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The title of my talk should be changed to "A Perspective from One American." It will not be a view from all of America, but just one American, and a slightly odd one at that because I have spent part of my career studying Japan. It is probably fair to say that I know more about Japan than most Americans, so this may be a slightly different perspective than one would get from the average American legal scholar.

Nevertheless, I initially shared Prof. Kobayashi's sense that he and I had the easier job, which is to discuss the law and not the difficult metaphysical issues. Law is concrete: There are statutes and court cases. But in my conclusion, I find myself differing from Prof. Kobayashi in a number of respects.

I will start with two relatively simple points. First, from any rational perspective, viewed against the backdrop of the legal systems of the rest of the world, freedom of religion in Japan looks very good. A fairly broad scope of action is permitted, and very little regulation inhibits religion. There are the usual bureaucratic problems. There are complications and difficulties of a sort that we will discuss in a bit more detail in a moment. But by and large, compared to the vast majority of countries in the world, the picture of freedom of religion in Japan looks quite good.

Having said that, let me make my second point, which is that there are trends in Japan that, as a longtime observer of Japan, I find somewhat worrisome. I am not persuaded that the actions of the administrative agencies, the legislature, or the courts are adequately attentive to the kinds of protection that religion really needs in Japan. Let me elaborate that point by starting from the proposition that law is very difficult to examine in the abstract. Law is designed to serve a particular social purpose. It derives from the current needs of the people. Those needs in turn generally derive from the historical background of that country as well as the current sociological and political situation. It is against that backdrop that I question some of the legal doctrine that has developed in Japan over the last three decades.

Let me start with what I think is perhaps the simplest proposition that informs my thinking about Japan today. As you think about how principles of church-state relationships develop around the

world, each country has its own peculiar history. But if one looks particularly at Europe, where the concept of freedom of religion first developed in its strongest form, you see that the problem was essentially not that the state was controlling or suppressing religion, but precisely the opposite. The question in most cases was that religion was exerting undue influence on the state—at least from the perspective of the development of civil society. The impact and effect of religion were very strong.

If we look at the United Kingdom, for example, much of the struggle between church and state was over whether the state could act independently, irrespective of the wishes of the church, the church being largely identified in the person of the pope. Certainly, in the unification of Germany, that was Bismarck's problem. He brought into the state a very large Catholic population. The loyalty of that population to the pope and the pope's ability to control the political processes in Germany were his central preoccupations.

If you go back a hundred years before that and look at a number of countries around Europe, much of the issue was how does the state get itself out from under the control of the pope. In France, the revolution was at least partially related to that. The king was ruling by divine right and, therefore, had some investiture from a religious authority. The people wanted to separate themselves from that kind of religious control and develop a democratic system, a republican system, in which the people were not subject to the control of the religion and the state was not subject to the control of the religion. That is at least part of the problem that some of the countries in eastern Europe face as they try to figure out how to strike the balance between religion and civil society.

Only when that was accomplished did the European countries turn to the second set of issues—those issues of freedom from the power of the state with respect to the individual's religious practices or the freedom of religion from the power of the state. It is from that point in history that America was established. That is the debate that we see in America. But that debate goes on in America only because the prior debate had been settled some 50 to 100 years earlier in most of the European countries and some 150 years earlier in England, the country from which the United States derived most of its political tradition.

Japan, on the other hand, would present a somewhat different case. Certainly in premodern Japan the relationship between church and state was not a particularly complicated one. Shintoism was extremely decentralized. It was not heavily controlled by the state nor did it have much relationship to or effect on the state, though it did have a very deep relationship to the population.

With the Meiji restoration, however, the state's relationship to religion changed dramatically. At that point the state needed some form of legitimizing ethic or myth, and it began to identify Shintoism as an attractive vehicle for generating a certain kind of political support.

Shintoism, along with the Japanese versions of Buddhism and Confucianism, had explained such concepts as death and the afterlife to a large extent in terms of the continuity of souls connected to the family. Therefore, the perpetuation of life extended in an unbroken line from ancestors to the current generation to future descendants. It was a very short leap from that kind of doctrinal base to thinking that one might be able to manipulate the doctrines of Shintoism to place the emperor at the head of the line. Standing at the head not only of the lineage but of the state makes the perpetuation of the state dependent on the perpetuation of the emperor's lineage.

Indeed, when one looks at the actions of the government in the period of the Meiji restoration—and this is a very complicated history, which I am shortening—one sees that the government takes a number of steps to accomplish this use of religion. First, they separate Buddhism and Shintoism. This results in a great deal of problems for Buddhism, because Buddhist temples had often been the superior temples with the Shinto shrines within the same temple complex. Now those two are to be separated. Many of the Buddhist shrines are, in fact, looted, with the property taken by Shinto organizations. More importantly, the government separates sectarian Shintoism from shrine Shintoism. Shrine Shintoism becomes the principal repository or the performer of the national rites. Those are the rites that are central to the notion of unification. So shrine Shinto becomes ritualistic and administrative and not particularly pastoral in its dimensions.

It is this set of rituals that provide a very important component in defining the national myth, defining the essence of being Japanese, and defining the essence of the country. As we talk about respecting long religious traditions in Japan, I would posit that in fact those traditions are not very long in their history. Neither are they very traditional. In fact, they were often created or adopted by the government and manipulated to create a certain kind of national ethic. This enshrined the emperor as the symbol of the cult of national unity, which in turn became becomes an important variable.

The second important variable is the quest to enhance nationalism. The enshrinement of the glorious war was a way of generating a particular kind of patriotism, national unity, and national ethic. In fact, if you trace the growth of state Shinto and shrine Shinto, it actually begins most

strongly in 1905 with the Russo-Japanese War and was further expressed in the Sino-Japanese War and then World War II. That enshrinement provides a very powerful impetus toward national unity.

Viewed from that perspective, Shintoism begins to occupy a space in the public sphere that necessarily begins to push out other religions that would find this kind of ideology antithetical to their beliefs. For example, Christians are generally required to participate in the imperial rites. Christian schools are required to have different kinds of shrines within the school and have a shrine representing the emperor. So you begin to see this kind of indoctrination.

In addition, you begin to see the development of political and legal doctrines that suggest non-participation is akin to treason, perhaps a violation of the peace preservation law. For the most part, Shinto does not really object to this incorporation because it enfranchises Shinto to a very strong degree. A provision in the Meiji constitution protects freedom of religion, but it is highly qualified: Religion is protected as long as it is not inconsistent with a whole range of other things.

Historical records suggest that freedom of religion was put in the constitution largely because people felt that foreign countries would demand that kind of provision before agreeing to revise the unequal treaties. In fact, there is a wonderful quotation by Ito Hirobumi, one of the of the constitution's principal drafters. He says something like the following in his commentaries after the promulgation of the constitution: "Faith is a matter of heart, but law and order require that general constraints be placed on public expressions of one's heart." Then he gives a list of various necessary constraints—rituals, proselytizing, speaking in public, and organizing meetings. That doesn't leave very much room, except for being a religious adherent in the privacy of your own home, as long as one does not speak about it, gather together, or in any way perform communal activities.

All people were required to participate in Shinto, and those who did not were subject to relatively severe penalties. Christian professors who refused to participate in the rites were dismissed from their positions. Steps were taken against religions that were thought to be somehow antithetical, such as the Omotokyo in 1935, which had its headquarters destroyed. Other religions were banned outright. Should any doubt remain that this is what the government intended, in 1940 it passed the Religious Organizations Law, which required all religions to register to be recognized. Only those religions that supported the teaching of the emperor's divinity were recognized. In addition, in 1941 the Peace Preservation Law was amended to authorize the police to investigate and suppress religious groups that denied or opposed the national policy of emperor worship.

It is against this backdrop that the promulgation of the modern constitution of Japan and the occupation forces' attempt to dismantle state Shinto take place. Charles Cates, one of the chiefs of the government section of the occupation, said, "we wanted to not only close the door on state Shintoism but also to throw away the key so it could not be opened." The occupiers were very clear about that. They wanted to prevent religion from becoming a tool of nationalism. They took a series of steps to do that: They stopped state support of Shinto and made shrine Shinto simply another form of religion that needed to be registered under the Religious Organizations Law, as well as promulgating the two constitutional provisions that we have seen.

Interestingly, these provisions were not directly modeled on the U.S. Constitution but more on that of the Philippines. They actually have a very close linguistic connection to that constitution. Now this was effective in many ways. It inevitably discredited shrine Shinto in an important way and resulted in a dramatic expansion of religious organizations. At the moment there are 180,000 different religions registered under the Religious Organizations Law.

Let me conclude with a couple of thoughts about why I think this history is so relevant and why I worry a bit about current trends. The Japanese government has achieved an extraordinary degree of economic development and peace and prosperity. However, it continues to look for a set of legitimizing principles. Somehow democracy, liberalism, and capitalism do not seem sufficient as a unified ethic or national myth. One indication of this is the extent to which there has been a decades-long debate about what it means to be Japanese and what is unique about the Japanese—the famous Nihonjin Ron debate. Ethnicity alone does not seem to be adequate.

The government has made some clear attempts to again identify Japan with the myth of Shinto and the emperor to some extent. Legislation has been introduced in the Diet five times that would revive state support for at least some limited form of shrine Shinto, particularly the Yasukuni shrine, the Esai shrine, and so forth. In addition, as Prof. Kobayashi suggested, there are a large number of occasions on which local officials participate, by making financial contributions or in other ways, in local Shinto activities.

In light of that history, the courts, in my judgment, have not been overly vigorous in protecting the principle of freedom of religion. From that perspective—and trying to ensure that the state does not resume trying to manipulate religion in order to create a certain kind of national ethic and national unity—we have the ruling in the Ji-Chin Sai case that was talked about earlier. Certainly, one may look at the purpose and effects test and say that it was a purpose perhaps. It

was a secular activity, and the effect did not particularly promote religion. But the ruling goes on to say it did not exceed the limits considered appropriate in the context of societal and cultural circumstances considering Japan's history, in a way suggesting that this practice was traditional. It has been done in the past, so this is not such a bad thing.

It would seem to me, as an outsider looking at that past history, that, in fact, the Supreme Court should have said precisely because of Japan's history and the prior extent to which the government manipulated those symbols, this sort of activity should be carefully guarded against.

I think the same is true about the Self-Defense Forces' enshrinement case. In that case, again, the religious activities objectively followed common sense and did not seem to have a particular purpose. The court said that the Self-Defense Forces were merely engaged in a clerical task by providing names to the Shinto or the bereavement organization to be enshrined. The problems of that analysis are twofold. One is that the Self-Defense Forces were not providing those names to other religions, even though other religions had requested them. So you have, in fact, a problem of discrimination.

Second, you have a fairly severe problem in that it was precisely those kinds of clerical acts that enfranchised Shinto at the expense of other religions. It is also a problematic case, because it does not seem to recognize the fact that tolerance, if excessively applied, can itself become a doctrine of intolerance. That is to say, the widow's right to exclusivity in her belief is something that the court does not credit at all. That itself, I think, has a long historical background.

I have a few thoughts on the Aum Sinrikyo incident and developments since then, but let me skip that and just conclude with these thoughts. One is that I do think Japan provides a very broad space for religion in the public square. Nevertheless, there are some worrisome signs. The courts are not enforcing the current protections with the kind of vigor that would be suggested as necessary in view of Japan's history. Even the more recent Ehime case, which is a move in the right direction, nevertheless has doctrines built into it that seem to me to provide, in light of Japanese history, excessive flexibility. This is likely to be a particular problem in the coming years. As a number have suggested at this conference, an increasing number of people are interested in exploring the religious side of their lives, resulting in the growth in new religions. The need for adequate space for religions, which themselves will be at some level exclusive liturgies in their own way, is critical.