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Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause

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— Comment —

ADDRESSING THE HYBRID-RIGHTS EXCEPTION: HOW THE COLORABLE-PLUS APPROACH CAN REVIVE THE FREE EXERCISE CLAUSE

> "*[I]n this land of equal liberty, it is our boast, that a [person's] religious tenets will not forfeit the protection of the laws, nor deprive him of the right of attaining and holding the highest offices that are known in the United States.*"
>
> —George Washington*

* MAXIMS OF WASHINGTON 372 (N.Y., D. Appleton & Co. 1894).

INTRODUCTION

The First Amendment provides the language for the Free Exercise Clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Although the definition of religion and the scope of the Free Exercise Clause have been the subject of much contention for centuries, the last decade has seen a drastic shrinkage in the scope of the Free Exercise Clause and in the protection of individuals' rights to freely practice their religion in the face of governmental regulations.[2] The deflation of the Free Exercise Clause was initiated by the United States Supreme Court in its 1990 decision *Employment Division, Department of Human Resources of Oregon v. Smith*,[3] which the Court subsequently affirmed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[4] Now we are faced with a fundamental constitutional question: What is left of the Free Exercise Clause? Because case law and scholarly discussion regarding the scope of the Free Exercise Clause vary greatly,[5] this question requires further examination.

The scope of this Comment narrowly reviews and addresses a qualification to the generally accepted *Smith* rule known as the hybrid-rights exception, which states that free exercise claims are deserving of heightened scrutiny if they are combined with an independent, constitutional claim. This doctrine, developed by the Supreme Court in

1. U.S. CONST. amend. I.

2. *See* Hope Lu, Note, *Mandatory Vaccinations Within the Schoolhouse Gate: How a Law-Medicine Perspective and the Hybrid-Rights Exception Salvage a Right to Religious Exemptions*, 63 CASE W. RES. L. REV. (forthcoming 2013) (documenting the historical changes regarding the Supreme Court's narrowing of the Free Exercise Clause). However, the Supreme Court's recent decision *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* raises a contention, the discussion of which is outside the scope of this Comment, that the Supreme Court has revived the Free Exercise Clause to a certain extent. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012) (holding that a ministerial exception grounded in the Religion Clauses of the First Amendment existed and applied in an employment discrimination case, barring the government from interfering with a religious group's decision to fire one of its ministers).

3. Emp't Div. v. Smith, 494 U.S. 872 (1990).

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

5. *See infra* Part I; *see also* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 411 (1990) (arguing against the constitutionally compelled free exercise exemption because it "sets forth a false dichotomy between secular and religious belief systems and ignores the similarity of their functions . . . in the political and social environment").

Smith, has caused courts and legal scholars to suffer considerable confusion and criticism. Some courts have contended that since the hybrid-rights exception is dicta in *Smith*, courts should wait until the Supreme Court provides more guidance. Other courts have attempted to apply the hybrid-rights exception but have not done so successfully. A few courts have even stated that the hybrid-rights theory is illogical and have criticized the *Smith* majority for seeking to distinguish *Smith* from precedent using the hybrid-rights exception.

This Comment addresses the hybrid-rights qualification to the *Smith* axiom and argues for a specific approach to the hybrid-rights exception through a novel set of lenses. Part I introduces the current free exercise legal framework and the hybrid-rights exception. Part II presents the lower courts' confusion with interpreting the Supreme Court's hybrid-rights exception. Part III suggests a novel view for how the hybrid-rights doctrine should be interpreted. This Comment concludes by arguing that the hybrid-rights theory can breathe life back into the Free Exercise Clause so long as courts apply strict scrutiny to state action that restricts the free exercise of religion where the action gives rise to a separate, colorable, and interdependent constitutional claim.

I. THE HYBRID-RIGHTS CONTROVERSY

The constitutional definition of religion and the scope of the Free Exercise Clause have been controversial topics.[6] This Part reviews the current status of the Supreme Court's free exercise framework, which sets forth the basic axiom of *Smith* and then the qualifications to *Smith*: (1) the *Hialeah* exception, (2) the individualized exemption, and (3) the hybrid-rights exception.

A. The Basic Axiom of Free Exercise Jurisprudence

The basic axiom of free exercise jurisprudence is found in *Employment Division v. Smith*, which held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability.[7] *Smith*, however, was seen by many as a drastic change from the decades of Supreme Court free exercise jurisprudence before it.[8] Some commentators subscribe to the idea that free exercise rights

6. *See* Lu, *supra* note 2 (explaining the controversy surrounding the Free Exercise Clause in the context of mandatory vaccinations).

7. *Smith*, 494 U.S. 872.

8. *See, e.g.*, Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1671 & n.2 (2011) ("Since it was decided twenty years ago, many commentators, both scholarly and otherwise, have characterized *Employment Division v. Smith* as a dramatic, unjustified departure from previous free exercise cases." (footnote omitted)).

received vigorous strict scrutiny protection before *Smith* and that *Smith* was a radical departure from previous precedent.[9] Other scholars and courts have argued that the standard in *Smith* was the same as the standard in most cases even prior to the 1990 decision.[10] Regardless of the camp to which one subscribes, free exercise jurisprudence has been a contentious area for decades.[11]

In 1963, the Supreme Court held in *Sherbert v. Verner*[12] that strict scrutiny was the appropriate test in assessing laws burdening religious freedom.[13] The Court concluded that denying unemployment benefits to a Seventh-day Adventist who quit her job instead of working on Saturday Sabbath imposed a substantial burden on her because she had to pick between her job and her faith.[14] Applying strict scrutiny, the Court held that the government did not have a compelling governmental interest and that to deny benefits to the plaintiff violated her free exercise rights.[15] However, strict scrutiny as the standard for free exercise claims came to a screeching halt in 1990 with the Supreme Court's decision in *Smith*.

In *Smith*, the defendants were fired by a drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, as part of a religious ritual for the Native American Church.[16] Oregon law prohibited the "knowing or intentional possession of a 'controlled substance'" unless a medical practitioner authorized and prescribed such usage.[17] The Court concluded that the Free Exercise Clause did not preclude the state from prohibiting peyote use for religious purposes, and therefore the denial of unemployment benefits was constitutional.[18]

The *Smith* Court addressed the change from the previous *Sherbert* standard, which required governmental actions that substantially burden a religious practice to be justified by a compelling

9. *Id.* at 1671–72.

10. *See, e.g.*, *id.* at 1674 (arguing against the view that *Smith* was a radical departure from precedent).

11. *Id.*

12. Sherbert v. Verner, 374 U.S. 398 (1963).

13. *Id.* at 406.

14. *Id.* at 404.

15. *Id.* at 406–07.

16. Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

17. *Id.*

18. *Id.* at 890.

governmental interest.[19] The Court stated that the *Sherbert* test had been applied to invalidate state unemployment compensation rules in three instances, but outside the unemployment-benefit context, the Court had never used the *Sherbert* test to invalidate any governmental action.[20] The *Smith* Court also stated that they "would not apply [the *Sherbert* test] to require exemptions from a generally applicable criminal law."[21] Thus, the *Smith* standard became the basic axiom of free exercise jurisprudence.

B. The Smith Qualifications

There are three qualifications to the *Smith* axiom: (1) the *Hialeah* exception, (2) individualized exemptions, and (3) the hybrid-rights exception. This Part addresses each road around *Smith*, emphasising the hybrid-rights exception.

1. The *Hialeah* Exception

The one Supreme Court decision that has interpreted and applied *Employment Division v. Smith* is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[22] In *Hialeah*, the Court held that a Florida ordinance, which barred "[killing] animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed," was unconstitutional because the law's clear purpose was to prohibit a religious practice.[23] The ordinance was enacted as a response to the Santeria Church's announcement that it was establishing a school, cultural center, and museum to bring its practices, including the ritual sacrifice of animals, into the open.[24]

The Court ruled that the law was not one of "general applicability" because the ordinance did not prohibit other animal killings besides religious sacrifice.[25] The Court also concluded that the law lacked neutrality because its objective was to stop the practice of the Santeria religion.[26] Since the government could achieve "[t]he

19. *Id.* at 882–83; s*ee also Sherbert*, 374 U.S. at 402–03 (holding that governmental burdens on free exercise must "be justified by a compelling state interest" (internal quotation mark omitted)).

20. *Smith*, 494 U.S. at 883 (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); *Sherbert*, 374 U.S. 398)).

21. *Id.* at 884.

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

23. *Id.* at 527, 538.

24. *Id.* at 525–26.

25. *Id.* at 543.

26. *Id.* at 534–35.

proffered [public health] objectives" without burdening the Santeria practices, the law was unconstitutional.[27] Thus, in *Hialeah*, the Court reaffirmed *Smith*, stating that even though a neutral and generally applicable law "has the incidental effect of burdening a particular religious practice," the law does not have to be "justified by a compelling governmental interest."[28]

The conclusion of *Smith* and its application in *Hialeah* yield the current state of free exercise jurisprudence. Even if a law encumbers religious practices, as long as the law does not single out religious practices for punishment and is not motivated by the desire to interfere with the individual's right to practice the religion, the law will likely be considered constitutional under *Smith*. Free exercise rights are not violated by a neutral law of general applicability so long as rational basis review is satisfied. Conversely, a law that is not of general applicability will be found unconstitutional if it does not meet strict scrutiny.

2. The "Individualized Exemption"

The "individualized exemption" qualification to the basic *Smith* rule was discussed in the *Smith* decision.[29] This exception stands for the proposition that if a state has a facially neutral law with a system of individualized exemptions, then that state may not refuse to extend that system of exemptions to cases of religious hardship without a compelling reason. The Supreme Court has used *Sherbert* and *Thomas* as examples of individualized exemption cases because unemployment compensation programs involve a system that lends itself to individual governmental assessment of the reasons behind an applicant's unemployment.[30] In *Sherbert* and *Thomas*, a person was not eligible to receive unemployment benefits if the individual refused to work "without good cause," and that "good cause" language created a mechanism for individualized exemptions.[31] The Court reasoned that "[i]f a state creates such a mechanism [of individualized exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."[32] With such systems allowing individualized governmental review, the Supreme Court concluded that the applicable test would be the strict scrutiny of *Sherbert* rather than the rational basis of *Smith*.[33]

27. *Id.* at 546.

28. *Id.* at 531 (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)).

29. *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

30. *Id.*

31. *Id.*

32. *Roy*, 476 U.S. at 708.

33. *Id.* at 884–85.

3. The Hybrid-Rights Exception

The "hybrid-rights" exception was first presented in *Smith*.[34] The *Smith* majority surveyed the cases where free exercise challenges were upheld in the face of a neutral, generally applicable law's application to religiously motivated action, and none of those cases involved free exercise claims alone.[35] Justice Scalia, in his *Smith* majority opinion, deemed these cases hybrid-rights cases—ones that might warrant heightened scrutiny instead of rational basis review.[36] These "hybrid situation[s]" were claims where a free exercise action was coupled with other assertions of constitutional protection, such as freedom of speech or the right of parents to direct the education of their children.[37] The *Smith* majority distinguished *Smith* from these "hybrid-rights" cases that used strict scrutiny by noting that the case before the Court "[did] not present . . . a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[38] The *Smith* Court used *Wisconsin v. Yoder* as the basis for the hybrid-rights exception.[39]

In *Yoder*, the Court upheld claims of free exercise and the right to control the education of one's children and granted Amish parents an exemption from compulsory school laws for their fourteen- and fifteen-year-old children.[40] The Court concluded that the Amish objected to education beyond the eighth grade because what is taught in schools is in "marked variance" with Amish values and way of life.[41] The Court found that the compulsory attendance laws infringed on the Amish

34. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699 (10th Cir. 1998) (identifying the "hybrid-rights theory discussed in *Smith*"); *see also Smith*, 494 U.S. at 881–82 (discussing "hybrid situation[s]").

35. *Smith*, 494 U.S. at 881–82; *see, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (invalidating a flat license tax on solicitations when it was applied to religious disseminations because it infringed upon both the free exercise of religion and the freedom of speech and of the press); Cantwell v. Connecticut, 310 U.S. 296, 304–07 (1940) (striking down a licensing system that applied to religious solicitations because it violated the Free Exercise and Free Speech Clauses of the First Amendment).

36. *Smith*, 494 U.S. at 881–82.

37. *Id.*; *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972) (striking down application of compulsory school-attendance laws to Amish parents because it violated both the parents' freedom of religion and liberty to control the education of their children under the First and Fourteenth Amendments).

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

39. *Id.* at 881 (citing *Yoder*, 406 U.S. 205).

40. *Yoder*, 406 U.S. at 207, 235–36.

41. *Id.* at 210–11.

parents' rights to control the upbringing of their children and that "the traditional way of life" for the Amish was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[42] The Court concluded that the Wisconsin law "affirmatively" compelled the Amish parents, "under threat of criminal sanction," to act in a way "at odds with . . . their religious beliefs" and thus destroyed their free exercise rights.[43] Therefore, the *Yoder* Court applied the strict scrutiny standard and found in favor of the Amish parents.[44]

A review of the free exercise jurisprudence establishes that if a claim against a law does not satisfy the requirements of the *Smith* exceptions, then that claim will be evaluated under the rational basis review of *Smith*.[45] However, if a claim satisfies one of the three qualifications to *Smith*, a higher level of scrutiny may be implicated. If, like *Hialeah*, a law is not neutral and generally applicable—as required for application of the *Smith* rule—then the law must satisfy strict scrutiny.[46] Similarly, a law that satisfies the requirements of the individualized exemption approach would implicate strict scrutiny as well.[47] Lastly, as the next Part demonstrates, courts are divided on the existence of a hybrid-rights claim and whether such a claim triggers strict scrutiny analysis.[48]

42. *Id.* at 216.

43. *Id.* at 218–19.

44. *Id.* at 234–36.

45. *See supra* Part I.A.

46. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

47. Emp't Div. v. Smith, 494 U.S. 872, 884 (1990).

48. *See, e.g.*, Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) (holding that accompanying infringements of the right to interstate travel and a right to drive by requiring a driver's license applicant to supply his social security number did not violate the Free Exercise Clause under rational basis review); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998) (holding that a school district's refusal to allow a student to attend classes part-time concomitantly did not infringe on parents' right to direct their child's education and did not implicate the hybrid-rights theory). *Compare* Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681 (N.D. Tex. 2000) (applying rational basis review to a challenge against school uniforms based on the Free Exercise Clause and the right of parents to control the upbringing of their children), *with* Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999) (applying strict scrutiny to similar claims).

II. THE CIRCUIT SPLIT: LOWER COURTS' CONFUSION REGARDING THE HYBRID-RIGHTS EXCEPTION

In the wake of *Smith*, the hybrid-rights exception has split the circuit courts.[49] Although three major approaches to the hybrid-rights exception have been recognized by courts and scholars, a review of the lower courts' decisions and recent case law show that four approaches to this theory that have been adopted: (a) the "refusal-to-recognize" approach, (b) the "independently-viable-claim" theory, (c) the "colorable-claim" approach, and (d) what this Comment terms the "open recognition" approach.[50]

However, due to recent decisions that have emerged from the lower courts, these major approaches have changed form. Furthermore, there are other approaches that scholars have proposed as alternatives for addressing the hybrid-rights exception.[51] This Part addresses each approach in turn.

A. The Refusal-To-Recognize Approach

The "refusal-to-recognize" approach has recently branched into two camps. The Sixth Circuit refused to recognize the hybrid-rights exception, finding the theory to be flawed.[52] The Second and Third Circuits also have refused to recognize the hybrid-rights exception without more direction from the Supreme Court and have characterized the theory as non-binding dicta.[53]

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49. Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348, 353 (4th Cir.), *cert. denied*, 132 S. Ct. 590 (2011) (observing that there is a circuit split over the validity of this "hybrid-rights" exception).

50. Benjamin I. Siminou, Note, *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, 318 & n.37 (2006). Siminou does not recognize the "open recognition" approach but instead identifies a separate "genuinely-implicated" approach. *Id.*

51. *See, e.g.*, *id.* at 324–26, 340-46 (formally recognizing and arguing for a "genuinely-implicated" standard).

52. *See, e.g.*, Prater v. City of Burnside, 289 F.3d 417, 430 (6th Cir. 2002) (reinforcing the rejection of strict scrutiny application to hybrid-rights claims); Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply strict scrutiny or any scrutiny level higher than rational basis review to hybrid-rights cases).

53. *See, e.g.*, Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 246–47 (3d Cir. 2008) (per curiam) (refusing to apply an undefined hybrid-rights theory without further Supreme Court direction); Leebaert v. Harrington, 332 F.3d 134, 143–44 (2d Cir. 2003) (rejecting the application of strict scrutiny, or anything higher than *Smith*'s rational basis review, to hybrid-rights cases); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (interpreting *Smith* hybrid-rights language as dicta).

The United States Court of Appeals for the Sixth Circuit initially used the refusal-to-recognize approach in *Kissinger v. Board of Trustees*, where it stated that the hybrid-rights exception was "completely illogical" because the level of scrutiny should not be dependent upon the number of constitutional rights claimed.[54] The court held that a public university's policy regarding the school's veterinary-medicine curriculum, which required a course involving operations on live animals, did not need to meet any standard stricter than the standard in *Smith*.[55] Therefore, the court applied rational basis review.[56]

This view of the approach is buttressed by Justice Souter's concurring opinion in *Hialeah,* where he commented on the confusion surrounding *Smith* and the flawed nature of an exception to its general rule:

> Though *Smith* sought to distinguish the free exercise cases in which the Court mandated exemptions from secular laws of general application, I am not persuaded. . . . And the distinction *Smith* draws [between a pure free exercise case and a "hybrid" situation] strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith,* since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason . . . to have mentioned the Free Exercise Clause at all.[57]

In 2008, the Third Circuit joined this approach by refusing to recognize the hybrid-rights theory unless the Supreme Court provided more express guidance.[58] This view differs from the Sixth Circuit's approach, however, because this take on the refusal-to-recognize approach leaves space for the possibility of future hybrid-rights claims if the Supreme Court provides more direction. The Second Circuit and the Supreme Court of Missouri have also taken this refusal-to-recognize view of the hybrid-rights exception, seeing the

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

55. *Id.*

56. *Id.*

57. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566–67 (1993) (Souter, J., concurring) (citation omitted).

58. *Combs*, 540 F.3d at 247 ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.").

Smith hybrid-rights language as non-binding dicta but leaving open the option to allow future hybrid-rights claims.[59]

B. The Independently-Viable-Claim Theory

In the independently-viable-claim approach to the hybrid-rights exception, strict scrutiny is triggered when a free exercise claim is accompanied by an independently viable constitutional claim.[60] The courts that have been thought to take this approach are the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the District of Columbia Circuit.[61] However, whether the First Circuit actually follows the independent viability approach is debatable. As discussed later, this Comment instead places the First Circuit's line of hybrid-rights cases under a different approach.[62]

Thus, the only Court of Appeals that seems to adopt the independently viable claim and has not yet expressly changed that view is the District of Columbia Circuit. The D.C. Circuit has not fully analyzed a hybrid-rights claim, but rather has supported the hybrid-rights exception in the form of an independently viable claim conjoined with a free exercise claim. In *EEOC v. Catholic University of America*,[63] the D.C. Circuit held that a religious ministerial exception survived *Smith* but, if that was an incorrect conclusion, the holding was still valid because the plaintiff could use the hybrid-rights exception by joining her Free Exercise Clause claim with her independently viable Establishment Clause claim.[64] In other words, the court maintained that a hybrid-rights claim could be brought in the future under the independently viable approach.

C. The Colorable-Claim Standard

The third major approach is the colorable-claim standard.[65] The colorable-claim approach requires that a plaintiff with a free exercise

59. *See* Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) (rejecting the application of strict scrutiny to hybrid-rights cases because "*Smith*'s language relating to hybrid claims is dicta and not binding" (internal quotation mark omitted)); *see also* Blakely v. Blakely, 83 S.W.3d 537, 547-48 (Mo. 2002) (en banc) (agreeing with the Second Circuit's rejection of strict scrutiny).

60. 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, 754 (2005).

61. Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1501 (2010).

62. *See infra* Part II.D.

63. EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996).

64. *Id.* at 467.

65. *See, e.g.*, Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 464–65 (N.Y. 2006) (rejecting the hybrid-rights approach

claim join a "colorable claim" that an accompanying constitutional right has also been violated.[66] "Colorable" has been taken to mean that there is a "'likelihood,' but not a certitude, of success on the merits."[67]

The colorable-claim approach arose from the United States Court of Appeals for the Tenth Circuit's decision in *Swanson v. Guthrie Independent School District No. I-L.*[68] The Tenth Circuit concluded that, even though *Smith* was not clear about the application of the hybrid-rights exception, for a hybrid-rights claim to be brought there had to be "at least [a] . . . colorable showing of infringement of recognized and specific constitutional rights, rather than mere invocation of a general right."[69] In other words, a colorable claim did not require a certain violation of an accompanying constitutional right but did require more than a general allegation.[70] However, the Tenth Circuit did not actually apply the hybrid-rights exception because the plaintiffs did not meet the showing of a colorable claim.[71]

The colorable-claim approach was also adopted by the Ninth Circuit, which concluded in a line of cases that a colorable claim of an accompanying constitutional violation served to hybridize the companion claim with the plaintiffs' free exercise action.[72] The Ninth Circuit in *Miller v. Reed* held that 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,' but not a certitude, of success on the merits."[73]

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because the claim of free speech in addition to the free exercise challenge was "insubstantial").

66. Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (citing Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703, 707 (9th Cir. 1999)).

67. *Thomas*, 165 F.3d at 707.

68. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998).

69. *Id.* at 700.

70. *Id.*

71. *Id.*; *see also* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655–56 (10th Cir. 2006) (rejecting plaintiff's hybrid-rights claim, but reaffirming the colorable-claim approach because the inquiry is fact-driven and must be examined on a case-by-case basis).

72. *See Thomas*, 165 F.3d at 704–05 (applying the colorable-claim test after an in-depth analysis of the other available approaches). *Thomas* was ultimately overturned en banc because of lack of ripeness. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000). *See also* Axson-Flynn v. Jonson, 356 F.3d 1277, 1297 (10th Cir. 2004) (affirming the *Thomas* standard and using the colorable test because it is a middle ground solution); Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999) (affirming the standard set out in *Thomas*).

73. *Miller*, 176 F.3d at 1207–08 (quoting *Thomas,* 165 F.3d at 703, 707).

D. "Open Recognition" Approaches

A fourth approach that the First, Fifth, Seventh, and Eighth Circuit Courts of Appeals have taken is defined by this Comment as the "open recognition" approach. This approach is characterized by a court openly recognizing the hybrid-rights exception, not taking any of the other specific approaches outlined above, and applying its own approach. Within this "open recognition" category, the circuit courts' analyses of hybrid-rights claims fall into three sub-categories: (1) interdependent considerations, (2) per se delineations, and (3) completely open approaches.

1. Interdependent Considerations

The First Circuit initially approached the hybrid-rights exception by requiring an independently viable constitutional claim, but it altered its approach in a 2008 decision. The First Circuit, in *Brown v. Hot, Sexy & Safer Productions, Inc.*, held that a hybrid-rights claim is not triggered unless a plaintiff joins a free exercise challenge with another independently viable constitutional claim.[74] The *Brown* court found that the plaintiffs' claims did not bring them within the hybrid-rights exception because the plaintiffs' alleged parental prerogative and family-relations claim did not state a privacy or substantive due process claim.[75] Thus, since the free exercise claim was not conjoined with an independently protected constitutional claim, the plaintiffs did not have a viable hybrid-rights action.[76] Rejecting the plaintiffs' free exercise challenge, the court reasoned that their claim was distinct from that of hybrid-rights cases like *Yoder*. The court distinguished the *Brown* plaintiffs from the *Yoder* plaintiffs because the *Brown* plaintiffs did not allege that the one-time compulsory attendance law threatened their entire way of life, whereas the Amish parents in *Yoder* persuasively demonstrated the sincerity of their religious beliefs, the interrelationship of their religious beliefs with their way of life, the vital role that the religious belief played in their community, and the dangers presented by the State's enforcement of this generally applicable compulsory education law.[77]

Recently, however, the First Circuit in *Parker v. Hurley* held that the plaintiffs' assertion that their sincerely held religious beliefs were deeply offended was not enough to reach the level of a hybrid-rights claim because the plaintiffs had not described a constitutional in-

74. Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995).

75. *Id.*

76. *Id.*

77. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 235 (1972)).

fringement of their rights or those of their children.[78] The First Circuit sought to stay as closely as possible to the Court's analysis in *Yoder*, stating that the *Yoder* Court did not analyze the due process and free exercise interests of the parent-plaintiffs separately, "but rather considered the two claims interdependently, given that those two sets of interests inform one other."[79] Thus, the First Circuit with *Parker* has moved towards an interdependent considerations approach when reviewing the coupling of constitutional claims rather than analyzing each claim separately.

2. Per Se Delineations

The Fifth Circuit in *Society of Separationists, Inc. v. Herman* openly recognized the hybrid-rights exception, finding that *Smith* specifically exempts "religion-plus-speech" cases from the broad sweep of its holding.[80] The plaintiff argued that being forced to state an oath or affirmation violated not only her freedom of religion but also her freedom of speech.[81] Thus, the Fifth Circuit concluded that the plaintiffs presented a viable hybrid-rights claim through a per se rule of specific delineations outlined by the Supreme Court.[82]

3. Completely Open Approaches

The Seventh Circuit, in *Civil Liberties for Urban Believers v. City of Chicago*, stated that "in cases implicating the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and freedom of association, the First Amendment may subject the application to religiously motivated action of a neutral, generally applicable law to a heightened level of scrutiny."[83] However, the Seventh Circuit ultimately held that the speech, assembly, and equal protection claims before the court individually lacked the merit needed to withstand summary judgment, so the plaintiffs could not establish a hybrid-rights claim.[84] Thus, the Seventh Circuit did not follow the "refusal-to-recognize" approach and instead openly recognized the hybrid-rights theory by citing *Smith's* hybrid-rights language. But the Seventh Circuit did not expressly take the

78. Parker v. Hurley, 514 F.3d 87, 99 (1st Cir. 2008).

79. *Id.* at 98 (citing *Yoder,* 406 U.S. at 213–14, 232–34).

80. Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1216 (5th Cir. 1991) (citing Emp't Div. v. Smith, 494 U.S. 872, 877–78, 881 (1990)).

81. *Herman*, 939 F.2d at 1215.

82. *Id.* at 1216–17.

83. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003) (citing *Smith,* 494 U.S. at 881–82).

84. *Urban Believers*, 342 F.3d at 765–67.

"independently viable" approach or the "colorable-claim" approach.[85] Since the Seventh Circuit resolved this case by stating that the appellants could not satisfy any requirements for the hybrid-rights claim, it did not need to decide if strict scrutiny was met.

The Eighth Circuit in *Cornerstone Bible Church v. City of Hastings* took a slightly different route by openly recognizing the hybrid-rights exception but not choosing which standard to apply.[86] The district court rejected the hybrid-rights claim brought before it by granting summary judgment to the City on the Church's free speech, freedom of association, equal protection, and due process claims. The Eighth Circuit reversed the district court's summary judgment, concluded that this brought the hybrid-rights claim back to life, and directed the district court to consider this claim on remand.[87] Furthermore, in a more recent decision, the Eighth Circuit stated that "[s]trict scrutiny [is] the appropriate analysis . . . under the 'hybrid rights doctrine.'"[88]

III. ARGUING FOR THE EXCEPTION: A NOVEL LEGAL APPROACH

Although many lower courts have recognized the hybrid-rights exception, some courts have not taken a stance in the hybrid-rights controversy. Several circuit courts and legal scholars have expressed considerable confusion and criticism about the purpose and mechanics of the hybrid-rights exception.[89] But the hybrid-rights qualification to the *Smith* rule serves a purpose, and this Part will argue for the full recognition of the hybrid-rights exception, evaluate the outlined approaches, and advocate for the colorable-plus approach, which uses the interdependent-considerations analysis as a twist.

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85. *Id.*

86. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472–73 (8th Cir. 1991).

87. *Id.* at 474.

88. Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008) (finding that strict scrutiny applied to the plaintiff's free exercise claim paired with an equal protection claim).

89. *See* Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 246 (3d Cir. 2008) (per curiam) (adopting the refusal-to-recognize approach due to the lack of defined standards). *Compare* 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, 2220–21 (2005) (arguing that *Yoder* bolsters free exercise protection through hybrid rights), *with* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision,* 57 U. CHI. L. REV. 1109, 1121–22 (1990) (contending that the *Smith* Court developed hybrid rights solely to distinguish *Yoder*).

A. Policy Arguments for Full Recognition of the Hybrid-Rights Exception

In *Smith*, Justice Scalia emphasized that free exercise claims present some unique challenges, including that courts tend to delve inappropriately into "the effects of a governmental action on a religious objector's spiritual development" and the centrality of the religious beliefs.[90] To address these issues, Justice Scalia articulated the broad *Smith* rule—that free exercise challenges against neutral laws of general applicability do not warrant heightened scrutiny and thus the government need only satisfy rational basis review.[91] Along with this broad rule, Scalia discussed the hybrid-rights exception, whereby heightened scrutiny is implicated when a free exercise claim is conjoined with another constitutionally protected claim.[92]

The hybrid-rights exception, like the *Smith* holding, keeps courts from delving into an individual's religious sensitivities, focusing instead on the constitutional rights and provisions in question, as many constitutionally protected rights are tied up in religious beliefs.[93] Additionally, considerations of judicial economy support bolstering the hybrid-rights exception. Requiring that the free exercise claim be coupled with another constitutional right (1) keeps frivolous free exercise claims from being brought, preventing the courts from being clogged, (2) conserves litigation time, and (3) decreases costs and expenses for parties and the courts.

B. Evaluating Other Approaches

In evaluating each approach outlined above, it is evident that one approach far surpasses the others, even though each theory has its advantages and drawbacks. The first two approaches toward the hybrid-rights exception—the "refusal-to-recognize" and "independently-viable-claim" approaches—are not viable because they are legally or logically fallible. The "open-recognition" approach, which splits into the mere recognition and the per se approach, also is not the best approach because it produces vague or limited results. Thus, the best approach is the "colorable-claim" approach with the utilization of interdependent considerations—the "colorable-plus" approach.

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90. Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

91. *Id.* at 882.

92. *Id.*

93. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972) (describing the pervasive effect of compulsory education statute on Amish community); *Olsen*, 541 F.3d at 832 (describing a hybrid-rights claim that alleged both free exercise and equal protection violations); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003) (describing a hybrid-rights claim that alleged free exercise, speech, assembly and equal protection violations).

1. Arguing Against the Refusal-to-Recognize Approach

The Sixth Circuit's refusal to recognize the hybrid-rights exception contradicts the *Smith* decision and conflicts with the approaches of the Second and Third Circuits. The *Smith* decision distinguished itself from *Yoder* and other cases where strict scrutiny had been the standard by saying the latter were "hybrid" cases.[94] In other words, the hybrid-rights exception was explicitly created in *Smith*.[95] Thus, ignoring the hybrid-rights qualification to the *Smith* axiom effectively ignores the Court's conclusion in *Smith*. In the line of cases identified in *Smith*, the Court struck down laws that would otherwise have satisfied the *Smith* requirements for a generally applicable and neutral law because the laws violated both the Free Exercise Clause *and* other constitutional guarantees.[96] Thus, the holdings of these cases were not in conflict with *Smith* because they were hybrid-rights cases—whereas the only claim in *Smith* was a free exercise claim. Indeed, the Court stated in *Yoder* that a law may be invalidated for violating the Free Exercise Clause even if the law was "neutral on its face" and "of general applicability," and the Court expressly recognized this when it developed the hybrid-rights theory in *Smith*.[97] Thus, the Sixth Circuit's approach marks a dramatic departure from Supreme Court precedent.

The Second and Third Circuits' refusal to recognize the approach without further direction from the Supreme Court is similarly undesirable because the Court in *Smith* provided enough information to carry the hybrid-rights exception to a logical conclusion. As discussed below, the colorable-plus approach, or the colorable-claim theory with interdependent considerations, successfully implements the hybrid-rights exception as outlined by the Court in *Smith*, as it adequately addresses judicial concerns and balances those challenges with supporting individual constitutional rights.[98]

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94. *Smith,* 494 U.S. at 881–82.

95. *Id.*

96. *See Yoder*, 406 U.S. at 218–19 (exempting persons of the Amish faith from a compulsory education law because the statute infringed the Amish parents' religious beliefs and their parental right to raise their children); Murdock v. Pennsylvania, 319 U.S. 105, 108–10 (1943) (invalidating a flat tax on religious solicitations because the system violated both religious beliefs and free speech rights); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (invalidating a licensing system for religious and charitable solicitations on free exercise and Fourteenth Amendment due process grounds).

97. *Yoder*, 406 U.S. at 220; *see Smith,* 494 U.S. at 881–82.

98. *See infra* Part III.C; s*ee also* Lu, *supra* note 2 (providing an application of the hybrid-rights exception in the context of compulsory school vaccination law and showing how a colorable-claim approach would work).

Refusal to recognize the hybrid-rights exception has also been based on the fear that, if recognized, it would swallow the *Smith* rule.[99] This concern is ameliorated by the number of cases—including a Supreme Court case—where a hybrid-rights claim failed, even in the face of strict scrutiny.

The *Smith* Court cited *Prince v. Massachusetts*,[100] not in support of hybrid-rights claims, but rather in support of the *Smith* holding.[101] The *Prince* Court, in the face of strict scrutiny, upheld child labor regulations against a woman who allowed her children to distribute and sell magazines that preached the works of Jehovah's Witnesses.[102] *Prince* stated that "Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives."[103] These objectives included "[a]cting to guard the general interest in youth's well being."[104]

Because there is precedent that hybrid-rights claims may potentially fail even in the face of strict scrutiny analysis, *Prince* refutes the idea that the hybrid-rights exception would swallow the rule. Furthermore, if there truly were no exceptions to the *Smith* rule, then the Free Exercise Clause would not have any meaning left. Thus, courts should follow Supreme Court precedent and recognize the hybrid-rights exception.

2. Arguing Against Two of the Open Recognition Approaches

After establishing that the hybrid-rights exception should be recognized, the next step is to determine the manner in which it should be implemented. One option would be to follow the "open recognition" approach from the Fifth Circuit's decision in *Society of Separationists,*

99. *See* Church of the Lukumi Bablu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule.").

100. Prince v. Massachusetts, 321 U.S. 158 (1944).

101. *Smith*, 494 U.S. at 879–80 (discussing cases in which "the right of free exercise [did] 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 . . . conduct that his religion prescribes." (quoting *Prince*, 321 U.S. at 171) (internal quotation mark omitted)).

102. *Prince*, 321 U.S. at 170–71.

103. *Id.* at 170; s*ee id.* at 173-74 (Murphy, J., dissenting) (stating that "[t]he burden was therefore on . . . Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of [this] type" and "[i]f the right . . . to practice . . . religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child").

104. *Id.* at 166 (majority opinion).

Inc. v. Herman.[105] In *Herman*, the Fifth Circuit outlined a per se approach, where a hybrid-rights claim exists if a free exercise claim is coupled with a constitutional claim that the Supreme Court has expressly recognized as a claim that, when coupled with a free exercise claim, is exempt from *Smith*'s broad holding.[106] Such a per se approach would have to outline a finite list of constitutional claims.

This approach is more desirable than the "refusal to recognize" approach, as this route recognizes that the hybrid-rights exception is part of Supreme Court jurisprudence. But this approach is too narrow. The list of constitutional claims would be a small list, likely including freedom of speech claims, freedom of association, and the right to raise one's children. Furthermore, if the list was finite and could not be lengthened, it would defeat the purpose of the flexibility of due process and other constitutional claims. Alternatively, if the list was finite but could be lengthened, then that result would lessen the value of a per se rule. Thus, the results to the per se approach seem extreme and limited.

The "open-recognition" approach adopted by the Seventh and Eighth Circuits is also undesirable, as the courts recognized the hybrid-rights exception but provided no additional insight or clarity to the hybrid-rights standard.[107]

3. Arguing Against the Independently-Viable-Claim Theory

The next approach, the independently viable claim, is logically flawed. The independently-viable-claim theory is not a suitable approach because if each claim can be brought independently and is viable on its own, then the existence of a hybrid-rights exception is not needed.[108] The plaintiff could just bring each claim forward on its own.

C. Arguing for the Colorable Claim Requirement—with a Twist

Although the independently viable claim seems to be similar to the colorable-claim approach, there is a fundamental and important distinction between the two that makes the colorable-claim approach considerably more desirable. Central to the colorable-claim approach

105. Soc. of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991); *see also* Part II.D.2 (discussing *Herman*).

106. Herman, 939 F.2d 1216–17 (finding that *Smith* expressly excluded "religion-plus-speech" cases from its holding).

107. *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764–65 (7th Cir. 2003) (stating that heightened scrutiny may apply in hybrid-rights cases, but ultimately deciding that this was not such a case); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472–73 (8th Cir. 1991) (openly recognizing the hybrid-rights exception, but refusing to set a standard to apply).

108. *See* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 989 (N.D. Ill. 2003) (describing the independently-viable-claim theory as effectively eliminating the hybrid-rights exception).

is the assumption that requiring a successful claim under a separate constitutional provision would nullify the hybrid-rights exception. Thus, the colorable-claim approach effectively resolves the issue that makes the independently viable claim fallible. The colorable-claim approach is also stronger than the refusal-to-recognize approach because the latter ignores the fact that Justice Scalia discussed the hybrid-rights idea in *Smith*, and it thus represents a departure from Supreme Court precedent.[109]

Furthermore, the colorable-claim approach has been litigated successfully, whereas the other approaches have not. In *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, the U.S. District Court for the Northern District of Illinois held that a church that demonstrated a free exercise claim coupled with a colorable infringement of free speech and equal protection successfully brought a hybrid-rights claim, and that the appropriate scrutiny was strict scrutiny.[110] In *Vineyard*, the church brought an action against the city, challenging the city's use of a zoning ordinance to prohibit the church from conducting worship services.[111] The court noted that since the church "demonstrated that its free speech and equal protection rights [had] been violated, . . . [this] case [was] arguably analogous to those cited in *Smith* as involving hybrid rights."[112] Since the court had already applied strict scrutiny to the zoning ordinance in question in the equal protection context, the court just reiterated its earlier conclusion that the city had failed to demonstrate that the law in question was narrowly tailored to the city's proffered goals.[113] Thus, a federal district court implemented the colorable-claim approach and came to a viable result that echoed the Supreme Court's previous constitutional analysis.

Although the colorable-claim approach led to a federal judicial decision that was buttressed by a different constitutional analysis yielding the same result, there are certainly arguments against the logic of the colorable-claim approach.[114] Criticism of the colorable-claim standard includes the argument that this approach combines two distinct losing claims and produces a winning claim, which makes "zero plus zero equals one" when "in law as in mathematics zero plus

109. *See* Note, *supra* note 61, at 1505 (criticizing the colorable-claim approach). For Justice Scalia's language about the hybrid-rights theory, see Emp't Div. v. Smith, 494 U.S. 872, 881 & n.1 (1990).

110. *Vineyard*, 250 F. Supp. 2d at 989.

111. *Id.* at 963–64.

112. *Id.* at 989.

113. *Id.*

114. *See* Note, *supra* note 61, at 1505 (criticizing the colorable-claim approach).

zero equals zero."[115] *Henderson* presented the concern: "[A]lthough the regulation does not violate the Free Exercise Clause, and although [there is] no viable First Amendment claim against the regulation, the combination of two untenable claims equals a tenable one."[116] In other words, the *Henderson* court criticized the hybrid-rights exception as "mak[ing] something out of nothing."[117]

But the First Circuit in *Parker* refuted *Henderson's* criticism as unfounded, stating that "it is equally true that the sum of a number of fractions—one-half plus one-half, for example—may equal one."[118] The First Circuit further stated that "[i]n the criminal law, we have recognized that at times the cumulative effect of a series of individual rulings, none of which individually constituted error, could mean the trial was not fair."[119] The First Circuit recognized that this criminal law example was not perfectly analogous.[120] But an important consideration, as seen in *Parker* and many other legal contexts, is the "totality of the circumstances," in which the "whole is greater than the sum of its parts."[121] There are many situations where, if examined in black and white, it would appear that zero plus zero equals one, but sometimes the individualized parts can cumulatively form a larger

115. *Id.* at 1501, 1504–05 (quoting Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001)). The phrase "the whole is greater than the sum of its parts" even draws support from physics, as demonstrated by strong emergence theory, invented by a Nobel Prize–winning physicist. *Cf.* ROBERT B. LAUGHLIN, A DIFFERENT UNIVERSE: REINVENTING PHYSICS FROM THE BOTTOM DOWN, at xiv (2005) ("What physical science thus has to tell us is that the whole being more than the sum of its parts is not merely a concept but a physical phenomenon.").

116. *Henderson*, 253 F.3d at 19 (citations omitted).

117. Parker v. Hurley, 514 F.3d 87, 98 n.13 (1st Cir. 2008) (citing *Henderson*, 253 F.3d at 19).

118. *Id.* at 99 n.13 (quoting 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)).

119. *Id.*

120. *Id.*

121. *Cf.* United States v. Sokolow, 490 U.S. 1, 8–9 (1989) (using the "totality" standard in Fourth Amendment analysis by stating that, "[a]ny one of these factors is not by itself proof of any illegal conduct[,] . . . [b]ut we think taken together they amount to reasonable suspicion"); LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989–90 (9th Cir. 2001) (employing the "totality" standard in a First Amendment free speech context, where each set of facts seen individually was not substantial but the weight of the whole picture justified the school district's action against a student's speech); *In re* Meyer, 467 B.R. 451, 458 & n.4 (Bankr. E.D. Wis. 2012) (providing another constitutional context where totality of the circumstances is used, even though it is regarding the right to direct the education and upbringing of the debtors' children in a bankruptcy case).

whole. This reasoning gives rise to the "totality of the circumstances" standard, which is prevalent in numerous cross-sections of law—including constitutional law.[122]

The "totality" viewpoint is not only acceptable in this context but also desirable. The First Circuit highlighted that "parental rights and the free exercise of religion by parents are interests that overlap and inform each other, and thus are sensibly considered together."[123] The First Circuit recognized that these constitutional claims are inherently related and intertwined. This result is also a middle ground that ensures that not all plaintiffs who wish to combine their free exercise action with a constitutional claim get their case heard, but that cases that should be reviewed at a higher standard than rational basis are decided under the appropriate standard. Under this approach, the court holds the power to determine which cases are worthy of the hybrid-rights exception. Furthermore, the colorable-claim approach is consistent with the *Yoder* decision on which the hybrid-rights exception is based.[124]

Thus, the First Circuit reveals the twist to the colorable-claim approach: only colorable constitutional claims that are intertwined with the free exercise of religion are sufficient to support a hybrid-rights claim. The court in *Henderson* misinterpreted the hybrid-rights exception. The hybrid-rights exception does not operate to turn two untenable constitutional claims into one that is tenable. Instead, the hybrid-rights exception defines the circumstances under which a free exercise claim is tenable. This analysis synthesizes the Supreme Court's decisions in *Yoder* and *Smith*, the colorable-claim approach, and the First Circuit's interdependent considerations rationale in *Parker*, and the result is that a free exercise claim is tenable when a viable free exercise claim is brought with a colorable claim, limited to the companion claims that the *Smith* majority stated merited heightened scrutiny.[125] These hybrid-worthy companion claims include freedom of speech, freedom of the press, the right of parents to direct and control the upbringing of their children, and freedom of association.[126] The accompanying claim requires "at least . . . a colorable showing of infringement of recognized and specific constitutional rights," where "the claimed infringements are genuine."[127] After *Yoder*, *Smith*, and *Parker*, the free exercise claim in conjunction with a colorable claim, taken together in "totality,"

122. *See supra* note 121.

123. *Parker*, 514 F.3d at 99 n.13.

124. Wisconsin v. Yoder, 406 U.S. 205, 208–09, 213 (1972).

125. Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

126. *Id.*

127. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699–700 (10th Cir. 1998).

amount to a viable hybrid-rights claim that warrants heightened scrutiny. This approach seems to provide the best alternative to an otherwise amorphous and vague legal framework for addressing free exercise claims.

The "colorable-plus" approach to the hybrid-rights exception recognizes a class of free exercise claims worthy of special consideration and reserves all other free exercise claims to the lower standard of review set forth in *Smith*. This special consideration is not warranted simply by the assertion of a separate constitutional violation. Rather it is the assertion of a restriction on free exercise that is inextricably and logically bound with a restriction on another constitutionally protected activity.

The difference can be illustrated using the situation where parents refuse to follow compulsory school-vaccination laws to immunize their child. For parents who have a genuine religious belief against vaccinating their child, two constitutional claims are implicated: a First Amendment free exercise claim and a Fourteenth Amendment substantive due process claim for the freedom to raise one's child. Although each claim may not be independently viable, the combined claim viewed in totality is viable under the colorable-plus approach. The two claims inform each other and are inextricably bound, as the parents object to the inoculation of their child *because* of their religious beliefs. In this situation, even if each claim cannot survive on its own, the existence of the free exercise claim, the additional colorable constitutional claim, and their interdependent nature requires that this type of free exercise claim receive more than the limited review outlined in *Smith*.

If a case brought before a court is viewed as a hybrid-rights case under the colorable-claim approach, the next inquiry asks what level of scrutiny applies. Although there has been uncertainty as to whether the hybrid-rights exception implicates strict scrutiny, the language in *Smith* implies that a hybrid-rights case can, but does not have to, trigger strict scrutiny.[128] There are two reasons why the appropriate standard in this type of hybrid-rights case is strict scrutiny.

128. *Smith*, 494 U.S. at 886 n.3 ("Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.").

A concern may be whether the colorable-plus approach would then always implicate strict scrutiny. However, under this standard, a cognizable claim has to have both a free exercise claim and a colorable accompanying constitutional claim. *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655–59 (10th Cir. 2006) (providing an example of a case where three separate constitutional claims accompanying the free exercise claim, including free speech and association, due process, and equal protection, were rejected as not meeting the "colorable" standard in the colorable-claim approach); Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999) (providing

First, the colorable-claim approach only works if the scrutiny level triggered is strict scrutiny. If parties making a hybrid-rights claim have to claim both that a law infringed upon their religious belief and that it also impinged upon another fundamental constitutional right, then the plaintiffs would face an additional obstacle only to trigger the same degree of scrutiny that would result from the companion claim alone. This would be an absurd result that the majority opinion in *Smith* likely did not intend. Thus, strict scrutiny should be the requisite scrutiny level if a successful hybrid-rights claim is brought before the court.

Second, a hybrid-rights case would be legally analogous to *Yoder*, which used the compelling governmental interest as the level of scrutiny.[129] While a law of general and neutral applicability is presumptively valid, when a hybrid-rights case is put forth that is sufficiently similar to *Yoder*, the validity of the general and neutrally applicable law is questioned, and the totality of such a hybrid-rights case should trigger strict scrutiny.[130]

CONCLUSION

Free exercise jurisprudence in many ways is similar to other types of constitutional law, including other areas of First Amendment jurisprudence. There have been points of punctuated equilibrium with the Supreme Court's free exercise jurisprudence, and finally the Supreme Court seems to have solidified a few aspects. The Supreme Court set forth a basic rule, the *Smith* axiom, and like other types of First Amendment jurisprudence, the Court qualified the rule with several exceptions and qualifications. One such exception is the hybrid-rights exception.

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another example of when a plaintiff's hybrid-rights claim using the colorable claim approach failed because his accompanying constitutional claim did not meet the "colorable" standard). Such a constitutional claim under this approach would be limited to constitutional claims that the Supreme Court has declared worthy as a basis of a hybrid rights suit. *Smith*, 494 U.S. at 881. These companion claims include freedom of speech, freedom of the press, the right of parents to direct the upbringing of their children, and freedom of association. *Id.* at 881–82. In the future, the Supreme Court could decide that other constitutional claims may be conjoined with a free exercise claim to successfully produce a hybrid-rights claim. However, the limitation provides a standard that is not so low of a threshold that any accompanying constitutional claim would implicate strict scrutiny.

129. *Yoder*, 406 U.S. at 215. ("We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.").

130. *Id.*

The hybrid-rights exception as outlined in *Smith* is unclear.[131] But the Supreme Court's language is clear enough to provide some guidance. Since the freedom to raise children and other important constitutional rights arise from the Due Process Clause, these constitutional concerns are meant to be flexible. Thus, adhering tightly to *Yoder*, as some have suggested, might not be the best approach.[132] Molding tightly and narrowly to the *Yoder* decision takes away from the dynamic body of law that is due process and other constitutional areas.

The hybrid-rights analytical framework gives birth to a tenable free exercise claim if the free exercise action is conjoined with another constitutional claim that is aligned with Supreme Court precedent. The analytical framework starts with the basic maxim in *Smith* that, for a neutral and generally applicable law, rational basis review is the appropriate level of scrutiny when dealing with free exercise claims.[133] But that basic axiom is qualified in the situation where a free exercise claim is coupled with other constitutional claims that the Supreme Court has indicated are sufficient to implicate the hybrid-rights exception. Upon evaluating the major approaches taken by lower courts, including recent updates, the best approach is the colorable-claim approach plus interdependent considerations because this route (1) does not ignore the Supreme Court, (2) is logically sounder than any other approach, and (3) has proven to yield sound results. Using this altered colorable-claim approach, which this Comment terms the colorable-plus approach, one must conclude that the conjugation of the free exercise claim and an accompanying constitutional claim—in totality—warrants strict scrutiny.

The hybrid-rights exception balances protecting individual liberties with giving state governments their police powers. As a rule, the hybrid-rights exception softens the harsh *Smith* maxim and preserves a fundamental freedom that otherwise would have little clout: the freedom to exercise one's religion. The hybrid-rights exception works with the *Smith* rule to keep courts from diving into

131. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 12.3.2.3, at 1215–16 (2d ed. 2002) ("Lower courts have done relatively little to clarify when a claim should be regarded as 'hybrid' under *Smith*.").

132. *Cf.* Note, *supra* note 61, at 1500 (explaining that the Supreme Court decides complex cases which sometimes requires obscure line drawing and the Court must be allowed to distinguish a case from the one prior to it).

133. *Smith*, 494 U.S. at 879 ("[T]he right of free exercise 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) conduct that his religions prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Sevens, J., concurring))); *see also supra* Part I.

individuals' religious sensitivities. Instead, the hybrid-rights doctrine allows courts to focus on the fundamental rights in question, as many constitutionally protected rights are tied up in religious beliefs. The hybrid-rights theory also balances accepting worthy free exercise claims and keeping frivolous free exercise claims out. Since Justice Scalia decided to include hybrid-rights exceptions in the *Smith* decision, he and the other Justices in the majority must have envisioned a way for hybrid-rights claims to proceed.[134] Without the hybrid-rights exception, the Free Exercise Clause would have little meaning. The colorable-plus approach provides that meaning.

Hope Lu[†]

134. *See* Lu, *supra* note 2 (applying the hybrid rights exception as well as the colorable-plus approach to the compulsory school vaccination law context).

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