

# CONSTITUTIONAL PROVISIONS IN THE OCCUPIER'S INTEREST: LESSONS FROM ARTICLE 9 OF THE JAPANESE CONSTITUTION

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## I. INTRODUCTION

With the recent invasions, occupations, and ongoing re-constructions occurring in the Middle East, there has been extensive interest in and scholarship on the concept of nation building in the wake of war.<sup>1</sup> One major component of nation building is the creation of a new or revised national constitu-

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1. E.g., Armin von Bogdandy et al., *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches*, 9 MAX PLANCK Y.B. UNITED NATIONS L. 579

tion for the occupied nation. Legal scholars have written extensively on this constitutional construction process, attempting to identify issues common to all such tasks and to propose possible solutions to recurring problems that are likely to arise in such projects.<sup>2</sup> In attempting to identify, examine, and resolve these problems, past constitutional creation projects have been one major source of inspiration.<sup>3</sup>

Aiming to learn from past mistakes and successes to improve present-day nation building in the Middle East, scholars have conducted immense research into how powerful states have previously conducted post-war reconstructions in defeated states.<sup>4</sup> These researchers have given considerable at-

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(2005); Brent Scowcroft & Samuel R. Berger, *In the Wake of War: Getting Serious About Nation-Building*, 81 NAT'L INT. 49 (2005).

2. E.g., MICHAEL IGNATIEFF, *EMPIRE LITE: NATION-BUILDING IN BOSNIA, KOSOVO AND AFGHANISTAN* (2003); Sujit Choudhry, *Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Politics*, 37 CONN. L. REV. 933 (2005); Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005); Yash Ghai & Guido Galli, *Constitution-building Processes and Democratization: Lessons Learned*, in 2 INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *CONFLICT AND HUMAN SECURITY: FURTHER READINGS* (2006), available at [http://www.idea.int/publications/dchs/upload/dchs\\_vol2\\_sec6\\_2.pdf](http://www.idea.int/publications/dchs/upload/dchs_vol2_sec6_2.pdf); von Bogdandy et al., *supra* note 1.

3. See, e.g., RAY SALVATORE JENNINGS, *THE ROAD AHEAD: LESSONS IN NATION BUILDING FROM JAPAN, GERMANY, AND AFGHANISTAN FOR POSTWAR IRAQ* (United States Institute of Peace 2003), available at <http://www.usip.org/files/resources/pwks49.pdf> (enumerating lessons from previous military occupations that the United States should draw upon in determining its policy in Iraq); Miriam Benze, *Post-World War II Germany as a Model for Successful Nationbuilding* (Fall 2008) (unpublished seminar paper, Chicago-Kent College of Law), available at <http://www.kentlaw.edu/perritt/courses/seminar/benze-final-seminarpaper.pdf> (discussing lessons for nation building derived from situation in Germany after World War II); James D. Brinson, *A Study of Postwar Japan (1945–1950): What Insights and Lessons Can Be Gained From the United States Led Rebirth of Japan?* (2006) (unpublished master's thesis, United States Army Command and General Staff College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA463788> (deriving lessons for the future from the United States occupation of Japan); von Bogdandy et al., *supra* note 1 (drawing conclusions from several constitutional transitions and nation building situations); Ghai & Galli, *supra* note 2 (analyzing the link between the processes of constitution-making and democratization).

4. See, e.g., JAMES DOBBINS ET AL., *AFTER THE WAR: NATION-BUILDING FROM FDR TO GEORGE W. BUSH* (2008), available at [http://www.rand.org/pubs/monographs/2008/RAND\\_MG716.pdf](http://www.rand.org/pubs/monographs/2008/RAND_MG716.pdf) (discussing nation building initiatives undertaken by the United States); von Bogdandy et al., *supra* note 1

tention to the role of foreign states as “nation builders,” where the occupying states attempt to repair the wartime damage and restore order in the defeated states simultaneously during an occupation period. Along with these humanitarian concerns, victorious nations give primacy to ensuring that the defeated state does not maintain any pre-war characteristics that causally contributed to the outbreak of the war.<sup>5</sup>

In attempting to identify how powerful states specifically pursue these aims, many writers have focused intensely on how occupiers have influenced constitutional construction in the defeated state.<sup>6</sup> This focus makes intuitive sense, as the constitution defines how a national government can exercise its powers both domestically and in foreign affairs. Furthermore, a nation's constitution arguably gives structure to the values emblematic of a state.<sup>7</sup> Thus, occupying powers may try to reduce the likelihood of a future war with the defeated state by manipulating the constitutional construction process and ensuring that the new constitution does not contain any structural features that may promote preferences for belligerency

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(examining different approaches to nation building, including the role of domestic and foreign actors in this process); Ghai & Galli, *supra* note 2, at 237 (suggesting guidelines for the role of foreign parties in the constitution-building process).

5. See generally JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 346–48 (1999) (cataloguing the purging of militaristic and nationalistic rhetoric from the Japanese constitution); Scowcroft & Berger, *supra* note 1, at 49–50 (describing how post-conflict nation building is essential for “winning the peace” after winning a war); Benze, *supra* note 3, at 12–18 (detailing the demilitarization and de-Nazification of Germany).

6. See, e.g., DOWER, *supra* note 5, at 346–73 (chronicling the American construction of the Japanese constitution); Choudhry, *supra* note 2, at 933 (using the actions of the United States in Japan as an example of “[o]ccupying military powers. . . recraft[ing] the constitutional orders of vanquished foes”); Feldman, *supra* note 2, at 858–59 (listing well-known cases of constitutional drafting in “the shadow of the gun”); Edmund Spevack, *American Pressures on the German Constitutional Tradition: Basic Rights in the West German Constitution of 1949*, 10 INT'L J. POL. CULTURE & SOC'Y 411, 412–13 (1997) (describing the American drafting of individual rights guarantees in the West German constitution); JENNINGS, *supra* note 3, at 10 (referring to the United States' post-conflict peace efforts in Japan, Germany and Afghanistan).

7. See generally DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST* (2010) (arguing that constitutions do more than provide a framework for laws; the way their broad mandates are interpreted also disseminates societal values and preferences).

rather than for pacific or liberal democratic values.<sup>8</sup> Recognizing that occupying nations hold dual interests of both desiring to further their own national interests and security, while also attempting to promote the occupied nation's own growth and development, commentators on nation building and constitutional construction have acknowledged and examined difficult occupation policy choices that inevitably require that one interest be sacrificed in favor of the other. Analyzing this conflict of interests in the context of constitutional construction, scholars such as Noah Feldman have written detailed normative arguments for placing restrictive limits on occupiers' use of influence and self-interest in overseeing constitutional constructions.<sup>9</sup> Such authors logically oppose any attempt by occupying states to interfere with the constitutional construction process by insisting on constitutional provisions that would never result from an occupied state's exercise of pure self-determination.

Arguments against an occupier utilizing self-interested influence over an occupied state's constitutional construction are admittedly well-reasoned; however, despite their varied and powerful arguments, the restraints these scholars seek to impose on self-interested occupiers go too far to be realistic.<sup>10</sup> Furthermore, critics of occupiers' self-interested influence in constitutional constructions assert that not only is such influence undesirable normatively, but that any attempt to impose truly substantive changes in an occupied nation is doomed to

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8. Behind this latter assertion is what is commonly called "Democratic Peace Theory," which posits that democratic nations are not likely to wage war on each other. While a detailed explanation of this theory and its significant criticisms are beyond the scope of this Note, works by Bruce Russett provide detailed defenses and explanations for its validity. *E.g.*, BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1994); Bruce Russett et al., *The Democratic Peace*, 19 INT'L SECURITY 164 (1995).

9. Feldman, *supra* note 2; *see also, e.g.*, Amatai Etzioni, *A Self-Restrained Approach to Nation-Building by Foreign Powers*, 80 INT'L AFF. 1 (2004) (going beyond Feldman to argue that restraint needs to be the guiding principle at every step of nation building).

10. *See* Choudhry, *supra* note 2, at 935 (describing how the idealism of supporters of "new nation-building" is often not supported by the reality of modern occupations).

fail in every practical sense.<sup>11</sup> Underlying these critics' arguments are two fundamental beliefs. First, for such criticisms to hold any real value, powerful occupying nations must be willing and able to refrain from pursuing their own self-interest in the context of overseeing an occupied state's constitutional construction. Second, advocates of occupiers refraining from self-interested influence in constitutional construction plainly assume that even the most powerful occupiers have no real ability to influence a defeated nation's substantive development and that such efforts will only have negative results.<sup>12</sup>

This Note argues that these two assumptions are unfounded and even contrary to existing evidence. To counter these assumptions, and thus the larger argument against having a foreign occupier act out of self-interest to influence constitutional construction, I will explore the validity of these assumptions in the historical case of the U.S. occupation of and constitutional construction in Japan after World War II. Specifically, this Note will detail the creation and evolution of the Japanese Constitution's Article 9.<sup>13</sup> Implemented primarily due to U.S. self-interest in eliminating any future threat of Japanese aggression,<sup>14</sup> Article 9 has received extensive criticism

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11. *Id.* at 934–35 (citing NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 83 (2004)).

12. *Id.*

13. Article 9 states:

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.

NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 9 (Japan).

14. This description is an oversimplification of the various motives which may have been behind the ultimate creation of Article 9. See discussion on the American reasons for pursuing Article 9 *infra* note 40. Furthermore, there is an outstanding debate as to whether Article 9 was originally suggested by Japanese Prime Minister Shidehara rather than being the creation of General MacArthur. Compare Kenzo Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS* 79–88 (Dan Henderson ed., 1968) (strongly arguing that Shidehara suggested the idea for what would become Article 9 to the head of the U.S. occupation, Douglas MacArthur), with KOSEKI SHOICHI, *THE*

from Japanese conservative elites since its adoption. Interestingly, Article 9 was severely weakened shortly after the end of the American occupation, not because of a popular view of its illegitimacy but because of invasive American political influence exerted on the Japanese Supreme Court in its first and only ruling interpreting the article.<sup>15</sup> Despite its near de facto nullification, Article 9 remains officially in effect today with sufficient popular support to protect it from any sustained attempts at revision. Moreover, Article 9 is recognized as an embodiment of the strength of the Japanese commitment to peace since the end of World War II.<sup>16</sup>

Article 9 serves as an example of the power of occupying nations to successfully mold a defeated nation's constitutional construction to promote the occupier's national interest. The American imposition of Article 9, as well as the subsequent American pressure on Japan to interpret away the Article's substantive constraints, demonstrates the primacy of self-interested considerations in how occupying states oversee the constitutional construction of occupied nations. Additionally, Article 9's history of popular approval demonstrates that occupiers effectively can instill substantive values in an occupied nation's

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BIRTH OF JAPAN'S POSTWAR CONSTITUTION 83–86 (Ray A. Moore ed., 1997) (examining the history of the debate with the evidence and motivation behind the competing claims and concluding that MacArthur was most likely the originator of Article 9); *see also, e.g.*, CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 150–51 (2d ed. 2008) (mentioning the debate but taking no firm stance); Hideo Otake, *Two Contrasting Constitutions in the Postwar World: The Making of the Japanese and the West German Constitutions*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 49–50 (Yoichi Higuchi ed., 2001) (explaining the evidence for both sides and concluding that Shidehara had proposed the concept in terms of a potential official, but non-constitutional, declaration by Japan and that MacArthur had decided to include it in his plans for Japan's new constitution); DOWER, *supra* note 5, at 613 n.57 (noting a historian's rejection of the idea that Shidehara originally conceived of the renunciation of war provision and emphasizing MacArthur's role in its creation).

15. See discussion on the Sunakawa Case, *infra* Part IV, where the subversive actions of U.S. policymakers in controlling the interpretation of Article 9 even after the end of the U.S. occupation will be examined as a dramatic instance of an occupier's self-interest controlling even post-occupation relations with the former occupied state.

16. See KENNETH L. PORT, THE STORY OF ARTICLE 9 OF THE JAPANESE CONSTITUTION 5, 15, (2008), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=kenneth\\_port](http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=kenneth_port) (describing modern associations organized around resisting revision of Article 9).

popular constitutional identity despite intense and sustained opposition by political elites to these “foreign impositions.”<sup>17</sup>

This Note will go through a step-by-step analysis of the history of Article 9, devoting substantial focus to both the motivations of the Americans in constructing and developing Article 9, as well as to the manner in which the Japanese received the article. Part II will start by refuting the argument that Japan is a distinguishable, historical example of a successful constitutional imposition unable to be recreated; instead, I will show that Japan stands as a stark and still unexplained counterexample to the traditional theories that claim that self-determination is an essential component for successful constitutional construction. In Part III, I will begin to discuss the specifics of the historical context under which Article 9 was formulated, proposed, and eventually adopted as part of the Japanese constitution. In Part IV, I focus on the rationale behind the American decisions to first impose Article 9 in Japan’s constitutional construction and argue that its creation was a realization of American self-interest rather than an exercise of Japanese democratic self-determination. Subsequently, I explore how the United States changed its attitude towards Japan’s Article 9 almost immediately after the occupation ended and how U.S. policymakers went to significant lengths to ensure that the Japanese government creatively interpreted Article 9 so as to all but eliminate its substantive content. Part V then focuses on examining how Article 9 has been received by the Japanese populace and its political elites from the time of its initial presentation to the public through the present day. This part will also address how Article 9’s restrictions on Japanese power have affected the government’s role and capabilities in conducting international relations. Finally, Part VI concludes that the Article 9 case study is evidence that occupiers have not, cannot, and should not deliberately refrain from pursuing their self-interest in overseeing the constitutional construction of an occupied state.

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17. *Contra* Feldman, *supra* note 2, at 885–86 (emphasizing that approval by local political elites is key to effecting substantive constitutional change).

## II. JAPAN AS A CASE STUDY AND COUNTER-EXAMPLE TO TRADITIONAL THEORIES

Critics dispute the relevance of older constitutional constructions, including that of Japan after WWII, distinguishing them because they occurred prior to the establishment of a “widespread commitment to democratic self-determination.”<sup>18</sup> However, this reservation seems both erroneous and irrelevant given a brief examination of the circumstances of the Japanese constitutional construction and its ongoing use without a single post-enactment amendment.

First and foremost, critics such as Noah Feldman fail to adequately explain why the Japanese have not revised their Constitution since its adoption in order to better allow for democratic self-determination. Addressing the possibility for revision, Professor Feldman only mentions that the Japanese government did establish a commission that considered, but never actually moved to implement, constitutional revisions after the American occupation had ended.<sup>19</sup> He argues that this failure to implement revisions represents the Japanese popular “acquiescence” to a constitution known to be imposed by the United States.<sup>20</sup> Accordingly, Feldman argues that such an acquiescence is “unimaginable” in the present day due to the background commitment to democratic self-determination.<sup>21</sup> What is notably missing from this argument is any explanation for why the Japanese have still not replaced their constitution or at least implemented extensive revisions to provide for true democratic self-determination. If such a background commitment has truly developed since the 1960s, there seems to be no reason why it would only apply to modern constitutional constructions and not to existing constitutions that did not meet its criterion of democratic self-determination and thus arguably remain illegitimate. As such, the development of such a widespread commitment to self-determination as aca-

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18. Feldman, *supra* note 2, at 859; *see also* Choudhry, *supra* note 2, at 935–36 (casting doubt on whether such a commitment to democratic self-determination has actually developed and arguing that it alone does not fully distinguish modern nation building from past instances). *But see* Feldman, *supra* note 2, at 858–59 (acknowledging the continued existence and success of imposed constitutionalism).

19. Feldman, *supra* note 2, at 859.

20. *Id.*

21. *Id.*



demics suggest either has not truly occurred, or it has occurred but constitutions that are constructed with a significant absence of democratic self-determination can still survive if legitimacy is gained later.

Second, the characterization of the constitutional construction in Japan as a unilateral set of commands from the U.S. occupiers is essentially accurate; however, such a description grossly oversimplifies the level of consultation back and forth between the U.S. and Japanese leaders charged with revising the constitution. This oversimplification undervalues the level of democratic self-determination that actually existed in the Japanese constitutional creation. Furthermore, such an analysis creates an exaggerated perception of the difference between past and present U.S. commitments to recognizing a role for democratic self-determination in the constitutional construction context.<sup>22</sup> Because of this, scholars have failed to recognize that in 1946, America understood the benefits of promoting an occupied state's exercise of democratic self-determination. Thus occupied states could put their own touch on the manner in which the constitution was structured. However, they could not refuse to adopt the essential values that the occupier required as retribution and payment for the war that had resulted in the occupation.<sup>23</sup>

Third, at the time of the constitutional construction, the United States had gone to significant lengths to ensure that the public viewed the constitution as domestically created. It was not until two years after its adoption that details of the extent of American involvement were made public.<sup>24</sup> Feldman and others who share his view present few reasons as to why

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22. See generally SHOICHI, *supra* note 14 (discussing the origins of Japan's constitution); DOWER, *supra* note 5, at 346–404 (discussing the history of the American occupation of Japan).

23. See DOWER, *supra* note 5, at 391 (noting American urging of Japanese legislatures to propose amendments within the bounds of respecting the core principles that were imposed).

24. See RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY 321 (2002) (mentioning how American involvement in the constitutional construction was publicized just a few years after its completion); JAPAN'S COMMISSION ON THE CONSTITUTION, THE FINAL REPORT 222 (John M. Maki ed., trans., 1980) (describing the great extent of U.S. control over the constitutional creation as known shortly after the constitution's adoption); DOWER, *supra* note 5, at 391 (describing how censorship of General Douglas MacArthur, who served as the Supreme Commander for the Allied Powers, and his

the constitution must be authentically created through democratic self-determination, and most of their critiques only address the need for a popular belief in democratic self-determination as a prerequisite for stable new governance.<sup>25</sup> The presentation of an occupied state's commitment to democratic self-determination as an obstacle to an occupier's pursuit of its interests hinges on the assumption that an occupier will always be unable to successfully disguise its interests as equivalent to or aligned with those of the occupied state.

Fourth, the assertion that the Japanese "failure" to modify or reject its constitution after the level of American imposition was discovered would never be tolerated by a free nation today, due to an increased embrace of democratic self-determination as a core national value, gives no credit to the political pressures that states face after losing a war and suffering an occupation. Occupied nations, whether Japan or Germany after WWII or Middle Eastern nations in the near future, depend heavily on their former occupiers for financial, political, and military support in their fledgling state; to suggest that such states are willing or able to challenge any imposed stipulations that their former occupiers had considered to be important preconditions to ending the occupation gives insufficient weight to political realities.

My fifth and final criticism of the scholarly contention that Japan's constitutional construction is inapposite for understanding such constructions today relates to the possibility for a constitution, illegitimate at the time of its adoption, to acquire legitimacy over time. While Feldman finds that foreign powers will generally lack sufficient motivation to ensure a societal transformation that would legitimize the imposed constitutional values, by itself a questionable assumption as I argue

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staff's heavy involvement with the constitutional construction ended in 1949).

25. See Feldman, *supra* note 2 (arguing that the power of democracies is predominately exercised through majority rule, thus occupying states cannot hope to accomplish any goals which would be opposed by a substantial portion of the occupied populace); see also IGNATIEFF, *supra* note 2, at 24 (arguing that this superficial promotion of self-determination is a more accurate description of modern constitutional constructions); Choudhry, *supra* note 2, at 935 (acknowledging the academic trend of recognizing a "new" nation building concept that embraces self-determination, but pointing out that reality does not match the theory).

in Part IV.B–C, such a conclusion fully ignores the possibility that societies that adopt constitutions without democratic self-determination may evolve to adopt the values of such a constitution over time.<sup>26</sup> The case of Japan's constitution in fact poses an ideal case for demonstrating that if an imposed constitution is insulated from post-occupation revisionism for a long enough period of time, the domestic populace may both internalize its values and adopt interpretations of its provisions that best suit domestic interests. This means of legitimizing an imposed constitution under an extended period of democratic self-determination via judicial and popular interpretation creates the opportunity for occupied states to test the experience of operating under the constitutional values imposed by a foreign state while also allowing the state to gradually restore any core values and interests which were not originally present in the text of the imposed constitution. By imposing constitutional values which would not be expected to be embraced by the occupied state, occupiers can ensure that the ideals they desire to see develop will have some chance to grow roots in the occupied state's national identity rather than being rejected at the outset. Additionally, by requiring that the occupied state at least facially embrace foreign-regarding values as it reemerges onto the global stage, the occupier provides the occupied state a chance to experience greater international acceptance, which in turn may influence a nation's populace to embrace such values as aligned with its own interests.<sup>27</sup> Of course, such foreign values may still be rejected through a constitutional amendment process, but only after the occupied state has undergone a deliberative choice that any such values are truly undesirable.

For these reasons, a case study of Japan's constitutional construction, with special focus on the evolution of its Article 9, is more than suitable for responding to critiques of the concept of "imposed constitutionalism" regardless of the era in which that imposition occurs. These reasons further demon-

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26. See Feldman, *supra* note 2, at 887–88 (“[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.”).

27. See *infra* Part IV (discussing the imposition of American values onto the Japanese).

strate the universal applicability of the rebuttal of not only Feldman's claim but also any similar arguments that rely upon a sense of modern commitment to a right of self-determination. Having demonstrated why the Japanese constitutional creation should not be considered an unhelpful, aberrational model of successful, yet imposed constitutional constructions, the following section will delve into the historical context in which the Japanese Constitution was created.

### III. THE ORIGIN OF ARTICLE 9 OF THE JAPANESE CONSTITUTION

To understand the relevance and successes of the Japanese constitutional construction, it is essential to understand the Japanese Constitution's origins and the historical setting and confluence of forces and influences that led to its birth. This section will map out the history of the events, the relevant actors, and the motivations and political forces behind the creation of the new Constitution.

In the wake of World War II and the graphic debut of the power of nuclear weaponry, the United States commenced a lengthy occupation of a thoroughly defeated Japan.<sup>28</sup> This occupation was headed out of a General Headquarters (GHQ) in the financial district of Tokyo by General Douglas MacArthur, who served as the Supreme Commander for the Allied Powers along with his staff (collectively SCAP).<sup>29</sup> Of all the tasks charged to SCAP, MacArthur viewed the creation of the new Japanese Constitution as "probably the single most important accomplishment of the occupation."<sup>30</sup> The basis for SCAP's authority to revise Japan's Constitution officially came from portions of the Potsdam Declaration, a joint statement issued by the Allied Powers in July 1945 calling for Japan's unconditional surrender.<sup>31</sup> The Potsdam Declaration's various terms calling for substantial reform of the Japanese government, in combination with orders to General MacArthur from Washing-

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28. See generally DOWER, *supra* note 5 (providing an authoritative historical analysis and description of the occupation).

29. *Id.* at 40, 47.

30. *Id.* at 346.

31. Proclamation Defining Terms for Japanese Surrender (Potsdam Declaration), U.S.-Republic of China-U.K., July 26, 1945, available at <http://www.ndl.go.jp/constitution/e/etc/c06.html>.

ton, prompted SCAP to take up the task of “revising” the Japanese Constitution.<sup>32</sup>

From the start, there was significant tension between MacArthur’s desire to leave responsibility for constitutional revision to the remaining members of the Japanese government and the American government’s expectation that significant changes in Japanese governance would be implemented rapidly in accordance with the demands of the Potsdam Declaration.<sup>33</sup> Despite the Japanese government’s eagerness to exercise control over the inevitable revisions to its Constitution, General MacArthur eventually decided that SCAP would need to take charge of creating adequate revisions to the Constitution.<sup>34</sup> There are many reasons for this change of plans, but arguably most significant was the inadequacy of the drafted revisions suggested by the Japanese government, which were made public on February 1, 1946.<sup>35</sup> By February 3rd, MacArthur had already drafted “three principles” that were to be the core guidelines for SCAP’s Government Section’s (GS) drafting of constitutional reforms.<sup>36</sup>

The second of these principles was the original concept and wording of what would eventually become Article 9. As it differs significantly from the ultimate text adopted for Article 9 but contains the best clues as to the original intent behind the renunciation of war<sup>37</sup> concept, the guideline is provided in full below:

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32. DOWER, *supra* note 5, at 348.

33. *Id.*

34. General MacArthur’s extensive control of constitutional revision should be viewed as confirming de facto American control of Japan’s constitutional reform through SCAP despite the official supremacy of the Far Eastern Commission (FEC), an Allied institution which was created to oversee SCAP’s operations. Moreover, Washington allowed MacArthur to exercise vast power and discretion in his control of the occupation, often to the ire of the FEC. *See* SHOICHI, *supra* note 22, at 69, 75–76 (contrasting the FEC’s desire to exercise heightened oversight of Japan’s constitutional revisions with SCAP’s belief that it could act even on matters of constitutional revision without consulting the FEC).

35. *See generally id.* at 7–79 (reviewing the full sequence of events from MacArthur’s initial notification to Japanese officials to expect constitutional change through February 1, 1946).

36. *Id.* at 78–79; DOWER, *supra* note 5, at 360.

37. It should be noted that despite repeated reference to the “renunciation of war” provision, Article 9 and all of its draft forms actually consist of a renunciation of war paragraph and a renunciation of war material and arms

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now 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 forces.<sup>38</sup>

This text will be analyzed in greater detail in Part IV.A as evidence of the initial intent of General MacArthur, and thus the United States,<sup>39</sup> in forming a constitutional restriction on the Japanese ability to engage in war. At this point, it is important to highlight that the original scope of the restriction was immense, going so far as to prohibit the Japanese government from retaining even the right to national self-defense. Additionally, the fact that the renunciation of war provision was listed as one of the first of SCAP's ideas for potential Japanese constitutional revisions demonstrates that the provision was viewed by MacArthur and his staff as an essential prerequisite for securing the occupation's goal of ensuring that Japan would not reemerge as a threat to international peace upon American departure.<sup>40</sup>

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paragraph. THEODORE MCNELLY, *THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION* 105 (2000). Additionally, the Japanese Constitution has statements in its preamble stating Japan's commitment to pacifism, though that section will not be discussed in this Note. SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 234 (2011).

38. DOWER, *supra* note 5, at 361; *accord* MOORE & ROBINSON, *supra* note 24, at 94.

39. This Note assumes, for convenience, the fiction that General MacArthur, as the official agent of the United States overseeing the occupation, acted to promote the national interests of United States until the time of his removal from power, and as such refers to his interests and actions, and those of the United States, interchangeably. *See* DOWER, *supra* note 5, at 360 (noting the incredible extent of MacArthur's authority to act on behalf of the United States); *see also supra* note 34 and accompanying text (explaining the breadth of MacArthur's power and corresponding U.S. deference to his decision-making in Japan).

40. *See* SHOICHI, *supra* note 22, at 82–84 (describing how General Whitney of SCAP especially viewed the renunciation of war provision as the most important revision to be proposed). *But see* DOWER, *supra* note 5, at 362 (suggesting that the real value of the renunciation of war provision to SCAP was its ability to protect the Imperial system by sufficiently placating the ardent critics who refused to stand by and allow both the imperial system and a

Within a week of MacArthur's distribution of his three principles, GS had completed a draft constitution.<sup>41</sup> It was at this point that the members of GS, specifically Colonel Charles Kades, altered MacArthur's provision on the renunciation of war, most significantly removing the language forbidding Ja-

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militarized Japan to remain). In fact, the weight of the evidence seems to support the conclusion that the renunciation of war provision was primarily desired as a tool to reduce the severity of international opposition against allowing the Imperial system to remain. Oddly enough, while the desire to protect the emperor would seem to fall neatly into the realm of interests held primarily by the occupied nation, here the interests of the United States and the Japanese "old guard" aligned due to MacArthur's firmly entrenched belief that the maintenance of the emperor was, ironically, a necessary prerequisite to American aims in Japan, including the instillation of liberal democratic values throughout the society, as he could be used to present American recommendations as Japanese in origin. See MATSUI, *supra* note 37, at 15 (noting MacArthur's belief that the imperial system was "essential for implementation of occupation policy"); DOWER, *supra* note 5, at 362, 611 n.41 (noting MacArthur's view that equally important to pushing for Japanese democratization was preservation of the Emperor system in Japan, going so far as to describe the latter goal as "integral to Japanese political and cultural survival"); see also *supra* note 14 and accompanying text (acknowledging the debate over the mixed motives behind the inclusion of the renunciation of war article in the constitution). However, the fact that the maintenance of the emperor was the primary purpose of Article 9 does not lessen the role of American self-interest in its adoption as both a tool of securing control, and as a direct boost to implementing pacifist values in Japan's constitutive national document. MacArthur's apparent belief in the extraordinary importance of maintaining the imperial system in order to promote a national perception of democratic self-determination appears to support Noah Feldman's emphasis on the necessity of legitimacy in constitutional constructions; however, the gains from legitimacy here result only from its perceived, rather than actual, existence. See *supra* Part II (suggesting how occupiers can bypass the dilemma between pursuing their self-interest and the likely resistance of occupied states if the occupiers are able to frame their interests as aligned with the interests of the occupied states, or even as originating from the occupied states). Similarly, while Japanese conservatives may have accepted the imposition of Article 9 as the sole means of saving the imperial system, this fact does not seem to have substantially reduced their antipathy to it, and they may have justified accepting it by rationalizing that it would be removed once the occupation had ceased. See DOWER, *supra* note 5, at 364 (describing how Prime Minister Yoshida would later defend his generous cooperation with SCAP as a necessity of the circumstances of the occupation whose primary aim was to free Japan from occupied status and preserve the imperial system); Otake, *supra* note 14, at 51 (pointing out that Yoshida took inconsistent positions as to his support for whether Japan should undergo permanent disarmament).

41. DOWER, *supra* note 5, at 365-73.

pan to engage in war in self-defense.<sup>42</sup> Additionally, Colonel Kades removed the references to Japan's reliance on the "higher ideals" of the international system.<sup>43</sup> The next step was the presentation of the GS draft constitution to the Japanese government, whose members were appalled by what they perceived as such radical and foreign impositions, especially the provision on the renunciation of war.<sup>44</sup>

The draft constitution would undergo several revisions as the Japanese government representatives changed various words and phrases in creating a Japanese language draft of the Constitution. These moves instigated strife with GS when translated back into English. However, after its translation, re-translation, and presentation to the emperor, the draft of the Constitution submitted for approval to the Japanese legislature contained the same wording for Article 9 as originally submitted by Colonel Kades.<sup>45</sup> After intensive legislative debate about the meaning of the submitted version of Article 9,<sup>46</sup> Hitoshi Ashida, chair of the House of Representatives' subcommittee on constitutional revision, proposed an amendment to the wording of the article.<sup>47</sup> The amendment was rather simple, adding only the phrase "[a]spir[ing] sincerely to an international peace based on justice and order," to the start of the first paragraph, and the phrase "[i]n order to accomplish the aim of the preceding paragraph," to the start of the second paragraph.<sup>48</sup>

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42. *Id.* at 369. It is important to note that because Kades removed the language prohibiting wars for self-defense it was not necessarily his intention to rephrase the article so that Japan could be realistically secure in its right to self-defense. No conclusion as to the full scope of Japanese defense rights intended to be preserved by Kades' language could be clear from reading the text of his draft alone. This issue of the vagueness and ambiguity as to the provision's relation to self-defense will be addressed more thoroughly below in Part IV and note 58.

43. DOWER, *supra* note 5, at 361.

44. James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS. 171, 174 (1990); MATSUI, *supra* note 37, at 236.

45. DOWER, *supra* note 5, at 394-96.

46. *Id.* at 395. An interesting feature of these debates is the fact that there was no consensus as to whether the submitted version of Article 9 did in fact prohibit a Japanese right to engage in wars of self-defense. *Id.*

47. *Id.*

48. *Id.* at 395-96; MATSUI, *supra* note 37, at 236-37.



The implications for the interpretation of Article 9 after this revision, deemed the Ashida Amendment, were complex and unlikely obvious at the time. Despite SCAP exercising close oversight over any proposed amendments that arose during the legislative debates, there was a deliberate choice not to interfere with the Ashida Amendment, as top SCAP officials did not view its changes to be significant enough to threaten any of the basic principles of the constitution.<sup>49</sup> Ashida himself claimed that he proposed the amendment specifically to allow an interpretation of the Article that would permit the Japanese government to potentially raise and maintain a self-defense force.<sup>50</sup> Despite this boasting, there does not seem to be any consensus by scholars nor any persuasive evidence that can clarify the extent to which either Ashida or the overseers at GHQ had any idea that the amendment would eventually be used to justify the development of the Japanese Self Defense Forces (SDF).<sup>51</sup>

In less than a year since the inception of the renunciation of war provision as part of MacArthur's guidelines, the wording and thus the scope of the provision's restrictions had changed profoundly and repeatedly. Despite the enormity of these changes, the life of Article 9 had only just begun when the Japanese Constitution was officially adopted in 1947. The next part will briefly review the creation of Article 9 as described with a focus on the American motivations behind each step of the changes to the Article, but the majority of Part IV

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49. See McNELLY, *supra* note 37, at 126 (suggesting that Kades believed that defense forces were already permissible under the Article 9); DOWER, *supra* note 5, at 396 (noting that the required approvals for the changes were made right away).

50. DOWER, *supra* note 5, at 396.

51. Compare *id.* (pointing out the complete lack of evidence to support Ashida's assertion that he proposed the amendment with the intent of providing interpretive leeway for self-defense forces), and MATSUI, *supra* note 37, at 237 (arguing that there is no clear evidence for why the amendment was proposed or adopted), with McNELLY, *supra* note 37, at 21, 126 (arguing that Ashida and Kades recognized the implications of the amendment for the potential of self-defense forces at the time of its proposal, and that such an interpretation was explicitly discussed and approved within GS). See also SHOICHI, *supra* note 22, at 192–211 (detailing the mystery of the original understanding and motivations behind the Ashida Amendment, including how a great deal of evidence supporting the idea that its insertion was to allow for self-defense forces was fabricated).

will address how the United States pursued its self-interest by pressuring Japan to adopt an interpretation of Article 9 that was essentially the ideological opposite of its initial conception. In analyzing American motives in this way, I hope to shed light on the unmistakable primacy of national self-interest as a motivating factor for occupying nations who seek to influence the development of occupied states, even in a post-occupation context. Since American interests shifted rapidly and extremely over just a couple of decades, Part IV analyzes the role of U.S. interests in driving the development of Article 9 in three phases: the constitutional construction phase (1945-1947), the occupation phase (1947-1951), and the immediate post-occupation phase (1951-1960).<sup>52</sup>

#### IV. AMERICAN SELF-INTEREST AS A DETERMINATIVE FACTOR IN INTERPRETING ARTICLE 9

##### A. *The Constitutional Construction Phase*

While the origin of Article 9 remains subject to debate,<sup>53</sup> the views of those involved in its adoption are well-documented.<sup>54</sup> The initial conception of Article 9 most likely arose

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52. These phases roughly correspond to major instances of American action that had direct influence on the creation and interpretation of Article 9. The final phase is unique for many reasons, especially as the nature of U.S. influence on the Japanese Constitution became notably less "direct." For this reason, it is this phase which is subject to the bulk of the analysis in Parts IV and V due to the stark manner in which Japanese and American interests clashed over the future of Japan's Constitution. Analysis of relevant events from 1960 until the present have been omitted from this Note primarily due to space constraints.

53. See *supra* note 14 (describing the controversy as to who had the original idea for a renunciation of war provision in the Japanese Constitution).

54. However, this wealth of source material on the views of those involved must be viewed critically, as over time the provision became the source of a great deal of political conflict and corresponding embarrassment for both the Japanese and the Americans. As such, public accounts by individuals involved in the Article's construction alleging to explain their intentions and expectations held during its creation, usually written years after its adoption and published in the context of the Cold War, should be read with a great deal of skepticism, especially in regards to the meaning of Article 9. See, e.g., Auer, *supra* note 44, at 171 (highlighting MacArthur's denial of any intent to limit Japan's right to self-defense only a few years after directing the constitution's drafters to do exactly that); DOWER, *supra* note 5, at 396-99 (describing the unsubstantiated nature of Ashida's claim of introducing his amendment to allow for the development of self-defense forces); see also

out of American goals to ensure that Japan would never reemerge as a military threat, formulated even prior to the start of the occupation and MacArthur's assumption of control.<sup>55</sup> General MacArthur chose to achieve this goal by formulating a constitutional provision that provided for an explicit renunciation of war clause, worded strongly so it would forbid Japan from engaging in war even as a means of protecting its national security.<sup>56</sup>

When Colonel Kades actually drafted an article under MacArthur's guidelines, he consciously decided to remove the prohibition on wars in self-defense;<sup>57</sup> however, due to the extraordinary breadth of the prohibition on any types of armaments provided in the article's second paragraph, any sort of right to self-defense seemed purely academic.<sup>58</sup> Even with the deletion of the express ban on a right to self-defense, there is little evidence the United States deviated from its original position that Japan be forbidden to maintain "war potential" of any sort.<sup>59</sup> Thus, it is clear that the inclusion of Article 9 dem-

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*supra* notes 14, 51 (noting the confusion in accurately portraying the history of Article 9 due to individuals' later dissemination of misinformation that contradicts the evidence of their real intentions). As a result, this Note does not rely on statements made by officials involved in the drafting of Article 9 as to beliefs and intentions in creating Article 9 if those statements were made after its adoption, especially since the majority of such statements do not seem to be supported by any evidence from the drafting period.

55. See, e.g. DOWER, *supra* note 5, at 613 n.57 (noting wartime pronouncements aimed to demilitarize Germany and Japan); McNELLY, *supra* note 37, at 5-7 (discussing various actors who may have contributed to MacArthur's idea to demilitarize Japan).

56. DOWER, *supra* note 5, at 360-61.

57. *Id.* at 369.

58. Colonel Kades appears to have had a strong ideological opposition to banning Japan's national right to self-defense, but he did not seem to be suggesting that his deletion of the express ban of the right to use war in self-defense also allowed for an implicit right to hold any armaments that would make self-defense feasible. See Auer, *supra* note 44, at 174 (describing Kades's suggestion that the Japanese fighting a hypothetical war of self-defense may be restricted to utilizing "bamboo sticks"). But see McNELLY, *supra* note 37, at 117-18 (consistently mentioning his view that Kades read his draft and subsequent version of Article 9 to allow for an implicit right to a limited set of military forces strictly for self-defense).

59. See MOORE & ROBINSON, *supra* note 24, at 250 (concluding definitively that there is no evidence that Ashida had any intention of allowing for rearmament through his amendment. It seems unlikely that any Americans would interpret it as such if he himself did not.). *Contra* sources cited *supra*

onstrates how the Japanese constitutional construction was directly manipulated by American self-interest. Within a matter of a few years, American interests regarding the development of Japanese war potential changed drastically, directly affecting the development of the Japanese Constitution.

### B. *The Occupation Phase (1947–1952)*<sup>60</sup>

By March 1948, less than a year since the new Japanese Constitution had gone into effect, U.S. policymakers were already seriously considering a limited remilitarization of Japan.<sup>61</sup> The rise of the Cold War and the newfound importance of the threat of Communism as the basis for American foreign policy decisions directly accounts for why the U.S. views on Japanese rearmament changed so drastically and so quickly.<sup>62</sup> Whether Article 9 was beloved or hated by the Japanese,<sup>63</sup> it was understood that American interests would dictate the interpretation and application of the article.<sup>64</sup> As the threat of Asian Communism grew rapidly from the rise of both the U.S.S.R. and China, the American desire to have Japan as a

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note 51 (suggesting that the Americans in charge of overseeing Japan's constitutional revision believed that the proposed (and amended) versions of Article 9 would allow for Japanese self-defense forces); *see also* DOWER, *supra* note 5, at 396–97 (describing the FEC's fear that Article 9 under the Ashida Amendment allowed for self-defense forces and that the constitution thus needed further revision to ensure "civilian" control).

60. The occupation officially ended in 1952 as the majority of American forces left Japan pursuant to the U.S.-Japan peace treaty concluded the previous year. *See* Treaty of Peace with Japan art. 6, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (officially ending the war between the United States and Japan and ending the occupation). *See also* SAYURI UMEDA, LAW LIBRARY OF CONG., JAPAN: ARTICLE 9 OF THE CONSTITUTION 13 (2006) (indicating that, though Allied occupational forces were withdrawn, some foreign occupation forces were retained, pursuant to bilateral treaties, to deter armed attack on Japan).

61. UMEDA, *supra* note 60, at 10.

62. *See id.* (indicating that the Communist threat to Far East Asia, particularly Russia "not [having been] extensively weakened," lead to the United States changing its policy toward Japan's disarmament).

63. The Japanese response to such an extreme and unprecedented constitutional provision will be examined in Part V, but it suffices to say here that responses were mixed.

64. DOWER, *supra* note 5, at 398 (noting the controversy over the interpretation of Article 9, suggesting that the confidence of American policymakers in controlling its interpretation was misplaced).

source of military support correspondingly grew as well.<sup>65</sup> Ultimately, the outbreak of the Korean War motivated the United States to abandon its original conception of a completely demilitarized Japan and force Japan to begin rearmament.<sup>66</sup>

In light of the complete shift of American interests in regards to Japanese rearmament, General MacArthur, who was put in charge of operations in Korea, quickly had to start explaining why the new Japanese Constitution created under his command did not prohibit actions that seemed to be banned explicitly by Article 9.<sup>67</sup> This task was all the more embarrassing as the extent of American involvement in crafting the Japanese Constitution was increasingly public knowledge by 1950.<sup>68</sup>

Initially American interests in rearming Japan were limited to having Japan provide for its own defense while American troops were busy in Korea, so MacArthur ordered that the Japanese government form a National Police Reserve (NPR), the predecessor to the modern Self Defense Forces (SDF).<sup>69</sup>

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65. See SHOICHI, *supra* note 22, at 252 (noting that, as the Chinese Communist Party expanded, the United States shifted its policy, stopping demilitarization and giving priority to the economic recovery of Japan so that Communism would not spread to Japan).

66. See UMEDA, *supra* note 60, at 10–11 (noting the major role of the spread of Communism in East Asia as a focal point for changes in U.S. policy towards Japan).

67. See, e.g., Auer, *supra* note 44, at 176 (explaining that MacArthur did not intend to deprive Japan of the means to defend itself); UMEDA, *supra* note 60, at 10–11 (discussing MacArthur's authorization of Japan's police reserve).

68. See MOORE & ROBINSON, *supra* note 24, at 321 (describing the various public sources that detailed American involvement in the drafting of the Japanese Constitution).

69. UMEDA, *supra* note 60, at 11. There is some evidence that the United States wanted more from Japan than just its provision for its own defense. However the fact that this never occurred, despite the U.S. maintenance of super-constitutional power over Japan at the time, shows that there was no sustained U.S. desire to have Japan actively participate in foreign military activity. See GLENN D. HOOK & GAVAN McCORMACK, JAPAN'S CONTESTED CONSTITUTION 13–14 (2001) (noting that the United States actually requested that Japan provide over 300,000 troops to aid the United States in Korea); GOODMAN, *supra* note 14, at 219 n.566 (citing a report showing the United States wanted Japan to create a paramilitary force of 150,000 during the Korean War). Cf. Edward J.L. Southgate, *From Japan to Afghanistan: The U.S.-Japan Joint Security Relationship, the War on Terror, and the Ignominious End of the Pacifist State*, 151 U. PA. L. REV. 1599, 1599–1601 n.2, 1614 (2003) (pointing

MacArthur had publically “clarified” that Article 9 in no way prohibited the Japanese inherent national right to self-defense just months prior to the outbreak of war in South Korea, but interpreting the Article to protect the right to engage in war for self-defense did not solve the obstacle posed by the article’s second paragraph containing a ban on all “war potential.”<sup>70</sup> Initially these forces were defended as legitimate because they were just a small contingent of ground forces with limited weaponry not capable of waging any sort of “war.”<sup>71</sup>

Although these grounds reasonably explained the existence of the NPR through the end of the American occupation, the continued constitutionality of the existence of these forces proved to be more difficult to justify after losing the “super-constitutional” authority of SCAP and the context of urgency presented by the Korean War.<sup>72</sup> Rather than providing for a constitutional amendment, U.S. policymakers were thoroughly convinced that Article 9 would present no obstacle to successfully pressuring Japan for further rearmament in the future, and they insisted that Japan accept their interpretation of Article 9.<sup>73</sup> Perhaps having grown accustomed to controlling the implementation and development of the Japanese Constitution, the United States decided not to press for constitutional revision of Article 9 prior to ending the occupation. This decision consequently set the stage for incredible tensions between America and Japan during the immediate post-occupation period. Absent the super-constitutional powers used by the United States during the occupation, American policymakers after 1951 had to find more indirect ways to continue manipulating the development of Article 9 in a manner that would suit U.S. interests.

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out that a sizable contingent of what has been described as a Japanese coast guard was sent to Korea to conduct secret minesweeping operations).

70. UMEDA, *supra* note 60, at 11.

71. *Id.*; Auer, *supra* note 44, at 177–78.

72. UMEDA, *supra* note 60, at 10–11.

73. *Id.* at 12. Japan committed to increasingly provide for its own defense as part of a security treaty signed with the United States on the same day as the San Francisco Peace Treaty. Security Treaty Between the United States and Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3329 [hereinafter 1951 Security Treaty] (providing as well that Japan maintained the right to engage in collective security agreements and collective self-defense, and further granting the United States the right to maintain military troops in Japan to partially provide for Japan’s defense).

### C. *The Post-Occupation Phase (1952–1960)*<sup>74</sup>

While American de jure control over Japan's affairs ended in 1952, American interest in dictating how Japan's Constitution was to be interpreted did not. In demonstrating how essential an occupier's self-interest is in how it conducts constitutional constructions, it is informative to examine how far the United States went to rectify the "mistake"<sup>75</sup> of inserting Article 9 into Japan's Constitution. While unable or unwilling to pressure Japan to go so far as to amend its Constitution to better serve shifted American interests, the United States instead applied immense political pressure on the Japanese government to interpret Article 9 in a manner that would allow Japan to substantially aid in American military affairs.

While the United States utilized treaty arrangements as its primary means of ensuring that Japan developed into an ally that held a strong military presence in the Pacific,<sup>76</sup> the most important instance of post-occupation U.S. influence over the development of Japan and its Constitution was the Sunakawa Case.<sup>77</sup> The case concerned the Japanese government's decision to allow the United States to take private land to extend a runway on a U.S. air force base near the town of Sunakawa in 1957.<sup>78</sup> This taking sparked a large protest<sup>79</sup> during which

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74. I have chosen 1960 as an appropriate end point for this period as it is the year of the renewal of the Japan-U.S. Security Treaty, an event which would define the structure of U.S.-Japan military relations through the remainder of the Cold War. See generally UMEDA, *supra* note 60, at 13–33 (describing how the major shifts in Japanese-U.S. military relations happened pre-1960 and post-1990); Southgate, *supra* note 69, at 1615–16 (suggesting that the period from 1946–1960 is the most enlightening one for understanding U.S.-Japan military relations, at least until the late 1990s).

75. HOOK & MCCORMACK, *supra* note 69, at 14 (describing how Vice President Nixon characterized the U.S. choice to create Article 9).

76. E.g., U.S. and Japan Mutual Defense Assistance Agreement, U.S.-Japan, Mar. 8, 1954, 5 U.S.T. 661; Treaty of Mutual Cooperation and Security Between Japan and The United States of America, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1632 [hereinafter Mutual Security Treaty] (which was technically only a revision of the 1951 Security Treaty, *supra* note 73, but which significantly changed its provisions).

77. Saiko Saibansho (Sunakawa Case) [Sup. Ct.] Dec. 16, 1959, Showa 34(A) no. 710, 13 SAIKO SAIBANSHO KEJI HANREISHU [KEISHU] 3225 (Japan) [hereinafter Sunakawa Case], available in English at <http://www.courts.go.jp/english/judgments/text/1959.12.16-1959-A-No.710.html>.

78. Alfred C. Oppler, *The Sunakawa Case: Its Legal and Political Implications*, 76 POL. SCI. Q. 241, 242 (1961).

seven protestors broke down a fence and trespassed onto the base.<sup>80</sup> At their trial in 1959, the protestors argued that the law under which they were charged was unconstitutional in light of the fact that Article 9 prohibited the stationing of any military forces in Japan, and the district court remarkably agreed.<sup>81</sup>

The details of how the district court accepted the protestors' arguments and interpreted Article 9 to forbid the use of U.S. military forces to provide for Japan's defense will be analyzed in Part V.B of this Note, but it should be apparent from the holding alone that such an interpretation of Article 9 could not be allowed to stand if Japan was to meet its 1951 treaty obligations. U.S. policymakers immediately recognized the importance of this decision, as it bore directly on their significant foreign policy and national security interests in maintaining military forces in Japan.<sup>82</sup> If the case had arisen earlier, the United States likely would have addressed the situation differently, with less urgency and through more traditional diplomatic means; however, by 1959 the United States and Japan were in the middle of politically charged negotiations as to how to substantially revise the 1951 Security Treaty.<sup>83</sup> News of

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79. Protests of the Japanese government's support of U.S. military interests were increasingly common throughout the 1950's, as a large and passionate portion of the Japanese populace vocally opposed the maintenance of U.S. military bases in various locations throughout Japan. See Douglas H. Mendel, Jr., *Japanese Attitudes Towards American Military Bases*, 28 FAR E. SURV. 129-130 (1959) (describing the "widespread popular hostility" to the U.S. military presence in Japan). These bases became "intensely unpopular" after the Korean War ended, as it was the primary excuse for their necessity (and constitutionality). *Id.* at 130. See also *infra* Part V (examining these protests as evidence of Japanese popular acceptance of Article 9 as a legitimate constitutional provision that substantively limited the government's discretion in military matters).

80. Oppler, *supra* note 78, at 242-43.

81. For a detailed analysis of the complex and interesting legal arguments made about why the law criminalizing interference with U.S. military forces or property was unconstitutional, see *id.* at 241-45. The specifics of the protestors' arguments relating to Article 9 as accepted by the district court will be examined in Part V below.

82. See, e.g., McNELLY, *supra* note 37, at 153-160 (describing American interests in preserving a military force in the Pacific to counter the increasingly threatening influence of Communism in the region, going so far as to characterize Japan as a "superdomino"); MATSUI, *supra* note 37, at 245.

83. In fact, the Japanese had been eager to revise the terms of the 1951 Security Treaty shortly after regaining sovereignty, but it was not until



the verdict not only threatened the constitutionality of any potential military agreement between the United States and Japan but also granted legitimacy to and boosted the morale of the protest movement.<sup>84</sup>

As such, upon hearing news of the trial court's decision (commonly known as the "Date Decision"),<sup>85</sup> U.S. officials moved quickly to attack it on all fronts.<sup>86</sup> The U.S. ambassador to Japan at the time, amazingly and somewhat ironically, was Douglas MacArthur II, nephew of General Douglas MacArthur.<sup>87</sup> MacArthur II met with the Foreign Minister of the Japanese government the day after the Date Decision to convey American insistence that the Japanese government do everything within its power to rectify the decision as soon as possible. Specifically, MacArthur II recommended that the government appeal the case directly to the Supreme Court.<sup>88</sup> Additionally, less than a month after meeting with the Foreign Minister, MacArthur II met privately with the Chief Justice of

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around 1958 that the United States was willing to begin negotiating such revisions. See J.A.A. STOCKWIN, *GOVERNING JAPAN: DIVIDED POLITICS IN A MAJOR ECONOMY* 51 (3d ed. 1999) (discussing the success of the 1958 negotiations); I.M. DESTLER, *MANAGING AN ALLIANCE: THE POLITICS OF U.S.-JAPANESE RELATIONS* 16–19 (1976) (discussing Japan's attempts during the mid-1950s to challenge the 1951 Security Treaty). See also *Bold 1955 Treaty Offer to U.S. Revealed*, YOMIURI SHIMBUN, Jul. 28, 2010, <http://www.yomiuri.co.jp/dy/national/T100727005413.htm> (reporting recently declassified information that in 1955 the Japanese government had actually sent the U.S. government a proposed draft of a new treaty, intended to replace the 1951 Security Treaty, which the United States categorically refused).

84. Mendel Jr., *supra* note 79, at 129; STOCKWIN, *supra* note 83, at 51.

85. Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 30, 1959, 180 Hanrei Jiho [HANREI] 2 (Japan) [hereinafter Date Decision]. The decision was dubbed the "Date Decision" after Akio Date, the presiding judge on the three judge panel that heard the case. Oppler, *supra* note 78, at 243–44.

86. *U.S. Coerced Court in '59 Base Case*, JAPANTIMES.COM (May 1, 2008), <http://info.japantimes.co.jp/print/nn20080501a5.html>.

87. *Id.*

88. *Id.* (stating that MacArthur II expressly mentioned to the Foreign Minister the U.S. concern that the decision would frustrate talks on revising the 1951 Security Treaty); see also *U.S. Ambassador Pressed Japan's Top Court to Reject Lower Court Ruling that U.S. Forces in Japan are Unconstitutional*, AKAHATA (May 11, 2008), <http://www.japan-press.co.jp/modules/news/index.php?id=4761> [hereinafter *Ambassador Pressed Japan*] (noting that a direct appeal from the trial court to the Japanese Supreme Court had only been done once before).

the Japanese Supreme Court.<sup>89</sup> Even without direct evidence of what occurred in MacArthur's closed-door meeting with the Chief Justice, the circumstances of the meeting and the resulting history strongly suggest that the Japanese government's appeal was all but a formality to the reversal of the Date Decision.

The Japanese Supreme Court delivered a unanimous opinion in the Sunakawa Case on December 16, 1949, but unanimity may be less indicative of widespread agreement on the merits and may instead serve as evidence of the influence of the intense pressure on the court to decisively reject the Date Decision. Despite voting unanimously to adopt the joint opinion, the decision did notably have eight additional opinions made by a total of ten out of the fifteen justices on the court which varied greatly in their rationales for the holding and their tone in describing any possible merits of the protestors' claims.<sup>90</sup> The Sunakawa Case is important for a variety of reasons, including being the first and only case where the Supreme Court provided substantial interpretation of Article 9,<sup>91</sup> but adequate treatment of its legal reasoning and political ramifications is outside the scope of this Note. Therefore, only the relevant points in the opinion, specifically how the text and history of Article 9 are interpreted and any textual evidence which may show the influence of American pressure on the court's reasoning, will be discussed.

The joint opinion of the court decisively states that Article 9 in no way bars Japan's inherent right to self-defense, nor

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89. See *Ambassador Pressed Japan*, *supra* note 88 (describing how MacArthur II was informed by the Chief Justice that the case had been given priority but that a decision would still take several months).

90. Saiko Saibansho (Sunakawa Case) [Sup. Ct.] Dec. 16, 1959, Showa 34(A) no. 710, 13 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU] 3225 (Japan). Six of the additional opinions were "supplemental opinions." This means that the authors agreed with both the holding and reasoning in the joint opinion and simply wished to add individual thoughts not present in the majority opinion. See HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* 101-02 (1989) (explaining the forms of Japanese Supreme Court opinions by analogy to U.S. Supreme Court opinions). The remaining two opinions agreed only with the holding of the joint opinion and serve to explain how the writing justices reached the same holding while rejecting the majority's reasoning. *Id.* at 102 (noting that both types of opinions are analogous to the American concurrence).

91. Isao Sato, *Treaties and the Constitution*, 43 WASH. L. REV. 1057, 1066 (1968).

does it prohibit Japan from exercising this right by entering into security agreements where foreign nations agree to guarantee Japanese defense.<sup>92</sup> The joint opinion went on to bypass the thorny question of whether the ban on military forces and armaments in Article 9(2) extended to the context of self-defense, but notably it held that the Article's ban was limited by the term "war potential," which was defined to only apply to such military forces and instruments over which Japan had a right of "command and supervision."<sup>93</sup> Finally, the joint opinion went on to uphold the constitutionality of the 1951 Security Treaty, which it reviewed only under the limited test of whether the treaty's adoption was "clearly unconstitutional and void."<sup>94</sup>

The justices delivered multiple additional opinions in the case that clarified or distinguished their views from the joint opinion. These additional opinions focused mainly on how the joint opinion addressed the question of the constitutionality of the 1951 Security Treaty. I admit that claiming that these opinions are particularly influenced by MacArthur II's meeting with the Chief Justice is little more than speculation.<sup>95</sup> Accord-

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92. Saiko Saibansho (Sunakawa Case) [Sup. Ct.] Dec. 16, 1959, Showa 34(A) no. 710, 13 SAIKO SAIBANSHO KEJI HANREISHU [KEISHU] 3225 (Japan) ("Thus, this Article renounces the so-called war and prohibits the maintenance of the so-called war potential, but certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance . . . . Article 9 of the Constitution does not at all prohibit our country from seeking a guarantee from another country in order to maintain the peace and security of the country.")

93. Consequently, the opinion concluded that Article 9 could not apply to foreign armed forces. *Id.*

94. More accurately, the court ducked the question altogether, instead choosing to utilize a doctrinal solution akin to the American political question theory and described the matter as one best left to the political branches of government. *Id.* While the joint opinion does not expressly identify its action as following "political question" doctrine, Justices Hachiro Fujita and Toshio Irie wrote a supplementary opinion clarifying that the opinion represented the Japanese use of a similar doctrine, while Justice Katsumi Tarumi disclaimed knowledge of the American "political question" doctrine but went on to elaborate on a Japanese theory of judicial restraint essentially identical to the concept, which was at play in the majority opinion. *Id.*

95. This point is only amplified by the fact that details of MacArthur II's meeting with the Chief Justice remain unknown. See *Ambassador Pressed Japan*, *supra* note 88 (noting multiple "private meetings" between MacArthur II and

ingly, I will remark only on two issues that I believe may have been directly influenced by MacArthur II's actions: the two opinions which do not accept the majority reasoning and the unanimous choice not to address whether Article 9(2) bans "war potential" over which Japan exercises "command and supervision."

The choice to utilize political question doctrine to resolve the question of the 1951 Security Treaty's constitutionality signaled the Japanese Supreme Court's conscious and self-regarding decision to significantly limit the scope of its own power,<sup>96</sup> a choice with which a minority of the court disagreed.<sup>97</sup> However, this decision also represents the majority's decision to recognize the overwhelming pressure of the political realities evidenced by the ongoing importance of military security treaties to both the nation of Japan and to the ally upon which it depended for defense, the United States. Consequently, the majority of the court, including the Chief Justice, may have been acting pursuant to the policy needs of the United States. This view is bolstered by the opinions' repeated references to the international nature of Article 9 and the international forces necessarily involved with and affected by any potential decision on the treaty's constitutionality.<sup>98</sup> Accord-

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the Chief Justice). Given this, I do not believe it is unreasonable to imagine that the U.S. interest and its preferred resolution of the case were likely conveyed to the Chief Justice with the expectation that he would at least provide that information to the other justices for their consideration.

96. See *supra* note 94 and accompanying text (describing the Court's use of reasoning akin to political question doctrine to limit the scope of its own authority).

97. See Saiko Saibansho (Sunakawa Case) [Sup. Ct.] Dec. 16, 1959, Showa 34(A) no. 710, 13 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU] 3225 (Japan) (opinion of Okuno & Takahashi, JJ., and opinion of Kotani, J.) (criticizing the majority for relying on a rationale akin to the political question doctrine).

98. For example, Chief Justice Kotaro Tanaka characterizes the concept of national self-defense as not only a right, but also a "moral obligation assumed unto itself by the state in the community of international society," and states that Article 9 does not erase this obligation nor "the duty of maintaining peace and security in the community of international cooperative entity." *Id.* (opinion of Tanaka, J.) He goes on to conclude, "unless we give due consideration to the matter from the standpoint of international dimension, it will be an impossible task to interpret Article 9 of the Constitution." *Id.* The fact that the supplemental opinion of the justice with whom MacArthur II met contains statements that essentially replicate the stated expecta-

ingly, the minority justices' opposition to the choice of political question doctrine, may have been due not only to their sincere reluctance to relinquish authority over such matters entirely to the political branches that are demonstrably less insulated from foreign pressures but also to their unwillingness to let American interests dominate the development of the Japanese Constitution.

As tenuous as the above assertion may be, it is at least based on a critical reading of the text of the opinions. I further suggest that some or all of the members of the Japanese Supreme Court, motivated by the desire to avoid delivering politically momentous and fractious opinions that would upset the U.S. government, deliberately chose not to address the question of the constitutionality of any Japanese-controlled "war potential." Unfortunately, this theory is based only on the curious absence of an explanation from the opinions. The choice of all the justices to limit the scope of their opinions to only the narrowest constructions of the legal questions presented was neither unprecedented nor unexpected. By 1959, the Supreme Court had already turned down one chance to adjudge the constitutionality of Japanese-controlled "war potential."<sup>99</sup> The Sunakawa Case similarly lacked any facts that demanded a judgment on the constitutionality of "war potential" under Japanese control. However, it is hard to believe that the court could not have justified making such a judgment as either con-

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tions of a U.S. policymaker commenting on the American view that Japan should assume at least a nominal role in providing for international self-defense is rather stark evidence of the influence of the meeting in furthering American interests. See UMEDA, *supra* note 60, at 12 ("[I]t was felt that Japan should be willing to make at least a token contribution and a commitment to a general cause of collective security," quoting a comment from John Foster Dulles to Prime Minister Yoshida in the course of negotiating the U.S.-Japan Peace Treaty in early 1951). Of course, Justice Tanaka may have simply held ideological beliefs closely aligned with American views and so his meeting with MacArthur II may have had virtually no effect as Tanaka was already sold on the cause. See Oppler, *supra* note 78, at 250-51 (noting the unique force of Tanaka's opinion long prior to the revelation of U.S. behind-the-scenes involvement with him, but also mentioning that Tanaka's views on the interdependence of nations, especially in the realm of national security, were well known prior to the Sunakawa Case).

99. Saiko Saibansho [Sup. Ct.] Oct. 8, 1952, 6 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 783 (Japan) (NPR Case) (dismissing a bald claim alleging the unconstitutionality of the NPR under Article 9 because the claim presented no case or controversy to grant standing for such a challenge).

venient or necessary.<sup>100</sup> Again, it is worth noting that the decision to avoid addressing the issue of Japan's right to provide for its own defense outwardly signaled that the court would not render unconstitutional a core demand of the United States. Such a demand was well known for its primacy in the 1951 treaty negotiations with Japan and was increasingly expected by the United States throughout the 1950s.<sup>101</sup> Additionally, avoidance protected decisional unanimity by not forcing the justices to choose between either driving the final nail into the metaphorical coffin of Article 9 or instigating a domestic and international political uproar by prohibiting Japan from providing for its own defense in the midst of Cold War tensions. Therefore, by reserving judgment on the applicability of Article 9 to Japan's potential to maintain its own "war potential" for self-defense purposes, the court again adopted a path of constitutional development that directly suited American interests with little regard for the constitutional text or original intent.

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100. For instance, the court was willing to rule that Article 9(2) did not eliminate a national right to self-defense despite the fact that such a ruling was technically unnecessary to how the court resolved the questions of the case. See Saiko Saibansho (Sunakawa Case) [Sup. Ct.] Dec. 16, 1959, Showa 34(A) no. 710, 13 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU] 3225 (Japan) (opinion of Tarumi, J.) ("While still holding that the court had no authority to review the constitutionality of the Japan-U.S. Security Treaty, the decision of this court, nevertheless, proceeded to adjudge whether the treaty conforms to the first part of paragraph 2, Article 9 of the Constitution. In the process of its reasoning, the court began its explanation with the assertion that Japan had the inherent right of self-defense, thus rendering an opinion on the intent of the provisions of the Constitution . . . .") The court's deliberate desire not to rule on the constitutionality of Japanese pseudo-military forces has been demonstrated for decades. See MATSUI, *supra* note 37, at 241-43 (reviewing cases spanning four decades in which the Japanese Supreme Court found excuses not to touch on the constitutionality issue regardless of how directly relevant it was to the resolution of the case).

101. See UMEDA, *supra* note 60, at 12-15 (describing that American negotiators of treaties with Japan were to ensure that Japan maintained and gradually built up the means to provide for its own defense); see also 1951 Security Treaty, *supra* note 73 ("[T]he expectation, however, [is] that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression . . . ."); U.S. and Japan Mutual Defense Assistance Agreement, *supra* note 76, art. VIII (promising that Japan will "take all reasonable measures which may be needed to develop its defense capacities . . . .").

## V. ASSESSING THE SUCCESS OF ARTICLE 9 AS AN IMPOSED CONSTITUTIONAL VALUE

This part of the Note shifts the analytical focus from examining the role of American self-interest in including Article 9 in Japan's constitutional construction to measuring the extent to which Japan's national identity and constitutive values accommodated or absorbed the extreme pacifism imposed by the United States through Article 9.<sup>102</sup> As in Part IV, this sec-

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102. It is important to mention at the outset the difficulty, if not impossibility, of gauging the extent to which apparent changes in an occupied state's national values are causally linked to any corresponding constitutional provision. First, the standard problems associated with this type of political science-based inquiry certainly exist, such as identifying what a state's national values are, when those values have changed, and what, if anything, had a causal relationship to that change; however, these problems are inevitable in any such study that lacks significant quantitative data to test its hypotheses. More importantly, I mean to point out that the post-war context, in which constitutional construction inquiries are conducted, may entirely confound the hope of engaging in valuable analysis. Losing a war significant enough to result in an occupation is likely to cause a state's populace to undergo a revolutionary re-conception of their nation's identity and corresponding constitutive values. As such, any examination of a state's development under an imposed constitution may prove useless in determining the role of the constitution in affecting the course of that state's development, as the only possible basis of comparison, the value structure of the pre-war state, may likely have been rendered completely irrelevant due to transformative impact of the war on the nation's collective consciousness. To counter this latter issue, I have done my best to focus on a single value, national self-defense, which should arguably be an inherently desirable right for any state, regardless of the context of its constitutional construction. See Feldman, *supra* note 2, at 860 (choosing for his case study the issue of state religion, which similarly is a value that should remain relatively insulated from the value-altering effects of war, and depends only on meeting the condition that the state in question has a post-war population composed of a majority of Muslim citizens; if this condition is not met, Feldman notes that different value struggles will likely emerge but not necessarily the issue of state religion). Some questions and criticisms will always still remain, obviously. For instance, is national self-defense truly an inherently desired right by any national populace so that any attempt to prohibit its realization will be met with opposition, or can an occupied state sufficiently trust foreign powers to adequately provide for its defense such that it will not mount any resistance to an imposition such as Article 9? For the purposes of this Note, it will suffice to state that it is unlikely that either extreme is fully correct. To respond to the arguments of Feldman, Choudhry, and others who believe that any unwanted constitutional constructions which are imposed by self-interested occupiers will inevitably fail, it is enough to demonstrate that occupiers may have various means of ensuring that such provisions succeed.

tion will address the integration of Article 9 into the Japanese national identity in subsections that roughly correspond to Japan's increasing independence from American influence.

#### A. *The Occupation Phase (1945–1952)*

The occupation phase is easily the least informative period for gathering information about the authentic Japanese view of and reaction to Article 9 for many reasons, most notably that American power and influence over Japan was at its zenith. Since SCAP was engaging in strict censorship of various topics, including all issues relating to its role in constitutional drafting, Japanese public opinion on American impositions was either non-existent or too ill-informed to be of any value.<sup>103</sup> Similarly, while Japanese government officials could debate, discuss, and tinker with the mechanics of Article 9,<sup>104</sup> there was never a question that it would ultimately be implemented in the Japanese Constitution as envisioned by SCAP or that its interpretation and application would remain subject to American oversight.<sup>105</sup>

Keeping the above qualifications in mind, only one issue deserves attention in this section: the popular response to the new Constitution and Article 9. The role of public opinion has been given little attention in this Note so far, and it is crucial to understanding how self-interested constitutional constructions can succeed. Therefore, reviewing how the Japanese public reacted to the March 6, 1946 dissemination of the SCAP

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103. See DOWER, *supra* note 5, at 405–40 (citing various examples of the breadth of SCAP's censorship). While polling data of public opinion on the constitution gathered shortly after the 1949 release of the information detailing the extent of SCAP's role in its creation would be ideal to use, for several reasons the data is not available due to a nearly "complete absence of revisionist agitation" between 1946 and 1950. H. Fukui, *Twenty Years of Revisionism*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS 44 (Dan F. Henderson ed., 1968).

104. E.g., Dower, *supra* note 5, at 395–98; MOORE & ROBINSON, *supra* note 24, at 169–70; SHOICHI, *supra* note 22, at 192–202.

105. See DOWER, *supra* note 5, at 547 (describing how, when the outbreak of the Korean War led the United States to issue orders to the Japanese government demanding the start of Japanese rearmament, the United States was not to initiate any amendment proceedings so as to ensure the legitimacy of these actions under the text of Article 9, and disappointed Japanese leaders from all sectors had no recourse but to comply).



draft constitution should provide some evidence of the original impressions of the Japanese populace regarding Article 9.

Polling evidence paints a picture of popular opinion as severely critical of the substantive limits of Article 9, despite general theoretical support for an anti-war provision.<sup>106</sup> For instance, in one poll that demonstrated an amazing level of support, 72% of respondents were in favor of the renunciation of war concept. However, the same poll also found that there was a strong popular commitment to interpreting the Article so that it did not prohibit a Japanese right to self-defense or the right to maintain forces sufficient for realizing that right.<sup>107</sup> Thus, the apparent high level of support for Article 9 as a general idea was greatly tempered by the fact that such support masked public reluctance to commit to relinquishing the right to maintain military forces. Even more explicit evidence of this public antipathy to the apparent self-defense ban set by Article 9 can be found in one newspaper's reaction: "[T]he Japanese people would defend the nation's life and independence at the cost of blood."<sup>108</sup>

The public statements of Japanese political party leaders as to their opinions on the March 6 draft also provide an interesting glimpse into the opinions of the Japanese political elite who were likely to drive future political change and developments after the occupation ceased. These statements were made by individuals who had been highly involved in the political events going on between GHQ and the government, and these individuals likely had greater knowledge of the specific influence of the SCAP on the draft than the average citizen whose views were captured by the polls discussed above. As party leaders were better informed, their statements serve as better evidence of the Japanese reaction to American impositions. However, the statements also carry significant problems in terms of their evidentiary value in representing the honest

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106. See, e.g., Fukui, *supra* note 103, at 42 (explaining that the draft was subject to "scathing criticism"); MOORE & ROBINSON, *supra* note 24, at 270 (citing the general support for the idea, but not the specifics, of an anti-war provision).

107. MOORE & ROBINSON, *supra* note 24, at 270 (recording the results of a May 1946 *Mainichi Shimbun* poll).

108. Fukui, *supra* note 103, at 42 (quoting the *Yomiuri-Hochi Shimbun* which published those strong words just two days after the release of SCAP's draft constitution).

beliefs of the speakers or their respective constituencies. These party leaders had to balance the need to represent their party interests with their desire not to offend SCAP.<sup>109</sup> Even in light of the powerful motive to remain in the good graces of SCAP, the opinion statements on the SCAP draft constitution were similar to the polling data in that they were characterized by negative criticism.<sup>110</sup> Thus, the clear feedback from the public opinion data is that SCAP's constitutional draft did not meet popular expectations. Although there seemed to be widespread support for the concept of a renunciation of war clause, the strict limit on "war potential" even for self-defense was notably unpopular.<sup>111</sup> This was not a passing sentiment. One poll taken in 1950 found that almost twice as many respondents as compared to the 1946 poll desired Japanese rearmament, predicated on the understanding that any military forces acquired would be utilized solely for self-defense purposes.<sup>112</sup> Overall, the poll data showed large-scale support for Article 9 as a pro-peace concept, but there was a strong resistance to relinquishing a right to maintain self-defense forces.<sup>113</sup>

Before the end of the decade, Japan was already on the path toward a whirlwind of changes that affected every aspect of popular conceptions of Article 9. Sparked initially by the increasing Cold War pressures with the fall of China to Communism in 1949 and the outbreak of the Korean War the next

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109. *Id.* at 43 (mentioning the fact that these opinion statements were "cautious in tone" and "couched in generalities" so as to not offend SCAP, going on further to identify certain statements which likely contained flat-out falsehoods in light of subsequent behaviors).

110. *Id.* at 42-43.

111. Here the role of inside information as to the importance of this provision to MacArthur personally and to the goal of protecting the imperial system may have proven decisive as statements from the party leaders notably were supportive of this provision. MOORE & ROBINSON, *supra* note 24, at 270. It is important not to overstate the criticism here, as only one political party actually explicitly opposed the draft constitution, the Communist Party. See DOWER, *supra* note 5, at 387 (explaining that the Communists opposed the draft on the grounds of both objecting to the continuation of the imperial system *and* to the denial of the right to self-defense).

112. Fukui, *supra* note 103, at 55.

113. This finding seems to support exactly the prediction of critics of constitutional constructions driven by self-interest. However, it is the ultimate adoption or rejection of Article 9 by the Japanese populace which is the focus of this inquiry.

year, Japan emerged from the occupation in 1952 in the midst of an intense political battle raging in its legislature over the future of Article 9, the Japanese defense forces, and Japan's new security treaty commitments to its former occupier.<sup>114</sup>

### B. *Popular Discontent (1952–1960)*

The 1950s was a period of intense change for Japan as a nation, especially for matters concerning Article 9. Japan would experience constant internal political struggles over constitutional revision of Article 9, increasing de facto violation of its provisions, rising pressure from the United States for Japan to meet its ever-growing treaty obligations, and steadily rising popular discontent with the ongoing presence of U.S. military bases and troops.<sup>115</sup> Concurrently, Japanese conservative political elites returned to power, carrying along an intense dislike for what they viewed as an American-imposed Constitution.<sup>116</sup> Most importantly, battle lines were drawn as numerous politically diverse and powerful groups joined together under the banner of revisionism, a cause for all of those who were eager to see either the complete rewriting of the Constitution or the implementation of major revisions to various provisions of the Constitution, especially Article 9.<sup>117</sup>

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114. Fukui, *supra* note 103, at 46.

115. *See id.* at 46–70 (giving a summary of the rise and fall of revisionist sentiment in Japanese political movements in the 1950s, with a focus on the role of rearmament and U.S.-Japan military relations in legislative debates); MOORE & ROBINSON, *supra* note 24, at 319–22 (describing how the Cold War altered U.S. policy interests regarding Japan and the immediate implications for constitutional revision); STOCKWIN, *supra* note 83, at 47–52 (detailing the domestic tension and rising popular discontent in Japan's political affairs in the 1950s).

116. Fukui, *supra* note 103, at 46–47. *See also* HOOK & McCORMACK, *supra* note 69, at 14–15 (mentioning the views of Nakasone Yasuhiro, who would serve as Prime Minister in the 1980s, that the Japanese Constitution was un-Japanese). Nakasone's views seem to exemplify those expected by critics of self-interested constitutional constructions, so it will be especially informative to see why his and his colleagues' fervent plans for constitutional revision fell through.

117. *See generally* Fukui, *supra* note 103 (identifying three different types of revisionism, with the second type centered around pursuing revision of Article 9, and describing their history and ultimate failure in great detail). *See also* MOORE & ROBINSON, *supra* note 24, at 320–22 (describing the formation of an official Japanese "Commission on the Constitution" which pursued legislative inquiries as to the appropriateness of constitutional revision); MAT-

These revisionist movements quickly garnered widespread popular and political support, and despite having started as significantly factionalized, they managed to drive major reformations of the political landscape that ultimately resulted in the creation of the most powerful political party in modern Japanese history, the Liberal Democratic Party (LDP).<sup>118</sup>

With this powerful momentum and popular support, why then was the revision of the Japanese Constitution, much less its reviled Article 9, never realized? The answer to this question is multifaceted and complicated,<sup>119</sup> and for purposes of vindicating the staying power of imposed constitutional constructions, only two of the reasons deserve attention here. First, the rise of revisionist efforts spurred the development and political union of multiple groups around a principle of anti-revisionism, devoted to zealously thwarting the aims of revisionism and especially revisionists' rearmament goals.<sup>120</sup> This group, devoted to protecting the pacifistic norms of the Japanese Constitution that revisionists decried as imposed, was able to gain sufficient seats in the legislature by 1956 to block any attempt at amendment.<sup>121</sup> Thus the anti-revisionists, underdog defenders of the norms inherited from the U.S. occupation, were still able to preserve Article 9 and the legacy of the imposed Constitution despite lacking the level of support equivalent to that of the revisionists. This example demonstrates the error underlying the assumption that if constitu-

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SUI, *supra* note 37, at 262–73 (giving a short history of the various attempts at constitutional revision in Japan's recent history).

118. Fukui, *supra* note 103, at 62; Ellis S. Krauss & Robert J. Pekkanen, *The Rise and Fall of Japan's Liberal Democratic Party*, 69 J. ASIAN STUD. 5, 5 (2010) ("The LDP can boast of being the most successful political party operating in a democracy since the mid-twentieth century. The party held power nearly continuously from its formation in 1955, a scant three years after the end of the U.S. occupation.").

119. For a reasonable explanation for the revisionists' failure, see Fukui, *supra* note 103, at 62–70 (detailing the influence of many factors, such as the general loss of popular support for the movement as years passed without action, as well as the role of internal sources of strife among the revisionists, who disagreed over the extent of revision desirable and the best manner for its implementation).

120. *Id.* at 50.

121. *Id.* at 51 (noting that, at one point, anti-revisionists held over one-third of the seats in the House of Councillors).

tional constructions are imposed on a nation contrary to the interests of its majority, those provisions cannot survive.<sup>122</sup>

The second relevant reason that revisionism failed is closely related to the first. By 1956, the same year the anti-revisionists succeeded in blocking any legislative attempt at revision, poll data shows that public opinion no longer supported the revisionists to any great degree.<sup>123</sup> The revisionist movement had settled on calling for total revision of the Constitution, as opposed to just revising Article 9 and other specific provisions as desired by an internal minority contingent of revisionists. Thus the revisionists as a whole nonetheless expected that the Japanese people would rise up and eagerly cast away the shameful American-imposed Constitution.<sup>124</sup> In noting that the exact opposite result was actually achieved, H. Fukui profoundly stated, “[t]he masses, consciously or unconsciously, have identified themselves as beneficiaries, rather than victims, of the occupation regime and the new Constitution.”<sup>125</sup>

The end of the revisionists’ battle did not mean the end of significant popular demands to better sync the text of the Constitution with the *de facto* policies of the Japanese government. While revisionists pursued the elimination of Article 9 to justify and further encourage rapid development of the SDF, which was becoming a *de facto* Japanese military,<sup>126</sup> the protestors that were involved in the Sunakawa Case simply sought to have the substantive limits of Article 9 enforced.<sup>127</sup>

In interpreting Article 9 to prohibit the ability of Japan to maintain “war potential” of any sort and going to the extreme

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122. *Contra* Choudhry, *supra* note 2, at 934–35.

123. Fukui, *supra* note 103, at 62–63.

124. *Id.*

125. *Id.* at 64.

126. Auer, *supra* note 44, at 179.

127. This balance of the alternate interests of the revisionists and the protestors is fairly artificial, especially in light of the fact that the protestors were before a judge because they were charged with crimes, rather than actively having sought judicial relief. See Date Decision, *supra* note 85, for a description of the procedural posture of the case. However the comparison is adequate for establishing the distinction between achieving constitutional change through direct amendment as opposed to through judicial interpretation. Furthermore, the protestors’ actions and criminal charges can plausibly be viewed as a conscious use of the judicial branch, rather than the political system, to place a spotlight on issues regarding Article 9.

extent of finding that even foreign troops were constitutionally banned from being stationed in Japan by Article 9, the Date Decision had momentous implications for the future of U.S.-Japan security relations which were recognized instantly.<sup>128</sup> More relevant to the focus of this Note, however, the Date Decision was unique in that it interpreted a constitutional provision that was originally imposed by the United States in the manner originally intended by its American drafters, yet its effect was to directly impair U.S. interests. The Date Decision demonstrates how Japan, as represented by the popular defendant-protestors and the government judges on the Tokyo district court, had internalized and embraced the pacific spirit of Article 9 to the point that it enforced those values above all else.<sup>129</sup> The idea that such a choice was an aberration caused by a misguided district court is clearly erroneous given that such a decision was exactly what had been demanded by the vast majority of the Japanese public.<sup>130</sup> Consequently, the Date Decision strongly demonstrates the extent to which a formerly occupied nation may fully embrace an "imposed" constitutional value, even to the chagrin of its former occupier.

## VI. CONCLUSION

This Note has responded to the emphasis of recent scholarship on the alleged undesirability of an occupying state imposing constitutional values onto an occupied state, when such values are not native to, nor desired by, the occupied state. This criticism of imposing constitutional values contains two main parts. First, critics insist that occupying states have two sets of interests to consider, the occupier's own self-interest and those of the occupied state, and argue that the interests of

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128. See, e.g., *Ambassador Pressed Japan*, *supra* note 88 (describing the instant U.S. reaction to the decision); STOCKWIN, *supra* note 83, at 51 (describing the "morale boost" given to protestors of American bases in Japan); Mendel, Jr., *supra* note 79, at 129 (describing the significance of the decision to protestors of American forces in Japan).

129. The magnitude of such a choice cannot be overstated; the Date Decision would directly harm Japanese self-interests by frustrating political relations with its most important ally and potentially forcing the removal of its only military protections.

130. See Mendel, Jr., *supra* note 79, at 130 (presenting poll data that, in 1958, nearly five times as many respondents wanted the immediate removal of American bases and troops as opposed such removal).

the latter should dominate the constitutional construction process. Second, critics contend that attempting to impose self-interested values on occupied states will have no chance at success. This assumption comes in large part from a belief that any such foreign imposition will be quickly rejected or reversed as the process of democratic self-determination weeds out provisions that are antithetical to the occupied state's interests.

Having investigated thoroughly the case of American influence over the Japanese constitutional construction post-WWII, specifically in regards to American insistence that Japan adopt Article 9, I found that the evidence suggests no reason to expect failure as more likely than not if an occupier should attempt to impose self-interested values in the constitutional construction of an occupied state. To the contrary, I found that American-imposed values have been incorporated into the Japanese national identity. Furthermore, I noted multiple ways in which an imposition may bypass popular removal by democratic self-determination.<sup>131</sup> Additionally, I found that each instance of American interaction with Japan was driven by self-interest, suggesting that states are unable or unwilling to use any other criterion for decision making.

As such, this single case study directly rebuked the notion that there should be a preference against constitutional constructions involving impositions made in the occupying nation's self-interest. Further case studies would be informative, especially those examining situations in which exhibitions of influence by occupying states on occupied states' constitutional constructions are more indirect than the sheer imposition of a core constitutional text.<sup>132</sup> Any further theories as to

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131. See, e.g., *supra* Part II (specifically finding many reasons why democratic self-determination neither served as an effective bulwark against foreign impositions nor damaged the perceived legitimacy of subsequent constitutional value development); *supra* notes 120–125 and accompanying text (describing the anti-revisionists' success in protecting Article 9. Their success demonstrates the power of an imposed provision to survive a challenge by an angry democratic majority, if it is protected by amendment provisions which require some sort of super-majority levels, in which case only a moderate minority needs to support such an imposition to save it from destruction by democratic processes).

132. For at least one article along these lines that provides an interesting examination of the role of foreign influence in constitutional constructions in modern occupations, see Philipp Dann & Zaid Al-Ali, *The Internationalized*

how and why certain occupying states' impositions succeed while others fail would potentially be the most directly useful for aiding ongoing occupations such as those in the Middle East. Until such further scholarship is available, it is important simply to recognize that although there is a stigma to past imperialism and an increasing commitment to having native populations provide their own constitutional constructions, neither of these generalities completely eclipse the principles behind the American constitutional construction in postwar Japan. Ultimately, given further study and support, nations confronted with the daunting task of overseeing a constitutional construction may find relief in the conclusion that they need not wholly refrain from pursuing their own interests as they guide an occupied nation in its constitutional renaissance.