Shut up and Sing: The Rights of Japanese Teachers in an Era of Conservative Educational Reform

Isaac Young

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† Candidate for J.D., Cornell Law School, 2009; A.B. History, Brown University, 2009. Many thanks to Awahara Hiroki, Ohara Mami, Kubota Shuhei, and Kyoko Selden for their help in checking my translations of Japanese materials and their feedback. Thanks also to Alex Peterson, Derrick Moore, Peter Milligan, Laura Wexler, and Tina Geraghty for their patient editing and supervision. Thanks and love to Amanda Gibbs for her patience and support. All Japanese names are written in Japanese fashion with the family names written first (except for those used in citations, which follow western conventions).

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"Thousands of years of happy reign be thine
Rule on, my lord till what are pebbles now
By age united to mighty rocks shall grow
Whose venerable sides the moth doth line."

- Kimigayo (The Japanese National Anthem)¹

Introduction

School entrance and graduation ceremonies in Japan, as in other countries, are occasions of tremendous emotion.² Every March and April, parents, students, and teachers come to school dressed in their best clothes.³ They file into the school gymnasium or auditorium to express their pride for the children who are graduating or entering the school. Then, when all are gathered in the gymnasium, the crowd expresses their pride and respect for their country: the assembly stands and sings Kimigayo, the Japanese national anthem, while facing a large Japanese flag that hangs over the podium at the front of the hall.⁴

On the surface, there seems to be nothing controversial about these patriotic rituals. Yet from 2000 to 2005, authorities disciplined 875 teachers throughout Japan because the teachers refused to stand and sing the national anthem.⁵ The controversy stems from the flag and anthem's ties to militarism and imperialism and from recent directives mandating stricter punishments for teachers who do not stand and sing the anthem at public schools.⁶ Japan, unlike Germany and Italy, did not replace its flag

¹ Denise Cripps, Flags and Fanfares: The Hinomaru Flag and the Kimigayo Anthem, in CASE STUDIES ON HUMAN RIGHTS IN JAPAN 76, 78 (Roger Goodman & Ian Neary eds., 1996).
⁴ See, e.g., Glimpses of Japan, supra note 2.
and its anthem after World War II. Instead, in 1999—forty-four years after the end of the war—the Japanese parliament (the Diet) passed legislation designating the Hinomaru flag and Kimigayo anthem as the country's national flag and anthem.8

Since the Diet passed the legislation, the two symbols have been fodder for political and legal controversy.9 Conservative politicians and school administrators believe that integrating these rituals—singing the national anthem while standing and facing the flag—into school events is necessary to teach students patriotism and respect for their country.10 Left-leaning teachers, however, associate the flag and anthem with the extreme nationalism and militarism of Japan during World War II and refuse to sing the national anthem at school events.11

Since 2000, Japanese courts have affirmed school administrators' power to order teachers to sing the national anthem and to discipline them for refusing to sing.12 Nevertheless, in September 2006, a Tokyo District Court judge ruled that 401 teachers in Tokyo schools "owed no duty" to stand and sing—or accompany on piano—the national anthem while facing the national flag because the order to stand and sing violated their freedom of conscience, a right guaranteed by Article 19 of the Japanese Constitution.13 The plaintiffs' attorneys hailed the decision as "probably the best ruling in a trial related to the educational system" and an "epoch-making ruling."14

In February 2007, however, the Supreme Court of Japan ruled that an elementary school principal did not violate a music teacher's freedom of conscience when the principal reprimanded the teacher for refusing to play

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7. See ROBERT W. ASPINALL, TEACHERS' UNIONS AND THE POLITICS OF EDUCATION IN JAPAN 124 (2001) (stating that "Japan did not change or modify its national symbols after the war").


10. See ASPINALL, supra note 7, at 125.


12. See, e.g., Shino v. Otsu Kyōikuinkai, 1087 HANREI TAIMUZU 117 (Otsu D. Ct., May 7, 2002); Kawakami v. Saitama Kyōikuinkai, 1037 HANREI TAIMUZU 112 (Urawa D. Ct., June 28, 2001); see also Michael Fitzpatrick, Tokyo to Get Tough on Flag and Anthem, TIMES EDUC. SUPPLEMENT, Mar. 24, 2006, at 20.

13. Nagai v. Tokyo Kyōikuinkai, 1228 HANREI TAIMUZU 88 (Tokyo D. Ct., Sept. 21, 2006); see Jun Hongo, Tokyo Teachers Win Anthem Fight: 'Kimigayo' Directive Violates Freedom of Thought, Court Rules, JAPAN TIMES, Sept. 22, 2006, at 1 [hereinafter Teachers Win Fight]. Article 19 states that "freedom of thought and conscience shall not be violated." KENPO, art. 19 (Japan). For clarity, this Note will refer to Nagai v. Tokyo Kyōikuinkai as the "Tokyo District Court Case."

14. See Teachers Win Fight, supra note 13, at 1.
the national anthem on the piano during a school entrance ceremony.\textsuperscript{15} This was the Supreme Court's first decision on the issue of mandatory participation in the singing of the national anthem.\textsuperscript{16} The Supreme Court did not directly address the broader issue of whether teachers can be compelled to stand and sing the national anthem.\textsuperscript{17} 

During this same period, Japan's governing coalition, led by the conservative Liberal Democratic Party (LDP), passed legislation that changed the statutes governing the Japanese education system.\textsuperscript{18} These changes included a wholesale revision of the Fundamental Law of Education (FLE),\textsuperscript{19} the foundational law that states the goals of Japanese education and the basic principles that govern educational administrations.\textsuperscript{20}

This Note will argue that the Japanese Supreme Court will not uphold the 2006 Tokyo District Court decision (Tokyo District Court Case) protecting the rights of teachers to refuse to stand and sing the anthem. The Court will rule in this fashion primarily because of its previous ruling in the 2007 Supreme Court case (Music Teacher Case). I will also argue that, absent constitutional protection for teachers who refuse to stand and sing the anthem, government authorities will be able to remove teachers who defy orders to sing or accompany the anthem on piano. Such a decision will be detrimental to Japanese education. Part I describes the broader political climate in which the current controversy developed and gives background about the controversy surrounding the flag and national anthem. It also describes the new educational legislation passed by the LDP. Part II provides background about the Japanese Constitution and the Supreme Court's adjudication of constitutional and statutory issues that may bear on the Tokyo District Court Case. Part III examines the Tokyo District Court Case and the Supreme Court's March 2007 decision in the Music Teacher Case. Part IV predicts the Supreme Court's likely ruling upon review of the Tokyo District Court's decision and discusses the consequences of this ruling for teachers who refuse to stand and sing.

I. The Politics of Conservative Education Reform and of the Flag and Anthem

A. Political Background of Conservative Education Reform

The conservative Liberal Democratic Party (LDP) has governed Japan

\textsuperscript{15} X v. Tokyo Kyōikuinkai, 61 MINSHU 291 (Sup. Ct., Feb. 27, 2007); see Kobayashi, \textit{supra} note 5, at 4. For clarity, this Note will refer to \textit{X v. Tokyo Kyōikuinkai} as the "Music Teacher Case."


\textsuperscript{17} \textit{Tokyo Kyōikuinkai}, 61 MINSHU at 291.


\textsuperscript{20} See Council Urges Drastic Reform of Education System; Teachers Perplexed, ASAHI SHINBUN, Mar. 21, 2003 [hereinafter \textit{Council Urges Reform}].
almost without interruption since 1955. Since the mid-1990s, right-wing members of the LDP have gained further popular support, served important political offices, and sought to implement conservative social reforms. Meanwhile, the Japanese left—and its main political parties, the Japan Social Party (JSP) and the Japan Communist Party—has been unsuccessful in opposing right-wing policies. Within the field of education, the Japan Teachers’ Union (JTU), which once represented the vast majority of the country’s teachers and has opposed the use of the flag and anthem in schools, has seen its numbers and influence dwindle as well.

One of the principal goals of Japanese conservative leaders has been to reform the educational system. They believe that education in the post-World War II era has overemphasized individuality while failing to teach morality, patriotism, and consideration of others. Consequently, they argue that Japan has become “self-centered . . . and egotistic[al],” and that this change has caused a decline in academic and moral standards, a breakdown of classroom discipline, and an increase in violent crime. Conservative leaders blame public school teachers and the JTU for the faults in the education system. They also accuse teachers and the JTU of


23. See Lower House Election Results in Seats, 1990–2005, http://jpcentral.virginia.edu/LH-seats-1990-2005.htm (last visited Mar. 5, 2009). The decline in power of the Japanese left is most starkly visible in the Diet representation of the JSP, once the country’s largest opposition party. See id. In the 1990 election, the JSP claimed 136 seats in the lower house of the Diet. Id. In 1993, they won 70 seats. Id. In 2005, the Social Democratic Party, the successor party to the JSP, claimed only seven seats. Id.

24. Setsuko Kamiya, Nikkyoso: A ‘Cancer’ of Teachers?, JAPAN TIMES, Nov. 4, 2008, at 3. The union counted 86.3% of Japan’s educational personnel as members of its constituent organizations in 1958. Id. By 2007, the percentage had fallen to 28.3%. Id.

25. Rose, supra note 22, at 137.

26. In fact, schools in Japan have taught moral education since 1958. ASPINALL, supra note 7, at 40. In 1993, the Ministry of Education reported that “almost all elementary and lower secondary schools have now drawn up teaching plans for moral education and are using supplementary readers [developed by the Ministry].” CHRISTOPHER P. HOOD, JAPANESE EDUCATION REFORM: NAKASONE’S LEGACY 83 (2001) (quoting MONBUSHO, NEW DIRECTIONS IN SCHOOL EDUCATION: FOSTERING STRENGTH FOR LIFE 87 (1995)).

27. See Norimitsu Onishi, Japan’s Conservatives Push Prewar ‘Virtues’ in Schools, N.Y. TIMES, June 11, 2006, at 26 [hereinafter Conservatives Push Virtues].

28. Id.

29. See Akemi Nakamura, Abe to Play Hardball with Soft Education System, JAPAN TIMES, Oct. 27, 2006, at 1 [hereinafter Abe to Play Hardball].

30. See ASPINALL, supra note 7 passim. There is some truth to these charges. The JTU’s leadership has historically been left-wing with strong ties to the JSP. Id. at 162.
denigrating the national flag and anthem by opposing the use of these symbols in schools.\textsuperscript{31}

Conservatives have been particularly outspoken in their criticism of the teaching of Japanese history.\textsuperscript{32} They have argued that the textbooks approved by the Ministry of Education (MOE) are "masochistic" and damaging to students' sense of patriotism and identity because they describe Japan's conduct in World War II as aggressive and give details of particular incidents such as the Nanjing Massacre and the "Comfort Women" system.\textsuperscript{33} Consequently, conservatives have sought to create and promote their own textbook\textsuperscript{34} and have pressured mainstream textbook publishers to remove or reduce descriptions of the negative aspects of Japan's war

The union bitterly fought against educational reforms that they perceived as backsliding toward pre-war government control over education, such as textbook screening and the reintroduction of moral education. \textit{Id.} at 40-42. The JTU also opposed other less politically charged reform efforts, such as attempts to introduce national achievement tests and teacher training systems, that it perceived as government efforts to undermine the union. \textit{Id.} at 44-46. The union's membership, however, has always been much more politically moderate than its leadership. \textit{Hood, supra} note 26, at 91. The members are "relatively liberal in their social opinions but rather conservative in their preference for orderly, smoothly run schools." \textit{Id.} Moreover, since the early 1990s, the JTU has taken a more conciliatory stance toward both the conservative government and Ministry of Education and has dropped its opposition to many government policies. See \textit{Aspinall, supra} note 7, at 120-21. Despite this newly conciliatory attitude, however, the JTU has been shut out of the discussions that led to the recent reforms. See \textit{id.} at 187.

\textsuperscript{31} See \textit{Tokyo Flag Law, supra} note 9, at A1, A10. Tsuchiya Takayuki, a Tokyo assemblyman accused the JTU of "teaching students that the white of the rising-sun flag is the color of bone and red is the color of people's blood." \textit{Id.} at A10. This comment is strange because the JTU dropped its opposition to the hanging of the flag and singing of the anthem in 1995. See \textit{Aspinall, supra} note 7, at 121 (stating that the 1995 "campaign policy" makes no mention of a position regarding the flag and anthem, in comparison to the previous position which outwardly opposed both Kimigayo and the flag).

\textsuperscript{32} See \textit{Rose, supra} note 22, at 135-41.

\textsuperscript{33} See \textit{id.} at 139-41. The Nanjing Massacre took place in 1937 after Japanese soldiers occupied the then capital of China and engaged in "a storm of arson, brutality, rape, and wanton murder of unarmed civilians that raged unabated for several weeks." \textit{James L. McClain, Japan: A Modern History} 449 (2002). The Comfort Women were 100,000 to 250,000 women from territories conquered by the Japanese army who were forced into sexual slavery in military brothels. \textit{Id.} at 497. Many Japanese conservatives believe that the descriptions of these events were fabrications. See \textit{Rose, supra} note 22, at 139-40. Former Prime Ministers Hashimoto, Mori, and Abe were all members of the Committee on History and Screening, a group of Diet members who, in 1993, published a historical interpretation of World War II arguing that Japan went to war to liberate Asia from western colonialism and that the Nanjing Massacre and Comfort Women system were historical fabrications. \textit{Id.} at 139.

\textsuperscript{34} The conservative-led Society for the Creation of a New History published a history textbook for eighth grade social studies. \textit{John Nathan, Japan Unbound: A Volatile Nation's Quest for Pride and Purpose} 143-44 (2004). This textbook described Japan's campaigns in Asia as an anti-imperialist struggle supported by colonized Asian nations. See \textit{id.} at 141-42. It described the leaders of the Japanese military as saintly war heroes and although the textbook noted that the Japanese army occupied Nanjing in 1937, the textbook also said that "questions have been asked about the reliability of sources pertaining to actual events at the time, and there is a wide range of differing views." \textit{Id.} at 143-44. The textbook does not mention comfort women. \textit{Id.} at 144. The MOE approved the textbook in 2001. \textit{Id.} at 145.
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record.\(^{35}\)

Omissions or de-emphasis within Japanese education of instances of Japanese aggression during World War II and other historical issues has incensed the people and governments of South Korea and China\(^{36}\)—two countries that Japan invaded and colonized during the first half of the twentieth century.\(^{37}\) Both countries actively opposed Japan's effort to gain a permanent seat on the United Nation's Security Council; they believed that Japan's "lack of reflection on the past" meant that it could not be trusted in the "role of a world leader."\(^{38}\) In 2005, news of textbook revisions downplaying the Nanjing Massacre was also met by anti-Japanese rioting in China.\(^{39}\) In 2008, South Korea recalled its ambassador to Japan after new Japanese guidelines directed teachers to teach that a barely inhabited island subject to a territorial dispute between South Korea and Japan was actually Japanese territory.\(^{40}\)

By changing Japanese education, conservatives hope to give the Japanese people a sense of patriotism and pride about being Japanese and to restore some of the virtues of pre-war Japanese life.\(^{41}\) Some conservatives also wish to marginalize or eliminate what they view as "leftist teaching."\(^{42}\) According to a conservative historian and an educational advisor to former Prime Minister Abe Shinzo, "it is important to delete the leftwing slant and get rid of the remains of the leftists, the communists and the socialist way of thinking."\(^{43}\)

B. Background on the Flag and Anthem Controversy

The meaning of the controversy over the hanging of the flag and singing of the anthem at school ceremonies is apparent when examining the history and meaning of the flag and the anthem. Japan first adopted both the flag and the national anthem as national symbols during the nineteenth century.\(^{44}\) The Empire of Japan adopted the flag—a red circle on a white background\(^{45}\)—as its naval symbol in the 1870s.\(^{46}\) Both the flag and the anthem are also linked with Japan before and during World War II and

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35. See Nathan, supra note 34, at 140.
37. See McClain, supra note 33, at 307-12, 442-52.
38. See Tokyo Protests Rallies, supra note 36, at A8.
39. See id. Thousands of demonstrators protested in front of the Japanese Consulate in Guangzhou, while protesters in Beijing threw rocks at the Japanese Embassy and Japanese-owned businesses. See id.
41. See Rose, supra note 22, at 131-32.
43. Id.
44. See Cripps, supra note 1, at 77.
45. The design of the flag dates back over a thousand years and experts believe that the red circle represents the Shinto goddess Amaterasu, the mythical mother of the first emperor. See Kimigayo Conflicts, supra note 6, at 3.
46. See id.
with the emperor and the military—the two dominant institutions of the period. During this period, schools hung the flag outside of their gates. The Japanese military also used the current flag during the war in conjunction with other flags.

An even more intimate link exists between the anthem, the emperor, and the emperor's religious practices before the war. The anthem's title translates to "Your Majesty's Reign," and the lyrics call for the reign of the emperor to continue for thousands of years. In pre-war schools, students sang the anthem extensively as part of rituals worshiping the emperor and the Japanese state. The anthem was also sung during World War II to celebrate Japanese military exploits.

Because the anthem and flag have historical associations with the war and the worship of the emperor, liberals tend to oppose their use in schools. Others worry that the flag and anthem signal a broader campaign by right-wing politicians to create a strident nationalism among students who lack a connection to the war. Still others do not object to the singing of the anthem and hanging of the flag per se, but oppose compulsory observance of the rituals.

By contrast, conservatives have argued that raising the flag and singing the national anthem are necessary to instill patriotism in students and

47. See Cripps, supra note 1, at 78-79 (discussing the linkage of the symbols with pre-war and wartime Japan, as well as with the emperor); Kimigayo Conflicts, supra note 6, at 3 (the "flag and anthem connote Japan's militaristic past").

48. The 1889 Constitution of the Empire of Japan gave the emperor the right of sovereignty and the extensive power of an absolute monarch. STEPHEN S. LARGE, EMPEROR HIROYTO AND SHOWA JAPAN: A POLITICAL BIOGRAPHY 7 (1992). Although the emperor in fact exercised little political power and relied on the cabinet and military to govern, the public viewed the emperor as an all-powerful ruler who possessed sacred authority. Id. at 10-11. The military wielded political power during the 1930's and 1940's along with civilian bureaucrats. McClain, supra note 33, at 456.

49. Cripps, supra note 1, at 78.

50. Id.

51. Nathan, supra note 34, at 159. The anthem became the de facto national anthem after it was first performed at ceremonies at the imperial court in 1893. See id.

52. See Cripps, supra note 1, at 79. The MOE introduced the anthem into schools in 1891 along with the Imperial Rescript on Education. See id. The imperial government issued the Rescript to describe the goals of pre-war education. See id. at 79, 95. It was intended to instill the Confucian virtues of loyalty and filial piety and a sense of duty to the emperor and the state so that, "should any emergency arise," subjects would "offer [themselves] courageously to the state; and thus guard and maintain the prosperity of our imperial throne." Kathianne Hingwan, Identity, Otherness and Migrant Labor in Japan, in CASE STUDIES ON HUMAN RIGHTS IN JAPAN, supra note 1, at 51, 59. The MOE gave each elementary school a copy of the Rescript and a portrait of the emperor and empress, and on national holidays and festival days it required students to bow before the portrait and sing the anthem. See Cripps, supra note 1, at 79.

53. "When the Japanese military invaded Asia, the rising-sun flag led the corps and the 'Kimigayo' was sung when Japanese soldiers won a battle," said one teacher. Tokyo Flag Law, supra note 9, at A1.

54. Aspinall, supra note 7, at 125.

55. As another teacher stated, "I'm worried about Japan today. I think it's going back to the past, when they used schools to teach people to be nationalistic." Geoffrey York, The Empire Rises Again, Toronto Globe & Mail, Apr. 16, 2005, at F4.

56. Teachers Win Anthem Fight, supra note 13, at 1.
prepare Japanese people for increased contact with the broader world. Under this view, "Japanese people [cannot] properly learn to respect foreign cultures until they [have] learned to respect their own." Students "will feel ashamed and ridiculed when they go abroad" if schools do not teach them to respect the flag and anthem. It is also clear, however, that some members of the political right wish to "strengthen the role of the Emperor" and the emperor's place in the consciousness of the Japanese.

After World War II the American occupation authorities banned the use of the flag and anthem. The effort to restore the use of the flag and anthem in Japan's schools began in April 1948 when the MOE curriculum guidelines stated that it was desirable to raise the flag and sing the anthem on national holidays. The JTU, however, actively resisted the use of the flag and anthem, and many schools did not perform these rituals. In 1989, the MOE changed the guidelines to make the rituals mandatory at all school graduation and entrance ceremonies. The legally binding curriculum guidelines apply to all public schools and state that "[i]n ceremonies such as the enrollment ceremony and graduation ceremony [schools] shall, in light of the significance thereof, hoist the national flag and instruct [students] to sing the national anthem." These new curriculum guidelines led to a dramatic increase in the number of schools that, at least nominally, complied by hanging the flag and singing the national anthem at school ceremonies.

57. See Aspinall, supra note 7, at 125.
58. Id.
60. Cripps, supra note 1, at 97.
61. See id. at 97–98. Former Prime Minister Nakasone Yasuhiro fought for wider use of the flag and national anthem during his term in the 1980s. See id. As he stated: "The Emperor is something like the sun shining in the heavens. This is why there is respect for Japan. We must teach these national traditions through education for this reason. That is why we have such symbols as the national flag and national anthem." Id. at 98.
62. See id. at 81.
63. See id. The administration repealed all restrictions on raising flags in January 1949. Id.
64. See id. at 84–85. In 1985, despite government efforts, only bare majorities of schools both hung the flag and sung the national anthem at graduation ceremonies; the numbers were far lower in areas where the JTU influence was strong. See id.
65. Id. at 83.
67. Nominal compliance meant that, in some cases, the principal would play the anthem on a tape recorder while only the vice principal sang. See Aspinall, supra note 7, at 126.
68. See Cripps, supra note 1, at 90–91. According to MOE statistics, in 1984, 92.5% of elementary schools hung the flag and 72.8% sang the anthem, while 81.6% of senior high schools hung the flag and 53.3% sang the anthem. Id. at 91. In 1994, 98.4% of
Since the Diet passed legislation designating *Kimigayo* as the national anthem and the *Hinomaru* as the national flag in 1999, the MOE and school boards have stepped up efforts to ensure that schools abide by these rules. By 2003, 99% of public elementary and middle schools both hoisted the flag and sang the anthem during graduation and entrance ceremonies. Schools cannot legally punish students for refusing to stand or sing the anthem, but educational authorities have punished teachers for failing to do so. Between 2000 and 2005, authorities punished 875 teachers for refusing to sing the national anthem or accompany it on the piano.

C. Conservative Educational Reform and the Revision of the Fundamental Law of Education

Recently, conservative leaders have been remarkably successful in pushing through legislation revising the main statutes governing education in Japan, and their efforts have garnered significant popular support.

Elementary schools hung the flag and 85.6% sang the anthem, while in senior high schools, 97.5% hung the flag and 77.9% sang the anthem. It is the long-standing position of the MOE that standing for the flag and singing the anthem are not compulsory for children. See Educ. Minister Ryu Shinoya, Press Conference at the Ministry of Education (Nov. 11, 2008), available at http://www.mext.go.jp/b_menu/daijin/detail/08121109.htm (Education Minister states in 2008 that it is not compulsory under the law for children to stand and sing the anthem); see also Mayumi Itoh, *Japan's Neo-Nationalism: The Role of the Hinomaru and Kimigayo Legislation* (Japan Policy Research Inst., Working Paper No. 79, 2001), available at http://www.jpri.org/publications/workingpapers/wp79.html (Education Minister states in 1999 that children will not be forced to sing the anthem). Officials in the MOE have stated that although teachers can instruct students to stand and sing the anthem, they cannot compel students to do so, and students may not be reprimanded for non-compliance with an order if the order interferes with their inner convictions, nor may the refusal to comply affect a student's academic evaluations. See Itoh, supra.

The MOE reiterated, however, that it would not force children to sing the anthem. New Mandate: Patriotism, supra, at 1.

Part of the reason for this success is that the right holds power without significant left-wing opposition, which has stymied such reform in the past. See Japanese Politics Central, http://jpcentral.virginia.edu/Elections.htm (last visited Mar. 5, 2009). In addition, right-wing educational proposals have significant popular support because the public is dissatisfied with public schools due to recent drops in academic performance and highly publicized cases of bullying and juve-
The principle reform was the revision of the FLE, the cornerstone educational statute originally written by American occupation authorities, which sets out the goals of the Japanese education system. This law and its recent amendments will affect how the Supreme Court rules on the Tokyo District Court Case and the fate that awaits teachers who violate orders to stand and sing.

1. The Original FLE

After World War II, American occupation authorities wanted to remove the nationalistic and militaristic elements of the Japanese education system and institute democratic- and individual-centered education as a key to democratizing Japan. As part of the flurry of post-war education reforms aimed at accomplishing this goal, the Japanese government drafted and enacted the FLE. The FLE stated that the aim of education should be

the full development of personality, striving for the rearing of the people, sound in mind and body, who shall love truth and justice, esteem individual value, respect labor and have a deep sense of responsibility, and be imbued with the independent spirit, as builders of a peaceful state and society.

The law contained only eleven short and simple mandates for the administration of schools. In Article 10, the law set out a restrictive rule for school administration: “Education shall not be subject to improper control, but shall be directly responsible to the whole people.” The law then required that “[s]chool administration shall, on the basis of this realization, aim at the adjustment and establishment of the various conditions required for the pursuit of the aim of education.”

nile crime. See, e.g., Setsuko Kamiya & Akemi Nakamura, Suicides Lay Bare Bullying Menace, JAPAN TIMES, Nov. 24, 2006, at 3; Lower House, supra. The perception that the education system is broken has also cast a negative light on teachers. A 2005 survey showed that 60% of the Japanese are dissatisfied with the quality of public school teachers. See Motohiro Kondo, Rethinking Japanese Education—Again, JAPAN ECHO, Apr. 2005, at 27, 29, available at www.japanecho.co.jp/sum/2005/320208.html.

74. See Kyōiku Kihon Hō [Fundamental Law of Education], Law 120 of 2006 [hereinafter Revised FLE]; Council Urges Reform, supra note 20.
75. See ASPINALL, supra note 7, at 23–25.
76. See id. at 18–20.
77. See id. at 19; MCCLAIN, supra note 33, at 549.
79. See id. art. 10.
80. Id.
81. Id. This provision may have reflected the goals of the Allies of democratization and decentralization of control as a vaccine against the resurgence of the pre-war political control of education under the MOE. See MCCLAIN, supra note 33, at 548 (stating that the American occupation authorities instituted reforms based on the principle that “control of the schools should be widely dispersed rather than highly centralized”). The law has been a failure in this respect. The MOE, with the support of successive conservative governments, managed to reassert control over the curriculum. ASPINALL, supra note 7, at 21–22. Nevertheless, the FLE retained its value both as a rallying point for progressives and as a basis for lawsuits challenging the practices of the MOE.
2. The 2006 Revision

The revised FLE came into effect in 2006 and contained a number of important differences from the original version. It added new sections about subjects such as special education and life-long learning, both of which have become important since the enactment of the original statute. In addition, several important changes were made to existing sections. First, the revised law removed several parts of Article 1, the Aims of Education, including the aims to strive to raise children who “esteem individual value,” “love . . . truth and justice,” and “are imbued with an independent spirit.” The new statute also added a list of “targets” for education to achieve such as “master a wide knowledge;” “respect the value of the individual, and develop that individual’s ability;” and “respect justice and responsibility, equality of the sexes[,] . . . oneself and others.” Most of these targets were uncontroversial; however, the goal that education “cultivate[s] the attitude that esteems tradition and culture, loves our country and hometowns that developed them, and at the same time, respects other countries and contributes to international society’s peace and development” has provoked considerable controversy. Liberals fear that the government could steer the education system to promote tradition, patriotism, and respect for the state at the expense of freedom and individual rights.

Lastly, the statute extensively revised its sections dealing with educational administration. Article 10—“Educational Administration”—retains its prohibition against “improper control,” but no longer states that education “shall be directly responsible to the whole people.” It now says that “[e]ducation should be performed without improper control, and on the basis of what this law and other laws stipulate.” It goes on to specify that the state is responsible for “determin[ing] and enforc[ing] education related measures throughout [the country,]” and that local governments are responsible for “plan[ning] and enforc[ing] measures that correspond

82. See Revised FLE.
83. See id. arts. 3, 4, 7, 8, 10, 11.
84. Compare Revised FLE, art. 1, with Original FLE, art. 1. These changes may reflect the conservative criticism that the original FLE overemphasized students’ individuality. See Akito Okada, Education of Whom, for Whom, by Whom? Revising the Fundamental Law of Education in Japan, JAPAN F. 425, 429 (2002). In its place is the aim to “strive to rear sound people who are furnished with the necessary nature as builders of a democratic and peaceful nation and society.” Revised FLE, art. 1 (translated by author).
85. Compare Revised FLE, art. 2, no. 1, with Original FLE, art. 2.
86. Compare Revised FLE, art. 2, no. 2, with Original FLE, art. 2.
87. Compare Revised FLE, art. 3, no. 3, with Original FLE, art. 3.
88. Revised FLE, art. 2, no. 5 (translated by author).
90. See Revised FLE, art. 16.
91. Compare id., with Original FLE, art. 10.
92. Revised FLE, art. 16, no. 1 (translated by author).
to the real situation [in the area]." The passage of the law means that other education-related laws and policies must be revised to conform to the revised FLE’s principles. Liberals fear that the revised law will allow the MOE and conservative boards of education to interfere directly in classroom instruction and dictate what teachers can and cannot teach.

II. The Japanese Supreme Court and Relevant Constitutional Law

A. The Protection of Individual Freedoms Under the Japanese Constitution

Under the Japanese Constitution, statutes and other government actions are subject to judicial review to determine whether they infringe upon constitutional rights. The Constitution guarantees a significant number and variety of rights: Thirty-one of the ninety-two articles of the Constitution grant rights to individuals. Despite the breadth and depth of these protections, the text and judicial interpretation of the Constitution limits their application. Articles 12 and 13 of the Constitution set the "public welfare" as a limitation on the people’s exercise of their constitutional rights. Based on Articles 12 and 13, Japanese courts and constitutional scholars have read an "implicit 'public welfare' qualification" into all of the rights that the Japanese Constitution guarantees. A former Japanese Supreme Court Justice, Justice Iriye, summarized this qualification: "the liberties in the Constitution are not absolutely unlimited; in situations in which there exists sufficient reason recognized as absolutely necessary for public welfare or for other constitutional requirements, a limitation

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93. Id. art. 16, nos. 2, 3 (translated by author).
94. See Ishizuka, supra note 81. For example, since the passage of the new statute, the Diet has revised the school education law so that it now lists “nurturing in children a love of country and homeland” as one the goals of compulsory education.” Lower House, supra note 73, at 1. The Diet also revised the local education administration law to allow the Education Minister to issue binding instructions to local boards of education if the boards fail to follow education laws. See id.
95. See KENPO, art. 81 (stating that the Supreme Court has the power to “determine the constitutionality of any law, order, regulation or official act”); Fritz Snyder, The Fundamental Human Rights Compared in Two Progressive Constitutions: Japan and Montana, 14 INT’L LEGAL PERSP. 30, 30 (2004).
96. See Sylvia Brown Hamano, Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights, 1 U. PA. J. CONST. L. 415, 431-32 (1999). Among these rights are political rights such as equality before the law, personal rights such as freedom of religion and expression, social rights such as the right to choose a residence, economic rights such as the right to an education and to organize and bargain collectively, and procedural rights such the right to counsel and to a speedy and impartial trial. See KENPO, arts. 14, 20, 21, 22, 26, 28, 34, 37.
97. See KENPO, arts. 12, 13. Article 12 provides that “[t]he freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.” KENPO, art. 12. Article 13 provides that “[a]ll of the people shall be respected as individuals. Their right to life, liberty, and the pursuit happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other government affairs.” Id. art. 13.
98. See Snyder, supra note 95, at 36.
thereof . . . would not be considered unconstitutional.”99 In light of the above, Japanese constitutional law may reflect the principle that “when push comes to shove, constitutional guarantees must give way to”100 public welfare—“the general good of all the members of society.”101 The Japanese Supreme Court has rarely found statutes or official acts unconstitutional,102 but this does not mean that the rights guaranteed by the Constitution are a dead letter.103 Nevertheless, parties should not look to the Supreme Court for relief from government policies that arguably violate the letter or spirit of the Constitution.

B. Supreme Court Decisions Related to Issues in the Flag and Anthem Cases

The Japanese Supreme Court makes the final and authoritative interpretation of the Constitution and Japanese statutes.104 Consequently, to resolve any Japanese legal issue, it is important to look at relevant Supreme Court precedent.

1. Freedom of Conscience

Article 19 of the Japanese Constitution states that “freedom of thought and conscience shall not be violated.”105 Japanese constitutional scholars

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99. Id.
101. Id. at 28.
102. See id. at 36–37. Between 1950 and 1980, the Court found unconstitutionality only twice in 186 civil proceedings in which there was an issue of constitutionality. Id. For explanations why the Japanese Supreme Court has been so deferential to the Diet and government action, see id. at 42 (arguing that the Japanese courts are sensitive to the supremacy of the Diet within the Japanese Constitutional order); Hamano, supra note 96, at 443–44 (arguing that the judiciary and Supreme Court have a conservative political orientation); Ronald J. Krotoszynski, Jr., The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression, 1998 WIS. L. REV. 905, 983–85 (1998) (explaining that an activist Supreme Court that strikes down laws would run afoul of Japanese cultural norms of conflict-avoidance).
103. See Krotoszynski, supra note 102, at 985 (“[F]reedom of speech is a meaningful reality in Japan. This observation has been almost universally endorsed for the last twenty-five years.”); see also Ford, supra note 100, at 38–40 (discussing exceptions to the general rule that the Japanese Supreme Court rarely finds a law unconstitutional).
104. It should be noted that because Japan is a civil law jurisdiction, Japanese courts do not strictly follow the principle of stare decisis and that theoretically they must analyze each case based on the statute or article in question. KENNETH L. PORT & GERALD PAUL MCAULIFFE, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 43 (2d ed. 2003). Modern Japanese courts, however, cite other cases dealing with similar issues and have created a number of judicial rules that depart from the text of statutes and the Japanese Constitution. See id. Instead of stare decisis, Japanese courts follow a “system of case consistency.” MERYLL DEAN, JAPANESE LEGAL SYSTEM 136 (2d ed. 2002). As Meryll Dean points out, “the judgments of superior courts are followed and courts at all levels try to follow their own decisions.” Id. Accordingly, although its decisions are not binding in the same way that the decisions of the United States Supreme Court are, the Japanese Supreme Court’s precedents can be taken as a fair guide for how it and other courts will rule in the future. See id.
105. KENPO, art. 19.
tend to group "thought" and "conscience" together as one and believe that the two include a person's world view, ideology, view of humanity, and other aspects of their "inner spirit." The government infringes up this right when it forbids individuals from holding a particular thought or belief or imposes disadvantages upon those who do. It also infringes on this right by compelling a person to confess whether they hold a certain belief.

The Court decided the leading case on Article 19 in 1956 when it upheld a lower court's judgment in which the lower court ordered the defendant to publish an apology in the newspaper for libelous statements about the plaintiff. The lower court had required publishing that "the aforementioned broadcast or article was different from the truth and we injured the honor of the plaintiff and caused [him] trouble. Here we express our apologizes." While conceding that at times compelling an apology may be an unreasonable restriction on the judgment debtor's conscience, the Supreme Court held that orders "that simply required the confession of the facts and express[ion of] apologetic intent . . . could not be understood to demand the violation of the defendant's freedom of conscience."

Although the opinion left open the possibility that more extensive forced apologizes or other expressions could violate an individual's freedom of conscience, none of the Court's subsequent opinions have found a forced expression to do so. In two cases involving labor disputes, employers appealed an order of labor councils that required employers to post notice to unions that the employers had engaged in unfair labor practices against unions and to give unions written promises that they would abstain from unfair labor practices. The employers argued that these orders infringed upon their freedom of conscience because the orders commanded them to "deeply apologize[ ]" to the unions or to express that they "deeply regret[ted]" what they had done. Although in both cases the Court noted that the language of the compelled apology was unsuitable, the Court upheld the orders on the grounds that the main purpose of the apology was to emphasize that the employer would not repeat the action, not to compel "the manifestation of apologetic intent."

106. NOBUYUKI ASHIBE, KENPO, 139 (1997).
107. Id.
108. Id. at 139–40.
110. Id. (translated by author).
111. Id. (translated by author).
112. See id.
114. Orientaru Môta Kaisha, 765 HANREI TAIMUZU at 178; Iryo Hôjin Ryôshôkai, 734 HANREI TAIMUZU at 106.
115. Orientaru Môta Kaisha, 765 HANREI TAIMUZU at 178; Iryo Hôjin Ryôshôkai, 734 HANREI TAIMUZU at 106.
2. Interpretation of the FLE's Prohibition on Improper Control

Prior to the 2006 revision of the statute, the Supreme Court's leading decision about education and the FLE's prohibition on "improper control" was the 1976 Asahikawa Proficiency Test Case.116 There, the Supreme Court reversed a lower court's finding that a nationwide academic proficiency test that the MOE created and schools throughout the country administered was illegal.117

The Court applied a three-part test to determine whether the examination constituted undue control of education and was illegal under the FLE: (1) Were the ends reasonably related to matters that the MOE is authorized to deal with?; (2) Was the test necessary to achieve those ends?; and (3) Did its methodology have any characteristics "which render[ed] it unfair control over education?"118 The Court first determined that the examination was legal because the MOE's aim to use the examination data to determine students' general level of academic ability had a reasonable relationship to the MOE's authority to improve the quality of education.119 It then held that the test was necessary because there was no other way to gain data about the abilities of junior high school students.120 The Court concluded that the test did not constitute unfair control over education because it was investigative of general student academic ability.121 Thus, the Court found that the examination was not an educational activity per se because (1) it did not require each school to change part of the curriculum,122 and (2) "[t]he test did not influence or control education so greatly as to nullify its propriety as a necessary means to accomplish its lawful purposes."123

In the opinion, the Court also pointed out a number of things that might be forbidden under the Constitution or the FLE. The Court noted that the Constitution might "forbid[] national meddling [into the content of education] which would hamper the development of . . . free and independent personalities."124 The Court also remarked that some of the guidelines "prescribed [curriculum instructions] in too great detail and [were] not appropriately binding on local governments and teachers," but upheld the guidelines because "teachers retain wide discretion to provide education creatively and flexibly."125 Orders that do not permit teachers

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117. See id. at 230–31.
118. Id. at 241–42.
119. Id. at 241.
120. Id.
121. See id.
122. See id. at 241–42.
123. Id. at 242.
124. Id. at 238. For an example of such meddling, the Court used "coercing the adoption of educational content which inculcates a one-sided ideology and purveys erroneous information." Id.
125. Id. at 240.
this discretion might not pass muster under the statute.\textsuperscript{126} It should be noted, however, that as of December 2008 the Court has never declared an educational policy illegal on the ground that it violates the FLE's prohibition on undue control.\textsuperscript{127}

3. Rights of Public Employees

a. Constitutional Rights

Japanese public employees are subject to more legal restraints on their constitutional rights than ordinary citizens. In particular, they are prohibited from "engaging in political acts,"\textsuperscript{128} and labor activities such as strikes.\textsuperscript{129} The Japanese Supreme Court has generally upheld these restrictions on the freedom of expression and labor rights of public employees.\textsuperscript{130} The Court has recognized that these restrictions would be unconstitutional if applied to the public, but has justified them by relying on the public welfare doctrine,\textsuperscript{131} the Constitution's statement that "all public officials are servants of the whole community,"\textsuperscript{132} and the principle that public servants must be seen as politically neutral.\textsuperscript{133} Although it has occasionally struck down more extreme cases of overreaching by public authorities, on the whole, the Court has been unreceptive to constitutional claims by public employees.\textsuperscript{134}

b. Discipline by Superiors

Japan's Local Public Servant Law governs the employment and man-

\textsuperscript{126} See id.

\textsuperscript{127} The author of this article searched the Japan Law Information Center's LEGALBase database (http://jlic.softhouse-ihu.com/doc/index.php) for cases in which the Supreme Court decided whether a particular educational policy was illegal under Article 10 of the FLE. He did not find any cases in the Court concluding that a policy violated the Article.

\textsuperscript{128} LAWRENCE WARD BEER, FREEDOM OF EXPRESSION IN JAPAN 225 (1984) [hereinafter FREEDOM OF EXPRESSION] (quoting Kokka kōmūinhō [National Public Employees Law], Law No. 201 of 1947, art. 102, no. 1). This prohibition on political activities does not include the right to vote. Id.

\textsuperscript{129} See id. at 223-24 (quoting National Public Employees Law, art. 98, no. 2).

\textsuperscript{130} See id. at 236-39 (providing examples of the Court upholding sanctions against public employees for participating in political rallies, handing out campaign literature, and mounting posters supporting electoral candidates). According to Lawrence Beer, the prevailing court doctrine is that the political activities of a public employee "which do not impair performance of duty, . . . which are engaged in away from official premises while not on duty, and which are performed by a nonmanagerial service employee in a peaceful manner, are nevertheless liable to criminal sanctions." Id. at 238.


\textsuperscript{132} KENPO, art. 15, no. 2.

\textsuperscript{133} See The Continuing Revolution, supra note 131, at 273.

\textsuperscript{134} See id. at 274. In a noteworthy exception to this trend, in 1986, the Court quashed a prefecture's educational authority's attempt to discipline teachers who attended a labor rally on a school holiday. See id. However, as Lawrence Beer notes, "[t]he officials . . . need to litigate to reassert control over innocent activities is more noteworthy and typical than the Supreme Court's vindication of the teachers." Id.
agement of all public employees by local authorities. Under the law, public officials have a legal duty "to comply with laws and regulations, prefectural or municipal ordinances, rules of the relevant local public enti-
eyes . . . and faithfully observe the official orders of their superiors." If public officials do not comply, their superiors can discipline them under Article 29 by admonishment, cutting pay, suspension, or dismissal. Boards of education have authority over the teachers at schools established by the prefecture or municipality.

The statute states that "all discipline and restriction must be fair." Nevertheless, the Supreme Court has given boards of education considerable discretion to discipline teachers who disobey orders or deviate from the required curriculum. In a 1990 decision, the Court reversed a lower court's ruling that quashed the Fukuoka Prefecture Board of Education's firing of two high school teachers who ignored the required social studies curriculum and instead taught and tested their students about Marxist history. The teachers were also suspected of instigating student protests against an unpopular principal. The Court said that to be illegal, the firing had to be "manifestly inappropriate from a social perspective" and "exceed and abuse" the discretion of the board. It reasoned that boards make disciplinary decisions by looking at all aspects of a violation, the teacher's attitude and disciplinary record, and the influence that the punishment would have socially on other employees; and that courts should not second guess a board's decisions. The Court ultimately held that the decision to fire the teachers was "not inappropriate" and did not exceed the discretion of the board because the teachers deviated considerably from the required course of study (and were thus subject to dismissal under the Local Government Public Servant Act) and had disciplinary records for taking part in illegal strikes.

III. The Flag and National Anthem Cases

The Tokyo Metropolitan Government and its constituent wards have punished more teachers for failing to stand and sing the anthem at school events than any other prefecture in the country. It is no coincidence

135. See Chihō kōmuinhō [Local Public Servant Law], Law No. 261 of 1950, art. 1.
136. Id. art. 32 (translated by author).
137. See id. art. 29, no. 1.
138. See id. art. 6; see also Chihō kyōiku gyōsei no soshibi oyobi unei ni kansuru hōritsu [Law Related to Local Educational Administration Organization and Management], Law No. 112 of 1956, art. 23, no. 3.
139. See Local Public Servant Law, art. 27.
141. Id.
142. Id. at 79-80.
143. Id. at 80 (translated by author).
144. Id.
145. Id. at 81.
146. See Fitzpatrick, supra note 12, at 20 ("Of Japan's 47 prefectures, Tokyo is by far the strictest about signing the national anthem . . .").
that Tokyo’s governor, Ishihara Shintaro, and some of the mayors of the wards are outspoken conservatives.\textsuperscript{147} Tokyo and its wards have also adopted other conservative educational policies; for example, they drastically curtailed the influence of teachers over education policy and decision-making in public schools.\textsuperscript{148} The Metropolitan Board of Education (BOE) and the boards of education of several of the capital’s wards have adopted history textbooks prepared by right-wing historical societies.\textsuperscript{149} This section describes the efforts of the Tokyo Metropolitan Government and its constituent ward governments to enforce the singing of the anthem and the ensuing litigation.

A. Tokyo District Court Litigation

1. Events Leading Up to the Litigation

The Metropolitan Board of Education’s policy—which led to the Tokyo District Court’s 2006 decision—began to take shape in 1998 when the MOE released a survey showing that Tokyo public high schools had the lowest rate of compliance with the Ministry’s guidelines in the country: although 84% of schools had raised the flag, only 3.9% of the city’s schools had sung the anthem at graduation.\textsuperscript{150} In November 1999, the Metropolitan Board of Education formed the “Metropolitan School Graduation and Entrance Ceremony Countermeasures Section,” and the superintendent of the Metropolitan Board of Education sent a notice to all principals of Tokyo’s public high schools telling them to explain to teachers their responsibilities under the MOE’s guidelines.\textsuperscript{151} At all graduation ceremonies in March 2001, the flag was raised, and the anthem was sung at every public high school in Tokyo.\textsuperscript{152}

Nevertheless, members of the Tokyo Metropolitan assembly complained to the superintendent of the Metropolitan Board of Education that there were teachers who were not standing for the singing of the national anthem and that, before the singing of the national anthem, the master of ceremonies or school administrators told students and other attendees that they had the “inner freedom” to choose not to stand and sing.\textsuperscript{153} The

\begin{itemize}
  \item \textsuperscript{147} See \textsc{Nathan}, supra note 34, at 180 (discussing Ishihara’s conservative political stance); \textit{Conservatives Push Virtues}, supra note 27, at 26.
  \item \textsuperscript{148} See \textit{Conservatives Push Virtues}, supra note 27, at 26. Traditionally, teachers and principals in Tokyo—where the JTU was strong for much of the post-war period—worked together to make decisions about the schools. See \textit{id}. In 1998, however, the Metropolitan government changed the legal status of teachers to “advisors” by putting all legal authority for school decisions in the principals’ hands. See \textit{id}. In 2006, the government prohibited teachers from raising their hands and voting in school meetings. See \textit{id}.
  \item \textsuperscript{149} See \textsc{Nathan}, supra note 34, at 148.
  \item \textsuperscript{150} See Nagai v. Tokyo Kyōikuinkai, 1228 Hanrei Taimuzu 88, 99 (Tokyo D. Ct., Sept. 21, 2006).
  \item \textsuperscript{151} \textit{id.} at 99-100.
  \item \textsuperscript{152} \textit{id.} at 101.
  \item \textsuperscript{153} \textit{id.} The Metropolitan School Graduation and Entrance Ceremony Countermeasures Section identified six “problems” with the manner in which schools have implemented the MOE’s guidelines: (1) there were schools that did not correctly place the national flag at the center of the stage; (2) there were schools that performed the gradua-
superintendent promised to "strongly guide" each school and the board of education for each ward.  

In 2003, the Metropolitan Board of Education took three steps in response to the assembly members' complaints. First, it sent a detailed directive to the principals of all of the city's public high schools directing schools and teachers to hang the flag and sing the national anthem at school ceremonies. Specifically, the directive instructed the principals to order teachers to stand and sing the anthem and to order the music teacher to accompany the anthem on the piano—a legal prerequisite to disciplining teachers for their failure to do so. The directive also stated that teachers who did not obey orders would be held accountable. On the same day, the board released a report "regarding the handling of unsuitable educational administrators," which stated that principals and vice principals with unsatisfactory job records could face mandatory coursework or demotion—hinting at the fate of principals who failed to implement the directive.

Second, at a series of meetings with all of the principals in the city, BOE officials gave more detailed instructions to principals about how to run graduation ceremonies and entrance ceremonies. The superintendent instructed principals to assign seats to the teachers in advance and to inform the Metropolitan Board of Education personnel office of any teachers who did not stand for the singing of the national anthem. Later, at the Tokyo Metropolitan Assembly, the superintendent also opined that teachers whose students did not sing the anthem were either incapable of managing their classes or were deliberately violating the curriculum guidelines—both of which are causes for discipline. At other meetings, board of education supervisors distributed further instructions to principals saying that it was forbidden to tell students and attendees that they did not have to sing. Every public high school principal complied with the Met-

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154. See id. The instructions specified that schools must hang the flag over the center of the stage where the ceremony would take place and hang a flag outside of the school. Id. at 102. It also specified the size of these flags. Id. at 103. It stated that the master of ceremonies must announce that the national anthem will be sung and then ask for the audience to stand and sing, and that teachers must stand, face the flag, and sing the anthem while facing the flag. Id. at 102. Lastly, the instructions demanded that a teacher accompany the anthem on the piano. Id.
155. Id. at 102.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id. at 105.
162. Id. at 103.
ropolitan Board of Education’s instructions and gave individual written and verbal orders to all of their staff.163

Finally, when the city’s public school graduation ceremonies took place in March 2004, a supervisor from the Metropolitan Board of Education was at each ceremony.164 The supervisors sat behind the teachers and recorded several things, including whether the master of ceremonies announced the singing of the anthem and asked everyone to stand and whether the teachers, students, and parents stood for the anthems.165 When teachers did not stand for the national anthem or refused to accompany the song on the piano, the principal or vice principal of the school reported the teachers to the Metropolitan Board of Education’s human resources section.166 In total, 239 teachers refused to stand for the national anthem or accompany the anthem on the piano at the March 2004 graduations and April 2004 entrance ceremonies.167

The Metropolitan BOE formally admonished 204 high school teachers and 23 more teachers at Metropolitan elementary schools, junior high schools, and schools for disabled children.168 The Board of Education cut the pay of four teachers who had been previously disciplined.169 All of these teachers were also required to attend special training to “reflect on their responsibilities as a teacher.”170 More ominously, the Board of Education cancelled the contracts of three teachers who had reached the mandatory retirement age and had been re-contracted for post-retirement employment and turned down five other teachers’ requests for renewal of post-retirement contracts.171

Politicians in Tokyo applauded the Metropolitan Board of Education’s actions. Governor Ishihara thanked the superintendent of the BOE for establishing a uniform rule at city graduation and entrance ceremonies.172 A board member was more direct:

163. Id.
164. Id. at 104–05.
165. Id. at 105.
166. Id.
167. Id. Under the BOE’s policy, the BOE formally admonished teachers who refused to stand for the national anthem if it was their first offense. Id. If it was a teacher’s second offense, the BOE cut his or her pay 10% for one month, or six months after a third refusal. Id. If it was the teacher’s fourth refusal, the BOE suspended the teacher for one month. Id. In addition, the BOE also informally gave warnings to sixty-seven teachers including grade leaders—teachers who supervise the group of teachers responsible for the students in a certain grade—and school administrators for a lack of management ability. Id. at 106. According to the Board, these teachers and administrators failed to ensure that the students at their school stood for the anthem or failed to give appropriate “encouragement” to teachers who did not sing. Id. These teachers and administrators had told students and parents that they could use their own judgment in deciding whether to stand and sing. Id.
168. Id. at 105.
169. Id.
170. Id. at 106 (translated by author).
171. Id. at 105.
172. Id.
We must not allow any leniency to remain . . . Some might think that "isn’t it ok if it’s just one or two people [who are not standing]," but what we are fixing is a thing that is like a cancer that has been made in a half-century, and if you leave even a few cancer cells, then they will multiply again soon.\textsuperscript{173}

An assemblyman believed that the BOE was too lenient with teachers and told the superintendent that teachers who repeatedly refused to stand and sing or whose students failed to do so should not be allowed to return to teaching.\textsuperscript{174}

2. \textit{The Tokyo District Court’s Opinion}

In January 2004, 228 of the disciplined teachers filed suit against the Metropolitan Board of Education seeking damages for emotional distress and for nullification of the directive.\textsuperscript{175} One hundred and seventy-three more teachers joined the suit.\textsuperscript{176} The result of the lawsuit was a resounding victory for the plaintiffs.\textsuperscript{177}

The court began by declaring that an order to stand and sing the anthem or accompany the anthem on the piano violated the plaintiffs’ freedom of conscience as guaranteed by Article 19 of the Constitution.\textsuperscript{178} The court recognized that for some people the flag and the anthem had ideological content because they were used as the “spiritual pillars of imperialist and militarist thought” until the end of World War II.\textsuperscript{179} It reasoned that although ordering someone to stand or accompany a song on the piano was not the same as forbidding someone to hold a belief, compelling someone who refuses to participate for ideological reasons is the same thing.\textsuperscript{180}

The court then had to determine whether the teachers’ freedom of conscience could be restricted to preserve public welfare.\textsuperscript{181} To decide this issue, the court looked at the three sources of authority for such a restriction: 1) the requirement in the curriculum guidelines that teachers instruct students to sing the anthem; 2) the Metropolitan Board of Education’s directive to the principals; and 3) the principals’ orders to the teachers.\textsuperscript{182} The court found that the curriculum guidelines did not conflict with Article 10 of the FLE and were legally binding, but held that the guidelines did not create an individual duty for teachers to stand for the anthem or accompany it on the piano.\textsuperscript{183} The guidelines neither gave detailed instructions about how teachers should educate students about the anthem and flag, nor did they state whether teachers were supposed to stand for

\begin{footnotes}
\item 173. \textit{id.} at 105-06 (translated by author).
\item 174. \textit{id.} at 106.
\item 175. \textit{Teachers Win Fight, supra} note 13, at 1.
\item 176. \textit{id.}
\item 177. \textit{id.}
\item 178. \textit{Nagai, 1228 HANREI TAIMUZU} at 109 (translated by author).
\item 179. \textit{id.}
\item 180. \textit{id.}
\item 181. \textit{See id.}
\item 182. \textit{id.} at 109-12.
\item 183. \textit{id.} at 109-10.
\end{footnotes}
the anthem or accompany the anthem on the piano.\textsuperscript{184}

The court then held that the Metropolitan BOE's directive to principals conflicted with Article 10 of the FLE and thus did not create a duty for principals or teachers.\textsuperscript{185} It found that the order violated the rule against unreasonable control because it left each school almost no discretion about the administration of its ceremonies, and it essentially compelled teachers to give students only one theory or viewpoint: that all should stand and sing the national anthem.\textsuperscript{186}

Lastly, the court considered whether the orders of the individual principals created a duty to stand or accompany the anthem.\textsuperscript{187} The court recognized that although teachers generally owe a duty to follow the orders of a principal, they have no obligation to follow an order that is greatly and clearly flawed.\textsuperscript{188} Returning to the curriculum guidelines, the court found that teachers do have a duty to give students guidance about the hanging of the national flag and the singing of the national anthem and are not allowed to impede the ceremony.\textsuperscript{189} Nevertheless, the teachers who did not stand did not disrupt the ceremony, discourage students from standing, or hinder the guidelines' educational goal of teaching students a respectful attitude towards the flag.\textsuperscript{190} Additionally, music teachers, who typically owe a duty to accompany music classes on the piano, do not disrupt the ceremony by not accompanying the anthem because schools can use a recording of the song.\textsuperscript{191} Based on these principles, the court held that the principals' orders exceeded the minimally necessary restrictions allowed to implement the MOE's aims for high school education.\textsuperscript{192} As a result, the court found that the principals' orders were flawed and did not create a duty for teachers to stand or to accompany the song on the piano.\textsuperscript{193}

Thus, the court concluded that the BOE's disciplinary measures were an abuse of authority and nullified them.\textsuperscript{194} The court also awarded the teachers 30,000 yen each in damages for emotional distress.\textsuperscript{195} The Metropolitan Board of Education appealed the decision.\textsuperscript{196} As of March 2009, the Tokyo High Court is hearing proceedings in the case and has not issued a decision.

\textsuperscript{184} Id.
\textsuperscript{185} Id. at 111-12.
\textsuperscript{186} Id. at 111.
\textsuperscript{187} Id. at 112.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 112-13.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id. at 113.
\textsuperscript{196} Keiji Hirano, Concerns Aired Over Democracy, Freedom in Schools, Japan Times, Jan. 18, 2007, at 3.
B. The Music Teacher Case and the Supreme Court’s Decision

The events leading to the Supreme Court’s 2007 decision in the Music Teacher Case took place in Hino City, a suburban city within the Tokyo Metropolis. Since 1995, Elementary School A in Hino City has had a policy that teachers and students would sing the national anthem at graduation and enrollment ceremonies and that the school’s music teacher would accompany the anthem on the piano.

The plaintiff, a music teacher, joined the elementary school’s faculty on April 1, 1999, and in preparation for the April 6 entrance ceremony, the principal told the plaintiff that she would need to play the anthem on the piano. The plaintiff told the principal that she would not do so because of her beliefs. The principal then ordered the plaintiff to accompany the anthem, but the plaintiff refused. Finally, on the day of the ceremony, the principal ordered the plaintiff to perform again. When the master of ceremonies asked the attendees to sing the national anthem, the plaintiff sat silently in front of the piano. The principal played a tape recording of the anthem. He then gave the teacher an official admonition under the Local Public Servant Law.

The plaintiff sued the Tokyo Metropolitan Board of Education and the principal to rescind the admonition. She argued that she could not accompany the anthem because it is connected with Japan’s aggression in Asia and the principal’s order to do so violated her freedom of conscience. Both the Tokyo District Court and the Tokyo High Court ruled against the plaintiff.

The Supreme Court held that the admonition did not violate the plaintiff’s freedom of conscience. Although the Court noted that the plain-

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198. See Tokyo Kyōikuinkai, 61 MINSHŪ at 293.

199. Id.

200. Id.

201. Id.

202. Id.

203. Id.

204. Id. at 294.

205. Id.

206. Id. at 291.

207. Id. at 294.


209. See Tokyo Kyōikuinkai, 61 MINSHŪ at 296.
tiff’s action may be based on her view of history, it stated that her refusal to play was not “inseparably connected with” her view of history or the world, so the order to accompany the anthem “cannot be recognized to directly deny the plaintiff’s view of history and the world.” Instead, the court reasoned that because “at the time of the incident, it was well known that ‘Kimigayo’ was widely sung as the national anthem in [ceremonies] of public schools[,] . . . . from an objective perspective” accompanying the national anthem is a duty that is expected of a music teacher, and thus accompanying the anthem on the piano did not externally manifest the plaintiff’s thoughts. Consequently, the order did not violate the plaintiff’s freedom of conscience because it was not meant “to compel the [plaintiff] to have a specific thought or prohibit [the plaintiff] from having a specific thought, or demand the [plaintiff] to confess that [she] has or does not have a specific thought.”

Lastly, the Court sought to determine if the order to accompany the anthem was unreasonable. It stressed that the order could not be unreasonable in light of the plaintiff’s position as a public servant, the laws about education, and the curriculum guidelines. As a public servant, the plaintiff had a duty to faithfully observe the orders of her superiors. To show that an order to accompany the national anthem on a piano could not be unreasonable, the Court cited the School Education Act, which listed an understanding of “the . . . traditions of the children’s home communities and of the State” as a goal of elementary education, and the Curriculum Guidelines requirements that teachers instruct students to sing the national anthem.

IV. Predicting the Supreme Court’s Future Ruling and Its Potential Consequences

The Tokyo Metropolitan Government appealed the Tokyo District Court’s ruling to the Tokyo High Court. The Tokyo High Court will hear evidence, review the lower court’s findings of facts and law, and will then either reverse the lower court’s judgment or dismiss the appeal. Regardless of the outcome, it is almost certain that the Tokyo District Court Case will be heard by the Supreme Court. In addition, at least

210. Id. at 294 (translated by author).
211. Id. at 294–95 (translated by author).
212. Id. at 295 (translated by author).
213. Id. at 295–96.
214. Id.
215. Id. at 295.
216. Id. at 295–96 (translated by author).
219. In Japanese courts, a party who loses an appeal of first instance can appeal to the Supreme Court as a matter of right if the appellate judgment raises a constitutional issue. Id. at 21. Because the principal issue in the Tokyo District Court Case is a consti-
twelve other lawsuits have been filed around the country by teachers who boards of education have disciplined for failing to stand and sing the national anthem. Lower courts hearing these cases also face the issue of whether an order to stand and sing the national anthem violates a teacher's freedom of conscience. This section will discuss the Supreme Court's likely ruling in the Tokyo District Court Case and some of the possible consequences of such a ruling in light of the new education legislation.

A. The Supreme Court Will Not Uphold the Ruling in the Tokyo District Court Case

1. Freedom of Conscience

In the Music Teacher Case, the Court held that ordering a piano teacher to play the national anthem did not violate the teacher's freedom of conscience for two reasons. First, in the Court's view, refusing to accompany the anthem was not inseparably connected with the teacher's view of history or view of the world. Second, the principal's order to accompany the anthem—from the perspective of an objective observer—was not an order to manifest agreement with an idea, something that would breach the declarant's freedom of conscience. Rather, because the public knew that students and teachers sang the anthem at ceremonies in public schools with piano accompaniment, the Court reasoned that an objective observer would perceive accompanying the anthem at the graduation ceremony as part of a music teacher's duties.

The Court's reasoning here is awkward to say the least. The Court did not explain why it believed that refusing to accompany the anthem was not inseparably connected to the music teacher's view of history, which leaves us to guess what conduct might or might not qualify as inseparably connected. Moreover, when the Court asked whether an objective observer would believe that the music teacher was expressing agreement with the ideas of the song, it ignored the concept that matters of conscience and beliefs are inherently subjective. It is the significance that people assign to their own words and actions that determines whether an order to manifest words or conduct violates their conscience. What an observer believes about the words or conduct should not be dispositive.

tutional one, after the Tokyo High Court issues its decision, either party will be able to appeal to the Supreme Court as a matter of right. See supra text accompanying notes 178-180.

220. See Kobayashi, supra note 5, at 4.
221. See id.
222. This Note assumes that the Tokyo High Court will not significantly alter the lower court's findings of fact.
224. Id. at 294.
225. Id. at 294-95.
226. Id.
227. Id. at 294.
228. See id at 302 (Fujita, J., dissenting) (criticizing the majority's objective analysis).
229. See id.
Nevertheless, based on the Supreme Court's reasoning in the Music Teacher Case, the Court will likely hold that an order to stand and sing the national anthem does not violate a teacher's freedom of conscience. The Court will probably reach this conclusion because, like in the Music Teacher Case, most teachers in the Tokyo District Court Case who refused to sing the national anthem did so because of their revulsion over the song's historical use and connection to Japan's pre-war ideology, or because they saw the song as connected with creeping authoritarianism in modern Japan. Their views are similar to the music teacher's reasons for refusing to accompany the anthem on the piano—objections to the political or historical significance of the anthem. The Court did not see the music teacher's views as inextricably connected with her refusal to accompany the anthem, so it is unlikely that it will see these teachers' views as inseparably connected to their refusal to sing the anthem.

Teachers can argue to the Supreme Court that singing the anthem differs from accompanying it on the piano because singing requires teachers to say words that express an idea. They can argue that ordering someone to sing is thus similar to compelling someone to confess to believing that it would be desirable for the emperor to rule for thousands of years—a required declaration of faith that the Court previously hinted would be illegal. Nevertheless, the Court has approved of orders that require the use of words to express specific feelings—such as apologies that have a main purpose other than compelling the expression of the specific belief. Because, however, the educational guidelines require that schools lead the people assembled in singing the anthem at school ceremonies, the Court could characterize the main purpose of an order to stand and sing the anthem as an order to teach or lead, rather than one to state one's belief that the emperor should reign for thousands of years.

In addition, the Court could also find ample reason to state that an objective observer would perceive standing and singing the national anthem as part of an ordinary teacher's duties in connection with school ceremonies rather than as the confession of an idea. After all, most public school teachers do stand and sing the anthem at school entrance and graduation ceremonies. Out of the thousands of public high school teachers in Tokyo, all but the 212 sanctioned high school teachers stood and sang

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231. See Tokyo Kyōikuinkai, 61 MINSHŌ at 294.
232. Id.
234. See supra notes 111–115 and accompanying text.
the anthem at graduation and entrance ceremonies in 2004.\textsuperscript{237} Students and teachers at 99\% of schools in the country sang the national anthem at graduation in 2003 and most have been doing so since the late 1990's.\textsuperscript{238} Moreover, the conflicts between teachers and the government over the singing of the anthem are well known. Therefore, an observer can easily draw the inference that a teacher who is singing the anthem is doing so because the teacher is being ordered to do so rather than because he or she believes in the content of the lyrics.\textsuperscript{239}

There are two other reasons that are related to the Court's general approach to constitutional adjudication that will likely lead the Court to overturn the district court's holding. First, as noted earlier, the Court has historically been extremely reluctant to hold that government actions violate the Constitution, particularly actions regarding controversial political issues.\textsuperscript{240} Indeed, its default response has been to defer to government decisions—either by invoking the public welfare doctrine or the doctrines of legislative or executive discretion.\textsuperscript{241}

Second, the Court has been particularly resistant to protecting the individual rights of public employees when these rights conflict with their lawful duties or their special status as "servants of the whole people."\textsuperscript{242} The Court has largely refused to invalidate sanctions against public employees for off-duty activities that would be constitutionally protected if a non-public employee had performed them.\textsuperscript{243} Holding that a teacher's refusal to stand and sing the anthem is constitutionally protected would require that the Court invalidate both a government policy as unconstitutional and grant this protection to government employees while they are performing their work duties. This conclusion would be unprecedented in Japanese jurisprudence.\textsuperscript{244}

2. **The FLE Prohibition of Undue Control**

A more difficult issue that may arise when the Court reviews the Tokyo District Court's decision is whether to reverse the lower court's ruling that the Metropolitan Board of Education's order to the Tokyo public school principals violated Article 10 of the pre-revision FLE.\textsuperscript{245} Under the

\begin{itemize}
\item \textsuperscript{237} Nagai v. Tokyo Kyōikuinkai, 1228 Hanrei Taimuzu 88, 105 (Tokyo D. Ct., Sept. 21, 2006).
\item \textsuperscript{238} Id. at 100–01.
\item \textsuperscript{239} See, e.g., Asakura, supra note 69, at 3 (describing conflict between teachers and BOEs that ordered teachers to sing the anthem throughout the country).
\item \textsuperscript{240} See Ford, supra note 100, at 36.
\item \textsuperscript{241} Id. at 37; see Hamano, supra note 96, at 463–65 (discussing cases and the various doctrines that the Court has invoked to avoid finding unconstitutionality).
\item \textsuperscript{242} See supra notes 128–134 and accompanying text; see also Kenpo, art. 15.
\item \textsuperscript{243} See Beer, supra note 128, at 238.
\item \textsuperscript{244} See supra notes 95–103, 128–134 and accompanying text.
\item \textsuperscript{245} It is not certain that the Supreme Court will take up this issue. After determining that an order to stand and sing the anthem violates Article 19 of the Constitution, the lower court found that the Tokyo BOE's orders violated Article 10 of the FLE as part of its analysis of whether the public welfare exception applies. See Nagai v. Tokyo Kyōikuinkai, 1228 Hanrei Taimuzu 88, 111–12 (Tokyo D. Ct., Sept. 21, 2006). There-
three-part test established in the Asahikawa Proficiency Test Case, there is a strong argument that the directive was illegal. Although the outcome of this issue would not affect the legality of a direct order from a principal to a teacher to stand and sing the national anthem, it is significant because other prefectures and municipalities may look to Tokyo’s example as a way of cracking down on teachers who refuse to sing or accompany the anthem.

The ends of the Metropolitan Board of Education’s policy are reasonably related to matters over which the Metropolitan Board of Education has authority because under the Local Education Administration Law, the BOE can make decisions regarding curriculum and the management of teachers. Graduation and entrance ceremonies are considered part of the curriculum; thus, the Metropolitan Board of Education can make decisions related to the ceremonies to ensure that schools effectuate the curriculum by hanging the flag at graduation ceremonies and instructing the students to sing the national anthem.

It is difficult to say, however, that the BOE’s actions are necessary to achieve its ends. After all, even before the BOE’s campaign in 2003, the flag was flown and the anthem was sung at 100% of the city’s public schools. As the Tokyo District Court pointed out, it is not necessary for schools to order teachers to stand and sing the anthem to ensure that students are instructed to do so. It is also not necessary for a music teacher to accompany the song on the piano because a CD or tape can easily provide musical accompaniment.

This discrepancy between the ends and means casts doubt on the true purpose of the Metropolitan Board of Education’s policy. The Court could easily find two other, less appropriate, goals of the policy. First, it could find that the orders were a raw display of power over teachers. In light of the Tokyo Board of Education’s recent drive to reduce the influence of teachers over school management and conservative politicians’ general distrust of teachers, the BOE’s orders and sanctions could be seen as part of a broader plan to assert control over education in Tokyo and punish left-wing teachers that oppose other aspects of the conservative governor’s...
Second, the Court could find that the orders are a backdoor way of achieving what the BOE cannot legally do—force children to stand and sing the anthem. This hidden intention is evident in the BOE's orders to teachers to refrain from telling audience members and students about their "inner freedom" (i.e., the freedom to choose not to stand and sing), and in its threats that teachers and administrators will be considered incompetent if their students do not stand and sing. The effect of compelling teachers to stand and sing, and preventing discussion of students' rights to refuse, is to reinforce the social expectation—something often as powerful as legal sanction—that everyone should stand and sing the national anthem. Moreover, if, as the BOE threatened, teachers and administrators can be disciplined if the students do not stand and sing, the effect may be that teachers order their students to do so in violation of the students' rights.

Lastly, the BOE's order had some characteristics that the Court hinted in its Asahikawa decision would render "improper control over education." In particular, the BOE's orders about how ceremonies should be performed were highly detailed. They specified the content and timing of principals' written and verbal orders to teachers, the details of the ceremony—including what the master of ceremonies was to say and not say—and even mandated the size and placement of the flags in school gyms. These details deprive teachers and schools of flexibility in implementing the curriculum, a liberty that the Court has recognized as an important aspect of the FLE. Indeed, the dogmatic, unbending nature of the directive seems to go squarely against the liberal philosophy that the Court recognized in the FLE.

Nevertheless, it would be surprising to see the Supreme Court hold that the BOE's orders violated Article 10 of the FLE. The Court has never invalidated an educational policy promulgated by the MOE—the typical defendant in a challenge to an educational policy under FLE Article 10—because the order violated Article 10 of the FLE. The Court may be even more deferential to local education authorities than it is toward the MOE because the local educational authorities have statutory authority to control schools and the hiring, firing, and discipline of educational personnel.

252. See Tokyo Flag Law, supra note 9, at A10.
254. See id.
256. Nagai, 1228 HANREI TAIMUZU at 102-03.
257. Id.
258. See Sato, 30 KEISHO 615, translated in BEER & ITOH, supra note 116, at 240.
259. See id. at 239.
260. See supra note 127.
261. Law Related to Local Educational Administration Organization and Management, art. 23, no. 3.
Moreover, even if the Supreme Court were to uphold the lower court’s ruling that the BOE’s order violated Article 10 of the FLE, the Court’s view on the legality of a similar order would probably be different because it would analyze the legality of the order under the revised FLE, which would govern all educational policy disputes in the future. The result may be different because the revised FLE now lists “cultivating the attitude that esteems tradition and culture, and loving our country and hometown that developed them” as aims of education. The inclusion of this language arguably expands the realm of actions that schools and school boards can perform to achieve that end because, under the new law, the prohibition on undue control is qualified by the mandate that “education . . . should be performed on the basis of what this law and other laws stipulate.” Ensuring that all teachers stand for the anthem could be considered a necessary aspect of achieving the aforementioned aim because teachers who do not stand and sing the anthem, or who tell their students that they do not have to sing, would not be cultivating “an attitude that esteems tradition . . . and loves our country.”

Furthermore, the language of the revised FLE clearly enlarges the role of both the Ministry of Education and local educational authorities at the expense of teacher discretion. The statute provides that local educational authorities must plan and enforce measures “that correspond to the real situation in the area.” The BOE could conceivably justify its plan, or a similar plan, by arguing that aspects of the “real situation” in Tokyo—such as resistance to the use of the flag and anthem, or the lack of patriotism among the students—requires strict measures to ensure that schools comply with the MOE’s curricular guidelines. Consequently, even if the Supreme Court upheld the Tokyo District Court’s ruling that the Tokyo BOE’s directive was illegal, it may well be a fleeting victory.

B. Potential Consequences for Teachers Who Disobey Orders to Stand and Sing the Anthem

If the Supreme Court rules against the teachers, teachers will not have legal protection from discipline if they violate a principal’s order to stand and sing the national anthem or accompany it on the piano. Although it is unclear whether the Tokyo BOE’s directive will be upheld, the revision of the FLE means that courts will probably uphold similar orders in the future. This result may encourage other boards of education in areas in which teachers have resisted the compulsory singing of the national anthem at school events to mimic Tokyo’s policy. Given these two
probabilities, it is reasonable to ask what fate may befall teachers who continue to resist orders to sing the anthem.

It is possible that boards of education will seek to dismiss or otherwise harshly punish teachers for violating orders to stand and sing the anthem. In the absence of legal protection, a teacher who violates an order to stand and sing the national anthem can be admonished, face a pay cut, be suspended, or be dismissed for violating orders of a superior under the Local Government Employees Act. Terminations of teachers for violating the orders of superiors are extremely rare in Japan—it happened only once in 2004. However, the Tokyo Metropolitan Board of Education showed that it is willing to do so when it canceled the contracts of retired teachers who were seeking to continue working as contract teachers. There is also evidence of political pressure from conservative politicians in Tokyo to adopt harsh measures against teachers who repeatedly violate orders to stand and sing the anthem and to remove leftist teachers.

It is difficult to say whether a court would uphold a teacher’s dismissal or another harsh disciplinary measure; however, it is certainly a reasonable possibility. The Supreme Court has given boards of education considerable leeway by refusing to quash disciplinary measures unless they are “manifestly inappropriate from a social point of view” and “exceed and abuse” the board’s discretion. It is likely that a court would uphold the termination of a teacher for failing to stand and sing the anthem when ordered to do so if the teacher had a record of disciplinary violations or violated an order to stand and sing in a particularly flagrant way. This situation would be similar to the Court’s decision in the Fukuoka Teacher Case in which the Court, in upholding the prefecture’s decision to terminate the teachers, noted both the flagrant nature of the terminated teachers’ violations of the curriculum guidelines and the length of their disciplinary records.

By contrast, a court may intervene to quash an attempt to fire or harshly discipline a teacher with no disciplinary record who refused to stand and sing the anthem. The standard punishment for teachers who

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*Tokyo Flag Law, supra* note 9, at A10. Other prefectures have punished teachers, but have not issued official directives or created a similar system of punishments of increasing severity. Jun Hongo, *Teacher Traces Aversion to 'Kimigayo' to the War*, *Japan Times*, Mar. 14, 2007, at 3 [hereinafter *Aversion*].


271. See id. at 106.


273. See id.

274. See Jun Hongo, *Teachers Win Lost Pay Over 'Kimigayo'*., *Japan Times*, Feb. 8, 2008, at 2 [hereinafter *Lost Pay*]. But see Punished Teachers Lose Appeal Over 'Kimigayo', *Japan Times*, Dec. 17, 2008, at 3 [hereinafter *Punished Teachers*] (Fukuoka High Court over-turns district court decision to nullify pay cut imposed on teachers who refused to stand
defy an order to stand and sing the anthem for the first time is a mere admonition, even in Tokyo, so termination would be an unusually harsh punishment.\textsuperscript{275} Indeed, a second Tokyo District Court granted damages to thirteen Tokyo teachers who had been denied post-retirement reemployment due to their failure to stand and sing the anthem because the punishment “attached too much importance to the [teacher’s failure to stand and sing the anthem] while overlooking other factors regarding their employment records,” and was thus unreasonable retribution.\textsuperscript{276}

Even if a school or board of education cannot discipline a teacher directly, it still has mechanisms to make that teacher’s working life extremely unpleasant. Educational authorities can take retaliatory employment actions such as transferring teachers to schools far away from their homes and to less prestigious postings, or they can deny them leadership posts within schools.\textsuperscript{277} In addition, by insisting that singing the anthem is the normal, expected, and patriotic thing to do, authorities can create an atmosphere in which teachers who refuse to stand and sing are ostracized and scorned by their colleagues, students, and members of the community.\textsuperscript{278} In this atmosphere, teachers have been the victims of hate mail, angry phone calls, and even violent attacks.\textsuperscript{279} Absent a decision by the Court that vindicates the teachers’ rights, it is likely that both the authorities and communities will continue to inflict these informal punishments on teachers who refuse to stand and sing the anthem.

C. Consequences of the Potential Supreme Court Decision for Japanese Education

The likely result of the Supreme Court’s decision is that the Tokyo Metropolitan Government and other prefectures and municipalities with conservative leadership will be able to discipline teachers who do not fol-
low orders to stand and sing the anthem. This decision will have negative consequences for the Japanese education system as a whole.

Schools may lose teachers who refuse to sing the anthem. Some teachers may face termination or other harsh discipline. Others may quit due to adverse employment decisions or harassment. Moreover, an increasing number of teachers are taking leaves of absence due to stress from orders to sing the anthem or accompany it on the piano. The absence of these dedicated and skillful teachers hurts students.

The crackdown on teachers who refuse to stand and sing the national anthem could also preface efforts by conservatives to impose tighter controls on classrooms, ordering teachers to teach sensitive subjects such as history and moral education in line with conservative views. It is clear that conservative politicians are spoiling for a fight. They have been fighting for textbooks that reflect their views of history and morality and have changed the FLE to allow for greater governmental control of education and to emphasize the values that they hold dear. They have also sought to undermine the ability of teachers to affect school policies and have even established independent teacher hiring and training mechanisms to ensure that new teachers are trained to teach "traditional values." It would not be inconceivable if they sought to punish and remove teachers whose views on history and morality diverged from their own as part of an effort "to delete the leftwing slant and get rid of... the leftists."

Consequently, schools could be deprived of teachers who value history and historical truth. Teachers who are willing to face discipline and sue over beliefs based on their view of history are also the teachers who will insist that students be taught the full truth about the Japanese war record. Some of the same conservatives who, in the name of teaching patriotism, are bent on adopting textbooks that whitewash Japan's wartime atrocities also aim to remove teachers who do not stand and sing the anthem. If these teachers are forced out, it could result in a younger generation that is

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280. See supra notes 268-276 and accompanying text.
282. See Hirano, supra note 196, at 3; York, supra note 55, at 16 (describing a teacher who "found herself in a hospital... frightened that she was going to die... [because her health had finally succumbed to four years of psychological punishment].")
283. See Fitzpatrick, supra note 12, at 20.
284. SVEN SAALER, POLITICS, MEMORY, AND PUBLIC OPINION: THE HISTORY TEXTBOOK CONTROVERSY AND JAPANESE SOCIETY 87 (2005) (describing dissatisfaction among politicians that teachers were criticizing government policies to students and suggesting that government uses education system to promote its views).
285. See, e.g., supra notes 21-43 and accompanying text.
286. See supra notes 32-35, 76-94 and accompanying text.
289. See, e.g., NATHAN, supra note 34, at 149 (member of Tokyo Metropolitan Board of Education expresses desire to use revisionist textbook in all junior high schools in Tokyo); Tokyo Flag Law, supra note 9, at A10 (same member expresses support for directive to emperor).
ignorant about World War II history. This ignorance can only hurt Japan's international interests and may lead to tensions with China and Korea, who are both aware of the history and angered by Japanese ignorance.

Moreover, Conservatives may take the likely decision in the Tokyo District Court Case as a signal that the Court will not restrain them or protect teachers in the future. In particular, if the Court finds that the Tokyo Metropolitan Government's plan does not violate Article 10 of the Fundamental Law of Education, conservative prefecture governments may implement similarly detailed policies to control classroom instruction and other aspects of the curriculum through official orders and monitoring. It could then use the disciplinary process to punish and force out teachers who do not obey these orders. The Court has suggested in the past that direct meddling in classroom education would violate Article 10 of the original FLE. If, however, the Court finds that Article 10 does not forbid such actions, there are other constitutional bases for teachers to protect themselves and the educational system from this kind of control. Nevertheless, the revisions to the FLE that expand the powers of educational authorities, coupled with the Court's historical reluctance to override government policy, mean that there is no guarantee that the teachers will prevail in such a fight.

Indeed, the ferociousness with which conservatives have attacked teachers who refuse to stand and sing the anthem may influence teacher behavior even if conservatives do not explicitly order that teachers must teach particular content. For instance, teachers who previously told the students in their class to decide for themselves whether to stand and sing the anthem might now pressure their students to stand and sing because the teachers fear that they will be viewed as incompetent or disobedient if their students do not do so. More generally, teachers who may have otherwise discussed controversial social and political issues with their classes may sense where the prevailing political winds blow and shy away from topics that might draw official disapproval. This cautious silence has already begun to creep into the classroom and will only grow starker if

290. See Saaler, supra note 284, at 141-46 (discussing the increasing number of Japanese youth who answer "I don't know" to opinion polls about history).
291. See Pilling, supra note 42, at 2.
292. Cf. supra notes 155-167 and accompanying text.
293. Cf. supra notes 168-171 and accompanying text.
294. See supra notes 125-126 and accompanying text.
295. See, e.g., Kenpo, art. 23. (guaranteeing academic freedom); supra note 124 and accompanying text (Court suggests Constitution might forbid "coercing the adoption of educational content which inculcates a one-sided ideology and purveys erroneous information").
296. See supra notes 240-241, 262-267 and accompanying text.
297. Compare Hirano, supra note 196, at 3 ("While teachers are forced to follow the notice, they tell their students . . . 'You must make your own judgment independently' . . . "), with supra note 161 and accompanying text.
298. See Abe to Play Hardball, supra note 29, at 3.
conservatives tighten their control over Japanese education.\footnote{See id.}

Most distressing is the lesson students may draw from the fate of their teachers: there is nothing to gain and everything to lose from standing up to authority. Conservatives who believe that Japanese youth have grown to be individualistic and egotistical and who nostalgically reflect on authoritarian Japan may welcome this result.\footnote{See Conservatives Push Virtues, supra note 27, at 26.} This result, however, would be a tremendous loss for a society that has transformed itself into a vibrant democracy.

\section*{Conclusion}

The Tokyo High Court will decide the Tokyo Metropolitan Government's appeal of the Tokyo District Court Case in 2009 or 2010, and the Supreme Court will almost certainly review the decision thereafter. Although the Tokyo District Court Case was a groundbreaking ruling, there is little in Japanese case law or in the Supreme Court's history that suggests that the Supreme Court will uphold the Tokyo District Court's ruling. Rather, the Supreme Court will likely rule that a school does not violate a teacher's constitutionally guaranteed freedom of conscience by ordering teachers to stand and sing the Japanese national anthem. In light of the weakening legal protections for teachers, the result of this decision may be fewer progressive teachers in Japanese public schools and more right-wing "history" and "morality."

\footnote{See id.} \footnote{See Conservatives Push Virtues, supra note 27, at 26.}