SMITH'S FREE-EXERCISE "HYBRIDS" ROOTED IN NON-FREE-EXERCISE SOIL

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INTRODUCTION

The state must exempt religious home-schooling parents from compliance with teacher certification laws, while non-religious parents may be sent to jail for violating the same laws. Or at least, so said the Michigan Supreme Court on March 25, 1993. In *People v. Bennett*,[1] a plurality reasoned that the Bennetts' due process liberty interest in directing the education of their children[2] was not "fundamental." Therefore, the Fourteenth Amendment[3]

1. 501 N.W.2d 106 (Mich. 1993).

2. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding that states may not require public school attendance when parents send their children to a comparable private school).

3. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

to the United States Constitution did not bar the state from prosecuting. In *People v. DeJonge*,[4] the court held that the Free Exercise Clause[5] of the First Amendment[6] to the United States Constitution prohibited the state from prosecuting the DeJonges because they were motivated by religious belief to educate their own children. Neither ruling is particularly astonishing in its own right. When read together, however, they are impossible to logically harmonize. The blame for the dissonance in the combined reasoning rests upon a misunderstanding of the "hybrid" passage in the landmark Free Exercise case, *Employment Division v. Smith*.[7]

In *Smith*, the Court abandoned the strict scrutiny balancing test first announced in *Sherbert v. Verner*,[8] and returned to a categorical evaluation of state action that burdens religiously motivated conduct. According to *Smith*, religious motivation alone does not exempt an individual from complying with a religion-neutral, generally applicable regulation of conduct. Writing about what he later referred to as "hybrid situations,"[9] Justice Scalia observed, however, that some cases involving elements of both the Free Exercise Clause and another constitutional protection have resulted in a favorable outcome for the religiously motivated actor.[10]

In addition to the Michigan Supreme Court, many judges and commentators have construed these "hybrid situations" to be an exception to *Smith's* general rule against constitutionally mandated exemptions for the religious. According to them, a "hybrid claim" automatically requires free-exercise strict judicial scrutiny. This article will focus on these "hybrid situations" and will demonstrate that when the categorical rule[11] is correctly

4. 501 N.W.2d 127 (Mich. 1993).

5. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

6. As applied to the states by the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

7. 494 U.S. 872 (1990).

8. 374 U.S. 398 (1963) (granting exemption to a Seventh Day Adventist who was denied unemployment compensation because of her unwillingness to be available for work on Saturday).

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

10. *Id.* at 881 (citations omitted).

11. *Id.* at 892 (O'Connor, J., concurring in the judgment) ("The Court today extracts from our long history of free exercise precedents the single categorical rule that 'if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

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followed, religious motivation is irrelevant to the outcome of the case, and that "hybrid claims" do not exist at all.

Section I will briefly review the free exercise cases that preceded *Smith* and the *Smith* decision itself. Since "hybrid situations" implicate elements of more than one constitutional protection, the categorical framework must be built with respect to the free exercise of religion as well as the other constitutional protections. Section II will be devoted to building the categorical framework. Section II will also examine the elements of *Smith's* general rule: *i.e.*, (1) otherwise valid laws; (2) neutral laws; (3) generally applicable laws; and (4) incidental burdens. This is necessary to understand fully the categorical analysis required in "hybrid situations." One commentator has complained that *Smith* created these "hybrids" out of "whole cloth,"[12] but this article will proceed on the assumption that the hybrids are best understood within the categorical framework.

Section III(A) will take up the free-speech line of cases listed in *Smith's* hybrid passage. These cases will be looked at through the clarifying lens of the hybrid passage in *Smith*. This will be done by looking afresh at the elements of the state action in each case, the elements of the religiously motivated actor's conduct, and at the precise outcome of the case. Since the same outcome is achieved following the categorical rule announced in *Smith*, it is unnecessary to construe the hybrid passage as creating an exception. Religious motivation is of no consequence in deciding cases where the state regulates conduct in accordance with the elements of the *Smith* rule in speech/press hybrid situations.

Section III(B) will examine the parental rights line of cases, beginning with *Wisconsin v. Yoder*,[13] the quintessential example of the Court engaging in the free-exercise exemption analysis that *Smith* categorically rejected. In the wake of *Smith*, then, does *Yoder* stand as an exception to the general rule against court-granted exemptions for religiously motivated actors? Or, is the *Yoder* Court's exemption analysis a "constitutional anomaly"[14] that did not prevent a correct outcome on parental rights grounds?

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12. *See* Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 835 (1993). *See also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in [*Smith*].").

13. 406 U.S. 205 (1972).

14. *Smith*, 494 U.S. at 886.

Careful reading of *Yoder*, again through the lens of *Smith's* hybrid passage, demands the second interpretation. The full import of this conclusion is completely opposite from the prevailing view. *Smith*, rather than limiting *Yoder* to the cramped confines of its facts, actually extends the parental rights once believed available only to religiously motivated parents, to all parents equally.

In the second part of Section III(B) particular attention will be given to the companion parental rights cases, *People v. DeJonge* and *People v. Bennett*, the two home-schooling cases previously mentioned. Analyzing these two cases within the categorical framework will clearly demonstrate the illogical consequences of interpreting the hybrid passage as preserving an exception to the *Smith* rule. These two cases also graphically demonstrate the underlying injustice of the pre-*Smith* interpretation of parental rights to direct the education of children.

Following the Conclusion, Section IV will briefly discuss the Religious Freedom Restoration Act (RFRA)[15] and its effects upon "hybrid situations." Suffice to say that as long as RFRA remains the law of the land, the hybrid passage will be little more than a constitutional appendix, present within the corpus juris, but practically useless. If RFRA is either repealed or ruled to be unconstitutional, however, advocates, lured by the siren song of strict scrutiny, will once again attempt to breed "hybrid situations."

Having described what this Comment attempts to do, it might be helpful to state what it does not attempt. This Comment does not attempt to persuade the reader regarding the wisdom of the *Smith* rule[16] or RFRA.[17] Nor does it take a position with respect to the historical[18] arguments about constitutionally man-

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15. 42 U.S.C. § 2000bb (Supp. V 1993).

16. See generally McConnell, *supra* note 12 for a discussion in opposition to the *Smith* rule. See William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 308 (1991), for a discussion in favor of the *Smith* rule. For a more detailed argument against court-granted exemptions, see William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990).

17. See Michael Farris and Jordan Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV 65 (1995), for a discussion in favor of RFRA. But see Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U. L. REV. 7, 35 (1995), for a persuasive discussion that RFRA is unconstitutional.

18. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Professor McConnell argues that the original understanding may have been in favor of court-granted exemptions. For a

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dated exemptions from general laws. This Comment is also not concerned with the philosophical validity of legislative exemptions from general laws, but proceeds with the understanding that they are constitutional in at least some circumstances.[19] Finally, even though the principal cases involve home schooling and compulsory education, this Comment is not about the source or extent of parental rights to direct the education of children.[20] The author is content with merely attempting to understand what *Smith* actually says and perhaps to shed some light on the analysis required when examining "hybrid situations" under the United States Constitution.

The Religious Freedom Restoration Act has temporarily dampened the enthusiasm for this topic largely due to the common misinterpretation of the hybrid passage. Insofar as the true import of a correct understanding of *Smith's* hybrid passage is its effect upon the fundamental right of parents to direct the education of their children, I trust the effort is not totally in vain.

I. THE FREE EXERCISE CLAUSE

Does the Constitution mandate that an individual be eligible for an exemption from a neutral, generally applicable law that interferes with a religiously motivated practice? This question was first addressed by the Supreme Court in 1879 in *Reynolds v. United States*,[21] a case involving religious practitioners of polygamy in the Utah Territory:

> [T]he ... question ... is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and

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persuasive discussion that "late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws," see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992).

19. *See Smith*, 494 U.S. at 890.

20. For a discussion of the role of parents in a constitutional democracy, see Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983). *See also* Herbert W. Titus, *Education, Caesar's or God's: A Constitutional Question of Jurisdiction*, 1982 J. CHRISTIAN JURIS. 101. For a discussion against constitutional protection for home-schooling see Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987).

21. 98 U.S. 145 (1879).

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> punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.[22]

The Court did not grant the religiously motivated polygamists exemption from the neutral, generally applicable Territorial Law.

In *Braunfeld v. Brown*,[23] decided in 1961, the Court reiterated this view of the Free Exercise Clause while denying Sabbatarians exemption from Sunday closing laws: "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[24] In the intervening years the Court did not seriously entertain the notion of granting exemptions to those who objected to general laws on the basis of conscientious scruples alone.[25]

Two years after *Braunfeld*, in *Sherbert v. Verner*,[26] "despite the Court's protestations to the contrary [in a] decision [that] necessarily overrule[d] *Braunfeld v. Brown*"[27] the Court announced that a sufficiently large incidental burden imposed by a general law upon religious conduct must be justified by a "compelling state interest."[28] As Justice Harlan described it in his dissent: "What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions."[29]

This "free-exercise exemption analysis" survived until *Smith*, in 1990, without much impact beyond the unemployment cases.[30] Just prior to *Smith*, the full balancing test had evolved to the following:

> (1) [W]hether a defendant's belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant's belief, or

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22. *Id.* at 166.

23. 366 U.S. 599 (1961) (Warren, C.J., plurality opinion) (upholding a Sunday closing statute that did not grant exemption to Sabbatarians).

24. *Id.* at 603.

25. JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.6, at 523 (2d ed. 1992).

26. 374 U.S. 398 (1963).

27. *Id.* at 421 (Harlan, J., dissenting).

28. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

29. *Sherbert*, 374 U.S. at 420 (Harlan, J., dissenting) (footnote omitted).

30. *See infra* note 57.

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> conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden on the exercise of such belief or conduct; (4) whether a compelling state interest justifies the burden imposed upon a defendant's belief or conduct; (5) whether there is a less obtrusive form of regulation available to the state.[31]

Of the seventeen free-exercise cases before the Supreme Court between *Sherbert* and *Smith*, the religious objector lost in thirteen.[32] Three of the remaining four were unemployment cases,[33] leaving *Wisconsin v. Yoder*[34] as the lone survivor. In what has been curiously characterized as a stunning reversal[35] in *Smith*, the Court rejected free-exercise exemption analysis and returned to the categorical rule of *Reynolds*.

A. Employment Division v. Smith

By now, anyone with a passing interest in Free Exercise jurisprudence is likely to be acquainted with the misfortune of the hapless Messrs. Smith and Black. The gentlemen were recovering addicts employed by a private drug rehabilitation clinic.[36] As a condition of their employment, they were required to abstain from the use of alcohol and narcotic drugs, including the drug peyote, an hallucinogen. They were also members of the Native American Church whose communicants ingest peyote for sacramental purposes during certain religious ceremonies. While still employed at the drug rehabilitation clinic, Smith and Black par-

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31. *DeJonge*, 501 N.W.2d 127, 135 (Mich. 1993).

32. See James E. Ryan, Smith *and the Religious Freedom and Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1458 (1992), for a compilation of free-exercise cases in the United States Supreme Court and Courts of Appeals between 1963 and 1990.

33. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

34. 406 U.S. 205 (1972) (holding that religiously motivated Amish were exempt from compulsory education laws *because* of their religious motivation).

35. Professor McConnell acknowledged that the compelling interest test offered little more than a chance to go through the motions of applying strict scrutiny:

> [I]t must be conceded that the Supreme Court before *Smith* did not really apply a genuine "compelling interest" test.... In an area of law where a genuine "compelling interest" test has been applied ... no such [state] interest has been discovered in almost half a century.... The [free-exercise] "compelling interest" standard is a misnomer.

McConnell, *supra* note 12, at 1127.

36. *Smith*, 494 U.S. at 874.

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ticipated in the sacramental use[37] of peyote during one of those ceremonies.[38] The private clinic found out and fired them.[39] Under Oregon law at the time, the knowing or intentional possession of peyote constituted a felony, punishable by up to ten years in prison.[40] The gentlemen were never charged with a crime.[41] They were, however, denied unemployment benefits by the State of Oregon because their discharge was ruled to be on account of "work-related misconduct."[42]

On appeal, the Oregon Court of Appeals[43] and the Oregon Supreme Court[44] both applied the *Sherbert* compelling interest balancing test and ruled that denial of unemployment benefits violated the gentlemen's First Amendment right to the free exercise of religion.[45] After determining that Oregon law proscribed both recreational and sacramental use of peyote,[46] the United States Supreme Court, with Justice Scalia writing for the majority, reversed.

According to the Court in *Smith*, when an otherwise valid, neutral law of general applicability imposes an incidental burden on religious practice, the Free Exercise Clause of the First Amendment is not offended.[47] States may not regulate belief[48] and may not single out religious practices for the imposition of burdens.[49] Thus far, there is virtually no disagreement among judges[50] or scholars.[51] The controversy[52] arises because that is

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37. Black v. Employment Div., 707 P.2d 1274, 1276, (Or. App. 1985). There was testimony at the Oregon Employment Appeals Board that the amount ingested by Black was too small to produce any hallucinogenic reaction. *Id.*

38. Smith v. Employment Div., Dep't of Human Resources, 721 P.2d 445, 446 (Or. 1986); Black v. Employment Div., Dept. of Human Resources, 721 P.2d 451, 452 (Or. 1986).

39. *Smith*, 494 U.S. at 874.

40. Employment Div., v. Smith, 485 U.S. 660 (1988).

41. Smith v. Employment Div., 763 P.2d 146, 148 n.3 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

42. *Smith*, 494 U.S. at 874.

43. Black v. Employment Div., 707 P.2d 1274 (Or. App. 1985).

44. Smith v. Employment Div., Dep't of Human Resources, 721 P.2d 445 (Or. 1986).

45. *Smith*, 494 U.S. at 876.

46. Smith v. Employment Div., 763 P.2d 146, 148 n.3 (Or. 1988).

47. *Smith*, 494 U.S. at 878.

48. McDaniel v. Paty, 435 U.S. 618, 629 (1978); Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

49. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

50. *Id.* at 2242 (Souter, J., concurring in part and concurring in the judgment) ("This case . . . involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for free exercise constitutionality.").

51. *See* Michael W. McConnell, *Accommodation of Religion: An Update and Response*

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precisely where *Smith* ended. According to *Smith*, if the state regulates conduct for legitimate health, safety, and welfare reasons, and applies the laws equally toward all, the religiously motivated actor has no recourse to the Free Exercise Clause, even if the conduct is banned altogether. By eliminating application of the *Sherbert* compelling interest balancing test,[53] *Smith* held that courts are no longer required by the federal constitution[54] to decide whether a particular religiously motivated actor should be exempt from complying with an otherwise constitutional law.[55] Claiming that it had ever been so, Justice Scalia rejected Free Exercise exemption analysis: "We have never held that an individual's beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[56]

Sherbert was clearly limited to the unemployment context.[57] In a pivotal passage at the very heart of *Smith*, Justice Scalia set about dealing with the problem of *Wisconsin v. Yoder*, the only exemption analysis case left standing.[58]

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to the Critics, 60 GEO. WASH. L. REV. 685, 693 (1992) ("It is good to protect against persecution and overt discrimination; but under conditions of the welfare-regulatory state, it is necessary to do more—to take deliberate action to preserve the autonomy of religious life.").

52. See *McConnell, supra* note 12, at 1111, for a discussion of the immediate reaction to *Smith* in academic circles.

53. *Smith*, 494 U.S. at 884, 885.

54. This of course does not prevent the states from construing their own constitutions in a way that affords more protection than the federal constitution, *see* State v. Hershberger, 462 N.W.2d 393 (Minn. 1993) (holding that Minnesota's constitution retained the compelling interest test); or from enacting legislation that includes exemption for conscientious scruples. In fact, in the very next legislative session following *Smith*, Oregon revised her controlled substance laws to include an exemption for the religious use of peyote.

> In any prosecution under this section for manufacture, possession or delivery of ... peyote, it is an affirmative defense that the peyote is being used or is intended for use:
> (a) In connection with the good faith practice of religious belief;
> (b) As directly associated with a religious practice; and
> (c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user.

OR. REV. STAT. § 475.992(5) (1993).

55. Marshall, *supra* note 16, at 308.

56. *Smith*, 494 U.S. at 878-79.

57. *Id.* at 884 (limiting *Sherbert* to the unemployment cases, stating that a state may not deny unemployment benefits to those whose otherwise lawful religious practice creates an employment hardship if the state has a discretionary system that grants exemption on the basis of other, non-religious hardships).

58. *See* Ryan, *supra* note 32.

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> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections such as freedom of speech and of the press . . . or the right of parents to direct the education of their children.[59]

A proper understanding of this "hybrid" passage is critical to a proper understanding of the categorical rule.

II. *SMITH'S* CATEGORIES AND ELEMENTS OF THE GENERAL RULE

The categorical rule announced in *Smith* is a qualitatively different way to decide free-exercise cases than the strict scrutiny balancing regime it succeeded. The premise of this Comment is that the "hybrid" passage is best understood within the categorical framework. The hybrid passage links free-exercise concerns with free-speech, free-press and parental rights concerns. Justice Scalia, the architect of the free-exercise categorical framework, has vigorously argued that the holdings in free-speech cases are consistent with his approach to free-exercise, even if the rationales are not always so.[60] Adopting Justice Scalia's view, it is possible to demonstrate that the free-exercise categorical

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59. *Smith* 494 U.S. at 881 (citations omitted).

60. For example, the Court purports to follow a mid-level scrutiny test for expressive conduct cases:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968). Referring to the *O'Brien* mid-level scrutiny balancing test, Justice Scalia has written:

> All our holdings (though admittedly not some of our discussion) support the conclusion that the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription.

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 578-79 (1991) (Scalia, J., concurring in the judgment) (citations omitted).

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framework in *Smith,* is a type for free-speech, free-press, and parental rights categorical frameworks. Following the categorical rule for both elements of a "hybrid situation" serves to bring an otherwise confusing and ultimately illogical passage into focus.

As will be demonstrated below, the categorical rule endorsed in *Smith* could have been (and indeed has been)[61] consistently applied to reach similar outcomes in freedom of speech and press cases where a state's speech-neutral law of general applicability imposes an incidental burden on conduct. This is true even though the Court purports to use an intermediate level of scrutiny balancing test in expressive conduct cases. The discerning reader will wonder why, then, is it important to follow the categorical rule for all of the various constitutional protections? The reason, as will be demonstrated in Section III(B), is the effect this reasoning has on the parental rights hybrid situation found in *Wisconsin v. Yoder*. Because the vast weight of post-*Smith* interpretation of the "hybrid" passage holds that hybrids preserve an island of balancing in a sea of categorical rules, the reader is humbly asked to temporarily suspend disbelief.

The First Amendment begins with the words "Congress shall make no law."[62] Anyone wishing to understand the *Smith* categorical rule must realize that the Court's role is to ask whether a particular state action is permissible,[63] not whether the individual is free to do as he wishes.[64] The focus, therefore, is on the state action as demonstrated by its object or effect, not on the motivation of the actor. When speaking of First Amendment categories, the state is absolutely banned from regulating the freedom to believe or hold ideas.[65] The second First Amendment category involves those state actions that attempt to place a prior restraint upon, or

61. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (following the categorical approach in a free-press case).

62. U.S. CONST. amend. I.

63. Jones v. Opelika, 316 U.S. 584, 595 (1942).

64. *But see* Titus, *supra* note 17, at 22. Titus, former dean of Regent University School of Law, reads *Smith* to be a return to a jurisdictional approach to Constitutional analysis. According to him, there are some actions one owes solely to the Creator which the state may not regulate, and laws that purport to do so violate the free exercise of religion. See also Robert M. Cover, *Foreword:* Nomos *and Narrative,* 97 HARV. L. REV. 4, 26-35 (1983) for a discussion of the crisis faced by religious adherents when the law of the land collides with the law of God.

65. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("Thus the [First] Amendment embraces two concepts—the freedom to believe and the freedom to act. The first is absolute, but in the nature of things, the second cannot be.").

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to directly regulate the content of worship,[66] speech, or publication. Such regulations are presumed to be invalid:[67]

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of the political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
> [F]reedoms of speech and of press, of assembly, and of worship ... are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.[68]

The third category of state action involves regulations that serve to promote the health, safety, and general welfare of the people; regulations often described as within the police powers of the state. In this last category, the state, as sovereign, will be given great latitude so long as the laws regulating conduct employ rational means to achieve legitimate ends. These regulations enjoy the presumption of validity. Figure (1) tabulates how the elements of state action relate to conduct within the categorical framework in free-exercise, free-speech, and free-press cases.

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66. "Worship" generally carries with it the connotation of "reverent honor and homage paid to God." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1291 (2d ed. 1987). In this sense, the word is more akin to belief. The meaning of "content of worship" as used here involves "formal or ceremonious rendering of such honor and homage." *Id.*

67. *Accord* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in the traditional public forum is presumptively impermissible, and this presumption is a very strong one."); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.") (citations omitted); Kovacs v. Cooper, 336 U.S. 77, 82 (1949) ("When ordinances undertake censorship of speech or religious practice before permitting their exercise, the Constitution forbids their enforcement.").

68. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-39 (1943).

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Smith Categorical Framework

State Regulation of:	Religion	Speech	Press
Absolutely Banned	Belief	Ideas	Ideas
Strong Presumption of Invalidity	Content of Worship	Content of Speech	Content of Writing
Presumed Valid	**Conduct Within the**	**Police Powers of the**	**State to Regulate**

Figure 1 (assumes neutral, generally applicable laws).

The *Smith* opinion is concerned only with regulations that fall within the third category.[69] Remember, it is the object or effect of the regulation that is the focus of inquiry, not the actor's motivation for the conduct. To understand more fully how to evaluate a state regulation of conduct for either presumed invalidity or presumed validity, the elements of the *Smith* general rule must be understood. A regulation that is not otherwise valid, neutral, and generally applicable with respect to the free exercise of religion, freedom of speech, and freedom of the press is presumptively invalid.

A. *Otherwise Valid Laws*

An otherwise valid law is a law that does not suffer from a defect that would make it impossible to fairly enforce. A statute that suffers from vagueness is void, not necessarily because the object of the statute is outside the state's power, but because it is not possible for the individual or those charged with enforcement to determine just what the law requires.[70] In First Amendment cases, this may have the effect of deterring one from engaging in constitutionally protected activities.[71]

Another defect may involve a law that vests unbridled discretion in a state actor. This concept is familiar from equal protection clause analysis when the state actor discriminates on

69. *Smith*, 494 U.S. at 878.
70. Smith v. Goguen, 415 U.S. 566, 572 (1974).
71. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

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the basis of race or ethnicity.[72] Using this principle, *Smith* limited the application of *Sherbert* to the unemployment cases.[73] The state may not deny unemployment benefits to those whose otherwise lawful religious practice creates an employment hardship if the state has a discretionary system that grants exemption on the basis of other, non-religious hardships.[74] Presumably, had the gentlemen in *Smith* stopped at the local tavern for a beer, a legal, non-religious breach of their employment contract, they could have been fired and denied unemployment benefits. Had they participated in the lawful use of wine for sacramental purposes, they still could have been fired, but not denied unemployment benefits if the state had a process for excusing others who were fired under "hardship" conditions. Because the ingestion of peyote was illegal, whether done for religious or recreational purposes, Smith and Black were fired and denied unemployment benefits.[75]

This principle has also been applied to invalidate laws that allow the state actor to suppress the free exercise of religion,[76] the freedom of speech,[77] and freedom of the press.[78] When a law is invalidated on these grounds it is not because the conduct involved is always protected. Another statute that is valid on its face could conceivably regulate or ban the very same conduct.[79]

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72. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a law requiring all hand laundries to be in brick buildings violated the Equal Protection Clause in its administration since all Chinese laundries were forced to close, but almost all non-Oriental owned laundries were granted exemptions).

73. *See supra* note 57.

74. *Smith*, 494 U.S. at 884.

75. *Id.*

76. Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (striking down a statute giving a state official authority to deny a permit to solicit funds for any cause he determined was not religious).

77. Kunz v. New York, 340 U.S. 290 (1951) (holding that a statute that gave the police commissioner discretionary power to prevent citizens from speaking on city streets on religious matters was invalid on its face as a previous restraint on the right of free speech).

78. Lovell v. Griffin, 303 U.S. 444, 451 (1938) (holding that a city ordinance requiring written permission from the City Manager before distributing printed material "by hand or otherwise" was invalid on its face and violated the freedom of the press).

79. *Compare* Saia v. New York, 334 U.S. 558 (1948) (holding that an ordinance requiring the permission of the Chief of Police prior to using sound amplification devices was unconstitutional on its face) *with* Kovacs v. Cooper, 336 U.S. 77, 78-79 (1949) (upholding an ordinance that prohibited the use of sound amplification devices that "emit[ ] . . . loud and raucous noises . . . "). *See also* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding city regulation requiring city sound technician to operate city owned sound equipment in a city park band shell in order to ensure that the music was not played so loud as to disturb other park users). *See also* Grayned v. Rockford, 408 U.S. 104, 119

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B. Neutral Laws

According to Justice Scalia "the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion."[80] Justice Souter[81] referred to Justice Scalia's definition as "formal neutrality, which as a free exercise requirement would only bar laws with an object to discriminate against religion."[82] He continued:

> Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application.[83]

A state constitutional provision barring "[m]inister[s] of the Gospel, or priest[s] of any denomination whatever" from seeking election to public office is not neutral.[84] Neither is a state constitutional provision that requires a declaration of the belief in God as a qualification for holding state office.[85] Both provisions fail the requirement for "formal neutrality" that *Smith* teaches is required by the Free Exercise Clause.

The requirement for "formal neutrality" has a corollary in the Free Speech Clause. Non-neutral state actions that purport

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(1972) (upholding the portion of an ordinance that prohibited loud noises outside school buildings during school hours, but striking down on equal protection grounds that portion of the ordinance that prohibited picketing within 150 feet of any school except when peacefully picketing a school involved in a labor strike).

80. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2239 (1993) (Scalia, J., concurring in part, concurring in the judgment).

81. Justice Souter, of course, does not agree with the *Smith* rule. He urges that the Free Exercise Clause may also embrace "what might be called substantive neutrality, which in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws." *Id.* at 2241 (Souter, J., concurring in part and concurring in the judgment). *See also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

82. *Lukumi,* 113 S. Ct. at 2241 (Souter, J., concurring in part and concurring in the judgment).

83. *Id.* at 2242 (citations omitted).

84. McDaniel v. Paty, 435 U.S. 618, 620 (1978) (plurality opinion) (second and third alteration in original).

85. Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961).

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to regulate conduct the state is otherwise free to regulate have been invalidated as official suppression of ideas when targeting the following: speech that exhibits racial bigotry;[86] flag burning as political expression;[87] wearing black armbands as an anti-war symbol;[88] wearing military uniforms in a dramatic presentation as an anti-war protest;[89] hanging the U. S. flag upside down with a peace symbol affixed;[90] and flying a red flag to communicate sympathy with an unpopular political philosophy.[91] Each of these state actions were held to intentionally prohibit the conduct because of its expressive qualities, and because of official distaste for the ideas expressed.

A statute that prohibited open air burning to promote healthful air quality, would be enforceable against one who burned a flag to express dissatisfaction with the government.[92] If the burning flag caught the park band shell on fire, the communicator might be prosecuted for criminal mischief or be held liable for damages in tort. Since these state actions do not target the expressive qualities of flag burning they would not fail for lack of neutrality.

C. *Generally Applicable Laws*

"[T]he defect of a lack of general applicability applies primarily to those laws which, though neutral in their terms, through

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86. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (citations omitted)).

87. *Accord* United States v. Eichman, 496 U.S. 310 (1990) (striking down federal anti-flag burning statute) ("[T]he Government's desire to preserve the flag as a symbol for certain national ideals is implicated 'only when a person's treatment of the flag communicates a message' to others that is inconsistent with those ideals."); Texas v. Johnson, 491 U.S. 397, 406 (1989) (striking down a state statute proscribing desecration of venerated object (U.S. flag)) ("[The Government] may not ... proscribe particular conduct *because* it has expressive elements.").

88. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) ("[The wearing of armbands] was ... closely akin to 'pure speech' which, we have consistently held, is entitled to comprehensive protection under the First Amendment.").

89. Schacht v. United States, 398 U.S. 58, 63 (1970) ("The final clause in § 772(f) which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment.").

90. Spence v. Washington, 418 U.S. 405, 406 (1974) ("[A]s applied to [Spence's] activity the Washington statute impermissibly infringed protected expression.").

91. Stromberg v. California, 283 U.S. 359, 360 (1931).

92. Antonin Scalia, Associate Justice of the United States Supreme Court; *That Delicate Balance II: Our Bill of Rights; The First Amendment and Hate Speech*, The Columbia University Media and Society Seminars Collection, Columbia University's Graduate School of Journalism (1992) (videotape).

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their design, construction, or enforcement target the practice of a particular religion for discriminatory treatment."[93] A neutral law that inhibits a religious practice without aiming at the religion is constitutional with respect to free-exercise, providing the effect of the law is not to inhibit only the religious practice. A legislative act that proscribes conduct but does not include all practitioners may be constitutional,[94] but a statute that exempts everyone but the religious practitioner is not generally applicable.[95] Between granting no legislative exemptions and granting too many exemptions, precisely when a facially neutral statute becomes not "generally applicable" is a nice question.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,*[96] the Court determined that Hialeah's "ordinances were enacted 'because of,' not merely in 'spite of,' their suppression of the Santeria religious practice.'"[97] It determined this in part because the ordinances proscribed the slaying of live animals, but exempted nearly everyone with an interest in slaying animals (*e.g.* butchers, hunters, fishermen and pest controllers)[98] except the Santerias who wished to slay animals as part of a religious ceremony. Because of the combined operation of their proscriptions and exemptions, the ordinances were held to be not generally applicable.[99]

> [E]ach of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "have every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." This precise evil is what the requirement of general applicability is designed to prevent.[100]

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93. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2239 (1993) (Scalia, J., concurring in part and concurring in the judgment (citations omitted)).

94. In fact, *Smith* rested on the specific finding that neither Oregon's constitution nor her laws exempted sacramental peyote use. *Smith,* 494 U.S. at 875, 876. *See also* Employment Div., v. Smith, 485 U.S. 660, 670 (1988) (*Smith I*). Presumably, the statute would not have failed with respect to religiously inspired peyote use if it had exempted pharmaceutical use.

95. *Lukumi,* 113 S. Ct. at 2228 ("The design of these [facially neutral] laws accomplishes instead a 'religious gerrymander' an impermissible attempt to target [the Santerias] and their religious practice." (citations omitted)).

96. 113 S. Ct. 2217 (1993).

97. *Id.* at 2231.

98. *Id.* at 2232-33.

99. *Id.* at 2233.

100. *Id.* (quoting The Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted) (second alteration in original)).

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In contrast to cases where a non-generally applicable law was invalidated, the Court has upheld neutral, generally applicable laws that imposed civic obligations upon religious objectors where the state required the following: military service,[101] payment of taxes,[102] obedience to traffic laws,[103] and paying minimum wages,[104] as well as laws forbidding child labor,[105] and laws denying tax exempt status to private religious schools that discriminate on the basis of race.[106] Since *Smith*, the lower Courts have extended this application of the rule to a variety of activities for which the conscientious have sought protection and lost.[107]

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101. Gillette v. United States, 401 U.S. 437, 461 (1971) ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.").

102. United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment) ("The Court's analysis supports a holding that there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid tax law that is entirely neutral in its general application.").

103. Cox v. New Hampshire, 312 U.S. 569, 578 (1941) ("No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.").

104. Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 306 (1985) ("The Foundation's commercial activities, undertaken with a 'common business purpose,' are not beyond the reach of the Fair Labor Standards Act because of the Foundation's religious character ... and ... application of the Act to the Foundation's commercial activities is fully consistent with the requirements of the First Amendment.").

105. Prince v. Massachusetts, 321 U.S. 158, 169 (1944) ("[L]egislation appropriately designed to reach [the crippling effects of child labor] is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.").

106. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that disallowing tax exempt status to a religious school that discriminated on the basis of race was constitutional). The Court's reasoning revolved around the United States proving a sufficiently compelling interest to overcome the University's free-exercise claim. The case is included here because the Court could have followed *Smith's* reasoning that a general rule disallowing tax exempt status to any organization that embraced racially discriminatory policies would not offend the Free Exercise Clause. This, of course, does not address the question of whether the Internal Revenue Service has jurisdiction over church run educational institutions in the first instance.

107. While the *Smith* decision turned upon the application of a criminal law, the language of the decision lends itself to application involving any state action. *See* NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1306 (9th Cir. 1991) (labor laws); Kissinger v. Board of Trustees of the Ohio State Univ.—College of Veterinary Medicine, 786 F. Supp. 1308, 1313 (S.D. Ohio 1990) (State veterinary school curriculum); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir. 1991) (high school testing requirements); Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802, 809 (N.D. Cal. 1992) (Title VII); United States v. Philadelphia Yearly Meeting of Friends, 753 F. Supp. 1300, 1303 (E.D. Pa. 1990) (tax laws); Salvation Army v. Department of Community Affairs, 919 F.2d 183, 195 (3rd Cir. 1990) (housing laws); Calderon v. Witvoet, 764 F. Supp. 536, 541 (C.D. Ill. 1991) (Migrant and Seasonal Agricultural Worker Protection Act); Yang v. Sturner, 750 F. Supp. 558, 558 (D. R.I. 1990) (tort in diversity case).

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A statute banning conduct the state is ordinarily free to regulate that exempts only a particular sect may run aground on the rocks of establishment.[108] A religion-neutral law that proscribes peyote use, but exempts everyone except Native American Church members would fail for lack of general applicability.[109] A neutral statute requiring animals to be euthanised only by lethal injection would likely pass muster if the object were the prevention of cruelty to animals. This would be so even though it had the incidental effect of banning "ritual animal sacrifice," a central tenet of a particular religion.[110]

This principle has also been applied to uphold state actions with respect to expressive conduct when a generally applicable law had the effect of banning the following conduct for which the individual sought protection under the Free Speech Clause: hanging political posters on public property;[111] nude go-go dancing as artistic expression;[112] sleeping in a public park to demonstrate the plight of the homeless;[113] burning a draft card to express dissatisfaction with the government's foreign policy;[114] passing out religious literature at a state fair outside of desig-

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108. According to Justice O'Connor:

> Accommodation [by the government] ... do[es] not justify discriminations based on sect. A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews. A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to non-theistic belief (such as Buddhists) or atheistic belief.

Board of Educ. of Village of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J., concurring). *See also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 248 (1990) (referring to *Wisconsin v. Yoder*, Bork wrote, "[H]ad Wisconsin legislated an exception for the Amish, that favoritism clearly would have been held a forbidden establishment of religion.").

109. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

110. *See Id.* at 2230.

111. Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (upholding a city ordinance enacted for aesthetic purposes that prohibited the posting of signs on public property because it imposed a permissible incidental burden on speech) ("The text of the [Los Angeles] ordinance is neutral—indeed it is silent—concerning any speaker's point of view, and the District Court's findings indicate that it has been applied to appellees and others in an evenhanded manner.").

112. Barnes v. Glen Theatre, 501 U.S. 560, 571 (1991) (Rehnquist, C.J., plurality opinion) ("The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity.").

113. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984).

114. United States v. O'Brien, 391 U.S. 367, 376 (1968).

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nated locations;[115] broadcasting music from a sound truck on city streets;[116] participating in a noisy demonstration near a school during school hours;[117] and taking part in a parade without a permit.[118] None of these state actions targeted the expressive elements of the conduct. They were neutral vis-à-vis expression and were equally enforced against everyone who engaged in the conduct no matter what their motivation.

A newspaper's freedom of the press was not violated when the paper was required by a state court to pay damages for publishing the identity of a confidential source in breach of contract with the source. The Court reasoned that the state's promissory estoppel law was aimed at enforcing promises, not suppression of the press.[119] A generally applicable sales and use tax was valid as applied to a religious organization that published a magazine for sale.[120] The freedom of the press is not compromised by enforcing anti-trust laws against the commercial press.[121] None of these generally applicable state actions have the effect of singling out or imposing prior restraint upon the press.

If the Court concludes, however, that a law's proscriptions, exemptions, and compulsions, when taken together, amount to official suppression of the free exercise of religion,[122] the freedom

115. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 651, 653-54 (1981) (upholding state fair rule that was content-neutral and applied even-handedly with all charitable and religious groups).

116. Kovacs v. Cooper, 336 U.S. 77, 87 (1948) (plurality opinion) ("We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.").

117. Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (upholding the section of an ordinance that prohibited loud or noisy demonstrations outside of school buildings during school hours).

118. Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding an ordinance requiring the obtaining of a permit before using city streets for a parade or procession).

119. Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991).

120. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 389 (1990). *Cf.* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding that exemption from state sales tax for religious publications violated the Establishment Clause). *See generally* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (holding that a tax unique to the press was unconstitutional even though it favored the press, but suggesting that a generally applicable sales and use tax would be constitutional). *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) ("[A] genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible . . . .").

121. Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969).

122. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

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of speech,[123] or the freedom of the press[124] the regulation will not stand. This is so even when the regulation addresses conduct that the state would be free to regulate by way of a neutral law of general application.

> [A]n exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control ... the search for political truth."[125]

D. *Incidental Burdens*

A generally applicable law may impose an incidental burden upon an individual's religiously motivated conduct when the state regulates the conduct without targeting its religious nature. The right to believe and to hold ideas is absolute and completely beyond the reach of the state.[126] The rights to worship, speak, and print, however, are not absolute,[127] but direct, content-based regulation is presumed to be invalid.[128] Beyond the realms of intellect and spirit, virtually any conduct that is within the state's police powers to regulate, may be regulated so long as the state's end is legitimate and the means employed are rationally related to the end sought. When such a law imposes a burden on conduct that one might engage in for religious or expressive reasons, the law must both rest upon a rational basis (although the Court purports to use a mid-level balancing test for expressive conduct cases) and be neutral and generally applicable with respect to the First Amendment activity.[129] One statute may unconstitution-

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123. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2043 (1994).

124. *Cf.* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983).

125. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2043 (1994) (holding that a general ban on signs at private residences when taken together with its ten exemptions, unconstitutionally limited too much speech when banning a small sign in resident's window proclaiming, "For Peace in the Persian Gulf" (citations omitted)).

126. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

127. *See* Jones v. Opelika, 316 U.S. 584, 594 (1942).

128. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

129. *Cf.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2467 (1991) (Scalia, J., concurring). Justice Scalia would apply this principle in expressive conduct cases under the Free Speech Clause as well as well as in free exercise cases. *See supra* note 60.

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ally prohibit a particular conduct for the purpose of suppressing the ideas of the actor, while a neutral statute of general application may constitutionally prohibit exactly the same conduct. The first statute imposes a direct burden; the second imposes an incidental burden.

An incidental burden must not be confused with a "slight" burden. An incidental burden is incidental because the "First Amendment" nature of the conduct is not the object of the law. The weight of an incidental burden on an individual, however, may be oppressive. Conversely, where the state targets a particular religious practice by way of non-neutral or non-generally applicable laws, the proscription of the conduct may impose only a slight burden on the practitioner, but it would be a constitutionally impermissible direct burden and be presumptively invalid. Justice Scalia expanded on this principle in *Planned Parenthood v. Casey*,[130] an abortion rights case.

> I agree, indeed I have forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, but that principle does not establish the quite different (and quite dangerous) proposition that a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an 'undue burden.' It is that, of course, which is at issue here: Pennsylvania has *consciously and directly* regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1¢. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a 'substantial obstacle' to the exercise of First Amendment rights.[131]

It is not the relative weight of the burden upon the individual that justifies direct regulation of fundamental rights, rather, it is the rare necessity of such a regulation to achieve interests of the state that are of the highest order.[132]

The principle enunciated in *Casey* applies to a wide variety of conduct that religious people engage in out of religious moti-

130. 112 S. Ct. 2791 (1992).

131. *Id.* at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part) (citations omitted).

132. *See supra* notes 62 through 68 and accompanying text.

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vation. According to the *Smith* rule, the state may regulate the conduct by way of neutral laws of general applicability even if the result is a total ban. The state may not, however, justify direct regulation of religiously motivated conduct because the burden imposed is slight. Laying the foundation for *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[133] Justice Scalia drew upon this principle in *Smith*:

> [T]he "exercise of religion" often involves not only belief and profession, but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in the sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions *only* when they are engaged in for religious reasons, or *only* because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[134]

It would be constitutionally impermissible to target any of these physical acts by way of non-neutral or non-generally applicable statutes for the purpose, or with the effect of suppressing them because of the beliefs they display.[135] Yet, most of these physical acts are subject to some government regulation. Assembly for worship is subject to zoning laws[136] and if done in public

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133. 113 S. Ct. 2217 (1993).

134. *Smith*, 494 U.S. at 877-78 (citations omitted) (second alteration in original) (emphasis added). *But see* Titus, *supra* note 17, at 22. Dean Titus relies heavily upon this passage to demonstrate that Justice Scalia intended to mark jurisdictional lines between church and state. Referring to this passage Titus writes, "[Justice Scalia] then proceeded to name a few acts that he believed were constitutionally outside the jurisdiction of the government." *Id.* While this jurisdictional view is perhaps a better approach when discussing church and family governance, it almost certainly is not what Justice Scalia intended.

135. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993); McDaniel v. Paty, 435 U.S. 618, 629 (1978); Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

136. Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) (holding that a municipal zoning ordinance that prohibited the construction of church buildings in almost every residential district did not violate the Free Exercise Clause); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983) (holding that a religion-neutral zoning ordinance applied so as to prohibit use of a "single-family dwelling" as a meeting place for an Orthodox Jewish "shul" (synagogue) was constitutional).

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places to reasonable time, place, and manner restrictions[137] as is proselytizing.[138]

Children may be forbidden from consuming wine and adults subject to criminal liability for serving alcohol to minors. If the legislative body does not provide exemption for sacramental use of wine by children, the courts, under *Smith*, would not be compelled to grant exemption to churches,[139] even though the Savior commands, " '[D]o this for the remembrance of me.' "[140] Under the constitution the burden would be "incidental."[141] So long as the statute survived minimum scrutiny when evaluated for the police power purpose it was intended, it would be constitutional, and, according to *Smith*, the First Amendment would not be offended.[142]

The state is free to prohibit cruelty to animals, but it may not fashion a statute to reach only a particular sect of religious practitioners who sacrifice small animals by severing their carotid arteries.[143] For aesthetic purposes, the state is free to prohibit the posting of signs on public property, but not if the purpose is to suppress political or religious speech.[144] Presumably, private possession of gold may be regulated, but not if the only effect is to prevent the casting of golden calves to be bowed down before in worship.[145] In each example the same conduct is proscribed, but one statute imposes an incidental burden while the other imposes a constitutionally impermissible direct burden.

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137. *See* Kunz v. New York, 340 U.S. 290, 293 (1951).

138. *Cf.* Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943) (holding that an ordinance that made it unlawful to summon the inmate of a residence to the door in order to pass out religious literature was unconstitutional on free-speech and free-press grounds) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.").

139. *Cf.* Prince v. Massachusetts, 321 U.S. 158, 169 (1944) (upholding a law prohibiting children from distributing literature, suggesting that the state, as *parens patriae* may have more latitude when state action interferes with a child's free exercise of religion).

140. THE BOOK OF COMMON PRAYER: ACCORDING TO THE USE OF THE EPISCOPAL CHURCH 363 (1977).

141. According to Justice Souter, such a statute would violate "substantive neutrality" and he would hold it invalid, but he acknowledges that the statute would not violate the "formal neutrality" demanded by *Smith*. *Lukumi*, 113 S. Ct. at 2242.

142. *Smith*, 494 U.S. at 878.

143. *Lukumi*, 113 S. Ct. at 2222.

144. *See* Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

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

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In spite of the religious objector's free-exercise claim, this view of incidental burdens has been upheld in governmental actions banning polygamy,[146] requiring mandatory military instruction at a State University,[147] requiring all businesses to close on Sunday,[148] and requiring participation in the social security system.[149]

Before moving to the "hybrid situations," keep in mind that there are three main categories of state regulation. *Smith* is only concerned with the third category. Even though the state may regulate or even completely ban conduct in this third category, a particular state action may be unconstitutional if it is not otherwise valid, neutral, and generally applicable. This principle pertains to free-exercise, free-speech, and free-press issues in the third category. (See Figure 2).

Smith Categorical Framework

State Regulation of	Religion	Speech	Press	**Burden**
Absolutely Banned	Belief	Ideas	Ideas	**Direct**
Strong Presumption of Invalidity	Content of Worship	Content of Speech	Content of Writing	**Direct**
Presumed Valid	**Religiously Motivated Conduct**	**Expressive Conduct**	**Press Neutral Tax, Anti-trust, Contract Laws**	**Incidental**

Figure 2

III. HYBRID SITUATIONS

After announcing the general rule in *Smith,* Justice Scalia addressed several cases whose specific holdings he agreed with,

146. Reynolds v. United States, 98 U.S. 145 (1879).

147. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 266 (1934) (Cardozo, J., concurring) ("This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical. More must be shown to set the ordinance at naught.").

148. Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (plurality opinion).

149. United States v. Lee, 455 U.S. 252, 257 (1982).

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but whose rationales were not always quite clear, including one whose rationale completely refused to go along quietly with his general rule. Referring to what he later called "hybrid situations," he observed:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*; *Murdock v. Pennsylvania*; *Follett v. McCormick*, ... or the right of parents, acknowledged in *Pierce v Society of Sisters*, ... to direct the education of their children, see *Wisconsin v. Yoder*.[150]

At first glance one might interpret these "hybrid situations" to be an exception to the general rule against constitutionally mandated exemptions for religiously motivated conduct. This reasoning may be summarized as follows: If the proscribed conduct that the religiously motivated objector wishes to pursue also implicates the freedom of speech, the freedom of the press, or the right of parents to direct the education of their children, then the regulation must automatically pass the *Sherbert/Yoder* free-exercise balancing test, even if the individual elements of the hybrid need not. This line of reasoning naturally leads to the conclusion that *Smith* recognized a new legal creature, a free-exercise/free-speech "hybrid claim," much the same as the union of a donkey and a horse results in the birth of a mule. A representative sample of this reasoning is found in *Salvation Army v. Department of Community Affairs of New Jersey*:[151]

> By saying that there are some situations in which a free exercise claim will 'reinforce' a freedom of association claim, the Court in *Smith* did imply that the conjunction of these rights will protect activity that would not be protected if it were not religious in nature ....[152]

When one receives news that a two hundred year old Constitution has given birth to a new legal creature, it is wise to be skeptical. Even more so when the herald angels announce that the attending midwife was none other than Justice Antonin Scalia, a well known doubting Thomas with respect to constitu-

150. *Smith*, 494 U.S. at 881 (citations omitted).
151. 919 F.2d 183 (3rd Cir. 1990).
152. *Id.* at 200 n.9 (citations omitted).

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tional virgin birth.[153] Far from demanding the breeding of a constitutional mongrel, properly understood, the hybrid passage serves to clarify the analysis to be used within the categorical framework.

The word "hybrid" is susceptible of a meaning other than "mongrel." This second meaning refers to a situation that is "composed of elements of different or incongruous kinds."[154] An illustration is in order.

When a man of Chinese descent and an American woman of Anglo-European descent have a child, the child is neither Chinese nor American, but rather is a third race, a Chinese-American. Neither the Chinese nor the American elements are severable. If, on the other hand, I go to a Chinese-American restaurant and order egg roll from Column A and a hamburger with lots of onions from Column B, my lunch is neither Chinese nor American, but neither is it a distinctly different, third kind of lunch. It is "composed of elements of different or incongruous kinds" of lunch food. I could eat the egg roll or the hamburger or both. It is in this second sense that Justice Scalia used the word "hybrid."

If I eat both the egg roll and the hamburger, my wife will know that I had onions for lunch. She may not be able to tell whether they were in the egg roll or on the hamburger, but her inability does not mean they were in the egg roll. Following the "mongrel" approach within my Chinese-American restaurant categorical framework leads to an interesting conclusion. Suppose I don't want the onions so I send the hamburger back to the kitchen. Now, when I eat the egg roll and the hamburger, the "mongrel" approach concludes that my breath automatically smells of onions.[155]

As a handy way to refer to cases that are "composed of elements of different or incongruous kinds" of constitutional protections, the term "hybrid situations" is apt. It is simply incorrect to say, however, that *Smith* begat a heretofore unheard of legal claim. It only compounds the error to say that when invoked, "hybrid claims" automatically command free-exercise strict scrutiny. This is not what the words in *Smith* say; the notion is not supported by the cases cited in the passage; and,

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153. United States v. Carlton, 114 S. Ct. 2018, 2026 (1994). (Scalia, J., concurring in the judgment) ("I believe that the Due Process Clause guarantees *no* substantive rights.").

154. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 936 (2d ed. 1987).

155. Any reference to race has the potential for giving offense. For purposes of the illustration's word-play—to demonstrate the difference between the two meanings of the word "hybrid"—I have reluctantly violated the P.C. code.

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if true, the result is logically indefensible. Nevertheless, this is how many judges[156] and commentators[157] read this passage.

In his haste to discredit *Smith*, University of Chicago Professor of Law, Michael McConnell seems to have accepted the notion that there is such a thing as a "hybrid claim." He wonders why *Smith* itself isn't a "hybrid case." "If burning a flag is speech because it communicates a political belief, ingestion of peyote is no less [because it communicates the participant's faith in the tenets of the Native American Church]."[158] Professor McConnell confuses the actor's motivation with the impermissible state action. The statutes in both of the flag burning cases, *United States v. Eichman*[159] and *Texas v. Johnson*,[160] were struck down because they impermissibly targeted the political expression involved in flag burning. If all flags were made of material that

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156. Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 933 (6th Cir. 1991) ("The Smith decision implies without stating that those hybrid claims which raise a free exercise challenge coupled with other constitutional concerns remain subject to strict scrutiny"); State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990) ("The Smith II court limited the compelling state interest test used by this court in Hershberger I to claims involving not the free exercise clause alone, but free exercise in conjunction with other constitutional protections."); Donahue v. Fair Employment and Housing Comm'n, 13 Cal. App. 4th 350, 366 n.10 (1991) ("We note, however, that Smith's analysis upholding without any compelling governmental interest a generally applicable, religion-neutral law despite its burden upon the exercise of religion recognizes as an exception hybrid constitutional situations."); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 862 (Minn. 1992) ("Smith retained the compelling interest test for so-called hybrid situations. . . ."); Cornerstone Bible Church v. Hastings, 740 F. Supp. 654 (D. Minn. 1990) ("There are still two types of situations which will be strictly scrutinized under the free exercise clause. . . . [First, unemployment cases and] . . . [s]econd, 'hybrid situations' in which the free exercise clause and some other constitutional right . . . receive strict scrutiny.").

157. *See* Donald D. Dorman, Note, *Michigan's Teacher Certification as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J. L. REF. 733, 744 (1989) ("It thus remains clear that where free exercise of religion—accompanied by another 'constitutional protection[ ]'—is infringed directly or indirectly, courts must apply strict scrutiny." (alteration in original)).

The passage has also been give an overtly utilitarian interpretation:

> [The so-called hybrid right claims] are based upon the conjunction of free exercise and other constitutionally significant rights, like free speech or parental control over the rearing of children. Whatever the theoretical explanation for greater receptivity to 'free exercise plus' than 'free exercise pure,' a great many free exercise claims might be recast to take advantage of this construct. . . .
>
> Creative lawyering might thus preserve the force of many potential claims.

Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259, 266.

158. McConnell, *supra* note 12, at 1122 (footnote omitted).

159. 496 U.S. 310 (1990). *See supra* note 87 and accompanying text.

160. 491 U.S. 397 (1989). *See supra* note 87 and accompanying text.

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was toxic when burned, flag burning could be prohibited by the state to prevent poisoning, without impermissibly infringing on political expression. In *Smith*, the statute neither targeted the Native American Church nor the expressive qualities of ingesting peyote. It was neutral towards both and was merely a health and safety regulation, well within the police powers of Oregon.[161] In *Smith*, neither the free-exercise egg roll nor the free-speech hamburger had any constitutional protection onions.

Assuming that if Justice Scalia had intended to create an exception to the general rule he would have done so directly—which he did not do[162]—the passage only makes sense as a further classification of cases into the categorical framework. From the structure of the opinion, it is clear that the Court classified the hybrid cases by looking at the elements of the claims while narrowly adhering to the precise holding in every case (especially true for the cases decided during the post-*Sherbert*, pre-*Smith* era).

The hybrid passage describes two lines of cases involving: (1) the freedom of speech and of the press; and (2) the right of parents to direct the education of their children.[163] Referring to these parallel lines of cases, Justice Scalia wrote, "[b]oth lines of cases have specifically adverted to the non-free-exercise principle involved."[164] We will examine what this "adverting to"[165] means in the speech line of cases and later, compare that understanding with the parental rights line of cases.

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161. Justice Souter also dislikes the "hybrid claim," but comes closer to recognizing it for what Justice Scalia intended.

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Lukumi, 113 S. Ct. at 2244-45 (Souter, J., concurring in part and concurring in the judgment).

162. While it is difficult to prove a negative (no exception language), the opinion is certainly replete with contrary absolutes.

163. *Smith*, 494 U.S. at 881 n.1.

164. *Id.*

165. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 31 (1986), defines "advert" as "to turn the mind or attention: pay heed or attention."

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A. Speech/Press Line of Cases

In the decade or so surrounding World War II, fervent Jehovah's Witnesses, driven by missionary zeal, attempted to convert the nation by passing out *Watch Towers* door-to-door. In response, many towns enforced ordinances designed to regulate door-to-door solicitation. Jehovah's Witnesses were arrested and convicted in droves as a result.[166] In a series of cases, the Supreme Court considered how to deal with the Jehovah's Witnesses. In Round One, exemplified by *Jones v. Opelika*, (*Opelika I*)[167] the Court ruled that the Witnesses were book peddlers and subject to the same solicitation ordinances as any other peddler. The Jehovah's Witnesses were a persistent lot, however, and in the very next term the Court faced them again. Rather than grant the Witnesses exemption from the laws, the Court reexamined its view of the conduct. Unprotected peddling became protected dissemination of ideas.[168] When viewed in this light, the state regulations were seen as imposing a prior restraint upon protected activities. These Round Two cases were *Jones v. Opelika (Opelika II)*[169] as well as *Follett* and *Murdock*, two of the cases listed by Justice Scalia in the hybrid passage.

In order to classify *Cantwell*,[170] *Follett*[171] and *Murdock*,[172] it is necessary to look at the elements of the state action involved and the elements of the conduct for which the individual sought protection. Each of these cases involved Jehovah's Witnesses who were convicted by the various states of the crime of door-to-door solicitation without obtaining a permit that required either the payment of a flat tax[173] or the discretionary permission of a town official.[174] Each case noted that the state might lawfully impose regulations on door-to-door solicitation generally, under its police powers,[175] and that religious motivation alone was not

166. Brief for Appellee at 72, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (No. 591).

167. Jones v. Opelika, 316 U.S. 584 (1942), *rev'd*, 319 U.S. 103 (1943).

168. Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) ("It is a distortion of the facts of record to describe [the Jehovah's Witnesses'] activities as the occupation of selling books and pamphlets.").

169. 319 U.S. 103 (1943) (reversing previous decision in 316 U.S. 584 (1942)).

170. Cantwell v. Connecticut, 310 U.S. 296 (1940).

171. Follett v. Town of McCormick, 321 U.S. 573 (1944).

172. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

173. *Murdock*, 319 U.S. at 106; *Follett*, 321 U.S. at 574.

174. *Cantwell*, 310 U.S. at 302.

175. *Cantwell*, 310 U.S. at 304-05; *Murdock*, 319 U.S. at 110; *Follett*, 321 U.S. at 574.

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enough to justify any conduct within the state's police power to regulate.[176] The Witnesses were all motivated by religion,[177] to pass out or sell religious literature,[178] as a means of proselytizing face-to-face.[179] In each case, the Court held that the state action involved impermissible prior restraint upon the dissemination of religious beliefs or ideas.[180] To test the meaning of footnote one in *Smith,* ("[these] cases have specifically adverted to the non-free-exercise principle involved,") simply ask, "Which element of the claim had the constitutional protection onions, the free-exercise egg roll or the free-speech hamburger?"

While these three decisions admittedly discussed religious freedom, the underlying rationale for striking down the statutes did not depend upon religious motivation. Rather, the ordinances restricted the ability to communicate beliefs and ideas in a manner that had the effect of placing a prior restraint on that protected activity. One who believed he owed a duty to God to support his family by selling shoes door-to-door would need to comply with the ordinances. Without looking to the religious motivation, however, the ordinances still imposed an impermissible burden upon the speech/press non-free-exercise element of the "hybrid."[181] None of these cases turned upon granting exemption from the ordinance *only* to religiously motivated colporteurs, but to anyone distributing pamphlets to disseminate ideas or beliefs. Nor did they extend protection to *all* religiously motivated door-to-door peddlers, but *only* to those disseminating ideas. The constitutional protection afforded these "hybrid situations" derived vitality from the non-free-exercise element.

In *Martin v. City of Struthers,*[182] yet another Jehovah's Witnesses case, the Court made it quite clear that an actor's motivation for engaging in conduct is irrelevant. It left no doubt that the religiously motivated Jehovah's Witnesses were not the only beneficiaries of their ruling.

> [D]oor to door distributors of literature may ... be useful members of society engaged in the dissemination of ideas in

176. *Cantwell,* 310 U.S. at 305; *Murdock,* 319 U.S. at 116; *Follett,* 321 U.S. at 575.
177. *Cantwell,* 310 U.S. at 302; *Murdock,* 319 U.S. at 109; *Follett,* 321 U.S. at 576.
178. *Cantwell,* 310 U.S. at 301; *Murdock,* 319 U.S. at 106; *Follett,* 321 U.S. at 574.
179. *Cantwell,* 310 U.S. at 309; *Murdock,* 319 U.S. at 108; *Follett,* 321 U.S. at 576.
180. *Cantwell,* 310 U.S. at 306; *Murdock,* 319 U.S. at 117; *Follett,* 321 U.S. at 578.
181. *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 389 (1990) (limiting *Follett* and *Murdock* to those taxes that "tax ... the right to disseminate religious information, ideas or beliefs *per se*").
182. 319 U.S. 141 (1943).

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> accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance.... Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.[183]

Cantwell, Follett, Murdock, Opelika I, Opelika II, and *Struthers* are representative of hundreds of *Watch Tower* distribution cases that flooded state courts in the 1930's and 1940's.[184] In those antediluvian days the Court did not speak in terms of levels of scrutiny.[185] It is clear, however, that the modern Court would not brook a regulation that targeted expressive conduct because of the communicator's belief, whether religious or otherwise.[186] The Court recently reiterated this principle in *Rosenberger v. University of Virginia.*[187] "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[188] (See Figure 3).

183. *Id.* at 145-46 (citations omitted).

184. Brief for Appellee at 72-80, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (No. 591).

185. *See* Bennett, 501 N.W.2d at 123 n.10 (Riley, J., concurring in part and dissenting in part).

186. *Swaggart* v. Board of Equalization, 493 U.S. 378, 386 (1990).

187. 115 S. Ct. 2510 (1995).

188. *Id.* at 2516.

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Smith Categorical Framework

State Regulation of	Religion	Speech	Press	Burden
Absolutely Banned				Direct
Strong Presumption of Invalidity		**Cantwell** Struthers	**Murdock** **Follett** Opelika II	Direct
Presumed Valid	**Murdock** **Cantwell/Follett** Opelika I and II Struthers		Opelika I	Incidental

Figure 3

We have already seen that not all conduct linked with religious motivation results in the religious person winning his claim.[189] It has also been demonstrated that not all expressive conduct is protected by the Free Speech Clause.[190] In both, the Court's focus was properly on the state's target for regulation, not the actor's motivation for the conduct. In the "hybrid" passage Justice Scalia wrote, "The *only* decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . ."[191] This should not be read as saying that *all* claims brought by religiously motivated actors that also implicate freedom of speech or of the press will result in holdings barring application of the law. If the regulation passes review for both the free-exercise element and the free-speech element, the regulation will stand.

In a decision that preceded *Smith* by three months, the Court refused to apply the *Sherbert* compelling interest test[192] in a case implicating both free-exercise and free-press concerns. The facts in *Jimmy Swaggart Ministries v. Board of Equalization*[193]

189. *See supra* notes 101 through 107, 136, and 146 through 149.

190. *See supra* notes 111 through 121.

191. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 881 (1990) (citations omitted) (emphasis added).

192. *Sherbert*, 374 U.S. at 403, 406.

193. 493 U.S. 378 (1990).

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are straightforward. A religious ministry sold subscriptions to a magazine entitled "The Evangelist."[194] California charged a six per cent sales and use tax on the retail sales of all tangible personal property, which state tax officials contended included "The Evangelist."[195] The Court rejected the claim that *Follett* and *Murdock* exempted religious organizations from state sales and use taxes on the sale of religious literature. It limited *Follett* and *Murdock* to only those taxes that have the effect of imposing prior restraint "on the exercise of a privilege granted by the Bill of Rights."[196]

After asserting that Swaggart's "reliance on *Sherbert v. Verner* and its progeny [was] misplaced,"[197] Justice O'Connor, writing for a unanimous[198] Court, continued:

> We therefore conclude that the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on [the ministry's] religious practices or beliefs. The Free Exercise Clause accordingly does not *require* the State to grant [the ministry] an exemption from its generally applicable sales and use tax.[199]

This apparent hybrid situation lost because the burden on free-exercise was incidental as was the burden on free-press. When "specifically adverting to" the protection afforded the press element of the *Swaggart* facts, the Court found a press-neutral, generally applicable tax law. It did not automatically apply free-exercise strict scrutiny because the publication was religious: Instead, it applied the same standard it would have applied to anyone selling magazines.[200] In *Swaggart*, the Court unanimously rejected the application of strict scrutiny because the sales and use tax was neutral, generally applicable, and did not directly interfere with the ministry's ability to disseminate its ideas or beliefs.

Just two years after *Smith*, in *International Society for Krishna Consciousness, Inc., v. Lee*,[201] the Court had another

194. *Id.* at 382.
195. *Id.* at 381, 382.
196. *Id.* at 386 (quoting *Murdock*, 319 U.S. at 113).
197. *Id.* at 391.
198. *Id.* at 380.
199. *Id.* at 392.
200. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) (striking down a special tax that applied only to the press, but suggesting that a generally applicable sales tax would be within the State's power to enact).
201. 112 S. Ct. 2701 (1992).

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opportunity to apply the "hybrid" analysis. Religiously motivated Hari Krishnas sought relief from a rule that prohibited the solicitation of funds from passersby within a state-owned airport terminal. Using a "forum based" approach, the Court determined that for the purpose of face-to-face solicitation of funds from passersby, airport terminals are non-public fora and that state restrictions on free-speech need only satisfy a "requirement of reasonableness."[202] The Court had "no doubt that under this standard the prohibition on solicitation passe[d] muster."[203] Since the ban was neutral, generally applicable, and a reasonable way to regulate crowd congestion, the Court upheld the ban.[204] Not only is there no mention of a "hybrid claim" in the case, but the religious motivation of the Hari Krishnas was not considered as a factor in the outcome.

An examination of cases implicating the freedom of speech or freedom of the press where the non-religiously motivated challenger lost is also enlightening.[205] Would those challengers have won if they had also objected on the basis of religious scruples? In *Los Angeles v. Taxpayers for Vincent*,[206] the Court upheld a City of Los Angeles ordinance that banned the posting of bills on public property. All bills were prohibited to prevent interference with visibility and damage to the aesthetic quality of the city. Neither the content of the signs nor the motivation of the individual had any bearing on the outcome. The Court in *Vincent* rejected the very idea:

> [E]ven though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent— City Council."[207]

In *Barnes v. Glen Theatre, Inc.*,[208] nude go-go dancers claimed that the city ordinance banning public nudity violated their right

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202. *Id.* at 2708.
203. *Id.*
204. *Id.* at 2709.
205. *See supra* notes 111 through 114.
206. 466 U.S. 789 (1984).
207. *Id.* at 816.
208. 501 U.S. 560 (1991).

to free artistic expression. The Court upheld the ordinance because the city had not targeted the expressive qualities of nude dancing, but had banned public nudity generally, for moral reasons.[209]

It can scarcely be argued that those who wished to engage in these expressive activities would have won if they had been motivated by religion. Hanging Billy Graham posters or dancing nude in public out of devotion to the Greek god Dionysus would have been no more protected than the same conduct engaged in for political,[210] artistic,[211] or pecuniary[212] reasons. Where the expressive conduct suffered from an incidental burden imposed by a neutral, generally applicable law, it would not be reinforced by religious motivation that also suffered from an incidental burden. (See Figure 4).

Smith Categorical Framework

State Regulation of	Religion	Speech	Press	Burden
Absolutely Banned				Direct
Strong Presumption of Invalidity				Direct
Presumed Valid	Swaggart *Krishna* Vincent/Barnes	*Krishna* Barnes	Swaggart Vincent	Incidental

Figure 4

One of the most compelling arguments denying the existence of a "hybrid" exception to the general rule comes from a most surprising quarter. Professor McConnell, perhaps the most vociferous critic of *Smith*, was incredulous that Justice Scalia would quote favorably from *Board of Education of Minersville School District v. Gobitis*[213] in support of his categorical rule, since *West Virginia State Board of Education v. Barnette*[214] specifically overruled *Gobitis*.

More surprising than the precedents distinguished were the precedents relied upon. The Court relied most heavily,

209. *Id.* at 571.
210. *Vincent*, 466 U.S. at 816.
211. *Barnes*, 501 U.S. at 570.
212. *Id.* at 563.
213. 310 U.S. 586 (1940).
214. 319 U.S. 624 (1943).

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> with lengthy quotation, on Minersville School District v. Gobitis .... The Court neglected to mention that, three years after *Gobitis*, it overruled the case in one of the most celebrated of all opinions under the Bill of Rights. Relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*.[215]

Justice Scalia's reliance on *Gobitis* is not nearly as surprising as how readily Professor McConnell's denunciation yields to moderate scrutiny.

During the Jehovah's Witnesses Era, the courts were deluged with a second kind of free-speech case. The "compelled speech" cases involved the children of Jehovah's Witnesses who, as a matter of religious conviction, refused to salute the United States flag or recite the pledge of allegiance as required by the public schools.[216] *Gobitis* was decided in 1940.[217] Justice Frankfurter, writing for eight justices, recognized the high order of the competing values,[218] but determined that the conduct was within the power of the state to compel and that to grant the Jehovah's Witnesses' children exemption from a general requirement would be improper.[219] The Court viewed the conduct as being instruction in patriotism.[220] Apart from one paragraph in the opinion, free speech concerns were not mentioned and did not play a role in the decision.[221]

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215. McConnell, *supra* note 12, at 1124 (citations omitted). Professor McConnell knows this to be overstating the case and acknowledges as much in a footnote. *Id.* n.70. *See also* Note, *The Supreme Court, 1989 Term Leading Cases*, 104 HARV. L. REV. 198, 205 (1990) (referring to *Gobitis* as a "long-overruled and abhorrent case," the authors continue: "Nowhere in *Smith* did Justice Scalia note that *Gobitis* no longer remained good law.") *Id.* n.62.

216. The students relied upon *Exodus* 20:3-5 to justify their refusal to submit to the flag salute:

> Thou shalt have no other gods before me. Thou shalt not make any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them nor serve them.

Gobitis, 310 U.S. at 592 n.1.

217. *Gobitis* was preceded by five *per curiam* decisions upholding mandatory flag salute statutes at public schools. Leoles v. Landers, 302 U.S. 656 (1937); Hering v. State Bd. of Educ., 303 U.S. 624 (1938); Gabrielli v. Knickerbocker, 306 U.S. 621 (1939); Johnson v. Deerfield, 306 U.S. 621 (1939), *reh'g denied*, 307 U.S. 650 (1939).

218. *Gobitis*, 310 U.S. at 594.

219. *Id.* at 598.

220. *Id.*

221. *Id.* at 595.

Barnette, decided in 1943, does not stand for the rejection of the rule against court-granted exemptions, but rather as a reinterpretation of the import of the conduct. Harmless instruction in patriotism in *Gobitis*, became state-compelled speech that forced affirmation of belief in *Barnette*. While *Barnette* overruled the specific holding in *Gobitis*, the principle against exemptions was left intact.

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies [the Barnette's] motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.[222]

The *Barnette* Court did not base its ruling on the need for religious convictions against the state-mandated speech. West Virginia had exceeded its lawful power when it compelled speech in a manner that implied affirmation of the beliefs entailed.[223] *Barnette* rested explicitly on free-speech grounds and extended the same protection from government-compelled speech to all, regardless of motivation.[224] When the conduct in *Gobitis* was viewed as within state power to compel, the religiously motivated were not exempted from the required conduct. When the very same conduct was held to be outside the authority of the government on free-speech grounds, the liberty thereby attributed to the individual was extended to all, not just the religiously motivated.

Justice Scalia quoted *Gobitis* to support the proposition that the Free Exercise Clause does not mandate court-granted exemptions from general laws for those with conscientious scruples.[225] For the purpose of reinforcing the rule against constitutionally mandated exemptions for religiously motivated actors, *Gobitis* and *Barnette* stand as the perfect example of the principle reestablished in *Smith*.[226]

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222. *Barnette*, 319 U.S. at 634-35 (citation omitted).

223. *Id.* at 642. ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

224. *Id.* at 634.

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

226. They also serve to support Dean Titus's jurisdictional thesis. *See* Titus, *supra* note 17, at 56.

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In another case involving Jehovah's Witnesses and compelled speech, *Wooley v. Maynard*,[227] the Court overturned the Witnesses' conviction for covering New Hampshire's motto "Live Free or Die" on their automobile license plate. Again, the Court did not grant a religious exemption, but ruled solely on the basis of free-speech.[228] It is clear that religious motivation was not a deciding factor in *Gobitis*, *Barnette*, or *Wooley*, and that the Court "specifically adverted to" the free-speech concerns in each of these potential hybrid situations. (See Figure 5.)

Smith Categorical Framework

State Regulation of	Religion	Speech	Press	Burden
Absolutely Banned				Direct
Strong Presumption of Invalidity		Barnette *Wooley*		Direct
Presumed Valid	Barnette, *Wooley* Gobitis	Gobitis		Incidental

Figure 5

The Court in *Smith* did not create a new legal claim while rejecting the balancing test. As separate legal entities, free exercise/free-speech "hybrids" do not exist at all, either as exceptions to the general rule or in their own right. Each of the speech/press cases cited in the hybrid passage would be decided the same today if the motivation of the person were political, philosophical, or ideological rather than religious. Each of the holdings adverted to the impermissible state action with respect to the speech/press element of the "hybrid."

B. Parental Rights Line of Cases

The second line of "hybrid" cases involves the right of parents to direct the education of their children. Parents' rights are not guaranteed explicitly in the Constitution. The cases defining the right of parents to direct the education of their

227. 430 U.S. 705 (1977).
228. *Id.* at 713.

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children involve compulsory education statutes, most of which were enacted in the late nineteenth and early twentieth centuries.[229] There are, therefore, far fewer cases from which to draw an understanding of the exact nature and extent of parental rights, but this much we do know: the decision to become a parent is beyond the reach of the state;[230] the state may require parents to educate their children, but may not limit the choice to public school;[231] the state may not outlaw the teaching of foreign languages;[232] parents may direct the education of their children, but are not completely free from government regulation.[233] Since Justice Scalia considered this line of cases to be parallel with the speech line, we will proceed with an eye toward constructing a parental rights wing of the categorical framework. (See Figure 6).

Smith Categorical Framework

State Regulation of	Religion	Speech	Press	**Parental Rights**	Burden
Absolutely Banned	Belief	Ideas	Ideas	**Procreation**	Direct
Strong Presumption of Invalidity	Content of Worship	Content of Speech	Content of Writing	**Directing Education of Children**	Direct
Presumed Valid	Religiously Motivated Conduct	Expressive Conduct	Tax, Tort, Anti-trust, Contract Laws	**Requiring Parents to Educate**	Incidental

Figure 6.

1. *Wisconsin v. Yoder*

Wisconsin v. Yoder[234] presents a dilemma for those wishing to make sense of *Smith* within the categorical framework, since

233. LAWRENCE KOTIN & WILLIAM F. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE 25 (1980).

229. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that sterilization for some crimes and not others violated the Equal Protection Clause) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."). *Id.* at 541.

230. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

232. *See Pierce*, 268 U.S. at 534-35; *see also Yoder*, 406 U.S. at 213.

234. 406 U.S. 205 (1972).

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Yoder's rationale is in direct contradiction to *Smith.* Yet, *Smith* cites *Yoder* as an example of a parental rights case that specifically adverts to the non-free-exercise principle.[235]

In a state where education is seen as secular and distinct from religious training, there is certain to be conflict when the state requires that children be educated in ways that contradict the religious training parents feel duty bound to provide. *Wisconsin v. Yoder* presents a case where religious people did not recognize a line of demarcation between religious training and secular education.[236] For the Amish, all of life, including education, was subject to their religious view of the world.[237] Jonas Yoder was willing to send his children to public school through the age of thirteen. Thus far, the conduct required was consistent with his religious belief.[238] When Wisconsin required that he send them to school through the age of sixteen,[239] subject to criminal penalties[240] for failure to comply, Jonas was presented with the choice of "obey[ing] God rather than Man."[241]

Jonas violated the statute by not sending his daughter to the local public school when she should have entered the ninth grade, because it required a practice offensive to his religious belief. After the age of thirteen, parents in Yoder's community of Old Order Amish taught their children the trade of nineteenth century farming.[242] Public high school did not teach a man to handle a team of horses or a woman to keep house, raise children, and support her husband.[243] Public high schools promoted competition rather than community, faith in technology rather than in God, and intellectual skill rather than wisdom.[244] God called the Amish to remain separate from the worldly influence of the local public high school.[245]

The late Chief Justice Warren Burger had

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235. *Smith*, 494 U.S. at 881 n.1.

236. Wisconsin v. Yoder, 406 U.S. 205, 210 (1972).

237. *Id.* at 216.

238. *Id.* at 210.

239. *Id.* at 207.

240. *Id.* n.2.

241. Brief Amicus Curiae in Support of Petition for writ of Certiorari on Behalf of Church of God in Christ, Mennonite at 4, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (No. 81-3).

242. *Yoder*, 406 U.S. at 211.

243. *Id.*

244. *Id.*

245. *Id.*

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> no doubt as to the power of a State, having a high responsibility for the education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., *Pierce v. Society of Sisters*. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system.[246]

This passing mention of parental rights quickly yielded to free-exercise exemption analysis. *Yoder* was explicit in extending exemption from state compulsory education laws to parents whose motivation was based on sincerely held religious belief, and in dicta, rejected the notion that non-religious parents would enjoy the same measure of freedom to direct the education of their children.

> In evaluating [these] claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. 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.... Thus, 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. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[247]

It is generally conceded that *Smith* rejected free-exercise exemption analysis. In the non-hybrid, non-employment cases decided between *Sherbert* and *Smith*, the *Sherbert* era Court applied the strict scrutiny balancing test, but the religiously motivated actor lost.[248] *Smith* is quite clear that the holdings in those cases were correct, but that the balancing test was wrong. "We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold

246. *Id.* at 213 (citation omitted).
247. *Id.* at 215-16.
248. *See supra* notes 32 through 34 and accompanying text.

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the [*Sherbert*] test inapplicable to such challenges."[249] Internal consistency demands the same rejection in *Yoder*. In other words, the outcome for the parents in *Yoder* was correct, but the free-exercise exemption analysis was not.

When faced with the problem of classifying *Yoder* into the *Smith* categorical framework, Justice Scalia had three choices.[250] First, he could overrule *Yoder*, by holding that compulsory education as enacted in Wisconsin was a neutral, generally applicable exercise of the police powers of the state that did not infringe upon parental rights, and that religious objectors had no right to an exemption. Second, he could limit *Yoder* to its facts and preserve both the precise ruling and the rationale in *Yoder* by making it an exception[251] to the *Smith* rule against exemptions. Finally, he could concede[252] that the substantive due process liberty[253] right of parents is a fundamental, constitutionally protected right, and that *Yoder* was correctly decided on those grounds. This would have the effect of preserving the outcome in *Yoder*, while rejecting the incorrect free-exercise exemption rationale.

First, it is clear that *Smith* did not overrule the holding in *Yoder*. Second, there is no shadow of exception language anywhere in *Smith*, particularly not in the "hybrid" passage. This leaves only the third option: Resolve the conflict between *Smith* and *Yoder* in favor of extending the parental rights enjoyed by the religiously motivated Amish to all parents. If footnote one in *Smith* is to be taken seriously, then parental rights are the non-free-exercise rights "specifically adverted to" in *Yoder*.[254] By adverting to parental rights that are not dependent upon religious motivation, the *Smith* Court neutered the free-exercise exemption analysis for

249. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 885 (1990). *See also* NOWAK & ROTUNDA, *supra* note 25, § 21.6, at 524-26.

250. *See* McConnell, *supra* note 12, at 1121 ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing Yoder in this case.").

251. NOWAK & ROTUNDA, *supra* note 25, § 21.8, at 548 ("*Yoder* appears to create only a very limited exemption from compulsory attendance laws for families who can base their claim for an exemption on shared religious beliefs as well as on a general due process-liberty argument."). *See also* Note, *The Supreme Court, 1989 Term Leading Cases*, 104 HARV. L. REV. 198, 200 (1990).

252. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) ("[T]he value of perfection in judicial decisions should not be overrated. To achieve what is, from the standpoint of the substantive policies involved, the 'perfect' answer is nice—but it is just one of a number of competing values.").

253. United States v. Carlton, 114 S. Ct. 2018, 2026 (1994) (Scalia, J., concurring in the judgment) ("I believe that the Due Process Clause guarantees *no* substantive rights.").

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

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which *Yoder* is usually cited. All that is left of *Yoder*, after *Smith*, is the right of parents to direct the education of their children.

A short return visit to my Chinese-American restaurant categorical framework might be helpful. Chief Justice Burger could smell the constitutional protection onions in *Yoder*. He wrongly concluded that they were in the free-exercise egg roll, when all along they were on the parental rights hamburger.

The structure of the hybrid passage requires that the parental rights line of cases be read in parallel with the speech line. It necessarily follows that where the speech line of cases did not depend upon the religious motivation of the speaker, the parental rights line of cases does not depend upon the religious motivation of the parents.

Following the discussion of the speech and parental rights lines of cases where the Court had ruled in favor of the individual, *Smith* continued:

> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. [Mr. Smith] urge[s] us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.[255]

The converse of this proposition would read: "When otherwise constitutionally protected communicative activity or parental rights are accompanied by religious convictions, the convictions are irrelevant, but the protected conduct must be free from direct governmental regulation." This reading comports with the words actually used in the hybrid passage and the opinion generally, does not require the passage to be construed as an exception to the general rule, and preserves the holding in *Yoder*, consistent with the categorical framework. This reading of the passage also serves to define the right of parents to direct the education of their children as inhering in all parents, thus eliminating the private right to ignore generally applicable laws on the basis of religious scruples (a constitutional anomaly) and restoring equality of treatment (a constitutional norm).[256] (See Figure 7).

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255. *Id.* at 882.

256. *Id.* at 885. *See also* Scalia, *supra* note 252, at 1178 ("[O]ne of the most substantial [among a number] of ... competing values [in making judicial decisions] ... is the appearance of equal treatment.... The Equal Protection Clause epitomizes justice more than any other provision of the Constitution.").

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Smith Categorical Framework

State Regulation of	Religion	Speech	Press	Parental Rights	Burden
Absolutely Banned					Direct
Strong Presumption of Invalidity	Burger's Yoder			**Scalia's Yoder**	Direct
Presumed Valid	**Scalia's Yoder**			Burger's Yoder	Incidental

Figure 7

2. *People v. DeJonge* and *People v. Bennett*

The notion that *Smith* neutered *Yoder's* incorrect free-exercise exemption rationale is not the prevailing view, even though it is the only logical conclusion arrived at from the text of *Smith* itself. The illogic of the contrary view of *Smith's* hybrid passage is amply demonstrated by the Michigan Supreme Court's opinions in *People v. DeJonge*[257] and *People v. Bennett*,[258] two cases decided on May 25, 1993.

Michigan's compulsory education statutes required every child from the age of six to sixteen to attend school.[259] All schools, whether public, private, parochial, or denominational were required to be taught by state certified instructors.[260] Home-schooling was not illegal, but home schools had to comply with the teacher certification requirement.[261]

In 1984, Mark and Chris DeJonge elected to teach their two children at home. Because neither of the DeJonges were certified teachers they were charged with violating Michigan's compulsory education law.[262]

At trial, "the prosecution never questioned the adequacy of the DeJonges' instruction or the education the children received."[263] The DeJonges testified that they chose to home-school

257. 501 N.W.2d 127 (Mich. 1993).
258. 501 N.W.2d 106 (Mich. 1993).
259. MICH. COMP. LAWS § 380.1561(1) (1976).
260. MICH. COMP. LAWS § 388.553 (1976).
261. *Bennett*, 501 N.W.2d at 109 n.7.
262. *DeJonge*, 501 N.W.2d at 129.
263. *Id.* at 130.

because they wished to provide their children with a "Christ centered education."[264] They believed that the "major purpose of education is to show a student how to face God, not just show him how to face the world."[265] Mark DeJonge testified that Michigan's requirement that all children be taught by certified teachers violated his religious belief because scripture "specifically teaches that parents are the ones that are responsible to God for the education of their children" and that it would be a sin for him to submit to state authority in violation of God's clear commandment.[266] Nevertheless, the DeJonges were convicted of instructing their children without teaching certificates. They were each sentenced to two years probation, fined $200.00, and were ordered to arrange for certified instruction for their children.[267]

The DeJonges appealed their convictions on the grounds that the Michigan statute violated the Free Exercise Clause of the First Amendment to the United States Constitution. They also claimed that the statute amounted to an impermissible deprivation of their fundamental liberty as parents to direct the education of their children,[268] as guaranteed by the Fourteenth Amendment.

In 1985, John and Sandra Bennett were dissatisfied with the public school system. They considered sending their children to either a Catholic or a Lutheran school, but could not afford to do so.[269] Instead, they removed their four children from public schools and decided to teach them at home for the 1985-86 school year. They enrolled in a Home Based Education Program that provided the parent/teachers with support in developing a home-school program including limited access to classrooms and certified teachers.[270] Standardized achievement tests at the end of the home-school year indicated that three of the four children were either at or above their grade level. Their son, Scott, who had fallen below his grade level while in public school, had made

264. *Id.*

265. *Id.*

266. *Id.* at 130 n.4.

267. *Id.* at 130.

268. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (referring to the "liberty of parents and guardians to direct the upbringing and education of children under their control.").

269. People v. Bennett, 501 N.W.2d 106, 108 n.3 (Mich. 1993).

270. *Id.* at 109.

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progress toward his proper grade level while being taught at home.[271]

Neither parent was a state certified teacher. In 1986 they were charged with four counts of failing to send their children to school.[272] After a trial they were found guilty, fined $50.00, and were ordered to immediately arrange for certified instruction for their children.[273] They appealed, claiming the statute violated their fundamental right to direct the education of their children as guaranteed by the Fourteenth Amendment.[274] Their case was consolidated with *People v. DeJonge* in the Michigan Court of Appeals.[275]

The Michigan Court of Appeals upheld the convictions of all four parents and reaffirmed both trial court decisions on rehearing.[276] In *DeJonge*, using pre-*Smith* free-exercise analysis, the court of appeals ruled that the State had met the burden of proving that the teacher certification requirement was the least restrictive means of achieving the State's compelling interest in having an educated citizenry.[277] In *Bennett*, the Court of Appeals recognized the parents' fundamental[278] right to direct the education of their children, then applied minimum scrutiny.[279] It predictably found that the Bennetts did not meet the burden of overcoming the statute's presumed validity.[280]

In lieu of granting leave to appeal, the Michigan Supreme Court remanded *DeJonge* back to the Court of Appeals on October 17, 1990, for reconsideration in light of the *Smith* free-exercise ruling issued earlier in the year.[281] The Court of Appeals again affirmed the convictions using a compelling interest/least restrictive means test.[282] Both cases were argued before the Michigan Supreme Court on November 10, 1992 and decided on May 25,

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271. *Id.* at 109 n.6.
272. *Id.* at 108.
273. *Id.*
274. *Id.* at 110.
275. *DeJonge*, 501 N.W.2d at 130.
276. People v. DeJonge, 449 N.W.2d 899 (Mich. App. 1989).
277. People v. DeJonge, 501 N.W.2d 127, 131 (Mich. 1993).
278. The prosecuting attorney explained that the Court of Appeals was not using " 'fundamental' as a term of art, having special legal significance in the realm of constitutional law," but, rather that the court intended fundamental in its "everyday usage," *i.e.* "basic, deep-rooted, and essential." Appellee's Brief at 8, People v. Bennett, 501 N.W.2d 106 (Mich. 1993) (No. 91480).
279. People v. Bennett, 501 N.W.2d 106, 110 (Mich. 1993).
280. *Id.*
281. People v. DeJonge, 501 N.W.2d 127, 131 (Mich. 1993).
282. People v. DeJonge, 470 N.W.2d 433 (Mich. App. 1991).

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1993, after *Smith*, but before the enactment of the Religious Freedom Restoration Act.[283]

Before turning to the Michigan Supreme Court's analysis, it might be useful to first apply the categorical rule. First, requiring that all parents ensure that their children receive a certain level of education is almost universally conceded to be within the police powers of the state.[284] Second, it is clear that the Michigan statute did not target only religiously motivated home-schoolers and is, thus, properly classified as a neutral, generally applicable law with respect to free-exercise. Unlike *Smith*, however, both *DeJonge* and *Bennett* implicate one of the non-free-exercise elements directly listed by Justice Scalia: the right of parents to direct the education of their children.

According to the *Smith* categorical rule, as applied to parental rights, if directing the education of one's children is a fundamental liberty protected by the Fourteenth Amendment, then any direct regulation of that right is presumptively invalid. If a state regulation directly burdens the right, even slightly, it must meet the rare qualification of being necessary "to prevent grave and immediate danger to interests which the State may lawfully protect."[285]

For the purposes of this article it is not so important whether a parent's right to direct the education of her children extends to home-schooling from kindergarten through high school. What is important is how courts treat religious and non-religious parents whose identical conduct violates a religion-neutral, generally applicable teacher certification law.

Whether or not parents have a fundamental right to educate their young children themselves, the Supreme Court of Michigan should have applied the same standard to both the Bennetts and the DeJonges. *Smith* rejected court-granted exemptions from general laws on the basis of religious motivation. Either the

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283. 42 U.S.C. § 2000bb (Supp. V 1993) (purporting to reinstate the *Sherbert* and *Yoder* compelling interest tests to be used when religious practice is burdened by neutral, generally applicable laws).

284. *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); *see also* Appellants' Reply Brief at 1-4, People v. Bennett, 501 N.W.2d 106 (Mich. 1993) (No. 91480). The DeJonges and Bennetts conceded that the right to direct the education of their children is "fundamental" as opposed to absolute and is therefore subject to governmental regulation upon a State showing of a compelling interest. *But see* Titus, *supra* note 20, at 113 ("[E]ducation belongs to the family, the Church, and God .... [P]ublic education and other government regulations of education constitute clear violations of the First Amendment.") (footnote omitted).

285. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

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parents' right to home-school without the imposition of direct burdens by Michigan is fundamental and inheres in all parents, or Michigan may directly regulate, even prohibit the conduct.

The juxtaposition of *DeJonge* and *Bennett* is compelling because of the remarkable similarity of the parents' motivation for home-schooling, and because both families were before the court at the same time. The DeJonges were motivated by a religious belief that God commands parents to direct the education of their children.[286] They believed that God holds all parents accountable for the education of their children.[287] This is consistent with Western tradition, where parents are viewed as best situated and most highly motivated to promote their own child's best interests.[288]

The Bennetts were dissatisfied with the public schools. One might infer that their son Scott's substandard performance contributed to their decision to remove him. They apparently judged that he would be better served by a Catholic or a Lutheran school if they could have afforded it, and in the alternative, by a Home Based Education Program (a judgment borne out by Scott's improved academic performance). The Bennetts may well have been religious themselves and may indeed have shared Christian beliefs with the DeJonges. The duty parents owe to God, espoused by the DeJonges, was precisely the duty the Bennetts were fulfilling, in precisely the same way as the DeJonges. The only discernible difference between the two families

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286. Many Christian and Jewish parents rely upon the following Scripture to support their belief that the Lord has given them jurisdiction over the education of their children:

> And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shall talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up.

Deuteronomy 6:6-8 (King James). *See also* Titus, *supra* note 20.

287. *See Proverbs* 22:6 ("Train up a child in the way he should go: and when he is old, he will not depart from it.") (King James).

288. *Accord* Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' " (citations omitted)); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

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was that the DeJonges couched their duty in religious terms while the Bennetts did not.[289]

As is often the case, determining the level of scrutiny to apply also determines the outcome of the case. *Bennett* and *DeJonge* were no exception. Justice Brickley, writing for three of the seven Justices on the Fourteenth Amendment parental rights issue[290] in *Bennett*, framed the issue as:

> whether, in a challenge not involving religious convictions, a teacher certification requirement for home schools violates a parent's right to direct a child's education under the Fourteenth Amendment. The Bennetts, in challenging the requirements, are claiming that their Fourteenth Amendment right to direct the education of their children should be classified as a "fundamental right," thus making it impervious to the minimal scrutiny due process test....
>
> For reasons that follow, we hold that a parent's Fourteenth Amendment right to direct a child's education is not one of those rights described by the United States Supreme Court as fundamental, and, thus, the strict scrutiny test is unwarranted.[291]

Justice Riley, writing for three of the seven Justices in *DeJonge*, framed the issue as "whether Michigan's teacher certification requirement for home schools violates the Free Exercise Clause of the First Amendment of the United States Constitution ...."[292] Following three pages of free exercise history, she proclaimed that "the Court [in *Smith*] ruled that the 'Free Exercise Clause in conjunction with other constitutional protections, such

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289. To be precise, the DeJonges raised a religious objection to allowing their children to be taught by state-certified teachers. Narrowly viewed, this objection would likely extend to parochial schools that taught in accordance with the DeJonges' religious beliefs, but employed certified teachers, and, presumably prevented the parents themselves from obtaining teaching certificates. One could easily imagine, however, devout religionists, who believed that parents owe a duty to God to look out for their children's best interests, making the judgment that public schools were the best alternative for their children.

290. People v. Bennett, 501 N.W.2d 106, 120 (Mich. 1993). Justice Brickley also wrote for the court on the procedural Due Process issue. Six justices agreed that the Bennetts were denied an administrative hearing before they were prosecuted on criminal charges. On those grounds, the Bennetts' convictions were overturned and their case remanded to conduct the administrative review. *Id.*

291. *Id.* at 107-08.

292. People v. DeJonge, 501 N.W.2d 127, 131 (Mich. 1993) (Justice Riley also noted that "[t]he Michigan Constitution is at least as protective of religious liberty as the United States Constitution."). *Id.* n.9.

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as ... the right of parents ... to direct the education of their children,' demands the application of strict scrutiny."[293]

The opinions in *DeJonge* and *Bennett* demonstrate the Michigan Supreme Court's view that the hybrid passage in *Smith* preserved an island of free-exercise exemption analysis where religious parents direct the education of their children in violation of teacher certification statutes. After establishing the levels of scrutiny in the two cases, the remainder of the decisions are both predictable and unremarkable. The Michigan Supreme Court granted the DeJonges exemption from the statute on Free Exercise grounds using the *Sherbert/Yoder* compelling interest balancing test.[294]

> We hold that the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors. Such families, therefore, are exempt from the dictates of the teacher certification requirement.[295]

The Court denied the Bennetts' Due Process Liberty claim using minimum scrutiny. As Justice Brickley put it:

> We conclude that the Fourteenth Amendment does not provide parents a *fundamental* right to direct their children's secular education, and, thus, the state regulation need only

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293. *Id.* at 134 (citations omitted) (second alteration in original). She also took the opportunity to list the academic criticisms of the *Smith* opinion in great detail. *Id.* n.27. Hedging her bets, she noted:

> [W]e may certainly interpret the Michigan Constitution as affording additional protection to the free exercise of religion. However, because the ruling of *Smith* commands that strict scrutiny be applied in the case at issue, we do not undertake to determine at this time the extent of the Michigan Constitution's protection of the free exercise of religion generally. We do hold, however, that the Michigan Constitution mandates that strict scrutiny as articulated in this opinion be applied in the instant case.

Id. (citations omitted).

294. Justice Riley laid out the five part test, thus:

> (1) [W]hether a defendant's belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant's belief, or conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden on the exercise of such belief or conduct; (4) whether a compelling state interest justifies the burden imposed upon a defendant's belief or conduct; (5) whether there is a less obtrusive form of regulation available to the state.

DeJonge, 501 N.W.2d 127, 135 (Mich. 1993).

295. *DeJonge*, 501 N.W.2d at 144.

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> be judged by a rational relationship test. We further conclude that the [Bennetts] have not met the burden of establishing that teacher certification is not reasonably related to the state's legitimate interest.[296]

When taken together the two decisions pose an interesting question. If the DeJonge's free-exercise claim depended upon another "constitutional protection," namely the right of parents to direct the secular education of their children, but *Bennett* holds that parents enjoy no such protection, precisely what other "constitutional protection" does *DeJonge* rest upon? When "specifically adverting to" the parental rights in *Bennett*, the Court should have discovered conduct deserving no heightened level of scrutiny and ruled against the DeJonges as well. Following the "mongrel" approach, the Michigan Supreme Court concluded that even when there are no constitutional protection onions in the free-exercise egg roll or on the parental rights hamburger, the "hybrid claim" automatically smells of onions. (See Figure 8).

Hybrid Balancing within the *Smith* Categorical Framework

Level of Protection	Religion	Hybrid Claim	Parental Rights	Burden
Absolute				
Strict Scrutiny		DeJonge		Substantial Incidental
Minimum Scrutiny	DeJonge		DeJonge Bennett	Minimal Incidental

Figure 8

Justice Brickley proved too much in *Bennett*. Assuming that even if he were correct in saying that the Constitution does not guarantee that parents have a right to home-school their children without teaching certificates, he is almost certainly in error where he finds *no* fundamental interest at all. *Pierce* has been cited hundreds of times for the proposition that parents have at least some measure of protected interest in directing their children's secular education. At a minimum, *Pierce* prohibits a state from requiring parents to send their children to public schools over comparable private schools.[297]

296. People v. Bennett, 501 N.W.2d 106, 120 (Mich. 1993).
297. *Yoder*, 406 U.S. at 213.

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Pierce involved not only the Society of Sisters of the Holy Names of Jesus and Mary, operators of a parochial school, but also a second plaintiff, Hill Military Academy, a private secular school.[298] Hill Military Academy asserted the same claim as the Society of Sisters. Presumably, some of the parents whose rights were vindicated in *Pierce* were religiously motivated while others were martially motivated. The right to direct the education of children in *Pierce* extended to both the religiously motivated and the martially motivated parents.[299]

If *Bennett* and *DeJonge* are both correct, the principle from *Pierce* would necessarily need to be restated. The state would be permitted to direct the secular education of the children of martially motivated parents, but any state attempt to interfere with the children of religiously motivated parents must pass strict scrutiny. Those with a taste for irony might be forgiven for wondering how much the course of the Michigan Supreme Court's constitutional jurisprudence might have been diverted had the case been captioned *Pierce v. Hill Military Academy.*

The correct interpretation, of course, is that *Pierce* recognized the right of *all* parents to direct the education of their children. Both the religiously motivated DeJonges and the otherwise motivated Bennetts should enjoy the constitutional protection thereby afforded, and to the same extent. The parental rights element should be "specifically adverted to" in both cases. (See Figure 9).

Smith Categorical Framework

State Regulation of	Religion	Speech	Press	Parental Rights	Burden
Absolutely Banned					Direct
Strong Presumption of Invalidity				DeJonge Bennett	Direct
Presumed Valid	DeJonge				Incidental

Figure 9

298. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

299. As an interesting footnote, the Oregon Initiative invalidated by *Pierce*, which required parents to send their children to public schools, included an exemption for parents who educated their own children. Appellant's Brief at 3, Pierce v. Society of Sisters, 268 U.S. 510 (1925) (No. 583).

The two opinions of the Michigan Supreme Court are in obvious dissonance with each other and are logically indefensible. Worse, the Court's misreading of *Smith's* hybrid passage resulted in an arbitrary and unjust conclusion of law, to the detriment of those parents who faithfully carry out their duties without open reference to Divine Providence.[300]

CONCLUSION

Sherbert dramatically departed from nearly one hundred years of free-exercise jurisprudence. The *Sherbert* Court required the state to demonstrate a compelling interest for any action taken that placed a sufficient incidental burden on a religious practice. It allowed religious practitioners to seek exemption from otherwise sound laws by petitioning the courts. Although many individuals brought such claims they were not often rewarded with an exemption. *Wisconsin v. Yoder* stood as the only example of the Supreme Court granting exemption from a general law because of the religious convictions of the objector.

After less than thirty years of the ineffectual *Sherbert* balancing regime, *Smith* returned free-exercise jurisprudence to the traditional categorical rule. In wresting the categorical rule back from a balancing regime, Justice Scalia, with surgical precision, neutered *Yoder's* free-exercise exemption rationale. He referred to cases whose different elements implicated more than one constitutional protection as "hybrid situations." He, of course, used the word "hybrid" in the acceptable sense of being "composed of elements of different or incongruous kinds."[301] Accordingly, each element of a "hybrid situation" should be analyzed separately.[302] It is inconceivable that Justice Scalia intended to

300. Dean Titus attributes this injustice to the state arrogating to itself authority that belongs within the jurisdiction of the family:

> For years, civil authorities in the United States have breached the jurisdictional wall separating church and state.... By establishing tax-supported education, the state has secured a near monopoly in providing for the education of the children, wresting control from their parents who are duty bound to teach their children, aided and guided by the church, not by the state.

Titus, *supra* note 17, at 56 (footnotes omitted).

301. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 936 (2d ed. 1987).

302. A recent stimulating example illustrating the categorical analysis to be followed in free-exercise/free-speech hybrid cases, warrants strict scrutiny. The quoted segment is from oral arguments. The parties were the Second Church of Dionysus (ΣΧΔ) (petitioner)

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convey that the various constitutional protections were capable

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nd River City, Iowa (respondent):

Scalia, J.:	I see here that you've raised a constitutional defense under the Free Exercise Clause.
ΣΧΔ:	That's right, Justice, the annual Bacchanalian Festival of the Moon is a central feature of our religion. The police force not only ruined our Mooner's Dance, they also threw twenty-seven of our pledges in jail.
Scalia:	It says here that the pledges were arrested for violating the city ordinance banning public nudity.
ΣΧΔ:	But the Mooner's Dance is the very apex of our devotion to Lord Dionysus. Without total abandonment one may not be initiated into the fraternity of the faithful!
Scalia:	You really believe that stuff?
ΣΧΔ:	Sincerely!
Scalia:	Oh well, who am I to judge. It looks to me like the city banned public nudity for moral reasons. The ordinance applies equally to all River City people, right?
ΣΧΔ:	Yes, but the burden on our religion is really, really high! Won't you please cut us some slack?
Scalia:	Nope. Go talk to your mayor. The statute banning public nudity is not directed at your religious practice and it's evenly enforced throughout town. As far as River City is concerned, you can worship my Aunt Mable if you want to. The Free Exercise Clause is not offended. I see here that you also raise a free speech claim. What's that all about?
ΣΧΔ:	Your Honor, we don't just drop trou and howl at the various moons. Oh, no! Our every move is choreographed, stylized, and intended as an expression of our devotion to Lord Dionysus.
Scalia:	Uh, huh.
ΣΧΔ:	But wait, there's more! Our Mooner's Dance is the primary way we spread our faith. You wouldn't believe the crowds.
Scalia:	Couldn't wear bikini briefs, I suppose?
ΣΧΔ:	Oh no, that just wouldn't do! Why, whatever would Lord Dionysus think?
Scalia:	When I read the ordinance I don't see anything about dancing or expressive conduct at all. It looks to me like River City just wants everyone to wear clothes while they wander about.
ΣΧΔ:	But we really, really need to bare ourselves to the gods. Why, it's our duty! Couldn't you just cut us a little slack?
Scalia:	Well, you see, I've got the same problem now as I did last time. The ordinance is against nudity, nakedness, buffhood and deshabillity. It doesn't say anything about preventing dancing or expression. Now, some Justices might pat you on the fann—er—head and tell you that they looked at your—er—problem really close before they cut you off at the knees, but I'll be honest with you. I won't sell you any soft soap. No, sir! I'll just cut you off at the knees straight away. The Free Speech Clause is not offended. You can do the Dionysian Doo Wop all you want if you'll just wear a fig leaf. Conviction Affirmed. That's all!
ΣΧΔ:	Er ... Justice?
Scalia:	Yes, was there something else?
ΣΧΔ:	Begging your honor's pardon, but you haven't considered our hybrid claim.

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of begetting constitutional mongrels.[303] That would be an even more preposterous proposition than that asserted by astronomically inclined jurists who find constitutional rights lurking about in penumbrae cast by emanations of light from the Bill of Rights.[304]

Nevertheless, free-exercise advocates, accustomed to putting the courts through their strict scrutiny paces (however ineffectively) grasped at the hope of returning to the post-*Sherbert*, pre-*Smith* salad days. By cobbling together losing free-exercise claims and losing free-speech claims, they demanded strict scrutiny. *Smith*, far from demanding such an illogical conclusion, merely separated *Yoder's* wheat from its chaff by threshing it through the categorical rule.

Perhaps so many judges and scholars misread the hybrid passage in *Smith* because *Yoder's* dictum was so explicit and

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Scalia:	What's that? Is that in the Constitution?
ΣΧΔ:	Well, no sir, but you said in *Employment Division v. Smith* that a Free Exercise Claim linked with a Free Speech Claim gets automatic strict scrutiny.
Scalia:	It's a damnable lie, I never said any such thing!
ΣΧΔ:	Begging your pardon, sir, that's what everyone says you said.
Scalia:	Let me get this straight. You boys think that I said that if you hooked up a loser of a free-exercise claim with a loser of a free-speech claim that you'd wind up with a winner of a "hybrid" claim. Preposterous!
ΣΧΔ:	But, sir, we've counted on this so much. Can't you please just ...
Scalia:	Listen up! What I said was that sometimes religious people have babbled, scribbled and begat. Out of some soft-headed notion of respect for religion we've muddled around and let those people think they won their appeals because we like religion, when all along they should've won on account of babbling, scribbling and begetting! Now if River City had tossed you into the slammer on account of wacky beliefs or to stop you from passing out the Dionysian Dispatch, why that's a whole 'nother story. I'd leap cartwheels for you. You'd have to really mess up to lose on that score! But I don't know from hybrids! Now, leave my courtroom and never darken my towels again!

The Second Church of Dionysus v. River City, Iowa, 666 U.S. 666 (1995).

303. *Cf.* Hodgson v. Minnesota, 497 U.S. 417, 480 (1990) (Scalia, J., concurring in the judgment in part and dissenting in part) ("One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find no hint ... that the distinctions are constitutionally relevant ....").

304. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). No doubt constitutional penumbrae are sometimes cast by a procession of long black robes eclipsing the true source of constitutional light. *Compare Job* 38:31-33 (New International), " 'Can you bind the beautiful Pleiades?/ Can you loose the cords of Orion?/ Can you bring forth the constellations in their seasons?/ or lead out the Bear with its cubs?/ Do you know the laws of the heavens?/ Can you set up God's dominion over the earth?' " *with Luke* 11:52 (New International), " 'Woe to you experts in the law, because you have taken away the key to knowledge. You yourselves have not entered, and you have hindered those who were entering.' "

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because *Smith*, in rejecting the exemption rationale, did not deal directly with compulsory education or parental rights.[305] Whatever the reason, hybrids, as independent constitutional claims, do not exist. When religious people raise a constitutional objection to a state regulation of conduct, *Smith* teaches that they should be treated the same as any other similarly situated person, unless the state either intentionally or in effect, targets only their religiously motivated conduct.

It is difficult to imagine a constitutional justification for courts ruling that religious parents are free to care for their children while similarly situated non-religious parents are subject to direct, intrusive regulation. The text of the *Smith* opinion demands instead that parents be dealt with equally, and that their rights as parents be vindicated, not their religious motivation or lack thereof. Chief Justice Burger's mischievous obiter dictum in *Yoder*, about similarly situated Thoreauvian parents, has finally been exorcised from the true heart of the constitutional guarantee of equality of treatment for all. But in Michigan, because of a fundamental misunderstanding of the hybrid passage in *Smith*, acting out of love for your children might not be constitutionally protected, unless you also openly express that you are acting out of a sense of duty to God. The note thus struck rings sour alongside the clear, sweet sound of "liberty and justice for all."

IV. AN AFTERWORD ON THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act (RFRA)[306] is a remarkable, if not unique, bit of congressional legislation. It purports to overrule the Supreme Court's interpretation of the Free Exercise Clause as announced in *Employment Division v. Smith*.[307]

305. *See* Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1357 n.111 (1994) ("*Smith* eviscerated the doctrine of free exercise exemptions from laws of general applicability. *Smith* purported to 'preserve' *Yoder* by treating it as a case of 'hybrid' rights, involving free exercise and parental control.") (citations omitted). Professor Lupu fails to consider that by "eviscerating" the free exercise exemption rationale from *Yoder*, *Smith* left only the right of parents to direct the education of their children. He may have a vested interest in not seeing this alternative because he apparently believes it is the role of the state to ensure that children are properly raised, a duty the state thanklessly carries out even when faced with that most obstreperous class of parents, those who educate their own children. *See Id.* at 1358-59.

306. 42 U.S.C. § 2000bb (Supp. V 1993).

307. *Id.*

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It does this by requiring courts to ignore the *Smith* Court's categorical rule and to employ the post-*Sherbert*, pre-*Smith* strict scrutiny balancing test as a rule of decision.[308] These facts bode well for a constitutional clash between the legislative and judicial branches of the federal government. It may even be on a par with the clash between the judicial and executive branches resolved in favor of the judiciary by Chief Justice Marshall in *Marbury v. Madison*.[309] As interesting as this checks and balances blood sport might be, it is not here our concern. The question for this section is: "What effect does RFRA have on the 'hybrid situations?' "

In the pre-*Smith* years (1963-1990), religiously motivated people, whose conduct suffered incidental burdens from state action, stood a reasonable chance of successfully invoking strict judicial scrutiny. If they could demonstrate that the state action imposed a sufficient amount of incidental burden, the burden of proof shifted to the state to demonstrate that the burden imposed was necessary to achieve a compelling state interest. Spurred on by this possibility, free-exercise advocates sometimes brought cases of dubious merit. Most of those objectors lost even though the Court went through the motions of applying strict scrutiny.[310]

Employment Division v. Smith slammed the courthouse door to "incidental burdens" free-exercise cases by proclaiming that the Free Exercise Clause was not even implicated. Protest from academics and advocacy groups from most points on the political and jurisprudential compass was swift, outraged, and nearly unanimous.[311] Nothing short of a return to Justice Brennan's balancing test would be accepted. In fact, a surprisingly diverse coalition of academics petitioned the Court for rehearing, without success.[312]

Undaunted by the Court's rebuff, clever advocates argued that the "hybrid situations" preserved a small opening in the courthouse door. They characterized the hybrid passage as a narrow exception, like the peephole in a Prohibition Era speakeasy door. If the burdened free-exercise conduct could say, "Fred Free-speech sent me," perhaps the strict scrutiny door would

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308. *Id.*

309. 5 U.S. (1 Cranch.) 137 (1803).

310. *See* Ryan, *supra* note 32.

311. McConnell, *supra* note 12, at 1111.

312. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) *reh'g denied* 496 U.S. 913 (1990).

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still open.[313] This technique was successful because of a fundamental misunderstanding of the hybrid passage. It also prompted advocates to find "hybrid situations" in all manner of "incidental burden" cases because that offered the only hope of obtaining strict scrutiny.[314] Fortified by "mongrel approach" cases like *DeJonge*, automatic strict scrutiny in hybrid cases has become an accepted free-exercise principle.

RFRA gave advocates back the possibility of invoking the strict scrutiny test in all incidental burden cases, eliminating the need for breeding "hybrids."[315] So long as RFRA stands, hybrids need not be invoked. At this writing, one federal district court and one federal bankruptcy court have ruled that RFRA violates the separation of powers doctrine.[316] If RFRA falls, advocates will once again attempt to invoke strict scrutiny by claiming that their case involves a "hybrid claim." If that day comes, judges, like the Michigan Supreme Court, will once again be faced with the choice of favoring the religiously motivated or applying the law equally toward all. Since "hybrid claims" do not exist, the choice is clear.

James R. Mason, III

313. *See* Lupu, *supra* note 157.

314. *See supra* note 156.

315. As one court recently noted:

> [T]he Court in *Smith* suggested that the compelling state interest test would [only] apply in cases involving the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech or freedom of association, so-called "hybrid situations." Nevertheless, the RFRA restored the compelling state interest test in all free exercise of religion challenges, and provided a claim for persons whose free exercise rights are substantially burdened by government.

Hsu v. Roslyn Union Free Sch. Dist., 876 F. Supp. 445, 461 (E.D. N.Y. 1995) (citations omitted).

316. Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) *rev'd* 73 F.3d 1352 (5th Cir. 1996); In re Tessier, 1995 WL 736461 (Bankr. D. Mont); *but see* Belgard v. Hawaii, 883 F. Supp. 510, 513 (D. Haw. 1995); Sasnett v. Wisconsin Dep't of Corrections, 891 F. Supp. 1305 (W.D. Wis. 1995) (upholding RFRA).

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