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Equivalence at Law (and Society): Social Status in Korea, Race in America

Ilhyung Lee

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Equivalence at Law (and Society): Social Status in Korea, Race in America

*Ilhyung Lee**

ABSTRACT

Professor Lee's Article uses a comparison between the evolving role of social status in Korean society and that of race in the United States to explore Korean society and its legal system. Tracing the historical origins of status consciousness from the Confucianism of the Chosun dynasty to its vestiges in contemporary Korean society, Professor Lee notes several important parallels between social status in Korea and race in the United States. Emphasizing that there remain significant differences between the ways each functions in relation to law, Professor Lee argues that considering the two in equivalence is nonetheless analytically useful in both framing questions and proposing solutions. Finally, he points out the advantages to be

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Korean words and surnames that are commonly seen in English text will retain their form herein, in ordinary roman type, regardless of the accuracy of the Korean pronunciation (e.g., Chosun, Hanguk, yangban; Chang, Cho, Chun, Chung, Kim, Lee, Park). Otherwise, English translation of all Korean terms will be in italics, in spelling that most closely reflects the Korean pronunciation, with a hyphen (-) indicating the break between individual characters. For example, the Korean for "social status" would be *sah-hwe-juhkk shin-boon*. Although Korean names have the surname appearing first, for purposes of consistency in citation and text herein, all names will be in the Western order, with the first name first, followed by the surname. The second character of the first name of Korean names will be preceded by a hyphen and have an initial capital letter, unless the name is written differently in readily available English sources. The spelling of Korean commentators' names who have authored works in English will be honored.

gained from applying U.S. critical race theory methodology in a Korean social status context.

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I. INTRODUCTION

The subject of law and society in Korea¹ has received increasing attention from commentators in recent years.² The legal system in

1. Unless the context indicates otherwise, all references to "Korea" herein are to the Republic of Korea, popularly known as South Korea. There is the view that there is only one Korea, but that "[a]t present, the land is divided into two parts: the Republic of Korea (South Korea) and the People's Republic of Korea (North Korea)." KOREAN OVERSEAS INFORMATION SERVICE, A HANDBOOK OF KOREA 12 (9th ed. 1993).

2. For years, the leading English texts were PYONG-CHOON HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE (1986), and INTRODUCTION TO THE LAW AND

Korea in the opening years of the twenty-first century appears to be leaving behind nearly three decades of military dictatorships, as well as thirty-five years of Japanese colonial rule, welcoming democracy (though not yet certain how much), and rapidly transforming itself to meet the needs of a Korea with international designs. Of course, law in any national jurisdiction must always be studied in the context of its culture, and Korean society is one of a long traditional history, with social norms shaped by over five centuries of the Chosun dynasty and Confucian ideology. A relatively new constitutional democracy, the Korean setting provides for a rich discussion of matters relating to law, politics, society, and culture.

Regarding Korean society, the commentary includes the observation that Korea, unlike the United States, is a homogeneous society,³ free from the matter of race that continues to be a troublesome issue in U.S. society.⁴ Yet observers of Korea urge that the country is not the homogeneous society that it appears, and that quite the contrary, there are divisions within society based on a host

LEGAL SYSTEM IN KOREA (Sang Hyun Song ed., 1983), authored and edited, respectively, by two eminent Korean legal scholars. More recent texts, reflecting rapid changes in various areas of Korean law, are available in *KOREAN LAW IN THE GLOBAL ECONOMY* (Sang Hyun Song ed., 1996), and *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* (Dae-Kyu Yoon ed., 2000). In 2001, the Seoul National University College of Law began publication of the *Journal of Korean Law* (in English text). On October 9, 2002, the University of Illinois College of Law hosted what is believed to be the first conference devoted exclusively to Korean law held at a U.S. law school, "Korean Legal Reform: Achievements, Problems, and Prospects." There has been a growing number of articles in U.S. law journals on Korean law written by Korean law faculty, some of which are referenced herein. In addition, events relating to Korean business and politics, and the tensions over the nuclear threat on the peninsula have kept Korea in the news.

3. Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 102 (1997) ("Korea has historically been an extremely mono-cultural state."); Bruce D. Fisher, *The Ethical Consumer: A Rejecter of Positive Law Arbitrage*, 25 SETON HALL L. REV. 230, 231 n.3 (1994) ("Korea is ethnically homogeneous."); Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 PAC. RIM L. & POL'Y J. 395, 396-97 (1995) ("In homogeneous societies like Korea, social norms, such as morals, mores, and religion, become more effective means of social control and integration than law."); see Alex Y. Seitza, *The Intractable State of United States-Japan Relations*, 32 COLUM. J. TRANSNAT'L L. 467, 492 n.72 (1995) ("North Korea and South Korea are even more ethnically homogeneous than Japan: North Korea (99.9% ethnic Korean) and South Korea (99.9% ethnic Korean)").

4. See *HANDBOOK OF KOREA*, *supra* note 1, at 14 ("There are no significant racial minorities in Korea."); see also Ahn, *supra* note 3, at 102 ("No race or place of origin issue has ever bothered the Korean judiciary."); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 28 n.134 (1998) ("In . . . Korea, ethnic minorities are not merely economically disadvantaged, but practically nonexistent"); Fisher, *supra* note 3, at 231 n.3 ("[U]nlike the ethnically diverse United States, . . . Korea has little need for equal employment opportunity laws based on race or national origin."); James Robinson, *Social Status and Academic Success in South Korea*, 38 COMP. EDUC. REV. 506, 509 (1994) ("[R]acial, ethnic, and linguistic difference are absent in South Korea").

of factors—age, regional origin, class, among others⁵—that have contributed to a deeply hierarchical society. Social status⁶ is perhaps the most impacting and discriminating factor in contemporary Korean society. Social status shapes the life of every Korean.⁷ Status consciousness in Korea is so pervasive that status differentiation is frequently included in general discourse about society,⁸ and much of contemporary Korean society is seen through the lens of social status. Examples:⁹

- After Korea's "trial of the century," in which two former presidents were convicted of a host of charges stemming from a military coup in 1980 and slush funds amassed while in office, a spokesman of the then-current administration declared that the convictions proved "that all men are equal under the law, no matter how high their social status."¹⁰
- Politicians, in rhetoric, periodically urge national unity, regardless of social status.¹¹

5. Robert J. Fouser, *Cultural Dimensions: The Politics of "Uri"*, KOREA HERALD, Aug. 20, 1997, available at 1997 WL 10713197.

For all the talk of cultural unity, Korea is a diverse society. . . . Nearly all the world's major religions and philosophies claim followers in Korea. Differences among generations, social classes, and between rural and urban Koreans are sharp because of the rapid changes in Korean society over the last 30 years.

Id.; John T. Phillips, Editorial, *Unproven Superiority*, KOREA HERALD, Jan. 20, 1997, available at 1997 WL 7219378 (letter to editor) ("[F]oreigners . . . who constantly hear about the special ethnic unity of Koreans are at the same time puzzled to see the sharp divisions and the agonistic attitudes between regions (provinces), social classes and familial backgrounds on this small peninsula.").

6. Unless the context indicates otherwise, this Article will use "status" as an abbreviation for "social status."

7. In conversations in everyday life, different levels of language are used, depending on the social status of the communicants. See Roger Leverrier, *Class Consciousness and the Korean Mind*, 17 KOREA J. 20, 23 (1977); Robert J. Fouser, *Cultural Dimensions: Shifts in Korean Speech Levels*, KOREA HERALD, Sept. 24, 1997, available at 1997 WL 13905177; K. Connie Kang, *Greeting Another Language*, L.A. TIMES, Apr. 7, 2001, at B1.

8. See Leverrier, *supra* note 7, at 23.

9. The rhetoric in some of the following examples could be seen as part of an emerging societal demand for equality, regardless of social status.

10. Michael A. Lev, *S. Korea Verdicts End an Era*, CHI. TRIB., Aug. 27, 1996, § 1, at 3 (reporting remarks of Jong Hwan Suh, secretary for policy development).

11. See *Independent Rep. Chung MJ Maintains Independence*, WORLD NEWS CONNECTION, Nov. 29, 2000, available at 2000 WL 30029652 (reporting remarks of lawmaker and president of Korea Football Association that 2002 World Cup "should provide momentum for the Korean people to further integrate with one another so . . . conflicts among social classes can abate"); In-soo Nam, *Lee Soo-sung Stresses Honor*, KOREA HERALD, July 9, 1997, available at 1997 WL 10711315 (reporting presidential candidate's statement that the next president "should remove the differences between social classes"); *South Korea: President Stresses National Unity in Rebuilding Nation*, BBC WORLDWIDE MONITORING, Feb. 3, 1999, available at 1999 WL 11194710 (reporting president's urging leaders "to usher in an age of harmony and cooperation among . . . social classes"); *South Korea Tries to Bury Japan Animosity Ahead of World*

- The general standing of women in Korea is often cast in terms of social status.¹²
- A law professor urges that confrontation between social classes (among others) has reached “crisis” proportions.¹³

Why the obsession with social status?¹⁴ And what are Koreans and Korea watchers to make of the equal protection provision in the Korean Constitution that prohibits discrimination based on *sah-hwe-*

Cup, AGENCE FR.-PRESSE, Mar. 1, 2002, available at 2002 WL 2351523 (reporting president’s remarks that Korea emerged from Japanese colonial rule when “[a]ll the people became one regardless of religion, hometown, gender, age, wealth or social status”).

Even North Korea is getting into the act. See *North Korea: New Year Message Says 1999 “Turning Point”*, BBC WORLDWIDE MONITORING, Jan. 1, 1999, available at 1999 WL 2216594 (reporting statement by North Korean news agency that reunification depends on all Koreans uniting “irrespective of difference in ideology, ideal [sic], religious belief, political view and class and social stratum”).

12. See Min-hee Kim, *Korea Suffers Loss of Female Workers Due to Poor Childcare*, KOREA HERALD, Aug. 26, 2000, available at 2000 WL 21234857 (“Despite the great strides they have made in improving their social status, Korean women still carry a much greater burden in child rearing and housekeeping duties than their counterparts in advanced countries, experts say.”); Hyun-jin Seo, *Korean Women’s Social Standing Remains Low—U.N. Report*, KOREA HERALD, July 18, 2002, available at 2002 WL 19900268 (describing U.N. survey of national gender empowerment measures: “Despite Korean women’s increased participation in social activities over the last several years their social status has not improved noticeably”); Kyung-hwa Shin, *Web Portals Expand to Housewives, Feminists*, KOREA HERALD, Mar. 15, 2001, available at 2001 WL 8116743 (“While women still have a lower social status than men in Korea, they now seem to have established themselves in the cyber world.”); *Report Shows Textbooks Still Have Bias Against Women*, KOREA HERALD, Mar. 18, 1998, available at 1998 WL 7565217 (describing report by women’s research institute: “In spite of remarkable improvement in women’s social status over the past 20 years, Korean textbooks still tend to fill students’ heads with traditional concept of gender roles”); *Seoul to Host 2004 Global Summit of Women*, YONHAP ENG. NEWS, July 3, 2003, available at 2003 WL 56868547 (reporting plans for “global summit of women . . . [o]fficials said they expect the convention to serve as an opportunity for the world to see the improved social status of South Korean women”); *UN: Committee Told of Adverse Effects of Economic Crisis on Situation of Women in Republic of Korea*, M2 PRESSWIRE, July 8, 1998, available at 1998 WL 14094997 (reporting on report to UN: “Women’s participation in politics must be increased to enhance their social status and further the country’s overall democratic development”).

13. *South Korea—Roh Asked To Bring National Unity, Economic Stability*, BERNAMA MALAY. NAT’L NEWS AGENCY, Dec. 20, 2002, available at 2002 WL 104453308. A dozen years before, a media correspondent had reported that disparity in classes had become “a social time bomb that threatens the economic and political progress South Korea has made.” Bob Deans, *Widening Gap Between Rich, Poor Threatens South Korean Progress: Despairing Workers Turn to Violent “Self-Defense,”* ATLANTA JOURNAL-CONSTITUTION, May 14, 1990, at A04.

14. Why the report in the Korean media of a noted soprano’s desire to share her singing with “ordinary people around the world, regardless of their social status or wealth?” *All Your Answers Lie Inside of You*, KOREA TIMES, Nov. 24, 2000, available at 2000 WL 24666118. Or the remarks of a professor and former athlete that “[t]he social status of the Korean athletes will be elevated in Korea if they win the gold medals?” *Taekwondo Emerges As A Global Village Sport*, KOREA TIMES, Sept. 9, 2000, available at 2000 WL 24663467.

juhk shin-boon, or “social status”?¹⁵ This Article addresses these questions within an examination of the role of social status in Korean history and contemporary society. Given the comparable characteristics of social status in Korea and race in the United States, and the parallels between social status and law in the former and race and law in the latter, this Article advances the question of whether social status in Korea is the functional equivalent of race in the United States.¹⁶

Part II introduces status consciousness in Korea and traces the historical origins of such consciousness from the Chosun dynasty where Confucianism ruled and social status was formal and rigid.¹⁷ Although legal divisions based on status have long been abolished,¹⁸ status consciousness is still very much present in contemporary Korean society. Part III begins with a discussion of the basics of social status and race, and offers definitions. It then examines whether social status is to Korea what race has been to the United States, that is, a means of dividing persons within society, and draws several parallels between social status and race, especially its respective relation to law. Part IV addresses the question of whether such parallels would extend to the application in Korea of something akin to the critical race theory movement in U.S. legal academia. Such a critical movement in the Korean setting would challenge the notion of a formal equality regardless of social status and question whether Korean law actually provides for equality or, instead, allows and even fosters inequality based on status distinctions. Although the discussion concludes that there is ample support for the beginnings of a Korean “critical status theory,” it acknowledges practical concerns that would make the movement unlikely.

It is acknowledged here that while some will find provocative the question of the equivalence of race and social status in the respective societies, others will be more doubtful.¹⁹ Likewise, applying critical

15. “All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.” S. KOREA CONST. art. 11(1). The English translation is available on the Internet site of the Constitutional Court of Korea. *Constitution of the Republic of Korea*, available at <http://www.ccourt.go.kr/english/welcome01.htm> (last visited Nov. 14, 2003).

16. A text with similar intentions analogizes caste in India to race in America. See SIDNEY VERBA, BASHIRUDDIN AHMED & ANIL BHATT, CASTE, RACE, AND POLITICS: A COMPARATIVE STUDY OF INDIA AND THE UNITED STATES (1971).

17. DENISE POTRZEBA LETT, IN PURSUIT OF STATUS: THE MAKING OF SOUTH KOREA’S “NEW” URBAN MIDDLE CLASS 14 (1998).

18. S. KOREA CONST. art. 11(1).

19. It is fair to say that such mixed reactions are not uncommon in discussions of matters relating to race and law. There is the reality that in the U.S. setting, race is a subject that is generally complex, controversial, divisive, and disputed. See Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 535-36 (2001). Views regarding the impact of race and race relations in U.S. society are not

race theory, which criticizes traditional U.S. civil rights law and policy, to a non-U.S. setting, is, to say the least, a novel approach.²⁰ This Article, at a minimum, encourages exploration of Korean law and society, through concepts more familiar to the U.S. setting. The discussion of equivalence and theory application herein may be all the more apt in light of the view that Korean law, especially constitutional law, continues to be influenced by U.S. constitutional principles.²¹ If the development of Korean law at least in small part depends on the American equivalents, the U.S. approach to matters of race and civil rights deserve more consideration and scrutiny.

II. SOCIAL STATUS MATTERS²² (IT'S SOCIAL STATUS, STUPID)

Although every society is conscious of status, status in Korea takes on a heightened meaning.²³ Anthropologist Denise Lett begins her ethnographic study of Korea with the observation that "South Korea is a very status-conscious society"²⁴ and concludes that the

unanimous, and the suggestion that something that is admittedly not race (i.e., social status) functions in another society (Korea) like race in the United States is not commonly seen in the mainstream commentary. The matter of social status in Korea, or any society, is no simpler; there is "a great deal of controversy that surrounds the notion of social stratification," BRYAN S. TURNER, *STATUS* 1 (1988). Nevertheless, discussion on race in the United States, social status in Korea, the similarities between the two, and their respective relation to law should begin.

20. This discussion, to quote the vernacular, "pushes the envelope."

21. See Ahn, *supra* note 3, at 73, 115 ("Korea has been under the significant influence of American constitutionalism since its birth as a republic;" "[t]he influence of American constitutionalism has been conspicuous in major civil rights law areas since 1988"); Tscholsu Kim & Sang Don Lee, *The Influence of U.S. Constitutional Law Doctrines in Korea*, in *CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA* 303, 309 (Lawrence W. Beer ed., 1992) ("In the course of transformations of constitutional democracy and governmental structure of Korea, the influence of American constitutional law principles has been enormous . . . [C]onstitutional law doctrines of the United States have consistently exerted influence on the constitutional development of Korea since 1948."). Indeed, the President of the Constitutional Court has stated directly that "[m]any decisions of the Korean Constitutional Court have been influenced by related U.S. decisions." Yong-joon Kim, *Constitutional Adjudication System: Experience of Korea*, 4 HARV. ASIA Q. 1 (2000), available at <http://www.fas.harvard.edu/~asiactr/haq/200001/0001a002.htm> (speech by President of Constitutional Court at Harvard Law School, Oct. 4, 1999).

22. The phrasing is intentional. See generally CORNEL WEST, *RACE MATTERS* (1993).

23. Or as one commentator observed, "Korean class consciousness surpasses in thoroughness that of almost any other nation." Leverrier, *supra* note 7, at 21-22.

24. LETT, *supra* note 17, at 1. Lett's text appears to be the most comprehensive single volume work on social status in contemporary Korean society. Although Lett intends her study to focus on the Korean middle class, *id.* at 5, "it must be kept in mind that many features espoused by the author are, in fact, associated with the 'general' culture of Koreans, not exclusively with the culture of the 'middle-class.'" Doo-Seung Hong, *In Pursuit of Status: The Making of South Korea's "New" Urban Middle Class*, 28 CONTEMP. SOC. 677, 678 (1999) (reviewing LETT, *supra* note 17).

pursuit of status in Korea is so pervasive that it in large part defines the country.²⁵ Korea is a society where people have an underlying drive to attain status²⁶ and where status consciousness generates an entire "habitus" or lifestyle.²⁷ Lett's references to the Korean desire to seek high status as a "culturally inherited disposition,"²⁸ the deeply rooted consciousness of social status in Korean society, and the "ingrained concern with status passed on from generation to generation"²⁹ necessarily requires a return to the historical origins—traditional Korea during the Chosun dynasty (1392-1910) and the Confucian norms that shaped much of Korean thought.³⁰

An integral part of Confucianism³¹ is that it provides for a "means of ordering society."³² Confucianism, or perhaps more aptly "neo-Confucianism,"³³ that is, a brand of Confucianism adapted by the founders of the Chosun dynasty, "served as a blueprint for ordering and integrating Korea's political and social life."³⁴ When this blueprint was followed closely (at least in the early centuries of the

25. LETT, *supra* note 17, at 41, 206. Lett asserts that the societal "desire to acquire status . . . has been a driving force behind the development of South Korean human resources." *Id.* at 41.

26. *Id.*

27. *Id.* at 217.

28. *Id.* at 2.

29. *Id.* at 215.

30. The Chosun dynasty, sometimes referred to as the Yi dynasty, is frequently mentioned in historical discussions of Korea. Some Koreans claim their history is one of at least a few thousand years. See MARK L. CLIFFORD, *TROUBLED TIGER: BUSINESSMEN, BUREAUCRATS, AND GENERALS IN SOUTH KOREA* 18 (rev. ed. 1998). The Shilla (57 B.C.-935 A.D.) and Koryo (918-1392) dynasties preceded the Chosun. For a history of pre-Chosun Korea, see CARTER J. ECKERT ET AL., *KOREA OLD AND NEW: A HISTORY* 1-106 (1990); ANDREW C. NAHM, *INTRODUCTION TO KOREAN HISTORY AND CULTURE* 25-98 (1993).

31. As Professor Chaihark Hahm notes, Confucianism is multi-faceted and may mean different things to different audiences. Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 *COLUM. J. ASIAN L.* 253, 268, 276 (2003).

32. LETT, *supra* note 17, at 14.

33. See *THE RISE OF NEO-CONFUCIANISM IN KOREA* (William Theodore de Bary & JaHyun Kim Haboush eds., 1983); see also *FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, SOUTH KOREA: A COUNTRY STUDY* 88-89 (Andrea Matles Savada & William Shaw eds., 4th ed. 1992) [hereinafter *COUNTRY STUDY*]; LETT, *supra* note 17, at 14. Commentators have noted that Korean Confucianism was even more Confucian than the original Confucianism. See DONALD STONE MACDONALD, *THE KOREANS: CONTEMPORARY POLITICS AND SOCIETY* 32 (1988).

Within one to two centuries, Korea became recognized as a more perfect Confucian state than China itself. Court records were kept in Chinese; scholars composed excellent Chinese prose and poetry and were learned in the Chinese classics. The behavior of even the common people was governed by Confucian ethics.

Id. ANDREW C. NAHM, *KOREA, TRADITION & TRANSFORMATION: A HISTORY OF THE KOREAN PEOPLE* 95 (1988) ("In the end, Korea became more Confucian than Confucian China as its influence permeated every aspect of the life of the nation.").

34. LETT, *supra* note 17, at 13.

dynasty), the Confucian tradition demanded hierarchy and adherence to respective roles in all aspects of human relations.³⁵ Within the hierarchical society, social status was “rigid and dominant”³⁶ and legally defined. Beneath the king and the royal family, Korean society was formalized and stratified into discrete classes, with the yangban, representing the ruling class and the societal elite, at the very top, followed by, in descending order, *joong-in* (literally, “middle people”), *sang-in* (the commoner class), and *chun-min* (literally, the “low-born” or “inferior people”).³⁷ “Membership in all these status groups was ascribed by birth rather than acquired by achievement, and the law as well as social custom guarded against infringement of social boundaries.”³⁸ Thus, ancestry and birth to a particular class determined one’s social status, role in society, and all aspects of everyday life.

The yangban held the highest political and social status in Korean society.³⁹ The yangban has been described as the Korean aristocracy,⁴⁰ occupying a nobility status. The top officials in government and military were chosen from this class,⁴¹ and many were seen as the scholar-official, with the proper moral virtues and

35. “Acknowledging the authority of the nation and family, and obedience of the common people to the king, children to parents, wives to husbands, and the young to the elderly were considered the cardinal rules in maintaining social order.” Tae-Rim Yoon, *The Koreans, Their Culture and Personality*, in *THE PSYCHOLOGY OF THE KOREAN PEOPLE: COLLECTIVISM AND INDIVIDUALISM* 18-19 (Gene Yoon & Sang-Chin Choi eds., 1994); see also COUNTRY STUDY, *supra* note 33, at 89; DAVID I. STEINBERG, *THE REPUBLIC OF KOREA: ECONOMIC TRANSFORMATION AND SOCIAL CHANGE* 93 (1989).

36. Yoon, *supra* note 35, at 19.

37. The *joong-in* consisted of central and local functionaries, and medical, scientific, and foreign language professionals; *sang-in* composed of “farmers, craftsmen, fishermen and merchants”; and *chun-min* included slaves, domestic servants, sorcerers, butchers, basket-makers, and public entertainers. See NAHM, *supra* note 30, at 105-06; NAHM, *supra* note 33, at 100-01; see also PYONG-CHOON HAHM, *THE KOREAN POLITICAL TRADITION AND LAW* 110 n.4 (1967); LETT, *supra* note 17, at 17-20; Pyong-Choon Hahm, *The Traditional Patterns of Authoritative Symbols and the Judicial Process in Korea*, in HAHM, *supra* note 2, at 33-42 (adding another class of “outcasts” below *chun-min*); Byung Ho Park, *Social Castes and Legal Rights Under the Modern Korean Law*, 4 *KOREANA Q.* 35 (1962).

Hierarchy reigned supreme, as there was hierarchy within almost every class, including and perhaps especially, the yangban. See ECKERT, *supra* note 30, at 109 (noting that within yangban, “[t]he civil order was more prestigious than the military”); GREGORY HENDERSON, *KOREA: THE POLITICS OF THE VORTEXT* 37-46 (1968) (chronicling differences over several centuries); LETT, *supra* note 17, at 22 (noting aristocratic factions and hereditary groupings within yangban class). Within the *sang-in* class, farmers were perceived to occupy the highest sub-class, and the merchants the very lowest. *Id.* at 18.

38. MARTINA DEUHLER, *THE CONFUCIAN TRANSFORMATION OF KOREA: A STUDY OF SOCIETY AND IDEOLOGY* 13 (1992), quoted in LETT, *supra* note 17, at 20.

39. See FUJIYA KAWASHIMA, *WHAT IS YANGBAN?: A LEGACY FOR MODERN KOREA* 2 (2002).

40. See LETT, *supra* note 17, at 16; MACDONALD, *supra* note 33, at 35.

41. See ECKERT, *supra* note 30, at 108; HAHM, *supra* note 37, at 110 n.4; NAHM, *supra* note 30, at 105-06.

superior ethics to rule and govern.⁴² Initially, yangban status was achieved by competitive civil service exams, which required mastery of philosophy and ethics in Chinese;⁴³ thus, education afforded opportunities for social mobility. Eventually, however, “members of established ruling elite had effectively placed a hereditary requirement on future exam takers,” and only descendants of a former successful candidate were eligible for the exams.⁴⁴ Thus, membership in yangban as well as the other classes was determined by ancestry⁴⁵ in a “strict hereditary class structure.”⁴⁶

Despite the multiple classes in Korean society during the Chosun era, commentators have noted the essentially dichotomous nature of society—one was either yangban or non-yangban.⁴⁷ Or as Lett explains, “the major dividing line in Chosŏn society was the distinction between the ‘noble’ . . . and the ‘base’ . . . or the honored . . . and the despised . . .”⁴⁸, the pure and the impure,⁴⁹ the upper class and the lower class.

The upper orders were born to rule, to practice virtue, and to cultivate enlightenment and learning. The lower orders were born to obey and to serve; they were inherently ineducable and incapable of understanding the Confucian ethic. The upper classes were not only richer, more respectable, and better educated, but they were more virtuous.⁵⁰

42. The sole duty of the *yangban* was to devote themselves exclusively to the study and self-cultivation that Confucian doctrine holds must underlie the governing of others, and their sole profession was the holding public office. . . Their role . . . was to fashion an ideal Confucian polity through moral cultivation of Chosŏn’s people.

ECKERT, *supra* note 30, at 108-09. See Yoon, *supra* note 35, at 20 (describing “ideal picture of an official’s life: . . . being absorbed in reading, carrying a humble life while receiving a governmental stipend, composing poetry and memorizing ancient sages, being attentive to moral ethics, and being erudite”).

43. LETT, *supra* note 17, at 14-15.

44. *Id.* at 15-16. See ECKERT, *supra* note 30, at 114; HENDERSON, *supra* note 37, at 37.

45. LETT, *supra* note 17, at 207 (“During the Chosŏn dynasty, ancestry became the main basis of asserting high or yangban status.”).

46. *Id.* at 14. See BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN: A MODERN HISTORY* 51 (1997); Seung-Jong Ji, *Chosun juhn-gi-eui ju-jong-gwan-geh-wa sah-noh-bi-eui sung-gyuk [Master-Slave Relationships and the Character of Private Slaves in Early Chosun Times]*, in *HAN-GUK-EUI SAH-HWE-SHIN-BOON-GWA SAH-HWE-GEH-CHEUNG [SOCIAL STATUS AND SOCIAL HIERARCHY OF KOREA]* 33-36 (1986); MACDONALD, *supra* note 33, at 35.

47. LETT, *supra* note 17, at 16.

48. *Id.* at 20; see also *id.* at 21; CUMINGS, *supra* note 46, at 56.

49. LETT, *supra* note 17, at 20; see CUMINGS, *supra* note 46, at 56.

50. Herbert Passin, *Untouchability in the Far East*, 11 *MONUMENTA NIPPONICA* 247, 257 (1955), quoted in LETT, *supra* note 17, at 20-21. Professor Cumings echoes the point: “The purified social order was in which yangban were pure and everyone else was not. The pure at the top, having perfected the social order, and all others ought to

“Everything distinguished the yangban from the commoner, including the size of one’s home, the educational opportunities of one’s children, dress and the manner of address, even body language, one’s carriage.”⁵¹ Some of the restrictions were mandated by law.⁵² Enjoying the privilege and benefits of their status, the yangban “could not be other than elitist. They pursued various strategies to protect their status and limit their numbers. *Yangban* married only among themselves, thus preserving the hereditary nature of *yangban* status.”⁵³ They would not engage in clerical tasks or manual labor, “and even refused to have non-*yangban* families as their neighbors.”⁵⁴

It should be noted that the social status system described above lost much of its rigid and strict character long before the Chosun dynasty came to an end in 1910.⁵⁵ Korea expert Gregory Henderson notes that the four-class description “is the official one of the dynasty,”⁵⁶ but that, especially in the latter centuries, class distinctions were not as sharp or rigid as presumed.⁵⁷ Moreover, other authors confirm that the formal class system was legally abolished and the yangban-dominated status structure eliminated during the Chosun dynasty itself, in the “sweeping” and “momentous” social reforms of 1894, nearly two decades before Japanese colonial rule began.⁵⁸

Although these points are of some historical interest, more relevant to the discussion herein is to what extent the Confucian norms, especially those of order and hierarchy, are present in contemporary Korean society. The views are somewhat scattered. Korea specialist William Shaw challenges the “notion of static, timeless characteristics” of a “Korean social order” and questions the

know their place, and the difference between noble and base.” CUMINGS, *supra* note 46, at 56.

51. CUMINGS, *supra* note 46, at 56.

52. For example, the type of hanbok (traditional Korean attire) one could wear or the type of home one could occupy depended on one’s class standing. See *The History of Seoul Metropolitan*, available at <http://seoul600.visitseoul.net/seoul-history/minsok/txt/text/3-3-11.html>.

53. ECKERT, *supra* note 30, at 109.

54. NAHM, *supra* note 30, at 106.

55. HENDERSON, *supra*, note 37, at 42.

56. *Id.* at 37 (“Scholars have followed this description with more or less minor deviations.”). Indeed, many have. See *supra* note 37 for examples.

57. Henderson argues that there was a “high degree of unacknowledged flexibility in the middle levels,” and that social mobility explains the increase in the yangban population. *Id.* at 42. Relying on the work of Shikata Hiroshi, an expert on oriental population statistics, Henderson concludes that the yangban comprised 7.4 percent of the population in 1690, but increased to 48.6 percent in 1858. *Id.* at 41; see also Hahm, *supra* note 37, at 33 n.8. Henderson explains that “[o]nly the upper yangban maintained really strict status, and only the hopelessly poor cleaved strictly to low status.” HENDERSON, *supra* note 37, at 42.

58. ECKERT, KOREA OLD AND NEW, *supra* note 30, at 227.

lasting effects of Confucianism on Korean law.⁵⁹ Yet another commentator notes that “Confucian culture [still] provides the tools with which Koreans interpret and give order to the world around them.”⁶⁰ Even Shaw acknowledges “the residual strength” of Confucianism in “interpersonal relations;”⁶¹ such relations are a constant in the development of every society. Korea observers indicate that the residue has proved quite potent,⁶² and that the continuing influence of Confucianism on contemporary Korea is palpable.⁶³ Despite critical commentary of Confucianism seen in more recent years,⁶⁴ many of the Confucian norms prevalent in Chosun

59. William Shaw, *Rights, Culture, and Policy: The Prevailing Model*, in HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES 1, 4 (William Shaw ed., 1991). Shaw relies on developments on the peninsula beginning from end of the nineteenth century: the decline of Confucianism as a “living political philosophy . . . that began in the 1880s and sharply accelerated after the loss of Korean independence in 1910”; the growth during the same period of “alternative philosophical, religious, or political traditions and forms of organization, including . . . Christianity [and] Western liberalism”; the “militarized government and social control” by the Japanese from 1910 to 1945; and the “large, often politically significant military establishment[]” since 1945. *Id.*

Regarding the effect of Japanese colonial rule (1910-1945) on the traditional class structure, Lett asserts that “[t]here is no major ‘leap’ between yangban society and contemporary South Korean middle-class society, even with the intrusion of the Japanese colonization.” LETT, *supra* note 17, at 226. Another author acknowledges possibility of the elimination of such Korean traditions, but adds: “[I]t may also be argued that the Japanese system reinforced more abstracted concepts of hierarchy and allowed at least some of the *yangban* to retain their traditional roles vis-à-vis other Koreans, if not the Japanese themselves.” STEINBERG, *supra* note 35, at 94.

60. Hahm, *supra* note 31, at 257; see also *id.* at 271-72 (“[C]onfucianism provides the people with the signs, symbols, and strategies—the tools with which to negotiate the world around them.”).

61. Shaw, *supra* note 59, at 4.

62. CLIFFORD, *supra* note 30, at 10 (“The glue for this system comes in the form of a rigid hierarchy, a residue of Confucianism”); Sang-Hun Choe, *South Korean Draft Dodgers Are Marked Men*, CHI. TRIB., June 29, 2003, § 1, at 5 (referring to Confucianism as “the centuries-old primer on social behavior”).

63. One way to explain the influence of Confucianism on contemporary Korea is that Korean society appears to be one that “values tradition and continuity with the past,” and is still connected to “a nostalgic past to which everything attempted in the present must appeal.” Ilhyung Lee, *Culturally-Based Copyright Systems?: The U.S. and Korea in Conflict*, 79 WASH. U. L.Q. 1103, 1155 (2001) (citing FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS* 126 (2d ed. 1998)). “In contrast, the United States is oriented more to the present and future.” *Id.* at 1155. This would explain why even with the demise of the Chosun dynasty, “its long rule of 518 years had left a deep impression upon national attitudes and behavior that is still important.” MACDONALD, *supra* note 33, at 35.

64. Confucianism has been the target of blame for some of Korea’s societal woes and ills, including, the loss of Korean sovereignty to Japanese colonial powers, crony capitalism, corruption, and authoritarianism. See Hahm, *Law, Culture, and the Politics of Confucianism*, *supra* note 31, at 266. Confucianism is also frequently blamed for the unequal status of women in Korea. See generally Erin Cho, *Caught in Confucius’ Shadow: The Struggle for Women’s Legal Equality in South Korea*, 12 COLUM. J. ASIAN

dynasty are stitched tightly into the Korean social fabric.⁶⁵ Thus, although class and social status are no longer legally defined, contemporary Korean society continues to be deeply, perhaps rigidly, hierarchical.⁶⁶ In interpersonal relations within the family, in school, in the workplace, and in virtually any setting involving interaction with those other than mere passersby, Koreans have a keen awareness of their status relative to that of others.⁶⁷ In short, in the Korea of today, those with high status seek to maintain their status, and those with lower status seek to enhance their lot,⁶⁸ both with the passion, vigor, and occasional excess for which much of Korean society has become famous.⁶⁹ Social status matters, and matters a great deal. It may matter even more than individual merit and ability.⁷⁰ To put it mildly, "status is the key to everything" in Korea

L. 125 (1998). Cho also notes President Chung-Hee Park's condemnation of "Confucianism's influence in the economic realm for encouraging a mentality of vassalage, lack of independent spirit, indolence, lack of enterprise, malicious selfishness and lack of sense of honor in the Korean people." *Id.* at 152 (citing CHUNG-HEE PARK, *OUR NATION'S PATH: IDEOLOGY OF SOCIAL RECONSTRUCTION* 34-107 (1962)).

65. This is not to suggest that traditional cultural norms can explain everything in the Korea of the present. There is danger in relying on culture globally to explain, for example, the alleged piracy of U.S. intellectual property products in Korea. See Lee, *supra* note 63, at 1129. "When traditional culture meets the industrial age, it is not clear when culture applies and when it does not. Some cultural forces become more dominant than others, and the meeting of culture and modernization unearths inconsistencies and questions." *Id.*

66. This statement has support from observers of Korea from a variety of disciplines. *E.g.*, CLIFFORD, *supra* note 30, at 10.

Every aspect of Korean society is rigidly organized according to title, which often reflects seniority. Behavior toward seniors is extremely deferential, and requires special forms of speech, while that toward juniors can often be rough and crude. Even among twins, the younger one typically defers to the older one and uses an honorific form of speech.

Id. Yoon, *supra* note 35, at 18 ("Korean society is vertical; hierarchy is very strong.").

67. See MACDONALD, *supra* note 33, at 80 ("In interpersonal relations, age and relative status still carry some of their traditional importance: The junior owes respect to the senior, and the senior carries the obligation to look out for the junior."); Yoon, *supra* note 35, at 18 ("Children must obey parents, teachers, and elders.").

68. Beginning in the 1960s, "[t]hose with yangban ancestry sought to regain their previous status; those with commoner backgrounds sought to acquire status." LETT, *supra* note 17, at 206 (citing KWANG-OK KIM, *SOCIO-POLITICAL IMPLICATIONS OF THE RESURGENCE OF ANCESTOR WORSHIP IN CONTEMPORARY KOREA* 197 (1992)). "Rather than striving for yangban status, modern day Koreans strive for middle-class status." *Id.* at 32. Lett argues that the dichotomous nature of Chosun society is also seen in the contemporary setting, "between those preoccupied with status, including members of the so-called middle class, and those too poor to assert status." *Id.* at 207.

69. Mark Clifford refers to the "culture of rage" that is seen in various sectors of Korean life—politics, business, labor, education, religion. CLIFFORD, *supra* note 30, at 11-14.

70. See Chan Jin Kim, *Korean Attitudes Towards Law*, 10 PAC. RIM L. & POL'Y J. 1, 18-19 (2000); Sungeun Yang & Paul C. Rosenblatt, *Shame in Korean Families*, 32 J. COMP. FAMILY STUD. 361, 365 (2001).

“and is sought by all.”⁷¹

For the more accommodating reader, the above discussion will indicate similarities between social status in Korea and race in the United States. The dichotomous yangban and non-yangban distinction in traditional Korea draws the easy parallel of blacks and whites in the early United States; in both settings, birth determined membership, and there was formal, legal recognition and separation of the classes and races, which were eventually abolished⁷²; the still prevalent consciousness of status in contemporary Korea reminds of race consciousness stateside. For the less convinced, the following section delves into the question of this equivalence in more detail, beginning with the task of definition. What exactly is race (in the United States)? What does social status mean (in Korea)?

III. OF EQUIVALENCE AND PARALLELS

A. *rās*

Defining race is a difficult task⁷³ and is perhaps best described

71. MICHAEL BREEN, *THE KOREANS* 10 (1998).

72. *Id.* at 87-88.

73. The task of definition can sometimes be an exercise in despair, as seen in the following exchange at oral argument in a case involving a school district's alleged system of racial classifications and quotas.

| | |
|------------|---|
| THE COURT: | Will you tell me what race means? |
| COUNSEL: | I wish I knew. |
| THE COURT: | All right. Thank you. |
| COUNSEL: | I wish I knew what the plaintiffs said it means. |
| THE COURT: | Are you conceding that for the purposes of your client that they do not know what race means? |
| COUNSEL: | I'm saying I don't know what race means. |
| THE COURT: | You're representing the school district [the defendant]. |
| COUNSEL: | Yes. |
| THE COURT: | Does the school district know what race means? |
| COUNSEL: | I don't believe they do. I don't believe that they know more than I do. |

as a continuing work in progress.⁷⁴ Race is multi-faceted, as the dictionaries and commentary indicate.⁷⁵ There is the sharply criticized biological approach to race, which portrays race in terms of genotype, phenotype, and morphology.⁷⁶ This has given way to the view that race is socially constructed,⁷⁷ “the idea that race evolves as a function of historical, social, political, and economic contexts.”⁷⁸ The diverse approaches to the matter of race also include K. Anthony Appiah’s oft-quoted view that there is no such thing as race,⁷⁹ that

Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 861 (9th Cir. 1998).

74. A recent text that surveys the varied history is Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003). See also Nicholas D. Kristof, Editorial, *Is Race Real?*, N.Y. TIMES, July 11, 2003, at 19.

75. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1870 (1993) (providing multiple definitions and synonyms); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 3-5 (1991) (stating that race covers “four distinct ideas: status-race, formal-race, historical-race, and culture-race”).

Or is race in the eye of the beholder, a matter of choice? See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1244-54, 1262 (1997). The question received attention in the commentary relating to census forms in recent decades that allow individuals to self-identify their own race, in contrast to previous settings, where a census enumerator would make the racial determination. See Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin Comparison*, 87 CORNELL L. REV. 1093, 1105, 1111 & n.105 (2002).

76. See WILLIAM W. HOWELLS, THE MEANING OF RACE IN THE BIOLOGICAL AND SOCIAL MEANING OF RACE 16 (Richard H. Osborne ed., 1971) (“Races . . . are not, and never were, groups clearly defined biologically. The gene flow between human populations makes race boundaries always more or less blurred.”); Kristof, *supra* note 74, at 19 (quoting Bryan Sykes, Oxford geneticist and author (“There’s no genetic basis for any kind of rigid ethnic or racial classification at all”), and *The New England Journal of Medicine* (“race is biologically meaningless”)); see also Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 863 (9th Cir. 1998) (“Race got its standing in the nineteenth century by pseudo-science.”).

77. The commentary that espouses race as a social construct is considerable and growing. A leading work is Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). See also MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 54-55 (2d ed. 1994). The idea of race as a social construct has received agreement from one district court. *Cotter v. City of Boston*, 73 F. Supp. 2d 62, 63 n.1 (D. Mass. 1999) (citing *States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998)) (“[I]t is blind ignorance to declaim that the concept of ‘race’ is nothing more than a social construct.”).

78. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1759 (2002) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)).

79. “The truth is that there are no races: there is nothing in the world that can do all we ask ‘race’ to do for us.” Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in “RACE,” WRITING, AND DIFFERENCE 21, 35-36 (Henry Louis Gates, Jr. ed., 1985); ANTHONY APPIAH, IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 45 (1992).

the discussion should rather be in terms of “culture.”⁸⁰ The U.S. Supreme Court acknowledged many of the multiple approaches to race (except for that of Appiah) when it was faced with the task of defining race for the purpose of an actionable racial discrimination claim under Section 1981.⁸¹ The Court noted that the meaning of race changes over time, referring to no less than eleven dictionaries and encyclopedias, some from the early nineteenth century.⁸² The Court’s following statement provides a convenient summary of the multi-faceted approach to race:

There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. . . . [S]ome, but not all, scientists to conclude that racial classifications are for the most part *sociopolitical*, rather than biological, in nature.⁸³

Ultimately, the Court concluded that for purposes of Section 1981, race refers to “ancestry or ethnic characteristics,” and that discrimination based on such classifications is prohibited, “whether or not it would be classified as racial in terms of modern scientific theory.”⁸⁴ Thus, despite the considerable literature criticizing race as

80. Appiah, *Uncompleted Argument*, *supra* note 79, at 36. But then what is “culture”? Culture is:

“a fundamental feature of human consciousness, the *sine qua non* of being human”; culture is our “social legacy”; culture may take over the world. Culture has also been described as “one of the two or three most complicated words in the English language.” There is no shortage of proposed definitions—according to one study. The definition of culture remains elusive and contested. The various definitions exist in part because the term is used by experts in a number of different social fields. A substantial bibliography now exists on the search for a definition of culture (and perhaps a separate but related bibliography of works commenting on such search).

Lee, *supra* note 63, at 1109-10 (footnotes and citations omitted).

81. 42 U.S.C. § 1981 (1994). The case is *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). The specific issue in the case was whether the plaintiff of Arabian ancestry was protected from racial discrimination under Section 1981, which does not refer to “race,” but which the Court has construed to forbid racial discrimination. *Id.* at 609-10. The defendant had argued that since the plaintiff was of Arabian descent and therefore a member of the Caucasian race, racial discrimination was not at work, since the statute “does not encompass claims of discrimination by one Caucasian against another.” *Id.*

82. *Saint Francis College*, 481 U.S. at 610.

83. *Id.* at 610 n.4 (emphasis added) (extensive citations omitted).

84. *Id.* at 604.

a biological determination, the Court's approach indicates that the U.S. legal definition of race has a significant biological attachment.⁸⁵ Ancestry, by definition, refers to that passed on biologically, and although ethnicity is more susceptible to social construction, it can also be biologically transmitted. Race is thus thought to be inherited and fixed at birth.⁸⁶ And classifications made on such ground to determine "state-sanctioned benefits and burdens" are precisely the type of division that the Constitution does not and cannot endorse.⁸⁷

B. *sah-hwe-juhkk shin-boon*

In the social sciences, the subject of social status (and the related, and sometimes interchangeably used, "class"⁸⁸) appears to receive the most consideration by those in the field of sociology. A Western commentator notes that "the very concept of status is vague,"⁸⁹ but in an effort to begin the discourse, informs that "[w]ithin sociology, the notion of social status is often connected with the concept of social role. A role is a set of expectations which define the position of a person in society."⁹⁰ Differences of such social roles and the resulting social inequality are inevitable in every society that has reached a certain population size and development.⁹¹ Yet studies delineating status stratification or differentiation often entail controversy, for one reason or another.⁹² Regarding Korean society specifically, sociologists have attempted to determine class groups employing a variety of empirical methods and relying on economic

85. See Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 160 (1994) ("The popular concept of race persists in treating human ethnic difference as the product of a rigid, static biological mechanism."); Mary Coombs, *Interrogating Identity*, 11 BERKELEY WOMEN'S L.J. 222, 225 (1996) (reviewing JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* (1995)) ("Both ancestry and color assume that race is a biological quality."); Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 328 (1996) ("Under racial ideology in the United States, race is inherited biological status.").

86. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting that race and national origin are "determined solely by the accident of birth"); see also Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 131 (1998) ("The idea that race is fixed and inherited remains widely accepted and reflected in the law.").

87. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (citing *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 360-61 (1978)).

88. "Status" generally refers to "a position in society," whereas "class" tends to emphasize the Marxian concept of differentiation based on economic interests. See TURNER, *supra* note 19, at 1-2.

89. *Id.* at 1.

90. *Id.* at 3. "Roles may be defined as 'the bundles of socially-defined attributes and expectation associated with social positions.'" *Id.* (quoting NICHOLAS ABERCROMBIE ET AL., *THE PENGUIN DICTIONARY OF SOCIOLOGY* 180 (1984)).

91. See Chae-Yun Kim, *Social Strata*, in *KOREAN SOCIETY* 57, 57 (Shin-Yong Chun ed., 1982).

92. See TURNER, *supra* note 19, at 1.

and other factors.⁹³ These works are informative. A full appreciation of status consciousness in contemporary Korean society should also include any popular or social construction of social status; and understanding legal measures that prohibit discrimination based on social status requires an articulable legal definition of the term. These points are addressed in turn.

What does "social status" mean in Korea? The instructive portion of the Korean phrasing is the last two characters, *shin-boon*, which one Korean-English dictionary defines as "one's social position," "one's station in life," "one's position in society," "identity."⁹⁴ The leading Korean dictionaries must also be consulted. A 1957 edition offers only tautological descriptions ("individual's social status"; "individual's legal status");⁹⁵ a 1974 text repeats these descriptions and adds a third, which refers to caste distinctions in feudal and medieval societies.⁹⁶ A more recent reference defines *shin-boon* as "(1) status that a person enjoys in society . . . (2) qualification or function of a person as a member of society or corporation or such group of people . . . (3) social caste ranking from the privileged to the underprivileged in feudal age . . ."⁹⁷ A review of the references thus indicates that the term "social status" in Korea, at least in part, refers to one's identity, qualification, and function.⁹⁸

Like the definition of race in the United States, the meaning of social status in Korea has also received attention from the respective

93. See Doo-Seung Hong, *Occupation and Class: An Exploration of Class Classification by Cluster Analysis*, 16 KOREAN SOC. SCI. J. 7, 9-11 (1990) (summarizing methods of classification of Korean society by four independent studies). Hong advances class delineation based on occupation, as it is "the empirical variable which best represents class characteristics," but also acknowledges that "it is controversial to determine what specific aspect of occupational attributes offers most properly an account of similarities or dissimilarities between classes." *Id.* at 11; see also Hagen Koo & Doo-Seung Hong, *Class and Income Inequality in Korea*, 45 AM. SOC. REV. 610 (1980) (advancing premise that "classes designate structural positions in the social division of labor" and identifying five major class categories: "the capitalist class"; "the new middle class"; "the working class"; "the petite bourgeoisie"; and "the marginal class").

94. MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY 1257 (2d ed. 1993) (emphases added).

95. HANGUL ACADEMY, *KEUN-SAH-JUHN* [THE GREAT KOREAN DICTIONARY] 1935 (1957).

96. *SEH OO-RI-MAHL KEUN-SAH-JUHN* [THE NEW KOREAN GREAT DICTIONARY] 2094 (1974).

97. YONSEI KOREAN DICTIONARY, available at <http://clid.yonsei.ac.kr:8000/dic/default.htm> (last visited Nov. 14, 2003) (emphasis added).

98. In contrast, based on the etymological origins of "social" and "status," the English "social status" refers generally to the condition, position, or standing of a companion. See *THE BARNHART DICTIONARY OF ETYMOLOGY* 1029, 1062 (1988); ERIC PARTRIDGE, *ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH* 637, 665, 662 (1958). See also TURNER, *supra* note 19, at 2 ("In its everyday usage, the notion of status is derived from the Latin for 'standing' and relates simply to one's position in society.").

locale.⁹⁹ Perhaps social status (like race) can be viewed as a social construct,¹⁰⁰ one that “evolves as a function of historical, social, political, and economic contexts.”¹⁰¹ Reference to these contexts in the Korean setting unavoidably leads to a key common denominator: deeply rooted Confucian norms, which shaped Korean social history, and which arguably have significant impact on contemporary society, politics, and business.¹⁰² Consideration of the Korean experience—taken as a whole—indicates that three factors determine the construct of social status in contemporary society: education; family; and wealth.¹⁰³ Of the three, education and family are the two most direct remnants of status in the Chosun dynasty; wealth as a determinant of social status is more likely a result of democratization, capitalism, and economic progress. The determinant of family is also closely related to education and wealth. Each determinant is addressed in turn.

99. See *infra* note 168.

100. See LETT, *supra* note 17, at 225.

Status consciousness is embodied in a need for status and a disposition toward pursuing status. Status consciousness is imposed and internalized by class conditions or by conditions of existence. Part of class conditioning is *socially constituted*. The need for status, as are all cultural needs, is a product of upbringing and education.

Id. (emphasis added).

101. Carbado & Gulati, *supra* note 78, at 1759.

102. Yoon, *supra* note 3, at 398 (discussing connection between Confucianism and economic development in Korea); Amy Choe, Note and Comment, *Korea's Road Toward Respecting Intellectual Property Rights*, 25 RUTGERS COMPUTER & TECH. L.J. 341, 364 (1999) (noting that “despite the shift towards democratic rule, [Confucian] authoritarianism continues to play a major role in Korean politics”); Rosa Kim, Note, *The Legacy of Institutionalized Gender Inequality in South Korea; The Family Law*, 14 B.C. THIRD WORLD L.J. 145 (1994) (noting political influence of Confucian activists, and societal respect for Confucian heritage). *But see* Shaw, *supra* note 59, at 4 (arguing “decline of Confucianism as a living political philosophy”).

103. The discourse on social status has also included age, regional origin, and marital status as factors in determining social status. See LETT, *supra* note 17, at 48-49 (discussing favoritism based on region of origin in employment); Jeong-Yoo Kim & Hyunju Kim, *Stigma in Divorces and Its Deterrence Effect*, 31 J. SOCIO-ECONOMICS 1 (2002), available at 2002 WL 101782880 (“Social status of being married has several advantages, such as being free from pressures for marriage, and gaining an adult status in the family as well as in the society, and also having financial benefits in taxation as well as in salaries.”); Kelley Bouchard, *Diversity Expert Takes up Challenge in Lewiston*, PORTLAND PRESS HERALD, Dec. 8, 2002, at 1A, available at 2002 WL 23935366 (reporting experiences of American (and daughter of Slovak immigrants) in Korea, who was regularly asked questions “that reflected [a] fascination with religion and social status: Are you Christian? Are you married? How old are you?”).

1. Education (*hahk-buhl*)¹⁰⁴

Education is the single most important determinant of social status in contemporary Korea.¹⁰⁵ Stated simply, the purpose of education is to seek or maintain status.¹⁰⁶ This is a modern day continuation of the role of education in the Chosun years:¹⁰⁷ “Just as education was equated with moral worth and conferred prestige in and of itself in the Confucian world order of past days, education today is being sought for its own sake or, rather, for the prestige it confers.”¹⁰⁸ The presumption that inherent in education is character, culture, and proper behavior continues today.¹⁰⁹ Given the great importance of

104. *Hahk-buhl* is defined as “an academic clique; academical [sic] sectarianism.” MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY, *supra* note 94, at 2277. Less formalistically but more practically and commonly, one’s *hahk-buhl* refers to his educational background.

105. COUNTRY STUDY, *supra* note 33, at 98 (“Education remained the single most important factor affecting social mobility in the 1990s.”); LETT, *supra* note 17, at 159 (“A college or university education has become one of the most important markers of middle-class status in South Korea”); *id.* at 164 (“[A]cquisition of a university degree was the surest way . . . to acquire status.”); *see also* VINCENT S.R. BRANDT, A KOREAN VILLAGE: BETWEEN FARM AND SEA 95 (1971) (“Education is an important formal determinant of social status today.”); Robinson, *supra* note 4, at 512 (“Education has always played a gatekeeping role in the maintenance of higher social status.”).

106. The Korean pursuit of education is “more than anything else a pursuit of status.” LETT, *supra* note 17, at 159. Lett states that status, not job prospects, is the primary motive for seeking higher education. *Id.* at 164. Professor Won-Shik Chong refers to “a status-oriented education” in Korea, and notes the societal confirmation of the “idea of going to . . . college to secure a certain status.” Won-Shik Chong, *Zeal for Education*, 26 KOREA J. 45, 50 (1986); *see also* Michael Baker, *Rooting the Rote Out of Learning: S. Korea Wants Creativity in Its Education System, Not Uniform Ways of Thinking*, CHRISTIAN SCI. MONITOR, Dec. 6, 1996, at 1 (reporting remarks of Korean research fellow that Korean parents are interested in “the name value of the universities, not the quality of the education, and just regard education as a path to social success and status”).

107. *See* COUNTRY STUDY, *supra* note 33, at 98 (“The social importance of education is one of the major continuities between traditional and contemporary Korea.”); *see also* Robinson, *supra* note 4, at 512-13 (stating that in Chosun times, “young man’s ability to pass [the civil service] examinations validated a family’s social status, and the sons of yangban generally followed their ancestors in passing the exams. After 1945, the remaining traces of this Confucian educational order have remained prominent”). Lett explains the continuation of the Chosun norm and the modern variations:

During the Chosun dynasty, mastery of Chinese and the Confucian classics and passing the civil service exams and thereby earning a degree conferred high status. Now, it is the mastery of English and passing the university entrance exam in order to acquire a university degree that are marks of culture and high status.

LETT, *supra* note 17, at 210.

108. LETT, *supra* note 17, at 211.

109. *Id.* at 159, 161. “In the 1990s education, moral worth, and status were still linked in the minds of Koreans.” *Id.* at 160.

education—or more specifically, the undergraduate college to which one wins admission—preparation for the all-or-nothing college entrance exams begins at a very young age.¹¹⁰ The great cost that parents expend in preparing their children, the pressure they put on them to succeed academically, and the brutal years in the young life of the Korean student in preparation for college admissions are all legendary.¹¹¹ It is not uncommon for students, especially those in secondary schools, to be attending exam preparation schools, or receiving other private instruction into the evening hours, long after their regular school day is complete.¹¹² Given the rigorous schedule, the frequently seen Korean term for the process, *si-hum ji-ohk*, or “examination hell,” does not seem too much of an exaggeration.¹¹³

2. Family (*gah-moon*)¹¹⁴

The family is basic to the life of every Korean.¹¹⁵ Lett notes that “one’s class status is so very much a function of one’s family status”¹¹⁶

110. “Korea . . . is a republic of entrance exams.” Wan-jung Joo, *The Republic of Exams*, CHOSUN ILBO, Dec. 1, 2003, available at <http://english.chosun.com/w21data/html/news/200312/200312010030.html>. There is an accepted and well known hierarchy of colleges in the country. See COUNTRY STUDY, *supra* note 33, at 98; Jeffrey Goldberg, *The Overachievers*, NEW YORK, Apr. 10, 1995, at 46. Perhaps Korean colleges mirror the hierarchical society to which they send graduates.

111. See Chong, *supra* note 106, at 50 (“The education fever found these days in Korea can be hardly said to be that of the student but rather that of the parents”); Eunjung Kim, *The Relationship Between Parental Involvement and Children’s Educational Achievement in the Korean Immigrant Family*, J. COMP. FAM. STUD. 529 (Oct. 1, 2002), available at 2002 WL 20556573 (“[P]arents rarely leave educational success to chance; they generally subject their children to intense parental pressure to study hard and to succeed in the educational system.”).

112. See Meery Lee & Reed Larson, *The Korean “Examination Hell”: Long Hours of Studying, Distress, and Depression*, 29 J. YOUTH & ADOLESCENCE 2, available at 2000 WL 22038785 (reporting survey of high school seniors in Korea and the United States).

Korean adolescents were found to spend much more time in schoolwork and less time in discretionary activities than their American counterparts. Korean adolescents’ affect states across daily activities were more negative relative to American adolescents. . . . These findings suggest that the effect of the college exam in generating depression in Korean adolescents may be partly mediated through its effect on their daily experience.

Id.

113. There is a cost, on Korean youth, and ultimately, Korean society. *Id.*; see also JEONG-KYU LEE, KOREAN HIGHER EDUCATION: A CONFUCIAN PERSPECTIVE 173- 86 (2002); COUNTRY STUDY, *supra* note 33, at 115-16.

114. *Gah-moon* means “one’s family [clan]; pedigree.” MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY, *supra* note 94, at 27. To inquire of *gah-moon* is to seek information about family background, that is, parents, their identity, position, standing, education and wealth.

115. MACDONALD, *supra* note 33, at 69.

116. LETT, *supra* note 17, at 228.

and that "status and . . . status assertion are a family, rather than an individual, affair."¹¹⁷ Thus, one's status at birth depends in part on the parents' education and wealth.¹¹⁸ The family's status can be enhanced by the children's education.¹¹⁹ There is the following rather blunt assessment of how impacting and lasting the social status of a family can be in the Korean psyche:

A Korean filling out an application for a job or school admission will have to answer questions concerning family status. He or she will have to list family members, their gender, age, and occupation, what region of the country they are from (or where the applicant's father or his family is from), whether parents are alive, and sometimes the highest level of education achieved by each family member. A failing of any family member may weaken an applicant's chances. For example, Koreans . . . [whose family past] includes a low status job or poverty . . . want to hide that. Koreans tend to see past or present lower status as a predictor of bad things. . . . [W]ith lower status a predictor of bad things, for a father to lose his job or to have a lower status job is to create problems for his children in their finding good jobs, good marriages, and other kinds of success. Thus, in Korea there is not the sense that each person should be considered on her or his own merits. Individual shame can do damage to the status of other family members.¹²⁰

Family identity as a determinant of social status is also a continuation of the rules of the Chosun dynasty, since ancestry determined membership in the discrete classes.¹²¹ Modified in the contemporary setting, it is not patrilineage but the immediate family that shapes status.¹²² Thus, the marriage of children, much like their education, is seen as an activity affecting the family as a whole. Indeed, marriage is generally regarded as a union of two families rather than two individuals,¹²³ and is a vehicle to assert, maintain,

117. *Id.* at 212.

118. An example of anecdotal evidence is the reported experiences of a Korean American interviewing for jobs in Korea, who indicated that employers asked, "Where did your father go to school?" *Migrant Survives Pollution and Korean Cultural Shock*, SOUTH CHINA MORNING POST, May 19, 1996, at 7, available at 1996 WL 3758115 (emphasis added).

119. "[M]any families have used education as a means of social mobility." LETT, *supra* note 17, at 210; see *id.* at 160 ("[B]ecause education was so important to the status of the family . . . it is and always has been the family rather than the government that has carried the primary financial burden for the education of their young."). This would explain the great pressure parents put on their children to succeed academically. See *supra* text accompanying note 111.

120. Yang & Rosenblatt, *supra* note 70, at 365.

121. See *supra* text accompanying note 38.

122. LETT, *supra* note 17, at 40-41.

123. See Reuter, *Brides School Eases Transition of S. Korean Women Wed to GIs*, ROCKY MTN. NEWS, Feb. 26, 1995, at 77A, available at 1995 WL 3172783 (quoting program director of "brides school" for Korean wives and fiancées of American military men: "[In Korea,] a marriage is between families In America, a marriage is between individuals"); see also Hahm, *supra* note 31, at 294 n.144 ("Especially for the parents' generation, the notion that a marriage is something in which the family must

and enhance the social status of one or both sides.¹²⁴ Contemporary marriage strategies reflect the tendencies of the yangban,¹²⁵ for whom the choice of a spouse was a matter of status, and who refused to take wives from lower status groups.¹²⁶ Lett notes that Korea's middle class continues to observe the class endogamy of the yangban past through the use of matchmakers or "newly developed mechanisms" designed to screen proper candidates, thereby ensuring family status.¹²⁷

3. Wealth

Although the term "social status" as used here is not interchangeable with socioeconomic status, economic wealth does contribute to one's social standing. Given the tremendous economic growth and increased living standards enjoyed by many Koreans beginning from the 1980s,¹²⁸ social status has "come to depend more on differences in wealth."¹²⁹ Economic and material wealth may thus be one determinant of social status, reflecting Korea's emergent success with capitalism, the likes of which was not foreseen in the Confucian Chosun years. Although many yangban were of means, especially those in high positions or those with land holdings, the

play a vital role is still very widespread.") (citing Hyon-Song Yi, *Beh-oo-jah suhn-tehk gwa-jong-eui byun-hwa-wah gyul-jung yo-in* [*Changes in the Process of Selecting Spouses and its Causes*], 9 *GAH-JOK-HAHK NON-JIP* [FAMILY STUDIES] 3 (1997)). See generally LAUREL KENDALL, *GETTING MARRIED IN KOREA: OF GENDER, MORALITY, AND MODERNITY* (1996) (discussing aspects of Korean marriage).

124. LETT, *supra* note 17, at 211; see Mi-hui Kim, "In Praise of Older Women": *Gen-X Couples Discarding Old Dating Rules*, KOREA HERALD, June 30, 2000, available at 2000 WL 21232780 (stating that "marrying someone of your own social class and education level" is one of the informal dating and marriage rules that Koreans usually abide by). Obviously, not everyone can marry a partner of higher status.

125. LETT, *supra* note 17, at 197.

126. "Although never explicitly stated in the law codes, the strong status consciousness of the yangban prohibited intermarriage with lower social groups so that group endogamy was a major factor in the marriage strategy." LETT, *supra* note 17, at 182 (quoting Martina Deuchler, *The Tradition: Women During the Yi Dynasty, in VIRTUES IN CONFLICT: TRADITION AND THE KOREAN WOMAN TODAY* 9-10 (Sandra Matelli ed., 1977)). And what were the consequences of a yangban who transgressed? Professor Kawashima notes that first, the descendants would not be yangban, and second, "[s]uch a yangban had to pay for his act of social and ethical improprieties." KAWASHIMA, *supra* note 39, at 9.

Korea's version of the forbidden love story is captured in *Choon-Hyang-juhn* (or "Story of Chunhyang"), the culture's "most beloved love tale," about a romance between the daughter of a female entertainer and a man of noble blood. Eun-joo Bae, "Chunhyang in Love" *Festival Features Various Versions of Classic Love Story*, KOREA HERALD, Apr. 3, 2002, available at 2002 WL 3365934.

127. LETT, *supra* note 17, at 199.

128. *Id.* at 40.

129. *Id.* (citing Clark W. Sorensen, *Ancestors and In-Laws: Kinship Beyond the Family*, in *ASIA'S CULTURAL MOSAIC: AN ANTHROPOLOGICAL INTRODUCTION* 118, 144 (Grant Evans ed., 1993)).

idyllic life of the yangban meant a modest and humble lifestyle without extravagance.¹³⁰ Contemporary Korean society has seen not only an emerging middle class enjoying a commensurate economic lifestyle, but also a significant number of those who experienced sudden wealth as a result of real estate development and money market speculation.¹³¹ Those with economic means were seen asserting status not with “traditional criteria such as ancestry and education” but with conspicuous consumption, such as “expensive housing, home furnishings, and trips abroad.”¹³² Yet although economic wealth is an aspect of social status, it is a relatively new determinant,¹³³ in contrast to the constants of education and family, and wealth alone is not enough. Being “conspicuously rich” does not necessarily mean wealth of culture, which evokes both characteristics of proper education and family.¹³⁴ Those of recent wealth, in spite of their newly acquired “trappings of an upper-class lifestyle . . . were looked down upon by the descendants of yangban families who claimed the nouveaux riches had no culture and merely bought their status.”¹³⁵ As wealth is the least established means of determining social status and the most mutable, it is also the most suspect.

C. Social Status at Law

The commentary would indicate that education and family background, and to a lesser extent economic wealth, are key elements in the contemporary societal construction of social status, and that these three factors could be included in a practical definition of what

130. *Id.* at 28-32 (discussing different ways yangban status was asserted depending on family's assets and occupations).

131. For example, those who owned land near the Seoul area during the years of urban expansion became wealthy overnight. See LETT, *supra* note 17, at 59 (quoting Sue Chang, *Labor Pains: No End in Sight to Shortage of Workers*, 9 BUSINESS KOREA 41, 42 (1992)).

132. *Id.* at 211; *cf. id.* at 97 (noting that because “[l]egal status is no longer legally defined or inherited . . . conspicuous consumption has become an important means of asserting status regardless of educational level”).

133. *Id.* at 97.

134. *Id.* at 98. Of course, one's wealth would allow his family to invest in the children's education, by providing for private instruction and enhancing their chances at admission to one of the top colleges, which would enhance their and the family's social status. See STEINBERG, *supra* note 35, at 94.

135. LETT, *supra* note 17, at 59. A reviewer echoed the point:

The nouveau riches are less honored than they might be Recent wealth tends to be denigrated not just by the upper class but by society at large, due to a proclaimed lack of 'high-class culture.' The nouveau riche has a derogatory connotation in the daily discourse of most Koreans.

Hong, *supra* note 24, at 678. The Korean *byuh-rahk boo-jah*, with *byuh-rahk* meaning “thunder” and *boo-jah* meaning “wealthy person,” is a term with a negative connotation.

comprises social status. Of interest then is the Korean understanding of social status at law. What prompts the search for a legal definition is the provision in the Korean Constitution that provides for equality of all citizens before the law and explicitly prohibits discrimination based on social status. That provision, Article 11, provides in full:

- (1) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.
- (2) No privileged caste shall be recognized or ever established in any form.
- (3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges shall ensue therefrom.¹³⁶

The substance of Article 11 has remained intact throughout Korea's turbulent political history after it established an independent government in 1948,¹³⁷ and is one of the few provisions to remain virtually unchanged over several constitutional revisions.¹³⁸ Some historical development is necessary.

1. History of Article 11

Dr. Chin-O Yu, an eminent Korean legal expert of the day, is credited with being the primary draftsman of the Korean Constitution¹³⁹ and appears to have been the sole author of the

136. S. KOREA CONST. art. 11.

137. In the original Constitution adopted in 1948, the equal protection provision was contained in Article 8. The provision saw minor changes in phrasing during the amendments adopted in 1962 and 1987. See <http://www3.assembly.go.kr/alkms/cgi-bin/counter.cgi?lawcode=1001> (Art. 11). For the original 1948 version, see *infra* text accompanying note 158.

138. Most of the revisions were to accommodate power in the military regimes. The most notable revision took place in 1987, "the year of the constitutional miracle," when nationwide protests and mounting criticism against the regime of Doo-Hwan Chun led to substantial reforms, including direct popular election of the president. Kim & Lee, *supra* note 21, at 303, 322; see also James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, in HUMAN RIGHTS IN KOREA, *supra* note 59, at 222. The 1987 reforms also led to the establishment of the Constitutional Court of Korea, with jurisdiction to review cases of constitutional relevance. See S. KOREA CONST. arts. 111-13; Constitutional Court Act, available at <http://www.ccourt.go.kr/english/welcome02.htm>. The Korean Supreme Court, an entirely separate body, is the "highest Court of the state." See S. KOREA CONST. art. 101.

139. HENDERSON, *supra* note 37, at 158 ("Korean experts outside the assembly, like Yu, Chin-O were called on to do much drafting."); DONALD STONE MACDONALD, U.S.-KOREAN RELATIONS FROM LIBERATION TO SELF-RELIANCE: THE TWENTY-YEAR RECORD 170 (1992); Kim & Lee, *supra* note 21, at 305; see also Gregory Henderson, *Human Rights in South Korea 1945-1953*, in HUMAN RIGHTS IN KOREA, *supra* note 59 (noting that national Assembly's Constitution Drafting Committee "extensively consulted Korean experts, especially Mr. Yu Chin-O"). Yu's first-hand accounts on the Constitution are available in CHIN-O YU, HUN-BUB-GI-CHO-HWE-GOH-ROK [MEMOIRS ON

Korean equal protection provision.¹⁴⁰ Regarding equal protection generally, Yu saw the principle of equality as universal, recognized in almost all countries since the French Revolution.¹⁴¹ Yu noted, however, that because of the then still existing recognition of the social aristocracy in post-liberation Korea, the Constitution makes clear that “[n]o privileged caste shall be recognized or ever established in any form.”¹⁴² Regarding the prohibition of discrimination, Yu stated that gender discrimination was the key portion of the provision, noting only briefly that equality regardless of religion and social status was already established in Korea at the time.¹⁴³ Presumably then, the prohibition based on social status was to confirm this policy, and to protect descendants of classes from the Chosun era against discrimination in the future.¹⁴⁴ Other than the cursory references to *sah-hweh-juhk shin-boon*, Yu did not elaborate

DRAFTING THE CONSTITUTION] (1981) [hereinafter Yu, MEMOIRS]; CHIN-O YU, HUN-BUB-HAE-EUI [AN INTERPRETATION OF THE CONSTITUTION] (1949) [hereinafter YU, AN INTERPRETATION OF THE CONSTITUTION]; Chin-O Yu, *The Constitution of the Republic of Korea: Its Ideal and Reality*, 1 KOREANA Q. 5 (1960) [hereinafter Yu, *Ideal and Reality*]. There is also a biography. Kwang-Suhk Chun, *Hun-bub-hahk-jah Yu Chin O [Constitutional Scholar Yu Chin-O]*, 2 YON-SEI-BUB-HAHK-YEON-GOO [YONSEI LAW RESEARCH] 50 (1992).

140. MACDONALD, *supra* note 139, at 170.

141. YU, AN INTERPRETATION OF THE CONSTITUTION, *supra* note 139, at 34-35.

142. S. KOREA CONST. art. 11(2); S. KOREA CONST. 8(2) (1948); see YU, AN INTERPRETATION OF THE CONSTITUTION, *supra* note 139, at 34-35. Indeed, commentators agree that at the time of the drafting of the Korean Constitution, although Japanese colonial rule did dismantle the formalized class system from the Chosun dynasty, social aristocracy and class was still present. See CUMINGS, *supra* note 46, at 53; Jong-Soo Lee, ‘*Sah-hwe-juhk shin-boon-’eh eui-hahn cha-byul-geum-ji-eui hun-bub-juhk eui-mi [The Constitutional Meaning of Prohibition of Discrimination Based on “Social Status”]*, 31 GONG-BUB YEON-GOO [PUBLIC LAW] 351, 358 (2002).

143. See YU, AN INTERPRETATION OF THE CONSTITUTION, *supra* note 139, at 34-35; Lee, *supra* note 142, at 358 (citing CHIN-O YU, *SHIN-GO HUN-BUN HAE-EUI [AN INTERPRETATION OF THE CONSTITUTION (REVISED)]* 65-66 (1954)). Notes from Yu’s memoirs indicate that the list of grounds on which discrimination is prohibited—sex, faith, and social status—was not included in his original draft of the equal protection provision. It was apparently added later, then deleted in the draft submitted to the National Assembly Constitution Committee, then included again in the final version. See YU, MEMOIRS, *supra* note 139, at 114, 182, 223.

144. Kwang-Suhk Chun, *Guk-gah-in-gwon-we-won-hwe Se-mi-na toh-rohn-won-goh [National Human Rights Commission Seminar Discussion Manuscript]*, in NATIONAL HUMAN RIGHTS COMMISSION, GUK-GAH-IN-GWON-WE-WON-HWE JUHN-MOON-GAH TOH-ROHN-HWE [NATIONAL HUMAN RIGHTS COMMISSION SPECIALISTS SEMINAR] 53, 57 (2002) [hereinafter NATIONAL HUMAN RIGHTS COMMISSION SEMINAR]; Pil-Dong Kim, ‘*Guk-gah-in-gwon-we-won-hwe-buhb jeh-30-joh jeh-2-hahng-eui sah-hwe-juhk shin-boon-eui buhm-we-’eh deh-hahn toh-rohn yoh-ji [Summary of Discussion on “The Scope of Social Status Provided in Section 2 Article 30 of the National Human Rights Commission Act”]*, in NATIONAL HUMAN RIGHTS COMMISSION SEMINAR, *supra*, at 50, 51; Lee, *supra* note 142, at 358 (citing Soo-Woong Han, *Pyung-deung-gwon-eui goo-joh-wah shim-sah-gi-joon [The Structure of the Equality Right and the Standard of Review]*, 9 HUN-BUB-NOHN-CHONG [COLLECTION OF TREATISES ON THE CONSTITUTION] 40, 92-93 (1998)).

in his writings on the meaning of the term.¹⁴⁵ There is precious little from the literature at the time of the Constitution's drafting on what social status was to include or how the prohibition of discrimination based on that ground was to be applied in Korea when the Constitution was adopted on July 17, 1948.¹⁴⁶ Ultimately, the equal protection provision is part of the Constitution that was hurriedly debated and approved by the National Assembly in only two months and may well bear "the marks and dangers of . . . haste."¹⁴⁷

As an aside, in the task of drafting a constitution for the new sovereign, Yu stated that he drew upon the constitutions of various foreign countries, including that of Weimar Germany,¹⁴⁸ which had prohibited "[p]ublic legal privileges or disadvantages of *birth* or of *rank*."¹⁴⁹ Yu also reviewed an ordinance issued by the U.S. Army Military Government in Korea (USAMGIK),¹⁵⁰ which provided for equal protection under the law as well as civil liberties found in the U.S. Bill of Rights.¹⁵¹ In addition, Yu acknowledged receiving a proposed constitution drafted by USAMGIK legal staff,¹⁵² but did not indicate what he took from it. Other sources say that the U.S.

145. See generally YU, MEMOIRS, *supra* note 139.

146. The date is a national holiday in Korea, *jeh-hun-juh*.

147. Henderson, *supra* note 139, at 157, 162.

148. YU, MEMOIRS, *supra* note 139, at 22; see MACDONALD, *supra* note 139, at 170; Chun, *supra* note 139, at 52, 60 n.25.

149. GERMAN REPUBLIC [WEIMAR] CONST. art. 109 (1919), reprinted in THE WEIMAR REPUBLIC SOURCEBOOK 46, 49 (Anton Kaes et al. eds., 1994) (emphasis added). The corresponding language in the current German Constitution provides: "No one may be disadvantaged or favored because of his sex, *parentage*, race, language, *homeland and origin*, his faith, or his religious or political opinions." F.R.G. CONST. art. 3(3), available at <http://www.jurisprudencia.de> (emphasis added).

150. At the close of World War II, U.S. forces occupied both Japan (the defeated enemy) and the southern half of the Korean peninsula (a liberated former colony). See generally KOREA UNDER THE AMERICAN MILITARY GOVERNMENT, 1945-1948 (Bonnie B.C. Oh ed., 2002); E. GRANT MEADE, THE AMERICAN MILITARY GOVERNMENT (1952). Both were under the command of General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP). A formal U.S. Army Military Government in Korea (USAMGIK) was created a few months later, and operated as a unit under MacArthur's ultimate authority. See MEADE, *supra*, at 76, 78. The military government in both countries oversaw all aspects of society, and in Korea, until an independent national government satisfactory to U.S. interests was established.

151. YU, MEMOIRS, *supra* note 139, at 22; see Chun, *supra* note 139, at 60 n.25; Kim & Lee, *supra* note 21, at 306, 327 n.3. Professors Kim and Lee identify the ordinance as "The Ordinance on the Rights of the Korean People," issued on April 7, 1948. *Id.* at 305. The late Professor Hahm referred to the "Proclamation of the Rights of the Korean People," issued on April 5, 1948, which included various civil liberties of the type included in the U.S. Bill of Rights. HAHM, *supra* note 2, at 151, 151 n.63 (citing NATIONAL ECONOMIC BOARD, UNITED STATES MILITARY GOVERNMENT IN KOREA, SOUTH KOREAN INTERIM GOVERNMENT ACTIVITIES (SKIGA) No. 31, Apr. 1948, at 167). A review of the ordinances and proclamations issued by the USAMGIK in April 1948 do not yield any provisions regarding equality regardless of "social status."

152. MACDONALD, *supra* note 139, at 149-50, 170; YU, MEMOIRS, *supra* note 139, at 22. The draft was written by Colonel Emery J. Woodall, a USAMGIK legal officer. Kim & Lee, *supra* note 21, at 305.

proposed draft was “largely disregarded”¹⁵³ and had no “significant influence” in the creation of the Korean Constitution.¹⁵⁴ One source, an interpretative summary of State Department archives, declares that the final product “was prepared with little or no American advice.”¹⁵⁵

Concerning the language of the equal protection provision and the social status classification specifically, what Yu did not state directly in his post-drafting writings is what seems all too obvious, namely, that it was taken from the counterpart in the Japanese Constitution, which was adopted two years before, in 1946.¹⁵⁶ The very similar content and phrasing in the two equal protection provisions supports this view:

- Japan: All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.¹⁵⁷
- Korea: All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, faith or social status.¹⁵⁸

It should be noted that some commentators see the Japanese Constitution as essentially a product of the U.S. military, reflecting

153. MACDONALD, *supra* note 139, at 170.

154. Kim & Lee, *supra* note 21, at 305.

155. MACDONALD, *supra* note 139, at 149-50. Although it is not certain how much Yu and those working with him were influenced by American equal protection principles, the Fourteenth Amendment's general guarantee of “equal protection of the laws” was not known internationally to provide for equality regardless of social status specifically. Interestingly, however, at about the time when the U.S. military government oversaw affairs in Korea, the U.S. Supreme Court decided a case with social status implications in *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946). There, the clerk of court and jury commissioner of a California court had excluded from the jury lists “all persons who work for a daily wage.” *Id.* at 221. The Court stated:

Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.

Id. at 223-24.

156. Korean drafters could have had available the Japanese Constitution (or the MacArthur draft), and simply adopted the equal protection language therein, with minor modifications. Or perhaps U.S. advisors in Japan familiar with the Government Section's work could have simply forwarded the equal protection language to U.S. advisors in Korea, whose work was not yet finished, who in turn made it available to the drafting committee or Yu.

157. JAPAN CONST. art. 14, available at http://www.oefre.unibe.ch/law/icl/ja00000_.html.

158. S. KOREA CONST. art. 8(1) (1948), available at <http://www3.assembly.go.kr/alkms/cgi-bin/counter.cgi?lawscode=1001> (Article 11; 1948 version) (Korean text). The term “faith” was later amended to “religion.”

MacArthur's wishes and concerns about post-War Japan.¹⁵⁹ The entire process of drafting the Constitution was met with considerable discomfort by the Japanese.¹⁶⁰ The Japanese equal protection provision was merely one example.¹⁶¹ As one U.S. participant in the

159. See GLENN D. HOOK & GAVAN MCCORMACK, *JAPAN'S CONTESTED CONSTITUTION: DOCUMENTS AND ANALYSIS 3* (2001) (noting that key principles of the constitution were "presented as a virtual ultimatum" and "non-negotiable demands imposed by the war's victors"); John M. Maki, *The Japanese Constitutional Style, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-1967* 3, 9 (Dan Fenno Henderson ed., 1968) ("Although both the occupation and the Japanese government strove to maintain the fiction that the draft was a Japanese product, it was an open secret that it was not.").

160. General Douglas MacArthur was anxious for a new constitution to be adopted for post-war Japan. He rejected a revised constitution that the Japanese government had proposed (as too similar to the previous one), and directed the Government Section of SCAP, headed by a confidant, to draft a new one in secret. See Nobuyoshi Ashibe, Lawrence W. Beer & Masami Ito, *The United States Constitution and Japan's Constitutional Law, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA*, *supra* note 21, at 128, 179; see also Lawrence W. Beer, *Constitutionalism and Rights in Japan and Korea, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 225, 232-33 (Louis Henkin & Albert Rosenthal eds., 1990). In eight days, the Government Section submitted a draft to MacArthur, who in turn ordered revisions toward a "MacArthur draft," which was given to the Japanese. *Id.* at 233.

There is a fascinating series of events that occurred from the MacArthur draft to the final version of the Japanese Constitution, which author Dale Hellegers recounts in vivid detail, and is summarized here. DALE M. HELLEGERS, *WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* (2001). When the Government Section submitted the MacArthur draft to Japanese officials, the latter had been expecting to discuss the revised constitution that they had proposed shortly before, and not to be confronted with a new U.S. draft. *Id.* at 528; BEATE SIROTA GORDON, *THE ONLY WOMAN IN THE ROOM; A MEMOIR* 121 (1997). Stunned, shocked, and with little choice, the Japanese side relented. Initially, Japanese officials agreed that the Japanese government would "begin to adapt the American document and put it into 'proper language.'" HELLEGERS, *supra*, at 535. The MacArthur draft was translated into Japanese, with some revisions and omissions from the English version, which the U.S. side discovered with consternation when the Japanese version was translated back into English. An "atmosphere of mistrust and rancor" set in. *Id.* at 540. After tense discussions, flaring tempers, and around-the-clock translations, both sides saw the wisdom of eventual compromise. *Id.* at 537-43. A final version was released by the Japanese government as its own.

161. Initially, a committee of three persons was given the task of drafting the civil rights portion of the text. The equal protection language that the Civil Rights Committee submitted read in principal part: "All persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic, educational, and domestic relations on account of race, creed, sex, *caste* or national origin." HELLEGERS, *supra* note 160, at 585 (emphasis added). The Steering Committee left this language intact, and submitted it to MacArthur for approval. MacArthur apparently directed that "social status" be added to the list of classifications, and approved the remaining language in the provision, so as to read: "No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex, social status, caste or national origin." *Id.* at 679. The MacArthur draft was the first of the multiple versions of the proposed constitution that include "social status" in *haec verba*. The version that the Japanese government had prepared for release retains "social status," deletes "caste" and adds "family origin," to read in relevant part: "[T]here shall

discussions recalled, “[t]he formulas guaranteeing democracy and equality . . . were not things [the Japanese] could easily accept.”¹⁶² In 1968, Professor John Maki offered alternative assessments of the U.S. imposition of the equal protection language, stating:

The most important provisions relating to nondiscrimination were those involving sex and social status. Twenty years ago [1948] Articles 13 [which provides that “[a]ll of the people shall be respected ‘as individuals’”¹⁶³] and 14 [the equal protection provision] were regarded at best as being harmless statements of general principles to which obeisance had to be made as a matter of democratic good form, and at worst as demonstrations of the ignorant contempt of the occupation in its dealings with many elements of the Japanese social tradition.¹⁶⁴

Ultimately, if the similarity in the language of the Japanese and Korean equal protection provisions is evidence that the Korean version is merely a transplant of the Japanese counterpart,¹⁶⁵ then the result is an equal protection mandate in Korea that is essentially the product of what the U.S. military, namely Douglas MacArthur, perceived (whether correctly or incorrectly) would be an appropriate equal protection law for Japan, one that was imposed on the country without Japanese input or consideration.¹⁶⁶ In the final analysis, the Korean equal protection provision, like much of Korean law, appears to be based on the Japanese version.¹⁶⁷

2. Contemporary Discussion

The meaning of social status has drawn increasing interest from Korean commentators in the contemporary setting.¹⁶⁸ A leading

be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.” *Id.* This is the version that was ultimately adopted and is in effect today.

162. GORDON, *supra* note 160, at 121.

163. JAPAN CONST. art. 13.

164. Maki, *supra* note 159, at 32.

165. Given the great similarity between the Japanese and Korean equal protection provisions, one might expect that it be more readily noted in the commentary. It has received far less mention. See Byung-Sahk Koo, *Han-guk hun-bub-gwa Il-bohn hun-bub-eui teuk-ji [Features of Korean Constitution and Japanese Constitution]*, 1 IL-BOHN HAHK-BOH [JOURNAL OF JAPANOLGY] 5, 23 (1973); Lee, *supra* note 142, at 360 n.23.

166. Maki, *supra* note 159, at 31-32 (discussing U.S. influence on Japanese Constitution).

167. This is part of an ongoing irony. There has been continuing social and political tension between the two countries since Korea declared its independence from Japan. Yet much of Korean law, legal system, and legal education is based on the system that Japan imposed during colonial rule.

168. See, e.g., Lee, *supra* note 142. The definition of social status was the focus of a conference sponsored by the National Human Rights Commission of Korea in October 2002, with participants discussing the meaning of the term in the Korean Constitution and the National Human Rights Commission Act, No. 6481 (2001). For a press account

treatise on Korean constitutional law introduces the two common approaches to the meaning of social status under law.¹⁶⁹ The “congenital,” or inherited approach, provides that status is determined at birth; the “posteriori” approach includes, in addition to status determined at birth, status acquired after birth and occupied for a lengthy period of time.¹⁷⁰ The congenital approach, which would include descendants of a number of classes of persons,¹⁷¹ has been criticized as unduly narrow.¹⁷² Although this approach would honor the original concern of discrimination against descendants of classes from the yangban era, the class system has long since been formally abolished,¹⁷³ and the approach would have limited application in modern Korea. The posteriori approach¹⁷⁴ would better address contemporary society, but it too has been criticized, for its

of the conference and discussion, see *Sah-hwe-juhkk shin-boon Moo-uh-t-shin gah?* [What is Social Status?], KOREAN PROGRESSIVE NEWS AGENCY, Oct. 18, 2002, available at <http://www.kpna.net/newsPrint.php?number+456> (copy on file with author). A press release in English text announcing the conference is available on the commission's Internet site. See <http://www.humanrights.go.kr/eng/about/news/NeComitNewsView.jsp?seqid=19> (copy on file with author). Commentary resulting from the conference was published in NATIONAL HUMAN RIGHTS COMMISSION SEMINAR, *supra* note 144. Relevant articles therein are: Hong-Suhk Cho, *Guk-gah-in-gwon-we-won-hwe-buhb jeh-30-joh jeh-2-hahng-eui sah-hwe-juhkk shin-boon-eui buhm-we* [The Scope of Social Status Provided in Section 2 Article 30 of the National Human Rights Commission Act], in NATIONAL HUMAN RIGHTS COMMISSION SEMINAR, *supra* note 144, at 3; Chun, *supra* note 144; Kim, *supra* note 144; Huhn-Hwan Lee, *Bool-hwak-jung-geh-nyum-eui heh-suhk-gwa geu juhkk-yong* [The Interpretation of Ambiguous Concepts and Its Application], in NATIONAL HUMAN RIGHTS COMMISSION SEMINAR, *supra* note 144, at 43; Ki-Choon Song, *Guk-gah-in-gwon-we-won-hwe-buhb jeh-30-joh jeh-2-hahng heh-suhk-sahng eui hahn moon-jeh* [A Problem in the Interpretation of Section 2, Article 30 of the National Human Rights Commission Act], in NATIONAL HUMAN RIGHTS COMMISSION SEMINAR, *supra* note 144, at 21.

169. TSCHOLSU KIM, HUN-BUB-HAHK-GEH-ROHN [CONSTITUTIONAL LAW TREATISE] 408-09 (13th ed. 2002).

170. *Id.* at 409. The congenital v. posteriori approach to social status seen in Korean legal commentary correlates to the distinction between “ascribed” and “achieved” status discussed by one sociologist: ascribed status “refers to certain attributes of persons over which they have little or no control, such as race, gender or age,” whereas “achieved status” refers to the position which a person may achieve, for example through educational competition. TURNER, *supra* note 19, at 4.

171. Under this approach, social status would include persons born out of wedlock, those of a particular race, and descendants of naturalized citizens, convicted criminals, and the Chosun classes. See KIM, *supra* note 169, at 409; see also Cho, *supra* note 168, at 6.

172. Cho, *supra* note 168, at 8; Lee, *supra* note 142, at 359.

173. Lee, *supra* note 142, at 359.

174. Under the posteriori approach, social status would include, for example, naturalized citizens, convicted criminals, and residents of a particular region. See KIM, *supra* note 169, at 409; Cho, *supra* note 168, at 6. But given its definition, the approach could include anyone holding a particular occupation—e.g., teachers, civil servants, farmers, fishermen, merchants, students—as well as the rich and the poor. See KIM, *supra* note 169, at 409. One commentator specifically rejects the notion that economic wealth is a form of social status. See Lee, *supra* note 142, at 362.

overbreadth.¹⁷⁵ Even with the limitation that status must attach for some time, discrimination could be claimed based on a host of conditions. Nevertheless, perhaps by process of elimination, the posteriori approach is favored by a majority of the commentators.¹⁷⁶ One commentator has proposed a third approach, urging that social status refer to “historically oppressed groups,” so that the status classification would have equivalent weight and measure when compared with sex and religion, the other classifications explicitly listed.¹⁷⁷ Under this theory, the drafters kept open the possibility that new types of social status comparable to that seen in the social aristocracy could arise.¹⁷⁸

Adding to the confusion surrounding the meaning of social status is the provision of the National Human Rights Commission Act¹⁷⁹ that includes social status as a ground on which “discriminatory act of violating the right of equality” may occur.¹⁸⁰ Yet social status is one of eighteen grounds on which discrimination is subject to agency review, including, among others, sex, religion, regional origin, and family status.¹⁸¹ This has raised questions of whether the meaning of “social status” is the same in both the Constitution and the statute, and whether in the latter social status and the other grounds overlap or are mutually exclusive.¹⁸² Some lament that the term is an open-ended concept.¹⁸³

For its part, the Constitutional Court of Korea has ruled that social status is “status that a person occupies for a long term, that is accompanied by social estimation,”¹⁸⁴ taking a posteriori approach. The Court gave this definition in a case involving the constitutionality of a law that imposed enhanced punishment to those

175. Cho, *supra* note 168, at 8; Lee, *supra* note 142, at 362.

176. See KIM, *supra* note 169, at 409. Then there is the question of whether the meaning of social status depends on whether the list of grounds on which discrimination is proscribed—social status, sex and religion—is intended to be illustrative or exhaustive. See Cho, *supra* note 168, at 8; Chun, *supra* note 144, at 54; Lee, *supra* note 168, at 45; Song, *supra* note 168, at 28.

177. Do-Soo Hwang, *Hun-bub-jeh-pahn-eui shim-sah-gi-joon-eu-roh-suh-eui pyung-deung* [Equality as a Standard of Review in the Constitutional Court] 142 (1996) (unpublished Ph.D. dissertation, Seoul National University College of Law) (on file with author).

178. *Id.*; see also Lee, *supra* note 142, at 361-62.

179. National Human Rights Commission Act, No. 6481 (2001). An English version of the act is available at http://www.humanrights.go.kr/eng/dataroom/committee_data/DaComitBookView.jsp?choice_board_id=all&search=&choice=&seqid=76&page_num=1 (copy on file with author).

180. *Id.* art. 30(2).

181. *Id.* Powers of the National Human Rights Commission are discussed *infra* note 194.

182. See Chun, *supra* note 144, at 60.

183. Cho, *supra* note 168, at 16; Chun, *supra* note 144, at 61; Lee, *supra* note 168, at 47.

184. 93 Hun-Bah 43, Feb. 23, 1995.

convicted of repeated crimes.¹⁸⁵ The plaintiff argued that the additional punishment amounted to discrimination based on his social status—that of being a repeat offender—in contrast to those convicted of a first time offense, who would not face such punishment.¹⁸⁶ The Court upheld the constitutionality of the law, reasoning that it was reasonable action and permissible discrimination.¹⁸⁷ In its decision, the Court did not further elaborate on defining social status nor did it provide an illustrative or exhaustive list of the types of social status intended by Article 11.¹⁸⁸ Thus, what has emerged is a general description of the term by the Court, with observers attempting to compile a list based on case decisions where social status is implicated.¹⁸⁹ No definitive list of what qualifies as social status has been offered to date. Whether the Constitutional Court would endorse educational background, family background, or wealth, or some combination thereof (all of which would seem to fit under the Court's general guideline of significant length in time and social estimation) as coming within its definition of social status is unclear.

D. Status Discrimination

If status consciousness is prevalent in Korea, and there exist differences among members of Korean society along status lines, prejudice against those of lower status is inevitable. Professor John Lie writes that in the mid-1980s when inequality, class distinctions, and class consciousness became more keen in Korean society, "class prejudices were openly expressed."¹⁹⁰ Importantly, not all instances of prejudice based on social status in Korea amount to discrimination proscribed by law. The U.S. doctrine that the law prohibits only

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *E.g.*, Cho, *supra* note 168, at 7.

190. JOHN LIE, HAN UNBOUND: THE POLITICAL ECONOMY OF SOUTH KOREA 136 (1998). Professor Hagen Koo offers the narrative of one factory worker lamenting the class prejudice:

Women working in factories are *kongsuni*; men working in factories are *kongdoli*. [These terms are generally derogatory.] *Kongsuni* and *kongdoli* are contemptible guys, nothing worth counting, just loose folks. They call us this way as a whole group. We have to be *kongsuni* even if we hate it, simply because we are working in factories. If someone asks us where we are working, we simply say, "I work at a small company." . . . People fault us for spending money on appearance without making enough money, but our reason is to take off the label of *kongsuni* they put on us.

Hagen Koo, *The State, Minjung, and the Working Class in South Korea*, in STATE AND SOCIETY IN CONTEMPORARY KOREA 131, 152 (Hagen Koo ed., 1993), *quoted in* LIE, *supra*, at 136.

discriminatory activity by state action¹⁹¹ also applies in the Korean setting. That is, the equal protection provision in Article 11 of the Korean Constitution applies directly to government, and not private, action.¹⁹² The guarantee of equality and the prohibition of discrimination do not apply to a private actor unless a specific statute so provides, and such statutes have been enacted, most frequently for the employment setting.¹⁹³ The Labor Standards Act explicitly prohibits discrimination in employment based on social status and applies to private employers.¹⁹⁴ Although this Article does not seek to provide a comprehensive survey of prohibited discriminatory activity in contemporary Korean society, some examples will be helpful. In the employment setting, anecdotal evidence is available to show discrimination in hiring based on one's *hakk-buhl*.¹⁹⁵ Although

191. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4, at 486-517 (2d ed. 2002).

192. This is implicit in the decisions of the Constitutional Court and is the majority view of the commentators. See YOUNG-SUNG KWON, HUN-BUB-HAHK-WON-ROHN [CONSTITUTIONAL LAW: A TEXTBOOK] 316-18 (rev. ed. 2001).

193. *Id.*

194. Labor Standards Act, No. 6507, arts. 5, 10, 15 (2001), available at <http://www.moleg.go.kr/mlawinfo/english/htms/html/law33.html> (copy on file with author).

Of interest within this discussion is the National Human Rights Commission Act, which was enacted with the general purpose of "ensuring that inviolable, fundamental human rights of all individuals are protected." National Human Rights Commission Act, No. 6481, art. 1 (2001). The statute authorizes the National Human Rights Commission (NHRC) to review claims of discrimination on account of social status (or several other grounds). The law applies to both government and private parties, and covers alleged discrimination in employment, public services, and education and vocational training. *Id.* art. 30(2). Alleged victims of "unreasonable discrimination" may file a petition to the NHRC, which has authority to, among other things, investigate the discrimination, make recommendations to the respondent party, offer conciliation services, and refer the matter for prosecution or to an appropriate government agency. *Id.* arts. 19-29, 30(1). If the petitioner pursues a remedy in a court of competent jurisdiction, the NHRC may provide its opinions to the court. *Id.* art. 28(2). Questions have risen in the public commentary as to whether the act or the agency is powerless to protect equality rights. See *In-won-we-gah 'mah-dahng-bahl'-in i-yu* [*The Reason Why the NHRC Became a 'Nuisance'*], HAN-GYU-REH, June 20, 2003, available at <http://www.hani.co.kr/section-001033000/2003/06/001033000200306201824212.html> (copy on file with author).

195. Examples are available from "Antihakbul, a civic group against the deep-rooted school ties system in Korea." Kyung-hwa Shin, *Professors' Group Objects to Deep-seated Academic Cartel*, KOREA HERALD, Apr. 2, 2001, available at 2001 WL 8117391. The Internet site for the group included a posting from a person who candidly acknowledged benefiting from discrimination. The individual

majoried in engineering at Korea Advanced Institute of Science & Technology (KAIST) and was recently hired for a computer-related post. The writer, however, hinted that his employment was not fair.

"The other applicant . . ., I think, is more qualified for the job than [I]. While I have little knowledge about computers and my GPA is low, he specialized in computers and had a high grade point average," he said. "I think the company didn't hire him because he didn't graduate from a high-level university."

without empirical data, it is difficult to assess how widespread status discrimination is in hiring, retention, and promotion in employment, the view persists that top positions in government and industry in Korea are occupied by graduates of the elite universities, with the college attended as the primary, if not the only, qualification for entry.¹⁹⁶ In the education setting, a revealing work by Professor James Robinson argues that despite egalitarian reforms by the Korean government, there remains bias and institutionalized discriminatory treatment of primary school students in Korea based on the social status of the students' families.¹⁹⁷ Specifically, his research found a significant relationship between teachers' perceptions of students' social status and teachers' actions in denying or providing learning opportunities in the classroom.¹⁹⁸ Such biased treatment has an impact in a society where the college to which one gains admission is a critical determinant of individual lifestyle, and preparations for the college entrance examination begin in the early years. Whether individuals who are subject to discriminatory treatment in employment, education, or other settings due to their relatively lower social status resign themselves to the realities of societal norms or are willing to seek legal redress is a matter that deserves further study.

Id.

196. See *id.* (reporting view of professor that "the most serious problem of the academic clique is that graduates from the small number of top-level universities have obtained exclusive possession of significant posts in the Korean society."). Seoul National University, Korea University, and Yonsei University are generally considered to be the three universities in the elite tier. According to publicly available sources, over 85 percent of the attorneys admitted to the Korean bar at the three largest law firms in Korea completed their undergraduate studies at Seoul National, and nearly 95 percent did so at one of the top three universities. See http://www.martindale.com/xp/Martindale/Lawyer_Locator/Search_Lawyer_Locator/firm_search.xml www.martindale.com (entries for Kim & Chang, Lee & Ko); <http://www.shinkim.com/english/html/member.asp>. Typically, candidates take the equivalent of the U.S. bar examination after completing undergraduate studies; successful candidates then complete a two-year program at the Judicial Research and Training Institute (JRTI). Some may urge that hiring in the law firms is based entirely on merit—i.e., class rankings in the JRTI—and that undergraduate affiliations is coincidental.

197. Robinson, *supra* note 4, at 519-23. The study is elaborated in further detail *infra* text accompanying notes 211-13.

198. *Id.* at 519. One may point out that in the United States too, teachers' perceptions of students' social status, as well as their intelligence, or a whole host of other characteristics, can and do influence teaching behavior. This is not disputed. The instructive point here is that not all of these characteristics relate to classifications that the law does not permit.

E. Functional Equivalence?¹⁹⁹

To be clear: Race in the United States and social status in Korea are not the same.²⁰⁰ Indeed, social scientists from various disciplines will note differences between race and social status generally.²⁰¹ Perhaps the most glaring distinction is that while one's race (in most cases) is immediately obvious, one's social status is not, often requiring inquiry or investigation.²⁰² Another is that while race is

199. Given the partisan regionalism in Korea and historical discrimination against those from certain provinces in employment, politics, and marriage, some may argue that regional origin presents a stronger case for functional equivalence to race. One commentator gave a passing reference to the race/regional origin analogy: "[I]f race and racial relations . . . play a key role in the United States politics, region and regionalism have been conspicuous in South Korean politics." Sung Chul Yang, *South Korea's Top Bureaucratic Elites, 1948-1993: Their Recruitment Patterns and Modal Characteristics*, 34 KOREA J. 5, 5 (1994). The discussion among policy makers in Korea has already expanded to a debate over implementing U.S.-style affirmative action programs to provide for preferential treatment in education and government civil service based on regional origin. See Howard W. French, *South Koreans Seek Affirmative Action To End Regional Bias*, N.Y. TIMES, Apr. 27, 2003, § 1, at 14. Regarding discrimination and prejudice against those from a particular location in the U.S. setting, of interest is Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003). Professor Bassett calls attention to the "long standing, pervasive form of discrimination against rural dwellers" in the United States, especially in the areas of education and employment. *Id.* at 341.

200. Nor is race exclusive to the United States and social status exclusive to Korea. Race (primarily, one race) also exists in Korea, just as status consciousness is present in the United States. In the U.S. setting, race and class are not mutually exclusive. See generally Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353 (1995) (discussing relationship between class and race in U.S. society). One difference between the U.S. and the Korean setting is that the Korean Constitution, unlike the U.S. counterpart, explicitly prohibits discrimination on account of social status. See S. KOREA CONST. art. 11(1).

201. For example, in basic terms, an anthropologist would likely question whether social status presents a "distinctive, hereditarily transmissible physical characteristic []," CHARLES WINICK, *DICTIONARY OF ANTHROPOLOGY* 448 (1956), and note simply that status does not lead to separation of persons "on the basis of arbitrarily selected phenotypic traits," *ENCYCLOPEDIA OF ANTHROPOLOGY* 326 (David E. Hunter & Phillip Whitten eds., 1976); a sociologist would challenge the notion that race necessarily equates with "a position occupied by an individual in a social system," ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER'S GUIDE TO SOCIOLOGICAL LANGUAGE* 279 (1995); see *DICTIONARY OF SOCIOLOGY* 293 (Henry Pratt Fairchild ed., 1944). In both anthropology and sociology, race and social status are seen as distinguishable traits, with separate definitions.

202. But even this is not beyond debate. Granted, one's social status cannot be recorded instantaneously by a visual sensation; yet those familiar with Korean society will point out that individual social status can sometimes be accurately estimated after a brief encounter or exchange. There is also the view that one cannot always hide one's social status. See Koo, *supra* note 190, at 152 (quoting a factory worker: "[K]ongsuni cannot really hide their identity. They show it however hard they try to do makeup and dress up nicely").

fixed at birth and therefore immutable,²⁰³ social status, in contrast, is neither fixed nor unchangeable, since it may be enhanced or lowered in the course of a lifetime. It is urged here that such distinctions be the starting point for the discussion of the equivalence of race in the United States and social status in Korea²⁰⁴ and not the definitive rejection of the two as non-identical concepts. For even acknowledging that race and social status are not tautological or interchangeable, race in the U.S. experience and social status in the Korean counterpart share many of the same characteristics in function, history, and impact.

Initially, one may question the degree to which social status in Korea is immutable.²⁰⁵ In this regard, although the Constitutional Court's definition of social status is somewhat general, its limitation that the status must attach for some period of length²⁰⁶ suggests that it is not so easily changeable, on the presumption that if one could readily alter the status to avoid discrimination, he would do so. Nor is social status so mutable if it is determined, as discussed above, by the three factors of education, family, and (in less part) wealth. Beginning with family, it is a fair assessment that for many Koreans, the social status of one's family is established by the time of his birth, if not before.²⁰⁷ The educational achievement of the parents is fixed by that time, and although their occupational and economic positions are not permanent, it is at a point within a predictable progression of promotion and seniority.²⁰⁸ Regarding education, although one's educational status is established, not at birth, but by the late teens with the results of the college entrance exams,²⁰⁹ there is much to

203. *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (describing race, gender, and ethnic background as immutable characteristics); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (describing sex, race, and national origin as immutable characteristics). Critical race theorists and those who see race as socially constructed would challenge the notion of immutability of race. *E.g.*, Haney Lopez, *supra* note 77.

204. Perhaps some will prefer the less direct characterization of social status in Korea as *analogous* to race in the United States, or social status and race in the respective societies as *homologous* characteristics.

205. One is reminded of Professor Hahm's statement that Korea is "a society where all of man's political capacity is determined at birth." HAHM, *supra* note 37, at 34.

206. 93 Hun-Bah 43, Feb. 23, 1995.

207. One indicator of this is the great relevance of social status in the selection of a spouse. See *supra* text accompanying notes 123-27.

208. Korea is not a society that sees much career change in adulthood, although the numbers are increasing. See JU-YEON CHUNG, SUHN-JIN-GUK-GWA HAN-GUK-EUI JIK-UB-GYO-YUK: HOOL-LYUN JEH-DOH-EUI TEUK-SUNG-GWA HAN-GEH [VOCATIONAL EDUCATION IN DEVELOPED COUNTRIES AND IN KOREA: FEATURES OF TRAINING SYSTEMS AND THEIR LIMITS] 225 (2002) (noting tendency to search for *pyung-seng-jik-jang*, or "lifetime job").

209. Some students who are not successful in their attempts to win admission to the college of their choice in a given year try a second time the following year (*jeh-soo*), and some even try a third time (*sahm-soo*). See LETT, *supra* note 17, at 180.

indicate that the social status of one's family has a great impact on one's ultimate educational opportunity.²¹⁰ Professor Robinson's study indicates a positive relationship between teachers' perceptions of a student's family social status and the student's academic achievement.²¹¹ He confirms a process of "converting social status to academic achievement," namely,

- (1) . . . teachers acquire expectations of the social status of parents,^[212]
- (2) . . . these expectations influence teacher control and call-on behaviors with students, (3) . . . these expectations and interactional patterns between the teacher and the students affect peer group membership, and
- (4) . . . these variables affect the academic achievement of the child.²¹³

Moreover, a study by Korean researchers indicates a correlation between the higher education opportunities of high school seniors and the educational levels of the students' parents.²¹⁴ Simply, students whose parents have a relatively lower educational background do not have the opportunities of those whose parents achieved higher educations.²¹⁵

210. Admission to Korea's universities is determined, in the vast majority of cases, by entrance examination scores in open competition. It is not suggested here that preferential or discriminatory treatment based on social status occurs in college admissions. Still, some question whether the competition for college admission is fair or real, since a student's chances are shaped by his family's circumstance. See LIE, *supra* note 190, at 135 ("High test scores and entrance to prestigious universities depended on urban residence, access to cram schools, and the ability to hire private tutors, all out of reach for the child of the average worker."); Shin, *supra* note 195 (reporting comments of Korean professor who urges that "high school students start from different environments such as the level of their parents' wealth").

211. Robinson, *supra* note 4, at 506. Putting it bluntly, teacher expectations of social status influence academic achievement, since "the teacher more tightly controls the lower [socioeconomic status] child and interacts more with the higher [socioeconomic status] child, who achieves a higher social position in the classroom." *Id.*

212. Professor Robinson appears to use "social status" interchangeably with "socioeconomic status." For purposes of his study, status is determined by the student's father's education, mother's education, and father's occupation. *Id.* at 509.

213. *Id.* at 515.

214. The Korea Labor Institute conducted a survey of the families of 2,476 high school graduates nationwide. It revealed that about 70 percent of students with college-educated parents won admission to four-year colleges, in contrast to 45 percent for children of high school graduates, and 27.1 percent for those with parents having less education. *Children of Educated Parents Found To Enter Good Colleges*, KOREA TIMES, Nov. 10, 2001, available at 2001 WL 25565863. The correlation was also seen in the level of colleges to which students were admitted: 44.9 percent of the children of college graduates entered colleges ranked in the top 25 percent, mostly in Seoul, in contrast to 25 percent of children with parents with only high school diplomas, and 15.4 percent of children with less than high school education. The same study also reported a correlation between college opportunities for students and the students' parents' employment status (white collar v. blue collar v. farmers and fishermen) and location (urban v. rural areas). *Id.*

215. *Id.* One of the researchers asserted that "[r]ather than economic factors, the educational and social status of the parents were found to affect the future of their children." *Id.*

This impediment against mobility merely persists after one's college affiliation is determined. Korean observers urge that the notion of opportunities for upward mobility in free competition and reward for merit regardless of collegiate letters is a myth.²¹⁶ Professor Hoon Hong urges that a consequence of the *hahk-buhl* mentality in Korea is that graduates of the elite universities have exclusive control of the significant positions in Korean society, excluding those from other universities and allowing school connections to operate as a "caste system."²¹⁷ He continues, "Once a university is determined in one's late teens, his/her 'class' in the future is set."²¹⁸

Regarding wealth, assuming that wealth is increasingly becoming a factor in determining social status, it too is not fixed at birth. Again, however, to the extent that one's wealth is shaped by the status of one's parents, indications for the chances of one's wealth are in place by the time of one's birth. There are exceptions, of course, and these exceptions may provide the best possibility for upward mobility, and mutable social status. In recent years, a significant number of people in Korea experienced sudden increase in economic ability due to prosperous times, and perhaps a commensurate increase in status.²¹⁹ But as indicated above, wealth by itself does not ensure status, and sudden wealth has a derogatory connotation.²²⁰ In short, while social status in Korea may not be as fixed and immutable as race is in the United States, social status is far less mutable in practice than it may seem in theory and is far more predictable.

In advancing the cause for the equivalence of race in the United States and social status in Korea, a foremost commonality is that race and social status by their very nature serve to divide members of the respective societies, directly and unabashedly. This dividing function is inherent in the meaning of the two terms and may well be definitional. Whether race in the United States is understood biologically or as a sociopolitical construct, race, to put it bluntly, divides.²²¹ Indeed, *Webster's* offers as one definition of race "a *division*

216. See Shin, *supra* note 195. Despite reports that Korean society was moving away from the tradition of relying on one's college affiliation, and toward consideration of individual merit based upon free competition, some argue that "Korea has become a more academic clique-centered nation than before." *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. See *supra* text accompanying notes 133-34.

221. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 3-4 (1992) ("As a social and human division, [race] surpasses all others."); RICHARD M. MERELMAN, REPRESENTING BLACK CULTURE 3 (1995) ("Race divides Americans into groups of sharply unequal economic status and degrees of authority in social and political institutions."); Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 467 (1995) (reviewing LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY

of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type."²²² Likewise, social status in Korea also divides, and the dividing function is incorporated in the very presentation of the term, *sah-hwe-juhk shin-boon*. The instructive portion is *shin-boon*, with both *shin* and *boon* in Korean Hangul taken from the Chinese characters, *shun* and *feung*, respectively.²²³ The term *shun* means "body, person; hull; oneself, I, me; lifetime,"²²⁴ and *feung* means "divide; separate; duty; distinguish; measure; part; minute."²²⁵ Thus, *shin-boon* literally refers to the division of persons.²²⁶

Even acknowledging the common function of race and social status, some will be quick to point out that the function was most applicable in the United States and Korea of centuries past and is far less so now. Indeed, traditionally, race in the United States and social status in Korea were both black and white issues: race in the United States meant white or black;²²⁷ social status in Korea meant yangban or non-yangban.²²⁸ In contemporary U.S. society, race has become a more inclusive term, and the discussion of race, ancestry, or ethnicity includes not only whites and blacks, but Latinos and Asians,²²⁹

(1994) ("Race is one of the fundamental divisions in our society."); Viet D. Dinh, *Races, Crime, and the Law*, 111 HARV. L. REV. 1289, 1299 (1998) (reviewing RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997)) ("Race is indeed one of the great causes of factions in our history."); John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1415 (2002) ("Race is the vehicle through which we can include or exclude; stratify or equalize; divide or combine.").

222. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 75, at 1870 (emphasis added). See also WINICK, *supra* note 201, at 448 (defining race as "[a] major division of mankind, with distinctive, hereditarily transmiss[i]ble characteristics, e.g., the Negroid, Mongoloid, and Caucasoid races") (emphasis added). Another dictionary includes as a definition, "One of the greatest divisions of mankind, having certain physical peculiarities in common." XIII THE OXFORD ENGLISH DICTIONARY 67, 69 (2d ed. 1989) (emphasis added). But in a change from its previous 1933 edition, *The Oxford English Dictionary* adds, "The term is often used imprecisely; even among anthropologists there is no generally accepted classification or terminology." *Id.*

223. In the official version of the Korean Constitution, *sah-hwe-juhk shin-boon* is provided in Chinese characters.

224. BRUCE K. GRANT, *A GUIDE TO KOREAN CHARACTERS: READING AND WRITING HANGUL AND HANJA* 93 (2d rev. ed. 1982).

225. *Id.* at 38 (emphasis added). For definitions of *shin-boon* in Korean-English and Korean dictionaries, see *supra* text accompanying notes 94-97.

226. As noted above, "social status" in English refers less pointedly to one's condition, position or the standing of a companion. See *supra* note 98.

227. See Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, The Cheat, and Who Killed Vincent Chin?*, 5 ASIAN L.J. 41, 42 (1998) (discussing U.S. racial paradigm in which race "is generally understood to mean black and white").

228. See Kim, *supra* note 70, at 5-6.

229. For an interesting examination of the Asian-American experience through the conventional black-white lens, see generally Janine Young Kim, Note, *Are Asians*

among others, and those of mixed races.²³⁰ In Korea too, with the formal classes abolished, the lines of demarcation are not clear. The multiple factors of educational achievement, family background and economic wealth contributing to one's social status makes more difficult the determination of one's rank. In contemporary Korean society, "[i]nteresting contrasts in social status abound. A self-employed street vendor . . . may have a lower social status but earn more than a better educated teacher or a civil servant. . . . [A] self-employed butcher shop owner may have a lower social status than a daily laborer . . ." ²³¹ If indeed wealth has become an increasing factor in assessing status, it is difficult to distinguish between upper class and middle class consumption patterns.²³² The blurring of the strict lines between races in the United States and classes in Korea presents another parallel.

Although determinations of race and social status are not as clear in previous centuries, race in the United States and social status in Korea continue to matter today. In the U.S. setting, some commentators note that race not only matters and matters a great deal, but that race has become so all encompassing that it affects directly all aspects of life.²³³ Or as Professor Ian Haney Lopez explains, "Race dominates our personal lives":²³⁴

It manifests itself in our speech, dance, neighbors, and friends—"our very ways of talking, walking, eating and dreaming are ineluctably shaped by notions of race." . . . Race determines our economic prospects. The race-conscious market screens and selects us for manual jobs and professional careers, red-lines financing for real estate, green-lines our access to insurance, and even raises the price of that car we need to buy. Race permeates our politics. It alters electoral boundaries, shapes the disbursement of local, state, and federal funds, fuels the creation and collapse of political alliances, and twists the conduct of law enforcement. In short, race mediates every aspect of our lives.²³⁵

In the text above, replacing "race" with "social status" and directing the statement far east to the Korean setting would produce an equally vivid and applicable statement, given status consciousness in Korean society.²³⁶ To be sure, there are commentators who question

Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm, 108 YALE L.J. 2385 (1999).

230. See generally Tanya Kateri Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-blind Jurisprudence, 57 MD. L. REV. 97 (1998).

231. Robinson, *supra* note 4, at 512.

232. See LETT, *supra* note 17, at 218-19.

233. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

234. Haney Lopez, *supra* note 77, at 3.

235. *Id.*

236. See *supra* text accompanying notes 7-13, 23-30, 66-71. See also Debby Abe, *Korean Americans Strive To Hold Generations Together*, TACOMA NEWS TRIB., Jan. 8,

whether race is the all pervasive matter in U.S. society that others say it is,²³⁷ and others who may ask whether economics rather than race alone should be examined as the cause for the differences in society.²³⁸ In response to the latter, those advancing race as the primary mediator could note that race and economics are closely linked. This type of discussion may well have a counterpart across the Pacific. That is, there may well be arguments to the effect that despite the class system in the Chosun dynasty, social status in contemporary Korea is not as impacting as some say it is, or as is described above, or that in the age of democratization and capitalism, the discussion should focus more on the economic cause for class differentiation and not social status statically.²³⁹

In the United States, the impact of race in societal interactions and individual opportunities, among other factors, has given rise to "passing." According to Professor Alex Johnson, passing "refers to a situation where a black individual, due to her light pigmentation, appears white and therefore may 'pass' for white in American society despite the 'one drop' rule."²⁴⁰ History shows that there have been sharply negative responses by whites to passing.²⁴¹ Passing has appeared in Korean society, in Korean forms, in the traditional and modern setting. In the Chosun years, one's social status was visible,

1995, at B1, available at 1995 WL 5345894 (noting that in hierarchical Korea "status dictates interaction in every social setting from family to business").

237. See generally, e.g., STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997); Chen, *supra* note 85.

238. Alex M. Johnson, *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 896 (1996).

239. Let this discussion begin.

240. Johnson, *supra* note 238, at 919 n.125. Others would require some culpability for an act of passing. See Hernández, *supra* note 230, at 123 ("Passing refers to an individual's 'decision' to rely upon his or her light skin and European features in order to assume the life and privilege of a White person secretly"). Professor Randall Kennedy writes:

Passing is a deception that enables a person to adopt certain roles or identities from which he would be barred by prevailing social standards in the absence of his misleading conduct A passer is distinguishable from the person who is merely mistaken—the person who, having been told that he is white, thinks of himself as white, and holds himself out to be white (though he and everyone else in the locale would deem him to be 'black' were the facts of his ancestry known).

Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001).

241. Kennedy, *supra* note 240, at 1157 ("Segregationists condemned white Negro passers as an insidious danger that threatened the very foundations of the nation. Such people, it was feared, might contaminate white bloodlines by marrying unsuspecting Caucasians. According to Professor Joel Williamson, 'Southern whites in the early twentieth century became paranoid about invisible blackness'.") Kennedy notes that "[t]he most thoroughgoing effort in American history to prevent and punish passing emerged in Virginia in the 1920s with the birth of the Anglo Saxon Clubs of America." *Id.*

not only by the type of name tags that were required depending on one's class,²⁴² but also by body language.²⁴³ To prevent the passing of a member of the lower class by falsifying his birth in order to take the civil service examination, every applicant was required to list the names of the previous eight generations of his parents' families.²⁴⁴ Toward the end of the Chosun dynasty, persons of lower classes would pass themselves off as members of the upper class by assuming surnames of dignity and "buying" nobility, presumably by bribery.²⁴⁵ In contemporary Korea, even with the class structure long abolished, given the high status consciousness, "all Koreans identify themselves with the lineages of yangban scholar-officials."²⁴⁶ Although such claims may not meet the technical requirements of passing, at least some of those who claim yangban ancestry might be guilty of willful ignorance.²⁴⁷

Another parallel between race and social status is the degree to which race and status consciousness have become issues of serious concern for the respective societies. The United States is at least in part defined by race;²⁴⁸ the pursuit of social status largely defines Korean society.²⁴⁹ In the United States and Korea, race and social status, respectively, have become a problem. Commentators stateside

242. See CLIFFORD, *supra* note 30, at 22 ("Beginning in 1413, virtually every Korean had to wear name tags, which were permanent, graded badges with an identification number and personal information. The highest officials wore ivory tags. Outcasts and slaves wore large square wooden ones.")

243. See CUMINGS, *supra* note 46, at 56.

244. See HAHM, *supra* note 37, at 111 n.5.

245. See Yong-shik Choe, *Surnames: Microcosmic Icon of Confucian Order*, KOREA HERALD, Mar. 14, 2001, available at 2001 WL 8116705 (quoting Korean anthropologist, "Under the strict social hierarchy in which only influential families were treated with respect, people of lower social classes may have wanted to cover up their backgrounds by adopting noble family names," and noting that "[t]oward the end of the dynasty, a growing number of affluent commoners and entrepreneurs, who belonged to the lower echelons of the social hierarchy, secretly bought the status of nobility and adopted 'dignitary' yangban surnames").

246. Fujiya Kawashima, *The Way of the Sonbi: Local Yangban and the Korean Intellectual Tradition*, 10 KOREAN CULTURE 4, 15 (1989), quoted in LETT, *supra* note 17, at 13. Similarly, Lett notes that "[t]he pressure is so strong to make the claim that one has yangban ancestry that most South Koreans do." LETT, *supra* note 17, at 40. Robinson explains that the "social upheavals caused by the Japanese occupation—combined with the Korean War in which millions of Koreans were displaced and separated from their families—made social lines more difficult to delineate. As a result, claims of yangban status increased as such assertions become both easier to make and more difficult to prove." Robinson, *supra* note 4, at 512.

247. Kawashima, *supra* note 246, at 13. For those who accurately identify themselves as yangban (however they can confirm such status) it may be a matter of discomfort to see their standing diluted by seeing so many others stake the same claim.

248. Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggregate Theory of Liability*, 25 CAP. U. L. REV. 101, 121 (1996) ("[V]irtually every aspect of American life has been defined in terms of race. . .").

249. See LETT, *supra* note 17, at 41, 206.

have declared that race is the “most American of problems,”²⁵⁰ “the overriding American problem,”²⁵¹ “the most serious, the most divisive, and the most persistent problem in the United States.”²⁵² Korea observers note that the confrontation between social classes (along with that between provincial regions, and between North and South Korea) has reached “crisis” proportions,²⁵³ and that “class disparity has become a social time bomb.”²⁵⁴ As a result, race in the United States and social status in Korea are both sensitive subjects,²⁵⁵ difficult to discuss candidly. The rules of political correctness guides, restricts, and limits discussion on each.²⁵⁶

The parallel between race and law in the United States and social status and law in Korea is rather easy to draw and is offered here simply in the form of a historical review. For centuries, there was the separation of the races in the United States and of the social classes in Korea, mandated by law. During this time, black slaves and their descendants in the United States and non-*yangban* and their descendants in Korea had their respective place in society, detached from the upper class. This division was followed by (for lack of a better term) domestic turmoil, lasting for some years—the Civil War in the United States and Japanese colonial rule in Korea²⁵⁷—the conclusion of which brought formal liberation, an end to legal separation, and new law that provided for equality of all races stateside and all classes in Korea.²⁵⁸ On the U.S. side, such legal “equality” came into question in light of the decades of the separate but equal doctrine formally approved by *Plessy v. Ferguson*.²⁵⁹ Nearly six decades after *Plessy* came the “victory” of *Brown v. Board of*

250. David B. Wilkins, *Introduction to K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 3* (1996).

251. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 984 (1993).

252. J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 214 (1980).

253. *South Korea—Roh Asked To Bring National Unity*, *supra* note 13.

254. Deans, *supra* note 13, at A04.

255. See LETT, *supra* note 17, at 40 (“Koreans’ attitudes toward their *yangban* heritage are very ambiguous, and the complex of subjective attitudes creates a tension among the people.”); Kevin Sack & Janet Elder, *Poll Finds Optimistic Outlook but Enduring Racial Division*, N.Y. TIMES, July 11, 2000, at A1 (reporting “complex tensions” in U.S. society on matters of race, and racial divide that is still “stubbornly enduring”).

256. See LETT, *supra* note 17, at 40; *Watch What You Say—Thought Police A Gathering Storm Over the ‘Politically Correct,’* NEWSWEEK, Dec. 24, 1990, at 48.

257. Korea observers may think more apt the domestic turmoil of the 1980s that eventually led to the constitutional reforms of 1987.

258. The new law came in the form of the Reconstruction Amendments in the U.S. Constitution, and Article 8 (now 11) of the new Korean Constitution in South Korea.

259. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

*Education*²⁶⁰ made hollow by years of resistance to integration. The decades following *Brown* sowed the seeds of what became the critical race theory movement.²⁶¹ This movement in U.S. legal thought provides the opportunity for discussion of another parallel between law and race in the United States, and law and social status in Korea, namely, that of a possible critical status theory.

IV. THINKING CRITICALLY ABOUT SOCIAL STATUS AND LAW IN KOREA

A. *Critical Race International*

A brief primer on critical race theory will provide the necessary background. The critical race movement began in the 1970s,²⁶² stemming in significant part from dissatisfaction with traditional liberalism's approach to civil rights, which relies on the universalist principle of the "rule of law" and premises of "formal equality" to protect blacks from continued discrimination and subjugation.²⁶³ Critical race theorists assert that much of U.S. law, specifically anti-discrimination law, is "structured to maintain white privilege," and that "[n]eutrality and objectivity are . . . harmful fictions that obscure the normative supremacy of whiteness in American society."²⁶⁴ Put another way, the theory posits that law, under the guise of equality and detached, impartial rules,²⁶⁵ actually "conceal[s] the partisan exercise of power,"²⁶⁶ and acts as "an instrument of subordination and an agent for silencing minority voices."²⁶⁷ This critique of the

260. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

261. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3-4 (2001); *CRITICAL RACE THEORY: THE CUTTING EDGE* xiii (Richard Delgado ed., 1995).

262. DELGADO & STEFANCIC, *supra* note 261, at 3-4; *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra* note 261, at xiii. There was the view at the time that "the civil rights movement of the 1960s had stalled, that, indeed, many of its gains were being rolled back." *Id.*

263. Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1282 n.23 (1993). Initially, critical race theory was a matter of white domination and black oppression. The movement has since included other minority groups, including Latino/as (LatCrit theory) and Asian Americans (Asian American legal jurisprudence).

264. CROSSROADS, DIRECTIONS, *supra* note 78.

265. Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 745 (1993).

266. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 443 (1993).

267. Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263, 269 n.12 (1993); see Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992); Delgado, *supra* note 265, at 745. In this regard, critical race theory (like feminist legal theory) takes its theoretical underpinnings from the critical legal studies movement. Critical race theory borrows from critical legal studies "its skepticism of law as science, its questioning whether text

traditional, liberal approach to civil rights is one of the basic common themes of critical race theory.²⁶⁸ Another is the notion that racism is normal and ordinary in U.S. society, and ingrained in the sociolegal culture.²⁶⁹ Initially a fledgling enterprise, the critical race theory movement has since become an established discipline within the legal academy, with a substantial bibliography,²⁷⁰ including articles in the most prestigious law reviews,²⁷¹ law school courses,²⁷² and periodic conferences.²⁷³ Another reality of critical race theory is that it continues to be a controversial field within the legal academy and legal scholarship.²⁷⁴ This understanding of the key characteristics of critical race theory provides a blueprint for a discussion of the possibility of a similar critical theory thinking in Korea, in which status differentiation there would take the part of the racial divide stateside. It is a continuation of the discussion of parallels between race and law, and social status and law.

B. *Toward a Critical Status Theory*

In brief, a critical status theory would advance the case that Korean law, under the guise of equality and neutrality, perpetuates differences between those of higher and lower social status, continuing to subordinate the interests of the latter. Such a theory,

contains one right meaning, and its distrust of law's neutral and objective facade." *Id.* at 744 (footnotes and citations omitted).

268. Delgado, *supra* note 265, at 745.

269. See CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 261, at xiv. A third theme is what has been described as the "interest-convergence" idea, which posits that "white elites will tolerate or encourage racial advances for blacks only when they also promote white self-interest." *Id.* This convergence theme was first advanced by Professor Derrick Bell. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Other common themes of critical race theory scholarship are described in Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462-63 (1993).

270. The standard texts are CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 261; CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé W. Crenshaw et al. eds., 1996); CROSSROADS, DIRECTIONS, *supra* note 78.

271. See e.g., Delgado & Stefancic, *supra* note 269.

272. See Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1216 n.2 (2002) ("Over twenty American law schools offer courses in Critical Race Theory or include Critical Race Theory as a central part of other courses."). UCLA School of Law offers Critical Race Studies as a study of concentration. *Id.*

273. *Id.*

274. E.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (describing critical race theorists as part of "radical multiculturalists," and questioning their scholarship); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (questioning whether critical race writings meet sufficient academic rigor and present distinctive form of scholarship); Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40 (reviewing FARBER & SHERRY, *supra*, and describing critical race theory as "lunatic fringe" of legal academy).

as further elaborated below, would criticize the notions of the rule of law and formal, textual equality; remind that Korean recognition of divisions based on status is sharp, normal, ordinary, and deeply rooted; and suggest briefly that in Korea, rights for those with lower status are allowed only when they also serve the interests of those with higher status or benefit those already with status. Ultimately, this Part will conclude that there is ample support in the Korean setting for a critical theory movement in principle, especially in the area of education.²⁷⁵ The discussion ends with thoughts on the practical likelihood of such a movement taking place.

1. Critique of universal neutral principles

The critical race theory movement largely disputes that “neutral” principles of law can ever effect equality in U.S. society. The commentary indicates that the Korean setting raises questions about a far more basic and fundamental matter—whether law generally receives respect and has a meaningful presence in society. In a now famous work, the late Korean legal scholar Professor Pyong-Choon Hahm wrote in 1967 that, as a result of Korea’s “cultural background[] and historical tradition[],” law “is not the product of the people’s way of life,” Koreans “do not have ‘a valuable heritage of legality’ to be proud of,”²⁷⁶ and “‘the rule of law’ has never been a desirable goal of politics in Korea.”²⁷⁷ Professor Hahm indicated that during the centuries of rule by kings and royal families in the Chosun and previous dynasties,

The idea that an ordinary subject may look to the law for the protection of his freedom and liberty never even occurred to a Korean. The idea was totally alien to his way of thinking. It was conceptually impossible. The law was an antinomy or an antonym of freedom. Freedom vitiated the law, and *vice versa*.²⁷⁸

Other commentators have noted that there was contempt for law in the Chosun dynasty,²⁷⁹ and when law was applied, it was with a sense of “particularistic justice, which took into account an

275. This Article does not attempt a comprehensive review of all areas of Korean law, nor does it suggest that all of Korean law, practice, and policy is susceptible to attack under critical theory analysis. The area of education is selected both because of the importance of education in Korean life and the deep status consciousness in education-related activities.

276. HAHM, *supra* note 37, at 207.

277. *Id.* at 21.

278. *Id.* at 208.

279. DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 19 (1990).

individual's relative position in society and circumstances."²⁸⁰ With this backdrop, "the upper class saw the law as a convenient tool to perpetuate their status and privileges," while "the vast majority of the people viewed the law as a means of oppression[]."²⁸¹ The popularly held view of law as an instrument of oppression continued and worsened through the twentieth century when law became equated with Japanese rule.²⁸² Because the Japanese legal code was imposed by a foreign power to satisfy the goals of colonial rule, it had no relation to Korean traditions and social norms, and therefore, law was seen as "odious"²⁸³ and "distasteful."²⁸⁴ Law benefited only Japanese citizens who were exempt from many of the regulations, and perhaps those Koreans who were loyal to Japan.²⁸⁵ Even when Korea won liberation from Japan, law continued its role as an instrument imposed by a foreign occupier, this time, the U.S. military.²⁸⁶ Although the various new legal rules imposed by USAMGIK were "[w]ith the best of intention," they "simply reinforced unintentionally the continuing concept of law as one imposed from above (and from without) and unresponsive to local needs."²⁸⁷ Even after an independent Korean government was established in 1948, the authoritarian practices of Korea's first president, along with the "obvious and continuous violations of the Constitution"²⁸⁸ in the first dozen years of the republic, merely reinforced the attitude that "law was for the privileged to use against the masses of population."²⁸⁹ This view continued to the late 1980s when the presidency was by military dictatorship, and law was used to legitimize the governing

280. Kim, *supra* note 70, at 6. Similarly, Professor Yoon has noted, "Being a society based on status where inequality was the rule, it was only natural that law was applied on a discriminatory basis." YOON, *supra* note 279, at 17.

281. Kim, *supra* note 70, at 6-7.

282. *Id.* at 7.

283. HAHM, *supra* note 37, at 212.

284. David I. Steinberg, *Law, Development and Korean Society*, 13 KOREANA Q. 43, 55 (1971), *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 47, 53. Indeed, for that reason, breaking the law, showing disrespect for the rules, and flaunting legal authority was an act of Korean patriotism. See HAHM, *supra* note 37, at 212; Kim, *supra* note 70, at 7; Steinberg, *supra*, at 55, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 53.

285. Kim, *supra* note 70, at 7.

286. *Id.* at 8.

287. Steinberg, *supra* note 284, at 56, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 53-54.

288. *Id.* at 57, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 54.

289. *Id.* at 56, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA, *supra* note 2, at 54. "Even Dr. [Chin-O] Yu," the primary draftsman of the Korean Constitution, "became critical of [the Constitution's] ability protect the individual because of the lack of a democratic legal tradition in Korea." *Id.* at 57, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 55 (citing Yu, *Ideal and Reality*, *supra* note 139)).

regime and prolong power in office.²⁹⁰ Indeed, for the first forty years of the republic, the Constitution was revised to satisfy the ends of those in power.²⁹¹

One commentator has noted the “widespread feeling of the irrelevance of the role that law plays in the developmental or governmental processes,”²⁹² even contending that “[l]aw as an impartial arbiter, a universally applied rational standard, has never gained credence in Korea.”²⁹³ Given the deeply rooted attitudes of law based on the culture and history of Korea, the pessimism in the prospects for changing the views toward the rule of law is understandable. Professor Hahm wrote in 1967: “It is . . . no easy matter to change an attitude of several thousand years of history. Such an attitude cannot be altered or re-adjusted by a few decades of so-called *modern* life. Under these circumstances, one is inclined to abandon the whole effort as impossible or futile.”²⁹⁴ Just four years later, another commentator was not as despairing, but not much more optimistic, noting that whether law in Korea can assume the function of a neutral, rational standard “in the more distant future is unclear, but it is most unlikely that it can in the next generation.”²⁹⁵

It should be noted however, that many of the bleak forecasts for the rule of law taking hold in Korea²⁹⁶ were made before the profound

290. Steinberg, *supra* note 284, at 57, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 55 (citing Yu, *Ideal and Reality*, *supra* note 139)).

291. For a discussion of the specific amendments to the Constitution during these years, see YOON, *supra* note 279, at 96-105.

292. Steinberg, *supra* note 284, at 62, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 58.

293. *Id.* at 74, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 67.

294. HAHM, *supra* note 37, at 212.

295. Steinberg, *supra* note 284, at 74, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 67-68.

296. Professor Hahm’s cultural approach to law has come under some criticism. See Shaw, *supra* note 59, at 2-4, 19 (questioning “culture model” “blood-and-soil relativism weighted in favor of the past”); see also YOON, *supra* note 279, at 32-35 (critiquing “cultural determinism”). Shaw questions Hahm’s conclusions and their applicability in the contemporary setting:

Professor Hahm . . . cited a variety of Chinese sources, often from remote antiquity (and sometimes out of context), but did not discuss how individual Korean thinkers during the last traditional dynasty (from 1392 to 1910) interpreted these sources. He also failed to mention, much less analyze, a single traditional Korean source of law, legal commentary, or case book. . . . Most important, Hahm fails to note the degree to which Confucianism was discredited as political philosophy among twentieth-century Korean thinkers and political activists. He also neglected the diversity of modern Korean values, including those of the legal profession.

. . . Hahm’s [work] clearly remains captive to the notion of static, timeless characteristics of Korean society. His “Korean social order” never seems to change, despite changes in economy and social structure. Consequently, one

constitutional, political, and legal reforms of 1987, which resulted from mass demonstrations and civil unrest.²⁹⁷ That year began a period that saw increased democratization,²⁹⁸ rapid economic growth and prosperity, and perhaps changes in societal attitudes, to a degree that Hahm and other commentators could not have imagined in previous years. Korea's efforts to become "an active participant in world affairs"²⁹⁹ by necessity require some attention to, and compliance with, internationally accepted legal rules and norms. Domestically, economic prosperity has led to the emergence of a new middle class,³⁰⁰ and Korean society, long one of hierarchy and vertical structure, has taken on a more horizontal structure.³⁰¹ Capitalism has led to "calls for individual freedom and private initiative,"³⁰² and contributed to constitutionalism; the growing numbers of the middle class see "the legal system as a means of protecting and maintaining their status and wealth."³⁰³ Dr. Chan Jin Kim, a former National Assemblyman, notes that such changes have brought the "dissolution" of many traditional Korean values, and concludes, "New values have now risen to take the place of many of Korea's discarded traditions. Emerging values in modern Korean society are far more compatible with the rule of law."³⁰⁴ It may well be true that political and economic developments in the past two decades have led to "[g]reat progress . . . in improving Korean attitudes towards law."³⁰⁵ Yet, in spite of these developments—all of them a substantial departure from life under Japanese colonial rule, not to mention the ways of the Chosun society—there is still some ambivalence, as a result of the long social history and long-held beliefs that Professor Hahm and others have emphasized.³⁰⁶ Even Dr. Kim's optimism is tempered with the

model fits all periods of Korean history, and may equally well explain Korea hundreds of years ago, today, and tomorrow.

Shaw, *supra* note 59, at 3-4.

297. The constitutional amendment in 1987 was the only of the several revisions of the text implemented as a result of public protest and opposition. See YOON, *supra* note 279, at 105-06.

298. In 1987, Korea saw its first president elected directly by the public, followed by, in subsequent elections, the first civilian to be elected (in 1992), and then the first candidate of the opposition party to be elected (in 1997).

299. Kim, *supra* note 70, at 1.

300. See YOON, *supra* note 279, at 218; Kim, *supra* note 70, at 18-19.

301. See Kim, *supra* note 70, at 4.

302. YOON, *supra* note 279, at viii.

303. Kim, *supra* note 70, at 20.

304. *Id.* at 1-2.

305. *Id.* at 1.

306. Professor Yoon's passage below, which appears to be a description for contemporary Korea, indicates the lasting impact of the Confucian norms on present-day law.

In homogeneous societies like Korea, social norms, such as morals, mores, and religion, become more effective means of social control and integration than

realization that "the current state of legal consciousness of the Korean people remains a major obstacle to overcome in the course of democratization. Lack of respect for the law presents an enormous barrier to social change and advancement in Korea."³⁰⁷ Perhaps the words of Professor Dae-Kyu Yoon just three years after the 1987 reforms accurately capture the past, present, and future of the role of law in Korea, when he expressed the "hopeful assumption that law can be made an instrument for social change rather than for manipulating and maintaining the status quo," and looked to a brighter political future "in view of the social changes which have taken place since World War II."³⁰⁸ Still, he wrote, the realization of the rule of law in Korea may be a "stupendous task."³⁰⁹

What is the critical status theorist to make of this discussion of the "prospects" for the rule of law in Korea? To put it bluntly, it would be nothing short of an intellectual feast.³¹⁰ If the task for the critical race theorist stateside is to support the argument that liberalism's approach to equality under neutral principles of law is faulty, the Korean counterpart could present an a fortiori case: the basic rule of law, not to mention the formal rules of equality, is lacking in Korea. The critical status theorist may rely on what appears to be overwhelming evidence. It has been said that the legal history of Korea is such that for centuries, up to the middle of the twentieth century, law was designed to favor those of privilege, status, and rank.³¹¹ "Confucianism established the precedent of preferential legal

law. The reason for this is that such norms emerge organically from the social milieu and do not require state coercion. In such societies, the role of law is generally muted. *In Confucian hierarchical and centralized society, inequality is based on, and justified by, status.* Private law tends to operate peripherally, and public administration is conducted by orders or directives instead of permanent rules.

Yoon, *supra* note 3, at 396, 397 (emphasis added).

307. Kim, *supra* note 70, at 2. Dr. Kim notes:

It is not uncommon to encounter pedestrians disregarding a crosswalk sign or littering on the street. Traffic regulations are so commonly violated that many foreigners are reluctant to drive in Korea. When individuals are accused of violations of petty regulations, they may argue with the police and ask, "why in the world do you pick me up, while leaving so many violators unpunished?"

Id.

308. YOON, *supra* note 279, at vii.

309. *Id.* at 200.

310. The Korean setting must be the stuff of dreams for the critical legal theorist. Few other societies would possess a better tailored sociolegal history more vulnerable to the critical theorist's task of challenging liberalism's approach to equality.

311. Kim, *supra* note 70, at 6-7.

treatment in accordance with one's social status."³¹² Law was seen as an instrument of exploitation and oppression of the masses.³¹³ As a result of these centuries-old attitudes, reinforced periodically with blunt force, terms like "freedom" and "equality" were "devoid of content until recently" and are still "unfamiliar to Koreans" and not fully understood.³¹⁴ In what must strike as cumulative evidence, there are the explicit statements that in Korea, "[t]he law and legal institutions have generally supported the status quo,"³¹⁵ and "[t]he trouble with Korea lies in the fact that Koreans have yet to make the rule-of-law a working reality."³¹⁶ Given this background, the critical status theorist may advance the case that the Korean Constitution's mandate of equality for all persons before the law and prohibition of discrimination based on social status are precisely the formal premises of equality that have not been delivered.

The critical status theorist will not likely be dissuaded by the democratization reforms of 1987 or the establishment of the Korean Constitutional Court. At the time, the Constitutional Court became the "most active" judicial body in Korean history and showing "its readiness to acknowledge the unconstitutionality" of government action.³¹⁷ Yet the customs and practices of the Court in its first two

312. *Id.*; *see id.* at 5 ("Preference and privilege in the Yi dynasty were commonly granted along class lines, with social and legal expectations differing according to one's rank in society.").

313. YOON, *supra* note 279, at 200.

314. Kim, *supra* note 70, at 11.

315. Steinberg, *supra* note 284, at 74, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 68. Steinberg elaborated (in 1971) that none of the legal institutions in Korea have assumed a "progressive function":

The legal profession has never acted as a vital or experimental body determined to improve the understanding or administration of law or the distribution of justice. Legal education and legal educators have never been innovative in either training the professions or in providing new frontiers to the civil service in spite of the pivotal role of law in the training of executives or in the management of government. Neither the courts nor the National Assembly have [sic] provided a marked balance to the power of the Korean Executive Branch. The courts have generally been responsive to executive pressure, and the National Assembly on both sides of the aisle has often performed in what can only be termed an extra-legal manner.

Id. at 74-75, *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 2, at 68.

316. YOON, *supra* note 279, at viii.

317. *Id.* at 170. For a discussion of the origins of the Constitutional Court, its failed predecessors, and its outlook in the opening years, *see id.* at 168-70; James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73 (1990). A more recent work that chronicles the first 15 years of the Court's work, and that also offers a comparative profile (in relation to other constitutional courts in Asia), is Tom Ginsburg, *Rule by Law or Rule of Law? The Constitutional Court of Korea*, in JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 206 (Tom Ginsburg ed., 2003).

decades of operations would give the critical theorist the opportunity to argue that there are institutional barriers toward achieving equality, further challenging the notion of impartial, judicial tribunals that give life to the formal rule of equality. The matter of the Court's standard of review is one example. Those trained in U.S. law are accustomed to approaching cases relating to equal protection under the labels of impermissible classifications and standards of review, with the most heightened review (the rather imposing "strict scrutiny") for cases that grant benefits or impose burdens based on suspect classifications like race, national origin, and alienage.³¹⁸ Korean constitutional law is not as developed. The critical status theorist will likely make much of one commentator's observation that in Korea, "[a]ll legislative classifications are dealt with under a single standard. The concepts of 'suspect' or 'semi-suspect' classifications have yet to be imported,"³¹⁹ and that for many years, the courts "have enunciated only one standard of review . . . [the] 'reasonable test,' which "parallels the deferential, traditional American 'rational basis test.'"³²⁰ A singular classification and the rational basis test are suspicious to the critical theorist, since they can be used to uphold easily the constitutionality of measures that discriminate; classifications based on "social status" would receive no special attention, and its explicit inclusion in the equal protection provision would be rather meaningless. The response to this argument is that there has been progress and development in recent years. In 1999, the Constitutional Court specifically declared that one of two standards of review is to be applied, depending on the nature of the case.³²¹ The "reasonable test"³²² would be applied in a large number

318. See *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). In *City of Cleburne*, the Court stated that race, alienage, and national origin are:

[S]o seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971)).

319. Ahn, *supra* note 3, at 101.

320. *Id.*

321. 98 Hun-Mah 363, Dec. 23, 1999. The case is discussed *infra* note 325. The Court had referred to the two tests in previous cases, but had not previously indicated which test should be applied in what circumstances.

322. The Korean term for this test is *jeh-eui-geum-ji won-chik*, meaning roughly, "anti-arbitrary principle," and which requires "treating the like equally, and the unlike unequally." 90 Hon-Kah 97, May 13, 1991, quoted in Ahn, *supra* note 3, at 101 n.168. See also CONSTITUTIONAL COURT OF KOREA, THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT (1988-1998) 126 (2001).

of cases, but the more heightened “balancing test”³²³ would be applied in cases that allege violations of fundamental rights provided for in the Constitution or discrimination based on grounds explicitly stated in the Constitution.³²⁴ To this development, the critical status theorist will counter by noting that the Constitutional Court has applied the balancing test unevenly, leading to inconsistent results.³²⁵ Moreover, as another commentator notes, it is not always clear what standard the Court is applying or why it is doing so.³²⁶ This is part of a general frustration expressed by Court observers

323. Roughly meaning “proportionality principle” (*bib-neh-won-chik*), the balancing test would require consideration of (1) the legitimacy of government purpose; the propriety of the government measure; (3) the degree of infringement on the individual or the degree of restriction of the measure; and (4) the balancing of the government interests and individual rights. See KWON, *supra* note 192, at 338-40; Myung-Woong Lee, *Bi-reh-eui won-chik-gwa pahl-leh-eui nohn-jeung-bahng-bub* [Balancing Test and Demonstration Method in Case Law], 9 HUN-BUB-NOHN-CHONG [COLLECTION OF TREATISES ON THE CONSTITUTION] 671, 673 (1998), at http://www.court.go.kr/library/docu_material02.asp.

324. Thus, presumably, the heightened standard would be applied to cases involving classifications based on sex, social status and religion, S. KOREA CONST. art. 11(1), and also those alleging violation of, among others, the “freedom of occupation,” *id.* art. 15; privacy, *id.* arts. 17, 18; “freedom of conscience,” *id.* art. 19; “freedom of religion,” *id.* art. 20; “freedom of speech and the press” and “freedom of assembly and association,” *id.* art. 21.

325. One case involved a government regulation giving additional points on civil service examinations to military veterans. 98 Hun-Mah 363, Dec. 23, 1999. An English translation of the opinion is available in CONSTITUTIONAL COURT OF KOREA, DECISIONS OF THE KOREAN CONSTITUTIONAL COURT (1998.9 - 1999.12) 32 (2001), at <http://www.court.go.kr/english/decision02.htm>. Korea has compulsory military service for all males, with some exemptions allowed. The female plaintiffs argued that the measure was impermissible discrimination based on sex, since women are not required to serve in the military and many women do not. *Id.* The Court applied the heightened standard of review, even referring to “strict scrutiny,” and held that the preferential point system was unconstitutional. *Id.* at 45, 46.

Another case also involved a preferential policy for civil service examinations, this time given to *guk-gah-yu-gong-jah*, or roughly, “men of national merit” and their descendants. 2000 Hun-Mah 25, Feb. 22, 2000. Included within the “national merit” category are, among others, those injured or killed in the defense of the country, and those who fought against Japanese colonial rule. The Act on the Honorable Treatment and Support of Persons of Distinguished Service to the State, art. 4, § 1. Normally, these persons do not enjoy high social status. In its decision, the Court referred to the heightened balancing test, but stated that a more relaxed standard of review would be more appropriate in the case, but not necessarily the reasonable test. 2000 Hun-Mah 25, Feb. 22, 2000. The Court emphasized the service and sacrifice of the *guk-ah-yu-gong-jah*, and ultimately upheld the constitutionality of the preferential policy. *Id.*

One way to explain the apparent inconsistency between the above two cases is that while giving additional points to all military veterans would lead to preferential treatment of virtually half the population at the expense of the other half, preference to *guk-gah-yu-gong-jah* would be to a small number of people, a point that the Court specifically made. *Id.*

326. Cho, *supra* note 168, at 13.

concerning the lack of clarity in judicial decisions.³²⁷ For the Korean critical status theorist, this will smack of the “particularistic justice” of traditional Korea and confirm suspicion that institutional practices of broad discretion prevent the mandate of textual equality from becoming a practical reality.

2. Ordinariness of Status Division

Critical race theory posits that “racism is normal, not aberrant, in American society”:

Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture. Formal equal opportunity—rules and laws that insist on treating blacks and whites (for example) alike—can thus remedy only the more extreme and shocking sorts of injustice, the ones that do stand out. Formal equality can do little about the business-as-usual forms of racism that people of color confront every day and that account for such misery, alienation, and despair.³²⁸

The critical status theorist in Korea may urge that applying the statement to the Korean setting, and replacing race consciousness with status consciousness and persons of color with persons of lower status, would yield an equally apt and vivid statement. Critical status theory would advance the view that status consciousness in Korea—the willingness and tendency to draw sharp lines and make assumptions based on social status³²⁹—is normal, ordinary, and

327. Professor Ahn laments the

[J]udicial tradition of not elaborating the *ratio decidendi* of decisions. In many opinions the reasoning is based on a foregone conclusion. A typical ending may go something like this: “The discrimination here is not unconstitutional because it is not unreasonable.” By American standards, opinions of Korean courts fall short of full discussion on the legal arguments and issues raised and sometimes jump to hasty conclusions. Further ambiguities arise from the new judicial fashion of incorporating several constitutional provisions without sorting out the core ingredients of each provision.

Ahn, *supra* note 3, at 103.

328. DELGADO & STEFANCIC, *supra* note 261, at xiv.

329. Some in critical race discourse have used “race” as a verb: “To underscore race as an activity rather than an objective category, I describe specific acts that have the intent or effect of reinforcing racial relationships as ‘race-ing.’” Margaret (H. R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4, 6 n.9 (1995). Professor Kendall Thomas appears to be one of the first to propose this practice. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806-07 & n.8 (1993) (“I have suggested in some of my work in critical race theory that ‘race’ is a verb, that we are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”). Perhaps this is one example of the “shared vocabular[y]” that critical race theorists use in their scholarship. See generally Margaret E. Montoya, *Celebrating Racialized Legal Narratives*, in CROSSROADS, DIRECTIONS, *supra* note 78. Others may question whether the genre has resorted to

deeply rooted. The evidence from the available commentary is revealing. Contemporary Koreans “look down upon those without high social origins,”³³⁰ and “those higher up on the scale look [] down on those below.”³³¹ Elitist attitudes of Korea’s middle and upper classes include disdain and open contempt for blue-collar and manual workers “and a refusal to associate with them on equal terms.”³³² Like the yangban in the Chosun era, who determined that “soiling their hands would irremediably diminish their social status,”³³³ the contemporary middle and upper classes take pains to avoid “participation in blue-collar work or manual labor lest they lose their status.”³³⁴ The striking testimony continues: “People without a college education, including skilled workers with vocational school backgrounds, often were treated as second-class citizens by their white collar, college educated managers, despite the importance of their skills for economic development.”³³⁵

At this juncture, a discussion of how social status impacts on one important segment of Korean life—education—will further highlight the normal, ordinary, natural, and inherent nature of status consciousness in Korean society. One will note a vicious circle at work, with education and social status occupying the bipolar ends: one’s social status impacts one’s educational opportunities, and education is the single most important determinant of social status. A society so structured all but assures that the status quo will continue by perpetuating class reproduction.

As alluded to before, Professor James Robinson’s study of the Korean primary school setting indicates a strong correlation between social status of the student’s family and the student’s academic

terms and phrasing whose meaning are known only to members. Since there appear to be no equivalents to “racism” and “to race” in the social status discourse, the text herein will refer to more conventional descriptions.

330. LETT, *supra* note 17, at 40.

331. *Id.* at 44.

332. *Id.* at 208 (citing Carter Eckert, *The South Korean Bourgeoisie: A Class in Search of Hegemony*, in STATE AND SOCIETY IN CONTEMPORARY KOREA 95, 114 (Hagen Koo ed., 1993)).

333. CUMINGS, *supra* note 46, at 55; (1997); LETT, *supra* note 17, at 208.

334. LETT, *supra* note 17, at 43 (noting that “[t]his avoidance of manual labor has been termed by critics as the 3-D *pyong*, or ‘3-D disease,’ ‘3-D’ being the label that Koreans have given to work that is dirty, dangerous, and difficult”); see also *id.* at 53 (describing manual labor as “anathema for members of families concerned with status”); Yoon, *supra* note 35, at 21 (“Occupations such as ploughing or sweating with a hammer in a factory were thought to be the work of the ignorant people, whereas, educated college graduates could pursue government positions.”).

335. COUNTRY STUDY, *supra* note 33, at 116. “In the workplace, men and women with a middle-school or secondary-school education are often treated with open contempt by university graduate managers. The latter addresses [sic] them with rude or abrupt words whose impact is amplified by the status-sensitive nature of the Korean language.” *Id.* at 99.

achievement.³³⁶ Students' interaction with teachers, opportunities for learning and leadership, and even seating arrangements in the classroom all depend on their families' social status.³³⁷ Thus, the system benefits those who assert status³³⁸ and all but encourages (perhaps even demands) them to assert it. Those with lower status are powerless to effect their situation within this scheme.³³⁹ Professor Robinson's analysis of the impact of social status on educational opportunities could easily be a chapter in an anthology of Korean critical status theory.³⁴⁰ He notes that beginning in 1960, the Korean government had implemented reforms³⁴¹ in education "in an effort to

336. See *supra* text accompanying notes 211-13. Professor Robinson includes wealth (more specifically, the salary of the student's father) in assessing social status in his study. Robinson, *supra* note 4, at 509. Economic wealth is especially important for parents of schoolchildren in Korea in light of the practice of *chon-ji*, which is defined as "a little token of one's gratitude; a small present." MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY, *supra* note 94, at 2018. In the school setting, the most common form of *chon-ji* is money in an envelope, but also includes material gifts. Teachers "consider [*chon-ji*] as a reflection of the parents' concern." Robinson, *supra* note 4, at 516. The Korean media have reported that some teachers more than double their salaries through *chon-ji* payments. See *id.* at 518 (citations omitted). Parents see "a direct relationship between giving [*chon-ji*] and improving educational opportunities for their children." *Id.* Parents are buying "a chance for their child to be a student teacher, buying more opportunities for their child to be called on, and buying more chances for them to receive extra attention in overcrowded classrooms. This attention is purchased to improve the child's future and the family's claim to modern *yangban* status." *Id.*

One commentator has noted that "[o]ne could argue persuasively that *chonji* is a dysfunctional institution. Any social system, including South Korea's, is likely to improve when teachers treat students equally and fairly, without regard to gifts." Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?*, 24 YALE J. INT'L L. 223, 235-36 (1999). Such a statement is notable for both its unassailable content and the blind naivete of Korean society. The pursuit of social status, the importance of education in determining status, and the impact of *chon-ji* on one's chances are such that the practice has become routine.

337. See Robinson, *supra* note 4, at 523.

338. See LETT, *supra* note 17, at 214 (discussing Robinson, *supra* note 4).

339. See COUNTRY STUDY, *supra* note 33, at 116.

340. Thus, law need not be the exclusive site for critical status theory thought. Critical status theory, like its U.S. counterpart, can have interdisciplinary interest. Professors Delgado and Stefancic note that "[t]oday, many in the field of *education* consider themselves critical race theorists who use [the theory's] ideas to understand issues of school discipline and *hierarchy*, tacking, controversies over curriculum and history, and IQ and achievement testing." DELGADO & STEFANCIC, *supra* note 261, at 3 (emphasis added).

341. These reforms include: a ban on parent teacher associations "as they had become organizations that influential parents used to control teachers and schools through extra payments to schools"; random enrollment in public and private middle schools and high schools, which "effectively abolished an elitist educational system stacked in favor of the wealthy"; rotation of teachers in public schools to "discourage the type of close connections among teachers, schools, and students, that could lead to corrupt practices"; a ban on in-school extra classes paid for by parents, which extended the school day by four hours; and a ban on private instruction. Robinson, *supra* note 4,

provide more egalitarian opportunities for all social groups” but concludes that such reforms “have not penetrated the classroom and . . . inequalities still prevail.”³⁴² He states bluntly that although reforms present an appearance of equality regardless of social status, “equal opportunity in education is a goal that 30 years of educational reform has yet to achieve.”³⁴³ Professor Robinson’s references to *segregation* in Korean schools present an easy parallel to race and segregation in the pre- and post-*Brown* United States, which should resonate with critical race theorists stateside: “In the past, the elite school system^[344] engendered social segregation. Now, segregation is maintained within classrooms open to all.”³⁴⁵ In the end, Professor Robinson cautions that the educational system continues the status quo into the next generation, “with the children of each social stratum taking the places of their parents as social demarcation are maintained across generations.”³⁴⁶ The ordinariness of status consciousness and division based on social status is inherent in the educational system, which rewards those with status and encourages them to assert it.

The critical status theorist will argue that status consciousness and its ordinariness continue after school activities are complete. Given the importance of education, many students in primary and secondary schools receive private instruction after the class day ends, at exam preparation schools or in other settings.³⁴⁷ Again, this option is available only to those with the economic or material means, or

at 513-14. The ban on private lessons, which was later rescinded and modified, is discussed in more detail. See *infra* text accompanying notes 350-55.

342. *Id.* at 506.

343. *Id.* at 513.

344. Robinson notes that the elitist system was “stacked in favor of the wealthy,” such that “close connections among teachers, schools, and students . . . could lead to corrupt practices.” *Id.*

345. *Id.* at 530.

346. *Id.* at 528-29. Professor Robinson urges that “[i]f the schools mirror society, then equal educational opportunity will only occur when differences in social status are reduced,” and that what is needed is a “a major structural overhaul to reduce the educational scramble that monopolizes the energies and monies of parents and children from elementary through secondary school.” *Id.* at 529-30.

347. A study conducted by the Korean Educational Development Institute revealed that over half of all primary and secondary school students receive some form of private lessons. Parents gave the following reasons for such extracurricular activity: college admissions (58.2%), development of potential and talents (15.3%), “just because others do it” (14.6%), and lack of time to instruct children themselves (6.3%). See 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000 (Lee, J., dissenting). An English translation of the opinion is available in CONSTITUTIONAL COURT OF KOREA, DECISIONS OF THE KOREAN CONSTITUTIONAL COURT (2000), at <http://www.court.go.kr/english/decision01.htm> (“*Extracurricular Ban Case*”) [hereinafter *Extracurricular Ban Case*].

some position of influence.³⁴⁸ Here, too, the Korean government, in an effort to equalize educational opportunities, has implemented reforms, and again, the reforms have failed.³⁴⁹ In 1981, the new government under former army general and self-appointed president Doo-Hwan Chun implemented a law prohibiting virtually all private instruction outside of regular instruction in schools.³⁵⁰ Assuming compliance, such a rule would better level the playing field, and not deprive those students whose parents were without means to provide for private lessons. In a modern example of societal disregard for the rule of law, the statute banning private lessons was more famous for its widespread breach than compliance.³⁵¹

The statute banning private instruction was ultimately revised, with the ban to apply in a more narrow setting, permitting instruction at private teaching institutes, instruction by relatives, and instruction by college and graduate students.³⁵² Those with the means to avail themselves of instruction by these means could stay within the law. The main target of the statute was the giving³⁵³ of private lessons by elementary and secondary school teachers after school hours.³⁵⁴ In a decision that could give further ammunition to the critical status theorist, the Constitutional Court struck down the law.³⁵⁵ The case arose when the operator of a profitable Internet site that provided sample tests and answers to students was indicted for

348. Koreans tend to rely on personal connections. "Typically, a Korean man will try to figure out whom he knows in an organization (or whom he knows who knows someone) rather than make a direct approach." CLIFFORD, *supra* note 30, at 11.

349. See *Extracurricular Ban Case*, 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000 (acknowledging many people disregarded government's attempt at banning extra lessons).

350. Act on Private Institutes (revised by Act No. 3433, Apr. 13, 1981). Lett explains that such efforts sought to "ease the trend toward excessive out-of-school study, both because it was responsible for unreasonable high education costs to parents and because it put those who could not afford such lesson at a disadvantage." LETT, *supra* note 17, at 175.

351. The Constitutional Court acknowledged as much. *Extracurricular Ban Case*, 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000.

352. Act on the Establishment and Operation of Private Teaching Institutes (amended by Act No. 4964, Aug. 4, 1995). A violation of the statute was punishable by imprisonment of not more than one year or a fine not exceeding 3 million Won (approximately US\$2,500). *Id.* art. 22(1).

353. Technically, the statute prohibited only the giving of lessons, not receiving them or arranging for them. *Extracurricular Ban Case*, 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000.

354. As a policy matter, there was some concern with school teachers moonlighting by giving private lessons, since the extracurricular tutoring could affect their primary teaching responsibilities in regular schools. There was also concern that such private tutoring could jeopardize the integrity of the college entrance examinations. *Id.*

355. *Id.*

violation of the law.³⁵⁶ The majority of the Court decided that the statute impermissibly restricted the rights of students, parents, and those able to give lessons.³⁵⁷ Applying the heightened balancing test and emphasizing that the statute was not the "least restrictive means" to achieve legislative ends, the majority ruled that the limitations the law imposed were unconstitutional.³⁵⁸ A "traditional" or comparative discussion of the case could consider the main competing interests at issue: the right of parents to educate their children, on the one hand, versus the legislature's interest in reducing the societal burdens of education-related expenses and providing more egalitarian opportunity, regardless of social or economic status, on the other.³⁵⁹ Although such (and any) discussion of the case should be welcome, within the contemplation of a possible critical status theory movement, the Court's decision provides a tantalizing opportunity to imagine how a critical status theorist would approach the case, and to get inside the mind of such a thinker.

3. Critical Status Voice Attempted

What follows is an attempt at a critique of the Court's decision concerning the ban on private instruction, from the view of a

356. Neither the students who subscribed nor their parents were parties to the action. *Id.*

357. *Id.*

358. *Id.* The Court has nine members. Six justices were in the majority. Two justices filed "dissenting" opinions, both agreeing with the majority's conclusion that the statute was unconstitutional, but preferring to keep the statute effective in form, rather than immediately invalidating it. *Id.* (Han, J., dissenting; Chung, J., dissenting). Justice Young-Mo Lee also dissented, and would have upheld the constitutionality of the statute. He criticized the majority's overruling the legislature's discretion to accomplish substantive equality, and ignoring the public interest. *Id.* (Lee, J., dissenting). A sharply worded "reply opinion" joined by five out of the six justices in the majority noted that its decision did not declare all statutes limiting private instruction to be unconstitutional; the reply opinion also stated that the statute in question excessively restricts the "people's basic rights," and that it failed to "satisfy the requirement of the least restrictive means and the balancing of interests." *Id.* (Kim (Yong-Joon), Kim (Moon-Hee), Koh, Shin & Ha, JJ., reply op.). After the Court's decision, the National Assembly revised the statute to include a reporting requirement for those giving private lessons. *Id.* ("Aftermath of the Case").

359. The former interest was seen in two decisions by the U.S. Supreme Court, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The *Meyer* decision involved a Nebraska statute that prohibited the teaching of foreign languages in schools; the statute in *Pierce* required all students in Oregon to attend public schools, with minor exemptions. *Meyer*, 262 U.S. at 390-91; *Pierce*, 268 U.S. at 510-11. The Supreme Court held both statutes unconstitutional, emphasizing the constitutionally protected liberty right "to acquire useful knowledge . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," *Meyer*, 262 U.S. at 399, and "the liberty of parents . . . to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35.

hypothetical critical status theorist. The text emulates the voice and style taken by some critical race writers in U.S. legal academia and is mindful of zealous advocacy.³⁶⁰

To begin with, the statute placing limitations on private lessons that was before the Constitutional Court was a much diluted and eviscerated version of the ill-fated predecessor that prohibited virtually all private instruction. The purpose of the original law was to “minimize inequality in opportunity for private education.”³⁶¹ The revised statute had all but recognized an educational hierarchy that corresponded to social status and socioeconomic hierarchy in Korean society, namely, those who were able to provide for private tutoring at private teaching institutes or by college and graduate students, and those who could not.³⁶² Thus, what the Court had before it was a mere shell of the former statute that was driven by egalitarian desires. Given the opportunity to uphold a small appearance of equality, the Court instead chose to invalidate the law, further perpetuating class division, worsening the plight of those with the lowest social status, and confirming legal sanction of unequal social status.

There is judicial activism at work in the Court’s decision. The Court declares that the statute places impermissible restrictions on three fundamental rights: the right of parents to educate children; the students’ right to pursue happiness; and the right of occupation of those who wish to offer private tutoring services (at other than private teaching institutes).³⁶³ The right of parents to educate the children is a product of the Court’s convenience. Forced to acknowledge that such a right is absent in the Constitution, the Court claims that it nevertheless “arises out of” three other rights in the Constitution—the “inviolable human rights concerning marriage and family life;” the “right to pursue happiness;” and rights not enumerated in the Constitution.³⁶⁴ (If the United States Supreme Court can create new rights from the “penumbra” and “emanations” of the Bill of Rights,³⁶⁵

360. The exercise is far from a frolic, and is not intended to be mocking. To some, the text may read as an expression of critical thought in the Korean setting; to others, it will be an equivalent of the pseudo-scholarship that some say is seen in critical race writings. See, e.g., Posner, *supra* note 274, at 42-43 (“[T]he stories told by the critical race theorists do not rise to the level of literature. They are flops as stories and . . . flops as scholarship”; “[T]he critical race theorists come across as whiners and wolf-criers. By foreswearing analysis in favor of storytelling, they come across as labile and intellectually limited”).

361. *Extracurricular Ban Case*, 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000.

362. In addition to the well known hierarchy of colleges in Korea, perhaps there is also a hierarchy among college students who provide tutoring services. Students from colleges in the first tier can and do charge more for their services than their contemporaries in the lower tiers.

363. *Extracurricular Ban Case*, 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000.

364. *Id.* (citing S. KOREA CONST. arts. 36(1), 10, 37(1)).

365. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (describing constitutional right of privacy). There have been quotable criticisms of the decision. E.g., Raoul Berger, *Activist Censures of Robert Bork*, 85 NW. U.L. REV. 993, 1013 (1991) (“as vaporous a derivation as can be imagined”); David Crump, *How Do the Courts Really*

why not the Constitutional Court?) The Court then stretches the mercurial “right to pursue happiness” to include a student’s right to “free development of personality.”³⁶⁶ It is a remarkable leap of faith, or social engineering gone awry, to think that *si-uhm ji-ohk* (examination hell) contributes to the development of a student’s personality. Even the right of private tutors to peddle their services—allowing them to prey on the fears and hopes of students and parents—receives more recognition than the right of equality regardless of social status. With these “basic rights” chosen as the focus of the case, the statute has little chance under the Court’s aggressive application of the heightened balancing test, and the sudden, overwhelming emphasis of the “least restrictive means” requirement.³⁶⁷

The Court seems little concerned about the impact of its decision, the practical result of which is to favor those with the social and economic means to provide private instruction, at the expense of those who cannot. Only when the majority is reminded of this reality by Justice Lee in dissent, does it choose to address it, then rejecting the dissent’s objections caustically and defensively, even accusing it of “bigotry.”³⁶⁸

The decision is especially disturbing in light of the Court’s acknowledgment, to its credit, of educational elitism in Korean society as well as the decisive role that *hahk-buhl* plays in determining one’s social status and her place in the social structure. Justice Lee correctly notes that academic background is perceived “to exercise far more influence on [one’s] employment, salaries and social status than [her] merits.”³⁶⁹ Korea is still very much a society where social status

Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy, 19 HARV. J.L. & PUB. POLY 795, 844 (1996) (“Justice Douglas’s opinion supports a result reached independently of its logic.”).

366. *Extracurricular Ban Case*, 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000. The right to free development of personality is seen in the German Constitution. F.R.G. CONST. art. 2(1).

367. See Lee, *supra* note 323.

368. *Extracurricular Ban Case*, 98 Hun-Kah 16, 98 Hun-Mah 429, Apr. 27, 2000 (Kim (Yong-Joon), Kim (Moon-Hee), Koh, Shin & Ha, JJ., reply op.). The majority characterized the dissent as dichotomizing “the socially and economically strong and weak,” “capitalism and socialism,” and “liberty rights and social rights,” then taking the side of the latter in each pairing. *Id.* Continuing:

The dissent characterizes the position of unconstitutionality, namely that of allowing extracurricular lessons in principle, as siding with the former group and the position of constitutionality, namely that of banning extracurricular lessons, as siding with the latter. In view of the principle of free democracy, the basic order of our country, such theory has a logical leap [sic] or is an opinion of bigotry.

Id.

369. *Id.* (Lee, J., dissenting). This is apparently in contrast to “the deep national belief” in the United States that “individual merit and responsibility” should matter more than, say, race. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360-61 (1978)).

is “the whole thing, the whole ball game,” perhaps “life itself.”³⁷⁰ Status consciousness, as well as distinctions and divisions based on one’s status, is part of the Korean “social DNA.”³⁷¹ It is ordinary and obvious in every aspect of Korean life and in every institution of Korean society—family, education, religion, politics, marriage. Yet the Court pretends that its decision has no implications on social status, and seems little concerned with another explicit right provided for in the Korean Constitution—the right to be equal before the law, regardless of one’s social status.

The Court did a disservice to another Constitutional mandate, that “[a]ll citizens shall have an equal right to receive an education corresponding to their *abilities*.”³⁷² If elaboration of “abilities” (*neung-nyuk*³⁷³) is necessary, one would think “individual merit” would better define it than “social status.” With its decision, the Court has essentially ruled that social status is included in one’s “abilities,” a dangerous view that allows for credentializing high(er) social status. Or the Court has essentially crafted a right of education that supersedes the right of equality. Either way, the Court dilutes the meaning of equality.

There is a consistency of discomfiture here. We are told that the principle of equality before the law is “the most paramount principle” of our Constitution,³⁷⁴ and that the right of equality is “the most fundamental” of all fundamental rights.³⁷⁵ This equality is regardless of one’s social status, one would think.³⁷⁶ Yet it is “relative equality” (versus absolute equality) to which people are entitled,³⁷⁷ and notions of relative equality lead to results like the one in the private instruction case. Perhaps we in Korea demand equality when equality

370. Author Salman Rushdie used the phrasing to describe free speech. Salman Rushdie, *What Is My Single Life Worth?*, in THE PENGUIN BOOK OF TWENTIETH-CENTURY SPEECHES 478, 487 (Brian MacArthur ed., 1992).

371. Richard Delgado & Daniel Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 364 (1998) (transcript of comments of Professors Delgado and Farber, wherein Professor Delgado described racism as part of American “social DNA”).

372. S. KOREA CONST. art. 31(1) (emphasis added).

373. The Korean *neung-nyuk* is defined as “ability; capacity; capability; faculty; competency; qualification.” MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY, *supra* note 94, at 437. The Korean *neung* is taken from the Chinese character meaning “able, may, can; ability, talent, power”; *nyuk* is from the character meaning “strength, power.” GRANT, *supra* note 224, at 29, 169.

374. It is not an uncommon practice in the Korean vernacular to refer to the first person plural to refer to things Korean. For example: “our country” (*ooh-ri-nah-rah*) for Korea, and “our language” (*ooh-ri-mahl*) for Korean.

375. KWON, *supra* note 192, at 368 n.1 (citing 88 Hun-Hah 7, Jan. 25, 1989 (Korea Sup. Ct.)).

376. S. KOREA CONST. art. 11(1).

377. KWON, *supra* note 192, at 369. This statement also appears in an explanation of Article 11 on the Internet site of the Korean National Assembly. *Constitution of the Republic of Korea*, § 2, art. 11, *joh-moon-byul-sul-myung joh-moon-byul-sul-myung*, at <http://www3.assembly.go.kr/alkms/cgi-bin/counter.cgi?lawscode=1001>.

suits us.³⁷⁸ Does the rule of “relative equality” or “equality corresponding to . . . abilities” take us back to the Chosun dynasty and the days of the yangban and the lower classes? Even the mainstream commentary acknowledges the possibility of the *hahk-buhl* class society being a modern day social aristocracy that originated in the traditional era.³⁷⁹ This social structure reflects a separate equality, or an administrative equality, in an ordered society for which Korea continues to be world-renowned.³⁸⁰

C. Critical Status Denied?

What is the likelihood of a critical status movement taking root in Korea, one that would advance the theory that for all of the equality professed in Korean law and policy, Korea remains a society with a keen sense of status consciousness, with legally sanctioned division among members of society based on social status? As the discussion above indicates, using two major themes seen in critical race theory as a guide, the Korean setting provides the necessary foundation for such critical thought. Perhaps there are scholars in the Korean legal academy to advance this cause, perhaps there are not.³⁸¹ Only time will tell.

378. It has been said that U.S. civil rights law benefits whites more than blacks. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 63-64 (1989). In this fictional narrative, one states:

Although [the Fourteenth Amendment] was enacted to give blacks the rights of citizens, for most of its early history it was utilized as Professor Bittker put it so well, to nurture ‘railroads, utility companies, banks, employers of child labor, chain stores, money lenders, aliens, and a host of other groups and institutions.’

Id. In Korea too, the jurisprudence of the Constitutional Court reveals that not all who prevail on claims of discrimination based on social status are those without college degrees working in manual labor. *E.g.*, 90 Hun-Mah 28, Mar. 11, 1991 (declaring unconstitutional election law barring leaders of certain trade organizations from holding public office, on ground that law discriminated on account of social status of plaintiffs’ occupational position), *discussed in* Lee, *supra* note 142, at 361.

379. See Lee, *supra* note 142, at 364 n.46. Professor Lee refers to a media column in which the author is quite blunt in assessing that Korea, far from a “democratic republic,” has become a “state of social aristocracy.” Seh-Hwa Song, *Sah-hwe-gwi-jok-eui nah-rah* [A Social Aristocracy Nation], HAN-GYU-REH, Aug. 25, 2002, at <http://www.hani.co.kr/section-001012000/2002/08/001012000200208251819238.html>. The columnist urges that social aristocracy exists in all the institutions of contemporary Korean society, including politics, business, economy, education, legal profession, media, and religion. *Id.*

380. The reader will note that some of the predicted rhetoric of the critical status theorist resembles what “conservative” scholars in the United States have charged against a “liberal” Supreme Court.

381. Similarly, this Article suggests that a framework is in place for a Korean feminist legal jurisprudence, based on the U.S. equivalent. The Korean Constitution prohibits discrimination based on sex, S. KOREA CONST. art. 11(1), yet Korea “remains overwhelmingly a man’s world. Aside from Islamic countries, it has fewer female

Submitted for discussion herein are considerations that make the beginnings of a critical status theory movement questionable, at least in the near future. First, since critical status theory would be seen as controversial and unconventional as critical race theory has been stateside,³⁸² Korean scholars contemplating such scholarship (especially junior scholars), would likely be discouraged from doing so.³⁸³ There is the question of the extent to which the great pressure and demand for conformity seen in Korean society generally is also present in the Korean legal academy.³⁸⁴ If it is true that “Koreans . . . say of their society that ‘the nail that sticks out gets hammered down,’” does the Korean tendency to “swing the hammer harder and more often than just about any other people in the world”³⁸⁵ apply to the academic setting? One hopes that academic freedom knows no national boundaries and that even in a society where “any difference from others is easily regarded as deviance rather than creativity”³⁸⁶ that scholarship ought by definition encourage the opportunity to present differential academic theories regarding law and society.³⁸⁷

Moreover, to the extent that critical status theory adopts for its scholarship the still controversial writing form (chiefly, the

politicians and business executives and prominent figures than almost any other nation in the world.” Nicholas D. Kristof, *Seoul Journal: In Sexist South Korea, the Girls Even the Score*, N.Y. TIMES, July 13, 1996, at 4.

382. See *supra* text accompanying note 274. Judge Posner declines to pull punches regarding his views on the movement and its members: “Their lodgment in the law schools is a disgrace to legal education, which lacks the moral courage and the intellectual self-confidence to pronounce a minority movement’s scholarship bunk.” Posner, *supra* note 274, at 43.

383. See Alfred C. Yen, *Foreword: Making Us Possible*, 4 ASIAN L.J. 1, 3 (1997) (noting hostility that discourages young faculty from pursuing race conscious scholarship). A contrasting view would remind that in many Korean universities, entry-level faculty appointments come with tenure virtually assured, and thus, junior scholars could pursue whatever scholarship they choose without fear of reprisal.

384. See Yang & Rosenblatt, *supra* note 70, at 364 (“Koreans [are] expected to conform in many situations.”); Daniel Y. Jun, Note, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT’L L. 1071, 1077 (1996) (discussing “conformist views oriented towards the collective group”); Kwang Soo Ma, *Wanted: Democracy of the Mind; South Korean Society Hasn’t Shaken off Its Authoritarian Streak*, TIME, Apr. 3, 2002, at 21 (noting “ascetic, feudal values that hold non-conformity in contempt”); Barry Renfrew, *Poet Called Obscene For Non-Conformist Values*, ASSOCIATED PRESS, June 9, 1987, at 1987 WL 3151130 (describing demand for conformity as “suffocating”).

385. CLIFFORD, *supra* note 30, at 10.

386. Yang & Rosenblatt, *supra* note 70, at 369. Yang and Rosenblatt note that in addition to the expectation of conformity, “Koreans . . . are drawn by other Koreans into blaming those who deviate. In that blaming, one will usually agree publicly, even if one feels like disagreeing.” *Id.* at 364 (citing Yoon, *supra* note 35). The authors suggest a theoretical linkage between shame and conformity and status. *Id.* at 373.

387. Indeed, the recent years have seen the beginnings of two legal journals addressing progressive themes relating to law, society and democratic politics: *Bub-gwa sah-hwe (Law and Society)*, and *Min-ju bub-hahk (Democratic Legal Studies)*.

“storytelling” form of discussion) seen in critical race scholarship,³⁸⁸ the movement is practically doomed. Many critical race theorists decline the “impersonal voice” seen in dominant discourse of traditional civil rights scholarship, which adopts “white cultural patterns” as “a baseline norm.”³⁸⁹ They favor instead a “more subjective, personal voice”³⁹⁰ in “the material, aesthetic, emotional, and spiritual experiences of people of color.”³⁹¹ Thus, in discussing race, racism, and law, critical race theorists often resort to the storytelling form—“autobiographies, self-portraits, allegories, fables, and fictive narratives.”³⁹² Although some mainstream scholars have been sharply critical of the use of the (often uncorroborated) first-person narrative complaining of discrimination, disgust, and despair,³⁹³ critical race authors continue to defend the practice: “Autobiographical stories within legal discourse expose how the forces of domination are experienced at the individual level; how they are perceived from a given perspective, and how they make one feel.”³⁹⁴ Consider the following first-person account of Korean-American Professor Robert Chang, a leader in the Asian-American legal jurisprudence movement:

Of the different voices in which I speak, I have been most comfortable with the one called silence. Silence allowed me to escape notice when I was a child. I could become invisible, and hence safe. Yet now I find myself leaving the safety of my silence.

. . . . I think about the American border guard who stopped me when I tried to return to the United States after a brief visit to Canada. My valid Ohio driver's license was not good enough to let me return to my country. He asked me where my passport was. I told him that I did not have one and that it was my understanding that I did not need one, that a driver's license was sufficient. He told me that a driver's license is not proof of citizenship. We were at an impasse. I asked him what

388. See, e.g., Lino A. Graglia, *Book Review*, 5 CONST. COMM. 436, 437, 448 (1988) (reviewing BELL, *supra* note 378) (describing fictional narrative as “a whining litany of arrant and pernicious nonsense written in a childish prose,” “a piece of mindless left-wing ranting,” “wails of embittered, hate-filled self-pity”).

389. CRITICAL RACE THEORY: THE KEY WRITINGS, *supra* note 270, at 314.

390. DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER 171 n.10 (1994).

391. *Id.* See also Delgado & Stefancic, *supra* note 269, at 462-63 (noting that critical race theory scholarship counters and challenges “power-laden beliefs” with “counterstories, parables, chronicles, and anecdotes”); Montoya, *supra* note 329, at 244 (noting that narrative form “subverts the dominant discourse,” “displace[s] conventional wisdom and disrupt[s] official histories”).

392. Montoya, *supra* note 329, at 244.

393. See FARBER & SHERRY, *supra* note 274, at 96-97 (challenging accuracy and typicality of first-person accounts); see also Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 833 (1993) (same); Anne Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1270 (1995) (urging that first-person accounts be verifiable).

394. Montoya, *supra* note 329, at 244.

was going to happen. He said that he might have to detain me. I looked away. I imagined the phone call that I would have to make, the embarrassment I would feel as I told my law firm in Seattle that I would not be at work the next day, or maybe even the day after that

. . . . [There was also] the time I was driving in the South and was refused service at a service station. [And] the time I was stopped in New Jersey for suspicion of possessing a stolen vehicle. At first, it was just two cops. Then another squad car came. Four big (white) policemen for one small (Asian) man, in a deserted parking lot—no witnesses if it came to that. Perhaps they were afraid that I might know martial arts, which I do, but I am careful never to let them know. When my license and registration checked out, they handed back my papers and left without a word. They could not even say that one word, “Sorry,” which would have allowed me to leave that incident behind. I might have forgotten it as a mistake, one of those unpleasant things that happen. Instead, I have to carry it with me because of the anger I feel, and because of the fear—fear of the power that certain people are able to exercise over me because of this (contingent) feature that makes me different. No matter how hard I scrub, it does not come clean. No matter how hard I try, and I do try, I can never be as good as everyone else. I can never be white.

. . . . I am tired of silence. And so, I raise my voice.³⁹⁵

Chang is one of several critical race theorists who has relied on the personal narrative form in critical race scholarship. The question for critical status theory is whether a Korean law faculty member would resort to this contextualized discourse based on personal narrative and experience,³⁹⁶ over conventional, doctrinal scholarship, in order to advance the movement. Such discourse would begin with, for example, the revelation of a professor’s status as a descendant of generations of the lower or lowest classes in traditional Korea, or of parents who completed only secondary schooling. It would then be followed by a recounting of experiences of societal oppression, discrimination, and prejudice to which he and his family were subjected as a result of their social status. The likelihood of such disclosure and discussion requires consideration of multiple factors. First, if indeed there is a correlation between one’s educational achievement and family’s social status,³⁹⁷ there are not likely to be many in number who emerge from the bottom of the social structure, against tremendous odds, to rise to a university professorship. Second, as Professor Fujiya Kawashima, a scholar of yangban Korea has observed, “Today all Koreans identify themselves with the lineages of yangban scholar-officials. . . . I have met many Koreans who could identify famous scholar-official ancestors, but I do not

395. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1244 (1993).

396. See Delgado, *supra* note 265, at 745.

397. See *supra* text accompanying notes 210-13, 336-37.

recall meeting a Korean who could trace descent to a slave in the Choson dynasty.”³⁹⁸

Similarly, the literature on Korean behavioral norms includes the observation by Professors Seungeun Yang and Paul Rosenblatt that Koreans want to hide a family past that includes “low status or poverty.”³⁹⁹ If such statements are a fair reflection of the modal tendency in Korean society, as well as the segment of the population that comprises law faculty specifically, one wonders about the likelihood of a university professor, “the historical successor to the scholar of the Choson dynasty” and one of the most prestigious of occupations in contemporary Korea,⁴⁰⁰ venturing beyond the modal area. The belief that disclosure of prior low status and experiences with social prejudice entails risk of tainting a most cherished status would ultimately act as a prior restraint of such disclosure.⁴⁰¹ If this is the case, then status consciousness and the obsession with the pursuit and preservation of social status would show their powerful force, affecting the politics of scholarship and effectively preventing a critical status theory in Korean law from beginning. Under these conditions, the “willingness to search for truth . . . [that] is central to democracy”⁴⁰² and that is a purpose of scholarship would have to rely

398. Kawashima, *supra* note 246, at 15. This presents one difference between racial and status identification in the United States and Korea, respectively. Although persons of racial groups in the United States may express pride in their heritage and continue to identify with their ancestral origins, Koreans of non-*yangban* classes are not likely to do so.

399. Yang & Rosenblatt, *supra* note 70, at 364. “Many middle class Americans may brag about how they or their parents or grandparents came up from poverty, but middle class Koreans would rather not talk about it.” *Id.*

400. See LETT, *supra* note 17, at 46.

401. It should be noted that the current president of Korea, Moo-Hyun Roh, came from a family with limited means. His parents could not afford to send him to college. Even without a college education, he successfully passed the grueling bar examination and became a judge and a human rights lawyer. K. Connie Kang, *Los Angeles Koreans in L.A. Give Roh's Win Mixed Reviews*, L.A. TIMES, Dec. 20, 2002, at B3. In addition, the late Ju Yung Chung, the founder and chairman of Hyundai, a major Korean conglomerate, also acknowledged humble origins in what is now North Korea. See DONALD KIRK, KOREAN DYNASTY: HYUNDAI AND CHUNG JU YUNG 21-23 (1994); see also RICHARD M. STEERS, MADE IN KOREA: CHUNG JU YUNG AND THE RISE OF HYUNDAI 28-35 (1999). Perhaps those in such elevated positions, far removed from the upper middle class, are less likely to conceal their prior lower status.

Also of interest in this discussion is the disclosure of Ku Kim, a leader in the Korean independence movement during the years of Japanese colonial rule, and a key figure in modern Korean history. Kim had disclosed in an autobiography that his ancestors enjoyed high status until one was executed for a crime, early in the Chosun dynasty. The remaining family members fled, performed ordinary labor, and held out as commoners. They were “mistreated by neighbors” and were regarded “as below commoner status.” HENDERSON, *supra* note 37, at 391 n.23, 397 n.67. Henderson notes: “Such an admission borders on the *outside limits of Korean frankness* on the subject.” *Id.* at 397 n.67 (emphasis added).

402. FARBER & SHERRY, *supra* note 274, at 107. “*Jil-li-reul ahl-ji-ni jil-li-gah nuh-heui-reul jah-yu-keh hah-ri-rah.*” *Yo-han bok-eum [John]* 8:32 (“And ye shall know

on more conventional methods of discourse. In contrast, if the sentiments of Kawashima, Yang and Rosenblatt border on stereotype and do not fairly account for the possibility of individual differences, then the likelihood of Korean law professors recounting such personal histories in their texts is, without further data, uncertain at best.⁴⁰³ In all events, interested observers await the inclinations of the Korean legal academy.

V. CONCLUSION

Social status arguably defines the individual in Korean society; the pursuit of status defines the country as a whole. This contemporary status consciousness is deeply rooted, with origins in the centuries of traditional Confucian society that had formal, rigid class distinctions. At a minimum, this Article calls attention to the divisions within a society that has commonly been described as homogeneous, and the Korean legal system's recognition of such divisions. Moreover, even acknowledging the differences between social status in Korea and race in the United States, this Article advances the question of whether the two may be considered in equivalence, in several important respects. Principally, for centuries and still today, social status in Korea and race in the United States divide persons of the respective society. There are also ready parallels between race and law stateside and social status and law in Korea. Within ten years of each other, Korea adopted a new Constitution that explicitly abolished a social aristocracy and prohibited discrimination based on social status (1948), and the U.S.

the truth, and the truth shall make you free."). See also *id.* 8:45 ("And because I tell you the truth, ye believe me not.")

403. Would Koreans in the United States be up for the task, where status consciousness exists, but is less acute? More specifically, would second and third generation immigrants from Korea, the children of dry cleaner and grocery store owners who succeeded academically, graduating from Ivy League colleges and winning law faculty appointments, be willing to step forward to narrate their experiences of bias and prejudice within Korean communities in the United States or on return visits to Korea? Would such Koreans be less inclined to be discouraged from disclosing their families' earlier status? Were this to occur, the movement would be more of a *Korean American* critical status theory rather than a *Korean* critical status theory. Not all Koreans of the world are considered Korean by Koreans in the motherland. Cf. *Diversity Goes Global*, MINORITY L.J., Summer 2003, at 57, 58 (reporting that Korean business clients look down on second and third generation Korean American lawyers: "The clients didn't view the Korean American lawyers as really being Korean anymore."); SAMSUNG PRESS FOUNDATION, A STUDY OF KOREAN AND AMERICAN NEWSPAPER EDITORS' PERCEPTION OF THE UNITED STATES, KOREA, AND NORTH KOREA 19 (1998), discussed in *Jeh-mi-dong-po Image Boo-jung-juhkk* [Negative Image of Korean Americans], HAN-KUK ILBO [KOREA TIMES] (Chicago edition), June 26, 1999, § 2, at 1 (reporting survey that showed 44.4 percent of respondents had negative image of Koreans in United States, 30 percent positive image, and 25.6 percent neutral image).

Supreme Court demanded integration in public primary schools, calling for an end to the separate but equal doctrine (1954). In both countries, these moments can be seen as reflecting the enlightened view that whatever distinctions society may make based on social status or race, law ought not allow the government to impose burdens or dispense benefits based on such distinctions. Two decades later, U.S. critical race theorists began to question whether civil rights law effects the equality that the law of the land guarantees or merely maintains the status quo of inequality between the races. A similar question could be advanced in the Korean setting, namely, whether the legal system actually provides the equality that the Korean Constitution demands, or whether the legal institution, like the rest of society, is merely a part of the national make-up that encourages and continues division based on social status. The Korean critical theorist would likely raise as a concern the still developing state of legal consciousness in Korea and the uncertain impact of the rule of law.

The equal protection provision in the Korean Constitution that declares that all citizens are equal before the law and that prohibits discrimination based on social status may well be a mere transplant of the rule that the U.S. military had imposed on Korea's neighbor across the East Sea.⁴⁰⁴ Or, less likely, the provision could be a true reflection of the *Korean* sense of individual equality in the 1940s when the Constitution was adopted. The point is largely a matter of historical interest. The reality is that the Korean Constitution has adopted the language of equality regardless of social status from the very beginning of the republic and has retained it at every juncture. It is a matter of contemporary Korean law. The meaning given to the formalistic right of equality and against discrimination depends, of course, on political and societal conditions, and Korea has seen changes in that regard in recent decades. The democratization movement that began in the late 1980s has led to the more frequent use of terms such as "equality." At the same time (and somewhat ironically, when anti-U.S. sentiment has been growing), Korean commentators have noted the positive influence of U.S. constitutionalism on Korean jurisprudence.⁴⁰⁵ Indeed, the Korean judiciary may benefit from the more developed rules of U.S. law and the experience of a federal judiciary with over two centuries of

404. This body of water is known as the Sea of Japan to the rest of the world.

405. See generally Kim & Lee, *supra* note 21. The commentary includes revisionist interpretations of the Korean Constitution to the effect that the document was inspired by principles of U.S. constitutional law. *Id.* at 303, 304 (noting that "the influence of the U.S. Government on the [Korean] Constitution was notable" and "USAMGIK contributed to the introduction of basic concepts of American constitutional law"). *But see* MACDONALD, *supra* note 139, at 150 (noting that Korean Constitution "was prepared with little or no American advice").

judicial review.⁴⁰⁶ However, the careful observer in Korea will note that U.S. equal protection law has not been unassailable from all quarters, and that it too has been targeted as a source of inequality in U.S. society.

This Article, which encourages discussion of the equivalence of race and social status and the possible extension of a critical theory movement to Korea, invites new discourse in both Korean and U.S. legal thought. In the Korean setting, policy makers must continue the dialogue on what aspects of U.S. law and legal system Korea wishes to adopt and adapt for implementation in Korea, and why. In addition, the notion of a critical status theory may lead legal commentators to offer Confucianism as the major cause of the acute status consciousness that is present in contemporary Korean society, joining the list of modern conditions for which Confucianism has been blamed.⁴⁰⁷ Across the Pacific, this Article could trigger new comment on the now established, but also much maligned, critical race theory thought in the U.S. legal academy. Some will note weaknesses in the critical race approach when compared with a law and society of another jurisdiction where even a stronger case for critical theory can be made. Others will note the universality of the basic tenets of critical race—the challenge against liberalism and the dominant discourse, and the search for equality with dignity—and encourage efforts to apply them in the international setting,⁴⁰⁸ perhaps in the form of nation case studies. In any event, using race and law in the U.S. setting as a model will allow for better understanding of the relationship between social status and law in Korea. Those more familiar with the Korean model could employ the reverse method.

This Article also encourages further examination of Korean law in the context of its social norms and a history both remarkable and turbulent. In the opening years of a new millennium, Korea seeks a significant role on the international stage. At the same time, this nation where constitutionalism, democracy, and equality are relatively new concepts must continue to address what role law will play in its domestic (as well as international) affairs. The good news is that Korean law, like Korean society, is in a state of

406. Korean constitutionalism is not as developed as that of the United States, and is still in its early stages. Korea has had a constitution for just over five decades, and a constitutional democracy only since 1987, exactly two hundred years after the United States adopted its constitution. See Kim & Lee, *supra* note 21, at 303, 322.

407. See generally Cho, *supra* note 64.

408. There is precedent. One law journal held a symposium on critical race theory and international law. *Symposium, Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827-1220 (2000). Also of interest is a panel discussion sponsored by the American Society of International Law. *International Dimension of Critical Race Theory*, 91 AM. SOC'Y INT'L L. PROC. 408 (1997).

transformation,⁴⁰⁹ thus leaving open the possibility of reform. How much reform Korea will adopt and in what time will say much about this culture.

409. See RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY, *supra* note 2; see also Ahn, *supra* note 3, at 115. See generally Kim & Lee, *supra* note 21. Korean law in transformation was a theme of the conference on Korean law held at Illinois. See *supra* note 2.