemaru*, ECONOMIST, Apr. 6, 1996, at 95, for a summary of the misdeeds and downfall of the LDP and its "kingmaker" Shin Kanemaru.

[183] KENPŌ, art. 98. *See supra* note 152 and accompanying text.

[184] *See supra* text accompanying note 93.

the time of the previous apportionment.[185] However, particularly with the change to revision suggested at ten-year intervals,[186] completely abandoning the reasonable period doctrine would be the better course.[187] If the imbalance is unconstitutional, the Court should simply declare it so. Although the Court could easily move away from this Court-created doctrine, its continued stress on deference to the legislature suggests that the reasonable period doctrine will not be completely abandoned soon.

3. *Expedite Malapportionment Cases*

The Japanese courts take an unconscionable amount of time to decide these cases.[188] Since *Kurokawa*, the analyses in the majority opinions have been devoid of new thought. Most merely parrot the set phrases of prior decisions,[189] and absent a special case, even a junior law clerk (and Japanese law clerks at the Supreme Court level are seasoned, senior judges)[190] could prepare an opinion in no time at all.[191] The *Kawabara* decision in 1990 came down two years and eleven months after the election.[192] This is unreasonably long in the context of well-settled doctrine, virtually identical facts, and a dire constitutional need for quick action. Accelerated Court declarations of unconstitutionality would spur earlier action by the Diet,

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[185] The original Schedule I of the Election Law simply suggested revision every five years, not five years after some event. Were this done faithfully, there would be no need to search for an event from which to count the time. To give the Diet five years from the point of unconstitutionality is simply deference gone mad.

[186] Per the new Schedule II of *Kōshoku senkyohō*.

[187] Another practical effect of the reasonable period doctrine is that it takes the pressure off ameliorative action by the Diet. For example, in *Kawabara*, the Court found an unconstitutional imbalance of 3.18 to one to be within the reasonable period, so the provision was not ruled unconstitutional. 47 Minshū at 87-88.

[188] The time elapsed in the courts until the Supreme Court speaks is very easy to calculate because the suits must be filed within 30 days after the election per section 204 of the Election Law. *Kōshoku senkyohō* § 204.

[189] Every case post *Kurokawa*, for example, mentions that case and quotes liberally from it, often repeating doctrinal arguments verbatim, but without point cites, as is the custom. *See, e.g.*, *Kawabara*, 47 Minshū at 83 (reasoning section starts by saying that the basic thinking of the case follows that of *Kurokawa*, *Koshiyama II*, and *Kanao*, "that there is no reason to change it, [and the] content of those decisions follows.").

[190] TANAKA, *supra* note 76, at 48, 693.

[191] Substitute the new imbalance number from the best- and worst-represented districts and the decision virtually writes itself.

[192] A proposal to require lawsuits under section 204 of the Election Law to be decided in one hundred days did not make it into the 1994 Election Law reform. NIHON SHAKAITŌ SENKYO TAISAKU IINKAI [JAPAN SOCIALIST PARTY ELECTION COMMITTEE], *YOKU WAKARU SHIN-SENKYO SEIDO Q & A* [UNDERSTANDING THE NEW ELECTION LAW: Q & A] 58 (1994).

shortening the time during which citizens' constitutional rights are violated. Furthermore, Court action within a few months would increase the possibility of election invalidation. Only the desire of the Court to be deferential to the Diet stands in the way of expediting the process.

IV. CONCLUSION

The Court should reconsider the impact of its decisions on malapportionment. The Diet has, in fact, respected the Court's declarations of unconstitutionality;[193] even though the Diet's action has seldom been fast or thorough, it has followed the Court's rulings.[194] The Court can accelerate the pace of reform by expediting malapportionment cases through the court system.

Every legislative revision has respected the Court's three to one ratio by coming in below it—even if just barely below it.[195] A two to one standard, zealously protected by the Court, will give Japanese voters a more equal voice in running their government.[196] Under that standard, if the price

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[193] Remarkably, in 1994, the Diet revised the apportionment of the House of Councillors after a High Court decision but before the Supreme Court had decided the case. The Osaka High Court, in a malapportionment suit with an imbalance of 6.59 to one had held that an imbalance over three to one was suspect and that over six to one certainly was at an unconstitutional level. *Tanoue*, 838 HANREI TAIMUZU at 86, 92. In coming to a *jijō hanketsu* decision, the court indirectly scolded the Supreme Court for not finding prior House of Councillors' imbalances over five to one unconstitutional, thus foregoing the opportunity to exhort the Diet to reform the apportionment. *Id.* at 93. This was the first time in any court that a House of Councillors' election had been held illegal. NOBUYOSHI ASHIBE, *JINKEN TO KENPŌ SOSHŌ* [*CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION*] 274 (1994). This case was decided by the Grand Bench of the Supreme Court on September 11, 1996. The court ruled that the 6.59 to one imbalance had reached an unconstitutional level, but that the "reasonable period" for revision by the Diet had not been exceeded. Hence, the election was not held to be unconstitutional. This conclusion overruled the Osaka High Court and affirmed the decision of the Tokyo High Court in a set of companion cases. All fifteen justices supported the finding of the "unconstitutional level," but the majority decision refusing a final declaration of unconstitutionality for the imbalance garnered only eight votes. Seven of the justices dissented saying that the "reasonable period" had long passed. *Kakusa 6.59 bai wa iken jōtai,* NIHON KEIZAI SHIMBUN, Sept. 12, 1996, at 35. The Diet reformed the apportionment in June 1994 by taking eight seats from the best-represented districts, and allocating them to the worst-represented. The imbalance after the reform was still 4.81 to one. Nonaka, *supra* note 115, at 31.

[194] One could argue that the Diet follows the Court because the standard set is so loose. However, the Diet seems to have reacted first to declarations of unconstitutionality, then to the specific number. *See supra* text accompanying note 176.

[195] *See supra* chart accompanying notes 166-72.

[196] Certainly, perfect equality is unattainable if traditional political boundaries are to be respected, but a two to one standard can accommodate some such factors in the apportionment process. True regional representation can be accommodated only by constitutional amendment since the equality requirement in article 14 of the Constitution should trump any law or regulation that attempts significant non-population based representation.

of rice stays at six times the world price, at least it will be a conscious, deliberate choice of all the people, not just those in favored electoral districts.[197]

[197] On October 20, 1996, the first House of Representatives election under the new electoral system was held. WALL ST. J., Oct. 21, 1996, at A16. Malapportionment is almost certainly to have occurred again. As shown *supra* page 24, the vote imbalance was already 2.137 to one at the time of the 1994 revision of the Election Law. If the past is any guide, new law suits will be brought and the Supreme Court will once again have the opportunity to implement the faster action, more equal ratios, and other steps recommended here.