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Assessing the Constitution's Role as a Protector of Minorities: A Comparative
Examination of Japan's Homogenous Approach and the United States'
"Acceptance" of Heterogeneity

By Ruby Garrett

Can you speak a bit about the different threads within the Japanese feminist movement? For example, I am interested in learning about the ways in which the Korean-Japanese feminist movement differs from the mainstream Japanese feminist movement. And, when and how did these different threads become visible?

The Japan International Immersion Program provided a forum for me to pose the questions above to two leading feminists in Japan—Yukiko Tsunoda and Kazuko Ito. Before my sophomore year of college, I would not have ever dreamed of posing such questions. Not because the set of questions above represents a particularly advanced thought process, but because I was unaware of the effect my status as a female had on my life experiences. Growing up in the south, my blackness overshadowed my identity as a female. My blackness dictated everything from where I sat in the cafeteria to which derogatory name I was called on the playground. It shaped life.

College exposed me to feminism; I was skeptical, at least in the beginning. The class conversations about the movement and the various student groups fighting for equality did not resonate with my experience. It felt conflicting to unite with white women, who were right beside white men oppressing the Black community. And, what is more, our respective fights and barriers to success seemed quite distinct. When I found the Black feminist movement and bell hooks, the conflict made sense. While there are some things, such as equal pay, that all women can fight for together, other issues are specific to Black females.

In response to Ms. Tsunoda and Ms. Ito's questioning eyes, I volunteered a summary of my discovery of Black feminism and shared how the experience inspired the series of questions. Their once questioning eyes displayed understanding. They took turns explaining that minority feminism was not prominent in Japan. One mentioned Japan's homogenous approach as a contributing factor. The other highlighted the relatively small percentage of minorities in Japan. Together, they discussed that it would be interesting to explore the need for a bifurcated movement in Japan.

As they considered the possibility, my mind raced with their reality. What is like to have a united front among women? What would it have been like to grow up and not have my blackness define every interaction? Would my female identity maintain its small role? Or, would it consume the space where my Blackness once existed? Of course, I cannot say for sure what it

would be like as a united female front, but I can imagine that our progress towards equal pay and other universally shared injustices would be much further along.

The purpose of this research paper is to explore the progress of minorities in the United States and Japan. More specifically, I explore whether the Constitutions of Japan and the United States have had as much of an influence on the plight of minority communities as we like to think. Japan is touted as being a homogenous country, while the United States “accepts” its heterogeneity. How do these two approaches interact with the Constitution and advance the rights of minority communities? The proposed comparative approach is three-fold. First, I want to develop the actors. Who are the minorities? Who are the active and passive oppressors? Second, I want to track the plight of the minorities as it relates to legally recognized rights. And, finally, I hope to make recommendations for improving advocacy for minorities’ rights in the United States and Japan. The United States used to be at the forefront of change, but in recent years, we have found ourselves behind the times. We were not the first to decriminalize marijuana, legalize gay marriage, or declare sentencing young people to life imprisonment without the possibility of parole to be unconstitutional. What else are we behind on?

In Part I, this paper explores the systems that create the voiceless community and identifies the minority communities. In Part II, this paper

unpacks the heterogeneous and homogenous approach taken by America and Japan respectively. It then investigates how the differing approaches affect refugee law and “passing.” In Part III, this paper introduces the main provisions of each Constitution that pertains to minority communities. In Part IV, this paper explores and compares the plight of minorities in each nation. Part V, concludes this research paper by providing suggestions for minorities in each nation to advance their respective causes.

I. The Voiceless

I'm not an activist, nor the leader of any mass movement, and I'm certainly not the "voice of the voiceless." (We know of course there's really no such thing as the 'voiceless'. There are only the deliberately silenced, or the preferably unheard.)¹

Underlying Arundhati Roy's humility is a salient point. Why do we strive to be a voice for the voiceless as opposed to providing a forum for the voiceless to speak? Those silenced (and their silencers) have always been a source of intrigue and curiosity. The University of Chicago embodies American ideals when it encourages the market place of ideas. Japan's Prime Minister Shinzo Abe has similarly encouraged “womenomics” to diversify the

¹ Arundhati Roy, *The 2004 Sydney Peace Prize Lecture*, THE UNIVERSITY OF SYDNEY (Nov. 4, 2004), <http://sydney.edu.au/news/84.html?newsstoryid=279>.

workplace.² But, neither of these pushes for diversity goes far enough, nor do they seem genuinely interested in amplifying the voices of the voiceless.³ There is hesitancy around enacting radical reform that would create a true marketplace of ideas. But, the hypocrisy of the powerful is for another paper. For the purpose of this paper, we just need to unpack who the voiceless communities are in both the United States and Japan. And, we need to also unpack what institutions or systems render and perpetuate the communities' status as voiceless. After indirectly unpacking the former through a discussion of the latter, this Part proceeds by directly unpacking the former with an examination of the numerical breakdown.

A. The United States—Constructing the Voiceless

Race in America is a social construct. It is malleable and “contingent on collective acceptance, imposition, or agreement.”⁴ However, though it is

² See generally Helen Macnaughtan, *Womenomics for Japan: is the Abe policy for gendered employment viable in an era of precarity?*, 13 ASIA PAC. J. JAPAN FOCUS 1 (2015) (explaining Prime Minister Abe’s “Womenomics”).

³ See Alexandra Silets, *Lori Lightfoot, Dean Angelo Come Face-to-Face on Task Force Report*, CHICAGO TONIGHT (May 2, 2016, 8:47 PM) <http://chicagotonight.wttw.com/2016/05/02/lori-lightfoot-dean-angelo-come-face-face-task-force-report> (accepting the Mayor’s promise to implement only one-third of the proposed changes to the Chicago Police Department). Compare Kathy Kemper, *Womenomics Makes Headway*, HUFFPOST WOMEN (Oct. 23, 2015 1:38 PM) http://www.huffingtonpost.com/kathy-kemper/womenomics-makes-headway_b_8371276.html with Kevin Rafferty, *Why Abe’s ‘Womenomics’ Program Isn’t Working*, THE JAPAN TIMES (Dec. 21, 2015) <http://www.japantimes.co.jp/opinion/2015/12/31/commentary/japan-commentary/abes-womenomics-program-isnt-working/#.VzjcpBWDGkp>.

⁴ Emanuel I. Lusca, *Race As A Social Construct*, ANTHROPOLOGY.NET (Oct. 1, 2008) <https://anthropology.net/2008/10/01/race-as-a-social-construct/>.

malleable, everyone's ability to shift the narrative is not equal. College students around the nation will hear this theory in first-year psychology and/or sociology courses in the fall. But, it was not always so widely accepted. W.E.B. Du Bois and Albert Einstein were early pioneers of this theoretical framework.⁵ They were willing to call out how racial categorization was used to create and maintain white supremacy. Their pleas were ignored for far too long. Even though the majority of the population is willing to admit that minorities are not genetically predisposed to lead inferior lives, the racial construct and assumptions still pervade American society.

Such pervasive thought can be witnessed in the response to the mass incarceration of the Black community and criminal activity in general. It is no secret that Blacks are overrepresented in the criminal justice system. It is likewise no secret that whites are more likely to sell drugs, but Blacks are more likely to be policed and subsequently arrested for drugs. Yet, the expected outrage is not present in the white community. Yes, a decent number of white Americans are upset at the injustice, but there is large population that buys into the stereotype that Blacks are simply more prone to commit crime.⁶ This construction of race is perpetuated by the media through news coverage and further negatively influences the perception of minority

⁵ Maria Popova, *Albert Einstein's Little-Known Correspondence with W.E.B. Du Bois on Race and Racial Justice*, BRAINPICKINGS
<https://www.brainpickings.org/2015/01/06/albert-einstein-w-e-b-du-bois-racism/>.

⁶ Jennifer L. Eberhardt, Valerie J. Purdie, Phillip Atiba Goff, and Paul G. Davies, *Seeing Black: Race, Crime and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

communities in America. This feedback loop creates an acceptance of taking the right to vote from minority communities in bulk through felon disenfranchisement, cumbersome voter identification laws, and the elimination of weekend voting. If the American electoral process is supposed to be the place for everyone to bring concerns, how do the “vote less” (minority communities) escape “voicelessness” (being silenced)?

B. Japan—Constructing the Voiceless

Race in Japan is a legal construct. That is, in contrast to the United States, it is more so subject to the whims of the legislative making bodies. When the legislature or judiciary makes a shift, there is not as much resistance as evinced by the South’s reaction to the abolishment of slavery or segregated schools. In Japan, “[n]umerous laws and regulations decide who belongs in Japan, who qualifies for citizenship, and who deserves legal protection under Japanese law.”⁷ Though the laws often codify what was in the process of being socially constructed, they go much further than any social construct of race. But, similar to the United States, the minority communities do not have much power or capital to change the legal constructs.

One would think that given the relatively homogenous race, there would not be a racial basis for silencing communities. However, the group

⁷ Timothy Webster, *Minorities: International Law's Challenge to Japan's Ethnic Homogeneity*, 36 N.C.J. INT'L L. & COM. REG. 557, 558 (2011).

viewed as the “model minority” in the United States has a voiceless community as well. They just have a more overt way of accomplishing the silence. As with most countries, the right to vote is reserved for citizens. But, obtaining Japanese citizenship is difficult and costly to achieve. In addition, it is rare for an individual to receive dual citizenship. This means that a permanent resident of Japan must denounce his or her original country in order to reap the benefits that come along with representation. For some, such as Zainichi Koreans, this presents quite the dilemma—assimilate or stay voiceless. While some local elections have allowed the limited participation of permanent residents, the Diet has refused to initiate wide-sweeping reform.

C. Numerical Breakdown—Counting the Voiceless

While I have included a chart below depicting the racial breakdown in the United States as of 2010,⁸ it is quite difficult to do the same for Japan. Japan collects information based on citizenship as opposed to ethnicity. So, it is unclear how many of the 98.5% are truly Japanese. However, Japan is viewed as having at least “six principle minority groups—Ainu, burakumin, Chinese, Koreans, nikkeijin (Japanese return migrants and their

⁸ *Population of the United States by Race and Hispanic/Latino Origin, Census 2000 and 2010*, U.S. Census Bureau: National Population Estimates; Decennial Census.

descendants) and Okinawans.”⁹ And, “[e]ven if minority demographic numbers are relatively small, particularly in comparison to the United States, the fact remains that Japan is a multi-racial and multi-ethnic society with a Wajin majority and a diverse gathering of significant minority groups, including indigenous peoples.”¹⁰

2010 Census Data

Race	Percent of Population
White	63.7%
Hispanic or Latino	16.3%
Black or African-American	12.2%
Asian	4.7%
American Indian or Alaska Native	0.7%
Native Hawaiian and other	0.15%

⁹ Jeff Kingston, *Race, Ethnicity and Identity in Japan*, THE JAPAN TIMES (Apr. 19, 2009) <http://www.japantimes.co.jp/culture/2009/04/19/books/book-reviews/race-ethnicity-and-identity-in-japan/#.VzkS4RWDGko>.

¹⁰ Mark A. Levin, *Essential Commodities And Racial Justice: Using Constitutional Protection Of Japan's Indigenous Ainu People To Inform Understandings Of The United States And Japan*, 33 N.Y.U. J. INT'L L. & POL. 419, 524.

Pacific Islander

Two or more races	1.9%
Other race	0.2%

II. The Approach

A government, to afford the needful protection and exercise proper care for the welfare of a people, must have homogeneity in its constituents. It is this necessity that has divided the human race into separate nations, and finally has defeated the grandest efforts which conquerors have made to give unlimited extent to their domain.¹¹

Though Jefferson Davis' quote is largely premised on a desire to maintain slavery, he has a point: homogenous nations are better able to care for constituents.¹² Diversity complicates the calculus largely because one group is always in the majority. And, it is difficult to convince the majority to consider the effect laws and regulations will have on minority communities. In fact, it is somewhat illogical given that the majority community possesses

¹¹ JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* xxvii (Da Capo Press) (1990).

¹² Emily Tamkin, *Will Everyone Shut Up Already About How the Nordic Countries Top Every Global Ranking?*, SLATE (Aug. 29, 2014, 9:00 AM) http://www.slate.com/blogs/the_world_/2014/08/29/will_everyone_shut_up_already_about_how_the_nordic_countries_top_every_global.html.

no incentive to relinquish power. This Part proceeds by discussing the different approaches by America and Japan. After the discussion, it compares each countries approach in relation to refugees and passing.

A. Heterogeneity—America’s “Acceptance”

To the rest of the world, America proudly welcomes individuals of all backgrounds in order to maintain the “melting pot” / “salad bowl” persona, but the internal approach to minority communities is troubling. In the middle of the 20th century, the framework shifted from melting pot to salad bowl. The desire to separate from the assimilationist images invoked by the melting pot (and lauded by Japan) inspired the change. Under the salad bowl framework, “different ethnic groups now would coexist in their separate identities like the ingredients in a salad, bound together only by the “dressing” of law and the market.”¹³ While the ability to maintain one’s ethnic identity and still be an American is positive, being an ingredient in the salad presents at least two problems. First, those who opt to remain too ethnic are not truly ever accepted. Though lettuce and Black come in all different types, they are viewed as a monolithic community with small exceptions. Second, those who opt to remain too ethnic are rarely ever represented. The census data above demonstrates that America consists of

¹³ Bruce Thornton, *Melting Pots and Salad Bowls*, HOOVER INSTITUTION (Aug. 26, 2012) <http://www.hoover.org/research/melting-pots-and-salad-bowls>.

more than white men, but looking at our leadership, it is difficult to glean that others exist.

B. Homogeneity—Japan’s Reality

While Japanese leadership works diligently to convey that Japan is a homogenous nation, the country is home to several minority communities yearning for recognition. In fact, Prime Minister Nakasone criticized the United States’ melting pot approach. He firmly believed that the country’s low intelligences levels “were attributable to ‘blacks, Puerto Ricans and Mexicans.’”¹⁴ Much to the dismay of minorities in Japan, he proudly contrasted the United States’ “multi-ethnic” society to Japan’s “mono-ethnic” society.¹⁵ Over the voices of protestors, he continued, “[t]he Ainu [and other minorities] are already largely assimilated. Why, with my heavy beard, I’m sure I’ve got a lot of Ainu blood myself.”¹⁶ There is this insistence on glossing over diverse communities and rendering them invisible. I can only imagine what it is like to identify as a diverse individual and have leadership inform me that my diversity is a figment of my imagination, that my ancestors’ plight lacks relevance, and that my community does not matter.

C. A Comparative Look: Refugees & “Passing”

Now that we have unpacked the different approaches that the United

¹⁴ Levin, *supra* note 10, at 440 n.75.

¹⁵ *Id.*

¹⁶ *Id.* (citing Mizuno Takaaki, *Ainu, The Invisible Minority*, 34 JAPAN Q. 143, 145 (1987); Clyde Haberman, *For Nakasone, Boos from an Unmelted Minority*, N.Y. TIMES, Nov. 5, 1986, at A4).

States and Japan take towards diversity, it is worth examining the manifestation with a real world application. To show widest spectrum of influence I selected one legal real world application (refugee law) and one non-legal real world application (“passing”).

1. *Refugees*

How does the difference in approach influence the acceptance and subsequent recognition of foreigners in each respective country? The United States has a better acceptance rate of refugees than Japan.

There have been some critics about the refugee policy in the United States, but the leaders of the nation have committed to gradually accepting more refugees each year.¹⁷ Earlier this year it was announced that by 2017, the ceiling for refugees would rise to 100,000.¹⁸

Japan will not likely experience such rapid refugee program growth. While on the Japan International Immersion trip, we had the opportunity to attend a lecture by Hiroshi Miyauchi on refugee law in Japan. In that lecture, he shared that Japan consistently accepted very few refugees. And, seeking

¹⁷ Carol Morello, *Obama administration to expand number of refugees admitted to U.S.*, THE WASHINGTON POST (Jan. 13, 2016) https://www.washingtonpost.com/world/national-security/obama-administration-to-expand-number-of-refugees-admitted-to-us/2016/01/13/35613e74-ba0b-11e5-99f3-184bc379b12d_story.html.

¹⁸ *Id.*

asylum in Japan is like seeking to obtain “water out of a rock.”¹⁹ This imagery came to life as he described his attempts to get his client recognized. Nevertheless, neither result is shocking. America’s increase comports with America’s public acceptance of heterogeneity; Japan’s consistently low figures comports with its push for homogeneity.

2. “*Passing*”

How does the difference in approach influence views about “passing” as a member of the majority race when beneficial? In the United States, it is taboo; in Japan, “passing” is the norm.

Each ingredient in the American salad has a subsection that can pass. But for the sake of brevity, we will use the Black community as an example. Passing in the Black community was most prominent from the late 18th century to the end of the 20th century. It was not a solo act. It “required other people who were willing to keep your secret, and a community that was willing to let you go and look the other way, even when it hurt.”²⁰ Those who passed, such as University of Chicago’s Dr. Albert Johnston, received mixed reactions from the community they left. Some viewed it as a necessary evil to get ahead and others viewed it as selling out the race.

¹⁹ Hiroshi Miyauchi, Attorney, Refugee Law in Japan Lecture for University of Chicago Law School Japan International Immersion Program (Mar. 14, 1016).

²⁰ Karen Grigsby Bates, ‘*A Chosen Exile: Black People Passing In White America*, NPR (Oct. 7, 2014, 5:12 PM) <http://www.npr.org/sections/codeswitch/2014/10/07/354310370/a-chosen-exile-black-people-passing-in-white-america>.

On the contrary, passing in Japan is encouraged by the legislature. As discussed earlier in this paper, the legislature has enacted laws that incentivize assimilation. While some Ainu hope that their children will marry other Ainu to sustain the culture,²¹ their children like other minority children are fighting an uphill battle. I do not subscribe to the Great Man Theory, but not everyone can fight the status quo like Kim Kyongdok. Mr. Kyongdok is known for being the first Zainichi Korean attorney in Japan.²² He was also the father of our main guide during the International Immersion Program. Through his son, we learned about the difficult plight of Zainichi Koreans. And, unlike Black Americans who passed, “most minorities in Japan were not only phenotypically ‘invisible’ as they ‘passed’ within Japanese society, but were also officially ‘invisible’ within the national discourse of a minority-free ‘homogeneous Japan.’”²³ This dual push created a norm.

III. The Constitution

And now, my Democratic friends, come forward. Throw off these things, and come to the rescue of this great principle of equality.

Don't interfere with anything in the Constitution. That must be

²¹ See Levin, *supra* note 10, at 506–07.

²² John Lie, *Zainichi (Koreans in Japan): Diasporic Nationalism and Postcolonial Identity* 160 (University of California Press) (2008).

²³ Debito Arudou, *Global Perspectives On Colorism: Japan's Under-Researched Visible Minorities: Applying Critical Race Theory To Racialization Dynamics In A Non-White Society*, 14 WASH. U. GLOBAL STUD. L. REV. 695, 718 (2015).

maintained, for it is the only safeguard of our liberties. And not to Democrats alone do I make this appeal, but to all who love these great and true principles.²⁴

Abraham Lincoln held the Constitution in high regard. But, one can only help but wonder whose liberties are safeguarded. Who is “our”? Who gets to experience “equality”? This Part will be brief. The goal is to introduce main provisions of the American Constitution and the Japanese Constitution that will be discussed in the remaining two Parts. The selected provisions were either designed to or have been interpreted to protect minority communities.

The American Constitution has three main provisions that grant rights to minority communities and aim to prevent discrimination. Collectively these provisions are considered the Reconstruction Amendments. Through the Reconstruction Amendments, “Congress attempted to integrate African Americans into society.”²⁵ “[T]he Thirteenth Amendment abolished slavery and involuntary servitude; the Fourteenth Amendment guaranteed due process and equal protection to all citizens; and the Fifteenth Amendment aimed to prevent voting rights discrimination on the basis of race.”²⁶

The Japanese Constitution has several provisions that grant rights to

²⁴ ABRAHAM LINCOLN, *THE COLLECTED WORKS OF ABRAHAM LINCOLN (VOLUME 2)* 366 (Wildside Press) (2008).

²⁵ Ruby J. Garrett, *A Call for Prophylactic Measures to Save "Souls to the Polls": Importing A Retrogression Analysis in S 2 of the Voting Rights Act*, 2015 U. CHI. LEGAL F. 633, 636 (2015).

²⁶ *Id.*

minority communities and aim to prevent discrimination. After the war, Japan pulled from several sources when constructing its Constitution. While the main focus was on ensuring that the country could not initiate war again, somehow individual rights ended up being extremely robust. Chapter III of the Japanese Constitution contains thirty-one articles devoted to human rights—eight are specifically relevant to minority communities. Article 13 solidified the respect due to individuals; Article 14 prohibited discrimination; Article 15 granted the affirmative right to vote; Article 18 abolished slavery; Article 25 guaranteed access to welfare; Article 26 ensured that all children would have access to free education; and Articles 27 and 28 solidified worker’s rights.²⁷

IV. The Plight

Judges are the people who have to protect the rights of individuals, have to protect the rights of minorities, have to protect the rights in the Constitution, have to protect the requirement that the executive and the legislature not simply exercise raw power but adhere to standards of reasonableness and constitutionality.

If you look at where the judges of the United States, particularly

²⁷ The Constitution of Japan, May 3, 1947.

federal judges, have had their greatest moments, they are in areas like protecting civil liberties, protecting free speech, protecting civil rights. Where they've had their worst moments is where they've caved to the executive or to the legislature. The Dred Scott slavery decision, for example.²⁸

Judge Jed S. Rakoff clearly views the role of judges and the Constitution as a protector of minorities. But, is he too idealistic? In practice, have judges and the Constitution maintained status quo? If his role is to protect minorities, he must be protecting them from the majority. In the United States, as the census data above indicates, whites are the majority by a long shot. Japan has an apparent majority as well. "Viewed within the present-day political boundaries of the Japanese state, the Wajin majority is overwhelmingly dominant and privileged in comparison with the minority populations."²⁹ To match the term "whiteness" used in America, one scholar created the term "Wajin-ness."³⁰ It is through this term and lens that he is able to explore racial subordination in Japan. Given that the focus of this paper is minority communities, I will not take a deeper dive in to "whiteness/wajin-ness" comparison. This Part proceeds by comparing the

²⁸ Howard Fineman, *Jed S. Rakoff: Federal District Judge Of New York's Southern District (The Inspirational)*, HUFFPOST POLITICS (Dec. 27, 2011, 4:13 PM) http://www.huffingtonpost.com/2011/12/27/jed-s-rakoff-federal-dist_n_1171227.html.

²⁹ See Levin, *supra* note 10, at 514.

³⁰ *Id.* at 514–15.

Native Americans to the Ainu and the Blacks to Buraku.

A. Comparator for Native Americans

The natural comparator for Native American is the Ainu community. Like the Native Americans the Ainu are Japan's indigenous people. While America has recognized Native Americans for some time as indigenous, "[t]he Japanese government did not formally recognize the Ainu as indigenous to Japan, with a distinct language and culture, until 2008."³¹ Similar to Native American communities, they struggle when it comes to obtaining quality education and maintaining a robust economy. In fact, "[t]wice the number of Ainu are on social welfare compared to the majority Japanese population."³² The community is crippled much like the Native American community.³³ Thirty percent of Native Americans are on welfare.³⁴

Before one jumps to the conclusion that Native Americans fare better

³¹ Dean Irvine, *Japan's hidden people: Ainu try to keep ancient traditions alive*, CNN (Feb. 9, 2015, 5:02 PM) <http://www.cnn.com/2015/02/09/travel/cnngo-travel-hokkaido-ainu/> (positing that Japan decided to formally recognize the Ainu community because the "UN General Assembly passed the Declaration on the Rights of Indigenous Peoples").

³² *Id.*

³³ Shawn Regan, *5 Ways The Government Keeps Native Americans In Poverty*, Forbes (Mar. 13, 2014, 6:07 AM) <http://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#4c896be76cc6> (describing the way the ways in which the American government prevents true economic growth in the Native American community).

³⁴ Paul Bedard, *51% Of Immigrant Households On Welfare, 30% 'Native Americans'*, WASHINGTON EXAMINER (Sept. 2, 2015, 10:51 AM) <http://www.washingtonexaminer.com/51-of-immigrant-households-on-welfare-30-native-americans/article/2571257>.

because they were recognized earlier, I'd like to posit that the Ainu community has fared better under the Constitution of Japan. Yes, the Native American community has the Bureau of Indian Affairs to manage its affairs and its reservations. Yes, the government respects tribal sovereignty (for the most part).³⁵ But, the United States Supreme Court approaches the Native American community with a paternalistic mindset. Chief Justice Marshall referred to tribes as “domestic dependent nations” that need the United States federal government as their “guardian.”³⁶ On the contrary, the Japan Supreme Court is willing to recognize the Ainu as individuals and value their cultural contribution. The language used in the relatively recent Nibutani Dam case evinces this. When discussing Article 13, the Japanese Supreme Court referred to the Ainu community’s “distinct ethnic culture” as an “essential commodity” and a “right.”³⁷ The Court went even further: “We believe the guarantee of that right fulfills the basic tenets of democracy by meaningfully respecting the individual while striving for the majority's comprehension of and respect for the circumstances faced by the socially weak.”³⁸

B. Comparator for Blacks

³⁵ I say for the most part, because in several instances the Supreme Court has pierced tribal sovereignty. *See e.g., United States v. Wheeler*, 435 U.S. 313 (1978) (holding that the Double Jeopardy Clause does not bar the prosecution of a Native American who has already been prosecuted by the tribe).

³⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

³⁷ Levin, *supra* note 10, at 462.

³⁸ *Id.*

At first blush, the best comparator for the Black community seemed to be the Korean community;³⁹ however, after careful consideration, the Buraku community became a better comparator. Like the Black community, the Buraku community is viewed at the bottom of the totem pole. The Buraku community “is an outcast group at the bottom of the Japanese social order that has historically been the victim of severe discrimination and ostracism.”⁴⁰ While it is not a racial group the similarities between the treatment received by the two groups is readily apparent. In Japan, the outcasts were viewed as “one-seventh of an ordinary person.”⁴¹ In America, the U.S. Constitution deemed Blacks three-fifths of a person.⁴² Furthermore, America was built on the backs of Blacks as they picked cotton day in and day out.⁴³ Even though they made the country financially stable, they were deemed untouchable. Similarly, the Buraku community makes leather and slaughters Waygu beef for the nation. And, yet, they consistently experience

³⁹ I should also note that I considered comparing Blacks in Japan to Blacks in America. This comparison had the appeal of comparing two visible minorities, but there is not a significant amount of literature on the plight of Blacks in Japan.

⁴⁰ *Burakumin*, WIKIPEDIA <https://en.wikipedia.org/wiki/Burakumin>.

⁴¹ Mike Sunda, *Japan's hidden caste of untouchables*, BBC NEWS (Oct. 23, 2015) <http://www.bbc.com/news/world-asia-34615972>.

⁴² U.S. Const, art, I, § 2.

⁴³ I promised my father that I would mention his childhood in one of my law school papers. Now seems particularly relevant. He was a sharecropper in South Carolina. He and his family worked in the fields for meager compensation. And, even though they made a “profit,” the white locals, much like the Buraku community, deemed them untouchable. But, as the remainder of this subsection indicates, the Black community has experienced more upward social mobility than the Buraku community. From one untouchable to another, Buraku community, keep your head up and keep trudging.

discrimination.

While the Black community shares many similarities with the Buraku community, overall, they have fared better under the Constitution. Before going on the trip and learning more about the community, I suspected that the Buraku would win this “race” because they do not have to fight the originalist interpretation that often thwarts communities of color in the United States. But, as one International Immersion Program speaker noted, minority communities in general (including the Buraku) have not availed themselves of the test litigation (aside from the fingerprinting case) that has been successful in America. There is not an NGO or ACLU to do so. There is no bandwidth. Because of America’s bandwidth, Blacks in America have been able to use the Reconstruction Amendments to make strides towards Lincoln’s equality.

V. The “Race”

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

I have a dream today!

I have a dream that one day, . . . right there in Alabama little black boys and black girls will be able to join hands with little

white boys and white girls as sisters and brothers.⁴⁴

Martin Luther King, Jr.'s dream is one that is shared by every minority. Each minority hopes that their race, their children, the next generation will have a true shot at winning the race. For this to come to fruition, minorities across the world must begin to share war stories. We must unite in order to achieve equality within our own nations. When I began this research, I set out to understand the role the Constitution plays in the advancement of minority communities in both Japan and the United States.

This mission was inspired by a class took my first year of law school. In class my professor often exclaimed, "the rule doesn't matter!" He maintains that in the majority of situations, the law does not have as much influence on one's behavior as we like to think. To use his example, let us consider boat captains, dock owners, and of course, an unexpected storm. What happens when there is an unexpected storm? The boat captain needs to dock his boat, but there is no time to make an agreement with the dock owner. He docks, planning to pay later. The unexpected storm gets worse and the dock sustains a great deal of damage. Who pays? My professor posits that we do not need a rule that says, in the event of a storm, boat captains must pay for damage to docks when they latch on in emergency situations. His theory goes against the bad man theory (simply, what would a person with ill intent do),

⁴⁴ Martin Luther King, Jr., I Have a Dream at the Lincoln Memorial in Washington D.C. (Aug. 28, 1963).

which in this case would mean that the boat captains would want the dock owners to pay. He reasons that boat captains would pay in the absence of a rule to prevent either (a) fewer dock owners going into business due to an inability to pay for repairs or (b) all dock owners increasing the price for everyone to pay for damage caused by a select few. The rule does not matter.

This project was a play on his theory. I essentially wanted to explore whether the Constitution mattered. Having completed my research, I do not think his theory maps on to the Constitution as swimmingly as it does boats, docks, and storms. The rule and the approach (homogeneity or heterogeneity) matter. Nevertheless, I hope to provide an additional framework of understanding for those seeking to use the Constitution to improve the plight of minority communities. While I cannot claim to be an expert on either Constitution or any minority community, I have two ideas for minorities in each nation to consider.⁴⁵

A. Suggestions for the United States

First, minority communities in the United States should consider appealing to international standards like minorities in Japan. I am fully aware that the U.S. jurisprudence states that international law is not precedential or binding, but the U.S. has clearly shown that it does not want

⁴⁵ Initially, I planned to make recommendations only to minority communities in the United States. I mean, what authority do I have to make suggestions to minority communities in Japan. But, one of the Japanese LLMs who attended the presentation of our research projects encouraged me to do so.

to be deemed barbaric among peer nations. For example, while the test litigation was imperative in desegregating schools, the Supreme Court justices and other leaders reported feeling the pressure from other countries when they visited.

Second, minority communities in the United States should make a concerted effort to amend the Constitution. Yes, it is difficult to amend the Constitution and it has not happened for some time. But, there has not been a nationwide movement to do so. There is a Ran Hirshl argument to be made that if minorities enumerate rights, it will actually limit advancement. However, the United States has already begun to enumerate rights. We are not in the position of Australia. Given the progress made with impact litigation, having amendments like Japan that affirmatively grant the right to vote, provide for workers rights, and guarantee access to education could change the game.

B. Suggestions for Japan

First, minority communities in Japan should fight for dual citizenship. It does not seem as if the Japanese leadership is willing to let go of its homogenous approach. So, for minority communities to maintain cultural individuality and achieve equality, they must work within the homogenous framework. The homogenous approach is not a bad idea. Homogenous communities have lower crime, better prison conditions, and less police brutality. Pushing for dual citizenship is a win-win for all. Japan can report

only the Japanese citizenship rate and minority communities do not have to sacrifice their culture or history.

Second, minority communities in Japan should strengthen the justiciability of constitutional provisions vis-à-vis test litigation. Before the Nibutani Dam litigation discussed above, there was uncertainty about whether Article 13 was similar to the United States Preamble or contained an enforceable right. It is well worth pooling resources to bring these claims. While there are significant upfront costs, the payoff has the potential to be equally as or even more significant. Plus communities can collaborate with law school clinics in Japan or in the United States to lower the upfront cost.