NOTE

THE BEST OF A BAD LOT: COMPROMISE AND HYBRID RELIGIOUS EXEMPTIONS

I. INTRODUCTION

The Free Exercise Clause of the Constitution has had a meandering history. Few have questioned that the clause prohibits the government from deliberately restricting religious beliefs as such[1] or from proscribing certain behaviors "only because of the religious belief that they display."[2] More contentious, however, has been the clause's interaction with laws of general applicability that, by their terms, happen to sweep in religiously motivated behaviors. For most of the nation's first two centuries, the Supreme Court upheld a variety of such laws against claims that they inhibited the free exercise of religion.[3] In 1963, however, the Warren Court reversed course and, in *Sherbert v. Verner*,[4] held that South Carolina could not deny unemployment benefits to a Seventh-Day Adventist who had been fired for being unavailable to work on Saturdays, her Sabbath.[5] *Sherbert* and the cases that followed[6] "created the potential for challenges by religious groups and individual believers to a wide range of laws that conflict with the tenets of their faiths, because such laws impose penalties either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct."[7]

In the decades following *Sherbert*, free exercise jurisprudence consisted largely of similar challenges,[8] but in 1990, the Court reversed course again and sharply restricted the scope of the clause's reach with respect to laws of general applicability. In *Employment Division v. Smith*,[9] the Court ruled that the clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) con-

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[1] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible . . . .").

[2] Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

[3] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411–12 (1990) (collecting cases).

[4] 374 U.S. 398 (1963).

[5] *See id.* at 410.

[6] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the state could not override an Amish family's religious objection to sending its children, who had finished the eighth grade, to public school).

[7] McConnell, *supra* note 3, at 1412.

[8] *Id.* at 1413.

[9] 494 U.S. 872 (1990).

duct that his religion prescribes (or proscribes).'"[10] In so doing, the Court declined to overrule the prior cases that had granted religious exemptions to general laws, instead attempting to distinguish them on the ground that they had involved a type of "hybrid situation" in which the free exercise right was combined with some other constitutional claim.[11]

This effort to distinguish the earlier free exercise cases has been criticized as flawed[12] and dishonest,[13] but regardless of its soundness, the lower federal courts remain in the unenviable position of attempting to decipher and apply it. Unsurprisingly, their efforts to do so have been neither straightforward nor consistent. The courts have broken into three major camps, each with a different approach to hybrid rights: some courts essentially ignore the hybrid rights discussion in *Smith*, dismissing it as dicta and treating *Smith* as having overruled the earlier cases; others pay lip service to hybrid rights by recognizing hybrid claims but requiring the companion claim to be "independently viable," which renders the free exercise claim redundant; and still others have developed a "colorable claim" standard, which requires some showing of a likelihood of success on the non–free exercise claim to trigger increased scrutiny. Each of these approaches represents an honest effort to draw a clear rule from the language of *Smith*, but unfortunately, it is impossible to adopt a broadly applicable approach to hybrid rights that does not compromise other important constitutional values.[14]

Because such a broad rule is impossible, this Note suggests cabining the hybrid rights doctrine to claims and fact patterns that very closely resemble those discussed by the *Smith* Court. This approach would allow the lower courts to respect their subordinate role in the judiciary by giving meaning to both *Smith*'s holding and its hybrid

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[10] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[11] *See id.* at 881–82. The Court also distinguished *Sherbert* and its progeny as having involved an existing mechanism for making individual exceptions, which the state could not constitutionally use to grant exemptions for secular but not religious reasons. *Id.* at 884.

[12] *See, e.g.*, Jonathan B. Hensley, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 120 (2000) (calling the doctrine "logically flawed and ultimately untenable"). *But see* John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741, 769 (2005) (arguing that the colorable claim approach makes the hybrid rights concept "workable").

[13] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) ("[T]he *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously.").

[14] That is, an approach that (i) treats the hybrid precedents as having continuing vitality, (ii) does not reduce the Free Exercise Clause to a formality, (iii) does not violate the principles of the Establishment and Equal Protection Clauses, and (iv) produces a broad predictive rule. *See infra* Part IV, pp. 1508–15.

rights language, while also preventing the hybrid rights doctrine from compromising the Establishment and Equal Protection Clauses in favor of the Free Exercise Clause. Part II lays out the Court's opinion in *Smith* and briefly notes the academic criticism and legislative responses it provoked. Part III discusses the various approaches adopted by the lower courts since *Smith* and their respective shortcomings. Part IV proposes a new alternative, and Part V briefly concludes.

II. THE PROBLEM: *EMPLOYMENT DIVISION V. SMITH*

A. The Case

In *Employment Division v. Smith*, the Supreme Court considered the constitutionality of Oregon's controlled substances law — which outlawed the use of peyote — as applied to members of the Native American Church, who ingested peyote for sacramental purposes.[15] The Court conceded that a law seeking "to ban such acts . . . only when they are engaged in for religious reasons, or only because of the religious belief that they display" would very likely violate the Free Exercise Clause.[16] Even so, the Court suggested that the *Smith* plaintiffs were seeking to "carry the meaning of 'prohibiting the free exercise [of religion]' one large step further" by claiming that prohibiting free exercise "includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[17]

The Court explained that cases in which exemptions to general laws *had* been granted, like *Cantwell v. Connecticut*[18] and *Wisconsin v. Yoder*,[19] had "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."[20] In contrast, the Court found that "[t]he present case does not present such a *hybrid* situation, but a free exercise claim unconnected with any communicative activity or parental right."[21] The Court likewise distinguished the seminal case of *Sherbert v. Verner* as having involved a unique context: because eligibility for unemployment compensation was based on

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

[16] *Id.* at 877.

[17] *Id.* at 878 (alteration in original).

[18] 310 U.S. 296 (1940) (invalidating a statute giving a government official discretion to grant or deny a license to solicit charitable contributions on the basis of a determination of whether the cause in question is religious).

[19] 406 U.S. 205 (1972).

[20] *Smith*, 494 U.S. at 881 (citations omitted).

[21] *Id.* at 882 (emphasis added).

a statutory "good cause" standard — which necessarily required a case-by-case "governmental assessment of the reasons for the relevant conduct"[22] — a "mechanism for individualized exemptions" was already in place in such cases.[23] Accordingly, the state could not then "refuse to extend that system to cases of 'religious hardship' without compelling reason."[24]

B. The Aftermath

Smith's holding that the Free Exercise Clause does not prevent neutral laws of general applicability from burdening religious exercise promptly fell under criticism from a variety of quarters,[25] and has even been described as "almost universally despised."[26] Congress responded by enacting the Religious Freedom Restoration Act of 1993[27] (RFRA), which expressly sought to turn back the clock on the Court's free exercise jurisprudence and reestablish *Sherbert*'s balancing test for religious exemptions to general laws.[28] A number of states followed suit by enacting so-called "mini-RFRAs."[29]

In particular, *Smith*'s attempt to distinguish *Sherbert*, *Yoder*, and the other free exercise precedents as individualized assessment or hybrid rights cases prompted harsh criticism from the legal academy. Professor Michael McConnell suggested that *Smith*'s hybrid cases discussion "appears to have one function only: to enable the Court to reach the conclusion it desired . . . without openly overruling any prior

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[22] *Id.* at 884.

[23] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)) (internal quotation mark omitted).

[24] *Id.* (quoting *Bowen*, 476 U.S. at 708). In two separate opinions, four Justices rejected the Court's effort to distinguish *Cantwell*, *Yoder*, and *Sherbert*. *See id.* at 891–907 (O'Connor, J., joined in part by Brennan, Blackmun, and Marshall, JJ., concurring in the judgment); *id.* at 907–21 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

[25] *See, e.g.*, McConnell, *supra* note 13, at 1116–19 (criticizing the *Smith* Court for failing to attempt even a superficial examination of the history of the Free Exercise Clause); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992) (arguing that *Smith* "entrenches patterns of de facto discrimination against minority religions"). *But see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (arguing that, despite the shortcomings of the opinion itself, the *Smith* Court reached the proper result in rejecting compelled exemptions to neutral general laws).

[26] Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 581 (2003).

[27] 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

[28] *Id.* § 2000bb. This legislation, in turn, led to the Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which invalidated RFRA as applied to the states on the ground that Congress could not overrule the Court's judgment of how much the First Amendment, via the Fourteenth Amendment, restricted state action. *Id.* at 516–36. RFRA, however, continues to apply to action by the federal government. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[29] Nicholas Nugent, Note, *Toward a RFRA That Works*, 61 VAND. L. REV. 1027, 1029 (2008).

decisions."[30] Professor Alan Brownstein asserted that the attempt to distinguish *Yoder* "fooled no one."[31] And Professor William Marshall wrote that the *Smith* opinion's "use of precedent borders on fiction" — in an article *defending* the case's holding.[32] Nevertheless, *Smith* was now the law, and litigants would soon attempt to employ its hybrid rights language.

III. THE MESS: EXISTING APPROACHES TO HYBRID RIGHTS

In the aftermath of *Smith*, the lower federal courts suddenly found themselves in the position of having to interpret and apply the hybrid rights doctrine. The courts have developed a variety of approaches in the two decades since *Smith*, each of them a somewhat different attempt to reconcile the irreconcilable by squaring *Smith* with the cases that came before it.[33] Four circuits have either not yet considered the question of hybrid rights or not clearly fallen into one of the camps discussed in this Part.[34]

A. Mere Words: Or, It Makes No Sense

Courts that fall into this camp essentially dismiss the hybrid rights discussion in *Smith* as unworkable dicta; this is by far the most straightforward approach currently employed. In *Kissinger v. Board*

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[30] McConnell, *supra* note 13, at 1124; *see also id.* at 1121 ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case.").

[31] Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 187–88 (2002).

[32] *See* Marshall, *supra* note 25, at 309.

[33] It should be noted that these categorizations involve some amount of interpretation on the part of the scholars who have described them. Even so, the first three categories discussed here, which were first laid out in Jonathan B. Hensley's *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, *supra* note 12, in 2000, appear to be widely accepted and have been employed elsewhere. *See, e.g.*, Tuttle, *supra* note 12, at 751–64. The fourth category is a more recent and tentative development. *See infra* section III.D, pp. 1507–08. This Part deals only with the line of cases distinguished by the *Smith* Court as hybrid cases — *Sherbert* and its "individualized assessment" progeny present different issues and are thus beyond the scope of this Note.

[34] Multiple district courts in the Fourth and Fifth Circuits have made various attempts to address hybrid claims, but it remains to be seen how the courts of appeals themselves will approach the issue. *See, e.g.*, Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681 (N.D. Tex. 2000); Hicks *ex rel.* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997); Ala. & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993). The Seventh Circuit has not clearly articulated its approach, but it has quoted approvingly from the Ninth Circuit's colorable claim language. *See* Civil Liberties for Urban Believers v. Chicago, 342 F.3d 752, 765 (7th Cir. 2003) (quoting Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999)). The Eighth Circuit has "recognized the existence of hybrid rights but has not defined the contours of the analysis." Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 246 n.22 (3d Cir. 2008) (citing Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 474 (8th Cir. 1991) (remanding to district court to evaluate hybrid claim)).

of Trustees of the Ohio State University,[35] the Sixth Circuit announced its intention, in essence, to ignore hybrid rights claims. The *Kissinger* court considered a claim by a veterinary student that her school had violated her free exercise rights by requiring her to operate on healthy animals in contravention of her religious beliefs.[36] In rejecting her argument that her free exercise claim warranted strict scrutiny because it was coupled with other alleged constitutional violations, the court did not mince words:

> [H]old[ing] that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights . . . is completely illogical; therefore . . . 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.[37]

In 2003, the Second Circuit adopted this same approach in *Leebaert v. Harrington*.[38] There, the parent of a middle school student alleged that the school had violated both his right to direct the education of his child and his free exercise rights by requiring his son to attend a health education class.[39] Citing *Kissinger*, the *Leebaert* court wrote: "We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."[40] Accordingly, the Second Circuit pledged to employ the rational basis standard when evaluating hybrid claims.[41]

More recently, the Third Circuit adopted this line of reasoning. In *Combs v. Homer-Center School District*,[42] a challenge by homeschooling parents to Pennsylvania's compulsory education law, the Third Circuit undertook a thorough survey of the various approaches taken by other circuits.[43] After discussing a number of cases and noting that "[t]he criterion applicable to a free exercise claim combined with a companion constitutional right was left undefined" in *Smith*,[44]

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[35] 5 F.3d 177 (6th Cir. 1993).

[36] *Id.* at 178–79.

[37] *Id.* at 180; *see also* Prater v. City of Burnside, 289 F.3d 417, 430 (6th Cir. 2002) ("[T]his court has rejected the 'assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.'" (quoting Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 240 F.3d 553, 561 (6th Cir. 2001))).

[38] 332 F.3d 134 (2d Cir. 2003).

[39] *Id.* at 135–38.

[40] *Id.* at 144. The court also specifically distinguished *Yoder*, finding that the plaintiff had not alleged a burden akin to the burden in that case. *Id.* at 144–45.

[41] *Id.* at 144; *see also* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) ("The allegation that a state action . . . infringes more than one . . . constitutional right[] does not warrant more heightened scrutiny than each claim would warrant when viewed separately.").

[42] 540 F.3d 231 (3d Cir. 2008).

[43] *See id.* at 244–47.

[44] *Id.* at 246.

the court announced: "Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."[45]

There is an appealing honesty to this approach. It reflects the extensive criticism of the hybrid discussion in *Smith* and avoids guessing at the Court's intentions when they cannot be divined from its opinions. Many law students — and perhaps judges — likely wish that more courts would dispense with opaque or inconsistent precedents in such a straightforward fashion. There is, however, a reason that most courts do not. To dismiss the hybrid rights discussion in *Smith* as dicta is to assume that *Smith* implicitly overruled *Yoder* and the other hybrid cases. However, as the Court itself has stated, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court[s] of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[46] Thus, for the circuit courts to assume that *Smith* overruled *Yoder* and *Cantwell* sub silentio is, by the Court's own command, overreaching.[47]

Indeed, *Smith* not only declined to overrule *Yoder* and its kin, but went further and explicitly affirmed their continued vitality. The Court's role as arbiter of complex doctrinal disputes necessarily involves a great deal of sometimes obscure line-drawing, and the Court must be able to articulate the principles it uses to draw those lines such that the lower courts can themselves decide borderline cases. Thus, allowing the lower courts to disregard the Supreme Court's efforts to distinguish the case before it from its prior decisions would impair the Court's ability to set precedent effectively. While the lower courts can question the consistency of the Supreme Court's opinions, the Court's constitutional position as *supreme* entitles it to command: "Do as I say, not as I do."[48]

B. Independent Viability

The second approach to *Smith*'s hybrid rights doctrine is understood to "require that the companion claim be independently viable be-

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[45] *Id.* at 247; *see also* McTernan v. City of York, 564 F.3d 636, 647 n.5 (3d Cir. 2009) ("We have neither applied nor expressly endorsed a hybrid rights theory, and will not do so today."). *Combs* also relied upon Justice Souter's concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which he criticized the hybrid rights doctrine as "ultimately untenable," *id.* at 567 (Souter, J., concurring). *See Combs*, 540 F.3d at 244 n.20.

[46] Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

[47] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999) ("*Cantwell* . . . and *Yoder* . . . remain on the books and are binding on lower courts. We are not at liberty to ignore them."), *rev'd en banc on other grounds*, 220 F.3d 1134 (9th Cir. 2000).

[48] *See* 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) ("The fact that the Court draws its boundaries illogically does not mean that its power to establish those boundaries is suspect . . . .").

fore the law in question will be reviewed [with] strict scrutiny, meaning that unless the companion claim merits strict scrutiny, the hybrid rights claim will not."[49] The First and D.C. Circuits have been thought to apply this standard,[50] but the First Circuit may now be best understood to apply a different approach, as discussed further in section III.D below, and the D.C. Circuit's designation as an independent viability court is probably tentative at best.

Commentators have understood the D.C. Circuit to require an independently viable companion claim on the basis of two cases. First, the court found the hybrid rights doctrine to apply in *EEOC v. Catholic University of America*.[51] There, the court considered a Title VII sex discrimination claim by a nun who was denied tenure at the university.[52] The court concluded that the suit was barred by Title VII's ministerial exception (a byproduct of the Free Exercise Clause), which it considered to have survived *Smith*, and further held that the EEOC's investigation of the case was an "excessive entanglement" in violation of the Establishment Clause.[53] Additionally, the court stated that even if it was wrong to conclude that the ministerial exception had survived *Smith*, the dual free exercise and establishment concerns presented by the case resulted in "the kind of 'hybrid situation' referred to in *Smith* that permits us to find a violation of the Free Exercise Clause."[54]

Conversely, the D.C. Circuit found that the hybrid rights doctrine did not apply in *Henderson v. Kennedy*.[55] There, the court denied a challenge to a regulation that banned sales of message-bearing t-shirts in certain sections of the National Mall, concluding that the regulation violated neither the Free Exercise nor the Free Speech Clause.[56] In doing so, the court also rejected a hybrid rights claim based on the combination of the free speech and free exercise claims, stating that "in law as in mathematics zero plus zero equals zero."[57]

The contrast between these cases has led observers to conclude that the D.C. Circuit requires an independently viable companion claim to

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[49] Tuttle, *supra* note 12, at 754.

[50] *See, e.g.*, *Thomas*, 165 F.3d at 703 ("The First and District of Columbia Circuits have suggested that *Smith* mandates the existence of an independently viable companion right in addition to free exercise."); Hensley, *supra* note 12, at 130 ("The First and D.C. Circuits have indicated that an independently viable constitutional claim will trigger the hybrid-rights exception to *Smith*.").

[51] 83 F.3d 455 (D.C. Cir. 1996).

[52] *Id.* at 457.

[53] *See id.* at 466–68. According to the exception, "the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes." *Id.* at 461.

[54] *Id.* at 467. This language has been read to require an independently viable claim. *See* Hensley, *supra* note 12, at 131; Tuttle, *supra* note 12, at 756.

[55] 253 F.3d 12 (D.C. Cir. 2001).

[56] *See id.* at 18–19.

[57] *Id.* at 19.

find a hybrid claim.[58] However, the brief hybrid discussion in *Catholic University of America* represents at most an alternate holding, and it combined a free exercise claim with an establishment claim — which was subject not to strict scrutiny, but rather to the Court's *Lemon* test.[59] Likewise, the free speech claim in *Henderson* was not subjected to strict scrutiny because it was fallacious.[60] Thus, in neither case was the D.C. Circuit actually presented with a free exercise claim coupled with a companion claim that independently warranted strict scrutiny.

To the extent that it is in fact employed, the independent viability approach represents the weakest attempt by the courts to give the hybrid rights language in *Smith* real meaning. As should be obvious, if the companion claim must itself warrant strict scrutiny for the free exercise claim to do so, the free exercise claim is "mere surplusage."[61] As the Tenth Circuit stated in rejecting such an approach:

> [I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary. If the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid-rights exception would add nothing to the case.[62]

Nor can independent viability be justified with reference to the Court's hybrid precedents: while the plaintiffs in *Cantwell* arguably had an independently viable free speech claim, the theory cannot account for *Yoder*, where the religious element was essential to the holding.[63] Such an approach thus pays mere lip service to the Supreme Court's hybrid rights discussion in *Smith*. Accordingly, it bears all of the negatives of the mere-dicta approach employed by the Second, Third, and Sixth Circuits, and adds nothing but confusion.

C. Colorable Claim

Under the third approach, "to assert a hybrid-rights claim, 'a free exercise plaintiff must make out a "colorable claim" that a companion right has been violated — that is, a "fair probability" or a "likelihood,"

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[58] *See* sources cited *supra* note 50.

[59] *See Catholic University of America*, 83 F.3d at 465–67 (1971) (applying the three-prong test for establishment of religion laid out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

[60] *See Henderson*, 253 F.3d at 18–19.

[61] Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1150 (9th Cir. 2000) (en banc) (Kleinfeld, J., dissenting).

[62] Axson-Flynn v. Johnson, 356 F.3d 1277, 1296–97 (10th Cir. 2004).

[63] *Compare* Cantwell v. Connecticut, 310 U.S. 296, 308–11 (1940) (seeming to apply the "clear and present danger" speech test), *with* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . .").

but not a certitude, of success on the merits.'"[64] The Tenth Circuit first planted the seed of this method in *Swanson v. Guthrie Independent School District No. 1-L*,[65] in which the court considered a challenge by home-schooling parents to the school district's policy prohibiting part-time attendance. The *Swanson* court wrote, "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 . . . ."[66] However, because the parents had shown no colorable claim, the court concluded that *Swanson* was "not a hybrid-rights case."[67]

The seed planted in *Swanson* sprouted in *Thomas v. Anchorage Equal Rights Commission*,[68] in which the Ninth Circuit evaluated a challenge by landlords to laws prohibiting them from discriminating among prospective tenants on the basis of marital status.[69] The court conducted a thorough survey of the existing attempts to apply the hybrid exemption and concluded that the Tenth Circuit's colorable claim test provided the proper, middle-ground approach.[70] In turn, it found that the Alaska laws in question "authorize[d] a 'physical invasion' of the landlords' property" sufficient to implicate the Fifth Amendment right against takings without compensation,[71] and that "the Fifth Amendment [thus] serve[d] to 'hybridize' the [plaintiffs'] Free Exercise Clause challenge."[72]

Thomas was subsequently overturned en banc for lack of ripeness,[73] but the Ninth Circuit reaffirmed *Thomas*'s reasoning in 1999 in *Miller v. Reed*.[74] In *Miller*, the California Department of Motor Vehicles denied the plaintiff a driver's license because he refused, as required by his faith, to provide his social security number.[75] In his suit, he claimed that the denial violated his "rights to interstate travel and free exercise of religion" and that the two rights together created a hy-

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[64] Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 707 (9th Cir. 1999), *rev'd en banc on other grounds*, 220 F.3d 1134 (9th Cir. 2000)).

[65] 135 F.3d 694 (10th Cir. 1998).

[66] *Id.* at 700.

[67] *Id.*

[68] 165 F.3d 692.

[69] *Id.* at 696. The landlords believed that cohabitation before marriage was sinful, and that "facilitating cohabitation in any way is tantamount to facilitating sin." *Id.*

[70] *See id.* at 704–05.

[71] *Id.* at 709.

[72] *Id.* The court likewise concluded that the plaintiffs had made a colorable free speech claim regarding their inquiries into potential tenants' marital statuses. *See id.* at 710–11.

[73] Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000) (en banc).

[74] 176 F.3d 1202 (9th Cir. 1999).

[75] *Id.* at 1204.

brid claim under *Smith*.[76] Although the court rejected his claim on the ground that his right to interstate travel had not been infringed, it reaffirmed the *Thomas* approach.[77] The Tenth Circuit also revisited the issue in *Axson-Flynn v. Johnson*[78] and likewise reaffirmed its adherence to the colorable claim approach.[79]

The primary appeal of the colorable claim approach is that it attempts to "strike[] a middle ground between the two extremes of painting hybrid-rights claims too generously and construing them too narrowly."[80] It thereby avoids making the hybrid rights exception into a nullity, either expressly or effectively. In this respect, it is clearly superior to the mere-dicta or independent viability standards employed by other courts. It is thus unsurprising that many commentators have endorsed this approach over the alternatives.[81] Unfortunately, however, it still suffers from serious flaws.

First, the colorable claim approach constitutes a significant departure from the traditional understanding of constitutional rights,[82] which the D.C. Circuit summed up succinctly in *Henderson*: "[I]n law

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[76] *Id.*

[77] *Id.* at 1206–07. A handful of other Ninth Circuit cases have since applied *Miller*'s colorable claim language as well. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004); Am. Family Ass'n v. City & County of S.F., 277 F.3d 1114 (9th Cir. 2002). Recently, however, there has been a hint of dissent within the Ninth Circuit regarding hybrid rights claims. In *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008), the court considered a number of claims made by students challenging their school's dress code. After concluding that the dress code did not impinge upon the plaintiffs' free speech or free exercise rights, the court stated the following in a footnote: "The 'hybrid rights' doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner. We decline to be the first." *Id.* at 440 n.45 (citations omitted).

[78] 356 F.3d 1277 (10th Cir. 2004).

[79] *See id.* at 1295 ("We find [the Ninth Circuit's] analogies helpful, and will only apply the hybrid-rights exception to *Smith* where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim."); *see also* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006) (citing *Swanson* and *Axson-Flynn* for the proposition that "a number of courts, including this circuit, [require] that a litigant . . . assert at least a 'colorable' claim to an independent constitutional right to survive summary judgment").

[80] *Axson-Flynn*, 356 F.3d at 1295.

[81] *See, e.g.*, Aden & Strang, *supra* note 26, at 600 ("The colorable claim standard, properly applied, appears to most closely approximate the design of *Smith*."); Tuttle, *supra* note 12, at 764–69 (arguing that the colorable claim standard strikes the best possible balance between too stringent and too lenient a standard of review for companion claims).

[82] *See* Brownstein, *supra* note 31, at 191 (arguing that the colorable claim approach's effect of combining two losing claims into a winning claim "violates basic constitutional intuitions about the nature of fundamental rights"). *But see* Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2221 (2005) (arguing that, in understanding *Smith*, "[i]nstead of viewing individual constitutional rights as completely set off from one another in individual boxes . . . it is more precise to think of the rights as interconnected spheres").

as in mathematics zero plus zero equals zero."[83] This blunt statement reflects the basic understanding that each constitutional right is a discrete binary — either it has been violated, or it has not. Any state action that does not reach the violation threshold of a given right is not actionable, no matter how distasteful or how closely it approaches the threshold of that or any other right. By contrast, the colorable claim approach allows litigants to combine two separate losing claims into a winning claim[84] — zero plus zero equals one. It stretches the bounds of plausibility to suggest that the Court intended to effect such a fundamental change by mere implication.

Second, even on its own terms, colorable claim's mechanism for combining claims is difficult to justify. Even if the *Smith* Court did intend to create a scheme in which two almost-successful claims could be combined into one successful one — say, one-half plus one-half equals one[85] — colorable claim does not measure the *magnitude* of the companion claim, but rather its *probability*; that is, a colorable claim court does not ask whether the companion claim equals one-half, but instead asks whether there is a "fair probability" that the companion claim equals one. As Professor Brownstein has explained, such language is used elsewhere in the law, but "almost always in terms of a threshold, temporal contingency"[86] where there is not enough time to develop the factual record. Under colorable claim, however, the apparent strength of the claim at the outset fixes the standard of review for the duration of the action. Thus, a claimant who can establish a "fair probability" of a successful companion claim on the basis of an incomplete record but whose claim would, after full development, reveal a relatively minor restriction of the companion right will establish a valid hybrid claim. However, a plaintiff who cannot initially establish a "fair probability" of success but who had in fact suffered a significant restriction would be unable to do so. There is no logical explanation for this effect, and the Court's hybrid precedents plainly examine the magnitude of the restriction in light of a fully developed record.[87]

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[83] *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001).

[84] While a colorable hybrid claim must still prevail on the merits, the dramatic difference between rational basis scrutiny and "fatal in fact" strict scrutiny means that, in many cases, the standard of review will decide the case. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[85] *See* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 858 (2001).

[86] Brownstein, *supra* note 31, at 189.

[87] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233–36 (1972) (emphasizing the extent of the burden imposed on the Amish plaintiffs by the mandatory schooling requirement, as revealed by a full record).

Third, and finally, colorable claim analysis treats similarly situated plaintiffs differently on the basis of their religious beliefs in violation of basic Establishment Clause and Equal Protection Clause principles.[88] In borderline cases, some religious plaintiffs will receive strict scrutiny of infringements upon their rights, while other religious plaintiffs and all secular plaintiffs will not.[89] The obvious counter to this argument is that the parties are treated differently because the latter do not have — or simply are not employing — free exercise rights, while the former do and are doing so.[90] This is no answer, though: after *Smith*, religious claimants do not have an *independent* free exercise right against a neutral law of general applicability.[91] Under colorable claim, the free exercise right serves to "bootstrap" the plaintiff's companion claim into a standard of review that it would not otherwise warrant.[92] As a result, adopting the colorable claim approach to hybrid rights represents a choice to exacerbate the underlying tension between the two Religion Clauses.[93] That tension may always exist[94] — and indeed, part of the difficulty here lies not with the colorable claim standard, but with the very concept of hybrid rights itself[95] — but colorable claim analysis nonetheless places the two Religion Clauses in direct conflict. A doctrinal approach that forces one fundamental con-

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[88] *Cf.* Brownstein, *supra* note 31, at 192 ("Hybrid rights analysis suggests that religious people should be treated preferentially with regard to the exercise of fundamental rights when their religious beliefs influence the way they exercise their rights.").

[89] *See id.* ("Viewpoint discrimination in favor of religious speech would be built into the very structure of the First Amendment."). There have been some hints that secular worldviews like atheism may be entitled to free exercise protection, *see, e.g.*, Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005) (holding that atheism qualified as a prison inmate's religion for First Amendment purposes and that the prison's refusal to allow him to form an atheist study group violated the Establishment Clause), but a plaintiff seeking to evade a general law because of the demands of such a creed would face a very heavy burden, both because worldviews like atheism define themselves in large part by the absence of "religion" as the word is traditionally understood, and because they rarely include affirmative demands and dogmas of the sort found in traditional organized religions.

[90] *Cf.* Lechliter, *supra* note 82, at 2221 (arguing that hybrid cases are best understood as free exercise cases in which the particular free exercise right at issue is strengthened by the implication of the incorporated companion claim, rather than as cases that combine two discrete claims).

[91] *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[92] *See* Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008).

[93] *Cf., e.g.*, Tilton v. Richardson, 403 U.S. 672, 677 (1971) ("Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause.").

[94] *See, e.g.*, Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 632 (1998) (describing the tension between the two clauses as "inherent").

[95] *See* Brownstein, *supra* note 31, at 192.

stitutional principle up against another in a zero-sum game cannot be favored.[96]

D. Close Resemblance

As noted above, scholars and courts have generally placed the First Circuit with the D.C. Circuit as an independent viability court.[97] This Note — with the admitted advantage of further evidence — diverges from that categorization to posit that the First Circuit's approach, while still unclear, turns primarily on the resemblance of the case at bar to the *Smith* Court's hybrid precedents, most notably *Yoder*.[98]

In the salaciously titled *Brown v. Hot, Sexy & Safer Productions, Inc.*,[99] the First Circuit considered a claim that compelling public school students to attend a sexually explicit AIDS-awareness assembly violated their parents' privacy, due process, and free exercise rights.[100] After the court rejected the privacy and due process claims, it dismissed the free exercise claim, stating that the claim was not "conjoined with an independently protected constitutional protection."[101] This language understandably gave rise to the impression that the court required independent viability. However, the *Brown* court also distinguished the plaintiffs' claim from that in *Yoder*, finding that "the plaintiffs do not allege that the one-time compulsory attendance at the Program threatened their entire way of life. Accordingly, the plaintiffs' free exercise claim for damages was properly dismissed."[102] At the time, the import of this language was unclear, but the court's next hybrid case shed some light on it.

The First Circuit returned to the question of hybrid rights in 2008 in *Parker v. Hurley*,[103] in which two sets of parents "assert[ed] that they must be given prior notice by [their children's] school and the opportunity to exempt their young children from exposure to books they find religiously repugnant."[104] The *Parker* court noted that:

> [While o]thers have interpreted this circuit's decision in *Brown* as . . . requiring an independently viable constitutional claim[,] *Brown* did not explicitly consider this debate, and the parental rights claim asserted

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96 *Cf. id.* (stating that a hybrid analysis that creates viewpoint discrimination in favor of religious speakers is "unacceptable").

97 *See* sources cited *supra* note 50.

98 *Cf.* Tuttle, *supra* note 12, at 755 (suggesting that Brown v. Hot, Sexy & Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995), could be read *either* as requiring independent viability *or* "as requiring a close analogy between the hybrid claim and the claim brought in *Yoder*").

99 68 F.3d 525.

100 *Id.* at 530.

101 *Id.* at 539.

102 *Id.*

103 514 F.3d 87 (1st Cir. 2008).

104 *Id.* at 90.

> in that case was found to be so weak that it was not a colorable claim, much less an independently viable one. Thus we do not read *Brown* as having settled this question or as firmly establishing that *Smith* created a *new* category of hybrid claims.[105]

Accordingly, the court announced that "[w]ithout entering the fray over the meaning and application of *Smith*'s 'hybrid situations' language," it intended to "approach the parents' claims as the Court did in *Yoder*," by "consider[ing] the two claims interdependently."[106] The court then described considerable differences between the Parkers and the Yoders, noting that, unlike the Yoders, the Parkers had not alleged a crushing burden to their very way of life and were not subject to criminal penalties.[107] On the basis of these differences from *Yoder*, the court concluded that the plaintiffs had not stated a valid free exercise claim.[108] Thus, it makes sense to read *Parker* as attempting to reserve for the First Circuit the right to develop a more complete approach to hybrid rights in the future; in combination with *Brown*, however, *Parker* also seems to suggest that successful hybrid claims will have to resemble very closely the claims in one of the cases mentioned in *Smith*.

Since the First Circuit has expressly disclaimed any specific understanding of *Smith*, it is impossible to undertake a full assessment of its approach. Even so, as is argued in section IV.B, an approach to hybrid rights that cabins the hybrid exception to cases that closely resemble the Supreme Court's hybrid precedents represents the best possible compromise. To the extent that the First Circuit has in fact adopted such an approach, this Note endorses it.

IV. THE COMPROMISE

A. Competing Principles

As should be clear from the discussion above, any attempt by the lower courts to interpret and apply *Smith*'s description of hybrid free exercise rights will necessarily involve compromise.[109] It is impossible to adopt an approach to hybrid rights claims that simultaneously: (1) obeys the Supreme Court's commands, both in *Smith*'s holding and

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[105] *Id.* at 98 n.9 (citations omitted).

[106] *Id.* at 98.

[107] *Id.* at 100.

[108] *Id.* at 107. The *Parker* plaintiffs then sought review by the Supreme Court, citing the circuit split described here, but their petition for certiorari was denied. *See* Petition for Writ of Certiorari, Parker v. Hurley, 129 S. Ct. 56 (2008) (No. 07-1368).

[109] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999) ("[N]one of the contending interpretations of *Smith*'s hybrid-rights passage is perfect. Each, unfortunately, entails certain logical and interpretive difficulties.").

its affirmation of the continued vitality of *Sherbert*, *Yoder*, and the other Warren Court precedents; (2) does not reduce the Free Exercise Clause itself to a formality; (3) respects the Establishment Clause's ban on privileging certain religious sects or religion generally; (4) conforms to the Equal Protection Clause's similar proscription of unequally distributed or protected rights; and (5) creates a broad rule that operates consistently across different types of cases and fact patterns.[110]

The relative urgency of these various principles is certainly arguable, but they are not all equally pressing. While one (broad predictive rules that operate consistently across cases and fact patterns) is a basic concept of sound jurisprudence,[111] the remaining four (the Supreme Court's binding authority, and the free exercise, equal protection, and establishment principles) flow directly from the Constitution, and the lower courts are thus obligated to give them primacy.

1. Article III Hierarchy. — The lower courts' status as subordinate to the Supreme Court is both a constitutional command and a necessary corollary to a functional multilevel judiciary. It is unnecessary to belabor the difficulties that would ensue if the lower courts could disregard appellate decisions they found problematic or illogical; suffice it to say they may not. Accordingly, they are obligated to treat *Sherbert* and the other free exercise precedents as binding and valid.[112] In turn, this obligation mandates a construction of the hybrid rights doctrine that does not, expressly or implicitly, ignore it. As discussed above, this fact plainly precludes both the mere-dicta and independent viability approaches currently employed by certain circuits. Conversely, the lower courts are also obligated to respect *Smith*'s holding itself, which precludes them from adopting a reading of the hybrid rights exception so broad that it swallows the rule.[113] While the colorable

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[110] It is important to note that these various principles did not operate in perfect harmony prior to *Smith*, either. The Free Exercise Clause, as explicated by the Supreme Court, had a clear meaning, but at the expense of other constitutional principles — some religious plaintiffs, like the Amish in *Yoder* or the Seventh Day Adventist in *Sherbert*, enjoyed greater protection of certain rights than other religious claimants or secular plaintiffs. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . ."). Even so, that particular compromise was plainly mandated by the Constitution itself as interpreted by the Court. In *Smith*, however, the Supreme Court sapped the Free Exercise Clause of the power to overcome these other constitutional values, and the lower courts now enjoy some flexibility in performing this balancing act.

[111] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Predictability . . . is a needful characteristic of any law worthy of the name.").

[112] *Cf. Parker*, 514 F.3d at 96 ("The Court in *Smith* did not say it overruled any prior free exercise cases.").

[113] *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so

claim standard is not so loose as to undermine *Smith* completely, it is broad enough to conflict with *Smith*'s rule.

2. Free Exercise Meaning. — Perhaps most obviously, the Free Exercise Clause itself must be given some meaning. While it could certainly be argued that *Smith* itself robbed the Free Exercise Clause of the meaning it previously possessed — and, conversely, that it still has meaning because it protects against deliberate restrictions of religious activity — for the purposes of the lower courts, the Free Exercise Clause as described by the Supreme Court must be given some meaning. This requirement likewise precludes the mere-dicta and independent viability standards, as they entirely ignore an important aspect of the clause's operation as described by the Court.[114]

3. The Establishment Clause Ban on Privileging Religion. — The Establishment Clause's proscription against providing stronger protections for the rights of religious persons (or members of certain religions) is likewise of paramount importance. "The Establishment Clause . . . prohibits government from . . . 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[115] There are few ways that government could more directly peg "standing in the political community" to religiosity or adherence to a particular creed than to grant to certain religious claimants more vigorous protection of the very same bundle of rights enjoyed by nonreligious claimants or adherents to other sects. While it may be true that this problem lies as much in the interstitial nature of hybrid rights themselves as it does in any particular application or interpretation of the doctrine,[116] it nevertheless counsels that the doctrine be applied narrowly, eschewing when possible any direct conflicts between the two Religion Clauses.

4. Equal Distribution and Protection of Rights. — Similarly, the principle that all citizens should enjoy the same fundamental rights and that those rights are all safeguarded with equal vigor is a bedrock value enshrined in the Equal Protection Clause of the Fourteenth Amendment: "There is an equality dimension to liberty rights. Part of the core idea of fundamental rights is that all citizens have an equal

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vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith* . . . .").

114 Indeed, because overt religious oppression is now widely understood to be unacceptable and unlawful, the Free Exercise Clause's effect on laws of general applicability is likely to make up the lion's share of the clause's operation, however the Court allows or limits it.

115 County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)); *see also* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

116 *See* Brownstein, *supra* note 31, at 192.

right to exercise them."[117] Thus, like the Establishment Clause, the Equal Protection Clause counsels that the hybrid rights doctrine be given a narrow scope such that it does not create distinct classes of citizens who enjoy different levels of protection against government infringement of their fundamental rights. In turn, both clauses militate against the adoption of the colorable claim standard, which necessarily privileges religious claimants more than is required by the Court's description in *Smith*.

5. Broad, Predictive Rules. — Statutory and constitutional doctrines that operate consistently across different types of claims and fact patterns are plainly advantageous in a legal system that seeks equality, efficiency, and predictability.[118] For this reason, among others, the Supreme Court's decisions are usually understood as promulgating broad rules: litigants must have some idea of what to expect when they bring their disputes before the courts, and the lower courts must be able to rely on authority when no factually identical precedents exist.[119]

Many of the problems with the approaches described above result not from an abrogation of this principle, but rather from a valiant effort to adhere to it. In adopting their various methods, the circuits have aimed to extrapolate from *Smith* broad rules that can be applied consistently in a variety of cases. As should now be clear, however, there is no feasible broad-rule approach to hybrid rights that does not contravene any of the other values above. Accordingly, against these weighty constitutional commands, the principle of predictive rules must give way.

B. Proposed Balance

In light of this clash of constitutional and jurisprudential values, this Note proposes that the lower courts cabin the hybrid rights exception to cases that very closely resemble the paradigmatic hybrid cases discussed in *Smith* — namely, *Yoder* and *Cantwell*. The precise degree of similarity that would be necessary to establish a successful hybrid claim would of course have to be refined by the courts in future case law; but as discussed below, some useful guidance can be found in the First Circuit's decisions in *Brown* and particularly *Parker*. Broadly, though, this resemblance would have to be sufficiently precise to preclude wide applicability, in order to stay true to *Smith*'s holding and

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[117] *Id.*

[118] *Cf.* Jeff Todd, *Undead Precedent: The Curse of a Holding "Limited to Its Facts,"* 40 TEX. TECH. L. REV. 67, 70–71 (2007) (describing predictability, equality, and efficiency as considerations militating in favor of adherence to precedent). *See generally* Scalia, *supra* note 111.

[119] *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (noting "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise").

avoid the difficulties discussed above, and would likewise have to be loose enough to make the hybrid exception a reality and not a formality. Thus, it would be going too far to say that *Yoder* and *Cantwell* are "limited to their facts" in the sense that they no longer have precedential value,[120] but it would be proper to view them as requiring a very close resemblance in the relevant facts. Such an understanding may not reflect the most natural reading of *Yoder* and *Cantwell* alone, but after *Smith*, it is the most coherent, and it does find support in the cases themselves.

As the First Circuit put it in *Parker*, "*Yoder* emphasized that its holding was essentially sui generis, as few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with *any* schooling system."[121] The *Yoder* Court wrote that "[f]ormal high school education beyond the eighth grade is contrary to Amish beliefs . . . [in part] because it takes [children] away from their community, physically and emotionally, during the crucial and formative adolescent period of life."[122] As a result, one expert testified, compulsory secondary schooling could "ultimately result in the *destruction of the Old Order Amish church community* as it exists in the United States."[123] The Court agreed, but emphasized that its holding should be understood as heavily dependent on the long and unique history of the Amish in the United States.[124]

Likewise, *Cantwell* can be read as uniquely fact-bound. In *Cantwell*, three Jehovah's Witnesses were arrested and convicted for peacefully proselytizing and soliciting donations on a city street in violation of a statute requiring a permit to solicit charitable or religious contributions.[125] The Supreme Court vacated their convictions, holding that the statute as applied to the defendants violated the First Amendment.[126] The Court also vacated a conviction of one of the Witnesses for breach of peace on the same grounds.[127] The *Cantwell* opinion plainly relied on both the Free Speech and Free Exercise Clauses, bol-

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120 *See* Todd, *supra* note 118, at 75–77 (noting that the phrase "limited to its facts" is sometimes used to restrict a case's precedential value, and sometimes used merely to distinguish a case on its facts).

121 Parker v. Hurley, 514 F.3d 87, 100 (1st Cir. 2008) (citing Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972)); *see also* Blackwelder v. Safnauer, 689 F. Supp 106, 135 (N.D.N.Y. 1988) (stating that "the holding in *Yoder* must be limited to its unique facts").

122 *Yoder*, 406 U.S. at 211.

123 *Id.* at 212 (emphasis added).

124 *Id.* at 235–36; *see also id.* at 233 ("[W]hen the interests of parenthood are combined with a free exercise claim *of the nature revealed by this record*, more than merely a 'reasonable relation to some purpose within the competency of the State' is required . . . ." (emphasis added)).

125 *See* Cantwell v. Connecticut, 310 U.S. 296, 301–03 (1940).

126 *Id.* at 303.

127 *See id.* at 307–10.

stering the *Smith* Court's reading of *Cantwell* as a hybrid case.[128] However, the Free Exercise Clause was not implicated merely because the speech in question was religious; the Court was particularly concerned that the permit statute granted to a state administrator the discretion to decide whether applicants' causes were actually religious.[129] The statute gave the state the power to restrict speech generally *and* to judge the validity of a religious message.

Under this construction of the hybrid precedents, successful claims would have to show a burden similar to that of the *Yoder* plaintiffs, going to the core of their way of life, or a direct assertion of government power to regulate religious speech akin to that in *Cantwell*.[130] This Note does not suggest that these readings of *Cantwell* and *Yoder* are natural, but rather that, in light of *Smith*'s holding and the difficulties in applying its hybrid language in any broad and prospective fashion, *Smith*'s discussion of these cases is best read as descriptive, rather than prescriptive.[131] There is no language in *Smith*'s hybrid discussion that requires the lower courts to extrapolate a rule of broad application therefrom. To the *Smith* Court, the reach of these cases had been misunderstood, and so the Court clarified it.[132] This approach is also not an unusual one for courts to take when dealing with precedents that are now disfavored but not explicitly overruled.[133]

It has been argued, however, that "[t]o explain that the hybrid rights [language in *Smith*] was not an exercise in rulemaking, but an exercise in descriptive legal history, is not helpful,"[134] especially in light of the fact that *Smith* was written by Justice Scalia, whose enthusiasm for reliable judicial rules is well known.[135] Justice Scalia, the argument goes, "presumably intended the hybrid rights doctrine to function as a predictive rule."[136] Certainly, there is sense to this idea: Justice Scalia and the other Justices surely intend their decisions to be read as

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[128] *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (citing *Cantwell* as a case involving "the Free Exercise Clause in conjunction with . . . freedom of speech").

[129] *See Cantwell*, 310 U.S. at 305 ("[T]he Act requires an application to the secretary of the public welfare council of the State; . . . he is empowered to determine whether the cause is a religious one.").

[130] In *Sherbert*-type individual assessment cases, the magnitude of burden necessary to establish a claim would be lower, in accord with the *Smith* Court's discussion of such cases. *See Smith*, 494 U.S. at 884.

[131] *Cf.* Parker v. Hurley, 514 F.3d 87, 97 (1st Cir. 2008) ("Observers debate whether . . . in discussing 'hybrid situations' the [*Smith*] Court was merely noting in descriptive terms that it was not overruling certain cases such as *Pierce* and *Yoder*.").

[132] *Cf.* Todd, *supra* note 118, at 73 ("Sometimes a case is not clearly worded, so the court will limit it to its facts to clarify the extent of the holding.").

[133] *See* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 384 (1987).

[134] Aden & Strang, *supra* note 26, at 605.

[135] *See, e.g.*, Scalia, *supra* note 111, at 1179 ("[I]n writing for the majority of the Court, I adopt a general rule, and say, 'This is the basis of our decision' . . . .").

[136] Aden & Strang, *supra* note 26, at 574.

laying down coherent principles. Yet this argument does not compel the conclusion that the *Smith* majority intended its hybrid discussion to "provide guidance to the courts and litigants"[137] in a broad range of future disputes. Indeed, given the tensions discussed above, any attempt to apply *Smith*'s hybrid language broadly would be inimical to the rule of consistent application. It seems that the predictive rule Justice Scalia intended to lay down was that of the *Smith* holding, and that the hybrid rights discussion was intended to circumvent those cases that contradicted it, not to announce another broad (and contrary) rule.[138] In fact, the rule laid down in *Smith*'s holding itself counsels caution — too generous a hybrid exemption would undermine the balance of religious and state interests struck in *Smith*.[139]

From this perspective, the circuit that has come the closest to properly applying the hybrid language in *Smith* is the First Circuit. While reserving a clear articulation of its approach for future cases,[140] the circuit has apparently rejected both hybrid claims to come before it for failing to resemble *Yoder* with sufficient precision.[141] The *Brown* court wrote that, in contrast to the *Yoder* plaintiffs, the *Brown* plaintiffs did "not allege that the one-time compulsory attendance at the [school assembly] Program threatened their entire way of life."[142] On that basis alone, the court concluded that the claims were easily distinguishable. Similarly, in *Parker*, the circuit announced its intention to "approach the parents' claims as the Court did in *Yoder*."[143] Observing that "[t]he heart of the *Yoder* opinion is a lengthy consideration of 'the interrelationship of belief with [the Amish] mode of life [and] the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization,'"[144] the court easily distinguished the case at bar:

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[137] *Id.* at 608. Steven Aden and Professor Lee Strang argue that the hybrid rights approach is best understood as laying down a broad rule that should be applied using the colorable claim standard. *See id.*

[138] This conclusion is consistent with the scholarly criticisms that *Smith* distinguished *Yoder* and *Sherbert* solely in order to avoid overruling them. *See supra* section II.B, pp. 1497–98.

[139] *Smith* plainly represents a conclusion by the Court that religious belief should not act as "a law unto itself," and that the legislature is the appropriate body to draw whatever exceptions are appropriate to accommodate religious belief. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[140] *See* Parker v. Hurley, 514 F.3d 87, 99 n.13 (1st Cir. 2008) ("As in *Brown*, we do not settle the question of what must be pled to raise a viable hybrid claim, as *Smith* uses the term.").

[141] *See id.* at 98 ("As for this circuit, *Brown* noted that *Yoder* survived *Smith*, but then explained that the facts in *Brown* were far from analogous to the unique facts of *Yoder*, and held that no hybrid claim was presented.").

[142] Brown v. Hot, Sexy & Safer Productions, Inc., 68 F.3d 525, 539 (1st Cir. 1995).

[143] *Parker*, 514 F.3d at 98.

[144] *Id.* at 99 (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).

> While plaintiffs do invoke *Yoder*'s language that the state is threatening their very "way of life," they use this language to refer to the centrality of these beliefs to their faith, in contrast to its use in *Yoder* to refer to a distinct community and life style. . . . Nor is there a criminal statute involved . . . . They retain options, unlike the parents in *Yoder*.[145]

Finally, the court noted that, relative to *Yoder*, few groups would be able to demonstrate a similarly fundamental conflict between public schooling and their way of life.[146]

The First Circuit thus seems to be on the right track. It remains to be seen exactly how precise an analogy to *Yoder* the circuit will require in future cases for a hybrid claim to be successful,[147] but the court does not seem inclined to find valid hybrid claims in situations that do not very closely resemble that presented by *Yoder*.

V. CONCLUSION

Whatever the reasoning behind the opinion in *Employment Division v. Smith*, that case's discussion of hybrid free exercise rights has forced the lower courts to shoulder the burden of deciphering and applying a fundamentally flawed doctrine. A number of approaches have developed, but each suffers from one or more flaws that will be inherent in any attempt to apply the language of *Smith*. A better, albeit still flawed, compromise is possible: by restricting the hybrid rights doctrine to cases involving precisely the same claims and substantially identical fact patterns as those discussed in *Smith*, the lower courts can respect their roles as subordinates to the Supreme Court while safeguarding the principles behind the Free Exercise Clause and its companion, the Establishment Clause. Until the Supreme Court chooses to revisit *Smith*, the lower courts would be best served by adopting this approach.

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145 *Id.* at 100.

146 *See id.*

147 The *Parker* court noted that one factor militating in favor of the plaintiffs was the relative youth of their children: the *Parker* children were in elementary school, whereas the *Yoder* children were high school–aged. *See Parker*, 514 F.3d at 100. This discussion may suggest that the court is willing to depart somewhat from *Yoder*'s precise facts, but given that the departure could be characterized as upward rather than downward from the bar *Yoder* sets, it is unclear the extent to which this is the case.