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FOR THE SAKE OF THE COUNTRY, FOR THE SAKE OF THE FAMILY: THE OPPRESSIVE IMPACT OF FAMILY REGISTRATION ON WOMEN AND MINORITIES IN JAPAN

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The principle of hierarchy appears in virtually every description of Japanese society.¹ Cast in the benign form of a status arrangement without assignment of worth, hierarchy has been used to explain everything from individual psychology to corporate organization to dispute resolution.² It is also credited with generating na-

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1. See, e.g., H. BEFU, *JAPAN: AN ANTHROPOLOGICAL INTRODUCTION* (1981); T. FUKUTAKE, *JAPANESE SOCIETY TODAY* (1981); C. NAKANE, *JAPANESE SOCIETY* (1970); E. REISCHAUER, *THE JAPANESE* (1988); K. VON WOLFERON, *THE ENIGMA OF JAPANESE POWER: PEOPLE AND POLITICS IN A STATELESS NATION* (1989).

2. See, e.g., T. DOI, *THE ANATOMY OF DEPENDENCE* (1973) (the role of presumption on the benevolence of hierarchical superiors in Japanese personality and society); P. NOGUCHI, *DELAYED DEPARTURES, OVERDUE ARRIVALS: INDUSTRIAL FAMILIALISM AND THE JAPANESE NATIONAL RAILWAYS* (1990) (hierarchical structure of family as model for corporate structure of Japanese National Railways); T. ROHLEN, *FOR HARMONY AND STRENGTH: JAPANESE WHITE-COLLAR ORGANIZATION IN ANTHROPOLOGICAL PERSPECTIVE* (1974) (hierarchy in corporate structure); Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265, 278 (1982) (lack of formal sanctions reinforces hierarchical structures necessary for extrajudicial dispute resolution); Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41, 43-44 (A. von Mehren ed. 1963) (importance of hierarchy for extrajudicial dispute resolution); Sanada, *The Cultural Bases of the Japanese as Key to the Myth of the Reluctant Litigant in Japan: A Prelude to the Understanding of the Japanese Legal Culture*, in *CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TO-*

tional solidarity and societal stability in a world perceived as changeable and threatening. This picture is imbalanced, however, because negative social repercussions of this ubiquitous hierarchical principle have not been fully considered.

Legal regulation of the family through family registration, the requirement that family status events be registered with the government, has been an important means of generating and maintaining hierarchy in Japanese society. This Article examines the operation of the family registration system in Japan and the costs imposed on groups that have fought against oppressive aspects of family registration since its establishment in 1872. One of the earliest groups to challenge the family registration system was children who became "illegitimate" in the wake of legalizing marriage through the requirement of registration. Another was burakumin, Japanese who are ethnically and genetically identical to majority Japanese but who are shunned for historical reasons having to do with their ancestors' occupation and residence.³ Other groups, including Koreans in Japan and families with adopted minor children, have sought changes in order to minimize the exclusion they experience as a result of the widespread use of family registries.

The most recent protest against family registration comes from feminists.⁴ In increasing numbers, petitioners are seeking change in family registration to reduce its reinforcement of a patriarchal model of the family. Considered in isolation, these feminist voices seem puny and their issues trivial. Considered in the context of

DAY 105, 107-18 (1988) (religious principles result in greater acceptance of hierarchy which reduces resort to litigation); Wagatsuma & Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986) (intersection between various psychological features connected to hierarchical social organization and the legal system).

3. The term "burakumin" is problematic because not all members of the group identified as "burakumin" use this term. Even activists within the group hold different views about the correct self-referent. Some believe that people who live in "buraku," including the poor and Koreans, should be referred to as "people of buraku" (*buraku no hito*) rather than "burakumin," a term used to refer to those who can trace their ancestry to membership in outcaste communities established in the Tokugawa period (1600-1868). Many polite majority Japanese prefer the term "dowa" (literally, "same," and "harmony"), which emphasizes assimilation, but members of the subordinated group do not use the term as a self-referent. At this point, only the terms "burakumin" and "buraku no hito" have emerged from the subordinated group itself.

4. This is not to suggest a united front against family registration. Indeed, many Japanese, including many Japanese women, believe that the family structure validated and reinforced by the government through family registration is a valuable source of women's protection. Thus, as will be discussed in the conclusion, those who seek social change through modification of family registration cannot call on a wide cross-section of the population of Japanese women.

other protests and governmental response to those protests, their strategies seem sensible, even inevitable. This Article examines this recent wave of opposition to family registration in light of the history of previous attempts at modification.

Exploration of the patterns of activism and governmental response also yields insight into reasons for the continued resilience of the current system of family registration. Some of these reasons are related to the government's consistent failure to respond effectively to many of the burdens generated by registration. The government's response provides only apparent relief which fails to reach the deeper structure of family registration and the social structures with which it articulates. Other reasons are related to unconscious participation in oppression by majority Japanese. Finally, some reasons are related to the protesters themselves. For example, all protesters, but particularly women as primary caretakers of the family, have been sensitive to continuing support for the patriarchal family model underlying family registration. That support stems from the historical ideological linkage of family stability to national stability through the regulatory device of family registration. Family registration resulted in nationwide imposition of one (upper class) family model which in turn became the paradigm for a range of relationships such as employer/employee, teacher/student, government/citizen. Although diffuse, the belief is strong that Japan's domestic stability and international competitive success were achieved partially through adherence to norms and values associated with that family structure. For the sake of their country, for the sake of their families, those harmed by the system of family registration have been reluctant to engage in active protest.

Following an overview of the system of family registration, this Article presents three recent controversies that highlight the centrality of women's issues in contemporary disputes about family registration. In order to illuminate the contours of those contemporary issues, this Article traces in detail the activism and governmental response associated with the problems experienced by burakumin, by Koreans in Japan, and by nonmarital and adopted children. The Article then returns to a more detailed analysis of the current controversy over women's issues before concluding with a comparison of protest strategies and majoritarian responses.

I. THE SIGNIFICANCE OF FAMILY REGISTRATION

The family registry (*koseki*) is fundamental to all aspects of all Japanese individuals' lives because it is the vehicle by which the

state gives legal significance to personal status events such as birth, marriage, divorce, and death. An individual is not married legally unless and until registration is accepted by the local registrar. Each couple creates a new family registry, and subsequent personal status changes such as births of children, adoptions, and divorce must be recorded on the same family registry.⁵ An individual may not succeed to property through intestate succession, for example, without proper recordation on the family registry.

The family registry is of major importance in a Japanese individual's life because it is used to determine eligibility for basic government benefits such as education and income assistance. It provides a means of tracing an individual's movement within Japan not only because each personal status change must be registered, but also because requests for copies of the registry can be traced. Since copies of family registries are required for passport issuance and renewal, family registration also enables the government to control movement outside of Japan.

The family registry is widely used in the private sector by employers, schools, and parents of potential spouses in order to learn more about an individual's background. As the subsequent examples will illustrate, information deemed relevant by the Japanese government for registration purposes takes on particular significance in labeling individuals as worthy of certain benefits and experiences in Japanese society. The Japanese government has consistently maintained that the information required for registration is relevant only for the purpose of legitimating the status events involved and that the family registry itself is a value-neutral document. However, the family registry cannot be value-neutral because value judgments adhere to the required information in ways that create and maintain hierarchies of worthiness and participation in Japanese society. Individuals are excluded, or restricted in participation, on the basis of others' knowledge of negatively valued elements of their family registries.

Family registration has pernicious effects beyond its use by others. Individuals know what their family registries contain, and, at conscious and unconscious levels, they connect the required data with the historical import and underlying values associated with that information. The particular pieces of information deemed sig-

5. See Appendix I *infra* pp. 166-67 for an example of a family registry.

nificant for registration purposes become all important in self-definition and self-confidence.⁶

II. THREE RECENT CASES

The following three introductory cases illustrate some of the recent issues around which protest against family registration has crystallized. All were *cause celebre* in Japan; all provoked discussion of the impact on women's lives of this particular type of family registration as it articulates with social norms and values associated with the family.

In 1988, the Supreme Court of Japan rejected the last appeals of Noboru Kikuta, a doctor whose license was suspended because he falsified the birth records of 220 babies born to mothers who had initially sought abortions.⁷ Dr. Kikuta issued false birth reports so that those babies could have family registries that disguised the circumstances of their births and adoptions; the birth reports enabled them to be registered as the legitimate offspring of their adoptive parents.

Despite much public acknowledgement that the false reports enabled the adoptive parents and children to escape the stigma associated with adoption under these circumstances, Dr. Kikuta's falsification of the birth reports was adjudged an offense serious enough to warrant suspension of his right to practice medicine.⁸ Appellate courts upheld the suspension on the grounds that the period of suspension was reasonable given the offense and that Dr. Kikuta's wrong was more serious than the harm he sought to prevent.⁹

6. See *infra* note 37 for references to the considerable literature on the creation and maintenance of "otherness" through legal distinctions that label individuals.

7. Judgment of June 17, 1988, Saikō Saibansho [hereinafter Saikōsai] (Supreme Court, 2nd Petty Bench), 681 Hanrei Taimuzu 99 (1989) [hereinafter HANTA] (appealing the local medical association's revocation of his license to perform abortions); Judgment of July 1, 1988, Saikōsai (Supreme Court, 2nd Petty Bench), 723 HANTA 201 (1990) (appealing the Minister of Health and Welfare's six month suspension of his medical license).

For descriptions of the dispute and its legal consequences, see Ishikawa, *Reform of the Adoption Law in Japan—The Legislative Creation of Special Adoption*, 32 JAPANESE ANN. INT'L L. 65, 67 (1989); Nakatani, *Kikuta ishi: Jitsuko assen jiken no keiji hoteki sokumen*, 665 JURISTO 66 (1978); *Top Court Rejects Doctor's Appeal*, JAPAN L.J., Aug. 1988, at 1; *Court Dismisses Suit by Suspended Doctor*, Japan Times, June 29, 1983, at 2, col. 5.

8. Dr. Kikuta was found guilty of violating Penal Code Section 157(1) which prohibits willful recordation of false information.

9. It seems ironic that Dr. Kikuta would be prohibited from performing abortions since he is now prohibited from placing unwanted children by submitting fraudulent birth reports. However, the local medical association based its decision on the circum-

Although Dr. Kikuta did not accept any fees for the false registrations, the courts feared that exoneration could result in a gray market in babies. In addition to accepting arguments cast in terms of the best interests of the children,¹⁰ the courts also feared that the failure to punish false registrations would cast doubt on the "purity" of the family registration system.

Despite the fact that most of those whom Dr. Kikuta assisted were married women unable to care for another child, debate about the case side-stepped that issue. Indeed, Dr. Kikuta's case was used to decry the alleged erosion of sexual morality; condemnation of Dr. Kikuta's actions was seen as necessary to prevent easy options for unmarried mothers.

As Dr. Kikuta's legal battle was winding down, another legal battle about family registration was just beginning. Reiko Sekiguchi began legal proceedings to secure the right to use her premarital surname in the course of her employment as a professor at a Japanese university.¹¹ As a requirement of legal marriage, Japanese couples must choose one of their surnames at the time they establish a family registry.¹² Although either surname may be selected, government statistics indicate that 97.8% choose the husband's name.¹³ Ms. Sekiguchi, too, took her husband's surname upon marriage, although she had started her academic career three years previously under her premarital surname. However, Ms. Sekiguchi's employer at the time, another university, allowed her to continue to use her premarital surname. Sixteen years later, when Ms. Sekiguchi changed universities, her new employer required her

stances under which Dr. Kikuta had arranged the adoptions. Apparently he told pregnant women seeking abortions that he would place their children if they carried the children to term instead of aborting them. The local medical association believed that this was an inappropriate attitude for an abortionist. One would think that Dr. Kikuta's case would arouse less outrage since abortion is basically illegal in Japan, despite exceptions that swallow the rule, and that the search for alternatives would generally meet with approval. Therefore, the real issue must have been the fraudulent birth reports which enabled everyone involved to escape stigma.

10. The best interests of the children included access to their biological parents' medical histories and prevention of subsequent inadvertent incestuous marriages.

11. For discussions of this case, see Sakakibara, *Kazoku no arikata no tayoka o motomeru*, 61 HORITSU JIHŌ, Apr. 1989, at 90; Kato, Hoshino, Torii, Toshitani & Omori, *Fufu bessei no kento kadai*, 936 JURISTO 90 (1989) [hereinafter *Fufu bessei*]; Zadankai, *Fufu besshi*, 37 JIYU TO SEIGI, May 1986, at 85. English language newspapers also carried the story. See, e.g., *Professor Files Suit to Use Maiden Name*, Japan Times, Jan. 4, 1989, at 2, col. 1; *Fight in Japan over Law on Married Names*, SACRAMENTO BEE, Jan. 3, 1989, at A2, col. 1.

12. MINPŌ § 750.

13. *Fufu bessei*, *supra* note 11, at 94; see also Chira, *What's in a Japanese Name? For Many Women, Obscurity*, N.Y. Times, Jan. 3, 1989, at A1, col. 3.

to use her formally registered surname rather than her professionally established, premarital surname for all internal administrative matters.¹⁴

In the lawsuit, which is still pending, the university contended that Sekiguchi's legal obligation to use her husband's surname arose from her and her husband's decision to take his surname instead of hers; if she valued her surname so much, she should have protected it herself through the couple's choice of her surname upon marriage rather than expecting the university to use an unregistered surname. Ms. Sekiguchi contended that she should be able to use the name under which she had established her professional reputation, regardless of the fact of her marriage. As Sekiguchi pointed out, Japanese law disproportionately burdens marriages in which both spouses are professionals because one spouse is required to give up his or her surname at marriage. Ms. Sekiguchi argued that couples should not be put to the choice of whose surname to protect or left to the benevolence of employers who may or may not force use of the legally registered name.

In a third case, decided by the Tokyo District Court in 1989, Motoko Suzuki and six other women employees of Nissan Motor Company brought suit against Nissan for failure to pay them family allowances (*kazoku teate*).¹⁵ Nissan, like most Japanese companies, provides family allowances to employees who are heads of households with children. Since the women employees were not registered as the heads of their households, their requests for family allowances were denied despite proof that they were supporting minor children. They argued that all employees supporting minor children should be entitled to a family allowance and that the "head of household" requirement has a discriminatory impact on women employees because registered heads of households are, overwhelmingly, husbands.

The Tokyo District Court held that it was reasonable for Nissan to use legal registration of head of household as exclusive proof of actual house headship. Moreover, the court held, there was no discrimination against women employees because women employ-

14. These included matters such as course listings, requests for funds to pay research assistants, publications submitted through the university, and applications for leaves to attend conferences abroad. The dispute reportedly reached the level of university officials tearing down lecture notices and refusing to transfer outside telephone calls if Sekiguchi's premarital surname were used.

15. Judgment of January 26, 1989, Chihō Saibansho [hereinafter Chisai] (Tokyo District Court), 1301 Hanrei Jihō 71 (1989) [hereinafter HANJII].

ees would be entitled to the family allowance if they were registered as heads of their households.¹⁶

The preceding three cases are examples of the most recent debates centering on the ramifications of a supposedly value-neutral system of family registration. Historically, however, other features have been targeted for change. An examination of some of those protests reveals patterns of activism and reaction that have influenced the protests of today.

III. THE IMPORTANCE OF HONSEKI: BURAKUMIN PROTEST AGAINST FAMILY REGISTRATION

Although a new family registry is created with each new marriage, family registries are linked through information that enables tracing of family histories as far back as 1872, when the present system of family registration was established. Through this possibility of genealogical tracing and the fact that personal status events are recorded on one document for each family rather than on separate documents that concern only one individual's life, the system of family registration reinforces a concept of the individual as embedded within a family structure.

The information that links family registries is the *honseki* (ancestral homesite). When the present system of family registration was established, the *honseki* was simply the current residence of the registered family.¹⁷ It served the administrative purpose of anchoring successive generations of eldest sons of the same family, thereby facilitating official recordation of the family over time. This family structure, known as the *ie* or "house" system, was patriarchal as well as patrilineal because eldest sons bore responsibility for governing the family in accordance with standards developed by preceding generations of eldest sons. Family registration based on this patrilineal, patriarchal family model facilitated unification of Japan through legal imposition of a chain of authority and accountability; individuals were made legally accountable to their househeads who were, in turn, accountable to government officials.¹⁸

16. The plaintiffs appealed, but an agreement was reached whereby Nissan agreed to pay family allowances to employees supporting minor children, irrespective of the employees' status as head of household. Since the basis for the settlement is unclear, the Tokyo District Court opinion still stands as guidance to other companies. *Danjo sabetsu soshō ga wakai*, *Rafu Shimpō*, Sept. 19, 1990.

17. 16 *ENCYCLOPEDIA JAPONICA* 627 (1971).

18. See *infra* notes 98–102 and accompanying text.

Over time the information regarding a family's current household composition and address was separated from the family registry and recorded in a completely separate "household registry" (*juminhyo*).¹⁹ The relationship between current address and the ancestors' past residence became more distant, but the *honseki* was retained because of administrative ease in indexing the family registry as well as reinforcement of the house system for purposes of legal accountability.

After World War II, Japanese jurists and Occupation legal officers revised the Family Registration Law to require all couples, including those in which the husband is an eldest son, to establish a family registry at the time of their marriage. The nuclear family was considered more democratic than the former house system, which gave the househead considerable power over house members.²⁰ However, the present Family Registration Law permits the symbolic continuation of the former house system because all couples must select one *honseki* for the newly established family.²¹ The selected *honseki* becomes a link between all families listing the same *honseki*, and it is possible to trace families in much the same way as they were traced under the former system.

It is legally possible for couples to select a new *honseki* when they marry and to change their *honseki* whenever they choose to do so after marriage. It would be logical for a couple to register their *honseki* where they will reside after marriage because it would be easier and faster to obtain copies of the family registry without having to write to a distant government registrar.²² Nevertheless, the overwhelming majority of couples choose the husband's family's

19. The *juminhyo* is a record of current household composition that is kept at the local registrar's office. While the family registry is maintained by the registrar of the listed *honseki*, the *juminhyo* is kept by the registrar of the area where the household is located. A couple may transfer their *honseki* to the local registrar, or they may maintain a "short version" of the family registry at the local registrar.

20. A. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN 116-20 (1976). For a discussion of changes in the legal power of househeads before and after World War II, see Watanabe, *The Family and the Law: The Individualistic Premise and Modern Japanese Family Law*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY, *supra* note 2, at 366-98.

21. *Honseki* is sometimes translated as "legal domicile." This translation is inapt because *honseki* designation does not require any intention to return to or, indeed, any actual physical presence ever at that location.

22. Couples may open a registry at their local government registrar, but any additions or deletions to the registry are sent to the registrar of the couple's *honseki*. While the couple can obtain copies of the "short form" of their registry kept at that local government registrar, the short version is not always acceptable, and requests must be made in writing to the *honseki* registrar for full copies.

honseki at marriage and do not change the *honseki* after marriage. While some couples merely participate in the customary practice of choosing the husband's family's surname and *honseki*, others consciously reject the possibility of a completely new *honseki* or subsequent change of *honseki* because both suggest an attempt to hide one or both of the spouses' *honseki*. That they have chosen a *honseki* different from that of either family at the time of marriage is traceable from the family register, as are any subsequent changes in *honseki*.

One reason couples put up with the inconvenience of a distant *honseki* is fear that a changed *honseki* will raise the suspicion that they are burakumin. Burakumin are Japanese who are physiologically identical to majority Japanese but who are shunned nevertheless by other Japanese.²³ The only way a Japanese can be forced to carry the heavy burden of buraku status is through tracing that individual to ancestors who were branded as outsiders because their occupations, such as butchery, leather working, and disposal of the dead, were considered unclean in the Buddhist context.²⁴ From the beginning of the seventeenth century, these people, labeled *eta* ("much filth") or *himin* ("nonhumans"), were forced to live in separate residential areas. Due to historical and residual residential segregation, a *honseki* within a particular area identifies the family as buraku.²⁵ While some burakumin have attempted to change their *honseki* several times in order to remove themselves from a particular, damning geographical location, the fact of a change,

23. There is no way of ascertaining the size of the buraku population in Japan. Estimates range from 1 to 3 million in a total Japanese population of approximately 123 million. See *supra* note 3 for a discussion of use of the term "burakumin."

24. For an overview of the historical background and types of past and present discrimination against burakumin, see G. DE VOS & H. WAGATSUMA, *JAPAN'S INVISIBLE RACE: CASTE IN CULTURE AND PERSONALITY* (1966); M. HANE, *PEASANTS, REBELS AND OUTCASTES: THE UNDERSIDE OF MODERN JAPAN* 138-72 (1982); I. NEARY, *POLITICAL PROTEST AND SOCIAL CONTROL IN PRE-WAR JAPAN: THE ORIGINS OF BURAKU LIBERATION* (1989); F. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 78-123 (1987); Ninomiya, *An Inquiry Concerning the Origin Development, and Present Situation of the Eta in Relation to the History of Social Classes in Japan*, 10 *TRANSACTIONS ASIATIC SOC'Y OF JAPAN* 47 (1933); Upham, *Ten Years of Affirmative Action for Japanese Burakumin: A Preliminary Report on the Law on Special Measures for Dowa Projects*, 13 *LAW IN JAPAN* 39 (1980) [hereinafter Upham, *Ten Years*]; Wada, *Buraku sabetsu to koseki seido*, 37 *JYU TO SEIGI* 69 (1986).

25. Others now live in buraku areas, but they are also negatively valued groups such as Koreans.

which is itself recorded, is usually sufficiently suspicious to defeat the purpose of the change.²⁶

The use of family registries to discriminate against burakumin is intertwined with the historical development of the registry itself. In 1871, the year before family registration was instituted, the Japanese government issued an Emancipation Edict for burakumin. Although the government couched the Edict in terms of humanitarian concerns, a central reason for the Edict may have been that majority Japanese wanted to enter some of the occupations "monopolized" by the burakumin.²⁷

Support for the argument that the government was not really interested in improving the status and condition of burakumin lies in the government's requirement that they be listed as "New Commoners" (*shin heimin*) or "Former Eta" (*moto eta*) on family registries.²⁸ Initial registration of the burakumin as "New Commoners" enabled discrimination to persist because all new registrations of marriages and births, for example, were added to the original register established in 1872. The new label did not alleviate discrimination against burakumin, because it was still a label which denoted difference, a label which retained a pejorative connotation.²⁹ Indeed, in the early 1900s it was still possible to publish the following description of burakumin: "One rib is lacking; they have a dog's

26. Buraku individuals who attempt such changes rarely anticipate the difficulties involved in escaping the labeling effects of *honseki*. Many do not realize that changes are recorded on the family register or that they will be questioned about such changes. Many who have not carefully examined their family registries do not realize that the *honseki* of one's parents and that of one's spouse's parents is recorded on the couple's new family registry in addition to their chosen *honseki*. Therefore, two generations must participate in the change of *honseki*. Unfortunately, procedural difficulties such as recordation of changes of *honseki* and recordation of parental *honseki* are similarly insufficiently understood by nonburaku Japanese who sometimes argue that buraku individuals could prevent discrimination by "simply" electing a different *honseki*.

27. I. NEARY, *supra* note 24, at 32.

28. M. HANE, *supra* note 24, at 147.

29. The idea that the government was not interested in reducing discrimination is also supported by a publication in 1880 by the Ministry of Justice that referred to the "new commoners" as "eta" and described them as so low as to be close to animals. *Id.* at 146.

Hane also describes the intense reaction of majority Japanese opposed to the integration of burakumin. In one incident in May 1875, 400 buraku homes were burned, 18 burakumin were killed, and several others injured when 26,000 peasants in Okayama Prefecture rioted in opposition to the elevation of burakumin. In 1916, a village in Gifu Prefecture joined in a detailed pledge to prevent sales of real property to burakumin; to prevent eating, drinking or other social activities with burakumin; to prevent loans to burakumin; and to prevent burakumin from taking wood or bamboo from common lands on pain of exclusion from the village. In 1922, authorities in Oita Prefecture burned a buraku village because, they claimed, it was nothing but a haven for criminals

bone in them; they have distorted sexual organs; they have defective excretory systems; if they walk in the moonlight their necks will not cast shadows, and, they being animals, dirt does not stick to their feet when they walk barefoot."³⁰

The second attempt by the Japanese government to reduce the use of family registries to discriminate against burakumin occurred in 1976 when the government restricted access to family registries to family members, their legal representatives, and officials whose job required it.³¹ Prior to 1976, anyone could obtain a copy of the family registration of any other person simply by paying a small fee to the local government registrar. Directories of buraku areas were published by private businesses and sold to companies seeking to identify burakumin among their job applicants.³² Private investigators also used the directories so that parents could be assured that their child's potential spouse was not buraku.

For those who believe that the oppressive effect of the *honseki* derives primarily from discovery and abuse by nonburaku Japanese, an important question is the actual extent to which family registries are used to determine buraku identity. This is an extraordinarily difficult question to answer because the subject is not easily discussed or researched in Japan. One highly educated Japanese person told me that the problem of discrimination is a problem of the past, and that, to the extent it remains, discrimination is the fault of the burakumin themselves for keeping the distinction alive. Other Japanese report continuing discrimination, although there is disagreement about the extent and type of discrimination.³³

and drifters harboring diseases. No relocation assistance or compensation was provided. *Id.* at 144-46.

These incidents, as well as the examples of violent acts against burakumin reported by the authors cited in note 24, *supra*, support the conclusion that reform of the family registration was not the product of a grass roots effort to improve the circumstances of a disadvantaged group.

30. I. NEARY, *supra* note 24, at 3 (quoting K. SANYA, *ETAZOKU NI KANSURU KENKYU* 72-73 (1923)).

31. Amendment of Section 10 of the Family Registration Law.

32. Frank Upham describes the importance of family registries in perpetuating discrimination against burakumin, ineffectual action by the central government to the repeated requests by burakumin to restrict access, burakumin's limited success with local governments, and lawsuits by private investigation firms determined to retain access to the information desired by their clients. Upham, *Ten Years*, *supra* note 24, at 41-42 n.11.

33. Statistics compiled by the Buraku Liberation League show declining discrimination in the form of an increase in marriages between burakumin and nonburakumin. While only about 5% of married burakumin had a nonburaku spouse before 1925, the percentage has increased steadily to the point of passing the 50% mark sometime between 1975 and 1979. *Japan's Invisible Minority Rejects Life on the Margins*, Christian

Discrimination continues because individuals may be asked to supply "personal histories" (*rirekisho*) which customarily include *honseki*. Although it is impossible to ascertain how often it happens, individuals interviewing for jobs or marriage are still asked to produce a copy of their family registry. Too many changes of *honseki* or suspicious *honseki* result in rejection or investigation. Private detectives are still employed to ascertain whether a potential spouse is burakumin, and some companies reportedly continue to investigate suspicious applicants.³⁴ Access to registries that detail changes of *honseki*, for example, is possible despite closure of the registries because local registrars do not consistently enforce the prohibition on securing copies of unrelated individuals' family registries.³⁵

The fact that access is possible does not in itself prove access, of course. But continuing discrimination is likely because there is no reason for it to have stopped. Once a value-laden hierarchy is embedded, subordination will persist until it is actively stopped through consistent, conscientious attention to the problem.³⁶ At best there has been only inconsistent effort to reduce discrimination against burakumin.

The lack of sufficient evidence about others' use of family registries is frustrating only if one takes the position that the problem of oppression would cease if others were prevented from obtaining or abusing information about an individual's buraku status. However,

Science Monitor, Jan. 9, 1991, at 6-7. On the other hand, in 1990, a Japanese school board decided not to relocate an elementary school in a predominantly buraku area because of letters with sentiments like the following: "It will be sad if our children go to this school—they will be considered burakumin. . . . We are happy just to live in a separate community and to have different bloodlines." *Id.* at 6.

34. In an interview conducted in 1990 by an American researcher, a Japanese company manager readily admitted to consulting directories in order to exclude applicants of buraku status. L. Clear, *Education for Social Change: The Case of Japan's Buraku Liberation Movement 82* (1991) (Ph.D. dissertation, UCLA Department of Education). Nevertheless, such explicit acknowledgement of intentional exclusion is rare, and we cannot know how prevalent the practice is.

35. This was confirmed in discussions with Japanese legal scholars who pointed out that it would be very difficult to ascertain how frequently registrars give out unauthorized copies of family registries. Those whose requests are denied will not complain of others' access because they will not know about it. Those given unauthorized copies will not complain because they got what they wanted. Accordingly, we do not know how often or under what circumstances these violations occur.

36. American legal scholars Charles Lawrence and Alan Freeman and others have documented and analyzed the ways in which hierarchy becomes submerged rather than ending when outright expressions of subordination are no longer acceptable. See *infra* notes 159-160 and accompanying text for a more detailed discussion of this idea in the Japanese context.

to adopt the position that the problem of oppression will end with closure of family registries discounts the results of sophisticated scholarship about the oppressive effects of labeling.³⁷ That the *hon-seki*, a marker of degraded status for some, is required for creation of a family registry signals to the individual that that information is relevant in the construction of self. That others are prevented from obtaining the information they would otherwise like to have does little to alleviate the sense of peril and degradation associated with the hidden label.³⁸ The government's decision to hide rather than to eliminate a label known to cause such hardship reinforces the

37. The role of American law in creating and maintaining inequality through labeling has been addressed from a variety of perspectives. See Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345 (1980), for the proposition that labeling in and of itself results in oppressive violation of an individual's liberty and equality interests.

Others take the view that labeling may well violate a liberty interest without necessarily violating an individual's interest in equality. Only if value judgments adhere to the labels will labeling result in injury to both interests. See, e.g., Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987).

The literature on labeling associated with racism and legal facilitation of subordination through maintenance of "otherness" is also well developed. See, e.g., Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Recent books by Kenneth Karst and Martha Minow bring to bear a wide range of psychological, social scientific, and philosophical insights in examining different kinds of labels and the ways in which written law and legal behavior enhance the power of labels as sources of inclusion and exclusion. K. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); M. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

Psychological, historical, and sociocultural features of labeling are configured differently in Japan, but the basic problem of divisions engendered by labels further entrenched by the legal system is an important frame for understanding the experience of those in Japan who have fought for change in the system of family registration.

38. The negative effects of stigma on self-concept have been noted by many in a variety of settings. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) ("To separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); F. FANON, *BLACK SKINS, WHITE MASKS* 28-29 (1967) ("When a bachelor of philosophy from the Antilles refuses to apply for certification as a teacher on the ground of his color, I say that philosophy has never saved anyone."); K. KARST, *supra* note 37, at 26 ("The victim of stigma may suppress aspirations that look unattainable when seen with the restricted vision imposed by a withered self-concept.").

The literature about members of subordinated groups in Japan reveals a similar pattern of internalization of condemnation. See, e.g., T. SHIMAZAKI, *THE BROKEN COMMANDMENT* (1974); G. DE VOS & H. WAGATSUMA, *supra* note 24; Wagatsuma, *Problems of Self-Identity Among Korean Youth in Japan*, in *KOREANS IN JAPAN: ETHNIC CONFLICT AND ACCOMMODATION: JAPAN'S INVISIBLE RACE* 304-53 (C. Lee & G. De Vos eds. 1981).

message that the information is appropriately a source of shame and that the information is significant enough to retain at all costs. Far from reducing discrimination, the government's decision to make covert that which was overt has merely driven discrimination below the surface where it is more difficult to attack.

Why is choice of *honseki* still required for family registration? Why is it not stricken from existent registries? Some majority Japanese point to the administrative burden of relocating family registries in accordance with current residence. Others defend continuity of the *honseki* on the grounds that ancestor reverence is an important feature of Japanese society.³⁹ If the avoidance of administrative expense and protection of ancestor reverence are in fact the primary reasons choice of *honseki* is still required for family registration, they are achieved at the cost of reinforcing self-hatred among those who have been burdened all along.⁴⁰ Not surprisingly, that cost is not considered by majority Japanese to be too high because of the historical low valuation of the group which must bear the burden.

Governmental action in the form of changing labels and closure of registries is insufficient to correct the problem of internalization of value judgments associated with *honseki*. Either the *honseki* must be eliminated or its symbolic value diluted. In recent years some majority Japanese have chosen *honseki* such as parks, courts, or the place where the couple met. The motive for these choices is not clear, but, whatever the reasons, an increase in known cases of such choices among majority Japanese might well reduce the oppressive effect of the *honseki*.

39. Wada contends that eliminating the importance of ancestors is key to improving the burakumin situation in Japanese society. Wada, *supra* note 24, at 72. He is one of the most radical in opposing family registration in that he sees the entire system as oppressive rather than simply the one element of *honseki*.

40. Evidence from the American sociolegal context suggests that this is certainly not unique to Japanese society. In her article about legal protection of "hate speech" in the United States, Mari Matsuda likens an absolutist First Amendment stance to a psychic tax imposed on those least able to pay. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323, 2376 (1989). A recurrent theme of Martha Minow's *Making All the Difference* is the extent to which "[t]he price of . . . legal categories has been borne disproportionately by the most marginal and vulnerable members of the society." M. MINOW, *supra* note 37, at 10.

IV. FAMILY REGISTRATION AND NATIONALITY: THE IMPACT OF FAMILY REGISTRATION ON KOREANS IN JAPAN

As the burakumin example illustrates, value judgments associated with registered information result in classifications that restrict or expand opportunities for participation in Japanese society. On the national level, too, the family registration system generates insider/outsider distinctions because the family registry is the authoritative source of Japanese nationality; only Japanese can have Japanese family registries. Under current Japanese law, an individual can be referred to on a Japanese registry without being Japanese (through adoption or marriage, for example), but only a Japanese national can create a family registry or occupy a status position as a principal on the registry.⁴¹

While negatively valued registration information can result in reduced opportunities for participation in Japanese society, having no Japanese family registry is even more serious because of the connection between citizenship and entitlement to government benefits. Koreans who entered Japan as a result of Japanese annexation of Korea in 1910 are a special population of foreigners because of Japanese responsibility for their presence in Japan.⁴² However, those individuals, along with their children and grandchildren, most of

41. When a Japanese person marries a foreign national, the Japanese person occupies the position of head of the family with a notation to the effect that he or she has married a foreign national. Specific information as to the spouse's name and nationality is also recorded in the space above the head of the family's name. See Appendix I *infra* p. 166. Since aliens cannot occupy positions at the bottom of the registry, the family registry of a Japanese person who marries a foreign national will have status blocks only for the Japanese head of the family and Japanese children born to the couple or adopted by the couple; there will be no status block for the spouse. See *infra* p. 167.

42. The Korean population numbers approximately 700,000. Most Koreans attribute their presence in Japan to Japanese labor "recruiters" having forcibly brought Koreans from Korea after annexation in 1910 to be used as laborers in Japan during Japanese militaristic expansion throughout Asia before World War II. According to at least one poll, most Japanese now agree with that view. *Poll Shows 41% Feel Koreans Aren't Discriminated Against*, Japan Times, June 8, 1990, at 3, col. 6.

South Korean President Roh Tae Woo's visit to Japan in the summer of 1990 stimulated the search for records of forced laborers, records the Japanese government had ordered burned after World War II because of fear that American forces would find evidence of war crimes. *Not Many Lists of Laborers Are Available*, Japan Times, June 7, 1990, at 3, col. 5. Over the course of the summer of 1990, many such lists emerged. A partial list from one newspaper includes the following: *Name Lists Found in Hokkaido Towns*, Japan Times, Aug. 17, 1990, at 3, col. 1; *Korean Labor Lists Discovered in Both Public, Private Offices*, Japan Times, Aug. 8, 1990, at 1, col. 2; *Other Lists of Forced Laborers Found*, Japan Times, July 8, 1990, at 2, col. 6; *Forced-Labor List Preserved*, Japan Times, June 15, 1990, at 3, col. 5; *Farmer Makes List of Forced Labor Victims*, Japan Times, June 2, 1990, at 2, col. 6. Even a published manual for controlling Ko-

whom speak only Japanese, are denied the right to establish Japanese family registries without first becoming Japanese nationals. Certain segments of the resident Korean population were given permanent residency under the ROK-Japan Normalization Treaty of 1965, but the scope and eligibility requirements for this grant were narrowly defined because of opposition by the Japanese government.⁴³ Permanent residency status is inferior to citizenship, but most Koreans do not apply for naturalization because of the belief that they will be unsuccessful, or, even if successful, required to renounce their Korean cultural identity and take a Japanese name.⁴⁴ Indeed, until revision of the Nationality Law in 1985, there were such requirements; in their absence, however, Koreans who choose to become naturalized Japanese would still face the likelihood that they would not be treated as Japanese by majority Japanese.

Whereas Japanese citizens establish family registries, Korean individuals must carry alien registration cards at all times, a constant reminder that they are aliens despite the fact that Japan is the only country most have ever known. Given their reasons for immi-

rean and Chinese laborers forcibly brought to Japan was discovered. *Manual on Forced Labor Discovered*, Japan Times, June 28, 1990, at 2, col. 4.

Previous to the revelations of the summer of 1990, many historians had focused on immigration statistics which, because they did not count kidnapped laborers, supported the conclusion that most immigration was voluntary, at least until the National Manpower Mobilization Act of 1939. Moreover, much of the immigration seemed to have occurred during industry slumps. Thus, antagonism toward Koreans is sometimes attributed to competition for employment. See, e.g., M. WEINER, *THE ORIGINS OF THE KOREAN COMMUNITY IN JAPAN 1910-1923*, 49-98 (1989); Lee & De Vos, *The Colonial Experience, 1910-1945*, in *KOREANS IN JAPAN: ETHNIC CONFLICT AND ACCOMMODATION*, *supra* note 38, at 31, 34-43, 49-50, 52-54.

At this juncture, the truth about the sources of Korean immigration is less important than the fact that differing views exist and create conflict between those who believe that Koreans are in Japan because their ancestors were ripped away from country and family and those who believe that the Koreans forced themselves on the Japanese at a time when Japanese needed jobs taken by Koreans. Majority Japanese can assuage any sense of guilt with "facts" about voluntary immigration and can argue that Koreans should go back to Korea if they don't like their situation in Japan. Even if the historical context were one of voluntary immigration, however, it is important to remember, as the historians cited above point out, that Koreans came to Japan largely because the Japanese had so dominated the power structure of Korea and pillaged so much of the country that immigration was necessary for survival.

43. Lee, *The Legal Status of Koreans in Japan*, in *KOREANS IN JAPAN: ETHNIC CONFLICT AND ACCOMMODATION*, *supra* note 38, at 133, 146-47.

44. Lee & De Vos, *supra* note 42, at 133-59; Sather, *Taking Issue with Fingerprinting*, 8, 9 *ASIAN ISSUES* 8, 9 (1986). Recent scholarship by anthropologist John Ogbu suggests ways in which the historical fact of involuntary immigration may be particularly influential in many Koreans' present reluctance to become fully part of Japanese society. Ogbu, *Minority Status and Literacy in Comparative Perspective*, 119 *DAEDALUS*, Spr. 1990, at 141.

gration to Japan and the extreme hardship the Korean population has suffered at the hands of the Japanese, immigration classification along with all other foreigners is a stinging slap in the face. Moreover, the alien registration card system is an ongoing source of anxiety because the requirement of production on request exposes Koreans to police harassment. Minor infractions of the Alien Registration Law can result legally in deportation to Korea, a country with which most have only a tenuous connection.⁴⁵

The primary avenue through which Koreans in Japan have publicized their plight and fought discrimination has been refusal to submit to repeated fingerprinting for issuance and renewal of their alien registration cards. This has required considerable courage because refusal can result in deportation. After years of litigation and eventual reduction of the fingerprinting requirement to one time only, on January 10, 1991, the Japanese government announced an end to fingerprinting of Koreans and others from former Japanese colonies.⁴⁶

In place of alien registration, the Ministry of Justice is now considering establishing a family registration system for South Koreans.⁴⁷ The government's true intent may be to enhance current negotiations with South Korea or to defuse the controversy relating to fingerprinting and alien registration cards rather than to improve the Koreans' situation in Japanese society. Moreover, such a change would not in itself eliminate discrimination due to the continued registration of individuals as Korean or Japanese. Indeed, the registries for Koreans would be quite different from Japanese family registries; they may contain photographs and signatures, for example.⁴⁸ If this proposal is adopted, the differences between Japanese and Korean family registries will be so great as to suggest two different systems of registration rather than incorporation of the Korean community into the Japanese system or modification of the Japanese system to accommodate Korean members of Japanese so-

45. For a description of the connection between violations of the alien registration requirements and deportation, see Lee, *supra* note 43, at 138-43, 148-49, 157. Deportation was facilitated by the ROK-Japan Normalization Treaty of 1965 under which South Korea agreed to accept Koreans deported from Japan. Japan and South Korea are currently negotiating the successor to the Normalization Treaty, and the issue of Koreans in Japan is on the table.

46. *Fingerprint Rule to End for Koreans*, Japan Times, Jan. 11, 1991, at 1, col. 2 [hereinafter *Fingerprint*].

47. *Id.* at 1, col. 3; *Family Registry Eyed for Koreans*, Japan Times, May 4, 1990, at 2, col. 3. These initial reports identify only South Koreans as the intended beneficiaries of the change.

48. *Fingerprint*, *supra* note 46, at 1, col. 3.

ciety. Reactions from the Korean community are yet to be heard, but a system of family registration rather than alien registration would appear to be at least a step toward inclusion, a step that would be potentially significant if it were backed by more legal entitlements to employment and other social benefits.⁴⁹

While family registration may well provide some benefits over alien registration, the wide use of family registries will permit the continuation of discrimination against Koreans, some of whom could pass for majority Japanese otherwise. The case of *Pak Chong-Sok v. Hitachi Co.*, decided in 1974, illustrates the dilemma many Koreans will face even if family registration is available.⁵⁰ When Mr. Pak applied for employment at Hitachi, he used the Japanese name which he customarily used,⁵¹ and he listed his place of birth as Japan. Mr. Pak spoke fluent Japanese because he had been raised and educated in Japan. He passed the employment examination and interviews, but Hitachi retracted its offer of employment after Mr. Pak provided a copy of his Korean family registry to complete his file. When Mr. Pak sued, Hitachi argued that Mr. Pak had committed perjury on his application. The court decided in favor of Mr. Pak despite acknowledging that Mr. Pak had used a false name and supplied misleading information.⁵² The court was sympathetic with Pak's motive to escape discrimination, and it found no damage to the company resulting from Pak's actions.

The Pak case is unusual because Japanese courts generally have not been willing to acknowledge discrimination resulting from the structure or use of family registries. The case of Asako Kanda, decided by the Japanese Supreme Court in 1961 illustrates the complexity of the historical connection between nationality and family

49. When it announced the plan to establish a family registration system, the Japanese government also committed to opening other avenues of participation in Japanese society as well. Examples include directives to local governments to allow South Koreans to take examinations to qualify as teachers and to apply for government positions. *Id.* at 4, col. 6. Despite these improvements, it is noteworthy that the Japanese government is also considering eliminating the fingerprint requirement for other foreigners. In that respect, Koreans are still being treated as foreigners.

50. Lee & De Vos, *On Both Sides of Japanese Justice*, in *KOREANS IN JAPAN: ETHNIC CONFLICT AND ACCOMMODATION*, *supra* note 38, at 253, 277-78.

51. Most Koreans born and raised in Japan use Japanese names. Hiroshi Wagatsuma has written about this practice in terms of its impact on Korean self-identity. Wagatsuma, *supra* note 38, at 319-30.

52. The legal treatment of names is different in Japan than in the United States where an individual can legally use any name as long as there is no intent to defraud. In Japan, the only legal name is the registered name. Names are regulated so extensively that Japanese registering the birth of a baby must conform to an approved list of Chinese characters for names.

registration and the resulting burdens borne by the Korean population and by Japanese women who married non-Japanese men.⁵³

Ms. Kanda married a man of Korean nationality and was entered on his family registry in Korea in 1935. At that time Japan controlled Korea and considered Korea to be part of the Japanese Empire. Accordingly, at the time Kanda married, the fact of registration on a Korean family registry had no impact on her Japanese citizenship.⁵⁴ After marriage the couple resided for about six years in Tokyo before moving to Korea where the husband's parents lived. Less than a year after arriving in Korea, Kanda's husband left her to live with another woman in Korea, and Kanda returned to Japan.

At the urging of her Korean parents-in-law, Kanda returned to Korea in June of 1945, but she was unable to persuade her husband to resume their relationship. As the situation in Korea worsened in the final stages of World War II, Kanda fled with her parents-in-law to North Korea. By late 1950 Kanda finally found her way to Pusan, South Korea, where there was a reception center for Japanese, but she was not able to return to Japan until the following fall of 1951.

Kanda initiated divorce proceedings soon after her return to Japan. On November 14, 1952, nine days after the divorce judgment became final, Kanda attempted to register the divorce on her former family registry, that of her parents. The document was rejected on the grounds that she was an alien because she had been stricken from her former Japanese family registry. Under the terms of the Peace Treaty of 1951, Japan surrendered all territories taken before the war, and all persons belonging to those countries became citizens of those countries. According to the Japanese government's

53. Judgment of April 5, 1961, Saikōsai (Supreme Court, Grand Bench), *reprinted in* 8 JAPANESE ANN. INT'L L. 153 (1964). See *infra* note 59 for a discussion of the lasting effects of this case.

54. Justice Irie contended in his supplementary opinion that Kanda lost her Japanese citizenship at the time she entered a Korean family registry because, under the Potsdam Declaration and the Peace Treaty of 1951, Japan acknowledged that it had held Korea illegally. The effect of those two international agreements was to restore Korea (and other captured territories) to its former position of independence and to treat it as though it had never been a Japanese colony. Under Korean law at the time of Kanda's marriage, registration on a Korean family registry conferred nationality. Under Japanese nationality law at the time, wives followed their husbands' nationality law. Therefore, according to this justice's opinion, Kanda lost Japanese nationality at the time of her marriage. However, this view was not adopted by the majority which held that Kanda lost her Japanese nationality by operation of the Peace Treaty of 1951.

interpretation, those entered on family registries of surrendered territories were persons belonging to those countries.⁵⁵

A majority of Supreme Court justices accepted the government's interpretation of the treaty language. The Court rejected Justice Shimoizaka's interpretation that Kanda did not become a "person belonging to Korea" by virtue of her marriage to a Korean because she never knowingly surrendered Japanese citizenship. Indeed, the majority agreed that operation of the treaty (an unforeseeable event when Kanda married) and not the marriage itself resulted in the loss of Japanese citizenship. Nevertheless, the majority pointed to the different treatment accorded those registered on Korean registries as a type of notice that marriage had serious consequences. The majority concluded that the outcome was not unduly harsh because they believed that Kanda could easily restore her Japanese citizenship through naturalization procedures. The Court never explicitly acknowledged that its decision left Kanda without citizenship in either country because her divorce removed her from her Korean husband's registry as well.

Besides predicted ease of naturalization, the Court may have ruled as it did because it found the bright line distinction of family registration attractive as a means of giving content to the treaty language.⁵⁶ The *Kanda* decision can also be interpreted as underscoring the legitimacy of governmental regulation of the system of family registration at a time of widespread dissatisfaction with the

55. In 1952, local officials responsible for family registration received Circular No. 438 of April 19, 1952 of the Director of the Civil Affairs Bureau, Office of the Attorney-General (*reprinted in* 8 JAPANESE ANN. INT'L L. 173 (1964)). That document described the new rules that resulted in loss of Japanese nationality and directed local officials to act in accordance with them "without expressing any regrets." All those entered on Japanese family registries retained Japanese nationality; all those entered on Korean or Taiwanese family registries became citizens of those countries on the effective date of the Treaty.

56. Justice Shimoizaka's opinion chides the majority for facile, formalistic application of the law without regard for the unfair burdens it generates for particular individuals. Shimoizaka would have made an exception for those similarly situated to Kanda, even if the government's interpretation of the treaty were adopted. Shimoizaka was particularly mindful of the fact that Kanda's precarious situation was not of her own making. At the time of her marriage, Kanda had no reason to believe that ultimately her marriage would affect her citizenship. Moreover, she complied with all social norms regarding attempted reconciliation with her husband even though this resulted in considerable delay. The facts also indicate that Kanda made every effort to return to Japan as soon as possible.

During the time of treaty negotiations and formalization, Kanda was trying to obtain a divorce through the Japanese judicial system. Delays in processing her divorce (it was finalized after the effective date of the treaty) appear to have resulted from slow judicial processing rather than any delays on Kanda's part.

government. According to legal sociologist Nobuyoshi Toshitani, some Japanese citizens who were disillusioned with their government after World War II refused to cooperate with the requirement of registration at the government registrar's office in order to give legal effect to personal status changes.⁵⁷

The disenchantment reportedly expressed by some of those citizens was focused on the government's role in family registration and not on the concept of family registration itself. That attitude is reflected in remarks such as the following: "Something as important as the family registry cannot be left to you [government officials];" "I will keep my own family registry;" and "Who needs such things as family registration by a defeated Japan."⁵⁸ Such comments illustrate that the concept of family registration was fully entrenched by this point despite disrespect for the government that maintained it. The Supreme Court's *Kanda* decision may well have been responsive to a perceived need to bolster respect for the government during the post-World War II era.⁵⁹

Another issue the Court, including the dissenter, did not address was the disparate impact of the majority's interpretation of the Peace Treaty on the lives of Japanese women as compared to Japanese men. Because marriage has always typically involved a wife entering her husband's family registry, Japanese men would not have been entered on foreign registries and thus risk loss of citizenship. Only Japanese women would face this automatic penalty for having married an individual who became a legal alien subsequent to the marriage.⁶⁰

57. N. TOSHITANI, *KAZOKU TO KOKKA* 150 (1987).

58. Toshitani quotes Hashio Suminao, the head of a Tokyo registrar's office in the immediate post-War period. *Id.*

59. It is important to remember that the *Kanda* decision affected the lives of Koreans in Japan as well as Japanese women entered on Korean registries. In January of 1989, the High Court in Fukuoka rejected an appeal from a Korean seeking to regain the Japanese citizenship he claimed was wrongfully taken from Koreans forcibly brought to Japan and detained there. In addition to recognition of his Japanese citizenship, the plaintiff sought monetary damages for having been forcibly brought to Japan. He argued that the Peace Treaty of 1951 concerned only territory and not the nationality of people resident in Japan. At the very least, he argued, principles of international law required the government to allow Korean residents the choice of Japanese or Korean citizenship. The court based its rejection on the *Kanda* decision. *Korean Resident's Suit for Citizenship Denied*, *Japan Times*, Jan. 31, 1989, at 2, col. 4.

60. Shimoizaka's opinion rests on the harsh outcome of the majority's decision rather than on an analysis of disparate treatment that had become unconstitutional under the post-World War II constitution.

Although the Nationality Law was revised in 1950 so that marriage would not result in the automatic loss of citizenship,⁶¹ the conflation of nationality and family registration continued to disadvantage Japanese women, more so than Japanese men, when they married a non-Japanese. Under the Nationality Law of 1899 Section 2, which was not revised in 1950, a child could be a Japanese national only "when the father is a Japanese national at the time of the child's birth."

Moreover, non-Japanese fathers did not have Japanese family registries in which their wives or children could be registered. Indeed, until 1985, neither Japanese women nor Japanese men could establish a new family registry if they married a non-Japanese.⁶² However, Japanese women were disadvantaged relative to Japanese men because Japanese men customarily entered non-Japanese wives on their parents' family registry, since marriage involved the wife's entering her husband's family registry. Registration of the marriage conferred legitimacy and Japanese citizenship on children born to the couple after marriage.

Because women "followed their husbands" and left their parents' registry upon marriage, Japanese women who married non-Japanese were forced to choose between illegitimacy and Japanese nationality for their children.⁶³ If a Japanese woman had children before marriage, her children would be illegitimate but they would be Japanese by virtue of her being able to establish her own family registry or remaining on her parents' family registry. If the Japanese woman married before having children, her children would be legitimate but they would not have Japanese citizenship.

Apparently many women decided to have children before marriage in order to insure their children's Japanese citizenship.⁶⁴ This

61. Previously, under the Nationality Law of 1899, spouses were required to have the same nationality. If marriage to an alien husband resulted in the Japanese wife's acquisition of her husband's nationality in accordance with the law of her husband's country, she automatically lost Japanese citizenship. Nationality Law of 1899 § 18.

62. A reason frequently given for this rule was that the death of the Japanese spouse would have resulted in the non-Japanese spouse's becoming head of a Japanese house.

63. A Japanese woman did not lose citizenship upon marriage to a foreigner. The fact of the marriage was noted above her name on her parents' registry. However, when the woman had children, those children could not be recorded on the woman's parents' registry because they were not children of that family. The children of these women and non-Japanese fathers were stateless if their fathers could not confer their nationality on them.

64. R. YAMADA & F. TUCHIYA, *AN EASY GUIDE TO THE NEW NATIONALITY LAW* 7 (1985).

was a rational choice because it seemed easier for the non-Japanese father to acknowledge paternity after their marriage than for the children to obtain Japanese citizenship later.⁶⁵ Moreover, citizenship entitled the children to benefits, such as education and health insurance coverage, that aliens have received only as a matter of grace. However, this rational choice put women at a severe disadvantage because they were stigmatized as unwed mothers, and they were exposed to the possibility that the father would refuse to acknowledge paternity or marry them. They were disadvantaged not only relative to Japanese men but also relative to other women, both Japanese and non-Japanese, who married Japanese men. Viewed from the perspective of the children involved, the former system caused the children of Japanese women married to non-Japanese to bear burdens not borne by children of Japanese men married to non-Japanese.

This aspect of family registration was revised in 1985. Under the new Nationality Law, either parent can confer Japanese nationality on his or her child.⁶⁶ The Family Registration Law was also revised so that now Japanese men or women who marry non-Japanese can establish a new registry upon marriage.⁶⁷ Their marital children have dual citizenship until the age of twenty-two.⁶⁸ At that time they automatically lose their Japanese nationality if they have not taken steps to renounce their foreign citizenship.⁶⁹ This provision continues discrimination against non-Japanese because the default rule results in loss of Japanese nationality rather than loss of the foreign nationality if the child does not actively seek to retain Japanese nationality. Children whose parents are both Japanese do not have to do anything to retain their Japanese citizenship.

65. The underlying assumption was that their children would be unsuccessful in acquiring citizenship due to discrimination against aliens, especially Chinese and Koreans.

66. Under the new Nationality Law Section 2 (1), a marital child born to a Japanese parent has Japanese citizenship. However, there is still a distinction drawn between marital and nonmarital children. If the nonmarital child's mother is Japanese, the child may have Japanese citizenship without special naturalization procedures. However, if the nonmarital child's mother is not Japanese, the child may have Japanese citizenship only if the child's Japanese father acknowledges paternity *and* the child successfully completes naturalization procedures.

67. Under Section 16 of the Family Registration Law, a Japanese individual who marries a non-Japanese can establish a new family registry at the time of marriage. However, the non-Japanese spouse is not listed in the space provided for "wife" or "husband." Instead, the non-Japanese spouse's name is included in the registration of the fact of the marriage in the "particulars of status" column.

68. Nationality Law § 14.

69. Nationality Law § 15(3).

V. THE PURE FAMILY LINE—THE PURE FAMILY REGISTRY:
THE IMPACT OF FAMILY REGISTRATION ON NONMARITAL AND
ADOPTED CHILDREN

Other classes of children have been adversely affected by the way in which family registries are used as evidence of an individual's character. The stigma of illegitimacy and adoption is reinforced considerably by the family registration system, both with respect to condemnation by outsiders and internalization of the negative value judgment.⁷⁰ The stigma reaches everyone listed on the same registry with the nonmarital or adopted child, including parents and siblings. When Dr. Kikuta provided birth documentation which falsely identified the biological parents of a baby, he was trying to help all concerned avoid the stigmatizing effect of illegitimacy and adoption.⁷¹ Unmarried women and married women alike had reasons to avoid registration of a birth followed by adoption. The adoptive parents and child also avoided the stigmatizing effect of illegitimacy and adoption. If recorded, both are irregularities that might generate difficulties at crucial junctures, like school entrance, application for employment, and marriage negotiations.⁷²

Although not all schools, employers, or parents of potential spouses examine family registers, those are the areas of possible exposure and rejection based on conclusions drawn from the family registry. At the time of decision about abortion or adoption, the decisionmaker may in fact overestimate the probability of and extent of damage from such exposure to outside review and rejection. The problem is not so much that discrimination is certain to occur. Rather, the problem is that individuals who fear stigma believe that harm is highly probable and are inhibited from taking what they perceive to be an excessively high risk.

Illegitimacy has resulted in stigma ever since the delegitimization of men's registering mistresses (and the children of those unions) in addition to registering wives (and the children of those unions). Prior to the introduction of national family registration,

70. A quick glance at the family registry confirms whether an individual is a marital or nonmarital child; the former are clearly labeled with their sibling rank while the latter are labeled only "male" or "female." See Appendix I *infra* p. 167.

71. Dr. Kikuta made these arguments in his lawsuits to restore his license to practice medicine and to perform abortions. See *supra* note 7.

72. I am told that only marriage go-betweens require copies of the family registry up front. Schools and employers, if they request it at all, are likely to request a copy after admission in order to complete the file. The more frequent problem appears to be discriminatory treatment in the classroom or with job promotions, for example, if negatively valued information becomes known, rather than outright exclusion.

communities largely determined the legitimacy of any given relationship despite attempts by feudal lords to exercise some control over such events as marriage and divorce.⁷³ Although the national government took away that validation right from local communities when it instituted family registration in 1872, the mere legalization of marriage at the national level did not result in distinctions between children of mistresses and children of wives.⁷⁴ From 1872 until 1882 men had the right to register mistresses, and the births of all children born to registered women were recorded on the father's registry.⁷⁵ In 1882 when the government abrogated the right to register mistresses, children of those unions were no longer registered on their fathers' registries, either. Even if the father registered acknowledgement of paternity, the record of birth itself was registered on the mother's family registry, and the child belonged to the mother's house, not the father's. That removal from the paternal house is the source of the distinction called "illegitimacy," and many newly "illegitimated" children complained (through such media as letters to newspaper editors) that they would suffer the most from elimination of mistress registration.⁷⁶

Nonmarital children are burdened by the system of family registration because it is the official record of birth: a record that is used by the individual and by others for categorizing and valuing the individual. By rigorously reflecting legitimacy or illegitimacy, the family registry facilitates perpetuation of the stigma of illegitimacy by signaling the importance of that information. The family registry is also the basis for determining rights to intestate succession; nonmarital children are entitled to only half the portion that would be inherited by a legitimate child.⁷⁷

73. Ishii, *The Status of Women in Traditional Japanese Society*, 29 JAPANESE ANN. INT'L L. 10, 18-20 (1986).

74. Kaneshiro, *Hichakushutsushi to koseki*, 37 JIYU TO SEIGI, May 1986, at 41-43.

75. *Id.* As early as 1870, the government recognized mistresses (*mekake*) and wives as relatives in the second degree, but the system of family registration was begun later, in 1872.

76. *Id.*

77. MINPŌ § 900(4).

In 1980 there was a proposal to eliminate the distinction between marital and nonmarital children with respect to inheritance. The Diet dropped the proposal partially in response to a public opinion survey in which only 16% of those responding supported the proposal while 48% objected. One interpretation of those results is that a large number of people identified with the position of marital children whose share would be reduced if a nonmarital child could receive an equal share. *Id.* at 45.

A second argument against the elimination of disparate treatment is that it would promote irresponsible sex. According to this view, disparate treatment under the law sends the message that illegitimacy is wrong and thereby stigmatizes the parents as well

The stigma associated with the adoption of minors is related to the stigma associated with illegitimacy. It is particularly intense with respect to children who are not biologically related to one of the adoptive parents. Less than three percent of adoptions legally effected annually in Japan involve children who are unrelated to either parent.⁷⁸ Those who were adopted by nonrelatives must live with their own and others' suspicion that they were illegitimate or abandoned. Adoptions of adults are far less suspicious,⁷⁹ and there is some evidence that even minor adoption meets with less condemnation these days because it prevents a family registry from looking "too pure."

Nevertheless, minor adoption is still treated as an undesirable irregularity in family background that raises doubts about whether the individual has been properly socialized and about the strength of the bond between that individual and others in the family. Banks, for example, are reputed to be particularly rigorous in requiring their employees to have faultless family registries. Personnel officers question whether individuals raised in unusual family circumstances, as indicated by the legal events recorded on the family registry, have been exposed sufficiently to values that would ensure their honesty and industriousness. Moreover, both adoption and illegitimacy raise the specter that the bank may not be able to go to the parents if there is wrongdoing on the part of the employee. The fear is that such parents feel less obligation because they are not the biological parents and that those parents could dissolve their legal connection to the employee through adoption dissolution pro-

as the child. This reasoning can be inverted quite easily. As the law stands now, an individual's marital children inherit more than if a nonmarital child could share equally. Knowing that his or her marital children will not be so badly harmed reduces the guilt an individual might otherwise feel. If the goal is to control sexuality through legislation, a rule that would enable marital and nonmarital children to share equally may provide more incentive to prevent nonmarital births than a rule that limits the amount those nonmarital children could receive. Ultimately, there is no indication that the attempt to control adults' sexuality through legal rules affecting their children's inheritance has been or ever will have anything other than a harmful result.

78. This statistic is based on 1985 data. DEPARTMENT OF JUSTICE, CIVIL AFFAIRS DIVISION, LEGAL RESEARCH GROUP, *KAISEI YOSHI HO TO KOSEKI JITSUMU 7* (1988). Recent research by Minoru Ishikawa reveals that the number is still quite small and declines each year. Ishikawa, *supra* note 7, at 65-66.

79. See Bryant, *Sons and Lovers: Adoption in Japan*, 38 AM. J. COMP. L. 299 (1990), for a discussion of the wide use of adult adoption. See also Ishikawa, *supra* note 7, at 65-66.

ceedings or through legal contest of a former acknowledgement of paternity.⁸⁰

Banks may have the reputation for being particularly strict in their requirement of family registry conformity, but other employers, as well as schools and potential spouses, are believed to use the family registry as evidence of an individual's character and background. The registry appears to be a concise, reliable statement of the social nexus within which the person was presumably raised; all legal events associated with that individual and with other members of his or her family are recorded through governmental procedures that appear to make the registry reliable. There is a strong expectation that family registries are and should remain "pure," and that no one would desecrate a family registry with falsehoods.

The issue of purity was an important element of the debate that emerged from the Kikuta case. Dr. Kikuta argued that hiding the fact of illegitimacy and adoption could literally save those children's lives, an observation supported by research that reveals that 82.2 percent of victims of infanticide are nonmarital children.⁸¹ One of many arguments against disguising the fact of adoption was that it would sanction the recordation of falsehoods on the family registry; the entire institution would lose validity.

Despite this persistent belief in the purity of the document and accuracy of registration information, there is considerable opportunity for fraudulent registration. In the early days of the present family registration system, some families avoided sending their sons to military service by having them adopted as eldest sons of other families.⁸² Adoption was easily effected, and eldest sons were exempt from the draft. Adoptions could be dissolved after the danger had passed. A contemporary example of manipulation of the family registration system is the problem of fraudulent registration of di-

80. Interview with Sakata Yasuo, historian, in Los Angeles (June 14, 1989).

The Civil Code permits dissolution of adoption over the adoptee's objection if specified fault grounds are proved. MINPŌ § 814. The fault must arise in the context of the relationship, however. Wrongdoing against others is not, in and of itself, grounds for dissolution. The employer's worry may stem from ignorance of the law or concern that an individual who would engage in wrongdoing in one context may do so in others such that grounds exist for dissolution of the adoptive relationship.

81. Kaneshiro, *supra* note 74, at 47; see also *Research Committee on Female Crime, Japan, A Study on the Victims of Homicide Committed by Females*, in *VICTIMOLOGY IN COMPARATIVE PERSPECTIVES* 272 (1986) (additional data on the vulnerability to infanticide of nonmarital newborns).

82. N. TOSHITANI, *supra* note 57, at 146.

vorces by only one spouse.⁸³ Fraud occurs because there is no requirement that spouses appear in person to register their mutual consent to the divorce.⁸⁴ Procedures associated with family registration present ample opportunities for fraudulent registration despite the apparent concern for and belief in accuracy.

These conflicting positions—purity of the system versus compassion for those burdened by value judgments associated with the registered information—survive in the “Special Adoption” Law (*tokubetsu yoshi engumi ho*) approved by the Diet in 1987.⁸⁵ Enacted in response to the problem raised by Dr. Kikuta’s case, the law reflects an heroic but unsuccessful attempt to hide the fact of adoption without the registration of falsehoods. It is significant that the debate centered on changing adoption procedures so as to disguise the fact of adoption rather than on changing attitudes toward adoption and adopted children. Indeed, the government’s response in this situation is reminiscent of its decision in 1872 to rename “eta”⁸⁶ and its 1919 decision to relabel “illegitimate” children,⁸⁷ as though changes in labels in and of themselves would result in changes in social perception.⁸⁸ Far from indicating naivete about social change, these actions reveal the government’s deep ambivalence regarding real social change in these areas.

Under the “Special Adoption” Law, adopting parents between the ages of twenty and twenty-five may adopt children who are six years old or younger with special procedures intended to disguise the fact of adoption.⁸⁹ The terms “adoptive mother,” “adoptive father,” and “adoptive child” are not used, and even the birth order

83. Both spouses must register their voluntary agreement to divorce. Family Registration Law § 76.

84. See Bryant, *Obstacles to Marital Dissolution in Japan: Legal Obstacles and Their Impact*, 17 LAW IN JAPAN 73, 95–96 (1984) (discussion of fraudulent divorce).

85. MINPŌ § 817.2. The law came into effect in 1988.

86. See *supra* notes 27–30 and accompanying text.

87. Kaneshiro, *supra* note 74, at 42–43.

88. Current attempts by majority Japanese to substitute “dowa” for “burakumin” fall into this same genre of attention to the label rather than attention to the underlying problem. See *supra* note 3.

89. MINPŌ §§ 817.4, 817.5. The adopting parents must be between the ages of 20 and 25 because the purpose of the special adoption is to create a biologically plausible parent-child relationship. The legal effect of special adoption differs from that of regular adoption in that the adopted child will have only one set of parents. Other adoptions result in the adopted individual’s maintaining legal rights and obligations with respect to his biological parents as well as his adoptive parents. The similarities and differences between special and regular adoption are described in detail by K. HOSOKAWA, *ATARASHII YOSHI HO* 11–80 (1988). See also Ishikawa, *supra* note 7; Kimura, *Tokubetsu yoshiengumi jiken no jitsujo*, 1342 HANJI 3 (1990).

of siblings is altered to account for the age difference between the adopted and biological children.⁹⁰

The fact of adoption is not completely disguised, however. A family court judge must determine that the biological parents of the adopted child are "inappropriate" or unable to raise the child,⁹¹ and the date of the family court's order of change of the child's registration is noted immediately above the basic information of the child's relationship to the other members of the family.⁹² The fact of the family court's involvement signals that the child's background is unusual. The "special adoption" procedures thus fail to disguise the fact of adoption because knowledgeable people will realize that the child was adopted, and people who are not knowledgeable will ask questions.

In fact, it is not only the adopting family's registry that is affected by these procedures. Three family registries bear the marks of special adoption procedures. First, the biological parents' registry is affected because the facts of the child's birth and subsequent change of registry by court order are recorded. Second, a new family registry in the child's name alone is established as a record of the child's former surname and *honseki*. The biological parents' first names and addresses are not recorded, but they can be traced through the number of the judicial order of change of registration. This new family registry for the child is merely a transitional stage intended to insert a layer of difficulty in tracing the connection between the family of origin and the family of adoption. Finally, the adoptive family's registry is affected because a judicially ordered change of registry for one of its members is recorded. That record can be disguised if the parents subsequently change the *honseki* for the entire registry, because the adoptee's different registration will not be recorded on the new registration document. However, the fact of a changed *honseki* alerts an outsider to the existence of a prior family registry and suggests that the family has something to hide. The prior document continues to exist so that the adoption can be discovered and traced.

The "Special Adoption" Law is unlikely to reduce the incidence of fraudulent registrations of adopted babies as the biological

90. See Appendix II *infra* p. 168 for examples of ordinary and special adoption.

91. MINPŌ § 817.7.

92. For a more extensive discussion of the procedures and documentation involved, see Ishikawa, *supra* note 7 and Kimura, *supra* note 89. The authoritative text in Japanese is KOSEKI HO SHIKO KISOKU (Procedural Regulations of the Family Registration Law).

offspring of their adoptive parents. The new legal procedures do not allow the parents or child to disguise sufficiently the adoption, and the biological mother must retain the stigmatizing record of the child's birth on her family registry. Even for those parents who choose legal procedures, ordinary adoption procedures may well seem preferable to special adoption procedures because the special adoption law was created in the context of controversy over unwed mothers and their babies. Indeed, the requirement that the biological parents of the adoptive child be "inappropriate" or unable to raise the child casts a pall over the entire system of "special adoption." In addition, there were many proposals that made special adoption less desirable than ordinary adoption, and people are confused about which proposals survived.⁹³

The "Special Adoption" Law is not particularly useful because it fails to address the concerns of those who engage in fraudulent birth registrations.⁹⁴ "Special adoption" is potentially riskier and just as ineffective as "ordinary adoption" in preventing discrimination against adopted children. According to Aiko Noda, one of the drafters of the new law, any value the law might have had in reduc-

93. For example, one that did survive is the fact that a child adopted under special adoption procedures loses the right to inherit from both sets of parents, while a child adopted under ordinary adoption retains that right. The reason given for that difference is to make the child as much like a biological child as possible. Ishikawa, *supra* note 7, at 71.

However, another proposal rooted in the same objective did not survive. The legislative committee's draft proposal provided that there be no procedure for dissolution of special adoptions, although ordinary adoptions can be dissolved under certain circumstances. Eventually they realized that forbidding dissolution of the adoption regardless of the circumstances would make special adoption seem so risky that no one would ever utilize the procedure. Accordingly, dissolution of adoption is available for "special adoptions" as it is for "ordinary adoptions." MINPŌ §§ 817.10, 811.

94. This is not to say that "special adoption" is not used. During the first year after enactment, a total of 3,202 petitions for special adoptions were filed in the Japanese family court system. During the second year, the number of petitions dropped to 1,287. The overwhelming majority of petitions requested reclassification of an adoption from "ordinary" to "special." However, because of the restrictions on use of "special adoption" and misunderstandings on the part of the petitioners, some petitions were rejected or withdrawn. While only 40.2% of those filed in 1988 were approved, 62.8% of those filed in 1989 were approved. Kimura, *supra* note 89, at 4-6.

It is difficult to attach significance to these numbers other than to say that special adoption is used. We do not have information about the relative drop in ordinary adoption petitions, and the number of minor adoptions is still extremely low relative to the number of adult adoptions. Ishikawa, *supra* note 7, at 65-66. Moreover, we cannot know how many fraudulent adoptions are still occurring. The magnitude of the problem was never fully known, and, in fact, Dr. Kikuta's activity was discovered not as a result of an investigation but because he himself placed a local newspaper advertisement for someone to raise a newborn boy as her natural child.

ing stigma was destroyed by the requirement that family court authorization be noted on the adoptive family registry. The Japanese government was motivated to change registration procedures because of tremendous public sympathy for Dr. Kikuta and because of its own concern about the development of a gray market in babies. However, fears about the consequences of the government's involvement in disguising adoptions proved more powerful.⁹⁵ If procedures were implemented to permit the complete concealment of the adoption, the adoptive family's registry would contain a falsehood sanctioned by the government. What would become of the family registry if its purity could be eroded so easily? Similarly, if unmarried mothers were not forced to bear the burden of registering their nonmarital babies, what would prevent them from having irresponsible births?

VI. THE IMPACT OF FAMILY REGISTRATION ON WOMEN

The governmental response to the dilemma posed by Dr. Kikuta's case illustrates a contemporary use of family registration as a means of social control of women. The other recent cases of Sekiguchi's fight to use her surname and the Nissan employees' argument of entitlement to family allowances rest on a related claim about the impact of family registration on women. These plaintiffs argued that family registration promotes a patriarchal model of the family that subordinates them in violation of the postwar Constitution's insistence on individual dignity and autonomy.

One consistent response to this claim is that the system of family registration is gender neutral because women can become legal househeads. This view credits post-World War II legal revision with elimination of the major gender-based legal impediments associated with the house system. Remnants of the house system are seen as fragmentary and insignificant. Skeptics also argue that the causal link between oppression and family registration is tenuous, particularly since there were sources of oppression in Japanese society, such as Confucian ideology, other than the use of a patriarchal model of the family. Finally, opposition to change in family registration in this as in other contexts stems from a belief in the basic neutrality of the document; discrimination results either directly from abuse by intentional discriminators or indirectly through failure to change social patterns associated with the family.

95. Fears about medical necessity and subsequent inadvertent incest were also raised as justifications.

In order to understand the claim of gender neutrality, it is important to delve briefly into the historical development of family registration.⁹⁶ The Japanese government's explicit reason for instituting family registration in 1872 was to monitor population growth and movement, but by 1873 the government had removed the six year reporting requirement for census purposes.⁹⁷ Household registration was established for those purposes, but family registration was retained nonetheless.

Historian Einosuke Yamanaka suggests three reasons for requiring family registration after household registration replaced it as a means of census data collection.⁹⁸ One was crime control; individuals who might not consistently report their current residence might nevertheless register personal status changes. Another reason may have been the government's desire to break the spine of local communities' power.⁹⁹ Prior to legalization of personal status changes, communities as a whole had the power to validate events such as marriage and adoption.¹⁰⁰ Under the family registration system, the central government had the final say as to the validity of those events.¹⁰¹ A third reason for instituting family registration, as opposed to individual registration, is that it reinforced an ideology that was particularly useful to the government. If individuals could be made to answer to the heads of their families and family heads

96. Cornell and Hayami report four conceptually distinct periods in the historical development of family registration. The Japanese government first instituted population recordation in 702 A.D., but the geographical area controlled by the government was limited and few of the records survived. In the late sixteenth century, central and local authorities again used population surveys, this time to ascertain the extent of labor power controlled by individual lords. They were also used to identify and persecute Christians, although compilation was irregular and geographically limited due to individual lords' inconsistent compliance with government directives. There was a third period, at the beginning of the eighteenth century, during which various forms of registration existed, but it was not until 1872 that the present comprehensive, nationwide system of family registration was established. By then the central government of Japan was becoming powerful enough to impose its control on the nation as a whole. Cornell & Hayami, *The Shūmon Aratame Chō: Japan's Population Registers*, 11 J. FAM. HIST. 311 (1986).

97. ENCYCLOPEDIA JAPONICA 444 (1971).

98. E. YAMANAKA, NIKON KINDAI KOKKA NO KEISEI TO "IE" SEIDO 41-44 (1988).

99. *Id.* at 115-16.

100. *Id.*; see also Ishii, *supra* note 73, at 19.

101. This concern of the newly centralized government was reflected in other actions taken by the government such as redistricting the school system so that it cut across village boundaries and bringing in school administrators from outside the villages served by the particular school. See Chiba, *Relations Between the School District System and the Feudalistic Village Community in Nineteenth-Century Japan*, 2 LAW & SOC'Y REV. 229 (1968).

could be made to answer to the government, the government's need to control and monitor individual behavior would be reduced.¹⁰² Authorizing the family head to register status events gave the househead power, but not enough power to threaten the stability of the government because that power was granted, and could be taken away, by the state.

The problem for the government was that only the families of landowners, wealthy merchants, and samurai were structured in a way that facilitated imposition of a hierarchy of accountability.¹⁰³ While the notion of a senior male representative for the family was present for other classes, family life was characterized by more equality between the sexes and by a relatively high tolerance for movement in and out of family structures through divorce and remarriage.¹⁰⁴ Through its nationwide institution of the family registry system, the government imposed the more rigid, hierarchical upper class family structure (the *ie*, hereinafter "house") on commoners and made househeads the legal representative of the house

102. E. YAMANAKA, *supra* note 98, at 41-44.

103. Ishii Ryosuke describes differences between the samurai house structure and the far less rigid or hierarchical structure of commoners' families. Ishii, *supra* note 73. Joy Hendry also notes the dissemination of the samurai house structure throughout other classes. J. HENDRY, MARRIAGE IN CHANGING JAPAN 14-15 (1981). The pattern is identified exclusively with the samurai class, but there is evidence that the house system was used by wealthy families generally. Otake contends that an idea of the house system, that is, men serving as representatives to the outside, was widespread but that women worked alongside men in the nonsamurai classes. Their participation in making the family a going economic concern resulted in their having greater voice in family decisions and mitigated the subordinating effects of the hierarchical family system. H. OTAKE, IE TO JOSEI NO REKISHI 233-34 (1977); see also Ramseyer, *Thrift and Diligence: House Codes of Tokugawa Merchant Families*, 34 MONUMENTA NIPPONICA 209 (1979) (analysis of house codes among merchant families). Either because the concept was already present in some form or because it was associated with the elite classes in Japanese society, the government may have had greater success with imposition of the house system than it would have in importing or designing a totally alien structure.

104. As Otake suggests, the greater equality may have stemmed from the overlap of work and family relationships rather than from the existence of a totally different family structure. *Id.*; Ishii, *supra* note 73, at 11-18. In 1885, Yukichi Fukuzawa wrote of Japanese women prior to "samuraization" that "[p]articularly in marriage, they were very free, never restricted by the confining doctrines of later years. In those years, no one criticized a woman's remarriage." Y. FUKUZAWA, *On Japanese Women*, in FUKUZAWA YUKICHI ON JAPANESE WOMEN: SELECTED WORKS 25 (E. Kiyooka ed. 1988). Similarly, Yuzawa's analysis of historical patterns of divorce suggests that divorce was relatively frequent and not stigmatized except in those aristocratic families subscribing to the house system. Yuzawa, *Nihon: kindai no naka no konmei*, in SEKAI NO RIKON 170-202 (1979). Echoes of this flexibility exist in some accounts of rural, post-World War II communities in Japan, which suggests that attitudes toward marriage, divorce, and remarriage are more complex than current literature reflects. See, e.g., R. SMITH & E. WISWELL, THE WOMEN OF SUYE MURA 149-76 (1982).

to the government.¹⁰⁵ The government also gave extensive power to the househead in running the house.¹⁰⁶

If family registries were not widely used, or there were no value judgments associated with the registered events, the family model underlying family registration would have had relatively little impact. However, family registries *are* widely used, and there *are* negative value judgments associated with the registered events. Therefore, it is, in fact, significant that the government validated the more rigidly patrilineal, patriarchal model of the house system of the upper class as the basis for the family registry. Typically, in that system of patrilineal linkage of the eldest sons of successive generations, the eldest son and his wife and unmarried children remained on the registry of his father (who was, in turn, the eldest son of the preceding generation). That son assumed responsibility for continuity of the house through rituals respecting the house ancestors and through ensuring the correct conduct of present members of the house. Other sons left the registry when they married and established their own or "branch" houses. Daughters remained on their fathers' registries until they married and entered their husbands' family registries.

Women could become househeads under certain circumstances,¹⁰⁷ but the stratum of society from which the house system was drawn, the samurai class, emphasized male control.¹⁰⁸

105. For a description of the upper and lower class family structures in the Edo era, see Ishii, *supra* note 73, at 18. Ishii points out that families did have "heads" or "spokespersons" (*namaenin*) but that they had no powers like those given to househeads when the government established family registration. *Id.* This lends support to Otake's contention that the idea of the house already existed among nonsamurai classes.

106. Househeads could control such things as the occupation, residence, and marriage partner of his children. He controlled his wife's property as well as the house property because she could not legally enter into contracts on her own. Househeads' authority was backed by the power to expel members of the house. For a detailed description of the househead's legal power, see Watanabe, *supra* note 20.

107. Section 736 of the Meiji Civil Code provided that a daughter could become the head of a house. If she married, her husband entered her house and became its head unless there was a contrary agreement that she would remain head of house. See J.E. de Becker's annotated version of the Meiji Civil Code for a discussion of Section 736. 2 J. DE BECKER, *THE PRINCIPLES AND PRACTICE OF THE CIVIL CODE OF JAPAN* 539 (1921); see also N. HOZUMI, *LECTURES ON THE NEW JAPANESE CIVIL CODE* 93 (1912).

108. William Hauser analyzed data about female heads of houses in Osaka before and after 1730. See *supra* note 96, for a discussion regarding regarding population registries that preceded the 1872 registry system. He found increasing legal impediments to women becoming househeads. For example, for a woman to become a househead, a family representative had to ask for permission to register the woman as househead.

Whereas formerly women in the samurai class were much more restricted in autonomy relative to women in other classes, the imposition of the house system made that restriction generally applicable to all women. When they married, women married out of their fathers' house and into their husbands' house; they were insiders only if and when their husbands succeeded to headship of the house.¹⁰⁹

Women experienced the insider/outsider distinction on a daily level because mothers-in-law frequently subjected their daughters-in-law to difficult tests of obedience and respect.¹¹⁰ They were outsiders also in relation to their own children. Children born to them during marriage were children of their husband's house and would remain with the father in the event of divorce; the husband's mother had more legal right to the children than did the mother.

If Japanese women were previously relatively powerless within the family, family registration that resulted in legal entitlement to protection by government officials might have benefitted women by providing a means of equalizing power between the couple. However, not only did the law not provide for governmental intervention in the house, there is evidence that Japanese women of the lower classes were considered strong, respected family members prior to the imposition of the house system through the registration requirement.¹¹¹

The term was to last only until a man became househead or no longer than three years. Hauser suggests that such restrictions sprang from an interest in limiting competition among merchant houses. In those cases where the woman was succeeding to house property, that is, main house lines, special dispensations were made so that the main line of the house could continue. In those cases where the woman was succeeding to a house that rented property, that is, branch houses, the restrictions were applied such that it was harder for the house to survive. Thus, the rules restricting househeadship made it more difficult for branch houses, established by younger sons, to survive and compete with main house lines (established by eldest sons). Hauser, *Why So Few?: Women Household Heads in Osaka Chonin Families*, 11 J. FAM. HIST. 343-51 (1986).

Two points in Hauser's analysis are particularly significant. First, women's roles within the upper class house structure in some areas were already restricted well before the government made use of the house system for family registration. Second, the restrictions did not spring primarily from assumptions about women's inferiority.

109. Yamanaka contends that the classification of women as outsiders was the source of most of the status deterioration that attended imposition of the family registry. E. YAMANAKA, *supra* note 98, at 260-61; see also J. HENDRY, *supra* note 103, at 16-17.

110. T. LEBRA, *JAPANESE WOMEN: CONSTRAINT AND FULFILLMENT* 141 (1984).

111. R. ISHII, *IE TO KOSEKI NO REKISHI* 701-02 (1981) (lower class women were tough and respected for their hard work and contributions to the family); H. OTAKE, *supra* note 103, at 233-34 (lower class women had some authority due to hard work shared with their husbands; upper class women had virtually no authority).

Nationwide imposition of one family registration system that validated only one family structure, a structure that cast women only in the role of baby-maker, could not have *benefitted* Japanese women in those classes that had previously permitted flexibility of family relationship and participation. The question is whether it has *harmed* them. If, as some Japanese scholars contend, the house system was compatible with pre-existing family structures, the family registry could function as a written statement of only part of the social reality of the family without necessarily undermining other parts of that reality. However, there is disagreement about pre-existing compatibility, and even those who assert such compatibility agree that the imposition of the upper class house system through family registration negatively affected women's status in the family and other social contexts.

Subordination of women was exacerbated by use of the house system as a paradigm for other relationships, including the relationship between the Emperor and Japanese citizens. The ideology of the Japanese nation as "One Family" was an important part of the Meiji government's attempt to consolidate power and unify the country.¹¹² In that context of instilling commitment to strengthening the nation, certain aspects of the house system—the importance of duty, loyalty, and acceptance of hierarchical superiors' decisions—were amplified and became dominant aspects of the socio-cultural content of the house. Because women were most often in tangential or structurally inferior positions within the houses they were born into or inmarried into, an emphasis on those aspects of the house, which were amplified for nationalistic purposes, must have resulted in greater expectations of subservience than might have been the case had the model of the house not been used to strengthen commitment to the Japanese government.

The system of family registration as it was instituted in 1872 also affected women through the government's requirement that

112. This idea is widely accepted by Japanese and Western historians, social scientists, and legal scholars. See, e.g., C. GLUCK, *JAPAN'S MODERN MYTHS: IDEOLOGY IN THE LATE MEIJI PERIOD* 4 (1985); N. HOZUMI, *ANCESTOR-WORSHIP AND JAPANESE LAW* 108–13 (2d ed. 1973); Watanabe, *supra* note 20, at 364. Kawashima, one of Japan's most respected legal scholars of the postwar era, has written that the Japanese government instituted conciliation for the resolution of family disputes because permitting litigation would weaken the family and, thereby, the state. "The traditional family system being the very basis of the official ideology (*shushin*) and the power structure of the state, the government adopted *chotei* [conciliation] to settle disputes arising from the disorganization of the family. Rather than adjustment through a system of legal rights, disputes were to be 'washed away' in order that the family might be strengthened and preserved." Kawashima, *supra* note 2, at 41, 58.

men register mistresses.¹¹³ There is no evidence that registration was required for the purpose of protecting mistresses or that its impact on women was even considered. However, some benefits did redound to both wives and mistresses. A wife was less likely to suffer a divorce if her husband could find another to make up for her "failings" without getting rid of the wife. The wife also derived some status security through the legal rule that no one in the legal family could ever marry anyone in the mistress's line, even after the relationship between mistress and husband was dissolved.¹¹⁴ Of course, heightened security of status would not have been important if movement in and out of the status of marriage were acceptable. Prior to family registration, divorce was not stigmatized among the nonelite, and marital status mobility was acceptable for most Japanese upon whom family registration was imposed. Thus, the minimal benefits of protected status afforded by the rules of family registration merely made the disadvantages associated with family registration more palatable.

Registration also afforded mistresses security because it resulted in limited rights to receive support. Through registration mistresses obtained a place within the house structure, even though that place was secondary to that of the legal wife.¹¹⁵ Since registration was a possibility, women could demand the protections of registration before serving as mistresses, or they could exact a higher sum in exchange for eschewing registration. Historian Hideo Otake's account of mistress registration suggests that registration of mistresses is best understood as a means through which mistresses obtained employment security. The relationship was negotiated by a go-between, and, besides registration, there was often a collateral contract that stipulated how much compensation the mistress was to receive and the duration of their relationship.¹¹⁶

Benefits resulting from family registration came at a high price. Despite legal protection during their periods of employment, mis-

113. A. HISATAKE, *UJI TO KOSEKI NO JOSEISHI* 25, 74-75 (1988); H. OTAKE, *supra* note 103, at 75-83; J. HENDRY, *supra* note 103, at 19-20; *see also* Kaneshiro, *supra* note 74, at 41-42.

114. H. OTAKE, *supra* note 103, at 252. Otake states that the reason for the rule was avoidance of confusing the legal family bloodline.

115. A. HISATAKE, *supra* note 113, at 74-75; H. OTAKE *supra* note 103, at 75-83; *see also* Kaneshiro, *supra* note 74, at 41-42.

116. One such contract provided that the mistress would receive a certain sum of money at the outset and that the relationship would last for five years. The mistress reserved the right to request an unspecified amount more if she gave birth to a son. Apparently there were various types of contracts providing for different periods of tenure and different types of job requirements. H. OTAKE, *supra* note 103, at 90-91.

tresses, like other women, were harmed by the system of family registration because it emphasized the importance of continuing the house and their role as baby-makers. Women were protected as far as "fair use" of their bodies was concerned, but that limited protection came in the context of legal validation of only the role of "baby-maker."¹¹⁷ Government provision for registration of mistresses for terms of employment reflected and reinforced the notion of women as sexual disposables. It also validated the use of women to enhance male prestige by serving as a public declaration of the number of women a man could support.¹¹⁸

Women were harmed also because registration of women according to their sexual relationship with a man divided women among themselves according to class. Professor Otake reports three categories of registered women.¹¹⁹ In descending order of status these were legal wives (*honsai* or *seisai*), mistresses (*mekake*), and prostitutes (*yujo*). Only upper class, financially able men could afford registered extramarital relationships. Their wives were women of the same class, and they chose mistresses from the same or slightly lower class. Prostitutes were women whose economic circumstances required them to exchange sex for money. As Otake points out, there was no real difference between mistresses and prostitutes—both exchanged sex for money—but they were perceived differently. The prostitutes' greater need and lower class status provided excuses for others to accord them lesser treatment and respect. This system of categorizing women through registration status reinforced the class structure and created a divisive pecking order among the women themselves.

The categorization and control of women was not a primary goal when family registration was instituted, and, in fact, it is all too easy to characterize the imposition of the system of family registration as the intentional control of *male* power and sexuality.¹²⁰

117. Some of the same concerns about informed agreement and the potential for exploitation currently voiced about surrogate motherhood contracts are applicable here because many of these mistress contracts were for the purpose of obtaining a son to continue the family line and business.

118. Kaneshiro, *supra* note 74, at 42 (men were proud to be able to register many mistresses).

119. H. OTAKE, *supra* note 103, at 72-93.

120. Registration of mistresses can be characterized as governmental control of men's sexuality in that it co-opted men's prerogative to enter into extramarital relationships without having to answer to anyone. The government controlled the number of mistresses a man could register. H. OTAKE, *supra* note 103, at 81 (Otake used this fact to support his assertion that many men had many mistresses, but he does not report the legal limit). The government did divert power to the hands of mistresses in that they

Thus, harm done to women through family registration can be dismissed as merely symbolic or unintended. As Yamanaka points out, the government certainly had other incentives to impose family registration than the oppression of women.¹²¹ Moreover, registration of personal relationships was convenient for the government because, to the extent that people used registration and respected the duties that flowed from it, the government could regulate the creation of dependency relationships and the assumption of legal, financial, and moral responsibility which those relationships entailed. Permitting a man to hire a mistress to produce a son was less destabilizing to the social order than requiring the man to divorce his wife in order to remarry with the hope of having a son.

When the Japanese government did abrogate the requirement of mistress registration in 1882, it did not do so out of concern for its impact on women. In fact, the decision apparently had little to do with the utility of mistress registration in the Japanese context. At that time the Japanese were trying to avoid having to accept unequal treaties with Western powers, and it was feared that such a practice would make the Japanese appear uncivilized and, thus, unworthy to be treated as peers.¹²²

In general, historical evidence about the imposition of family registration suggests governmental mindfulness of considerations other than overt discrimination against women. While changes in the Family Registration Law did result in some incremental improvements for women,¹²³ a concerted, explicit effort to equalize the treatment of men and women under the law did not emerge until post-World War II legal revision. During the postwar Occupation, the constitution and codes were revised with the goal of "democra-

could exact a price for their service. Nevertheless, overall, the system appears to have benefitted men more than it constrained them. Extramarital relationships cannot really be strictly controlled, and there is no evidence of fines for failure to register. What the government was providing through mistress registration was the opportunity to claim the mistress's children as house members. It also gave men an opportunity to rank themselves according to ability to support women.

121. Historian Yamanaka contends that family registration served three purposes: crime control, central government's usurpation of local or village autonomy in validating personal status changes, and creation of a chain of legal accountability with househead control over family members. *See supra* note 98 and accompanying text.

122. Kaneshiro, *supra* note 74, at 42; H. Otake, *supra* note 103, at 247-48.

123. One was the right to use the husband's surname which indicated an incorporation of the wife fully into the house. Another was elimination of the husband's right to unilateral divorce. In 1872, the government first recognized a wife's right to secure a divorce through judicial procedures. From 1919, administrative divorces would not be registered on the family registry without both spouses' consent. Ishii, *supra* note 73, at 21.

tizing" Japan, which was defined primarily as instilling values of equal treatment and respect for the individual.¹²⁴ Two of the most significant changes in Family Registration Law at that time were elimination of the multigenerational house in favor of nuclear family registration¹²⁵ and the entitlement of individual men and women to establish their own separate family registries.¹²⁶

Gradually other amendments were enacted to promote democratic values. Examples include the closure of the family registries in 1976, the right obtained by women in 1976 to retain their married surname or to return to their prior surname when establishing a family registry after divorce,¹²⁷ and the 1985 amendment that eliminated disparate treatment between Japanese men and women who marry non-Japanese.

Many Japanese believe that the postwar and subsequent changes in the Civil Code and Family Registration Law, such as nuclearization of the registered family, removed the worst of the subordinating aspects of the family model underlying family registration. This belief rests partially on an assumption that approval by the Occupation legal advisors, those charged directly with democratizing Japan, meant that the Family Registration Law and Civil Code were basically as democratic as they needed to be. How-

124. An example of constitutional revision is article 24 which provides that registration of marriage is to be the result of the individual spouses' choice and not that of their respective parents. An example of revised family law provisions is Civil Code Section 770, which equalized the grounds for contested divorces.

125. According to Chizuko Ueno, the change to nuclear family structure diluted the only form of power women exercised, the power of mistress of the extended house. While wives in nuclear households do retain considerable autonomy within that role, the role itself has been circumscribed by the nuclearization of the family. Ueno, *The Position of Japanese Women Reconsidered*, 28 CURRENT ANTHROPOLOGY S75 (1987).

126. Not many Japanese women use this legal right to establish an independent family registry. This option is used primarily by those women who have divorced and prefer not to return to their family registries (or whose family prefers that they not return). This legal possibility is not exercised any more frequently than the legal opportunities to choose the woman's surname or *honseki* at marriage or to list her as the head of household. The law is gender neutral on its surface, but the options it provides are not fully utilized. The mere fact of those legal rights does not penetrate to actual practice.

127. Civil Code Section 767 allows retention of the marital surname, but the default rule is that the premarital surname will be resumed. Unless the individual actively seeks to retain the married name within three months of divorce, the premarital name will automatically become the legal name. Hisatake details the change in the rule. A. HISATAKE, *supra* note 113, at 197. According to Yamagawa, a legal historian, the change in rules concerning surnames arose out of concern for women who would have different surnames than their children if they were not allowed to keep the marital surname. Yamagawa, *Rikon no sai ni sho shite ita uji o sho shita tsuma to uji no henko*, in KAZOKU HO TO KOSEKI 295, 301 (K. Hosokawa & Y. Ebilira eds. 1986).

ever, Occupation advisors were not fully aware of how certain legal rules (such as the retention of *honseki* and the specific provision for inheritance of religious paraphernalia associated with ancestor remembrance) permitted continuity of the hierarchical house system.¹²⁸ Moreover, Japanese and Occupation jurists were incrementalists worried about the implementation of drastic change at a time of political and social chaos in postwar Japan. Nevertheless, the idea that the Occupation would not have left an inherently undemocratic institution in place is one source of majoritarian resistance to the call for sweeping change in the Family Registration Law and accompanying Civil Code provisions. Thus, a hallmark of postwar attacks on family registration, including contemporary attempts to push legal revision further in the direction of equalizing the impact of family registration on men and women, is a focus on specifically offensive features rather than a grand scale attack.

A. *The Requirement of One Surname and Its Impact on Women*

Ms. Sekiguchi's dispute with her employer, Toshokan Joho University, over the use of her husband's surname is not the first time that the issue of wives' surnames has arisen. In the period immediately prior to institution of family registration, peasants did not have surnames, and women lost even their first names upon marriage.¹²⁹ From marriage they were called simply by their title (bride, wife, mother, or widow).

When the present system of family registration was instituted in 1872, women were not allowed to adopt their husband's surname or *honseki* because it was considered important to preserve information regarding the mother's contribution to the "blood" of her husband's offspring.¹³⁰ Given this historical context, it was considered an elevation of women's status for them to be allowed to take their husband's surname and *honseki* upon marriage. This shift, which occurred at the time the Civil Code was promulgated in 1898, was perceived as part of a trend recognizing the importance of the pres-

128. A. OPPLER, *supra* note 20, at 117.

129. Cornell & Hayami, *supra* note 96, at 319.

130. E. YAMANAKA, *supra* note 98, at 257 (the rule amounted to establishing a pedigree and illustrates the negative effects of the house system on women's status); Ishii, *supra* note 73, at 13 (wives' kept surname of parents' registry until Meiji Civil Code of 1898).

ent generation of the house, a trend which permitted more integration of wives as members.¹³¹

The focus for the present debate over the selection of a surname at marriage, the Sekiguchi case, is couched in much different terms. Many who favor improvement of the status of women in Japanese society now argue in support of allowing each spouse to continue to use his or her premarital surname if he or she chooses.¹³² Absorption into the husband's house is viewed as a hindrance to the improvement of women's lives because it symbolizes their continued subservience to the demands of their husbands and their husbands' parents. The requirement that spouses select one of their surnames is particularly vexing for those women whose careers outside the home are important to their conception of self.¹³³

The system of family registration is central to the debate about surnames. The choice of one of the spouse's surnames is required at the time of marriage, which is legally defined as the time of registration on a family registry. As in the case of discrimination against burakumin and adopted and nonmarital children, the family registry is accorded such weight that an individual cannot easily avoid the application of labels derived from it. Given the importance of the family registry in Japanese society, it is not surprising that Ms. Sekiguchi's employer required her to use the surname recorded on her family registry.¹³⁴

131. There is evidence that Japanese women began using their husbands' surnames, despite the difference in registration, before the legal change in registration. A. HISATAKE, *supra* note 113, at 101. See *id.* at 90-101 for details of changes in rules regarding women's surnames.

132. There appears to be more support for the right to choose to use one's premarital surname than for the idea that women should necessarily continue to use their premarital name. Shortly after the Sekiguchi suit was filed, a professor of a four-year women's college in Japan surveyed her classes as to whether they intended to select their husbands' surnames upon marriage. The overwhelming majority expressed an intention to select the husband's surname. Nevertheless, this seems to reflect the expectation that marriage will be the most important variable in defining themselves. The issue of name recognition is much more important to women who have established professional reputations before marriage. Perhaps a husband who is less concerned than his wife about name recognition could be persuaded to take his wife's surname, but the custom of taking the husband's surname is quite strong.

133. According to a Japan Times report, articles about professional women who chose to use their premarital surnames began to appear in women's magazines around 1983, and many women, like Ms. Sekiguchi, began requesting permission to use their premarriage name despite having registered their marriages under their husbands' surnames. *Group Fighting to Let Couples Keep Own Surnames*, Japan Times, Oct. 22, 1988, at 3, col. 1.

134. Another issue involved in the surname dispute is the question of whether recordation should absolutely preclude use of an unregistered name such as the surname the

Ms. Sekiguchi's lawsuit against her employer over her right to use either surname brings into focus several issues that connect the system of family registry with the social unit it documents and legitimizes. One of the primary arguments against the required selection of one surname is the contention that the system of family registration reinforces the concept of the family, rather than the individual, as the smallest meaningful legal and social unit. This conflicts with the postwar constitution, which provides for protection of individual autonomy and dignity and for marriage based only on the mutual consent of the spouses.¹³⁵ The unitary surname requirement illustrates this tension in that it requires some individuals to choose between marriage or protection of a professional reputation established under the premarital surname.

There is considerable support for this interpretation of the unitary surname requirement. The Tokyo Bar Association supports revision to permit retention of both surnames,¹³⁶ and more legal scholars have focused attention on the benefits of revision and on resolving the administrative problems that would result from relaxation of the unitary surname requirement.¹³⁷

Nevertheless, there is also residual support for the unitary surname requirement that stems from a belief that it assists in the maintenance of a stable society. In a case decided by the Gifu Family Court in 1989, the plaintiff couple attempted to register their marriage without choosing one surname, but the local registrar refused to accept the registration.¹³⁸ The court, rejecting the plaintiff couple's lawsuit to direct the local registrar to accept their registra-

individual chooses in the particular context of employment. If the act of legal recordation of the surname sufficed without the necessity of actual use, the Sekiguchi dispute would not have aroused such public controversy, if it had arisen at all. The problem in this case is not that the idea of actual use varying from legal documentation is an alien concept in Japanese society. Indeed, a "[d]isparity between operating by the rules (*tatema*) and operating by pragmatic judgment (*hon*)" is frequent and accepted in Japan. Wagatsuma & Rosett, *supra* note 2, at 461, 466. The problem with tolerating such disparity in this context is either that name regulation is considered extremely important or that this particular documentation, the family registry, is so significant as to prevent relegating the legal surname to mere formality.

135. See *infra* note 138.

136. *Group Fighting to Let Couples Keep Own Surnames*, *supra* note 133, at 3, col. 1.

137. *Zadankai*, *supra* note 11; *Fufu bessei*, *supra* note 11.

138. Judgment of June 23, 1989, 41 *Kasai Geppō* 116 (Gifu Family Court) (Sept. 1989). The plaintiff couple claimed that Civil Code Section 750, which requires the couple to select one surname, violates Article 13 (respect for the individual) and Article 24 (marriage is to be based exclusively on the mutual consent of the two people to be married) of the constitution. They also failed to provide other required information, such as their parents' names, they deemed violative of their constitutional rights of individual equality and free choice in marriage.

tion, emphasized that the unitary surname requirement reinforces the concept of couple as one family and facilitates third party recognition of the couple as married. The court stressed the message of the requirement rather than the administrative ease associated with it.

The dispute over surname selection underscores the tension between those who view the family as the source of individual and societal stability and those who view it as a hindrance to the personal development of its members. That tension is evident also in the *Nissan* lawsuit about family allowances.

B. *Suzuki v. Nissan Motor Company: Family Allowances, Family Registries, Household Registries*

The legal registry of actual, current household residence and membership (*juminhyo*) is specifically at issue in the lawsuit seven women employees brought against Nissan.¹³⁹ The household registry is used for census purposes, and it is requested in many situations in addition to the family registry because it verifies current residence and household composition. A buraku leader has argued that the household registry is much more suitable than the family registry for verifying the identity and address of a job applicant, for example, because it provides current information that is registered according to legal procedures designed to insure veracity without including the *honseki*.¹⁴⁰ The household and family registries are related, however, because both reify the same family structure; both identify the same individual as head of the family. Thus, while the burakumin's problem would be eased by use of the household registry, the problem experienced by women who want to be treated without reference to their family roles would not be decreased by use of the household registry instead of the family registry. The *Nissan* dispute illustrates the problem of overlap in women's roles as employees and family members, a problem exacerbated by reliance on registries based on family units.

There is evidence that in 1977, long before the issue came before the courts in 1981, Nissan recognized a problem with its procedure of granting family allowances. Nissan had a rule (known as "Rule A") that heads of households were entitled to a family allowance for each child they supported as long as the child was eighteen

139. Judgment of January 26, 1989, Chisai (Tokyo District Court), 1301 HANJI 71, 694 HANTA114.

140. Wada, *supra* note 24, at 74-75.

years old or younger.¹⁴¹ Only women employees who could prove that their husbands were deceased or disabled were eligible to receive family allowances for their children without being registered as heads of their households. In 1977 Nissan considered replacing Rule A with a new rule ("Rule B") that would allow any employee to receive a family allowance if he or she were supporting children, regardless of whether the employee was the head of a household.¹⁴² However, Nissan never officially replaced Rule A with Rule B; registration of head of household continued as the determinative factor in providing family allowances.

Nissan did adopt a different rule ("Rule C") which expanded the class of dependent relatives to include parents over the age of sixty. It also adopted the policy that single employees supporting siblings or parents would not necessarily be required to prove head of household status. However, Nissan left in place the rule that registered head of household status was prerequisite for married employees.

The plaintiff women employees of Nissan wanted Nissan to pay family allowances to all employees who support minor children. They argued that Rule C was discriminatory because it used the legal registration of head of household to determine eligibility.¹⁴³ Since the overwhelming majority of Japanese couples register the husband as househead, Nissan's reliance on household registries unfairly furthered the advantage which men receive. While the plaintiffs also found fault with Rule B,¹⁴⁴ at least Rule B eliminated the registration of househead as a determining factor.

Although the court did not accept Nissan's argument that the "family allowance" was a gift (and therefore not subject to rules about fair distribution), the court did uphold Nissan's provision of family allowances under Rule C. First, the court held that deference should be accorded to companies' interpretation and execution of their own rules as long as there is a reasonable basis for the com-

141. Nissan provided family allowances for up to three children per household.

142. The same age and number of children limitations were applied.

143. The plaintiffs brought the case under sections 4 and 13 of the Labor Standards Law (antidiscriminatory provisions). They claimed that the basis for determining which employees could receive family allowances also violated the company's own rules against discrimination. Moreover, they argued, judicial validation of Rule C would violate Section 90 of the Civil Code which prohibits judicial validation of legal acts counter to public policy.

144. Plaintiffs argued that Rule B would not significantly reduce discrimination against women employees because Nissan could interpret the phrase "employees supporting children" narrowly to mean "househeads," thereby allowing them to use the same criterion as before.

pany's action. Second, Rule C was found to be a reasonable rule for accomplishing Nissan's goal of providing for employees' children because those registered as household heads usually *are* household heads, and heads of households are considered by most Japanese to be primarily responsible for supporting the couples' children.¹⁴⁵

Finally, Rule C was not discriminatory, the court held, because the company was trying to match family allowances with the higher earner of the family. This was not because the size of the family allowance was related to the amount of salary. Rather, it was advantageous to give the family allowance to the higher wage earner who, as head of household, could receive tax deductions for dependents. If women earned more than men, it would be reasonable for them to receive the family allowance and to be treated as head of household for tax and other purposes.¹⁴⁶ Among Nissan employees, more husbands than wives were the higher earner. Therefore, Nissan's identification of househeads through their registration comported with the reality of househeads among Nissan employees, and it was legitimate to use househead registration to determine the family allowance. In other words, the court was most interested in protecting an efficient family income unit given the current tax regulations.

The court and Nissan shared the assumption that each family has one primary provider. Indeed, Nissan's argument for not putting Rule B into effect was that double income families would receive two family allowances; single income families would receive only one. The court unquestioningly accepted Nissan's argument that such a difference between families was inequitable and provided sufficient reason to retain Rule C. The plaintiffs' proposal that all employees supporting minor children receive family allowances was never seriously evaluated. The court's reliance on household or family registration, both of which identify only one househead, reinforced the assumption that each family has only one provider.¹⁴⁷

145. The court relies more on social custom than on the law. Under the Civil Code, both parents are equally responsible for supporting their minor children, regardless of who is the registered head of household. MINPŌ §§ 818, 820.

146. This is peculiar reasoning. Husbands are not househeads *because* they are higher earners; husbands are househeads and higher earners because men are privileged in both areas.

147. One problem with family allowances given to all employees who support minor children is that would result in discrimination against employees who are members of families but not supporting minor children. This question of defining the "family" part of the term "family allowance" was not at issue in this case. Also, this case does not

CONCLUSION

The examples of burakumin, nonmarital and adopted children, Koreans, and women illustrate how the Japanese family registration system maintains divisions associated with class, nationality, and gender in Japan. The examples also demonstrate the extent of intersection: Japanese women were harmed by the treatment of Koreans; class distinctions emerge through stigmatization of "illegitimacy" as well as through identification of buraku status; attempts to control women's sexuality have had serious consequences for unborn and nonmarital children. Purity of the family registry is as important in employment contexts as it is in marriage, and both men and women suffer to the extent that their registries are sullied by irregularities such as illegitimacy, buraku *honseki*, or divorce. Thus, the system of family registration is a potent source of wide-reaching social classification and control.

The family registry exerts a powerful influence on all Japanese citizens also because it locates individuals within a group of people, any one of whose socially unacceptable behavior, such as illegitimacy or divorce, harms the social standing and opportunities of all members; "black sheep" cannot be hidden easily.¹⁴⁸ For the sake of other family members, individuals will avoid "bad" behavior or rec ordation of events that could result in condemnation not only of themselves but of other members of the family. As it is, various negative conclusions can be drawn from facts over which individuals exercise little control; problems with infertility are surmised from the absence or spacing of children, for example.¹⁴⁹

appear to have generated much debate over this problem or the possible solution of shifting the responsibility for child allowances to the government instead of employers. Whether one receives a family allowance and how much it will be depends on whether one is working. The argument is that families in which both parents are working clearly indicate a greater need and, therefore, a greater justification for receiving two family allowances.

148. When criminal records and serious health problems were recorded on the family registry, there were even more possibilities for adverse consequences flowing from one family member's illness or misdeed. Ishii Ryosuke reports that when an individual entered prison that information was recorded in red on his or her family registry. R. ISHII, *supra* note 111, at 533; *see also*, Upham, *Ten Years*, *supra* note 24, at 41-42 n.11.

149. A poignant example of the ripple-out effect of family registries is the experience of Shigeko Niimoto, a badly scarred survivor of the atomic bombing of Hiroshima. R. BARKER, *THE HIROSHIMA MAIDENS* (1985). The disfigurement itself would have been a serious hindrance to finding a husband, but fears about the unknown effects of radiation sickness made it virtually impossible. Ever since the end of World War II matrimonial bureaus and individual go-betweens have avoided individuals who were exposed to either atomic bomb or its fallout because of fear of contagion, heavy caretaking responsibility, and unknown effects on the victims' offspring. This prejudice continues

Some of the most recent challenges against family registration rest on a claim that, although both men and women are vulnerable to disadvantages associated with the use and importance of family registration, women are affected negatively more often due to the confluence of social practices and regulations based on family registration. One example is the link between household head and access to benefits like family allowances and tax benefits.¹⁵⁰ Another example is the differential impact on women of the legal obligation of mutual support between siblings, parents, and children. If a person is left destitute after a divorce, for example, his or her siblings and parents are obligated to provide support if they can. Obviously those siblings and parents will try to prevent a divorce, and since more women than men will face financial difficulty upon divorce, such pressure is more commonly applied to women. Use of the family registry to identify those responsible for support may be of benefit in the reduction of welfare expenditures, but it also results in greater pressure on individual women not to divorce.

The underlying assertion in recent challenges is that the present system of family registration adversely affects women disproportionately because it reifies a family structure that subordinates them. Women's success or failure is closely connected to family role fulfillment, and, unlike men, there are few opportunities to expand the concept of self through a career outside the home. Their lack of access to the same educational and employment opportunities as men is directly related to the strength of a family structure that values women's participation in society only to the extent that

despite research which shows no statistical evidence of increased risk of deformity or defect in the offspring of atomic bomb victims. According to Barker, the fear is that radiation sickness could skip generations such that the effects will be expressed in subsequent generations. *Id.* at 178-79, 228. Go-betweeners who used family registries as sources of information about families with marriage-age children regularly called on the Niimoto family and requested information about the third, unmarried daughter. Shigeko recalls listening from behind the sliding paper door as her mother alternatively lied that all three daughters were already married or offered explanations for her daughter's unavailability. *Id.* at 42. The existence of a readily available document listing all family members and their ages subjected Shigeko and her family to repeated inquiries, repeated reminders of her inability to marry and her social isolation.

150. If a wife earns more than 900,000 yen in one year, her husband may no longer claim her as a dependent, thereby losing that tax deduction. Some family allowance plans require the wife to be a dependent as established by those tax records. Accordingly, a wife who wants to work must be able to earn enough to offset that disadvantage to the family. Part-time work is unlikely to provide sufficient financial advantage; so the family has to either need the money badly enough to absorb that cost of the part-time work, or the woman has to work full-time to make it worthwhile. Employers can offer part-time work at low wages with the inducement that the wage will not threaten the dependency ceiling.

they, as homemakers, smooth the way for their husbands and children.

This argument of disproportionate impact is strengthened by the government's linkage of national stability, the family registry, and the family model underlying the family registry. The government's use of the house system as a model of the relationship between government and citizens colored the sociocultural content of the house system through an emphasis on obedience, loyalty, and quiet acceptance of hierarchical superiors' decisionmaking. That value content, which was part and parcel of the entire structure, adhered more to the status of women than to the status of men because of the undiluted hierarchical inferiority of women within the house.

The government's linkage of family and state has resulted also in a belief that the nation's stability is linked to maintenance of the house system. Those who seek change are seen as selfishly rocking the very boat which has provided domestic tranquillity and national prestige abroad. In addition, the house system has become so entrenched as a model throughout society that it is difficult to stand outside of it to grasp its ramifications or to launch a successful attack.

The related problems of awareness of the reach of family registration and creativity in attacking it are illustrated by a lawsuit initiated in 1988 by a couple who rejected family registration because of the single surname requirement.¹⁵¹ They did establish a household registry, but when they attempted to register their children in typical fashion by reference to their birth order (e.g. oldest son, oldest daughter, second son, second daughter), they discovered that only "legitimate" (marital) children may be listed that way. Nonmarital children are referred to simply as "child" in the household registry and as "male" or "female" in the family registry.¹⁵²

The couple sued Musashino City and its mayor on the grounds that the registration law as applied by the local registrar discriminated against nonmarital children.¹⁵³ They cited various laws as a

151. See Sakakibara, *supra* note 11, at 90.

152. Nonmarital children are listed on the mother's family registry and take her surname.

153. According to Sakakibara's report, the couple claimed that the local registrar could have registered the children as they requested because registrars in other locations did so in similar cases. The court responded that local registrars have considerable autonomy in such matters; the central government issues only nonobligatory guidelines. Sakakibara, *supra* note 11, at 90.

basis for their argument,¹⁵⁴ but the City argued that mere recordation in and of itself does not have a discriminatory effect. The City acknowledged that such registration may promote discrimination, but that that was not considered to be as serious as direct discrimination. Moreover, such an outcome is perfectly consistent with a system of legal marriage. In other words, by choosing not to validate their marriage legally, the couple had chosen not to validate their children legally as members of a legal family that entitled them to the use of referents associated with legal family members.¹⁵⁵

The plaintiff couple thought they were avoiding only the problem of surname selection when they eschewed formal registration of marriage. Despite their disavowal of that particular representation of the family system, they accepted without apparent reflection or criticism the representation of the family system in the form of referring to children by their birth order in legal marriages. Perhaps the couple sincerely and consistently disapproved of the system of family registration but sought, nonetheless, to spare their children the consequences of their decision. However, it is at least equally likely that the couple failed to see the inconsistency of their positions because of their lifelong experience in a society structured in accordance with the house system.

The latest protest against family registration is not marred by a particular lack of insight or imagination. *All* the groups that have criticized family registration share the problems of an inability to imagine a different ordering structure and the conflation of the house system with national stability such that direct attacks are seen as dangerous. As participants in the same society, these subordinated groups share with majority Japanese beliefs about the value of family registration. Indeed, it is that sharing in the same value system that results in the internalization of oppression. Challenges have been limited because the groups harmed by others on the basis of family registration have also suffered from its corrosive effect on self-esteem and self-confidence. Many have internalized the predominant view that the negative labels reflect real distinc-

154. According to Sakakibara's report, the couple brought their action under the Constitution, KENPŌ articles 13 (guarantee of equality), and 14 (respect for individual dignity and privacy), Universal Human Rights Declaration, article 12 (freedom from interference), and the International Covenant on Human Rights, article 24(b) (no child should be discriminated against due to origin of birth), and section 2 of the Child Welfare Law (national and local governments have responsibility to protect children and provide conditions for them to grow up as healthy and sound individuals). *Id.* at 91.

155. *Id.* at 91-92.

tions intrinsic to the subordinated groups rather than social constructions of reality. This results also in a disbelief in other groups' claims, an important reason for subordinated groups' failure to join together in protest.

Another reason for the lack of joint protest has been the tendency to focus on specific, piecemeal changes rather than major overhauls of the family registration system. Typically, challenges have involved attacks on specific provisions with little crossover interest such as the listing of *honseki* or the inability to incorporate adopted or nonmarital children into the house structure's terminology for sibling birth order. Buraku leaders and some feminists have argued that the entire system of family registration is oppressive because of the centrality of ancestors and males, respectively. Koreans, too, have blamed the entire system as symbolic of the exclusion they experience in Japanese society. But the legal system does not provide many opportunities for sweeping attacks, and the political system is impenetrable for most of these groups. Surely deep-seated pessimism about accomplishing such massive change is a major factor in the choice to pursue limited improvement.

Groups are also internally divided about the extent of desired change. Individuals of buraku status differ with respect to approving the breadth and means of challenging family registration. Women, too, are divided on the benefits and costs of challenging family registration. The high value placed on women's work within the home takes the edge off some women's discontent. Also, some compare themselves to other women in Asia and attribute their greater safety and affluence to a government that has done a good job of providing national security whether or not that security arose from the use of the house system as a model for governance. If they question family registration at all, some women consider its negative effects to be a small price to pay for overall stability and affluence. Divisions within the groups harmed by family registration have resulted in diminished capacity to launch a coherent attack on family registration.

Other reasons for difficulty in changing family registration have to do with majoritarian investment in the present system of family registration.¹⁵⁶ One source of the continued strength of family registration is surely inertia, particularly since the use of family

156. The boundary between majority Japanese and members of subordinated groups is least distinct when it comes to the norms and values that underlie family registration. All of the majoritarian attitudes described here are present to greater or lesser degrees among members of the subordinated groups.

registries is so interwoven with Japanese social practices. Majority Japanese have few occasions to consider family registration in other than pragmatic terms of acquiring the legal effects of personal status events, such as marriage, divorce and adoption, which are validated through registration.

When they think of it in abstract terms at all, majority Japanese think of the registration document as value-neutral because explicit reasons for its establishment and maintenance are couched in neutral terms. The government's explicit rationale for instituting family registration in 1872 was to monitor population growth and movement.¹⁵⁷ The rationale for preserving family registration is the administrative ease of documenting personal status events from which legal consequences flow and a harmless respect for ancestor reverence. It is extremely difficult for subordinated groups to identify a specific causal relationship between the family registry and discrimination. Unless an intentional discriminator is identified, the oppressive effects of family registration seem minor because they are considered the indirect, unintended consequences of an ostensibly value neutral system of necessary documentation.¹⁵⁸ Mere participation in the hierarchy generated by family registration is not believed to amount to active discrimination.¹⁵⁹ For instance, many Japanese use the family registry to verify that they are not burakumin without realizing that that in itself reinforces the stig-

157. See *supra* note 98 and accompanying text.

158. As Alan Freeman notes in the American context, "[t]he fault concept gives rise to a complacency about one's own moral status; it creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination." Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1055 (1978). When analyzing case studies of hate speech, Matsuda found a similar sense of innocence and refusal to believe in systemic racism. Incidents of hate speech are seen by non-target-group members as isolated pranks that do not require state response. Matsuda, *supra* note 40, at 2327-29; see also M. MINOW, *supra* note 37, at 70-78 (examining the assumption that the status quo is natural, good, and uncoerced).

159. This resonates with some of Charles Lawrence's ideas about unconscious racism among Americans. In arguing against legal responsiveness tied to intentional discrimination only, Lawrence points out that "[t]raditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes." Lawrence, *supra* note 37, at 322 (footnote omitted). Rather, racism is the product of shared experience in a society that devalues nonwhites. *Id.* The latter of two theories Lawrence raises to explain unconscious racism, Freudian defense against seeing oneself as a bad person and cognitive theories concerning absorption of tacit understandings about the world, is plausible in this Japanese context since there is ubiquitous awareness of family registries and the underlying house structure.

matization of burakumin.¹⁶⁰ Similarly, Japanese use the family registry without realizing that each use of it and each registration event reinforces the message present in the structure of family registration that women occupy hierarchically inferior status positions. The stream of registration events in one's life affirms the stability of that hierarchy even when much in the society seems to be changing. Majority Japanese do not seem aware that this required, repetitive activity of registering personal status events results in unintentional subordination that is no less destructive than intentional subordination.

Women face particular difficulty in demonstrating a causal link between subordination and family registration for two reasons. First, there are other sources of subordination such as neo-Confucian ideas about women's supposedly negative or passive (*yin*) nature.¹⁶¹ Second, their situation seems different from that of burakumin, Koreans, or nonmarital children. For those latter groups, exclusion and negative valuation occur regardless of the context. For women, however, staying within the family structure results in treatment with at least superficial respect.¹⁶² Rather than

160. It is a positive sign that some majority Japanese are choosing unusual *honseki*, whether or not the intent is reduction of discrimination, but the number of such cases is small. It is doubtful that many majority Japanese would participate in modification of family registration through this or other means because the family registry reinforces to themselves as well as to others their superior status as nonburakumin. Moreover, if buraku status loses its power to stratify Japanese society those who gained superior status through that means risk landing on the other side of status distinctions if another category becomes status-determinative. For similar reasons, challenges by other groups would fall on equally deaf ears because the status quo seems to be working so well for majority Japanese.

161. This was discussed and criticized by Yukichi Fukuzawa in 1885. See Y. FUKUZAWA, *On Japanese Women: Part Two*, in FUKUZAWA YUKICHI ON JAPANESE WOMEN: SELECTED WORKS, *supra* note 104, at 37, 39.

162. There is conflicting evidence about women's status within and outside the family. In 1885 Fukuzawa wrote that "women of our country have no responsibility either inside or outside of their homes, and their position is very low." Fukuzawa, *supra* note 104, at 6, 11. In the late 1970's, many analysts of Japanese women's status suggested that, despite a clear distinction between men's and women's activities, neither receives more positive social evaluation. See, e.g., Berger, *Japanese Women—Old Images and New Realities*, 11 JAPAN INTERPRETER 56 (1976); Salamon, "Male Chauvinism" as a Manifestation of Love in Marriage, in ADULT EPISODES IN JAPAN 20 (D. Plath ed. 1975); Schooler & Smith, ". . . and a Japanese Wife": Social Structural Antecedents of Women's Role Values in Japan, 4 SEX ROLES 23 (1978); Vogel, *Professional Housewife: The Career of Urban Middle Class Japanese Women*, 12 JAPAN INTERPRETER 16 (1978).

More recently, there has been greater appreciation for the complexity of the question of women's status. For example, Takie Lebra explicitly couches her life cycle analysis of Japanese women in opposition to the simplistic characterizations of Japanese women's status as positive or negative. T. LEBRA, *supra* note 110 (descriptions of the

the blanket negative valuation accorded the others, subordination of women takes the form of permission to participate in society only as support persons for their families.¹⁶³ Because Japanese women are not consistently devalued in all areas of social life, it is difficult for them to argue, and perhaps believe, that partial exclusion, or inclusion only on someone else's terms, is as bad as total exclusion.

Majority Japanese responsiveness to those who would change family registration for the purpose of reducing discrimination is blunted by a belief that sufficient change has already occurred to permit protection. Burakumin can change their *honseki*, Koreans can naturalize (or perhaps soon establish family registries), nonmarital children can be adopted under the Special Adoption Law, and women can be registered as heads of households. Women have the most difficulty with this argument because of the number of sweeping postwar and subsequent incremental changes that have addressed inequities between men and women. However, in all cases under review previous changes have failed to reach deeply into the oppressive features of registration. In fact, as we have seen in each case of attempted amelioration, the changes themselves embed messages of subordination and lesser worth. The argument that subordinated groups can protect themselves fails to recognize the handicapping which is caused by lifelong participation in the subordinating structure.

Central to the problem of changing the family registration system is the Japanese preference for communitarian values despite respect for principles associated with an ideology of equality.¹⁶⁴ Some indigenous support for individualistic principles is longstanding, and those ideals were incorporated into the postwar constitution and codes.¹⁶⁵ Nevertheless, the ideals of individualism and equality

various views are included in the Preface). Similarly, Anne Imamura's research reveals that the life of a housewife is still characterized as "three meals and an afternoon nap," despite acknowledgment that the tasks associated with women's role are viewed as important for the maintenance of society. A. IMAMURA, *URBAN JAPANESE HOUSEWIVES: AT HOME AND IN THE COMMUNITY* 88 (1987).

163. With respect to this one issue of limited rights to participation, one is reminded of the persistent notion that blacks would not have as much difficulty if they would but stick to athletics and music, as though stepping across the line is worthier of condemnation than the line-drawing itself.

164. See Upham, *infra* note 165 (discussing that the Japanese vision of justice in the postwar era contains the individualistic principles of equality and opportunity despite a continuing preference for communitarian outcomes).

165. Since there were Japanese who favored inclusion of democratic principles both during the drafting of the Civil Code of 1898 and during legal revision after World War II, the lack of commitment to equality is not simply the product of resistance to externally imposed values. Rather, the situation was complicated by the existence of com-

are realized, if at all, in the context of communitarian values rather than as the primary concerns of the society and the legal system. The American example demonstrates that ideological commitment is not sufficient, but the absence of even rhetorical adherence to the primacy of equality is a stumbling block for those challenging family registration.¹⁶⁶ In Japan hierarchical patterns of social and national organization combine with an ideology of homogeneity and its necessary counterpart, exclusivity, as bases of national solidarity. The assumptions that hierarchy is "natural," that the hierarchical categories are "natural," and that hierarchy is necessary for national stability result in placid tolerance of categories that restrict the opportunities of some Japanese to participate in society. Majority descriptions of hierarchical ordering as value-neutral are belied by the experience of groups who have protested against family registration, but majority Japanese may not be able to see or to under-

peting, deeply held views, incrementalism among the progressives, and concern on all sides about possible destabilizing effects of introducing principles of individualism and equality. Ultimately, the outcomes in both cases of legislation were compromises that left some traditional, hierarchical features in place alongside the less hierarchical features. For a discussion of debate preceding the Civil Code of 1898, see R. ISHII, *JAPANESE LEGISLATION IN THE MEIJI ERA 577-92* (Japanese Culture in the Meiji Era, No. 10, 1958); Y. KONO, *THE EVOLUTION OF THE CONCEPT OF MATRIMONIAL CONSENT IN JAPANESE LAW*, *MONUMENTA NIPPONICA SERIES* 1970; and M. Nagy, "How Shall We Live?": Social Change, the Family Institution and Feminism in Prewar Japan (1981) (Ph.D. dissertation, U. of Washington). A. OPPLER, *supra* note 20, and Watanabe, *supra* note 20, discuss the debate during post-World War II legal revision.

In judicial decisions as well, the ideals of equality and opportunity are intermingled with communitarian values, even if the latter predominate. Upham, *Visions of Justice in Postwar Japan: A Preliminary Inquiry*, in *LAW IN EAST AND WEST* (1988). Upham also discusses how the Japanese legal system encourages the use of informal dispute resolution procedures which obviate resort to formal rules and the development of justiciable rights. *Id.* at 160-65.

166. In this context it is important to consider whether the Japanese are all that unique in their lack of preoccupation with principles of individualism and equality. The American ideological emphasis on those values may well be unusually pronounced. Frank Upham notes the centrality of freedom and opportunity as uniquely American. Upham, *supra* note 165, at 145; see also K. KARST, *supra* note 37. An ideological emphasis on equality has not resulted in actual equality for a variety of reasons, some of which have been raised previously. See *supra* notes 36-38, 40, 158, 159, 165. Moreover, as Mary Dudziak's research suggests, American hyperemphasis on equality may have arisen for reasons other than a desire to actualize those values in American society. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61 (1988) (desegregation emerged because of international attention on America's racial segregation and American governmental officials' recognition that selling democracy to the Third World would be difficult given international awareness of widespread racial injustice in America).

stand that experience because of their privileged position in the hierarchy.¹⁶⁷

Majoritarian investment in family registration goes hand in hand with subordinated groups' difficulties in acquiring meaningful change in the basic structure of family registration. For the sake of national stability and the institutions which enhance it, challenges, and responses to those challenges, are limited to specifically offensive features. For the sake of one's own family, not just for the sake of the institution, individuals are reluctant to challenge hierarchies in ways that will affect other family members. Women are relatively more burdened by the linkage of family, national stability, and family registration because, unlike the other subordinated groups, women's very reason for existence has been closely linked to supporting the family and, through the family, the country.

One way of furthering the feminist challenge would be to unite with others fighting against family registration. However, achieving a coalition would be difficult because members of one subgroup often participate in the subordination of other negatively valued groups. Moreover, some of the groups are associated with liberation tactics so heavily censured as to give rise to worry about a negative halo effect.¹⁶⁸ Nevertheless, in seeking a basis for joint protest, in finding commonality with others, feminists might break through the barrier of the family as the primary, if not exclusive, source of the definition of women. Through this redefinition and united protest, change in family registration could benefit women not only as women but as members of other subordinated groups.

167. I am reminded here of Matsuda's comment that only people who can identify with target groups are sympathetic with her advocacy of legal restriction of hate speech. She describes others as incredulous, skeptical, and hostile. Matsuda, *supra* note 40, at 2326. This resonates with much of the material on majority Japanese response to opposition to family registration, as does Minow's assertion that the greater one's power within the social order, the less the ability to understand how socially constructed the world is. M. MINOW, *supra* note 37, at 379.

168. Members of the Buraku Liberation League, for example, have used public denunciation of those who have discriminated consciously or unconsciously against them. While Japanese courts have validated use of denunciation under limited circumstances, denunciation has done relatively little to improve majoritarian responses to burakumin and to the buraku liberation movement. See Upham, *Instrumental Violence and Social Change: The Buraku Liberation League and the Tactic of "Denunciation Struggle"*, in *LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES* 289 (J. Haley ed. 1988). Koreans, too, have attempted public education in the form of the fingerprint issue. See *supra* notes 46-49 and accompanying text. While less violent than "denunciation," these attempts have not been perceived favorably by majority Japanese.

APPENDIX I
FIRST PAGE OF FAMILY REGISTRY

Information about registered events such as: date and location of birth registration, marriage registration, spouse's former registry, adoption registration, and registration of paternity acknowledgment.										Information about the registry itself such as: date of first registration and transferring the registry to another registrar's office.			Honseki
													Head of Registry
													Name of Head of Registry
	Husband												
Birthdate	First Name of Husband							Mother's name	Father's name				

SECOND PAGE OF FAMILY REGISTRY

Information about registered events such as: date and location of birth registration, marriage registration, renunciation of future inheritance.										Information about registered events such as: date and location of birth registration, marriage registration, former register, and adoption registration.									
Birthdate	First Name of Marital Child*				Mother's Name	Father's Name	Birthdate	Wife First Name of Wife				Mother's Name	Father's Name						

Sibling rank**

Sibling rank

*X through block indicates removal from registry (upon marriage, for example). Nonmarital children are listed by name, but they have no sibling rank. In the box for "sibling rank" the individual is labelled "male" or "female."

**Sibling rank includes identification of gender (e.g. "eldest daughter" or "second daughter").

APPENDIX II
PART OF FAMILY REGISTRY THAT CONCERNS ADOPTION

SPECIAL ADOPTION

ORDINARY ADOPTION

Information about registered events such as: birth registration, family court authorization of change of registry.										
Birthdate	First Name of Adoptee				Mother's name*		Father's name*			
					Sibling rank					

Information about registered events such as: birth registration, date and location of adoption registration and former registry.										
Birthdate	First name of adoptee				Adoptive mother's name		Adoptive father's name		Biological mother's name	
					Biological father's name		"Adopted child"		Sibling rank	

*Name of adoptive parent identified as if biological parent.