

SECULARISM AND LIBERAL CONSTITUTIONALISM: LESSONS FROM JAPAN

*Frank S. Ravitch**

2017 MICH. ST. L. REV. 149

TABLE OF CONTENTS

INTRODUCTION.....	149
I. THE MEIJI CONSTITUTION, STATE SHINTO, AND THE ILLUSION OF RELIGIOUS FREEDOM	150
II. THE MODERN JAPANESE CONSTITUTION, SECULARISM, AND LIBERAL DEMOCRACY	154
III. SECULARISM AND LIBERAL CONSTITUTIONALISM WRIT LARGE.....	159
CONCLUSION.....	161

INTRODUCTION

This symposium asks an important question. Is secularism a non-negotiable aspect of liberal constitutionalism? The likelihood is that secularism is a nearly insurmountable requirement of liberal constitutionalism, but it is at least theoretically possible to have a system that promotes both liberal constitutionalism and religion. There are, however, some strong lessons from history that demonstrate that more often than not, secular constitutions are the best route to protect individual autonomy as well as religion. This Article will focus on the important lessons we can learn about this issue from Japan and Japanese history.

Japan's first experiment with modern constitutionalism was the Meiji Constitution, which led to the primacy of State Shinto, while including provisions that appeared, on their face, to protect personal and religious freedom.¹ As will be seen, it was an abject failure in the

* Professor of Law and Walter H. Stowers Chair of Law and Religion; Director, Kyoto Japan Program, Michigan State University College of Law. The Author thanks Richard Albert, Alan Brownstein, Tarun Khaitan, Jaelyn Neo, Yaniv Roznai, Seval Yildirim, Bruce Ledewitz, Gábor Halmai, and all those who attended the AALS Section on Law and Religion panel at the 2017 Annual Meeting.

1. DAI NIHON TEIKOKU KENPŌ [MEIJI CONSTITUTION] (Japan). An English translation is available at <http://www.ndl.go.jp/constitution/e/etc/c02.html>. *See also* Kiyomi Morioka, *The Evolution of State Shintō*, in A HISTORY OF JAPANESE

latter realm.² In contrast, the modern Japanese constitution, which is grounded in a secular approach, has been far more successful than the Meiji Constitution in protecting personal autonomy and religious freedom.³ The Japanese example, at least, supports the argument that in most contexts secularism is helpful in promoting liberal constitutionalism even if it is not an insurmountable predicate. Moreover, the Japanese example teaches us that secular constitutionalism may also be a better means to protect broad religious freedom than non-secular approaches, at least for those who are not part of the dominant majority religion in a given system.

I. THE MEIJI CONSTITUTION, STATE SHINTO, AND THE ILLUSION OF RELIGIOUS FREEDOM

The Meiji Constitution was promulgated on February 11, 1889.⁴ It borrowed heavily from European constitutions of the era and, on its face, reflected some of the ideals of liberal constitutionalism.⁵ It created a set of rights for citizens that were, in theory, progressive for that era.⁶ These included bestowing the right to elect members of the lower house in the Japanese Parliament (the Diet) to some citizens,⁷ the right to own property,⁸ the right to change residence freely,⁹ the right to be free from government entrance or search of one's home,¹⁰ the right to trial in criminal

RELIGION 525, 528 (Kazuo Kasahara ed., Paul McCarthy & Gaynor Sekimori trans., 2001) (discussing the primacy of State Shintō during the Meiji Era); NOBUSHIGE HOZUMI, ANCESTOR-WORSHIP AND JAPANESE LAW 47 (2d & rev. ed. 1912) (same).

2. See *infra* Parts I and III.

3. See *infra* Part II.

4. DAI NIHON TEIKOKU KENPŌ [MEIJI CONSTITUTION] (Japan) (the reference to “[t]he 11th day of the 2nd month of the 22nd year of Meiji” correlates to February 11, 1889, on the Roman Calendar).

5. *Id.* arts. 22-30.

6. *Id.* arts. 25-30.

7. *Id.* art. 35. Article 35 made this right dependent on the election law, which limited who could vote to the wealthiest men until 1925 when the election laws were amended to allow all men to vote. Women's suffrage did not occur until 1945. See Aaron William Moore, *Childhood, Education and Youth in Imperial Japan, 1925-1945: The Historical Setting*, CHILDHOOD, EDUCATION AND YOUTH IN MODERN JAPAN, <http://www.japanese-childhood.manchester.ac.uk/en/topics/history-of-japan-1889-1845/> [<https://perma.cc/L3CQ-W445>] (last visited Mar. 18, 2017).

8. DAI NIHON TEIKOKU KENPŌ [MEIJI CONSTITUTION], art. 27 (Japan).

9. *Id.* art. 22.

10. *Id.* art. 25.

matters,¹¹ and the right to freedom of speech.¹² In reality, however, these rights were quite limited.¹³

Some have touted the fact that the Meiji Constitution contained a religious freedom clause as evidence that it protected religious freedom. This idea, however, is contradicted by a great deal of history, which demonstrates that non-conforming religious groups were persecuted.¹⁴ Even traditional local Shinto groups were impacted by the government's establishment of State Shinto and laws that did not recognize local shrines and, in some cases, required shrines to merge or close.¹⁵

The religious freedom provision of the Meiji Constitution read:

Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.¹⁶

Over time, the second and third clauses severely limited the fourth clause, which set forth the right to religious freedom and supported persecution of religions and religious leaders who did not show proper fealty to the Emperor.¹⁷ The root of this persecution arose from the advent and rise of State Shinto and absolute fealty to the Emperor.¹⁸

The Meiji Constitution had another clause relating to religion: "The Emperor is sacred and inviolable."¹⁹ Thus, as a practical matter, the predicate language to the right to religious freedom, "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects,"²⁰ included duties to the

11. *Id.* art. 24.

12. *Id.* art. 29.

13. See Norikazu Kawagishi, *The Birth of Judicial Review in Japan*, 5 INT'L J. CONST. L. 308, 311, 321 (2007) (explaining that the Meiji Constitution never lived up to its potential of fostering liberal constitutionalism).

14. See JOSEPH M. KITAGAWA, RELIGION IN JAPANESE HISTORY 202-45 (1990); see generally Tanaka Jiro, *Religion and the State under the Meiji and the Present Constitutions*, in RELIGION AND STATE IN JAPAN (Int'l Inst. for the Study of Religions ed., 1959).

15. See Morioka, *supra* note 1, at 535-37. People often quietly continued the local practices secretly. *Id.* at 537.

16. DAI NIHON TEIKOKU KENPŌ [MEIJI CONSTITUTION], art. 28 (Japan).

17. See notes 13-15 and accompanying text.

18. See Kawagishi, *supra* note 13, at 311, 321; Morioka, *supra* note 1, at 535-37.

19. DAI NIHON TEIKOKU KENPŌ [MEIJI CONSTITUTION], art. 3 (Japan).

20. *Id.* art. 28.

“sacred and inviolable” Emperor.²¹ This was true of other rights as well.²²

The Meiji Constitution, while including some secular values, was not in any true sense a secular constitution.²³ Article 3 of the Meiji Constitution, and many of the practices condoned under it, provide adequate evidence of this conclusion. In fact, what has become known as State Shinto was born under the Meiji Restoration and supported by the Meiji Constitution.²⁴ It was established as the state religion;²⁵ although the government consistently tried to cast it as a form of political and ethical system rather than religion.²⁶ At its height, State Shinto was used and manipulated by the military and the government to support war and persecution.²⁷ It was also closely tied to the duties of Japanese citizens.²⁸ The Home Ministry—through a shifting set of bureaus and agencies—was responsible for promoting elements of State Shinto among the populace,²⁹ and the military was later able to utilize this as a tool.³⁰

State Shinto centered on the worship of, and public recognition of and fealty to, the Emperor and the imperial ancestors, who were said to have come from an unbroken line descended from the Goddess Amaterasu, the Goddess of the sun and universe in Shintoism.³¹ It is important not to confuse State Shinto with the longstanding tradition of Shintoism in Japan. While State Shinto had

21. *Id.* art. 3.

22. *See, e.g., id.* art. 31 (freedom of speech); *id.* (“The provisions contained in the present Chapter [Chapter II: Rights and Duties of Subjects] shall not affect the exercise of the powers appertaining to the Emperor, in times of war or in cases of a national emergency.”)

23. *See* Morioka, *supra* note 1, at 535; Frank S. Ravitch, *The Shinto Cases: Religion, Culture, or Both—The Japanese Supreme Court and Establishment of Religion Jurisprudence*, 2013 BYU L. REV. 505, 506-07 (2013).

24. *See* Keiko Yamagishi, *Freedom of Religion, Religious Political Participation, and Separation of Religion and State: Legal Considerations from Japan*, 2008 BYU L. REV. 919, 928 (2008).

25. *See id.* at 925-28. *Cf.* Morioka, *supra* note 1, at 535-37 (noting that the Meiji era, government attempted to obfuscate the religious nature of State Shinto by casting it as an ethical and nationalist system).

26. *See* Morioka, *supra* note 1, at 535-37.

27. *See* Kawagishi, *supra* note 13, at 315-16, 321-22; Ravitch, *supra* note 23, at 507-08; Frank S. Ravitch, *The Japanese Prime Minister's Visits to the Yasukuni Shrine Analyzed Under Articles 20 and 89 of the Japanese Constitution*, 22 MICH. ST. INT'L L. REV. 713, 716-18 (2014).

28. *See* HOZUMI, *supra* note 1, at 57-59; Morioka, *supra* note 1, at 534-38.

29. *See* Morioka, *supra* note 1, at 525-36.

30. *See* C. SCOTT LITTLETON, UNDERSTANDING SHINTO 8-9 (2002).

31. *See* HOZUMI, *supra* note 1, at 15.

a central focus on the Emperor and his ancestors, traditional Shinto is heavily focused on household and local ancestors, and to some extent, broader spirits and animism.³² This does not mean that traditional Shintoism has no focus on national or imperial ancestors, but rather that imperial ancestors and nationalism are not central to most Shinto traditions.³³ In fact, the non-recognition and pressure placed on many local shrines under the State Shinto system was an important problem for religious freedom.³⁴ Moreover, as Shinto scholars have noted, State Shinto—and the government's promotion of it as an ethical and nationalist institution—placed significant pressure on the traditional view of ancestor Kami and local Kami (spirits) and ultimately led to a significant decrease in the following of traditional Shinto.³⁵

In State Shinto, the Emperor and nationalism were the core of everything.³⁶ State Shinto included public rituals at the Imperial House and required shrines to the Emperor's ancestors in every home.³⁷ The Imperial Household gave items to every household in Japan every year from the Imperial Shrine at Ise.³⁸ It was considered to be the duty of every loyal Japanese subject, often including mandatory attendance by schoolchildren, to attend the public rituals held in their areas.³⁹ This is hardly an environment in which free exercise of religion was easily maintained. Buddhism, which had in earlier periods of Japanese history sometimes been favored by the state, became somewhat disfavored as State Shinto gained ascendancy.⁴⁰

Ultimately, State Shinto facilitated a nationalist frenzy accompanied by what has sometimes been called a national cult of Emperor worship.⁴¹ This helped foster a militant mentality and a greater sense of Japanese superiority,⁴² which in turn led to

32. See LITTLETON, *supra* note 30, at 23.

33. See *id.* at 23, 47.

34. See Morioka, *supra* note 1, at 535-37.

35. *Id.* at 536.

36. See *id.* at 535-37; Ravitch, *supra* note 23, at 506-07; LITTLETON, *supra* note 32, at 8-9.

37. HOZUMI, *supra* note 1, at 30, 37-39, 84-85, 95-105.

38. *Id.* at 30. The Ise Shrine is the most important shrine involving the Imperial Family in the Shinto Tradition.

39. *Id.* at 108, 112-13.

40. *Id.* at 91.

41. Helen Hardacre, *Shintō and the State, 1868-1988*, in *STUDIES IN CHURCH AND STATE* 32 (John F. Wilson ed., 1989).

42. *Id.* at 40.

increasing military aggressiveness and territorial occupation during the Meiji, Taisho, and Showa eras.⁴³

So what does all of this have to do with the question at hand, namely, is secularism necessary for liberal constitutionalism? The Meiji Constitution in practice was not what most people would consider an example of liberal constitutionalism, but it aspired to be so, at least within the era when it was written. The language of the Meiji Constitution gives individuals protections that did not exist as a matter of constitutional right before it was promulgated.⁴⁴ Indeed, it gave a modicum of protection for individual rights and expression.⁴⁵

Yet, its promotion of a quasi-religious nationalism based in State Shinto undermined these individual freedoms in practice.⁴⁶ It could have theoretically gone the other way. It could have been that people enjoyed all the individual freedoms so long as they did not try to prevent others from viewing the Emperor as sacred and inviolate. But, of course, that is not how it played out, and the sacredness of, and fealty to, the Emperor impeded individual freedoms in many ways.⁴⁷ The Meiji Constitution is an example of how a religiously affected constitutional system might make liberal constitutionalism less likely to succeed. This is especially so when the Meiji Constitution is compared to the modern Japanese Constitution, which is secular and yet has been quite effective at promoting religious freedom, among other rights.

II. THE MODERN JAPANESE CONSTITUTION, SECULARISM, AND LIBERAL DEMOCRACY

The modern Japanese Constitution was imposed on Japan by the United States occupying authorities after World War II.⁴⁸ It was promulgated in November 1946 and became enforceable on May 3,

43. See *id.* at 4; Kōsaku Yoshino, 'Resurgent Cultural Nationalism' and 'Prudent Revivalist Nationalism', in 5 NATIONALISM: CRITICAL CONCEPTS IN POLITICAL SCIENCE 1885 (John Hutchinson & Anthony D. Smith eds., 2001); Tokihisa Sumimoto, *Religious Freedom Problems in Japan: Background and Current Prospects*, 5 INT'L J. PEACE STUD. 77, 77-86 (2000).

44. DAI NIHON TEIKOKU KENPŌ [MEIJI CONSTITUTION], arts. 22-30 (Japan).

45. *Id.*

46. See *supra* notes 15, 27, 43 and accompanying text.

47. See, e.g., Morioka, *supra* note 1, at 535-37 (impeding traditional Shinto at the local level); KITAGAWA, *supra* note 14, at 202-45 (limitations on religious freedom and other freedoms); Jiro, *supra* note 14 (same); Ravitch, *supra* note 23, at 505-08 (same).

48. Ravitch, *supra* note 23, at 508.

1947.⁴⁹ Even though it was imposed on Japan by the United States, it has become central to the modern Japanese state and its people.⁵⁰ In fact, as the Saiko-saiban-sho (Japanese Supreme Court) has recognized, over time the Japanese people and courts have adapted the modern Japanese Constitution to better fit Japanese culture and traditions.⁵¹

The modern Japanese Constitution is secular. In fact, one of the purposes of the religion clauses in the Constitution,⁵² as well as the clauses related to the Emperor,⁵³ was to diminish the government's ability to impose and foster State Shinto.⁵⁴ This movement began with the Potsdam Declaration even before the modern constitution was promulgated.⁵⁵ In this way, the modern Japanese Constitution stands in stark contrast to the Meiji Constitution.

Yet, both the modern Japanese Constitution and the Meiji Constitution, on their face, are designed to promote a great deal of personal freedom.⁵⁶ The difference lies, in part, in the way in which the Meiji Constitution placed fealty to the Emperor, who was sacred and inviolate, above all personal rights.⁵⁷ As explained in Part I, this led to the promotion of State Shinto and strong practical limitations on many of the personal freedoms the Meiji Constitution sought to protect. In contrast, the modern Japanese Constitution protects a variety of freedoms, including religious freedom, from a secular vantage that does not hold any religion as superior to others.⁵⁸ These freedoms are of course not perfectly effectuated under the modern Japanese Constitution, and there are areas where seemingly strong constitutional rights have been limited through judicial interpretation and cultural practices, but that is true in many constitutional systems.

In order to understand the secular nature of the modern Japanese Constitution, it is helpful to understand the ways in which

49. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

50. *The Ehime Tamagushi Case*, Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) no. 156, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (Japan).

51. *Id.*; Ravitch, *supra* note 23, at 508.

52. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 20, 89 (Japan).

53. *Id.* arts. 1-8.

54. See Morioka, *supra* note 1, at 542-43; Kawagishi, *supra* note 13, at 308-09; *The Ehime Tamagushi Case*, *supra* note 50.

55. *Potsdam Declaration*, Proclamation Defining Terms for Japanese Surrender, issued at Potsdam, July 26, 1945; see, e.g., Morioka, *supra* note 1, at 542.

56. See *supra* Part I; *supra* notes 47-53 and accompanying text.

57. See *supra* Part I.

58. See *supra* Part I.

the constitution treats the relationship between government and religion. This is set forth primarily in two clauses. The religion clauses of the Japanese Constitution can be found in Articles 20 and 89. Article 20 reads:

Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The State and its organs shall refrain from religious education or any other religious activity.⁵⁹

Article 89 reads:

No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.⁶⁰

In a series of cases, these clauses have been interpreted to create a separation of politics and religion (*seiji to shuukyō no bunri*).⁶¹ These cases can be broadly (and over-simplistically) classified into two categories: (1) Cases that set forth the importance of the separation of politics and religion, but found that the particular practice in question would be understood by the average Japanese citizen as a cultural practice, even if it has religious dimensions, rather than an advancement of religion;⁶² and (2) Cases that also assert the importance of the separation of politics and religion and found that the government practice in question violates that principle by advancing religion in a manner that would be understood as advancing religion by the average Japanese citizen.⁶³

The Japanese Supreme Court has interpreted Article 20 as providing stronger protection for religious freedom than under the U.S. Constitution.⁶⁴ In the latter context, there is some interesting debate over whether the decision protecting religious accommodations was really a case under Article 20 or whether it was

59. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20 (Japan).

60. *Id.* art. 89.

61. *See* Ravitch, *supra* note 23, at 508-14.

62. *Id.* at 510-12.

63. *Id.* at 513-20.

64. *See, e.g.,* Matsumoto v. Kobayashi, Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan) (Petty Bench) (also known as the *Kobe Technical Case*); Frank S. Ravitch, Symposium, *The Unbearable Lightness of Free Exercise Under Smith: Exemptions, Dasein, and the More Nuanced Approach of the Japanese Supreme Court*, 44 TEX. TECH. L. REV. 259, 275-76 (2011).

more a statutory case, but that debate is beyond the scope of this Article. For what it is worth, there was a statutory element to the case, but I agree with those who think the decision also relied on Article 20.

Finally, the Shuukyou Hojin Ho (Religious Juridical Persons Act) has been upheld as consistent with the Japanese Constitution.⁶⁵ That Act provides a number of benefits, including tax breaks, to religious entities that register as a religious juridical person under the Act.⁶⁶ The Act makes clear even those groups that do not register as Religious Juridical Persons have the full free exercise of religion granted under the Constitution and laws of Japan.⁶⁷ The Act has been criticized after it was amended following the Sarin Gas attacks by Aum Shinrikyo to require a minimal amount of government oversight, but compared to many laws in Western Europe, the oversight is minor and only arises in limited circumstances.⁶⁸

The cases supporting the concept of separation of politics and religion demonstrate that the modern Japanese Constitution is secular both on its face and as interpreted. This is, of course, consistent with Japanese society as well. Japanese society is mostly secular, and while many Japanese identify with Shinto and/or Buddhist traditions, this is mostly in a cultural context.⁶⁹ That is, people experience religious traditions, such as visiting shrines on certain dates, as more of a cultural practice than a religious one.⁷⁰ Of course, there is no exact dividing point between culture and religion, but suffice it to say that there is no great cry from the majority of people in Japan for a non-secular constitution. A secular constitution fits twenty-first century Japan well.

Make no mistake, a secular constitution—any secular constitution—is not a guarantee of unlimited personal freedom. Whether under the U.S. Constitution, the modern Japanese

65. Shuukyou Hojin Ho [Religious Juridical Persons Act] (as amended 1951, amended in 1995) (Japan).

66. *Id.*

67. *Id.*

68. See *International Religious Freedom Report 2002: Japan*, BUREAU OF DEMOCRACY, HUM. RTS., & LAB., <https://www.state.gov/j/drl/rls/irf/2002/13874.htm> [<https://perma.cc/QHV4-KP8Q>] (last visited Feb. 22, 2017).

69. Sumimoto, *supra* note 43, at 81 (“Although the image of Japan abroad is one of a country filled with picturesque temples, the truth is that the Japanese are among the least religious of nations. A poll reported in the *Daily Yomiuri*, 3 July 1994, indicated that only one out of four Japanese claim to follow a particular religion, and over 70 percent do not believe in any religion.”).

70. See *id.*

Constitution, or others, courts have restricted personal freedom more than the language of the constitution requires and sometimes the language itself restricts certain freedoms.⁷¹ Just because a constitution reflects liberal constitutional values does not mean it will lead to optimal protection of those values; if there is even a means for determining what optimal protection would look like.

Under the modern Japanese Constitution, free speech is the area where perhaps the greatest restrictions have arisen.⁷² On its face, the Japanese Constitution offers strong protection for free speech rights,⁷³ and in many ways this is reflected in practice. Yet, in several cases the Saiko-saiban-sho (Japanese Supreme Court) has upheld limitations on freedom of speech and the freedom not to speak, which would not be likely under other liberal constitutional systems.⁷⁴ Significantly, however, the Japanese Constitution has provided greater protection than most other constitutions for some freedoms, such as the freedom of religion.⁷⁵

While one can certainly disagree with the Japanese Supreme Court's interpretations of free speech rights and other rights, there is little question that the modern secular Japanese Constitution is far more protective of rights than its predecessor. The Meiji Constitution was an abject failure in protecting most personal freedoms, including those it protected on its face. The modern Japanese Constitution has sometimes failed to live up to idealistic protections of personal autonomy, just as the U.S. Constitution and many others have failed to live up to idealistic protections of personal autonomy, but it has succeeded in creating and fostering personal freedom even in a nation where group dynamics are exceptionally important.

Some of what may be viewed as failures of the Japanese constitutional system in protecting rights may arise from a significant cultural difference between Japan and the West, namely, the concept

71. See *Case to Seek Revocation of the Admonition*, Saikō Saibansho [Sup. Ct.] June 14, 2011, 2010 (Gyo-Tsu) 314 no. 65, 4 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] (Japan) (Petty Bench) (upholding punishment of teachers for failure to stand and face the flag during the national anthem, but requiring that the punishment not be excessive); see also *X v. Tokyo Kyikuiinkai*, Saikō Saibansho [Sup. Ct.] Feb. 27, 2007 (Gyo-Tsu) 328, no. 61, 1 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 291 (Japan) (school teacher forced to play piano for national anthem); Dan Rosen, *Policing Political Speech: Japan's Mistrust of the Marketplace*, 22 MICH. ST. INT'L L. REV. 799, 800-01 (2014) (political speech).

72. See *supra* note 71 and accompanying text.

73. See Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], arts. 19, 21 (Japan).

74. See *supra* note 72 and accompanying text.

75. See *supra* note 64 and accompanying text.

of Wa in Japanese culture.⁷⁶ Wa is a term usually translated as “harmony,”⁷⁷ but it reflects a much broader social structure of group dynamics and conflict avoidance that is central to Japanese society and often misunderstood by people from other cultures.⁷⁸ The “group,” whether friends, company, family, or others plays a central part in Japanese culture.⁷⁹ As a result, the western concept of personal autonomy does not always fit well in Japanese society.⁸⁰ Despite the prominence of Wa, some Japanese court decisions protecting individual freedoms, even against group dynamics and rules, have been issued under the modern Japanese Constitution.⁸¹ I raise this to point out that while Japanese culture may affect the way in which the Japanese Constitution is interpreted—which one would hope is the case—the fact that Japanese culture has a strong group identity has not taken the Japanese Constitution out of the category of constitutions promoting a concept of liberal constitutionalism.

III. SECULARISM AND LIBERAL CONSTITUTIONALISM WRIT LARGE

How does the Japanese experience help us understand whether secularism is a necessary predicate for liberal constitutionalism on a broader scale? Japan is one of the few countries that had a constitution espousing individual rights and freedom but maintaining and promoting a dominant religion that was immediately followed by a secular constitution espousing individual rights and freedoms. Of course, Japan is quite different from many other countries, but the Japanese constitutional experience suggests, at the very least, that secularism is helpful in promoting the autonomy and personal freedom that is so central to concepts of liberal constitutionalism.

Consider the following. Both the Meiji Constitution and the modern Japanese Constitution espoused religious freedom rights and free speech rights.⁸² Under the Meiji Constitution, these rights were overwhelmed by principles of fealty to the Emperor and State Shinto.

76. See Frank S. Ravitch, *The Continued Relevance of Philosophical Hermeneutics in Legal Thought*, in *THE NATURE OF LEGAL INTERPRETATION* (Brian Slocum ed., Univ. of Chicago Press, forthcoming 2017) (explaining how Westerners often miss important aspects of Japanese legal aspects due to underestimating or missing Japanese cultural norms such as Bunka and Wa).

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

81. See *supra* note 64 and accompanying text.

82. See *supra* Parts I-II.

Dissenters were persecuted, and speech and religious freedom was significantly limited when those freedoms conflicted with the established order and State Shinto.⁸³

At first glance, one might argue that this was because of Japanese group culture combined with the militarism of the era, rather than being caused by religion. This, however, overlooks two salient points. First, group dynamics and harmony are still core to Japanese culture, and yet today dissenting religions are protected,⁸⁴ there is a modicum of free speech,⁸⁵ and people are not generally punished by government for dissent; although dissent may hurt their status within certain social groups.

Second, the militarism of the Meiji era cannot be neatly separated from the doctrine of State Shinto.⁸⁶ Militarism and a sense of cultural superiority were fostered by State Shinto, and State Shinto was favored by the military to maintain its power.⁸⁷ The Emperor was constitutionally sacred and inviolable⁸⁸ and, as a practical matter, a living religious icon.⁸⁹ Therefore, it is not that the values of individual autonomy and freedom were excluded from the Meiji Constitution, but rather that the constitutional fostering of State Shinto informed the cultural, legal, and social structures of that era in such a way as to allow the promised freedoms to become illusory for most people who did not conform to the dominant norm. Of course, the era in which a constitution arises affects that constitution, but the roots of liberal constitutionalism from which the Meiji Constitution, in part, borrowed existed before the Meiji Constitution.⁹⁰ The failure of liberal constitutional values cannot be attributed solely to State

83. See *supra* Part I.

84. See *Matsumoto v. Kobayashi*, Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan) (Petty Bench); see also Ravitch, *supra* note 76.

85. But see *supra* note 71 and accompanying text (citing some of the limitations on that freedom).

86. See Morioka, *supra* note 1, at 535; see also Ravitch, *supra* note 23, at 506-08; Yoshino, *supra* note 43, at 1885; Sumimoto, *supra* note 43.

87. See *supra* note 43 and accompanying text.

88. See DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 3 (Japan).

89. See Morioka, *supra* note 1, at 534-35; see also Ravitch, *supra* note 23, at 506-07; Yoshino, *supra* note 43, at 1883, 1885; Sumimoto, *supra* note 43.

90. Kant, among others, such as Locke, had written about these concepts many years before the Meiji Constitution was promulgated. See generally IMMANUEL KANT, CRITIQUE OF PURE REASON (Cambridge Univ. Press 1998) (1781).

Shinto, but there is no doubt that government support for, and promotion of, State Shinto played an important role in that failure.⁹¹

Times have changed, and today established state religions may not lead to murder and warfare in a constitutional democracy. Yet, the dynamic of the government preferred religion leading to persecution and limitation of rights for those who are not part of, or beholden too, the preferred religion is all too real. We have seen the principles of liberal democracy and personal freedom violently crushed on occasion even in the United States when local governments have violated the secular norms of the U.S. Constitution and tried to enforce a preferred religion.⁹² The violence and persecution fostered by state religious preference under the Meiji Constitution may have been more extreme than what we often see today, but that is a question of degree of harm rather than a question of whether constitutional religious preferences foster limitations on liberal constitutionalism in the first place.

CONCLUSION

The era of constitutionalism in Japan began with a lot of promise. The Meiji Constitution on its face granted a number of personal freedoms. That constitution, however, was not secular, and partly as a result of the State Shinto it fostered, it never lived up to its promise of granting individual rights and freedoms.

Conversely, the modern Japanese Constitution has fostered a great deal of individual and religious freedoms. It is clearly a secular constitution, and while imposed by the United States, it has been embraced and transformed by the Japanese courts and people. It is not perfect, nor is any constitution. At times, certain rights have been interpreted more narrowly than some would like, but in the end it is a good example of liberal constitutionalism. The relationship and comparison between the Meiji Constitution and the modern Japanese Constitution demonstrate that secularism, while perhaps not a necessary predicate to liberal constitutionalism, is far more likely to bring about stronger personal and religious freedom for all citizens.

91. *See supra* Part I.

92. *See generally* FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS* (1999) (cataloguing a long line of instances of violence and persecution resulting from government violations of constitutional and secular norms).