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Implicit Limits on Amending the Japanese Constitution

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IMPLICIT LIMITS ON AMENDING THE JAPANESE CONSTITUTION

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Abstract: Japan's Liberal Democratic Party has advocated many years for constitutional revision, and after attaining a two-thirds majority in both Houses of the Diet in 2017, Prime Minister Shinzō Abe is poised to move forward with that goal. The only hurdles to amending the Constitution of Japan are the amendment procedures stipulated in Article 96. The plain text of Article 96 requires a two-thirds vote in both Houses followed by popular referendum, but it poses no explicit limitations on the scope of any amendment—even the amendment process itself is fair game at first glance. Nevertheless, Japanese scholars have claimed that limits must exist to Article 96, lest an amendment destroy the Constitution itself. This Comment seeks to discover whether any such implicit limits exist based on a comprehensive analysis of the text and structure of the current Constitution as well as the Meiji Constitution. In so doing, this Comment attempts to provide a roadmap for Japanese courts to assert the power of judicial review over amendments that would do harm to the core values enshrined in the Constitution.

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I. INTRODUCTION

The debate over amending the Constitution of Japan ("1946 Constitution")[1] has generated no small volume of international scholarship. Much of that scholarly contribution has focused on critiquing the many substantive reforms sought by the majority Liberal Democratic Party ("LDP"),[2] including revision of the Pacifism Clause in Article 9.[3] This provision, unique among the world's constitutions, has earned Japan's

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1 Drafting of the postwar Japanese Constitution began in late 1945, it was officially promulgated on November 3, 1946, and it went into effect on May 3, 1947. *See generally Birth of the Constitution of Japan: Chronological Table*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/etc/history.html (last visited Sept. 4, 2018) (detailing major events throughout the process of creating the current constitution). As such, it is also referred to in literature as the "1947 Constitution." *See* Carl F. Goodman, *Contemplated Amendments to Japan's 1947 Constitution: A Return to Iye, Kokutai and the Meiji State*, 26 WASH. INT'L L.J. 17, 18 (2017).

2 *See* Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655, 657 (2015); Goodman, *supra* note 1, at 19; Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427, 428 (2017).

3 *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9, para. 1 (Japan), http://www.ndl.go.jp/constitution/e/etc/c01.html ("[T]he Japanese people forever renounce war as a sovereign right of the nation.").

Constitution the nickname of "Peace Constitution,"[4] spurring international support for the renunciation of war as a goal for all humankind.[5] Despite such widespread support both within Japan and abroad,[6] Article 9 has faced repeated calls for amendment from conservative Japanese politicians.[7] This dynamic is compounded by the fact that, ever since 1955, a "1.5-party system" has persisted in Japanese politics, characterized by weak opposition parties unable to contend with the conservative LDP's coalition majorities throughout most of Japan's post-war history.[8] As such, Article 9's survival thus far has been less the result of opposition parties' successes than economic priorities and bickering among factions within the LDP, all of which have combined to effectively block any reform efforts.[9] This debate has once again been thrust into the international spotlight with Prime Minister Shinzō Abe's renewed calls to amend Article 9, along with the entirety of the 1946 Constitution.[10] The only constitutional barrier to these proposed revisions is the amendment process in Article 96.

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[4] *See, e.g.*, C. Douglas Lummis, *We, the Japanese People: Rethinking the Meaning of the Peace Constitution*, ASIA-PAC. J. (2018), https://apjjf.org/-C--Douglas-Lummis/5118/article.pdf.

[5] Some supporters have even petitioned for Japan's Peace Constitution to be awarded the Nobel Peace Prize. *See* D. McN., *Japan's Pacifist Constitution: Keeping the Peace*, ECONOMIST (May 14, 2014), https://www.economist.com/blogs/banyan/2014/05/keeping-the-peace.

[6] *See, e.g.*, Albert, *supra* note 2, at 675.

[7] *Id.*; *see also* Michael A. Panton, *Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 ASIAN-PAC. L & POL'Y J. 163, 183 (2009).

[8] *See* Samee Siddiqui, *The Rise and Fall of the Democratic Party of Japan (DPJ): Prospects of a Two-Party System in Japan*, ALJAZEERA CTR. FOR STUD. 2 (Feb. 26, 2013), http://studies.aljazeera.net/mritems/Documents/2013/2/25/20132251158505177 34The%20Rise%20and%20Fall%20of%20the%20Democratic%20Party%20of%20Japan.pdf; Yuichiro Tsuji, *Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment*, 46 ENV. J. INT'L L. & POL'Y 159, 160–61 (2018). The only instance when a party other than the LDP has held power in both Houses of Japan's parliament, known as the Diet, was from 2009 to 2011. *See* Siddiqui, *supra,* at 3. LDP dominance in Japanese politics grew from the merger of two major conservative parties in 1955, which is why this arrangement is also called the "1955 system." *See Modern Japan in Archives: Establishment of 1955 System*, NAT'L DIET LIBR., http://www.ndl.go.jp/modern/e/cha6/index.html (last visited Sept. 4, 2018); Jayshree Bajoria, *The Rise of Political Opposition in Japan*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/rise-political-opposition-japan (last updated Aug. 31, 2009).

[9] *See* FRANK O. MILLER, MINOBE TATSUKICHI: INTERPRETER OF CONSTITUTIONALISM IN JAPAN 288 (1965); *cf.* Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of* Jus ad Bellum, 30 U. PA. J. INT'L L. 267, 328–35 (2008) (discussing the "Yoshida Doctrine" and how using Article 9 as a shield against pressure from the United States to remilitarize allowed the LDP to focus on economic growth during the Cold War).

[10] *See* Albert, *supra* note 2, at 660; Motoko Rich, *Shinzo Abe Announces Plan to Revise Japan's Pacifist Constitution*, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/world/asia/japan-constitution-shinzo-abe-military.html. *See generally "Kenpō kaisei sōan" o happyō* [*Announcing the "Draft for the Amendment of the Constitution"*], JIMIN NEWS (Liberal Democratic Party [LDP], Tōkyō, Japan), Apr. 27, 2012, https://www.jimin.jp/policy/policy_topics/recapture/pdf/063.pdf (providing a brief outline of past reform efforts and describing how the proposed amendments would change the current

Despite these persistent efforts to invoke the amendment process, the Constitution has never actually been amended.[11] Article 96 of the Constitution of Japan contains the following process for proposing and adopting constitutional amendments:

> Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.
>
> Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.[12]

Faced with the daunting task of overcoming these constitutional barriers to amendments, in early 2013, Prime Minister Abe responded by changing tactics to focus on first amending the amendment process itself.[13] The LDP published its proposed revisions to the entirety of the 1946 Constitution in

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Constitution); *LDP Announces a New Draft Constitution for Japan*, JIMINTŌ (May 7, 2012), https://www.jimin.jp/english/news/117099.html. For an example of the LDP's efforts to persuade younger Japanese of the need for constitutional revision, see Manga Pamphlet, Jiyūminshutō Kenpō Kaisei Suishin Honbu [LDP Headquarters for the Promotion of Revision of the Constitution], Honobono ikka no kenpō kaisei tte nāni? [The Honobono Family in What is a Constitutional Amendment?] (Apr. 2015), http://jimin.ncss.nifty.com/pdf/pamphlet/kenoukaisei_manga_pamphlet.pdf.

[11] *See* Albert, *supra* note 2, at 659. Popular support of Article 9 and opposition to constitutional revision has resulted in the failure of any amendment proposals to ever actually materialize. *See* Lawrence Repeta & Colin P.A. Jones, *State Power Versus Individual Freedom: Japan's Constitutional Past, Present, and Possible Futures*, *in* JAPAN: THE PRECARIOUS FUTURE 304, 307 (Frank Baldwin & Anne Allison eds., 2015) (finding no record of the LDP ever submitting any amendment proposal to the Diet).

[12] KENPŌ art. 96.

[13] Prime Minister Abe did briefly retreat when faced with strong opposition from constitutional scholars and others. *See* Editorial, *LDP Out to Undermine Constitution*, JAPAN TIMES (Apr. 18, 2013), https://www.japantimes.co.jp/opinion/2013/04/18/editorials/ldp-out-to-undermine-constitution/. Scholars opposing calls to amend Article 96 responded by forming groups such as the "Article 96 Association" to organize symposia and protests across Japan. *See* Ishibashi Hideaki, *Gakushara "96-jō no Kai" kessei: San'insen muke kaisei hantai yobikake* [*Scholars Form the "Article 96 Association": A Call to Oppose Revision for the House of Councillors Election*], ASAHI SHINBUN (May 23, 2013, 8:21 PM), http://digital.asahi.com/articles/TKY201305230274.htm [http://blog.livedoor.jp/gataroclone/archives/27376713.html]; Mizushima Asaho, *"96-jō no Kai" hassoku—Rikken shugi no teichaku ni mukete (1)* [*Inauguration of the "Article 96 Association"—Toward the Establishment of Constitutionalism (1)*], ASAHO.COM (May 27, 2013), http://www.asaho.com/jpn/bkno/2013/0527.html. For an overview of the response from the academic community, see Okano Yayo, *Prime Minister Abe's Constitutional Campaign and the Assault on Individual Rights*, ASIA-PAC. J. 2–4 (Mar. 1, 2018), https://apjjf.org/-Okano-Yayo/5519/article.pdf.

2012.[14] The LDP Draft for the Amendment of the Constitution of Japan ("LDP Draft") would amend Article 96 as follows:

> Amendments to this Constitution shall be initiated by members of the House of Representatives or the House of Councillors, through a concurring vote of a *majority* of all the members of each House, and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all valid votes cast thereon, at a referendum as specified by law.
>
> Amendments when so ratified shall immediately be promulgated by the Emperor.[15]

Immediately, there is one substantive change that the proposed amendment would effectuate—lowering the initial barrier to constitutional amendment from a supermajority to a simple majority vote in the Diet.[16]

Even though support for the initial LDP Draft has waned,[17] the LDP coalition recently surpassed Article 96's supermajority barrier in the 2016 and 2017 elections,[18] prompting Prime Minister Abe to reignite discussions

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[14] For an overview of the problematic nature of the LDP Draft, Lawrence Repeta, *Japan's Democracy at Risk—The LDP's Ten Most Dangerous Proposals for Constitutional Change*, ASIA-PAC. J. (July 14, 2013), https://apjjf.org/Lawrence-Repeta/3969/article.pdf; Repeta & Jones, *supra* note 11 (categorizing and critiquing the types of reforms contained in the LDP Draft).

[15] Draft, Jiyūminshutō [Liberal Democratic Party], Nihonkoku Kenpō kaisei sōan [Draft for the Amendment of the Constitution of Japan] art. 100 (Apr. 27, 2012) (emphasis added), https://jimin.ncss.nifty.com/pdf/news/policy/130250_1.pdf, *as translated in Draft for the Amendment of the Constitution of Japan*, VOYCE, https://www.voyce-jpn.com/ldp-draft-constitution (last updated Apr. 18, 2016) [hereinafter LDP Draft]; *see also* Tomohiro Osaki, *LDP Sets Aside 2012 Draft Constitution Ahead of Diet Debate on Revision*, JAPAN TIMES (Oct. 18, 2016), http://www.japantimes.co.jp/news/2016/10/18/national/politics-diplomacy/ldp-sets-aside-2012-draft-constitution-ahead-diet-debate-revision/ (describing how the LDP coalition achieved two-thirds of both houses in the 2016 election, but had publicly stated that it will postpone any action on the 2012 draft).

[16] Some of the other changes to Article 96 include simple clarifications of the proposal and voting procedures, as well as a requirement that the votes be "valid." Conspicuously omitted, however, is the final portion stating that amendments are promulgated "in the name of the people, as an integral part of this Constitution." This omission is important to the extent that it would bring the new amendment process in line with the overall objective of the LDP draft, which is to eliminate the "people" and return the Emperor to semi-sovereign status. *See* Goodman, *supra* note 2, at 37–45; Yuichiro Tsuji, *supra* note 8, at 162.

[17] *See LDP Shelves Controversial Constitutional Draft*, MAINICHI (Oct. 18, 2016), https://mainichi.jp/english/articles/20161018/p2a/00m/0na/021000c.

[18] *See* Leika Kihara & Linda Sieg, *Abe to Push Reform of Japan's Pacifist Constitution After Election Win*, REUTERS (Oct. 21, 2017, 4:35 PM), https://www.reuters.com/article/us-japan-election/abe-to-push-reform-of-japans-pacifist-constitution-after-election-win-idUSKBN1CQ0UW. The first electoral victory was arguably in support of the purported results of "Abenomics." For an explanation of

on amending the Constitution.[19] Nevertheless, even with supermajority control over both Houses, neither the public nor the House of Councillors is solidly in support of amending the Constitution.[20] So long as Article 96 remains intact, the most likely path to achieving the LDP's long-time goal remains a "piecemeal" approach. Starting with small amendments, the Diet can codify new constitutional rights that are more likely to garner public support.[21] Accordingly, LDP can build toward lowering the amendment threshold in Article 96 to finally push through the more controversial changes. Although such a strategy appears more politically viable, it inevitably raises more troubling questions. For example, if the Diet could pass regular legislation under the same vote threshold as amendments, is the Constitution still the supreme law of the land? What would happen to other provisions in the Constitution that still require a two-thirds majority? And can a constitutional amendment legitimately repeal fundamental components of the Constitution of Japan?

This Comment aims to provide answers to these questions by attempting to identify implicit limits to the amendment process under Article 96. Rather than applying a purely theoretical approach based on constituent

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"Abenomics," see *Abenomics*, JAPANGOV, https://www.japan.go.jp/abenomics/index.html. The second electoral victory was more in response to the looming threat of North Korea. *See* Masazumi Wakatabe, *A Snap Election in Japan May Endanger Abenomics*, FORBES (Sept. 21, 2017, 10:20 PM), https://www.forbes.com/sites/mwakatabe/2017/09/21/snap-election-japan-endanger-abenomics-shinzo-abe/; Anthony Fensom, *Japan Election Victory Gives Abe Mandate for Reform*, DIPLOMAT (Oct. 23, 2017), https://thediplomat.com/2017/10/japan-election-victory-gives-abe-mandate-for-reform/.

[19] *See New Draft Constitution to Be Submitted to Parliament—PM Abe*, JAPAN FORWARD (June 26, 2017, 5:06 PM), https://japan-forward.com/under-the-flag-of-constitution-revision-prime-minister-abe-resolves-to-go-on-the-offensive/. Prime Minister Abe has stated that he expects to have a new draft constitution ready in time for the 2020 Tokyo Olympics. *See* Leo Lewis, *Abe Sets 2020 Target to Revise Japan's Pacifist Constitution*, FIN. TIMES (May 3, 2017), https://www.ft.com/content/a4d2aaa0-2fd9-11e7-9555-23ef563ecf9a. In the newest round of talks, the primary focus was reconciling the goal of legitimizing Japan's Self-Defense Force with efforts to maintain certain popular aspects of Article 9. *See* Memorandum, Jiyūminshutō Kenpō Kaisei Suishin Honbu [LDP Headquarters for the Promotion of Revision of the Constitution], Jimintō Kenpō kaisei ni kansuru ronten torimatome [Summary of Issues on LDP Constitutional Amendments] (Dec. 20, 2017) https://jimin.ncss.nifty.com/pdf/news/policy/136448_1.pdf. The two possibilities identified in regard to Article 9 are to eliminate entirely the second clause—which forbids Japan from maintaining any war potential—consistent with the 2012 LDP Draft, or to retain both clauses while explicitly recognizing the Self-Defense Force as an exception. *Id.*

[20] *See Candidates' Opposition to Revising Article 9 Stronger than Support: Poll*, MAINICHI (June 25, 2016), https://mainichi.jp/english/articles/20160625/p2a/00m/0na/013000c (finding on 55% of all candidates for the 2016 House of Councillors election in favor of constitutional revision); *Nearly 70% Oppose Diet Actions Directed at Constitutional Revision in 2018: Survey*, JAPAN TIMES (Dec. 16, 2017), https://www.japantimes.co.jp/news/2017/12/16/national/nearly-70-oppose-plans-propose-constitutional-amendment-diet-2018-poll/.

[21] *See, e.g.*, LDP Draft, *supra* note 15, art. 19-2 (protecting the privacy of personal information); *id.* art. 25-2 (protecting the environment).

power and other abstract concepts,[22] this Comment will attempt to provide concrete arguments that Japanese courts could potentially rely on to assert the power of judicial review over an allegedly unconstitutional constitutional amendment. In reality, because Article 96 has never been successfully invoked, this area of the law is very much a blank slate. As such, this Comment will address the constitutional interpretation issue from first principles by employing a comprehensive approach. Arguments will focus particularly on the text and structure of the 1946 Constitution as well as its predecessor, the Meiji Constitution, while looking to some contemporaneous drafting history to provide context.[23] Due to the influence of American legal concepts in the Japanese Constitution,[24] the Supreme Court of Japan has relied on U.S. Supreme Court cases in many instances,[25] and the author—for practical reasons as well—will do the same.

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[22] *See, e.g.*, Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures*, *in* THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 23 (Richard Albert et al. eds., 2017).

[23] Reference to drafting history is less to determine the drafters' intent than to discern what meaning the text can reasonably bear. *Cf.* Green v. Bock Laundry Machine Co., 490 U.S. 504, 529 (1989) (Scalia, J., concurring) (choosing among alternative interpretations that do the "least violence to the test" to avoid giving text "a meaning . . . it simply will not bear."). For more on this form of textualist interpretation, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33 (2012) (requiring that text be given a "fair reading" based on "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued"). This is not to imply that a similar school of thought necessarily exists in Japan. Instead, the author relies on textualist canons of construction as a means of persuasive authority more capable of translating between different legal cultures.

[24] *See* SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 35 (2011); *cf.* Hideo Tanaka, *Impact of Foreign Law in Japan: American Law*, 14 CONTEMP. L. 287 (1966), *as translated in* THE JAPANESE LEGAL SYSTEM 245, 251 (Hideo Tanaka ed., 1976) (noting the strong influence of American law generally in many Japanese laws). German legal concepts have also played a major role in Japan's constitutional development. *See* SHIGENORI MATSUI, *supra*, at 35 ("[A]lthough the Japanese Constitution was enacted under the strong influence of the United States' Constitution, strong German influence also remained. The modern constitutional history of Japan can be said to be an implantation of American jurisprudence on a German foundation, modified by Japanese tradition."); *cf. id.* at 154 (recognizing a "strong contribution of German constitutional thought" in interpreting human rights); SATŌ TATSUO, KENPŌ GENRON [PRINCIPLES OF THE CONSTITUTION] 56680 (1982) (relying heavily on German constitutional theories, particularly those of Carl Schmitt, to describe implicit limits on Article 96).

[25] Because Japan is a civil law country and judicial precedent is technically not binding on other courts, scholarly opinions can be treated as equally if not more persuasive. *See* SHIGENORI MATSUI, *supra* note 24, at 23–24. Perhaps due to this lack of a legal tradition of citing precedent, judges frequently fail to provide citations in their decisions, even when quoting entire passages verbatim. *See* THE JAPANESE LEGAL SYSTEM, *supra* note 24, at 59 n.23. Nevertheless, there are several examples of cases in which Justices on the Supreme Court of Japan have directly referenced U.S. Supreme Court decisions. *See, e.g.*, Saikō Saibansho [Sup. Ct.] Feb 5, 1964, Shō 38 (o) 422, 18 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 270, (Saitō, J., concurring) (citing Baker v. Carr, 369 U.S. 186 (1962)); Sup. Ct. July 9, 2014, Hei 26 (gyō tsu) 96, 247 SAIKŌ SAIBANSHO SAIBANSHŪ [SAISHŪ MIJI] 39, (Chiba, J., concurring) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936)); *cf.* Sup. Ct. Sept. 10, 1975, Shō 48 (a) 910, 29 SAIKŌ SAIBANSHO KEIJI

One of the most recent and in-depth examinations of Article 96 and implicit limits on amending the Constitution of Japan is Richard Albert's article, *Amending Constitutional Amendment Rules*.[26] While noting that Article 96 itself is not explicitly entrenched against amendment, Albert evaluates and rejects three potential arguments for implicit entrenchment, including judicial review.[27] Nevertheless, the target audience of Albert's article is "constitutional designers," and his analysis of Article 96 is primarily to provide an example of a present controversy.[28] In closing, Albert acknowledges the shortcomings in his analysis and notes that more could be gleaned by actually delving into the 1946 Constitution's drafting history and failed subsequent amendment efforts.[29] This Comment will build on Albert's foundation by employing a comprehensive analysis to uncover whether implicit limits on Article 96 exist that a Japanese court could rely on to justify striking down an unconstitutional amendment.[30] In particular, this comment will focus on textual bases within the Constitution—albeit outside of Article 96—as well as historical context to delineate the metes and bounds of the amendment process. As an expression of the peoples' desire to restrain governmental abuses of power, every constitution must be interpreted against its own unique history and legal culture.[31]

HANREISHŪ [KEISHŪ] 489, (Kishi, J., concurring) (discussing the U.S. Supreme Court's First Amendment "clear and present danger" test).

[26] Albert, *supra* note 2. Richard Albert is a Professor of Law at the University of Texas at Austin and writes about comparative constitutional law. *See* RICHARD ALBERT, http://richardalbert.com/ (last visited May 23, 2018).

[27] Albert, *supra* note 2, at 666–77. Those implicit limits include "the distinction between amendment and revision, judicial constitutional review, and unwritten unamendability." *Id.* at 658. This Comment is primarily concerned with Albert's second argument in regard to judicial review in Japanese courts.

[28] *Id.* at 657–58.

[29] *Id.* at 685.

[30] This is all assuming, however, that the Supreme Court of Japan will in fact exercise its power of judicial review. The Court is notoriously conservative and generally has been willing to defer to the Diet in all but the most extreme cases—almost sixty years after its inception, the Court has declared only a handful of parliamentary actions unconstitutional. *See* SHIGENORI MATSUI, *supra* note 24, at 145–47. In many instances, judicial review for contentious issues can be avoided through application of Japan's stringent standing or political question doctrines. *See id.* at 134–40; Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375, 1382–88 (2011). *But cf.* John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88 WASH. U. L. REV. 1467 (2011) (arguing that the Japanese Supreme Court's "conservatism" can be explained by structural and societal factors). For an in-depth discussion of and argument for rethinking the Court's political question doctrine, see Po Liang Chen & Jordan T. Wada, Comment, *Can the Japanese Supreme Court Overcome the Political Question Hurdle?*, 26 WASH. INT'L L.J. 349 (2017).

[31] *Cf.* KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION 68 (1991) ("[A] constitution is the product of a particular political tradition and historical circumstances.").

Part II of this Comment will pick up where Albert's analysis left off. It will begin with a brief note on the drafting history of Article 96 and its relevance, followed by a reexamination of the only proposed constitutional amendment in Japanese history—the 1946 Constitution itself. Scholarly views in Japan and other countries on the topic of implicit amendment limits are also briefly summarized as a potential source of persuasive authority. Part III will identify the structural and textual keys to understanding the implicit limits on what can and cannot be amended via Article 96. Finally, Part IV will synthesize the limitations identified in Part III to uncover how those provisions would constrain efforts to amend the amendment process itself. In doing so, this Comment attempts to transform the dialog surrounding the debate over Article 96 in Japan and provide concrete, text-based arguments for recognizing implicit limits on the amendment process.

II. ARTICLE 96 AND CURRENT ARGUMENTS IN THE DEBATE OVER IMPLICIT LIMITS ON THE AMENDMENT PROCESS

A. Background on the Adoption of the 1946 Constitution and the Drafting History of Article 96

Drafting history can be an invaluable tool in deciphering the intended meaning of complex and sometimes ambiguous constitutional provisions. This is particularly the case with the U.S. Constitution, as the Federalist Papers and the recorded debates in the Constitutional Convention provide a treasure trove of context.[32] However, several factors unique to Japan's situation counsel against placing much weight on the drafting history. First of all, legislative history is generally disfavored as a source of law in Japanese courts.[33] Second, and more importantly, due to the complicated circumstances surrounding the 1946 Constitution's drafting and adoption, no single source of drafting history can reliably shed light on "intent."

The origin of Japan's Peace Constitution began with the end of World War II. After the unconditional surrender of Japan on August 15, 1945, General Douglas MacArthur was placed in charge of efforts to democratize

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[32] *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION 5–53 (2005) (describing the circumstances surrounding the adoption of the U.S. Constitution).

[33] *See* Tanaka, *supra* note 24, at 97–98. For the purposes of this Comment, this reality more than answers the question of whether drafting history should be given any credence.

Japanese society.[34] Under the direction of the Occupation's General Headquarters ("GHQ"),[35] large-scale legal reforms commenced, and it soon became clear that revising the Meiji Constitution would be necessary to accomplish the GHQ's mission.[36] The Japanese government responded by establishing a committee to look into potential amendments to the Meiji Constitution.[37] However, the initial draft crafted by the Diet, also known as the Matsumoto Draft, proposed only minor changes in wording to the Meiji Constitution and would have kept most of the Imperial structure intact.[38] When a newspaper leaked the conservative Matsumoto Draft to the public, it received "extremely unfavorable" reactions both from Japanese citizens and the GHQ.[39] Around that same time, various other scholarly associations and political parties also prepared drafts to replace the Meiji Constitution.[40] Fearing that the Far Eastern Commission ("FEC")—consisting of eleven of the Allied Powers and not just the United States[41]—would dilute the GHQ's influence and eliminate the Emperor's position entirely if the Japanese government was unable to adopt a sufficiently liberal constitution, General MacArthur decided that the GHQ must provide its own draft.[42]

General MacArthur's staff proceeded to draft a new constitution ("GHQ Draft")[43] over a span of eight days and presented it to the Japanese

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[34] *See* SHIGENORI MATSUI, *supra* note 24, at 13; *Birth of the Constitution of Japan: Outline: Part 1 Military Defeat and Efforts to Reform the Constitution*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/outline/01outline.html (last visited Nov. 25, 2018).

[35] While General MacArthur—and by extension his office—is usually referred to in U.S. literature by his title of Supreme Commander of the Allied Powers ("SCAP"), Japanese literature almost uniformly refers to him and his staff collectively as the General Headquarters, or "GHQ." This Comment will follow the Japanese convention.

[36] SHIGENORI MATSUI, *supra* note 24, at 13–14; *see also* KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 7–10 (Ray A. Moore trans., Westview Press 2018) (1989) (describing the circumstances where General MacArthur first suggested the need for constitutional revision to Prince Konoe Fumimaro).

[37] SHIGENORI MATSUI, *supra* note 24, at 14.

[38] *Id.*

[39] *See* KOSEKI SHŌICHI, *supra* note 36, at 60–61; *cf. id.* at 57–60 (comparing the Matsumoto Draft with the Meiji Constitution).

[40] In contrast, to the Matsumoto Draft, other groups and scholars did not rely exclusively on the Meiji Constitution and did examine foreign constitutions for their drafts. *Id.* at 62. For an overview of the various Japanese drafts, see *id.* at 26–48.

[41] *See id.* at 68–69.

[42] *See id.* at 77; SHIGENORI MATSUI, *supra* note 24, at 14; Hideo Tanaka, *A History of the Constitution of Japan of 1946*, *in* THE JAPANESE LEGAL SYSTEM, *supra* note 24, at 653, 661 (describing the GHQ's proposal as an effort to counter other Allied nations' calls to try Emperor Hirohito as a war criminal).

[43] Memorandum from Charles L. Kades et al. to Chief of GHQ Government Section, Constitution of Japan (Feb. 12, 1946), *reproduced in Birth of the Constitution of Japan: GHQ Draft, February 13, 1946*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/03/076shoshi.html (last visited Sept. 4, 2018)

government on February 15, 1946.[44] While the drafters were undoubtedly influenced by their own familiarity with the U.S. Constitution,[45] the GHQ also relied heavily on drafts submitted by Japanese scholars and other Japanese authors.[46] Despite its rushed nature, the GHQ Draft represented key compromises to satisfy Japanese obligations under the Potsdam Declaration and the FEC's expectations, which may have imposed its own constitutional draft should Japan have not adopted one.[47] After the GHQ Draft was accepted by the Japanese government,[48] work began on translating the draft into Japanese,[49] and it was published in full on April 17.[50] The final election under the Meiji Constitution was conducted on April 10,[51] and deliberations on the GHQ Draft lasted 114 days until it was approved by the Imperial Diet on October 7.[52] While in the Imperial Diet, the draft underwent several

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[hereinafter GHQ Draft]. Many of the documents central to the drafting of the Japanese Constitution are reproduced in full on the National Diet Library's website. *Birth of the Constitution of Japan*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/index.html (last visited Sept. 4, 2018). For ease of reference, direct citations to the various documents will be omitted in favor of directing readers to the main exhibit pages from which the referenced documents can be accessed. Further specifications will be provided for pages that contain multiple documents.

[44] SHIGENORI MATSUI, *supra* note 24, at 15. While technically accurate, this description fails to fully appreciate the complexities of the situation. For more complete accounts on the GHQ's drafting process, see KOSEKI SHŌICHI, *supra* note 36, at 68–94; THEODORE MCNELLY, THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION 55–88 (2000).

[45] The chapter on individual rights in particular was heavily influenced by the U.S. Constitution. *See* MATSUI, *supra* note 24, at 154.

[46] *See* KOSEKI SHŌICHI, *supra* note 36, at 70; SHIGENORI MATSUI, *supra* note 24, at 18–21; MCNELLY, *supra* note 44, at 98–100; *Birth of the Constitution of Japan: Rowell "Comments on Constitutional Revision Proposed by Private Group," January 11, 1946*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/03/060shoshi.html (last visited Sept. 4, 2018) (indicating that the GHQ "paid careful attention" to draft proposals from Japanese scholars, with the Constitution Investigation Association's draft being highly influential). For the complete text of the Constitution Investigation Association's draft, see *Birth of the Constitution of Japan: Constitution Investigation Association, "Outline of Constitution Draft," December 26, 1945*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/02/052shoshi.html (last updated May 3, 2004) [hereinafter *CIA Draft*].

[47] *See* Hideo Tanaka, *supra* note 42, at 657–58.

[48] *See* KOSEKI SHŌICHI, *supra* note 36, at 111 (suggesting that the Japanese government adopted the GHQ Draft "very reluctantly"). *But see id.* at 108 (noting "unanimous approval" by the cabinet).

[49] For more on this process and substantive changes that resulted from translation of the GHQ Draft, see *id.* at 111–22.

[50] *Id.* at 133.

[51] *Id.* at 165.

[52] *Id.* at 208. That is not to imply that the draft constitution was debated by the full Diet for all 114 days. Instead, the draft was first examined by the Privy Council over eleven sessions, then sent to a special committee for deliberations, followed by nearly a month of secret meetings in a subcommittee for incorporating all of the proposed changes. *Id.* at 168–69; *see also Birth of the Constitution of Japan: Deliberations in the Imperial Diet*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/outline/04outline.html (last visited Sept. 4, 2018).

revisions,[53] including the so-called "Ashida Amendment" to Article 9.[54] The new Constitution was promulgated by the Emperor on November 3, 1946, and took effect on May 3, 1947.[55] One year later, the Diet was provided with an opportunity to amend the Constitution, and yet, no action was taken.[56] In summary, the 1946 Constitution is more properly viewed as a collaborative effort, reflecting the ideas of various drafters, both Japanese and American.[57]

Focusing more narrowly on the drafting history of Article 96, early proposals from the GHQ drafters would have foreclosed any amendment for the first ten years or would have explicitly entrenched the provisions on individual rights against amendment.[58] The original proposal would also have erected much higher thresholds for amendments, requiring a three-fourths vote in the Diet followed by two-thirds in a public referendum.[59] In what is described as "the only case in the record in which MacArthur involved himself in formulating the final text," General MacArthur ordered the deletion of those explicit entrenchment provisions from the GHQ Draft.[60] There was one other provision in the GHQ Draft that would have prohibited the Diet from overriding Supreme Court decisions on individual rights, although it is unclear why that compromise was not included in the final Constitution.[61] Except for slight changes in language to reflect the decision

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[53] *See* KOSEKI SHŌICHI, *supra* note 36, at 165–88 (discussing Diet deliberations on compulsory education, women's rights, citizenship, and popular sovereignty).

[54] *See id.* at 192–95. The Ashida Amendment arguably allowed for Japan to "maintain war potential for the purpose of self-defense," *id.* at 200, by limiting the scope of Article 9 to "accomplish[ing] the aim of the preceding paragraph,"; KENPŌ, art. 9, para. 2.

[55] KOSEKI SHŌICHI, *supra* note 36, at 208.

[56] *See id.* at 243–51; SHIGENORI MATSUI, *supra* note 24, at 21.

[57] *See* J. Patrick Boyd, *Reasoning Revision: Is Japan's Constitution Japanese?*, J. ASIA-PAC. STUD., Mar. 2014, at 47, 50–51; *cf.* KOSEKI SHŌICHI, *supra* note 36, at 4 (describing the 1946 Constitution as a "mosaic"); SHIGENORI MATSUI, *supra* note 24, at 21 (rejecting the notion that the Constitution was "imposed").

[58] *See* MCNELLY, *supra* note 44, at 73.

[59] *Birth of the Constitution of Japan: GHQ Original Draft: Original Drafts of Committee Reports*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/03/147/147_007l.html (last visited Sept. 4, 2018) (draft of the Committee of the Emperor and Miscellaneous Affairs) (emphasis added).

[60] MCNELLY, *supra* note 44, at 74.

[61] *Id.* at 74. That provision, contained in the Article describing the Supreme Court's power of judicial review, would have declared as final "the judgment of the Supreme Court in all cases arising under or involving Chapter III [Rights and Duties of the People]," while permitting the Diet to override other Supreme Court decisions by a two-thirds vote. *See* GHQ Draft, *supra* note 43, art. LXXIII.

to retain a bicameral legislature,[62] the amendment process proposed in the final GHQ Draft remained largely unchanged throughout the process.[63]

Given this drafting history, it may be tempting to treat General MacArthur's intervention to remove the proposed entrenchment provisions from Article 96 as definitive proof that no limits exist. However, placed in context, such a presumption would grossly overstate the actions of a single individual who had no other role in the drafting process. Furthermore, it would be erroneous to ascribe much weight to any of the GHQ drafters' actions when the drafting process was conducted largely in secret,[64] and most Japanese citizens did not even learn of the GHQ's role in drafting the 1946 Constitution until years after its adoption, due to censorship during the Occupation.[65] Of course, because the explicit entrenchment provisions were never presented to the Japanese government in the first place, it is equally true that the Diet's adoption of the amendment process contained in the GHQ Draft neither confirms nor denies the existence of limits on permissible amendments. In light of the similarities between the amendment process in the Meiji Constitution and the GHQ Draft, it is equally plausible that the Diet's intent was to simply retain that same procedure.[66] Because deliberations in the Diet were also conducted in secret,[67] attempting to discern the Japanese government's intent is likewise problematic. Nevertheless, of the few debate records that do exist,[68] little mention is made of Article 96 or the amendment process.[69]

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[62] *Compare* GHQ Draft, *supra* note 43, art. XLI, *with* KENPŌ, art. 42. There is some indication that the unicameral Diet was also intended as a bargaining chip. *See* KOSEKI SHŌICHI, *supra* note 36, at 91.

[63] *Compare* GHQ Draft, *supra* note 43, art. LXXXIX, *with* KENPŌ, art. 96.

[64] *See* Hideo Tanaka, *supra* note 24, at 660 n.9.

[65] *See* KOSEKI SHŌICHI, *supra* note 36, at 1; *cf.* MCNELLY, *supra* note 44, at 86–88 (listing the reasons why the GHQ preferred to keep its role in the drafting process a secret).

[66] For glimpses at the various minor modifications to Article 96 that occurred through each round of drafting and translation, see 3 SATŌ TATSUO, NIHONKOKU KENPŌ SEIRITSUSHI 32, 89–90, 148, 415, 488–89 (Sato Isao ed., 1994). Similarities between the Meiji and 1946 Constitutions are addressed next. *See infra* Section II.B.

[67] *See* KOSEKI SHŌICHI, *supra* note 36, at 169 (noting that minutes of the secret subcommittee meetings were not even released to the public until 1995).

[68] The National Diet Library's exhibit contains only two partial records of the actual debates conducted in the Diet. *See Birth of the Constitution of Japan: Records of the Privy Council Committee, April to May 1946*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/04/111_1shoshi.html (last visited Sept. 4, 2018); *Record of the Examination Committee of Privy Council on the Bill for Revision of the Imperial Constitution After the Decision in the 90th Session, October 19, 1946*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/04/129_1shoshi.html (last visited Sept. 4, 2018).

[69] Although the Privy Council had little to say about the amendment process, in its discussion on Chapters IX, X, and XI, several members did express a desire to eliminate Chapter X as unnecessary. *See*

This complex drafting history begs the question of whose intent controls when interpreting the 1946 Constitution: The foreign Occupation forces in the GHQ whose draft became the foundation for the 1946 Constitution? The government translators who sought to reinsert aspects of the Meiji Constitution when preparing the Japanese version of the GHQ Draft before the Diet even began deliberations?[70] The conservative-majority legislature,[71] elected before the final government draft was even published, that adopted the new Constitution primarily in order to ensure the safety of the institution of the Emperor?[72] Or the subsequent legislatures[73] that declined to propose any amendments, even when explicitly given the chance?[74] Unlike the open drafting history of the U.S. Constitution,[75] it is difficult to draw any specific inferences about contemporary understanding of the 1946 Constitution from the statements of these actors. Quite possibly the only commonality among the various drafters was a desire to ensure "[c]omplete legal continuity from the Constitution of 1889."[76] The significance of these similarities to the Meiji Constitution will be examined further in Part III.

Birth of the Constitution of Japan: Records of the Privy Council Committee, April to May 1946, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/04/111_1shoshi.html (last visited Sept. 4, 2018) (statements of Irie Toshio & Minobe Tatsukichi on May 15, 1946). And yet, Chapter X was adopted intact.

[70] *See* KOSEKI SHŌICHI, *supra* note 36, at 111–16; *cf. id.* at 132 (noting that groups who advocated for only minor changes to the Meiji Constitution supported the March 6 Japanese draft, whereas those who sought more substantial reform expressed criticism).

[71] *See id.* at 133 (describing the "overwhelming conservative victory" for the Liberal Party, predecessor of the LDP).

[72] *See id.* at 166–67.

[73] Perhaps some significance can also be drawn from the fact that the public arguably rebuked the Liberal Party's role in watering down the 1946 Constitution by giving the Japan Socialist Party its first and only electoral win in the April 25, 1947 general election, just prior to the new Constitution coming into force. *See Dai 23-kai sōsenkyo* [*The 23rd General Election*], SHŌWA MAINICHI, http://showa.mainichi.jp/news/1947/04/23-4701.html (last visited Nov. 24, 2018).

[74] The FEC's role in the adoption of the 1946 Constitution adds another layer of complexity, as this constitutional review was mandated by the FEC. *See Birth of the Constitution of Japan: Far Eastern Commission's Policy Decision on the Review of a New Japanese Constitution*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/05/129shoshi.html (last visited Sept. 4, 2018); MCNELLY, *supra* note 44, at 25–28; *cf.* KOSEKI SHŌICHI, *supra* note 36, at 141–61 (cataloging General MacArthur's many policy clashes with the FEC).

[75] Which included direct public participation in state conventions as well as a rich dialog on the functions of the new Constitution in the Federalist Papers. *See* AMAR, *supra* note 32, at 14–15.

[76] KOSEKI SHŌICHI, *supra* note 36, at 152 (quoting the FEC's criteria for adopting a new constitution); *see also id.* at 4 (describing some provisions as "vestiges of the Meiji Constitution that Japanese legal bureaucrats . . . succeeded in retaining"); *id.* at 57–60 (summarizing Matsumoto's Four Principles); *id.* at 91 (noting the GHQ drafters' desire to retain the structure of the Meiji Constitution). When drafting history is particularly ambiguous, much as with legislative history, "it is clear that [courts] must look primarily to the statutes themselves to find the legislative intent." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971).

B. Discerning the Permissible Scope of Amendments from Historical Practice

Before returning to the text of Article 96, historical practice can also shed light on potential implicit limitations to the amendment process. While many contemporary constitutions[77] explicitly place limits on the scope of amendments or create a distinction between simple "amendments" and large-scale "revisions,"[78] nothing within the 1946 Constitution supports such a distinction.[79] If anything, the plain text of Article 96 supports the contention that the same procedure was intended to apply to all amendments, whether total revisions or minor adjustments.[80] Such an understanding would coincide with Article V of the U.S. Constitution, which also makes no distinction between amendments and revisions.[81]

Nevertheless, the format and scope of subsequent amendments can be heavily influenced by the format of prior amendments. Thus, when the Bill of Rights was adopted by the several states in the process of ratifying the U.S. Constitution, those first ten amendments served as a template for all future amendments.[82] In the Japanese context, however, there have been no successful amendments to the Japanese Constitution since its adoption in

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[77] *See* Albert, *supra* note 2, at 667 n.105 (citing Austria, Spain, and Switzerland as examples of countries that contain such a distinction and impose differing thresholds). For example, Article 44 of the Austrian Constitution prescribes three tiers of amendment: regular constitutional amendments can be passed by a two-thirds vote of the National Council; amendments "restricting the competence of the provinces" require consent of the Federal Council in addition to a two-thirds vote of the National Council; and "[a]ny total revision of the Federal Constitution" must further be passed by national referendum, while partial revisions only must follow the referendum process if a one-third of the National Council so requests. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBL No. 1/1930, art. 44(3) (Austria).

[78] Albert describes revisions as "fundamental changes to the constitution" that would require "more exacting procedures," whereas amendments have a lower threshold and are only "used for narrow, non-transformative adjustments." Albert, *supra* note 2, at 667.

[79] The 1946 Constitution only uses the term "amendment" (*kaisei*), and only in three locations. *See* KENPŌ art. 7 (Imperial promulgation); *id.* art. 16 (individual right to petition); *id.* art. 96 (amendment process). Furthermore, no distinction is drawn between smaller, more technical amendments and larger, wide-reaching revisions—the term "amendment" arguably incorporates both concepts. Albert recognized this fact and noted that even those Japanese political actors opposed to amending the Constitution have not contemplated this argument. Albert, *supra* note 2, at 668 n.111.

[80] *Compare* B-VG art. 44(3) (imposing the two-thirds vote threshold only for larger revisions), *with* KENPŌ art. 96 (requiring a two-thirds vote and public referendum for any amendment).

[81] *See* U.S. CONST. art. V; United States v. Sprague, 282 U.S. 716, 730–32 (1931) (rejecting an argument that amendments to the U.S. Constitution affecting personal liberties must be referred to the people instead of passed via ratification by state legislatures).

[82] For some specific examples of recurring structure and language, *see* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, § 2; *id.* amend. XXVI, § 2.

1946.[83] The closest Japan has come to amending the 1946 Constitution was arguably in 1957 when the LDP-led government established a commission to explore potential amendments, and yet, seven years later, those efforts resulted in no specific proposals.[84] The sole amendment to the Meiji Constitution was the 1946 Constitution itself, which was in fact adopted and ratified via the amendment process prescribed by Article 73 of the Meiji Constitution:[85]

> When it has become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial Order.
>
> In the above case, neither House can open the debate, unless not less than two thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two thirds of the Members present is obtained.[86]

The process itself employs an identical supermajority requirement as that contained in Article 96 of the 1946 Constitution.[87] Of further interest here is that the Meiji Constitution expressly contained two limitations on the amendment process. Article 74 states that "[n]o modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet,"[88] in essence shielding the Emperor and rules of succession from alteration via regular legislation or amendment.[89] Article 75 further stipulates that "[n]o modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency."[90]

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[83] Although Japanese politicians have used this fact to argue for amending Article 96, the current process is only "marginally above average in amendment difficulty." Albert, *supra* note 2, at 659; *see also* SHIGENORI MATSUI, *supra* note 24, at 262–65.

[84] *See* SHIGENORI MATSUI, *supra* note 24, at 262–63; *cf.* Repeta & Jones, *supra* note 11, at 307 (finding no specific amendment to ever have been officially proposed in the Diet).

[85] *See* SHIGENORI MATSUI, *supra* note 24, at 21.

[86] DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 73 (Japan), http://www.ndl.go.jp/constitution/e/etc/c02.html (last visited Sept. 4, 2018).

[87] Key differences from the 1946 Constitution are the lack of any popular referendum requirement and the fact that all amendments must originate with an "Imperial Order." *Compare id.*, *with* KENPŌ, art. 96.

[88] MEIJI KENPŌ art. 74.

[89] The Japanese term used here is *kaisei*, which is translated as "amendment" elsewhere. *Id.*

[90] *Id.* art. 75. A regent generally means an individual appointed to carry out the Emperor's duties while the Emperor is absent or otherwise incapacitated, or until the Emperor comes of age. *See Regent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/regent (last updated Mar. 20, 2018); *see also* KENPŌ art. 5 (describing the effects of a regency); Kōshitsu tenpan [Imperial House Law], Law No.

The question then is whether an "amendment" can rewrite the entire Constitution. By historical practice it did, so the answer must be yes.[91] However, this "wholesale" exception can be interpreted both broadly and narrowly. Broadly speaking, the 1946 Constitution overwrote the Meiji Constitution in its entirety—including its primary structural pillar of placing the Emperor as the sovereign[92]—while nominally following the procedures in Article 73.[93] This precedent would suggest that if a "new" constitution is proposed, it need merely attain the minimum requirements of an ordinary amendment to effectively replace the current Constitution in its entirety.[94]

However, such a broad reading overlooks certain facts that tend to undercut the apparent logic in its simplicity. For example, the same basic act of rewriting the entire Constitution could only be accomplished otherwise by individually amending each provision, a process that would be impeded by any explicit or implicit limits to the amendment process itself. Such a "piecemeal" approach is preferable for the obvious reason that it would allow more time for deliberation of every single provision prior to enactment. While neither Constitution explicitly forbids the consideration of multiple amendments at the same time, no provision expressly provides that such "wholesale" amendments are subject to lesser restrictions than "piecemeal" amendments.[95] Furthermore, historical context played an immeasurable role

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3 of 1947, art. 16 (requiring a regent when the Emperor is a minor or when the Emperor is mentally or physically unable to perform the required duties).

[91] This oversimplifies the debate over the legitimacy of the act of promulgating an entirely new constitution as an amendment. For a summary of Japanese scholarly theories on the significance of this enactment history, see *infra* Section II.D.3.

[92] *See, e.g.*, MEIJI KENPŌ art. 4 (Japan) (designating the Emperor as the sovereign and head of Japan).

[93] In Emperor Hirohito's signing statement, he specifically pointed out the fact that the 1946 Constitution was itself an "amendment[] . . . made in accordance with Article 73." *Birth of the Constitution of Japan: The Constitution of Japan*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/etc/c01.html (last visited Sept. 4, 2018).

[94] Not coincidentally, leaders of the LDP themselves proposed the label of "Draft New Constitution" when they first published their plan for a "wholesale" revision in 2005. *See* Repeta & Jones, *supra* note 11, at 304; SHIGENORI MATSUI, *supra* note 24, at 264. For an overview of recent efforts to draft a new constitution, *see* CHRISTIAN G. WINKLER, THE QUEST FOR JAPAN'S NEW CONSTITUTION: AN ANALYSIS OF VISIONS AND CONSTITUTIONAL REFORM PROPOSALS 1980–2009, at 94–133 (2011). For a comparison of prior iterations of the 2005 LDP "Draft New Constitution," see Chart, Nihon Minshu Hōritsuka Kyōkai [Japan Democratic Lawyer's Ass'n], Nihonkoku Kenpō to Jimin "shin kenpō sōan," dai 1-ji soan, sōan taikō to no taihihyō [Comparison Chart for the Constitution of Japan and the LDP's "Draft New Constitution," First Draft, and Draft Outline] (Nov. 12, 2005), http://www.jdla.jp/jdlanet/kenpou-taihi.pdf. Interestingly, the initial 2004 LDP draft outline suggested amending Article 96 to provide two pathways for adopting amendments: either with a two-thirds vote in both houses and no public referendum, or with a simple majority in both houses followed by a simple majority in a public referendum. *Id.* at 24.

[95] This distinction between "wholesale" and "piecemeal" revision is not unique to Japan's history and is can be expressly found in other near-contemporaneous constitutions. *See, e.g.*, CONSTITUCIÓN

in prompting the adoption of each "new" constitution in Japan. The Meiji Constitution was the ultimate fruit of years of civil war followed by efforts to abolish the prior feudal system and to reinstate the Emperor as the leader of a unified Japan,[96] while the 1946 Constitution came as a direct result of Japan's surrender at the end of World War II.[97] These two constitutions arose amid similar circumstances equivalent to revolutions, complete with shifts in the locus of sovereign power—from the Tokugawa shogunate to the Emperor, and then from the Emperor to the people. Some may suggest that, absent such revolutionary circumstances, a complete constitutional revision would be impermissible.[98] As such, a broad reading of any "wholesale" amendment exception is unlikely to garner much support from the courts.[99]

Progressively narrower readings would posit that even a "wholesale" rewriting of the Constitution, while permissible via the regular amendment process, must still abide by those limits already placed on the amendment process. In the case of the Meiji Constitution, the only applicable explicit limit[100] on the constitutional amendment process in Article 73 was that no

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ESPAÑOLA [C.E.] [CONSTITUTION] B.O.E. n. 168, Dec. 29, 1978 (Spain) (requiring additional procedures and ratification by referendum for a "total revision").

[96] *See* SHIGENORI MATSUI, *supra* note 24, at 7–10.

[97] *See id.* at 12–16.

[98] *See, e.g.*, MILLER, *supra* note 9, at 288 (attributing anti-revisionist arguments that "certain provisions . . . express[ing] the key constituent political decisions . . . can be changed only by revolution" to the works of political theorists such as Carl Schmidt); *id.* at 354 n.67 ("[T]he draft revision [of the constitution] has as its premise the basic upheaval in our political structure brought by our acceptance of the Potsdam Declaration terms . . . [and] it is only on this basis that it can be thought to be constitutionally permissible.") (quoting MIYAZAWA TOSHIYOSHI, KOKUMIN SHUKEN NO TENNŌSEI [POPULAR SOVEREIGNTY AND THE EMPEROR SYSTEM] 93–94 (1957)); *cf.* MASATOMO KODAMA, THE DAWN OF A NEW CONSTITUTION 96 (Carl Freire trans., 2015) (likening the situation surrounding the adoption of the 1946 Constitution as "akin to a revolution"); MILLER, *supra* note 9, at 276 (discussing the August Revolution thesis, which states that "acceptance of the Potsdam Declaration was a revolutionary act which . . . subverted the old constitution") (quoting MINOBE TATSUKICHI, NIHONKOKU KENPŌ GENRON [PRINCIPLES OF THE JAPANESE CONSTITUTION] 118–19 (1948)).

[99] To be clear, Albert approaches this theoretical limitation on the amendment process as a question of political practice to be self-governed by political actors themselves. However, there is no indication, if such a constitutional distinction does exist between "amendment" and "revision"—or for that matter "wholesale" and "piecemeal" amendments—that it would not be judicially enforceable. The ultimate measure is legitimacy of the processes in the eyes of the people, which arguably may fall under some broader conception of what *procedures* are required, which *would* be judicially reviewable.

[100] Notably, the Preamble also appears to explicitly proscribe any attempt at "alteration" of the Constitution except "according to the conditions imposed by the present Constitution." MEIJI KENPŌ pmbl. The Japanese word used here is *funkō*, essentially meaning to recklessly alter or revise in a disorderly fashion. *See Funkō*, KOTOBANKU, https://kotobank.jp/word/紛更-623136 (last visited Mar. 26, 2018). See Section II.D.3 for further discussion of the importance of the Preamble.

amendment may take place while a regency is in effect.[101] As this was not an issue when the 1946 Constitution was promulgated,[102] it is arguable that the "wholesale" revision of the Constitution in 1946 was permissible because it complied not only with the literal amendment process in Article 73 but with the explicit restrictions in Article 75 as well.[103] At its absolute narrowest, the historical exception for a "wholesale" revision would further be limited to only those extreme circumstances that brought about the Meiji Constitution in 1889 and the 1946 Constitution.[104] Such a reading essentially restates the truism that "no constitutional provision . . . can survive revolution."[105]

Without delving too deeply into either extreme, it would appear that a middle-of-the-road approach would best encapsulate the scope of this historical exception. That is, "wholesale" revision of the Constitution must follow the same processes and restrictions as the "piecemeal" amendment process, similar to what occurred in 1946. However, faced with a revolution or some other exigent crisis, even explicitly entrenched provisions may pose no barrier to total constitutional revision. Applying this approach to the proposed LDP Draft,[106] it becomes clear that, barring some particularly extreme circumstances, any "wholesale" revision at the very least must comply with any textual limitations to the amendment process. Part III will attempt to uncover what those implicit or explicit limits might be.

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[101] MEIJI KENPŌ art. 75. Because the Imperial House Law was itself not at issue, the other explicit limit on the amendment power was not in play. *See id.* art. 74.

[102] This contention is corroborated by Emperor Hirohito's signing statement. *See Birth of the Constitution of Japan*, *supra* note 93.

[103] General MacArthur's comments upon submitting the draft constitution to the Diet reiterated the intent "that the procedure followed assures complete legal continuity with the constitution of 1889 now existing . . . ." *Birth of the Constitution of Japan: MacArthur's Statement on Deliberations over the Constitution Draft, June 21, 1946*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/04/116shoshi.html (last visited Sept. 4, 2018).

[104] Ironically, this argument—encapsulated by the August Revolution theory—is precisely the majority view among scholars in Japan. *See* discussion *infra* Section II.D.3.

[105] Richard Albert, *The Unamendable Core of the United States Constitution*, *in* COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION 13, 14 n.8. (András Koltay ed., 2015), lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1985&context=lsfp.

[106] With a two-thirds majority in both Houses and a potential "mandate" for some degree of constitutional change, there arguably may be little need for the LDP to proceed with a "piecemeal" approach should public opinion hold steady. *But see* Hiroyuki Tanaka & Hiroshi Odanaka, *Ruling Bloc to Put Off Plan to Pass Bill to Revise Constitutional Referendum Act*, MAINICHI (July 4, 2018), https://mainichi.jp/english/articles/20180704/p2a/00m/0na/032000c (discussing a setback in revising the referendum procedures for proposed amendments).

C. The Availability of Judicial Review to Invalidate an Allegedly Unconstitutional Constitutional Amendment

Another barrier to challenging the constitutionality of an amendment is the constitutional scope of judicial review.[107] The power of judicial review is expressly enshrined in Article 81 of the 1946 Constitution. "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or *official act*."[108] The term *shobun*, translated here as "official act," refers to a discretionary or administrative decision, usually involving the application of law to facts in order to determine how something or someone should be dealt with.[109] The only other instance of the term *shobun* is in Article 78, which prohibits "disciplinary *action* against judges . . . by any executive organ or agency."[110] A necessary corollary to Article 81 is the Supremacy Clause in Article 98, which provides that "no law, ordinance, imperial rescript or other *act of government*, or part thereof, contrary to the [Constitution], shall have legal force or validity."[111] A key difference here is the much more expansive scope of Article 98's residual clause, which would reach any other "act," or *kōi*—a much broader term susceptible to circular definition even in Japanese.[112] The term *kōi* also appears in several other provisions.[113] Of course, because the Diet has never proposed an amendment to begin with, there is no precedent from the Supreme Court that clearly answers whether one would be reviewable as an "act of government" or whether it would be beyond review.[114]

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[107] Although Albert dismissed judicial review as an option to challenge an amendment to Article 96, his analysis presumed the *constitutional* availability of judicial review for an amendment, and his dismissal was based on the likelihood that Japanese courts would exercise judicial constraint based on *prudential* concerns. *See* Albert, *supra* note 2, at 672. This Comment is less concerned with whether a court *will* exercise its power—which depends more on the composition of the Supreme Court—than whether it *can*.

[108] KENPŌ art. 81 (emphasis added).

[109] *See Shobun*, KOTOBANKU, https://kotobank.jp/word/処分-535108 (last visited Mar. 26, 2018).

[110] KENPŌ art. 78 (emphasis added).

[111] *Id*. art. 98.

[112] *See Kōi*, KOTOBANK, https://kotobank.jp/word/行為-61390 (last visited Mar. 26, 2018) (meaning "act" or "conduct"). For a brief discussion of the varying permutations of the term across legal disciplines, with a particular focus on criminal law, see Okamura Harunobu, *Keihō ni okeru kōi ron no kiso* [*The Basis of Act Theory in Criminal Law*], 29 TŌYŌ L. REV. 1, 2 (1986), http://id.nii.ac.jp/1060/00003588/.

[113] *See* KENPŌ arts. 3, 4, 5, 7, 17, 20, 39.

[114] One interesting side note in assessing the intended scope of judicial review in Japan is the fact that the GHQ Draft contained a provision that would have allowed the Diet to overrule a Supreme Court decision with a supermajority vote, and yet that provision was not included in the final text of the 1948 Constitution. *See* THEODORE MCNELLY, THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION 74 (2000); Hideo Tanaka, *A History of the Constitution of Japan of 1946*, *in* THE JAPANESE LEGAL SYSTEM, *supra*

The *Sunakawa* case[115] is instructive in this instance not only because it involves Article 9 and the birth of the political question doctrine[116] in Japan, but because it involves a constitutional challenge to a *treaty*, judicial review of which is not addressed in either Article 81 or 98.[117] Instead, treaties are mentioned in the second paragraph of Article 98, stipulating that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed."[118] This special treatment has prompted some scholars to argue that treaties are therefore superior to the Constitution itself, or at least supersede any statutes in conflict.[119] The answer to whether treaties are reviewable, thus, may bear on the question of whether a court could potentially review a constitutional amendment.

The *Sunakawa* case involved a constitutional challenge to a criminal law enacted to enforce provisions of the Japan-United States Security Treaty—if the treaty itself violated Article 9, then so did those criminal provisions. A unanimous Court—albeit with multiple concurring opinions—held that "the question of whether the treaty was in accord with the Constitution was carefully discussed by both Houses and finally ratified by the Diet as being a legal and proper treaty."[120] Due to the "extremely high degree of political consideration, having bearing upon the very existence of [Japan] as a sovereign power," the Court declared that, "unless the said

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note 42, at 37 n.6. One possibility for the initial inclusion of this option was a general distrust among U.S. scholars and politicians at the time of activist courts overturning beneficial legislation. *See* MCNELLY, *supra*, at 74; *cf*, Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 20 n.90 (2004) (discussing Canadian reluctance to entrench certain provisions of its constitution "based upon a distrust of the judiciary" stemming from U.S. courts' *Lochner*-era jurisprudence). Although it is possible that these concerns may have been alleviated by the other restrictions imposed on judicial appointees. *See* KENPŌ art. 79, para. 2 (providing for popular review of appointments); *id.* para. 5 (affixing a mandatory retirement age).

[115] *See* THE JAPANESE LEGAL SYSTEM, *supra* note 24, at 709–11 (summarizing the background facts and majority opinion).

[116] For an in-depth explanation and critical examination of Japan's political question doctrine, or *tōchi kōi ron*, see generally Chen & Wada, *supra* note 30.

[117] In contrast, the Supremacy Clause as initially proposed by committee prior to completion of the GHQ Draft would have contained the following language: "This Constitution shall be the Supreme Law of the Land, and no law, ordinance, *treaty* or other governmental act contrary to the provisions thereof shall have legal force or validity." *Birth of the Constitution of Japan: GHQ Original Draft: Original Drafts of Committee Reports*, *supra* note 59 (emphasis added) (draft of the Committee of the Emperor and Miscellaneous Affairs).

[118] KENPŌ art. 98, para. 2.

[119] *See* SHIGENORI MATSUI, *supra* note 24, at 28–29 (noting that most scholars agree with the second contention).

[120] Sakata v. Japan, Sup. Ct. Dec. 16, 1959, Shō 34 (a) no. 710, 13 KEISHŪ 3225, 3234, *translated in* 1959 (A) (710), SUP. CT. JAPAN, http://www.courts.go.jp/app/hanrei_en/detail?id=13 (last visited Nov. 24, 2018) [hereinafter *Sunakawa*].

treaty is obviously unconstitutional and void, it falls outside the purview of the power of judicial review granted to the court."[121] In the normal sense then, the Court held that "the determination of [a treaty's] constitutionality should be left primarily to the Cabinet which has the power to conclude treaties and the Diet which has the power to ratify them; and ultimately to the political consideration of the people with whom rests the sovereign power of the nation."[122] Because the security treaty in question was not "obviously unconstitutional," the Court exercised judicial restraint under its political question doctrine and stopped short of reaching the merits.

Although the term "treaty" does not appear in Article 81, the *Sunakawa* Court nevertheless concluded that even highly political treaties can be subject to judicial review if "obviously unconstitutional and void." As the concurring opinion of Justice Tarumi acknowledged, the majority in fact did engage in a superficial review if only to determine whether further inquiry was required.[123] The Court did not, however, specify how it is that treaties fall under the penumbra of judicial review. In fact, the majority opinion did not discuss judicial review under Article 81 even once.[124] Some justices indicated that treaties, being indistinguishable in effect from laws insofar as domestic application is concerned, would fall under the term "law" as utilized in Article 81.[125] Justice Kotani, on the other hand, would have recognized a power of judicial review commensurate with that exercised by federal courts in the United States, after which the Japanese courts' power was modeled.[126] Because the majority opinion and all of the

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[121] *Id.* at 3235.

[122] *Id.*

[123] Justice Tarumi noted that the majority's opinion in fact "accepts the proposition that the court has the power to conduct substantive investigation for the sake of formality . . . to determine whether or not it has the substantive power to review the constitutionality of the treaty." *Id.* at 3258 (Tarumi, J., concurring). Justice Tarumi concluded that "the court has the power to review the constitutionality of any law, including ordinary treaties when applied as a domestic law," while noting that "there are certain matters which should be excluded from the application of the court's power to review as an exceptional case." *Id.* at 3256.

[124] Article 81 is first mentioned in the concurring opinion of Justices Fujita and Irie. *Id.* at 3246 (Fujita & Irie, JJ., concurring).

[125] Justices Okuno and Takahashi would have found all treaties reviewable as "Article 81 provided for judicial review of all laws, subservient to the Constitution." *Id.* at 3280 (Okuno & Takahashi, JJ., concurring); Justice Shima expressed even less aversion to judicial review, noting that the Court need only "discover a clue which would indicate that the latter formula was clearly improper compared with the former" for a treaty to be reviewable. *Id.* at 3245 (Shima, J., concurring).

[126] Justice Kotani pointed to "a theory which advocates that Article 81 of the Constitution is not a provision which directly confers the power of judicial review but that such a power intrinsically exists in the court which is bound by the Constitution and the laws. According to this, Article 81 is reduced to a provision which merely stipulates that the Supreme Court is the court of last resort with regard to reviewing of constitutional questions." *Id.* at 3273 (Kotani, J., concurring); Justice Kotani adopted this broad

concurring opinions were unanimous in that even the most politically sensitive treaties are reviewable under certain circumstances, the *Sunakawa* case at the very least does not preclude the contention that a constitutional amendment, applicable domestically and not involving sensitive negotiations with a foreign sovereign, would also be judicially reviewable.

Nevertheless, some attempt should be made to harmonize the *Sunakawa* Court's holding on the appropriate level of deference due to treaties on the one hand and the text of the Constitution on the other, to determine whether an amendment would also be subject to this "obviously unconstitutional" threshold. The first step is to address the apparent differential in scope between Articles 81 and 98. While Article 81 vests the Supreme Court only "with power to determine the constitutionality of any *law*, *order*, *regulation* or *official act*,"[127] the question remains of who can invalidate an "ordinance, *imperial rescript* or *other act of government*" that is nevertheless unconstitutional under Article 98.[128] The short answer, as provided in the Constitution, is that "[t]he whole judicial power is vested in a Supreme Court,"[129] and "[t]he Supreme Court is the court of last resort."[130] Justices Fujita and Toshio describe this as "the concept of superiority of the judiciary," albeit with certain caveats.[131] Justices Okuno and Takahashi briefly attempted to address this apparent discrepancy, concluding only that "there is no basis for the claim that just because the term 'treaties' is not included in paragraph 1, Article 98, it does not come under the Constitution or that it is beyond the reach of the judicial review."[132] Indeed, under the general canon of construction that individual provisions should be interpreted in harmony with one another,[133] Articles 81 and 98 are best

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understanding of judicial review while indicating that the majority opinion's limitation of "immediately, clearly unconstitutional and void" is dictum, and there is "no necessity for such requirement neither from the substantive law nor from the procedural law point of view." *Id.* at 3277.

[127] KENPŌ art. 81 (emphasis added).

[128] Both "Order" and "ordinance" are translations of the same underlying Japanese term *meirei*. *See id.* arts. 81, 98.

[129] *Id.* art. 76, para. 1; *cf. id.* para. 2 ("[N]or shall any organ or agency of the Executive be given final judicial power.").

[130] *Id.* art. 81.

[131] *Sunakawa*, *supra* note 120, at 3246 (Fujita & Irie, JJ., concurring).

[132] *Id.* at 3281 (Okuno & Takahashi, JJ., concurring).

[133] *See* LACKLAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION 36 (2009). Contemporaneous statements from the GHQ drafters confirm that the 1946 Constitution was intended to be viewed as a whole. *See* Hideo Tanaka, *A History of the Constitution of Japan of 1946*, *in* THE JAPANESE LEGAL SYSTEM, *supra* note 42, at 664 ("We feel that the whole Constitution as written is basic. . . . [I]n general, we regard this document as a unit.").

understood as providing non-exhaustive lists to illustrate the broad reach of the Court's power of judicial review.[134]

Delving further into the constitutional text, however, reveals that the slight differences between the two lists indicate separate conceptions of the breadth of judicial review. Applying the common maxims of *noscitur a sociis* and *ejusdem generis*,[135] Article 81 appears to provide a list of those presumptively reviewable acts of government in order of diminishing formality, from "law" to "official act."[136] Article 98, in contrast, lists items differing in kind—"law" being the purview of the legislative branch under Chapter IV of the Constitution; "order" referring to an action by the executive branch under Chapter V; "imperial rescript" obviously emanating from the Emperor, although that power no longer exists in Chapter I of the 1946 Constitution; while the general term "other act of government" would arguably extend to any action performed by any other manifestation of governmental authority under the remaining Chapters of the Constitution.[137] This would undoubtedly include local ordinances, or *jōrei*, issued by local entities constituted under Chapter VIII "Local Self-Government."[138] Read in

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[134] This understanding is supported by the GHQ drafters' acknowledgment that they were "warranted in giving the Supreme Court absolute power of review over questions of Constitutional interpretation." *Birth of the Constitution of Japan: GHQ Original Draft: Ellerman Notes on Minutes of Government Section, Public Administration Division Meetings and Steering Committee Meetings Between 5 February and 12 February Inclusive*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/03/147shoshi.html (last visited Sept. 4, 2018).

[135] *See Noscitur a sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[T]he meaning of an unclear word or phrase . . . should be determined by the words immediately surrounding it."); *Ejusdem generis*, BLACK'S LAW DICTIONARY, *supra* ("[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."). Similar principles for ascertaining meaning from surrounding terms apply in Japanese interpretation. *See* Hirano Toshihiko, *"Sono ta" heiretsu "sono ta no" reiji—Hōrei yōgo shakugi sono 1* [*Examples with "Et Cetera" and "Other"—An Exegesis of Legal Terminology Part 1*], 9 HIROSHIMA L. REV. 87 (2013), https://ir.lib.hiroshima-u.ac.jp/files/public/3/34433/20141016202048691 06/HiroshimaLawRev_9_87.pdf.

[136] KENPŌ art. 81. A "law" requires a majority of both Houses, *id.* arts. 56, 59; an "order" requiring agreement among the Cabinet, *id.* art. 73; a "regulation," or *kisoku*, potentially referring to procedural rules that can be established by courts or the Diet to govern their own actions, *id.* arts. 58, 77; and any other "official act" undertaken by an individual official, *see id.* art. 17 ("Every person may sue for redress . . . [for] damage through illegal act of any public official."); Sup. Ct. July 7, 1948, Shō 22 (re) 188, 2 KEISHŪ 801, 808 (finding that a trial or judicial decision also constitutes an "official act" under Article 81).

[137] KENPŌ art. 98; *cf.* Ishizuka v. Japan, Sup. Ct. June 20, 1989, Shō 57 (o) 164, 43 MINSHŪ 385, 391, http://www.courts.go.jp/app/files/hanrei_jp/161/052161_hanrei.pdf [hereinafter *Ishizuka*] (interpreting the residual clause as reaching any exercise of public authority with similar characteristics to the listed items, including any "act of state establishing legal norms" (*hō kihan o teiritsusuru kuni no kōi*)). For background on the *Ishizuka* case, see SHIGENORI MATSUI, *supra* note 24, at 242–43.

[138] KENPŌ art. 94; *see also Sunakawa*, *supra* note 120, at 3272 (Kotani, J., concurring) ("Even though the term 'Jorei' is not contained in Article 81 of the Constitution there is not a thread of doubt that such

conjunction, all governmental actions, regardless of formality or source of power, are therefore subject to judicial review, and there is no reason why this rationale would not also extend to Chapter IX "Amendments."

At first glance, such an interpretation of the wide breadth of judicial review would seem to contradict the *Sunakawa* principle that some treaties are beyond the Court's reach. Despite appearances, these results are not actually in conflict, and the *Sunakawa* Court's holding can be reconciled with the text of the Constitution. Article 98's residual clause extends to any "act of government" (*kokumu ni kansuru kōi*),[139] which is undoubtedly a broad term under which nearly any conceivable governmental action might fall. Most notably, Article 7 supports this broad reading in delineating those "matters of state" (*kokuji ni kansuru kōi*) to be performed by the Emperor, which includes the "[p]romulgation of amendments of the constitution."[140] The near identical terminology used in the Japanese text is illuminating in this respect—*kokumu* roughly translates as "state affairs"[141] and *kokuji* as "national affairs."[142] However, other provisions of the Constitution shed light on the intended distinction between these terms.[143] In particular, Article 72 uses *kokumu* to differentiate between "national affairs" and "foreign relations," or *gaikō*.[144] The term *kokuji*—only used in the Constitution to refer to the Emperor's duties[145]—can be understood as supplying the broadest definition, as the Emperor's duties span from "[r]eceiving foreign ambassadors and ministers" to "[p]roclamation of general election of

ordinance is subject to judicial review."); *id.* at 3280–81 (Okuno & Takahashi, JJ., concurring) (comparing reviewability of local ordinances to treaties).

[139] KENPŌ art. 98. This Japanese translation of what would become Article 98 was changed during the drafting process from "*seifu no kōi" to "kokumu ni kansuru kōi*," One key distinction on which the Supreme Court has spoken is that the act in question must be governmental in nature, so when the government is acting as an individual—such as by purchasing land to build a Self-Defense Force base—it does not fall within the reach of Article 98. *Ishizuka*, *supra* note 137, at 391.

[140] KENPŌ art. 7.

[141] *See Kokumu*, KOTOBANKU, https://kotobank.jp/jeword/国務 (last visited Nov. 24, 2018); *see also* KENPŌ art. 73 ("[A]ffairs of state"); *id.* art. 3 ("[M]atters of state").

[142] *Kokuji*, KOTOBANKU, https://kotobank.jp/jeword/国事 (last visited Nov. 24, 2018).

[143] Under the widely accepted canon of construction, words used in a constitution are presumed to have the same meaning throughout. BLOOM, *supra* note 133, at 31. Correspondingly, where a different term is used, it is reasonable to believe a different meaning is intended. *See id.* at 451 n.6. How a term is used elsewhere within the text can further aide in determining its proper meaning. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

[144] KENPŌ art. 72 (emphasis added) ("The Prime Minister . . . reports on general *national affairs* and *foreign relations* to the Diet . . . .").

[145] *Id.* arts. 3, 4, 5, 7.

members of the Diet."[146] Affairs of state (*kokumu*) and foreign relations (*gaikō*), therefore, each comprise a subset of the overall panoply of potential governmental activities.

Because Article 98 utilizes the term *kokumu* in extending to any "act of government" (*kokumu ni kansuru kōi*), this can be interpreted as only precluding judicial review for those decisions involving foreign affairs (*gaikō*) that have been committed to the absolute discretion of the peoples' representatives,[147] unless "obviously unconstitutional" under the *Sunakawa* standard. On the other hand, judicial review would be presumptively available for all other domestic acts.[148] Such a reading would provide a textual hook within the Constitution to support the *Sunakawa* decision[149] and Japan's now well-established political question doctrine.[150] The Constitution of Japan being a document of domestic application, amendments should then be considered an "act of government" subservient to the Constitution under Article 98, and in turn, subject to judicial review under Article 81.

This is not to imply that Article 98 confers a separate power of judicial review on the Supreme Court beyond that contained in Article 81 or that a constitutional amendment by itself could be challenged in court. Instead, Article 98 adds dimensional perspective to the reach of judicial review authorized under Article 81. Another constitutional limit not yet

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[146] *Id.* art. 7.

[147] The responsibility to "[m]anage foreign affairs" falls exclusively within the executive powers vested in the Cabinet. KENPŌ art. 72, para. 1, cl. 2. This coincides with the general understanding of the executive branch's broad discretion to conduct foreign affairs under the U.S. Constitution. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[148] Some scholars have read this to include "any form of national law." 2 HIGUCHI YŌICHI ET AL., CHŪSHAKU NIHONKOKU KENPŌ [THE ANNOTATED CONSTITUTION OF JAPAN] 1485 (1984) ("[*I*]*ssai no kokuhō keishiki* . . . "). The term "national law" (*kokuhō*), in turn, includes constitutions, and would equally extend to amendments. *See Kokuhō*, KOTOBANKU, https://kotobank.jp/word/国法-499793 (last visited May 25, 2018). Of course, because the Constitution of Japan has never actually been amended, much of the work in this area is purely theoretical. In the absence of definitive interpretations from the Supreme Court, the best course is to rely on the constitutional text.

[149] Justices Fujita and Irie clarified that the "high degree of political consideration" was present in that particular security treaty because it involved "negotiation . . . under the complicated and ever-changing international situation" of "restor[ing] complete sovereignty to Japan." *Sunakawa*, *supra* note 120, at 3248–49 (Fujita & Irie, JJ., concurring). This, along with the other concurrences, suggests that whether foreign policy is involved, as opposed to purely domestic policy, may be the determining factor on the question of reviewability.

[150] *See, e.g.*, Tomabechi v. Japan, Sup. Ct. June 8, 1960, Shō 30 (o) no.96, 14 MINSHŪ 1206, 1210, http://www.courts.go.jp/app/hanrei_en/detail?id=14 (declining to review the highly political decision to dissolve the House of Representatives); Chen & Wada, *supra* note 30, at 352 & n.22; Shigenori Matsui, *supra* note 30, at 1387–88 (discussing the political question doctrine).

discussed is that any attempt to challenge an amendment would still need to comply with the Court's "case and controversy" limits.[151] For example, a justiciable case could potentially exist when an official acts or refuses to act under a law passed pursuant to an allegedly unconstitutional amendment.[152] Even though the preceding analysis clarifies that no constitutional barriers prevent courts from reviewing a challenged amendment, the Court may still fashion prudential limits to review.[153] As Albert and many other commentators have recognized,[154] Japanese courts are considered to be generally conservative and unlikely to interfere in areas of policy that are better left to the discretion of the elected branches, such as economic policies, social rights, and election laws.[155] A question that cannot be answered is whether the Court will nevertheless fashion a similar prudential barrier to review for the content of a constitutional amendment. While there is at least some textual support in the Constitution counseling against premature judicial review for the contents of treaties, as well as for laws pertaining to elections and social welfare programs,[156] similar language is not present regarding amendments. Although Article 96 does proclaim that all amendments "shall be initiated by the Diet" and "the Diet shall specify" the means of public referendum, this merely speaks to amendment procedure,

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[151] Although the words "case and controversy" do not appear in the Constitution, the Supreme Court nevertheless held that such a requirement was a precursor to the exercise of judicial power under Article 76, which in turn is a precursor to judicial review for the constitutionality of a statute under Article 81. *See* Shigenori Matsui, *supra* note 30, at 1379 (discussing the standing doctrine in the *National Police Reserve* case).

[152] The *Sunakawa* case is also instructive because the Court only considered the availability of judicial review for a treaty when it was necessary to determine the validity of a criminal statute enacted to enforce provisions of the underlying treaty. *See* THE JAPANESE LEGAL SYSTEM, *supra* note 42, at 709.

[153] Other constitutional limits that the Supreme Court of Japan has recognized include immunities from suit under treaties and international law, as well as cases that the Constitution itself places outside the realm of judicial review, such as impeachment. *See* KENPŌ arts. 55, 64; ASHIBE NOBOYOSHI, KENPŌ [THE CONSTITUTION] 331 (5th ed. 2011). An example in U.S. law of a mixed constitutional-and-prudential doctrine would be mootness, which is not wholly mandated under the U.S. Constitution. *See* CONG. RESEARCH SERV., RS22599, MOOTNESS: AN EXPLANATION OF THE JUSTICIABILITY DOCTRINE 3–5 (2007).

[154] *See* Albert, *supra* note 2, at 671; Haley, *supra* note 30, at 1467; Shigenori Matsui, *supra* note 30, at 1375.

[155] *See* ASHIBE NOBOYOSHI, *supra* note 153, at 332. Using election law as an example, although judicial review may be precluded on discretionary determinations of where to draw borders for voting districts, such policies have been declared unconstitutional when violating basic concepts such as equality under the law. *See* KENPŌ art. 14, para. 1 ("All of the people are equal under the law . . . ."); William Somers Bailey, *Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act*, 6 PAC. RIM L. & POL'Y J. 169, 175 (1997).

[156] *See* KENPŌ art. 73, para. 1, cl. 2–3 (vesting the Cabinet with the exclusive power to "[m]anage foreign affairs" and "[c]onclude treaties"); *id.* art. 47 (leaving "matters pertaining to the method of election" to the discretion of the Diet); *id.* art. 25, para. 2 ("In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.").

not content.[157] To reiterate, nothing in the Constitution bars judicial review of amendments, assuming a valid case or controversy is brought before the Court. Whether or not the Court will actually exercise its power is a separate question that is beyond the scope of this Comment.

D. Scholarly Opinions and Foreign Judicial Decisions on Implicit Limits to the Amendment Process

1. Lessons from the "Basic Structure" Doctrine Can Be Applied to the Japanese Constitution, Even If the Doctrine Itself Cannot

Although the Constitution of Japan benefits from a specific textual provision highlighting the judiciary's ability to invalidate an otherwise properly promulgated act of the legislative branch, not every constitution clearly recognizes the power of judicial review.[158] Nevertheless, various courts across the globe have at times taken it upon themselves to exercise powers not explicitly granted under their respective constitutions to prevent the abuses of governmental actors, even to the point of invalidating constitutional amendments.[159] The Indian Supreme Court's "basic structure" doctrine is possibly the earliest and most well known instance of this notion.[160] At its root, the "basic structure" doctrine states that, because it is the constitution that provides for an amendment process, the ability to amend the constitution must be limited to those actions that would not destroy its "basic structure."[161] In fact, this understanding is nearly identical

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[157] Thus far, this Comment has been concerned with the reviewability of a constitutional challenge to the *content* of an amendment—*procedural* challenges are presumptively justiciable. *Cf.* U.S. v. Sprague, 282 U.S. 716 (1931) (exercising jurisdiction over procedural and substantive challenges to the validity of the Eighteenth Amendment). *See infra* Section II.D.2 for further discussion of the U.S. Supreme Court's views on the availability of judicial review for constitutional amendments. The *Sunakawa* Court also expressed no qualms about assessing the security treaty's ratification procedures and quickly concluded that it comported with the process in Article 73. *Sunakawa*, *supra* note 120, at 3236.

[158] For example, the U.S. Constitution does not explicitly provide for the power of judicial review, and yet Chief Justice Marshall found such a power implied in the grants of judicial power and original jurisdiction under Article III. Marbury v. Madison, 5 U.S. 137, 173–74 (1803). *Cf.* U.S. CONST. art. III, §§ 1–2, *with* KENPŌ art. 81 (explicitly providing for judicial review).

[159] *See, e.g.*, Po Jen Yap, *Constitutional Fig Leaves in Asia*, 25 WASH. INT'L L.J. 421, 444–45 (2016) (describing the "basic structure" doctrine as a judicial attempt to thwart authoritarianism).

[160] Albert, *supra* note 2, at 669–71. Although Albert ultimately dismisses the possibility that Japanese courts will follow a similar route. *Id.* at 671.

[161] *See id.* at 669. For more on the Indian "basic structure" doctrine, see Manoj Mate, *Judicial Supremacy in Comparative Constitutional Law*, 92 TUL. L. REV. 393, 414–28 (2017).

to the views ascribed to by many Japanese constitutional scholars,[162] and as such, may be useful in determining how the Supreme Court of Japan could approach a similar controversy.

Unlike the broad language in Articles 81 and 98 of the Japanese Constitution, Article 13 of the Indian Constitution specifically defines "law" in such a manner so as to arguably preclude review of amendments.[163] Nevertheless, the Indian Supreme Court reasoned that allowing the Indian Parliament to amend the amendment process itself would "distort [the constitution] out of recognition . . . [by] demolish[ing] the very pillars on which the preamble rests."[164] The Court even used this "basic structure" doctrine to strike down an amendment that would have removed any implicit limitations on Parliament's amendment power, reasoning that "[t]he donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."[165] Although the particulars of the amendment process under the Indian Constitution are immediately distinguishable from the situation in Japan,[166] the approach taken by the Indian Supreme Court in identifying the contours of limits to the amendment power is instructive.

In particular, when first announcing the doctrine in *Kesavananda Bharati v. State of Kerala*, Chief Justice Sikri's opinion for the majority applied a "structural approach to interpretation," considering not only the plain text of Article 368 but also "the preamble, the directive principles, and the non-inclusion in Article: 368 of certain constitutional provisions."[167] Based on these sources, the Court concluded that the "basic structure" of the

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[162] *See, e.g.*, ASHIBE NOBOYOSHI, *supra* note 153, at 385–88 (describing the three pillars of the Constitution of Japan—popular sovereignty, individual rights, and pacifism—with particular note of the Preamble as placing those pillars outside of Article 96); John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, 53 LAW & CONTEMP. PROBS. 73 (1990); *see also* discussion *infra* Section II.D.3. Nevertheless, those views falter under the same criticisms—lack of "textual authorization for the court to exercise this power." Albert, *supra* note 2, at 670 (discussing criticisms of the Indian Supreme Court's power grab).

[163] *See* INDIA CONST. art. 13, § 2 ("[A]ny *law* made in contravention of this clause shall, to the extent of the contravention, be void.") (emphasis added); *id.* § 3 ("In this article . . . "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage . . . .").

[164] Minerva Mills Ltd. v. Union of India, (1981) 1 SCR 206, 240 (India).

[165] *Id.*

[166] For example, Article 368 of the Indian Constitution does not require every amendment to be submitted to popular referendum. INDIA CONST. art. 368, § 2. Furthermore, amendments to certain Articles and Chapters of the Constitution were specifically entrenched and further required the approval of a majority of the state legislatures. Thus, the Indian Supreme Court was justified in concluding that Parliament's unilateral amendment power was not intended to be absolute. *See* Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225, 393 (India); Mate, *supra* note 161, at 418.

[167] Mate, *supra* note 161, at 418.

Indian Constitution rested on five unamendable pillars.[168] Although the *Kesavananda* Court's analysis undeniably rested heavily on the Preamble, which accounts for a majority of those five pillars,[169] its structural analysis allowed the Court to look beyond the plain text of Article 368 to ascertain how various provisions interact with one another. As the doctrine evolved, a framework emerged for identifying whether a feature was part of the Constitution's "basic structure" by examining the feature's purpose, its placement within the overall constitutional scheme, and "the consequences of its denial on the integrity of the Constitution."[170]

Courts in other countries have also adopted judicial review of constitutional amendments similar to the Indian "basic structure" doctrine, but only under similar circumstances. In Taiwan, for example, there are no appreciable checks and balances on the National Assembly's ability to amend the Constitution.[171] Owing to this peculiar imbalance, the Judicial Yuan—Taiwan's constitutional court—concluded that "the constitutional amendment proceedings must especially abide by the due process to ensure that the will of the public is indeed fully taken into consideration."[172] Based on that reasoning, the Judicial Yuan invalidated a constitutional amendment that was enacted by anonymous vote as violating constitutional principles of transparency.[173] Courts in Brazil, the Czech Republic, Germany, Italy, South Africa, and Turkey have also adopted a similar "basic structure" doctrine of some sort in response to too-lenient amendment barriers.[174] However, not every court considering the doctrine has accepted its premise.[175]

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[168] Those five principles are the constitutional supremacy, republican form of government, secularism, separation of powers, and federalist principles. *Id.* (quoting *Kesavananda*, 4 SCC at 274).

[169] *See* INDIA CONST. pmbl. ("WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC . . . .").

[170] Mate, *supra* note 161, at 421 (quoting Indira Nehru Gandhi v. Shri Raj Narain, (1975) Supp. SCC 1, 252 (India)).

[171] *See* MINGUO XIANFA [CONSTITUTION], arts. 72, 127 (1947) (Taiwan).

[172] Judicial Yuan [J.Y.] Interpretation No. 499, DAFAGUAN JIESHI [JIESHI] (Const. Ct. Mar. 24, 2000) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=499.

[173] *See id.*; Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 17 (2018).

[174] *See generally* Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JURIS. 5, 21–31 (2009) (discussing India, South Africa, and Germany); Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 677–713 (2013) (discussing Brazil, Italy, Turkey, and many other Latin American, European, and Asian countries); Vincent J. Samar, *Can a Constitutional Amendment Be Unconstitutional?*, 33 OKLA. CITY U. L. REV. 667, 727–35 (2008) (discussing Germany, India, Argentina, and Nepal).

[175] *See* Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. INT'L L. J. 673, 691 (2016) (noting a "mixed reception" to the

The United States' experience also appears to contradict the applicability of such a doctrine. For example, the Fourteenth Amendment is commonly viewed as having revised the "basic structure" of federalism to achieve the goals of Reconstruction.[176] Because Article V of the U.S. Constitution subjects all varieties of amendment to the same rigorous process,[177] the legitimacy of even such a fundamental revision is hardly questionable.[178] Likewise, as the primary motivator behind the Indian "basic structure" doctrine and its adoption elsewhere was the relative ease by which legislatures could unilaterally amend a country's founding document, such a doctrine would seem inapposite to the Constitution of Japan.[179] Nevertheless, one obvious parallel between the Indian "basic structure" doctrine and Japanese scholarship on the limits of Article 96 is their reliance on the text of the Preamble.[180] More important, however, is the fact that the Indian Supreme Court has routinely employed a broader structural analysis to uncover implicit limits on the amendment power. At the very least, such an approach may prove useful for illuminating limits on the scope of Article 96. This analytical framework will be explored further in Parts III and IV.

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doctrine in Malaysian courts); Roznai, *supra* note 174, at 699–701 (discussing rejection of the doctrine in Malaysia, Singapore, and Sri Lanka).

[176] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456–57 (1976); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 288–94 (1998); *cf.* Albert, *supra* note 105, at 14 n.6 ("It is worth considering whether the First Amendment was a mere 'amendment' or whether it amounted to a 'revision' that transformed the United States Constitution, as did the Fourteenth Amendment.").

[177] Although it could be said that Article 96 of the Japanese Constitution employs the same approach of subjecting all amendments–including "wholesale" revisions–to the same adoption and ratification process, the historical circumstances surrounding the Civil War and Reconstruction largely mirror the revolutionary circumstances that made such drastic changes permissible in Japan at the time of the adoption of the Meiji and 1946 Constitutions. *See* discussion *supra* Section II.B.

[178] Although that has not prevented hardliner segregationists from attacking aspects of the adoption process to discredit the Fourteenth Amendment's legitimacy. *See, e.g.*, Forrest McDonald, *Was the Fourteenth Amendment Constitutionally Adopted?*, 1 GA. J.S. LEGAL HIST. 1 (1991).

[179] Far from being rife for abuse, many Japanese politician—and even some scholars—have decried the constitutional amendment process in Article 96 as a near impossible hurdle. *See, e.g.*, Stephen Harner, *Why Abe Is Right About Constitutional Revision*, FORBES (Dec. 23, 2013, 9:30 PM), https://www.forbes.com/sites/stephenharner/2013/12/23/why-abe-is-right-about-constitutional-revision/; *Why Should the Current Japanese Constitution Be Amended?*, JAPAN INST. FOR NAT'L FUNDAMENTALS (Nov. 30, 2012), https://en.jinf.jp/news/archives/1623.

[180] Despite this superficial similarity, fundamental differences in the drafting history and context surrounding the adoption of the Indian Constitution and the Constitution of Japan would counsel against employing the same reasoning. In justifying its reliance on the Preamble, the *Kesavananda* Court noted that "[n]o other Constitution in the world is like ours. No other Constitution combines under its wings such diverse peoples . . . [The Indian Constitution] has a noble and grand vision. The vision was put in words in the Preamble and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of directive principles." Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 306 (India).

2. Unwritten Unamendability Doctrine in the United States as a Jumping-Off Point

Because Japan is a civil law country, the learned views of constitutional scholars are often treated as a source of law unto themselves and can be highly influential.[181] As such, scholarly opinions on implicit unamendability in both the United States and Japan can provide some insight into what facets of constitutional text and structure may be instructive when interpreting Article 96. In regards to the U.S. Constitution, the common understanding is that every provision is amendable. Douglas Linder summarized this notion as follows: "Nothing could be more inconsistent with the conception of the living Constitution than an unamendable amendment or an amendment authorizing unamendable amendments and which by its own terms is unamendable."[182] While it may seem at odds with a constitution designed for the purpose of protecting individual liberties, this concept is deeply rooted in the history of the U.S. Constitution.[183] Entrenchment provisions were thought to endanger the long-term viability of any constitution, as doing so "increases the risk of violence and revolutionary change, and it increases the risk that people will grow to disrespect the source of the institutions and arrangements that are forced on them."[184] There are, nevertheless, some provisions in the U.S. Constitution that were explicitly entrenched against amendment. The only clause that specifically recognized such statuses was located within Article V itself.[185] As part of a compromise to secure ratification in the Southern states, Article V prohibited amending the Constitution to abolish the slave trade or impose any direct taxation on states prior to 1808.[186] The equal representation of states in the Senate is also shielded by requiring that "no state, without its consent, shall be deprived of its equal suffrage in the Senate."[187] The Equal Suffrage Clause may therefore be constructively unamendable, as no state would rationally consent to a reduction of its own representation.[188] Aside from these provisions in Article V, U.S. scholars have also indicated that

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[181] *See* THE JAPANESE LEGAL SYSTEM, *supra* note 24, at 59–60.

[182] Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 731 (1981).

[183] *See* AMAR, *supra* note 32, at 285–86 (describing problems with the Articles of Confederation that convinced the founders of the need for flexibility).

[184] Linder, *supra* note 182, at 731.

[185] *See* U.S. CONST. art. V, § 2. These temporal entrenchments have long since expired, so nothing is explicitly unamendable at present. *See* Albert, *supra* note 173, at 22 & n.97.

[186] *See* U.S. CONST. art. V, § 2; Linder, *supra* note 182, at 721; AMAR, *supra* note 32, at 20–21.

[187] U.S. CONST. art. V, § 3.

[188] *See* Albert, *supra* note 2, at 662; Linder, *supra* note 182, at 717 n.3.

various fundamental concepts, such as certain democratic participation rights protected by the First Amendment,[189] may be so essential to the country's identity as to have acquired unamendable status.[190] Some have additionally argued that the Equal Protection Clause, perhaps due to its widespread popular support in the political realm as well as in private civil litigation and popular culture, may be considered unamendable.[191] And yet scholars and politicians alike have seriously advocated for the repeal or curtailment of various provisions in both the First and Fourteenth amendments.[192]

Although the implicit limits to the amendment power of Article V are far from settled, arguably any such limits must have at least some root in the actual text of the Constitution and not just popular support. One interesting claim of unamendability has focused on the specific language used as evidence of the framers' intent. The No Religious Test Clause of Article VI states that "no religious Test shall *ever* be required as a Qualification to any Office or public Trust under the United States."[193] One scholar has argued that, because "[t]his is the only instance of the word 'ever' in the Constitution, and it is the only time any word indicating permanence appears in the Constitution," the No Religious Test Clause is therefore implicitly entrenched against amendment.[194] This claim, while certainly novel, is not entirely indefensible insofar as it finds support both within the text and in the

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[189] *See* Albert, *supra* note 105, at 40.

[190] *See, e.g.*, LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 33–34 (2008) (suggesting that a republican form of government and the rule of law may be unamendable concepts); AMAR, *supra* note 32, at 292 (suggesting that the amendment power itself cannot be eliminated). *See generally* Yaniv Roznai, *Towards a Theory of Unamendability* (N.Y.U. Pub. Law and Legal Theory Working Papers, Paper No. 515, 2015), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1515&context=nyu_plltwp (surveying various theories of unamendability with a focus on primary and secondary constituent power).

[191] *See* JOHN R. VILE, A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS 110 (6th ed. 2015).

[192] This includes the current U.S. President. *See* Phillip Bump, *Donald Trump and Scott Walker Want to Repeal Birthright Citizenship. It's Nearly Impossible.*, WASH. POST (Aug. 18, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/08/18/donald-trump-and-scott-walker-want-to-repeal-birthright-citizenship-its-nearly-impossible/; Josh Marshall, *Priebus: Trump Considering Amending or Abolishing 1st Amendment*, TALKING POINTS MEMO (Apr. 30, 2017, 3:41 PM) https://talkingpointsmemo.com/edblog/priebus-trump-considering-amending-or-abolishing-1st-amendment. Of course, calls for amending the First Amendment have come from both sides of the aisle. *See, e.g.*, David Cole, *How to Reverse* Citizens United*: What Campaign-Finance Reformers Can Learn from the NRA*, ATLANTIC, Apr. 2016, https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/.

[193] U.S. CONST. art. VI, § 3 (emphasis added).

[194] George Mader, *Binding Authority: Unamendability in the United States Constitution—A Textual and Historical Analysis*, 99 MARQ. L. REV. 841, 843 (2016).

Constitution's enactment history.[195] That same scholar also reasoned that, since the U.S. Constitution itself contains at least one explicit entrenchment provision—and quite possibly two other implicit ones—unamendable provisions are not entirely contrary to the spirit of a living constitution.[196] Even assuming that inclusion of the word "ever" indicates an intent to implicitly entrench the No Religious Test Clause, the question remains of whether such an entrenchment itself would also be considered unamendable.

Despite being invoked to amend the U.S. Constitution twenty-seven times, the Supreme Court has not yet specifically recognized any implicit limits to Article V.[197] Various procedural challenges to ratified amendments have been deemed justiciable,[198] although it is unclear what a justiciable substantive challenge would look like. Recalling the Indian Supreme Court's "basic structure" doctrine, even provisions not subject to normal amendment can still be changed, but only by utilizing additional processes or by adopting an entirely new constitution.[199] Constitutional law scholar Akhil Reed Amar suggests that even the explicit entrenchment provisions in Article V could themselves have been amended out, thereby allowing a second amendment to ban slavery prior to 1808.[200] Perhaps such a "double amendment" is all the additional process that would be required to overcome implicit entrenchment provisions as well. Because Article V does not limit its own scope, it also does not proscribe the future enactment of provisions explicitly entrenched even against "double amendment."[201] Therefore, if such a doubly entrenched amendment is enacted,[202] future generations must still be able to remove those explicitly unamendable provisions under the proper circumstances.[203] When that time comes, it is undoubtedly the

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[195] *See id.* at 870–78. *But cf.* AMAR, *supra* note 32, at 166 (suggesting that "Article VI broke new ground," as many state constitutions at the time did employ such religious tests).

[196] *See* George Mader, *Generation Gaps and Ties That Bind: Constitutional Commitments and the Framers' Bequest of Unamendable Provisions*, 60 HOW. L.J. 483, 515–17 (2017).

[197] *See* CONG. RESEARCH SERV., DOC. NO. 112–9, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 997–98 (interim ed. 2017), https://www.congress.gove/content/conan/pdf/GPO-CONAN-2017.pdf.

[198] *See id.* at 911–13; U.S. v. Sprague, 282 U.S. 716 (1931).

[199] *See* Albert, *supra* note 105, at 22–23 (discussing Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 366); *cf.* AMAR, *supra* note 32, at 295–99 (questioning whether Article V is the exclusive vehicle to amend the Constitution, as the text of Article V conspicuously lacks such a descriptor).

[200] AMAR, *supra* note 32, at 292–93.

[201] *See* Mader, *supra* note 196, at 495.

[202] *Cf.* Roznai, *supra* note 190, at 4 (discussing the proliferation of unamendable provisions in more than half of modern constitutions).

[203] *Cf.* Linder, *supra* note 182, at 733 (suggesting that Article V itself also cannot be amended to limit the scope of future amendments). An explicit entrenchment provision could thereby narrowly be read as

Supreme Court that must then determine whether those circumstances have been met,[204] logically implying at least some degree of substantive review for constitutional amendments. Given the potential availability of judicial review at least to determine the amendability of explicitly entrenched provisions, there is no reason why the Supreme Court could not also theoretically invalidate an amendment that had failed to first repeal an explicit—or implicit—entrenchment.

3. The Current Prevailing Views in Japan on Implicit Limits to Article 96

Any discussion of the limits to constitutional amendments must begin with the first and only successful amendment in Japanese history—the 1946 Constitution itself. Given the extraordinary circumstances surrounding the adoption of the 1946 Constitution,[205] however, there is no consensus among Japanese scholars on what implicit limits to Article 96 exist.[206] This debate has resulted in two general camps of thought on the amendment power: "limited" and "unlimited."[207] Notably, the "unlimited" theory largely mirrors the position that U.S. constitutional scholars generally adhere to.[208] So long as a proposed constitutional amendment satisfies the literal commands of Article 96—which by its own text poses no limitations on an amendment's content—then there are no limits to what can or cannot be amended.[209] As such, the 1946 Constitution would have been a permissible amendment of the Meiji Constitution. The converse assertion is that, if two-thirds of both Houses and half of the Japanese voters so desired, sovereignty could just as easily be returned to the Emperor, thus reinstating the Meiji Constitution.[210] Going one step further, hardliner conservative theorists routinely decry the

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only precluding amendment under the procedures in Article V, while still allowing for the adoption of some other amendment creating a new amendment process to circumvent those limits.

[204] *See* CONG. RESEARCH SERV., *supra* note 197, at 1011–14 (discussing Coleman v. Miller, 307 U.S. 433 (1939), and the availability of judicial review under Article V.

[205] For a more in-depth history of the drafting of the 1946 Constitution, see generally Goodman, *supra* note 2, at 23–25; KOSEKI SHŌICHI, *supra* note 36; MCNELLY, *supra* note 114.

[206] *See* Tsuji Yuichiro, *Amendment of the Japanese Constitution—A Comparative Law Approach*, 37 NANZAN REV. AM. STUDS. 51, 65 (2015). Coincidentally, the Japanese government—largely consisting of career bureaucrats—has not weighed in on which understanding of amendment limits (or lack thereof) it officially adopts. *See id.* at 63 (citing SAKATA MASAHIRO, SEIFU NO KENPŌ KAISHAKU [GOVERNMENTAL INTERPRETATION OF THE CONSTITUTION] 308 (2013)).

[207] *Id.* at 64; *see also* ASHIBE NOBOYOSHI, *supra* note 153, at 385–386; 2 HIGUCHI YŌICHI ET AL., *supra* note 148, at 1440–50.

[208] *See, e.g.*, Albert, *supra* note 2, at 667.

[209] *See* Tsuji Yuichiro, *supra* note 206, at 64; 2 HIGUCHI YŌICHI ET AL., *supra* note 148, at 1446–49.

[210] *See* Tsuji Yuichiro, *supra* note 206, at 64–65 (describing so-called constitutional suicide).

1946 Constitution as "imposed" or a "foreign document," claiming that it therefore lacks any real legitimacy.[211] This view, while generally rejected by constitutional scholars, appears to have its greatest foothold in the nationalist movement.[212] Unfortunately, many of those who lead the party that holds the reins on future constitutional reform also subscribe to such beliefs.[213]

In contrast, under the "limited" theory, because the Constitution provides the mechanisms for proposing and adopting amendments, Article 96 cannot therefore be used to usher in fundamental changes that would destroy the Constitution's identity. Instead, "[o]nly deletions, additions, and corrections are permissible."[214] Although there is disagreement on the extent, the majority of Japanese scholars generally accept the proposition that the ability to amend the Constitution is limited.[215] Many arguments focus on the theoretical aspects of popular sovereignty, assuming such limits naturally exist as the power to enact a constitution resides solely with the people, and the people would never allow for an amendment that would threaten their own sovereignty, such as reestablishing a monarchy.[216] In contrast, under an Imperial monarchy, the Emperor could unilaterally "abolish" the constitution in its entirety without threatening the Emperor's own sovereignty in the least.[217] It is this distinction between Article 96 conferring only the power to "amend" the Constitution via Article 96 and not to "abolish" that supports the existence of such limits.[218] Having established that Article 96 grants only a fraction of the peoples' full power to establish a constitution, many

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[211] *See* Boyd, *supra* note 57, at 48–50; SHIGENORI MATSUI, *supra* note 24 at 262. For a published example of these arguments, see generally KOYAMA TSUNEMI, NIHONKOKU KENPŌ MUKŌ RON (2002).

[212] *See* Boyd, *supra* note 57, at 49–50.

[213] *See* CONG. RESEARCH SERV., RL33436, JAPAN-U.S. RELATIONS: ISSUES FOR CONGRESS 8 (2016) ("Abe's selections for his cabinets include a number of politicians known for advocating nationalist, and in some cases ultra-nationalist, views that many argue appear to glorify Imperial Japan's actions."); Josh Gelernter, *Japan Reverts to Fascism*, NAT'L REV. (July 16, 2016, 8:00 AM), https://www.nationalreview.com/2016/07/japans-new-fascism/ (describing Prime Minister Abe's membership in Nippon Kaigi, a "radical nationalist organization").

[214] Tsuji Yuichiro, *supra* note 206, at 65.

[215] *See* SHIGENORI MATSUI, *supra* note 24 at 260. For an early discussion on limits to Article 96, see Inomata Kōzō et al., *Zadankai: Kenpō wa kaiseisubeki ka ina ka* [*Symposium: Should the Constitution be Amended or Not?*], 68 CHŪŌ KŌRON (1953), *reprinted in* KENPŌ KAISEI RON [CONSTITUTIONAL AMENDMENT THEORY] 170 (Hasegawa Masayasu & Mori Hideki eds., 1977).

[216] *See* 2 HIGUCHI YŌICHI ET AL., *supra* note 148, at 1443–44; SATŌ TATSUO, *supra* note 24, at 571. In many respects, this understanding, mirrors—and predates—the Indian Supreme Court's "basic structure" doctrine. *See* Tokujin Matsudaira, *Japan's Election and Constitutional Revision*, INT'L J. CONST. L. BLOG (Dec. 18, 2012), http://www.iconnectblog.com/2012/12/japans-election-and-constitutional-revision/.

[217] *See* 2 HIGUCHI YŌICHI ET AL., *supra* note 148, at 1440–41.

[218] *See id.* at 1443–44 (comparing Japan's experience to countries such as France and Belgium, where monarchies were overthrown).

scholars have settled on at least three fundamental pillars that cannot be amended through the exercise of that limited power.[219] Some contend that the popular referendum requirement in Article 96 is also unamendable, as abolishing it would greatly upset the balance of popular sovereignty.[220]

One major dilemma is how to harmonize this limited theory with the reality that the 1946 Constitution itself arguably far exceeded the limits of the Meiji Constitution's amendment power. In an attempt to alleviate this tension, the August Revolution theory (*hachigatsu kakumei setsu*) posits that Japan's surrender in World War II qualified as a "revolution."[221] Under this theory, it was in actuality the Potsdam Declaration—which laid out the terms for Japan's surrender in World War II[222]—that reverted sovereignty in Japan to the people, whereby the processes in Article 73 were followed merely to give the appearance of legitimacy.[223] The Emperor officially accepted those terms of surrender on August 14, 1945,[224] hence the name "August Revolution." Due to this unconditional surrender, the concept of Imperial sovereignty enshrined in the Meiji Constitution therefore posed no bar to the passage of a wholesale revision.[225] By diminishing the role of the Meiji Constitution in the adoption process, this theory attempts to preserve the assumption that amendments are implicitly limited to those that do not destroy or rewrite the Constitution itself. Despite the August Revolution theory's widespread acceptance,[226] common criticisms include the fact that the Potsdam Declaration of its own terms did not demand the transfer of

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[219] *See id.* at 1444–45. Those pillars consist of popular sovereignty, individual rights, and pacifism. *See id.*; ASHIBE NOBOYOSHI, *supra* note 153, at 386–87; SHIGENORI MATSUI, *supra* note 24, at 260–61; SATŌ TATSUO, *supra* note 24, at 571–73.

[220] *See* ASHIBE NOBOYOSHI, *supra* note 153, at 387–88; SATŌ TATSUO, *supra* note 24, at 573.

[221] *See* SHIGENORI MATSUI, *supra* note 24, at 18–21; MILLER, *supra* note 9, at 274–77. *See generally* MIYAZAWA TOSHIYOSHI KENPŌ NO GENRI [PRINCIPLES OF THE CONSTITUTION] 376–89 (1967) (explaining the author's August Revolution theory).

[222] *See Birth of the Constitution of Japan: Potsdam Declaration*, NAT'L DIET LIBR., http://ww.ndl.go.jp/consitution/e/etc/c06.html (last visited Sept. 4, 2018).

[223] *See* KOSEKI SHŌICHI, *supra* note 36, at 124–29; *cf.* 2 HIGUCHI YŌICHI ET AL., *supra* note 148, at 1441–43 (doubting any real legal continuity between the Meiji and 1946 Constitutions due to such inherent limits to the amendment power).

[224] *See Birth of the Constitution of Japan: Imperial Rescript of the Termination of the War, August 14, 1945*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/01/017shoshi.html (last visited Sept. 4, 2018).

[225] *See* SHIGENORI MATSUI, *supra* note 24, at 19; MILLER, *supra* note 9, at 354 n.67; MIYAZAWA TOSHIYOSHI, *supra* note 221, at 387–89.

[226] *See* Yamashita Takeshi, *8-gatsu kakumei setus to 4-gatsu seitei setsu–Nihonkoku Kenpō no tanjōbi wa itsu ka* [*August Revolution Theory and April Establishment Theory–When Is the Constitution of Japan's Birthday?*], TEIKYŌ L. REV., Mar. 2008, at 1, 5.

sovereignty from the Emperor to the people,[227] as well as the fact that the Meiji Constitution continued in force up until the new Constitution took effect on May 3, 1947.[228] The government at the time rejected this theory by reiterating that legal continuity was maintained by complying with the Meiji Constitution's amendment process.[229] Regardless of the precise mechanisms involved,[230] at the very least, it is safe to say that the 1946 Constitution has since been accepted by the vast majority of the Japanese people as legitimate.

Even if Japanese scholars are generally in agreement that removing certain fundamental pillars goes beyond the scope of Article 96,[231] the lack of explicit textual support in Article 96 may impede courts from reaching a similar conclusion. Another critique scholars must contend with is that there is no definitive way to determine what is "fundamental."[232] Despite such criticisms, Japanese scholars have constructed text-based arguments for the unamendability of the three fundamental "pillars" of the 1946 Constitution: popular sovereignty, individual rights, and pacifism.[233] Although these concepts can be traced back to the Potsdam Declaration[234] and instructions from General MacArthur[235] and others within the Occupation,[236] Japanese scholars understandably prefer to rely on the Preamble.[237]

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[227] *See id.* at 6–7; *cf.* MCNELLY, *supra* note 114, at 216 n.2 (noting that a prior draft would have explicitly allowed the preservation of the current constitutional monarchy).

[228] *See* KOSEKI SHŌICHI, *supra* note 36, at 4; SHIGENORI MATSUI, *supra* note 24, at 16, 19. For an overview of the various theories on when the Meiji Constitution ended, see Yamashita Takeshi, *supra* note 226, at 3–10.

[229] *See* MILLER, *supra* note 9, at 354 nn.68–69; MCNELLY, *supra* note 114, at 28–29.

[230] Some scholars also attempt to resolve this issue by noting that the new Constitution did not become supreme law of Japan until Japanese sovereignty was officially returned on April 28, 1952. *See* Yamashita Takeshi, *supra* note 226, at 29; Takehana Mitsunori, *Teikoku Kenpō no kaisei tetsuzuki* [*Procedure of Amendments to the Constitution of the Empire of Japan*], 62 KOMAZAWA U. L. REV. 1, 29 (2001). In turn, Koseki refers to May 1949 as the true birth of the Constitution, when the Diet declined the opportunity to pass further amendments and adopted the 1946 Constitution. KOSEKI SHŌICHI, *supra* note 36, at 4.

[231] *See* Tsuji Yuichiro, *supra* note 206, at 66; SHIGENORI MATSUI, *supra* note 24, at 18.

[232] *See* 2 HIGUCHI YŌICHI ET AL., *supra* note 148, at 1445–46. Matsui identifies several other "fundamental principles," including the rule of law, separation of powers, central government and local autonomy, and Japanese society, although he stops short of claiming that such concepts are also unamendable. SHIGENORI MATSUI, *supra* note 24, at 29–35.

[233] *See* SHIGENORI MATSUI, *supra* note 24, at 260; ASHIBE NOBOYOSHI, *supra* note 153, at 385–88.

[234] *See Birth of the Constitution of Japan: Potsdam Declaration*, *supra* note 222. In particular, Article 10 demanded that Japan support "democratic tendencies among the Japanese people" and "respect . . . fundamental human rights," while Article 12 listed a "peacefully inclined and responsible government" as a prerequisite for the withdrawal of occupying forces after Japan's surrender. *Id.*

[235] Albert, *supra* note 2, at 674. The three basic points that General MacArthur identified as essential to include in the new constitution were: retaining the Emperor as head of state, abolishing the sovereign right to wage war, and ending the feudal system. *See Birth of the Constitution of Japan: MacArthur Notes*

> We, the Japanese people, . . . determined that we shall secure for ourselves and our posterity . . . the blessings of *liberty* throughout this land, . . . do proclaim that *sovereign power* resides with the people and do firmly establish this Constitution. . . . We . . . desire *peace* for all time and . . . recognize that all peoples of the world have the *right to live in peace*, free from fear and want.[238]

Although those three pillars can be found in the Preamble—much like Indian "basic structure" doctrine's five principles—nowhere does the text explicitly declare the corresponding provisions to be unamendable.[239] Acknowledging this, Japanese scholars nevertheless claim that the Preamble's purpose is to affirm the preexisting implicit limits on the amendment power.[240]

The unavoidable question that arises is what effect or legal force can be attributed to rights or concepts recognized only in the Preamble? As far as the U.S. Constitution is concerned, "[a]lthough that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power."[241] The Supreme Court of Japan reached a similar conclusion in

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(MacArthur's Three Basic Points), February 3, 1946, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/03/072shoshi.html (last visited Sept. 4, 2018).

[236] The State-War-Navy Coordinating Committee's ("SWNCC") January 7, 1946 policy directive in particular played a large role in guiding the GHQ's reform efforts. *See* MCNELLY, *supra* note 114, at 4–7; *Birth of the Constitution of Japan: Reform of the Japanese Governmental System (SWNCC 228)*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/03/059shoshi.html (last visited Sept. 4, 2018) [hereinafter *SWNCC 228*].

[237] *See* SHIGENORI MATSUI, *supra* note 24, at 261; ASHIBE NOBOYOSHI, *supra* note 153, at 387.

[238] KENPŌ pmbl. (emphasis added).

[239] Furthermore, the Preamble's drafting history counsels against relying on its text. The Meiji Constitution did not contain an actual Preamble, although the Imperial Rescript on promulgation served that role. MCNELLY, *supra* note 44, at 81. As such, the 1946 Constitution's Preamble was almost entirely drafted by a single GHQ officer. *Id.* Although it was removed from the first Japanese draft, it was promptly reinserted at the GHQ's insistence and retained in substantially the same form thereafter. *Id.* at 83–84.

[240] In support, Ashibe likens the Preamble's text to Article 79 of the German Basic Law and Article 89 of the French Constitution. *See* ASHIBE NOBOYOSHI, *supra* note 153, at 387. However, this argument overlooks the fact that those foreign constitutional provisions are substantive and explicitly entrench certain concepts against amendment—the Preamble of the Constitution of Japan shares neither quality. *Compare* GRUNDGESETZ [GG] [BASIC LAW] art. 79, sec. 3, translation at http://www.gesetze-im-internet.deenglisch_gg/index.html (Ger.) ("Amendments to this Basic Law affecting [principles of federalism] . . . or [basic human rights] shall be inadmissible."), *and* 1958 CONST. art. 89, para. 5 (Fr.) ("The republican form of government shall not be the object of any amendment."), *with* KENPŌ pmbl. ("Government is a sacred trust of the people, the authority for which is derived from the people . . . this is a universal principle of mankind upon which this Constitution is founded.").

[241] Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

Ishizuka v. Japan, holding that the Preamble's "right to live in peace" was not a concrete right enforceable by courts.[242] The Nagoya High Court revisited that same clause in 2008, albeit reaching a slightly different conclusion.[243] In dicta,[244] the High Court declared that the Preamble, while not independently enforceable, maintains "legal normative character" that provides guidance on how to interpret other provisions in the Constitution.[245] Utilizing something of a "penumbra" approach,[246] the High Court reasoned that an unenumerated right to live in peace was cognizable under Article 13, which recognizes the "right to life, liberty, and the pursuit of happiness,"[247] when viewed in conjunction with the renunciation of war in Article 9.[248] Although not providing tangible rights, the Preamble may yet prove useful in guiding the interpretation of more concrete provisions in the Constitution.

Even assuming that the Preamble has independent force, the Preamble of the 1946 Constitution contains very little support for the contention that these three "fundamental pillars" cannot be altered in any way. In particular, claims for entrenchment of the pacifism principle in Article 9 have been drawn from the Preamble's text,[249] but this simply masks the reality that those arguments almost exclusively rely on popular support.[250] Indeed, the relevant text is lofty even for the Preamble, arguably extending well beyond Japanese citizens.[251] Article 9's unamendable status is further called into question by subsequent attempts by the United States to urge Japanese

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[242] *See* Hudson Hamilton, Translation, Mōri v. Japan*: The Nagoya High Court Recognizes the Right to Live in Peace*, 19 PAC. RIM L. & POL'Y J. 549, 550 n.9 (2010) (discussing *Ishizuka*, *supra* note 137, at 393).

[243] *Id*. at 550.

[244] The district court originally dismissed the case on standing, and the Nagoya High Court confirmed that dismissal, then proceeded to discuss the underlying right in dicta. While not bound to that ruling, the Okayama District Court followed the Nagoya High Court's reasoning in a similar case. *See id*. at 550–51.

[245] *Id.* at 560. In the *Sunakawa* case, Justice Tanaka, analyzing the merits of the security treaty, found that Article 9 "must be interpreted in the light of the concept of eternal peace and international cooperation as proclaimed in the Preamble in its entirety." *Sunakawa*, *supra* note 120, at 3241 (Tanaka, J., concurring).

[246] *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing a "zone of privacy" emanating from the "penumbra" of various guarantees in the Bill of Rights).

[247] KENPŌ art. 13.

[248] Hamilton, *supra* note 242, at 560–61; *see also* Yuichiro Tsuji, *Constitutional Law Court in Japan*, TSUKUBA HŌSEI [TSUKUBA J.L. & POL.], Mar. 2016, at 65, 71–72.

[249] *See* ASHIBE NOBOYOSHI, *supra* note 153, at 387.

[250] *See* Albert, *supra* note 2, at 674–77; *cf. Polls on Abe's Desire to Revise Article 9 of Constitution Produce Mixed Results*, MAINICHI (May 22, 2017), https://mainichi.jp/english/articles/20170522/p2a/00m/0na/009000c (explaining discrepancies in polls that show popular support for clarifying the constitutional role of the Self-Defense Force, but not for amending Article 9).

[251] *See* KENPŌ pmbl. (emphasis added) ("We recognize that *all peoples of the world* have the right to live in peace, free from fear and want.").

remilitarization.[252] Without more concrete structural or textual support from the operative text of the 1946 Constitution—rather than the lofty prose of the Preamble—scholarly opinions may not be enough to convince courts to fully adopt the "limited" theory. This is not to declare that no textual bases exist within the 1946 Constitution that can support such claims of implicit amendment limits. However, to achieve those results, a broader textual understanding of Japan's constitutional structure and history is necessary.

III. THE ROLE OF HISTORICAL CONTEXT TO UNDERSTANDING IMPLICIT LIMITS ON THE AMENDMENT PROCESS

A. Explicit Limits to the Amendment Process Under the Meiji Constitution Provide Context for Implicit Limits Under the 1946 Constitution

As noted above, Article 96 simply provides a procedural pathway for any proposed amendment to become an "integral part" of the Constitution of Japan. It is the sole Article contained within Chapter IX of the Constitution, aptly titled "Amendments."[253] From a cursory glance of the text, the conclusion that the Constitution places no explicit or implicit limits on the amendment power in Article 96 seems inescapable. While such a straightforward answer is undoubtedly tempting, the Constitution of Japan and its structure must be understood in its historical context. The Meiji Constitution served as the model for the 1946 Constitution, which was then adopted pursuant to the existing amendment process in Article 73 so as to maintain legal continuity. As both documents share much of their structure and mechanics, understanding the latter requires examining the former.

The 1946 Constitution consists of eleven chapters,[254] beginning with the constitutional status of the Emperor as the "symbol of the State," while

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[252] *See* Lee Hudson Teslik, *Japan and Its Military*, COUNCIL ON FOREIGN REL. (Apr. 13, 2006), https://www.cfr.org/backgrounder/japan-and-its-military ("The United States has long pressured Japan to take a more robust military posture."). Although it should be noted that these attempts occurred after Japan's independence was restored in 1952, largely in response to the outbreak of the Korean War. *See* MCNELLY, *supra* note 114, at 149–50.

[253] *See* KENPŌ ch. IX.

[254] The Chapters of the 1946 Constitution are arranged as follows: Chapter I, The Emperor (Articles 1–8); Chapter II, Renunciation of War (Article 9); Chapter III, Rights and Duties of the People (Articles 10–40); Chapter IV, The Diet (Articles 41–64); Chapter V, The Cabinet (Articles 65–75); Chapter VI, Judiciary (Articles 76–82); Chapter VII, Finance (Articles 83–91); Chapter VIII, Local Self-Government (Articles 92–95); Chapter IX, Amendments (Article 96); Chapter X, Supreme Law (Articles 97–99); Chapter XI, Supplementary Provisions (Articles 100–103). *See id.* chs. I–XI.

recognizing the principle that all sovereign power is derived from the people.[255] Although the Meiji Constitution contained only seven chapters[256]—the first of which identified the Emperor as the sole source of Japanese sovereignty[257]—every chapter thereafter and their ordering to a large extent remained intact through the constitutional transition after World War II.[258] Although the Constitution was rebuilt to reflect needed reforms as identified by the GHQ,[259] the underlying structure was preserved,[260] and many provisions were retained in their entirety.[261] Certain institutions, such as the bicameral legislature, were reinserted at the behest of Japanese constitutional drafters,[262] and several amendments from Japanese legislators to the text of the final draft were incorporated prior to its promulgation.[263] This understanding also reflects the reality that the 1946 Constitution was not a foreign document wholly "imposed" on the Japanese people.[264]

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[255] *Id.* art. 1.

[256] The Chapters of the Meiji Constitution are arranged as follows: Chapter I, The Emperor (Articles 1–17); Chapter II, Rights and Duties of Subjects (Articles 18–32); Chapter III, The Imperial Diet (Articles 33–54); Chapter IV, The Ministers of State and the Privy Council (Articles 55–56); Chapter V, The Judicature (Articles 57–61); Chapter VI, Finance (Articles 62–72); Chapter VII, Supplementary Rules (Articles 73–76). *See* MEIJI KENPŌ chs. I–VII.

[257] *Id.* art. 1.

[258] Some chapters do have slightly different names for obvious reasons. For example, "The Ministers of State and the Privy Council" became "The Cabinet" in the 1946 Constitution and was expanded from a meager two Articles to eleven. *Compare id.* arts. 55–56, *with* KENPŌ arts. 65–75. This was due to the absorption of many of the executive powers previously exercised by the Emperor, such as managing foreign affairs and concluding treaties. *Compare* MEIJI KENPŌ art. 13, *with* KENPŌ art. 73.

[259] *See* KOSEKI SHŌICHI, *supra* note 36, at 79; *Birth of the Constitution of Japan: Charles Kades' Comments on the "Gist of the Revision of the Constitution (Matsumoto Draft)," February 12, 1946*, NAT'L DIET LIBR., http://www.ndl.go.jp/constitution/e/shiryo/03/002_15shoshi.html (last visited Nov. 25, 20180 [hereinafter *Kades Letter*].

[260] *See* MCNELLY, *supra* note 44, at 58 (noting that one of the first things the GHQ drafters agreed on was to preserve the structure and headings of the Meiji Constitution); KOSEKI SHŌICHI, *supra* note 36, at 91–94 (suggesting that the structural similarities may have been intended as the GHQ "was not framing a new constitution for Japan but merely amending the Meiji Constitution," to follow international rules under the Hague Convention on Land Warfare, or for other practical reasons).

[261] *Compare* MEIJI KENPŌ art. 33 ("The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives."), *with* KENPŌ art. 42 (Japan) ("The Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.").

[262] *See* Hideo Tanaka, *supra* note 42, at 664.

[263] *Id.*; *see also* KOSEKI SHŌICHI, *supra* note 36, at 179–88 (discussing the adoption of Diet amendments to Articles 23, 25, and 26, as well as the insertion of Article 10).

[264] *See, e.g.*, David S. Law, *Three Popular Misconceptions About the Japanese Constitution*, COUNCIL ON FOREIGN REL., https://www.cfr.org/blog/david-law-three-popular-misconceptions-about-japanese-constitution (last updated May 9, 2017). Although due to increasing rhetoric from the LDP and Prime Minister Abe, some western audiences have begun to accept that claim. *See, e.g.*, Peter Landers, *Biden Gets Japan's Attention with Nuclear Remark*, WALL STREET J. (Aug. 17, 2016, 9:45 PM), https://www.wsj.com/articles/biden-gets-japans-attention-with-nuclear-remark-1471424823.

As their structure and chapters are almost identical, some explanation must be given to the significance of the differences therein. For example, Article 9 of the 1946 Constitution is contained within its own chapter titled "Renunciation of War."[265] Its location within the 1946 Constitution is not happenstance.[266] Chapter I of the Meiji Constitution contained seventeen Articles, whereas Chapter I of the 1946 Constitution contains eight. This is because Article 9's "Renunciation of War" directly contradicts and displaces Articles in the Meiji Constitution that gave the Emperor power to issue ordinances "for the maintenance of the public peace and order,"[267] as well as command over Japan's military forces,[268] and the sole ability to declare war.[269] Article 9's placement within the 1946 Constitution is therefore best understood as a declaration that the Emperor's formerly broad powers under the Meiji Constitution have been repudiated and revoked.

That strategic placement of constitutional provisions specifically seeking to rectify abuses of power under the Imperial government is also evident in the chapters describing "Rights and Duties of the People."[270] Article 18 of the Meiji Constitution and Article 10 of the 1946 Constitution are essentially identical: "The conditions necessary for being a Japanese national shall be determined by law."[271] However, in contrast to the Meiji Constitution, the Article immediately following the citizenship clause in the 1946 Constitution broadly proclaims that the "fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights,"[272] and the remainder of the chapter bears little similarity to the Articles describing

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[265] KENPŌ ch. II.

[266] Reference to the strategic placement of provisions within a constitution, or "constitutional architecture," is another tool commonly used in canon of constitutional interpretation. *See* BLOOM, *supra* note 133, at 44–45 (discussing Chief Justice Marshall's use of contextual arguments in landmark cases, including Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[267] MEIJI KENPŌ art. 9; *see also id.* art. 6 (providing an Imperial veto over laws passed by the Diet); *id.* art. 8 (allowing for emergency ordinances); *id.* art. 31 (allowing deprivation of rights "in times of war or in cases of a national emergency"); SHIGENORI MATSUI, *supra* note 24, at 10–12 (detailing how these weak checks on executive power led to Japanese militarization and World War II). The LDP's proposed amendments would reinsert similar "emergency" clauses. *See* LDP Draft, *supra* note 15, ch. IX (creating a "State of Emergency" chapter, allowing the Cabinet to issue orders with the effect of law).

[268] MEIJI KENPŌ arts. 11–12.

[269] *Id.* art. 13.

[270] KENPŌ ch. III; *see also* MEIJI KENPŌ ch. II ("Rights and Duties of Subjects").

[271] KENPŌ art. 10; *accord* MEIJI KENPŌ art. 18 (using the word "subject" in place of "national"). Although the Japanese text does contain further differences in word usage and grammatical style. It is also worth repeating that this Article was not included in the GHQ Draft. *See* GHQ Draft, *supra* note 43.

[272] KENPŌ art. 11.

rights in the Meiji Constitution.[273] Of course, this directly reflects the drafters' desire to rectify the vast human rights curtailments and abuses under the Imperial government,[274] and, in many respects, was a necessary component for any post-World War II constitution in Japan.[275]

The chapters on the Diet, the executive branch, the judiciary, and finances follow the same ordering in both the Meiji Constitution and the 1946 Constitution, albeit with more specificity in duties and more checks and balances in the 1946 Constitution. Many of the changes to these sections reflect goals that the GHQ deemed necessary to the democratization of Japan, such as combining an English-style parliamentary system with an American-style executive branch,[276] while others reflect proposals from the Japanese Diet and Japanese drafters, who preferred to retain a bicameral legislature over the GHQ's unicameral suggestion.[277] One significant role of the bicameral legislature is the ability of the House of Councillors to essentially veto a bill passed by the House of Representatives, who can then override that veto through a two-thirds majority vote.[278]

The remaining chapters of the 1946 Constitution consist of provisions governing local governments, the amendment process, the supremacy of the Constitution, and other "Supplementary Provisions."[279] In contrast, the Meiji Constitution contains only one other chapter: "Supplementary Rules."[280] The

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[273] *Compare, e.g.*, MEIJI KENPŌ art. 28 (emphasis added) ("Japanese subjects shall, *within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects*, enjoy freedom of religious belief.") (emphasis added), *with* KENPŌ art. 20, para. 1 ("Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.").

[274] *See* SHIGENORI MATSUI, *supra* note 24, at 10–12; *cf.* Mindy Kotler, *The Comfort Women and Japan's War on Truth*, N.Y. TIMES (Nov. 14, 2014), https://www.nytimes.com/2014/11/15/opinion/comfort-women-and-japans-war-on-truth.html (detailing Prime Minister Abe's revisionist views of World War II atrocities, such as the comfort women system). Even the Diet committee responsible for the Matsumoto Draft recognized the need to adopt measures to prevent future rights violations. *See* KOSEKI SHŌICHI, *supra* note 36, at 56.

[275] *See, e.g.*, *SWNCC 228*, *supra* note 236, app. B, para. 6; *Kades Letter*, *supra* note 259, cmt. 4.

[276] *See* Mieko Endo, Douglas MacArthur's Occupation of Japan: Building the Foundation of U.S.-Japan Relationship 64–65 (May 22, 2006) (unpublished graduate dissertation, University of Montana) (on file with the University of Montana, at https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=3123&context=etd); *see also* KENPŌ art. 66 (creating a Prime Minister and a civilian cabinet, all of whom are responsible to the Diet).

[277] *See* Hideo Tanaka, *supra* note 42, at 664.

[278] KENPŌ art. 59, para. 2. Although the gridlock caused by the two houses being controlled by different political parties (*nejire kokkai*) has since resulted in some politicians to call for abolishing the House of Councillors. *See, e.g.*, ETŌ SEISHIRŌ, ICHIINSEI KOKKAI GA NIHON O SAISEISURU! [A UNICAMERAL LEGISLATURE WILL REGROW JAPAN!] (2012).

[279] KENPŌ chs. VIII–XI.

[280] MEIJI KENPŌ ch. VII.

concept of local self-government was not contained in the Meiji Constitution, although it was permitted by laws at the national level,[281] and it was inserted into the 1946 Constitution to "make [the people's] will more effective in the conduct of local affairs."[282] The final chapter in the Meiji Constitution dealing with miscellaneous provisions was then split up in order to emphasize certain aspects, including important changes from the Meiji Constitution. The relationship between Chapter VII of the Meiji Constitution and Chapters IX and X of the 1946 Constitution, and what those similarities mean is further explored in the sections that follow.

B. The Context and Importance of the Final Chapter of the Meiji Constitution

Chapter VII of the Meiji Constitution was titled "Supplementary Rules"[283]—the first provision in this Chapter was the amendment process in Article 73. Like many other provisions in the 1946 Constitution, the text of Article 96 also closely mirrors that of its counterpart in the Meiji Constitution, except that Article 73 imposed a two-thirds quorum requirement whereas the 1946 Constitution shifts the power of amending the Constitution to the public by requiring that any amendment be additionally subject to popular referendum.[284] In addition to the amendment process in Article 73, Chapter VII contained three other provisions:

> Article 74. No *modification* of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.
>
> (2) No provision of the present Constitution can be *modified* by the Imperial House Law.
>
> Article 75. No *modification* can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.

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[281] *See* KOSEKI SHŌICHI, *supra* note 223, at 89–91; ASHIBE NOBOYOSHI, *supra* note 153, at 356; 2 HIGUCHI YŌICHI ET AL., *supra* note 148, at 1371–76.

[282] *Kades Letter, supra* note 259, cmt. 5. Although the concept of local government was also contained in one of the drafts proposed by Japanese scholars, see KOSEKI SHŌICHI, *supra* note 223, at 89, it was not publicly distributed at the time, HIGUCHI YŌICHI ET AL., *supra* note 148, at 1378, and the Chapter is more readily attributable to policies in SWNCC-228, MCNELLY, *supra* note 114, at 77.

[283] MEIJI KENPŌ ch. VII.

[284] *Compare* KENPŌ art. 96, *with* MEIJI KENPŌ art. 73 (Japan). A similar sentiment can also be seen in the Constitution Investigation Association's draft. *See CIA Draft*, *supra* note 46.

> Article 76. Existing legal enactments . . . shall, so far as they do not conflict with the present Constitution, continue in force. . . .[285]

Although the amendment process was largely self-contained within Article 73—much as it exists in Article 96 of the 1946 Constitution—the two Articles immediately following it both appear to impose some explicit constraints on the amendment process.[286] Article 76, on the other hand, deals exclusively with what one might consider to be a "Supplementary" matter—it provides for what will happen to existing laws and contracts once the Meiji Constitution comes into effect. This Article appears to correspond directly with the various "Supplementary Provisions" included in Chapter XI at the end of the 1946 Constitution. It is also fairly obvious that Article 73 of the Meiji Constitution is almost directly transplanted into Chapter IX "Amendments" of the 1946 Constitution. By process of elimination, therefore, Chapter X "Supreme Law" of the 1946 Constitution would be the spiritual successor to Articles 74 and 75 of the Meiji Constitution—Articles that imposed explicit limitations on the amendment process.

This theory, while based primarily on the constitutional structure, is further supported by the content of those two Articles and their combined effect on the amendment process. By explicitly separating the processes for modifying the Meiji Constitution and the Imperial House Law, Article 74 provided for something of a dual supremacy clause.[287] The Diet, even when acting pursuant to the amendment process in Article 73, was prohibited from tampering with the Imperial family's guiding document.[288] Likewise, the Emperor, acting through the Imperial House Law, could not unilaterally dismantle or undermine the Constitution.[289] Likewise, Article 75 further

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[285] MEIJI KENPŌ arts. 74–76 (emphasis added). Although translated as "modification," the Japanese term actually used in Paragraph 1 of Article 74 is *kaisei*, translated elsewhere as "amendment." *Id.* art. 74, para. 1. Other instances of "modify" use the term *henkō*, or "alter," see *id.* art. 9, arguably because they refer to the process of changing the Imperial House Law, *id.* art. 74, para. 2, or both processes, *id.* art. 75.

[286] *See* Takehana Mitsunori, *supra* note 230, at 20–23.

[287] This is also described as recognizing the Imperial House's autonomy, separate from the constitutional structure. *Id.* at 20.

[288] Hirobumi Itō, lead architect of the Meiji Constitution and first Prime Minister of Japan, reasoned that the Imperial House Law "bears no relation to the reciprocal rights and duties" mentioned elsewhere in the Meiji Constitution, and therefore any modifications need not be subjected to the Diet. HIROBUMI ITŌ, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN 155–56 (Miyoji Itō trans., Greenwood Press 2d ed. 1978) (1906).

[289] *See id.* at 156. (describing Paragraph 2 of Article 74 as a "special safeguard" to keep the Constitution's foundations "free from exposure to destruction.").

entrenched the Emperor's superiority by solidifying the Imperial veto over amendments.[290] By prohibiting any amendment during a Regency, Article 75 ensured that the Diet could not conspire to take advantage of an Emperor's ailment or age to undermine the Imperial structure.[291] In addition to those limitations, Article 73 itself required all proposed amendments to originate from an Imperial Order,[292] so the system was explicitly designed with the intent to ensure survival of the Emperor's sovereignty and absolute control.[293] Articles 73, 74, and 75, while primarily procedural in nature, were designed to guarantee a substantive outcome protecting the Emperor as the supreme source of law and legitimacy in Japan.

These provisions in conjunction erected a barrier around the Emperor as "supreme," effectively entrenching the Imperial order itself against dismantlement, unless the Emperor should somehow decide to do so himself.[294] Because both constitutions share nearly identical structures and many similar provisions, it can rationally be understood that Chapter X of the 1946 Constitution should function in the same manner as Articles 74 and 75 of the Meiji Constitution—by implicitly entrenching substantive aspects of the Constitution against dismemberment.[295] Of course, because Article 73 was never invoked to amend the Meiji Constitution until the adoption of the

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[290] The Emperor already had the explicit power to veto any bill passed by the Diet. *See* MEIJI KENPŌ art. 6 ("The Emperor gives sanction to laws . . . ."); HIROBUMI ITŌ, *supra* note 288, at 12 (remarking that the Emperor "also possesses the power to refuse His sanction . . . even if [a bill] has received the consent of the Diet.").

[291] HIROBUMI ITŌ, *supra* note 288, at 157 (noting that this restriction was justified as the Imperial House and the Constitution were of "far superior importance," and only the Emperor has the power of amendment).

[292] MEIJI KENPŌ art. 73 ("[Amendments] shall be submitted to the Imperial Diet by Imperial Order.").

[293] *See* HIROBUMI ITŌ, *supra* note 288, at 153 (confirming that the process in Article 73, which required amendments to be submitted by the Emperor, was designed to ensure that "the essential character of the Constitution should undergo no alteration.").

[294] Surely such a situation was unthought-of at the time, and yet that is exactly what transpired after the Japanese surrender ending World War II. *Cf.* Takehana Mitsunori, *supra* note 230, at 9 (noting the dominance of the "limited" theory under the Meiji Constitution and the prevailing assumption that Imperial sovereignty was likewise unamendable). Once again, this serves to reiterate the point that all regimes—constitutional or otherwise—ultimately must give way to revolution. Or, to assert the negative, barring a revolution, adhering to the provided amendment scheme is the sole means of altering a constitution.

[295] In a similar manner, one of the many textualist canons of statutory construction states that "when [the legislature] borrows a statute, it adopts by implication interpretations placed on that statute, absent express statement to the contrary." WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 324 (1994) (describing the borrowed statute rule). The 1946 Constitution by its own terms only rejects those laws "in conflict" with the Constitution's core principles. *See* KENPŌ pmbl. Because the author's proposed interpretation of Chapter X—albeit relying on the structure of the Meiji Constitution—would not "conflict" but instead entrench and reinforce those core principles against dismemberment, there is no reason to assume that such a structural comparison would be impermissible as an interpretive tool.

1946 Constitution itself, there are no judicial decisions on this precise topic either. As such, the only means of theorizing the potential limits of Article 73 and its relation to the 1946 Constitution is through a textual and structural analysis, such as that employed above.

C. Article 97's Role in Understanding the Function of Chapter X "Supreme Law"

Given the understanding that the provisions directly following the Meiji Constitution's amendment process in Article 73 were designed to place both procedural and substantive limits on that process, and in light of the previous discussion regarding the inherent structural and textual similarities between the Meiji and 1946 Constitutions, the provisions directly following Article 96 in the 1946 Constitution should likewise be expected to place similar constraints on the amendment process. Although Chapter X contains no express language acknowledging this functionality, Article 97 strongly hints that its purpose in fact is to provide just such an entrenchment against amendment. Although Chapter X is titled "Supreme Law," the text of Article 97 almost exclusively appears to relate back to the individual rights contained in Chapter III.

> The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.[296]

Puzzlingly enough, no mention is made of the amendment process, nor of supreme law or express limits on governmental powers, seemingly foreclosing any possible relation to Articles 74 or 75 of the Meiji Constitution. In fact, the language of Article 97 closely mirrors that in Article 11, which declares that "[t]he people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be *conferred upon the people of this and future generations as eternal and inviolate rights*."[297] The similarity in the Japanese text is even more striking.[298] This then begs

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[296] KENPŌ art. 97.

[297] *Id.* art. 11 (emphasis added); *see also id.* art. 12 ("The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people . . . .").

[298] *Id.* arts. 11, 97 ("[*I*]*kasu koto no dekinai eikyū no kenri* . . . .").

several questions: Is Article 97 merely a tautology? If so, why did the drafters decide to include *two* separate tautologies affirming the value of fundamental human rights—one in Chapter III and one in Chapter X? If not, does Article 97 have any independent force separate from Article 11?[299]

While the text itself claims neither to prohibit nor mandate any form of governmental action, the true purpose of Article 97 becomes clear only from the context of its placement in the constitutional scheme. Under the well-established rule against superfluity, language in a constitution must be interpreted in such a manner as not to render it mere surplusage.[300] Chief Justice Marshall endorsed just such a canon of construction in the seminal case establishing the power of judicial review in the United States: *Marbury v. Madison*. The Chief Justice reasoned that "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it."[301] While it certainly makes logical sense to assume that constitutional drafters would not include superfluous provisions in a foundational text, that principle of constitutional construction does not necessarily require courts to go out of their way to transform every clause of constitutional text into an operative one.[302] Certain introductory—or "prefatory"—clauses and preambles may not themselves be intended to have an operative effect.[303] Nevertheless, Chief Justice Marshall instructed that "[i]f any other construction would

[299] The question of drafting intent is particularly poignant here as the GHQ Draft did not contain this second provision on individual rights. *See* GHQ Draft, *supra* note 43, ch. X. The provision was inserted later by the Japanese drafters, supposedly in response to a request from the GHQ, although why it was inserted in Chapter X remains unclear. *See* SATŌ TATSUO, *supra* note 66, at 116–17, 148–49. Despite early criticisms that Article 97 was a misplaced duplication of Article 11, its placement in Chapter X has since been suggested to indicate the unamendability of individual rights provisions. *See* HIGUCHI YŌICHI ET AL., supra note 148, at 1475, 1479.

[300] *See* BLOOM, *supra* note 133, at 21; *cf.* District of Columbia v. Heller, 554 U.S. 570, 643 (2008) (Stevens, J., dissenting) (admonishing Justice Scalia's majority opinion for effectively treating half of the Second Amendment's text as "mere surplusage").

[301] Marbury v. Madison, 5 U.S. 137, 174 (1803).

[302] For example, the Tenth Amendment is one of the few provisions in the U.S. Constitution where the Supreme Court has found that the language "states but a truism." *See* United States v. Darby, 312 U.S. 100, 124 (1941); *see also* Steven Schwinn, *The ACA and the Tenth Amendment*, SCOTUS BLOG (Aug. 5, 2011, 1:38 PM), http://www.scotusblog.com/2011/08/the-aca-and-the-tenth-amendment/ (describing the evolution of the Court's interpretation of the Tenth Amendment). Even so, the Tenth Amendment today is commonly cited as providing a textual foundation for the anti-commandeering doctrine as well as for other federalism principles. *See, e.g.*, New York v. United States, 505 U.S. 144, 176–77 (1992); Printz v. United States, 521 U.S. 898, 936 (1997) (Thomas, J., concurring); Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).

[303] *See Heller*, 554 U.S. at 578 n.3 (majority opinion) ("[W]here the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do.").

render the clause inoperative, that is an additional reason for rejecting such other construction . . . ."[304] This distinction between prefatory and operative clauses, however, is inapplicable to Article 97, which itself would be rendered superfluous if read merely to restate similar language used in Article 11. Given the context of Article 97's placement immediately following the amendment process and under the label of "Supreme Law," it is highly unlikely that it was intended to act as an introduction of any sort.

The language of the provision itself may also be significant in determining what effect it should be given. Article 97 is unique not only due to its placement in the constitutional scheme, but also for its command that fundamental human rights "be held *for all time* inviolate."[305] The Japanese term *eikyū* only appears in two other provisions in the 1946 Constitution: Article 9 and Article 11.[306] Similar to the sole inclusion of the word "ever" in the No Religious Test Clause of the U.S. Constitution,[307] the language utilized here also demonstrates an intent that fundamental human rights deserve some higher status than other constitutional provisions, which can be revised simply through the processes of Article 96. The significance of Article 97 may further be evinced by the fact that the LDP Draft eliminates it entirely.[308] The LDP authors apparently recognized that a repeal of Article 97 may be first be necessary to achieve the other proposed curtailments of fundamental rights in the LDP Draft, such as free speech.[309]

Although Articles 74 and 75 of the Meiji Constitution explicitly mention the amendment process—whereas Articles 97, 98, and 99 of the 1946 Constitution do not—when viewed in context, a strong inference can be drawn that the same entrenching effect remains. Applying the rule against superfluity, Article 97's language is particularly conspicuous—especially in

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[304] *Marbury*, 5 U.S. (1 Cranch) at 175.

[305] KENPŌ art. 97.

[306] *See id.* art. 9, para. 2 ("[W]ar potential, will never be maintained"); *id.* art. 11 ("[E]ternal and inviolate rights").

[307] *See* U.S. CONST. art. V, § 3; Mader, *supra* note 194, at 843.

[308] In addition to the removal of Article 97, the LDP Draft heavily alters Articles 11 and 12. *See* LDP Draft, *supra* note 15, arts. 11, 12, 97; *Factbox: Key Facts About Japan's Constitution, Proposed Changes*, REUTERS (May 23, 2013, 7:35 PM), https://www.reuters.com/article/us-japan-abe-constitution/factbox-key-facts-about-japans-constitution-proposed-changes-idUSBRE94N04920130524.

[309] *See* LDP Draft, *supra* note 15, art. 21 (emphasis added) ("Notwithstanding the provisions of the preceding paragraph [recognizing the freedom of expression], engaging in activities with the purpose of harming the *public interest and public order* and forming associations to attain this objective shall not be recognized."). The LDP appears to try not to draw attention to these changes in the propaganda it has published for its draft. *See, e.g.*, *LDP Announces a New Draft Constitution for Japan*, *supra* note 10.

light of terms connoting permanence—and must be given some different effect than Article 11. The placement of Article 97 in Chapter X also mirrors the placement of Articles 74 and 75 in relation to the amendment procedures in the Meiji Constitution. These should not be dismissed as coincidences. In *Alden v. Maine*, the U.S. Supreme Court described its process of interpreting the Eleventh Amendment to broadly recognize the doctrine of sovereign immunity: "[W]e have looked to 'history and experience, and the established order of things,' rather than 'adhering to the mere letter' of the Eleventh Amendment . . . ."[310] Under this approach, the Court has consistently upheld claims "falling outside the literal text"[311] on the understanding that the Eleventh Amendment's intent was to "codify[] the traditional understanding of sovereign immunity."[312] Applying a similar reasoning to the Japanese Constitution, the textual and structural context of Article 97 illustrates a desire to codify the "traditional understanding" of the limited amendment process that existed under the Meiji Constitution. By logical extension, therefore, Articles 98 and 99 also serve this purpose, as all are collectively contained within Chapter X as "Supreme Law." Part IV next explores how these provisions interact with Article 96 to give physical form to the implicit limits on the amendment process inherent in the Japanese Constitution.

IV. IMPLICIT LIMITS ON AMENDING THE AMENDMENT PROCESS

A. The Supremacy Clause in Article 98 and Its Potential Limits on Constitutional Amendments

As previously noted, the GHQ drafters were aware of the availability of explicit entrenchment provisions.[313] Examples could also be found in both the U.S. Constitution and the Meiji Constitution.[314] Contemporaneous constitutions also include entrenchment provisions for human rights and other fundamental democratic structures. For example, the German Basic Law of 1949 explicitly prohibits amendments that would destroy the nation's federalist structure or adversely affect basic principles, such as the rule of law or separation of powers.[315] And yet no explicit limits on the

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[310] Alden v. Maine, 527 U.S. 706, 727 (1999) (citations omitted) (quoting Hans v. Louisiana, 134 U.S. 1, 13–14 (1890)).

[311] *Id.* at 727.

[312] *Id*. at 723.

[313] *See* discussion *supra* Section II.A.

[314] *See* discussion *supra* Sections II.D.2, III.A.

[315] GG art. 79, para. 3.

amendment power were included in Article 96. It is nevertheless unlikely that the GHQ—or the Japanese citizens who suffered under military rule—would have supported a new constitution that could, as soon as the Occupation ended, unilaterally be repealed or replaced with the Meiji Constitution. Rather than the types of substantive amendment limits that have proliferated in recent history,[316] a more likely notion is that the 1946 Constitution inherited a similar form of semi-procedural entrenchment that existed in the Meiji Constitution. With Article 74 precluding amendment of the Imperial House Law, and Article 75 prohibiting any amendment while the Emperor was incapacitated, these procedural hurdles effectively reinforced the Emperor's veto power over amendments.[317] While primarily procedural in nature, these requirements obviously encoded certain substantive value judgments[318]—namely, by requiring the Emperor's assent, the Meiji Constitution sought to entrench the principles of Imperial sovereignty and supremacy.[319] The Supremacy Clause in Article 98 of the 1946 Constitution, therefore, can be viewed as imposing a similar procedural barrier to amendments by effectively giving the Constitution itself—supplanting the Emperor as the "supreme law" of the land—a presumptive veto. In other words, any act of government, including amendments to the 1946 Constitution,[320] cannot be "contrary" to the provisions of Chapter X.

The term "contrary" is used only in Article 98,[321] although the underlying Japanese term *hansuru* is found elsewhere in both Article 18 and in the Preamble. Although Article 18's use of the term is perhaps attributable to a simple translation decision,[322] the remaining instance of *hansuru* in the

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316 *See, e.g.*, Roznai, *supra* note 190, at 4.

317 *See* MEIJI KENPŌ arts. 73–75.

318 The line between what is procedural and what is substantive is notoriously blurry in many legal realms. *Cf.* Texas v. United States, 809 F.3d 134, 176 (5th Cir. 2015) (applying the "substantial impact" test to "nominally procedural" agency rules); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (treating administrative rules that "encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior" as substantive rather than procedural).

319 The same rationale lies behind Albert's suggestion that the Equal Suffrage Clause of the U.S. Constitution is constructively entrenched against amendment, as no state would voluntarily vote to reduce its own representation. *See* Albert, *supra* note 2, at 662.

320 *See* discussion *supra* Section II.B.

321 Some significance can also be drawn from the fact that the language in Article 98 mirrors that in the U.S. Constitution's Supremacy Clause, albeit more forcefully. *Compare* U.S. CONST. art. VI, § 2. (emphasis added) ("This Constitution . . . shall be the supreme Law of the Land . . . anything . . . to the *Contrary* notwithstanding."), *with* KENPŌ art. 98, para. 1 (stripping any "act of government . . . contrary to" the Constitution of all "legal force or validity.").

322 Article 18 prohibits "[i]nvoluntary servitude" and "bondage of any kind." KENPŌ art. 18. This language is almost directly transplanted from the U.S. Constitution. *See* U.S. CONST. amend. XIII, § 1. The text of the second clause in Article 18 literally translated prohibits "hard physical labor *contrary* to the

Preamble is particularly significant given its context. Setting the foundation for the 1946 Constitution to replace the Meiji Constitution as the law of the land, the Preamble declares that "the Japanese people . . . reject and revoke all constitutions, laws, ordinances, and rescripts *in conflict* herewith."[323] The "universal principle" referenced immediately prior to this statement is "that sovereign power resides with the people . . . ."[324] Although the Preamble carries no legal force, it has "legal normative character,"[325] and in this instance it provides context to what it means to be "contrary" to the Constitution under Article 98. As the Preamble indicates, any act of government that appears to undermine the principle of popular sovereignty would be "contrary" to the 1946 Constitution. This seems to confirm Article 98's imposition of a presumptive constitutional "veto"—in place of a presumptive Imperial "veto" under the Meiji Constitution—which can be exercised pursuant to the power of judicial review enshrined in Article 81 as expanded by Article 98 itself. Under this interpretation, the term "contrary" would include any amendment to the Constitution that stands opposed to or calls into question the validity of those constitutionally entrenched norms in Chapter X. In particular, if the ultimate effect of any proposed amendment would cast doubt on the very principle of popular sovereignty, Article 98 would empower the judiciary to exercise this presumptive "veto" power. When and how this power comes into play can be clarified by reading the Supremacy Clause in conjunction with its counterpart in Article 99.

B. Permissible Amendments Under Article 99's "Obligation to Respect and Uphold"

Article 99, the final provision contained in Chapter X, may also be instrumental in understanding the implicit constitutional limits on amending the amendment process. "The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to *respect and uphold* this Constitution."[326] Significant here is the requirement to both "respect *and* uphold" the provisions of the

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intent" of the prohibition on slavery, except as punishment for a crime. KENPŌ art. 18 (emphasis added) ("[*S*]*ono i ni hansuru kueki ni fukusaserarenai.*"). In this context, *hansuru* does not require direct conflict—because Article 18 prohibits anything contrary to the "intent" to prohibit slavery, the term would indicate a broader understanding. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (broadly interpreting the Thirteenth Amendment as allowing Congress to also prohibit "the badges and incidents of slavery").

[323] KENPŌ pmbl. (emphasis added).

[324] *Id.*

[325] *See* Hamilton, *supra* note 242, at 560 n.24.

[326] KENPŌ art. 99 (emphasis added).

Constitution.[327] The Japanese term *yōgo*—translated here as "uphold," although connoting a meaning of "safeguard" or "protect from harm"[328]—is wholly unique to this provision. Nowhere else does the Constitution impose such a duty.[329] For that matter, the Japanese term *gimu*, meaning "duty" or "obligation," does appear in several other locations, but only within Chapter III, "Rights and Duties of the People."[330] That is to say, the language of Article 99 more closely resembles that of an individual right than any of the provisions describing the "responsibilities" (*sekinin*) of public officials.[331]

Some advocates opposed to constitutional revision have interpreted this provision as precluding government officials from proposing or even discussing wholesale constitutional revision.[332] While somewhat extreme, this understanding reflects the reality that public officials are already subjected by law to oaths of office that prohibit defamatory remarks.[333] Such restrictions on political activity have been routinely upheld against public workers and court officers,[334] although Article 96 clearly contemplates some ability for politicians to discuss amending the Constitution.[335] Nevertheless, the Supreme Court of Japan has said relatively little about Article 99 itself or whether it is independently enforceable.[336] When the Court does mention Article 99 in passing, it may be cited as a basic presumption that officials, including elected members of the Diet, will obey judicial decisions—even

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[327] Japanese scholars have interpreted these terms to essentially mean the same thing. *See* HIGUCHI YŌICHI ET AL., *supra* note 148, at 1505 (equating both terms with *mamoru* or "protect"). However, one significant change that the LDP Draft proposes is to split the duty so that every citizen must "respect" the Constitution, but only public officials—excluding the Emperor—must additionally uphold it. *See* LDP Draft, *supra* note 15, art. 99. How courts would treat that difference in language is unclear.

[328] *Yōgo*, KOTOBANKU, https://kotobank.jp/word/擁護-652922 (last visited Mar. 24, 2018) ("*Shingai, kigai kara, kabai mamoru koto.*")

[329] Although Article 26 does use a related term *hogo* when referring to the "obligat[ion] to have all boys and girls under [a parent's] *protection* receive ordinary education." KENPŌ art. 26 (emphasis added).

[330] *See id.* arts. 26–27, 30.

[331] *See, e.g.*, *id.* art. 66, para. 3 (emphasis added) ("The Cabinet, in the exercise of executive power, shall be collectively *responsible* to the Diet.").

[332] *See* Urabe Noriho, *Kenpō sonchō yōgo gimu* [*The Duty to Respect and Uphold the Constitution*], HŌGAKUKAN KENPŌ KENKYŪSHO [JAPAN INST. CONST. L.] (Feb. 21, 2013), http://www.jicl.jp/urabe/backnumber/20130221.html; SHIGENORI MATSUI, *supra* note 24, at 270 (interpreting Article 99 as requiring public officials to "refrain from criticizing" the Constitution); HIGUCHI YŌICHI ET AL., *supra* note 148, at 1507 (noting that, under the limited theory of Article 96, advocating for an amendment exceeding implicit limitations would not be permissible).

[333] *See Kenpō 99-jō no "Kenpō yōgo gimu" to wa?* [*What Is the "Duty to Uphold the Constitution" in Article 99 of the Constitution?*], NIPPON KYŌSANTŌ [JAPANESE COMMUNIST PARTY] (Mar. 19, 2003), http://www.jcp.or.jp/akahata/aik2/2003-03-19/2003-0319faq.html.

[334] *See* SHIGENORI MATSUI, *supra* note 24, at 201 n.63.

[335] KENPŌ art. 96, para. 1 (requiring that all amendments "shall be initiated by the Diet").

[336] *See generally* HIGUCHI YŌICHI ET AL., *supra* note 148, at 1503–10.

those that invalidate legislation as unconstitutional.[337] Most scholars have generally interpreted this provision as a truism, simply restating the fact that public officials owe the people—as the source of sovereignty under the 1946 Constitution—a duty to avoid constitutional errors and violations in carrying out public affairs.[338] Additionally, Article 99 can be read as imposing a moral or logical duty on public officials to proactively prevent and resist activities abhorrent to the Constitution.[339]

Perhaps the best way to understand the purpose of Article 99 is to contrast it with the proposed text in the LDP Draft: "*All people* shall respect this Constitution. Members of the Diet, Ministers of State, judges, and all other public officials have the obligation to respect and uphold this Constitution."[340] The LDP Draft would effectuate two significant changes to Article 99. First, the obligation to "respect" the Constitution, previously only imposed on public officials, would be extended to all people. This could be considered particularly problematic in light of other proposed amendments, such as a completely new provision that would constitutionally create a duty to "respect the national flag and the national anthem."[341] Failure to sing the national anthem would no longer be an exercise of free speech but a constitutional violation.[342] Second, the LDP Draft would completely exempt the Emperor from any requirement to "uphold" the Constitution.[343] Although the LDP Draft purports to maintain the principle of popular sovereignty, several provisions—including this amendment to Article 99—have been cited as an indication that the LDP is actually seeking to reinstate the Meiji

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[337] *See, e.g.*, Sup. Ct. Nov. 20, 2013, Hei 25 (gyō tsu) no.209, 67 MINSHŪ 1503,1538 (Ōhashi, J., dissenting), http://www.courts.go.jp/app/files/hanrei_jp/745/083745_hanrei.pdf. Article 99 is also commonly cited in conjunction with Articles 76 and 81 to reiterate the Court's role in striking down unconstitutional laws. *See* HIGUCHI YŌICHI ET AL., *supra* note 148, at 1507–08; *Sunakawa*, *supra* note 120, at 3281 (Okuno & Takahashi, JJ., concurring).

[338] Nitta Hiroshi, *Kenpō hoshō no gutaiteki hōhō ni kansuru hikaku hōteki kenkyū* [*A Comparing Legal Study on Concrete Method to Defend Constitution*], CHIIKI SEISAKU KENKYŪ [STUD. REGIONAL POL'Y], Feb. 2009, at 19, 22, http://www1.tcue.ac.jp/home1/c-gakkai/kikanshi/ronbun11-4/nitta.pdf; HIGUCHI YŌICHI ET AL., *supra* note 148, at 1505.

[339] Nitta Hiroshi, *supra* note 338, at 22.

[340] LDP Draft, *supra* note 15, art. 102 (emphasis added).

[341] *Id.* art. 3; *see also* Repeta & Jones, *supra* note 11, at 320–22 (discussing such "constitutional duties" in the LDP Draft).

[342] Many school districts already have rules that require teachers to stand and sing the national anthem, and those rules have been upheld as constitutional. *See* Kyla Ryan, *Japan: Controversy Over the National Anthem*, DIPLOMAT (June 22, 2015), https://thediplomat.com/2015/06/japan-controversy-over-the-national-anthem/.

[343] *See* Repeta & Jones, *supra* note 11, at 320 (suggesting that this change is tied to elevating the status of nationalism and national symbols). Although perhaps the Emperor may still fall under the duty for "all people" to at the very least "respect" the Constitution.

Constitution's Imperial structure.[344] Needless to say, no analogous provision to "respect and uphold" existed in the Meiji Constitution.[345]

Attempting to synthesize these varying conceptions of Article 99 is no meager task—as is the case with any constitution, many provisions are intentionally vague to ensure ample flexibility to adapt to unforeseen circumstances.[346] While the straightforward meaning that follows is that government officials must obey the Constitution, the inverse proposition is equally conceivable. That is, any public official, under direction by their superior or by a co-equal officer or branch of government, can assert Article 99 as an independent right to object to such an unconstitutional directive or, at least, to seek clarification on its constitutionality from the Supreme Court.[347] Such an interpretation would be in alignment with the scholarly understanding of Article 99 to impose a duty to avoid causing or failing to rectify constitutional violations.[348] This interpretation can also be applied in the form of a judicial inference that legislators and other government actors are presumed to follow the Constitution, and therefore any actions carry a strong presumption of an intent to "respect and uphold" constitutional values.

C. Is Article 96 Itself Implicitly Unamendable or Entrenched Against "Contrary" Amendments?

Although this Comment argues that Chapter X of the 1946 Constitution is best understood as implicitly limiting the scope of Article 96, no provision therein appears to prohibit amending the amendment process itself. Indeed, none of those Articles are themselves *explicitly* entrenched against amendment. Given the fact that the drafters chose not to make the entrenchment provisions explicit, this may reflect a compromise rooted in

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[344] *See* Goodman, *supra* note 2, at 39.

[345] The closest language appears only in the Imperial Rescript on promulgation, which is also commonly treated as the Meiji Constitution's Preamble. *See* MEIJI KENPŌ pmbl. ("Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution . . . .").

[346] *See, e.g.*, Robert W. Bennett, *Are We All Living Constitutionalists Now?*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 165, 173–74 (suggesting that vague or ambiguous language in the U.S. Constitution was intentionally inserted as compromises, to allow future generations to decide, or to mollify other constituents); *cf.* Albert, *supra* note 173, at 80–82 (discussing constitutional resilience and the value in constitutions that can adapt to rapidly changing circumstances).

[347] *See* KENPŌ art. 81. Of course, seeking clarification in such a manner by violating a directive would arguably result in that official losing their job. Standing doctrine would pose no bar to the Court's jurisdiction in such a case.

[348] *See* Nitta Hiroshi, *supra* note 338, at 22.

the desire to emphasize certain constitutional values.[349] The first step is to synthesize the analyses from previous sections into a concrete understanding of what the implicit entrenchment provisions in Chapter X signify.

Some constitutional scholars argue that entrenchment provisions are themselves implicitly unamendable.[350] Amar signals that the entrenched provisions can be amended simply by first amending out the entrenchment clause and then amending the previously unamendable provision.[351] While others claim there is no need to go through such a formalistic "double amendment" process—a single amendment can accomplish both.[352] Albert similarly proposes a "rule of mutuality," based on principles of symmetry and legal continuity, to act as a counterbalance against any constitutional dismemberment.[353] Under this rule, any amendment—or the Constitution itself—can be legally repealed "using only at least the same procedure that was used to ratify it."[354] There is also some theoretical support for amendments exceeding the scope of Article V, based on the history of the Constitutional Convention exceeding its scope of amending the Articles of Confederation to instead propose an entirely new constitution.[355] A similar historical argument exists in Japan, as the 1946 Constitution far exceeded the scope of what an amendment could theoretically accomplish under the

[349] Given the complex and secretive drafting history and ratification process, a court would likely try to avoid any over-reliance on previous drafts or contemporary statements. Instead, the text and structure of the Constitution itself are more likely to guide any determination on the limits of amendments. *See* discussion *supra* Section II.A.

[350] *See* Yaniv Roznai, *Amending 'Unamendable' Provisions*, CONST. MAKING & CONST. CHANGE (Oct. 20, 2014), http://constitutional-change.com/amending-unamendable-provisions/.

[351] AMAR, *supra* note 32, at 292–93; *see also* Roznai, *supra* note 350; Albert, *supra* note 2, at 663 n.75 (positing that such a strategy would be permissible and yet "circumvent[] the spirit of the constitution.").

[352] *See* Roznai, *supra* note 350; Linder, *supra* note 182, at 729 (suggesting that the 1861 Corwin Amendment, which would have prohibited future amendments from abolishing the institution of slavery, would nonetheless have been implicitly repealed upon passage of the Thirteenth Amendment).

[353] Albert, *supra* note 173, at 7.

[354] *Id.* at 6. Applying this theory to Japan, Albert theorizes that, because the 1946 Constitution was enacted via Article 73 of the Meiji Constitution, the Constitution cannot validly impose an additional popular referendum requirement—the entire 1946 "amendment" could be undone by a simple two-thirds vote in both Houses. *Id.* at 76. Of course, because the Meiji Constitution itself was promulgated by Imperial Order, under this rule of mutuality, the Emperor could unilaterally rescind both the Meiji and 1946 Constitutions at the same time. Albert does attempt to distance himself from such an extreme proposition by noting that "legality" is distinct from "legitimacy," and that following Article 96 would be a necessary predicate for public acceptance of any amendment, much less any new constitution. *Id.* at 77.

[355] *See* Richard Albert, *America's Unamendable Constitution*, CATO UNBOUND (Dec. 11, 2015), https://www.cato-unbound.org/2015/12/11/richard-albert/americas-unamendable-constitution.

Meiji Constitution. If an entirely new constitution can be enacted under the disguise of an amendment,[356] do entrenchment provisions even matter?

Once again, Japanese courts are likely to adopt a middle-ground approach—no provision is itself unamendable, but any barrier entrenching certain provisions against amendment must itself first be explicitly repealed. But how should courts textually justify such a position? When a new statute or amendment is enacted, under the doctrine of implied repeal, any older provisions in conflict with the newly enacted law become legally inoperable, even if not explicitly repealed.[357] For example, the Twenty-First Amendment to the U.S. Constitution explicitly repealed the Eighteenth Amendment, effectively ending the practice of Prohibition.[358] In contrast, the Thirteenth Amendment did not explicitly repeal anything, and yet is understood to have effectively nullified the Three-Fifths and Fugitive Slave Clauses.[359] U.S. courts generally employ a very strong presumption *against* implied repeal in statutory interpretation cases, but only when conflict is avoidable.[360] How

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[356] *See* SHIGENORI MATSUI, *supra* note 24, at 261 (comparing such an eventuality to the 1946 Constitution and suggesting that, so long as such an amendment remained popular with the people, it would be justified as a "new constitution," even if it exceeded the implicit limits on Article 96).

[357] *See generally* Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487 (2004) (providing an overview of the doctrine of implied repeal as well as recent examples). The doctrine is conceptualized as a corollary to the later-enacted-statute rule, which requires courts to give preference to the more recent statute if it conflicts with an older one. *Id.* at 498 n.53; *see also Sunakawa*, *supra* note 120, at 3272 (Kotani, J., concurring) (noting the common rule that subsequent laws are accorded priority and yet reasoning that treaties should have priority even if a subsequent law is in conflict). Although more commonly used in reference to statutes, the doctrine also applies to constitutional amendments. *See* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 275 (2004).

[358] *See* U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed."). *But cf.* Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENTARY 217, 219–20 (1995) (arguing that the inartful drafting of Section 2 of the Twenty-First Amendment effectively transforms individual violations of state alcohol laws into constitutional violations).

[359] *See* U.S. CONST. amend. XIII, § 1; Chin, *supra* note 357, at 277; *cf.* Tribe, *supra* note 358, at 219 n.12 (commenting that the Court exceeded what was necessary for an implied repeal by interpreting the Eleventh Amendment as extending beyond its literal text to reinvigorate state sovereign immunity).

[360] *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). Determining whether the conflict is actually unavoidable, however, may involve intrinsic value judgments and vary highly depending on the reviewing judge. *See* Petroski, *supra* note 357, at 494 (noting the difficulties in determining whether two statutes are truly irreconcilable). Especially when it comes to the Reconstruction Amendments, scholars regularly debate whether or not an implied repeal has occurred and to what extent. *See, e.g.*, Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 B.Y.U. L. REV. 927, 986 (2005) (arguing that the Section 1 of the Fourteenth Amendment is irreconcilable with the Natural-Born Citizen Clause); *cf.* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*,

Japanese courts might resolve such a dilemma is less clear,[361] but when these general legal principles are viewed in light of Article 99's constitutional presumption of an intent to respect the Constitution,[362] the combined effect should require a court to reject any interpretation of an amendment that would result in the *presumptively unintended* implied repeal of other constitutional provisions. If conflict is absolutely unavoidable and any application of the doctrine of implied repeal nevertheless produces results "contrary to" the Constitution under Article 98, then the Supreme Court may have no choice but to reject such an amendment. This presumption against the implied repeal of constitutional provisions would be strongest—possibly insurmountable—if the conflicting language forms part of the fundamental principles of the 1946 Constitution entrenched in Chapter X.[363]

To paraphrase, Article 99 would require the reviewing court to assume that a challenged constitutional amendment was intended to "respect and uphold"[364] the inviolability of "fundamental human rights"[365] while not

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103 YALE L.J. 677, 699–703 & nn.79, 88 (1993) (noting that the Corwin Amendment, which would have entrenched slavery, may not be completely irreconcilable with the Thirteenth Amendment, and therefore, is still potentially available for ratification via the same process as the Twenty-Seventh Amendment).

[361] Although Japan follows the general legal rule that a later-enacted statute is given priority when in direct conflict with an older statute, see discussion *supra* note 357, having never amended its Constitution, the author can only speculate that Japanese courts will look to U.S. experience for guidance. A similar controversy has arisen regarding how this legal principle might interact with a recent LDP proposal to add a third Paragraph to Article 9, thereby officially recognizing Japan's Self-Defense Force in the Constitution. *Compare* Igarashi Jin, *Abe 9-jō kaiken kōsō no kikensei o chokushishinakereba naranai* [*We Must Face the Dangers in Abe's Plan to Amend Article 9*], BLOGOS (Sept. 15, 2017, 9:23 AM), http://blogos.com/article/246324/ (suggesting that the proposal, as a later-enacted law, would effectively nullify Paragraphs 1 and 2 of Article 9), *with* Momochi Akira, *"Jieitai meiki" de hōteki antei kakuho o kokumin ga mitomete iru koto to "gōkensei" wa betsu da* [*Securing Legal Stability by "Clarifying the Self-Defense Force"—Being Acknowledged by the People and "Constitutionality" Are Different*], SANKEI NYŪSU (Jan. 23, 2018, 11:00 AM), https://www.sankei.com/column/news/180123/clm1801230004-n1.html (arguing that the provisions would not be in direct conflict, and therefore the later-enacted rule would be inapplicable).

[362] The U.S. Constitution similarly states that officials "shall be bound by Oath or Affirmation, to *support* this Constitution," U.S. CONST. art. VI, § 3 (emphasis added), and yet the doctrine of implied repeal has regularly been applied to amendments, *see* Chin, *supra* note 357, at 276 (listing examples). One argument to support potentially treating the Constitution of Japan differently rests in the historical context surrounding promulgation and adoption of the two constitutions. The U.S. Constitution came about from the failure of the Articles of Confederation to provide enough power and flexibility to the central government for it to properly function. *See* AMAR, *supra* note 32, at 25–29. In contrast, the 1946 Constitution arose from the inability of the Meiji Constitution to constrain the central government and prevent the various abuses of power that resulted in World War II. *See* SHIGENORI MATSUI, note 24, at 12 (calling the Meiji Constitution "almost meaningless" during the war). History counsels against permitting amendments that would impliedly repeal fundamental pillars of the Japanese Constitution.

[363] *Cf.* Petroski, *supra* note 357, at 527–28 (proposing a new approach to the presumption against implied repeal, with a weaker presumption if the older statute is obsolete or has generated no reliance interests, and a much stronger presumption for statutes codifying important rights).

[364] KENPŌ art. 99.

impairing the Constitution's status as "supreme law of the nation"[366]—any irreconcilable conflict would therefore be unintended and should be avoided at all costs.[367] However, an affirmative intent to repeal any specific Article—even the entrenchment provisions in Chapter X—if duly ratified by two-thirds of both Houses and a majority of the public via referendum, must override any such presumption. For example, should the LDP seek to water down the individual rights in Chapter III implicitly entrenched by Article 97, the entrenchment provision itself must first be amended out. Likewise, in order to amend many of the provisions on the Emperor in Chapter I, Article 99, and quite possibly Article 98, must first be amended to explicitly remove support for the fundamental pillar of popular sovereignty. Where the conflict is not as direct, the Court would still be justified in avoiding any implied repeal of other provisions without the public's affirmative consent.

Now that the general contours of the implicit limits on Article 96 have been laid out, the next question is what this means for attempts to amend the amendment process itself. More specifically, what arguments grounded in the Constitution's text would effectively preclude the LDP from first lowering the vote threshold in Article 96 and then removing the remaining Chapter X entrenchments under that lower threshold?[368] The two-thirds vote barrier is itself significant, as a contextual analysis illustrates that the same supermajority requirement is employed elsewhere in the 1946 Constitution. For example, Article 56 provides the basic threshold for passing regular legislation in the Diet. The Article imposes a quorum requirement consisting of "one-third or more of total membership," after which "[a]ll matters shall be decided, in each House, by a majority of those present, *except as elsewhere provided in the Constitution*."[369] A supermajority of "two-thirds or more of the members present" in the relevant House is required to "deny a seat to any member" if judged to be unqualified;[370] to hold a "secret

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[365] *Id.* art. 97.

[366] *Id.* art. 98.

[367] Such a strong presumption against implied repeal also appears to have also existed under the Meiji Constitution. In particular, Article 74's constitutional safeguard against being "modified by the Imperial House Law," MEIJI KENPŌ art. 74, was intended to ensure that such modifications do not "either directly or indirectly bring about any alteration of the present Constitution," HIROBUMI ITŌ, *supra* note 288, at 156.

[368] Albert's "rule of mutuality," for example, may stand opposed to the LDP Draft's proposal to reduce the amendment threshold from a two-thirds vote to a simple majority in both Houses, as the 1946 Constitution itself was passed under a two-thirds vote. However, that same rule would permit abolishing the referendum requirement—which was not employed when the 1946 Constitution was adopted—or more. *See* Albert, *supra* note 173, at 76.

[369] KENPŌ art. 56 (emphasis added).

[370] *Id.* art. 55

meeting";[371] or to "expel a member" for violating codes of conduct.[372] Most importantly, a two-thirds vote in the House of Representatives can enact a bill into law over the objection of the House of Councillors.[373] By raising the threshold against expelling duly elected members, the Constitution seeks to respect the people's chosen representatives against arbitrary exclusion. By doing the same for public debate in the Diet, the Constitution furthers interests in transparency to ensure that the public can hold their representatives accountable in the next election. And by allowing the House of Representatives to override a "veto," the Constitution gives preference to the House that most directly reflects public perception.[374] The significance of these supermajority provisions becomes even more apparent when compared to the Meiji Constitution, which only imposed a supermajority requirement for the amendment process,[375] and in fact proscribed any bill from being reconsidered if either of the two Houses had rejected it in that session.[376] These supermajority provisions, therefore, protect an underlying value that was not recognized under the Meiji Constitution—namely, popular sovereignty. That value forms the core of Articles 98 and 99.

Furthermore, reducing the amendment barrier to a simple majority would directly cast in doubt the very supremacy of the Constitution. If the Constitution is the "supreme law," then logic would dictate that it cannot be easier to amend the Constitution than it would be to enact regular legislation—otherwise, the Constitution is no longer "supreme." Any of those actions that would still require a supermajority vote would then exist on a higher plane than a mere amendment. Would a bill passed over the objections of the House of Councillors via Article 59 be superior to an amendment? Alternatively, could the subsequent passage of a national referendum by simple majority thereby transform any regular law into a constitutional amendment? These questions reach even more absurd results after factoring in the doctrine of implied repeal. With those Articles providing supermajority barriers in irreconcilable conflict with the LDP

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[371] *Id.* art. 57, para. 1.

[372] *Id.* art. 58, para. 2.

[373] *Id.* art. 59, para. 2.

[374] This is further evidenced by the fact that the House of Representatives serves shorter, four-year terms, and can be dissolved in order to immediately poll public opinion. *Id.* art. 45; *see also* SHIGENORI MATSUI, *supra* note 24, at 100–03 (noting that Prime Ministers have repeatedly invoked Article 7 to dissolve the House of Representatives, even though the Constitution contains no provision allowing for immediate dissolution).

[375] MEIJI KENPŌ art. 73, para. 2.

[376] *Id.* art. 39.

Draft's version of Article 96, the Court would have to decide whether to impliedly repeal Article 98—thereby destroying the entire constitutional structure—or to impliedly repeal the other supermajority requirements. If a two-thirds vote is no longer required for amending the nominally "supreme law," then a supermajority would also not be necessary for the House of Representatives to pass a regular law over the House of Councillors. Without an effective veto power, of what use would the House of Councillors be? Amending Article 96 would logically entail the abolishment of the bicameral system—a system specifically reinserted by the Japanese drafters prior to ratification of the 1946 Constitution. Would a two-thirds vote still be necessary before ejecting duly elected members? Or could a simple majority rewrite the rules of conduct, then summarily expel all members of any opposition party? Because these supermajority requirements are so closely tied to the principle of popular sovereignty, lowering the amendment threshold would effectively mark the first step on returning Japan to authoritarian rule.[377] These are far from abstract comparisons—Japanese bar associations[378] and many others in Japan[379] have recognized these incongruities and voiced their opposition to amending Article 96.

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[377] *Cf.* MCNELLY, *supra* note 114, at 74 (describing the view of some GHQ drafters that not including counter majoritarian protections in the amendment provision would "open the gates to fascism"). These fears are particularly acute given the Prime Minister Abe's and the LDP's track record on fundamental rights. *See, e.g.*, *A New Bill Reveals the Japanese Government's Authoritarian Streak*, ECONOMIST (Apr. 20, 2017), https://www.economist.com/asia/2017/04/20/a-new-bill-reveals-the-japanese-governments-authoritarian-streak (questioning the LDP's motives in proposing an anti-terrorism bill); Bill Powell, *How Shinzo Abe Became Postwar Japan's Most Consequential Leader*, NEWSWEEK (Sept. 29, 2015, 6:33 AM), https://www.newsweek.com/2015/10/09/shinzo-abe-critics-fear-militaristic-japan-future-377715.html (noting similarities between Prime Minister Abe's policies and those of his grandfather, Nobusuke Kishi, who was arrested as a war criminal for his role in Japan's occupation of Manchuria, only to later be elected Prime Minister).

[378] *See, e.g.*, Pamphlet, Nihon Bengoshi Rengō Kai [Japan Fed'n of Bar Ass'ns], Kenpō 96-jō kaisei ni igi ari!! [We Object to Amending Article 96!!] (May 2013), https://www.nichibenren.or.jp/library/ja/publication/booklet/data/constitution.pdf; Irome Yoshio, *Kenpō dai 96-jō no kenpō kaisei hatsugi yōken no kanwa ni hantaisuru kaichō seimei* [*Chairman's Statement Against Relaxing the Requirements for Amending the Constitution in Article 96*], NARA BENGOSHI KAI [NARA B. ASS'N] (June 17, 2013), http://www.naben.or.jp/seimei_1615.html; Iwasaki Atsushi, *Kenpō dai 96-jō no kenpō kaisei hatsugi yōken kanwa ni hantaisuru kaichō seimei* [*Chairman's Statement Against Relaxing the Requirements for Amending the Constitution in Article 96*], KŌCHI BENGOSHI KAI [KŌCHI B. ASS'N] (Aug. 27, 2013), https://kochiben.or.jp/憲法第９６条の憲法改正発議要件緩和に反対する/; *Kenpō 96-jō no kenpō kaisei hatsugi yōken kanwa ni hantaisuru ketsugi* [*Resolution Against Relaxing the Requirements for Amending the Constitution in Article 96*], SHIZUOKA BENGOSHI KAI [SHIZUOKA B. ASS'N] (June 7, 2013), https://www.s-bengoshikai.com/bengoshikai/seimei-ketsugi/k13-6kenpou96/.

[379] *See, e.g.*, *Kyōto 96-jō no Kai to wa?* [*What is the Kyoto Article 96 Association?*], KYŌTO 96-JŌ NO KAI [KYOTO ARTICLE 96 ASS'N], http://kyoto.96jo.net/?page_id=13 (last visited Aug. 24, 2018); *"Kenpō 96-jō" o kaisei subeki desu ka? Bengoshi 48-nin ga kangaeru "kenpō kaisei ron"* [*Should "Article 96" Be Amended? What 48 Lawyers Think of "Constitutional Amendment Theory"*], BENGO4.COM (June 2, 2013,

For these reasons, the LDP's proposed amendment to Article 96 directly runs afoul of the principles of constitutional supremacy and popular sovereignty entrenched in Chapter X. Because reducing the vote threshold for amendments under Article 96 would create an irreconcilable conflict with the fundamental norms in Articles 98 and 99, the Court would be justified in ruling that the proposed amendment exceeded the implicit limits placed on Article 96 itself through the provisions of Chapter X. Nevertheless, what the Court would do next with such an unconstitutional amendment is difficult to predict. There are, perhaps, several alternatives short of striking down the amendment in its entirety that the Court may prefer.[380] One option would be to declare a "state of unconstitutionality"[381] without declaring the amendment itself void and to direct the Diet to rectify its error within a reasonable time.[382] In the situation of an amendment to Article 96 itself, the Court could theoretically direct the replacement to comply with the original vote thresholds in Article 96 and enjoin the adoption of any other amendments in the meantime.[383] Another option would be for the Court to find the ratification process procedurally inadequate.[384] Because Article 96 stipulates that the public referendum shall be conducted in a manner "as the Diet shall specify," [385] any amendment must fully comply with those

3:05 PM), https://www.bengo4.com/other/1146/1287/n_377/; Press Release, Shakai Minshutō Kenpō Kaiaku Soshi Tōsō Honbu [Social Democratic Party Headquarters for Efforts to Prevent Deterioration of the Constitution], Kenpō dai 96-jō "kaisei" mondai ni tsuite no kenkai [Views on the Issue of "Amending" Article 96] (Mar. 21, 2013), http://www5.sdp.or.jp/policy/policy/constitution/images/130321.PDF; Reizei Akihiko, *Kenpō 96-jō kaisei no mondaiten o kangaeru* [*Thoughts on the Problems with Amending Article 96*], NEWSWEEK JAPAN (Mar. 6, 2013, 1:42 PM), https://www.newsweekjapan.jp/reizei/2013/03/96.php.

[380] Recall that the Supreme Court of Japan is notoriously conservative and reluctant to even strike down regular legislation. *See* sources cited *supra* note 30.

[381] Sup. Ct. Nov. 20, 2013, Hei 25 (gyō tsu) 209, 67 MINSHŪ 1503, 1526, http://www.courts.go.jp/app/files/hanrei_jp/745/083745_hanrei.pdf ("*[K]enpō. . . ni hansuru jōtai*"); *see also* Toko Sekiguchi, *Japan's Elections: In Unconstitutional State but Not Unconstitutional*, WALL STREET J. (Nov. 20, 2013, 9:43 PM), https://blogs.wsj.com/japanrealtime/2013/11/20/japans-elections-in-unconstitutional-state-but-not-unconstitutional/ (discussing the Court's response to a 2.43 vote weight disparity between electoral districts in the 2012 elections). For a critical examination of the Court's "unconstitutional state" or "*iken jōtai*" doctrine as applied to election challenges, see generally Yuichiro Tsuji, *Vote Value Disparity and Judicial Review in Japan*, REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS [J. CONST. RES.], May–Aug. 2018, at 57.

[382] Notably, this is the approach the Court has repeatedly employed when dealing with disparity in the weight of an individual's vote in the numerous malapportionment cases. *See* Shigenori Matsui, *supra* note 30, at 1391–92; Haley, *supra* note 30, at 1477–83; Yuichiro Tsuji, *supra* note 381, at 78–85.

[383] At least under the Court's current jurisprudence, even a ruling clearly declaring a statute unconstitutional does not immediately strike down the law in question—that duty generally lies with the Diet. *See* SHIGENORI MATSUI, *supra* note 24, at 145 (discussing the unconstitutional parricide law, which remained in place for over twenty years as the Diet failed to amend or abolish it).

[384] Recall that the Court expressed no qualms about reviewing the ratification process of the security treaty in the *Sunakawa* case. *See supra* note 157 and accompanying text.

[385] KENPŌ art. 96, para. 1.

procedures as well. The Diet finally enacted a National Referendum Law in 2007,[386] which sets a time period for discussing any proposed amendment after passage in the Diet[387] and establishes a National Referendum Public Relations Council[388] to direct outreach and inform citizens of the proposed amendment's effect.[389] If the voting public was not fully informed that ratification of the contested amendment would result in the implied repeal of other fundamental constitutional provisions, the Court could find the amendment procedurally invalid and require a new referendum for explicitly authorizing repeal of those provisions. Finally, the Court may be inclined to apply the strong presumption against implied repeal—at its apex when potentially facing the implied repeal of a fundamental principle such as popular sovereignty—to interpret an amendment in such a way as to avoid any direct conflict.[390] What an amendment to Article 96 would have to look like in order to pass constitutional muster is not readily imaginable. However, one possibility is that the Court will interpret such an amendment not as repealing the existing amendment process but as creating a new one

[386] Nihonkoku Kenpō no kaisei tetsuzuki ni kansuru hōritsu [Act on Procedures for Amendment of the Constitution of Japan], Law No. 51 of 2007.

[387] *Id.* art. 2, para. 1 (directing the public referendum to be conducted between 60 and 180 days after the Diet approves an amendment).

[388] *Id.* art. 11 ("*Kokumin tōhyō kōhō kyōgikai*"); Kokkaihō [Diet Act], Law No. 79 of 1947 arts. 102–11, para. 1 (establishing a Council composed of members from both Houses once an amendment is proposed).

[389] *See, e.g.*, Law No. 51 of 2007, art. 14 (directing the Council to prepare and publish an easily understandable explanation of the proposed amendment, including arguments for and against, as well as a comparison with current law in a fair and unbiased manner). For an overview of the public announcement process, see *Kokumin tōhyō seido: Kōhō shūchi kokumin tōhyō undō* [*National Referendum System: Public Announcement, Information, and Referendum Activities*], SŌMUSHŌ [MINISTRY INTERNAL AFF. & COMM.], http://www.soumu.go.jp/senkyo/kokumin_touhyou/syuchi.html (last visited Aug. 24, 2018).

[390] *See* Petroski, *supra* note 357, at 497 (noting how courts will construe older statutes to "make room" for newer ones to avoid implied repeals); *cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393 (1821) (emphasis added) ("[T]he duty of the Court . . . [is] to construe the constitution as to give effect to both provisions, *as far as it is possible to reconcile them*, and not to permit their seeming repugnancy to destroy each other."). The presumption against implied repeal may be so strong as to justify almost rewriting the conflicting provisions to reach reconciliation. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 556 n.141 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)); Branch v. Smith, 538 U.S. 254, 304 (2005) (O'Connor, J., dissenting in part and concurring in part) (chiding the majority for "overlooking the words of the statute" in its attempt to avoid implied repeal). *But cf.* Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy,"* 45 GONZ. L. REV. 437, 466 (2009) (arguing that the doctrine of implied repeal amounts to rewriting a statute); Petroski, *supra* note 357, at 512 n.118 (listing criticisms of implied repeal).

and then limiting its scope to technical corrections and other minor changes.[391]

In summation, in order to amend Article 96, the LDP must first find a way to circumvent Articles 98 and 99 without subsequently destroying the entire constitutional structure in the process. That is not to say Article 96 is completely unamendable. If the Diet expressed an unmistakably clear intent to abolish Articles 98 and 99, and a majority of the public approved, those entrenchments must fall, leaving nothing to stand in the way of amending Article 96. Quite possibly, the only way this could be accomplished is by repealing and replacing the entire Constitution via "wholesale" amendment. Given the inability of passing any amendment to the 1946 Constitution thus far, it is highly unlikely that this would be a viable method. The whole reason why the LDP has focused on amending Article 96 is *because* it would be much more difficult to attempt complete constitutional revision with the supermajority barrier intact. As it stands, under this structural understanding of the implicit limits on amending the amendment process, a "piecemeal" approach of first amending Article 96 to then easily dismantle the remainder of the Constitution is effectively foreclosed.

V. CONCLUSION

Every constitutional regime has a rich and complex history—this is particularly true of the Constitution of Japan. Although simplifying the legal analysis may allow conclusions to be drawn across cultures, attempting to do so may ultimately result in confirming one's own predetermined conclusions. Not every constitution is the same nor should they be treated identically. As an expression of the people's will, every constitution is inextricably tied to cultural identity and societal norms. Any constitutional analysis, therefore, requires an equally critical lens.[392] When dealing with theoretical questions

[391] Thereby creating an explicit distinction between "amendments" and "revisions," the latter only accomplishable through the original amendment process in Article 96. This would correspond to analogous distinctions contained in other constitutions. *See supra* note 77 and accompanying text. Such a solution would incidentally turn many of the ultraconservative arguments for amending the Constitution against themselves. *See, e.g.*, *Kenpō mondai shiryōshū—Genkenpō o shiru tame no 12-shō* [*Collected Documents of Constitutional Problems–12 Chapters for Understanding the Current Constitution*], NIPPON KAIGI (July 11, 2000), https://www.nipponkaigi.org/opinion/archives/882 (listing several minor translation errors in the Japanese Constitution as evidence for the need to lower the amendment threshold).

[392] Although this Comment reflects an attempt to step into the shoes of a Japanese court to analyze the implicit limitations on Article 96 under first principles, there is no guarantee that actual Japanese courts will reach the same conclusions. The author unabashedly relies on U.S. Supreme Court cases interpreting the U.S. Constitution to draw certain conclusions about the Japanese Constitution. This analysis may come

this high up on the legal hierarchy, however, the answers are necessarily complicated—the relationship between constitutions and amendments has always been, and may forever remain, a blurry line.

Employing a contextual analysis of both the Meiji and 1946 Constitutions, this Comment concludes that Chapter X is the repository of those implicit limits. The three fundamental pillars therein consist of respect for fundamental human rights (Article 97), constitutional supremacy (Article 98), and popular sovereignty (Article 99). For the many scholars who have relied on the Preamble to argue that the pacifism principle is also implicitly entrenched, this may come as an unsatisfactory result.[393] However, as the Nagoya High Court suggested, the "right to live in peace" may nevertheless be cognizable as an individual right under Articles 9 and 13, which would at least bring an aspect of the pacifism principle under Article 97's implicit entrenchment. Regardless, as the analysis in Part IV illustrates, any amendment to Article 9 must be conducted in the Diet under the current supermajority threshold and then submitted to public referendum—the LDP cannot adopt a "piecemeal" approach of amending Article 96 first.

Nevertheless, Article 9 may be constructively unamendable.[394] Given the circumstances in Japan—where only a minority of the public supports amending the Constitution,[395] the public has given supermajority control in

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out differently if the reviewing judges are more familiar with German constitutional law, or if they attempt to reach a conclusion based solely upon the dearth of Japanese Supreme Court cases. Japanese scholars have nonetheless argued for years that implicit limits on the amendment process must exist—this Comment therefore seeks to logically tether those arguments to the text and structure of the Constitution.

[393] Professor Miyazawa Toshiyoshi, who initially proposed the "August Revolution" thesis, see MILLER, *supra* note 9, at 274, also rejected the notion that amending Article 9 would exceed the scope of Article 96, but suggested that popular sovereignty would, *see* Inomata Kōzō et al., *supra* note 215, at 172.

[394] Constructive unamendability refers to a prolonged political climate where amendments are a practical impossibility due to the inability of proponents to meet the requisite vote thresholds. *See* Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. 181, 182 (2014). Although Albert discusses constructive unamendability in regard to the Equal Suffrage Clause in the U.S. Constitution, in Albert, *supra* note 2, at 662, he stops short of applying it to the situation in Japan.

[395] *See Opposition to Abe's Amendment Quest Hits 55%; Support for Article 9 Rewrite Falls: Survey*, JAPAN TIMES (Jan. 14, 2018), https://www.japantimes.co.jp/news/2018/01/14/national/politics-diplomacy/opposition-revising-constitution-grows-55-kyodo-survey/. Popular support for amending Article 96 also falls far short of the necessary threshold. *See* Aramaki Hiroshi & Masaki Miki, *Sanpi ga kikkōsuru kenpō kaisei: "Kenpō ni kansuru ishiki chōsa" kara* [*Pros and Cons Running Neck and Neck on Constitutional Amendment: From the "Attitude Survey on the Constitution of Japan"*], HŌSŌ KENKYŪ TO CHŌSA [NHK MONTHLY REP. ON BROADCAST RES.], July 2015, at 38, 46 http://www.nhk.or.jp/bunken/summary/research/report/2015_07/20150702.pdf (reporting that only 18% of respondents supported revising Article 96, whereas 71% answered that "constitutionalism" should be a primary consideration). Interestingly enough, Emperor Akihito does not support the LDP's nationalist rhetoric. *See* Norihiro Kato, *The Emperor and the Prime Minister*, N.Y. TIMES (Aug. 15, 2016), https://www.nytimes.com/2016/

both Houses to a party renowned for its revisionist goals [396]—any amendment in the near future is highly unlikely. So long as the 1.5-party system persists and Japanese voters have no viable alternatives, [397] the political process alone is not necessarily guaranteed to protect the interests of the people. Thankfully, Article 96 also requires the public to directly weigh in on any proposed revisions. More often than not, constructive unamendability is less the result of particular rights attaining some level of popular support[398] than it is political impasse due to partisan bickering.[399] Due to the 1.5-party system, however, the type of constructive unamendability at issue in Japan is of a different kind altogether.

What, then, of a "wholesale" amendment? As discussed in Part II, if the 1946 Constitution—reverting Japanese sovereignty from the Emperor to the people—was a viable amendment under Article 73 of the Meiji Constitution, then a "wholesale" revision of the 1946 Constitution must be an available recourse under Article 96. It could be argued that this historical exception is limited only to similar revolutionary circumstances under which the 1946 Constitution was adopted.[400] Furthermore, because the adoption process complied not only with Article 73 but also with Articles 74 and 75, one could claim that any "wholesale" amendment must also comply with the entrenchment provisions in Chapter X. However, one must concede that there is no barrier in legality or legitimacy to prevent a complete

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08/15/opinion/the-emperor-and-the-prime-minister.html; Ernils Larsson, *Gap Widens Between the LDP and Japan's Liberal Emperor*, E. ASIA F. (Apr. 8, 2015), http://www.eastasiaforum.org/2015/04/08/gap-widens-between-the-ldp-and-japans-liberal-emperor/.

[396] *See* Tomohiro Osaki, *Shinzo Abe Calls for Japan's 'Rebirth' in 2020 Along with Constitutional Revision*, JAPAN TIMES (Dec. 19, 2017), https://www.japantimes.co.jp/news/2017/12/19/national/politics-diplomacy/shinzo-abe-calls-japans-rebirth-2020-along-constitutional-revision/ (describing the LDP's goal of revising the Constitution within a few years). According to a survey after the 2017 election, 80% of elected representatives—even those not in the LDP-Kōmeitō ruling coalition—supported amending the constitution, and 52% were in favor of clarifying the Self-Defense Force's constitutional position. *VOTE 2017: Constitutional Revision Backed by Over 80% of Lower House*, ASAHI SHIMBUN (Oct. 23, 2017, 4:05 PM), http://www.asahi.com/ajw/articles/AJ201710230048.html.

[397] *See* Gerald Curtis, *Japan's Democratic Party Doomed to Opposition*, E. ASIA F. (Apr. 30, 2017), http://www.eastasiaforum.org/2017/04/30/japans-democratic-party-doomed-to-opposition/; Ken Victor Leonard Hijino, *Credible Opposition to Japan's Conservatives Beyond Hope*, NIPPON.COM (Oct. 12, 2017), https://www.nippon.com/en/currents/d00361/ (discussing the proliferation of small parties splintering off prior to elections, only to disappear or remerge with the LDP).

[398] Aside from popular support, other factors have also led to the constructive unamendability of Article 9, such as a desire to focus on economic recovery. *See* Martin, *supra* note 9, at 329–30. However, those factors that existed during the Cold War have all but abated.

[399] Of course, a near-identical climate rendering constitutional amendments a practical impossibility can also be said to exist in the United States. *See* Albert, *supra* note 355.

[400] *Cf.* Albert, *supra* note 173, at 5–7 (discussing the rule of mutuality).

constitutional revision, assuming the literal commands of Article 96 as it currently stands are followed. Indeed, who would have standing to challenge such a "wholesale" amendment? At most, this historical precedent suggests that the source of sovereignty—the Emperor under the Meiji Constitution, and the people under the 1946 Constitution—must be fully aware of and explicitly consent to all changes resulting from any amendment. Textual and structural arguments have their limits, and this Comment attempts only to pave the pathway for a text-based understanding of the implicit limits on Article 96. The concept of popular sovereignty means that the public must ultimately decide, and given the widening disconnect between the LDP's ambitions and popular opinion on the need for constitutional revision, hopefully this debate will remain in the realm of hypothetical speculation.