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Legal Excisions

“Omissions are not Accidents.”¹

Timothy Webster†

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Introduction

Japan's constitutional tradition has long borrowed from other countries. Over the past 1,300 years, Japan has turned to China, France, Germany, and the United States for guidance in developing its written law.² Despite this large-scale reception of foreign law, however, Japanese constitutionalism has not been particularly receptive toward foreigners. This disinclination can be detected in the current Constitution of Japan, as well as the five decades of case law it has generated.

The promulgation of the Japanese Constitution has sparked controversy since its promulgation. Unlike the previous Meiji Constitution, the postwar Constitution was initially drafted by a group of Americans, many of them with little legal experience, under the command of General Doug-

1. MARIANNE MOORE, *THE COMPLETE POEMS OF MARIANNE MOORE*, at vii (1967).

† The author wishes to thank many people for their advice and support. Professor Mitchel Lasser gave insightful and sensitizing suggestions at key stages of the writing process. Audiences at the East Asian Philosophy of Law Conference at National Taiwan University, and the East Asian Studies Graduate Student Conference at Columbia provided useful feedback from various disciplines and viewpoints. Soo Chung, Eliot Walker, and the other editors at *Cornell International Law Journal* showed acumen, patience, and great attention to detail throughout the editing process. I offer this piece to the memory and spirit of my mother, Elaine Gerber Webster.

2. Its first legal code, the seventh-century Constitution of Prince Shōtoku, reflected the central governing principles of China, Japan's better organized neighbor. David A. Funk, *Traditional Japanese Jurisprudence: Justifying Loyalty and Law*, 17 S.U. L. REV. 171, 178 (1990). In the late nineteenth-century, to bolster its status vis-à-vis the west, Japan promulgated the Meiji Constitution (1889) and Civil Code (1891), both of which drew heavily on French and German sources. See generally Yasuhide Kawashima, *The American Constitution and Japanese Minpō, 1945-1980*, 21 INT'L LAW. 1167 (1987). Most recently, after World War II, Japan made its last major legal borrowing from abroad in drafting an American-style constitution. *Id.*

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las MacArthur.³ Additionally, critics hold, the document was imposed on Japan like a package of unpalatable dictates foisted by the victorious United States.⁴ Early critics also feared the document would continue to subject Japan to American influence.⁵ Undoubtedly, America used its superior positioning to insert key protections into the Constitution, such as MacArthur's three principles.⁶ But to think the Constitution was simply an American imposition overlooks a critical part of the process: its adoption and adaptation by the Japanese. Through a process of "selective reception," the Japanese also restricted the reach of many constitutional provisions.⁷

This note attempts to reinsert Japanese agency into the creation of the Japanese Constitution. By focusing on the Japanese adaptation of the English-language document--and its concomitant deletions, interpretations, and accommodations--we find that the Japanese Constitution is no

3. Of course, the Meiji Constitution was no purebred, composed in secrecy at the hand of four Japanese and a German. See GEORGE M. BECKMANN, *THE MAKING OF THE MEIJI CONSTITUTION: THE OLIGARCHS AND THE CONSTITUTIONAL DEVELOPMENT OF JAPAN, 1861-1891*, at 77-83 (1957).

4. See, e.g., Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT'L & COMP. L. 127, 153 (2005) ("The Constitution does not come 'from' the Japanese people. Rather, it is an imposed constitution.").

5. Typical of this position are the following comments made by Ugata Junzō, formerly a law professor at Kyushu University. Though talking only about human rights provisions, Ugata's language captures well the sentiment that the Constitution is an unwelcome scolding impressed upon the Japanese:

Whether you call it a given constitution, or an imposed constitution, the autonomous and active will of the Japanese people [*kokumin*] is nowhere to be seen. There is all the difference in the world when compared with Article 1 of the German Basic Law: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." This statement is clearly suffused with respect for human rights, one that springs from the feelings of the people. It teems with respect for basic human rights. But the words concerning our basic human rights are nothing more than oratory, mere prose. To put it frankly, the blessing of those lofty human rights given to the Japanese people [*kokumin*] were, so to speak, an admonition from the victor to the vanquished. It is not a constitutional provision, but a war lesson from the victor to the vanquished.

UGATA JUNZŌ, *NIHONKOKU KENPŌ NO KAISHAKU TO HIHAN* [INTERPRETATION AND CRITICISM OF THE JAPANESE CONSTITUTION] 137 (1972) (translated by author).

6. MacArthur's three principles, or "Constitutional musts," included the maintenance of a dynastic emperor, renunciation of war as a "sovereign right of the nation," and the abolition of Japanese feudalism. See KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* 16 (1991); Douglas MacArthur, *Three Basic Points* (Feb. 3, 1946) (MacArthur's notes), available at <http://www.ndl.go.jp/constitution/e/shiryo/03/072/072tx.html>. The National Diet Library website now devotes a special section to the "Birth of the Constitution of Japan." Historical documents, including the discussions of the National Diet, Japanese officials' diaries, and a helpful timeline, are available in Japanese and, to a more limited extent, English. See Nat'l Diet Library, *Birth of the Constitution of Japan*, <http://www.ndl.go.jp/constitution/e/> (last visited Apr. 27, 2006).

7. See generally Claire J. Hur, *Returnees from South America: Japan's Model for Legal Multiculturalism?*, 11 PAC. RIM L. & POL'Y J. 643, 670-71 (2002) (noting three areas of human rights protections that Japanese officials narrowed during the collaborative drafting process: the rights of individuals (vis-à-vis the "public welfare"), the rights of foreigners, and the rights of women and illegitimate children). This Note focuses on the second of these, in part because of the intriguing drafting history.

carbon copy of its Anglophone counterpart. Rather, the Japanese officials who helped draft the Japanese-language Constitution in essence *recomposed* it. In so doing, they limited provisions and guarantees that the American side proposed, while ensuring their own positions were embedded in the document or deferred for later explanation.

Specifically, the Japanese stripped away constitutional provisions protecting the rights of foreigners. This process actually involved two distinct yet related tasks: a) omitting provisions explicitly protecting aliens; and b) translating the relatively inclusive English term "the people" with the more circumscribed Japanese word *kokumin*, meaning "people," but more specifically "citizen" or "national."⁸ Rights the Americans intended to extend to "all natural persons" ended up going only as far as Japanese "citizens." The result was the excision of foreigners both from the constitutional text, as well as its protective penumbra. At the same time, however, this textual exile did not resolve problems concerning the rights of foreigners in Japan.

In the absence of a constitutional mooring, foreigners have instead turned to Japanese courts to determine their status. Three cases in particular shed light on how the Japanese judiciary has responded to this constitutional lacuna.⁹ In 1978, the Supreme Court of Japan held that a resident alien shall enjoy the same rights as a Japanese national, save those which "by their nature" must be limited to the Japanese.¹⁰ In a less influential, but highly publicized 1999 decision from the Shizuoka District Court, a judge invoked an international human rights treaty (the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)) to fashion a remedy for a foreigner in a racial discrimination suit.¹¹ Most recently, the Supreme Court invoked the constitutional principle of "national sovereignty" in permitting the Tokyo city government to exclude foreigners from civil servant appointments.¹²

In other words, the removal of foreigners from the Constitution has in the end merely *deflected* the decision-making process to a different branch of government, namely, the courts. While the Supreme Court has taken a cautious and conservative approach to interfering with the other branches,¹³ lower courts have been able to broaden the source of protection, such as international treaty law.

8. KENKYUSHA'S NEW JAPANESE-ENGLISH DICTIONARY 904 (4th ed., 1974).

9. See *infra* Part IV.

10. Ironically, the Supreme Court turned to Chapter Three of the Constitution, where many of the omissions took place, in deciding the "nature" of foreigners' rights in Japan. See *McLean v. Minister of Justice*, 32 MINSHŪ 1223 (Sup. Ct., Oct. 4, 1978).

11. See *Bortz v. Suzuki*, 1045 HANREI TAIMUZU 216 (Shizuoka Dist. Ct., Oct. 12, 1999).

12. See *Chong v. Tokyo*, 1885 HANREI JIHŌ 3 (Sup. Ct., Jan. 26, 2005).

13. Professor T.J. Pempel notes that the Supreme Court "has been an important, if frequently unrecognized, vehicle for preserving the status quo in Japan and for reducing the capacity of courts to reverse executive actions." Wikipedia, *Supreme Court of Japan*, http://en.wikipedia.org/wiki/Supreme_Court_of_Japan (last visited Apr. 27, 2006). See also *infra* Part IV.C.

This note begins with a review of pertinent scholarship on legal transplants, calling attention to two important features of that process. Part II then briefly sketches the collaborative process by which a group of American soldiers¹⁴ and a group of Japanese officials drafted a new Constitution, paying particular attention to the ways in which foreigners were literally written out of the Constitution. Part III reinforces this process of exclusion by focusing on issues of word choice. Finally, Part IV examines three judicial decisions that inform the current status and discussion of foreigners' rights in Japan.

I. Legal Transplants: The Synchronic and Diachronic

While the legal transplant has become the dominant metaphor for discussing transformative effects of legal borrowing, recent scholarship has questioned the viability and value of this model. The recent profusion of articles proposing alternatives, clarifications, and criticisms of Alan Watson's basic theory¹⁵ is itself suggestive. Scholars have responded to Watson with such colorful theories as legal transfers,¹⁶ legal irritants,¹⁷ legal formants,¹⁸ and legal translations,¹⁹ while still others have vehemently

14. On the American side, this process was led by the Supreme Command of the Allied Powers in the Pacific (SCAP) which was in charge of the American occupation and administration of postwar Japan.

15. Watson shows greater interest in the fact that transplants *happen*, than in how they take place, who graft them, what is selected and why, how it is later deployed, and so on. The following passage reveals the limits characteristic of Watson's project:

It cannot be doubted either that a rule transplanted from one country to another, from Germany to Japan, may equally *operate to different effect* in the two societies, even though it is expressed in apparently similar terms in the two countries. But our first concern will be with the existence of the rule, not with how it operates within the society as a result of academic or judicial interpretation.

ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 20 (1974) (emphasis added). One problem with this approach is its confident gloss over the "apparently similar terms" in two societies or languages. The processes of translation, as well as transplantation, are invariably more complicated than Watson considers.

16. See, e.g., David Nelken, *The Meaning of Success in Transnational Legal Transfers*, 19 WINDSOR Y.B. ACCESS JUST. 349, 353 (2001) (noting that "the question of success [of a legal transplant] can arise in more than one stage of the transfer of legal rules and institutions").

17. See, e.g., Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998) (noting the transformative effects of legal borrowing on both the institution that is transplanted and the system into which it is introduced).

18. The concept of legal formants understands law as a dynamic social process in which groups of interpreters--lawyers, judges, legislatures, academics--compete to have their vision of the law prevail. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 343, 344-45 (1991). In the comparative context, attention focuses on the ways elites in the recipient culture selectively deploy provisions to introduce into their legal culture. Though the donor may attempt to control the transaction, the power of selection and absorption ultimately rests with the host elite. P.G. Monateri, *The Weak Law: Contaminations and Legal Cultures*, 13 TRANS-NAT'L L. & CONTEMP. PROBS. 575, 583 (2003).

19. Máximo Langer proposes the alternate metaphor of "legal translation" to call attention to the difference in meaning a legal word or concept may take on as it migrates

denied the very possibility of legal transplantation.²⁰

While the theoretical ingenuity used to derive alternative concepts is impressive, their very diversity suggests that no one theory is in danger of eclipsing the rest. Instead of coining a new metaphor and joining the debate, however, this note first synthesizes the important lessons to be drawn from these discussions. By culling recent legal scholarship, and then filtering it through somewhat more venerable linguistic theory, one can develop a new paradigm by which to understand the transplant phenomenon.

Recent scholarship on transplants has highlighted multiple roles that the recipient legal culture plays in adapting transplanted law. Gunther Teubner, for example, notes the transformative effects a borrowed legal institution may have on the receiving country's legal system. In his account, the British absorption of the continent's "good faith" standard in contract law actually ended up altering relations between the British judiciary and government, ceding greater power to the former.²¹ Teubner's point is that no transplant retains its original form or function in new surroundings. Rather, as it adapts to its new environment, it will simultaneously push up against, and stimulate change within, the adoptive system.

The contribution of Rodolfo Sacco's "legal formants" has also heightened the debate. Briefly, Sacco aims to expand the scope of transplant studies by engaging a broader variety of legal and institutional actors. Instead of focusing merely on the act of legislation itself, a proper evaluation must also include the law's various constructions at the hands of judges, attorneys, scholars, and legislators.²² As the law is "domesticated," all of these institutional actors, or legal formants, compete to promote their particular understanding of the legal transplant. Judges, for instance, interpret the transplant differently from the legislators who introduced it; the lawyer building a case on the transplanted law will approach it differently from the scholar writing about it.²³

from one legal system to another. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 32-34 (2004).

20. Pierre Legrand's dismissal of legal transplants rests on the notions that a) meaning in a legal system cannot be reduced to the words of a regulation, and b) these words, when inserted into a new legal system, can neither have, nor bring about, the same meaning they had in the initial legal system. See Pierre Legrand, *What "Legal Transplants"?*, in ADAPTING LEGAL CULTURES 60-62 (David Nelken & Johannes Feest eds., 2001). Legrand's theoretical heft somewhat obscures his power to construct or suggest worthy paths of investigation, however. Urging scholars to apprehend "each manifestation of the law" as a "complete social fact," Legrand does not always account for the lengthy and uneven process by which rules are actually assimilated. *Id.* at 60. Take, for example, his rather conclusory description of the English borrowing of a French remedy: "[T]he French formulation was immediately domesticated by the English interpretative community with the result that the meaning of what is public law, private law . . . and so on, inevitably differs as between the two jurisdictions." *Id.* at 62.

21. Teubner, *supra* note 17, at 29.

22. Sacco, *supra* note 18, at 344-45.

23. See *id.*

Finally, P.G. Monateri draws particular attention to the exclusivity with which legal elites determine law. Responding to Sacco's legal formant paradigm, Monateri examines the selection process by which the legal elite--legislators and other official interpreters of foreign law--carefully considers its own legal system's flaws and then selects particular remedies to fix them. Importantly, Monateri observes that the recipient is the final arbiter in deciding which laws to adapt,²⁴ a thesis which resonates intriguingly in the postwar American-Japanese context.

The three paradigms resonate with an approach to scholarship familiar to linguists and other scholars. Teubner and Sacco attend to the *diachronic* adaptive processes by which a legal transplant is received and indeed reconceived within the recipient culture. Monateri, on the other hand, examines the *synchronic* "historical moment" at which the transplant occurs, and the conscious decisions that frame the choice of particular provisions.²⁵

These two frames--the diachronic and synchronic--generally track the scholarly agenda of legal transplant critics. Any serious discussion of legal transplants, as would any serious study of the English language, needs to entertain *both* aspects of the transplant phenomenon: the highly charged moment of its introduction *and* its consequent digestion within the new state. For the purposes of this note, the object of inquiry then shifts to examine issues such as how an individual clause was struck from a draft, or why a particular word was selected (among many) and inserted into the Japanese version of the Constitution. Second, but no less vitally, one must also attend to historical integration of the transplanted law into Japanese legal culture. To ignore the first part would be to overlook an important and purposive act by Japanese officials as they introduced the American concept of "the people" into their language, law, and society. To ignore the second would seal the Constitution off from the rough and tumble of half a century of legal developments. But by attending to both, we can profitably investigate a topic contested since its inception into Japan.

II. The Constitution and the Foreigner

With the defeat of Japan in World War II, the Allied powers strived to create a new framework for regulating Japanese society. The 1945 Potsdam Declaration (PD) required the Japanese government to "remove all obstacles to the revival and strengthening of democratic tendencies among the

24. Monateri, *supra* note 18, at 583.

25. These terms were first defined nearly a century ago by Ferdinand de Saussure in order to analyze language change. A diachronic ("through time") or "evolutionary" model examines the changes within a language from two different historical moments. For example, how did Chaucer's knight (pronounced *kuh-nicht*) become our knight (pronounced like *night*)? What happened to thee and thou? See FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 140-3 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1959). In a synchronic ("same time") study, the scholar takes a snapshot of a language and then describes and investigates its various components. For example, how do words relate to one another in a sentence? What is the word order? Does the language decline or inflect? See *id.* at 101-2.

Japanese People."²⁶ The task of implementing the basic PD principles fell to Douglas MacArthur and other members of the Supreme Command of the Allied Powers in the Pacific (SCAP).²⁷

Before examining the elaborate genealogy of proto-constitutional development, a brief chronology is in order.²⁸ In January 1946, the State Department sent SCAP a blueprint of how its ideal Japanese Constitution would appear.²⁹ With this and other provisions in mind, SCAP composed a model Japanese Constitution from February 3 to February 13.³⁰ The Japanese had other plans, hoping merely to bring the Meiji Constitution into conformity with the PD principles by adding several provisions.³¹ On February 8, a Japanese committee led by Matsumoto Joji submitted their own "Gist of the Revision of the Constitution" to SCAP,³² which took over half its provisions from the Meiji Constitution.³³ The American side was unimpressed:

The draft of the constitutional revision, which you submitted to us the other day, is wholly unacceptable to the Supreme Commander as a document of freedom and democracy. The Supreme Commander, however, being fully conscious of the desperate need of the people of Japan for a liberal and enlightened Constitution that will defend them from the injustices of the arbitrary control of the past, has approved this document and directed that I present it to you as one embodying the principles which in his opinion the situation in Japan demands.³⁴

26. Proclamation Defining Terms for Japanese Surrender art. 10, July 26, 1945, 3 Bevans 1204, available at <http://www.ndl.go.jp/constitution/e/etc/c06.html>.

27. See Theodore H. McNelly, "Induced Revolution": *The Policy and Process of Constitutional Reform in Occupied Japan*, in *DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION* 76, 76-77 (Robert E. Ward & Sakamoto Yoshikazu eds., 1987); see also *supra* note 14 (noting the role of SCAP in postwar Japan).

28. See generally National Diet Library, Chronological Table of Birth of the Constitution of Japan, <http://www.ndl.go.jp/constitution/e/etc/history.html> (last visited Apr. 27, 2006) (listing major events of 1945 through 1947 in chronological order).

29. This document, Decision 228 of the State-War-Navy Coordinating Committee (SWNCC 228), represented several months of work by the U.S. State Department. State-War-Navy Coordinating Committee, Decision Amending SWNCC 228: Reform of the Japanese Government System (Jan. 7, 1946), available at <http://www.ndl.go.jp/constitution/shiryo/03/059/059tx.html> [hereinafter SWNCC 228]. One scholar called it "the definitive statement of U.S. policy on constitutional and governmental change in postwar Japan." It calls for a government determined by "the freely expressed will of the Japanese people," and states that the Allies are empowered to insist that "civil is supreme over the military branch of the government." It also instructed MacArthur to "indicate the reforms which this Government considers necessary" in the postwar democratic Japan, even if that should mean formal instructions. Robert E. Ward, *Presurrender Planning: Treatment of the Emperor and Constitutional Changes*, in *DEMOCRATIZING JAPAN*, *supra* note 27, at 1, 29-30.

30. Ward, *supra* note 29, at 28 (noting other postwar planning documents employed by SCAP).

31. INOUE, *supra* note 6, at 11.

32. An English language version of these proposed changes can be found at National Diet Library, Matsumoto Draft Submitted to GHQ, <http://www.ndl.go.jp/constitution/e/shiryo/03/074shoshi.html> (last visited Apr. 27, 2006).

33. INOUE, *supra* note 6, at 12.

34. *Id.* at 17.

While not an auspicious beginning, this opening shot did not completely cut off the possibility for further refinement and collaboration with the Japanese.

The Japanese responded with their own "translation" of the draft, which they presented to SCAP on March 4, 1946.³⁵ The marathon session of March 4 through 5, in which MacArthur demanded that Japanese and American participants hammer out a version he could endorse, led to a provisional "Constitution" made public on March 7.³⁶ Next, the Japanese Diet and Privy Council discussed, deliberated, and substantively revised this provisional Constitution for several months.³⁷ On November 3, 1946, the Japanese Constitution was promulgated.³⁸ To be sure, the result contained many provisions that the American side demanded; yet, as discussed below, the text of the Constitution was also significantly altered to accommodate Japanese standards and expectations.

Throughout these months of constitutional contestation, the rights of foreigners gradually eroded. In its current form,³⁹ the Japanese Constitution now extends its protections to "citizens of Japan," and no one else. This significantly deviates from the original conception put forth by the Americans.

Concern for the rights of foreigners in Japan had been an American priority *ex ante*.⁴⁰ The text of the MacArthur Draft of SWNCC 228⁴¹ ("MacArthur Draft") states that the guarantee of basic rights would extend "to Japanese subjects and to all persons within Japanese jurisdiction."⁴² The decision specifically criticized the limited nature of the Meiji Constitution's protections: "Instead of granting those rights to all persons [the Meiji Constitution] stipulates that they shall apply only to Japanese subjects, leaving *other persons in Japan* without their protection."⁴³ These "other persons in Japan" referred not only to the American members of SCAP, but also to more than two million residents from the former colonies, such as

35. *Id.* at 22.

36. *Id.* at 22-26.

37. See, e.g., National Diet Library, Bill for Revision of Imperial Constitution Revised and Passed by the House of Representatives, http://www.ndl.go.jp/constitution/e/shiryo/04/124_1shoshi.html (last visited Feb. 13, 2006) (noting various amendments to the Constitution proposed by the House of Representatives and the House of Peers).

38. INOUE, *supra* note 6, at 36.

39. The Japanese Constitution has not been amended since its promulgation nearly 60 years ago. Currently, however, the ruling Liberal Democratic Party is preparing a new constitution that would expand the role of the Japanese military (to include international peacekeeping and emergency relief missions), environmental rights, and the right to privacy. Tomohiro Kasai, *Constitutional Revision Set to Be Big Issue*, DAILY YOMIURI ONLINE, Jan. 15, 2006, <http://www.yomiuri.co.jp/dy/national/20060115TDY03002.htm>.

40. See Koseki Shōichi, *Japanizing the Constitution*, 35 JAPAN Q. 234, 235 (1988); see also SWNCC 228, *supra* note 29.

41. See *supra* note 29 and accompanying text.

42. SWNCC 228, *supra* note 29, ¶ 4(a)(5). As one scholar frames the constitutional lineage "[T]here can be no doubt as to the basic paternity of the MacArthur Draft. It was clearly SWNCC-228 where most of the basic principles were concerned." Ward, *supra* note 29, at 36.

43. SWNCC 228, *supra* note 29, ¶ 6(c) (emphasis added).

China, Taiwan, and Korea.⁴⁴

The MacArthur Draft was unambiguous in its protection of human rights, explicitly extending it to "[a]ll natural persons." Two key provisions of the inchoate American version protected human rights in a very broad manner:

Art. 13: *All natural persons* are equal before the law. No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex or social status, caste, or *national origin*.⁴⁵

Art. 16: Aliens shall be entitled to the equal protection of law.⁴⁶

A broad penumbra of protection is evident, including provisions for sex, social status, and race. For our purposes, we note that the protections extend to foreigners in two discreet provisions: the "all natural persons" and "national origin" language of Article 13, as well as "[a]liens" in Article 16. The original intent of the American document was to reach *all* people in Japan: citizens, foreigners, and people "in between," such as resident Koreans and Taiwanese.

Interestingly, the first Japanese response dated March 4, 1946, included the protection of all natural people. Though changing the language slightly, as well as the ordering of the provisions, the Japanese hewed closely to the American draft:

Art 13: All natural people, Japanese citizens [*kokumin*] or otherwise, are equal before the law. No discrimination in political, economic, or social relations shall be tolerated due to race, creed, sex, social status, family origin, or nationality.

Art 14: Aliens shall be entitled to the equal protection of law.⁴⁷

This first step toward a jointly-authored Constitution reveals that the Japanese side acknowledged, and indeed put into their own words, the American desire to provide basic safeguards to citizens and non-citizens alike. However, over the next two days, these provisions would be eviscerated.

With the Japanese translation in hand, MacArthur ordered a new draft—revising the Japanese version of March 4—to be drawn up and translated as quickly as possible.⁴⁸ Beginning at 9pm on March 4, American and Japanese officials and linguists spent the night refining and smoothing

44. FURUKAWA ATSUSHI, KIHONTEKI JINKEN: NIHONKOKU KENPŌ, KENSHŌ 1945-2000 SHIRYŌ TO RONTEN, DAIYONKAN [FUNDAMENTAL HUMAN RIGHTS, VOL. 4 OF VERIFYING THE JAPANESE CONSTITUTION, 1945-2000: DOCUMENTS AND ARGUMENTS] 61-62 (2001); see also RAINICHI GAIKOKUJIN JINKEN HAKUSHO [WHITE PAPER ON RIGHTS OF FOREIGNERS IN JAPAN] 15-16 (Tanaka Hiroshi & Ebashi Takashi eds., 1997) (quoting the SCAP-drafted "Employment Policies" that specifically required the Japanese government to ensure equal employment rights and opportunities for Korean, Taiwanese, and Chinese residents in Japan).

45. KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 114 (Ray A. Moore ed. & trans., 1997) (emphasis added).

46. *Id.*; see also Koseki, *supra* note 40, at 235.

47. See FURUKAWA, *supra* note 44, at 60-61.

48. INOUE, *supra* note 6, at 22, 26.

over inconsistencies in the various drafts. On March 6, the eve of public announcement, MacArthur endorsed a working draft of the Constitution with "a sense of deep satisfaction."⁴⁹

During those two days, however, important alterations took place. Article 13, for example, underwent two critical mutations. First, the drafters struck the phrase that granted equal protection to people whether "Japanese citizens [*kokumin*] or otherwise," defining the scope of protections to an unqualified "all natural people." Later, further negotiation pared the text down to merely "all people" [all *kokumin*].⁵⁰ The constitutional protection of Article 13 thus shrank from protecting "[a]ll natural persons, whether Japanese citizens or not" to "all citizens."⁵¹

Second, Article 13 also excluded "nationality" [*kokuseki*] from the list of prohibited bases by which to discriminate. Instead, the Japanese substituted *monchi*, or "family lineage," but *monchi* and *kokuseki* have very different meanings. Family lineage refers to one's status, family, or class background, and asks whether one is a commoner, nobleman, untouchable, and so on.⁵² By turning the protections inward to reach Japanese people of different classes, this provision may have entrenched human rights within Japan. But at the same time, by using a term that described differences among Japanese people, the question of nationality was mooted. Foreigners in Japan thus lost two forms of constitutional recourse.

More glaring still was the elimination of Article 14 *in toto*. Aliens, once "entitled to the equal protection of law,"⁵³ were banished from the text of the Constitution. Satō Tatsuo⁵⁴ asked SCAP why a separate provision protecting foreigners was necessary, and was told that "foreigners are equal to the Japanese."⁵⁵ Then it need not be explicitly stated, replied Satō in turn, offering instead that protection for foreigners be included in Article 13.⁵⁶ As discussed above, however, the subjects of Article 13 were ultimately diluted down from "all natural people, Japanese citizens or otherwise" to "all people" [*kokumin*]. Thus, through a series of shifts and eliminations, protections which the Americans once sought for themselves and other "non-Japanese" were written out of the text; both groups were rendered constitutional *personae non gratis*. Though American officials still showed concern about nationality-based discrimination in April

49. *Id.* at 26.

50. FURUKAWA, *supra* note 44, at 61.

51. Koseki Shōichi, one of Japan's leading contemporary constitutional scholars, has found "no reliable documents that explain how the Japanese presented the proposal to eliminate the reference to foreigners' rights, nor why the Americans agreed to accept it." KOSEKI, *supra* note 45, at 129.

52. KENKYUSHA'S NEW JAPANESE-ENGLISH DICTIONARY, *supra* note 8, at 1125-26.

53. See *supra* text accompanying notes 46, 47.

54. Satō was a councilor on the Bureau of Legislation, frequent go-between in the discussions, and advocate for narrow protections of human rights. Recent critics have accused Satō of inserting "interpretations into legal texts by manipulating phraseology and nuance." Koseki, *supra* note 40, at 235.

55. KOSEKI, *supra* note 45, at 119-20.

56. *Id.* at 120.

1946,⁵⁷ the provision would not be altered.

Satō's desire to eliminate protections for foreigners becomes clearer upon reading his testimony before the Japanese Diet many years later. In his words, "treating foreigners equally was bad enough in itself, but having to include Article 16 [protecting aliens] in the Japanese draft was particularly objectionable."⁵⁸ To be sure, not all Japanese members of the drafting committee or translation staff shared this sentiment.⁵⁹ Nevertheless, through selective inclusion and omission of provisions the American side sought to include, the Japanese Constitution did not simply instantiate the will of the Americans. This note now turns to the ways that word choice played a role in limiting foreigners' rights.

III. Choice Words

For most of the translation and revision process, Japanese drafters tended to use the word *kokumin* to translate the English term "the people," "all the people," and "all natural persons." The word *kokumin*, a compound meaning literally "people [min] of a state [koku]," has at least two meanings in English. First, it refers literally to the people within a country, or "residents," without a strong political connotation. But it has a more modern, political significance as well, roughly equivalent to the English word "citizen" or "national," as when we might call someone "a Chinese national."⁶⁰ By couching the inclusive English terms "people/persons" and "citizen" into the bivalent *kokumin*, Japanese officials and translators could limit the protective power of the Constitution.

The choice of *kokumin* as the appropriate translation, however, was far from inevitable. The reason for its choice, at least according to the transcripts, lay in its capacity to incorporate the emperor *and* the people as one unit or body in a non-oppositional manner.⁶¹ Other contenders for this crucial feature of the constitutional lexicon included *shinmin* (subjects), *jinmin* (people), and *kokujin* (people of a state).⁶² The selection process itself deserves our attention, as it too has an important political dimension.

When the Japanese government submitted its first preliminary draft to SCAP, it used the word *shinmin* (subjects) to refer to the people of Japan.

57. THE CONSTITUTION OF JAPAN: A DOCUMENTARY HISTORY OF ITS FRAMING AND ADOPTION, 1945-1947, at RM278 ¶ 3 (Princeton University Press CD-ROM, 1998) [hereinafter *THE CONSTITUTION OF JAPAN*].

58. Koseki, *supra* note 40, at 235-36.

59. See KOSEKI, *supra* note 45, at 180-81.

60. Lydia Liu refers to this type of compound as a "return graphic loan." Nineteenth-century Japanese scholars selected certain compounds from classical Chinese to serve as translations for important European concepts then being introduced into Japan. The term *kokumin*, or *guomin* in Chinese, has a history spanning thousands of years, back to China's first narrative history, the fifth century B.C. *Zuo Zhuan* [Zuo's Chronicles]. LYDIA H. LIU, *TRANSLINGUAL PRACTICE: LITERATURE, NATIONAL CULTURE, AND TRANSLATED MODERNITY--CHINA, 1900-1937*, at 302, 308 (1995).

61. INOUE, *supra* note 6, at 190-205.

62. See discussion *infra* notes 63-71; *THE CONSTITUTION OF JAPAN*, *supra* note 57, at RM325.PM.SP17 ¶ 2.

This term, combining *shin* (public minister; servant) and *min* (people; masses), preserved a linguistic and conceptual vestige of the Meiji Constitution which subordinated the subjects to the emperor.⁶³ The word did not pass muster for this very reason. Even if SCAP envisioned postwar Japan as a democratic monarchy, sovereignty must reside with the people, and not with the emperor. According to SCAP, calling the people “subjects” would not sufficiently bolster their status or give Japan a sufficiently democratic basis.⁶⁴

The closest challenger to *kokumin* was *jinmin*, a much broader, and in some ways less palpably political, term. The Japanese Ministry of Foreign Affairs, preparing an early English-language draft for the cabinet, employed *jinmin* to translate the English word “people.”⁶⁵ The word, consisting of *jin* (person; persons) and *min* (people; masses) had also found its way into Japanese translations of international treaties, such as the Kellogg-Briand Pact.⁶⁶ In draft constitutions proposed by the Japanese Communist Party, moreover, *jinmin* was the preferred term.⁶⁷

To some Japanese, however, including members of various drafting committees, the term had excessively Marxist overtones. The word intimated “people who have liberated themselves from oppressors,”⁶⁸ or “the ruled or folk standing in contrast to the Government or the ruler.”⁶⁹ This might have seemed an attractive alternative, particularly to those who wanted the new Constitution to break with the militaristic wartime Japanese government. Despite the term’s Marxist leanings, many occupation officials still sought to use *jinmin*, which “covers all inhabitants of Japan, including foreign nationals, but excludes the emperor.”⁷⁰ Here again, the American inclination toward inclusive language collided with the Japanese desire to restrict the scope of these provisions.⁷¹

63. INOUE, *supra* note 6, at 188–89.

64. Kanamori Tokujirō, an important presence in the drafting and larger constitutional debate, explained the difference to the Diet in the following way: “This word [*shinmin*] has not been especially chosen for this draft Constitution with the view of criticizing the word used in the [Meiji] Constitution.” THE CONSTITUTION OF JAPAN, *supra* note 57, at RM456.

65. INOUE, *supra* note 6, at 189.

66. See THE CONSTITUTION OF JAPAN, *supra* note 57, at RM325.PM.SP16 ¶ 1 (comments of Kita Reikichi); Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

67. INOUE, *supra* note 6, at 189; TAKEMAE EIJI & OKABE FUMINOBU, KENPŌ SEITEISHI: NIHONKOKU KENPŌ, KENSHŌ, 1945–2000 SHIRYŌ TO RONTEN, DAI’IKKAN [HISTORY OF THE ENACTMENT OF THE CONSTITUTION, VOL. 1 OF VERIFYING THE JAPANESE CONSTITUTION, 1945–2000: DOCUMENTS AND ARGUMENTS] 117 (2000).

68. INOUE, *supra* note 6, at 189.

69. THE CONSTITUTION OF JAPAN, *supra* note 57, at RM325.PM.SP16 ¶ 1 (comments of Kita Reikichi).

70. Koseki, *supra* note 40, at 236.

71. Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 438 (1999) (noting “from the very outset the Japanese government strove to limit legal protections for the basic human rights of non-Japanese”).

In the end, however, *kokumin* prevailed. Though evidence suggests that high-ranking American officials understood the difference between *jinmin* and *kokumin*,⁷² they ultimately accepted that rights be granted only to *kokumin*. Conventional scholarship claims *kokumin* prevailed over the others because it included both the emperor and the people;⁷³ in the postwar Japanese state, the emperor was no longer above the people of Japan, but was to be inalienably one of them. Using *jinmin*, however, would only call attention to the difference in status, in effect splintering the populace from the emperor. *Kokumin* would transcend this fissure, uniting the Japanese people with their fallen patriarch.⁷⁴

What SCAP might not have expected, however, was a key insertion made by the Japanese Diet some months later. Now that *kokumin* had gained ascendancy in the text of the Constitution, the next step was to define the term. At the beginning of Chapter Three of the Constitution, "Rights and Duties of the People," the Diet introduced a clarification of *kokumin* in Article 10: "The conditions necessary for becoming a Japanese national [*kokumin*] shall be determined by law."⁷⁵ Though SCAP welcomed the addition, it is unlikely they could predict what would happen several years later.⁷⁶

In 1950, the Diet passed the Nationality Law, which narrowly construed *kokumin* to persons holding Japanese citizenship.⁷⁷ The Diet thus froze the politically-edged meaning of *kokumin* into law: the "citizens," not the "people," would henceforth receive constitutional protection. Foreigners--at this moment resident Koreans and Taiwanese⁷⁸ and later also American teachers and Brazilian journalists⁷⁹--were now effectively effaced from the Constitution.

Despite the clearly unequal positions from which postwar America and Japan debated the latter's constitutional principles, the notion of *pure* imposition is no longer viable. To be sure, SCAP insisted on including

72. INOUE, *supra* note 6, at 190.

73. *Id.*

74. THE CONSTITUTION OF JAPAN, *supra* note 57, at RM325.PM.SP17 ¶ 2 (noting the following statement by Kanamori: "I thought . . . we had better make use of one word, in spite of some difficulty or inconvenience, that might express the idea of *oneness* of the ruler and the people, and after a careful study and examination, we arrived at the conclusion that we should use the word 'Kokumin' (people) in denoting our ruler and ourselves together").

75. KOSEKI, *supra* note 45, at 179-80.

76. *Id.* at 180.

77. *Id.*

78. Though this note does not focus on the difficulties faced by resident Koreans and Taiwanese with regard to their national status, the issue needs to be raised. Many were brought to Japan as slave-laborers during the colonial period (Japan began to colonize Taiwan in 1895 and Korea in 1910), only to find themselves as an unprotected class after the war. Many of these two million "residents" left Japan in the postwar period, but some 600,000 Koreans remained in Japan. Paul E. Kim, Note, *Darkness in the Land of the Rising Sun: How the Japanese Discriminate Against Ethnic Koreans Living in Japan*, 4 CAR-DOZO J. INT'L & COMP. L. 479, 483 (1996).

79. See *infra* Part IV.A-B.

many principles that later became constitutional provisions.⁸⁰ But other American suggestions were not so readily absorbed. The Japanese domestication of key American ideas--among them the protection of foreigners--involved a series of eliminations, redefinitions, and amendments. The successful lobbying by conservative Japanese such as Satō Tatsuo⁸¹ that limited constitutional safeguards should give us pause, for the act of translation itself--of word choice, editing, substituting, interpreting--necessitated important political choices. The drafters of the Japanese Constitution, in choosing the word *kokumin* to translate the English word "people," clearly set the stage for a contraction of protection. This choice word, coupled with the Diet's later insertion of Article 10--requiring "Japanese national" to be defined by law--effectively eliminated rights guarantees to non-Japanese.⁸² What this deferral did not do, however, was to resolve basic questions about the status of foreigners in Japan. The result has been to give that decision-making authority over to the judiciary, which now presides over cases where foreigners sue the executive branch.

IV. Ongoing Debate: the Courts

Having outlined the basic process by which the Constitution came to exclude foreigners, we now turn to how that exclusion has played out until the present. As might be expected, the removal of foreigners from constitutional purview simply left issues unsettled, many to the present day. Further clarification has been provided by subsequent court decisions at all levels: Supreme Court, high courts, and district courts.⁸³ Before examining the contribution courts have made in redefining foreigners' rights in Japan, we briefly note this important change of "venue:" an entirely new set of legal formants--judges, attorneys, disgruntled foreigners--has been invited to shape the debate over foreigners' rights in Japan. The arena--the courtroom, as opposed to SCAP headquarters or the Diet--has also changed, and with it standards of "acceptable" treatment of human beings. Banished from the Constitution, foreigners now flock to the courts.

A. *McLean v. Minister of Justice*

The most relevant judicial decision concerning the rights of foreigners dates from 1978.⁸⁴ The Minister of Justice denied an American English teacher's application to renew his visa after he participated in antiwar demonstrations and failed to notify the Immigration Office of his change in workplace.⁸⁵ McLean successfully sued the Minister of Justice in Tokyo

80. Hamano, *supra* note 71, at 426-27.

81. KOSEKI, *supra* note 45, at 118-22.

82. Koseki, *supra* note 40, at 236.

83. See generally Hamano, *supra* note 71, at 442-67.

84. All facts from this paragraph are taken from the editorial note preceding the translation of the case. See *McLean v. Minister of Justice*, 32 MINSHŪ 7, 1223 (Sup. Ct., Oct. 4, 1978), translated in LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, at 471 (1996).

85. *Id.*

District Court which chastised the Ministry's denial as unfair, inappropriate from a social standpoint, and "contrary to the constitutional aspiration for international cooperation and fundamental human rights."⁸⁶

Appealed to the Tokyo High Court and then to the Supreme Court of Japan, however, the case has come to stand for a number of propositions.⁸⁷ With regard to the Minister's denial of McLean's application, the Supreme Court held that the Minister could exercise discretion in deciding what constituted a threat to international (here, Japan-U.S.) relations. Since customary international law places the decision of admitting aliens into the hands of each nation, the Minister's act was neither "clearly unreasonable" nor "improper by society's views."⁸⁸ Consequently, it did not violate law.⁸⁹

At the same time, the decision also precariously positioned the rights of foreigners in Japan. According to the Court, "the guarantees of fundamental human rights contained in Chapter 3 of the Constitution, with the exception of those rights *which by their nature* must be limited to the Japanese [*kokumin*], apply equally to aliens staying within our country."⁹⁰ At once guaranteeing and withholding rights from foreigners, this statement was later clarified in the opinion. The Court explained that even though McLean's participation in political demonstrations was constitutional and lawful, the Minister of Justice still had discretion to decide that it was "undesirable for Japan" to admit him into the country.⁹¹ Foreigners are guaranteed the right to march in Japanese demonstrations, it would seem, but not the right to march into Japan.

Needless to say, this holding has generated many interpretations. In addition to the right to enter Japan, Japanese scholars have also understood the rights "limited to Japanese citizens" to include suffrage and possibly the right to survive.⁹² While the human rights of foreigners and Japanese are thus "close," they are not coterminous. Confusing matters further, some scholars have interpreted that certain *aspects* of suffrage--such as the right to participate in local (not national) elections and the right to hold certain non-elected government appointments--may be extended to foreigners.⁹³

86. *Id.*

87. *Id.* at 474-78 ("The Decision of This Court").

88. *Id.* at 478.

89. *Id.*

90. *Id.* at 477 (emphasis added).

91. *Id.*

92. See, e.g., Munesue Toshiyuki, *Jinken Hoshō wo Dō Teijū Gaikokujin nimo Hirogete Yuku ka* [How to Extend the Protection of Human Rights to Permanent Residents?], in 59 ASAHI SHIMBUN EXTRA REPORT & ANALYSIS: KENPŌ GA WAKARU [UNDERSTANDING THE CONSTITUTION] 102, 105 (2000) (noting that the right to vote is limited to the Japanese); Kuramochi Takashi, *Jiyū Kakutoku no Doryoku: Gaikokujin no Jinken wo Mite Ayuku* [Efforts to Gain Freedom: Looking at the Human Rights of Foreigners] 534 HŌGAKU SEMINA 82, 85 (1999) (holding up the rights to vote, to enter Japan, and to survive as traditionally limited to the Japanese).

93. Kuramochi, *supra* note 92, at 85.

McLean's puzzling and open-ended holding does not carve out the rights of foreigners in stone. Though setting aside some core rights which "by their nature" the Constitution does not extend to foreigners,⁹⁴ the case does not specifically tell us what those rights are. While scholars have tried to map out the limits, the opinion does not adequately guide courts. Of course, Japan being a civil law country, its lower courts would not be bound by Supreme Court holdings.⁹⁵ However, McLean fails to define either the limits or an adequate source to which courts may turn as they grapple with the question of foreigners' rights. This has given great latitude to the decision-making capacity of lower courts.

B. *Bortz v. Suzuki*

Walking into a jewelry store may seem perfectly pedestrian, but it actually brought about a lawsuit, a small media blitz,⁹⁶ and eventually a \$12,500 award,⁹⁷ a sizable sum for a Japanese human rights case. In 1998, Ana Bortz, a Brazilian journalist walked into a jeweler in Hamamatsu, Japan (population 570,000), which had implemented a "No foreigners" policy of simply not allowing foreigners on the store premise. Upon ascertaining Bortz was Brazilian (and not, as they had first judged, a representative of a French jewelry manufacturer⁹⁸), the owners of the store pointed at a sign saying "Foreigners are not allowed in this store." They then asked Bortz to leave, in English and Japanese, eventually calling the police to eject her. After three hours of remonstrations, unsuccessful demands for apologies, and threatened lawsuits, Bortz left the store with her Japanese-Brazilian husband.⁹⁹

Bortz's vindication in Shizuoka District Court attracted the attention of many. Judge Soh Tetsuro's far-reaching opinion not only wove in the philosophical and historical strands of the human rights doctrine, dating from Confucius to the present,¹⁰⁰ but also creatively welded constitutional and international treaty law.¹⁰¹ As in McLean, the opinion turned to a constitutional principle, here a "strong commitment to international cooperation."¹⁰² The court then looked toward international norms and cited an international treaty Japan had recently ratified, namely, the International Convention on the Elimination of All Forms of Racial Discrimination

94. See *supra* text accompanying note 90.

95. Lower courts are not bound to follow the decisions of the Japanese Supreme Court, though they tend to do so. Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 LAW & CONTEMP. PROBS. 135, 159 (1990).

96. Even the New York Times published an article on the suit. See Howard W. French, *Japan Only Policy Takes Body Blow in Court*, N.Y. TIMES, Nov. 15, 1999, at A1.

97. *Bortz v. Suzuki*, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999).

98. Sumi Shin, *Newcomer Migrants: Implications for Japan's Administration of Social Services and Nationality*, 6 UCLA J. INT'L L. & FOREIGN AFF. 313, 361 n.213 (2002).

99. *Bortz*, 1045 HANREI TAIMUZU at 217-18.

100. *Id.* at 225-28.

101. *Id.* at 223-25.

102. *Id.* at 224. Article 98 of the Constitution ensures that the "treaties concluded by Japan and established laws of nations shall be faithfully observed." KENPŌ, art. 98, para. 2.

(CERD).¹⁰³

Whether international treaties are binding in Japan is a complex topic, but here it suffices to note that Japanese courts have invoked them in occasional human rights cases.¹⁰⁴ In other words, judges may give international treaties a kind of indirect effect by applying an internationally-derived standard to domestic law, as the judge did in the *Bortz* case. Article 6 of CERD guarantees victims of racial discrimination the right to seek damages in the tribunals of the host country.¹⁰⁵ As Bortz was undoubtedly a victim of racially discriminatory acts in Japan, the district court devised a remedy through Japanese tort law.¹⁰⁶ With no constitutional provision, Supreme Court case, or domestic anti-discrimination legislation¹⁰⁷ directly on point, the judge was at liberty to look beyond Japanese law and reach out for an international human rights standard. Compensation for Bortz's suffering was based on provisions of international treaty law and cost the discriminating jeweler 1.5 million yen, or roughly \$12,500.¹⁰⁸

C. *Chong v. Tokyo*

After working for six years as Tokyo's first non-Japanese public health nurse, Chong Hyang-gyun, a Korean resident in Japan, set her sights on becoming a manager.¹⁰⁹ Having fulfilled all necessary requirements for the promotion, she applied to take the managerial level examination in March 1994, but the Tokyo metropolitan government refused her application because she was not Japanese.¹¹⁰ Chong sued the city in 1994, seek-

103. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, S. EXEC. DOC. C, 95-2, 660 U.N.T.S. 195 (entered into force for Japan on Jan. 16, 1996) [hereinafter CERD].

104. YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* 37 (1998).

105. Article 6 of CERD provides,

States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

CERD, *supra* note 103, art. 6.

106. Article 709 of the Civil Code codifies what we would call a tort, providing that "[a] person who intentionally or negligently has infringed upon the rights of another is liable for the resultant damages." MINPO, art. 709.

107. Keiko Yamanaka, *Ana Bortz's Law Suit and Minority Rights in Japan* (Japan Policy Res. Inst., Working Paper No. 88, 2002), available at <http://www.jpri.org/publications/workingpapers/wp88.html>.

108. *Id.*

109. *Promotion Just for Japanese: Supreme Court*, JAPAN TIMES ONLINE, Jan. 27, 2005, <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20050127a1.htm>.

110. Born in Japan in 1950 to a Korean father and Japanese mother, Chong was a Japanese national at birth. However, with the 1952 signing of Peace Treaties with Korea and China, Japan effectively "alienated" hundreds of thousands of Koreans and Chinese who elected to remain in Japan after the war, ending Chong's Japanese citizenship. David McNeill, "I want to make Japan a better place to live", JAPAN TIMES ONLINE, Feb. 1, 2005, <http://search.japantimes.co.jp/member/member.html?fl20050201zg.htm>; Tanaka

ing the right to sit for the examination and two million yen in damages.¹¹¹ The Tokyo District Court dismissed both claims, holding somewhat narrowly that the "Constitution does not guarantee foreigners the right to employment as a civil servant [at the managerial level]."¹¹²

On appeal, the Tokyo High Court reversed, holding that employing foreigners in certain types of civil service positions¹¹³ would not infringe the principle of "national sovereignty" envisioned in Article 1 of the Constitution.¹¹⁴ Rather than uniformly reject all foreign applicants, the city would first have to determine whether the position required one to make decisions concerning the exercise of government authority.¹¹⁵ If it did, that position would only be available to Japanese citizens [*kokumin*] under the principle of "national sovereignty."¹¹⁶ If it did not, foreigners could apply for the position, relying on the protections of Articles 22(1)¹¹⁷ and 14(1)¹¹⁸ of the Constitution.¹¹⁹ The appellate court awarded Chong

Hiroshi, *Saikōsai hanketsu wa dō ichizukerareru ka* [How Will the Supreme Court's Decision Be Evaluated?], 77 HÖRITSU JIHŌ 86, 88 (2005). Though Chong could have applied for, and perhaps received, Japanese nationality, she retained her South Korean citizenship because of the "history between the two countries; I'd like Japan to acknowledge this history and apologize for it." McNeill, *supra* note 110.

111. Chong's argument had three prongs: 1) refusing a foreign applicant the right to work as a local civil servant violated Articles 14 (equality under the law) and 22.1 (right to choose one's profession) of the Constitution; 2) since permanent residents like Chong were no different from Japanese citizens, they should not be excluded from managerial employment; 3) unlike the right to vote in local elections which according to a 1995 Supreme Court decision required local legislation, foreigners were not restricted by law from working as local civil servants. *Chong v. Tokyo* (*Chong I*), 1566 HANREI JIHŌ 23, 23 (Tokyo D. Ct., May 16, 1996).

112. *Id.* at 31 (translated by author).

113. The High Court devised a tripartite typology of civil servant positions based on the responsibilities each position entailed. The first type included positions directly related to the functioning of government; a foreigner working in such a position would offend the principle of "national sovereignty" and would thus violate the Constitution. The second type included positions indirectly related to the functioning of the government; for such a position, an independent assessment of the contents, authorities, and functions must take place before it was offered to a foreigner. The third type included positions with virtually no relation to the functioning of government and which could be freely taken by foreigners. *Chong v. Tokyo* (*Chong II*), 1639 HANREI JIHŌ 30, 33-34 (Tokyo High Ct., Nov. 26, 1997).

114. National sovereignty [*kokumin shuken*] returns us to the problem of translation and word choice. The term could be rendered more literally as "citizen sovereignty," the implication being that *only* citizens of Japan should decide the country's fate. Article 1 of the Constitution provides that the emperor shall be the symbol of the state and that his position derives "from the will of the people with whom resides sovereign power." KENPŌ, art. 1.

115. *Chong II*, 1639 HANREI JIHŌ at 34.

116. *Id.*

117. Article 22(1) of the Japanese Constitution ensures that "[e]very person shall have freedom to choose . . . his occupation to the extent that it does not interfere with the public welfare." KENPŌ, art. 22, para. 1. Here, it is important to note that the subject of this sentence is not "people" in the sense of Japanese citizens [*kokumin*], but rather "everybody" or "anybody" [*nanibito*]. Many constitutional provisions are written in this kind of inclusive, and less politically charged, language.

118. Article 14(1) guarantees that "[a]ll of the people [*kokumin*]" 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." KENPŌ, art. 14, para. 1.

400,000 yen, or roughly \$3,300.¹²⁰

Seven years later, in a Grand Bench decision,¹²¹ the Supreme Court reversed the High Court's decision.¹²² Thirteen Justices agreed that the city had a "rational basis" for distinguishing between foreigners and Japanese nationals in the appointment of local civil servants.¹²³ Given the principle of "national sovereignty . . . it should be assumed that those appointed to local civil servant positions requiring exercise of public authority hold Japanese nationality."¹²⁴ Because a rational basis could be discerned, Tokyo's policy did not violate Article 14(1) of the Constitution.¹²⁵

The Court's logic failed to persuade two Justices on the Court¹²⁶ and many in the press¹²⁷ and academia.¹²⁸ Dissenting Justice Takii Shigeo conceded that certain managerial posts could only be filled by citizens; however, he argued that Tokyo could not uniformly exclude foreigners from all managerial posts, regardless of the type of the positions, because there was no "rational basis" for a local governing body to be comprised solely of Japanese nationals.¹²⁹ Similarly, Justice Izumi Tokuji first pointed out that the state did not place any legal restrictions on special permanent residents, such as Chong, relating to their appointment as local civil ser-

Again, it should be emphasized that "the people" here means "Japanese citizens," not members of the human race.

119. *Chong II*, 1639 HANREI JIHŌ at 34.

120. *Id.* at 35.

121. The Japanese Supreme Court normally handles cases in petit benches of five Justices. For constitutional issues, all fifteen Justices sit. Luney, *supra* note 95, at 147.

122. *Chong v. Tokyo (Chong III)*, 1885 HANREI JIHŌ 3, 7 (Sup. Ct., Jan. 26, 2005).

123. *Id.* at 9.

124. *Id.* (translated by author).

125. *Id.*

126. Justices Takii Shigeo and Izumi Tokuji both issued dissents. *Id.* at 12-18.

127. The *Asahi Shimbun* called the decision "anachronistic" and "backward-looking." See Yamauchi Toshihiro, *Gaikokujin no kōmu shūinken to kokumin shuken gainen no ran'yō* [Foreigners' rights to public employment and the abuse of the concept of popular sovereignty], 77 HŌRITSU JIHŌ 72, 72 (2005) (quoting the *Asahi Shimbun* editorial of January 27, 2005). The *Japan Times* suggested that the country needed to "make better use of talented people, Japanese or non-Japanese." *Better Use of Talented People*, JAPAN TIMES WEEKLY ONLINE, Feb. 5, 2005, <http://www.japantimes.co.jp/weekly/ed/ed20050205a1.htm>.

128. See, e.g., Kondō Atsushi, *Shogaikoku ni okeru kōmuin no shūninken* [Civil servants' right to appointment in foreign countries], 77 HŌRITSU JIHŌ 68, 68 (2005) ("In the Supreme Court's decision, the concept of rule [*tchi*] is overbroad. . . . The principle of national sovereignty means only that decisions concerning the proper governance of the country shall be based on the collective will of the citizenry. The principle does not mean that every civil servant charged with the exercise of public authority will be a citizen.") (translated by author); Okada Masanori, *Saishin hanrei enshūshitsu (gyōseihō): 'Kōkenryoku no hōshi' wa shuken (tōchiken) no hōshi to dōgi ka* [Recent case study (administrative law): Is 'the exercise of state power' synonymous with the exercise of sovereignty (right to rule)?], 607 HŌGAKU SEMINA 119, 119 (2005) ("The decision . . . confuses the concepts of state power, sovereignty, and the right to rule.") (translated by author); Yamauchi, *supra* note 127, at 74 (noting that the court's reasoning had "several 'logical leaps'").

129. *Chong III*, 1885 HANREI JIHŌ at 13 (Takii, J., dissenting).

vants.¹³⁰ He then indicated that special permanent residents had strong ties to the local community and that, if local governments were to limit their rights, there must be a better ("stricter") reason for doing so.¹³¹ Though both dissents reveal critical gaps in the majority's opinion and city's nationality requirement, their observations were not enough to sway a sufficient number of the other Justices to their side.

Critics likewise pointed out logical deficiencies in the holding. Yamauchi Toshihiro noted the key difference between governance at the national level and governance at the local level.¹³² Since residents (including foreigners) were part of the local body politic, it was perfectly appropriate that they participate in local governance.¹³³ Moreover, there were plenty of civil positions (e.g. tax collectors, policemen, etc.) which exercised a type of public authority but lacked final responsibility for matters relating to governance;¹³⁴ the servant would still have to follow her superior's orders.

Japanese courts have reintroduced the problem of defining and protecting the rights of foreigners for a new generation. In *McLean*, *Bortz*, and *Chong*, courts have attempted to fill in constitutional omissions concerning the rights of foreigners by reference to other constitutional provisions and international human rights law. The excision has, on the one hand, opened up a wider storehouse of protections for judges to invoke, including fairly expansive international human rights treaties.¹³⁵ On the other hand, the exclusion has also sent judicial interpreters back to the Constitution to ascertain which rights might be deemed appropriate for foreigners.¹³⁶

In a legal system that does not require *stare decisis*,¹³⁷ courts are given a fair amount of discretion in handling cases without being bound by earlier decisions. As the *Bortz* opinion suggests, this has lent judges considerable leeway in devising a remedy.¹³⁸ Ironically, exclusion from the Constitution has made foreigners' rights reviewable on a case-by-case basis. As *McLean* and *Chong* clearly indicate, however, a governmental body that discriminates against foreigners need only appeal to the highest court to vindicate the right to discriminate. The Japanese Supreme Court has earned a reputation for both deference to the other branches of government and conservatism with respect to human rights and social issues.¹³⁹ This tendency has not eluded international organizations, such as Amnesty International and the United Nations, which have repeatedly criticized "the

130. *Id.* at 16 (Izumi, J., dissenting).

131. *Id.* at 17.

132. Yamauchi, *supra* note 127, at 74.

133. *Id.*

134. *Id.* at 75.

135. *See supra* Part IV.B.

136. *See supra* text accompanying notes 109-134.

137. Luney, *supra* note 95, at 159.

138. *Id.* (noting that "lower court judges tend to be more liberal and more protective of fundamental human rights than Supreme Court justices").

139. *Id.* at 154, 161.

rational discrimination" that Japanese courts and the government employ in their treatment of foreigners.¹⁴⁰

Conclusion

By addressing diachronic and synchronic developments in Japanese constitutional law, this note casts the complicated status of foreigners into bolder relief. First, we examined key moments in the drafting of the Constitution that showed how the Japanese drafting committee, with the agreement of their American counterparts, circumscribed the protective aegis of the Constitution.¹⁴¹ This was effectuated through a complex process of deleting certain provisions, revising and paring down others, and finally employing the fraught term *kokumin*.¹⁴² While aliens were displaced from the constitutional text, however, the problem of the foreigners' rights did not simply subside, but rather opened up new avenues of redress. Repeatedly, foreigners have turned to Japanese courts to shore up their rights, requiring us to take a diachronic approach to the issue.¹⁴³

While Japanese courts have not elucidated a platform of rights that foreigners may enjoy in complete security, they have shown an occasionally more liberal approach to the issue than the early drafters did. In *McLean*, the Supreme Court made a positive grant of protections to foreigners, but did not adequately define the limits of those protections. Decades later, an enterprising district court judge used this instability to justify a turn from domestic positive law toward international legal standards. Whether Japanese courts will again employ such a liberal reading of the law to resolve the rights of foreigners remains to be seen, but in the meantime, unfettered by a constitutional provision, they have a wide panoply of sources to consult in devising a remedy.

140. See, e.g., U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: Japan*, ¶¶ 11, 13, U.N. Doc. CCPR/C/79/Add.102 (Nov. 19, 1998) (expressing the Committee's concern about such issues as the "vagueness of the concept of 'reasonable discrimination,'" and the "discrimination against members of the Japanese-Korean minority who are not Japanese citizens"). Likewise, Amnesty International has criticized the xenophobia of the Japanese government: "Just because foreign residents do not have Japanese citizenship, it does not mean that foreign residents do not have rights. . . . Japan has a duty . . . under the U.N. agreements that it has signed." McNeill, *supra* note 110 (quoting an Amnesty International official).

141. See *supra* Part II.

142. See *supra* Part III.

143. See *supra* Part IV.

