

Choosing the Standards of Scrutiny for the Equality Right Cases: Questioning the Applicability of the Proportionality Principle

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Abstract

Beginning with analysis of the relevant J.Y. Interpretations, this article researches on how to choose the standards of scrutiny for equality right cases. Meanwhile, it also discusses the applicability of the proportionality principle to such cases. In Part II, this article finds the earlier J.Y. Interpretations often used the vague test of “reasonable” or “necessary” to measure whether the different treatment in question is arbitrary, without giving sufficient justifications. In the last several years, Grand Justices began to determine the standards of scrutiny by looking at the classifications and types of interests involved. An increasing use of categorization approach seems to emerge, too. In Part III, this article further finds many Germany-trained constitutional scholars argue in favor of the reception of the “dual formula” developed in Germany, which applies the proportionality principle as the new and stricter formula for reviewing some of the equality right cases. However, in Part IV, this article argues the proportionality principle as applied in this “dual formula,” in spite of being a categorization approach, would still put too much emphasis on the “degree of restrictions” and fail to address the most sensitive issue of equality right: classifications. With or without modifications, the proportionality principle would not fit to be an appropriate standard of scrutiny for equality right cases. This article finally argues, in Part V, there should be multi-level standards of scrutiny for equality right cases and the categorization approach should be a better one to proceed. In so doing, the courts should take both classifications and

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types of interests more seriously in choosing the appropriate standards, particularly the former factor.

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