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Note, Two Wrongs Make a Right: Hybrid Claims of Discrimination

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NOTES

TWO WRONGS MAKE A RIGHT: HYBRID CLAIMS OF DISCRIMINATION

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This Note reinterprets and recontextualizes the pronouncement in Employment Division v. Smith (Smith II) *that exemptions from generally applicable laws will not be granted unless claims of free exercise are accompanied by the assertion of another constitutional right. It argues that when Arab American Muslims, and others who are of minority race and religion, bring claims for exemption from generally applicable laws on the basis of free exercise and equal protection principles, they ought to be able to invoke* Smith II*'s hybridity exception, thus meriting heightened judicial scrutiny and increased solicitude from courts.*

INTRODUCTION

Few decisions have provoked courts[1] and Congress[2] in the

 A.B., Harvard University, 2000; J.D. candidate, New York University School of Law, 2004. My thanks to the Asian American Jurisprudence Seminar, Professor Noah Feldman, Professor Larry Kramer, Dean-Emeritus John Sexton, and Professor Nelson Tebbe for inspiring this reflection on race and religion. Thanks also to my peer editors at the *New York University Law Review*, especially Kelly Burns, Mike Burstein, Evelyn Sung, Mike Wajda, Aneta Wierzynska, and Steve Yuhan for transforming it into publishable form. My deepest gratitude extends to my husband Stephen, who is my most devoted partner in securing equality and liberty for *all* minorities, and to our families.

[1] In *Employment Division v. Smith* (*Smith II*), Justices O'Connor and Blackmun wrote scathing critiques of Justice Scalia's majority opinion for its interpretation of free exercise jurisprudence. *See* 494 U.S. 872, 891 (1990) (O'Connor, J., concurring); *id.* at 907–09 (Blackmun, J., dissenting). Three years later, Justice Souter vigorously disavowed *Smith II*'s holding: "[T]he [hybrid] distinction *Smith* draws strikes me as ultimately untenable." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566–67 (1993) (Souter, J., dissenting).

[2] Congress passed the Religious Freedom Restoration Act (RFRA) in order "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(1)–(2) (2000) (citations omitted). In the landmark decision of *City of Boerne v. Flores*, the Court held that Congress lacked authority to enact the RFRA under Section 5 of the Fourteenth Amendment, and that the RFRA no longer furnished a cause of action against state governments. *See* 521 U.S. 507, 511, 519 (1997). Though the issue is not yet settled in the federal courts, most circuit courts have assumed that the RFRA remains enforceable against the federal government. *See* Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121 (1996 & Supp. 2003) (collecting and analyzing federal cases arising under RFRA). Congress has since enacted the

manner of *Employment Division v. Smith* (*Smith II*).[3] The decision has been characterized as "illogical,"[4] "untenable,"[5] and "incompatible with our Nation's fundamental commitment to individual religious liberty."[6] *Smith II* ushers in an era of free exercise jurisprudence devoid of strict scrutiny[7] except in "hybrid situations" where free exercise claims are joined by colorable claims arising under another part of the Constitution.[8] Under the hybridity exception, free exercise exemptions from neutral laws in fact may be preserved, even in the absence of discriminatory intent.[9] However, there is no further elaboration of hybridity in *Smith II* or in subsequent Supreme Court decisions. As a result, *Smith II*'s hybridity doctrine has puzzled judges, with the predictable consequence being that lower courts have applied the doctrine inconsistently[10] and infrequently.[11]

Rather than resurrect the rage of critics of *Smith II*, this Note argues that the theory of hybridity introduced in *Smith II* is an

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Religious Land Use and Institutionalized Persons Act, which mandates the use of strict scrutiny for free exercise cases that involve infringements on religion from land-use laws and laws regarding institutionalized persons in prisons, hospitals, retirement homes, and nursing homes. *See* 42 U.S.C. § 2000cc-2(b) (2000). Also, eleven state legislatures have passed their own versions of RFRA legislation. *See* RFRA REBORN AT THE STATE LEVEL, *at* http://www.religioustolerance.org/rfra2.htm (last visited Apr. 6, 2004) (discussing laws passed in Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas).

3 494 U.S. 872.

4 Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993).

5 *Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., dissenting).

6 *See Smith II*, 494 U.S. at 891 (O'Connor, J., concurring).

7 *Id.* at 883 ("In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.").

8 *Id.* at 885 ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such [free exercise] challenges.").

9 See *Lukumi Babalu Aye*, in which the Court declared intentional discrimination on the basis of religion to violate the Free Exercise Clause of the First Amendment. 508 U.S. at 533 ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (citation omitted)).

10 For example, the Ninth and Tenth Circuits require a "colorable claim of infringement." Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 706 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998). In contrast, the First and D.C. Circuits have determined that companion rights must be independently viable constitutional claims in order to be hybridized with a free exercise right. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995). The Sixth Circuit denounced the notion of hybrid rights as "illogical." *See* Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993).

11 *See, e.g.*, *Kissinger*, 5 F.3d at 180 (showing court's reluctance to apply hybrid rights doctrine); *see also infra* note 31.

appropriate response to the unique social reality of dual minorities.[12] Specifically, this Note provides a theoretical justification for hybridity, lacking in the spare language of the *Smith II* decision, by looking to intersectionality theory. Lower courts mostly have applied the hybridity doctrine in the joinder of free exercise with other First Amendment rights. In keeping with the illustrative dicta in *Smith II*, this Note argues that dual minorities such as Arab American Muslims ought to be able to join their rights to free exercise with constitutional rights originating under other clauses, including the Equal Protection Clause's right to nondiscrimination, in order to obtain heightened judicial protection. Not only does this Note contend that hybridity is justifiable jurisprudentially and normatively, but it also claims that hybridity maps a useful legal strategy for dual minorities.

Part I describes *Smith II*'s implications for free exercise and introduces the confusion and criticism that surround it and the hybridity doctrine. Part II draws on intersectionality theory to reinterpret the meaning of hybridity.[13] It simultaneously offers a theoretical justification for the doctrine of hybridity (namely, intersectionality) and a doctrinal hook for intersectionality theory (namely, hybridity). Part III explores the ramifications of this reinterpretation and applies the newly reinterpreted doctrine of hybridity to cases involving dual minorities whose claims are premised on both racial and religious marginalization. While the theory of hybridity is intended to apply broadly, for illustrative purposes this Note focuses on the intersection of race and religion. The overlapping natures of these social identities illuminate the consonant policies of the Free Exercise and Equal Protection Clauses and provide a context for the theory with contemporary relevance—Arab American Muslims' assertions of hybrid rights in the wake of September 11.

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[12] Throughout this Note, the term "dual minority" is used to refer to individuals possessing two or more characteristics of identity that traditionally are disfavored or disadvantaged. While the paradigmatic example of this phenomenon may be race and gender, this Note focuses primarily but not exclusively on the situation of racial and religious minorities. It takes as its primary focus recent examples of claims asserted by Arab Americans of Muslim faith. While recognizing that not all Arab Americans are Muslim and vice versa, the example is drawn for its contemporary relevance. Moreover, the term "Arab American Muslim" is used as shorthand for the dual minority category encompassing both racial and religious characteristics, even as it understates the religious diversity of Arab Americans and the racial diversity of American Muslims.

[13] Intersectionality theory asserts that dual minorities confront structural disparities under the law. *See infra* notes 42–48 and accompanying text. The theory is based on the outcomes of actual litigation brought by dual minority plaintiffs, though it has not been established to a degree of statistical significance. This Note bases its assumption that dual minorities are currently at a legal disadvantage on intersectionality theory and consequently on the assumptions upon which that theory is based.

As is the case of every sociolegal argument, the arguments advanced below inherently rely on values and assumptions that the reader may or may not endorse. On its own terms, the Note offers a conceptually coherent and strategically useful rendering of *Smith II* to those who may confront this breed of distinctive but highly significant claims.

I

FREE EXERCISE JURISPRUDENCE IN *EMPLOYMENT DIVISION V. SMITH*

Separate cases culminating in the *Smith II* decision involved the claims of Alfred Smith and Glen Black, who were fired from their jobs with a drug rehabilitation center because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of the Native American Church.[14] Their applications for unemployment compensation were denied under a state law disqualifying employees discharged for work-related "misconduct."[15] Holding that the denials violated respondents' First Amendment free exercise rights, the Oregon Court of Appeals reversed those determinations.[16] On appeal, the Oregon Supreme Court affirmed.[17] The U.S. Supreme Court vacated the judgment and remanded for a determination of whether the controlled substance law of Oregon proscribed sacramental peyote use.[18] The Oregon Supreme Court held that sacramental peyote was not exempted from the state law prohibition,[19] but it then pronounced the prohibition invalid under the Free Exercise

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[14] *Smith II*, 494 U.S. at 874. Oregon law prohibits the knowing or intentional possession of a controlled substance unless the substance has been prescribed by a medical practitioner. OR. REV. STAT. § 475.992(4) (2001). The law defines a controlled substance as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811–812 (2000). As compiled by the State Board of Pharmacy, Schedule I contains the drug peyote, a hallucinogen derived from the plant *lophophora williamsii lemaire*. OR. ADMIN. R. 855-080-0021(3)(v) (1988).

[15] *Smith II*, 494 U.S. at 874.

[16] *See* Black v. Employment Div., 707 P.2d 1274 (Or. App. 1985); Smith v. Employment Div., 709 P.2d 246 (Or. App. 1985).

[17] *See* Smith v. Employment Div., 721 P.2d 445 (Or. 1986). The Oregon Supreme Court held that the denial of benefits was impermissible because Smith's peyote use was irrelevant to the resolution of his constitutional claim. According to the court, the purpose of the misconduct provision under which Smith had been disqualified was not to enforce the State's criminal laws, but to preserve the financial integrity of the compensation fund, and was unconstitutional since such a purpose is inadequate to justify the burden that disqualification imposed on respondents' religious practice. *Id.* at 450–51.

[18] *See* Employment Div. v. Smith (*Smith I*), 485 U.S. 660, 671–72, 674 (1988).

[19] *See* Smith v. Employment Div., 763 P.2d 146, 148 (1988) (holding that Oregon statute "makes no exception for the sacramental use" of drugs).

Clause.[20] The U.S. Supreme Court, in a 5-4 majority opinion authored by Justice Antonin Scalia, contradicted the Oregon Supreme Court, holding instead that the Free Exercise Clause *permits* the State of Oregon to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use.[21]

A. Smith II*'s Holding and Its Consequences for Free Exercise*

In his opinion for the majority, Justice Scalia reasoned that a state would be "'prohibiting the free exercise [of religion]'"[22] in violation of the Clause if it sought to ban the performance or abstentions of physical acts—such as assembling for worship, participating in sacramental use of bread or wine, or abstaining from certain foods or modes of transportation—only when they are engaged in these acts for religious reasons, or only because of the belief they display.[23] However, he reasoned that the right of free exercise does not relieve an individual of his obligation to comply with a valid and neutral law of "general applicability" that incidentally forbids the performance of an act that one's religious belief requires.[24] This is true even if the law is not directed specifically at religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.[25]

The Court contended that the respondents' claim for a religious exemption from the Oregon law could not be evaluated under the balancing test set forth in the line of cases following *Sherbert v.*

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[20] *Id.*

[21] *See Smith II*, 494 U.S. at 890 ("Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").

[22] *Id.* at 877 (quoting U.S. CONST. amend. I).

[23] *Id.*

[24] *See id.* at 879 (citing Reynolds v. United States, 98 U.S. 145, 166–67 (1879)). In *Reynolds*, the Court rejected a claim that criminal laws against polygamy could not be constitutionally applied to those whose religion encouraged it. 98 U.S. at 166–67. *See also* United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (rejecting claim that regulatory law compelling payment of Social Security taxes is constitutionally required to make exemption for Amish employer whose faith prohibits participation in governmental support programs); Gillette v. United States, 401 U.S. 437, 461–62 (1971) (rejecting claim that Selective Service System violates free exercise by conscripting persons who opposed war on religious grounds); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (upholding Sunday closing laws against claim that they burden religious practices of persons whose religions compel them to refrain from work on other days); Prince v. Massachusetts, 321 U.S. 158, 159, 166, 170–71 (1944) (permitting custodian to be prosecuted under child labor laws for using her children to dispense literature in streets notwithstanding her religious motivation).

[25] Compare the intentional discrimination cases discussed in *Smith II*, *see* 494 U.S. at 879–80, with those elaborated *supra* note 24.

Verner,[26] whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest."[27] In lieu of strict scrutiny, the Court proceeded to evaluate the case under rational basis review.[28]

B. Smith II*'s Hybridity Exception*

In support of its core holding, the majority opinion harmonized free exercise jurisprudence by distinguishing *Smith II* from preceding cases that permitted seemingly similar exceptions: "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*."[29] The Court reasoned that in contrast to the above-described situation, "[t]he present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[30] These two sentences from the *Smith II* decision have given rise to a vast body of literature and litigation over the requirements for a "hybrid rights" claim, in which a claimant may establish a violation of the Free Exercise Clause by showing that the challenged governmental action compromises both the right to free

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[26] 374 U.S. 398, 402–03 (1963) (observing government may not regulate religious beliefs as such, but rather may regulate conduct that poses "substantial threat to public safety, peace, or order").

[27] *Smith II*, 494 U.S. at 883–84 (noting rejection of *Sherbert* test in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42, 452–53 (1988), in which Court declined to apply *Sherbert* test to government's logging and road construction activities on lands used for religious purposes by several Native American tribes); Bowen v. Roy, 476 U.S. 693, 708–09 (1986) (rejecting *Sherbert* test in analysis of federal statutory scheme requiring benefit applicants and recipients to provide Social Security numbers); Goldman v. Weinberger, 475 U.S. 503, 504, 506–07 (1986) (rejecting application of *Sherbert* test to military dress regulations forbidding wearing of yarmulkes).

[28] *See Smith II*, 494 U.S. at 885–86 & n.3 (distinguishing use of compelling government interest standard in case of racial discrimination and free speech violations from incidental religious discrimination). The Court reasoned that the *Sherbert* test was developed in the particular context of unemployment compensation eligibility rules, which lent itself to individualized governmental assessment reasons for the relevant conduct, thus permitting an assessment of motive and potentially discriminatory intent. Though *Smith II* also involved unemployment compensation, the Court said the *Sherbert* analysis was inapplicable to an across-the-board criminal prohibition on a particular form of conduct. *Id.* at 883–84. Noting that it approved the use of the compelling interest test in other contexts, the Court held that in the context of free exercise such a test would produce "a private right to ignore generally applicable laws." *Id.* at 886.

[29] *Id.* at 881 (emphasis added).

[30] *Id.* at 882.

exercise of religion and a companion right arising under another part of the Constitution.[31]

Despite repeated opportunities to clarify its intent, the Supreme Court has yet to expound on the meaning of hybrid rights. Most lower courts, noting that every case the Court cited in *Smith II* combines a free exercise claim with another First Amendment claim, have applied the doctrine only in cases where a free exercise claim is made in conjunction with another First Amendment claim.[32] But on its face, the language used by the Court to describe hybridity does not limit hybridity to the joinder of claims originating in the First Amendment, and there is no obvious or logical reason why it should be so limited. Based on the language of *Smith II*, a free exercise claim plus a companion right arising under a separate part of the Constitution (such as the Equal Protection Clause of the Fourteenth Amendment) ought to suffice for a hybridity exception.[33] This reinterpretation and recontextualization of the hybridity doctrine speaks to the current climate of increasing claims by religious and racial minorities against the government.[34] The theoretical insights and normative arguments proffered are not necessarily limited to religious and racial minorities. However, focusing on the claims raised by these particular dual-minority groups illustrates a broad phenomenon with greater clarity and concreteness.

II
A Reinterpretation of Hybridity Doctrine

Noting the ambiguity of the Court's oblique reference to hybridity in *Smith II*, this Part sets forth an alternate interpretation of the hybrid rights exception to free exercise. Part II.A explains

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[31] The Sixth Circuit in *Kissinger v. Board of Trustees* expressed bewilderment at the notion that the Free Exercise Clause could be violated only if other constitutional rights were implicated. *See* 5 F.3d 177, 180 (6th Cir. 1993). Additional cases challenging hybrid rights are collected in Robin Cheryl Miller, Annotation, *What Constitutes "Hybrid Rights" Claim Under Employment Div., Dept. of Human Resources of Oregon v. Smith*, 163 A.L.R. Fed. 493, 511–12 (2000).

[32] *See, e.g.*, Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000) (establishment clause); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996) (establishment clause); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 200 (3d Cir. 1990) (free speech).

[33] Compare cases asserting non-First Amendment companion rights to *Smith II*. *See* Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999) (holding that plaintiff did not allege hybrid rights claim because claim of infringement of right to interstate travel was meritless); Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1991) (rejecting hybridity claim because of insufficient constitutional protection afforded to right to employ).

[34] See, for example, cases referenced in Miller, *supra* note 31, at 511–12.

traditional understandings of hybridity. Part II.B explains intersectionality theory in order to highlight the contribution that such a theory may make to understanding hybridity. Part II.B.1 demonstrates how the core insight of intersectionality can be of use to those trying to understand *Smith II*'s hybridity doctrine. Part II.B.2 demonstrates mainstream acceptance and support for the style of interpretation espoused.

A. Traditional Theories of Hybridity

Many commentators who have reflected on the hybridity doctrine presume that it functions by aggregating the cumulative effect of two or more partial constitutional rights with one sufficient constitutional claim.[35] In this spirit, lower courts interpreting the *Smith II* decision have split on the *degree* of sufficiency required for each partial claim to obtain the desired cumulative effect, with some arguing that a viable claim is necessary[36] and others claiming that a merely colorable claim is required.[37] Some commentators allege that multiple claims "signal" impropriety, or the perception thereof, arguing that for this reason the *quantity* of claims asserted bears directly on the court's estimation of the seriousness of the constitutional wrong.[38] Each of these formulations of hybridity evinces a classic assumption that

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[35] *See, e.g.*, Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393 (1994).

[36] *See, e.g.*, Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995).

[37] *See, e.g.*, *Miller*, 176 F.3d at 1207; Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998). While the focus of this Note is not to settle the matter of whether hybrid claims need to be viable or merely colorable, for the sake of the analysis that follows, this Note presumes the position taken by a majority of courts and commentators that hybrid claims merely need to be colorable. Presuming the opposite would not alter the reasoning or conclusions in this Note.

[38] *See supra* note 35 and accompanying text. An alternative interpretation of hybridity not addressed in this Note is known as signaling theory. The signaling theory of hybridity interprets the Free Exercise Clause as providing a platform from which to send a message that a particular law is so flawed as to be of dubious constitutional value and, as such, requires a compelling state interest for it to be sustained. The idea behind this approach is that when facially neutral statutes infringe both a free exercise right and another substantive provision of the Constitution, the legitimacy of the act deservedly is cast into doubt. *See, e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1000 (1990). For further discussion, consider the related notion of expressive harms:

> [E]xpressive theories tell actors—whether individuals, associations, or the State—to act in ways that express appropriate attitudes toward various substantive values. In one well-known version, the State is required to express equal respect and concern toward citizens. . . . Expressivism is thus an internal account of existing normative practices, but one with sufficient critical capacity to exert leverage over those practices and to indicate where they ought to be reformed.

claims joined in a lawsuit under conventional rules of civil procedure must be evaluated independently of one another before being aggregated so that each claim presumably succeeds or fails without regard to the other claims asserted.[39] The notion that hybridity may compensate for the inadequacy of severed claims by affording them cumulative effect understandably offends this mode of legal reasoning.[40]

B. A Reinterpretation of Hybridity

The assumption that claims must be disaggregated is itself a jurisprudential principle subject to evaluation. This Note posits an alternative interpretation of hybridity drawn from intersectionality theory that obviates the apparently serious concerns described in the previous Section.

1. Intersectionality Theory

Intersectionality theory posits that overlapping, independently sufficient claims of discrimination effectively prevent the vindication of either claim.[41] As a result, say intersectionality theorists, the law disadvantages dual minorities who assert claims premised on multiple rights. Accordingly, the law requires corrective action to achieve true equality on behalf of dual minorities.

Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

[39] For example, Rule 18(a) of the Federal Rules of Civil Procedure provides that a party asserting a claim to relief "may join, either as independent or as alternate claims, as many claims . . . as the party has against an opposing party." FED. R. CIV. P. 18(a). Case law interpreting Rule 18 and related joinder provisions presume the importance of the claims arising out of the same nucleus of operative facts. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (discussing meaning of "cause of action" and federal courts' pendent jurisdiction).

[40] For example, in a simple lawsuit over an automobile accident, a claim sounding in tort law may be brought alongside a claim sounding in contract law in a single lawsuit. Most likely, the tort claim would be measured against a wholly different standard of proof, with wholly separate evidence presented, from a claim sounding in contract arising out of the same transaction or occurrence. Consequently, it is entirely foreseeable that the contract claim may succeed even if the tort claim fails. Even if the factual record developed on one issue is appended or judicially noticed with regard to the other, the outcome of one claim does not directly dictate the outcome of the other.

[41] Two prominent intersectionality theorists include New York University Law Professor Paulette Caldwell and U.C. Berkeley, Boalt Hall Professor Angela Harris. *See generally* Paulette M. Caldwell, *Proceedings of the 1999 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law: Is There a Disconnect Between EEO Law and the Workplace?*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 131, 161–65 (1999); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). See also *supra* note 13 for a discussion of the empirical data and social realities on which this assumption is based.

Take *Rogers v. American Airlines*,[42] in which a black woman claimed that she was disparately impacted by a commercial airline's policy prohibiting flight attendants from wearing a cornrow hairstyle. She will have trouble proving discrimination given the airlines' retention of *black* men (militating against race discrimination) and white *women* (militating against gender discrimination).[43] Similarly, an African American woman may be denied the ability to serve as a class representative of either *women* or *black people* in a discrimination suit, even though she is fully female and fully black, because she is adjudged insufficiently representative of the majority of women or the majority of black people; she may also have trouble making out a claim under one or more statutes.[44] Based on these sorts of cases, intersectionality theorists conclude that the problem of double difference creates a "matrix of oppression" that assures less judicial protection than would result if the individual possessed only one minority trait or the other.[45]

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[42] 527 F. Supp. 229, 231 (S.D.N.Y. 1981). *Rogers* relies on *Carswell v. Peachford Hospital*, which upheld an employer's dismissal of an employee for wearing beads woven into a braided hairstyle, pursuant to a prohibition on jewelry in the workplace. *See* 27 Fair Empl. Prac. Cas. (BNA) 698 (N.D. Ga. May 26, 1981).

[43] In order to establish a prima facie case of discrimination, the victim of discrimination must show that she was treated differently than a similarly situated person on the basis of her protected status as a woman or racial minority. Thus, the apparent gender similarities with white women and race similarities with black men make demonstration of differential treatment difficult to establish. For further examples of courts' failures to recognize intersections of race and gender, see *Rogers*, 527 F. Supp. at 231; *Carswell*, 27 Fair Empl. Prac. Cas. at 700; DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976) (declining to recognize protected sub-category of "black women" with standing independent of black males); *cf.* Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) (recognizing discrimination claim of Asian American female job applicant against hiring committee favoring Asian American men).

[44] *See, e.g.*, Moore v. Hughes Helicopter, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (declaring that plaintiff black female inadequately represents white females' interests for purposes of class certification). Similar phenomena occur in the intersection of gender with sexuality, national origin with language ability, and alienage with race. The related phenomena of "felon proxies," in which the characteristic of being a black male is substituted for criminal propensity on the basis of stereotypical associations, highlights another problem arising from intersectional identity.

[45] Professor Caldwell discusses the correlative assumptions of "race-sex correspondence" and "race-sex independence or distinctiveness" in the law. Caldwell, *supra* note 41, at 372–73; *see also* Frontiero v. Richardson, 411 U.S. 677, 686, 688 (1973) (acknowledging race-sex analogy and suggesting heightened scrutiny for gender that has since been labeled "skeptical scrutiny"); 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA app. 5, at 1073–78 (Transaction Publishers 1996) (1944) (analogizing plight of blacks and women and comparing civil rights movement to women's rights movement); Serena Mayeri, Note, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001); *cf.* Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, *in* FEMINIST THEORY IN PRACTICE

According to intersectionality theory, the unity of two minority traits constitutes in fact a distinct single-minority entity. While the idea may seem novel, one can easily imagine the transformative power of combining two component entities into an amalgamated whole in other disciplines. In chemistry, for example, the individual elements of hydrogen and oxygen combine to form the distinct substance of water. In physics, the colors blue and yellow combine to produce the distinct color green rather than a shade of blue or yellow. Similarly, intersectionality theory proposes that two claims come together to constitute a distinct claim. The force of intersectionality theorists' claims is not limited to the particular combination of race and gender. It may be extended to several combinations of identity, including race and religion.[46]

In each case, the crux of intersectionality is to recognize and respond to the law's tendency to depress dual minorities in response to their duality, rather than in response to either of their minority characteristics alone. The resulting claim, which incorporates what heretofore would have been separate causes of action, is fundamentally different and thus merits stricter scrutiny on the basis of its changed nature.[47]

2. *Intersectionality as a Justification for Hybridity*

Intersectionality theory contributes to hybridity the insight that dual-minority status results in a *transformation* of one's experience under the law to a more depressed status. This matrix of oppression experienced by dual minorities—be they black women, gay racial minorities, disabled immigrants, or Muslims with dark skin and Arab

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AND PROCESS 75 (Micheline R. Malson et al. eds., 1989) (providing feminist perspective on strength of black women).

[46] Though not evaluated under the paradigm of free exercise, a third example of intersectionality may be seen in litigation brought to challenge the assumption that Chinese immigrants in the 1800s were non-Christian and therefore were not competent to serve in public office or proffer sworn testimony. *See* People v. Hall, 4 Cal. 399, 404 (1854) (overturning murder conviction of free white citizen secured on testimony of Chinese witnesses because "[t]he same rule which would admit [Chinese] to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls").

[47] While this Note focuses on the legal claims that a dual minority would need to make under a reinterpretation of hybridity, it is interesting to consider the implications of this argument for the remedies sought by that dual minority. Presumably, if the two claims considered jointly are transformed into a fundamentally different sort of claim, the resulting claim presumably is indivisible insofar as it cannot easily be redivided into its component parts. While the dual minority may not be barred from claiming recovery under the race and religion causes of action as an initial matter, the implication of the analysis seems to be that success on a hybrid claim would preclude further litigation or recovery on either of the component claims.

ancestry—requires corrective action if these dual minorities are to enjoy comparable rights to their single-minority counterparts. If dual minorities occupy a lower legal status than their majority counterparts, and even their single-minority counterparts, extraordinary judicial protection is required for them to enjoy comparable rights. While obtaining a legal status comparable to single minorities still may fall short of the legal protection afforded to majorities, dual minorities nonetheless move crucially closer to full protection insofar as the law provides them with a fighting chance of vindicating their claims in court. In an era when intentional discrimination is harder and harder to prove, this increased leverage is indispensable to obtaining equal protections and preserving equal freedoms under law.

3. *Doctrinal Examples of the Logic of Hybridity*

Rooted in the tradition of critical race theory, the jurisprudential logic of intersectionality theory is not only cohesive, as shown above, but it also is supported by several elements of mainstream legal analysis. Placed in the context of such mainstream jurisprudence, the reinterpretation of hybridity in terms of intersectionality theory emerges as a legitimate and applicable proposal.

a. Suspect Classifications

The suspect classification strand of equal protection jurisprudence, in which the state bears the burden of justifying legislation that singles out groups laden with a history of discrimination, supports the notion that the assertion of multiple rights under the Constitution necessitates a heightened level of judicial scrutiny.

Thus, in *Plyler v. Doe*, Justice Brennan's majority opinion declared a Texas statute denying children of immigrants access to public education to be unconstitutional.[48] In the course of his decision, he explained that strict scrutiny was the appropriate standard of judicial review because the challenged scheme implicated both the suspect class of national origin—albeit unintentionally—and impinged on the exercise of a fundamental right.[49] With regard to the suspect classification, he explained, "Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."[50] While the differential

[48] 457 U.S. 202, 230 (1982).

[49] *Id.* at 216–17 & nn.14–15. In *Plyler*, Justice Brennan notes that the Court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Id.* at 216–17 (citations omitted).

[50] *Id.* at 216 n.14.

impact of the Texas policy on education of immigrant children did not by itself merit heightened scrutiny without proof of an invidious intent, Justice Brennan explained that a compelling interest was nevertheless necessary: "In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."[51] Since *San Antonio Independent School District v. Rodriguez* already had clarified that education, although important, was not by itself a "fundamental right" worthy of strict scrutiny,[52] Brennan portends that proper application of the test in *Rodriguez* would weigh the assertion of two claims arising under the Constitution more heavily than the assertion of either right alone—a logic remarkably similar to that described in free exercise and in the equality rationale for hybridity.

b. Fundamental Rights

Though based on a distinct clause of the Fourteenth Amendment, the Supreme Court's due process case *Skinner v. Oklahoma* similarly held that the level of scrutiny accorded certain statutory classifications depends not only on the classification itself, but also on how "fundamental" the affected interest is.[53] These two considerations necessitated strict scrutiny when viewed together rather than individually—much the same way as would be required under hybridity.

In *Skinner*, the Court applied strict scrutiny to an Oklahoma statute mandating the sterilization of "habitual criminals" because it so intimately affected one of the basic civil rights of man—procreation—and because Oklahoma's ability to sterilize its citizens could have devastating *effects* for a racial minority group (again, absent intent to target such a group).[54] Therefore, the Court felt duty bound

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[51] *Id.* at 217 n.15.

[52] 411 U.S. 1 (1973). In *Rodriguez*, a case substantially similar to *Plyler*, Justice Powell denied strict scrutiny to African American plaintiffs alleging the unconstitutionality of a school financing system. *See* 411 U.S. at 18 (1973). In contrast to the outright denial of education asserted in *Plyler*, plaintiffs in *Rodriguez* asserted that an educational financing scheme yielding *inadequate* education for minority students merited strict scrutiny. Claiming that plaintiffs lacked a fundamental right to a specified quality of education and thus asserted only one colorable claim under the Constitution, alongside their claim of equal protection, Justice Powell refused to apply strict scrutiny. *Id.* at 37. Powell's concurrence in *Plyler* distinguishes his findings in *Rodriguez* and argues that heightened scrutiny, though not strict scrutiny, was appropriate for children of illegal aliens. *See Plyler*, 457 U.S. at 238–40 & 239 nn.2–3 (Powell, J., concurring).

[53] 316 U.S. 535, 541 (1942).

[54] *Id.* at 541.

to apply stricter scrutiny when legislation infringed both fundamental liberty and equal protection of suspect classifications.[55]

c. Discrete and Insular Minorities

Under established equal protection jurisprudence, special protections are afforded to discrete and insular minorities, as defined in the famed footnote four of the Court's decision in *United States v. Carolene Products Co.*[56] The rationale for this special protection is that these distinct types of minorities are distinguishable from the general, so to speak, minority. Thus, the dual minority's distinct position in society places him or her squarely within the discrete and insular class. For example, the dual religious and racial minority is distinct from religious minority groups and racial minority groups in two senses: Their experiences in society are insufficiently similar to other groups in society and are thus "discrete,"[57] and their experiences in

[55] The Supreme Court's subsequent cases, which suggest that marriage may not constitute a fundamental right worthy of due process protection, may be thought to weaken the analogy presented above. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 376, 388–89 (1971) (marking the high point for the Court's consideration of marriage as fundamental right). However, the legal analysis presented in *Skinner* illustrates the Court's continuing acceptance of hybrid styles of reasoning, notwithstanding subsequent changes in the Court's weighting of one particular right used to form part of a hybrid claim. The same is true of *Rodriguez*, in which Justice Powell modeled a hybrid style of reasoning in the equal protection context, despite subsequent determinations that education may not constitute a fundamental right. 411 U.S. at 40; *see also supra* notes 48–52 and accompanying text.

[56] 304 U.S. 144, 152 n.4 (1938). Also instructive is the Court's decision in *West Virginia Board of Education v. Barnette*, in which the Court wrote that

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943).

[57] Consonant with the view that religious minorities are discrete are the views of several prominent academics that religion should be analyzed within the paradigm of equal protection developed in association with racial justice movements. For example, Michael McConnell, who was formerly a law professor and since has served as a federal appeals court judge, argues that religion cannot and should not be separated from antidiscrimination law pertaining to protected classes such as race. *See generally* Michael W. McConnell, *Religion and Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000). Professors Christopher Eisgruber and Lawrence Sager have extended this reasoning a step further in an influential article proposing that free exercise be analyzed in accordance with the values of equal protection. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (arguing that free exercise is best understood as protecting vulnerable groups rather than privileging particular acts or beliefs and that religious believers are uniquely vulnerable to being ignored or misunderstood by outside bodies because they proceed from idiosyncratic and often inaccessible epistemological assumptions). Such views interpret the religion clauses as func-

politics are weakened by an inability to influence public debate and inspire protective legislation, and thus are considered "insular."[58]

Though not binding authority, Justice Blackmun's observation in *Smith II* is consistent with the Court's prior descriptions of discrete and insular minorities. Justice Blackmun decried the majority's assertion that the Court has rejected or declined to apply the compelling interest test in its recent cases.[59] He declared, "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance."[60] Along similar lines, Justice O'Connor expressly referenced the political powerlessness of religious minorities in her concurrence to *Smith II*: "[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise

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tioning primarily to prevent preferential treatment among different faiths. Compare these views with interpretations of the religion clauses as functioning primarily to protect voluntariness of faith as a matter of liberty. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1160 (1988) ("What emerges from the Court's examination of history is a pair of fundamental principles . . . animating the first amendment: voluntarism and separatism . . . . [Voluntarism means that] the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state.").

58 The academic literature contains a vibrant debate about whether religious argument is and ought to be excluded from political debate. *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993) (advocating for greater religious voice in public debate); STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS (2000) (same); E.J. Dionne Jr. & John J. DiIulio Jr., *God and the American Experiment: An Introduction*, *in* WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT? 1, 13 (E.J. Dionne Jr. & John J. DiIulio Jr. eds., 2000) (asserting that "God and arguments about God will always have a great deal to do with the American experiment"); Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOYOLA L.A. L. REV. 1411 (1996) (cautiously approving of religious discourse in public life); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 748 (1993) (describing and critiquing "movement towards a greater intermingling of politics and religion"). For a recent example of this debate playing out in the context of the debate over the propriety of government aid to faith-based charities, see SACRED PLACES, CIVIC PURPOSES: SHOULD GOVERNMENT HELP FAITH-BASED CHARITY? (E.J. Dionne Jr. & Ming Hsu Chen eds., 2001).

59 Justice Blackmun, rejecting the majority opinion, claimed that the "'constitutional anomaly'" is the view that laws can never give way to claims of free exercise, not that they might be a "'luxury'" that cannot be afforded in a "well-ordered society." *Smith II*, 494 U.S. at 908–09 (Blackmun, J., dissenting) (quoting majority opinion in *Smith II*, 494 U.S. at 886 & 880).

60 *Id.*; *see also infra* text accompanying note 76.

doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups."[61]

That Justices O'Connor and Blackmun spoke of free exercise in the language of equality is not coincidental. Despite continuing debate over the original purposes of the Free Exercise Clause, scholars mostly agree as a descriptive matter that the religion clauses of the Constitution underwent a revolution during the Warren Court era such that they have come to stand for an equality principle ever since.[62] As a result of this revolutionary reinterpretation, the Free Exercise Clause has become a legal hook for ensuring that religious minorities obtain equal treatment under the law.[63]

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[61] *Smith II*, 494 U.S. at 902 (O'Connor, J., concurring). For further support of Justice O'Connor's interpretation of footnote four of *Carolene Products*, see, for example, JOHN HART ELY, DEMOCRACY AND DISTRUST 75–77, 86–87 (1980) (setting forth influential variant on political process rationale in footnote four); Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1103 (1982) (providing insider's view of footnote four genesis and meaning); Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1089 (1982) (summarizing footnote four argument for strict scrutiny judicial review of minority rights as being judicial correction of defective democratic process disabling discrete and insular minorities); *cf.* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 742 (1985) (contending that diffuse and anonymous minority groups such as women, poor people, and gays also may qualify for strict scrutiny given their inability to influence political process).

Professor Abner Greene presents an innovative argument that religious exemptions may be required to compensate for the structural disadvantages religions suffer in politics as a result of the Establishment Clause, which disables them from using religious arguments as a basis for legislation. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613 (1993). Compare this view with Justice Scalia's counterargument in *Smith II* that religious minorities have been able to access the legislature, as evidenced by the fact that "a number of States have made an exception to their drug laws for sacramental peyote use" and that even if "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . [this is an] unavoidable consequence of democratic government." *Smith II*, 494 U.S. at 890.

[62] *See generally* Noah Feldman, *From Liberty to Equality: Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 676 (2002) (arguing Establishment Clause is properly rooted in liberty principles but underwent metamorphosis to equality principles during Warren era). While the original intent of the religion clauses remains disputed, *see supra* note 57, the contemporary state of free exercise jurisprudence has binding effect notwithstanding its faithfulness to legal history. This contemporary understanding thus provides relevant background for this Note about dual minorities. Further support for this approach can be found in Justice Brennan's concurring opinion in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). Brennan writes that "[a] too literal quest for the advice of the Founding Fathers . . . seems to me futile and misdirected . . . . [T]he historical record is at best ambiguous," *id.* at 237, and that "our religious composition makes us a vastly more diverse people than our forefathers . . . . [They] knew differences chiefly among Protestant sects," *id.* at 240.

[63] This perception of religious minorities as posing an equality concern that can be dealt with best through a heightened level of protection may be contrasted with the view that diversity creates an administrative problem that requires more *stringent* regulations to avoid increasing demands on government. After all, in any given situation where two par-

The foregoing analogies to suspect classification and due process jurisprudence illustrate that the joint consideration of typically distinct claim types is not without precedent in constitutional law. However, the analogies offered should not be taken as an argument that either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment should be relied on directly and exclusively as recourse for free exercise rights.[64] The claims of dual minorities are distinct from both free exercise and equal protection analyses as conventionally understood. But dual minorities continue to occupy a distinct legal posture from those who assert claims exclusively under either the Equal Protection Clause or the Due Process Clause. Thus, when courts speak about combined claims of religious and racial discrimination in terms of free exercise or equal protection alone, they miss the fundamental point: Hybridization of religion and race transforms these joined claims into something that is distinct from both. Without endorsing either equal protection or due process jurisprudence as the primary justification for hybrid analysis, this Note adopts intersectionality theory as the primary justification.[65]

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ties are treated differently, equality may be obtained by either raising the level of treatment afforded to one or lowering the level of treatment for the other. While Justices Blackmun, O'Connor, and Harlan take the former view, Justice Scalia takes the latter. In *Smith II*, Justice Scalia states that exempting religious minorities would be "courting anarchy" and that this danger "increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." 494 U.S. at 888. Rather than viewing diversity as a strength, he writes,

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Id. (emphasis omitted) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

[64] Notice that the given examples lack the requisite intent element to independently trigger strict scrutiny under either conventional equal protection jurisprudence or pre-*Smith II* free exercise jurisprudence.

[65] Moreover, framing hybrid discrimination in terms of equal protection is especially problematic because the Equal Protection Clause of the Fourteenth Amendment protects primarily against "class or caste treatment" of historically subjugated groups with immutable identity characteristics. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982). In contrast, the paradigmatic cases of Arab American Muslims discussed in this Note are ideological and hence more consistent with the theoretical underpinnings of the religion clauses than with the underpinnings of the Equal Protection Clause.

Contemporary commentators make a similar point in analogizing sexuality to religion rather than race on the belief that it is significantly voluntary and expressive of ideology. *See, e.g.*, DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION 354–70 (1998) (arguing that sexuality should be treated as suspect classification, in manner of gender, race, and religion, given that each characteristic is immutable, based on irrational stereotype, and historically disfavored, and that each group is politically powerless); Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189 (1999) (discussing connec-

This Note references equal protection and due process jurisprudence merely to set forth a plausible interpretation of the hybridity doctrine developed in *Smith II*. Notwithstanding these cautionary notes, the pairing of religion and race under the Constitution makes intuitive as well as doctrinal sense.

III
HYBRIDITY RECONTEXTUALIZED: DUAL MINORITIES AND ARAB AMERICAN MUSLIMS

Part II endorsed an interpretation of hybridity that draws on intersectionality theory's insights that dual minorities are qualitatively different in ways protected by the equality dimensions of free exercise and therefore worthy of heightened scrutiny. Part III espouses the special relevance of hybridity for dual minorities seeking identity-based exemptions from laws of general application. Specifically, Part III recontextualizes hybridity as understood in Part II in order to illuminate the distinctive claims brought by dual minorities in two common circumstances: religious minorities' petitions for exemption from government-sponsored dress regulations in order to wear religious garments, and religious minorities' petitions for accommodation of religious symbols in government-sponsored holiday displays. By comparing the legal analysis that would pertain to their claims under traditional and revised notions of hybridity, Part III highlights the important differences that such a reinterpretation achieves for dual minorities' distinct challenges under constitutional law. While steeped in the language of hybridity promisingly introduced in *Smith II*, this Part builds on dicta in *Smith II* and the insights of intersectionality theory in order to sketch a comprehensive legal strategy that may be employed by Arab American Muslims.

A. Exemptions for Religious Garments

In *Goldman v. Weinberger*,[66] the Supreme Court denied a Jewish soldier's request for exemption from uniform dress codes that prohibited him from wearing a yarmulke in accordance with the dictates of his faith.[67] Applying a deferential standard of review,[68] the Court

tion between "self-realization," religion, and sexual orientation); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1005–27 (2002) (arguing that gender and sex are "disestablished" in Constitution and analogizing disestablishment to treatment of religion).

[66] 475 U.S. 503 (1986).

[67] *Id.* at 504.

[68] *Id.* at 506 ("'[T]he military is, by necessity, a specialized society separate from civilian society.'" (quoting Parker v. Levy, 417 U.S. 733, 743 (1974))). Compare Justice

held that the military officials' determination appropriately distinguished exceptions for "religious apparel that is visible and that which is not"[69] and were properly within the province of "professional judgment."[70] Judicial questioning as to whether accouterments "create a 'clear danger' of undermining discipline and esprit de corps" were "beside the point."[71]

Concurring, Justice Stevens acknowledged that while Captain Goldman presented "an especially attractive case for an exception from the uniform regulations,"[72] the test of the regulations must consider how it would apply to "all service personnel who have sincere religious beliefs that may conflict with one or more military commands."[73] On this basis, Stevens suggested that permitting religious exemptions from dress regulations inevitably would lead to unequal treatment among faiths. Officials would be unlikely to permit a "ragtag band of soldiers" clothed in accouterments from various religious faiths, even though they might be willing to permit the lone yarmulke. Quoting Justice Brennan's dissent, Stevens perceptively noted, "The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as 'so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed.'"[74] Rather than risk this danger, Stevens would have all soldiers restricted to the same uniform without regard for the garments or symbols that their faith may require of them.

In a dissenting opinion that most closely approximates the sentiments in this Note, Justice Blackmun disavowed the notion that a fair distinction may be drawn between Jewish soldiers desiring to wear a yarmulke and Sikhs desiring to carry sacramental weapons or wear beards. Unlike Justice Brennan and like Justice Stevens, Blackmun worried that the disparate treatment of Orthodox Jews and Sikhs

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Brennan's view of the need for higher scrutiny when individual liberties are at stake. *Id.* at 515 (Brennan, J., dissenting) ("While we have hesitated [to intervene], due to our lack of expertise concerning military affairs and our respect for the delegated authority of a coordinate branch, . . . we have never abdicated our obligation of judicial review.").

[69] *Id.* at 510.

[70] *Id.* at 509.

[71] *Id.*

[72] *Id.* at 510.

[73] *Id.* at 512; *see also id.* at 503 n.5 (Stevens, J., concurring) (characterizing question presented as "'[w]hether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a "yarmulke" . . . while he is in uniform on duty at a military hospital'" rather than narrower question of whether valid general prohibition is impermissible as applied to petitioner (quoting Brief for the Petitioner at i, *Goldman* (No. 84-1097)).

[74] *Id.* at 512 (Stevens, J., concurring) (citations omitted).

would be unconstitutional, regardless of whether it would be "*more* troublesome or unfair than the existing neutral standard."[75] Unlike Justice Stevens, however, Blackmun saw this as a reason to permit *more* exemptions from military dress codes rather than *less*. He interpreted the military's disputed policy to incidentally burden less established minority religions to a greater extent than more established faiths; indeed, Blackmun understood the policy to encourage such differential treatment. Not only would established faiths "receive special treatment under such an approach; they would receive special treatment precisely *because* they are conventional."[76]

Justice Blackmun's concern implicitly speaks to the danger that minority faiths plagued with multiple dimensions of unconventionality would suffer unequally—whether because they are small, recently developed, or practiced predominantly by nonmainstream groups. As such, Blackmun's argument intuits that dual minorities are qualitatively different from single minorities. Without using the terms "dual minority" or "intersectionality," Justice Blackmun recognized that recently-immigrated or darker-skinned religious minorities such as Sikhs suffer from multiple dimensions of "unconventionality." Consequently, they stand in a different place, not merely a relatively worse place, than single minorities such as white Muslims or more established minority practitioners such as the Jews or the Amish.

The debate in *Goldman* is thus prescient: It anticipates contemporary debates over the propriety of Arab American Muslims and Sikhs seeking permission to wear religious symbols and clothing otherwise banned from public spaces and discouraged in private spaces such as airports. The very types of claims that the *Goldman* Court worried would ensue in their parade of horribles now are being pressed in courts nationwide.[77]

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[75] *Id.* at 522; *see also* Sasnett v. Wisconsin Dep't of Corr., 197 F.3d 290, 292 (7th Cir. 1999) (Posner, C.J.) (noting in dicta that "[n]othing in *Smith* authorizes the government to pick and choose between religions without any justification"). In *Sasnett*, Posner decried a prison regulation that would allow crosses to be worn when attached to rosaries, but not otherwise, since the addition of a string of beads that could be used for strangulation makes the ensemble more dangerous rather than less. "The prison authorities opined that Protestants . . . could simply ignore [the rosary] and concentrate on the cross, but this shows a complete ignorance of religious feeling. One might as well tell Anglicans to kiss the Pope's ring but pretend he's the Archbishop of Canterbury." *Id.* at 293.

[76] *Goldman*, 475 U.S. at 527 (Blackmun, J., dissenting).

[77] *See, e.g.*, Chowdhury v. Northwest Airlines, 238 F. Supp. 2d 1153 (N.D. Cal. 2002) (challenging practice at Northwest Airlines of denying passage to American citizens whose names bear similarities to names on FBI watch list after September 11). See also *infra* sources referenced in note 79 for more examples of litigation brought by Arab American Muslims since September 11.

Under the theory of this Note, a Sikh or Arab American Muslim challenging an airport "dress code" limiting the adornment of jewelry, symbols, or clothing may be able to make out a hybrid claim. The claim would assert colorably (1) that such a policy unduly burdens adherents' free exercise of Islam or Sikhism, and (2) that it draws distinctions that more heavily impact members of a protected class on the basis of their race, color, national origin, or religion. The combination of the claims would trigger strict scrutiny such that the government would have to make out a compelling justification for its policy and demonstrate that the policy is narrowly tailored to that end.[78] To the extent that perceived, rather than actual, security threats motivate the government distinctions, dual minorities have an enhanced position over the Jewish soldier in *Goldman* because a searching judicial inquiry into the alleged threat and the proposed governmental action would be required. More to the point, dual minorities also would be in a better position than the similarly-situated individuals claiming exemption from a generally applicable federal law in the post-September 11 context.[79] Their odds of prevailing in this hypothetical example, drawn from *Goldman* and closely approximating the

[78] As in the actual cases, the commercial airlines referenced in the situations described *infra* note 79 are substantially regulated by the Federal Aviation Administration and the dictates of the Constitution due to their reliance on federal funding for their institution of publicly funded security clearance procedures and their use of personnel from agencies such as the Transportation Security Administration.

[79] Numerous instances of these types of incidents, colloquially termed "flying while brown," have been documented and considered for legal challenge. *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 ANN. SURV. AM. L. 295, 299 (2002) ("A complex matrix of 'otherness' based on race, national origin, religion, culture, and political ideology may contribute to the ferocity of the U.S. government's attacks on the civil rights of Arabs and Muslims [after September 11]."); Charu A. Chandrasekhar, Note, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L. J. 215 (2003) (describing use of racial profiling in aviation security and examining legal redress available to profiled passengers); *see generally* COUNCIL ON AMERICAN-ISLAMIC RELATIONS RESEARCH CTR., AMERICAN MUSLIMS: ONE YEAR AFTER 9-11 (Sept. 5, 2002), *available at* http://www.cair-net.org/downloads/911report.pdf; MICHAEL S. LEE, ARAB AMERICAN INST., HEALING THE NATION: THE ARAB AMERICAN EXPERIENCE AFTER SEPTEMBER 11, *available at* http://www.aaiusa.org/PDF/healing_the_nation.pdf (last visited Apr. 6, 2004); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, BACKLASH: WHEN AMERICA TURNED ON ITS OWN, A PRELIMINARY REPORT TO THE 2001 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS, *available at* http://www.napalc.org/literature/annual_report/Post9_11.pdf (requires passcode "napback911") (last visited Apr. 4, 2004). While the nature of the grievances alleged in these types of cases may resonate with equal protection analysis, they are analyzed under the Free Exercise Clause. This is because the Free Exercise Clause presents a plausible cause of action, whereas settled interpretations of the Equal Protection Clause posit that causes of action must demonstrate intentional discrimination and longstanding historical discrimination against the protected class in order to be legally cognizable.

analysis of *Wisconsin v. Yoder*[80] appearing in *Smith II*, ostensibly would be stronger under a hybridity analysis than existing tests. The example does not show that the dual minority who seeks exemption due to his Amish, Sikh, Muslim, or Jewish religious practices will win, but merely that he could win. A court hearing such a case can weigh carefully the competing interests in reaching its own decision whether to grant or deny an exemption.

B. Accommodation of Religious Displays

Another arena in which dual minorities have demanded special consideration from government is in the erection of religious displays. For example, in *Allegheny v. ACLU*, the Supreme Court responded to plaintiffs' challenges to a holiday display that included Christian and Jewish symbols.[81] The Court held unconstitutional a freestanding display of a nativity scene on the main staircase of a county courthouse that was not surrounded by secular Christmas decorations, but it upheld the display of a Jewish Chanukah menorah placed next to a Christmas tree and a sign saying "Salute to Liberty" in a public building one block away from the courthouse.

Utilizing a nonendorsement analysis under the Establishment Clause, the Court reasoned that the nativity scene unaccompanied by reindeer and Santa Claus figures suggested that the government took a position on a question of religious belief that related to a person's "'standing in the political community.'"[82] A different majority reasoned that the menorah display, in contrast, conveyed a message that was not "exclusively religious," but rather conveyed a message of "pluralism and freedom of belief during the holiday season."[83]

While *Allegheny* technically arose under the Establishment Clause, rather than the Free Exercise Clause, its facts still may be used to illustrate the core themes of this Note. Throughout its fractured opinions in this and other crèche cases, the Court assumed that Christmas and Chanukah, while not entirely secular, possessed a

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[80] 406 U.S. 205 (1972). For more information about the *Yoder* case, see *infra* note 85.

[81] 492 U.S. 573 (1989); *cf.* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (permitting City of Pawtucket to purchase and exhibit crèche display and declining to take absolutist view of religion clauses on grounds that such view would discourage "diversity and pluralism"). In *Lynch*, Justice Brennan protested that the nativity scene, unlike every other element of the display, conveyed to minority religious groups a message "that their views are not similarly worthy of public recognition nor entitled to public support" and inflicted "insult and an injury" not countenanced by the religion clauses. *Id.* at 701, 709 (Brennan, J., dissenting).

[82] *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

[83] *Id.* at 635.

"secular dimension" consistent with the tradition and history of the American people.[84] While this view may seem amenable to religious minorities and may not be obviously discriminatory—since it protects Judaism—the embedded test of tradition or conventionality is insidious. The test inevitably disadvantages marginalized minority religions that have, for a variety of reasons, not assimilated to the mainstream.[85]

The Court prescribed a de facto limiting principle by reference to religious minority groups who do not share the same length of history or level of acceptance that Jews (or the Amish) have achieved. As the Court expressed in *Yoder* and implied in *Goldman* and *Allegheny*, part of the test for exemption is whether a religious minority has demonstrated the adequacy of its alternative mode of living "in terms of precisely those overall interests that the State advances."[86] Even if some minority groups such as the Amish may be able to make this sort

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[84] Justices Blackmun and Kennedy expressed a belief that Christmas and Chanukah had secular components. To Blackmun,

> [T]he relevant question . . . is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply acknowledges that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.

Id. at 616 (Blackmun, J., concurring); *see also id.* at 664 (declaring crèche and menorah displays permissible, noncoercive accommodation of religious faith and "purely passive symbols of religious holidays") (Kennedy, J., concurring in judgment and dissenting in part). In *Lynch*, the Court noted that

> [t]here is an unbroken history of official acknowledgment . . . of the role of religion in American life . . . . Our history is replete with official references to the value and invocation of Divine guidance . . . [by] the Founding Fathers and contemporary leaders. . . . Presidents and . . . the Congress have proclaimed both Christmas and Thanksgiving National Holidays.

465 U.S. at 674–76.

[85] In further illustration of this point, similar logic is employed in the *Smith II* majority's attempt to distinguish the granting of an exemption from compulsory education laws to Amish parents on the basis of free exercise from the denial of Native Americans' request for exemption from drug laws so that they could smoke peyote in ceremonies. In *Wisconsin v. Yoder*, 406 U.S. 205, 224–26 (1972), the Court praised the industry and productivity of Amish traditions and acknowledged the pedagogical merit to their alternative education system. The Court emphasized that "we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." *Id.* at 235. Rather, the Court declared, "[a]ided by a history of three centuries . . . and a long history as a successful and self-sufficient segment of American society," the Amish

> have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continual survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

Id.

[86] *Id.*

of showing, the Court notes that "probably few other religious groups or sects could make" such a showing.[87] One only can surmise that Arab American Muslims likely are not among them.

One could theorize that, under *Allegheny*, if a group of black Muslims desired that the government put up another holiday display consisting of the Nation of Islam's crescent moon emblem, quotations from Malcolm X about the importance of faith for the empowerment of black men, and a Kwanzaa candle, it would not pass the "unbroken history" test. Yet it would possess a secular dimension such that it ought to satisfy the anti-endorsement test.

Under the hybridity analysis set forth in this Note, the black Muslim seeking accommodation of the above-described holiday display has a colorable case: Permission for such a display would advance his right to free exercise and would convey a message to black nationalists that they stand equal to all others before the government in the same way that the nativity scene did in *Lynch* and the menorah did in *Allegheny*.

A court may counter that the Nation of Islam's symbols are antithetical to inclusion because they bespeak racial separatism. But to the extent that these ideas are inextricably tied to the religious ideology condemned by the government, the doctrine of hybridity would trigger strict scrutiny so that a court would have to justify its prohibition against the individual's asserted rights. A court *might* weigh the balance of free exercise against the government's interest in preventing violence of the sort that led to the assassination of Malcolm X and Martin Luther King. More likely, however, such an interest would be deemed rational or even important, but not compelling, and such a prohibition would not be deemed narrowly tailored to the goal of stilling violence.

Admittedly, the Court's recently fluctuating stance towards imposing affirmative obligations on government actors for the sake of obtaining substantive equality in higher education,[88] contracting,[89]

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[87] *Id.* at 236.

[88] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (upholding principle of diversity as compelling interest for affirmative action programs in higher education); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271–72, 319–20 (1978) (upholding possibility of affirmative action in higher education but striking down specific program using quotas as violative of Equal Protection Clause); Hopwood v. Texas, 236 F.3d 256, 274, 275 & n.66 (5th Cir. 2000) (striking down principle of diversity as compelling interest for affirmative action and criticizing *Bakke* as nonmajority opinion).

[89] *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995) (striking down affirmative action in contracting).

voting,[90] and other contexts may weaken the likelihood that similar free exercise claims would succeed for reasons independent of the hybridity analysis described herein. At the very least, however, a dual minority in the examples described would obtain a more exacting standard of review. Under this exacting standard of review, he may insist that the government carry its burden of establishing narrowly tailored means of achieving a compelling interest before it infringes on his rights. Accordingly, while each of his colorable claims once may not even have survived preliminary motion practice—his free exercise exemption claim because of the Scylla of deferential review obtained in *Smith II* and his equal protection claim because of the Charybdis of disparate impact without intent—his claims now would be heard together on their merits. These hybrid claims would be assessed for their cumulative and distinctive effects on the plaintiff. In this way, a dual minority plaintiff would avoid the Scylla and Charybdis posed by current equal protection and free exercise jurisprudence and obtain a forum in which his distinct harms may be redressed.

CONCLUSION: TWO WRONGS MAKE A RIGHT

Numerous questions remain that are beyond the scope of this Note, or that require further litigation as an antecedent to further theorizing. One issue, however, seems worth noting and responding to here for the purpose of both clarifying and defending the doctrine of hybridity as it has been interpreted throughout this Note—the case of a plaintiff who claims free exercise rights without also being able to allege a protected status under the Equal Protection Clause.

As a matter of formal logic, it would appear that a white plaintiff, for example a white evangelical Christian, ought to be able to qualify for strict scrutiny under the hybridity doctrine if a minority plaintiff claiming free exercise rights qualifies. Otherwise, the two individuals appear to stand unequal before the law in violation of the Fourteenth Amendment, or at least in violation of norms of fairness and equity.

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[90] *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461 (2003) (upholding principle of influence districting when race of voters is considered under § 5 of Voting Rights Act, 42 U.S.C. § 1973 (2000)); Easley v. Cromartie, 532 U.S. 234, 241 (2001) (approving affirmative action in redistricting for goal of increasing minority representation, so long as race is not "predominant" factor); Shaw v. Reno, 509 U.S. 630, 658 (1993) (finding appellants stated claim under Equal Protection Clause by alleging North Carolina's redistricting plan was irrationally and unjustifiably designed "to segregate voters into separate voting districts because of their race").

Throughout, this Note has endeavored to offer principled justifications rather than merely strategic ones. Even in the apparently troubling comparison of the white versus black adherents of the same minority faith, a principled justification exists. If we are to take seriously the insights from intersectionality theory, we must admit that the single-minority plaintiff (for example, a white convert to Islam) and the dual-minority plaintiff (for example, an Arab American Muslim) stand in substantially different places before the law. The claim of the Arab American Muslim is not *quantitatively* stronger than that of his white counterpart just because he alleges two claims rather than one. Nor is it possible to measure the additional leverage brought to bear by race as if in a scientific experiment that holds religion constant and lets race vary. The point of intersectionality theory, and the point of this Note, is to recognize that the two litigants stand in *qualitatively* different places. Comparing them in the manner described above is to compare apples with oranges and to overlook the key insight from intersectionality theory.

It nonetheless may be troubling that the white plaintiff cannot vindicate his religious rights with more than rational review. However, we must consider the source of this trouble. Under the core holding of *Smith II*—that all religious practitioners seeking exemptions from generally applicable, neutral laws merit rational review—the white plaintiff appropriately obtains rational review for his free exercise claim. Notwithstanding any of its flaws, *Smith II* remains good law. Thus, the position of the white litigant is controlled by the status quo ante, or the holding in *Smith II*. As the *Smith II* Court notes, the white litigant is free to seek congressional override by lobbying his congressman for a legislated exception to the policy that brought about his claim and imposed a burden on his religious practice. Whether or not he can succeed in doing so thus is left to politics, assuming once again that he does not belong to the rare "discrete and insular minority" that cannot fairly be expected to utilize the legislative process.

It is true that hybridity may not benefit everyone equally or bolster free exercise jurisprudence categorically. But that is not its goal. Rather than advocating that *Smith II* be overturned, it endeavors to present a principled legal means by which dual minorities—including, but not limited to racial and religious minorities such as Arab American Muslims—may obtain strict scrutiny and preserve the possibility of receiving exemptions under the law. Under the theory of this Note, the dual-minority litigant would trigger the hybridity exception in *Smith II* if he presents colorable claims under the Free Exercise and Equal Protection Clauses of the Constitution. After clearing this

threshold, he would trigger strict scrutiny, or an opportunity to have the government policy in question be justified stringently and according to the dictates of the compelling-interest and narrow-tailoring requirements. This heightened scrutiny is justified normatively and legally by the transformation of the Free Exercise Clause to include equality values and the social reality of the ways race and religion can combine to form discrete and insular minorities.

While not a cure-all for religious freedom, the revision and robust application of the doctrine of hybridity articulated in this Note can help some of the most disadvantaged—those least able to effectuate legal change through the traditional means of democracy and the courts—to preserve their claims. The irony of the strategy suggested by this Note may be that it subverts any hidden purpose of the Court to deny religious minorities liberty and the protection of law by taking seriously the Court's stated aims of encouraging uniform rules of law and compliance by all, especially disfavored minorities. After all, if the hybridity exception is integrated into the jurisprudential vision of the Court, it ought to be available to all, not only to the Amish and other religious minorities who have gained favor over time, but also to newer dual minorities.

The doctrine of hybridity may not right what many consider to be the ultimate wrong fashioned by the revolutionary jurisprudence of *Smith II*. But it does take two so-called wrongs inflicted upon minorities and transforms them into a right of action against the government. Thus, where hybrid claims of religious and racial discrimination are concerned, two wrongs *do* make a right.