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CAN THE JAPANESE SUPREME COURT OVERCOME THE POLITICAL QUESTION HURDLE?

Po Liang Chen & Jordan T. Wada*

Abstract: In 1947, a new Japanese Constitution (“Kenpō”) was born and its pacifist ideal was embodied in Article 9. Meanwhile, judicial review was transplanted, mainly from the United States (“U.S.”), into Japan. While the U.S. Supreme Court has narrowed its political question doctrine since *Baker v. Carr* in 1962, Japan developed its constitutional avoidance and political question doctrine in part to avoid deciding the merits of Article 9 disputes, including the legitimacy of Japan’s Self-Defense Force, the Security Treaty between the US and Japan, and the stationing of U.S. Forces in Japan. The Japanese Supreme Court (“SCJ”) adopted a deferential temperament to maintain stability with the political branches, thereby abdicating an effective means of settling critical disputes by routinely allowing executive interpretations of the Kenpō to stand unchallenged. Under the auspices of Prime Minister Shinzo Abe, an executive reinterpretation of Article 9 in July of 2014 sparked intense debate over the Kenpō’s fundamental principle of pacifism; it nearly divided Japan. In order to stimulate constitutional checks and balances, SCJ should seize the role of authoritative interpreter of the Kenpō. An important step in this direction can be accomplished by reexamining the unique text and history of the Kenpō and the development of political question doctrine in Japan. As the U.S. acted as Japan’s transplant donor of judicial review, the development of the U.S. political question doctrine could offer a model for SCJ to reconsider the weight of textual and historical considerations. We recommend that SCJ restate and clarify its political question doctrine using the development of the U.S. political question doctrine as a model. Further, agreeing to hear an Article 9 case will allow SCJ to play an active role in furtherance of a constructive dialogue between the government and the people to form a new consensus on its national security strategies and move Japan forward.

INTRODUCTION

In the wake of World War II, the current Constitution of Japan (the “Kenpō”) was enacted under unusual circumstances, coordinately drafted by United States (“U.S.”) and Japanese legal experts.¹ The Kenpō is known as the pacifist Constitution and this principle is expressed substantively in the Kenpō’s Preamble and in Article 9.² Article 9, Paragraph 1, provides, “the

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¹ KENZO TAKAYANAGI ET AL., *NIHON-KOKU KENPŌ SEITEI NO KATEI* [PROCESS OF ENACTMENT OF JAPANESE CONSTITUTION] II, 13 (1972).

² *NIHONKOKU KENPŌ* [KENPŌ] [CONSTITUTION], preamble (Japan) (providing: “We, the Japanese people, . . . resolved that never again shall we be visited with the horrors of war through the action of government . . . We . . . desire peace for all time . . . and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world.”).

Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.”³ Article 9, Paragraph 2, the “War Potential Clause,” declares, “[i]n order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained.”⁴

Since the *Kenpō*'s enactment, the War Potential Clause has invariably represented the most controversial issue in Japanese politics.⁵ Given the ambiguity in the War Potential Clause's language, concern over the constitutionality of Japan's military body—the Self-Defense Force (“SDF”)—abounds.⁶ Similar controversies regarding *The Treaty of Mutual Cooperation and Security between the United States and Japan*⁷ (“*Anpo*”) and the stationing of U.S. forces in Japan compounded.⁸ Early disputes over the SDF, *Anpo*, and the stationing of U.S. forces comprise three of the most prominent factors shaping the field of Japanese politics, and planted seeds of dynamic social movements springing up since the 1950s.⁹

On July 1, 2014, Japanese Prime Minister Shinzo Abe's Cabinet issued an executive reinterpretation of Article 9 (“2014 reinterpretation”).¹⁰ The

³ KENPŌ art. 9, para. 1.

⁴ *Id.* at art. 9, para. 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.”). The first clause is known as the “war potential clause.”

⁵ David S. Law, *The Myth of the Imposed Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 245 (Dennis J. Galligan & Mila Versteeg eds., 2013).

⁶ Shigenori Matsui, *Why is the Japanese Supreme Court so Conservative?*, 88 WASH. U. L. REV. 1375, 1387 (2011) (describing SCJ's major decision regarding the SDF's constitutionality, the *Sunagawa Case*) [hereinafter Matsui].

⁷ The Security Treaty Between the United States and Japan was first signed on September 8 1951, becoming effective on April 28 1952, the Security Treaty between The United States and Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3329; The Security Treaty was substantially amended in January 1960 by President Dwight D. Eisenhower and the Prime Minister Nobusuke Kishi in Washington, and retitled the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1632; *Nihonkoku to amerika gasshūkoku to no aida no sōgo hoshō oyobi anzen hoshō jōyaku*, Treaty No. 6 of 1960, <http://www.mofa.go.jp/region/namerica/us/q&a/ref/1.html>. The most controversial provisions are Article 5 Section 1, reading: “Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes”; and Article 6 Section 1: “For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan.”

⁸ SHINICHI YAMAMURO, *KENPŌ 9 JŌ NO SHISO SUIMYAKU* [THE HISTORICAL THOUGHTS OF KENPŌ ARTICLE 9] (2007).

⁹ Takashi Yamada, *Zainichibeigun kichi to sunakawa jiken* [The US base in Japan and Sunagawa Incident], 60 Horitsu Semina 717, (2014).

¹⁰ Kuni no sonritsu o mattou shi, kokumin o mamoru tameno kireme no nai anzen hoshō hōsei no seibi ni tsuite [Regarding Development of Seamless Security Legislation to Ensure Japan's Survival and

government claimed the basic rationale remained the same, but many believed this reinterpretation¹¹ substantially shifted the meaning of Article 9's War Potential Clause away from its previous interpretation allowing only individual self-defense¹² to include collective self-defense.¹³ This 2014 reinterpretation shook the roots of the *Kenpō* and its pacifist principle.¹⁴ Although the 2014 reinterpretation will not produce a practical impact until potential new legislation enables the SDF to undertake acts and redefine its relationship with U.S. forces, the reinterpretation was criticized as a significant departure from longstanding policy.¹⁵ Most Japanese constitutional scholars denounced the 2014 reinterpretation as unconstitutional, criticizing the Cabinet for bypassing the process of amending the *Kenpō*.¹⁶ Thereafter, dormant social movements reawakened, summoning thousands of citizens to the streets, and bringing the issues of the constitutional legitimacy of the SDF, *Anpo*, and stationing of U.S. forces back into the political spotlight.¹⁷ A deadlock between the hard-liner Cabinet and the pacifist people generated a constitutional crisis.¹⁸

Protect Its People], National Security Committee & Cabinet Decision, July 1, 2014, *translated in* Cabinet Secretariat's website, at http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei_eng.pdf.

¹¹ Keigo Komamura, 7. 1 *Kakugi kettei shudantekijieiken koshi no gentei-teki yonin – Nihon-gata bunpo bun tochi no rekishi-teki shirimetsuretsu* [Cabinet decision on July 1st, an acceptance of the right to collective self-defense exercise – The historic incoherent with Japanese rule of law], 17 *QUARTERLY JURIST* 100, 105 (2016) [hereinafter Keigo Komamura].

¹² See Director General of CLB, Tatsuo Sato's answer at Cabinet Committee of House of Representatives, Naikaku in kaigiroku [Cabinet Committee Minutes, House of Representatives], 19th Diet Session, No. 20, 2 (Apr. 6, 1954); Director General of CLB, Ichiro Yoshikuni's answer in the Budget Committee of the House of Councilors, Nov. 13, 1972, Sangiin Yosan Iin Kaigiroku [Budget Committee of House of Councilors Minutes], 70th Diet Session, No. 5, at 2 (Nov. 13, 1972).

¹³ Previously, the SDF could employ self-defense only when Japan was attacked (individual self-defense). The 2014 reinterpretation authorizes the Japanese government to mobilize the SDF to defend an ally, the U.S., "where an attack occurs against the units of the United States armed forces currently engaged in activities which contribute to the defense of Japan and such situation escalates into an armed attack depending on its circumstances." TAKASHI YAMADA, *supra* note 10; MASAHIRO SAKATA, *KENPŌ 9-JŌ TO ANPO HŌSEI* [KENPŌ ARTICLE 9 AND ANPO LEGAL SYSTEM] 6 (2016).

¹⁴ Yasuo Hasebe, *Shudantekijieiken koshi yonin-ron no mondaiten* [The problem of the right to collective self-defense], in 65 *LIBERTY & JUSTICE* (9) 8 (Sept. 2014); Toshiyuki Muniesue, *Shudantekijieiken fūkei – 9-jō, zenbun, 13-jō* [The right to collective self-defense landscape - Article 9, the preamble, Article 13], *Horitsu Jiho*, Vol. 87 No. 12, 33 (Nov. 2015).

¹⁵ Keigo Komamura, *supra* note 11.

¹⁶ Yasuo Hasebe, *supra* note 14; Keigo Komamura, *supra* note 11; MASAHIRO SAKATA, MASAHIRO SAKATA, *supra* note 13, at 1; Asaho Mizushima, *Shūdantekijieiken kōshi ga kenpō-jō mitomerarenai riyū* [The Reason collective self-defense rights are not compatible with KENPŌ], in *SHŪDANTEKIJIEIKEN NO NANI GA MONDAI KA: KAISHAKU KAIKEN HIHAN 119* (Yasuhiro Okudaira & Jiro Yamaguchi eds. 2014); TOSHIHIRO YAMAUCHI, ANZEN HOSHŌ' HŌSEI TO KAIKEN O TOU [THE PROBLEM OF SECURITY LAW AND KENPŌ AMENDMENT] 114 (2015).

¹⁷ Lisa Torio, *Japan Is Scrapping Its Pacifist Constitution, Despite Massive Public Opposition*, *THE NATION* (Sept. 16, 2015), <https://www.thenation.com/article/japan-is-scrapping-its-pacifist-constitution->

At this critical moment of constitutional crisis, one of several serious obstacles the Supreme Court of Japan (“SCJ”) must overcome to serve as Japan’s court of last resort is its own political question doctrine.¹⁹ SCJ jurisprudence is fairly characterized as exhibiting judicial restraint, often leaving the executive branch as the final interpreter of the *Kenpō* in practice.²⁰ Currently, for both political and legal reasons, no defined route for judicial review is established for Article 9 challenges.²¹ When hearing disputes related to defense or foreign policy, especially concerning *Anpo* and stationing of U.S. forces, SCJ justices and sitting in the interior court judges have employed the concept of *Tochi Koi Ron* (“political question doctrine”),²² a theory to the effect that certain acts of the Diet done in the name of the State or of the government are not subject to the power of judicial review.²³ This theory is influenced by the U.S. political question doctrine²⁴ and acts as one legal barrier preventing the Court from rendering a substantive opinion.²⁵ Though Article 81 of the *Kenpō* grants the Court full judicial review power, SCJ has placed little emphasis on this text, and shies away from the *Kenpō*’s framers’ insistence on full judicial review.

despite-massive-public-opposition/; Justin McCurry, *New generation of Japanese anti-war protesters challenge* Abe, THE GUARDIAN (Sept. 16, 2015), <https://www.theguardian.com/world/2015/sep/16/japanese-anti-war-protesters-challenge-shinzo-abe>.

¹⁸ Yasuo Hasebe, *supra* note 14; Keigo Komamura, *supra* note 11; McCurry, *supra* note 17.

¹⁹ KENPŌ, art. 81, para. 1 (“The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”).

²⁰ Shigenori Matsui, *supra* note 6, at 1375 (explaining SCJ’s reluctance to overturn laws or government acts).

²¹ KENPŌ, art. 81, para. 1; See David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1428–1448 (2011) (exploring, *inter alia*, cultural explanations, the status of judges as second-class bureaucrats, and political factors as barriers to judicial review).

²² The concept of *acte de gouvernement* was initially introduced into Japan from France in 1938, interpreted as *Tochi Koi Ron* [統治行為論]. However, after WWII, the concept of *Tochi Koi Ron* was substantially transformed and influenced by the political question doctrine in the U.S. The term *Tochi Koi Ron* was also referred to as *Seijimondai* (political question) [政治問題]. See Yasuhiro Okudaira, *Tochi koi riron no hihanteki kosatsu* [A critical view on the political question doctrine], 45 HORITSU JIHO No.10, 80 (1973) [hereinafter Yasuhiro Okudaira]; Setsu Kobayashi, *Amerikagasshūkoku ni okeru seijimondai ni kansuru hanrei no dōkō to jittai* [The precedent of political question doctrine in the U.S. and its trends], 53 HOGAKU KENKYU (3) 381, 382 (1980) [hereinafter Setsu Kobayashi]; AKIRA OSUGA, ET AL., KENPŌ JITEN [DICTIONARY OF THE CONSTITUTION] 359 (2001) [hereinafter KENPŌ JITEN].

²³ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan) (Katsumi Tarumi J., concurring) (A ruling on the constitutionality of stationing of U.S. forces in Japan and 1952 *United States-Japan Security Treaty*).

²⁴ Setsu Kobayashi, *supra* note 22, at 381–82.

²⁵ *Id.* (since 1947, SCJ has developed its constitutional avoidance and political question doctrine to avoid deciding the merits of disputes related to Article 9, including the legitimacy of the Self-Defense Force, the Security Treaty between the US and Japan, and the stationing of U.S. Forces).

Clarifying the political question doctrine in light of U.S. Supreme Court jurisprudence could remove one major hurdle that prevents SCJ from granting a merits hearing and settling the current constitutional crisis. Reexamining the meaning of political questions and contemplating its wane in the U.S. Supreme Court could provide SCJ with a jurisprudential basis to play a more effective role in interpreting the *Kenpō*.²⁶ Part I of this comment introduces the historical transplant of judicial review and the political question doctrine into Japan. Part II provides an overview of judicial review and the political question doctrine in the U.S., as a foundation for comparison. Part III recommends steps SCJ could take to clarify and restate its political question doctrine, and how it might use the U.S. political question doctrine's development from *Baker v. Carr* (1962) to *Zivotofsky v. Clinton* (2012) as an example when navigating a challenge to the 2014 reinterpretation. We conclude that overcoming the political question doctrine will help bring SCJ one step closer to the role of final interpreter of the *Kenpō* to provide clear guidance and produce a constructive dialogue among the government, scholars, and the people.

I. JUDICIAL REVIEW AND THE POLITICAL QUESTION DOCTRINE IN JAPAN

The political question doctrine is difficult to distill because it is intertwined with debates regarding the boundary of judicial review and the proper function of the judicial branch. Therefore, before reaching the political question doctrine in Japan, it will prove useful to review the historical context wherein judicial review was transplanted from the U.S. into Japan. This will provide a backdrop to examine the jurisprudential evolution of the political question doctrine in Japan, especially in SCJ over the past seventy years.

A. *The Establishment of SCJ and Judicial Review in 1947*

The establishment of Japanese judicial review is swaddled in an unusual history. On August 14, 1945, the Empire of Japan surrendered to the United Allies and the U.S. appointed General Douglas MacArthur Supreme Commander for the Allied Powers (“SCAP”), marking the end of World War II.²⁷ Under Allied and SCAP supervision, Japanese Prime

²⁶ Yasuhiro Okudaira, *supra* note 22, at 80.

²⁷ The Law Library of Congress, Global Legal Research Center, Japan: Interpretations of Article 9 of the Constitution, <https://www.loc.gov/law/help/japan-constitution/interpretations-article9.php>; GENERAL STAFF OF GENERAL DOUGLAS MACARTHUR, REPORT OF GENERAL MACARTHUR - MACARTHUR IN JAPAN:

Minister Kijuro Shidehara, appointed Joji Matsumoto chairman of the Constitution Research Committee (“Matsumoto Committee”) to amend Japan’s Meiji Constitution.²⁸ The Matsumoto Committee drafted two versions of its constitutional amendment.²⁹ No record exists of any Matsumoto Committee member proposing judicial review. General MacArthur was unsatisfied with the Matsumoto Committee’s failure to revive democratic tendencies and respect fundamental rights in its proposal; he directed the Government Section (“GS”)³⁰ to secretly begin a new draft (the “MacArthur proposal”).³¹ On February 13, 1946, the SCAP formally rejected the Matsumoto Committee proposal and presented the until-then-clandestine MacArthur proposal.³² Surprising the Japanese government, Article 73³³ of the MacArthur proposal included a limited version of judicial review, reading:

The Supreme Court is the court of last resort. Where the determination of the constitutionality of any law, order, regulation or official act is in question, the judgment of the Supreme Court in all cases arising under or involving Chapter III [rights of the people] of this Constitution is final; in all other cases where determination of the constitutionality of any law, ordinance, regulation or official act is in question, the judgment of the Court is subject to review by the Diet.³⁴

After reviewing and deliberating over the MacArthur proposal, the Japanese government embraced the idea of full judicial review and insisted on removing³⁵ the MacArthur proposal language that would have limited judicial review.³⁶ During negotiations between the GS and Japanese

THE OCCUPATION:
MILITARY PHASE: VOLUME I SUPPLEMENT 67 (Washington: GPO, 1966), <http://www.history.army.mil/books/wwii/MacArthur%20Reports/MacArthur%20V1%20Sup/Index.htm>.

²⁸ KENZO TAKAYANAGI ET AL., *NIHON-KOKU KENPŌ SEITEI NO KATEI* [PROCESS OF ENACTMENT OF JAPANESE CONSTITUTION] II, 13 (1972) [hereinafter KENZO TAKAYANAGI II].

²⁹ YASUHIRO OKUDAIRA, *KENPŌ SAIBAN NO KANOSEI* [THE SCOPE OF JUDICIAL REVIEW] 99–115 (1995).

³⁰ The Government Section of the General Headquarters, Supreme Commander for the Allied Powers.

³¹ KENZO TAKAYANAGI ET AL., *NIHON-KOKU KENPŌ SEITEI NO KATEI* [PROCESS OF ENACTMENT OF JAPANESE CONSTITUTION] I, 40 (1972) [hereinafter KENZO TAKAYANAGI I].

³² KENZO TAKAYANAGI II, *supra* note 28, at 55.

³³ YASUHIRO OKUDAIRA, *KENPŌ SAIBAN NO KANOSEI* [THE SCOPE OF JUDICIAL REVIEW], 97 (1995).

³⁴ KENZO TAKAYANAGI II, *supra* note 28, at 242–245.

³⁵ RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* 356 (2002).

³⁶ KENZO TAKAYANAGI I, *supra* note 31, at 27, 32, 122, 186; KENZO TAKAYANAGI II, *supra* note 28, at 242–245.

government on March 4–5, 1946, the Japanese government emphasized the importance of judicial independence and public reliance on the judicial branch, rationales in contrast with the GS's concern of judicial oligarchy.³⁷ Thus, the March 6, 1946 draft of the constitution provides, “[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act,”—textually identical to Article 81 of the 1947 *Kenpō*, which is viewed as the origin of judicial review in Japan.³⁸ The March 6, 1946 draft was thereafter written in vernacular, and ultimately came into effect on May 3, 1947 as the 1947 *Kenpō*.³⁹ The birth of judicial review in Japan emanates a duality. On one hand, it is clear that judicial review was initiated as a legal transplant from the U.S. rather than from Japanese enthusiasm.⁴⁰ On the other hand, at the *Kenpō*'s drafting, compared to the McArthur proposal's limited scope judicial review, the framing Japanese scholars and officials all preferred full judicial review, employing rationales of judicial independence and public reliance on the judicial branch.⁴¹

Following the *Kenpō*'s enactment, SCJ first took office in August 1947.⁴² As with U.S. Supreme Court Chief Justice John Marshall in the early 19th Century, the issue of drawing the boundary of judicial review soon emerged. In response, the concept of *Tochi Koi Ron*⁴³ was considered and accepted by SCJ.⁴⁴ Given that the U.S. acted as Japan's main judicial review donor, Japanese scholars and SCJ naturally noted the U.S. political question doctrine among their influences.⁴⁵ Meanwhile, the weight of

³⁷ KENZO TAKAYANAGI I, *supra* note 31, at 245.

³⁸ YASUHIRO OKUDAIRA, *supra* note 29, at 112.

³⁹ JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 365–367 (1999).

⁴⁰ Robert Ward, *Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980 (1957); KENZO TAKAYANAGI I, *supra* note 31, at xxii (explaining “Dr. Matsumoto said he has been forced to accept the ‘MacArthur Constitution’ only after a statement was made by the GHQ staff that ‘the person of the Emperor could not be guaranteed.’”).

⁴¹ KENZO TAKAYANAGI II, *supra* note 28, at 242–245; MOORE & ROBINSON, *supra* note 36.

⁴² Lawrence Repeta, *Reserved Seats on Japan's Supreme Court*, 88 WASH. U. L. REV. 1713, 1713 (2011).

⁴³ The concept of *Tochi Koi Ron* was substantially influenced by the political question doctrine in the U.S. *See supra* note 22.

⁴⁴ *Id.*; Hiroshi Kaneko, *Tochi koi [The political question doctrine]*, 131 JURIST 39, 40 (1957); Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, Shō 34 (a) no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan) (Hachiro Fujita, J., & Toshio Irie, J., concurring).

⁴⁵ Saikō Saibansho [Sup. Ct.] Dec 16, 1959, A no.710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan) (Hachiro Fujita, J., & Toshio Irie, J., concurring) (“[T]here are divergent views regarding the origin, the basis for the theory, or the scope of the acts which would fall within the purview of such restriction, such is a well established precedent and an accepted academic

Article 81's text and unusual history diminished in SCJ's political questions case law.⁴⁶

B. The Sunagawa Case: Japan's Leading Precedent on the Political Question Doctrine

Soon after the enactment of the 1947 *Kenpō*, communism in Far East Asia threatened the security of Japan.⁴⁷ The U.S. government and Japanese ruling elites agreed this necessitated the establishment of the Japanese Self-Defense Force and retention of U.S. forces for Japan to deter potential armed attacks or internal riots.⁴⁸ As a result of this decision, SCJ had to face three main types of constitutional challenges brought under the *Kenpō*'s Article 9, Paragraph 2, War Potential Clause: challenges to the SDF, to *Anpo*, and to the stationing of U.S. forces in Japan.

For disputes concerning the legitimacy of SDF, SCJ seemed to fall under the influence of the constitutional avoidance principles stated in the 1936 U.S. Supreme Court case *Ashwander v. Tennessee Valley Authority*,⁴⁹ and have not granted a merits hearing on the issue of the SDF's constitutionality. SCJ first faced a War Potential Clause challenge in the *National Police Reserve Case* (concerning the origin and predecessor of the SDF), filed by Japan's Socialist Party in 1952.⁵⁰ SCJ dismissed the case and held "it could not determine the constitutionality of a law or an official act in the abstract and in the absence of any concrete legal dispute."⁵¹

In contrast to the constitutional avoidance analysis deployed on the issue of the legitimacy of SDF, SCJ adopted the political question doctrine in disputes involving *Anpo* and the stationing of U.S. forces.⁵² SCJ initially

theory in the European and American countries, as may be perceived from such expressions as. . . 'political question', appearing in American cases.").

⁴⁶ SETSU KOBAYASHI, SEIJIMONDAI NO HŌRI [THE POLITICAL QUESTION DOCTRINE] 108 (1988).

⁴⁷ The Law Library of Congress, Global Legal Research Center, Japan: Interpretations of Article 9 of the Constitution, <https://www.loc.gov/law/help/japan-constitution/interpretations-article9.php>.

⁴⁸ *Id.*

⁴⁹ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); MIYOKO TSUJIMURA, KENPŌ [CONSTITUTION] 511, 512 (2000).

⁵⁰ Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, Volume 6, Issue 9 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 783 (Japan).

⁵¹ *Id.*; see also SETSU KOBAYASHI, *supra* note 46.

⁵² MOTOAKI HATAKE, KENKYŪ TO GIRON NO SAIZENSEN [KENPŌ ARTICLE 9 - FRONTIERS OF RESEARCH AND DISCUSSION], 94-95 (2006).

adopted the political question doctrine in the 1959 *Sunagawa Case*.⁵³ Japanese scholars have achieved consensus that *the Sunagawa Case* concerned political questions jurisprudence, and they continue to debate how far its political questions implications extend.⁵⁴ In the *Sunagawa Case*, SCJ invoked what it understood as the spirit of the political question doctrine to avoid the political controversy of whether *Anpo* and retaining U.S. forces in Japan violated the War Potential Clause.⁵⁵ Thereafter, the political question doctrine became a legal barrier to further Article 9 challenges.⁵⁶

In autumn of 1957, seven demonstrators protesting the expansion of a military base in the town of Sunagawa were charged with trespassing on a U.S. air base.⁵⁷ Their protest violated Article 2 of the Special Criminal Law, criminalizing trespasses against military bases stationing U.S. armed forces.⁵⁸ The case soon gained public attention because the Special Criminal Law raised an Article 9 issue: whether the authoritative basis of the Special Criminal Law, the 1952 *United States-Japan Security Treaty*, which allowed the stationing of U.S. forces, violated the War Potential Clause.⁵⁹ The Tokyo District Court acquitted the protesters on March 30, 1959, holding the 1952 *United States-Japan Security Treaty's* allowance of U.S. military personnel in Japan violated Article 9, Paragraph 2.⁶⁰ The Tokyo District

⁵³ The term “political question doctrine” was not formally referred to in the judicial opinion. However, the spirit of the political question doctrine is apparent. See Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, INTL. J. OF CONST. L. 224, 226 (2003),

⁵⁴KISABURO YOKOTA, IKEN SHINSA [THE JUDICIAL REVIEW] 83 (1968); SETSU KOBAYASHI, *supra* note e 46, at 139–41; AKIRA OSUGA, *supra* note 22, at 359–60.

⁵⁵ CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 225 (2003); NOBUYOSHI ASHIBE, *KENPŌ SOSHO GENDAI-TEKI TENKAI* [THE MODERN DEVELOPMENT OF CONSTITUTIONAL LITIGATION] 129, 132 (1981); KISABURO YOKOTA, IKEN SHINSA *supra* note 54; See Yasuhiro Okudaira, *supra* note 22, at 75; Obayashi Keigo, *Seijimondai no hōri no yukue* [The Future of Political Question Doctrine], 87 *Hōgaku Kenkyū* No. 2, 198; Masaomi Kimizuka, *Tochi Koi-Ron Saikō — Aru Ga Nai* [Reconsidering Political Question Doctrine —To Be or Not to Be], 22 *YOKOHAMA L. REV.* 33 (2013); AKIRA OSUGA, *supra* note 22, at 55; Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no.710, 13 *SAIKŌ SAIBANSHO KEIJI HANREISHŪ* [KEISHŪ] 3225 (Japan). *Id.*

⁵⁶ Tsunemasa Arikawa, *Hōri Saikōsai tōchikōi* [The Principle of Law, The Supreme Court, and Political Question], 87 *HORITSU JIHO* No. 5, 4 (2015); Yasuo Hasebe, *Sunakawa jiken hanketsu ni okeru tōchi kōi-ron* [The Political Question Doctrine in Sunagawa Case], 87 *HORITSU JIHO* No. 5, 44 (2015).

⁵⁷ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no. 710, 13 *SAIKŌ SAIBANSHO KEIJI HANREISHŪ* [KEISHŪ] 3225 (Japan).

⁵⁸ Nipponkoku to Amerikagasshūkoku to no ma no anzen hoshōjōyaku daisanjo ni motodzuku gyosei kyōtei ni tomonau keiji tokubetsu-ho [Special Criminal Act due to the security treaty Administrative Agreement between Japan and the United States of America under Article 3], Law No. 138 of 1952, art. 2 (Japan).

⁵⁹ *KENPŌ*, art. 9, para. 2.

⁶⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 30, 1959, Sho 32 (wa) no. 367, 368, 1 *KAKYŪ SAIBANSHO KEIJI SAIBAN REISŪ* [KAKEISHŪ] 3, 776 (Japan). The District Court decision preceding the *Sunagawa Case* was also called the “Date Decision,” named after presiding judge Akio Date. “Article 2 of

Court's decision churned up controversy over Article 9 and the undefined boundary of judicial review.⁶¹ Addressing the dispute, SCJ took the case and overturned the district court, limiting the scope of judicial review on political question grounds.⁶²

The SCJ interpreted Article 9, Paragraph 2 as prohibiting the maintenance of war potential over which Japan exercises the right of command and supervision only, not the stationing of foreign armed forces in Japan.⁶³ Moreover, SCJ raised the political question doctrine without directly citing its name,⁶⁴ declining to rule on the merits whether the SDF is unconstitutional under Article 9.⁶⁵

The *Sunagawa Case*'s majority noted that the issue of whether the stationing of U.S. armed forces under the 1952 United States-Japan Security Treaty conflicts with Article 9 featured "an extremely high degree of political consideration . . . there is a certain element of incompatibility in the process of judicial determination of its constitutionality by a court of law which has as its mission the exercise of the purely judicial function."⁶⁶ SCJ further indicated, "legal determination as to whether the content of the treaty is constitutional or not is . . . related to the high degree of political consideration or discretionary power on the part of the Cabinet . . . and

the Special Criminal Law Enacted in Consequence of the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America is null and void, as it contradicts Article 31 of the Constitution on the premise that the stationing of the United States armed forces in Japan contravenes the provisions of the first part of paragraph 2, Article 9 of the Constitution."

⁶¹ *Id.*

⁶² Declassified U.S. documents indicate SCJ Chief Justice Kotaro Tanaka conducted private correspondence with senior U.S. diplomats in Tokyo before trial in the *Sunagawa Case*, raising judicial independence and due process concerns. See REIKO FUKAWA & TOSHIKAZU SHINOHARA, SUNAKAWA JIKEN TO TANAKA SAIKŌSAI CHOKAN AMERIKA KAIKIN BUNSHO GA AKIRAKA NI SHITA NIHON NO SHIHŌ [SUNAGAWA INCIDENT AND THE CHIEF JUSTICE TANAKA – THE JAPANESE JUDICIAL SYSTEM FROM THE PERSPECTIVES OF THE REVEALED AMERICAN CLASSIFIED DOCUMENT] 60–61 (2013).

⁶³ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan).

⁶⁴ At least one scholar viewed the *Sunagawa Case* as a discretion theory case, rather than as political question doctrine case. See Kakudo Toyoji, *Tochi Koi* [Political Question Doctrine], 638 JURIST 172, 173 (1977).

⁶⁵ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan); Motoaki Hatake, *supra* note 52, at 95; Katsutoshi Katami, *Hō Saikōsai tōchi* [Law, Supreme Court, and Ruling], 87 HORITSU JIHO NO. 5, 50; NOBUYOSHI ASHIBE, KENPŌ 343 (Takahashi Kazuyuki rev. 6th ed. 2015).

⁶⁶ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan).

. . . the Diet.”⁶⁷ The Court concluded judicial restraint was proper because highly political considerations belong to the people.⁶⁸

As for drawing the boundary of judicial review on issues with a high degree of political consideration, SCJ held that the 1952 United States-Japan Security Treaty and the stationing of U.S. forces were not “obviously unconstitutional and void,” fell outside the scope of judicial review, and must be left to the discretion of the executive and legislature.⁶⁹ Accordingly, SCJ has “avoided ruling upon the merits of constitutional challenges to Japan’s military activities and security arrangements under Article 9,” and ruled that the Tokyo District Court exceeded the scope of judicial review.⁷⁰

In the *Sunagawa Case*, SCJ set a landmark for the political question doctrine, straddling the competing ideas of judicial supremacy and the avoidance of judicial oligarchy. The Court restricted judicial review of Article 9 challenges to those concerning the *1952 United States-Japan Security Treaty* or the stationing of U.S. forces, and placed issues of “an extremely high degree of political consideration” outside the scope of Article 81’s judicial review power.⁷¹ For reviewable Article 9 issues (which exclude the constitutionality of the SDF), SCJ declared a clear mistake rule, deferring to the political branches so long as the act is “not obviously unconstitutional and void.”⁷²

C. *Evolution of the Political Question Doctrine After the Sunagawa Case*

After the *Sunagawa Case*, SCJ soon faced two questions: whether the political question doctrine and its clear mistake rule would extend to other disputes of high political consideration, and whether it would bind all future Article 9 disputes. As for other highly political disputes, one year after the *Sunagawa Case*, SCJ considered the issue of the procedure for dissolving the Diet in the *Tomabechi Case*, setting political questions criteria distinct

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Tatsugoro Isozaki, *Iwayuru tōchi kōi o kōtei suru gakusetsu no hihan* [*Criticism of Political Question Doctrine*], 31 HANDAIHŌGAKU 8 (1959); NOBUYOSHI ASHIBE, *supra* note 55, at 119; Yasuo Hasebe, *supra* note 56, at 44.

⁷² Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan).

from *Sunagawa*.⁷³ On August 28, 1952, Prime Minister Shigeru Yoshida dissolved the house of representatives pursuant to Article 7 of the *Kenpō*.⁷⁴ Representative Gizo Tomabechi challenged the dissolution and sued for his unpaid salary.⁷⁵ In 1953, the Tokyo District Court held the dissolution invalid because it was not made at a Cabinet meeting.⁷⁶ In 1954, the Tokyo High Court reversed on appeal, ruling the Cabinet reached its decision in a legal manner, but rejecting the political question doctrine.⁷⁷

Representative Tomabechi appealed to SCJ.⁷⁸ As in the *Sunagawa Case*, SCJ evoked the political question doctrine without directly naming it.⁷⁹ SCJ held that judicial review should be precluded from touching action within the discretion of the political branches, including the Cabinet's act of dissolving the Diet.⁸⁰ The Court reasoned that this discretion should be viewed as subject to political accountability, controlled ultimately by the people.⁸¹ In the *Tomabechi Case*, although the spirit of the political question doctrine was retained, SCJ used new rationales and distinguished it from the *Sunagawa Case* in two ways. First, SCJ did not mention the "not obviously unconstitutional and void" clear mistake rule. Second, SCJ emphasized the rationales of separation of powers and political accountability to justify its exercise of judicial restraint.

As to whether the *Sunagawa Case* and its clear mistake rule would bind future Article 9 disputes, SCJ and the lower courts distinguished those cases from the *Tomabechi Case*. For cases that threatened to unleash an Article 9 issue, especially those challenging the constitutionality of *Anpo* and retaining U.S. forces in Japan, the application of the *Sunagawa Case* political question doctrine is binding.⁸² In short, a dual standard for political

⁷³ Saikō Saibansho [Sup. Ct.] June 8, 1960, 14 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] (7) 1206 (Japan).

⁷⁴ KENPŌ, art. 7, para. 1 (stating, "The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people . . . Dissolution of the House of Representatives.").

⁷⁵ Saikō Saibansho [Sup. Ct.] June 8, 1960, 14 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7, 1206 (Japan).

⁷⁶ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 19, 1953, Sho 27 no. 156, 14 KAKYŪ SAIBANSHO KEIJI SAIBAN REISŪ [KAKEISHŪ] 7, 1251 (Japan).

⁷⁷ Tōkyō Kōtō Saibansho [Tokyo High. Ct.] Sep. 22, 1954, Sho 27 no. 2010, 14 KŌTŌ SAIBANSHO MINJI HANREISHŪ [KOMINSHŪ] 7, 1265 (Japan).

⁷⁸ Saikō Saibansho [Sup. Ct.] June 8, 1960, 7, 14 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1206 (Japan).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Motoaki Hatake, *supra* note 52, at 94–95.

questions analysis bore over the lower courts.⁸³ First, the *Sunagawa Case*'s clear mistake rule prevailed in Article 9 disputes including challenges to *Anpo* and stationing of U.S. forces.⁸⁴ Second, other disputes of high political consideration, such as the mutual relations between the political branches seen in the *Tomabechi Case*, are categorically precluded from judicial review.⁸⁵

Since the *Sunagawa Case*, SCJ has further split Article 9 disputes by subject matter. First, on *Anpo* and the stationing of U.S. forces disputes, SCJ affirmed the *Sunagawa Case* as binding precedent. SCJ cited the *Sunagawa Case* and adopted the political question doctrine and clear mistake rule, while refraining from ruling on the merits in the 1969 *Zenshihosendai Case*,⁸⁶ and the 1996 *Okinawa Mandamus Case*.⁸⁷ As for disputes regarding SDF and its military base, while SCJ refrained from stepping in on the 1982 *Naganuma Case*⁸⁸ and the 1989 *Hyakuri Air Base*

⁸³ MASAYUKI ATARASHI, KENPŌ SOSHŌ-RON [CONSTITUTIONAL LITIGATION] (377–381) (2d ed. 2010); Masaomi Kimizuka, *Tochi Koi-Ron Saikō—Aru Ga Nai [Reconsidering Political Question Doctrine—To Be or Not to Be]*, 22 YOKOHAMA L. REV. 33 (2013).

⁸⁴ Motoaki Hatake, *supra* note 52,

⁸⁵ *Id.*

⁸⁶ Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, 5, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 685 (Japan) The defendants were employees in court and participated in a political strike against *Anpo*. The defendants were accused of violating National Public Service Law Article 98, paragraph 5 and article 110, paragraph 1, item 17, which imposed criminal liability on public officials involving in “striking, engaging in delaying acts or other acts of dispute, or from resorting to delaying tactics which reduce the efficiency of governmental operations, against the public as employer represented by the Government.” These defendants were guilty in district court and high court. SCJ dismissed the appeal. As for the dispute concerning the constitutionality of *Anpo*, SCJ cited the *Sunagawa Case* as precedent, indicating “the Court should consider *Anpo* disputes prudentially because of their highly political considerations,” and holding the new *Anpo* was “not obviously unconstitutional and void,” and thus outside the scope of judicial review.

⁸⁷ Saikō Saibansho [Sup. Ct.] Aug. 28, 1996, 7, 50, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1952 (Japan) (After the 1995 Okinawa rape incident, Okinawan residents were furious with U.S. military forces. Land owners rejected to renew their land lease where the U.S. forces bases were built. Based on Articles 3 & 14 of the Special Measures Concerning Land for U.S. Armed Forces Law and Article 36, paragraph 5 of the Land Expropriation Law, the governor incurred a duty to proxy sign the lease extension. But the Governor of Okinawa Prefecture, Masahide Ota, refused to do so. SCJ unanimously ruled the Japanese central government has authority to so act. As for the dispute about the Japan–U.S. Security Treaty, SCJ formally cited the *Sunagawa Case* and ruled, “unless the Japan–U.S. Security Treaty and the Agreement on the Status of U.S. Armed Forces are obviously unconstitutional and void, the courts should examine whether the Special Measures concerning Land for U.S. Armed Forces Law is constitutional or not on the premise that the treaties are constitutional.”), http://www.courts.go.jp/app/hanrei_en/detail?id=268; see also Nicholas D. Kristof, *Japanese Court Rules Government Can Seize Land for U.S. Bases*, N.Y. TIMES, Aug. 29, 1996, <http://www.nytimes.com/1996/08/29/world/japanese-court-rules-government-can-seize-land-for-us-bases.html>.

⁸⁸ Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 9, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (Japan). In the *Naganuma Case*, the Sapporo District Court declined to apply the *Sunagawa Case* precedent, and ruled, the SDF constituted land, sea and air forces, in violation of Article 9, paragraph 2. See Sapporo Chiho Saibansho [Sapporo Dist. Ct.] Sept. 7, 1973, 712 HANREI JIHO [HANJI] 24 (Japan). The

Case,⁸⁹ the lower courts were divided between the political question doctrine,⁹⁰ constitutional avoidance,⁹¹ and striking down the SDF.⁹²

D. *The Jurisprudence of Judicial Review and the Political Question Doctrine in Japan*

Most Japanese constitutional scholars approved of SCJ's application of the political question doctrine in the *Sunagawa Case* utilizing three main rationales: the prudential view,⁹³ judicial competency,⁹⁴ and separation of powers.⁹⁵

Sapporo High Court, discussed the *Sunagawa* political question doctrine, but ultimately decided the case on the basis of standing, another obstacle to judicial review. See Sapporo Koto Saibansho [Sapporo High. Ct.] Aug. 5, 1976, 821 HANREI JIHO [HANJI] 21 (Japan). The SCJ affirmed and rejected to review on the basis of lacking interests in case. See Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 9, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (Japan).

⁸⁹ Saikō Saibansho [Sup. Ct.] June 20, 1989, 6, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 385 (Japan) The issue in dispute was whether selling properties to the SDF was a violation of *KENPŌ* Article 9, and therefore grounds for rescission. The district court adopted the political question doctrine and clear mistake rule, and rejected ruling the SDF unconstitutional. The high court dismissed the appeal and ruled the SDF was neither antisocial nor against the public morality. As a result, there was no cause for rescinding the sale. SCJ dismissed the appeal because "Article 9 is not applicable to actions of private parties." See GOODMAN, *supra* note 55, at 227.

⁹⁰ The appellate court in the *Naganuma Case* (Sapporo Kōtō Saibansho [Sapporo High. Ct.] Aug. 5, 1976, no. 821, 21 HANREI JIHO [HANJI] (Japan)), the district court in the *Hyakuri Air Base* (Mitoshi Chiho Saibansho [Mitoshi Dist. Ct.] Feb 17, 1977, no. 872, 22 HANREI JIHO [HANJI] (Japan)) and appellate court in the *Atsugi Air Base* (Tōkyō Kōtō Saibansho [Tokyo High. Ct.] Apr. 9, 1986, no. 1192, 1 HANREI JIHO [HANJI] (Japan)), adopted the political question doctrine and rejected an Article 9 argument challenging the legitimacy of SDF.

⁹¹ The district court in the *Eniwa Case*. (The defendant, accused of cutting the phone lines of an SDF facility, was indicted by the Special Criminal Law, incriminating the act of destroying materials serving defensive purposes. The court held that the phone lines were not used for defense purposes and granted acquittal.) See also Sapporo Chiho Saibansho [Sapporo Dist. Ct.] Mar. 29, 1967, 3, 9 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 359 (Japan).

⁹² The district court in the *Naganuma Case*. See Sapporo Chiho Saibansho [Sapporo Dist. Ct.] Sept. 7, 1973, 712 24, HANREI JIHO [HANJI] (Japan), translation is available in LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* 83 (1996).

⁹³ Junjiro Yamada, *Tōchi kōi ni tsuite* [*The Political Question Doctrine*], 13 KŌHŌ KENKYŪ 160 (1955); Hidenori Tomatsu, *PUREPPU KENPŌ* [PREP. CONSTITUTION] 135 (2007); Nobuyoshi Ashibe, *KENPŌ SOSHO RIRON* [THE THEORY OF CONSTITUTIONAL LITIGATION] 428 (1973) [hereinafter *KENPŌ SOSHO RIRON*].

⁹⁴ Hiroshi Hokama, *Tochi koi ni tsuite* [*The Political Question Doctrine*], 41 KOHO KENKYU 200 (1979).

⁹⁵ Ogawa Ichiro, *Tochi koi-ron* [*The Political Question Doctrine*], GYOSEIHORI 119 (1986); Hiroshi Kaneko, *Tochi koi no kenkyu* [*Research on the Political Question Doctrine*], 72 KOKKAGAKKAI ZASSHI (9) 1, 4 (1958); Toshio Irie, *Tōchi kōi* [*The political question doctrine*], 13 KOHO KENKYU 75, 90 (1955) [hereinafter Toshio Irie]; Tatsuhiko Yamamoto, *Kokumin shuken to tōchi kōi* [*Popular Sovereignty and Political Question Doctrine*], 729 HORITSU SEMINA 50 (Oct. 2015) (Professor Yamamoto and Justice Irie emphasized the rationale of popular sovereignty and political accountability to justify judicial restraint. But they seemed to overlook the issue of whether the Japanese electoral system, campaign strategies, and Diet are capable of reflecting the true voice of the Japanese people. See REIN TAAGEPERA & MATTHEW SOBERG

Prudential view scholars⁹⁶ argue the political question doctrine is a political custom rather than a legal theory.⁹⁷ Scholar Junjiro Yamada asserts the political question doctrine possesses characteristics of law and politics, yet is still within the scope of judicial examination.⁹⁸ However, Yamada acknowledges the judiciary must exercise restraint and analyze both costs and benefits, and the likelihood of chaos a decision might entail when deciding whether to rule.⁹⁹ Aligning with the prudential view, scholar Nobuyoshi Ashibe favors a balancing test that considers the necessity of the protection of human rights, the political consequences of a decision, the risk of politicizing the judiciary, the limits of judicial competency, and the probability of enforcement.¹⁰⁰ However, the prudential view draws criticism for failing to render clear guidance for drawing the boundary of judicial review in practice.¹⁰¹

Other scholars agreed on the necessity of judicial restraint while focusing on the rationale of judicial competency.¹⁰² Under the influence of U.S. jurisprudence emphasizing judicial “passive virtues” and arguing for the importance of prudential considerations, these scholars pay close attention to judicially discoverable and manageable standards.¹⁰³ Assessing judicial competency through this lens, these scholars mainly agree that the *Sunagawa Case*’s clear mistake rule is appropriate.¹⁰⁴

The third rationale, separation of powers, has been adopted by many Japanese scholars.¹⁰⁵ Scholar Hiroshi Kaneko and Justice Irie argue that

SHUGART, SEATS A VOTES: THE EFFECTS AND DETERMINATION OF ELECTORAL SYSTEMS 77–81 (1989)); ELLIS KRAUSS AND ROBERT J. PEKKANEN, THE RISE AND FALL OF JAPAN’S LDP: POLITICAL PARTY ORGANIZATIONS AS HISTORICAL INSTITUTIONS 100, 128 (2011).

⁹⁶ See Kineko Kubota, *Amerika kenpō ni okeru seijimondai [Political Questions in the U.S. Constitution]*, 13 KOHO KENKYU [Public Law Research] 168, 173 (1955); Masami Ito, KENPŌ [THE CONSTITUTION] 636 (3d ed. 1995); Akira Nishio, *Tōchi kōi ni tsuite [About Political Question Doctrine]*, 5 DOSHISHA HOGAKU, 113 (1976).

⁹⁷ HIDENORI TOMATSU, *supra* note 93, at 135; HIDENORI TOMATSU, SHIHŌ SHINSA-SEI [THE JUDICIAL REVIEW SYSTEM] 171 (1989).

⁹⁸ Junjiro Yamada, *supra* note 93, at 108.

⁹⁹ *Id.* at 78, 85.

¹⁰⁰ NOBUYOSHI ASHIBE, *supra* note 93, at 428; NOBUYOSHI ASHIBE, *supra* note 55, at 137.

¹⁰¹ MASANARI SAKAMOTO, KENPŌ RIRON I [CONSTITUTIONAL THEORY I] 426 (3d ed. 2000); Toyoji Kakudo, *Tōchi Kōi [Political Question Doctrine]*, 638 JURIST 176 (1977).

¹⁰² Hiroshi Hokama, *Tōchi kōi ni tsuite [About the Political Question Doctrine]*, 41 KŌHŌ KENKYŪ 200 (1979).

¹⁰³ KŌJI SATŌ, KENPŌ [CONSTITUTIONAL LAW] 357 (1995).

¹⁰⁴ YŌICHI HIGUCHI, KENPŌ IV [CONSTITUTIONAL LAW IV] 150 (2004).

¹⁰⁵ ISAO SATŌ, NIHONKOKU KENPŌ GAISETSU [OUTLINE OF THE CONSTITUTION OF JAPAN] 477 (5th ed. 1996); KAZUHIRO NAGAO, NIHONKOKU KENPŌ [THE CONSTITUTION OF JAPAN] 243 (4th ed. 2011).

because the *Kenpō* designates a democratic government, the people must ultimately speak on issues of high political consideration and maintain control of the political branches.¹⁰⁶ This formulation of separation of powers is coupled with the concept of popular sovereignty and commits political matters to the political branches rather than the unelected judicial branch, distinguishing it from its U.S. counterpart which emphasizes constitutional structure and grants of power.¹⁰⁷

Opposing the consensus among most scholars that the Japanese political question doctrine is legitimate, scholars Tatsugorō Isozaki¹⁰⁸ and Yasuo Sugihara¹⁰⁹ strictly adhere to the *Kenpō*'s text and argue for constitutional supremacy.¹¹⁰ Article 81 unequivocally names SCJ the court of last resort to determine constitutionality in all disputes, distinguishing it from the U.S. Constitution.¹¹¹ Analyzing the *Kenpō*'s unique structure and text, these scholars argue that the U.S. political question doctrine is a poor tool for interpreting the *Kenpō*.¹¹² To the extent the political question doctrine has a constitutional rationale, it supports strong judicial review because the framers expressly vested final interpretive power of the *Kenpō* with SCJ rather than the people.¹¹³ The scholar Setsu Kobayashi adds an originalist argument, observing that prior to World War II, the political branches wielded final decision-making power and proceeded to eviscerate the Meiji Constitution. To Kobayashi, this historical lesson underpins the collective intent of the *Kenpō*'s framers to have an independent judiciary and a functioning system of checks and balances. Kobayashi argues that a political question doctrine that narrows judicial review is inconsistent with the *Kenpō* framers' intent.¹¹⁴

While SCJ adopted its political question doctrine based on separation of powers and prudential rationales with few other developments, the U.S.

¹⁰⁶ Toshio Irie, *supra* note 95, at 91 (Justice Irie conceded that the best way to accomplish political accountability is via public referendum and the general election is an alternative when the public referendum has not yet been established); Hiroshi Kaneko, *supra* note 95, at 1, 4.

¹⁰⁷ Toshio Irie, *supra* note 95, at 91; Hiroshi Kaneko, *supra* note 95, at 1, 4.

¹⁰⁸ Tatsugorō Isozaki, *Iwayuru tōchi kōi to waga kuni kenpō* [*The Political Question Doctrine and the Japanese Constitution*], 39 MINSHŌHŌ ZASSHI 867, 871–72 (1959).

¹⁰⁹ YASUO SUGIHARA, KENPŌ II [CONSTITUTIONAL LAW II] 372 (1989).

¹¹⁰ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 98, para. 1 (“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.”).

¹¹¹ Tatsugorō Isozaki, *supra* note 108, at 871–72.

¹¹² Yasuhiro Okudaira, *supra* note 22, at 70; SETSU KOBAYASHI, *supra* note 46, at 139–41.

¹¹³ Tatsugorō Isozaki, *supra* note 71, at 27.

¹¹⁴ SETSU KOBAYASHI, *supra* note 46, at 141 (reasoning that compromised judicial power is inconsistent with the framers' intent).

political question doctrine evolved in phases leading up to the 1962 landmark case *Baker v. Carr* in which it was restated.¹¹⁵ Before discussing how SCJ may adopt lessons from the U.S. in its approach to the 2014 reinterpretation controversy, an overview of judicial review and the political question doctrine in the U.S. Supreme Court is in order.

II. JUDICIAL REVIEW AND THE POLITICAL QUESTION DOCTRINE IN THE U.S. SUPREME COURT

The U.S. acted as transplant donor for judicial review in Japan and may similarly serve as a useful model for developing Japan's political question doctrine. Reviewing the evolution of judicial review in the U.S. Supreme Court will provide a basis for competing views of its political question doctrine. Corresponding to the development of the judicial review, this part analyzes the trend of the U.S. political question doctrine and its jurisprudential changes.

A. *The Origin of Judicial Review in the U.S. Supreme Court*

Ratified in 1788, the U.S. Constitution omits any express grant of judicial review to the Supreme Court.¹¹⁶ Its text develops little about the Supreme Court, inviting over two centuries of argument over the Court's proper role.¹¹⁷ The 1803 case *Marbury v. Madison* is commonly viewed as the first time the U.S. Supreme Court exercised judicial review to declare an act of Congress unconstitutional.¹¹⁸ Chief Justice John Marshall emphasized, “[i]t is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.”¹¹⁹

¹¹⁵ Zachary Baron Shemtob, *The Political Question Doctrines: Zivotofsky v. Clinton and Getting Beyond the Textual—Prudential Paradigm*, 104 GEO. L. J. 1001, 1007 (2016); Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 625–31 (2012).

¹¹⁶ Compare U.S. CONST. art. III (omitting a judicial review provision), with NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81, para. 1 (granting this power expressly to the SCJ).

¹¹⁷ See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 3–10 (rev. ed. 1994).

¹¹⁸ *Marbury v. Madison*, 5 U.S. 137, 175–78 (1803); see also Yasuo Hasebe, *Constitutional Applications of the Supreme Court of Japan*, in CONSTITUTIONAL JURISPRUDENCE: FUNCTION, IMPACT, AND CHALLENGES 237, 237 (2016); But cf. Norikazu Kawagishi, *The Birth of Judicial Review in Japan*, 5 INT'L J. CONST. L. 308, 330 (2007), <http://icon.oxfordjournals.org/content/5/2/308.full> (describing the 1948 *Placard Case*, in which SCJ declined to rule on the constitutionality of a statute criminalizing criticism of the Emperor, instead dismissing an appeal of conviction on a technicality).

¹¹⁹ *Marbury*, at 177.

Ever since, the Supreme Court retained the power to declare a law unconstitutional.¹²⁰

B. *Three Views on the Role of Judicial Review in the Supreme Court*

Observing judicial review's uneven history in the U.S., three main schools of thought developed characterizing its proper level of activity.¹²¹ The "classical theory" emphasizes judicial restraint based on popular sovereignty and prioritizes the politically elected branches.¹²² "Passive virtues" emphasize prudential considerations in selecting cases with an eye toward maintaining legitimacy with the public.¹²³ Finally, proponents of robust judicial review emphasize the Constitution as the supreme law of the land that must supersede conflicting laws.¹²⁴

1. The Classical Theory and the Rule of the Clear Mistake

The "classical theory" of judicial review emphasizes the Court's unelected status as a reason for it to be highly deferential and to let reasonable acts of Congress stand.¹²⁵ In 1893, scholar James Bradley Thayer recommended that courts "can only disregard [an] Act [of Congress] when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question."¹²⁶ Thayer cautions that they must not "step into the shoes of the law-maker."¹²⁷ In this view, a "distinction between what is merely incorrect and what is unreasonable" must be recognized.¹²⁸ The classical theory and Thayer's "rule of the clear mistake" fell out of favor with an

¹²⁰ See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 981 (2003).

¹²¹ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 5 (1986); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

¹²² See BICKEL, *supra* note 121, at 17.

¹²³ *Id.*

¹²⁴ See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 4–6 (1972).

¹²⁵ See BICKEL, *supra* note 121, at 21–40 (describing Thayer's theory).

¹²⁶ Thayer, *supra* note 121, at 144.

¹²⁷ *Id.* at 152.

¹²⁸ Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 522 (2012) (explaining Thayer's theory).

ascendant Warren Court in the 1960s, and has yet to regain a foothold in Supreme Court jurisprudence.¹²⁹

2. The Counter-Majoritarian Difficulty and Prudential Factors

Alternatives to the strict classical theory emerged as civil rights issues fueled more active judicial review in the Warren Court.¹³⁰ However, judicial review is suspect because when the Supreme Court strikes down a law, it “exercises control, not on behalf of the prevailing majority, but against it.”¹³¹ Scholar Alexander Bickel argued for limited yet authoritative use of judicial review to address this “counter-majoritarian difficulty” wherein unelected officials make final decisions overturning the elected branches.¹³² Bickel contends the judiciary should avoid deciding controversies when judges lack knowledge or expertise, political backlash from the public is likely, and when the Court might invite conflicts with another branch.¹³³ Bickel’s passive virtues may best be characterized in Supreme Court jurisprudence by Justice Louis Brandeis’ 1936 concurring opinion in *Ashwander v. Tennessee Valley Authority*.¹³⁴ Justice Brandeis lays out prudential rules for deciding when to exercise judicial review that are not found in the Constitution’s text.¹³⁵ Bickel believed that regularly exercising passive virtues to dodge controversial decisions builds the Court’s legitimacy with the public.¹³⁶

3. Robust Judicial Review

Comparatively, proponents of robust judicial review contend the Supreme Court legitimately claims the final say on constitutional interpretation and fulfills its proper role when deciding controversial issues.¹³⁷ Robust judicial review embraces the Court’s role as a policy-making body because the political branches historically have failed to

¹²⁹ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring federal courts “supreme in the exposition of the law of the Constitution . . .”).

¹³⁰ BICKEL, *supra* note 121, at 36–7.

¹³¹ *Id.* at 120.

¹³² *Id.*

¹³³ *Id.* at 111–83.

¹³⁴ Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1012 (1994).

¹³⁵ *Id.* at 1016–17 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936)).

¹³⁶ BICKEL, *supra* note 121, at 200.

¹³⁷ See generally Larry D. Kramer, *supra* note 115, at 625–31.

vindicate minority rights.¹³⁸ In 1959, scholar Herbert Wechsler formulated a version of robust judicial review wherein, “courts have both the title and the duty. . . to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices.”¹³⁹ In 1968, scholar Archibald Cox approvingly wrote, “[j]udges do make law, they have no choice but to make law, their law making is and should be a reflection of their views on public policy.”¹⁴⁰ A Supreme Court exercising robust judicial review is confident in its role as policymaker, aptly describing the Court’s general temperament since the Warren Court.¹⁴¹

C. *Political Question Doctrine Jurisprudence in the U.S. Supreme Court*

With the differing rationales of the competing schools of thought regarding the role of judicial review in mind, we turn to the application of the political question doctrine in the U.S.¹⁴² The political question doctrine precludes entire subject areas from being decided on the merits despite a case satisfying all other tests of justiciability, such as standing, mootness, and ripeness.¹⁴³ This method of avoiding controversial rulings is considered a rule of judicial restraint rather than procedure,¹⁴⁴ based on two ideas: (1) the Constitution grants the political branches certain powers the Court cannot question; and (2) the political branches are best equipped to remedy particular issues.¹⁴⁵

1. The Classical Political Question Doctrine

The origin of the political question doctrine in the U.S. Supreme Court can be traced to *Marbury*, applied narrowly when the Constitution

¹³⁸ Edwin W. Tucker, *Book Review*, 41 IND. L. J. 330, 333 (1966) (reviewing MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964)).

¹³⁹ Wechsler, *supra* note 121, at 19.

¹⁴⁰ Martin Shapiro, *Book Review*, 31 J. POL. 853, 853 (1969) (reviewing ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968)).

¹⁴¹ Kramer, *supra* note 115, at 630–31.

¹⁴² ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 130–31 (2011).

¹⁴³ *Id.*

¹⁴⁴ Margit Cohn, *Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, 59 AM. J. COMP. L. 675, 677 (2011).

¹⁴⁵ CHEMERINSKY, *supra* note 142, at 131 (noting that while scholars disagree about the doctrine’s validity and wisdom, they agree that its definition and scope have changed over time).

expressly vests plenary power with the president.¹⁴⁶ Chief Justice Marshall held that certain executive actions are not subject to judicial review because:

[W]here the heads of departments . . . act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. . . . The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.¹⁴⁷

This formulation became known as the “classical political question doctrine” and is closely tied to the Constitution’s text.¹⁴⁸ Under this doctrine, controversial issues are categorically excluded from justiciability when the Constitution vests plenary discretion with the President such as in foreign affairs—but not to vindicate individual rights.¹⁴⁹ Marshall’s classical doctrine was limited by a textual constitutional grant of power in specified areas of policy.¹⁵⁰ U.S. scholars acknowledge the classical political question doctrine to employ a separation of powers rationale.¹⁵¹

2. The Rise and Fall of the Prudential Political Question Doctrine

After *Marbury*, the textual scope of political questions gradually came to include prudential factors.¹⁵² Prudential factors are various, including the sensitivity of involved national interests, and whether there are clearly established legal standards for the issue.¹⁵³ Prudential factors first emerged

¹⁴⁶ Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 248–49 (2002).

¹⁴⁷ *Marbury*, at 166–70 (1803).

¹⁴⁸ See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 518 (1966) (coining the term “classical theory” to describe the political question doctrine when referring to the *Marbury* version).

¹⁴⁹ JARED P. COLE, CONG. RESEARCH SERV., R43834, THE POLITICAL QUESTIONS DOCTRINE: JUSTICIABILITY AND SEPARATION OF POWERS 3 (2014).

¹⁵⁰ Barkow, *supra* note 146, at 239; *Marbury*, at 163–70.

¹⁵¹ Carol Szurkowski, *The Return of Classical Political Question Doctrine in Zivotofsky Ex. Rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), 37 HARV. J. L. & PUB. POL’Y 347, 353 (2014).

¹⁵² COLE, *supra* note 149, at 4; See also Barkow, *supra* note 146, at 255–57.

¹⁵³ Szurkowski, *supra* note 151, at 353.

alongside the classical doctrine in the 1849 case *Luther v. Borden*.¹⁵⁴ The Court deferred to Congress advancing two main rationales: (1) the legislative branch possesses sole constitutional authority to decide this matter; and (2) “prudential considerations,” including the likely chaos that would result from a decision.¹⁵⁵

The first half of the Twentieth Century saw the Supreme Court demure on political representation cases.¹⁵⁶ In 1912, the Court elevated prudential considerations in *Pacific States Telephone & Telegraph Co. v. Oregon*, relying on the far-reaching effects of a decision more than on constitutional text and structure.¹⁵⁷ The Court conceded the “great variety of relevant conditions, political, social and economic” put it out of its depth and decided it could not distill a standard, holding, “the lack of criteria for a judicial determination” is a “dominant consideration” in deciding whether an issue is a political question.¹⁵⁸ The Court introduced the judiciary’s limited institutional capacity as a prudential factor in the 1946 congressional redistricting case *Colegrove v. Green*.¹⁵⁹ *Colegrove* was an electoral malapportionment case in which rural individuals were vastly overrepresented.¹⁶⁰ Justice Frankfurter’s plurality insisted the Court should opt “not to enter th[e] political thicket,” and designated the redrawing of congressional districts as outside the Court’s competence.¹⁶¹ Justice Frankfurter notes Congress’s express constitutional power to regulate the type of election at issue in *Colegrove*, and his judgment turns on the prudential consideration of the Court’s inability to remedy the injury at issue.¹⁶²

3. Baker v. Carr: Reframing the Political Question Doctrine

In 1962, the Supreme Court dramatically reformulated the political

¹⁵⁴ *Luther v. Borden*, 48 U.S. 1, 10 (1849) (deciding that whether a State has exercised proper maintenance of “a republican form of government” as required by the Constitution is a question left to Congress).

¹⁵⁵ *Id.*; COLE, *supra* note 149, at 4 (the issue in *Luther v. Borden* asked the Court to determine the legitimate government of a sovereign state, likely to result in chaos if decided).

¹⁵⁶ COLE, *supra* note 149, at 4.

¹⁵⁷ *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 141–42 (1912) (holding that whether the state of Oregon’s initiative and referendum system was consistent with the Constitution’s “republican form of government” Guaranty Clause requirement is a political question).

¹⁵⁸ *Id.* at 453–55.

¹⁵⁹ *Colegrove v. Green*, 328 U.S. 549 (1946).

¹⁶⁰ *Id.* at 550–51; CHEMERINSKY, *supra* note 142 (explaining Frankfurter’s plurality opinion).

¹⁶¹ *Colegrove*, 328 U.S. at 556.

¹⁶² Barkow, *supra* note 146, at 239 (explaining Frankfurter’s plurality opinion, stating the Court had no ability to remedy voter dilution relative to Congress.).

question doctrine in *Baker v. Carr*.¹⁶³ Though *Colegrove* found that apportionment of state congressional voting districts is a political question, the Court found in *Baker* that a similar issue, framed differently, was not a political question.¹⁶⁴ *Baker* reinforced that the political question doctrine is “primarily a function of the separation of powers.”¹⁶⁵ Justice Brennan’s majority opinion lays out a six-factor test to help guide the Court in making the determination, examining whether there is:

[1] [a] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁶⁶

In *Baker*, Brennan attempted to craft, for the first time, a unified political question doctrine.¹⁶⁷ The first factor focuses on the constitutional text granting other branches specific powers the judiciary may not question, as in *Luther*.¹⁶⁸ The second factor is primarily structural and alludes to the competencies of the other branches, as in *Coleman*.¹⁶⁹ The final four factors are prudential considerations, cautioning against an unelected court tackling highly political issues.¹⁷⁰

D. *The Political Question Doctrine After Baker*

After *Baker*, the Supreme Court narrowed the influence of prudential factors in political questions analysis.¹⁷¹ In more contemporary analyses,

¹⁶³ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁶⁴ *Id.* at 208–09.

¹⁶⁵ *Id.* at 210.

¹⁶⁶ *Id.* at 217.

¹⁶⁷ Shemtob, *supra* note 115, at 1007.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Barkow, *supra* note 146, at 267–76; *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that whether Congress had the authority to deny seating a duly elected member was not a political

prudential factors are rarer, despite the *Baker* test officially endorsing them.¹⁷² While the *Baker* test includes both textual and prudential factors, the balance between them remained a puzzle for over fifty years.¹⁷³ The treatment of the political question doctrine itself has likewise narrowed in applicable scope since *Baker*.¹⁷⁴ Between the 1962 *Baker* decision and 2016, the Supreme Court discussed the political question doctrine in thirty-eight cases, finding a nonjusticiable political question only twice.¹⁷⁵ In *Bush v. Gore* (2000), the Court's decision determined the outcome of a presidential election.¹⁷⁶ Justice Breyer's *Bush v. Gore* dissent embraced Frankfurter and Bickel's prudential analysis and passive virtues, arguing that the case's political nature made it nonjusticiable.¹⁷⁷ Bickel's passive virtues, to be deployed when a case threatens the Court's legitimacy with the public, were laid to rest in *Bush v. Gore*, and have yet to be revived.¹⁷⁸

Since John Roberts was seated as Chief Justice in 2005, the Court has yet to find a political question. The Roberts Court notably found no political question and ignored *Baker's* prudential factors in the 2012 case *Zivotofsky v. Clinton*, deciding that whether an individual has the right to have "Jerusalem, Israel" listed as a place of birth on a passport when the State Department took no stance on Jerusalem's political status, was not a political question.¹⁷⁹ In *Zivotofsky*, the Roberts majority held that the political question doctrine is a "narrow exception" to the general rule that "the Judiciary has the responsibility to decide cases properly before it."¹⁸⁰ The Court relied on the first two *Baker* factors only and held a political question exists "where there is a textually demonstrable constitutional commitment of

question); *Goldwater v. Carter*, 444 U.S. 996 (1979) (relegating consideration of prudential factors to concurring opinions, and not as part of central holding); *Nixon v. United States*, 506 U.S. 224 (1993) (finding a political question based on a textually demonstrable commitment of impeachment power granted to the legislature and lack of manageable and discoverable standards for judicial management of impeachment proceedings; not prudential factors); *Bush v. Gore*, 531 U.S. 98 (2000) (finding no political question over strong dissent that prudential factors weighed against hearing case that would decide a presidential election). See also *Shemtob*, *supra* note 115, at 1010 (explaining only two cases have found political questions since *Baker*, neither of which was decided on prudential grounds).

¹⁷² *Shemtob*, *supra* note 115, at 1008.

¹⁷³ *Id.*

¹⁷⁴ *Barkow*, *supra* note 146, at 267–68.

¹⁷⁵ See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (finding supervision of the military was solely within the constitutional power of the executive and legislative branches); *Nixon v. United States*, 506 U.S. 224, 226–38 (1993) (finding review of impeachment proceedings solely within Congress's constitutional power and outside the scope of the judiciary).

¹⁷⁶ *Bush v. Gore*, 531 U.S. 98 (2000); *Barkow*, *supra* note 146, at 273–74.

¹⁷⁷ *Bush*, at 156–57 (Breyer, J., dissenting).

¹⁷⁸ *Shemtob*, *supra* note 115, at 1014.

¹⁷⁹ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

¹⁸⁰ *Id.* at 194.

the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”¹⁸¹ The majority’s conspicuous omission of *Baker’s* prudential factors sparked debate over the *Baker* test’s viability going forward.¹⁸²

As robust judicial review ascended in the U.S. Supreme Court, the political question doctrine receded. The political question doctrine may yet again transform after *Zivotofsky*, but the Court’s turn toward a textual and structural focus is significant.¹⁸³ In the four most recent cases that considered finding a political question, appeals to text and structure dominated and prudential considerations were relegated concurrences or dissents.¹⁸⁴ The judicial restraint of Thayer and Bickel, and the importance of prudential considerations in political questions analysis have been mostly cast aside.¹⁸⁵ The *Zivotofsky* majority’s exclusive focus on text and structure throws the future prudential factors into doubt.¹⁸⁶ The jurisprudential changes that have shaped the political question doctrine in the U.S. Supreme Court from *Baker* to *Zivotofsky* present a model SCJ might consider when in its approach the 2014 reinterpretation.

III. THE SCJ COULD RESTATE AND CLARIFY ITS POLITICAL QUESTION DOCTRINE AND REEXAMINE ITS APPLICATION

Developments in the U.S. political question doctrine can act as a guide to SCJ as it navigates the complex and unique context of *Kenpō* Article 9 disputes in this critical moment. We recommend that SCJ restate and clarify its political question doctrine. We also recommend that SCJ consider the U.S. Supreme Court’s adoption of robust judicial review and its political questions development from *Baker* through *Zivotofsky*. These recommendations stem from our analysis that SCJ has undervalued the text history, and checks and balances of the *Kenpō*, and overemphasized prudential consideration in its political questions analysis.¹⁸⁷ The benefits of

¹⁸¹ *Zivotofsky*, at 195 (citing *Nixon v. United States*, 506 U.S. 224 (1993)) (internal quotation marks omitted).

¹⁸² Shemtob, *supra* note 115, at 1009.

¹⁸³ Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 522 (2012).

¹⁸⁴ *Zivotofsky*, 566 U.S., at 189; *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Bd. Of Cty. Comm’rs v. Umbehr*, 518 U.S. 668 (1996); *Nixon v. United States*, 506 U.S. 224 (1993).

¹⁸⁵ Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1233 (2002).

¹⁸⁶ See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Zivotofsky*, 566 U.S., at 189.

¹⁸⁷ See *supra* Part I sub. A and I sub. D; see also *supra* Part II sub. D.

our approach are two-fold. First, because finding a political question precludes judicial review, a clarified political question doctrine will help to restore judicial checks and balances on the executive. Second, we believe a more active SCJ can encourage a deep dialogue between the government and the people to deliberate national security strategies and move Japan forward.

A. *Clarifying the SCJ Political Question Doctrine*

We recommend SCJ clarify the political question doctrine by restating it in a judicial opinion that includes: 1) elaborating the role separation of powers plays in political questions analysis; 2) determining what, if any, relation the clear mistake rule bears to the political question doctrine; and 3) consideration of the weight SCJ will give to the *Kenpō's* text, history, and structure when determining whether a political question exists. This restatement will align the Japanese political question doctrine with the *Kenpō's* text and structure as the U.S. Supreme Court did in its treatment of *Baker in Zivotofsky*.

1. *Elaborating the Spirit of Separation of Powers: Checks and Balances*

First, SCJ can begin restating its political question doctrine by clarifying the role of separation of powers. Clarifying separation of powers includes SCJ defining its own role as constitutional interpreter, defining when another branch is constitutionally empowered to act, and addressing the checks and balances interplay between them. The first power SCJ should define is its own judicial review power under Article 81. In the U.S., the political question doctrine primarily operates as a function of separation of powers, not as a political confrontation escape pod.¹⁸⁸ Article 81 expressly grants SCJ the power of interpreting the *Kenpō*.¹⁸⁹ The War Potential Clause prohibits maintaining war potential.¹⁹⁰ Nowhere does the *Kenpō* provide that executive power regarding foreign as well as national security policy and treaties is immune from judicial review. Yet in the *Sunagawa Case*, SCJ cites “an extremely high degree of political consideration” as a valid reason not to rule on the merits.¹⁹¹ The *Kenpō's* history shows it was designed to vest judicial review with SCJ, the framers’

¹⁸⁸ See *Id.*

¹⁸⁹ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81, para. 1 (Japan).

¹⁹⁰ *Id.* at art. 9, para. 2.

¹⁹¹ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, Shō 34 (a) no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan).

chosen final interpreter.¹⁹²

Next in its separation of powers clarification, SCJ should define the constitutional powers of the other branches in a given arena. Deference for the sake of political stability that does not identify the branch empowered by the *Kenpō* to make final decisions on a given issue weakens separation of powers analysis. In the *Sunagawa Case*, SCJ announced it would defer to the political branches as long as the act is “not obviously unconstitutional and void.”¹⁹³ The *Sunagawa Case* has been regarded as a precedent effectively precluding SCJ and lower courts from hearing disputes regarding *Anpo* and the stationing of U.S. Forces. We have examined the U.S. Supreme Court examples of *Marbury* and *Zivotofsky*, discussing when a constitutional provision empowers the executive to act; this is an appropriate place to begin political questions analysis. *Baker* and *Zivotofsky* affirm the political question doctrine is primarily a function of separation of powers. This example can be useful to SCJ because defining the powers of each branch helps clarify when the judicial branch encounters a political question that lies outside its power of judicial review.

After defining its own power and that of the separate branches, SCJ should then identify the checks and balances between them. SCJ employed the separation of powers rationale in the *Tomabechi Case*, designating relations between the political branches as outside the scope of judicial review. But SCJ has not identified the role of checks and balances between the branches. A focus on highly politicized issues instead of checks and balances as determined by the *Kenpō* should be reconsidered. Eviscerating checks and balances will block the flow of dialogue among the three branches, and between the government and the people. While SCJ is under no obligation to adopt the U.S. version of political questions, the doctrine’s driving force, checks and balances, is baked into both the *Kenpō* and U.S. Constitution, and is a principle worth clarifying.

2. Clarifying the Clear Mistake Rule’s Relationship to Political Questions

Second in its political questions restatement, SCJ should clarify the

¹⁹² See KENZO TAKAYANAGI I, *supra* note 31, at 245; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81, para. 1 (Japan).

¹⁹³ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, A no. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225. (Japan).

relationship between the political question doctrine and the clear mistake rule. SCJ's Article 9 jurisprudence would benefit from severing the clear mistake rule from the political question doctrine. The *Sunagawa Case's* clear mistake rule precedent, cited in the *Zeshihosendai Case* and the *Okinawa Mandamus Case*, has entrenched the clear mistake rule in Article 9 jurisprudence on the *Anpo* and stationing of U.S. troops issues. There is no analogue in modern U.S. Supreme Court political questions jurisprudence, where the clarity required has trended toward which branches is constitutionally authorized to act. Because the U.S. clear mistake rule as formulated by Thayer does not place subject matter off limits and its political question doctrine does, SCJ's potent combination of the two in the *Sunagawa Case* demands clarification on their relationship. In the U.S. Supreme Court, if a political branch is acting without express constitutional authority, the Court is capable of deciding the case, and prudential factors weigh in favor of a decision, then the mistake's degree of clarity is inapposite. SCJ may clarify that the clear mistake rule's application to Article 9 cases is in fact not political questions analysis. Such clarification would at least uncouple these potent barriers to judicial review.

3. Weighing Text and History Against Prudential Considerations

Third, SCJ's political questions opinion should consider the weight given to textual and historical factors in political question analysis. There is no question that some prudential factors, particularly the likelihood of resulting chaos and potential inconsistent declarations from another branch, are potentially important to SCJ.¹⁹⁴ However, the U.S. Supreme Court provides a model where prudential factors do not predominate over the textual and structural factors. While the prudential consideration seems still influential in Article 9 cases,¹⁹⁵ the U.S. Supreme Court has shown political questions jurisprudence can shift away from prudential factors in stages. Prudential considerations were four of six of factors announced in the *Baker* test, yet had vanished from the Court's analysis in *Zivotofsky*. The Court's emphasis on checks and balances may have helped facilitate the *Zivotofsky* shift.

The SCJ is not bound by prudential considerations and retains a plain text and rich history that would support a shift away from them. If SCJ were

¹⁹⁴ NOBUYOSHI ASHIBE, *supra* note 65.

¹⁹⁵ *See infra* Part ID.

to consider the historical drafting process of Article 81, this history would provide strong support for a textual and historical restatement of the political question doctrine. This history strongly suggests SCJ was intended to decide controversial cases and has been almost completely ignored in SCJ analysis. Article 81 designates SCJ the “court of last resort” and may choose whether textual and historical considerations are dominant or prudential considerations are dominant. While declaring either as dominant in a judicial opinion will clarify this issue, anointing textual and historical factors as dominant will allow SCJ to unleash the unusual history of judicial review’s establishment in Japan to bolster its credibility as final interpreter of the *Kenpō*.

Japanese prudential view scholars might argue that judicial determination of political disputes regarding Article 9 threaten to damage the judiciary’s legitimacy with the public and draw indifference from the political branches. However, we believe this is worth the risk for three reasons. First, these concerns might be mere speculation lacking solid ground that result in judicial abdication and causing more serious chaos and instability. Second, public reliance on the judicial branch should be based on sound, convincing, reasoning of the decision, rather than judicial abdication. Third, the legal effect of a hypothetical 2014 Reinterpretation decision would merely be bound to that specific case, rather than imposing general effects.

Clarifying and restating a political questions test that includes discussion of separation of powers and the clear mistake rule, and also considers how it wishes to weigh textual and historical versus prudential factors will help provide guidance for future political questions cases. Applying a test that focuses on specific provisions of the *Kenpō* to both Article 9 cases is an important step in removing the political questions barrier.

B. Reexamining the Political Question Doctrine in Light of U.S. Political Question Developments

We also suggest SCJ may benefit from observing post-*Baker* developments of political questions jurisprudence in the U.S. Supreme Court. SCJ may benefit by: 1) considering adopting a new political questions test aligning with the U.S. Supreme Court’s post-*Baker* developments; and 2) considering hearing a challenge to the 2014 reinterpretation to develop a new test.

First, SCJ may examine U.S. political questions jurisprudence from *Baker* through *Zivotofsky* to get a sense of what action fits its goals. Observing the way the *Zivotofsky* Court took the unranked *Baker* factors and favored text as opposed to prudential factors could lead to strategic insights on the weight of *Kenpō*'s text and structure. It was unclear for many years after *Baker* how the balance between textual and prudential factors would play out. Its multi-factor test allows the Court to determine the weight of the factors, either by express announcement, or in subsequent interpretation. While prudential considerations will always necessarily depend on the circumstances, the text and history of the *Kenpō* will always be available to anchor a political questions opinion. As a preliminary step, these factors could find their way into a restated political questions standard. A carefully chosen and clearly stated test can help clear the political questions hurdle to hear a challenge to the 2014 CLB reinterpretation, or to subsequent Article 9 controversies.

Second, in order to move toward fulfilling its designed institutional function as final interpreter of the *Kenpō*, SCJ may decide to hear an Article 9 challenge to the 2014 CLB reinterpretation. *Baker* itself did not decide the substantive issue when it announced its political questions test.¹⁹⁶ SCJ can hear a 2014 reinterpretation challenge in order to equip itself with a clarified and unified restatement of the political question doctrine. This will help facilitate a constructive dialogue between the government and the people. In doing so, it may seek to develop its own navigable and manageable political questions test to achieve political stability in the modern day.

IV. CONCLUSION

In the seventy years since the 1947 transplant of judicial review from the U.S. into Japan, SCJ has referenced foreign judicial experience and built its own model of the political question doctrine.¹⁹⁷ SCJ, like the U.S. Supreme Court, struggled with the issues of the counter-majoritarian difficulty and drawing the boundary of judicial review to balance power with the political branches.

In this comment, we argue that under the *Kenpō*'s text, its framers' intent, and the Court's institutional function, SCJ could play an active role as final interpreter of the *Kenpō* and offer solid guidance to settle the political

¹⁹⁶ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁹⁷ KISABURO YOKOTA, *IKEN SHINSA [THE JUDICIAL REVIEW]* (1968).

instability brought on by Article 9 controversies. The *Kenpō*'s text and institutional function designate the *Kenpō* the supreme law of Japan, and textually grant SCJ the power to be its final interpreter.¹⁹⁸ The framers, including Japanese scholars on the Matsumoto Committee, politicians, and the experts within the GS and SCAP, all agreed on adopting judicial review without restriction and without interference from the Diet.

One major obstacle to clarifying the effect of the 2014 reinterpretation on Article 9 is the 1959 *Sunagawa Case*'s political questions precedent. In subsequent cases, SCJ has undervalued the *Kenpō*'s text and history and overvalued other factors. Political questions jurisprudence in the U.S. Supreme Court could help provide an example to narrow the political question doctrine. Restating a standard that clarifies the separation of powers including checks and balances, the clear mistake rule's role, and strategically considers textual and historical factors will represent an important first step. Announcing this standard after hearing a challenge to the 2014 Reinterpretation with an understanding of the U.S. Supreme Court's political questions experience to balance the factors of history, text and judicial prudence after *Baker* is another step toward clearing the political questions hurdle. And we sincerely believe a more active SCJ can encourage a deep dialogue between the government and the people to form a new consensus on its national security strategies and move Japan forward.

¹⁹⁸ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 76, 81, 98 (Japan).

