The majority opinion declares Article 3, para.1 of the Nationality Act to be unconstitutional in causing the Distinction, and further determines that the appellant has acquired Japanese nationality. In conclusion, the majority opinion supports the judgment of first instance that declared that the appellant has Japanese nationality, while dismissing the appeal to the court of second instance filed against said judgment. The court thus allows acquisition of nationality by excluding, from the requirements prescribed in Article 3, para.1 of the Nationality Act, the requirement of having acquired the status of a child born in wedlock as a result of the marriage of the parents (legitimation requirement), and only applying the remaining requirements. There may be a criticism that such determination of the court is equal to depriving the legislative body of the opportunity to choose any other reasonable requirement in lieu of the legitimation requirement, thereby unduly restricting the discretionary power vested in the legislative body to take legislative measures, and therefore impermissible. I completely agree with the concurring opinion by Justice IMAI on this point, and as one of the justices who are in agreement with the majority opinion, I would like to give an additional opinion.

The majority opinion allows acquisition of nationality by excluding the legitimation requirements from the requirements prescribed in Article 3, para.1 of the Nationality Act and applying only the remaining requirements. This is nothing more than the consequence of the court's efforts to construe the existing Nationality Act in line with the Constitution, and it does not mean that revising the Nationality Act to add any other requirement goes against the Constitution. Needless to say, it is permissible to add any other requirement in lieu of the legitimation requirement based on legislative decisions as far as such additional requirement is in conformity to the Constitution.

As explained in the majority opinion, the legislative purpose of the Nationality Act is to, while keeping the principle of jus sanguinis, provide for certain requirements that can be the indicators by which to measure the closeness of the tie between the child and Japan, in addition to the existence of a legal parent-child relationship with a Japanese citizen, and grant Japanese nationality to children after birth only if they satisfy these requirements, and this legislative purpose per se has a reasonable basis. However, the majority opinion holds that no reasonable relevance can be found any longer between requiring legitimation as a means to achieve the legislative purpose and the legislative purpose per se. Therefore, revising the Nationality Act to add any other requirement that can be an indicator to measure the closeness of the tie between the child and Japan is permissible as the exercise of the discretionary power to take legislative measures, as far as such additional requirement has any reasonable relevance with the legislative purpose. For instance, in addition to being acknowledged by a Japanese father after birth, having the place of birth within Japan or residing in Japan for a certain period of time can be a requirement for acquisition of Japanese nationality, as other states also have such requirements, and these options can be chosen in the future, irrespective of whether or not they are acceptable from the policy perspective.

There is an argument that if a person can acquire Japanese nationality just by obtaining acknowledgment and making a notification, a person other than the natural father of a child is likely to make a fictitious acknowledgement (fake acknowledgment) in an attempt to acquire Japanese nationality for the child, and this may be considered as a reason for supporting the legitimation requirement. However, as explained in the majority opinion, even though such likelihood exists, it is difficult to find any reasonable relevance between the necessity to prevent fictitious acknowledgement and the adoption of the legitimation requirement. Nevertheless, in order to prevent fictitious acknowledgment, for instance, making it a requirement for acquisition of nationality to scientifically prove the existence of a natural father-child relationship between the child and the person who is to acknowledge the child, may be another option, and I do not deny the possibility that this option will be chosen in the future, irrespective of whether or not it is acceptable from the policy perspective.

Thus, following the rendition of this judgment, there may be the possibility that the Diet, by exercising its discretionary power to take legislative measures, will revise the Nationality Act in line with the Constitution and provide for an additional requirement in lieu of the legitimation requirement. If such legal revision is made in the future, a difference in treatment would occur between the appellant, who is not legitimated but found to have acquired Japanese nationality regardless of whether or not he/she satisfies the new requirement, and non-legitimated children to be born after the legal revision who are required to satisfy the new requirement. However, since it is possible, as the majority opinion suggests, to put a constitutional and reasonable construction on the provision of Article 3, para.1 of the Nationality Act as well as the provisions of said Act while taking into consideration only the requirements prescribed under said paragraph except for the legitimation requirement, any possible difference in treatment, which may be caused by the exercise of the discretionary power in legislation to provide for an additional requirement in lieu of the legitimation requirement, will not be so material.

The opinion by Justice FUJITA Tokiyasu is as follows.

1. I am in agreement with the conclusion of the majority opinion on the following points: Under the existing Nationality Act, discrimination in granting Japanese nationality exists among children born out of wedlock to Japanese fathers and non-Japanese mothers depending on whether or not they satisfy the requirement of "marriage of the parents" prescribed in Article 3, para.1 of said Act (legitimation requirement), and this discrimination is unacceptable under the Constitution; it is possible to eliminate this discrimination by putting a reasonable construction to the provision of Article 3, para.1 of said Act, without strictly sticking to the exact language of said paragraph, so as to construe that the provision of said paragraph should also be applied to children who do not satisfy the legitimation requirement (non-legitimated children), and in this law case, this court should choose this way. However, I cannot deny that there is a gap between my way of thinking and that of the majority opinion with regard to what the substance of the provision of Article

3, para.1 of the existing Nationality Act is and what the exact meaning of the aforementioned reasonable construction is. Therefore, I would like to give my own opinion on these points.

2. The basic structure of the existing Nationality Act can be summarized as follows. The Act, as a primary principle, provides that a child shall acquire Japanese nationality if the father or mother is a Japanese citizen at the time of birth (Article 2), and basically allows those who do not have Japanese nationality to acquire Japanese nationality through naturalization (Article 4), while specially allowing acquisition of nationality by those who satisfy the requirements prescribed in Article 3, para.1 of said Act by making a notification. This means that Article 3, para.1 of the Act provides for the legitimation requirement with the intention of giving preferential treatment in granting nationality to legitimated children who satisfy other requirements prescribed in said paragraph, and it is not intended to deliberately exclude non-legitimated children. In other words, the present situation where non-legitimated children are unable to acquire nationality by making a notification is not due to the existence of Article 3, para.1 of the Act but it is rather a natural consequence leading from Article 2 and Article 4 of the Act, and the existence of the discrimination that is caused by the legitimation requirement under Article 3, para.1 of the Act and cannot be overlooked under the Constitution is, in a way, nothing more than a reflex effect of said paragraph. Accordingly, I should say that the existing unconstitutional condition due to the existence of the legitimation requirement under said paragraph is not derived from the existence of an "excessive" requirement, as argued by the majority opinion, but it is rather caused by the "deficiency" of the requirements, and if we wish to eliminate the unconstitutional condition by putting a reasonable construction to the provision of Article 3, para.1 of the Act, it should be done not by removing the "excessive" part but by supplementing the "defective" part. As far as my own views shown above with regard to the legislative purpose of said paragraph and the cause of the unconstitutional condition in dispute in this law case are concerned, I must say that I have more in common with the dissenting opinion than with the majority opinion.

3. The question is, in order to eliminate the unconstitutional condition in dispute in this law case, whether or not it is permissible for the court to put a broad construction to the provision of Article 3, para.1 of the Nationality Act as mentioned above, and with regard to this question, I should say that the dissenting opinion by Justice KAINAKA Tatsuo and Justice HORIGOME Yukio---the unconstitutional condition due to inaction of the legislative body should be eliminated exclusively through a legislative measure to make a new law, and if the court attempts to do so through legal construction, it goes beyond the limit of the judicial power---is sufficiently worth listening to. Nevertheless, I would dare to choose the option of putting a broad construction to solve the issue in this case, for the following reasons.
In general, where the legislative body has been in the state of unconstitutional inaction, the task of eliminating such state should be primarily left to the legislative body, and in particular, as in this law case, where the issue in dispute relates to the requirements and procedure for acquiring nationality, which should by nature be basically left to the legislative body's broad discretion, and the unconstitutional condition at issue is in violation of the principle of equality before the law, it cannot be denied that there is only very limited room for the judiciary to intervene in such inaction. However, where the legislative body has already made a judgment based on a certain legislative policy, and according to the basic direction of such judgment, there seems to be a very limited number of reasonable options to be chosen for the area where a specific legislative measure has not yet been taken, I believe that it is not completely impermissible for the court to, for the purpose of giving relief within the scope of individual lawsuits to people who are subject to seriously unreasonable discrimination, put a reasonable broad construction to the provisions of the existing law and aim to eliminate the unconstitutional condition to the extent that it does not conflict with the basic judgment already made by the legislative body. I would like to explain this reasoning in more detail in light of the specific circumstances of this case.
As mentioned above, the legislative body has, by establishing Article 3, para.1 of the Nationality Act, already made an arrangement for people who were unable to acquire Japanese nationality upon birth so as to enable them to acquire Japanese nationality by making a notification if they are acknowledged by Japanese fathers after birth and their parents are married. This arrangement itself does not raise any issue of unconstitutionality at all, and there is no problem with the effect of the provision of said paragraph (The majority opinion, considering that said paragraph contains an "excessive" requirement, argues as if there were a theoretical possibility that the provision of said paragraph as a whole would be held unconstitutional due to the unconstitutional condition alleged in this law case. However, according to my views shown above with regard to the legislative purpose of said paragraph, there could be no theoretical possibility that said paragraph itself would be held unconstitutional). It goes without saying that the court should perform legal construction while presupposing the existence of this provision (the lawmakers' judgment) or making good use of it. On the other hand, the legislative body has also made an arrangement for children who are acknowledged by Japanese fathers after birth but not legitimated, not simply requiring them to take the same procedure as foreign nationals in general but allowing them to acquire Japanese nationality through a more simplified procedure (Article 8). It cannot be denied that as the underlying basis for these provisions of the Act, there may be a policy judgment to give preferential treatment at least to children born to Japanese citizens for acquisition of Japanese nationality as far as it will not be problematic from the perspective of national interests, such as ensuring national security and maintaining order. As the majority opinion also points out, the difference in the level of preferential treatment regarding the procedural requirements that exists between legitimated children and non-legitimated children under the existing Act as described above, seems to be basically created because of national

interest in that legitimated children seem to have a close tie with Japan whereas non-legitimated children do not. Such grounds are unreasonable and therefore any distinction created due to such grounds is unconstitutional. This is where the argument on unconstitutionality started in this case. Assuming so, and as far as the existence of Article 3, para.1 of the Nationality Act is presupposed, treating non-legitimated children in the same manner as legitimated children may be a very natural way to eliminate the existing unconstitutional condition. There is no sufficient reason to argue that such solution is absolutely against the intention of the lawmakers who created the existing Nationality Act. A possible counterargument to this view may be that the legislative body could have chosen to grant nationality to, among non-legitimated children, for instance, only those who have been residing in Japan for a certain period of time (add a "residence requirement"). However, since we stand on the assumption that the policy itself of making a distinction between legitimated children and non-legitimated children by reason of the close tie with Japan is unreasonable, a similar question will be posed, why it is necessary to impose the residence requirement only on non-legitimated children, and I find it difficult to give a reasonable explanation to this question. Under these circumstances, when the court, in an effort to eliminate the existing unconstitutional condition, puts a broad construction to the provision of Article 3, para.1 of the Nationality Act so as to construe that said paragraph shall also apply to non-legitimated children who were acknowledged by Japanese fathers after birth, I cannot possibly think that such legal construction will be in conflict with the lawmakers' reasonable intention.
On the other hand, focusing on the situation of the appellant, it cannot be said that the right to acquire Japanese nationality is directly guaranteed to him/her under the Constitution. However, as stated in the majority opinion, Japanese nationality is an extremely important legal status that means a lot to people in order to enjoy the guarantee of fundamental human rights, obtain public positions or receive public benefits in Japan, and in this respect, it constitutes the critical basis for enjoying fundamental rights. The appellant, despite the fact that he/she was born to a Japanese citizen, is prevented from acquiring such legal status even by making a notification. This is all due to various distinctions made to distinguish people like him/her from others, irrespective of what he/she wishes or how hard he/she tries to avoid---- distinctions made under the existing law to determine whether or not to grant nationality (distinction on the basis of the time of birth and distinction based on whether or not the parents are married), as well as distinction based on the factual cause (distinction based on which of his/her parents (father or mother) is a Japanese citizen), and he/she was caught in a web of these distinctions. Even if these distinctions are reasonable to some extent from the perspective of legislative policy when examined one by one, when people who are in the situation mentioned above due to such web of distinctions demand relief by individually filing lawsuits, it is rather the court's duty to meet such demand by, while taking into consideration the legislative body's reasonable intention that can be presumed, putting a broad construction to the existing provisions of law, which is not generally rejected as an available method of legal construction, and I believe that the court, by doing so, cannot be deemed to go beyond the bound of its power and usurp the legislative power. Needless to add, if any considerable inconvenience would be caused in terms of national interests when the construction on Article 3, para.1 of the Nationality Act that this court has adopted in this case is established as a general legal rule, the legislative body has a choice to immediately take a legislative measure to revise it to the extent that such measure will not be in conflict with this court's judgment on unconstitutionality. The reasonable sharing of powers and duties between the legislative body and the judicial body should be considered from such comprehensive perspective.

The dissenting opinion by Justice YOKOO Kazuko, Justice TSUNO Osamu, and Justice FURUTA Yuki is as follows.
The Nationality Act provides that among children acknowledged after birth, legitimated children are allowed to acquire Japanese nationality by making a notification whereas non-legitimated children are required to follow the naturalization procedure, and we believe that these provisions are not beyond the range of choices of legislative policy and therefore not in violation of Article 14, para.1 of the Constitution. Consequently, we find that the conclusion of the court of prior instance that dismissed the appellant's claim is justifiable, and his/her final appeal should be dismissed. The reasons for our opinion are as follows.
1. To grant nationality is to determine a person's status as a member of a national community, and whether or not to grant nationality should be decided by taking into consideration the person's tie with the national community and other various circumstances as indicated by the majority opinion. It is the most fundamental function of a national community and can be said to be one of the most fundamental sovereign functions. From this viewpoint, we should say that it is left to the broad legislative discretion to formulate requirements for granting nationality, to the extent not prejudicial to the principle that nationality should be granted according to clear standards upon birth uniformly and in the manner that each person should have only one nationality if possible.
Although nationality is an important legal status necessary to enjoy the protection of fundamental human rights and other benefits, it is unallowable, in principle, to claim nationality of a particular state as a right, and such importance of nationality cannot be deemed to have any influence on the aforementioned legislative discretion. It should also be noted that, apart from the case where a person has no nationality at all, in which state a person receives protection, in Japan or any other state, is an issue of the sovereignty of each state. Legal advantages or disadvantages that the person is to enjoy or suffer will vary depending on his/her respective nationality or state of residence or depending on the issue in question, and such advantages and disadvantages are of a relative nature, i.e. an advantage in one state could be a disadvantage in another state and vice versa.
Dual nationality is a condition that arises unavoidably from the fact that nationality is granted uniformly upon birth, and it is only acceptable as an inevitable exception.

The Nationality Act, while keeping the principle of jus sanguinis, grants nationality uniformly upon birth to people who are children of Japanese citizens not only by blood but also by law, and it can be construed to provide that in cases where children who have blood relationships with Japanese citizens have become legal children of Japanese citizens after birth, since such children have different living conditions, whether or not to grant nationality should be determined by specifically examining whether or not the children have a tie with Japanese society that is beyond the mere fact that they were born to Japanese citizens, and considering the degree of closeness of such tie.
In light of such structure of the Nationality Act, the provision of Article 3, para.1 of said Act can be regarded as a special provision of Article 2 of said Act in that it recognizes the effect of automatic acquisition of nationality, and at the same time it can also be regarded as a special provision on naturalization in that it allows acquisition of nationality after birth.

2. The majority opinion argues as follows. Although it is reasonable to allow acquisition of nationality after birth by taking into consideration a child's tie with Japan, and at the time when Article 3, para.1 of the Nationality Act was enacted, it was reasonable to regard the fact of becoming a legitimated child as an indicator to show the existence of a close tie between the child and Japan. However, due to the changes that have occurred since then, such as changes in views regarding family lifestyles and parent-child relationships, changes in the realities such as the increase in the number of children born out of wedlock, the increase in the number of children born to couples of Japanese citizens and foreign citizens, and the changes in international trends in legal systems, it is no longer reasonable, in relation to the legislative purpose, to regard the fact of legitimation as an indicator to show the child's tie with Japan.
However, although it is true that the views regarding family lifestyles and parent-child relationships have changed to some extent, in what form and to what extent these views have changed, or whether or not there has been a significant change in the public consciousness of these matters, cannot be deemed to be specifically clarified.
We do not think that there has been an outstanding change in the realities of family lifestyles. According to the statistics, the number of children born out of wedlock increased from 14,168 (1.0%) in 1985, the year following the year of enactment of Article 3, para.1 of the Nationality Act, to 21,634 (1.9%) in 2003, and the number of children born to Japanese fathers and foreign mothers also increased from 5,538 in 1987, the first year when statistical data were available, to 12,690 in 2003, but the increase in these numbers is small.
Thus, contrary to the argument presented by the majority opinion, it is sufficiently possible to regard the fact that the increase in the number of children born out of wedlock over the past 20 years is so small, as proof to show, at least, that there has been no significant change in the public consciousness with regard to the desirable form of a family with a child.
It is true that foreign states, mainly those in Western Europe, have made laws to grant nationality to non-legitimated children as well as legitimated children. However, in these states, it seems that international marriages have been popular for historical or geographical reasons, and in addition, regional integration has been promoted and enhanced, as seen in the case of formation of the European Union. Furthermore, the percentage of children born out of wedlock exceeds 30% in many of these states, and even in the lower cases, the percentage seems to exceed 10%. Thus, there is a large difference between these states and Japan in terms of the social circumstances. At the time of enactment of Article 3, para.1 of the Nationality Act, the legal systems of these foreign states may have been referred to when examining whether the provision of said paragraph was appropriate as a legislative measure but they do not seem to have been referred to when examining the constitutionality of said provision. According to these circumstances, we consider that it is inappropriate to directly take into consideration the trends in these foreign states in the process of examining the constitutionality of the provision in Japan.
The majority opinion also points out the difference in treatment compared to children born out of wedlock to Japanese mothers or children acknowledged by Japanese fathers before birth.
However, in both cases, it is determined at the time of birth that the children are legal children of Japanese citizens, and there is no possibility that any subsequent change in their living situation will have an influence on this definite fact. Considering that nationality should be granted uniformly upon birth, it is reasonable to grant Japanese nationality to these children. Substantially, children born out of wedlock to Japanese mothers shall be subject to the parental authority of the mother upon birth, and acknowledgment before birth may be made only voluntarily. In these cases, although there may be a difference in level, we can find some factors showing that children, upon birth, already have a tie with Japanese society arising from the parent-child relationship, which is stronger than the tie established by blood. The difference in treatment between children born out of wedlock to Japanese fathers and those to Japanese mothers arises from the difference between father and mother in terms of how they interact with the child upon birth, and we do not find it appropriate to regard such difference as discrimination based on gender.

3. On the other hand, Article 3, para.1 of the Nationality Act was enacted with the aim of achieving a balance in treatment, when granting nationality, between children whose birth precedes the marriage of the parents and children whose birth follows the marriage of the parents, and also by giving consideration to the view that it is desirable that children born in wedlock aged under 20 who live with their parents should have the same nationality as that of the parents. In this respect, said paragraph is established as a measure to supplement the principle of jus sanguinis, under which nationality is granted on the basis of the time of birth, and it is not intended to thoroughly implement or enhance the principle of jus sanguinis. We can find it sufficiently reasonable to allow acquisition of nationality not in all cases where children have obtained acknowledgement but only in cases where legitimation has occurred and

legitimated children have made a notification. There are various reasons supporting this view: (i) When legitimation has occurred, the legal relationship between the father and the child becomes firm because the father obtains the parental authority over the child and is also given the rights and obligations to take custody of and take care of the child; (ii) If nationality shall be granted on the sole condition of making a notification, the requirements for such notification should be made as clear and uniform as possible; (iii) A person who wishes to acquire nationality by making a notification is not required to renounce his/her own nationality in a foreign state; (iv) Since non-legitimated children have different levels of ties with Japan, it is reasonable and consistent with the structure of the Nationality Act to apply to them the naturalization procedure wherein the level of tie with Japan is examined specifically on a case-by-case basis; and (v) in the case of non-legitimated children, the requirements for naturalization are significantly relaxed. It cannot be said that these points have been changed due to the circumstances suggested by the majority opinion.

With regard to naturalization, the majority opinion argues that even though the requirements for naturalization are relaxed for children who have obtained acknowledgement, naturalization depends on the discretion of the Minister of Justice, and the availability of the naturalization procedure does not give reasonable grounds for the difference in treatment between legitimated children and non-legitimated children. However, as explained above, with regard to non-legitimated children whose ties with Japanese society are difficult to classify, it is rather reasonable to grant them nationality through naturalization. Furthermore, even though naturalization depends on a discretionary act of the Minister of Justice, as far as the minister performs this act as a State organ, the act should be reasonable based on the purpose of the naturalization system, and may also be subject to a judicial review. We must say that the majority opinion underestimates the entire structure of the Nationality Act and the simplified naturalization system, although there may be some points to consider in the operation thereof.

For the reasons stated above, we believe that even though there is room to review the scope of children eligible to acquire nationality by making a notification through arrangements such as classifying the cases where a close tie with Japan can be found in non-legitimated children, the provisions of the Nationality Act which allow legitimated children to acquire nationality by making a notification, while requiring non-legitimated children to follow the naturalization procedure, are not beyond the range of choices of legislative policy and therefore not in violation of Article 14, para.1 of the Constitution.

We of course do not deny that non-legitimated children should be given proper protection depending on their needs, but it is a diffident matter from on what conditions nationality should be granted.

4. Even supposing that it is unconstitutional not to allow non-legitimated children to acquire nationality by making a notification, we still believe that the final appeal should be dismissed. The reasons for our view are almost the same as the dissenting opinion by Justice KAINAKA Tatsuo and Justice HORIGOME Yukio. We would like to make an additional comment on this point.

As both Justice KAINAKA and Justice HORIGOME suggest, the impossibility for non-legitimated children to acquire nationality even by making a notification is due to lack of a provision that allows their acquisition of nationality, and it is the same with or without the provision of Article 3, para.1 of the Nationality Act. Although said provision requires acknowledgment as a prerequisite for acquiring nationality, it mainly focuses on children who have acquired the status of a child born in wedlock, and limits the scope of children eligible to receive nationality to those who have acquired such status as a result of legitimation.

It appears that the majority opinion, while considering that the Nationality Act keeps the principle of jus sanguinis and that Article 3, para.1 of said Act provides for the aforementioned prerequisite, intends to make the provision of said paragraph effective for all children who have obtained acknowledgement, by removing the part pertaining to legitimated children. However, the provision of said paragraph, if the part pertaining to legitimated children is removed therefrom, would be almost meaningless, and it is not an issue of literal construction but is a consequence of the fact that said provision exclusively targets children who have acquired the status of a child born in wedlock. It is indeed unreasonable to consider, just because acknowledgment is the prerequisite for acquiring nationality, that the removal of the part pertaining to legitimated children will expand the scope of children subject to said provision to all children who have obtained acknowledgement. Furthermore, it is obvious that expanding the scope of eligible children in such manner amounts to granting nationality beyond the bounds of construction of the terms and purport of the provisions of the Act, and whatever explanation is given, we must say that such expansion is equal to allowing acquisition of nationality in cases that are not actually stipulated in the Nationality Act and in effect constitutes a legislative measure.

In addition, if acquisition of nationality is allowed according to the view suggested by the majority opinion, it would lead to the consequence that even a person who has been living in a foreign state as a foreign national over many years without having any relations with Japanese society can acquire Japanese nationality just by making a notification if the person is a minor and has obtained acknowledgment, or in other words, acquisition of Japanese nationality would be allowed even in cases where no close tie can be found between children and Japanese society. Although there is a requirement that the parent who has acknowledged the child should be a Japanese citizen at the time when the child makes a notification, since it is rare that such parent has lost Japanese nationality by the time of notification, it is difficult to show, just because said requirement is satisfied, that the child has a close tie with Japan that is beyond the mere fact that the child was born to a Japanese citizen, and we must say that the arrangement as suggested by the majority opinion is in effect the same as recognizing the child's close tie with Japan just by reason of the child's intention to seek Japanese nationality (or in the case of a child aged under 15, such intention of the child's statutory

agent).
Such view according to the majority opinion is not only far beyond the legislative purpose of Article 3, para.1 of the Nationality Act but also inconsistent with the structure of the Nationality Act wherein whether the child has a close tie with Japanese society should be taken into consideration when granting nationality after birth.
The procedure for granting nationality has a significant impact in various aspects with regard to immigration control and management of foreign nationals residing in Japan, and it should be noted that it is an issue that needs to be examined from a policy perspective by taking these matters into consideration.
Should the view suggested by the majority opinion be acceptable at all, in cases where the provisions for granting rights or interests created by laws are concerned, it would be possible for the court to grant a wide range of such rights or interests to people who are not entitled to receive them under the laws, regardless of the content of the provisions or the nature or structure of the laws, and beyond the legislative purpose or objective thereof.
We do not mean to deny that the court may exercise its power of judicial review on constitutionality in cases like this law case. However, taking into consideration all of these points mentioned above, we believe that if the court grants nationality by a judicial decision in this case, it would cause a problem in terms of the limit of the judicial power.

The dissenting opinion by Justice KAINAKA Tatsuo and Justice HORIGOME Yukio is as follows.
We consider that the final appeal should be dismissed, for the following reasons.
1. The Nationality Act is a law that creates and grants rights, and it stipulates, in accordance with the provision of Article 10 of the Constitution, what requirements should be satisfied when granting Japanese nationality. Without the provisions of the Nationality Act, the definition of Japanese citizens cannot be determined. Where a person does not satisfy the requirements prescribed in the Nationality Act for acquiring Japanese nationality, it is only as if nothing has been decided in relation to acquisition of Japanese nationality. In other words, where a person fails to conform to the provisions under which Japanese nationality shall be granted, it is nothing more than the state of non-existence of legislation or inaction on legislation in relation to the provisions of the Nationality Act. This also applies to other administrative laws under which the Diet shall grant certain rights or interests to the public from a policy perspective.

2. In accordance with Article 2, item 1 of the Nationality Act, a child acknowledged by a Japanese father before birth shall acquire Japanese nationality by birth. Article 3, para.1 of said Act also provides that legitimated children born to Japanese fathers may acquire Japanese nationality by making a notification. However, with regard to children who were acknowledged after birth but not legitimated (non-legitimated children), said Act does not contain any provision to the effect that such children shall be granted Japanese nationality upon notification. Therefore, we should say that in relation to acquisition of nationality by non-legitimated children by making a notification, the current situation is nothing other than the state of non-existence of legislation or inaction on legislation.

3. The Nationality Act causes a distinction between legitimated children and non-legitimated children by granting nationality to the former through the notification procedure while closing the door for the latter to acquire nationality through said procedure due to the non-existence of legislation or inaction on legislation (this distinction shall hereinafter be referred to as the "Distinction"). At the time when Article 3, para.1 of the Nationality Act was enacted, the Distinction had a reasonable basis and was not in violation of Article 14, para.1 of the Constitution. However, we consider that at the time when the appellant submitted a notification for acquisition of Japanese nationality to the Minister of Justice, at the latest, the Distinction amounted to discrimination without reasonable grounds and constituted violation of Article 14, para.1 of the Constitution. The reason for this view is the same as the holdings of the majority opinion in 4 above. However, what is unconstitutional is the state of inaction on legislation, or the lack of a provision to grant nationality to non-legitimated children upon notification. While the majority opinion states that what is unconstitutional is the provision of Article 3, para.1 of the Nationality Act per se, we consider that said provision is not unconstitutional at all because it is a provision that is intended to create and grant a right, i.e. grant nationality to legitimated children upon notification. The majority opinion can be construed to hold that the provision of said paragraph contains a part that means that non-legitimated children shall not be granted Japanese nationality even if they make a notification and such part is unconstitutional and therefore void. However, since such construction goes contrary to the nature of the Nationality Act as a law that creates and grants rights, it is, after all, the same as reading legitimated children as children acknowledged after birth, and it should inevitably be deemed to be beyond the limit of legal construction.
We agree with the idea that where a special provision or a provision that restricts rights is unconstitutional, it is permissible, as a method of legal construction, to make such part of the provision void and apply a general provision in order to grant rights. However, it is obvious that this law case is not such a case. Since the Nationality Act can be deemed to adopt the principle of jus sanguinis, as mentioned in the majority opinion, but cannot be construed to stipulate thorough implementation of the principle of jus sanguinis, the provision of Article 3, para.1 of said Act cannot be construed to generally grant Japanese nationality to children acknowledged after birth upon notification, while restricting non-legitimated children from acquiring Japanese nationality through the notification procedure.
Consequently, acquisition of Japanese nationality by non-legitimated children by making a notification cannot be allowed according to the construction of the provision of Article 3, para.1 of the Nationality Act.

4. As explained above, what constitutes violation of Article 14, para.1 of the Constitution in this case is not the provision of Article 3, para.1 of the Nationality Act per se but the state of inaction on legislation or the lack of a law

that grants nationality to non-legitimated children upon notification, and it is obvious that this fact does not make the appellant legally entitled to acquire nationality by making a notification. Therefore, we believe that the judgment of prior instance that dismissed the appellant's claim is justifiable and the final appeal should be dismissed.
Justice FUJITA Tokiyasu holds that what is unconstitutional is the inaction on legislation which results in not granting nationality to non-legitimated children even if they make a notification, and in this respect, he holds the same viewpoint as ours. However, Justice FUJITA further argues that nationality should be granted to non-legitimated children by putting a broad construction to the provision of Article 3, para.1 of the Nationality Act and concludes that the appellant's claim should be upheld. We find his view to be worth listening to, but cannot immediately agree to construe the provision of said paragraph in that way.

5. The majority opinion is based on the assumption that "it is necessary to give relief to people who are subject to unreasonable discriminatory treatment due to the Distinction, thereby correcting the unconstitutional condition arising from the Distinction." Such assumption will inevitably lead to the conclusion drawn by the majority opinion. However, it is inappropriate to depend on such assumption, because the mission entrusted to the judiciary is to construe and apply law objectively on neutral ground, and in this case, the court should make its decision from the perspective of "whether or not it is possible, through construction and application of the provision of Article 3, para.1 of the Nationality Act, to give relief to people who are subject to unreasonable discriminatory treatment due to the Distinction, thereby correcting the unconstitutional condition arising from the Distinction."

6. The conditions for being a Japanese citizen are determined by law through creation and grant of rights. Since the state of inaction on legislation can be found with regard to the point at issue in this law case---acquisition of nationality by non-legitimated children by making a notification, if such state is found to be an unconstitutional condition but it cannot be corrected through construction and application of law, it is a principle under the Constitution to correct this state through a legislative measure taken by the Diet (Article 10, Article 41, and Article 99 of the Constitution). Furthermore, if there are several reasonable options for legislation, the Diet has the authority and responsibility to decide which one of them should be chosen. In this law case, when determining requirements to be satisfied for acquisition of nationality by non-legitimated children by making a notification, there exists "the possibility that there is any other reasonable option for legislation" in addition to the requirement based on the construction given by the majority opinion. Also in this respect, we consider that it should be left to the Diet to decide how to eliminate the unconstitutional condition.

7. For the reasons stated above, we should say that the majority opinion has established an inappropriate assumption according to the legal construction that is contrary to the nature of the Nationality Act, i.e. the provision of Article 3, para.1 of said Act per se is in violation of the Constitution, and upheld the appellant's claim based on such assumption. The majority opinion, after all, creates a new requirement for acquisition of nationality that is not stipulated by law and it is in effect equal to legislation by the judiciary. Therefore, we cannot agree with the majority opinion.

Presiding Judge Justice SHIMADA Niro
Justice YOKOO Kazuko
Justice FUJITA Tokiyasu
Justice KAINAKA Tatsuo
Justice IZUMI Tokuji
Justice SAIGUCHI Chiharu
Justice TSUNO Osamu
Justice IMAI Isao
Justice NAKAGAWA Ryoji
Justice HORIGOME Yukio
Justice FURUTA Yuki
Justice NASU Kohei
Justice WAKUI Norio
Justice TAHARA Mutsuo
Justice KONDO Takaharu

(This translation is provisional and subject to revision.)

Date of the decision	2013.09.04
Case number	2012 (Ku) No. 984 and 985
Reporter	Minshu Vol. 67, No. 6
Title	Decision concerning whether the provision of the first sentence of the proviso to Article 900, item (iv) of the Civil Code, is in violation of Article 14, paragraph (1) of the Constitution
Case name	Case of special appeal against the ruling that dismissed the appeal filed against the ruling on the division of estate
Result	Decision of the Grand Bench, quashed and remanded
Court of the Second Instance	Tokyo High Court, Decision of June 22, 2012
Summary of the decision	1. The provision of the first sentence of the proviso to Article 900, item (iv) of the Civil Code was in violation of Article 14, paragraph (1) of the Constitution as of July 2001 at the latest. 2. The judgment made by the Supreme Court to the effect that the provision of the first sentence of the proviso to Article 900, item (iv) of the Civil Code was in violation of Article 14, paragraph (1) of the Constitution as of July 2001 at the latest has no effect on any legal relationships that have already been fixed by rulings or other judicial decisions on division of estate, agreements on division of estate or other agreements, etc. made on the assumption of the provision of the first sentence of the proviso to said item with regard to other cases of inheritance that have commenced during the period after July 2001 until said judgment is made. (There are concurring opinions concerning 1 and 2.)
References	(Concerning 1 and 2) Article 14, paragraph (1) of the Constitution, Article 900 of the Civil Code; (Concerning 2) Article 81 of the Constitution Constitution Article 14 (1) 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. Article 81 The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act. Civil Code (Statutory Share in Inheritance) Article 900 If there are two or more heirs of the same rank, their shares in inheritance shall be determined by the following items: (i) if a child and a spouse are heirs, the child's share in inheritance and the spouse's share in inheritance shall be one half each; (ii) if a spouse and lineal ascendant are heirs, the spouse's share in inheritance shall be two thirds, and the lineal ascendant's share in inheritance shall be one third; (iii) if a spouse and sibling(s) are heirs, the spouse's share in inheritance shall be three quarters, and the sibling's share in inheritance shall be one quarter; (iv) if there are two or more children, lineal ascendants, or siblings, the share in the inheritance of each shall be divided equally; provided that the share in inheritance of an child out of wedlock shall be one half of the share in inheritance of a child in wedlock, and the share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents.
Main text of the decision	The decision in prior instance is quashed. The case is remanded to the Tokyo High Court.
Reasons	Concerning Reason for Appeal I argued by Appellant Y1 and Reason for Appeal III (2) argued by the appeal counsel for Appellant Y2, ODAWARA Masayuki, SHIKADA Masashi, and YAGYU Yukiko 1. Outline of the case In this case, with regard to the estate of P, who died in July 2001, the appellees who are P's children born in wedlock (including P's heir(s) per stirpes) filed a petition for a ruling on the division of P's estate against the appellants, who are P's children born out of wedlock. The court of prior instance determined that the part of the proviso to Article 900, item (iv) of the Civil Code, which provides that the share in inheritance of a child born out of wedlock shall be one half of the share in inheritance of a child born in wedlock (hereinafter this part shall be referred to as the "Provision"), was not in violation of Article 14, paragraph (1) of the Constitution, and concluded that P's estate should be divided based on the respective statutory shares in inheritance of the appellees and the appellants as calculated by applying the Provision. Appellant Y1 and the appeal counsel for Appellant Y2 argue that the Provision is in violation of Article 14, paragraph (1) of the Constitution and therefore void. 2. Criteria for judging the consistency with Article 14, paragraph (1) of the Constitution Article 14, paragraph (1) of the Constitution provides for equality under the law, and this provision should be interpreted as prohibiting any discriminatory treatment by law unless such treatment is based on reasonable grounds in relation to the nature of the matter. This is the case law established by the precedent rulings of this court (1962 (O) No. 1472, judgment of the Grand Bench of the Supreme Court of May 27, 1964, Minshu Vol. 18, No. 4, at 676; 1970 (A) No. 1310, judgment of the Grand Bench of the Supreme Court of April 4, 1973, Keishu Vol. 27, No. 3, at 265, etc.) The inheritance system sets rules as to who is to inherit the property of the decedent, and in order to define the inheritance system, the circumstances in each country such as the tradition, social conditions and public sentiments should be taken into consideration. Furthermore, since the modern inheritance system is closely related to the concept of a family, it cannot be defined without ignoring the rules, people's perceptions, etc. regarding marital or parent-child relationships in the country. It is left to the reasonable

discretion of the legislature to define the inheritance system while comprehensively considering all these factors. The major issue disputed in the present case is, within the inheritance system defined in that manner, whether or not the distinction made by the Provision in terms of the statutory shares in inheritance between children born in wedlock and children born out of wedlock constitutes discriminatory treatment without reasonable grounds. If there is no reasonable ground for making such distinction even when the abovementioned discretionary power vested in the legislative body is taken into consideration, it is appropriate to construe that said distinction is in violation of Article 14, paragraph (1) of the Constitution.

3. Whether or not the Provision is consistent with Article 14, paragraph (1) of the Constitution

(1) Article 24, paragraph (1) of the Constitution provides that "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis," and paragraph (2) of said Article provides that "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes." In accordance with these provisions, Article 739, paragraph (1) of the Civil Code provides that "Marriage shall take effect upon notification pursuant to the Family Registration Act," thus adopting the principle of legal marriage and rejecting de facto marriage. Meanwhile, with regard to the inheritance system, the Civil Code was partially revised by Act No. 222 of 1947 (hereinafter referred to as the "1947 Civil Code revision"), abolishing the right to succeed to the position of the head of the family, which had been the foundation for the Japanese "family" system, and introducing the present inheritance system wherein, as a rule, the spouse and child(ren) of the deceased shall be heirs. Still, the clause providing that in the case of inheritance that commences upon the death of a family member, the statutory share in inheritance of a child born out of wedlock shall be one half of that of a child born in wedlock (the proviso to Article 1004 of the Civil Code prior to the 1947 Civil Code revision) survived and was maintained as the Provision in the existing Civil Code.

(2) The decision of the Grand Bench of the Supreme Court on 1991 (Ku) No. 143, July 5, 1995, Minshu Vol. 49, No. 7, at 1789 (hereinafter referred to as the "1995 Grand Bench Decision") took into consideration that the provisions concerning the statutory share in inheritance, including the Provision, do not require that inheritance be conducted according to the statutory share in inheritance of each heir, but function as supplementary rules to be applied in cases such as in the absence of designation of the shares in inheritance by a will. Then, according to the criteria for judgment of the same effect as those shown in 2. above, the Supreme Court accounted for the purport of the Provision, which sets the statutory share in inheritance of a child born out of wedlock as one half of that of a child born in wedlock, holding as follows: "As long as the Civil Code adopts the principle of legal marriage, the Provision gives preferential treatment to the spouse who has been in a marital relationship with the deceased and their child(ren) in terms of the statutory share in inheritance, while at the same time, it assures that a child born out of wedlock will have a certain statutory share in inheritance so as to protect such child." In conclusion, the Supreme Court ruled that the Provision cannot be regarded as going beyond the bounds of the reasonable discretion vested in the legislature and therefore it cannot be deemed to be in violation of Article 14, paragraph (1) of the Constitution.

However, even under the principle of legal marriage, the issue of how to set rules for the statutory share in inheritance of a child born in wedlock and that of a child born out of wedlock should be determined by comprehensively considering the matters referred to in 2. above, and these matters change along with times. Therefore, the reasonableness of such rules should be subject to constant examination and scrutiny in light of the Constitution, which provides for individual dignity and equality under the law.

(3) With regard to important matters among those referred to in 2. above, the factual circumstances have changed as outlined below since the 1947 Civil Code revision.

A. Looking at the process of the 1947 Civil Code revision, it may be seen as the background factors that there was an ethos among people aspiring to have the legitimate descendants inherit their family estate even after the abolition of the right to succeed to the position of the head of the family that had supported the Japanese traditional "family" system, and that there was also a sense of discrimination among people toward men and women in relationships other than legal marriage and children born in such relationships, while regarding only legal marriage as legitimate marriage and respecting and trying to protect it. Furthermore, in the Diet sessions in which the revision bill was deliberated, the existence of laws in other countries at that time, which made a distinction in terms of the share in inheritance between children born in wedlock and children born out of wedlock (such as by denying shares in inheritance to children born out of wedlock), was repeatedly argued as the grounds for supporting the consistency of the Provision with Article 14, paragraph (1) of the Constitution. This suggests that these laws of other countries had an influence on the process of introducing the Provision in the existing Civil Code.

However, since the 1947 Civil Code revision, the actual state of marriage and family in Japan has changed along with the changes in social and economic circumstances, and it is said that people's perceptions of marriage and family have also changed accordingly. Although there may be differences by region or type of work, a family composed of husband and wife and their children who have not grown up became the common minimum unit to support workers' lives and the number of families of such composition increased amid the rapid economic development in the post-war period. At the same time, along with the progress in aging of the population, it has become increasingly necessary to provide security for the lives of surviving spouses, bringing about a drastic change to the significance of inheritance property, which had largely served as the means of living of the descendants. This led to the increase in the spouse's statutory share in inheritance, which is included in the

partial revision to the Civil Code by Act No. 51 of 1980. Moreover, the number of children born out of wedlock had been on a declining trend until around 1979, but then it took an upward turn and has been continuing to increase until today. Since the beginning of the Heisei era (from 1989), more people tend to marry later or choose not to marry, and the birth rate has continued to decline. Along with these trends, there has been an increase in the number of households wherein middle-aged single children live with their parents and the number of single-person households, and there has also been an increase in the number of divorces, and, in particular, the numbers of divorces and remarriages involving minor children. In view of these facts, it is said that the forms of marriage and family have greatly diversified, and people now have diversified perceptions of marriage and family accordingly.

B. There has also been a dramatic change in the situations in other countries, which had an influence on the process of introducing the Provision in the existing Civil Code as mentioned in A. above. In other countries, and in the United States and European countries in particular, there used to be a strong sense of discrimination against children born out of wedlock due to religious reasons. At the time of the 1947 Civil Code revision, a tendency to award only a limited share in inheritance to children born out of wedlock was seen in many countries, and this had an influence on the process of introducing the Provision. However, since the late 1960s, most of these countries promoted equal treatment between children born in wedlock and children born out of wedlock from the perspective of protecting children's rights and enacted laws to abolish discrimination in terms of inheritance. At the time when the 1995 Grand Bench Decision was rendered, among the major countries where such discrimination still existed, Germany enacted Erbrechtsgleichstellungsgesetz (Act on Equalization of Succession Rights) in 1998, and France enacted Loi n° 2001-1135 du 3 decembre 2001 relative aux droits du conjoint survivant et des enfants adulterins et modernisant diverses dispositions de droit successoral (Law No. 2001-1135 of December 3, 2001 on the Rights of the Surviving Spouse and Children Born out of Wedlock and Modernizing Various Provisions of Inheritance Law) in 2001, thereby eliminating discrimination in terms of the share in inheritance between children born in wedlock and children born out of wedlock. At present, among the United States and European countries, no country maintains a distinction in terms of the share in inheritance between children born in wedlock and children born out of wedlock, as Japan still does. Thus, such treatment can be said as being rare on a global scale.

C. Japan ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979 (Treaty No. 7 of 1979) and the Convention on the Rights of the Child (CRC) in 1994 (Treaty No. 2 of 1994). These treaties provide that children must be protected against discrimination of any kind by birth. Furthermore, as organizations affiliated with the United Nations, the United Nations Human Rights Committee was established under the ICCPR and the Committee on the Rights of the Child was established under the CRC. These committees are vested with the authority to express opinions, make recommendations, etc. to the contracting States with regard to matters such as the status of implementation of the respective covenant and convention. As for the status of implementation of the ICCPR and the CRC by Japan in relation to treatment of children born out of wedlock, the United Nations Human Rights Committee made a comprehensive recommendation in 1993 that Japan should remove the discriminatory provisions relating to children born out of wedlock, and since then, both committees have repeatedly expressed concerns, recommended legal revision, etc. to Japan, specifically criticizing the discriminatory provisions relating to nationality, family register, and inheritance, including the Provision. Recently, in 2010, the Committee on the Rights of the Child again expressed its concern about the existence of the Provision.

D. Under the changing global circumstances as described in B. and C. above, the Japanese legal systems, etc. relating to the distinction between children born in wedlock and children born out of wedlock have also changed. In 1988, an action was brought against the requirement of making an entry of a child's relationship with the head of his/her household in his/her residence certificate. In 1994, while this case was pending before the court of second instance, the Guidelines for Handling Affairs Relating to the Basic Resident Registers were partially revised (Jichi-Shin Notice No. 233 of December 15, 1994), and, as a result, it was provided that a child of the head of the household shall be indicated simply as a "child," irrespective of whether the child is born in wedlock or out of wedlock. In addition, another action was brought in 1999 against the requirement of making an entry of the relationship of a child born out of wedlock with his/her mother or father in the family register. In 2004, after the court of first instance rendered a judgment on this case, the Ordinance for Enforcement of the Family Register Act was partially revised (Ordinance of the Ministry of Justice No. 76 of 2004), and, as a result, it was provided that a child born out of wedlock must be indicated in the same manner as a child born in wedlock, for example, the "first son/daughter." With regard to the indication of the relationship of a child born out of wedlock with his/her mother or father already entered in the family register, it was announced by a circular notice (Circular Notice Min-Ichi No. 3008 of November 1, 2004, issued from the Director-General of the Civil Affairs Bureau) that such indication should be corrected according to the new rule mentioned above upon request. Furthermore, in 2006 (Gyo-Tsu) No. 135, the judgment of the Grand Bench of the Supreme Court of June 4, 2008, Minshu Vol. 62, No. 6, at 1367, the court declared that Article 3, paragraph (1) of the Nationality Act (prior to the revision by Act No. 88 of 2008), which provided for different rules for the treatment of children born out of wedlock from that of children born in wedlock in terms of acquisition of Japanese nationality, had been in violation of Article 14, paragraph (1) of the Constitution as of 2003 at the latest. When said revision was made to the Nationality Act in response to this Supreme Court judgment, children born out of wedlock who had made a notification for acquisition of Japanese nationality before 2003 were deemed to be entitled to acquire Japanese nationality.

E. The necessity to equalize the statutory share in inheritance of children born in wedlock and that of children

born out of wedlock had been recognized earlier on. In 1979, the Counsellor's Office of the Civil Affairs Bureau of the Ministry of Justice released a draft outline of the Civil Code revision relating to inheritance as an outcome of the deliberation at the Personal Status Law Subcommittee of the Civil Law Committee of the Legislative Council of the Ministry of Justice, in which the office proposed equalization between the statutory share in inheritance of children born in wedlock and that of children born out of wedlock. In addition, said office released a draft outline of the Civil Code revision relating to the marriage system, etc. in 1994 also as an outcome of the deliberation at said subcommittee, and the Legislative Council reported to the Minister of Justice an outline of a bill for partial revision of the Civil Code in 1996, and in these documents, it was clearly stated that the statutory share in inheritance should be equalized for both categories of children. Furthermore, in 2010, the government prepared a revision bill addressing the same point as the abovementioned outlines of the bill with a view to submitting it to the Diet, but neither of them actually reached the Diet.
F. As a result of the revisions made as explained in D. above with regard to the matters for which the abovementioned committees had expressed concerns, recommended legal revision, etc., the distinction in treatment between children born in wedlock and children born out of wedlock has been largely eliminated, but the revision to the Provision has not been achieved yet. Looking at the reasons for this situation, one would notice the following facts. In the United States and most European countries, children born out of wedlock account for a large share in all new born children, and in some countries, the share of these children exceeds 50 percent. In Japan, in contrast, although the percentage of children born out of wedlock has been increasing every year, the number of such children was only slightly over 23,000 in 2011, accounting for only about 2.2 percent in all new born children. In addition, couples' decision to submit a notification of marriage seems to be closely dependent on the pregnancy of their first child. Thus, one possible reason for the abovementioned situation in Japan may be that Japanese people as a whole tend to avoid having children born out of wedlock, or in other words, despite the fact that people's perceptions regarding family are said to have become diversified, the attitude to respect legal marriage seems to still widely prevail among Japanese people.
However, the reasonableness of the Provision, which sets the statutory share in inheritance of a child born out of wedlock as one half of that of a child born in wedlock, is a question of law which should be determined while taking various factors into comprehensive consideration and examining whether or not the Provision unduly violates any rights of children born out of wedlock in light of the Constitution that provides for individual dignity and equality under the law. None of the factors mentioned above, namely, the wide prevalence of the attitude to respect legal marriage, the actual number of children born out of wedlock, and the percentage of such children in Japan as compared to that in other countries, can be regarded as being directly associated with the answer to the abovementioned question of law.
G. Since it rendered the 1995 Grand Bench Decision, this court has ruled that the Provision is in conclusion consistent with the Constitution. However, upon rendering the 1995 Grand Bench Decision, five Justices already pointed out in their dissenting opinion that more weight should be attached to the position of children born out of wedlock, and moreover, said decision was also accompanied by a concurring opinion given by one Justice stating that the Provision which had been reasonable at the time of the 1947 Civil Code revision was becoming no longer reasonable, in view of the changes in the forms of marriage and parent-child relationship or family relationship, as well as the changes in the international circumstances. Opinions to the same effect have also been attached repeatedly by individual Justices to the subsequent petty bench judgments and decisions (see 1999 (O) No. 1453, judgment of the First Petty Bench of the Supreme Court of January 27, 2000, Saibanshu Minji No. 196, at 251; 2002 (O) No. 1630, judgment of the Second Petty Bench of the Supreme Court of March 28, 2003, Saibanshu Minji No. 209, at 347; 2002 (O) No. 1963, judgment of the First Petty Bench of the Supreme Court of March 31, 2003, Saibanshu Minji No. 209, at 397; 2004 (O) No. 992, judgment of the First Petty Bench of the Supreme Court of October 14, 2004, Saibanshu Minji No. 215, at 253; 2008 (Ku) No. 1193, decision of the Second Petty Bench of the Supreme Court of September 30, 2009, Saibanshu Minji No. 231, at 753, etc.) In particular, the abovementioned judgment of the First Petty Bench of the Supreme Court of March 31, 2003, and rulings made by this court thereafter can be understood as barely maintaining the conclusion in favor of the constitutionality of the Provision, if the concurring opinions attached thereto are taken into consideration.
H. Some of the concurring opinions attached to this court's previous rulings mentioned in G. above pointed out that in order to revise the Provision, it was necessary to make a comprehensive decision while paying attention to the consistency with other related provisions regarding inheritance, marriage, parent-child relationship, etc. as well as to the entire framework of the family and inheritance system, and caution would be required for setting the time at which such revision was to take effect and defining the scope of application of the revised provision. On the basis of this, said opinions stated that those matters mentioned therein can be achieved appropriately through the legislative measures taken by the Diet or that the Diet was expected to take the necessary legislative measures quickly.
These concurring opinions were expressed probably because of the great impact of the circumstantial factors mentioned in E. above, that is, there were movements toward the review of the Provision intermittently since 1979 and revision bills were drafted before and after the 1995 Grand Bench Decision were rendered. Be that as it may, it is not necessarily clear which elements of the family and inheritance system are associated with the review of the discriminatory treatment against children born out of wedlock in terms of the statutory share in inheritance. The revision bill outline and the revision bill mentioned in E. above included equalization of the statutory share in inheritance between children born in wedlock and children born out of wedlock but did not aim to revise the spouse's share in inheritance or other related elements of the family and inheritance system as a means to achieve such

equalization of the statutory share in inheritance. Hence, the necessity to consider the consistency with the related provisions cannot be the reason for maintaining the Provision as a given. The abovementioned concurring opinions cannot be understood as suggesting that it is impossible to declare unconstitutionality of the Provision by way of a judicial decision. In this respect, even if the Provision is declared unconstitutional by way of a judicial decision, it is still possible to achieve balance with the assurance of legal stability, as explained in detail in Section 4 below.

As mentioned in (2) above, the 1995 Grand Bench Decision also took into consideration that the provisions concerning the statutory share in inheritance, including the Provision, function as supplementary rules to be applied in cases such as in the absence of designation of the shares in inheritance by a will. However, in light of such supplementary nature of the Provision, it is not unreasonable at all to equalize the statutory share in inheritance between children born in wedlock and children born out of wedlock, and what is more, in relation to the statutory reserved share, which cannot be violated even by a will, the Provision is apparently a discriminatory rule set by law, and the very existence of the Provision has the risk of provoking a sense of discrimination against children born out of wedlock upon their birth. In consideration of these points, it must be said that the supplementary function that the Provision has as mentioned above is not a material factor in judging its reasonableness.

(4) None of the changes in various matters, etc. associated with the reasonableness of the Provision can solely be a decisive reason for judging the distinction in terms of the statutory share in inheritance under the Provision. However, giving comprehensive consideration to circumstances such as the trends in society seen from the time of the 1947 Civil Code revision up until now, the diversification of the forms of family in Japan and the changes in people's perceptions resulting therefrom, the legislative trends in other countries as well as the content of the treaties ratified by Japan and the criticism given by the committees set up under these treaties, the changes in the legal system, etc. relating to the distinction between children born in wedlock and children born out of wedlock, and the problems, etc. repeatedly pointed out in the rulings handed down by this court thus far, it can be said to be an evident fact that respect for individuals in a family, which is a collective unit, has been recognized more clearly. Even if the legal marriage system itself is entrenched in Japan, it is now impermissible, as a result of such change in the recognition, to cause prejudice to children by reason of the fact that their mother and father were not in a legal marriage when they were born —a matter that the children themselves had no choice or chance to correct. Rather, it can be said that a notion that all children must be given respect as individuals and that their rights must be protected has been established.

Putting all points mentioned above together, it must be said that even in consideration of the discretionary power vested in the legislative body, the distinction in terms of the statutory share in inheritance between children born in wedlock and children born out of wedlock had lost reasonable grounds by the time when P's inheritance commenced as of July 2001 at the latest.

Consequently, it must be concluded that the Provision was in violation of Article 14, paragraph (1) of the Constitution as of July 2001 at the latest.

4. De facto binding force as a precedent

The decision of the present case concludes that the Provision was in violation of Article 14, paragraph (1) of the Constitution as of July 2001 at the latest. It does not intend to modify the conclusion drawn by the 1995 Grand Bench Decision and the subsequent petty bench judgments and decisions mentioned in 3(3)G. above, which affirmed the constitutionality of the Provision at the time of the commencement of inheritance in the earlier cases in which inheritance had commenced before July 2001.

On the other hand, in principle, any law that is in violation of the Constitution is void, and the effect of any action taken in accordance with such law should be annulled. If that is the case, since the Provision is judged by the decision of the present case to have been in violation of Article 14, paragraph (1) of the Constitution as of July 2001 at the latest, the Provision is deemed to have been void from July 2001 and onward due to the de facto binding force as a precedent, and the effect of judicial decisions and agreements, etc. subsequently made in accordance with the Provision would also be annulled. However, the Provision forms part of the Civil Code, which is a fundamental law addressing people's lives and family relationships, and regulates inheritance which takes place as a common phenomenon in everyday life. As about 12 years have passed since July 2001, it is easily presumed that during this period, there have been a number of cases in which division of estate is conducted on the assumption of the constitutionality of the Provision, and new rights and interests have been widely formed on the basis of the results of such division of estate. In particular, the judgment of unconstitutionality of the Provision made by the decision of the present case is the first action taken by this court to declare the Provision to be unconstitutional by reason that the Provision lost its reasonableness in light of the changes in social circumstances over a long period of time. Nevertheless, if the judgment of unconstitutionality made by the decision of the present case is deemed to have a de facto binding force as a precedent and affect the division of estate, etc. conducted thus far, and ultimately have an effect on already solved cases, this would amount to considerable harm to legal stability. Legal stability is a universal requirement inherent in law, and it should therefore be said that the judgment of unconstitutionality made by this court is required to have only a limited binding force as a precedent, thereby achieving balance with the assurance of legal stability. This point could raise an issue in respect of whether or not it is appropriate to declare the Provision to be unconstitutional by way of a judicial decision (see 3(3) H. above).

From the viewpoints explained above, although it is inappropriate to overturn at present such legal relationships that have already been fixed among the parties concerned by means of judicial decisions, agreement, etc., if legal relationships among the parties concerned have not reached that stage, it may be appropriate to make their legal relationships fixed without applying the Provision, which is

judged by the decision of the present case to be unconstitutional and void. With regard to divisible claims or divisible obligations which are to be divided according to the statutory share in inheritance upon the commencement of inheritance by operation of law, the application of the provisions concerning the statutory share in inheritance can be an issue in the course of receiving payment from obligors or making payments to obligees. Therefore, it is inappropriate to consider that the legal relationships among the parties concerned have been fixed as a result of the division of such claims and obligations according to the share in inheritance set by the Provision immediately upon the commencement of inheritance. It is rather appropriate to consider that the legal relationships among the parties concerned have been fixed only when it can be said that the dispute among the parties concerned has been settled by the final judicial decision or the explicit or implicit agreement, etc. and there is no need any longer to apply the Provision.
Consequently, it is appropriate to construe that the judgment of unconstitutionality made by the decision of the present case has no effect on any legal relationships that have already been fixed by rulings or other judicial decisions on division of estate, agreements on division of estate or other agreements, etc. made on the assumption of the Provision with regard to other cases of inheritance that have commenced during the period after P's inheritance commenced until the decision of the present case is rendered.

5. Conclusion
For the reasons stated above, with regard to P's inheritance that commenced in July 2001, the Provision should be judged to be inapplicable because it is in violation of Article 14, paragraph (1) of the Constitution and therefore void. The determination of the court of prior instance mentioned above, which is contrary to this conclusion, was made on the basis of the erroneous interpretation of said paragraph and therefore cannot be affirmed. The arguments by Appellant Y1 and the appeal counsel for Appellant Y2 are well-grounded on this point, and without needing to make a determination on other points argued by them, the decision in prior instance should inevitably be quashed. We remand the case to the court of prior instance in order to have the case further examined.

Therefore, the decision has been rendered in the form of the main text by the unanimous consent of the Justices. There are concurring opinions by Justice KANETSUKI Seishi, Justice CHIBA Katsumi, and Justice OKABE Kiyoko, respectively.

The concurring opinion by Justice KANETSUKI Seishi is as follows.
The holding of this court regarding the de facto binding force of this decision, included in the court opinion, is the first holding indicated by this court on that issue, and it will have significance as a general rule for the future and therefore can provoke various arguments. In view of this, I would like to present my understanding on this issue.
How is it possible to validate the view presented in this decision? To consider this question, one should take, as a premise, what is generally referred to as the incidental judicial review system and the doctrine of case-by-case effect when applied to a judgment of unconstitutionality, which have been established as rules for the Japanese judicial review system.
The incidental judicial review system is a system in which the Supreme Court makes a judgment on the issue of constitutionality of a law or regulation to the extent necessary for solving a specific case. The matter raised as an issue in connection with the inheritance disputed in the present case is the provision on the statutory share in inheritance that had a substantive effect at the time when said inheritance commenced. Therefore, the judicial review on this matter should be conducted as of the time of the commencement of that inheritance. Hence, this decision made a judgment on the issue of constitutionality of the Provision as of the time when the inheritance disputed in the present case commenced.
Under the doctrine of case-by-case effect, a judgment of unconstitutionality is effective only with regard to the case concerned, and even a judgment of unconstitutionality made by the Supreme Court does not have such effect as generally nullifying the provision that it has judged to be unconstitutional. Therefore, unless such provision is removed from a law or regulation or revised by legislation, courts in charge of other cases have to make a judgment on the issue of constitutionality while taking the existence of said provision as a given. Thus, the Supreme Court's judgment of unconstitutionality under the doctrine of case-by-case effect only has a de facto binding force as a precedent in relation to other cases. Admitting that, since it is judged by the Supreme Court that the Provision was in violation of Article 14, paragraph (1) of the Constitution at the time of the commencement of the inheritance disputed in the present case at the latest, it would be appropriate, from the perspective of equal application of law, for courts in charge of other cases addressing the inheritance that commenced thereafter to judge the Provision to be unconstitutional in accordance with said judgment by the Supreme Court. In this sense, the judgment of unconstitutionality made by this decision is effective retroactively in principle.
However, the de facto binding force as a precedent is admitted in order to meet the request of fair and equal application of law by giving the same solution to the same type of cases. Assuming so, an exception to such binding force based on reasonable grounds may be allowed as in the case that the principle of equality under Article 14, paragraph (1) of the Constitution allows an exception based on reasonable grounds. In addition, the de facto binding force as a precedent is also intended to achieve legal stability by giving the same solution to the same type of cases. If admitting such binding force would rather harm legal stability, its function should be diminished accordingly. As explained in the court opinion, if the judgment of unconstitutionality made by this decision is allowed to affect the effect of the division of estate, etc. already conducted, it would amount to considerable harm to legal stability. In particular, when the Supreme Court makes a judgment of unconstitutionality regarding a law or regulation that the court has previously judged constitutional, as it happens in

the present case, annulling the effect of actions already taken while relying on the precedents of earlier cases would cause greater harm to legal stability.
There is a view that whether or not the retroactive effect of a legal interpretation given by the court can be restricted largely depends on issues such as whether the legal interpretation stays within the confines of the discovery of the right law or goes beyond that and functions as the creation of a new law. Indeed, it must be said that an act of defining the scope of application of a specific legal interpretation apart from the case concerned may have something in common with a legislative act. Those who think that a legal interpretation by the court should stay within the confines of the discovery of the right law would be negative about restricting the retroactive effect of a legal interpretation. In the first place, some might question whether it is appropriate for the Supreme Court to indicate its view on how to apply the law in question to other cases. However, it can be understood that in this decision, the court indicates its holding on this issue, considering that it is inappropriate to judge the Provision to be unconstitutional without showing how to avoid an expected confusion that may arise as a result of such judgment, and thus said holding is closely related to the judgment of unconstitutionality and therefore it should not be regarded merely as obiter dictum. Furthermore, with regard to the view that a legal interpretation by the court must stay within the confines of the discovery of the right law, on actual occasions where the court makes a legal interpretation, it may be difficult in general to avoid accompanying something equivalent to legislation, although the degree and manner of such act would differ depending on the case. In this respect, it may not be appropriate to put such limitation as mentioned above to the method of legal interpretation by the court. In the United States, where the tradition of common law is maintained, prospective overruling is allowed.
Prospective overruling is not an issue to be discussed only in the context of a constitutional judgment, but as mentioned above, the requirement of the assurance of legal stability emerges as a more serious and broad issue in the course of changing a previous constitutional judgment of a provision of a law or regulation. In view of the magnitude of its influence, judicial review of a law or regulation is sometimes made with a reserved attitude, such as interpreting a law or regulation narrowly and constitutionally. Where the Supreme Court restricts the retroactive effect of its judgment of unconstitutionality, it is equal to attempting to limit the scope of such judgment, and in a sense, the Supreme Court can be regarded as showing a reserved attitude to exercise the power to make judicial review.
In any event, since the Supreme Court's judgment of unconstitutionality only has a case-by-case effect, such judgment, including the court's holding on the retroactive effect, is deemed to be effective when it is respected and followed by other courts, etc. as a judgment with a de facto binding effect as a precedent. In this sense as well, it is different from legislation. However, in reality, it is impossible to predict all possible disputes that may arise in the future, and this decision does not exhaustively mention in which case the judgment of unconstitutionality will not have an effect. Therefore, while following the holding indicated in this decision as a guideline, each court will have to try to find an appropriate solution to the case concerned by making a proper judgment on matters, including whether or not it needs to make a judgment of unconstitutionality.

The concurring opinion by Justice CHIBA Katsumi is as follows.
I would like to give some comments with regard to the relationship between the holding included in the court opinion as to the retroactive effect of the judgment of unconstitutionality in the present case, and the power to make judicial review vested in the Supreme Court.
1. The court states in its opinion that the Provision was unconstitutional at the time when the inheritance disputed in the present case commenced at the latest and it has been void thereafter. With regard to the point as to whether the judgment of unconstitutionality in the present case has the de facto binding force as a precedent, the court holds that this judgment of unconstitutionality is not effective in relation to already solved cases, thereby limiting the scope of its effect to a certain extent so as not to cause detriment to legal stability (hereinafter referred to as the "holding on the retroactive effect of the present case").
It is a general understanding that the power to make judicial review vested in the Supreme Court of Japan is subject to the incidental review system and the effect of a judgment of unconstitutionality made through the exercise of this power is governed by the doctrine of case-by-case effect. Based on this understanding, said holding can be regarded as an unusual one because it results in indicating in advance, inter alia, whether or not the judgment of unconstitutionality in the present case has a retroactive effect and to what extent it has such effect as matters relating to how to handle the same type of cases in the future, beyond the bounds of the handling of the specific case concerned, even though it addresses these matters with a view to explaining the de facto binding force as a precedent. However, considering that the action to judge a law or regulation to be unconstitutional and void usually poses a risk of overturning a number of legal relationships, etc. that have been formed in accordance with that law or regulation, the court indicates said holding as a sort of step to avoid such a situation that would considerably harm legal stability. Hence, such holding is basically an explanation that always needs to be given by the Supreme Court when it judges a law or regulation to be unconstitutional and void. In this sense, the holding on the retroactive effect of the present case should be indicated not as obiter dictum but as ratio decidendi.

2. Next, when a legislative action is to be taken to abolish a law or regulation that is judged to be unconstitutional and void, arrangements are expected to be made as necessary with regard to the effective date of the revision law to abolish the law or regulation or the transitional measures by way of attaching supplementary provisions to the revision law, in consideration of matters such as the adverse effect of harming legal stability. The holding on the retroactive effect of the present case is quite similar to this action (the legislative action to make arrangements by way of attaching

supplementary provisions to the revision law), and in this respect, there may be a concern that whether such holding is possible or appropriate as a judicial action is called into question.
Since the power to make judicial review that the Constitution vests in the Supreme Court includes laws and regulations as its target, if the Supreme Court judges a law or regulation to be unconstitutional and void, such judgment would have an extensive de facto binding force as a precedent even under the doctrine of case-by-case effect, and it is naturally presumed that a situation that would undermine legal stability might take place unless some kind of measure is taken. Considering this, in order to avoid such a situation, the function to limit, inter alia, cases where a judgment of unconstitutionality should have a retroactive effect, as well as the time from when and to what extent it should be deemed to be effective retroactively, which can be said to be similar to a legislative action to decide matters such as the effective date of the revision law by way of its supplementary provisions, should have been supposed to be included from the beginning in the Supreme Court's power to make judicial review. The holding on the retroactive effect of the present case represents a part of the principle or action that is naturally inherent in the Supreme Court's exercise of its power to make judicial review or that is supportive of a function or system incidental to such exercise of power. It should be understood that the Constitution in advance approves of this as a judicial action in the form of the exercise of the power to make judicial review.

The concurring opinion by Justice OKABE Kiyoko is as follows.
In light of the facts of the case, I would like to give some comments with regard to the issue of the constitutionaltiy of the Provision and the attitude to respect legal marriage in Japan.
1. The 1995 Grand Bench Decision stated that if, as a result of the adoption of the legal marriage system under the Civil Code, children born in wedlock and children born out of wedlock are differentiated and subject to different rules in terms of matters such as the formation of a parent-child relationship, such consequence must be tolerated. As for the requirement for the formation of a parent-child relationship, a child conceived by a wife during marriage shall be legally presumed to be a child of her husband upon birth, without any procedure (Article 772 of the Civil Code). In this respect, such child is different from a child who is born out of wedlock but whose relationship with his/her father is later formed as a result of filiation. This distinction is based on the marital relationship between the mother and the father and is therefore considered to be reasonable. However, the provisions concerning the share in inheritance relate to the effect of a parent-child relationship. The conclusion that children born in wedlock should be given preferential treatment compared to children born out of wedlock cannot be accounted for as a conclusion with logical necessity, in the same sense that the abovementioned requirement for the formation of a parent-child relationship has grounds.
The respect for a marriage is respect for a marital unit involving a child born in the marital relationship. There is a view that the respect for a marital unit necessarily represents respect in terms of the share in inheritance. However, as explained in the court opinion, the inheritance system is defined while taking various matters into comprehensive consideration and these matters change along with the times. Therefore, even if the Civil Code embraces such view and the Provision is a proof of this fact, constant review would be required as to whether or not it is permissible under the Constitution to adhere to the policy of respecting a marital unit in the context of inheritance by awarding a preferential share in inheritance to the decedent's child born in wedlock compared to the same decedent's child born out of wedlock.

2. As the substantive grounds for the idea that a marital unit consisting of husband and wife and their children should be protected, there is a view that property obtained by the married parties during the period of their marriage is in substance property that belongs to the marital unit and it should basically be inherited by their children born in their marital relationship who are members of the marital unit. It is true that husband and wife work and cooperate with each other to maintain their marital unit (husband and wife have a legal obligation to assist each other), and their cooperation would require their long-term, constant endeavor. It is also a fact in society that in most cases, husband and wife respectively work to make a living, do housework, and perform various other things such as socializing with their relatives and neighbors, and in addition to these, they are engaged in bringing up their children, which imposes physical and economic burden on them over a long period of time, and they may also be committed to taking care of their aged parents or other relatives. Children born in wedlock are supported and raised to be grown up through such cooperative work of husband and wife, and normally, the children themselves are in effect expected to provide cooperation to the married couple accordingly, although the children's cooperation to their parents may be different in nature and degree from the cooperation between husband and wife.
This has basically been considered to be a picture of a family in Japan, and the attitude to respect legal marriage can be said to have been widely shared among Japanese people based on such picture of a family. In 1988, when the inheritance on which the 1995 Grand Bench Decision was rendered had commenced, it is considered that the abovementioned picture of a family had prevailed widely and provided support for the reasonableness of the Provision. Even at present, this picture of a family seems to still prevail to a certain extent, and under such circumstances, it is understandable for the members of a marital unit to have a negative feeling about setting the share in inheritance of children born out of wedlock, who do not belong to the marital unit, as equal to that of children born in wedlock, who are members of the martial unit.
However, as pointed out in the court opinion, the abovementioned picture of a family has changed due to various reasons. Moreover, it should be noted that children born out of wedlock do not have a choice to become members of a martial unit from the very beginning of their life. Of course, there are such cases where the mother and

father choose not to legally marry of their own will and their children therefore cannot obtain the status of children born in wedlock although in effect they live as a marital unit. However, in most cases, the reality is that children born out of wedlock are placed in the position from the very beginning of their life in which they are deprived of chances to participate in or work to maintain the marital unit even if they want to. It can be said that the changes in circumstances that have occurred in and outside Japan since the 1947 Civil Code revision, as pointed out in the court opinion, have led to establish an idea that children should be respected as individuals, and although there are sufficient grounds for protecting marital units, these changes in circumstances have diminished the reasonableness of the policy of giving preferential treatment to marital units necessarily and generally compared to non-martial units for that purpose, and said changes have ultimately diminished the reasonableness of the policy of awarding a preferential share in inheritance to children born in wedlock, who are members of marital units, compared to children born out of wedlock, who do not belong to marital units, for the purpose of protecting marital units.
From this standpoint, I should say that even though the attitude to respect legal marriage widely prevails among Japanese people as a whole, it is no longer appropriate to make a distinction in terms of the share in inheritance between children born in wedlock and children born out of wedlock.

Presiding Judge

Justice TAKESAKI Hironobu
Justice SAKURAI Ryuko
Justice TAKEUCHI Yukio
Justice KANETSUKI Seishi
Justice CHIBA Katsumi
Justice YOKOTA Tomoyuki
Justice SHIRAKI Yu
Justice OKABE Kiyoko
Justice OTANI Takehiko
Justice OHASHI Masaharu
Justice YAMAURA Yoshiki
Justice ONUKI Yoshinobu
Justice ONIMARU Kaoru
Justice KIUCHI Michiyoshi

(This translation is provisional and subject to revision.)

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SYMPOSIUM: RELIGIOUS LEGAL THEORY: SEPARATION OF CHURCH AND STATE IN JAPAN: WHAT HAPPENED TO THE CONSERVATIVE SUPREME COURT?

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LEXISNEXIS SUMMARY:
... Introduction Since around the turn of the millennium, observers of Japanese law and politics have been concerned about the disconcerting signs that Japanese politicians are increasingly nationalistic: Ex-Prime Minister Yoshiro Mori described Japan as a "divine nation centering on the Emperor" in his speech at a gathering of pro-Shinto lawmakers in 2000; his successor, Junichiro Koizumi, repeatedly visited the controversial Yasukuni Shrine throughout his term in office, triggering an outcry from Asian neighbors. ... Prior to Anzai, the vast majority of Justices had been appointed by the dominant Liberal Democratic Party ("LDP"), the party with the greatest affinity for Shintoism. ... The District Court applied the Kakunaga test, found that granting permission to use the premises to a religious group amounted to a religious activity proscribed under Paragraph 3 of Article 20, and concluded that the mayor must demand of the neighborhood association that the city property be kept free of religious objects or symbols. ... Four Justices wrote a joint opinion concurring in the result only, and maintaining that the Sapporo High Court's findings of facts - on which the majority based its judgment - were too insufficient and one-sided to support the Court's conclusion as to the constitutionality of the shrine's presence on municipal land, thereby calling for a remand to examine the evidence more thoroughly and consider "all the circumstances" in the true sense of the word. ... This was perhaps because, first, before the beginning of the twentieth century, judges deciding constitutional claims did not have enough accumulation of case law or constitutional theories to rely on, as there had been few decisions about individual rights and liberties, and second, on the part of the society as well, the idea of bringing a lawsuit to defend one's constitutional rights was not so common among the general public. ... In the case of Japan, the circumstances similar to those of the United States before the era of civil rights still exist today. ... An illegitimate child like the plaintiffs in Anonymous can now acquire Japanese nationality ipso jure by simply filing with the Minister of Justice, stating that his or her father is a Japanese national. ... The issues dealt with in cases decided after around 1990 are more substantive than those identified in earlier cases in terms of their constitutional significance: voting rights, prohibition on discrimination based on immutable characteristics, and the separation of church and state, which is meant to solidify the protection of religious liberty, according to Kikuya.

TEXT:
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Introduction

Since around the turn of the millennium, observers of Japanese law and politics have been concerned about the disconcerting signs that Japanese politicians are increasingly nationalistic: Ex-Prime Minister Yoshiro Mori described Japan as a "divine nation centering on the Emperor" [1] in his speech at a gathering of pro-Shinto lawmakers in 2000; his successor, Junichiro Koizumi, repeatedly visited the controversial Yasukuni Shrine throughout his term in office, [2] triggering an outcry from Asian neighbors.

The political climate in Japan has changed considerably over the past several years. Gone are the ultraconservatives' proposals for constitutional revision to strengthen the power of the **[*448]** Emperor, and arrived are an unprecedented number of tourists from around the world. [3] Economic partnership agreements with Indonesia and the Philippines took effect in 2008, creating a flow of candidates for nurses and care workers moving into Japan. [4] Not a single day passes by without news or comments on Asia-Pacific integration. Japan finally seems to be opening its doors and minds to its surrounding nations.

In Kikuya v. Taniuchi, [5] the Supreme Court of Japan, which appeared so reluctant to exercise its power of judicial review in the past, joined this tide and ruled that a Shinto shrine's use of city-owned-land free of charge was impermissible under Article 89 of the Japanese Constitution, a provision which prohibits the use of public resources for religious purposes. Until this decision was made, the purpose and effect test modeled after Lemon v. Kurtzman [6] had been in place in case law, but the Court's own narrow formulation of the doctrine had essentially prevented Japanese taxpayers from successfully litigating separation of church and state cases. Since the adoption of the test in 1977, there was only one judgment invalidating governmental action in this field.

In applying the much more flexible "totality of the circumstances" analysis, the majority in Kikuya demonstrated its awareness of the highly political context of the case and of its possible international implications. The motivation for judicial activism seems clear: the perception of the need for increased protection of fundamental constitutional values and for eradication of pre-modern customs in order to "occupy an honored **[*449]** place in an international society striving for ... the banishment of ... oppression and intolerance" [7] as outlined in the Preamble to the Constitution of Japan.

This Article first introduces the Japanese constitutional scheme as it relates to separation of church and state and explains the case law governing this area. It then compares this constitutional scheme with the new approach taken in Kikuya. Following the discussion about the Japanese Supreme Court's recent willingness to break with precedent in high-profile cases involving constitutional issues, it concludes with a suggestion that the development is best

understood as an example of the judiciary's self-conscious efforts to rectify unconstitutional governmental practice in light of the progress of globalization. Indicating that the Japanese Supreme Court is prepared to fulfill its mandate to the fullest extent, Kikuya has signaled a new era for law and religion in Japan, whose constitution is a sister to the United States Constitution but whose people's religious consciousness stands in sharp contrast with that in the United States. [8]

I. The Japanese Constitution and the Separation of Church and State

From a perspective of comparative law, Japan is a "mixed jurisdiction" in the sense that its legal system is built upon dual foundations of common-law and civil-law materials. [9] While many of the other so-called mixed jurisdictions are typically former French or Dutch colonies that were later occupied or acquired by Britain or the United States - which is the case in places like Louisiana, Quebec, South Africa, and Sri Lanka - Japan does not share such history. It follows the general pattern usually found **[*450]** in mixed legal systems, however, in that its private law has been principally rooted in the civil law tradition, whereas its public law is primarily Anglo-American. [10] This is because Japan created its modern legal system following the continental European model in the nineteenth century, but its constitution was completely revised under the American influence in 1946.

This means that the system of judicial review was introduced to Japan after the Second World War. It also means that, realistically, the protection of individual rights and liberties started in the latter half of the 1940s, because the previous Japanese constitution was modeled after the Constitution of the Kingdom of Prussia of 1850, which was highly autocratic in nature. Under the Constitution of the Empire of Japan, adopted in 1889 and often referred to as the Meiji Constitution, [11] all the powers were in the hands of the Emperor, [12] checks and balances among governmental branches were virtually nonexistent, and reservations were attached to the guarantee of rights and liberties. [13] According to its text, Japanese "subjects" enjoyed the freedom of religion, but only "within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects." [14]

[*451] Their duties as subjects turned out to be quite onerous: Shintoism, whose highest authority is the Emperor, [15] was made a de facto national religion, [16] Shinto shrines all over the country were granted a privileged status, and they became a mechanism of conveying the will of the Emperor to his subjects. Selfless devotion to the sun goddess Amaterasu Omikami, the mythical ancestor of the Imperial family, was demanded. A special statute was passed in the Imperial Diet in 1906 to let the national treasury fund the operating expenses of more than two hundred Shinto shrines of major importance, [17] and an Imperial edict issued that same year directed all the prefectures, cities, towns, and villages in Japan to make seasonal offerings to Shinto shrines in their domain. [18] The government did this by explaining that Shintoism was not a religion, [19] but a Japanese tradition or convention that every person should abide by.

All this changed when the German-style Meiji Constitution was replaced by the present constitution, pursuant to the Potsdam Declaration and subsequent suggestions made by General Douglas MacArthur, the Supreme Commander for the Allied Powers (the "SCAP"). The Constitution of Japan, which was proclaimed in 1946 and came into effect in 1947, provides that the Supreme Court has the power to determine the constitutionality of any statute or governmental action [20] and that law or governmental action that is contrary to the Constitution shall have no legal force or validity. [21] It has an extensive list of individual rights and liberties as well, [22] thanks to the meticulous **[*452]** and passionate efforts of U.S. legal advisors working under the SCAP, including Courtney Whitney and Milo E. Rowell. The spirit of the rule of law and the essence of Marbury v. Madison [23] are explicitly embodied into the text of the Constitution, as well as other related political ideals such as representative democracy [24] and separation of powers. [25]

Mindful of the disastrous consequences of commingling politics with religion before and during the war, the present Constitution pays special attention to the issue of separation of church and state. [26] Paragraph 1 of Article 20 states the basic principle that no religious organization shall receive any privileges from the State nor exercise any political authority, while the following paragraph specifies that no person shall be compelled to take part in any "religious act, celebration, rite or practice." [27] Paragraph 3 of Article 20 draws a corollary therefrom and sets a limit on governmental conduct: "The State and its organs shall refrain from religious education or any other religious activity." [28] Finally, Article 89 elaborates the point as it relates to finance by providing that "no public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority." [29]

[*453] The leading case in this area is Kakunaga v. Sekiguchi, [30] in which the Japanese Supreme Court faced the question of whether the municipal government could remunerate Shinto priests for performing a ritual with some religious significance. The dispute started when the City of Tsu held a groundbreaking ceremony called jichinsai on the occasion of constructing a city gymnasium. Originally a Shinto rite intended to calm the god of the earth, jichinsai is arguably a custom firmly established in most parts of Japan. Many landowners, regardless of their religious affiliation, have this ceremony conducted whenever construction begins on their property, perhaps because carpenters are often reluctant to set to work without a proper jichinsai, for fear that it might anger the god of the earth and lead to an accident on site. [31]

A communist member of the city council sued the mayor and sought the return of the priests' honoraria and other expenses for the ritual, arguing that such expenditure out of public funds was unlawful. The Japanese Supreme Court dismissed the suit, on the grounds that jichinsai was mostly secular and did not violate the Constitution. The Court emphasized at the outset that a total separation of religion and the State was almost impossible, and that an attempt to realize it would verge on the absurd, calling into question the constitutionality of government subsidies for all private schools including religiously affiliated schools, for example. Accordingly, the Court interpreted Paragraph 3 of Article 20 as prohibiting not all governmental contact with religion, but only that which exceeded reasonable limits.

[*454] The majority, consisting of ten Justices out of fifteen, went on to formulate a test to determine whether the contact was within reasonable limits. Under Kakunaga, governmental conduct falls under Paragraph 3 of Article 20 only when it has some religious meaning as its purpose and its effect is to "promote, subsidize, or, conversely, to interfere with, or oppose religion." [32] The Court concluded that the groundbreaking ceremony was not a religious activity prohibited by Paragraph 3 of Article 20, because its purpose was to "ensure a stable foundation and safe construction" [33] and it could not possibly have the effect of "promoting or encouraging Shinto or of oppressing or interfering with other religions." [34] The Justices explained that it was unlikely that a secularized ritual such as jichinsai would "raise the religious consciousness of those attending or of people in general or lead in any way to the encouragement or promotion of Shinto." [35]

Kakunaga was decided in 1977. [36] It has been pointed out that there are echoes of Lemon v. Kurtzman, a 1971 decision, in its purpose and effect test. [37] Despite the similarity in appearance, however, the Kakunaga test is much harder to meet, as there is no entanglement prong and a litigant must demonstrate that the governmental conduct in question has a religious purpose and an effect of promoting or opposing religion in order to prevail. The government enjoys the benefit of the presumption of constitutionality under Kakunaga.

[*455] Applying this standard, the Japanese Supreme Court subsequently rejected most of the petitions asking it to declare governmental action inconsistent with Paragraph 3 of Article 20. In Japan v. Nakaya, [38] a Christian wife of a deceased member of the Ground Self-Defense Force ("SDF") sought damages for his enshrinement in a Shinto shrine without her consent. The Court succinctly rejected her claim, stating that the government's secretarial support for the ex-servicemen's association in its application for the enshrinement of the plaintiff's husband was for the purpose of "raising the social status and morale of SDF members" [39] and "would not be considered by the general public as having the effect of the State drawing attention to a particular religion, or sponsoring, promoting or encouraging a specific religion or suppressing or interfering with a religion." [40] Likewise, a city's reconstruction of a monument to honor the memory of those who were killed in the war was found to be secular in purpose and neutral in its effect; [41] so was another city's granting permission for a group of residents' erection of a stone statue of a Buddhist saint on a parcel of land owned by the city without paying any

rental or other consideration. [42]

[*456] The only exception to this trend came in 1997. In Anzai v. Shiraishi, [43] the Japanese Supreme Court held that it was a violation of Paragraph 3 of Article 20 for a prefectural governor to use taxpayers' money for offerings to Shinto shrines. The majority, composed of ten Justices, applied the Kakunaga test and found the donation unconstitutional; three Justices concurred in the result, and the remaining two dissented.

Concurring opinions in Anzai are illuminating. Justice Itsuo Sonobe [44] - who was an administrative law professor before coming to the Court - suggested that he would apply Article 89, instead of Paragraph 3 of Article 20, and find the offerings automatically invalid; he questioned the propriety of some of the earlier decisions using the Kakunaga test inadvertently in the context of Article 89. The other two Justices maintained that Kakunaga had been wrong from the beginning in that it allowed government involvement in religion unless proven to be excessive. Indeed, the correct interpretation of Paragraph 3 of Article 20 should be that such involvement is prohibited across the board unless justified by exceptional circumstances. Although a decision invalidating governmental action under a deferential standard of review - particularly when accompanied with forceful concurring opinions - may often be a signal that the Court is willing to adopt a stricter test in the future, the exact scope of Anzai was not clear, partly because of its timing: nine Justices out of thirteen who considered the governor's action unconstitutional were those appointed by either the short-lived 1993 coalition government or the following Socialist-led coalition **[*457]** government. [45] Prior to Anzai, the vast majority of Justices had been appointed by the dominant Liberal Democratic Party ("LDP"), the party with the greatest affinity for Shintoism.

II. Kikuya v. Taniuchi: A Turning Point

Kikuya v. Taniuchi, [46] decided January 2010, may be an extension of the suggestions of the concurring Justices in Anzai. The essential facts are undisputed. The City of Sunagawa, located in Hokkaido, the northernmost major island of Japan, has a community center on its land. Being otherwise perfectly ordinary, it has a few peculiar features: in front of the one-storied building is a torii, a double T-shaped stone structure representing a gateway to a Shinto shrine, approximately fifteen feet in width and twelve feet in height. It is a fixture generally believed to demarcate the sacred realm from the secular. There is a plaque attached to the torii, which reads "Sunagawa Sorachibuto Shrine." The community center behind the torii gate has two separate entrances, one that is for everyday use and the other for Shinto worshippers who come to pray on New Year's Day and during the Spring and Autumn Festivals, when Shinto priests are dispatched from a nearby shrine. Local Shinto believers regularly take care of the maintenance and cleaning of the part of the building used as a shrine, but they have never made any payment to the city for the use of its property.

A Christian resident sued the mayor in court, asking for a declaratory judgment that it was illegal for the mayor not to request the neighborhood association in charge of the management of the community center to remove the torii and all other facilities and equipment related to Shintoism. The District Court applied the Kakunaga test, found that granting permission to use the premises to a religious group amounted to a religious activity proscribed under Paragraph 3 of Article 20, and **[*458]** concluded that the mayor must demand of the neighborhood association that the city property be kept free of religious objects or symbols. The High Court affirmed. The Japanese Supreme Court affirmed in part and reversed in part, but it made it clear that the city's inaction was constitutionally impermissible. The only reason it reversed the judgment below was because it opined that the problem might well be solved by transferring the title of the property to the neighborhood association - an aggregate of private citizens - or charging them a reasonable rent. [47]

Interestingly, the Supreme Court did not discuss Paragraph 3 of Article 20 at all. Instead, it took a new approach to the issue and applied Article 89. Under the majority's view, when the State or a municipality lets a religious institution make use of public property free of charge, its constitutionality under Article 89 is determined by looking to all the circumstances - including the nature of the religious institution in question, how its use of public property started, what kind of benefits are provided, and how the general public views the situation. The Court made only a passing reference to its precedent: It simply stated that its interpretation of Article 89 is consistent with both Kakunaga and Anzai.

After examining the totality of the circumstances, the majority concluded that the city's inaction was unconstitutional under Article 89. It found that the religious institution in question was nothing but a Shinto shrine, and that the shrine was continuously receiving benefits not enjoyed by others for an extended period of time. Although the way the use of public property had started was not completely out of reason, for a substantial portion of the land had been donated to the city by one of its residents - supposedly a Shinto believer - with the understanding that the shrine could continue to operate there, the general public would inevitably view the state of affairs as the city giving special benefits and support to Shintoism. [48] The Court therefore held that the entanglement between the city and the shrine or Shintoism exceeded reasonable limits and was in **[*459]** contravention of Article 89. Additionally, it suggested that the status quo might also be seen as a violation of Paragraph 1 of Article 20, which forbids privileges for religious organizations. The case was remanded to the Sapporo High Court for reconsideration of remedies, because the eight Justice majority did not agree with the lower court's ruling that the mayor must urge the neighborhood association to remove all things religious from the city property. The city could, for example, ameliorate the constitutional problem by collecting a rent commensurate with the market rate.

Four Justices wrote a joint opinion concurring in the result only, and maintaining that the Sapporo High Court's findings of facts - on which the majority based its judgment - were too insufficient and one-sided to support the Court's conclusion as to the constitutionality of the shrine's presence on municipal land, thereby calling for a remand to examine the evidence more thoroughly and consider "all the circumstances" in the true sense of the word. [49] Two Justices dissented, but one of them was of the opinion that he would uphold the judgment below in its entirety, without remanding the case. Only one Justice said that he would rather declare it in fact constitutional for the city to let Shinto believers continue to use its property free of charge. [50]

Bypassing Kakunaga by relying on Article 89, Kikuya effectively changed the rules of the game for lawsuits aimed at eliminating excessive government involvement with religion. The Japanese Supreme Court has established a new framework for reviewing the constitutionality of governmental action in this area, under which it can more freely fine-tune the thresholds according to individual factual backgrounds. The Justices' admonition to the mayor regarding his loose control and poor management of public resources has sent a shock wave from Hokkaido to Okinawa, as it is estimated that there are thousands of shrines that "continue to enjoy privileged, and so probably **[*460]** unconstitutional, access to municipal land" [51] in the country. It is also notable that many of the Court's earlier decisions concerning Paragraph 3 of Article 20 appear to be susceptible to overruling if they are to be reconsidered in light of Kikuya, for many of them involve the payment of money, the transfer of property, or the provision of services or other benefits. The discovery of Article 89's hidden potential may have a significant impact upon the actual day-to-day practice of local governments across Japan, and ultimately upon how Japan is perceived by outsiders living within its borders, as well as by the rest of the world - especially by neighboring Asian nations where Shintoism is still regarded as a symbol of militarism.

One vexing question remains: What about the national government's entanglement with religion? Here lies a fundamental contradiction. More than sixty years after the adoption of the United-States-inspired constitution, Japanese litigants are suffering from the remnants of the past, in the form of an inflexible understanding of administrative law and procedure imported from pre-war Germany, followed faithfully by fossilized judges and doctrinaires. The theory, still prevalent in practice, goes like this: as for the unlawful use of public funds by a prefecture or a municipality, any resident thereof can challenge it in court, since there is a provision in the Local Autonomy Law explicitly authorizing a citizen to bring an action. [52] In contrast, nowhere in the Japanese Gazette is there a statute recognizing the rights of taxpayers to sue the national government for such a wrong, unless associated with some other, more individualized harm for which redress is available.

As a result, Japanese taxpayers today find themselves in an anomalous position, where, with respect to exactly the same kind of governmental action, they must demonstrate that their own rights are infringed upon if they are to sue the State, whereas no such proof is necessary

If the defendant is a local government. The best example of the preposterousness of this approach can be seen in a 1995 decision of the Osaka High Court, which rejected a claim for a declaratory judgment that the expenditure of over 2.5 billion yen out of public coffers for daijosai, the first major Shinto ceremony conducted by the Emperor after his enthronement, was **[*461]** unconstitutional. [53] In an ironical dictum, the three judges unanimously pointed out that "it is evident that daijosai has a character as a Shinto ritual," [54] and that "there remains some doubt" [55] as to whether the disbursement would be constitutional if it were to be examined under Kakunaga. That did not affect the outcome of the case, however, for the governmental action in question did not impose material obligations or burdens on the plaintiffs, according to the Osaka High Court. [56]

Yet, it is also true that such incongruous decisions have brought to light the inadequacy of mechanical and formalistic jurisprudence. Citing Kurokawa v. Chiba Prefecture Election Commission, [57] in which the Supreme Court held despite the lack of a statutory basis enabling the plaintiff to file a suit that vote dilution through malapportionment violated the Equality Clause, [58] Hidenori Tomatsu - the foremost authority on Japanese constitutional law litigation - emphasizes that lawsuits to enforce the separation of church and state should be entertained against the national government, as well as the local ones, in order to promote constitutional values. [59] He also proposes that a new statute should be enacted to specify the procedures for seeking damages in tort or contract against the State, [60] considering that such an action is often the only practicable measure a plaintiff can take when trying to implement a constitutional norm against the national government's **[*462]** unlawfulness. The plaintiffs in the daijosai case, for example, claimed compensation for emotional pain and suffering caused by the government-sponsored Shinto ceremony, which they did not approve of, but the Osaka High Court was hard pressed to find a statutory ground for awarding damages to them.

If the Japanese Supreme Court is willing to stretch its judicial creativity a little further, it may be possible to elaborate upon Kikuya and make a fresh observation on the issue of politicians' visits to the Yasukuni Shrine, a shrine dedicated to those who died in war including executed Class A war criminals, which have been a source of tension between Japan and its neighbors since at least the 1980s. [61] Because of the lack of alternatives, litigants in the past challenged the constitutionality of prime ministerial visits to the Yasukuni Shrine via the National Compensation Law [62] or the Civil Code, [63] seeking damages for emotional distress caused by the infringement upon their religious freedom, [64] the right to privacy, [65] or the right to live in peace. [66] No court has ever recognized an invasion of such rights in this context. This has made the question of whether the Prime Minister's visit to the Yasukuni Shrine is compatible with the Constitution totally irrelevant and not worth answering, although some lower courts have gone ahead and found it unconstitutional in dicta. [67] Every single claim for damages has been denied, as no cognizable interest exists in the first place in the eyes of the law. [68]

[*463] It would be extremely unnatural, however, if Article 89 could not be applied to the national government without proof of infringement on individual rights. Now that the obscure provision in the chapter on finance has turned out to be remarkably effective as a restraint upon the local government's sloppy property management, the paradox of the traditional formalistic approach is visible to everyone. A politician capable of attracting domestic and international attention is most probably accompanied by security guards, who are public servants, twenty-four hours a day, seven days a week. He or she typically uses an official vehicle wherever he or she may go. Ex-Prime Minister Koizumi used to justify his visits to the Yasukuni Shrine by highlighting that worshipping the souls of the war dead was not part of his official duty as the Prime Minister, [69] but the use of public resources for personal religious purposes would be highly questionable if it were to be examined from the angle of Article 89, or in light of the totality of the circumstances. Whatever the purpose of the Prime Minister's visit may be, the general public is likely to consider it as the government giving special support to Shintoism associated with ancestor worship. Seemingly a case about a community center in the distant countryside at first glance, Kikuya may be an encrypted message from the judiciary to nostalgic politicians in Tokyo. [70]

Concluding Observations: The Impact of Globalization for Japanese Law

Article 81 of the Constitution of Japan provides that the Japanese Supreme Court is "the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." [71] As a matter of legal structure, it has therefore been possible, and in fact obligatory, for the Japanese judiciary to step in to invalidate law or governmental action infringing upon individual rights and liberties and enforce constitutional norms for the past sixty-plus years. The Court, however, was not active in fulfilling its mission up until recently. Its indecisiveness was noted by outside observers. Lawrence Friedman points out that **[*464]** the Supreme Court of Japan has been "rather reluctant to exercise the power" [72] of judicial review, very much unlike the German constitutional court, which was also created when Americans restructured the government after the Second World War; [73] Tom Ginsburg too notices that the Court "appears to follow a path of great restraint." [74] Ginsburg describes what the Court exercises as "low-equilibrium judicial review." [75] Since the Court is concerned about its own ability to secure compliance from other bodies, it does not often challenge politically powerful actors, with the result that it is "rarely called upon to adjudicate truly important disputes." [76]

To put things into perspective, even in the United States, the Supreme Court seldom exercised the power of judicial review before the Civil War, although Marbury itself was decided in 1803. The first few successful cases involving freedom of speech or freedom of the press came still later, specifically in the 1920s and 1930s; [77] and as for the Free Exercise Clause and the Establishment Clause of the First Amendment, the Court seems to have started vindicating them in the 1940s. [78] Even in the homeland of judicial review, it took more than a century before the judiciary embarked on actively enforcing rights and liberties enshrined in the Bill of Rights.

This was perhaps because, first, before the beginning of the twentieth century, judges deciding constitutional claims did not have enough accumulation of case law or constitutional theories to rely on, as there had been few decisions about individual rights and liberties, and second, on the part of the society as well, the idea of bringing a lawsuit to defend one's constitutional rights was not so common among the general public. The model for constitutional decision-making was apparently lacking. Major civil rights organizations such as the National Association **[*465]** for the Advancement of Colored People [79] and the American Civil Liberties Union [80] started their activities in the first half of the twentieth century. In the case of Japan, the circumstances similar to those of the United States before the era of civil rights still exist today.

It is then little wonder that the Supreme Court of Japan has not utilized its power of judicial review frequently so far. The situation has been quite extreme. The Appendix to this Article below shows the number of its decisions that struck down statutory provisions or governmental actions on constitutional grounds. Even taking into consideration Japan's low litigation rates per capita and the disproportionately small number of lawyers, [81] these figures seem too low. The Court has held statutory provisions unconstitutional only eight times in its entire history.

Yet a closer look reveals that major qualitative changes are taking place. The Supreme Court seems to have gotten more attentive to its mission and "less timid over time." [82] Most importantly, there has been a shift in the areas the Court focuses its attention on.

Although there are a number of decisions that invalidated governmental actions on constitutional grounds from the 1940s to the 1970s, they are mostly those that arose from idiosyncratic fact patterns. In one case, the court of first instance forfeited the vessel and cargo used for smuggling without providing any notice whatsoever to the owner, who had nothing to do with the **[*466]** defendant; [83] in another case, the criminal trial was discontinued for more than fifteen years for unknown reasons. [84] Similarly, decisions that invalidated statutory provisions in the 1970s also include one eccentric case, in which a provision in the Criminal Code mandating capital punishment or lifetime imprisonment for patricide, irrespective of individual circumstances, was held to be unconstitutional. [85] These cases are so outlandish that it is obvious to anyone that there were serious violations of constitutional law. Aside from such exceptions, the Court was evidently unwilling to enforce constitutional norms against the wishes of the government.

Recent examples of judicial intervention contrast nicely with such lethargy in the past. In Takase v. Japan, [86] decided in 2005, the Supreme Court held that Public Offices Election Law