BEGGING THE HIGH COURT FOR CLARIFICATION: HYBRID RIGHTS UNDER *EMPLOYMENT DIVISION V. SMITH*

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> The court begins its opinion by stating that this is a case in search of a controversy. One wonders, rather, whether this is a court afraid of a case. No court would eagerly enter the jurisprudential thicket surrounding the intersection of First Amendment free exercise concerns and [another companion right].[1]

I. INTRODUCTION

It is a mathematical axiom that zero plus zero always equals zero[2] and that any number greater than zero plus any number greater than zero always equals the sum of those two numbers. The latter principle can otherwise be stated as two values that are added together create a single greater value. In American jurisprudence, this principle is apparent when separate rights, statutes, or court decisions are considered in tandem to create a greater penalty, protection, or right.[3]

It is not the purpose of this article to offer a complete solution to what has become murky waters surrounding the Supreme Court's interpretation of the Free Exercise Clause.[4] While it would be logical to

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

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

[3] *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 69 (3rd ed. 1996) (discussing Chief Justice Marshall's reliance on "structures and relationships" among various constitutional provisions).

> I am inclined to think well of the method of reasoning from structure and relation. I think well of it, above all, because to succeed it has to make sense – current, practical sense. The textual explication method, operating on general language, [contains] within itself no guarantee that it will make sense, for a court may always present itself or even see itself as being bound by the stated intent, however nonsensical, of somebody else. [With structural approaches] we can and must begin to argue at once about the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting. [We] must deal with policy and not with grammar.

Id. (quoting C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22-23 (1969)).

[4] *See*, *e.g.*, Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 1 (1989).

suppose that Constitutional Construction 101 requires that the highest possible level of scrutiny be given to the alleged violation of any provision expressly written into the text of the Constitution, a given provision must be considered in the context that it is currently being interpreted to be effectual. There is no doubt that the right to the free exercise of religion is a fundamental right enjoyed by citizens of the United States guaranteed by the First Amendment of the Constitution.[5] That right was extended to the states in 1940.[6] Prior to *Employment Division v. Smith*,[7] the Supreme Court agreed that the right to free exercise of religion is fundamental. In *Sherbert v. Verner*,[8] the Court required the state to show a compelling interest in promulgating and enforcing any law that results in the violation of an individual's right to the free exercise of religion.[9]

Even under this seemingly straightforward test, courts were regularly adhering to the principle that "an individual's religious beliefs [cannot] excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[10] Consequently, the compelling interest standard for review of free exercise claims was quickly becoming a misnomer.[11]

This article will expose the above stated incongruity, describe the resulting confusion surrounding the treatment of hybrid rights, and reveal the possible value in the Court's unpopular formulation of the Hybrid Right's Doctrine enunciated in *Smith*.[12] Part II will introduce the Hybrid Rights Doctrine and the problem associated with treating violations of multiple constitutional provisions the same as violations of

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> Since the critical terms in the [religion] clauses are neither self-evident nor defined, and religion is a profoundly emotional subject, it is not surprising that the religion clauses have given rise to enormous controversy, both popular and academic, and to a body of case law riven by contradictions and bogged down in slogans and metaphors ("wall of separation," "entanglement," "primary effect"). There is need for a fresh approach.

Id.

[5] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (when state laws impinge on personal rights protected by the Constitution, strict scrutiny is applied).

[6] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

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

[8] Sherbert v. Verner, 374 U.S. 398 (1963).

[9] *Id.* at 403, 406-09.

[10] *Smith*, 494 U.S. at 878-79. For a general consideration of pre-*Smith* free exercise jurisprudence, *see* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

[11] *Smith,* 494 U.S. at 885.

[12] *Id*. at 881-82.

single constitutional provisions. First, this Part will explore the origins and implications of the Hybrid Rights Doctrine in the context of the Supreme Court's formulation of the issue in *Smith*. Then, it will use the recent opinion of the Second Circuit in *Leebaert v. Harrington*[13] to illustrate a current analytical approach and the challenges facing a court attempting to apply *Smith*.

Part III will provide an objective analysis of the confusion that has embraced the district and appellate courts in interpreting *Smith*.[14] This Part will consider the three interpretive approaches used by the various courts. First, it will address the position of the Second and Sixth Circuits which hold that the Hybrid Rights Doctrine is not constitutional doctrine. Second, this Part will address the theory that only a colorable constitutional claim is needed to join a free exercise claim to invoke the *Smith* exception. The third approach this Part will discuss is that an independently viable claim must be joined with a valid free exercise claim in order to invoke the *Smith* hybrid rights exception.

Part IV will offer an objective application and analysis of the various interpretations and conclude that the Supreme Court should articulate a clear affirmation that the Hybrid Rights Doctrine is constitutional doctrine. This Part will argue that the Court should make clear that the proper approach is that an independently viable constitutional claim is required in conjunction with a free exercise claim.

The purpose of this article is to extrapolate upon the dictate of *Smith*, which purports to do away with the once requisite compelling interest standard[15] for free exercise challenges and replace it with something novel (or maybe not so novel). Regardless, the vastly different approaches to the language in *Smith* taken by courts across the country will almost certainly force the high court to revisit and clarify exactly what it meant.[16]

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[13] Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003).

[14] *See also* Peter M. Stein, Smith v. Fair Employment and Housing Commission: *Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" under* Employment Division v. Smith*?* 4 GEO. MASON L. REV. 141, 143 n.4 (1995) (citing numerous cases in which state courts and federal courts have arrived at different conclusions derived from varying interpretations concerning the application of *Smith's* hybrid rights language).

[15] City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to Constitutional law.").

[16] *Ecclesiastes* 5:8 ("If you see the poor oppressed in a district, and justice and rights denied, do not be surprised at such things; for one official is eyed by a higher one, and over them both are others higher still.").

II. THE HYBRID RIGHTS DOCTRINE

A. The Hybrid Rights Doctrine Under Employment Division v. Smith

In April 1990, Justice Scalia delivered the opinion of the Supreme Court in *Smith* and vastly changed the jurisprudential landscape regarding the Free Exercise Clause. The crux of *Smith* is best summed up by the following excerpt from Justice Scalia's opinion:

> 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*, such as freedom of speech and of the press or the *right of parents to direct the education of their children*.[17]

After *Smith*, the general rule was that a facially neutral and generally applicable state regulation is constitutional, regardless of how the regulation affects the exercise of religion.[18] The exception to this general rule is a hybrid situation.[19] A hybrid rights situation is one in which a free exercise claim is made in conjunction with another constitutional claim.[20] Where a valid hybrid rights claim is made, a higher level of scrutiny is required to justify the violation of those rights.[21] In support of this new approach to free exercise claims, the opinion stated:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 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.[22]

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[17] Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (citations omitted) (emphasis added). The latter part of this quotation ("the right of parents . . . to direct the education of their children") was derived from the holdings of Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder, 406 U.S. 205 (1972).

[18] *Smith*, 494 U.S. at 890 (holding it is consistent with the Free Exercise Clause to deny unemployment benefits for violation of a general and neutrally applicable law prohibiting ingestion of peyote, even if ingestion was a religious act).

[19] *Id.* at 881.

[20] *Id.*

[21] With respect to the right of parents to direct the education of their children, Justice Scalia went on to say that the Court's holding in *Pierce* as interpreted in *Yoder* provides that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 881 n.1 (quoting *Yoder*, 406 U.S. at 233).

[22] *Id.* at 885 (citations omitted).

Writing for the majority, Justice Scalia reasoned that the compelling interest standard for justifying a violation of an individual's right to the free exercise of religion is qualitatively different from applying that standard to other constitutional provisions, such as equal protection or free speech.[23] He stated that "[w]hat it produces in those other fields – equality of treatment and an unrestricted flow of contending speech – are constitutional norms; what it would produce here – a private right to ignore generally applicable laws – is a constitutional anomaly."[24] Hence, a free exercise claim in isolation is insufficient to warrant the violation of a generally applicable law, but if it is joined with another right that the Court deems to be within the scope of a "constitutional norm," the combined protection may be sufficient.

The Supreme Court, in a decision subsequent to *Smith*, reiterated that, when a law is not both neutral and generally applicable, it must, under the Free Exercise Clause, be justified by a compelling state interest and be narrowly tailored to advance that interest.[25] Consequently, the test for free exercise claims utilized prior to *Smith* (requiring strict scrutiny) remains for laws that either facially, or in practice, discriminate on the basis of religion.[26]

The result that has raised so much controversy is that the Free Exercise Clause has been effectively abrogated to mere surplusage in the face of a neutral and generally applicable law; it requires help from some other source in the Constitution to validate the Free Exercise claim.[27] Furthermore, in regard to a law that is neither neutral nor of general applicability, the Free Exercise Clause is not being interpreted as the grant of an affirmative constitutional right.[28] In the latter case, this interpretation leaves no substance to an independent Free Exercise Clause. The Court treats it as a virtual non-suspect class by which the Fourteenth Amendment's right to equal protection requires only a rational state interest to justify a law that discriminates based upon

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[23] *Id.* at 885-86.

[24] *Id.* at 886.

[25] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993).

[26] *Id.* at 534.

[27] *Id.* at 566-67 (Souter, J., concurring in part) (claiming that a hybrid right is illogical because, if another constitutional right is required to make it, then there is no need to mention the Free Exercise Clause at all).

[28] *See* City of Boerne v. Flores, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting) (remarking that the Framers of the Constitution did not intend that the Free Exercise Clause be interpreted merely to prevent the "government from adopting laws that discriminated against religion, . . . [but] that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice").

religion.[29] The Free Exercise Clause is not even given the same weight as would be given any other fundamental right under an Equal Protection analysis. In sum, *Smith* has been a difficult decision for courts, both to apply its hybrid rule and to give a sound rationale for its choice of application.[30]

B. Leebaert v. Harrington: *An Example of the Confusion that is the Hybrid Rights Doctrine*

On June 13, 2003, the United States Court of Appeals for the Second Circuit held that the language in *Smith* "relating to hybrid claims is dicta and not binding upon this court."[31] The situation at issue in *Leebaert v. Harrington*[32] is not atypical of those confronted by other courts asked to rule on the applicability of *Smith* and its hybrid rights language. As a Christian, Turk Leebaert objected to his seventh-grade son, Corky, being forced to attend his public school's health education curriculum.[33] Leebaert contended that, because the public school required his son to attend these classes, the school was infringing upon both his Fourteenth Amendment right,[34] under the Due Process Clause, to direct the upbringing of his children,[35] and his First Amendment

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[29] *See generally* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976). For equal protection purposes, "a suspect class is one saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id*. (internal quotations omitted).

[30] *See* Miller, Robin Cheryl, *What Constitutes 'Hybrid Rights' Claim Under* Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 163 A.L.R. Fed. 493, §2a (2003).

> [A] number of courts have considered whether the language in *Smith* concerning hybrid rights claims was intended to establish constitutional doctrine, and most such courts, embracing the hybrid rights doctrine, have stated or recognized that, under *Smith*, where a hybrid rights claim is shown to exist, the free exercise claim is not subject to the general rule announced in *Smith*, that a 'valid and neutral law of general applicability' does not violate the Free Exercise Clause, and instead the free exercise claim is subject to a higher level of scrutiny, although a few courts, apparently rejecting the hybrid rights doctrine, have declared that the conjoining of an independent constitutional claim with a free exercise claim does not except the free exercise claim from the general rule announced in *Smith*.

Id. at 504.

[31] Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) (quoting Knight v. Conn. Dep't. of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001)).

[32] *Id*.

[33] *Id.* at 136-37.

[34] No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[35] *Leebaert*, 332 F.3d at 137.

right, under the Free Exercise Clause, to the free exercise of his religion.[36] His free exercise claim was based upon his religious belief that abstention from sex before marriage is appropriate, the school's teaching that a family does not necessarily have to be comprised of a man and woman as the basic unit is contrary to his beliefs, and teaching regarding usage of drugs and tobacco are best left in the home.[37] Furthermore, he stated that he as the father should be the one to teach his children about health, sex, and character development, rather than the government.[38]

Leebaert asserted that the violation of his rights under the Fourteenth Amendment and the First Amendment, either separately or in conjunction, required the court to apply strict scrutiny; the school's curriculum and attendance requirements "must be narrowly tailored to meet a compelling state interest."[39] The court refused to do so and applied middle-tier scrutiny, which required only that the public school show a rational state interest to justify its curriculum and attendance requirements,[40] a test that is easily overcome. To understand Leebaert's claims, a brief summary of the Second Circuit's rationale intertwined with standing tests and determinations by the Supreme Court regarding similar claims is necessary.

1. Leebaert's Claim that Parents Have a Fundamental Right to Direct the Upbringing of their Children

In its *Leebaert* opinion, the Second Circuit began its reasoning concerning Leebaert's parental rights claim by stating that "[w]here the right infringed is fundamental, strict scrutiny is applied to the challenged governmental regulation."[41] In a number of cases, the Supreme Court has stated that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests" recognized by the Court.[42] In *Troxel v. Granville*,[43] the Supreme Court quoted the cases of *Meyer v. Nebraska*[44]

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36 *Id.* at 137-38.

37 *Id.*

38 *Id.* at 136-37.

39 *Id.* at 139.

40 *Id.* at 142-43.

41 *Id.* at 140.

42 Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality).

43 *Id.*

44 Meyer v. Nebraska, 262 U.S. 390, 401 (1923). "In *Meyer*, the Supreme Court held that 'the right of parents to engage him so to instruct their children . . . [is] within the liberty of the [Due Process Clause of the Fourteenth] Amendment.'" *Leebaert*, 332 F.3d at 140 (quoting *Meyer*, 262 U.S. at 400)).

and *Pierce v. Society of Sisters*[45] to support its longstanding position that parents have the right to both "control the education of their own" and "direct the upbringing and education of children under their control."[46] The *Troxel* opinion continued by stating that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a better decision could be made."[47] With this language, it would logically follow that *any* regulation infringing on a parent's right to raise his children would be subject to strict scrutiny.

Even after being confronted with the Supreme Court's holdings in *Meyer*, *Pierce*, and *Troxel*, the Second Circuit concluded that the public school's infringement of Leebaert's parental rights should not be subject to strict scrutiny.[48] To reach this result, the court dealt with the scope of the admitted right to direct the upbringing of one's children by asserting that the issue in *Leebaert* was really one of "whether Leebaert's asserted right – the right to excuse his son from mandatory public school classes – is fundamental."[49]

In so doing, the court effectively transformed the essence of Leebaert's claim from the general right to direct the upbringing of his children, under *Meyer*, *Pierce*, and *Troxel*, to the specific right of a parent to change the public school curriculum. Once the argument was so framed, precedent was examined to determine the validity of the newly defined right that Leebaert was supposedly asserting. The Second Circuit relied on another Supreme Court case, *Runyon v. McCrary*,[50] to limit the precedential effect of *Meyers*, *Pierce*, and *Troxel*.[51] *Runyon* did not even deal with parental rights, but with a Caucasian private school's denial of admission to African-American students. In *Runyon*, the Supreme Court stated that the situation in which a private school refused to admit African American students infringed "no parental right

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[45] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925). In *Pierce*, the Supreme Court reasoned:

> rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.

Id. at 535.

[46] *Troxel*, 530 U.S. at 65 (quoting *Meyer*, 262 U.S. at 401, and *Pierce*, 268 U.S. at 534-35).

[47] *Id*. at 72-73 (internal quotations omitted).

[48] *Leebaert*, 332 F.3d at 142-43.

[49] *Id*. at 140.

[50] Runyon v. McCrary, 427 U.S. 160 (1976).

[51] *Leebaert*, 332 F.3d at 140.

recognized in *Meyer*, *Pierce*, [or] *Yoder*."[52] The *Runyon* court, while recognizing as valid a parent's right to direct the upbringing of his child,[53] held that it was unconstitutional, on other grounds, to deny students admission on the basis of their race.[54]

The *Leebaert* court, using language from *Runyon*, described the holdings in *Meyer* and *Pierce* as protecting the right of parents regarding "the subject matter . . . taught at . . . private school[s] and[,] . . . the latter established a parental right to send . . . children to a particular private school rather than a public school."[55] This language allowed the *Leebaert* court to piggy back on a decision made by the First Circuit[56] to thereby conclude that "*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."[57] Consequently, the *Leebaert* court held that requiring a child to attend "health education" classes does not unconstitutionally infringe upon a parent's right to direct the upbringing of his children, when the public school can demonstrate a rational reason for requiring it in its curriculum.[58]

2. Leebaert's Hybrid Rights Claim

The *Leebaert* court balked at Leebaert's assertion that his claim warranted strict scrutiny because it implicated both his right to free

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[52] *Runyon*, 427 U.S. at 177.

[53] The Court quoted *Pierce* for the proposition that it is the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 177 (quoting *Pierce*, 268 U.S. at 534-35). Consequently, it remains that, when a fundamental right has been infringed by governmental regulation, including the right of parents to direct the education of their children, as recognized in *Meyer*, *Pierce*, *Runyon*, and *Troxel*, strict scrutiny is applied. *See Leebaert*, 332 F.3d at 140. The issue becomes: What is the scope of the right to direct one's minor children?

[54] *Runyon*, 427 U.S. at 186. It is interesting to note that the Court in *Runyon* made a point of mentioning that "[n]othing in this record suggests that [either of the schools at issue in the case] excludes applicants on religious grounds, and the Free Exercise Clause of the First Amendment is thus in no way involved." *Id.* at 167 n.6.

[55] *Leebaert*, 332 F.3d at 140 (quoting *Runyon*, 427 U.S. at 177) (internal quotation omitted).

[56] Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995). *Brown* was decided prior to the Supreme Court's decision in *Troxel*. In its decision, the First Circuit stated that "the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." *Id.* at 533. The First Circuit declined to answer that question and stated that the parental claim would fail even strict scrutiny. *Id.* The Court stated that the parental rights delineated in *Meyer* and *Pierce* did not include "a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." *Id.*

[57] *Leebaert*, 332 F.3d at 141.

[58] *Id.* at 143.

exercise and his right to direct the upbringing of his child, thus creating a hybrid rights claim under *Employment Division v. Smith*.[59] Instead, the court claimed that the hybrid rights "approach" was not binding upon it.[60] In making this assertion, the court relied on a Sixth Circuit case, *Kissinger v. Board of Trustees of the Ohio State University*,[61] which "explicitly rejected a more stringent legal standard for hybrid claims."[62] The court agreed with the *Kissinger* Court that it could "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."[63] Because the court flatly rejected the viability of a hybrid rights claim, it did not discuss the validity of Leebaert's claims under a hybrid rights analysis.

Nevertheless, Leebaert argued that, even though the court refused to recognize the applicability of *Smith*, it surely could not ignore the Supreme Court's holding in *Wisconsin v. Yoder*.[64] The *Leebaert* court did in fact recognize the holding in *Yoder* to be the "Supreme Court['s] invalidat[ion of] Wisconsin's compulsory high-school attendance law under the Free Exercise Clause in response to Amish parents' objections."[65] The *Leebaert* court further recognized that the Supreme Court held that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."[66]

The *Leebaert* court continued by stating that Leebaert's claim stood in contrast with the situation in *Yoder* by citing the "pains" the Supreme Court took to limit its holding to a free exercise claim of the nature revealed in the *Yoder* court's record.[67] Because Leebaert failed to allege, "his [religious] community's entire way of life is threatened by Corky's participation in the mandatory health curriculum," the court held that his "free exercise claim is . . . qualitatively distinguishable from that alleged in *Yoder*."[68] In the end, the Second Circuit would not be swayed.

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[59] *Id.* at 143-44.

[60] *See also supra* note 36 and accompanying text.

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

[62] *Leebaert*, 332 F.3d at 144.

[63] *Id.*

[64] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[65] *Leebaert*, 332 F.3d at 144.

[66] *Id.* (quoting *Yoder,* 406 U.S. at 233).

[67] *Id.*

[68] *Id.* at 144-45 (quoting Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995)).

The question of the viability of hybrid rights under *Smith* delved deeper into murky waters, the answer left unknown.

III. THREE CLEAR VIEWPOINTS EMERGE REGARDING HYBRID RIGHTS UNDER *EMPLOYMENT DIVISION V. SMITH*

The courts have come up with three very different interpretations of the hybrid rights language in *Smith*. These three different interpretations have resulted in a split among six circuit courts of appeals. Courts adhering to the first interpretation refuse to accept the language in *Smith* as binding constitutional doctrine. The Second and Sixth Circuits have refused to accept *Smith*'s hybrid rights language, calling it mere dicta.[69] The second position requires only a "colorable claim" that a constitutional right has been violated in addition to a free exercise claim to warrant heightened scrutiny under a hybrid rights theory; courts within the Ninth and Tenth Circuits have adopted this approach.[70] The third position holds that the hybrid rights exception can be invoked only when an independently viable claim is joined with a free exercise claim; courts within the First Circuit and the D.C. Circuit have espoused this view.[71] To demonstrate the foregoing divergence of opinion, the following analysis summarizes various court decisions which have taken one of the three views in attempting to decipher the hybrid rights language in *Smith*.

A. Denial of the Hybrid Rights Doctrine

The Second and Sixth Circuit Courts have stated that the language in *Smith* was merely dicta and that it does not constitute binding constitutional doctrine.[72] The first time hybrid rights were addressed by the Sixth Circuit was in *Vandiver v. Hardin Board of Education*.[73] In *Vandiver*, a home-schooler was forced to take equivalency tests in order to be designated a senior upon matriculating at a public school.[74] He objected to this testing and alleged that the required testing violated his and his parents' constitutional rights.[75] The court held that there was no

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[69] *Leebaert*, 332 F.3d at 143; Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177 (6th Cir. 1993).

[70] *See* Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998).

[71] *See* Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001); Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003). "The First Circuit has addressed the issue, holding that the [*Smith* hybrid] exception can be invoked only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim." *Id.* at 121.

[72] *See supra* note 74.

[73] Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991).

[74] *Id.* at 929-30.

[75] *Id.*

violation of free exercise rights in this situation, but in so doing it considered the possible implication of hybrid claims.[76]

The *Vandiver* court recognized that "[t]he *Smith* decision implies without stating that those hybrid claims which raise a free exercise challenge coupled with other constitutional concerns remain subject to strict scrutiny."[77] The Court essentially expanded the holding of *Smith* concerning hybrid rights from criminal prohibitions to civil issues, and particularly, educational requirements.[78] Prior to the *Vandiver* decision, the scope of the applicability of hybrid rights claims was unclear. The decision was important in that it opened the door for hybrid rights' applicability to virtually every conceivable claim, thus providing a basis by which other courts (particularly in other circuits) could employ *Smith*'s hybrid rights formulation to both criminal and non-criminal statutory regulations.

Vandiver was implicitly overruled in *Kissinger v. Board of Trustees*. *Kissinger* is now recognized as the leading case for the proposition that *Smith's* hybrid rights language is mere dicta.[79] In *Kissinger*, the plaintiff was a woman enrolled in Ohio State University's Veterinary School who objected to the school's requirement of a class (Operative Practices and Techniques) that entailed performing surgery on a living and healthy animal.[80] Following the surgery, the animal was killed.[81] She objected to taking the class and requested an alternative means of fulfilling the requirement.[82] The school refused and she brought a lawsuit alleging the school violated her constitutional rights to freedom of speech, freedom of association, freedom of religion, due process, and equal protection.[83] Faced with a lawsuit, the school settled with the plaintiff by offering an alternative class, but the case continued to resolve a dispute arising out of the assessment of attorneys' fees with the plaintiff alleging only a violation of her right to the free exercise of her religion.[84] The plaintiff was unsuccessful because the Sixth Circuit held that Ohio State's curriculum was generally applicable to all of its veterinary students, and it was not aimed at any particular religion or religious practice.[85]

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[76] *Id.* at 931-34.

[77] *Id.* at 933.

[78] *Id.* at 932.

[79] Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177 (6th Cir. 1993). *See also infra* note 97 and accompanying text (relying on *Kissinger*'s interpretation of *Smith*).

[80] *Id.* at 178.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 178-79.

[84] *Id.* at 179.

[85] *Id.*

Before arriving at the above stated conclusion, the Sixth Circuit addressed *Smith*. The court stated that the opinion in *Smith* did not "explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated," and that until the Supreme Court clarifies what it meant, the Sixth Circuit would not apply hybrid rights.[86] In reference to *Vandiver*, where the court seemingly accepted the applicability of hybrid rights, the court stated that that opinion "did not hold that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights."[87] The court also distinguished the case from *Yoder* by stating that, in *Yoder*, school attendance was mandatory, but the plaintiff in *Kissinger* had chosen to attend school there.[88]

In 2001, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*,[89] the Sixth Circuit again had occasion to revisit the hybrid rights issue. In that case, a city had an ordinance requiring door-to-door solicitors to register with the city before they could solicit private residences.[90] Under the ordinance, owners of private residences had the option of filling out a form with the city that permitted them to check off certain groups that they did not want to solicit their homes.[91] A group of Jehovah's Witnesses challenged the ordinance claiming it violated their rights to free speech and free exercise of religion. But the court, relying in part on *Kissinger*, said the ordinance was content neutral and of general applicability; consequently, intermediate scrutiny applied to the claim.[92]

Kissinger was also relied on in *Prater v. City of Burnside*,[93] a case involving a church alleging at the trial court, among other claims, that the city violated its free exercise rights when it elected to develop a road between two adjacent lots owned by the church.[94] The Sixth Circuit reminded the trial court that it should not have even analyzed this

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86 *Id.* at 180.

87 *Id.*

88 *Id.*

89 Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 240 F.3d 553 (6th Cir. 2001).

90 *Id.* at 558-59.

91 *Id.*

92 *Id.* at 561-62 (relying on its decision interpreting *Employment Division v. Smith* in *Kissinger v. Board of Trustees* for the conclusion that the standard of scrutiny does not change simply because a hybrid rights claim is made).

93 Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002).

94 *Id.* at 422-23.

situation for a valid hybrid rights claim because the circuit had foreclosed the validity of such a claim in *Watchtower*.[95]

The Second Circuit was asked to interpret the language in *Smith* relating to hybrid rights in *Knight v. Connecticut Department of Public Health*.[96] In that case, two state employees were told not to discuss their religious beliefs during their official duties.[97] The court ruled that it did not need to address the general applicability of hybrid rights as stated in *Smith* because the facts in the case indicated that the situation was squarely within the "public employee context" and thus must be analyzed under a different test.[98] Before it gave its ruling, however, the court stated that it read *Smith*'s hybrid rights language as dicta.[99]

Finally, in 2003, *Leebaert*[100] came before the Second Circuit. In making its decision to declare that *Smith*'s discussion of hybrid rights was dicta and not binding on it, the court relied on its decisions in both *Kissinger* and *Knight*.[101]

B. Colorable Claim in Conjunction with a Free Exercise Claim Invokes the Hybrid Rights Doctrine

The Ninth and Tenth Circuits have enriched the debate with at times colorful analysis of hybrid rights in coming to the conclusion that a free exercise claim coupled with another colorable constitutional claim is sufficient to invoke a higher level of scrutiny.

The Ninth Circuit began its interpretation of *Smith* in *American Friends Service Committee Corp. v. Thornburgh*.[102] In *Thornburgh*, a group of Quakers sued the United States for violating their constitutional rights to free exercise and an employer's right to employ individuals for his business.[103] The court held that the right to employ is not a cognizable right and thus fails as a right that could support a free exercise claim and invoke the hybrid rights analysis as stated in *Smith*.[104]

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[95] *Id.* at 430.

[96] Knight v. Connecticut Dep't of Pub. Health, 275 F.3d 156 (2d Cir. 2001).

[97] *Id.* at 160.

[98] *Id.* at 167.

[99] *Id.*

[100] *See supra* notes 35-72 and accompanying text.

[101] *See supra* note 74 and accompanying text.

[102] Am. Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808 (9th Cir. 1991) (opinion revised in 961 F.2d 1405 (9th Cir. 1991)).

[103] *Id.* at 809.

[104] *Id.* The Court went on to state:

> [the] "right to employ" has been accorded insufficient constitutional protection to place it alongside the cases *Smith* cites as examples of "hybrid claims." Those cases are restricted to express constitutional protections such as freedom of speech, and firmly recognized substantive due process

Miller v. Reed[105] is one of the major cases that came before the Ninth Circuit regarding hybrid rights. The case involved a man who sued California's Department of Motor Vehicles because it required him to give his social security number in order to renew his driver's license.[106] He claimed that this requirement violated his constitutional rights to interstate travel and his free exercise of religion.[107] In its opinion, the court stated that hybrid rights claims are applicable to even non-criminally prohibited conduct.[108] The court expressed its acceptance of hybrid rights and articulated that, to make a hybrid rights claim, the "free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated – that is, a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits."[109] In the case at hand, the court stated that there is not a constitutionally granted fundamental right to drive. Consequently, because the plaintiff in this case did not supplement his Free Exercise claim with a constitutional claim of colorable merit, he did not have a hybrid rights claim.[110]

In another case before the Ninth Circuit, *Thomas v. Anchorage Equal Rights Commission*, the court determined whether plaintiffs had standing to contest the constitutionality of an Alaska statute that prohibited landlords from discriminating among potential tenants based upon marital status.[111] The court held that, because no landlord had yet been injured by the law, the issue was not ripe, and therefore the landlords could not challenge the law.[112]

However, the concurrence and the dissent in *Thomas* discussed hybrid rights, alleging that it is likely that the majority came to its conclusion because it wanted to avoid deciding the possible hybrid rights claims.[113] The opinions claimed that *Smith*'s hybrid rights language is

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> rights such as the privacy right in rearing children. 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.

Id.

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

[106] *Id*. at 1204.

[107] *Id*.

[108] *Id*. at 1207.

[109] *Id*; *accord* Am. Family Ass'n v. City & County of San Francisco, 277 F.3d 1114 (9th Cir. 2002); Ventura County Christian High Sch. v. City of San Buenaventura, 233 F. Supp. 2d 1241 (C.D. Cal. 2002).

[110] *Miller*, 176 F.3d at 1208.

[111] Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137 (9th Cir. 2000).

[112] *Id*. at 1142.

[113] *Id*. at 1147 (O'Scannlain, J., concurring). The concurrence candidly states that:

> The court begins its opinion by stating that this is a case in search of a controversy. One wonders, rather, whether this is a court afraid of a case. No court would eagerly enter the jurisprudential thicket surrounding the

fraught with complexity both in doctrine and in practice.[114] The concurring opinion even listed several of the leading cases in other circuits that came to differing conclusions regarding the application of hybrid rights.[115] The concurring opinion completed its treatment of the hybrid rights issue by stating that, "[p]erhaps the Supreme Court will have an opportunity before the issue arises again in this circuit to refine its approach in this area in light of the experience of five circuits."[116]

The dissenting opinion posed a hypothetical wherein a city bans consumption of all alcohol in the interest of combating rampant alcoholism in the community and Catholics seek an exemption for communion purposes. The dissent expressed concern over the possibility that *Smith* would definitively preclude such an exemption because the Catholics may not be able to formulate a proper hybrid claim.[117] The dissent continued by stating:

> The Free Exercise Clause is not mere surplusage. It establishes a constitutional right and has the force of law. Proper construction requires that the clause be construed to establish a right other than and in addition to the rights established by the Free Speech Clause, The Establishment Clause, and the Equal Protection Clause.[118]

The Tenth Circuit has given virtually the same treatment to hybrid rights as the Ninth Circuit. In *Swanson v. Guthrie*, parents sued a public school district, alleging a violation of their free exercise rights and their right to direct the upbringing of their child, for its refusal to allow their home-schooled child to attend the school part-time.[119] The court held that the right to direct the upbringing of a child does not include the right to send a child to a public school on a part-time basis, and, consequently, a valid hybrid rights claim had not been alleged.[120] Specifically, the court intimated that "[w]hatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather

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> intersection of First Amendment free exercise concerns and civil rights created by fair housing laws. Thus we postpone, perhaps serendipitously, but ineluctably, definitive application of *Employment Division v. Smith*.

Id.

[114] *Id.* at 1147-48.

[115] *Id.* (showing that for a valid hybrid rights claim, a plaintiff must show a violation of his free exercise right and: according to the Ninth and Tenth Circuits, a colorable infringement of a companion right; according to the D.C. and First Circuits, an independently viable claim of infringement of a companion right; and according to the Sixth Circuit, the hybrid rights exception doesn't even apply).

[116] *Id.* at 1148.

[117] *Id.* at 1150 (Kleinfield, J., dissenting).

[118] *Id.*

[119] Swanson by & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 696 (10th Cir. 1998).

[120] *Id.* at 703.

than the mere invocation of a general right such as the right to control the education of one's child."[121]

In *Thiry v. Carlson*, parents who were one thirty-second Indian fought to save their house and land, upon which was buried their still-born baby, and through which the government wanted to build a highway.[122] The family objected to the government's proposal, alleging that it violated their right of free exercise and right to family unity and integrity.[123] The Court ultimately held that there was no substantial burden on the family's religious rights because the gravesite could be moved and the family could be buried alongside her. Thus, in the face of a neutral and generally applicable law, there is nothing to base a hybrid rights claim upon.[124]

In the case of *Axson-Flynn v. Johnson*, heard before the United States District Court for the District of Utah, a female student at a state university was required as part of its curriculum to perform in plays.[125] She told professors she would not use profanity or remove clothing at an audition for an upcoming play.[126] In a performance, she omitted profane words and feared she would be expelled from the program based upon meetings she had had with her professors and the director of the program.[127] She sued the school, alleging violation of her rights to free exercise and free speech forming a hybrid right.[128] The court held that the professors were entitled to immunity from such a suit and that the curriculum requirements bore more than a reasonable relationship between the curriculum and the purpose of ensuring that graduates were competent in the field.[129]

Although it did not make a difference for the plaintiff in *Johnson*, the court's opinion is quite helpful in fleshing out exactly what is meant by a colorable claim. There, the plaintiff had alleged a free speech right that the court held failed as a matter of law. But was it sufficient to make a colorable claim? The court referred to Black's Law Dictionary, which defines a colorable claim as one "appearing to be true, valid, or right."[130] In considering this definition, the court declared that:

> If this definition is taken as the standard, it cannot be said that Plaintiff has a colorable Free Speech claim which would invoke a

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[121] *Id.* at 700.

[122] Thiry v. Carlson, 78 F.3d 1491, 1493 (10th Cir. 1995).

[123] *Id.*

[124] *Id.* at 1496.

[125] Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1328 (D. Utah 2001).

[126] *Id.*

[127] *Id.* at 1329.

[128] *Id.* at 1328.

[129] *Id.* at 1341.

[130] *Id.* at 1338 (quoting BLACK'S LAW DICTIONARY 259 (7th ed. 1999)).

> higher level of scrutiny; she has not made a "showing of infringement of recognized and specific constitutional rights" that appears true, valid, or right because her Free Speech claim fails as a matter of law.[131]

Even with such a definition of a colorable claim, the problem becomes what exactly constitutes "appearing?" The court then went on to recognize that the Tenth Circuit:

> has more generously defined what constitutes a colorable claim, holding that: to determine whether a claim is colorable, it is necessary to examine its merits. A determination that a claim lacks merit, however, does not necessarily mean it is so lacking as to fail the colorable test. A . . . claim . . . is not colorable if it is immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous.[132]

The *Johnson* court concluded that, under the Tenth Circuit's definition of a colorable claim, the plaintiff had "raised a genuine question regarding whether required participation in the [curriculum] constituted government compelled speech offending constitutional Free Speech protections."[133] Consequently, she made a colorable free speech claim and a hybrid rights claim. The Court concluded that heightened scrutiny was required.[134] It decided, however, that strict scrutiny should not be applied, relying instead on *Yoder* to make the proper level of scrutiny "more than merely a reasonable relationship between its law and a purpose within the competency of the state."[135] Nevertheless, even under this heightened scrutiny, the court held that the plaintiff's claim failed.[136]

C. An Independently Viable Constitutional Claim Joined with a Free Exercise Claim Invokes the Hybrid Rights Doctrine

The First Circuit and the D.C. Circuit have required that a valid hybrid rights claim must include both a valid free exercise claim and an independently viable companion claim. The First Circuit case, *Brown v. Hot, Sexy and Safer Productions, Inc.*, is the leading case for this position.[137] In *Brown*, a public school required attendance at a sex education course; the parents of a student in that school brought due process, equal protection, and free exercise claims against the school for

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[131] *Id.*

[132] *Id.* (citing Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998) (internal quotation marks omitted)); *see also* United States v. McAleer, 138 F.3d 852, 857 (10th Cir. 1998) (noting that "colorable" claims have "some possible validity").

[133] *Johnson*, 151 F. Supp. 2d at 1338.

[134] *Id.* at 1339.

[135] *Id.*

[136] *Id.* at 1341.

[137] Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995).

requiring attendance in these classes.[138] The court held that the parent's claims were without merit because, under equal protection, the discrimination was based upon viewpoint, not gender;[139] the free exercise claim failed because there would likely be no future violation of those rights;[140] the due process claim failed because the plaintiffs acknowledged that no post-deprivation procedure would correct the damage done.[141]

The court reasoned that the case did not present a hybrid rights claim because, since there was not a valid "privacy or substantive Due Process claim," the parents' "Free Exercise challenge is thus not conjoined with an independently protected constitutional protection."[142] Also, the free exercise claim was qualitatively distinguishable from that alleged in *Yoder*.[143] Thus, the court established that a valid hybrid rights claim in its jurisdiction required an independently viable constitutional claim.[144]

Similarly, the D.C. Circuit has stated that a valid hybrid rights claim requires an independently viable constitutional claim in addition to a valid free exercise claim.[145] In *Henderson v. Kennedy*, two Christians sought to sell t-shirts on the National Mall, but were prohibited from doing so by a National Park Service statute.[146] In upholding the constitutionality of the statute, the court rejected a possible hybrid rights claim analysis, stating that heightened scrutiny was not applicable in the case because both the free exercise and the free speech claims were untenable.[147] The Court reasoned that it is illogical to hold that the "the combination of two untenable claims equals a tenable one," and added that, "in law as in mathematics zero plus zero equals zero."[148] The court held that a hybrid claim depends for its success on the success of the companion constitutional claim.[149]

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[138] *Id.* at 529.

[139] *Id.* at 541.

[140] *Id.* at 539.

[141] *Id.* at 537.

[142] *Id.* at 539 (*compare supra* notes 35-72 and accompanying text discussing *Leebaert v. Harrington*).

[143] *Id.*

[144] *See* Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003); Pelletier v. Me. Principals' Ass'n, 261 F. Supp. 2d 10 (D. Me. 2003).

[145] *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996).

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

[147] *Id.* at 19.

[148] *Id.*

[149] *Id.*

IV. ANALYSIS

Generally, when the government can show a rational state interest for promulgating a neutral and generally applicable law, no violation of the First Amendment's Free Exercise Clause occurs. In his opinion in *Employment Division v. Smith*, Justice Scalia claimed that it would produce a constitutional anomaly for an alleged violation of an individual's Free Exercise right to be overcome only by a compelling state interest.[150] However, if a right to free exercise is joined with another right the Court deems to be within the scope of a "constitutional norm," the combined hybrid right may raise the level of scrutiny.[151]

Nevertheless, when a neutral and generally applicable law infringes upon more than just one's free exercise right (a hybrid right), critics of hybrid rights would afford the same justification as that required for a violation of a single right. Should there not be some recognition of the fact that the law violates multiple constitutional rights?

For example, in the criminal law context, if an individual accidentally kills another person by knocking something over or by dropping something while leaving a bank, the resulting criminal charge for the offense, if any, may be merely manslaughter. However, under the felony murder doctrine, if that same event occurs while the accused is committing or fleeing the scene of a robbery, the resulting criminal charge for the combined offenses may be capital murder.[152] In isolation, the crimes of either manslaughter or robbery would fail to support a possible death sentence, but together, our jurisprudence elects to heighten the punishment. The law views each of the crimes of manslaughter and robbery as having a value higher than one and thus, when added together to result in a far more egregious offense to society, than either of the acts in isolation. Another example in the criminal context involves racially motivated conduct; when a criminal selects his victim because of his race, his sentence may be increased.[153]

Is it logical to apply this aggregation of law in the reverse, to afford greater weight to affirmative rights if asserted together? This question should be answered in the affirmative for any violation of a right that is valued at anything greater than nothing according to the above mathematical analogy. By this I mean that, in the United States all citizens have a range of personal inalienable rights, protected by the Constitution, that would logically garner a value of greater than zero (because, after all, they are the foundation of our legal system). Consequently, the combination of multiple constitutional rights should

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[150] Employment Division v. Smith, 494 U.S. 872, 886 (1990).

[151] *Id.* at 885-86.

[152] *See* Tison v. Arizona, 481 U.S. 137 (1987).

[153] Wisconsin v. Mitchell, 508 U.S. 476 (1993).

lead the Court to require higher standards of scrutiny to justify the violation of the rights.

Such aggregation, in fact, does take place among various provisions of the Constitution. For example, the Supreme Court's substantive due process jurisprudence utilizes numerous constitutional provisions to arrive at various non-textual fundamental rights. To see substantive due process in action, note that at no place within the text of the Constitution do the terms "parenting," "contracting," "abortion," or "sexual intimacy" appear. Proponents of such "fundamental" rights rely on the text of the 14th Amendment, which provides that "no State can deprive any person of life, liberty or property without due process of law."[154] A deprivation of liberty occurs when state action invades certain rights provided to individuals by the Constitution.[155] The challenge before courts confronted with assertions of the above rights is to ascertain the scope of the meaning of the term "liberty" within the Due Process Clause.[156]

The Supreme Court has recognized that the term "liberty" grants a fundamental right to an individual's privacy.[157] This zone of privacy is derived from *several* fundamental constitutional guarantees that are enumerated within the Bill of Rights.[158] The right to privacy has provided the basis upon which the Court has found a constitutional right to parenting,[159] contracting,[160] abortion,[161] contraception,[162] and sexual intimacy,[163] among others. Is this not the adding together of various rights under the Constitution to produce new rights by which the Constitution affords the highest possible protection, requiring a compelling state interest to justify violation of any of them?

Another example of a constitutional right that fluctuates in the level of governmental justification required to violate it is the First

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154 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

155 Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).

156 *Id.*

157 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

158 *Id.* at 484. These Constitutional guarantees include the right of association contained in the First Amendment, the Third Amendment's prohibition against the quartering of soldiers, the Fourth Amendment's right of freedom from unreasonable searches and seizures, the Fifth Amendment's right against compelled self-incrimination, and the Ninth Amendment's language concerning the non-exclusivity of specific rights enumerated in the Constitution.

159 Troxel v. Granville, 530 U.S. 57 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1905).

160 Lochner v. New York, 198 U.S. 45 (1923).

161 Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

162 Eisenstadt v. Baird, 405 U.S. 438 (1972).

163 Lawrence v. Texas, 539 U.S. 558 (2003).

Amendment right to the freedom of speech.[164] Violation of an individual's right to free speech requires the government to show a compelling state interest when the regulation is aimed at the content of speech, and a lesser level of justification when regulation is aimed at conduct associated with speech.[165] While this difference in scrutiny results from the competing interests between the government and the individual, in various contexts, the Court has recognized that the scrutiny afforded to alleged violations of free speech hinge upon the existence of another constitutional right. For example, the government must show a compelling interest when it promulgates a law that may chill free speech because it is overly broad or vague.[166] This is so because a statute that potentially limits a person's speech because he does not know if it applies to him violates both the individual's rights under the 14th Amendment's Due Process Clause and the First Amendment's right to free speech.

In the context of the hybrid rights asserted in *Smith*, the issue becomes: which interpretation is best in keeping with governmental regulatory concerns and its citizens' constitutional rights? Three basic approaches have emerged to answer the question of whether violation of a hybrid right (free exercise joined with another affirmative right) justifies heightened scrutiny to exempt an individual from a religiously neutral and generally applicable law.[167]

The first approach, the refusal to recognize hybrid rights, fails completely to provide for the possibility that multiple violations of a right should be justified by something more than a rational state interest on the part of the state. Not only in this regard does this viewpoint fail, but also because it essentially disregards the clear holding in *Yoder* that heightened scrutiny is required for violation of a free exercise right joined with a due process claim.[168] In so doing, this viewpoint retains the general holding in *Smith* prohibiting religious exemptions from neutral

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[164] See Bertrand Fry, Note: Breeding Constitutional Doctrine: The Province and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence, 71 TEX. L. REV. 833 (1993). Applying hybrid rights

> gives minority-religion adherents a way to signal that the lawmaker has exceeded its legitimate authority . . . . Justice Scalia clearly believes that the framework he lays out in *Smith* has general application. In *Barnes v. Glen Theatre, Inc.*, Justice Scalia advocated the same framework for use in free speech cases . . . he does take notice of the strong powers that are . . . granted to society in its effort to regulate itself.

Id. at 861.

[165] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

[166] Gentile v. State Bar of Nev., 501 U.S. 1030 (1991); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[167] *See supra* notes 72 - 74 and accompanying text.

[168] *See supra note* 24. *See also* Jonathan B. Hensley, Comment: *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 138 (2000).

and generally applicable regulations, but leaves out the exception to that rule explicitly recognized in that opinion—except when another constitutional right is added to a free exercise claim.

The second approach, requiring a colorable claim in addition to the free exercise claim, is positive in that it retains independent force of law for the Free Exercise Clause, recognizing it for what it is: a constitutionally granted affirmative right. However, the loose requirement of adding to that claim only a colorable claim of another right fails to provide a bright-line test by which other courts can apply a hybrid analysis. The question of exactly what constitutes a colorable claim presents another difficulty for this position. It is a test that has for one of its primary elements a deliberately vague standard. If only a partial or colorable right must be proven, then the individual asserting the right could prevail on free exercise alone without proving infringement on an additional right. Such a result would be contrary to the stated exception to the general rule in *Smith*, which clearly required another right, not merely a colorable one, to be joined with free exercise to create a hybrid right that warrants higher scrutiny.

The third position, which requires an independently viable claim in addition to a free exercise claim, is the most accurate reading of the exception articulated in *Smith*. Here, the individual asserting a hybrid rights claim must show separate infringement of two affirmative rights. Nevertheless, the criticism is that this position effectively reads the Free Exercise Clause out of the Constitution. This is only true, however, when an individual asserts, or a court determines, that the right combined with the free exercise claim governs the standard of scrutiny that should be applied. Additionally, this view permits utilization of the combining together of affirmative rights that is already accepted practice in constitutional jurisprudence. Adoption of this view will result in compliance with the mandate of *Smith* and *Yoder* while providing courts with a clear analysis by which to confront assertions of a hybrid right. Lastly, this view places a high benchmark which claims must reach in order to warrant an exemption from a neutral and generally applicable law, thus largely retaining the power of the government to enforce its law.

V. CONCLUSION

In lieu of attributing to the Free Exercise Clause the weight of an affirmative fundamental right, regardless of whether the right is asserted to combat a neutral and generally applicable law or a law that discriminates on the basis of religion, the Supreme Court should bolster its opinion in *Smith* with a new bright-line analysis for hybrid rights claims.

Of the three methods of interpreting *Smith's* hybrid rights language, the Supreme Court should adopt the independently viable constitutional claim interpretation. In making this decision, the Court should clearly articulate two principles. First, infringement of a person's free exercise of religion by a non-neutral and generally applicable law requires the highest available level of scrutiny before it can be justified, thus affirming *Sherbert v. Verner*. Second, there is an exception to the general rule that individuals cannot claim exemption from neutral and generally applicable laws on the basis of free exercise of religion. This exception pertains where an individual can assert an independently viable free exercise claim and an independently viable companion right. The resulting justification needed to uphold the law as constitutional would either be a more than merely reasonable relation to a legitimate state interest or the justification required to uphold the law against the scrutiny applied to the companion right, whichever is greater.

Such a holding would vindicate the place and value of the Free Exercise Clause as providing a fundamental right, keep with the Supreme Court's holdings in *Smith* and *Yoder*, resolve the conflict among six circuits, and not give individuals seeking an exemption from neutral and generally applicable laws a license to disobey otherwise valid regulations promulgated by the government.