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Separation of Religion and State in Japan: A Pragmatic Interpretation of Articles 20 and 89 of the Japanese Constitution

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SEPARATION OF RELIGION AND STATE IN JAPAN: A PRAGMATIC INTERPRETATION OF ARTICLES 20 AND 89 OF THE JAPANESE CONSTITUTION

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Abstract: Article 20 of Japan's Constitution establishes freedom of religion. To protect this freedom, the provisions of Articles 20 and 89 separate religion from the state to prevent the return of State Shintō. Despite this separation, the Japanese Supreme Court has consistently upheld instances where state entities interact with religious groups. These decisions have raised the ire of numerous academics and legal professionals in and out of Japan who believe that Japan's constitutional separation requires absolute separation, or at least something more stringent than the Supreme Court has been willing to find. Although this comment rejects the approach taken by the Supreme Court in these cases, it also seeks to rebut the arguments of scholars and professionals opposed to these decisions by reinterpreting these articles in a way that still comports with the results reached in these Supreme Court cases.

I. INTRODUCTION

Since the 1977 *Tsu City Groundbreaking* case, legal scholars and professionals have debated Japan's constitutional freedom of religion. The *Tsu City* case was Japan's first case since World War II to define religious freedom.[1] The case required the Supreme Court to decide the degree to which Articles 20 and 89 of Japan's Constitution, dealing with separation of religion and state, limit state entities from interacting with religious organizations.[2] Answering this question, the Court held that these articles created less than absolute constraints on religious activity.[3] This decision led to a vigorous academic debate to define the terms, context, and application of Articles 20 and 89. In the decades following *Tsu City*, the scholarly debate continued, fueled by Supreme Court decisions that, in all but one case, reaffirmed *Tsu City*'s holding.

Interestingly, this debate is radically one-sided: almost every article on the topic condemns the Supreme Court's rationale in *Tsu City* and subsequent decisions reaffirming that result. Critics primarily complain about the Supreme Court's refusal to defer to Article 20's seemingly absolute language, and criticize the court for upholding what they perceive as

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1 Saikō Saibansho [Sup. Ct.] July 13, 1977, Sho 46 (gyo-tsu) no. 69, 31(4) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533, *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL LAW OF JAPAN 1970 THROUGH 1990, at 478-92 (1996) [hereinafter *Tsu City*].

2 *Id*.

3 *Id*. at 480.

patently unconstitutional outcomes. But, if this criticism is valid, and these decisions are repugnant to Japan's Constitution, then why does the Supreme Court continue to reaffirm *Tsu City*?

This comment seeks to answer this question and rebut the prevailing academic view through a reinterpretation of Articles 20 and 89. In reinterpreting Japan's constitutional guarantee of freedom of religion through the separation of religion and the state, this comment examines the Japanese Supreme Court's reasoning in *Tsu City* and its progeny, common Japanese principles of interpretation, the underlying purpose of Articles 20 and 89, and current public policy considerations. Using these sources, this comment argues that Japanese courts can reasonably interpret these articles to permit significant interaction between the state and religious groups and that the Constitution does not require absolute or even strict separation of religion and the state.

Part II of this comment begins with a brief history of religion and state in Japan, which frames the current debate, before introducing the text of Articles 20 and 89. Part III first reviews the Japanese Supreme Court cases that interpret these articles, and then discusses various academic and Supreme Court interpretations and the problems that arise from those interpretations. Part IV reassesses Articles 20 and 89 under prevailing principles of Japanese legal interpretation and offers a new test to analyze whether future situations violate these constitutional provisions. Finally, Part V concludes with a summary of the debate, and where this new interpretation fits within that debate.

II. THE LONG HISTORY OF RELIGIONS AND THE STATE IN JAPAN DIRECTLY INFLUENCED THE DEVELOPMENT OF ARTICLES 20 AND 89

Understanding this constitutional debate concerning Articles 20 and 89 requires a brief historical overview of the Japanese state's historical comingling with, and abuse of, religion. In 538 A.D., a delegation from the Korean peninsula introduced Buddhism to the Yamato court, which until that point had adhered to the religious authority of *Amaterasu* (the sun-goddess) and her human descendants.[4] In 593, Prince Shōtoku took power, unified Japan, and established Buddhism as the state religion.[5] Buddhism, Shintō, and their various schools were largely tolerant, if not syncretic, until the middle of the thirteenth century when the monk Nichiren introduced a new

[4] MASAHARU ANESAKI, HISTORY OF JAPANESE RELIGION: WITH SPECIAL REFERENCE TO THE SOCIAL AND MORAL LIFE OF THE NATION 32-33, 53 (1930).

[5] *Id.* at 57.

school of Buddhist practice that scorned all other religions, for which the state eventually exiled him.[6] In the centuries following the end of the Kamakura period (1185–1333), Japan devolved into warlordism, marked by intense clan fighting and even outright warfare between religious sects.[7] In 1549, amid this civil war, St. Francis Xavier introduced Christianity to Japan, which Japan's reunifier, Shōgun Oda Nobunaga, nominally embraced.[8]

Christianity's general acceptance lasted until 1615, when Shōgun Tokugawa Ieyasu banished the missionaries and fostered active persecution of Christians and Nichiren Buddhists.[9] Although Buddhism continued as Japan's state religion, it had become a mere tool for the government to maintain control.[10]

When the Meiji Restoration began in 1868, another major shift occurred in the state's relationship with religion. In 1868, Shintō became the state religion, and the government ordered its separation from Buddhism to help legitimate the new ruling structure.[11] This separation resulted in strict regulation of all religions, and Shintō priests used their new positions of favor to "plunder" Buddhist temples.[12] Throughout the State Shintō era, a wave of new religions arose in Japan. However, the government violently suppressed these groups,[13] despite constitutionally guaranteeing religious freedom.[14]

After World War II, Japan transitioned into a new socio-religious climate, which has endured through today. In 1945, the Allied Occupation quickly dismantled State Shintō and formally ended the Meiji government's suppression of all other religions. To keep the Japanese state from ever reviving State Shintō, the Diet[15] ratified the Articles 20 and 89, which protect freedom of religion and ban state support for religious organizations, thus framing the debate over Japanese religious freedom.[16]

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[6] *Id*. at 194-95.
[7] *Id*. at 229-39.
[8] *Id*. at 241, 244.
[9] *Id*. at 250-53.
[10] *Id*. at 260.
[11] HELEN HARDACRE, SHINTŌ AND THE STATE 1868-1988, at 27-28 (1989).
[12] *Id.* at 28-29.
[13] *Id.* at 126-28.
[14] *See* DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [MEIJI CONSTITUTION], art. 28, *available at* http://www.ndl.go.jp/constitution/e/etc/c02.html#s2.
[15] The Diet is the name of Japan's national legislative body.
[16] *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION]. "*Kenpō*" is the Japanese word for "constitution." This comment uses the English translations of the Japanese Constitution published by the Japanese Attorney General's Office and the National Diet Library. *See* ATTORNEY-GENERAL'S OFFICE, THE CONSTITUTION OF JAPAN AND CRIMINAL LAWS (1951); *The Constitution of Japan*, NATIONAL DIET

Japan's current Constitution contains two articles that affect religions: Articles 20 and 89. Chapter III of the Constitution, setting forth the "Rights and Duties of the People," contains Article 20,[17] which provides

> 1) Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.
>
> 2) No person shall be compelled to take part in any religious act, celebration, rite or practice.
>
> 3) The State and its organs shall refrain from religious education or any other religious activity.[18]

On its face, Article 20 appears to guarantee absolute freedom of religion by not setting forth any exceptions to that right; the repeated use of the word translated as "shall" is usually read as an absolute obligatory requirement. This unwavering obligation receives further support from the Article's prohibitive language, "shall refrain," which takes power away from the state.

Article 89 is found within Chapter VII of the Japanese Constitution, the chapter on "Finance."[19] Article 89 has two parts:

> 1) No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or
>
> 2) for any charitable, educational or benevolent enterprises not under the control of public authority.[20]

Article 89 limits the government's power to expend funds on religious and other non-governmental entities.[21] Although the article distinguishes religious organizations in 89(1) from all other non-governmental organizations in 89(2), the article nonetheless equally prohibits the government from expending public funds for both of these types of groups.

LIBRARY, http://www.ndl.go.jp/constitution/e/etc/c01.html (last visited Feb. 10, 2012) (based on the English Edition by the Government Printing Bureau).

[17] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. III.

[18] *Id.* art. 20.

[19] *Id.* art. 89.

[20] *Id.*

[21] *Id.*

III. THE JAPANESE SUPREME COURT HAS FAILED TO OFFER A WORKABLE INTERPRETATION OF ARTICLES 20 AND 89

Beginning with the 1977 *Tsu City* case, this Part will review the facts of these cases and the Supreme Court's rationale for each resulting decision, and will then discuss the prevailing academic critiques of these cases.

A. The Japanese Supreme Court Cases Defining Articles 20 and 89 Permit Significant Interaction Between Religions and State

Over the past forty years, the Japanese Supreme Court has decided only a handful of cases concerning the separation of religions from the state.[22] All of these cases stemmed from complaints of unconstitutional interaction between the state and the Shintō religion. In all but two cases, the Supreme Court has upheld the challenged state action.

1. The Tsu City Groundbreaking *Case Established the Purpose and Effects Test Used by Japanese Courts in Cases Involving Articles 20 and 89*

The controversy in this case began when the mayor of Tsu City spent public funds on a Shintō purification ceremony at the groundbreaking for a new city gymnasium.[23] Disagreeing with this expenditure, one of the city's councilmembers sued the mayor.[24] The city councilman alleged that the expenditure violated Articles 20 and 89 because Article 20 establishes freedom of religion and separates religion and state, and Article 89 forbids, *inter alia*, the use of public funds to benefit religious organizations.[25] Given the articles' broad reach, the mayor's payment to a religious organization to perform a ceremony at a public event appeared to violate the Constitution.

Nominally, the Supreme Court agreed that Articles 20 and 89 embody the ideal of total separation of all religions and the state.[26] However, the Court also found this ideal unachievable because state regulation will

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[22] For cases on the freedom of religion as opposed to the separation of religion and state, see Saikō Saibansho [Sup. Ct.] May 15, 1963, Sho 36 (a) no. 485, 17(4) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 302 (the Criminal Exorcism case); Saikō Saibansho [Sup. Ct.] Feb. 29, 2000, Hei 10 (o) no. 1081, 54 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 582 (the Jehovah's Witness Blood Transfusion case); Saikō Saibansho [Sup. Ct.] Jan. 30, 1996, Hei 8 (ku) no. 8, 50(1) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 199 (the Aum Shinrikyō Dissolution case); and Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, Hei 7 (gyo-tsu) no. 74, 50(3) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (the Jehovah's Witness School Kendō case).

[23] *Tsu City*, *supra* note 1, at 479.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 480.

inevitably interfere with a religion's beliefs or practices in certain circumstances.[27] More importantly, the Supreme Court stated that total separation is undesirable because it would force the state to end current programs that involve religious groups, such as those providing financial assistance to private religious schools and state assistance for preserving historic architecture owned by religious groups.[28] The Court pointed out that such total separation would ironically come full circle in that denial of "such subsidies would impose a disadvantage on these entities simply because of their religious nature and would inevitably result in invidious discrimination because of religion." For this reason, the Court concluded that total separation is impractical and possibly unconstitutional.[29]

Proceeding from the premise that total separation is undesirable, the Court next tried to reach a balanced, middle ground through the "purpose and effects" test.[30] The purpose and effects test requires state neutrality and "prohibit[s] conduct which leads to collusion between the state and a religion," but "only when such activity exceeds reasonable bounds as determined with reference to the conduct's purpose and effects."[31]

The Court introduced the purpose and effects test to explain that the government violates Article 20(3), which prohibits the state from engaging in religious activity, when state action

> exceeds reasonable limits and which has as its purpose some religious meaning, or the effect of which is to promote, subsidize, or conversely, to interfere with or oppose religion . . . . [It is not enough that the procedure of the activity is] set by religion. The place of conduct, the average person's reaction to it, the actor's purpose in holding the ceremony, the existence and extent of religious significance, and the effect on the average person, are all circumstances that should be considered to reach an objective judgment based on socially accepted ideas.[32]

Under this interpretation, the state cannot violate Article 20(3) just by engaging in objectively religious activity; a court must also find that the public subjectively considers the activity religious in nature.[33] Notably, the

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[27] *Id.*
[28] *Id.*
[29] *Id.* Presumably, the Court would find such discrimination to be a violation of the freedom of religion.
[30] *Id.* at 480-81.
[31] *Id.* at 481.
[32] *Id.*
[33] *Id.* at 481-82.

purpose and effects test only applies to violations of paragraph (3) of Article 20, not to violations of paragraphs (1) and (2).[34]

The *Tsu City* Court then applied this framework, finding that inviting and funding the ceremony did not violate Article 20(3) because the ceremony did not

> raise the religious consciousness of those attending or of people in general or lead in any way to the encouragement or promotion of Shintō . . . . It is absolutely inconceivable that such a practice threatens to lead to the development of a special relationship between the State and Shintō, or the reestablishment of Shintō as a State religion . . . . It will not have the effect of promoting or encouraging Shintō or of oppressing or interfering with other religions. It therefore should not be considered . . . prohibited by Article 20, paragraph 3.[35]

Simply put, the Court held that the state can constitutionally hold a religious ceremony so long as the ceremony does not have the obvious effect of promoting a particular religion or impairing religious freedom.

Although the Court's judgment reversed in favor of the state, it did not do so unanimously. The dissent primarily looked to the purpose of Articles 20 and 89—preventing the return of State Shintō.[36] Because these articles serve a grave purpose, the dissent argued, the Court can only truly uphold these articles' purpose by interpreting them to require absolute separation.[37] The dissent's arguments remain important because they augment the criticisms lodged by many of the debate's commentators.

2. The Self-Defense Forces Enshrinement *Case Reaffirmed the Supreme Court's Lenient Purpose and Effects Test*

Almost two decades after deciding *Tsu City*, the Supreme Court once again reviewed Articles 20 and 89 in the *Self-Defense Forces* ("*SDF*") *Enshrinement* case,[38] largely reaffirming *Tsu City*'s rationale. The *SDF Enshrinement* case had its origins in 1968, when Yasuko Nakaya's husband

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[34] *Id.* (noting that "the two paragraphs differ in purpose, intent, and scope, and they guarantee different freedoms").

[35] *Id.* at 482.

[36] *Id.* at 483-84.

[37] *Id.*

[38] Saikō Saibansho [Sup. Ct.] June 1, 1988, Sho 57 (o) no. 902, 42(5) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277, *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL LAW OF JAPAN 1970 THROUGH 1990, 492-516 (1996) [hereinafter *SDF Enshrinement*].

died in a traffic accident while on duty as a member of the SDF.[39] In the years following this accident, a group called the SDF Friendship Association ("SDF Friends"), a private support group, sought to have Mr. Nakaya and other fallen SDF members enshrined (*goshi*) at the Yamaguchi Shintō Gokoku, a Shintō shrine for war dead.[40] When the shrine denied the request to enshrine these deceased SDF members, SDF Friends sought assistance from the SDF Yamaguchi Regional Liaison Office, the government's local SDF office.[41] The SDF Regional Office facilitated SDF Friends' subsequent petition for enshrinement by providing guidance and general assistance to SDF Friends when they submitted their second petition.[42]

When the second petition succeeded, SDF Friends informed Mrs. Nakaya of her husband's soon-to-be enshrinement by inviting her to the enshrinement ceremony.[43] Mrs. Nakaya, a Christian, believed that SDF Friends violated her freedom of religion by enshrining her husband without her consent; she then chose to sue for rescission of the enshrinement and damages from SDF Friends.[44] Although SDF Friends was not a government actor, the lower courts ruled for Mrs. Nakaya and held that the regional SDF office's aid to the SDF Friends was an unconstitutional religious activity by a government actor.[45]

On appeal, however, the Supreme Court viewed this case as one of competing religious beliefs rather than state engagement in religious activity. The Court noted that in life, Mr. Nakaya had held no known religious beliefs.[46] However, Mrs. Nakaya did hold a Buddhist memorial service to appease Mr. Nakaya's father, and subsequently held a Christian memorial service according to her own religious beliefs.[47] When Mrs. Nakaya vocalized her disapproval to SDF Friends, Mr. Nakaya's father wrote a letter that requested the enshrinement proceed because he wanted to see his son enshrined.[48] In addition to these two, with their competing religious beliefs, the Court identified a third interested and competing party—the shrine.

For Mrs. Nakaya's claim to succeed under *Tsu City*'s purpose and effects test, the Court had to find an impermissible government action in violation of the procedural guarantee of freedom of religion provided by

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[39] *Id.* at 492.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 498.
[46] *Id.* at 496.
[47] *Id.*
[48] *Id.* at 509.

Article 20(3). The Court first decided whether the defendants had violated the constitutional separation of religion. It determined that the purpose and effect of the regional office's assistance was to raise the morale of SDF members and their families; this was not a religious purpose and thus not a religious activity.[49]

Although the Court could have ended its analysis there, having found no religious activity, it continued. Relying on Article 20(3) as an indirect procedural guarantee, the Court held that Mrs. Nakaya had no individual cause of action unless the state violated the substantive rights contained in Article 20(1) or (2).[50] This diverged from *Tsu City* by turning Article 20(1) into a directly enforceable right.

After determining that government action to improve troop morale was permissible under Article 20(3), the Court turned to Mrs. Nakaya's claim that the shrine had violated her substantive rights under Article 20(1). The Court denied Mrs. Nakaya's claim by finding that the shrine was an interested third party with the same religious freedoms as Mr. Nakaya's wife and father.[51] The Court then ruled that it could not sustain Mrs. Nakaya's claim for injunctive relief and damages because to do so would in turn violate the shrine's religious freedom.[52] This means that a person cannot violate Article 20(1) (guaranteeing freedom of religion) when the challenged action also represents an exercise of religious freedom. In such instances, freedom of religion requires tolerance for the religious activities of others "as long as such acts do not disturb his or her freedom of religion by way of compulsion or disadvantaging the individual," which would directly violate Article 20(2).[53]

The Supreme Court's rejection of Article 20(3) and 20(1) left Article 20(2) as the only provision of Article 20 still available for sustaining Mrs. Nakaya's claim. Under Article 20(2), the Court found that the defendants did not violate the provision because they did not compel her to attend the ceremonies and did not restrict her from remembering her husband in a Christian way.[54] As explained in *Tsu City*, a person cannot violate Article 20(2) without an outward act that has the effect of preventing a person from independently exercising his or her beliefs. As a result, the Court denied all relief to Mrs. Nakaya under any provision of Article 20 because 1) the enshrinement did not prevent Mrs. Nakaya from exercising

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[49] *Id.* at 500.
[50] *Id.*
[51] *Id.* at 501.
[52] *Id.*
[53] *Id.*
[54] *Id.*

her own religious beliefs, 2) no government action took place, and 3) competing religious beliefs require tolerance.

The dissent chastised the majority for its interpretation of Article 20(1) and 20(3). Regarding Article 20(3), the dissent would have added a third factor to the purpose and effects test by analyzing the degree of government entanglement.[55] The dissent also argued that the Regional SDF office violated Article 20(1) when it took positive actions to facilitate the SDF Friends' subsequent application process to the Shintō shrine.[56] The dissent believed this act had the effect of promoting Shintō over other religions; thus, this action violated Article 20(1)'s prohibition on religions receiving state privileges.[57] The dissenting justices also disapproved of the fact that the Regional Office only considered Shintō enshrinement and did not consider obtaining recognition from other religions.[58] These are valid criticisms that the Supreme Court has yet to address.[59]

3. In the Ehime Prefecture *Case, the Supreme Court, for the First Time, Found a Violation of the Separation of Religion and State*

The *Ehime Prefecture* case[60] remains the only instance where the Court truly ruled against the state in finding a violation of Japan's constitutional separation of religion and state.[61] In this case, Ehime Prefecture had allocated public funds for offerings to Yasukuni Shrine and to Gokoku Shrine to perform Shintō ceremonies.[62] The plaintiffs challenged cash donations (*tamagushiryo*) for various seasonal festivals (*reitaisai*) and another type of cash donation (*kumotsuryo*) for memorial ceremonies (*ireitaisai*).[63] Challenging these donations, a group of citizens launched a taxpayer suit against the former governor and other officials to repay the prefecture for allegedly violating Articles 20(3) and 89.[64]

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[55] *Id.* at 514. Together, those three factors (purpose, effects, and excessive entanglement) comprise the United States Supreme Court's balancing test for separation of church and state as established in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1970).

[56] *SDF Enshrinement*, *supra* note 38, at 515.

[57] *Id.*

[58] *Id.*

[59] *See infra* Part III.B.

[60] Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, Hei 4 (gyo-tsu) no. 156, 51(4) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673, *translated in* SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY: NOS. 27-30 1996-99, NO. 30 (1999) [hereinafter *Ehime*].

[61] In *Sunagawa II*, discussed *infra* Part III.A.6, the Court merely remanded to remedy the city's unconstitutional action.

[62] *Ehime*, *supra* note 60, at 2.

[63] *Id.*

[64] *Id.*

The majority found that the Japanese government should have a secular nature and maintain religious neutrality because the Constitution created an unconditional freedom of religion.[65] The majority believed that they could only truly prevent State Shintō's return by requiring strict separation.[66] Nevertheless, the majority—with a nod to the decision in *Tsu City*—accepted Article 20(3) as an indirect institutional guarantee, agreed that total separation was not feasible, and stated that balancing under the purpose and effects test was appropriate.[67]

The majority then restated *Tsu City*'s test for impermissible religious activity by the state: "activities exceeding such reasonable limits, the purpose of which have some religious meaning and the effect of which is to support, promote, or, adversely, oppose or interfere with religion, should be prohibited."[68] However, the Court went one step further than *Tsu City* by explicitly extending the purpose and effects test beyond Article 20(3) to Article 89;[69] the *Tsu City* majority had only implied as much.[70]

Thus, applying the same test from *Tsu City*, the Court had to distinguish the facts of *Tsu City* to explain why the offerings by Ehime Prefecture were improper. The Court distinguished these cases by pointing out that the offerings by Ehime Prefecture to support the shrines' highest ceremonies (events with extreme religious significance) went well beyond a minor groundbreaking ceremony (an event with little religious significance) from *Tsu City*.[71]

The majority also found fault with the form of the donations. Even though many citizens supported the Prefecture's donations to mourn the nation's war dead, the majority of the justices found such public requests inapposite because of the significance contained in *tamagushiryo* and *kumotsuryo*.[72] The Court faulted the defendants because they had other, less religious, methods available to achieve the same purpose of officially mourning the war dead. The Court suggested that the Prefecture could have made the donations as *koden,* an offering to families in consolation of their deceased, whereas *tamagushiryo* is a donation to support the shrine's priests; the Court also suggested that the Prefecture could have used *saisen,* which, although possessing the same meaning as a *tamgushiryo*, is offered

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[65] *Id.* at 3.
[66] *Id.* at 3-4.
[67] *Id.* at 4.
[68] *Id.* at 4-5.
[69] *Id.* at 5.
[70] *See Tsu City*, *supra* note 1, at 492 ("[I]n light of the purpose and effects of the Groundbreaking Ceremony . . . it therefore does not violate Article 89 of the Constitution.").
[71] *Ehime*, *supra* note 60, at 6.
[72] *Id.* at 6-7.

anonymously.[73] Given these available alternatives, the Court found that the Prefecture's use of *tamgushiryo* gave a strong impression of a special government relationship with Shintō to the exclusion of other religions.[74] Accordingly, the Prefecture failed to narrowly tailor its actions to achieve its purpose of mourning the nation's war dead.

Despite the majority accepting Article 20 as a conditional freedom of religion, concurring justices held strong to the idea of unconditional freedom in order to guard against the return of State Shintō.[75] These justices criticized the purpose and effects test because of its proven ineffectiveness to coherently guide lower courts.[76] Instead of keeping the test, these justices would have held it void for vagueness.[77]

Although one dissenting opinion agreed with the methodology used by the majority, it diverged in its application. This dissent considered the Yasukuni and Gogoku shrines to have special national significance because they serve as monuments to the war dead, thus muting the shrines' religious nature.[78] This distinction is critical because Article 20 only applies to religious activity; if the challenged activity is not religious, then courts do not need to examine the activity under the purpose and effects test.

These dissenters essentially would have added another factor to the effect prong of the purpose and effects test. Rather than ask whether the action created an effect that favors any one religion, the dissent would ask whether the effect furthered a legitimate state interest that outweighed the religious nature of the activity.[79] The dissent thought that because government officials from all religions—not just Shintō—pay official visits to these specific Shintō shrines, government support of these war dead memorials constituted a legitimate state interest.[80] The dissent also argued that because the donations' monetary value was small, there was less of a danger that the activity could be said to promote unreasonably any one religion over all others.[81]

Another dissenting opinion strictly interpreted "religious activity" to prohibit only ceremonies actually performed by the state itself,[82] which was

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[73] *Id.*
[74] *Id.* at 6.
[75] *Id.* at 21.
[76] *Id.* at 23-24, 28 (discussing multiple cases where lower trial and appellate courts applied the test only to have their decisions reversed on appeal).
[77] *Id.*
[78] *Id.* at 36.
[79] *Id.*
[80] *Id.* at 36-37.
[81] *Id.* at 40-43.
[82] *Id.* at 50-51.

a factor that also arose in *Tsu City*.[83] In that sense, this dissent argued that because the governor did not personally perform the ceremony, the state had not engaged in religious activity. Considering Article 89, the dissent noted that in all practicality, the effect of donating a sum of money to a religion is no different than giving a tax preference based upon status as an incorporated religion.[84] When "religious activity" is interpreted as this dissent would interpret it, then it is inconsistent to hold that the government can give preferences to religions in one way, but not another way, even though both actions have the same end result. Although many Western scholars may not agree with this ends-justify-the-means reasoning, it permeates Japanese court opinions where, in general, pragmatism reigns to achieve the correct ends by any reasonable means possible.[85]

4. The Minō Relocation, Minō Memorial Services, *and* Minō Subsidy *Cases Show that the* Ehime *Case Did Not Set a New Standard for Religious Separation Cases*

In 1976, the Kamisakas filed the first of three suits that would eventually make it to Japan's Supreme Court.[86] The Kamisakas alleged that various public officials in Minō City violated Articles 20 and 89 through material support for a local *chukon-hi* (war memorial).[87] The Kamisakas brought the first case against the officials for their decision to pay to relocate the war memorial onto land owned by the school district and allow the memorial to use the land rent-free.[88] The second case demanded the officials reimburse the city for the funds they had expended to hold Shintō and Buddhist memorial services at the monument and for the salaries paid to local officials who attended the services.[89] The third case challenged an annual subsidy to the Minō Chapter of the Japan Association of War-Bereaved Families ("Minō JAWBF"), which the Kamisakas argued was acting as a religious organization.[90] The plaintiffs challenged the use of the funds by the Minō JAWBF to pay for the memorial services and visits to

[83] *See supra* Part III.A.1.
[84] *Ehime*, *supra* note 60, at 63.
[85] *See infra* Part IV.A.1.
[86] DAVID M. O'BRIEN, TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN 63 (1996).
[87] *Id.* at 98-141.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 111.

Yasukuni Shrine.[91] The Supreme Court decided each case against the Kamisakas.

In the first two cases, the Court applied the *Tsu City* purpose and effects test, but before doing so, found that the monument had lost all religious significance during the occupation when the Allies severed the monument's formal ties to Shintō and to Yasukuni Shrine.[92] The Court determined that the monument could not be considered an "alter ego" of Yasukuni just because the monument at one point had enshrined war dead whom priests at Yasukuni had also enshrined.[93] Furthermore, the soldier memorial services held there alternated between Shintō and Buddhist, so that the monument could not be said to be an object of any one religion.[94]

Because the memorial had seemingly lost all religious significance and also alternated between religions, the Court found that the effect of the local government's action did not give any undue support or favoritism to one religion over another.[95] The Court then absolved the public officials who attended the ceremonies by finding that they attended out of social courtesy.[96]

Regarding financial assistance to the Minō JAWBF, the Court found that the organization served a primarily secular purpose, mooting any need to discuss Articles 20 and 89 in that context.[97] Despite the fact that the Minō JAWBF used some of the city's subsidy to sponsor trips to Yasukuni (a Shintō shrine), the Court found that paying to visit a religious site did not make the organization's primary function religious.[98] The Court supported this analysis by citing the fact that the national organization spent decades lobbying to improve pensions for veterans and that all the organization's activities centered on veterans.[99] Thus, the memorial services, although religious, had a secular purpose of honoring veterans.[100]

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91 *Id.*
92 *Id.* at 127-28, 130.
93 *Id.*
94 *Id.* at 127-28, 134.
95 *Id.*
96 *Id.* at 129.
97 *Id.* at 127-28.
98 *Id.*
99 *Id.* at 113.
100 *Id.*

5. The Daijō Sai *Cases[101] Show the Continued Vitality of the Purpose and Effects Test in Japan*

Three years after the Supreme Court decided the last *Minō* case, the Court again took up separation of religion and state in two cases concerning Emperor Akihito's 1989 succession ceremony. The Third Petty Bench[102] decided the first case, a taxpayer suit against the governor and other local officials from Ōita Prefecture.[103] The First Petty Bench, two days later, decided a similar case against the governor and officials from Kagoshima Prefecture.[104]

In both of these cases, the Imperial Household Agency had invited local officials to attend Emperor Akihito's succession ceremony, specifically the *Daijō sai*.[105] According to Shintō practice, new emperors perform the *Daijō sai*, during which the emperor prays to the gods for peace and a bountiful harvest.[106] The ceremony also serves a second function, celebrating the emperor's succession.[107] To attend this ceremony, the officials expended government funds, which the plaintiffs claimed violated Articles 20 and 89.[108] Although the ceremony is religious, the Supreme Court ignored its religious nature and emphasized the ceremony's secular purpose.

Focusing on this secular purpose as the relevant purpose for the purpose and effects test, the Supreme Court affirmed the lower courts' decisions to dismiss the suits. The Court found that the officials attended the ceremony only as a celebration of Emperor Akihito as the symbol of the Japanese state.[109] Regarding the ceremony's effect, the Court found, without any discussion, that the ceremony neither promoted nor repressed any religion, having an essentially neutral effect on religion.[110]

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[101] *See generally* Saikō Saibansho [Sup. Ct.] July 9, 2002, Hei 10 (gyo-tsu) no. 239, 1799 HANREI JIHŌ 101 [hereinafter *Kohno*]; Saikō Saibansho [Sup. Ct.] July 11, 2002, Hei 11 (gyo-tsu) no. 93, 56 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] No. 6 at 1204 [hereinafter *Higo*] (*translated at* http://www.courts.go.jp/english/judgments/text/2002.7.11-1999-Gyo-Tsu-No.93.html). Page number citations are to the PDF page number of the opinions on the Court's website.

[102] Japan's Supreme Court is comprised of three Petty Benches, each with five justices, and a Grand Bench where all fifteen justices sit *en banc*. Most Supreme Court cases are decided by one of the three petty benches.

[103] *Kohno*, *supra* note 101.

[104] *Higo*, *supra* note 101.

[105] *Id.*

[106] *Id.* at 2-3.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

6. The Sunagawa Neighborhood Association Shrine Cases[111] Suggest a Change in the Court's Application of the Purpose and Effects Test

The Supreme Court decided the most recent cases involving the separation of religion and the state in early 2010. The Court reviewed a pair of cases against Sunagawa City in northern Japan. In both cases, Sunagawa City offered city-owned lands to local neighborhood associations ("NHAs") without requiring compensation in return.[112] In both cases, the city knew that the NHAs would use part of the land and buildings to house Shintō shrines that had already been on the land for decades.[113] The city actually wanted to divest itself of the shrines and corresponding property because it thought that it needed to in order to comply with Article 89.[114] The only other option—removing the shrines—would violate Article 20.[115] Instead of being hailed for its attempt to comply with the constitution's mandate, the city was sued by a local group of residents for the way that it divested itself of the shrines.[116]

These cases are significant because despite having nearly identical facts, the Supreme Court found a violation of Article 89 in one case, but not the other, thereby signaling an attempt to clarify the cumbersome purpose and effects test. The Supreme Court distinguished the cases based on the different ways that the city tried to divest itself of the shrines. In *Sunagawa I*, the city granted the shrine land and property to the NHA.[117] In *Sunagawa II*, the city entered into a contract with the NHA to loan the land for use as a shrine free of charge.[118]

Affirming the unconstitutionality of the city's loan in *Sunagawa II*, the Supreme Court listed several options for making the transfer that would not have violated Article 89: grant, transfer for value, and lease at fair market value.[119] Ultimately, the Supreme Court found that the city's loan contract

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[111] *See generally* Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, Hei 19 (gyo-tsu) no.334, 64(1) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 128 [hereinafter *Sunagawa I*] (*translated at* http://www.courts.go.jp/english/judgments/text/2010.01.20-2007.-Gyo-Tsu-.No..334.html); Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, Hei 19 (gyo-tsu) no. 260, 64(1) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 [hereinafter *Sunagawa II*] (*translated at* http://www.courts.go.jp/english/judgments/text/2010.01.20-2007.-Gyo-Tsu-.No..260.html). Page number citations are to the PDF page number of the opinions on the Court's website.

[112] Cases cited s*upra* note 111.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id*.

[117] *Sunagawa I*, *supra* note 111, at 1.

[118] *Id*.

[119] *Id*. at 2.

violated the Constitution, but remanded with instructions for the lower court to examine constitutional alternatives to removing the shrine.[120]

In upholding the city's action in *Sunagawa I* and condemning it in *Sunagawa II*, the Supreme Court adhered to the purpose and effects test, but with a new emphasis. The Court never mentioned purpose in *Sunagawa I; it* mentioned it only briefly in *Sunagawa II*, and only to state that the city's initial secular purpose was not sufficient to comply with the Articles 20 and 89.[121] The Court's failure to mention the purpose prong in the first case and only briefly mention it in the second case appears to signal that the Court sees purpose as a secondary and marginal factor, compared to the effects factor.

The Court put a new emphasis on the effects requirement by rephrasing and combining the effects criteria from the prior cases:

> Article 89 of the Constitution can be construed to prohibit the state's or local public entity's connection with religion in cases where its connection with religion in terms of appropriating public property for use, etc. is found to be beyond the limit that is deemed to be reasonable, in light of the social and cultural conditions of our country, in relation to the fundamental purpose of the system of securing guarantee of freedom of religion.[122]

This test combines elements of the prior cases with its reference to social and cultural conditions and reasonable limits, while maintaining that the public's point of view still serves as the benchmark for reasonableness. However, the *Sunagawa II* Court dropped the original effects prong, which asked whether the "effect of which is to promote, subsidize, or conversely, to interfere with or oppose religion."[123]

Further clarifying effects, the Court identified circumstances where state-owned religious property might not violate Article 89:

> For instance, a facility that has the nature of a religious facility in general terms can be, at the same time, protected as historic or cultural property. Such facilit[ies] often ha[ve] other meanings as tourist resources, means of promoting international

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[120] *Id.* at 3.
[121] *Id.* at 8.
[122] *Id.*
[123] *Compare Sunagawa II*, *supra* note 111, *with Tsu City*, *supra* note 1.

> goodwill, places where local residents cultivate mutual friendship, and so forth.[124]

By developing these hypotheticals, the Court appeared to imply that each would be seen as within reasonable limits when viewed by the public.

Although the Grand Bench unanimously decided in favor of the city in *Sunagawa I*, the Court fractured in *Sunagawa II*, with nine Justices either concurring or dissenting. Justice Fujita presented the most important concurring opinion. Although he approved of the purpose and effects test, he also recognized that the Court needed to address the arguments presented by academics and in prior dissenting opinions.[125] In pointing out that the Court's precedents are not "the absolute rule," he called for a more searching purpose and effects test that would take a hard look at all the facts and circumstances surrounding alleged constitutional violations.[126]

In his dissent, Justice Horigome argued that the purpose prong of the test merited more attention, primarily through a close examination of the religious nature of the action at issue.[127] The concurring opinion of Justice Kondo outright rejected this approach as an inappropriate risk-based test.[128] Justice Tahara and Justice Kondo rejected the relaxed approach advocated by Justice Horigome because they viewed the constitutional separation as absolute.[129] Also acknowledging the inadequacy of the majority's application of the law to the facts, the concurring opinion of Justices Kainaka, Nakagawa, Furuta, and Takeuchi advocated a closer, more comprehensive examination of the facts; these Justices would require a large trial record that includes more local history, more information regarding the religious entity, and facts regarding the local population's relationship with the entity.[130] Although *Sunagawa II* generated a plurality of opinions, one thing pulls them together: the need for a new test to remedy the inadequacy of the decades-old purpose and effects test. The rest of this comment is dedicated to addressing that need.

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[124] *Sunagawa II*, *supra* note 111, at 9.
[125] *Id*. at 14-16 (Fujita, J., concurring).
[126] *Id*.
[127] *Id.* at 39-40 (Horigome, J., dissenting).
[128] *Id*. at 27-28 (Kondo, J., concurring).
[129] *Id*. at 20-21 (Tahara, J., concurring), 27-28 (Kondo, J., concurring).
[130] *Id*. at 34-35 (Kainaka, Nakagawa, Furuta, and Takeuchi, JJ., concurring).

B. The Prevailing Academic View Accurately Critiques the Supreme Court's Test, but Fails to Provide an Adequate Replacement

As discussed in Part II of this comment, Article 20 appears to guarantee absolute freedom of religion by not providing any explicit exceptions to that freedom. The only exceptions provided in the Article withhold power from the state in order to protect that religious freedom.[131] However, if Article 20 did so operate—isolated from all other laws, legal principles, and constitutional provisions—the Supreme Court's results in all but *Ehime* and *Sunagawa II* would appear paradoxical. Over the past decade, law professors from Japan, the United States, and other countries have leveled this criticism at the Japanese government's approach to Article 20, and in particular, the premise that Article 20 does not require total separation.[132]

That premise constitutes one of the main sticking points among critics. The Supreme Court in *Tsu City* supported its premise of limited separation by explaining that "an actual system of government that attempts a total separation of religion and the state is virtually impossible."[133] The dissent in *Tsu City* argued to the contrary that the Japanese state in fact needed to sever all religious ties to prevent a return to State Shintō.[134]

However, the *Tsu City* dissent's argument is problematic because it summarily dismisses the majority's premise that absolute separation is impossible, and it further fails to explain how Japan can realistically achieve absolute separation. Such a hard-line textualist view of Article 20(1)'s prohibition on any state privileges is untenable. To achieve absolute separation, Japan would have to repeal the Religious Juridical Persons Law, because the Law contains numerous privileges conferred by the state on religions.[135] However, such a result would go against the Diet's intent in ratifying Article 20.[136] Although strict separation would require repealing this and other laws, none of the strict separation supporters have gone so far as to advocate repeal. If these critics in practice do not want to adhere to

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[131] *See supra* Part II.

[132] *See, e.g.*, Scott M. Lenhart, *Hammering Down Nails*, 29 GA. J. INT'L & COMP. L. 491 (2001); Eric N. Weeks, *A Widow's Might: Nakaya v. Japan and Japan's Current State of Religious Freedom*, 1995 BYU L. REV. 691 (1995); Chun-Pin Su, *The Constitutional Debates on the Yasukuni Shrine and the Separation of Religion and State in Japan*, 2 NAT'L TAIWAN U. L. REV. 1 (2007); Brent T. White, *Reexamining Separation: The Construction of Separation of Religion and State in Post-War Japan*, 22 UCLA PAC. BASIN L.J. 29 (2004).

[133] *Tsu City*, *supra* note 1.

[134] *Id.* at 483-84.

[135] *See generally* Shukyō hōjinhō [Religious Juridical Persons Law] 1995. This statute allows religions, *inter alia*, to incorporate, receive tax benefits, and own land. *See id.*

[136] *See infra* Part IV.A.3.

strict textualism, then there must be some other reason for criticizing the Court's decisions in this area.

Rather than attacking the Court's failure to require total separation, other critics accept the premise that total separation is impossible, but instead attack the purpose and effects test for not providing enough separation. In the *SDF Enshrinement* case, the dissent wanted the majority to adopt the rest of the *Lemon v. Kurtzman* purpose and effects test from the United States Supreme Court.[137] In *Lemon*, the U.S. Supreme Court analyzed the propriety of state activities that implicate religion by asking 1) whether the activity had a secular purpose, 2) whether its principal or primary effect was one that neither advanced nor inhibited religion, and 3) whether the activity fostered "an excessive government entanglement with religion."[138] This third prong is what the Japanese Supreme Court left out of its adaptation of *Lemon*'s purpose and effects test. Many academics criticize the Japanese test as too lenient because it does not use "excessive entanglement" as an additional factor for scrutinizing government action.[139]

The Court's critics also deride Japan's purpose and effects test as impractical. The concurring Justices in the *Ehime* case would have held the purpose and effects test void for vagueness, and the Justices in *Sunagawa II* agreed through their numerous critiques of the test.[140] These Justices pointed to numerous lower and appellate court cases where courts apply the test, but frequently come to conflicting results in similar cases.[141] These empirical results strongly support these critics' argument that the test is impractical.

One significant reason for this impracticality comes from the Supreme Court's tactic of deferring to the "average Japanese person" when avoiding judicial review of government actions. The Court does this by basing a case's outcome on a determination that "the average Japanese person is not offended by these [religious] practices and that the average Japanese [person] does not view them as religious acts."[142] The Japanese Supreme Court uses this determination as a condition precedent to applying the purpose and effects test by concluding that if the challenged activity does not qualify as religious, then no constitutional violation could have possibly

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[137] *SDF Enshrinement*, *supra* note 38; Lemon v. Kurtzman, 403 U.S. 602 (1971).

[138] *Lemon*, 403 U.S. at 612-13.

[139] *See, e.g.*, Chun-Pin Su, *The Constitutional Debates on the Yasukuni Shrine and the Separation of Religion and State in Japan*, 2 NAT'L TAIWAN U. L. REV. 1, 6 (2007); Shigenori Matsui, *Japan*: *The Supreme Court and the Separation of Church and State*, 2 INT'L J. CONST. L. 534, 542-43 (2004).

[140] *Ehime*, *supra* note 60; *Sunagawa II*, *supra* note 111.

[141] *Ehime*, *supra* note 60; *Sunagawa II*, *supra* note 111.

[142] White, *supra* note 132, at 56.

occurred. This approach is defective because the Court has yet to define what circumstances would fall into the category of religious acts.

While this comment argues that the Supreme Court reached the proper result in these cases, some of the critiques presented by commentators and dissenting Justices are compelling. Avoiding constitutional questions by holding that an apparently religious activity is not religious because it is secular in the eyes of the people can only go so far. At some point, the courts will have to hear a case where the average person finds an act religious and employ a more practical test to determine whether the action violates the Constitution. Currently, after finding an activity is religious, the courts go on to apply the purpose and effects test. However, as discussed above, Japanese courts have not been able to uniformly apply this test. Because this test has been shown to be impracticable, this comment agrees that Japan should abandon the purpose and effects test, but not because the Japanese Constitution requires strictly separating religion from the state.

IV. FASHIONING A NEW INTERPRETATION FOR JAPAN'S CONSTITUTIONAL SEPARATION OF RELIGION AND STATE REQUIRES AN UNDERSTANDING OF JAPANESE METHODS OF CONSTITUTIONAL INTERPRETATION

Having examined Japan's religious history, the current state of the law, and various critiques of the law, this Part turns to Japan's future. Section A reinterprets Articles 20 and 89 in light of their original intent and contemporary public policy considerations. In line with this reinterpretation, Section B proposes a new test for deciding cases of separation of religion and state in Japan.

A. Pragmatism, Purposivism, and Societal Norms Shape Japanese Constitutional Interpretation

Fashioning a new test for questions arising out of Articles 20 and 89 first requires a reinterpretation of these articles. The following sections show that Japan uses many of the same interpretive methods, but often with less of an emphasis on text.

1. Japan's Interpretive Process Foremost Relies on Pragmatism, thus Focusing on a Law's Purpose Over Its Text

Japanese courts rarely rely on text alone to determine the outcome of sensitive cases dealing with rights and constitutional law. In fact, Japanese courts occasionally bend the black letter law because Japan recognizes

custom and natural reason as collateral sources of law.[143] Although the result may violate a statute, judges would rather come to a reasoned outcome that takes societal policies into account than take a rule to its logical and sometimes absurd end.[144] Japanese courts essentially value substance over form.

An everyday example of this occurs in Japanese marriage law. Article 739 of the Civil Code requires couples to register their marriages before they become legally effective.[145] Over the years, Japanese courts have taken the marriage law and interpreted it to extend benefits to de facto marriages, even recognizing de facto divorces.[146] Consequently, the courts have rendered statutory provisions requiring registration of a marriage with the state virtually unnecessary.

An even more striking example of Japan's belief in pragmatic reasoning concerns the constitutional rights of the accused. In *Hashimoto*, the Japanese Supreme Court explicitly contradicted the plain meaning of the law's text to achieve a pragmatic result.[147] In that case, the Supreme Court interpreted Articles 31 and 35 of the Constitution. Article 31 prohibits criminal penalties from being imposed except according to lawful procedures.[148] Article 35 limits what constitutes lawful procedure when seizing evidence.[149] Police arrested Hashimoto; he was convicted of narcotics possession after a body search by police found narcotics.[150] The police violated Hashimoto's right to be free from illegal seizure when they performed the search without his consent or a reasonable apprehension of danger to warrant an involuntary search.[151]

Despite this unlawful seizure, the Japanese Supreme Court unanimously upheld the prosecution's use of the evidence at trial.[152] The Supreme Court began its decision by admitting a constitutional violation had occurred because "the officer . . . seriously violated the privacy of the individual. The officer's action was an unreasonable search under the

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[143] MERYLL DEAN, JAPANESE LEGAL SYSTEM 133-35, 517 (2d ed. 2002).
[144] *Id.*
[145] *Id.* at 142.
[146] *Id.*
[147] *See, e.g.*, Saikō Saibansho [Sup. Ct.] Sept. 7, 1978, Sho 51 (a) no. 865, 32(6) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1672, *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL LAW OF JAPAN 1970 THROUGH 1990, 433 (1996) [hereinafter *Hashimoto*].
[148] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31.
[149] *Id.* art. 35.
[150] *Hashimoto*, *supra* note 147, at 428.
[151] *Id.* at 429.
[152] *Id.* at 434.

circumstances . . . . [Consequently,] the evidence must be said to have been seized unlawfully as part of the arrest."[153]

Nonetheless, the Court went on to base its holding on pragmatic principles:

> [I]n a situation in which the requisites for an official interrogation existed, and the necessity and the urgent conditions for examining the personal effects were recognized, and the defendant did not make a clear response as to whether or not he would comply with the officer's request, *the officer exceeded only a little the limits of the law* . . . . From the beginning, the officer had no intention to neglect any law or regulation connected with principles requiring the warrant, nor was there any evidence of use of physical force by the officer in examining the personal effects. The evidence in this case should be admitted.[154]

In effect, the Court weighed Hashimoto's privacy rights against societal rights and expectations and determined that, in context, the officer's actions did not constitute a glaring offense.[155]

Furthermore, although Hashimoto had only violated narcotics possession laws, the Court identified other important public welfare factors for ensuring his confinement, including his known mafia affiliation.[156] *Hashimoto* stands for the principle that pragmatic reasoning, which looks to the underlying purposes behind statutes, can matter more than the text used to achieve those purposes. In essence, the means specified by the Diet have less importance than the ends that those means serve to achieve.

2. A Purely Textual Interpretation Is Impossible Because the Constitution's Ambiguous Text Does Not Fully Define the Boundaries of Japan's Freedoms

Although the text alone will not determine a case, the cases in this section show that Japanese courts will sometimes use canons of statutory interpretation when interpreting text. As previously discussed in Part II of this comment, the provisions of Article 20 individually and together may

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[153] *Id.* at 432.

[154] *Id.* at 433 (emphasis added).

[155] Weighing against Hashimoto's privacy right were the government's duty to maintain safety and order in society, the public welfare, the nature of the evidence, and Hashimoto's character. *Id*. Although the police had wrongfully seized the evidence, the seizure in no way diminished its reliability and weight to Hashimoto's criminal case. *Id.*

[156] *Id*. at 430.

give readers the sense that religious freedom is absolute.[157] Although this seems a natural reading, the term "absolute" is absent from the Article. Without the presence of a qualifier such as "guaranteed without exception or restraint" or "except as otherwise provided," the degree of constitutionally-guaranteed religious freedom remains ambiguous.

When resolving these sorts of ambiguities, Japanese courts have looked to canons of statutory interpretation. For example, in interpreting a statute that listed *kisha* (steam train) and *densha* (electric train), a court extended the statute to gas-powered trains by using the canon whereby items in a list are considered to imply the inclusion of other items in the same class.[158] In another case, the Supreme Court applied the canon whereby the expression of one thing necessarily excludes all others. The statute in that case prohibited public servants from supporting or opposing a particular candidate, but as interpreted by the Court, did not apply to a person who intended to be a candidate.[159] However, the Court ignored that same canon in another case where it extended the term *mono* (usually understood to pertain to tangible things) to include electricity because humans can capture electricity, making non-tangible electricity tangible enough as far as the criminal statute was concerned.[160] As these cases demonstrate, Japan may use canons of textual interpretation, but the courts do not always rely on these canons consistently.

One interpretive rule that the Supreme Court has applied consistently requires reading articles of the Constitution in context of the whole; this holds especially true when interpreting fundamental rights in Japan. Article 20 appears in Chapter III, titled "Rights and Duties of the People." The reference to duties suggests that Japan views rights more as privileges, or qualified rights.[161] Although constitutions generally give fundamental human rights, such as religious freedom, more deference and fewer restrictions than other rights, the Japanese Constitution, through the context of Article 12, imposes duties that limit these rights:

> The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms

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[157] *See supra* Part II.

[158] *See* THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 107 (Hideo Tanaka ed., 1976) [hereinafter Tanaka].

[159] *See id*. at 104.

[160] *See id*. at 106.

[161] An example of this concept would be driving; people who obtain a driver's license have a right to drive, but also have a duty to exercise that right in accordance with the rules of the road.

> and rights and *shall always be responsible for utilizing them for the public welfare*.[162]

That final clause concerning the public welfare has been read to limit the manner in which the Japanese people can exercise all other constitutionally protected rights. Japan scholars widely know this rights-versus-duties relationship as the public welfare doctrine.

The Supreme Court most famously discussed the public welfare doctrine in the *Lady Chatterley's Lover* case.[163] In that case, the Supreme Court affirmed the criminal convictions on obscenity charges of a prominent novelist and a reputable publisher. The charges stemmed from these individuals' roles in the distribution and sale of a widely popular translation of D.H. Lawrence's sexually-charged novel, *Lady Chatterley's Lover*.[164] The Court recognized the artistic value of the novel, as protected by Article 21's guaranteed freedom of expression, but also recognized that the presence of artistic value does not mutually exclude obscenity.[165] In extending public welfare as a justification for criminalizing obscenity and using it as a limitation on Article 21, the Court cited eight previous cases where it had read constitutionally-protected rights in context with Articles 12 and 13.[166] It is therefore appropriate, if not necessary, to read Article 20's guaranteed freedom of religion in context with the public welfare limits outlined in Article 12.

3. The Government's Original Understanding of Articles 20 and 89 Calls for a Loose Interpretation, Allowing for Broad Interaction Between the State and Religions

Although Article 20 contains a textual ambiguity by failing to define the extent of Japan's religious freedom, the rest of the Constitution provides context for setting the limits on this freedom. This context comes from Article 12, which defines Article 20 according to the public welfare. However, because the Constitution does not define public welfare, Article 20

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[162] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 12 (emphasis added).

[163] Saikō Saibansho [Sup. Ct.] Mar. 13, 1952, 11(3) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997, *translated in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS 1948–60, at 3 [hereinafter *The Lady Chatterley's Lover Decision*].

[164] *Id.*

[165] *Id.*

[166] *Id.* Article 13 further extends the public welfare doctrine: The "right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13.

cannot be fully understood without first looking outside the Constitution to define Article 12's public welfare and the limits it places on rights.

Courts may define the proper bounds of rights through legislative intent, which is usually contained in legislative debates or in commentary written by the drafters. Typically, Japanese courts do not cite to legislative history, but the courts do periodically use this history to informally guide their decisions.[167]

In examining the current Japanese Constitution, readers should keep in mind that the Supreme Commander of the Allied Powers ("SCAP")[168] drafted these provisions. Article 89, as well as Article 20's separation clause, did not appear in the drafting process until the United States submitted its February 1946 draft.[169] According to Kenzō Takayanagi,[170] the Diet adopted these provisions under a feeling of duress:

> In 1946, when I participated in the making of the present Constitution, I believed that it was "imposed" upon Japan . . . . There is no doubt that such acceptance was gained by the superior military force of the Allied Powers, and that such policy [of democratization] was "forced" upon the Japanese government . . . . I was not then aware of the Moscow Agreement[171] . . . [and] thought SCAP was entitled to impose any constitutional text upon Japan . . . . I imagined also that the acceptance by Japan of this "imposed" Constitution might be one of the terms of the future peace treaty . . . . No legislation was enacted by the "free will of the Japanese" in the sense that enactment was accomplished "without any outside interference."[172]

Because the Constitution is not wholly a Japanese Constitution, textual interpretation should not provide the only lens for analyzing its provisions. Instead, scholars can best understand the constitution's text not only through

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[167] Tanaka, *supra* note 158, at 97.

[168] Although "SCAP" was General Douglas MacArthur's official title, the acronym has become synonymous with the entirety of Allied occupation forces in Japan.

[169] KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 126, 129, 136 (1991).

[170] Kenzō Takayanagi was a Japanese lawyer, member of the House of Peers during the Occupation, and Chairman of the Commission on the Constitution from 1957 to 1964.

[171] The Moscow Agreement was a joint declaration between Allied and Soviet diplomats that, *inter alia*, called for the joint oversight of Japan through the Far Eastern Commission and gave guidance and limits on SCAP's power to democratize Japan.

[172] Kenzō Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, *in* THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947–1967, at 76-77 (Dan F. Henderson ed., 1968).

examining SCAP's intent where it added certain provisions, but also through the ratifying Diet's interpretation of those provisions to fit Japan's needs.

When SCAP drafted Articles 20 and 89, it intended to "purge" Shintō from the state, regardless of the results of such policy.[173] As one SCAP draftsman stated: "We simply wanted to separate religion from the state. That was all there was to it. We were not concerned about any theories regarding church-state relations."[174] In other words, SCAP inserted Articles 20 and 89 solely to eliminate Shintō as a source of ultra-nationalism that could hinder pacification; SCAP had no concern in drafting those provisions, whatsoever, for the ideals of religious freedom. Because SCAP failed to consider public policy, strict reliance on the text of the separation articles is ill-advised without first considering what public policies will be advanced or hindered by separation.

Although SCAP did not stop to consider Japan's best interests, the Diet was not so short-sighted. Looking to the policies embodied by the text of these articles, members in both the House of Representatives and House of Peers raised concerns whether Article 20(1) was an absolute freedom.[175] In addressing these concerns, Japan's executive branch assured the Diet that Article 12 (public welfare) worked in conjunction with Article 20 to limit freedom for the public welfare.[176] The government also assured the Diet that provisions limiting government interference with religion were not self-executing, but would be enacted by statute and protected in the courts by due process.[177] This original interpretation from the Japanese government supports the holding in the *SDF Enshrinement* case that the separation clauses provide an institutional guarantee and not an individually enforceable right.[178]

Japan's history of nationalism and religious persecution may provide a dual framework for interpreting Article 20. During the constitutional debates, Matsudaira Narimitsu of the House of Peers, in line with SCAP's intent, understood every sentence after Article 20(1) as merely a mechanism "to prevent the government's imposition of a particular religion that emphasizes ultra-nationalistic ideology."[179] However, Mr. Kanamori of the Japanese government understood these additional provisions as keeping the

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[173] WILLIAM WOODWARD, THE ALLIED OCCUPATION OF JAPAN 1945–1952 AND JAPANESE RELIGIONS 78 (1972) (citing Letter from Frank Rizzo, General Section drafter (Aug. 28, 1967)).
[174] *Id.* at 79 (quoting Letter from Frank Rizzo).
[175] INOUE, *supra* note 169, at 132-33.
[176] *Id.*
[177] *Id.* at 133-35.
[178] *See SDF Enshrinement*, *supra* note 38.
[179] INOUE, *supra* note 169, at 137.

state from actively or passively influencing any religion.[180] Mr. Kanamori likely had in mind the Meiji government's forced revision of religious doctrines, as happened to the religion Tenrikyō, and the baseless harassment of religious groups, as happened to the religions Ōmoto and Hito no Michi.[181] Under the government's interpretation, Article 20 served two purposes: 1) to prevent the government from reestablishing a state religion, and 2) to prevent the government from harassing religions. To those ends, Japan should limit Article 20 to provide the most flexibility for the Diet and the courts to consider the public welfare in addressing inevitable contacts between religion and government.

Although SCAP's purpose behind Articles 20 and 89 did not focus on religions, the text is impliedly for the benefit of religions. Because these provisions directly impact religions, scholars should also consider what sort of freedom and separation Japanese religions' adherents desired. Religious leaders and Diet members alike expressed deep concern over the practical implications of these articles, especially Article 89.[182] When the Diet ratified the Constitution, the Religions League of Japan (Nihon Shūkyō Remmei), representing Shintō, Buddhist, and Christian leaders, expressed dissatisfaction with Articles 20 and 89.[183] Religious leaders feared that these articles would end all special privileges for religions, including tax exemptions and rent-free use of lands.[184]

Addressing these concerns, the Japanese government assured the Diet and religious leaders that Article 89 would not take away the prior privileges open to all religions.[185] Regarding Article 20, the government further clarified that the provision requires the government to respect all religions equally, without emphasizing one religion to the exclusion of others.[186] Therefore, while the text can be read to require strict separation, the Diet and religious groups only intended to ensure that all religions have equal opportunity to enjoy government privileges.

Diet members also raised concerns regarding the Article 20(3) prohibition against the government directly engaging in religious activity. Responding to those worries, the Japanese government informed the Diet that "it was perfectly acceptable for public schools to offer religious

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[180] *Id.* at 139.

[181] Kiyomi Morioka, *Attacks on the New Religions: Risshō Kōseikai and the "Yomiuri Affair"* (1989), *translated in* 21 JAPANESE J. OF RELIGIOUS STUD. 21/2-3 at 281, 309 (1994); SHIGEYOSHI MURAKAMI, JAPANESE RELIGION IN THE MODERN CENTURY 96-101 (1980).

[182] INOUE, *supra* note 169, at 144.

[183] WOODWARD, *supra* note 173, at 79; INOUE, *supra* note 169, at 145.

[184] WOODWARD, *supra* note 173, at 79.

[185] INOUE, *supra* note 169, at 145-46.

[186] *Id.* at 150.

programs as extracurricular activities, as long as the school did not restrict itself to one religion."[187] The government further explained that the Ministry of Education would "encourage activities such as alumni groups inviting various religious authorities for lectures, and that [the government] saw no problem with the principal of the public school initiating or actively participating in such activities."[188] Given the Japanese government's original understanding of these provisions as narrow limitations, the Supreme Court's decisions in *Tsu City*, *Minō*, and other religious activity cases do not appear out of line with the constitutional interpretation that government actors may support religion, as long as they do not deny other religions an opportunity to work with the state as well.

4. Japan Should Define the Constitutionally-Required Degree of Religious Separation by Current Societal Standards Because Japanese Courts Recognize a "Living Constitution"

Although narrowly tailoring Article 20's restrictions on government interaction with religion comports with the Article's legislative history, scholars should remember that Japan's form of constitutionalism tempers any such interpretation. Japan's Constitution is a living Constitution;[189] this means that what may have been constitutional at the time of drafting will not necessarily remain constitutional as the years pass.

The *Chatterley* decision provides an excellent example of Japan's belief in a living Constitution. In the *Chatterley* case, the Court announced that the test for whether something constitutes obscenity, and thus violates the public welfare, is determined by "the good sense operating generally through the society, that is, the prevailing ideas of society."[190] However, one must keep in mind that what constitutes "prevailing ideas of society" is a judgment of law—not fact.[191]

Just because judicial discretion defines the shifts in public welfare does not mean that Japan's societal standards go unchanged. In *Repeta v.*

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[187] *Id.* at 151.

[188] *Id.*

[189] Kenzō Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, *in* THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 163, 191-93 (Hideo Tanaka ed., 1976).

[190] *The Lady Chatterley's Lover Decision*, *supra* note 163, at 9.

[191] *See* Saikō Saibansho [Sup. Ct.] Oct. 15, 1969, Sho 39 (a) no. 305, 23(10) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1239, *translated in* HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70, at 188 (1978) ("[J]udges are charged with determining whether or not a work is possessed of obscenity by judging the work itself according to prevailing social ideas; and this determination is a judgment of law.").

Japan, the Japanese Supreme Court reversed a trial judge's ruling on the grounds that the public welfare interests had diminished.[192]

The case started when a trial judge prevented Lawrence Repeta, a prominent American legal scholar, from taking research notes while observing the judge's trial.[193] Repeta challenged the order as an unconstitutional restraint on freedom of expression and as inequitable as applied because the court allowed the press corps to take notes during the trial.[194]

Addressing Repeta's challenge, the Supreme Court began its opinion by affirming the standard that "rational restriction" (*gōriteki seigen*) can limit any freedom.[195] In determining whether the restriction had a rational basis, the Supreme Court reversed, finding the trial judge's rationale obsolete because present day circumstances had diminished the need for such public welfare restrictions:

> [T]he instant measure should be said to be an exercise of the courtroom policing power lacking a rational basis. [Although there may have been a rational basis for restricting note-taking in the past, when courtroom disruption was an everyday occurrence,] at present we have reached the point where consideration for the taking of notes by spectators is lacking, and hereafter must recognize that concern for the taking of notes by spectators is demanded.[196]

The Supreme Court's opinion in *Repeta* provides a clear indication that Japan's constitutional provisions evolve as Japanese society changes. Although Article 20's legislative history indicates an intent that the courts loosely construe its provisions, Japan's constitutionalism requires that they also take into account the country's current situation; this constitutionalism should hold special importance for Japan in light of the fact that SCAP drafted the constitution's text.[197] Thus, in terms of Article 20 and other constitutional rights, the *Repeta* case indicates that the boundaries of Japan's rights, as defined by Article 12's public welfare provisions, will change over

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[192] *See generally* Saikō Saibansho [Sup. Ct.] Mar. 8, 1989, Sho 63 (o) no. 436, 43(2) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 89, *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL LAW OF JAPAN 1970 THROUGH 1990 (1996) [hereinafter *Repeta*].

[193] *Id.* at 628.

[194] *Id.*

[195] *Id.* at 629.

[196] *Id.* at 632.

[197] *See supra* Part IV.A.3.

time as Japan's people and the circumstances in which they live also change.[198]

5. Taking Public Policy into Account, a Narrow Interpretation of the Prohibitions in Articles 20 and 89 Best Serves Japan's Public Welfare

To determine whether Japan's current societal situation calls for stricter or looser interpretation of Articles 20 and 89 requires examining public policy considerations. Where, as here, different constitutional provisions compete (that is, Articles 20 and 89 compete against Article 12), the Japanese Supreme Court has held that weighing public policy becomes all the more important.[199]

Tanaka v. Nishiwaki provides a good example of this principle in action.[200] In limiting the inviolable right to own or to hold property, embodied in the letter and purpose of Article 29 of the Constitution, the Supreme Court found that changed circumstances had made it more important to require land-owners to show justifiable cause before removing renters who have greater need for the land.[201] In the spirit of *Tanaka*, the Court should place greater emphasis on examining changed circumstances and determining which policies would benefit from a narrow interpretation of the prohibitions in Articles 20 and 89.

When SCAP drafted these articles, it feared Japanese re-militarization. As part of its strategy to prevent that from happening, SCAP inserted Articles 20 and 89.[202] In the decades since the close of World War II, the Japanese people and their religions no longer face the threat of State Shintō, or of the state otherwise co-opting religion.

Instead, the Japanese people and their state have been threatened by religiously-motivated violence and religions used for fraud. On March 20, 1995, the religion Aum Shinrikyō staged a coordinated attack on the Tokyo subway system; in that attack, the group released the nerve gas Sarin, killing thirteen people and injuring nearly a thousand more.[203] Along with religious

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[198] *Repeta*, *supra* note 192, at 627.

[199] HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70, at 149 (1978) (discussing Saikō Saibansho [Sup. Ct.] Nov. 21, 1967, Sho 42 (a) no.1464, 21(9) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1245 (*Taniguchi v. Japan*)).

[200] Saikō Saibansho [Sup. Ct.] June 6, 1962, Sho 34 (o) no. 502, 16(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1265, *translated in* THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 82-86 (1976).

[201] *Id.*

[202] *See supra* Part IV.A.2.

[203] For background on Aum Shinrikyō, its path to violent extremism, the 1995 gas attack, and subsequent government crackdown, see generally Thomas Leo Madden, Note, *The Dissolution of Aum Shinri Kyou as a Religious Corporation*, 6 PAC. RIM L. & POL'Y J. 327 (1997); IAN READER, A POISONOUS

extremism, Japan has also had to deal with allegations of religions defrauding its members.[204]

In both situations, the government dealt with these threats judiciously. Although the government ultimately disbanded Aum Shinrikyō, "[t]he sect's crimes include[d] not only a large-scale indiscriminate terrorist attack, but also kidnapping, drugging, homicide, the production of weapons of mass murder, and conspiracy to commit armed insurrection."[205] Considering these crimes, and the lives lost and negatively impacted because of Aum, disbandment and criminal prosecution were necessary to protect the public welfare. Without a lenient interpretation of Article 20, the government could not have adequately dealt with the threat Aum presented.

The public also vehemently called for disbanding the religion Risshō Koseikai after a series of scathing articles by the Yomiuri newspaper in the 1950s.[206] Although the Diet launched an investigation in response to the newspaper attacks, which ultimately criticized the religion, the executive branch, through the Ministry of Education, kept the Diet in check and worked with Koseikai to resolve the incident.[207] In the end, Koseikai came out stronger than before,[208] whereas in the Meiji Era, Koseikai would have seen its leaders arrested for *lèse-majesté* and been either disbanded or forced by the government to alter its doctrines.[209]

Based on the government's demonstrated ability to even-handedly balance religious freedom with the public welfare and the lack of any real threat of re-establishing State Shintō, there is no readily apparent policy justification for rigidly applying Articles 20 and 89—their original purpose is safely being served.

Japan's policy favoring broad judicial discretion also benefits from narrowly interpreting the prohibitions in Articles 20 and 89. This policy objective explains why Japan's Constitution contains so many vague provisions such as the "public welfare" provisions. Kenzō Takayanagi[210] explained the purpose behind the current constitution's vagueness this way:

COCKTAIL?: AUM SHINRIKYO'S PATH TO VIOLENCE (1996); IAN READER, RELIGIOUS VIOLENCE IN CONTEMPORARY JAPAN: THE CASE OF AUM SHINRIKYO (2000).

[204] *See generally* Morioka, *supra* note 181; *see also* HELEN HARDACRE, AFTER AUM: RELIGION AND CIVIL SOCIETY IN JAPAN, THE STATE OF CIVIL SOCIETY IN JAPAN 150-52 (2003).

[205] SUSUMU SHIMAZONO, AUM SHINRIKYŌ NO KISEKI (1995), *condensed and translated in* Robert Kisala, *In the Wake of Aum: The Formation and Transformation of a Universe of Belief*, 22 JAPANESE J. OF RELIGIOUS STUD. 381, 381-82 (1995).

[206] *See generally* Morioka, *supra* note 181.

[207] *Id*. at 298-300.

[208] *Id*. at 308-10.

[209] *See supra* note 181 and accompanying text.

[210] Kenzō Takayanagi was a Japanese lawyer, member of the House of Peers when the Constitution was ratified; he was in charge of revising Japan's constitution during the 1950s and 1960s.

> To establish detailed restrictive provisions in the Constitution itself might result, on the one hand, in narrowing the area of independent discretion as expressed by the exercise of the high intelligence of the Supreme Court and, on the other, in imposing contemporary views on later generations by means of the Constitution itself. It is the intent of the Constitution of Japan to provide elasticity, not by resorting to frequent constitutional revision, but by determining through the exercise of good sense of the Supreme Court the limitations on fundamental human rights in accordance with changes from period to period.[211]

Under this framework, it makes sense that as the threat of State Shintō decreases over time, Articles 20 and 89 need not remain the robust prohibitions that their text originally embodied. With SCAP's original purpose served, these provisions now serve only to ensure that people remain free to exercise their religious beliefs and religious conscience. Strict separation no longer makes sense because, as demonstrated here, a government-funded ceremony or stipend does not generally prevent people from being able to attend worship services or otherwise exercise their personal beliefs.

Without the threat of revived State Shintō, Article 20 only serves to protect free conscience in two very distinct forms. One form serves to shield the people from legislation that would impose religious laws, such as Canon Law[212] or Shariʿa Law,[213] which is in no way a current threat. More pressing, Article 20 serves to protect religions from the people. Popular opinion in Japan distrusts religions and believes they should no longer enjoy tax privileges.[214] In such a political climate, there simply exists no compelling reason to keep the government from engaging with religious groups to ensure their continued freedom.

A lack of strong policies justifying strict separation, however, does not necessarily mean that Japanese courts should narrowly construe the prohibitions in Articles 20 and 89. There must be a legitimate public policy objective served by interactions between the state and religion. As the Aum incident indicates, one such policy is that the government must have freedom to regulate religions where public safety is at stake. Another policy

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[211] Takayanagi, *supra* note 172, at 93.

[212] Canon Law is the set of laws that govern the Roman Catholic Church and its members.

[213] Shariʿa Law is the set of laws that govern Islam and its members.

[214] HARDACRE, *supra* note 204, at 135 (citing Ishii Kenji, *Nihonjin no 'shūkyō dantai' ni tai suru ishiki to jittai ni tsuite*, 510 CHŪŌ CHŌSAHŌ 1 (2000)).

is to protect religion's very existence. To do so, the government must also have the freedom to afford those groups various privileges such as tax exemptions and the right to acquire property in the organization's name.

The goal of fostering civil society provides another public policy not yet examined, which may also serve to restore public trust in religion.[215] Japan's religious civil society organizations provide public benefits in many ways, including fighting poverty, crime, and drug addiction; operating schools, museums, parks, and hospitals; operating homes for orphans, the elderly, and the handicapped; organizing efforts for community self-improvement; and advocating social policies in legislatures and in courts.[216] Governments can, when it is done properly, directly achieve the goal of improving civil society by providing public funds and other financial benefits to civil society groups for services rendered, or through subsidies to provide these services to others.[217] In both the United States and Japan, the state contributes more capital to civil society organizations than any other of these groups' funding sources.[218] Without government support, it is safe to say that many civil society organizations would no longer have the means necessary to operate. So long as public funds do not come with excessive strings or other circumstances that hinder these organizations' independence, civil society will be improved.[219]

Japan, by permitting the state and religions to liberally interact, will become safer, will give its religions a better chance of survival, and will improve its society as a whole through the increase in social capital.[220] Although many benefits come from increasing religious interaction, Japan must still guard to prevent government discrimination against religions. To address this concern, the Japanese Supreme Court should adopt a new test for balancing the freedom of religion with the public welfare.

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[215] This comment uses Robert Pekkanen's definition of civil society: the "organized, nonstate, nonmarket sector." ROBERT PEKKANEN, JAPAN'S DUAL CIVIL SOCIETY: MEMBERS WITHOUT ADVOCATES 3 (2006).

[216] Helen Hardacre, *Religion and Civil Society in Japan*, 31 JAPANESE J. OF RELIGIOUS STUD. 389, 393 (2004); HARDACRE, *supra* note 204, at 135.

[217] Robert Pekkanen, *Molding Japanese Civil Society: State-Structured Incentives and the Patterning of Civil Society*, *in* THE STATE OF CIVIL SOCIETY IN JAPAN 116, 116-18 (2003).

[218] PEKKANEN, *supra* note 215, at 71.

[219] Pekkanen, *supra* note 217.

[220] For an introduction to the concepts of civil society and the benefits of social capital, see ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

B. A New Test: Balancing Religious Freedom with the Public Welfare

Japanese courts, influenced by U.S. jurisprudence, frequently apply balancing tests to decide legal questions.[221] The purpose and effects test discussed in this comment provides one such example. Although this comment proposes abandoning that test, the Court should replace it with another balancing test. Balancing is critical because every case that invokes Article 20 will always implicate Article 12's public welfare doctrine. The courts cannot simply leave such conflicting constitutional provisions of equal legal importance in conflict, but must reconcile the provisions by weighing the interests surrounding each article.

As a part of this new balancing test, Japanese courts should review allegations of state misconduct under a rebuttable presumption of constitutionality. As in any lawsuit, the plaintiffs carry the initial burden of proof. As a practical matter when reviewing government action, Japanese courts will, and already do, impose a heightened burden to rebut Japan's long-standing presumption favoring the government. It has been argued that Japan's courts do this as a matter of institutional self-preservation as a co-equal branch of government. In the past, the Diet has taken years to respond to Supreme Court decisions holding laws unconstitutional.[222] Because the Japanese courts to date have not been fully treated as a coequal branch of government, a heightened burden must be met before a constitutional violation will be found. By requiring a higher standard, the judicial system assures itself that any case of misconduct that meets that standard will likely get the attention of the other branches of Japanese government.[223]

Under this standard for judicial review, the courts should weigh the public welfare against the principles of freedom and separation of religion, as the courts do in every case implicating constitutional rights. Based on the preceding sections, proper considerations for the public welfare include 1) public safety, and 2) the improvement of civil society. Freedom of religion and the separation of religion from the state are guided by 1) the threat of reestablishing a state religion, 2) whether the religious activity engaged in by the state works to the detriment of other religions, and 3) whether the government actor has denied other religions the opportunity to receive similar public benefits or recognition.

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[221] Hidenori Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY, 251, 266-67 (Yoichi Higuchi ed., 2001).

[222] *Id*. at 270-71.

[223] JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW 181-82 (1998) (arguing the Japanese Supreme Court's inability or reluctance to decide against the government has helped to bolster its power to effectuate change in the few cases where the Court has found constitutional violations).

Weighing these factors, the courts should ask whether the plaintiffs have shown a probable threat to religious freedom by the state. In answering these allegations, the state can defend by showing weaknesses in the plaintiffs' arguments or by demonstrating that the public welfare outweighs any concerns raised by the plaintiffs. In cases such as the *Aum Shinrikyō Dissolution* case, where the government totally disbands a religion, the plaintiffs will easily meet their burden and the government will necessarily have to demonstrate a strong countervailing threat to public safety. But in other cases like *Tsu City* or *SDF Enshrinement*, where no religion has been denied a public benefit and no person has been prevented from exercising their faith, the government can argue that the plaintiffs failed to meet their burden, or easily defend by pointing to the public benefit supplied by such activities.

V. CONCLUSION

The era of government intolerance of religion in Japan is over. State Shintō is dead and religions no longer fear arbitrary dissolution or doctrinal revision by the hands of the state. To cement these gains, the Japanese Constitution separates religion and state within the context of public welfare. However, the Constitution does not define the extent of this separation for the public welfare. To resolve this ambiguity, many scholars have called for interpreting the Constitution to require strict separation. But the Japanese Supreme Court has consistently held otherwise without providing any consistent indication as to the proper limits on separation.

To resolve this issue, this comment has analyzed Articles 20 and 89 of Japan's Constitution, and interpreted those articles in light of the intent behind their ratification and current public policy. The result is an interpretation that narrowly construes the prohibitions of Articles 20 and 89 so as to permit a broad degree of interaction between religion and the state for the continued benefit of Japan, while maintaining a vigilant watch for renewed disparate treatment of religions.