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A Basic Introduction to Constitutional Free Exercise of Religion in the United States and Japan

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ABSTRACT. This article explores the free exercise of religion under the United States and Japanese Constitutions. The free exercise clause of the First Amendment of the United States Constitution and Article 20 of the Japanese Constitution are the key provisions. The article focuses on the question of mandatory exemptions to laws generally applicable laws. In other words, must government give exemptions based on religion to laws that apply the same to everyone, but create a burden on individuals with particular religious practices. The United States Supreme Court said the answer is "no" in Employment Division v. Smith. The Japanese Supreme Court suggested the answer is "yes" in Matsumodo v. Kobayashi. This article suggests that the Japanese Supreme Court better addressed what is necessary for the free exercise of religion, and provided better suggestions on how to achieve it than the United States Supreme Court.

Keywords: Free Exercise of Religion, U.S. Constitution, Japanese Constitution, First Amendment, and Article 20

Introduction

This article compares the constitutional protections afforded the free exercise of religion in the United States and Japan. The article focuses solely on the question of whether government entities are required to provide exemptions to generally applicable laws—that is, laws that apply on their face and purpose to everyone regardless of their religion. The article does not explore the question of intentional discrimination against and individual or individuals based on religion, as both constitutional systems protect against such discrimination, although there have been some notable exceptions in the jurisprudence and practices of both countries.

When evaluating the availability of mandatory exemptions to generally applicable laws the Japanese Supreme Court has actually provided broader protection than the United States Supreme Court. However, this comparison is complex because of the differences in the legal systems of the two countries and the specific holdings addressed below. Significantly, an underlying question may be raised as to whether greater religious heterogeneity is more or less likely to result in mandatory exemptions to generally applicable laws. Yet, in the end, it is hard to escape the conclusion that from the perspective of free exercise of religion for everyone, including religious minorities, the Japanese Supreme Court decision in *Matsumodo v. Kobayashi*,[1] is far more protective of free exercise by all than the United States Supreme Court's decision in *Employment Division v. Smith*.[2]

I. United States Free Exercise Jurisprudence and *Employment Division v. Smith*

In *Employment Division v. Smith*,[3] Native American employees of a drug rehabilitation center were fired, and subsequently denied unemployment benefits because they used peyote at a ritual service.[4] There was no evidence that these employees used peyote at any time other than the ritual services; in fact, their religion forbade use outside of ritual ceremonies.[5] They sued under the Free Exercise Clause of the First Amendment to the United States Constitution to receive unemployment benefits. In an opinion written by Justice Scalia, the Supreme Court held that the state need not create exemptions to laws of general applicability to accommodate religious practices.[6] The opinion noted that states remained free to create exemptions to laws that have an adverse impact on religious practices.[7]

The facts of the case are well documented.[8] As noted above, two members of the Native American Church were denied unemployment benefits after being fired from their jobs at a substance abuse rehabilitation center.[9] The employees were fired because they had chewed peyote, an illegal substance under Oregon law, during religious rituals.[10] Oregon law stated that being fired for misconduct—which is how the firing was characterized—recluses the receipt of unemployment benefits.[11] Neither individual abused peyote and there was no evidence that either had used peyote anywhere other than in religious ceremonies.[12] In fact, it would violate the tenets of the Native American Church to use peyote outside of appropriate religious rituals because the substance has significant religious import for members of the faith.[13] Oregon, unlike many states and the federal government, did not have a religious exemption for Native American peyote use under its general drug laws.[14] Thus, the Court had to decide whether the two men denied unemployment benefits had a

constitutional right to an exemption to the drug laws given the religious nature of their peyote use.[15] An exemption would have precluded the denial of unemployment benefits based on ritual peyote use.[16]

The backdrop of legal precedent seemed to favor the men, but that precedent—contrary to popular belief—was anything but clear or terribly helpful to religious minorities. The precedent many thought would be key to the decision was *Sherbert v. Verner*,[17] which held that a state must have a compelling governmental interest for denying unemployment benefits to a person who was fired for refusing to work on her Sabbath.[18] Relevant, but not decisive on my reading of the *Sherbert* opinion, was the fact that the state unemployment laws contained a number of exemptions for nonreligious reasons.[19]

Another decision, *Wisconsin v. Yoder*,20 was also potentially relevant. In *Yoder* the Court held that Amish families with high school age children were entitled to exemptions from the state's compulsory education laws in the absence of a compelling state interest.[21] The court looked at the Amish community's track record of good citizenship, hard work, and the success of its young people within the community to demonstrate that the state had no compelling interest for denying the exemption.[22]

Given this precedent most people believed that the battle lines in *Smith* would be drawn over whether the state had an adequate compelling governmental interest. In fact, Oregon's attorney general at that time later pointed out that the state never argued for disposing of the compelling interest test,[23] but rather argued that compliance with the state's drug laws satisfied the burden under that test, especially in light of post *Sherbert* and *Yoder* case law.[24] As will be seen, that subsequent case law suggested that *Sherbert* and *Yoder* were primarily paper tigers, at least in the United States Supreme Court.

Between *Yoder* and *Smith* the Court decided a string of free exercise exemption cases. With the exception of a few unemployment cases the person seeking the exemption never won.[25] In some cases the nature of the government institution, i.e. the military or prisons, served as a basis for not applying the compelling interest test.[26] In others, the relief requested was decisive in not applying the compelling interest test. For example, cases where the government entity involved would have had to change its policies to grant an exemption.[27] Finally, there were cases where the court ostensibly applied the compelling interest test, but in a manner that made it anything but strict scrutiny.[28] It should be noted, however, that *Sherbert* and *Yoder* did influence the outcomes of some lower court cases.[29]

The *Smith* Court relied on the post-*Yoder* decisions, as well as some pre-*herbert* decisions, to hold that *Sherbert* is limited to the unemployment context where there are generally a variety of exemptions built into the

unemployment laws.[30] Furthermore, the claim in *Smith* was different from earlier free exercise cases granting exemptions to unemployment laws because the claimants in *Smith* sought an exemption based on illegal conduct while the claimants in the earlier cases sought an exemption based on religious conduct that was otherwise legal.[31] *Yoder* was harder to distinguish, but the Court created the concept of "hybrid rights"—and I stress the word "created"—because the concept makes no legal sense as explained below. "Hybrid rights" cases are cases in which the Free Exercise Clause right is connected to some other important right (in *Yoder* parental rights).[32] This concept was used to distinguish several earlier cases that involved freedom of expression as well as free exercise concerns,[33] and to distinguish *Yoder*. Yet, to characterize *Yoder* as a hybrid rights case is patently disingenuous.

Moreover, the concept of "hybrid rights" makes no sense whatsoever. Is the Court saying that two inadequate constitutional rights combined can make an adequate one? If so, it would not be hard to hybridize almost anything into a viable constitutional right. Or are hybrid rights the combination of two adequate constitutional rights? This possibility is precluded by the *Smith* Court's reasoning because clearly the Free Exercise Clause right would be inadequate by itself in an exemption case under the *Smith* Court's reasoning.[34] This leaves two possibilities. First, the other constitutional right in the hybrid rights context would be adequate on its own and the Free Exercise Clause right is not, in which case why mention the Free Exercise Clause in exemption cases because it essentially serves no function other than being an anti-discrimination principle.[35] Second, and apparently accurate, hybrid rights are just a judicial creation to get around inconvenient precedent. The last possibility seems to be the obvious answer.[36]

The mischaracterization of *Yoder* would be more troubling if the traditional story of Free Exercise Clause jurisprudence were accurate, but the reality is that *Sherbert* and *Yoder* were never the panacea they have been made out to be.[37] The idea of a compelling interest test held a lot of promise, but in the hands of shifting majorities on the Court that promise was never realized; although it was sometimes realized in the lower courts.

Divorcing *Smith* from all the important baggage regarding *stare decises*, etc...., we are left with the basic notion that the Free Exercise Clause does not require exemptions to generally applicable laws. The argument seems to be that because these laws are religion neutral the Free Exercise Clause has no impact on them except through the political process.[38] This, of course, begs the question of whether such laws can ever be neutral given the vast array of religions and huge amount of government activity in the United States.[39]

One factor to consider in this regard is that the United States Supreme Court's initial struggles with the issue led to the development of a dichotomy between belief and practice. *Reynolds v. U.S.*,[40] is generally considered a major early precedent for this dichotomy. Essentially, the dichotomy suggests that belief must be protected in order to have religious freedom, but behavior/practice may be regulated (under generally applicable laws in the modern version) for the good of society.[41] This dichotomy was altered in the landmark case of *Sherbert v. Verner*,[42] and in turn this "great advancement" was undermined by the Court's decision in *Employment Division v. Smith.*[43]

This account of the evolution and subsequent devolution of free exercise rights is flawed. *Sherbert* was not the panacea that it has been made out to be, and *Smith* while seemingly altering legal doctrine, may simply be a recognition of what the Court was doing all along.[44] Religious minorities (especially non-Christian religious minorities) did not reap great benefits from *Sherbert*,[45] and *Smith* seems consistent both with pre-*Sherbert* cases such as *Braunfeld v. Brown*[46] and with post-*Sherbert* cases such as *Goldman v. Weinberger*,[47] *Bowen v. Roy*,[48] and *Lyng v. Northwest Indian Cemetery Protective Association.*[49]

Thus, if *Smith* is a flawed decision—and this article asserts that it is—the flaw seems inherent in U.S. Free Exercise Clause analysis generally. In this view, *Smith* is simply an explicitstatement of what has been going on all along, and the infatuation with *Sherbert* and its progeny has served to obfuscate that fact.

As discussed above, the Supreme Court's analysis of laws of general applicability in *Smith*,[50] and most of the cases that preceded it is based in the assumption that a "law of general applicability" in the free exercise context is really generally applicable.[51] In the end, the Court's approach in *Smith* was predetermined—at least in part—by its acceptance of this baseline, notably without discussion. If the baseline is questionable, the Court's failure to address it is potentially more problematic than the mental gymnastics it used to reinterpret *Sherbert* and *Yoder.*

The belief/practice dichotomy and the notion of "laws of general applicability" make perfect sense to many people. After all, if every religious faith or denomination were accommodated many laws would not apply in the same way to everyone, and might be harder to enforce.[52] This may be so, but the assertion contains an implicit weighing of values. In this weighing, the value assigned to application of generally applicable laws to all citizens outweighs the free exercise interests of religious minorities, who are less likely than dominant faiths to receive exemptions through the legislative process that gave rise to the "generally applicable" law.[53] Thus, while the dominant tradition and values are projected both into the

legislative process and the judicial evaluation of the product of that process in the free exercise context, minority traditions and values are less likely to be considered or reflected in the legislative process, and are outweighed by the interest in "general applicability" in the judicial process.

Under these circumstances there would appear to be a great imbalance in the social reality of Free Exercise rights for members of practice centered minority faiths and members of more dominant faiths. This is troubling because it would seem to run counter to First Amendment doctrine, specifically the counter-majoritarian implications and tradition of the First Amendment; yet it should have been expected because many judges are not equipped to understand the impact on a religious minority of an imposition on religious practice.

For practice oriented religions, such as Judaism, the Native American Church, or Seventh Day Adventism, rules of general applicability can have a profound impact, and exemptions would be harder to come by in many areas, at least prospectively. *Goldman v. Weinberger* provides a post-*Sherbert*, but pre-*Smith*, example of this.[54] Consider also the example of Sunday closing laws.[55] These closing laws could be devastating to an Orthodox Jew's or Seventh Day Adventist's livelihood. She must close her store from Friday afternoon until sundown Saturday, thus causing the store to be closed during the best sales period of the week (excluding Sunday). These laws of "general applicability" are only general if one buys into a particular baseline, that is, that they apply to everyone the same way. Yet this baseline is open to question. No *mainstream* Christian business[56] will face the same impact for religious reasons as the Jewish or Seventh Day Adventist business, because the supposedly neutral law reflects the prevailing Christian norm.[57] Interestingly, even if that norm has shifted to a more secular norm since the situation that gave rise to the Sunday closing cases in the early 1960's, the new norm may be equally unhelpful to religious minorities.

The belief/practice dichotomy reflected in *Smith* strips the Free Exercise Clause, at least as it relates to practice oriented religions, of one of its most useful purposes—accommodating religious practices when government action threatens to directly or indirectly penalize those who engage in such practices.[58] The dominant/majority religious community will generally be protected because its beliefs will be understood, and perhaps empathized with, but for religious minorities quite the opposite might be true.[59] The *Smith* Court advocated a majoritarian approach, since it will most often be religious minorities[60] who need to seek exemptions to generally applicable laws, and it is precisely those same minorities who might have the hardest time getting such exemptions enacted.

II. The Japanese Constitution and Free Exercise of Religion and *Matsumodo v. Kobayashi*[61]

Given the above discussion one might expect that the Japanese courts would view Free Exercise in the same way Justice Scalia did writing for the majority in *Smith.* After all, social norms,[62] uniformity in rule applicability,[63] and viewing one's role in light of cultural expectations are strong[64]—although certainly not universal—norms in Japan. Individuality in Japan often takes a back seat to cultural expectations, at least in the public sphere.[65]

Moreover, views on religion in Japan are generally inclusive and/or secular.[66] This means that the Japanese generally do not think it necessary to subscribe to only one faith or to any faith at all.[67] Many Japanese follow Buddhist and Shinto rituals, and some of these people may also entertain theistic notions as well—in the sense that they believe there is some greater force out there, but do not see the need to define it along sectarian or definite lines.[68] Under this view religious requirements may be perceived as somewhat flexible, even as they are respected.[69] Additionally, many Japanese are atheist or agnostic.[70]

Despite the issues of ethnic discrimination that Japan has struggled with,[71] religious intolerance is less of an issue in Japan.[72] The one religious trait that many Japanese people do find troubling is proselytization. It is viewed as intolerant to try to change other people because there is only one way to be saved, etc...[73] This is highly relevant given the faith of the plaintiff in the leading Japanese religious exemption case discussed below.

Japanese perceptions of cultural uniformity, and a somewhat flexible view about religious duties, would seem to create a great likelihood that religious exemptions to generally applicable laws would not be ordered by Japanese courts. Of course, one might argue that Japanese culture's general religious tolerance might point toward granting religious exemptions, but the U.S. is supposedly a land of religious tolerance and that did not keep Justice Scalia and the *Smith* majority from fearing that mandatory exemptions would potentially make each person a law unto himself or herself.[74] Every one being a law unto himself or herself would be particularly troubling in Japan where individuality tends to bend to cultural expectation in the public sphere.

Yet, the Japanese Supreme Court when faced with such a case engaged in reasoning that is virtually the opposite of that in *Smith.*[75] In *Matsumodo v. Kobayashi,*[76] often referred to as the "Kobe Technical College" case, because that college was the defendant in the suit,[77] a petty bench of the Japanese Supreme Court[78] required the college to accommodate a Jehovah's Witness who would not engage in Kendo,[79] one of the college's physical

education requirements.[80] The Court reasoned that for everyone to have free exercise of religion as expressed in the Japanese Constitution, accommodations are appropriate because for some people a seemingly neutral law can interfere with freedom of religion.[81] The court held that such accommodations must be balanced against the interests of others and society,[82] but that the government must have a very good reason to infringe on the interests of the religious individual.[83] The court also explained that such accommodations are a way to prevent a negative impact on the religious person created by the law.[84] Most importantly, to the extent that an accommodation allows the religious person to avoid a requirement or hardship the government may require an equally demanding alternative.[85]

This reasoning demonstrates two inherent flaws in the reasoning of the United States Supreme Court in *Smith*. First, the idea that the "general applicability" of "laws of general applicability" should be determined without regard to the impact they have on religious people. Second, that mandatory exemption creates some sort of windfall for the exempted individual rather than equalizing things (or doing so once government imposes an alternative requirement).

It is important to note that the Japanese Supreme Court ordered an exemption in the case before it,[86] and held that such an exemption does not create an establishment of religion,[87] but the court did not hold that exemptions are always mandated since that issue was not before the court.[88] This has to do with Japanese legal approaches and the nature of the claim. In Japan, the Supreme court can decide the issue before it, but to avoid a case by case approach the legislature must pass a law, which assuming it is constitutional, would make the norm applicable nationwide (or within the territory of local legislatures that pass such laws).[89] Still, the test the Court used demonstrates that exemptions are appropriate under the Japanese Constitution when a general law interferes with religious practices, subject to the balancing of interests.[90] In fact, since the case was decided there have been laws passed that require accommodation and Japanese courts have upheld those laws.

Given the U.S. Supreme Court's nearly consistent failure to recognize free exercise exemptions going back more than a century how is it that the Japanese Supreme Court so clearly saw what a majority of the U.S. Supreme Court has often failed to see? That is, religious exemptions need not interfere with orderly society and exemptions are not windfalls, but rather may be a way to equalize the burdens imposed by laws that may have considered the majority's social and religious norms, but not lesser known religious norms. I will make a controversial assertion here, namely, the reason is that the U.S. Supreme Court is more effected by dualistic Western and Christian norms, even if only as a matter of cultural traditions, and—

and this is the most controversial part—the *Smith*, *Braunfeld*, *Reynolds*, etc... majorities—were unable or unwilling to reflect adequately to see beyond their dualistic views of the world. This is clear from the reasoning in those cases as opposed to the holdings, as it would be possible to adequately reflect and still come to the same conclusions those courts did, but not with the same reasoning those Court's used. Lest there be any doubt, I *am* suggesting that the *Smith*, *Goldman*, *Lyng*, *Braunfeld*, *Reynolds*, *Davis*, etc.... Courts simply engaged in reflexive analysis of the underlying issues and thus the answers in those cases were predetermined, even if in a case like *Smith* that required logical gymnastics in light of precedent.

None of this says anything about how those Courts should have ruled on the issue. Rather, it suggests that those Courts never seriously considered the central issues of the relationship between belief and practice in many religions, nor did those Courts consider the core issue of what it means to say that a law is "generally applicable" in the free exercise context. The Japanese Supreme Court, however, seemed aware of both of these issues.[91] The Japanese Court did not share many of the religious and cultural presuppositions of a heavily Christianized AND secularized society, yet it did at least potentially share those of a highly secularized society.[92]

Does this mean that there is no escape from the sort of reasoning we have seen in numerous U.S. Supreme Court free exercise decisions? No. The Japanese Court may not have shared the same cultural predispositions as the U.S. Court, but still the cultural predispositions of the Japanese Supreme Court would have seemed equally likely to lead to the same result as that in *Smith* and its predecessors. Yet it didn't. From a legal reasoning standpoint this is because the Japanese Court considered what it means to call a law what the U.S. Court labeled "generally applicable" in the free exercise context and because it seems to have considered the seriousness of religious practice.[93]

Another factor some might point to is that the Japanese Court used a balancing approach, whereas Justice Scalia and several Justices in the *Smith* majority tend toward formalism.[94] This, however, explains little. First several of the Courts in pre-*Smith* decisions tended more toward balancing than formalism and yet used formalistic approaches that are at least consistent with *Smith*. Moreover, the Japanese Supreme Court often prefers formalism to balancing approaches.

Moreover, the Japanese Supreme Court also provided a solution to the *Smith* majority's concern about a flood of exemption claims were exemptions to be mandated. The Japanese Supreme Court noted that it was acceptable for a government entity granting an exemption to mandate the person seeking an exemption meet an alternative requirement which does not burden his or her religious free exercise.[95] The plaintiff in *Matsumodo v.*

Kobayashi had proposed several such alternatives and the court noted this.[96] Yet, the U.S. Supreme Court never even considered this possibility in *Smith.*

Conclusion

This article has suggested that the *Smith* decision reflects embedded western, Christocentric and secular centric cultural predispositions. Sadly, the *Smith* Court could have engaged in more reflective analysis (and might have ruled the same way or the opposite way on the ultimate issue in that case based on this more reflective analysis). In fact, the Japanese Supreme Court demonstrated in *Matsumodo v. Kobayashi*, that it is possible for a court to reflect carefully on what the free exercise of religion means even in the face of contrary culturally embedded preconceptions.

NOTE

This article is adapted from Frank S. Ravitch, *The Unbearable Lightness of Free Exercise under Smith: Exemptions, Dasein and the More Nuanced Approach of the Japanese Supreme Court*, 44 TEXAS TECH. L. REV. (forthcoming 2012) (symposium) and Frank S. Ravitch, *Free Exercise in the United States and Japan*, DOSHISHA L. REV. (forthcoming 2012 (symposium honoring Professor Taisuke Kamata).

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2. 494 U.S. 872 (1990).
3. 494 U.S. 872 (1990).
4. *Id.*
5. Epps, Garrett (2001), *To an Unknown God: Religious Freedom On Trial*, St. Martin's Press, 60-62.
6. *Smith*, 494 U.S. 872.
7. *See* EPPS, *supra* note 5 (providing detailed discussion of the factual background leading to the *Smith* case).
8. *Id.* (providing excellent discussion of the underlying facts and setting forth some possible liberties taken by the *Smith* majority with the facts).
9. *Smith*, 494 U.S. at 874.
10. *Id.*
11. *Id.*
12. *See* Respondents' Brief at 1-5, Employment Div. v. Smith, 485 U.S. 660 (1988) (Nos. 86-946, 86-947), 1987 WL 880316; Garrett Epps, *To An Unknown God: The Hidden History of Employment* Division v. Smith, 30 ARIZ. ST. L.J. 953, 962-63, 981-85 (1998).

13. Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 583 (1998) ("An uncontroverted part of the record was the relentless opposition by the peyote religion to the use of peyote outside the ritual context, and to the use of other drugs and alcohol for any reason whatsoever."); *see also* Employment Div. v. Smith, 494 U.S. 872, 913-16 (1990) (Blackmun, J., dissenting).

14. *See generally Smith*, 494 U.S. 872.

15. *Id.*

16. *Id.*

17. 373 U.S. 398 (1963).

18. *Id.*

19. *Id.* at 406; *see also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 50 (1990) ("The other point in the Court's explanation of its unemployment compensation cases is secular exemptions. If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons. . . . In general, the allowance of any exemption is substantial evidence that religious exemptions would not threaten the statutory scheme.").

20. 406 U.S. 205 (1972).

21. *Id.*

22. *Id.* at 209-12, 216-18, 222-27, 235-36.

23. *See* Brief for Petitioners, Employment Div. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126846; Garrett Epps, *To An Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST.

L.J. 953, 990, 1010-15 (1998). This was also confirmed in a conversation I had with former Oregon Attorney General Dave Frohnmayer in Kyoto Japan in 2001, when we both spoke at a forum addressing the free exercise of religion at Doshisha University where Frohnmayer was speaking as the President of the University of Oregon and I was a Fulbright Scholar at the Faculty of Law at Doshisha University.

24. *Id.*

25. In fact, no non-Christian has ever won a Free Exercise Clause exemption case before the United States Supreme Court and even most Christians have lost such cases. Mark Tushnet, *"Of Church and State and the Supreme Court:" Kurland Revisited*, 1989 S. CT. REV. 373, 381 (1989).

26. *See, e.g.* Goldman v. Weinberger, 475 U.S. 503 (1986) (military setting); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (prison setting).

27. Bowen v. Roy, 476 U.S. 693 (1986).

28. United States v. Lee, 455 U.S. 252 (1982).

29. Lower court cases went both ways after *Sherbert* and *Yoder*, and while many denied the claimant's exemptions, a number did not. *See, e.g.*, Dayton Christian Schs., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985) (school's free exercise rights violated by application of civil rights laws); McCurry v. Tesch, 738 F.2d 271 (8th Cir. 1984) (enforcement of state order against operation of church school in violation of state law infringed church's free exercise rights); *Warner v. Graham*, 675 F. Supp. 1171 (D.N.D. 1987) (Free Exercise Clause violated where plaintiff lost her job because of sacramental peyote use); United States v. Lewis, 638 F. Supp. 573 (W.D. Mich. 1986) (rule requiring government to consent to waiver of

a jury trial violated defendants' free exercise rights); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) (Bald Eagle Protection Act violated defendant's free exercise rights); Equal Employment Opportunity Comm'n v. Fremont Christian Sch., 609 F. Supp. 344 (N.D. Calif. 1984) (same); Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (regulations interfering with congregation's operation of its nursery school violated free exercise rights); Chapman v. Pickett, 491 F. Supp. 967 (C.D. Ill. 1980) (free exercise rights of Black Muslim prisoner were violated by his punishment for refusal to follow order to handle pork); Geller v. Sec'y of Def., 423 F. Supp. 16 (D.D.C. 1976) (regulation denying Jewish chaplain right to wear facial hair violated his free exercise rights); Lincoln v. True, 408 F. Supp. 22 (W.D. Ky. 1975) (denial of unemployment compensation to claimant who terminated employment for religious reasons infringed her free exercise rights); Am. Friends Serv. Comm. v. United States, 368 F. Supp. 1176 (E.D. Pa. 1973) (tax withholding statute violates plaintiffs' free exercise rights); Nicholson v. Bd of Comm'rs, 338 F. Supp. 48 (N.D. Ala. 1972) (statutory oath required of applicant for admission to state bar infringed on applicant's free exercise rights).

30. *Smith*, 494 U.S. at 883-84.

31. *Id.* at 874-75, 878.

32. *Id.* at 881-82.

33. *Id.*

34. *See generally, Id.*

35. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Of course, such an antidiscrimination principle could be covered under the Equal Protection Clause and perhaps the Establishment Clause, which raises the question of whether the Free Exercise Clause serves any function under the *Smith* Court's reasoning other than in unemployment cases.

36. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U.Chi. L. Rev. 1109, 1121 (1990); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court Centrism*, 1993 BYU L. Rev. 259, 267 (1993); Maxine Eichner, *Who Should Control Children's education?: Parents, Children, and the State*, 75 U. Cin. L. Rev. 1339, 1384 (2007).

37. FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 98-99 (1995); John Thomas Bannon, Jr., *The Legality of the Religious Use of Peyote By the Native American Church: A Commentary on the Free Exercise, Equal Protection, and Establishment Issues Raised by the* Peyote Way Church of God *Case*, 22 AM. INDIAN L. REV. 475, 484 (1998); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 446-47 (1994); Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 16 (1996); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 385 n.101 (1994); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO.WASH. L. REV. 230, 237 (1993); Robert W. Tuttle, *How Firm A Foundation? Protecting the Religious Land Uses After* Boerne, 68 GEO.WASH. L. REV. 861, 871-72 (2000).

38. *See generally, Smith*, 494 U.S. 872.

39. Frank S. Ravitch, (2007), Masters Of Illusion: The Supreme Court and The Religion Clauses. NYU Press.

40. 98 U.S. 145 (1879).

41. *See Generally*, *Smith*, 494 U.S. 872; *Reynolds*, 98 U.S. 145. There is, however, a strong argument that the law at issue in *Reynolds* was designed as a mechanism to discriminate against an unpopular religious minority.

See Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. UNIV. L. REV. 691 (2001).

42. 374 U.S. 398 (1963).

43. 494 U.S. 872 (1990).

44. William P. Marshall, *What if the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L. J. 193, 195-196 (2000)(acknowledging that

Smith was not a major shift from the results of earlier post-*Sherbert* cases even if it was a major shift in doctrine).

45. Feldman, (1997), *Please Don't Wish Me A Merry Christmas*: *A Critical History Of Separation of Church and State*, NYU Press, 218-254.

46. 366 U.S. 599 (1961).

47. 475 U.S. 503 (1986).

48. 476 U.S. 693 (1986).

49. 485 U.S. 439 (1988).

50. 494 U.S. 872 (1990).

51. It seems obvious that laws which sanction religious practitioners for practicing their religion are not generally applicable if one views the issue from the perspective of whether such laws are generally applicable in regard to religious practice, rather than generally applicable without regard to specific impacts on religious practice as the *Smith* Court viewed the concept. This is a complex issue that has been the subject of a great deal of scholarship. Some have suggested that this view of the Free Exercise Clause is a function of majority dominance. *See* Feldman, *Supra.* note 45; Verna C. Sanchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HAST.WOMEN'S L. J. 31 (1997).

52. This essentially the position taken by Justice Scalia in *Smith*, 494 U.S. 872.

53. The Smith Court specifically noted that the political process is the key to exemptions and may have a negative impact on religious minorities, but viewed such an impact as an inevitable aspect of the political process.

Smith, 494 U.S. 872; Feldman, *supra* note 45.

54. *See, e.g. Goldman*, 475 U.S. 503.

55. Sunday closing laws were upheld by the U.S. Supreme Court in McGowan v. Maryland, 366 U.S. 420 (1961)(Establishment Clause challenge), and *Braunfeld*, 366 U.S. 296 (Free Exercise Clause challenge).

56 The term "mainstream" is key here, given that several smaller Christian denominations, such as the and the Worldwide Church of God, may face similar challenges because they observe the Sabbath on Friday night and Saturday, and/or also have prohibitions on working during the Sabbath.

57. Feldman, PLEASE DON'T WISH ME AMERRY CHRISTMAS, *Supra.* note 45.

58. Of course, if there is proof of an intent to discriminate against a religious exercise, religious individual, or denomination, the Free Exercise Clause is still useful. *See, e.g.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Significantly, the Free Exercise Clause is concerned with government interference with religious freedom, and such interference is possible with or without the *mens rea* apparently necessary to successfully invoke the Clause under *Lukumi Babalu Aye.*

59. *See e.g.*, Frank S. Ravitch, (1999), *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters*, Northeastern Univ. Press; Feldman, *Supra.* note 45.

60. In this context the religious majority need not be only one sect or denomination. There are few places in the United States where a specific sect makes up a statistical majority of the population. Yet an overwhelming majority of the population may identify with a faith oriented religious view, even if through a variety of denominations. After all, a majority of the religiously identifying population in the United States are Protestant, and mostly from faith oriented denominations. Although, some practice oriented sects, such as the Seventh Day Adventists, have experienced growth.

61. 50 Minshu 469 (Sup. Ct., March 8, 1996) (petty bench).

62. Sandra Buckley, (2002), *Encyclopedia of Contemporary Japanese Culture.* 1st ed, Routledge, 212 (The Japanese "relational model of identity . . . [defines self as] a continuum of relations from self to family to group to nation").

63. *Id.* (Japanese culture broadly values uniformity in many respects, such that individualized approaches to relationships are often "treated as a [corruption] . . . of an essential characteristic of the formation of Japanese identity').

64. Nancy R. Rosenberger, (1992), *Japanese Sense of Self.* 1st ed, Cambridge University Press, 4 (The meaning of the Japanese word for self, "'Jibun' . . . [literally refers to] a part of a larger whole that consists of groups and relationships," implying that the individual is neither physically nor temporally separate from the larger social world).

65. Rokuo Okada, (1955), *Japanese Proverbs And Proverbial Phrases.* 1st ed Japan Travel Bureau, 61 (A common Japanese expression, "The nail that sticks out gets hammered down," speaks to a moiré that warns against prioritizing one's own desires over group cohesion). This norm is reflected in many aspects of Japanese society.

66. William S. Pfeiffer, (2010), *Cults, Christians, and Confucius: Religious Diversity in Japan.* Japan Studies Ass'n J. 132, 134 (2010) (Japanese culture places a higher value upon "the practical benefits of faith and ritual" than it does upon adherence to a specific belief system)

67. *Id.* at 135 (The Japanese "often belong to or practice several different religions simultaneously, each of which satisfies different purposes and addresses different parts of their life...").

68. *Id.*

69. *Id.* (Analogizing the mainstream Japanese perspective on religion to restaurant dining preferences, "an apt metaphor might be a restaurant buffet, which

they prefer over a set menu . . . [Many] Japanese draw from diverse faiths and belief systems depending on the time of life and situation").

70. N.J. Demerath, *Crossing the Gods: World Religions and Worldly Politics* 138 (Rutgers University Press, 1st ed. 2003) ("64% of the Japanese population does not believe in a God'").

71. Chris Hogg, Japan Racism "Deep and Profound," BBC News, July 11, 2005, http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/4671687.stm (U.N. analyst expresses concern regarding discrimination against some ethnic minorities in Japan).

72. S. Comm. On Foreign Relations, 108th Cong., *Annual Report On International Religious Freedom 2004* 195 (Joint Comm. Print 2004) (There exists a "generally amicable relationship among religions in [Japanese] society").

73. Robert J. Kisala &Mark R.Mullins, (2001), *Religion and Social Crisis In Japan*: *Understanding Japanese Society Through The Aum Affair*. 1st edition. Palgrave, 8 ("Proselytization activities" are not generally well-received by the Japanese people).

74. *Smith*, 494 U.S. 872.

75. *Compare Kobayashi*, 50 Minshu 469, *with Smith*, 494 U.S. 872.

76. 50 Minshu 469 (Sup. Ct., March 8, 1996) (petty bench).

77. *Id.*

78. Supreme Court of Japan website, http://www.courts.go.jp/english/system/system.html#02 (visited June

27, 2011) (explaining jurisdiction of the Japanese Supreme Court and Court structure including petty benches and the grand bench).

79. *Kobayashi*, 50 Minchu 469; *see also* Takahata, *supra* note 117 at 742-45 (excellent discussion of the case in English).

80. *Id.* at 473-75.

81. *Id.* at 476-79.

82. *Id.* at 473-79.

83. *Id.* at 476-77.

84. *Id.* at 473-80.

85. *Id.* at 479.

86. Takahata *supra* note 117, at 742-45.

87. *Id.*

88. *Id.*

89. Hiroshi Oda, (2009), *Japanese Law*. 3rd Ed. Oxford Univ. Press.

90. *Kobayashi*, 50 Minchu 469.

91. *Kobayashi*, 50 Minchu 469.

92. N.J. Demerath, *Crossing the Gods: World Religions and Worldly Politics* 138 (Rutgers University Press, 1st ed. 2003) (64% of the Japanese population does not believe in a deity).

93. *Kobayashi*, 50 Minchu 469.

94. *Compare Id, with Smith*, 494 U.S. 872; *see also* RAVITCH, *supra* note 39 at 32-34 (explaining that the Smith Court relied on "formal neutrality").

95. *Kobayashi*, 50 Minchu 469, 479.

96. *Id.*