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Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen

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NOTE

RELIGIOUS HYBRIDS IN THE LOWER COURTS: FREE EXERCISE PLUS OR CONSTITUTIONAL SMOKE SCREEN?

After the recent restriction of the Religious Freedom Restoration Act (RFRA)[1] in *City of Boerne v. Flores*,[2] the Supreme Court's seminal free exercise decision in *Employment Division v. Smith*[3] has received renewed strength (at least as applied to the states).[4] *Smith* rejected the thirty-year-old application of strict scrutiny to free exercise cases which had been mandated by *Sherbert v. Verner*[5] in 1963. In its place, a new test upholding any law which was "neutral and generally applicable" was adopted.[6] "By holding an individual's religious beliefs do not 'excuse him from compliance with an otherwise valid law,' the Court reverted to the harsh dictates of the *Reynolds* regimen, mitigated only by

1 42 U.S.C. § 2000bb (1994).

2 117 S. Ct. 2157 (1997).

3 494 U.S. 872 (1990).

4 The *Boerne* decision held that RFRA was unconstitutional as applied to the states (as a matter of federalism) but did not clearly rule as to RFRA's constitutionality as applied to *federal* law. Thus, several courts have held that as a federal matter, RFRA remains the law of the land. *See In re* Young, 141 F.3d 854 (8th Cir. 1998); *In re* Hodge, 220 B.R. 386 (D. Idaho 1998). For commentary arguing the same position, see John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 111 (1997). *But see* Waguespack v. Rodriguez, 220 B.R. 31 (W.D. La. 1998) (refusing to apply RFRA after *Boerne*).

To the extent that RFRA is still viable, hybrid claims are essentially meaningless for claims involving federal action. "[A]s long as RFRA remains the law of the land, the hybrid passage will be little more than a constitutional appendix, present within the corpus juris, but practically useless." James R. Mason, III, Comment, Smith's *Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 204 (1995).

5 374 U.S. 398 (1963).

6 *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing to *Smith* for the proposition "that a law that is neutral and of general applicability need not be justified by a compelling governmental interest").

Justice Scalia's invention of the 'hybrid exception.'"[7] Met with almost universal disfavor by both academics and judges,[8] *Smith* was viewed as a decision doomed to quick reversal. But some eight years later, the Court continues to uphold the application of *Smith* and it now requires renewed attention.

This Note looks at how lower courts have interpreted and applied the hybrid rights exception. I have separated the lower court cases based upon the type of hybrid claims that they involve. Part I establishes the analytical framework in which hybrids exist. Part II deals with hybrid claims involving the freedom of speech. Part III deals with parents' rights to educate their children. Part IV analyzes the freedom of association. Part V addresses the various other types of hybrids which have been attempted in court as well as those suggested by the academy. Finally, Part VI concludes with a brief overview of the future of the hybrid exception in free exercise jurisprudence.

I. HYBRID RIGHTS FRAMEWORK

A. *History of the Hybrid*

In what may have been no more than dicta,[9] the *Smith* Court attempted to conform all previous free exercise precedent to the neutral, generally applicable law standard—in other words, attempting to say, "We have really applied this standard all along." For the most part, this was not a terribly difficult prospect since the Court had never really applied the *Sherbert* strict scrutiny test with consistency.[10]

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7 Roald Mykkeltvedt, Employment Division v. Smith: *Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 623 (1991) (footnote omitted) (referring to the scrutiny test of *Reynolds v. United States*, 98 U.S. 145 (1878)).

8 *See* Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 117 ("The Supreme Court's decision in *Employment Division v. Smith* outraged most scholars of the Free Exercise Clause."); *see also* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992) (collecting the scholarly criticisms of *Smith*).

9 *See* Michael S. Satow, *Conscientious Objectors: Their Status, The Law and its Development*, 3 GEO. MASON U. CIV. RTS. L.J. 113, 133 (1992) ([The hybrid exception] "does not appear to be a commandment by the Supreme Court. Indeed it is merely a statement of fact.").

10 *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990):

> [I]t must be conceded that the Supreme Court before *Smith* did not really apply a genuine 'compelling interest' test. Such a test would allow the government to override a religious objection only in the most extraordinary of circumstances. In an area of law where a genuine 'compelling interest' test has been applied, [racial discrimination], . . . no such interest has been discovered in almost half a century.

In the twenty-seven years following *Sherbert*, the Court was faced with a total of seventeen free exercise cases. In these, the religious objector lost in thirteen while three of the remaining four dealt with unemployment compensation claims.[11] This left *Wisconsin v. Yoder*[12] as the only nonemployment case which could not be squared with the new approach. Rather than overturning *Yoder*, Justice Scalia (writing for the majority) carved out the following exception to accommodate those few future cases which could not possibly fit the Court's new model:[13]

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, . . . or the right of parents . . . to direct the education of their children. . . . Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion. . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.[14]

B. Form of the Hybrid

This "convenient discovery"[15] of the "hybrid"[16] exception is aimed at the level of scrutiny to be applied by the court in examining the constitutionality of a law burdening religious activity.[17] Under the

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Id. at 1127

11 *See* Ryan, *supra* note 8, at 1458. The unemployment cases do not affect the focus of this Note since *Smith* retained strict scrutiny in unemployment situations which involve "a system of individual exemptions." *Smith*, 494 U.S. at 884. The hybrid exception only comes into play when a generally applicable law is involved.

12 406 U.S. 205 (1972).

13 The hybrid exception can thus be characterized "as an unartful tool to distinguish troubling precedent." Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 30 (1995); *see also* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 751 (1998).

14 *Smith*, 494 U.S. 872, 881–82 (1990) (cases and citations omitted).

15 James M. Donovan, *Restoring Free Exercise Protections By Limiting Them: Preventing a Repeat of* Smith, 17 N. ILL. U. L. REV. 1, 49 n.18 (1996).

16 This phrase is derived from Scalia's statement in *Smith* that the facts of that case did not present "such a hybrid situation." *Smith*, 494 U.S. at 882.

17 The *Smith* decision only affects analysis in Free Exercise cases dealing with religious *action*. *Smith* specifically retained *Sherbert* strict scrutiny analysis for cases involving a state imposed burden on religious *belief*. "Thus, the First Amendment obviously

Sherbert test, the government was required to show a compelling interest to uphold any law which placed a substantial burden on religion. *Smith* eliminated this test for neutral, generally applicable laws but at least implicitly retained a higher standard of analysis for the hybrid exception.[18] However, it is not clear from *Smith* itself what this "higher" level of analysis is. Most courts and commentators have assumed that the appropriate standard is the *Sherbert* strict scrutiny test.[19] Even some courts that have refused to analyze the hybrid rights claim did so because this "is simply to require us to apply the same test we must apply in any event under [RFRA]"; in other words, strict scrutiny.[20] I agree with this view and assume for purposes of this Note that strict scrutiny is the appropriate standard for hybrid analysis.

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excludes all 'governmental regulation of religious *beliefs* as such.'" *Smith*, 494 U.S. at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

18 *See* Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 933 (6th Cir. 1991) ("The *Smith* decision implies without stating that those hybrid claims which raise a free exercise challenge coupled with other constitutional concerns remain subject to strict scrutiny."); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D. Tex. 1997) (noting the "heightened level of scrutiny used in hybrid cases"); First United Methodist Church v. Hearing Examiner, 916 P.2d 374, 379 (Wash. 1996).

19 *See South Jersey Catholic Sch. Teachers v. St. Theresa*, 696 A.2d 709, 722 (N.J. 1997); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 862 (Minn. 1992); *State v. Hershberger*, 462 N.W.2d 393, 396 (Minn. 1990) (noting that compelling interest is the correct standard for hybrid claims). For general commentary, see Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 838–41 (1993).

See also Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 308 ("Hybrid cases continue to enjoy strict scrutiny review by the courts . . . ."); Thomas J. Cunningham, *Considering Religion As a Factor in Foster Care in the Aftermath of* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 28 U. RICH. L. REV. 53, 65 (1994) ("[W]hen faced with such a 'hybrid' challenge, courts should continue to apply the 'compelling interest' test."); Rod M. Fliegel, *Free Exercise Fidelity and the Religious Freedom Restoration Act of 1993: Where We Are, Where We Have Been, and Where We Are Going*, 5 SETON HALL CONST. L.J. 39, 69 (1994) ("Under the hybrid claim exception, claims involving free exercise rights [and other rights] . . . trigger strict scrutiny . . . ."); and David M. Smolin, *The Free Exercise Clause, The Religious Freedom Restoration Act, and the Right to Active and Passive Euthanasia*, 10 ISSUES L. & MED. 3, 25 (1994) (noting the same).

20 Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 921 (Cal. 1996). *See also* Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 79 (1994) ("Even if the parents' claim is a hybrid one, the result under the First Amendment probably would be the same as the result under RFRA: the strict scrutiny standard would apply . . . .").

I also assume that hybrid claims are subject to the same rules of standing,[21] ripeness,[22] initial burden of proof,[23] and other procedural requirements as are other constitutional claims.[24] As an initial matter, the plaintiff must still prove that a particular state action has caused a burden to a sincerely held religious conviction and at least one other constitutional right.[25] For purposes of hybrid claims, it is not clear whether this proof need be substantial but it must at least be sufficient to implicate the right.[26]

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21 *See Vandiver*, 925 F.2d at 933 (noting that parents' hybrid claims were barred by a lack of standing and the statute of limitations); *see also* Health Servs. v. Temple Baptist Church, 814 P.2d 130, 136 (N.M. Ct. App. 1991) (holding that religious day care did not have standing to raise parental right to educate).

22 *See* Hinrichs v. Whitburn, 772 F. Supp. 423, 431–32 (W.D. Wis. 1991) (dismissing free exercise claim as unripe and therefore not having anything to combine with a parental right to educate in order to form a hybrid).

23 *See South Jersey Catholic Sch. Teachers*, 696 A.2d at 721 (dismissing associational hybrid for defendant's failure to present "any argument in their briefs to support that claim"). At the very least, both a free exercise and "other" type claim must be raised. *See* Fowler v. Robinson, No. 94-CV-836, 1996 WL 67994, at *14 (N.D.N.Y. Feb. 15, 1996) (noting that no hybrid claim exists if plaintiff fails to allege another constitutional right); *see also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska 1994) (noting the same).

24 *See* Swanson v. Guthrie, 135 F.3d 694, 699 (10th Cir. 1998) ("[S]imply raising [a hybrid claim] is not a talisman that automatically leads to application of the compelling-interest test. We must examine the claimed infringements on the party's claimed rights to determine whether either the claimed rights or the claimed infringements are genuine."). *But see* Ann L. Wehener, Comment, *When a House is Not a Home But a Church: A Proposal for Protection of Home Worship from Zoning Ordinances*, 22 CAP. U. L. REV. 491, 510–11 (1993) (arguing that a burden on religion may only have to be proved when the "other" right of the hybrid is an unenumerated right such as the right to educate children; cases involving enumerated rights such as free speech would not require proof of a burden).

25 *See* Christ College v. Board of Supervisors, Fairfax County, No. 90-2406, 1991 WL 179102, at *4 (4th Cir. Apr. 8, 1991) (dismissing hybrid claim for failure "to establish the first element in any free exercise claim; [plaintiffs] have not proved that the [challenged laws] burden their exercise of religion"); *see also* John A. Russ IV, *Shall We Dance? Gay Equality and Religious Exemptions at Private California High School Proms*, 42 N.Y.L. SCH. L. REV. 71, 115 (1998) (noting elements of a hybrid claim). Hybrid claims also involve questions of fact, and are thus not subject to resolution on a motion to dimiss. *See* United States v. Hsia, No. Crim. 98-0057(PLF), 1998 WL 635848, at *10–11 (D.D.C. Sept. 10, 1998).

26 *See* Al-Amin v. City of New York, 979 F. Supp. 168, 171 n.4 (E.D.N.Y. 1997) (refusing to apply hybrid analysis since "plaintiffs' vending activity does not implicate freedom of speech"); *see also* Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 252 n.61 ("*Smith's* reference to other freedoms must involve something more than mere implication, referring to those situations where other freedoms are directly abridged."). *But see* State v. Hersh-

Finally, I assume that the *Smith* test applies to civil laws as well as to criminal statutes. Most courts have now addressed this issue and almost all have held that the *Smith* holding extends beyond its existence as a criminal case.[27] The only striking exception to this is the Ninth Circuit, which has consistently limited *Smith* to the criminal context.[28] While neither *Lukumi* (which dealt with a criminal ordinance) nor *Boerne* resolved this issue, the reasoning of the majority seems more in line with the reasoning of *Smith* itself.

C. Substance of the Hybrid

"Assessing the relevance of the 'combination' or 'hybrid' analysis in *Smith* is hard. Most scholars assume this language was a makeweight to 'explain' *Yoder* that lacks enduring significance."[29] Some even question whether it remains a part of free exercise law at all.[30] No one seems to understand what constitutes such a claim[31] or where its boundaries should be drawn.[32] Perhaps the most biting criticism of

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berger, 462 N.W.2d 393, 396 (Minn. 1990) (noting that a free exercise claim need only "touch" on another constitutional right).

27 For a listing of cases addressing this issue, see Jeremy Meyer, *Ratchet Plus? Possible Constitutional Foundations for the Religious Freedom Restoration Act of 1993*, 48 WASH. U. J. URB. & CONTEMP. L. 343, 351 n.51 (1995).

28 *See* American Friends v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991); NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991). This distinction continues to exist and was most recently applied in *Washington v. Garcia*, 977 F. Supp. 1067 (S.D. Cal. 1997).

29 Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 335.

30 *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 90 (1996) ("[The hybrid analysis] balancing is *not* part of the doctrine of the Free Exercise Clause; it is doctrine for the new hybridized grouping of constitutional provisions, of which free exercise is only a part and the contours of which we cannot yet see."). But most courts have continued to treat it as part of free exercise law. *See* Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 (D. Utah 1992) (dismissing Free Exercise claim only after holding that the law is neutral, generally applicable and there is no hybrid right).

31 *See, e.g.*, Russell S. Bonds, Comment, First Covenant Church v. City of Seattle: *The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions*, 27 GA. L. REV. 589, 614 (1993) ("Any potential overextension of the hybrid exception . . . results from the lack of clarity in the *Smith* decision.").

32 *See* Swanson v. Guthrie, 135 F.3d 694, 699 (10th Cir. 1998) ("It is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*."). Yet, even in light of this, the hybrid right was seen as enough of a "clearly established constitutional right" to defeat a city employee's motion for summary judgment on the issue of qualified immunity! *See* Rourke v. New York State Dep't of Correctional Serv.,

the new hybrid analysis was written by Justice Souter in *Church of the Lukumi Babalu Aye v. City of Hialeah*:[33]

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*. . . . But if a hybrid claim is one in which the litigant would actually obtain an exemption from a formally neutral, generally applicable law *under another constitutional provision*, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[34]

The distinction which Justice Souter makes is critical. Does the religious victor gain an exemption from the law based upon the "other" constitutional provision, which is compelling enough to win on its own, or is the exemption granted to a combination of losing rights, which together become worthy of constitutional protection?[35] Is the hybrid exception a mere front for deciding free exercise cases upon other constitutionally protected grounds (most notably free speech)[36] or does it have some separate value of its own? Lower courts were left to interpret the hybrid claim in one of these two ways.

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915 F. Supp. 525, 541 (N.D.N.Y. 1995) (involving the firing of a Native American correctional officer for refusing to cut his long hair).

33 508 U.S. 520 (1993).

34 *Id.* at 567 (Souter, J., concurring) (emphasis added).

35 *See* Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 930 (1998).

> Is there some sort of constitutional chemistry at work, some sort of synergy created by the combination of ingredients, so that the free exercise claim, when joined with a privacy or free speech claim somehow activates an otherwise inert clause? Or was the Court in *Smith* saying something even simpler—that the Free Exercise Clause has no appreciable power of its own, at least in the absence of laws that especially target religion for discriminatory treatment?

Id.

36 *See* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); *see also* R. Collin Mangrum, *The Falling Star of Free Exercise: Free Exercise and Substantive Due Process Entitlement Claims in* City of Boerne v. Flores, 31 CREIGHTON L. REV. 693, 728 (1998) ("[Some] see these cases as pure free speech cases, unaffected by their free exercise context, prompting a 'reductionist' argument that the Free Speech Clause reaches all that is constitutionally protectable under free exercise.").

1. The Logical Interpretation

If hybrid analysis means what Justice Scalia logically implies that it does, there should be something of an equal correlation between the success of any type of hybrids, particularly those formed with free speech or the parental right to educate.[37] You begin with two separate claims (free exercise and another constitutional provision) and discover that these both lose by themselves. Then, you combine the two and create an entirely new constitutional animal which is subject to strict scrutiny (without any reference to the standard of analysis for the underlying claims).[38] If hybrid analysis were applied literally, this new beast would not be laden down with any debris from the rejection of the two prior individual claims but would have a life of its own.[39] It would *not* simply be equal to the sum of its component parts.

To put this into formulaic terms, assume that a "live" constitutional claim has the value of two and a "dead" claim (i.e., one which is not sufficient to win on its own) has a value of zero. Before any judicial ruling, we would have a free exercise claim = 2 and another constitutional claim = 2. The court rejects both after conducting separate individual analyses. Now we have free exercise = 0 and "other" = 0. Yet, if applied literally, the court should now combine the two sepa-

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37 This requires the logical assumption that the success of the hybrid claim is independent of the success or failure of its constituent parts or their relative strength or weakness as constitutional claims. The consequence of this assumption is to give the same degree of protection to unenumerated rights as to enumerated rights. Moreover, it even makes unenumerated rights "superior" as compared with free exercise alone. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 37.

38 *See* Teresa Stanton Collett, *Heads, Secularists Win; Tails, Believers Lose—Returning Only Free Exercise to the Political Process*, 20 U. ARK. LITTLE ROCK L.J. 689, 697 (1998) ("While the Court has yet to develop this concept, at a minimum it would seem to encompass cases where the burdens imposed on any one fundamental right are not sufficient to trigger judicial intervention, but the aggregate burden is sufficient to require some form of judicial relief.").

39 *See* Ernest P. Fronzuto, Comment, *An Endorsement for the Test of General Applicability:* Smith II, *Justice Scalia, and the Conflict Between Neutral Laws and the Free Exercise of Religion*, 6 SETON HALL CONST. L.J. 713, 730 (1996) (characterizing hybrid claims as being "legally distinct from 'pure' free exercise claims" since they only "remotely or partially touch on the free exercise issue"); *see also* John J. Coughlin, *Common Sense in Formation for the Common Good—Justice White's Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News*, 66 ST. JOHN'S L. REV. 261 (1992):

> The Court's use of the term "hybrid" seems to mean that each "ancestor" is a sine qua non of the result (e.g., a nectarine). However, if the same result would happen even if only one ancestor is present (the due process right), one must wonder how this is a hybrid.

Id. at 327 n.106.

rate claims, leaving us with hybrid = 2.[40] Professor Richard Duncan expresses it in this manner:

> Clearly, what the Court must have meant is that a less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the compelling interest test. In other words, the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim.[41]

Put simply, two losers equals one winner.[42]

2. The Subterfuge Interpretation

A second possible interpretation is what I have entitled the "subterfuge" approach. This interpretation assumes that the hybrid exception is nothing more than a questionable explanation of past precedent. It was created in order to hide the direction in which the law was really moving. Modern courts pretend to uphold religion under the guise of free exercise but the real protection comes from other constitutional provisions, most notably speech.

In operating under this interpretation, a court would begin by analyzing the strength of the "other" constitutional provision. If this claim were successful, the court would then move on and hold in favor of the hybrid claim, thus creating a secondary support for the judgment (although one based solely in dicta). It is under this interpretation that the constitutional strength or weakness of the "other" right becomes truly relevant. Favored constitutional rights would combine to create more successful hybrids while disfavored rights would be quickly dismissed.

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40 Commentators appear to agree that this is the correct way to characterize the formula created by Scalia. *See* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 71–72 ("It is important to understand that this model makes sense only on the assumption that the second claim standing alone would also not trigger the balancing process, for otherwise it is the second claim alone, and without any contribution from the Free Exercise claim, that does the work.").

Also, Professor Stanley Ingber notes that "no explanation is given why two rights, each of which, assuming Scalia's analysis, independently cannot justify an exemption, somehow become empowered by their coupling." Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1630 (1994).

41 Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 430–31 (1994).

42 Professor Smolla refers to this as a "two-for-one sale[ ]." *See* Smolla, *supra* note 35, at 930.

3. Supreme Court Guidance

Unfortunately, since *Smith* itself, the Supreme Court has not given any further explanation or guidance regarding hybrid claims.[43] The result of this is disastrous for judicial uniformity and economy. Analyzing this lack of explanation, one commentator has succinctly noted:

> [L]ower federal and state courts will be relatively free to establish their own interpretations and analysis of the hybrid exception. Consequently, few religious objectors will present courts with pure federal free exercise claims. Instead, plaintiffs will approach the challenge with an arsenal of interrelated First Amendment rights including freedom of speech and freedom of association in conjunction with free exercise.[44]

Whether or not Justice Scalia's characterization of former precedents as hybrids is logical[45] or can be accurately derived from the cases cited is a separate topic which has been covered elsewhere at length.[46] This Note does not dwell upon that discussion. Rather, it analyzes the way in which lower courts have interpreted the hybrid exception and its possible future application.[47]

II. FREE SPEECH HYBRIDS

In pigeon-holing prior cases into the hybrid exception, Justice Scalia distinguished between two separate categories: (a) those cases which the Court had subjected to strict scrutiny based on their hybrid

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43 Neither *Lukumi* nor *Boerne* clarified or affected this analysis. *See* Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 266 ("Nothing in *Church of the Lukumi* expands, narrows, or clarifies *Smith*'s pronouncement concerning so-called hybrid right claims.").

44 Renee Skinner, Note, The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: *Still Sacrificing Free Exercise*, 46 BAYLOR L. REV. 259, 278 (1994).

45 *See* Greenawalt, *supra* note 29, at 335. ("Justice Scalia's implicit claim—that free exercise claims are a *necessary* component of some successful 'hybrid' challenges but that claims of the same type can *never* succeed on their own—approaches, and possibly achieves, incomprehensibility.").

46 *See generally* Mason, *supra* note 4.

47 One commentator has argued that the hybrid exception has "limited practical significance." Fliegel, *supra* note 19, at 71. However, this reflection was simply a statement of the time, made when RFRA required strict scrutiny anyway and before many of the lower court rulings applying the exception. *See* Wehener, *supra* note 24, at 507 ("While the hybrid claim was obviously a viable tool to protect free exercise rights after *Smith*, its application now under the regime of the Religious Freedom Restoration Act is at least questionable and may not, in all probability, be required at all."). It is therefore not dispositive of the current state of affairs in free exercise law.

character of free exercise/free speech,[48] and (b) those cases "decided exclusively upon free speech grounds, [which] have also involved freedom of religion."[49] No direction was given as to what factors separated these two categories or how lower courts should decide which type of analysis to conduct. But remember that this debate is over the level of scrutiny to be applied. Free speech claims are often subject to strict scrutiny when raised by themselves, particularly when they involve a form of content control. Yet Justice Scalia's characterization seems to imply that the free speech interest involved in the hybrid exception cases was somehow not enough of an interest to stake the entire case upon.

After *Smith*, free exercise does not itself receive the benefit of strict scrutiny in situations of neutral, generally applicable laws and, under the logical interpretation, a hybrid could only be created by combination with a free speech claim that is not sufficient to win on its own.[50] This leads to the conclusion "that if you hooked up a loser of a free-exercise claim with a loser of a free-speech claim that you'd wind up with a winner of a 'hybrid' claim."[51] Lower courts, faced with this position, have not applied the hybrid exception in any such literal fashion.[52]

48 *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Folett v. McCormick, 321 U.S. 573 (1944). I do not dwell on these cases since they were all decided prior to the compelling interest test of *Sherbert*. *See* Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699, 831 n.143 (noting the lack of a need to distinguish these cases).

49 Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

50 This assumes that the Court is applying the hybrid standard in an honest manner and not simply basing its decisions upon the underlying free speech claim. *See* Keith Jaasma, Note, *The Religious Freedom Restoration Act: Responding to* Smith*; Reconsidering* Reynolds, 16 WHITTIER L. REV. 211, 256 (1995) ("Implicit in the *Smith* majority's explanation of the 'hybrid' concept, however, is an assertion that the constitutional rights that joined with free exercise rights to form 'hybrid' protection would have been inadequate alone to trigger strict scrutiny of the challenged laws.").

51 Mason, *supra* note 4, at 256 n.302.

52 In fact, although several definite patterns can be traced in hybrid analysis, it is an area that most courts seem reluctant to analyze in any great depth. *See* Gressman & Carmella, *supra* note 30, at 89 n.101 (noting that "the 'hybrid' concept has been left largely undeveloped by lower federal courts"). This reluctance is most likely attributable to the small amount of detail that the Supreme Court provided for hybrid analysis and also the controversial character of the claim.

A. *Free Speech Hybrids in the Federal Courts*

(1) The first federal case to raise the hybrid exception was *Cornerstone Bible Church v. City of Hastings*.[53] The plaintiff, an evangelical Christian church, was held to be in violation of the Hastings Zoning Ordinance for conducting its religious services in an area of the city which was zoned exclusively industrial. The Church argued (a) that this was a direct regulation of religious worship, and (b) "that the ordinance should be strictly scrutinized because it violates the Church's right to free exercise of religion as well as the Church's rights to free speech, equal protection, and due process."[54] The court rejected all of the Church's original claims, granting summary judgment for the city on the "pure" free exercise, free speech, due process, and equal protection claims. In analyzing the hybrid claim, it held that "[b]ecause plaintiffs have failed to establish a violation of another constitutional right, their free exercise claim alone is not sufficient to establish a cause of action."[55]

On appeal, the Eighth Circuit reversed the grant of summary judgment on the free speech and equal protection claims (while upholding the pure free exercise and due process judgments) and remanded the case for a determination of further issues.[56] "Our reversal of the summary judgment orders breathes life back into the Church's 'hybrid rights' claim; thus, the district court should consider this claim on remand."[57] While the church could not argue a free exercise claim, it could argue a free exercise-based hybrid claim. "In other words, the freedom of religion claim was utterly superfluous; a church has freedom only if it can point to some clause in the Constitution other than the one guaranteeing the free exercise of religion."[58]

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53 948 F.2d 464 (8th Cir. 1991).

54 Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 670 (D. Minn. 1990).

55 *Id.*

56 Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991). The court of appeals failed to explain how the city ordinance could be both "a neutral law of general applicability" for purposes of pure free exercise summary judgment and yet represent a possible violation of equal protection. It seems as if "generally applicable" is just another way of phrasing "equal protection of the law." *See* Kissinger v. Board of Trustees, 786 F. Supp. 1308, 1313–14 (S.D. Ohio 1992) (holding that an equal protection claim fails once law is found to be a neutral rule of general applicability); *see also* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540 (1993) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

57 *Cornerstone*, 948 F.2d at 473.

58 Michael P. Farris & Jordan W. Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 79 (1995).

This scenario shows clearly that any possible determination by the lower court would be based primarily upon free speech or equal protection, with a hybrid claim serving only as a secondary basis for judgment. *Summary: Free Speech Possible; Free Exercise Loses; Hybrid Possible.*

(2) *Society of Separationists, Inc. v. Herman*[59] involved a prospective juror (atheist Robin Murray-O'Hair) who refused to take the oath required of all venire members. The judge offered her the opportunity to make an affirmation, and she again refused, contending that an affirmation was a "religious statement."[60] After unsuccessfully attempting to convince her to make the affirmation, the state judge held O'Hair in contempt and jailed her for three days. O'Hair filed suit in district court alleging that her "First and Fourteenth Amendment rights had been violated because she was imprisoned for refusing to take a religious oath."[61]

The court held that the judge had indeed violated O'Hair's constitutional rights since "the government may not compel affirmation of religious belief" and this was the effect of requiring either an oath or an affirmation.[62] It then went on to say: "Our holding in this case is consistent with [*Smith,* which] . . . specifically excepts religion-plus-speech cases from the sweep of its holding."[63] As in *Cornerstone,* this statement was only a secondary, nonessential basis for the judgment which relied primarily upon the "religious belief" exception enunciated by *Smith* itself.[64] *Summary: Pure Free Exercise Wins; Hybrid Also "Wins."*

(3) By far the most intriguing of the hybrid cases is *Kissinger v. Board of Trustees.*[65] Plaintiff Jennifer Kissinger was a fourth-year student at the Ohio State University–College of Veterinary Medicine. One of the required degree courses involved surgery on live animals solely for educational purposes, a practice which Ms. Kissinger claimed violated her religious beliefs. She filed a civil rights suit against the University, which summarily agreed to provide her with an alternative curriculum. Unsatisfied, Ms. Kissinger then sought attor-

59 939 F.2d 1207 (5th Cir.), *superseded by* 959 F. 2d 1283 (5th Cir. 1991) (dismissing claim in federal court for lack of standing), *cert. denied,* 506 U.S. 866 (1992).

60 *Society of Separationists,* 939 F.2d at 1210.

61 *Id.* at 1210–11.

62 *Id.* at 1215 (quoting *Smith,* 494 U.S. at 877).

63 *Id.* at 1216. For commentary suggesting that the *Herman* court may have improperly applied the hybrid analysis, see Ronald B. Flowers, *Government Accommodation of Religious-Based Conscientious Objection,* 24 SETON HALL L. REV. 695, 724 (1993).

64 The *Smith* neutral, generally applicable analysis does not apply to "'governmental regulation of religious beliefs as such.'" *Smith,* 494 U.S. at 877 (quoting *Sherbert,* 374 U.S. at 402).

65 786 F. Supp. 1308 (S.D. Ohio 1992), *aff'd,* 5 F.3d 177 (6th Cir. 1993).

ney's fees for the costs of the suit. She argued a hybrid claim "because in addition to the free exercise claim, she asserted causes of action under the due process, free speech, and freedom of association, and equal protection clauses."[66] The district court rejected these claims since they would not have provided even a minimum basis for compelling the university to provide an alternative curriculum.[67]

The Sixth Circuit affirmed the denial of fees but, in a surprisingly vehement passage, utterly rejected the use of the hybrid claim.

> We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free Exercise Clause if it did not implicate other constitutional rights . . . . Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.[68]

Rather than follow the lead of other courts which were merely using the hybrid exception as a cover up for basing decisions on the Free Speech Clause, the Sixth Circuit chose to reject such an "illogical" test.[69] *Summary: Hybrid Analysis Rejected.*

(4) In *Jane L. v. Bangerter*,[70] abortion-providing physicians challenged the Utah Abortion Act, which set limits on abortions, on the grounds that it legally mandated a religious viewpoint of the Mormon Church. An unsympathetic district court made short work of their hybrid claim.

> Plaintiffs allege that the Act interferes with their Free Exercise rights, along with their right to freedom of speech . . . . [T]he "hybrid rights" exception present in [*Yoder*] does not apply here. Here, the freedom of speech argument fails because there is no free speech right to solicit criminal acts . . . . Since the Utah law is not aimed at violation of the free exercise of religion, and no additional constitutional rights are violated so as to meet the "hybrid rights"

66 *Id.* at 1313.

67 *See id.* at 1314.

68 *Kissinger*, 5 F.3d at 180.

69 The *Kissinger* court was the first to denounce what Kent Greenawalt has described as a situation in which "free exercise claims [are] required for a result, though they could not conceivably be sufficient by themselves." Greenawalt, *supra* note 29, at 335.

70 794 F. Supp. 1537 (D. Utah 1992), *aff'd in part, rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995).

> exception, this court holds that the Free Exercise claim must be dismissed.[71]

No free speech rights equals no hybrid and no strict scrutiny for religion. *Summary: Free Speech Loses; Free Exercise Loses; Hybrid Loses.*

(5) In *Alabama & Coushatta Tribes v. Trustees of Big Sandy Independent School District*,[72] Native American students brought an action challenging the school district's dress code, which restricted the hair length of all male students. The students claimed that long hair was religiously mandated and thus the regulation violated their free exercise rights.[73] The court accepted the sincerity of these beliefs and then went on to analyze the interest of the government in enforcing this regulation. After a lengthy debate over whether or not *Smith* applies outside of the criminal context,[74] the court held that "the present case does not require a resolution of [this issue] . . . as plaintiffs have alleged a hybrid claim of free exercise, free speech, due process, and equal protection rights."[75] The court proceeded to apply strict scrutiny to the hybrid claim and held that the state had failed to demonstrate an important state objective. It then went on to dismiss the due process and equal protection claims, while holding the school regulation unconstitutional under the Free Speech Clause. This case is unusual since the hybrid was decided *before* the speech issue, but, once again, the free speech claim by itself appears to have been a sufficient basis for the decision. *Summary: Free Speech Wins; Hybrid Wins.*

(6) *Rourke v. New York State Department of Correctional Services*[76] raised the question of how well hybrid rights have been established in free exercise law. Rourke, a Native American, was fired from his position as a prison correctional officer after refusing to cut his long hair for religious reasons. He filed a § 1983 action against the state and several individual actors, claiming a violation of his First Amendment rights. The individual defendants moved to dismiss the claims against

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71 *Id.* at 1547 (footnote omitted).

72 817 F. Supp. 1319 (E.D. Tex. 1993), *remanded for unstated reason*, 20 F.3d 469 (5th Cir. 1994) (unpublished opinion).

73 The plaintiffs also argued that the regulation undermined "the right of parents and the Tribe to direct the religious upbringing of their children." *Alabama & Coushatta*, 817 F. Supp. at 1328. The district court found a violation of this right but never combined it with the hybrid analysis.

74 *See supra* text accompanying notes 27–28.

75 *Alabama & Coushatta* 817 F. Supp. at 1332. For some reason, the court did not add into this framework "the parental right to guide their children's education and upbringing" which it held was also "a valid constitutional claim." *Id.* at 1334.

76 915 F. Supp. 525 (N.D.N.Y. 1995).

them on the basis of qualified immunity since "'there was no preexisting law that would put reasonable officials on notice that their actions were unlawful.'"[77] The district court disagreed. After determining that *Smith* governed the case, the court looked to "determine if the plaintiff has a hybrid case. If, in fact, the plaintiff has a hybrid claim, then the defendants cannot prevail on their motion."[78]

The court went on to hold that the plaintiff's claim did fit within the boundaries of the hybrid exception since his hair was worn in a symbolic fashion to denote his membership in a religion. "Use of symbols to express ideas or beliefs has been held to implicate the right to freedom of speech and expression. Accordingly, this court finds that the plaintiff has implicated the free exercise clause and at least one other right as mandated by the now statutorily overruled *Smith*."[79] Since this law had been "well-settled" at the time of the termination, defendant's motion to dismiss based on qualified immunity failed.[80] *Summary: Free Speech Possible; Free Exercise Possible; Hybrid Possible.*

(7) *Chalifoux v. New Caney Independent School District*[81] involved another student challenge, this time to a school prohibition on gang related apparel which was extended to the wearing of "rosaries as a necklace outside the shirt."[82] After careful analysis, the court found a constitutional violation of the student's free speech rights, but rather than ending the case there, it moved on to analyze the hybrid "religion-plus-speech" claim:[83]

> Plaintiffs' causes of action combine free exercise of religion and free speech claims; accordingly, the heightened level of scrutiny used in hybrid cases applies. Therefore, pursuant to the holding in *Yoder*, this Court must perform a balancing test to determine whether the school's regulation bears more than a "reasonable relation" to [the district's] stated objective. . . . [T]he Court finds that the prohibition on wearing rosaries violates Plaintiffs' First Amendment rights.[84]

Free speech had already decided the case, so why not tack on an extra right? *Summary: Free Speech Wins; Hybrid Wins.*

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77 *Id.* at 540 (quoting from Defendant's Memorandum of Law at 27).

78 *Id.* at 541.

79 *Id.* (citations omitted).

80 *See id.*

81 976 F. Supp. 659 (S.D. Tex. 1997).

82 *Id.* at 664.

83 *Id.* at 671.

84 *Id.*

(8) *In re Young*[85] presented the question of hybrid claims in the bankruptcy setting. In 1991, debtor Bruce Young contributed $13,450 to the Crystal Evangelical Free Church. Less than a year later, he entered Chapter 7 bankruptcy. The appointed trustee brought a proceeding against the Church to recover these funds as "fraudulent transfers," and the Church resisted. On appeal to the district court, the church argued both a pure free exercise claim and a hybrid free speech claim. "The church argues that through their contributions the debtors were supporting the dissemination of a particular message protected by the Free Speech Clause. The church asserts that this 'hybrid' free speech/freedom of religion argument must be analyzed under the compelling interest and less restrictive means test."[86]

The district court rejected both of these contentions. The pure free exercise claim failed under the *Smith* neutral, generally applicable test and the hybrid failed because a "limitation on the amount that a person may contribute to a cause 'entails only a marginal restriction upon the contributor's ability to engage in free communication.'"[87] Without free speech, there was nothing to "combine" with.[88] *Summary: Free Speech Loses; Free Exercise Loses; Hybrid Loses.*

B. Free Speech Hybrids in the State Courts

The only state court case to significantly discuss the hybrid free speech issue[89] was *First Covenant Church v. City of Seattle*.[90] The Church

85 152 B.R. 939 (D. Minn. 1993), *rev'd*, 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997), *on remand*, 141 F.3d 854 (8th Cir. 1998).

86 *Id.* at 953.

87 *Id.* at 954 (quoting Buckley v. Vako, 424 U.S. 1, 20–21 (1976) (per curiam)).

88 The Eighth Circuit reversed this decision based upon RFRA, 82 F.3d 1407 (8th Cir. 1996), but the Supreme Court vacated and remanded in light of *Boerne*. *In re Young*, 117 S.Ct. 2502 (1997). On remand, the Eighth Circuit upheld its decision by maintaining that RFRA was still applicable to federal action. *In re Young*, 141 F.3d 854 (8th Cir. 1998).

A similar bankruptcy tithing claim was raised and summarily rejected in *Waguespack v. Rodriguez*, 220 B.R. 31 (W.D. La. 1998). For commentary arguing that this situation represents the perfect hybrid, see Donald R. Price & Mark C. Rahdert, *Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy*, 26 U.C. DAVIS L. REV. 853, 903 (1993).

89 *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) raised a free speech hybrid but the court refused to analyze under *Smith* and based the decision instead on the state constitution.

This lack of state court decisions on the issue can be traced partly to the passage of RFRA which required strict scrutiny already, thus making hybrid analysis unnecessary. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996). After plaintiff raised a free speech claim, the court said, "We need not, and do not, consider the 'hybrid rights' issue. [Even if *Smith*] does preserve the 'compelling interest' test

had been designated as an historic landmark and board permission was required to make any alterations to the existing structure (even for liturgical purposes). The Washington Supreme Court struck down the application of the ordinance on free exercise grounds, but the U.S. Supreme Court vacated this judgment and remanded the case for review in light of *Smith*.[91] Once again, the Washington court held the ordinance unconstitutional as applied since it was "not neutral and generally applicable. Further *Smith II* does not apply because the case presents a 'hybrid situation': First Covenant's claim involves the free exercise clause in conjunction with free speech."[92] At best, hybrid analysis was a third basis for the decision since the court relied primarily upon the pure free exercise claim, the free speech claim, and also upon the Washington State Constitution.[93] *Summary: Free Exercise Wins; Hybrid Also "Wins."*

C. Free Speech Hybrid Summary

A summary of the published hybrid free speech cases reveals the following: the hybrid claim won (i.e. the free exercise plus claim received *at least* strict scrutiny) in six of the nine free speech hybrid cases (*Cornerstone Bible Church, Society of Separationists, Alabama & Coushatta Tribes, Rourke, Chalifoux,* and *First Covenant Church*). In every one of these cases, the free speech claim had a sufficient life of its own to warrant analysis based upon a compelling interest standard (and even to possibly win an exemption).[94] "The so-called hybrid situation [did] not raise the level of protection accorded regulations of religious interests. Religious speech receives the same level of protection under the speech clause as does secular speech."[95] The courts' reli-

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in cases involving 'hybrid rights,' the effect is simply to require us to apply the same test we must apply in any event under [RFRA]." *Id.* at 921.

90 840 P.2d 174 (Wash. 1992).

91 787 P.2d 1352 (Wash. 1990), *cert. granted, judgment vacated and remanded,* 499 U.S. 901 (1991).

92 *First Covenant Church,* 840 P.2d at 182. The free speech involved was the statement given to religious viewers when they looked at the exterior or interior of the church. "[W]hen the State controls the architectural 'proclamation' of religious belief inherent in its church's exterior it effectively burdens religious speech." *Id.*

93 *See id.* at 185 ("[W]e eschew the 'uncertainty' of *Smith* II and rest our decision also on independent grounds under the Washington constitution.").

94 *See* Fry, *supra* note 19, at 847 ("Subsequent lower court case law has interpreted Justice Scalia's hybrid situation to require free exercise claimants to assert free speech rights that are strong enough that, were they standing alone, they would be sufficient claims.").

95 Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct,* 54 OHIO

ance upon a hybrid claim always represented a secondary basis,[96] a further board blocking the door just in case anyone tried to break into the validity of the decision.

Other "type" hybrids have received similar (if less successful) treatment at the hands of the lower courts.

III. Parental Right to Educate Hybrids

A parent's right to educate her children is a right implicitly derived from the Fourteenth Amendment and first enunciated by the Supreme Court in *Pierce v. Society of Sisters.*[97] Unlike free speech, it is not a "fundamental" right. Governmental action which infringes upon a parent's right to educate is constitutional if it serves a legitimate state interest under the rational basis standard of review.[98]

Under a parental rights hybrid, "a party may claim improper infringement of free exercise rights if the party can simultaneously claim infringement of the right to choose his or her children's religious education."[99] According to the *Smith* majority, this was the type of claim involved in *Wisconsin v. Yoder.*[100] Recall that *Yoder* was the sole case outside of the unemployment compensation area where the compelling interest test of *Sherbert* was applied with full consistency. In drafting his opinion for *Smith,* Justice Scalia somehow needed to distinguish *Yoder* in order to insulate its holding from the new neutral, generally applicable standard. The hybrid exception was his way of

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St. L.J. 713, 742 (1993). Professor Hamilton used this phrase to describe the Court's past precedent but it applies equally well to later lower court application of the hybrid doctrine.

96 The decision which comes the closest to using free speech hybrid analysis as a primary basis is the California Court of Appeals decision in *Smith v. Fair Employment and Housing Commission,* 30 Cal. Rptr. 2d 395 (Ct. App. 1994). The court described the case as "a paradigm of the hybrid genus." *Id.* at 403. However, this decision was overturned two years later by the California Supreme Court in *Smith v. Fair Employment and Housing Commission,* 913 P.2d 909 (Cal. 1996).

97 268 U.S. 510 (1925).

98 *See* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

99 Health Serv. v. Temple Baptist Church, 814 P.2d 130, 135 (N.M. Ct. App. 1991).

100 406 U.S. 205 (1972) *But see* Frederick Mark Gedicks, *The Improbability of Religion Clause Theory,* 27 Seton Hall L. Rev. 1233, 1254 (1997) ("[T]he *Smith* Court's reformulation of *Yoder* as a 'hybrid rights' decision is really a thinly disguised judgment that this decision should not have been tied to the Free Exercise Clause in the first place.").

doing this.[101] In essence, this exception merely retained what had been clearly stated in *Yoder*:

> Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, *when 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.[102]

Unlike the free speech hybrid, a hybrid based upon a parent's right to educate has been argued almost exclusively in the state courts.[103]

A. "Parental Right to Educate" Hybrids in the Federal Courts

(1) In *Brown v. Hot, Sexy and Safer Productions, Inc.*,[104] the parents of public high school children brought suit alleging that the students' compelled attendance at a sexually explicit presentation had violated several of their constitutionally protected rights. Along with a claimed violation of their right to educate, the parents stated that the show "'imping[ed] on their sincerely held religious values regarding chastity and morality,' and thereby violated the Free Exercise Clause of the First Amendment."[105] However, the court dismissed the parental rights claim because there was no right "to restrict the flow of information in the public schools."[106] Without a "privacy or substantive due process claim" to tack free exercise onto, the school's neutral, generally applicable rule was upheld.[107] *Summary: Parental Rights Loses; Free Exercise Loses; Hybrid Loses.*

(2) The possibility that children themselves might be able to successfully raise a parental rights hybrid claim was raised in *Vandiver v.*

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101 *See* Greenawalt, *supra* note 29, at 335 ("Most scholars assume this language was a make-weight to 'explain' *Yoder* that lacks enduring significance."); *see also* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer, Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 887, 890 (1996) ("*Yoder* as a pure Free Exercise case would seem to be dead. But as something else—the Court called it a "hybrid"—it seems very much alive."); Lupu, *supra* note 43, at 267 (suggesting that the hybrid theory may be no more "than an unprincipled attempt to pretend that *Yoder* survived *Smith*.").

102 Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (emphasis added).

103 Six of the nine cases raising this hybrid were argued in the state courts and only three were raised in the federal arena.

104 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996).

105 *Id.* at 537.

106 *Id.* at 534.

107 *Id.* at 539.

Hardin County Board of Education.[108] Brian Vandiver, an eleventh grade home schooler, sought to enroll in the twelfth grade at the local public school. However, the school required that Brian take equivalency tests to prove that he was academically prepared for the twelfth grade curriculum. Brian's parents initially agreed but after "seeing how much studying would be necessary to handle this combined load, [they] decided that the burden of testing and extra courses would prove too onerous for Brian. For his part, Brian decided on the basis of his religious belief that the load was unfair and more than what God would want him to bear."[109] When the school board refused to grant an exemption to the equivalency-testing requirement, the Vandivers brought suit alleging a deprivation of their free exercise rights.

Unfortunately for Brian's parents, they had waited too long to bring the suit and found their claims barred by the statute of limitations. "As a result, only if Brian's own free exercise challenge is joined with other constitutional concerns may his claim survive the free exercise standard of *Smith.*"[110] Brian could assert the same right in religious education that his parents possessed under *Pierce* and *Yoder.* However, "Brian's alleged interest is in minimizing the burdens of test-taking, not in religious education."[111] Since freedom from test-taking was not a constitutional right, Brian was left without an attachment for his free exercise claim and the court ruled against him. *Summary: Parental Rights Loses; Free Exercise Loses; Hybrid Loses.*

(3) In *Swanson v. Guthrie Independent School District,*[112] home-schooling parents wished to have their daughter enrolled in the public school for a few classes which were difficult to teach (such as music, foreign language, and science). However, the school board refused to admit students who were not enrolled full time because they would not be counted for state aid purposes.[113] In analyzing the case, the Tenth Circuit first dismissed the pure free exercise claim because the policy of the school board was neutral and of general application. Turning to the hybrid claim, the court held:

> We note that this case illustrates the difficulty of applying the *Smith* exception. At a minimum, however, . . . it cannot be true that a plaintiff can simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the govern-

108 925 F.2d 927 (6th Cir. 1991).
109 *Id.* at 929.
110 *Id.* at 933.
111 *Id.*
112 135 F.3d 694 (10th Cir. 1998).
113 *See id.* at 696–97.

> ment to demonstrate the presence of a compelling state interest. Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of *recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child.*[114]

Relying upon the *Hot, Sexy and Safer* case, the court found that the parents did not have a specific right to force a public school to accept their children on a part-time basis. Without such a right, no hybrid was possible.[115] *Summary: Parental Rights Loses; Free Exercise Loses; Hybrid Loses.*

B. "Parental Right to Educate" Hybrids in the State Courts

(1) In *State v. DeLaBruere,*[116] the parents of a minor child were charged under a Vermont truancy law for failing to send their son to a state licensed school. The parents moved to dismiss the charges on the grounds that the state truancy law as applied violated their rights under the Free Exercise Clause of the First Amendment and under Chapter I, Article 3 of the Vermont Constitution. In analyzing the decision, the court noted that strict scrutiny was still required even after *Smith* since "this is a 'hybrid situation' implicating more than a free exercise claim and, thus, the State must show more than that the truancy law is of general applicability and is valid and neutral."[117] Even under strict scrutiny, the parents lost their challenge because Vermont was able to demonstrate a compelling governmental interest in the truancy law.[118] *Summary: Hybrid Receives Strict Scrutiny but Loses.*

(2) If the parental right to educate has been lost, then no hybrid can be formed. This issue was touched upon in *In re Marriage of Lange.*[119] In this divorce action, the Lutheran mother was given custody of the children while the Catholic father was granted limited visitation rights. A restriction upon these visitation rights (based on a statute giving religious education rights to the custodial parent) prevented the father from teaching his children religion because his "religious beliefs concerning the role of females is detrimental to the

114 *Id.* at 700 (emphasis added) (citation omitted).

115 *See id.*

116 577 A.2d 254 (Vt. 1990).

117 *Id.* at 261 n.8. However, this case was decided immediately after the *Smith* test was announced and is more properly viewed as applying the old *Sherbert* analysis rather than the new hybrid test. *See id.* at 263 n.10 (noting that since the state had proven a compelling interest, it did not matter what test was applied).

118 *See id.* at 272.

119 502 N.W.2d 143 (Wis. Ct. App. 1993).

children."[120] The father challenged this restriction as a parental rights hybrid but the court ruled against him. Having "lost the parental right to choose his children's religion," the father failed to present a valid hybrid claim.[121] *Summary: Parental Rights Loses; Free Exercise Loses; Hybrid Loses.*

(3) Several cases in which education hybrids have been raised involve claims brought by institutions rather than individual parents. *Hill-Murray Federation v. Hill-Murray High School*[122] involved the constitutionality of applying the Minnesota Labor Relations Act to a private religious school. The school attempted to create an education hybrid, but the court rejected this claim because the school did not have an interest in the education of the child; only the parent did. "We find no hybrid interest on the part of Hill-Murray and note that the rights of parents in the education of their children as outlined in *Yoder* are altogether different than the rights of a religiously affiliated employer with respect to the control of and authority over their lay employees."[123] *Summary: Parental Rights Loses; Free Exercise Loses; Hybrid Loses.*

(4) The exact same issue was involved in *New York State Employment Relations Board v. Christ the King Regional High School.*[124] In analyzing the school's attempted hybrid claim, the court held:

> The School's argument suggests that the application of the State Labor Relations Act to it would interfere with fundamental rights of parents of students to direct the religious education of their children. This argument is flawed and unpersuasive because, as we analyze the matter, the Supreme Court in *Smith* did not intend its hybrid exception to turn back on itself in circumstances such as this singularly generic First Amendment setting and circumstance. Rather, the Court expressly referenced the hybrid exceptional situations to free exercise settings in which other discrete constitutional protections are also implicated.[125]

Since no parents were involved in the action, the School could not raise another constitutional right to produce a hybrid and the claim was summarily dismissed.[126] *Summary: Parental Rights Loses; Free Exercise Loses; Hybrid Loses.*

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120 *Id.* at 145.

121 *Id.* at 155.

122 487 N.W.2d 857 (Minn. 1992).

123 *Id.* at 863.

124 660 N.Y.S.2d 359 (1997).

125 *Id.* at 363 (citation omitted).

126 The same issue was at stake in *South Jersey Catholic School Teachers Organization v. St. Theresa*, 696 A.2d 709 (N.J. 1997). There, the court came to the same conclusion ("Allowing lay teachers to unionize does not interfere with any parental decision mak-

(5) The final case in which an institutional actor attempted to raise an educational hybrid was *Health Services v. Temple Baptist Church.*[127] The Temple Baptist Church brought an action against the state health services department which required all child care centers to be licensed. One of the requirements of licensing, however, was a prohibition on the spanking of children. The Church claimed that this prohibition violated their religious rights since "[i]t has a policy, which the church believes is mandated by the Bible, by which the teachers spank the children when they misbehave."[128] The court addressed the issue head on as whether or not an institution could raise a hybrid involving a right of its members.

> In this case, there are no individuals with children in the child care center claiming a deprivation of a parent's right to direct his or her children's religious education. Thus, the church stands or falls on its own bare right to run a child care facility according to church doctrine, not on the rights of its member parents. We do not deal with a hybrid right in this case.[129]

Without individual parental claims to guarantee it strict scrutiny, the Church was unable to prevail. *Summary: Parental Rights Loses; Free Exercise Loses; Hybrid Loses.*

(6) The sole case in which an education hybrid was used to produce a victory for the religious party was *People v. DeJonge,*[130] in which a home-schooling couple challenged the constitutionality of a Michigan instructor certification requirement. The parents were convicted of violating the education law, fined $200 each, and placed on two years probation.[131] They challenged their conviction and eventually came before a very friendly Michigan Supreme Court which essentially disagreed with the new *Smith* test.[132] The court immediately squeezed the DeJonges into the education hybrid, determining that "Michigan's teacher certification requirement must undergo strict scrutiny to survive a free exercise challenge." Upon applying strict scrutiny, the

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ing authority."), but went on to protect their holding by conducting heightened analysis anyway ("We will, nonetheless, conduct the *Smith* 'compelling state interest' analysis required for hybrid claims."). *Id.* at 722.

127 814 P.2d 130 (N.M. Ct. App. 1991).

128 *Id.* at 131.

129 *Id.* at 136 (citation omitted).

130 501 N.W.2d 127 (Mich. 1993).

131 *Id.* at 130.

132 *See* 501 N.W.2d at 134 n.27 ("We are not unaware of the criticism generated in reaction to *Smith*. . . . Nevertheless, this Court must follow the interpretation of the Free Exercise Clause in the prevailing opinions of the United States Supreme Court, 'even though we may be in accord with the dissenting opinions in those cases.'") (citation omitted).

court held the certification requirement unconstitutional since it was not the least restrictive alternative for achieving the state's interest.[133] However, even in this case, the court noted that strict scrutiny was already required by the Michigan Constitution (thus making the hybrid claim unnecessary).[134] *Summary: Parental Rights Wins; Hybrid Wins.*

C. *Parental Right to Educate Hybrid Summary*

Of the nine published[135] parental hybrid claims raised, strict scrutiny was only applied in two of them (*DeLaBreuere* and *DeJonge*, which ended in an exemption). Since a hybrid is merely a combination of a "dead" free exercise claim and another "alive" claim, the strength of the hybrid will always turn upon the strength of the underlying "alive" claim. Thus, the limited success rate of parental hybrids (in comparison to free speech hybrids) demonstrates a strong correlation to the weakness of a parent's right to educate.[136] This further strengthens the proposition that courts analyze hybrids based solely upon the strength or weakness of the parental rights liberty interest without any reference to the underlying free exercise claim.

IV. ASSOCIATION

The only case to seriously address associational hybrids (and which did so in a devastatingly direct way) was *Salvation Army v. New Jersey Department of Community Affairs*.[137] The Salvation Army ran a family center (the Paterson Center) for the disadvantaged which was designed to bring residents to God through a structured living envi-

133 *See id.* at 134–35.

134 *See id.* at 134 n.27 ("We do hold, however, that the Michigan Constitution mandates that strict scrutiny . . . be applied in the instant case.").

135 For unpublished parental rights hybrid cases, see, for example:

Christ College v. Board of Supervisors, No. 90-2406, 1991 WL 179102 (4th Cir. Apr. 8, 1991), which involved a § 1983 action brought by parents who were denied a permit to build or operate a schoolhouse. The court dismissed the claim for failure to prove that the zoning laws burdened their exercise of religion.

Johnson v. Dade County Public Schools, No. 91-2952-CIV-UUB, 1992 WL 466902 (S.D. Fla. Nov. 25, 1992), which involved a parental challenge to a sex information telephone hotline promoted by the school. The court rejected the hybrid for a failure to prove governmental coercion to use the hotline.

136 The foundation of a parent's right to educate in the Fourteenth Amendment may be the cause for the limited success of parental hybrids. "[B]ecause it depends upon a judge-made right of parental control as a boost to the textual right of free exercise, it is the most controversial member of the hybrid rights set." Lupu, *supra* note 43, at 267.

137 919 F.2d 183 (3rd Cir. 1990).

ronment. In 1979, New Jersey passed the Rooming and Boarding House Act which required licensing and set standards for all facilities operating as boarding houses. The Bureau of Rooming and Boarding House Standards notified the Paterson Center that it must obtain a license under the new statute, but instead of complying, the Salvation Army sought an exemption from the district court based upon its religious beliefs.[138] In particular, it argued that because it "fulfills its central religious mission at its Adult Rehabilitation Centers through a comprehensive program of spiritual teaching, counseling and work therapy," its freedom of religious association had been infringed.[139] The district court granted summary judgment for the state and the Salvation Army appealed.

The Third Circuit began its hybrid analysis[140] by discussing *NAACP v. Alabama ex rel. Patterson*[141] and *Roberts v. United States Jaycees*,[142] which established and defined the constitutional right of association. As for the first kind of association ("intimate association"), the court noted that this protection "attaches only to 'certain kinds of highly personal relationships,' such as marriage and family relationships, which are essential to 'the ability independently to define one's identity that is central to any concept of liberty.'"[143] The Supreme Court had not found religion to fall under this category of "highly personal relationships," and so the Third Circuit refused to accept any associational hybrid based upon "intimate association."[144]

The second type of associational right is known as "expressive association," the right to assemble for the purpose of enjoying another constitutional right. In this sense, it derives from an already existing constitutional protection.[145] The court found such a right on the part of the Salvation Army but held that it did not affect the case at hand.

> We would not expect a derivative right to receive greater protection than the right from which it was derived. In the context of the right to exercise of one's religious convictions, we think it would be par-

138 *See id.* at 190.

139 *Id.* at 197.

140 The court had already held that the Army's free exercise claim failed by itself. *See* 919 F.2d at 196.

141 357 U.S. 449 (1958).

142 468 U.S. 609 (1984).

143 *Salvation Army*, 919 F.2d at 198 (citation omitted) (quoting Roberts v. United States Jaycees).

144 *Id.*

145 *See id.* at 199 ("[The Supreme Court] has made it clear that the right to expressive association is a derivative right, which has been implied from the First Amendment in order to assure that those rights expressly secured by that amendment can be meaningfully exercised.").

> ticularly anomalous if corporate exercise received greater protection than individual exercise — if, for example, the right to congregational prayer received greater protection than the right to private prayer.[146]

Having already dismissed the Salvation Army's pure free exercise claim, the court refused to recognize any associational hybrid challenge to state action unless such action was "directly addressed to religious association."[147] It dismissed the hybrid rights claim but remanded for further determination of free speech associational rights.

Salvation Army effectively closed the door on later associational hybrid claims.[148] The only other cases to even raise such claims saw them rapidly dismissed or passed over as a basis for judgment.[149] The analysis of *Salvation Army* is convincing on the level of associational rights except for its attempt to limit the application of *Smith* associational hybrids to those "situations where state action is directly addressed to association for religious purposes."[150] Such situations will already be subjected to strict scrutiny under the first part of *Smith*, which retains such analysis for all actions which are not neutral and generally applicable. Instead, it is simply easier to say that "no hybrid right based upon religious association can survive *Smith*."[151]

V. Other Hybrid Claims

The language of *Smith* leaves it essentially unclear as to what types of claims can be combined with free exercise to form a valid hybrid.[152] Justice Scalia spoke only about a combination with "other constitu-

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146 *Id.*

147 *Id.* at 199-200.

148 The later case of *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992) rejected the possibility of associational hybrids for intimate association but for different reasons. It held that hybrid analysis was strictly limited to free exercise rights combined with communicative or parental rights. *See id.* at 1547 n.11.

149 The other cases which raised an associational hybrid claim were *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993) (rejecting hybrid analysis), *South Jersey Catholic Sch. Teachers v. St. Theresa*, 696 A.2d 709, 722-23 (N.J. 1997) (no right to associate in employment when right to unionize at stake) and *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (decided on state constitutional grounds).

150 *Salvation Army*, 919 F.2d at 200 n.9.

151 *Id.* at 203 (Becker, J., concurring). *But see* Fry, *supra* note 19, at 852–53 (arguing that an associational hybrid is still possible after *Salvation Army*).

152 *See* Marie Elise Lasso, Note, Employment Division v. Smith: *The Supreme Court Improves the State of Free Exercise Doctrine*, 12 St. Louis U. Pub. L. Rev. 569, 596–97 (1993) ("The federal courts, however, have not yet precisely defined the type or combination of rights that is required in a 'hybrid' case.").

tional protections,"[153] but did not restrict this to "fundamental rights" or those found in the Bill of Rights.[154] The three examples which *Smith* lays out (free speech, association, and parental right to educate) are based on the First Amendment and a Fourteenth Amendment liberty interest. In distinguishing the facts of the *Smith* case from the hybrid situation, Justice Scalia used language which appears to limit possible hybrids to these three areas. The Oregon drug law in *Smith* was not a hybrid since it presented "a free exercise claim *unconnected with any communicative activity or parental right*" and did not "attempt to regulate religious beliefs, *the communication of religious beliefs, or the raising of one's children in those beliefs.*"[155]

The absence of any mention of other constitutional hybrids can be viewed in one of two ways: (1) the three enumerated rights are the only possible hybrid combinations,[156] or (2) *any* constitutional right can be joined with free exercise for this new analysis. The second view begins with the notion that Justice Scalia was merely involved in describing past precedent—precedent in which the Court had never decided a free exercise case on a combined basis with other constitutional rights (such as the right to privacy).[157] Thus, the absence of other specified rights in *Smith* would not close the door to their existence.

Plaintiffs and academics have almost universally accepted the latter interpretation and attempted to use the hybrid exception as a means to expand free exercise protection as much as possible.[158] This view of *Smith* has led the academy to suggest a veritable myriad of hybrid "wannabes." Some of the "combination" rights suggested in-

153 Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

154 *But see* American Friends Serv. Comm. v. Thornburgh, 941 F.2d 808, 810 (9th Cir. 1991) (noting that the other constitutional claim for a hybrid must be "substantive.").

155 *Smith*, 494 U.S. at 882 (emphasis added).

156 This was the view accepted by the district court in *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992). The plaintiffs attempted to "come within the 'hybrid rights' exception in *Yoder* by asserting several alleged violations of the 13th and 14th Amendments . . . . However, these claims go beyond the formulation of 'hybrid rights' exception established by the Supreme Court in *Smith*." *Id.* at 1547 n.11.

157 *See* Fry, *supra* note 19, at 854 ("Justice Scalia's omission of privacy and equal protection hybrids may be related to the existing state of case law; the Supreme Court has not decided any cases in which it found a free exercise claim linked with the right to privacy or with equal protection.").

158 *See* Lupu, *supra* note 43, at 266 ("Whatever the theoretical explanation for greater receptivity to 'free exercise plus' than 'free exercise pure,' a great many free exercise claims might be recast to take advantage of this construct.").

clude: (1) Native American Indian rights,[159] (2) the right to marry,[160] (3) the right to divorce,[161] (4) the right to receive information,[162] (5) the right to abortion,[163] (6) the right "to live in a particular arrangement,"[164] (7) the right to freedom of conscience,[165] (8) the right to exclude others from property,[166] and (9) "the right of family members to determine the medical treatment of their incompetent family members."[167] Even the accepted claim of free speech has been invoked to justify some unique hybrids, including the religious "use of brainwashing as a recruiting method."[168] If the possible hybrid combina-

159 *See* Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 474 (1995) ("Courts' acknowledgment of the government's obligation to protect Indian existence under the trust relationship should provide the courts with the necessary 'hybrid' situation described by Scalia in the *Smith* case.").

160 *See* Richard L. Elbert, Comment, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1219 (1995) ("[E]ven under *Smith*, a challenge to the marriage penalty involves a 'hybrid' situation such that strict scrutiny would be appropriate.").

161 *See* Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 94 (1993) ("In the case of a get, the husband is also asserting a hybrid claim, since he is relying upon both free exercise and the constitutionally guaranteed right to dissolve his marriage . . . .").

162 *See* Enid Trucios-Haynes, *Religion and the Immigration and Nationality Act: Using Old Saws on New Bones*, 9 GEO. IMMIGR. L.J. 1, 54 (1995) ("A hybrid constitutional claim exists because the right of association and to receive information may be implicated by the denial of religious worker classification to an American member of a religious denomination.").

163 *See* Susan E. Looper-Friedman, *"Keep Your Laws Off My Body": Abortion Regulation and the Takings Clause*, 29 NEW ENG. L. REV. 253, 269 (1995) ("While the right to privacy or liberty in connection with abortion may possibly be considered a fundamental right to which free exercise is closely tied, it remains to be seen if the Supreme Court is serious about enforcing the hybrid exception in *Smith*.") (footnote omitted).

164 Jaasma, *supra* note 50, at 257 ("Arguably, the rights to marry, to live in a particular arrangement, or to raise children in a particular manner could be considered with free exercise rights to entitle religiously motivated polygamy to strict scrutiny protection as a 'hybrid' of constitutional rights.").

165 *See* Paul M. Landskroener, Note, *Not the Smallest Grain of Incense: Free Exercise and Conscientious Objection to Draft Registration*, 25 VAL. U. L. REV. 455, 503 n.131 (1991) ("A strong argument could also be made that the right to not kill implicates a fundamental right of conscience that goes beyond free exercise of religion, thus becoming a 'hybrid' case . . . .").

166 *See generally* Peter M. Stein, Smith v. Fair Employment and Housing Commission*: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under* Employment Division v. Smith, 4 GEO. MASON L. REV. 141 (1995). *See also* Berg, *supra* note 13, at 751 (rights of private property).

167 Smolin, *supra* note 19, at 30.

168 Laura B. Brown, Note, *He Who Controls the Mind Controls the Body: False Imprisonment, Religious Cults, and the Destruction of Volitional Capacity*, 25 VAL. U. L. REV. 407, 454 n.211 (1991) ("[T]he use of brainwashing as a recruiting method arguably does in-

tions are indeed open, how "significant" does a constitutional right have to be to receive protection? Must it qualify as a "fundamental" right?[169]

The judicial arena does not provide a conclusive answer to this question. The few courts which have addressed the issue have been far more inclined to limit the hybrid exception as much as possible.[170] Most have followed the reasoning of *Waguespack v. Rodriguez*.[171] There, the court noted that "the suggestion of such a hybrid exception on the facts of this case would be strained, inventive, and without any constitutionally limiting principle. It would be difficult to imagine any free exercise claim that would not fit into the 'hybrid' classification."[172] For example, the Ninth Circuit refused to accept an equal protection hybrid since "[i]t is questionable whether an equal protection claim can satisfy the hybrid claim requirements of *Smith*."[173] In *State v. Hershberger*, Amish defendants raised a hybrid based upon (among other things) the freedoms of assembly and travel, but the court chose to analyze the case solely under the Minnesota Constitution.[174] *Thiry v. Carlson* involved a hybrid based on "substantive due process rights to family unity and integrity," but the court dismissed it for lack of a factual basis.[175] Finally, in *Steckler v. United States*, the plaintiff attempted to create a hybrid based upon the Fifth Amendment right to compensation for property taken by the government.[176] The court summarily dismissed the claim.

A final possible hybrid that has been raised is the combination of free exercise with a *state* constitutional protection. Taking the lan-

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volve a hybrid situation because such proselytizing implicates First Amendment free speech rights as well as free exercise rights.").

169 *See generally* Fry, *supra* note 19, at 856–57. Fry noted that hybrid analysis does not add anything to fundamental rights since these are already subject to strict scrutiny. Thus, it only has a noticable effect upon possible hybrid combinations which do not already require strict scrutiny.

170 The First Circuit at least appears to recognize the possibility of bringing such claims. In analyzing a proffered hybrid claim, the court rejected it because it did "not state a privacy or substantive due process claim" which would be "an independently protected constitutional protection." Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995).

171 220 B.R. 31 (1998).

172 *Id.* at 35–36.

173 United States v. Carlson, No. 90-10465, 1992 WL 64772, at *2 (9th Cir. Apr. 2, 1992). Unfortunately, the court did not specify what these "requirements" were.

174 State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990).

175 Thiry v. Carlson, 78 F.3d 1491, 1496 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 78 (1996).

176 Stedder v. United States, No. Civ. A. 96-1054, 1998 WL 28235 (E.D. La. Jan. 26, 1998).

guage of *Smith* at literal face value ("other constitutional protections"), this would seem to be possible. A California Court of Appeals noted this possibility in *Donahue v. Fair Employment and Housing Commission.*[177] No court has accepted such a possibility, however, and such mixing and matching of constitutions has little chance of success.[178]

A telling example of this reluctance to create new hybrids is seen in *American Friends Service Committee v. Thornburgh.*[179] The AFSC (a charitable Quaker relief organization) was in the practice of hiring foreign aliens who were not licensed to work in the United States. Under the Immigration Reform and Control Act (IRCA), this practice was made illegal. Rather than change its hiring practices, the AFSC challenged the constitutionality of the IRCA.[180]

> AFSC contends that its claim is "hybrid" in that it combines a substantive due process "right to employ" with a free exercise claim. At least since the demise of *Lochner v. New York*, the "right to employ" has been accorded insufficient constitutional protection to place it alongside the cases *Smith* cites as examples of "hybrid claims." . . . There would be little left of the *Smith* decision if an additional interest of such slight constitutional weight as "the right to hire" were sufficient to qualify for this exception.[181]

The only case in which a new hybrid was accepted was in the highly unlikely setting of *EEOC v. Catholic University.*[182] Sister Elizabeth McDonough, a canon law teacher, brought a Title VII action alleging that the university discriminated against her on the basis of sex. The D.C. Circuit held that the ministerial exception of the Free Exercise Clause and excessive entanglement concerns precluded applica-

177 2 Cal. Rptr. 2d 32, 40 n.10 (Ct. App. 1991) ("Here, arguably, a hybrid state constitutional claim exists . . . .").

178 The plaintiffs in *Jane L. v. Bangerter* attempted to create a hybrid between free exercise and the right to practice a profession. The court held that "plaintiffs' argument based upon the right to practice a profession fails. The right to practice the professions in question is created by the State . . . ." Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 (D. Utah 1992). This reluctance to combine federal with state rights for hybrid analysis is the more likely course that courts will follow.

179 961 F.2d 1405 (9th Cir. 1991).

180 For a case raising a very similar claim, see *Intercommunity Center for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990) (involving a Catholic organization challenge to the IRCA). It is unclear whether a hybrid claim was raised by the plaintiff but the court sealed this avenue anyway by holding that "this case does not involve a hybrid claim in which other constitutional concerns bolster the free exercise claim." *Id.* at 44.

181 *Thornburgh*, 961 F.2d at 1408 (citation omitted).

182 83 F.3d 455 (D.C. Cir. 1996).

tion of Title VII to McDonough's claim. Thus, for all intents and purposes, the case was decided.[183] Yet, as in so many other hybrid cases, the court decided to give itself one final backup.

> We have demonstrated 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. As a consequence, this case presents the kind of "hybrid situation" referred to in *Smith* that permits us to find a violation of the Free Exercise Clause even if our earlier conclusion that the ministerial exception survived *Smith* should prove mistaken.[184]

This bizarre twist can only be noted as the exception to the unwritten judicial rule against "new" hybrids. Otherwise, academics will continue to create hybrid "wannabes" and the courts will continue to limit them. In fact, the hybrid claim has been judicially limited "precisely because it had the potential to swallow the rule."[185] But even if hybrid claims are extended to include rights not specifically mentioned in *Smith,* they would still remain subject to the same limiting subterfuge interpretation.

VI. CONCLUSION

Analysis of hybrid claims in the lower courts leads to the unmistakable conclusion that the hybrid "calculus" or logical interpretation (i.e., two loser constitutional claims = one winner constitutional claim) simply is not being applied. Instead, these cases are being decided based solely upon the strength or weakness of the "other" constitutional provision without reference to the Free Exercise Clause.[186] This explains two general principles which apply to virtually every hybrid case. First, when a court allows a hybrid to "win" by applying strict scrutiny to the claim, it never does so as the primary basis for the

183 *See id.* at 467 ("These conclusions are a sufficient basis for affirming the district court's dismissal of this case under the Establishment Clause."); *see also id.* at 465 (affirming the dismissal on the basis of the Free Exercise Clause).

184 *Id.* at 467.

185 Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 TEX. L. REV. 209, 214 (1994).

186 *See* Richard M. Paul III & Derek Rose, Comment, *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses,* 60 MO. L. REV. 889, 919 (1995) ("While a 'hybrid' case allows the courts to apply the compelling interest test to free exercise claims, the majority of the laws challenged in such cases would be struck down anyway due to the strict scrutiny applied to the other constitutional right infringed upon.") (footnote omitted).

decision.[187] Either the case had already been decided on some other basis (such as free speech), or strict scrutiny was mandated by the state constitution anyway. Second, the "success" of hybrid claims is directly tied to the constitutional strength of the right with which free exercise is combined. Thus, free speech hybrids are more likely to win than parental right to educate hybrids. So, Justice Souter was right: "[T]here [was] no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."[188]

Despite its troublesome background, the *Smith* hybrid exception is a part of current free exercise law that must be understood and taken into consideration.[189] Whether or not the Court's analysis is "reasonable" is irrelevant to answering the question of how free exercise will currently be analyzed. As Professor Joanne Brant has noted: "Scalia's use of 'hybrid rights' as an unartful tool to distinguish troubling precedent simply does not weaken the force of the Court's institutional argument. The fact that the Court draws its boundaries illogically does not mean that its power to establish those boundaries is suspect . . . ."[190] However illogical, the hybrid exception is a boundary which must be applied.[191]

What is important is that these current boundaries are properly understood for what they are. The hybrid claim is no more than a smoke screen under which the Court hides the wreck of the rapidly sinking Free Exercise Clause. And the only passengers to survive are those picked up by the lifeboats of other constitutional provisions.

*William L. Esser IV**

187 Thus, the Sixth Circuit's formal rejection of hybrid analysis in *Kissinger* presents no problem to the religious claimant. Since protections remain available under free speech, et cetera, it is still possible to receive all the protection offered by a hybrid without its awkward framework.

188 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 567 (1993).

189 Professor Berg goes so far as to recommend that "Congress enshrine the [hybrid] category in a statute" as a way of "calling the Court's bluff." Berg, *supra* note 13, at 751.

190 Brant, *supra* note 13, at 30.

191 Professor Lupu encourages "pressing hybrid claims wherever plausible [since this] will presumably result in either an explanation and reaffirmation of 'free exercise plus' or an ultimate admission by the Court that the theory was no more than an unprincipled attempt to pretend that *Yoder* survived *Smith*." Lupu, *supra* note 43, at 267.

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