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No Constitutional Shelter: The Ninth Circuit's Reading of the Hybrid Claims Doctrine in *American Friends Service Committee Corp. v. Thornburgh*

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> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.[2]

I. INTRODUCTION

In 1990 the Supreme Court decided the case of *Employment Division v. Smith*.[3] There it held, "[I]f prohibiting the exercise of religion . . . is not the object of the [tax or regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[4] The Court appeared to qualify this surprising[5] and controversial[6] rule by admitting that it had struck down generally-applicable legislation on the basis of the Free Exercise Clause[7] in some "hybrid situation[s],"[8] when the free exercise claim had been asserted "in conjunction with other

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1. 961 F.2d 1405 (9th Cir. 1992) (amended opinion).

2. THE VIRGINIA BILL OF RIGHTS (1776), *reprinted in* SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 151 (Samuel Eliot Morison ed., 2d ed. 1965).

3. 494 U.S. 872 (1990).

4. *Id.* at 878.

5. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1. "The Court sharply changed existing law without an opportunity for briefing or argument, and it issued an opinion claiming that its new rules had been the law for a hundred years." *Id.*

6. *E.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1109-11 (1990).

7. 494 U.S. at 881.

8. *Id.* at 882.

constitutional protections."[9] The principle on which the Court said that it relied in such cases will be referred to as the hybrid claims doctrine.

This note examines the hybrid claims doctrine as recently applied by the Ninth Circuit in a case where a Quaker organization asserted a free exercise claim against the federal government: *American Friends Service Committee Corp. v. Thornburgh*.[10] A careful reading of *Thornburgh* suggests that the hybrid claims doctrine provides no genuine exception to the core holding of *Smith*.

II. THE *SMITH* DECISION AND HOW IT CHANGED FREE EXERCISE JURISPRUDENCE

A. *Where We Came From: The* Sherbert *Balancing Test*

The Constitution declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[11] In other words, the Free Exercise Clause protects freedom of religion by prohibiting Congress from passing laws that interfere with religious practice. On its own terms, the Free Exercise Clause applies only to congressional legislation. The Supreme Court, however, has extended the scope of the Free Exercise Clause to cover actions by state governments.[12] This means the Court makes no distinction between federal and state action for purposes of Free Exercise inquiry.[13]

Beginning with *Sherbert v. Verner*,[14] the Supreme Court evaluated Free Exercise Clause challenges according to a balancing test.[15] Justice O'Connor stated that test in the following terms: "[T]he government [must] justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."[16] On one side of the scales lay the burden to religious

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9. *Id.* at 881.
10. 961 F.2d 1405 (9th Cir. 1992) (amended opinion).
11. U.S. CONST. amend. I.
12. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
13. *Id.*
14. 374 U.S. 398 (1963).
15. *Id.* at 403.
16. Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concur-

practice caused by government action. On the other side lay the government's interest in pursuing that action. In practice, the *Sherbert* test gave religious freedom a less effective shield than it first appeared to construct. "The Court generally found either that the free exercise right was not burdened or that the government interest was compelling."[17] Despite this trend in the high Court, religious practice received benefit from the *Sherbert* test. "There were many more applications of the doctrine in the state and lower federal courts, and legislatures and executive bodies frequently conformed their decisions to its dictates."[18] From 1963 until 1989 the Court continued to apply the *Sherbert* test,[19] thus bolstering its strength by reconfirming its authority. In 1990, however, the Court eviscerated whatever protection the *Sherbert* test offered religious practice.[20]

B. Where We Are Now: The Smith *Decision*

1. Smith's core holding

In *Smith* the Court reinterpreted the Free Exercise Clause to mean that government needs to show only that its statute does not specifically target a religious practice.[21] As long as a regulation treats religious interests the same as every other interest, the Court interpreted the Free Exercise Clause not to require governments to accommodate a religious practice that otherwise runs afoul of the statute.[22] With a few narrow and ill-defined exceptions,[23] this holding forms the general rule

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ring) (citations omitted).

17. McConnell, *supra* note 5, at 1110.

18. *Id.*

19. Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.") (citations omitted); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("[A]ny incidental burden on the free exercise of [a person's] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'") (citations omitted).

20. *See* Laycock, *supra* note 4, at 4 ("[T]he Free Exercise Clause itself now [after *Smith*] has little independent substantive content.")

21. *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

22. *Id.* at 878-79.

23. For a discussion of these exceptions and their contours, see Laycock, *supra*

that now defines the scope of personal rights protected by the Free Exercise Clause.[24]

2. The hybrid claims doctrine

a. The language of the Smith *opinion.* To reach its conclusion that the Free Exercise Clause requires only that laws not directly target religious practice,[25] the Court had to overcome a significant obstacle. *Sherbert* and some of its progeny suggest that the First Amendment required greater deference toward religious practice than mere facial neutrality.[26] Those cases suggest instead that the *Sherbert* balancing test imposed on government an affirmative duty to avoid burdening religious practice.[27] In *Smith* the Court characterized this precedent in the following passage.

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.[28]

This description of precedent in terms of a novel doctrine[29] creates ambiguities.

b. Two alternative readings.

(1) The hybrid claims doctrine is an attempt to distinguish contrary precedent.[30] Because the cases cited to

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note 4, at 39-54.

24. *See* American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1407 (1992) (amended opinion).

25. *See* 494 U.S. at 878.

26. *See* Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

27. *Id.*

28. *Smith*, 494 U.S. at 881, citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

29. Laycock, *supra* note 4, at 1.

30. McConnell, *supra* note 5, at 1121-22; *see infra* note 36 and accompanying

this point[31] contradict the rule enunciated in *Smith*, the *Smith* Court had to somehow distinguish them. One leading commentator adopts this reading and suggests that the *Smith* Court articulated the hybrid claims doctrine "for the sole purpose of distinguishing *Yoder* in this case."[32]

Precedents can also be overruled *sub rosa*, which may be what happened in *Smith*. Compare, for example, *Wisconsin v. Yoder*[33] with *Smith*. In *Yoder* the Court held that the Free Exercise Clause barred Wisconsin from applying its compulsory school attendance statute against members of the Old Order Amish religion, whose religious tenets required them to remove their children from public schools after the eighth grade.[34] As part of its reasoning the Court addressed the issue of facial neutrality. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[35] Compare this language with the *Smith* holding, which permits legislation to burden religion so long as that effect is not the express purpose of the legislature.[36] Whatever its explicit treatment of precedent, the Court makes it clear that the balancing test of *Sherbert* and the high protection afforded free exercise claims expressed in *Yoder* have been mostly replaced by judicial deference to legislative decisionmaking.[37]

(2) The hybrid claims doctrine is an exception to the core holding of Smith. The passage from *Smith* could mean that a court should apply the general rule unless a plaintiff can show that her free exercise claim is accompanied by another consti-

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text.

31. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Follett v. McCormick, 321 U.S. 573, 577 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 112-13, 117 (1943); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940); and Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

32. *See* McConnell, *supra* note 5, at 1121.

33. 406 U.S. 205 (1972).

34. *Id.* at 234.

35. *Id.* at 220.

36. *Smith*, 494 U.S. at 878.

37. *See Smith*, 494 U.S. at 878.

tutional claim.[38] This interpretation could lead in two possible directions.

Lower courts might read the hybrid claims doctrine to reduce the number of enforced free exercise claims by requiring every free exercise claim to be coupled with another constitutional claim. This would force plaintiffs to couch their free exercise claims in terms of hybrid claims, on the assumption that combining claims would result in an enforceable constitutional claim. This idea of getting more out of a free exercise claim combined with another constitutional claim than one could get by asserting the free exercise claim alone has been compared by one commentator to *Hamburger Helper*.[39]

Read expansively, the hybrid claims doctrine might also increase the number of successful constitutional claims by allowing constitutional claims of doubtful strength to be invigorated through hybridization. On this reading, the hybrid claims doctrine makes the Free Exercise Clause a kind of super-vitamin to invigorate otherwise feeble constitutional claims.

c. Criticism of both readings of the hybrid claims doctrine.

(1) The hybrid claims doctrine fails to distinguish Yoder. The *Smith* holding simply contradicts *Yoder*.[40] Given that contradiction, the Court in *Smith* probably could not have logically reached its holding without overruling *Yoder*. If so, the hybrid claims doctrine may not be capable of accomplishing what it

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38. *See* American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1409 (9th Cir. 1992) (amended opinion). Here the plaintiffs assert a free exercise claim coupled with a claim based on the "right to employ" and argue that this hybrid falls within "the exception for 'hybrid claims.'" *Id.*

39. James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 98 n.49 (1991).

40. *Compare* Employment Div. v. Smith, 494 U.S. 872, 879 (1990) ("[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes [or prescribes] conduct that his religion prescribes [or proscribes].'") (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982)) (Stevens, J., concurring in judgment) *with* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.") (citations omitted). This comparison emphasizes a point I made earlier. *Supra* notes 35-36 and accompanying text.

was invented to do. In light of its characterization of precedent quoted above, the Court in *Smith* appears not to have treated *Yoder* as controlling precedent, which it had an obligation to distinguish from the instant case. Rather, as one commentator boldly states, "[T]he Court's account of its precedents in *Smith* is transparently dishonest."[41] Because the *Smith* Court treated *Yoder* disingenuously the hybrid claims doctrine can be read as a failed attempt to distinguish contrary precedent.

(2) Does the hybrid claims doctrine provide a genuine exception to the core holding of Smith*?* Neither reading of the hybrid claims doctrine as a genuine exception to *Smith* is plausible. The restrictive reading transforms the Free Exercise Clause into a jurisprudential zero having no constitutional gravity of its own. The *Smith* holding had that effect already.[42] If that's the entirety of the hybrid claims doctrine, then it has no substantive content beyond the meaning of the holding. The expansive reading swallows the general rule of *Smith*. If every feeble constitutional claim can receive new life merely by association with a free exercise claim, then *Smith* means nothing at all.[43]

At the writing of *Smith*, the precise boundaries of its holding were unclear and remained to be worked out in future cases.[44] Part of that process of clarification has focused on the hybrid claims doctrine. As with most new rules, its meaning becomes clear only after application in the courts. The Ninth Circuit recently applied the hybrid claims doctrine in *American Friends Service Committee Corp. v. Thornburgh*.[45]

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41. Laycock, *supra* note 4, at 2 (citations omitted).
42. *Id.* at 4.
43. *See infra* note 85 and accompanying text.
44. *See* Laycock, *supra* note 4, at 9. "[A]lthough the Court distorted the rationale of its precedents beyond recognition, the exceptions and limitations to its new principle preserved all its prior results. We may be told in the next case that these results were really undermined by *Smith* and they must now be overruled after all . . . . Part of the task in future cases is to search for principled lines between what the Court has preserved and what it has rejected." *Id.* Among these "exceptions and limitations" is the hybrid claims doctrine.
45. 961 F.2d 1405 (9th Cir. 1992) (amended opinion).

III. THE *THORNBURGH* LITIGATION

A. *Underlying Facts*

1. *The history of the litigation*

In 1989, the American Friends Service Committee (AFSC) and some of its members sued the Attorney General, the Immigration and Naturalization Service, and the United States.[46] AFSC challenged the provisions of the Immigration Reform and Control Act of 1986 (I.R.C.A.),[47] which require an employer to verify employees' immigration status and not to employ or continue to employ any person who is not authorized to work in the United States.[48] Failure to comply with these provisions subjects an employer to civil penalties of up to $10,000 for each violation[49] and criminal penalties of up to six months imprisonment.[50]

The plaintiffs conceded that they had not complied with I.R.C.A. since its effective date.[51] In support of their actions, they argued that complying with I.R.C.A. would violate their religious beliefs. Quakers believe that all human beings are equal and that they have a duty to help any human being in need.[52] If the plaintiffs were to check the immigration status

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46. American Friends Serv. Comm. v. Thornburgh, 718 F. Supp. 820 (C.D.Cal. 1989), *aff'd*, 961 F.2d 1405. The Federal Reporter contains three appellate opinions entitled *American Friends v. Thornburgh*: 941 F.2d 808; 951 F.2d 957; and 961 F.2d 1405.

The third opinion was released on April 20, 1992, and supersedes the previous two opinions. Its only substantive change consists of a characterization and application of the Supreme Court's holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990) in terms of a four-part test for evaluating free exercise claims, rather than in the broader terms in which *Smith* was characterized in the earlier two opinions. The Ninth Circuit first enunciated this four-part test in its amended opinion in *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1305 (9th Cir. 1991) (amended opinion).

47. 8 U.S.C. § 1324a (1988).

48. 8 U.S.C. §§ 1324a(a)(1)-1342a(a)(2) (1988).

49. 8 U.S.C. § 1324a(e)(4) (1988).

50. 8 U.S.C. § 1324a(f) (1988).

51. American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1406 (9th Cir. 1992) (amended opinion).

52. *See Thornburgh*, 718 F. Supp. at 821 (quoting the plaintiffs' religious belief in "the sacredness and equality of all human life"; IRWIN ABRAMS, THE NOBEL PEACE PRIZE AND THE LAUREATES 149 (1988) (referring to the Quaker belief that every person is endowed with the Inward Spirit of Truth and Love and Goodness, which should be "translated into action"); (CHRISTIAN CHURCHES OF AMERICA: ORI-

of their employees and refuse employment to anyone not authorized to work in the United States, they would in effect rob them of their ability to feed and clothe themselves, thus adding to the sum of human misery.[53] The contradiction between the requirements of I.R.C.A. and the requirements of the plaintiffs' religious convictions becomes even more apparent when one learns that the charitable activities of AFSC have their origin in the Quaker belief that the Inward Spirit of Truth and Love and Goodness should be translated into action through humanitarian efforts.[54] On the basis of this contradiction between their religious practices and the law, the plaintiffs sought a declaration that the employer sanctions provisions of I.R.C.A. violated their rights under the Free Exercise Clause of the First Amendment.[55] The defendants responded by filing a motion to dismiss for failure to state a claim.[56]

To fully understand the clash of interests faced by the Ninth Circuit in *Thornburgh*, it is helpful to know something about the purposes behind I.R.C.A. and the history of AFSC.

2. *I.R.C.A.'s purposes*

Congressman Mazzoli of Kentucky, Chairman of the House Judiciary Committee and one of the leading forces behind I.R.C.A., listed what he considered to be the central purposes animating I.R.C.A.

> First, to prevent the uncontrolled influx of undocumented aliens into the United States;
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> Second, to end the current exploitation of millions of undocumented aliens who live in a twilight subrosa [sic] society, afraid to come forward, because of their illegal status; and

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GINS AND BELIEFS, 144 (Milton V. Backman, Jr., 1983) (referring to the Quaker spirit of equality and humanitarianism).

53. *Thornburgh*, 718 F. Supp. at 821.

54. Abrams, *supra* note 52, at 149 (discussing William Penn's statement that the Inward Spirit should inspire believers to improve the condition of the world and reporting that the AFSC representative emphasized the religious grounds for the AFSC's humanitarian efforts in his Nobel lecture); *see* NOBEL PRIZE WINNERS, 14-15 (Tyler Wasson, ed. 1987) (noting the origin of AFSC's humanitarian work in the Quaker conviction that the Inward Spirit inheres in every person).

55. *Thornburgh*, 718 F. Supp. at 821.

56. *Id.*

> Third, to preserve the humanitarian traditions and generous ideals of this country regarding the admission of legal immigrants and refugees.[57]

Mazzoli further explained how the employers sanctions provisions served the legislative purposes behind I.R.C.A.:

> This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions . . . .
>
> Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.[58]

The end sought by Congress in passing I.R.C.A. was to control illegal immigration. The means it chose was to require employers to hire and employ only those authorized to work in the United States.[59] This requirement that employers participate in the federal immigration scheme ran headlong into AFSC's long history of religiously-motivated charitable work.

3. AFSC history

The American Friends Service Committee (AFSC) was founded in 1917 by Quakers who wanted to provide opportunities for conscientious objectors to serve in nonmilitary capacities. In 1947, AFSC, along with the Friends Service Council, a British Quaker charitable organization, received the Nobel Peace Prize.[60] During its seventy-five year existence AFSC has participated in several relief efforts. Following the destruction of World War I it fed the Germans, just as it fed the Rus-

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57. NANCY HUMEL MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, AND LEGISLATIVE HISTORY 413-14 (1987).
58. *Id.* at 314.
59. *Id.*
60. Abrams, *supra* note 52, at 148.

sians during the terrible famine of the early 1920s and assisted victims of Hitler's antisemitic attacks during the 1930s.[61] More recently, AFSC fed, clothed, and housed the victims of the 1985 Mexico City earthquake. It distributed medicine, clothing, and other supplies to reduce the suffering of people in Nicaragua and also participated in the controversial sanctuary movement.[62]

At the time of the *Thornburgh* litigation AFSC employed about four hundred people.[63] In accordance with its religious mission to relieve human need, AFSC has historically made employment decisions without regard to a person's immigration status.[64]

B. The District Court Opinion

The district court granted the defendants' motion and dismissed the plaintiffs' action with prejudice.[65] The district court's holding bears repeating at length, because it captures the reasons why the court dismissed AFSC's suit.

> [A]ssuming I.R.C.A. has a substantial impact upon plaintiffs' free exercise rights as alleged, the plaintiffs' interests cannot overcome the government's interest in immigration control as a matter of law. The Court finds, moreover, that plaintiffs cannot state a claim because a reasonable accommodation for plaintiffs' religious practice in the form of an exemption to I.R.C.A. is not feasible . . . . Granting an exemption to the

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61. Abrams, *supra* note 52, at 148. (referring to relief efforts by AFSC before its receipt of the 1947 Nobel Peace Prize).

62. Wasson, *supra* note 54, at 16 (noting the humanitarian efforts of AFSC during the past decade); Douglas L. Colbert, *The Motion in Limine: Trial Without Jury—A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 25 n.106 (1986) (quoting Goldman, *U.S. Clerics Debating Ethics of Giving Sanctuary to Aliens*, N.Y. TIMES, Aug. 23, 1985, at A1, col. 3) (listing the churches and religious organizations who publicly supported the sanctuary movement).

63. American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1406 (9th Cir. 1992) (amended opinion).

64. *See id.*

65. By granting the defendants' motion to dismiss the district court in effect denied AFSC a full trial on the merits. Instead the court ruled on the basis of the briefs and the law, and found that the law gave AFSC no basis for its claim. *Thornburgh*, 718 F. Supp. at 823. By granting the defendants' motion with prejudice the court barred further litigation by AFSC of its free exercise challenge of I.R.C.A. *See* BLACK'S LAW DICTIONARY 469 (6th ed. 1990).

plaintiffs would have the effect of reactivating the employment "magnet" that Congress has endeavored to turn-off by enacting I.R.C.A.[66] In essence, this holding says that AFSC's free exercise interests, no matter how substantial, could not overcome the federal government's interest in controlling the flow of immigration. This decision may seem harsh from AFSC's point of view, but at least the district court weighed
AFSC's interest in avoiding I.R.C.A. against the federal government's interest in compelling AFSC to comply with I.R.C.A.[67] Because the Supreme Court decided *Smith* after the district court handed down its judgment but before AFSC could appeal that judgment,[68] AFSC did not receive the benefit of that balancing test on appeal.

C. *The Ninth Circuit Opinion*

AFSC appealed to the Ninth Circuit, which affirmed the dismissal, holding that "*Smith* . . . *requires* rejection of AFSC's free exercise claim."[69]

The Ninth Circuit gave three grounds supporting its holding on the free exercise issue. First, I.R.C.A.'s employer sanction provisions are neutral, meaning that they "are not aimed at suppressing the free exercise of religion."[70] Second, AFSC's free exercise challenge to I.R.C.A.'s provisions fails to fit within the hybrid claims doctrine because the free exercise claim is not accompanied by another "cognizable constitutional claim."[71] Third, I.R.C.A. contains no procedures for granting individualized exemptions that might give AFSC constitutional grounds for obtaining a free exercise exemption.[72]

The Ninth Circuit found that I.R.C.A. survived the general rule of *Smith*, requiring only that a statute not have as its

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66. *Id.* To see where this language about employment as a magnet for illegal aliens originated, refer to *supra* note 58 and accompanying text.
67. *See* American Friends Serv. Comm. Corp. v. Thornburgh, 718 F. Supp. 820, 823 (C.D. Cal. 1991).
68. *Smith* was decided April 17, 1990. Employment Div. v. Smith, 494 U.S. 872, 872 (1990). The Ninth Circuit decided *Thornburgh* August 2, 1991. American Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808, 808 (9th Cir. 1991).
69. *Thornburgh*, 961 F.2d at 1409 (emphasis added).
70. *Id.*
71. *Id.*
72. *Id.*

object the suppression of religious practice.[73] Under the *Sherbert* balancing test the court might have gone on to ask whether I.R.C.A. had the effect of prohibiting the members of AFSC from practicing their religion.[74] The facts of *Thornburgh* intimate the quandary in which AFSC found itself. Its Quaker members could not satisfy the demands of their faith without violating I.R.C.A., and *vice versa*.[75]

The *Thornburgh* court, however, cannot be accused of misapplying precedent. Its application of *Smith* is probably correct to a fault. The court read *Smith* to require only the barest inquiry into the question whether a statute reveals antireligious bias on its face.[76] The language of the *Smith* opinion requires no further inquiry. Unless Congress was imprudent enough to say that I.R.C.A. marked an attempt to impose a burden on a particular religion, the statute should survive judicial scrutiny. This is true regardless of whether I.R.C.A. actually burdens the Quakers' religious practice. The obstacle to AFSC's free exercise challenge lies with the *Smith* rule itself, not with the Ninth Circuit's application of it.

The *Thornburgh* Court's third reason for deciding that I.R.C.A. did not violate AFSC's free exercise rights was that I.R.C.A. does not provide for the type of individualized exemptions that the *Smith* Court identified as an exception to its general rule.[77] One commentator has defined "individualized exemptions" in terms of instances when legally-binding decisions are made ad hoc. Such decisions include "zoning, landmarking, and condemnation decisions."[78] But the *Thornburgh* Court may not have read I.R.C.A. as much in favor of AFSC on this point as it might have done.

Consider, for example, I.R.C.A.'s definition of an "unauthorized alien." Under I.R.C.A. an unauthorized alien is a person who fits into one of two categories: "(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General."[79] The

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73. *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).
74. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).
75. 8 U.S.C. §§ 1324a(a)(1)-1324a(a)(2) (1988).
76. *Smith*, 494 U.S. at 877.
77. *Id.* at 884.
78. Laycock, *supra* note 4, at 48.
79. 8 U.S.C. § 1324a(h)(3) (1988).

first category is self-explanatory. The second consists of two subcategories. The first subcategory consists of aliens authorized to work "by this chapter,"[80] which in turn refers to aliens whom I.R.C.A. legalizes and to agricultural workers who may obtain a green card after eighteen months' agricultural work in the United States. The second subcategory refers to immigration decisions made by the Attorney General. This second subcategory might have provided AFSC with an exception to the *Smith* rule.

In *Smith* the Court wrote, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[81] If I.R.C.A. authorizes the U.S. Attorney General to make "individual exemptions" based on the particular circumstances of a person's case, the Ninth Circuit might have found that I.R.C.A. establishes "a system of individual exemptions." If I.R.C.A. establishes such a system, the Ninth Circuit should have required the Attorney General, who was, after all, a defendant in *Thornburgh*, to extend an exemption to AFSC or to demonstrate a compelling reason why he should not.[82]

Having addressed the first and third grounds of the Ninth Circuit's decision, we turn to the second issue it addressed: hybrid claims.

IV. ANALYSIS OF THE HYBRID CLAIMS DOCTRINE AS APPLIED IN *THORNBURGH*

A. *How the Ninth Circuit Applied the Hybrid Claims Doctrine in* Thornburgh

AFSC argued that its claim was a hybrid of a free exercise claim and the "right to employ."[83] The court refuted that argument by demolishing the "right to employ" component of AFSC's purported hybrid.[84] It reasoned that "the right to employ" lacked constitutional significance and so could not evade the central holding of *Smith*.[85]

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80. *Id.*
81. *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).
82. *Id.*
83. American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1992) (amended opinion).
84. *Id.*
85. "There would be little left of the *Smith* decision if an additional interest of

The court's reasoning appears to suggest that AFSC might have succeeded if it had coupled a stronger claim with its free exercise claim. Counsel for AFSC might have argued for a hybrid composed of free exercise and free expression claims. The free expression claim might be asserted because AFSC employed illegal aliens to express the organization's political disagreement with Congress's attempt to stop the influx of illegal aliens.[86] To formulate a free expression claim in this manner is highly debatable, but it might have been closer to the truth than the "right to employ" and it has enough plausibility that it might have compelled the AFSC Court to discuss the hybrid claims doctrine more carefully than it did. Counsel for AFSC should have known that the "right to employ" would leave the court an easy out: a wave of the hand, an allusion to "the Lochner court"[87] and AFSC's hybrid claim dies a quick death. Pointing out this misstep, however, does not resolve the question of the validity of the hybrid claims doctrine. Should substantial constitutional claims based on the Free Exercise Clause hang on such a slim thread as the choice of which constitutional right should accompany a free exercise claim? Could AFSC have increased its likelihood of success by constructing a stronger hybrid claim?

B. How the Ninth Circuit's Application of the Hybrid Claims Doctrine Affected AFSC in Thornburgh

Even after a close reading of *Thornburgh*, it remains unclear how much the Ninth Circuit's holding on the hybrid claims issue will affect AFSC. If nothing more, the court's holding makes it more difficult for AFSC to accomplish its religious

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such slight constitutional weight as the 'right to hire' were sufficient to qualify for this [hybrid claims] exception." *Id.*

86. Recall that AFSC publicly revealed its participation in the Sanctuary Movement. Colbert, *supra* note 62, at 5, n.106.

87. American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1992) (amended opinion). This allusion ought to suggest the well-known fact that asserting anything resembling the "liberty of contract" at issue in *Lochner* spells almost certain defeat in federal court, given the general distaste with which *Lochner* is viewed. For a survey of the political, economic, and social forces that caused the demise of *Lochner* and its style of constitutional adjudication in cases asserting economic rights, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 578-81 (2d ed. 1991).

mission.[88] At most the court's holding compels AFSC to refuse to hire or continue employing illegal aliens. This dissonance between the religious aims of the organization and the secular means that the organization may legally use to accomplish those aims may lead to two consequences for AFSC.

First, the organization now presents a public persona that runs contrary to a fundamental quality of the Quaker religion: readiness to relieve suffering.[89] AFSC appears hypocritical by refusing to employ the same people whom it otherwise reaches out to help. Some observers may doubt AFSC's commitment to its own religious mission because I.R.C.A. keeps AFSC from employing people without regard for their employment status.

Second, the organization's officers and members must choose between living their religion and staying out of jail. (The threat of criminal penalties for large employers who engage in a "pattern or practice" of disobeying I.R.C.A. will surely hang heavy over any decision that AFSC makes with respect to I.R.C.A.)[90] Given its prosecutorial discretion, the Justice Department may choose to apply I.R.C.A. to AFSC by assessing civil sanctions without necessarily initiating criminal prosecutions against AFSC. However defensible, this choice is not *mandated* by I.R.C.A. The law allows for criminal prosecution when an employer exhibits a "pattern or practice" of disobeying the law.[91] If AFSC chooses to pursue its religious mission in spite of the law, it will likely find itself the subject of heavy civil penalties (no small sanction to lay on a charitable organization) and even criminal penalties.

C. Thornburgh *Suggests that the Hybrid Claims Doctrine Provides No Genuine Exception to the Central Holding of* Smith

Given the ease with which the Ninth Circuit dispensed with AFSC's hybrid claim, one may infer that the court didn't

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88. *See* Laycock, *supra* note 4, at 55-56.

89. American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1406 (9th Cir. 1992) (amended opinion).

90. *Compare* American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1406 (9th Cir. 1992) (amended opinion) *with* Laycock, *supra* note 4, at 29-30, 57.

91. 8 U.S.C. § 1324a(f) (1988).

read the hybrid claims doctrine as a serious exception to *Smith* (a genuine path for plaintiffs to circumvent its holding) at all.[92] Moreover, as another commentator has noted, "[a] constitutional right that has meaning only when it is combined with another right would be anomalous."[93] Thus, the Ninth Circuit correctly rejected the plaintiffs' implicit reading of the hybrid claims doctrine.[94]

Instead the court read the hybrid claims doctrine as an attempt to distinguish precedent. The court read the *Smith* opinion's language about hybrid claims and concluded that any category of hybrid claim other than those explicitly mentioned by the *Smith* Court would undermine that case's holding.[95] A skeptic might say that AFSC failed because its hybrid claim was so weak. Because the Ninth Circuit read the hybrid claims doctrine as an attempt to distinguish precedent and not as a genuine means of evading the core holding of *Smith*, no hybrid claim could have survived its scrutiny. In its totality, *Thornburgh* suggests that the hybrid claims doctrine provides only an illusory refuge from the central holding of *Smith*.

V. Conclusion

Plaintiffs wishing to assert a claim under the free exercise clause should not expect much protection by invoking the hybrid claims doctrine. Read carefully, the Ninth Circuit's ruling in *Thornburgh* means that the hybrid claims doctrine is a failed attempt to distinguish flatly contradictory precedent.[96] Understood in this way, the hybrid claims doctrine provides only an illusory means of circumventing the core holding of *Smith*. With the demise of the hybrid claims doctrine as a genuine exception to *Smith*, religious practice has no constitutional shelter from the shifting tides of majoritarian will.

Shawn Gunnarson

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92. *See also* McConnell, *supra* note 5, at 1122: "[A] legal realist would tell us . . . that the *Smith* Court's notion of 'hybrid claims was not intended to be taken seriously."

93. Gordon, *supra* note 39, at 98.

94. *See* American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1992) (amended opinion).

95. *Thornburgh*, 961 F.2d at 1408.

96. *See supra* notes 35-36 and accompanying text.