

**WAR, PEACE, AND NATIONAL SECURITY IN THE PACIFIC:
U.S. AND JAPANESE GEOSTRATEGIC
CONSTITUTIONALISM, AND THE CREATION OF THE
JAPANESE CONSTITUTION OF 1947**

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Written largely by and adopted at the insistence of the U.S.-led Allied Occupation of Japan in the aftermath of the Second World War, the Japanese Constitution of 1947 (“1947 Constitution”) represents a unique contribution to U.S. geostrategic constitutionalism. At its core, the document is an explicit extension of the geostrategic vision espoused by Washington in 1796, a vision to protect the nation and its vital interests from the devastation inherent to militarism and war. U.S. legal scholars have thus far overlooked the 1947 Constitution as part and parcel of America’s constitutional heritage. This Note seeks to rectify this shortcoming in the literature and preliminarily situate the 1947 Constitution in a U.S constitutional context.

However, in seeking to so place the 1947 Constitution, the issue of the document’s legitimacy as Japan’s “higher law”—a recurring feature of Japanese domestic politics—comes into sharp relief. The substantial American contribution to the development of the 1947 Constitution has perpetuated an impression that the document was unilaterally imposed on the Japanese nation. Yet such a view of U.S.-imposed constitutionalism on Japan is ultimately simplistic and superficial, and undervalues the considerable Japanese interests represented in the 1947 Constitution itself and the process by which it was designed. This Note builds on the significant body of scholarship that has attacked the imposition perspective, but rather than looking toward popular acceptance — as previous scholarship has done — this Note considers the role of Japanese geostrategic considerations in the 1947 Constitution’s drafting and ratification process.

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In his 1796 Farewell Address to his young nation, George Washington devoted significant time towards elaborating on the geostrategic genius of America's new constitution. "[E]very part of our country," exulted Washington, "thus feels an immediate and particular interest in union." He went on:

[A]ll the parts combined cannot fail to find in the united mass of means and efforts greater strength, greater resource, proportionably greater security from external danger, a less frequent interruption of their peace by foreign nations; and, what is of inestimable value, they must derive from union an exemption from those broils and wars between themselves, which so frequently afflict neighboring countries not tied together by the same governments.¹

From Washington's perspective, the formation of a political *unum* from a fragmented *pluribus* offered manifold benefits for the new North American polity: the united strength of the states would deter unwanted militarism both by foreign national powers and the states themselves.

Throughout the course of American constitutional development, from the Constitutional Convention in Philadelphia to the current Obama Administration, this geostrategic vision of the U.S. Constitution of 1789 has received regular explanation and expansion,

¹ George Washington, Farewell Address (Sept. 19, 1796), http://avalon.law.yale.edu/18th_century/washing.asp.

and the concept of geostrategic constitutionalism—the influence of national security considerations on the development of a constitutional state—has firmly established itself within America's constitutional canon.² In fact, as far as the purpose of a constitution is to structure a polity and provide for the structure's preservation in perpetuity, geostrategic constitutionalism can be understood as the foundation upon which any constitutional state is necessarily constituted. Yet one crucial subject remains noticeably absent from the academic literature on U.S. geostrategic constitutionalism: the Japanese Constitution of 1947 (“1947 Constitution”).

Written largely by and adopted at the insistence of the U.S.-led Allied Occupation of Japan in the aftermath of the Second World War, the 1947 Constitution represents a unique contribution to U.S. geostrategic constitutionalism. At its core, the document is an explicit extension of the geostrategic vision espoused by Washington in 1796, a vision to protect the nation and its vital interests from the devastation inherent to militarism and war. U.S. legal scholars have thus far overlooked the 1947 Constitution—and in particular, its Renunciation of War Clause—as part and parcel of America's constitutional heritage. This Note seeks to rectify this shortcoming in the literature and preliminarily situate the 1947 Constitution in a U.S. constitutional context.

However, in seeking to so place the 1947 Constitution, the issue of the document's legitimacy as Japan's “higher law”—a recurring feature of Japanese domestic politics—comes into sharp relief. The substantial American contribution to the development of the 1947 Constitution has perpetuated an impression that the document was unilaterally imposed on the Japanese nation.³ Among contemporary U.S. legal scholars, Noah Feldman has been a prominent proponent of such a view, reflecting nostalgically that “Gone are the days when American legal officers could write the constitution of Japan, translate it into Japanese, and extract the acquiescence of such a Japanese government as existed under the auspices of U.S. occupation and the reign of Supreme Allied

² See generally AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005) (discussing the Framers' intent to unite the colonial landmass and establish a union).

³ It is commonly held that Japan presents the “classic,” and most successful, example of an imposed constitution that the world saw in the twentieth century. David S. Law, *The Myth of the Imposed Constitution*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 239, 240 (Denis Galligan & Mila Versteeg eds., 2013).

Commander General Douglas MacArthur.”⁴ Across the Pacific, numerous Japanese scholars, politicians, and members of the public likewise espouse the viewpoint that the 1947 Constitution was a foreign imposition on a weak post-war Japan. In particular, Japanese conservatives frequently promote this version of historical events in the hopes of undermining the 1947’s Constitution’s governing legitimacy and the historically substantial public support for its Renunciation of War Clause, which operates in law—though perhaps not in practice—to limit Japan’s military capabilities.⁵

Yet this story of a U.S.-imposed constitutionalism on Japan is ultimately simplistic and superficial, and undervalues the considerable Japanese interests represented in the 1947 Constitution itself and the process by which it was designed. The 1947 Constitution represented nothing short of a geostrategic victory for the Japanese nation in the aftermath of loss in a devastating global conflict. At the time of its creation, Japan had unconditionally surrendered to the Allied Powers, and was both legally and militarily at their mercy. Between the fall of 1945 and the promulgation of the 1947 Constitution on November 3, 1946, the Japanese maneuvered within the confines of Occupation demands—sometimes choosing to acquiesce, other times successfully exerting their own preferences—to develop a constitution that satisfied political forces on both sides of the Pacific. What emerged from the give-and-take was a nothing short of a constitution for a new Japan. Therefore, while seeking to place the 1947 Constitution in U.S. constitutional context, this Note simultaneously seeks to place it in its Japanese constitutional context and challenge the accusation that it was simply foisted on a weak Japan.

As such, this Note builds on the significant body of

⁴ Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 857 (2005). John Dower has observed, “No modern nation ever has rested on a more alien constitution.” JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 347 (1999).

⁵ Law, *supra* note 3, at 240. The post-1947 interpretation and application of the Renunciation of War Clause (Article 9) is beyond the scope of this Note. For more information on Article 9 and the development of the contemporary Japanese national security apparatus, see Karen Piotrowski, *Keeping Pace with the Progress of the World: Article 9 of the Japanese Constitution*, 83 WASH. U. L. REV. 1653 (2005). In the wake of terrorist attacks on Japanese citizens, current Japanese Prime Minister Shinzo Abe has advocated in favor of formally amending Article 9. Martin Fackler, *Abe Is Said to Have Plans to Revise Pacifist Charter*, N.Y. TIMES (Feb. 5, 2015), <http://www.nytimes.com/2015/02/06/world/asia/abe-wants-to-revise-pacifist-constitution-as-early-as-2016-ally-says.html>.

scholarship that has attacked the imposition perspective. While scholars critical of the imposition interpretation of the 1947 Constitution's history have largely written from the vantage point of popular acceptance—arguing, for example, that the public's support for the new constitution endowed the document with governing legitimacy, despite perceived opposition from Japanese political elites⁶—this Note takes an alternative approach and considers the role of Japanese geostrategic considerations in the 1947 Constitution's drafting and ratification process.

In other words, this Note seeks to accomplish two overarching goals: 1) to understand the 1947 Constitution within the dual frameworks of both U.S. and Japanese geostrategic constitutionalism; and 2) to examine how viewing the 1947 Constitution through the lens of Japanese geostrategic constitutionalism undermines the assessment of the document as an imposed and foreign constitution.

The Note begins with a brief examination of both U.S. and Japanese geostrategic constitutionalism prior to the Second World War, and shows how the two nations' respective constitutions and constitutional developments embodied national security interests. The Note then turns toward 1945, and assesses the exertion of geostrategic considerations by both the U.S. and Japan at the conclusion of the Second World War.

Next, the Note scrutinizes the process of drafting and ratifying the 1947 Constitution, and argues that the document can be properly understood through the dual frameworks of U.S. and Japanese geostrategic constitutionalism. In the process, the Note challenges the view of the 1947 Constitution as imposed on Japan by showing how U.S. and Japanese actors and interests collaboratively exercised agency and influence over the creation of the post-war constitution.

Finally, the Note concludes with a few observations on the 1947 Constitution, and the continuing influence of U.S. and Japanese geostrategic constitutionalism in contemporary times.

⁶ See, e.g., Law, *supra* note 3, at 240 (discussing the popular support for the Japanese Constitution and the Japanese conservatives' strategic argument that the Constitution was imposed). Law challenges the view of the 1947 Constitution as an imposed constitution by challenging 1) the conflation of the preferences of the Japanese leadership of the time with the preferences of the Japanese people and 2) the minimization of popular opinion on the constitution-making process. In short, Law argues that public support for the 1947 Constitution shielded it at the time of its promulgation and has continued to do so throughout the decades, providing an explanation for its considerable longevity despite calls by conservative politicians to amend or overturn it. *Id.* at 241, 252-53.

I. PUBLIUS' GEOSTRATEGIC VISION: THE CONSTITUTION OF 1789 & U.S. GEOSTRATEGIC CONSTITUTIONALISM

By 1787, the Articles of Confederation—which had formally bound the thirteen colonies-then-states of the New World together since their revolution against Great Britain—was failing in majestic fashion. States showed little respect for even the limited power that the national government could legally exercise and likewise showed little respect for each other, threatening their individual and collective internal stability and external security.⁷ It was in this precarious context that the 1787 Philadelphia Convention was convened. Attended by some of the most prominent statesmen of the era—George Washington, Benjamin Franklin, James Wilson, Alexander Hamilton, John Jay, and James Madison, among others—the Convention led to the creation and adoption in 1789 of the Constitution of the United States.

For many of its Framers, the Constitution of 1789 concerned the “fate of an empire in many respects the most interesting in the world.”⁸ But what did this constitution actually accomplish, and why did these illustrious men view the document’s enactment as vital to the survival of their New World polity?

In their series of essays in support of ratification of the Philadelphia Plan, Hamilton, Jay, and Madison—writing jointly under the name “Publius”—argued that in order to realize the true benefits of perpetual union, the thirteen separate states would need to merge into one indivisible nation. Such a united polity in the New World, argued Publius, could mirror Britain’s unique security as a united island nation, fortified against hostile forces both at home and abroad. As Akhil Amar has observed, “[b]y creating an ‘insular’ condition in America, the proposed Constitution would guarantee Americans the rights of Englishmen, and more, by replicating—indeed, surpassing—the geostrategic niche of Englishmen.”⁹

Publius preached the positive geostrategic implications of perpetual union from both an internal and external perspective. In

⁷ See generally Jack N. Rakove, *The Collapse of the Articles of Confederation*, in *THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION* 225–45 (J. Jackson Barlow et al., eds., 1988).

⁸ THE FEDERALIST No. 1 (Alexander Hamilton).

⁹ AMAR, *supra* note 2, at 44.

critiquing the internal situation faced by the several states, Publius observed that the history of continental Europe presented a miserable history “. . . of towns taken and retaken; of battles that decide nothing; of retreats more beneficial than victories; of much effort and little acquisition.”¹⁰ In Europe, argued Publius, regimes required well-equipped and well-manned armies to defend their land borders against invasion by their neighbors.¹¹ Because “most other BORDERING nations [are] always . . . either involved in disputes and war, or live in the constant apprehension of them,” a single state bent on military adventurism could compel nearby states to build up their armed capabilities as a means to deter and repel invasion, leading in short time to the establishment “. . . in every part of this country the same engines of despotism which have been the scourge of the Old World.”¹² Armies could be and often did find themselves wielded not only to impede would-be invaders, but also to quash individual liberty and collective self-government.¹³ To Publius, the North American states needed to take sweeping action to avoid the unfortunate fate of continental Europe by emulating the 1707 union of Scotland and England: they must permanently unify their New World landmass and be “. . . bound together in a strict and indissoluble Union . . . superior to the control of all transatlantic force or influence, and able to dictate the terms of the connection between the old and the new world!”¹⁴

Examining the states’ external position, Publius argued that the “firm league of friendship” established by the Articles of Confederation was ill-equipped to fulfill its fundamental purpose of securing “. . . [the states’] common defense, the security of their liberties, and their mutual and general welfare” against “all force offered to, or attacks made upon them, or any of them” by

¹⁰ THE FEDERALIST No. 8 (Alexander Hamilton).

¹¹ *Id.* (“The nations of Europe are encircled with chains of fortified places, which mutually obstruct invasion.”).

¹² THE FEDERALIST No. 5 (John Jay); THE FEDERALIST No. 8, *supra* note 10.

¹³ AMAR, *supra* note 2, at 45. The Framers distinguished between armies and navies, the latter being viewed as less threatening to liberty compared to the former. In fact, navies were widely viewed as the protectors of liberty. See THE FEDERALIST No. 41 (James Madison) (“The batteries most capable of repelling foreign enterprises on our safety, are happily such as can never be turned by a perfidious government against our liberties.”).

¹⁴ THE FEDERALIST No. 11 (Alexander Hamilton). See also THE FEDERALIST No. 5, *supra* note 12. (“If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation.”).

antagonistic powers.¹⁵ To perpetuate the Articles and its weak form of national government would be to extend an invitation to European military adventurism in North America, and leave the young nation unable to adequately respond.¹⁶ From Publius' perspective, Americans must discourage the monarchies of Europe from seeking to reinforce their New World presence. Compared to the loose alliance under the Articles, a truly "*United States*" would be more capable of turning back European adventurism.¹⁷ The Atlantic Ocean would be pacific in essence; in Amar's words, "an English Channel times fifty, a vast moat that would protect America against . . . the militarism of the European continental powers."¹⁸

While Publius' geostrategic vision primarily viewed the Constitution of 1789 as a means to quell the dangers that would accompany disunion, both internal and external, it also included a practical economic component: bringing the thirteen states together

¹⁵ ARTICLES OF CONFEDERATION OF 1781, art. III, para. 1; *Federalist* No. 15 (Hamilton) ("[T]he concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union . . . The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has, at length, arrested all the wheels of the national government, and brought them to an awful stand.").

¹⁶ See THE FEDERALIST No. 4 (John Jay) ("[W]hatever may be our situation, whether firmly united under one national government, or split into a number of confederacies, certain it is, that foreign nations will know and view it exactly as it is; and they will act toward us accordingly. If they see that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united, they will be much more disposed to cultivate our friendship than provoke our resentment. If, on the other hand, they find us either destitute of an effectual government . . . or split into three or four independent and probably discordant republics or confederacies . . . what a poor, pitiful figure will America make in their eyes!"). In the words of another leading Federalist, James Wilson, "Such number of separate states, contiguous in situation, unconnected and disunited in government, would be, at one time, the prey of foreign force, foreign influence, and foreign intrigue." 1 FRANK MOORE, AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES: BY THE MOST EMINENT ORATORS OF AMERICA 78 (1st ed. 1880). Likewise, during the Constitutional Convention, James Randolph observed that the confederation provided no security against foreign invasion, as the congress lacked the means to prevent or even wage war. 1 1787: DRAFTING OF THE U.S. CONSTITUTION 85, 87–88 (Wilbourn E. Benton ed., 1st ed. 1986) ("If force [is necessary to meet force], this force must be drawn from the States, and the States may or may not furnish it.").

¹⁷ AMAR, *supra* note 2, at 47.

¹⁸ *Id.* at 46. See also THE FEDERALIST No. 8, *supra* note 10 ("If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation. Europe is at a great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot, in this position, be necessary to our security.").

under a single “continental canopy” would save on the total amount of money needed for military defense and other core governmental functions, as well as more effectively distribute financial resources in times of national exigency.¹⁹ Moreover, the creation of a united front against European powers would simultaneously produce a “demilitarized interstate free-trade zone,” permitting increased business dealings between Americans themselves.²⁰ Free intra-American trade would also encourage a domestic shipping industry; America would become a “nursery of seamen,” and these seamen could then be converted into an American navy in times of crisis.²¹

While this geostrategic vision of the Constitution of 1789 informed much of its textualized structure and substance,²² a written

¹⁹ AMAR, *supra* note 2, at 48; THE FEDERALIST No. 13 (Alexander Hamilton) (“The money saved from one object may be usefully applied to another, and there will be so much the less to be drawn from the pockets of the people. If the States are united under one government, there will be but one national civil list to support; if they are divided into several confederacies, there will be as many different national civil lists to be provided for—and each of them, as to the principal departments, coextensive with that which would be necessary for a government of the whole.”); THE FEDERALIST No. 4, *supra* note 16 (“One government can . . . apply the resources and power of the whole to the defense of any particular part, and that more easily and expeditiously than State governments or separate confederacies can possibly do, for want of concert and unity of system.”).

²⁰ AMAR, *supra* note 2, at 47. In particular, the economic implications of North American geography seemed well suited to national coordination and oversight. In a speech to the Pennsylvania Ratification Convention, James Wilson observed, “The extent of territory, the diversity of climate and soil, the number, and greatness, and connection of lakes and rivers, with which the United States are intersected and almost surrounded, all indicate an enlarged government to be fit and advantageous for them.” 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 358 (Merrill Jensen ed., 1976).

²¹ AMAR, *supra* note 2, at 48. *See also* THE FEDERALIST No. 41, *supra* note 13 (“It must, indeed, be numbered among the greatest blessings of America, that as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad. In this respect our situation bears another likeness to the insular advantage of Great Britain.”).

²² For example, compare the enumerated goals for union in ARTICLES OF CONFEDERATION of 1781, art. III (“. . . for their common defense, the security of their liberties, and their mutual and general welfare . . .”) with U.S. CONST. pmb. (“. . . to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . .”), with the latter adding the goal of internal security, as well as the actions verbs “provide,” “promote,” and “secure.” Moreover, geostrategic considerations influenced the Constitution’s ban on standing appropriations for armies (but not navies) in Article I, section 8; its rules about state troops in Article I, section 10; its protections of the militia in both Article I and the Second Amendment; its distrust towards “soldiers” (but not “sailors,” mirroring Article 1, section 8) in the Third Amendment; its civilian leadership of the military in Article II; its provisions for the admission of new states (contemplation of the

constitution is ultimately just a few words on a piece of paper.²³ Constitution-making—or the operationalization of a constitutional text from written word to acted deed—involves interpretation, explanation, and action over many years by many people, with sustained consideration for the document’s architecture and purpose.²⁴ This process of operationalizing the Constitution of 1789 and its geostrategic vision began under the Washington Administration, and subsequent presidents, other political and military leaders, and the American public itself,²⁵ have continued the process in earnest.²⁶

In what was perhaps the most refined and stirring articulation of the Constitution’s geostrategic vision since Washington’s Farewell Address, Abraham Lincoln opined in his First Inaugural Address in 1861, “[p]hysically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them Is it possible then to make that intercourse more advantageous, or more satisfactory, after separation than before? Can aliens make treaties easier than friends can make laws?”²⁷ Like Publius, Lincoln worried about generating an arms race or trade war

religiously-influenced political belief that would become known popularly as “Manifest Destiny”) in Article IV; its guarantee of each state’s boundaries against invasion and each state’s democratic republic against military tyranny in Article IV; and its language describing the Constitution as the law of “the Land” (again contemplating Manifest Destiny) in Article VI. AMAR, *supra* note 2, at 51.

²³ Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 485 (1991).

²⁴ *Id.* at 485.

²⁵ While this Note focuses on constitution-making by high-level U.S. government actors, popular participation in America’s constitutional project serves as a foundation on which these elites act. See, e.g., Mark Tushnet, *Popular Constitutionalism and Political Organization*, 18 ROGER WILLIAMS U. L. REV. 1, 1 (2013) (delineating the normative and descriptive strands of popular constitutionalism, focusing on the descriptive strand and how popular views include social movements and political parties).

²⁶ A few early examples include the Louisiana Purchase, and the developments of the Monroe Doctrine and the nationalist concept of Manifest Destiny. AMAR, *supra* note 2, at 49.

²⁷ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), http://avalon.law.yale.edu/19th_century/lincoln1.asp; Abraham Lincoln, Second State of the Union (Dec. 1, 1862), <http://www.presidency.ucsb.edu/ws/?pid=29503>. The Civil War also offers a unique intra-American case study of what Noah Feldman terms “imposed constitutionalism”: the post-war Reconstruction, during which Union Army-occupied southern states were denied representation in Congress until they ratified the Thirteenth and Fourteenth Amendments. Feldman, *supra* note 4, at 859. These two amendments—the Fourteenth, in particular—restructured the balance of power between the federal government and the states and in effect imposed a new nationally-oriented constitutional order.

between two neighboring national powers—in his time, the United States and the Confederate States of America—a situation that had the potential to lead to the permanent militarization and impoverishment of the North American continent.²⁸ As Lincoln saw it, Americans who disliked the Union were themselves free to leave it, but they could not take the land with them, or impose secession on other Americans. Such a right would undermine—even render moot—the valuable geostrategic dividends carefully crafted by the Constitution of 1789.

Since Lincoln confronted a nation at war with itself, Americans have continued to benefit from U.S. geostrategic constitutionalism. During the Second World War, for example, although Europe and Asia suffered colossal damage and death, America's wide oceanic "moats" kept the continental U.S. safe from harm.²⁹ However, waters alone would not guarantee American safety in perpetuity. U.S. geostrategic constitutionalism would need to keep pace with a changing global national security landscape, and adopt new strategies for protecting the American people and indeed the world.³⁰

II. THE WEST COMES TO JAPAN: THE MEIJI CONSTITUTION OF 1889 AND JAPANESE GEOSTRATEGIC CONSTITUTIONALISM

In 1853, less than a decade before Lincoln would engage in geostrategic constitutionalism with the advent of the Civil War, another American brought U.S. geostrategic constitutionalism across the Pacific—to Japan. At the command of U.S. President Millard Fillmore, Commodore Matthew Calbraith Perry appeared in the waters off the Japanese coast and demanded that Japan end the policy of national seclusion that had characterized its approach to the outside world for centuries.³¹ The following year, Perry and the Japanese

²⁸ AMAR, *supra* note 2, at 52.

²⁹ *Id.* at 52. During the Second World War, only Pearl Harbor in Hawai'i and certain parts of Alaska came under serious attack. The continental U.S. remained unscathed and far removed from the devastation that the war wrought throughout Europe and Asia.

³⁰ The evolving nature of national security and warfare, and its implications for U.S. geostrategic constitutionalism and U.S. constitutional development more generally, is beyond the scope of this Essay.

³¹ LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS, 1889–2002 8 (2002).

leadership formally concluded the Treaty of Kanagawa, which effectively ended the nation's isolation from the Western world; within a few years, a number of European nations followed suit with similar treaties of their own.³² Taken together, these treaties gave Western nations a slew of legal and economic rights to conduct business in Japan, while declining to provide Japan with reciprocal benefits in return.³³

The creation of these one-sided treaties at the urging of Western powers precipitated the collapse of Tokugawa rule over Japan in 1868, ending its period of political domination lasting since approximately 1603.³⁴ Political power was returned to the Japanese Emperor, but he struggled to maintain Japanese independence in the face of Western pressure to open itself to foreign economic interests.³⁵ To discourage Western imperialism, Japan undertook a program of rapid Westernization of its legal and political systems, a Western power precondition to renegotiating the earlier treaties signed in the wake of Commodore Perry's first visit.³⁶

However, while external pressure supplied the motivation for domestic legal and political reorganization, Japan's reform process was not haphazard or without due regard for Japan's social and political legacy. In choosing to adopt a Western-style civil code in the mold of the French legal system over an U.S.-style common law regime, for example, Japanese leaders consciously considered the appropriateness of a civil code in light of Japan's historical familiarity with authoritarian forms of government administration, the Confucian tendency to respect government authority, and the

³² *Id.* See also *The Treaty of Kanagawa: Setting the Stage for Japanese-American Relations*, NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/treaty_of_kanagawa; Treaty of Kanagawa, Japan-U.S., March 31, 1845, 11 Stat. 597.

³³ BEER & MAKI, *supra* note 31, at 8. Most prominently, the treaties provided Western nations with a combination of port access, fishing rights, and trade privileges. "The Treaty of Kanagawa," *supra* note 32.

³⁴ *Id.*; Percy R. Luney, Jr., *Introduction*, in JAPANESE CONSTITUTIONAL LAW viii (Percy R. Luney, Jr., and Kazuyuki Takahashi eds., 1993).

³⁵ *Id.* at ix.

³⁶ *Id.* During this formative period, Japan abolished feudalism and its longstanding four-class system, including its warrior class that had ruled Japan for seven centuries; created a centralized bureaucratic government; established a national army and navy; and created national legal and judicial systems. Moreover, Japan underwent significant economic and social change, including the introduction of Western science, the beginnings of a national railway system and a merchant marine, the development of print media, and the start of integration into global trade. BEER & MAKI, *supra* note 31, at 15.

hierarchical nature of Japanese society.³⁷ Such considerations also actively informed and influenced the development of the Meiji Constitution.

By the late nineteenth century, Japan was ripe for a Western-style written constitution. On October 12, 1881, the Emperor issued a rescript ordering that a national legislature form by 1890.³⁸ While the creation of a constitution went unmentioned, such a legislature was without precedent in Japanese history.³⁹ If such a political institution were to be established, the foundation of a constitution would be required.⁴⁰ However, a constitution was also needed for even more compelling governance and national security reasons. The complexity of the emerging nation-state, and the importance of order and stability to its successful operation, would benefit from a codified government structure.⁴¹ Most crucially for the Japanese leadership at the time, a written constitution would signal to the Western world that Japan was becoming a modern nation-state and deserved to be treated on an equal footing with Western powers.⁴² Japanese leadership viewed the constitutional project as a means to assert Japanese national power against foreign intrusion, much as Hamilton, Madison, and Jay viewed their own constitutional project in 1780s North America. Just as the Framers of the U.S. Constitution of 1789 utilized a constitutionalized national governing structure as a device to withstand foreign militarism, so too would the drafters of the Meiji Constitution. Both sought to show the international powers of their day that their respective nations were capable of being—indeed, required treatment as—player of equal stature on the international stage. In short, both actively engaged in geostrategic constitutionalism.

³⁷ Luney, *supra* note 34, at ix. The French-inspired code was adopted in 1890. However, in 1896, Japanese leaders replaced the French-inspired civil code with a German-inspired code, which remains in effect to this day. See MINPŌ (民法) [CIV. C.] 1896 (Japan). Moreover, Japan's Criminal Code of 1907 is similarly modeled after German law. Andreas Schloenhardt, *Mission Unaccomplished: Japan's Anti-Bōryoku-Ban Law*, 28 J. JAPANESE L. 123, 128 (2010).

³⁸ BEER & MAKI, *supra* note 31, at 16.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

On February 11, 1889, Japan's Meiji Emperor revealed Japan's first constitution to his country and the world.⁴³ The Meiji Constitution was patterned after the monarchical Prussian Constitution of 1850, which—with its recognition of imperial sovereignty—fit well into Japanese tradition.⁴⁴ In essence, the Meiji Constitution established an absolutist form of monarchy. This absolutist feature of imperial sovereignty came to override some of the Meiji Constitution's more democratic features⁴⁵ and provided a foundation for the rise of the authoritarian militarism that would rule over Japan from the 1930 until the end of the Second World War.⁴⁶

It was then that U.S. and Japanese geostrategic constitutionalism would collide with Japanese defeat, U.S. military occupation, and the creation of the 1947 Constitution.

III. GEOSTRATEGIC CONSTITUTIONALISM, ARTICLE 9, AND CREATION OF THE 1947 CONSTITUTION

A. *The Potsdam Declaration and Allied Occupation Policy*

Written and ratified during the Allied Occupation of Japan following the Second World War, the Japanese Constitution of 1947

⁴³ *Id.* at 17.

⁴⁴ DAI NIPPON TEIKOKU KENPŌ (大日本帝国憲法) [CONSTITUTION], Nov. 29, 1890, pmbl. (Japan) (hereinafter MEIJI CONSTITUTION) (“These Laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors”); *Id.* at art. 1 (“The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal”); *Id.* at art. 4 (“The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution”); Luney, *supra* note 34, at ix. While the Prussian Constitution served as a model for the Japanese drafters of the Meiji Constitution, the drafters by no means copied the Prussian Constitution in wholesale fashion. The drafters adapted their constitution to fit Japan's needs, at least as they viewed them. For example, the Meiji Constitution went even farther than the Prussian Constitution by declaring sovereignty as residing in a divine Emperor who provided the constitution to his subjects as a generous gift. Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, in JAPANESE CONSTITUTIONAL LAW 3, 3-4 (Percy R. Luney, Jr., & Kazuyuki Takahashi eds., 1993).

⁴⁵ For example, the Meiji Constitution established the Imperial Diet as the national legislature consisting of two Houses, an upper House of Peers and a lower House of Representatives. While the House of Peers would be composed of the members of the Imperial Family, nobility, and other persons nominated by the Emperor, the people would elect members of the House of Representatives. MEIJI CONSTITUTION, *supra* note 44, at art. 33, para. 1; *Id.* at art. 35, para. 1.

⁴⁶ BEER & MAKI, *supra* note 31, at 21.

represented a logical extension of American geostrategic constitutionalism, a means to secure the freedom-promoting benefits of peace across the aptly named Pacific Ocean. One particularly noteworthy feature of the 1947 Constitution aimed to secure this peace—and the liberty that flourished under it—in perpetuity. This feature arose out of victory in war and subsequent military occupation calling for a complete disarmament of the Japanese state.⁴⁷ This feature was pacifism, and it was textually embodied in Article 9 of the 1947 Constitution.

When the U.S. military occupied Japan in the fall of 1945, its leadership came with a mandate to fundamentally transform the Meiji Constitution, which was viewed as a cause-in-fact of Japan's militaristic adventurism both prior to and during the Second World War.⁴⁸ An inability of civilian government to organize itself under the pre-war constitution without military support, coupled with a series of assassinations organized by military groups and a perpetual war in China, had led to the downfall and dissolution of Japanese civilian government in the 1930s and the formation of a military-controlled central administration.⁴⁹ From then until the end of the Second World War, military rule and an ideology rooted in militarism would dominate Japan.⁵⁰

In addition to seeking to create a “rule of law” society paralleling the U.S.—there was an overriding belief among U.S. policymakers that Japan should adopt a political system based on the American democratic ideals—the Occupation forces intended to fully excise military influence from the Japanese body politic.⁵¹ In fact, the former goals were widely viewed as a necessary predicate to the latter: a democratic political society, it was believed, would serve as a bulwark against future militarism.⁵²

The Occupation viewed Japan as nothing short of a militaristic state dangerous to world peace, and as such, the

⁴⁷ John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, in JAPANESE CONSTITUTIONAL LAW 40, 40 (Percy R. Luney, Jr., & Kazuyuki Takahashi eds., 1993).

⁴⁸ CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 41, 266 (3d ed. 2012).

⁴⁹ *Id.* at 266.

⁵⁰ *Id.* at 266.

⁵¹ *Id.* at 40.

⁵² *Id.* at 41; THEODORE McNELLY, *THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION* 132 (2000).

eradication of Japanese militarism and complete demilitarization of Japan formed one of the dominant aims of Occupation policy.⁵³ From the personal perspective of U.S. General Douglas MacArthur—head of the Supreme Commander of Allied Powers (SCAP), which was responsible for overseeing and administering the Occupation—Japan should become the “Switzerland of the Far East” and remain neutral in all future wars.⁵⁴

The Japanese had forewarning that Occupation policy would emphasize pacifism. The terms of surrender articulated in the Potsdam Declaration, accepted by the Emperor on behalf of the Japanese nation on August 15, 1945,⁵⁵ included the destruction of Japan’s war-making power and the complete disarmament of its military forces.⁵⁶ The Declaration also provided that “[t]he Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people,” which, as previously discussed, was viewed by the Americans as adding an additional check on Japan military promiscuity.⁵⁷ The Japanese signatories understood the Occupation conditions and in essence consented to them.⁵⁸

⁵³ GOODMAN, *supra* note 48, at 266. The “United States Initial Post-Surrender Policy for Japan,” approved by President Truman on September 6, 1945, listed “complete disarmament and demilitarization” among the principal means to achieve the Occupation’s objectives, together with “the establishment of a peaceful and responsible government which will . . . support the objectives of the United States.” PETER J. HERZOG, *JAPAN’S PSEUDO-DEMOCRACY* 218 (1993).

⁵⁴ HERZOG, *supra* note 53, at 218. The name “Supreme Commander of Allied Powers” referred to both MacArthur’s title and the Allied Occupation offices under his supervision.

⁵⁵ Japan’s formal Instrument of Surrender was signed between the Japanese government and the Allied Powers at Tokyo Bay on September 2, 1945. The Instrument provided for “the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.” INSTRUMENT OF SURRENDER (Japan 1945), <http://www.ndl.go.jp/constitution/e/etc/c05.html>.

⁵⁶ POTSDAM DECLARATION (Japan 1945), <http://www.ndl.go.jp/constitution/e/etc/c06.html>. See also HERZOG, *supra* note 53, at 218; TETSUYA KATAOKA, *THE PRICE OF A CONSTITUTION: THE ORIGINS OF JAPAN’S POSTWAR POLITICS* 17 (1991).

⁵⁷ POTSDAM DECLARATION, *supra* note 56; McNELLY, *supra* note 52, at 176.

⁵⁸ INSTRUMENT OF SURRENDER, *supra* note 55 (“We [the Japanese signers of the Instrument of Surrender] hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration.”); McNELLY, *supra* note 52, at 28.

With ongoing discussions concerning the fate of Japanese military capabilities in the background, on October 4, 1945, General MacArthur communicated to the Japanese government that the Meiji Constitution still in force would require substantial reform.⁵⁹ The U.S. government and the Allied Powers intended to bring about the democratization of the Japanese governmental system, and ordered MacArthur to see it done.⁶⁰ MacArthur repeated the requirement directly to Prime Minister Shidehara Kijuro one week later, on October 11, two days after the formation of his new Cabinet. With MacArthur's position submitted, a committee under Matsumoto Joji, a Minister of State without Portfolio,⁶¹ was formed to consider the question of constitutional revision.⁶²

The Matsumoto committee put together two proposals based on the principles of the Meiji Constitution: a relatively conservative Draft A prepared by Matsumoto personally and a more liberal Draft B prepared by the whole committee.⁶³ With respect to armed forces, Draft A stated: "The system of armed forces is retained. The supreme command of the armed forces may not be exercised independently, except with the advice of the Ministers of State."⁶⁴ While Draft B deleted the Meiji Constitution's references to armed forces, it did not prohibit the maintenance or use of such forces in the future.⁶⁵

On February 1, 1946, Draft A was leaked.⁶⁶ The draft, which continued to place sovereign power in the Emperor, was heavily criticized by the SCAP leadership as simply too conservative, and MacArthur decided that the "Japanese shilly-shallying [on constitutional reform] had gone on long enough."⁶⁷ On February 3, MacArthur ordered SCAP's Government Section—headed by Brigadier General Courtney Whitney and responsible for administrative reform of Japanese governmental systems—to draw

⁵⁹ James E. Auer, *Article Nine: Renunciation of War*, in JAPANESE CONSTITUTIONAL LAW 70 (Percy R. Luney, Jr., & Kazuyuki Takahashi eds., 1993).

⁶⁰ McNELLY, *supra* note 52, at 28.

⁶¹ A Minister of State without Portfolio refers to the position whereby the officeholder does not have any officially delegated responsibilities, but nonetheless has Cabinet-level status.

⁶² AUER, *supra* note 59, at 70.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ KATAOKA, *supra* note 56, at 37.

⁶⁷ AUER, *supra* note 59, at 70; KATAOKA, *supra* note 56, at 37.

up a new draft constitution embodying three principles: retention of the emperor system as the symbol of the nation, but not as a sovereign power; abolition of the nobility; and renunciation of war.⁶⁸

MacArthur's instruction concerning the renunciation of war was broad, seemingly encompassing even self-defense:

War as a sovereign right of the nation is abolished. Japan renounces it as an instrument for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are not stirring the world for its defense and its protection. No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.⁶⁹

This instruction would become the basis for Article 9 and the generally pacifist nature of the 1947 Constitution in its entirety.

B. The Emperor and Origins of Article 9: A Case for Japanese Agency

As explained above, one can frequently find asserted—on both sides of the Pacific—that General MacArthur and the U.S.-led Occupation imposed the 1947 Constitution, with its pacifist character as embodied by Article 9, on the Japanese nation.⁷⁰ While MacArthur's role in the Constitution's formation and ultimate

⁶⁸ AUER, *supra* note 59, at 70; KATAOKA, *supra* note 56, at 37; HERZOG, *supra* note 53, at 219. For a comprehensive account of the American appropriation of the constitutional project, see RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 81–96 (2002).

⁶⁹ Douglas MacArthur, *Three Basic Points Stated by Supreme Commander to Be "Musts" in Constitutional Revision* (Feb. 4, 1946), <http://www.ndl.go.jp/constitution/e/shiryo/03/072/072tx.html#t002>. Part of MacArthur's original instructions for the anti-war clause later appeared in adapted form in the 1947 Constitution's Preamble. Compare MacArthur's instructions ("It relies upon the higher ideals which are not stirring the world for its defense and its protection") with the 1947 Constitution's Preamble ("We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world."). NIHONKOKU KENPŌ (日本国憲法) [CONSTITUTION], art. 9, para. 1 (Japan); HERZOG, *supra* note 53, at 219.

⁷⁰ MCNELLY, *supra* note 52, at 28.

enactment was certainly significant, it is an oversimplification to assert that he arbitrarily imposed a foreign constitution on a feeble post-war Japan solely for U.S. benefit.⁷¹ MacArthur's ultimate position in favor of maintaining the Japanese monarchy and its monarch was one simultaneously shared with, and highly influenced by, the Japanese government and an overwhelming majority of the Japanese people.⁷²

Among the Allied Powers, prominent voices demanded the abolition of the Japanese monarchy, including Soviet leader Joseph Stalin and Sun Fo, president of the Legislative Yuan of the Republic of China (ROC) and son of ROC founder Sun Yat-sen.⁷³ Prior to Japan's formal surrender, the Allies had explicitly rejected an offer from Japan that would have protected the sovereign right of the Emperor.⁷⁴ For the Allies, Japan's "unconditional surrender" brought everything up for grabs, including the imperial throne.⁷⁵ Beyond the issue of the monarchy as an institution, some in the U.S. government—high-ranking members of the War and Navy departments, and members of Congress, among them—wanted to go so far as to try the Emperor as a war criminal.⁷⁶

⁷¹ *Id.*

⁷² *Id.* According to Feldman, "localized self-interest" is the key to creating a powerful and durable mode of governance through the process of imposed constitutionalism. FELDMAN, *supra* note 4, at 886. ("[W]here the international community or the occupier lacks the will or capacity for sustained transformation of constitutional norms over time, it would be mistaken to impose norms that are perceived by local political actors as antithetical to their interests. This is especially true when the imposed norms are understood locally to contradict important symbolic features of the constitutional order.") *Id.* at 887–88. MacArthur understood the widespread Japanese interest in maintaining the monarchy as an "important symbolic feature" of the constitutional structure and catered to it as a means to accomplish the goals of the Occupation, including the promulgation of a new constitution.

⁷³ MCNELLY, *supra* note 52, at 28, 96. For a summary of the fall 1945 debate that took place in Washington over the future role of the Japanese monarchy, see KATAOKA, *supra* note 56, at 23 (expounding on the role of Japan's monarchy).

⁷⁴ KATAOKA, *supra* note 56, at 17–18; MCNELLY, *supra* note 52, at 2.

⁷⁵ MCNELLY, *supra* note 52, at 2–3.

⁷⁶ For example, on September 25, 1945, Democratic Senator Richard Russell of Georgia introduced a joint resolution in Congress declaring that it was "the policy of the United States that Emperor Hirohito [of Japan] be tried as a war criminal." The resolution was debated, but never passed. KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 161 (1991); MOORE & ROBINSON, *supra* note 68, at 36.

MacArthur came to reject such extreme measures and fought strenuously to protect the monarchy and its Emperor.⁷⁷ From a practical standpoint, he viewed the Emperor as a valuable instrument of governance, allowing Occupation directives to be indirectly implemented through the Imperial Japanese Government.⁷⁸ Moreover, MacArthur himself came to respect the Emperor.⁷⁹ After all, the Emperor successfully ordered the surrender of the Japanese military and naval forces in August 1945 and stopped the war, renounced his divinity in January 1946, and became an official sponsor of the democratic constitution written predominantly by MacArthur's staff.⁸⁰ MacArthur regularly gave public praise to the Emperor's actions, further strengthening the post-war status of the monarchy.⁸¹

However, while MacArthur began his mission in Japan with an inclination towards retaining the Emperor as a means to accomplish Occupation goals,⁸² his ultimate position in favor of the Emperor came about in no small part due to a concerted lobbying effort led by the Emperor's own staff.⁸³ These Japanese government insiders were well aware of the American public's perception of the Emperor as a complicit actor in the Japanese war effort, and therefore deserving of trial and punishment—a view they feared would influence MacArthur's policies.⁸⁴ At the same time, the Japanese insiders were aware and took advantage of MacArthur's own unofficial Occupation goal: to advance Christianity in Japan.⁸⁵

MacArthur was a pious Christian who believed that democracy could only exist with a Christian foundation to support

⁷⁷ For a summary of developments in U.S. policy towards the Japanese emperor and MacArthur's constitutional reforms of the Japanese monarchy, see INOUE, *supra* note 76, at 160-220 (describing the development of the Articles of the Constitution).

⁷⁸ MCNELLY, *supra* note 52, at 2.

⁷⁹ INOUE, *supra* note 76, at 219.

⁸⁰ MCNELLY, *supra* note 52, at 11. The exact origins of the Emperor's "Declaration of Humanity," issued on January 1, 1946, are unclear, though MacArthur and his staff were involved. MOORE & ROBINSON, *supra* note 68, at 46.

⁸¹ KATAOKA, *supra* note 56, at 17.

⁸² In July 1945, MacArthur told his chief of staff that he favored "maximum utilization of the existing Japanese governmental agencies and organization" as "premature dislocation of governmental machinery would be undesirable." Doubtless, removal of the Emperor would have been a significant dislocation. MOORE & ROBINSON, *supra* note 68, at 38.

⁸³ *Id.*

⁸⁴ *Id.* at 39.

⁸⁵ *Id.* at 38.

it.⁸⁶ In preparation for the Occupation's democratization project, he and his staff authorized priority entrance of foreign Christian missionaries to Japan, ahead of any other foreign group; provided logistical support to those missionaries groups on the ground; supported the establishment of a new international Christian university in Tokyo; and openly encouraged the Japanese citizenry to embrace Christianity.⁸⁷

With MacArthur's views on the intersection of religion and government in mind, the insiders engaged in a deliberate and organized campaign to persuade MacArthur that the Emperor was not only innocent of war crimes, but was himself a victim of the militarists who had led the Japanese nation into war. They also insisted that the Emperor was a pacifist deeply influenced by Christianity, would cooperate with MacArthur to turn Japan into a Christian-based democracy, and that in fact the Emperor's cooperation was the most efficient and effective means to accomplish the basic American goal of Japanese democratization.⁸⁸ As part of their effort, the insiders enlisted the support and lobbying efforts of both Japanese Christians and American missionaries.⁸⁹ The insiders knew that MacArthur's geostrategic constitutionalism was premised on Christianity—a belief that without the Christian faith, democracy could not flourish.⁹⁰ By recognizing and effectively working within MacArthur's conceptual framework of faith and constitutionalism, the Japanese engaged in constitutionalism of their own. The Japanese geostrategic advantage was in accommodating, at least in appearance, MacArthur's own geostrategic vision. To them, MacArthur's vision offered the surest path to maintaining their imperially oriented national structure and regaining their full sovereignty.

In the end, the Japanese insiders won, and MacArthur was sold. He would later advise the Japanese government on the best way to achieve its primary objective in constitutional reform—protection of the monarchy—and warned them about the difficulties to achieving its objective if appropriate action was not taken.⁹¹ As

⁸⁶ *Id.* at 45.

⁸⁷ *Id.* at 44–45. As of December 1945, SCAP guidelines spelled out that “It is the policy of this theater to increase greatly the Christian influence and every effort will be made here to absorb missionaries as rapidly as the church can send them into the area.” *Id.* at 44.

⁸⁸ *Id.* at 38–39.

⁸⁹ *Id.* at 39–44.

⁹⁰ *Id.* at 44.

⁹¹ McNELLY, *supra* note 52, at 28.

General Whitney would tell the Japanese when presenting the SCAP draft: “[T]he acceptance of the provisions of this new Constitution would render the Emperor practically unassailable.”⁹²

Unsurprisingly, MacArthur’s goal to preserve the institution of the monarchy was widely accepted both within the Japanese government and throughout Japanese society. The governing Liberal and Progressive Parties had been elected on platforms advocating for the preservation of the “national polity,” the central tenet of which was the idea that the Emperor ruled by divine right.⁹³ During the deliberations over the new constitution, Kanamori Tokujiro, the cabinet minister then in charge of constitutional revision, proclaimed to the Diet that MacArthur’s constitution would not alter the national polity, but in fact would preserve it.⁹⁴ Suzuki Kantaro, who had been prime minister at the time of the decision to surrender to the Allied Powers, also emphasized that the proposed constitution would preserve the national structure, with the Emperor at its symbolic center.⁹⁵ In essence, the Japanese accepted the 1947 Constitution in exchange for the preservation of their imperial system, engaging in nothing short of classic geostrategic constitutionalism.⁹⁶ Key to the exchange was Article 9.

The origin of MacArthur’s idea to explicitly constitutionalize pacifism and renunciation of war remains somewhat disputed, although MacArthur claimed later in his career that Prime Minister Shidehara had proposed the idea to him.⁹⁷ According to MacArthur, during a two-and-a-half hour talk on January 24, 1946, Shidehara proposed that “when the new constitution became final . . . it [should] include the so-called no-war clause. He also wanted it to prohibit any military establishment for Japan—any military establishment

⁹² *Id.* at 12.

⁹³ *Id.* at 18.

⁹⁴ MCNELLY, *supra* note 52, at 18. Ironically, in making such public proclamations, Kanamori in fact jeopardized the new constitution and its maintenance of the imperial system. At meetings with Kanamori on July 17 and 23, 1946, Colonel Kades — who worked on General Whitney’s staff — complained that statements that the new constitution would not alter the national structure were undermining the efforts of MacArthur to preserve the monarchy. As Kades emphasized, MacArthur had to defend the new constitution to the Allied Powers, who were extremely critical of the monarchy, and the Japanese were making it very difficult for MacArthur to do this. *Id.* at 18–19.

⁹⁵ *Id.* at 12.

⁹⁶ KATAOKA, *supra* note 56, at 36.

⁹⁷ HERZOG, *supra* note 53, at 219.

whatsoever.”⁹⁸ MacArthur’s account has since received corroboration from renowned Japanese law professor Takayanagi Kenzo, who chaired of the committee that investigated the formation of the Constitution from 1957 to 1964.⁹⁹ Takayanagi originally believed that MacArthur had authored and forcibly imposed Article 9 on the Japanese government.¹⁰⁰ Following his committee’s investigation, however, Takayanagi concluded that:

Article 9 had its origins in Tokyo, not in Washington. . . . Shidehara astonished the General with a proposal for the insertion of renunciation-of-war and disarmament clause into the new Constitution. Apparently the General hesitated at first because of the possible deleterious effects on United States foreign policy in East Asia. . . . The Prime Minister, however, succeeded in persuading the General that in the Atomic Age the survival of mankind should precede all national strategies.¹⁰¹

Despite its origins, however, “Shidehara behaved as if Article 9 were proposed by MacArthur, although he never clearly said so. If he had said the proposal was his idea, not MacArthur’s, it might have been rejected by the Cabinet. Shidehara was diplomatic enough to know this.”¹⁰²

According to Shidehara’s secretary, Shidehara had indeed suggested that Japan should renounce war in the future as a matter of policy, but the idea to explicitly codify the policy in the 1947 Constitution came directly from MacArthur. On this account, Shidehara was shocked to find it codified in the draft constitution.¹⁰³

Other sources claim the idea originated with MacArthur. Frank Rizzo, who succeeded General Whitney as head of the Government Section, asserted that General MacArthur “undoubtedly authored the war renunciation clause.”¹⁰⁴ The personal notes of an

⁹⁸ KATAOKA, *supra* note 56, at 36.

⁹⁹ Auer, *supra* note 59, at 71.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 71–72.

¹⁰³ HERZOG, *supra* note 53, at 219.

¹⁰⁴ *Id.* at 219.

officer on General Whitney's staff likewise claim that General MacArthur was the originator of Article 9.¹⁰⁵ Under this view, the most likely inspiration for MacArthur's renunciation of war requirement to the new constitution was the 1935 constitution of the Philippines.¹⁰⁶

Yet regardless of the actual origins of Article 9, the Japanese government later explained the constitutionalization of the renunciation of war to the Diet as an absolute requirement from SCAP—and importantly, as an absolute requirement to preserve the monarchy. Prime Minister Yoshida, who succeeded Shidehara in May 1946, stated publicly that he agreed with constitutionalizing the renunciation of war in order to quell fears of the reemergence of Japanese militarism.¹⁰⁷ In other words, like their predecessors developing the Meiji Constitution, the Japanese government used a constitutional project to protect their national structure from the threat of dissolution and amplify their national power in the face of substantial foreign authority over their affairs. As MacArthur and his American staff was developing U.S. geostrategic constitutionalism, the Japanese cooperated as a means to assert their own. The Japanese course of action was not coercion or imposition, but rather calculation and choice.

These calculations would continue throughout the deliberation and amendment process prior to the Constitution's promulgation, as the Japanese molded the final document into a product reflecting their self-interest.

¹⁰⁵ *Id.* at 220.

¹⁰⁶ KATAOKA, *supra* note 56, at 37. In 1934, the U.S. Congress passed the Tydings-McDuffie Act, authorizing the Philippine legislature to convene a constitutional convention and draft a constitution in preparation for the colony's independence. Article II, Section 2, of the 1935 Philippine Constitution read: "The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation." *Id.* Other accounts contend that the idea originated from within Government Section, as staff took inspired from the pre-war Kellogg-Briand Pact. *See* McNELLY, *supra* note 52, at 5–6.

¹⁰⁷ HERZOG, *supra* note 53, at 220. Through 1952, Yoshida continued to insist that Article 9 applied to offensive war potential, stating publicly that rearmament would require a revision of the Constitution. On the other hand, Yoshida distinguished "defense potential," which he contended was not unconstitutional. Auer, *supra* note 59, at 74–75.

C. *Debate and Adoption: The Post-War Constitution's Promulgation*

After receiving MacArthur's orders, SCAP's Government Section prepared its draft constitution in six days and submitted it to the Japanese government on February 13.¹⁰⁸ Article 8 of the SCAP draft—which would later become Article 9—stated: “War as a sovereign right of the nation is abolished. The threat or use of force is forever renounced as a means of settling disputes with other nations. No army, navy, air force or other war potential will ever be authorized and no rights of belligerency will ever be conferred upon the state.”¹⁰⁹ Even with the deletion of the words “even for preserving its own security,” the Shidehara Cabinet reacted to the clause with shock.¹¹⁰ However, Shidehara told his Cabinet that this new Constitution—and the renunciation of war clause, in particular—would set the monarchy on a more solid foundation.¹¹¹ With this in mind, the clause remained.

In fact, the Emperor's direct role in the formal implementation of Article 9 should not be overlooked. MacArthur viewed legal continuity with the Meiji Constitution as “necessary to prevent subsequent invalidation of the constitution.”¹¹² This would require the Emperor's cooperation and formal participation: “Article 73 of the Meiji Constitution required that in amending the constitution, the Emperor assume ‘the initiative right’ and that the amendment project be submitted to the Diet by ‘imperial order.’”¹¹³

Aware of his direct role in the implementation of the provisions of the Potsdam Declaration, on June 20, 1946, the Emperor formally initiated constitutional change by submitting the imperial project of amendment of the Meiji Constitution to the

¹⁰⁸ GOODMAN, *supra* note 48, at 40; Auer, *supra* note 59, at 71. For a copy of the SCAP draft of the Constitution, see *Memorandum from the Steering Comm. et al. to the Chief of the Gov't Section of the Pub. Admin. Div.* (Feb. 12, 1946), http://www.ndl.go.jp/constitution/e/shiryo/03/076a_e/076a_etx.html#t005 (last visited Apr. 5, 2016) (providing the draft version that removed a provision that no amendment in the future could constrain or eliminate the rights, which the new Constitution of Japan may guarantee).

¹⁰⁹ Auer, *supra* note 59, at 71.

¹¹⁰ *Id.*

¹¹¹ McNELLY, *supra* note 52, at 12. See also MOORE & ROBINSON, *supra* note 68, at 112–14 (explaining how MacArthur convinced Shidehara that the renunciation of war clause promoted Japan's best interest to re-establish amicable relationships with other countries).

¹¹² McNELLY, *supra* note 52, at 15.

¹¹³ *Id.* at 10–11.

Diet.¹¹⁴ The imperial message referred to the elimination of obstacles to democratic government and affirmed the vision of a constitution representing the freely expressed will of the people.¹¹⁵

The SCAP draft constitution was submitted to the Diet's House of Representatives, which formed a 72-member Constitutional Amendment Committee (CAC) to propose revisions.¹¹⁶ However, it was understood that any changes to the draft required the concurrence of SCAP headquarters.¹¹⁷ The CAC commented on the SCAP draft and made select changes, but attempts to significantly modify the draft were countered by American threats towards the status of the Emperor and threats to take the draft directly to the Japanese people for a popular election.¹¹⁸ The Japanese government believed that if the SCAP draft were presented to the Japanese people alongside the Matsumoto draft, the SCAP draft would be overwhelmingly approved, and so the government understood that its role was to acquiesce to the new Constitution and its reconceptualization of the Japanese state.¹¹⁹

The CAC eventually proposed two amendments concerning Article 9: the words "aspiring sincerely to an international peace based on justice and order" were added to the beginning of the first sentence; and the words "in order to accomplish the aim of the preceding paragraph" were added to the beginning of the second sentence.¹²⁰ When the amendments were brought to the attention of Government Section, no objections were made.¹²¹

At the time, the public explanation for the additions was that they would more sincerely indicate Japan's wish for peace—however, just a few years later, Ashida Hitoshi, who had chaired the CAC,

¹¹⁴ *Id.* at 16.

¹¹⁵ *Id.* at 15.

¹¹⁶ *Id.* at 16–17; Auer, *supra* note 59, at 73.

¹¹⁷ MCNELLY, *supra* note 52, at 16.

¹¹⁸ GOODMAN, *supra* note 48, at 40.

¹¹⁹ *Id.*

¹²⁰ Auer, *supra* note 59, at 73.

¹²¹ MCNELLY, *supra* note 52, at 21. In fact, according to historian Sato Tatsuo, the Government Section showed a great deal of respect for Japanese preferences, refrained from applying pressure during the Diet deliberations, and approved almost all changes recommended by the Japanese. The ideas that the Government Section proposed were not foreign to Japan; since the late nineteenth century, educated Japanese had been well informed of trends in Western constitutional thought, but progressive constitutional ideas were unable to get traction in the face of the ultra-nationalism that gripped Japan until 1945. BEER & MAKI, *supra* note 31, at 85.

announced that the amendments to Article 9 had been written specifically to permit rearmament for the purpose of self-defense.¹²² Ashida's claim directly conflicted with the objectives of the Occupation, which included Japan's perpetual demilitarization as a primary goal. From the Occupation's perspective, a complete prohibition of armed forces would seem the most effective means of preventing the reappearance of militarism.¹²³ Nonetheless, MacArthur's staff seemed to have been aware of the interpretive changes introduced by the CAC amendments and nonetheless acquiesced. When Dr. Cyrus Peake, a Government Section officer, pointed out to General Whitney that the CAC's textual modifications would permit Japan to maintain defense forces, Whitney agreed that this change was "acceptable."¹²⁴

Throughout the Diet deliberations, Prime Minister Yoshida repeatedly clarified the enactment of the new democratic constitution would fulfill a basic precondition for the withdrawal of the Occupation forces: the establishment of a democratic form of government, as provided in paragraph 12 of the Potsdam Declaration.¹²⁵ Interestingly, Yoshida's argument for adopting SCAP's draft constitution mirrored the arguments motivating Japanese leadership of the 1880s to create the Meiji Constitution. In both the late 1880s and late 1940s, Japan found itself under the thumb of foreign power, and in each instance Japanese leaders viewed constitutionalism as an avenue of escape and renewed vitality. In neither period was constitutionalism imposed on Japan; rather, both cases demonstrate Japan choosing constitutionalism as a means to achieve geostrategic advantage. The constitutionalism of 1940s Japan began with surrender to the Allied Powers and acceptance of the Occupation on Japanese soil, and was managed with a view towards reassuming the position of a sovereign and self-governing nation. In short, like their American occupiers, the Japanese actively engaged in geostrategic constitutionalism.

¹²² Auer, *supra* note 59, at 73.

¹²³ HERZOG, *supra* note 53, at 220.

¹²⁴ McNELLY, *supra* note 52, at 21. In fact, despite early policies suggesting permanent disarmament, the American government directive known as SWNCC 228 stated that the civilian branch of government should control the military, suggesting that the American government did not expect a perpetually demilitarized Japan. Nowhere did SWNCC 288 suggest the imposition on a permanent ban on war. HERZOG, *supra* note 53, at 218–219; KATAOKA, *supra* note 56, at 35.

¹²⁵ McNELLY, *supra* note 52, at 16.

The new constitution—drafted by the Occupation, with select approved modifications made by the CAC—was promulgated by the Emperor on November 3, 1946, in line with the procedure for constitutional amendment set out by the Meiji Constitution.¹²⁶

The 1947 Constitution's Preamble sets a pacifist tone that glosses the entire document. From its opening sentence, the denouncement of militarism and aggression that motivated the constitution's drafters becomes evident, as "We, the Japanese people" declare themselves "determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government."¹²⁷ To forever prevent the "horrors of war" and secure "the fruits of peaceful cooperation"—to effectuate the Preamble's ambition and promise, both for the U.S. and Japanese nations who had fought the bitter war in the ironically named Pacific—the 1947 Constitution codifies its renunciation of war in the words of the constitutional text itself:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.¹²⁸

This was the promise of the 1947 Constitution, a promise directed towards the Americans and Japanese alike.¹²⁹ Indeed, it was a promise directed towards the world.

¹²⁶ GOODMAN, *supra* note 48, at 40. Coincidentally, November 3 also happened to be the 94th anniversary of the birth of the Meiji Emperor. *Id.*

¹²⁷ NIHONKOKU KENPŌ (日本国憲法) [CONSTITUTION], May 3, 1947, pmbl. (Japan).

¹²⁸ *Id.* at art. 9.

¹²⁹ Whether the promise has been fulfilled is another matter entirely, but is beyond the scope of this Note.

IV. CONCLUSION

Leading Japanese politicians today continue to challenge the legitimacy of the 1947 Constitution, arguing that its structure and substance are designed to keep Japan perpetually weak.¹³⁰ Some conservative Japanese scholars have even gone so far as to refer to Japan's acceptance of SCAP's draft constitution as the nation's "second surrender."¹³¹

Superficially, this line of reasoning has some truth to it. Article 9 was indeed considered a crucial element to the goals of the victorious Americans, who did not want the specter of a future war in the Pacific hanging over their heads.¹³² MacArthur's revision of the Japanese constitution, therefore, can be understood as an effort to enforce the principal objective of U.S. Occupation policy: to prevent Japan from ever again endangering U.S. national security.¹³³ In fact, MacArthur himself came to view the Japanese Occupation as his greatest military achievement.¹³⁴ This was U.S. geostrategic constitutionalism at its apex.

Yet to contend that the 1947 Constitution was manifestly an imposed instrument of government undersells at best, and overlooks entirely at worst, the agency of Japanese actors and the consideration given Japanese interests in the constitution's development, ratification, and ultimate promulgation.¹³⁵ The constitutional debates

¹³⁰ MCNELLY, *supra* note 52, at 148-150. These members of Japan's political class overlook the fact that the constitution which the 1947 Constitution replaced—the Meiji Constitution—was itself largely of foreign origin and imposition, albeit less directly. Law, *supra* note 3, at 264.

¹³¹ KOSEKI SHŌICHI, *THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION* 109 (Ray A. Moore trans., 1997).

¹³² GOODMAN, *supra* note 48, at 41-42. Ironically, the Occupation's support for Japanese disarmament and the prohibition of the Japanese to ever again become a military power did not last long. The outbreak of war in the face of communist expansion on the Korean peninsula in 1950 changed their tune. American policymakers soon came to view Article 9 as a strategic error, one that kept Japan disarmed in the face of communist aggression. In fact, speaking in Tokyo in November 1953, then-Vice President Richard Nixon himself "pointed out that the situation in Asia had become radically different from what it had been when Article 9 was enacted at the insistence of the U.S. leaders." *Id.* at 268; MCNELLY, *supra* note 52, at 150-151.

¹³³ MCNELLY, *supra* note 52, at 133.

¹³⁴ KATAOKA, *supra* note 56, at 29-30.

¹³⁵ At the same time, such a view undersells the Occupation's collaborative approach to constitutional development. *See also* MOORE & ROBINSON, *supra* note 68, at 10 (explaining that the U.S. Occupation found constitutional revision as "absolutely fundamental" in reforming Japan and even aspired to use its own national tradition of

within the Japanese political community in 1946 were not hasty or shallow, or subservient to Occupation pressures.¹³⁶ To contend that the 1947 Constitution—or, even more narrowly, Article 9—was imposed on a helpless Japan ignores the intelligent and well-informed Japanese who seized the moment to lay a new foundation for their nation in the post-war world.¹³⁷ The Japanese weighed their interests and made a series of calculated decisions to protect them. In particular, Japanese leadership exercised its own brand of geostrategic constitutionalism. These leaders chose surrender and cooperation with the Allied Powers in order to protect their monarchy and their national sovereignty in the long run. Like the Meiji Constitution of the late nineteenth century, constitutionalism came to be viewed by the Japanese as a means to reach a geostrategic end: the national vitality of the Japanese state.

More tellingly, despite mechanisms available in the 1947 Constitution to formally amend the document—or even excise Article 9 in its entirety—Japan has never undertaken to do so. Quite to the contrary, the 1947 Constitution has *never* been formally amended.¹³⁸ “[F]ew if any, alien documents have ever been as thoroughly internalized and vigorously defended as this [Japanese] national charter would come to be [by the Japanese public].”¹³⁹ Moreover, this vigorous defense of the constitution as ratified did not take long to foment: shortly after the proposed constitution became public in 1946, public opinion polls revealed strong and immediate support for the constitution’s foundational precepts, including eighty-five percent of respondents favoring retention of the Emperor in a reduced role, and seventy-two percent characterizing Article 9 as necessary.¹⁴⁰

However, since the 1947 Constitution’s enactment, Japanese governments have regularly “reinterpreted” its provisions to suit changing national security needs. As recently as July 1, 2014, Japan’s current Prime Minister, Shinzo Abe, “reinterpreted” Article 9 to permit Japan’s Self-Defense Force (SDF), the country’s pseudo-

constitution-making as a “normative” guide to help “establish forms of government,” which could bring “happiness” for other nations).

¹³⁶ BEER & MAKI, *supra* note 31, at 92.

¹³⁷ *Id.*

¹³⁸ MCNELLY, *supra* note 52, at 29.

¹³⁹ DOWER, *supra* note 4, at 347 (alteration to original).

¹⁴⁰ Law, *supra* note 3, at 254. *Mainichi Shimbun*, one of Japan’s major newspapers, conducted the cited poll.

military, to play a more assertive role in East Asian affairs.¹⁴¹ Rather than being confined to a merely defensive role, the reinterpretation would allow the SDF to aid “friendly countries under attack” under a theory of collective self-defense.¹⁴² Even a decade ago, such use of force by the SDF would have been unthinkable.¹⁴³

While the reinterpretations of Article 9 in which Abe and his predecessors have engaged might be seen as adventurous when compared to the clause’s text and intent, they have a check: the vote. Japan’s present foreign policy is as much determined by the public’s attitude towards its own interpretations of Article 9 as by diplomacy and national security strategy.¹⁴⁴ While the Japanese government’s stance has been to arm its country purely for individual self-defense, the Japanese people as a whole strongly support the aspiration for peace expressed in the 1947 Constitution and embodied in Article 9.¹⁴⁵ Geostrategic constitutionalism lives on.

¹⁴¹ Martin Fackler & David E. Sanger, *Japan Announces a Military Shift to Thwart China*, N.Y. TIMES (July 1, 2014), http://www.nytimes.com/2014/07/02/world/asia/japan-moves-to-permit-greater-use-of-its-military.html?_r=0.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ MCNELLY, *supra* note 52, at 151.

¹⁴⁵ *Id.*