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A Widow's Might: Nakaya v. Japan and Japan's Current State of Religious Freedom

Eric N. Weeks

A Widow's Might: *Nakaya v. Japan* and Japan's Current State of Religious Freedom

I. INTRODUCTION

While the ashes of Hiroshima and Nagasaki were still settling, the Japanese, trying to come to terms with their first military defeat in recorded history, suffered yet another blow to their national identity: On New Year's Day, 1946, Emperor Hirohito publicly denounced his divinity. Because the then state religion, Shinto, deemed the Emperor to be a direct descendant of the gods as well as the spiritual and political leader of the country, the reverberations from this announcement shook the already devastated Japanese populace.[1] With the religious implications of the announcement came significant social and political changes.

Prior to this time, religion and state in Japan had been united through the imperial throne, and Japanese culture reflected this merger. The Emperor's announcement, along with political and legal restructuring effected by occupational forces, created a legal separation between religion and the state that had never before existed in Japanese society. The less formal, cultural union of the Shinto religion and the Japanese state was not so easily dismissed, however, and it continues to influence both the popular and public concepts of separation of church and state and religious freedom in Japan.

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1. Although most Japanese today do not regard the Emperor to be a descendent of the gods, many still display a sentimental loyalty to the throne, and some retain their belief in the Emperor's divinity. Hideaki Kase, an author on the Japanese Imperial Family, is not untypical of this group. In reference to the current Emperor he has stated the following: "The English term 'emperor' is too broad. He is a priest-king, the highest ranking Shintoist priest, half-god, half-man." When confronted with the fact that the Emperor conceded that he was not divine, Kase has responded "Yes . . . but at American gunpoint. Suppose your God in heaven was declared no longer God. *Tennou* [the Emperor] is still sacred. He is a holy man, a shaman." Nina J. Easton, *Shinto Meets Chanel: An Imperial Family Steeped in Tradition Searches for a Clear Identity as Japan Struggles to Update the Myth of its Chrysanthemum Throne*, L.A. TIMES MAG., June 6, 1993, at 16, 53 (quoting Hideaki Kase).

This Comment focuses on religious freedom and the separation of church and state within the context of Japanese society, emphasizing the Japanese Supreme Court's decision in *Nakaya v. Japan*.[2] In that case, the Japanese Supreme Court held that a government agency that had facilitated the Shinto enshrinement of the remains of a Christian woman's deceased husband against her will did not violate the Japanese Constitution's religious guarantee. Japan's minority religions almost universally oppose the court's decision. Some see the ruling as a subtle governmental endorsement of Shinto as the state religion, others see it as a step down the path to a resurgent Japanese militarism.

As a background for understanding the role of religion and state in Japan, Part II of this Comment will provide a brief overview of Japan's religious foundations and the basic tenets of Shinto, focusing on its influences on the Japanese sociological and political framework. It will also briefly discuss the origins of the Constitution of Japan and outline its religious guarantees. Part III will discuss the *Tsu City* case, the first Japanese Supreme Court decision to address the issue of constitutional religious freedoms and the precursor to *Nakaya*. Part IV will then analyze the Japanese Supreme Court's reasoning in *Nakaya*. Part V will discuss *Nakaya* in light of current American analysis of religious freedom jurisprudence. Finally, Part VI will discuss the possible effects of *Nakaya* on Japanese religious freedoms, discussing the difficulties of its application in modern Japanese culture and examining potential pitfalls that must be avoided in order to ensure the maintenance of religious freedoms in Japan.

II. HISTORICAL BACKGROUND

A. A Brief History of Japan and Shinto

The history of Shinto is essentially the history of Japan itself, for out of Shinto arose the modern idea of much of what is Japanese. According to ancient Shinto legend, Japan was founded in 660 B.C. by Jimmu Tennou, a great grandson of the

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2. Judgment of June 1, 1988, Saikousai [Supreme Court], 42 Minshuu 277 (Japan). For the benefit of English readers, the remainder of citations to the case will refer to the following English translation: *Judgment on the Enshrinement of a Dead SDF Officer to Gokoku Shrine*, 25 SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY 1 (1991) [hereinafter *Judgment on the Enshrinement*].

Sun Goddess, Amaterasu. The lineage of emperors is said to descend directly from Jimmu Tennou;[3] thus Japanese emperors are considered divine.[4] The islands of Japan were also considered to be of divine origin, created and protected by the gods.[5] Such ancient folklore defines the historical traditions and much of the modern culture of Japan.

Shinto has been described by one scholar as "a crude form of polytheism, combined with animism, or nature worship."[6] Under the philosophy of Shinto, there exist a myriad of gods. For example, there is a god (*kami*) for each city and village. Oftentimes, special waterfalls, rocks, trees, and other objects are also given the title of *kami*.

Ancestor worship is another important aspect of Shinto. This practice—of particular importance in this Comment—is thought to have been introduced into Shinto philosophy over 1000 years ago, possibly through the influence of the Chinese.[7] Shinto places special emphasis on deceased imperial ancestors and tribal deities who are considered to be gods and who are worshipped at Shinto shrines dedicated to their memory.[8] This view of the spiritual world and of Japan's origins has been deeply ingrained in Japanese culture from early on,[9] thus

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3. Jimmu Tennou is considered by most scholars to have been an actual historical figure.

4. *See* ROBERT K. REISCHAUER, EARLY JAPANESE HISTORY 109-115 (1967). The title *Tennou* is still used to address the emperor of Japan.

5. According to ancient Japanese records, the islands of Japan were created when the gods of heaven commanded a male god named Izanagi and a female god named Izanami to create a new land. The legend maintains that they reached down from heaven and dipped a jewelled spear into the ocean. When they withdrew it, the muddy soil that dripped down from its tip formed an island. Izanagi and Izanami are then said to have descended from heaven to this island, from which they procreated the other islands of Japan, becoming its first inhabitants. *See* KOJIKI [RECORD OF ANCIENT THINGS], bk. I, chs. 1-11 (712 A.D.), *translated in* KOJIKI 47-70 (Donald L. Philippi, trans., 1969); NIHON SHOKI [CHRONICLES OF JAPAN] bk. I, pt. I (720 A.D.), *translated in* NIHONGI 1-28 (W.G. Aston, trans., new ed. 1972); REISCHAUER, *supra* note 4, at 107.

6. MALCOLM KENNEDY, A SHORT HISTORY OF JAPAN 22 (1963).

7. *Id.*; *see also* H. PAUL VARLEY, JAPANESE CULTURE 18-21 (3d ed. 1984).

8. This practice of ancestor worship differs somewhat from common Buddhist practice in Japan. The most common form of ancestor worship in most forms of Japanese Buddhism focuses on the worship of specific, usually recently deceased, ancestors whose remains are placed in a *butsudan* or Buddhist altar kept in the home of the deceased's relatives.

9. For example, ancient stories speak "of Jimmu Tennou worshiping his ancestor the Sun Goddess in his palace," which is thought to have been a "crude wooden structure," serving the multiple purposes of imperial residence, center of government, and religious shrine. KENNEDY, *supra* note 6, at 23; *see also* KAREL

shaping the culture and mind-set of Japan.

While Shinto was closely associated with Japanese culture and government from its beginnings, it was not until the 1880s that they made their most notorious merger. As the Japanese feudal system began to decline, the imperial family was promoted as the new rallying point for the loyalties of the people. Political leaders and scholars promulgated a new constitution in 1889,[10] establishing the Emperor as the spiritual and political head of state.[11] With this shift in power, a new form of Shinto emerged. Elevated to the position of official state religion and "remodeled" to include ultra-nationalist teachings and the Japanese warrior code of conduct,[12] State Shinto was designated as a code of national ethics and rituals, and the Shinto

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VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 274 (1989).

10. Now referred to as the Meiji Constitution.

11. The first portion of the imperial oath read:

> We, the Successor to the prosperous Throne of Our Predecessors, do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government.

MEIJI KENPOU [Meiji Constitution] Imperial Oath sworn in the Sanctuary in the Imperial Palace (Japan 1889), *in* COUNT H. ITO, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (M. Ito trans., 1889), *reprinted in* THE JAPANESE LEGAL SYSTEM 16 (Hideo Tanaka ed., 1977) [hereinafter TANAKA]. Articles 1 to 4 of Chapter I of the Meiji Constitution read:

> ARTICLE 1. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.
>
> ARTICLE 2. The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.
>
> ARTICLE 3. The Emperor is sacred and inviolable.
>
> ARTICLE 4. The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitutions.

Id. at 18. The actual power and influence of the Emperor during this era is still somewhat debatable and the actual extent of his influence may never be known. Most scholars, however, appear to think that the Emperor functioned more as a figurehead and a facade for the actions of government officials than as an autonomous military dictator.

12. Known in Japanese as *bushidou*. This warrior code includes the Japanese caste system and undying obedience to feudal lord and country. Most readers will be familiar with the practice of *harakiri* or *seppuku*, which is the ritual of killing oneself by disembowelment in order to atone, for example, for disgracing one's lord or honor. This was commonly practiced by those warriors (*samurai*) who had lost an important battle or had committed some other serious violation of their code of honor. The inclusion of many of these warrior class doctrines into the state version of Shinto served to promote an extremely strong sense of nationalism. *See, e.g.*, JOHN ALLYN, THE 47 RONIN STORY (1970); HERMAN OOMS, TOKUGAWA IDEOLOGY (1985).

beliefs regarding the creation and supremacy of Japan were taught as unquestionable historical truth.[13]

This shift set the country on a course that would lead to its military aggression in World War II and culminate in defeat and surrender to the Allied Forces in 1945. Upon defeat, Japan was placed under the control of the Allied Forces and was required to rewrite the Meiji Constitution to address issues including human rights, the political supremacy of the Emperor, and the wide-ranging effects of state Shinto.[14] The Allied Forces rejected the first draft, which was prepared by the Japanese, stating that it was "wholly unacceptable . . . as a document of freedom and democracy."[15] Under the direction of General MacArthur, a handful of American lawyers prepared their own draft.[16] This American draft became the foundation of the current Japanese constitution.[17] Among other radical changes, this new Japanese constitution sought to clearly divide militaristic state Shinto from the operations of the newly reorganized government.[18] The Japanese Government estab-

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13. KENNEDY, *supra* note 6, at 15, 154. This was accomplished through compulsory curriculum in all public schools.

14. HIROSHI ODA, JAPANESE LAW 111-13, 122-24 (1992); *see also* Sugata Masaaki, *Shinto Resurgence*, 15 JAPAN Q. 365 (1988) (providing an overview of modern Shinto sects and their relations to state Shinto).

15. KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION 17 (1991) (*quoting* 1 NIHONKOKU KENPOU SEITEI-NO KATEI [THE MAKING OF THE JAPANESE CONSTITUTION] 322 (Takayanagi Kenzou et al. eds., 1972)); *see also* ODA, *supra* note 14, at 112. The Japanese draft took approximately half of its articles directly from the Meiji Constitution. It also retained the Emperor as the political head of the country, thus falling far short of the Allied Forces' democratic expectations. INOUE, *supra*, at 9-16.

16. This group consisted of Courtney Whitney, chief of the Government Section who was assigned to direct the constitutional reformation, and three members of his staff: Col. Charles L. Kades, Lt. Col. Milo E. Rowell, and Comdr. Alfred R. Hussey. INOUE, *supra* note 15, at 16. The Allied Occupation Forces considered Article Twenty, which deals with the role of religion in the Japanese state, to be one of the more crucial aspects of the new constitution. Reacting to the Emperor's complete control of both religious and governmental activities during World War II, the Supreme Commander of the Allied Powers enforced a strong policy of separation of church and state during the postwar occupation. ODA, *supra* note 14, at 123. *See generally* WILLIAM P. WOODARD, THE ALLIED OCCUPATION OF JAPAN 1945-1952 AND JAPANESE RELIGIONS (1972).

17. For more information on the history of the Constitution of Japan, see INOUE, *supra* note 15; TETSUYA KATAOKA, THE PRICE OF A CONSTITUTION: THE ORIGIN OF JAPAN'S POSTWAR POLITICS (1991); ODA, *supra* note 14, at 32-34, 111-15 (1992); TANAKA, *supra* note 11, at 642-85.

18. *See infra* text accompanying notes 20-23; YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 196-97 (Anthony H. Angelo ed. & trans., 1976). For a comprehensive discussion of the development, revision, and adoption of the religion clauses

lished the Constitution of Japan (*Kenpou*) on May 3, 1947.[19]

B. The Japanese Constitution's Religious Guarantees

The Constitution of Japan rejected several of the principles of the prior Meiji Constitution. One of the more notable changes, Article Twenty, provided an express guarantee of religious freedom:

> (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 acts, celebration, rite or practice.
>
> (3) The State and its organs shall refrain from religious education or any other religious activity.[20]

Paragraph three is commonly referred to as the Institutional Guarantee. Together with the second sentence of paragraph one, it strongly implies that there shall be a clear separation of church and state.[21] The first sentence of paragraph one and the sentence comprising paragraph two of Article Twenty provide for the free exercise of religion.[22] The language of the Constitution of Japan is much more specific than that of the United States.[23] This is undoubtedly due to the American drafters' fears of a possible reunification of Shinto with the

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in the Constitution of Japan, see INOUE, *supra* note 15, at 104-59.

19. For an insight into the events involved in drafting the current Constitution of Japan, see TANAKA, *supra* note 11, at 653-64.

20. KENPOU [Constitution] ch. III, art. 20, ¶ 3 (Japan), *in* TANAKA, *supra* note 11, at 6. For an introduction to the making of this constitution and the accompanying political maneuvers of both the Allied Forces and the Japanese, see *id.* at 642-64.

21. Paragraph Three is analogous to the Establishment Clause of the United States Constitution, which states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

22. In the two religious cases decided by the Japanese Supreme Court under this constitution, these two sentences were analyzed together. These sentences are analogous to the United States' Free Exercise Clause which states: "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Id.*

23. The specificity of the Japanese Constitution's religious guarantees might imply that the Japanese Supreme Court is allowed comparatively less freedom of interpretation than its counterpart in the United States. However, because the Japanese Supreme Court has only reviewed two cases under this Article (Sekiguchi v. Suminaga (The Tsu City case), Judgment of July 13, 1977, Saikousai [Supreme Court], 31 Minshuu 533 (Japan); and Nakaya v. Japan, Judgment of June 1, 1988, Saikousai [Supreme Court], 42 Minshuu 277 (Japan)), the extent of the court's interpretative powers remains to be seen.

Japanese State. Thus, the Constitution of Japan seems to mandate a complete separation of church and state in modern Japan.

The Japanese Supreme Court has only interpreted Article Twenty on two occasions. Accordingly, the two cases addressing the Article weigh heavily on the future of religious freedom in Japan. The first case to address Article Twenty was *Sekiguchi v. Suminaga*.[24] More than a decade later, the Supreme Court addressed Article Twenty again in *Nakaya v. Japan*.[25]

III. PRECEDENTIAL BACKGROUND OF *NAKAYA V. JAPAN*: THE *TSU CITY* CASE

The Japanese Supreme Court first interpreted Article Twenty of the Japanese Constitution in 1977, nearly three decades after the constitution's adoption, in *Sekiguchi v. Suminaga*, a decision commonly referred to as the "Tsu City" case. In 1965, the City of Tsu held a *jichinsai*[26] when it commenced construction of a new municipal gymnasium.[27] Seiichi Sekiguchi, a Communist member of the Tsu City Council,[28] filed suit against the Mayor, charging that both the fees paid to four Shinto priests for the *jichinsai* and the City's endorsement of the ritual violated Article Twenty of the Constitution of Japan.[29] After a verdict in favor of the city in the Tsu District Court, the Nagoya High Court reversed in favor of the plaintiff.[30]

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24. Judgment of July 13, 1977, Saikousai [Supreme Court], 31 Minshuu 533 (Japan).

25. Judgment of June 1, 1988, Saikousai [Supreme Court], 42 Minshuu 277 (Japan).

26. A *jichinsai* is a Shinto ceremony performed to purify and dedicate a building site and to ensure the safety of construction workers.

27. Judgment of July 13, 1977, 31 Minshuu at 533; *see also* TANAKA, *supra* note 11, at 735.

28. According to research by Keiichi Yanagawa and David Reid, most religious organizations in Japan can be classified as favoring a certain relation between Japanese religion and government. They suggest that groups tending to prefer a policy of religious tolerance coupled with wide separation from government activities include Joudo Shinshuu (a relatively modern, "reformist" Buddhist group), the vast majority of Christians, and members of the many "new religions" currently forming in Japan. Japanese Communists and members of other political and social minorities are also generally considered to be part of this diverse group. See Keiichi Yanagawa & David Reid, *Between Unity and Separation: Religion and Politics in Japan, 1965-1977*, 6 JAPANESE J. RELIGIOUS STUD. 500, 504-08 (1979).

29. *See* TANAKA, *supra* note 11, at 735; Yanagawa & Reid, *supra* note 28, at 500, 512.

30. Judgment of May 14, 1971, Nagoya Kousai [Nagoya High Court], 630

A. The Nagoya High Court's Standard

The high court used a three-pronged analysis to determine whether the state action was religious. The court asked "[1] whether the ceremony was conducted by a man belonging to some religious sect, [2] whether the ceremony was performed following an order set by a religious sect, and [3] whether the ceremony was of such a nature as to be accepted by every ordinary person without any feeling of discord."[31]

In addressing the first two considerations, the court noted that the ceremony was of ancient Shinto origin and until the conclusion of World War II, had been administered by the Home Ministry, a government bureau which, before its abolishment, had dealt with the administration of Shinto shrines and rituals.[32] The court, focusing on history, thus emphasized the religious nature of the ceremony. In addressing the third consideration, the court found that the *jichinsai* was accepted by every ordinary person without discord.[33]

The court then held that a simple showing that a state entity performed a religious activity or otherwise "assist[ed]" a religion is sufficient to establish a violation of Article Twenty's guarantee of the separation of church and state.[34] Under this standard, the court held that the ceremony was not "of a purely customary nature" and was thus a violation of paragraph three of Article Twenty.[35]

HANJI 8 (Japan). A partial English translation of this decision is contained in TANAKA, *supra* note 11, at 735-37.

31. TANAKA, *supra* note 11, at 736.

32. *Id.* The Home Ministry (*naimu shou*) was disbanded by the Allied Forces in 1947.

33. The court did not question the validity or usefulness of this "discord" inquiry in a society such as Japan's where the Shinto religion is highly integrated into mainstream culture. This issue is addressed in part VI.A., *infra*.

34. TANAKA, *supra* note 11, at 736.

35. *Id.* It is of great interest to note that in reversing the decision of the district court, the Nagoya High Court also held that

> it is not necessary to prove that there was any compulsion to attend a religious activity. The fact that the state or a local public entity performed a religious activity is in itself a violation of [the] principle [of separation of church and state]. The fact that the political power, prestige and money of the state or a public entity are behind the public performance of a religious activity by a certain sect, in itself constitutes the giving of assistance to that sect, brings it nearer to the position of an established religion, and serves as an indirect pressure against other religious groups and nonbelievers . . . .

Id. This holding was later rejected in its entirety by the majority in *Nakaya*.

There are problems with this standard. Such a deep chasm between religion and state could potentially deny any sort of government assistance to religious groups. This would result in a government position that is in fact hostile to religion rather than one that is accommodative. In contrast, government assistance or accommodation would continue to be freely available to other social or political groups simply because they do not bear the stigma of "religion."

B. The Tsu City *Decision*

On appeal, the Japanese Supreme Court reversed the high court's decision. The court declined to apply the Nagoya court's three-pronged standard, creating a new standard based on "the assessment of religion among ordinary people and the ideas current in [Japanese] society."[36] Under this new standard, the main considerations for determining whether governmental actions violate Article Twenty were (1) whether the actions of the governmental entity were for the purpose of propagating religion (the propagation prong); and (2) whether the activity interfered with other religions (the interference prong).[37] Using this standard, the court held that the ritual could not be construed as being religious because it was not for the purpose of propagating Shintoism and did not interfere with other religions.

C. Analysis of the Tsu City *Standard*

The supreme court's standard is superior to the Nagoya High Court's. Instead of focusing solely on the religiosity of the action, the propagation prong ensures that government actions serving merely to accommodate religion will not violate Article Twenty as long as the government does not intend to promote a particular religion through its actions.

The supreme court's interference prong, however, is potentially over-restrictive. It is virtually impossible to publicly practice a religion without some interference with the belief systems of others. Some amount of toleration and accommodation of others' beliefs is necessary to maintain the freedom of all

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36. Yanagawa & Reid, *supra* note 28, at 513 (quoting Judgment of July 13, 1977, Saikousai [Supreme Court], 31 Minshuu 533 (Japan)).

37. Judgment of July 13, 1977, Saikousai [Supreme Court], 31 Minshuu 533 (Japan).

religions; the *Tsu City* standard could be interpreted to ban all governmental accommodation of public religious practice.

Furthermore, by basing the analysis upon "the assessment of religion among ordinary people and the ideas current in society,"[38] the *Tsu City* standard exposes itself to the same problem faced by that of the High Court. That is, by requiring that decisions be based on societal norms, the standard potentially ignores minority voices.[39] This standard stood unchallenged in the supreme court for more than a decade before the issue of religious rights was again addressed in *Nakaya v. Japan*.

IV. *NAKAYA V. JAPAN*

A. Facts

Yasuko Nakaya lives in Yuda, a town on the outskirts of Yamaguchi City near the southern end of Japan's main island. In 1958, she was baptized into the Yamaguchi Shin'ai Church of the United Church of Christians, joining the mere 1.4% of Japanese citizens who consider themselves Christians.[40] She married Takafumi Nakaya in 1959 in a ceremony involving no religious rituals, and they resided in the city of Morioka where Takafumi was a member of the Self-Defense Force (SDF) of Japan.[41] Takafumi did not believe in any particular religion.[42]

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38. *Id.* (English translation from Yanagawa & Reid, *supra* note 28, at 500, 512).

39. *See infra* part VI.A., which discusses in greater depth the problem of confusing assimilated religion with culture. Because over 95% of the Japanese population practices Shinto, it might be difficult for this standard to protect the small minority whose religious ideals by definition exclude them from the category of "ordinary people," and whose small numbers weaken their voice in the crescendo of "ideas current in society."

40. 95.8% of Japanese practice Shinto, 76.3% practice Buddhism, 1.4% practice Christianity, and 12.0% practice another religion. These statistics reflect the Japanese practice of observing multiple religions. *Kaleidoscope: Current World Data*, February 20, 1995, *available in* LEXIS, World Library, KCWD File.

Christianity has experienced dark periods in Japanese history. After some initial acceptance, Japanese leaders turned against the foreign religion. Twenty-six Christians were crucified in Nagasaki in 1597, and thousands of murders and other serious persecutions continued into the early seventeenth century. Christianity was officially outlawed in 1614. *See* VARLEY, *supra* note 7, at 146-49.

41. *Judgment on the Enshrinement*, *supra* note 2, at 3. The Self-Defense Forces evolved from the National Police Reserves which were created by Gen. Douglas MacArthur in response to the onset of the Korean War. NORMA FIELD, IN THE REALM OF A DYING EMPEROR: JAPAN AT CENTURY'S END 109 (1991). These forces might be compared to the national reserve system in the United States with a major exception being that the Japanese constitution forbids the Self-Defense Forc-

In 1968, he was killed in an on-duty car accident and given a Buddhist funeral at the request of his father. Yasuko later held a Christian funeral service at her church.

Earlier, in 1964, the prefectural Veterans Association, a private organization concerned with relations between the SDF and the general public, had spoken with a Shinto priest regarding the possibility of enshrining the spirits of local SDF officers who had died during service. This enshrinement would occur at a Shinto defense-of-the-nation (*gokoku*) shrine, whose pre-World War II function was to deify those who died in military actions.[43] Such shrines are wholly religious in nature.[44] This initial request for enshrinement was denied.

In 1970, during further discussions with the priests of the shrine, the Veterans Association enlisted the assistance of the prefectural Regional Liaison Office (the Regional Office), the government body in charge of SDF affairs. The Regional Office assisted the Veterans Association by (1) obtaining information from other prefectures to determine their practices and opinions regarding such enshrinement, (2) sending requests to the deceased officers' families for the documents and information required for enshrinement, (3) soliciting donations from the families for enshrinement fees, and (4) managing all donations received. The Regional Office, at the Veterans Association's request, also drafted an application procedure for the enshrinement of SDF officers. During the negotiation process, an administrative officer of the Regional Office communicated directly with the chief Shinto priest at the local *gokoku* shrine.[45]

During these negotiations, Mrs. Nakaya received communications from both the Veterans Association and the Regional Office requesting vital statistics and documents necessary for the enshrinement. Mrs. Nakaya repeatedly refused to provide the information for the enshrinement and voiced her objections during several telephone conversations with both organizations. In March of 1972, the *gokoku* shrine agreed to proceed with the enshrinement ceremony for the officers. Despite Mrs. Nakaya's

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es from participating in any military activity other than in defense of their country. KENPOU [Constitution] art. IX, ¶¶ 1-2 (Japan).

42. *Judgment on the Enshrinement, supra* note 2, at 3.

43. For a brief history of *gokoku* shrines and their role in state Shinto as well as reflections on the *Nakaya* case, see Sakai Takeshi, *A Matter of Faith*, 15 JAPAN Q. 357 (1988).

44. *See Id.*

45. *Id.* at 4-6.

protests, the enshrinement was conducted on April 19, 1972. Mrs. Nakaya later received a certificate from the shrine which stated: "Offerings for the Sacred Eternal Prayer in memory of Shinto Deity Nakaya Takafumi [are] solemnly accepted. Hereafter, Memorial Services will continue to be held on the 12th day of January, eternally."[46] Mrs. Nakaya brought suit against the government, alleging that the actions of the Regional Office violated the constitutional guarantee of separation of church and state and deprived her of her personal religious rights.[47]

B. Judicial History

The Yamaguchi District Court ruled in favor of Mrs. Nakaya, holding that the government's cooperation with the private Veterans Association was a substantial factor in the shrine's ultimate decision to proceed with the enshrinement ceremony and thus violated the separation of church and state as guaranteed by the Constitution of Japan. The court also held that the enshrinement "infringed on [Mrs. Nakaya's] legal interest to live under a quiet religious atmosphere, or infringed on her personal religious right."[48] Upon the government's appeal, the Regional High Court affirmed the district court's ruling. An appeal to the Japanese Supreme Court followed.

C. Holding of the Nakaya *Court*

In an unusually long and fragmented decision, the Japanese Supreme Court ruled fourteen to one to reverse the holdings of the lower courts. Reviewing the events leading up to the enshrinement, the court determined that the enshrinement "was basically realized through the efforts of the Veterans Association,"[49] and that the Regional Office's activities had

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46. *Id.* at 5-6. In the certificate Mr. Nakaya's name is written with the family name first as is customary in Japan.

The enshrinement ceremony consists of prayers for the deceased and a ritual which transmits the soul of the deceased into a small piece of wood bearing the name of the deceased preceded by the title *god*. Clyde Haberman, *Shinto Is Thrust Back onto the Nationalist Stage*, N.Y. TIMES, June 7, 1988, at A4.

47. *Judgment on the Enshrinement*, *supra* note 2, at 4-7.

48. *Id.* at 7-8.

49. *Id.* at 9. The court stated that "the application . . . was made under the name of the Veterans Association [and] was filed independently in its substance and could not be regarded as a joint action of the Regional Office staff and the Veterans Association, nor [could it] be considered that the office staff themselves

only an "indirect relation with the religion."[50] Thus, the court concluded that the government's actions were sufficiently independent from the Veterans Association's activities and were constitutionally permissible. The court also rejected Mrs. Nakaya's claim of a personal religious right.

1. The court's standard

The *Nakaya* court held that the term "religious activity should not be construed to include any activities relating to religion but . . . only the activity whose purpose has a religious meaning and whose effect is to promote, to facilitate, to accelerate, to oppress or to intervene [sic] a religion."[51] The court made this determination based on a standard consisting of an "objective[]" decision that "follow[s] common sense" and gives express consideration to "various factors such as place of the action, the public's evaluation, intent, purpose and religious feelings of those who act, its effect and influence to the general public, etc."[52]

The court also held that even if the actions of the Regional Office violated Paragraph three, "the institutional guarantee does not guarantee the [sic] religious freedom itself directly to individual persons, but rather it is an attempt to indirectly guarantee the freedom of religion by setting forth the parameters of actions which the State and its organs may not conduct."[53]

In summary, the court held that when considering the religious rights of individuals, religious activities of government will not be considered to violate the Constitution of Japan unless the actions directly restrict or compel religious activities as provided in the second sentence of paragraph one and in paragraph two of Article Twenty.

2. The personal religious right

Addressing Mrs. Nakaya's claim that she was entitled to relief based on a "personal religious right," the Japanese Su-

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applied for it." *Id.* at 9-10. The court did, however, find that there had been some cooperation between the two entities, mostly in the form of clerical work. *Id.* at 9.

50. *Id.* at 11.

51. *Id.* at 10.

52. *Id.* (citing as the source of this standard Judgment of July 13, 1977, Saikousai [Supreme Court], 31 Minshuu 533 (Japan)).

53. *Id.* at 11.

preme Court again reversed the lower courts' holdings, finding that the "religious personal right" or in other words, the "interest to live a religious life under a quiet religious atmosphere,"[54] could not be recognized as a protected interest under the Constitution of Japan.[55]

D. Analysis of the Nakaya *Court's Decision*

1. Separation of church and state: revision of the Tsu City *standard*

In *Nakaya*, the court considered two factors in making its constitutional inquiry into Article Twenty, paragraph three: first, what is the permissible extent of governmental involvement in supporting religious activities, and second, what was the purpose and nature of the government agency's action. The court did not articulate a precise standard for the first factor, but seemed to make its determination based on the particular facts of the case. This factual inquiry addressed the question of whether the application for enshrinement should have been regarded as a joint action of the Regional Office and the Veterans Association.

a. The first factor: the scope of the actions of the Regional Office. As previously stated, the court concluded that the actions taken by the Regional Office could not be construed to be a unified action with the Veterans Association. Nine of the fifteen judges agreed on this point. The court reasoned that the request for enshrinement originated with the families of the dead SDF officers, the president of the private veterans group was the primary negotiator with the shrine's chief priest,[56] and the actions of the Regional Office Staff were only clerical in nature.[57] Based on these considerations, the majority held that the enshrinement was "basically realized through the efforts of the Veterans Association."[58]

The language of the court suggests that stricter scrutiny may be applied to more directly collaborative efforts between the government and private organizations with respect to religious activities. Thus, if the Regional Office had tried to direct-

54. *Id.* at 12-13.
55. *Id.* at 11-14.
56. *Judgment on the Enshrinement, supra* note 2, at 9.
57. *Id.* at 9-10.
58. *Id.* at 9.

ly persuade the shrine to go through with the enshrinement, the court may have been more inclined to find the Regional Office's involvement unconstitutional.[59] In sum, the court suggested that indirect government involvement—specifically that which is only clerical in nature—is not necessarily prohibited by the Constitution's Institutional Guarantee.

b. The second factor: the constitutional effect of the action. After discussing the permissible extent of government involvement in religious activities, the court focused on the purpose and religious nature of the actions of the governmental agency. The court stated that paragraph three of Article Twenty "should not be construed to include any activities relating to religion but to mean only the activity whose purpose has a religious meaning and whose effect is to promote, to facilitate, to accelerate, to oppress or to intervene [sic] a religion."[60] The court set up a standard resembling the rule stated in *Tsu City*, developing a non-exclusive list of considerations to be used to determine the constitutionality of governmental actions involving religion. These considerations are: (1) the "place of the action," (2) "the public's evaluation" of the action, (3) the "intent, purpose and religious feelings of those who act," and (4) the action's "effect and influence to the general public . . . ."[61] Using these guidelines, the court concluded that the actions of the Regional Office were constitutionally permissible.

The first and third considerations appear to focus on the religiosity and purpose of the governmental action. The second and fourth considerations seem to focus on the degree of religious divisiveness engendered by the action in the community as a whole. Thus, in applying the new standard, the court seems to have kept *Tsu City*'s propagation analysis while aban-

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59. This would seem to be similar to the excessive government entanglement prong of the *Lemon* test, discussed *infra*, part V.A.

In *Nakaya*, there was some debate as to the extent of the influence of the Regional Office's involvement. Some of the justices were concerned that the *gokoku* shrine did not grant permission for the enshrinement until the Regional Office had become involved in the proceedings. There was evidence to suggest that in addition to the clerical responsibilities, the Regional Office's involvement served to convince the shrine to go through with the enshrinement. The majority of the court did not agree with this assertion, however, and determined that the actions of the Regional Office did not have a significant influence on the shrine's decision to conduct the enshrinement.

60. *Id.* at 10.

61. *Id.*

doning its interference analysis in favor of requiring a showing of social divisiveness. The reason for the change in standards is unclear. The *Nakaya* court did not explain its rationale for substituting social divisiveness for the interference factor.[62]

In applying its standard, the *Nakaya* court accommodates some government involvement with religion by permitting government involvement that does not promote, facilitate, accelerate, oppress, or intervene in a religion. The court specified that at least two kinds of government action fall into this category: those that have only indirect relations with religion (for example, actions consisting of mainly clerical work), and those that serve to promote secular purposes, such as raising the morale and social status of employees.[63] Nevertheless, the court did not clearly delineate the actual extent of permissible government activity.

2. The court's treatment of paragraph one, sentence two

Paragraph one, sentence two of Article Twenty provides that "[n]o religious organization shall receive any privileges from the State nor exercise any political authority."[64] It could be argued that the shrine received a privilege from the state in the form of clerical assistance in violation of the second sentence of paragraph one. The court's determination that government actions must not serve to promote or accelerate religion may be seen as the application of this constitutional principle. However, the court did not mention this constitutional provision, and the exact implications of the second sentence of paragraph one remain unclear.[65]

The court may have determined that the terms "promote" and "accelerate" are sufficiently broad to include the terms in this sentence. On the other hand, a more direct application of this sentence may add a new dynamic to the analysis by adding the words "privilege" and "political authority" to the list of unconstitutional effects of government involvement in religion.

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62. The *Nakaya* court appears to have adopted the same standard they rejected eleven years earlier in their review of the Nagoya High Court's decision in *Tsu City*. The problems inherent in both of these analyses when applied to a society in which religion is deeply assimilated into the people's cultural consciousness are discussed *infra*, at part VI.A.

63. *Id.* at 10-11.

64. KENPOU [Constitution] art. XX, ¶ 1 (Japan).

65. *See Judgment on the Enshrinement, supra* note 2, at 9-11.

3. Mrs. Nakaya's free exercise claim

In addition to her Article Twenty, paragraph three claims, Mrs. Nakaya asserted a cause of action based on a theory—previously untested in Japanese religious freedom adjudication—that might be characterized as analogous to a free-exercise argument in American jurisprudence.[66] Mrs. Nakaya asserted that she was entitled to a "religious personal right" under paragraphs one and two of Article Twenty. The first sentence of paragraph one reads: "Freedom of religion is guaranteed to all."[67] Paragraph two reads: "No person shall be compelled to take part in any religious acts, celebration, rite or practice."[68] Together, these sentences ensure that individuals in Japan are free to practice their religious beliefs.

a. The personal right of religious freedom. Mrs. Nakaya argued that she had a "religious personal right," which entailed a legal interest in religious privacy and the ability to "live under a quiet religious atmosphere."[69] Although arguments predicated on "personal rights" are rare in Japan, they have been used with some success in environmental litigation.[70] Realizing this, Mrs. Nakaya seized the opportunity to present a "personal rights" argument in a religious context.[71] This argument was upheld in the two lower courts, but the Japanese Supreme Court reversed.[72] The court devoted minimal analysis to the claim, merely stating that Mrs. Nakaya's claims of a "religious personal right [and a] right of religious privacy" had "no reason"[73] and that such a right could not be recognized under the Japanese Constitution because Mrs. Nakaya had not alleged "that any disadvantage was suffered because she did not attend the ceremonies" nor had she made a showing that she "was prohibited, restricted, suppressed or intervened in any way to

66. Aside from analysis in conjunction with the Institutional Guarantee in *Tsu City*, the Japanese Supreme Court had never addressed a religious free exercise question until its brief discussion of "the personal religious right" in *Nakaya*.

67. KENPOU [Constitution] art. XX, ¶ 1.

68. KENPOU art. XX, ¶ 2.

69. *Judgment on the Enshrinement*, *supra* note 2, at 8, 13.

70. Karl Schoenberger, *Japan Widow Loses Religious Rights Case*, L.A. TIMES, June 2, 1988, pt. 1, at 7.

71. *Id.*

72. This was not a surprise to Kenkichi Nakahira, head attorney for Mrs. Nakaya, who stated: "We weren't surprised the Supreme Court didn't recognize it, given its conservative bent." *Id.*

73. *Judgment on the Enshrinement*, *supra* note 2, at 13-14.

believe in Christianity or to mourn her late husband based on her religious faith."[74]

b. The court's analysis of the personal religious right. In rejecting the religious personal right, the majority opinion reasoned that "[t]he guarantee of freedom of religion requires tolerance for religious activities of others that are inconsistent with the religion that one believes in as long as such activity does not disturb his or her freedom of religion through compulsion or by giving rise to disadvantages."[75] In his concurring opinion, Justice Nagashima added that "it is constitutionally required that a religion should tolerate activities of other religions and should not interfere with nor disturb them."[76]

Only two justices, Sakaue and Ito (the lone dissenter), failed to side with the majority on this issue. Justice Sakaue's analysis of this issue is of particular interest. Although Justice Sakaue would recognize a personal religious right "on the grounds of infringement of religious feelings" in relation to an enshrinement that is against the will of the plaintiff,[77] he would limit its application by (1) not recognizing the plaintiff's legal right if the enshrinement was "based on the will of the deceased himself;"[78] and (2) not recognizing a legal right when other members of the family support the enshrinement and there are no "special circumstances as to give priority to [the plaintiff's] mental peace."[79] Applying these standards, Justice Sakaue concluded that Mrs. Nakaya was not entitled to legal compensation or an injunction because some members of her family—notably her father-in-law—had been supportive of the enshrinement and because there was no reason "to give priority to . . . the spouse of the deceased rather than to . . . the father."[80] Although Justice Sakaue's standard would not have provided relief in Mrs. Nakaya's case, it does recognize a free exercise right. His proposed standard, however, may be problematic in that it requires extensive factual inquiry into the

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74. *Id.* at 13. While the reasons for rejecting the "personal religious right" claim appear to address standing issues, it is clear that the *Nakaya* court rejected not only Mrs. Nakaya's assertion of the right, but also the validity of the right itself. *Id.* at 13-14.

75. *Id.* at 12.

76. *Id.* at 15 (Nagashima, J., concurring).

77. *Id.* at 29 (Sakaue, J., concurring).

78. *Id.* at 31 (Sakaue, J., concurring).

79. *Id.*

80. *Id.* at 31-32.

minds and intentions of family members. In addition, the standard could serve to exacerbate emotional divisions in families—a result almost universally held to be against public policy.

Nakaya appears to be the only Japanese Supreme Court case which addresses a free exercise claim. Based on the court's analysis, it appears that while such a claim may eventually be recognized, it faces a difficult path in obtaining full legal acceptance. The court is clearly more willing to analyze questions such as Mrs. Nakaya's solely in the establishment context.

V. COMPARISON WITH THE UNITED STATES' RELIGION CLAUSE JURISPRUDENCE

Despite its unique history and culture, the constitutional religious freedom issues facing Japan are similar to those faced elsewhere. For instance, many of the establishment issues raised in the *Nakaya* case have been debated in state and federal courts in the United States. Because the Constitution of Japan was drafted primarily by Americans and is interpreted through a judicial review process similar to that in the United States, some insight into *Nakaya*'s reasoning can be gained by comparing the standards used in each country.

A. *The* Lemon *Test*

Some aspects of the *Nakaya* standard bear a striking resemblance to the standard adopted by the United States Supreme Court for determining the constitutionality of state actions in the religious sphere—the *Lemon* test, established in *Lemon v. Kurtzman*.[81] In order to be constitutional under the *Lemon* test, a governmental action must satisfy three separate inquiries: (1) the action must have a secular purpose, (2) the principal or primary effect of the action must be one that neither advances nor inhibits a particular religion, and (3) the action must not constitute an excessive government entanglement with religion. This analysis has been applied to a wide variety of Establishment Clause cases. In comparing the *Lemon* test to the analysis used in *Nakaya*, this comment will focus on the line of United States cases most analogous to the issue in *Nakaya*—those dealing with the display of creches or other religious articles on public land.

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81. 403 U.S. 602, 612-13 (1971).

Among the most significant cases addressing religious displays are *Lynch v. Donnelly*[82] and *County of Allegheny v. American Civil Liberties Union*.[83] In *Lynch*, the United States Supreme Court held that a city's Christmas display of a creche, along with other holiday symbols, did not violate the Establishment Clause. In *County of Allegheny*, however, the Court held that a city's display of a lone creche at the top of the courthouse steps was violative of the Establishment Clause. The Court applied the *Lemon* test in both situations.

In *Lynch*, the Court, applying *Lemon*'s first prong, reasoned that there was a secular purpose for the display because it was sponsored by the city in order to "depict the origins of that Holiday."[84] In her concurrence, Justice O'Connor compared the creche to legislative prayers and "the printing of 'In God We Trust' on our coins," stating that such religious activities serve the secular purpose of "solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society."[85]

Based on the *Lemon* holdings, it appears that the government's actions in *Nakaya* would also pass the *Lemon* test's first prong. The stated purpose of the actions of the Regional Office was to increase the morale and social status of the SDF members. The morale and social status of military personnel are legitimate secular concerns of virtually all governments. Additionally, it is apparent that the enshrinement would be congruent with Justice O'Connor's statement. Just as legislative prayers or the display of a creche solemnize public occasions and encourage "recognition of what is worthy of appreciation in society," the enshrinement solemnizes the efforts of those SDF officers who had died on duty and provides public recognition of their sacrifice.

With respect to the second prong—that the principal or primary effect of the government action neither advance nor inhibit religion—the *Lynch* Court concluded that the display of the creche did not have the principal or primary effect of advancing or inhibiting religion because any advancement of religion due to the display of the creche was "indirect, remote

82. 465 U.S. 668 (1984).
83. 492 U.S. 573 (1989).
84. *Lynch*, 465 U.S. 668 at 681.
85. *Id.* at 693 (O'Connor, J., concurring).

and incidental."[86] The Court reasoned that the display of the creche did not advance religion any more than the display of religious paintings in public museums.[87]

In *County of Allegheny*, however, the Court held that the display of the creche did advance religion. The Court gave great weight to the fact that the creche was displayed on its own, whereas the creche in *Lynch* was placed among other holiday symbols such as Santa Claus and reindeer. In addition, the *Allegheny* display had a large banner proclaiming "Gloria in Excelsis Deo," and was positioned at the top of the courthouse steps, a prominent public location.[88] Based on these differences, the *Allegheny* Court distinguished *Lynch* and held that the second prong of the *Lemon* test was not met, thus finding the display of the creche to be unconstitutional. *County of Allegheny* suggests that in the United States the public prominence of the governmental actions and the message they convey are important in determining whether the actions advance or inhibit religion.

The *Nakaya* court similarly looked at the underlying meaning and effect of the governmental action in making its determination. In *Nakaya*, the majority found that the Japanese Constitution was not violated as long as the governmental actions did not "promote, facilitate, accelerate, oppress, or intervene" in a religion. Despite the similar language of the two standards, it appears that the *Nakaya* court's application of its standard might allow the government greater liberties in its actions. In *Nakaya* the government helped to facilitate a public ceremony involving only one religion. The Regional Office made no effort to contact other religious or civic groups even though they too could perform ceremonies or give special notice to raise the morale of SDF officers.

Singling out one religion appears to be contrary to the United States Constitution as evidenced by *Bd. of Trustees v. McCreary*,[89] another case involving the display of a creche. In *McCreary*, the city council of a predominantly Jewish community refused to allow a coalition of Christian groups to continue the placement of a creche in a public park. In holding this refusal to be unconstitutional, the Court emphasized the impor-

86. *Id* at 683.
87. *Id.*
88. *Allegheny*, 492 U.S. 573 at 598-602.
89. 471 U.S. 83 (1985), *aff'g* 739 F.2d 716 (2d Cir. 1984).

tance of assuring that the park provide equal access to all religious and civic groups,[90] implying that giving exclusive attention to one religion strongly suggests that the government action advances that particular religion.[91] Thus, the *Nakaya* analysis seems to be more permissive than the *Lemon* test in that it permits governmental actions that accommodate one particular religion exclusively, while the *Lemon* test, as applied to the creche cases, does not.

The third prong of the *Lemon* test states that the government action must not result in undue governmental entanglement with religion.[92] In *Lynch* the Court found, based on several factors, that there was no undue government entanglement. First, while the city erected and maintained the display, it did not contact any religious organization regarding the design or placement of the display. Second, the city had paid only a nominal price for the display and had spent no other money on its maintenance.[93] Third, the Court concluded that there was no evidence of "comprehensive, discriminating, and continuing state surveillance" or "enduring entanglement" referred to in *Lemon v. Kurtzman*.[94] The *Nakaya* test similarly requires governmental actions to be only indirectly related to religion, yet clearly allows for some expenditure of governmental time and funding, such as were expended on the clerical activities involved in the *Nakaya* case.

Another factor U.S. courts consider in applying the excessive entanglement test is the political divisiveness of the situation. Nevertheless, the Supreme Court "has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct."[95] Thus, political divisiveness is not in itself a

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90. 739 F.2d at 724-26.

91. *See also* Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 938-39 (Utah 1993) (expressing the need to assure that public funds and facilities are accessible to all in order to avoid the promotion of a particular religion).

92. This is similar to the first issue addressed by the *Nakaya* court where it held that indirect, clerical government actions were permissible.

93. 465 U.S. 668 at 684.

94. 403 U.S. at 619-22.

95. *Lynch*, 465 U.S. at 684. The concurrence stated:

> Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the Lemon test is properly limited to institutional entanglement.

prong in the *Lemon* test. In contrast, the *Nakaya* analysis requires a consideration of the action's "effect and influence to the general public . . . ."[96] Thus, it appears that social divisiveness is a major consideration in determining the nature and purpose of the government action in Japan. The extent to which political divisiveness is encompassed within the concept of social divisiveness, however, is unclear.

The analysis in *Nakaya* has much in common with the *Lemon* test. They both seem to require that there be a secular purpose behind the governmental actions. Each requires that the government action not advance nor inhibit religion, although the *Nakaya* analysis seems to be more permissive in that it accommodates governmental actions directed at a particular religion. Finally, both tests allow only minimal entanglement of government in religion. In making this determination both consider the extent of divisiveness caused by the government's action, but the *Nakaya* analysis seems to place more weight on this factor than the United States Supreme Court's analysis does.

B. Comparative Analysis Under the Endorsement Standard

Recent United States Supreme Court decisions indicate that the *Lemon* test may be abandoned[97] in favor of the endorsement analysis.[98] This analysis makes a single determination: whether the government's conduct amounts to an endorsement of a particular religion or religious beliefs, or of religion generally. Because the test has yet to be adopted by a

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Id. at 689 (O'Connor, J., concurring). Justice O'Connor concluded that "political divisiveness along religious lines should not be an independent test of constitutionality." *Id.* The Court may have shied away from a political divisiveness inquiry due to concern that litigants may "create the appearance of divisiveness" simply by commencing a lawsuit. The litigant could then exploit the resulting divisiveness as evidence of government entanglement. *Id.* at 684-85. It may also be due to concerns over religious acculturation, a problem which is discussed *infra* part VI.A.

96. *Judgment on the Enshrinement*, *supra* note 2, at 10 (citing Judgment of July 13, 1977, Saikosai [Supreme Court], 31 Minshuu 533 (Japan)).

97. *See* Lee v. Weisman, 112 S. Ct. 2649, 2660-61 (1992); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

98. This test's main proponent and author is Justice O'Connor. For an in-depth discussion of the pros and cons of the proposed standard, see *Lynch*, 465 U.S. at 668, particularly the separate opinions of Justices O'Connor and Kennedy; W. Scott Simpson, Comment, *Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465; William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

majority of the Court, it is difficult to state conclusively what the exact wording of a final endorsement test might be. However, Justice O'Connor has articulated it as follows:

> The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding [governmental] practices as a disapproval of his or her particular religious choices, in light of the fact that [the governmental practices] serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.[99]

If the facts of the *Nakaya* case were to be analyzed under this standard, the main question would appear to be whether the actions of the Regional Office served to promote Shinto and/or disapprove of Christianity.[100] It would appear that the Regional Office's exclusive focus on Shinto would weigh heavily against the constitutionality of its actions. There is no indication, however, that the *Nakaya* court would have necessarily reached the opposite conclusion under this standard. In fact, the holding that the Regional Office's exclusive focus on Shinto did not constitute propagation of that religion might indicate that the outcome of *Nakaya* would remain unchanged under the endorsement analysis.

C. Comparative Analysis Under the Utah Constitution

It is also interesting to compare *Nakaya* to a Utah case addressing very similar issues. In *Society of Separationists v. Whitehead*,[101] the Utah Supreme Court held that some governmental clerical assistance may be provided to facilitate activities that are religious in nature without violating Utah's constitutional guarantee of separation of church and state.[102]

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99. County of Allegheny v. ACLU, 492 U.S. 573, 631 (O'Connor, J., concurring). Justice O'Connor has also stated that the standard "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring).

100. This formulation of the inquiry is reinforced by Justice O'Connor's statement that "the term 'endorsement' is closely linked to the term 'promotion' . . . ." 492 U.S. at 593.

101. 870 P.2d 916.

102. Article one, section four of the Utah Constitution states:

> The rights of conscience shall never be infringed. *The State shall make no law respecting an establishment of religion* or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office

In *Whitehead*, the Salt Lake City Council was sued by a separationist group seeking to enjoin the City Council's practice of inviting members of various religious groups to offer prayers or personal thoughts before the commencement of its public meetings. This practice was governed by several procedures. First, the city council's staff was required to mail letters to a wide variety of churches and other civic organizations every six months in order to inform them of the city council's practice and invite them to participate. The staff was also responsible for the scheduling of requests to participate in the brief ceremony. Secondly, the staff was required to keep a list of those who participated and to provide that list to the city attorney and other officials biannually.[103] The Utah Supreme Court held that the clerical activities necessitated by this practice were not violative of the state constitutional guarantee. Thus, as with *Nakaya*, government entities were permitted to use government time, personnel, and funds to support religious activities.

Both the *Nakaya* court and the Utah Supreme Court relied on the facts of the individual case in determining the extent of government involvement. The determination of the extent of government involvement is factual: the legal question is where the line should be drawn between permissible and impermissible government involvement. Although neither court set forth an identifiable bright line, a comparison of each court's analysis of the facts of its case sheds some light on where such a line should be drawn.

The actions of the Japanese Regional Office were somewhat similar to those of the Salt Lake City Council staff. Both government offices drafted procedures for the handling of a religious activity, both were designated as the repositories for the documentation necessary to conduct the activity, and both solicited information from religious sources. There are some significant differences, however. The Salt Lake City Council

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of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. *There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.* No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

UTAH CONST. art. I, § 4 (emphasis added).

103. *Whitehead*, 870 P.2d at 918 n.2.

staff was careful to solicit the participation of a broad range of diverse religious organizations. The Japanese Veterans Association, on the other hand, obtained clerical help from the Regional Office in order to promote a religious activity unique to a particular religion. The Veterans Association's stated purpose for the enshrinement was to raise the morale and social status of SDF members.[104]

There was evidence, however, that both the Regional Office and the Veterans Association were only interested in raising morale through a *Shinto* ritual. After the enshrinement, a member of the Regional Office staff told Mrs. Nakaya that "it was natural to deify Takafumi in the shrine because he had died for the State."[105] On another occasion a staff member stated that "Gokoku Shrine is an official religion so that the Japanese national, regardless of religions of their families, should be officially deified to Gokoku Shrine."[106] These statements indicate that at least some members of the Regional Office Staff were focused exclusively on a Shinto enshrinement to raise the status and morale of SDF members. Although these statements were reviewed by the court, they did not convince it to hold that the actions were unconstitutional. Thus, the *Nakaya* court permitted government involvement that favored a particular religion.

It appears that government actions such as those taken by the Salt Lake City Council in *Whitehead* would also be permissible under the *Nakaya* standard. It is highly questionable however, whether the reverse would be true. In *Whitehead*, the Utah Supreme Court gave substantial weight to the fact that the city council solicited input from varied groups and not only from those of the majority religion.[107] Thus, the determina-

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104. The *Nakaya* court found that "the Regional Office had hoped for the enshrinement of the dead SDF members in order to improve the social status of SDF members and to raise their morale." *Judgment on the Enshrinement, supra* note 2, at 21.

105. *Id.* at 24. On another occasion a staff member informed Mrs. Nakaya that the reason the SDF officers were enshrined was to insure "that dead SDF members who were killed while on duty would be ranked as highly as loyal retainer [of past wars] and that they had been deified so as to make SDF members in active service proud of their life and death." *Id.*; *see also* FIELD, *supra* note 41, at 250 (discussing speeches made by Regional Office members immediately following the enshrinement).

106. *Judgment on the Enshrinement, supra* note 2, at 24.

107. *See Whitehead*, 870 P.2d at 918-19, 938-39. In drafting the procedures, the City Council relied on *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Stein v. Plainwell Community Sch.*, 822 F.2d 1406, 1410 (5th Cir. 1987), taking steps to

tion of the type and nature of permissible government actions established in *Nakaya* seems to be less strict than the analysis adopted by the Utah Supreme Court in *Whitehead*.[108]

VI. POTENTIAL PROBLEMS FACED BY FREEDOM OF RELIGION JURISPRUDENCE IN JAPANESE CULTURE

A. The Problem of Religious Acculturation

The degree to which religion becomes integrated into a people's social and cultural consciousness can significantly affect the constitutional review of government actions in the religious realm. This problem of religious acculturation is particularly important in Japan.

Both the *Nakaya* and *Lemon* tests require a threshold finding that the activity at issue is "religious" in nature. Difficulties in making this determination arise where inherently religious activities are culturally ingrained in a particular community or event, thus creating an overlap of culture and religion. As a result, it is often difficult for courts to determine where culture ends and religion begins. Because the *Nakaya* court's "divisiveness" analysis places substantial weight on the public perception of a given government action, the acculturation of religion necessarily plays a large role in Japanese religious-freedom jurisprudence.

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ensure that the prayers or comments were nondenominational and did not attempt to proselytize or prefer one religion over another.

In addressing the propriety of the government preferring one religion over another, the Utah Supreme Court stated:

> In Utah, these lessons were learned at a steep price. We think that the drafters of the Utah Constitution achieved a remarkable degree of detachment from the passions that had swirled around them in the years preceding 1895, and wisely concluded that it was best to maintain neutrality among various religious groups as well as between those whose consciences were persuaded by religion and those whose consciences were not.

Whitehead, 870 P.2d at 940 (citation omitted).

108. Three of the justices in *Nakaya*, however, found the adopted standard slightly troublesome. Although concurring in the judgment, they stated that while "the [statements of the Regional Office members] in themselves have nothing to do with the infringement alleged by the Appellee . . ." they "may cause suspicion against their religious neutrality and should be considered overdone." *Judgment on the Enshrinement*, *supra* note 2, at 24 (Takashima, Yotsuya, and Okuno, JJ., concurring). A fourth justice, reflecting on some of the post-enshrinement speeches given by Regional Office members, called them "inappropriate" and stated that the officials "should have exercised more self-restrain[t]." *Id.* at 21-22 (Nagashima, J., concurring).

1. Culture vs. religion: What constitutes religious activity in Japan?

Because Japan's culture is so deeply rooted in Shinto, it is often difficult to separate Japanese culture from Japanese religion. Some rituals and rites of passage have become so commonly accepted that they are considered cultural events or customs and have nearly lost their religious connotations.[109] Other rituals, such as formal Shinto purification rites, lie near the other end of the spectrum—they continue to be undeniably religious in nature even though they are commonly practiced by a majority of the Japanese population. In many situations, however, the distinction between cultural and religious activities is less clear because of the high level of acculturation of Shinto in modern Japanese society.

Scholars of Japanese religion have debated the question of what constitutes a religious activity for some time. One such debate occurred between Ian Reader and Richard Anderson involving the question of whether the ritual of offering an *ema* at a Shinto shrine constituted a religious activity. An *ema* is a tablet sold at a Shinto shrine that is often engraved with a request, in the form of a prayer, for a particular favor from the gods. The *ema* is purchased and offered to the Shrine.[110] In one example of a typical *ema* ritual, a student visits a local shrine (one does not need to travel very far to find one in Japan; shrines dot not only the cities, but the countryside as well) and purchases an *ema* with an engraving that requests help

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109. One example of this phenomenon is the Japanese custom of placing pine branches and a mandarin orange above a door (a *kadomatsu*) to welcome the New Year. This practice has roots in Shintoism, but has lost virtually all of its religious meaning.

Another example, which is Buddhist in origin, is the Dharma doll (*daruma ningyou*). A Dharma doll is a round figure with a large face and two large, round eyes. A person purchases a Dharma doll and blacks in one eye, making a personal goal. When the goal is accomplished, the person colors in the other eye to mark its completion. This ritual has deep roots in Buddhism. Dharma was a Buddhist monk who was said to have lost both arms and legs due to lack of use as he sat in the lotus position seeking an understanding of enlightenment (hence the round shape of the doll). The basic message—the importance of endurance—has virtually eclipsed any purely religious meaning associated with the ritual.

As stated previously, courts in the United States have had many occasions to deal with similar situations, the most comparable seem to be the cases involving the public display of creches.

110. For a more complete description of the *ema* ritual, see Ian Reader, *Letters to the Gods: The Form and Meaning of* Ema, 18 JAPANESE J. RELIGIOUS STUD. 23 (1991).

with an important examination. The student then offers the *ema* at the shrine. This involves a quick prayer[111] before the shrine and a presentation of the *ema*.[112] From a Western perspective, the *ema* ritual would appear to be unquestionably religious, rather than purely cultural.[113] For the Japanese, however, the ritual's mixed historical, cultural, and religious associations make the distinction more problematic.

Ian Reader argues that the historical merger of religion and culture does not render the ritual nonreligious; in spite of this merger the ritual can only be described as "religious behavior."[114] Reader bases this determination on the fact that the ritual is "performed in a religious center" and that it uses "forms of behavior . . . that are generally accepted elements in the religious action of worship and prayer."[115] Additionally, the *ema* is purchased and deposited at the Shrine and the inscription on the *ema* is addressed to the gods.

Richard Anderson,[116] on the other hand, argues that the Japanese do not see the *ema* ritual as religious. He asserts that informal conversations with patrons of Shinto shrines show that the "vast majority" do not categorize the inscription of *ema* as "religion" (*shuukyou*) or as a "belief" (*shinkou*).[117] Instead, he reports that the majority would describe the ritual as "custom" or "habit" (*shuukan*).[118] These observations suggest that

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111. A Shinto prayer typically consists of ringing a bell to wake the gods, pressing the hands together in a position of respect and bowing slightly forward. At the conclusion of the prayer, the worshiper claps twice.

112. The *ema* is donated to the shrine and many shrines have a special gallery dedicated to the *ema* offerings.

113. Not surprisingly, many Japanese Christians appear to share this perception. In questioning several native Japanese Christians, all felt that the ritual did not fit within the acceptable realm of Christian religious conduct. On the other hand, all agreed that there was no Christian religious objection to the use of *kadomatsu* or Dharma dolls. *See supra* note 109. While this informal poll cannot be considered statistically accurate, it indicates that to at least some Christians in Japan, there is a definite distinction between religious and cultural rituals.

114. Ian Reader, *What Constitutes Religious Activity? (II)*, 18 JAPANESE J. RELIGIOUS STUD. 373, 375 (1991).

115. *Id.*

116. Mr. Anderson describes himself as "a folklorist [who is] interested in modern Japanese society." Richard W. Anderson, *What Constitutes Religious Activity? (I)*, 18 JAPANESE J. OF RELIGIOUS STUD. 367, 367 (1991).

117. *Id.*

118. *Id.* Mr. Anderson's theory is subject to the same limitations as my informal poll. *See supra* note 113. It is possible to reconcile the results because both polls are inherently biased. My poll focused on a small minority group—Japanese Christians—who felt the *ema* ritual was religious. Mr. Anderson's poll questioned people visiting the shrine, a group likely to represent the majority of Japanese who

the *ema* ritual has become so common that it has lost its religious meaning to the majority of the Japanese populace.

Ironically, both scholars are probably correct in their basic assumptions. While the religious overtones of the ritual are very apparent, a large part of the Japanese population seems to ignore the religious nature of the activity because they are highly accustomed to the practice. Using Mr. Anderson's labels, it is possible that most Japanese see those who make and sell *ema* as "artists" rather than "priests" and the ritual itself as "custom" rather than "religious activity."[119]

2. The problem of confusing culture with acculturated religion

a. Manifestations of the problem in Japan. Mr. Anderson further asserts that an *ema* cannot be a religious item because he knows a restaurateur who hangs them on the wall and occasionally gives them as gifts to his patrons.[120] Mr. Reader counters that were crucifixes used in the same way, it would not negate their inherently religious nature.[121] Some might suggest that Mr. Reader's argument—that acculturation does not deprive religious acts of their religiosity—only demonstrates the difference between the Western and Japanese views of religion. However, this argument ignores the problem faced in *Nakaya*. The danger in the implications of Mr. Anderson's viewpoint lies in ignoring the Japanese inclination to label an intrinsically religious activity as "culture" because it is a common practice, thus opening the door to government endorsement of the majority's religious activities (to the detriment of minority religions) on the assumption that such activities are merely a manifestation of national culture.

The problem presented by acculturation of religious activities into a dominant culture has also been discussed by Angela Carmella. Ms. Carmella suggests that such assimilation is a phenomenon common to the majority of religious traditions.[122] She also suggests that theological analysis should be

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practice some form of Shinto and thus perform the *ema* ritual. This majority sees the ritual as a part of their customary routine.

119. *Id.* at 369, 371.

120. *Id.* at 371.

121. Reader, *supra* note 114, at 375.

122. Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 785 (1992).

relevant to legal decision-making.[123] In the United States, the courts strongly discourage any inquiries into the doctrinal validity of religious activities or into their relative degree of necessity in a theological context.[124] This is a well-accepted and necessary safeguard to ensure the autonomy of religious beliefs and to protect the dignity of religions. Some courts have tried to protect the integrity and dignity of religions by evaluating the religious activity in question from the position of a "neutral observer." Ms. Carmella suggests that "the neutral observer misses entirely the reality of acculturation and calls 'secular' those religious activities that do not look sectarian, radical, or counter-cultural."[125] For example, one might assume that the performance of Shinto burial rites has only cultural significance and ignore the theological implications of those rites for a nonbeliever, dismissing her valid constitutional objections as irrelevant.

b. The Utah Supreme Court's treatment of the problem. One effective approach to the problem of acculturation of religious activities is illustrated by the Utah Supreme Court case discussed above, *Society of Separationists v. Whitehead*.[126] The State of Utah faces cultural circumstances somewhat analogous to those of Japan. As a result of its unique history,[127] Utah has a high concentration of Mormon inhabitants[128] and consequently has a correspondingly high level of religious acculturation that can sometimes blur the line between the religious and the cultural.[129] In addressing the reli-

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123. *Id.* at 793-95.

124. *See, e.g.*, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-50 (1969) (refusing to evaluate and make factual findings concerning the fundamental tenets of church doctrines); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 114-16 (1952) (stating that U.S. constitutional jurisprudence prohibits state interference in matters of church doctrine); United States v. Ballard, 322 U.S. 78, 85-88 (1944) (holding that religion itself cannot be the subject of trial).

125. Carmella, *supra* note 122, at 793.

126. 870 P.2d 916 (Utah 1993).

127. Utah was settled primarily by Mormon pioneers who were seeking a new home after being driven out of several states in the eastern and central United States. For a brief history of its settlement and government, see *id.* at 921-29.

128. The official name of the *Mormon* Church is The Church of Jesus Christ of Latter-Day Saints.

129. The differences between Japan and Utah, however, should also be emphasized. Japan is culturally and ethnically isolated while Utah is part of a culturally and ethnically diverse nation. Utah also has a much higher percentage of minority religions and cultures than does Japan. Accordingly, Utah is subject to stronger

giosity of nondenominational prayer at City Council meetings, the Utah Supreme Court held that a prayer addressed to God did constitute a religious activity. However, it distinguished prayers and references to God on American currency and in other public places from Christmas carols, reasoning that the latter, when "sung apart from a formalized worship service, on or off church property . . . are simply artistic expressions of a predominantly Christian culture. The same is true of any number of other artistic expressions that have occupied center stage in Western European civilization for more than 1500 years."[130] This distinction takes into consideration the religious history of the community when determining whether an activity is merely cultural or essentially religious. The approach serves to protect the religious and cultural interests of the majority. It also ensures that truly religious activities of the majority, in this case those who believe in God, are properly labeled as religious and thus not endorsed by the government, even though the conduct is highly acculturated in the community.

In summary, when religion is highly acculturated, the method of analysis applied by courts must ensure that those aspects of the traditional culture that have some religious association are not confused with true religious activity. The courts must protect non-assimilated religious minorities from subtle domination and oppression by a religious majority whose beliefs are highly acculturated. Failure to account for religious acculturation can present a court with two potential problems. First, it may cause the court to refuse to recognize that an inherently religious activity is indeed religious simply because it consists of conduct that is arguably "cultural." Second, it may lead a court to deny appropriate constitutional protection to a majority religion simply because its activities are highly acculturated and the court fails to appropriately characterize the behavior as "religious." The Japanese Supreme Court should consider, as the Utah Supreme Court did, the underlying motivations, purpose, and nature of such actions when determining whether or not they are truly "religious."

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internal and external influences from minority concerns. This implies that if the acculturation of religion were ignored in both places, Japan's minorities will have comparatively less support and protection from non-judicial sources.

130. *Society of Separationists*, 870 P.2d at 932.

B. *Japanese Culture's Effect on Free Exercise Jurisprudence.*

1. *The problem of personal rights: Making waves in Japanese society*

Religious acculturation is not the only social factor significantly affecting religious freedoms in Japan. The court's rejection of Mrs. Nakaya's claim of a personal religious right suggests another issue that should be considered by the Japanese Supreme Court: the apparent reluctancy of Japanese citizens to avoid enforcing individual rights through judicial action. The ideals of cooperation and harmony pervade almost every aspect of modern Japanese society, and the ever-present corollary to these ideas is the inclination to sacrifice individual interests for the benefit of the larger group.[131] Perhaps in no other highly-developed country does the idea of the group play such a strong role.[132] This is not to say that Japanese individuals are unwilling to think for themselves—this would clearly be incorrect. It is simply to recognize that Japan evidences an exceptionally strong cultural pressure to conform.

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131. At the turn of the century, one Japanese scholar commented:

> [I]ndividuals are not believed to exist for and of themselves as autonomous entities; only the state does. In Japan, state sovereignty is heaven-granted while individual rights are bestowed by the state. The state allows limited individual rights to the extent that they further the aims of the state. Thus, individual rights are always instruments of the state, not to be utilised for the aims of the individual. While in the West individual rights are thought to be granted by heaven and thus inalienable . . . respect for individual rights and individual identity in the West is inconceivable for the Japanese, just as Japanese respect of state sovereignty and the state is inconceivable for Westerners.

VAN WOLFEREN, *supra* note 9, at 209-10 (quoting HAJIME KAWAKAMI, KAWAKAMI HAJIME CHOSAKUSHU [COLLECTED WORKS OF HAJIME KAWAKAMI] 190 (1964)).

132. The Japanese ideal of communal unity of thought and action is best expressed by the word *wa*. *Wa* is not easily translated into any single English word, but the word *harmony* may be the best one-word translation. The words of one Japanese official give more insight into its meaning:

> Japan's history is much different from that of the United States. . . . Today, as in the old days, the basic unit of Japanese society is not "atomistic" individuals, but "molecule-like" groups. . . . The fundamental ethic which supports a group has been "harmony." Such American values as individual freedom, equality, equal opportunity, and an open-door policy can be considered "foreign proteins" introduced into the traditional body of Japanese society.

FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 205-06 (1987) (quoting retired MITI official Amaya Naohiro); *see also* HARUMI BEFU, JAPAN: AN ANTHROPOLOGICAL INTRODUCTION 166-170 (1971).

This pressure contributes to the scarcity of lawyers in Japan. Japanese lawyers have not obtained the relatively high social status that their counterparts in the United States have. This is partly because the Japanese tend to avoid any kind of public dispute. In fact, there is much "cultural dislike" of lawyers and the court system in general.[133] In the interest of "maintaining harmony,"[134] the Japanese bring between one-twentieth and one-tenth as many cases as their Western neighbors.[135] Some scholars have even suggested that government limitations on the number of lawyers, public veneration of the virtues of homogeneity,[136] and judicial denial of individual rights combine to preserve the current authority structure of

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133. VAN WOLFEREN, *supra* note 9, at 246.

134. *Id.* at 213. A Japanese government training manual contained the following statement:

> The organisational climate that makes possible this kind of groupism peculiar to our country stems from our national traditions, from the fact that our country consists of a homogeneous race, which is rare in the world, and from the fact that we go about our lives while mutually grasping one another's feelings, fearing confrontation, regarding 'harmony as noble,' mutually restraining ourselves, and aligning ourselves to the thoughts and actions of people in the group.

Id. at 314 (quoting Chiho Jichi Kenkyu Shiryo Sentaa, Gendai Kanrisharon [MODERN MANAGEMENT] 22 (1977)).

135. TANAKA, *supra* note 11, at 255. Even with the relatively low number of cases, it is often difficult for the Japanese to obtain a lawyer because of their scarcity, especially in rural areas. ODA, *supra* note 14, at 102-03; *cf.* John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359-90 (1978) (asserting that the low level of litigation is at least as much the result of institutional arrangements as of cultural restraints).

136. Unfortunately, the veneration of homogeneity can lead to bigotry and intolerance for those that do not conform to the same cultural, social, and racial ideals. A 1983-84 survey showed that over 80% of the Japanese surveyed felt that they were one of the "superior races in the world." William Wetherall, *Nakasone Promotes Pride and Prejudice*, FAR E. ECON. REV., 19 Feb. 1987, at 87.

This supremacist dynamic also manifests itself in the shockingly racist statements of some government officials. Former Prime Minister Yasuhiro Nakasone, addressing the Liberal Democratic Party of Japan, stated that "Japan has an 'intelligent society' because 'in America there are many Blacks, Puerto Ricans and Mexicans.' *Id.* It is also telling that of the fifty-some-odd reporters covering the address, only two found this statement worth mentioning in their reports. *See* VAN WOLFEREN, *supra* note 9, at 267-68.

The glorification of Japanese homogeneity has even spurred a new and popular genre of literature. *Nihonjinron* ["theory on what is Japanese"] extols the virtue of Japanese uniqueness and often speaks of the superiority of the Japanese race. For works addressing this issue, see PETER N. DALE, THE MYTH OF JAPANESE UNIQUENESS (1986); VAN WOLFEREN, *supra* note 9, at 263-72; Paul Lansing & Tamra Domeyer, *Japan's Attempt at Internationalization and Its Lack of Sensitivity to Minority Issues*, 22 CAL. W. INT'L L.J. 135 (1991-92); John Lie, *The Discriminated Fingers: The Korean Minority in Japan*, 38 MONTHLY REV. 17 (1987).

Japan.[137] Karel Van Wolferen, a scholar of Japanese politics, suggests that "if Japan were to use the law as it is used in the Western democracies, and as it is supposed to be used under the Japanese constitution, the present Japanese authority structure would collapse."[138]

This problem is compounded because of the foreign origin of the present Japanese constitution. As previously discussed, the Constitution of Japan is not only a product of Japanese scholars and politicians, but also of Americans.[139] When the Constitution of Japan was accepted by the Japanese Diet, many politicians made much of the fact that the new constitution was primarily a foreign document.[140] Today, critics of the Constitution of Japan rally around this point, demanding that many provisions of the new constitution be removed.[141] However overstated this complaint may be, it is clear that many modern Japanese legal concepts, including the concept of individual human rights, are of foreign origin. The foreignness of modern Japanese law has resulted in an uncomfortable incongruity between legal and social norms that makes many Japanese reluctant to abandon cultural expectations in order to

137. VAN WOLFEREN, *supra* note 9, at 212; *see also* UPHAM, *supra* note 132, at 205-21.

138. VAN WOLFEREN, *supra* note 9, at 212.

139. It should be noted that Japan has a strong civil law tradition, stemming from its adaptation of German codes in the late 1800s. The Constitution of Japan and other legal influences later introduced an overlay of common law in the post-World War II occupation period. When considering that these legal traditions overlay a considerably older system of social control based on custom and cultural sanctions (consisting of shinto and buddhist philosophy, the warrior code (*bushidou*), and other cultural traditions), common law judicial interpretation is indeed a "new" idea to the Japanese. *See* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 1-5 (2d ed. 1985); *see also* RALPH PIDDINGTON, AN INTRODUCTION TO SOCIAL ANTHROPOLOGY 319-355 (2d ed. 1952) (discussing law and custom in selected primitive societies and showing that law and custom both serve to maintain social control); A.R. RADCLIFFE-BROWN, STRUCTURE AND FRAMEWORK IN PRIMITIVE SOCIETY 205-11 (1965) (introducing the role and nature of social sanctions in culture); TANAKA, *supra* note 11, at 59 (explaining that custom or "customary law" (*kanshuu hou*) may have a strong legal force in modern Japan).

140. After several amendments, the Constitution of Japan was nearly unanimously accepted by the Japanese Diet. TANAKA, *supra* note 11, at 665. However "many claimed that it was a constitution imported from the United States." *Id.*

141. Not surprisingly, restoring the emperor to the position of head of state is one of the most common demands. Ultraconservative political groups and other dissenters make much of the foreign origin of the Constitution in advancing these arguments. *See id.* at 665-66.

assert legal rights that are not a traditional part of the Japanese psyche.[142]

Professor Tatsuo Inoue suggests that Japan has "an urgent need to heed the voice that calls for increased respect for individual rights."[143] Specifically mentioning the *Nakaya* case, Professor Inoue suggests that the court's admonitions of tolerance are evidence of the cultural imperative to conform.[144] The Justices of the *Nakaya* court were not the only ones to emphasize the need for conformity. Mrs. Nakaya's stance proved to be unpopular with much of the Japanese public, and she has paid a price for going against the grain of Japanese society.[145] It is unlikely that the court will consider a shift to individual rights without a struggle—socially and governmentally protected cultural norms will not easily be replaced by new values.[146]

2. *Viability of the religious personal right claim*

Social and cultural assumptions clearly played a major role in the *Nakaya* court's decision, but the court's reluctance to accept Mrs. Nakaya's free-exercise assertion may also be attributed to other, more judicially legitimate, public policy concerns.

First, the establishment of a "personal religious right" might potentially subject the Japanese courts to frivolous claims. Permitting individual citizens to bring legal action every time the government does something that offends their personal religious beliefs could open the proverbial "flood-gates

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142. *See id.* at 665-68; UPHAM, *supra* note 132, at 7-16.

143. Tatsuo Inoue, *The Poverty of Rights-Blind Communality: Looking Through the Window of Japan*, 1993 B.Y.U. L. REV. 517, 531.

144. Yoichi Higuchi, one of the leading constitutional lawyers in Japan, also referring to the *Nakaya* case, suggested that "[m]ajority opinions that 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 rights precedence over those of individuals. Higuchi Yoichi, *"When Society Is Itself the Tyrant,"* 35 JAPAN Q. 350, 354 (1988).

145. Much of the anger directed at Mrs. Nakaya has come in the form of letters. *See* FIELD, *supra* note 41, at 134. One letter contained defaced newspaper photographs of Mrs. Nakaya, carrying captions such as: "You are possessed by the spirit of death! You are not a woman! You are a human demon on this earth!" *Id.* Typical letters read somewhat like the following: "'If you don't like the verdict, get out! Go to a "Christian country," a "foreign country"'; 'You aren't Jewish by any chance are you?'; 'Hairy barbarian!'; 'Get off Japanese soil, unclean thing!'" *Id.* at 135, 212.

146. *See* UPHAM, *supra* note 132, at 205-21 (suggesting that group ideology provides the basic framework for the entire Japanese bureaucracy).

of litigation." A standard providing that a person has a right not to be offended by the religious beliefs or practices of another is problematic. Professor William Marshall suggests that "religious sensibilities . . . do not merit special deference under the Constitution [of the United States] and cannot, in any event, possibly be shielded from offense in a complex society."[147] Because religious beliefs vary widely and often diametrically oppose each other, it is impossible to allow diverse religious beliefs to coexist in a public forum without requiring religious adherents to show tolerance and accommodation of each other's beliefs. In order to protect the religious interests of all Japanese people, there must be some degree of tolerance toward the beliefs and practices of others, including the majority, even if the result is sometimes painful to individual sensibilities.

Second, recognition of Mrs. Nakaya's claim of a personal religious right could present overly burdensome administrative obstacles for the free exercise of those religions whose practices involve prayers or ordinances for members of other religions.[148] If the court were to recognize a cause of action to enforce a personal religious right, it might require the express permission of family members of the deceased as a prerequisite to performing such prayers or ordinances. While the vast majority of these religions would comply with such regulations, compliance would create an administrative burden that might infringe the right of such religions to practice their beliefs or fulfill duties they view as religious imperatives.

Third, the recognition of a personal religious right could also foreseeably infringe on the constitutional rights of those religions that proselytize in Japan. If individuals were afforded

147. William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 363 (1990-91). Mr. Marshall suggests that because of the problems inherent in standards based on offensiveness, "the infusion of an offensiveness component into religion clause jurisprudence is inappropriate and should be eliminated." *Id.* at 353. He suggests that religious freedoms should be treated as freedom of speech is, with minimal regard to the personal offense of the listener.

148. For example, it is the practice of members of the Church of Jesus Christ of Latter-Day Saints to perform proxy baptisms in the names of deceased individuals of all religions. Latter-day Saints believe that the proxy baptism may be accepted or rejected by the deceased in the afterlife or "spirit world." Thus, the ordinance differs somewhat from Shinto enshrinement in that it presents an "option" for the deceased rather than defining the nature of the deceased through a religious title.

the right not to have their peaceful religious enjoyment disturbed by a potentially offensive religious message, the free speech rights of those people who share their religions through missionary work might be infringed.[149] This would have far-reaching repercussions on the rights of proselyting religions such as the Church of Jesus Christ of Latter-day Saints, Seventh Day Adventists, Jehovah's Witnesses, Sokka-Gakkai, and many others.

In any event, any claim to a personal religious right faces a difficult road to acceptance. As discussed above, it has been suggested that in Japan the need for cultural harmony too often comes "at the expense of individual rights."[150] While constitutional language emphasizes the rights of individuals, courts have consistently emphasized the rights of the group.[151] Accordingly, many Japanese would rather deal with infringements of their rights than face the social stigmatization that often visits those who choose to stand alone in a group culture.

VII. CONCLUSION

Despite the cultural differences between the two countries, the current state of religious freedom in Japan appears to have some significant similarities to religious freedom in the United States. Article Twenty of the Constitution of Japan contains clauses analogous to the Establishment Clause and the Free Exercise Clause in the United States Constitution. Furthermore, in hearing only two cases dealing with the issue of religious freedom, the Japanese Supreme Court has designed an establishment standard not highly dissimilar from its American counterpart, the product of a much longer history of scrutiny and evolution.

The Institutional Guarantee in the Constitution of Japan serves as an assurance of the separation of religion and state. In determining whether government actions violate this clause,

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149. Applicable provisions of the Constitution of Japan include Articles 19 and 21. Article 19 reads "Freedom of thought and conscience shall not be violated." Article 21 reads "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. . . . No censorship shall be maintained, nor shall the secrecy of any means of communication be violated." KENPOU [Constitution] arts. XIX, XXI (Japan).

150. Dean J. Gibbons, *Law and the Group Ethos in Japan*, 3 INT'L LEGAL PERSPECTIVES 98, 119 (1990).

151. *Id.*; UPHAM, *supra* note 132, at 205-21.

courts must first decide if the actions are religious in nature, then determine the extent of the government involvement. The Japanese Supreme Court has stated that only activities whose effect is to promote, facilitate, accelerate, oppress or intervene in a religion are violative of the Constitution. In making this determination, courts appear to have substantial freedom to set their own standards, but the *Nakaya* court has specifically mentioned that the existence of a secular purpose, the nature of the activity, the extent of government entanglement, and the evaluation of the public are valid considerations. The *Nakaya* court's second inquiry focuses on the nature and extent of the actions of the governmental agency. *Nakaya* holds that indirect government involvement—particularly that which is only clerical in nature—is not automatically prohibited by the Constitution's Institutional Guarantee. However, courts might apply stricter scrutiny to government actions that appear to be directly collaborative with private organizations involved in religious activities. Finally, it appears that the Japanese Supreme Court will allow slightly more cooperation in religious activities from the government than its American counterpart will.

In the end, however, the *Nakaya* standard would afford solid protection to the people of Japan only if the courts are aware of the pitfalls inherent in giving great weight and consideration to the public perception of state activity. The courts must be sensitive to the normative effects of acculturation and the potential for oppression by a majority religion in order to effectively protect the religious freedoms of all of its citizens.

As for the free exercise of religion, the Japanese Supreme Court has stated that there is no legal right to live one's life under a quiet and undisturbed religious atmosphere. The court has placed a strong emphasis on the need to be tolerant of the views of others and appears to be wary of religious freedom claims that reach beyond mere protection from religious compulsion or disadvantage. Because the protection here closely parallels that of the Institutional Guarantee, it appears that this standard could provide adequate protection of religious freedoms. However, the apparent disdain for personal rights raises serious questions as to whether a free exercise claim will ever be fully recognized by the Japanese Supreme Court. It also raises questions as to how much time will pass before another individual will be bold enough to assert their religious rights before the courts. It is interesting to note that this time

the brave soul was a seemingly simple widow from rural Japan. By asserting her beliefs, Mrs. Nakaya paid a high personal price for going against the cultural norms of Japanese society. However, she has renewed the examination of religion's place in Japanese culture. *Nakaya* was heard a decade after *Tsu City* and the years have again mounted since this most recent decision was handed down. Because of Mrs. Nakaya's courage, perhaps another decade will not have to pass before the discussion is taken up again.

Eric N. Weeks