COMMON LAW CONSTITUTIONALISM AND ITS COUNTERPART IN JAPAN

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I. INTRODUCTION

In the Anglo-American legal tradition, there are ideas that the common law restrains governmental power, that common law reasoning influences constitutional arguments, and that common law rights are incorporated into a constitution. We can call these ideas "common law constitutionalism."[1] For instance,

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1. The phrase "common law constitutionalism" is used in various ways. As Robert Leckey says, "scholars differ when defining common-law constitutionalism and classifying the research done under its banner." ROBERT LECKEY, BILLS OF RIGHTS IN THE COMMON LAW 35 (2015). Usually this phrase means one type of constitutionalism based on common law tradition, common law reasoning, and common law rights. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 888 (1996) (saying that "common law provides the best model for both understanding and justifying how we interpret the [U.S.] Constitution"); Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEGAL STUD. 435, 439 (2003) (stating that common law constitutionalism considers the courts to be "primary guardian of a society's fundamental values and rights . . . ."); Thomas Poole, *Questioning Common Law Constitutionalism*, 25 LEGAL STUD. 142, 142 (2005) (describing common law constitutionalism as "an attempt to reconfigure the common law as a primary site of normativity"); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482 (2007) ("A central claim of common law constitutionalism has been that precedent and tradition embody some form of latent wisdom."); ADRIAN VERMEULE, LAW AND THE LIMIT OF REASON 11-12 (2009) (discussing superiority of democratic rule making over common law constitutionalism, which defends court-based rule making); KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA: LEGAL THOUGHT BEFORE MODERNISM, 1790-1900, at 3-4 (2011) (exploring the deep relationship between the common law and the U.S. Constitution in nineteenth century America); Abigail R. Moncrieff, *Common-Law Constitutionalism, the Constitutional Common Law, and the Validity of the Individual Mandate*, 92 B.U. L. REV. 1245, 1257 (2012) (explaining that under David Strauss's common law constitutionalism, "the [American] courts are . . . engaging in a kind of conservative, Burkean evolution that courts have engaged in from time immemorial"); STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY

when Sir Edward Coke (Coke) rebutted absolute monarchy in seventeenth century England, he thought that even a king or the British Parliament could not arbitrarily overrule the common law. He said, as a judge in the Court of Common Pleas, that "when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll [sic] it, and adjudge such Act to be void . . . ."[2]

From then on, common law lawyers have thought that the common law is reason accumulated since time immemorial.[3] Many generations have made the common law over hundreds of years; therefore, lawyers consider the common law to be their collective wisdom.[4] Common law constitutionalism tends to think of the common law rights as fundamental; as a result, jurists believe that common law rights and constitutional rights are deeply related. This type of constitutionalism assumes constitu-

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AND PRACTICE 24 (2013) (reviewing how U.K. common law constitutionalism "claims the existence of judicially enforceable higher law even absent a switch to a formal written constitution, including the power of courts to disapply conflicting statutes"); W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE 270-71 (2007) (defending the Canadian Charter of Rights and Freedoms and judicial review in Canada in terms of flexible and adaptable constitutionalism). *See generally* T.R.S. Allan, *Text, Context, and the Constitution: The Common Law as Public Reason*, *in* COMMON LAW THEORY 185-203 (Douglas E. Edlin ed., 2007) (considering various aspects of common law constitutionalism); Jeffrey Goldsworthy, *The Myth of the Common Law Constitution*, *in* COMMON LAW THEORY 204-36 (Douglas E. Edlin ed., 2007); James R. Stoner, Jr., *Natural Law, Common Law, and the Constitution*, *in* COMMON LAW THEORY 171-84 (Douglas E. Edlin ed., 2007); Noga Morag-Levine, *Common Law, Civil Law, and the Administrative State: from Coke to* Lochner, 24 CONST. COMMENT. 601 (2007) (contemplating the relationship between *Lochner*-era laissez-faire constitutionalism and common law constitutionalism); Noga Morag-Levine, *Judges, Legislators, and Europe's Law: Common Law Constitutionalism and Foreign Precedents*, 65 MD. L. REV. 32 (2006) (looking at constitutionalism based on the idea that U.S. common law is not so ready for quoting foreign precedents). In this Article, the phrase "common law constitutionalism" means a theory that long-accumulated wisdom of lawyers, mainly derived from ordinary civil and criminal cases, acquires constitutional status even if it is not explicitly enumerated in a written constitution.

2. Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.), *reprinted in* 1 EDWARD COKE, SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 275 (Steve Sheppard ed., 2003).

3. *See* PARKER, *supra* note 1, at 28-35; J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY, A REISSUE WITH A RETROSPECT 34 (1987); GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 4-5 (1986).

4. POCOCK, *supra* note 3, at 34.

tional rights are derived from the common law.[5] Furthermore, reasoning in constitutional cases is also derived from common law reasoning.[6]

Common law constitutionalism has various aspects. In this Article, however, I would like to define common law constitutionalism as follows, and I will use the term only in this way. According to common law constitutionalism, the long-accumulated wisdom of lawyers, which is mainly derived from ordinary civil and criminal cases, acquires constitutional status even if it is not explicitly enumerated in a written constitution. It is not based on temporal wisdom but based on long-accumulated wisdom.[7] It appraises lawyers' professional knowledge, not laymen's will.[8] Common law constitutionalism is derived from ordinary civil and criminal cases, not from constitutional cases, in its narrowest sense.[9] Moreover, a textual basis in a written constitution is not important. Common law constitutionalism assumes that such long-accumulated professional wisdom acquires constitutional status, which means that it can be used in judicial review or it can restrain arbitrary governmental power.

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5. *See* PARKER, *supra* note 1, at 4 ("In the notorious case of *Lochner v. New York* (1905), the Court effectively read common law freedoms into the U.S. Constitution's Due Process Clause . . . .").

6. *See* David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 977 (2011) ("The common law is a system that emphasizes precedent and tradition but that allows for innovation—in carefully circumscribed ways. . . . [M]y claim is that many of the central doctrines of American constitutional law are the product of the same kind of reasoning.")

7. Common law lawyers acclaimed that old law was embedded in English history. *See infra* Part II.A-C. For instance, Thomas M. Cooley (Cooley), a famous American lawyer from the late nineteenth century, said that "[o]f all the constitutions which a people makes for itself, the best is that which is written with close hold on the past . . . ." Thomas M. Cooley, *Comparative Merits of Written and Prescriptive Constitutions*, 2 HARV. L. REV. 341, 356 (1889).

8. Sir Edward Coke (Coke) stressed, when he thought the common law could control legislation, the common law had been made by legal professions from time immemorial, and therefore a statute based on a temporal whim could not override the common law. *See infra* notes 25-30 and accompanying text.

9. In the *Lochner* era, lawyers came to consider liberty of contract, which was originally derived from contract law, to be a constitutional right, and therefore legislation could not infringe upon that right. *See infra* notes 91-94 and accompanying text. Likewise, under common law constitutionalism, a constitution protects a right derived from civil and criminal proceedings at the common law as a constitutional right; a famous example is "the privilege against self-incrimination." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994); *see infra* notes 53-55 and accompanying text.

It is easy to suppose that common law constitutionalism can only exist based on the long-established common law tradition in Anglo-American countries. This Article argues, however, that a similar conception exists in Japan, a typical civil law country. Lawyers respect the legal wisdom accumulated through long time practice even in a civil law country. Such wisdom tends to be incorporated into constitutional principles. Common law countries do not monopolize the basic idea of common law constitutionalism. The purpose of this Article is to introduce constitutional practice of and constitutional cases from Japan and then analyze them from the perspective of their resemblance to common law constitutionalism. So far, previous American and Japanese studies have not analyzed them from this perspective; therefore, this Article contributes to a new understanding of Japanese constitutional law and comparative law. Furthermore, this Article reveals that the civil law and the common law traditions are not as different as we usually assume.

Part II of this Article examines the conception of a constitutional right in common law constitutionalism mainly by using historical sources. From seventeenth century England to nineteenth century America, the common law and a constitution had a deep relationship. Anglo-American lawyers thought that the common law could restrain governmental power and the common law had constitutional importance. Part III considers Japanese constitutional cases following the principles of common law constitutionalism. For instance, it discusses cases in which the Supreme Court of Japan seemed to think that long-established rights embedded in basic legal practice are worth constitutional protection.

II. The Common Law Background of the U.S. Constitution

A. Common Law Thought in England Before the American Revolution

In this Part, I examine common law constitutionalism in Anglo-American legal history. From seventeenth century England to nineteenth century America, the common law had a constitutional status, that is, the common law restrained arbitrary governmental power.[10] Moreover, the common law rights

10. *See infra* Part II.A-C.

were incorporated into constitutions, and therefore the principles of the common law were used in judicial review.[11]

The common law had developed since the age of the Norman dynasty and was viewed as "the general custom of the realm."[12] According to recent studies, the theorization of the common law began in seventeenth century England.[13] In order to rebut absolutism, common law lawyers like Coke developed a sophisticated understanding of common law theory. Their theory is now known as "[c]lassical common law theory."[14] Classical common law theory saw law, by definition, as unwritten and "immemorial custom" based on reason and the consent of the people and the common law was considered to hold continuance from the ancient Saxon era.[15] If law was not a command of a king but a long continuous custom, a king could not freely make law according to his will. Therefore, classical common law theory could be a strong refutation of the thesis of the king's prerogative to make law freely.[16] Seventeenth century common law lawyers like Coke invented this classical common law theory, and later Sir Matthew Hale and Sir William Blackstone (Blackstone) sophisticated and developed it. [17] Furthermore, classical common law theory deeply influenced Edmund Burke's political philosophy.[18]

The most important feature of classical common law theory was its peculiar definition of law. It defined law as unwritten and "immemorial custom."[19] Blackstone held as follows:

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11. *See infra* notes 53, 91 and accompanying text.

12. *See* MARY ANN GLENDON ET. AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW 306 (3rd ed. 2007).

13. PARKER, *supra* note 1, at 28-29; POCOCK, *supra* note 3, at 31-32; POSTEMA, *supra* note 3, at 3 n.1.

14. POSTEMA, *supra* note 3, at 3.

15. POCOCK, *supra* note 3, at 32-37; *see* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1680 (1994).

16. *See* POCOCK, *supra* note 3, at 51.

17. *See* POSTEMA, *supra* note 3, at 13; *e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 17 (Univ. of Chi. Press 1979) (1765); MATTHEW HALE, THE HISTORY OF COMMON LAW OF ENGLAND 7 (Charles M. Gray ed., Univ. of Chi. Press 1971) (1713).

18. EDMUND BURKE, *Reflections on the Revolution in France*, *reprinted in* REFLECTIONS ON THE REVOLUTION IN FRANCE 50 (Frank M. Turner ed., Yale Univ. 2003) (1790); J.G.A. POCOCK, POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 202-232 (Univ. of Chi. Press reprt. 1989).

19. POCOCK, *supra* note 3, at 37.

> That antient [sic] collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest.[20]

As a result of this definition of law, the exponents of this approach applauded the common law and distrusted statutes and any prerogative of a king. Customs were seen as reasonable because they had lasted for a very long time. If a custom was unreasonable, people and lawyers just ceased using it and it lost its customary status.[21] By contrast, common law lawyers thought that statutes or prerogatives never had such a basis of reasonableness because these laws could be made by only one lay person in one night.[22] The common law is accumulated wisdom from over a long time. Its long continuance proves its excellence.[23] Blackstone said that ancient rules had survived in spite of various innovative attempts to abolish them because they were reasonable:

> [I]t hath been an antient [sic] observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broke in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.[24]

In addition, the common law was not only customary law but also the product of many generations of jurists who made it over thousands of cases. Coke said as follows:

> [I]f all the reason that is dispersed into so many severall [sic] heads were united into one, yet could he not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned man, and by long experience growne [sic] to such a perfection, for the government of this Realme [sic], as the old rule may be justly verified of it . . . No man (out of his owne [sic] private reason) ought to be wiser than the Law, which is the perfection of reason.[25]

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20. BLACKSTONE, *supra* note 17, at 17.

21. POSTEMA, *supra* note 3, at 5-7.

22. *See id*. at 15-16 ("[I]n the view of Common Law theory, legislation is inevitably the temporary aggregate of arbitrary wills."). POCOCK, *supra* note 3, at 34.

23. PARKER, *supra* note 1, at 31.

24. BLACKSTONE, *supra* note 17, at 70.

25. 2 SIR EDWARD COKE, SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 701 (Steve Sheppard ed., 2003) (1606) (footnote omitted).

The common law was excellent because it was a perfection of many lawyers' professional reason, which had accumulated since time immemorial. By contrast, any statute and prerogative were devoid of such reasonableness; therefore the common law was seen as a law superior to them.[26] Blackstone said that "almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other, courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament . . . ."[27] The common law was "the accumulated wisdom of ages,"[28] and therefore legitimacy of the common law outweighed statutes.[29] Coke's words that "when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the common law will controll [sic] it, and adjudge such Act to be void"[30] should be understood in this context. Coke's argument is one of the most famous examples of common law constitutionalism. Here, the old common law can restrain arbitrary governmental power.

After the Glorious Revolution in England, the principle of parliamentary sovereignty was established.[31] As Blackstone wrote, "[t]he power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. . . . It hath sovereign and uncontrolable [sic] authority in making, con-

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26. *See* POCOCK, *supra* note 3, at 34.

27. BLACKSTONE, *supra* note 17, at 10.

28. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769 435 (Univ. of Chi. Press 1979) (1769).

29. Researchers have discussed the relationship between the common law and statutes. In particular, there is still controversy surrounding how to appropriately read *Dr. Bonham's Case*. Today, the idea that the common law had power to make statutes contrary to it void is not so popular among historians. Currently, many researchers do not support the superiority of the common law in the level of validity between two legal sources; instead, many researchers support the superiority of the common law in the level of moral legitimacy. *See* 8 MICHAEL LOBBAN, A HISTORY OF THE PHILOSOPHY OF LAW IN THE COMMON LAW WORLD, 1600-1900, at 41-46 (2007); POSTEMA, *supra* note 3, at 14-19.

30. *Dr. Bonham's Case*, *reprinted in* COKE, *supra* note 2.

31. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 866 (1978) ("As Parliament achieved practical supremacy in 18th-century England, new constitutional theory gave it unlimited legal sovereignty."); John Phillip Reid, *In Legitimate Strips: The Concept of "Arbitrary," the Supremacy of Parliament, and the Coming of the American Revolution*, 5 HOFSTRA L. REV. 459, 495 (1977) (noting that "after the Glorious Revolution, Parliament was supreme . . . [and] sovereign").

firming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws . . . ."[32] Because of this, the idea of supremacy of the common law has not been predominant in the United Kingdom. As I discuss below, however, this idea subsisted in the United States.[33] In classical common law theory, we can see the germ of American common law constitutionalism. Classical common law theory assumed that the common law was superior to other forms of law and the common law could overrule other forms of law, and American legal thought surely inherited this basic assumption.[34]

B. The Influence of Common Law Thought in the Early American Republic

1. Common Law Thought in the American Revolution

The American Revolution and the framing of the written state constitutions and the Constitution of the United States were a new experience and departure from the old English tradition. The republican form of government,[35] framing of the written constitutional codes,[36] and the repeal of status-based so-

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32. BLACKSTONE, *supra* note 17, at 156.

33. *See infra* Part II.B-C.

34. *See* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 181 (2011); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 177 (4th impression 1971); LOBBAN, *supra* note 29, at 123; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L. J. 585, 585-86 (2009); Jack P. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 S. ATLANTIC Q. 56, 64 (1986); Grey, *supra* note 31, at 866-7; Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 189-90 (1998); John Phillip Reid, *In Accordance with Usage: the Authority of Custom, the Stamp Act Debate, and the Coming of the American Revolution*, 45 FORDHAM L. REV. 335, 364 (1976).

35. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 169 (1991) ("The Revolution brought to the surface the republican tendencies of American life. The 'Suddenness' of the change from monarchy to republicanism was 'astonishing.'"). *See also id.* at 5.

36. HAYEK, *supra* note 34, at 179 ("[T]he idea of making this higher law explicit and enforcible [sic] by putting it on paper, though not entirely new, was for the first time put into practice by the Revolutionary colonists."); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 71 (3rd ed. 2005) ("The Revolutionary period was, by necessity, an age of innovation in fundamental law. The old ties with England had been snapped. The states and the general government began to draft written constitutions."); PARKER, *supra* note 1, at 68-9.

ciety[37] were all innovative experiences in the new country.[38] So it was not surprising that novel and innovative political thought flourished in the era. For instance, Thomas Paine (Paine) advocated for the rights of man.[39] According to Paine, American colonists' struggle was not for the rights of Englishmen, but for the rights of man. Thomas Jefferson (Jefferson) considered that one generation of men had no right to bind another. He said "'*that the earth belongs in usufruct to the living*'; that the dead have neither powers nor rights over it."[40] For Jefferson, law was not accumulated wisdom but the creative product and will of the present generation. To be ruled by old law meant a denial of self-rule.

Old-fashioned classical common law theory, however, was never banished in the early American Republic. Classical common law theory survived even in the new continent, though new thought sometimes influenced and attacked it.[41] This Article focuses on this continuous pervasion of classical common law theory in the United States. It does not suggest that classical common law theory outweighed or prevailed over other political thoughts in the early American republic.[42] My purpose here is to show that classical common law theory and common law con-

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37. PARKER, *supra* note 1, at 68 ("[B]irth had ceased to be the formal basis of power and privilege.").

38. *See* WOOD, *supra* note 35, at-7-8.

39. THOMAS PAINE, *The Rights of Man*, *reprinted in* COMMON SENSE, RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 165-69 (Meridian 1984) (1791-1792).

40. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* THOMAS JEFFERSON, POLITICAL WRITINGS 593 (Joyce Appleby & Terrence Ball eds., 1999) (1789) (emphasis in original).

41. See, for example, PARKER, *supra* note 1, at 78; JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 192-93 (1992); and Stephen A. Conrad, *James Wilson's "Assimilation of the Common-Law Mind*," 84 NW. U. L. REV. 186, 196 (1989), about the influence of new ideologies upon classical common law theory.

42. Traditionally, it is said that Lockean liberalism was the predominant ideology in the early American republic. *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 5-6 (1955). Recent research revealed civic humanism also had a strong position in America at that time: see, for example, J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 506-52 (2d ed. 2003); Issac Kramnick, *Republicanism Revisited*, 87 AM. HIST. REV. 629, 630 (1982) ("The republican revisionist reading has replaced Lockean liberalism with civic humanism."); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION,at v-ix (2d prtg. 1967) (implying the spokesmen of the Revolution were both civic humanists and liberals); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 53 (1969) ("The sacrifice of individ-

stitutionalism existed in the United States, and then to compare U.S. common law with Japanese cases. Through such consideration, we will find the similarity of fundamental legal thought in the common law and civil law traditions.

Classical common law theory influenced early American lawyers in many ways. First, classical common law theory pervaded the thinking of lawyers in the age of the American Revolution.[43] The colonies' protest against the taxes and duties that Great Britain imposed was partly based on the common law. The colonists saw the oppressive policies and taxation of the government of Great Britain as the violation of the colonial men's common law rights and English liberty—and they considered such policies to be unconstitutional.[44] According to the established principle of the common law, English subjects could bring their own law into a newly discovered land. In a conquered land, however, the land's aboriginal law endured.[45] The colonists thought they discovered America and so they brought their common law there—although Blackstone thought that America was not a discovered country but a conquered country.[46] The colonists thought that Englishmen discovered

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ual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution.").

43. See generally ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM (1997); GREENE, *supra* note 34; HAYEK, *supra* note 34; CHARLES HOWARD MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION (Da Capo Press reprt. 1973) (1923); 4 JOHN PHILLIP REID, THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1993); Gedicks, *supra* note 34; Grey, *supra* note 31; McConnell, *supra* note 34; Reid, *supra* note 34; and John Phillip Reid, *In an Inherited Way: English Constitutional Rights, the Stamp Act Debates, and the Coming of the American Revolution*, 49 S. CAL. L. REV. 1109 (1975), for research that emphasizes the influence of the common law upon the American Revolution.

44. HAYEK, *supra* note 34, at 177 ("[T]he claims and arguments advanced by the colonists in the conflict with the mother country were based entirely on the rights and privileges to which they regarded themselves entitled as British subjects."); MCILWAIN, *supra* note 43, at 19 ("Their rights as Englishmen were to the Americans the safest and surest ground of opposition to the Parliament."); REID, *supra* note 43, at 25 ("From the beginning to the end of the revolutionary controversy, American whigs relied on the same rights: their rights as Englishmen.").

45. Blackstone said that "if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient [sic] laws of the country remain . . . ." BLACKSTONE, *supra* note 17, at 104-05.

46. *Id.*

America and therefore, they were worthy of the protection of English law.[47] For example, Richard Bland wrote as follows in his pamphlet in the age of the American Revolution:

> I do not suppose, Sir, that you look upon the present inhabitants of Virginia as a people conquered by the British arms. If indeed we are to be considered only as the savage ABORIGINES of this part of America, we cannot pretend to the rights of English subjects; but if we are the descendants of Englishmen, who by their own consent and at the expense of their own blood and treasure undertook to settle this new region for the benefit and aggrandizement of the parent kingdom, the native privileges our progenitors enjoyed must be derived to us from them, as they could not be forfeited by their migration to America.[48]

Likewise, James Otis stated that "[l]ife, liberty, and estate, being personal rights, are (by the gentleman admitted to be) secured to us by the common law. I do not remember to have heard that the colonies ever contended for more . . . ." [49] In the same way, Thomas Fitch wrote:

> It therefore seems apparent that the King's subjects in the plantations have a right, and that it is for the honor of the crown and law that they should have a right, to the general and essential privileges of the British constitution, as well as the rest of their fellow subjects.[50]

As discussed above, the colonists claimed that they were worthy of protection of English common law and had common law rights. They said that the taxes and policies that Great Britain imposed violated their common law rights. For instance, the colonists claimed the right to trial by jury, the right to personal liberty, as protected by the Habeas Corpus Act, and the right to be free from taxation without representatives. All these rights were based on the common law.[51]

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47. *See* REID, *supra* note 43, at 114-15; Greene, *supra* note 34, at 63-64.

48. RICHARD BLAND, *The Colonel Dismounted*, *in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at 319 (Bernard Bailyn ed., 1965) (1764).

49. JAMES OTIS, *A Vindication of the British Colonies*, *the Rights of the British Colonies Asserted and Proved*, *in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 48, at 577 (1765).

50. THOMAS FITCH ET AL., *Reasons Why the British Colonies in America Should Not Be Charged with Internal Taxes*, *in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 48, at 389 (1764).

51. The quotations below from the pamphlets of the American Revolution are some examples of such arguments.

> This privilege is of ancient date, and whenever it hath been encroached upon has been claimed, struggled for, and recovered as being essential for the preservation of the liberty, property, and freedom of the subject. For if the privilege of not being taxed without their con-

When the colonists vindicated their rights, they used the language of the common law. For them, the British government's violation of their common law rights was illegal and unconstitutional. Like classical common law theorists in seventeenth century England, the colonists thought that common law rights and principles could restrain governmental power.

2. Common Law Thought in the Declaration of Independence and the U.S. Constitution

The Declaration of Independence also reflected common law thought. It consisted of two parts: in the first part, the Declaration of Independence declared the natural rights, but in the second part, it stated that history showed that the English kings violated the old rights of Englishmen. This means that the cause of the American Revolution was at least partly the vindication of the common law which Great Britain had violated.[52]

In many provisions of the U.S. Constitution, the Framers guaranteed common law rights as constitutional rights.[53] Jeffrey

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> sent be once taken from them, liberty and freedom are certainly gone with it. That power which can tax as it shall think proper may govern as it pleases; and those subjected to such taxations and government must be far, very far from being a free people. They cannot, indeed, be said to enjoy even so much as the shadow of English liberties.

Id. at 386-87.

> [F]or the principle of the common law is that no part of their property shall be drawn from British subjects without their consent, given by those whom they depute to represent them; and this principle is enforced by the declaration of the GREAT CHARTER and the Bill of Rights, neither the one nor the other introducing any new privilege.

DANIEL DULANY, *Considerations on the Property of Imposing Taxes in the British Colonies*, *in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 48, at 635 (1765) (emphasis in original).

> The power therein given to courts of admiralty alarms them greatly. The common law is the birthright of every subject, and trial by jury a most darling privilege. So deemed our ancestors in ancient times, long before the colonies were begun to be planted. Many struggles had they with courts of admiralty, which, like the element they take their name from, have divers time attempted to innundate the land.

OXENBRIDGE THACHER, *The Sentiments of a British American*, *in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 48, at 492-3 (1764).

52. *See* STONER, *supra* note 41, at 185-190; Gedicks, *supra* note 34, at 622-24; McConnell, *supra* note 34, at 195-97.

53. CLINTON, *supra* note 43, at 96-97; STONER, *supra* note 41, at 212-22; JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 16-21 (2003); Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Com-*

Jackson said that the individual rights that the Framers protected "were overwhelmingly English rights or responses to perceived violations of the rule of law in England."[54] For instance, the Framers protected "the right to trial by jury[,] . . . . [t]he privilege of writ of habeas corpus[,] . . . . [t]he prohibitions on bill of attainder[, and] . . . . [t]he prohibition on ex post facto laws" have their origin of English history and the English common law.[55] The framing of the written constitution was a new project, but the Framers did not attempt to completely abolish and replace the old wisdom. They did not try to build a novel order from scratch. They just tried to improve the old law and rights.[56] The Framers thought that the common law rights were also constitutional rights that the government should not infringe upon them.

3. Common Law Thought of the Federalists

After Declaration of Independence and the framing of the Constitution, the influence of common law theory upon constitutional thought continued. After the American colonies declared independence, Federalists, such as James Kent (Kent), Joseph Story (Story), and James Wilson (Wilson), argued that the common law of England should prevail in America when it was under attack for allegedly being antidemocratic and unsuitable for the new republic.[57] In the end, prominent Federalist

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mon Law Baseline for the Interpretation of Unenumerated Rights, 62 OKLA. L. REV. 167, 185 (2010).

54. Jackson, *supra* note 53, at 185.

55. *Id.* at 185-86.

56. *See* STONER, *supra* note 41, at 177; Gedicks, *supra* note 34, at 640; McConnell, *supra* note 34, at 197; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1156 (1987). John Dickinson said as follows in the Constitutional Convention at Philadelphia:

> Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them. This is then our guide.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 278 (Max Farrand ed., 1966) (1787).

57. FRIEDMAN, *supra* note 36, at 66; LOBBAN, *supra* note 29, at 145 ("While defending a vision of the constitution shared by [Supreme Court Chief Justice John] Marshall, these men [James Wilson (Wilson), Joseph Story (Story), and James Kent (Kent)] also defended and developed a view of the common law in America at a time

lawyers, like Story and Kent, mainly led the formation of American law.[58] Therefore, another legal system never replaced the English common law in the United States.[59] Next, I will consider legal thought of the Federalists.

The Federalists played an important role in the Americanization of English common law. Wilson, a Federalist lawyer and a Justice of the Supreme Court of the United States, heavily depended on classical common law theory.[60] He said that many constitutional rights were derived from the common law of the ancient Saxon era. For example, the privilege of senators and representatives from arrest during their attendance at the session had continued since the time of the Saxons.[61] Likewise he said, the right to trial by jury,[62] the right to bear arms,[63] and the proportionality of crime and punishment were derived from the Saxons.[64] Here, we can understand his conception of the constitutional rights: they were derived not from the written texts of the Constitution but from the ancient common law.

A distinguished Federalist lawyer, Story, who was also a Supreme Court Justice, accommodated classical common law the-

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when it was under attack."); Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 410 (1966).

58. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 48 (3d ed. 2007) (demonstrating that American lawyers at that time considered legal treatises of Kent and Story to be a starting point of legal research). About the controversies between the Federalists and the Republicans, see JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s, at 57-60 (1984); KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 78-91 (2nd ed. 2009); PARKER, *supra* note 1, at 92-116; and HIDEO TANAKA, AMERIKAHŌ NO REKISHI [A HISTORY OF AMERICAN LAW] 296-7 (1980).

59. *See* FRIEDMAN, *supra* note 36, at 66.

60. *See* LOBBAN, *supra* note 29, at 146 ("Wilson described the common law as a developing customary system, reflecting the needs and manners of the people. In doing so, he drew largely on the ideas of seventeenth century common lawyers such as Coke and Hale . . . ."); PARKER, *supra* note 1, at 90 (indicating that Wilson believed that the U.S. Constitution was similar to ancient Saxon law); Conrad, *supra* note 41, at 187 ("Wilson held the common law not only over and above statutory law, but also perhaps—and Wilson's apparent ambiguity is at the heart of the matter—over and above what we now call *constitutional* law." (emphasis in original)).

61. 1 THE WORKS OF JAMES WILSON 420 (Robert Green McCloskey ed., Belknap Press 1967) (1804).

62. 2 *id.* at 516.

63. *Id.* at 657.

64. 1 *id.* at 350.

ory in the new era.[65] He described common law as a system that had been continuously developing since the immemorial past. In his view, common law had a very old origin, but it reflected the latest social circumstances.[66] In that way, common law contained both the long-standing wisdom and the latest knowledge obtained in a new age. Furthermore, like Wilson, Story thought various new constitutional provisions originated in the common law.[67] For instance, Story maintained that the Third and Fourth Amendments to the U.S. Constitution were mere expression of the principles of the common law. [68] He said the Third Amendment's "plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."[69] Likewise, he said the Fourth Amendment "seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law."[70] According to Story, the following various constitutional rights derived from the Magna Carta and the Bill of Rights in 1689:[71]

> the right of trial by jury; the right to personal liberty and private property according to the law of the land; that the subjects ought to have a right to bear arms; that elections of members of parliament ought to be free; that freedom of speech and debate in parliament ought not to be impeached, or questioned elsewhere; and that exces-

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65. Story had the old conception of the common law. He defined the common law as immemorial unwritten law. *See* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 505 (William W. Story ed., Da Capa Press reprt. 1972) (1852). He never thought, however, that the common law was fixed system and the same as it had been during the old Saxon era. He said the common law had progressed in accordance with the progress of the age. *See id.* at 702. Therefore the common law could be in harmony with the development of commercial law by Lord Mansfield. *See id.* See LOBBAN, *supra* note 29, at 148-51, for a discussion of Story's theory of common law.

66. STORY, *supra* note 65, at 702; *see also* LOBBAN, *supra* note 29, at 149.

67. *See supra* notes 60-64 and accompanying text (providing information about Wilson's writings).

68. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION, §§ 1892-1894, at 747-48 (1833).

69. *Id.* § 1893, at 747.

70. *Id.* § 1895, at 748.

71. *See id.* § 1858, at 718; *see also* Magna Carta, *translated and reprinted in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 345-48 (Ellis Sandoz ed., Liberty Fund, Inc.1993); ENGLISH BILL OF RIGHTS 1689, LILLIAN GODMAN LAW LIBRARY, http://avalon.law.yale.edu/17th_century/england.asp (last visited Oct. 24, 2015).

> sive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.[72]

For both Wilson and Story, constitutional rights were common law rights, and Wilson saw the U.S. Constitution as a restoration of the Saxons' ancient constitution.

C. The Theory of an Unwritten Constitution in the Late Nineteenth Century

1. Christopher G. Tiedeman

In the late nineteenth century, classical common law thought highly influenced American laissez-faire lawyers' conception of the U.S. Constitution.[73] They argued that the U.S. Constitution embodied unwritten customs that had developed over a long time, even though the United States already had a written constitution.[74] A prominent lawyer and scholar, Christopher G. Tiedeman (Tiedeman) published a book entitled *The Unwritten Constitution of the United States* in 1890. [75] He contended that the U.S. Constitution was an unwritten custom of a people who had a long tradition. He asserted that it was not an order of the sovereign, but a developed custom, saying, "the conclusion is irresistible that the fundamental principles which form the constitution of a state cannot be created by any governmental or popular edict; they are necessarily found imbedded in the national character and are developed in accordance with the national growth." [76] He insisted that "the substantive

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72. STORY, *supra* note 68, § 1858, at 718.

73. Laissez-faire lawyers thought that the U.S. Constitution was embedded in Anglo-American history and unwritten custom—like how the classical common law theory considered the common law to be unwritten custom embedded in history. For example, Christopher G. Tiedeman (Tiedeman) said that "the great body of American constitutional law cannot be found in the written instruments, ... it is unwritten . . . ." CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 45 (1890). Cooley said, "the leading principles are all to be found in Magna Charta and other charters of English liberty which the people of America at the time of the Revolution had claimed as a part of their inherited freedom . . . ." Cooley, *supra* note 7, at 348. For a discussion about scholarships on laissez-faire constitutionalism, see *infra* note 89.

74. *See* DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 346 (2013).

75. *See generally* TIEDEMAN, *supra* note 73.

76. *Id.* at 16.

law is essentially nothing more than the moral rules, commonly and habitually obeyed by the masses . . . ."[77]

For Tiedeman, the U.S. Constitution was a product of English history; it was never a product of the genius and invention of the Founders. Tiedeman said that the U.S. Constitution was the natural sequential development of the English constitution and not the voluntary creation of the Americans in the eighteenth century. According to him, the U.S. Constitution was a long time-evolving custom of the Anglo-American nations. The Founders did not create the Constitution from scratch, rather the Constitution was mere "sequential development[ ] of the British Constitution."[78] Like classical common law theorists who considered law to be old custom, Tiedeman saw the constitution as old customary law. Therefore, "most of the principles entering into the composition of the American Constitution are neither original nor novel,—the American constitutions being evolutionary forms of the British Constitution . . . ."[79]

Furthermore, Tiedeman thought that American constitutional law was mainly unwritten.[80] The U.S. Constitution was composed of cases, statutes, customs, and history. Its main part was not a written constitutional code. Additionally, the unwritten constitutional law was not fixed at the time of framing but had been evolving throughout history.

> [T]he flesh and blood of the Constitution, instead of its skeleton, is here, as well as elsewhere, unwritten; not to be found in the instrument promulgated by a constitutional convention, but in the decisions of the courts and acts of the legislature, which are published and enacted in the enforcement of the written Constitution. The unwritten constitution of the United States, within the broad limitations of the written Constitution, is just as flexible, and yields just as readily to the mutations of public opinion as the unwritten constitution of Great Britain.[81]

Tiedeman considered U.S. law and the U.S. Constitution to be based on unwritten custom and embedded in Anglo-Ameri-

77. *Id.* at 15.
78. *Id*. at 21.
79. *Id.* at 91.
80. *Id.* at 45.
81. TIEDEMAN, *supra* note 73, at 43.

can history.[82] We can consider his thought as a descendant of classical common law theory.

2. Thomas M. Cooley

Another famous lawyer of the time, Thomas M. Cooley (Cooley), advocated a similar theory. Cooley viewed the law as a custom, the same as classical common law theory. He wrote that "'[w]ith customs we do well,' says the proverb, 'but statutes may undo us;' and our laws we do not forget are still for the most part customary."[83] Cooley thought that law was not a command but a custom that people voluntarily adopted; people, therefore, can obey law without any difficulty.[84]

Furthermore, he was an advocate of the classical view of the common law; therefore, he saw the common law as unwritten and immemorial custom.

> The common law of England consisted of those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of domestic relations, and the acquisition, control, and transfer of property from time immemorial. It was the outgrowth of the habits of thought and action of the people, and was modified from time to time as those habits became modified, and as civilization advanced, and new inventions changed the modes of business.[85]

He contended that the U.S. Constitution embodied long usage and suggested that it was highly continuous with that of Britain. He even said the change that had happened during the framing of the U.S. Constitution was smaller than the change that took place when the Glorious Revolution had occurred.[86] Further, Cooley stated that constitutional rights and common law rights were identical. The Constitution did not create rights

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82. *See id.* at 6, 21. PARKER, *supra* note 1, at 244-45 ("Custom and ideas of 'unwritten' law played an extremely significant role in the burgeoning constitutional law literature during the last third of the nineteenth century.").

83. Thomas M. Cooley, *The Uncertainty of the Law*, 22 AM. L. REV. 347, 367 (1888).

84. *See id.* at 368.

85. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 21 (1868).

86. Cooley, *supra* note 7, at 350.

from scratch; rather, it merely confirmed the vested rights that the people already had based on the common law.[87]

Both Tiedeman and Cooley insisted that the Constitution was an unwritten, customary law developing from a very old age.[88] Their legal thought had a political intent to preserve the old Jacksonian economic order and to oppose new legislations intervening in the free market.[89] If the law was a custom, legislation and administrative orders could not intervene in society because societal customs were already the only "law" Americans should respect. Political ideologies, however, cannot fully explain their legal thought well. Their legal thought was possible

87. COOLEY, *supra* note 85, at 416-17; *see also* RABBAN, *supra* note 74, at 319 ("At times, he [Cooley] simply equated the constitutional guarantees with the common law in effect when they were adopted.").

88. *See supra* notes 74-87 and accompanying text.

89. In the past, historians saw Cooley and Tiedeman as advocates of unregulated corporate capitalism. *See generally* CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW (Da Capo Press reprt. 1973) (1954). Recent *Lochner* revisionism scholars, however, state that their thought was based on a belief in the old Jacksonian, small scale and individualistic economic order. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 2 (1991) ("The founders of substantive due process—Thomas Cooley, Christopher Tiedeman, and John Dillon—were Jacksonian to the core."); Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1350 (1990) (summarizing how Tiedeman defended small-scale property rather than big corporations); Alan R. Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas*, *in* AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS 131-33 (Harold Hyman & Stuart Bruchey eds., 1987) (arguing Cooley's conservatism was based on theory and practice of Jacksonian democracy). Other revisionists have stated that laissez-faire constitutionalism was based on an opposition to class legislation. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 9 (2011) (commenting that "the liberty of contract doctrine . . . . evolved from" anticlass legislation doctrine and natural rights theory); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 55 (3d prtg. 2004) (suggesting anticlass legislation theory and tradition could explain the cases in the *Lochner* era well); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 305 (1985) (expounding how laissez-faire constitutionalism was based on opposition to class legislation and special legislation). Revisionists' scholarships have influenced constitutional theory as well as legal history. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 186-207 (2011) (covering the changing status of the *Lochner* case); KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 213-18 (2006) (clarifying *Lochner* is no longer considered to be illegitimate).

only based on the tradition of common law theory and we can see their thought as one historical example of common law constitutionalism.

3. The Fourteenth Amendment to the U.S. Constitution

The Fourteenth Amendment to the U.S. Constitution was viewed as the restoration of the ancient constitution. Supreme Court Justice Brown said that "the adoption of the Fourteenth Amendment to the Constitution imposed upon the states certain obligations that had long before been imposed upon Congress, and which had been recognized as familiar restrictions upon legislative power from time immemorial."[90] For lawyers in the late nineteenth century, the U.S. Constitution was customary and constitutional rights were common law rights. The Supreme Court of the United States has declared that the Due Process Clause guarantees common law rights.[91] "[T]he liberty guaranteed [by the Due Process Clause] . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract . . . and generally to enjoy those privileges long recognized at common law . . . ."[92] Stephen Siegel has said jurists in the *Lochner* era[93] turned to the common law as the source of substantive due process:

> In sum, in turning to the common law as the source of their notions of substantive due process, Lochner era jurists conceived that mass of doctrines and rules as an expression of abstract principles and concepts that formed the traditional norms of the Anglo-American people. Because the common law's principles and concepts were the traditional norms of the Anglo-American people, they were the "law

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90. Henry B. Brown, *The New Federal Judicial Code*, 34 ANN. REP. A.B.A. 339, 347-48 (1911).

91. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Lochner v. New York, 198 U.S. 45, 56 (1905) (holding that the Fourteenth Amendment protects liberty of contract, which is derived from common law); Munn v. Illinois, 94 U.S. 113, 124-25 (1876) (finding the right which the Constitution protects comes from the common law); Slaughter-House Cases, 83 U.S. (1 Wall.) 36, 114-15 (1872) (Bradley, J., dissenting); *see also* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 81-83 (1991).

92. *Meyer*, 262 U.S. at 399.

93. *See generally Lochner*, 198 U.S. 45 (1905). From the late nineteenth century to the beginning of the twentieth century, the Supreme Court of the United States struck down some progressive legislation, which were intended to protect workers. It is common to call this period the *Lochner* era. *See* ROOSEVELT, *supra* note 89, at 214; WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 123 (1998).

> of the land"-the norms the founding generation intended the Constitution's Due Process Clause to protect.[94]

From seventeenth century England to late nineteenth century America, the common law had constitutional importance. The common law was long-accumulated customary wisdom and therefore, it was worthy of respect and governmental power could not easily overrule it. In classical common law theory, common law restrained statutes and prerogatives.[95] In the United States, the common law rights were incorporated into the Constitution. [96] Many American jurists argued that the common law was people's custom, but it was simultaneously a product of professional lawyers. It seems that they thought the common law judges could represent the popular will and people's custom. Therefore, from Coke to Cooley, there was no explicit conflict between professional knowledge of law and popular custom.[97]

D. The Common Law and the U.S. Constitution in the Modern Age

Today, the relationship between the common law and the U.S. Constitution is much more ambiguous. The Supreme Court sometimes uses common law terminology in constitutional arguments. For example, in *Hague v. Committee for Industrial Organization*,[98] it referred to "time out of mind" in order to construct a theory of the public forum.[99] The Court held as follows:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of

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94. Siegel, *supra* note 91, at 81-82.
95. *See supra* Part II.A.
96. *See supra* Part II.B-C.
97. Brian Z. Tamanaha argues that:

> [c]ommon law judges previously claimed to represent the common customs and morals of the realm, thus bearing the consent of the community, but after the transition it was legislators who directly represented community consent. Although the historical jurists and the realists similarly thought of judges as the conduits through which social views were brought into law, after the transformation, with judges in a reduced position and no longer plausibly claiming to represent community consent, this notion became far more problematic.

BRIAN Z. TAMANAHA, BEYOND THE FORMALIST REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 88 (2010) (citation omitted).

98. 307 U.S. 496. (1939).
99. *Id.* at 515.

> mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[100]

In *McDonald v. City of Chicago, Illinois*,[101] the Court also referred to "ancient times" and Blackstone when it held that the right to bear arms in the Second Amendment was incorporated against the states.[102] In that case, Justice Alito explained that the right to bear arms was the right of Englishmen from ancient times.[103] Furthermore, the common law plays a role in the due process cases today. According to modern substantive due process jurisprudence, only fundamental rights are worth strict scrutiny protection.[104] Justice Scalia seemed to think that the common law history could impact the fundamental status of a right in the dissenting opinion of *Lawrence v. Texas*,[105] because when he cited *Meyer v. Nebraska*,[106] he emphasized its holding that the rights "long recognized at common law" are worthy of constitutional protection.[107] In modern constitutional law, however, the Court's reference to common law terminology is merely one part of many historical arguments. The words of the U.S. Constitution are highly abstract; therefore history, tradition, and precedents are important when interpreting it. Here, common law rights have lost their direct connection to constitutional rights unlike in the past.

There are some examples that show the influence of the common law upon the U.S. Constitution in modern constitutional theory—even though connections are much weaker than in the past. James R. Stoner Jr. says both today's liberals and conservatives "remain in debt to certain common-law ways of thinking and to specific common-law rights."[108] First, some con-

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100. *Id.*

101. 561 U.S. 742 (2010).

102. *Id.* at 767-68.

103. *Id.* at 768.

104. *See* Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 250 (4th ed. 2010) ("Today the Court will apply strict forms of review under the due process clauses and the equal protection clause to any governmental actions which limit the exercise of 'fundamental' constitutional rights.").

105. 539 U.S. 558 (2003).

106. 262 U.S. 390 (1923).

107. *Lawrence*, 539 U.S. at 593 (quoting *Meyer*, 262 U.S. at 399) (emphasis omitted).

108. STONER, *supra* note 53, at 4.

stitutional theorists defend the common law type of reasoning in constitutional cases. For instance, David A. Strauss (Strauss) argues for "a living constitution" which is based on the common law reasoning.[109] According to him, the changes and developments of the U.S. Constitution throughout American history are a common law-type evolution. The U.S. Constitution has gradually evolved through distinguishing and interpreting precedents.

> The living constitution of the United States is a common law constitution in the sense that the principal mechanism of change is the evolution of the law through the development of precedent. The answer to the critics who say living constitutionalism is just an excuse for judicial fiat or whim is that the common law has been restraining judges for centuries in areas like contracts and property.[110]

For instance, he argues that "*Brown v. Board of Education*[111] is an example of the common law approach . . . ."[112] "The best justification of *Brown* is that it followed from a line of precedents that had steadily eroded 'separate but equal'; *Brown* was just the last step in a progression. This is how the common law works."[113] In short, Strauss considers the Court to have developed constitutional jurisprudence in a common law manner.

Second, Cass R. Sunstein (Sunstein) states that substantive rules of the common law still have influence on the U.S. Constitution. He argues that distribution of rights and properties based on the common law has been considered to be neutral, and neutral status rarely needs to be constitutionally justified.[114] For instance, the distinction between negative rights and positive rights depends on the common law. Usually people assume the U.S. Constitution only guarantees negative rights, like property and freedom of religion, and that it does not protect positive rights like welfare rights.[115] Sunstein says this separation is

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109. DAVID A. STRAUSS, THE LIVING CONSTITUTION 1-2 (2010).

110. Strauss, *supra* note 6, at 978.

111. 347 U.S. 483 (1954).

112. Strauss, *supra* note 6, at 978 (italics added) (footnote added). *See generally Brown*, 347 U.S. 483.

113. Strauss, *supra* note 6, at 978 (italics added) (citation omitted); *see also* STRAUSS, *supra* note 109, at 77-92.

114. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 48, 68 (1993).

115. *See id.* at 69-70.

dependent on the common law.[116] Likewise, state action and inaction are distinguished based on the common law.[117]

Sunstein also explains that the common law deeply influences many other constitutional interpretations, like procedural due process,[118] unconstitutional conditions,[119] and standing.[120] For example, "liberty and property [in the Due Process Clause] continue to be defined by reference to existing distributions and even to the common law."[121] In short, common law rules and rights are considered to be a baseline of constitutional arguments. Sunstein not only analyzes constitutional cases from this perspective but also criticizes this "status quo neutrality."[122]

As argued above, the common law is still of importance in contemporary constitutional jurisprudence.[123] Direct connection, however, between common law rights and constitutional rights largely disappears. Therefore, it is unclear if the Court respects long-accumulated wisdom of lawyers derived from ordinary civil and criminal cases in modern American constitutional law. As I examine below, we can find that in some cases, the Supreme Court of Japan follows the principles of common law constitutionalism more directly than the United States.[124]

III. Japanese Case Study

A. Introduction

I will argue that the respect for long-accumulated legal wisdom also exists in present Japanese legal and constitutional practice. Japan is a typical civil law country, and almost all important laws are in the forms of statutes and codes.[125] The legal reasoning is not based on analogy from previous cases but on

116. *Id.* at 70 ("[T]he provision of welfare, or government protection against private racial discrimination, is thought to involve 'positive' rights because these rights interfere with existing distributions and with common law principles").

117. *Id.* at 74.

118. *Id.* at 82 (describing how the Court has held that common law rights cannot be taken without a full hearing).

119. *Id.* at 85.

120. Sunstein, *supra* note 114, at 88-89.

121. *Id.* at 83.

122. *Id.* at 48, 123.

123. *See supra* Part II.D.

124. *See infra* Part III.B.

125. René David & John E. C. Brierley, Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law 496-97 (2d ed. 1978); Glendon et al., *supra* note 12, at 226 ("The primary sources in all

syllogism, so Japanese lawyers prefer to apply abstract legal rules to specific facts.[126]

After World War II, Japan adopted an American-type judicial review in which ordinary courts' judges tackle constitutional matters in order to settle the concrete cases and controversies.[127] The Supreme Court of Japan has been very reluctant to declare laws unconstitutional, but there are some cases in which the Court declared a statute unconstitutional.[128] In these cases, the Court has tended to view a right that has been embedded in Japanese traditional legal practice or traditional private law as a constitutional right.[129] In this legal practice, I think there is an idea similar to common law constitutionalism. The rights which have a long history and that many lawyers have sophisticated, even before the ratification of the Constitution of Japan and the birth of judicial review, tend to be incorporated into constitutional rights. The judges dealing with constitutional matters in Japan are judges who are often experts of ordinary civil and

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civil law systems are enacted law and custom, with the former overwhelmingly more important.").

126. Lawyers in civil law countries prefer "judicial syllogism." *See* MITCHEL DE S.-O-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 5, 34 (2004).

127. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81; *see also* Norikazu Kawagishi, *The Birth of Judicial Review in Japan*, 5 INT'L J. CONST. L. 308, 309 (2007).

128. Many scholars argue that the Supreme Court of Japan rarely declares statutes unconstitutional. *See generally* Herbert F. Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HASTINGS INT'L & COMP. L. REV. 87 (1980); David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009); David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011); Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011); Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 LOY. L.A. L. REV. 603 (2007). In contrast, John O. Haley argues that the Supreme Court of Japan is not as conservative as we usually assume. *See* John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88 WASH. U. L. REV. 1467, 1491 (2011). He says that the Court merely follows the communitarian orientation of Japanese society. *See id.* Furthermore, some professors say that recently, the Court has become more active and liberal than it was in the past. *See* Norikazu Kawagishi, *Japanese Supreme Court: An Introduction*, 8 NAT'L TAIWAN U. L. REV. 231, 243 (2013) ("[T]he Supreme Court of Japan has slightly changed its attitude toward constitutional litigation. The almost inactive era seems to have come to an end."). *See generally* Hideo Yokoo, *Saikōsai no Ikenshinsa no Kasseika to Kenpō Hanrei* [*The Japanese Supreme Court's Activation of Judicial Review and Constitutional Cases*], 18 CHUKYO LAWYER 101 (2013).

129. *See infra* Part III.B.1.

criminal cases. Therefore, it is very natural for them to respect the rights embedded in ordinary legal practice.

Even when the Supreme Court of Japan does not declare statutes unconstitutional, the Court often restrains governmental power using the old traditional wisdom of law. In these cases, the Court uses older methods of statutory interpretation, which have existed since before the ratification of the Constitution of Japan, in order to restrain governmental power instead of using direct constitutional arguments.[130] Justices in Japan prefer traditional methods of statutory interpretation to constitutional arguments when they would like to restrain arbitrary governmental power.

Of course, Japan is a civil law country; therefore, Japanese traditional legal practice is mainly composed of interpretation of statutes, not the common law or case law. In Japan, however, some basic statutes, like the Civil Code and the Penal Code, are profession-made law and have a long history.[131] As argued below, such basic codes were framed in nineteenth century and from then on, scholars and judges have contributed to developing an interpretation of the codes.[132] Furthermore, such codes are immune from frequent and political amendment. Here, constitutional practice in Japan follows the principle of common law constitutionalism, that is, the long-accumulated wisdom of lawyers, mainly derived from ordinary civil and criminal cases, acquires constitutional status even if it is not explicitly enumerated in a written constitution.

B. Cases

1. The Cases in Which the Court Declared Statutes Unconstitutional

Let us see the actual cases. In *Hiraguchi v. Hiraguchi* (the Forest Act case),[133] the Supreme Court of Japan declared the Article 186 of the Forest Act[134] unconstitutional, which pre-

130. *See infra* Part III.B.3-4.

131. *See infra* Part III.B.

132. *See infra* notes 234-235 and accompanying text.

133. Saikō Saibansho [Sup. Ct.] Apr. 22, 1987, 41 SAIKŌ SAIBANSHO MINJI HARANEISHŪ [MINSHŪ] 408, *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL LAW OF JAPAN, 1970 THROUGH 1990, at 327-45 (1996).

134. Sinrinhō [Forest Act], Law No. 249 of 1951, art. 186, *translated in* BEER & ITOH, *supra* note 133, at 327.

cluded a division claim of a jointly-owned forest unless a claimant had more than half of the share of a forest. In that case, the Court viewed the ownership right prescribed in the Civil Code[135] and the right to claim for dividing a jointly-owned property prescribed in the Civil Code[136] as constitutional rights,[137] and held a statutory restriction on these rights was unconstitutional.[138] The Court held that this right to claim for dividing a jointly-owned property was gradually developed and finally prescribed in the Civil Code of Japan.[139] This right has existed since the Civil Code came into operation in 1898.[140] Furthermore, the model of the Civil Code in Japan was *Bürgerliches Gesetzbuch*,[141] which was largely written based on ancient Roman law.[142] Therefore, the right at issue in this case has a long history and is much older than the Constitution of Japan, which was enacted in 1946. By contrast, the Forest Act was enacted in 1951 and the Article 186 of the Forest Act did not have such a long history but was merely introduced because of a governmental forest policy.[143] The Court respected the right to claim for dividing a jointly owned property because of its long history and practice in Japan and even in the civil law world. A Japanese professor of civil law has said that the historically developed basic legal

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135. MINPŌ, [MINPŌ] [CIV. C.] art. 256.

136. *See id.* at art. 256, para. 1.

137. Saikō Saibansho [Sup. Ct.] Apr. 22, 1987, 41 [MINSHŪ] 408, 412, *translated in* BEER & ITOH, *supra* note 133, at 327, 329.

138. *Id.* at 417, *translated in* BEER & ITOH, *supra* note 133, at 332.

139. *Id.* at 412, *translated in* BEER & ITOH, *supra* note 133, at 329.

140. *See* Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 23-31 (Arthur Taylor von Mehren ed., 1963) (about the history of the Civil Code in Japan).

141. *See* Takayanagi, *supra* note 140, at 30-31; GLENDON ET AL., *supra* note 12, at 70; Yoichi Sakaguchi, *Minpōten Kisō No Hōkō: Hozumi To Ume Ni Okeru Doitsu Minpō Keiju No Ronri* [*Direction of Draft of the Civil Code: Hozumi's and Ume's Logics of the Reception of the German Civil Code*], 22 TOKYO GAIKOKUGO DAIGAKU RONSYU 107, 107-08 (1972) (saying that the Japanese Civil Code was written based on the German Civil Code). *Bürgerliches Gesetzbuch* means "civil code" in German. *See generally* BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, [BUNDESGESETZBLATT] [BGBL. I] 42, 310, para. 3(1) (Ger.), *translated in German Civil Code*, FED. MINISTRY OF JUST. CONSUMER PROTECTION, *available at* http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf.

142. *See* GLENDON ET AL *supra* note 12, at 65; ALAN WATSON, THE MAKING OF THE CIVIL LAW 180 (1981) ("Modern civil codes are themselves the direct descendant of Justinian's *Institutes* in structure and range of contents alike.").

143. *See* Saikō Saibansho [Sup. Ct.] Apr. 22, 1987, 41 [MINSHŪ] 408, 413, *translated in* BEER & ITOH, *supra* note 133, at 329-30.

rules of property, such as the right at issue here, can acquire a kind of constitutional status.[144]

Similarly, in *Shichifukusangyo Corp. v. Japan* (the Postal Act case),[145] the Court held that a part of Article 68 and Article 73 of the Postal Act[146] were unconstitutional. These Articles exempted the government from tort liability even when a postal worker lost mail as a result of his or her gross negligence or intent. The Court held that such immunity was unconstitutional and void. [147] Under the tort provision of the Civil Code[148] and the State Redress Act,[149] anyone, including the government, has to be liable for tort responsibility when he or she causes injury or loss by negligence or intent. The Postal Act gave special exemption from this general principle to an official postal worker because it seemed to be useful to the governmental postal policy.[150] The Court, however, viewed the general tort liability principle as having constitutional status; therefore, such an exemption should be reviewed under strict scrutiny.[151]

In this case, again, the legal principle and rule embedded in Japan's long legal practice acquired constitutional importance. There has been tort liability for a private person since the ratification of the Japanese Civil Code in 1898. Additionally, there has been tort liability for the government since the ratification of the State Redress Act in 1947. These tort liabilities have been an important part of Japanese legal practice. In the Postal Act case, the traditional tort law provided a baseline of judicial review.[152] In short, the Court thought that rights that have a long tradition and are embedded in important codes or statutes

144. Akio Yamanome, *Zaisanken no Kiku toshiteno Minji Kihon Hōsei* [*Basic Civil Legal Systems as a Measure of Property*], 35 KIKAN KIGYOU TO HOUSOUZOU 158, 165 (2013).

145. Saikō Saibansho [Sup. Ct.] Sept. 11, 2002, 56 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1439, http://www.courts.go.jp/app/hanrei_en/detail?id=585.

146. Yūbinhō [Postal Act], Law No. 165 of 1947.

147. Saikō Saibansho [Sup. Ct.] Sept. 11, 2002, 56 [MINSHŪ] 1439, 1443.

148. MINPŌ [MINPŌ] [CIV. C.] art. 709.

149. Kokka Baisyōhō [Kokubaihō] [State Redress Act], Law No. 125 of 1947, art. 1, para. 1.

150. The government thought exemption of damages would enhance rapid and reasonable mail delivering service because exemption would reduce delivering costs and release officers from receiving too much attention. Saikō Saibansho [Sup. Ct.] Sept. 11, 2002, 56 [MINSHŪ] 1439, 1445.

151. *See id.* at 1445.

152. Jōji Shisido, *Kokka Baishō Sekinin No Menjo To Kenpō 17 Jō* [*Restriction/ Exemption of State Redress liability and the Article 17 of the Constitution*], *in* KEMPŌ

would be guaranteed as constitutional rights even without enumeration in the Constitution because lawyers view such rights as customary and integral parts of legal practice in Japan.

2. *The Relation Between the Right to Privacy and Freedom of Expression*

In Japan, the right to privacy has been gradually accepted in tort law and criminal law. As a result, it has a much higher possibility of being incorporated into constitutional law than the right to expression. When the rights of privacy and freedom of expression come in conflict with each other, the Court tends to give preference to the right of privacy.

In *Ohnishi et al. v. Japan* (the Tachikawa Leaflet Posting case),[153] the defendants were prosecuted under the Article 130 of the Penal Code,[154] which punishes breaking into a residence. The defendants argued that punishing entering a shared space of the apartment building for the purpose of posting leaflets was unconstitutional because it violated the Free Expression Clause of the Constitution.[155] The Court held, however, that expressive action shall not infringe upon the rights of others; therefore the defendants' free expression claim was unreasonable.[156] Here, the Court preferred the residents' right to privacy to the defendants' right to freedom of expression. One of the reasons for this is that the Court's attitude as to the weight that should be given to each of the two rights.

The right of a resident's privacy has been protected since the enactment of the Penal Code in 1907. Justices are very familiar with the interpretation and practice involving the Penal Code. This is because the Penal Code has been valid law and applied to ordinary criminal cases in the Japanese courts for a long time. From 1907 on, Japanese judges have been trained to apply the Penal Code. By contrast, freedom of expression does not have such a firm basis of legal tradition in Japan. Freedom

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HANREI HYAKU SEN [SELECTED ONE HUNDRED CONSTITUTIONAL CASES] 286, 287 (Yasuo Hasebe et al. eds., 2013).

153. Saikō Saibansho [Sup. Ct.] Apr. 11, 2008, 62 SAIKO SAIBANSYO KEIJI HANREISHŪ [KEISHŪ] 1217, http://www.courts.go.jp/app/hanrei_en/detail?id=945.

154. KEIHŌ [KEIHŌ] [PEN. C.] art. 130.

155. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21, para. 1.

156. Saikō Saibansho [Sup. Ct.] Apr. 11, 2008, 62 SAIKO SAIBANSYO KEIJI HANREISHŪ [KEISYŪ] 1217, 1224-25.

of expression was prescribed in *Meiji Kenpō* [constitution].[157] The *Meiji* Constitution ratified in 1889 included the list of constitutional rights and division of governmental powers, but the courts could not enforce the constitutional rights. The constitutional rights were merely political restraints and there was no judicial review in the *Meiji* Constitutional regime.[158] Therefore, though the *Meiji* Constitution had a clause protecting freedom of expression, the courts never enforced this right.[159] Judicial review started only upon the ratification of the Constitution of Japan in 1946.[160] For many decades, however, and even now, the Supreme Court of Japan has not taken freedom of expression seriously.[161] I think this difference in the historical weight of rights has deeply influenced the Court's reasoning. It is quite usual for the Justices to respect rights that their own have enforced and esteemed for a long time.

The Court's tendency to take long-established rights more seriously than the right to freedom of expression is quite evident in many other cases in Japan. The Supreme Court of Japan has consistently preferred property and privacy to freedom of expression. In *Yamagishi v. Japan* (the Yamagishi Poster case),[162] the defendants glued posters to utility poles and were prosecuted under the Minor Offenses Act, Article 1, no. 33.[163] The Minor Offenses Act prohibited anyone from gluing something to others' property. The Court held that even if the defendants' conduct was a means to express their ideas, they should not trespass on others' property.[164] There were several of the same types of cases, which held that freedom of expression should not violate property rights.[165]

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157. DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 29.

158. Kawagishi, *supra* note 127, at 312-14.

159. *See supra* notes 157-158 and accompanying text.

160. *See supra* note 127.

161. *See* Kawagishi, *supra* note 128, at 239 ("[F]reedom of expression, which is regarded as one of the most fundamental rights in a liberal democracy and thus is widely believed to warrant careful protection, has never been sufficiently appreciated . . . .").

162. Saikō Saibansho [Sup. Ct.] June 17, 1970, 24 SAIKO SAIBANSYO KEIJI HANREISHŪ [KEISHŪ] 280, *translated in* HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-1970, 244-46 (1978).

163. *Id.* at 281-82, *translated in* ITOH & BEER, *supra* note 162, at 244-45.

164. *Id.* at 282, *translated in* ITOH & BEER, *supra* note 162, at 244-45.

165. *See generally* Saikō Saibansho [Sup. Ct.] Mar. 3, 1987, 41 SAIKO SAIBANSHO KEIJI HANREISHŪ [KEISYŪ] 15; Saikō Saibansho [Sup. Ct.] Dec. 18, 1984, 38 SAIKO

Likewise, in *Shinchosya Publishing Corp. v. Doe* (the *Ishi ni Oyogu Sakana* [fish swimming in a stone] case),[166] the Court held that the novel that the defendant wrote based on the real experience of the plaintiff infringed upon the reputation and privacy of the plaintiff.[167] In another case, the Court held that a nonfiction novel which disclosed a past criminal record of the plaintiff infringed upon the plaintiff's privacy rights.[168] Generally speaking, the Court's tendency to prefer privacy and property to freedom of expression has been predominant.

3. The Relationship Between Constitutional Rights and Statutory Rights

Justices in the Supreme Court of Japan tend to solve constitutional problems without referring to the Japanese Constitution. Let us examine *Izawa v. City of Funabashi* (the Public Library case of 2005),[169] which concerned freedom of expression.[170] I think if this case had been brought in the United States, the courts would have found a violation of a constitutional right.[171] In Japan, however, the case was organized as violation of a statutory right. In 2005, a public library discarded books written by the plaintiffs because its librarians disliked the plaintiffs' political ideologies.[172] The library had standards for deregistering library books, but the librarians did not obey them

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SAIBANSHO KEIJI HANREISHŪ [KEISYŪ] 3026; Saikō Saibansho [Sup. Ct.] Dec. 18, 1968, 22 SAIKO SAIBANSHO KEIJI HANREISHŪ [KEISYŪ] 1549.

166. Saikō Saibansho [Sup. Ct.] Sept. 24, 2002, 1106 HANREI TAIMUZU [HANTA] 72.

167. *Id.* at 75.

168. Saikō Saibansho [Sup. Ct.] Feb. 8, 1994, 48 SAIKO SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 149, 156.

169. Saikō Saibansho [Sup. Ct.] July 14, 2005, 59 SAIKO SAIBANSYO MINJI HANREISHŪ [MINSHŪ] 1569 http://www.courts.go.jp/app/hanrei_en/detail?id=759.

170. *Id.* at 1574.

171. If this case had occurred in the United States, the act of the librarians could have violated freedom of speech because the defendant could argue that the case involved content-based restriction of speech at a public forum. *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547, 559 (1975) (holding that a public theater could not prohibit an applicant from using the theater because of its content under the First Amendment); Brown v. State of La., 383 U.S. 131, 133, 147-50 (1966) (holding that a silent protest at a public library shall be protected by the First Amendment).

172. Saikō Saibansho [Sup. Ct.] July 14, 2005, 59 [MINSHŪ] 1569, 1571.

in this case.[173] The plaintiffs sued the library under the State Redress Act[174] and claimed damages.

The Court held that the librarians' actions were illegal and violated the plaintiffs' personality right [*jinkaku ken*],[175] which the State Redress Act and the Civil Code protect in the Japanese legal system.[176] The Court did not directly hold that the library violated freedom of expression as protected by the constitutional law. Here, the Court again preferred the personality right embedded in Japanese traditional legal practice under the basic codes and statutes to a constitutional right. Personality right was the statutory right that gradually emerged and was approved by the cases sued under the Civil Code and the State Redress Act. In Japanese legal practice, this right includes the right to life, person, freedom, honor, and so forth, except for property rights and financial interests.[177] In this case, the plaintiff's personality right, which is embedded in traditional Japanese legal practice, was the reason why the Court held that the librarians shall not arbitrarily discard books. Even though personality rights are not explicitly enumerated in the Japanese Constitution, the Court took them seriously.

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173. *Id.*

174. Kokka Baisyōhō [Kokubaihō] [State Redress Act], Law No. 125 of 1947, art. 1, para. 1.

175. Personality right [*jinkaku ken*] was originally derived from a moral right, which today means "[t]he right of an author or artist, based on natural-law principles, to guarantee the integrity of a creation despite any copyright or property-law right of its owner." BLACK'S LAW DICTIONARY 1162 (10th ed. 2014) (defining "moral right"). Originally, the concept of a moral right emerged in eighteenth century Germany in order to protect authors. *See* Kazunari Kimura, *Doitsu Ni Okeru Jinkakuken Gainen No Keisei (1)* [*Formation of the Concept of Personality Rights in Germany*], 295 RITSUMEIKAN HŌGAKU 94, 102 (2004). But today, "personality right" has very different meanings in Germany and Japan. In Japan, it means all personhood interests including life, liberty, and reputation except monetary interests. *See* RYŌICHI YOSHIMURA, FUHŌKŌIHŌ [LAW OF TORTS] 37 (2nd ed. 2000). Unfortunately, U.S. law does not have this concept; therefore translation is difficult. Naoki Kanaboshi translated *jinkaku ken* as "a personhood right." Naoki Kanaboshi, *Competent Persons' Constitutional Right to Refuse Medical Treatment in the U.S. and Japan: Application to Japanese Law*, 25 PENN ST. INT'L. L. REV. 5, 65 (2006).

176. Saikō Saibansho [Sup. Ct.] July 14, 2005, 59 [MINSHŪ] 1571, 1574.

177. John Locke included the right to life, liberty, and property in the word "property." *See* JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT 234 (George Routledge and Sons 1884) (1690). The Supreme Court of Japan, however, has distinguished between personal interests and property interests. Personal interests include life, liberty, reputation, and so forth. They are not directly related to monetary interests. In contrast, property interests are directly related to monetary and financial interests.

The Court dealt with a similar problem in *Japan v. Takeda* (the Jehovah's Witness Transfusion case).[178] The biggest difference was that this case involved private parties. In this purely civil case, the plaintiff sued doctors who gave her a blood transfusion against her will.[179] The plaintiff was a Jehovah's Witness and hence refused any blood transfusion. [180] Here, the Court did not refer to freedom of religion guaranteed by the Japanese constitutional law because the constitutional law basically only regulates the relation between the government and private parties.[181] The Court held that the blood transfusion violated the plaintiff's Civil Code-guaranteed personality right and ordered the payment of damages.[182]

When we compare these two cases, the Public Library case of 2005 and the Jehovah's Witness Transfusion case, we can understand that a personality right protected against private infringement also restrains governmental power and the Court prefers a personality right to freedom of expression. This personality right has a long history in Japanese legal practice. The term "personality right" itself is not used in the Civil Code, but the Code explicitly protects a person's body, liberty, and reputation from injury in Article 710.[183] The Court has held that this clause of the Civil Code protects these interests (body, liberty, and reputation) as a part of personality rights.[184] Furthermore, the Court has held that courts can issue an injunction against various conducts when these conducts would injure personality

178. Saikō Saibansho [Sup. Ct.] Feb. 29, 2000, 54 SAIKO SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 582, http://www.courts.go.jp/app/hanrei_en/detail?id=478.

179. *See id.* at 584-85.

180. *Id.*

181. In the United States, see Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."); and NOWAK & ROTUNDA, *supra* note 104, at 311 ("Most of the protections for individual rights and liberties contained in the Constitution and its Amendments apply only to the actions of governmental entities."). The same is true in Japan. *See* Saikō Saibansho [Sup. Ct.] Dec. 12, 1973, 932 SAIKO SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1536, http://www.courts.go.jp/app/hanrei_en/detail?id=41. About various countries' attitudes on this issue, see Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 393-411 (2003).

182. Saikō Saibansho [Sup. Ct.] Feb. 29, 2000, 54 [MINSHŪ] 582, 587.

183. MINPŌ [MINPŌ] [CIV. C.] art. 710 (Japan).

184. Saikō Saibansho [Sup. Ct.] June 11, 1986, 40 SAIKO SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 872, 877, http://www.courts.go.jp/app/hanrei_en/detail?id=82.

rights.[185] For instance, courts can issue an injunction against the publication of books that would injure one's reputation,[186] the construction of an industrial waste disposal facilities,[187] the construction of an atomic power plant,[188] the construction of facilities causing air pollution,[189] and the manufacturing of tobacco.[190] Furthermore, the Court can issue an injunction to remove obstacles on private roads if these obstacles frustrate a plaintiff's ordinary life.[191]

As these examples have shown, Japanese judges and attorneys are very familiar with litigations concerning personality rights because adjudications concerning these rights occur very frequently. They know well how personality rights restrain harmful conducts in tort cases; hence, it is quite reasonable that they use personality rights in order to restrain governmental power as well as private conduct. Japanese practitioners are much more familiar with personality rights embedded in the Civil Code and tort cases than with constitutional liberties. [192] This is one reason why they prefer statutory personality rights to constitutional rights, even when Japanese courts tend to restrain governmental power.

4. The Avoidance of Constitutional Arguments[193]

The Supreme Court of Japan often avoids constitutional arguments and reference to the constitutional rights, but it re-

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185. *Id.*

186. *Id.*

187. Mito Chihō Saibansho [Mito Dist. Ct.] Mar. 15, 1999, 1986 HANREI JIHŌ [HANJI] 86.

188. Fukui Chihō Saibansho [Fukui Dist. Ct.] Mar. 22, 2000, 1043 HANREI TAIMUZU [HANTA] 259.

189. Tsu Chihō Saibansho [Tsu Dist. Ct.] May 11, 1999, 1024 HANREI TAIMUZU [HANTA] 93.

190. Nagoya Chihō Saibansho [Nagoya Dist. Ct.] Nov. 13, 1998, 1025 HANREI TAIMUZU [HANTA] 247.

191. Saikō Saibansho [Sup. Ct.] Jan. 27, 2000, 196 SAIKO SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 201.

192. The standards of whether a defendant infringed upon a personality right are well-established and every lawyer well knows how to deal with this kind of adjudication. About these standards, see YOSHIMURA, *supra* note 175, at 37-43. In contrast, Japanese courts have been reluctant to deal with constitutional adjudications. *See infra* notes 249-254 and accompanying text.

193. This legal phenomenon was also introduced by Yasuhiro Okudaira, and arguments here are partly owed to him. YASUHIRO OKUDIARA, KENPŌ SAIBAN NO KANOUSEI [POSSIBILITIES OF CONSTITUTIONAL ADJUDICATIONS] 155-210 (1995).

strains governmental power by using usual methods of interpretation of statutes. In *Japan v. Kumabe* (the Monthly Magazine Pen case),[194] a president of a big religious group in Japan sued a publishing company for defamation because the company issued a magazine disclosing the president's intimate relationship with several women.[195] In Japan, the Penal Code Article 230 punishes defamation.[196] This Article states that a statement to the public injuring a person's reputation shall be defamation even if the statement is true. The Penal Code says, however, that when a statement is of public concern, and the statement was made for public purpose and the statement is true, the conduct is not punishable.[197] The Court held that the defendant was not punishable because the private fact about the famous president's relationship with women was influential to society and of public concern.[198] In this case, however, the Court did not even mention freedom of expression at all, despite that freedom of expression is enumerated in the Constitution.[199] What the Court did was merely the traditional and usual interpretation of the Penal Code. It is quite a contrast when we compare it to *New York Times v. Sullivan*,[200] in which the Supreme Court of the United States held that the defamation law in question and the First Amendment were deeply interrelated.[201]

Instead of referring to freedom of speech, the Supreme Court of Japan has restrained the government's prosecution power by using traditional statutory interpretation. We can see here the Court's preference to restrain governmental power not by constitutional interpretation but by statutory interpretation, which is more traditional and familiar to Japanese lawyers. I said that the Court preferred privacy to freedom of speech, but in this case, the direct statutory provision [202] that makes a

194. Saikō Saibansho [Sup. Ct.] Apr. 16, 1981, 35 SAIKŌ SAIBANSHO KEIJI HANREISHU [KEISHŪ] 84.

195. *Id.* at 87.

196. KEIHŌ [KEIHŌ] [PEN. C.] art. 230, para. 1.

197. KEIHŌ [KEIHŌ] [PEN. C.] art. 230-2, para. 1.

198. Saikō Saibansho [Sup. Ct.] Apr. 16, 1981, 35 [KEISHŪ] 84, 89.

199. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21, para. 1.

200. 376 U.S. 254 (1964).

201. The Supreme Court of the United States held that "the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action . . . ." *Id.* at 264.

202. *See supra* note 191 and accompanying text.

speaker unpunishable was critical. The Justices in this might have felt that it was easier to judge in favor of freedom of speech thanks to the explicit words of the Penal Code. All they had to do in order to defend freedom of expression was interpret the words of the Code per the usual statutory interpretation.

We can find the same legal attitude of the Court in an administrative law case. In *City of Tokyo v. Kawakami* (the Taxi Driver case),[203] the Land Transport Bureau denied a license of running a taxi business to the plaintiff. In this case, the Court held that denial of the license was illegal because the Bureau did not give the applicants the opportunities to claim eligibility and to submit evidence about their eligibility.[204] The Court mentioned, however, neither the Constitution nor the due process of law. What the Court did was interpret the Road Transportation Act.[205] The Court restrained the arbitrary administrative procedure by interpreting the statute even though it did not mention constitutional rights. Here, we can also find the tendency of the Court to avoid constitutional arguments; the Court tried to restrain governmental power by the liberal interpretation of the statute.

Similarly, in *Kobe City College of Technology v. Kobayashi* (the Jehovah's Witness Fencing Refusal case),[206] the Court wrote the opinion without referring to a constitutional right, even though the case was about the free exercise of religion. In this case, the plaintiff, who was a Jehovah's Witness, declined to complete a mandatory course of Japanese fencing [*kendō*] at his public high school because of his religion. The principal of the high school denied him academic credit and ordered him to leave school.[207] This case's legal issue is similar to the U.S. cases of *Sherbert v. Verner*,[208] *Employment Division, Department of Human Resources v. Smith*,[209] and *Burwell v. Hobby Lobby*

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203. Saikō Saibansho [Sup. Ct.] Oct. 28, 1971, 25 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSYŪ] 1037.

204. *Id.* at 1042-43.

205. Douro unsōhō [Road Transportation Act], Law No. 183 of 1951.

206. Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, http://www.courts.go.jp/app/hanrei_en/detail?id=294.

207. *Id*. at 473-5.

208. 374 U.S. 398 (1963).

209. 494 U.S. 872 (1990).

Stores, Inc.[210] This is because it was about whether a public agency can exempt general and secular duties because of a person's religion. The Court, did not, however, refer to the right of free exercise of religion, which is enumerated in the Constitution of Japan.[211] The Court held that the act of the principal was illegal and should be revoked, but the argument that led to this conclusion was not a constitutional one. The Court held that depriving the plaintiff of his student status was too serious and harsh compared to his violation of academic standard.[212] Also, the Court held that the school should have had him fulfill alternative duties like writing papers.[213] The Court considered the balance and proportionality between governmental sanctions and nonperformance of citizens' duties, and this way of thinking is typical of Japanese administrative cases.[214] It is obvious that the Court avoided directly tackling the constitutional problem. Instead the Court solved the case as a usual administrative case without referring to the constitutional right. In this case, the Court restrained the discretionary power of the principal by means of classical administrative law reasoning, not by referring to the constitutional right. Here we can also find that the Court preferred the normal statutory settlement to constitutional arguments. This is reasonable because the judicial review and judicial enforcement of the constitutional law were born after World War II, but there were administrative cases before the war. The justices were familiar with ordinary administrative cases but not so familiar with constitutional cases.

Again, in *Shigefuji v. Japan* (the Fukuoka Prefecture Youth Protection Ordinance case),[215] the Court restrained governmental power using ordinary interpretation without referring to a constitutional right. In this case, the Fukuoka Prefecture Youth

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210. 134 S. Ct. 2751 (2014).

211. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20, para. 1.

212. Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, 476-77, http://www.courts.go.jp/app/hanrei_en/detail?id=294.

213. *Id.* at 477.

214. Hidenori Sakakibara, *Gakusei Ni Taisuru Sochi To Sairyō Sinsa* [*Disposition to a Student and Judicial Review of Discretion*], *in* GYŌSEI HANREI HYAKU SEN [SELECTED ONE HUNDRED ADMINISTRATIVE LAW CASES] 170, 171 (Katsuya Uga et al. eds., 2013); KATSUYA UGA, GYŌSEIHŌ GAISETU: GYŌSEIHŌ SŌRON [ADMINISTRATIVE LAW TEXT, VOL. 1: GENERAL THEORIES] 55-56 (5th ed. 2013).

215. Saikō Saibansho [Sup. Ct.] Oct. 23, 1985, 39 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 413.

Protection Ordinance prohibited anyone from having sexual intercourse with youth under the age of eighteen.[216] If it had been brought in the United States, the right to privacy under the U.S. Constitution's Substantive Due Process Clause could have become an issue.[217] The Supreme Court of Japan, however, did not mention the right to privacy. It does not necessarily mean the Court held no one had a right to sexual intercourse with minors. The Court considered punishing sexual intercourse that was based on a marital relationship or a similar sincere relationship was too harsh and too broad.[218] Therefore, the Court interpreted the ordinance narrowly,[219] that is, according to the Court, the ordinance authorized criminal punishment only when defendants deceived youth into sexual intercourse or when defendants had sexual intercourse with youth for the only purpose of satisfying their sexual desires.[220] Here, the Court also restrained governmental power without referring to a constitutional right. The Court interpreted the ordinance by usually referring to the purpose and words of the ordinance. The ordinary interpretation of the statute replaces constitutional arguments, but the Court restrained governmental power.

We can find a very interesting attitude of the Court in *Japan v. Roe* (the *Horikoshi* case). [221] In this case, the defendant was prosecuted because he posted political pamphlets of the Japanese Communist Party.[222] The National Public Service Act prohibits a public officer from engaging in political activities in order to secure political neutrality of administrative staffs and to establish nation's trust in their neutrality.[223] The Court referred to freedom of expression but did not declare the statute uncon-

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216. *Id.* at 414.

217. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 456-57 (16th ed. 2007) ("Does the right recognized in the Griswold-Roe line of cases extend to consensual sexual behavior? If so, between whom? Married couples? Unmarried heterosexuals? Teenagers?").

218. Saikō Saibansho [Sup. Ct.] Oct. 23, 1985, 39 [KEISHŪ] 413, 416.

219. *Id.*

220. *Id.*

221. Saikō Saibansho [Sup. Ct.] Dec. 7, 2012, 66 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1337, http://www.courts.go.jp/app/hanrei_en/detail?id=1179.

222. *Id.* at 1339-40.

223. Kokka kōmuinhō [Kokōhō] [National Public Service Act], Law No. 120 of 1947, art. 102, para. 1. It says as follows:

> Officials shall not solicit, or receive, or be in any manner concerned in soliciting or receiving any subscription or other benefit for any political party or political purpose, or engage in any political acts as pro-

stitutional. Instead, the Court interpreted the statute narrowly using the ordinary method of statutory interpretation.[224] According to the opinion of the Court, the purpose of the statute is to secure political neutrality of public officers; therefore, the statute's prohibition on political activities should be limited to only activities that could actually harm political neutrality.[225] Political activities that merely cause possible harm to neutrality should not be prohibited, even though the words of the statute do not express such a limitation. The Supreme Court of Japan often interprets a statute freely regardless of its written words.[226] Here, the Court also limited the scope of punishable activities by means of ordinary statutory interpretation. The concurring opinion, written by Justice Katsumi Chiba, explained legal philosophy of the Court well. He said that all the Court did in the case was ordinary statutory interpretation,[227] that is, the Court interpreted the statute, considered the purpose, ideal, and structure of it, and did not necessarily adhere to the statute's written words.[228] For a long time, the Court freely departed from the written words of statutes and interpreted a law according to its purpose and policy.[229] In the *Horikoshi* case, the Court applied an old method of statutory interpretation and restrained governmental power. The thesis that the Court respects customary and traditional legal values rooted in Japanese legal practice can explain all of these cases above well.

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vided for by rules of the National Personnel Authority other than to exercise his/her right to vote.

224. Saikō Saibansho [Sup. Ct.] Dec. 07, 2012, 66 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1337, 1342.

225. *Id.* at 1341-42.

226. Notable examples are interpretations of labor law and consumer protection law. *See* Shigenori Matsui, *Cloudy Weather, with Occasional Sunshine: Consumer Loans, the Legislature, and the Supreme Court of Japan*, 22 PAC. RIM. L. & POL'Y J. 555, 556 (2013).

227. *See* SAIKŌ SAIBANSHO [SUP. CT.] DEC. 7, 2012, 66 [KEISHŪ] 1337, 1354-55.

228. *See id.*

229. Matsui, *supra* note 128, at 1414 ("[T]he Japanese Supreme Court has showed its creativity and flexibility in fashioning unwritten principles in other fields of law [except for constitution law]."). *See also supra* note 226.

C. The Reasons Why Japanese Jurisprudence Follows the Principle of Common Law Constitutionalism

As argued above, in the United States, common law rights are incorporated into the constitutional principles.[230] Similar legal phenomena exist in Japan. The old and historical rights are incorporated into the constitutional law and old principles of law are respected at the constitutional level.[231] I will discuss the possible reasons of this resemblance below.

1. The Backgrounds of the Justices

The first possible reason for this resemblance is the backgrounds of the Justices. The Supreme Court of Japan is composed of fifteen Justices. "[T]he fifteen seats on the Court are allocated on the basis of informal quotas to different segments of the legal community and bureaucracy. The largest allocation belongs to the judiciary: six of the Court's members are career judges, and the Chief Justice, in particular, has almost invariably risen to the post through the ranks of the career judiciary."[232] The rest of the seats are allocated as follows: four attorneys, two career prosecutors, two administrative bureaucrats, and one academic.[233] It is evident that the large majority of Justices have been career judges and practical attorneys.

There is a reason that Justices prefer the way of reasoning and rights embedded in the Civil Code and the Penal Code—both of them are the typical old and long-established law in Japan—and basic and fundamental statutes like the State Redress Act. The Civil Code and the Penal Code were ratified in the late nineteenth to early twentieth century and Japanese lawyers have used and applied them as basic laws in the courts for more than a hundred years without the passing of any major amendment.[234] For judges and attorneys, the main parts of their legal

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230. *See supra* Part II.B-C.

231. *See supra* Part III.B.

232. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, *supra* note 128, at 1551 (citations omitted).

233. Kawagishi, *supra* note 128, at 235.

234. The Civil Code came into operation in 1896 and is immune from a substantial amendment. Yasuhide Kawashima explained the history:

> The Japanese Civil Code is closely akin to the German Civil Code in both organization and content. Before enactment in 1898, almost thirty years of study and debate went into its construction, and it has

study and work tend to be composed of these basic laws.[235] In order to pass the national bar exam, the Civil Code is the most important subject.[236] After passing the bar exam, future lawyers

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> worn well. There have been no important amendments, and its interstices have been solidly filled by judicial construction.

Yasuhide Kawashima, *The American Constitution and Japanese Minpō, 1945-1980*, 21 INT'L L. 1167, 1168 (1987) (citation omitted). He added that even the law reformation after World War II did not affect the Civil Code's first three books. *Id.* at 1169. This is still true today. *See* ATSUSHI OMURA, MINPŌ KAISEI WO KANGAERU [THINKING ABOUT THE AMENDMENT TO THE CIVIL CODE] 26 (2011) (saying that the Civil Code has not experienced a large amendment).

The Penal Code went into effect in 1907 and never has been significantly amended. Kenzō Takayanagi said as follows:

> After World War I, an attempt was made, as in Germany and Switzerland, to effect a code revision, and a committee was set up for that purpose. But the attempt bore no fruit, nor have a few amendments after World War II affected in any fundamental way the character of the Penal Code of 1907.

Takayanagi, *supra* note 140, at 18. About the history of Japanese Penal Code, see *Takayanagi, supra*, at 15-18; and HIROFUMI UCHIDA, NIHON KEIHŌGAKU NO AYUMI TO KADAI [History and Problems of Japanese Criminal Law Theory] 17-48 (2008).

235. The Japanese legal system is composed of a few basic codes and thousands of statutes. The Civil Code provides basic and fundamental principles of private parties' legal relationships. The thousands of statutes regulating private parties should be interpreted by such principles. Here, basic laws mean laws that provide general principles. Yasuhide Kawashima explains this idea:

> The *Minpō* (Civil Code) is the basic and most important body of private law in Japan. It consists of five parts: general legal principles, law of property, law of obligations, law on relatives, and law of succession. The *Minpō* is accompanied by a number of satellite laws that expand and apply general principles in particular fields.

Kawashima, *supra* note 234, at 1168 (italics in original); *see also* BASIC JAPANESE LAWS, at v (Hiroshi Oda ed., 1997) ("The Civil Code . . . contains the core principles of private law in Japan and . . . basic rules set out in the Civil Code are also applicable to commercial transactions."). The same is true in the Penal Code. The Penal Code is composed of general principles and lists the elements of each crimes, and these general principles prevail over other satellite criminal statutes. *See* KEIHŌ [KEIHŌ] [PEN. C] art. 8. Furthermore, some Japanese scholars argue that the Civil Code is the basic law of society because it is composed of the intellectual tradition of lawyers. Lawyers have contributed to making and sophisticating the Civil Code for centuries. *See* Kouji Aikyō, *Kenpō To Minpō Mondai No Kenpōgakuteki Kōsatsu* [*Constitutional Law and Civil Law: From the Perspective of Constitutional Theory*], 230 NAGOYA DAIGAKU HŌSEI RONSYU 169, 172 (2009).

236. The subjects examined before 2006 were: civil law, civil procedure, commercial law, constitutional law, and criminal procedure. Today applicants have to study administrative law and an elective in addition to these subjects. Hisashi Aizawa, *Japanese Legal Education in Transition*, 24 WIS. INT'L L.J. 131, 144, 148 (2006); Setsuo Miyazawa, *Education and Training of Lawyers in Japan—A Critical Analysis*, 43 S. TEX. L. REV. 491, 492 (2002). Based my own experience and conventional wisdom, civil law is the most voluminous and demanding; therefore, it is critical for applicants to master the subject. Some successful applicants say the civil law is the most impor-

must experience practical training under the Legal Training and Research Institute for a year.[237] During this practical training period, which is very important for young lawyers because it is the first time they experience legal practice,[238] the main subjects of study and training are the rules and reasoning of the Civil Code, and the Penal Code and their procedures.[239] For a long time, these subjects have been considered to be the basic and fundamental legal areas necessary in order to acquire a lawyer's way of thinking, similar to how U.S. law schools regard contracts and torts.[240] Then after admission to the bar, a lawyer's practice is mainly composed of laws such as the Civil Code and Penal Code.[241]

In contrast to the Civil Code and the Penal Code, future lawyers usually never study constitutional law at the Legal Training and Research Institute. Furthermore, after ordinary practitioners are admitted to the bar, they rarely deal with constitutional law. Therefore, the more experienced a lawyer is, the more he or she is familiar with the basic Civil Code and Penal

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tant subject to pass on the exam. SHIN SHIHŌ SHIKEN GOUKAKUSYA FAIRU 08 JUKEN BAN [A FILE OF SUCCESSFUL APPLICANTS OF THE NATIONAL BAR EXAM VERSION 2008] 33, 83 (2007).

237. In the past, training was for two years. Tom Ginsburg, *Transforming Legal Education in Japan and Korea*, 22 PENN ST. INT'L L. REV. 433, 435 (2004); Peter A. Joy et al., *Building Clinical Legal Education Programs in a Country Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417, 425 (2006); Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, *supra* note 128, at 1552.

238. Joy et al., *supra* note 237, at 424 ("[T]he sole source of training for the practice of law until 2004 has been the Legal Training and Research Institute."). I think this circumstance has not radically changed—even after 2004, when Japanese graduate J.D. programs started. About this program, see Katsumi Yoshida, *Legal Education Reforms in Japan: Background, Rationale, and the Goals to be Achieved*, 24 WIS. INT'L L.J. 209, 216-18 (2006) and see generally, Mark D. West, *Making Lawyers (and Gangsters) in Japan*, 60 VAND. L. REV. 439 (2007).

239. *See* Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, *supra* note 128, at 1552-53.

240. ANN M. BURKHART & ROBERT A. STEIN, LAW SCHOOL SUCCESS IN A NUTSHELL: A GUIDE TO STUDYING LAW AND TAKING LAW SCHOOL EXAMS 56 (2d ed. 2008) (saying that the first year curriculum at U.S. law schools is offered to nurture the ability to "think[ ] like a lawyer" and this curriculum is composed typically of "civil procedure, constitutional law, contracts, criminal law, property, and torts").

241. The Civil Code provides general principles applied to all other statutes regulating relationship between private parties; therefore, the Civil Code is always important when a lawyer deals with civil litigation. The circumstance is the same as criminal adjudications where the Penal Code provides general principles. *See supra* note 235.

Code. Conversely, even a well-learned lawyer tends to have scarce experience of dealing with constitutional law. Such a contrast makes lawyers prefer and respect the Civil Code and the Penal Code. Therefore, when Justices tackle the constitutional problems in the Supreme Court, they tend to apply basic principles of familiar law, the Civil Code and the Penal Code. Then the old and traditional legal principles that Japanese lawyers use most frequently tend to be incorporated at the constitutional level. In a sense it is similar to common law constitutionalism because the common law lawyers' love of their profession-made law is one of the reasons why common law rights have a highly respected status.[242] Japanese lawyers' attachment to their familiar laws can explain the high status of long-established old codes.

2. The Biased Political Color of the Constitutional Law in Japan

In Japan, the Constitution has been always a symbol of liberal progressive political ideology.[243] In Japanese society and legal community, people do not consider the Constitution to be the bundle of technical rules and principles which only lawyers can command.[244] Rather, people tend to see it as a symbol of liberal and left political ideology which anyone, including layman, can reference. This situation is very different from the one in the United States because in the United States, both liberals and conservatives support the U.S. Constitution.[245] By contrast,

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242. *See supra* notes 25-30 and accompanying text.

243. Liberals in Japan tend to stand for pacifism, individual liberties, and economic equality. Further, the liberals think the Constitution embodies these ideas; therefore, they are always against the Constitution by the Liberal Democratic Party's proposed amendments, which has been the ruling party composed of conservatives. About a typical argument from a liberal arguing against the constitutional amendment, see TAKESHI KOBAYASHI, IMA KENPŌ KAISEI TO JINKEN WO KANGAERU [NOW TAKING THE CONSTITUTIONAL AMENDMENT INTO CONSIDERATION] (2005).

244. *See* Junji Annen, *Kenpō to Kenōgaku* [*Constitutional Law and Constitutional Theory*], *in* HORN BOOK KENPŌ [HORN BOOK CONSTITUTIONAL LAW] 31, 67 (Yoichi Higuchi ed., rev. 2000) (saying that the people do not consider constitutional law and its theory to be technical).

245. *See* ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 27 (2010) (about the split in the Supreme Court of the United States between liberals and conservatives). Erwin Chemerinsky describes the Supreme Court of the United States as one where both liberals and conservatives try to enforce their ideologies not by amendment, but through the U.S. Constitution itself. *Id. See also* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 25-

in Japan liberals always support the Constitution, while conservatives attack the Constitution and advocate for its radical amendment.[246] According to conservatives, the Constitution is too individualistic and lacks Japanese traditional values because U.S. military force framed the majority of the Constitution.[247] This ideological separation might make the interpretation of the Constitution a difficult job for the Court because if the Court was active in constitutional cases, it might be criticized as being politically left. Consequently, I think the Court chooses to avoid constitutional arguments and instead uses statutory arguments.

Japanese Justices are proud of their own special knowledge and competence in interpreting law (especially codes and statutes), and their professional knowledge is the source of legitimacy of the Supreme Court of Japan.[248] It seems that Justices are afraid of the Japanese people considering them to be too liberal and politicized if the Court uses the constitutional provisions frequently. Although the people do not elect the Justices, judgments of the Justices sometimes decide nationally important matters; therefore the Court's decisions are legitimate under a democracy only when their decision is based on professional legal judgment. If the Constitution is deemed to be a mere politi-

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26 (1998) (describing different methods of constitutional interpretation between liberals and conservatives).

246. About the liberals' position, see *supra* note 243. In contrast, conservatives think the General Head Quarter imposed the Constitution of Japan upon the Japanese people just after World War II. Moreover, they think pacifism of the Constitution prevents Japan from being independent and influential in international relations. Further, they argue that the individualism of the Constitution has spoiled traditional and historical values, like importance of family and community. For a typical conservative argument, see generally HIDETSUGU YAGI, KENPŌ KAISEI GA NAZE HITUYOU KA [WHY WE NEED CONSTITUTIONAL AMENDMENTS] (2013) (discussing a typical conservative argument that the Constitution is not based on national history, unduly individualist; therefore the Constitution needs amendments). For information about the ideological separation between liberals and conservatives, see generally SINICHIRO KITO ET AL., KENPŌ KAISEI NO RONTEN [ISSUES OF CONSTITUTIONAL AMENDMENT] (2014) (about the ideological separation between liberals and conservatives).

247. Hidetsugu Yagi makes an argument typical of the conservative side. *See generally* YAGI, *supra* note 246.

248. A typical career path of a Justice is as follows: passing the national bar exam young, getting good grades, and graduating from the Legal Training and Research Institute. Post-graduation, a Justice experiences highlighted posts, including work as a law clerk of the Supreme Court. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, *supra* note 128, at 1557-58.

cal ideal rather than technical rules and legal principles, it is reasonable for Justices to refrain from using the constitutional provisions easily. The Civil Code, the Penal Code, and the basic traditional statutes are usually deemed as the sources of technical and professional legal knowledge, and Justices tend to appeal to such Codes rather than directly appeal to the constitutional provisions. A famous Japanese constitutional researcher has said that Justices on the Court do not want their decision to be based on the Constitution because such an avoidance of constitutional argument appears professional and legalistic.[249] Similarly, Shigenori Matsui (Matsui), another famous Japanese constitutional scholar, said Justices consider the Constitution to be a mere political ideal, not law applicable in the courts. He said, "[w]hat is most alarming, though, is the fact that the Constitution is regarded with distrust, or at least with caution, by the Justices. Many Justices tend to view the Constitution not as a law, but more as a political document stipulating political principles."[250] He also mentioned that "most judges are reluctant to assert power that cannot be found in statutes,"[251] that is, in the Japanese legal community, judges do not regard the Constitution as a law but a political ideal. For them, the codes and statutes that the National Diet (Japan's legislature) enacts are the only legitimate and established legal sources. This is reasonable, however, when we remember that the Japanese courts have applied codes and statutes since the late nineteenth century, but judicial review only started in 1947. Before then, the Japanese legal community did not have any history or idea of judicial review. It is quite a contrast to the Supreme Court of the United States. The U.S. legal community already had the beginnings of judicial review, like *Dr. Bonham's Case*,[252] when the Supreme Court of the United States established the power of judicial review in *Marbury v. Madison*.[253] Matsui said

249. OKUDAIRA, *supra* note 193, at 178.

250. Matsui, *supra* note 128, at 1413 (citation omitted).

251. *Id.*

252. 77 Eng. Rep. 638 (C.P.), *reprinted in* COKE, *supra* note 2.

253. 5 U.S. (1 Cranch) 137 (1803). It is said that U.S. judicial review was already established before *Marbury v. Madison*. "A number of state court decisions in the years between independence and the federal constitutional convention involved judicial invalidation of state legislation." SULLIVAN & GUNTHER, *supra* note 217, at 11-12; *see also* HAYEK, *supra* note 34, at 187 (saying that state courts in the colonial period already established judicial review); FRIEDMAN, *supra* note 36, at 17 (discussing a controversial example of judicial review in the United States' colonial period);

that before the ratification of the Japanese Constitution, Japanese lawyers did not know of judicial review and firmly believed in legal positivism.[254] This perspective can explain the reason why the Court has respected the long-established legal sources in the Japanese legal community for a long time when Justices tackle constitutional problems. In a sense, it also resembles common law constitutionalism because common law constitutionalism aims to restrain governmental power in regards not to a political ideal but the common law.

IV. Conclusion

In common law constitutionalism, the long-accumulated wisdom of lawyers, mainly derived from ordinary civil and criminal cases, acquires constitutional status even if it is not explicitly enumerated in a written constitution. The basic principles of common law constitutionalism are not monopolized by Anglo-American common law countries. The Supreme Court of Japan has viewed a right embedded in Japanese traditional legal practice as a constitutional right even without explicit enumeration in the Constitution. Furthermore, the Court restrains governmental power not by constitutional interpretation but by traditional statutory interpretation, which is derived from ordinary civil and criminal cases and has a long legal tradition. The Court prefers the statutory arguments that look professional and legal to the constitutional arguments that seem more political. The Court relies on the traditional legal knowledge rather than the Constitution itself in order to develop Japanese constitutionalism.

Hall & Karsten, *supra* note 58, at 76 (explaining how the words "judicial review" are not in the U.S. Constitution). Whether we can consider *Dr. Bonham's Case* to be a precedent of U.S. judicial review is more controversial. *See supra* note 29. James R. Stoner, Jr. has said that Coke did not strike down the statute in the case, but rather interpreted it. Stoner, *supra* note 41, at 59-62. According to him, Coke had a notion that judges could interpret law according to a fundamental law and enforce the idea of constitutional government. *Id.*

254. Matsui, *supra* note 128, at 1401. *Contra* Tokujin Matsudaira, *Judicialization of Politics and the Japanese Supreme Court*, 88 Wash. U. L. Rev. 1559, 1559-60 (2011) (Tokujin Matsudaira argues that the influence of German legal positivism upon Japanese jurisprudence is not so great.).