

RACIST RACISM: COMPLICATING WHITENESS THROUGH THE PRIVILEGE AND DISCRIMINATION OF WESTERNERS IN JAPAN

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With no anti-discrimination legislation, strong Confucian-inspired in-group mentality, and a belief in their mono-ethnicity, Japan is marred by a culture of widespread discrimination. Although it has ratified the International Convention for the Elimination of All Forms of Racial Discrimination, and guarantees equality in its Constitution, all those who differ from the closely circumscribed norm are excluded culturally, and legally. Whites' position in this milieu is complicated because of the West's unique historical relationship with Japan, and due to the perception of white global dominance. Although admired and arguably privileged over other outsiders, Caucasians are nevertheless mocked and discriminated against—openly, frequently, and with impunity. The concept of racism, as funneled through critical race theory's ("CRT") reliance on homogeneous white privilege, lacks dialectic space to address their experiences of discrimination. Yet both CRT analytical tools and desire for praxis, and Confucian respect for human dignity have much to offer in expanding discrimination discourse, exposing the concept of racism as Western-centric, supporting equality, and giving voice to victims who do not fit the victim norm. In the process, this enlarged theoretical and analytical space can help alleviate Japan's labor shortage, prompting multi-faceted reforms, and achieving true Confucian harmony and democracy. I propose to create new discourse, situated within expanded CRT and whiteness studies, while providing analytical coverage to a group of Caucasians rarely mentioned in popular or scholarly literature. Definitions of "the other" and "white privilege" need to move away from monolithic notions of race and power, which are white-centric and racist themselves.

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I. INTRODUCTION

“[F]ew modern nations have erected such high barriers against foreign people and ideas.”¹ Backed by “fear that allowing foreigners entry into the nation’s life would give them terrifying power,”²

[d]iscrimination is a very common experience for foreign residents . . . [B]ias and prejudice are very explicit and straightforward against people who are physically, linguistically, and culturally different. Very often, foreigners are discriminated against on the basis of their dress, face, manners, odors and behaviors.³

In a recent government survey, fewer than 60% of respondents agreed that foreigners should have human-rights protections, and at least some public officials are taught that foreigners inherently have no human rights.⁴ Many landlords refuse to rent to those who appear foreign, and “No Foreigners” signs (often in several languages) are frequently posted on restaurants, bars, public baths, stores, entertainment venues, and other public establishments.⁵ In a survey conducted in 2008, 70% of owners of traditional inns (“*Onsen*” in Japanese) that

¹ ALEX KERR, *DOGS AND DEMONS: TALES FROM THE DARK SIDE OF JAPAN* 335 (2001).

² *Id.* at 351.

³ GOPAL KSHETRY, *FOREIGNERS IN JAPAN: A HISTORICAL PERSPECTIVE* 273 (2008). Although discrimination experienced by Caucasians is the focus of this Article, Japan has a long history and ongoing problems with discriminating against its former colonial subjects and their descendants (particularly Koreans and the Chinese), and against Japanese indigenous groups (including the Ainu from Hokkaido, the Ryukyans from Okinawa, and the Burakumin untouchable caste). *Id.* at 275-84. Those groups arguably suffer even more prejudice than white foreigners do. *Id.* at 273-98. The Japanese perceive all other Asians to be weak and hereditarily inferior to the Japanese. George Devos, *Dimensions of the Self in Japanese Culture*, in *CULTURE & SELF: ASIAN AND WESTERN PERSPECTIVES* 141, 169-170 (Anthony J. Marsella et al. eds., 1985) [hereinafter *CULTURE & SELF*]. Some scholars argue, however, that whites face the most overt acts of discrimination. *See, e.g., Bortz v. Suzuki*, 1045 HANREI TAIMUZU 216 (Shizuoka Dist. Ct. Hamamatsu Branch, Oct. 12, 1999), translated in Timothy Webster, *Bortz v. Suzuki, Judgment of October 12, 1999, Hamamatsu Branch, Shizuoka Dist. Ct.*, 16 PAC. RIM L. & POL’Y J. 631 (2007) [hereinafter Webster, *Bortz v. Suzuki*]. Such discrimination is likely due to the fact that non-Asians are visibly non-Japanese. By focusing on Caucasians’ discrimination in Japan, I am not minimizing the extent of discrimination faced by non-whites there.

By speaking of a common, shared Western Caucasian experience, I am also not ignoring the effect on individual experience of factors such as specific national origins, socioeconomic class, racial appearance, gender, and education. However, all those with visible Western heritage tend to be perceived and treated similarly by the Japanese, contributing to commonalities in their experiences in Japan. ADAM KOMISAROF, *AT HOME ABROAD: THE CONTEMPORARY WESTERN EXPERIENCE IN JAPAN* 11 (2012) [hereinafter KOMISAROF, *AT HOME ABROAD*]. The Japanese tend to overlook individual heritage, socioeconomic status, and family background when they view foreigners, since they all fall outside Japan’s internal caste system. *Id.* at 18-19.

⁴ Interview by Victor Fic with Arudou Debito, *Overcoming the ‘Japanese Only’ Factor* (Jan. 12, 2012), available at <http://www.atimes.com/atimes/Japan/NA12Dh01.html>.

⁵ KERR, *supra* note 1, at 351; KSHETRY, *supra* note 3, at 288.

did not have any foreign guests admitted they were unwilling to accept foreign guests, and 70% of real estate companies admitted that they were reluctant to accept foreign tenants.⁶ The typical excuse given is that non-natives do not know how to follow local customs,⁷ and are inherently incapable of being taught how to do so—even if they are long-term residents, speak the language fluently, and are married to locals.⁸ Even those who naturalize and forsake their original nationalities and names fare no better: Public establishments refuse access to those who *look* foreign, including naturalized citizens,⁹ and local governments have been known to oppose giving them suffrage.¹⁰ Some judges explicitly support this discriminatory outlook, even regarding second—or later—generation immigrants. For example, the highest court has ruled that public employers are permitted to refuse awarding senior posts to minorities (even those native-born), because they do not have the right to hold positions of authority over “real” natives.¹¹ Such data is disheartening, yet not surprising, given the lack of domestic anti-discrimination law, and the strong we-versus-they mentality.

What might be surprising, however, is that this is Japan. Today. As the only advanced society that has “remained primitive to the present day,” as indicated by its societal governance through shame, fear, absolutism, and communalism,¹² Japan has the lowest percentage of immigrants of all advanced

⁶ Jeffrey Hays, *Discrimination and Racism in Japan*, FACTS AND DETAILS (July 2011), <http://factsanddetails.com/japan/cat18/sub119/item632.html>.

⁷ Arudou Debito, *Resurrecting Gregory Clark's Embarrassingly Xenophobic Japan Times Column on "Global Standards" Nov 1, 1999, Quietly Deleted Without Retraction from JT Online Archives*, DEBITO.ORG (Aug. 4, 2012), <http://www.debito.org/?p=10483>.

⁸ See, e.g., ARUDOU DEBITO, *JAPANESE ONLY: THE OTARU HOT SPRINGS CASE AND RACIAL DISCRIMINATION IN JAPAN* (2004) [hereinafter ARUDOU, JAPANESE ONLY].

⁹ *Arudou v. Earth Cure*, Case No. H 13(U) 206, 1150 HANREI TAIMUZU 185 (Sapporo Dt. Ct., Nov. 11, 2002), translated in Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002 Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. 297 (2008) [hereinafter *Otaru Onsen Case*]. Three Caucasian plaintiffs filed the case (including a naturalized Japanese citizen), under Article 14 and the ICERD, after they were denied admission to an onsen. Defendant onsen argued that it had to turn away all those who did not look Japanese because its Japanese customers had been offended in the past by rowdy Russian sailors. Defendant city argued that ICERD did not impose obligations on local governments, and that it was impossible for the city to control private business decisions. The District Court ordered the onsen liable for damages to the plaintiffs, after finding its actions irrational. Despite noting that local governments have the same duties under the ICERD as the central government, the Court concluded that the city had no legal obligation to pass a local anti-discrimination ordinance.

¹⁰ See, e.g., Arudou Debito, *Tsukuba City's Resolution Against NJ Suffrage Passed in 2010, a Retrospective in the Wake of Alarmism*, DEBITO.ORG (Apr. 24, 2012), <http://www.debito.org/?p=8459>. Japan does not allow dual citizenship. *The Choice of Nationality*, MINISTRY OF JUSTICE, <http://www.moj.go.jp/ENGLISH/information/tcon-01.html> (last visited Aug. 12, 2014). Thus, not allowing suffrage to naturalized citizens would render them politically voiceless.

¹¹ Hays, *supra* note 6.

¹² *Japan: Confucianism in Modern Japanese Society*, MADISON MORRISON, <http://www.madisonmorrison.com/topics/confucianism/japan/confucianism-in-modern-japanese-society.html> (citing PATRICK SMITH, *JAPAN: A REINTERPRETATION* (1997)) (last visited Aug. 8, 2014).

nations—since 1955, between 0.7% and 1.7% of the total population.¹³ The immigration policy in this country of 128 million¹⁴ is premised on allowing highly skilled workers to enter, on temporary basis.¹⁵ Japan is also the only advanced nation not to have anti-discrimination legislation, despite having ratified the International Convention for the Elimination of all Forms of Racial Discrimination (“ICERD”) in 1995, being the 148th country to do so,¹⁶ thirty-one

¹³ In 2011, for example, the foreign-born population of Japan constituted 1.63% of its total population. FOCUS MIGRATION, *Country Profile: Japan*, No. 24, Nov. 2012, at 1, available at <http://www.bpb.de/gesellschaft/migration/laenderprofile/150346/japan?blickinsbuch> [hereinafter FOCUS MIGRATION] (citing Ministry of Justice data). The foreign-born population in Japan has tended to be primarily comprised of migrants from other Asian countries, business people from Western countries, and Indochina refugees. *Id.* at 2. The largest immigrant groups in Japan today are the long-standing Korean and Chinese migrant communities, many of whom entered Japan during its colonial period. *Id.* at 4.

After the 1990 immigration law revisions, the following groups have constituted the majority of foreigners entering Japan: (1) descendants of former Japanese immigrants to Brazil and Peru; (2) technical intern trainees from developing countries, especially China; and (3) care workers from the Philippines and Indonesia. *Id.* at 3. In 2007, 40.4% of registered foreigners were special permanent residents (former Korean and Chinese imperial subjects, and their descendants) or permanent residents; 12.5% were long-term residents; and 11.9% were spouses or children of Japanese nationals. U.N. Office of the High Comm’r for Human Rights [OHCHR], Comm. on the Elimination of Racial Discrimination [CERD], *Third, Fourth, Fifth and Sixth Combined Periodic Reports*, Japan, ¶¶ 16, 21, U.N. DOC. CERD/C/JPN/3-6 (June 16, 2009), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fJPN%2f3-6&Lang=en [hereinafter JAPAN’S 2009 REPORT].

¹⁴ Japan is currently the tenth most-populous country in the world. See *2013 World Population Datasheet*, POPULATION REFERENCE BUREAU, at 2, http://www.prb.org/pdf13/2013-population-datasheet_eng.pdf (last visited on August 26, 2014) (hereinafter *World Population Data Sheet 2013*). However, its population has been declining and is anticipated to continue doing so. *Japan Population to Shrink by One-Third by 2060*, BBC, (Jan. 30, 2012), <http://www.bbc.co.uk/news/world-asia-16787538>. Twenty five percent of its population is over the age of 65, and its birth rate is one of the lowest in the world. *World Population Data Sheet 2013*, at 10. Its population has been declining steadily since 2005, and it is aging at an unprecedented rate. Apichai W. Shipper, *Contesting Foreigners’ Rights in Contemporary Japan*, 36 N.C. J. Int’l L. & Com. Reg. 505, 505 (Spring 2011).

¹⁵ FOCUS MIGRATION, *supra* note 13, at 4; JAPAN’S 2009 REPORT, *supra* note 13, ¶ 17.

¹⁶ Some commentators note that the only reason why Japan, one of the largest financial contributors to the UN, signed the ICERD was to obtain a seat on the UN Security Council. See Int’l Convention on the Elimination of All Forms of Racial Discrimination, Dec. 15, 1996, 660 U.N.T.S. 195, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec.; Arudou Debito, *Britain Now Supports Japan’s Bid for UN Security Council Seat: How Eyeblinkingly Blind of GOJ History Re Unfollowing International Agreements*, DEBITO.ORG (May 13, 2011), <http://www.debito.org/?p=8876> [hereinafter Arudou, *Britain Now Supports Japan’s Bid*]. Some even argue that all instances of Japan’s ratification of international conventions are a superficial attempt to improve its global reputation. Timothy Webster, *International Human Rights Law in Japan: The View at Thirty*, 23 COLUM. J. ASIAN L. 241, 247 (2010) [hereinafter Webster, *View at Thirty*]. Starting in the late 1970s, Japan became a party to most of the major international human rights instruments, including the International Covenants on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on

years after its adoption by the United Nations (“UN”). Not being self-executing,¹⁷ the ICERD imposes obligations on its signatories to adopt domestic measures.¹⁸ The Japanese government maintains that Japan is mono-ethnic, and thus has no need for legislation that addresses rights of ethnic or racial minorities,¹⁹ despite the fact that approximately 20,000 cases of human rights violations are reported annually to its Ministry of Justice.²⁰ Local governments argue that they have no obligation to pass anti-discrimination ordinances because it is too difficult to make such laws effective, especially given that no national legislation exists.²¹ Fundamentally, government officials perceive ICERD’s obligations as merely “political” duties.²² Judges tend to agree.²³

The lack of anti-discrimination law goes hand in hand not only with strict immigration laws, but also with other markers of inequality and otherness. For example, the Ministry of Justice has set up an Internet site and an anonymous hotline available on weekdays, weekends, and most public holidays, for reporting those suspected of being illegal foreigners, that is, those who look foreign and make the locals feel anxious.²⁴ Difficult to obtain and often arbitrary,²⁵ the award of naturalization²⁶ requires adopting a Japanese name,²⁷ denouncing original

the Rights of the Child; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention Relating to the Status of Refugees. See U.N. OHCHR, Comm’n on Human Rights: *Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Exnophobia and Related Intolerance*, Mission to Japan, 62nd Sess., ¶ 9, U.N. Doc. E/CN.4/2006/16/Add.2 (Jan. 24, 2006) (by Doudou Diène) [hereinafter, DIÈNE REPORT].

¹⁷ DIÈNE REPORT, *supra* note 16, ¶ 11.

¹⁸ See *infra* Part II.A.2.a.

¹⁹ James M. Kearney, *Local Public Employment Discrimination Against Korean Permanent Residents in Japan: A U.S. Perspective*, 7 PAC. RIM L. & POL’Y J. 197, 207 (1998).

²⁰ DIÈNE REPORT, *supra* note 16, ¶ 79 (citing 2006 data). In addition, it is unknown how many more incidents of discrimination occur but are unreported.

²¹ DIÈNE REPORT, *supra* note 16, ¶ 64.

²² See, e.g., ARUDOU, JAPANESE ONLY, *supra* note 8, at 56 (describing Otaru City’s arguments in the *Otaru Onsen Case*).

²³ See, e.g., *Otaru Onsen Case*, *supra* note 9, at 319-21.

²⁴ *Reception of Report on Illegal Stay Foreigner at the Office on Closing Days (Notice)*, MINISTRY OF JUSTICE, http://www.immi-moj.go.jp/english/keiziban/happyou/an%20informant_070921.html (last visited July 28, 2014).

²⁵ Kearney, *supra* note 19, at 206 (noting how “opaque,” and “subject to subtle discrimination” the naturalization process is, despite its fairly straightforward official requirements).

²⁶ Japan’s nationality law is based on *jus sanguinis* (“right of blood”), so that a child takes its parents’ nationality. FOCUS MIGRATION, *supra* note 13, at 5. Thus, race (visible phenotype), nationality, and legal status are conflated. See also Arudou Debito, *Anti-Discrimination Templates/Meetings, “US Senator Daniel Inouye Dies, Mazie Hirono Becomes First U.S. Senator Born in Japan; Contrast with Do-Nothing Self-Gaijinizing Tsurunen”*, DEBITO.ORG (Jan. 8, 2013), <http://www.debito.org/?p=10737>.

²⁷ The UN has criticized Japan’s practice of encouraging the adoption of Japanese names at naturalization. U.N. OHCHR, CERD, *Concluding Observations of the Comm. on the Elimination of Racial Discrimination*, Japan, 76th Sess., Feb. 15–Mar. 12, 2010, ¶ 16, U.N. Doc. CERD/C/JPN/CO/3-6 (Apr. 6, 2010). [hereinafter *Committee’s 2010 Report*].

nationality, and demonstrating full assimilation into Japanese society.²⁸ To evaluate one's degree of assimilation, "the government will open up your refrigerator to see what you eat. They'll look at your children's toys to see what they play with. They'll ask your neighbors if they think you are 'really Japanese.'"²⁹

A. Japan's Complicated Relationship with the West and With Whiteness

The concepts of race and otherness are complex in Japan, filled with contradictions and dichotomies. "Race" gets conflated with foreignness and citizenship,³⁰ so that all those who look or act differently than the norm tend to face xenophobia. Discrimination is entrenched and fused into the political, social, and economic hierarchies that distinguish between the pure Japanese "race" and all others, about whom negative generalizations are widely propagated.³¹ As the only consistently privileged race in Japan, the native-born, ethnic Japanese tend to overlook their privilege—which becomes transparent—and ignore the discrimination of all others. This attitude resembles the invisibility of white privilege in the United States, as addressed by critical race theory ("CRT") scholars.³² Unlike the United States, however, in which privilege is directly related to one's degree of similarity to the white norm,³³ in Japan, Asians tend to be even more heavily discriminated against than Caucasians.³⁴ This can be attributed to the global dominance of Western culture, as well as to Japan's history of imperialism,³⁵ and its sense of cultural and economic superiority in Asia.³⁶ From the West, Japan learned that in order to avoid being colonized, it had to be Westernized and whitewashed. To the Japanese, "white" refers to a relative position of power, rather than to actual skin color.³⁷

²⁸ KSHETRY, *supra* note 3, at 279; KERR, *supra* note 1, at 337; U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011, JAPAN 20-21 (2011), <http://www.state.gov/documents/organization/186486.pdf> [hereinafter 2011 COUNTRY REPORT].

²⁹ KOMISAROF, AT HOME ABROAD, *supra* note 3, at 82.

³⁰ Kearney, *supra* note 19, at 205.

³¹ ARUDOU, JAPANESE ONLY, *supra* note 8, at 166-68. This resembles how whites perceive racial minorities in the United States. BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?: AND OTHER CONVERSATIONS ABOUT RACE, 48-49 (1997).

³² See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV 1709 (1993).

³³ *Id.*

³⁴ See *supra* text accompanying note 3.

³⁵ Japan's imperialism in East Asia included victories over China (in Korea, in 1895), and Russia (in Manchuria, in 1905), and was reinforced by governmental measures to instill patriotism and nationalism, with a sense of Japanese superiority and power. ANDREW GORDON, A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIMES TO THE PRESENT 118-21 (2003). It continued with military expansion into China during the 1930s, and into Indochina in 1941. *Id.* at 210-11.

³⁶ *Id.* at ch. 14.

³⁷ For a general discussion about how whiteness connotes power relations, rather than color, see CHARLES W. MILLS, THE RACIAL CONTRACT (1997). Thus, the self-definition employed by the Japanese does not comport with how Caucasians see them, lumping them together with other East

In the process of its selective Westernization,³⁸ Japan developed a complicated relationship with the West and with whiteness: Caucasians became synonymous with power, modernity, and technological advances, considered the ultimate un-assimilable “other,”³⁹ and thus often excused when making cultural faux pas. The Japanese oscillate in how they approach Caucasians, elevating them culturally due to their (stereotypical) physical traits and the influence of Western (especially, American) culture, yet treating them as peripheral or even ostracized at work and in the community. Westerners are expected to fully assimilate in order to naturalize, but even then, they will never become members of the in-group.⁴⁰ As permanent outsiders, they can never be equal.

Shaped in part by its unique history and geographical isolation,⁴¹ Japan’s cultural and legal approach to outsiders also stems from its selective reading of Confucianism, which is “still a living legacy” in Asia.⁴² Whereas anti-discrimination laws in the West derive from the fundamental belief in everyone’s equality,⁴³ and from liberalist notions of individual rights and the autonomous self,⁴⁴ Confucianism⁴⁵ has been interpreted to instill a sense of collectivism,⁴⁶ “inequality, and discrimination” in many Asian countries.⁴⁷ Today, the Confucian tradition exhibits itself in “reflexive obedience, . . . reluctance to question

Asians as non-white. The American view of the Japanese as non-white has its judicial roots in *Ozawa v. United States*, 260 U.S. 178 (1922).

³⁸ For a discussion of how Japan adapted Western scientific and technological advances, yet resisted its cultural influence, see *infra* Part II.B.2.a.

³⁹ See *infra* Part II.B.2.

⁴⁰ “Assimilation” occurs when newcomers melt into the host culture (and sometimes even prompt it to change in response), and “integration” takes place when newcomers retain some of their original national traits, without affecting the local culture. KOMISAROF, *AT HOME ABROAD*, *supra* note 3, at 215-18.

⁴¹ See *infra* Part II.B.2.

⁴² Fred Dallmayr, *Tradition, Modernity, and Confucianism*, 16 *HUM. STUD.* 203, 210 (1993). For an example of a modern Japanese Confucian, see RODNEY L. TAYLOR, *THE CONFUCIAN WAY OF CONTEMPLATION: OKADA TAKEHIKO AND THE TRADITION OF QUIET-SITTING* (1988) [hereinafter TAYLOR, *CONFUCIAN CONTEMPLATION*].

⁴³ See, e.g., JEREMY WALDRON, *GOD, LOCKE AND EQUALITY* (2002).

⁴⁴ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 381-87 (1986).

⁴⁵ The philosophies of Buddhism, Shintoism, and Taoism also have had profound influence on Japanese culture today. IAN READER, *RELIGION IN CONTEMPORARY JAPAN* (2d ed. 1991). It is Confucianism, however, that has had a greater impact on the everyday socio-political structure and daily interpersonal relations than the other schools of thought, all of which incorporate aspects of mysticism and metaphysics, and thus are more divorced from daily concerns. EDWARD CRAIG, 7 *ROUTLEDGE ENCYC. OF PHILOSOPHY* (1998). Unlike the other belief systems influential in Japan, modern Confucianism has been based on rationality, humanism, and ethics. SIU-CHI HUANG, *ESSENTIALS OF NEO-CONFUCIANISM: EIGHT MAJOR PHILOSOPHERS OF THE SONG AND MING PERIODS* (1999). Hence, it is the most significant philosophy in Japan to discuss in terms of discrimination and governmental actions.

⁴⁶ See, e.g., Betty H. Winfield et al., *Confucianism, Collectivism and Constitutions: Press Systems in China and Japan*, 5 *COMM. L. & POL’Y* 323 (2000).

⁴⁷ *Confucian Culture Causes Nuclear Meltdowns Too?*, *THE UNLIKELY EXPAT*, (July 24, 2012), <http://theunlikelyexpat.blogspot.com/2012/07/confucian-culture-causes-nuclear.html>.

authority,” inertia, consensus building, and insularity.⁴⁸ As a result, all those perceived not to be fully “real” Japanese are outsiders, to be disfavored in comparison to members of the in-group, especially given governmental approval of such inequality.

Identities, of course, are always contingent, and based at least in part on differentiation from an outsider, the symbolic “other.” This difference—whether imagined or real—inevitably results in subordination and inequality (whether overt or implicit, institutionalized, intentional or unconscious), further reinforced by our inherent preference for those who are more similar to us.⁴⁹ Thus, in any setting, acknowledgement of inequities and adoption of anti-discrimination measures are necessary to ensure that the inherent dignity of all human beings is respected. Japan is an extreme modern example of this need, given its traditional preoccupation with differences from the in-group, attitudes that continue to actively shape not only cultural biases but also governmental sanction of them. Furthermore, anti-discrimination legislation is not only necessary under the ICERD, but also mandated according to Japan’s own Constitution, pursuant to which Japan claims to eternally banish intolerance, ensure equality, and forbid discrimination.⁵⁰ Incidentally, Confucian notions of fairness and respect for human dignity, overlooked in Japan today, also dictate equality.⁵¹ Even Confucian collectivist prioritizing of the community over individual right to justice,⁵² and its emphasis on harmony support equality: Given Japan’s increasing labor shortage,⁵³ amicably and fully incorporating more immigrants is becoming necessary to maintain its position of economic power and to support its rapidly aging population. Treating immigrants as equals will benefit Japan as a collective.

B. Critical Race Theory’s Limiting Construction of Whiteness and of Racism

Although discrimination in Japan generally,⁵⁴ and inequalities faced by Asian and indigenous minority groups specifically⁵⁵ have been addressed by

⁴⁸ *Id.*

⁴⁹ Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love Or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 438 (1999); Christopher L. Aberson et al., *Ingroup Bias and Self-Esteem: A Meta-Analysis*, 4 PERSONALITY & SOC. PSYCHOL. REV. 157, 157-73 (2000).

⁵⁰ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], preface., art. 14, para. 1.

⁵¹ See *infra* Part III.A.

⁵² Chongko Choi, *Basic Problems of East Asian Feminist Jurisprudence: A Korean Perspective*, 5 J. KOREAN L. 1, 5-6 (2005) (noting how Confucianism dictates that law in Asia be based on harmony, morality, and the greater public good, rather than on individual justice).

⁵³ See *infra* Part III.B.1.

⁵⁴ See, e.g., Allen D. Madison, *The Context of Employment Discrimination in Japan*, 74 U. DET. MERCY L. REV. 187 (1997); Craig Martin, *Glimmers of Hope: The Evolution of Equality Rights Doctrine in Japanese Courts from a Comparative Perspective*, 20 DUKE J. COMP. & INT’L L. 167 (2010).

scholars and commentators, anti-white racism rarely garners attention. The Japanese ignore or deny the problem. The little discussion by Westerners tends to consist of reporting specific incidents of discrimination or particular lawsuits.⁵⁶ From a theoretical perspective, although several scholars have noted the usefulness of applying CRT to the Japanese legal context, those analyses center on the privilege of the dominant native ethnic group in Japan (Yamato, also called *wa-jin*, the “Wa people”), akin to the position of whites in the United States.⁵⁷ Cultural-studies scholars have also discussed the concept of whiteness in Japan.⁵⁸ Despite its complexity, however, the experience of whites—discriminated, yet imbued with high status in the global power hierarchy—tends to be overlooked. The one notable exception that looks specifically at both the subordination and the privilege of whites does so from within a purely cultural context.⁵⁹ Moreover, rarely do scholars note how the Yamato group also oscillates between its experience of dominance, and feelings of inferiority that stem from the white-dominated global power rhetoric.⁶⁰

CRT and its offshoot, the study of whiteness, have tended to focus on white privilege that advantages Caucasians, both overtly, and implicitly through the functioning of society.⁶¹ Both are premised on the assumption that Caucasians are the dominant, privileged, homogeneous group. Nuances in this underlying belief have been pointed out by scholars who note heterogeneity of whites – as marked by factors such as gender,⁶² socio-economic status,⁶³ and immigrant

⁵⁵ Scholarly discussions of racial discrimination tend to center on Japan’s native minorities as well as its long-term residents who used to be Japan’s colonial subjects. See, e.g., Kearney, *supra* note 19; 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 (2001) [hereinafter Levin, *Commodities*].

⁵⁶ See, e.g., ARUDOU, JAPANESE ONLY, *supra* note 8; Webster, *View at Thirty*, *supra* note 16.

⁵⁷ See, e.g., Mark Levin, *The Wajin’s Whiteness: Law and Race Privilege in Japan*, 80 HÖRITSU JIHŌ 80, 80-91 (2008), available at <http://ssrn.com/abstract=1551462> [hereinafter Levin, *Wajin*]; Timothy Webster, *Insular Minorities: International Law’s Challenge to Japan’s Ethnic Homogeneity*, 36 N.C.J. INT’L L. & COM. REG. 557, 559-61 (2011) [hereinafter Webster, *Insular Minorities*].

⁵⁸ See, e.g., Takao Fujikawa, *Whiteness Studies in Japan: Types of Whiteness, Visible and Invisible*, 5 J. HIST. FOR PUB. 1 (2008); Mikiko Ashikari, *Cultivating Japanese Whiteness: The ‘Whitening’ Cosmetics Boom and the Japanese Identity*, 10 J. MATERIAL CULTURE 73 (2005) [hereinafter Ashikari, *Cultivating Whiteness*].

⁵⁹ Fumi Sakata, *A Critique of Critical Race Theory: A Textual Analysis of the ‘Mr. Gaijin’ Mask* (Aug. 2012) (M.A. Thesis, Queen’s University, Canada) (on file with author).

⁶⁰ See, e.g., Levin, *Commodities*, *supra* note 55, at 517-18.

⁶¹ Whiteness scholars have also addressed how Caucasians see themselves and others, and the broad cultural, legal, political, and economic infrastructure that is often invisible, yet frames the functioning of society. See, e.g., RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 1 (1993); *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997).

⁶² See, e.g., *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

⁶³ See, e.g., Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859 (2008).

background⁶⁴—which affect access to all the benefits that whiteness bestows on the typical heterogeneous, Christian, healthy, middle-class, youthful, white male.⁶⁵ What remains unexplored, however, is how whites fare when they are not a locally dominant race.

The privileged,⁶⁶ yet inferior, experience of Caucasians in Japan begins to expose some of the complexities of whiteness. While whiteness functions as a signifier of power and desirable global, modern culture,⁶⁷ it is also an outward marker of cultural difference and inferiority.⁶⁸ Privilege and lack thereof are simultaneously signified by white bodies. This is facilitated by Japanese color categorizations, which do not strictly operate on the white-versus-racialized hierarchy⁶⁹ that shapes CRT and the understanding of racism in the West.⁷⁰ Thus, CRT discourse of racialization and privilege cannot be simply transplanted to Japan.⁷¹ Instead, this Article proposes to expand and create space within existing critical discourse⁷² to make it responsive to particular nuances and subtleties within localized power dynamics. By exposing how “racist” (that is, West-centered) notions of inequality and racism are, the author hopes to further chip away at the monolith of whiteness, opening space for discussion of whites who are not privileged, and of non-whites who are not subordinated.

Despite its current limitations, CRT methods and discourse have much to contribute to the analysis of the experience of Caucasians in Japan. This in turn can expand CRT’s analytical approach and practical implications. Closely

⁶⁴ See, e.g., Dagmar Rita Myslinska, *Contemporary First-Generation European-Americans: The Unbearable ‘Whiteness’ of Being*, 88 TUL. L. REV. 559 (2014) [hereinafter Myslinska, *Unbearable Whiteness*]; Dagmar Rita Myslinska, *Intra-Group Diversity in Education: What If Abigail Fisher Were An Immigrant*, 34 PACE L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2309741>.

⁶⁵ TATUM, *supra* note 31, at 22-23.

⁶⁶ See *infra* Part II. See also participant discussions on the “Debunking White” blog, *Whiteness in Non-White Countries*, LIVEJOURNAL.COM, <http://debunkingwhite.livejournal.com/647003.html?thread=12900443> (noting how whites in Japan are never hassled at the airports; get complimented for their looks; are exposed to positive images of Caucasians; find Western cultural products readily available; and are not questioned when making purchases with credit cards) (last visited Aug. 3, 2014).

⁶⁷ KAREN KELSKY, *WOMEN ON THE VERGE: JAPANESE WOMEN, WESTERN DREAMS* 145 (2001); see also *infra* Part II.B.2.

⁶⁸ See *infra* Part II.B.2.

⁶⁹ Vera Mackie, *The Taxonomic Gaze: Looking at Whiteness From East to West*, 5 AUSTRAL. CRIT. RACE & WHITENESS STUD. ASS’N E-JOURNAL, No. 1, 1 (2009).

⁷⁰ The inadequacy of the white-black binary in the United States has been challenged by LatCrit, ClassCrit, FemCrit, and AsianCrit scholars, among others. See, e.g., Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995).

⁷¹ Mackie, *supra* note 69, at 2.

⁷² For a discussion of how a new discourse must create space within which to function, see Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 553 (1982); see also Robert S. Chang, *Toward Asian American Legal Scholarship: Critical Race Theory, Post-structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1268 (1993).

reading both codified law and judicial opinions, deciphering implicit understanding of key legal concepts, and placing them within the relevant socio-political and cultural context, as done in this Article, can improve our understanding of whiteness, privilege, and otherness. Race and ethnicity matter. “Transnational” CRT studies have tended not to stray far from America,⁷³ and from non-whites.⁷⁴ My goal is to better understand the construct of racism, as circumscribed by the Western-centric notion of (universal) white privilege, and thus denying Caucasians the ability to speak up when they are discriminated against. In the process, I hope to encourage the expansion of CRT discourse to whites, and beyond the boundaries of the United States, prompting praxis through the merging of critical theory and practice among various groups of outsiders.

C. Roadmap

In Part II, this Article examines the problematic position of whites in Japan, as both privileged and discriminated against. It starts by describing domestic and international laws pertaining to anti-discrimination, highlighting Japan’s failure to fulfill its obligations under the ICERD. It then proceeds to examine some cultural aspects that promote both individual and governmental valorization of sameness, and conscious ignorance or approval of discrimination. Japan’s contemporary approach to otherness is then placed within the contexts of Confucianism, and historical relationship with the West. In Part III, the Article attempts to reconcile Japan’s cultural, legal, and economic factors with equality, exposing how Confucianism supports human rights, and recommending multifaceted approaches—driven by governmental consensus rebuilding—to make equality a reality. The Article concludes by drawing attention to some implications of expanded anti-discrimination protections and a broader critical framework, while illustrating how inadequate the current concepts of racism and whiteness are.

Both practical and theoretical implications of this Article are manifold. The number of registered foreigners has been steadily rising in Japan.⁷⁵ Moreover, due to the increasing labor shortage,⁷⁶ addressing immigrants’ needs and fully integrating them into the socio-political sphere will become of even greater importance to Japan’s own economic survival. On a practical level, this

⁷³ See, e.g., Elizabeth M. Iglesias, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997).

⁷⁴ See, e.g., Ediberto Roman, *LatCrit VI, Outsider Jurisprudence and Looking Beyond Imagined Borders*, 54 RUTGERS L. REV. 1155 (2002).

⁷⁵ JAPAN’S 2009 REPORT, *supra* note 13, ¶ 5.

⁷⁶ Antoni Slodkowski, *Japanese Firms Near Crisis Point as Labor Shortage Deepens*, REUTERS (July 10, 2014), <http://www.reuters.com/article/2014/07/10/us-japan-economy-labour-idUSKBN0F21120140710>; Clint Richards, *Japan’s Persistent Labor Shortage*, DIPLOMAT (July 14, 2014), <http://thediplomat.com/2014/07/japans-persistent-labor-shortage/>.

Article aims to benefit victims of discrimination, attorneys, judges, and government officials in Japan. Holding a position of cultural and economic influence in Asia, Japan can also become a catalyst for human rights reform in other parts of the continent. Furthermore, more discussion and action is needed regarding other international treaties that are signed but not followed, even in the presence of domestic laws, in Japan and elsewhere.⁷⁷

Adopting domestic anti-discrimination legislation is the first necessary step in attaining equality in Japan.⁷⁸ Historical examples indicate that discrimination does not disappear on its own, but instead must be legislated away.⁷⁹ In addition, unlike in the West—where change stems from a confluence of personal, cultural, and legal transformation⁸⁰—the Japanese tendency for relative ethics, fear of sticking out, and respect for authority figures implies that transformation in Japan must be prompted by legislative change, accompanied by new consensus building by the government.⁸¹ Any such reforms must be multifaceted—prompted by pressure from within Japan and from the outside, by both the Japanese and the non-Japanese. Legal and cultural transformation in Japan can be eased by relying on several aspects of Confucianism, including the respect for individual dignity (a feature of Confucianism commonly overlooked in Japan), and the goal of community betterment (an aspect of Confucianism which is widely accepted in Japan).⁸² Incidentally, critical legal studies

⁷⁷ For example, despite having adopted the Equal Employment Opportunity Law in 1985, in the aftermath of signing the Convention On the Elimination of All Forms of Discrimination Against Women, Japan has failed to effectively address gender inequality, which is common in its workplaces and prevalent throughout society. M. Christina Luera, *No More Waiting for Revolution: Japan Should Take Positive Action to Implement the Convention On the Elimination of All Forms of Discrimination Against Women*, 13 PAC. RIM L. & POL'Y J. 611, 613 (2004).

⁷⁸ Some scholars see equality as an essential concept of justice, instead of just a part of local notions of rights. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 441-49 (1971). In arguing why Japan should adopt domestic anti-discrimination legislation, the author, however, grounds her argument in Japanese laws, cultural traditions, and socio-economic pressures. The author does not address whether we should all aspire to some “universal” (albeit often Euro-centric) moral standard of human rights. For a general discussion of universalism and moral values in Asia today, see Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia,”* 14 IND. INT'L & COMP. L. REV. 1 (2003).

⁷⁹ See, e.g., U.S. Civil Rights Act, 42 U.S.C. § 2000e (2006); see also *Discrimination Still Alive in Japan*, Free Choice Foundation, <http://www.freechoice.jp/discrimination.asp> (last visited Aug. 3, 2014).

⁸⁰ B.S. Chimni, Professor, Jawaharlal Nehru University, Keynote Address at Osgoode Hall Law Sch., Toronto, Can., Graduate Law Students' Association 2013 Osgoode Forum, *Global Futures: Fragments of a Vision* (May 11, 2013).

⁸¹ See *infra* Part III.B.1. Without being accompanied by efforts to build new cultural consensus, gender equality law has had little impact. See Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143, 145-56 (1999).

⁸² Choi, *supra* note 52, at 5-6. Confucian expectations of law, as based on community harmony and the greater public good, resemble the interest-convergence explanation of why the U.S. Civil Rights Act was adopted to benefit interests of the majority. See, e.g., Derrick A. Bell, Jr., Comment, *Brown*

movement from which CRT stems also relies on a communitarian view of justice, based on public, rather than individual, ends.⁸³ Ultimately, Japan's actualization of the concept of equality will not only benefit Japan, more fully respect its Confucian heritage, and fulfill its international obligations, but will also comport with the meaning of its character for law, *hou*, which connotes "justice."⁸⁴

II. EXPOSING WHITES' PRIVILEGE AND DISCRIMINATION IN JAPAN

I moved to Japan in the late 1980s to work for a bank, during the economic bubble. Although I had always been fascinated by Japanese culture, loved Japanese food, and had a basic knowledge of the language, I was not sure whether I would settle here permanently. But then I slowly got used to all the perks and daily conveniences that Japan offers, like trains running on time, polite customer service, and safe and clean surroundings. After a few years of living here, going back to visit my family became a bit of a struggle. Then I met my Japanese wife, and we started a family. With time, I became fluent in Japanese and learned the cultural nuances at play in everyday life. As I plan to stay here permanently, I became a permanent resident, and I have petitioned to naturalize. Japan is my home.

The "real" Japanese do not see it that way, however. I am reminded of that on a daily basis. When moving here, I expected of course that finding clothing that fits or shampoos for fine hair would be a struggle, but I did not expect that everyday interactions would make me feel like a weird curiosity, fascinating yet reviled. Despite being fluent in Japanese and having a management position at a Japanese bank, I still get asked frequently about when I am going back home, where I am teaching English, whether I can use chopsticks, and whether I eat natto (a fermented soybean product from which even most Japanese abstain). Whenever I travel outside Tokyo, I get stared at, and children point at me, giggle, and yell "gai-jin." Seats adjacent to me often remain empty on packed subway trains. I have been turned away from numerous bars and bathhouses, even when my wife accompanied me. Looking foreign here is tantamount to being an ostracized permanent alien.

But the challenges of daily life go deeper than that. When I first arrived here, I could find very few landlords willing to rent to *gai-jin*, and they all required Japanese guarantors, and steep fees that are not charged of the locals. Despite having been here for more than two decades and having a Japanese

v. *Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Specifically, the majority sought to neutralize racial political pressure in the face of the Cold War. See, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

⁸³ This can be contrasted with the liberalist theories of justice postulated by scholars like Rawls and Dworkin. Choi, *supra* note 52, at 3-4.

⁸⁴ FREE KANJI TRANSLATION, <http://www.jp41.com/kanji/justice.html> (last visited Aug. 3, 2014).

family, I still find it difficult to find housing. Landlords won't rent to us because they assume that I will never be able to follow local customs. The few properties available to us are listed in separate books—typically labeled “pets and foreigners.” We thought of buying a home, but few owners were willing to sell to my wife once they discovered that she is married to a gai-jin. Also, getting a mortgage for us is virtually impossible. I struggled for years just to find a bank willing to open up a savings account for me.

Despite all the Western celebrities glorified by the media here, portrayals of everyday gai-jin are not as glowing. Advertisements often feature Westerners as boorish rude clowns, in awe of Japanese technology and beauty, and confounded by its sophisticated culture. We are also frequently represented in governmental announcements and police safety campaigns as dangerous criminals. Until 1993, even those of us who had permanent resident status were required to be fingerprinted, and to carry “foreigner card” on us, to present to the police upon random inspections or potentially face arrest.⁸⁵ We are not included in government registries or population counts,⁸⁶ even if we pay taxes. Naturalization is too difficult for most of us to consider seriously. In turn, the fact that so few of us obtain citizenship here only reinforces the locals' impression of us as sojourners.⁸⁷ The locals would prefer it that way. After all, the “Secret Files of Foreigners' Crimes”⁸⁸ magazine sold in convenience stores until a few years ago showed just how afraid they are of us. At election times, right-wing political candidates drive around in vans, proclaiming via loudspeakers that Japan is for

⁸⁵ Pursuant to the Alien Registration Law of 1947, all non-Japanese were required to be fingerprinted every three years (this provision was in effect between 1955 & 1993), and to carry their alien-registration cards at all times, to produce whenever requested by the police. MICHAEL WEINER & DAVID CHAPMAN, *Zainichi Koreans in history and memory*, in JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY 162, 176-77 (Michael Weiner ed., 2d ed. 2009); SONIA RYANG, *Introduction: Resident Koreans in Japan*, in KOREANS IN JAPAN: CRITICAL VOICES FROM THE MARGIN 1, 4 (Sonia Ryang ed., 2000).

⁸⁶ *Koseki*, the official household registry system, which serves as certificate of citizenship, marriage, birth and death information, does not list non-citizens; until 2012, *jūminhyō* registry of residency refused to list non-citizens as “spouses” or even “family members,” even if they paid residency taxes. Arudou Debito, *Rough Draft Text of My Speech to UN Rep Bustamante Mar 23 in Tokyo*, DEBITO.ORG (March 19, 2010), <http://www.debito.org/?p=6233>. Some local governments (such as Tokyo Nerima Ward) have been known not to even count non-native Japanese in their population tallies. *Id.*

⁸⁷ See also ARUDOU, JAPANESE ONLY, *supra* note 8, at 11, 398 (noting how the post-war image of foreigners in Japan has been that of Caucasian, temporary English teachers).

⁸⁸ The Japanese-language publication *Kyōgaku no gaijin hanzai ura fairu - gaijin hanzai hakusho 2007* (“Shocking Secret Foreigner Crime File – Foreigner Crime White Paper 2007”) was a cross between a book and a magazine, sold online and in Japan's third-largest convenience store chain (Family Mart). Richard Lloyd Parry, *Tiny Reasons for a Furious Storm*, THE TIMES (U.K.), Feb. 6, 2007, at 16. It contained photographs, caricatured images, and descriptions of crimes allegedly committed in Japan by non-Japanese. *Id.* After protests from several prominent Westerners in Japan, Family Mart discontinued selling it. Stuart Biggs & Kanoko Matsuyama, *Japan Store Withdraws 'Foreigner Crime File' Magazine (Update 2)*, BLOOMBERG NEWS, Feb. 7, 2007.

the Japanese only. Even government officials speak of us poorly, recommending that we be rounded up in case of a natural disaster.⁸⁹

What is ultimately the most challenging, however, about living here is the difficulty of making real friends with the Japanese. Most of the younger ones assume that all gai-jin are either English-speaking tourists or temporary English teachers, and so they are eager to practice on us their English language skills. They act shocked whenever I speak back to them in Japanese.

But being a gai-jin also has its perks. We bond easily with other expats - aside from a few idealists who think that they can instead integrate into the local Japanese community. We can easily get into trendy entertainment spots, in order to act as magnets for hip customers. Once inside, it is not uncommon for the locals—especially once they’ve had a few drinks—to offer to buy us drinks, talk to us, and on occasion, try to touch our hair. Also, since we are expected to never fit in, we can play the “*gaijin* card” to get out of trouble when lacking cultural tact. And we do not have to abide by the Japanese saying that “The nail that stands out will be struck down” because we always stand out. Our marginal position gives us a sense of freedom that the locals do not have.

Many of us are considered cool and attractive here, even if we wouldn’t be in the West. Our look seems to be prized here, especially if we have Nordic features. Auto-photo machines often exaggerate Caucasian features, whitening skin color, and enlarging eyes. The features of many manga (comic-book) Japanese characters appear Caucasian. Store mannequins are always white, as are models in many advertisements for beauty, leisure, or luxury products. Our elevated position balances out our peripheral status, although both make us feel like outsiders, all the time. A lot of my gai-jin friends left Japan after getting tired of being treated like permanent strangers and walking stereotypes. Those of us who stay become resigned to this status since it seems to be a deeply ingrained part of the Japanese culture, and speaking up would make us look even more un-Japanese.⁹⁰

⁸⁹ Arudou Debito, *Post #1500!: Japan Times JUST BE CAUSE Column Dec 1 2009 on Making Japan More Attractive to Immigrants*, DEBITO.ORG (Dec. 1, 2009), <http://www.debito.org/?p=5295> (noting how the governor of Tokyo publicly announced that foreigners should be rounded up in case of an earthquake, due to their criminal propensities).

⁹⁰ This narrative is based on personal experiences, Internet postings, information disseminated by human rights activists in Japan, and the author’s interviews with numerous *gaijin* conducted in the summer of 2012. Experience-based narrative (personal, others’, and even fictional) often contributes significantly to CRT analysis. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Mari J. MATSUDA, *Public Response to Racist Speech: Considering the Victims Story*, 87 MICH. L. REV. 2320 (1989). For additional narrative accounts based on other Westerners’ experiences in Japan, see AMÉLIE NOTHOMB, *FEAR AND TREMBLING* (Adriana Hunter trans., 2001) (1999), and SARA BACKER, *AMERICAN FUJI* (2001).

A. Applicable Domestic and International Laws Mandate Racial Equality, But Are Ineffectual

Japanese judges have applied the constitutional equality provision inconsistently and only to forbid discrimination that is unreasonable. The ICERD imposes clear anti-discrimination obligations on Japan, but it is routinely ignored. The Japanese government, in fact, perceives not having a need for domestic legislation since it denies both the existence of minority groups in Japan and any incidents of racism.⁹¹ Therefore, despite constitutional guarantees and ratification of the ICERD, discrimination in Japan tends to be lawful.

1. Japan's Constitution Ineffectively Guarantees Equality, and Anti-Discrimination Laws are Lacking

Although a few domestic laws—such as the National Public Service Act, the Labor Standards Law, and the Employment Security Act—guarantee freedom from racial discrimination in closely circumscribed contexts,⁹² they all tend to be “narrow, limited, and of debatable effectiveness.”⁹³ The preeminent source of anti-discrimination protections in Japan stems from Article 14⁹⁴ of the

⁹¹ DIÈNE REPORT, *supra* note 16, ¶ 79; U.N. OHCHR, CERD, *Seventh, Eighth, and Ninth Combined Periodic Reports*, Japan, ¶ 67, U.N. DOC. CERD/C/JPN/7-9 (July 10, 2013) [hereinafter JAPAN'S 2013 REPORT].

⁹² Pursuant to the National Public Service Act, art. 27, “all citizens shall be accorded equal treatment and shall not be discriminated against by reason of race, . . . social status, [or] family origin . . .” Act No. 120 of 1947, *available at* http://ssl.jinji.go.jp/en/recomme/rl_npsa.pdf. Under the Employment Security Act, art. 3, “No one shall be discriminated against in employment placement, vocational guidance, or the like, by reason of race, nationality, . . . [or] family origin . . .” Act No. 141 of 1947, *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_117326.pdf. “[P]ublic Employment Security Offices shall not discriminate” based on race, nationality, or family origin in offering guidance, job placement, interviewing, or giving offers. Ordinance for Enforcement of the Employment Security Act, Ordinance of the Ministry of Labour No. 12 of Dec. 29, 1947 at art. 3, para. 1, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CCwQFjAC&url=http%3A%2F%2Fwww.japaneselawtranslation.go.jp%2Fflaw%2Fdetail_download%2F%3Fff%3D09%26id%3D168&ei=t8LfU7v4BIOnyAS_goC4DA&usg=AFQjCNHDVEVfV0P0v_ysnhuw79gbFuutSA&bvm=bv.72197243,d.aWw. Furthermore, under the Labor Standards Law, employers may not discriminate in terms of “wages, working hours, or other working conditions” on the basis of nationality or social status. Labor Standards Act (Act No. 49 of 1947) at art. 3, *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_117328.pdf.

⁹³ Martin, *supra* note 54, at 176.

⁹⁴ In addition to Article 14, Article 13 emphasizes the importance of individual rights. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13 (“All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”). In practice, however, the effectiveness of this article has been limited in supporting equality. *See, e.g.*, Martin, *supra* note 54, at 175 (noting that “it has been [merely] argued that Article 13 . . . also provides some assistance to understanding the importance of the individual . . .”).

Constitution (“Article 14”), pursuant to which “[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”⁹⁵ Despite its explicit mandate of equality, Article 14 historically has been narrowly constructed. During the drafting of the Constitution, the Japanese delegation limited its scope to Japanese citizens only.⁹⁶ Furthermore, an early Supreme Court⁹⁷ decision interpreted Article 14 as merely a reflection of “the great principle that all of the people are equal in the value of their character . . . ,”⁹⁸ which still allows for differentiating among people “as requested by morality, justice or suitability for purposes . . . after taking into consideration various circumstances such as . . . natural makings” of people.⁹⁹ Although Article 14’s equality clause has been interpreted more broadly in recent decades, without civil rights legislation, only a few judges and some local governments have stepped in to create an ad hoc, inadequate equality regime that exists today.

a. Constitutional Guarantees Have Been Meekly Enforced

According to the Preface of its Constitution, Japan seeks to “occupy an honored place in an international society striving for . . . the banishment of . . . oppression and intolerance for all time from the earth.”¹⁰⁰ Constitutional rights are “eternal and inviolate.”¹⁰¹ Article 14’s explicit prohibition of racial discrimination has been limited, however, in its practical application. Constitutional protections have not been uniformly applied to non-citizens, the burden of proving unlawful discrimination is extremely high, and judges tend to differentiate outsiders from “real” Japanese due to alleged innate differences between races. A more fundamental obstacle exists due to the fact that Japanese judges shy away from finding governmental actions unlawful,¹⁰² and have a history of ruling unfavorably in human rights cases.¹⁰³

⁹⁵ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], at art. 14, para. 1.

⁹⁶ See Webster, *Excisions*, *infra* note 105; see also *infra* text accompanying note 105.

⁹⁷ The Supreme Court is the highest court in Japan. SUPREME COURT OF JAPAN, *Overview of the Judicial System in Japan*, http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html#%2001. Trial-level courts include fifty District Courts; eight High Courts serve as intermediate courts of appeals. *Id.*

⁹⁸ *Judgment Upon Case of Bodily Injury Resulting in Death to Lineal Ascendant Under Article 205-2 of the Penal Code*, Case No. 1950(A) 292 (Sup. Ct., Oct. 11, 1950), translation available at <http://webcache.googleusercontent.com/search?q=cache:LfALDKELccJ:www.courts.go.jp/english/judgments/text/1950.10.11-1950-A-No.292.html+&cd=3&hl=en&ct=clnk&gl=us&client=safari> (last visited Aug. 4, 2014).

⁹⁹ *Id.*

¹⁰⁰ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], preface.

¹⁰¹ *Id.* at art. 11.

¹⁰² On appeal in the *Otaru Onsen Case*, the Sapporo High Court even stated that courts cannot hold legislature liable for omissions, such as not passing a law. *Arudou v. Earth Cure*, Heisei 14-nen (ne) Dai 498-Gou, Heisei 15-nen (ne) Dai-352-Gou Dai Futai Kauso Jiken (Sapporo High Ct., Sept.

i. Constitutional Protections Have Been Extended by Some Lower Courts to Non-Citizens Despite the Drafters' Contrary Intention

As written in Japanese, the Constitution protects Japanese citizens only: Although the word *ko-ku-min* can be loosely translated as bestowing rights to “the people,” it connotes Japanese nationals only.¹⁰⁴ Notably, the Japanese officials involved in drafting and translating the U.S.-proposed Constitution not only limited its scope through this linguistic choice, but also insisted that any provisions giving protections to non-citizens be taken out from U.S. drafts that extended constitutional rights to *all* people in Japan (including foreigners, and aliens).¹⁰⁵

Despite these legislative shortcomings, Article 14 has been applied by some lower courts in recent decades to non-citizens. The *Arudou v. Earth Cure* (the “*Otaru Onsen Case*”) court, for example, held that foreigners residing in Japan are protected by constitutional rights, which are inalienable, fundamental, and a general social norm in Japan.¹⁰⁶ Even more broadly, the court in *Bortz v. Suzuki* noted how democracy depends on a fundamental human right to equality,¹⁰⁷ and proceeded to create a path for claims by individuals against private acts of racism by citing to the ICERD in support of its holding.¹⁰⁸ All of the plaintiffs in both *Bortz* and in the *Otaru Onsen Case* had either permanent-resident status or Japanese citizenship. It is not clear whether courts would be

16, 2004), translated in ARUDOU, JAPANESE ONLY, *supra* note 8, at App. Two (The court also rejected the onsen’s appeal, thus affirming plaintiffs’ win against the onsen.) Japan has been criticized for not having an independent judiciary. See, e.g., KERR, *supra* note 1, at 56-57 (noting how the Secretariat of the Supreme Court pressures judges not to rule against government defendants, as indicated by the fact that plaintiffs lose in approximately 95% of such cases).

¹⁰³ See ARUDOU, JAPANESE ONLY, *supra* note 8, at 278-79, 314. The Japanese judicial system also lacks judicial activism, does not respect judicial precedent, and does not use juries. *Id.*

¹⁰⁴ The typical English translation of this clause is “all of the people;” however, the Japanese word *kokumin* is more accurately translated as “Japanese people” or “nationals (of Japan).” See Webster, *Excisions*, *infra* note 105 at 437.

¹⁰⁵ Timothy Webster, Note, *Legal Excisions: “Omissions are Not Accidents.”*, 39 CORNELL INT’L L.J. 435, 444 (2006) [hereinafter Webster, *Excisions*].

¹⁰⁶ *Otaru Onsen Case*, *supra* note 9, at 302; see also ARUDOU, JAPANESE ONLY, *supra* note 8, at App. One. “Onsen” refers to a traditional Japanese bathhouse.

¹⁰⁷ Webster, *Bortz v. Suzuki*, *supra* note 3. Ana Bortz, a Brazilian journalist married to a *nikkei-jin* (Brazilian of Japanese origin), and a lawful resident of Hamamatsu City (with a population of more than 10,000 Brazilians) was gestured out of a jewelry store by its proprietor, after he pointed to a police warning of frequent robberies by foreigners. Defendant argued that his constitutional freedom of occupation allowed him to eject anyone, especially given a recent crime wave by foreigners. The Court awarded Bortz damages after finding that she had suffered discrimination under ICERD standards. (Because the judgment was based on international law only, it could not be appealed under Japanese law.) *Id.* at 659-64; Howard W. French, ‘Japanese Only’ Policy Takes Body Blow in Court, N.Y. TIMES, Nov. 15, 1999, available at <http://www.nytimes.com/1999/11/15/world/japanese-only-policy-takes-body-blow-in-court.html>.

¹⁰⁸ Keiko Yamanaka, *Ana Bortz’s Law Suit and Minority Rights in Japan*, (Japan Policy Research Instit., Working Paper No. 88, 2002), available at <http://www.jpri.org/publications/workingpapers/wp88.html>.

willing to extend constitutional rights to those with a weaker claim to residency in Japan.

ii. Reasonable Discrimination Is Permissible

Although, unlike in early jurisprudence,¹⁰⁹ today the equality provision of Article 14 has been held to be self-executing and thus prohibits discriminatory treatment; racist acts are allowed as long as they have a “reasonable basis that is in line with the nature of the matters concerned.”¹¹⁰ In practice, this is akin to rational-basis review in the United States.¹¹¹ Japanese courts do *not* employ a heightened level of scrutiny that U.S. courts apply when evaluating actions that differentiate members of “suspect” groups, such as racial or national-origin minorities.¹¹² Thus, although even non-citizens might be entitled to equality, this constitutional right is limited in scope.

In effect, only irrational discrimination might be found prohibited.¹¹³ That is, defendants must merely “articulate a good-faith rationale for their discriminatory policy or conduct”¹¹⁴ Laws can be found to violate Article 14 only “where a reasonable basis cannot be found in the legislative purpose of making such a distinction . . . or where a reasonable relevance cannot be found between the distinction in question and the aforementioned legislative purpose”¹¹⁵ Japanese courts frequently find differentiation between the Japanese and *gaijin* reasonable because “aliens¹¹⁶ . . . have social and factual difference[s] from . . . citizens,” which provides reasonable grounds for difference in their

¹⁰⁹ DIÈNE REPORT, *supra* note 16, at 5-7.

¹¹⁰ *See, e.g., Case to Seek Revocation of the Disposition of Issuance of a Written Deportation Order*, Saikō Saibansho [Sup. Ct.] June 4, 2008, 2006 (Gyo-Tsu) no. 135, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 6 (citing to a long line of Supreme Court cases from the 1960s and 1970s noting the same), *translation available at* http://www.courts.go.jp/app/hanrei_en/detail?id=955.

¹¹¹ Webster, *View at Thirty*, *supra* note 16, at 264-65.

¹¹² *See generally* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011) (discussing the levels of scrutiny applied by U.S. courts).

¹¹³ *Otaru Onsen Case*, *supra* note 9, at 302-03; *see also* ARUDOU, JAPANESE ONLY, *supra* note 8, at App. One.

¹¹⁴ *Otaru Onsen Case*, *supra* note 9, at 298.

¹¹⁵ *Case to Seek Revocation of the Disposition of Issuance of a Written Deportation Order*, Saikō Saibansho [Sup. Ct.] June 4, 2008, 2006 (Gyo-Tsu) no. 135, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 6 (citing to a long line of Supreme Court cases from the 1960s and 1970s noting the same), *translation available at* http://www.courts.go.jp/app/hanrei_en/detail?id=955.

¹¹⁶ Due to the frequent overlap between nationality, foreignness, and race in Japan, *gaijin* have typically asserted *racial* discrimination when objecting to policies that target those who are foreign-looking or those who lack Japanese nationality or permanent residency. *See, e.g., Otaru Onsen Case*, *supra* note 9; *see also* ARUDOU, JAPANESE ONLY, *supra* note 8, at App. One. *Gaijin* (a frequently used abbreviation of the word *gai-koku-jin*, meaning “outside-country people”) is a common term for foreigners, particularly white Westerners. JAPANESE MIND, *infra* note 195, at 261.

treatment.¹¹⁷ For example, a bank's policy of refusing loans to those who are not Japanese citizens or permanent residents was found lawful, given the reasonable concern that such individuals are more likely to leave Japan without repaying their loans.¹¹⁸ On the other hand, excluding *all* foreign-looking individuals in order to decrease Japanese customers' social unease caused by prior experiences with a specific subgroup might not be reasonable.¹¹⁹ Distinguishing between "true" Japanese and naturalized Japanese citizens also appears reasonable.¹²⁰

b. Japan Lacks Local Anti-Discrimination Measures

Given the lack of domestic equality legislation and the widespread tolerance of discrimination, there has been little support for anti-discrimination policies at local levels. The only notable exception was the short-lived anti-discrimination ordinance in Tottori Prefecture,¹²¹ which incidentally happens to be the least populous and one of the least economically developed prefectures.¹²² Approved by a margin of 35-3, after almost a year of deliberations, the ordinance financially penalized various types of discriminatory behaviors, and created an investigative panel with the power to conduct hearings, and to recommend case prosecution and fine imposition.¹²³

After taking effect in 2006 as a trial measure (to expire in 2010), it elicited immediate attack, both locally and beyond, by laymen and legal professionals alike, for allegedly inhibiting freedom of speech, and impermissibly vesting judicial and policing powers in an administrative agency.¹²⁴ Internet petitions were created to suspend the ordinance.¹²⁵ A major newspaper in the neighboring Hiroshima Prefecture claimed that the ordinance

¹¹⁷ *Case to be Brought for Violation of the Alien Registration Act*, Saikō Saibansho [Sup. Ct.], Nov. 17, 1997, 1994 (A) 687, 51 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 855, translation available at http://www.courts.go.jp/app/hanrei_en/detail?id=333.

¹¹⁸ Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Nov. 12, 2001, Herman v. Asahi Bank, 1789 HANREI JIHŌ 96 (finding defendant bank not liable—under both the Constitution, and the ICERD—for having a policy to refuse mortgage applications from those lacking permanent resident status, even if they had strong ties to Japan and had resided there for many years); see also Maki Nibayashi, *Up Against the Law*, METROPOLIS, <http://archive.metropolis.co.jp/tokyointerview/311/tokyointerviewinc.htm>.

¹¹⁹ *Otaru Onsen Case*, *supra* note 9, at 302-03 (rejecting the onsen's argument that rowdy behavior by Russian sailors was making its Japanese patrons uncomfortable at the sight of *any* foreign-looking guests, thus justifying the exclusion of *all* foreign-looking customers).

¹²⁰ See Kearney, *supra* note 19, at 206 n.57.

¹²¹ See Arudou Debito, *Archiving Tottori's 2005 Jinken Ordinance (The First and Only One Ever Passed, then Unpassed, Penalizing Racial Discrimination in Japan) to Keep it in the Historical Record*, DEBITO.ORG (Nov. 17, 2012), <http://www.debito.org/?p=10762> [hereinafter, Arudou, *Archiving Tottori*].

¹²² See LOUIS-FRÉDÉRIC NUSSBAUM, JAPAN ENCYC. 990 (KÄTHE ROTH trans., 2002).

¹²³ Arudou, *Archiving Tottori*, *supra* note 121.

¹²⁴ *Id.*

¹²⁵ *Id.*

would ironically shackle human rights.¹²⁶ The Japan Federation of Bar Associations also noted that the ordinance vested excessive and arbitrary power to the governor, and infringed freedom of speech.¹²⁷ The original supporters of the ordinance succumbed to this public pressure.¹²⁸ As a result, after less than six months, the prefectural assembly voted unanimously to suspend it indefinitely.¹²⁹ In hindsight, a representative of the Tottori Governor's office noted that the public, unaware of existing human rights violations, did not seem to understand what the ordinance was designed to prevent.¹³⁰ Notably, the measure has been removed from Tottori Prefecture's legislative record.¹³¹

2. Japan Has Ignored Its ICERD Obligations to Ensure Equality and Freedom from Discrimination

Under Article 98(2) of its Constitution, Japan must follow international treaties that it ratifies, giving them the effect of domestic law.¹³² In fact, in the hierarchy of laws in Japan, treaties are ranked above domestic statutes and other domestic laws, and only below the Constitution.¹³³ Thus, in addition to any obligations that they impose directly, treaties require an appropriate adoption and/or revision of domestic laws to bring them into conformity therewith.¹³⁴ Despite ratifying the ICERD in 1996, Japan has ignored its obligations thereunder, maintaining that it is mono-ethnic and thus does not experience any racial discrimination.

a. Japan is Obligated to Condemn Discrimination and Adopt All Necessary Measures to Combat It

ICERD's requirements are broad and far-reaching. Its signatories vow to affirmatively "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races"¹³⁵ More

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *Tottori Approves Bill Nixing Disputed Human Rights Ordinance*+, JAPAN ECON. NEWSWIRE PLUS, Mar. 24, 2006.

¹³⁰ Arudou, *Archiving Tottori*, *supra* note 121.

¹³¹ *Id.*

¹³² NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 98, para. 2. See also Webster, *View at Thirty*, *supra* note 16, at 244; Webster, *Bortz v. Suzuki*, *supra* note 3 at 650.

¹³³ Webster, *View at Thirty*, *supra* note 16, at 245.

¹³⁴ See, e.g., Webster, *Bortz v. Suzuki*, *supra* note 3 at 650.

¹³⁵ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S., at art. 2, para. 1 [hereinafter ICERD], available at <http://www.refworld.org/docid/3ae6b3940.html>. "Racial discrimination" is defined under the ICERD as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the

specifically, parties pledge not only to “ensure that all public authorities and public institutions, national and local, shall act in conformity . . .”¹³⁶ with the ICERD, but also to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization,”¹³⁷ whether such discrimination is perpetrated “against persons, groups of persons or institutions . . .”¹³⁸ Furthermore, public officials and institutions are prohibited from promoting racial discrimination.¹³⁹ In light of Japan’s occasional stance to the contrary, the United Nations (U.N.) has emphasized that foreigners must be afforded the same protections under the ICERD as citizens.¹⁴⁰ Equality before the law is to be guaranteed in a wide range of activities, including the “right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.”¹⁴¹ Thus, Japan is obligated to adopt domestic measures to ensure that all individuals and groups are free from racial discrimination perpetrated by private individuals, groups, or public institutions.

In addition, signatories are required to ensure access to effective and adequate protections from and remedies (including reparations) for any acts of racial discrimination, through “competent national tribunals and other State institutions . . .”¹⁴² In order to facilitate U.N. monitoring of compliance, signatory states are required to make reports every two years to the Committee on the Elimination of Racial Discrimination (“U.N. Committee”), which is composed of independent human rights experts.¹⁴³

b. The Legislative and Executive Branches Have Abdicated Their Responsibilities

Despite ICERD’s clear and explicit mandates, the national Diet¹⁴⁴ has failed to introduce a single anti-discrimination or civil rights legislation, and the

purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field or public life.” *Id.* at art.1, para. 1.

¹³⁶ *Id.* at art. 2, para. 1(a).

¹³⁷ *Id.* at art. 2, para. 1(d).

¹³⁸ *Id.* at art. 2, para. 1(a).

¹³⁹ *Id.* at art. 4, para. (c).

¹⁴⁰ U.N. OHCHR, CERD, *Gen. Rec. No.30 (Gen. Comments): Discrimination Against Non Citizens*, U.N. DOC. A/59/18 (Oct. 1, 2004), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f59%2f18&Lang=en.

¹⁴¹ ICERD, *supra* note 135, at art. 5, para. (f).

¹⁴² *Id.* at art. 6.

¹⁴³ *Id.* at art. 8-9. All States parties are required to file a report with the Committee one year after acceding to the ICERD, and then every two years. *Id.* at art. 9.

¹⁴⁴ The Diet, composed of the House of Representatives and the House of Councillors, is the legislative branch of the Japanese government. THE NATIONAL DIET OF JAPAN, *Relationship to Other Bodies*, HOUSE OF COUNCILLORS, THE NATIONAL DIET OF JAPAN, <http://www.sangiin.go.jp/eng/guide/relation/> (last visited Aug. 6, 2014).

Executive Branch has similarly shown complete abdication of its responsibilities.¹⁴⁵ The Diet has only gone so far as to debate a human rights bill.¹⁴⁶ The bill provided for the establishment of an independent Human Rights Committee to investigate potential human rights infringements and for the creation of a remedial system.¹⁴⁷ The proposal, however, was widely criticized by members of the legislature, the media, lawyers, and human rights activists.¹⁴⁸ The conservative Liberal Democratic Party (“LDP”)—Japan’s largest and strongest political party since its formation in the 1950s¹⁴⁹—refused to endorse the bill due to its fear that foreign-born residents would be allowed to serve as human rights commissioners.¹⁵⁰ It was repealed in 2003 due to dissolution of the Parliament.¹⁵¹ A proposal to create a Human Rights Commission was also made in 2012, but the dissolution of the House of Representatives resulted in it being scrapped.¹⁵²

Thus, Japan has no domestic anti-discrimination or human rights law. It does not even have a mechanism for investigating complaints of discrimination experienced when appearing before the judicial system.¹⁵³ Even more troubling is the fact that the government “does not believe that in present-day Japan racist thoughts are disseminated and racial discrimination are fanned to the extent that would warrant consideration of enactment of laws to administer punishment”¹⁵⁴ The Ministry of Foreign Affairs has been consistent in stating that the Diet is

¹⁴⁵ Webster, *View at Thirty*, *supra* note 16, at 260.

¹⁴⁶ DIÈNE REPORT, *supra* note 16 ¶¶ 34, 78.

¹⁴⁷ Human Rights Bureau, MINISTRY OF JUSTICE, <http://www.moj.go.jp/ENGLISH/HB/hb.html>.

¹⁴⁸ *Japanese National Human Rights Commission ASIA-PACIFIC HUMAN RIGHTS INFO. CENTER* (June 2002), <http://www.hurights.or.jp/archives/focus/section2/2002/06/japanese-national-human-rights-commission.html>.

¹⁴⁹ The conservative and nationalistic Liberal-Democratic Party had propelled Japan to its recovery from WWII and development into an economic superpower. 7 ENCYC. BRITANNICA 328 (15th ED. 2010), *Liberal-Democratic Party of Japan (LDP)*. LDP places value on preserving traditional Japanese culture. *See id.* As part of its emphasis on economic progress and national defense, it advocates close cooperation with the United States. *Id.* It has retained control of the Japanese government for most of the last two decades. *See id.*

¹⁵⁰ *LDP Forgoes Immediate Diet Submission of Human Rights Bill*, KYODO NEWS INT’L, INC., May 16, 2005, available at 2005 WLNR 25862895.

¹⁵¹ JAPAN’S 2009 REPORT, *supra* note 13, ¶ 34; DIÈNE REPORT, *supra* note 16, ¶ 34.

¹⁵² JAPAN’S 2013 REPORT, *supra* note 91, ¶ 67, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhskWEDuvHC0IMabuZ0OD1HY0eBpCcaAmmnWxGDQdbe2RcHZHbd7ir4%2fOopdpAxhkw7hMqQtl%2bKdQesv4xMiMpyd2UMgflxU3OzELVljbMt8C6>.

¹⁵³ JAPAN’S 2009 REPORT, *supra* note 13, ¶ 45 (the Japanese government does, however, promise that “necessary investigation will be conducted” by court officials when such a complaint is to be made).

¹⁵⁴ JAPAN’S 2009 REPORT, *supra* note 13, ¶ 38; *see also* U.N. OHCHR, CERD, *Initial and Second Periodic Reports*, Japan, U.N. DOC. CERD/C/350/Add.2 (Sept. 26, 2000) [hereinafter JAPAN’S 2000 REPORT], and JAPAN’S 2013 REPORT, *supra* note 91.

not required to pass anti-discrimination legislation because, to the extent racist incidents might occur, the judicial system is capable of addressing them.¹⁵⁵

c. The Few ad hoc Judicial Decisions That Address Equality Have Failed to Impose Sufficient Legal Obligations under the ICERD

Since the national Diet has abdicated its proper role as a “codifier of international law,”¹⁵⁶ and the executive branch has also stayed clear of such matters, courts have applied ICERD ad hoc, struggling to fashion discrimination remedies, and failing to fully acknowledge the extent of Japan’s obligations thereunder. Judges who have elected to draw on it as a source of law have had to bolster their analysis by citing Article 14, and have had to fashion actual remedies via domestic tort law (which determines which acts are unlawful and thus compensable).¹⁵⁷

Judicial decisions—even those finding for plaintiffs—have not acknowledged the full scope of ICERD protections. Although in *Bortz*, the district court accurately noted that the ICERD applies to both private relations and acts by public bodies,¹⁵⁸ in the more recent *Otaru Onsen Case*, another district court stated that it does not apply to private relations.¹⁵⁹ To its credit, the *Bortz* court also noted that ICERD rights apply to non-citizens.¹⁶⁰ This view, however, was not supported by the more recent *Herman v. Asahi Bank* decision, which stated that the ICERD does not apply to distinctions or preferences between citizens and non-citizens.¹⁶¹ The disparity in those decisions might derive from greater judicial willingness to protect plaintiffs who are permanent residents, like *Bortz*, rather than plaintiffs with no permanent status, like *Herman*. Moreover, the finding of unreasonable discrimination in *Bortz* might have prompted the court to also view ICERD’s rights more expansively.

In addition to these shortcomings, a problematic aspect of judicial legislating of the ICERD has been treating it as merely an indirect, “interpretive standard,” to be employed at courts’ discretion to merely facilitate the application

¹⁵⁵ See *Comments of the Japanese Government on the Concluding Observations Adopted by the Committee on the Elimination of Racial Discrimination on March 20, 2000 Regarding Initial and Second Report of the Japanese Government*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, ¶ 5(1), available at <http://www.mofa.go.jp/policy/human/comment0110.html> (last visited Aug. 7, 2014); see also JAPAN’S 2009 REPORT, *supra* note 13, and JAPAN’S 2013 REPORT, *supra* note 91.

¹⁵⁶ Webster, *View at Thirty*, *supra* note 16, at 242.

¹⁵⁷ See, e.g., Webster, *Bortz v. Suzuki*, *supra* note 3, at 666 (relying on Civil Code Articles 709 and 710 to award monetary damages for mental anguish and wounded dignity due to the illegality of defendants’ conduct in breaching the right not to be discriminated against); see also *Otaru Onsen Case*, *supra* note 9 (relying on Civil Code Article 90 to fashion a monetary remedy).

¹⁵⁸ Webster, *Bortz v. Suzuki*, *supra* note 3, at 636.

¹⁵⁹ *Otaru Onsen Case*, *supra* note 9, at 317.

¹⁶⁰ Webster, *Bortz v. Suzuki*, *supra* note 3, at 640.

¹⁶¹ See Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Nov. 12, 2001, *Herman v. Asahi Bank*, 1789 HANREI JIHŌ 96.

of relevant private law.¹⁶² Again, this approach has been inconsistent, even within single opinions: For example, despite calling it an interpretive standard, the *Bortz* court did apply ICERD directly, noting that treaties are meant to be applied directly to private disputes.¹⁶³

Critically, Japanese courts have avoided criticizing the Diet or local legislatures for failing to legislate Japan's obligations under the ICERD into domestic law. The *Bortz* court has gone as far as the judiciary appears willing to reprimand another branch of government: It noted, in passing, that the ICERD does impose an obligation to adopt domestic law, but then proceeded to point out that it is not necessary to do so since plaintiffs can obtain damages through applying Article 6 of the ICERD as an interpretive standard.¹⁶⁴ The *Otaru Onsen Case* was more typical of Japanese judicial deference to other branches of government, noting that courts will not tell government bodies what to do, and refusing to hold state parties liable for failing to adopt appropriate anti-discrimination measures.¹⁶⁵ Specifically, the district court held that it was best left to the municipality's discretion as to which anti-discrimination initiatives to adopt or how to implement them.¹⁶⁶ The appellate court affirmed this ruling, noting that Otaru City had only a "political" obligation under the ICERD to its citizenry as a whole, not a legal obligation to pass laws to protect individual rights.¹⁶⁷

Although the occasional judicial activism since the 1990s is to be applauded, especially given Japanese cultural inertia and pressure for outward harmony, these isolated examples have not been a sufficient response to ICERD obligations.

d. The U.N. and NGOs Have Consistently Criticized Japan for Its Failure to Follow the ICERD

The U.N. has frequently reprimanded Japan for failing to adopt domestic anti-discrimination law and human rights protection bill, for refusing to penalize hate speech and other forms of discrimination, and for not educating law

¹⁶² See, e.g., *Otaru Onsen Case*, *supra* note 9, at 317.

¹⁶³ Webster, *Bortz v. Suzuki*, *supra* note 3, at 651 (also noting that, even if ICERD does not apply directly to private conduct, it can be given effect indirectly through interpreting human rights provisions of the Constitution).

¹⁶⁴ *Id.* at 652.

¹⁶⁵ *Otaru Onsen Case*, *supra* note 9, at 299; see also Sapporo High Court decision, *translated in* ARUDOU, JAPANESE ONLY, *supra* note 8, at App. Two.

¹⁶⁶ *Otaru Onsen Case*, *supra* note 9, at 299 (praising the city government for holding public meetings and advising public baths to cease their exclusionary policies, and noting that these actions fulfill the city's obligations under the ICERD).

¹⁶⁷ *Id.*

enforcement officials and the public regarding human rights.¹⁶⁸ The U.N. Special Rapporteur on Racism¹⁶⁹ has instructed Japan to take specific measures to combat the prevalent economic and social discrimination of foreigners, including: (1) recognizing the existence of racial discrimination in Japan, expressly criticizing it, and taking steps to combat it; (2) establishing a national commission for equality and human rights which is separate from the Ministry of Justice;¹⁷⁰ and (3) improving education and media portrayal of foreigners and of human rights issues.¹⁷¹ The Rapporteur has also noted with great dismay how, instead of combating discrimination, public officials in Japan encourage it by making biased remarks, blaming foreigners for crimes,¹⁷² and asking Japanese citizens to anonymously inform on any suspected unlawful migrants.¹⁷³ The Rapporteur's investigation revealed that Japan's culture of discrimination is "deep and profound,"¹⁷⁴ and that acts of discrimination are widely accepted with impunity.¹⁷⁵

Ever since responding to Japan's first report under the ICERD (submitted in 2000, combined for years 1997 and 1999), the U.N. has been clear in demanding that Japan adopt anti-discrimination law.¹⁷⁶ After reviewing examples of judicial legislating, the U.N. has emphasized that it was "necessary" for Japan "to adopt specific legislation to outlaw racial discrimination," to fulfill its ICERD obligations.¹⁷⁷ In its 2010 Report, the U.N. has continued to note that Japan must adopt domestic law, and address its persistent societal discrimination and xenophobia.¹⁷⁸

¹⁶⁸ *Committee's 2010 Report*, *supra* note 27; *see also* U.N. OHCHR, CERD, *Concluding Observations of the Comm. on the Elimination of Racial Discrimination*, Japan, 58th Sess., Mar. 6–23, 2001, ¶ 13, U.N. Doc. CERD/C/304/Add.114 (Apr. 27, 2001) [hereinafter *Committee's 2001 Report*].

¹⁶⁹ The U.N. Commission on Human Rights established the position of Special Rapporteur on Racism in 1993, to examine incidents of racism and create measures to address them. U.N. OHCHR, Comm'n on Hum. Rts. [CHR] Res. 1993/20, *Measures to Combat Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 49th Sess., ¶ 10, U.N. Doc. E/CN.4/RES/1993/20 (Mar. 2, 1993).

¹⁷⁰ The Ministry of Justice is in charge of implementing human rights policies. MINISTRY OF JUST., HUM. RTS. BUREAU, ACTIVITIES OF THE HUMAN RIGHTS ORGANS OF THE MINISTRY OF JUSTICE, <http://www.moj.go.jp/ENGLISH/HB/hb-02.html> (last visited Aug. 12, 2014).

¹⁷¹ DIÈNE REPORT, *supra* note 16, ¶¶ 74, 79, 82, 87, 89, 93.

¹⁷² *Id.* ¶¶ 60-64; Arudou Debito, *Japan Times JUST BE CAUSE Col 65*, "Police 'Foreign Crime Wave' Falsehoods Fuel Racism," July 8, 2013, DEBITO.ORG (Jul. 10, 2013), <http://www.debito.org/?p=11647> (noting how the National Police Agency had created the illusion of a foreign crime wave).

¹⁷³ DIÈNE REPORT, *supra* note 16, ¶ 61.

¹⁷⁴ *UN Envoy Urges Japan to Adopt Anti-Discrimination Legislation*, VOICE OF AM. NEWS, (Oct. 31, 2009, 10:14 AM), available at <http://www.voanews.com/content/a-13-2006-05-18-voa6/315279.html>.

¹⁷⁵ DIÈNE REPORT, *supra* note 16, ¶¶ 62-65.

¹⁷⁶ *Committee's 2001 Report*, *supra* note 168, ¶ 12.

¹⁷⁷ *Id.* ¶ 10.

¹⁷⁸ *Committee's 2010 Report*, *supra* note 27, ¶¶ 21, 28, 30; *see also* *Japan Faces U.N. Racism Criticism*, JAPAN TIMES, Feb. 26, 2010, available at <http://www.japantimes.co.jp/news/2010/02/26/>

NGOs on the ground in Japan note the same areas of concern that the U.N. has pointed. For example, in a joint 2009 submission, eighty three of Japan's leading NGOs—collectively called the “Japan Network for the Elimination of Racial Discrimination”—bemoaned the prevalence of racial discrimination, and called for domestic legislation and improved education.¹⁷⁹

e. Japan has Consistently Refused to Acknowledge Its Obligations Under the ICERD

In its reports to the U.N. Committee, Japan has maintained that there are no cases of discrimination in Japan, and that even if it were otherwise, courts would be competent to effectuate ICERD provisions.¹⁸⁰ Emphasizing Article 98 of its Constitution, which gives treaties the effect of domestic law,¹⁸¹ Japan insists that it has no need to adopt specific domestic legislation.¹⁸² It has also pointed to discrete domestic regulations—such as the Hotel Business Law, and the Railway Business Law, that prohibit discrimination due to race or ethnicity—as further alleviating the need for civil rights legislation.¹⁸³ Citing Article 14, Japan insists that it has taken “every conceivable measure to fight against racial discrimination.”¹⁸⁴ Japan also maintains that its Ministry of Justice appropriately fosters and disseminates respect for human rights, by effectively “eliminating prejudice and discrimination against foreigners, holding an attitude of tolerance towards and respect for diverse cultures,”¹⁸⁵ and by adopting suitable measures to address reported human rights abuses.¹⁸⁶ The government also insists that it provides sufficient human rights education to judges, law enforcement officers, and court officials,¹⁸⁷ as well as to students.¹⁸⁸

national/japan-faces-u-n-racism-criticism/#.U1cju8fJd_M.

¹⁷⁹ U.N. OHCHR, CERD, *Joint Submission by Japan Network for the Elimination of Racial Discrimination Related to Japan for the Consideration of the List of Issues by the Comm. on Racial Discrimination*, U.N. Doc. CERD/NGO/JPN/76/9291 (Aug. 26, 2009), available at http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/JPN/INT_CERD_NGO_JPN_76_92_91_E.doc.

¹⁸⁰ See, e.g., JAPAN'S 2000 REPORT, *supra* note 154, ¶ 4-5, 91.

¹⁸¹ Under Article 98(2) of the Constitution, “Treaties concluded by Japan and established laws of nations shall be faithfully observed.” There is a consensus among Japanese constitutional scholars that treaties have domestic legal force and, in case of a conflict of laws, override domestic statutory law. See YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW*, Chap. 3 (1998).

¹⁸² In its first report to the U.N. Committee, which combined what were supposed to be its first and second reports, the Japanese government also stated that its judiciary is capable of offering appropriate redress for any acts of discrimination. *Id.* ¶5.

¹⁸³ JAPAN'S 2009 REPORT, *supra* note 13, ¶¶ 56-57.

¹⁸⁴ *Id.* ¶ 2. This report was Japan's aggregate response for its obligatory third, fourth, fifth, and sixth periodic reports that were due in 2003, 2005, and 2007.

¹⁸⁵ *Id.* ¶ 20.

¹⁸⁶ *Id.* ¶ 34.

¹⁸⁷ *Id.* ¶¶ 46-48.

¹⁸⁸ *Id.* ¶ 76.

Japan's 2013 responses to the U.N. Office of the High Commissioner for Human Rights evince a similar failure to accept its ICERD obligations. Again, Japan maintains that it "has taken every conceivable measure to fight against racial discrimination," in accordance with Article 14,¹⁸⁹ pointing in particular to the investigative, counseling, and remedial efforts of the Human Rights Organs within the Ministry of Justice.¹⁹⁰ Those investigative efforts, however, are "based on the voluntary cooperation of persons concerned,"¹⁹¹ and the harshest remedial measures available are a written request that a relevant administrative body remedies an infringement of human rights, and a written "accusation" pursuant to the Code of Criminal Procedure.¹⁹² Furthermore, Japan continues to reiterate its refusal to penalize hate speech because such action would infringe upon freedom of speech.¹⁹³

B. Certain Aspects of Japan's Historical and Cultural Background Facilitate Widespread Societal and Governmental Discrimination

Both Japanese government officials and the citizenry rely on deeply ingrained beliefs of Japan's racial uniqueness to justify widespread exclusion and discrimination of all deemed to be different. Japan's history of perceiving Westerners as outsiders, and whites as the symbol of otherness—to be either reviled or admired—contribute to its modern racism. Selective Confucian values and a history of isolation reinforce racial discrimination today.

1. Select Confucian Values, Still Alive Today, Facilitate Discrimination

Confucian ideology—the official philosophy of Japan during the Tokugawa Shogunate, which lasted until the beginning of Japan's modernization in 1868¹⁹⁴—continues to strongly affect Japanese culture, even if only in an unconscious way.¹⁹⁵ Based on strict ethical rules, humanism, and sociability,

¹⁸⁹ MISSION PERMANENTE DU JAPON, *Response to the OHCHR*, § 1, EM/UN/33 (Jan. 23, 2013), available at <http://www.ohchr.org/Documents/Issues/Racism/AdHoc/5thsession/Japan.pdf>.

¹⁹⁰ *Id.* § 2(2).

¹⁹¹ *Id.* § 2(2)(b).

¹⁹² *Id.* § 2(2)(c)(i).

¹⁹³ *Id.* § 4. In October 2013, Kyoto District Court was the first to rule that hate speech exists in Japan, that it is unlawful, and that it is subject to penalties pursuant to the ICERD. Arudou Debito, *Kyoto District Court Orders Anti-Korean Zaitokukai to Pay Damages in First J Court Decision Recognizing Hate Speech as an Illegal Form of Racial Discrimination*, DEBITO.ORG (Oct. 8, 2013), <http://www.debito.org/?p=11890>. Although Japan has laws against libel and slander for disseminating misleading information about *individuals*, it does not have laws against spreading misleading or hateful information about *groups*.

¹⁹⁴ The Tokugawa Shogunate (1600-1868) was the last feudal military period of Japanese history. See JAPAN ENCYC., *supra* note 122, at 879-80.

¹⁹⁵ THE JAPANESE MIND: UNDERSTANDING CONTEMPORARY JAPANESE CULTURE 62-63 (Roger J. Davies & Osamu Ikeno eds., 2002) [hereinafter JAPANESE MIND].

Confucianism prizes altruism, reciprocity, justice, righteousness, loyalty, decorum, harmony, and wisdom.¹⁹⁶ Although some Japanese might not consciously recognize this today,¹⁹⁷ “Confucian concepts are still clearly evident in modern Japanese society,”¹⁹⁸ and many social conventions reflect Confucian influence.¹⁹⁹ Widespread discrimination of all perceived not to fit the norm can be seen as a reflection of Confucian aspirations for in-group harmony and stability, exaggerated by the desire for consensus building.

a. Desire for Superficial Harmony Among In-Group Members, Reinforced by a Belief in Racial Uniqueness, Lead to Valorizing Sameness and Resisting Change

Contemporary Japanese life continues to value the Confucian ideal of harmony (*wa*), loyalty, and reciprocity in relationships, but only between members of closely-knit groups.²⁰⁰ This has resulted in great concern about personal reputation, especially among members of the in-group,²⁰¹ and a high degree of social cohesion,²⁰² reinforced by an “almost visceral preference . . . for their own kind.”²⁰³ The in-group relationships that are prized, however, are “coded into a hierarchy of favors and obligations” that are to be fulfilled²⁰⁴ in order to maintain harmony. The desire for (superficial) harmony also drives the Japanese to ignore things that are unpleasant or do not fit their preexisting conceptions.²⁰⁵ A remnant from the feudal social structure, the Japanese approach is that if you are not part of the in-group, “you might as well not exist.”²⁰⁶

Japanese group-consciousness (*shudan ishiki*) and concern with the close in-group²⁰⁷ result in minimizing the importance of individual happiness.²⁰⁸ Satisfaction is derived from belonging to a close group—through family, school, or work²⁰⁹—of which “members are somewhat merged in their collectivity,” sharing the “same goals and . . . similar implicit interpersonal affective

¹⁹⁶ *Id.* at 43.

¹⁹⁷ Mark Schumacher, *Japanese Confucianism in Modern Culture & Society*, ONMARKPRODUCTIONS.COM, <http://www.onmarkproductions.com/html/japanese-confucianism.html> (last visited Aug. 8, 2014).

¹⁹⁸ *Id.*

¹⁹⁹ *See, e.g.*, MORRISON, *supra* note 12 (citing PATRICK SMITH, *JAPAN: A REINTERPRETATION* (1997)) (last visited Aug. 8, 2014).

²⁰⁰ JAPANESE MIND, *supra* note 195, at 10.

²⁰¹ *Id.* at 14.

²⁰² KOMISAROF, *AT HOME ABROAD*, *supra* note 3, at 32.

²⁰³ *Id.* at 37.

²⁰⁴ AMERICAN FUJI, *supra* note 90, at 69.

²⁰⁵ KERR, *supra* note 1, at 74.

²⁰⁶ KOMISAROF, *AT HOME ABROAD*, *supra* note 3, at 120.

²⁰⁷ *See, e.g.*, JAPANESE MIND, *supra* note 195, at 195-99.

²⁰⁸ *Id.* at 195.

²⁰⁹ CULTURE & SELF, *supra* note 3, at 164.

patterns.”²¹⁰ Westerners are perceived to be too individualistic for this merging of the self with the collective, which is reserved only for the Japanese, falsely believed to be “of the same heredity.”²¹¹

Japanese sense of uniqueness²¹² (embedded in the notion of *nihon-jinron*, the formal study of the Japanese as unique people), popular again since the 1960s, has reinforced the Japanese propensity to be critical of outsiders.²¹³ Pursuant to this view, the Japanese are homogeneous in their biology and psychology, and fundamentally different from all others.²¹⁴ “[C]ulturally, ethnically, and geographically distinct from the rest of humanity,”²¹⁵ the Japanese consider themselves to be the most pure and superior race²¹⁶ in their ethnic hierarchy (*minzoku*), destined to become the leaders of all non-whites.²¹⁷ Thus, outsiders are thought of as inherently incapable of becoming members of this genetically unique group or of even understanding it. And so, the Japanese take it upon themselves to adjust and create cultural bridges.²¹⁸ This is arduous, and makes the Japanese hesitant to engage with those who appear non-Japanese.²¹⁹

The focus on the inherent differences between the pure Japanese race and all others continues to be common today. Relying in part on visible racial

²¹⁰ *Id.* at 170.

²¹¹ *Id.*

²¹² ARUDOU, JAPANESE ONLY, *supra* note 8, at 170.

²¹³ *Id.* at 393.

²¹⁴ ADAM KOMISAROF, ON THE FRONT LINES OF FORGING A GLOBAL SOCIETY: JAPANESE AND AMERICAN COWORKERS IN JAPAN 111 (2011) [hereinafter KOMISAROF, ON THE FRONT LINES]; see also generally Haruko Minegishi Cook, *Joint Construction of Folk Beliefs by JFL Learners and Japanese Host Families*, in LANGUAGE LEARNERS IN STUDY ABROAD CONTEXTS 120, 120-50 (Margaret A. DuFon & Eton Churchill eds., 2006) (discussing dinner conversations between Japanese foreign language learners and host families). Ironically, the idea of Japanese racial homogeneity might be a reflection of how Westerners have historically understood Japan. John Lie, *The Discourse of Japaneseness*, in JAPAN AND GLOBAL MIGRATION 70, 83-84 (Mike Douglass & Glenda S. Roberts eds., 2003); see also BRIAN MOERAN, LANGUAGE AND POPULAR CULTURE IN JAPAN, at vii-viii (1989).

²¹⁵ Timothy Webster, *Reconstituting Japanese Law: International Norms and Domestic Litigation*, 30 MICH. J. INT'L L. 211, 213 (2008) [hereinafter, Webster, *Reconstituting Law*].

²¹⁶ JOHN W. DOWER, WAR WITHOUT MERCY: RACE & POWER IN THE PACIFIC WAR 220 (1986).

²¹⁷ Alastair Bonnett, *A White World? Whiteness and the Meaning of Modernity in Latin America & Japan*, in WORKING THROUGH WHITENESS: INTERNATIONAL PERSPECTIVES 69, 91 (Cynthia Levine-Rasky ed., 2002) [hereinafter Bonnett, *A White World?*] (noting how the separation of white/modern and Japanese/non-white identities was stronger before Japan's defeat in WWII). Ironically, Japan's desire in the early 1900s to become a leader of the “colored” people of the world—based in part on the perception that it was the only non-white nation to have escaped Western domination—resulted in its attempt to include a racial-equality provision in the League of Nations Charter of 1920, to benefit non-white nations such as itself. ALASTAIR BONNETT, WHITE IDENTITIES: HISTORICAL AND INTERNATIONAL PERSPECTIVES 67 (2000) [hereinafter BONNETT, WHITE IDENTITIES].

²¹⁸ KOMISAROF, AT HOME ABROAD, *supra* note 3, at 187.

²¹⁹ *Id.* at 188.

markers,²²⁰ the us-versus-them mentality has been actively reproduced by Japanese laws and policies.²²¹ Linguistic choices also indicate and reproduce a sense of unique, collective Japanese identity, erecting barriers against those deemed not innately privy to it: Ware-ware nihon-jin (“we, Japanese”)²²² is a frequent preface to statements by the Japanese about their culture or identity; wa-shiki refers to “Japanese style,”²²³ and yamato-damashii refers to “Japanese spirit.”²²⁴ All these phrases refer to the dominant Yamato (also known as the “Wa people”) ethnic group.²²⁵ Since genetics are taken to matter greatly in shaping personalities and behaviors,²²⁶ all who differ from the Japanese norm can never become part of the in-group. Thus, they can be ignored, alienated,²²⁷ or discriminated against.²²⁸

The desire for harmony (at least among members of the in-group) also exhibits itself in resistance to change, whether it be new ideas or new ways of doing things²²⁹—unless they are government-driven, such as the cultural, political, and economic reforms during the Meiji Restoration. Harmony is achieved through the denial and repression of differences, and through valorizing sameness and continuity.²³⁰ In turn, the greatest stigma in Japan is to be different from the closely circumscribed norm,²³¹ even if one is native-born Japanese.²³² “Being different is tantamount to criminal behavior” in Japan.²³³

²²⁰ KOMISAROF, ON THE FRONT LINES, *supra* note 214, at 108-09.

²²¹ Webster, *Insular Minorities*, *supra* note 57, at 561.

²²² *Japanese Culture—A Primer for Newcomers*, JAPAN FAQ, <http://www.thejapanfaq.com/FAQ-Primer.html> (last visited Aug. 28, 2014).

²²³ Nicolas, *Kanji Card*, Nihon Ichiban (Aug. 18, 2011), <http://nihongoichiban.com/2011/08/18/jlpt-kanji-%E5%92%8C/>.

²²⁴ Michael Carr, *Yamato-Damashii ‘Japanese Spirit’ Definitions*, 7 Int’l J. Lexicography 279-306 (1994), available at <http://ijl.oxfordjournals.org/content/7/4/279.abstract>.

²²⁵ See also, *supra* Part I.B. Incidentally, “wa” also refers to the Japanese concept of harmony.

²²⁶ Hays, *supra* note 6.

²²⁷ Webster, *Reconstituting Law*, *supra* note 215, at 214.

²²⁸ KOMISAROF, AT HOME ABROAD, *supra* note 3, at 191.

²²⁹ See KERR, *supra* note 1, at 30, 162. Fundamentally, their laws and attitudes have not changed since the 1960s. *Id.* at 209. This resistance to change in everyday life is mirrored in Japanese preference for fixed movements (*kata*) in art. *Id.* at 30.

²³⁰ *Id.* at 290.

²³¹ *Id.* at 291. Such differences include mental or physical disabilities, not having the typical Japanese physical appearance, having visible tattoos, or simply not abiding by cultural gender expectations in one’s demeanor. See, e.g., Nicholas D. Kristof, *Outcast Status Worsens Pain of Japan’s Disabled*, N.Y. TIMES, Apr. 7, 1996, available at <http://www.nytimes.com/1996/04/07/world/outcast-status-worsens-pain-of-japan-s-disabled.html> (“harmony is achieved by excluding those who do not seem to fit”); Mizuho Aoki, *Osaka’s Hashimoto Puts Municipal Workers’ Tattoos Into the Limelight*, JAPAN TIMES, May 18, 2012, available at <http://www.japantimes.co.jp/news/2012/05/18/news/osakas-hashimoto-puts-municipal-workers-tattoos-into-the-limelight/#.UvqiOoWmUtE>; Emi Koyama, “Gender-free” and the Conservative Backlash Against Feminism in Contemporary Japan, EMINISM.ORG (July 3, 2007), <http://eminism.org/blog/entry/26>.

²³² KOMISAROF, AT HOME ABROAD, *supra* note 3, at 1.

²³³ BACKER, *supra* note 90, at 107.

Gaijin are permanently different from the in-group,²³⁴ disruptive to its harmony.²³⁵ Whereas harmony is the goal for the in-group (*uchi*), it becomes irrelevant for the out-group (*soto*).²³⁶ Thus, all who differ by behavior, language, color, nationality, culture, or appearance can be ostracized.²³⁷ All *gaijin* are *soto*, to be treated differently and not closely associated with.²³⁸ The resulting xenophobia gets reinforced by the Japanese educational system,²³⁹ which not only ignores students' biases, but also portrays foreigners as aliens, not to be mixed with.²⁴⁰ Strong group mentality (*kumi*) only reinforces divisions between the "we" and the "others."²⁴¹

b. Selective Adaptation of Confucianism Facilitates Widespread Discrimination of Outsiders

Collectivism and in-group harmony remain strong values in Japan today, facilitating inequality. Businesses reach resolutions based on group consensus.²⁴² Similarly, government decisions follow societal consensus.²⁴³ Rooted in Confucian ideals, these attitudes have been reinforced by Japan's unique history and location: geographical isolation, centuries of seclusion, diplomatic isolation between 1633 and 1868,²⁴⁴ and rice-farmers' traditional dependence on collective effort.²⁴⁵ Arguably, the lack of a monotheistic all-powerful God also contributed to focusing more on interpersonal relationships and personal hierarchies. Today, prioritizing in-group harmony, and refusing to change without group consensus, support widespread racism and xenophobia.

²³⁴ JAPANESE MIND, *supra* note 195, at 217.

²³⁵ CULTURE & SELF, *supra* note 3, at 169.

²³⁶ JAPANESE MIND, *supra* note 195 at 217.

²³⁷ *Id.*, at 219.

²³⁸ *Id.* at 219-22.

²³⁹ KERR, *supra* note 1, at 288.

²⁴⁰ *Id.* at 286-87.

²⁴¹ *Id.* at 287.

²⁴² Shintaro Tominaga, *Decision-Making Process in Japanese Firms*, SCHINTARO'S CORNER (Feb. 27, 2008), <http://pacificdreamsseminar.blogspot.com/2008/02/decision-making-process-in-japanese.html>.

²⁴³ See Kazumasa Okubo, *The Nature and Role of the Civil Service in Japanese Government Decision-Making 1* (PRI Discussion Paper Ser. No. 05A-11, 2005), available at <http://www.eaber.org/node/22313>.

²⁴⁴ Yamanaka, *supra* note 108.

²⁴⁵ See, e.g., Rochelle Kopp, *The Decision Making Process in Japan*, JAPAN INTERCULTURAL CONSULTING (Apr. 2, 2012), <http://www.japanintercultural.com/en/news/default.aspx?newsid=154>.

i. Selective Confucian Values Are Reflected in Pervasive Racism by Individuals

Prioritizing close relationships over interactions with individuals who do not stand in a special familial moral relation,²⁴⁶ Confucian values have led to the exclusion of all non-Japanese. Perceiving all foreigners to be similar, the Japanese generalize an individual foreigner's shortcomings to all foreigners.²⁴⁷ Deemed to be inherently different from the unique Japanese race,²⁴⁸ *gaijin* are assumed to be innately incapable of comprehending the Japanese way of thinking, emoting, and doing things.²⁴⁹ Although this can function to excuse *gaijin* behaviors that are un-Japanese,²⁵⁰ it marks them as the symbolic other. Ironically, globalization—the economic success of which depends in part on being able to interact with other cultures—can heighten racism and strengthen in-group preference by increasing sensitivity to people's differences.²⁵¹ Tending to be socially conservative,²⁵² the Japanese not only relegate outsiders to a permanent out-group, but also react against Western notions of human rights.²⁵³

This view of all *gaijin* as innately different—and thus not deserving of the same treatment as the Japanese—is reflected in judicial opinions. In *Bortz*, for example, the shop owner argued that ejecting the plaintiff from his store did not exceed the limits of socially-acceptable behavior, and did not upset public order because excluding foreigners benefits society in general, especially given prior reports of theft by Brazilians.²⁵⁴ The defendant pointed to numerous differences between the Japanese and foreigners—including lifestyle, customs, behavior, modes of thinking, emotional responses, and spiritual activities—which inhibit the creation of relationships of trust between the two groups.²⁵⁵ Although the court found that the defendant had violated ICERD standards, this in-group/out-group mentality was left unchallenged. What is particularly troubling is that the

²⁴⁶ TAYLOR, CONFUCIAN CONTEMPLATION, *supra* note 42, at 66.

²⁴⁷ See ARUDOU, JAPANESE ONLY, *supra* note 8, at 166. This outlook bears a striking resemblance to how offenses committed by one racial minority member in the United States are generalized by Caucasians to that entire minority group. TATUM, *supra* note 31, at 120.

²⁴⁸ ARUDOU, JAPANESE ONLY, *supra* note 8, at 170.

²⁴⁹ See REX SHELLEY, CULTURE SHOCK! JAPAN (1993).

²⁵⁰ *See id.*

²⁵¹ Peerenboom, *supra* note 78, at 65.

²⁵² Andrew Levidis, *Shinzo Abe and the Dream of a Conservative Asia*, E. Asia F. (Oct. 2, 2012), <http://www.eastasiaforum.org/2012/10/02/shinzo-abe-and-the-dream-of-a-conservative-asia/>.

²⁵³ Peerenboom, *supra* note 78, at 67.

²⁵⁴ Webster, *Bortz v. Suzuki*, *supra* note 3 at 661.

²⁵⁵ *Id.* at 647. Such widespread cultural attitudes comport, of course, with Western notions of “racism.” “Racists are people who believe that innate, inherited characteristics biologically determine human behavior . . . [so that] the value of a human being is not determined by his or her individuality, but instead by membership in a so-called ‘racial collective nation.’” Holocaust Encyc., *Racism: An Overview*, U.S. HOLOCAUST MEMORIAL MUSEUM (JUNE 20, 2014), <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005184>.

Japanese are less likely to view unequal treatment of *all* foreigners – rather than of a specific subgroup – as discrimination. Thus, in the *Otaru Onsen Case*, some locals admitted that singling out Russians and prohibiting them from entering the baths would have been discriminatory, whereas excluding all who appear foreign is reasonable.²⁵⁶

Interestingly, the *Bortz* court drew attention to Confucian emphasis on in-group solidarity, while treating all others severely,²⁵⁷ an attitude reinforced by the Meiji Restoration's emphasis on adopting Western learning, yet retaining "Japanese spirit."²⁵⁸ The court noted how these deeply rooted Confucian ideals are contrary to equality and universal human rights,²⁵⁹ which are fundamental values in a democracy.²⁶⁰

ii. Selective Confucian Values Enable Governmental Inertia and Approval of Racism

While the Japanese look up to the paternalistic state to drive the moral tone of society,²⁶¹ and show little initiative to change,²⁶² the government draws upon Confucian values to inspire its inertia and refusal to follow legal mandates. Having become a basic element of Japanese political and social philosophy by the Nara period in the 700s,²⁶³ and the official government philosophy during the Tokugawa period (up until 1868),²⁶⁴ Confucianism continues to drive government actions today.²⁶⁵ As cultural constraints are prioritized over legal mandates, the government does not take action unless it is in conformity with the cultural mores of the Japanese people.²⁶⁶

²⁵⁶ ARUDOU, JAPANESE ONLY, *supra* note 8, at 33.

²⁵⁷ Webster, *Bortz v. Suzuki*, *supra* note 3 at 658.

²⁵⁸ *Id.* at 659.

²⁵⁹ *Id.* at 657.

²⁶⁰ *Id.* at 656-57.

²⁶¹ Peerenboom, *supra* note 78, at 67.

²⁶² This can be contrasted with the West—where change is often prompted by popular discontent and where judges attempt to gauge current public opinions when modifying legal doctrine. John Schwartz, *Despite Setback, Gay Rights Move Forward*, N.Y. TIMES, Sept. 21, 2010, http://www.nytimes.com/2010/09/22/us/22legal.html?_r=2&. In some cases, of course, the U.S. government has had to step in to ensure popular compliance with judicial decisions. For example, after the Supreme Court decided to desegregate schools in *Brown v. Board of Education*, the National Guard had to be sent to schools in Little Rock to ensure that the court's ruling would be carried out. Michelle Collins, *Little Rock, 1957: An Overview*, N.Y. TIMES, <http://events.nytimes.com/learning/general/specials/littlerock/overview.html> (last visited Aug. 10, 2014).

²⁶³ KSHETRY, *supra* note 3, at 16.

²⁶⁴ See generally CONFUCIANISM AND TOKUGAWA CULTURE (Peter Nosco ed., 1997) (discussing responses to Neo-Confucianism during Tokugawa Japan (1600-1868)).

²⁶⁵ See, e.g., Luera, *supra* note 77.

²⁶⁶ See *id.* at 611.

“[S]ocial beliefs and practices dictate political action, and the government will not affirmatively act to change society in the absence of a social or political consensus.”²⁶⁷ To avoid (direct) social conflict, the government adjusts laws in response to shifts in the majority’s beliefs.²⁶⁸ Reflecting the Confucian value of in-group harmony,²⁶⁹ “rule by consensus severely undermines the government’s power to effect social change,”²⁷⁰ and results in “social inertia that effectively preserves the conservative status quo.”²⁷¹ Achieving justice is not a reason to bring about change.²⁷² In effect, conflict is suppressed, and minority groups are ignored, as justice and individual rights are sacrificed for the illusion of harmony among members of a homogeneous in-group.²⁷³ The conservative,²⁷⁴ elitist LDP has been criticized for using Confucian values to justify its political agenda of status quo.²⁷⁵ In the process, the government ignores its international legal obligations and its Constitution,²⁷⁶ undermining its democracy.

2. Japan’s Historical Relationship with the West Supports Today’s View of Whites as Permanent Outsiders, Either Admired or Reviled

After its long early periods of isolationism, Japan developed the tradition of *adapting* selective elements of foreign cultures to its own needs and customs

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 1-2 (1987). *See also* Knapp, *supra* note 81, at 145-46. This approach is drastically different from how some laws are reformed in the United States. For instance, “Congress enacted legislation to protect African-Americans’ civil rights, even though significant portions of the country opposed the legislation.” Luera, *supra* note 77, at 614 n.26.

²⁷⁰ Luera, *supra* note 77, at 614 n.26.

²⁷¹ *Id.* at 638.

²⁷² *Id.* at 639.

²⁷³ Paul Lansing & Tamra Domeyer, *Japan’s Attempt at Internationalization and Its Lack of Sensitivity to Minority Issues*, 22 CAL. W. INT’L L.J. 135, 140-41 (1991) (describing Japan’s aversion to change).

²⁷⁴ “Conservatism” in Japan is marked by commitment to tradition, and maintenance of the status quo. *Id.*

²⁷⁵ Chalmers Johnson, *The People Who Invented the Mechanical Nightingale*, in *SHOWA: THE JAPAN OF HIROHITO* 71, 88 (Stephen R. Graubard ed., 1992) (noting how Japan’s “covert conservative alliance” uses cultural values “to keep the people docile and preoccupied with nonessential matters”). *See also* Robert Larsen, *Ryousai Kenbo Revisited: The Future of Gender Equality in Japan After the 1997 Equal Employment Opportunity Law*, 24 HASTINGS INT’L & COMP. L. REV. 189, 190 (2001) (pointing how “the government has used Confucian values in order to build support for [its] policy agenda[s]”).

²⁷⁶ Some might argue that Japan’s need to follow its own Constitution is not absolute because it was drafted under pressure of American occupying forces. That assumption is not correct, however, as Japan had shown assertiveness during the drafting process: For example, it deleted from the final draft all U.S.-proposed safeguards for aliens. Webster, *Excisions*, *supra* note 105 at 437 (noting how Japanese officials “recomposed” the Japanese constitution while going back and forth between English- and Japanese-language versions).

(*itoko-dori*), while rejecting aspects deemed too foreign.²⁷⁷ Since the Meiji era (1868-1912), Japan has strategically appropriated Western technological advances, military developments, capitalism, and some items symbolizing modernity and luxury.²⁷⁸ Despite rapidly industrializing and modernizing after WWII,²⁷⁹ Japan retained its traditional, Confucian values, becoming critical of Western notions of human rights.²⁸⁰ This selective adaptation, combined with a relativist, flexible ethical value system produced modern-day Japan, in which public disapproval of unethical behaviors by in-group members is to be avoided; yet exclusion of *gaijin* is approved since they are outsiders, deemed to be mere symbols of modernity rather than persons deserving human rights.²⁸¹

a. Japan's Historical Experiences and Attitudes Led It to Reject *Gaijin* as Strangers

The Japanese sense of uniqueness—even sacredness—as a mono-ethnic group has been fostered throughout its history, prompted in part by its geographical isolation,²⁸² and its limited contact with the West in the 1400s and 1500s,²⁸³ as a result of which Japan developed both a sense of admiration for Western scientific discoveries, and feelings of cultural superiority over the West. Thus, Westerners were called *joi* (“barbarians”),²⁸⁴ and *batakusai* (“stinking of butter”).²⁸⁵ Before the term *gaijin* (“outside people”) became widely adopted after WWII, Westerners had also been called *nan-ban* (“Southern savages,” because they had entered Japan via the South Sea),²⁸⁶ and *ijin* (“strange people”);²⁸⁷ thus, always positioned linguistically as the symbolic other, and often as inferior to the Japanese.²⁸⁸

²⁷⁷ JAPANESE MIND, *supra* note 195, at 127-30. The term “critical appropriation” is an apt description—as opposed to the extremes of “traditionalism” (advocating a return to the past) or “modernism” (advocating a complete break with the past). See Dallmayr, *supra* note 42, at 204.

²⁷⁸ Bonnett, *A White World?*, *supra* note 217, at 93.

²⁷⁹ Daniel A. Metraux & Kellie Ann Warner, *The Character and Structure of the Economy*, in A COUNTRY STUDY: JAPAN, U.S. LIBRARY OF CONGRESS (Ronald E. Dolan & Robert L. Worden eds., 1994), available at <http://countrystudies.us/japan/98.htm>.

²⁸⁰ SOR-HOON TAN, CONFUCIAN DEMOCRACY: A DEWEYAN RECONSTRUCTION 3-4 (Roger T. Ames ed., 2003)

²⁸¹ See JAPANESE MIND, *supra* note 195, at 130-31.

²⁸² KSHETRY, *supra* note 3, at 3-4.

²⁸³ *Id.*

²⁸⁴ See *id.*

²⁸⁵ Hays, *supra* note 6 (noting how traditionally, the Japanese did not consume dairy, and so found its smell unpleasant).

²⁸⁶ KSHETRY, *supra* note 3, at ch.2; *Nanban “Southern Barbarian”*, EVERYTHING JAPANESE GUIDE, <http://www.japanese123.com/nanban.htm>.

²⁸⁷ YOSHIO ICHIKAWA, A NEW POCKET DICTIONARY OF THE ENGLISH AND JAPANESE LANGUAGES 256 (1888).

²⁸⁸ BOYE LAFAYETTE DE MENTE, NTC’S DICTIONARY OF JAPAN’S CULTURAL CODE WORDS 92-93 (1994). Interestingly, the Japanese have never called whites by any term associated with the color

The Japanese have historically been protective of their culture against negative Western influences. Fearing foreign aggression and dilution of its unique cultural values by Christianity, Japan imposed a period of isolation (*sakoku jidai*) between 1640 and 1850s, closely controlling the few foreigners allowed in, and severely limiting its citizens' ability to travel abroad.²⁸⁹ After being forced by the United States to slowly open to the West, Japan developed strong anti-foreign feelings (*sonno joi*) against the barbarians who were polluting its sacred land.²⁹⁰ To this day, the Japanese believe in their unique sacredness, which causes extreme difficulties when dealing with non-Japanese, people.²⁹¹ Thus, even if *gaijin* speak Japanese, are familiar with the local culture, behave in a Japanese way, and have Japanese spouses and children, they are always outsiders.²⁹²

The Japanese have also traditionally perceived themselves to be a mono-ethnic, distinct racial group,²⁹³ with a unique; truly "white" skin color.²⁹⁴ The government explicitly encourages this view,²⁹⁵ and also fails to include "ethnicity" as a category in the national census.²⁹⁶ Thus, due to their nationality, approximately 98.5% of census respondents are classified as "Japanese."²⁹⁷ Furthermore, the cultural definition of "Japanese" is very closely circumscribed: One is perceived as Japanese only if one looks in complete accordance with Japanese stereotypes, follows traditional Japanese values, and exhibits patterns of

of their skin, unlike what Caucasians call themselves. In addition to the terms discussed here, the Japanese have also called Caucasians *aoi me no hito* ("blue-eyed people"), and *hana no takai-hito* ("big-nosed people"). JAPANESE AND NIKKEI AT HOME AND ABROAD 6 (Nobuko Adachi ed., 2010). Caucasian physical characteristics that have been most salient in the Japanese imagination have not been based on skin color.

²⁸⁹ KSHETRY, *supra* note 3, at 76-84.

²⁹⁰ *Id.* at 101-15.

²⁹¹ CULTURE & SELF, *supra* note 3, at 169-70. This is despite the fact that scientists have traced the origins of the majority of the Japanese population today (other than its indigenous groups) to Korea and China. *Making Sense of DNA Data and the Origins of the Japanese*, HERITAGE OF JAPAN, <http://heritageofjapan.wordpress.com/yayoi-era-yields-up-rice/who-were-the-yayoi-people/making-sense-of-dna-data-and-origins-of-the-japanese/> (last visited Aug. 10, 2014).

²⁹² See generally KOMISAROF, AT HOME ABROAD, *supra* note 3 (discussing how foreigners settling in Japan struggle to find their place).

²⁹³ See, e.g., Herbert P. Bix, *Hirohito and the Making of Modern Japan* (2001); DIÈNE REPORT, *supra* note 16, ¶ 5; and see, e.g., WEINER, *supra* note 85.

²⁹⁴ Ashikari, *Cultivating Whiteness*, *supra* note 58, at 79, 82, 84. This identification of the Japanese themselves as a unique race based on their skin color appears to have its roots during the Meiji Restoration, when Japan opened up to the West. *Id.* at 84.

²⁹⁵ Stephen Murphy-Shigematsu, *Multiethnic Japan and the Monoethnic Myth*, 18 MELUS 63, 65-66 (1993).

²⁹⁶ MINISTRY OF INTERNAL AFFAIRS AND COMMUN'S, STAT. BUREAU, ENGLISH TRANSLATION OF THE JAPANESE CENSUS (2010), available at <http://www.stat.go.jp/english/data/kokusei/taiyaku/english1.pdf>; see also JAPAN'S 2009 REPORT, *supra* note 13, ¶ 4 (noting that "the ethnic breakdown of Japan is not readily available since Japan does not conduct population surveys from an ethnic viewpoint.").

²⁹⁷ *The World Factbook: Japan*, CIA, <https://www.cia.gov/library/publications//the-world-factbook/geos/ja.html>.

behavior that comport with deeply-ingrained cultural norms.²⁹⁸ All others are strangers.

The United States-led post-WWII occupation of Japan served to reinforce the perception of differences between Westerners and the Japanese. Between 1945 and 1952, General Douglas MacArthur and his staff led a cloistered existence, living in segregated quarters and avoiding interacting with the Japanese aside from their work duties.²⁹⁹ Thus, Westerners appeared to be a separate, privileged caste of temporary visitors,³⁰⁰ which affects inter-group dynamics in Japan to this day.

b. Dichotomies in the View of Caucasians as “The Other” Prevail to This Day

Gaijin continue to be viewed as mere sojourners, and as inherently different from the Japanese. In contrast to conservative, collectivist, and hardworking locals, Westerners are perceived throughout Asia as individualistic, transgressive, and decadent.³⁰¹ In Japan, however, this outlook is more complicated, as Westerners are also admired. Starting with the Meiji Restoration,³⁰² some Japanese leaders attempted to align their country with the West instead of with Asia,³⁰³ even calling for intermarriage to acquire some “superior” Caucasian traits.³⁰⁴ To this day, some Japanese intellectuals and politicians explicitly ally Japan with the West in order to claim superiority in Asia³⁰⁵ for being the only “advanced” country in the region.³⁰⁶ Even though many Japanese admire Western modernity and power, the underlying national ideology developed before WWII was anti-foreign.³⁰⁷ To this day, Japan continues its tradition of being very discriminatory, class-based, and feudalistic,³⁰⁸ which only

²⁹⁸ See generally Levin, *Wajin*, *supra* note 57, at 6 (noting how, in addition to physiological markers, shared cultural traits and patterns of behavior of the Japanese are used to denote the existence of a homogeneous, fixed, unique Japanese identity); see also WEINER, *supra* note 85, at 172 (noting that dominant Japanese homogeneity excluded immigrants who maintained homeland affinity). This resembles America’s one-drop rule to determine belonging to the pure white race. See F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION’S DEFINITION* 5 (1991).

²⁹⁹ KOMISAROF, *AT HOME ABROAD*, *supra* note 3, at 7.

³⁰⁰ *Id.*

³⁰¹ Bonnett, *A White World?*, *supra* note 217, at 92.

³⁰² The Meiji Restoration began the process during which Japan adapted Western knowledge and technology to transform itself politically and economically, becoming the second biggest industrial power (after the United States) by 1968. KSHETRY, *supra* note 3, at i.

³⁰³ Bonnett, *A White World?*, *supra* note 217, at 92-93.

³⁰⁴ KSHETRY, *supra* note 3, at 122.

³⁰⁵ Bonnett, *A White World?*, *supra* note 217, at 93-94.

³⁰⁶ *Id.* at 95.

³⁰⁷ KSHETRY, *supra* note 3, at 119-40.

³⁰⁸ *Id.*

reinforces any underlying anti-foreign attitudes, and the negative view of Caucasians as the other, whether admired or scorned.

i. Freedom and Modernity Conflated with Whiteness

Admiring the West as progressive and advanced, Japan came to conflate the idea of modernity with whiteness—as the representative, stereotypical race of the West—as both strange and familiar.³⁰⁹ In the process, Japanese indigenous aesthetic preference for white skin³¹⁰ (stemming from northern prefectures, known for milky skin)³¹¹ became enmeshed with the Western tradition of privileging the white race.³¹² Today in Japan, light skin tops the racial hierarchy, and many of those lower on the racial totem pole are perceived as “black.”³¹³ Japanese light-skin preference partakes of the symbolisms of modernity and power, conflated with whiteness. Whiteness thus becomes familiar. The duality of seeing whiteness as both foreign and similar,³¹⁴ to be desired for connoting progress, yet rejected for its excessive individualism and transgression,³¹⁵ mirrors Japan’s selective adaptation of Western advances, and the perception of Westerners as superior yet inferior.

Whether idealized or rejected, symbolic Western whiteness always connotes otherness, and is often situated on the Caucasian body—its pale skin, facial features, body hair, body odors (real or assumed), body proportions, dress,

³⁰⁹ Bonnett, *A White World?*, *supra* note 217, at 69, 95.

³¹⁰ One of the best examples of that traditional preference is geisha’s lightening their faces with snow-white makeup, which is today typically made of rice flour paste, and in the past also included droppings of the Japanese bush-warbler. *See, e.g.*, Liza DALBY, *GEISHA* (1983). Scholars have dispelled the notion that the Japanese prize white skin due to their fascination with the West. *See, e.g.*, BONNETT, *WHITE IDENTITIES*, *supra* note 217, at 69.

³¹¹ The northern Akita Prefecture is famous for *Akita bi-jin*, “Akita beauties” with milky skin. Ashikari, *Cultivating Whiteness*, *supra* note 58, at 82. Today, this aesthetic preference for rice-white skin continues with a booming industry of whitening cosmetic treatments and make-up, collectively called *bihaku* (“beautiful and white”). *See, e.g.*, Mikiko Ashikari, *The Japanese Woman’s Obsession for the White Complexion: The ‘Whitening’ Cosmetics Boom and the Japanese Identity* (Univ. of Cambridge, Social Anthropology Dep’t, Discussion Paper) [hereinafter Ashikari, *Whitening Cosmetics*]. Furthermore, Japanese women take great pride in having flawless, pale skin, and expend considerably daily effort to avoid tanning—through the daily use of sunscreens, parasols, long-sleeved clothing, sun hats and large visors, hand coverings, special vitamin supplements, and even staying indoors while sunlight is strong. Ashikari, *Cultivating Whiteness*, *supra* note 58, at 85-87.

³¹² Bonnett, *A White World?*, *supra* note 217, at 92-93; BONNETT, *WHITE IDENTITIES*, *supra* note 217, at 69.

³¹³ *See* Ashikari, *Whitening Cosmetics*, *supra* note 311, at 1, 4.

³¹⁴ BONNETT, *WHITE IDENTITIES*, *supra* note 217, at 71.

³¹⁵ Bonnett, *A White World?*, *supra* note 217, at 95-96. It is common today to see Caucasians in advertisements for beauty products and items symbolizing risk-taking, freedom, and individualistic pleasure, in which the whiteness of Westerners makes the products so much more tantalizing for being culturally foreign and transgressive. *See* BONNETT, *WHITE IDENTITIES*, *supra* note 217, at 72-73.

hairstyles, and body modifications.³¹⁶ All these elements are duly noted by the Japanese as they oscillate between trying to become more Western and attempting to differentiate themselves from Westerners. For example, Western fashions have been followed en masse since WWII, yet traditional *kimono* and *yukata* (kimono's less formal version) are still worn by modern Japanese when taking part in traditional, uniquely Japanese events.³¹⁷ Stereotypes of *gaijin* include excessive body hair, propensity to sweat, unkempt hair, and tattoos.³¹⁸ Japan's uneasy relationship with Westernization and with whiteness has led some to remark that the "Japanese skin" (*nihon-jin no hada*), unique to their race,³¹⁹ is innately "white" in color, whereas Caucasian skin is inferior, merely "transparent"³²⁰ or pale.³²¹ Thus, whiteness becomes just a color, a symbol divorced from the personhood of whites. Similarly, although Caucasian models are often used in advertisements for skin-whitening products in Japan, they are appropriated only as symbols of a modern world culture, rather than as exemplars of beauty.³²² Distance is thus created between Caucasians as real human beings and as symbols of what is selectively desired, paving the way for denying Caucasians human rights.

ii. Whiteness Conflated with Derided Foreignness

Perceptions of whites and the significance of whiteness continue to be plagued by inconsistencies in popular Japanese culture. In addition to a plethora of Caucasian models in popular advertisements, and the use of only white mannequins in stores, whites are to be ridiculed as permanently strange. A party mask called "Hello, Mr. Gaijin" depicts foreign whiteness as stereotyped by an exaggerated large nose, iridescent blue eyes, blond hair, and inflated gesticulations.³²³ These features consist of amplified, cartoonish racial stereotypes rather than a realistic image of a white man. Still up for sale in Japan,³²⁴ and

³¹⁶ Mackie, *supra* note 69, at 2.

³¹⁷ SHELLEY, *supra* note 249, at 61.

³¹⁸ See, e.g., TIM ANDERSON, *TUNE IN TOKYO: THE GAIJIN DIARIES* (2011).

³¹⁹ Ashikari, *Cultivating Whiteness*, *supra* note 58, at 83.

³²⁰ Bonnett, *A White World?*, *supra* note 217, at 98-99; see also Ashikari, *Whitening Cosmetics*, *supra* note 311, at 6.

³²¹ Mackie, *supra* note 69, at 5-6.

³²² Ashikari, *Cultivating Whiteness*, *supra* note 58, at 82.

³²³ Sakata, *supra* note 59; see also Brian Ashcraft, *Hey Foreigners, You're a Party Joke in Japan!*, KOTAKU.COM (Sept. 25, 2012, 5:00 AM), <http://kotaku.com/5946130/hey-foreigners-youre-a-party-joke-in-japan>. Stereotypes of whites as blonde and having huge noses are common in popular advertisements. See, e.g., Simon Tomlinson, *Nippon Airlines Apologises for 'Racist' Advert that Pokes Fun at Westerners' Big Noses and Blonde Hair*, DAILY MAIL ONLINE (Jan. 20, 2014), <http://www.dailymail.co.uk/news/article-2542569/Nippon-airlines-sorry-racist-advert-pokes-fun-Westerners-big-noses-blonde-hair.html>.

³²⁴ Its name was later revised to the slightly more politically correct "gaikokujin" ("outside-country-person"). Aruduo Debito, *Success, of a Sort, as a "Gaijin Mask" Maker Amends Their*

displayed among party costumes³²⁵ to help the Japanese masquerade as someone they are not, the mask differentiates Caucasians as the other, to be laughed at and mocked. Whether ridiculed or admired, whites are always the other.

Unlike the black cartoonish “Dakko” doll in the 1980s that drew widespread criticism of racism, “Mr. Gaijin” mask has not been pulled from market, in part because very few Caucasians speak up against it.³²⁶ The author argues that this is because our global understanding of racism is itself racist, reliant on the assumption of global white privilege and power.³²⁷ Due to this myopic view, whites who do not fully access white privilege due to their personal circumstances or due to being in a geographical context where they are not the dominant race (as discussed here) are silenced, and racism against them is not labeled as such. The faulty belief in a homogenous, privileged whiteness reduces our ability to perceive and acknowledge racism against whites, even when they are publicly and widely othered, ridiculed, or discriminated against.

III. HARMONIZING CULTURAL AND LEGAL INCONSISTENCIES TO PROMOTE JAPAN’S COMPLIANCE WITH ITS CONSTITUTION AND WITH THE ICERD

Reform implementation is both easier and more effective when it finds support in local socio-cultural traditions, reasoning discourse, and value schemas,³²⁸ as well as when it appeals to emotions of the masses.³²⁹ Despite having been employed to support inertia, rejection of outsiders, and rule by consensus, Confucianism provides a flexible approach that can address the needs of contemporary society,³³⁰ by adapting and responding to a changing environment.³³¹ Confucian intellectual traditions can create a “liberal-

Racist Product to “Gaikokujin Masks”. *Same Racialized Marketing, Though.*, DEBIT.ORG (Sept. 23, 2012), <http://www.debito.org/?p=10591>.

³²⁵ Ashcraft, *supra* note 323.

³²⁶ The Dakko baby doll was pulled from market in the 1980s. DrSenbi, *Banned in the Name of Good Taste*, TOKYO SCUM BRIGADE (Apr. 14, 2011, 8:00 AM), <http://tokyoscum.blogspot.com/2011/04/banned-in-name-of-good-taste.html>. Another version of the Dakko doll that was introduced in the 2000s has also been criticized as racist. Coco Kubota, *Japanese Toymaker Comes Under Fire For a “Racist” Doll*, DIGITAL J. (Jan. 25, 2001), <http://www.digitaljournal.com/article/32149>.

³²⁷ For a description of how racism depends on imagining a difference from the European norm, see CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997), and DAVID THEO GOLDBERG, *RACIST CULTURE* (1993).

³²⁸ Peerenboom, *supra* note 78, at 57.

³²⁹ See generally GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* (Dover ed. 2002) (discussing crowd characteristics).

³³⁰ Peerenboom, *supra* note 78, at 77. For a thorough discussion of how Confucianism has responded to and evolved with changing historical forces, see generally CONFUCIANISM FOR THE MODERN WORLD (Daniel A. Bell & Hahm Chaibong eds., 2003).

³³¹ See, e.g., TAN, *supra* note 280, at 7, 88; DAVID L. HALL & ROGER T. AMES, *THINKING THROUGH CONFUCIUS* (1987). Not surprisingly, one Confucian tenet is that, “The green reed which bends in the wind is stronger than the mighty oak which breaks in a storm.” *Confucius*, GOODREADS,

communitarian” theory of law that values individual justice, and nurtures each individual’s potential to fully engage in the service of the community.³³² “[T]here is no intrinsic tension between Confucianism and human rights.”³³³ Moreover, Confucianism is not incompatible with the essence of democracy—government *for* the people.³³⁴ Steeped in this reading of Confucianism, multi-faceted reform initiatives—if driven by government efforts—can make Japan truly harmonious, and responsive to the needs of all its people, while enabling it to remain an economically successful and respected global player.

A. Fundamental Confucian Values Support Human Rights and Equality

Professing values of cooperation and civility in human relations *generally*, instead of limiting them to small in-groups only, Confucianism can provide a native intellectual foundation for human rights.³³⁵ It also emphasizes learning, communication, and meritocracy based on ethics and abilities.³³⁶ These classical Confucian values support equality. Driven by benevolence, justice, respect, and wisdom as its cardinal values,³³⁷ “if approached properly, Confucius can be the teacher of an open, democratic, non-oppressive society where all human relations are governed by *jen*, that is, by consideration and fairness, and also by *li*, that is, by certain public-institutional forms, structures, and conventions which render fellowship concretely feasible”³³⁸ Thus, instead of only backing conventionalism or traditionalism,³³⁹ Confucian philosophy can support a culture that combines some tendencies of modern liberalism, equality, and individual rights, while retaining sensitivity to collectivism.³⁴⁰

In fact, Okada Takehiko, a contemporary Japanese Confucian scholar and practitioner, has argued that Confucianism must be re-envisioned in today’s

<https://www.goodreads.com/quotes/210361-the-green-reed-which-bends-in-the-wind-is-stronger> (last visited Aug.12, 2014). One example of its adaptability is how differently it has been reinvented and incorporated into the socio-political cultures of China, North Korea, South Korea, Vietnam, and Japan today. For example, the former Chinese President Hu Jintao drew on Confucian ideas to develop his notion of a “Harmonious Socialist Society.” Yi Liu, *Confucianism in China Today*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFF. (Apr. 14, 2011), <http://berkeleycenter.georgetown.edu/events/confucianism-in-china-today>.

³³² See, e.g., Choi, *supra* note 52, at 6.

³³³ Louis Henkin, *Epilogue: Confucianism, Human Rights, and “Cultural Relativism”*, in *CONFUCIANISM AND HUMAN RIGHTS* 308, 313-14 (William Theodore de Bary and Tu Weiming eds., 1998).

³³⁴ TAN, *supra* note 280, at 15.

³³⁵ See *id.* at 79.

³³⁶ *Id.* at 97, 105-07.

³³⁷ Noriko Sugano, *Gender, Modern Japan, and the Reception of Confucianism*, Paper Presented at the Berkshire Conference of Women Historians at 2 (2005), available at <https://apps.main.teikyo-u.ac.jp/tosho/nsugano22.pdf> (last visited Aug. 12, 2014).

³³⁸ Dallmayr, *supra* note 42, at 209.

³³⁹ *Id.* at 210.

³⁴⁰ *Id.* at 209.

Japan as respect for human dignity and concern for humankind.³⁴¹ A living (neo-)Confucian, Okada has emphasized Confucianism's concern for taking moral action³⁴² in actual human relations,³⁴³ and attaining *true* harmony within society.³⁴⁴ Those aspirations are not compatible with inequality. With its core of humanism,³⁴⁵ and concern with this world (as opposed to the divine or afterlife),³⁴⁶ Confucianism supports human rights and equality. It also approaches human beings as teachable and perfectible,³⁴⁷ instilling hope for the future.

B. Cultural and Historical Impediments to Equality Can be Overcome by Government-Driven, Multi-Faceted Reforms that Enable Japan to Honor Its Legal Obligations

Notwithstanding Caucasians' occasional position of privilege in Japan, discrimination against them is common, reinforced by a closely circumscribed notion of the in-group, and the conservative government's inertia. Japan's legal obligations under its own Constitution and the ICERD are clear. Ad hoc judicial legislating is not an adequate response, especially given that it is "un-Japanese" to even be involved in a lawsuit. Whereas permanent transformation in Western societies stems from a confluence of legal, cultural, and personal change,³⁴⁸ that understanding cannot be applied to Japan, where reform efforts are complicated by relative ethics, importance of superficial harmony, fear of sticking out, and rule by consensus. In a catch-22 situation, individuals wait for guidance from above,³⁴⁹ and the government waits for popular consensus before taking action. Stagnation and inertia are the result, reinforced by the attitude of being resigned to what happens in life (*shikata-ga-nai*, "it can't be helped").³⁵⁰ Therefore, any reforms in Japan must be diverse and wide-ranging, involving local advocacy,

³⁴¹ RODNEY L. TAYLOR, *THE RELIGIOUS DIMENSIONS OF CONFUCIANISM* 146-47 (1990).

³⁴² Okada contrasted Confucianism with Buddhism in this respect. TAYLOR, *CONFUCIAN CONTEMPLATION*, *supra* note 42, at 9.

³⁴³ *Id.* at 109.

³⁴⁴ *Id.* at 90.

³⁴⁵ Harold J. Berman, *Faith and Law in a Multicultural World*, in *RELIGION IN GLOBAL CIVIL SOCIETY* 69, 70 (Mark Juergensmeyer ed., 2005).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ Chimni, *supra* note 80.

³⁴⁹ The general population is slowly beginning to express some support for the adoption of anti-discrimination legislation. On September 22, 2013, for example, more than 1,000 people staged a march in Tokyo, calling for an end to ethnic and racial discrimination, and urging the government to comply with the ICERD. See Ida Torres, *Anti-Hate Speech Rally in Tokyo Calls for End to Racial Discrimination*, *JAPAN DAILY PRESS* (Sept. 23, 2013), <http://japandailynews.com/anti-hate-speech-rally-in-tokyo-calls-for-end-to-racial-discrimination-2336372/>. That initiative, however, focused on the rights of ethnic Koreans, many of whom have been lawful residents in Japan for several generations. *Id.*

³⁵⁰ Hugh Cortazzi, *The Curse of 'Shikata Ga Nai'*, *Japan Times* (Apr. 16, 2001), <http://www.japantimes.co.jp/opinion/2001/04/16/commentary/the-curse-of-shikata-ga-nai/#.VAE2T2SwI09>.

the media, better education, and pressure by Westerners in Japan and abroad. Within Japan, this change needs to be driven and actively supported by the national government, as it is exceedingly difficult to propagate change from the bottom due to the stigma of speaking up against popular accord. The government needs to (1) legislate against discrimination, and (2) begin building a new consensus, thereby expanding the notion of an in-group, and making Japan a true citizen of the modern, global world, while decreasing its populace's unease towards dealing with change.

1. Drawing on Confucian Core Values, Japan's Legislative and Executive Branches Must Lead Reforms, in Order to Ensure Continued Economic Success and to Save Face in the Global Arena

Solutions cannot be simply transplanted and imposed on Japan based on Westerners pressure or using Western models of legal reform and human rights. Instead, Western approaches need to be selectively adapted, taking into account Japan's culture, history, and politics. The Japanese government should take a good look at how it is undermining its own credibility within the international arena—by not fulfilling its obligations under treaties that it has ratified, and at how it needs to open up to immigration in light of anticipated labor shortages.³⁵¹ Respecting equality would not only benefit Japan's capitalism³⁵² by enabling *gaijin* to more fully participate in Japan's economic arena, but would also reflect fundamental Confucian ideals of individual justice and human dignity.

As one of the world's quickest aging societies,³⁵³ Japan's population is predicted to decrease by approximately 30% by 2060, with 40% of its population being over the age of 65.³⁵⁴ “In order to achieve demographic equilibrium, Japan will need [to accept] between 17 and 30 million new immigrants by 2050”, which will constitute approximately 18% of its population.³⁵⁵ (Today, immigrants and foreign workers constitute about 1% of its population, which is the lowest

³⁵¹ FOCUS MIGRATION, *supra* note 13, at 4; Arudou Debito, *TheDiplomat.com: “In Japan, Will Hafu Ever Be Considered Whole?” on the Debate About Japan's Increasing Diversity*, DEBITO.ORG (Oct. 6, 2013), <http://www.debito.org/?p=11884>.

³⁵² For a contrary view, arguing how capitalism and equality are inimical, see L.A. Visano, *The Impact of Whiteness on the Culture of Law: From Theory to Practice*, in WORKING THROUGH WHITENESS 209, 214 (Cynthia Levine-Rasky ed., 2002). The view that capitalism and racism are symbiotic is premised, however, on non-whites' economic and political subjugation by whites in Western countries. Thus, it does not necessarily apply in Asian countries. See also KOMISAROF, AT HOME ABROAD, *supra* note 3, at 1; Hiroko Tabuchi, *Despite Need for Workers, Japan Keeps Doors Closed*, INT'L HERALD TRIBUNE TRIB., Jan. 3, 2011, available at 2011 WLNR 68029.

³⁵³ KOMISAROF, AT HOME ABROAD, *supra* note 3, at 1, 5.

³⁵⁴ *Japan Population to Shrink by One-Third by 2060*, BBC (Jan. 30, 2012), <http://www.bbc.co.uk/news/world-asia-16787538>.

³⁵⁵ KOMISAROF, ON THE FRONT LINES, *supra* note 214, at 14.

proportion of any advanced nation.)³⁵⁶ Japan must not only change its immigration policy, but also create a legal culture and everyday climate in which racial discrimination is condemned, and outsiders are made to feel welcome. Only by fully integrating and utilizing talented immigrants from around the world can Japan remain a global economic leader.

The political process in Japan has overlooked global human rights standards and ICERD obligations in the course of privileging native-born Japanese. In the absence of executive and legislative action, the judiciary has on occasion admirably stepped in. Leaving legislative responsibilities to the judiciary has clear shortcomings, however. The Supreme Court has not ruled on racial discrimination by individuals (as opposed to by the state),³⁵⁷ judicial decisions in Japan have debatable *stare decisis* power, and lower-court decisions like *Bortz and the Otaru Onsen Case* have little precedential value.³⁵⁸ Despite its power of judicial review, the Supreme Court has proven itself to be “deferen[tial] to the other branches of government and conservati[ve] with respect to human rights and social issues.”³⁵⁹ In its post-WWII history, it has ruled in fewer than ten cases that a government policy or law was unconstitutional.³⁶⁰ Furthermore, judicial legislating leaves plaintiffs at the mercy of individual, inconsistent judges,³⁶¹ who have an overall history of ruling unfavorably in human rights

³⁵⁶ World Population Data Sheet 2013, *supra* note 14, at 10; Howard W. French, *Still Wary of Outsiders, Japan Expects Immigration Boom*, N.Y. TIMES, March 14, 2000, available at <http://www.nytimes.com/2000/03/14/world/still-wary-of-outsiders-japan-expects-immigration-boom.html>.

³⁵⁷ On appeal in the *Otaru Onsen Case*, the Sapporo High Court concluded that the judiciary cannot hold the legislative branch liable for not promulgating a law, and it rejected the onsen’s appeal on the lower court’s finding of discrimination. See ARUDOU, JAPANESE ONLY, *supra* note 8, at App. Two.

³⁵⁸ It is debatable how much weight lower courts must give to higher-court decisions in Japan, but the principle of *stare decisis* is not as significant as in common-law countries. See, e.g., Webster, *Excisions*, *supra* note 105, at 454.

³⁵⁹ *Id.*

³⁶⁰ Martin, *supra* note 54, at 168. See also Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 L. & CONTEMP. PROBS. 135, 159 (1990). One of the justifications given for expanding executive powers and limiting judicial independence (as well as suppressing political opposition) is that the former are needed to ensure economic success—as demonstrated, for example, through LDP’s strong post-WWII leadership. *Id.* at 161.

³⁶¹ A view of whites as overly aggressive and incapable of following Japanese cultural norms is evident in judicial opinions. For example, the Supreme Court affirmed a finding of kidnapping by a white father who had joint custody over his daughter, when he took her from her Japanese mother in order to travel with her to Holland to see her ailing grandfather. *Case to be brought for kidnapping for the purpose of transporting the kidnapped person to a foreign country and destruction of objects*, Saikō Saibansho [Sup. Ct.], Mar. 18, 2003, 2002 (A) 805, 57 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 371, translation available at <http://www.courts.go.jp/english/judgments/text/2003.03.18-2002-A-No.805.html>. In its reasoning, the Court criticized the father’s actions using uncharacteristically incensed language—in sharp contrast to its description of the Japanese parent’s “peaceful” rearing environment, in which the daughter was safe and “protected.” *Id.* For a discussion of challenges *gaijin* parents face in custody disputes, see Megan J.

cases. The judiciary is not known for judicial activism, and taking appeals or having decisions overturned is rare since losing face and open conflict are to be avoided.³⁶² Another problem with judicial legislating is that it provides little notice and deterrence, especially because litigation in Japan is “an alienating, politically impotent method of pursuing social change,” as it is “considered shameful to sue someone or even be mentioned in court.”³⁶³ Even if a discrimination victim overcomes these cultural impediments,³⁶⁴ and gets assigned to a progressive judge, proving discrimination is very demanding: “Rational” discrimination is permitted, and a plaintiff must overcome high burden of proof, akin to the beyond-reasonable-doubt standard under common law.³⁶⁵ Even if all these hurdles are overcome, judges are circumscribed in applying international law directly, having to interpret the extent to which applicable domestic law exists, what force to give it, and how to fashion a remedy via domestic provisions.³⁶⁶

In addition to adopting effective domestic legislation,³⁶⁷ the central government should implement national-level integration measures. The goals of any effective law are to prevent, protect, and prosecute. Domestic anti-discrimination law should be broad in scope (and include hate speech), easy to enforce by individuals, and made well known to both the Japanese and to *gaijin*. National-level integration initiatives—so far limited to a few co-existence (as opposed to assimilation) measures, and made without input from *gaijin* themselves³⁶⁸—need to be expanded to enable non-Japanese people to contribute more to Japanese society. For example, free language courses for immigrants of

Reynolds, *It Can Be Done: On Japan Becoming a Successful Signatory to the Hague Convention on the Civil Aspects of International Child Abductions*, 44 GEO. WASH. INT'L L. REV. 367 (2012).

³⁶² ARUDOU, JAPANESE ONLY, *supra* note 8, at 314. For a discussion of how ineffective the Japanese judiciary is, see David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1426 (2011) (having “struck down only eight laws on constitutional grounds” between its founding in 1947 and 2011, the Supreme Court of Japan is known as “the most conservative and cautious in the world” with respect to the exercise of judicial review.”).

³⁶³ Madison, *supra* note 54, at 202-03.

³⁶⁴ Perhaps it is not surprising that Americans litigate more discrimination claims than any other plaintiffs in Japan, despite ranking sixth in the overall number of foreign residents. Webster, *Reconstituting Law*, *supra* note 215, at 216. Thus, judicial legislating is mostly responding to Americans’ concerns.

³⁶⁵ Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT'L L.J. 263, 264 (2004).

³⁶⁶ See, e.g., *Otaru Onsen Case*, *supra* note 9.

³⁶⁷ Japan itself has acknowledged to the U.N. that international treaties bind signatory states and require the adoption of domestic measures, as they do not establish individual rights directly. U.N. Int'l Convention on the Elimination of All Forms of Racial Discrimination, CERD, *Summary Record of the 1444th Meeting*, Japan, 58th Sess., ¶ 5, U.N. DOC. CERD/C/SR.1444 (June 11, 2001).

³⁶⁸ For example, a multi-agency committee was set up in 2012 within the Cabinet Office (an agency handling the day-to-day operations of the Executive branch) to research and recommend national-level policy initiatives on immigration. Arudou Debito, *GOJ Embryonic Policymaking Reboot for “Co-existence with Foreigners”*: Some Good Stuff, but Once Again, Policy About NJ Without Any Input from Them, DEBITO.ORG (June 10, 2012), <http://www.debito.org/?p=10271>.

all ages, social assistance, acculturation classes, and job training should be implemented throughout Japan, with input from *gaijin* to take into account their localized challenges. In addition, the central government must provide local governments with support for implementing such efforts. Enabling immigrants to contribute more meaningfully to Japan's economy and society will offset the costs of such initiatives. Furthermore, the Ministry of Justice's Bureau of Human Affairs needs to be strengthened. An effective independent watch group might prove even more beneficial, by providing victims of discrimination with relevant information, taking the first steps in mediating incidents of discrimination, and also creating a knowledge base for advocacy efforts and improved education. Such steps need to be supported by legislative initiatives that address immigrant needs. For example, Japan should allow dual citizenship, award joint child custody to non-Japanese parents, and provide tenure eligibility to foreign-born professors. Both practical and legislative reforms need to be supported by data collection.³⁶⁹

In addition to such reforms, the Japanese government should build new popular consensus by making public statements in support of equality and immigrant assimilation, deconstructing conservative status quo. Although due to group pressure and respect for authority, Japanese culture is likely to shift in response to changes in governmental policy and domestic laws, regaining harmony will be quickened if the government takes affirmative steps to change popular perceptions of foreigners, and of human rights issues. Ideally, the notion of the in-group will expand, so that equality of all people in Japan will matter, and global shaming will become more meaningful. Equality in Japan would also give Japanese nationals abroad a stronger moral ground for being treated with dignity and equality. Rebuilding consensus would in turn facilitate further governmental action, allowing Japan to maintain (true) social harmony, while fulfilling its international treaty obligations.

2. Local Advocacy by Both the Japanese and Westerners Should Complement National-Level Measures

Japanese reforms must include advocacy by native-born Japanese people, scholars, and government officials, as well as by Westerners in Japan and abroad. Although some local governments³⁷⁰ have been more receptive of nonnatives' needs than the right-wing, nationalistic, central government, such efforts have been limited given the lack of support from the national government, lack of public awareness, and cultural prerogative of consensus-building. The localities and the media should disseminate information about any local efforts so that other local governments can learn from those rare examples. Advocacy by Japanese NGOs and local activists has also been limited, constrained by the view

³⁶⁹ Because discrimination is not a crime, the Japanese government does not track it.

(reinforced by the national government)³⁷¹ of Japan as harmonious, mono-ethnic, and discrimination-free. National legislative and executive reforms will likely create space for increased local advocacy, which will in turn hasten the creation of a new popular consensus.

The few Japanese who currently speak up for human rights tend to focus on the treatment of indigenous groups and Asian minorities.³⁷² The Caucasian cause has been addressed rarely. In addition to Arudou Debito's ongoing efforts to document *gaijin* experiences,³⁷³ a notable short-lived initiative was ISSHO Kikaku, an NGO advocating coexistence and broader multiculturalism in Japan,³⁷⁴ which had investigated various incidents of exclusion from private business establishments, hosted press conferences on the topic, and urged Japanese politicians to address the problem.³⁷⁵ Given the lack of popular support, such efforts have done little to affect Japanese culture. Still, every little step counts—not only to bring about concrete reduction in discriminatory practices, but also to create an environment where such incidents are criticized openly.

Just as the Japanese shy away from expressing opinions that do not follow the norm, Westerners in Japan have also tended not to voice their concerns. Many passively accept discrimination as an innate part of Japanese culture, and do not want to draw further attention to their otherness by acting un-Japanese and speaking up against the norm. Some Westerners even proclaim that anti-*gaijin* discrimination is an inherent right of the Japanese people.³⁷⁶ Furthermore, the support of employers or Japanese spouses helps to blunt the effects of discrimination faced by many *gaijin*. Additionally, racial discrimination in Japan tends not to produce overt violence, which is more likely to prompt its victims to speak up. When *gaijin* do take on the system, however, they can be effective. Arudou Debito, for example, was the force behind the

³⁷⁰ A few localities have provided foreign residents with some civil, political, or social rights, such as free consultation services, and membership on advisory councils to affect local policies. Apichai W. Shipper, *Contesting Foreigners' Rights in Contemporary Japan*, 36 N.C. J. INT'L L. & COM. REG. 505, 508 (2011).

³⁷¹ For example, Yasuhiro Nakasone, the conservative prime minister in the 1980s, referred to Japan as a nation with one ethnicity and one language. Murphy-Shigematsu, *supra* note 295, at 78 n.1; William Wetherall, Nakasone Promotes Pride and Prejudice, 135(8) FAR E. ECON.REV. 86, 86-87 (Feb. 19, 1987), available at http://members.jcom.home.ne.jp/yosha/yr/nationalism/Nakasone_pride_and_prejudice_FEER.html.

³⁷² See, e.g., Torres, *supra* note 349; *NGO & Volunteer Groups*, WEB JAPAN, <http://web-japan.org/links/society/ngo/peace.html> (last visited Aug. 13, 2014).

³⁷³ See generally ARUDOU, JAPANESE ONLY *supra* note 8.

³⁷⁴ ISSHO Kikaku, <http://www.issho.org/index.html> (last visited Aug. 13, 2014).

³⁷⁵ Julian Chapple, *Open for Business, but Not for All Discrimination in Japan Reveals a Need for Greater Awareness of Human Rights*, BURAKU LIBERATION & HUM. RTS. RES. INST. (1997), available at http://blhri.org/blhri_e/news/new115/new11503.html (last visited Aug. 13, 2014).

³⁷⁶ Gregory Clark, *Antiforeigner Discrimination Is a Right for Japanese People*, JAPAN TIMES, Jan. 15, 2009, available at <http://www.japantimes.co.jp/opinion/2009/01/15/commentary/antiforeigner-discrimination-is-a-right-for-japanese-people/#.UtXM7bSmUtE>. See also Arudou Debito, *Gregory Clark Argues in Japan Times That 'Antiforeigner Discrimination is a Right for Japanese People'*, DEBITO.ORG (Jan. 16, 2009), <http://www.debito.org/?p=2128>.

Otaru Onsen Case, which helped advance anti-discrimination lawsuits in Japan.³⁷⁷

Ironically, if *gaijin* accepted the fact that they will always be perceived as foreign, no matter how Japanese they try to act, they would feel liberated to go against the grain and speak up. Those who have children in Japan owe it to them to try to create a more equal society in the future. Cooperating with the Japanese in such efforts is essential, of course. *Gaijin* should educate Japanese people by sharing their experiences of discrimination, and should solicit their support.

3. Educational and Media Initiatives Should Reinforce Advocacy and Governmental Efforts, Helping to Build a New Cultural Consensus

Education is a critical component of changing cultural perceptions, supporting government and advocacy efforts, and building new popular consensus that can support further anti-discrimination efforts. This can be effectuated through official governmental statements, formal education, the media's express countering of the historical view of *gaijin*, and connecting respect for human rights to Japan's continuing economic success and improved international image. To be more effective, such educational efforts can draw support from Confucian values of equality and justice, rather than from Western notions of universal human rights.

Japanese people have very low awareness of human rights and of discrimination,³⁷⁸ and so need to be educated. They tend to believe that there are no minorities and no human rights violations in Japan, and that all outsiders are either tourists or sojourners,³⁷⁹ who will eventually go back home.³⁸⁰ Thus, *gaijin* are always ignored as outsiders, to be treated differently than those who are truly Japanese.³⁸¹ Although some municipalities have made some efforts to counter this image, and to disseminate human rights ideas,³⁸² the involvement of the Ministry of Education can greatly facilitate this process. Japanese students should be taught at a young age about immigration, discrimination, and human rights. In

³⁷⁷ Arudou, Japanese Only, *supra* note 8.

³⁷⁸ Webster, *Bortz v. Suzuki*, *supra* note 3 at 659.

³⁷⁹ For example, Japanese coworkers see Westerners as guests even if they are long-term or permanent residents, or have Japanese families. KOMISAROF, ON THE FRONT LINES, *supra* note 214, at 82-105. Consequently, Japanese tend to give deference to *gaijin* that is reserved for respected guests (*okyakusama atsukai*). Komisarof, AT HOME ABROAD, *supra* note 3, at 11.

³⁸⁰ TESSA MORRIS-SUZUKI, RE-INVENTING JAPAN: TIME, SPACE, NATION 191 (1998).

³⁸¹ Chapple, *supra* note 375.

³⁸² For example, the Tokyo metropolitan government distributes booklets on the eradication of discrimination, and organizes conferences on human rights for educators; and the Kyoto local government disseminates practical information to foreigners, in several languages. DIÈNE REPORT, *supra* note 16, ¶¶ 32-33.

addition, law enforcement officials, attorneys,³⁸³ and judges must be formally trained about Japanese obligations under international treaties, and about human rights. Such scholastic initiatives should include not only curriculum changes, but also events that address multiculturalism and human rights issues.³⁸⁴

The media should be employed to assist the government in educating its populace, bringing about cultural change and instilling greater respect for human rights. Government officials and representatives of immigrant communities could be involved in developing media campaigns to help change conservative attitudes.

4. Foreign Governments and Organizations Must Exert Pressure on Japan

Since the Japanese government does care about its overseas image,³⁸⁵ exerting pressure from outside is critical in rousing reforms. This should be done sooner rather than later, given that once Japan obtains a permanent seat on the U.N. Security Council, it will have even less reason to abide by the treaties it has signed.³⁸⁶ Unfortunately, foreign governments and international organizations have voiced little criticism of Japan, likely due to Japan's important role in the global economic arena, and Westerners' flawed impression of Japan as either modern and Westernized, or Zen-like and peaceful, particularly when contrasted with other countries in the region.

In order to uphold the importance of international treaties and to help their own nationals in Japan, foreign governments need to speak up. All ICERD signatories have an interest in ensuring that Japan follows the Convention in order to strengthen ICERD mandates as international customary law, influential for non-signatory states as well.³⁸⁷ Japan must be publicly shamed for not being a good citizen of the world by merely signing and paying lip service to

³⁸³ Ms. Bortz's lawyer, Hideyo Ogawa, admitted, "Just as I didn't know of the existence of this treaty beforehand, neither did most other lawyers." French, *supra* note 107 (comparing the decision to Rosa Parks' defiance).

³⁸⁴ The first human rights museum in Japan, Liberty Osaka, re-launched in 1995, but it ignores the experience of Caucasians. Osaka Human Rights Museum, LIBERTY OSAKA, <http://www.liberty.or.jp> (last visited Aug. 13, 2014) (*translation available at* https://translate.google.com/translate?sl=ja&tl=en&js=y&prev=_t&hl=en&ie=UTF-8&u=http%3A%2F%2Fwww.liberty.or.jp&edit-text=).

³⁸⁵ ARUDOU, JAPANESE ONLY, *supra* note 8, at 65. For instance, the elimination of the fingerprinting requirement for foreigners (in 1993 for permanent resident aliens, and by 2000 for all aliens) was motivated by Japan's desire to improve its international image, following its ratification of the Universal Declaration of Human Rights, and of the International Refugee Convention and Protocol, in the early 1980s. JOHN LIE, MULTIETHNIC JAPAN 24 (2001). As a result of signing these treaties, however, between 1982 and the end of 2007, Japan recognized a total of only 451 persons as refugees. JAPAN'S 2009 REPORT, *supra* note 13, ¶ 6. Low refugee admission rates are symptomatic of Japan's paying lip service to international norms.

³⁸⁶ See, e.g., Arudou, *Britain Now Supports Japan's Bid*, *supra* note 16.

³⁸⁷ Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 649 (1990).

international conventions.³⁸⁸ Foreign companies doing business with Japan tend to lack sufficient motivation to address these issues, especially as long as their commercial interests are not affected. For example, American companies' business interests are to a certain degree protected by the U.S.-Japan Friendship, Commerce and Navigation Treaty.³⁸⁹ Sadly, the lack of civil rights protections in Japan might make corporate operations there easier. In addition, private enterprises have less influence than public or governmental bodies do. Thus, foreign governments need to step in to ensure Japan's respect for equality. U.N. criticism alone has not proven effective.

a. The United States Should Play a Significant Role in Such Efforts Due to Its Special-Relationship Status

The United States has a special role to play in these efforts, given its post-WWII occupation of Japan, the strength of its economic relationship, and its ongoing military presence. As the most successful American-reconstructed postwar country in Asia, Japan occupies a strategic political and defense position in relation to the United States. It is the second largest, non-North American, import and export U.S. partner,³⁹⁰ and the second-largest source of foreign direct investment in the United States.³⁹¹ In addition to these strong economic ties, approximately 53,000 U.S. troops are stationed in Japan, providing it with a nuclear shield.³⁹² Japan is likely to heed to U.S. pressure since LDP advocates close cooperation with the United States.³⁹³

The United States is well aware of the culture of discrimination in Japan, yet has voiced little criticism. The Department of State has consistently noted how common and open societal discrimination is in Japan. For example, its annual reports have noted the prevalence of "Japanese Only" signs, blaming foreigners for crimes, failing to adopt domestic anti-discrimination legislation, and restricting foreigners' access to housing, education, health care, and employment opportunities.³⁹⁴ Unfortunately, the United States has shied away from a more direct criticism of human rights violations in Japan. The U.S. media denounces Japan only sporadically—mostly in response to Japanese proposals

³⁸⁸ See, e.g., Webster, *View at Thirty*, *supra* note 16, at 247.

³⁸⁹ Treaty of Friendship, Commerce and Navigation, U.S.-Japan, art. VIII, Oct. 30, 1953, 4 U.S.T. 2063, *available at* 1953 WL 44533.

³⁹⁰ *U.S.-Japan Relations*, EMBASSY OF THE UNITED STATES IN JAPAN, <http://aboutusa.japan.usembassy.gov/e/jusa-usj.html> (last visited Aug. 13, 2014).

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ See ENCYC. BRITANNICA, *supra* note 149, at 328.

³⁹⁴ See, e.g., U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, JAPAN (2012), *available at* <http://www.state.gov/documents/organization/204416.pdf>; 2011 COUNTRY REPORT, *supra* note 28.

that do not sit well with U.S. policies heavily discussed at the moment,³⁹⁵ or when U.S. celebrities speak up against Japan's brutal traditions, such as the annual dolphin hunt.³⁹⁶ The U.S. government has traditionally kept quiet, worrying about allegedly imperiling its special relationship with Japan.³⁹⁷ The rare instances of its express condemnation are in response to Japan's valorization of its militaristic past.³⁹⁸

“The United States publicly asserts that it is a strong advocate for and supporter of higher global standards for individual rights throughout the world.”³⁹⁹ To maintain its own credibility on human rights issues, the United States should openly disapprove of Japan's failure to follow the ICERD. Moreover, the United States should not support Japan's application to be a permanent member on the U.N. Security Council until it honors its treaty promises.⁴⁰⁰ Through a confluence of domestic and international efforts, Japan may be able to continue being an economic power, while gaining international respect for its humaneness.

IV. CONCLUSION

Japan is full of contradictions, inconsistencies, and dichotomies—some superficial and fleeting, and others fundamental and long-standing. Whiteness signifies privileged and admired status, despite being a marker of inferiority and of permanent outsider position that excuses discrimination. Some judges legislate international law into domestic obligations, despite calling it mere interpretive guidelines and showing great deference to other branches of consensus-driven government. Japan ratifies international laws, yet fails to acknowledge that they

³⁹⁵ See, e.g., Editorial, *Japan's Dangerous Anachronism*, N.Y. TIMES, Dec. 16, 2013, available at http://www.nytimes.com/2013/12/16/opinion/japans-dangerous-anachronism.html?_r=0 (criticizing the breath of Japan's government secrecy laws).

³⁹⁶ Associated Press, *Celebrities Want to Tie Trade Pact to Dolphin Hunt*, WASH. TIMES, Feb. 5, 2014, available at <http://www.washingtontimes.com/news/2014/feb/5/celebrities-want-to-tie-trade-pact-to-dolphin-hunt/>.

³⁹⁷ See Marie Conte-Helm, ‘SPECIAL RELATIONSHIPS’? - *The United States, Great Britain and Japan*, DAIWA FOUNDATION (Seminar Series 2009), <http://www.dajf.org.uk/annual-seminar/%E2%80%98special-relationships%E2%80%99-the-united-states-great-britain-and-japan> (last visited Aug. 13, 2014).

³⁹⁸ See George Nishiyama, *Abe Visit to Controversial Japanese Shrine Draws Rare U.S. Criticism*, WALL ST. J., Dec. 26, 2013, <http://online.wsj.com/news/articles/SB10001424052702304483804579281103015121712>.

³⁹⁹ Jennifer R. White, Note, *IEEPA's Override Authority: Potential for a Violation of the Geneva Conventions' Right to Access for Humanitarian Organizations?*, 104 MICH. L. REV. 2053 (2006).

⁴⁰⁰ While making a speech in Japan, former Secretary of State Condoleezza Rice noted, “the United States unambiguously supports a permanent seat for Japan on the United Nations Security Council.” Joel Brinkley, *As Nations Lobby to Join Security Council, the U.S. Resists Giving Them Veto Power*, N.Y. TIMES, May 15, 2005, <http://www.nytimes.com/2005/05/15/politics/15diplo.html?pagewanted=all>.

apply domestically. The government demands full immigrant assimilation in order to naturalize, yet the culture rejects all those who appear foreign as perpetual outsiders. Japan prizes Western advances, yet avoids its cultural influences. Japan considers itself to be the leader of the Asian world, yet perceives itself Western-like. Equality is constitutionally mandated, yet widespread discrimination is tolerated. Harmony is valorized yet it is superficial, limited to those who fit the closely circumscribed Japanese norm, and achieved through suppression of difference. Confucian ideals are relied upon to enable racism, while Confucian core beliefs in human dignity and equality get overlooked.

Equality, fortunately, is consistent with both democracy and Confucianism. Born with the ability to perceive differences, we have a drive to categorize in order to more efficiently make sense of the world,⁴⁰¹ and we instinctively prefer those who are similar to us.⁴⁰² When these predispositions get combined with Japan's unique historical and cultural context, it is not surprising that the modern Japanese focus on differences and show reflexive preference for members of their in-group, excluding all others as strangers. What can—and must—be changed, however, is the absent-minded acceptance and propagation of stereotypes that are negative, reductionist, and offensive. A true democracy demands equality.⁴⁰³

Acknowledging and discussing discrimination is the first step needed to affect change. Although Western scholars can offer a good starting point, greater collaboration with Japanese academics and activists is needed to spread the message of equality beyond just a few classrooms and law reviews. It is also critical for Asian scholars to address how Confucianism fits within their modern socio-economic pressures and an evolving sense of human rights, taking into account their specific cultural context and traditions. Continuing to affect actions, words, and the imagination of the Japanese people, “Confucianism can be made to stand for many different things.”⁴⁰⁴ As much as it was employed by the political system in feudal Japan to support inequality and unquestionable loyalty to one's group, its ideology is dichotomous and flexible enough to support an altruistic approach towards others, filled with respect and mutuality.

Given how strong the resistance to change is in Japan, reforms must be multi-faceted, spurred by the victims, propagators, enablers, and observers.

⁴⁰¹ Charles T. Snowdon, *A Naturalistic View of Categorical Perception*, in *CATEGORICAL PERCEPTION: THE GROUNDWORK OF COGNITION* 332, 336 (Stevan Harnad ed., 1987); Nicole Branan, *Are Our Brains Wired for Categorization?*, *SCI. AM.*, Jan. 8, 2009, <http://www.scientificamerican.com/article/wired-for-categorization/>.

⁴⁰² See Brewer, *supra* note 49; see also Aberson, *supra* note 49.

⁴⁰³ Webster, *Bortz v. Suzuki*, *supra* note 3 at 656-57.

⁴⁰⁴ CHAIHARK HAHM, *Law, Culture, and the Politics of Confucianism*, 16 *COLUM. J. ASIAN L.* 253, 267 (2003).

Gaijin themselves must acknowledge racism instead of tolerating it,⁴⁰⁵ and those in positions of power with Western governments or business elites must speak up and exert pressure on Japan to change its policies. The Japanese need to include whites more meaningfully at work and in their communities, and *gaijin* who make Japan their home should make an effort to integrate into their local communities. Critically, *gaijin* should share their experiences of discrimination with the locals, while being sensitive to the Japanese preference for non-confrontational interactions. Both groups must stop seeing the cultural differences between them as insurmountable. More fundamentally, both need to stop focusing on culturally constructed hierarchies of power.

My hope is that such efforts will lead not only to a greater respect for international laws and for those who do not fit the norm in Japan, but also to a broader CRT perspective, and a more nuanced understanding of the experience of otherness in a transnational and comparative context. Expanding the notion of otherness protected by anti-discrimination laws—in both Japan and in the United States⁴⁰⁶—to include appearance, as well as cultural and ethnic traits, is essential because the basis for inequality is often grounded in markers of otherness that go beyond mere color constructs,⁴⁰⁷ and beyond Western-centric notions of homogeneous white privilege. Some of the observations made here might also be relevant to race conditions in China and South Korea, both of which have been heavily influenced by Confucian ideology, have poor human rights track records,⁴⁰⁸ and are significant global economic players.

The experience of whites in Japan further dispels racial homogeneity myths, and exposes notions of racism as white-biased in themselves. Just as the presence of the Ainu, Okinawans, and the burakumin dispels the Japanese homogeneity rhetoric, the presence of Caucasians in Japan dispels the notion of whites as privileged. The white norm is based on an idealized Caucasian male who is young, healthy, and Christian.⁴⁰⁹ I propose to add to that definition that he must also be in a historical and cultural context where whiteness is locally constructed into privileged class. In essence, our understanding of discrimination and of disadvantage should be grounded on otherness, which is based on time- and place-specific definition of the privileged norm imbued with social and cultural capital. My goal is to help deconstruct the white-centric view of racism—always contextualized and narrated by privileged Caucasians—which reaffirms the exclusionary effect of white privilege, while disadvantaging those

⁴⁰⁵ See Ander, *What You Need to Know About Racism in Japan*, JAPAN TALK (Oct. 10, 2012), <http://www.japan-talk.com/jt/new/racism-in-japan>.

⁴⁰⁶ See, e.g., Perea, *supra* note 70; Myslinska, *Unbearable Whiteness*, *supra* note 64.

⁴⁰⁷ For similar arguments about why “ethnic traits” should be included in “national origin” protections under employment equality provisions of the U.S. Civil Rights Act, see Perea, *supra* note 70.

⁴⁰⁸ For a discussion of some commonalities among East Asian nations’ jurisprudence, see Choi, *supra* note 52.

⁴⁰⁹ See TATUM, *supra* note 31, at 22.

whites who lack access to it. Through further complicating race theory, the rhetoric of global white power becomes significantly challenged.

The Japanese culture of racism contradicts Western racial thinking, and does not conform to the theoretical underpinnings that ground existing literature on race. The racialization of whites as the other in the “Mr. Gaijin” mask is a critical moment where the privileged white male theorized in the Western racial discourse becomes unstable, complicating CRT’s theoretical approach to whiteness. Expanding anti-discrimination protections, as well as the underlying theoretical discourse of equality, to all those who are not in positions of privilege should prompt all groups to reevaluate their unique placement within the hierarchy of power—which is always localized historically, culturally, and geographically— and create space for new coalition building. It is time to move beyond old race-based constructs, to better reflect today’s reality, and to make way for real equality. As Confucius said, “He who by reanimating the Old can gain knowledge of the New is indeed fit to be called a teacher.”⁴¹⁰ To ease this path of learning and transformation in Japan, “[cleaned] of archaic feudal overtones, Confucius’ teachings can still be a guidepost for the 21st century”⁴¹¹

⁴¹⁰ CONFUCIUS & ARTHUR WALEY, 173 THE ANALECTS OF CONFUCIUS 90 (Arthur Waley ed., 1938).

⁴¹¹ Dallmayr, *supra* note 42, at 210.

