THE JAPANESE CONSTITUTION AS LAW AND THE LEGITIMACY OF THE SUPREME COURT'S CONSTITUTIONAL DECISIONS: A RESPONSE TO MATSUI

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I. INTRODUCTION

It is notorious in the area of Japanese legal studies that the Supreme Court of Japan has held legislation to be unconstitutional in only a handful of cases since the Constitution was promulgated in 1947.[1] This feature of its jurisprudence is viewed as being rather remarkable when compared to the records of the high courts in other liberal democracies, and in light of the relatively robust array of individual rights enshrined in the Constitution of Japan. It has been the subject of much scholarly analysis and criticism. In his Article *Why is the Japanese Supreme Court so Conservative?*, Professor Shigenori Matsui explores the many arguments that have been advanced over time to explain this aspect of Japanese constitutional law, which Matsui calls the Court's "conservative jurisprudence."[2] Many of these arguments are not new, of course, but his compilation and summary of the analysis is nonetheless very helpful.[3]

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1. Technically, the Constitution of 1947 constituted an amendment of the 1898 Constitution of the Empire of Japan, commonly known as the Meiji Constitution, though in reality it was an entirely new constitution. On the history of the process of "amendment" and promulgation, 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. & trans., 1997).

2. Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011) [hereinafter Matsui, *Japanese Supreme Court*].

3. *See, e.g.*, HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 78 (1997); J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003) [hereinafter RAMSEYER, MEASURING JUDICIAL

Within this review, however, Matsui advances a new argument and isolates it as being one of the most important explanations for the Court's reluctance to strike down legislation as unconstitutional—that the judges of the Supreme Court tend not to understand the Constitution as being a source of positive law that requires enforcement by the judiciary.[4] He argues that most of the judges view the Constitution with some distrust and suspicion, and understand it to be more of an articulation of political and moral principles than a source of law.[5]

This argument makes an important contribution to the literature on the Supreme Court's apparent conservatism, passivity, weakness, or timidity, depending on how one explains its reluctance to enforce the Constitution. It offers up a very different kind of explanation than most of the other claims about the Court's conduct. Rather than being an account based on reasons that are primarily political, institutional, or cultural, it is very much a critique grounded in the judges' approaches to and employment of legal principles. It is an argument that examines the conduct of the court as such, assessing it on the basis of how it applies and interprets its decisions as a legal institution, rather than analyzing the court as simply one of several political institutions vying for power and authority within a competitive political system.

INDEPENDENCE]; 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); 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*]; David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009) [hereinafter Law, *Conservative Court*]; Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, *in* JAPANESE CONSTITUTIONAL LAW 123, 145 (Percy R. Luney, Jr. & K. Takahashi eds., 1993); Setsuo Miyazawa, *Administrative Control of Japanese Judges*, *in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 103 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001); 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*]; 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*]. *See generally* JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW (1998); HIGUCHI YOICHI, KENPŌ HANREI O YOMINAOSU [RE-READING CONSTITUTIONAL PRECEDENTS] (2d ed. 1999); HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES (1989); ASHIBE NOBUYOSHI, KENPŌ SOSHŌ NO RIRON [THEORY OF CONSTITUTIONAL LITIGATION] (1973); FUJII TOSHIO, SHIHŌKEN TO KENPŌ SOSHŌ [JUDICIAL POWER AND CONSTITUTIONAL LITIGATION] (2007); FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987) [hereinafter UPHAM, LAW AND SOCIAL CHANGE]; 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).

4. Matsui, *Japanese Supreme Court*, *supra* note 2.

5. *Id.*

As a primary explanation for the Court's conduct, this argument is both new and potentially important. And in this short response to Professor Matsui's Article, I would like to suggest that the significance of his central argument can be further highlighted by reframing his central question and thereby shifting slightly the focus of the inquiry. It should be understood that there is, after all, a normative component to Matsui's argument. He not only asks why the Court is so conservative, and answers that it is so because the judges do not sufficiently respect the Constitution as law, but he is also implicitly arguing that such failure to understand the Constitution as law is wrong, and that the reluctance of the Court to enforce the rights in the Constitution is improper. It is ultimately a normative argument aimed at changing the way the Court decides constitutional cases.

While I think that Professor Matsui's explanation is important and powerful, I want to suggest that reframing the question, and thus the nature of the argument, can help to strengthen his claim regarding the Court's understanding of the Constitution. Perhaps more importantly, such shifting of the focus can help to create a more powerful set of arguments aimed at creating pressure for change. In short, rather than ask why the Court is so conservative, I would suggest that we ask whether the Court's constitutional decisions are legitimate. For reasons that I will explore in Part II, it may be somewhat misleading to characterize the Court and its conduct as being "conservative," just as it is not that helpful to debate the level of a court's alleged "activism."[6] In the debate on the appropriate role of courts in the United States, it has been argued that it is more fruitful to consider the extent to which the court's judgments are legitimate, based on clearly articulated criteria for legitimacy, rather than engage in discussion about the extent to which courts are "activist."[7] Similarly, to ask whether the Supreme Court of Japan's decisions are legitimate is to turn the focus from making inferences about the operation of forces external to the Court, the nature of the Court as an institution, or the character or ideology of its judges as people, to the manner in which the judges actually reach their decisions and explain their judgments. And reshaping the question in this way brings into much starker relief the significance of Matsui's argument regarding the failure of the judges to take seriously the Constitution as a source of positive law.

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6. As discussed below, this argument that it is more meaningful to focus on legitimacy rather than judicial activism is from KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS (2006).

7. *Id.*

In Part III of this Article, I will review briefly two different approaches to analyzing the legitimacy of a court's decision-making process in cases involving fundamental constitutional rights, based on two different but well-established theories of rights and judicial review. The first is grounded in a theory of substantive rights and the application of the proportionality principle in the judicial review of fundamental constitutional rights, while the second is a process theory approach to assessing legitimacy. Under both approaches, it is accepted that there is no one definitively correct answer to any given constitutional issue, but it is claimed that there are nonetheless criteria against which we can assess whether a decision falls within a reasonable range of legitimate responses. Or, to put it another way, any particular decision can be analyzed for the purpose of determining whether the reasoning and ultimate result of the court's decision is sufficiently consistent with the theoretical principles that inform our understanding of rights and the function of constitutional judicial review.

The suggestion is that a systematic analysis of the decisions of the Supreme Court of Japan in constitutional rights cases, in accordance with either of these approaches, may reveal that a significant percentage of the Court's judgments are lacking in legitimacy. This short Article is not the place for such a comprehensive analysis, of course, but in Part IV of the Article, I examine one recent equality rights decision of the Supreme Court, the *Tokyo Metropolitan Government* case, and illustrate how such an assessment of a judgment's legitimacy might be conducted. The exercise suggests that both the reasoning and the result of the Court's judgment quite clearly fail to meet the legitimacy requirements under either the proportionality or the process theory approach. Moreover, the reasons provide quite explicit evidence that some of the judges understand the individual rights in the Constitution as being something other than positive law to be enforced by the courts.

The point is not, of course, that all of the Court's constitutional jurisprudence is illegitimate. The Court has in fact recently handed down decisions in the equality rights context that suggest that it may be developing a more sophisticated, and ultimately more legitimate, approach to constitutional rights cases.[8] But if a significant number of constitutional

8. Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367, *available in* English at http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html. For a detailed analysis of the case, and the extent to which it represents the development of a new approach by the court, see Craig Martin, *Glimmers of Hope: The Evolution of*

cases can indeed be shown to lack legitimacy, and more particularly one can show precisely how they lack legitimacy, it could provide powerful evidence in support of Professor Matsui's claim that many of the judges simply do not accept the Constitution as positive law. More importantly, because Matsui's claim is one that essentially focuses on how the Court understands and employs legal principles, an approach that redirects the inquiry more specifically toward how the Court decides cases, rather than focusing on the nature of the results, may be more effective as a normative argument for change. In particular, reformulating the inquiry in this way will likely lead to a much more powerful and detailed criticism of how the judges conduct themselves in the decision-making process. If one accepts the proposition that how the judges apply legal principles and develop doctrine matters, as Matsui's claim clearly does, refocusing the analysis on the illegitimacy of the decision-making process is more likely to advance the normative aspect of his argument and create greater pressure for effective change.

II. CONSERVATISM OR LEGITIMACY?

A. Problems with the Conservative Label

Professor Matsui is certainly not alone in arguing that the Japanese Supreme Court is conservative, and that it is excessively so. But what, precisely, is meant by saying the Court is conservative? I would suggest that the term, used in the context of an analysis of the court's decision making, suffers from an ambiguity that tends to blunt the power and significance of Matsui's central argument. The ambiguity begins with the fact that the term conservative, even when applied to the jurisprudence and conduct of a particular court, has several distinct and quite different meanings. In criticism of the Supreme Court of Japan, it tends to be used primarily to mean that the Court is overly deferential to the government and the Diet in its decision making, in refusing to strike down legislation and invalidate government action for being in violation of the Constitution. In this sense, conservative is the polar opposite of "activist," a term frequently employed to criticize courts for being insufficiently deferential to the democratically elected branches of government and engaging, so the argument goes, in the "making of law" as opposed to the

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Equality Rights Doctrine in Japanese Courts from a Comparative Perspective, 20 DUKE J. COMP. & INT'L L. 167 [hereinafter Martin, *Glimmers of Hope*].

mere interpretation and application of the law.[9] But even within the context of this activist-conservative spectrum, the term conservative can have different facets, sometimes meaning deferential to the government and legislature, while at other times meaning minimalist and parsimonious in a court's approach to interpretation of law, particularly the Constitution, and in its development of doctrine. These two meanings can often overlap to a considerable degree, but they can also diverge in important ways, with courts sometimes being quite "activist" in their development of new doctrine in the cause of deference to the political branches of government, and at other times being minimalist in their approach to interpretation in the process of striking down new government initiatives.

In arguing that the Supreme Court of Japan is conservative, however, it is also sometimes meant that the Court is taking positions and making judgments that reflect and implement conservative ideology. This is certainly a significant component of the criticism of the Court for its failure to enforce the individual rights enshrined in the Constitution.[10] In this respect, the term conservative is used in contrast to a "liberal" or "progressive" approach to rights enforcement and constitutional interpretation. The two meanings of conservative tend to be easily elided in the Japanese context, since the government has itself been characterized as being conservative for virtually all of the Court's existence, and thus determining whether the motive behind the Court's jurisprudence was primarily one of deference to the government or the ideologically motivated implementation of conservative policy would be rather difficult.[11] But the fact remains that courts generally can and do engage in decision making that cuts across these spectra, making decisions that,

9. ROOSEVELT, *supra* note 6, at 12–16. For examples of such criticism of courts for activism, see generally MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005).

10. *See, e.g.*, ITOH, *supra* note 3, at ch. 6. For analysis of constitutional law and the Supreme Court's approach to the Constitution, see generally SHIGENORI MATSUI, NIHONKOKU KENPŌ [JAPANESE CONSTITUTIONAL LAW] (2d ed. 2002) [hereinafter MATSUI, KENPŌ]; ASHIBE NOBUYOSHI, KENPŌ [CONSTITUTIONAL LAW] (3d ed. 1997); ASHIBE NOBUYOSHI, KENPŌ HANREI O YOMU [READING CONSTITUTIONAL CASES] (1987); ASHIBE NOBUYOSHI, KENPŌ SOSHŌ NO RIRON [THEORY OF CONSTITUTIONAL LITIGATION] (1973); URABE NORIHO, KENPŌGAKU KYŌSHITSU [COURSE ON CONSTITUTIONAL LAW] (1988); FUJII, *supra* note 3.

11. There is, of course, important scholarship demonstrating that at least on certain issues deemed to be important to the government of the Liberal Democratic Party, the lower courts in Japan have been responsive to structural pressure to decide cases in conformity with government policy preferences. Law, *Conservative Court*, *supra* note 3 (noting that institutional characteristics of the Supreme Court make it vulnerable to government pressure); Ramseyer, *Judicial Independence*, *supra* note 3 (providing empirical analysis demonstrating the adverse career consequences for deciding cases against the government on particular issues).

according to the definitions frequently employed by their critics, are both aggressively activist and ideologically conservative on the one hand, or on the other hand, deferential and minimalist in approach but with significantly liberal outcomes. [12]

This argument should not be pressed too far—obviously the term conservative has definite meaning in political terms, and to the extent that the Court is being considered as one of several political institutions locked in competition, describing it as conservative may be both coherent and meaningful.[13] The problem I am focusing on here is the widespread practice of describing the Court's decision making and jurisprudence as being conservative, which is less coherent. And that is important, unless we reject the notion that the Court operates as a legal institution that makes decision in accordance with legal principles, and we instead embrace the argument that the Court is a purely political institution that operates solely according to political imperatives. And quite aside from the lawyer's normal proclivity to consider courts as having some validity and legitimacy as legal institutions, which primarily operate according to legal imperatives for the purposes of giving effect to principles of law, the fact remains that empirical analysis supports the proposition that the Japanese courts in particular demonstrate a considerable degree of independence and professional integrity.[14]

The problem of describing the Court's decision making as conservative is important, therefore, because in addition to the potential confusion in what is precisely meant by the term "conservative" as discussed above,

12. Several recent cases in the United States illustrate this point. In the Ninth Circuit Court of Appeals decision in *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), the court dismissed the claim of Binyam Mohamad and several other applicants who sought damages and other remedies under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2006) (enacted as part of the Judiciary Act of 1789), for the harm caused to them resulting from their "extraordinary rendition" by the CIA to foreign countries for the purpose of interrogation employing torture. The court, sitting en banc, overturned a decision of a panel of three of its justices, based on an expansive formulation of the State Secrets Doctrine. It has been argued that the court's expansion of the scope and application of the doctrine was particularly aggressive, because the privilege was developed to exclude specific pieces of evidence, rather than as a doctrine justifying the dismissal of an entire case. For analysis of the evolution of the doctrine, see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010) and Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 770 (2010). The decision can be said, in this sense, to bear the hallmarks of "activist" decision making by expanding a doctrine into new territory with little underlying textual or other authority. But at the same time, the judgment could be said to be deeply conservative in its deference to the government, and moreover in its ideological position on where to draw the line between individual rights and national security imperatives.

13. My thanks to Frank Upham for emphasizing the importance of this distinction.

14. *See generally, e.g.*, Haley, *Judiciary*, *supra* note 3; Ramseyer, *Judicial Independence*, *supra* note 3; Upham, *Political Lackeys*, *supra* note 3.

there is the argument that the term does not have any real meaning as a tool for legal analysis. In this sense, the term "conservative" has no more meaning than "activist." To say that a court or a specific judge was activist or conservative in any particular decision is to really only suggest that one disagrees with the result, and moreover, that the judgment not only represents an obvious error but was essentially dishonest in some way. It implies that the judge or panel of judges ignored some plain meaning of the Constitution and reached a result with which the speaker profoundly disagrees for ideological reasons.[15] In the rhetoric of "judicial activism," this is framed in terms of the court having departed from the text and established meaning of the Constitution to impose its own philosophical values. In the discussion of "judicial conservatism," it is expressed as the Court's excessive deference to the political branches of government, abdication of judicial responsibility to enforce the constitutional rights and obligations, and, sometimes, the imposition of its own conservative ideological views in the process of denying the rights of others.

Kermit Roosevelt has argued in the American context that rather than engage in debate over judicial activism, it is more helpful and meaningful to discuss the legitimacy of a court's decision making.[16] The same argument can be applied to the issue of judicial conservatism. And in the context of Japan, analyzing the legitimacy of the Supreme Court's decisions and its decision-making process may lead to far more concrete criticism of the manner in which the judges of the Supreme Court understand the Constitution and develop doctrine for its enforcement. It is precisely in such an analysis that Matsui's central argument, that the Court fails to understand the Constitution as positive law that commands obedience and judicial enforcement, becomes so important.

In the final analysis, the accusation that the Supreme Court of Japan is excessively conservative is based in large measure on the Court's low rate of striking down laws and regulations as being constitutionally invalid. As Professor Haley points out in his Article for this conference, low rates of invalidating laws do not ultimately tell us very much[17]—they could merely mean that the Diet is better at drafting laws that comply with the Constitution than legislatures in other countries, and that the government is more compliant with the Constitution in its policy making. It is precisely because we think that many cases were in fact wrongly decided, and that

15. ROOSEVELT, *supra* note 6, at 39.

16. *See generally id.* at 1–64.

17. John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88 WASH. U. L. REV. 1467, 1467–68 (2011).

the government has not been as compliant as the jurisprudence would suggest, that we think something is wrong. But demonstrating precisely how a significant number of decisions might be of doubtful legitimacy, and illustrating how the doctrine employed by the Court is inconsistent with well-established approaches to rights enforcement, may be a more meaningful criticism than simply arguing that the court is excessively conservative.

III. TWO APPROACHES TO ASSESSING LEGITIMACY

We turn next to the question of what exactly we mean by legitimacy and how one might assess the legitimacy of judicial decisions as an alternative to categorizing them as either too conservative or excessively activist. The idea is to analyze the decisions within the framework of accepted theories of rights, constitutional interpretation, and judicial review; to assess whether the reasons for the decision can be justified in terms of such theories; and to determine whether the ultimate conclusion falls within a reasonable range of possible decisions in the circumstances of the case.

What exactly is meant by the term "legitimacy," and how is it any more precise or substantive than either the activist or conservative labels? The key distinction is that the inquiry into legitimacy focuses on the nature of the decision-making process, assessing the analytical approach employed by the Court against a set of criteria that flow from well-established theoretical approaches to constitutional interpretation, rights, and judicial review. In contrast, arguments about activism and conservatism tend to concentrate on the results—whether the Court has upheld or struck down legislation—and the motivation or ideological agenda that is imputed to the judges on the basis of those results. While the rhetoric surrounding both judicial activism and conservatism tends to both assume and imply that there is one correct and clear answer to most constitutional questions, the idea of legitimacy is grounded in the notion that there is a range of possible reasonable decisions to complex constitutional questions, all of which may be legitimate, so long as the doctrine developed and the analytical approach used can be justified by reference to well established theory.[18]

Again, it is important to emphasize that the discussion of legitimacy here relates to the soundness of the decision-making process of the Court

18. *Id.* at 16, 20, 43–44.

in legal terms, rather than addressing the status or authority of the Court as a political actor—though, as I will return to below, these are not entirely unrelated factors. To the extent that the decision-making process is illegitimate in legal terms—and it is increasingly perceived to be so by lawyers, legal scholars, and even lower court judges—then the authority and power of the Court as a political institution is likely to suffer.

There are, of course, several different and competing theories of constitutional interpretation and rights analysis, and which one in particular should be selected as the basis for assessing the legitimacy of the Court's decisions could itself be the subject of very heated debate.[19] But this short Article is intended to be merely the beginning of a discussion on the matter and so is not the place to canvass the field or explore that debate.[20] Instead, for purposes of illustrating how legitimacy might be assessed, I select here two very different approaches from among a handful of dominant contenders, being the proportionality principle approach, and the process theory approach to judicial review.[21] As I will illustrate in Part IV, some decisions of the Court will in any event fail the test under either of these approaches.

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19. Some of these relate more to constitutional interpretation than to theories of rights or the rationale for judicial review, though interpretation will obviously affect the approach to judicial review—but generally, I am referring here to the moral theory or substantive rights approach to interpretation and judicial review, which is most closely associated with Ronald Dworkin; the process theory of rights and judicial review advanced by John Hart Ely; the originalist approaches of constitutional interpretation, often associated with Robert Bork and Justice Antonin Scalia; and the theory of judicial review of constitutional rights encompassed in the proportionality principle model that is championed by David Beatty. *See* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

20. It should be acknowledged here that it is possible that any given decision may fall within this range of legitimacy when analyzed in accordance with one theory or analytical approach, but fail to do so under a competing approach. There are, without question, ongoing debates regarding these competing theoretical approaches, but this does not detract from the argument that in general terms, assessing the legitimacy of the reasons for judgment of a court according to some well-established theory is more meaningful and helpful than criticizing the final result as being either conservative or activist.

21. David Beatty, in a short review of several of these approaches, argues that the proportionality principle model is not only superior for a number of reasons, but is in fact the most widely applied in the constitutional courts of the democratic world. Process theory is primarily limited to the United States. *See* BEATTY, *supra* note 19, at ch. 1 for the comparative review, and ch. 5, for the argument advocating for the proportionality principle.

A. The Proportionality Principle Approach

The first approach is based on the application of the proportionality principle in the judicial review of rights claims. David Beatty has argued that the employment of a proportionality analysis in the judicial review of fundamental constitutional rights is not only becoming universal in the jurisprudence of constitutional democracies, but is an essential component of a thick conception of the rule of law.[22]

The proportionality principle is the justification analysis employed by the court in determining whether a violation of a right may nonetheless be justified in terms that are consistent with the values of a free and democratic society, and will be easily recognized by most readers. In its general form, the proportionality model requires the court to make a careful evaluation of the relationship among: (i) the objective of the impugned government action; (ii) the means selected by the government to achieve that objective, in the form of a prescribed law; and (iii) the effects of such law, both in terms of the extent to which it may be expected to realize its stated objective, and the nature and extent of the harm it will inflict on the claimant class and the constitutional system itself.[23] The first branch of the analytical approach requires not only an assessment of the importance of the government objective but also its legitimacy, in terms that are consistent with the underlying values of democracy. In other words, the government must establish not only that the objective is compelling or significantly important, but also that it comports with the values and principles of a free and democratic society.

In the second element of the test, the government must prove that there is a rational connection between the impugned measures and their stated objective, such that it would be more likely than not that the selected means would indeed lead to a realization of the objective. Moreover, in assessing rationality, the test requires the court to determine whether the law in question is carefully tailored so as not to be over- or underinclusive, and whether there are alternative measures that could be adopted to achieve the same objective that would be less restrictive or harmful to the right in question (the so-called less restrictive alternative.)

The third element of the test is the analysis of the proportionality between the harm that is to be caused through the admitted violation of the right, and the benefit that is to be derived from achieving the important

22. *Id.*

23. *Id.* at 92–93, 98 (discussing the relationship to equality rights, which we will be examining in more detail below).

governmental objective. The evaluation of both rationality and proportionality involves a detailed evidence-based inquiry into the facts, in which careful account is taken of the perspectives of both sides. The analysis of the effects on the claimant requires a meaningful examination of the precise manner in which the impugned law is said to violate the right in question and how the harm from that violation is experienced by the claimant. That in turn requires some understanding and appreciation of the substantive nature of the right itself and its philosophical foundations.[24] Only then can the court develop a meaningful understanding of the harm caused and the costs imposed by the violation for the purposes of considering whether it is proportionate to the putative benefits of achieving the objectives.

Moreover, the assessment of proportionality is not to be an exercise in crude balancing of costs to the individual claimant, or even class of claimants, against the expected benefits to the broader society, a calculus in which the individual right will always be trumped by majoritarian considerations.[25] In this respect, the proportionality model reflects the insight of Ronald Dworkin that if one is to take rights seriously, one has to recognize that the protection and enforcement of fundamental rights impose real costs upon society, but that those are costs that we ought to accept in a liberal constitutional democracy as being the necessary price of maintaining the very essence of our system of government.[26]

As mentioned earlier, the proportionality principle as it is employed by most courts assumes a substantive conception of rights.[27] Under this approach, when core individual constitutional rights are at issue, the

24. This point will be addressed in more detail below, but in the application of the strict scrutiny test by U.S. courts, this assertion is not always true.

25. On this point, see, in particular, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198–204 (1977).

26. *Id.* at 204. It should be noted, however, that there are significant differences between the theory of judicial review advanced by Dworkin, what Beatty calls a "moral theory" of judicial review, and that of the proportionality principle model articulated by Beatty. *See* BEATTY, *supra* note 19, at 25–33, 173–74.

27. David Beatty does not make this point explicitly, and indeed he distinguishes the principle in some important respects from the moral theory of Dworkin. Nonetheless, in such courts as the Supreme Court of Canada, the Supreme Court of South Africa, and the European Court of Human Rights, to name just a few, the assessment of whether there has been a violation of a fundamental right that precedes the justification analysis provided by the proportionality principle is grounded in a substantive conception of rights. Indeed, the very nature of the analysis in applying the proportionality principle, and in particular the evidence-based consideration of the harm caused to the claimant by the violation, suggests very strongly that the principle itself assumes and is grounded in a substantive conception of rights. It is really only in the application of a variation of the principle in the U.S. Supreme Court's strict-scrutiny analysis that a substantive content-based understanding of the right in question is sometimes explicitly rejected in favor of a process theory conception of rights.

determination of whether the violation of the right can be justified will be made with reference to the substantive content of the right or freedom given effect in the constitutional provision in question, specifically in the proportionality stage of the analysis. Thus, in applying the proportionality principle as a model for assessing the legitimacy of judicial decisions, one would look at the extent to which the court has sufficiently weighed the substance and importance of the right in question and assessed the nature and extent of the harm caused by the violation of the right, both in the initial inquiry into whether the impugned law has violated the right, and later in assessing the proportionality of benefits to be achieved against the harm caused by the impugned law.

This employment of a substantive conception of rights is potentially more controversial, at least in the United States, where there is greater debate over this issue in the competing theoretical justifications for judicial review and the most legitimate approach to constitutional interpretation.[28] But at a sufficient level of generality and abstraction, there is nonetheless considerable agreement regarding the philosophical foundations of the fundamental individual rights enshrined in constitutions. To argue otherwise is really to reject the very idea of a "thick" rule of law as being a fundamental component of constitutional democracy.[29] And while there may remain disagreements over the details, a doctrinal approach can be developed that nonetheless reflects a genuine effort to give effect to that broad understanding of the foundational constitutional values and core rights in a democracy. And as Beatty has argued, such a doctrine has developed in the form of the proportionality principle, which is increasingly reflected in the constitutional jurisprudence of liberal democracies all around the world.[30]

As Beatty's study illustrates, the proportionality model is found in the jurisprudence of the European Court of Human Rights; many of the constitutional courts or courts of final appeal in the countries of the European Union; the Supreme Courts of Canada, India, and Israel; the Constitutional Court of South Africa; as well as that of the Human Rights Committee and other international human rights bodies. It is, moreover,

28. For a good overview of the different approaches, see BEATTY, *supra* note 19, at 1–35.

29. David Dyzenhaus, *Law As Justification: Etienne Mureinik's Conception of Legal Culture*, 14 S. AFR. J. ON HUM. RTS. 11 (1998); David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005 (2006). On the rule of law more generally, and the distinction between thick and thin conceptions of the rule of law, see BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004), particularly chapters 7 and 8; and TOM BINGHAM, THE RULE OF LAW (2010).

30. *See* BEATTY, *supra* note 19, at 33–35; 171–76; and 182–88.

notwithstanding the debate in the United States over substantive versus process theories of rights, reflected in the strict scrutiny test applied by the United States Supreme Court in fundamental rights cases. Beatty even argues that it is to be found in some of the decisions of the Supreme Court of Japan.[31]

I would suggest that the proportionality model provides a framework for assessing the legitimacy of court judgments regarding the enforcement of fundamental individual rights enshrined in most democratic constitutions, including that of Japan. Where the reasoning of a court in a particular decision departs markedly from the primary considerations in the proportionality model, or where the result cannot be reasonably explained in terms that are consistent with the considerations under the proportionality model, there is reason to doubt the legitimacy of the decision. Again, this does not presume that there is only one correct answer to a difficult constitutional question. There may be a range of conclusions that could all reasonably flow from a proper application of the proportionality model. But decisions falling outside of that spectrum will reflect a failure by the court to have sufficiently considered factors that are essential to enforcing fundamental constitutional rights. Such decisions will suggest that the court has failed to take the constitutional rights seriously. How this might be so is perhaps best illustrated through an examination of a concrete example, to which we will turn in the next Part. First, however, we look at the alternative of a process theory approach to legitimacy.

B. A Process Theory Approach

The basic argument that it is more meaningful and helpful to assess the legitimacy of judicial decision making rather than characterize courts as activist (or conservative) based on the conclusions they reach, is drawn from a book by Kermit Roosevelt, a constitutional scholar at the University of Pennsylvania. But in contrast to the proportionality principle approach to assessing legitimacy, which as we have seen, generally assumes a substantive conception of rights, Roosevelt employs a process theory approach to the assessment of legitimacy. This should appeal to Professor Matsui, who is himself a process theory scholar.[32] Process

31. *Id.* at 68–71, 162 (relying, however, on cases involving freedom of religion).

32. Professor Matsui studied under John Hart Ely at Yale when doing his doctorate. For more on process theory itself, see ELY, *supra* note 19; for Matsui's own approach to constitutional law, see MATSUI, KENPŌ, *supra* note 10.

theory, as initially elaborated by John Hart Ely, suggests that the courts' approach to judicial review of constitutional rights cases ought not to be based on any substantive theory of the rights in question, or analysis of the substantive content of such rights. Rather the examination should be grounded in theories of democracy and separation of powers, and the extent to which the claimant class can assert its rights and claims through other avenues in the democratic process.[33] According to Roosevelt, in his application of this approach, the issue of legitimacy is fundamentally a question of whether the court's judgment falls within an appropriate range of deference to the other branches of government. Thus, to determine whether the level of deference reflected in a judgment is appropriate or falls within the acceptable range, in the particular circumstances of the case and with respect to the specific constitutional questions in issue, one analyzes the decision within the framework of a number of criteria.[34]

These factors are typical of a process theory understanding of rights enforcement, in that they make little reference to any philosophical explanation of the particular right in question. It is about the democratic process rather than the substantive content of particular rights. The first factor would be the relative institutional competencies implicated by the right in question and the issues in the case at hand. The theory suggests that the doctrine employed by the court should be more deferential where the question is one of assessing and balancing the societal costs and benefits of broad policy, or where the policy involves non-legal specialized expertise, but less deferential the more narrowly targeted the law and the less general the putative benefit will be, or where the issue is either more purely legal or more general in nature—the underlying assumption being that the political branches are likely more competent than courts at both aggregating the diverse and complex empirical data required for either broad societal or specialized non-legal analysis, and are likely better equipped to conduct the broad policy analysis itself.

The second factor, the "lessons of history," would require a consideration of past inequities or failures of the political branches with respect to the issue and the claimant class in question. Thus, this factor would suggest a less deferential doctrine where the class of claimants has been the subject of legislative neglect or inequity in the past. This is reflected in the United States, where distinctions based on race are treated by the courts with the highest suspicion, in recognition of the history of

33. *See generally* ELY, *supra* note 19.
34. *See* ROOSEVELT, *supra* note 6, at 43–44.

systemic race-based discrimination. Similarly, the third factor, the "defects of democracy," is a classic process theory analysis of whether the class of rights claimants have adequate access to the levers of power within the democratic process or, conversely, represent a minority that is marginalized or disenfranchised within the democratic process and thus requires judicial protection.[35] This is why, so the argument goes, discrimination against women in the United States is only subject to intermediate scrutiny (a less rigorous justification analysis than strict scrutiny), since women constitute a slim majority in the society and thus are arguably better positioned to assert their rights through the democratic process than a minority that comprises less than fifteen percent of the population.

The fourth factor, the "costs of error," would assess how the costs of the court making a mistake in its judgment on the rights issue in question will manifest themselves depending on the level of deference selected. In addition to actually examining the relative direct cost of erring on one side or the other, this factor calls for consideration of the fact that if the highest court strikes down a law in error, that decision cannot be easily overturned. Conversely, the mistaken upholding of a law may be more easily corrected by the legislature in the future, so long as the defects of democracy and lessons of history do not suggest that the legislature is unlikely to do so.

Finally, the last factor, "rules vs. standards," involves the question of whether the doctrine employed by the court in the case in question involved the use of rules or standards, and an assessment of which would be preferable in the context of the issues implicated.[36] The suggestion is that in the development of doctrine to deal with certain kinds of rights, standards that allow for greater judicial discretion and flexibility in interpretation and application will be preferable to bright-line rules, which might constrain courts in unintended ways in the future. The argument is that in assessing the legitimacy of a court's decision, the doctrine developed or employed and the way in which that doctrine is applied in the court's reasoning can be analyzed to assess whether it reflects a reasonable level of deference in light of the application of the other four factors.

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35. *Id.* at 22–36.
36. *Id.*

IV. THE LEGITIMACY OF JAPAN'S SUPREME COURT DECISIONS

This short response paper is not, of course, the place to begin a comprehensive analysis of the constitutional jurisprudence of the Supreme Court of Japan for the purposes of determining its legitimacy. But an illustration of how a particular decision might be assessed for legitimacy, with an explanation of how the judgment's reasoning may be flawed, may help start a discussion along those lines. A brief examination of one important and relatively recent case is provided here, and it will be suggested that the judgment illustrates the kind of Supreme Court decision that is of very doubtful legitimacy, whether analyzed from the perspective of either the proportionality principle model or the process theory approach.

A. The Tokyo Metropolitan Government *Case Examined*

The *Tokyo Metropolitan Government* case of January 26, 2005,[37] involved the claims of discrimination asserted by a Japanese-born Korean woman, a permanent resident of Japan, who was a local public employee within the Tokyo Metropolitan Government.[38] Although she was a Korean national, her mother was Japanese, and like most second- and third-generation Koreans in Japan, she had "special permanent resident" status. This meant that she enjoyed certain privileges above and beyond other foreign residents, even those with permanent resident status.[39] She was a health-care professional already employed by the Tokyo government, and

37. This examination draws in part from my analysis of the case in a different Article. See Martin, *Glimmers of Hope*, *supra* note 8.

38. There are over 600,000 Koreans in Japan, many of whom are 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). There is considerable literature on the discriminatory treatment of Koreans in Japan. *See, e.g.*, 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) [hereinafter ONUMA, ZAINICHI KANKOKU-CHŌSENJIN]; 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) [hereinafter Onuma, *A Case Study on the Korean Minority*].

39. Special Permanent Resident Status, or *Tokubetsu Eijuken*, is reserved for Korean and Taiwanese nationals who were Japanese nationals in 1946, or their descendents. With the signing of the San Francisco Treaty in 1946, former Taiwanese and Korean nationals who then had Japanese citizenship were stripped of their Japanese nationality. They were extended a special status, with unique rights relating to re-entry and deportation in particular, in 1965 and with periodic amendments to the immigration laws thereafter. *See* TETSUKA KAZUAKI, GAIKOKUJIN TO HŌ [FOREIGNERS AND THE LAW] 61–62, 81 (2005).

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, but merely an informal unwritten practice; by the following year, when she was again denied, the policy had been formalized, but still not in the form of a law or regulation).[40] She sued the Tokyo government for violation of, among other things, Article 3 of the *Labour Standards Law* and Article 14 of the Constitution.

Article 14(1) of the Constitution provides for the right to be treated as an equal and not to be discriminated against, specifically providing that: "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."[41]

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.[42] The Supreme Court has developed an extremely relaxed doctrine for assessing whether discrimination by the government can be justified, which is commonly called the "unreasonable discrimination test."[43] The approach is essentially to skip any inquiry into the nature of the discrimination itself, or how precisely the impugned law violates the right, with reference to the prohibited grounds and the protected relations in the provision. There is no evidence-based examination of the nature of the harm that it has caused to the claimant. Rather, the inquiry moves directly to a justification analysis, or more specifically, whether the discrimination is "reasonable." 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"

40. 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 shown very little deference in the justification analysis.

41. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, para. 1 (official translation from the Government Printing Office, available on the National Diet Library website at http://www.ndl.go.jp/constitution/e/etc/c01.html#s2).

42. Saikō Saibansho [Sup. Ct.] Nov. 18, 1964, 18 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [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. Nonetheless, the Supreme Court of Japan decided in the 1964 case that it included foreigners, and the accepted translation is "all of the people."

43. *See* Martin, *Glimmers of Hope*, *supra* note 8, at 199–205 (providing an analysis of the doctrine and its development).

(*gorisei*, which can be translated as either "reasonableness" or "rationality") was prohibited by the Constitution.[44] Assessing the "reasonableness" of any particular discriminatory law involves an assessment of whether there is a rational connection between the government objective and the means adopted for its achievement, without any inquiry into the relative importance of the objective itself, or whether the objective is consistent with the other constitutional values or indeed any of the norms and values of a democratic society.[45] It is an assessment of the logic of the internal relationship between end and means, without any reference to external criteria whatsoever.

In the *Tokyo Metropolitan Government* case, the Tokyo High Court departed from this relaxed doctrine. It granted the applicant partial relief on the grounds that she enjoyed the protection of Article 14, that the policy of the Tokyo government was discriminatory in the context of economic relations and on the basis of social status, and that the impugned policy was overly broad and not the least restrictive means of achieving its stated objectives.[46] The Supreme Court, however, granted the appeal and overturned the decision of the Tokyo High Court, thereby upholding the constitutionality of the policy of the Tokyo Metropolitan Government. The result in and of itself might be seen by some as conservative, in that it was deferential to a government—albeit a prefectural government rather than the federal government—and ideologically it would seem to have reflected a very thin conception of individual rights protection. But it is through an examination of the reasoning of the Court that we can assess the extent to which the judgment falls within the range of legitimate decisions in the context of the issues and circumstances of the case. We may also find direct evidence of the judges declining to take seriously the provisions of the Constitution as positive law requiring enforcement. We will begin by examining the case through the lens of the proportionality principle, following which we will assess it against the factors of legitimacy in the process theory approach.

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44. *See, e.g.*, Saikō Saibansho [Sup. Ct.] Apr. l4, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISUHŪ] 3, 265 (the *Patricide* case) *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, at 146 (1996). For a discussion of the test, see ASHIBE, KENPŌ [CONSTITUTIONAL LAW], *supra* note 10, at 125–27.

45. ASHIBE, KENPŌ [CONSTITUTIONAL LAW], *supra* note 10, at 125–27.

46. Kōtō Saibansho [Tokyo High Ct.] Nov. 26, 1997, 1639 TŌKYŌ KŌTŌ SAIBANSHO HANKETSU JIHŌ [KEIJI] 30.

B. Legitimacy of the Judgment—The Proportionality Principle Approach

It is apparent from the reasons of the Supreme Court that the Tokyo Metropolitan Government had argued that the discriminatory policy was necessary to maintain the integrity and functioning of its so-called "integrated management appointment system."[47] Under this horizontally integrated system, all employees who were promoted above a certain managerial rank would become theoretically eligible for all of the senior managerial positions throughout the government apparatus. Only a few of these managerial positions involved the exercise of what was called "public authority," but the Supreme Court accepted the argument that, in its current structure, the system operated such that anyone promoted to this managerial level would also be eligible to work in one of the few posts involving the exercise of 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 the provision as meaning that only Japanese nationals could hold office as local government employees with "public authority." Therefore, because the integrated management system operated in such a way that all managers above a certain rank were 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.[48] This applied to the case of the applicant too, even though she had sought to take specialized exams related only to her health profession and was seeking to work in a specific area that did not exercise such "public authority." Indeed, only a small percentage of all the management positions involved the exercise of public authority.

The Article 15 sovereignty argument is highly questionable, but is beside the point for our purposes.[49] Assuming it to be correct, the

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47. Saikō Saibansho [Sup. Ct.] Jan. 26, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1, plurality opinion, at sec. 4.

48. *Id.* at sec. 4.

49. Article 15 provides:

> 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.

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 paragraph 4(2) of the majority opinion, in which the Court held:

> 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 such measure not to be a violation of Article 3 of the Labor Standards Law or Article 14, Para. 1 of the Constitution.[50]

The Court merely accepted that it is within the discretion of a local public body (that is a municipal or prefectural government) "to establish, based on its own judgment, an integrated management appointment system,"[51] and its objectives required no further justification. There was thus no inquiry into the importance of having such a comprehensive system or what pressing interest was served by having everyone promoted to management level be eligible for later appointment to positions of "public authority." Indeed, the policy objective was never clearly articulated by the Court, far less its importance or the benefits of achieving it. There was no analysis as to whether or precisely how 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 objective, even though this was the one element of the unreasonable discrimination test that the court was required to explore. There was no analysis of whether the objectives, whatever they might be, could be achieved through means that would be less discriminatory than was the policy of total exclusion. The Tokyo High Court, for instance, had

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NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 15, paras. 1–4. 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.

50. Saikō Saibansho [Sup. Ct.] Jan. 26, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1, plurality opinion, at sec. 4(2).

51. *Id.*

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.[52] 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 impair 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, in keeping with the "unreasonable discrimination test," it did not evaluate the precise nature of the discrimination or the harm that it might cause to the claimant. 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, in both the objective and subjective sense of the term, of all foreigners resident in Japan.[53] As is typical in the Court's application of the "unreasonable discrimination test," 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 fulfill 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; and (3) therefore, the policy of excluding foreigners from promotion to management rank is reasonable.[54]

Moreover, when one goes on to examine the concurring opinions of several of the other Justices, there is even further reason to query the legitimacy of the Court's approach to the issue of equality rights in this

52. Kōtō Saibansho [Tokyo High Ct.] Nov. 26, 1997, 1639 TŌKYŌ KŌTŌ SAIBANSHO HANKETSU JIHŌ [KEIJI] 30.

53. In the context of equality rights, the dignity of the person has both an objective and a subjective component, with the objective relating to the inherent value of every human being in Kantian terms, and the subjective relating to the individual's own sense of self-esteem and self-worth. *See* Sophia R. Moreau, *The Wrongs of Unequal Treatment*, 54 U. TORONTO L.J. 291, 295–97 (2004).

54 While it was not raised in the judgment, it could be argued that the ease with which foreign nationals can naturalize, that is adopt Japanese nationality, ought to be a consideration in assessing the extent of the harm to the claimant. It has, in fact, become easier than it once was for *zainichi kankokujin* to naturalize under the Nationality Act. But, as several judges of the Supreme Court of Canada held in a case considering similar issues, even where naturalization is available, there are important reasons why persons within a particular cultural community within a country may not want to naturalize, including the possible requirement to abandon one's original nationality. There is the argument that nationality, like religion, while it may not be permanent or immutable, is closely tied to one's sense of identity, and one should not be required to abandon it as the price of obtaining access to important state institutions, or the enjoyment of other rights and entitlements. See Lavoie v. Canada, [2002] S.C.R. 769 (Can.) at para. 5 (McLauchlin C.J. and L'Heureux-Dubé J., dissenting).

case. 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.[55] None of them addressed the question that was in fact before the Court, the question that related to an actual provision in the Constitution, which was whether a public policy that treats foreigners differently by denying them promotion within the prefectural government service constitutes discrimination on the basis of nationality and national origin, and unjustifiably violates the right to be treated as an equal under the law in, among other things, economic relations.[56]

Justice Fujita went so far as to suggest that the right to equality is not an "inherent right" in any event, writing that "[f]reedom 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."[57] This reflects an understanding of Article 14 as being a purely procedural right, designed merely to govern the operation and enjoyment of other substantive rights enshrined in the Constitution. This interpretation is entirely at odds with 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.[58] 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

55. Saikō Saibansho [Sup. Ct.] Jan. 26, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (concurring opinions of Justices Ueda, Kanatani, and Fujita).

56. It should be noted that while Article 14 prohibits discrimination on the basis of creed and social status, among other things, the Supreme Court has held several times that the list is not exhaustive, and that national origin is included within the list, whether as an analogous ground or subsumed within social status. SAIKŌ SAIBANSHO [Sup. Ct.] Nov. 18, 1964, 18 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 9, 579. 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, KENPŌ [CONSTITUTIONAL LAW], *supra* note 10, at 123–25, and ASHIBE, KENPŌ HANREI O YOMU [READING CONSTITUTIONAL CASES], *supra* note 10, at 133–36. For information about the specific status of foreigners, see 1 NONAKA TOSHIHIKO & URABE NORIHO, KENPŌ NO KAISHAKU [INTERPRETATION OF THE CONSTITUTION] 209–13 (1989).

57. Saikō Saibansho [Sup. Ct.] Jan. 26, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (Fujita, J., concurring opinion, at sec. 2).

58. On the underlying intention, see MOORE, PARTNERS, *supra* note 1, at 130–31; on the interpretation of the provision, see generally ASHIBE, KENPŌ [CONSTITUTIONAL LAW], *supra* note 10, at 121–38.

bounds of legally acceptable personnel policy."[59] Here, then, is some cogent evidence of a constitutional provision not being taken seriously as positive law that requires enforcement by the Court, in corroboration of Professor Matsui's central claim.

While the Court never explored the actual objectives of the policy, Justice Fujita in a sense put his finger on the very crux of the issue. In discussing the Tokyo High Court's consideration of less restrictive alternatives, Justice Fujita wrote that if such special personnel considerations were required of local governments in developing their policies (that is, making positions of public authority open to only a subset of all those promoted to senior management, as a less restrictive means of achieving the objectives), it would harm the flexibility of the personnel management systems.[60] Thus, for him, the policy objective was apparently one of maximizing administrative flexibility, and the issue for him was one of balancing the fundamental right to equality on the one hand, and administrative efficiency and convenience on the other.[61] Needless to say, administrative convenience won out.

In short, both the reasoning and the result of this judgment are very difficult to reconcile with the operation of the proportionality principle model. The bureaucratic policy was not even prescribed by law, and its objective—which, putting it at its highest, has to be explained in terms of maintaining a system that maximized bureaucratic effectiveness, flexibility, and the breadth of experience among senior managers within the government—cannot be characterized as being so important as to justify the denial of a fundamental constitutional right. The rational connection was never really tested, and it is difficult to understand how

59. Saikō Saibansho [Sup. Ct.] Jan. 26, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (concurring opinion of Fujita, J., at sec. 3; concurring opinion of Kanatani J., at sec. 3; and concurring opinion of Ueda J., at sec. 3.).

60. *Id*, concurring opinion of Fujita J., at sec. 3.

61. As discussed further below, there are two strong dissents in the decision, one of them by Justice Izumi, who also participated in this conference. For the purposes of comparison, it may be useful to examine the Canadian Supreme Court decision in *Lavoie v. Canada*, [2002] S.C.R. 769 (Can.), and that of the South African Constitutional Court in *Larbi-Odam v. Member of the Executive Council for Education*, 1997 (1) SA 745 (CC) (S. Afr.), as the issue in both cases was the validity of government personnel policies that 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 Charter's justification analysis. The case has been heavily criticized, but the approaches of both the majority and the dissents are very interesting to compare to that in the *Tokyo Metropolitan Government* case.

altering the system so as to permit the promotion of foreign nationals (who number about one percent of the population) to a subset of senior management positions not exercising "public authority" would have undermined the overall objectives of the system in any meaningful way. The policy was thus overly exclusive, and there were far less restrictive alternatives available, which the Court refused to even analyze.

Finally, the failure to discuss the nature of the harm to the claimant class not only meant that there was no appreciation of whether the benefits of the policy were proportionate to the injury caused, but it suggested a failure to really understand the nature of the right itself. The discrimination against this claimant, a member of the distinct *zainichi kankokujin* (Koreans in Japan) minority in Japan that has suffered a long history of prejudice, discrimination, and marginalization, merely served to again reinforce public stereotypes and reaffirm that Koreans in particular, and foreigners in general, are less deserving of the government's respect, concern, trust, and protection than everyone else in Japanese society. The policy injured the dignity not only of the claimant and the specific minority to which she belonged, but the judgment further undermined the normative power of the constitutional right itself.

C. Legitimacy of the Judgment—The Process Theory Approach

When examined from a process theory perspective, and drawing upon the five factors articulated by Roosevelt for assessing the legitimacy of judicial decisions, the judgment of the Supreme Court in the *Tokyo Metropolitan Government* case falls outside of the range of legitimate deference to the government—and particularly a prefectural government at that.[62] As indicated in the analysis of the judgment above, the deference shown by the Court was quite extreme. Indeed, the unreasonable discrimination test is by its very nature highly deferential, requiring only a rational connection between objective and means. There is no requirement to question the legitimacy or importance of the objective, and true to form, the Court here explicitly granted the prefectural government wide latitude to decide for itself how best to structure its personnel system, regardless of the specific policy objectives.

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62. For those unfamiliar with the Japanese constitutional model, it should be emphasized that while Japan is technically a federal system, the Prefectures do not have independent law-making authority under constitutionally established heads of power as is the case with the states of the United States or the provinces of Canada. So the case for deference to a Prefectural government should be significantly weaker than for deference to state or provincial legislation in either of those countries.

Beginning with the first factor, the "institutional competencies" criteria, it will be recalled that a court will be expected to tend toward greater deference where the political branch of government is likely to have a greater institutional competency than the court in weighing the competing policy interests. Generally, the broader the scope of the policy and the wider and more significant the societal interests that are at stake, or the more specialized the subject matter of the policy, the more likely it will be that the legislature would be better placed to determine the right balance, whereas the more narrow the policy objectives and the more localized the effects, and the less specialized or more purely legal the issues,the less deferential a court should be. In the circumstances of this case, therefore, one would expect the Court to tend significantly toward the less deferential end of the spectrum, since the impugned policy was narrowly targeted both in terms of the class of people who were to be directly burdened, and in terms of the very localized nature of the benefits to be gained. Maintaining a marginally more effective and flexible personnel administrative system within the government of one prefecture is hardly the stuff of broad societal interests and ought to command little deference from the courts. And there is no reason to believe that the Tokyo Metropolitan Government had any particular competency in assessing the injury that its policy was likely to inflict on Koreans and indeed all other foreigners living in Japan. Given that it was initially implemented as an unwritten policy suggests that it was not the product of a process involving careful deliberation and analysis.

Similarly, the second factor, the "lessons of history," and the third factor, the "defects of democracy," militate very strongly against any deference whatsoever in this case. As already noted, the applicant was part of a Korean-Japanese minority, a community of around 600,000 people, who have historically been the victims of prejudice and discrimination, both broadly within society and at the hands of various levels of government. Moreover, it is a community that was disenfranchised after World War II.[63] More broadly, the employee represented all foreign permanent residents in Japan, who also constitute an insular and distinct minority of just less than one percent of the population that is disenfranchised, and who are subjected to well-documented systematic discrimination in Japan.[64] It is precisely in this kind of case—in which a

63. For more on the treatment of Korean descendants in Japan, see, for example, LEE & DE VOS, *supra* note 38; ONUMA, ZAINICHI KANKOKU-CHŌSENJIN *supra*, note 38; Onuma, *A Case Study on the Korean Minority*, *supra* note 38.

64. *See, e.g.*, U.N. Comm'n on Human Rights, Econ. & Soc. Council, Report of the Special

government agency is discriminating against an insular minority that has historically suffered from societal prejudice and official discrimination, and the claimant class is politically marginalized with no meaningful access to the normal levers of power within the democratic process—that courts are expected to show little deference to the offending government branch.

The defects of democracy are further exacerbated in the circumstances of this case because the discriminatory policy was just that—an internal policy formulated by a prefectural government, rather than a law passed in the due course of the democratic process, or even a formal regulation duly promulgated under the delegated authority of any such law. Indeed, the policy had been no more than an informal practice not even committed to paper the first year the claimant was denied access to the exam.

In considering the fourth factor, the "costs of error," here again the circumstances of the case suggest that there ought to have been no deference for the government position. If the Court erred by striking down the policy, the result would be, at most, an increased cost and administrative inconvenience to the Metropolitan Government, caused by the requirement that it more carefully tailor the integrated personnel system to permit the promotion of foreigners to nonpublic authority positions. While it is true that the prefectural government could not overrule the result, and so the error could not be easily corrected, the societal effects would have been trivial. On the other hand, the costs of error in the event that the Court wrongly upheld the policy would be not only the deprivation of the claimant's rights and the effective ending of her career, but far more importantly, the mistake would perpetuate prejudice and discrimination against Koreans and other foreigners within Japan and further weaken the right to equality generally under the Constitution. Moreover, given the political marginalization of the entire class of claimants—that is, in light of the defects of democracy and the lessons of history—there was no reasonable basis to believe that the Tokyo Metropolitan government would be likely any time soon to adjust the policy and effectively correct the error of the Court. The profound asymmetry in the costs of error here argued for no deference whatsoever.

Rapporteur on Contemporary Racial Discrimination: Xenophobia and Related Intolerance, (Mission to Japan), U.N. Doc. E/CN.4/2006/16/Add.2 (Jan. 24, 2006), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/103/96/PDF/G0610396.pdf?OpenElement; JAPANESE FEDERATION OF BAR ASSOCIATIONS, REPORT OF JFBA REGARDING SECOND PERIODIC REPORT BY THE GOVERNMENT OF JAPAN UNDER ARTICLES 16 AND 17 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (Mar. 2, 2001), *available at* http://www.nichibenren.or.jp/ja/kokusai/humanrights_library/treaty/data/society_ report_2_en.pdf.

Finally, with respect to the fifth factor, the "standards versus rules" element, we may find some overlap between the proportionality principle model and the process theory approach. Recall that under this element in the process theory approach, we inquire into the nature of the doctrine that the Court applies and how likely it is to lead to deferential results. As we have discussed above, there is an increasingly universal application of some variant of the proportionality principle model in the adjudication of fundamental constitutional rights. And as we have already explored, the proportionality principle model does not involve the application of some bright-line rule. Thus, the issue here is not really the question of whether the Court applied a standard rather than a rule, but rather it is the nature of the standards that it applied, as compared to the standards suggested by the alternative approaches.

The proportionality principle model is sophisticated, in that it both takes rights seriously and yet recognizes that rights are not absolute. While it certainly is not inherently deferential, it can and does lead to decisions that accept the justification of government violation of fundamental rights.[65] In contrast, the unreasonable discrimination doctrine applied by the Supreme Court of Japan in all equality rights cases, regardless of the nature of the discrimination or the grounds upon which the impugned law makes distinctions, is a simplistic standard that is excessively deferential in virtually all circumstances. The criticism here is not the Court's reliance upon the concept of reasonableness—there are, after all, a number of doctrines that have been developed in various jurisdictions to assess and determine whether some government law or regulation can be justified as being "reasonable."[66] The problem with the test as it has been developed by the Supreme Court of Japan is its failure to incorporate any external criteria or exogenous factors whatsoever. Ignoring as it does any inquiry into the nature of the discrimination or the harm that it causes, and refusing to examine the importance or legitimacy of the legislative objective by reference to such external criteria as the values and norms inherent in a constitutional democracy, the test approaches a tautology. So long as the legislative means could be shown to rationally advance achievement of the objective, no matter what that may be, then the

65. Although, in the U.S., the application of strict scrutiny is considered to be generally fatal to the impugned law or regulation, that is not true of the application of the proportionality principle in other jurisdictions. *See, e.g.*, PETER HOGG, CONSTITUTIONAL LAW OF CANADA, at ch. 35 (4th ed. 2008).

66. For example, the doctrine developed to assess the reasonableness of search and seizure under the 4th Amendment to the U.S. Constitution.

discrimination it causes is said to be reasonable. The absurdity of the test is illustrated by recognizing that a law to implement a genocidal program, for the purposes of achieving the elimination of an identifiable group from the society, would theoretically not constitute unreasonable discrimination under a strict application of this analysis. It is for this reason that the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR),[67] in its observations in response to the periodic reports submitted by Japan, has repeatedly criticized the analytical model employed by the Japanese 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."[68] And that is further evidence of the doctrine's lack of legitimacy.[69]

V. THE BIGGER PICTURE

The argument advanced here is that a systematic analysis of the decisions made by the Japanese Supreme Court on questions of constitutional rights would likely reveal that a significant number can be viewed as lacking legitimacy, from either a process theory or substantive rights–based proportionality principle approach. Certainly most cases decided on the basis of the "unreasonable discrimination test" would be suspect. But that does not mean, and I do not suggest, that all the decisions of the Supreme Court relating to fundamental constitutional rights are illegitimate. Indeed, even in the context of equality rights, the Court recently struck down a provision of the Nationality Act[70] as being

67. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. Japan has been a state party since June 21, 1979.

68. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Committee: Japan, ¶ 11, UN. Doc. CCPR/C/79/Add.102 (Nov. 19, 1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/5a2baa28d433b6ea802566d40041ebbe?Opendocument.

69. It should not be supposed that this is an instance of "Western values" being imposed upon an Asian legal system. The inadequacy of the unreasonable discrimination doctrine is also well recognized by Japanese constitutional scholars. For examples of Japanese constitutional discussion of the standards, see MATSUI, KENPŌ, *supra* note 10, at 364; ASHIBE, KENPŌ [CONSTITUTIONAL LAW], *supra* note 10, at 125; ASHIBE, KENPŌ HANREI O YOMU [READING CONSITUTTIONAL CASES], *supra* note 10, at 136. Moreover, one should not suppose that the issue of "rights" itself is somehow foreign to the Japanese legal consciousness. While it is true that the modern words used to express the concepts related to rights only came into existence in the nineteenth century, the ideas themselves have played an important role in Japanese society for far longer. See ERIC A. FELDMAN, THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY 16–37 (2000).

70. Kokuseki Hoū [Nationality Act], Law No. 147 of 1950 (as amended by Law No. 45 of 1984).

unconstitutional and did so through an analysis that shared most of the features of the proportionality principle model.[71] I have argued elsewhere that this and other evidence suggests that the Court is developing a new approach to equality rights cases, such that the illegitimate "unreasonable discrimination test" may soon become a relic of the past.[72]

It is precisely because the Court does hand down decisions that can be defended as being legitimate, in the sense that both the result and the reasoning are consistent with various approaches to constitutional interpretation and theories of judicial review, that in my view a more systematic inquiry into the legitimacy of the Court's judgments would be more meaningful than assertions of its conservatism as an institution. This is all the more so when one considers that the Supreme Court has shown itself to be both "liberal" and "activist," which is to say nonconservative on two different axes, when dealing with nonconstitutional issues. For instance, Frank Upham and others have explored in considerable detail the manner in which the judiciary single-handedly created and enforced the right of women to equal treatment within the private-sector employment context.[73] The Supreme Court played an important role in the process with its decision in the *Nissan Motors* case, holding that the corporation's policy requiring women to retire at an earlier age than men was unlawfully discriminatory.[74] While the judgment was quite "liberal" in both result and

71. Saikō Saibansho [Sup. Ct.] June 4, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 6, 1367.

72. Martin, *Glimmers of Hope*, *supra* note 8. Justice Izumi, who wrote one of the two powerful dissents in the *Tokyo Metropolitan Government* case and was a participant at the symposium for which this article is written, confirmed during discussion that he had written the dissent in the hope that it would help in the development of such a new doctrine, and he further suggested that there is reason to be hopeful that it is indeed taking root. At the time of the conference, the next test of this proposition was expected be a decision in yet another case involving the discrimination against illegitimate children with respect to their entitlements to inheritance in the Civil Code. A Grand Bench hearing was scheduled for 2011, which typically means that the lower court decision is going to be overturned and a law struck down, but the case settled in March 2011, as this Article was going to print, and so we will have to wait a while longer to see whether the new doctrine has taken root. *See* Asahi Shinbun, *Hichyaku shutsushi kakusa ga shūketsu* [*The Illegitimate Child Disparity Litigation Concludes*], March 12, 2011, *available at* http://www.asahi.com/national/jiji/JJT201103120036.html. For an analysis of the earlier illegitimate children inheritance cases, see Martin, *Glimmers of Hope*, *supra* note 8, at 221–22.

73. UPHAM, LAW AND SOCIAL CHANGE, *supra* note 3; *see also* Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?*, 43 UCLA L. REV. 635 (1996).

74. Saikō Saibansho [Sup. Ct.] Mar. 24, 1981, 35 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 300 (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 44, at 179–81.

reasoning, what is even more striking about this case (and other lower court decisions on women's rights at the time) is the manner in which the Court used the values of Article 14 of the Constitution for the purposes of engaging in a very creative, or what many would say "activist," interpretation of a provision of the *Civil Code* in order to create a legal basis for granting relief.[75]

There are many such cases in which the Court has shown itself quite willing to be very creative in the interpretation of statutes and to reach results that could be characterized as being rather liberal.[76] They provide further support for Professor Matsui's claim that one of the predominant reasons that the Supreme Court is so deferential and "conservative" when it comes specifically to constitutional issues is that the Court, or at least the majority of judges on the Court at any given time in the past, have somehow viewed the Constitution as being more of a collection of moral or political principles than as positive law that commands obedience and judicial enforcement.[77] And in addition to suggesting that Matsui's claim is an important contribution to the debate on these issues, I would suggest that an inquiry into the legitimacy of the judgments handed down by the Supreme Court would help to both verify the validity of that claim and provide the basis for a more meaningful criticism of the Court's jurisprudence. Moreover, I would argue that Matsui's central claim is really more relevant to the issue of legitimacy than it is to the question he purports to be answering, namely, "Why is the Supreme Court so conservative?" If the question is reframed as, "Are the constitutional decisions of the Supreme Court legitimate?" then the process of answering the question requires us to delve into exactly how the judges decide cases, how they understand the Constitution, and what doctrine they develop in the process of interpreting and enforcing its provisions.

Some may respond that such an exploration of *how* the Court decides still does not get us any closer to understanding *why* the Court is so deferential to the government, or ideologically conservative, or minimalist

75. *See* BEER & ITOH, *supra* note 44, at 179–81.

76. For discussion of many of these, see generally UPHAM, LAW AND SOCIAL CHANGE, *supra* note 3.

77. Matsui, *Japanese Supreme Court*, *supra* note 4. Frank Upham has pointed out that the Supreme Court has also been "conservative" in a similar sense with respect to administrative judicial review. An exploration of that proposition, and comparison of administrative and constitutional decisions for the purpose of determining whether the court is more or less "deferential" in constitutional cases, is something that should be further explored to advance this overall project. Certainly, it has to be acknowledged that to the extent that there is significant deference shown in administrative judicial review, it would suggest that there are reasons for such deference in constitutional cases other than simply a lack of respect for the Constitution as positive law.

in its approach to constitutional issues—in a word, "conservative," in all senses of the word. And from that perspective, it will be argued that the other explanations, be they institutional, political, ideological, cultural, or a combination of all of these, are really more important to understanding why the Court decides the way that it does, regardless of whether or not one can characterize the manner in which it decides as being legitimate.

There is no question that those are important and fruitful lines of inquiry, and indeed the insights they provide are not unrelated to the legitimacy issue. But Matsui's central claim, that the judges of the Court do not take the Constitution seriously as law, is itself grounded in the idea that the manner in which the judges understand the Constitution, and the legal principles they develop to both interpret and enforce it, are central to the explanation of why the Court is so "conservative." Moreover, implicit in that argument is the normative critique that the failure to sufficiently respect the Constitution as law is wrong, and that the resulting deference is both excessive and contrary to the very norms and principles enshrined in the Constitution. It is, at root, an argument aimed to change how the judges make their decisions. But I would argue that recasting the inquiry slightly would be more effective in achieving these concrete normative goals. A systematic analysis of how the Court makes its decisions, with a view to demonstrating that specific decisions of the Supreme Court are lacking in legitimacy when examined from the perspective of a number of different but well-established theories of constitutional interpretation, rights, and judicial review, is more likely to create pressure for change than broad assertions regarding the Court's character or ideology based on the end results of its decisions. And changes to doctrine can have an impact on how future courts will decide constitutional issues, holding out the promise of greater legitimacy in the Court's constitutional decision making over time.