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The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children

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NOTE

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INTRODUCTION

Gurdev Cheema is a devout Khalsa Sikh. A central tenet of the Sikh faith requires Ms. Cheema and her three children to bear five symbols of their faith at all times: "kes" (long hair), a "kangha" (comb), "kachch" (sacred underwear), a "kara" (steel bracelet), and a "kirpan" (ceremonial knife).[1]

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1. Cheema v. Thompson, 67 F.3d 883, 884 (9th Cir. 1995).

In 1994, the Livingston, California school district banned knives — kirpans included — from all public schools. Any student who failed to comply with the ban was threatened with expulsion.[2] Ms. Cheema's three children were all enrolled in Livingston public schools at the time, so Ms. Cheema faced three unattractive choices: (1) her children could violate a central tenet of their religion and attend school without their kirpans; (2) her children could violate their school's instructions and face expulsion; or (3) she could keep her children at home and file a lawsuit against the school in order to force the board to grant her children an exception.[3] She chose the last option.

Fortunately for Ms. Cheema, she eventually prevailed in court and her children were permitted to return to school with their kirpans.[4] Central to her success was the Religious Freedom Restoration Act (RFRA), which mandated that state governments may not burden a person's free exercise of religion unless the governmental action was the least restrictive alternative and served a compelling interest.[5] The Supreme Court subsequently struck down the part of the RFRA that applied to the states.[6]

Cases like Ms. Cheema's are expected to become even more common with the influx of programs which are likely to offend certain faiths, such as school uniforms[7] and sexual health courses.[8] With this potential increase in disputes there has been a decrease in judicial clarity on how to handle such cases.[9] The reason for the murkiness has much to do with a rapid reconfiguration of the First Amendment's

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2. *See* CAL. PENAL CODE § 48915(a)(2) (West 2003) (requiring a recommendation of expulsion for the possession of a knife of no reasonable purpose to the pupil).

3. *Cheema*, 67 F.3d at 884-85.

4. *Id.* at 886.

5. 42 U.S.C. § 2000bb-1 (2000). The RFRA stated:

> (a) In general: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section. (b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

6. City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the RFRA because Congress overstepped its authority under Section Five of the Fourteenth Amendment).

7. *See* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 653 (E.D.N.C. 1999). In *Hicks*, a custodial great-grandmother objected to the School Board's uniform policy on religious grounds because she claimed the policy eliminated all free will and was required by the anti-Christ. *Id.*

8. *See* Leebaert v. Harrington, 193 F. Supp. 491, 497 (D. Conn. 2002).

9. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) (discussing confusion), *rev'd en banc*, 220 F.3d 1134 (2000).

Free Exercise Clause[10] jurisprudence over the past fifteen years and corresponding jousting between the Supreme Court and Congress.

From 1963 through 1990, the Supreme Court employed what was termed a "strict scrutiny" test for free exercise challenges.[11] The Court, in *Employment Division Department of Human Resources v. Smith*, abandoned this test in 1990 and replaced it with a much less restrictive one.[12] In *Smith*, the Court confronted the question of whether Oregon's criminal law against peyote use was constitutional as applied to members of the Native American Church who smoked peyote for religious purposes.[13] The Court found that the law was constitutional and held that the Free Exercise Clause does not relieve individuals of the obligation to comply with neutral laws that incidentally proscribe conduct mandated by the individual's religion or require conduct that is prohibited.[14] As long as a law is "generally applicable" and not designed with malice towards religious practice and is an area that the state is free to regulate, governments will not usually be required to provide exemptions to religious objectors.[15] The Court further noted that without such a rule, there would be a "system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[16] The Court implied that this rule was in fact not really "new" because in the past the Court only held generally applicable laws to be inapplicable when the Free Exercise Clause was acting "in conjunction with other constitutional protections."[17]

Eighteen years before *Smith*, in the archetypical free exercise case, *Wisconsin v. Yoder*,[18] the Supreme Court had held that Amish parents

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10. The Free Exercise Clause is found within the Constitution's First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

11. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); *see also* Sherbert v. Verner, 374 U.S. 398 (1963) (stating that the government may not burden a person's free exercise of religion unless the burden advanced a compelling governmental interest and was the least restrictive means of accomplishing that interest). In practice, however, the test was often not that strict. *See infra* notes 195-207 and accompanying text.

12. *See* Employment Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

13. *Id.* at 874.

14. *Id.* at 878. This decision inspired fierce attack by many academics. For a comprehensive history of Free Exercise Clause jurisprudence and a critique of *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

15. *Smith*, 494 U.S. at 879.

16. *Id.* at 890.

17. *Id.* at 881.

18. 406 U.S. 205 (1972).

had a right to violate a state compulsory schooling law because the law violated the parents' free exercise rights.[19] With *Yoder*, the Court reaffirmed its view that even generally applicable laws must sometimes give way to individual free exercise rights. In *Smith*, Justice Scalia's opinion for the Court rejected much of *Yoder*'s force and instead distinguished the case because it represented a "hybrid situation" in which both parental rights[20] and free exercise rights were at stake.[21] The claimants in *Smith* on the other hand, presented a "free exercise claim unconnected with any communicative activity or parental right."[22]

Smith completely changed the landscape of free exercise jurisprudence.[23] Although the Court created what has come to be known as a "hybrid rights exception,"[24] it shed very little light on the scope of hybrid rights and how these claims should be treated in the future.[25] Congress, unhappy with the decision in *Smith* and unwilling to rely on any hybrid rights exception, decided to take action. In 1994,

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19. *Id.* at 219 ("enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.").

20. *See infra* notes 36-42 and accompanying text for a discussion of parental rights as fundamental under the Constitution.

21. *Smith*, 494 U.S. at 881 n.1. Professor McConnell suggests that the creation of a hybrid right was simply a means to distinguish *Yoder*. McConnell, *supra* note 14, at 1121 ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case."). Other prominent commentators have echoed this view. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 902 (1994) ("Justice Scalia had only five votes. He apparently believed he couldn't overrule anything, and so he didn't. He distinguished everything away instead.").

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

23. *E.g.*, McConnell, *supra* note 14, at 1110-11. The *Smith* Court also stated that it was not overruling *Sherbert v. Verner*, which first announced the Free Exercise Clause's strict scrutiny test. *Id.* Although the Court distinguished *Sherbert* because *Sherbert* did not involve a claimant who broke a law, *Smith* still put to rest the notion that free exercise challenges should always be granted strict scrutiny.

24. *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1202 (D. Wyo. 2002) (recognizing a "'hybrid rights' exception to neutral and generally applicable regulation of religious conduct"). In order to comprehend the potential power of the exception, consider two cases decided by the Michigan Supreme Court on the same day. In one, the Court used strict scrutiny to strike down two parents' convictions for home-schooling their child because their parental right was reinforced with a free exercise claim. People v. Dejonge, 501 N.W.2d 127, 134 (Mich. 1993). In the other case, the Court used a low level of scrutiny in disallowing secular parents the right to home-school their children. People v. Bennett, 501 N.W.2d 106, 115 (Mich. 1993). The only material difference between the cases was the lack of a free exercise claim in *Bennett* that would have created a hybrid right. *See* Roderick Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 172 n.92 (2003) (noting how the Michigan Supreme Court rejected the parents' claim in *Bennett* because it was not connected to a free exercise claim).

25. *See Smith*, 494 U.S. at 881 n.1 (describing hybrid situations but failing to elaborate on how lower courts should address such situations in the future).

Congress passed legislation through the RFRA that intended to once again compel states to grant religious exemptions to generally applicable laws and return free exercise jurisprudence to the pre-*Smith* status quo.[26]

The RFRA was Congress's attempt to force courts to apply stricter scrutiny when states incidentally burdened religious freedom.[27] The RFRA evaded *Smith* by creating a statutory avenue through which a claimant could attack a generally applicable law independent of the Free Exercise Clause;[28] it was not so much an attempt by Congress to overrule the Supreme Court's *Smith* decision as it was an attempt to make the decision irrelevant.[29] This congressional sidestep was short lived. In *City of Boerne*, just three years after President Clinton signed the RFRA, the Supreme Court struck down the act as it applied to states as an unconstitutional overstepping of Congress's power under the enabling provision of the Fourteenth Amendment.[30]

After *City of Boerne*, parents like Ms. Cheema could no longer bring a free exercise challenge coupled with a RFRA challenge against a school board. A number of states, however, passed their own versions of the RFRA that have made it easier for parents and other claimants in those respective states.[31] Similarly, a few state supreme courts have held that their state constitutions require a stricter test for

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26. 42 U.S.C. § 2000bb-1 (2000).

27. 42 U.S.C. § 2000bb.

28. For example, even if a claim failed under the Free Exercise Clause, a claimant could still claim a right to an exemption under the RFRA. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 921 (Cal. 1996).

29. *See* William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 309-11 (1996). Van Alstyne opined:

> [T]he directive [of the RFRA] is to dictate the legal effect courts are to give to any party's free exercise claim — directing the court to give it the legal effect appropriate in Congress's view (as stipulated in the statute), contrary to the judicial understanding of the Free Exercise Clause. The RFRA means (and declares that it means) to make the alleged "right" of the complaining party carry more by way of entitlement than the Court has declared the Constitution provides. It does not put too fine a point on the matter to say that the RFRA is meant to make the lack of a meritorious First Amendment claim (an "unmeritorious" claim, in the Supreme Court's view) utterly irrelevant.

Id. (citations omitted).

30. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

31. The language of state RFRAs is similar to the original federal RFRA in that they typically require that the government follow a compelling state interest/least restrictive means standard. *See* ALA. CONST. of 1901, amend. 622 (1999); ARIZ. REV. STAT. § 41-1493.01 (2003); CONN. GEN STAT. ANN. 52-571b (West 2003); FLA. STAT. ANN. § 761.03 (West 2002); IDAHO CODE § 73-402 (Michie 2003); 775 ILL. COMP. STAT. 35/15 (2003); N.M. STAT. ANN. § 28-22-3 (Michie 2003); 51 OKLA. STAT. tit. 51, § 253 (2002); 71 PA. CONS. STAT. § 2404 (2003); R.I. GEN. LAWS § 42-80.1-3 (2002); S.C. CODE ANN. § 1-32-40 (2002); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (Vernon 2003).

religious claims.[32] Nonetheless, in a state in which neither the court nor the legislature has recognized the need for higher scrutiny (which a strong majority have not),[33] parents are forced to rely on *Smith*'s hybrid language when searching for a way to exempt their children from certain neutral school actions which infringe upon their free exercise of religion.

Parents wishing to assert their parental rights to direct the religious upbringing of their children must rely on *Smith*'s discussion of *Yoder* and "hybrid situations."[34] In addition to the Free Exercise Clause, the second constitutional foundation of this hybrid stems from a substantive due process theory that parents have a right to direct their children's upbringing.[35] One form of this parental right is the "right[] of parents to direct the religious upbringing of their children."[36] This parental right was of course central to *Yoder*, but its history goes further back into the golden age of substantive due process, beginning with *Pierce v. Society of Sisters*.[37] *Pierce* concerned an Oregon act that mandated that children aged eight through sixteen attend public school.[38] The Court, relying on a parental right to direct the education of their children and send them to private schools if they wish, found the Oregon act unconstitutional.[39] Although *Pierce* did not rely on the

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32. *See* State v. Miller, 549 N.W.2d 235, 240-41 (Wis. 1996); Att'y Gen. v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992).

33. The following thirty-five states do not follow a compelling interest test: Alaska, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

34. *See Smith*, 494 U.S. at 881 n.1.

35. The Court has recently confirmed that this right is firmly rooted within the Constitution. *See* Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion) (describing the longstanding history and vitality of the right). Although a splintered plurality opinion, a majority of the Court makes it clear that some form — although unclear on the details — of a parental rights due process doctrine is going to endure. *Id.* In fact, eight of the nine justices recognized this right, although Justice Thomas questioned its legitimacy. *See id* at 65; *id.* at 77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 86-87 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting).

36. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.").

37. 268 U.S. 510 (1925).

38. *Id.* at 530.

39. The court held that:

> [R]ights 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 upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him

Free Exercise Clause,[40] the *Yoder* Court specifically read *Pierce* as a "charter of the rights of parents to direct the religious upbringing of their children."[41] *Smith* did not attempt to overrule *Pierce* or *Yoder*; in fact, one of the two specific hybrid rights the Court noted was one concerning parental rights acting in conjunction with the Free Exercise Clause.[42]

Despite *Smith*'s implications, lower courts have failed to universally embrace hybrid rights, and the courts that have accepted the idea have struggled to set forth a consistent understanding of when and how the constitutional right should apply.[43] The circuit courts have offered three very different general schools of thought on how to address a hybrid claim.[44] Some circuits do not accept hybrid rights at all. Even in those circuits that do accept hybrid rights, two distinct modes of analysis have developed. As a result, claimants, attorneys, and judges all appear deeply confused about how exactly to frame a free exercise hybrid rights challenge. Complicating matters, the Supreme Court has offered no further guidance on who is right or wrong.

This Note argues that parents have a fundamental right under the U.S. Constitution to direct the religious upbringing of their children and that courts interpreting *Smith* have systematically misunderstood and misapplied the Supreme Court's confusing hybrid rights language. Part I explains how *Yoder* and *Smith* create and preserve parents' right to direct the religious upbringing of their children. The essential point is that the free exercise right and the parental right are not examined independently and simply added together, but instead are incorporated together to provide a specific bite to the free exercise claim. Part I also examines the lower courts' treatment of hybrid rights

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and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535.

40. The claimants did stress the statute's negative impact on parochial schools and religious liberty, but the Court probably ignored the free exercise nature of these claims because the Clause's restrictions had not yet been placed upon state governments. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding for the first time that the free exercise clause applies to the states).

41. *Yoder*, 406 U.S. at 233.

42. Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990).

43. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) (reviewing hybrid rights jurisprudence), *rev'd en banc*, 220 F.3d 1134 (2000).

44. The first school dismisses the hybrid language as mere dicta. *See* Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003). The second school requires an independently viable claim in conjunction with the free exercise claim. *See* Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995). The third school requires a colorable claim in conjunction with the free exercise claim. *See* Swanson v. Gutherie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998).

claims and argues that no lower court has correctly articulated the hybrid rights standard because they have looked solely at the language on its face without sufficiently examining the purpose and history of the right. Part II delves deeper into the Supreme Court's Free Exercise Clause jurisprudence and argues that parental free exercise challenges to public school policies must be analyzed under pre-*Smith* scrutiny. For example, the hybrid rights language requires that parents have a fundamental right to direct the religious upbringing of their children as exemplified by *Yoder*. Part II further explains why parental free exercise claims must be treated seriously and proposes a solution in how the scope of this right should be applied by detailing the proper scrutiny that courts must use.

I. WHY LOWER COURTS FAIL TO UNDERSTAND THE MEANING OF *YODER* & *SMITH*

Fundamental to Free Exercise Clause jurisprudence is the Court's assertion in *Smith* that "[t]he 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."[45] This part addresses the implications of this argument and explains how lower courts have misinterpreted the language. Section I.A argues that *Smith* did not extinguish the parental right to direct the religious upbringing of one's child. It notes the hybrid theory implicit in *Yoder*'s rationale and details the special significance of parental free exercise rights in education. Section I.B shows that circuit courts that have concluded that hybrid rights do not exist are ignoring Supreme Court precedent and misconstruing the law. Section I.C examines circuit court decisions that have recognized hybrid rights only when there is an independently viable claim and concludes that these circuits misunderstand the point of hybrid rights. In such cases an independently viable claim should by definition be able to carry the day on its own — independently. Finally, Section I.D examines the circuit courts that have recognized hybrid rights, but only require a

45. *Smith*, 494 U.S. at 881. For support of this statement, the Court cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (invalidating a tax on solicitation as applied to the dissemination of religious ideas on free exercise and power of the press grounds); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a licensing system for religious and charitable solicitations because the law abridged the free exercise of religion and the freedom to communicate). The court also cited a number of cases decided on freedom of speech and association grounds that also involved the free exercise of religion. *See* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984); Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

colorable claim as opposed to an independently viable claim. These courts have made a valiant effort but ultimately have misconstrued the standard and therefore are equally ineffective at determining when an exception to a generally applicable law is mandated.

A. *The Right of Parents to Direct the Religious Upbringing of Their Children*

The *Smith* Court, primarily because of two different policy concerns, rejected the previously held idea that the Constitution mandates certain religious exemptions from generally applicable laws.[46] The first concern was that if someone is entitled to evade general laws merely because of religious convictions, that person effectively becomes a "law unto himself."[47] The second concern stemmed from the Court's fear that federal judges would be unable to properly balance the importance of general laws against the importance of an individual's religious convictions.[48]

The Court has long worried that too liberal an exemption policy for free exercise challenges would eviscerate the rule of law and proper enforcement.[49] The Court's concern boils down to a fear that in a pluralistic United States, full of so many religions and faiths, a sweeping exemption standard would grant virtually every individual a constitutional right to ignore the law. *Smith* proclaimed that "such a system would be courting anarchy" and the danger of anarchy "increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[50]

Working alongside this trepidation was the Court's concern that judges are not equipped to sufficiently balance the rule of general laws with an individual's religious convictions. Combining the "horrible" contemplation that federal judges must engage in balancing with the possibility of "anarchy" if each man is a "law unto himself," the *Smith* Court proclaimed that it is the legislative process, not the courts, which must safeguard the free exercise of religion:[51]

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46. *See Smith*, 494 U.S. at 889-90.

47. *Id.* at 879.

48. *See id.* at 889-90 n. 5 ("It 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.").

49. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166-67 (1879) ("Can a man excuse his practices to the contrary [of law] because of his religious belief? To permit this 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.") (holding that religious practice was not a defense to polygamy laws).

50. *Smith*, 494 U.S. at 888.

51. In retrospect, it is clear that the Court meant specific state exemption clauses and not sweeping, national legislative language. This is apparent because the Court subsequently

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[52]

The merits of the Court's arguments have been sufficiently addressed elsewhere.[53] The basic critiques are that courts will ultimately decide if an exemption is warranted and therefore be able to safeguard general laws; that balancing conflicting interests is the very thing judges are supposed to do and have always done; and that leaving everything to the legislative process will effectively gut one of the Free Exercise Clause's primary purposes — to protect minority faiths from majority oppression.[54] The purpose of this Note, however, is not to critique *Smith*. Rather, it is to understand the decision and explain why the hybrid right of parents to direct the religious upbringing of their children deserves special scrutiny.

By distinguishing *Yoder*, *Smith* confirmed that the Court's 1972 decision remained good law.[55] Furthermore, the Court made the means for distinguishing *Yoder* abundantly clear — in *Yoder*, the Free Exercise Clause was acting in conjunction with the "right of parents . . . to direct the education of their children,"[56] while in *Smith* the free exercise claim stood alone. The longstanding ambiguity of the decision comes not from what the Court said in *Smith*, but from what the opinion did not say — the Court offered no support for why it should matter that the two rights were acting "in conjunction." This seemingly illogical conclusion coupled with a lack of support has been the reason that hybrid rights have received the ire of lower courts and commentators alike. It is true that *Smith* offered no justification for hybrid rights, but it cannot be automatically concluded that hybrid rights are illogical simply because of their lack of support. Although support is lacking in *Smith*, the logic behind a parental hybrid right can be found embedded in free exercise principles and the *Yoder* opinion itself.

Chief Justice Burger's opinion in *Yoder* is considered by many to be the high water mark of free exercise protection.[57] Before *Smith*,

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struck down the RFRA while favorably citing state exceptions to drug laws for religious peyote use. *Id.* at 890.

52. *Id.*

53. *See, e.g.*, McConnell, *supra* note 14, at 1141-50.

54. *Id.*

55. *Smith*, 494 U.S. at 881.

56. *Id.*

57. *See, e.g.*, Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI L.J. 153, 161 (2000).

Yoder was viewed as a proclamation that even generally applicable laws must sometimes give way to individual free exercise exceptions.[58] *Smith* seems to have devastated that view while somehow leaving *Yoder* intact.[59] In order to understand that anomaly, *Yoder* must be read carefully to recognize the subtle interplay between parents' free exercise rights and their right to direct their children's education.

First, *Yoder* was clear that parental claims to direct the education of their children, absent any religious grounding, would never be enough to grant an exception to a general law: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[60] From language like this, some assumed that the Free Exercise Clause did all the work in *Yoder*,[61] but such an assumption ignores much of the opinion's text.

Viewing *Yoder* simply as a free exercise case ignores the Court's repeated references to the importance of the parental rights at stake. The Court wrote that the case involved "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."[62] Furthermore, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[63] Finally, the Court characterized *Pierce v. Society of Sisters* as "a charter of the rights of parents to direct the religious upbringing of their children."[64]

Most importantly, the Court held that "when the interests of parenthood *are combined* with a free exercise claim of the nature

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58. *See, e.g.*, Quaring v. Peterson, 728 F.2d 1121, 1123 (8th Cir. 1984) ("Before the state may refuse to issue [the requested exemption], 'It must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.'") (quoting Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)).

59. *See Smith*, 494 U.S. at 881 n.1.

60. *Yoder*, 406 U.S. at 215. The Court then adds that "if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis." *Id.* at 216.

61. *See* Brian A. Freeman, *Trends in First Amendment Jurisprudence: Expiating the Sins of* Yoder *and* Smith*: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 54 (2001) ("Certainly the Court in *Yoder* referred to no right other than free exercise.").

62. *Yoder*, 406 U.S. at 232.

63. *Id.*

64. *Id.* at 233.

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*."[65] It is here that the "hybrid" impact at work in *Yoder* is most evident.[66] The free exercise claim working together with the parental claim deserves more than "reasonable relation" review.[67]

Further possible confusion comes from trying to decipher what right is actually doing the work in *Yoder*. The Court held that when "the interests of parenthood are combined with a free exercise claim" akin to the claim in *Yoder*, there must be more than a reasonable relationship to a legitimate state purpose in order to satisfy the "State's requirement *under the First Amendment*."[68] Moreover, the Court affirmed the Wisconsin Supreme Court's decision that Yoder's conviction was "invalid under the Free Exercise Clause of the First Amendment to the United States Constitution."[69] Thus, *Yoder*'s holding falls under the First Amendment. *Yoder* rested on the free exercise rights of parents, not on their rights to control public school education.[70] Religion is the necessary force underlying *Yoder*. The end result is that certain free exercise claims are paramount — one of which is the fundamental right of parents to control the religious destiny of their children, even in the face of public education.

Yoder did not hold that the right to direct the upbringing of one's child is provided a higher degree of protection when it is religiously motivated, but rather, that the free exercise challenge is provided a higher degree of protection when religion acts in conjunction with parental rights. Our country has traditionally been deeply concerned with infringements on free exercise that directly affect the right of parents to determine the religious upbringing of their children.[71] The Court explicitly held that the parental right on its own is not enough. But that does not mean that the free exercise claim on its own is not

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65. *Id.* (emphasis added) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).

66. It is much easier to make sense of the hybrid metaphor when *Yoder's* "combined with" language is recognized.

67. *Yoder*, 406 U.S. at 233.

68. *See id.* (emphasis added).

69. *Id.* at 207.

70. The court could not have been clearer on this point: "Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, *while not impairing the free exercise of religion*, provide for continuing agricultural vocational education . . . ." *Id.* at 236 (emphasis added).

71. *See id.* at 231-32 (referencing the Court's previous recognitions of the "traditional concepts of parental control over the religious upbringing and education of their minor children" and stating that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

enough. The free exercise claim may in fact carry the weight on its own, but only certain types of free exercise claims may do so. In *Yoder*, for example, it was those claims that involve a parent's attempt to guide the religious education of his child. For these types of claims, courts must use a more exacting level of scrutiny.[72]

Approaching the parental hybrid right this way allows one to give more credence to *Smith*'s language while realizing that the Court was doing more than merely suggesting that two invalid constitutional claims added together equal one valid claim.[73] For even if the primary purpose of describing *Yoder* as a hybrid right was in order to distinguish the case,[74] the characterization still remains viable and faithful to *Yoder*'s specific proclamations. Perhaps part of the confusion is that the word "hybrid" or the phrase "in conjunction with" are not precise descriptions of the Court's thinking. Instead of viewing individual constitutional rights as completely set off from one another in individual boxes — as the word "hybrid" and the phrase "in conjunction with" may suggest — it is more precise to think of the rights as interconnected spheres. Thinking of a kind of constitutional Venn diagram allows one to visualize a more powerful First Amendment free exercise case when the sphere is interconnected with parental rights.[75] It appears more accurate to claim that the Free Exercise Clause incorporates parental rights in this instance, as opposed to acting in conjunction with them.[76] Regardless of how one characterizes it, *Smith* stands as a recognition that individual rights do

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72. This idea is hardly novel in constitutional jurisprudence. For example, there are at least three different tiers of scrutiny used under equal protection analysis. Staying within the First Amendment context, the Court uses different standards of review for freedom of speech claims depending on the circumstances of the infringement. *See* Vieth v. Jubelirer, 124 S. Ct. 1769, 1786 (2004) (plurality opinion) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable.").

73. *See* Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363 n. 69 (2003) ("One can question whether the hybrid claim exception makes sense, as it appears the Court is engaging in a form of new math, suggesting that 0 + 0 = 1.").

74. *See supra* note 21.

75. *Cf.* Mary Ann Glendon & Raul F. Yannes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 548 (1991). Glendon and Yannes state:

> Justice Scalia's opinion for the Court in *Employment Division v. Smith*, moreover, reveals a majority ready to take account of the interplay among the various parts of the Bill of Rights, specifically, the ways in which one constitutional value can be amplified or muted by its association with other constitutional values.

Id.

76. By incorporate, I mean that the two rights combine together in order to form a united whole. The word "hybrid," on the other hand, connotes some type of unnatural pairing resulting in mutation.

not exist in a vacuum, but instead interplay and work together as well as against each other.[77]

B. *Mere Dicta: Circuit Courts Denying the Existence of Hybrid Rights*

Although the *Smith* Court refused to overrule *Yoder* and instead relied on it as an example of a case in which "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action,"[78] two circuits have decided to ignore the Court's language and deny the existence of hybrid rights.[79]

In *Kissinger v. Board of Trustees*,[80] the Sixth Circuit affirmed the district court's dismissal of Ms. Kissinger's claim for attorney's fees under 42 U.S.C. § 1988 because the court determined that The Ohio State University was not required to alter its veterinary-medicine curriculum in order to accommodate Ms. Kissinger's religious beliefs.[81] The court distinguished *Yoder* by stating that the plaintiff was not required to attend Ohio State, while the children in *Yoder* were challenging a law that required their attendance at public school.[82] The court also rejected Ms. Kissinger's hybrid rights claim.[83] Drawing strength from a recent Justice Souter concurrence criticizing the hybrid rights exception,[84] the court stated that the idea that the legal standard under the Free Exercise Clause would change depending on whether the free exercise challenge was coupled with another constitutional protection was "completely illogical."[85] Finally, the

77. *See id.* ("What Scalia referred to as 'hybrid' cases requiring a higher level of scrutiny were those in which the plaintiffs' claims seemed especially strong because they were supported by mutually reinforcing constitutional rights"). *Cf.* Boyd v. United States, 116 U.S. 616, 633 (1886) (noting "the intimate relation between the [Fourth and Fifth] amendments").

78. Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990).

79. *See* Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003); Kissinger v. Bd. of Trustees, 5 F.3d 177, 180-81 (6th Cir. 1993).

80. 5 F.3d 177 (6th Cir. 1993).

81. *Id.* at 178.

82. *Id.* at 180-81. It seems that the case could have been distinguished on simpler grounds, namely, that Kissinger was not a parent objecting to a law which interfered with the rights of a parent to direct the religious upbringing of her child during the child's formative years.

83. In addition to her free exercise claim, Ms. Kissinger also made section 1983 claims based on her freedom of speech, association, and her rights to due process and equal protection. *Id.* at 179.

84. *See infra* note 135 and accompanying text.

85. *Kissinger*, 5 F.3d at 180. The court also confessed that it could not "see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free Exercise Clause if it did not implicate other constitutional rights." *Id.*

court concluded that "until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause."[86]

The Second Circuit followed the Sixth Circuit's lead. In *Leebaert v. Harrington*,[87] the court held that a father's right to direct the education of his child did not require his son's school to exempt him from a mandatory health class.[88] The court found that there was no "fundamental right of every parent to tell a public school what his or her child will and will not be taught,"[89] that his claim was not governed by *Yoder*,[90] and that a hybrid right did not exist. The court adopted the language of *Kissinger* and agreed that there was "no good reason for the standard of review [in free exercise cases] to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."[91] Like the *Kissinger* court, the Second Circuit did not treat *Yoder* as an example of a hybrid claim, but instead as a different means in which the plaintiff was challenging the generally applicable law.[92] By distinguishing *Yoder* on its facts and then addressing the hybrid claim, the court failed to realize that *Yoder* is the hybrid rights situation.

The difficulty with both courts' reasoning can best be summed up with this question: If there is no such thing as a hybrid right, and if the Free Exercise Clause never relieves individuals of the obligation to comply with neutral laws that incidentally proscribe conduct mandated by the individual's religion or require conduct that is prohibited, how can one possibly explain the Court's reasoning in *Yoder*? The answer is that one cannot; the Second and Sixth Circuits simply ignored this question.[93] Even if these courts accepted the

86. *Id.*

87. 332 F.3d 134 (2d Cir. 2003).

88. *Id.* at 142. It is important to note that the Connecticut class had an opt-out provision which entitled a parent to excuse their child for the six classes dealing with family life instruction and AIDS education. *Id.* at 137.

89. *Id.* at 141.

90. *Id.* at 144. The court concluded that the class did not threaten Mr. Leebaert's "entire way of life" as the law in *Yoder* did, and therefore *Yoder* did not apply. *Id.*

91. *Id.* The court further noted that "*Smith*'s 'language relating to hybrid claims is dicta and not binding on this court.'" *Id.* at 143 (quoting Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001)).

92. *Id.*

93. The Ninth Circuit has accused the Sixth Circuit of taking "the path of least resistance" in *Kissinger* by throwing "up its hands up in despair" in the face of *Smith's* hybrid language. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 704 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (2000).

reasoning offered by many that the only purpose of Justice Scalia's hybrid rights exception was to distinguish *Yoder*,[94] it is improper for lower courts to simply dismiss Supreme Court language as unbinding because they believe they are able to decipher a deeper motive within the language that disqualifies the language itself.[95]

Courts that dismissed *Smith*'s hybrid language while recognizing *Yoder* as good law gave no indication or reasoning for why *Yoder* would still require stricter scrutiny.[96] The courts simply recognized that *Yoder* did receive stricter scrutiny and then stated that the hybrid language was dicta without offering an alternative theory.[97] As incomplete as *Smith*'s language may be, it at least attempted to justify *Yoder* when it distinguished the case.[98] If a lower court wishes to stamp the hybrid language as dicta in a case analogous to *Yoder*, it must offer a different reason why *Yoder* itself received higher scrutiny, since the case remains good law. Implying that the Supreme Court is making disingenuous efforts not to overrule its own precedent is not good enough.

Furthermore, there is in fact more to Justice Scalia's hybrid language than a simple means to distinguish *Yoder*.[99] First, *Yoder*'s

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94. *See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 30 (1995) (stating that the exception is "an unartful tool to distinguish troubling precedent"); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 187 (2002) (stating that the *Smith* court's hybrid exception served the specific function of allowing the Court to avoid overruling *Yoder*); McConnell, *supra* note 14, at 1121 ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case."). Other commentators have attacked the existence of hybrid rights on more fundamental grounds akin to the *Kissinger* and *Leebaert* courts. Some echo Justice Souter's belief that the exception could swallow the rule. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 214 (1994) ("The hybrid rights exception, which purported to protect free exercise in association with some other constitutional right (such as speech or association), has been rejected precisely because it had the potential to swallow the rule."). Others have concluded that the doctrine merely mandates that one add unsuccessful constitutional claims on top of each other and therefore the doctrine is completely illogical. *See* DeGroff, *supra* note 73, at 363 n. 69 ("One can question whether the hybrid claim exception makes sense, as it appears the Court is engaging in a form of new math, suggesting that 0 + 0 = 1."); Eric J. Neal, *The Ninth Circuit's "Hybrid Rights" Error: Three Losers Do Not Make a Winner in* Thomas v. Anchorage Equal Rights Commission, 24 SEATTLE UNIV. L. REV. 169 (2000) (stating that three insufficient challenges cannot add up to a sufficient one, and also somewhat quizzically suggesting that if a court undertakes its analysis properly, a hybrid rights exception cannot be found in *Smith*).

95. *Thomas*, 165 F.3d at 705 (stating that it was not the Ninth Circuit's place to "speculate or hypothesize about the Justices' true intentions").

96. *See, e.g.*, Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003); Kissinger v. Bd. of Trustees, 5 F.3d 177, 180-81 (6th Cir. 1993).

97. *See Leebaert*, 332 F.3d at 144; *Kissinger*, 5 F.3d at 180-81.

98. Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990).

99. Professor McConnell, on the other hand, believes that if the Court was truly sincere about hybrid rights, they would have recognized one using the facts of *Smith* itself. *See*

proclamation that higher scrutiny was needed when "the interests of parenthood are combined with a free exercise claim"[100] closely mirrors *Smith*'s "in conjunction with" language. This certainly weakens claims that Justice Scalia plucked hybrid rights out of thin air.[101] Second, in dissent, Justice Scalia had shortly before *Smith* cited the Court's recognition that "in some circumstances States must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations."[102] This language suggests that Justice Scalia was thinking approvingly of religious exceptions to generally applicable state laws before he ever wrote the *Smith* opinion.[103] Third, the Court had a chance to refine its language or discard it in *City of Boerne v. Flores*.[104] Instead, Justice Kennedy's opinion reaffirmed *Smith*'s holding and once again offered *Yoder* as a distinguishable case because "[t]hat case implicated not only the right to the free exercise of religion but also the right of parents to control their children's education."[105]

It is certainly possible to classify the Court's hybrid language as dicta, although it is questionable that Justice Scalia would.[106] But because the Court relied on *Yoder* in its decision,[107] the rationale of the case must be dealt with seriously when a claimant uses it as support. *Smith* offered one way to deal with *Yoder* — hybrid rights. If a lower court considers that method dicta and rejects it as such, the court then has a duty to offer an alternative legal theory upon which future claimants may rely, because the law still holds that *Yoder* serves as an example of an exception to the general rule.

McConnell, *supra* note 14, at 1122. This claim is open to debate. Although this Note will not engage in an extensive digression into free speech doctrine, it is questionable whether or not the religious purpose of smoking peyote represents any type of protected communicative activity.

100. *Yoder*, 406 U.S. at 233.

101. *See supra* note 94.

102. Edwards v. Aguillard, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting).

103. *Edwards* was decided in 1987, three years before *Smith*.

104. 521 U.S. 507 (1997).

105. *Id.* at 513-14.

106. Although the language was not central to the Court's holding, it is arguable that the language was central to the Court's reasoning in *Smith*. *See* Rogers v. Tennessee, 532 U.S. 451, 469 (2001) (Scalia, J., dissenting) (criticizing the majority's attempt to offer a "concept of dictum that includes the very reasoning of the opinion"). Furthermore, lower courts have recognized that they should "consider and respect Supreme Court dicta as well as holdings because the Supreme Court hears relatively few cases and frequently uses dicta to give guidance to the lower courts." Town Sound and Custom Tops v. Chrysler Motor Corp., 959 F.2d 468, 496 n.41 (3d Cir. 1992) (en banc).

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

C. *Independently Viable Claims: Circuit Courts Recognizing Hybrid Rights While Eviscerating Their Power*

Only the Second and Sixth Circuits have gone so far as to proclaim that a hybrid right can never exist.[108] But other courts that have recognized hybrid rights nonetheless have struggled to implement a coherent standard.[109] The struggle is apparent when one examines the idea of an independently viable claim requirement used by the First Circuit[110] and once by the D.C. Circuit.[111] Instead of dismissing *Smith*'s hybrid language as dicta, these Circuits require that in order to receive stricter scrutiny, claimants must offer an independently viable claim in addition to their free exercise claim.[112]

In *Brown v. Hot, Sexy & Safer Products, Inc.*, two high school students and their parents sued the directors of an AIDS awareness program and the school committee for what they considered an offensive mandatory assembly.[113] The plaintiffs filed a sexually hostile environment claim and also claimed that the assembly deprived the children of their privacy rights, substantive due process rights, procedural due process rights, and their free exercise right in conjunction with a parental right to direct the upbringing of their children.[114] The First Circuit found all these claims to be without merit.[115]

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108. *See* Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003); Kissinger v. Bd. of Trustees, 5 F.3d 177 (6th Cir. 1993).

109. *See e.g.*, Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995).

110. *Id.* at 539.

111. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996).

112. *See Brown*, 68 F.3d at 539.

113. *Id.* at 529. The complaint alleged that the director of the assembly:

> 1) told the students that they were going to have a "group sexual experience, with audience participation"; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as "erection wear"; 6) referred to being in "deep sh[it]" after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his "orgasm face" with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a "nice butt"; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.

Id. at 529.

114. *Id.* at 530.

115. *Id.* at 541. Although the RFRA was in force during the appeal, the court found that it did not apply retroactively and therefore it should not be applied to the assembly, which took place before the RFRA's enactment. *Id.* at 537-38.

With respect to the hybrid claim, the court first addressed the parental right to direct the upbringing of their children,[116] but also questioned whether the parental right was fundamental[117] — a question that is now settled in the affirmative.[118] The First Circuit then correctly concluded that standing by itself, the parental right found in *Pierce* and *Meyer v. Nebraska*[119] was not broad enough to force public schools to amend their curriculum for every child whose parents have "genuine moral disagreements with [a] school's choice of subject matter."[120] The *Meyer* Court had recognized parental due process rights in holding unconstitutional a Nebraska statute that prohibited public schools from teaching in any language other than English.[121] The difference between *Meyer* and *Brown*, the First Circuit noted, is that the first case "involve[d] the state proscribing parents from educating their children, while the second involved parents prescribing what the state shall teach their children."[122]

The court then considered the free exercise hybrid claim. Essentially, the First Circuit split this claim into two distinct tests: (1) is the free exercise challenge conjoined with an "independently protected constitutional protection";[123] or (2) does the claim fall within the "sweep of *Yoder*"?[124] The court made a swift determination that the parents failed the first test because their parental rights claim failed and therefore they did not make out an independently viable claim.[125] The court stated that the parents' claim also failed the second test because they failed to show a threat to their "entire way of life"

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116. *Id.* at 533. The parents addressed this issue by claiming that the "defendants violated their privacy right to direct the upbringing of their children and educate them in accord with their own views." *Id.* at 532. It seems odd to characterize this right as one of privacy as opposed to being found more generally in the Due Process Clause's "liberty" language. *See* Troxel v. Granville, 530 U.S. 57 (2000).

117. *Id.* at 533. The court also stated that the parental rights foundational cases would likely be decided today on First Amendment grounds because the Amendment has since been incorporated into the Fourteenth Amendment. *Id.* at 533 n.5.

118. *See Troxel*, 530 U.S. at 57.

119. 262 U.S. 390 (1923). For a discussion of *Pierce*, see *supra* notes 37-41 and accompanying text.

120. *Brown*, 68 F.3d at 534.

121. *Meyer*, 262 U.S. at 403.

122. *Brown*, 68 F.3d at 534.

123. *Id.* at 539.

124. *Id.* The court's discussion of this issue was confined to the parents' claims for monetary damages. The court also found that the claimants lacked the standing required for declaratory relief. *Id.*

125. *Id.* The court did not state any reason for why this was the proper test to use nor did the court discuss the origins of the test.

and their situation was therefore "qualitatively distinguishable" from *Yoder*.[126]

Less than a year later, the D.C. Circuit decided *EEOC v. Catholic University of America*.[127] The case materialized after Catholic University denied tenure to a Dominican nun who subsequently filed a Title VII claim against the University.[128] In a complex opinion, the court held that it was barred from reviewing the employment decision because of the ministerial exception to the Free Exercise Clause[129] and because to do so would have constituted excessive entanglement between church and state under the Establishment Clause.[130] But the court also stated that even if the ministerial exception did not survive *Smith*, a "hybrid right" would be recognized because the court found the excessive entanglement claim independently viable.[131] Although the court did not identify this test as the "independently viable" approach, the approach is substantially the same as the one adopted by the First Circuit.[132]

The independently viable approach to hybrid rights claims presents many of the same problems that are inherent in the Sixth and Second Circuits' approach of simply denying the right's existence.[133] Although courts that follow the independently viable approach are making a good faith attempt to adhere to *Smith*, the approach will typically lead to the evisceration of all hybrid rights. If the independently viable claim on its own can raise the level of scrutiny, there is no need to

126. *Id.* ("Here, the plaintiffs do not allege that the one-time compulsory attendance at the Program threatened their entire way of life. Accordingly, the plaintiffs' free exercise claim for damages was properly dismissed.").

127. 83 F.3d 455 (D.C. Cir. 1996).

128. *Id.* at 459-60.

129. *Id.* at 461. Essentially, the ministerial exception precludes courts "from adjudicating employment discrimination suits by ministers against the church or religious institution employing them." *Id.*

130. *Id.* at 466.

131. *See id.* at 467 ("As a consequence, this case presents the kind of "hybrid situation" referred to in *Smith* that permits us to find a violation of the Free Exercise Clause even if our earlier conclusion that the ministerial exception survived *Smith* should prove mistaken."). Although outside of the sphere of parental rights, the *Catholic University* decision merits discussion because it is one of the few cases in which the court actually recognized the existence of a hybrid right. The existence of the right in this case was entirely peripheral, however, because the court had already decided the question using the ministerial exception. Furthermore, free exercise challenges in conjunction with Establishment Clause challenges were not among the challenges that *Smith* sought to distinguish.

132. *See* Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1148 (9th Cir. 2000) (stating that both *Brown* and *Catholic University* stand for the proposition that "a free exercise claim based on the hybrid rights exception must include at least a colorable claim of infringement of a companion right").

133. *See supra* notes 96-105 and accompanying text.

invoke the Free Exercise Clause at all, let alone in conjunction with the independent right.[134] This point is best summed up in Justice Souter's *Church of Lukumi Babalu v. City of Hialeah* concurrence:

> But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[135]

To illustrate Justice Souter's point, consider a different hypothetical result in *Brown*: The First Circuit instead initially concludes that the parents' substantive due process right to direct the upbringing of their children automatically triggers heightened scrutiny whenever parents object to a public school's curriculum.[136] The school would then be forced to provide its reasons for the curriculum choice and also show that the curriculum was sufficiently tailored to advance those reasons. But it would be unnecessary for such a ruling to even consider the free exercise challenge. If one agrees with this reasoning, then the actual reasoning of *Brown* also makes perfect sense: because the parents failed to state a viable substantive due process right to direct the upbringing of their children, the Free Exercise Clause can add nothing to their claim.[137] So under either approach, the Free Exercise Clause serves no purpose and the hybrid rights exception is entirely illusory.[138]

D. *Colorable Claims: Circuit Courts Searching for Meaningful Hybrid Rights Ground*

In an attempt to add more clarity and substance to *Smith's* hybrid rights language, the Tenth[139] and Ninth[140] Circuits adopted a third approach to examining free exercise claims made in conjunction with

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134. *See Catholic Univ.*, 83 F.3d at 467.

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

136. This, of course, would be an absurd misreading of precedent since the Court has never suggested that schools have to justify their curriculum in response to every parental objection. *See supra* notes 60-61 and accompanying text.

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

138. *See* Anthony Merlino, *Tightening the Seal: Protecting the Catholic Confessional from Unprotected Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655, 689 (2002) (writing that the independently viable claim approach makes the free exercise claim "mere surplusage").

139. *See* Swanson v. Gutherie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998). It is notable that the plaintiff's case was argued by Professor Laycock, a prominent Free Exercise Clause scholar. *See* Laycock, *supra* note 94.

140. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (2000).

another constitutional right. This approach requires something less than an independently viable claim: a colorable claim.[141] Again, this approach shows the difficulty in interpreting and implementing a coherent hybrid rights standard.[142]

In *Swanson v. Gutherie Independent School District*,[143] Annie Swanson and her parents sued the Gutherie School District in an attempt to force the school to let her attend part-time in order to supplement her home schooling.[144] Annie filed a free exercise claim against the school board and her parents filed a claim against the school board for denying them the right to direct the upbringing of their child.[145] The Tenth Circuit held that the school's policy was valid and that Annie was not entitled to an exemption.[146]

The court first addressed the Swansons' claim that the policy violated Annie's free exercise of religion because the policy was not generally applicable. After dismissing Annie's free exercise claim on procedural grounds,[147] the court then addressed the parents' hybrid claim by searching for "genuine" infringements.[148] The court recognized that parents have a limited right to direct their children's education, but that the right was not so broad as to enable parents to "control each and every aspect of their children's education and oust the state's authority over that subject."[149] Finally, the court found that because the parents had no valid right to send their child to school

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141. *See, e.g.*, Swanson, 135 F.3d at 700. One court has also described the colorable claim approach as requiring a "genuine claim of infringement." Hicks v. Halifax County Bd. of Educ., 93 F. Supp 2d 649, 662 (E.D.N.C. 1999).

142. *See, e.g.*, *Swanson*, 135 F.3d at 700 ("We note that this case illustrates the difficulty of applying the Smith exception.").

143. 135 F.3d 694 (10th Cir. 1998).

144. *Id.* at 696. The School had allowed Annie to attend part-time as a seventh grader but a new superintendent was hired after that year and refused to allow her to resume her part-time studies as an eighth grader. *Id.* The reason for the policy change was concern over the fact that the state did not count part-time students when making funding decisions. *Id.*

145. *Id.*

146. *Id.* at 703.

147. *Id.* at 698. The court quickly dismissed Annie's claim that the policy was aimed directly at Annie in an attempt to discriminate against Christian home-schoolers because the discriminatory aspect of the claim was not raised below at the district court level. Although one cannot be sure why the Swansons failed to make this argument at the trial level, it was likely because *City of Boerne* was decided in between the trial and the appeal. Since they could have received higher scrutiny under the RFRA, there was presumably no need to make the discrimination argument. Regardless, the Tenth Circuit insinuated that even if it were to address the claim, it would have found that the policy did not discriminate on the basis of religion, but instead on the basis of funding. *See id.* at 698 n.3.

148. *Id.* at 699 ("We must examine the claimed infringements on the party's claimed rights to determine whether either the claimed rights or the claimed infringements are genuine.").

149. *Id.*

part-time or to pick their child's classes, they failed to make a colorable parental rights claim, and therefore, the case did not present a hybrid rights situation.[150]

In 1999, the Ninth Circuit also entered the fray.[151] The Ninth Circuit's original opinion in *Thomas v. Anchorage Equal Rights Commission*,[152] which was later withdrawn and reversed on other grounds,[153] is significant for two distinct reasons. First, the court offered a thorough review of hybrid rights treatment within the other circuits.[154] Second, the case was fundamentally different from most of the typical hybrid rights complaints this Note has examined thus far in that it did not involve a free exercise claim in conjunction with a parental right or free speech, but instead a free exercise claim in conjunction with a per se takings claim.[155]

Thomas I involved two Alaskan landlords who refused to rent to unmarried couples because they argued that doing so would facilitate a sin and run afoul of their religious convictions.[156] But by discriminating against unmarried couples, they would be violating both Anchorage and Alaska's fair housing laws.[157] So, the landlords filed suit seeking a declaratory judgment on the grounds that enforcement of the statute against them would violate their free exercise of religion.[158]

Before the Ninth Circuit stated what standard it would apply to the hybrid claim, it surveyed the alternative methods of other courts and

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150. The court reasoned that

> The claimed constitutional right Plaintiffs wish to establish in this case is the right of parents to send their children to public school on a part-time basis, and to pick and choose which courses their children will take from the public school. . . . However, decisions as to how to allocate scarce resources, as well as what curriculum to offer or require, are uniquely committed to the discretion of local school authorities, as the cases cited above demonstrate. . . . The above discussion establishes that Plaintiffs have shown no colorable claim of infringement on the constitutional right to direct a child's education.

Id. at 699-700.

151. The First, Sixth, Tenth, and D.C. Circuits had already decided hybrid rights issues.

152. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) [hereinafter *Thomas I*].

153. *See* Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000).

154. *See Thomas I*, 165 F.3d at 703-05.

155. *Thomas I*, 165 F.3d at 707 (stating that Thomas's takings claim was based on his right to exclude others from his property). The Supreme Court adheres to a per se rule of compensation for physical takings because landowners are entitled to exclusive possession of their property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

156. *Thomas I*, 165 F.3d at 696.

157. *See* ALASKA STAT. § 18.80.240 (Michie 2003) (making it unlawful "(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status . . . . (2) to discriminate against a person because of sex, marital status . . . .").

158. *Thomas I*, 195 F.3d at 697.

the language of *Smith*[159] to determine whether a hybrid right actually existed, and if so, what it entailed.[160] In seeking the correct path, the Ninth Circuit relied heavily on Justice Souter's critique of hybrid rights in his *Lukumi* concurrence.[161] The court agreed with Justice Souter that the right could not rest on an independently viable claim standard[162] or be triggered every time some other right was implicated.[163] For reasons before mentioned, the former would render the Free Exercise Clause moot and the latter would swallow the rule in *Smith*.[164]

In an attempt to work around these two extremes, the court decided to use a "colorable claim" standard as a type of middle ground.[165] Under the court's theory, the companion claim must be colorable, or "seemingly valid and genuine,"[166] meaning that it must have a fair probability or likelihood of success on the merits.[167] The Ninth Circuit decided that this theory was the most faithful to Supreme Court language because under the mere implication theory, *Smith* itself would have been a hybrid case,[168] and under the independently viable right theory, cases such as *Yoder* would have failed.[169] Furthermore, the court found the colorable claim standard to be perfect for these concerns because under the theory, Smith's claim would still fail to invoke a hybrid right while cases such as *Yoder* would have succeeded.[170] Applying this *Swanson*-like standard, the court found that the takings claim was colorable and that a hybrid

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159. The Ninth Circuit also described the Supreme Court's guidance on the matter as "less than precise" and "rather cryptic." *Id.* at 703.

160. *Id.*

161. *Id.*; *see supra* note 135 and accompanying text.

162. *Id.* at 704 ("[T]he Supreme Court's repeated references to the Free Exercise Clause in the so-called hybrid cases leave us with little doubt that, whatever else it did, the Court did *not* rest its decisions in those cases upon the recognition of independently viable free speech and substantive due process rights.").

163. *Id.* at 705 ("Government action will almost always 'implicate' a host of constitutional rights, even though it does not seriously threaten, much less violate, any of them. Hence, under a permissive 'implication' standard, rarely if ever would a neutral, generally applicable law be subject to the general rule of *Smith*.").

164. *See supra* notes 135-138 and accompanying text.

165. *Thomas I*, 165 F.3d at 705. In doing so, the court recognized that the colorable claim standard lacked the "exactitude" of the implicated or independently viable approach. So, it would require courts "to make difficult, qualitative, case-by-case judgments." *Id.*

166. *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 449 (1986)).

167. *Id.* at 707.

168. *Id.* at 706.

169. *Id.* at 706-07.

170. *Id.* at 707 ("[A]mong the potential approaches to hybrid rights, only a colorable-claim standard accounts *both* for *Smith* (which an implication standard cannot) *and* for the original hybrid cases (which an independently-viable-rights standard cannot).").

right existed.[171] Applying strict scrutiny, the court further found that the burden on the landlords was substantial and that the burden was not justified by a compelling state interest.[172]

Although this colorable claim standard is the best attempt so far made by courts to legitimately interpret *Smith's* hybrid exception, the approach is far from substantively perfect and also presents procedural challenges.[173] As the *Thomas I* court pointed out, the approach requires judges to undertake difficult ad hoc balancing in order to interpret the merit of the companion claim acting in conjunction with the Free Exercise Clause.[174] Furthermore, the approach seemingly treats any colorable companion claim the same and makes no attempt to explain why the Court singled out certain types of First Amendment and parental right claims in *Smith*.[175]

The main problem with the colorable claim approach is that it will often be impossible to distinguish it from the independently viable claim approach because there is no standard for what amounts to a "genuine" or colorable claim. A claim is either viable or it is not, but what is the correct standard for something in between? For example, it is difficult to read *Swanson* and see how the colorable claim approach is meaningfully distinguishable from the First Circuit's approach in *Brown*.[176] The difference between an "independently viable" claim and a "genuine" claim might often prove hard to recognize and it is easy to see the two seemingly distinct standards joining together to form one blurry, malleable standard. Because of this danger, all of the problems inherent in the independently viable claim approach are also potentially present in the colorable claim approach.[177]

There is also a concern that presents itself in the colorable claim approach that is distinct from the problems of the independently

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171. *Id.* at 708-09.

172. *Id.* at 714. In a spirited dissent, Judge Hawkins expressed his belief that *Smith*'s language was dicta best to be ignored and that he would have followed the Sixth Circuit's lead. *Id.* at 722-24 (Hawkins, J., dissenting). Unfortunately, the Ninth Circuit's *Thomas I* opinion has been withdrawn and the *en banc* court never reached the issue of the proper role of hybrid rights in Free Exercise Clause jurisprudence. It would have been highly instructive to have the scope of the *Smith* exception addressed by eleven judges sitting *en banc* as opposed to the typical three-judge panel. Nonetheless, Judge O'Scannlain's original opinion stands out as the most comprehensive judicial review of what exactly the hybrid exception in *Smith* actually means and should prove to be instructive to future courts and scholars alike.

173. *See Thomas I*, 165 F.3d at 705.

174. *Id.*

175. *See* Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990). This fact could be important because Justice Scalia's opinion plainly states that in *Smith* the claimants presented a "free exercise claim unconnected with any communicative activity or parental right." *Id.*

176. *See generally* Swanson v. Gutherie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998).

177. *See supra* Section I.C.

viable approach. In *Smith*, the Court stated that there was no hybrid claim presented in the case because the claimant's free exercise claim was "unconnected with any communicative activity or parental right."[178] This specific language, the scope of which is often ignored by courts,[179] deserves some discussion.[180] Notice that *Smith* did not say that there was no hybrid claim because the free exercise claim was unconnected with any *constitutional right*. Instead, it is lack of a communicative activity or a parental right in conjunction with the free exercise claim that causes the claimants to fail.[181] Courts that use a colorable claim standard do not look solely for a communicative activity or parental right in examining the companion claim, however, but are instead open to examining any other constitutional right.[182] This approach is somewhat inconsistent with the Supreme Court's language as well as with the cases the Court cited to illustrate hybrid rights.[183] But if hybrid rights are only to apply to free exercise claims acting in conjunction with communicative activity or parental rights, the obvious question that follows is why? What makes those specific rights so intertwined with the Free Exercise Clause that they should be privileged to some favored constitutional status? Part II of this Note offers at least a partial answer to these questions.

II. THE VIGOR OF THE FREE EXERCISE CLAUSE ACTING IN CONJUNCTION WITH PARENTAL RIGHTS

In order to understand the importance of parents' right to direct the religious upbringing of their children, one must appreciate the tension that often develops between minority faiths and public education. Schools, which apply firm rules and regulations, will invariably come in conflict with religious practice, which also often requires strict adherence to ritual. Section II.A shows how the nation's enduring commitment to both public education and religion has resulted in a constitutional jurisprudence that mandates special scrutiny when those two commitments collide. Section II.B outlines the test courts must use when resolving such conflicts.

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

179. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999).

180. This language will be further discussed in this Note in Part II when the proper scope of hybrid rights is examined.

181. *See Smith*, 494 U.S. at 882.

182. The potential problem is evident in examining the takings claim in *Thomas*. *See Thomas I*, 165 F.3d at 708-09. This problem does not present itself when the court uses an independently viable claim approach because the Free Exercise Clause essentially does no work in those cases. So, the independent claim, if successful, would be successful regardless of whether or not the free exercise clause was attached.

183. *See supra* Section I.A.

A. *Public School Policies Clashing with Free Exercise*

The very nature of parents' right to direct the religious education of their children requires special scrutiny. Few would dispute that religious liberty[184] and a commitment to public education[185] are two of the most important goals of America's democracy. Our devotion to education is evident in mandatory schooling laws, but it is because of this unwavering determination to educate American children that religious values are at stake. The ultimate catch-22 is to tell a parent that of course her child will be educated, but her religion must suffer at the whims of school administrators.[186] If a parent cannot pay for private education, the government effectively makes the decision between education and religion for the parent via mandatory schooling laws. Although schools typically are sensitive to religious convictions, especially majority religions, a hybrid right is especially important to safeguard minority religions. The need for a more stringent Free Exercise Clause — or at least a closer examination by courts of the conflicting interests at stake — is essential when minority religious faiths are threatened.[187]

Consider the recent ordeal of Nashala Hern, an eleven-year-old, sixth-grade girl in Oklahoma. Nashala is Muslim, and her religion requires her to wear a headscarf known as a hijab. Initially, her school seemed to have no complaints with the hijab, but on September 11, 2003, she was summoned to the principal's office and her parents were called and told that Nashala must remove her headscarf.[188] Her parents refused and Nashala was suspended.[189] The school district's

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184. *See* Braunfeld v. Brown, 366 U.S. 599, 612 (1961) (Brennan, J., concurring and dissenting) ("For religious freedom — the freedom to believe and to practice strange and, it may be, foreign creeds — has classically been one of the highest values of our society.").

185. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). The Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id.

186. *Cf. Braunfeld*, 366 U.S. at 616 (1961) (Stewart, J., dissenting) (lamenting that by denying an exemption from a Sunday closing law to a Jewish business, the Court's decision "compels an Orthodox Jew to choose between his religious faith and his economic survival. It is a choice which I think no State can constitutionally demand.").

187. *See* McConnell, *supra* note 14, at 1132 (arguing that prior to *Smith*, the Free Exercise Clause allowed courts to grant "minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process.").

188. Sheila K. Stogsdill, *Scarf causes controversy; Muslim student draws attention to suspension*, DAILY OKLAHOMAN, Oct. 10, 2003, at 1-A.

189. Nashala was suspended for five more days upon her return to school. *Id.*

attorney then informed her parents that she would not be allowed back at school as long as she continued to wear the hijab because the school, in order to reduce gang activity, had implemented a ban on headwear.[190] This is the most vulgar of ultimatums — either your child can receive a public education or she can continue to faithfully practice her religion, but not both. Putting aside any concern that the school's action against the Muslim girl eerily took place on September 11, there are other fundamental issues at stake here.[191]

Why not force an unwilling school to reasonably examine a request for a religious exemption under the Free Exercise Clause?[192] Assuming, *arguendo*, that Oklahoma state law permitted the school to infringe on Nashala's free exercise and the school's actions were not religiously motivated, her only immediate recourse was to sue under federal law. But without a hybrid parental right, *Smith*'s general ruling would prohibit any redress from this generally applicable law. Placing aside the constitutional infirmity that would result in such a misreading of *Smith* and *Yoder*, this seems completely illogical. The best solution leaves both the school's policy and Nashala's religion completely intact — simply recognize that the policy remains in place while simultaneously recognizing that Nashala must be given a religious exemption.

In cases like Nashala's,[193] where free exercise rights are especially threatened, one can see the enduring need for some type of constitutional parental right to direct children's religious upbringing. To completely read out hybrid rights is to destroy the legacy of *Yoder* and *Pierce*'s charter that parents have a fundamental right under the Free Exercise Clause of the First Amendment to shape their children's religious upbringing.

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190. *Id.*

191. Interestingly, the school's attorney implied that he was ignoring arguments from the girl's parents that the ban violated the Religious Freedom and Restoration Act because the Supreme Court in *Boerne* deemed the applicable portions of the Act unconstitutional. *See id.* But that ignores the fact that Oklahoma has its own Religious Freedom Act and Nashala's case falls directly within the Act's jurisdiction. *See* 51 OKLA. STAT. tit. 51, § 253 (2002).

192. In Nashala's case, it is obvious that she was not wearing the hijab as part of gang-related activity and absent some other justification, it was unreasonable for the school not to grant her an exemption.

193. Fortunately for Nashala, the United States Department of Justice intervened in her father's lawsuit against the Muskogee public school district and the parties settled the case with the school district agreeing to allow Nashala to wear her hijab until she graduates. The school district also agreed to establish a process through which students could request religious exemptions from the dress code. *See* Press Release, United States Department of Justice, Justice Department Reaches Settlement Agreement With Oklahoma School District in Muslim Student Headscarf Case (May 19, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/May/04_crt_343.htm (last visited Apr. 14, 2005).

B. *The Proper Standard for Courts to Use When Addressing Parents' Hybrid Rights Claims*

The basic premise of circuit courts that have accepted the possibility of hybrid rights is that when a hybrid right is sufficiently established, a court must use pre-*Smith* strict scrutiny in reviewing the claim.[194] The misconception of this premise arises from the term "strict scrutiny." The truth is that free exercise challenges never really received strict scrutiny,[195] insofar as the term has been understood in equal protection challenges based on race, where — at least until recently — many considered it strict in theory but fatal in fact.[196] The real test was more akin to some type of intermediate scrutiny, requiring not a compelling government interest, but rather an interest of the "highest order"[197] or a "substantial" government interest.[198]

Other commentators have accurately stated that the pre-*Smith* free exercise test used by the Court was essentially the same test used by the Court in free speech cases arising under *United States v. O'Brien*.[199] The *O'Brien* test mandates that if a generally applicable law regulating conduct has an incidental effect on speech, the government must show a substantial interest that must be balanced against the challenger's speech interests to ensure that the "incidental restriction on alleged First Amendment freedoms is no greater than essential" to further the

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194. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998) (recognizing the argument that a valid hybrid rights claim requires the court to review the claim under *Yoder*'s standard).

195. *See* Geoffrey R. Stone, *A Structural Overview and an Appraisal of Recent Developments: Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 994 (1986) ("The Court frequently states that laws having even an incidental effect on religious activity must pass strict scrutiny. If one looks to the Court's results rather than to its rhetoric, however, one sees that the actual scrutiny is often far from strict.").

196. *See* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) ("Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact."). In fact, it is rare for the Court to allow any racial classification to stand when challenged under the Fourteenth Amendment's equal protection prong. *But see* Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003) ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.").

197. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

198. Gillette v. United States, 401 U.S. 437, 462 (1971).

199. *See* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 105-06 ("[I]n the free exercise cases the Court has articulated the requisite governmental interest in various ways. In practice, however, the Court has essentially applied the *O'Brien* test."); McConnell, *supra* note 14, at 1139 (writing that the *O'Brien* test is "virtually identical to the free exercise exemptions test, once it is stripped of overblown language about 'compelling' interests").

government's interest.[200] *O'Brien*, which involved a man who burned his draft card in protest, demonstrates the explicit need for religious exemptions in the world of public education, even more so than in content regulating laws that have incidental affects on speech. After all, even if O'Brien could not burn his draft card, he had many more alternative ways to protest the draft. Nashala Hern, however, was effectively prevented from practicing her religion while simultaneously receiving a public education unless an exemption was mandated.[201]

In the context of free exercise exemptions, the equivalent test was stated in *Braunfeld v. Brown*: if the state enacts a generally applicable law, "the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[202] At first blush this test sounds quite demanding. But in application, the *Braunfield* Court denied an exemption from a Sunday closing law to a Jewish merchant because it:

> might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. . . . [And] enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.[203]

In practice, this test does not always mandate exemptions, showing that more rigid free exercise protection does not in fact make each individual a law unto him or herself.[204] Instead, a court must properly weigh the state's interest, the individual's free exercise interest, and the means the state uses to advance its interest. Like nearly all the rights listed in the Bill of Rights, the Free Exercise Clause marks a "boundary between the powers of the government and the freedom of individuals," and that boundary is defined and ultimately policed by the courts.[205] Because the court — as an arm of the government — is the ultimate arbiter of what the law is, one can be sure that the "individual believer is not judge in his own case."[206]

Furthermore, it is important to understand that the issue is not a zero-sum game of continued enforcement or granting exemptions. Instead, a request for a free exercise exemption is more akin to an "as

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200. United States v. O'Brien, 391 U.S. 367, 377 (1968). In *O'Brien*, the Court found that O'Brien's conviction for burning his draft card could stand because the government met its burden. *Id.*

201. *See supra* notes 189-192 and accompanying text.

202. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

203. *Id.* at 608.

204. *See supra* notes 49-50 and accompanying text.

205. McConnell, *supra* note 14, at 1150.

206. *Id.*

applied" constitutional challenge — the general validity of the law is not challenged, the law is simply challenged as applied to the religious objector.[207] If the exemption is granted, the law remains in force, just not for the individuals granted religious exemptions.

Also, the interest of the government must be properly narrowed.[208] In the context of parental hybrid exceptions, this means that the Court will not accept a "sweeping claim" that "education is so compelling that even . . . established religious practices . . . must give way."[209] Instead, "[w]here fundamental claims of religious freedom are at stake . . . [the Court] must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow" if the State did grant the requested exemption.[210] So the precise government interest to be weighed is the more narrow interest in not granting the exemption.[211] In *Yoder*, for example, after stating that courts "must move with great circumspection" when balancing a state's interest with claims for religious exemptions,[212] the Court found that the strong Amish interests at stake entitled the parents to an exemption because the State failed to show how its "admittedly strong interest in compulsory education *would be adversely affected by granting an exemption* to the Amish."[213]

With this proper understanding of how free exercise exemptions worked prior to *Smith*, it is far easier to see how courts could effectively implement the standard in present day hybrid cases. Such an approach would also be consistent with the two policy evils that *Smith* attempts to curtail. First, as discussed above, each parent would not be a law unto him- or herself. To the contrary, judges would simply evaluate parental claims to ensure that they state a sufficient hybrid right and then decide if the school has a sufficient interest in not granting the exemption. In the case of Nashala Hern, for example,

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207. *Id.* at 1138 ("[T]he concept of an 'as applied' challenge to a law is a precise parallel.").

208. *See* Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 909-10 (1990) (Blackmun, J., dissenting) ("It is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."). Although Justice Blackmun dissented in *Smith* on the grounds of whether pre-*Smith* scrutiny should apply, his view of what constituted a state's interest was accurate. *See, e.g.*, Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 719 (1981) (stating that the interests advanced by the state must be "properly narrowed").

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

210. *Id.*

211. As Justice Blackmun pointed out in his dissent in *Smith*, failure to properly balance the interest in this way "tends to distort the weighing process in the State's favor." *Smith*, 494 U.S. at 910 (Blackmun, J., dissenting on other grounds).

212. *Yoder*, 406 U.S. at 235.

213. *Id.* at 236 (emphasis added).

it seems reasonable to suppose that a judge would have found that the centrality of the headscarf to the Muslim faith is of great significance — in the words of *Yoder*, central to the religion's "way of life." At the same time, while the government surely has a substantial interest in preventing gang violence, it is difficult to claim that it has a substantial interest in not granting this specific exemption — at least not until a hijab becomes common gang fashion. This example illustrates how most exemptions in this context are easily created and administered while not negatively impacting the substantive polices the school is attempting to implement.

Of course, this still requires federal judges to balance the two interests — a process that *Smith* suggests is "horrible."[214] But balancing interests is central to the role of judges in a democracy where individual rights and the public powers of the State often collide.[215] There is no reason to think that judges are somehow less equipped to undertake this judicial task when the issue at stake is the free exercise of religion and the adverse parties are a school and parent. Furthermore, the careful weighing of interests in this context is exactly what *Yoder* endorses and mandates.[216]

CONCLUSION

The debate over hybrid rights is not yet over.[217] Hopefully, the Supreme Court will revisit its somewhat infamous *Smith* language and give lower courts further guidance in how to address this difficult

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214. *Smith*, 494 U.S. at 890 n.5. Although per se rules should be deemed favorable to balancing tests, it seems odd that the Court in this case favored a per se rule against free exercise considering the plain constitutional text mandates "no law" prohibiting the free exercise of religion. U.S. CONST. amend. I.

215. *See* David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 838 (1993). Faigman states:

> [B]ecause rules are a function of the clash between majoritarian values and individual liberty, the Court must assume the responsibility for making the difficult choices along the constitutional frontier. Inevitably, therefore, when the Constitution is implicated, the Court must weigh the social importance of the government action against the value of individual liberty infringed by that action.

Id. Balancing is the most common process through which judges solve the "Madisonian dilemma," which can be understood as the clash between majority and minority tyranny, where "neither the majority nor the minority can be trusted to define the freedom of the other." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

216. *See Yoder*, 406 U.S. at 235 ("This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements.").

217. This is evident from the wide disparity and confusion of Circuit Courts addressing the issue.

question. For the time being, however, federal courts would be wise to not shrink from *Smith*'s language, but instead wrestle with it and treat parental free exercise claims with the respect they have been given in the past century of Supreme Court jurisprudence.

The true fear is that minority religions will not receive the same protections afforded to the more traditional "American" religions.[218] The Free Exercise Clause used to act as a judicial checkpoint in this regard. After *Smith*, many lower courts have acted as if this is no longer so. But in those special hybrid rights instances, such as the parental right to direct the religious upbringing of a child, there is still reason to hope that courts will warm to the idea that it is their responsibility to fashion a public education system most faithful to the Constitution — one that recognizes and embraces the pluralistic society deeply anchored in America's history and tradition.

218. This is most likely because of legislatures' general ignorance to minority faiths, as opposed to a specific intent to infringe on one's free exercise. The fact that the House voted unanimously in favor of RFRA and the Senate approved RFRA by a vote of 97-3 reinforces this point. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994).