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J.D. Candidate, May 2012, The Catholic University of America, Columbus School of Law; B.A., American University. The author would like to thank Professor Mark Rienzi for his wisdom and encouragement, and John C. Raffetto for his dedication and insight. The author would also like to dedicate this Comment to his parents, Bill and Lisa Haun, and his fiancée, Caroline Simms, for proving throughout this process that love is indeed patient and kind.

A STANDARD FOR SALVATION: EVALUATING "HYBRID-RIGHTS" FREE-EXERCISE CLAIMS

William J. Haun[+]

President Thomas Jefferson, whose own epitaph proudly cites to his authorship of the Virginia Statute for Religious Freedom,[1] referred to the liberty rights guaranteed by the First Amendment's Free Exercise Clause[2] as "the most inalienable and sacred of all human rights."[3] Yet, the current free-exercise doctrine, as defined by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*,[4] actually allows states to restrict free exercise through facially "neutral [and] generally applicable" laws.[5] Except in the "the extreme and hypothetical situation in

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1. Considering it one of his greatest achievements, President Jefferson desired that his tombstone reflect his drafting of the statute, which influenced the First Amendment's religion clauses, as well as the religion clauses in various state constitutions. *See* Thomas Jefferson Found., *Virginia Statute for Religious Freedom*, MONTICELLO CLASSROOM, http://classroom.monticello.org/kids/resources/profile/262/Virginia-Statute-for-Religious-Freedom/ (last visited Aug. 8, 2011).

2. U.S. CONST. amend. I.

3. Thomas Jefferson, *An Exact Transcript of the Minutes of the Board of Visitors of Virginia, During the Rectorship of Thomas Jefferson*, *in* 19 THE WRITINGS OF THOMAS JEFFERSON 361, 416 (Thomas Jefferson Mem'l Ass'n ed., 1903); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990) (explaining that the concept of religious free exercise was a component of American colonial law from as early as 1648, when Lord Baltimore of Maryland took action to protect Roman Catholics from persecution by the new Protestant governor).

4. 494 U.S. 872, 878 (1990), *superseded in part by statute*, Religious Freedom Restitution Act (RFRA) of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (codified as amended at 42 U.S.C. §§ 2000bb-4), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006). *Smith* was originally superseded by the Religious Freedom Restitution Act (RFRA) of 1993, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488. However, the Supreme Court held the Act unconstitutional as applied to state and local government through the Enforcement Clause of the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997). Congress responded by amending the Act to apply only to the federal government. *See* 42 U.S.C. §§ 2000bb-1 to 2000bb-2 (2006). Therefore, the rule in *Smith*, discussed in this Comment as the constitutional standard for the Free Exercise Clause, is still applicable to states that have not enacted legislation mirroring the RFRA.

5. 494 U.S. at 878 (holding that a generally applicable law does not offend the First Amendment as long as its object is not to burden free exercise, even if the law *incidentally* has

which a State directly targets a religious practice,"[6] the *Smith* rule removes the Free Exercise Clause as a source of protection against state laws that burden religious exercise.[7]

The Court in *Smith* purported to leave religious liberty claimants with an avenue of relief from neutral and generally applicable legislation burdening their free exercise.[8] However, the *Smith* rule "only"[9] exempts from these neutral and generally applicable laws those claims that implicate other constitutional provisions in addition to the free-exercise claim.[10] The Court has applied this hybrid exemption when the claim involved a "communicative activity" protected by the First Amendment or the Fourteenth Amendment's "parental right."[11] Supporters and critics of the Court's judgment in *Smith* view such "hybrid" claims as a judicially crafted contrivance to distinguish relief-friendly precedent from the *Smith* rule.[12] Historical fact supports this cynicism: in the twenty years since *Smith*, the Supreme Court has not formally

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such an effect). The question of facial neutrality—whether a law discriminates against a particular religion within its plain language—is not limited to statutory interpretation. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. . . . Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

6. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring).

7. *See id.* at 893.

8. *See id.* at 881 (majority opinion).

9. *Id.* In *Smith*, the Court foreclosed the use of another potential exception to the general rule announced, by explicitly confining the *Sherbert v. Verner*, 374 U.S. 398 (1963), "substantial-burden" test, which would have allowed certain government actions to be invalidated, to the unemployment-benefits context. *See id.* at 882-85 (showing no "inclin[ation] to breathe into *Sherbert* some life beyond the unemployment compensation field").

10. *Id.* at 881. The Court referred to this type of claim as a "hybrid" situation. *Id.* at 882.

11. *Id.* at 881–82 (citing Wisconsin v. Yoder, 406 U.S. 25 (1972); Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania., 319 U.S. 105 (1943); Cantwell v. Connecticut. 310 U.S. 296 (1940)).

12. *See id.* at 896 (O'Connor, J., concurring) ("The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions . . . but there is no denying that both cases expressly relied on the Free Exercise Clause . . . and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence." (citations omitted)); *id.* at 908 (Blackmun, J., dissenting) ("[The majority] mischaracteriz[es] this Court's precedents. The Court discards leading free-exercise cases such as [*Cantwell* and *Wisconsin*] as 'hybrid.'" (citations omitted)); *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case."); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 n.3 (1991) ("The Court's claim that [*Wisconsin*] was decided on the basis of a 'hybrid' constitutional right . . . is particularly illustrative of poetic license." (citations omitted)).

revisited hybrid situations,[13] and no federal court has justified strict scrutiny of a free-exercise claim based on the hybrid-rights theory alone.[14] A near majority of federal circuit courts have dismissed the hybrid-rights precedent acknowledged in *Smith* as "completely illogical" dictum.[15] Even those circuits that nominally permit hybrid claims struggle to employ a consistent, workable standard for assessing such claims.[16]

The Supreme Court's sole discussion of hybrid rights after it decided *Smith* falls within one paragraph of Justice David Souter's concurrence in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, in which he denigrated *Smith* and its hybrid exception as "untenable."[17] Justice Souter further derided the exception as either too large or too insignificant to exempt certain free-exercise claimants from laws of general applicability.[18] These criticisms provided the foundation for the rationales articulated by those circuits rejecting the hybrid-rights exception.[19]

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13. As discussed *infra* in notes 17–19 and accompanying text, the Supreme Court mentions hybrid rights post-*Smith* only in Justice Souter's *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah* concurrence, and in a passing reference in *City of Boerne v. Flores*. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566–67 (1993) (Souter, J., concurring); City of Boerne v. Flores, 521 U.S. 507, 513–14 (1997).

14. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 88 (Cal. 2004).

15. *See infra* Part I.E (discussing the treatment of hybrid-rights theory in the federal circuit courts); *see also infra* Part I.D (discussing Justice Souter's criticism of *Smith*'s hybrid-rights discussion in *Church of the Lukumi Babalu Aye*).

16. Although the D.C. Circuit entertains hybrid-rights claims—provided an independently viable companion claim is joined with the free-exercise claim—it has not elaborated on how to evaluate such claims. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (demonstrating the existence of a hybrid claim within the Establishment Clause and the Free Exercise Clause by successfully establishing that the "EEOC's attempt to enforce Title VII would both burden Catholic University's right of free exercise and excessively entangle the Government in religion"); *see also infra* Part I.E. Only the Tenth Circuit developed a doctrine of analysis for hybrid rights, which assessed whether the companion claim to the free-exercise claim is "colorable" enough to suggest a constitutional violation on its own. *See* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 136 F.3d 694, 700 (10th Cir. 1998). Other circuits, including the Fifth, Seventh, and Eighth, endorse the notion of hybrid claims but have not provided an analytical approach. *See* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 764–65 (7th Cir. 2003); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473–74 (8th Cir. 1991); Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1216 (5th Cir. 1991), *aff'd on reh'g en banc*, 959 F.2d 1283, 1289 (5th Cir. 1992).

17. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 566–67 (Souter, J., concurring). The Court's passing reference to hybrid rights in *City of Boerne v. Flores* provides little in the way of analysis. *See* 521 U.S. at 513–14 ("The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake . . . [These] case[s] implicated not only the right to the free exercise of religion but also [another constitutional claim].").

18. *Church of the Lukumi Babalu Aye*, 508 U.S. at 567; *see also infra* Part I.D.

19. *See, e.g.*, Kissinger v. Bd. of Trs. of the Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 179 n.1 (6th Cir. 1993) (asserting that Justice Souter's concurrence strengthens the

Failing to entertain and evaluate hybrid claims renders the Free Exercise Clause irrelevant unless a state is "naive" enough to "enact a law directly prohibiting or burdening a religious practice as such."[20] Without hybrid analysis, victims of subtle religious discrimination lack the "affirmative individual liberty" guaranteed by the Free Exercise Clause, which would be necessary to assert a claim against the government.[21] Additionally, without such analysis those cases that the Supreme Court distinguished as hybrids in *Smith* lose their precedential value despite the Court's expressly preserving them.[22] Absent a recognition of and standard for hybrid rights condoned by precedent and responsive to critics, the Free Exercise Clause stands reduced as only a weak guardian of religious liberty.[23]

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conclusion that *Smith*'s treatment of hybrid-rights claims is dicta). Every circuit court that has rejected hybrid rights has cited to *Kissinger*. *See infra* note 111 and accompanying text.

20. *See* Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

21. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 578 (Blackmun, J., concurring) (remarking that *Smith* "ignored the value of religious freedom as an affirmative individual liberty" asserted against the state, and lowered the Free Exercise Clause into "no more than an antidiscrimination principle").

22. *See Smith*, 492 U.S. at 881–82. *See also* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999) (explaining that because the Court's opinion distinguished *Cantwell*, *Murdock*, *Follett*, and *Yoder*, those cases are still binding on lower courts, and *Smith*'s treatment of hybrid rights should not be disregarded), *withdrawn and reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc as not ripe*, 220 F.3d 1134 (9th Cir. 2000).

23. Multiple scholarly articles discuss hybrid rights from a variety of perspectives, but none have identified a standard from Supreme Court precedent in light of Justice Souter's criticism. Instead, the vast majority of articles either consider *Smith*'s language and its implications, or explain why a particular circuit's approach taken is preferable for hybrid rights. *See, e.g.*, Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 834–35, 862–63 (1993) (considering the language of *Smith* to predict how the hybrid-rights doctrine could unfold); Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 120 (2000) (commenting on the flawed logic of the hybrid-rights doctrine and examining post-*Smith* treatment of the doctrine); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 651 (2001) (exploring the implications of *Smith* with a focus on the need for further judicial guidance); John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741, 742 (2005) (advocating the "colorable showing approach" as the best approach to hybrid rights). Other articles elaborate on how courts hold hybrid rights in disregard. *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 609 (2003) (finding that parties have generally been unsuccessful on hybrid-rights claims). Still others developed their own approach based on the *Smith* opinion. *See* Benjamin I. Siminou, Note,

This Comment will address the existence and analysis of hybrid claims, illustrating how *Smith* both confirms the existence of hybrid rights and provides an analytical roadmap to handle hybrid-right claims. After outlining *Smith*'s rule, this Comment explains how the Supreme Court has distinguished precedent from *Smith*'s rule and highlights previous applications of hybrid analysis. Next, this Comment considers the fate of a free-exercise claim without hybrid rights in light of the Supreme Court's recent decision in *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez* (*CLS*).[24] This Comment then addresses Justice Souter's criticism of the hybrid rights in *Smith* and the credibility his critique offers to circuit courts that reject or ignore hybrid analysis. After exploring both sides of the hybrid-rights argument, this Comment describes the different approaches taken by circuit courts wrestling with hybrid analysis. From these varied approaches, this Comment demonstrates the necessity of a hybrid analysis, and argues that the Court's treatment of hybrid-rights precedent in *Smith*, considered with the Court's hybrid analysis, provides an appropriate standard. This Comment tests that standard against Justice Souter's criticisms, and explains how the Court could have found a successful hybrid-rights claim in *CLS*. Finally, this Comment concludes that the Supreme Court should reaffirm hybrid-rights claims and the existing evaluative standard, and encourages religious-liberty plaintiffs to bring claims that can resolve the remaining interstices in hybrid-rights analysis.

I. ACKNOWLEDGEMENTS AND ASSESSMENTS OF HYBRID CLAIMS

A. A Maculate Conception: Smith *Carves out Hybrid Rights*

In the late 1980s, the Employment Division of Oregon's Department of Human Resources refused to provide unemployment benefits to two individuals who were fired for consuming peyote.[25] Challenging the denial, these individuals argued that their consumption of the hallucinogen was sacramental and, accordingly, protected by the Free Exercise Clause.[26]

Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid-Rights Exception in Douglas County v. Anaya, 85 NEB. L. REV. 311, 314 & n.12 (2006) (arguing that the "genuinely implicated" approach should be used when addressing hybrid-rights claims).

24. 130B S. Ct. 2971, 2995 n.27 (2010) (concluding that the *Smith* decision precludes the Christian Legal Society's (CLS) from arguing that the university's rule requiring student groups to accept "all-comers" violates the Free Exercise Clause). There was no mention of hybrid rights in *CLS*.

25. *Smith*, 494 U.S. at 874 (1990) (noting Smith and Black were fired for violating ORE. REV. STAT. § 475.992(4) (1987), which defined "controlled substances" to include peyote, in accordance with 21 U.S.C. §§ 811–812 (2006)).

26. *Id.* at 874. The Court in *Smith* explained the state-level appellate history, along with the case's initial presence before the Supreme Court in 1987 regarding the relevancy of the legality of

In *Smith*, the Supreme Court began its evaluation of this claim with the uncontroversial statement that the Free Exercise Clause "obviously excludes all 'governmental regulation of religious *beliefs* as such.'"[27] The clause accordingly has been used to prohibit government-compelled affirmation of religious belief, proscribing or prohibiting particular forms of religious expression, or the government lending its weight to a given side within an intra-religious dogmatic dispute.[28] Yet, the Court in *Smith* considered the respondents' argument—that the Free Exercise Clause mandates a religious-based exemption to a facially nondiscriminatory and generally applied law that forbids performance of an act required by their religion—to go "one large step further" than the clause's textual commission.[29]

After excluding exemption as a form of relief available to the respondents, the Court distinguished earlier precedent that had granted such relief so prohibited by *Smith*'s rule.[30] The Court clarified that these prior cases possessed exemption-worthy claims because the Free Exercise Clause did not act alone, but rather conjoined with constitutional rights protected by the First Amendment or the constitutionally recognized parental right—so-called hybrid situations.[31] These companion claims protected different rights—the First Amendment's "communicative activit[ies]" of speech, press, and association,[32]

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the claimant's peyote use to their free-exercise argument. *Id.* at 874–75. The Court's explanation of this history suffices for the purposes of this Comment. When the Oregon Supreme Court ultimately found the Oregon criminal statute invalid as applied to the sacramental consumption of peyote under the Free Exercise Clause and ruled that the law could not deny them unemployment benefits on those grounds, the Supreme Court granted certiorari to review the case. *Id.* at 876. Using the argument vindicated by *Sherbert v. Verner*, respondents asserted that Oregon's criminal statute substantially burdened their religious practice and, therefore, required justification from a compelling government interest to sustain the prohibition. *Id.* at 882–83 (citing Sherbert v. Verner, 374 U.S. 398, 402–03 (1968)).

27. *Id.* at 877 (quoting *Sherbert*, 374 U.S. at 402); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559–60 (1993) (Souter, J., concurring) (referring to *Smith*'s assertion that free exercise is not offended by the enforcement of a neutral and generally applicable law as a "noncontroversial principle").

28. *Smith*, 494 U.S. at 877; *see also*, McConnell, *supra* note 3, at 1425 (discussing the historical underpinnings of religious free-exercise protections and their influence on the founding generation).

29. *Smith*, 494 U.S. at 878. However, the Court hedged its holding as a textual matter when it conceded that the respondents' proposed reading was "*permissible*," but ultimately concluded, "we do not think the words *must* be given that meaning." *Id.* (emphasis added).

30. *See id.* at 881–82.

31. *Id.*

32. U.S. CONST. amend. I. The Court in *Smith* pointed to previous Supreme Court cases that involved various hybrid claims implicating First Amendment rights. *Smith*, 494 U.S. at 881–82. In *Cantwell v. Connecticut*, the Court invalidated a religious-solicitation licensing system because it gave the administrator discretion to refuse a license request whenever he believed the cause to be nonreligious. 310 U.S. 298, 304–07 (1940). In *Murdock v. Pennsylvania* and *Follett v. McCormick*, the Court invalidated flat taxes on solicitation as they were applied to

and the constitutionally recognized "right of parents . . . to direct the education of their children."[33] Separately, the *Smith* Court recognized that some cases presented hybrid situations because religious beliefs motivated the claimant's desire for an exemption; however, the Court concluded those cases, which involved compelled expression, had been decided solely under the Free Speech Clause.[34]

The Court further recognized that in communicative hybrid cases the nexus between the communicative activity and free exercise is within "the communication of religious beliefs."[35] Additionally, *Smith* acknowledged that the parental right and free exercise combine within "the raising of one's children in those [religious] beliefs."[36] The *Smith* Court found in each precedential case involving hybrid rights that its analysis had focused specifically on the other constitutional principles involved, rather than free exercise.[37] After explaining how it had previously resolved hybrid claims, the Court applied the hybrid requirements to the facts presented in *Smith*.[38] Finding that ingesting peyote is unconnected to any communicative activity or parental right, the Court held that no hybrid claim existed.[39]

B. Separating Sheep from Goats[40]: Hybrid-Rights Successes and Failures

In explicating the free-exercise doctrine, the Court in *Smith* cited Supreme Court precedent that both upheld and rejected hybrid claims, and set forth the factual scenarios in which each claim arose.[41]

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the dissemination of religious ideas. *Murdock*, 319 U.S. 105, 112–15 (1943); *Follett*, 321 U.S. 573, 577–78 (1944). The Court also indicated the potential for hybrid claims involving free exercise and freedom of association. *Smith*, 494 U.S. at 882 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

33. *Smith*, 494 U.S. at 881 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)). In *Wisconsin v. Yoder*, the Court invalidated laws mandating school attendance as applied to Amish parents refusing to comply for religious reasons. 406 U.S. 205, 234–36 (1972).

34. *Smith*, 494 U.S. at 882 (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

35. *Id.* at 882.

36. *Id.*

37. *Id.* at 881 n.1.

38. *Id.* at 882. The Court addressed the respondents' *Sherbert*-based argument after it explained the hybrid-rights exception, creating the impression that the two are separate exceptions to *Smith*'s general free-exercise rule. *See id* at 881–83. Additionally, the Court's confinement of *Sherbert* to the unemployment-compensation context, even though the hybrid-rights exception contains no such caveat, provides further indication of their analytical separation. *See supra* note 9.

39. *Smith*, 494 U.S. at 882.

40. *Matthew* 25:32 ("And before him shall be gathered all nations: and he shall separate them one from another, as a shepherd [divideth] his sheep[] from the goats.").

41. *Smith*, 494 U.S. at 879–82.

1. "Communicative Activity" Hybrid Cases

The *Smith* Court characterized *Cantwell v. Connecticut*[42] and *Murdock v. Pennsylvania*[43] as successful hybrid cases involving a communicative activity in conjunction with a free-exercise claim.[44] In *Cantwell*, the Court invalidated a Connecticut statute that provided an administrator the discretion to refuse a license to solicit support for a religious cause if he believed the cause to in fact be non-religious.[45] Although the Court by its words based this holding on the "freedom to act" under the Free Exercise Clause, the particular act involved was solicitation of support for religious views—an act that by its very nature constitutes a communicative activity.[46] The Court additionally held that that the petitioner's conviction for breach of the peace must be set aside.[47] The Court reasoned that prosecutions for breaching the peace at common law of a general and undefined nature countered the interest of the United States in protecting the free exercise of religion and "the freedom to communicate information and opinion."[48] The Court in *Smith* interpreted *Cantwell* to stand for the principle that the First Amendment prevents prosecution of religious free exercise when doing so would contemporaneously abridge the freedom to communicate information within the Free Speech Clause.[49]

Murdock v. Pennsylvania involved another solicitation statute, which required anyone soliciting orders for goods and other items in Jeannette, Pennsylvania to pay a fee and obtain a license.[50] Local Jehovah's Witnesses were arrested for soliciting people to buy religious books without first acquiring such a license.[51] The Supreme Court, agreeing with the Jehovah's Witnesses' First Amendment challenge, equated the statute's licensing fee to "a tax [on a preacher] . . . for the privilege of delivering a sermon."[52] When the combined concerns of free exercise and freedom of the press "ma[d]e [free] exercise so costly as to deprive [the religion] of the resources necessary for its

42. 310 U.S. 296 (1940).

43. 319 U.S. 105 (1943).

44. *Smith*, 494 U.S. at 881. The *Smith* Court acknowledged that *Follett v. Town of McCormick*, 321 U.S. 573 (1944), also dealt with a hybrid-rights claim. *Id.* However, because the Court considered the case facts and holding with regard to hybrid rights in *Follett* to be the same as those in *Murdock*, this Comment does not separately analyze *Follett*. *Id.*

45. *See* 310 U.S. at 303–06.

46. *See id.* at 303–04.

47. *Id*. at 310–11.

48. *Id.* at 302–03, 307.

49. *See Smith*, 494 U.S. at 881–82.

50. 319 U.S. 105, 106 (1943).

51. *Id.* at 106–07.

52. *Id.* at 112.

maintenance,"[53] the rights protected by the First Amendment prohibited prosecution as they had in *Cantwell*.[54]

2. Communicative Cases Decided Based on the Freedom of Speech Alone

In *Smith*, the Court considered certain exemption-granting cases to be hybrid situations because, although they exclusively involved a free-speech claim, the cases factually arose from burdens placed on the respective claimants' religious exercise.[55] The *Smith* Court cited both *West Virginia Board of Education v. Barnette*[56] and *Wooley v. Maynard*[57] as falling within this category of cases.[58]

Barnette involved a free-speech and free-exercise challenge to a resolution that required all students to salute the American flag during the recitation of the Pledge of Allegiance.[59] A state school expelled Jehovah's Witnesses for refusing to salute the flag on religious grounds.[60] In *Wooley*, the State of New Hampshire prosecuted a couple who covered the slogan on their license plates that stated, "Live Free or Die."[61] Both Jehovah's Witnesses, the couple claimed the slogan's message violated their religious beliefs.[62]

The Court recognized that both a flag salute and traveling with a particular license plate represent symbolic messages, which can be persuasive methods of communication.[63] The Court did not address the religious motivations in either case,[64] but noted that the respective regulations required "an individual, as part

53. *Id.* at 108, 112.

54. *Id.* 113 ("The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down." (citing *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (other citations omitted)).

55. Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 , 881–82 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

56. 319 U.S. 624 (1943).

57. 430 U.S. 705 (1977).

58. *Smith*, 494 U.S. at 882.

59. *Barnette*, 319 U.S. at 627–30.

60. *Id.* at 629–30.

61. *Wooley*, 430 U.S. at 707–08.

62. *Id.*

63. *Barnette*, 319 U.S. at 632 (finding that the flag salute is a "primitive but effective way of communicating ideas"); *accord Wooley*, 430 U.S. at 715 ("Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.").

64. *Wooley*, 430 U.S. at 714 (analyzing the issue in terms of "the right to speak freely and the right to refrain from speaking" because they implicate "the broader concept of 'individual freedom of mind'" (quoting *Barnette*, 319 U.S. at 637)); *Barnette*, 319 U.S at 634–35 (noting that

of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view that he finds unacceptable" through such symbols.[65] In both *Barnette* and *Wooley*, the Court held that the Bill of Rights prevents government officials from forcing an individual to symbolically affirm a belief contrary to his conscience—a holding compelled by the values protected under the Free Speech and Free Exercise Clauses.[66]

3. Hybrid Cases Involving Parental Right

Wisconsin v. Yoder is the only hybrid-claim case acknowledged by the *Smith* Court, in which the Court invalidated a neutral, generally applicable law because of parental rights.[67] The *Smith* Court also cited to *Prince v. Massachusetts*;[68] however, in that case the Court did not find a successful hybrid claim involving parental rights and consequently upheld a neutral, generally applicable law as applied to the claimant, who professed religious motivations.[69]

In *Yoder*, an Amish family sought to exempt its children from a state law compelling secondary education because such education violated their way of

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the issue did not turn on the religious motives of the appellees, but rather the Court's decision rested on whether or not the state had the power in the first place to make the salute a legal duty).

65. *Wooley*, 430 U.S. at 713 (equating the flag-salute statute in *Barnette* to the license plate statute in the present case); *see also Barnette*, 319 U.S. at 633 ("[Saluting the flag] requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.").

66. *Wooley*, 430 U.S. at 717; *Barnette*, 319 U.S. at 641–42. Stanford Law Professor and former Tenth Circuit Judge Michael McConnell, before criticizing Justice Felix Frankfurter's dissent in *Barnette*, explained the significance of free-exercise protection in accordance with the holdings in *Barnette* and *Wooley*:

> If government admits that God (whomever that may be) is sovereign, then it also admits that its claims on the loyalty and obedience of the citizens is partial and instrumental. Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.

McConnell, *supra* note 3, at 1516.

67. Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 881 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

68. *Id.* at 879–80 (citing Prince v. Massachusetts, 321 U.S. 158, 171 (1944)). The Court does not discuss *Prince* in the context of other hybrid situations, but rather discusses it in support of its general prohibition against religious exemptions to laws of general applicability. *Id.* However, by the Supreme Court's own terms in *Prince*, a hybrid situation was in fact involved. *See Prince*, 321 U.S. at 165 ("On one side is the obviously earnest claim for freedom of conscience and religious practice. *With it is allied* the parent's claim to authority in her own household and in the rearing of her children." (emphasis added)).

69. *See Prince*, 321 U.S. at 165–67, 170.

life as members of the Amish religion.[70] The Court recognized that an infringement on the "rights of parents to direct the religious upbringing of their children. . . . combined with a free exercise claim" warranted strict scrutiny.[71] Because the state law at issue in *Yoder* did not satisfy strict scrutiny, the Court granted the Yoders an exemption to compulsory education.[72]

The *Prince* case, like *Yoder*, presented a hybrid claim involving free exercise combined with the parental rights associated with raising children.[73] Massachusetts labor laws prevented a mother from directing her children to distribute religious literature in the streets.[74] Although the Court recognized the right of "parents to give [their children] religious training and to encourage them in the practice of religious belief,"[75] the Court concluded that legitimate concerns regarding child health and public safety could justify a state's constraints on that parental right.[76] Unlike Wisconsin's relatively weak child-welfare interest in *Yoder*, Massachusetts's interest in prohibiting child labor sufficiently outweighed the parental-rights hybrid claim.[77] Accordingly, the claim in *Prince* failed.[78]

C. Silence Speaks Volumes: CLS *and a World Without Hybrid Claims*

In *CLS*, The University of California, Hastings College of Law denied the CLS student group official recognition because its statement of faith violated

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70. Wisconsin v. Yoder, 406 U.S. 205, 209 (1972).

71. *See id.* at 233. The Court did not explicitly call their review of Wisconsin's compulsory-education statute strict scrutiny. However, the Court does conclude that the analysis requires more than rational-basis review. *See id.* at 221 (discussing Wisconsin's argument that "its interest in its system of compulsory education is so compelling"). Additionally, the Court rejected the State's argument because of the parent's religious interests at stake in conjunction with the State's failure to show countervailing health and safety interests. *Id.* at 221, 230. A compelling state interest is a key component of strict scrutiny analysis. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (holding, in accordance with *Sherbert*, that when a state law in the context of unemployment benefits burdens religious free exercise, the Court "subject[s] [the law] to strict scrutiny and could be justified only by proof by the State of a compelling interest").

72. *Yoder*, 406 U.S. at 233–34. The Court recognized that the Amish produced "persuasive evidence undermining the arguments the State . . . advanced to supports its claims in terms of the welfare of the child and society as a whole." *Id.* at 234. These considerations informed the contrary result in *Prince*, a case similarly involving a parental-rights hybrid claim. *See Prince*, 321 U.S. at 166–67.

73. *Prince*, 321 U.S. at 165.

74. *Id.* at 161–62.

75. *Id.* at 165.

76. *Id.* at 166–67 ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.").

77. *See id.* at 166–67.

78. *Id.* at 170.

the school's nondiscrimination policy.[79] When the Supreme Court considered whether a public law school could require adherence to the policy as a condition for official student-group recognition, the Court considered the policy's requirements and its implementation.[80] The policy prevented student groups from discriminating, inter alia, on the basis of religion in membership and leadership selection.[81]

The law school admitted that although it refused to recognize CLS, a religious group, the school's nondiscrimination policy allowed other types of groups "to select officers and members who were dedicated to a particular set of ideals or beliefs."[82] The law school's denial of recognition prohibited CLS from accessing the University's communication mediums and school funding.[83]

Although the Supreme Court entertained CLS's many First Amendment claims,[84] the Court quickly dismissed the free-exercise claim in a footnote, citing to the rule in *Smith* that "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations" of general application that incidentally burden religious conduct.[85] According to the Court, giving CLS a free-exercise exemption from the law school's policy would give it "preferential, not equal treatment."[86] CLS did not raise the issue of *Smith's* hybrid-situations exception,[87] and the Court did not mention it.[88]

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79. CLS, 130B S. Ct. 2971, 2979–80 (2010). ("CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation."). For the purposes of this Comment, the *CLS* discussion will focus on the "nondiscrimination policy" as written, rather than the "all comers" policy that informed the majority opinion and had been adopted through the parties' factual stipulation. *See id.* at 2984. CLS was denied registered-student-organization status under the nondiscrimination policy—only that denial, if anything, would implicate a hybrid claim. The majority evaluated the claim under the "all comers" policy because of the *prospective* relief requested by CLS; therefore, their concerns regarding the nondiscrimination policy are not implicated here. *Id.* at 2982 n.6.

80. *Id.* at 2979–80.

81. *Id.* at 2979.

82. *Id.* at 3003 (Alito, J., dissenting).

83. *Id.* at 3002 (Alito, J., dissenting). These campus communicative avenues include "posting messages on designated bulletin boards, sending mass e-mails to the student body, distributing material through the Student Information Center, and participating in the annual student organizations fair." *Id.*

84. *Id.* at 2984–95.

85. *Id.* at 2995 n.27 (citing Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 878–882 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006)).

86. *Id.*

87. Brief for Petitioner at 40–41, CLS,130B S. Ct. 2971 (2010) (No. 08-1371). CLS's brief arguably suggested a hybrid-rights claim when it recognized that the right to religious association is "rooted in both the Free Exercise Clause and the Speech Clause." *See id.* At a minimum,

D. The Court's Doubting Thomas[89]: Justice Souter's Argument Against Hybrid Rights

Justice Souter's critique in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* attacked both the existence of hybrid rights and the jurisprudential consequences of their recognition.[90] His critique stands as the only elaboration on hybrid rights from the Supreme Court since *Smith*.[91]

Justice Souter disagreed with the majority in *Smith* because of his view that the purported hybrid cases were, in truth, pure free-exercise cases.[92] Discussing *Cantwell* and *Yoder*, Justice Souter argued that "[n]either opinion . . . leaves any doubt that 'fundamental claims of religious freedom [were] at stake.'"[93] According to Justice Souter, the *Cantwell* Court separately provided its free-speech analysis later in the opinion *after* its discussion of free exercise.[94] The free-speech claim in *Cantwell* thus referred to "an entirely different issue" than the free-exercise claim.[95]

Justice Souter argued that the *Smith* Court placed undue significance on the of role parental rights in *Yoder*.[96] He considered the language in *Yoder* that dismissed the standard of review under a parental-rights claim as "inapplicable."[97] As characterized by Justice Souter, the *Yoder* Court required that the state's action "must be measured by a stricter test, the test developed

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CLS's cryptic reference to hybrid rights demonstrates how much the existence of the doctrine is ignored and undeveloped by the Court. *Cf.* Brett G. Scharffs. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 37 PREVIEW U.S. SUP. CT. CASES 300, 304 (2010), *available at* www.abanet.org/publiced/preview/ChristianLegal.pdf ("One might have thought that this case would have been a good place to test the concept of hybrid rights or to test the limits of autonomy of religious groups.").

88. *CLS*, 130B S. Ct. at 2995 n.27.

89. The term is a reference to Christ's apostle Thomas, who refused to recognize Christ's resurrection unless Christ Himself provided him the proof. *See John* 20: 24–29.

90. *See* 508 U.S. 520, 566–67 (1993) (Souter, J., concurring).

91. The Court in *City of Boerne v. Flores* acknowledged hybrid rights in passing:

> The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake. In *Wisconsin v. Yoder*, for example, we invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated not only the right to the free exercise of religion but also the right of parents to control their children's education.

521 U.S. 507, 513–14 (1997) (citations omitted).

92. *Church of the Lukumi Babalu Aye*, 508 U.S. at 566 (Souter, J., concurring).

93. *Id.* (alteration in original) (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

94. *Id.* at 567 n.4.

95. *Id.* at 567.

96. *Id.* at 566–67, 567 n.4.

97. *Id.* at 567 n.4 (citing *Yoder*, 406 U.S. at 233).

under the Free Exercise Clause."[98] Considered along with other indicia,[99] he was not persuaded by the *Smith* Court's characterization of *Yoder* as a distinguishable hybrid situation.[100]

Justice Souter's primary criticism of the hybrid-rights doctrine focused on two central points.[101] First, the *Smith* Court's conception of a hybrid claim as simply one that implicates a second constitutional right in conjunction with free exercise would create an exception so vast that it swallows the rule.[102] He noted that "free speech and associational rights are certainly implicated in the peyote ritual" at issue in *Smith*.[103] Justice Souter reasoned that if the mere presence of a companion constitutional claim defeats *Smith*'s general rule, then *Smith* was a hybrid case and the rule that courts take from it does not distinguish hybrid claims—it is consumed by them.[104] Second, if a claimant were exempt from a neutral law of general applicability in a so-called hybrid claim under a different constitutional provision, then there would be no need to include the free-exercise claim because the claim under the companion provision would be adequate to achieve the same result.[105] Therefore, according to Justice Souter, the hybrid analysis is not only absent from the relevant case law, but attempting to implement any analysis from *Smith*'s parsing would be logically indefensible.[106]

E. Serving Many Masters: Circuits Wrestle with the Arguments

The disputed validity of hybrid rights within free-exercise jurisprudence inspired a convoluted and increasingly skeptical circuit-court reception.[107]

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98. *Id.* (citing *Yoder*, 406 U.S. at 233). Justice Souter's reference here is to the substantial-burden test elaborated in *Sherbert*. *See supra* note 9.

99. *Church of the Lukumi Babalu Aye*, 508 U.S. at 567 n.4 (Souter, J., concurring). Justice Souter noted, "the Yoder opinion makes clear that the case involves 'the central values underlying the Religion Clauses.'" *Id.* (quoting *Yoder*, 406 U.S. at 234). He also noted that the Yoders' only defense to their prosecution under the school-attendance law was a free-exercise claim, and the Court only granted certiorari on a free-exercise claim. *Id.*

100. *Id.* at 566 ("Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, I am not persuaded." (citations omitted)).

101. *See id* at 567.

102. *Id.*

103. *Id.*

104. *See id.*

105. *Id.*

106. *See id.*

107. *See* Leebaert v. Harrington, 332 F.3d 134, 143–44 (3d Cir. 2003) ("Several circuits have stated that *Smith* mandates stricter scrutiny for hybrid situations than for a free exercise claim standing alone, but, as far as we are able to tell, no circuit has yet actually applied strict scrutiny based on this theory."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 1261–62 (3d ed. 2006) (discussing circuit disputes over the application of the hybrid exception recognized in *Smith*).

The Sixth Circuit's decision in *Kissinger v. Board of Trustees of the Ohio State University, College of Veterinary Medicine*[108] informed the other federal circuits, including the Second, Third, and Ninth Circuits, all of which viewed *Smith*'s hybrid-rights discussion as dicta.[109] In *Kissinger*, the Sixth Circuit characterized the hybrid-rights doctrine as a theory that would strike down an ordinance on free-exercise grounds "if it implicates other constitutional rights," but preserves the ordinance as constitutional if the ordinance only implicates the Free Exercise Clause.[110] The court considered this "completely illogical," arguing that Justice Souter's critique strengthened this conclusion.[111] Rather than wrestle with the Court's words, the *Kissinger* approach simply considers *Smith*'s hybrid-rights language to be dicta until the Supreme Court further

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108. 5 F.3d 177, 180 (6th Cir. 1991) (finding the hybrid-rights concept "completely illogical").

109. *See, e.g.*, Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008) (implying that *Smith*'s hybrid-rights doctrine is dicta because it has been widely criticized and "no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner"); Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 246–47 (3d Cir. 2008) (per curiam) (agreeing with the Sixth Circuit that the *Smith* decision left the hybrid-rights analysis undefined and finding *Smith*'s hybrid-rights language to be dicta until further guidance issues from the Supreme Court); Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003) (agreeing with the Sixth Circuit's *Kissinger* decision when declining to adopt the hybrid-rights approach contained in *Smith*'s dicta because the court found "no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated"); *see also* Warner v. City of Boca Raton, 64 F. Supp. 1272, 1288 n.12 (S.D. Fla. 1999) (rejecting the plaintiffs' argument for using strict scrutiny under *Smith*'s hybrid-rights theory because it is dicta and such an analysis is otherwise untenable (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J. concurring))). In 1999, the Ninth Circuit attempted to employ a hybrid-rights analysis requiring a "colorable" companion claim because, according to the court, *Smith* did not overrule the so-called hybrid cases, rather it distinguished them and, therefore, they still stand as binding precedent and cannot be ignored. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999), *withdrawn and reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc as not ripe*, 220 F.3d 1134 (9th Cir. 2000). However, the Ninth Circuit withdrew the opinion sitting en banc and substituted a new opinion in 2000, which vacated the district court's decision and instructed it to dismiss the case on remand as not ripe; therefore, the court did not address the issue of hybrid rights. *See Thomas*, 220 F.3d at 1142. Before the court withdrew the initial *Thomas* opinion, another Ninth Circuit opinion, *Miller v. Reed*, relied upon *Thomas*'s discussion of hybrid rights to reject the claimant's argument that his claim was a hybrid. *See* 176 F.3d 1202, 1207–08 (9th Cir. 1999) (citing *Thomas*, 165 F.3d at 703, 707). The court reasoned that a hybrid-rights claim requires more than the combination of an "utterly meritless" constitutional claim; however, the court did not further discuss the issue beyond its refusal to acknowledge the claim as hybrid. *Id.* In 2004, the Ninth Circuit, this time relying on *Miller*, concluded that the claimant failed to assert a hybrid-rights claim because the claimant's companion constitutional claims were not "colorable." San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004). However, the Ninth Circuit's most recent decisions refuse to acknowledge the hybrid-rights doctrine. *See* Ass'n of Christian Sch. Int'l v. Stearns, 362 F. App'x 640, 646 (9th Cir. 2010) (quoting *Jacobs*, 526 F.3d at 440 n.45).

110. 5 F.3d at 180 & n.1.

111. *Id.* at 180 n.1.

elaborates on the issue.[112] The Fifth, Seventh, and Eighth Circuits took a step back from the Sixth Circuit's skepticism and acknowledged the possibility of hybrid claims; however, these circuits ultimately shied away from attempting to define an evaluative standard.[113]

In contrast, the First Circuit suggested that a hybrid-rights claim could be successful if a claimant argued a free-exercise claim in conjunction with an *independently protected* companion constitutional claim—a constitutional claim, other than free exercise, which can be viably raised from the facts.[114] The D.C. Circuit also seems to have embraced the independently protected approach,[115] but has only used the approach in dicta.[116] Opinions from these circuits do not clearly demonstrate whether an independently protected claim is actually required with a free-exercise claim for a hybrid challenge. The First Circuit will likely not clarify the issue because it recently disputed the assertion that it had ever actually considered the hybrid-rights theory.[117]

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112. *Id.* at 180; *accord Jacobs*, 526 F.3d at 440 n.45; *Combs*, 540 F. 3d at 247; *Leebaert*, 332 F.3d at 144.

113. *See* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 765 (7th Cir. 2003) (recognizing the ability to bring a hybrid free-exercise claim entitled to heightened scrutiny but finding that the appellants' companion claims lacked the merit necessary to survive a motion for summary judgment; therefore, the court concluded that the appellants had failed to establish a hybrid claim); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (accepting *Smith*'s acknowledgement of hybrid-rights claims but remanding the case to determine whether the plaintiff's facts presented such a claim); Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1209–16 (5th Cir. 1991) (noting that the court's holding is consistent with a hybrid-claim exception from the general rule in *Smith* because this case implicated "religion-plus-speech"—the plaintiff was forced to state an oath or affirmation that she argued violated her freedom of speech and religion), *aff'd on reh'g*, 959 F.2d 1283, 1288–89 (5th Cir. 1991).

114. *See* Brown v. Hot, Sexy, & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (finding no hybrid-rights claim for parents alleging interference with their parental right because those allegations "do not state a privacy or substantive due process claim" and, therefore, "[t]heir free exercise challenge is . . . not conjoined with an independently protected constitutional protection"), *overruled in part by* Martinez v. Hongyi CUI, 608 F.3d 54, 63–64 (1st Cir. 2010).

115. *See, e.g.*, Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) (noting that a successful hybrid-rights argument requires a "violat[ion]" of the Free Exercise Clause and having a "viable" claim under another constitutional clause). The D.C. Circuit noted here that a lacking free-exercise claim would not be saved by an equally lacking free-speech claim. *See id.* ("[T]he combination of two untenable claims [does not equal] a tenable one.").

116. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996). Here, the court noted that it could find a free-exercise violation even it its actual holding is mistaken because the case involved a hybrid claim between the Establishment Clause and the Free Exercise Clause, and "EEOC's attempt to enforce Title VII [against Catholic University] would both burden Catholic University's right of free exercise and excessively entangle the Government in religion." *Id.* The actual holding was based on the court's recognition that Catholic University fell under the ministerial exception from Title VII. *Id.*

117. *See* Parker v. Hurley, 514 F.3d 87, 97, 98 & n.9 (1st Cir. 2008) (concluding that *Brown* neither settled the question whether "independently viable constitutional claim[s] are required to bring a successful hybrid-rights claim, nor did it definitively establish that *Smith* created a new

Ultimately, neither the D.C. Circuit nor the First Circuit has decided a case on hybrid grounds.[118]

The Tenth Circuit stands alone with an articulated, explicit analytical standard for hybrid claims.[119] Seeking to harmonize Justice Souter's critiques with *Smith*'s explication,[120] the Tenth Circuit has required that "the hybrid-rights claimant . . . show that the companion constitutional claim is 'colorable.'"[121] Rather than proving the independent viability of the companion claim, the "colorable claim" approach simply requires the companion claim have "a fair probability or likelihood, but not a certitude, of success on the merits."[122] The fact-specific nature of this case-by-case approach inhibits the articulation of a clear rule.[123] Even with the standard, the Tenth Circuit has yet to decide a case on the grounds of a hybrid-rights claim.[124]

II. ANALYZING THE ARGUMENTS, ARTICULATING A STANDARD

The conflicting views of the *Smith* Court and Justice Souter on hybrid rights, along with the attempts of lower courts to weigh and apply those divergent views, raise two essential questions: First, do *Smith* and its cited precedent recognize hybrid-rights claims involving free exercise? If so, then second, does free-exercise precedent provide an analytical standard?

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category of hybrid claims in the first place). In Parker v. Hurley, the First Circuit declined to involve itself in the debate over the interpretation of *Smith*'s hybrid-rights doctrine. *Id.* at 98. For an extensive analysis of the independently viable companion claim approach, see Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77, 94–95, 99 (2004/2005).

118. *Cf.* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 88 (Cal. 2004) ("We are aware of no decision in which a federal court has actually relied solely on the hybrid rights theory to justify applying strict scrutiny to a free exercise claim [as of the date of this decision, March 1, 2009].").

119. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1295–97 (10th Cir. 2004); *see also*, Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (declining to find a hybrid claim in the present case, but acknowledging that the hybrid-rights analysis requires at least a "colorable" claim).

120. *Axson-Flynn*, 356 F.3d at 1295, 1296 & n.18 ("Our [colorable claim] approach strikes a middle ground between the two extremes of painting hybrid-rights claims too generously and construing them too narrowly.").

121. *See id.* at 1296–97. The Tenth Circuit's "colorable claim" approach is similar to the approach taken by the Ninth Circuit before it decided *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008), in 2008. *See supra* note 111.

122. *Axson-Flynn*, 356 F.3d at 1297.

123. *See id.*

124. *Cf.* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 88 (Cal. 2004).

A. Hybrid Rights Exist Within Free-Exercise Precedent

Before the Ninth Circuit abandoned the colorable-claim approach,[125] it recognized the unavoidable problem with rejecting *Smith*'s hybrid-rights theory in its withdrawn opinion in *Thomas v. Anchorage Equal Rights Commission*: "*Smith* did not overrule *Cantwell*, *Murdock*, *Follett*, and *Yoder*; it distinguished them."[126] Each of these cases involved claims that required an exemption from a neutral law of general applicability.[127] If the hybrid-rights exception does not exist, then the cases cited in *Smith* are irreconcilable with the Court's decision because they *mandate* religious-based exemptions from generally applicable laws—a view of free exercise that *Smith* explicitly rejected.[128] Failing to distinguish these cases from the general principle announced in *Smith* that there can be no religious exemptions for neutral, generally applicable laws[129] would contradict *Smith*'s holding, rendering it meaningless.[130]

Denying or ignoring hybrid precedent fails to appreciate the vast change that *Smith* brought to free-exercise law, and the relief hybrid-rights theory preserves in light of that change.[131] The *Smith* rule restricted free-exercise-based exemptions, drastically reducing plaintiffs seeking to vindicate their free-exercise rights in litigation.[132] Without overruling hybrid cases and by applying them to petitioners' claim, *Smith*'s analysis strongly suggests that hybrid-rights theory is to ensure the viability of religious-based exemptions as a remedy to free-exercise violations that are not caught by *Smith*'s rule, but nevertheless represent protected aspects of the Constitution's

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125. *See supra* note 111.

126. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999), *withdrawn and reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc as not ripe*, 220 F.3d 1134 (9th Cir. 2000).

127. *Id.*

128. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566 (1993) (Souter, J., concurring) (noting that the *Smith* Court called the hybrid cases "not true free-exercise cases" because "the Court mandated exemptions from secular laws of general application" (citing Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 881–85 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006))).

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

130. *See Thomas*, 165 F.3d at 704.

131. *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 157–64 (2008) (discussing the sea change *Smith* brought to free-exercise jurisprudence and its subsequent impact on legislation and case law).

132. *Id.* Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & ST. 237, 240–42, 25 (2004).

free-exercise guarantee.[133] Furthermore, legal scholars and members of Congress considered the Court's confirmation of hybrid rights in *Smith* bona fide.[134] Some scholars and courts might dismiss hybrid-rights theory under the argument that the Court in *Smith* created a distinction merely to reason around precedent that would have otherwise mandated an undesired result.[135] Yet lower court judges "charged with resolving a specific controversy . . . lack the luxury that the ivory tower provides."[136] The role of these courts is not to right the potential wrongs of Supreme Court case law, but "to make sense of a confusing doctrinal situation—to make the pieces fit."[137] By ignoring hybrid precedent, which the Supreme Court expressly preserved in *Smith*, circuit courts treat controlling law with improper casualness[138] and diminish the import of free-exercise exemptions, especially given *Smith*'s already limited role for such exemptions.[139]

B. Searching for a Standard in Smith

In addition to serving as the proverbial display case for hybrid rights, the decision in *Smith* also provides the blueprints for the hybrid-rights analysis. The Court's description of successful hybrid precedent highlights the contours

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133. *See Smith*, 494 U.S. at 881–82. The Court's analysis of the fired employees' claim suggests that its non-hybrid status was dispositive:

> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.

Id. at 882.

134. *See, e.g.*, *Congress' Constitutional Role in Protecting Religious Liberty: Hearing Before the Subcomm. on the Judiciary*, 105th Cong. 68–69 (1997) (statement of Michael Stokes Paulsen, Associate Professor of Law, University of Minnesota Law School) (responding to Senator Edward Kennedy's questions regarding ways in which Congress can legislate to protect hybrid rights). Professor Paulsen offered a suggestion considered by other testifying experts:

> My suggestion is to consider very carefully, and to reproduce in the form of statutory language, all of the situations of hybrid rights already identified by the Supreme Court in the *Smith* case, plus others that reasonably can be inferred from the Court's language and description of the principle, and to vigorously enforce those Free Exercise rights.

Id. at 69.

135. *See, e.g.*, *supra* note 12.

136. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 n.8 (9th Cir. 1999), *withdrawn and reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc as not ripe*, 220 F.3d 1134 (9th Cir. 2000).

137. *Id.*

138. *Id.*

139. *See* Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 881 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

of the doctrine.[140] First, a free-exercise claim can join a companion constitutional claim pertaining to a communicative activity (free speech, free press, and perhaps association) or a parental right.[141] The Court's language in *Smith* leaves the door open for potential non-communicative and non-parental companion claims, but *Smith*'s reasoning may limit companion claims to those two varieties.[142] Second, a communicative activity serving as a companion claim must be connected to "the communication of religious beliefs," and a parental right must be connected to "the raising of one's children in those beliefs."[143] This nexus between the free-exercise claim and the companion claim allows the analysis to "specifically advert to the non-free exercise principle involved"[144] from the free-exercise claim.[145] The Court does not explicitly address whether the non-free-exercise principle must be an independently protected companion claim or simply a colorable-enough violation of a constitutional protection.[146] However, its language does suggest

140. *See id.* at 881–82.

141. *See id.* at 881.

142. The Court lists communicative and parental-rights claims as examples of companion claims, but the language "in conjunction with *other constitutional protections such as*" suggests that the Court may treat other constitutional claims similarly. *Id.* at 881 (emphasis added). In fact, the D.C. Circuit's treatment of Catholic University's hybrid claim involving the Establishment and Free Exercise Clauses indicates the plausibility of reading *Smith*'s hybrid analysis beyond just communicative and parental rights. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996). The same could be said under the colorable-claim approach. *See, e.g.*, Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999) (refusing to find a hybrid-rights claim implicating both interstate travel and free exercise because the interstate-travel claim was "utterly meritless"). However, *Smith* confined its speculation of other hybrid claims to First Amendment communicative concerns. 494 U.S. at 882 ("And it is easy to envision a case in which a challenge on freedom of association grounds would likely be reinforced by Free Exercise Clause concerns." (citing Roberts v. U.S. Jaycess, 468 U.S. 609, 622 (1984))). The Court resolved that the facts did not fit a hybrid mold because the free-exercise claim was unconnected to "any communicative activity or parental right." *Id.*

143. *See Smith*, 494 U.S. at 882.

144. *See id.* at 881 n.1.

145. City of Boerne v. Flores, 521 U.S. 507, 513–14 (1997) (construing Smith's reference to hybrid rights as one where the free-exercise claim has to rely on another constitutional claim at stake).

146. However, *Smith*'s citation to hybrid cases decided "exclusively" upon the companion claim cuts against the colorable-claim approach because the cited cases clearly involved more than a colorable claim. *See* Wooley v. Maynard, 430 U.S. 705, 713–15 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). Yet *Smith*'s language creates some ambiguity over the requirements of the companion claim because the cited hybrid precedents are themselves ambiguous. Although no hybrid precedent involved an explicitly "colorable" companion claim, *Cantwell* involved an apparently viable speech claim subject to the "clear and present danger" test under free-speech doctrine. *See* Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). On the other hand, the Court in *Yoder* dismissed the viability of the parental-rights claim in lieu of the free-exercise claim. Wisconsin v. Yoder, 406 U.S. 205, 215–19 (1972). For a detailed discussion of the implications involved with accepting the colorable-claim approach to hybrid claims on

that the companion claim must at least plausibly exist.[147] Additionally, mere religious belief, or the centrality of the implicated religious activity to one's religious beliefs, is not a part of the companion claim.[148]

C. Smith's Cited Precedent Refines the Analysis

Smith divided hybrid precedent into three variations: communicative activities, parental rights, and cases in which the decisions exclusively rely on another constitutional right but involve religious freedom.[149] These three categories possess one commonality that functions both as a guidepost and a limit to the hybrid analysis—all successful hybrid cases decided in the Supreme Court challenged laws requiring affirmative compulsion "under threat of criminal sanction to perform acts undeniably at odds with fundamental tenets of [the claimant's] religious beliefs."[150] As suggested in *Mundock* and *Cantwell*, the affirmative compulsion in the communicative context must rise to the level of censorship.[151] In *Barnette* and *Wooley*, cases that exclusively relied on free-speech grounds, this compulsion took the form of state-imposed symbolism.[152]

Establishment Clause and Equal Protection Clause doctrine, see Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1506–07 (2010).

147. *Cf. Smith*, 494 U.S. at 881 n.1. The Court would not focus its situation specifically on the free-exercise principle as the claim presented was implausible. *See id.*

148. *See id.* at 886–87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?").

149. *Id.* at 881–82.

150. *See, e.g.*, *Yoder*, 406 U.S. at 218 (exempting Amish claimants from compulsory school attendance because mandating secondary education interfered with the religious development of Amish children); *accord Wooley*, 430 U.S. at 706, 717 (holding that New Hampshire was prohibited from enforcing criminal sanctions against Jehovah's Witnesses who covered the state motto on their license plates because the motto was repugnant to their religious beliefs); *Barnette*, 319 U.S. at 624, 626–29 (exempting Jehovah Witnesses from a public school resolution that compelled a flag salute and pledge by threatening prosecution of the child and parents for insubordination, when such consents were fundamentally at odds with their religious beliefs); Murdock v. Pennsylvania, 319 U.S. 105, 107–08, 113 (1943) (invalidating the enforcement of a license tax on the solicitation of orders for goods as applied to Jehovah's Witnesses distributing religious literature because the tax effectively censured their free exercise); *Cantwell*, 310 U.S. at 305 (invalidating the enforcement of criminal sanctions against Jehovah's Witnesses for failure to comply with a mandatory licensing system for religious solicitation because the system permitted censorship of religion as the means of determining its "right to survive").

151. *See Murdock*, 319 U.S. at 113 ("The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship . . . ."); *Cantwell*, 310 U.S. at 305 ("Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment . . . .").

152. *See Wooley*, 430 U.S. at 715; *Barnette*, 319 U.S. at 632.

The parental-rights category contains analogous qualifications for the affirmative compulsion required to garner the hybrid exemption. Importantly, the *Yoder* case clarified that its holding "in no degree depends on the assertion of the religious interest of the child . . . it is [the parents'] right of free exercise, not that of their children" at issue because the State was prosecuting the parents, not the child.[153] The Court's focus on the rights of the parents in *Yoder* reveals the nature of the improper state infringement in that case—the state's compulsory policy "prevented these Amish parents from making *fundamental* decisions regarding their children's religious upbringing and *effectively overrode their ability to pass their religion on to their children*."[154] Therefore, the parental right implicated in a successful hybrid case is narrowed to instances where the state's affirmative compulsion renders it nearly impossible for parents to guide the religious future of their children.[155]

The *Prince* case further narrowed the scope of affirmative-compulsion hybrid-rights exemption when the Court noted that parental rights are limited to some extent by the state's proffered interests in child health and public safety.[156] Thus, the Court will not grant an exemption for a parental-rights free-exercise claim when the interests of the state in the child's health and the public welfare outweigh those rights.[157]

Both the communicative-activity and parental-rights categories of hybrid precedent reveal the significance of raising a companion claim with a free-exercise claim—but for the free-exercise implication, the state's affirmative compulsion could be constitutional.[158] In the communicative

153. *Yoder*, 406 U.S. at 230–31.

154. Parker v. Hurley, 514 F.3d 87, 99–100 (1st Cir. 2008) (second emphasis added). This quotation accurately reflects the Court's discussion in *Yoder* of the fundamental right that parents possess, including the interest of the parents "to guide the religious future and education of their children." *See Yoder*, 406 U.S. at 232. The Court looked to *Pierce v. Society of Sisters* for support, which accorindg to the Yoder Court acknowledged the fundamental right and duty of parents "to recognize and prepare [their child] … for additional obligations." *Id.* at 232–33 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)). The Court interpreted these "additional obligations" as necessarily including the teaching of "moral standards, religious beliefs, and elements of good citizenship." *Id.* at 233.

155. *See* Yoder, 406 U.S. at 219; *see supra* text accompanying notes 155–56.

156. Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("[A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." (footnote omitted)).

157. *See id.*

158. *Cf. Yoder* 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). The cases cited to in *Smith* as decided exclusively on other grounds are not relevant here because their resolution did not require the analysis of a religious free-exercise claim in conjunction with any companion claim. *See* Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 882 (1990) (citing Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. Bd. of Educ. v. Barnette, 319

context, the *Murdock* Court noted that religious claimants require more protection from a tax on pamphleteering than secular, commercial speech because of the censorship on religious speech.[159] A secular claimant would not necessarily receive the same level of protection as that provided to a religious claimant in such a case.[160] In the parental-rights context, a parent's claim would not inhibit reasonable regulation if the parent based his or her objection on "purely secular considerations."[161]

State interests may still intercede in the context of health and public safety to temper the plus factor that the Free Exercise Clause provides.[162] With this analysis, the hybrid-rights doctrine recognizes a significant exception to *Smith*'s general free-exercise rule because the claimant's free-exercise interest in the companion activity "saves" the claimant from what could otherwise be a constitutional state regulation of the companion activity.[163]

U.S. 624 (1943)), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

159. *See* Murdock v. Pennsylvania, 319 U.S. 105, 110–12 (1943).

160. *Id.* at 110–11. Although it is true that "the pamphlets of Thomas Paine were not distributed free of charge," and are thus afforded a similar level of protection as religious publications, this language simply proves that political speech could also serve as a "plus factor," much like religion did in *Murdock*. *See id.* However, this does not dispute that religion did provide the *Murdock* claimant a plus that, as the Court says, "retailers or wholesalers of books" would not have. *See id.* Therefore, the opinion's language reveals that a speech claim would necessarily give a claimant the same type of "plus" factor that religion would always give a claimant. *Id.* at 111–12.

161. *See Yoder*, 406 U.S. at 215.

162. *See* Prince v. Massachusetts, 321 U.S. 158, 165–67 (1944).

163. *See supra* Parts II.A–B. Although the Court has yet to entertain a hybrid claim involving a sect, such as secular humanism, that does not profess a belief in the existence of God, the sole case on point fell into the uncontroversial territory of the free-exercise prohibition against compelled belief. *See* Torasco v. Watkins, 367 U.S. 488, 495 & n.11 (1961) (reaffirming that the Free Exercise Clause prohibits states and the federal government from either "constitutionally forc[ing] a person" to believe or disbelieve a religion or aiding God-believing religions against other religions, such as secular humanism). As the Court implied that secular humanism was a religion, the hybrid-rights exception would likely protect it even though secular humanism rejects traditional religious concepts. *See id.* at 495 n.11. The potential for this expansion of the exception is not likely to compromise the exception's limits because the hybrid analysis evaluates the extent to which a state interferes with a constitutionally protected activity implicated by the claimant's free exercise, rather than the content of the particular religious belief. *See supra* Part II.C.

D. The Analytical Sequence for Hybrid Rights

Smith's language and hybrid-rights precedent provide a test for hybrid rights that is divided into three "lines of cases" with common threshold requirements.[164]

1. Threshold Requirements

As a threshold matter, a successful hybrid-rights claim must possess either an independently viable constitutional claim related to a communicative activity protected by the First Amendment or a constitutionally recognized parental right.[165] Either companion claim must possess a certain nexus with the free-exercise claim that pivots the analysis toward the companion claim.[166] The regulated activity must implicate both the free-exercise claim and the companion claim in a way that accords with the required nexus for a communicative or parental-rights claim.[167] The state's regulation must place an affirmative burden on free exercise that compels the claimant to perform some act.[168] Assuming satisfaction of the threshold determinations, the analysis then branches off into one of the three categories identified in *Smith*.[169]

2. Category 1: Communicative-Activity Hybrid Cases

In the communicative context, a free-exercise claim links with communicative claims that evoke religious beliefs.[170] This category requires the imposition of an affirmative obligation on a communicative act involving religious beliefs that exacts a burden on their free exercise.[171] Significant interference with the ability to communicate religious beliefs is necessary to reach the required level of burdening.[172] *Smith* emphasizes that this part of the

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164. Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 881–82, 881 n.1 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

165. *See* Part II.B. *Smith* does not dismiss the possibility of non-communicative or non-parental companion claims in hybrid rights, nor does *Smith* dismiss companion claims that are less than independently viable. *See supra* note 144 and accompanying text. However, Supreme Court precedent involved an independently protected claim, which certainly avoids the possibility that the hybrid analysis would advert to a claim that does not exist. *See* Smith, 494 U.S. at 882.

166. *See Smith*, 494 U.S. at 882; *supra* notes 146–47 and accompanying test.

167. *See Smith*, 494 U.S. at 882.

168. *See supra* Part II.C.

169. *See Smith*, 494 U.S. at 881.

170. *See id.* at 881 n.1.

171. *See supra* note 153 and accompanying text.

172. This is consistent with the conventional standard for a successful claim asserting the violation of a fundamental constitutional right. *See* Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (requiring "substantial interference" with a fundamental constitutional right to successfully

hybrid exception protects the ability to communicate information about religion, not solely the ability to communicate.[173] If the imposition is akin to censorship, the combination of the religious implication with the communicative activity exempts the claimant from the law.[174]

3. Category 2: Cases Exclusive to Free Speech

If in satisfying the threshold requirements, the state law requires an affirmative compulsion from the claimant in the form of a symbolic utterance that implies acceptance of an ideology as belief,[175] then this communicative case is resolvable exclusively on free speech grounds and falls outside the scope of the hybrid analysis.[176]

4. Category 3: Parental-Rights Cases

When a state law implicates parental rights and free exercise, the free-exercise claim connects with the parental-rights claim if the regulated activity involves child rearing in religion.[177] However, the reasoning in *Yoder* does not allow a religious claimant to withhold children from a compulsory activity simply because the parent's religion conflicts with the law.[178] Rather, the compelled act must override the parents' right to pass their religious beliefs and practice on to their children.[179] However, as both *Prince* and *Yoder* make clear, legitimate state interests in child health and public safety can override parental interests even if the state regulation requires a compulsory act.[180] If

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litigate the claim). This is not to be confused with an evaluation of the extent to which the communicative conduct is central to the practitioner's religion. *Smith* rejects this form of analysis emanating from *Sherbert v. Verner*. *See supra* note 8.

173. *See supra* note 147.

174. *See* Part I (discussing *Murdock* and *Cantwell*).

175. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 705 (1977) (holding that compelling drivers to leave the state motto uncovered on their vehicle license plate is constitutionally impermissible); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 624, 642 (1943) (concluding that state compulsion of school children to salute the flag is constitutionally impermissible).

176. *See Smith*, 494 U.S. at 882 (explaining that although both *Wooley* and *Barnette* involved religious activity, they were decided purely on free-speech grounds (citing *Wooley*, 430 U.S. at 713; *Barnette*, 319 U.S. at 642)).

177. *See supra* notes 155–57 and accompanying text.

178. Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972) (concluding that a mere religious objection does not allow "every person to make his own standards on matters of conduct in which society as a whole has important interests").

179. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 99–100 (1st Cir. 2008) ([C]ompulsory attendance at *any* school—whether public, private, or home-based—prevented these Amish parents from making *fundamental* decisions regarding their children's religious upbringing and effectively overrode their ability to pass their religion on to their children as their faith required." (citing *Yoder*, 406 U.S. at 233–35)).

180. *See Yoder*, 406 U.S. at 234 (determining that Wisconsin's proffered interest in child health and welfare through compulsory education could not trump the Yoders' right to pass

the state's has no interest or its interest is not compelling, the analysis ends in favor of the parents.[181]

III. COMMENTARY ON THE SIGNIFICANCE OF APPLYING HYBRID RIGHTS

A. CLS Shows the Peril of Free Exercise Without Hybrid Rights

The *CLS* decision demonstrates both the significance of ignoring hybrid claims and the effect of such claims.[182] If the Court had considered the hybrid standard, then it never could have relegated CLS's free-exercise argument to one footnote.[183] In fact, the proposed standard could have provided an avenue for CLS's success under a hybrid theory considering the nondiscrimination policy.

CLS would have had to first demonstrate a plausible companion constitutional claim—either a communicative activity or parental right implicated with their free-exercise claim.[184] The *CLS* majority correctly recognized the communicative activity of "expressive association" within the case facts.[185] Because "expressive association in this case is 'the functional equivalent of speech itself,'"[186] a viable companion, communicative claim existed, provided that CLS had an implicated free-exercise interest with the requisite nexus to its communicative claim.[187] The communicative activity at issue pertained to the communication of religious beliefs through CLS's advocacy of its statement of faith. The law school required that CLS open its doors to all students regardless of religious beliefs to gain recognized organization status and university benefits.[188] Such a requirement is

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religion on to their children); Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (noting that a parent cannot claim freedom from a compulsory act such as child vaccination due to child health and public safety concerns); *see also Prince*, 321 U.S. at 168–69 (holding that the state interests in child health and safety in preventing certain forms of child labor superseded a parental interest in passing religion on to children).

181. *See Yoder*, 406 U.S. at 214 ("[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.").

182. CLS, 130B S. Ct. 2971, 2995 n.27 (2010).

183. *See id.*

184. *See supra* Part II.B.

185. *CLS*, 130B S. Ct. at 2985.

186. *Id.* (quoting Brief for Petitioner at 35, *CLS*, 130B S. Ct. at 2985 (No. 08-1371)).

187. *See supra* Part II.B; *see also* City of Boerne v. Flores, 521 U.S. 507, 514 (1997) (describing *Smith* as holding that "a neutral, generally applicable law . . . fail[s] to pass constitutional muster" when a free-exercise claim—in addition to another constitutional claim—is brought).

188. *CLS*, 130B S. Ct. at 2950. The use of the law school's communication avenues is limited to recognized student organizations only. *Id.* at 2979. That the law school denied CLS

tantamount to an affirmative compulsion because CLS would be forced to set aside its statement of faith and would no longer be able to advocate its religious beliefs effectively.[189]

If CLS had met the hybrid threshold requirements, then analysis would have adverted to the non-free-exercise principle[190]—CLS's communicative companion claim.[191] Under its nondiscrimination policy,[192] the law school prohibited CLS, as an official student group, from denying membership or leadership roles to those who did not adhere to its statement of faith.[193] The law school's denial of official statutes, and the consequent denial of access to the schools' communicative forums, implicates relatively straightforward viewpoint discrimination because it came while granting political, social, and cultural groups official status even though they deny similar statuses to students based on ideological beliefs.[194]

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this status because its statement of faith did not conform with the nondiscrimination policy implicates the concerns that those avenues would be used to communicate the beliefs contained in the statement of Smith. The statement of faith requires, among other things, adherence to Christian teachings regarding One God in Three Persons, accepting Jesus Christ as humanity's savior, and the active presence of the Holy Spirit in one's life. *Id.* at 2980 n.3

189. *Id.* at 2980–81. Had a hybrid-rights argument been considered, CLS would likely have had to address why the interference on its free exercise still rose to the same level as the hybrid cases *Smith* recognized, even though no apparent threat of criminal sanctions existed. CLS could plausibly respond that the focus of the hybrid analysis here is on the level of imposition on its exercise and whether it rises to affirmative compulsion—not whether the State choose to classify that imposition as criminal. The hypothetical argument above proceeds on CLS reasoning in this fashion.

190. *See* Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 881 n.1 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

191. The hybrid analysis does not resolve the dispute over whether a companion claim must be independently protected by the Constitution or simply raise a colorable violation. *See supra* Part II.B. However, a hybrid-rights claimant would be wise to analyze a companion claim under the higher standard because an independently protected claim is certainly colorable, but the opposite is not necessarily true.

192. *See supra* note 79 (discussing why the nondiscrimination policy is considered in this Comment rather than the "all comers" policy).

193. *CLS*, 130B S. Ct. at 2980.

194. *See id.* at 3010 (Alito, J., dissenting). The First Amendment's opposition to viewpoint discrimination is considered a "bedrock principle" by the Supreme Court. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (citations omitted)). As Justice Samuel Alito, Jr. noted for the dissent, the Court did not try to defend the law school's nondiscrimination policy as constitutional because any attempt to do so would have failed. *See CLS*, 130B S. Ct. at 3010. The language of the nondicrimination policy demonstrates the law school's intent to disfavor religious groups specifically, while amounting to "patent viewpoint discrimination." *See id.*

With the companion claim satisfied, the Court could have then determined the particular what category of hybrid case at issue. Given the independent viability of CLS's speech claim,[195] the case presents an analytical analogy to communicative category cases, such as *Cantwell* and *Murdock*.[196]

Here, CLS's hybrid claim analogizes comfortably to the claim at issue in *Murdock*.[197] The law school's denial of communicative forums to CLS because its statement of faith required those that advance it actually share it significantly interfered with an "age old type of evangelism"—advertising religious events and advocating its religious belief.[198] Denying CLS access to communicative avenues made available to other groups is arguably a more potent example of censorship than experienced by the claimants in *Murdock*, in which Pennsylvania simply taxed their use of communicative avenues.[199] After satisfying a prima-facie hybrid analysis, it is plausible CLS could have prevailed on these facts.[200]

B. The Hybrid Standard: Resolving Ambiguity, Critiques

The hybrid analysis detailed above clarifies the utility of the hybrid precedent displayed in *Smith*. Its application could robustly reinvigorate free-exercise jurisprudence for victims of subtle religious discrimination.[201]

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195. *See supra* Part II.D.I (discussing independent-viability claims).

196. *See supra* Part II.D.2. However, Justice Alito's dissent permits the inference that CLS's expressive-association claim—unconstitutional compulsion to associate with others with whom they disagree—more closely aligns with claims that can be decided upon those grounds alone, apart from the free-exercise interest as in *Barnette* and *Wooley*. *See* CLS, 130B S. Ct. at 3012 (Alito, J., dissenting) ("As our cases have recognized, the right of expressive association permits a group to exclude an applicant for membership only if the admission of that person would 'affec[t] in a significant way the group's ability to advocate public or private viewpoints.'" (alteration in original) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)); *supra*, Parts I.B.2, II.D.3.

197. *See supra* Part II.D.2.

198. *See* Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943) ("[S]preading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.").

199. *Compare CLS*, 130B S. Ct. at 3008 (noting the CLS was prevented from using campus facilities with few exceptions, and from accessing the school's communication avenues), *with Murdock*, 319 U.S. at 106 (describing the state law at issue, which required paying a tax to canvas or solicit).

200. *Cf.* Scharffs, *supra* note 89, at 304 ("One might have thought that this case would have been a good place to test the concept of hybrid rights or to test the limits of autonomy of religious groups.").

201. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1387–92 (6th ed. 2000) (discussing the decrease in free-exercise relief post-*Smith* due to the lack of strict-scrutiny protection for plaintiffs).

Importantly, the standard provides a response to Justice Souter's prominent two-pronged critique.[202]

Unlike the case-by-case colorable-claim theory, developed to reconcile *Smith*'s critics with *Smith*'s language,[203] this standard strives to provide the missing analysis through the hybrid precedent confirmed in *Smith*.[204] Having an evaluative standard gives circuit courts appropriate guidance through binding, precedential case law.[205] The recognition of hybrid rights and their evaluative standard would bolster efforts by the circuits to protect those hybrid rights while awaiting a doctrine from the Supreme Court for evaluating the claims.[206]

During the intervening time, religious-liberty plaintiffs should work to expel the ambiguity remaining within the standard. Although some precedential cases successfully invoking hybrid rights have suggested a requirement that the state demonstrate an interest rising above a rational basis,[207] the Court should make it clear that hybrid scrutiny is indeed strict scrutiny, rather than a variation of intermediate scrutiny.[208] Additionally, the sufficiency of a colorable companion claim to trigger the hybrid analysis[209] and the limitation of companion claims to communicative activities and parental rights, are issues left undetermined in successful hybrid precedent.[210] The former issue is consequential to the characterization of a potential hybrid case, as *CLS*

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202. *See supra* Part I.D.

203. *See, e.g.,* Santoli, *supra* note 23, at 669 ("[T]he 'colorable claim' theory to the hybrid rights exception is best suited to weigh the companion claim."); Tuttle, *supra* note 23, at 722 ("[T]he colorable showing approach is needed to clear up the ambiguity surrounding the hybrid rights exception.").

204. *See supra* Parts II.B–D.

205. *See* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (1998) (noting that "this case illustrates the difficulty of applying the *Smith* exception" and expressing uncertainty over what the "exception" requires other than, at least, a colorable claim).

206. *See supra* Part I.E.

207. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.").

208. *Cf.* Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 930 (1998) (explaining that *Smith* stated hybrid claims are to be evaluated using strict scrutiny, but noting that the Supreme Court failed to explain its rationale for using this test).

209. *See supra* note 148.

210. *See supra* note 148 and accompanying text; *see also* William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 238 (1998) (noting that judicial treatment of *Smith*'s ambiguous language is inconclusive but the courts that have addressed this issue tend to limit the scope of potential companion claims). For an elaboration on the variety of claims brought as hybrids, see Esser, *supra*, at 240–42.

demonstrates.[211] Religious-liberty plaintiffs would be wise to employ the hybrid-standard framework outlined above in litigation to refine these undetermined aspects of the hybrid analysis in the circuit courts before the Supreme Court's ultimate resolution.

Despite its interstices, the standard refutes Justice Souter's influential criticisms of hybrid rights. As noted above, the circuit courts that have rejected hybrid rights as dicta rely on Justice Souter's concurrence.[212] However, the merits of *Smith*'s hybrid-rights exception are not the issue for circuits contending with hybrid claims so long as *Smith* remains good law, no matter the merits of Justice Souter's general critiques of the decision. The issue for courts contending with hybrid claims is what standard to apply to such claims.[213]

Justice Souter first argued that a proper understanding of the hybrid-rights exception would in theory be "so vast as to swallow the *Smith* rule."[214] Yet, the hybrid analysis articulated above demonstrates the rarity of successful hybrid claims.[215] Applicable companion claims are limited because they must be constitutionally protected, implicated by the free-exercise claim, and reaching some colorable quality.[216] Furthermore, hybrid claims require affirmative compulsion, characterized as state-imposed symbolic speech, the equivalent of censorship, or overriding parental control of a child's religious upbringing.[217] Beyond these general requirements, further limitations exist within specific variations of hybrid cases. In the communicative cases, censorship must put the ability of the claimant to communicate at stake.[218] For example, the *CLS* case implicated such censorship only because the law school's policy eliminated communicative avenues on campus.[219] In the parental prong, the state's overriding action is *permissible* if the state can show a legitimate interest in the child's health and public safety.[220]

Justice Souter's second argument questioned the relevance of adding a free-exercise claim to an independently viable claim that would alone warrant an exemption.[221] However, this argument ignores what hybrid-rights precedent

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211. *See infra* Part III (discussing *CLS*).

212. *See supra* Part I.E.

213. *See supra* Part I.E.

214. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566 (1993) (Souter, J., concurring).

215. *See supra* Part II.D & note 212.

216. *See supra* Parts II.B, II.D.1.

217. *See supra* Part II.C.

218. *See supra* Part II.D.2.

219. *See* Part III.A.

220. *See supra* Parts II.C, II.D.4.

221. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

confirms: the free-exercise claim adds a plus factor that could otherwise be unavailable on purely secular grounds.[222] When a state's action attempts to override the parental interest in a child's religious upbringing, barring safety considerations, a parent can bring a claim that would not likely stand on purely secular grounds.[223] Similarly, the communicative context shows that less protected forms of speech, such as commercial speech, could never provide the same degree of relief that religiously based communication can under the hybrid analysis.[224] For example, in *CLS*, a non-religious school group would be unable to engage in the religious discrimination that, under a hybrid analysis, CLS could engage in, even if it wanted to or thought it necessary.[225]

IV. CONCLUSION

So long as *Smith*'s rule prohibiting religious exemptions to neutral, generally applicable laws controls free-exercise claims, the Court's only recognized exception must possess a clear standard. Reading successful hybrid-rights precedent through *Smith*'s lens reveals a standard comporting with the Court's language in *Smith* and illuminating circuit court ambiguity. Most importantly, it provides a vibrant avenue of relief for the constitutional right given first billing, but secondary treatment,[226] in the Bill of Rights.

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222. *See supra* notes 158–65 and accompanying text. One scholar has criticized hybrid rights by using Justice Souter's second argument to support the contention that a hybrid-rights theory, if valid, would allow religious speakers to claim greater constitutional protection than secular speakers against otherwise neutral, generally applicable laws. *See* Alan Brownstein, *Why Conservatives, and Others, Have Trouble Supporting the Meaningful Enforcement of Free Exercise Rights*, 33 HARV. J.L. & PUB. POL'Y, 925, 933 n.30 (2010). However, this argument ignores the significance behind the constitutional enumeration of the free-exercise right. The specific enumeration itself suggests an elevation above some other forms of communicative exercise. *See supra* notes 161–62 and accompanying text.

223. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

224. *See supra* notes 161–62 and accompanying text.

225. CLS, 130B S. Ct. 2971, 3012 (2010) (Alito, J., dissenting) ("It bears emphasis that permitting religious groups to limit membership to those who share the groups' beliefs would not have the effect of allowing other groups to discriminate on the basis of religion.").

226. *See, e.g.*, Vincent Martin Bonventre, *The Fall of Free Exercise: From 'No Law' to Compelling Interests to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399, 1415 (2007) ("The Supreme Court majority in *Smith* acknowledged the inevitable burden on free exercise resulting from its judicial passivity in protecting religious liberty. '[L]eaving accommodation to the political process,' Scalia conceded, 'will place at a relative disadvantage those religious practices that are not widely engaged in.' But he justified this as a 'consequence of democratic government [that] must be preferred'—preferred, apparently, to taking free exercise more seriously by insuring more rigorous safeguards." (quoting Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990), *superseded in part by statute*, RFRA, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006))).