THE UNBEARABLE LIGHTNESS OF FREE EXERCISE UNDER *SMITH*: EXEMPTIONS, DASEIN, AND THE MORE NUANCED APPROACH OF THE JAPANESE SUPREME COURT

Frank S. Ravitch[*]

I. INTRODUCTION

This Article suggests that the *Employment Division v. Smith* decision was predictable.[1] *Smith* is an intellectually uninquisitive and reflexive decision that reinforces embedded cultural notions about religion and religious exemptions. It is more an example of what Justice Cardozo would have considered unreflective judging than it is an example of bias against religious minorities or exemptions, as has often been suggested.[2] In fact, it would have been possible for the *Smith* Court to come to the same conclusion in a more reflective and open fashion, but that would have required the Court to grapple with uncomfortable embedded cultural notions about "general applicability" and about religious practices.

---

* Professor of Law and Walter H. Stowers Chair in Law and Religion, Director of the Kyoto, Japan Summer Abroad Program, Michigan State University College of Law. The author would like to thank Jesse Choper, Arnold Loewy, Bill Marshall, William Van Alstyne, and John Taylor for participating in the panel at the 2011 Criminal Law Symposium: *Criminal Law & the First Amendment* at Texas Tech University School of Law on April 8, 2011, which gave rise to this Article, and for their stimulating and interesting comments and papers. He would also like to thank Dean Akira Morita and the Doshisha University Law School in Kyoto, Japan, without whose facilities and kindness parts of this Article would have been significantly harder to research. As always, he would like to thank Dean Joan Howarth and his colleagues at MSU College of Law, who give the best research support any researcher could hope for as well as the stimulating intellectual environment to write. Finally, the author would like to thank his research assistants Philip Berens, Heather Snider, Elena Rozdowski, Jonathon Warner, and Jim Zeihmer for their work researching this project.

1. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) [hereinafter Emp't Div. v. Smith], *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

2. *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167-68 (22d prtg 1964) (1921).

The *Smith* majority seemed unequipped to do so. This is demonstrated by its failure to seriously grapple with precedent such as *Sherbert v. Verner* and *Wisconsin v. Yoder*, which would have required it to ask some of the uncomfortable questions it did not address.[3] As this Article suggests, *Sherbert* and *Yoder* were never the panacea they have been made out to be because various majorities of the Court, both before and after those cases, shared the *Smith* Court's embedded horizons on those issues. There is, however, an example of a court that overcame other culturally embedded horizons on religion and legal/cultural uniformity. That court confronted some of the questions the *Smith* Court simply presumed the answers to and created a much more interesting legal approach. The Japanese Supreme Court in *Matsumoto v. Kobayashi*, a case discussed in detail later in this Article, provides this example.[4]

II. A BRIEF INTRODUCTION TO FREE EXERCISE JURISPRUDENCE AND *EMPLOYMENT DIVISION V. SMITH*

Most readers of this Article and attendees of its preceding symposium are already familiar with Free Exercise Clause jurisprudence and the role of *Employment Division v. Smith* in that jurisprudence. This section provides a brief introduction to Free Exercise Clause jurisprudence and to *Smith*, for those who are not familiar with this fascinating area of law. This section also provides a focus on some of the issues raised in *Smith* that are addressed later in the Article.

In *Smith*, Native American employees of a drug rehabilitation center were fired and subsequently denied unemployment benefits because they used peyote at a ritual service.[5] There was no evidence that these employees used peyote at any time other than in the ritual services; in fact, their religion forbade use of the substance outside of ritual ceremonies.[6] The employees sued under the Free Exercise Clause to recover their unemployment benefits.[7] 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.[8] The opinion noted, however, that states remained free to create exemptions to laws that have an adverse impact on religious practices.[9]

---

3. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

4. *See* Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan); *infra* Part IV.

5. *Smith*, 494 U.S. at 874.

6. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 62 (2001).

7. *Smith*, 494 U.S. at 874.

8. *Id.* at 885.

9. *Id.* at 892.

The facts of the case are well documented.[10] 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.[11] The employees were fired because they had chewed peyote, an illegal substance under Oregon law, during religious rituals.[12] Oregon law stated that being fired for misconduct—which is how the firing was characterized—precludes the receipt of unemployment benefits.[13] Neither individual abused peyote and there was no evidence that either had used peyote anywhere other than in religious ceremonies.[14] 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.[15] Oregon, unlike many states and the Federal Government, did not have a religious exemption for Native American peyote use under its general drug laws.[16] 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.[17] An exemption would have precluded the denial of unemployment benefits based on ritual peyote use.[18]

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*, 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.[19] Relevant, but not a deciding factor in the *Sherbert* opinion, was the fact that the state unemployment laws contained a number of exemptions for nonreligious reasons.[20]

---

10. *See generally* EPPS, *supra* note 6 (providing an excellent discussion of the underlying facts and setting forth some possible liberties taken by the *Smith* majority with the facts).

11. *Smith*, 494 U.S. at 874.

12. *Id.*

13. *Id.*

14. *See* Respondents' Brief at 1-5, Emp't Div. v. Smith, 485 U.S. 660 (1988) (Nos. 86-946, 86-947), 1987 WL 880316 at *1-5; 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).

15. 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* Emp't Div. v. Smith, 494 U.S. 872, 913-14 (1990) (Blackmun, J., dissenting).

16. *See Smith*, 494 U.S. at 890 (noting that several states, including Arizona, Colorado, and New Mexico, have made exceptions for religious use of peyote).

17. *Id.* at 874.

18. *Id.*

19. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

20. *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.").

Another decision, *Wisconsin v. Yoder*, was also relevant.[21] 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 for the laws.[22] 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.[23] There have been some serious criticisms of the Court's approach in *Yoder*,[24] but for present purposes this basic overview of the Court's holding is adequate.

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.[25] In fact, Oregon's attorney general at that time later pointed out that the State never argued for disposing of the compelling interest test.[26] Rather, the State 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.[27] 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.[28] With the exception of a few unemployment cases, the person seeking the exemption never won.[29] In some cases, the nature of the government institution, i.e., the military or prisons, served as a basis for not

---

21. Wisconsin v. Yoder, 406 U.S. 205 (1972).

22. *Id.* at 235-36.

23. *Id.* at 222-27, 234-36.

24. *See id.* at 241-42 (Douglas, J., dissenting); Richard J. Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of* Wisconsin v. Yoder, *in* 38 POLITICAL ORDER 365, 365-68 (Ian Shapiro & Russell Hardin eds., 1996); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 252-56 (2003) (noting that *Yoder* "illustrates the importance of Christianity for a successful free exercise exemption claim"); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 563 n.17 (1991).

25. Epps, *supra* note 14, at 992; *id.* at 1015 ("[A]ll the parties were shocked at how the Court had decided [*Smith*]. Most observers, both at the time and later, have concluded that . . . the Court rewrote the entire jurisprudence of the Free Exercise Clause . . . ."); *see also id.* at 956-57 nn.11-12 (citing many legal and journalistic commentators criticizing *Smith* soon after it was decided).

26. *See* Brief for Petitioners, Emp't Div. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126846 at *11-16; Epps, *supra* note 14, at 990, 1012-15. This statement 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.

27. *See* Brief for Petitioners, *supra* note 26, at *11-16; Epps, *supra* note 14, at 990, 1012-15.

28. *See Smith*, 494 U.S. at 883-84.

29. *See id.* 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. *See* Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 381 (1989).

applying the compelling interest test.[30] In others, the relief requested was decisive in not applying the compelling interest test—for example, cases in which the government entity involved would have had to change its policies to grant an exemption.[31] Finally, there were cases in which the Court ostensibly applied the compelling interest test but in a manner that made it anything but strict scrutiny.[32] It should be noted, however, that *Sherbert* and *Yoder* did influence the outcomes of some lower court cases.[33]

The *Smith* Court relied on the post-*Yoder* decisions, as well as some pre-*Sherbert* decisions, to hold that *Sherbert* is limited to the unemployment context, in which there are generally a variety of exemptions built into the unemployment laws.[34] Furthermore, the claim in *Smith* was different from earlier free exercise cases granting exemptions to unemployment laws.[35] The claimants in *Smith* sought exemptions based on illegal conduct, while the claimants in the earlier cases sought exemptions based on religious conduct that was otherwise legal.[36] *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.[37] Hybrid-rights cases are

---

30. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-50 (1987) (applying a test other than the compelling interest test to a prison setting); Goldman v. Weinberger, 475 U.S. 503, 507-11 (1986) (declining to apply the compelling interest test to a military setting).

31. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 706-11 (1986).

32. *See, e.g.*, United States v. Lee, 455 U.S. 252, 260-62 (1982).

33. *See, e.g.*, Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 949-55 (6th Cir. 1985) (holding that the school's free exercise rights were violated by application of civil rights laws), *rev'd on other grounds*, 477 U.S. 619 (1986); McCurry v. Tesch, 738 F.2d 271, 275-77 (8th Cir. 1984) (enforcing a state order against operation of a church school in violation of state law infringed the church's free exercise rights); Warner v. Graham, 675 F. Supp. 1171, 1177-81 (D.N.D. 1987) (holding that the Free Exercise Clause was violated when plaintiff lost her job because of sacramental peyote use), *rev'd*, 845 F.2d 179 (8th Cir. 1988); United States v. Lewis, 638 F. Supp. 573, 577-81 (W.D. Mich. 1986) (holding that a rule requiring the government to consent to waiver of a jury trial violated defendants' free exercise rights); United States v. Abeyta, 632 F. Supp. 1301, 1307-08 (D.N.M. 1986) (discussing that the Bald Eagle Protection Act violated defendant's free exercise rights); EEOC v. Fremont Christian Sch., 609 F. Supp. 344, 346-49 (N.D. Cal. 1984) (holding that the school could not use the Free Exercise Clause to defend its benefits policy), *aff'd*, 781 F.2d 1362 (9th Cir. 1986); Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655, 658-63 (S.D.N.Y. 1984) (holding that regulations interfering with a congregation's operation of its nursery school violated the Free Exercise Clause); Chapman v. Pickett, 491 F. Supp. 967, 971 & n.1, 972 (C.D. Ill. 1980) (explaining that the free exercise rights of a Black Muslim prisoner were violated by his punishment for refusal to follow order to handle pork), *vacated*, 484 U.S. 807 (1987); Geller v. Sec'y of Def., 423 F. Supp. 16, 17-18 (D.D.C. 1976) (holding that a regulation denying a Jewish chaplain his right to wear facial hair violated his free exercise rights); Lincoln v. True, 408 F. Supp. 22, 23-24 (W.D. Ky. 1975) (discussing that the denial of unemployment compensation to claimant whose employment was terminated for religious reasons infringed her free exercise rights); Am. Friends Serv. Comm. v. United States, 368 F. Supp. 1176, 1182-85 (E.D. Pa. 1973) (holding that a tax-withholding statute violates plaintiffs' free exercise rights), *rev'd*, 419 U.S. 7 (1974); Nicholson v. Bd. of Comm'rs of Ala. State Bar Ass'n, 338 F. Supp. 48, 57-59 (M.D. Ala. 1972) (explaining that the statutory oath required of applicant for admission to state bar infringed on applicant's free exercise rights).

34. Emp't Div. v. Smith, 494 U.S. 872, 883-84 (1990).

35. *See id*. at 874-75, 878.

36. *Id.*

37. *See id.* at 881-82.

cases in which the Free Exercise Clause right is connected to some other important right (for example, parental rights in *Yoder*).[38] This concept was used to distinguish several earlier cases that involved freedom of expression as well as free exercise concerns and to distinguish *Yoder*.[39] 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 because, under its reasoning, the Free Exercise Clause right would clearly be inadequate by itself in an exemption case.[40] This dilemma 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 would not—in which case, why mention the Free Exercise Clause in exemption cases if it essentially serves no function other than being an antidiscrimination principle?[41] Second, hybrid rights may just be a judicial creation used to get around inconvenient precedent.[42] The last possibility seems to be the obvious answer.[43]

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.[44] The idea of a compelling interest test held a lot of promise, but in

---

38. *See id.*; *see also* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (linking the Free Exercise Clause right with the parental right to the religious upbringing of children).

39. *See Smith*, 494 U.S at 881-82.

40. *See generally id.* (stating that courts use other constitutional protections, such as freedom of speech or freedom of the press, in combination with the Free Exercise Clause to exempt religious groups from following certain laws).

41. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-34 (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.

42. *See id.* at 566-67 (Scalia, J., concurring).

43. *See* Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1384-857 (2007); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court Centrism*, 1993 BYU L. REV. 259, 266-67 (1993); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120-22 (1990).

44. *See* 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 Religious Land Uses After* Boerne, 68 GEO. WASH. L. REV. 861, 871-72 (2000).

the hands of shifting majorities on the Court, that promise was never realized. It was sometimes realized in the lower courts, however.[45]

Divorcing *Smith* from all the important baggage regarding stare decisis, etc., we are left with the basic notion that the Free Exercise Clause does not require exemptions to generally applicable laws.[46] The argument seems to be the following: because these laws are religion neutral, the Free Exercise Clause has no impact on them except through the political process.[47] This is, of course, a claim of formal neutrality. But how is formal neutrality "neutral" in this context? One might ask this in the language of *Smith*: how can a law be generally applicable in this context? The concurring and dissenting opinions in *Smith* essentially ask this question and answer that the laws are neither neutral nor generally applicable for free exercise purposes.[48]

Here, there may be a dichotomy between claims of neutrality and general applicability. The law without religious exemptions is not neutral, whether viewed from the perspective of free exercise or from that of the legal regime as a whole.[49] The Court admits as much in suggesting that no one is entitled to a religious exemption, and religious minorities might be at a disadvantage when attempting to get exemptions through the political process.[50] Whatever baseline one sets for neutrality in this context, neither the result nor the baseline can be proven neutral.[51] Yet, one might set two different baselines for general applicability in this case: one that views general applicability without regard to the nature of the claim, and one that views general applicability specifically in the free exercise context. From the latter perspective, the law is not generally applicable because it places a significant burden on those whose religious practices require a violation of the law. From the former perspective, the law is generally applicable because it applies to all citizens, even if it may have a differing impact on some. This, of course, simply begs the question.

How does one choose between these baselines? Certainly, the choice is not based on the tortured use of precedent by both the majority and dissenting opinions in *Smith*. So what really allowed the Justices to choose? We will, of course, never know for sure, but it seems the majority presumed that it is religion neutral to analyze the general applicability of the law without regard to the nature of the claim.[52] Otherwise, the Court's reasoning makes no sense. If the law was not religion neutral in the free exercise context, then it was not

---

45. *See supra* note 33 and accompanying text.

46. *See* Emp't Div. v. Smith, 494 U.S. 872, 888-89 (1990).

47. *See generally id.* at 890 (stating that the government can pass legislation to exempt religious groups from following particular laws).

48. *Id.* at 906-07 (O'Connor, J., concurring); *id.* at 907-09 (Blackmun, J., dissenting).

49. *See infra* notes 79-83 and accompanying text.

50. *See Smith*, 494 U.S. at 890.

51. *See* FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 13-36 (2007).

52. *See generally id.* at 13-17 (arguing that because the Court relies on formal neutrality, it does not consider the effects of the underlying claim); *Smith*, 494 U.S. at 886 n.3 (comparing the religion neutral analysis to the race and free speech analyses).

generally applicable because it would apply differently to different religious groups:

> The governing precedent was mixed; although it does seem the majority opinion took some liberties with precedent. In the end the Court had to answer the question, as the *Sherbert* Court tried to do, what does the Free Exercise Clause mean, and how should it be applied to exemptions from laws that are not directly aimed at religion? By relying on general applicability and facial neutrality, the Court never seriously engages this question. The answer is presumed—general applicability/neutrality is determinative because that is what the Free Exercise Clause requires. Why? Because generally applicable laws cannot burden free exercise in a constitutionally significant way. Why? Because we said so. . . . Even if one were to argue that general applicability has meaning separate from its implicit neutrality claim, one is left trying to determine if the laws of general applicability approach used by the Court is adequately supported by an appropriate mode of religion clause interpretation. Neutrality is used here to avoid carefully answering the tough question of what the Free Exercise Clause requires and why.[53]

In the end, there is a complete disjunction between the Court's assumptions about free exercise and even basic understandings of religion. Because the Court was analyzing the free exercise of religion, this disjunction seems troubling.

Many scholars have recognized the tension between the Supreme Court's approach to free exercise exemptions and the theological underpinnings of some religious traditions.[54] This Article suggests that the dynamic in this context was affected by the preconceptions of judges and justices regarding what religion is and what the Free Exercise Clause protects.[55] Of course, these are related preconceptions. These preconceptions are connected to baseline principles the Court has relied upon in evaluating exemption cases.[56]

As noted above, the popular version of the free exercise exemptions tale suggests that the Court's initial struggles with the issue led to the development of a dichotomy between belief and practice.[57] *Reynolds v. United States* is generally considered a major early precedent for this dichotomy.[58] Essentially, the dichotomy suggests that belief must be protected in order to have religious

---

53. RAVITCH, *supra* note 51, at 35-36.

54. *See, e.g.*, STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF SEPARATION OF CHURCH AND STATE 246-54 (1997) (providing a good example of such a critique).

55. *See, e.g.*, *id.*; Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division of Employment v. Smith, *A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388, 433-37 (1991); *cf.* Mark V. Tushnet, *Questioning the Value of Accommodating Religion*, *in* LAW & RELIGION: A CRITICAL ANTHOLOGY 245, 251-53 (Stephen M. Feldman ed., 2000) (arguing that requiring religious accommodations actually threatens religion).

56. *See infra* notes 74-78 and accompanying text.

57. *See Smith*, 494 U.S. at 877-78; Reynolds v. United States, 98 U.S. 145, 166 (1878).

58. *Reynolds*, 98 U.S. at 166.

freedom, but behavior or practice may be regulated—under generally applicable laws, in the modern version—for the good of society.[59] This dichotomy was altered in the landmark case of *Sherbert v. Verner*,[60] and in turn, this great advancement was undermined by the Court's decision in *Employment Division v. Smith*.[61]

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 having altered legal doctrine, may simply be a recognition of what the Court was doing all along.[62] Religious minorities (especially non-Christian religious minorities) did not reap great benefits from *Sherbert*;[63] moreover, *Smith* seems consistent with both pre-*Sherbert* cases, such as *Braunfeld v. Brown*, and post-*Sherbert* cases, such as *Goldman v. Weinberger*, *Bowen v. Roy*, and *Lyng v. Northwest Indian Cemetery Protective Association*.[64] Thus, if *Smith* is a flawed decision—and this Article asserts that it is—the flaw seems inherent in Free Exercise Clause analysis generally. In this view, *Smith* is simply an explicit statement 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*, and most of the cases that preceded it, is based on the assumption that a "law of general applicability" in the free exercise context is really generally applicable.[65] In the end, the Court's approach in *Smith* was predetermined—at least in part—by its acceptance of this baseline, notably without discussion.[66] If the baseline is questionable, the Court's failure to address it is potentially more problematic than the mental gymnastics it used to

---

59. *See Smith*, 494 U.S. at 877-78; *Reynolds*, 98 U.S. at 166. 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. U. L. REV. 691, 710-16 (2001).

60. Sherbert v. Verner, 374 U.S. 398, 404-09 (1963).

61. *Smith*, 494 U.S. at 882-84.

62. William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 195-96 (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).

63. FELDMAN, *supra* note 54, at 218-54.

64. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Braunfeld v. Brown, 366 U.S. 599 (1961).

65. *Smith*, 494 U.S. at 879. It seems obvious that laws that 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. *See id.* at 890. 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 generally* Verna C. Sanchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31 (1997); FELDMAN, *supra* note 54; Sherwin, *supra* note 55.

66. *See Smith*, 494 U.S. at 879-82.

reinterpret *Sherbert* and *Yoder*. If evaluating the baseline would lead to the conclusion that it cannot be reconciled with the horizon of the Free Exercise Clause,[67] or that an alternative interpretation could be "better" reconciled,[68] the Court should have considered these possibilities. Yet some form of the baseline underlying *Smith* had already been utilized in cases from *Braunfeld* to *Goldman* to *Lyng*.[69]

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 was accommodated, many laws would not apply in the same way to everyone and thus might be harder to enforce.[70] 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.[71] 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 they are outweighed by the interest in "general applicability" in the judicial process.[72]

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 compared to 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

---

67. The term "horizon" refers to the interpretive horizons of both text and interpreter in Gadamerian Hermeneutics—in this case to the horizon of the text. *See infra* text accompanying note 94 (discussing the concept of interpretive horizons in some detail).

68. The use of the term "better" here does not imply that there is any objective foundation that can consistently identify "best" or "better" results across times and contexts. *See infra* text accompanying note 94. The term is meant to indicate an interpretation in which the horizon of the text and the horizon of the interpreter are more consistent with each other than another interpretation would be. *See infra* text accompanying note 94. This does not mean that other interpretations are not plausible, or that alternative interpretations might not also be "better" than the one under scrutiny. *See infra* text accompanying note 94.

69. *See Lyng*, 485 U.S. 439; *Goldman*, 475 U.S. 503; *Braunfeld*, 366 U.S. 599.

70. *See Smith*, 494 U.S. at 890. This is essentially the position taken by Justice Scalia. *See id*. at 872-90.

71. *See id.* at 885-86. The *Smith* Court specifically noted that the political process is the key to exemptions and may have a negative impact on religious minorities, but the Court viewed such an impact as an inevitable aspect of the political process. *Id.* at 890; FELDMAN, *supra* note 54, at 246-49.

72. *See Smith*, 494 U.S. at 890.

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.[73] Consider also the example of Sunday closing laws.[74] 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, if they apply to everyone the same way. Yet this baseline is open to question. No *mainstream* Christian business 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.[75] 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 1960s, the new norm may be equally unhelpful to religious minorities.

The dichotomy between belief and practice 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.[76] The dominant or 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.[77] The *Smith* Court advocated a majoritarian approach because it will most often be religious minorities who need to seek exemptions to generally applicable laws, and it is precisely those same minorities who might have the hardest time getting exemptions enacted.[78]

---

73. *Goldman*, 475 U.S. at 510 (allowing Air Force regulation prohibiting Jewish petitioner from wearing religious headgear under the First Amendment).

74. *See generally* McGowan v. Maryland, 366 U.S. 420, 452 (1961) (upholding Sunday closing laws against Establishment Clause challenge); *Braunfeld*, 366 U.S. at 608-09 (upholding Sunday closing laws against Free Exercise Clause challenge).

75. *See* FELDMAN, *supra* note 54, at 263-64. The term "mainstream" is key here, given that several smaller Christian denominations, such as the Worldwide Church of God, may face similar challenges because they observe the Sabbath on Friday night and Saturday, and also have prohibitions on working during the Sabbath. *See id.*

76. *See Smith*, 494 U.S. at 885-86. 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, 547 (1993) (holding that a city ordinance related to animal sacrifice, targeted to suppress practice of a religious group, was prohibited under the Free Exercise Clause). 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*. *See id*.

77. *See, e.g.*, FELDMAN, *supra* note 54, at 264-65; FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS 144-46 (1999).

78. *See Smith*, 494 U.S. at 890. 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. *Cf. U.S. Religious Landscape Survey*, PEW FORUM ON RELIGION AND PUB. LIFE, http://religions.pewforum.org/maps (last visited Dec. 20, 2011) (demographic map showing forty-six states

The irony is that, while *Smith* has been criticized for this, there is an assumption in much of that criticism that *Smith* was a major shift in Free Exercise Clause jurisprudence.[79] It might be more accurate to suggest that *Smith* was a shift in doctrine, not in practice.[80] The doctrine espoused in *Smith* is inherent in the results and analysis of the Court's free exercise cases, both before and after *Sherbert v. Verner*.[81] Thus, *Smith* may simply be an explicit statement of an interpretive horizon that was influencing results in free exercise cases even after *Sherbert*—one that privileges faith or social conformity at the expense of practice, and religious minority practices in particular.[82] In this view, cases like *Wisconsin v. Yoder* are the exception, and perhaps they are only an exception because the dominant faith in those cases reflected idealized Christian values.[83]

Judges who operate from within the dominant culture and tradition are likely to undervalue or simply fail to understand religious practices that fall outside the cultural horizons those judges are accustomed to.[84] This would be true whether that dominant culture is seen as Christian, secular, or a combination of both.[85] As the philosopher Hans-Georg Gadamer suggested, we are historically situated and affected by the dominant traditions in our society.[86] Without appropriate reflection—and perhaps even with it—judges are influenced by their historical situatedness in a culture that has had a dominantly

---

have no religious majority (at least among Christians)). Four states, Arkansas, Oklahoma, and Tennessee—which have majorities identifying themselves as Evangelical Protestants—and Utah—which has a majority who identify themselves as Mormons—are the exceptions. *Id.* Yet an overwhelming majority of the population may identify with a faith-oriented religious view, even if through a variety of denominations. *Id*. After all, a majority of the religiously identifying population in the United States is Protestant, and most are from faith-oriented denominations. *Id.* (combining Evangelical Protestant, Mainstream Protestant, and Historically African American affiliations leads to the conclusion that 51.3% of the U.S. population identifies as Protestant).

79. *See, e.g.*, Edward M. Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. REV. 189, 210 (1993); Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 214-15 (1991); *cf.* Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 TEX. L. REV. 761, 773 (2000) (noting that in *Smith*, "the Court disowned the *Sherbert* test").

80. Gaffney, *supra* note 79, at 210.

81. Sherbert v. Verner, 374 U.S. 398, 406-10 (1963). *See generally* Gaffney, *supra* note 79, at 200-01, 205-09 (discussing cases from the late nineteenth century in which the Free Exercise Clause did not protect Mormons from the Court's hostility and cases after *Sherbert* but before *Smith* in which the protections of the Free Exercise Clause slowly eroded away).

82. *See* FELDMAN, *supra* note 54, at 248-49.

83. Wisconsin v. Yoder, 406 U.S. 205 (1972); *see* FELDMAN, *supra* note 54, at 246-49.

84. *See* FELDMAN, *supra* note 54, at 246-49.

85. *See id.*; *see also, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 3-8 (1993) (describing American culture as privately religious and publicly secular at the same time); *cf.* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 107-16 (1991) (describing two conflicting cultures in the United States, one highly secular and the other religious (but not only Christian)).

86. HANS-GEORG GADAMER, TRUTH AND METHOD 257-64 (Joel Weinsheimer & Donald G. Marshall trans., The Continuum Publishing Co. 2d rev. ed. 1995) (1960); RAVITCH, *supra* note 51, at 9-10 (explaining how the concept of *daesin* means that our preconceptions are formed by our traditions and these preconceptions narrow our view of the world).

Christian influence until relatively recently, and even more recently, has had a strong secular influence.[87] Neither of these historical or social influences tends to account well for nonmainstream religious practices.[88]

III. NO ONE SHOULD BE SURPRISED BY *SMITH*

Interpretation is always necessary to apply legal concepts in real world situations.[89] As I have written elsewhere, "[h]ermeneutics are an inescapable part of everyday life. We are always interpreting, whether we know it or not."[90] Many different philosophical approaches recognize this, as have some of the greatest legal minds to consider the question.[91] The philosophical approach I find most helpful in the judicial context, but still only one of many that roughly lead to the same conclusion, is that of the philosopher Hans-Georg Gadamer.[92] I have written about Gadamer's approach in a number of contexts,[93] and this section simply boils that discussion down adequately to apply it in the Free Exercise Clause exemption context. As I wrote in an earlier article:

> Gadamer explained that there is no absolute method of interpretation. Each interpreter brings his or her own preconceptions into the act of interpreting a text (text can refer to more than just a written text). These preconceptions are influenced by the tradition, including social context, in which the interpreter exists. The interpreter's tradition(s) provides her with a horizon that includes her interpretive predispositions. This horizon is the range of what the interpreter can see when engaging with a text. The concept of *dasein*, or being in the world, captures this dynamic. We exist in the world around us and that world influences how we view things. Thus, our traditions and context are a part of our being. . . .
>
> Still, the text has its own horizon of meaning. That horizon is influenced by the context (or tradition) in which it was written, those influencing or interpreting it over the passage of time, the words used, and the context of the original author or authors. Philosophical hermeneutics suggests that to understand a text, a give and take must occur between text and interpreter—a dialogue between one's being and the object that one seeks to understand.

---

87. *See* CARTER, *supra* note 85, at 3-11; FELDMAN, *supra* note 54, at 246-49.

88. *See* CARTER, *supra* note 85, at 10-11; FELDMAN, *supra* note 54, at 246-49.

89. Frank S. Ravitch, *Interpreting Scripture/Interpreting Law*, 2009 MICH. ST. L. REV. 377, 381 (2009).

90. *Id.* (footnote omitted).

91. *See, e.g.*, CARDOZO, supra note 2, at 167-68 (explaining that judges are always interpreting and that it is not useful to deny the fact that judges must interpret, as many pretend, but rather it is best to acknowledge this and to reflect on it).

92. GADAMER, *supra* note 86, at 257-64.

93. *See, e.g.*, Ravitch, *supra* note 89, at 381-82; Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1020-21 (2005); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 493-94 (2004).

> This conversation transforms both the text and interpreter as they engage in the give and take.
>
> The interpreter necessarily projects his or her horizon into the interpretive process, but should also reflect upon it and the horizon of the text. The horizon of the text has a binding quality in that if the interpreter openly enters into dialogue with the text, the horizon of the text will limit the range of preconceptions the interpreter can project consistently with the horizon of the text. Since the text and interpreter are engaged in a dialogue to reach a common truth, neither text nor interpreter is the sole source of meaning.[94]

This is not a form of relativism as some critics have suggested.[95] Through a dialogue between text and interpreter, one can reach a more informed understanding of the text than one who does not engage in such dialogue and simply assigns a reflexive meaning to the text.[96] Thus, while there is no methodological approach to interpretation in Gadamerian hermeneutics, there is a way for text and interpreter to interact to reach a meaning that is both consistent with the text and cognizant of the role the interpreter plays in reaching that meaning.[97]

If we are embedded creatures—embedded in our traditions and context—as the concept of *dasein* suggests, there is no Archimedean point from which we can say that a given methodology is objective, at least in contested interpretive contexts.[98] This does not mean that judicial decisions are merely subjective, as some have suggested.[99] In fact, as I have written elsewhere, the common western legal notion that subjectivity and objectivity are opposites, and the common western legal implication that they are the only two choices, create a false antinomy that itself betrays a more useful answer—namely, the opposite of objectivity, if there is one (and subjectivity as well), is context.[100] As Gadamer suggests, context is neither inherently objective or subjective, but it affects everything and very much affects judicial decisions.[101]

Part II addressed how interpretive horizons have affected Free Exercise Clause jurisprudence by reifying a mainstream Christian and secular view of religion. While the *Smith* Court's use of precedent was certainly disingenuous, the underlying reasoning of the decision was not, as some have suggested, an intentional attempt to privilege majority religious views over others, but rather it was the result of the influence those religious views have had on the Court's

---

94. Ravitch, *supra* note 89, at 381-82 (footnotes omitted).

95. *See* JEAN GRONDIN, INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS 141-42 (Joel Weinsheimer ed. & trans., Yale Univ. Press 1994) (1991).

96. *See* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 627 (1990).

97. GADAMER, *supra* note 86, at 267-69.

98. *See id*. at 257-64.

99. *See* RAVITCH, *supra* note 51, at 157 (providing relevant citations to various views).

100. *Id.*

101. *See supra* text accompanying note 94; GADAMER, *supra* note 86, at 324-30.

perspective.[102] Simply put, the Court essentially read dominant and culturally embedded notions of religion into the Free Exercise Clause without reflecting seriously on the role those notions played in forming the Justices' perspectives.[103] From this viewpoint, one might say that the dissenting Justices attempted to consider other traditions and contexts in addressing the Free Exercise Clause question. It is also obvious, however, that the dissenting Justices simply disagreed with the Court's abandonment of *Sherbert* and *Yoder*.[104] Yet, as mentioned in Part II, those decisions were later minimized by a majority of the Court in a number of decisions where dominant cultural views on religion prevailed.[105]

Given how hard it is for people to escape their horizons through adequate reflection, the question remains: Is it possible, or even desirable, for a majority of any court to escape culturally embedded notions of religion over the long run in cases interpreting the Free Exercise Clause? Justice Cardozo pointed out that such reflection is the duty of a good judge, but also explained that it is a duty too few judges equip themselves to meet.[106] Yet, around the world there are several examples of courts that have done just that in the context of free exercise exemptions (or their equivalent in those constitutional systems).[107] The rest of this Article will address one of the best of these opinions, that of the Japanese Supreme Court.[108] One reason for focusing on the Japanese Supreme Court decision is that it involves the court accommodating an unpopular religious group in a nation that is culturally focused on individuals meeting legal and cultural norms and expectations—the very concerns Justice Scalia expressed in *Smith*.[109] Another reason is that one of the relevant provisions in the Japanese Constitution is partially modeled on U.S. notions of free exercise, and partially on the earlier Meiji Constitution's religious-freedom provisions.[110] Some of the principles reflected in these constitutional provisions were imposed

---

102. *See* Emp't Div. v. Smith, 494 U.S. 872, 881-84 (1990).

103. *See id.*

104. *See id.* at 908-11 (Blackmun, J., dissenting).

105. *See supra* notes 62-72 and accompanying text.

106. *See generally* CARDOZO, *supra* note 2, at 166-67 (discussing the role each judge's past experience plays in determining the outcome of a case).

107. *See, e.g.*, Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, 469-70 (Japan); Multani v. Commission scolaire Marguerite-Bourgeoys, [1996] 1 S.C.R. 256 (Can.); Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1045 (2004) (discussing a German case in which the court gave preference to religion over social order).

108. Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, 469-70 (Japan).

109. *Compare id.*, *with Smith*, 494 U.S. at 879-82.

110. *See* U.S. CONST. amend. I; Eiichiro Takahata, *Religious Accommodation in Japan*, 2007 BYU L. REV. 729, 737-38 (2007).

on the Japanese people after World War II,[111] but they are still well-regarded principles of freedom in Japan.[112]

IV. OVERCOMING PRECONCEPTIONS: AN EXAMPLE FROM JAPAN, *MATSUMOTO V. KOBAYASHI*, AND THE REJECTION OF FORMAL NEUTRALITY AND *SMITH*-STYLE "GENERAL APPLICABILITY"

Given the above discussion, one might expect that the Japanese courts would view free exercise in the same way Justice Scalia did when writing for the majority in *Smith*. After all, social norms,[113] uniformity in rule applicability,[114] and viewing one's role in light of cultural expectations[115] are strong—although certainly not universal—norms in Japan. Individuality in Japan often takes a back seat to cultural expectations, at least in the public sphere.[116]

Moreover, views on religion in Japan are generally inclusive, secular, or both inclusive and secular.[117] This means that the Japanese generally do not think it necessary to subscribe to only one faith, or to any faith at all.[118] Many Japanese are, at the same time, Buddhist, Shinto, and in some ways theistic 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.[119] Under this view, religious requirements may be perceived as somewhat flexible, even as they are respected.[120] Additionally, many Japanese are atheist or agnostic.[121]

---

111. DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 14 (2006).

112. *See generally* Takahata, *supra* note 110, at 739-48 (discussing various cases in which courts permitted free exercise of religion).

113. *See* ENCYCLOPEDIA OF CONTEMPORARY JAPANESE CULTURE 212 (Sandra Buckley ed., 2002) (stating that the Japanese "relational model of identity [defines] self as . . . a continuum of relations from self to family to group to nation").

114. *See id.* (stating that 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").

115. *See* Nancy R. Rosenberger, *Introduction* to JAPANESE SENSE OF SELF 1, 4 (Nancy R. Rosenberger ed., paperback ed. 1994) (1992) (stating that 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).

116. *See* ROKUO OKADA, JAPANESE PROVERBS AND PROVERBIAL PHRASES 38 (Tourist Library Series vol. 20, 1955). A common Japanese expression, "The nail that sticks out gets hammered down," speaks to a mores that warns against prioritizing one's own desires over group cohesion. *Id.* This norm is reflected in many aspects of Japanese society. *See id.*

117. *See* William S. Pfeiffer, *Cults, Christians, and Confucius: Religious Diversity in Japan*, 8 JAPAN STUDIES ASS'N J. 132, 134 (2010) (stating that Japanese culture places a higher value upon the "*practical* benefits of faith and ritual" than it does upon adherence to a specific belief system).

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

119. *Id.*

120. *See id.* (analogizing the mainstream Japanese perspective on religion to restaurant dining preferences: "[a]n apt metaphor might be a restaurant buffet, which they prefer over a set menu . . . [because] many Japanese draw from diverse faiths and belief systems depending on the time of life and situation").

Despite the issues of ethnic discrimination that Japan has struggled with,[122] religious intolerance is not generally a problem in Japan.[123] The one religious trait that many Japanese people do find troubling is proselytization.[124] To many Japanese people, it is viewed as intolerant to try to change other people because there is only one way to be saved, etc.[125] 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 somewhat flexible views 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 the Japanese culture's strong religious tolerance might point toward granting religious exemptions; however, the United States 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.[126] Each person 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 the reasoning in *Smith*. In *Matsumoto v. Kobayashi*, often referred to as the *Kobe Technical College Case* because that college was the defendant in the suit, a Petty Bench of the Japanese Supreme Court required the college to accommodate a Jehovah's Witness who would not engage in Kendo, one of the college's physical education requirements.[127] The Japanese Supreme 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

---

121. *See* N.J. DEMERATH III, CROSSING THE GODS: WORLD RELIGIONS AND WORDLY POLITICS 138 (2001) (stating that 87% of the Japanese population has never considered membership in a religious organization).

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

123. *See* DEP'T OF STATE, 108TH CONG., ANN. REP. ON INT'L RELIGIOUS FREEDOM 2004, at 195 (Comm. Print 2005) ("[There exists a] generally amicable relationship among religions in [Japanese] society.").

124. *See* Robert J. Kisala & Mark R. Mullins, *Introduction* to RELIGION AND SOCIAL CRISIS IN JAPAN: UNDERSTANDING JAPANESE SOCIETY THROUGH THE AUM AFFAIR 1, 10 (Robert J. Kisala & Mark R. Mullins eds., 2001).

125. *See id.* (discussing how "proselytization activities" are not generally well-received by the Japanese people).

126. *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

127. *See* Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, 473-75 (Japan); *see also* Takahata, *supra* note 110, at 742-45 (providing an excellent discussion of the case in English); *Overview of the Judicial System in Japan*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/system/system.html#02 (last visited Nov. 7, 2011) (explaining jurisdiction of the Japanese Supreme Court and court structure, including Petty Benches and the Grand Bench).

law can interfere with freedom of religion.[128] The court held that such accommodations must be balanced against the interests of others and society, but that the government must have a very good reason to infringe on the interests of the religious individual.[129] The court also explained that such accommodations are a way to prevent a negative impact on the religious person created by the law.[130] 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.[131]

This reasoning demonstrates two inherent flaws in the *Smith* Court's reasoning: first is the idea that the general applicability of laws of "general applicability" should be determined without regard to the impact they have on religious people; and second is the assumption that mandatory exemptions create some sort of windfall for the exempted individual rather than equalizing things (at least once the government imposes an alternative requirement).

It is important to note that the Japanese Supreme Court ordered an exemption in the case before it and held that such an exemption does not create an establishment of religion.[132] The court did not, however, hold that exemptions are always mandated because that issue was not before the court.[133] 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 that would make the norm applicable nationwide—assuming it is constitutional—or within the territory of local legislatures that pass such laws.[134] 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.[135] In fact, since the case was decided, there have been laws passed that require accommodation, and Japanese courts have upheld those laws.[136]

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 reflect the majority's social and religious norms, but not lesser known religious norms. I will make a

---

128. *See* Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, 476-79 (Japan).

129. *Id.* at 473-79.

130. *Id.* at 476-80.

131. *Id.* at 479.

132. Takahata, *supra* note 110, at 742-45.

133. *Id.*

134. HIROSHI ODA, JAPANESE LAW 27-30, 32-40 (3rd ed. 2009).

135. *See* Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

136. *See generally* Takahata, *supra* note 110, at 745-58 (discussing statutory policies that the Japanese Government had implemented).

controversial assertion here: namely, the reason is that the U.S. Supreme Court is more affected by dualistic Western and Christian norms, even if only as a matter of cultural traditions, and (this is the most controversial part) the *Smith*, *Braunfeld*, *Reynolds*, etc., majorities were unable or unwilling to adequately reflect to see beyond their horizons. This is clear from the reasoning in those cases, as opposed to the holdings, because it would be possible to adequately reflect and still come to the same conclusions those courts did by using different reasoning. 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 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.[137] 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.[138]

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 horizon as the U.S. Court, but still its horizon 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.[139]

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 tended toward formalism.[140] This, however, explains little. First, several of the Courts in pre-*Smith* decisions leaned more toward balancing than formalism and yet used formalistic approaches that are at least consistent with

---

137. *See* Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

138. *See* DEMERATH III, *supra* note 121, at 138 (stating that 87% of the Japanese population has never considered membership in a religious organization).

139. Emp't Div. v. Smith, 494 U.S. 872, 880 (1990) (citing United States v. Lee, 455 U.S. 252, 258-61 (1982)); *see* Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

140. *Compare* Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan), *with Smith*, 494 U.S. at 876-90; *see also* RAVITCH, *supra* note 51, at 32-34 (explaining that the *Smith* Court relied on "formal neutrality").

Smith.[141] Moreover, the Japanese Supreme Court often prefers formalism to balancing approaches.[142]

No doubt formalism played a role in *Smith* and a number of other decisions, but the horizons of the Justices on these issues helped enable formalism to gain a majority by presuming the answers to the key questions mentioned above.

What the Japanese Supreme Court opinion teaches us is that it is possible for courts to adequately reflect on their horizons and to expand them in light of the text (case) they are addressing, but as Justice Cardozo pointed out, this is not easy.[143] And while the Japanese Court is to be credited for doing it, no one should be surprised that the *Smith* Court did not.[144] In the end, *dasein* is a powerful and embedded force, and when *dasein* reflects Western and Christian dualisms, it can be particularly problematic in enabling courts to even see the key questions in exemption cases.[145] The results in cases like *Smith*, however, would be less troubling, I think, if the Court had openly confronted the key questions to which it assumed answers, openly addressed the contradictory precedent which might have forced it to confront at least the question of what perspective general applicability should be viewed from, and then came to whatever conclusion it did based on such open reasoning.

Apparently, in many American courts this is too much to ask for, but at least in Japan, Germany, Canada, and elsewhere, there are examples of courts openly confronting their horizons.[146] I mention the latter countries because some might argue that the Japanese Supreme Court decision may have been easier to reach because the country is more religiously homogeneous. The same cannot be said of modern Germany or Canada.[147] Moreover, I would suggest that in a more norm-oriented and homogeneous country, the task of expanding horizons about nonmainstream religions should be harder. If the idea is that exempting in a more homogeneous country is less problematic, the argument proves too much. First, it does not answer why the *Smith* Court didn't even address key underlying questions.[148] Second, even when *Sherbert* and *Yoder*

---

141. *See* Wisconsin v. Yoder, 406 U.S. 205, 213-36 (1972); Sherbert v. Verner, 374 U.S. 398, 401-10 (1963).

142. *See* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189, 195 (2000).

143. *See supra* note 106 and accompanying text.

144. *See supra* Part III.

145. *See* GADAMER, *supra* note 86, at 257-64.

146. *See* Multani v. Comm'n scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (Can.); Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan); *MEC for Educ. Kwazulu-Natal v. Pillay*, 2008 (1) SA 474 (CC) at paras. 46-114 (S. Afr.); Eberle, *supra* note 107, at 1076-79; Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 404-06 (2008).

147. *Germany: International Religious Freedom Report 2004*, U.S. DEP'T OF STATE, www.state.gov/g/drl/rls/irf/2004/35456.htm (last visited Dec. 20, 2011); *see Religious Diversity in Canada*, POLICY RESEARCH INITIATIVE, GOV'T OF CAN., http://www.horizons.gc.ca/2009-0008_eng.pdf (last visited Jan. 5, 2012).

148. *See supra* Part I.

set forth the governing principles in free exercise exemption cases, there was not a flood of exemption claims in the United States.[149] Thus, when practical reality is considered, there is not a huge difference between more religiously heterogeneous countries like the U.S. and Canada, and more religiously homogeneous countries like Japan, which also has not experienced a "flood" of exemption claims since *Kobayashi*.[150] Finally, even if such a flood were a concern, the Japanese Supreme Court provided a solution which could limit the flood, one that the U.S. Supreme Court never even considered: requiring the person seeking an exemption to meet an alternative requirement that does not burden his or her religious free exercise.[151]

V. CONCLUSION

This Article has argued that no one should have been surprised by the *Smith* decision despite earlier decisions like *Sherbert* and *Yoder*. This does not mean that *Smith* is a good decision; rather, it means that it reflects embedded Western, Christocentric, and secular-centric horizons. Sadly, the *Smith* Court could have engaged in more reflective analysis and decided the case either way, because, as the Japanese Supreme Court demonstrated in *Matsumoto v. Kobayashi*, it is possible for a court to adequately reflect to expand its horizon in cases involving free exercise exemptions—even in the face of contrary culturally embedded preconceptions.[152] Justice Cardozo would have been proud . . . of the Japanese court, not the *Smith* Court.

149. *See* RAVITCH, *supra* note 51, at 33-34.

150. Takahata, *supra* note 110, at 749 (noting that litigation is not as favored in Japan as it is in the U.S.).

151. Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyo-Tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, 479 (Japan).

152. *See id.*