The Sphalm of Legal Positivism, the Churlhood of Justice Scalia, and *Employment Div., Dep't of Human Res. of Oregon v. Smith*

A l'exemple de Saturne, la Révolution dévore ses enfants. Like the mythological Titan Saturn, the Revolution devours its children. So said Jacques Mallet du Pan, of the tragedy of the French Revolution.[1] The grim, atavistic progression from the grandiose and lofty aims of the *Philosophes* to tumbrels overflowing with severed human heads (the heads of Royalists and Jacobins alike) that characterized du Pan's Paris is not unique. Often in history, well-intentioned men, in the service of some nebulous, utopian notion of "progress," have given birth to monstrosities. The death-warrants of Cromwell's Commonwealth, The Committee of Public Safety, revolutionary Marxism, and the pseudo-science of eugenics were all supposed to usher in a more enlightened age, yet they came into this world in forms so ebullient with grotesquerie that the very same high-priests of progress that sired them eventually could not deny the stench of immiseration and human blood that hung about them. From this pernicious intellectual tradition comes Legal Positivism. The fruit of Utilitarian luminaries Jeremy Bentham and John Austin, Legal Positivism was conceived with the noble intentions of effectuating a great divorce between religious and secular law, and of supplying a foundation of empiricism and logical induction for the latter. Bentham, the great apostle of liberty, would surely have been horrified to see Legal Positivism become the basis for an egregious trammeling of personal freedom[2] in *Employment*

---

[1] JACQUES MALLET DU PAN, CONSIDERATIONS SUR LA NATURE DE LA RÉVOLUTION DE FRANCE, 80 (1793).

[2] Bentham's views on religion are conflicted, but he clearly supported the freedom of religious worship. *See* JEREMY BENTHAM, THEORY OF LEGISLATION, 63 (eds. & trans. Étienne Dumont & R. Hildreth, 1908) (1802) ("The choice of their religion ought to be referred entirely to the prudence of individuals"). *But see, generally,* JEREMY BENTHAM, THE CHURCH OF ENGLAND CATECHISM EXAMINED (ed. J. M. Wheeler, 1890) (1818) (In which Bentham heavily criticizes

Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990). In this case, the Court relied on an application of what Professor H.L.A. Hart considered to be the three principle tenets of classical Legal Positivism, and as a result, arrived at a decision that was manifestly unjust.

Legal Positivism

Legal Positivism, according to Professor Hart, was conceived by Jeremy Bentham and John Austin, "the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws."[3] There is no doubt that they were that, but their sanguine legal theory would eventually come to betray the very ends they so ardently sought.[4] Hart identifies three central ideas that defined the early Utilitarians' Legal Positivism: 1) "the separation of law as it is and as it ought to be;"[5] 2) "that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law was vital;"[6] and 3) "the…imperative theory of law—that law is essentially a command."[7] Yet, as beneficent as the animating impulse behind the doctrines of Legal Positivism surely was, when let loose to play upon the law, in minds less refined than Bentham's, they wreaked all manner of havoc.

The Smith Case

---

the Church of England); see also, JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION, XIII § 17 (eds. Neill H. Alford et al., 1986) (1780) (Arguing that even if religious doctrine is erroneous, the "pen is the proper weapon to combat error with, not the sword" of state police power).

[3] H.L.A. Hart, *Positivism and the Separation of Laws and Morals*, 71 HARV. L. REV. 593, 596 (1958) [hereinafter *The Separation of Laws and Morals*].

[4] *See, e.g.,* Kenny Yang, *The Rise of Legal Positivism in Germany: A Prelude to Nazi Arbitrariness*, 3 WEST. AUSTRALIAN JURIST 245 (2012) ("rise of legal positivism…left the door ajar for Nazi arbitrariness to enter the system, and…in adopting a separation of 'is' and 'ought' approach to the law, it left the German legal profession little theoretical resources to resist").

[5] *The Separation of Laws and Morals, supra* note 3, at 596.

[6] *Id.* at 601

[7] *Id.*

Alfred Leo Smith and Galen Black were employed by a drug rehabilitation clinic in Oregon in 1985.[8] Both were also members of the Native American Church, the religious practices of which included the use of the hallucinogenic drug peyote, "for sacramental purposes."[9] Both were fired for their drug use, and both applied for unemployment benefits.[10] The state of Oregon denied their applications, because "they had been discharged for work-related 'misconduct,'"[11] namely, their peyote use. Smith and Black appealed, on the grounds that Oregon's policy impermissibly penalized them for asserting their Free Exercise rights under the First Amendment.[12]

In 1990, their case reached the Supreme Court. In an opinion by Justice Scalia, the Court held that Oregon had not violated Smith and Black's Free Exercise rights, because the statute in question was "a valid and neutral law of general applicability."[13]

Law As Command

The troublesome poltergeists of Legal Positivism haunt Justice Scalia's opinion. One could start with the most fundamental and misguided concept: the notion that laws are essentially "orders backed by threats given by one person to others."[14] Scalia writes that "Oregon law prohibits the knowing or intentional possession of a 'controlled substance.'"[15] He characterizes this as a "general criminal prohibition."[16] Twice, Scalia's use of the imperative-voice "prohibit"

---

[8] *Employment Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 874 (1990).
[9] *Id.* at 872.
[10] *Id.*
[11] *Id.* at 874.
[12] *Id.*
[13] *Id.* at 879 (internal quotations omitted).
[14] H.L.A. HART, THE CONCEPT OF LAW, 79, (2nd Ed. 1994) [hereinafter THE CONCEPT OF LAW] (a concept so erroneous that Hart himself seems to reject it).
[15] *Smith*, 494 U.S. at 874.
[16] *Id.*

suggests that Oregon's law is exactly the sort of "order" or "command" Utilitarian Legal Positivism had in mind.[17] Furthermore, this order is backed with a "coercive"[18] "threat."[19] The threat, Scalia explains, is that "[p]ersons who violate this provision by possessing a controlled substance listed on Schedule I are guilty of a class B felony."[20] To Scalia, Oregon is simply a sovereign giving a command, which is to be enforced by coercive threat of jail-time for noncompliance.

Purely Analytical

The second characteristic of Legal Positivism according to Hart is the "purely analytical study of legal concepts," utilizing the "distinctive vocabulary of the law."[21] This is surely how we can characterize Justice Scalia's opinion, which engages in a good deal of one could, after Hart, characterize as "analytical…distinctive vocabulary," but which Scalia himself at times colourfully referred to as "interpretive jiggery-pokery."[22]

The majority opinion does acknowledge that the Court has, in the past, allowed First Amendment Free Exercise exemptions from generally applicable statutes. It then quickly turns to the "distinctive vocabulary of the law," arguing that other cases "are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutionalprotections [sic]."[23] "Distinguishing," in the "distinctive vocabulary of the law" is

[17] *Id.*; THE CONCEPT OF LAW, *supra* note 14, at 79; *The Separation of Laws and Morals*, *supra* note 3, at 601.
[18] THE CONCEPT OF LAW, *supra* note 14, at 80. Again, I note that this proposition appears so odious that even Hart himself rejects it, but my aim is to analyze this case according to the triptych of tenets that Hart identifies in foundational Legal Positivism.
[19] *Id.* at 79.
[20] *Smith*, 494 U.S. at 874.
[21] *The Separation of Laws and Morals*, *supra* note 3, at 601.
[22] *King v. Burwell*, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting).
[23] *Smith*, 494 U.S. at 872.

"to note a difference…in (an earlier case)…to minimize the case's precedential effect."[24] Scalia goes to great rhetorical lengths to distinguish Smith and Black's case from the Court's previous Free Exercise jurisprudence. This may be because the Court's previous jurisprudence supplied a perfectly valid line of morally and legally sound reasoning with which to exempt Smith and Black from the statute: the holding in *Sherbert*.[25] Scalia, however, obfuscates that the *Sherbert* test "was developed in a context…that lent itself to individualized governmental assessment of the reasons for the relevant conduct" while, for whatever reason, Smith and Black's case did not so lend itself.[26] What was this "context," so radically removed from Smith and Black's case that it rendered *Sherbert* inapplicable? "[S]tate unemployment compensation rules."[27] In other words, *the exact same thing* that was at issue in Smith and Black's case. This is analysis that only a lawyer could produce, and only a pettifogger could love. It is "purely analytical" in so far as it scoffs at pure analysis's antipode: common sense.

Scalia continues to twirl through legalese analysis bordering on sophistry: "[a]lthough…we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws…we have never applied the test to invalidate one."[28] How one "analyzes" per a test without "applying" the test is a legal legerdemain, the secret to which Scalia must have taken to his grave. This opinion is then, in Scalia's mind, "analysis," but it reaches a nadir far shallower and more intellectually shabby than what Hart presumably had in mind when he wrote of "purely analytical" legal reasoning.[29] If one, like Scalia, has a penchant for dictionaries, one could

---

[24] *DISTINGUISH*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[25] *Smith*, 494 U.S. at 873 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).
[26] *Id.* at 873.
[27] *Smith*, 494 U.S. at 883.
[28] *Id.* at 884-85.
[29] *The Separation of Laws and Morals*, *supra* note 3, at 601.

define "analysis" as "a method…of resolving complex expressions into simpler or more basic ones."[30] Scalia's opinion is purely analytical in the sense that it, in the assessment of his brethren on the bench, "extracts from our long history of free exercise precedents" a "single categorical rule,"[31] and a bad one at that.

The Law As It Is, Not As It Ought to Be

Finally, and most emphatically, the Court's decision in the *Smith* case smacks of Hart's most beloved tenet of Legal Positivism, the one that not even Nazi *diablerie* could diminish in his mind[32]: that there must be an impregnable wall that divides the law from morality. In Hart's alternative, more academic phrasing, "[t]he existence of a law is one thing, its merit or demerit is another."[33]

In order to see how Scalia, after Hart, so hermetically cabins law from morality, one must first have a sense of the American moral character. If there is but one moral precept upon which the United States was founded, it is the freedom to practice one's religion without governmental interference. The vast majority of those who expatriated forth to this continent from England in the 17th century were religious nonconformists who sought the right to worship according to the dictates of their own conscience. Puritans from East Anglia fleeing religious persecution settled the majority of New England.[34] Maryland was settled by English Catholics, fearful of state persecution,[35] and the Delaware River Valley by William Penn and his fellow

---

[30] *ANALYSIS*, MERRIAM-WEBSTER ENGLISH DICTIONARY, www.m-w.com (last visited No. 9, 2017).
[31] *Smith*, 494 U.S. at 891 (O'Connor, J., concurring)
[32] *See The Separation of Laws and Morals*, *supra* note 3, at 617-21 (attempting to rationalize why Nazi lawyers' reliance on the doctrines of Legal Positivism to unjustly execute a civilian does not putrefact the doctrines themselves).
[33] *Id.* at 596.
[34] SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 61 (1965).
[35] *Id.* at 79.

nonconforming Quakers.[36] Thomas Jefferson's most important legislative accomplishment in the nascent state of Virginia was his 1786 Statute for Religious Freedom,[37] which would serve as a model for the First Amendment, which ensconced the "free exercise" of religion as a fundamental right in the United States.[38] This bar against federal interference with religious practice was deemed so fundamentally important that the Supreme Court incorporated it, via the Fourteenth Amendment, against state and local legislatures as well.[39] Freedom of religion, by the mid-20th century, was considered by the United Nations to be a fundamental human right, of all peoples, everywhere.[40]

It is self-evident from an examination of our history that the free exercise of religion is a moral value of the highest order, yet in the *Smith* case, Justice Scalia demonstrates the impressive mental dexterity necessary to completely hermetically separate foundational American moral values from the law. In Hart's words, he is able to consider "the law as it is" without any reference to its "merit or demerit."[41] The Oregon law, writes Scalia, "makes no exception for the sacramental use of the drug."[42] He continues on, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law."[43] It seems obvious that the law *ought* to have excused Smith and Black's peyote use as their free exercise of religion, but Hart might brush off this objection: "[t]he word 'ought' merely reflects

---

[36] *Id.* at 126.
[37] THOMAS JEFFERSON, SELECTED WRITING OF THOMAS JEFFERSON, 253 (eds. Adrienne Koch & William Peden, 1982).
[38] U.S. Const. amend. I; *see also Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that free exercise of religion is a "fundamental right").
[39] *See Cantwell v. Connecticut*, 310 U.S. 296 (1940).
[40] United Nations Universal Declaration of Human Rights, Art. 18 (1948), http://www.un.org/en/universal-declaration-human-rights/index.html (last visited Nov. 9, 2017).
[41] *The Separation of Laws and Morals*, *supra* note 3, at 596.
[42] *Smith*, 494 U.S. at 876.
[43] *Id.* at 878-79.

some standard of criticism" and "not all standards are moral."[44] Scalia seems wholeheartedly on board with this analysis. He writes, "to say that a nondisciminatory religious-practice exemption is permitted, *or even that it is desirable*, is not to say that it is constitutionally required."[45] Here, Scalia is unambiguously endorsing the fundamental proposition of Hart's dichotomy between what the law is and what it ought to be. In Scalia's mind, "the law," and what "is desirable" are entirely unrelated notions, as Hart argues they should be. Scalia, in the words of Professor Fuller, "take[s] refuge behind the maxim that 'law is law' and explain[s] his decision in such a way that it would appear to be demanded by the law itself,"[46] despite the fact that the result he arrived at is, in the words of his colleagues, "incompatible with our Nation's fundamental commitment to individual religious liberty."[47]

Scalia finally ends with a chimerical invocation of the spectre that haunted the original Positivist concerns of Bentham and Austin, writing, "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land."[48] In Scalia's mind, Smith and Black's religious use of peyote is the portentous harbinger of an imminent pre-Enlightenment theocracy, a post-modern Bonfire of the Vanities, and a new Dark Age. *Barbaris esse portarios*.

Scalia's Slippery Slope?

[44] *The Separation of Laws and Morals*, *supra* note 3, at 612.
[45] *Smith*, 494 U.S. at 890 (emphasis added).
[46] Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 637 (1958).
[47] *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).
[48] *Id*. at 879.

It would be dishonest not to acknowledge that the fears that motivated Scalia's decision in part possess some quantum of legitimacy. Scalia's concern is that a holding in *Smith* contrary to his own would essentially "make the professed doctrines of religious belief superior to the law of the land."[49] If we must exempt from every statute of general applicability anyone who claims that her religion prevents her from obeying it, have we not opened a Pandora's Box of (potentially spurious) of religious exemptions from the law? Perhaps. But as with the Pandora's Box of myth, after all the evils have emerged into the world, we may still find some hope of a well-ordered legal regime remains.[50]

The Strict Scrutiny Option

The problem with originalists like Scalia and their "austere interpretative method"[51] is that they see the world in absolute terms with no space for nuance or happy medium. In fact, there are several alternatives to Scalia's absolutist position that would have accommodated Black and Smith, but not worked violence against the rule of law.

For such an example, Justice Scalia need look no further than a dozen pages in the United States Reports, to Justice O'Connor's opinion in the very same case. O'Connor proposes that when evaluating a Free Exercise exemption from a general statute, a court should subject the law to strict scrutiny.[52] Firstly, the offending law must be justified by a "compelling state interest;" and secondly, the law must employ "means narrowly tailored to achieve that interest."[53] How

---

[49] *Id.*
[50] *See* HESIOD, WORKS AND DAYS, ln. 90-95 (trans. Hugh G. Evelyn-White, 1914) (700 B.C.) (The oldest extant iteration of the myth of Pandora and her box).
[51] Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012.
[52] *Smith*, 494 U.S. at 895 (O'Connor, J., concurring).
[53] *Id.*

would this case have played out if the Court had applied that test instead of Scalia's harsh and vapid "the law is the law" tautology? Presumably, Black and Smith would have been denied unemployment benefits, and they would have brought a Free Exercise challenge to the unemployment eligibility law. The court would probably determine that preventing "work-related misconduct"[54] was a compelling state interest, but that the law was not narrowly tailored, because it could have contained an exemption for *bona fide* mandatory religious peyote use. The law would have been struck down, the Oregon legislature would have had to spend fifteen minutes adding the aforementioned exemption to their unemployment law and calling a voice-vote on it, and everyone would have been content with the outcome. Oregon gets to deny benefits in 99% of "misconduct" cases, Smith and Black get to observe their religion untrammelled by the state, and Justice Scalia could declare that he defended a textualist reading of the Free Exercise Clause.[55]

The *Stare Decisis* / Balancing Test Option

In an alternative scenario, Justice Scalia could have fired a rhetorical broadside against "judicial activism,"[56] and embraced the principle of *stare decisis*,[57] ruling for Smith and Black on

[54] *Id.* at 876.

[55] It seems to me that a serious textualist, faced with the proposition that "[c]ongress shall make no law…prohibiting the free exercise [of religion]" would take it to mean that *any* law that prohibits the free exercise of religion is unconstitutional.

[56] Scalia has condemned "[t]he Imperial Judiciary" as a "Nietzschean vision," in contrast with his ideal of a "more modest role" for the courts. *Planned Parenthood v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in part & dissenting in part). He has also criticized "tak[ing] federal courts wildly beyond their institutional capacity." *Brown v. Plata*, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting).

[57] Scalia has even asserted the concept of *meta-stare decisis*: "[i]t seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*…." *Casey*, 505 U.S. at 993 (Scalia, J., concurring in part & dissenting in part).

the grounds that he was ineluctably compelled to do so by precedent. In *Cantwell v. State of Connecticut*, the Court held that a Connecticut law of general applicability prohibiting the unauthorized door-to-door solicitation of money unconstitutional on the grounds that it violated a religious solicitor's Free Exercise rights.[58] In *Wisconsin v. Yoder*, the Court held that a Wisconsin law of general applicability mandating public school attendance unconstitutional on the grounds that it violated Yoder's Free Exercise rights as an Amish Mennonite to religiously educate his children.[59] The Court held that "[a] regulation, neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[60]

How did the *Yoder* Court respond to Scalia's fears that such a decision would "make the professed doctrines of religious belief superior to the law of the land?"[61] The *Yoder* Court reasoned that Free Exercise challenges to generally applicable statutes must be approached with "great circumspection in performing the sensitive and delicate task of *weighing*" the state's interest against the objector's Free Exercise interest.[62] What the Court should do, to prevent an anarchic Saturnalia of religious lawlessness, is to *weigh* the competing interests. Framed in the parlance of Justice Frankfurter, it should apply a *balancing test*.[63] In *Yoder*, the Court balanced the state's interest in mandatory public schooling with Yoder's interest in free exercise of his

---

[58] 310 U.S. 296, 305 (1940).
[59] 406 U.S. 205, 220 (1972).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 235 (emphasis added).
[63] Justice Frankfurter was a strong proponent of First Amendment balancing tests. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) ("Decades ago, Justices Black and Frankfurter waged a similar battle in the First Amendment context, and the echoes of their struggle continue to reverberate in free speech doctrine…Justice Frankfurter and the First Amendment balancers won most of their battles.").

religion. Weighing in favour of the state was its "power…as parens patriae."[64] Weighing in favour of Yoder was the Amish Mennonites' "history of three centuries as an identifiable religious sect," their "successful[ness]" as a part of American society, the "sincerity of their religious beliefs," and the "adequacy of their alternative mode of…education."[65] The balancing tilted in Yoder's favor.

There is no reason the *Smith* Court could not have applied the same balancing test. It could have weighed the Native American Church's history as an identifiable religious sect and the history and centrality of its peyote use against Oregon's interest in discouraging "misconduct,"[66] and would likely have found Oregon's policy unconstitutional as applied. The castle gates would not have swung open and welcomed in a Charivari "rule of misrule"[67] because each religious objector to a law would have to make her individual case to the Court, which would balance the competing interests before permitting an exemption.

Justice Scalia might be heard objecting that "[j]udging the centrality of different religious practices is… unacceptable."[68] To this we might say that "judging" is what judges *do*, it is their *primary function*. But, Scalia persists, it is unconstitutional for the government to define what are and are not legitimate expressions of religion! In fact, the Court has held (in *dicta*) that the government *can* make such determinations. In *Lemon v. Kurtzman*, the Court held that in order for a religious tax exemption to be granted, "the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship."[69] To "ascertain" whether the

---

[64] *Yoder*, 406 U.S. at 229.
[65] *Id.* at 235-36.
[66] *Smith*, 494 U.S. at 876.
[67] *See* THE OXFORD HANDBOOK OF WITCHCRAFT IN EARLY MODERN EUROPE AND COLONIAL AMERICA, 86 (ed. Brian P. Levack, 2013).
[68] *Smith*, 494 U.S. at 887.
[69] 403 U.S. 602, 614 (1971).

activity conducted on a property is "religious" is, *ipso facto*, to make a judgment about what *is* and *is not* legitimately "religious."[70] The Court proclaimed the power to do this twenty years before Scalia wrote *Smith*; perhaps his clerks were on vacation that week.

Would this sort of balancing test, which requires courts to determine what is and is not "religion," result in excessive government entanglement with religion, offending the Establishment Clause? Perhaps, but this requires us to entertain a second balancing test: would the minimum level of government entanglement in religion that this approach would require cause more or less harm than Scalia's implausibly narrow reading of the Free Exercise Clause? Competition between opposing constitutional mandates is tricky business. Perhaps one way to reframe the question is, if the government engages in action that has the minor marginal effect of "establishing" religion, who is harmed, and how acute is the harm? If, on the other hand, Scalia's narrow reading of the Free Exercise Clause prevails, two particular people are directly harmed by being deprived their unemployment benefits. In the former case, the harm seems attenuated, non-particularized, and inchoate; in the latter case, it is specific, material, and personal. Perhaps that analysis is overly reductive, but it is where this author will hang his hat, until a better line of moral reasoning reveals itself.

. In any event, Justice Scalia had at least two plausible, less draconian approaches available to him to resolve the case. The Court could have convincingly held that either strict scrutiny applies in Free Exercise cases, or it could have held that Free Exercise challenges are subject to a balancing test, as it had previously. Instead, he chose to indulge his historical

[70] The author notes that this example is not quite apposite. *Lemon* was an Establishment Clause case, not a Free Exercise case. Nevertheless, the quote does suggest that the government, in some cases, may pass judgment on what is and is not "religious" without offending the constitution.

curiosity, dug up the churlish old doctrines of Legal Positivism, and dressed his authoritarian ruling up in the robes of its academic pedigree.

Aftermath

Despite Scalia's protestations to the contrary, the injustice that arose from the *Smith* case was so open and obvious that even that most sclerotic and dysfunctional of American institutions, the United States Congress, took action to rectify it. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which was designed to legislatively overrule the Court's decision in the *Smith* case, and compel the courts to use strict scrutiny when analysing Free Exercise cases in the future.[71] Although the tug-of-war between legislatures and the courts over this issue would go on for almost a decade,[72] the overwhelming support RFRA drew from Congress[73] suggests that the Court was seriously out-of-step with popular moral opinion. In Professor Fuller's formulation of the problem, "the authority to make law must be supported by moral attitudes that accord to it the competency it claims,"[74] and Scalia's opinion had no moral foundation. The Court had instead arrived at a holding so unjust that the entire legislative branch

---

[71] Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1 (West); *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) (holding that the purpose of RFRA was to prevent the application of the *Smith* standard to Free Exercise Clause cases); *Meyer v. Fed. Bureau of Prisons*, 929 F. Supp. 10, 13 (D.D.C. 1996) (same).

[72] The Supreme Court struck down RFRA as unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997); in response, Congress passed the Religious Land Use and Institutionalized Persons Act (42 U.S. § 2000cc et seq.) in 2000; and 21 states have passed state-level RFRA bills as of 2015. National Conference of State Legislatures, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Nov. 9, 2017).

[73] RFRA passed in the House unanimously; it passed 97-3 in the Senate. https://www.govtrack.us/congress/votes/103-1993/s331 (last visited Nov. 9, 2017); https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions (last visited Nov. 9, 2017).

[74] Fuller, *supra* note 46, at 644.

of government (less three Senators) transcended its perpetual state of gridlocked paralysis to heap unambiguous moral obloquy upon Scalia's misguided exercise in Legal Positivism.

The purpose of this paper has been to analyse the Legal Positivist arguments that lead the Supreme Court to find against the Free Exercise right of Smith and Black to not be penalized by the government for their sacramental use of peyote in 1985, and to demonstrate the injustice of that result. The larger, contemporary debate over to what extent the Free Exercise clause protects behaviour that discriminates on the basis of race, sex, sexual orientation, or any other immutable characteristic,[75] having much less moral clarity than *Smith*, this author leaves to better minds and sharper scholarship. The argument this paper makes is that, in the specific case of *Smith*, the Court applied the erroneous doctrine of Legal Positivism, and achieved a commensurately erroneous result.

[75] *See, e.g., Burwell v. Hobby Lobby Stores,* 134 S.Ct. 2751 (2014).