REEXAMINING SEPARATION: THE CONSTRUCTION OF SEPARATION OF RELIGION AND STATE IN POST-WAR JAPAN

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ABSTRACT

This article provides a comprehensive doctrinal analysis and critique of the Japanese Supreme Court's treatment of separation of religion and the state in post-war Japan. After placing the development of the doctrine in its proper historical and political context, the article argues that the Court's construction of the doctrine threatens to undermine religious liberty and equality in Japan. The article then considers the various socio-political forces underlying the Court's construction of the doctrine, including the role that the Court sees itself playing in the contest over separation of religion and state in Japan. The article concludes by arguing that, through the lens of the Japanese experience, one can draw normative lessons about the dangers of religious identity exclusion and the inappropriateness of relying upon one constitutional standard—be it the Japanese Court's purpose and effect test, the *Lemon* test, or the O'Connor endorsement test—in interpreting the constitutional principle of separation of religion and the state.

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Articles 20 and 89 of the post-war Japanese Constitution require separation of religion and state.[1] However, in the 57-year history of the Constitution, the Supreme Court of Japan has rendered only seven decisions dealing with separation of religion and state and in six of those decisions the Court upheld governmental endorsements of Shinto religious practices. In the first of these decisions, the Court held that a municipality did not violate Article 20 or 89 of the Constitution when it sponsored a Shinto groundbreaking ceremony before construction of a school gym-

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1. Articles 20 and 89 of the Japanese Constitution read as follows:

Article 20

(1) Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.
(2) No person shall be compelled to take part in any religious act, celebration, rite or practice.
(3) The State and its organs shall refrain from religious education or any other religious activity. KENPŌ, art. 20.

Article 89

No public money or other property shall be expended or appropriated for the use, benefit, or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority. KENPŌ, art. 89.

nasium.[2] The Court relied on its own adaptation of the *Lemon v. Kurtzman*[3] "purpose and effect test" and found that the groundbreaking ceremony was constitutional because it had neither the purpose nor the effect of promoting religion. Liberal Japanese constitutional law scholars roundly criticized the "purpose and effect test" as gutting Articles 20 and 89 of their meaning. They charged that the Court was intent on gradually redefining religion to exclude Shinto ritual, thus clearing the way for governmental use of Shinto symbolism in order to propagate nationalism. On the other side, conservatives applauded the decision as recognizing the centrality of Shinto ritual in Japanese culture, and the inappropriateness of imposing Western concepts of separation of religion and state on Japanese society. In the next two decisions involving Articles 20 and 89, the Court again upheld actions by the government involving direct state endorsement of Shinto religious practices, further fueling the concerns of Japanese separationists and emboldening conservatives seeking to reassert Shinto as the national religion of Japan.

Then, in a decision heralded as "epoch-making" by the Japanese press,[4] the Court found for the first time on April 2, 1997, that a governmental act violated Articles 20 and 89 of the postwar Constitution. The Court relied upon the same "purpose and effect test" that it had developed in the Tsu city groundbreaking case to hold that Ehime Prefecture's donations of public funds to Yasukuni Shrine, the preeminent symbol of the Shinto religion in Japan, were unconstitutional.[5] The *Ehime* decision seemed to suggest that there was at least some limit to the extent of governmental support of Shinto that the Court would tolerate.

Nevertheless, two years later in 1999, the Court upheld governmental funding of an organization that advocates official worship at Yasukuni Shrine and subsidizes trips by "war-bereaved families" to worship there. In 2002, in two separate cases, the Court similarly upheld the use of public funds by prefectural governors to attend Shinto ceremonies related to the ascension of Emperor Akihito to the throne.

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2. Sekiguchi v. Kadonaga, 31-34 MINSHU 533 (Sup. Ct., July 13, 1977) (Japan) [hereinafter Tsu] (translated and on file with Professor Frank Upham, New York University School of Law) (page numbers refer to translated version).

3. *Lemon*, 403 U.S. 602 (1971).

4. "*Tamagushi-ryou Shishutsu wa Iken*," MAINICHI SHINBUN, Apr. 3, 1997, at 1; *Tatakai 15 Nen Hanketsu wa Daiippou*, ASAHI SHINBUNSHIMBUN, Apr. 3, 1997, at 1; *Sengo Shori to Kanren-duke*, ASAHI SHIMBUN, Apr. 3, 1997, at 33; Saigyakuten, *Kenpou no Genten Kakunin*, ASAHI SHIMBUN, Apr. 3, 1997, at 34.

5. Anzai v. Shiraishi, 51-4 MINSHŪ 1673, 1601 HANREI JIHŌ 47, 940 HANREI TAIMUZU 98 (Sup. Ct., Apr. 2, 1997) (Japan) [hereinafter Ehime] (translated by and on file with author, Japanese version *available at* http://www.courts.go.jp) (page numbers herein refer to translated version).

The result of these conflicting decisions is a doctrine in seeming disarray, with lower courts reaching widely varying decisions on substantially the same questions. For example, on February 27, 2004, the Osaka District Court rejected a case challenging Prime Minister Junichiro Koizumi's official visits to Yasukuni Shrine, holding: "While we realize that the plaintiffs were exasperated because of their religious beliefs, it cannot be said their specific rights accorded under the law were in any way violated." Less than two months later on April 7, 2004, however, the Fukuoka District Court held that these very same visits constituted "religious activities" and were therefore unconstitutional.

This article attempts to decipher the doctrine of separation of religion and state in Japan. As hinted above, the proper relationship between the State and religion is highly contested in Japan, as it is in many societies including the United States. Equally as contested is the definition of religion itself. Much of this debate concerns whether Shinto, the indigenous "religion" of Japan, can properly be called a religion at all, and whether it can ever be separated from Japanese culture. Moreover, due to the historical role of State Shinto in legitimizing Japanese militarism during World War Two, the contest over the proper role between Shinto and State is often framed in the language of nationalism.

Before exploring the Japanese Supreme Court's treatment of Articles 20 and 89, this article thus places the discussion in a historical context (Part I) and outlines the contemporary political framework in which separation of religion and state is contested in Japan (Part II). The article then outlines the Japanese Supreme Court's decisions relating to separation of religion and state with an eye toward developing a comprehensive overview of the Court's jurisprudence in the area (Part III). With this foundation in place, the article argues that the Court's decisions reconstruct Article 20 and 89 in a manner that undermines their purpose, and threatens religious liberty and equality in Japan (Part IV). The article then considers the various socio-political forces underlying the Court's reconstruction of the Articles, including the role that the Court sees itself playing in the contest over separation of religion and state in Japan (Part V). Finally, the Conclusion argues that, by looking at the issue of separation through the lens of the Japanese experience, one can draw normative lessons about the dangers of religious identity exclusion and the value in relying upon more than one theoretical justification in interpreting the constitutional principle of separation of religion and state.

PART I: HISTORICAL BACKGROUND

Articles 20 and 89 cannot be properly understood or interpreted without a basic knowledge of the critical role that the Shinto religion played in justifying and fostering Japanese aggression in Asia and the Pacific during World War Two.

Beginning during the Meiji Period (1868-1912) and up until the end of World War Two, the Japanese government co-opted "Shrine Shinto," the indigenous religion of Japan, to create a national civil religion known as "State Shinto." The government bureaucracy organized Shinto shrines according to a national hierarchy and by 1930 had firmly established "State Shinto" as the national "supra-religion" of Japan.[6] This "supra-religion" was in turn used to promote Japanese nationalism, to justify military aggression in Asia and to mobilize the populace during World War II.

At the top of the national hierarchy of Shrines was a shrine near Tokyo called Yasukuni Shrine. The Ministry of War used Yasukuni Shrine, along with its affiliated "Nation Protecting Shrines" in each prefecture, to deify fallen soldiers as Shinto gods during World War Two.[7] Japanese citizens, beginning as school children, were taught to revere the Emperor as a manifest deity, to believe that the Japanese people were superior to other races, to support the "sacred" war effort and to worship the "glorious war dead" at Yasukuni. Soldiers were sent to battle with the assurance that, should they die serving their country, they too would be enshrined as national protecting deities at Yasukuni.[8] Kamikaze pilots would begin their suicide missions with the farewell, "we'll meet again under the cherry blossoms at Yasukuni."[9]

Although the pre-war Constitution nominally guaranteed religious freedom, severe religious persecutions were common-

6. *See* HELEN HARDACRE, SHINTO AND THE STATE 1868-1988 (1989); KÔICHI YOKOTA, *The Separation of Religion and State*, *in* JAPANESE CONSTITUTIONAL LAW 205, 210 (Percy Luney & Kazuyuki Takahashi eds., 1993).

7. SABURÔ IENAGA, THE PACIFIC WAR, 1931-1945: A CRITICAL PERSPECTIVE ON JAPAN'S ROLE IN WORLD WAR II AND THE JAPANESE 1931-1945 38 (1978).

8. *See id.* ch. 3. Enshrinements continued after World War Two. In 1945, the Japanese Government, with the permission of the Occupation Authorities, held a mass enshrinement for all the Japanese war dead not yet enshrined from World War Two. PETER J. HERZOG, JAPAN'S PSEUDO-DEMOCRACY 105 (1993). Thereafter, the Japanese government began enshrining the war dead individually by name. Nobuhiko Takizawa, *Religion and the State in Japan*, 30 J. CHURCH & ST. 89, 93 (1988); K. Peter Takayama, *Enshrinement and Persistency of Japanese Religion*, 32 J. CHURCH & ST. 527, 536 (1990). As of 1985, over 2,464,151 war dead had been enshrined at Yasukuni as national deities. Takizawa, *supra* note 8, at 93. [wu jie, Is this right? Shouldn't it be id?]

9. Takayama, *supra* note 8, at 331.

place.[10] According to the teachings of State Shinto, a Japanese individual was born Shinto and the duty of every Japanese was to worship the Emperor as a god and to follow his dictates. Shinto practices were thus defined as "non-religious" and the government could compel attendance at Shinto ceremonies and worship of the emperor, and simultaneously claim not to violate religious freedom. Under the same theory, Japanese people were required to provide financial support for Shinto shrines. Christians and Buddhists faced imprisonment and in some cases execution if they refused to recognize the Emperor's superiority to Jesus or Buddha.

After the war, American occupation authorities regarded the separation of religion and state as essential in preventing the return of Japanese militarism and in ensuring religious liberty in Japan.[11] Soon after the commencement of the occupation, the Supreme Commander for the Allied Powers (SCAP) issued the "Shinto Directive" disestablishing State Shinto. The Shinto Directive prohibited "governmental sponsorship, support, perpetuation, control, and dissemination of State Shinto." Its main objectives included: 1) freeing Japanese people from direct or indirect compulsion to believe in or profess to believe in any religion designated by state, 2) lifting the burden of compulsory financial support for Shinto, 3) preventing the use or perversion of Shinto for militaristic and nationalistic purposes, and 4) promoting democratic values.[12]

SCAP also insisted that, on January 1, 1946, the Japanese Emperor issue a rescript renouncing his divinity.[13] The Rescript read:

> The ties between Us and Our people have always stood upon mutual trust and affection. They do not depend upon mere legends and myths. They are not predicated on the false conception that the Emperor is divine, and that the Japanese people are superior to other races and are fated to rule the world.

In September 1946, Yasukuni Shrine and its branches were reestablished as private religious institutions.[14] Finally, SCAP included the principle of separation of religion and state in the

10. Article 28 of the Meiji Constitution read as follows: "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief." MEIJI KENPŌ, art. 28.

11. KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 104 (1991).

12. WILLIAM P. WOODARD, THE ALLIED OCCUPATION OF JAPAN 1945-1952 AND JAPANESE RELIGIONS, 54-74, 295 (1972).

13. *Id.* at 256-68.

14. Takizawa, *supra* note 8, at 93.

draft of the Japanese Constitution, and the principle was eventually adopted by the Japanese as Articles 20 and 89.[15]

During the limited debate in the Japanese National Diet[16] over ratification of Articles 20 and 89, Diet members pressed government representatives to admit that Shinto shrines, which the government had previously classified as non-religious, were indeed religious institutions. Rather than focus on why the principle of separation of religion and state was included in the new Constitution, Japanese Diet members tried instead to force the government to recognize the history of State Shinto as an agent of oppression and to delineate the future relationship between Shinto and the State, and expressed concern over leaving the definition of religion up to the courts.[17] This concern likely emanated from the government's past conduct in manipulating the definition of religion to exempt State Shinto. Indeed, at least some members of the Diet foresaw a problem with the principle of separation of religion and state as it was written in the new Japanese Constitution. Diet member Matsumura Shinichiro warned:

> There is a potential danger that the state will distort the definition of religion once again, claim that shrines are not religious institutions, and force it on the people.
> As long as there is no objective set of criteria by which a given belief system could be established as a religion, the new clause of freedom of religion would ultimately not be able to eliminate the possibility of the government calling shrines nonreligious institutions again and forcing people to worship there.[18]
> I am afraid, from now on, we will have no choice but to depend on the Court to decide what is a religion.[19]

PART II: THE POLITICIZATION OF SEPARATION OF RELIGION AND STATE IN JAPAN

There is considerable disagreement in Japanese society over the appropriate role of religion in the national landscape and the proper relationship between Shinto and the State. At the center

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15. *Id.* at 126. There is considerable historical disagreement over whether Occupation Authorities essentially imposed the Japanese Constitution or whether it was actually the end-product of extensive debate and collaboration within and across national lines. For a discussion of this issue, see, e.g. Lynn Parisi, *Lessons on the Japanese Constitution*, JAPAN DIGEST (November 2002) (*available at* http://www.indiana.edu/~japan/Digests/const.html#5).

16. The Diet is the Japanese Parliament. The Diet is composed of the House of Councilors (*Sangiin*) and the House of Representatives (*Shuugiin*).

17. Takizawa, *supra* note 8, at 136-48.

18. *Id.* at 140.

19. *Id.* at 144.

of this debate is Yasukuni Shrine, which remains the preeminent symbol of State Shinto in Japan. While Yasukuni Shrine lost its privilege as a special governmental shrine during the Occupation and was designated as a private "religious organization" under the Religious Corporation Law in 1951,[20] it has remained controversial. Yasukuni has been the focus of conservative efforts to revive nationalism in postwar Japan, and, consequently, plays a central role in the contest over separation of religion and state.

Immediately after the end of the Occupation, conservatives began to argue for renewed state patronage of Yasukuni and the revival of other symbols of pre-war nationalism such as the *hi-no-maru* (the Rising Sun flag) and *Kimigayo* (a national anthem praising the Emperor).[21] In 1953, the government announced that executed Japanese war criminals would be renamed "persons killed by judicial action" and henceforth treated like other war dead.[22] In 1959, the Ministry of Health and Welfare submitted a list of class B and class C war criminals to be enshrined at Yasukuni.[23] In 1956, the Association of War Bereaved Families (AWBF) began circulating a petition for the nationalization of Yasukuni.[24] In 1969, conservative LDP members introduced a bill to do exactly that. Numerous right-wing organizations, the AWBF, and Shinto authorities backed the bill. One of the bill's biggest supporters, chairman of the Association of War Bereaved Families and future Prime Minister Yasuhiro Nakasone, explained:

> Of course, the Yasukuni Shrine must be separate from the Shinto religion. In order that Yasukuni be separate from the Shinto religion, it should be nationalized. We should resurrect the symbol of Yasukuni as the Japanese spiritual ground where we can pay our respects to those who died for the sake of our country. This is done through commemoration and enshrinement of their spirits. By placing the Shrine under a special legal body, it would thus come under the umbrella of the state. As long as the state exists in Japan, we should have a place where foreign dignitaries can formally attend worship with the Emperor of Japan. Otherwise, Japan cannot be called a state.[25]

The bill was opposed by a vocal coalition of Christians, Buddhists, the Union of New Religions, labor unions, and opposition

20. DAVID M. O'BRIEN & YASUO OKOSHI, TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN 53 (1996).

21. PAUL J. BAILEY, POSTWAR JAPAN: 1945 TO THE PRESENT 120-21 (1996).

22. *Id.* at 93.

23. HERZOG, *supra* note 8, at 105.

24. Takizawa, *supra* note 8, at 90.

25. Quoted in Takayama, *supra* note 8, at 534.

political parties.[26] By 1966, the AWBF had collected signatures of over 22 million supporters of the bill to nationalize Yasukuni Shrine. In contrast, opposition groups were only able to collect 3.27 million signatures opposing nationalization. Nevertheless, the bill was defeated each time the LDP submitted it to the Diet.[27]

Following the bill's fifth defeat, LDP conservatives and the AWBF shifted their strategy and began calling for a return to the pre-war practice of official worship at Yasukuni by the Emperor and the Prime Minister. Conservative LDP members created a new coalition called the Association for Honoring the Glorious War Dead which began to collect signatures and exert pressure on prime ministers to officially worship at Yasukuni.[28] Beginning in 1975, Prime Ministers began making "unofficial" visits to worship at Yasukuni on August 15, the Day for Mourning and Honoring the War Dead. In 1978, fourteen Class-A war criminals, including General Hideki Tojo, Supreme Commander of the Imperial Army, were enshrined at Yasukuni at the urging of the Ministry of Health and Welfare as "martyrs in the Showa Era."[29]

The issue of visits to Yasukuni became highly contentious every August 15 with conservatives pressing for official visits and liberals denouncing even unofficial visits as a return to pre-war nationalism.[30] In 1984, the LDP formally announced that its "subcommittee to study the Yasukuni question" had concluded that official worship at Yasukuni was constitutional. Then, on August 15, 1985, Prime Minister Nakasone, former naval officer, defense chief, and AWBF president, made an official visit to Yasukuni with his entire cabinet.[31]

Domestic and international criticism of the visit was intense.[32] Nakasone responded to domestic criticism with the reply that the "overwhelming majority of Japanese people will support

26. Doff McElhinney, Tradition and Seiko Bunri: The Separation of Religion and State in Postwar Japan 80 (1990) (unpublished A.B. thesis, Harvard University) (on file with Professor Frank Upham, New York University School of Law); HERZOG, *supra* note 8, at 107.

27. O'BRIEN, *supra* note 20, at 163-163.

28. By 1984, the association had collected 10 million signatures and supporting resolutions from 37 prefectural assemblies and 1,548 local governments. *Id.* at 166, 168.

29. Takizawa, *supra* note 8, at 930. In the Japanese calendar, periods (also know as "eras") correspond with the reign of different emperors. The Showa period (1926-1989) followed the Taisho period (1912-1926) which followed the Meiji period (1868-1912). The Showa period corresponds to the reign of Emperor Hirohito, encompasses World War Two, and is the longest period in Japanese history.

30. O'BRIEN, *supra* note 20, at 163-163.at 104.

31. *Id.* at 167, 169.

32. *See, e.g.*, Takizawa, *supra* note 8, at 96.

my official visit to the shrine."[33] However, he was unprepared for the torrent of international outrage. The People's Republic of China denounced the visit to Yasukuni, a place "dedicated to Class-A war criminals," as an outrage and an affront to the Chinese people.[34] Large demonstrations, including the burning of the Japanese flag, took place in Beijing and other large cities.[35] Anger in Korea was also widespread. The official Korean newspaper issued a statement opposing the "new movement by the Japanese government, which hopes to justify the war of aggression against the Asian nations" and announced "Korea and China should raise a voice of opposition."[36] The official Soviet news agency reported, "The policy of the present Japanese administration indicates the strengthening of a militaristic trend."[37] The United States government was silent, but rejected the request that then Defense Secretary Casper Weinburger visit Yasukuni on his upcoming visit to Japan. Chinese opposition to the visit was so strong, however, that the Japanese Minister of Home Affairs went to China to discuss the issue. By August 1986, China and the rest of Asia had prevailed: Nakasone announced on August 14 that he would not visit Yasukuni the next day, even privately, in deference to the wishes of the people of China, Korea and Southeast Asia.[38]

While cabinet members continued to make official visits to Yasukuni, Nakasone's retreat led to the stagnation of the issue until 1996—when it was temporarily revived when then Prime Minister Hashimoto, also a former AWBF president, visited Yasukuni on his birthday.[39] However, current Prime Minister Koizumi has recently brought this controversy back to the forefront.[40] Koizumi has repeatedly visited Yasukuni in his "official capacity," and these visits have been the subject of no less than

33. McElhinney, *supra* note 26, at 87. Contrary to Nakasone's assertion, an ASAHI SHIMBUN survey showed that while 60 percent of those over age fifty supported Nakasone's visit, only 35 percent of those under 35 did so. O'BRIEN, *supra* note 20, at 170.

34. McElhinney, *supra* note 26, at 90.

35. O'BRIEN, *supra* note 20, at 170.

36. McElhinney, *supra* note 26, at 88. The Korean Government was similarly enraged in 1982 when the Ministry of Education changed the word in textbooks used to describe Japan's military invasion of Korea and China from *shinryaku* (invasion) to *shinshutsu* (advancement). *Id.*

37. *Id.* at 88.

38. *Id.* at 90.

39. Seifu, *Reisei ni Uketome*, YOMIURI SHIMBUM, Apr. 3, 1997, at 3. Hashimoto had previously made several official visits to Yasukuni in his capacity as Minister of Finance. *Id.* at 94. While Minister of Finance, Hashimoto stated that it is a "delicate issue of definition" as to whether Japan committed acts of aggression against Asian neighbors during World War Two. *Id.*

40. *See, Putting Yasukuni in its Place*, JAPAN TIMES, Apr. 9, 2004, *available at* http://www.japatimes.co.jp/cgibin/getarticle.pl5?ed20040409a1.htm.

six lower court challenges. Koizumi's visits have thus rekindled a national debate on the proper role of Yasukuni, and by extension Shinto, in the political landscape.

The intensity of this debate is clear from the invective coming from both sides of the national dialogue. For example, when Buddhist priest Kenji Anzai filed suit in the *Ehime* case challenging state patronage of Yasukuni Shrine, he received threatening phone calls telling him to leave Japan and denouncing him as a *hikokumin* (an insult meaning *traitor*, used to describe unpatriotic Japanese during World War Two). During the trial, he was followed to court by right wing activists in trucks blaring slogans at him, surrounded and intimidated by young men dressed in military clothes, and glared at by hostile spectators who packed the courtroom.[41] The stridency of the right comes from the belief that Yasukuni is *the* spiritual symbol of Japan as a nation and a monument to those who sacrificed their lives for their country. To Japanese conservatives, barring official support of Yasukuni would thus be the equivalent of barring governmental support to Arlington National Cemetery.

Those on the left, however, see the re-elevation of Yasukuni as a national symbol as the harbinger of renewed militarism. This view is encapsulated by an editorial in the Japan Times regarding visits by Prime Minister Koizumi to Yasukuni:

> Honoring the war dead, of course, is a natural act of mourning. Nobody, including Mr. Koizumi, can be criticized for expressing such a genuine feeling. But Mr. Koizumi is not a private citizen; he is the prime minister of Japan. Inevitably, what he says or does in public assumes official meaning. So he needs to be very careful about visiting a religious facility, particularly one that used to serve as a moral beacon for Japanese militarism. History shows that politics and religion make a dangerous mix. In Japan, from the Meiji Era (beginning in 1868) to the end of World War II, Shinto helped form the national character — with tragic consequences. That is why the postwar Constitution stipulates that "the state and its organs shall refrain from religious education or any other religious activity."[42]

The Japanese Supreme Court's treatment of separation of religion and state must be understood in this highly politicized context.

41. THE ASAHI SHIMBUN, Apr. 3, 1997, at 33.
42. *Putting Yasukuni in its Place*, *supra* note 40.

PART III
THE JURISPRUDENCE OF SEPARATION OF RELIGION AND THE STATE IN JAPAN

Perhaps not surprisingly, the Japanese Supreme Court has been reluctant to enter into the fray. In the almost 60-year history of constitutional separation of religion and state in Japan, the Supreme Court has rendered only seven decisions dealing with the issue. Since these decisions are mostly inaccessible to the non-Japanese reader, and in order to provide the proper flavor of the way in which the issue of separation of religion and state has been presented in the courts, this section discusses the facts and reasoning of those cases in detail. The larger goal of this section is to provide the reader with a comprehensive overview of the Supreme Court's jurisprudence relating to separation of religion and state.

THE TSU CITY GROUNDBREAKING CASE

The seminal decision of the Japanese Supreme Court regarding state support of religion was handed down on July 13, 1977, in the *Tsu City Groundbreaking Case* (hereinafter *Tsu*).[43] Tsu City is in the Mie prefecture of Honshu where Ise Shrine is located. In 1965, Tsu City sponsored a Shinto-style groundbreaking ceremony, or *jichinsai*, before the construction of a school gymnasium. The city arranged and paid for the ceremony. It also gave four Shinto priests an honorarium of 4,000 yen to perform the ceremony.[44] According to the teachings of Shinto, the purpose of a groundbreaking ceremony is to pacify the earth *kami* (gods) and thus ensure safe construction. The Tsu City groundbreaking ceremony strictly followed, with one exception, the order of State Shinto groundbreaking ceremonies as set by the Meiji Home Ministry in 1907.[45]

Over one hundred local government officials attended the ceremony.[46] Seiichi Sekiguchi, a city official and member of the Communist Party, brought suit against the Mayor of Tsu City. Sekiguchi demanded that the Shinto priest and the construction company reimburse the city for the expense of the ceremony, as government support of the ceremony violated Article 20(3) of the Constitution.[47] He also sought damages of $250.00 for being

43. Tsu, *supra* note 2, at 1.

44. O'BRIEN, *supra* note 20, at 84.

45. Sekiguchi v. Kadonaga, 22-5 GYÔSAISHÛ 680 (Nagoya High Ct., May 14, 1971) (App. Ct.) (Japan).

46. O'BRIEN, *supra* note 20, at 84.

47. Article 20(3) reads: "The State and its organs will not engage in any religious education or any other religious activity."

forced to attend the ceremony in violation of his free exercise rights.[48]

Reversing the decision of the Nagoya High Court, the Supreme Court held that the groundbreaking ceremony was not a "religious activity" prohibited by Article 20(3). While the Court admitted that the form of the ceremony was religious and that the Shinto priest conducted the ceremony out of sincere religious conviction, the Court found that the religious significance of the groundbreaking ceremony to the average person had weakened over time to the point where it was now merely a ritual formality devoid of "deep" religious significance.[49] In reaching this conclusion, the Court relied entirely on (1) the Court's assertion that the ceremony was commonplace, and thus "customary," in the construction industry and (2) the Court's conjecture that most people would not consider the ceremony to be religious.[50]

Further, the Court reasoned that since there is "naturally" a limit to separation of religion from the state, Article 20(3) does not prohibit the government from engaging in all religious activities. Rather, it only prohibits the government from engaging in activities that 1) have a religious purpose *and* 2) have the effect of assisting, promoting, advancing, oppressing or interfering with religion *and* 3) exceed the appropriate limit in light of Japan's cultural and social conditions.[51]

Applying this test, the Court reasoned that the government's purpose in funding the ceremony was "secular." It found that the ceremony was virtually a prerequisite in the construction industry because construction workers believe a groundbreaking ceremony is indispensable to safety. Thus, the Court held that the government was simply ensuring the actual, *and safe*, construction of the building. Funding of the ceremony was simply a natural "secular" response to social realities and thus the "purpose" of the ceremony was not religious.[52]

As for the effect of the ceremony, the Court concluded that the "average Japanese" person was not affected by the ceremony. The Court found that the most "salient" characteristic of Shinto is its close attention to ceremonial form rather than to the type of proselytizing common in Western religions. As such, the Court concluded, the ceremony did not promote Shinto or raise Shinto consciousness among the average person. It was "absolutely inconceivable" to the Court that funding the Shinto

48. O'BRIEN, *supra* note 20, at 84.
49. Tsu, *supra* note 2, at 4.
50. *Id.* at 5.
51. *Id.* at 9-10.
52. *Id.* at 5-6.

groundbreaking ceremony would have "the effect of assisting, promoting, oppressing or interfering with religion."[53] The Court thus found that the government did not engage in a religious activity in violation of the constitution.[54]

THE SELF DEFENSE FORCES ENSHRINEMENT CASE

The second case to be decided by the Japanese Supreme Court regarding separation of religion and the State was the *Self Defense Forces Enshrinement* case (hereinafter *SDF* case) in June of 1988, three years after Prime Minister Nakasone's "official visit" to Yasukuni.[55] The facts of the case were as follows: Takafumi Nakaya died from a car crash while on duty with the Self Defense Forces in 1968. Four years later, at the application of the Yamaguchi Prefecture Branch Alliance of Fellow Soldiers Association and the governmental SDF Liaison Office, Nakaya and twelve other soldiers were enshrined as nation-protecting gods at a Shinto shrine, despite the opposition of Nakaya's Christian wife, Yasuoko Nakaya.[56] After the SDF denied her request to rescind the enshrinement, Nakaya brought suit claiming that the SDF had violated her legal interest in peaceful enjoyment of her religious rights.[57] The Yamaguchi District Court and the Hiroshima High Court both found in favor of Nakaya, holding that the enshrinement was the result of a common action of the state and the Soldiers Association and was illegal under Article 20(3).[58]

The Supreme Court, which contained twelve Nakasone appointees, reversed in a 14-1 decision. The Court, in its plurality opinion, overruled the two lower courts' findings of facts that the acts of the SDF Liaison Office and the Soldiers Association were "collaborative."[59] The Court found that the original request for enshrinement came from the individual families of the deceased soldiers and the veterans association, not the SDF Liaison Office. The SDF Liaison Office "merely" expressed approval, wrote to the Nation-Protecting Shrine in Kyushu to inquire about enshrinement, drafted a fund-raising prospectus, and collected con-

53. *Id.* at 5.

54. *Id.* at 6.

55. Nakatani v. Japan, 42 MINSHŪ 277 (Sup. Ct., June 1, 1988) [hereinafter SDF] (translated version on file with Professor Frank Upham, New York University School of Law) (page numbers refer to translated version).

56. *Id.* at 4.

57. *Id.* at 4-5.

58. *See* O'BRIEN, *supra* note 20, at 260-63.

59. The Japanese Code of Civil Procedure, Article 321, states: "The facts lawfully established in the original judgment shall bind the court [of last resort]." CODE CIVIL [C. CIV.] art. 321 (Japan). The Court thus should have been procedurally bound by the High Court's findings of fact.

tributions. The dissent noted, however, that the involvement of the Liaison Office was much more extensive. According to the dissent (and the lower courts), the Liaison Office actively promoted the enshrinement, publicly supported the ceremony, provided a family register and names of deceased soldiers to enshrine (and had declined to do so for other religious groups), and was directly involved in negotiations with the plaintiff after enshrinement. Moreover, the Veterans Association shares an office with the Liaison Office and employs no full time staff of its own. Many of the actions of the "Veteran Association members" were undertaken as part of their official orders as SDF soldiers.[60]

Nevertheless, the Court found that the SDF Liaison Office did not have any direct involvement in the enshrinement. The Court found that the enshrinement was "substantially" sponsored by the Veterans Association and was not promoted in cooperation with the SDF Liaison Office.[61] The Court also separated the enshrinement from the application for the enshrinement and reasoned that because enshrinement is the most important Shinto ceremony, it ultimately had to be the autonomous act of the Shrine.[62] Although the application might have had a connection to the enshrinement, it was not a religious activity in itself. The actions of the Liaison Office were therefore not religious activities as defined in *Tsu*.[63]

Since the Court found that the application for the enshrinement was not a religious activity, there should have been no apparent reason to turn to the purpose and effect test. However, the Court proceeded to apply the purpose and effect test developed in *Tsu*. The Court found that the "assertion" by the High Court that the SDF's purpose in applying for the enshrinement was to raise morale "did not seem true according to facts." The Court then concluded without discussion that the application for enshrinement "did not strengthen religious consciousness, did not call attention to a particular religion, and did not assist, promote or interfere with religion."[64]

Finally, making the above conclusion seem superfluous, the Court held that the plaintiff did not have standing to challenge the government's actions in the first place. The Court reasoned

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60. SDF, *supra* note 67, at 13-16.

61. SDF, *supra* note 67, at 5-6

62. In fact, the enshrinement was not the independent decision of the Shrine. The Shrine had first refused to conduct the enshrinement and agreed to do so only at the continued insistence of the local SDF Liaison Office. The Shrine also required that the SDF Liaison Office collect the necessary signatures. *Id.* at 14 (*dissenting opinion*).

63. *Id.* at 6-7.

64. *Id.* at 7.

that Article 20(3) is an institutional guarantee and was not meant to guarantee religious freedom directly. Consequently, the Court held that the state does not infringe upon individual rights even if it engages in a religious activity. Additionally, the Court ruled that, in this case, the plaintiff would not have had standing regardless because the enshrinement was an "autonomous" decision of the Shrine and not an act by the state.[65] Turning the case on its head, the Court held that the Shrine was free to deify the soldiers if it pleased as part of its own right to free exercise of religion. The Court found that the plaintiff was still free to mourn according to her own religious beliefs and admonished her for not being more tolerant.[66]

THE MINOO MEMORIAL AND MINOO MEMORIAL SERVICES CASES

In the *Minoo Memorial* and *Minoo Memorial Service* cases, handed down on February 16, 1993, the Third Petty Bench[67] of the Supreme Court held 5-0 that a *chukonhi*, a war memorial for the souls of the war dead, was not a religious object and that the attendance of government officials at Shinto and Buddhist memorial services held at the monument did not constitute religious acts.[68]

Chukonhi were built all over Japan at the urging of the military during World War Two in order to glorify the souls of the war dead.[69] Souls of local villagers enshrined at Yasukuni were subsequently enshrined at local *chukonhi* as "loyal souls."[70] Occupation authorities thus considered *chukonhi* to be symbols of Japanese militarism and ordered them destroyed.[71] Local villagers hid the Minoo *chukonhi* and when the occupation ended it

65. *Id.*

66. *Id.* at 8. The Court reconstructs Japanese "tradition" when it claims that the Shrine and Nakaya had equal rights to mourn Mr. Nakaya. In Japan, the family of the deceased typically had the right to mourn the deceased free of interference. *Id.* at 9-10 (concurring opinion). The only way a shrine can claim the right is if it enshrines the soul at the request of the state who has claimed the soul of the deceased as public property. *See* HARDACRE, *supra* note 6, at 156-57. Yoichi Higuchi, one of the leading constitutional lawyers in Japan argues, "[m]ajority opinions which treat a shrine's freedom of religion as equivalent to that of the plaintiff, and require the exercise of mutual 'tolerance,' actually give the shrine's right precedence over those individuals." Translated by TATSUO INOUE, *in The Poverty of Rights-Blind Community: Looking Through the Window of Japan*, 1993 BYU L. REV. 517, 541 (1993).

67. *See infra* note 91.

68. Kamisaka v. Nakai, 47 MINSHŪ 1687 (Sup. Ct., Third Petty Bench Decision of Feb. 16, 1993) (Japan) [hereinafter Minoo Memorial and Minoo Memorial Service].

69. O'BRIEN, *supra* note 20, at 1-2. HERZOG, *supra* note 8, at 127.

70. O'BRIEN, *supra* note 20, at 5.

71. *Id.* at 1-3. HERZOG, *supra* note 8, at 127.

was returned by the AWBF to its previous location on the grounds of an elementary school.[72] In 1975, Minoo City decided to add a swimming pool and a new wing to the elementary school, requiring it to remove the *chukonhi*. Minoo spent ¥86 million to relocate the monument to a new plot of land across from the school that it then leased to the AWBF free of charge.[73] After the monument was reconstructed, the local AWBF, with the help of ¥445,000 in subsidies from Minoo City, began holding annual memorial services for the souls enshrined at the monument.[74] In 1976, the AWBF held a Shinto ceremony, and in 1977 a Buddhist one.[75] Public officials attended both ceremonies and public resources were used for the services. Public officials made offerings of *tamagushi*[76] at the Shinto ceremony and burnt incense at the Buddhist one.[77]

Satoshi and Reiko Kamisaka and nine other citizens brought a suit against the mayor, the chairman of the board of education, and other city officials demanding restitution on the basis of Self Governing Law Article 242(2).[78] Originally filing pro se, the plaintiffs argued that relocating the *chukonhi* was in violation of the "peace constitution."[79] With the assistance of Christian lawyers, who later took the case pro bono, the plaintiffs amended their complaint and argued that: (1) paying for the relocation of the *chukonhi* constituted state support of Shinto because *chukonhi* were religious objects linked to Yasukuni; (2) the participation of city officials in the memorial services was a religious act in violation of Article 20(3); and (3) the AWBF was in substance a religious organization and payment of subsidies to AWBF constituted financial support of a religious organization in violation of Article 89. Each of these three arguments became the basis for separate suits filed in the Osaka District Court, known respectively as the *Minoo Memorial*, the *Minoo Memorial Services*, and the *Minoo Subsidy* cases.[80]

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72. O'BRIEN, *supra* note 20, at 3. HERZOG, *supra* note 8, at 127.

73. *Id.*

74. *Id.* at 129.

75. O'BRIEN, *supra* note 20, at 11.

76. A *tamagushi* is a sprig from a *sakai* (evergreen) tree with a *shide* (white paper helix) attached. The green branch and leaves symbolize life, while the white paper helix is a symbol of purity. *Tama* refers to *tamashii* (soul) and *gushi* to *kushi* (to connect). Individuals offer *tamagushi* to establish a spiritual connection with a (the) god.

77. *Id.* at 11. or is it O'BRIEN, *supra* note 20, at 11. because of above?

78. *Id.* at 12. HERZOG, *supra* note 8, at 127. This law is discussed *infra* at page 45. In short, the law provides for taxpayer suits against local governments for misuse of public funds.

79. O'BRIEN, *supra* note 20, at 13.

80. *Id.* at 13-14.

The *Minoo Memorial* and *Memorial Service* cases were reviewed jointly by the Third Petty Bench of the Supreme Court. Dismissing the *Minoo Memorial* case, the Court held that Minoo's *chukonhi* was not necessarily an object of religious worship. Because the purpose of the *chukonhi* was to comfort the souls of the war dead, the Court held that it also had a secular nature as a monument to those who died for their country. While all parties stipulated that the *chukonhi* was originally an offshoot of Yasukuni Shrine, the Court held that the *chukonhi* should "be regarded as a monument to the war dead and not the alter ego of Yasukuni."[81] Further, the Court reasoned that because the memorial services alternated between Shinto and Buddhist, the *chukonhi* did not have a connection with one particular religion.[82] Changing the purpose and effect test in *Tsu* from one which asks if the government act promoted religion in general, the Petty Bench thus concluded that the relocation of the monument did not "endorse, facilitate, or advance any *particular* religion."[83]

Turning to the *Minoo Memorial Service* case, the Court held that the mayor and the other public officials had attended the ceremonies as a matter of social protocol and not out of religious conviction. Regardless of the religious nature of the ceremonies, the purpose of the officials was not religious and thus they did not engage in a religious activity in violation of Article 20(3) of the Constitution.[84]

The Ehime Tamagushi Donation Case

At the urging of Ehime Governor Haruki Shiraishi, Ehime Prefecture donated a total of 160,000 yen from 1981 to 1986 to Yasukuni Shrine and Ehime Nation Protecting Shrine.[85] The donations were given in response to a direct request in 1981 from Yasukuni Shrine and its Nation-Protecting Shrines that prefectures donate money to purchase *tamagushi* and *kento* to be used at certain shrine festivals honoring the souls of the war dead.[86] Ehime Prefecture and 37 other prefectures responded by donating money directly to Yasukuni or to their local prefectural Na-

81. *Id.* at 127.
82. *Id.*
83. *Id.* at 134.
84. *Id.* at 128-29.
85. HERZOG, *supra* note 8, at 118. Ehime National Protecting Shrine is a local affiliate of Yasukuni. 160,000 yen corresponds to approximately $1,500 at 106 yen to the dollar.
86. As explained above *supra* note 76, *tamagushi* are sprigs from *sakai* trees used as a symbolic means of establishing a spiritual connection with god. *Kento* are votive lanterns which are lit as offerings during worship.

tion-Protecting Shrines.[87] In 1982, the Ministry of Home Affairs issued a directive advising that prefectures should stop donating money for *tamagushi* due to "questions" about their constitutionality. Ehime prefecture ignored the directive and continued to donate money until 1986, when Kenji Anzai, a Buddhist priest, and 24 other residents of Ehime Prefecture sued Governor Shiraishi and six other prefectural leaders.[88] The plaintiffs demanded restitution for damages suffered by the prefecture from the use of public funds to support a religious organization in violation of Articles 20 and 89.[89] The defendants responded that the donations were merely a matter of social etiquette and did not have a religious purpose. They also claimed that the size of the donations did not exceed the "appropriate" constitutional limit.[90]

On November 13, 1996, approximately ten years after the case was originally filed, the Supreme Court announced that the entire Grand Bench would hear arguments in the *Ehime* case on January 22, 1997.[91] On April 2, 1997, the Supreme Court reversed the decision of the Takamatsu High Court and held that Ehime Prefecture's donations of public funds to a Shinto Shrine were unconstitutional.

The Court began by noting that Yasukuni Shrine is a religious organization and that it is public knowledge that in Shrine

87. One such prefecture was Iwate Prefecture, the officials of which were also sued by the residents for donating money for *tamagushi* and for passing a resolution advocating official worship at Yasukuni by the prime minister and the Emperor. 1370 HANREI JIHÔ 3 (Sendai High Ct., Jan. 10, 1991) [hereinafter Iwate] (discussed *infra* notes 196-198 and accompanying text).

88. Yoshimitsu Nishijima, *Ehime Tamagushiryo Iken Sosho no Keika*, HO TO MINSHUSHUGI 16 (Feb.-Mar. 1997). HERZOG, *supra* note 8, at 117-18. Ehime prefecture is one of Japan's most conservative prefectures, sometimes called Japan's "Conservative Kingdom." In 1997, the prefectural assembly was still 80% LDP—Japan's conservative party—and 27,000 residents of Ehime are members of the Association of War Bereaved Families (AWBF). The AWBF has, among other things, led the charge advocating state patronage of Yasukuni Shrine since the end of the occupation. Governor Shiraishi, not incidentally, was a past president of the AWBF. In 1994, Governor Shiraishi boasted "we are proud to be the only prefecture left giving donations [to Yasukuni]" in response to questions concerning Ehime's failure to follow the Ministry of Home Affairs directive. Saigyakuten, *supra* note 4.

89. For text of the articles see *supra* note 1.

90. Tetsumi Takara, *Tamagushiryo Kokin Shishutsu to Jumin Sosho,* HANREI KENKYU 1 (Mar. 1993).

91. *1 Gatsu ni Hotei Benron*, KOBE SHINBUN, Nov. 13, 1996 (evening edition), at 1. The Japanese Supreme Court is divided into two levels: three Petty Benches, consisting of five justices each, and the Grand Bench, consisting of 15 justices. Most cases reviewed by the Court are heard by one of the petty benches. O'BRIEN, *supra* note 20, at 66. However, the petty bench rarely overturns lower court decisions and the fact that the Grand Bench decided to hear the case created a stir in the Japanese press and fueled speculation that the Court intended to overrule the High Court, which had upheld the constitutionality of the donations. *See* Seikyou-bunri Shinhandan-e, ASAHI SHIMBUN, Nov. 13, 1996, at 1.

Shinto, festivals are a central religious activity in which *tamagushi* and *kento* have deep religious significance.[92] Thus, "the actions of Ehime Prefecture had a clear connection with the important religious ceremonies of a particular religious organization."[93]

The Court reasoned that unlike groundbreaking ceremonies to pray for safety during construction, giving of donations for *tamagushi* had not yet become customary social etiquette devoid of religious significance. The Court wrote, "It is hard to think that the general population would judge the donation of money for *tamagushi* as mere social etiquette."[94] The Court further concluded, "People who give donations for *tamagushi* have at least some consciousness that the donations have a religious meaning."[95]

The Court noted that Ehime Prefecture did not give donations to other religious groups that performed similar ceremonies. It "intentionally maintained a special relationship with only one particular religious organization."[96] The Court explained that when a governing body maintains a special relationship with one religious organization, it "gives the impression" that the particular religion is more important than other religions. It also arouses public interest in that particular religion.[97]

The Court alluded to the "various harmful effects" of the entanglement of Shinto and the State in the prewar period and the background in which separation of religion and the State was written into the Japanese Constitution. It then concluded that, keeping these evils in mind, the special relationship created by the donations between the Prefecture and Yasukuni Shrine was unacceptable.[98]

In summary the Court wrote:

> Considering the above circumstances in totality, it must be recognized that the prefecture's giving of the donations for *tamagushi* cannot escape having as a purpose some religious meaning and the effect of assisting, promoting, and advancing a particular religion. For this reason, the connection between the prefecture and Yasukuni Shrine exceeds the appropriate limit as illuminated by our country's social and cultural conditions. It is appropriate to understand the donations as religious activities prohibited by Article 20(3) of the Constitution.

92. Ehime, *supra* note 5, at 11. See *supra* note 76 and 86 for an explanation of their religious significance.
93. *Id.* at 12-13.
94. *Id.*
95. *Id.*
96. *Id.* at 14.
97. *Id.*
98. *Id.*

Thus understanding the expenditures as religious activities prohibited by section 3, they are illegal.[99] Also, considering the above analysis, the donations are public expenditures prohibited by Article 89 of the Constitution and are illegal.[100]

THE MINOO SUBSIDY CASE

In October 21, 1999, the First Petty Bench of the Supreme Court decided the companion case to the *Minoo Memorial* and *Memorial Services* cases discussed above. In the Minoo Subsidy case,[101] citizens of Minoo City claimed that the distribution of ¥445,000 of the City's 1976 social welfare budget to the Minoo Association of War-Bereaved Families violated Article 89 of the Constitution.[102] The AWBF is a powerful interest group of several million members and is a strong constituent of the Liberal Democratic Party (LDP).[103] Originally organized during World War Two by the Secretary General of Yasukuni Shrine, the AWBF has led the charge advocating state patronage of Yasukuni Shrine since the end of the Occupation. It also promotes enshrinements and other religious ceremonies at local nation protecting shrines, donates money to Yasukuni and other Shinto shrines, and sponsors trips for its members to make pilgrimages to Yasukuni. As a "benevolent organization under the control of public authority," the AWBF receives a large part of its budget in the form of subsidies from the local and national government.[104]

In the *Minoo Subsidy* case, the plaintiffs claimed that, because the AWBF was in substance a religious organization and because the primary use of the allocated funds was for memorial services and other activities to honor war dead, the allocation of funds constituted a governmental privilege to a religious organization in contravention of Article 89.

In a decision foreshadowed by dicta in the *Minoo Memorial* and *Memorial Services* cases, the Court held that the AWBF was not a religious organization. The Court conceded that some of the activities of the AWBF could be considered religious, such as visits to the Yasukuni Shrine, and that the funding of the AWBF constituted subsidization of activities that "could be deemed re-

99. *Id.* at 17.

100. *Id.* at 18.

101. Kamisaka v. Nakai, 47 MINSHŪ 1687 53-7 MINSHŪ 1190, 1696 HANREI JIHŌ 96, 1018 HANREI TAIMUZU 166 (Sup. Ct. First Petty Bench, Oct. 21, 2000) (Japan) [hereinafter Minoo Subsidy].

102. Over half of Minoo City's social welfare budget for subsidies of local organizations went to the AWBF. O'BRIEN, *supra* note 20, at 112.

103. *Id.* at ix.

104. *Id.* at 111-13.

ligious." However, the court found that the main activity of the AWBF is supporting bereaved families through memorial services for war dead. Such memorial services are not *necessarily* tied to any particular religion. The Court thus held that the "*essential purpose*" of the AWBF was supporting bereaved families. The fact that the AWBF engages in this "essential purpose" by "glorifying the spirits of the war dead", sponsoring Shinto ceremonies and funding trips for bereaved families to worship at Yasukuni, did not, in the Court's eyes, make it a religious organization. The Court thus held that the AWBF was primarily a non-religious private organization and not subject to Article 89's prohibition of funding of religious activities.[105]

THE OITA RICE HARVESTING CEREMONY CASE

With the passing of Emperor Hirohito on January 7, 1989, Japan faced its first imperial succession in the Post-War period. It also faced its first head on collision between the constitutionally designated role of the Emperor as the "symbol of the state" and the constitutional requirement of separation of religion and state. As discussed earlier, the Japanese officially worshiped the Emperor as a manifest deity until he "renounced" his divinity on January 1, 1946. However, the validity of this forced renouncement is still contested by the far right in Japan, as is the question of whether the Emperor retains his status as a manifest deity.[106]

Questions of the Emperor's divinity are inextricably interwoven with the ritual of imperial accession. The ritual of accession has been described as follows:

> The process of accession is intended to cement the temporal powers of the Emperor and bestow upon him the powers of the arahitogami, the living god. Accession is a three-stage process, called in Japanese *sens*, *sokui-rei*, and *daijsai* [commonly *daijosai*], terms which, translated roughly, mean "accession," "ascending the throne," and "the great thanksgiving," respectively. Daijsai, the final consummation of the accession, is the Shinto rite of transfiguration signifying the end of the ascension process. According to one commentator, the daijsai has the effect of turning the Emperor from an ordinary person into "a supernatural being, whose person embraces the entire welfare of the people, and has the power to represent them before all the kami [gods]."[107]

Given the unmistakable religious character of the traditional ceremonies of accession, there was considerable controversy in

105. *Id.* at 127-28.

106. Noah Berlin, *Constitution Conflict with the Japanese Imperial Role: Accession, Yasukuni Shrine, and Obligatory Reformation*, 1 U. PA. J. CONST. L. 383, 403-05 (1998).

107. Id. at 404.

Japan over whether such rituals, especially the *Daijosai*, which has particularly strong religious implications, should be held for the accession of the new Emperor Akihito.[108] Ultimately, the government decided that the ceremonies could not be conducted as "official" ceremonies, but could be held as "private" ceremonies of the Imperial Household. The government nevertheless provided over two billion yen (approximately 17 million dollars) in public funds to finance the ceremonies.

Religious minority groups brought several lawsuits challenging the national government's use of public funds for religious purposes. These suits were uniformly dismissed by lower courts under the by then well-settled rule of the *SDF* and *Ehime* cases that Articles 20 and 89 do not grant individuals any enforceable rights against the national government, and do not provide individuals with standing to directly challenge governmental actions that violate the principle of separation of religion and the state.[109]

Plaintiffs also filed several taxpayer suits against prefectural officials for "misusing" public funds to attend the *Daijosai.* One such suit was the *Oita Rice Harvesting Ceremony Case*,[110] in which the plaintiff sought damages for the use of public funds by prefectural officials, including the governor, to attend the *sukisaiden-nukiho* (rice harvesting ceremony) portion of the *Daijosai.*[111]

The Oita district court found that while the rice harvesting ceremony was a Shinto religious ceremony, the defendants' attendance at the ceremony did not have the purpose or effect of promoting religion.[112] The Fukuoka High Court affirmed the decision and the plaintiff appealed.[113]

On July 9, 2002, the Third Petty Bench of the Supreme Court also found in favor of the defendants and ordered the plaintiff to bear all costs of the litigation. The Court began its decision by reiterating the legal standards relating to Articles 20 and 89 contained in the Tsu and Ehime decisions. The Court then held:

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108. Even Prime Minister Noboru Takeshita publicly questioned whether holding the Daijosai ceremony would be unconstitutional. *Id.* at 406.

109. This issue is discussed *infra* notes 178-199 and accompanying text.

110. Kohno v. Hiramatsu, 1799 Hanrei Jihô 101 (Sup. Ct., July 9, 2002) [hereinafter Oita] (translated and on file with author).

111. During this ceremony rice is offered to the Emperor who then offers it to the gods. Some claim that through this ceremony a god enters the body of the Emperor while he sleeps. Shigenori Matsui, *Japan: The Supreme Court and the Separation of Church and State*, 2 Int'l J. Const. L. 534 (2004).

112. Kohno v. Hiramatsu, 45 Gyôsaishû 1465 (Oita Dist. Ct., June 30, 1994).

113. Kohno v. Hiramatsu, 1660 Hanrei Jihô 34 (Fukuoka High Ct., Sept. 25, 1998).

> The *sukisaiden-nukiho* takes place in the funeral hall of a Shinto shrine, and is performed as a Shinto ritual using specified ceremonial instruments. The act of the defendants Governor, Vice Governor and Director-General for Agriculture of Oita participating in the ceremony unmistakably involved religion.[114]
>
> [T]he defendants' participation in the *sukisaiden-nukiho* is seen as having had the purpose of fulfilling social etiquette in relation to the emperor as symbol of Japan and the people of Japan on the occasion of the traditional ritual accompanying the accession to the throne of the new emperor; and without the effect of assisting, encouraging, promoting, oppressing, or interfering with religion.[115]
>
> Consequently, it is correct to interpret that the extent of the religious involvement of defendants' participation in the *sukisaiden-nukiho* did not exceed the appropriate level in light of our nation's various social and cultural requirements and in relation to the fundamental purpose of the system ensuring freedom of religious belief, and violated neither the Constitution's principle of separation of religion and state nor the provisions for the separation of religion and state based thereupon.[116]

THE KAGOSHIMA DAIJOSAI CASE

Minatoichi Higo, a resident of Kagoshima prefecture filed a similar taxpayer's lawsuit against Prefectural Governor Yoshiteru Tsuchiya, challenging his use of public funds to attend the *Diajosai*.[117] Like the plaintiff in *Oita*, Higo lost in both the trial and high courts.[118] On July 11, 2002, two days after the Third Petty Bench decided the *Oita* case, the First Petty Bench, using almost identical language, reached the same conclusion in *Kagoshima*. Namely, the *Daijosai* was religious, but the defendants' participated in the *daijosai* out of social etiquette and such participation did not have the effect of assisting, encouraging, promoting, oppressing, or interfering with religion. The First Petty

114. Kohno v. Hiramatsu, 1799 HANREI JIHÔ 101.

115. *Id.* Before reaching this conclusion, the Court noted that "the *daijosai* is an important, traditional ritual for the imperial family, which, with the exception of a temporary period in which it was not practiced, has been regularly performed on the occasion of imperial accession to the throne since the 7th century, and the *sukisaiden-nukiho* is a ceremony to harvest new rice as part of the rice-offering ceremony that is central to the *daijosai* ritual and is an indispensable and characteristic element traditionally performed in connection with the *daijosai* ritual on the occasion of imperial enthronement." *Id.*

116. *Id.*

117. Higo v. Tsuchiya, 56-6 MINSHÛ 1204 (Sup. Ct., July 11, 2002). [hereinafter Kagoshima] (translated and on file with author, available in Japanese at http://www.courts.go.jp).

118. Higo v. Tsuchiya, 1435 HANREI JIHÔ 24 (Kagoshima Dist. Ct., Oct. 2, 1992); Higo v. Tsuchiya, 188 HANREI CHIHOJICHI 51 (Fukuoka High Ct., Dec. 1, 1998).

Bench thus affirmed the decision of the Fukuoka High Court and ordered Higo to bear all costs.

PART IV: CRITIQUING THE COURT'S OPINIONS

It is possible to identify several unifying themes in the Court's approach to Articles 20 and 89. The themes in turn signify how the Court sees its role in defining the contours of separation of religion and state in Japan. This section discusses these themes and offers a critique of the Court's approach.

TOLERANCE FOR STATE SUPPORT OF RELIGION

The Court's opinions regularly begin with discussions of the importance of the principle of separation of religion and the state in ensuring religious liberty in Japan. However, these opinions also show that the Court understands the idea of separation of religion and the state does not conform with the reality of Japanese society. As aptly illustrated by the *Oita* and *Kagoshima* cases, the Court has shown a great deal of tolerance of direct support of religion, in particular Shinto, by the State.

To be sure, the appropriate degree of separation between religion and the state is by no means an easy question for any society to answer. A similar debate has long raged in American jurisprudence over just how high the wall of separation between church and state should be. The Warren Court (1953-1969) enthusiastically defended the "wall of separation" between religion and the state. The United States Supreme Court has since moved away from this position to the point where in *Lynch v. Donnelly* in 1984, Justice Burger wrote that the "wall of separation" metaphor is "a useful figure of speech" which does not reflect the actual relation of church and state.[119] In other words, to a large degree, separation is also not the reality of the American system either.

Perhaps then, it should not be surprising that the Japanese Court has taken a similar approach. However, the Court acknowledges in the first paragraph of *Tsu* that in the context of Japan, "an unconditional guarantee of religious freedom has not been enough to fully guarantee freedom of worship."[120] Moreover, as discussed above, the post-war Japanese Constitution was written by occupation authorities and adopted by the Japanese in response to a history of collusion between the State and Shinto, and the wholesale persecution of all religious minorities in Japan

119. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
120. Tsu, *supra* note 2, at 2.

who refused to practice State Shinto.[121] Recognizing this history, one might argue that strict separation addresses more adequately some of the fears underlying the drafting of the Post-war Constitution. These fears include those expressed by Diet member Matsumura Shinichiro at the time of promulgation of the Constitution that the Japanese government would once again redefine religion and force Shinto upon the people.

Nevertheless, the Court acts on the presupposition that because total separation of religion and state is impossible, state contact with religion should be expected and tolerated.[122] Instead of interpreting Article 20(3) as prohibiting all religious activities by the state and Article 89 as prohibiting all state funding of religious organizations, as the text could be read to suggest, the Court interprets the Constitution as only prohibiting such acts if they "exceed the appropriate limit." Instead of requiring that the government justify a given religious act or instance of financial support of a religious organization as being an appropriate exception to the general constitutional prohibition, the Court requires that plaintiffs prove that the governmental action "exceeded the appropriate limit." So far, only direct governmental donations to a Shinto Shrine have exceeded this limit.

Untenable Purpose and Effect Test

At first glance, the *Tsu* purpose and effect test appears to be similar to the purpose and effect test developed by the United States Court in *Lemon v. Kurtzman*. In *Lemon v. Kurtzman*, the United States Court held that a statute or government action does not violate the Establishment Clause if it: 1) has a secular purpose; 2) has a primary effect that neither advances nor inhibits religion; and 3) does not involve the excessive entanglement of religion and the state.[123] If a governmental action or statute fails any prong of the *Lemon* test, it violates the Establishment Clause and is unconstitutional *unless* justified by a compelling state interest. The *Tsu* purpose and effect test, however, prohibits only those governmental actions which have 1) an essential purpose involving some "religious meaning" *and* 2) an effect which assists, promotes, advances, oppresses or interferes with religion *and* 3) the religious purpose and effect of which exceeds the appropriate limit in light of Japan's cultural and social conditions.[124]

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121. *Id.* at 6-7. Ehime, *supra* note 5, at 15.
122. Tsu, *supra* note 2, at 2. Ehime, *supra* note 5, at 8.
123. *Lemon*, 403 U.S. 602.
124. Ehime, *supra* note 5, at 9-10.

The Japanese version of the purpose and effect test differs significantly from the *Lemon v. Kurtzman* purpose and effect test. First, instead of each prong of the test standing on its own, the Japanese test is cumulative. In other words, if a governmental act has only a religious purpose or only an effect that promotes religion, it does not violate the Constitution. It must have both, and also exceed the "appropriate limit." Even if an act involved an explicitly religious purpose, it would be constitutionally permissible if it did not have the effect of promoting religion to the "average person." Likewise, a governmental act that unquestionably promoted a particular religion would be constitutionally permissible if its "essential purpose" was not religious. The Japanese test also turns the third prong of the *Lemon* test against excessive entanglement of religion and the state on its head. In *Lemon*, even if an act's purpose and effect does not promote religion, it is still suspect if it excessively entangles religion and the state. The third prong is thus an added protection separating the state from religion. In the Japanese version, however, an act with both an explicitly religious purpose and the unquestioned effect of promoting religion still might be constitutional if it does not exceed the "appropriate limit in light of Japan's cultural and social conditions." As far as the Court is concerned, if a governmental action is culturally and socially acceptable, it is also constitutional.

Second, the Japanese Court's purpose and effect test requires only that the government's *essential* purpose not be religious. In the *Minoo Memorial* and *Minoo Subsidy* cases, the Court held that the AWBF is not a religious organization, despite the fact that its central activity was supporting and funding trips to worship at Yasukuni Shrine, because the Court found that its essential purpose was supporting bereaved families.[125] In *Tsu*, the Court held that, even if the groundbreaking ceremony were religious, the government's purpose in sponsoring the ceremony was to promote the safe construction of the building.[126] Taken together, these cases indicate that if the government is trying to reach a "secular" goal, it can use a religious means and still not violate the purpose prong of the test. This standard allows the government to sponsor activities that are profoundly religious to the participants themselves, as long as the government seeks some secular gain.[127] For example, the Supreme Court held in

125. O'BRIEN, *supra* note 20, at 127-28.

126. Tsu, *supra* note 2, at 5-6.

127. According to the U.S. Supreme Court, the principle of separation of religion and the state "enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially relig-

Tsu, that while the Shinto Priest conducted the ceremony out of sincere religious conviction, "the purpose of conducting the ceremony was to ensure a stable foundation and safe construction. It was thus chiefly secular."[128]

Moreover, an act does not violate the effect prong of the test unless its assists, promotes, advances, oppresses or interferes with religion in the eyes of the average Japanese person. The test, in that sense, operates in a similar manner to the "objective observer" standard of the O'Connor endorsement test.[129] As the Court notes in *Tsu*, the religious consciousness, as the Court understands the term, of the average Japanese person is low.[130] If this is true, then the government's discretion is almost unlimited. In fact, the Court has found only one governmental act so far to have failed this test. On the other hand, the court has found that the following do not violate the principle of separation of religion and the state: sponsoring Shinto groundbreaking ceremonies; facilitating the enshrinement as gods of Self-Defense Force soldiers; holding religious services at a religious monument; and official attendance at a Shinto ceremony whereby the Emperor, symbolically at least, becomes a manifest deity.

Lower courts have been equally, if not more, permissive, upholding direct governmental participation in a number of religious activities including the Shiga Prefecture governor's wearing of religious attire and acting as the master of ceremonies in a Shinto rice harvesting festival (*niinamesai*) intended to bless rice grown by the prefecture according to Shinto rites for consumption by the "divine" Emperor.[131] The underlying rational of these decisions has consistently been that the average Japanese person is not offended by these practices and that the average Japanese does not view them as religious acts.[132]

Seemingly ignored in this calculus are the significant minority of Japanese who actually do view such acts as religious and who are deeply offended by governmental support of Shinto.[133]

ious means to serve governmental ends where secular means would suffice." Sch. Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 230, 231 (1963). The Japanese Court allows all three types of state involvement with religion.

128. Tsu, *supra* note 2, at 5-6.

129. The O'Conner endorsement test is a refinement of the "effect prong" of the *Lemon* test. Under the endorsement test, a state action is unconstitutional if an "objective observer" would perceive the action as an endorsement of religion. See, Wallace v. Jaffree, 472 U.S. 38, 76 (O'Connor J., concurring).

130. In Tsu, the Court wrote "it is not unreasonable to say that the average Japanese has little interest in and consciousness of religion." Tsu, *supra* note 2, at 5.

131. Minoru Yoshihara, *Odorokubeki "Meiji Kenpo no Ibutsu" O Yurusanai,* Ho to Minshushugi 28-29 (Feb.-Mar. 1997).

132. *See id.*

133. Discussed *infra* notes 144-152 and accompanying text.

The principle of separation of religion and state in Japan thus operates to protect the religious majority, but does not similarly protect religious minorities, who are offended by a broader range of government activities. This seems in direct contradiction to the Japanese Supreme Court's own admonishment that:

> Unlike Christian or Muslim countries, Japan is pluralistic and thus the mere guarantee of religious freedom is not enough. In light of Japan's historical and cultural conditions, it is also necessary to prevent entanglement of the state with religion, and thus the Constitution strives for the "ideal" of complete separation of religion and state.[134]

Another striking component of the Court's purpose and effect test is that it directly contradicts what would seem to be a common sense understanding of Articles 20 and 89. These articles specifically spell out what kinds of governmental acts are prohibited. Article 20(3) prohibits the state from engaging in religious activities. It says nothing of prohibiting only those religious activities which have a religious purpose and effect and which "exceed the appropriate limit in light of Japan's social and cultural conditions." Following a common sense reading of the Article, it would seem that the only question would be: "is the activity religious?" If it was, the government could not engage in it. Likewise, Article 89 states: "no public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association." A common sense understanding of Article 89 would not appear to allow donations of public money to religious organizations as long as they do not exceed the appropriate limit. The Court also ignores Article 20(1) altogether, never mentioning it in any decision.[135]

It could be argued that the Court is merely responding to the misfit between an inflexible constitution imposed upon an occupied country that requires separation of religion and state in a society where such separation makes little cultural sense.[136] By reading a "cultural out" into the articles, the Court is able to adjust the concept of separation to cultural realities and still step in, as in *Ehime*, where the government goes too far. However, any argument based upon the Constitution being "imposed" loses considerable force when one considers the fact that the final draft of the Constitution in March 4, 1946 was the product of negotiations between Japanese officials and SCAP, and that

134. Yoshihara, *supra* note 131, at 28-29.

135. Article 20(1) reads: "No religious organization shall receive any privileges from the state, nor exercise any political authority." KENPŌ, art. 20, para. 1. Ironically, this is the one article for which a "purpose and effect test" might be appropriate.

136. *See, e.g.*, Berlin, *supra* note 106, at 383.

"popular press reaction upon publication of the new draft was overwhelmingly positive."[137] Moreover, the post-war Japanese Constitution has never been amended in its entire 57-year history. In other words, the Constitution was adopted and has survived in its current form due to the strong support of the Japanese populace.[138]

Japanese culture is not monolithic, despite any myths to the contrary, and any discussion of the appropriateness of separation in Japanese society must be framed to reflect the diversity of the people of Japan. As discussed above, the Court itself recognizes that Japan is religiously "pluralistic." And, as will be discussed in more detail below, when the government endorses Shinto religious practices as expressions of Japanese culture, the psychological pressure to engage in these practices is immense. Articles 20 and 89 were, at least in part, specifically designed to address this reality. By reinforcing the dominant culture at the expense of "pluralism," the Court offers less protection to cultural and religious minorities against government endorsement of majority religious views and undermines religious liberty and equality.

DEFINITION OF RELIGIOUS ACTIVITY WHICH CONFLATES SHINTO RELIGIOUS PRACTICES WITH "JAPANESENESS"

The definition of "religious activity" is pivotal to Article 20(3)'s prohibition of participation by the government in religious activities. If an act is religious, the government should be prohibited from engaging in it according to Article 20(3). However, defining "religious activities" is by no means an easy task and is particularly hard in Japan where there is traditionally no sharp distinction between the sacred and the secular, and where the definition of religion, or *shukyo,* has long been contested.[139]

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137. *Id.* at 400.

138. Article 96 of the Japanese Constitution allows amendments upon the vote of at least two thirds of each house of the Diet and ratification by majority vote at a special or general election. *Kenpo* [Constitution] Article 96 (Japan). This procedure is relative easy compared to the process for amending the U.S. Constitution which requires two-thirds majorities in both houses plus ratification by at least *three-fourths* of all states. U.S. CONST. art. V. Despite numerous attempts by conservatives to amend the Japanese Constitution, "[u]nlike the American constitution, which was amended and reinterpreted extensively even during its first 50 years, the Japanese constitution. . . has remained sacrosanct." *See, Japan: Revisionism Revived,* THE ECONOMIST, May 3, 1997, at 28.

139. *See* Takizawa, *supra* note 8, at 95. Many conservative Japanese claim that, unlike Christianity and Buddhism, Shinto is not a religion. In fact, the Japanese word for religion, *shukyo*, originated in the 19th century as a response to the influx of Buddhism and Christianity. Thus, in the prewar period, the word *shukyo* never referred to Shinto but to more prototypical *shukyo* such as Christianity. However, the continued distinction between Shinto and *shukyo* in the Meiji period was based largely upon shrine administrators' desire to distinguish Shinto from Buddhism and

Japanese people have often been described as "nonreligious" because they rarely associate themselves with one religion.[140] Japanese "culture" is traditionally polytheistic, syncretic, and animistic. Most Japanese respond that they have no religion when asked to identify their religion.[141] This of course does not mean that Japanese people are not religious, only that they do not generally self-identify as such.[142]

A closer look at Japanese religious practices and beliefs reveals that the perceived lack of religiosity among the Japanese is as much cultural myth as it is social reality. Surveys have shown that a significant majority of Japanese hold beliefs and participate in acts that display strong religious consciousness.[143] The explanation for this seeming contradiction lies in the fact

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Christianity as a national "*supra*-religious entity" and thus "preserve its exclusive prerogative to perform state rites." HARDACRE, *supra* note 6, at 66. As long as State Shinto was "nonreligious," the State could require the populace to attend Shinto ceremonies, force its subjects to profess belief in Shinto doctrine, and access local populations for financial support of the shrines, despite guarantees of religious freedom in the Meiji constitution. *Id.* at 39.

140. *See* HARDACRE, *supra* note 6, at 96.

141. In a survey by the NHK Broadcasting Corporation in 1981, two-thirds of the Japanese population claimed no personal religious faith. Jan Swyngedouw, *Religion in Contemporary Japanese Society*, *in* RELIGION AND SOCIETY IN MODERN JAPAN 49, 50 (Mark R. Mullins et al. eds., 1993).

142. *Id.* at 60. As a traditionally polytheistic culture, Japanese rarely affiliate themselves with one particular religion. Additionally, except for Christians, Soka Gakkai members, and some believers of the "new" religions, the Japanese see little contradiction in looking for benefits from several religions and are generally not cognizant of the differences in religious doctrines. In short, the Japanese are not generally concerned about religious questions of transcendental truth and salvation but are preoccupied with the "pragmatic" benefits of religion such as success and good health. However, low consciousness of affiliation, ignorance of religious doctrine and concern with pragmatic benefits of particular religious practices does not in and of itself reflect a lack of religiosity. *Id.* at 55.

143. Takizawa, *supra* note 8, at 85. In an NHK survey, over 71% of Japanese people expressed a "need for religion." Moreover, lack of belief in a specific institutional religion did not correlate to a rejection of faith in super-natural beings. Of the Japanese surveyed, 35.9% believed in Shinto *Kami*, 47.8% believed in Buddha, 54% believed in the existence of a soul, and over 60% had prayed to "god" in times of distress. Likewise, approximately 77% of the population relied on charms for good fortune, and 74% of young adults and 40% of the elderly had used fortune telling by oracle a lot. The Japanese also "practice" religion inside their households: 60% have *kamidana*, or Shinto altars; 61% have Buddhist altars; and 45% have both. Only 25% of the population had neither a Buddhist nor a Shinto altar. Thirty-give percent of those surveyed worship at their *kamidana* and 57% worship at their Buddhist altar. Moreover, a large percentage of the Japanese engage in religion-related practices outside of their homes. Eighty-nine percent of the Japanese make annual visits to ancestral graves, and 81% visit Shinto shrines or Buddhist temples on New Year's Eve. Similarly, most Japanese businesses have shrines to local gods, a particular god personally venerated by the company founder, or a god identified with the company's type of work. Companies also regularly sponsor festivals, such as Founding Day at the Mitsubishi Group, in honor of their guardian deities. Swyngedouw, *supra* note 141, at 51-55, 57.

that popular religious sentiment in Japan is rarely identified by the Japanese themselves as religion, but instead as culture and tradition. In essence, the "religion of Japan" is a "syncretic mixture of Shinto, folk belief, Buddhism, Confucianism, Taoism, and, to some degree, Christianity, together which are, to most Japanese, part of a 'basic cultural code.'" Within this mixture, Shinto is undoubtedly the most important.[144] Going to the Shrine on New Year's to pray and other seemingly religious practices are not identified as religious acts by most Japanese, but as tradition. Of course, going to church on Easter could also be regarded as an American tradition. The difference is that few Americans would argue that the act of worship does not also carry religious significance. Many Japanese would insist, however, that going to the shrine to pray has nothing to do with religion.[145] Rather, it is about being Japanese.

In fact, being Japanese, or the "religion of Japaneseness," seems to be the "ultimate concern"[146] of many Japanese people. The notion of "Japaneseness" as a religion is explained best by Jan Swyngedouw in her article "Secularization in the Japanese Context:"

> Admittedly, it is a vague and possibly unscientific notion to call his being Japanese the principle that integrates his individual biography, appealing, thus, to the "religion of Japaneseness." Yet that seems in fact to be the guiding factor in his behavior. The vagueness of this concept, combines with the question whether it can rightly be called religious or sacred, corresponds to the vagueness of Japanese religiosity. One of the results of this mode of perception is that scholars of Japanese religion can logically argue that the individual Japanese is in fact very religiously minded even though the same individual explicitly claims to have no religion![147]

Another helpful way of viewing this seeming contradiction is offered by Joseph Kitagawa. He explains the dichotomy as the difference between the "autobiographical" and "biographical"

144. Takayama, *supra* note 8, at 528-29.

145. However religion may be defined at the margins, praying at a shrine would seem, to borrow from Hart, to fall with the "settled core" of the definition of the word religion. *See*, H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

146. In U.S. v. Seeger, 380 U.S. 163 (1965), the U.S. Supreme Court used the concept of an individual's ultimate concern to define religion as that which for each individual is the source of that person's "ultimate concern" or "what [one] take[s] seriously without reservation." *Id.* at 187 (quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)). The word "concern" denotes the affective or motivational aspect of human experience and the word ultimately signifies that the concern must be of an unconditional, absolute or unqualified value. In other words, one's ultimate concern is the ordering principle or superseding conviction in one's life.

147. Jan Swyngedouw, *Secularization in a Japanese Context*, 3 JAPANESE J. RELIGIOUS STUD. 283, 300 (1976).

understandings of experience and the "inner" and "outer" meanings of a given phenomenon. In other words, the autobiographical experience of the average Japanese confirms the "inner" cultural, and non-religious, interpretation she gives to certain practices. These same practices must necessarily be viewed by the outsider through a "biographical" perspective that is more sensitive to their "outer" religious meaning. The Japanese "insider" complains that her traditions are misunderstood as religious by the "outsider," and the "outsider" concludes that the Japanese perspective is beyond rational thinking.[148] What seems self-evidently religious in nature to the "non-Japanese" is simply culture to the "Japanese."

This is not to say that the "insider" is wrong or that the "outsider" is correct. Rather, it is to say that whose definition the court chooses to adopt has important implications for the concept of separation and, in turn, for religious liberty and equality. Within "pluralistic" Japanese society there are many people who do not engage in Shinto practices and who are members of religious minorities. These individuals are marginalized as "non-Japanese" by the failure of Japanese society as a whole, and the government in particular, to understand the outer religious meaning of certain practices of "Japaneseness."[149]

To fully appreciate this point it is necessary to understand the enormous importance placed on conformity to notions of "Japaneseness" in Japanese society. A well-known Japanese proverb warns, "The nail that pokes out, gets hammered down." The psychological, and often physical, cost of failing to heed this warning is most vividly illustrated by the extremely high incidence of suicide among students in Japan who are victims of relentless and violent bullying (*ijime*) because they dare or are unfortunate enough to be "different."[150] Bullying and ostracizing of individuals who are different is not limited to children—it merely begins in earnest upon entry to school—but extends well into adulthood.[151] The psychological cost of being ostracized and the extent to which individuals will go to avoid it should not be unappreciated in looking at the effect on religious liberty and

148. Joseph M. Kitagawa, *Some Reflections on Japanese Religion and Its Relationship to the Imperial System*, 17 JAPANESE J. RELIGIOUS STUD. 129, 129-31 (1990).

149. The strongest advocates of separation of religion and state in Japan tend to be Christians, Jehovah's witnesses, Soka Gakkai (a Buddhist sect), and members of other minority religious groups.

150. See ALEX KERR, DOGS AND DEMONS, 291 (2001). Consider, for example, children who risk being bullied because their religious beliefs prevent them from entering Shinto temples during school field trips to important "cultural" sites.

151. *See id.*

equality of defining Shinto as Japanese custom rather than as religion.[152]

When Shinto religious ritual is defined as Japanese custom, practicing Shinto and being "Japanese" become intertwined, and many Japanese citizens find themselves in the untenable position of choosing between their "Japaneseness" and their religion. The importance of recognizing the religious character of Shinto and separating it from "mere" tradition thus lies in maintaining a distinction between being Japanese and being Shinto. Assuming that maximizing religious freedom is a central goal of separation of religion and state, a constitutional definition of "religious activity" must recognize the tension created by the conflicting inner and outer meanings of "cultural traditions."

The Japanese Court's definition of "religious activity," as first developed in *Tsu*, is based entirely upon "inner meanings" and the "autobiographical experiences" of the "average Japanese." The external characteristic of the act, or whether it is religious in nature and form, is not determinative. Instead, the Court offers five factors to be used to determine if an act is a religious activity for constitutional purposes: 1) the place of conduct, 2) the average person's reaction to the act, 3) the actor's purpose in conducting the activity, 4) the existence and extent of religious significance, and 5) the activity's effect on the "average" person.[153]

All of the Court's five factors, with the possible exception of the first, arguably have nothing to do with whether an activity is religious, but with whether the activity falls outside the ambit of accepted cultural tradition.[154] The Court's examples of what would constitute a religious activity under this definition reinforce such an interpretation. As typical examples of "religious activities" the Court lists "missionary work, proselytizing, and propaganda."[155] Other religious activities such as "celebrations, rites, and other functions" are religious only if they "purport" to

152. As an illustration of the psychological cost of social ostracization in Japan see Norimitsu Onishi, *The Struggle for Iraq: The Hostages,* N.Y. TIMES, Apr. 23, 2004, at A1 (describing how a psychiatrist found the condemnation and ostracization arising from the public perception that three Japanese hostages released from captivity in Iraq had "caused trouble" by disobeying the government and going to Iraq was more stressful than being threatened with beheading while in captivity).

153. Tsu, *supra* note 2, at 3.

154. When subjected to historical investigation many supposedly ancient Japanese customs and traditions turn out to be modern inventions. For collected works discussing Japan's invented traditions, see MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN (Stephen Vlastos ed., 1998).

155. Tsu, *supra* note 2, at 3.

propagate religion.[156] In short, "non-traditional" religious practices always constitute religious activities but "traditional" Japanese ritualistic religious practices may not. The Court, in effect, holds that Article 20(3)'s prohibition does not apply as strictly to traditional Japanese religious practices.[157]

The malleability of the Court's "definition" of religion is clear from its application. In *Tsu*, the Court held that the Shinto groundbreaking ceremony was social custom and not a religious activity despite its overtly religious character. In order to reach its conclusion, the Court brushed over the religious nature of the groundbreaking ceremony while trivializing the animistic phenomenon of Shinto. Deeply rooted in Shinto tradition is the fear of unpacified spirits. According to this tradition, the groundbreaking ceremony, conducted in strict Shinto form, pacifies the earth *kami,* or spirits.[158] While not denying the religious origin of groundbreaking ceremonies, the Court asserted that to the average person such ceremonies had become "traditional folkways" devoid of religious significance.[159]

The fact that groundbreaking ceremonies are so common, and that workers are unwilling to precede with construction without one, implies belief in the ceremony and undermines the Court's assertion that are devoid of religious significance. In the final analysis, whether a Shinto priest conducts a groundbreaking ceremony to appease Shinto *kami* (gods) or a Christian minister prays to God for safe construction makes little difference in defining the religious character of both acts. While both are concerned with pragmatic benefits, such as safe construction, both acts also reflect a degree of religious faith. The Court misstates reality when it asserts that the ceremonies have lost their meaning over time. The strong beliefs of the construction workers, who are, one would assume, the "average Japanese" upon whom the Court claims to base its decision, indicate that the ceremony has yet to lose its religious significance. Moreover, the fact that, at the time of the Court's decision, several different religions performed groundbreaking ceremonies that were also commonly

156. The Court ignores the implications of the reality that ritual cannot "purport" to advance religion in the way proselytizing and missionary work do. The Supreme Court itself notes, "[o]ne of the salient characteristics of Shinto is its close attention to ceremonial form and its converse lack of interest in external activities such as the proselytizing seen in other religions." Tsu, *supra* note 2, at 5. Put differently, careful adherence to ceremonial form is itself an act central to the belief in the Shinto religion. It therefore seems contradictory to recognize the far-reaching role of religious ritual in Japanese society and then subject traditional acts of religiosity to less constitutional scrutiny.

157. *See* INOUE, *supra* note 11.

158. O'BRIEN, *supra* note 20, at 135.

159. Tsu, *supra* note 2, at 4-5.

used in the construction industry implies that there was not one accepted traditional ceremony that had become a custom. The particular Shinto ceremony used in *Tsu* did not even exist until 1907 when the Japanese Home Ministry created it as part of its program to propagate State Shinto. That particular groundbreaking ceremony was performed for only a few decades in the prewar period and abandoned for the most part after the war until the early seventies when it regained wide acceptance.[160] This would hardly seem to make the ceremony a non-religious tradition.

Since the *Tsu* decision however, Shinto groundbreaking ceremonies have become so commonplace that Japanese, particularly Christians, who refuse to hold such ceremonies before the construction of their homes face questioning and disapproval from their neighbors who see them as abnormal.[161] One wonders what role the Court's decision has had in defining and entrenching the Shinto groundbreaking ceremony as a Japanese "tradition."

The Court's ruling in *Tsu* resembles to some extent the U.S. Supreme Court's ruling in *Lynch v. Donnelly*.[162] In *Lynch*, a bare majority of the Court upheld government funding of a nativity scene as part of a Christmas display in Pawtucket, Rhode Island. The Court held that although the nativity scene was a significant religious symbol for Christians, within the context of a general Christmas display, the nativity scene took on an overriding secular meaning. To the majority, the nativity scene was a single symbol of a historic religious event.[163]

The dissent responded, "by insisting that such a distinctly sectarian message is merely an unobjectionable part of our religious heritage, the Court takes a long step backwards to the days when Justice Brewer could arrogantly declare for the court that 'this is a Christian nation.'"[164] The dissent's response has similar applicability to the Japanese Court's majority decision in *Tsu*. By reasserting the position of Shinto ritual as national tradition, the Court is in essence declaring, "Japan is a Shinto nation." By endorsing the Shinto groundbreaking ceremony as Japanese tradition, the State also reinforces the idea that the Shinto groundbreaking ceremony is somehow more "Japanese" than

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160. *Sekiguchi*, 22-5 GYÔSAISHÛ at 680.

161. Interview with Katsuyuki Kumano, Christian Minister, in Okinawa, Japan (Jan. 28, 1997).

162. *See Donnelly*, 465 U.S. 668.

163. *Id.* at 680.

164. *Id.* at 717 (Brennan, J., dissenting).

other religious forms. Shinto and "Japaneseness" become intertwined.[165]

Moreover, the Court assumes that social custom and religion are mutually exclusive and thus defines religion negatively. If an act is a social custom, it is not religious.[166] For example, the Court held that Minoo's *chukonhi* was not *necessarily* an object of religious worship because the purpose of the *chukonhi* was to comfort the souls of the war dead. The Court reasoned that although the ceremonies held at the memorial were Shinto and Buddhist, the mayor and the other public officials had attended the ceremonies as a matter of social protocol and not out of religious conviction. Regardless of the religious nature of the ceremonies, they were not religious because they accorded with the social custom of consoling and praising the war dead.[167]

In *Ehime*, the Court does not abandon this approach but simply reaches a different conclusion. In *Ehime*, the Court wrote:

> The prefecture clearly had a connection with the important religious ceremonies of a particular religious organization. In general, the dedication of money for *tamagushi* and the like are different from ground breaking ceremonies sponsored by builders in order to pray for things like safety during construction. Giving of donations for tamagushi cannot yet be said, according to movement of the times, to have become a social custom of weakened religious significance. It is hard to think that the general population would judge the donation of money for *tamagushi* as mere social custom.[168]

The determinative factor in the Court's analysis is whether or not the general population views the act as a social custom. If it does, then the act is not religious. In the *Ehime* case, the Court decides that *tamagushi* offerings are not yet a custom and are

165. It should also be noted that the nativity scene in *Lynch v. Donnelly* differed dramatically from the Shinto groundbreaking ceremony. Whereas the nativity scene was a passive object acknowledging a "historic" religious event, the groundbreaking ceremony was conducted in strict Shinto form by a Shinto priest. Further, the state chose the Shinto ceremony over other religion's ceremonies. Moreover, the groundbreaking ceremony was not set in a historical context nor was it one part of a secular display like the crèche in Lynch v. Donnelly. The groundbreaking ceremony stood alone as an example of government endorsed Shinto. In that sense, it is more similar to Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) in which a shifting majority of the U.S. Supreme Court ruled that a governmental display of a nativity scene standing alone violated the Establishment Clause because it endorsed one view of Christmas over another.

166. Another way of understanding the Court's distinction between religion and custom is that, according to the Court, complete separation of religion and the State is impossible precisely because the state must support culture. If a practice is a custom, state participation is not only allowed, it is expected.

167. HERZOG, *supra* note 8, at 129.

168. Ehime, *supra* note 5, at 13.

thus still religious. In stating that the donations "cannot yet be said" to be social custom, the Court leaves open the possibility that *tamagushi* offerings might be "non-religious" in the future.

Prior to *Ehime*, the lower courts were split over whether *tamagushi* offerings were customary acts of social etiquette or religious acts. In the *Ehime* case, the District Court had held that the *tamagushi* offerings were religious and then the High Court overturned, holding that the offerings were customary acts of social etiquette. In *Iwate*, a similar case, the district court held that the offerings were social custom and then the High Court overturned, holding that the *tamagushi* offerings were religious acts. While the Supreme Court resolved this dispute in *Ehime*, the decision provided little guidance to lower courts over how the courts should define religion in future cases. Instead, it leaves the definition of religion to the particular court's subjective view of what is a Japanese custom. This allows courts to continue to define religious acts according to their own "autobiographical" or "inner" interpretations without recognizing a given practice's "biographical" or "outer" meaning to Japan's monotheistic religious minorities.[169]

169. The Court could have fashioned a much different definition of religion that would have been sensitive to both autobiographical and biographical meanings. One suggestion would be the Nagoya High Court's definition of religion in Tsu which asked: 1) did religious officials preside over the ceremony; 2) did the ceremony follow that of a religious sect; 3) would ordinary people consider the ceremony "without hesitation" a traditional folk way? O'BRIEN, *supra* note 20, at 86.

Another suggestion would be the approach taken by John Sexton in *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056 (1978), in which he argued for a bifurcated definition of religion for Free Exercise and Establishment Clause purposes. The Note proposes an expansive definition of religion for Free Exercise purposes and a narrower "operational standard" for Establishment Clause purposes. The operational standard would "approximate both (1) the power possessed by followers of the practice or belief and (2) the extent to which the belief or practice is generally recognized as religious." *Id.* at 1086. Religious practices are those that have "readily discernible factors" constituting the "trappings of religiosity." *Id.* at 1087.

By asking to what extent the practice is generally recognized as religious, this approach seems to have the same problem as the Court's standard, i.e. Shinto practices may not be recognized by the "average" Japanese as religious. But in the Harvard Note's "operational standard," the court's determination of a group's actual religiousness and power depends on several criteria: organization, theology, and attitudinal conformity. Organization refers to structural elements such as number of members, longevity of the association, ownership and occupation of facilities, and the presence of channels of authority such as priests. Theology refers to nature of the tradition or practice. The presence of ritual, common prayers, reading from sacred books, etc. are included in this notion of theology. Attitudinal conformity refers to the ideological conformity of the group including such factors as the existence of shared symbols and the number and scope of rules prescribing conduct.

Under all three criteria, Shinto practices would unquestionably be religious. Organizationally, Shinto is the most powerful religion in Japan. Theologically, the presence of extensive ritual and reading from sacred books in Shinto are readily

MARGINALIZATION OF ARTICLE 89

Absent from the Court's discussion of "the principle of separation of religion and state" is any independent role for Article 89. Article 89 of the Japanese Constitution reads: "no public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association or for any charitable, educational or benevolent enterprise not under the control of public authority."

The Court ignores Article 89 in the *Tsu* and *SDF* cases and only mentions Article 89 in the *Minoo Memorial* and *Minoo Subsidy* cases in connection with the AWBF not being a religious organization for purposes of the Article. Even more surprisingly, in the *Ehime* case, which dealt directly with the issue of public donations to a religious organization, the Court marginalizes Article 89 to the point where it has no independent meaning outside of Article 20(3). Discussing Article 89's relation to the principle of separation of religion and state for the first time, the Court wrote in totality:

> [t]he meaning of Article 89's prohibition of the appropriation of public money or other property for the use, benefit, or maintenance of a religious institution or association must be interpreted in light of the meaning of separation of religion and state in general and to include only expenditures of public money which exceed the appropriate limit judged by the same purpose and effect test used for Article 20(3).[170]

Applying this "analysis" to the facts in *Ehime*, the Court simply wrote:

> It is appropriate to understand the donations as religious activities prohibited by Article 20(3) of the constitution. Thus understanding the expenditures as religious activities prohibited by section 3, they are illegal.
>
> Also, considering the above analysis, the donations are public expenditures prohibited by Article 89 of the constitution and are illegal.[171]

The donations were illegal under Article 89 only because they were "religious activities" in violation of Article 20(3).

The problematic nature of this approach is manifold. First, if the Court's understanding of Article 89 were correct, there would be no need for Article 89 in the constitution at all. Article 20(3) prohibits government participation in religious activities and Article 89 prohibits the giving of public money to religious organizations. Nothing in the articles suggests that they were

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discernible "trappings of religiosity." As for Attitudinal Conformity, Shinto is centered around shared symbols, not the least of which are Yasukuni and the Emperor.

170. Ehime, *supra* note 5, at 10-11.

171. *Id.* at 18.

both directed at the same type of governmental action. Article 20(3) should be relevant for cases such as *Tsu* and *Minoo* where the government held a religious ceremony, whereas Article 89 should be relevant in cases such as *Ehime* where the government gave public money to a religious organization. There seems little need for the Court's convoluted reasoning in *Ehime* that the giving of money is a religious activity.

The Court's marginalization of Article 89's prohibition of public donations to religious organizations must be understood in the context of its prior interpretation of the rest of the Article. The Court has interpreted Article 89 as having two parts: one prohibiting public support of religious organizations and one prohibiting support of "charitable, educational or benevolent enterprises not under the control of public authority."

The key to the Court's treatment of the latter part has been the phrase "under the control of public authority." The Court has interpreted that phrase to mean that the government has the right to control how public funds are spent. In other words, in order for private organizations to receive public funds, they must provide a report of finances to the government outlining the manner in which the organization allocates its financial resources. In most cases, governmental review is procedural rather than substantive, but the government has the power to suggest changes.

Organizations that refuse to follow these suggestions risk losing their public funding. The Court justifies this loss of independence in that private organizations do not have to accept public money.[172] The purpose of the first part of Article 89, dealing with religious organizations, is entirely separate according to the Court and must be understood in light of Article 20(3).

There are two difficulties with this approach. First, it interprets Article 89 as having two separate purposes when nothing in the Article suggests that the underlying purposes of the article are any different for the first and second parts. The Court separates the Article so that the first part is interpreted according to the principle of separation of religion and state and the second by the principle of accountability of public funds.

This approach not only seems disjointed and unnecessary, but it also deprives the first part of Article 89 of any independent meaning outside of Article 20(3).[173] The Court fails to recognize

172. *See* TOSHIYOSHI MIYAZAWA, NIHONKOKU KENPÔ 738-40 (1967).

173. Justice Sonobe similarly criticized the Court's approach in his concurring opinion. Justice Sonobe argued that, according to the revision of the Japanese legal system after the war, Yasukuni and its Nation Protecting Shrines became just like any other religious organization. With that as a presupposition, Justice Sonobe argued that even if the donations are social etiquette, giving money to a religious or-

the unifying theme underlying Article 89—public money should not be used for the maintenance or benefit of private organizations whether charitable, educational, or religious. In other words, the government is to stay out of private affairs.

Recognizing this unifying theme would be consistent with the principle of separation of religion and state and, at the same time, make sense for the latter part of the Article. The underlying rational for both parts would be limiting government influence and control in matters of individual conscience. If the government is free to fund religious and other private organizations, the government will have the propensity to discriminate on the basis of the beliefs of those organizations. The solution is to prohibit government funding of private organizations altogether. As for the phrase "not under the control of public authority," it should be interpreted to allow use of taxpayers money for the government's own educational and benevolent organizations, such as public schools and public welfare organizations.

The second difficulty with the Court's dual approach to Article 89 is that its approach to the second part defeats the purpose of the first. By interpreting the second part as allowing government funding of private organizations if the organization subjects itself to public authority, the Court allows the government to indirectly fund religious organizations and religious practices. It also allows the government to control the agendas of private political, educational, and benevolent organizations.

In the *Minoo Subsidy* case, the plaintiffs challenged Minoo City's subsidization of the AWBF as violating Article 89's prohibition of the use of public funds to support a religious organization. The Court held, however, that the AWBF was not a religious organization despite the fact that it supported religious activities, because the AWBF's "essential purpose" was to promote the "welfare of bereaved families in poverty" and was thus a benevolent organization.[174] The problem with the Court's decision is explained by David O'Brien:

> Minoo City subsidized the association of war-bereaved families, and its subsidies covered the cost of the memorial service in the first place. This remains the virtually hidden yet crucial aspect of the postwar government's assistance for religious activities. It was the root both of the government's entanglement with religion and of conservatives' endeavors to revive State Shinto.[175]

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ganization violates Article 89. Thus, he argued, there is no need to look at Article 20. Ehime, *supra* note 5, at 22.

174. O'BRIEN, *supra* note 20, at 127-28.

175. *Id.* at 117.

Moreover, the *Minoo* case does not represent an isolated incident of government support of religious activities. As O'Brien further notes:

> Money was funneled to these regional and local affiliates for conducting Shinto ceremonies, enshrining dead soldiers, and so that members could travel to Tokyo to visit the Yasukuni Shrine. Local government officials also catered to regional and local associations of war-bereaved families, disbursing small amounts of financial assistance to ensure their support at election time. Such practices, especially among conservative LDP politicians, were in accord with long-established patron-client social networks and the traditional understanding of reciprocal dependency in social and political relations.[176]

O'Brien's analysis is perhaps most instructive in that it helps explain why the Court chose its dual approach to Article 89 in the first place. Had the Court interpreted Article 89 as prohibiting governmental subsidies of any private organization, it would have threatened long-standing patterns of political patronage. Instead, the Court interpreted the "under control of public authority" clause in a way that would allow governmental subsidies of private organizations to continue as usual. However, because the constitutional principle of separation of religion and state makes clear that religious organizations cannot be "under the control of public authority," the Court had no choice but to interpret the first and second parts of Article 89 as having independent underlying purposes.

Limited Standing

Another salient characteristic of the Court's treatment of Articles 20 and 89 is its persistent denial of standing to individuals wishing to challenge national governmental actions that violate the principle of separation of religion and state. By denying would-be plaintiffs access to the courts in such instances, the Court has ensured that the issue of separation will primarily be contested, defined, and ultimately resolved in the political realm rather than the judicial one.

In Japan, taxpayers generally do not have the right to bring taxpayers' suits against the national government. In order to sue the national government, a plaintiff must show, pursuant to Article 1 of the National Compensation Act (*Kokka Baisho-ho*), that (1) an official of the local or national government (2) who was on duty at the time (3) illegally and (4) intentionally or negligently (5) caused harm to the individual.[177] The National Compensa-

176. *Id.* at 118.

177. Emotional harm only suffices in rare cases where particularized, quantifiable damages can be proven. Japanese courts do not award damages for mental

tion Act provides the primary means by which a person can assert a cause of action against the national government.[178] In contrast, the U.S. Supreme Court has developed special standing rules for violations of the Establishment Clause which allow individuals to sue even in the absence of individualized harm.

In Japan, individuals are limited to filing taxpayers' suits against local governments pursuant to Self Governing Law Article 242(2). In order to file such a suit, the resident taxpayer(s) must first request an accounting (*kensa seikyu*), which is conducted by an auditing committee chosen by the local government itself. The auditing committee typically takes one to two years to render a decision and routinely decides in favor of the government. After the audit has been completed and the decision handed down, the resident(s) who requested the accounting must file suit within 30 days in a district court in order to preserve the cause of action. Residents who do not join the original request for the accounting cannot later join the suit. Despite these limitations and procedural requirements, many suits are brought in this manner, but, again, never against the national government.[179] To sue the national government, a citizen must show individualized harm, which is impossible in the context of separation of religion and the state.[180]

In *Tsu*, the Court held that the constitutional separation of religion and state is only a systematic protection and not an individual one.[181] Under this construction, there is no individualized harm when the government engages in a religious act or funds a religious organization. In effect, Articles 20(3) and 89 do not grant individuals any constitutional rights, nor do they provide individuals standing to challenge government actions that violate the articles. Making this point clear, the Court explicitly held in the SDF case that because Article 20(3) was a "systematic protection," the plaintiff did not have standing to challenge the government's actions.[182] In the *Ehime* case, the Court reaffirmed that the principle of separation of religion and state is "a systematic guarantee not intended to protect religious freedom directly."[183] The national government is thus not judicially

distress even in accidental death cases. This, of course, precludes individuals from bringing suits claiming mental distress when the national government acts in ways that offend their religious consciousness. Interview with Tetsumi Takara, Professor of Law, Ryukyu University, in Okinawa, Japan (Apr. 30, 1997).

178. *Id. See also* Yokota, *supra* note 6, at 217-18.

179. See notes 206-17 and accompanying text.

180. Yokota, *supra* note 6, at 217.

181. Tsu, *supra* note 2, at 2.

182. SDF, *supra* note 67, at 7.

183. Tsu, *supra* note 2, at 9.

accountable for even the most blatant violations of Articles 20(3) and 89.

A number of suits brought against the national government for violating Articles 20(3) and 89 have been dismissed in the lower courts for lack of standing. In 1992, the Osaka District Court dismissed a suit against the government for sponsoring a Shinto ceremony of imperial accession known as the *daijosai*,[184] holding that taxpayers do not have standing to sue the national government. In 1995, on appeal, the Osaka High Court found that the *daijosai* is a Shinto ceremony and that the constitutionality of government support for the ceremony is "doubtful." However, the High Court upheld the lower Court's dismissal of the suit reasoning that the plaintiffs did not suffer any tangible harm that would allow them to sue under the National Compensation Act.[185]

As such, members of minority religions wishing to challenge the constitutionality of the Daijosai were left, as in *Oita* and *Kagoshima*, to indirectly challenge public funding of the Diajosai by suing local officials for attending the ceremony. As seen in *Oita* and *Kagoshima* however this enabled the Court to conveniently sidestep the question of the constitutionality of public funding of the Shinto accession ritual, and instead focus on the purpose and effect of the officials' attendance at the ceremony. Thus, the Court has avoided ruling on one of the most important constitutional questions in Japan: the proper role of the Emperor, the titular head and manifest deity of State Shinto, in a constitutional system that, in name at least, requires separation of religion and state.[186]

The Judiciary has similarly dodged the equally important question of the constitutionality of official worship by state offi-

184. Norikatsu Sasagawa, *"Seikyo-bunri" Ron no Saikou wo — Gakusetsu ka Joubun ka*, 316 HO TO MINSHUSHUGI 7 (Feb.-Mar. 1997). In 1990, the government spent ¥30.42 billion for the accession ceremonies of Emperor Akihito in which the new emperor was installed according to Shinto ceremonies, some of which symbolize the emperor's accession as a manifest deity in Shinto mythology. Among the ceremonies funded by the government was a deeply religious Shinto ceremony of thanksgiving called the Daijosai. Yoichi Koizumi, *Yuragu okumin shuken to seikyo bunri no gensoku*, 425 HÔGAKU SEMINÂ 44, 46 (May 1990). Yokota, *supra* note 6, at 24.

185. Sasagawa, *supra* note 184, at 7-8.

186. Some scholars have argued that there is a fundamental conflict between the constitutionally mandated role of the Emperor and the principle of separation of religion and the state. *See, e.g.*, Berlin, *supra* note 106. However, in outlining the limits of the Emperor's role as the "symbol of the State," Chapter I, Article 4 of the Japanese Constitution specifically prohibits the Emperor from violating any other part of the Constitution. It would thus seem that the Constitution itself resolves the question of which takes precedence: the specific provisions requiring separation of religion and state or the Emperor's general role as a symbol of the State.

cials at Yasukuni Shrine. In 1988, the Fukuoka District Court, in a decision upheld by the High Court, dismissed a suit for lack of standing brought against Prime Minister Nakasone for his official worship at Yasukuni. The Court held that the plaintiffs could not sue for mental anguish caused by Nakasone's action, as it was not the type of harm contemplated by the National Compensation Act. In March 1990, the Himeji Branch of the Kobe District Court rejected a similar suit for the same reason.[187] All told, over five suits brought against Prime Minister Nakasone or members of the cabinet for use of public funds to worship at Yasukuni, have been dismissed for "failure to demonstrate a legally recognizable harm."[188]

Three recent suits against Prime Minister Koizumi for his official visits to Yasukuni Shrine have met with similar results.[189] The Osaka District Court rejected a case filed by a group of 631 plaintiffs holding that "it cannot be said their specific rights accorded under the law were in any way violated [by Koizumi's official visits]."[190] The Matsuyama District Court in Ehime Prefecture dismissed the claims of 133 individuals over the visits holding: "The prime minister's visits to Yasukuni Shrine did not have any kind of binding power on the plaintiffs, or lead to any disadvantage for them. The visits did not place limitations on the plaintiffs in making their own decisions or taking action in paying respects to the war dead."[191] The Fukuoka District Court similarly rejected the plaintiffs' claims for compensation—holding that the visits did not violate their freedom of conscience.[192]

However, unlike the Matsuyama and Osaka District Courts, which did not reach the question, the Fukuoka District Court went on to hold in dicta that Koizumi's official visits were relig-

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187. *Id.* at 6-7. HERZOG, *supra* note 8, at 118-19.

188. Sasagawa, *supra* note 184, at 6-8.

189. Koizumi has visited the shrine every year since January 2001. Each trip has met with vociferous opposition at home in Japan and abroad in China, South Korea and Taiwan. Six lawsuits have been filed — in district courts in Tokyo, Osaka, Chiba, Naha, Fukuoka, and Matsuyama — over these visits. Decisions have been handed down in three of those cases — Osaka, Fukuoka, and Matsuyama. *Putting Yasukuni in its Place*, *supra* note 40.

190. *Court Denies Redress for 631 Suing over Yasukuni Visit*, JAPAN TIMES, Feb. 28, 2004, *available at* http://www.japantimes.co.jp.

191. *Redress Denied in Suits over Koizumi Shrine Visits*, JAPAN TIMES, Mar. 17, 2004, *available at* http://www.japantimes.co.jp.

192. More than 200 citizens, including religious figures, in Kyushu, filed the Fukuoka lawsuit. The plaintiffs had sought 100,000 yen each in damages from the government, citing the psychological damage suffered as a result of the shrine visits. *Koizumi Shrine Visit Ruled Unconstitutional*, JAPAN TIMES, Apr. 8, 2004, *available at* http://www.japantimes.co.jp.

ious acts that improperly promoted the shrine.[193] The court explained its dicta as follows: "The Yasukuni visit was made without sufficient debate on constitutionality and has since been repeated. If the court evades making a constitutional judgment, the possibility would be high that similar acts will be repeated."[194]

The Fukuoka District Court's dicta notwithstanding, plaintiffs have generally been forced to resort to indirectly challenging the constitutionality of actions by the national government by suing local governments. Such efforts have been met with limited success. For example, precluded from suing the national government for funding the Shinto funeral of Emperor Hirohito and the Shinto ceremonies of accession for Emperor Akihito, various plaintiffs responded by suing the prefectural government. These plaintiffs demanded restitution from the prefectural governors, pursuant to Self Governing Law 242(2), for the expenses related to the governors' attending the ceremonies. Courts have consistently rejected such suits, holding that regardless of the religious nature of the ceremonies, the governors' attendance was a matter of social etiquette.[195]

On the other hand, in a taxpayer's suit against the Iwate prefectural governor and 40 Iwate assemblymen, the Sendai High Court held that "official visits" to Yasukuni Shrine by the Prime Minister and Emperor were unconstitutional.[196] The suit (hereinafter *Iwate*) was brought by Morioka residents who demanded the return of expenses used by the prefecture to deliver an assembly resolution, calling for "official worship" by the Prime Minister and the Emperor at Yasukuni, to the central government in Tokyo. The suit also sought the return of 21,000 yen given to Yasukuni by the prefectural government to buy *tamagushi*.[197] Rejecting Iwate Prefecture's argument that official

193. The court reasoned: "The prime minister has visited Yasukuni Shrine, which is not necessarily an appropriate place to honor the war dead, as many as four times, despite strong opposition even from within the Liberal Democratic Party and the Cabinet. In light of this, the visits have been made on the basis of political motivations, in the knowledge that they involved constitutional problems." *Id.*

194. Responding to the decision, plaintiffs noted: "It is the best ruling. Our request for compensation was rejected, but our purpose was achieved." *Id.* Moreover, plaintiffs do not intend to appeal, thus ensuring that the court's holding that the visits were unconstitutional will not be overturned. The state cannot appeal because it technically won the case. *Id.*

195. *See, e.g., Court Denies Redress for 631 Suing over Yasukuni Visit*, JAPAN TIMES, Feb. 28, 2004, at B2 *available at* http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040228b2.htm. *See also Redress Denied in Suits over Koizumi Shrine Visits*, JAPAN TIMES, Mar. 17, 2004, at A5, *available at* http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040317a5.htm.

196. Iwate, *supra* note 97.

197. O'BRIEN, *supra* note 20, at 172.

visits to Yasukuni were a matter of social etiquette intended to honor the "glorious war dead," the Sendai Court held that official visits to Yasukuni by public officials constituted religious acts in violation of the Constitution. The court further held that official visits to Yasukuni by the Prime Minister, and particularly the Emperor, would be especially symbolic and would promote Yasukuni as a special religious organization. The court thus held that the resolution of the assembly and the use of public funds to deliver the resolution to the central government in Tokyo were unconstitutional. The court did not order the defendants to indemnify the prefecture, reasoning that before this decision, the unconstitutionality of official visits to Yasukuni was not clear. Significantly, the court also held, applying basically the same reason later adopted by the Supreme Court in *Ehime*, that the donation of public funds for *tamagushi* offerings to Yasukuni was unconstitutional. The court granted immunity to the defendants, however, and did not require that they indemnify the prefecture for the funds used for the *tamagushi*. The Second Petty Bench of the Supreme Court rejected the subsequent appeal by the government as without legal merit, on the grounds that the government won the case when the plaintiffs' damage claims were rejected.[198]

Even in "successful" causes like *Iwate*, the effectiveness of suing local governments as a means of changing the behavior of the national government is not unequivocal. While such cases generate significant publicity and give plaintiffs a public forum in which to challenge governmental actions, conservative politicians have been slow to adjust their behavior. For example, the re-

198. Takara Tetsumi, constitutional law professor at Ryukyu University, argues that the *Iwate* decision represents a new strategy by the lower courts of finding against the government on the substantive issues of separation of religion and state but technically ruling in favor of the government in order to prevent appeal to the more conservative Supreme Court. Takara, *supra* note 100. The lower courts can thus preserve their rulings and shape the national debate on separation of religion and state. In support of this position, Takara also cites an Osaka High Court decision in which official visits to Yasukuni by Nakasone were held unconstitutional, yet the court dismissed the suit on the ground that the plaintiffs had not suffered a legally recognizable harm. One can see a similar interplay at work in the Fukuoka District Court decision of April 8, 2004 discussed above. As the number of decisions mount holding that official visits to Yasukuni are unconstitutional, a national consensus could evolve that such visits violate the principle of separation of religion and state. This in turn makes it increasingly likely that the Supreme Court might take up the issue and agree. In that sense, the strategy described by Takara could prove quite effective in the long run. In the short run, it also gives ammunition to those calling for an immediate end to state patronage of Yasukuni. The Japan Times notes: "As far as Mr. Koizumi's visits are concerned, though, there is as yet no Supreme Court judgment. But this hardly means that he should continue to visit Yasukuni Shrine as before. He should respect the latest ruling, even though it represents a lower court decision." *Putting Yasukuni in its Place*, *supra* note 40.

sponse of the LDP to the *Iwate* decision was to stage a mass official visit of cabinet members and congressmen to Yasukuni Shrine.[199]

Moreover, the fact remains that, unlike in the United States where the Court has fashioned special standing rules for Establishment Clause cases, the most direct means of challenging actions of the national government that violate the principle of separation of religion and state has been cut off by the Japanese Court. This contrasting approach suggest that the Courts have different views of their respective roles as the final arbiters of the meaning of constitutional principles, in general, and in answering divisive questions of the proper relationship between religion and the state, in particular.

PART V: EXPLAINING THE COURT'S JURISPRUDENCE

But for the *Ehime* decision, it would be reasonable to explain the decisions of the Japanese Supreme Court relating to Articles 20 and 89 as primarily a reflection of the Court's unwillingness to enforce separation of religion and state in Japan, at least as it relates to Shinto and the state. The *Ehime* decision however shows that the Courts' tolerance of state support of Shinto has some limit. In understanding what was different about *Ehime*, it is possible to develop a fuller understanding of the doctrine of separation of religion and the state in Japan, and the role that the Court sees itself playing in the development of this doctrine.

SUBSTANTIVE DIFFERENCES IN THE CASES

First, there are some significant substantive differences in the *Ehime* case that suggest a theoretical approach to separation of religion and the state aimed at preventing a particular evil at which the Constitution was directed. In *Ehime*, the Court wrote:

> It is a fact of public knowledge that, in Shrine Shinto, festivals are the central religious activities . . . .
> the Prefecture thus clearly had a connection with the important religious ceremonies of a particular religious organization. In general, the dedication of money for *tamagushi* is different from groundbreaking ceremonies sponsored by builders in order to pray for safety during construction. Giving of donations for *tamagushi* cannot yet be said, according to movement of the times, to have become customary social etiquette of weakened religious significance. It is hard to think that the general

199. O'BRIEN, *supra* note 20, at 174.

population would judge the donation of money for *tamagushi* as no more than social etiquette.[200]

There is a significant difference, at least in the eyes of most Japanese, between a groundbreaking ceremony and giving *tamagushi* offerings to Yasukuni. This difference is deeply rooted in Japanese society. Peter Takayama explains in "Revitalization Movement of Modern Japanese Civil Religion":

> Whereas state Shinto centered on the veneration of the emperor, early and communal Shinto centered around the animistic worship of natural phenomena—sun, mountains, trees, rocks, and the whole process of fertility. Totemistic ancestors were included among the *kami,* or deities worshipped, and no line was drawn between humanity and nature.[201]

The *Tsu* groundbreaking ceremony can be seen as an extension of traditional Japanese animistic beliefs in that it is intended to pacify earth kami before construction. The ceremony would also be accepted by most Japanese as a custom.

Yasukuni is something entirely different. Takayama illuminates the difference:

> In order to promote the emperor cult as the most important ingredient of State Shinto, the Meiji government established a special shrine in Tokyo (Yasukuni) for the repose of those who had died for the royalist cause at the time of the Meiji Restoration. . . Enshrinement was limited to the soldiers who laid down their lives for the emperor and the state.[202]

Yasukuni is connected to the emperor and to State Shinto, not to traditional Japanese religiosity. Funding of Yasukuni is thus exactly the kind of "church" and state collusion at which the Japanese Constitution was directed.

The Court noted in *Ehime* that "the appropriate relationship between religion and state varies according to a nation's historical and social conditions." It further elaborated that:

> [T]he Imperial Constitution had previously guaranteed freedom of religion in Article 29. Not only was that guarantee limited but State Shinto was in reality established as the national religion. Belief in State Shinto was demanded of the general population and certain religious groups were persecuted severely. The present Constitution took into consideration the many evils associated with the close relationship between the State and Shinto since the Meiji Restoration and sought anew to unconditionally guarantee freedom of religion. Moreover, to make that guarantee a reality, the rule requiring separation of religion and state was included.[203]

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200. Ehime, *supra* note 5, at 12.

201. Peter Takayama, *Revitalization Movement of Modern Japanese Civil Religion*, 48 Soc. Analysis 328, 331 (1988).

202. *Id.*

203. Ehime, *supra* note 5, at 3.

The "many evils" to which the Japanese Supreme Court is referring include the corruption of Shrine Shinto by the Japanese Government to promote Japanese nationalism and to justify Japanese aggression during World War II. According to William Woodard, an authority on the Occupation, it was this link between Shinto and Japanese militarism that primarily prompted the inclusion of separation of religion and state in the post-war Japanese Constitution.[204]

Woodard argues that while "separation of religion and state" were the terms used to describe the principles underlying the Shinto Directive and later the Japanese Constitution, the underlying principle was actually separation of "church" and the state. A strictly textual interpretation would thus be "foreign" to the intent of the clauses. Woodard argues that recognition of the importance of the "cultivation of religious sentiment" is essential to understanding the policy of the Occupation toward the Japanese State's connection with religion. Rather than promoting secularization, the intent of the Occupation was to allow a close relationship between religion and the state to continue as before, while preventing the types of abuses presented by State Shinto. "Any interpretation of the Constitution which denies this would not only be harmful and contrary to the purposes of the Occupation but also a violation of the principle of religious freedom."[205]

The divergent outcomes in the *Ehime* and *Tsu* decisions could thus reflect a particular theoretical approach to separation of religion and state in Japan in which the plain meaning of the constitution is less important that the underlying rationale. *Ehime* involved a direct connection between the state and Yasukuni Shrine, the "spiritual backbone of State Shinto,"[206] whereas *Tsu* simply involved state recognition of the religious sentiment of the construction workers in their desire to have a groundbreaking ceremony. The former raises the prospect of a resurgence of State Shinto, whereas the latter does not.

This substantive difference cannot fully explain the Court's approach to separation of religion and the state, however. The *SDF*, *Minoo, Oita,* and *Kagoshima* cases, to varying degrees, similarly involved vestiges of State Shinto and yet the Court found in favor of the State in all cases. The *SDF* case involved State cooperation in the enshrinement of soldiers at a local branch of Yasukuni Shrine. Enshrinement of soldiers at Yasukuni was one of the main underpinnings of Japanese militarism. Likewise, the

204. William Woodard, *Religion-State Relations in Japan*, 25 CONTEMP. JAPAN 81, 112 (1957).

205. *Id.*

206. *Putting Yasukuni in its Place, supra* note 40.

Minoo cases involved, among other things, the giving of *tamagushi* offerings by public officials at a Shinto ceremony to honor the local war dead, as well as the giving of public funds to the local AWBF to subsidize trips to worship at Yasukuni. *Oita* and *Kagoshima* involved attendance at Shinto ceremonies historically related to the deification of the Emperor—something at the heart of State Shinto. None of these cases centered around the animistic worship of natural phenomena, as did the *Tsu* groundbreaking ceremony, but instead involved indirect support of Yasukuni or its local affiliates. *Minoo* even involved the donation of the same type of *tamagushi* offerings as in *Ehime*.

A theoretical approach to separation of religion and the state aimed at preventing the resurgence of the symbols of State Shinto would have dictated different outcomes in the *Minoo* and *SDF* cases. A principled theoretical approach might also compel the Court, issues of standing aside, to enter the fray in addressing the appropriateness of official state worship at Yasukuni and the proper symbolic role of the Emperor.[207] Other factors are undoubtedly at work in the Court's approach to separation of religion and state.

Shifting Composition of the Court

The Japanese Supreme Court has been criticized for lack of independence and for failure to exercise judicial review.[208] Much of this lack of independence is due to the reality that for thirty-eight years, until 1993, the Liberal Democratic Party ("LDP") controlled the government as well as appointments to the Japanese Supreme Court.[209] The cabinet and the prime minister have almost complete control over appointments to the Supreme Court.[210] The average judge is usually appointed late in his career and serves only four to six years before being required to resign when reaching retirement age of 65.[211] Turnover is high and judicial appointments to the Supreme Court are often rewards for long careers of loyalty and deference to the LDP controlled government. The Court thus reflects in significant part the beliefs of the ruling party that appointed the individual jus-

207. In *Oita* and *Kagoshima* the plaintiffs were only able to challenge the attendance of government officials at the ceremonies, and were precluded by standing limitations from directly challenging the actual use of government funds to pay for the ceremonies.

208. For a discussion of the lack of independence in the Japanese judiciary, see, for example, Setsuo Miyazawa, *Administrative Control of Japanese Judges,* 25 Kobe U. L. Rev. 45 (1991).

209. Takayama, *supra* note 201, at 338.

210. *See* O'Brien, *supra* note 20, at 76-78.

211. *Id.* at 79.

tices.[212] For example, the Court that decided the *SDF* case was made up of twelve Nakasone appointees, out of fifteen members.[213] Nakasone is, as previously noted, a self-proclaimed nationalist and strong advocate of the nationalization of Yasukuni Shrine.[214] It therefore should not be surprising that the *SDF* Court, Nakasone's Court, went to such great lengths to uphold the government's support of the enshrinements at local affiliates of Yasukuni Shrine.

Arguably, a changing political climate and the LDP's temporary loss of control over the government has since opened the door to more "liberalism" on the Court. The *Ehime* Court not only contained the Court's first female justice, but also a number of non-LDP appointed judges.[215] More significantly, the judges on the *Ehime* Court represented a shift to a more progressive generation of leaders. Chief Judge Miyoshi Toru, one of the two dissenters in Ehime and, along with his fellow dissenter, the oldest member on the Court, was in the last graduating class of the Naval Military High School, which was shut down after World War Two.[216] His isolation on the Court, and the labeling of his decision by the Japanese press as "fanatical," belies a revolution in the composition of the Court and of Japanese society as a whole.[217] Lawrence Beer notes:

> The passing of Emperor Hirohito on January 7, 1989, seems part of a major transition from the postwar generation of leaders to a new generation educated in the past half century. This generational succession is part of a broad pattern of leadership changes in Asia. The emerging leaders of Japan are more apt to be matter-of-fact than passionate about the Emperor and Shinto, more comfortable than some of their predecessors with the 1947 Constitution. . . At this juncture of generational leadership succession, the revolution of freedom may be as firmly institutionalized in Japan as in any other constitutional democracy.[218]

Whether or not Beer's conclusion is accurate, he correctly identifies a generational progression in Japan. This progression affects

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212. *See id.* at 79-83.

213. *Id.* at 197.

214. Fukatsu Masumi, *A State Visit to Yasukuni Shrine*, 33 JAPAN Q. 19, 23-24 (1986).

215. *"Seikyo Bunri:" Genkaku ni Handan*, YOMIURI SHINBUN, Apr. 3, 1997, at 3.

216. *Id.*

217. *Kohi Hatome, Uradachi*, ASAHI SHINBUN, Apr. 3, 1997, at 2.

218. Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution, in* JAPANESE CONSTITUTIONAL LAW 222 (Percy R. Luney & Kazuyuki Takahashi eds., 1993). Symbolic of this transition, Governor Shiraishi of Ehime died two days before the Court's decision. *Tatakai 15 Nen, Hanketsu wa Daiippo*, *supra* note 4, at 2.

the composition of the Supreme Court and it could be responsible, at least in part, for the court's break with the past in *Ehime.*

Just two years later in the *Minoo Subsidy* case, however, the Court upheld government subsidation of the AWBF, which funds worship at Yasukuni by war-bereaved families. Then, in *Oita* and *Kagoshima*, the Court upheld official attendance at Shinto accession ceremonies for the Emperor. These decisions seem to run counter to the theory that a new generation of justices has adopted a more vigorous approach to enforcing separation of Shinto and the State. However, *Minoo Subsidy* was essentially decided in 1993 in the *Minoo Memorial* and *Memorial Services*, where the Court noted in dicta that that the AWBF was primarily a nonreligious private organization and not subject to Article 89 of the Constitution.[219] To reach a different decision in the *Minoo Subsidy* case would have required the Court to explicitly repudiate its earlier findings.

Moreover, the decisions in Oita and Kagoshima were too narrow to draw any definitive conclusions. The Court's holding that the attendance of the local officials was merely a matter of social etiquette, on its face at least, seems to be correct. However, the Court also held that the *Daijosai* was a religious ceremony. This seems to suggest that there might be some support on the Court for the idea that direct government funding of the *Daijosai* ceremony is unconstitutional. On the other hand, the Court noted that the Daijosai is also a longstanding "tradition." As such, the constitutionality of public funding of the ceremony remains an open question.

It would thus be a mistake to read too much into the *Minoo Subsidy, Oita,* or *Kagoshima* cases, at least as they relate to the Court's evolving interpretation of separation of religion and state. Likewise, it is probably too early to tell if *Ehime* reflects the beginning of a generational shift in the Court's approach to Articles 20 and 89.

Political Realities

The Court's decision in *Ehime* might just as well reflect the controversial nature and politicization of Yasukuni Shrine. As discussed above, "Questions of state patronage of and official worship at the Yasukuni Shrine have provoked or revived an unending controversy among various groups and have caused serious political and social dispute and divisiveness."[220] Donations to Yasukuni involve divisive historical, political and social dimensions that groundbreaking ceremonies do not.

219. O'Brien, *supra* note 20, at 127-28.
220. Takizawa, *supra* note 8, at 100.

The Court was surely aware that both international and domestic attention would be focused on its decision in *Ehime*, the first Supreme Court case to directly address the Yasukuni question. The LDP's repeated failures to nationalize Yasukuni, the weakening of the LDP, a vocal domestic minority opposed to support of Yasukuni, and predictable international outrage to the condoning of official state patronage of Yasukuni, likely played at least some role in the *Ehime* decision.

Subsequent reactions to the decision seem to confirm this interpretation. While the LDP and the AWBF denounced the decision, most major Japanese newspapers, legal scholars, opposition political parties, and the Peace AWBF, an opposition group to the AWBF, heralded the decision. Even the New Frontier Party (Shinshinto), a conservative split-off of the LDP, announced it would support the decision.[221] The decision was also reported as major international news throughout Asia, particularly in China and Korea, where the decision was front-page news.[222] For the Court to have held that the donations were legal, it would have had to face strong domestic and international criticism. This would have been an especially high price to pay considering the fact, as even the Secretary General of the Cabinet noted, "Donations for *tamagushi* are a fifteen year-old story."[223]

BUREAUCRATIC INFORMALISM

As discussed above, Shinto officials requested in 1981 that prefectures donate money to purchase *tamagushi* and *kento* to be used at festivals honoring the souls of the war dead. Ehime Pre-

221. *"Seikyo Bunri:" Genkaku ni Handan*, *supra* note 234, at 3. The president of the AWBF declared: "today's decision is not the end. We will fight until our earnest wish is fulfilled." *Kohi Hatome, Uradachi*, *supra* note 236, at 3. The LDP denounced the decision as "unexpected" and against earlier Supreme Court cases that dictated a "constitutional result." The secretary general of the cabinet declared that the fight was not over: "the country was not the party concerned. We think of [donations] as something different than public worship by cabinet members." However, the New Frontier Party announced that "the Government and local governments should solemnly accept the decision and fairly put it into effect." The Socialist-Democratic Party (Minshu-to) announced that the decision was an "extremely good decision," noting that "the LDP and the New Frontier Party should consider the principle of separation of religion and state and stop official visits to Yasukuni." The Communist Party called the decision "a natural result making clear that official worship at Yasukuni is unconstitutional." The Socialist party announced they "welcomed the epoch-making decision." The Taiyoto stated simply that "the decision is something for the Japanese people to think about and that the decision should be respected." *"Seikyo Bunri:" Genkaku ni Handan*, *supra* note 234, at 3.

222. *Sengo Shori to Kanren-duke*, *supra* note 4, at 33; *Tamagushiryo Hanketsu: Kakutou, Kankeisha no Hannou*, MAINICHI SHINBUN, Apr. 3, 1997, at 12.

223. *Seifu-Yotou wa Hakyuu wo Keikai*, ASAHI SHINBUN, Apr. 3, 1997, at 33.

fecture and 37 other prefectures responded by donating money directly to Yasukuni or local Nation Protecting Shrines. Responding to controversy over the donations, the Ministry of Home Affairs issued a directive in 1982 advising that prefectures should stop giving *tamagushi* offerings due to concerns about their constitutionality. Ehime Prefecture ignored the directive and continued to make offerings until the *Ehime* suit was filed in 1986, at which time it finally stopped making *tamagushi* offerings.[224]

Thus, by the time the issue reached the Supreme Court, it had been 11-years since Ehime stopped giving *tamagushi* offerings and 15-years since the Ministry of Home Affairs had directed prefectures to stop the practice.[225] Had the Court held that *tamagushi* offerings were constitutionally permissible, a fifteen-year precedent would have been reversed, and local prefectures would have been free to ignore the administrative directive of the Ministry of Home Affairs. This would have hardly coincided with the type of deference to bureaucratic control, or bureaucratic informalism, that has long characterized the Japanese legal system.

In *Law and Social Change in Postwar Japan*, Frank Upham identified bureaucratic informalism as the process by which the "bureaucracy tries to gauge the fundamental direction of social change, compares it with the best interest of society from the perspective of the ruling coalition of which it is a part, and then attempts to stimulate and facilitate the creation of a national consensus that supports it own vision of correct national policy."[226] Under this model, litigation in Japan is often the means for making the bureaucracy aware of serious social discontent but "it is not allowed to develop into an institutional channel for resolving disputes or setting national policy because either role would destroy the elites control over the process as well as the substance of policy making."[227]

The *Ehime* litigation significantly follows the pattern of bureaucratic informalism. Prefectural donations of money for *tamagushi* and *kento* to Yasukuni created significant political and social controversy, to which the Ministry of Home Affairs re-

224. Nishijima, *supra* note 88, at 16-19.

225. *"Kako no Hanashi" Jichitai Heisei*, ASAHI SHINBUN, Apr. 3, 1997, at 33. Even Prime Minister Hashimoto did not make a *tamagushi* offering when he visited Yasukuni in July of 1996, and when cabinet members make their annual visit Yasukuni on August 15 they regularly give floral arrangements rather than *tamagushi* offerings. *Kohi Hatome, Uradachi, supra* note 236, at 2.

226. FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 21 (1987).

227. *Id.* at 21-22.

sponded with a directive instructing prefectures to stop the practice until "questions of constitutionality" could be resolved.[228] Under the model of bureaucratic informalism, this preemptive move by bureaucracy would have been designed to keep the socially divisive issue of state patronage of Yasukuni out of the courts until a national consensus could be reached on the proper relationship between the government and Yasukuni.

Ehime's, and particularly Governor Shiraishi's, open defiance of the administrative directive can thus be seen as an exercise in resistance to bureaucratic control. In response to questions concerning Ehime's failure to follow the Ministry of Home Affairs directive, Governor Shiraishi boasted, "We are proud to be the only prefecture left giving donations [to Yasukuni]."[229]

In its decision, the Court stressed that because the Ministry of Home Affairs had notified the Prefecture that this type of donation was constitutionally questionable, Governor Shiraishi was personally liable for the cost of the donations.[230] Unlike state officials in the United States who are liable only if they violate clearly established law, Governor Shiraishi was liable because he openly defied the Ministry of Home Affairs, despite the fact that there was no clearly established law as to the constitutionality of *tamagushi* donations.[231]

By fining Governor Shiraishi for his defiance, the Court reasserted the role of the bureaucracy as the channel to resolve conflict and as the shaper of national policy. Rather than standing as an example of "protecting the rights of the religious minority against the government," as the decision was described in an editorial in the *Asahi* Newspaper,[232] or as an indication of a doctrinal shift in the Court's approach to separation of religion and the State, the *Ehime* decision could just as easily be an example of bureaucratic informalism.

Bureaucratic informalism is also consistent with other decisions of the Court relating to separation of religion and the state. In the *SDF* case, the Court upheld the bureaucratic policy of enshrining deceased soldiers in the face of challenge by "activist" who sought to use the courts as a means of challenging bureaucratic policy. The bureaucratic response, however, was to seek to neutralize the issue, and since the *SDF* case, local SDF offices have ceased enshrinements of SDF soldiers.[233]

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228. *See* Nishijima, *supra* note 88, at 16.
229. *Tatakai 15 Nen Hanketsu wa Daiippou*, *supra* note 4.
230. *Id.* at 20-21.
231. Ehime, *supra* note 5, at 20.
232. *Sengo Shori to Kanren-duke*, *supra* note 4, at 33.
233. *See* O'BRIEN, *supra* note 20, at 202.

While bureaucratic informalism cannot fully explain *Tsu*, *Minoo*, *Oita*, and *Kagoshima*, where specific policies of the federal bureaucracy were not at issue, bureaucratic informalism is certainly consistent with those decisions.[234] Moreover, the fact that the Court has only decided seven cases dealing with separation of religion and state in over 57 years and has severely limited the standing of plaintiffs to challenge actions of the national government suggests that the model of bureaucratic informalism is in play. By limiting the availability of judicial remedies for violations of Articles 20 and 89, the Court has not allowed litigation "to develop into an institutional channel for resolving disputes or setting national policy" as to proper relationship between Shinto and the State.[235] In that sense, the narrow holdings of the Court as to the constitutionality of any particular governmental action are secondary to the larger role of its decisions in reinforcing bureaucratic control over social change in Japan.

CONCLUSION

The Japanese Supreme Court has, for the most part, declined to enforce separation of religion and state as it relates to governmental endorsement of Shinto religious practices. Instead, the Court has embraced an untenable "purpose and effect test," crafted a definition of religion that conflates Shinto religious practices with Japanese culture, and interpreted Articles 20 and 89 in a manner in which individuals are unable to directly challenge actions of the national government that violate the principle of separation of religion and state.

The problem with the Court's approach is not so much that it is paving the way for a resurgent use of Shinto to promote Japanese nationalism, though this fear is not completely unfounded.[236] Rather, the real concern lies in the threat of the

234. In a process resembling bureaucratic informalism on the local level, after the filing of the *Minoo* cases, Mayor Nakia announced that he would now adhere to a policy of not attending memorial services at the *chukonhi* in order to avoid controversy. *Id.* at 118. Memorial services are no longer held at the Minoo *chukonhi*, which has fallen into disarray. *Id.* at 140.

235. UPHAM, *supra* note 226, at 21.

236. Historically, this fear strikes at the heart of one of the motivations behind the inclusion of separation of religion and state in the post-War Constitution. *Id.* Moreover, ultra-conservatives in Japan, many of whom currently serve in the LDP, aim to do exactly that. *Id.* However, in *Ehime*, the Court made clear that Yasukuni is a religious organization, Yasukuni's ceremonies are religious activities, and the government may not make direct financial donations to support ceremonies at Yasukuni. Ehime, *supra* note 5, at 4-7. The underlying message: government officials should be cautious in their relations with Yasukuni Shrine and other vestiges of State Shinto. The Fukuoka District Court recently reinforced this message when it held that Prime Minister Koizumi's official visits to Yasukuni were unconstitutional. *Koizumi Shrine Visit Ruled Unconstitutional*, JAPAN TIMES, Apr. 8, 2004, at A1,

Court's approach to religious liberty and equality. It is out of this concern that the first normative lesson may be drawn. It is no coincidence that the strongest advocate of separation of religion and state in Japan tends to be the Christian minority. Nor is it a coincidence that, in the United States, members of the Christian majority tend to be the strongest supporters of school prayer and other forms of government endorsement of religion. This difference highlights a striking similarity: in both Japan and the United States, government endorsement of majority religious beliefs creates a perception among minority religious groups of being disfavored outsiders.

We should be concerned about this perception not just because it hurts the feelings of the outsider, or reminds them that they are a minority, but because it sends the message that they are second-class citizens and are politically unequal.[237] It thus has "practical consequences for the democratic process."[238] We should also be concerned about identity exclusion because of the danger of coercive pressure—or the danger that "one who suffers identity exclusion on the basis of religion will change his religion and assimilate his identity to the majority religion."[239] Finally, we should be concerned about identity exclusion because religious identity is basic and fundamental to selfhood, and exclusion based upon religious identity is psychologically destructive.[240]

The second normative lesson is that there need not be one underlying purpose for separating religion and state—there can be several. It is the attempted reliance on one theoretical justification,[241] or more accurately, one constitutional standard—be it the *Lemon* test, the O'Connor endorsement test, or the *Tsu* pur-

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available at http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040408a1.htm. Wide acceptance and praise of the Ehime decision indicates that ultra-conservatives may be losing the battle to reassert State Shinto as the official national religion.

237. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 709 (2002).

238. *Id.* at 703.

239. *Id.* at 716.

240. *Id.* at 716, 718. Feldman ultimately rejects all of these interlocking justifications for the equality rationale because he concludes that the equality rationale fails, on its own, to offer a complete theoretical answer to the question: "Why separate church and state?" *Id.* at 731. A comprehensive response to Feldman's rejection of the equality rationale is beyond the scope of this article. However, a partial answer is found in the Japanese experience and is discussed *infra* above.

241. As noted by Feldman, scholars of the Establishment Clause have attempted on numerous occasions to identify a unifying theoretical justification for the Establishment Clause. *See id.* at 674 (citing Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1133 (1988); Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233 (1997); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of*

pose and effect test—that leads to indefensible and incompressible jurisprudence in the area of separation of religion and state in both the United States and Japan.

Rather than being contained in one short clause like the Establishment Clause, the principle of separation is set forth in three separate provisions in the Japanese Constitution. Article 20(1) prohibits the state from granting religious organizations special privileges and religious organizations from exercising political authority. Article 20(3) prohibits the state and its organs from engaging in any religious education or other religious activities. Article 89 prohibits the government from using public money for the benefit or maintenance of a religious organization. There is no reason why all three provisions must be read as having the same purpose or the same theoretical justification. Likewise, there is no compelling reason why all three provisions should be examined using the same *Tsu* purpose and effect test, which as we have seen operates in a similar manner to the *Lemon* and/or endorsement tests used by the United States Supreme Court.

Failing to consider this possibility, the Court in *Ehime* was left to force its analysis through the *Tsu* purpose and effect test. To reach its decision, the Court was compelled to conclude that giving financial support to a religious institution endorses religion because it constitutes a religious activity in the eyes of the average person. There was no need for the Court's strained reasoning. The Court could have concluded that Article 89 was aimed not at endorsement, but based upon the belief that it impinges on one's religious conscience to be taxed to support a religion with which one disagrees.[242] Likewise, Article 20(1), prohibiting religious organizations from exercising political authority and the state from granting them special privileges, need not be concerned solely with identity exclusion, but could also address concerns of theocracy and the notion that a "union of government and religion tends to destroy government and to degrade religion."[243] The appropriate test to judge whether a given governmental action violates the principle of separation of religion and state should vary given the particular underlying concern(s) that are implicated by that action.

Likewise, that the Establishment Clause is one single phrase does not imply one single purpose, nor does it require one single test. Indeed, the drafters of the Japanese Constitution were

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the Religion Clauses, 7 J. CONTEMP. LEGAL ISSUES 357 (1996); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992)).

242. As discussed *infra*, the history of the provision supports this interpretation.

243. Feldman, *supra* note 237, at 691 n.79.

Americans attempting to incorporate the same protections against establishment and for religious liberty contained in the U.S. Constitution. The purposes behind disestablishing State Shinto were, as noted above in Part II: 1) freeing the Japanese people from direct or *indirect* compulsion to believe in or profess to believe in any particular religion; 2) lifting the burden of compulsory financial support for Shinto; 3) preventing the use or perversion of Shinto for nationalistic purposes; and 4) promoting democratic values.[244]

These purposes sound very similar to various purposes that have been articulated for the Establishment Clause: the danger of indirect coercive pressure on religious minorities from the endorsement of majority religious beliefs; the belief that one should not be forced to financially support religion; the notion that separation protects both government and religion; and the protection of political equality. If one can see why promoting multiple values is desirable in the Japanese context, it seems a logical step to draw the same conclusion in the United States, especially given that the Japanese principle of separation originated in large part from the Establishment Clause. Freed from the search for one theoretical justification for separation of religion and state, one is able to see the both the value in the endorsement test, and the value in continuing to search for other means of protecting the various principles contained in the Establishment Clause and in Articles 20 and 89 of the Japanese Constitution.

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244. WOODARD, *supra* note 12, at 54-74.