Legal Foundations of the Tokugawa Bakufu and Post-Colonial United States:

A Comparative View of Certain Precepts, Values and Attitudes that Forged Two State Systems

By
Jeffrey E. Morrison
Georgia State University
Introduction

A historiography comparing the founding precepts, values and attitudes of the early Tokugawa shoguns who established the *baku-han* system in Japan during the first half of the seventeenth century with the “Founding Fathers” who established the United States of America and drafted the Constitution during the late eighteenth century does not exist. On initial reflection, comparing a Japanese era typically described as repressive or absolutist, or associated with a myriad of autocratic definitions such as “late feudalism,” “centralized feudalism” or “post-feudal”\(^1\) to an era commonly considered the most free and democratic of its time would appear to be of limited utility in any attempt to better understand either.

Nonetheless, comparing the reigns and policies of Tokugawa Ieyasu (1603-05), Tokugawa Hidetada (1605-1623) and Tokugawa Iemitsu (1623-1651)—consolidators of the Tokugawa *bakufu* or Shogunate (1603-1868)—with the newly formed American government following the Revolutionary War surprisingly, and provocatively, produces as many similarities as differences. The ruling elite of both nations established new governments after a brutal period of military conflict and immediately attempted to legitimize their rule. Both feared challenges and challengers, both real and potential. Both wrestled with the proper “place” for the lower classes, whether merchant, townsmen, farmer, peasant or slave. Both wrestled with the challenges posed by the increased urbanization of an agrarian society. New and powerful modes of philosophical thought and feeling permeated their respective societies.

The death of the third Tokugawa shogun, Iemitsu, in 1651 provides a logical endpoint for the “establishment” of the Tokugawa regime, consisting of a centralized Tokugawa *bakufu* or

Shogunate and localized han or territories under daimyō or local military lords. By such time the government, both in the Shogunate and in the han, had acquired its basic structure. By Iemitsu’s death the general administrative structure of the bakufu was complete, a structure that largely survived for over two hundred years.\textsuperscript{2} In addition, the first half of the seventeenth century was the first of two great periods of legislative activity during the Tokugawa era.\textsuperscript{3}

This research essay compares this early Tokugawa period with the period in U. S. history beginning with the American Revolution and the election of 1800. This comparison will focus on three topics: (1) each government’s attempt to legitimize its rule, including the legal, philosophical and social milieu in which each government functioned; (2) each government’s response to dissent and opposition to its rule; and (3) each government’s attempt to establish a strong central government while granting a certain level of autonomy to their han or states. Finally, this research essay concludes by highlighting what we can learn from comparing these two very distinct and interesting periods in world history.

Because the story of the creation of the Tokugawa government may be less familiar, a brief summary follows.

\textit{Creation of the Tokugawa Government}

Just as General George Washington emerged as the unqualified leader of the new American government after an unprecedented victory over British military forces, Tokugawa

\textsuperscript{2}Iemitsu became shogun in 1623 but his father was still alive and was exercising authority as retired shogun, so he was unable to formulate his own policies. Iemitsu’s own preferences surfaced following his father’s death early in 1632. Shinzaburo Oishi, “The Bakuhan System,” in \textit{Tokugawa Japan: The Social and Economic Antecedents of Modern Japan}, eds. Chie Nakane and Shinzaburo Oishi (Tokyo: University of Tokyo Press, 1990), 28-29.

Ieyasu’s rise to power came after a bloody conflict, originally initiated by fellow daimyō Oda Nobunaga (1534-1582) and Toyotomi Hideyoshi (1536-1598). Along with the daimyō loyal to him, Ieyasu controlled most of Japan’s landed resources. As a former Sengoku daimyō, Ieyasu knew that these daimyō were not guaranteed to be his future allies, and that they could band together with the daimyō who had supported the losing side for an attack on the Tokugawa regime if they acquired the collective will and military resources to do so. As a result, Ieyasu knew that in order to establish a Tokugawa regime that would survive his death, he must control the daimyō and indirectly their land, the han.⁴

The task confronting Ieyasu was to wipe out the rival factions and unify the nation under his own authority. After the imperial court designated him as shogun in 1603, Ieyasu embarked on two major initiatives. The first was to dispose of Toyotomi Hideyori (1593-1615), Hideyoshi’s heir. The second was to solidify the Tokugawa family’s right to the shogunate by making it a hereditary office. The Osaka military campaigns during the winter of 1614 and summer of 1615 ended with Hideyori’s death and the liquidation of the Toyotomi family. In order to ensure that the position of shogun would be the hereditary possession of the Tokugawa family, in less than three years after being appointed shogun, Ieyasu placed his son Hidetada in nominal charge of the government.⁵

It is unclear when Ieyasu first considered establishing a hereditary dynasty. Scholars speculate that his inspiration was 13th century Japanese leader Minamoto Yoritomo (1147-1199),

---


who founded the Kamakura shogunate. Regardless, Ieyasu instituted the process of primogeniture when designating his grandson, Iemitsu, as the third Tokugawa shogun. Ieyasu concluded that the order of birth rather than intelligence or physical condition would better ensure the continuity of the Tokugawa regime. Immediately after deciding upon Iemitsu, he justified his decision to his primary wife by saying, “For the second son to have greater influence than the oldest is the root cause of family troubles.”

**Tokugawa Legitimacy: Shogun, the Imperial Court, Confucianism and Rule by Status**

When Oda Nobunaga set out to unify Japan during the last half of the sixteenth century he faced two major opponents: the opposing daimyō and the institutions and federations associated with Buddhism. After effectively destroying these opponents, if Nobunaga had not been assassinated in 1582, the imperial court may have been his next candidate for elimination. Unlike Hideyoshi, Nobunaga based his legitimacy on himself, not on some assumed delegation from heaven or from the imperial court.

Now, with the destruction of the Toyotomi family, Ieyasu faced the same issue that his two predecessors faced: what would be the basis for his legitimacy as the supreme leader of the Japan? Ieyasu’s military control was so absolute in 1615 that it would have been no problem for him to abolish the imperial house. In fact, one of Ieyasu’s closest advisors suggested in 1615 that the imperial family be confined to Ise, where it would perform only ritual duties, and Ieyasu

---


would take the title of son of heaven, on an equal level with the emperor. Ignoring such advice while severely limiting the prestige and influence of the imperial family, Ieyasu chose to receive his legitimating commission directly from the imperial throne and subsequently never seriously considered eliminating the imperial family as the “ultimate” authority in Japan.\(^9\)

Soon after his chief rival Hideyori perished in Osaka Castle in 1615, Ieyasu issued the *Kuge shohatto* (Laws for the Court) consisting of seventeen articles that isolated the court from all but a few shogunal officials and isolated the emperor from all but a few of his own ministers. This was the first instance in Japanese history in which the shogun exercised judicial authority over the court. The *Kuge shohatto* combined existing regulations applicable to the court with those that addressed the granting of “awards of purple gowns” but also added new regulations on the conduct of the emperor himself. Clearly demarcated areas of responsibility for the court and the *bakufu* were now law. Political affairs were the *bakufu*’s responsibility while the emperor’s function was to engage in scholarship and ceremony. The imperial court and all its lands were now under the jurisdiction of the *bakufu*.\(^10\)

Although Confucianism was the dominant secular philosophy during the seventeenth century, and provided an important basis for the legitimacy of Tokugawa rule during the second half of the seventeenth century, many scholars contend that neither Ieyasu nor the two early shoguns rested the legitimacy of their rule on the tenets of Confucianism or otherwise established

---


\(^10\)Oishi, “The Bakuhan System,” 24-25; Webb, *The Japanese Imperial Institution in the Tokugawa Period*, 57-58. Relations between the Tokugawa shoguns and the imperial court were strained at times. Iemitsu would visit
Confucianism as official government orthodoxy. What served to legitimate the Tokugawa regime during the first half of the century, they argue, was not ideas, but ritual, grounded on de facto, overwhelming military might. The early Tokugawa shoguns, in creating the structure of their symbolic legitimacy, were much more concerned with ritual than with any verbal orthodoxy. Regardless, the growing Confucianist movement and the spread of Neo-Confucian doctrines undoubtedly played a major role in establishing a secular philosophy throughout Japan and provided the bakufu with philosophical support for its exercise of political authority.\textsuperscript{11}

After Nobunaga’s destruction of Buddhist institutions at the end of the sixteenth century, scholars were free to liberate Confucianism from its subjugation to Buddhism. Historians credit two scholars, Fujiwara Seika (1561-1619) and his principal disciple, Hayashi Razan (1583-1657), for such liberation, through the use of Sung philosophy, especially the Chu Hsi school of Confucianism, which was particularly suited to the political needs of the time. Political support for this new philosophy was provided by none other than Ieyasu himself, who frequently attended Seika’s lectures in Kyoto and had invited Seika to Edo as early as 1593.\textsuperscript{12}

It is unlikely that Ieyasu’s interest in Confucianism was due to its literary or spiritual values. Ieyasu was interested in Confucianism because of its fundamental moral principles and its concepts of political legitimacy. Primarily concerned with immediate practical and political

\textsuperscript{11}Bellah, \textit{Imagining Japan}, 23-24; Ooms, \textit{Tokugawa Ideology}, chapter 6. Herman Ooms argues that Confucianism’s importance during the early Tokugawa era is overstated due to the later influence of Yamazaki Ansai’s comprehensive defense of the Tokugawa regime, which relied on a combination of Neo-Confucianism and Shinto. Ooms contends that Ansai’s arguments became the prototype for all subsequent Japanese nationalist ideologies, but he points out that Ansai was neither authorized nor encouraged by the political authorities to produce his analysis, nor did it have any status as an official ideology. The most dramatic example of the importance of ritual was Iemitsu’s effort to sacralize Ieyasu by rebuilding the small shrine in Nikko which his father Hidetada had built to enshrine Ieyasu. In 1645, upon Iemitsu’s request, the imperial court upgraded Ieyasu’s shrine in Nikko and it has thereafter been called Nikko Toshogu. Oishi, “The Bakuhan System,” 25.
problems, Ieyasu needed a doctrine that would instill loyalty to his government and Confucianism was the only available tradition that could make sense of the new order.\textsuperscript{13} What developed was a “status” ethic that provided the basis for a model of political relations with applicability to the entire nation. Sung Confucianism had been the official orthodoxy in China for some time largely because it gave nearly absolute endorsement to established authority in family and state. The system developed by Chu Hsi and his immediate followers equated the existing social order with the order of nature itself and preached an ethic of submissiveness to the inherited status system. Ieyasu did not object.\textsuperscript{14}

The creation of “Rule by Status” is brilliantly summarized by John W. Hall as being precipitated by “the fundamental current of change in sixteenth century Japan”—the separation of the samurai from the land and leaving the peasants in place in newly defined village communities. The breakup of the paternalistic relationship between samurai and peasant partially freed the peasants from the direct personal control of village samurai and established the peasant household as an independent social unit under the administrative control of the feudal lord.\textsuperscript{15}

Ieyasu, picking up on what Hideyoshi started, fostered institutions which partially liberated all social groups from local and often arbitrary personal authority in favor of impersonal authority that regulated social groups with objective criteria. At the same time society was separated into hierarchical classes and groups—samurai, farmer, merchant, artisan, and


\textsuperscript{15}Hall, “Rule by Status in Tokugawa Japan,” 44.
priest—and such groups were segmented into self-regulating units such as the military group, the village, or the city ward, over which each daimyō was able to extend his control through his own administrative apparatus. As society divided according to status, the arbitrary exercise of authority became limited. Rule by Status encouraged an equality of treatment appropriate to the class or status of each individual household.\textsuperscript{16}

The philosophical rationale that supported the exercise of authority based on impersonal Rule by Status created the need for a new rationale of government, for which Confucianist doctrine was well suited. Confucianism rested on the premise that there existed a natural division of society by status and vocation. It also emphasized loyalty to superior authority and rationalized submission to authority as a matter of principle. As one influential Confucianist of the time stated, “. . . you must not censure the rulers of the country in which you live. If you do not occupy a position which gives you competence, you must not criticize state policy. It is contrary to loyalty and fidelity that an inferior should criticize his superior.”\textsuperscript{17}

\textit{U. S. Legitimacy: Popular Sovereignty, Enlightenment and the Constitution}

Within a few years after being name shogun in 1603,\textsuperscript{18} Ieyasu appointed Seika’s disciple, Hayashi Razan, as his personal legal adviser and official scholar. Later, in response to a question concerning the legitimacy of Tokugawa rule, Razan wrote, “Only in accordance with the popular

\textsuperscript{16}Ibid, 44-45.

\textsuperscript{17}Quoted in ibid, 48.

\textsuperscript{18}John W. Hall and others credit the year of Razan’s appointment as 1605 while other scholars use 1607 and 1610. Shinzaburo Oishi claims that Ieyasu employed Razan in 1605 but the official appointments did not occur until 1607. Hall, \textit{Japan}, 182; Maruyama, \textit{Studies in the Intellectual History of Tokugawa Japan}, 13-14; and Earl, \textit{Emperor and Nation in Japan}, 3.
will of the whole land is one sovereign; without this, he is but another common man.”

Razan's admonition regarding the importance of popular will would have resonated with the drafters of the United States Constitution.

For centuries, the concept of “popular sovereignty,” the notion that the common masses of people had the right and the capability to govern themselves, seemed absurd. Since ancient Greece, political thought supported the doctrine of hierarchical authority, reflecting the conclusion that most people were incapable of fulfilling public responsibilities. From the middle ages, periodic peasant revolts and urban unrest reinforced the belief of elites throughout Great Britain and Europe that “people” were too unstable and irrational to govern themselves. The elites routinely described the lower classes as the “the beast,” “the rabble,” and even the “idiot multitude.”

England’s brief flirtation with popular sovereignty ended with the restoration of the English monarchy in 1660, but even before the outbreak of the English Civil War, religious dissidents who fled to New England practiced a form of self-rule by compact, which some dissenters described as “democracy.” Consistent with British law, the typical colonial charter in America contained property requirements for voting. In many newly-settled areas of colonial America land was cheap and up to eighty percent of a colony’s adult white male population might be eligible to vote in political elections. Early America’s tradition of town meetings and independent churches also provided opportunities for colonists to engage directly in the political

---

19 Quoted in Noda, Introduction to Japanese Law, 37.

20 Sean Wilentz, The Rise of American Democracy: Jefferson to Lincoln (New York: W. W. Norton & Company, 2005), 5. This attitude is similar to the attitude held by educated classes in Japan who felt contempt for the lower classes who made up the vast majority of the population. The lower classes were often “stupid people” who had to be talked down to like children and who consistently engaged in a series of practices that deeply offended bakufu and Confucian notions of proper moral behavior. John Henry Wigmore, ed., Law and Justice in Tokugawa Japan: Materials for the History of Japanese Law and Justice under the Tokugawa Shogunate, 1603-
process. Nonetheless, within the older settlement in rural areas and in most coastal towns and cities, the percentage of eligible voters among adult white males was as little as forty percent and those percentages declined further up to the outbreak of the American Revolution, when the rate of property ownership fell. In addition, the famous town hall meetings in democratic New England often constituted little more than a ratification of decisions already made by the local elite. Thus, in the years immediately preceding the Revolution, the elite’s traditional contempt for the masses could still be heard. George Washington described yeoman farmers of Virginia as “the grazing multitude.” John Adams referred to the masses as the “common Herd of Mankind.”

Just as Neo-Confucian doctrines supported “Rule by Status” as a new working paradigm for society in Tokugawa Japan, American intellectuals forged a secular religion out of the philosophy of European Enlightenment. While the American colonies were founded by leaders of various dogmatic religious persuasions, when it became necessary to unite against England, no one religious faith provided a holistic, unifying theme to rally the colonies toward independence from Britain. Leaders turned toward the secular faith of the Enlightenment. Many of the most distinguished leaders of the American revolution—Thomas Jefferson, George Washington, John Adams, Benjamin Franklin, Alexander Hamilton and Thomas Paine—were powerfully influenced by English and French Enlightenment thought. The God who “endowed” individuals with “certain inalienable rights” in the Declaration of Independence was the same deist God David Hume worshipped in Scotland and Jean-Jacques Rousseau worshipped in France, not the God of the traditional churches that supported monarchical government.


throughout Europe. American ideas of liberty and equality, the language of natural law, of inherent freedoms and of self-determination all reflected the language of the Enlightenment, America’s new “civil religion.”

By the 1770s, the English colonies of North America, spurred on by the rhetoric of the Enlightenment espoused in Paine’s *Common Sense*, were poised to give popular sovereignty a try. The Revolution, by striking down the British form of hierarchical government and indirect political representation, encouraged the creation and consideration of political theory that challenged the necessity of hierarchical authority. Between 1776 and the ratification of the U. S. Constitution in 1788, the attitude of many Americans toward concepts such as popular sovereignty and democracy dramatically changed. Nonetheless, the elites’ concerns with the lower classes’ capability to govern themselves remained. When the Framers met in Philadelphia to design a new federal government, fears of too much democracy were real. Yet when the delegates to the constitutional convention began the process of addressing the deficiencies in the Articles of Confederation, fears of too much democracy quickly gravitated toward ideas espoused by Thomas Paine that were very different from the conventional wisdom of elites in 1776. The new American government would not be a government of elites such as in Great Britain. Nor would sovereignty lie within the state governments, as the Articles of Confederation had placed it. Instead, the *people* (i.e., white adult males) of the United States purportedly would be sovereign.

This new reality of popular sovereignty was quickly reflected in the method by which the delegates to the Constitutional Convention sought approval for their work. Rather than

---


submitting the new federal Constitution to the elites that populated the upper houses of the state legislatures, where approval could be more easily and swiftly anticipated, the delegates sought approval directly from the people. Thus, legitimacy for the new Constitution and the government it created was accomplished by seeking and receiving the consent of ordinary American citizens who gave their consent at specially elected ratifying conventions held in all thirteen states beginning in late 1787. Eight states elected convention delegates under special rules that were more populist than normal, and two others followed existing rules that permitted virtually all taxpaying adult white male citizens to vote. No state used special election rules that were more property-based or less populist than existing electoral rules. 24 Thus, many Americans previously prohibited from voting or running for any political office now would be delegates voting up or down on the creation of a new nation.

Dissent and Opposition in Tokugawa Japan

The stability of Tokugawa rule was due in part to internal pacification, which prevented internal challenges. Thus, controlling social discourse was of paramount importance to the new government. In addition to the potential threat posed by the daimyō, religion remained a threat to Tokugawa unification efforts. Therefore, inspired by Nobunaga’s destruction of Buddhist temple forces, the first three Tokugawa shoguns persecuted Christian converts, ending with the brutal repression Christian peasants in Western Kyushu in 1637-38. Less well known is the persecution of the Pure Land and Nichiren sects of Buddhism that had become well entrenched in several

---

24 Akhil Reed Amar, America’s Constitution: A Biography (New York: Random House, 2005), 5-9. The Articles of Confederation proposed by the Continental Congress in late 1777 was ratified by the thirteen state legislatures, none of which permitted popular participation in any way.
parts of the country and who refused to admit the legitimacy of any rulers other than the emperor, the leaders of their own sect or Buddha.\textsuperscript{25}

The extent of violent rebellion was significantly less during the early Tokugawa era than in comparable agrarian societies. First, due to travel restrictions applicable to villagers, revolts seldom spread to other regions. Second, exhausted from decades of civil conflict, peasants did not want to overthrow the government, but simply wanted the government to live up to its stated governing philosophy of “benevolent rule,” a concept derived from the Confucian concept of \textit{jinkun}, or benevolent lord. Oral legends show, and petitions indicate, that peasants expected to be treated with dignity and respect, a concept radically new for Japan. Third, all current schools of Confucianist thought taught that that political criticism was a form of rebellion.\textsuperscript{26}

With one notable exception, anything resembling a free marketplace of ideas did not exist in Tokugawa Japan. The only form of social protest allowed was the conservative form of criticism that denounced the present for not conforming to the purer customs of an earlier day or which denounced the ostentation of prosperous townsmen and peasants. The \textit{bakufu} permitted this type of criticism because it did not challenge the legitimacy of the government but rather reinforced it.\textsuperscript{27}

To the extent there was “rebellion” during the early Tokugawa era, it took the form of direct petitions through representatives. One petition properly reflected the fealty shown to the ruling elite, “We wish to ever serve as \textit{onbyakusho} [honorable peasants] and we petition with


reverence so that we may pay income derived from agriculture. If we are aided by your mercy, we the lower, will respectfully and thankfully accept the aid.” However, not even this less threatening mode of “protest” protected a speaker from the government’s wrath. Legend describes the execution of Miyoshi Shiroeimon of Kawauchi village in 1627 because of his strong petitions in opposition to a new land survey ordered by local daimyō officials.28

Dissent and Opposition in Post-Colonial America

Unlike the Tokugawa shoguns, the new American government did not fear immediate military conflict from within. Fortunately, for Americans the issue of dissent was limited to the issue of whether citizens would be free to express themselves, including whether they would be permitted to criticize the government.

The common assumption is that the original U.S. Constitution was concerned with the rights and powers of the three branches of the federal government while the Bill of Rights, enacted a few years later, focused on protecting individual rights. In fact, for much of the legal history of the United States, the Bill of Rights was rarely used to protect individual rights. In fact, prior to 1866, with the ironic exception of the Dred Scott case, not a single “right” outlined in the entire Bill of Rights, including the First Amendment’s protection of speech and the press, was successfully used by the Supreme Court to invalidate federal or state action.29

That is not to say that freedom of expression was not an important individual right at the nation’s birth. In fact, the English origins of many rights (in addition to specific protections afforded speech and the press) memorialized in the Bill of Rights were closely linked to freedom

27Bellah, Imagining Japan, 156-57; Noda, Introduction to Japanese Law, 36.
of expression. After all, the most severe punishments in England were reserved for those who criticized the King and his government. Even the “enlightened” leaders of England carried out typically gruesome sentences on political dissenters.\(^{30}\)

When the Bill of Rights was enacted a few years later, while individual rights and the rights of political minorities did constitute a theme in the Bill of Rights, it clearly was not the dominant theme. At its inception, the First Amendment actually reflected more concern about self-interested government officials than protecting minority rights. That is why the entity explicitly restrained in the First Amendment is Congress, and not state legislatures. The conventional wisdom was that a national government, located far from its constituents, would not reflect majority will and posed little danger of oppressing minorities. The danger of political majorities oppressing political minorities was far greater at the state level where state legislative majorities were far more likely to reflect the sentiments of popular majorities. Therefore, the First Amendment’s provisions dealing with freedom of expression and limiting its restraint to Congress suggests that the primary concern of the Amendment’s draftsmen was not an oppressive majority silencing unpopular speech but rather Congress taking action to prevent the popular will from being expressed.\(^{31}\)

\(^{29}\)Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857), in which the Supreme Court invalidated free-soil-territory laws such as the Northwest Ordinance and the Missouri Compromise.

\(^{30}\)One sentence read: “You are to be drawn upon a hurdle to the place of execution, and there you are to be hanged by the neck, and being alive cut down, and your privy-members to be cut off, and your bowels to be taken out of your belly and there burned, you being alive; and your head to be cut off, and your body to be divided into four quarters, and that your head and quarters be disposed of where his majesty shall think fit.” John L. Baker, Criminal Courts and Procedure at Common Law 1550-1800, in Crime in England 1550-1800, ed. J.S. Cockburn, Princeton: NJ: Princeton University Press, 1977), 42.

In colonial North America, prosecutions for seditious libel—political criticism that threatened to diminish respect for the government, its laws or public officials—were not common but only a few of those in support of ratification of the Constitution suggested that a free press clause prevented government prosecution for criminal libel. During the period 1776-1789, no state rejected the common-law concept of seditious libel. Twelve states, including all nine that guaranteed a free press in their respective state constitutions, also provided by constitution or statute that the common law of England before the Revolution was to operate with full force unless inconsistent with or repugnant to some other statutory provision. The First Amendment protected the freedom of speech and the freedom of the press as they existed in the states from federal interference, the amendment did not purport to further protect speech or the press. Thus, as the American nation began, while they enjoyed far greater freedoms than the Tokugawa peasant or townsman, the desire to protect the government against libelous advocacy clearly outweighed any perceived benefits to be derived from the free expression of controversial ideas. 32

Despite the legal acceptance of the limits placed on criticism of the government, the popular political culture tolerated a much broader range of criticism than any theory of seditious libel allowed. The popular perception of the freedom of expression had so widened that seditious libel became a rather narrow category of verbal offenses against the government. It was not until 1798 that this greater public tolerance of criticism of the government collided with government attempts to suppress it when the Adams administration enacted four pieces of legislation that became infamously known as the Alien and Sedition Acts. Inspired by fears of a coming military conflict with France, these statutes made it a crime to publish “any false, scandalous, and malicious writing or writings against the Government of the United States.” Less than a decade

after the Bill of Rights became law, federal judges unhesitatingly sentenced men to jail for criticizing the government.\textsuperscript{33}

In the end, no state or federal court invalidated the Alien and Sedition Acts. The critics of the administration ultimately prevailed by appealing to the sense of the community, culminating in a popular majority “adjudicating” the First Amendment question in the election of 1800, by throwing out the Adams administration and the politicians who had tried to shield themselves from popular criticism.\textsuperscript{34}

*Federalism and Democracy in Tokugawa Japan: Control of the Daimyō, the Han and Villages*

The effective establishment of the *baku-han* system was completed during the reign of Iemitsu, who consolidated policies begun by his father and grandfather. The *han*, or *daimyō* domains, covered some three-quarters of the total area of the Japanese islands. They held most of Japan’s wealth and collected most of its taxes. Under their control came the greater part of Japan’s military forces, as at least three-quarters of the samurai class were in their service. The role of the *han* was defined by the *bakufu*, for it was the Tokugawa government that confirmed their existence and prescribed the extent of their responsibilities and the limits of their jurisdiction. This interdependence was recognized right from the beginning of the Tokugawa period, for there is every indication that Ieyasu was committed to the *han* as an institution. This did not, however, prevent him from dealing severely with individual *daimyō*.


The baku-han system consisted of two elements: a strong central power and autonomous han. Each han enjoyed political and legal autonomy and had its own law. However, as time went on, while bakufu law in principle was only enacted to regulate the bakufu’s own territory, daimyō were to ensure that their own statutes did not contravene those of the bakufu. As a result, the laws of the han often resembled the laws of the shogunate.35

Not surprising, the largest threat to a peaceful baku-han system were the daimyō, and the Tokugawa shoguns were especially skillful in developing methods preventing the development of daimyō power beyond their han. From the outset, the Tokugawa bakufu forcefully regulated the daimyō. Immediately after his victory at Sekigahara in 1600, Ieyasu made sure that those who had fought against him were given cause to regret their decision. Eighty-eight han were destroyed, among them han that had been controlled by some of Japan’s most powerful provincial families. Other daimyōs lost large tracts of land. Without exception, the land of the new han were considerably smaller than those they replaced, and it was clear to the ruling daimyō that their new responsibilities included keeping an eye on their less dependable neighbors.36

The bakufu developed other methods of controlling the daimyō. The first method was enacting laws and regulations circumscribing daimyō behavior. The government enacted its first ordinance in 1611, the Oath of Fealty, which became the foundation for the early Tokugawa control system.37

35Noda, Introduction to Japanese Law, 36; Steenstrup, A History of Law in Japan until 1868, 121.


37Hall, Japanese Feudal Law, 271-72, 286; David J. Lu, Japan: A Documentary History, Vol. 1 (Armonk, NY: M.E. Sharpe, 1997), 205. Daimyō taking the oath of fealty to the shogun, most likely in the Castle of Nijo in Kyoto, would have spoken the following: (1) we will respect the laws and institutions of the Shogunate as
In 1615, at the pinnacle of his power, Ieyasu convened the daimyō at Fushimi Castle and issued a thirteen-article directive, the *Buke shohatto* (Laws of Military Households). The *Buke shohatto* of 1615 reflected the reality that the risk of armed conflict remained. Thus, the bakufu was organized in such a manner that it could be transformed immediately into a military organization should necessity dictate. For example, Article 3 of the first *Buke shohatto*, stated: “Offenders against the law should not be harbored or hidden in any domain. Law is the basis of social order. Reason may be violated in the name of law, but law many not be violated in the name of reason. Those who break the law deserve heavy punishment.” Article 13 stated: “the lords of the domains should select officials with a capacity for public administration. Good government depends on getting the right men. Due attentions should be given to their merits and faults; rewards and punishments must be properly meted out.”

The daimyō were expressly forbidden to admit within their borders any criminals—harboring fugitives from the bakufu was considered treason and would be adjudicated in Edo. The law prohibited new fortifications, or surreptitious repairs to old ones and even demanded that daimyō receive official permission before arranging marriages for members of their own families. Its thirteenth and final clause urged the daimyō to appoint capable men as han administrators, thereby claiming for bakufu the ultimate responsibility in han internal affairs. If

---

38Quoted in Lu, *Japan: A Documentary History*, 206-08; Wigmore, *Law and Justice in Tokugawa Japan*, 50; and Oishi, “The Bakuhan System,” 23; Maruyama, *Studies in the Intellectual History of Tokugawa Japan*, 10, n. 14. Possibly reflecting a reduced concern with armed conflict, these two provisions disappeared after the *Buke shohatto* of 1635, which begins with this statement: “Loyalty to the lord and filial piety must be encouraged and proper conduct be maintained. Attention must be given to learning and to military arts. Just principles must be stressed and purity of customs and manners be preserved.”
the current daimyō could not effectively govern the han, the bakufu would find someone who would.  

The reason why Ieyasu could deprive the daimyō of the trappings of sovereignty was that he could have dictated more humiliating conditions, but he did not. They were allowed to rule their kashindan, their burghers, and their farmers as before, and to legislate as before. In essence, on their home ground they appeared sovereign.

In 1635, Iemitsu also issued regulations requiring that daimyō wives and children remain in Edo and established the sankin kotai (alternative attendance) system that required the feudal lords to reside in the capital every other year or every other half-year and to leave their immediate families there when they returned to their fiefs.

In order to further limit daimyō power, the shogunate adopted an aggressive policy of abolishing daimyō houses or transferring them to other domains. A lord could lose all or part his domain by failing to maintain order or due to the absence of an heir in the daimyō’s family. Even if a daimyō had an heir, inheritance of the domain required the prior approval of the bakufu. An adopted son could gain recognition as heir, but only with bakufu consent, which during the early Tokugawa period was rarely given. From 1615 to 1650, a total of ninety-five daimyō lost their han or substantial parts of them. Over that same thirty-five years the bakufu effectuated approximately 250 transfers of a daimyō (their families, and their vassals) from one han to another.

---


In addition to han seizures and transfers, the shogunate imposed tremendous financial burdens on the daimyō. The bakufu required daimyō to finance the construction of castles throughout the bakufu domains, necessitating the contribution of men, money and materials. As time went on, particularly after the Tokugawa victory in the Osaka campaigns of 1614 and 1615, the bakufu grew increasingly assertive in its relations with the daimyō. In 1617, the regime established the principle that all han would be distributed by the shogun, as head of the bakufu. In that year every daimyō received a document that defined the extent of his landholdings. Practically, the documents told the daimyō what most of them already knew. Symbolically, the documents reminded the daimyō that what had previously been theirs by right of possession or inheritance was now something subject to forfeiture.43

The Buke shohatto of 1635 further defined the new relationship between the han and the central government. In addition to the previous prohibitions, daimyō were forbidden from interfering with highways crossing their han, installing barriers or creating new embargoes. The bakufu also removed officially designated post towns, together with lands belonging to religious institutions, from their immediate control. Each han was now required to “follow the laws of Edo in all things.” An instruction issued to the southwestern han in 1609 prohibiting the construction of large ships was now made universal. Finally, in 1642, the government expanded the application of the sankin kotai (alternate attendance) system to the entire country. In order to assess daimyō compliance with bakufu law, the government created groups of inspectors and spies and charged them with monitoring developments in the han.44

Control of the individual daimyō was not the same thing as control of the han, its villages and the families residing there. While the shogunate issued instructions for just about every

43Bolitho, “The Han,” 212.
social unit in the country—family, temple, village, guild, feudal domain—it allowed a great deal of autonomy, including the responsibility of self-policing within the han. And with the exception of the samurai class, most people living in the han perceived the shogun and the emperor as having little relevance in their daily lives.45

For the majority of the common people, the only form of government they knew was provided by their han. Its borders defined their known world. Due to the rigorous natural demands of the rice cycle that required cooperation in planting, irrigating and harvesting, immobility and social solidarity largely characterized a villager’s personal existence. Rural villages were often rather small with only a few hundred people and, as an economic and social unit, were largely self-contained.46

In private matters between villagers, local law mandated that a village regulate its internal affairs through appointed village officials. While the bakufu and the daimyō in each han had the ultimate authority to approve the selection of a headmen and deputy headman in each village, villagers enjoyed a large degree of autonomy in resolving legal and political issues. The headman was responsible for determining the relative distributing of tax quotas on the individual households, the publication of laws and decrees, the distribution of access to common assets such as irrigation water and uplands, as well as having jurisdiction over firefighting, police and criminal investigations.47


For the ordinary villager during the early Tokugawa era, the method by which they resolved village issues remained largely unchanged. Agreement was reached by consensus. Villagers typically resolved legal and political disputes by employing “primitive conciliation” as opposed to adjudication in anything resembling a “court.” “Primitive conciliation” meant village conciliators using pressure and admonishment in support of the doctrine that it was not only “better to agree,” but also that “you had better agree!” Civil disputes which were not resolved peremptorily by family status authorities were resolved rather exclusively by village conciliators.48

As applied to the political decisions (as opposed to disputes), in his study of Japanese law in 1991, Carl Steenstrup concluded that the Japanese custom was to “discuss [an issue] until agreement is reached. And if no agreement is reached, there is no decision” and found no evidence of majority rule.49 However, other scholars disagree, finding numerous examples where majority rule prevailed: the election of officers by vote was used for certain positions at the imperial court, in Kato Kiyomasa’s domain (during the period 1562-1611) in the Pure Land sect and in villages, often in the election of village officials, for the allocation of newly developed rice paddies and the setting of prices for certain goods. One additional important area of village life that relied on majority vote as opposed to “consensual” decision making was the area of criminal investigations. Upon the occurrence of a crime, a vote was taken as to the

---


49Steenstrup, A History of Law in Japan until 1868, 132.
identity of the offender. The person who received the majority of votes (together with the members of his households) would be charged with the crime.\textsuperscript{50}

\textit{Federalism and Democracy in Post-Colonial America: \\
“City” and “Country” Democracy and States’ Rights in Post-Colonial America}

According to historian Sean Wilentz, in the late eighteenth century American democratic politics broadly coalesced into two different visions, one formed by “country” democrats and the other formed by “city” democrats. Before the issue of slavery divided the nation geographically, from New England to the deepest South, like the Tokugawa peasant and townsmen, the relationship between the white middle- and lower-classes and the white elite largely was determined by where you lived and what you did.\textsuperscript{51}

From relatively wealthy commercial farmers who resided near commercial cities or towns to subsistence settlers living on the edge of the frontier, farm households shared certain broad characteristics. Each subsisted primarily on the produce of their own farms and on what they received in exchange with neighboring households. Farms were usually family operations, and most commonly in the South, with the assistance one or two slaves. Conflicts between farmers, large proprietors, government officials and Indians led to sporadic violence, which worsened after the Revolution. Most of the new disputes concerned access to land, as politically connected businessmen used their clout to squeeze out poorer farmers. Disputes between debtors and creditors were common as indebted farmers often demanded forgiveness of loan defaults during tough economic times, while lenders demanded the payment.\textsuperscript{52}

\textsuperscript{50}Ooms, \textit{Tokugawa Village Practice}, 223.


\textsuperscript{52}Ibid, 15-16.
As with the Tokugawa peasant, humble farmers sent petitions to their legislators pleading for relief of one kind or another. However, during the Revolutionary War, the colonial farmer in America had an opportunity that his Tokugawa counterpart did not. With no existing military infrastructure, farmers and other commoners in America were asked to supply most of the manpower and supplies to fight the British. In response, the lower classes recognized that they now had political leverage that they never had before. Petition campaigns and political participation increased dramatically as common citizens demanded reforms ranging from the easing of debt payments to the disestablishment of the official Anglican Church. In colonial legislatures, the percentage of farmers holding political office doubled from just over twelve percent of the total in the 1760s to twenty-five percent in the 1780s.\(^{53}\)

City democrats largely consisted of skilled artisans and mechanics, as well as petty merchants, shopkeepers, and other tradesmen. Their intellectual and political leaders were Enlightenment-inspired physicians, clergyman, teachers and lawyers. Suppressing their usual contempt for the common man, politically ambitious merchants vigorously soliciting support from the “rabble” by creating political “tickets,” organizing political caucuses through taverns, using newspapers for political appeals and political pamphleteering. Inspired by their effective participation in demonstrations in response to the Stamp Act,\(^{54}\) artisans joined forces with the lowest classes of mechanics and unskilled laborers and began nominating and electing their own men to office.\(^{55}\)

\(^{53}\)Ibid, 16-17.

\(^{54}\)The Stamp Act made the colonists pay taxes on various items such as paper, legal documents, newspapers, other publications, and even playing cards.

\(^{55}\)Ibid, 20-22.
However, as late as 1790, common citizens who did not own land often were left out of the political process. Fewer than half of the original thirteen states had liberalized suffrage laws by replacing property ownership with taxpaying qualifications. During the Revolution, states hesitated to liberalize requirements for those seeking political office, retained the practice of appointing persons to state and local offices, and continued the malapportionment of representation within legislative bodies in a manner that favored the old wealthy elite.\(^{56}\)

Nonetheless, democratic ideas, like the Confucian ideal in Japan, also made considerable progress. New York, New Jersey, New Hampshire, North Carolina and South Carolina significantly liberalized their suffrage laws. Except in South Carolina, state legislatures eliminated religious tests that had prevented non-Protestants from exercising a right to vote. Requirements for officeholders democratized markedly. In lower legislative houses, a much-expanded number of representatives included a far greater proportion of ordinary farmers, artisans, and other men of middling wealth than had sat in the colonial assemblies.\(^ {57}\)

Not all of the elite were pleased with democracy’s progress. In fact, negative reactions to the “flowering of democracy” contributed directly to the Philadelphia Constitutional Convention in 1787. When Daniel Shays, a former Revolutionary Army captain, led a rebellion by farmers in Massachusetts against excessive taxes on property, polling taxes which prevented the poor from voting and the lack of a stable currency, white elites worried that localized democracy was getting out of hand. With more democratic state legislatures came disproportionately narrow-minded men, suspicious of government power and fiercely protective of local interests. In


response, the delegates to what became the Constitutional Convention saw the necessity for a political system that empowered enlightened rulers who would think of the national interest as opposed to the more narrow interests of their states or local communities. Delegates cautioned each other of the danger posed by the “popular frenzy” and “the turbulence and follies of democracy.”

While the convention did not produce a Constitution that disproportionately favored the elites, strong checks were placed on the political powers of ordinary citizens. The executive would not be elected directly by the voters but in the Electoral College, by electors chosen by the states. Senators would not be elected directly, unless the states so dictated, which none of them did. A national judiciary, headed by the Supreme Court, would be appointed by the indirectly elected executive with the advice and consent of the indirectly elected Senate. The only national office for which the Constitution prescribed popular elections was for members of the House of Representatives, to be chosen by the same electorate that voted for representatives in each of the state legislatures.

But the cause for greater democracy also experienced victories. In fact, the Constitution infused some form of democracy into almost all of its main Articles. Echoing the Preamble’s first three words, Article I promised that all members of the new House of Representatives would be elected directly “by the People.” No constitutional property qualifications would limit eligibility to vote for or serve in the federal Congress; nor could Congress add any qualifications by statute. In addition, Article I prohibited both state and federal governments from creating

---

hereditary government positions via titles of nobility. Under Articles II and III, the presidency and federal judgeships would be open to men of merit regardless of wealth or lineage. Government servants in all three branches would receive government salaries so that the right to hold office would not be practically restricted to the independently wealthy. Military leaders were accountable to democratically elected leaders. Juries composed of ordinary citizens would check the power of professional judges in the courtroom. States would create militias of citizen soldiers rather than relying on professional armies controlled by the executive branch. Article IV guaranteed every state a “Republican Form of Government”—that is, a government ultimately derived from the people, as opposed to an aristocracy or monarchy. If legislative bodies failed to remedy constitutional flaws or frustrated needed reforms, Article V enabled Americans to bypass these legislatures by holding conventions to propose and ratify new constitutional rules. Finally, Article VI prohibited religious leaders from formally establishing a favored position within the new federal government or from excluding adherents of other faiths from federal service.60

With respect to the state governments, delegates to the Constitutional Convention concluded that the autonomy currently enjoyed by the states prevented the United States from truly being united and being a viable country. The national government under the Articles of Confederation was so impotent that it was impossible to conduct an effective foreign policy, secure the nation’s defense or complete commercial treaties. Unlike Ieyasu, the systematic control of a powerful daimyō or state governor would not solve the problem faced in America. Under the Articles of Confederation the states truly were legally sovereign states. This had to change so that while states entered into the Constitution as sovereign entities, they would not


60Amar, America’s Constitution, 15-16.
remain so after ratification. The federal Constitution was now the supreme law of the land. Anti-Federalists who opposed ratification knew what was happening and argued at state ratifying conventions that this “more perfect union” destroyed the right of a state to be a sovereign and independent entity. One Maryland Anti-Federalist presciently warned that the nationalistic tone of the Constitution’s treason clause made a citizen’s allegiance to the United States greater than his allegiance to his home state in the event of armed conflict between the two. Federalists did not disagree with Anti-Federalists claims that states were no longer sovereign. However, Federalist reminded participants in the great debate over ratification that the states were the building blocks of the new country, that state legislatures would choose Senators and the methods by which members of the House were chosen, and that states could propose and ratify federal constitutional amendments.\textsuperscript{61}

Of course, delegates to the Constitutional Convention carefully submerged the ultimate contradiction to democracy in its final document. The final draft of the Constitution avoided mentioning slavery explicitly. It would be “wrong to admit in the Constitution,” James Madison explained, “the idea that there could be property in men.” The new supreme law of the land barred the federal government from taking any action against slavery in the states, counted slaves as three-fifths of full citizens for the purposes of representation in the House of Representatives and the Electoral College (as well as for direct taxation), guaranteed slaveholders the return of their runaway slaves and barred congressional interference with the transatlantic slave trade for twenty years. At the Revolution’s commencement, slavery had existed in all thirteen colonies, but by 1787, Massachusetts, Pennsylvania, Connecticut, and Rhode Island had undertaken formal emancipation. Despite such movement toward abolition, even in the northern states, as historian Ira Berlin succinctly notes, “the demise of slavery was a slow, tortuous process.”

\textsuperscript{61}Amar, America’s Constitution, 35.
to the legal machinations contained in laws conferring emancipation, by 1810, more than 27,000 slaves still lived in supposedly “free” states. Gradual emancipation laws in the largest slaveholding states in the North, New York and New Jersey, meant that many blacks remained in some form of legal servitude almost up the Civil War. Slavery in the South experienced increased brutality at the same time as receiving greater legal protection.62

**Conclusion**

Comparing the formation of these two disparate state systems reinforces the critical importance of legitimacy. No matter how legitimacy is achieved, whether through philosophical doctrines that support obedience to authority or directly seeking the consent of the governed, the ability of the elite to govern is implicitly dependent upon the consent of the governed.

A comparison of these two different eras also illustrates the importance of having a secular faith that can transcend religious and cultural differences. In Tokugawa Japan, Rule by Status, supported by Confucian doctrines perfectly meshed with the desire of Ieyasu and his successors to establish an ordered state. In America, Enlightenment-inspired notions of popular sovereignty inspired colonies to not only revolt against Great Britain but also cede some of their independence to a newly formed central government when their victory had been achieved. In Tokugawa Japan and post-colonial America, most people typically thought and acted with local interests in mind. Only a powerful secular faith—or principles embodied in “laws”—that did not offend local customs and norms could be respected, and the leaders of Tokugawa Japan and in post-Colonial America were fortunate to have one.

Finally, despite the supposed superiority of democratic government, it was the Tokugawa shogunate that recorded one of the most unique political achievements in modern times. For nearly three centuries shoguns and their surrogates preserved a nation safe from foreign aggression and war; maintained unified control within their own realm, without revolution, over a group of powerful principalities and daimyōs organized on a feudal military basis, and kept their citizens in a fair degree of prosperity and contentment while cultivating some of the finer arts of life. No European nation achieved near as much during such period.

Ironically for the United States, despite its republican beginnings, the fierce contradictions inherent in a progressively more democratic country maintaining an ever-more oppressive institution of slavery eventually made it impossible to solve the problem of slavery peaceably. The supposed “triumph” of democracy would nearly destroy the United States within three generations.
Bibliography

Primary Sources:


Primary Sources-Legal Documents and Court Cases:

*United States Constitution*

*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857)

Secondary Sources-Books:


Secondary Sources-Specific Chapters in Multi-Author Books:


Secondary Sources-Articles:


