

Theorizing *Employment Division v. Smith*: The Affective Politics of the Legal Regulation of Religion

Law, Culture and the Humanities

1–17

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DOI: 10.1177/1743872116678213

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Abstract

This commentary interrogates, first, Justice Antonin Scalia's assertion in *Employment Division v. Smith* that the law must uphold the belief-action distinction in order to preserve democratic norms and, second, the affect that this distinction had on Alfred Smith's relationship with his faith. I argue that as Smith responded to the law's repeated requests for justification as to why his religious convictions ought to exempt him from the criminal regulation of peyote, he experienced a profound sense of legal, political, and spiritual disempowerment – a disempowerment compounded by the erasure of the complexities of his faith in both the decision and aftermath of *Smith*. By way of making this argument, I bring Scalia, Smith, and *Smith* into sustained conversation with an unlikely interlocutor: Jürgen Habermas. As one of the leading legal and political theorists of religion in the late modern moment, Habermas articulates a vision of democratic life that at once venerates public religious expression and insulates law- and policy-making institutions from faith-based influence. Habermas's vision is often characterized by contemporary political theorists and legal academics as the ideal to which all religiously plural democracies should aspire, but when his argument is considered alongside the experiences of Smith before the Court, a powerful disjuncture between theory and practice emerges. For although Habermas encourages religious individuals to adopt an epistemic stance of public reason and to engage in cooperative acts of translation in order to settle collaboratively the appropriate limits of religion as well as the law, I argue that, when applied to *Smith*, these methods of discursive engagement work to not only underscore the absolute primacy of the law over religion, but also to undercut Smith's own understanding of his faith. I ultimately suggest that this mode of inquiry – that is to say, infusing theory with nuances gleaned from the everyday legal lives of ordinary individuals – generates new pathways through which to ameliorate latent social and political harms.

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Keywords

political theory, legal theory, religious freedom, religious accommodation, free exercise, reason, power, Jürgen Habermas, Native American, Supreme Court, *Employment Division v. Smith*

Just prior to the United States Supreme Court's denial of Alfred Smith's claim that the Klamath Nation practice of sacramental peyote consumption should be exempted from criminal regulation, Justice Antonin Scalia declared: "To make an individual's obligation to obey the law contingent upon the law's coincidence with his religious beliefs permits him to become a law unto himself."¹ Delivered from the bench to a crowded courtroom in late April 1990, Scalia's statement captures what was, for the Justices, a deeply rooted anxiety: that, should the Court side with Smith, few bulwarks would remain against a tide of religious individuals citing their beliefs in order to be exempted from "compliance with otherwise valid laws."² Scalia further suggested that to decide in favor of Smith would be to absolve individuals of their democratic responsibility to contribute to and participate within a secular public square due to the "mere possession of religious convictions."³ Although Scalia qualified the stringency of his remarks by acknowledging that the First Amendment's provisions for the free exercise of religion⁴ could never be construed in such a way as to abrogate an individual's right to "bow down before a golden calf" or "abstain from certain foods,"⁵ he nevertheless noted that properly practiced public religion must respect the "belief-action distinction."⁶ First used to proscribe the Mormon practice of polygamy in *Reynolds v. United States* (1878),⁷ this distinction mandates that the law must refrain from criminalizing religious thought, but not religious conduct – provided that said conduct poses a palpable threat to the liberty and equality of all individuals. By calling upon *Reynolds* to underscore the Court's reasoning in *Employment Division v. Smith*, Scalia thus prohibited Smith from participating in a rite he considered central to his spiritual wellbeing even as he preserved "constitutional traditions and common sense"⁸ by preemptively curtailing future free exercise challenges to ostensibly neutral laws.

Reactions to *Smith* were swift and unequivocal. Buoyed by the robust concurring and dissenting opinions respectively filed by Justices Sandra Day O'Connor and Harry

1. Antonin Scalia, Supreme Court of the United States, Washington, District of Columbia, April 17, 1990. Announcement of Decision from Bench.
2. *Employment Division, Department of Human Resources of Oregon v. Smith* 494 US 872 (1990). *Smith* at 879.
3. *Smith* at 879.
4. The First Amendment to the United States Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
5. *Smith* at 877 and 878.
6. Carolyn N. Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith* (Lawrence, KS: The University Press of Kansas, 2000), p. 48. See also: *Smith* at 879.
7. *Reynolds v. United States* (1878) 98 US 145.
8. Scalia, Announcement of Decision from Bench.

Blackmun, several prominent Native American organizations condemned the Klamath Nation's "loss of cultural integrity [...] and, therefore, religious survival."⁹ Furthermore, spiritual leaders from Christian, Jewish, and Islamic communities worked alongside the American Civil Liberties Union and elected officials to draft federal legislation that would overrule "the Supreme Court's elimination of the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion."¹⁰ This legislation, now known as the Religious Freedom Restoration Act (RFRA),¹¹ secured the bipartisan support of all but three senators and was signed into law by President Bill Clinton in 1993. Indeed, the magnitude of the responses to and remedies for *Smith* inspired one journalist to note that the American political and legal landscape would forever bear the marks of the "fight to the death to preserve the right of every person to practice whatever convictions he or she has."¹²

Yet within this tumultuous post-*Smith* terrain, one figure was notably absent: Alfred Smith himself. To both the Court and to those who worked to mitigate the impact of the Court's decision, Smith functioned as a cipher. For the former, he represented the possibility that an insidious and irrational "rule of religion" would endanger the freedom and equality guaranteed to all persons by secular democratic governance.¹³ For the latter, he represented an injustice wrought by an elite group of individuals far removed from the religiously-inflected lives of everyday Americans. In each setting and with each new invocation of *Smith*, the complex rationale given and spiritual experiences recounted by Smith in support of his use of sacramental peyote were elided; not only did the Court dismiss Smith's religious beliefs with a mere half sentence by ascribing them to the Native American Church¹⁴ (an organization to which he never belonged¹⁵), but so too did

9. *Smith* at 920.

10. Garrett Epps, *To an Unknown God: Religious Freedom on Trial* (New York: St Martin's Press, 2001), p. 231.

11. 42 USC §2000bb. In passing RFRA, Congress sought to "restore" constitutional jurisprudence on matters of religious freedom to standards set by prior Supreme Court decisions, specifically those set by *Sherbert v. Verner* (374 US 398 (1963)) and *Wisconsin v. Yoder* (406 US 205 (1972)). Simply put, *Sherbert* and *Yoder* mandate that the government cannot substantially burden religious exercise absent compelling justification. However, the final language of RFRA declined to extend permanent legal protection to the consumption of sacramental peyote. In the House report accompanying the bill, the authors wrote: "In terms of the specific issue addressed in *Smith*, this bill would not mandate that all states permit the ceremonial use of peyote, but it would subject any such prohibition to the aforesaid balancing test. The courts would then determine whether the State had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the State had chosen the least restrictive alternative required to advance that interest." See: Report No. 88, 103d Congress, 1st Session, 1993.

12. Nat Hentoff, "Justice Scalia vs. the Free Exercise of Religion," *Washington Post*, May 19, 1990, p. A25. As cited in Epps, *To an Unknown God*, p. 235.

13. Winnifred Sullivan, "The World that Smith Made," in Elizabeth Shakmun Hurd et al. (eds), *Politics of Religious Freedom* (Chicago, IL: University of Chicago Press, 2015), p. 234.

14. *Smith* at 890. See also: Sullivan, "The World that Smith Made," p. 235.

15. Alfred Leo Smith, Personal Interview with Garrett Epps, June 21, 1995.

RFRA proponents cast him as a “red man expected to be in a headdress, born with a freakish set of rituals to practice.”¹⁶ The pervasiveness of the dismissals and reformulations of Smith’s religious beliefs prompted him to later remark: “My religion and my reasons for peyote use could not be recognized by the law. I was given a God – a God that I didn’t even understand.”¹⁷

This commentary interrogates, first, Scalia’s assertion that the law must uphold the belief-action distinction in order to preserve democratic norms and, second, the affect that this distinction had on Smith’s relationship with his faith. I argue that as Smith responded to the law’s repeated requests for justification as to why his religious convictions ought to exempt him from the criminal regulation of peyote, he experienced a profound sense of legal, political, and spiritual disempowerment – a disempowerment compounded by the erasure of the complexities of his faith in both the decision and aftermath of *Smith*. By way of making this argument, I bring Scalia, Smith, and *Smith* into sustained conversation with an unlikely interlocutor: Jürgen Habermas. As one of the leading legal and political theorists of religion in the late modern moment, Habermas articulates a vision of democratic life that at once venerates public religious expression and insulates law- and policy-making institutions from faith-based influence. Habermas’s vision is often characterized by contemporary political theorists and legal academics as the ideal to which all religiously plural democracies should aspire, but when his argument is considered alongside the experiences of Smith before the Court, a powerful disjuncture between theory and practice emerges. For although Habermas encourages religious individuals to adopt an epistemic stance of public reason and to engage in cooperative acts of translation in order to settle collaboratively the appropriate limits of religion as well as the law, I argue that, when applied to *Smith*, these methods of discursive engagement work to not only underscore the absolute primacy of the law over religion, but also to undercut Smith’s own understanding of his faith. Simply put, *Smith* stripped Alfred Smith of his sense of belonging, both in deliberative democratic politics and in his religious community.

My argument progresses in three sections. The first section sketches the broader theoretical and legal contexts in which *Smith* was situated. In this section, I examine how Scalia and his fellow Justices enacted a modified form of Habermas’s adjudicatory ideal: that is to say, the public use of reason informed by cooperative acts of translation. The second section focuses on the figure of Smith himself by reconstructing his experiences before the bench through a parsing of the interviews he gave in the decades preceding his death. I highlight how the Court’s reliance on reasoned, Habermasian “common sense” dialogue discounts spiritual revelation and induces metaphysical crises – it is, in other words, a reliance that imposes an asymmetrical burden on devout individuals who desire to practice their faith in concert with their actions. The third section concludes by reflecting on the methodological necessity of fostering interdisciplinary conversations among law, theory, and lived experiences. I argue that this form of scholarship not only exposes how the law possesses a power that can adversely affect private belief and public conduct,

16. Smith, Personal Interview.

17. Smith, Personal Interview.

but so too does it generate pathways through which to ameliorate the latent political and spiritual harms endured by figures like Alfred Smith.

I. A New Legal Reality

Employment Division v. Smith occupies a fraught place in American political and legal consciousness. For example, on the one hand, legal scholar Winnifred Sullivan suggests that although the American experiment with religious freedom originated nearly six centuries ago, “there is a sense in which the conversation began anew when the Supreme Court decided *Smith*.”¹⁸ Political philosopher Steven Shiffrin echoes this sentiment, noting that *Smith* launched an era in which the question of whether religious individuals could claim a right to equal treatment under the law “occupied a status similar to that of the question of racial equality in mid-twentieth century America.”¹⁹ However, on the other hand, many jurists claim that Scalia’s reliance on *Reynolds v. United States* is indicative of the Court’s more immediate view of *Smith* as a “routine summary of previous case law.”²⁰ In support of this interpretation, jurists Christopher Eisgruber and Lawrence Sager argue that Scalia’s use of Justice Morrison Waite’s determination that “laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices”²¹ demonstrates the Court’s openness to public religious expression – so long as the rights of all individuals to equal freedom and liberty are rigorously protected.²² I seek to forge a middle path between these two competing interpretations of *Smith*. Portraying *Smith* as either the vehicle for jurisprudential and legislative change or as the logical outcome of more than a century of struggles over what counts as religious expression belies the depth of Scalia’s legal and social anxieties and diminishes the impact that Smith’s encounter with the Court had on his relationship to both his faith and the law. In this section, I interrogate the reasons animating Scalia’s decision in *Smith* in order to better understand Smith’s lived experiences in the following section.

I The Decline of Secularism

At the outset of this commentary, I noted that when Scalia announced the *Smith* decision, he articulated two fears: first, that a decision in favor of Smith would absolve religious

18. Sullivan, “The World that Smith Made,” p. 233.

19. Steven H. Shiffrin, *The Religious Left and Church State Relations* (Princeton, NJ: Princeton University Press, 2009), p. 21. Citing to: Jack N. Rakove, “Once More into the Breach: Reflections on Jefferson, Madison, and the Religion Problem,” in Diane Ravitch and Joseph P. Viteritti (eds), *Making Good Citizens: Education and Civil Society* (New Haven, CT: Yale University Press, 2001), p. 233.

20. Epps, *To an Unknown God*, p. 228.

21. *Reynolds* at 166 and 167.

22. Christopher Eisgruber and Lawrence Sager, “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,” in *University of Chicago Law Review* 61 (1994), 1245.

citizens of their duty to contribute to and participate within a secular public square secured by enforceable criminal regulations and, second, that such absolutism would infuse formally neutral laws with religious inflection. Although it is possible to ascribe Scalia's desire to maintain a religiously neutral participatory democracy to his ideological commitment to constitutional originalism, there is nonetheless a decidedly modern worry present in his comments. To wit, in the years that *Smith* was before the Court (roughly 1989–1990), the United States underwent a rapid demographic shift. The collapse of the Berlin Wall spurred an increase in migration to western democratic states, the rise of global capital brought foreign companies and interests to American shores, and – perhaps most troublingly for Scalia – sociological researchers declared the politico-legal practice of secularism a failure. The sheer magnitude of this failure, these scholars suggested,²³ could be plainly seen in the empirical data detailing the renewed role of religion in the public square. According to a study conducted by the Pew Forum on Religion and Public Life, the influence of religious organizations in the waning decades of the twentieth century had declined – even as the popular value ascribed to individual testimonies of faith had risen. The Pew Forum further determined that although “traditional” western faiths like Christianity and Judaism remained among the most practiced religions, an increasing number of persons associated themselves with so-called minority faiths such as Islam, Buddhism, or Native spirituality.²⁴

However, it was not simply that the shift in the methods and modes of modern religious practice had challenged the continued primacy of secularism, but rather that these shifts were accompanied by legal demands for political representation and positive public accommodation. As such demands came before local, regional, and federal courts judges increasingly favored the decisions set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) over the century-old precedent set by *Reynolds*. Taken together, *Sherbert* and *Yoder* determined that it was only permissible to deny religious individuals the right to freely exercise their beliefs in a public setting if the government could identify a compelling, and narrowly tailored, reason for doing so.²⁵ Religiously-motivated requests for exemption from generally applicable laws expanded exponentially as Catholic nurses sought relief from assisting with surgical procedures that would endanger the life of a fetus, Seventh Day Adventist steel smiths requested to not be placed on assembly lines that manufactured bullets, and Methodists won the right to end work-related phone calls with “have a blessed day.”

It is within this fractured social and legal landscape that Scalia wrote the majority decision for *Smith* and opined for a return to *Reynolds*. Indeed, unlike *Sherbert* or *Yoder*,

23. Peter L. Berger, for instance, argued that “experiments with secularism have generally failed [and that] the world is as furiously religious as it ever was, if not more so.” Craig Calhoun has likewise determined that the “prominence of religion today still has the capacity to startle secular thinkers who thought it was clearly designed to fade in the face of enlightenment and modernity.” See: Peter L. Berger, *The Desecularization of the World* (Washington, DC: Ethics and Public Policy Center, 1999), p. 2. Craig Calhoun, “Afterword: Religion’s Many Powers,” in Eduardo Mendieta and Jonathan Vanantwerpen (eds), *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011), p. 118.

24. The Pew Forum on Religion and Public Life. “Religious Landscape Survey,” February 2008.

25. *Supra* note 11.

Reynolds possessed a clear rubric through which the Court could assess the impact of an accommodation request on the public square. Although Scalia demurred that the Court could not presume to “determine the plausibility of a religious claim,”²⁶ the belief-action distinction in *Reynolds* provided a legal pathway through which to curtail the decline of secular democratic life. This distinction could prevent, in other words, “the prospect of constitutionally required exemptions from civic obligations of every conceivable kind”²⁷ – exemptions that would, in turn, “make the professed doctrine of religious belief superior to the law of the land and in effect permit every citizen to become a law unto himself.”²⁸ Relying on *Reynolds* thus provided Scalia with the tools to reinforce both the secular ideal that properly practiced religion was publicly circumspect and the legal ideal that every citizen was deserving of protection from the potentially harmful conduct of others, even as he ostensibly left unquestioned the content of the religious belief itself. It is the affect of this assumption, that the belief-action distinction can be applied in a neutral manner that has little-to-no impact on an individual’s religious belief, which provides the motivation for the remainder of this section and, more broadly, the remainder of this commentary.

2 Scalia’s Belief-Action Distinction, Habermas’s Public Reason

Many modern scholars of religion and the law have parsed the perniciousness of the belief-action distinction to great effect. For example, with specific respect to *Reynolds*, Sarah Song notes that as Waite declared that the First Amendment’s protection of religious freedom extended only to belief and not action, he condemned polygamy as a “monstrous practice on par with human sacrifice.”²⁹ Waite’s use of the belief-action distinction, she argues, “integrated the protection of [monogamous and Protestant] Christian marriage into the First Amendment” as it was deemed “integral to the flourishing of democracy.”³⁰ Song concludes that this integration both rendered the right to religious freedom contingent upon an individual’s compliance with Protestant Christian values and endowed the Court with the power to adjudicate which public faith-based actions properly conformed to this standard. Similarly, although in regards to a more contemporary legal challenge, Winnifred Sullivan suggests that as religious individuals waged a legal battle over the right to erect vertical (rather than horizontal) grave markers in a Boca Raton cemetery, the judge’s use of the belief-action distinction reinforced an elite and abstracted understanding of religion – an understanding that categorized the faith-based conduct of the plaintiffs as “mere personal preference” when the reasons for such conduct could not be verified through textual exegeses or longstanding social traditions.³¹ When the markers were

26. Scalia, Announcement of Decision from Bench.

27. Scalia, Announcement of Decision from Bench.

28. *Smith* at 879, quoting *Reynolds* at 145.

29. Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (New York: Cambridge University Press, 2007), p. 149.

30. Song, *Justice, Gender, and the Politics of Multiculturalism*, p. 148.

31. Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005), p. 105.

ordered removed, one plaintiff experienced a profound sense of “spiritual loss” as she was no longer certain that her deceased child would be welcome in the afterlife.³² Finally, and most recently, Andrew March contends that the belief-action distinction, particularly as applied to the legal regulation of blasphemy, pushes Islamic individuals to privatize their faith when speech acts possess the potential to injure.³³ Drawing in part from the intense political controversy surrounding Kurt Westergaard’s illustration of Muhammad with a bomb in his turban, March argues that secular modes of governance are ill-equipped to take seriously the notion that violations of Islamic ethical traditions can be experienced as physical wounds to the body. The law’s desire to transform public wounds into privatized harms, he concludes, is indicative of its willingness to tolerate religiously injurious speech in order to preserve democratic norms and ideals, often at the expense of non-Western or non-Christian faiths.³⁴

If the above treatments of the belief-action distinction are taken together, a commonality emerges: that when the law encounters public expressions of minority faiths, it relies upon majoritarian understandings of religion in order to assess whether such expressions cohere with the ideals of secular democracies. In doing so, the law links the concepts of “secularism” and “democracy” to Protestant Christian modes of worship; that is to say, by encouraging individuals to adopt privatized relationships with their chosen gods, the law seeks to ensure that the public square will remain free from the interfaith conflicts that often plague religiously plural states and, as a result, secure liberty and equality for all.³⁵ As Jeremy Waldron notes, this manner of modern governance – which cultivates an attitude of religious neutrality even as it promotes Protestantism – “unfairly excludes and diminishes minority religious conceptions of moral life [...] thereby devaluing the subjective emotional world of certain persons.”³⁶ To adopt the rhetoric of the belief-action distinction is thus to participate within a potent legal and political history that holds certain rights and freedoms hostage to an individual’s adherence to privatized, Protestant modes of religious conduct.

32. Sullivan, *The Impossibility of Religious Freedom*, p. 105.

33. Andrew March, “Speech and the Sacred: Does the Defense of Free Speech Rest on a Mistake about Religion?” *Political Theory* 40(3) (2012), 1–28.

34. March, “Speech and the Sacred,” 19.

35. The origins of this argument – that the prohibition of public acts of faith can secure the stability of a liberal democratic state – can be traced to the writings of John Locke. For more, see: John Locke, *A Letter Concerning Toleration* (Amherst, NY: Prometheus Books, 1990).

36. Jeremy Waldron, “Toleration and Reasonableness,” in Catriona McKinnon and Dario Castiglione (eds), *The Culture of Toleration in Diverse Societies* (Manchester: Manchester University Press, 2003), pp. 13–37. As cited in March, “Speech and the Sacred,” 2, 5. Other excellent interrogations of the Protestant Christian foundation in secular liberal democracies can be seen in: Peter Danchin, “Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law,” *Harvard Law Review* 49(2) (2008), 249–321. Kirstie McClure, “Difference, Diversity, and the Limits of Toleration,” *Political Theory* 18(3) (1990), 361–91. Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003). Wendy Brown, *Regulating Aversion: Toleration in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006).

It is not enough to interpret *Smith* as another instance of the belief-action distinction's perniciousness. For although Scalia does indeed rely upon the belief-action distinction to lay the legal foundation for proscribing public religious expression and, in doing so, reinforces the Protestant ideals of secular democratic life, he also exceeds the discursive parameters originally set by *Reynolds*. To wit, in the moments after Scalia cited Waite as support for his argument that a robust constitutional commitment to the free exercise of religious expression would "permit every citizen to become a law unto himself,"³⁷ he admonished that those who would challenge his ruling ought to first parse the "common sense" that would lead them to "deem presumptively invalid [...] every regulation of conduct that protects an interest of the public sphere."³⁸ In contrast to Scalia's earlier claim that he would not presume to "determine the plausibility of a religious claim,"³⁹ this statement, first, mandates that religious individuals weigh their beliefs against a secular standard of the common good and, second, requires that this process begin well before an accommodation request is filed or a law is challenged. Deployed in this manner, the belief-action distinction becomes something quite different – and much more powerful – than what was first seen in *Reynolds*. Indeed, rather than leaving the private convictions of religious individuals relatively unregulated, the *Smith* interpretation of the belief-action distinction imposes upon religious individuals the obligation to reflexively evaluate the validity of their private beliefs and to determine, in relation to others, whether faith-based public action can be condoned. It is this reflexive requirement that ultimately illuminates the affective power of *Smith*.

To understand how Scalia's use of a discourse reliant on concerns for the public sphere and reflexive common sense imbues the law with an adverse affective power, a turn to Habermas is helpful. Using Habermas as a tool to parse Scalia's statement is not to say that Scalia himself adopted a Habermasian milieu when deciding *Smith*, but rather that the theoretical and practical nuances of his argument can be seen more clearly in relief – particularly since the decision offers so little in the way of guidance. It is best to begin interrogating Scalia's understanding of the public sphere and common sense at the point at which Habermas's work begins: with the theory of communicative action. Simply put, the public sphere designates "a theater in modern societies in which political deliberation is enacted through the medium of talk."⁴⁰ It is an arena in which private citizens gather to deliberate over "issues of public concern and common interest"⁴¹ and, by way of doing so, provide an institutionalized check on the power of the state. Citizens within the public sphere are expected to conform to "the theory of communicative action," in that their deliberations must be critically reasoned and conducted without

37. *Supra* note 30. See also: Scalia, Announcement of Decision from Bench.

38. Scalia, Announcement of Decision from Bench.

39. *Supra* note 26.

40. Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in Craig Calhoun (ed.), *Habermas and the Public Sphere* (Cambridge, MA: The MIT Press, 1994), p. 110.

41. Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: The MIT Press, 1991).

recourse to emotion, tradition, or strategic interest; it is only by eschewing these latter modes of speech that the promulgation of just laws and policies can be assured.⁴² At the core of this theory is the assumption that each participant within the public sphere will use plain language to raise validity claims about the propositional truth, normative rightness, and sincerity of the statements raised by their peers. The purpose of interpersonal engagement within the public sphere is to find – through the use of back-and-forth argumentation – a consensus that can serve as the basis for political, legal, or social change. Under Habermas's rubric, communicative action functions as a cooperative process of reasoned negotiation in which "no participant has a monopoly on correct interpretation."⁴³ The formation of the laws and policies that structure the contemporary democratic state are thus not beholden to *who* is speaking or *whether* she possesses a high economic, social, or political status, but rather the *soundness* of the reasons she offers in the course of communal deliberations in a public space.

When Habermas originally conceived of his theory of communicative action in 1962, religious discourse in the public sphere was "limited in the degree of its freedom of communication" as its claims regarding redemption and salvation could never be "rationally validated" outside of appeals to emotion or tradition.⁴⁴ Moreover, Habermas expected that, as modern liberal states began to adopt and conform to the ideology of the public sphere, "the authority of the holy would be gradually replaced by the authority of achieved consensus."⁴⁵ Religious discourse and religious authority were, in other words, intended to be absent in matters of legal, political, and social importance. By imposing constraints on the manners and modes of speech welcome in the public sphere, Habermas posited a nearly insurmountable polarization between religion and reason.

It is within this theoretical context that Habermas witnessed the enduring presence of religion in public life. Alarmed by the possibility of both strident secularists and religious adherents excluding others from participating in matters of law- and policy-making, Habermas turned to John Rawls's notion of translation⁴⁶ to reaffirm the obligations that citizens had to reciprocally render their arguments in language that would be accessible to one another. For religious citizens, this entailed the duty of rationally comprehending that the commitments of the liberal state to freedom and equality for all necessarily

42. Michele Dillon, "Jürgen Habermas and the Post-Secular Appropriation of Religion," in Philip Gorski et al (eds), *The Post-Secular in Question: Religion in Contemporary Society* (New York: New York University Press, 2012), p. 250.

43. Jürgen Habermas, *The Theory of Communicative Action, Volume 1* (Boston, MA: Beacon Press, 1981), p. 100.

44. Jürgen Habermas, "Transcendence from Within, Transcendence in This World," in Don Browning and Francis Schussler Fiorenza (eds), *Habermas, Modernity, and Public Theology* (New York: Crossroad, 1992), p. 233.

45. Jürgen Habermas, *Legitimation Crisis* (Boston, MA: Beacon Press, 1975), p. 120.

46. In the chapter entitled "The Idea of Public Reason" in *Political Liberalism*, Rawls writes: "As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, [citizens] should be ready to explain the basis of their actions to one another in terms each could reasonably accept that others might endorse as consistent with their freedom and equality." For more, see: John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 218.

prohibits the wholesale promulgation of faith-based legislation within its institutional framework. For secular citizens, this entailed the duty of recognizing that the moral and ethical content of religious speech could impart new knowledge to the existing framework of the state. Each citizen would bear the responsibility of treating his or her peers with unerring respect; as envisioned by Habermas, religious and non-religious citizens would work together to strip away the overtly spiritual tones of a faithful individual's contributions to democratic deliberations – leaving behind, ideally, an inclusive public sphere infused with “generally apprehensible” kernels of secular truth.⁴⁷

Habermas asserts that this process of translation – which he calls “public reason” – functions neither as a simple matter of governance nor as an “overhasty reduction of the polyphonic complexity of religious voices.”⁴⁸ He states: “The domestic procedure [of the liberal state] owes its legitimizing power to two components: first, the equal participation of all citizens, which ensures that the addressees of the law can also understand themselves to be the authors of these laws; and second, the epistemic dimension of deliberation that grounds the presupposition of a rationally acceptable outcome.”⁴⁹ In this passage, Habermas isolates the factors crucial to the continued legitimacy of the state in pluralistic polities: robust cross-cultural engagement in law- and policy-making decisions and the encouragement of reasoned and rational debate on said decision-making processes such that they can rightly be said to promote the constitutional ideals of freedom, liberty, and equality. Yet Habermas's interpretation of democratic deliberation and inclusion can, and should, be pushed further. Indeed, Habermas argues that all citizens must – and will – cultivate a deep sense of respect for and solidarity with their peers, regardless of the inevitable instances of interpersonal disagreement or dissent that will arise during the normal course of deliberation.⁵⁰ Moreover, he determines that this cultivation of respect must move past the simple social and institutional recognition of an individual's right to negative liberty. Respect, he clarifies, imposes an active moral duty on a liberal state's members to engage one another on diverse subjects and to decide collaboratively on a course of political or legal action. It is only by doing so that such actions can “count as legitimate” as they appear as impartial outcomes derived from the “light of generally acceptable reasons.” Public reason, properly defined, thus buttresses the legitimacy of the liberal state by not only cultivating an atmosphere of respectful democratic engagement, but also by imposing internal and informal regulations that require secular *and* religious community members to use readily accessible language and reasoning when engaging in civic debate.

Given the above, it is tempting to assert a simple analogy: Scalia's appeal to the secular “public sphere” recalls and reconstitutes Habermas's argument for a robust participatory democracy, within which religious individuals work closely and respectfully with their secular counterparts to identify the reasoned, “common sense” principles of their beliefs. On this reading, each individual – religious and secular – will eschew discrete

47. Jürgen Habermas, *Between Naturalism and Religion* (Malden, MA: Polity Press, 2008), p. 122.

48. Habermas, *Between Naturalism and Religion*, p. 131.

49. Habermas, *Between Naturalism and Religion*, p. 121.

50. Habermas, *Between Naturalism and Religion*, p. 121.

traditions, emotions, or faiths that would compromise the freedoms and liberties guaranteed by the Constitution should such individuated commitments become “the law of the land.” Scalia acts as Smith’s secular interlocutor – he encourages Smith to shed his spirituality in articulating his reasons for requesting exemption, engages in democratic deliberation over the legitimacy of modern laws and policies, and secures the continued primacy of neutral laws directed towards preserving the commonwealth. Thus, when Scalia asks Smith and his attorney during oral argument whether “the state can say we don’t want Native Americans to use peyote [...] as it is harmful to people and children shouldn’t be brought into this church and taught to use this thing [...] much like the practice of Mormon polygamy,”⁵¹ he is merely asking Smith to articulate a plain language, cross-cultural understanding of peyote use that accounts for its impact on non-Native persons.

Tempting though this analogy may be, it fails to capture fully the affective power of the iterative process required to isolate a common sense approach to peyote use. Describing the Court – and Habermas’s – reliance on reasoned dialogue, cooperative acts of secular-religious translation, and the primacy of “generally apprehensible truths” that can be transformed into “generally apprehensible laws” discounts the profoundly normative and constitutive manner by which such discursive tools operate. For example, when Scalia invokes the language of a child’s harm in thinking through the legality of peyote, he implicitly suggests that the sacramental practices of Native spiritualists are unreasoned or irrational because they fail to take into account the wellbeing of vulnerable populations. On this reading, to possess a common sense understanding of peyote would be to abstain from its use because, if it were to be broadly legalized, it would possess the capacity to injure others in the public sphere. To see precisely how Smith experienced this requirement to interpret and validate his faith as an affective exercise of power, a brief return to Habermas is needed – a return that will, ultimately, allow for the recognition of Smith, the individual, within *Smith*, the legal ruling.

II. The Lived Experience: Locating Smith in *Smith*

The affective power of reasoned deliberations over matters of law and policy can be most clearly seen in how Habermas defines what may serve as both the form and content of “generally acceptable” reason. For while the community member-turned-democratic deliberator may certainly profess religious convictions publicly, such beliefs cannot and should not be used as generally acceptable reasons in the course of deliberations over laws and policies. Habermas determines:

Citizens of a democratic polity owe one another good reasons for their political positions. Even if the religious contributions are not subject to self-censorship, they depend on *cooperative acts of translation*. For without a successful translation the substantive content of religious voices has no prospect in being taken up into the agendas and negotiations within political bodies and of gaining a hearing in the broader political process.⁵²

51. Official Transcript of Proceedings Before the Supreme Court of the United States, November 6, 1989. Alderson Reporting Company, Inc. Pages 38, 40.

52. Habermas, *Between Naturalism and Religion*, p. 132. Emphasis added.

In order to achieve political salience or legal traction within government operations, religious language deployed within the public sphere must undergo a process of translation⁵³ that renders it sensible to persons of other (or of no) faiths. The public presence of religion in associative life, or even in national debates, does not ensure its eventual ascription to or promulgation within national law or policy. Moreover, when Habermas declares that the content of religious speech must be subjected to cooperative acts of translation, he institutionalizes an epistemic filter that reinforces the secular standing of the liberal state. Indeed, even though he admonishes secular citizens to “open their minds to the potential truth content” of faith-based public speech that “might well emerge in the guise of generally acceptable reason,” he reminds religious citizens of the “institutional threshold [...] that only allows secular contributions from the Babel of voices in the public sphere to pass through.”⁵⁴ For Habermas, a cooperative act of translation thus rests on a twofold process: first, on the religious citizens’ proactive removal of any demonstrable faith-based motivations for their political actions and, second, on the willingness of secular citizens to aid in the secularization of faith-based speech if religious citizens are unable to do so.

When Habermas’s argument for public reason and cooperative acts of translation are taken together, I argue that a tension emerges within his assertion that public reason accords religion a meaningful place in associative life – and this tension ultimately renders vulnerable the ability of religious citizens to pursue their spiritual needs and to advocate for the positive accommodation of these very same needs. This tension can be most clearly seen when Habermas addresses the charge that cooperative acts of translation might place an unfair and unjust burden on religious citizens. Simply stated, Habermas recognizes that public reason and its reliance on cooperative acts of translation “potentially impose an asymmetrical burden on religious traditions and communities,” but he does little to alleviate it. He offers two distinct solutions. First, he determines that religious individuals have the right to “make a strict separation between secular and religious reasons in the political arena when they experience this separation as an attack on their personal identity,” and second, he reaffirms that all participants in the public sphere must make a good-faith effort to understand “the possibility that both religious and secular contributions to the public sphere may have substance.”⁵⁵ Yet after treating each potential solution in turn, Habermas reasserts that the law- and policy-making bodies of post-secular states must remain agnostic to the persuasiveness of religious dialogue. In my view, this argumentative move divests the state of its responsibilities towards its religious citizens *and* relegates the task of maintaining political and legal order to the translational abilities of secular citizens. It is a move, in other words, that can radically disaffect and disenfranchise religious citizens.

The extent of this disaffection and disenfranchisement can be seen in the lived experiences of Alfred Smith. At the outset of this commentary, I argued that the story that is often told of this case is neither complete nor wholly accurate. As envisioned by many theoretical and legal scholars, this case concerns the efforts made by Smith to fight the

53. Habermas often refers to this as the “translation proviso” of public reason.

54. Habermas, *Between Naturalism and Religion*, p. 132.

55. Habermas, *Between Naturalism and Religion*, p. 139.

denial of his unemployment benefits as a result of Oregon's classification of peyote consumption as a criminal offense. In this story, Smith often emerges as a figure wrongly denied the free exercise of his religion – a figure whose agency was only regained through the RFRA. The accepted story of this case generally concludes by suggesting that the Supreme Court's decision to deny Smith's claim was the result of its hubristic and rigid adherence to policies of secularism. But, again, this story is neither complete nor wholly accurate. For although it does detail several of the legal and political consequences that emerged from that decision, this story elides the lived experiences of Smith in favor of a narrative that, first, promotes the idea that Smith himself had a concise understanding of the requirements of his faith and, second, posits the assumption that modern laws and policies can serve as guarantors of religious freedom. In what follows, I argue that Smith's appeal for the political and legal accommodation of his beliefs was mediated through and conditioned by the law's reliance on a process of granting accommodation that echoes Habermas's discourse of public reason and cooperative translation. The disaffection and disenfranchisement that emerges from this reading, I determine, at once exposes both the practical limits of the Court's ability to accommodate public religious expression outside of the limits of Protestant Christianity and the theoretical limits of Habermas's theory to grant religious individuals equal representation in matters of law, policy, and faith.

To hear Smith tell the story of his encounter with the law is to hear a story that spans several decades and several court systems, but, like many religious accommodation cases, Smith's legal journey began with an administrative court hearing. Smith had been an intake counselor at a drug and alcohol rehabilitation facility, and specialized in combining an Alcoholics Anonymous program with the Native practice of the sweat lodge. A lifelong alcoholic himself, Smith had found that the practice of "sweating" allowed him to "cleanse the worldly impurities"⁵⁶ that enticed him to drink; although sweat lodge ceremonies are often combined with the consumption of peyote, Smith did not partake out of fear of relapse. However, after a series of what he called "revelatory signs," Smith partook of peyote. Shortly thereafter, his employers learned of his peyote use and, citing the facility's policy that prohibited "the misuse and abuse of drugs or alcohol," summarily fired Smith. Due to the nature of his termination, Smith was unable to receive unemployment benefits – an action that he believed rested on a misunderstanding of his right to religious freedom.

As Smith's claim moved through the legal system, he began to encounter resistance to his assertion that peyote served as a crucial medium through which a Native spiritualist practiced his faith. Smith recalls: "At each turn, I was asked to prove my faith. I was asked to give reasons for why I needed to eat peyote in order to be a Klamath Native."⁵⁷ For instance, at the administrative court hearing over his unemployment benefits, Smith was asked: "How can you define your revelations?" This question triggered, for Smith, a crisis of faith. Smith responded:

The ceremonies, they are new to me. I was raised in parochial school and did not connect with the culture – the spiritual answer for me is in the ether. It's like I don't even know what the

56. Smith, Personal Interview.

57. Smith, Personal Interview.

questions are. My gut says well, your Indian god, your spiritual god. [With respect to peyote use] One morning, I went to work, there was an eagle feather on the ground. I interpreted this as an invitation to the peyote meeting. If I accepted the feather, how could I not go? So I went. I took a lot of peyote, came back, and they razed me at the meeting in the morning. My supervisor asked if I had taken any peyote. I said, well yeah, that's the sacred sacrament. I got fired.⁵⁸

What emerges from this quote is, for Smith, a profound commitment to spiritual uncertainty – his practice of his faith is not static, but rather shifts to accommodate each new revelation. If Smith were to locate a concrete mode of “being” a Native spiritualist, he would foreclose potential avenues for his recognition by his elders in the afterlife.⁵⁹

It was, however, Smith's commitment to uncertainty – and his seeming inability to locate a “common sense” reason for seeing a revelatory sign in an eagle feather – that undercut his legal claim. For instance, in reflecting on his multiple appearances before the Court, Smith recalled:

I was a bump on the log – a freak they expected to be in a headdress. They couldn't have cared less about who I am. I was cast as a member of the Native American Church, but I do not consider myself a member of the church. I never did and I never will. My religion and my reasons for peyote use could not be recognized by the law. I was given a God – a God that I didn't even understand.⁶⁰

Here, as Smith struggled to pinpoint the precise origins and meanings of his faith, he was held to a legal standard that is informed by reasoned practices of cooperative translation; he was asked to identify, within his ever-shifting understandings of his faith, a secular kernel of truth that would permit his legal challenge to succeed in altering the state's prohibition on the consumption of classified drugs. On this reading, the legal process – and its Habermasian method of deliberation – at once enabled and constrained the agency of Smith. For although the legal actors in this case strove to present themselves as neutral entities devoted to preserving the constitutional freedoms and liberties endowed upon both secular and religious subjects, they were also deeply invested in conserving the power of the state to enforce generally apprehensible truths and generally applicable laws. Smith's devotion to sacramental experimentation, to determining what it meant to be spiritual *for himself* absent any institutional framework, was discursively incomprehensible to the Court – an incomprehension that resulted in the Court's ascription of Smith to another faith entirely and, consequently, his disaffection from both his spiritual practices and the protections promised by the law itself.

When Smith returned to Oregon following the decision in *Smith*, he declared he would never go before the law again. The process of exerting his right to free exercise, he determined, was akin to withstanding “an attack on [his] life, [his] faith.”⁶¹ In this quote, Smith echoes one of Habermas's solutions to the problem of placing reasoned, translational

58. Smith, Personal Interview.

59. Smith, Personal Interview.

60. Smith, Personal Interview.

61. Smith, Personal Interview.

burdens on religious individuals – that is to say, Smith claimed the right of refusing to participate in deliberative discourse over the validity of his faith and of generally applicable laws and policies. Although Smith’s purposeful extraction of himself from the public sphere had the effect of (temporarily) preserving a law that many legal actors regarded as crucial in guarding the health and safety of the commonwealth, it nonetheless resulted in the reduction of what Habermas called “the polyphonic complexity of religious voices” in the public sphere. Smith’s journey to the Supreme Court thus subjected him to a mode of governance that claimed to protect the interests of citizens of (or of no) faith even as it determined his faith-based way of engaging in deliberative democracy was lacking in reason and common sense – thereby placing Smith’s spirituality outside the protection of the law, rendering Smith himself unintelligible to broad law- and policy-making deliberations, and, ultimately, propelling Smith from the public sphere altogether.

III. Theorizing the Law

This commentary was largely motivated by a cross- and inter-disciplinary methodology of critique. By bringing theoretical conversations on public religious pluralism into conversation with the actual legal and political experiences of accommodation, I sought to illuminate how political theorists and legal actors alike underestimate the affective powers of reason and overestimate the ease with which religious individuals can separate their deeply entrenched beliefs from their public conduct. More specifically, I endeavored to articulate the power possessed by the law when it adjudicates free exercise challenges to generally applicable laws, even if it claims to only regulate – following *Reynolds* – conduct rather than belief. Indeed, when religious individuals are pushed to isolate what Scalia and Habermas alternatively term common sense, public reason-oriented, and cooperatively translated understandings of their faiths, they can experience a profound sense of material and metaphysical loss. Put in slightly different terms, under a regime of common sense and public reason, the promises held out by liberal democracies – political and legal representation, the ability to pursue religious salvation free from state interference, and communal belonging – become contingent on an individual’s adherence to and participation within a specific mode of discursive citizenship; failure to conform to these standards results in a disaffecting and disenfranchising experience, wherein religious individuals suffer the loss of the belief that the laws and policies governing their lives protect not only their political, but also their spiritual, wellbeing.

By mediating an account of the legal decision of *Employment Division v. Smith* and the theoretical works of Jürgen Habermas through the lived experiences of Alfred Smith, I also sought to expose the limits that the law and theory have in addressing the discrete concerns of everyday individuals. Indeed, what emerges from orienting *Smith* and Habermas towards Smith is the understanding that the boundaries placed on public religious expression are not neutral; to call upon, and then to impose, ideals of common sense, public reason, and cooperative translation is to participate in a mode of governance that valorizes “secularism” even as it elides its Protestant Christian foundations. Yet despite this commentary’s critique of both the law and theory, the effect of reading both together has the possibility to clarify pathways for ameliorating the legal inequalities, political injuries, and spiritual unfreedoms experienced by individuals like Smith. More

precisely, the effect of reading Scalia and Habermas in conjunction with one another makes room for the possibility that the concept of “reason” itself might possess some intriguing prescriptions for collective, social life – namely, the drive towards a transcendent moral or ethical good, or the admonition for respectful interpersonal relations.

With this in mind, I conclude this commentary by focusing on contemporary legal challenges for religious freedom. How might an understanding of the affective power possessed by common sense and reason help contemporary academics and legal actors interpret or decide cases that rest on the RFRA legislation that emerged from *Smith*, like *Burwell v. Hobby Lobby* (2014) or *Washington v. Arlene’s Flowers* (2016)? The first way to answer this question is to view a Habermasian standard of public reason as necessary and defensible. Yet even if liberal states and their courts continue to emulate this standard, it is nonetheless important to acknowledge what is lost – the absolute freedom of religious expression. In, for example, cases where religious vendors refuse to serve same-sex couples, it is imperative to consider what is at stake for both parties and to engage in a balancing of interests. At the very least, even if these vendors are found in violation of antidiscrimination laws and norms, understanding the power of reason helps illuminate, first, the spiritual importance in mounting a religious freedom challenge and, second, the nature of the political and legal constraints imposed on the pursuit of individual salvation.

The second way to answer this question would be to advocate for an ethos of humility. For although a Habermasian public reason standard suggests that the secular state and its secular citizens can understand the import of a religious freedom claim via the process of cooperative translation, is it possible that outsiders to a certain faith can truly understand the motivations behind, for example, the Green family’s refusal to cover forms of birth control they consider to be abortifacients as seen in *Hobby Lobby*? Perhaps, in these instances, it would be helpful to adopt – rather than a stance of common sense or cooperative translation – a stance of epistemic humility; that is to say, to adopt a recognition that there can be no singular truth and, to echo the prescriptions of John Stuart Mill,⁶² to believe otherwise would be to disparage the knowledge derived from real, everyday life. In both of these potential answers, what emerges is an understanding that the impact of the law or the enforcement of secular liberal democratic ideals cannot be fully grasped in isolation from the lived experiences of religious individuals – interdisciplinarity can, in other words, add contours and complexities to what political theorists and legal actors often leave unquestioned.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This research received funding from the Berkeley Center for the Study of Religion and the Berkeley Empirical Legal Studies Fellowship.

62. Mill, John Stuart. *On Liberty* (Indianapolis: Hackett Publishing Company, 1978).