EXCEPTIONS TO *EMPLOYMENT DIVISION V. SMITH*: A NEED FOR CHANGE

by
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Employment Division v. Smith *states that a facially neutral law that indirectly has a negative impact on an individual's Free Exercise of religion need only be subjected to rational relationship scrutiny to be found constitutional. There are two exceptions to this rule. One is in the unemployment benefits context and the other is where the Free Exercise claim is combined with other constitutional claims. These exceptions receive strict scrutiny. This Comment discusses how the two exceptions to* Smith *inadequately protect an individual's Free Exercise rights and concludes that all Free Exercise claims should be evaluated under intermediate-level scrutiny. This strikes the proper balance between the need to protect the individual's Free Exercise rights and the need to allow states to pass neutral, generally applicable laws.*

I. INTRODUCTION

The Free Exercise Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."[1] It has been made applicable to the States by incorporation

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into the Due Process Clause of the Fourteenth Amendment.[2] Ever since the Framers enacted this Amendment, the Supreme Court has been trying to define its scope.

At its most basic level, the Free Exercise Clause means that an individual has the right to believe and profess whatever religious principle that person so desires.[3] As a result, it prevents any "governmental regulation of religious *beliefs* as such."[4] The government may not punish religious expression of doctrines it believes false[5] or compel affirmation of a belief that is religiously repugnant to an individual.[6] Furthermore, the government cannot impose special disabilities that discriminate against individuals or groups solely on the basis of their religious status or religious views,[7] lend its power to a particular

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[1] U.S. CONST. amend. I (emphasis added).

[2] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (reversing criminal convictions that stemmed from solicitation of money for religious purposes and stating: "We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.").

[3] Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (holding that while the First Amendment, at its most basic level, allows individuals the right to profess any religious belief they want to, the First Amendment did not allow two Native Americans to use peyote for religious functions in violation of a facially neutral state criminal statute).

[4] Sherbert v. Verner, 374 U.S. 398, 402 (1963) (holding that a Seventh-Day Adventist had a First Amendment right to be free of governmental regulation that took unemployment benefits away from her based solely on her refusal to work on Saturday, her day of worship).

[5] United States v. Ballard, 322 U.S. 78, 86–88 (1944) (holding that in prosecution for using and conspiring to use the mail to defraud by means of a so-called "religious movement," where defendants consistently contended that the indictment wrongfully invaded their constitutional religious freedom and should be quashed, their acquiescence in the court's withdrawal from the jury of the truth of defendants' religious doctrines and beliefs did not preclude defendants from asserting on appeal that no part of the indictment should have been submitted to the jury).

[6] Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (holding that the requirement of a declaration of belief in the existence of God, as a test for office, invaded the freedom of belief and religion of the petitioner, in violation of the First and Fourteenth Amendments to the United States Constitution).

[7] McDaniel v. Paty, 435 U.S. 618, 620, 629 (1978) (holding that a candidate for delegate to a Tennessee constitutional convention who was a Baptist minister could not be disqualified to serve by a Tennessee constitutional provision barring "[m]inisters of the Gospel, or priests of any denomination whatever" from such posts because the challenged provision violated the candidate's First Amendment right to the free exercise of his religion in that it conditioned his right to the free exercise of his religion on the surrender of his right to seek office); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (holding that a Jehovah's Witness minister's conviction based on an ordinance that provided that no person shall address any political or religious meeting in any public park violated the First Amendment of the Federal Constitution).

side in controversies over religious authority or dogma, [8] or use its taxing power to inhibit the dissemination of religious views.[9]

An individual's religious beliefs, however, do not automatically justify all conduct in the name of religion.[10] The Court has rejected challenges under the Free Exercise Clause to governmental regulation over certain overt acts that were motivated by religious beliefs or principles and has made it clear that "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions."[11] These regulations have been upheld because they prevent conduct or actions that "invariably pose[] some substantial threat to public safety, peace or order."[12]

[8] Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445, 452 (1969) (holding that the First Amendment forbade a civil court from awarding church property on the basis of interpretation and significance the civil court assigns to aspects of church doctrine); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95–119 (1952) (holding that a New York law to transfer control of New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to governing authorities of Russian Church in America, a church organization limited to the diocese of North America and the Aleutian Islands, was unconstitutional as prohibiting the free exercise of religion); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–25 (1976) (holding that the state court's "detailed review" of the evidence was impermissible under the First and Fourteenth Amendments, and the court's error was compounded by error in evaluating evidence, error in delving into various church constitutional provisions and error in sanctioning circumvention of tribunals set up to resolve internal church disputes. Although the defrocked diocesan bishop controlled a monastery and was the principal officer of property-holding corporations, the civil courts were required to accept that consequence as the incidental effect of an ecclesiastical determination which was not subject to judicial abrogation, having been reached by the final church judicatory in which authority to make the decision resided).

[9] Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (holding that convictions based on a violation of an ordinance of the City of Jeannette, Commonwealth of Pennsylvania, prohibiting the sale of goods, wares and merchandise of any kind within the city by canvassing for, or soliciting without a license could not be upheld because a tax that was specifically directed at the free exercise of religion was unconstitutional under the First Amendment); Follett v. Town of McCormick, 321 U.S. 573, 575 (1944) (reversing a conviction for violating an ordinance of the Town of McCormick, S.C., that imposed a license tax on canvassing book-sellers because the ordinance violated the First Amendment).

[10] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[11] Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (plurality opinion) (upholding a Pennsylvania criminal statute that proscribed Sunday retail sale of certain enumerated commodities because the law only had an indirect effect on an individual's exercise of religion).

[12] *Sherbert*, 374 U.S. at 403. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 162–67 (1878) (holding that a party's religious belief, in a prosecution against bigamy, could not be accepted as a justification for his committing an overt act, made criminal by the law of the land); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding a Massachusetts compulsory smallpox vaccination law because even political and religious convictions must give way to the State's ability to protect its citizens from imminent danger); Prince v. Massachusetts, 321 U.S. 158 (1944); Cleveland v. United States, 329 U.S. 14 (1946) (holding that the fact that members of a religious sect were motivated by a religious belief in polygamy resulting in the transportation of plural wives across state lines was not a defense to prosecution under the Mann Act because the determination whether an act was immoral within meaning of the Act was not to be determined by the accused's concepts of morality).

What happens, however, when a facially neutral law indirectly has a negative impact on an individual's Free Exercise rights? Before 1990, the Court applied strict scrutiny to Free Exercise claims.[13] Under this test, if the law substantially burdened the individual's Free Exercise rights, the law was presumed unconstitutional unless the government could provide a compelling state interest and show that its means were narrowly tailored to that interest.[14] For example, in *Sherbert v. Verner*,[15] the Court held that the South Carolina's Unemployment Compensation Act substantially impacted a Seventh-Day Adventist church member's Free Exercise rights because it forced her to either not receive unemployment benefits or work on Saturday.[16] Because South Carolina could not prove from the record that it had an interest in preventing fraudulent religious claims, it did not provide a compelling state interest to justify its law.[17] Thus, by applying strict scrutiny to Free Exercise claims, the Court held that even a facially neutral law that indirectly impacted an individual's Free Exercise rights was unconstitutional.[18]

In 1990, however, the Supreme Court in *Employment Division v. Smith*[19] reversed the presumption of unconstitutionality of laws that substantially impact individuals' Free Exercise rights and shifted the burden to the individual to prove that the law intentionally discriminates against religious conduct either on its face or as applied.[20] In *Smith*, the Court confronted whether it was constitutional for Oregon to criminally prosecute, under its drug control laws, two Native Americans for smoking peyote for religious purposes.[21] The Court held that Oregon's law was constitutional because it only incidentally impacted

[13] *See Sherbert*, 374 U.S. at 405–10.

[14] *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n., 480 U.S. 136, 140 (1987) (holding that Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment because the state could not provide a compelling state interest to justify its burden on appellant's constitutional rights); Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (holding that Indiana's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion and did not pass strict scrutiny review); Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972) (holding that Wisconsin's compulsory school-attendance law (which requires a child's school attendance until age sixteen) did not pass strict scrutiny review and, as a result, violated the First Amendment).

[15] 374 U.S. at 402.

[16] *Id*. at 404.

[17] Although not a part of the Court's holding, the Court stated in dicta that even if this were a compelling governmental interest, the state would have to show that the means were narrowly tailored to that the interest. The Court doubted this was possible. *Id*. at 407.

[18] *Id*. at 404 ("For if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.") (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (internal quotation marks and parenthesis omitted).

[19] 494 U.S. 872 (1990).

[20] Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1051 (2000).

[21] *Smith*, 494 U.S. at 874.

the Native Americans' Free Exercise rights and was otherwise a perfectly valid law.[22]

To alleviate this harsh result, the Court created two exceptions to the rule above. First, the *Smith* Court did not overrule *Sherbert*, but rather simply limited its application of strict scrutiny to the unemployment benefits context.[23] Second, the Court stated that Free Exercise claims outside the unemployment benefits context, if combined with other constitutional claims, would receive strict scrutiny.[24] For example, the Court pointed to cases like *Wisconsin v. Yoder* where the Court invalidated compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school.[25] Thus, the Court in *Smith* pointed out that because the parents in *Yoder* were able to combine the constitutional right to raise their children the way they wanted with a Free Exercise claim, the Free Exercise claim received strict scrutiny.[26]

This Comment focuses on the Court's two exceptions to the *Smith* rule and how effective they have been to protect an individual's Free Exercise rights. First, the Comment analyzes the *Sherbert* and *Smith* decisions and describes the concerns for the Court in each. Second, it describes the application of the Supreme Court's "hybrid rights" jurisprudence and the *Sherbert* exception and how these exceptions simply provide lower courts with the functional equivalent of a balancing test—one that heavily favors the State. Third, it puts forward four possible frameworks for the Court to adjudicate Free Exercise claims. Finally, it concludes that intermediate-level scrutiny is the best approach because it provides the proper balance between the need to protect individual Free Exercise rights and the need to allow states to pass neutral, generally applicable laws without having the smallest, indirect effect on an individual's religion invalidate it. In addition, intermediate-level scrutiny addresses the jurisprudential concerns expressed by Justice Scalia in *Smith.* As a result, the Court should take *certiorari* and apply intermediate-level scrutiny to Free Exercise claims.

II. 1963−1990: STRICT SCRUTINY—*SHERBERT V. VERNER*

In *Sherbert v. Verner*,[27] the Court considered whether South Carolina's denial of unemployment benefits to a Seventh-Day Adventist was a violation of the Free Exercise Clause.[28] The plaintiff had been discharged from her job "because she would not work on Saturday, the Sabbath Day of her faith."[29] Under the South Carolina Unemployment Act, a claimant was ineligible for

[22] *Id*. at 878.
[23] *Id*. at 883.
[24] *Id*. at 881–82.
[25] *Id*. *See* Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972).
[26] *Smith*, 494 U.S. at 881–82.
[27] 374 U.S. 398 (1963).
[28] *Id*. at 403–04.
[29] *Id*. at 399.

unemployment benefits if she was unable to work, was unavailable for work, or she had failed, without good cause, to accept available suitable work when offered to her.[30] The Employment Security Commission denied the plaintiff unemployment benefits because her refusal to work on Saturday "brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered . . . by the employment office or the employer."[31]

The Court held that South Carolina's refusal of unemployment benefits violated the Free Exercise Clause.[32] The Court followed a two-step approach. First, it asked whether the South Carolina Unemployment Act substantially burdened the plaintiff's free exercise of her religion.[33] The Court pointed out that a law can be constitutionally invalid even when it is facially neutral.[34] In addition, the Court held that it was "apparent that [plaintiff's] declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice [was] unmistakable."[35] Thus, the Court concluded that because the Commission's ruling forced the plaintiff to choose between following her religion and forfeiting benefits on one hand, and abandoning her religion and accepting work on the other, this type of law was the equivalent of a fine imposed upon her for worshiping on Saturday and a substantial burden on the free exercise of her religion.[36]

Second, after finding that South Carolina's law substantially infringed upon plaintiff's Free Exercise rights, the Court asked whether there was a compelling state interest to justify this infringement.[37] In doing so, the Court expressly rejected the rational relationship test for Free Exercise claims by stating that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses endangering paramount interest, give occasion for permissible limitation."[38]

The Court held that South Carolina's justification that there was a "possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work" was without merit.[39] First, this state interest was

[30] *Id*. at 400–01.

[31] *Id*. at 401.

[32] *Id*. at 410.

[33] *Id*. at 403.

[34] *See id*. at 404 ("For if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.") (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (internal quotation marks and parenthesis omitted).

[35] *Id*.

[36] *Id*.

[37] *Id*. at 406.

[38] *Id*. (internal citation, quotation marks, and parenthesis omitted).

[39] *Id*. at 407.

not discussed by the South Carolina Supreme Court.[40] Second, even if it was presented to the state supreme court, this interest was not supported by the record.[41] Alternatively, even if this evidence was produced, the Court stated that it doubted that it would justify substantial infringement upon religious liberties because the state would still have to show "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[42]

By extending strict scrutiny to Free Exercise claims, the Court showed that it had an intense interest in protecting Free Exercise rights from governmental intrusion. The Court decided that risks of fraud and coercion, while a valid concern, could not justify a substantial infringement on the religious freedom that the Founders codified in the Free Exercise Clause. Thus, from a policy perspective, nothing but the most serious state interests can justify intrusion into the constitutionally protected rights found in the Free Exercise Clause.

III. 1990−PRESENT: *EMPLOYMENT DIVISION V. SMITH*

In *Employment Division v. Smith*,[43] the issue before the Court was whether the Free Exercise Clause prohibited Oregon from criminalizing religiously-inspired peyote[44] use under its drug laws.[45] Oregon argued that because peyote use is illegal under its statutes, the state was justified in denying unemployment benefits to persons dismissed from their jobs because they used peyote in religious ceremonies.[46]

Under Oregon law, it is a criminal offense to knowingly or intentionally possess a "controlled substance" unless the substance has been prescribed by a medical doctor.[47] "Controlled substance" is defined as one classified in Schedules I through V of the Federal Controlled Substances Act,[48] as modified by the State Board of Pharmacy.[49] Schedule I contains the drug peyote and section 475.992(4)(a) of the Oregon Revised Statutes makes possession of peyote a class B felony.[50]

Because plaintiffs, members of the Native American Church, ingested peyote for sacramental purposes at a ceremony, a private drug rehabilitation

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[40] *Id*.

[41] *Id*.

[42] *Id*. This statement is commonly referred to as the second part of strict scrutiny in that the law must be narrowly tailored to the compelling state interest. *See generally* DONALD T. KRAMER, STANDARDS OF REVIEW; GENERALLY—STRICT SCRUTINY TEST, 16B AM. JUR. 2D *Constitutional Law* § 815 (2005).

[43] 494 U.S. 872 (1990).

[44] Peyote is "a hallucinogen derived from the plant *Lophophora williamsii Lemaire*." *Id*. at 874.

[45] *Id*.

[46] *Id*.

[47] OR. REV. STAT. § 475.992(3) (2005).

[48] 21 U.S.C. §§ 811−812 (2000).

[49] OR. REV. STAT. § 475.005(6) (2005).

[50] *Smith*, 494 U.S. at 874.

organization fired them from their jobs.[51] After losing their jobs, plaintiffs applied for unemployment compensation.[52] The Employment Division denied the plaintiffs unemployment benefits after determining that plaintiffs were ineligible "because they had been discharged for work-related misconduct."[53]

The Court found that the Free Exercise Clause did not prevent Oregon from prohibiting the ingestion of peyote and, as a result, held that the State's denial of unemployment benefits was constitutional.[54] The Court reasoned that while the government is prohibited from regulating religious beliefs, the Free Exercise Clause does not prohibit a generally applicable and otherwise valid regulation that has a mere incidental effect upon a religious practice.[55] The Court pointed out that laws:

> are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary 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.[56]

Thus, the Court's primary concern was to close the door to the floodgate of Free Exercise claims by requiring plaintiffs to show more than mere incidental effect.

As discussed in the previous section, before *Smith*, the government had to exempt individuals from compliance with a law when that individual showed that the law burdened his or her religious beliefs, unless the government could prove that its law served a compelling governmental interest and was narrowly tailored to achieve that interest.[57] By holding that the Free Exercise Clause does not free an individual from complying with a valid and neutral law of general applicability, the Court reversed this presumption and shifted the burden to the individual to prove that the law intentionally discriminates against religious conduct either on its face or as applied.[58]

The Court, however, alleviated this harsh result by creating two exceptions. First, the "hybrid-rights" exception allows a plaintiff to bring Free Exercise claims challenging a neutral, generally applicable law to religiously motivated action if the Free Exercise claim is combined with another constitutional claim.[59] Thus, by adding another constitutional claim to its Free Exercise claim, a party can challenge a neutral, generally applicable law. Second, the Court explicitly stated that strict scrutiny still applied to cases involving "state unemployment compensation rules that conditioned the

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[51] *Id*.
[52] *Id*.
[53] *Id*. (internal citation marks omitted).
[54] *Id*. at 890.
[55] *Id*. at 878.
[56] *Id*. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).
[57] *See* Sherbert v. Verner, 374 U.S. 398 (1963).
[58] Kaplan, *supra* note 20, at 1051.
[59] *Smith*, 494 U.S. at 880–81.

availability of benefits upon an applicant's willingness to work under condition forbidden by his religion."[60] In doing so, the Court left open the test of strict scrutiny to the unemployment compensation field.

The Court's move away from strict scrutiny for all Free Exercise claims was motivated by several jurisprudential and policy goals. First, the Court wanted to bring the application of the compelling state interest test in Free Exercise jurisprudence in line with other areas of constitutional law, specifically equal protection and free speech.[61] According to Justice Scalia, the author of the majority opinion, application of the compelling state interest test in the equal protection and free speech fields furthers constitutional norms,[62] while in the Free Exercise field "a private right to ignore generally applicable laws—is a constitutional anomaly."[63]

Second, the Court was concerned that courts, in their application of the compelling state interest test to Free Exercise claims, were watering the test down. For example, when reviewing pre-*Smith* cases the Court found that, except for unemployment cases, the Court "always found the [compelling state interest] test satisfied."[64] Furthermore, the Court stated that "if 'compelling interest' really means what it says," many laws would not withstand the test, and that watering down the test in Free Exercise cases would "subvert its rigor in other fields where it is applied."[65]

Third, the Court stated that it was impossible for courts to judge the merits of individuals' religious beliefs.[66] Pre-*Smith* jurisprudence required judges to access whether the law's burden on the individual was "substantial" by looking to the sincerity of the claimant's beliefs and how central the beliefs were to the conduct in question.[67] The Court remedied this problem by shifting courts' attention away from the individual's religious beliefs to the challenged law or regulation's purpose, effect, structure, and enforcement. As Justice Scalia

[60] *Id*. at 883. The Court has only used this rationale on three occasions, all limited to the unemployment compensation field. *See e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

[61] *See Smith*, 494 U.S. at 885–86.

[62] *Id*. (stating that equal protection and free speech jurisprudence protects constitutional norms in that they guarantee "equality of treatment and an unrestricted flow of the contending speech").

[63] *Id*. at 886.

[64] *Id*. at 883.

[65] *Id*. at 888.

[66] *Id*. at 886–87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the Free Exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.") (citation omitted).

[67] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963) ("No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible.").

tacitly acknowledged, this effect is to simply punt resolution of religious accommodation back to the political process.[68]

IV. CIRCUIT COURTS' APPLICATION OF THE *SMITH* EXCEPTIONS

As discussed above, there are two exceptions to *Smith* that give the plaintiff strict scrutiny review. The first exception, the so-called *Sherbert* exception, gives strict scrutiny review to claims that involve unemployment compensation. Courts have differed with regard to the scope of this exception but it is generally thought to simply be limited to the unemployment compensation benefits context.[69]

The second exception, the so-called hybrid-rights exception, gives strict scrutiny review to Free Exercise claims when they are combined with other constitutional claims.[70] As with the *Sherbert* exception, courts have not applied this exception uniformly. This division of the courts when interpreting *Smith*'s hybrid-rights exception can be divided into three general categories: (1) *Smith*'s hybrid-rights language is mere dicta, (2) the plaintiff must show an independently viable claim in conjunction with the Free Exercise claim to receive strict scrutiny, and (3) the plaintiff must show at least a colorable claim

[68] *See Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

[69] Even though there are generally three differing views concerning this exception's scope, by far the most persuasive position is the one that *Sherbert* is limited to the unemployment compensation benefits context and should not be expanded. Because of this fact, this Comment does not go into the details of the different view. With that said, the following is a summary of those views. First, some courts, following the language in *Smith*, restrict the exception to unemployment compensation cases. *See*, *e.g.*, Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 n.10 (D. Utah 1992) ("The Supreme Court has expressly stated that the holding regarding statutes with individual exemptions applies only in the unemployment compensation context."). Second, other courts go to the opposite extreme in holding that any challenged law that contains a secular exception without providing a religious one falls within the exception. *See, e.g.*, Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (holding that because a landmark preservation ordinance contained individualized exemptions, it failed *Smith*'s neutrality and general applicability test); First Covenant Church v. City of Seattle, 840 P.2d 174, 181–82 (Wash. 1993) (holding that landmark ordinances that contain a mechanism for individualized exemptions fall within the *Sherbert* exception). Third, still other courts apply the *Sherbert* exception to laws or regulations that contain individualized exemptions resembling those found in unemployment cases. *See*, *e.g.*, Am. Friends Serv. Comm. Corp v. Thornburgh, 961 F.2d 1405, 1408–09 (9th Cir. 1991) (holding that there is a distinction between exceptions that exclude "entire, objectively-defied categories of employees from the scope of the statute" from "individualized exemptions"); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932–33 (6th Cir. 1991) (distinguishing between the choice of a school board to assign credits for prior work to students transferring from nonaccredited schools from a "good cause" exemption standard in *Sherbert*); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 701 (10th Cir. 1998) (holding that there was a distinction between school board policy and individualized exceptions in *Sherbert*).

[70] *Smith*, 494 U.S. at 881–82.

in conjunction with the Free Exercise claim to receive strict scrutiny. Each school of thought will be addressed in the immediately following sections.

A. Hybrid-Rights Exception Is Mere Dicta

The first school of thought states that the hybrid-rights language in *Smith* is mere dicta, refusing to give strict scrutiny review to hybrid-rights claims.[71] For example, in *Leebaert v. Harrington* the plaintiff argued that compelling his child to attend health education classes violated both his constitutional parental right to direct the upbringing and education of his child and violated his Free Exercise rights.[72] Thus, the plaintiff presented a hybrid-rights claim that would seem to invite strict scrutiny review under the language laid out in *Smith*.

The Second Circuit, however, refused to review plaintiff's Free Exercise claim under strict scrutiny because it claimed that *Smith*'s language that mandated strict scrutiny for hybrid-rights claims was mere dicta.[73] First, the court reasoned that *Smith* explicitly stated that the "present case does not present such a hybrid situation."[74] Second, the Second Circuit pointed out that even though the First,[75] Ninth,[76] Tenth,[77] and D.C.[78] Circuits stated that hybrid-

[71] Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003). *See also* Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (holding that a student's claim that university's veterinary-medicine curriculum violated other constitutional provisions as well as the Free Exercise Clause did not require application of a stricter standard than would otherwise be applied when evaluating her Free Exercise claim because "[s]uch an outcome is completely illogical").

[72] *Leebaert*, 332 F.3d at 135, 137.

[73] *Id*. at 143.

[74] *Id*. (quoting *Smith*, 494 U.S. at 882).

[75] Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 538–39 (1st Cir. 1995) (holding that parents' and students' claim that a neutral, generally applicable requirement that students of public high school attend sexually explicit AIDS awareness assembly impinged on their sincerely held religious values regarding chastity and morality, which was not cognizable under the Free Exercise Clause and law then in effect, also did not fall within the "hybrid" exception for cases involving Free Exercise Clause in conjunction with other constitutional protections, where plaintiffs could not state a privacy or substantive due process claim, and did not allege that one-time compulsory attendance at assembly threatened their entire way of life).

[76] Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999) (denying relief to plaintiff in a case involving a state's denial of a driver's license renewal because of applicant's refusal, on religious grounds, to supply his social security number, holding that an assertion of a hybrid-rights claim requires at least a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere combining of a Free Exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or nonexistent right).

[77] Swanson v. Gutherie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998) (holding that a school district's policy against part-time attendance at public school did not infringe parents' constitutional right to raise and educate their children, and assertion by the student and her parents that policy violated both the Free Exercise Clause and parents' right to direct child's education thus did not invoke hybrid-rights theory requiring application of compelling interest test because application of the hybrid-rights theory, which purports to require compelling interest analysis of claims involving the Free Exercise Clause in combination with other constitutional protections, at least requires a colorable showing of

rights cases would warrant strict scrutiny, none of these courts applied strict scrutiny based on this theory.[79] Further, the court noted that none of the above circuits in their opinions explained "the requirement of strict scrutiny for hybrid situations; they simply rely on the language in *Smith*."[80] Thus, the court held that it was not bound by the language of *Smith*.[81]

The court then proceeded to determine whether the hybrid-rights theory was appropriate.[82] The court, aligning itself with the Sixth Circuit,[83] held that it could "not see how a state regulation would violate the [F]ree Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights."[84] Therefore, the court stated that until the Supreme Court held that legal standards vary depending on how many constitutional rights are implicated, it would not evaluate hybrid-rights claims under strict scrutiny.[85]

This position is very persuasive. If anything, pleading an additional constitutional right gives the plaintiff an additional road for relief; it does not add an additional lane to the Free Exercise road.[86] This idea is supported by the

infringement of recognized and specific constitutional rights, rather than mere invocation of a general right, such as the right to control the education of one's child).

[78] Equal Employment Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996) (holding in the alternative in a case involving Catholic University's refusal to grant tenure to a Catholic nun for a faculty position teaching canons of church, stating that "[w]e have demonstrated that the EEOC's attempt to enforce Title VII would both burden Catholic University's right of Free Exercise and excessively entangle the Government in religion. 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.").

[79] *Leebaert*, 332 F.3d at 143.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (holding that a student's claim that university's veterinary-medicine curriculum violated other constitutional provisions as well as Free Exercise Clause did not require application of stricter standard than would otherwise be applied when evaluating her Free Exercise claim because "[s]uch an outcome is completely illogical.").

[84] *Leebaert*, 332 F.3d at 144 (quoting *Kissinger*, 5 F.3d at 180).

[85] *Id*.

[86] The *Smith* Court noticed that its previous cases where it had invalidated neutral, generally applicable laws involved more than one constitutional right. The Court cited several arenas where this has occurred, such as the freedom of speech, *see* Cantwell v. Connecticut, 310 U.S. 296, 304–07 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious in a case that involved the freedom of speech); freedom of the press, *see* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas) *and* Follett v. Town of McCormick, 321 U.S. 573, 575 (1944) (same); or the right of parents to direct the education of their children, *see* Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). It also noted that some of its cases that were decided exclusively upon free speech grounds have also involved freedom of religion. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977) (invalidating compelled display of a

fact that each provision in the Constitution should be able to stand on its own with full force. If one provision of the Constitution had to depend on the presence of another provision, claims under the Constitution would be more complicated than currently exist.

Thus, courts in this school of thought object to the hybrid-rights theory for three reasons: 1) the Court in *Smith* did not decide the case upon the hybrid-rights theory, 2) none of the circuit courts that claim that the hybrid-rights theory warrants strict scrutiny have ever applied that theory, and 3) adjudication of rights under the Free Exercise Clause should not change just because other constitutional rights are involved. As a result, plaintiffs seeking strict scrutiny under the hybrid-rights theory are denied this level of review and their claims almost always fail under the rational-relationship test.

B. Second Claim Must Be Independently Viable

The second school of thought states that there must be an independently viable claim in conjunction with the Free Exercise claim to receive strict scrutiny.[87] For example, in *Brown v. Hot, Sexy & Safer Productions, Inc.* the plaintiffs alleged that compelled attendance in an indecent AIDS and sex education program violated their First Amendment rights under the Free Exercise Clause and deprived them of their constitutional right to direct and control the upbringing of their children.[88] Thus, the plaintiffs presented a hybrid-rights claim that would seem to invite strict scrutiny review under the language laid out in *Smith*.

The First Circuit, however, affirmed the district court's dismissal of plaintiffs' Free Exercise claim because plaintiffs did not assert a second claim in conjunction with its Free Exercise claim that was an "independently

license plate slogan that offended individual religious beliefs); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). The Court also envisioned a case which could be decided upon freedom of association grounds and reinforced by Free Exercise Clause concerns. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."). The cases that the Court cited, however, did not assert the principle of the hybrid-rights theory. The *Smith* Court simply imported the hybrid-rights theory into those cases. Before *Smith*, the Court had never explicitly stated that the level of review of Free Exercise claims can depend on the number of other constitutional claims before it. The closest example of the Court combining rights to reach a higher scrutiny was in the equal protection realm where it combined the quasi-fundamental right to education (quasi-fundamental because the Supreme Court has never held that it is fundamental) with the quasi-suspect status of illegal-alien children (quasi-suspect because the Supreme Court has never that that they are a suspect class). *See* Plyler v. Doe, 457 U.S. 202, 223–24, 230 (1982) (invalidating a Texas statute which withheld from local school districts any state funds for education of children who were not "legally admitted" into the United States and which authorized local school districts to deny enrollment to such children).

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

[88] *Id*. at 530.

protected constitutional protection."[89] The court reasoned, though somewhat convolutedly, that the only possible claims that would award constitutional protection to parents for the constitutional right to direct the upbringing of their children would be a constitutional privacy or substantive due process claim.[90] Thus, the court found that a general assertion that the school's compulsory education programs infringed upon the plaintiffs' constitutional right to direct the upbringing of their children was not enough.[91]

Further, the court stated that this case was distinguishable from *Wisconsin v. Yoder*,[92] where the Supreme Court invalidated a compulsory school attendance law as applied to Amish parents.[93] The court stated that, unlike the Amish parents in *Yoder*, the parents in this case had not shown that one-time compulsory attendance for a sex education and AIDS awareness program would threaten their very way of life.[94] Thus, because the plaintiffs did not show a viable privacy or substantive due process claim or show that the compulsory program would threaten their very way of life, the court dismissed plaintiffs' Free Exercise claim.[95]

Instead of allowing plaintiffs time for discovery to prove their constitutional right to direct the upbringing of their children, the court would dismiss the Free Exercise claim unless plaintiffs could plead other, more specific, constitutional rights like privacy or substantive due process to justify a more general right to direct the upbringing of their children.[96] This is unfair. As the court implicitly conceded by citing and distinguishing *Yoder*, there is a constitutional right afforded to parents to direct the upbringing of their children—one that has justified giving strict scrutiny to review a Free Exercise claim. The court provides no reason to justify why the constitutional right to direct the upbringing of children is not a constitutional right that can be pleaded in conjunction with a Free Exercise claim in this case, other than the effect on the plaintiffs is arguably less severe than in *Yoder*.

The bottom line is that the court's analysis makes it virtually impossible for a plaintiff to plead a constitutional right to direct the upbringing of a child to get strict scrutiny for its Free Exercise claim. Implicit in its characterization of *Yoder*, the court basically states that unless the regulation changes the plaintiff's very way of life, it is not enough. Essentially, this reasoning cuts off relief to almost everyone in the United States except for a minute portion of society in similar situations to the Amish. As a result, plaintiffs in these situations will effectively never receive strict scrutiny review for Free Exercise claims when combined with the constitutional right to direct the upbringing of

[89] *Id*. at 539.
[90] *Id*.
[91] *Id*.
[92] 406 U.S. 205, 232–33 (1972).
[93] *Id*.
[94] *Brown*, 68 F.3d at 539.
[95] *Id*.
[96] *Id*.

their children. Thus, the court's analysis leads to the same result as the *Smith* rule itself—a win for the State.

C. Second Claim Must Be Colorable

The third school of thought states that the plaintiff must show at least a colorable claim in conjunction with the Free Exercise claim to receive strict scrutiny.[97] For example, in *Swanson v. Guthrie Independent School District*, the plaintiffs filed suit claiming that the school district's refusal to allow a child to attend public school on a part-time basis violated her rights under the Free Exercise Clause and her parents' constitutional right to direct her education.[98] Thus, as in the previous two sections, plaintiffs presented a hybrid-rights claim that would seem to invite strict scrutiny review under language laid out in *Smith*.

The Tenth Circuit, however, affirmed the district court's grant of summary judgment to defendants, thereby denying relief for plaintiffs' Free Exercise claim, because plaintiffs did not assert a second claim in conjunction with its Free Exercise claim that was at least a colorable claim affording constitutional protection.[99] First, the court reasoned that the mere raising of a second constitutionally protected claim "is not a talisman that automatically leads to the application of the compelling-interest test."[100] Second, the court proceeded to analyze whether the right to send children to public school on a part-time basis and to pick and choose which courses they take was a constitutional parental right to direct a child's education.[101] The court concluded that "parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject."[102] Further, the court reasoned that if plaintiffs were able to assert this right and overturn the local school board's explicit decision to disallow part-time attendance because it would not receive adequate funding, it would circumvent the state's established authority over decisions of where to allocate resources and what curriculum to offer or require.[103] As a result, plaintiffs' claimed right was not constitutionally protected.

Although this school of thought is not quite as facially severe to hybrid claims as categories one and two, the result in this case still prevents plaintiffs from receiving strict scrutiny for a hybrid claim. By requiring the second claim to be colorable, it narrows the chance that the plaintiff will receive strict scrutiny review for Free Exercise claims. Thus, while the hybrid-rights theory theoretically provides strict scrutiny for some Free Exercise claims, by requiring the second claim to be colorable, it practicably eliminates the hybrid-

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[97] Swanson v. Gutherie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998).
[98] *Id*. at 698.
[99] *Id*. at 700.
[100] *Id*. at 699.
[101] *Id*. at 699–700.
[102] *Id*. at 699.
[103] *Id*. at 700.

rights exception completely. As the Second Circuit pointed out in *Leebaert*, not even the circuits that approve of the hybrid-rights theory have ever breathed life into it by providing strict scrutiny review to Free Exercise claims based upon that theory.[104]

V. SOLUTIONS TO THE ADJUDICATION OF FREE EXERCISE CLAUSE CASES

As illustrated above, because the hybrid-rights doctrine has never been applied by a circuit court to invalidate a neutral, generally applicable law under the Free Exercise Clause, the hybrid-rights exception to rational relationship test review results in the same outcome as the test itself would produce. As a result, the Court's effort in *Smith* to allow strict scrutiny for cases that put forward the need for extraordinary protection under the Free Exercise Clause through the hybrid-rights doctrine has been undermined by the fact that this theory has never invalidated a neutral, generally applicable law. Thus, the Court needs to take certiorari and find a new vehicle to balance protection of individual Free Exercise rights, on one hand, with limiting an individual from making their religion the supreme law of the land, on the other.

At this point, there are four legitimately possible routes the Court could take to balance these two concerns: 1) Apply strict scrutiny to all Free Exercise claims and revert back to *Sherbert v. Verner*; 2) Apply rational relationship scrutiny to all Free Exercise claims, even ones that involve unemployment benefits, as in *Sherbert*; 3) Apply strict scrutiny to different types of Free Exercise claims, following the *Sherbert* exception for unemployment benefits as recognized in *Smith*; or 4) Hold that Free Exercise claims should be adjudicated under "intermediate level" scrutiny, akin to review under the Equal Protection clause for sex discrimination, where the "narrowly tailored" requirement of strict scrutiny is removed but the requirement for a "compelling governmental interest" remains. These four potential routes will be applied in the following sections to the Supreme Court cases of *Yoder*, *Smith*, and *Sherbert*. In the end, intermediate level scrutiny will result in the best analytical balance between the above concerns.

A. Apply Strict Scrutiny

Under this approach, the Court would simply revert back to its approach in *Sherbert* and apply strict scrutiny to all Free Exercise claims. This approach would acknowledge that the Court's jurisprudential concerns of wanting to bring the application of the compelling state interest test in Free Exercise claims in line with other areas of constitutional law, preventing the compelling state interest test from being watered-down as applied to Free Exercise claims, and preventing the arbitrariness of a court's ability to judge the merits of individuals' religious beliefs are outweighed by the protection that the

[104] Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003).

Constitution affords individuals to exercise their religion, even when the law is neutral and generally applicable.

The Court, under this approach, would emphasize that even neutral, generally applicable laws have a significant effect on religious practices and individuals should be protected from these effects by the Free Exercise Clause. Thus, this approach would simply choose strict scrutiny over rational relationship scrutiny because it is the better of two imperfect systems, due to the fact that it errs on the side of protecting individuals, which is the spirit of individual constitutional rights in the first place.

If strict scrutiny were applied to *Yoder*, *Smith*, and *Sherbert*, the result would be the same for all three cases, a win for the plaintiff.[105] In *Yoder*, the Court stated that the state did not provide a compelling state interest in its law requiring school attendance for children between the ages of seven and sixteen.[106] The Amish did not contend that their children should not go to elementary school, but objected to further compulsory schooling.[107] The Court held that compulsory education past elementary school was substantially less of a state interest than requiring education generally because historically this type of concern was always mixed with the concern of preventing child labor.[108] Because there was no compelling state interest, the law was invalidated.[109] The Court did not inquire whether the means were narrowly tailored to the state interest because a compelling state interest was lacking. Implicit in the Court's reasoning, however, is that because there are two state interests, the need for education and prevention of child labor, it is unlikely that the Court would find that compulsory education after elementary school is narrowly tailored to preventing child labor as well as education. For example, to support the interest of the prevention of child labor, the means would be more narrowly tailored if faulty parties were simply prosecuted for violation of child labor laws. Thus, under either of the two prongs, the state could virtually never get past strict scrutiny in *Yoder*.

The same result occurred when the Supreme Court applied strict scrutiny to *Sherbert*. In *Sherbert*, the Court found that the state's fear of fraud was not a compelling state interest to disallow unemployment benefits to a Seventh-Day Adventist because the plaintiff's compliance with the unemployment compensation benefits violated her Free Exercise rights.[110] The Court also doubted that the means were narrowly tailored to that state interest.[111] Thus, the law was explicitly invalidated under the first prong and would probably have been invalidated under the second prong as well.

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[105] In this first section, I will briefly review the facts of each case and apply strict scrutiny review. In the following three sections, however, it is assumed that the reader remembers the basic facts presented in this section.

[106] Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972).

[107] *Id*.

[108] *Id*. at 228–29.

[109] *Id*. at 236.

[110] Sherbert v. Verner, 374 U.S. 398, 407–08 (1963).

[111] *Id*. at 407.

Consistent with the results in *Yoder* and *Sherbert*, if the Court had applied strict scrutiny to *Smith*, the state law that made it a criminal offense to use peyote would have been invalidated as well. If the Court had applied strict scrutiny, Oregon's law would have passed the first prong of the strict scrutiny test, but would have failed on the second. Oregon's compelling state interest was to enforce its drug laws by not allowing a religious exception for the use of peyote.[112] Thus, Oregon probably had a compelling state interest because protecting its citizens from the negative effects of illegal drugs falls under the state's valid interest in public safety.

Oregon's law, however, would not pass the second prong that the law must be narrowly tailored to the compelling state interest. Here, instead of criminally prosecuting the plaintiffs for possession of peyote, the State denied them unemployment benefits. As the dissent pointed out, Oregon had no evidence of drug-trafficking, no evidence that a flood of other religious claims would come, and was not even prosecuting the plaintiffs for criminal offenses.[113] For the means to be narrowly tailored, Oregon would have had to criminally prosecute the plaintiffs' use of peyote which it was perfectly able to do. Thus, because Oregon's means of enforcement would not have been considered narrowly tailored to its compelling state interest, the law would not have passed strict scrutiny.

Thus, as the above discussion demonstrates, strict scrutiny would invalidate each of the above state laws and has invalidated most other state laws when subject to strict scrutiny review. While this approach would provide consistency as to which level of scrutiny Free Exercise claims should get and gives extra protection to Free Exercise plaintiffs, it ignores Justice Scalia's jurisprudential concerns in *Smith* and would make it exceedingly difficult for legislatures to enforce neutral, generally applicable laws because they would always indirectly affect an individual's religious beliefs. Thus, this approach fails to strike the proper balance between an individual's Free Exercise rights and a state's need to pass generally applicable laws.

B. Apply Rational Relationship Scrutiny

Under this approach, the Court would simply continue its application of rational relationship scrutiny to Free Exercise claims but remove both the hybrid-rights exception and the unemployment compensation benefits exception in *Sherbert*. This approach would embrace the *Smith* Court's jurisprudential concerns of wanting to bring the application of the compelling state interest test in Free Exercise claims in line with other areas of constitutional law, preventing the compelling state interest test from being watered-down as applied to Free Exercise claims, and prevent courts from arbitrarily judging the merits of individuals' religious beliefs.

The Court, under this analysis, would emphasize that laws that are prejudiced and specifically pointed at certain religious practices are still subject

[112] Employment Div. v. Smith, 494 U.S. 872, 904 (1990) (O'Connor, J., concurring).
[113] *Id*. at 912–21 (Blackmun, J., dissenting).

to strict scrutiny review and individuals are given full Free Exercise protection. As applied to neutral, generally applicable laws, however, this approach would simply choose the rational relationship test over strict scrutiny because the Free Exercise concerns of the state specifically prohibiting the exercise of religion are absent. Finally, the Court would emphasize that if a plaintiff would be able to object to a law when it only has an indirect effect on religion, this would lead the Court down the slippery slope to the conclusion that the state could hardly pass a law that would not violate the Free Exercise Clause.

If rational relationship review were applied to *Yoder*, *Smith*, and *Sherbert*, the result would be the same for all three cases, a win for the state. In *Yoder*, the Court would have found that childhood education was a legitimate state interest and criminally prosecuting parents for not allowing their children to go to school would be rationally related to that interest. In *Sherbert*, the Court would have found that the state's fear of fraud in applications for unemployment benefits would be a legitimate state interest and denial of unemployment compensation benefits would be rationally related to that interest. Finally, as the Court demonstrated in *Smith*, protecting its citizens from the effects of illegal drugs was a legitimate state interest and preventing violations of this state law by denying unemployment compensation was rationally related to that interest.[114]

Thus, as the above discussion demonstrates, the rational relationship test would uphold each of the above state laws and has upheld every other state law when subject to rational relationship review under the Free Exercise Clause. While this approach would also provide consistency as to which level of scrutiny Free Exercise claims receive and supports Justice Scalia's jurisprudential concerns in *Smith*, it would make it exceedingly difficult for Free Exercise plaintiffs to successfully challenge a neutral, generally applicable law because almost every law's enforcement is at least rationally related to its purpose. As the *Sherbert* Court made clear, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses endangering paramount interest, give occasion for permissible limitation.'"[115] Thus, this approach fails as well.

C. Apply Strict Scrutiny Categorically

Under this approach, the Court would carve out exceptions to the rational relationship test for certain categories of cases under its reasoning in *Sherbert* for unemployment compensation cases. In *Smith*, the Court noted that it had applied strict scrutiny for unemployment compensation cases where state benefits were conditioned on the applicant's willingness to work under conditions that violated his or her religion.[116] The *Smith* Court did not overrule

[114] *Id*. at 890.

[115] *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[116] *Smith*, 494 U.S. at 883. The three cited cases were Hobbie v. Unemployment Appeals Comm'n., 480 U.S. 136, 140 (1987) (holding that Florida's refusal to award

Sherbert and its progeny, but simply distinguished it.[117] Thus, as in the unemployment compensation field, the Court could simply choose to extend strict scrutiny to other categories of cases that it deems to require unusual protection.

The Court would emphasize, under this approach, the plaintiffs' need for constitutional protection in areas where they are particularly vulnerable and where constitutional violation is frequent, as the Court noted in the unemployment compensation context.[118] As such, the exceptions would serve as the counterbalance to the effect of the rational relationship test upon Free Exercise claims.

Ultimately, however, this approach would cause more problems than it would solve. While it does provides some balancing between the need to protect Free Exercise plaintiffs with the need to allow states to pass neutral, generally applicable laws without interference, its fatal flaw resides in deciding which categories of cases should receive strict scrutiny and which kinds should not. First, the provisions of the Bill of Rights are fundamentally individual rights against government intrusion. Further, they are provisions that protect the individual from the dominant political majority. In light of this, individual protection should not depend on whether there are frequent violations in the same context. In other words, protection for one individual should not depend on the number of other individuals that the law is negatively affecting. Second, the Free Exercise Clause states that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."[119] It does not make distinctions between types of Free Exercise contexts. As applied to *Yoder*, *Sherbert*, and *Smith*, why should Free Exercise claims in the context of religious ceremonies (*Smith*) or in the context of parental supervision of their children's education (*Yoder*) not receive the same protection as an applicant for unemployment benefits (*Sherbert*)? There is really no principled reason that violations of the Free Exercise Clause in one context are worse than in others. Third, this approach does not further any of Justice Scalia's jurisprudential goals in *Smith*. Fourth, this approach would be very difficult to administer and would not develop consistency between different kinds of Free Exercise claims. Thus, just as the in the cases of the previous two approaches, this approach ultimately fails.

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unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment because the state could not provide a compelling state interest to justify its burden on appellant's constitutional rights); Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (holding that Indiana's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion and did not pass strict scrutiny review); *Sherbert*, 374 U.S. at 402 (holding that a Seventh-Day Adventist had a First Amendment right to be free from governmental regulation that took unemployment benefits away from her based solely on her refusal to work on Saturday, her day of worship).

[117] *Smith*, 494 U.S. at 884 (stating that the Court's unemployment compensation jurisprudence stood "for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without a compelling reason.") (internal quotation marks omitted).

[118] *Id*.

[119] U.S. CONST. amend. I (emphasis added).

D. Apply Intermediate-Level Scrutiny

Under this approach, the Court would apply "intermediate-level" scrutiny to all Free Exercise claims. Unlike Equal Protection, Supreme Court review over state law under its substantive due process framework through the Due Process Clause of the Fourteenth Amendment is limited to strict scrutiny and rational relationship. Supreme Court review of state law under the Equal Protection Clause of the Fourteenth Amendment, however, is not limited to those two levels of review. Intermediate-level scrutiny has its roots from the Court's analysis of sex discrimination under the Equal Protection Clause. Under this analysis, the second prong of strict scrutiny is simply lopped off. If this analysis were applied in the substantive due process realm as it applies to Free Exercise claims, the government would still have to show a compelling state interest but would not have to demonstrate that its means were narrowly tailored to that interest.

This approach would put forward the proper balance between the need for constitutional protection to plaintiffs against the effects of neutral, generally applicable laws and the need to allow states to pass neutral, generally applicable laws without excessive interference. On one hand, this approach would give significant protection to plaintiffs by requiring the state to provide a compelling state interest to justify its law. On the other hand, however, once the state has shown a compelling state interest, it cannot be invalidated under the more difficult narrowly tailored prong simply because another method theoretically exists that is more narrowly tailored to the compelling state interest. Thus, this approach would put Free Exercise claims into a pure balancing test with the state interest on one side and the burden on the individual on the other.

This approach would also be consistent with two of Justice Scalia's three jurisprudential goals laid out in *Smith.* First, because the approach would explicitly lower the level of scrutiny, it would prevent strict scrutiny from being watered-down as applied to Free Exercise claims. Second, Justice Scalia thought that application of strict scrutiny practically guaranteed a victory for the plaintiffs and, as a result, essentially created "a private right to ignore generally applicable laws," a constitutional anomaly.[120] Because this approach does not require the state to narrowly tailor its laws, it does not practically guarantee that the plaintiff will be able to defeat a neutral, generally applicable law simply because it has a negative indirect effect on his or her religious beliefs. In this way, a proper balancing test would not produce a constitutional anomaly as Justice Scalia describes it, but would properly align Free Exercise claims with other constitutional norms—a guarantee of individual freedoms unless the state has a superseding interest.

The last jurisprudential concern for Justice Scalia is that under the compelling state interest test, the court has to judge the merits of individuals' religious beliefs. While this is true to a certain extent, this concern is present in every individual constitutional rights case. As Justice O'Connor noted in her

[120] *Smith*, 494 U.S. at 886.

concurrence in *Smith*, the Court has "to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling."[121] Furthermore, as Justice Blackmun pointed out in his dissent:

> [A]lthough . . . courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion, . . . I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion.[122]

Thus, even though Justice Scalia's concern is valid, it should not be so important as to prevent individuals from demonstrating the impact of a state's regulation on their religious beliefs.

As the following discussion of cases will make clear, if courts follow the proper analysis of what is the burden on the plaintiffs in their practice of their religion and the sincerity of the beliefs themselves, Justice Scalia's third jurisprudential concern is not a problem because some religions will be more severely affected than others. For example, if intermediate-level scrutiny were applied to *Yoder*, *Smith*, and *Sherbert*, the result would be a mixed bag—the proper result of a balancing test. While intermediate-level scrutiny would produce the same result strict scrutiny would produce in *Yoder* and *Sherbert* because the laws in those cases could have been invalidated under either prong of strict scrutiny, a different result would occur in *Smith*.[123] As the discussion *supra* in section A illustrates, regulating the use and possession of illegal drugs is a compelling state interest because it goes to the heart of the state protecting its citizens' safety.

Under intermediate-level scrutiny, Oregon's law would stand and the state would not have to show that its means are narrowly tailored to its compelling state interest. Under strict scrutiny, however, the law would have been

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[121] *Id*. at 899 (O'Connor, J., concurring).

[122] *Id*. at 919 (Blackmun, J., dissenting).

[123] For another example of where the removal of the narrowly tailored prong would make a difference *see, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) (a case from the same context of parental control over their children's education). In *Swanson*, the plaintiffs claimed that the school board's denial of their application for part-time admission was a violation of their Free Exercise rights in that it indirectly affected their ability to educate their child in their religious tradition. *Id*. at 702. The state's interest was to protect funding for full-time students. As the court pointed out, the school board's policy to not allow part-time attendance does not prevent the plaintiffs from completely educating their child at home, sending her to a private school on a part-time basis, or enrolling her full-time into public school. *Id*. As the court stated, "[t]he Free Exercise Clause does not extend so far. It is designed to prevent the government from impermissibly burdening an individual's free exercise of religion, not to allow an individual to exact special treatment from the government." *Id*. Thus, the burden to the plaintiff would not be very high and the state's interest in its funding decisions for its scarce resources would be compelling. Under intermediate-level scrutiny, the state would win this case, as it did under the rational relationship test that the court used. This would not necessarily be true under strict scrutiny. Even if the state's interest in funding was compelling, the state would still have to prove that its means were narrowly tailored to that interest. Under this prong, the law would likely fail.

invalidated because denial of unemployment benefits was not a means narrowly tailored to prevent the use and possession of drugs. A narrowly tailored means would have been to criminally prosecute the violators for possession of peyote, a suit that Oregon was perfectly able to bring under its law. Again, the real telling difference between intermediate-level scrutiny and strict scrutiny is that if the Court found that the state's interest was compelling, the law would stand under intermediate scrutiny whereas it would still be invalidated under the narrowly tailored prong of strict scrutiny. Thus, unlike strict scrutiny and rational relationship, intermediate-level scrutiny allows courts to properly balance individual Free Exercise rights with a state's need to pass generally applicable legislation.

VI. CONCLUSION

Because no circuit court has invalidated a neutral, generally applicable law under the Free Exercise Clause through the hybrid-rights exception, the hybrid-rights exception results in the same outcome as the rule itself. Further, because the *Sherbert* exception has been limited to unemployment benefits cases, it also fails to provide relief for Free Exercise plaintiffs. Thus, the Court needs to take certiorari and find a new vehicle to balance protection of individual Free Exercise rights, on one hand, with limiting an individual from making their religion the supreme law of the land, on the other.

Of the four possible routes that the Court could take, only the intermediate scrutiny approach properly balances the individuals' Free Exercise rights with a state's need to pass neutral, generally applicable laws. First, a strict scrutiny approach would revert back to *Sherbert* and allow plaintiffs to invalidate state laws even if the law only had an indirect effect on religious beliefs. Second, a rational relationship approach would keep *Smith* alive and make it exceedingly difficult for Free Exercise plaintiffs to ever successfully challenge a neutral, generally applicable law because almost every law's enforcement is at least rationally related to its purpose. Third, categorical application of strict scrutiny would be unfair because a plaintiff's constitutional protection would depend on the number of other plaintiffs that would present a similar claim. Intermediate level scrutiny, however, does provide a proper balance. On one hand, by removing the narrowly tailored portion of the strict scrutiny test, intermediate scrutiny still protects Free Exercise rights by requiring the state to show a compelling interest. On the other hand, by not having to show narrowly tailored means, the state does not have to worry about every insignificant effect that a neutral, generally applicable law would have upon an individual's religious beliefs. As a result, the Supreme Court should take certiorari and apply intermediate-level scrutiny to Free Exercise claims.