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DISSECTING THE HYBRID RIGHTS EXCEPTION: SHOULD IT BE EXPANDED OR REJECTED?

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I. INTRODUCTION

In the early 1960s, the Supreme Court of the United States adopted a high level of protection for religious liberty claims.[1] The Court applied a version of strict scrutiny when evaluating governmental laws or regulations that burdened an individual's free exercise of religion.[2] In 1990, the Supreme Court reversed decades of precedent and fundamentally changed the meaning and application of the Free Exercise Clause. In *Employment Division v. Smith*, the Court, in an opinion by Justice Antonin Scalia, determined that the Free Exercise Clause does not protect individuals from laws that do not target specific religious beliefs or practices.[3] However, Justice Scalia offered an exception for cases involving "hybrid rights."[4]

A "hybrid right" is one that involves both the Free Exercise Clause and another constitutional right.[5] In the twenty-three years since the *Smith* decision, state and federal courts have grappled with the meaning and application of the hybrid rights exception with no clarification from the Supreme Court. In the process, lower courts have developed at least three general approaches to hybrid rights—rejection, independent viability, and colorable claim.[6] In some cases, courts arguably have used a fourth approach called the "cabining" approach, which limits application of hybrid rights to cases closely resembling the cases distinguished by the Court in *Smith*.[7]

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1.*See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

2. *See generally Yoder*, 406 U.S. 205, *Sherbert*, 374 U.S. 398.

3. 494 U.S. 872, 878–79 (1990).

4. *See id.* at 880–81.

5. *Id.* at 881–882.

6. Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions,* 123 HARV. L. REV. 1494, 1495 (2010). .

7. *Id.*

Many legal commentators and courts believe the federal circuits have split on the issue of hybrid rights.[8] However, an examination of case law reveals that, regardless of the various approaches, the lower courts' analyses of hybrid rights claims sometimes differ in form, but rarely differ in substance. So, while many courts and legal commentators recognize at least three approaches to hybrid rights, this article contends there can only be one viable approach—rejection. This is so because, as Justice David Souter once opined, the hybrid rights exception is "untenable."[9] This article contends that religious liberty advocates should abandon the hybrid rights exception and seek protection elsewhere.

Two paths have emerged to provide greater protection for religious liberty. The first involves recasting free exercise claims as free speech claims. The second involves state and federal statutes that legislatively restore a strict scrutiny, pre-*Smith* approach. This article will argue that, of the two paths, free speech proves more promising.

Part II of this article discusses *Employment Division v. Smith,* and introduces the hybrid rights exception. It also reviews the backlash that followed the *Smith* decision and outlines the ways state and federal governments attempted to override it. Part III focuses on the failure of the hybrid rights exception. It summarizes the lower courts' responses and approaches to hybrid rights. Then, it illustrates each approach by analyzing specific hybrid rights cases. These cases support the contention that courts accepting a hybrid rights theory, in substance, look no different from courts that do not. Finally, Part IV discusses four main advantages to seeking refuge under the Free Speech Clause.

II. *EMPLOYMENT DIVISION V. SMITH*: THE HYBRID RIGHTS EXCEPTION

Understanding the hybrid rights exception requires an analysis of the Supreme Court's decision in *Employment Division v. Smith*. It also requires examining how the religious liberty community responded in full force to the *Smith* decision. Part II.A will discuss the *Smith* decision and the hybrids rights exception. Part II.B will discuss the backlash to the hybrid rights exception.

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8. *Id.*

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

A. The Hybrid Rights Exception

Justice Scalia created the hybrid rights exception in *Employment Division v. Smith*.[10] Alfred Smith and Galen Black worked as counselors for an Oregon-based private drug and alcohol rehabilitation center. When they ingested peyote as a part of a sacramental rite in the Native American Church., the rehabilitation organization fired them for "misconduct."[11] Because peyote use is illegal, the state's employment division found Mr. Smith and Mr. Black ineligible for unemployment benefits.[12]

The two men sued, arguing that the denial of benefits violated their free-exercise rights under the First Amendment to the Constitution of the United States.[13] The Supreme Court of the United States held that the Free Exercise Clause would not protect them, because individuals have an obligation to comply with neutral laws of general applicability regardless of the burden those laws place on their religious practices.[14] Thus, the Court ruled that Oregon did not have to grant a religious exemption in order to comply with the federal constitution.[15]

In reaching its decision, the Court had to contend with a line of precedent that granted exemptions when neutral, generally applicable laws interfered with religious practice.[16] For example, in three cases—*Cantwell v. Connecticut*,[17] *Murdock v. Pennsylvania,*[18] and *Follett v. McCormick*[19]—Jehovah's Witnesses faced sanctions for violating solicitation ordinances when they distributed religious materials door-to-door in residential neighborhoods. In each case, the Court held that the Free Exercise Clause of the First Amendment protected their activities.[20]

The *Smith* Court also distinguished *Pierce v. Society of Sisters*, a case involving an Oregon law prohibiting parents from sending their children to private schools.[21] In *Pierce*, a private religious school sued state officials, arguing that a law requiring that all children attend public school violated parental rights under the Due Process Clause.[22] The Court held that the law

10. 494 U.S. 872, 881(1990).
11. *Id.*
12. *Id.*
13. *Id.* at 876–77.
14. *Id.* at 879.
15. *Smith*, 494 U.S. at 879
16. *Id.* at 881.
17. Cantwell v. State of Connecticut, 310 U.S. 296, 301–02 (1940).
18. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 114–15 (1943).
19. Follett v. Town of McCormick, 321 U.S. 573, 574 (1944).
20. *Id.* at 578; *Murdock*, 319 U.S. at 114–15; *Cantwell*, 310 U.S. at 303. In *Murdock*, the Court also found a violation of free speech. *Murdock*, 319 U.S. at 114–15.
21. 268 U.S. 510, 532 (1925).
22. *Id.*

in question infringed on the right of parents to direct the religious upbringing and education of their children.[23]

Justice Scalia also had to contend with the formidable precedent of *Wisconsin v. Yoder*, a decision in which the Court ruled that Amish parents were entitled to a religious based exemption from a mandatory compulsory education law.[24] The parents sought an exemption because their religious faith required them to withdraw their children from school in the eighth grade.[25] The Court decided *Yoder* on the same grounds as *Pierce*, holding that the state needed to exempt Amish families from the law.[26]

The *Smith* Court noted that two other Jehovah's Witness cases—*West Virginia Board of Education v. Barnette* and *Wooley v. Maynard*—also involved free-exercise rights, though the Court decided them on free-speech grounds.[27] In *Barnette*, the Court reasoned that school officials could not suspend the children of Jehovah's Witnesses when they refused to salute the American flag.[28] The Barnettes taught their daughters saluting the flag was tantamount to worshipping a graven image, a practice forbidden by the Bible.[29] In *Wooley*, the Court held that the State of New Hampshire violated the Constitution by imposing criminal sanctions on Jehovah's Witnesses when they covered the motto "Live Free or Die" on their license plates.[30] The plaintiffs in *Wooley* contended that the motto contradicted their religious beliefs.[31] The Court held in both cases that the First Amendment prohibited the government from compelling speech.[32]

The Court distinguished these cases by explaining that, unlike *Smith*, these cases involved "hybrid rights," the Free Exercise Clause working in conjunction with other constitutional protections, such as freedom of speech, freedom of the press, or parental rights.[33] Mr. Smith and Mr. Black's case,

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23. *Id.* at 534–35. The Court stated, "[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children . . . ." *Id.*

24. 406 U.S. 205, 207 (1972).

25. *Id*. at 207–08.

26. *Id.* at 234. The Court states, "[T]he Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children." *Id.* at 233.

27. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882 (1990).

28. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

29. *Id.* at 629.

30. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

31. *Id.* at 706–707.

32. *Id.* at 714; *Barnette*, 319 U.S. at 642.

33. *Smith*, 494 U.S. at 882. Justice O'Connor stated in her concurring opinion, "The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions . . . but there is no denying that both cases expressly relied on the Free Exercise Clause . . . and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence." *Id*. at 896. So, one could argue the Court's legal reason-

the Court argued, did not "present such a hybrid situation," because their free exercise claim did not connect with any "communicative activity or parental right."[34] The Court broadened its definition of "hybrid rights" by suggesting that free exercise could also combine with other rights, such as freedom of association.[35] Thus, the Court distinguished a significant line of religious liberty cases and simultaneously created an exception to its new rule, known as the "hybrid rights" exception.[36] Critics charged that Scalia's "use of precedent borders on fiction."[37]

B. The Hybrid Rights Exception Backlash: Statutory Exemptions and Protection Under State Constitutions

The *Smith* decision was controversial and the backlash was severe.[38] Professor Garrett Epps explained that the case "sparked a nationwide outcry by religious groups across the political and theological spectrum, and spurred Congress to seek to overrule the decision not once but twice."[39] Congress responded by passing the Religious Freedom Restoration Act (RFRA) in 1993.[40] Contrary to the *Smith* rule, RFRA required the government to justify any law substantially burdening religious practice with a compelling interest.[41] A few years following RFRA's enactment, however,

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ing in this instance amounts to what at least one judge refers to as a "bit of interpretive jiggery-pokery." *See* King v. Burwell, 135 S.Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

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

35. *Id.*

36. The Court also had to contend with *Sherbert v. Verner*, 374 U.S. 398 (1963). In that case, the Court granted an exemption to an employee who likewise could not get unemployment benefits. *Id.* at 401–02. Her employer fired her because she would not work on the Sabbath. *Id.* at 399. Under the *Sherbert* test, the government may not burden religious practice without a compelling interest. *Id.* at 403. The majority stated in *Smith* that *Sherbert* (unlike *Smith*) involved an unemployment benefits regime with a system of individual exemptions. *Smith*, 494 U.S. at 884. Under those specific circumstances, the government could not refuse to grant a religious exemption (in addition to others) without a compelling reason. *Id.* Thus, the *Smith* Court distinguished *Sherbert*, thereby creating a second exception to the *Smith* rule—the "*Sherbert*" exception. *See* Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1046 (2000).

37. William P. Marshall, *Correspondence: Correspondence on Free Exercise Revisionism; In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991).

38. Ryan S. Rummage, Book Note, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1187 (2015).

39. GARRETT EPPS, THE STORY OF AL SMITH: THE FIRST AMENDMENT MEETS GRANDFATHER PEYOTE, CONSTITUTIONAL LAW STORIES 477, 477–78 (ed. Michael C. Dorf, New York, Thomson Reuters/Foundation Press, 2009).

40. Christopher Lund, *Religious Liberty After Gonzales: A Look at State RFRAS,* 55 S.D. L. REV. 466, 471 (2010).

41. *Id.* at 471–72.

the Supreme Court struck it down as applied to the states.[42] In response, Congress enacted a narrower law known as the Religious Land Use and Institutionalized Persons Act (RLUIPA).[43] Under RLUIPA, Congress reinstated the compelling interest test when a law substantially burdened religious practice, but only in the context of land use regulation and prisons.[44]

After *Smith*, ten state high courts examined free exercise claims under their state constitutions and, contrary to the *Smith* Court, chose to apply a heightened level of review.[45] Additionally, Alabama amended its constitution to restore the compelling interest test in free exercise cases.[46]

At the same time, states also began enacting their own RFRAs.[47] So far, twenty-one states have enacted some version of the original RFRA passed by Congress.[48] In doing so, lawmakers hoped state RFRAs would provide greater protection to religious litigants than the federal constitution.[49] However, many courts interpret state RFRAs in a manner unfavorable to religious claimants.[50] For example, under many state RFRAs, in order to obtain strict scrutiny review, a litigant must show that the law in question places a substantial burden on his or her free exercise right.[51] This "substantial burden" test has become a difficult hurdle to clear.[52] Consequently, RFRAs have morphed into "the dog that has not barked."[53] Because RFRAs can be weak protectors of religious liberty, some look to the hybrid rights exception

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42. City of Boerne v. Flores, 521 U.S. 507, 533–34 (1997); Lund, *supra* note 40, at 471–72.

43. Rummage, *supra* note 38, at 1188–89.

44. *Id.* at 1189. It is worth noting that litigants who have filed suit under RLUIPA have been met with inconsistent results. In the prison context, courts disagree on the level of deference given to prison officials. Case Comment, *Religious Land Use and Institutionalized Persons Act—Religious Liberty—Holt v. Hobbs*, 129 HARV. L. REV. 351, 358–59 (2015). In the land use context, courts have split on the definition of "substantial burden." Karla L. Chafee & Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437, 439 (2009).

45. Paul Benjamin Linton, *Religious Freedom and Defenses under State Constitutions,* 7 U. ST. THOMAS J. L. & PUB. POL'Y 103, 186 (2013) (listing Alaska, Indiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Washington, and Wisconsin).

46. *Id.* at 108.

47. Lund, *supra* note 40, at 474.

48. *See 2015 State Religious Freedom Restoration Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx (last visited August 7, 2016) (providing a list of the twenty-one states that have passed RFRAs as of September 3, 2015).

49. Lund, *supra* note 40, at 475–76.

50. *Id.* at 485.

51. *Id.* at 477.

52. *Id.* at 488; *see also* Mark Strasser, *Old Wine, Old Bottles, and Not Very New Corks: On State RFRAS and Free Exercise Jurisprudence*, 34 ST. LOUIS U. PUB. L. REV. 335, 359–60 (2015).

53. Lund, *supra* note 40, at 469.

for protection.[54] But, in a vast majority of cases, the hybrid rights exception has not delivered on its promise.[55]

III. THE FAILURE OF AND THE RESPONSE TO THE HYBRID RIGHTS EXCEPTION

The hybrid rights exception produced unanswered questions that lower courts struggled to answer. As such, courts applied the hybrid rights exception differently. Part III.A discusses the failure of the hybrid rights exception, and Part III.B discusses the four approaches courts generally use when applying the hybrid rights exception.

A. The Failure of the Hybrid Rights Exception

In *Smith*, the Supreme Court left many unanswered questions concerning its hybrid rights exception:

> (1) What types of companion claims can combine with a free exercise claim to form a hybrid?
>
> (2) How strong must the companion claim be?
>
> (3) If the court finds a hybrid right, should it apply strict scrutiny?[56]

Lower courts need broad, clearly articulated rules in order to create "equality, efficiency, and predictability."[57] At the same time, litigants need to know what to expect when they bring their claims.[58] Lower courts and litigants need answers. The *Smith* Court left them wanting.

Some legal commentators argue that the *Smith* Court never meant for the hybrid rights exception to be a substantive one—that it "was not intend-

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54. *See* Rummage, *supra* note 38, at 1188–89.

55. A thorough review of the case law on hybrid rights reveals only one successful hybrid rights claim at the appellate court level—a Supreme Court of Pennsylvania case. Shepp v. Shepp, 906 A.2d 1165 (Pa. 2006). In that case, a trial court forbade a father from speaking to his daughter about his religious beliefs concerning polygamy. *Id.* at 1168. The court found a free exercise/parental rights hybrid sufficiently similar to *Yoder* to warrant strict scrutiny. *Id.* at 1173.

56. *See, e.g.*, Benjamin I. Siminou, *Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid-Rights Exception in Douglas County v. Anaya*, 85 NEB. L. REV. 311, 317–18 (2006).

57. *The Best of a Bad Lot*, *supra* note 6, at 1511.

58. *Id.*

ed to be taken seriously."[59] But, as one federal district court judge lamented, "[T]he language of *Smith* remains," and a lower court must "give meaning to the seemingly impenetrable hybrid-rights exception by applying the law to the facts of cases before it."[60]

Consequently, some courts have attempted to piece together a broad principle that can be applied consistently in different cases.[61] However, "there is no feasible broad-rule approach to hybrid rights."[62] The most significant problem occurs when courts grapple with the strength of the companion claim.[63] To this, Justice Souter reasoned, if the exception requires the companion claim to be implicated, then the exception would "swallow the *Smith* rule," because the peyote-smoking ritual at issue in *Smith* implicated two companion rights—freedom of speech and freedom of association.[64] On the other hand, if the hybrid rights exception requires the litigant to show a violation of the companion right, then the free exercise claim becomes superfluous.[65]

B. The Response to the Hybrid Rights Exception: Four Approaches to Hybrid Rights

Most legal commentators have identified three main approaches to hybrid rights: (1) rejection; (2) independent viability; and (3) colorable claim.[66] One might also argue a fourth approach—"cabining."[67] As the federal circuit

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59. Bradley C. Johnson, Note, *By Its Fruits Ye Know: Axson-Flynn v. Johnson: More Rotted Fruit from Employment Division v. Smith*, 80 CHI.-KENT L. REV. 1287, 1310 (2005). Professor Michael McConnell believes the majority in *Smith* used hybrid rights "to reach the conclusion it desired . . . without openly overruling any prior decisions." *The Best of a Bad Lot*, supra note 6, at 1497–98.

60. Hicks v. Halifax Bd. of Educ., 93 F.Supp.2d 649, 660–61 (E.D.N.C. 1999).

61. *The Best of a Bad Lot*, *supra* note 6, at 1511.

62. *Id.*

63. Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). So far, only the Third Circuit has addressed a free exercise/freedom of association hybrid. In that case, the Salvation Army sought an exemption from a state statute regulating boarding houses. Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 185 (3d. Cir. 1990). The court noted that the right to freedom of association derived from the First Amendment and attached to either the expression of ideas (free speech) or the exercise of religion (free exercise). *Id.* at 199. The right to free speech, the court explained, had "different contours than the right to free exercise of religion." *Id.* The court then reasoned, "[w]e would not expect a derivative right to receive greater protection than the right from which it was derived." *Id.*

64. *City of Hialeah*, 508 U.S. at 567

65. *Id.*

66. *The Best of a Bad Lot*, *supra* note 6, at 1495.

67. *Id.* No court has used the "cabining" approach by name. At least one other commentator suggests a "genuine implication" approach. *See* Siminou, *supra* note 56, at 318. Under this approach, the hybrid must consist of one of three companion claims—free speech, paren-

courts of appeal split on the meaning and application of the hybrid rights exception, some courts have implored the Supreme Court for clarification.[68] But, the cases consistently reveal that, when a litigant brings a hybrid rights claim before any court (regardless of the named approach), and the law in question is neutral and generally applicable, the court will apply the same basic analysis. Thus, one wonders if lower courts truly need the clarification they seek.

For parental rights/free exercise hybrids, for example, the level of scrutiny depends entirely on its similarity to *Yoder*. If the case closely resembles *Yoder*, the court will apply a heightened level of review. If not, the court will apply *Smith*'s general rule to the free exercise claim. The foregoing cases suggest this is true of courts that accept and courts that reject hybrid rights.

For any other free exercise hybrid, most courts analyze the companion right separately, applying relevant jurisprudence and tests. The level of scrutiny hinges entirely on the level of scrutiny required by the companion claim. If the court finds a violation of the companion right, it usually grounds its holding there.[69] If not, the court applies *Smith*'s general rule to the free exercise claim. Again, the case law suggests this is true of courts that accept a hybrid rights theory and of those that do not. The following subsections discuss the four possible approaches to hybrid rights and the circuits that apply such approaches, beginning with the rejection approach.

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tal rights, or freedom of association. *Id.* at 324. In addition, the challenged law must "genuinely implicate" the asserted companion right. *Id.* Siminou argues that some district courts use this approach, focusing on the court's hybrid rights analysis in *Hicks v. The Halifax Bd. of Educ*. *Id.* at 325. This article contends the *Hicks* court's analysis fits a "cabining" approach, as discussed later. Like the "cabining" approach, no court has used the "genuine implication" approach by name. *Id.* at 326.

68. For example, the Ninth Circuit stated in an en banc decision, "*Smith* itself is fraught with complexity both in doctrine and in practice . . . [p]erhaps the Supreme Court will have an opportunity before this issue arises again in this circuit to refine its approach in this area . . . ." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1147–48 (9th Cir. 2000). The Sixth Circuit stated, "therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* . . . ." Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993).

69. And, even if it does not ground its holding in the companion claim, it certainly could. The free exercise analysis is often superfluous.

1. The Rejection Approach: Some Courts Reject the Hybrid Rights Exception

One approach to the hybrid rights exception is to reject it completely. The Sixth, Second, and Third Circuits have adopted this approach.[70] These circuits apply *Smith*'s general rule to the free exercise claim, regardless of any other rights asserted. However, should the facts of the case closely resemble *Yoder*, these courts have indicated they would apply a heightened level of review. The following subsections discuss key decisions rejecting the hybrid rights exception in each circuit.

a. The Sixth Circuit: *Kissinger v. Board of Trustees of Ohio State University*

While a student at the College of Veterinary Medicine at Ohio State University, Jennifer Kissinger wanted to opt out of a required course in veterinary surgery, because healthy animals would be killed as part of the class.[71] Ms. Kissinger claimed this activity would violate her religious beliefs.[72] When the university informed her she would need the course to graduate, Ms. Kissinger sued, claiming a violation of freedom of religion, freedom of speech, freedom of association, equal protection, and due process.[73] She contended the hybrid rights exception applied to her claim.[74]

The Sixth Circuit characterized the hybrid rights exception as "illogical," explaining it made no sense that a state regulation would violate the Free Exercise Clause only if it implicated other constitutional rights.[75] The court applied *Smith*'s general rule to Kissinger's claim, finding the school's curriculum was generally applicable and neutral, with no system of particularized exemptions.[76] Therefore, the school did not violate Ms. Kissinger's free exercise right when it refused to grant her an exemption.[77] The court also distinguished Ms. Kissinger's claim from *Yoder* (though her claim did not involve parental rights) noting that, unlike the Amish families in *Yoder*,

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70. The United States Court of Appeals for the Eleventh Circuit has yet to address the hybrid rights exception, but a district court in the Eleventh Circuit rejected it. *See* Warner v. City of Boca Raton, 64 F.Supp.2d 1272, 1288, n.12 (S.D. Fla. 1999).

71. Kissinger v. Bd. of Tr. of Ohio State Univ., 5 F.3d 177, 178 (6th Cir. 1993).

72. *Id.*

73. *Id.* at 179. The parties reached a settlement, but the district court refused to award Ms. Kissinger any attorney's fees. *Id.* at 178. Thus, Ms. Kissinger appealed. *Id.*

74. *Id.* at 180.

75. *Id.*

76. *Id.* at 179.

77. *Kissinger*, 5 F.3d. at 178. The court would not award Ms. Kissinger any attorney's fees. *Id.*

the government did not compel Ms. Kissinger to attend veterinary school.[78] She willingly enrolled knowing the school would require her to take the surgery course.[79]

b. The Second Circuit: *Leebaert v. Harrington*

In *Leebaert v. Harrington,* the Second Circuit also declined to recognize the hybrid rights exception.[80] Mr. Leebaert argued that the government infringed on his constitutional right to direct the upbringing and education of his son, Corky, by requiring that Corky attend a health education class.[81] He claimed the program ran counter to his religious beliefs about sex.[82]

Mr. Leebaert contended that the government's action in this case warranted strict scrutiny because his claim (1) consisted of a parental rights/free exercise hybrid; and (2) closely resembled *Yoder*.[83] Though the court declined to recognize the hybrid rights exception, it applied *Yoder* to Leebaert's claim, acknowledging that *Yoder* required a heightened level of review.[84] However, unlike the Amish parents in *Yoder*, the government in Leebaert's case did not threaten his "entire way of life" by requiring Corky's participation in a health education class.[85] Thus, Leebaert's claim did not receive heightened scrutiny.[86]

c. The Third Circuit: *McTernan v. City of York*

Mr. McTernan stood in an alleyway at the back entrance of a Planned Parenthood, distributing pro-life literature and talking to potential patrons and staff.[87] A police officer restricted access to the back entrance and threatened to arrest Mr. McTernan if he saw him lingering there.[88] Mr. McTernan sued, claiming the officer violated his First Amendment freedoms of speech,

78. *Id.* at 180–81.
79. *Id.*
80. 332 F.3d 134, 144 (2d Cir. 2003).
81. *Id.* at 137.
82. *Id.*
83. *Id.* at 139. Leebaert also argued a parent's right to direct the education of his child is "fundamental" under *Troxel v. Granville,* 530 U.S. 57 (2000). *Id.* But, the court held this parental right does not include the right to exempt one's child from public school requirements. *Id.* at 141.
84. *Id.* at 144.
85. *Id.*
86. *Leebaert*, 332 F.3d at 144.
87. McTernan v. City of York*,* Pa., 564 F.3d 636, 641 (3d Cir. 2009).
88. *Id.* at 643.

association, and religion.[89] Mr. McTernan argued that the court should apply strict scrutiny to his free exercise claim because it fit the hybrid rights exception.[90]

The United States Court of Appeals for the Third Circuit also rejected the hybrid rights exception.[91] Instead, it applied *Smith*'s general rule to the free exercise claim, and determined that, though the restriction was neutral, a jury would need to decide if the officer applied the restriction in a general manner.[92] If so, the Free Exercise Clause would not protect Mr. McTernan's activities.[93]

As to Mr. McTernan's free speech claim, the court held that the officer's action was content neutral, which meant that the court would uphold the restriction if it served a significant government interest and was narrowly tailored to serve that interest (intermediate scrutiny).[94] Hence, if a jury determined that the restriction was neutral and generally applicable under the Free Exercise Clause, it would apply the level of review dictated by the free speech claim.

2. The Independent Viability Approach: Some Courts Permit a Hybrid Rights Exception, as Long as a Litigant Proves a Violation

Another approach to the hybrid rights exception is to focus attention on the other constitutional claim. The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") and the Supreme Court of New Mexico have adopted this method—called the independent viability approach.[95] Under this approach, the free exercise claim could conceivably connect with any constitutional right to form a hybrid.[96] At the same time, these courts require the plaintiff to prove that the government has violated the companion right.[97] The free exercise claim warrants strict scrutiny only if the companion claim does.[98] So, while these courts recognize a hybrid

89. *Id.* at 644. The court noted that, though McTernan referenced freedom of association, he did not argue it in his brief. *Id.* at 644, n.3. The court subsumed this claim into its free speech analysis. *Id.*

90. *Id.* at 647, n.5.

91. *Id.*

92. *Id.* at 649.

93. *McTernan*, 564 F.3d at 649.

94. *Id.* at 652–53.

95. *The Best of a Bad Lot*, *supra* note 6, at 1500–01. This case comment discusses the D.C. Circuit's approach, but does not discuss the Supreme Court of New Mexico's approach.

96. For example, the D.C. Circuit found a Free Exercise/Establishment Clause hybrid in *E.E.O.C. v. Catholic Univ. of Am.,* 83 F.3d 455, 467 (D.C. Cir. 1996).

97. Rummage, *supra* note 36, at 1193.

98. *Id.* at 1194.

rights theory, they approach their cases no differently than the courts that reject it.[99]

The Supreme Court of New Mexico recently decided a case illustrating the independent viability approach as applied to a free exercise/free speech hybrid.[100] The D.C. Circuit, on the other hand, applied the approach to a Free Exercise/Establishment Clause hybrid.[101] In both cases, however, the hybrid rights analysis did little to distinguish either court from the Sixth, Second, or Third Circuits. The following sections discuss the key decisions in the circuits adopting the independent viability approach.

a. The Supreme Court of New Mexico: *Elane Photography v. Willock*

The New Mexico Human Rights Act (NMHRA) prohibits businesses providing public accommodations from discriminating against people based on sexual orientation.[102] Elane Photography refused to photograph a commitment ceremony between two women.[103] It claimed the act, as applied, violated its First Amendment free speech and free exercise rights.[104] Further, because Elane Photography raised both a free exercise and a compelled speech claim, it argued hybrid rights.[105]

First, Elane Photography contended the NMHRA impermissibly compelled it to engage in expression that sent a positive message about same-sex marriage.[106] The Supreme Court of New Mexico reasoned that the NMHRA did not require Elane Photography to recite or display any message.[107] It did not regulate the content of the photographs.[108] Nor did it even require Elane Photography to take photographs.[109] The NMHRA merely stated that, if a business chooses to operate as a public accommodation, it cannot discriminate against people based on sexual orientation.[110]

Elane Photography also argued that, by compelling it to photograph same-sex weddings, observers would view it as approving same-sex marriage.[111] The court disagreed, asserting that most observers do not assume a

99. *Id.*
100. Elane Photography v. Willock, 309 P.3d 53 (N.M. 2013).
101. *Catholic Univ. of Am.*, 83 F.3d 455.
102. *Elane Photography*, 309 P.3d at 58.
103. *Id.* at 59.
104. *Id.*
105. *Id.* at 75.
106. *Id.* at 63.
107. *Id.* at 64.
108. *Elane Photography*, 309 P.3d at 64.
109. *Id.*
110. *Id.*
111. *Id.* at 68.

wedding photographer shares the couple's views on marriage, or any other subject for that matter.[112]

Thus, the court did not find the free speech claim to be "independently viable."[113] And, because the NMHRA was a neutral law of general applicability, the government did not violate Elane Photography's free exercise rights.[114] "Elane Photography," the court stated, "offers no analysis to explain why the two claims together should be greater than the sum of their parts."[115] So, like the Third Circuit's free exercise/free speech case, if the law is neutral and generally applicable, the court will apply a heightened level of review only if the free speech claim warrants it.

b. The D.C. Circuit: *E.E.O.C. v. Catholic University of America*

Sister Elizabeth McDonough and the Equal Employment Opportunity Commission sued Catholic University of America for engaging in sex discrimination, in violation of Title VII, when it denied her application for tenure in its Department of Canon Law.[116] The E.E.O.C. argued that, because Title VII was a neutral law of generally applicability, Catholic University would have to comply.[117]

The court dismissed the E.E.O.C.'s claim for two primary reasons: (1) Sister McDonough served as the functional equivalent of minister, which the Free Exercise Clause forbids judicial review because of the ministerial exception;[118] and (2) an intrusive investigation by the government into the tenure process for a theological appointment promoted excessive entanglement between government and religion in violation of the Establishment Clause.[119] The court then held, in the alternative, that the case presented a Free Exercise/Establishment Clause "hybrid situation," which would permit

112. *Id.* at 69.

113. *Id.* at 75.

114. *Elane Photography*, 309 P.3d at 75.

115. *Id.* at 75–76. The court also complained that Elane Photography did not properly brief the hybrid rights claim. *Id.* at 75. One legal commentator argues that the Supreme Court's failure to adequately address the hybrid rights exception creates a "trifurcated problem" for litigants: (1) Litigants fail to fully brief their claims; (2) some courts will not address or adjudicate hybrid claims without further guidance from the Supreme Court; and (3) qualified immunity often prevents litigants from obtaining damages in free exercise cases. Rummage, *supra* note 38, at 1197.

116. E.E.O.C. v. Catholic Univ. of Am., 83 F.3d at 457 (D.C. Cir. 1996).

117. *Id.* at 461–62.

118. The ministerial exception to the Free Exercise Clause exempts the selection and employment of clergy from Title VII and similar statutes. *Id.* Therefore, under the ministerial exception, courts will not decide employment discrimination suits by ministers against the religious institutions that employ them. *Id.*

119. *Id.* at 457.

the court to find a violation of the Free Exercise Clause, even if the court was wrong about the ministerial exception.[120]

Many legal commentators believe the D.C. Circuit took an independent viability approach because it required a violation of the companion claim (the Establishment Clause), before finding a free exercise hybrid[121] (though one could argue the court took no position because it applied the hybrid rights exception in an alternative holding).[122] Even without the Free Exercise Clause, however, the court found in favor of Catholic University, because the E.E.O.C. failed the *Lemon* test.[123] Thus, the hybrid rights analysis did little to distinguish the D.C. Circuit from the other analyses.[124]

3. The Colorable Claim Approach: Some Courts Permit a Hybrid Rights Exception Without Requiring a Litigant to Prove a Violation

In an attempt to avoid this problem, the Ninth and Tenth Circuits have developed the colorable claim approach.[125] Like the independent viability approach, under this approach, any constitutional right can combine with the free exercise claim to form a hybrid.[126] However, unlike the independent viability approach, the litigant does not have to prove the violation.[127] A colorable claim determination is similar to a "likelihood of success on the merits" analysis for preliminary injunctions.[128] The requisite strength of the

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120. *Id.* at 467.

121. *The Best of a Bad Lot*, *supra* note 6, at 1501.

122. *Id.* Subsequent cases reveal the D.C. Circuit has adopted an independent viability approach. *See* Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) ("The combination of two untenable claims equals a tenable one."); Mahoney v. District of Columbia, 662 F.Supp.2d 74, 95, n.12 (D.D.C. 2009) ("Plaintiffs may not, however, raise a 'hybrid claim,' because they do not have an independently viable claim under the Speech Clause.").

123. *Catholic Univ. of Am.*, 83 F.3d at 470; *see also The Best of a Bad Lot*, *supra* note 6, at 1501.

124. *Catholic Univ. of Am.*, 83 F.3d at 467; *see also The Best of a Bad Lot*, *supra* note 6, at 1502.

125. Rummage, *supra* note 38, at 1195. At least one case suggests the United States Court of Appeals for the Fifth Circuit is open to the colorable claim approach. Cornerstone Christian Sch. v. Univ. Interscholastic League, 563 F.3d 127, 136, n.8 (5th Cir. 2009). In *Cornerstone*, the plaintiffs did not ask the court to apply the hybrid rights exception, but did allege a violation of their free exercise and parental rights under *Yoder*. *Id.* After discussing the claim's dissimilarity to *Yoder*, the court explained it would not apply the hybrid rights exception, because the Plaintiffs did not present a "colorable claim" for a violation of either their free exercise or their due process rights. *Id.*

126. Rummage, *supra* note 38, at 1210.

127. *See id.* at 1195.

128. *See id.* at 1198–99; *see also* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 706 (9th Cir. 1999), *reh'g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999), and *on reh'g*, 220 F.3d 1134 (9th Cir. 2000).

companion claim ostensibly falls somewhere between the two extremes—it requires more than mere implication, but less than independent viability.[129]

Thus, if a litigant establishes a fair probability of success for the companion claim, and the plaintiff can couple that claim with a free exercise right, the court will apply strict scrutiny.[130] However, a litigant without a free exercise claim would need to prove a violation.[131] Because this kind of analysis favors religious claimants, it raises Equal Protection and Establishment Clause concerns.[132]

In practice, however, the colorable claim approach looks no different than the independent viability approach.[133] Though a colorable claim court says it is determining a companion claim's "likelihood of success on the merits," it actually analyzes the claim much like courts that require independent viability.[134] As one critic observed, "it is difficult for a court to analyze a constitutional claim only halfway," especially when it has all of the essential facts.[135] So, the colorable claim approach runs into the same problems as the independent viability approach in that the exception becomes superfluous to the analysis.[136] This analytical flaw appears most clearly in a recent Tenth Circuit case.[137]

a. The Tenth Circuit: *Axson-Flynn v. Johnson*

Christina Axson-Flynn enrolled in the University of Utah's Actor Training Program ("ATP").[138] Because Axson-Flynn is Mormon she refused to say "fuck" or "God damn" during classroom exercises.[139] Axson-Flynn wanted to substitute other words for the offensive ones, but a faculty member told her to "get over" it.[140] The faculty never ordered Axson-Flynn to leave the program, but she assumed they would eventually force her out.[141] Thus, Axson-Flynn filed a lawsuit, claiming the school violated her free

129. *Thomas*, 165 F.3d at 705.
130. *See The Best of a Bad Lot*, *supra* note 6, at 1506.
131. *See id*.
132. *Id.* at 1511.
133. Johnson, *supra* note 59, at 1312.
134. *Id*.
135. *Id.*
136. *See id.*
137. *See id.* at 1312–13.
138. Axson-Flynn v. Johnson, 356 F.3d 1277, 1280 (10th Cir. 2004).
139. *Id.*
140. *See id.*
141. *Id.*

speech and free exercise rights.[142] She contended her claim fit the hybrid rights exception.[143]

The United States Court of Appeals for the Tenth Circuit first examined her free speech claim.[144] Because the speech in question was school-sponsored speech, the court applied the *Hazelwood* test.[145] Under *Hazelwood*, the school's restriction on speech or press only had to be "reasonably related to legitimate pedagogical concerns"—a form of rational basis review.[146] The school justified its restriction as a methodology for preparing students for careers in acting.[147]

The court found that, though this methodology was not necessary to the program's pedagogical goal, it was reasonably related to it.[148] However, Axson-Flynn countered that the proffered goal served as a pretext for an ulterior motive—religious discrimination.[149] The court decided to remand the free speech claim for further fact finding, because it could not determine, from the facts before it, if the claim had "a fair probability or likelihood, but not certitude, of success on the merits."[150]

Thus, even with a lower threshold requirement for the companion claim, the court required the government to fail rational basis review before it would apply strict scrutiny to the free exercise claim. So, the Tenth Circuit falls into the same trap as a court applying the independent viability approach, and the hybrid rights exception becomes pointless to the analysis. This analytical flaw is apparent even when the free exercise hybrid consists of companion rights other than free speech, as evidenced by a Ninth Circuit case, *Thomas v. Anchorage Equal Rights Commission*.

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142. *Id.*
143. *Id.* at 1294–95.
144. *Axson-Flynn*, 356 F.3d at 1283.
145. *Id.* at 1285.
146. *Id.* at 1289.
147. *Id.* at 1291.
148. *Id.* at 1292.
149. *Id.* at 1293.
150. *Axson-Flynn*, 356 F.3d at 1297. The court ultimately decided it would not remand the case on the hybrid rights issue, because the defendants were entitled to qualified immunity. *Id.* at 1297. When determining whether a defendant is entitled to qualified immunity, courts engage in a two-step inquiry: (1) did the defendant violate the plaintiff's constitutional rights; and (2) was the law clearly defined at the time of the violation? John C. Williams, *Qualifying Qualified Immunity,* 65 VAND. L. REV. 1295, 1298 (2012). In *Axson-Flynn,* the court held the hybrid rights exception was not clearly defined at the time of the defendants' actions. *Axson-Flynn*, 356 F.3d at 1301. A more recent Supreme Court case further exacerbates the problem that qualified immunity creates for hybrid rights litigants. In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court of the United States held that courts could answer the clarity question without reaching the constitutional issue. Williams, *Qualifying Qualified Immunity*, at 1299. Thus, the doctrine of qualified immunity may preclude further development of the hybrid rights exception, since courts no longer have to determine if the government violated a constitutional right. *Id.*

b. The Ninth Circuit: *Thomas v. Anchorage Equal Rights Commission*

Kevin Thomas and Joyce Baker owned residential rental properties in Anchorage, Alaska.[151] Both the state and city passed laws forbidding discrimination in rental housing based on marital status. Thomas and Baker, avowed Christians, believed it was a sin for unmarried couples to cohabitate, and refused to rent to them.[152] They sued the Anchorage Equal Rights Commission ("AERA"), claiming a violation of their free exercise rights.[153] The AERA argued that, because the law was neutral and generally applicable, the plaintiffs would have to comply with the law, regardless of the burden it placed on their free exercise right.[154] To the contrary, Thomas and Baker insisted the hybrid rights exception applied, because the law also violated their Fifth Amendment eminent domain and First Amendment free-speech rights.[155]

The court first applied the requisite three-factor test to determine if the law, in effect, operated as a regulatory taking in violation of the Fifth Amendment.[156] The court considered the economic impact of the regulation, the interference with investment-backed expectations, and the character of the action.[157] Citing Supreme Court precedent, the court concluded that, though the law had no economic impact on the plaintiffs, it sufficiently interfered with their dominion and possession to qualify as a regulatory taking.[158] Therefore, the court held that the Fifth Amendment claim was "colorable."[159]

The court then addressed the free speech allegation.[160] The plaintiffs pointed to provisions in the law that forbade them from making "a written or oral inquiry or record" of the marital status of a prospective renter, or to "'represent to a person that real property is not available for inspection, sale, rental, or lease' on the basis of the lessee's marital status."[161] Applying relevant free speech jurisprudence, the court determined that the speech in ques-

151. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 696 (9th Cir. 1999), *reh'g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999), and *on reh'g*, 220 F.3d 1134 (9th Cir. 2000).

152. *Id.* at 696–97.

153. *Id.* at 697.

154. *Id.* at 702.

155. *Id.* The court overturned this decision, en banc. *See* Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137 (9th Cir. 2000).

156. *Thomas*, 165 F.3d. 692, 708.

157. *Id.*

158. *Id.* at 709.

159. *Id.*

160. *Id.*

161. *Id.* at 702.

tion was not commercial speech subject to intermediate scrutiny, but pure religious speech, subject to strict scrutiny.[162]

Because the court found both the Fifth Amendment and First Amendment free speech claims colorable (and thus likely to succeed), it applied strict scrutiny to the free exercise claim (though it could have reached the same result by applying strict scrutiny to the free speech claim without reference to the free exercise claim).[163] Applying strict scrutiny, the court determined that Alaska's interest in preventing marital status discrimination was not compelling, in large part because unmarried couples did not qualify as a "suspect class."[164] At the same time, the law placed a substantial burden on Thomas and Baker's free exercise rights.[165] Therefore, to comply with the Constitution, the AERA would need to grant Thomas and Baker an exemption from the law.[166]

Despite trying to find a middle ground between implication and independent viability, one could argue that the Ninth Circuit differs little from the other circuits. Though one might disagree with the court's conclusions concerning the strength of the Fifth and First Amendment claims, it fully adjudicated each one, applying the requisite jurisprudence and tests.[167] In addition, because the plaintiffs could have prevailed solely on the regulatory takings claim or the free speech claim, the plaintiffs did not need the hybrid rights exception.

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162. *Thomas*, 165 F.3d at 710.

163. *Id.* at 714.

164. *Id.*

165. *Id.*

166. *Id.*

167. The dissent argued that Thomas lacked standing on the Fifth Amendment claim, because the statute took effect well before he entered the residential rental market. *Id.* at 725. So, he knew the law would restrain his right to exclude. *Id.* In addition, the dissent argued the speech in question was commercial speech, subject to the *Central-Hudson* test. *Id.* at 726. It also took issue with the court's analysis of hybrid rights, and advocated an approach "consistent with principles of judicial restraint." *Id.* at 723. It suggested that a court should only consider the hybrid rights exception when confronted with a case paralleling one of the cases distinguished by *Smith*. *Id.* As previously noted, the Ninth Circuit subsequently reviewed this case en banc and held the claim was not justiciable. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d. 1134, 1137–38 (9th Cir. 2000). It also chose to take no position on the hybrid rights exception until the Supreme Court could clarify the issue. *Id.* at 1147–48. Despite this decision, courts in the Ninth Circuit continue to apply the colorable claim approach. *See* Am. Family Ass'n, Inc. v. City and Cty. of S. F., 277 F.3d 1114 (9th Cir. 2002); Every Nation Campus Ministries v. Achtenberg, 597 F.Supp.2d 1075 (S.D. Cal. 2009); Jacobs v. Clark Cty. Sch. Dist., 373 F.Supp.2d 1162 (D. Nev. 2005);

4. The "Cabining" Approach: Some Courts Limit Hybrid Rights to Certain Claims

To avoid these issues, some commentators propose a "cabining" approach.[168] One might argue that, to some extent, the First Circuit follows this kind of approach.[169] Whereas the independent viability and colorable claim approaches set forth broad rules, "cabining" forges a very narrow path.[170] It restricts the hybrid rights doctrine to claims and fact patterns that quite closely resemble the cases distinguished in *Smith*, like *Wisconsin v. Yoder*.[171]

Most of the courts who have applied this approach would find a free exercise/parental right hybrid only in cases with facts similar to *Yoder*.[172] More specifically, courts will apply strict scrutiny only when litigants prove that the government has substantially interfered with their ability to pass their religious beliefs and practices to their children.[173]

In essence, this approach does not differ from an outright rejection. For, though the Second Circuit has refused to recognize the hybrid rights exception, it still applies *Yoder* when the facts of the case require it. The only difference between the First Circuit and the Second Circuit is that the First Circuit applies *Yoder* in the name of a free exercise/parental rights hybrid, and the Second Circuit applies *Yoder* without reference to hybrid rights, as shown by the following examples.

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168. *The Best of a Bad Lot*, *supra* note 6, at 1495.

169. *Id.* at 1507.

170. *Id.* at 1495.

171. *Id.*

172. *Id.* at 1513. While most cases implicate *Yoder*, the Fifth Circuit decided a hybrid rights case similar to *Barnette* and *Wooley.* In that case, potential juror, Robin Murray-O'Hair, an atheist, refused to take the required pre-voir dire oath because it included a reference to God. Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1209 (5th Cir. 1991). The judge jailed her for contempt. *Id.* She sued, alleging a violation of her free exercise right. *Id.* The court held that a God-free affirmation is a "religious statement." *Id.* Citing *Barnette* and *Wooley*, the court explained that the Constitution protected the right to refrain from speaking when to do so would be morally objectionable. *Id.* at 1215. Though these principles are "bottomed on the First Amendment's Free Speech Clause," they "developed in response to religiously-motivated objections to coerced speech." *Id.* Because *Smith* reaffirmed "[that the] government may not compel affirmation of religious belief," the Free Exercise Clause protected Murray-O'Hair. *Id.* at 1216. Though the court granted declaratory relief, it also held that Judge Herman was immune from suit. *Id.* at 1211. The Fifth Circuit overturned this decision en banc, holding Murray-O'Hair lacked standing. *Id.* at 1284.

173. *The Best of a Bad Lot*, *supra* note 6, at 1500–01.

a. First Circuit: *Brown v. Hot, Sexy and Safer Productions* and *Parker v. Hurley*

For a number of years, commentators put the First Circuit in the independent viability camp, primarily due to the court's analysis of hybrid rights in *Brown v. Hot, Sexy and Safer Productions*.[174] In *Brown*, the fifteen-year-old plaintiffs attended a required program on AIDS awareness, where the leader of the program subjected them to "sexually explicit monologues" and "sexually suggestive skits."[175] The parents and children sued, asserting a parental rights/free exercise hybrid.[176] After separately analyzing the parental rights contention, the court rejected the hybrid rights claim for two reasons: first, the free exercise right did not conjoin with an "independently protected" constitutional right; and second, unlike *Yoder*, a one-time compulsory attendance at an assembly did not "threaten their entire way of life."[177] Thereafter, commentators assumed the First Circuit would take an independent viability approach, because it required the companion right to be "independently protected."[178]

However, the First Circuit disputed that categorization in *Parker v. Hurley,* another parental rights/free exercise case.[179] In *Parker*, two parents sued a Massachusetts school district, because teachers subjected their children to books depicting same-sex couples in a positive manner.[180] This offended their religious beliefs about homosexuality.[181] The First Circuit seemed to reserve the right to develop its approach to hybrid rights more fully.[182] At the same time, it suggested a successful hybrid rights claim would have to resemble one of the cases distinguished in *Smith*, particularly *Yoder*.[183] The court held that the burden on the parents' free exercise rights in *Parker* did not rise to the level of that in *Yoder*.[184]

174. 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).
175. *Id*. at 529.
176. *Id.* at 539.
177. *Id.*
178. *The Best of a Bad Lot*, *supra* note 6, at 1507.
179. Parker v. Hurley, 514 F.3d 87, 98, n.9 (1st Cir. 2008); *The Best of a Bad Lot*, *supra* note 6, at 1507.
180. *Parker*, 514 F.3d at 90.
181. *Id.*
182. *Id.* at 99; *see also*, *The Best of a Bad Lot*, *supra* note 6, at 1508.
183. *Parker*, 514 F.3d at 99.
184. *Id.*

b. The United States District Court for the Eastern District of North Carolina: *Hicks v. The Halifax Board of Education*

Hicks v. The Halifax Board of Education, a case decided by a district court in the Eastern District of North Carolina, offers an example of a more developed "cabining" approach.[185] In *Hicks*, elementary school officials suspended Aaron Ganues because he would not comply with the school's uniform policy.[186] His great-grandmother (and legal guardian) believed that, by wearing the school uniform, Aaron would be showing an allegiance to the Antichrist, a being who required conformity.[187] The school district filed a motion for summary judgment, arguing that under *Smith*, the plaintiffs had to comply with the uniform policy, because it was a neutral, generally applicable rule.[188] To the contrary, Ms. Hicks argued that her claim warranted strict scrutiny because it consisted of a parental rights/free exercise hybrid.[189] The court agreed with Ms. Hicks.[190]

The "'hybrid' path of parental religious freedom left narrowly open by [*Smith*]," the court contended, required that the "character of the interference" closely resemble that in *Yoder* and *Pierce*.[191] The court acknowledged that Ms. Hicks had the constitutional right to direct her child's upbringing in a manner consistent with her religious beliefs.[192] The court stated, "[a]t stake in this case is Hicks' ability to impress upon her great-grandson the truth and importance of her religious beliefs, specifically those beliefs regarding

185. 93 F.Supp.2d 649 (N.D.N.C. 1999). The United States Court of Appeals for the Eighth Circuit has not taken a clear approach to the hybrid rights exception, though it has acknowledged its validity. *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991). Two district courts in the Eighth Circuit, however, seem to apply a "cabining" approach. For example, in The United States District Court for the Eastern District of Arkansas, a plaintiff objected to the administration of the Hepatitis B vaccine to her daughter for religious reasons. Boone v. Boozman*,* 217 F.Supp.2d 938, 942 (E.D. Ark. 2002). The plaintiff did not qualify for the religious exemption under the statute, because she was not a member of a recognized religion with tenets against vaccination. *Id.* at 943. The court held that her claim did not meet the hybrid rights exception, because it did not fit *Pierce* or *Yoder*. *Id.* at 955. Likewise, in *Spiering v. Heineman,* Scientologists wanted to keep the hospital from testing their newborn for metabolic disorders, because it would involve a needle prick. 448 F.Supp.2d 1129, 1132 (D. Neb. 2006). Their religion required them to insulate their child from pain for a period of seven days after birth. *Id.* They asserted a parental rights/free exercise hybrid. *Id.* at 1139. The court contended that the hybrid rights exception applied only in cases similar to *Yoder*. *Id.* Thus, it would not apply the exception to the plaintiffs' claim, because the claim had nothing to do with the education of their child. *Id.*

186. *Hicks*, 93 F. Supp.2d at 652.

187. *Id.* at 653.

188. *Id.* at 657.

189. *Id.* at 659.

190. *See id.* at 669.

191. *Id.* at 656.

192. *Hicks*, 93 F.Supp.2d at 659.

the preparation for salvation."[193] The court held Ms. Hick's case closely resembled *Yoder*.[194] As a result, the court applied strict scrutiny to the school district's policy.[195]

The analysis in *Parker* and *Hicks* is virtually identical to the Second Circuit's analysis in *Leebaert.* All three courts applied *Yoder* to free exercise/parental rights cases in lieu of *Smith*'s general rule. All three courts required the character of the free exercise/parental rights claim to parallel that in *Yoder*. The only difference is that one court (the Second Circuit) rejected hybrid rights and the other two did not.

Obviously, the lower courts have struggled to apply the hybrid rights exception. That explains the various approaches the courts have adopted. Part IV explains another alternative in lieu of hybrid rights.

IV. FREE EXERCISE AS FREE SPEECH: ADVANTAGES TO SEEKING REFUGE UNDER THE FREE SPEECH CLAUSE IN LIEU OF A HYBRID RIGHTS EXCEPTION

Religious claimants seem to assert the free exercise/free speech hybrid as often as they assert the free exercise/parental rights hybrid. However, one could argue that the Free Speech Clause alone may offer sufficient protection to religious litigants. Although the Free Speech Clause was not designed intentionally to protect religious liberties, it has often done so.[196] Beginning in the 1940s, when the Supreme Court decided *Cantwell, Murdock*, and *Barnette*, for example, free speech and free exercise often worked hand-in-hand.[197] This likely is because the Court had not yet developed free exercise jurisprudence.[198] As a result, free exercise often "piggyback[ed] on the shoulders" of free speech.[199] In those, free speech/free exercise cases in the 1940s, the Court provided religious speech with the same protection as political speech.[200]

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193. *Id.*

194. *Id.*

195. *Id.* at 663. Despite the district court's analysis, the United States Court of Appeals for the Fourth Circuit has not taken a position on hybrid rights. *See* Workman v. Mingo Cty. Bd. of Educ., 419 Fed. Appx. 348, 353 (4th Cir. 2011) ("We observe that there is a circuit split over the validity of the 'hybrid-rights' exception . . . we do not need to decide this issue here . . . ."). Likewise, the United States Court of Appeals for the Seventh Circuit has no clear theory on hybrid rights. In its only case addressing the exception, the court stopped short of advocating any one approach, because it found the companion claims to be "utterly meritless." Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 765 (7th Cir. 2003).

196. Mark W. Cordes, *Religion as Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty,* 38 SW. L. REV. 235, 235 (2008).

197. *Id.* at 238–39; Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J. L. & POL. 119, 125 (2003).

198. Brownstein, *supra* note 197, at 125.

199. *Id*. at 125–26.

200. Cordes, *supra* note 196, at 239.

In the next forty years, however, free speech and free exercise developed independently of one another.[201] Through its free speech jurisprudence, the Court created a complex doctrinal framework.[202] As that framework developed, an important principle emerged—the principle of content neutrality.[203] Under this principle, the Court subjected content-based laws, restrictions based on the content or subject matter of the speech, to strict scrutiny.[204]

In a series of important free-speech decisions, the Rehnquist Court held that providing equal access to religious speech in a public forum did not violate the Establishment Clause, because it did not have the primary effect of promoting religion.[205] During that time, the Court treated religion as one viewpoint among many.[206] As such, religion acted as a "co-equal participant" in American public life, and protection for religious speech became robust.[207]

In the late 1960s, the Supreme Court provided equally robust protections for free exercise.[208] The Free Exercise Clause came into its own in *Sherbert* in 1963, and then in *Yoder* in 1972.[209] The Court held in both cases that significant burdens on free exercise, even if incidental, triggered a heightened level of review.[210]

This changed several years later when the Rehnquist Court shifted to an emphasis on neutrality in *Employment Division v. Smith*.[211] While the principle of neutrality strengthened protections for religious speech under the Free Speech Clause, it significantly weakened protections for free exercise.[212] As a result, religious litigants began looking to the Free Speech Clause for protection.[213]

However, as Professor Thomas McCoy forcefully argued, the Court has not incorporated its more nuanced free speech jurisprudence into its free exercise jurisprudence.[214] He argues that employing the Supreme Court's more fully developed and nuanced standards for evaluating time, place, and

201. Brownstein, *supra* note 197, at 126.
202. *Id.*
203. *See* Cordes, *supra* note 196, at 240.
204. *Id.* at 240–41.
205. *Id.* at 246–47.
206. *Id.* at 246.
207. *Id.*
208. Brownstein, *supra* note 197, at 126.
209. *Id.*
210. Cordes, *supra* note 196, at 263.
211. *Id.* at 266–67.
212. *Id.*
213. *Id.* at 267.
214. *See* Thomas C. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1344 (1995).

manner restrictions on speech provides a better approach for addressing Free Exercise Clause claims than the "doctrinal extremes" of applying the *Sherbert* compelling interest test, or the rational or sub-rational basis test from *Smith*.[215] This approach should require courts to apply a version of intermediate scrutiny as opposed to strict scrutiny or rational basis.

The courts have not caught up to Professor McCoy's insights. Jurisprudence under the Free Exercise Clause is still underdeveloped. Thus, it makes sense for litigants to advance free speech claims rather than religious liberty claims. A key advantage to advancing a free speech claim is that there is a broader and more forceful neutrality principle in free speech jurisprudence than free exercise jurisprudence.[216] Under the Free Speech Clause, for example, the government must treat religious speech as equal to secular speech.[217] In *Smith*, however, the Court opened the door to exemptions that would benefit the religious litigant.[218] The resulting privilege may have left those statutes vulnerable to attack under the Establishment Clause.[219] Thus, one advantage that the shift from free exercise to free speech offers is that the neutrality principle set forth in free speech jurisprudence better comports with the Establishment Clause.

The shift also has other advantages. First, when a neutral law of general applicability interferes with the free exercise of religion, courts must apply the low level, rational basis inquiry under *Smith*.[220] However, when a content neutral law interferes with religious speech, the court will apply intermediate scrutiny.[221] Thus, if a religious litigant can clear the initial hurdle, requiring her to prove that her religious practice is a form of expression, she will receive a heightened level of review.[222]

Second, in order to gain protection under the Free Exercise Clause, a litigant must show that a law specifically targets religion.[223] The Supreme Court of the United States has found only one example of this.[224] Thus, free

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215. *Id.* at 1364–65.

216. *Id.*

217. Cordes, *supra* note 196, at 246.

218. Brownstein, *supra* note 197, at 168.

219. In *Warner v. City of Boca Raton,* for example, a federal district court observed that Florida's RFRA exempted religious, but not secular conduct from compliance with neutral laws of general applicability. 64 F.Supp.2d 1272, 1287 n.11 (S.D. Fla. 1999). Such an exemption, it contended, would prove unconstitutional under the Establishment Clause if challenged. *Id.*

220. Brownstein, *supra* note 197, at 151.

221. *Id.*

222. In many instances, this will not be difficult. "[T]here is enough of a speech dimension to many religious activities" to implicate the Free Speech Clause. *Id.* at 182.

223. *Id.* at 156.

224. Church of the Lukumi Babalu Aye. v. City of Hialeah, 508 U.S. 520, 547 (1993).

exercise jurisprudence only allows a facial challenge to the law.[225] To the contrary, a free speech claim, bolstered by the overbreadth doctrine, allows the religious claimant to mount an as-applied challenge to the law.[226] In other words, the free speech doctrine does not require proof of "religious gerrymander[ing]."[227] If the law incidentally restricts a substantial amount of protected expression, a court will invalidate the law.[228]

Third, unlike the Free Exercise Clause (along with state RFRAs and RLUIPA), the Free Speech Clause protects religious speech regardless of the speaker's sincerity or motives.[229] A religious claimant does not have to prove the practice in question is central to a sincerely held belief.[230] Both the "sincerity" test and the "substantial burden" test are absent from the free speech analysis.[231] This eliminates a significant obstacle.

V. CONCLUSION

Religious litigants cannot depend on the hybrid rights exception for protection. The hybrid rights exception under the Free Exercise Clause is unworkable because courts have not developed a clear definition and application of the exception that substantially differs from outright rejection. So, whether a court accepts a hybrid rights theory or not, it will treat the hybrid rights claim essentially the same: (1) if a free exercise/parental rights case resembles *Yoder*, the claimant will receive a heightened level of review; or (2) if the free exercise right is combined with any other constitutional protection, the companion claim will dictate the level of review.

In the twenty-three years since *Smith,* the Supreme Court has remained silent on hybrid rights. Perhaps the *Smith* Court never intended to create a substantive exception. It merely used hybrid rights to reach its desired result. And, one might argue that the exception still sits where the Supreme Court left it, despite efforts to develop it.

Though the hybrid rights exception is unworkable, litigants still have avenues to advance religious liberty claims. In many cases, individuals turn to statutory claims under RFRA, RLUIPA, or a state RFRA. The reality is that there is greater statutory protection for free exercise claims than under the Free Exercise Clause of the First Amendment. Furthermore, in many cases, the Free Speech Clause will provide necessary protection. Character-

225. Brownstein, *supra* note 197 at 156.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 148.
230. *Id* .
231. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 907 (1990) (O'Connor, J., concurring).

izing free exercise as free speech has three main advantages: (1) the neutrality principle set forth in free speech jurisprudence better comports with the Establishment Clause; (2) under free speech, courts will subject content neutral laws that interfere with religious speech to intermediate scrutiny; (3) free speech doctrine does not limit religious claimants to facial challenges to the law; and (4) courts do not subject free speech litigants to a "sincerity" test or to a "substantial burden" test.

As advocates of religious freedom look for protection elsewhere, they will likely have to choose whether to pursue religious freedom through statutory exemptions or through free speech, because one pursuit may undermine the progress made by the other.[232] Such a choice requires advocates to decide whether the principle of neutrality, as set forth in free speech jurisprudence, is one worth preserving. If so, the path to religious freedom is clear, and must be sought through free speech jurisprudence.

232. See Cordes, *supra* note 196.