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In Combination: Using Hybrid Rights to Expand Religious Liberty

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IN COMBINATION: USING HYBRID RIGHTS TO EXPAND RELIGIOUS LIBERTY

ABSTRACT

The First Amendment to the United States Constitution protects, among other things, the right to the free exercise of religion. In 1990, the Supreme Court held, in Employment Division v. Smith*, that valid and neutral laws of general applicability do not violate the Free Exercise Clause. While this decision has reduced the amount of religious liberty protection available to claimants, the decision did leave a silver lining for religious liberty claimants in the form of hybrid rights, which involve the combination of a free exercise claim with another constitutionally protected claim. Because the Supreme Court in* Smith *did not adequately address hybrid rights, the question remains: when can a combination of protected rights provide religious liberty to a claimant?*

Three different hybrid rights approaches have emerged: treating Smith *as dicta, allowing independent claims, and allowing colorable claims. This Comment argues that the first two approaches completely foreclose the possibility of hybrid rights protection, while the colorable claim approach provides the proper avenue for religious claimants. Thus, this Comment argues that the colorable claim approach, which combines a free exercise claim with a constitutionally protected companion claim that has at least a probable chance of success on the merits, is the best approach to the hybrid rights doctrine and should be adopted by both state and federal courts.*

Then, this Comment makes two arguments for the expansion of hybrid rights. First, allowing a diversity of constitutional companion claims would remain within the parameters of the Supreme Court's free exercise jurisprudence and would afford more litigants the opportunity to have their interests balanced against those of the government. Second, once a litigant has presented a proper hybrid claim, the reviewing court should balance the claimant's interests against the government's interest using the following three factors: whether the litigant is being compelled to act, whether an exemption would injure others, and whether granting an exemption would violate the Establishment Clause. If a litigant can satisfy the colorable claim approach

standard along with these three inquiries, then the litigant should be afforded an exemption from the general law.

INTRODUCTION

In 1998, Christina Axson-Flynn applied for the Actor's Training Program at the University of Utah.[1] When asked during her audition if there were anything that she would feel uncomfortable saying as an actress, Axson-Flynn, a Mormon, responded that "she would not . . . take the name of God in vain, take the name of Jesus in vain, or say the four-letter expletive beginning with the letter F."[2] Her refusal to say any of these words or phrases stemmed from her religious beliefs.[3] After the instructors tried to convince Axson-Flynn to say one of these words during the audition, Axson-Flynn stated, "I would rather not be admitted to your program than use these words."[4]

Despite her stance, Axson-Flynn nonetheless was admitted to the program.[5] During one monologue assignment, Axson-Flynn substituted other words in place of two words she refused to say and received an "A" for her performance.[6] Upon hearing that Axson-Flynn had omitted certain words from the monologue, one instructor told her that she would have to "get over" her language concerns and that she could "still be a good Mormon and say those words."[7] During another assignment, Axson-Flynn objected to the use of particular words, and the instructor informed her that she would perform the scene as written, or else she would receive a grade of zero.[8] The instructor ultimately relented, allowing Axson-Flynn to omit the language that was offensive to her, and she was allowed to omit offensive language for the rest of the semester.[9]

At the end of the semester review, Axson-Flynn's instructors informed her that her request for exemptions from using certain words was unacceptable.[10] They told her, "You can choose to continue in the program if you modify your

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1 Axson-Flynn v. Johnson, 356 F.3d 1277, 1281 (10th Cir. 2004).

2 *Id.* at 1281 (internal quotation marks omitted).

3 *Id.* Her refusal to say "God" or "Christ" as profanity comes from one of the Ten Commandments: do not take the Lord's name in vain. *Id.*; *see Exodus* 20:7. Her refusal to use "the four-letter expletive beginning with the letter F" stems from her belief that this word treats a sacred act as vulgar. *Axson-Flynn*, 356 F.3d at 1281.

4 *Axson-Flynn*, 356 F.3d at 1281 (internal quotation marks omitted).

5 *Id.*

6 *Id.*

7 *Id.* at 1282 (internal quotation marks omitted).

8 *Id.*

9 *Id.*

10 *Id.*

values. If you don't, you can leave. That's your choice."[11] Axson-Flynn went to both the program's coordinator and the program's director about the situation, and both individuals backed the instructors' position: if she refused to say the words that she found offensive, she would have to find another program.[12]

The case of *Axson-Flynn v. Johnson* features many differing claims; not only do the state university's actions seem to burden Axson-Flynn's right to the free exercise of religion, but they also seem to be compelling her speech, which infringes upon another right protected by the First Amendment. This case is one of many that has emerged in the past two decades, all presenting a similar issue: how to resolve direct conflicts between government action and the right to the free exercise of religion along with another constitutionally protected right. For Christina Axson-Flynn, may her university's acting program force her to say words that she does not want to say in light of her freedoms of religion and speech?[13]

In addition to *Axson-Flynn v. Johnson*, questions regarding other combinations of rights have appeared over the past two decades. For example, how should a court handle a case when students challenge a state school's policy against discrimination, arguing that such a policy violates their rights to the free exercise of religion and expressive association?[14] How should a court handle a case when students challenge a school policy that requires students to wear their hair short, as violating their rights to the free exercise of religion and free speech?[15] Or, how should a court handle the competing interests of a same-sex couple's marriage ceremony against a photography business claiming that being forced to take pictures of the ceremony violates its rights to the free exercise of religion and free speech?[16] Finally, how should a court handle a state law compelling a business to act against its religious conscience, a law closely akin to the federal contraception mandate?[17] Throughout all of

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[11] *Id.* (internal quotation marks omitted).

[12] *Id.*

[13] For discussion on how *Axson-Flynn v. Johnson* would be analyzed under this Comment's proposal, see *infra* Part V.

[14] *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); *infra* Part I.C.

[15] *See* Ala. & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993), *remanded for reconsideration by* 20 F.3d 469 (5th Cir. 1994) (remanding for reconsideration in light of RFRA); *infra* Part III.C.

[16] *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 72 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *infra* Part IV.B.2.

[17] *See infra* Part V; *cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

these examples, the question remains: does such a combination of rights add to a litigant's chance of success? Although courts have not always looked favorably upon such combinations, this Comment asserts that they should.

The First Amendment begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[18] The second of these religion clauses, the Free Exercise Clause, allows an individual to practice his religious beliefs free from government interference. However, the Free Exercise Clause has had a tumultuous history filled with differing interpretations and levels of scrutiny.[19] In 1990, the Supreme Court held that "valid and neutral laws of general applicability" do not violate a claimant's right to the free exercise of religion.[20] Rather than overrule previous cases that applied differing levels of scrutiny to free exercise claims, the Court distinguished these cases on the grounds that they involved a "hybrid situation."[21]

Hybrid situations, or hybrid rights claims, are claims that involve alleged violations of the Free Exercise Clause and some other "constitutional protection[]."[22] Under a successful hybrid rights claim, the reviewing court applies a stricter level of scrutiny to the law at hand than rational basis review, which applies to naked free exercise claims.[23] The remedy to a hybrid rights claim usually does not involve finding a law unconstitutional; instead, all the claimant seeks is an exemption from the law. To follow the law, as the argument goes, would burden a claimant's practice of religion or require a claimant to violate his religious conscience, also known as the right to the free exercise of religion.

Although the Constitution grants numerous types of general liberties, it specifically requires religious liberty. Religious liberty has been a cornerstone of the United States, evident by the views of early colonists,[24] beliefs of the

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18 U.S. CONST. amend. I.

19 *See infra* Part I.A.

20 Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

21 *Id.* at 881–82.

22 *Id.* at 881.

23 *See infra* Part I.A.

24 *See* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 21–37 (3d ed. 2011) (describing how four views—Puritan, Evangelical, Enlightenment, and Civic Republican—helped inform and shape early American thought on religious liberty).

founders,[25] and original state constitutions.[26] Religious liberty was of fundamental importance at the founding of the United States, and it remains of the utmost importance to many people today. While there are a few limitations to this liberty,[27] the Free Exercise Clause should be able to provide exemptions to protect an individual's conscience.[28] This Comment is premised on the notion that religion remains an important aspect of many individuals' lives, an aspect that should not be cast off by the judiciary. The beliefs of many individuals can be summed up accordingly: "A religious duty does not cease to be a religious duty merely because the legislature has passed a generally applicable law making compliance difficult or impossible."[29]

Courts have granted exemptions from a general law based on religious liberty since the beginning of this nation,[30] and this Comment follows the rationale of the founders and the early state constitutions: exemptions should be utilized to protect religious liberty, not in an attempt to establish or impose religion, but to allow anyone the opportunity to freely exercise his religion and to remain free from violating his conscience.[31] Liberty comes in many forms, but few liberties are so central to one's being as religious liberty. Times have changed considerably since the founding of this nation, but one element remains: many individuals would rather violate the laws of man than violate what they consider to be God's law. How, then, should courts address those instances when government action impedes one's religious practices or beliefs? One method, while keeping in line with current Supreme Court precedent, is the expansion of the hybrid rights doctrine.

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[25] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1449–54 (1990) ("The growing popular support for broad religious freedom within the newly formed American states helped to shape the views of the framers of the Constitution and the free exercise clause.").

[26] *See* WITTE, JR. & NICHOLS, *supra* note 24, app. 2 at 299–303 (showing that forty-two of forty-eight state constitutions in effect before 1947 featured a general clause explicitly protecting the liberty of conscience, rights of conscience, or both).

[27] *See infra* Part IV.B.2.

[28] *See* McConnell, *supra* note 25, at 1512 ("[I]t is possible to say that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation.").

[29] *Id.*

[30] *See id.* at 1466–73 ("[E]xemptions were seen as a natural and legitimate response to the tension between law and religious convictions.").

[31] *See id.* at 1511–12 ("There is no substantial evidence that such exemptions were considered constitutionally questionable, whether as a form of establishment or as an invasion of liberty of conscience. . . . The modern argument against religious exemptions, based on the establishment clause, is thus historically unsupportable.").

In Part I, this Comment will begin with a brief overview of the strict scrutiny regime under which free exercise claims were once considered. Then, Part I will analyze the famous 1990 case, *Employment Division v. Smith*,[32] where the Supreme Court first introduced the concept of hybrid rights to free exercise jurisprudence. The Supreme Court distinguished, rather than overruled, all of the previous free exercise cases, showing that these cases survived on some form of hybrid theory. Part I will also exhibit what naked free exercise claims look like after *Smith*, which highlights the need for hybrid analysis in the courts. In particular, it will show how hybrid rights cases provide stronger protections for religious liberty than naked free exercise cases.

Part II will then examine the three-way interpretive split that has developed in the Circuit Courts of Appeals regarding hybrid rights claims. Part II will also demonstrate that clear guidance from the Supreme Court in this area is vital and that litigants will suffer from the consequences as long as there is not a clear standard.

Part III will demonstrate why the colorable claim approach is the best solution to the issue of hybrid rights. Then, Part III will explore the justifications of the colorable claim approach and describe how this approach is most similar to the distinguished free exercise cases. Finally, Part III will consider how courts have successfully applied the colorable claim approach. This Comment asserts that the colorable claim approach is the proper interpretation, evident by the protection it has provided litigants as opposed to other approaches.

Part IV will argue that the hybrid rights approach can be expanded to provide even more protection to litigants. To effect this expansion, Part IV will demonstrate that hybrid rights can expand to other rights that courts have not commonly considered as companion claims. Such combinations are still within the Supreme Court's acceptable parameters. Then, Part IV will assert that courts should not be so hesitant to balance the relevant factors between the government and the claimant. When a claimant is compelled to act, granting an exemption would not injure another, and granting an exemption would not violate the Establishment Clause, the reviewing court should strongly consider granting an exemption to protect the claimant's religious liberty.

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[32] 494 U.S. 872 (1990).

Finally, Part V will consider the application of the hybrid rights approach to *Axson-Flynn v. Johnson*, described at the beginning of this Introduction, and to a hypothetical state contraception mandate to consider how a state court would apply the hybrid rights doctrine to a law closely akin to the federal contraception mandate. These applications will exhibit the proper approach to the hybrid rights doctrine and show that the Free Exercise Clause can still afford protection to religious liberty.

I. ALTERING THE FREE EXERCISE LANDSCAPE

The Free Exercise Clause has had a tumultuous history, filled with varying judicial interpretations. Before examining how hybrid rights can expand religious liberty, it is important to understand the history of the Free Exercise Clause and how it has been interpreted over the past few decades. First, this Part will give a brief history of the Free Exercise Clause and of cases decided under strict scrutiny. Second, this Part will analyze the shift in the level of scrutiny announced in *Employment Division v. Smith* and highlight the birth of the hybrid rights doctrine. Finally, this Part will demonstrate the ramifications of the *Smith* holding on naked free exercise claims and describe the Congressional reaction to the decision.

A. The Free Exercise Clause Pre-1990

The Free Exercise Clause was invoked rarely in the first century and a half of America's existence. Even those cases that did arise under the religion clauses rarely sought an exemption from general laws until 1878,[33] when the Court finally handled its first major Free Exercise Clause challenge and applied a very low level of scrutiny to a statute forbidding polygamy.[34] This low level of scrutiny, commonly known as rational basis review, meant that the reviewing court would uphold the law if it were in pursuit of a legitimate governmental interest and if it were reasonably related to that interest.[35] This standard was an easy one for the government to satisfy, and every Supreme

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[33] *See* McConnell, *supra* note 25, at 1503. McConnell also suggests that the actual practices during America's first century favored exemptions, even though appellate decisions went the other way. *See id.* at 1511.

[34] Reynolds v. United States, 98 U.S. 145, 166–67 (1879) ("To permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."). The Court's first free exercise case was *Permoli v. Municipality No. 1 of New Orleans*, but the Court's inquiry into the Free Exercise Clause is quite uninformative. *See* 44 U.S. (3 How.) 589 (1845).

[35] WITTE, JR. & NICHOLS, *supra* note 24, at 135.

Court application of rational basis review in a Free Exercise Clause case over the next sixty years resulted in a win for the government.[36]

The level of scrutiny changed when the modern era of the Free Exercise Clause emerged in 1940 as the Supreme Court, in *Cantwell v. Connecticut*, held that the Free Exercise Clause applies to the states by way of the Fourteenth Amendment.[37] Additionally, the Court applied a higher level of scrutiny to allow Cantwell, a Jehovah's Witness, to distribute religious literature in spite of a law forbidding religious solicitation without a permit.[38] This new, heightened standard of review, commonly known as the intermediate scrutiny test, meant that the reviewing court would uphold the law only if it were in pursuit of an important or significant governmental interest and if it were substantially related to that interest.[39] This standard would last for the next twenty years and resulted in a fairly even split between cases holding for the government and cases holding for the free exercise claimant.[40]

The level of scrutiny changed yet again in 1963 when the Supreme Court, in *Sherbert v. Verner*, first applied the strict scrutiny standard to exempt a Seventh-Day Adventist from a law denying unemployment benefits to anyone who failed to accept work without good cause after the claimant refused to work on Saturday, her Sabbath day.[41] This strict scrutiny standard, also called the compelling interest test, meant that the reviewing court would only uphold the law if it were in pursuit of a compelling governmental interest and if it were narrowly tailored to achieve that interest, not intruding on the claimant's rights any more than was absolutely necessary.[42] This standard was the most difficult standard for the government to satisfy, and in the years after *Sherbert*, free exercise claimants won six out of ten cases that went before the Supreme Court.[43] The compelling interest standard would remain the standard for free exercise cases until the Supreme Court decided *Employment Division v. Smith*,

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36 *Id.* at 137.

37 310 U.S. 296, 303 (1940).

38 *Id.* at 311 ("[I]n the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication . . . raised no such clear and present menace . . . .").

39 WITTE, JR. & NICHOLS, *supra* note 24, at 135.

40 *Id.*

41 374 U.S. 398, 403 (1963) (holding that the State could only burden the free exercise of religion if it could be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))).

42 WITTE, JR. & NICHOLS, *supra* note 24, at 135.

43 *Id.* at 137.

a case that remains "fraught with complexity both in doctrine and in practice."[44]

B. Employment Division v. Smith

In the 1990 case *Employment Division v. Smith*, the United States Supreme Court changed the level of scrutiny for free exercise claims back to the lowest level of scrutiny, rational basis review.[45] In *Smith*, the plaintiffs were denied state unemployment compensation after they were fired from their jobs for workplace "misconduct."[46] This "misconduct" involved ingesting peyote, a banned substance under Oregon criminal law, for sacramental purposes at a ceremony of the Native American Church.[47] In breaking from its previous free exercise decisions, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[48] To effect this new interpretation, the Court determined that the compelling government interest test from *Sherbert* was inadequate.[49]

Justice Scalia, writing for the majority, could not understand why religious objections to valid and neutral laws should outweigh the function of government: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense."[50] To Justice Scalia, "valid and neutral laws of general applicability" should not be subjected to any kind of balancing approach: "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[51]

While the *Smith* decision put an abrupt halt to the previous decades of expanding free exercise protection, Justice Scalia did hold out some religious

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[44] Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1147 (9th Cir. 2000) (en banc) (O'Scannlain, J., concurring).

[45] *See* 494 U.S. 872, 876–77 (1990).

[46] *Id.* at 874 (internal quotation marks omitted).

[47] *Id.*

[48] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (internal quotation mark omitted).

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

[50] *Id.*

[51] *Id.* at 889 n.5.

liberty protection by introducing the doctrine of so-called hybrid rights. In an attempt to distinguish this new free exercise jurisprudence from previous decisions, Scalia explained the hybrid rights doctrine as follows: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[52] Although he did not elaborate upon how these hybrid rights cases should be handled by a reviewing court, Justice Scalia explicitly noted five constitutional rights that could combine with a free exercise claim to form a hybrid claim: freedom of speech, freedom of the press, the right of parents to direct the education of their children, freedom from compelled expression, and freedom of association.[53] Analysis of these cases provides guidance for how hybrid claims should be handled in future cases.

Justice Scalia first cited cases involving freedom of speech and of the press.[54] In each of these three cases, the Supreme Court invalidated laws requiring either a licensing system or a flat tax on religious solicitations.[55] These cases show that when a law restricts the freedoms of speech or press, protections expressly mentioned in the First Amendment, these rights can join the right to the free exercise of religion to form a successful hybrid rights claim. Since *Smith*, these types of hybrid cases have been the most successful in the lower courts.[56]

Justice Scalia then gave two examples of cases involving the right of parents to direct the education of their children.[57] In each of these cases, the Court held that parents have a great responsibility in the upbringing of their children and that this right deserves considerable protection.[58] These cases further expanded the hybrid rights doctrine: the companion claim joining the

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[52] *Id.* at 881.

[53] *Id.* at 881–82.

[54] *Id.* at 881 (citing Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[55] *See, e.g.*, *Cantwell*, 310 U.S. at 303 (holding that a licensing system for religious solicitations was invalid).

[56] *See infra* Part III.C.

[57] *Smith*, 494 U.S. at 881 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

[58] *See Yoder*, 406 U.S. at 236 (holding that a state law compelling Amish parents to send their children to school past the eighth grade violated their right to the free exercise of religion); *Pierce*, 268 U.S. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

free exercise claim does not have to be expressly mentioned in the Constitution; it only has to be one that affords a "constitutional protection[]."[59]

Next, Justice Scalia gave two examples of cases prohibiting compelled expression.[60] While each of these cases was decided solely upon compelled speech grounds, they were still presented as a hybrid combination of the rights to free exercise and free speech.[61] Compelled speech is a violation of the right to free speech, and in general, the government will have trouble when it seeks to compel action.[62]

Finally, Justice Scalia explained that another example of a hybrid rights case could be a claim involving the freedom of association, although he did not give an example of a case in which a claimant had successfully brought such a claim.[63] He did, however, explain what a freedom of association hybrid rights claim might look like.[64] Although courts generally have not applied the freedom of association to hybrid rights claims, it is still a viable option, one that claimants should readily use in the future.[65]

Rather than overrule many free exercise cases from the past century, Justice Scalia distinguished those successful free exercise claims as presenting "a hybrid situation."[66] Much debate has ensued regarding these hybrid rights,[67] and this debate has coincided with the reaction to and the application of *Smith* by the lower courts, which have grappled with the concept of hybrid rights without further guidance from the Supreme Court.

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59 *See Smith*, 494 U.S. at 881.

60 *Id.* at 882 (citing Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

61 *Id.* ("Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion . . . .").

62 *See infra* Part IV.B.1.

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

64 *Id.* (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)). Justice Scalia pointed to the language from *Jaycees*, in which the Court noted, "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* (alteration in original) (quoting *Jaycees*, 468 U.S. at 622).

65 *See infra* Part IV.A.

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

67 *See infra* Part II.

C. Post-Smith *Application*

The backlash from *Smith* was severe. Numerous scholars expressed concern over the court's narrowing of the Free Exercise Clause,[68] and other members of the Supreme Court echoed these concerns in regard to abandoning the compelling interest test, arguing that "courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."[69] However, despite the abrupt change,[70] every free exercise challenge now is analyzed in light of the rule in *Smith*, and this light has not shone very brightly in favor of religious liberty claimants.

Since *Smith*, for example, consider how a claimant will quickly lose any naked free exercise challenge, as seen in the Supreme Court's recent exposition into the free exercise doctrine, *Christian Legal Society v. Martinez*.[71] In *Christian Legal Society*, a law school's Christian Legal Society required members to hold particular religious convictions and abstain from premarital sex and homosexual conduct, and sought an exemption from the school's nondiscrimination policy in order to limit membership accordingly.[72] Among the arguments advanced by the society was that failure to grant an exemption would violate the society's First Amendment rights to free speech, expressive association, and free exercise of religion.[73] However, the school refused to register the society as a student organization because of its refusal to follow the nondiscrimination policy.[74] Because the federal district court held

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[68] *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4 ("The Free Exercise Clause is now principally a special case of equal protection, forbidding religious discrimination. . . . [T]he Free Exercise Clause itself now has little independent substantive content."). For a thorough collection of the criticism following *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (arguing that the decision was wrongly decided for two reasons: lack of historical justification and inconsistencies in the Court's theoretical First Amendment arguments), and James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992).

[69] *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[70] *Compare* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) ("In such cases as *Sherbert v. Verner*, *Wisconsin v. Yoder*, . . . we held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." (citations omitted)), *with Smith*, 494 U.S. at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

[71] 561 U.S. 661 (2010).

[72] *Id.* at 671–72.

[73] *Id.* at 673.

[74] *Id.* at 672–73.

that hybrid rights were not applicable in this case,[75] it came before the Supreme Court as a naked challenge to the free exercise of religion. As a naked free exercise challenge, the Supreme Court rejected the challenge without much analysis because the university's policy was a valid regulation of general application.[76] From *Smith* to *Christian Legal Society*, the Supreme Court has been clear: unless the State has clearly singled out religion for unfavorable treatment,[77] claimants will not receive any sort of protection against valid and neutral laws.

In response to the *Smith* decision and out of a desire to return free exercise jurisprudence to how it was pre-*Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[78] Because "in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,"[79] Congress decided "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*."[80] Congress provided that a religious exemption could be denied only if the government can prove that the law "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[81] Despite religious liberty advocates' excitement over the law, RFRA was short lived. Just four years after its enactment, the Supreme Court held RFRA unconstitutional as it applied to the states in violation of Congress's powers under the Fourteenth Amendment.[82] In response to this decision, Congress

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[75] Christian Legal Soc'y v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *26 (N.D. Cal. May 19, 2006) ("Because the Court finds that none of CLS's claims for violations of their constitutional rights have merit, there is no basis for their alleged 'hybrid-rights' claim.").

[76] *Christian Legal Soc'y*, 561 U.S. at 697 n.27 ("CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument." (citations omitted)); *see also* Christian Legal Soc'y v. Eck, 625 F. Supp. 2d 1026, 1052 (D. Mont. 2009) ("Because Plaintiffs' free speech claim fails as a matter of law, there is no basis for a 'hybrid rights' claim warranting strict scrutiny.").

[77] *See* Locke v. Davey, 540 U.S. 712, 720 (2004) (rejecting the argument that denial of funding for religious training was singling out religion for unfavorable treatment); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (holding that a city's laws prohibiting animal sacrifice were void because they stemmed from animosity toward a particular religion).

[78] 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the applicability of the Act to the States and States' subdivisions); *see also* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

[79] *Id.* § 2000bb(a)(4) (citation omitted).

[80] *Id.* § 2000bb(b)(1) (citations omitted).

[81] *Id.* § 2000bb-1(b).

[82] City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.").

passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) to handle free exercise claims challenging state laws regulating religious practice in prison settings and religious land use.[83] The Supreme Court upheld this legislation against an Establishment Clause challenge in *Cutter v. Wilkinson*.[84]

Thus, three standards remain for greater free exercise protection: RFRA applies to challenges brought under federal law, RLUIPA applies to state and local laws dealing with religious practice in prison settings and religious land use, and the hybrid rights doctrine applies to the vast number of remaining issues challenging state and local laws. While much has been written about RFRA, RLUIPA, and whether statutes can provide greater protection to religious liberty,[85] the remainder of this Comment will argue that expanding the hybrid rights doctrine put forth by Justice Scalia in *Smith* is the best way to provide protection under the Free Exercise Clause.

II. CURRENT HYBRID RIGHTS APPROACHES

In the years since *Smith*, commentators and courts alike have attempted to provide meaning and understanding to the hybrid rights doctrine. A hybrid rights claim involves a challenge that the government is simultaneously violating one's right to the free exercise of religion and some other "constitutional protection[]."[86] The strength of this other constitutional protection, known as the companion claim, determines whether a hybrid rights claim will be successful.

Three interpretations of the hybrid rights doctrine have emerged—dicta, independent claims, and the colorable claim approach—and United States Circuit Courts of Appeals are split on which of these approaches should rule. Thus, debates regarding these three approaches will continue until the Supreme Court clarifies the proper approach to hybrid rights. In the absence of further clarification, the divergent approaches taken by the circuit courts remain the

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[83] 42 U.S.C. §§ 2000cc to 2000cc-5 (2012); *see also* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

[84] 544 U.S. 709, 720 (2005) ("On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.").

[85] *See, e.g.*, Erin N. East, Comment, *I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships*, 59 EMORY L.J. 259 (2009) (arguing that RLUIPA provides an effective model for a more flexible statutory approach to reconciling the conflict between the rights of same-sex couples and the rights of religious objectors); Ryan, *supra* note 68 (arguing that enacting RFRA to reestablish the compelling interest test is a futile endeavor).

[86] Emp't Div. v. Smith, 494 U.S. 872, 881 (1990).

law and must, therefore, be discussed and analyzed. The three sections that follow will discuss these three approaches in detail.

A. Dicta

The first approach expressly ignores the hybrid rights approach of free exercise jurisprudence and simply considers Justice Scalia's language in *Smith* regarding hybrid rights to be pure dicta. So far, the Second, Third, and Sixth Circuits have adopted the dicta approach, and a later concurring opinion by Justice Souter has provided further support for this interpretation.

The Second Circuit first rejected the hybrid rights theory in *Knight v. Connecticut Department of Public Health*, a case in which a state agency reprimanded two employees for discussing religious beliefs with clients while on the job.[87] In response to the employees' argument that this was a hybrid situation regarding the rights of free speech and free exercise of religion, the Second Circuit concluded that *Smith*'s "language relating to hybrid claims is dicta and not binding on this court."[88] The Second Circuit elaborated its position further two years later by explaining that "[w]e . . . can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."[89]

Like the Second Circuit, the Third Circuit has also rejected hybrid claims as dicta. In *Combs v. Homer-Center School District*, a group of parents brought a hybrid rights claim, challenging the state's compulsory laws regarding home-school education as an infringement upon their rights to freely exercise their religion and to direct their children's upbringing.[90] The Third Circuit conducted a thorough examination of how other circuit courts were handling hybrid claims and concluded, "Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."[91] The Third Circuit affirmed this interpretation again the very next year.[92]

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87 275 F.3d 156, 160 (2d Cir. 2001).

88 *Id.* at 166–67.

89 Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003).

90 540 F.3d 231, 244 (3d Cir. 2008).

91 *Id.* at 247.

92 McTernan v. City of York, 564 F.3d 636, 647 n.5 (3d Cir. 2009) ("We have neither applied nor expressly endorsed a hybrid rights theory, and will not do so today. . . . Our reluctance to do so is reinforced by the decisions of our sister courts.").

The Sixth Circuit has produced the strongest language by a court of appeals in favor of the dicta approach to date, the oft-cited *Kissinger v. Board of Trustees*.[93] In regard to a hybrid rights claim challenging a state university's curriculum as violating the rights to free exercise and free speech, the court in *Kissinger* explained that it would not make sense if a state regulation could violate free exercise rights with the addition of other constitutional rights but could not violate the Free Exercise Clause by itself.[94] Thus, the court viewed hybrid claims as "completely illogical" and explained that it would not apply a stricter standard than the one from *Smith* until the Supreme Court did so first.[95]

In light of these circuit courts of appeals' views, perhaps the most important voice in support of the dicta approach belongs to Justice Souter.[96] In his concurring opinion in *Lukumi*, Justice Souter described hybrid rights "as ultimately untenable."[97] He expressed doubt as to the utility of hybrid rights claims:

> 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.[98]

Along with calling for *Smith* to be reconsidered as a whole, Justice Souter was not persuaded by the *Smith* majority's attempts at distinguishing free exercise cases in this hybrid fashion.[99]

The basis for these courts of appeals and Justice Souter's rejection of hybrid claims is solidly grounded. Admittedly, it would be illogical simply to allow a litigant to win a free exercise challenge just because he can present multiple constitutional challenges. Even other circuits, which do recognize hybrid claims, refuse to "bootstrap" free exercise claims by attaching any companion claim whatsoever, such as a weak or unsuccessful claim, to create a

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93 Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177 (6th Cir. 1993).

94 *Id.* at 180.

95 *Id.*

96 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring); *see also id.* at 577 (noting that *Smith* should be reconsidered and the "existing tension" of the Free Exercise Clause remains to be handled "another day").

97 *Id.* at 567.

98 *Id.*

99 *Id.* at 566.

hybrid rights claim.[100] When viewed in terms of adding any constitutional claim whatsoever or bootstrapping claims and expecting success, such expectations should be considered untenable. However, the dicta approach ultimately is misguided.

While the rejection of hybrid claims allows judges to quickly dispose of unnecessary and frivolous free exercise challenges, it should not be the standard because it does not allow for *any* balancing of interests. In this model, the Free Exercise Clause becomes worthless, and a litigant is left hoping that his secular challenges can succeed because his free exercise claims, no matter how strong or convincing, will not provide any protection so long as they are up against a "valid and neutral law of general applicability."[101] Just as Justice Scalia feared the extreme scenario of "a system in which each conscience is a law unto itself,"[102] Justice Souter seems to fear the opposite result, that is, "a hybrid claim is simply one in which another constitutional right is implicated."[103] Perhaps both justices ultimately fear the result articulated by Ira Lupu: "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[104] Yet, this fear of free exercise exemptions should not keep courts from engaging in hybrid rights analysis. The only thing worse than allowing any additional claim combined with a free exercise claim to clog up the court system is to completely preclude the option of religious liberty protection through hybrid rights, and that is precisely what the dicta approach does. In *Smith*, Justice Scalia wrote that previous free exercise cases presented a hybrid situation,[105] meaning that hybrid situations must exist and must mean *something*. Because the dicta approach does not allow for the hybrid rights doctrine to be considered at all, it should not be used to adjudicate hybrid rights claims.

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[100] Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("[N]o court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner. We decline to be the first." (citation omitted)).

[101] Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (internal quotation mark omitted).

[102] *Id.* at 890.

[103] *Lukumi*, 508 U.S. at 567 (Souter, J., concurring).

[104] Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

[105] *Smith*, 494 U.S. at 881.

B. Independent Claims

The second approach to hybrid claims holds that a hybrid rights claim is appropriate only when the companion claim can win on its own without the free exercise claim. The First and District of Columbia Circuits have adopted this independent-claims approach.

The First Circuit reviewed a hybrid rights challenge that high-school-aged children should not be required to attend a compulsory sexual education program at their public high school, in *Brown v. Hot, Sexy & Safer Productions, Inc*.[106] The court distinguished these facts from the hybrid challenge in *Yoder* and rejected the parents' hybrid rights claim because the free exercise claim was "not conjoined with an independently protected constitutional protection."[107] Although *Brown* did not explicitly state that the First Circuit was adopting the independent-claims approach,[108] the First Circuit[109] and other Circuit Courts of Appeals[110] have read *Brown* to invoke the independent-claims theory.

The District of Columbia Circuit has also adopted the independent-claims theory. In *Henderson v. Kennedy*, a religious group stated that a law forbidding the sale of t-shirts at the National Mall violated its right to free exercise and free speech, even though no one was permitted to sell t-shirts at the National Mall.[111] The court explained that, for the litigant's hybrid rights claim to succeed, the court would have to conclude that "the combination of two untenable claims equals a tenable one."[112] Although *Henderson* did not explicitly state that the District of Columbia Circuit was adopting the independent-claims theory, the District Court for the District of Columbia now considers hybrid claims utilizing this theory.[113]

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106 68 F.3d 525, 529 (1st Cir. 1995).

107 *Id.* at 539.

108 Parker v. Hurley, 514 F.3d 87, 98 n.9 (1st Cir. 2008) ("*Brown* did not explicitly consider this debate . . . . Thus we do not read *Brown* as having settled this question . . . .").

109 *See* Gary S. v. Manchester Sch. Dist., 374 F.3d 15 (1st Cir. 2004), *aff'g* 241 F. Supp. 2d 111, 121 (D.N.H. 2003).

110 *See, e.g.*, Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 245 (3d Cir. 2008).

111 253 F.3d 12, 13–14 (D.C. Cir. 2001).

112 *Id.* at 19.

113 *See, e.g.*, Mahoney v. Dist. of Columbia, 662 F. Supp. 2d 74, 95 n.12 (D.D.C. 2009).

However, this is the weakest of the hybrid interpretations.[114] Just as a rejection of hybrid claims altogether is too restrictive on the Free Exercise Clause, the independent-claims theory propounded by the First and District of Columbia Circuits ultimately does not properly handle free exercise claims. Without explicitly saying so, it appears that these two circuit courts became weary at the idea of litigants receiving strict scrutiny just by throwing multiple constitutional challenges at a court. To avoid this result, these two courts are essentially saying that, to receive strict scrutiny, the additional claim must be so persuasive that it is able to win independently from the free exercise claim. However, even amidst arguments that this approach is equivalent to the Court's approach in *Smith*,[115] the problem with this standard is evident: if the requirement is that the additional constitutional challenge must independently win to invoke a hybrid rights claim, then there is no need for a hybrid rights analysis in the first place.

Other courts have taken issue with this interpretation as well. In 2004, the Tenth Circuit refused to adopt this approach because "it makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary."[116] This approach is also redundant because "[i]f the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid rights exception would add nothing to the case."[117] In addition to rejecting the concept of hybrid rights as a whole, Justice Souter's comments in *Lukumi* further discount this independent approach:

> [I]f 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 for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[118]

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[114] Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1502 (2010) (describing this approach as the "weakest attempt" to give true meaning to the hybrid rights language in *Smith*).

[115] *See* Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77, 99 (2005) (arguing that the Supreme Court in *Smith* combined an independent claim, not merely a colorable claim, with the free exercise claim).

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

[117] *Id.* at 1297.

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

While the ultimate standard for analyzing hybrid approaches may still be unclear, it is clear that this is not the proper approach.

C. Colorable Claims

The third major approach to hybrid rights claims is the colorable claim approach, which holds that a hybrid rights claim is one that includes a free exercise claim and a companion claim that has a probable, or colorable, chance of success on its own. The Tenth and Ninth Circuits have adopted this colorable claim approach.

The Tenth Circuit first considered hybrid rights in *Swanson v. Guthrie Independent School District No. I-L*, a case involving the rights of parents to direct their child's upbringing in combination with their right to freely exercise their religion when a school district refused the parents' request to send their home-schooled child to the public school part time.[119] The court rejected the parents' hybrid claim against the public school's policy, explaining that a hybrid rights claim "at least requires a colorable showing of infringement of recognized and specific constitutional rights."[120] While the colorable claim approach is much more liberal than the previous two approaches, the Tenth Circuit did place a restraint on those attempting to bring a hybrid rights claim: "[W]e believe that simply raising such a claim is not a talisman that automatically leads to the application of the compelling-interest test."[121] The Tenth Circuit has affirmed this approach in later decisions and defined "colorable" as "a fair probability or likelihood, but not a certitude, of success on the merits."[122] The court further explained that analysis of this colorable claim approach should be "very fact driven" and examined on a "case-by-case basis."[123]

The Ninth Circuit has agreed with the Tenth Circuit's approach and first considered hybrid rights claims in depth in *Thomas v. Anchorage Equal Rights Commission*, a case in which religious landlords refused to rent to unmarried

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119 135 F.3d 694, 696 (10th Cir. 1998).
120 *Id.* at 700.
121 *Id.* at 699.
122 *Axson-Flynn*, 356 F.3d at 1297.
123 *Id.*

couples.[124] Although ultimately vacated due to a lack of ripeness,[125] the Ninth Circuit announced that it would follow the Tenth Circuit and the original district court decision in adopting the colorable claim approach.[126] This approach was affirmed when the court clarified that a plaintiff cannot "allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right."[127]

Of the three main approaches to hybrid rights claims—dicta, independent claims, and the colorable claim approach—the colorable claim approach is the best interpretation of the rule set out in *Smith* and comes the closest to giving the Free Exercise Clause its appropriate worth in a balancing scheme. Numerous commentators over the years have reached the same conclusion,[128] and this Comment endorses this approach.[129] However, just like the two approaches discussed before it, the colorable claim approach, albeit better, is not free from its detractors who argue that the colorable claim approach impermissibly grants favorable treatment to claimants based on religion.[130] Yet, in contrast to the dicta approach and the independent-claims approach, the colorable claim approach at least incorporates a balancing test, which this Comment asserts is in line with the proper approach.[131]

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[124] 165 F.3d 692, 696 (9th Cir. 1999), *vacated en banc on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000).

[125] *Thomas*, 220 F.3d at 1147–48 (O'Scannlain, J., concurring) ("Thus we postpone, perhaps serendipitously, but ineluctably, definitive application of [*Smith*] and its newly developed hybrid rights doctrine . . . ." (citation omitted)).

[126] *See Thomas*, 165 F.3d at 705.

[127] Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999).

[128] *See, e.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 600 (2003) ("The colorable claim standard, properly applied, appears to most closely approximate the design of *Smith*."); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 670 (2001) ("Thus, the 'colorable claim' theory to the hybrid-rights exception is best suited to weigh the companion claim."); 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, 742 (2005) ("This article contends the colorable showing approach to the hybrid rights exception of *Smith* is the most appropriate approach adopted by the lower courts.").

[129] *See infra* Part III.

[130] *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 191–92 (2002) (concluding that the colorable claim approach violates fundamental rights by treating people differently based on religious beliefs); Note, *supra* note 114, at 1506 ("[C]olorable claim analysis nonetheless places the two Religion Clauses in direct conflict.").

[131] *See infra* Part IV.B.

Until the Supreme Court clarifies the proper way to asses hybrid rights claims, the Court's lack of guidance creates a trifurcated problem for litigants attempting to address religious liberty claims: first, litigants are failing to fully brief claims, either by abandoning hybrid rights claims or improperly briefing them, denying courts the opportunity to consider hybrid rights claims;[132] second, some courts have become unwilling to address or adjudicate hybrid rights claims without further guidance from the Supreme Court, denying potential relief to deserving claimants;[133] and third, qualified immunity[134] often will prevent litigants from obtaining damages in free exercise cases.[135] These problems are all in addition to the glaring inconsistency among the circuit courts of appeals, leading to justice being available to some claimants but not others solely based on the claimant's geographical location. In the absence of further guidance from the Supreme Court, this Comment argues that the colorable claim approach is the best option available to protect religious liberty and promotes the idea that all circuit courts should adopt the colorable claim approach to state and local free exercise cases.

III. THE BEST APPROACH: COLORABLE COMPANION CLAIMS

After consideration of the current hybrid rights approaches and the glaring issues with the dicta and independent-claims approaches, what is to be done with hybrid rights claims? In light of the *Smith* decision, can hybrid rights provide proper religious liberty protection, a liberty with a fundamental

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[132] *See* Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 33 n.5 (10th Cir. 2013) ("On appeal, Plaintiffs argue their free exercise claim but abandon the hybrid claim theory. We therefore do not discuss the hybrid claim theory in this opinion."); Elane Photography, LLC v. Willock, 309 P.3d 53, 75–76 (N.M. 2013) (refusing to address the hybrid rights argument because the issue had been improperly briefed with a mere "three-sentence paragraph"), *cert. denied*, 134 S. Ct. 1787 (2014); *see also* Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 267 ("At the very least, pressing hybrid claims wherever plausible will presumably result in either an explanation and reaffirmation of 'free exercise plus,' or an ultimate admission by the Court that the theory was no more than an unprincipled attempt to pretend that *Yoder* survived *Smith*.").

[133] *See* Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("The 'hybrid rights' doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner. We decline to be the first." (citations omitted)); *see also* Ass'n of Christian Sch. Int'l v. Stearns, 362 F. App'x 640, 646 (9th Cir. 2010) (citing no reason to depart from the decision in *Jacobs*).

[134] The defense of "[q]ualified immunity shields public officials from . . . liability if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Axson-Flynn v. Johnson, 356 F.3d 1277, 1299 (10th Cir. 2004) (quoting Pino v. Higgs, 75 F.3d 1461, 1467 (10th Cir. 1996)) (internal quotation marks omitted).

[135] *Id.* at 1297 (concluding that remanding to the lower court to consider the Plaintiff's hybrid rights claim for monetary damages and declaratory relief was "pointless" because the Defendants would be entitled to the defense of qualified immunity on the hybrid rights claim).

importance dating back to the framing of the Constitution? How should lower courts handle free exercise cases when another fundamental right is also at play? As easy as it might be to completely dismiss hybrid rights, *Smith* distinguished previous cases on the grounds that they featured hybrid claims, and courts should not simply ignore these hybrid situations.[136] Hybrid rights must mean *something*. Therefore, despite the deficiencies of the current hybrid rights approaches, this Comment asserts that the hybrid rights doctrine can and must be utilized to provide religious liberty protections to litigants.

To effect such protection, this Comment argues for the colorable claim approach. This Part will argue that the colorable claim approach is the best approach to hybrid rights claims for three reasons: first, a low-threshold, colorable claim approach is the best approach for providing claimants with religious liberty protection; second, combining factors or claims to make one successful claim is a common practice for the Supreme Court; and third, the colorable claim approach has provided the most protection in the years since *Smith*, and lower courts have found this approach to be the most useful.

A. The Colorable Claim Approach Has the Greatest Potential to Protect

First, this Comment argues that, of the three approaches,[137] the proper approach to hybrid rights is the colorable claim approach because it has the greatest potential to protect litigants from violations of the right to the free exercise of religion. However, this Comment argues for the colorable claim approach as written, not necessarily the colorable claim approach as it has been shied away from by courts. As always, the issue with the colorable claim approach is whether the companion claim is, in fact, truly colorable.

As identified by the Tenth Circuit, a "colorable" companion claim is one that has "a fair probability or likelihood, but not a certitude, of success on the merits."[138] A successful colorable companion claim is located on the "middle ground between the two extremes of painting hybrid rights claims too generously and construing them too narrowly," as the Tenth Circuit explained in *Axson-Flynn v. Johnson*.[139] This requires that the companion claim be more

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[136] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999) ("We will not lightly presume that . . . the Supreme Court was wasting its breath."), *vacated en banc on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000).

[137] *See supra* Part II.

[138] *Axson-Flynn*, 356 F.3d at 1297.

[139] *Id.* at 1295.

than just "non-frivolous"[140] but less than a successful companion claim on its own, which would make the free exercise clause unnecessary.[141]

When applying the colorable claim approach as written, the threshold for determining what constitutes a colorable claim should be low because concluding that a litigant has a proper hybrid rights claim is not dispositive—it only determines the level of scrutiny. Rather, only once a court determines that it is dealing with a hybrid rights case should it engage in a balancing of the competing interests.[142] This second step is far more important to the ultimate determination of whether an exemption should be granted than the first step of determining whether the companion claim is colorable.

This low threshold will allow worthy claims to advance to the second step but still weed out the non-hybrid claims. The best example of a litigant's inability to invoke hybrid rights claims is the *Smith* case itself. In *Smith*, the plaintiffs brought a naked free exercise claim that did not invoke any other constitutional claims.[143] Although at least one commentator argues that the litigants could have received hybrid protection based on the free exercise of religion along with the rights to free speech and association,[144] these other rights were not "colorable" enough to warrant hybrid attention, although this is exactly the analysis that a reviewing court must undertake. The *Smith* litigants' free speech or freedom of association arguments had an almost zero likelihood of success on the merits, far below the level of success required for colorable claims.

While cases that cannot employ a companion claim at all will ultimately fail, by making the colorable threshold a low one, more litigants will be able to come to the courts for protection. However, the colorable claim approach is not without its detractors.[145] According to one critic, the colorable claim is flawed because its approach departs "from the traditional understanding of

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[140] *Id.* (citing Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998)) (internal quotation marks omitted).

[141] *See id.* at 1297.

[142] *See infra* Part IV.B.

[143] Emp't Div. v. Smith, 494 U.S. 872, 882 (1990).

[144] 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) (arguing that the litigants should have received hybrid rights protection and did not only because the case was decided without the briefing of this "undiscovered" concept).

[145] *See, e.g.*, Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 140 (2000) (claiming that the colorable claim standard is paradoxical since free exercise rights are less protected than other constitutional rights in some cases but are more protected in other cases).

constitutional rights."[146] As the argument goes, a hybrid rights approach departs from the traditional understanding of constitutional rights since a constitutional right has either been violated or it has not.[147] The District of Columbia Circuit, an advocate of the independent-claims approach, has argued that "in law as in mathematics zero plus zero equals zero."[148] However, as one commentator has responded to the District of Columbia Circuit, "it is equally true that the sum of a number of fractions—one-half plus one-half, for example—may equal one."[149]

This response to the District of Columbia Circuit sums up the colorable claim approach perfectly: the colorable claim approach can still afford protection to litigants in a manner consistent with the Supreme Court's decision in *Smith*. Justice Scalia's language in *Smith* distinguished, rather than overruled, all of the case law regarding the Free Exercise Clause, meaning that hybrid rights must mean *something*. The dicta and independent-claims approaches relegate hybrid rights to a position of zero worth, a position that is inconsistent with the *Smith* decision. Further, "[i]f the Free Exercise Clause is viewed as enacting a zero-sum game between democracy and religious pluralism, we will all lose something of inestimable value."[150] A hybrid rights approach does not have to be a zero-sum game between religious freedom and an artificial Free Exercise Clause, and the colorable claim approach is the proper way to honor religious freedom and provide substance to the Free Exercise Clause. Any claimant that is able to show a free exercise claim along with a colorable companion claim deserves to have these interests balanced against the government's countervailing interest.

B. Combining Factors Is a Common Practice for the Supreme Court

The idea of combining factors into a successful claim, as the colorable claim approach does, is not unique to free exercise litigation. For example, other constitutional protections, such as the right to privacy, have their origins in the combination of multiple constitutional rights. In *Griswold v. Connecticut*, the Supreme Court held that a state law prohibiting the use of contraception for married couples was unconstitutional because it violated the

146 Note, *supra* note 114, at 1504.
147 *Id.* at 1504–05.
148 Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001).
149 Duncan, *supra* note 144, at 858.
150 *Id.* at 855.

right to privacy.[151] The Court explained that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" before holding that "[v]arious guarantees create zones of privacy."[152] These guarantees include the First, Third, Fourth, Fifth, and Ninth Amendments.[153]

If the companion claim in a hybrid rights case were sufficient on its own, then the hybrid rights doctrine would not be needed. The foundation of the hybrid rights doctrine relies on the ability of more than one claim combining to form a winning argument. On this point, the Supreme Court seems clear: multiple constitutional rights strengthen the potential success of a claim. Just as the right to privacy is guaranteed despite the fact that it is not based on one singular protection, but a combination of protections, a free exercise claim should be guaranteed when it is brought in combination with another strong constitutional protection.

For another analogy, consider an example from criminal law: reasonable suspicion under the Fourth Amendment. In *United States v. Arvizu*, a border patrol officer stopped a van on an unpaved road in a remote area of Arizona after he witnessed common signs of drug smuggling.[154] The officer noticed that the defendant, who was driving on a very infrequently used route, seemed rigid and did not look at the officer as he passed, and that the defendant's children began to wave mechanically, as if being instructed to wave, and seemed as if their feet were propped on top of something in the floor.[155] The officer pulled the van over and found over one hundred pounds of marijuana in the van, but the Ninth Circuit held that the officer did not have proper reasonable suspicion to stop the van, citing uncertainty and unpredictability.[156]

However, the Supreme Court reversed and held that the officer had reasonable suspicion to search the van based on a combination of all the relevant factors.[157] Based on a "totality of the circumstances," the Supreme Court held that the officer did have reasonable suspicion to stop the van, admitting that "each of these factors alone is susceptible of innocent

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151 381 U.S. 479, 485 (1965).
152 *Id.* at 484.
153 *Id.* at 484–85.
154 534 U.S. 266 (2002).
155 *Id.* at 269–71.
156 *Id.* at 271–73.
157 *Id.* at 277.

explanation."[158] Despite the fact that none of the factors likely would have been sufficient in their own right, the Court explained that "[t]aken together, we believe they sufficed to form a particularized and objective basis for [the officer's] stopping the vehicle."[159]

This "totality of the circumstances" analysis is similar to the colorable claim approach of hybrid rights. As *Arvizu* shows, a border patrol officer can combine all of the relevant factors in order to obtain reasonable suspicion to search a vehicle. Just as one strange act of behavior by one car is not enough by itself to search a vehicle, one claim of compelled speech or interference with a child's education may not be sufficient to win an exemption from a law. However, if a border patrol officer can combine factors to serve as a basis to protect national security, a litigant should be able to combine rights to protect a right so precious and important as the right to the free exercise of religion. When the government violates multiple constitutional rights, these claims should stack up against the government, and the courts should protect a litigant from such offenses. The Constitution and the importance of religious freedom demand nothing less.

C. The Colorable Claim Approach Has Offered the Most Protection in the Lower Courts

Finally, while no circuit court of appeals has decided a free exercise claim on the basis of any of the hybrid rights approaches,[160] district courts have done so with a colorable claim approach that has been workable.[161] Only courts that are willing to apply the colorable standard have been able to properly provide religious liberty protection to litigants.[162] In the decades immediately following *Smith*, federal district courts began applying hybrid rights, and although there are not many victories for religious claimants, those raising free exercise–free

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158 *Id.*

159 *Id.* at 277–78.

160 *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 98 (1st Cir. 2008) ("No published circuit court opinion . . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim."). As of the writing of this Comment, this statement remains true.

161 *See* Tuttle, *supra* note 128, at 769.

162 Many cases were decided before the three-way circuit split concerning *Smith*—as to whether *Smith*'s hybrid claims language was merely dicta, allowed for independent claims, or allowed for colorable claims—emerged. However, the analysis that a strong companion claim would invoke strict scrutiny is sufficiently similar to the colorable claim approach to be a useful point of comparison.

speech hybrid rights claims have had the most success by far, as seen in two examples.[163]

First, in *Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District*, students challenged their school's dress code, which required them to wear their hair short, as a violation of their First Amendment rights.[164] The district court held that the students had successfully alleged a hybrid claim of free exercise and free speech rights that must pass strict scrutiny in order to be valid.[165] Because the school failed to show that the dress code restriction was a valid means of achieving its objectives to, among other things, maintain discipline and foster respect for authority, the court held that this restriction violated the students' First Amendment rights and granted a preliminary injunction against enforcement of the dress code.[166]

Second, in *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, a church brought a hybrid rights claim against a city's zoning ordinance that prevented the use of the property for worship or prayer, claiming that the law violated its rights to free exercise and free speech.[167] After noting that the Seventh Circuit had not given it any precedent by which to abide, the district court chose to adopt the colorable claim approach as stated by the Ninth and Tenth Circuits.[168] The court then held that this case was analogous to the cases cited in *Smith*, which all invoked a combination of rights, as invoking hybrid rights and applied strict scrutiny to the ordinance.[169]

In addition to hybrid free speech cases, cases that combine a free exercise claim with the right of parents to direct their children's education and upbringing have resulted in successful hybrid rights claims as well. In *Hicks ex rel. Hicks v. Halifax County Board of Education*, a student's legal guardian and great-grandmother cited religious reasons in challenging a school board's mandatory uniform policy.[170] The court explained that the *Smith* Court's

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163 For a thorough analysis of hybrid rights cases through 1997, see William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998), and see also, for example, *Chalifoux v. New Caney Independent School District*, 976 F. Supp 659, 671 (S.D. Tex. 1997) (holding that the schools prohibition on wearing rosaries violated plaintiff's hybrid rights of free exercise and free speech).

164 817 F. Supp. 1319, 1323 (E.D. Tex. 1993).

165 *Id.* at 1332.

166 *Id.* at 1333, 1336.

167 250 F. Supp. 2d 961, 963–64 (N.D. Ill. 2003).

168 *Id.* at 989.

169 *Id.*

170 93 F. Supp. 2d 649, 652 (E.D.N.C. 1999).

decision to distinguish, rather than overrule, *Yoder* suggests that hybrid claims combining free exercise rights and the right of parents' to direct the upbringing of their children necessitates heightened scrutiny.[171] Therefore, the court held that these two claims, in combination, were sufficient to invoke the hybrid rights exception to the *Smith* rule.[172]

Although some state courts have looked very unfavorably upon the hybrid rights doctrine,[173] not all state courts have been completely bereft of success for religious liberty claimants. In *Shepp v. Shepp*, a mother sued her ex-husband, a Mormon, because he was teaching their child about polygamy.[174] The court explained that although the state statute criminalizing polygamy is a generally applicable law and that engaging in polygamy would violate this state law, the father had successfully presented a hybrid rights claim by combining the right to freely exercise his religion along with the right to direct the upbringing of his child.[175] As long as the father's teachings did not harm the child's welfare, his teaching could not be suppressed.[176]

The cases above show that the hybrid rights doctrine can be used to grant constitutional equity to free exercise claimants. Each of the cases above employs a combination of protected rights to provide relief for a religious liberty claimant, a combination that would not be possible under the dicta or independent-claims approaches. The fact that religion is involved creates an even greater case to protect a claimant from undue burden. An individual constitutional claim may not be strong enough to succeed on its own, but in combination with the precious right to the free exercise of religion, the claim should succeed.

While there are examples of successful hybrid rights claims, the vast majority of which are found in the context of free speech and the right of parents to direct the upbringing of their children, hybrid rights cases generally have been few and far between. Because so many circuit courts of appeals have refused to recognize hybrid rights or have required independent claims,

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171 *Id.* at 661.

172 *Id.* at 662.

173 *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 88 (Cal. 2004) ("Assuming for the sake of argument the hybrid rights theory is not merely a misreading of *Smith* . . . ."); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 464 (N.Y. 2006) ("The notion of 'hybrid rights' is derived from a dictum . . . .").

174 906 A.2d 1165, 1167–68 (Pa. 2006).

175 *Id.* at 1172–73.

176 *Id.* at 1173–74.

many district courts are unable to apply hybrid rights.[177] However, recent victories for litigants claiming hybrid rights have emerged from district courts in the Fourth, Fifth, Seventh, and Tenth Circuits, along with state courts.[178] While many district courts are bound by the authority of their respective circuit courts of appeals on this issue, those courts that have ruled in favor of hybrid rights litigants have shown that a combination of rights, the colorable claim approach, is the best and only way to effect protection based on hybrid rights claims.

It is important to realize that only cases invoking a colorable claim approach can provide true meaning to the hybrid rights doctrine as the dicta approach forecloses the idea of hybrid rights and the independent-claims approach does not undergo the hybrid rights analysis. Ultimately, any court that adopts and applies the colorable claim approach to hybrid rights claims will afford greater religious liberty to claimants, as seen through the above cases. By granting an exemption, a court is not invalidating a law completely; it is simply providing constitutional equity by granting a claimant an exemption from an otherwise valid law. The colorable claim approach does not let just any companion claim through the door. Instead, only those claims that have a probability of success are allowed as companion claims. While a determination that a companion claim is colorable will require the reviewing court to balance the factors on each side, the fact that religious liberty is such a precious and protected right justifies this balance.

IV. EXPANDING THE HYBRID RIGHTS DOCTRINE

The colorable claim approach is the best tool to expand the hybrid rights doctrine of the Free Exercise Clause in a manner that remains within the parameters of Supreme Court precedent. Such an expansion will provide greater religious protection for litigants while not overstepping the bounds of the Supreme Court's interpretation. This Comment argues that even greater religious liberty protection can be accomplished, first, by applying companion claims that have not previously been used to form colorable hybrid rights

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177 *See supra* Part II.

178 *See* Brown v. Buhman, 947 F. Supp. 2d 1170, 1222 (D. Utah 2013) (Tenth Circuit); Netherland v. City of Zachary, 626 F. Supp. 2d 603, 610 (M.D. La. 2009) (Fifth Circuit); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 989 (N.D. Ill. 2003) (Seventh Circuit); Hicks *ex rel.* Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649, 664 (E.D.N.C. 1999) (Fourth Circuit); *Shepp*, 906 A.2d 1165 (Pennsylvania Supreme Court).

combinations and, second, by reconsidering the balancing test under the strict scrutiny standard of review to be utilized in the hybrid claims context.

A. Diverse Companion Claims

While the vast majority of cases decided under the hybrid rights rationale have dealt with the freedom of speech or parents' right to direct their child's education and upbringing as companion claims,[179] this Comment argues that the hybrid rights doctrine should be readily applied to other companion claims as well in order to provide more protection for religious liberty. Granted, there must be limits to which claims are acceptable,[180] but, again, the companion claim does not necessarily have to be an expressly enumerated constitutional right.[181] This approach does not advocate a position that any regulation that could be against one's religion is "presumptively invalid;"[182] instead, it is important to remember that hybrid rights claims usually are seeking only an exemption from the law, not a ruling that the law at issue is unconstitutional. It is also important to remember that a finding that a companion claim is colorable is not dispositive to a victory for the claimant.[183] Instead, such a finding only means that the government will engage in a balancing test to determine if the government has a compelling interest in burdening these rights.[184] Thus, courts should not fear a finding that a hybrid rights claim exists, since doing so does not immediately imply success for the claimant. These potential companion claims to hybrid rights combinations that can expand the scope of the doctrine include the freedom of association and other constitutional protections implied within the *Smith* decision.

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179 *See supra* Part III.C.

180 Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1991) ("There would be little left of the *Smith* decision if an additional interest of such slight constitutional weight as 'the right to hire' were sufficient to qualify for this exception.").

181 Justice Scalia only required the companion claim to afford a "constitutional protection[]." Emp't Div. v. Smith, 494 U.S. 872, 881 (1990). For example, the right of parents to direct the education of their children, while not explicitly mentioned in the Constitution, is an acceptable companion claim. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

182 *Smith*, 494 U.S. at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

183 *See supra* Part III.A.

184 *See infra* Part IV.B.

1. Freedom of Association

The right to freely associate[185] should be an acceptable hybrid rights companion claim by which litigants may receive religious liberty protection. Justice Scalia's language in *Smith* explicitly mentions certain companion claims, such as freedom of association, that could be joined to form a hybrid rights claim,[186] but courts have been much more skittish in applying this right as a companion claim. In fact, the freedom of association's first application to the hybrid rights doctrine after *Smith*, in *Salvation Army v. Department of Community Affairs*,[187] was quite damning, and it has not been actively applied ever since.

In *Salvation Army*, The Salvation Army, operators of a religious rehabilitation facility, challenged a New Jersey boarding ordinance as violating its First Amendment rights to freely exercise its religion and to associate.[188] The court considered the hybrid claim and analyzed the two types of association claims: freedom of intimate association and freedom of expressive association.[189] The court quickly dismissed the notion that the freedom of intimate association applied to the facts of the case and then considered whether the freedom of expressive association applied.[190] The court admitted that The Salvation Army had a constitutional right to expressive association but stated that this right could not help it in the case.[191] Because the Supreme Court had not yet provided the guidelines to determine an appropriate approach to freedom of association hybrids, the court held that this "derivative right" could not receive protection with the free exercise claim.[192]

However, this outcome should not result in the rejection of all freedom of association hybrid claims. Because it considered the freedom of association to be a derivative right, the court's approach in *Salvation Army* is at odds with other Supreme Court precedent in that it did not even look for a hybrid situation, once it was clear that another constitutional protection was

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185 Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

186 *Smith*, 494 U.S. at 882 ("And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.").

187 919 F.2d 183 (3d Cir. 1990).

188 *Id.* at 185, 196.

189 *Id.* at 198–200.

190 *Id.* at 198.

191 *Id.* at 199.

192 *Id.* at 199–200.

implicated.[193] When a freedom of association hybrid rights claim arises, the reviewing court should not simply dismiss the case, as the court in *Salvation Army* did; instead, the court should actually engage in a hybrid rights analysis.[194] Here, the freedom of association companion claim had a probable enough chance of success on the merits to be considered a "colorable" showing. At the end of the day, the law in *Salvation Army* instructed a private, religious organization to act against its mission, and this should certainly have been considered tenable enough to present a colorable claim that, in turn, should have led the court to balance the competing interests.[195]

While the Supreme Court did not give an example of a successful freedom of association hybrid rights claim, the Court did provide guidance for what one might look like.[196] Even though the Supreme Court has said that it is "easy to envision a case"[197] in which an associational right is combined with the Free Exercise Clause, reviewing courts simply have not done so.[198] Granted, one could argue that every hybrid rights claim is a viable combination of the rights to free exercise and the right to freedom of association because a claimant almost always belongs to a religious group.[199] However, the freedom of association companion claim is only meant to apply when a specific group's rights to free exercise are being violated.[200] If the government is burdening or compelling a religious group to act against its religious conscience, such an

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193 *See* Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 852 (1993) (arguing that the result in *Salvation Army* is at odds with *Yoder* since the companion claim in *Yoder* was not sufficient by itself, yet it received hybrid analysis while the companion claim in *Salvation Army* did not receive hybrid analysis at all).

194 *See* Brown v. Buhman, 947 F. Supp. 2d 1170, 1222 (D. Utah 2013) (holding that Plaintiffs had made a colorable claim as to their freedom of association claim).

195 *See infra* Part IV.B.

196 *See supra* note 64.

197 Emp't Div. v. Smith, 494 U.S. 872, 882 (1990).

198 Courts very rarely use freedom of association as the companion claim in a hybrid rights claim, but one court recently used the freedom of association claim, among other constitutional claims, to form a hybrid rights claim, holding as follows: "This is the case envisioned by Justice Scalia because Plaintiffs' various colorable constitutional claims relating to the cohabitation prong of the Statute, including a claim under freedom of association, are 'reinforced by Free Exercise Clause concerns.'" *Brown*, 947 F. Supp. 2d at 1221 (quoting *Smith*, 494 U.S. at 882).

199 In *Smith*, for example, the claimants were both members of the Native American Church. *Smith*, 494 U.S. at 874. However, membership alone is not enough to bring a colorable freedom of association companion claim. *See id.*

200 *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that the Boy Scouts of America did not have to include an adult leader in its organization because such inclusion would burden the organization's ability to advocate a viewpoint).

example should suffice to form a hybrid rights claim that would then proceed to a balancing of the interests.

Courts should look to apply freedom of association hybrid rights claims to situations where a state actor is forcing a group to include members it objects to or to promote ideas that are disfavored by the group. Although sparsely used, the freedom of association should carry the same weight as all the other constitutional protections mentioned in *Smith*.[201] In these situations, courts should not fear finding a hybrid rights situation and undertaking a compelling interest analysis. Failing to perform a hybrid rights balancing test forecloses religious protection to litigants and incorrectly disallows litigants from bringing worthy hybrid claims to the judicial system. Thus, courts should allow the freedom of association to be an acceptable companion claim to hybrid rights with just as much frequency as free speech or the right of parents to direct their child's upbringing.

2. Other Constitutional Protections

Another way to increase the scope of religious liberty protection is to branch out to other constitutional companion claims that traditionally have not been used as companion claims. The only requirement given in *Smith* is that the companion claim afford "constitutional protection[]."[202] Toward the end of his majority opinion in *Smith*, Justice Scalia stated, "The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[203] He then went on to mention eleven such exemptions—such as compulsory military service, the payment of taxes, child labor laws, and environmental protection laws—that "[t]he First Amendment's protection of religious liberty does not require."[204] In her concurring opinion to *Smith*, Justice O'Connor referred to this list as a "parade of horribles,"[205] and Justice Scalia retorted that "[i]t is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[206]

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201 *Smith*, 494 U.S. at 881–82.
202 *Id.* at 881.
203 *Id.* at 888.
204 *Id.* at 889.
205 *Id.* at 902 (O'Connor, J., concurring).
206 *Id.* at 889 n.5. (majority opinion).

Despite Justice Scalia's strong language opposing a balancing test between religious liberty and certain civic obligations, he explained that the purpose of his parade was "not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might)" but to keep courts from constantly determining whether an exemption was required.[207] Thus, this language implies that other rights, including rights mentioned in this "parade of horribles," can qualify as companion claims worthy of hybrid rights analysis. Although such exemptions will not be easily granted, the possibility still exists and should be explored by litigants.

For an example of hybrid rights claims that were not expressly mentioned in *Smith* yet are worthy of hybrid rights analysis, consider the recent case of *Brown v. Buhman*.[208] In *Brown*, the plaintiffs challenged a Utah statute forbidding cohabitation as violating the Free Exercise Clause along with multiple other constitutional provisions.[209] Upon review, the court followed the Tenth Circuit's precedent, adopted the colorable claim approach, and held that each of the plaintiff's constitutional claims—freedom of association, substantive due process, equal protection, free speech, and the Establishment Clause—made a colorable showing of a constitutional violation, meriting strict scrutiny.[210] Except for freedom of association and freedom of speech claims, the other claims were not expressly mentioned in the *Smith* decision.[211] The court correctly allowed multiple constitutional claims, even combinations such as free exercise combined with intimate association or the Establishment Clause, to serve as colorable companion claims. Again, a "constitutional protection[]" is all that *Smith* required.[212]

The first and most prominent way that the hybrid rights doctrine can be expanded is by applying the doctrine to more cases than just those involving free speech and the right of parents to direct their children's upbringing. While these two examples have gathered the most attention and success in courts, the hybrid formula does not exclusively apply to these two rights. The hybrid formula is simply a combination of more than one constitutional protection. As stated throughout this Comment, the mere invocation of a companion claim by itself is not sufficient for a hybrid rights claim. However, a companion claim

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207 *Id.*
208 947 F. Supp. 2d 1170 (D. Utah 2013).
209 *Id.* at 1176.
210 *Id.* at 1222.
211 *See Smith*, 494 U.S. at 881–82.
212 *Id.* at 881.

should not be precluded just because it is not an ordinary companion claim. While free speech and the right of parents to direct the upbringing of their children are certainly two protections that can be raised in a hybrid rights claim, many other protections—such as equal protection, due process, or even the freedom to contract—should be allowed to combine to form a hybrid rights claim. The importance of religious freedom demands that these other constitutional protections be considered.[213]

B. Relevant Factors for Consideration

While the approach to free exercise litigation changed dramatically with the *Smith* decision, many earlier cases were distinguished from it and remain good law. However, two largely unresolved questions remain: how did these cases survive, and how should courts deal with cases that present a valid hybrid rights claim?

To deal with this uncertainty, this Comment asserts that the primary issue is not with a particular hybrid rights standard; instead, the issue is with the balancing test of strict scrutiny analysis. A determination that a companion claim is colorable would not bring about an automatic win for the claimant. Once a claimant has presented a valid hybrid rights claim, the reviewing court then balances the government's interest against the claimant's.

As previously discussed, litigants should be able to use the colorable claim hybrid rights approach in order to get to a strict scrutiny balancing test with greater ease than has been the case over the past two decades.[214] In free exercise strict scrutiny analysis, such a balancing test should not be "'strict' in theory, fatal in fact."[215] The government is much more likely to prove a compelling interest regarding religious liberty than one regarding an issue such as race, evident by the government's far greater success in religious liberty strict scrutiny cases than all others.[216] Thus, courts should not be afraid of

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[213] For an analysis of a hybrid rights claim combining a free exercise claim and a constitutionally protected freedom of contract claim, see *infra* Part V.

[214] *See supra* Part III.

[215] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[216] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796–97, 813 (2006) (conducting an empirical study of court opinions applying strict scrutiny from 1990 to 2003 and concluding that the government satisfied strict scrutiny in 60% of religious liberty cases and only 24% in all other cases).

undertaking a thorough balancing of the competing interests in regard to religious liberty.

Current courts, state and federal alike, should be guided by three main factors: (1) is the claimant being compelled to act; (2) would granting an exemption injure others; and (3) would granting an exemption violate the Establishment Clause? By analyzing each of these three factors, courts can be true to historical free exercise jurisprudence and the Supreme Court's free exercise interpretation since *Smith*. Rather than constrain hybrid rights free exercise claims solely to occurrences with the exact fact patterns found in the *Smith* opinion,[217] this Comment proposes that these three relevant questions can guide courts in making decisions that can permissibly expand the hybrid rights doctrine. The answers to these three inquiries should inform a reviewing court whether an exemption should be granted from a general law.

1. Is the Claimant Being Compelled to Act?

There are two types of laws that claimants challenge as violating their free exercise rights: laws that prohibit a claimant from acting and laws that require a claimant to act.[218] This Comment argues that courts should examine laws that compel action with much greater scrutiny than those that merely prohibit action. Just because a law compels action does not mean that an exemption is deserved, just as a law prohibiting conduct may validly require an exemption. Instead, this section will argue that the Supreme Court's decisions show that laws that prohibit conduct are not as intrusive into one's right to the free exercise of religion, as opposed to laws which compel action, which are more intrusive.

First, laws that prohibit action are not as intrusive as laws that compel action and reviewing courts should take this into account. This idea stretches back to some of the first cases challenging the Free Exercise Clause, which dealt with polygamy.

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[217] *See* Note, *supra* note 114, at 1511 (arguing for lower courts only to use hybrid rights with cases that closely resemble *Smith*, particularly *Yoder* and *Cantwell*).

[218] In each of the following examples reviewed in this Part, cases requiring a claimant to act all deal with compelled action, not just telling the litigant he is required to stop an action. For example, in *Cantwell v. Connecticut*, one might argue that the government prohibited the claimant from distributing pamphlets, but really, the government required the claimant to obtain a license to distribute his material. *See* 310 U.S. 296, 306–07 (1940). In contrast, consider again the facts in *Smith*: the government did not compel any action but prohibited the claimants from ingesting peyote. *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

In *Reynolds v. United States*, the Supreme Court upheld a federal law prohibiting polygamy against a challenge that such a law violated the Free Exercise Clause.[219] The Court was concerned that if someone were allowed to practice polygamy based on a religious belief, he could also practice "human sacrifices" or a woman could "burn herself upon the funeral pile for her dead husband" under the cover of religious belief without government interference.[220] *Reynolds* was the first of many cases dealing with polygamy and the Free Exercise Clause, but the individuals in subsequent cases lost each time.[221] In each of these cases, the government did not compel action at all. Instead, in these cases and many others, the government simply maintained that the action at hand was prohibited.[222]

Second, it is an entirely different inquiry when the government compels someone to act, and litigants have had far greater protection when the government requires action. The vast majority of successful pre-*Smith* free exercise claimants dealt with this exact issue: the law forced the claimant to act in violation of religious beliefs. In *West Virginia State Board of Education v. Barnette*, the claimant's child was required to salute the flag in violation of the family's religion.[223] In *Sherbert v. Verner*, the claimant was required to work on Saturday in violation of her religious beliefs.[224] In *Wisconsin v. Yoder*, the claimant's child was required to attend school past the eighth grade in violation of the family's sincere religious beliefs.[225] In each of these three cases, the government compelled the claimant to act against religious beliefs, and the government lost each time.[226]

These results are correct because the government cannot coerce beliefs and matters of conscience.[227] Thus, courts should be much more willing to grant

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219 98 U.S. 145, 166 (1879).

220 *Id.*

221 *See, e.g.*, Davis v. Beason, 133 U.S. 333, 341, 343–45 (1890).

222 *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that refusing to allow a Muslim prison inmate to attend a weekly religious service did not violate the Free Exercise Clause); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that a military regulation forbidding petitioner from wearing his yarmulke with his military uniform did not violate the Free Exercise Clause).

223 319 U.S. 624, 626–29 (1943).

224 374 U.S. 398, 399–401 (1963).

225 406 U.S. 205, 207–09 (1972).

226 *Yoder*, 406 U.S. at 234; *Sherbert*, 374 U.S. at 409; *Barnette*, 319 U.S. at 642.

227 *See Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *see also* WITTE, JR. & NICHOLS, *supra* note 24, app. 2 at 299–303 (exhibiting that forty-two of the forty-eight state constitutions had a general clause explicitly protecting the liberty of conscience, rights of conscience, or both).

exemptions when the government compels action because this inevitably involves requiring one to act against his conscience. However, it is important to note that while reviewing courts should apply a greater level of scrutiny to a law that compels action, this does not mean that an exemption will be issued anytime a claimant is compelled to act against his religious beliefs. In fact, there are many examples to the contrary. In *Bowen v. Roy*, a child's parents contended that obtaining a Social Security number for their daughter, as required by law, would violate their Native American religious beliefs.[228] Although this law directly required the claimants to act against their religious consciences, the Supreme Court explained that "we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion."[229] Even though this action "indirectly and incidentally call[ed] for a choice between securing a governmental benefit and adherence to religious beliefs," the Court held that an exemption could not be granted.[230]

What is interesting about this case is that even though it was pre-*Smith*, it presents an example of a modern-day hybrid rights claim, combining the free exercise of religion with the right of parents to direct their child's upbringing. However, even if this case were brought today, the result would be the same under this Comment's proposal. Even though the government is compelling action, the difference in this case is that the government had a compelling interest in *Bowen*, one that it did not have in *Barnette*, *Sherbert*, or *Yoder*. The government has a strong interest in a uniform social security system without exemptions,[231] and a far less compelling interest in whether, for example, a child goes to school beyond the eighth grade.[232] A child's education is very important, but that interest does not outweigh the parents' right to control the upbringing of their child combined with the right to the free exercise of religion. Courts should not be hesitant to balance competing interests under the compelling interest test. Claims that do not present strong hybrid claims will not win, but those worthy hybrid claims will have a greater chance of success when balanced against the government's interest.

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228 476 U.S. 693, 695 (1986).

229 *Id.* at 704.

230 *Id.* at 706.

231 *Id.* at 707 ("[F]or the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude.").

232 Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

2. Would Granting an Exemption Injure Others?

The second factor in determining whether a free exercise hybrid rights claim is worthy of an exemption is one that has gained a significant amount of attention in recent years: injury to others that violates an antidiscrimination statute. Granting religious exemptions so long as they do not injure others is not a novel or original concept in any way. Both historical documents and the Supreme Court have established that religious exemptions are not to cause injury to the public.

An early example of this notion of religious freedom that doesn't injure or interfere with the rights of others is found in early state free exercise provisions. As early as 1663, Rhode Island provided for the free and full enjoyment of judgments and conscience so long as these are not acts "to the civill injurye or outward disturbeance of others."[233] Even where injury was not explicitly mentioned, the most common feature of these state free exercise provisions was the government's right to protect public peace and safety.[234] New York's 1777 Constitution allowed liberty of conscience but qualified the grant by providing that it "shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."[235] These provisions made it clear that no matter how strong the freedom of conscience claim might be, there are occasions when the injury to another will outweigh the freedom of conscience claim.

Throughout American history, the Supreme Court has frequently reaffirmed the notion that religious exemptions cannot be granted when it would cause injury or harm to another. As far back as 1890, the Supreme Court explained that the free exercise of religion "was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker . . . not injurious to the equal rights of others."[236] In 1940, the Court reaffirmed, "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public."[237] With all of this in consideration, the Supreme Court has not had great opportunity to adjudicate strong free exercise claims against claims that such an exemption would be injurious to others. To be sure, most

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233 McConnell, *supra* note 25, at 1426 (quoting R.I. CHARTER of 1663) (internal quotation mark omitted).
234 *Id.* at 1464.
235 *Id.* at 1456 (quoting N.Y. CONST. of 1777, art. XXXVIII).
236 Davis v. Beason, 133 U.S. 333, 342 (1890).
237 Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

free exercise claims, especially hybrid rights free exercise claims, cause injury to no one.

However, recently, there have been numerous challenges that requiring vendors to provide services to same-sex couple wedding ceremonies violates the vendors' constitutional right to the free exercise of religion.[238] These challenged vendors have included florists, bakers, and photographers, among others.[239] How, then, should the Supreme Court handle these competing claims under a hybrid rights approach?

This Comment asserts that the Supreme Court should give particular scrutiny to free exercise claims that are injurious to others or that interfere with others' rights, but what counts as sufficient injury? While accommodating religious rights for some may be inconvenient for others, this Comment argues that those who enter the public forum for commercial business should not be allowed an exemption from serving homosexuals. The claimants may have a legitimate hybrid rights claim, but such a claim will not be successful under a balancing test because the government has a compelling interest in preventing discrimination. While most challenges have yet to reach advanced stages of litigation, two of these cases can serve as examples of how courts have begun to handle these competing claims.

In *Elane Photography, LLC v. Willock*, a commercial photography business refused to take pictures at a same-sex wedding ceremony, citing violation of the free exercise of religion.[240] Although this would have been an ideal case for a free exercise–free speech hybrid claim, the hybrid rights claim was not properly briefed.[241] As such, the New Mexico Supreme Court held that the Free Exercise Clause had not been violated since the antidiscrimination statute was a "neutral law of general applicability."[242] Similarly, an administrative law judge recently held that a commercial bakery's refusal to make a cake for a same-sex wedding violated the same-sex couple's rights under a Colorado antidiscrimination statute, and the judge denied the bakery's free exercise–free speech hybrid claim.[243] If these cases are decided in favor of the business

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238 *See* Editorial, *Can Discrimination Be Legal?*, L.A. TIMES, Dec. 12, 2013, at A24, *available at* http://articles.latimes.com/2013/dec/12/opinion/la-ed-weddings-20131212.

239 *Id.*

240 309 P.3d 53, 72 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

241 *Id.* at 76.

242 *Id.* at 75.

243 Craig v. Masterpiece Cakeshop, Inc., Case No. CR 2013-0008 (Colo. Office of Admin. Cts. Dec. 6, 2013), *available at* https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf;

owners on another basis such as compelled speech or expressive association,[244] then that is a different matter, but the right to the free exercise of religion should not be invoked when it would amount to the injury of discrimination based on sexual orientation. While a federal court has yet to rule on a case involving wedding services vendors, these two examples above show that courts are unlikely to be in the business of granting exemptions that would be injurious to another.

Although both cases above feature attractive free exercise and free speech hybrid rights claims that seem to apply, a hybrid rights argument would have failed even if the reviewing courts had applied strict scrutiny since protecting citizens from discrimination is certainly a compelling governmental interest. Even though both respondents in the previous two examples had sincere beliefs and weren't acting with any sort of animus toward same-sex couples, this Comment argues that both of these cases were decided correctly. These cases make it clear: when someone enters the public business forum, the hybrid rights approach to the Free Exercise Clause cannot provide an exemption from an antidiscrimination statute.[245]

However, most free exercise cases to date have not involved injury to others. In *Barnette*,[246] no one was injured by an exemption permitting the student to not salute the flag. In *Yoder*,[247] no one was injured by an exemption permitting the Amish parents to remove their child from school after the eighth grade. And in *Hicks*,[248] no one was injured by an exemption from following a school board's mandatory uniform policy.

Those who run public businesses should not be granted an exemption from an antidiscrimination statute if it would result in injury to another, but with this protection in mind, reviewing courts should not quickly shoot down those

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see also Michael Paulson, *Can't Have Your Cake, Gays Are Told, and a Rights Battle Rises*, N.Y. TIMES, Dec. 16, 2014, at A1, *available at* http://www.nytimes.com/2014/12/16/us/cant-have-your-cake-gays-are-told-and-a-rights-battle-rises.html.

244 *See* Brief of Amici Curiae The Cato Institute et al. at 5, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33, 687), 2012 WL 5990629 (arguing that the case should be decided solely on compelled speech grounds).

245 In this situation, the government, through an antidiscrimination statute, is compelling the photographers to act. This factor leans in favor of granting an exemption for the photographers. However, the fact that such an exemption would be injurious to the same-sex couple tilts the balance in favor of denying an exemption.

246 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

247 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

248 *See* Hicks *ex rel.* Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999).

hybrid rights cases in which claimants request an exemption and the result will not injure anyone. Just because there is no injury to another certainly does not mean that the exemption should immediately be granted. Hybrid rights analysis remains a balancing test that any reviewing court should undertake with great thoroughness and with an eye toward whether anyone would be injured by an exemption.

3. Would Granting an Exemption Violate the Establishment Clause?

Finally, when a court considers granting a hybrid rights exemption, such an exemption cannot provide a benefit to the litigant that a nonreligious litigant would not receive, solely on the basis of religion. Allowing such a benefit because of religion would clearly violate the Establishment Clause.[249] The Establishment Clause and the Free Exercise Clause "are frequently in tension,"[250] but "there is room for play in the joints" between the two clauses.[251] This Comment argues that an exemption that carries with it some form of economic or social benefit, solely on the basis of religion, would violate the Establishment Clause. However, an exemption that carries with it some form of economic or social burden or neutral effect would not violate the Establishment Clause and would provide support for a free exercise hybrid rights exemption request.

A neutral outcome to an exemption does not violate the Establishment Clause and provides support for the hybrid rights exemption request. Neutral outcomes to free exercise exemptions are quite common. For example, in *Barnette*,[252] the child did not receive any benefit from the exemption from saluting the flag. Likewise, wearing one's hair long in violation of a school's dress code policy is not a strong enough benefit to invoke Establishment Clause concerns.[253]

However, there are free exercise claims in which granting an exemption would likely violate the Establishment Clause. In *United States v. Lee*, a member of the Old Order Amish claimed that the requirement to pay social security taxes violated his free exercise right.[254] The claimant argued that the

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249 U.S. CONST. amend I ("Congress shall make no law respecting an establishment of religion . . . .").

250 Locke v. Davey, 540 U.S. 712, 718 (2004).

251 Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

252 *See* W. Va. Sate Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

253 *See* Ala. & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1334 (E.D. Tex. 1993).

254 455 U.S. 252, 254–55 (1982).

Amish "believe it sinful not to provide for their own elderly" and thus believe that their religion prohibits accepting or contributing to the social security system.[255] Although this law directly required the claimant to act against his religious conscience, the Supreme Court explained that the government's interest in mandatory contribution to the social security system was very high and held that an exemption could not be afforded.[256]

Even if the Court had held that the claimant in *Lee* had presented a tenable hybrid rights combination, an exemption likely would not have been permissible as a violation of the Establishment Clause. An exemption in this case would have allowed the employer to save money by not paying a particular tax solely on the basis of religion. This is a benefit that any citizen, religious or not, would prefer to receive. More claims should receive this type of analysis, where the court actually balances the government's interest against the claimant's, but an exemption cannot be granted when it would result in a benefit for the claimant on the basis of religion.

V. THE PROPER APPLICATION OF THE HYBRID RIGHTS DOCTRINE

By applying the framework of an expanded hybrid rights doctrine set out in this Comment, a reviewing court can provide proper religious liberty protection based on a balancing of the competing interests that is in line with the *Smith* decision. The case set out in the Introduction, *Axson-Flynn v. Johnson*,[257] presents an example of a case featuring a hybrid rights claim worthy of an exemption. The Tenth Circuit never received an opportunity to discuss the hybrid rights approach again in this case because, after remanding the case back to the district court, the parties eventually settled outside of court.[258] The facts of the case nonetheless present an ideal situation for the hybrid rights doctrine to protect a claimant.

Under the colorable claim approach, the first question always is whether the companion claim to the free exercise of religion claim is colorable. The companion claims here, freedom of speech and freedom from compelled

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255 *Id.* at 255.

256 *Id.* at 258–59.

257 *See* Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004); *see also supra* text accompanying notes 1–12.

258 Angie Welling, *U., Axson-Flynn Settle Civil Rights Suit*, DESERET MORNING NEWS (Salt Lake City), July 15, 2004, at A01, *available at* http://www.deseretnews.com/article/595077344/U-Axson-Flynn-settle-civil-rights-suit.html.

speech, were explicitly mentioned in the *Smith* decision,[259] and Christina Axson-Flynn certainly set forth a claim that this compelled speech argument had at least a probable or colorable claim of success by itself. The program forced her to speak against her will, and there is a chance that she could have won solely on the compelled speech claim.[260] Nonetheless, if she could not have won on the compelled speech alone, her claim was colorable enough to combine with her free exercise of religion claim to form a valid hybrid rights claim.

Because there was a valid hybrid rights claim, the court would then balance the interests of both Axson-Flynn and the public university under the strict scrutiny standard, with an emphasis on the three factors set out in Part IV of this Comment: compelled action, injury to others, and Establishment Clause concerns. First, the school did, in fact, compel Axson-Flynn's conduct.[261] This factor is not dispositive, but the reviewing court should give great scrutiny to any policy compelling action. Second, granting an exemption would not have been injurious to anyone else. No individual would have been injured by a student's omission of a handful of objectionable words, nor would the theater program have been injured by this. Finally, there were no Establishment Clause concerns. No one could mistake such an exemption as establishing any form of religion, and Axson-Flynn was not afforded any benefit here; rather, she simply substituted words in a monologue. Axson-Flynn did not benefit because of her religious beliefs, and this exemption would not violate the Establishment Clause.

Ultimately, *Axson-Flynn v. Johnson* is an example of how the hybrid rights doctrine can protect a claimant's right to the free exercise of religion. Although Christina Axson-Flynn could not have received any type of damages for this specific ordeal based on qualified immunity, future courts would be able to grant damages, along with injunctions, once the colorable claim approach is officially adopted. The policy in *Axson-Flynn v. Johnson* was neutral and generally applicable, but this is an appropriate example of when an exemption should be granted from a law or policy. This policy burdened Christina Axson-Flynn's freedom to exercise her religion, and an exemption could have

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

260 *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that requiring the claimants to display the state motto on their vehicle's license plate violated their free speech rights based on compelled expression).

261 *Axson-Flynn*, 356 F.3d at 1290 ("There is no question that in the instant case, Defendants attempted to compel Axson-Flynn to speak.").

easily been granted to protect her fundamental rights without subjecting her to preferential treatment based on her religion.

Another way to analyze the hybrid rights approach advocated throughout this Comment is by analyzing how a law similar to the federal contraception mandate of the Affordable Care Act[262] should be reviewed if a state legislature or other state actor enacted it. As it is, challenges to the federal contraception mandate are reviewed under the Religious Freedom Restoration Act since it is a federal law, but what if a state passed a similar law compelling a business to act against its owners' conscience?

For background, the Supreme Court recently decided *Burwell v. Hobby Lobby Stores, Inc.*, a case in which closely held corporations challenged the federal contraception mandate as violating their right to the free exercise of religion.[263] The mandate required health insurance coverage to include "preventive care and screenings" for women, the scope of which would be determined by the Health Resources and Services Administration (HRSA).[264] In turn, the HRSA required all nonexempt employers to cover "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[265] However, the HRSA did establish exemptions for some "religious employers."[266]

According to the Court, the mandate gave these owners "a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations."[267] First, the Court determined that for-profit, closely held corporations fall under RFRA's definition of "person."[268] Because nonprofit corporations may receive free exercise and RFRA protection, the Court

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262 *See* 42 U.S.C. § 300gg-13 (2012).

263 134 S. Ct. 2751 (2014).

264 42 U.S.C. § 300gg-13(a)(4).

265 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (currently codified as 45 C.F.R. pt. 147) (alteration in original) (quoting *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVICES ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Jan. 25, 2015)) (internal quotation marks omitted).

266 45 C.F.R. § 147.131 (2013). The guidelines exempted religious employers if they met the following four criteria: they opposed contraceptive services, they operated as a nonprofit entity, they held themselves out as a religious organization, and they self-certified. *Id.* § 147.131(b).

267 *Hobby Lobby*, 134 S. Ct. at 2767.

268 *Id.* at 2768–69.

explained that it would not make sense if the term "person" "include[d] *some* but not all corporations."[269] After determining that the contraceptive mandate imposed a substantial burden on these closely held corporations' exercise of religion, the Court considered whether the mandate was in furtherance of a compelling government interest and whether the mandate was the least restrictive means of furthering that interest.[270] Ultimately, the Court held that the mandate was not the least restrictive means of furthering the government's interest because the government already was providing exemptions to nonprofit organizations.[271] Because the mandate was not the least restrictive means of furthering the government's interest, the Court held that the contraception mandate violated RFRA and because of this statutory holding, did not find it necessary to consider the First Amendment claim.[272]

In light of this case, the question remains: what would the hybrid rights analysis look like if a state passed a similar contraception mandate? Because the federal contraception mandate was analyzed under the federal RFRA, an analysis of a state imposed contraception mandate provides another occasion to apply a hybrid rights approach.[273] This Comment concludes that a state imposed contraception mandate would also present a successful hybrid rights claim that would be worthy of an exemption.

Under the colorable claim approach, the first inquiry is always whether the companion claim to the free exercise of religion claim is colorable. Here, the companion claim would be the freedom to contract, a right not explicitly mentioned in the *Smith* decision, but one that is a "constitutional protection[]."[274] Under the Contracts Clause of the United States Constitution, a state or local law cannot impair the obligation of contracts between two

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269 *Id.* at 2769.

270 *Id.* at 2779.

271 *Id.* at 2782. "If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal." *Id.* at 2781.

272 *Id.* at 2785.

273 In addition to the federal Religious Freedom Restoration Act (RFRA), over half of the states have either enacted a state RFRA compelling strict scrutiny or interpreted its Free Exercise Clause to require strict scrutiny. *See* EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 982–83 (5th ed. 2014). Presumably, a state with a RFRA or Free Exercise Clause compelling strict scrutiny would automatically apply strict scrutiny to a free exercise claim. Thus, the following analysis applies to any of the remaining states that do not automatically apply strict scrutiny to free exercise claims.

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

parties.[275] Although this "prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula,"[276] the Supreme Court has developed a three-part test to determine whether a particular law violates the Contracts Clause: the law must not substantially impair a contractual relationship, the state must have a "significant and legitimate public purpose behind the regulation," and the law must be "based upon reasonable conditions and be of a character appropriate to the public purpose."[277]

Here, a state law requiring a business to cover certain types of contraception in violation of the owner's conscience would satisfy the colorable claim approach, as such a law would have a probability of success on the merits. Although the state would have a sufficiently significant and legitimate purpose behind such a regulation to satisfy the Supreme Court's second requirement mentioned above, the business would have a strong argument that such a regulation does significantly impair its right to contract with its employees and that such a law is not of a character appropriate to the public purpose. As the argument would go, is there not another way to cover contraception besides forcing business owners to act directly against their conscience?

Not all government restrictions impair the right to freely contract. For example, the Supreme Court has held that minimum wage laws do not violate the freedom of contract.[278] Minimum wage laws are one of the best examples of laws that do not violate the Constitution because they protect "against the evils which menace the health, safety, morals, and welfare of the people."[279] Here, a state imposed contraception mandate is not on the same level as a federal minimum wage. The freedom of contract claim may not be strong enough to win outright on its own, but it is probable enough to be a colorable companion claim. With the addition of the business owners' sincere claim that abortion-inducing contraception would violate their conscience, this would be a sufficiently colorable hybrid rights claim.

Because this would be a hybrid rights claim, the next step is to balance the business owners' interests against the government's interest under the compelling interest test. Recall that the compelling interest test should not

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[275] U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

[276] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934).

[277] Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983).

[278] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

[279] *Id.* at 391.

automatically result in success for the claimant, as it has become with other issues brought under strict scrutiny, such as race. Instead, the reviewing court would then consider the three factors set out in Part IV of this Comment: compelled action, injury to others, and Establishment Clause concerns.

First, it is clear that the state would be compelling action with a contraception mandate. The state would be stepping in and forcing certain businesses to pay for certain types of contraception that they find objectionable, such as those that induce abortions. Although compelling action is not dispositive to success to a claimant on its own, it is a strong factor that the government will have difficulty outweighing.

The second factor is whether providing an exemption to such a state-imposed contraception mandate would be injurious to others. In regard to this question, the dissent in *Hobby Lobby* argued that an accommodation for the business owners would have an adverse effect on third parties, mainly the "thousands of women" employed by the companies.[280] However, the majority noted that a very large number of employees are not covered under the contraception mandate because their employers are exempt, including more than "one-third of the 149 million nonelderly people in America with employer-sponsored health plans" because they were enrolled in grandfathered plans and 34 million more employees who are not covered because their employers employ fewer than fifty people.[281] It is obvious that women's health is an interest of the utmost importance; however, it is difficult to argue that an exemption here would be overly injurious when there are already millions of women whose employers are not forced to cover their contraception.[282] This is a different scenario than what is presented in the discrimination cases regarding wedding services.[283] In those types of cases, the customers are being denied a specific service, that is, a specific person's creation or a specific person's photography. Here, one can still receive the exact same contraception; it simply must come from a source other than an objecting employer. Because the government already exempts many other groups, such as nonprofit employers, an exemption for for-profit corporations from covering these

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[280] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

[281] *Id.* at 2764 (majority opinion).

[282] *Cf. id.* at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.").

[283] *See supra* Part IV.B.2.

abortion-inducing contraceptives should not be considered injurious to others.[284]

The third factor is whether providing an exemption would violate the Establishment Clause. The main issue here is making sure that the objecting owners do not receive a benefit that nonreligious owners would not be entitled to. However, here, the government already had other exemptions in place to accommodate religious nonprofits.[285] Although the insurance company will pick up the cost when an employer receives an accommodation from the law, according to the HHS itself, "this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage."[286] As seen in many cases throughout this Comment, accommodating a religious conviction does not immediately constitute a violation of the Establishment Clause. Here, it is difficult to argue that this exemption would violate the Establishment Clause when the government has already taken such measures to provide exemptions. Thus, this Comment argues that an exemption to business owners would not violate the Establishment Clause in this setting.

Both of the applications above show that the colorable claim approach can be used to expand the hybrid rights doctrine. By allowing colorable companion claims to join with a sincere free exercise claim, courts can provide greater opportunity for claimants to receive religious liberty protection. Further, by invoking a proper balancing test involving the three factors set out in Part IV, a reviewing court can protect claimants from undue burdens on religious liberty.

CONCLUSION

By allowing colorable companion claims to join with a sincere free exercise claim, courts can provide greater opportunity for litigants to receive religious liberty protection. If anything, an expanded hybrid rights doctrine will provide litigants with a forum to pursue their free exercise claims, claims that might not otherwise see the light of day due to *Smith*'s rigid approach.

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284 *See Hobby Lobby*, 134 S. Ct. at 2759 ("Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections.").

285 *See id.*

286 *Id.* Further, "HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services." *Id.* at 2763.

Because religious liberty is so important to so many, such a right deserves as much protection as possible.

Since *Smith*, a three-way circuit split has emerged, and litigants are left with potential protection that is not uniform. Instead, the level of free exercise protection that one can receive solely depends on the circuit in which the claimant brings the case. Even if the Supreme Court refuses to allow greater protection to naked free exercise claims, the Court should clarify and expand the hybrid rights doctrine.

Such an expansion starts with adopting the colorable claim approach. Under this approach, more hybrid rights cases could proceed to the next step, the compelling interest test. Anyone could simply make multiple claims in an effort to receive hybrid protection, but the claim must genuinely be colorable. This would not result in sweeping numbers of colorable claims in the court system, but it would certainly allow more claimants to have their interests balanced against the government's, and courts should not be fearful of this.

The expansion of the hybrid rights doctrine should continue by allowing new claims, even ones that traditionally have not received hybrid protection, to be used to obtain religious liberty protection besides the oft-used claims of free speech and freedom of parents to direct their children's upbringing. Again, courts should not be timid in admitting that these claims can join a free exercise claim to make a valid hybrid rights claim.

The pressing inquiry, then, is the balancing of the relevant factors. Just because a court admits that a claimant has presented a hybrid rights situation does not mean that the claimant automatically wins. Instead, the court will balance the interests from both sides, and the court should pay unique attention to certain factors. If a hybrid rights claimant is being compelled to act, an exemption would not injure another, and granting an exemption would not violate the Establishment Clause, the court should have a compelling reason for not granting an exemption. Engaging in such an analysis is the proper action that a reviewing court should take to ensure that one's religious liberty

is not being burdened. As stated in the Introduction, religious liberty is of the utmost importance to so many, and an expansion of the hybrid rights doctrine, by way of the colorable claim approach, can protect this important right.

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