GLIMMERS OF HOPE: THE EVOLUTION OF EQUALITY RIGHTS DOCTRINE IN JAPANESE COURTS FROM A COMPARATIVE PERSPECTIVE

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INTRODUCTION

Equality is a concept that has been a preoccupation in much of the thinking about justice since at least the age of Aristotle. It informs our most primordial and intuitive understandings of fairness. It is a concept that has been the subject of serious debate among philosophers, political theorists, and jurists since the seventeenth century. It has become embedded in modern notions of democracy. It forms the foundation of one of the most fundamental rights—the right to be treated as an equal and not to be discriminated against—that is enshrined in some manner in most modern democratic constitutions, and in the bedrock conventions in international human rights law. Yet there has been disagreement over the theoretical and philosophical foundations and origins of the right. This has been reflected in practical terms by the extent to which different jurisdictions have historically approached the protection and enforcement of the right from often markedly divergent perspectives. As a result, the content of the right, its scope, and the degree to which it has been meaningfully protected by the courts, has often varied appreciably across legal systems. Even in North America, in which Canada and the United States share a common legal heritage, the constitutional approaches to "equality rights" or "equal protection" (even the terminology varies), continue to be significantly different.

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It is perhaps not surprising, therefore, that the Japanese approach to the constitutional protection of equality rights should be considerably different from each of these two North American models. Yet the Constitution of Japan of 1947 was primarily drafted by Americans,[1] and constitutional rights theory in Japan has continued to be influenced by American jurisprudence. On the other hand, the constitutional provision that these young Americans crafted was actually quite unlike the American Equal Protection Clause. Indeed, it was quite progressive and ambitious for its time, and as time marched on, the equality rights provisions of other national constitutions would come to share more with this provision of the Constitution of Japan, than any would share with the earlier American model. The equality rights provision in the Canadian *Charter of Rights and Freedoms*, for instance, has much in common with that of the Japanese Constitution. So while it might seem intuitively unsurprising that the Japanese approach is different, there are reasons to think that it should be less so. Indeed, it has been argued that there is an increasing commonality to how the judiciaries of constitutional democracies analyze and enforce the right to equality, and Japan may be seen as an anomaly in that context.

Notwithstanding the ambitiousness and apparent robustness of the equality rights provision in the Constitution of Japan, and the explicit and considerable authority conferred upon the judiciary to exercise judicial review powers to interpret and enforce such rights, the right to equality in Japan has had a sad history. As is well known and often explored, the Constitution of Japan as a whole has not enjoyed much protection or enforcement by the courts. In over sixty years, the Supreme Court of Japan has ruled that an impugned law or government policy was unconstitutional in less than ten cases, notwithstanding the fact that the U.N. Human Rights Committee, rapporteurs under various U.N. human rights conventions, and international human rights organizations, as well as domestic legal scholars and non-governmental organizations ("NGO"), have all documented serious violations of rights in Japan. There has been a wealth of analysis, including much in English, on the various factors that might explain this feature of the Japanese legal system, ranging from cultural to institutional and systemic reasons.[2] Many of these studies have made important

1. For two comprehensive histories of the drafting and ratification of the Japanese Constitution in English, see RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR (2002) [hereinafter MOORE, PARTNERS] and KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (Ray A. Moore ed. and trans., 1997).

2. As a starting point for some of this literature, see J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG., 259 (1997) [hereinafter Ramseyer, *Judicial Independence*]; J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003)

contributions to the general understanding of the Japanese system, have provided significant foundations for practical normative responses to some of the perceived failings of the system, and have generated generalizable insights within the context of comparative law. Not many of these studies, and none of those in English, however, have analyzed the equality rights doctrine of the courts, or considered the extent to which the analytical approach of the courts may be a factor in perpetuating the failure to enforce this particular constitutional right. Most of the literature on equality rights in Japanese literature, to the extent that it engages in any comparative analysis, focuses predominantly on American jurisprudence.[3] There is thus arguably a need for both a wider comparative analysis of the Japanese experience, and a closer examination of how the doctrine has developed and operated in relation to the protection of equality rights.

This article examines how the Japanese courts, particularly the Supreme Court, has analyzed equality rights issues. It explores the development of the doctrine of the Supreme Court by studying a number of the most important equality rights cases from a comparative perspective. In particular, the examination of the doctrine and its application is informed by the theoretical framework, a "proportionality analysis," that underlies an increasing number of constitutional and international law approaches, of which the Canadian constitutional model provides a good example. The analysis of the Japanese cases through the prism of this increasingly universal "proportionality test", exemplified in the Canadian jurisprudence, helps to bring into stark relief the shortcomings of the doctrine that has

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[hereinafter, RAMSEYER, MEASURING JUDICIAL INDEPENDENCE]; John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, in LAW IN JAPAN: A TURNING POINT, 99 (Daniel H. Foote ed., 2007) [hereinafter, Haley, *Judiciary*]; Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421 (2005) [hereinafter Upham, *Political Lackeys*]; David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009) [hereinafter, Law, *Conservative Court*]. *See generally* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987) [hereinafter UPHAM, SOCIAL CHANGE]; JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW (1998) [hereinafter HALEY, SPIRIT]; FUJII TOSHIO, SHIHŌKEN TO KENPŌ SOSHŌ [JUDICIAL POWER AND CONSTITUTIONAL LITIGATION] (2007); ASHIBE NOBUYOSHI, KENPŌ SOSHŌ NO RIRON [THEORY OF CONSTITUTIONAL LITIGATION] (1973). (Japanese names for Japanese language sources are provided in the standard Japanese format of surname first followed by given name).

3. It should be emphasized that this is so with respect to issues relating to individual rights enshrined in the constitution. For many other constitutional issues, there is considerable focus on the German and, to a lesser extent, French experience, given the shared civil law systems. Some of the seminal constitutional texts, which reflect this focus on American approaches to rights, include ASHIBE NOBUYOSHI, KENPŌ [CONSTITUTIONAL LAW] (3d ed. 2002) [hereinafter ASHIBE, CONSTITUTIONAL]; MATSUI SHIGENORI, NIHON KOKU KENPŌ [JAPANESE CONSTITUTIONAL LAW], (2d ed. 2002); URABE NORIHO, KENPŌGAKU KYŌSHITSU (1988) [Course on Constitutional Law]; MIYAZAWA TOSHIYOSHI, KENPŌ II [CONSTITUTIONAL LAW II] (1971); and KŌJI SATŌ, KENPŌ [CONSTITUTIONAL LAW] (3d ed. 1995).

been traditionally employed by the Supreme Court of Japan in its treatment of discrimination claims under the equality rights provision of the Constitution. It provides a solid foundation upon which to begin building a normative argument for why and in what manner the doctrine ought to be modified, if the Japanese judiciary is to give meaningful effect to the constitutional right.

The Japanese Supreme Court has failed, until very recently, to develop an analytical framework that would be capable of resolving equality rights claims in a principled and rigorous manner that was true to the theory of rights and the values that were enshrined in the Constitution. The Supreme Court of Japan has almost exclusively, until 2008, employed a rudimentary "rationality test" similar to that initially developed in the early equal protection cases in the United States, and it has applied it universally in respect of all forms of discrimination. The test focuses on the question of whether, in the circumstances of the case, the discrimination in question was "unreasonable," which is to be determined by reference only to criteria internal to the policy or law in question—that is, the relationship between the objective and the means of the legislation.

A closer examination of this test (which we may call the "unreasonable discrimination test"), by way of comparison with the proportionality analysis employed in Canadian and other courts, and informed by the underlying theory of equality rights, suggests that it is not only tautological, and the basis for result-oriented decision making, but that it also creates confusion over what constitutes the essence of discrimination and the substantive content of the right to equality. The test thus provides the lower courts with no assistance whatsoever in terms of how to analyze issues of discrimination. Its application almost invariably leads to a finding that the discrimination in question is "reasonable." As will be argued below, the judicial employment of this analytical framework and the failure of the Supreme Court of Japan to develop a doctrine that provides for a more sophisticated analysis, one which would require judges to work through a more rigorous reasoning process faithful to the theory of equality rights, have been significant factors contributing to the general failure of the courts to enforce this most fundamental of rights. And it will be suggested here, that notwithstanding the conservative nature of the judiciary and other factors that have militated against more robust rights protection in Japan, the development of a more sophisticated doctrine would likely make it more difficult for those factors to operate. In other words, it will be argued that doctrine does matter.

Moreover, this review of the jurisprudence will suggest that there is evidence that a new analytical approach, consistent with the proportionality

test used in an increasing number of courts in constitutional democracies, may already be emerging as the dominant doctrine in the Japanese courts. Notwithstanding the grim history of not enforcing the equality rights enshrined in the Constitution, a recent decision of the Supreme Court offers a glimmer of hope, a suggestion that an approach that reflects a more fully developed appreciation of the scope of the right, and a more rigorous analytical model for use in resolving claims of discrimination, may be in the ascendency. Evidence of this emerging doctrine can be found in a number of strong dissents in some earlier cases and the manner in which some of the lower courts analyzed discrimination cases. With the *Nationality Act* case of 2008,[4] there is reason for some optimism that this new approach is being embraced by the Supreme Court. The decision is examined in considerable detail below, showing how the majority opinion built upon the analysis of those earlier dissents, and illustrating how similar the reasoning is to that of the increasingly widespread proportionality model of constitutional analysis, as exemplified in the Canadian jurisprudence.

From a normative perspective, it will be argued below that the majority opinion in the *Nationality Act* judgment ought to be embraced as the appropriate approach to equality rights issues in Japan. Japan currently faces numerous social pressures, resulting from the aging of its society, prolonged economic malaise, and the gathering pace of globalization. Many of its responses to these developments will increase the pressure on equality rights. This is particularly so with respect to the likely increase in the number of foreigners, who together will constitute a discrete minority within Japan, and among whom will be large numbers of people who will also constitute racial, ethnic, and religious minorities. Japanese society has a well documented history of discrimination and a reluctance to provide full equality rights to minorities, and so it may be anticipated that the right to equality is going to come under increasing pressure in the years ahead.[5]

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4. Supreme Court Judgment, (June 4, 2008), 62 MINSHŪ 6 1367 (*Nationality Act* case), *court translation available at* http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html.

5. There is a wealth of literature on discrimination in Japan, particularly as it relates to the *burakumin*, who are descendants of a caste once labelled untouchable, the large Korean-national minority in Japan, ethnic and racial minorities, foreigners, the handicapped, and women. For official sources discussing such discrimination, a starting point would be the United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Fifth Periodic Reports of States Parties Due in 2002 (Japan)*, U.N. Doc. CCPR/C/JPN/5 (Apr. 25, 2007) *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/415/73/PDF/G0741573.pdf?OpenElement; United Nations Commission on Human Rights, *Report of the Special Rapporteur on Contemporary Racial Discrimination: Xenophobia and Related Intolerance, (Mission to Japan)*, U.N. Doc. E/CN.4/2006/16/Add.2 (July 11, 2005) *available at* http://daccess-dds-ny.un.org/doc/

How the judiciary deals with increasing claims for protection from discrimination is going to be an important issue, not least for the continued credibility of the judiciary and the integrity of the constitutional order.

It will also be argued that the comparative analysis provided here provides a powerful rationale for why, as one concrete element in the effort to encourage the continued development of a more robust doctrine, Japanese scholars should be looking to the jurisprudence of countries other than the United States for comparative study. For while Japanese scholars are generally critical of the Supreme Court's approach to discrimination, the scholarship almost overwhelmingly looks to American constitutional jurisprudence on the issues of individual rights. The comparative examination in this article, which includes a review of both the Canadian and American approaches to equality rights, and analyzes the Japanese cases through the prism of both, illustrates why the approach exemplified by the Canadian model would be more appropriate, and a more fruitful basis for comparative study, than the American equal protection doctrine. The American doctrine is also out of step with the increasingly universal model of proportionality and the robust protection of a substantive right to be treated as an equal.

This comparative analysis also suggests some interesting insights within the context of comparative constitutional law more generally, which could form topics for more focused study in the future. For instance, to the extent that the Japanese legal test is understood as having been borrowed in part from one aspect of the American equal protection doctrine, the Japanese experience may reflect some of the risks inherent in constitutional borrowing with insufficient attention to the context in which the borrowed principles originally operated.[6] Similarly, to the extent that the *Nationality Act* case indeed reflects the emergence of a new doctrine, its similarity in many important respects with the essential aspects of the Canadian and other similar proportionality models, may suggest an important example of constitutional migration.[7] On the other hand, the analysis of the operation of the older doctrine will be of interest to American scholars, for in a real

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UNDOC/GEN/G06/103/96/PDF/G0610396.pdf?OpenElement. For recent scholarship see, e.g., Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419 (2001) [hereinafter Levin, *Racial Justice*].

6. On such risks, and the importance of a contextual approach, see, e.g., MARK V. TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW ch. 1 (2008).

7. For a discussion of constitutional migration, and how it may be distinguished somewhat from constitutional borrowing, see generally Sujit Choudhry, *Migration As a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1 (Sujit Choudhry ed., 2006).

sense it provides a window into what might have been, an alternate reality, had the United States Supreme Court not developed the strict scrutiny level of review in the early years of the twentieth century. Moreover, the critical analysis of Japan's universal application of a doctrine that is essentially the American minimum scrutiny test, viewed through the prism of the Canadian substantive rights approach, may generate some interesting questions regarding the basis for the narrow limitations on the application of strict scrutiny review in American jurisprudence. While the debate rages on in the United States over the appropriateness of ever considering foreign law, particularly in the context of constitutional cases, this comparative analysis of equality rights doctrine suggests that there is something to be learned from examining how substantially similar issues are analyzed by different courts. The analysis of the Japanese experience, and the possible development of a more robust and rigorous standard in Japan, may naturally lead to thinking about whether the U.S. doctrine could not similarly make some tentative steps towards stronger protection against discrimination.

In Part I the article will very briefly review the sources of the right to equality in Japanese law. In Part II, the underlying theory of equality rights that informs this study is explained, and the Canadian and American approaches to the judicial protection of the right are reviewed. In Part III the early development of the "unreasonable discrimination" test in Japanese doctrine is examined, while Part IV provides an analysis of more recent application of the test. Part V explores the significance of the doctrine in the context of the general failure to enforce the right, and traces the origins of a new doctrine in early dissents. In Part VI, the article examines in detail the question of whether a new and more robust doctrine may be emerging in the Court's treatment of discrimination claims, and the article ends with some discussion of the comparative constitutional law questions raised by the analysis.

I. EQUALITY RIGHTS IN JAPAN – SOURCES OF THE RIGHT[8]

Equality rights in Japan have as their primary source Article 14 of the Constitution, specifically Article 14(1). It provides that:

8. This section, as well as some of the analysis below of the earlier Japanese equality rights cases, are revised portions of a shorter paper on equality rights in the context of Japan's aging society, published in 2008. *See* Craig Martin, *Coming of Age: The Courts and Equality Rights in Japan's Ageing Society*, *in* THE DEMOGRAPHIC CHALLENGE: A HANDBOOK ABOUT JAPAN (Florian Coulmas, Harald Conrad, Annette Schad-Seifert & Gabriele Vogt eds., 2008).

> All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.[9]

The phrase "all of the people" is the accepted translation of *subete kokumin* in the context of Article 14, and it has been interpreted to include foreigners.[10] A great deal has been written on how the terms "social status" and "family origin" are to be interpreted, and what concrete factors may fall within their scope, and also on the issue of whether the list of categories is exhaustive or illustrative.[11] However, for our purposes we may simply note that the Supreme Court has ruled on at least two occasions that the list is illustrative and not exhaustive.[12] It has also held that, while age is not the type of unchanging characteristic normally associated with social status for the purposes of the right, age is considered to fall within its scope.[13] Similarly, foreign nationality has been treated as being a prohibited ground of discrimination falling within the scope of "social status," even in the cases that have upheld the discrimination as having been reasonable.[14] Finally, Article 98 of the Constitution provides that the Constitution is the supreme law of the land, and that any law, ordinance or other act of government contrary to the provisions of the Constitution is invalid, while Article 81 provides that the Supreme Court is the court of last resort with the power to determine the constitutionality of any law, regulation, or

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9. Nihonkoku Kenpō [Constitution of Japan] art. 14 (1947).

10. Supreme Court Judgment, (November 18, 1964), 18 Keishū 9 579. *Subete kokumin* would normally be translated as "all nationals," and indeed there was considerable conflict between the American drafters and representatives of the Japanese government over the use of this language in the revision and translation process during the drafting of the Constitution. *See* MOORE, PARTNERS, *supra* note 1, at 130-31.

11. A convenient overview of the leading academic interpretations of the prohibited grounds of discrimination in Japanese scholarship can be found in Hideki Shibutani, *Enshu Kenpō 2* [*Constitution 2*], 234 HŌGAKU KYŌSHITSU 113 (2000). For a more detailed analysis, see ASHIBE, CONSTITUTIONAL *supra* note 3, at 123-25; ASHIBE NOBUYOSHI, *KENPŌ HANREI WO YOMU* [Reading Constitutional Cases] 133-36 (1987) [hereinafter ASHIBE, READING]; and with respect to the specific status of foreigners, NONAKA TOSHIHIKO AND URABE NORIHO, *KENPŌ NO KAISHAKU* [Interpretation of the Constitution], vol. 1, 209-13 (1989).

12. Supreme Court Judgment, (April 14, 1973), 27 KEISHŪ 3 265 (*Patricide* case) *translated under the title* Aizawa v. Japan, *in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 143-70 (1996); Supreme Court Judgment, (May 27, 1964), 18 MINSHŪ 4 676 (*Tateyama Mayor* case).

13. *Tateyama Mayor* case, at para. 3.

14. Supreme Court Judgment, (November 18, 1964), 18 KEISHŪ 9 579. Shigenori Matsui suggests that, at least from a process theory perspective, the support for this position flows more from the international legal obligations that inform the constitutional analysis, in accordance with article 98(2) of the Constitution, than from a proper interpretation of Article 14 itself. *See* MATSUI, *supra* note 3, at 313.

official act of government.[15] Thus, the courts have the authority, and arguably the duty, to enforce constitutional rights.

While the right to equality in Article 14 strictly applies only to the relationship between the state and the individual, the Supreme Court has confirmed the practice of lower courts in employing the constitutional values of the equality right in Article 14 to inform and give substance to statutory provisions governing private relations. Thus, the broad and rather ambiguous provisions of the *Civil Code* that prohibit juristic acts that have as their object matters that are contrary to public policy or good morals, and that require the *Code* to be construed from the standpoint of the dignity of the individual and the essential equality of the sexes, have been interpreted in a manner that imported the equality values of Article 14.[16]

In addition to Article 14, it has been argued that Article 13 of the Constitution also provides some assistance to understanding the importance of the individual, and identifying the centrality of individual dignity to the enjoyment of the other rights in the Constitution.[17] Article 13 provides that:

> All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.[18]

This provision has typically been interpreted within Japanese scholarship, and by the courts, as being a limiting provision, one that is relied upon by the courts for justifying the abridgment of rights. But the view that it also asserts the primacy of the individual and individual dignity is based in part on more recent interpretations of the provision by the courts. In an important case dealing with the aboriginal rights of the Ainu people in Hokkaido, the Sapporo District Court interpreted the provision as imposing a duty on the government:

> [T]his provision [Art. 13] demands the highest regard for the individual in his or her relationship with the state. It manifests the principles we call individualism and democracy as the recognition of

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15. Nihonkoku Kenpō [Constitution of Japan] art. 81, 98.

16. *See* , Supreme Court Judgment, (March 24, 1981), 35 MINSHŪ 2 300 (*Nissan Motors* case) (holding that "a lower compulsory retirement age for women than for men constitutes discrimination against women based solely on their gender and is irrational discrimination invalid under Article 90 of the Civil Code . . . Article 1-2). For an English translation of this case, under the title Nissan Motors, Inc. v. Nakamoto, see BEER & ITOH, *supra* note 12, at 179-81.

17. Levin, *Racial Justice*, *supra* note 5, at 461-63, 471-88.

18. Nihonkoku Kenpō [Constitution of Japan] art.13.

> the particular worth of all citizens, who collectively constitute the state, in the state's exercise of governance.[19]

Apart from the constitutional provisions, there are no other overarching statutory protections against discrimination in private relations. There are provisions in statutes governing specific spheres of activity that provide some protection, but these tend to be narrow, limited, and of debatable effectiveness. For instance, in the area of employment, the *Labour Standards Law* provides that "an employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of nationality, creed or social status of any worker."[20] While the clause "other working conditions" is open to interpretation, hiring, recruitment, and termination are not included, nor are they interpreted as being covered. Gender is conspicuously absent, which is one reason that the early cases involving sex discrimination in the employment context were advanced on the basis of the *Civil Code*.[21]

The U.N. Committee on the Elimination of Racial Discrimination discussed this absence of general equality rights legislation in its report on Japan in 2001, and observed that the failure to enact legislation prohibiting racial discrimination was inconsistent with Japan's obligations under the *International Convention on the Elimination of all Forms of Racial Discrimination*.[22] The Ministry of Justice reported that it had drafted and submitted to the Diet a *Human Rights Protection Bill* in 2002, but the bill was not passed, and the Ministry of Justice "continues to review" the legislation.[23] It appears at this stage, however, that it is unlikely to be enacted any time soon. Indeed, the *Law on the Promotion of Measures for Human Rights Protection*,[24] enacted in 1996 as a step towards the establishment of a human rights regime, was repealed in 2002. No mention of the legislation has been made in the periodic reports of Japan to the U.N. Human Rights Committee.[25]

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19. Sapporo District Court Judgment, (March 27, 1997), 938 HANREI TAIMUZU 75, *translated under the title* Kayano v. Hokkaido Expropriation Comm. *in* 38 I.L.M. 394, 418 (1999). I am grateful to Mark Levin for highlighting the relationship between Articles 13 and 14.

20. Labour Standards Act, Law No. 49 of 1947 (Japan), art. 3. There are similar provisions in the Employment Security Law, Law. No. 141 of 1947.

21. UPHAM, SOCIAL CHANGE, *supra* note *2*, at 130.

22. *See* UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, REPORT 34-38 (2001), *available at* http://www.unhcr.org/refworld/docid/3f52f3ad2.html.

23. Japanese Ministry of Justice, *Promotion and Protection of Human Rights*, www.moj.go.jp/ENGLISH/issues/issues07.html.

24. Law No. 120 of 1996 (repealed 2002).

25. HUMAN RIGHTS COMMITTEE, FOURTH PERIODIC REPORT OF STATES PARTIES DUE IN 1996: JAPAN CCPR/C/115/Add.3, (October 1, 1997) [hereinafter FOURTH PERIODIC REPORT], *available at*

Some local governments have initiated the passage of human rights regulation or more narrow anti-discrimination ordinances, but local governments have limited powers in Japan. Moreover, these efforts have actually been the object of attack by conservatives, such that the first such prefectural ordinance had to be repealed.[26] Finally, under Article 98(2) of the Constitution, the treaties to which Japan is a state party are incorporated into the law of Japan, and thus the equality provisions in the *International Covenant on Civil and Political Rights* (the "ICCPR"),[27] *International Covenant on Economic and Social Rights* ("ICESR"),[28] the *International Convention on the Elimination of All Forms of Racism* ("CERD"),[29] and the *Convention on the Elimination of Discrimination Against Women* ("CEDAW"),[30] to name the most important, theoretically provide protections in the public domain.[31] The courts of Japan, however, are reluctant to enforce provisions of such international treaties in individual litigation.[32] This brief review of the more general failure to provide protection against discrimination in Japanese society underlines the importance of the Article 14 guarantee and how it is enforced by the courts—not only in respect of the relationship between the individual and the state, but indeed in the private realm as well. For in addition to the fact that there are few other protections available and that the courts have extended the values of Article 14 to inform the interpretation of other

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http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.115.Add.3.En?Opendocument. Japan also posted its 5th Periodic Report, dated December 2006, which was due to be filed in 2002, at http://www.mofa.go.jp/policy/human/civil_rep6.pdf.

26. Debito Arudou, *How to Kill a Bill: Tottori's Human Rights Ordinance is a Case in Alarmism*, JAPAN TIMES, May 2, 2006, *available at* http://search.japantimes.co.jp/cgi-bin/fl20060502zg.html.

27. International Covenant on Civil and Political Rights, adopted Mar. 23, 1976, 999 U.N.T.S. 171. Japan has been a state party since June 21, 1979.

28. International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3. Japan has been a state party since June 21, 1979.

29. International Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195. Japan has been a state party since Dec. 15, 1995.

30. Convention on the Elimination of all Forms of Discrimination Against Women, Jan. 22, 1980, 19 I.L.M. 33 (1980). Japan has been a state party since 1985.

31. This proposition is not universally accepted, but is the dominant view of constitutional academics in Japan, has been endorsed by the Supreme Court, and is the position taken by the government in its reports to the Human Rights Committee. *See* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE LAW 28-32 (1998); FOURTH PERIODIC REPORT, *supra* note 25, at paras. 9-11.

32. *See, e.g.*, Japanese Federation of Bar Associations, "Report of JFBA Regarding Second Periodic Report by the Government of Japan under article 16 and 17 of the International Covenant on Economic, Social, and Cultural Rights," Mar. 2, 2001 [hereinafter "JFBA Report"]. The government also noted in the 4th Periodic Report to the HRC, that in none of the decisions that considered the ICCPR was any law of Japan held to be inconsistent with the convention. FOURTH PERIODIC REPORT, *supra* note 25, at para. 10.

statutes, the doctrine developed for analyzing claims under Article 14 has similarly been imported into the judicial treatment of such private law cases.

II. EQUALITY RIGHTS AND DISCRIMINATION – COMPARATIVE APPROACHES

Before launching into a critical examination of the Japanese judicial model for the analysis of discrimination, however, it is necessary to be clear about what we mean when we speak of equality rights and discrimination, and to say a few words about the theoretical perspective, and the comparative approaches, that inform the analysis in this article. This section therefore begins with a brief overview of that theoretical approach, one that is widely accepted in the world, both in terms of its representation in a wide number of constitutional models and in international human rights instruments. There follows a short examination of the Canadian constitutional model, as an example of how this perspective has been operationalized in practical terms within a constitutional system. I use Canada not because it is necessarily the ideal model, but because it is a good example of an approach that is characteristic of a number of liberal democratic systems, and it is simply the one I know best. Moreover, there are similarities between the structure of the equality rights provision in the Canadian *Charter of Rights and Freedoms* and that of its counterpart in the Constitution of Japan. Finally, this section provides a short review of the American equal protection doctrine, which is quite different in a number of important respects. It is revealing to compare the Japanese experience with both the substantive-rights and full proportionality approach as reflected in the Canadian model, with the much more procedural and limited American doctrine, since aspects of the American approach have exercised a considerable degree of influence on the development of Japanese jurisprudence.

A. The Theoretical Perspective – Substantive Rights

The right to be treated as an equal by the government and not to be discriminated against, as that right is enshrined in a number of modern constitutions and international human rights instruments, means at the very minimum that the individual has a right to be treated by the state with equal respect and concern as compared to anyone else. At its foundation lies the Kantian concept of human dignity, in the objective sense of the inherent worth of every human being, and the notion that to treat someone as being intrinsically worth less than another is to do harm to their human dignity. Discrimination, defined broadly, is treating some people differently than

others, in the denial of benefits or imposition of burdens, in a manner that is unfair.[33]

This leads to the question of what makes any particular differentiated treatment unfair, so as to constitute discrimination that violates the right to be treated equally. The fact that the distinction treats persons in a manner that suggests that they are less worthy of the state's respect and concern, and thus does harm to their dignity, would be one indicia that the treatment is unfair. Where the distinction is based on prejudice or a stereotype, in terms of treating a person on the basis of generalizations that may be inaccurate and that defines the individual according to another group's perceptions of him and "people like him," that person's autonomy is undermined and there is a presumption of harm. Similarly, where the treatment reflects and perpetuates excessive power imbalances, which again undermines the autonomy of a politically weaker group by limiting its members' access to social and political institutions and the policy making process, or other such social goods, this may constitute indicia of unfairness. A further indicia is where the treatment is likely to undermine the subjective sense of dignity of the individual, or at least would do so to a reasonable person in the individual's position. When we speak of the subjective sense of dignity rather than the objective inherent worth of a human being discussed above, it is the individual's own sense of self-worth and self-esteem that is implicated.[34]

Such constitutions as those of Japan, Canada, and South Africa, as well as the European Convention on Human Rights,[35] and the major

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33. There is obviously a vast abundance of literature on the issue of equality rights and discrimination, not only in law but also in political philosophy, ethics, and a range of other disciplines. It is a complex theoretical field and the overview of a perspective provided here is the very barest thumbnail sketch. An excellent analysis of the recent literature for the purpose of examining equality rights in the Canadian context, which I have drawn on here, is Sophia R. Moreau, *The Wrongs of Unequal Treatment*, 54 U. TORONTO L.J. 291 (2004). The perspective represented here is also informed by RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter, DWORKIN, RIGHTS]; and RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000) [hereinafter DWORKIN, SOVEREIGN]. Of course, the political philosophy of John Rawls, and his conception of justice, places a fundamental importance on the concept of equality. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971); for a shorter review, see WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (2002).

34. Moreau, *supra* note 33, at 294-97.

35. On its face Article 14 of the European Convention of Human Rights appears to be limited to discrimination in respect of the enjoyment of other rights in the Convention, however, it has been interpreted more broadly to prohibit discrimination more generally. Moreover, Protocol 12 to the Convention, which entered into force in April 2005, introduced a provision that any discrimination by a public authority on the basis of the listed prohibited grounds was prohibited, and as well any discrimination on such grounds in respect of any legal right was similarly prohibited. Protocol 12, with explanatory notes, is available at http://www.humanrights.coe.int/Prot12/Protocol%2012%20

international human rights conventions, actually build into the equality rights provision the presumption that differentiated treatment on the basis of certain grounds will be prima facie unfair. The prohibited grounds of discrimination (or suspect classifications, to use the American terminology) in those constitutions and conventions include such characteristics as sex, race, creed, national origin, religion, age, and social status. This reflects the underlying theoretical understanding that the treatment of individuals differently on the basis of personal characteristics that are immutable, or at least deep-rooted and extremely difficult to alter (such as religion and nationality), and which are related to the individual's sense of identity and self-worth, will often be based on prejudice or stereotype, and likely will cause harm to the individual's dignity, both in the objective and subjective sense.

The prohibited grounds included in constitutions and human rights conventions not only reflect this understanding, but they provide ready-made criteria and presumptions for courts to work with in assessing the nature of discrimination in any given case. Discrimination with respect to one of the prohibited grounds, or on the basis of analogous personal characteristics, will be presumptively injurious to the dignity of those sharing that characteristic. Moreover, and of considerable importance, in most such systems the discrimination need not be invidious or intentional in order to be a violation of the right. The law or policy creating the discrimination may have rational policy objectives and not be animated by motives based on prejudice, and yet have a negative impact and still be unfair in this sense and thus be a violation of the right.

The question of fairness, and thus the issue as to whether some treatment constitutes discrimination, is also quite separate from the question of whether that treatment may still be justified for policy reasons that are consistent with the values of a democratic society. No right, after all, is absolute, and different rights will often be brought into conflict in particular circumstances. There may thus be compelling policy reasons, aimed at furthering other rights and interests, and therefore consistent with the principles upon which the constitution is founded, which will justify the violation of the right in particular circumstances. But analytically, that is typically a separate question, requiring considerations that are distinct from the inquiry into whether there was discrimination constituting a violation of the right to begin with.

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and%20Exp%20Rep.htm. For more on the European Convention on Human Rights, see PIETER VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4th ed. 2006).

Different analytical models and legal tests have been developed by the courts in different liberal democracies for giving substantive meaning to the right as articulated in constitutional documents, and thereby determining what constitutes discrimination in the concrete circumstances of a given case, and when such discrimination may be justified. Certainly not all share the foregoing philosophical approach in all its particulars as a starting point; but if the right is to be taken seriously (to use Dworkin's language),[36] then the model must contain criteria for determining the basis upon which unequal treatment is to be deemed impermissible, who is to be compared with whom for the purposes of assessing the discrimination, and how the nature of the harm caused by the discrimination is to be assessed.[37]

Moreover, on the separate question of justification, there have to be sufficiently objective criteria, applied within a model that is logically consistent with the ideas underpinning the right, for determining when the state may be justified in overriding the right. A simple balancing of the individual right against the broader benefit to the public welfare that may be gained in violating the right, is simply not consistent with the notion of rights. The public welfare will always outweigh the individual's right, and the right becomes meaningless. As Dworkin has argued, there is a cost to respecting and protecting fundamental rights, but it is a cost that we have accepted as being necessary to the structure of the liberal democratic state.[38]

A recent study by David Beatty suggests that there is in fact an approach to the resolution of equality rights claims that is increasingly common in the constitutional jurisprudence of democracies around the world.[39] He argues that most high courts have come to rely upon a proportionality test, in which there is a careful evaluation of the relationship among the objective of the impugned government action; the means selected to achieve it, as reflected in the law or policy adopted for that purpose; and the effects of that law or policy, both in terms of the extent to which it actually achieves the desired objective, and the negative impact it has on the claimant and others similarly situated. Moreover, in

36. DWORKIN, RIGHTS, *supra* note 33, at 184.

37. Moreau makes the argument that, in most of the specific conceptions of treatment that constitutes discrimination that she considers, a comparison with others who may receive the benefit in question is not a necessary element of the analysis, although it may be helpful from an evidentiary perspective. Moreau, *supra* note 33, at 303. The courts in Canada and other jurisdictions, however, continue to rely on the notion of comparison with others as an essential element of the analysis of discrimination. See PETER HOGG, CONSTITUTIONAL LAW OF CANADA, 1259 (4th ed. 2008) ("It is the requirement of disadvantage that involves a comparison to others.").

38. DWORKIN, RIGHTS, *supra* note 33, at 194, 197.

39. DAVID BEATTY, THE ULTIMATE RULE OF LAW (2004).

this test the evaluation is not some abstract "balancing" of incommensurate interests. Rather, it is a factual examination, based on an evidentiary record, in which careful account is taken of the perspectives of the parties, paying particular attention to whether there are less restrictive alternatives to achieving the objective, and whether the law is either over or under inclusive in its operation.[40] We will see below how these concepts operate in the contexts of the Canadian, American, and Japanese approaches to the analysis of discrimination.

B. Modern Constitutional Approaches – The Example of Canada

As mentioned earlier, the substantive concept of a right to equality (as opposed to a mere procedural notion of the right) is not merely reflected in recent jurisprudence around the world, but is reflected to varying degrees in the constitutions of a number of countries, and in the major international human rights conventions. It is suggested by the structure of the very text of the provisions purporting to provide protection for the right to equality. For instance, the Constitution of South Africa provides in Article 9 that:

> 1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> 2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> 4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> 5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[41]

Paragraph 3, in particular, sets out the prohibition against unfair discrimination, and lists the prohibited grounds of discrimination, while paragraph 5 makes the explicit the presumption of unfairness where any

40. *Id.* at 92-93, 98.

41. S. AFR. CONST. 1996, ch. 2, art. 9.

discrimination is based on any of the prohibited grounds.[42] The equality rights provision in the *Charter of Rights and Freedoms* in the Canadian Constitution is similar in its prohibition of discrimination on a number of explicit grounds that reflect the basis for typical prejudice and stereotyping. Section 15 provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[43]

The purpose of subsection 2 is to permit the development of affirmative action programs. Subsection 1 provides for the protection of the right to equality, and not to be discriminated against. It is instructive to note how both the Canadian and South African provisions provide that the individual is equal in relation to the law in a number of different ways—the Canadian clause provides for equality in four different respects, "before" and "under" the law, and the right to "equal protection" and "equal benefit" of the law, while the South African provision provides for equality "before" the law, and "equal protection" and "equal benefit" of the law. The drafting history of the Canadian *Charter* reflects quite clearly that this formulation was deliberately adopted in order to ensure that the provision was not interpreted as merely providing procedural protections, as the Canadian courts had interpreted the earlier equality rights provision in the *Canadian Bill of Rights*,[44] and as well to extend beyond the equal

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42. For examples of how the right to equality in the Constitution of South Africa is analyzed by its courts, see Fourie v. Minister of Home Affairs, 2003 (5) SA 301 (CC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2003/11.html; Larbi-Odam v. Members of the Executive Council for Education, 1998 (1) SA 745 (CC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/1997/16.html. For a more general analysis of South African rights jurisprudence, see Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (2008).

43. *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, (U.K.) [hereinafter Canadian *Charter of Rights and Freedoms*], section 15.

44. S.C. 1960, ch. 44. Section 1(b) of the Act provided "the right of the individual to equality before the law and the protection of the law." For more on the reasons for the four-part formulation of the right, see HOGG, *supra* note 37 at 1240-41; Anne F. Bayefsky, *Defining Equality* Rights, *in* EQUALITY RIGHTS AND THE CHARTER OF RIGHTS 1-79 (Anne F. Bayefsky & Mary Eberts, eds. 1985);

protection formulation provided in the Fourteenth Amendment of the U.S. Constitution.

In addition to section 15 of the *Charter*, it is necessary also to examine section 1 in order to understand the equality rights doctrine of the Canadian courts. For the rights analysis under the *Charter* is a two stage process: the first stage comprises an inquiry into the question of whether the fundamental right or freedom was violated by government action; and, in the event such a violation is established, the second stage comprises an analysis of whether the violation can be justified. That justification phase is governed by section 1, and the analytical framework that has been developed from it. Section 1 itself provides that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[45]

Turning to how the courts have applied each of these provisions, let us begin with section 15. The Supreme Court of Canada established the fundamental contours of the right to equality and the framework for its analysis in the first case that raised the issue. The case involved a claim advanced by a non-Canadian lawyer against a law of the province of British Columbia that limited entry to the legal profession to citizens of Canada.[46] The court began with an analysis of the very concept of equality, and how the content of the right enshrined in section 15 was to be interpreted. After commenting on both the importance and elusive nature of equality in democratic philosophy, the plurality of the court confirmed that the right was to be both substantive and centered on the notion of discrimination. It rejected as overly formalistic the Court of Appeal's application of a "similarly-situated" test, which was a reformulation of the Aristotelian principle of equality and simply rested on the idea that persons who are "similarly situated be similarly treated" and persons who are "differently situated be differently treated."[47] Justice McIntyre, writing for the majority on this issue, noted that a right to equality so formulated could justify the Nuremberg laws of Nazi Germany, on the grounds that all Jews were being treated equally under the law.[48]

CANADA'S CONSTITUTION ACT, 1982 AND AMENDMENTS: A DOCUMENTARY HISTORY (Anne F. Bayefsky ed. 1989).

45. *Canadian Charter of Rights and Freedoms*, section 1.

46. Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 (Can.).

47. *Id*. at 165-66.

48. *Id*. at 166.

Rather, the Court confirmed that the promotion of equality "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration,"[49] and that the focus of the right was on the prohibition of discrimination, which lies at the core of the right to equality. That is not to be taken to mean that every distinction drawn by legislation is prohibited, as then virtually every law would be technically caught by the provision. Rather, discrimination in its pejorative sense is the limiting feature of the provision, and the concept that shapes the contours of the right. Discrimination was defined as:

> A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified.[50]

It is important to note that the discrimination need not be intentional, and indeed, under section 15 a law may be discriminatory on its face, may be facially neutral but discriminatory in its effect upon the claimants, or be discriminatory solely in the manner in which it is ultimately applied.[51] Justice McIntyre went on to explain that the prohibited grounds of discrimination listed in section 15(1) "reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must . . . receive particular attention."[52] He also made clear that the list of prohibited grounds was not exclusive or limited, and that other personal characteristics that were analogous to those listed could equally form the basis for a claim of discrimination in violation of the provision. But in order to establish that there has been discrimination on the basis of one of the enumerated or analogous grounds (this is the term used by the court, though the grounds are not, in fact, enumerated in the sub-section), the claimant must prove not only that the impugned law has a "differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is

49. *Id.* at 171. The echoes of Dworkin here are unmistakable.

50. *Id*. at 174-75.

51. *See* HOGG, *supra* note 37, at 1269-72.

52. Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143, 175 (Can.).

discriminatory."[53] The court must therefore analyze the content of the law, its purpose, and its impact upon those to whom it applies and those whom it excludes from application.[54]

There is considerable debate within the Canadian academy, the legal profession, and even the judiciary, over the extent to which this test has evolved or been departed from over the last three decades, but in its broad contours, and for the purposes of our analysis here, we can accept that the test remains essentially unchanged. That is to say, the right continues to be understood to be a substantive right grounded in a Kantian notion of human dignity, and the focus of the analysis remains unfair discrimination based upon a prohibited ground of discrimination, being one of those explicitly articulated in section 15 or personal characteristics that are analogous thereto. The Supreme Court provided a reformulation of the test in a judgment handed down in 1999, in which it further emphasized the concept of injury to dignity as being the core concept in discrimination, and suggested that there also had to be a demonstrated inconsistency between the purpose of the law and the purpose of section 15.[55] This was roundly criticized, however, as being an attempt to narrow the scope of the right further,[56] and in a judgment in 2008, the Supreme Court backed away from this new element of the test, while reaffirming that the concept of dignity is central to the substantive content of the right, that the focus of the analysis is on the concept of discrimination, and generally that the essential aspects of the test first established in *Andrews* continues to be controlling.[57]

All of this, however, only relates to the first phase of the analysis, which is the determination of whether there has been a violation of the right. In the event that the court determines that the right has been violated, as it did in the *Andrews* case itself, the examination moves to the question of justification. The analytical framework for this examination was first established in a case about the presumption of innocence, called *R*. v.

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53. *Id*. at 182.

54. *Id*. at 171.

55. Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 (Can.), at 501-02.

56. *See, e.g.*, Donna Greschner, *Does* Law *Advance the Cause of Equality?*, 27 QUEEN'S L.J. 299, 305-10 (2001-2002); Debra M. McAllister, *Section 15 — The Unpredictability of the* Law *Test*, 15 NAT'L J. CONST. L. 3 (2003-2004); Christopher D. Bredt & Adam M. Dodek, *Breaking the* Law's *Grip on Equality: A New Paradigm for Section 15*, 20 Sup. Ct. L. Rev. (2d) 33 (2003), Mayo Moran, *Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee*, *in* DIMINISHING RETURNS: INEQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 71 (Sheila McIntyre & Sanda Rodgers eds., 2006); Sheila McIntyre, *Deference and Dominance: Equality Without Substance*, *in* DIMINISHING RETURNS: INEQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 95 (Sheila McIntyre & Sanda Rodgers eds., 2006).

57. R. v. Kapp, [2008] 2 S.C.R. 483 (Can.), at paras. 17-26.

Oakes,[58] and so is generally known as the *Oakes* Test. It is the analytical framework that gives effect to section 1 of the *Charter*, which is to say it inquires into whether, in the circumstances of the case, the infringing law constitutes such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[59] It is a formulation that has its counterparts in European jurisprudence, and as will be seen below, bears many similarities to the strict scrutiny standard of review in the American doctrine. It also reflects the proportionality test that Beatty says is increasingly universal, and which he argues is the foundation of a common constitutional rule of law.[60] Others too have suggested that this proportionality analysis is one of the "defining features of global constitutionalism."[61]

The test is a three stage analysis.[62] At the outset, it is important to note that the onus shifts to the government to demonstrate that the law, which by this stage of the analysis has of course already been determined to violate a fundamental right or freedom, can be justified. The onus is that of the civil standard of proof: the balance of probabilities.[63] The first stage of the test is to establish that the impugned government act or policy is indeed "prescribed by law." If the government action is not enacted in formal legislation or regulation, the analysis ends here—only duly enacted law and policy can ever justifiably infringe a right. Put differently, there can never be any justification for the violation of rights by acts not authorized through the democratic process for promulgating law and regulation. This step is usually superfluous, as it was in *Andrews*, but it is an essential element in order to prevent arbitrary state action in the absence of legal authority. The second stage requires that the government demonstrate that the law serves a pressing and substantial objective, which is consistent with the principles and values that are integral to a free and democratic society. And, given the onus of proof requirement, the government has to adduce

58. R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).

59. This being the language from section 1, *Charter of Rights and Freedoms*, *supra* note 43.

60. BEATTY, *supra* note 39.

61. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008); *see also* David Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 695-96 (2005).

62. As will be seen, one of the stages itself comprises three steps, and subsequent cases have sometimes numbered the steps differently, such that it is sometimes described as a four-step test.

63. R. v. Oakes, [1986] 1 S.C.R. 103 (Can.), at paras. 65-68. Again, there is a wealth of literature within Canada on the extent to which the *Oakes* test too has been modified by the Court over time, with the development of differentiated standards of proof depending on the type of case, but for our purposes we need not delve into such minutiae. The general framework remains essentially unchanged.

cogent evidence as to the exact nature of the purpose of the law, the importance of that purpose, and its consistency with democratic values.[64]

The third stage of the test is an inquiry into the relationship between the means adopted by the legislation and its stated objective, which is itself a three part "proportionality test." The first element of this test is to determine whether there is a rational connection between the stated objective and the means taken by the legislation. At its most basic, this involves an inquiry into whether the means chosen will actually result in the achievement of the objective. But the court will also inquire into how carefully tailored the legislation is to achieve the objective, and whether it is over or under inclusive in terms of its scope and impact. The second and related element is to determine whether the law constitutes the least drastic means of achieving the objective—in other words, whether there are any less restrictive alternatives, or whether the law imposes the minimum impairment possible on the claimant class. Finally, the third element of the proportionality test is to inquire into the proportionality of the actual harm caused to the claimant or claimant class, relative to the proposed benefit to be derived from achieving the legislative objective.[65]

There is an inverse relationship between the "pressing and substantial objective" stage and the "proportionality test" stage of the test, which poses a dilemma for the government. The greater the level of abstraction with which the legislative objective is stated, the easier it is to meet the pressing and substantial test; but the higher the level of generality with which the objective is defined, the more difficult it is to demonstrate a rational connection between the means and the objective, and to prove that there are no less restrictive alternatives to achieving the objective.[66] This dilemma was illustrated to some extent in the *Andrews* case. The Law Society of British Columbia argued that the pressing and substantial purpose of the law limiting entry to the legal profession to Canadian nationals was to ensure that lawyers, who they argued fulfill important roles within the governmental process, had both an adequate knowledge of local affairs, customs, and institutions, and that they had a sufficient commitment and attachment to Canada as a country. The majority of the Court accepted the importance of the stated objective, but held that the exclusion of non-citizens was not rationally connected to that objective, in that citizenship was not a sufficiently precise proxy for either knowledge or commitment.

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64. *See id.* para. 69.

65. *Id.* paras. 74-75.

66. HOGG, *supra* note 37, at 881-82 (analyzing section 1 and the *Oakes* test, and discussing this relationship).

The law was not carefully tailored to achieve the objective, and was likely to be both under and over inclusive, in that it would exclude foreigners who were both knowledgeable and committed, and permit entry to Canadians who were neither.[67]

As was emphasized above in the explanations of the more general proportionality analysis, it should be noted that the *Oakes* test involves a careful evaluation of evidence as to the negative impact that the impugned law has on the claimant, as perceived by the claimant (or, at a minimum, by a reasonable person standing in the claimant's shoes), as well as evidence as to the government's actual legislative objectives, and the extent to which the means chosen have been carefully tailored to achieve that objective with minimum impairment of the rights of the claimant. In the Canadian model, this is perhaps more analytically rigorous by virtue of the separation of the two questions, beginning with a distinct inquiry into the nature of the discrimination and the extent of the harm to the claimant, before addressing the relationship between the legislative objectives, means, and the proportionality between the objective and impact on the claimant class.

This two part analysis, under sections 15 and 1 of the *Charter*, has been applied since 1982 to establish a fairly robust right to equality in Canada. Canadian advocates remain critical of the manner in which the courts have enforced the right, but as will become quite apparent after a brief review of the American doctrine and then a more detailed analysis of the Japanese case law, the Canadian model provides a relatively powerful protection of a substantive right, with a stringent justification requirement for any violation. Laws that have discriminated on their face, in their unintended effect, or in their application, on the basis of each of the prohibited grounds as well as a number of analogous grounds such as sexual orientation, have been struck down over the years.[68] When I examine the Japanese cases below in detail, this model will provide a useful comparison, and because of the similarity between the Japanese and Canadian constitutional provisions, I will suggest that the Canadian jurisprudence ought to be far more instructive for the Japanese courts than the American doctrine.

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67. Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143, (Can.), at paras. 12-16 (per Wilson, J., writing for the majority on this issue).

68. For a more detailed analysis of the right, and the various forms of discriminatory laws that have been struck down for violation of it, see generally HOGG, *supra* note 37, ch. 52.

C. The American Constitutional Approach to Equal Protection

In contrast to the more detailed equality rights provisions of the constitutions of Japan, Canada, and South Africa, and all the international human rights instruments, the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution is conspicuously brief and vague. It provides quite simply:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[69]

How is this to be interpreted? What is the content and scope of "equal protection of the laws?" Compared to the provisions we have seen above, there is no assistance for the courts in developing criteria for differentiating between valid and invalid distinctions, or determining the basis of unfair discrimination. Or, to look at it another way, there is no criteria suggested for limiting or defining the scope of the right. Indeed, what is the underlying philosophical rationale for the provision? In contrast to later equality rights provisions, which of course were drafted with the benefit of learning from the American experience, the text of the first modern constitutional clause designed to protect equality rights itself provides no assistance in answering these questions. In the *Slaughter-House Cases*, decided in 1872, the United States Supreme Court interpreted the clause narrowly, with the determination that its purpose was fundamentally aimed at countering racial discrimination: "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden."[70]

The scope of the provision has obviously been broadened since that early judgment, but race and the historical context of slavery and reconstruction continue to cast a long shadow over equal protection thinking. Moreover, the jurisprudence continues to reflect tension between conflicting understandings of the underlying philosophy of the provision, and divergent conceptions of what criteria ought to be applied by the courts in their judicial review of government action alleged to violate the provision. While we can only briefly review the approach here, for the

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69. U.S. Const. amend. XIV. As Laurence Tribe points out, however, the Equal Protection Clause is not the only provision in the constitution that operates to create equality rights, but it is the "fount of doctrine." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1437 (2d ed. 1988).

70. Slaughter-House Cases, 83 U.S. 36, 81 (1872).

purposes of our comparative analysis it is helpful to highlight the salient elements.[71]

By the end of the twentieth century the doctrine had stabilized around three standards or levels of judicial scrutiny, which would be applied according to either the right or interest that was burdened by the impugned law, or the basis of the classification (that is, the distinction) that the law made. In this sense, the equal protection clause had been interpreted so as to have two distinct aspects, which may be said to lead to two different lines of inquiry, each of which seeks to determine the level of judicial scrutiny that is to be applied. Both lines of inquiry can be seen as different ways to define the limits of the right. These two lines are neatly captured by the distinction between the right to be *treated equally*, and the right to be *treated as an equal*.[72] The right to be treated equally, the first aspect, only operates in respect of certain specific interests, particularly other fundamental rights such as the right to vote, the right to freely travel between states, and access to the courts and the judicial process. In other words, the provision only operates, in this aspect, to protect people from being discriminated against in a way that affects the enjoyment of one of these other rights. This defines the first form of limitation on the scope of the right, and the first line of inquiry begins with an examination of what rights or other interests are burdened or benefitted by the classification in the impugned law.

The second aspect, the right to be treated as an equal, which is shared by all and not linked to any other right or interest, reflects the requirement that the government treat all individuals with equal concern and respect. This second aspect, however, is instead limited by the nature of the classification made by the law or policy, and the type of disadvantage that is imposed upon the claimant. The second line of inquiry therefore begins with an examination of the basis of the classification. The Supreme Court has over time developed the idea that classifications based on certain types of personal characteristics are inherently "suspect," and established the principle that discrimination created by such classifications should be subject to closer judicial scrutiny than distinctions based on other types of personal characteristic. It has identified certain criteria for categorizing the types of classification that will be "suspect," and three levels of scrutiny for analyzing specific claims based on how they are thus categorized. It is this

71. There is much literature on this subject, but for a short yet excellent review and analysis of the three dominant theoretical approaches to, and justifications for, judicial review, see BEATTY, *supra* note 39, ch. 1.

72. TRIBE, *supra* note 69, at 1437.

second aspect of the right that relates more closely to the discrimination in the sense discussed above.

As just mentioned, each of these two lines of inquiry is aimed at determining which of the three levels of review ought to be applied. The most relaxed level of scrutiny is a simple rationality test, which as we will see, shares a great deal in common with the Japanese "unreasonable discrimination" test. This standard is applied to cases involving distinctions made in socio-economic policy making, not based on any "suspect" classification in which no other fundamental right or interest is implicated. The test requires the applicant to prove that the law is not "rationally related to furthering a legitimate government interest." The requirement that the legislative purpose be "legitimate"—both in terms of involving some conception of the public good, and in the fact that the purpose itself is not in violation of the Constitution or any laws—introduces an external criteria, thus avoiding a purely tautological demonstration of rationality between the means and ends of the law in question.[73] That having been said, the courts have been extremely deferential to the government in the application of this standard, often not requiring evidence to prove the original purpose of the legislation, but rather engaging in speculation as to what might have conceivably been the legitimate purpose under the circumstances.[74] In only a few cases has the Supreme Court held that the rationality test was not satisfied.[75]

At the other end of the spectrum is the "strict scrutiny" standard of review. Before examining the content of the standard and how it is applied, it is best to first outline the criteria that trigger its application. First, it is triggered if the court determines that the classification or distinction made in the impugned legislation implicates some other fundamental right or interest. Thus, minimum residency requirements as a pre-condition to receiving government benefits will be subjected to strict scrutiny, because of the impact that the law will have on the freedom of inter-state travel.[76] This trigger relates back to the first line of inquiry, with respect to "being treated equally."

The second trigger is the determination that the classification made by the law is itself suspect as constituting discrimination based on prejudice

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73. *Id.* at 1440.

74. United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-77 (1980).

75. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 65-66 (1982); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 622-24 (1985). However, Tribe argues that these do not represent the standard, and that in fact the Burger Court was applying a heightened scrutiny in respect of classifications it felt were suspect but did not want to so classify. TRIBE, *supra* note 69, at 1444-45.

76. *See, e.g.*, Shapiro v. Thomson, 394 U.S. 618, 638-42 (1969).

against racial or other minorities within society. In other words, the trigger is based not on the interest that is affected by the law, but on the characteristics of the persons burdened by the law, or the personal characteristics that form the basis for the distinction made by the law. Given the historical context, race is the primary suspect classification, as the Supreme Court affirmed in what is perhaps the country's most notorious equal protection case:

> All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[77]

In addition to race, the courts have classified a number of other bases for discrimination as being quasi-suspect, such that laws that make facial classifications based on such characteristics may be subject to strict scrutiny. This flows from the famous "footnote four" in *United States* v. *Carolene Products Co*., in which Justice Stone suggested that legislation may be subjected to more exacting scrutiny when it is directed at "particular religious . . . or national, . . . or racial minorities. . . . [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[78]

The reason *why* such discrete and insular minorities should be protected, however, continues to be of considerable debate within the United States, and these differing perspectives impact the scope of the right itself. For while the theoretical perspective discussed above, as implemented within the Canadian constitutional model, would suggest that any discrimination based on some immutable characteristic shared by discrete and insular groups within society should be suspect on the basis that such discrimination is likely to be injurious to their dignity, that view is not dominant in American rights theory. Indeed, Justice Stone's own articulation of the principle in footnote four grounds the reason in the political process—that is, minorities may require greater protection from

77. Korematsu v. United States, 323 U.S. 214, 216 (1944). The case involved a claim under the Fifth Amendment by Japanese-Americans who were ordered removed, by Executive Order 9066, from areas around the West coast of the United States during World War II, and the Supreme Court notoriously upheld the government policy.

78. United States v. Carolene Products, Co., 304 U.S. 144, 153 (1938) (internal citations omitted).

the courts because they are incapable of accessing the normal levers of political power within the democratic process to defend their interests.

This "process theory" explanation of rights thus rejects the idea that some putative substantive content of rights, such as a Kantian notion of dignity, forms the foundation of a right to equality, and focuses entirely on whether the claimant class requires greater protection due to its inability to exercise political power within the democratic process. This perspective is grounded in the traditional position that the courts should be deferential towards the legislative process, and that such deference should only be set aside when the democratic process is itself unlikely to properly resolve countermajoritarian dilemmas.[79] Some very prominent scholars continue to argue that rights jurisprudence can only be explained by some underlying substantive understanding of rights, but there appears to be a wider agreement that the Supreme Court's approach to the issue is based primarily upon process theory. [80] Thus, while "immutable characteristics" are referred to by the Supreme Court, how and for what purpose it employs immutable characteristics is subject to debate, and while the concept of immutable characteristics has at times been relied upon by the Court in reaching decisions in some equal protection cases, in other cases the notion has been explicitly rejected.[81]

The reliance upon a process theory approach to discrimination will of course lead to very different conclusions about what kinds of legislative

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79. The foundational work on process theory is JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). As mentioned earlier, for a good analysis of the dominant contending theories, see BEATTY, *supra* note 39, ch. 1.

80. Ronald Dworkin remains the dominant advocate of a substantive conception of rights. See DWORKIN, RIGHTS, *supra* note 33. *See also*, Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067-72 (1979). *But see generally* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991). Also, notwithstanding the assertion that the Court's general approach is grounded in process theory, Kermit Roosevelt also makes the point that the manner in which the Court has dealt with affirmative action cases is not consistent with a process theory approach to equality rights: KERMIT ROOSEVELT, THE MYTH OF JUDICIAL ACTIVISM, 181-188 (2006), a book written for a non-specialist audience, but which nonetheless provides an elegant and precise review of the process theory analysis of these issues.

81. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) ("Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .'"); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) (rejecting that the immutable characteristic of mental retardation should trigger heightened scrutiny: "if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.").

distinction deserve close scrutiny, or heightened justification, as compared to those that a Kantian substantive rights approach would suggest. The most obvious illustration of this is provided by the issue of gender discrimination. Since women comprise a slight majority of the voting population, the process theorist would argue that women ought to be able to exercise their political power within the democratic process to protect and advance their unique interests, and thus should not require any particular protection or assistance by the courts. The process theorist might concede that given the likely impact of historical discrimination, and the fact that men continue to overwhelmingly control the government process, some level of protection might be required in the short-term, but generally speaking women as a class do not deserve any special treatment that would justify the courts being less deferential of the political process. A more substantive rights approach, of course, would suggest that the fact that women as a class might have access to the levers of power is not dispositive of the question of whether a particular legislative distinction constitutes a form of discrimination that is likely to injure the dignity of individual women in society.[82]

Returning to our discussion of the doctrine itself, and the operation of "strict scrutiny," there have been very few classifications aside from race that have been determined to be suspect, and thus requiring strict scrutiny. Significantly, for our consideration of two of the Japanese cases analyzed below, national origin or "alienage" is the one other basis of discrimination that has attracted strict scrutiny as a "quasi-suspect" classification. Foreign nationals, or "aliens," have been described as "a prime example of, a single 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[83] The Supreme Court, however, has also developed a "political-function exception," according to which classifications for the purpose of excluding non-nationals from positions that are intimately connected to the process of democratic self-government, are subjected to the relaxed standard of scrutiny, or minimal rationality.[84] Nonetheless, the court will look carefully at how the classification is tailored, and has held that evidence of either over or under inclusiveness will undermine the argument that there is a legitimate political function that

82. See generally KERMIT ROOSEVELT, THE MYTH OF JUDICIAL ACTIVISM, *supra*, note 80; and BEATTY, *supra* note 39, ch. 1. For an authoritative treatment of process theory, see ELY, *supra* note 79.

83. Graham v. Richardson, 403 U.S. 365, 372 (1971).

84. Bernal v. Fainter, 467 U.S. 216, 221 (1984).

is actually being protected.[85] We will return to this analysis when we examine one of the key Japanese cases below.

As a result of this approach to rights, a number of classifications, such as gender and illegitimacy, which would constitute prohibited grounds of discrimination under the Canadian model, and indeed the South African, European, and the various international law conventions, have been placed in something less than a suspect category. These classifications thus trigger an "intermediate" standard of review, which is the third level of review, falling between strict scrutiny and the minimum scrutiny test. Indeed, for some of these forms of discrimination, only the minimum scrutiny test is applied. Moreover, another profound difference between the American model and other constitutional approaches, such as Canada's, is the treatment of discriminatory effect. It will be recalled that under the Canadian model the discrimination need not be intentional or invidious to ground a determination that the right to equality has been violated. That is not the case under the American doctrine. If it is alleged that a law creates a classification that, while on its face does not employ a suspect category (i.e., race), nonetheless has a disparate impact on members of a discrete and insular minority, that alone will not trigger strict scrutiny. In order to trigger the application of strict scrutiny the applicant must prove that that the law is animated, at least in part, by specific discriminatory intent. The fact of disparate impact may be evidence of such intent, but by itself does not ground the claim. What is more, discriminatory intent in this context means more than simply enactment with knowledge of the likely consequences. The claimant must prove that the law or policy was implemented *because of*, rather than *in spite of*, the foreseen disparate impact on the minority.[86]

This brings us finally to the substance of the three different standards of review. As discussed above, the minimum scrutiny or mere rationality test requires only that there be a rational connection between a legitimate purpose of the legislation, and the means that it employs to achieve that purpose, which creates the impugned distinction. The minimum scrutiny test reflects the presumption of constitutionality and the default deference to the legislative process, and legislation virtually always survives application of the test.

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85. *Id.* at 225-27. Justice Marshall determined that the Texas law that excluded non-nationals from acting as notary publics was underinclusive, since there were other positions that fulfilled similar functions that were not similarly protected, and he also decided that in any event notaries do not perform functions that "go to the heart of representative government." *Id.* at 225.

86. Washington v. Davis, 426 U.S. 229, 239 (1976); Personnel Adm. of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

The strict scrutiny test, on the other hand, is somewhat more complex. In one sense, it operates very much like the justification phase of the analysis (that is, the *Oakes* test) in the Canadian model. Thus, once triggered, the onus shifts to the government to prove that the purpose of the impugned legislation is *compelling* (analogous to the Canadian "pressing and substantial objective"), and that the classification or distinction that causes the alleged discrimination is *necessary* to the achievement of that purpose. Moreover, while the court will provide some latitude to the legislature, on the basis that "mathematical nicety" is not possible in the legislative process,[87] it will examine the extent to which the law is closely tailored to achieve the objective, and the extent to which it exhibits any under or over inclusiveness. Similarly, as part of the determination of necessity, it will examine whether there is any less restrictive alternative to the discriminatory means adopted. This tracks the rational connection element of the *Oakes* test quite closely, though there is no specific proportionality analysis in the strict scrutiny review. Nonetheless, it is often said that the strict scrutiny test is strict in theory but fatal in practice, and indeed, few cases survive its application.[88]

The strict scrutiny test is somewhat more complicated, however, because it is not a pure justification analysis as is the *Oakes* test in the Canadian model. The courts often employ a variant of strict scrutiny in a manner that suggests that it is being used to actually make the initial determination of whether there has been a violation of the equal protection clause, rather than solely as a justification analysis after the violation has been established.[89] The details of this need not concern us here, but it is useful to note that, in contrast to the Canadian model, there is not quite the same clear demarcation of the two phases of analysis.

Stepping back, however, and assessing the *Oakes* test and the strict scrutiny test in a broader comparative perspective, they both conform to the proportionality test that Beatty has found to be common to most constitutional democracies, and which he argues is the hallmark of the rule of law. That is, they both reflect a detailed evidence-based evaluation of the relationship among the legislative objective, the means chosen to achieve it, and the effects those means have on the parties—looked at from the perspective of the parties. The relationship between objective and means must be rational, and necessary, in the sense that there is no less restrictive

87. *See* TRIBE, *supra* note 69, at 1446.

88. *Id.* at 1451.

89. *See generally* Michael Helfand, *How the Diversity Rationale Lays the Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine*, 17 WM. & MARY BILL RTS. J. 607, 610-12 (2009) (offering a detailed analysis of the two ways in which the standard is employed).

alternative; and the relationship between the objective and the impact of the discrimination on the claimant must be proportionate.[90]

Finally, turning to the third of the three levels of review in the American doctrine, the intermediate standard of scrutiny requires that the government show that the purpose of the impugned legislation is *important* (as opposed to compelling), and that the means adopted by the law that makes the impugned distinction or classification, is *substantially related* (as opposed to necessary and closely tailored) to the purpose. As already discussed, this is employed for certain classifications that are quasi-suspect, such as gender, which would enjoy the same level of protection as race in the Canadian, South African, and other substantive rights systems. As such, the government can, under the American system, much more easily establish that discrimination based on gender and other such quasi-suspect classifications, is justified in the circumstances.

In summary, the scope of the right to equal protection is considerably narrower than that of the equality rights in the Canadian *Charter*. Laws drawing distinctions on the basis of physical and mental disability, age, sexual orientation, legitimacy, and gender, have all been struck down in Canada as constituting unjustifiable discrimination, while all those grounds of discrimination still remain outside of the "suspect" class, and thus do not attract strict scrutiny in the American courts (unless the law based on such classification otherwise implicates the enjoyment of some other fundamental right). As such, government action discriminating on those grounds will generally survive judicial review in the United States. Indeed, of these, only gender and illegitimacy have been clearly classified as being deserving of intermediate scrutiny. Moreover, as discussed above, without proof of specific discriminatory intent, non-facial or effects based discrimination does not attract any heightened level of scrutiny. Thus, as reflected in the foregoing discussion, only one narrow aspect of the American approach employs the proportionality analysis that is common to so many other constitutional democracies, and has been argued to underpin the rule of law. Nonetheless, as we turn to the Japanese cases, it will be instructive to consider how the application of the U.S. doctrine in these cases might have altered the analysis, and to ponder what inference might be drawn about the American doctrine from an examination of the almost universal application of a bare rationality test by the Japanese courts.

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90. While the strict scrutiny test does not explicitly require an inquiry into "proportionality" as does the *Oakes* test, the result of the inquiry into the importance of the legislative objective, how carefully the law has been tailored, whether it is over or under inclusive, and whether there are less restrictive alternatives, result in a *de facto* assessment of proportionality.

III. THE UNREASONABLE DISCRIMINATION TEST IN JAPAN

As we begin to look closely at the development of the Japanese doctrine, I should begin with a few words on the appropriateness of analyzing the Japanese cases within this comparative framework. The argument that this is some illegitimate imposition of "western values" can be anticipated. But the concept of equality discussed above should not be understood as some "western" notion of equality that is somehow foreign to Japanese legal thinking. To the extent that any system aspires to constitutional democracy founded on liberal democratic values, including the rule of law, it must necessarily protect the right to equality. Equality is increasingly seen as a fundamental component of the concept of justice itself.[91] Moreover, the notion that certain rights transcend and exist independent of mere positive law, and that their violation can only be justified in accordance with a strict proportionality analysis, is central to most robust explanations of the rule of law.[92] And finally, in contrast to the original German notion of *Rechtsstaat* (literally "state based on law") that comprised one of the fundamental principles of the earlier Constitution of the Empire Japan (1898), the Anglo-American conception of the rule of law is central to the understanding of the 1947 Constitution of Japan.[93]

Many of the doyens of Japanese constitutional law have remarked on the necessity to develop criteria for the interpretation of Article 14 that are consistent with the values of a free and democratic society and which recognize the dignity of the human being.[94] The problem is primarily that the courts have failed to do so. The Human Rights Committee under the ICCPR, in its observations on the periodic reports submitted by Japan, has repeatedly criticized the analytical model employed by courts in assessing discrimination as being inconsistent with Japan's obligations to enforce the right to equality under the ICCPR. In particular, it has expressed concern over "the vagueness of the concept of 'reasonable discrimination,' which, in the absence of objective criteria, is incompatible with article 26 of the Covenant," and about "the restrictions that can be placed on the rights guaranteed in the Covenant on the grounds of 'public welfare,' a concept that is vague and open-ended and which may permit restrictions exceeding

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91. *See* RAWLS, *supra* note 33, at 441-49; KYMLICKA, *supra* note 33, at 56.

92. BEATTY, *supra* note 39, at 162; *see generally* DAVID DYZENHAUS, *The Rule of Law as the Rule of Liberal Principle*, *in* RONALD DWORKIN 56 (Arthur Ripstein ed., 2007); DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006).

93. Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, 53 LAW & CONTEMP. PROBS. 61, 62-65 (1990).

94. MIYAZAWA, CONSTITUTIONAL LAW II, *supra* note 3; ASHIBE, READING, *supra* note 11, at 136-40; SATŌ, CONSTITUTIONAL LAW, *supra* note 3, at 477-83.

those permissible under the Covenant."[95] An examination of how the courts analyze discrimination illustrates the validity of these observations, although we will focus primarily on the issue of "reasonable discrimination."

A. The *Patricide* Case

The Supreme Court established in the first equality cases that, notwithstanding the unqualified language of Article 14, only discrimination that was "unreasonable" or that lacked "rationality" (*gōrisei*, which can be translated as either "reasonableness" or "rationality") was prohibited by the Constitution. It did not elaborate criteria for determining what made any given discriminatory law or policy reasonable, but the subsequent jurisprudence reveals that it is simply to be assessed by reference to the objectives and means of the law or policy in question. In comparison to the Canadian model and the American strict scrutiny test, and the proportionality analysis examined above, there is both a failure to assess the legitimacy or relative importance of the legislative objective, or the nature of the discrimination and its actual impact on the claimant. Of the triad of objective, means, and effects, the Japanese test does not impose any external criteria for assessing the first, and it entirely ignores the third.

It is instructive to begin our discussion with what is probably the most famous equality rights case in Japan, and one of only a handful of decisions in which the Supreme Court has actually held a law to be unconstitutional. The so-called *Patricide* case of 1973 involved Article 200 of the *Criminal Code*,[96] which provided for a harsher sentence for the murder of a lineal ascendant than the punishment for the murder of anyone else, as provided for in Article 199. The maximum punishments stipulated by the two provisions were the same, but the minimum possible sentences available under the two provisions, in practical terms, was a minimum of a 3 year sentence for an Article 200 conviction, and a conditional discharge for murder under Article 199.[97] The issue had come before the Supreme Court before, and the distinction made by the law had been upheld.[98] In the case

95. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Committee (Japan), UN. Doc. CCPR/C/79/Add.102, at paras. 8, 11, *available at* http://www.unhchr.ch/tbs/doc.nsf/0/5a2baa28d433b6ea802566d40041ebbe?Opendocument.

96. KEIHŌ [Penal Code], Law No. 45 of 1907, art. 200. Article 200 has since been repealed, though this did not happen until 1995 (Law No. 91, 1995), more than 20 years after the decision of the court holding it to be unconstitutional.

97. *Patricide Case*, (Sup. Ct. April l4, 1973), 27 KEISHŪ 3 265, *translated in* BEER AND ITOH, *supra* note 12, at 146.

98. Supreme Court Judgment, First Petty Bench (May 24, 1956), 10 Keishu 5 734.

that arrived before the court in 1973, however, the accused presented a tragic set of facts, having been the victim of a violent incestuous relationship with her father from the age of 14, and having borne five of his children before she finally killed him.

The majority of the court held that Article 200 was unconstitutional on the grounds that the disparity between the two punishments (for murder of an ascendant and murder *simpliciter*) was too great, such that the harshness of the punishment for patricide was disproportionate to the legislative objective, and so made the discrimination itself "unreasonable." That answered the question the court initially posed as being the issue in the case: "whether Article 200 of the *Criminal Code* violates the said clause of the Constitution [Article 14]; and [this issue] is to be settled based on a determination of whether or not the discrimination has reasonable grounds."[99] In trying to identify the legislative purpose, the court noted the ideological background of Confucian values regarding filial piety, and the extended family system that had been abolished immediately following World War II. Ultimately, the court found that the legislative purpose was to maintain and protect the respect and gratitude that people ought to have for their ascendants. It held that it was not unreasonable for the law to treat the murderers of ascendants differently, but that the harshness of the punishment for killing an ascendant, as compared to that for other murders, was disproportionate and thus unreasonable. A strong concurring judgment written by Justice Tanaka dissented on this latter point, holding that the differential treatment was itself unconstitutional.[100]

At first blush this case is difficult to understand from a traditional perspective on equality rights. In part, this is because the court never addressed the question of what, precisely, constitutes the discrimination in the case. It was assumed as given that Article 200 is discriminatory, but the court never applied any criteria for assessing what harm is caused by the differentiated treatment or how it is unfair, or who the accused is to be compared with for the purposes of the equality analysis. Most of the discussion relating to any comparison deals with the different punishments required by the law for the two groups of murders. But are we really to understand that the accused claims that she, and all other murderers of ascendants, are being treated unfairly as compared to "regular" murderers? Are we comparing two groups of murderers for the purpose of assessing the unequal treatment? That, quite obviously, cannot be right, and the

99. *Patricide Case*, at 144. (first insertion added; second insertion in original).

100. *Id*. at 150-56 (per Tanaka, J., concurring).

significance of the distinction does not lie in how it treats two groups of convicted criminals based on different definitions of their crimes.

The case can only be understood in terms of the legislative objective of holding out ascendants as deserving greater respect and concern than descendants within the family organization, rather than the differentiated treatment of persons accused of murder based on their relationship with their victims. The law, as the court itself recognized, was attempting to foster and preserve a culture of enhanced respect for ascendants, and on its face communicated to society that the killing of an ascendant was morally more pernicious than the killing of one's descendant. It suggested that killing one's mother is morally worse than killing one's child, and the law created, through its deterrence power, stronger protections for ascendants than it did for descendants.

We are all descendants at one stage of our lives, and most of us will be ascendants at a later stage, and many will be both simultaneously for part of their lives. Thus, it may not strike us that one's status as ascendant or descendant is the type of immutable characteristic upon which we would say that different treatment amounts to unjust discrimination. Yet in a very real sense the law suggested that, in any given family relationship, the life of the parent was of greater worth than that of the children or grandchildren. This was quite consistent with the underlying philosophy of the *Ie* system conception of the family that was established in Imperial Japan,[101] and the Confucian values from which that system had been developed. Justice Tanaka clearly had this in mind when he wrote in his reasons that the creation of special protection for ascendants is "based on a kind of status morality" that is likely to be "repugnant to the fundamental idea of democracy based upon the dignity and equality of individuals."[102]

The discrimination, therefore, lies not in the difference in the treatment of a specific accused based on her relationship with her victim, but rather in the lesser protection (through lesser deterrence) provided to descendants under the law than that provided to ascendants. Descendants were not being treated equally by the law in their capacity as potential victims, and the law signaled that they were worthy of less respect and concern than ascendants generally. The distinction drawn by the law was

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101. The *Ie* (literally meaning "house" or "home") system was one which, in its broadest and rhetorical sense, characterized the entire nation as one hierarchical family, with the Emperor at its head as a benevolent patriarch. In legal terms, it codified the hierarchical structure within the extended family, with a patriarch as the head of the household. The family law in the Civil Code was significantly revised during the Occupation to "democratize" it and, in particular, provide for equality between the sexes. *See, e.g.*, HIROSHI ODA, JAPANESE LAW, ch. 16 (2nd ed. 1999).

102. *Patricide Case*, at 152 (per Tanaka, J., concurring).

between ascendants and descendants within the family relationship, and the harm caused was to the dignity of the descendants, in both the objective and subjective sense of the word, in their relations within the family, rather than between the murderers based on who they killed, or the severity of the penal sanction that was actually meted out to the rare accused in a patricide case.

Had the court more deliberately explored and clearly articulated the nature of the comparison, and thus what in precise terms constituted the discrimination, it might well have come to a different conclusion on the question of the validity of the legislative objective. It almost certainly would have led to different reasoning (though not a different conclusion) regarding the "reasonableness" of the discrimination. For once the essence of the discrimination and the harm it caused becomes clear, and the distinction that is really being impugned has been isolated, then it becomes equally clear that the extent of the relative harshness of the punishment is really beside the point. While the court's reasoning is cast in terms that resemble the standard "rational connection" and "proportionality analysis" within justification arguments, it does not make sense in the context of the actual discrimination at issue.[103] *Any* harsher treatment of a convicted accused based on her status of being a descendant of the victim, designed to create greater deterrence against attacks on ascendants and thus to foster the notion that the lives of ascendants are worth more than those of descendants, would be illegitimate, and variations in the levels of harshness of the punishment do not constitute greater or lesser degrees of discrimination. Focusing on the severity of the punishment here is akin to questioning just how far back on the bus one has to be required to sit, for race-based segregated seating to become illegitimate.

While the court ended up concluding that the provision was unconstitutional, it did so on the grounds that the discrimination was "unreasonable." The only criteria offered for that finding was that there was a lack of proportionality between the objective of the legislation and the harshness of the means adopted to achieve it. But this should not be confused with a "less restrictive alternative" or "minimal impairment" argument. Because the court did not quibble with the means in and of itself—that is the imposition of a different punishment for killing an ascendant. The court did not suggest that the objective ought to be pursued through a different avenue that differentiates between ascendants and

103. *But see* Charles Qu Ba, Patricide, *Proportionality and Equality: Japanese Courts' Attitude Towards the Equality Principle as Reflected in Aizawa v. Japan*, 8(2) MUR. U.E.J.L. (2001) (while critical of the reasoning of the court, he argues that the majority decision was implicitly employing the proportionality principle).

descendants to a lesser degree. It merely questioned the harshness of the punishment and mistakenly identified that as the means for achieving the legislative objective. Varying the harshness in no way alters the nature of the discrimination. Moreover, the Court suggested no specific criteria for assessing the "reasonableness" of the actual discrimination and placed no importance on evaluating the effect of the discrimination on the claimant and those similarly situated.[104]

This lack of any clearly defined criteria for determining what constitutes "reasonable discrimination," and in particular the failure to access either the impact of the discrimination, or the legitimacy of the legislative objectives relative to fundamental constitutional values, constitutes the central weakness of the judicial model. Without external objective criteria the notion of "reasonable discrimination" simply relies on the court concluding that the government policy, taken on its own terms, has some rational basis. Depending on the level of generality at which the argument is pitched, establishing a rational connection between means and ends is not only easy to do, but when there is no inquiry into the legitimacy or importance of the objective, it can in fact be entirely tautological.[105] Moreover, this approach collapses and conflates the two distinct aspects of rights analysis—the first being the nature of the distinction being made and whether it is unfair and causes harm so as to constitute discrimination, and the second being whether such discrimination (if such has been determined) can be justified. By collapsing the analysis and focusing primarily on the justification, without first analyzing the nature of the discrimination and how it may violate the right, the justification analysis cannot be handled with any substantive precision. [106] In particular, and

104. Ashibe, in his analysis of the case, disagrees with the majority decision, but applauds what he suggests is a nuanced and sophisticated distinction between the legislative objective and the means of achieving it. But as argued here, the court was wrong in considering the difference in severity of punishment as being the means of achieving the objective that constituted the discriminatory treatment. ASHIBE, READING, *supra* note 11, at 140-41.

105. Hidenori Tomatsu has suggested that the Supreme Court has quite consciously limited itself to a "mild scrutiny" or rationality test with respect to equality, because the court recognizes that it would be difficult to obtain compliance from the executive and legislative branches of government. Hidenori Tomatsu, *Equal Protection of the Law*, *in* JAPANESE CONSTITUTIONAL LAW, 187, 202 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

106. The inadequacy of the standard of review is recognized by Japanese constitutional scholars, although, as discussed earlier, Japanese scholarship would benefit from looking at jurisprudence from such courts as those of Canada, South African, and the European Court of Human Rights. As discussed earlier, there is a tendency among Japanese academics looking at this issue to focus exclusively on the U.S. experience, and the Japanese "reasonable discrimination" test resembles the minimum scrutiny "rational basis" level of review. For examples of Japanese constitutional discussion of the standards, see MATSUI, *supra* note 3, at 364; ASHIBE, READING, *supra* note 11, at 136; ASHIBE, CONSTITUTIONAL, *supra* note 3, at 125. Ashibe, one of the most influential constitutional scholars of the last generation in

looked at from the perspective of the more general proportionality analysis, the "unreasonable discrimination" test fails utterly to analyze and evaluate how the discrimination affects the claimant or others similarly situated. Indeed, the benefit of the bifurcated analysis of the Canadian approach is that the initial examination of the precise nature of the discrimination helps to isolate and bring into stark relief the harm that is caused to the claimant class within society, against which the proportionate importance of the objective can then be assessed in the justification phase.

IV. APPLICATION OF THE DOCTRINE

The Supreme Court did not hold another law to be unconstitutional on the grounds that it was discriminatory in violation of Article 14, until 2008.[107] The vast majority of lower court decisions have followed the model of the Supreme Court in finding that alleged discrimination is "reasonable" in the circumstances. Moreover, as we will see, the test has been applied by the courts in adjudicating discrimination claims in the private sphere, where the values underlying Article 14 have informed the analysis, upholding discrimination by corporations and other entities on the grounds that it was "reasonable" in light of the circumstances and the entity's policy objectives. Before looking at cases in the private domain, however, we should address a more recent decision of the Supreme Court, which is also an important case for understanding how the "unreasonable discrimination" test is applied in cases involving more typical discrimination, against true discrete and insular minorities who have a history of disadvantage. It is particularly instructive for assessing how the rights of foreigners, including the second and third generation Korean permanent residents of Japan, are protected within the framework of this test.

A. The *Tokyo Metropolitan Government* Case

The *Tokyo Metropolitan Government* case of January 26, 2005, involved the claims of discrimination asserted by a Japanese-born Korean woman, a permanent resident of Japan, who was a local public employee

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Japan, has long been a champion of introducing the levels of review employed in the American courts, even though he is a proponent of substantive rights theory. Of the better known Japanese scholars, only Matsui is clearly a process theory advocate. As a doctoral student, he studied under the supervision of John H. Ely.

107. The Supreme Court has twice held the disparity in the ratio of voters per candidate as between rural and urban federal political ridings to be unconstitutional under article 14, although it did not purport to find the election law itself unconstitutional in either case.

within the Tokyo Metropolitan Government.[108] While a Korean national, her mother was Japanese, and like most second and third generation Koreans in Japan, she had special-permanent resident status. She was a healthcare professional already employed by the Tokyo government, and she sought to take the exams that qualified employees for promotion to managerial level. She was twice denied on the grounds that only Japanese nationals were entitled to take the exams (the first time she was denied there was no formally promulgated policy; by the following year, when she was again denied, the policy had been formalized).[109] The employee sued the Tokyo government for violation of, among other things, Article 3 of the *Labour Standards Law* and Article 14 of the Constitution. The Tokyo High Court granted her partial relief, on the grounds that foreigners are protected by the equality rights of Article 14, the policy of the Tokyo government was discriminatory, and the impugned policy was overly broad and not the least restrictive means of achieving its stated objectives.[110] The government appealed, and the Supreme Court granted the appeal and overturned the decision of the Tokyo High Court.

It is apparent from the reasons of the Supreme Court that the Tokyo government had argued that the discriminatory policy was necessary because the government had developed an "integrated management appointment system," whereby all employees who were promoted to certain managerial rank would become eligible for managerial positions throughout the government apparatus. Some of those managerial positions exercised "public authority". The Supreme Court accepted that the whole system was predicated upon the idea that once having passed the exams the applicant would be eligible to work in a post with "public authority," even

108. While one might be tempted to use the term Korean-Japanese, or Japanese-Korean, there is no standard practice of so calling second and third generation immigrants to Japan. In Japanese the term *zainichi kankokujin*, meaning quite literally "Korean in Japan" is used (and *zainichi chōsenjin* to denote more specifically those descendants of North Koreans in Japan). There are over 600,000 Koreans in Japan, many descendants of Koreans who were forcibly brought to Japan during the period of Japan's colonial control of the Korean peninsula. KOREAN OVERSEAS INFO. SERVICE, KOREA-JAPAN WORKING SUMMIT IN SEOUL 3 (2006) *available at* http://www.korea.net/korea/attach/D/03/123_en.pdf. There is a considerable literature on the discriminatory treatment of Koreans in Japan. *See, e.g.*, Yasuaki Onuma, *Interplay Between Human Rights Activities and Legal Standards of Human Rights: A Case Study on the Korean Minority in Japan*, 25 CORNELL INT'L L.J. 515 (1992); CHANGSOO LEE & GEORGE DE VOS, KOREANS IN JAPAN: ETHNIC CONFLICT AND ACCOMMODATION (1981); ONUMA YASUAKI, ZAINICHI KANKOKU-CHŌSENJIN NO KOKUSEKI TO JINKEN [The Nationality and Human Rights of Koreans in Japan] (2004).

109. As will be discussed more fully below, the "policy" was never actually promulgated by ordinance or regulation duly passed by the Tokyo government, and, not having been prescribed by law, one would expect such a "policy" to be treated with heightened suspicion.

110. Tokyo High Court Judgment, (November 26, 1997) (*Tokyo Metropolitan Government* case) [hereinafter *Tokyo Metro. Gov't case, High Ct.*]

though the applicant had sought to take specialized exams related only to her health profession, and was seeking to work in an area that did not exercise such "public authority." The term "public authority" had precise legal significance, flowing from Article 15 of the Constitution. Article 15 provides for the rights of suffrage and sovereignty of the people, and the Court reaffirmed prior interpretations of this provision as meaning that only Japanese nationals could hold office as local government employees with "public authority." Therefore, because the integrated management system operated so as to make all managers eligible for positions that exercised public authority, and given the necessity of restricting employees with public authority to Japanese nationals, the Court held that the Tokyo government's policy of excluding all foreign nationals from promotion to managerial status was reasonable.[111] At first blush, this may appear quite similar to the "political function" exception in the American treatment of alienage cases that we saw earlier.[112]

The Article 15 sovereignty argument is highly questionable, but is beside the point for our purposes.[113] Assuming it to be correct, the reasoning of the court in finding that the Tokyo government policy was "reasonable" still reflects the acute weakness of the unreasonable discrimination test as a means of giving effect to the right to equality. The *ratio* of the case may be found in section 4(2) of the majority opinion, in which the court held that:

> It follows that where an ordinary local public body establishes such an integrated management appointment system and then takes a measure to allow only Japanese employees to be promoted to managerial posts, the ordinary local public body is deemed to distinguish between employees who are Japanese nationals and those who are foreign residents based on reasonable grounds, so it is appropriate to construe

111. Supreme Court Judgment, (January 26, 2005), 59 MINSHŪ 1 128, (*Tokyo Metropolitan Government* case) [hereinafter *Tokyo Metro. Gov't case, Sup. Ct.*) majority opinion, at section 4.

112. *See* Bernal v. Fainter, 467 U.S. 216, 221 (1984); *supra* text accompanying notes 83-85.

113. Article 15 provides that: "The people have the inalienable right to choose their public officials and to dismiss them. (2) All public officials are servants of the whole community and not of any group thereof. (3) Universal adult suffrage is guaranteed with regard to election of public officials. (4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made." Nihonkoku Kenpō [Constitution of Japan] art. 15. It is very difficult to see how a plain reading of this provision can give rise to a principle that limits all exercise of "public authority" to Japanese nationals. Even if "the people" [*kokumin*] is interpreted here to mean "Japanese citizens," which would be to give the same word two very different meanings in two provisions of the same document, the provision still can only be read as limiting the right to *choose* public officials to Japanese citizens, rather than saying anything at all about the right to *serve* as a public official.

> such measure not to be a violation of Article 3 of the Labour Standards Law or Article 14 para 1 of the Constitution.[114]

The Court merely accepted that it is within the discretion of a local public body "to establish, based on its own judgment, an integrated management appointment system." So, there was no discussion as to the importance or necessity of having a comprehensive system in which everyone promoted to management level would be eligible for later appointment to positions of "public authority." Indeed the policy objective was never clearly articulated by the court. There was no analysis as to whether the policy of limiting promotion to Japanese nationals, or the feature of making all managers eligible for positions with "public authority," was rationally connected to the policy objectives. There was no analysis of whether the objectives, whatever they might be, were legitimate or consistent with the values of a democratic society, or whether they could be achieved through means that would be less discriminatory. The Tokyo High Court, for instance, had reasoned that a narrower policy could be fashioned, whereby foreigners could be promoted to managerial rank but restricted from transfer to positions wielding public authority. That argument was rejected in the majority decision of the Supreme Court without any analysis as to how such an adjustment of the personnel procedures would impact on the achievement of the overall policy objectives of the system.

Indeed, the court did not discuss the effects of the policy in any way, in terms of either its positive or negative impact. Most significantly, it did not evaluate the nature of the discrimination or the harm that it might occasion. There was no examination of what stereotypes might underlie the policy of excluding foreigners, the power imbalances it might perpetuate, or the extent to which it might deeply harm the dignity, both objective and subjective, of all foreigners resident in Japan. Once again, as in the *Patricide* case, the issue of discrimination and the violation of the right were collapsed into and lost within the justification argument. The decision, boiled down to its essentials, was simply this: (1) only Japanese nationals may fulfil positions of public authority; (2) under the integrated management system of the government, all those promoted to management rank may fill positions of public authority; (3) therefore the policy of excluding foreigners from promotion to management rank is reasonable.

Moreover, when one goes on to examine the concurring opinions of several of the other justices, there is even further reason to query how the

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114. *Tokyo Metro. Gov't case, Sup. Ct.*, (Sup. Ct. January 26, 2005), 59 MINSHŪ 1 128, majority opinion at section 4(2) (Unofficial Court translation).

court approaches the issue of equality rights. Justices Ueda, Kanatani, and Fujita, in three separate opinions, each addressed the question of whether the Constitution "guarantees foreign nationals the right to take office as government employees," as though this was indeed the operative constitutional question in the case. They completely failed to address the question that was in fact before the court, which is whether a public policy that treats foreigners differently by denying them promotion within the municipal government service, constitutes discrimination on the basis of nationality, and unjustifiably violates the right to be treated equally under the law. Justice Fujita went so far as to suggest that the right to equality is not an "inherent right" in any event, writing that "freedom of choice in employment, the principle of equality, etc. are rights to freedom, which are originally intended to only protect inherent rights and freedoms from restrictions, rather than creating rights and freedoms that are not inherent."[115] This reflects an understanding of Article 14 as being a purely procedural right, designed merely to govern the operation of other substantive rights enshrined in the Constitution, despite the fact that Article 14 was intended to be, and has been clearly interpreted as being, a substantive free-standing right to be treated as an equal and not to be discriminated against. In any event, in the final analysis all three justices ultimately addressed the issue as one of government discretion, and whether the integrated management appointment system and the policy excluding foreigners went "beyond the bounds of legally acceptable personnel policy."[116]

Justice Fujita in a sense put his finger on the very crux of the issue of the policy objectives. In discussing the Tokyo High Court's consideration of less restrictive means, Justice Fujita wrote that if such special personnel considerations were required of local government in developing their policies (i.e., requiring them to assess who could be transferred to positions of public authority), it would harm the flexibility of the personnel management systems.[117] Thus, for him the objective was one of maximizing administrative flexibility, and the issue was one of balancing the fundamental right to equality on the one hand, and mere administrative efficiency and convenience on the other.[118]

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115. *Id.*, concurring opinion of Justice Fujita, section 2.

116. *Id.*, concurring opinion of Justice Fujita, section 3, opinion of Justice Kanatani, section 3, and opinion of Justice Ueda, section 3.

117. *Id.*, concurring opinion of Justice Fujita, section 3.

118. As discussed further below, there are two strong dissents in the decision. For the purposes of comparison, it may be useful to examine the Canadian Supreme Court decision in Lavoie v. Canada, [2002] 1 S.C.R. 769 (Can.), and that of the South African Constitutional Court in Larbi-Odam, *supra*

It is helpful to consider how the issues in this case would be considered within the Canadian framework. The analysis would begin with an examination of the nature of the discrimination, and an assessment of whether it violated the right to equality. For that purpose it would start with an inquiry into how the distinction drawn by the policy operated, in order to determine whether it constituted unfair discrimination. The distinction here was based on nationality, a prohibited ground of discrimination (a ground held to be analogous to the enumerated prohibited grounds) under both the Canadian *Charter* and the Japanese Constitution. Under Article 14 of the Constitution of Japan, this distinction thus constituted discrimination in "economic relations," on the basis of an analogous prohibited ground of discrimination, and thereby fell squarely within the prohibition of the provision. The distinction discriminated in a manner that deprived non-nationals such as the applicant of the opportunity for advancement within the government service, and effectively denied them employment in the public service (for who would begin a career in which promotion is impossible?).

The discrimination was based on a personal characteristic that is tied closely to identity, one shared by a discrete and insular minority that has a history of disadvantage in Japanese society, and which has very limited access to the levers of political power. Moreover, the discriminatory policy effectively communicated to the society at large that nonnationals, even Japanese-born permanent residents such as the applicant, are somehow less worthy of trust, respect and concern than are Japanese nationals. The policy thus affected all nonnationals, not simply those already in the employment of the Tokyo Metropolitan government, or even all those who might aspire to such employment. As such, viewed in its totality, the harm caused by this discrimination was significant and went directly to the dignity of the applicant and all other foreigners resident in Japan.

The next step, as discussed earlier, would be to examine whether such a violation could be justified in a manner that was consistent with the democratic values enshrined in the Constitution. Under the *Oakes* test, the policy in this case could not have survived the first step, the determination of whether the discrimination was "prescribed by law." It will be recalled

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note 42, as the issue in both cases was the validity of government personnel policies which used nationality as one criterion for decision making with respect to advancement (*Lavoie*) and hiring (*Larbi-Odam*). Both courts found the policies to be discriminatory, although the Supreme Court of Canada in *Lavoie* found that the federal government promotion policy, which contained a preference for Canadian nationals in one of the two streams for advancement, constituted an infringement of the fundamental right that was nonetheless justifiable in a free and democratic society under the *Oakes* test. The case has been heavily criticized in Canada, but the approaches of both the majority and the dissents are very interesting to compare to that in the *Tokyo Metro. Gov't case, Sup. Ct*.

that the policy of the Tokyo Metropolitan Government in this case was not a law, ordinance, or any other product of the legitimate law-making process of government or valid democratic procedure. The first time it was applied to deny the applicant the opportunity to write the exam, it had never even been reduced to writing. But even if the policy had been prescribed by law, it is difficult to imagine how it could ever be justified.

Under the Canadian analysis, the next stage of the analysis would be to determine whether the objective was sufficiently important, in terms that were consistent with the values of a free and democratic society. The objective, which was identified as being to avoid placing limits on the integrated personnel appointment system and to maintain administrative flexibility, could not possibly be of sufficient importance to so grievously violate a fundamental constitutional right.[119] And again, even if one were to accept that the objective was sufficiently "pressing and substantial," the policy could not survive the rational connection and proportionality analysis. As held by Tokyo High Court, and indeed by the dissenting judges of the Supreme Court (whose opinions we will return to below), the blanket prohibition was overinclusive and by no stretch of the imagination the least restrictive alternative to achieving the stated objectives of the policy. Nor was the benefit to be derived, namely, unspecified administrative flexibility and efficiencies, in any way proportionate to the profound harm caused to the foreign employees of the government, and to all foreigners in Japan.

The Tokyo Metropolitan Government policy would also have been unlikely to survive under the American approach. It will be recalled that discrimination on the basis of nationality is a quasi-suspect class that has often attracted strict scrutiny. Even in those cases in which the "political function" exception is raised, the courts will examine closely the legitimacy of the claim, and the extent to which the exclusion is carefully tailored. This is reflected in the reasons of Justice Marshall in the case of *Bernal v. Fainter*,[120] which involved a Texas law that prohibited non-Americans from being qualified as Notary Publics. The Court struck down the law. First, it found that the role of notaries was not so central to the political process so as to be subject to the "political function" exception, and thus

119. It might be argued that the objective was, defined more broadly, to prevent foreigners from being appointed to positions of public authority, in accordance with Article 15 of the Constitution. But this argument assumes, without question or analysis, the necessity and legitimacy of the "integrated management personnel system," and more specifically the necessity that all people promoted to managerial level be eligible for "public authority" positions. This argument, therefore, is circular, assuming the very thing that has to be proved.

120. Bernal v. Fainter, 467 U.S. 216, 221 (1984).

strict scrutiny applied. Then, in applying strict scrutiny, the court held that the law was both underinclusive (because there were other professional positions fulfilling similar roles that were not so limited to American nationals), and overinclusive (because in seeking to guard against some foreign notaries who might be insufficiently familiar with Texas law, it excluded all resident aliens, many of whom would be sufficiently familiar with the law).[121] On that reasoning, the Tokyo Metropolitan Government policy would have been excluded from any "political function" exception due to it too being overly inclusive, since it included people, like the applicant, who were seeking promotion to specialized positions that had nothing to do with "public authority"; and once having been so excluded from the exception, the policy would likely fail the strict scrutiny test for the same reasons it would fail the *Oakes* test.

B. The *Sumitomo Cement* Case

Turning to the private sector, we will see that while the test can be used to reach different results, it provides no real protection against discrimination in this realm either. The values underlying the right to equality in Article 14 have been used by the courts to inform equality rights issues in private litigation. It has done so most famously in the line of cases in which the courts greatly advanced the right of women not to be discriminated against with respect to termination and retirement in the employment context. As mentioned earlier, the courts did so using Article 14 as a basis upon which to interpret vague provisions of the *Civil Code*. In the seminal case that began this judicial advance of women's rights, decided in 1966 and known as the *Sumitomo Cement* case,[122] the Tokyo District Court's reasoning on the issue of the reasonableness of the discrimination stands in stark contrast to the reasoning of the Supreme Court in the *Tokyo Metropolitan Government* case.

The company argued that it was entirely reasonable to require women to retire earlier than men (upon marriage, to be more precise), because under the lifetime employment and seniority-based pay system, women became less and less efficient in terms of the value of their labor relative to their cost to the company as time went on. This, of course, was because the system also entailed employing women in secretarial, clerical, and other forms of low-value employment, with no prospects for advancement, while

121. *Id.* at 226-27.

122. Tokyo District Court Judgment, (December 20, 1966), 17 Rōmin 6 1407 (*Sumitomo Cement* case). For an excellent analysis of the so-called first phase of women's rights litigation over employment issues, see UPHAM, SOCIAL CHANGE, *supra* note 2, ch. 4.

men were employed in upwardly mobile career paths. But under the seniority-based pay system they all received salary increases in step, and women over time became more costly than the value added by their career-limited labor, and so mandatory retirement upon marriage was a "rational" means of keeping the labor costs of female employees down.

The similarities in form between this argument and that of the Tokyo Metropolitan Government in respect of its integrated management appointment system are quite striking. So long as one accepted the objectives of the personnel system created by the discriminating entity as being necessary and sacrosanct, then the discrimination in accordance with the terms and in furtherance of the objectives of that system was, tautologically, "rational." But the Tokyo District Court would have none of Sumitomo Cement's argument. It held that, to the extent women were less efficient than men in the workplace, it was an inefficiency caused by the manner in which they were employed and by the seniority-based pay system itself. The inefficiency having been the result of the company's own policies, the company could not rely on such inefficiency as the basis for explaining the rationality of its discrimination.[123] The same form of argument could, of course, have applied with equal force in the *Tokyo Metropolitan Government* case.

Nonetheless, the court in the *Sumitomo Cement* case did repeat in its reasons that only "unreasonable discrimination" was prohibited, and it simply turned the company's reasonableness argument on its head. Where it differed from the *Tokyo Metropolitan Government* case and others like it, is that the court examined the importance of the policy objectives, and the legitimacy of the assumptions upon which those objectives were based. Indeed, in a very real sense, this case and the other gender-based employment cases that followed it show just how malleable the "reasonableness" analysis is to manipulation and result-oriented reasoning in either direction. But what is most significant to note for our purposes, is that the "unreasonable discrimination" analysis established by the Supreme Court in respect of Article 14 cases, has been carried over to the private sector discrimination cases that were informed by the values of Article 14. Thus, even most recently in the *Tokyo Metropolitan Government* case examined above, the Court held that the "reasonableness" of the discrimination meant that the policy violated neither the Constitution nor Article 3 of the *Labour Standards Law*, thereby importing an "unreasonableness" requirement to proving discrimination where none is

123. *Id.* For a discussion of the case see UPHAM, SOCIAL CHANGE, *supra* note 2, at 131-33.

reflected in the language of the *Labour Standards Law*.[124] This reflects the extent to which the "reasonableness" test has come to permeate judicial thinking in respect of all discrimination, both public and private.

The *Sumitomo Cement* case, and the others in this line of cases that advanced the rights of women in the 1960s and 1970s, may of course suggest that the courts may not be so hostile to enforcing the right to equality, and that they *could* in any event enforce the right if they were so inclined. On the first point, the lessons of the women's rights cases are somewhat more complicated. The extent to which the courts went well beyond both the statutory language and the contractual intent of the parties in protecting the rights of women in the first phase of women's rights litigation in the 1960s and 1970s, does not mean that the courts will be inclined to protect women, or indeed any other groups, from other forms of discrimination. An excellent analysis of the employment-related litigation for that period has proposed a more over-arching theory that places the *Sumitomo Cement* line of cases in perspective.[125] According to this theory, the courts were engaged in creating a coherent and internally consistent legal framework for the employment relationship in Japan, and one fundamental plank of that framework was job security in a life-time employment system. Thus, not only women were receiving the protection of the courts, but employees generally were protected from termination of all sorts. Thus, the early women's rights cases, in which the primary issues were related to job security, can be seen as falling within this grander judicial project, having much more to do with shaping the employment relationship than with equality rights per se. The quid pro quo in this judicially created scheme, however, was that companies would be given very wide discretion in terms of how they hired and managed their employees. Thus the courts deferred to corporate discretion and dismissed discrimination claims for damages where the issues involved hiring, transfers, promotions, farming out employees to sister companies, and the like.[126]

The fact remains that the courts, and especially the Supreme Court, have done little to protect minorities more generally from discrimination. The outlook for the ability of foreigners, and minorities among the foreign population in Japan, to find protection from discrimination under the "unreasonable discrimination" test is particularly bleak. Japanese

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124. *Tokyo Metro Gov't case, Sup. Ct.*, majority opinion, sections 4(2), (3)

125. Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of – Stability?*, 43 U.C.L.A. L. REV. 635 (1996).

126. *Id*.

constitutional scholars observe that, under this test, the courts have always found it remarkably easy to classify discriminatory treatment of foreigners as reasonable.[127] That is of course illustrated in the *Tokyo Metropolitan Government* case. Another recent example is a case in which the courts upheld the government's denial of pension and disability benefits to Taiwanese-Japanese who served with the Imperial Japanese Army, on the grounds that they were now foreigners. In the Supreme Court decision on this issue, the Court held that the discriminatory treatment was reasonable, based as it was on nationality, even though the claimants (or their family members, on whose behalf they raised their claims) had been Japanese nationals when they served in the Japanese military, and had been stripped of their Japanese nationality by the Japanese government after the execution of the *San Francisco Peace Treaty*.[128] There was no analysis in the decision as to the fairness of the distinction, or the harm that it caused. Nor was there any examination of what the objective of the distinction was alleged to have been, or why it was either necessary or important, or whether it could have been achieved through some means that was less discriminatory.[129]

The courts have similarly upheld as reasonable the denial to foreigners of pension benefits,[130] and, more recently, of social security benefits.[131] The denial of coverage under the *Daily Life Security Law*[132] to foreigners who have neither permanent nor long-term resident status means that such foreigners may be refused treatment by healthcare providers. Without the benefit of any analysis whatsoever, this, too, was held to be reasonable discrimination, and to have been within the sphere of legislative discretion in any event.[133]

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127. *See, e.g.*, MATSUI, *supra* note 3, at 381.

128. Supreme Court Judgment, (April 28, 1992), 46 Minshū 4 245 (*Taiwanese Veterans'* case), at para 5.

129. *Id*.

130. Supreme Court Judgment, (November 2, 1959) (the law in question has since been superseded).

131. Tokyo High Court Judgment, (April 24, 1997) (*Social Security for Foreigners* case).

132. Law No. 144 of 1950 (as amended).

133. *Social Security for Foreigners* case, section 4(2). For an overview of the legal treatment of foreigners with respect to social security and healthcare benefits, see TEZUKA KAZUAKI , GAIKOKUJIN TO HŌ [Foreigners and the Law], 301-29 (3d ed. 2005).

V. SIGNIFICANCE AND EVOLUTION OF THE DOCTRINE

A. Why the Doctrine Matters

As a purely descriptive matter, it can be argued that the shortcomings of the doctrine employed by the courts for analyzing and resolving discrimination cases is one significant factor contributing to the general failure of the system to enforce and adequately protect the right to equality. As discussed earlier, the test leads to confused thinking about equality rights and discrimination, and provides no assistance to judges grappling with the issue in concrete cases. To the extent that one accepts the basic premise that courts are constrained and guided by the analytical models and legal principles established in precedents, and that the conclusions that judges reach tend to be consistent with the application of such principles, then the inadequacy of the "unreasonable discrimination" test can be argued to be one reason for the failure of the courts to enforce the right to equality under the law.

That still leaves the causality issues unsettled, and does not really address the normative importance of the analysis. And it will be recalled that the second point raised by the *Sumitomo Cement* case is the notion that the courts *could* enforce equality rights if they were so inclined, even using the "unreasonable discrimination" test. The corollary is that if they are not so inclined, surely the issue of doctrine is beside the point, and arguments for a more sophisticated approach to the judicial analysis of discrimination are futile. In short, it raises the question of why the doctrine matters at all, and why it merits any attention. As mentioned earlier, a great deal has been written about why the Supreme Court (in particular) has been so timid, or so conservative depending on one's point of view, in exercising its judicial review powers. Explanations range from the lack of real judicial independence, deep conservatism of a fairly uniform judiciary, political weakness and a fear that the court's decisions might be ignored by the legislature and the executive, to broader sociological and cultural explanations.[134] One might be inclined to think that these are really the

134. *See, e.g.*, John O. Haley, *Judicial Independence in Japan Revisited*, 25 LAW IN JAPAN: AN ANNUAL, 1, 1-18 (1995); Haley, *Judiciary*, *supra* note 2; Malcolm M. Feeley, *The Bench, the Bar, and the State: Judicial Independence in Japan and the United States*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 67, 79-83 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002); Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS, (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001); Ramseyer, *Judicial Independence*, *supra* note 2; RAMSEYER, MEASURING JUDICIAL INDEPENDENCE, *supra* note 2; Upham, *Political Lackeys*, *supra* note 2; Hidenori Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 251, 251-77 (Yoichi Higuchi ed., 2001); Law,

more important issues, and that unless and until the courts are more predisposed to enforce rights generally, and the right to equality more specifically, the legal test itself is really not that significant.

While these other lines of inquiry into why the courts are so reluctant to enforce rights are obviously of great value, I would argue that focusing on the test itself is nonetheless important. Why and how doctrine is significant to judicial outcomes in any legal system is obviously a complicated and involved theoretical question that cannot be explored in any meaningful way here—but some discussion is necessary in order to defend the relevance and importance of this comparative analysis of the doctrine.[135] We can begin with the role that judges play in the Japanese legal system. John Haley, one of the preeminent authorities in Japanese law, makes the very strong argument that the judges "play a central part in the process of creating and enforcing legal rules."[136] He dismisses the view often expressed in non-Japanese scholarship that the judiciary is the least influential branch of government, and asserts that a more careful analysis of the legal system suggests that "[j]udges are the law's primary actors."[137]

Moreover, while Haley and Ramseyer disagree over the extent to which the judiciary is subject to political influence, and thus lacking political independence as the third branch of government, they and others all suggest that the Japanese judges are, generally speaking, highly professional, honest, and genuinely serious about their judicial role. Indeed, Ramseyer, who is more critical of the degree of judicial independence in Japan, argues that there is only evidence of judges deciding cases in a manner likely to have been influenced by the preferences of the governing political party in a narrow range of politically sensitive issues, particularly those involving Article 9 (the war renouncing provision of the Constitution) and vote malapportionment. Otherwise the evidence suggests that they are unbiased and independent.[138]

Conservative Court, *supra* note 2. In Japanese, see HIGUCHI YOICHI, KENPŌ HANREI WO YOMINAOSU [Re-reading Constitutional Precedents] (2d ed. 1999); ASHIBE, CONSTITUTIONAL, *supra* note 3.

135. This question, of course, transcends the issue of the Japanese judiciary and the Japanese legal system, and implicates much broader and more profound debates over the legitimacy of judicial decision making, and the extent to which judges are genuinely interpreting and implementing law, as opposed to imposing personal policy preferences, in an exercise of political power, under the veneer of legal language.

136. HALEY, SPIRIT, *supra* note 2, at xviii.

137. *Id.* at 90.

138. RAMSEYER, MEASURING JUDICIAL INDEPENDENCE, *supra* note 2, at 71-72, 80-81, 94-95, 121. *See also* Upham, *Political Lackeys*, *supra* note 2, at 430. Upham makes the interesting point that while Haley defends the integrity and independence of the judiciary, he tends to do so as an institution, and tends to submerge the individual judges within the tightly controlled institutional framework, while Ramseyer, who is more critical of the lack of judicial independence, actually portrays the judges as

The picture that emerges is a judiciary comprised of highly professional and honest judges, largely homogeneous in their conservative world view, and more tightly controlled by the bureaucratic court administration than their counterparts in most common law jurisdictions. Thus, while they may be somewhat less concerned about "applying the law" than judges in Anglo-American systems,[139] they are still very much dedicated and genuinely interested in fulfilling their role as interpreters and implementers of law, and they are indeed central to the process of interpreting and enforcing the law. There is, therefore, room to argue that doctrine can develop within the Japanese judicial system, spreading in influence over time as more individual judges are persuaded by the arguments commending a particular approach, more lawyers advance legal arguments in their cases grounded upon the new doctrine, more scholars develop criticisms of judicial decisions that fail to employ the new doctrine, and finally, more judges who feel increasingly vulnerable to criticism for relying on the old "unreasonable discrimination" test, in turn employ the new doctrine.

Even at a less ambitious or optimistic level, it could be suggested that if a more rigorous and sophisticated analysis of equality rights issues works its way into the jurisprudence, even those conservative judges who are most predisposed to dismiss discrimination claims will arguably be forced to give reasons that to some extent address the rights-based analytical model. As such, it will become more difficult to short-circuit questions regarding the unfairness of the distinction at issue and the harm it caused, or how it can be justified in accordance with the values of a democratic society. In short, the "unreasonable discrimination" test may become increasingly inadequate, even for those judges predisposed to dismiss discrimination claims, as it is incapable of responding in a sophisticated and convincing manner to the approach of a rights-based model; and judges may become increasingly uncomfortable with the exposure created by employing what is a simplistic test by comparison. This argument is in line with the fundamental reason that judges, particularly in common law systems, are required to provide detailed written reasons for their judgments.

There are several features of the Japanese system that make this argument for the relevance of doctrine more credible. The status of precedent is one. On the one hand, precedent is seen as highly authoritative,

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individual decision makers who, apart from the cases involving the identified politically sensitive issues, approach their role as autonomous and rational decision makers. Upham, *Political Lackeys*, *supra* note 2, at 450-51.

139. Upham, *Political Lackeys*, *supra* note 2, at 453.

and courts tend to follow judicial precedents of higher courts, and are influenced by the decisions of other courts at their level. Thus, doctrine tends to be followed.[140] On the other hand, it is not binding according to a formal principle of *stare decisis* as it is in common law systems, so there is room for lower courts to depart from higher court precedent in being somewhat more innovative in introducing new approaches.[141] Also, the influence of scholars in the development of law generally, and on the shaping of doctrine in particular, is stronger in Japan than it is in many common law countries—though even in the common law world there is powerful evidence that scholarly work exerts an influence on the development of jurisprudence. And while it can be argued in response that the widespread scholarly criticism of judicial conservatism in Japan has not had any marked effect in liberalizing the Supreme Court in particular, there are a number of examples of scholarly projects actually resulting in the development of new approaches and the adoption of new principles by the Japanese courts. For instance, the work of Eiichi Makino, professor of law at Tokyo University, was the primary influence in the introduction of the principles of "abuse of rights" and good faith into Japanese law.[142]

A final reason that the focus on doctrine has some relevance to normative arguments for improving the protection of certain rights in the Japanese legal system is that it is within the power of the courts to change. While the broader explanations for judicial conservatism and passivity are important in trying to understand why the courts are so conservative or timid when it comes to rights enforcement, as a basis for pragmatic normative arguments they become less attractive as the basis for attempting to mobilize change. They lead to arguments for solutions that are deeply structural and political, and beyond the ability of the judicial system itself to remedy. In contrast, the normative argument for the adoption of a legal

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140. *See* HALEY, SPIRIT, *supra* note 2, at 2.

141. An example of this can be found in the *Naganuma* case, involving the constitutionality of the Self-Defense Forces, where the Sapporo District Court explicitly rejected the political question doctrine that had been developed by the Supreme Court in the *Sunakawa* case. Sapporo District Court Judgment Judgment (Sept. 7, 1973) 712 Hanrei Jihō 24 (*Naganuma* case), *translated in* BEER & ITOH, *supra* note 12, at 83; Supreme Court Judgment, Grand Bench, (December 16, 1959), (*Sunakawa* case), *court translation available at* http://www.courts.go.jp/english/judgments/text/1959.12.16-1959-A-No.710.html. (The Sapporo High Court, of course, went on to overturn the District Court in *Naganuma*, and the Supreme Court upheld the High Court's decision. Translations of both can be found in BEER & ITOH, *supra* note 12).

142. HALEY, SPIRIT, *supra* note 2, at 48-49; *see, e.g.*, Foote, *supra* note 125, at 644 (discussing the abuse of right doctrine); Michio Aoyama, *Wagakuni ni okeru kenri ran'yo rinen no hatten* [The Development of the Abuse of Right Doctrine in Our Country], in *SUEKAWA SENSEI KOKI KINEN – KENRI NO RAN'YO* [In Honour of Professor Suekawa – Abuse of Rights] (1965), *translated in* John. O. Haley et al., LAW AND THE LEGAL PROCESS IN JAPAN 112 (1994).

test or analytical framework that is more consistent with the right to equality in the Constitution, proposes a solution that is more modest and realistic, and hence potentially effective, even if one accepts all the arguments about the judiciary being a conservative and tightly controlled bureaucratic institution.

In sum, the absence of a more robust and sophisticated analytical approach is a factor that contributes to weak protection of the equality right, while from a normative perspective, features of the Japanese legal system and past experience suggest that there is scope for the introduction of, and the incremental increase in the judicial employment of, new doctrine. Such an emergence and spread of a more sophisticated doctrine, consistent with the widely accepted approach to equality rights as exemplified by the Canadian jurisprudence, would in turn make it more difficult for courts to blithely dismiss discrimination cases, and over time could lead to more rigorous and progressive protection of this fundamental constitutional right. And what is more, while much more exhaustive research is called for to prove the hypothesis, there is some evidence that this process has been unfolding over the last several years, beginning with powerful dissents in a number of Supreme Court decisions, and continuing with the majority opinion in the *Nationality Act* case of last year. It is to these that we now turn.

B. Emergence of a New Doctrine

Returning to the *Tokyo Metropolitan Government* case, the Tokyo High Court had found there to be discrimination, and in looking at the issue of justification it applied the principle of "less restrictive alternative" in inquiring into whether the objectives of the policy barring foreigners, to prevent foreigners being promoted to positions of public authority while maintaining the flexibility of the integrated personnel selection system, could have been achieved through means that would have been less discriminatory. Those arguments were picked up by the dissenting judges in the Supreme Court decision.

The opinions of both Justice Takii and Justice Izumi, in contrast to the rest of the court, properly characterized the question before the court as being whether the unequal treatment of foreigners constituted discrimination, and if so, whether it could be justified. In the justification analysis, which they each purported to develop within the concept of the "reasonableness" test, they nonetheless looked to external and objective criteria as was discussed above, so that, in addition to questioning whether there was simply a rational connection between the means chosen and the objectives identified, they went on to inquire into the actual importance of

the purpose of excluding foreigners and the necessity of the integrated personnel system, and to examine whether there were less restrictive alternatives available to achieve the underlying objectives of the system.

Moreover, they both made clear that the onus of proving that the discrimination was justified rested with the government, and they each examined closely the evidence the government had advanced for that purpose. As a final stage of his analysis, Justice Izumi examined whether the benefit to the system of the government's policy outweighed the harm to foreign residents such as the applicant. Indeed, both justices considered the harm caused, particularly to special permanent residents such as the applicant, by the discrimination in question. In contrast, as we saw earlier, the majority of the Court had failed to examine in any way the nature of the discrimination in question or its impact on the claimant class. Both dissenting justices concluded that the blanket exclusion of foreigners from taking the exams for promotion constituted discrimination and was not justifiable.[143] Thus, in these dissents, we see the very same elements of the analysis as we saw in the Canadian system, with first an examination of the nature of the discrimination and the magnitude of the harm that it caused, and then an inquiry into the question of justification, which was analyzed in a manner reminiscent of the *Oakes* test and the strict scrutiny test in the American system—an assessment of the importance of the legislative or policy objective, an examination of the rationality of the connection between the objective and the means, including an analysis of whether there were less restrictive alternatives, and finally a determination of whether the benefit was proportionate to the harm that the discrimination caused.

There was a similarly strong dissent in an equality rights case before the Supreme Court ten years earlier, regarding the constitutionality of the *Civil Code* provision that limited the inheritance of illegitimate children to one half of that received by legitimate children, when the deceased had died intestate.[144] The majority held that the discrimination against illegitimate children occasioned by the law was not "unreasonable," in light of the objective of fostering respect for the legitimate children of spouses married by law, and thus respect for the institution of marriage itself, while nonetheless affording illegitimate children with some level of protection.[145]

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143. *Tokyo Metro Gov't case, Sup. Ct.*, (Sup. Ct. January 26, 2005), 59 MINSHŪ 1 128, (Takii, J., and Izumi, J., dissenting).

144. Supreme Court Judgment, Grand Bench,(July 5,1995), 49 Minshū 7 1789 (*Illegitimate Child Inheritance* case). The provision of the Civil Code in question was article 900.

145. *See id.*, majority opinion, sections 2 and 3.

Six Justices joined in two very strong dissenting opinions. Again, elements of what we have discussed here as being essential to an equality rights analysis were reflected in the dissenting justices' reasons. The opinion of five of the dissenting justices inquired into the nature of the discrimination in relation to the dignity of the individual, emphasizing that the equal status of the child as an individual ought to be stressed over his or her status as an outsider to the marital family. Moreover, they pointed out that the status of the person as being illegitimate is an immutable characteristic, beyond the control of the person to change, but having been within the power of the deceased to have altered. In other words the law stigmatized persons who had no control over the characteristic, which was the basis of a distinction being made for the alleged purpose of encouraging respect for the institution of marriage in people other than those actually being affected by the law. In their view, there was thus not even a rational connection between the objective and the means of the provision.[146]

Moreover, in addition to focusing on the nature of the discrimination and the harm that it caused, particularly in terms of perpetuating the social stigma of illegitimacy and fostering further private discrimination against those born out of wedlock, both dissenting opinions attempted to establish a standard of "higher reasonableness." Justice Ozaki argued that such a test for "higher reasonableness" should require that "the level of reasonableness or necessity of the purpose of legislation itself on the one hand, and the nature, content, and extent of the rights or legal value which is to be restrained by discrimination on the other hand, should be fully considered, and whether there is a substantial link between them both should be determined."[147] It is difficult to resist the inference that this was influenced by the American framework with its different levels of scrutiny, particularly given that Ashibe had by then advanced his influential arguments that the Japanese courts should adopt the American model consisting of three levels of scrutiny.[148] As we will examine in more detail below, this strand of thinking continues within Japanese scholarship, and

146. *Id.*, dissenting opinion of Justices Nakajima, Ono, Takahashi, Ozaki, and Endo, sections 2 and 3.

147. *Id.*, dissenting opinion of Justice Ozaki, section 1 (Ozaki J. joined the dissenting opinion of Nakajima J., *supra* note 146, but also filed a separate dissenting opinion).

148. ASHIBE, CONSTITUTIONAL, *supra* note 3. Many scholars today recognize that these arguments were misplaced, but the preoccupation with the American model remains high, and as will be discussed in more detail below, many still argue for an American style multi-level scrutiny approach. As should be clear from the overall argument presented here, and as I will discuss in more detail below, in my view the American model, and particularly the three levels of scrutiny, are entirely inappropriate as an analytical framework for the equality rights provision of the Constitution of Japan.

there are those who think that the Court does indeed follow the American approach.

In sum, however, there have been attempts even at the level of the Supreme Court to develop a test for discrimination that better incorporates the fundamental elements of equality rights analysis, as reflected in other democratic constitutional models, and to make it more consistent with the values of the Constitution of Japan. Until 2008, however, such attempts were limited to spirited dissenting opinions and lower court judgments.

VI. ASCENDENCY OF THE NEW DOCTRINE – THE 2008 *NATIONALITY ACT* CASE

As suggested in the introduction, a recent decision of the Supreme Court has provided some evidence that the Court may indeed be starting to embrace an analytical framework that is consistent with the proportionality model. Or, perhaps to put it more precisely, the number of justices in the Supreme Court who have adopted this more rigorous approach to equality rights issues has finally tipped into the majority.

A. Background to the Case

The decision of the Supreme Court on the constitutionality of a provision of the Nationality Act, handed down in June 2008, reflects what may be a seismic shift in the way the Court analyzes equality rights issues. The case has been heralded within Japan as epoch making,[149] but this is more because of the fact that it is only the eighth case in which a law had been struck down by the Supreme Court, and because of the manner in which the Court fashioned the remedy itself.[150] But when the analysis of the Court in this judgment is compared to the manner in which the courts

149. For extensive analysis of the case, and the resulting revisions to the Nationality Act, by Japanese scholars and jurists see Hasebe Yasuo, *Kokusekihō ikkenhanketsu no shisōyōshiki* [The Pattern of Thought in the Judgment Holding the Nationality Act Unconstitutional], 1366 JURIST 77 (2008); Sano Hiroshi, *Kokusekihō ikkenhanketsu to kokusekihō no kadai* [The Nationality Act Problem and the Judgment Holding the Nationality Act Unconstitutional], 1366 JURIST 85 (2008); Takahashi Kazuyuki et al., *Kokusekihō ikkenhanketsu wo megutte* [Regarding the Judgment Holding the Nationality Act Unconstitutional], 1366 JURIST 44 (2008). Also of interest is the analysis of the revisions to the law in accordance with the decision, in *Kokuseki hō no kaisei* [Revision of the Nationality Act], 1374 JURIST 2 (2009).

150. Rather than strike down the entire provision as being unconstitutional, and therefore of no force and effect, the Court chose to interpret the impugned provision as excluding the clause that caused the essential distinction (which will become clearer in the discussion below). In Canadian constitutional jurisprudence this practice of "reading down" is common, and is understood to be a device for doing the least violence to the legislation while nonetheless bringing it into conformity with the constitution. But this aspect of the case has been the most controversial in commentary in Japan, with many criticizing the Court for "legislating" and thus exceeding its judicial authority.

have traditionally applied the "unreasonable discrimination" test in previous cases, informed by an understanding of the theoretical foundation of equality rights as discussed above, the significance of this case becomes much more apparent.

The case involved a claim that was at the very nexus of two other distinct issues that had been festering for many years, and which had each come before the Court before in different forms. These two issues were the laws for acquisition of nationality by children born to Japanese and non-Japanese parents on the one hand, and on the other, the distinction made between legitimate and illegitimate children in various areas of the law, one example of which we have already seen above.[151] The claim, advanced by a number of different plaintiffs, attacked the constitutionality of Article 3(1) of the Nationality Act, which they argued discriminated against children who were born to unmarried parents of whom the father was Japanese and the mother non-Japanese, in the conferral of the benefit of Japanese nationality.

To put the case in some context, at the time the decision was handed down it was estimated that there were tens of thousands of children in Japan who were in the same circumstances as the plaintiffs. That is, they had been born "out of wedlock" to non-Japanese mothers and Japanese fathers, and were thus unable to acquire Japanese nationality. Many were children of permanent residents of Japan like Masami Tapiru, the ten-year-old girl, identified as one of plaintiffs, who spoke Japanese as a first language and had only rudimentary knowledge of her mother's first language (Tagalog in her case).[152] Yet, unable to acquire Japanese nationality, she is unable to travel freely, has constraints on her right to education, will be unable to vote even in local elections, has limited rights under the social security system, and, as I discussed in Part IV A, she will have limited access to careers in public service.

To understand the judgment of the Court it is necessary to dwell briefly on the precise operation of the nationality laws. Japan is one of the small minority of countries that retains an almost purely *jus sanguinis*

151. *Illegitimate Child Inheritance* case, *supra* note 144. In the second case, the Supreme Court in 1995 reversed a Tokyo High Court decision that had denied citizenship to a young boy who had been born in Japan to a mother who had abandoned the child and whose nationality was unknown (but suspected to be Filipino), and a father of unknown nationality (but suspected to be Japanese), deciding that he was entitled to Japanese nationality under Article 2(3) of the Nationality Act: Supreme Court Judgment, (January 27, 1995), 49 Minshu 1 56.

152. *See* Jun Hongo, *Bar to Kids' Citizenship Ruled Illegal*, JAPAN TIMES, June 5, 2008; Mariko Yasumoto, *Japanese-Filipino Kids Await Fate*, JAPAN TIMES, June 4, 2008.

system, or bloodline basis for the acquisition of nationality at birth.[153] Thus, Article 2(1) of the Nationality Act provides that a child shall be a Japanese citizen where the father or mother is a Japanese citizen at the time of birth. But, the concept of "father" and "mother" as used here constitutes more than a factual or biological relationship, but rather denotes a legal relationship between parent and child, and that legal relationship is required in order to ground a claim for nationality. For the purposes of the law, a legal relationship is established *ipso facto* when the child is born to parents who are married (or were married at the time of birth in the event of death of the father prior to birth, see Article 2(2)).[154] The legal relationship may also be established, however, by explicit recognition by the parent in question—and since the mother is deemed to have recognized the child at birth, this is really an issue that only applies to the relationship between child and father in circumstances where the parents are not married.

Article 3(1) of the Nationality Act, the article in issue in the case here, deals with the legal relationship in the event that the child is born to unmarried parents. It provides that such a child may, before reaching the age of 20, acquire Japanese citizenship by providing notice to the ministry, *if* he or she has obtained the "status of a legitimate child according to the marriage of his or her parents," *and* the parent who is currently Japanese (or was so at death), and who was Japanese at the time of birth, recognizes that he or she is their child.[155] In short, an illegitimate child may acquire nationality if his or her parents marry prior to her reaching the age of 20, and the Japanese parent acknowledges parenthood. What is not obvious, but arises from the relationship between Article 2(1) and Article 3(1), is that only an illegitimate child whose Japanese parent (i.e., a Japanese father) has not recognized him or her prior to birth is in this situation. For Article 2(1) provides that a person shall be a Japanese national if at the time of birth his or her father or mother was a Japanese national—and even

153. Nationality Act, Law No. 147 of 1950, as amended by Law No. 45 of 1984, art. 2(1). *See generally* Hosokawa Kiyoshi, *Japanese Nationality in International Perspective*, *in* NATIONALITY AND INTERNATIONAL LAW IN ASIAN PERSPECTIVE 177 (Ko Swan Sik, ed., 1990), and Ryoichi Yamada, et al, *The Acquisition of Japanese Nationality* Jure Sanguinis *and the Constitution*, 24-26 JAPAN. ANN. INT'L LAW 12 (1981-83).

154. Hosokawa, *supra* note 153, at 192.

155. The article in full provides:

> Article 3 (Acquisition of Nationality by Legitimization) 1. A person under 20 years of age who has acquired a status of a legitimate child according to the marriage of his or her parents and their recognition (excluding those who were Japanese nationals) may acquire Japanese nationality by filing a report with the Minister of Justice, if the father or the mother who recognized the child was a Japanese national at the time of the birth of the child and if the father or the mother is a Japanese national at present or was a Japanese national at the time of his her death.

if they are not married, acknowledgment established the legal relationship of "father" and "mother."

All of this is, quite obviously, rather confusing. But the bottom line is that by combination of these two provisions, it is effectively illegitimate children who are born to a non-Japanese mother and a Japanese father who has not acknowledged paternity prior to birth, who are burdened with the limitation in Article 3(1). That restriction limits them to acquiring nationality only in the event that their parents subsequently marry (thereby "legitimating" their birth), and the Japanese father acknowledges parenthood.

In essence, then, the regime so created makes a number of cross-cutting distinctions: between illegitimate and legitimate children; between children who are born to Japanese mothers and non-Japanese fathers on the one hand, and non-Japanese mothers and Japanese fathers on the other hand; and finally, between those illegitimate children born of a non-Japanese mother and a Japanese father, but who were acknowledged by the father before birth on the one hand, and children in precisely the same circumstances but who were not acknowledged by the father before birth. It was this last distinction that was central to the decision, for the children in the second category had to be "legitimated" by the subsequent marriage of their parents in order to gain nationality, while those in the first category did not. This last and rather bizarre distinction is illustrated most strikingly by one of the plaintiffs—Masami Tapriu, the ten-year-old daughter of a Filipino mother and Japanese father, has a six-year-old sister, Naomi Sato, who is Japanese by operation of Article 2(1), since her father acknowledged paternity prior to her birth.[156]

B. The Majority's Application of the New Doctrine

The majority opinion of the Court was only joined in by Chief Justice Shimada and two other justices, though it was largely supported on the central issue of the finding of unconstitutionality in the separate concurring opinions of seven other justices. There were differing views among this overall majority on the remedy to be fashioned. The majority decision began by examining the operation of Article 3(1) and Article 2(1) of the Nationality Act, as discussed above in Part V A, concluding that "consequently, Article 3, para. 1 of said Act is practically applied only to a child who was born to a couple of a Japanese father and a non-Japanese mother having no legal marital relationship and who was not acknowledged

156. Mariko Yasumoto, *Japanese-Filipino Kids Await Fate*, JAPAN TIMES, June 4, 2008.

by the father before birth."[157] The Court then noted that the plaintiffs had alleged that the distinction this caused, in violation of the right to equality in Article 14 of the Constitution, as explained above, was between illegitimate children who are born of mixed-nationality parentage but whose Japanese father recognized paternity prior to birth, and such children whose Japanese father recognizes paternity after birth, and who consequently are only able to gain Japanese nationality by having their parents marry in order to "legitimate" their status.

The Court repeated that only unreasonable discrimination is understood to be prohibited by the Constitution, but went on to explain that this means the discrimination must have reasonable grounds, and that:

> Where a reasonable basis cannot be found in the legislative purpose of making such a distinction even if the discretionary power vested in the legislative body is taken into consideration, or where a reasonable relevance cannot be found between the distinction in question and the aforementioned legislative purpose, the distinction is deemed to constitute discrimination without reasonable grounds and to violate the provision of Article 14, para. 1 of the Constitution.[158]

It is worth noting the important difference that is already revealed in this analysis as compared to that in earlier cases. The Court did not simply focus on the "rational connection," or as articulated here, the relevance between the legislative means and the purpose of the law, but has suggested that in addition and prior to that question, the reasonableness of the purpose itself must be considered. This, I would argue, is both new and vitally important, as it both forces the government to justify the importance of its policy choice, and it provides the necessary basis for considering the proportionality between the benefit derived by achieving the purpose so identified, and the harm it is causing by violation of the right. The court did not go further and articulate the criteria that should be applied in assessing the reasonableness of the purpose, such as consistency with the values of a free and democratic society for instance, but nonetheless, this step is of major significance. For the first time in a majority decision of the Supreme Court, the analysis was not primarily restricted to the internal relationship of the objective and the means to achieve it, but the entire legislative scheme was also to be judged against external criteria, and, as we will see below, weighed against the harm it causes.

The Court then proceeded to examine the purpose of the provision, noting that it was introduced into the Nationality Act in 1984 to supplement

157. *Nationality Act* case, (Sup. Ct., June 4, 2008), 62 MINSHŪ 6 1367, majority opinion, section 2.

158. *Id.*, majority opinion, section 4(1).

"the basic principle of said Act, *jus sanguinis*, by achieving a balance (in treatment) with a child born in wedlock to a Japanese father and a non-Japanese mother who may acquire Japanese nationality by birth."[159] Further, it inferred that the purpose of the distinction, and requirement of "legitimization" for children born to unmarried parents of mixed-nationality, was that "when the child has acquired the status of a child born in wedlock as a result of the marriage of the parents, the child's life is united with the life of the Japanese father and the child obtains a close tie with Japanese society through his/her family life, and therefore it is appropriate to grant Japanese nationality to such a child."[160] The Court accepted the argument that where a child is born to a Japanese citizen but does not acquire Japanese nationality at birth (that is, because the father fails to acknowledge paternity before birth if the parents are not married), then he or she is likely to develop closer bonds with the foreign state of his or her mother's nationality. The Court further recognized that Article 3(1) of the Nationality Act essentially creates conditions that are mere "indexes" or indicia of the closeness of the bond between the child and Japan, and that the legitimization requirement was designed to increase the strength of this bond. The Court held that this purpose of ensuring a sufficiently close connection to Japan as a prerequisite for granting nationality was legitimate and reasonable when the law was passed in 1984, and it noted that several other countries had at the time similar acknowledgement and legitimization provisions in their nationality laws (though the Court failed to specify which countries).[161]

Whether the purpose was ever sufficiently important remains debatable, and I would differ with the Court's conclusion on this issue. What the Court does not mention is that the Nationality Act was amended in 1984 in order to make it possible for Japan to ratify the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), which had entered into force in 1981. The Convention provided that all state parties were required to "grant women equal rights with men with respect to the nationality of their children,"[162] and the 1950 Nationality Act had been based on the principle of *jus sanguinis a patre*, or the bloodline of the father, which traced its way back to the original Civil Code. Under this law, only the legitimate child of a Japanese man, or the illegitimate child of a Japanese woman and a foreign man could acquire

159. *Id.* section 4(2)(a).

160. *Id.*

161. *See id.* sections 4(2)(a) and (b).

162. Convention on the Elimination of all Forms of Discrimination Against Women, art. 9(2), Jan. 22, 1980, 19 I.L.M. 33 (1980).

Japanese nationality at birth; the legitimate child of a Japanese woman and foreign man and the illegitimate child of a Japanese man and a foreign woman could not acquire Japanese nationality at birth.[163] The 1950 Nationality Act had been thus enacted, based on the old Civil Code provisions, despite loud arguments that it was inconsistent with both Article 14 and Article 25 of the new Constitution.

The 1984 amendments were designed to bring this regime into accordance with CEDAW. But as the Court would allude to later in the judgment, even the gender imbalance was not truly resolved in the new regime—for it will be noted that in contrast to the automatic nature of "recognition," thus establishing the legal character of the relationship between mother and child, the scheme requires the legal relationship between father and child of an unmarried relationship to be established by the overt act of acknowledgment. The result is that the children of Japanese mothers may always acquire Japanese nationality, while illegitimate children of a Japanese father also need him to act, and if he acts after the birth of the child, he must also marry the mother to confer nationality upon his child. It is not at all clear that either the act of acknowledgment or requirement to marry were ever valid mechanisms to ensure a close bond between the child and Japan, or were effective proxies to reflect such a bond, if indeed a close bond was ever really the purpose. The whole point of *jus sanguinis* is that the only bond one requires with the "nation" is a genetic one. Under Article 2 of the Nationality Act a person could be born in Russia to Japanese parents and never live in Japan, and yet still be Japanese by birth. Conversely, Korean-Japanese (*zainichi kankokujin*) who are born in Japan to third-generation Korean-Japanese parents, who know no other culture and speak no other language but Japanese, cannot acquire Japanese nationality as of right. The legal scheme is simply not about close bonds to the state, but is all about race and ethnicity.

In any event, all of that is merely context. Whether one agrees with the Court's initial finding that the purpose of the legislation was valid and reasonable at the time that it was passed, the important points are that first, it analyzed that purpose to determine its validity, and second, the Court then went on to further analyze whether that purpose continued to be valid and reasonable today. We return to that second step now.

The Court, having established that the fundamental purpose of the legislation was to ensure that there was a sufficiently close connection between the child and the Japanese parent, and thus a close connection between the child and the nation, it went on to look at the relevance of the

163. Hosokawa, *supra* note 153, at 183.

means employed by the legislation to achieve this objective. This is essentially the rational connection analysis that we examined earlier. The Court held that there may have been, at the time the amendment was enacted, "adequate reasons to consider that . . . the fact of the legal marriage of the parents would show the existence of the child's close tie with Japan developed through his/her family life with the Japanese father," and so ". . . a certain reasonable relevance can be found between the provision that requires legitimation in addition to acknowledgment for granting Japanese nationality, and the legislative purpose mentioned above."[164] But the Court then proceeded to examine whether that could still be said to be true at the time the plaintiffs commenced their claims.

The Court held that the social realities of family life, including the increases in mixed-nationality relationships and the number of children resulting from such relationships, and the more diverse views on marriage and the ideal structure of parent-child relationships, undermined the validity of marriage as a proxy for the bond between a child and the state. The Court concluded that "it is impossible to measure the degree of closeness of the tie between children and Japan just by examining whether or not their parents are legally married."[165] In further support of its conclusion that, in the current circumstances, there was not a sufficient rational connection between the objective and means, the Court noted that both the International Covenant on Civil and Political Rights, and the International Convention on the Rights of the Child, both of which Japan has ratified, prohibit discrimination against children "because of birth" (or, to be more precise, on the basis of legitimacy). This reference to international law principles, and Japan's international treaty obligations, is in and of itself a very positive development, and it again also illustrates the Court looking to criteria external to the four corners of the legislation in assessing not only validity of purpose, but the nature of the rational connection between the means and that purpose.

The Court next went back to the nature of the distinction itself, and examined the nature of the harm that it caused to those discriminated against. In terms of the theoretical approaches we reviewed earlier, and my criticism of earlier decisions of the Court, this is profoundly important. To be sure, the Court was not proceeding in the same methodical order as the *Oakes* test, that is, looking first at the nature of the discrimination and the harm caused thereby as part of assessing whether there has been a violation of the right, and only then proceeding to analyze justification questions

164. *Nationality Act* case, majority opinion, section 4(2)(b).

165. *Id.* section 4(2)(c).

involving the importance of the legislative purpose, rational connection, and proportionality. However, it covered the same ground, and in particular the Court did analyze the nature of the distinction, and assessed the gravity of the harm it would cause. In terms of the more general proportionality test discussed earlier, this constituted an evaluation of the effects, in addition to the objective and means, and as such was a dramatic departure from the form of analysis in the *Tokyo Metropolitan Government* case.

The Court began this evaluation of the effects of the discrimination by examining again the nature of the distinction made by the operation of the two provisions of the legislation:

> As a result, not only a child born in wedlock to a Japanese father or mother but also a child born out of wedlock and acknowledged by a Japanese father before birth and a child born out of wedlock to a Japanese mother are to acquire Japanese nationality by birth, whereas only a child born out of wedlock who is acknowledged by a Japanese father but has not acquired the status of a child born in wedlock as a result of legitimation, although such a child is also born to a Japanese citizen as his/her parent by blood and has a legal parent-child relationship with a Japanese citizen, is unable to acquire Japanese nationality by birth or even by making a notification under Article 3, para. 1 of said Act. We should say that due to such distinction, a child born out of wedlock who satisfies only the requirement of being acknowledged by a Japanese father after birth, alone, is subject to considerable discriminatory treatment in acquiring Japanese nationality.[166]

The Court then proceeded to discuss the nature of the injury to those children who were denied nationality on the basis of this discriminatory treatment, stating that the acquisition of nationality "means a lot to people in order to enjoy the guarantee of fundamental human rights and other benefits in Japan," and that as a result, "the disadvantages that children would suffer from the above-mentioned discriminatory treatment cannot be overlooked, and we must say that we can hardly find reasonable relevance between such discriminatory treatment and the aforementioned legislative purpose."[167] In again using the word "relevance" the Court rather unfortunately seems to have confused rational connection with proportionality, but it seems fairly clear here that the Court is looking at the balance between the putative purpose of the legislation, and the degree of harm caused to those who suffer the effect of the discrimination.

166. *Id.* section 4(2)(d).

167. *Id.*

The Court went on to point out that, if the purpose was to limit Japanese nationality to persons with a close tie to Japan, the provision "applies a means that goes far beyond the bounds where reasonable relevance with such legislative purpose can be found."[168] Indeed, the Court argued, though not specifically in these terms, that the provision was overly inclusive (or more precisely, over exclusive, since it excluded even such children as the plaintiffs, who were born and raised in Japan and quite obviously did have close ties to the country), that it was not the least restrictive means of achieving the objective (since other less discriminatory and more precise proxies and measures of close ties could be fashioned), and that moreover, it was particularly pernicious because it essentially punished children for a failure on the part of their parents to get married, over which the children had no control.[169] As such, the Court was employing all the aspects of the analytical framework that was discussed and championed above in our review of the Canadian example, and which the Court quite conspicuously ignored in the *Tokyo Metropolitan Government* case.

The Court thus concluded that Article 3(1) of the Nationality Act, and the distinction that it made, while having a reasonable purpose, had lost its rational connection (or relevance, in the language of the court) to that purpose, and that the discrimination that it created was unreasonable and a violation of Article 14 of the Constitution. It then set about fashioning a remedy, which it did by construing Article 3(1) of the Nationality Act so as to "read down" the requirement of marriage and thus legitimization as a condition for acquiring nationality.[170] As mentioned earlier, the Court's decision on the nature of the remedy turned out to be one of the most controversial elements of the decision, and is what spawned so many concurring but somewhat distinguishable decisions—but that controversy, which focused in large part on the scope of judicial review and concern for "judicial legislating," need not concern us here.

It may be useful to consider the exact form of the distinction that was drawn by the Nationality Act, and thus the precise nature of the discrimination. Because on one level it may appear that the Court here once again struck down a law on the basis of a bizarre distinction, as it did in the *Patricide* case. In that case the Court seemed to be comparing the legislative treatment of persons accused of murdering ascendants with those accused of murdering anyone but ascendants, and here the narrow

168. *Id.* section 4(2)(e).

169. *Id.* section 4(2)(d) and (e).

170. *Id.* section 5.

distinction seems to be between those children of un-wed Japanese fathers and foreign mothers who were acknowledged prior to birth by their father, and children of similar relationships but who were only acknowledged after their birth by their father. In the *Patricide* case it was discrimination against one group of murders as compared to another, and in this case it is the discrimination against one small set of illegitimate children of foreign mothers as compared to another group of similarly illegitimate children of foreign mothers. Where, one might reasonably ask, is the discrimination based on an immutable characteristic that goes to the identity of the individual in a manner that is injurious to dignity?

Once again, the Court did not do the best job of analyzing the distinction and explaining the nature of the discrimination—though, in my view, it did not totally misconstrue the nature of the discrimination in the way the Court did in the *Patricide* case. The discrimination in question here affects a subset of a group of children that is defined on the basis of foreign parenthood and illegitimacy, and it discriminates against that subgroup on the basis of its illegitimacy. The title of the provision in the Act is "legitimation," and the entire thrust of the provision is to make acquisition of a fundamental benefit, indeed the status necessary to access other fundamental human rights, conditional upon transforming their illegitimate status to legitimate. As such, the legislative scheme is discriminating against people on the basis of the social status of legitimacy, something the person has no personal control over and cannot change, in a manner that signals to society that those who lack this status of legitimacy are less worthy of the respect and concern of the state and society at large.

There is also the less obvious gender discrimination, which the Court did make passing reference to, and which Justice Izumi makes more explicit in his concurring opinion.[171] As mentioned earlier, the children of Japanese mothers are automatically granted nationality, whereas the illegitimate children of Japanese men only receive Japanese nationality automatically at birth if the father has already by that time acknowledged the child as his own—thereafter, he not only has to acknowledge the child, he must also marry the mother in order to have his child obtain Japanese nationality as of right (that is, without having to apply for naturalization, which is granted at the discretion of the Minister). This is not consistent with the provision in CEDAW, and it reflects discrimination on the basis of gender. It may be argued that all men have to do in such circumstances is recognize the child as theirs prior to birth—but herein lies an essential element in the analysis of both aspects of the discrimination. As a factual

171. *Id.* concurring opinion of Justice Tokuji, section 1.

matter it is far easier to ascertain paternity after birth than before birth. Yet it is precisely when, as a practical matter, it is easier to determine paternity, that the law makes it more difficult to acquire nationality.

This fact is highly relevant to the nature of the discrimination based on legitimacy. For in a large number of cases, including all of the plaintiffs in the lawsuit, the "recognition" by the father was compelled by legal proceedings.[172] In other words, illegitimate children seeking to acquire the various rights and support that flow from the legal relationship with a "father" that is created by "recognition," have to compel such acknowledgment, which practically speaking, is only possible after birth. Therefore, as a factual matter, the vast majority of illegitimate children of Japanese men and foreign women will be in the subset of illegitimate children against whom the law discriminates. And while they can compel recognition, they cannot compel their parents to marry.

The majority opinion of the Court suggests that the majority clearly understood the essence of the discrimination. Thus, while they highlighted the odd distinction drawn between illegitimate children recognized by fathers prior to birth and illegitimate children not recognized until after birth, they did so primarily to highlight the lack of rational connection between the purpose of the legislation and the means thus employed.[173] While the court did not address the manner in which this discrimination could add to the already significant stigma and indeed legal disadvantage that illegitimate children bear in Japanese society, and did not do as much as one would have liked to see in terms of evaluating the injury this causes to such people, it seems clear that the Court was focused on the discrimination based on the social status of legitimacy. The reference to the ICCPR and CRC prohibitions against discrimination based on illegitimacy, and to the fact that many other countries are "scrapping discriminatory treatment by law against children born out of wedlock"[174] make this clear. And indeed the remedy fashioned by the majority further reflects its true concern. The Court essentially "read down" the clause of the provision that reads "who has acquired a status of a legitimate child according to the marriage of his or her parents."[175] This left in place the distinction between

172. Yasumoto, *supra* note 152.

173. *Nationality Act* case, (Sup. Ct., June 4, 2008), 62 MINSHŪ 6 1367, majority opinion, section 4(2)(e).

174. *Id.* section 4(2)(c).

175. It should be noted that the translation of the provision in the Supreme Court provisional translation of the judgment differs from the official translation of the Nationality Act. In my discussion of the wording of the provision, I am relying on the official translation of the Act, which is the better translation.

children acknowledged before birth, who acquired nationality automatically, and those recognized by their father after birth, who were required to make a notification to the ministry in order to acquire nationality as of right. But it eliminated the requirement that the latter group of children be "legitimated" by the marriage of their parents as a condition of acquiring nationality, and thus ended the discrimination based on the social status of illegitimacy.

Thus, I would suggest that all the elements of the framework of the proportionality analysis, as exemplified in the Canadian approach examined above, are present in the majority's treatment of the issue in this case, though with some elements not articulated or examined as clearly as one might like. The court examined the precise nature of the distinction drawn by the legislation, and discussed the character of the discrimination it created. In doing so it evaluated the extent and nature of the harm that the discrimination caused. Then, in turning to the "reasonableness" or justification of the discrimination, the Court did not merely assess the rational connection by reference to the question of whether the means adopted were likely to advance the fulfilment of the objective. It looked at the complexity of the current social reality in analyzing the sufficiency and reasonableness of the legislative proxy, and moreover assessed whether the legislative mechanism was narrowly tailored or, conversely, was overly inclusive and not the least restrictive alternative to achieving the objective. Finally, the Court engaged, if only implicitly, in an assessment of the proportionality between the harm caused to those who were affected by the discrimination, and the benefit to be derived from the legislative distinction. All of these steps are, as I have argued above, important in an analysis of claims to the right to equality, and have been ignored by the Japanese courts in the past.

C. The Dissent and the Old Doctrine

Indeed, the dissenting opinions, particularly that of Justices Yokō, Tsuno, and Furuta (hereinafter, the "Yokō opinion"), again illustrates the traditional approach to equality rights analysis by the courts. With typical deference to the Diet, the Yokō opinion began with the assertion that under the provision, "legitimated children are allowed to acquire Japanese nationality by making a notification whereas non-legitimated children are required to follow the naturalization procedure, and we believe that these provisions are not beyond the range of choices of legislative policy and therefore not in violation of Article 14, para. 1 of the Constitution."[176]

176. *Nationality Act* case, dissenting opinion of Justices Yokō, Tsuno and Furuta, at para. 1.

Immediately apparent, at the outset of the analysis, is that the central question was identified as not being the nature of the discrimination and the harm it causes, or even whether it can be justified in terms that are consistent with the values of the Constitution, but simply whether the legislation and the policy choices it reflects are properly within the discretion of the legislature.

Indeed, far from assessing the nature of the harm that the discrimination might cause, the Yokō opinion categorically denies the relevance of any inquiry into the consequences of the discrimination. The granting of nationality, the dissenting Justices argued, is one of the most fundamental sovereign acts of a national community, and there must therefore be broad legislative discretion to formulate the requirements for granting nationality, so long as there are uniform and clear standards for the acquisition of nationality at birth. Thus, so they argued, even though nationality is an important legal status for the enjoyment of other fundamental rights, it is impermissible "in principle, to claim nationality of a particular state as a right, and such importance of nationality cannot be deemed to have any influence on the aforementioned legislative discretion."[177] I would suggest that according to this principle a legislature could pass laws that, according to a clear and uniform standard, limit the acquisition of nationality at birth to those persons of a particular race or ethnicity, and still be within the legitimate scope of legislative discretion. That such a plainly racist policy could satisfy their test should illustrate its obvious inadequacy.

On justification, the Yokō opinion quibbles with various features of the majority decision, but does not address the crucial questions of rational connection, least restrictive means, or proportionality between the benefit and the harm of the legislation. One of their main criticisms of the majority decision is regarding the argument that there have been sociological changes that undermine the validity of marriage as a proxy for close ties to Japan. But their attack focuses on the number of such illegitimate births in Japan, in absolute terms, as an increase over time, and relative to European society (and it is not at all clear that the numbers refer to all illegitimate births, or just illegitimate births to mixed nationality parents—and in any event, quite amazingly, the dissenting justices dismiss as insignificant the near doubling of the rate of out-of-wedlock births between 1985 and 2003).[178] They simply accepted without the slightest analysis, the proposition that "non-legitimated children have different levels of ties with

177. *Id.* section 1.

178. *Id.* section 2.

Japan," and that marriage of a person's parents is a sound proxy for establishing the degree to which that person has a bond with the country.[179] The justices never engaged, far less refuted, the argument of the majority that marriage is not a rational proxy, nor did they address whether it is overly inclusive, and that there might be more precise and less harmful ways of establishing and measuring a close bond with the country. The facts before the Court illustrated the very close ties that the plaintiffs had to the country, given that they had all been born and raised, and continued to live, in Japan. Finally, never having considered the nature of the discrimination and the potential harm that it might cause, there was absolutely no attempt to consider the proportionality between the proposed benefit and the expected injury caused by the discrimination.

The dissenting justices in the Yokō opinion asserted with some considerable indignation that the remedy fashioned by the majority could "lead to the consequence that even a person who has been living in a foreign state as a foreign national over many years without having any relations with Japanese society can acquire Japanese nationality just by making a notification . . . or in other words, acquisition of Japanese nationality would be allowed even in cases where no close tie can be found between children and Japanese society."[180] But this counterfactual indeed reveals the fallacy of the proxy relied upon by the legislation. For under Article 3(1) of the Nationality Act, a child born to an unmarried Japanese woman and a foreign man, even someone who is born overseas and goes on to live his or her entire life abroad, would enjoy Japanese nationality. Similarly, a child born to an unmarried Japanese man and foreign woman, where the father acknowledges the child after birth and marries the mother, could obtain Japanese nationality even if he or she continued to live in a foreign country. Conversely, as in the case of the plaintiffs who were before the Court, children born in Japan and living in Japan, with aspirations to make their life in Japan, are denied nationality because the Japanese man who is their father has not married their foreign mother. The fact is that marriage is not a sound proxy for a bond with Japan, and upon closer reflection, the legislation is not only overly broad—in that it excludes people who would have a close bond with Japan—but it also entirely fails to ensure that those whom it includes have a close bond.

179. *Id.* section 3.

180. *Id.* section 4.

D. Another Possible Interpretation, and Clouds on the Horizon

The foregoing provides some evidence that there is indeed a new doctrine emerging in the Supreme Court, and one that is more consistent with the proportionality test that forms the foundation of constitutional analysis in most liberal democracies today. Moreover, I have argued that, from a normative perspective, such a development is to be both applauded and encouraged. But the evidence is not at all conclusive, and there is indeed another viable interpretation of this recent history. What is more, while this article was already in final revisions for publication, the Supreme Court handed down yet another decision that further clouds the issues.

The other interpretation of the recent jurisprudence, and particularly the *Nationality Act* case, is that the Supreme Court is continuing to be influenced by the American approach. More specifically, the Court is continuing to apply a minimum scrutiny or simple rational connection test in discrimination cases, but where the distinction drawn by the legislation is in respect of some other fundamental right or interest, then a more rigorous analysis will be applied. It will be recalled that in the American approach the strict scrutiny test is triggered by one of two different features of the discrimination in question: first, if the distinction is made by reference to a suspect class, such as race or (sometimes) national origin; and second, if the distinction burdens some other fundamental right, such as the right to mobility.[181] It may be argued that the Court is in fact following the second element of this approach, and has developed a more rigorous level of scrutiny for those cases in which the discrimination is in relation to the exercise of some other fundamental right or interest. The extent to which the Court may also be following the American approach of applying a strict scrutiny test to the suspect class of race is difficult to discern—there are virtually no race-based discrimination cases that have made it to the Supreme Court, and little race-based litigation in Japan generally.[182]

As discussed above, the majority opinion in the *Nationality Act* case did in fact focus on the importance of the status of nationality, and the extent to which the enjoyment of other important human rights were

181. *See supra* text accompanying note 77 and 78.

182. But see, e.g., Eric Johnston, *Plaintiff Gets Redress But Not for Racial Bias*, JAPAN TIMES, October 19, 2006, where an action was brought against an Osaka store owner for refusing to serve a black customer. The plaintiff was successful in winning damages on appeal, but the Osaka High Court refused to do so on the basis of discrimination (this decision is not reported). There is, of course, a great deal of discrimination-related litigation based on ethnicity more broadly defined, by *Buraku*, Ainu, and others, though the courts tend not to deal with these as discrimination based on race (or *jinshu*), and to my knowledge no case has ever been decided on the base of race alone by the Supreme Court.

dependent upon the acquisition of Japanese nationality. It emphasized that due to the operation of the impugned provision, that status was denied on the basis of the "personal status" of the parents, and it could not be affected by the efforts or will of those being discriminated against. Therefore, the Court went on, "it is necessary to deliberately consider whether or not there are any reasonable grounds for causing a distinction . . . ."[183] This has been interpreted by many Japanese scholars as meaning that the Court was essentially applying a higher level of scrutiny because of the importance of the rights attendant to the acquisition of nationality. Indeed, Takahashi Kazuyuki of Meiji University, in a joint analysis of the judgment in the preeminent law journal *Jurist*, wrote that in his view there is a more rigorous level of scrutiny applied in those discrimination cases where an important legal right or status is implicated.[184] Similarly, Hasebe Yasuo, a distinguished constitutional scholar from Tokyo University, suggested in his analysis of the case that the normal standard of review, involving an inquiry into the reasonableness of the legislation and the rationality between its objective and means, is a relaxed test, but that where the discrimination is in respect of an extremely important status from which legal rights flow, then a more rigorous level of review will be applied.[185]

There is no explicit reference in the judgment to a heightened level of scrutiny, or any suggestion that there is a differentiated approach to discrimination cases. Takahashi concedes in his comments that it is not clear that the Court is indeed adopting such an approach.[186] Importance is placed by the commentators on the phrase "deliberately consider," as somehow signaling the application of a heightened level of scrutiny. It is quite possible that scholars are imposing upon the case an interpretation that is shaped by their own understanding of the American approach, which was championed by Ashibe long ago.[187] But in September of this year a Petty Bench of the Supreme Court handed down yet another judgment on the constitutionality of the provision in the Civil Code that limits the inheritance of illegitimate children of an intestate deceased to one half of that of the legitimate offspring.[188] In a 3-1 decision, the Court once again upheld the legitimacy of the discriminatory provision. It could be argued that this case supports the interpretation that the Court is applying a

183. *Nationality Act* case, (Sup. Ct. June 4, 2008), 62 MINSHŪ 6 1367, majority opinion, section 4.

184. Takahashi, *Regarding the Nationality Act Case*, *supra* note 149, at 55.

185. Hasebe, *Pattern of Thought*, *supra* note 149, at 77.

186. Takahashi, *Regarding the Nationality Act Case*, *supra* note 149, at 55-56.

187. ASHIBE, CONSTITUTIONAL, *supra* note 3.

188. Supreme Court Judgment, Second Petty Bench, (September 30, 2009) (*2009 Illegitimate Child Inheritance* case).

multilayered standard of review in discrimination cases, and at first glance the judgment is certainly difficult to reconcile with the idea that the *Nationality Act* case represents the emergence of a new doctrine.

Upon closer inspection, however, while the case is profoundly disappointing and to be criticized, it is not so clear which interpretation it really illustrates. The bench was comprised of only four justices, three of whom took part in the *Nationality Act* case.[189] Justice Furuta, who had been one of the dissenting justices joining in the Yōkō dissent in the *Nationality Act* case, presided as senior justice. The plurality decision consists of only two paragraphs, dismissing the appeal out of hand on the basis of the precedent laid down in the *Illegitimate Child Inheritance* case we examined above. There is no analysis of any kind, and so no indication in it whatsoever as to why or how the case differed from the *Nationality Act* case. In the concurring opinion, Justice Takeuchi, the one justice who did not take part in the *Nationality Act* case, was concerned about the impact that invalidating the provision with retroactive effect would have on all inheritance settlements entered since the commencement of the case nine years earlier. But after recounting the extent to which Japanese and international society had changed in recent years, he examined the nature of the discrimination that the provision created, and the injury it did to the dignity of illegitimate offspring, and concluded that "the suspicion that the provision is unconstitutional is extremely strong."[190] Then, after explaining how legislative amendment could resolve all the problems (except, he seemed to forget, those of the parties before him), and noting how amendments to the Civil Code had been recommended to the Minister of Justice at the time of the previous case, he exhorted the government to change the law. In effect, this was an opinion that concurred in the result only, while roundly criticizing the impugned law as being discriminatory, and it gives no indication that it was based on some lower standard of review.

The dissenting opinion of Justice Imai, who was part of the majority in the *Nationality Act* case, however, was a robust defense of the doctrine established in that case. He explicitly argued that the Court should have followed the *Nationality Act* case reasoning,[191] and he adopted the reasoning from that judgment in explaining how the impugned provision constituted unjustifiable discrimination against illegitimate offspring. He

189. For a detailed analysis of the short duration of judicial appointments, and the impact that has on conservative and timid nature of the bench, see Law, *Conservative Court*, *supra* note 2.

190. *2009 Illegitimate Child Inheritance* case, concurring opinion of Justice Takeuchi, section 1(3).

191. *Id.*, dissenting opinion of Justice Imai, section 2.

centered his analysis on the notion of individual dignity, bolstered by references to Articles 13 and 24(2) of the Constitution,[192] and emphasized the irrationality of a legislative provision that seeks to foster respect for the institution of marriage by punishing people other than those who actually disregard the related societal norm. Moreover, as in the *Nationality Act* case, he explained how both Japanese and international society have changed, thus altering the legitimacy of the legislative objective itself.

He also explained the context of the 1995 *Illegitimate Child Inheritance* case. The Supreme Court handed down its judgment in that case at a time when a law reform commission was examining the issue of the inheritance laws. The discrimination inherent in the law had been debated since 1979, and concrete amendments had been proposed in 1994, the year before the Supreme Court decided the case. Thus, he explained, the Supreme Court decision in that case, in which there were several very critical opinions that nonetheless concurred in the result, was predicated upon the expectation that the government was going to amend the impugned provision and end the era of discrimination. That, clearly, has not happened, and he argued that the Court had an obligation to find the law unconstitutional, and not abdicate its duty under cover of deferring to the legislature to remedy the problem.[193]

In short, the result of the judgment in the *2009 Inheritance* case is somewhat difficult to square with the idea that the *Nationality Act* case represents the emergence of a new doctrine in the Court's jurisprudence, but the only reasons provided are actually more consistent with the framework of that doctrine. (What remains a mystery is why Justice Nakagawa, who was part of the majority decision in the *Nationality Act* case, silently concurred with Justice Furuta in this case). So the *2009 Inheritance* case tends to muddy the waters further, but in my view it neither supports the idea that the Supreme Court is following an American-style multi-level scrutiny test, nor does it negate the proposition that the Court is increasingly adopting a fuller proportionality test similar to that which was examined above in Part II B. The reality is that it is too soon to tell. It is not possible to make more than a cautious claim that there is some meaningful evidence that this new analytical framework, one that can be traced back to earlier dissents in Supreme Court judgments, is in the process of becoming the dominant approach in the Court's treatment of

192. See *supra* text accompanying notes 17-19 for discussion of Article 13. Article 24(2) of the Constitution provides that with regard to, among other things, inheritance, "laws shall be enacted from the standpoint of individual dignity . . . ."

193. *2009 Illegitimate Child Inheritance* case, dissenting opinion of Justice Imai, sections 4 and 5.

discrimination cases and the enforcement of the equality rights in the Constitution.

Moreover, there is reason to believe that, as the number of such judgments grows, and if they increasingly refine and clarify the analytical framework and establish an increasingly rigorous logic for the test to be applied to discrimination issues, the "unreasonable discrimination" test has to come under ever increasing pressure. That pressure will operate at the level of the individual judges, who at the lower levels are less conservative and perhaps more concerned about the legal legitimacy of their judgments. Now they have a precedent of the Supreme Court, providing a rigorous proportionality test, to deal with. And over time, the pressure and influence exercised by this case and subsequent applications of the test may begin to have some traction with the Secretariat of the Supreme Court, which all agree is the single greatest institutional influence over the thinking and conduct of the judiciary.[194] For the continued use of the "unreasonable discrimination" test in the face of increased equality rights litigation, which may be expected as Japan grapples with the consequences of its demographic changes, may start to run counter to government policy. It could also give rise to mounting social and institutional costs, issues to which the Secretariat may well be sensitive.

Finally, from a normative perspective, everything should be done to encourage this development of an analytical framework that is consistent with the proportionality analysis that is at the foundation of the constitutional rule of law in most constitutional democracies in the world today.[195] In particular, the legal scholars of Japan ought to take up this issue, and engage in a more wide-ranging comparative analysis of the court's jurisprudence. The focus on the American approach, and suggestions that the court should indeed follow the American example, is in my view entirely misplaced. As discussed above, the American approach represents the requirement to develop parameters and limitations on what is a vague and apparently absolute constitutional provision. The multiple levels of review are completely unnecessary and counterproductive in the context of the more detailed constitutional provisions of Japan, Canada, or South Africa, to name just a few. What is more, as this review has hopefully illustrated, only the strict scrutiny test in the American approach conforms to the proportionality test that is considered key to the full

194. Ramsayer and Haley, for example, while they disagree fundamentally on the political independence of the judiciary, agree that individual judges are heavily influenced by the administrative control of the Secretariat. *See generally* RAMSAYER, JUDICIAL, *supra* note 2; HALEY, SPIRIT, *supra* note 2; Upham, *Lackeys*, *supra* note 2.

195. BEATTY, *supra* note 39.

protection and enjoyment of the right to be treated as an equal, and yet under the American approach the conditions for application of strict scrutiny are far too narrow. If one accepts that the right is substantive, rather than merely procedural, as the Japanese provision clearly reflects, then there is no principled reason why race should be privileged over gender, sexual orientation, creed, religion, or any of the other prohibited grounds of discrimination. Similarly, treating discrimination in respect of another right or interest differently than discrimination based on an immutable characteristic that nonetheless causes harm, is not consistent with a substantive notion of the right.

Rather than encouraging the court to follow an American approach that is increasingly out of step with the rest of the democratic world, or trying ever so hard to discern evidence in the Supreme Court's decisions that it is indeed applying aspects of the American doctrine, Japanese scholars would do well to engage in a more robust comparative analysis of other constitutional approaches. Through such scholarship a change in doctrine along the lines of the proportionality test embraced in so many other democracies could be further encouraged, and the equality rights enshrined in the Japanese constitution may finally come to be enforced in a meaningful way.

CONCLUSION – SOME COMPARATIVE OBSERVATIONS

There are few rights that are so fundamental to the foundations of liberal democracy and notions of liberty, and indeed to the dignity of the person as that concept is understood in Kantian philosophy, than that of equality. The right has been enshrined and provided protection in powerful terms in the Japanese Constitution, but the Supreme Court of Japan has, until last year, for the most part failed to enforce and protect the right. While the courts of Japan have failed to enforce the provisions of the Constitution more generally,[196] this Article has argued that the failure of the

196. Critics will argue that indeed, of the less than ten cases in which the Supreme Court has struck down laws as unconstitutional, Article 14 was the basis for a disproportionate number of them—but in only two did the Court actually strike down a law or part of a law as being invalid for violation of Article 14—the *Patricide* case and *Nationality Act* case, analyzed *supra* in Part III A and Part V, respectively. There have been a couple of voter discrepancy cases, in which the disparity in the value of votes between urban and rural areas was alleged to be unconstitutional, beginning with a case in 1976, in which the Court famously held that the "situation" was unconstitutional, but declined to strike down the law in question, invalidate the election, or grant any remedy. *See* Supreme Court Judgment, (April 14, 1976), 37 Minshū 9 1243. Freedom of expression, by way of contrast, is even less protected—not one law has been struck down for violation of the freedom of expression provision in the Constitution (*see* Matsui Shigenori, *Freedom of Expression in Japan*, 1 OSAKA UNIV. L.R. 13 (1991)). But with respect, as the various U.N. human rights bodies have recorded, discrimination is a serious issue in Japan, and none of the equality rights cases actually struck down a law that discriminated against any

courts, particularly the Supreme Court, to develop a rigorous analytical framework informed by the values of the constitutional right, and designed to resolve claims under the right in a principled fashion, has been a significant factor that has contributed to the continued failure of courts to enforce the right.

As revealed through the careful analysis of a number of the key cases in the Japanese equality rights jurisprudence, the "unreasonable discrimination" test is a simplistic test that is excessively deferential to legislative discretion, lends itself to result oriented decision-making, and moreover collapses and conflates the discrete elements that are each essential to a more rigorous analysis of the question of whether a given law has unjustifiably violated the right to equality. In particular the "unreasonable discrimination" test causes judges to skip any examination of the nature of the discrimination in question, and the factual evaluation of the extent and nature of the harm that it has caused to the claimants. Rather, it leads judges to begin their entire inquiry with the justification stage of the analysis, and then has them focus exclusively on the question of whether there is a rational connection between the legislative purpose and the means employed in the legislative provision that gives rise to the discrimination. If there is a rational connection, then the discrimination is deemed reasonable, and that is the end of the inquiry. There is not even any meaningful inquiry into the validity of the legislative objective, or its consistency with the values of the Constitution. Such a test could, without any exaggeration, justify genocide.

The seeds of a more sophisticated approach can be found as far back as the dissent of Justice Tanaka in the *Patricide* case, an approach that includes a number of the analytical devices employed in the increasingly universal proportionality analysis, as has been illustrated here by the Canadian example. And we have seen the evidence of those seeds developing further and being refined in the dissents of a number of important cases in the intervening years. With the *Nationality Act* case of 2008, however, the majority of the Court adopted this approach to strike down a law that discriminated against a discrete and insular minority at the intersection of illegitimacy and nationality. As we have seen in detail, the mechanisms both for analyzing the nature of the discrimination and thus the question of violation, and for assessing the issue of justification, were exhibited in the reasoning of the majority opinion.

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discrete and insular minority until last year. And two cases, over sixty years and in the context of such well documented government discrimination, does not constitute a robust enforcement of a right.

There is thus cause for optimism that this reflects the ascendency of a new approach to the enforcement of equality rights under the Constitution of Japan, becoming a new doctrine that may become firmly established as the standard means of judicial analysis of discrimination claims. Moreover, from a normative perspective, the comparison of the new doctrine to other constitutional models and modes of analysis, suggests the importance of the judiciary's continuing along this trajectory. While there are obviously other important institutional and systemic factors that explain the failure of the Japanese courts to generally enforce constitutional provisions, doctrine is both a factor that has contributed to this failure, and a means by which meaningful incremental change can be realized.

This comparative analysis also raises some interesting questions and generates some potentially significant observations. For one, the similarities between the actual structure of the Japanese equality rights provision, and those of the constitutions of Canada and South Africa, and the lack of any such similarity between the Japanese and American provisions, should raise questions as to why Japanese scholars have been so preoccupied with the American doctrine. Both the Japanese and Canadian provisions reflect an understanding that the equality right is a substantive right rather than merely a procedural or process-driven device, and both are focussed on the prohibition of discrimination on grounds that relate to personal characteristics. Neither of them suffer from the absence of internal limitations that have required the American courts to fashion different levels of scrutiny. The majority opinion of the Supreme Court in the *Nationality Act* case itself reflects the adoption of analytical tools that are very similar to those employed in the Canadian constitutional model, and as has been argued here, that approach accords with a more universal model of constitutional analysis, one which has been argued by others to be central to the rule of law itself, and is more consistent with the underlying philosophical foundation of the right as it has been articulated in the Constitution of Japan. As such, as part of this new development, it might be helpful for Japanese scholars and jurists to begin looking further afield in their comparative constitutional foraging.

From a purely comparative law perspective, the possible emergence of a new doctrine in the Japanese constitutional case law, and one that resembles in a number of important respects the analytical approaches used by courts in other constitutional democracies, is interesting. It is still too early to make more robust claims about the possible emergence of a new doctrine, as this is only one case, albeit one that appears to have built upon seeds planted in earlier dissents. But should the trend continue, this will be very fertile territory for exploring whether this represents a striking

example of constitutional borrowing or constitutional migration. Here may be an example of a constitutional democracy in the very process of adopting the proportionality model that has been found to increasingly characterize the constitutional jurisprudence of democracies, and if this is so, it would constitute an important subject for further detailed study of the forces that conspired to encourage the migration.

Similarly, this comparative analysis should be of some interest to American scholars and lawyers, in terms of the insights it provides regarding the nature of the American approach to equal protection and judicial review of discriminatory government action. For in one sense, the "unreasonable discrimination" test employed by the Japanese courts reflects something of a worst-case scenario of the U.S. doctrine—a laboratory experiment demonstrating the alternate reality of a United States in which the Supreme Court had failed to develop strict scrutiny review in the early years of the twentieth century. For the "unreasonable discrimination" test is essentially the same as the earliest form of the minimum scrutiny "rationality" test. At the same time, the analysis of the Japanese cases from the perspective of the Canadian constitutional approach, as an example of a more universal model, should raise questions about the adequacy of the protection provided under even the modern American doctrine. For only in the narrow circumstances in which strict scrutiny is applied does the American approach conform to the increasingly widespread proportionality analysis. Indeed, to the extent that one thinks that the right to be treated as an equal and not to be discriminated against is a substantive right, rather than simply a mechanism for correcting countermajoritarian problems in the democratic process, then the comparison of American doctrine with that of Canada and Japan may offer some insights about the failings of the American model. Justice Antonin Scalia would say that all this is irrelevant, but insomuch as we accept that human rights transcend national boundaries, then the way the courts in these different constitutional democracies analyze and enforce those rights ought to be of interest to us all.