

FREE EXERCISE CLAIMS IN CUSTODY BATTLES: IS HEIGHTENED SCRUTINY REQUIRED POST-SMITH?

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This Note discusses how free exercise claims made in custody disputes should be handled post-Employment Division v. Smith. Before Smith, the Supreme Court had held that free exercise claims should be evaluated using strict scrutiny. In Smith, the Court modified this analysis and stated that, in general, strict scrutiny is not required to evaluate free exercise infringement claims. However, the Court carved out several exceptions in which strict scrutiny analysis is still required. One such exception is hybrid rights, in which a free exercise claim is asserted in combination with another right. Free exercise claims made in custody disputes may create a hybrid right, since they may assert parental rights combined with free exercise rights. State courts, however, have been inconsistent as to whether they recognize hybrid rights in custody disputes. If these claims constitute hybrid rights, then Smith would entitle them to heightened scrutiny. This Note argues that state courts should explicitly recognize hybrid rights in custody disputes, but should not apply strict scrutiny if both parents are fighting for a right that only one of them can exercise. It argues that courts, at a minimum, should explicitly state the level of protection afforded and the source of that protection. For states that do offer free exercise protection, it then presents a framework that courts can use to determine when heightened scrutiny is appropriate.

INTRODUCTION

Jennifer and Robert are loving parents to their son, Bobby.¹ When they divorced, both parents wanted custody of Bobby. Jennifer, however, is a Jehovah's Witness. At the custody hearing, Jennifer explained that as a result of her religious beliefs, if awarded custody, she would not allow Bobby to celebrate holidays, salute the flag, or participate in certain extracurricular activities.² While these restrictions might seem unusual to someone unfamiliar with her faith, they would not necessarily endanger the welfare of the child.³ Should a court be able to deprive her of custody because she would restrict Bobby's activities in these ways, or does the First Amendment's Free Exercise Clause⁴ prohibit a court from awarding custody to the father as a result of the mother's religious convictions?

This Note explores how free exercise claims made in custody disputes, such as the one described above, should be handled

1. This scenario is drawn from *Pater v. Pater*, 588 N.E.2d 794 (Ohio 1992).

2. In *Pater v. Pater* the father also claimed that the mother would forbid Bobby from singing the national anthem, celebrating birthdays, socializing with non-Jehovah's Witnesses, and attending college. *Id.* at 799.

3. *Id.* at 799–800.

4. U.S. Const. amend. I.

post-*Employment Division v. Smith*.⁵ Before *Smith*, the Supreme Court had held that free exercise claims should be evaluated using strict scrutiny.⁶ In *Smith*, the Court modified this analysis and stated that, in general, strict scrutiny is not required.⁷ However, the Court carved out several exceptions in which strict scrutiny analysis should still be applied.⁸

One such exception is hybrid rights, in which a free exercise claim is asserted in combination with another right.⁹ Free exercise claims made in custody disputes may fall into this exception, since they may assert parental rights combined with free exercise rights.¹⁰ State courts, however, treat these claims in a variety of different ways.¹¹ If these claims constitute hybrid rights, then *Smith* would entitle them to heightened scrutiny.¹² While federal circuit courts have been reluctant to find (or have refused outright to recognize) viable hybrid claims,¹³ some state courts have explicitly recognized religious-based claims made in custody disputes as asserting hybrid rights.¹⁴ To return to the example given above,¹⁵ some courts would conclude that Jennifer, in challenging a custody decision she believes she lost as a result of her religion, is asserting a hybrid right.

This Note argues that state courts should explicitly recognize hybrid rights in custody disputes, but should not apply strict scrutiny if both parents are fighting for a right that only one of them can exercise. Part I reviews current caselaw to explain why federal free exercise protection in custody disputes turns on the existence of a hybrid right. Part I also discusses the controversy that has surrounded hybrid rights, which sheds light on how state courts could treat these “rights” so differently. Part II explores the different ways state courts have interpreted the level of federal free exercise protection applicable to custody claims. This discussion reveals that some courts fail even to consider whether these situations present hybrid rights, and that those courts that do consider hybrid rights then fail to consider (at least explicitly) whether it is appropriate to use

5. 494 U.S. 872 (1990).

6. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (requiring state to show compelling state interest when burdening free exercise).

7. *Smith*, 494 U.S. at 884–85. For a discussion of whether *Smith* was really a break from precedent, see *infra* notes 31–36 and accompanying text.

8. *Smith*, 494 U.S. at 877–78, 881.

9. *Id.* at 881. While it is unclear exactly which other rights can be used to form a hybrid right, see *infra* notes 54–57 and accompanying text, one of the examples *Smith* gave was parental rights combined with free exercise rights. 494 U.S. at 881.

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

11. See *infra* Part II.

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

13. See, e.g., *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993).

14. See, e.g., *Shepp v. Shepp*, 906 A.2d 1165, 1172 (Pa. 2006) (finding that “combining free exercise claims with the fundamental right of parents to raise their children, is a hybrid case”). For a discussion of the treatment of this issue in federal circuit courts, see *infra* notes 54–57 and accompanying text.

15. See *supra* notes 1–3 and accompanying text.

strict scrutiny to protect the claims of only one parent (and not the other). Part III presents a framework that courts could use to determine when strict scrutiny is appropriate, in which the court first decides whether to recognize hybrid rights and then, if it finds such protection, evaluates whether applying strict scrutiny to one parent's claim infringes on the other parent's rights.

I. FREE EXERCISE AND CUSTODY: HOW HYBRID RIGHTS MAY BE IMPLICATED

Before analyzing whether hybrid treatment of free exercise claims made in custody disputes is appropriate, it is useful to discuss both hybrid rights and custody law in general. This discussion is critical to understanding the confusion that surrounds custody claims, as it explains how state courts could, at least somewhat justifiably, conclude either that they are, or are not, required to recognize federal hybrid claims. Part I.A considers how the idea of a hybrid right came to be a part of Free Exercise Clause jurisprudence and explains how *Smith* transformed this area of law. Part I.B looks generally at how free exercise issues can be implicated in custody disputes. Part I.C then focuses the analysis from Part I.B by considering how, post-*Smith*, the idea of a hybrid right may provide federal protection for free exercise claims made in custody disputes.

A. *The Current State of Federal Free Exercise Jurisprudence*

This section explores the *Smith* decision and the reactions that followed, in order to give context to the muddle that resulted when state courts tried to apply the case to custody disputes. Part I.A.1 discusses *Smith* generally and explains why this shift in doctrine generated so much confusion. Part I.A.2 then looks at the hybrid exception and considers why it is even more problematic than the decision as a whole. Although this Note argues that courts should take the hybrid language seriously when making custody decisions, the discussion also acknowledges that there are significant arguments against doing so.

1. *The Smith Decision and the Subsequent Criticism.* — In *Employment Division v. Smith*, the Supreme Court held that the Free Exercise Clause does not require a state to provide a religious exemption from an otherwise valid, generally applicable law.¹⁶ In *Smith*, the two claimants were fired from their jobs for ingesting peyote, and because they had been fired, they were then denied unemployment compensation.¹⁷ As members of the Native American Church, they had taken the peyote as a sacrament in a religious ceremony.¹⁸ The Court held that Oregon was not required to create a religious exemption to its generally applicable drug

16. 494 U.S. 872, 878–79 (1990).

17. *Id.* at 874.

18. *Id.*

statute, and that it was entitled to deny unemployment compensation to individuals who were fired after religious use of peyote.¹⁹

This result came as a surprise to many,²⁰ because a number of pre-*Smith* cases had held that state action burdening an individual's free exercise of religion was subject to strict scrutiny.²¹ To withstand this review, the state must show its action satisfies two requirements.²² First, the law must enable the state to achieve a "compelling state interest."²³ Second, the state action must be the "least restrictive means" available to accomplish that end.²⁴

Many scholars criticized the *Smith* decision, attacking both the holding and its reasoning.²⁵ Even some of those scholars who defended the holding conceded that the opinion itself seemed poorly reasoned.²⁶ Hostility toward *Smith's* reduced free exercise protection was not limited to scholars. In the wake of *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which restored the use of a compelling interest test and least restrictive means analysis to free exercise challenges.²⁷ The RFRA attempted to undo the Court's decision and restore the use of strict scrutiny to evaluate free exercise claims.²⁸ However, the Supreme Court

19. *Id.* at 890.

20. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 1 (describing reaction to *Smith* as "widespread disbelief").

21. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141–42 (1987) (applying strict scrutiny test); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (same); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (same).

22. *Thomas*, 450 U.S. at 718 (holding that "state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"). Strict scrutiny is used to evaluate claims in other areas of constitutional law as well, such as equal protection. For a discussion of whether the "strict scrutiny" that was applied to free exercise claims, even before *Smith*, was ever as powerful as the version used in equal protection cases, see *infra* notes 58–62 and accompanying text.

23. *Thomas*, 450 U.S. at 718.

24. *Id.* For a discussion of how strict scrutiny applies to the "best interests of the child" standard, see *infra* notes 69–76, 86–93, and accompanying text.

25. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990) [hereinafter McConnell, *Free Exercise*] (criticizing both opinion's "use of legal sources" and "its theoretical argument"); Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. Rev. 1045, 1055 n.42 (2000) (listing recent scholarly criticism of *Smith*); James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1409 n.15 (1992) (listing early scholarly criticism of *Smith*).

26. See William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 308–09 (1991) (generally defending "rejection of the constitutionally compelled free exercise exemption" but acknowledging that opinion itself "cannot be readily defended" and that "decision, as written, is neither persuasive nor well-crafted" and "exhibits only a shallow understanding of free exercise jurisprudence").

27. 42 U.S.C. § 2000bb-1 (2000).

28. *Id.* But see John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. Pa. J. Const. L. 209, 212–22 (2006) (arguing levels of protection afforded pre- and post-*Smith* are not as different as they may seem).

subsequently held that the Act exceeded Congress's authority when applied to the states.²⁹ Thus, at least with respect to areas of law left to the states, free exercise claims are protected by the Federal Constitution only if they fall into one of the *Smith* exceptions.³⁰

Scholars have criticized *Smith*'s reasoning for making it seem as though the decision was not a departure from earlier free exercise jurisprudence.³¹ The Court stated that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."³² The Court added that past cases "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"³³ Throughout the opinion, the Court explained how previous cases conformed to its rule, which held the compelling interest test inapplicable to "generally applicable prohibitions of socially harmful conduct."³⁴ Much of the confusion that followed *Smith* likely arose because the Court distinguished, rather than overturned, previous cases.³⁵ Courts have since struggled to determine which claims fall into the exceptions that *Smith* carved out.³⁶

2. *The Hybrid Rights Exception.* — This Note will focus on the hybrid rights exception, but a discussion of the other exceptions helps to put the hybrid exception in perspective.³⁷ The Court made clear that religious belief (as distinct from religious expression) is still protected, and also that laws must be neutral and generally applicable.³⁸ There was also a suggestion that heightened scrutiny may be more appropriate in situations in which there are "individualized government assessment[s] of the reasons for the relevant conduct."³⁹ The Court offered as an example cases in the "unemployment compensation field," acknowledging that the

29. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

30. Some states passed their own state RFRAs. For examples and a discussion of these state RFRAs, see *infra* note 159 and text accompanying note 224. For a discussion of the exceptions, see *infra* Part I.A.2.

31. See Laycock, *supra* note 20, at 2–3 (describing "Court's account of its precedents [as] transparently dishonest"); Marshall, *supra* note 26, at 308–09 (arguing "use of precedent borders on fiction").

32. *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990)

33. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

34. *Id.* at 884–85.

35. For a discussion of the confusion that the decision and its exceptions have caused, see generally Kaplan, *supra* note 25.

36. Or, for those who view *Smith* as an unwelcome loss of free exercise protection, the struggle has been to fit claims within the exceptions.

37. For a discussion of the possible scope of these exceptions, see Laycock, *supra* note 20, at 41–54.

38. *Smith*, 494 U.S. at 877–78.

39. *Id.* at 884.

compelling interest test has been consistently used for claims in that field.⁴⁰

The Court also stated that hybrid rights will continue to receive heightened protection.⁴¹ Hybrid claims are those that implicate “the Free Exercise Clause in conjunction with other constitutional protections.”⁴² The Court gave specific examples of cases where two such rights were at issue.⁴³ It cited *Cantwell v. Connecticut*, in which free exercise was combined with “freedom of speech and of the press.”⁴⁴

The Court also cited *Wisconsin v. Yoder*, in which it claimed that free exercise was protected because it was combined with “the right of parents . . . to direct the education of their children.”⁴⁵ In *Yoder*, the Court held it was unconstitutional to require Amish parents, who objected to compulsory schooling past eighth grade for religious reasons, to send their children to school through the age of sixteen.⁴⁶ The Court in *Smith* found that *Yoder* thus recognized a free exercise right combined with the right of parents “to direct the education of their children.”⁴⁷

Scholars have criticized the hybrid exception on the grounds that it makes no sense⁴⁸ and that it seems simply to be a “make-weight” to get around *Yoder*.⁴⁹ Justice Souter neatly summed up this criticism in his own attack on the hybrid exception, stating:

[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

40. *Id.*

41. See *id.* at 881.

42. See *id.*

43. *Id.*

44. *Id.* (citing 310 U.S. 296, 304–07 (1940)). *Cantwell* considered whether an antisolicitation statute violated the rights of Jehovah’s Witnesses to distribute literature. *Cantwell*, 310 U.S. at 301–03.

45. *Smith*, 494 U.S. at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

46. 406 U.S. at 231.

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

48. See, e.g., Joanne C. Brant, Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers, 56 *Mont. L. Rev.* 5, 29–30 (1995) (describing Court’s discussion of hybrid rights as “both unconvincing and disturbing”); Alan E. Brownstein, Constitutional Questions About Vouchers, 57 *N.Y.U. Ann. Surv. Am. L.* 119, 119–20 (2000) [hereinafter Brownstein, Vouchers] (calling hybrid rights exception “unintelligible”); Frederick Mark Gedicks, The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States, 19 *Emory Int’l L. Rev.* 1187, 1219 (2005) (stating that “[f]ew people take the Hybrid Rights Exception seriously”).

49. Kent Greenawalt, Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses, 1995 *Sup. Ct. Rev.* 323, 334–35; see also Brant, *supra* note 48, at 30 (describing hybrid rights as “unartful tool to distinguish troubling precedent”); Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 *J.L. & Pol.* 119, 187 (2002) [hereinafter Brownstein, Protecting Religious Liberty] (arguing that “hybrid rights quite obviously served a specific function” of “allow[ing] the Court to avoid overruling *Yoder*”); McConnell, Free Exercise, *supra* note 25, at 1121 (stating that “[o]ne suspects that the notion of ‘hybrid claims’ was created for the sole purpose of distinguishing *Yoder*”).

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.⁵⁰

Despite these criticisms, more than fifteen years after *Smith* the Court has not backed down.⁵¹ This Note takes the Court at its word, and takes seriously the hybrid language.⁵² As one scholar has pointed out, the fact that the initial selection of the exceptions makes no sense does not mean that those boundaries cannot hold meaning.⁵³ Since the Court seems to be sticking with the exceptions, this approach makes sense.

With little guidance regarding hybrid rights, federal circuit courts have split on whether viable hybrid rights claims do exist, and if they do, what qualifies as a hybrid right.⁵⁴ This circuit split has been identified

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

51. Despite Justice Souter's criticism of the hybrid exception in his concurrence, the majority opinion gave no sign of rejecting the *Smith* framework in this subsequent free exercise case. *Church of the Lukumi Babalu Aye*, 508 U.S. at 524–47 (majority opinion).

52. See *infra* Part III.A.3 for a discussion of whether it is appropriate to take the hybrid exception seriously.

53. See Brant, *supra* note 48, at 30 (observing illogically drawn boundaries can be real and drawing analogy to standing principles established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

54. See *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (declining to apply “stricter legal standard” in evaluating possible hybrid claims (quoting *Kissinger v. Bd. of Trs.*, 5 F.3d 177 (6th Cir. 1993))); *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (identifying discussion of hybrid rights in *Smith* as “dicta and not binding”); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting idea that “combination of two untenable claims equals a tenable one”); *Kissinger*, 5 F.3d at 180 (rejecting idea of hybrid claim because a holding that states “the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights . . . is completely illogical”). But see *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (identifying existence of hybrid right); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) (concluding higher level of scrutiny is appropriate with respect to hybrid claims); *Tenafly Eruv Ass’n, v. Borough of Tenafly*, 309 F.3d 144, 165 n.26 (3d Cir. 2002) (noting possibility that hybrid rights claim exists, but not considering one because plaintiff did not raise it); *Miller v. Reed*, 176 F.3d 1202, 1207–08 (9th Cir. 1999) (recognizing existence of hybrid rights); *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 700 (10th Cir. 1998) (finding no viable hybrid right because hybrid right “requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one’s child”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding as alternate basis for overall conclusion that case presents hybrid right); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (stating that hybrid claim exists when free exercise combines with independently viable claim);

and discussed at length, with commentators analyzing both issues.⁵⁵ Adding to the confusion, some of the same scholars who argue that the logic underlying the hybrid exception makes no sense nonetheless would like to use the hybrid exception expansively.⁵⁶ The hybrid exception, often along with the other *Smith* exceptions, has been proposed as a way to circumvent the *Smith* holding for a variety of issues, as scholars try to squeeze various claims into one of the exceptions.⁵⁷

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (recognizing existence of hybrid claim before reversing and remanding).

55. See, e.g., Steven H. Aden & Lee J. Strang, When a "Rule" Doesn't Rule: The Failure of the *Oregon Employment Division v. Smith* "Hybrid Rights Exception," 108 Penn St. L. Rev. 573, 587-93 (2003) (discussing differing treatment that hybrid rights claims have received from various circuits); Ryan M. Akers, Begging the High Court for Clarification: Hybrid Rights Under *Employment Division v. Smith*, 17 Regent U. L. Rev. 77, 87 (2004) (noting three different interpretations of hybrid rights language in *Smith*); William L. Esser IV, Note, Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?, 74 Notre Dame L. Rev. 211, 214 (1998) (stating that most courts assumed strict scrutiny was appropriate test for hybrid rights); Jonathan B. Hensley, Comment, Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases, 68 Tenn. L. Rev. 119, 128-37 (2000) (discussing three approaches to hybrid rights used by federal courts); Bradley C. Johnson, Note, By Its Fruits Shall Ye Know; *Axson-Flynn v. Johnson*: More Rotted Fruit from *Employment Division v. Smith*, 80 Chi.-Kent L. Rev. 1287, 1309-13 (2005) (discussing different interpretations of hybrid rights); Eric J. Neal, Note, The Ninth Circuit's "Hybrid Rights" Error: Three Losers Do Not Make a Winner in *Thomas v. Anchorage Equal Rights Commission*, 24 Seattle U. L. Rev. 169, 179-82 (2000) (focusing on *Thomas v. Anchorage Equal Rights Commission*, 102 P.3d 937 (Alaska 2004), withdrawn, 192 F.3d 1208 (9th Cir. 1999)); Timothy J. Santoli, Note, A Decade After *Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment, 34 Suffolk U. L. Rev. 649, 668-70 (2001) (reviewing three theories courts have used in applying hybrid rights exception); John L. Tuttle, Note, Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under *Employment Division v. Smith*, 3 Ave Maria L. Rev. 741, 764-69 (2005) (arguing for colorable showing approach over other two theories).

56. See Christopher C. Lund, A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence, 26 Harv. J.L. & Pub. Pol'y 627, 628 (2003) (pointing out that "vitriolic attacks" on decision have decreased as academics have "thrown their efforts into making the *Smith* test as protective as possible"). But cf. Laycock, supra note 20, at 37 (suggesting *Yoder* exception may be very narrow).

57. See generally Brownstein, Vouchers, supra note 48 (considering school vouchers); April L. Cherry, The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment, 69 Tenn. L. Rev. 563 (2002) (considering claims of pregnant women refusing medical treatment); Brietta R. Clark, When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict, 82 Or. L. Rev. 625 (2003) (considering claims related to treatment received in Catholic hospitals); Lund, supra note 56 (considering general applicability requirement); James M. Oleske, Jr., Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation, 6 U. Pa. J. Const. L. 525 (2004) (considering Title VII reasonable accommodation provisions); Michael E. Chaplin, Comment, *Peterson v. Minidoka County School*: Home Education, Free Exercise, and Parental Rights, 75 Notre Dame L. Rev. 663 (1999) (considering home schooling); Ming Hsu Chen, Note, Two Wrongs Make a Right: Hybrid Claims of Discrimination, 79 N.Y.U. L. Rev. 685 (2004) (considering hybrid treatment for claims of discrimination based on race and religion); Michael Kavey, Note, Private Voucher Schools and the First Amendment Right to Discriminate, 113 Yale L.J. 743

Despite all of this criticism and the attempts to undo *Smith*, it is not entirely clear how “strict” the pre-*Smith* free exercise protection really was. The Court declared in earlier cases that “strict scrutiny” must be used to evaluate free exercise claims.⁵⁸ While strict scrutiny for equal protection claims has been described as “‘strict’ in theory and fatal in fact,”⁵⁹ as applied to free exercise claims it has been described as “strict in theory but feeble in fact.”⁶⁰ This may be an unfair categorization of the free exercise protection, since courts still scrutinized these claims, although perhaps at a more intermediate level.⁶¹ A discussion of this issue is beyond the scope of this Note; thus the term “heightened scrutiny” is used to describe the level of review that must be afforded to hybrid claims.⁶²

The question of exactly how “strict” is the scrutiny required to evaluate hybrid claims, however, may be moot, since federal circuit courts have not used it very often. In *Leebaert v. Harrington*, the Second Circuit, in rejecting a stricter level of scrutiny for hybrid claims, observed that while “[s]everal circuits have stated that *Smith* mandates stricter scrutiny for hybrid situations than for a free exercise claim standing alone . . . no circuit has yet actually applied strict scrutiny based on this theory,” and that those courts either “stated that hybrid situations would warrant strict scrutiny after *Smith*, but concluded that the plaintiffs in those cases had not sufficiently alleged a violation of two separate rights necessary to make them hybrid claims” or had “invoked the *Smith* hybrid-rights exception as

(2003) (considering school vouchers); Michael E. Lechliter, Note, The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children, 103 Mich. L. Rev. 2209 (2005) (considering education-related claims); Christopher R. Pudelski, Comment, The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-*Smith* World, 98 Nw. U. L. Rev. 703 (2004) (considering clergy privilege and mandatory reporting statutes); Benjamin I. Siminou, Note, Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court’s Approach to the Hybrid-Rights Exception in *Douglas County v. Anaya*, 85 Neb. L. Rev. 311 (2006) (considering infant metabolic screening claims); Jack S. Vaitayanonta, Note, In State Legislatures We Trust?: The “Compelling Interest” Presumption and Religious Free Exercise Challenges to State Civil Rights Laws, 101 Colum. L. Rev. 886 (2001) (considering civil rights laws).

58. See *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141–42 (1987) (applying “strict scrutiny”).

59. Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

60. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994).

61. See McConnell, Free Exercise, *supra* note 25, at 1127–28 (calling compelling interest test a “misnomer” but noting that test was more rigorous than rationality review).

62. At least one scholar has suggested this as a more appropriate categorization of the protection afforded. See *id.* at 1128.

an alternate basis for its holding, but not as the primary rationale in the case.”⁶³

While this may be an accurate categorization of the failure of hybrid rights at the federal level, it oversimplifies the overall picture by ignoring custody disputes. In custody cases a number of state supreme and appellate courts have protected free exercise claims by explicitly relying on *Smith* and recognizing hybrid rights.⁶⁴ This may be a surprising venue in which to find federal free exercise protection, as custody is traditionally a state and local matter, but it is an area where hybrid rights seem to be workable⁶⁵ (as opposed to other areas, where hybrid claims have been much harder to identify⁶⁶). Although some states can simply rely on their own constitutional free exercise clauses,⁶⁷ if they have been interpreted more broadly than the Federal Clause, states that do not have this option may be able to use hybrid rights.⁶⁸

B. *How the Free Exercise Clause May Be Implicated in Custody Cases*

Before considering how the Free Exercise Clause can become an issue in custody disputes, some background on custody is useful in order to understand how strict scrutiny applies to these decisions. Determinations in child custody cases are made in the “best interest of the child.”⁶⁹ Under this standard, courts look to a variety of factors,⁷⁰ such as the health, safety, and welfare of the child, the nature and amount of contact with each parent, and the use of drugs by either parent, to make deci-

63. 332 F.3d 134, 143–44 (2d Cir. 2003) (citation omitted).

64. See *infra* Part II.A.

65. See cases discussed *infra* Part II.A.

66. See *supra* note 63.

67. See cases discussed *infra* Part II.D.

68. For a discussion of the role that state constitutions may play, see generally William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986).

69. For a more detailed explanation of the best interest standard, see Melissa M. Wyer, Shelley J. Gaylord & Elizabeth T. Grove, *The Legal Context of Child Custody Evaluations*, in *Psychology and Child Custody Determinations* 3, 8–14 (Lois A. Weithorn ed., 1987). The elements of the standard, and even the standard itself, are debated. For a list of works on both sides of the debate surrounding the best interests standard, see Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 757 n.2 (1985). For a discussion of the history of custody law, see Richard A. Marafioti, *The Custody of Children: A Behavioral Assessment Model* 3–25 (1985); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. 687, 695–702 (1985); Wyer, Gaylord & Grove, *supra*, at 6–8.

70. These factors vary somewhat by state, and can be either statutory or judge-made. See, e.g., N.D. Cent. Code § 14-09-06.2 (2004); Vt. Stat. Ann. tit. 15, § 665 (2002); Va. Code Ann. § 20-124.3 (2006); *Pettinato v. Pettinato*, 582 A.2d 909, 913–14 (R.I. 1990) (explaining how “best interests of the child” standard remains “amorphous” with no “statutorily defined” factors in Rhode Island). For a state-by-state summary of recent changes or developments, see *Family Law in the Fifty States 2003–2004: Case Digests*, 38 Fam. L.Q. 817, 876–910 (2005).

sions that they believe will best promote the child's welfare.⁷¹ Courts that hear these family issues often must decide which parent should receive custody of the child or children.⁷² Some states prefer to award parents joint custody in situations where both parents offer healthy, stable homes.⁷³ Other states do not view joint custody so favorably.⁷⁴ Further, while "custody" is often discussed as one issue, the term actually should be thought of as describing two distinct entitlements: physical custody and legal custody.⁷⁵ Thus, the noncustodial parent could still be awarded joint legal custody, which could give him or her the right to have an equal say in decisions related to the upbringing of the child.⁷⁶

Religion can affect a court's decisionmaking process in different ways.⁷⁷ Some courts consider a parent's (perhaps unusual) religious be-

71. This example is an abridged description of Cal. Fam. Code § 3011 (West 2006).

72. Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. Colo. L. Rev. 965, 968 (2005) [hereinafter Greenawalt, *Child Custody*], reprinted in 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 421, 421–22 (2006) [hereinafter Greenawalt, *Religion and the Constitution*].

73. For a review of different state presumptions with respect to joint custody, see Robert E. Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 78 tbl.4.1 (1994); *Family Law in the Fifty States: Custody Criteria*, 40 Fam. L.Q. 593, 593 chart 2 (2007), available at http://www.abanet.org/family/familylaw/flqwinter07_custody.pdf (on file with the *Columbia Law Review*).

74. For a discussion of the debate over joint custody, see James C. Black & Donald J. Cantor, *Child Custody* 21–31 (1989); Emily M. Douglas, *Mending Broken Families: Social Policies for Divorced Families: How Effective Are They?* 91–115 (2006); Beverly Webster Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 Fam. Rel. 420 (1990). Joint custody may also have important implications in relation to gender biases. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 Cal. L. Rev. 615, 616 (1992) (arguing that joint custody imposes "more egalitarian family roles").

75. See Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 Md. L. Rev. 497, 503–05 (1998) ("Joint *legal* custody denotes parents' equal authority, or legal right, to make the vital decisions affecting a child's life. Joint *physical* custody refers to the approximately equal parental sharing of physical care and living time with the child—that is, to equal custodial responsibilities." (emphasis in original) (footnote omitted)).

76. But see Catherine R. Albiston, Eleanor E. Maccoby & Robert R. Mnookin, *Does Joint Legal Custody Matter?*, 2 Stan. L. & Pol'y Rev. 167, 172–73 (1990) (finding that fathers who had joint legal custody were not more involved in either day-to-day or major decisions than were fathers where mothers had sole legal custody).

77. This Note focuses on a specific religion-custody question: whether these claims should receive heightened protection as hybrid rights. For discussions of religion as a factor in custody disputes, see generally Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 Fordham L. Rev. 383, 425–26 (1989) (concluding that "[b]oth the unreflective use of religion as a positive factor in custody disputes and adoption proceedings and the contention that the establishment clause precludes use of religious factors are unwarranted"); Greenawalt, *Child Custody*, supra note 72, at 988 (arguing that "in general, courts should afford liberty to each parent to act as his or her religious conviction or conscience dictates, unless the exposure to two religions is evidently harmful to the child"); Carl E. Schneider, *Religion and Child Custody*, 25 U. Mich. J.L. Reform 879, 905–06 (1992) (concluding that "[w]e should not, then, expect to find any bright-line rule . . . that will reliably guide courts to correct results in these painful cases"); Michael Loatman, Note, *Protecting the Best Interests of the Child and Free Exercise Rights of the Family*, 13 Va. J. Soc. Pol'y & L. 89,

liefs, and the conduct that stems from them, in deciding whether to grant custody.⁷⁸ This Note considers whether, post-*Smith*, religiously motivated conduct can simply be treated like all other factors in custody disputes, or whether the Free Exercise Clause requires that some special treatment be afforded such conduct since it stems from religious beliefs. Free exercise issues can also arise when either the custodial or noncustodial parent wants to direct the child's religious upbringing or expose the child to a particular religion.⁷⁹ For example, courts have considered whether a noncustodial parent should be allowed to take the child to religious services,⁸⁰ a right that varies by state.⁸¹

Some courts have granted a parent custody because he or she is the more religious parent, arguing that it is advantageous to expose a child to religion.⁸² When a court favors a religious parent over a nonreligious one, it may very well violate the Establishment Clause.⁸³ A discussion of this, however, is beyond the scope of this Note.⁸⁴

If a free exercise claim asserted in a custody battle creates a hybrid right, heightened scrutiny should be used to evaluate potential free exer-

90–92 (2005) (analyzing and critiquing approach to this issue set forth in Am. Law Inst., *Principles of the Law of Family Dissolution* (2002)); Gary M. Miller, Note, *Balancing the Welfare of Children with the Rights of Parents: Petersen v. Rogers and the Role of Religion in Custody Disputes*, 73 N.C. L. Rev. 1271, 1271–72 (1995) (analyzing “conflict between the best interests analysis and the constitutional rights of parents”).

Custody disputes are sometimes further complicated by the existence of a previous agreement between the parents that attempts to determine the religious upbringing of the child. The enforceability of these agreements is a matter of debate. See Greenawalt, *Child Custody*, supra note 72, at 981–87 (supporting enforcement of agreements that “are specific enough about what is at issue, plainly contemplate divorce, and do not impair anyone’s religious liberty to a substantial degree”); Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 Duke L.J. 971, 973–75 (1998) (discussing enforcement of antenuptial agreements).

78. See, e.g., *Quiner v. Quiner*, 59 Cal. Rptr. 503, 516–18 (Ct. App. 1967). These situations are generally about whether a parent can gain or lose physical custody. However, they can also describe situations where a parent could lose both physical and legal custody. As a result, this Note uses the more general term “custody.”

79. This may relate to the idea of joint legal custody, but it need not be the same. For example, a parent could have the right to take the child to church services, but not to enroll the child in religious classes, because the other parent has been awarded the right to direct the religious upbringing of the child. Thus, in some states, it may be possible to expose the child to religion in certain ways but not to have joint legal custody with respect to religion. See *infra* Part III.B.2. To avoid confusing the two concepts, this Note does not use the term “joint legal custody.”

80. See *Lange v. Lange*, 502 N.W.2d 143, 145 & n.2 (Wis. Ct. App. 1993).

81. For an explanation of how this right varies by state, see *infra* Part III.B.2.

82. For citations to cases in which a court cited a parent’s religiosity as a positive factor in a custody dispute, see Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. Rev. 631, 635 n.8, app. at 722–29 (2006).

83. U.S. Const. amend. I.

84. For an argument that this situation violates the Establishment Clause, see Volokh, supra note 82, at 666–70.

cise infringements.⁸⁵ Where courts use heightened scrutiny, a parent's religiously motivated conduct should be treated differently from other conduct. The "best interests of the child" standard does not, on its own, satisfy the requirements of heightened scrutiny, because in some cases the child could be adequately protected (and any substantial interest of the state could be served) by a standard that would impinge less on religious conduct: the actual or likely harm requirement.⁸⁶ Modifying the best interests of the child standard in this way means that some level of harm must be shown to result from the parent's religiously motivated conduct before the parent can be deprived of parental rights on that basis alone.

In situations where a parent's religiously motivated conduct is harmful to the child, the state's interest in protecting the child would survive scrutiny.⁸⁷ Free exercise issues in custody battles arise when a parent would have been able to raise the child in a particular way absent divorce. Any conduct that is clearly harmful, or that the two parents would be prevented from engaging in even if they were raising the child together, would never be permitted. In custody disputes, the state must step in and make decisions, even though the state would not exercise such control absent divorce. As a result, it may be in a position to rule against a claimant based on a negative judgment about conduct that is religiously motivated.

While it might seem as though these "close cases," in which the conduct is not harmful, are rare, Professor Volokh notes that divorce attorneys often consider these "details" about the parents' religious practices to be outcome determinative.⁸⁸ Additionally, the divorce rate and the number of children involved in divorce have been increasing.⁸⁹ In the absence of a federal or state-imposed test,⁹⁰ a court can simply treat religious-based conduct in custody disputes like all other factors in determining what is in the best interest of the child, regardless of the effect that may have on a parent's religious exercise.

If these rights are protected by heightened scrutiny, exactly what level of harm needs to be shown is a matter of much debate. While some courts have required a showing of actual harm to the child,⁹¹ other courts

85. See *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

86. For a discussion of the level of harm that must be shown, see *infra* notes 91–92 and accompanying text.

87. See, e.g., *Bienenfeld v. Bennett-White*, 605 A.2d 172, 180–83 (Md. Ct. Spec. App. 1992) (finding that potential harm to child overcame strict scrutiny).

88. See Volokh, *supra* note 82, at 654 n.106.

89. See Bureau of the Census, U.S. Dep't of Commerce, *Divorce, Child Custody, and Child Support, Current Population Reports, Special Studies, Ser. P-23, No. 84*, at 1–2 (1979).

90. See *infra* Part III.C for a discussion of the role of state protection.

91. See, e.g., *Quiner v. Quiner*, 59 Cal. Rptr. 503, 518 (Ct. App. 1967).

require only some likelihood of harm to the child.⁹² This Note does not attempt to determine the appropriate standard.⁹³ Instead, it addresses a more basic question: Post-*Smith*, does the Free Exercise Clause require heightened scrutiny in custody disputes?

C. *Is Heightened Scrutiny Still Required in the Wake of Smith?*

Whether there is federal protection post-*Smith* turns on whether claims made in the course of a custody dispute fall into any of the exceptions *Smith* identified.⁹⁴ Custody cases are certainly not unemployment cases, one of the *Smith* exceptions.⁹⁵ There may be a way to frame the issue as requiring an individualized determination. The Court does not commit to individualized determinations as an exception category in *Smith*, but it leaves open the possibility.⁹⁶ While a judge will make individualized determinations in a custody dispute, it seems unlikely that the discussion in *Smith* referred to this type of situation. It more likely extends only to situations in which judgments relate to exceptions from general laws.⁹⁷ Since states have not used an individualized exception category in this way, such claims would be unlikely to succeed in the future.

The hybrid exception, however, has proved appealing to some state courts and commentators with respect to custody. Some courts and commentators have simply assumed that custody disputes present a hybrid of free exercise combined with parental rights.⁹⁸ Custody seems like an area in which hybrid claims would exist because parents are making claims about their children.⁹⁹ While initially appealing, however, it is far from

92. See, e.g., *Bonjour v. Bonjour*, 592 P.2d 1233, 1240 (Alaska 1979) (construing state statute as “being limited to cases where particular religious practices or beliefs pose a substantial threat of or would result in actual physical, emotional or mental injury to the child or will otherwise have a harmful effect on the child in violation of valid state statutes”).

93. For a discussion of the appropriate standard, see Greenawalt, *Child Custody*, supra note 72, at 975–77 (arguing for “serious threat of harm” standard); Miller, supra note 77, at 1285–92 (summarizing possible approaches).

94. See *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

95. *Id.* at 882–85.

96. *Id.* at 884.

97. See Greenawalt, *Child Custody*, supra note 72, at 978.

98. See *infra* Part II.A.

99. It is also natural to wonder whether the child has a free exercise right that would impact this decision. For a discussion of whether such a right exists, see Thomas J. Cunningham, *Considering Religion as a Factor in Foster Care in the Aftermath of Employment Division, Department of Human Resources v. Smith* and the Religious Freedom Restoration Act, 28 U. Rich. L. Rev 53, 81–87 (1994) (examining children’s rights to affect their own religious upbringing); Note, *Children as Believers: Minors’ Free Exercise Rights and the Psychology of Religious Development*, 115 Harv. L. Rev. 2205, 2206–08 (2002) [hereinafter *Children as Believers*] (same). Even if children have a right to free exercise that allows them to exert a religious preference, such a right might be overcome by issues related to juvenile choice and parental alienation. For a discussion of the problems associated with letting the child make decisions in custody determinations, see Philip M.

clear that these situations do, in fact, present a hybrid right. Some courts have failed to recognize this as a hybrid situation,¹⁰⁰ and some scholars have concluded that many custody situations would not create one.¹⁰¹ While those courts and commentators who have failed to recognize a hybrid right have done so with little explanation, one justification could be that if both parents have the right they cancel each other out, entitling neither to heightened scrutiny.¹⁰²

II. STATE COURTS DO NOT AGREE ON WHETHER FREE EXERCISE CLAIMS MADE IN CUSTODY DISPUTES REQUIRE HEIGHTENED SCRUTINY

If some or all free exercise claims made in custody disputes assert hybrid rights, and the hybrid language is to be taken seriously,¹⁰³ then the Free Exercise Clause would require that all state courts carefully consider whether particular claims in such disputes require heightened scrutiny.¹⁰⁴ State courts have varied, however, in whether they require heightened scrutiny.¹⁰⁵ Since state law controls custody, there are two constitutional sources that may require heightened scrutiny: the Federal Free Exercise Clause or the state constitution's free exercise clause.¹⁰⁶ If heightened scrutiny is required by only some state free exercise clauses, disparate treatment among the states makes sense. If it is a federal requirement, all states must afford it. This inquiry therefore reduces to whether the claim falls under one of the *Smith* exceptions.¹⁰⁷ The only exception that has been used by state courts in this area is the parental rights-free exercise hybrid.¹⁰⁸

More troubling than the inconsistent treatment among the states, however, is that state courts provide little explanation for their conclu-

Stahl, *Complex Issues in Child Custody Evaluations* 2–8, 109–24 (1999) (discussing parental alienation and stages of child development).

100. See, e.g., *Lange v. Lange*, 502 N.W.2d 143, 148 (Wis. Ct. App. 1993).

101. See, e.g., Greenawalt, *Child Custody*, supra note 72, at 978–79.

102. See discussion *infra* Part III.B.

103. For a discussion of the treatment of the hybrid rights exception, see supra note 54 and accompanying text.

104. There is perhaps a question as to whether an appropriate plaintiff could be found to satisfy the standing requirements in a federal court on this type of family issue. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 20–22 (2004) (Rehnquist, C.J., concurring).

105. See *infra* Part II.A.

106. Almost all state constitutions contain a free exercise-type clause. However, many states have interpreted their own free exercise clauses to offer only the level of protection that is federally available. Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 *St. Thomas L. Rev.* 235, 245 (1998). For a discussion of state religion clauses, see generally Crane, supra; Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409 (1990).

107. See supra Part I.C.

108. See supra Part I.C for a discussion of whether the other exceptions might, in theory, apply.

sions.¹⁰⁹ State courts do not acknowledge that other courts have found otherwise, and do not explain their reasons for adopting the approaches that they have chosen.¹¹⁰ While there is much literature and scholarly debate surrounding religion and custody, scholars are often similarly casual in their conclusions that a hybrid situation does or does not exist.¹¹¹ One scholar presented an empirical study of free exercise protection post-*Smith* and found that some custody cases have identified hybrid rights.¹¹² This study, however, failed to discuss whether that treatment was appropriate.

The state courts' treatment of free exercise claims raised in custody disputes falls roughly into four categories. Part II.A looks at state court decisions that have explicitly based their use of heightened scrutiny on the existence of a hybrid claim. Part II.B discusses cases in which a court uses heightened scrutiny and holds that it is required by the First Amendment to the Federal Constitution, but does not mention hybrid rights. Part II.C considers cases where a court has simply not applied heightened scrutiny at all. Part II.D then looks at cases in which state courts have used their own constitutional free exercise clauses, in combination with the Federal Free Exercise Clause, to employ heightened scrutiny. Taken together, these cases demonstrate not only that state courts disagree about how the federal precedents apply, but that they offer little explanation for their conclusions regarding federal precedent and almost no discussion of how applying heightened scrutiny might impact the non-complaining parent.

A. Courts That Explicitly Recognize a Hybrid Right

Some courts have been explicit in their conclusion that free exercise claims raised in custody disputes are to receive heightened scrutiny because they represent hybrid free exercise and parental rights claims under the Federal Constitution. In *Zummo v. Zummo*, an early post-*Smith* decision, the father objected to the divorce decree between him and his wife, which stated that he could not take their child to religious services of his own faith when the child was visiting him.¹¹³ The Pennsylvania Superior Court stated that *Smith* and *Yoder* recognize the right of a parent to control the religious upbringing of the child.¹¹⁴ Without considering that each parent may be attempting to exercise this right in opposition to

109. See *infra* Part II.A (discussing cases).

110. This is particularly surprising because state courts so often rely on other states' precedents with respect to these issues. See *infra* note 160 and accompanying text.

111. See, e.g., Cunningham, *supra* note 99, at 111–12 (assuming foster care presents hybrid situation even though several parties hold parental and free exercise rights); Children as Believers, *supra* note 99, at 2217 (assuming parents have hybrid rights).

112. Forren, *supra* note 28, at 220–29.

113. 574 A.2d 1130, 1132 (Pa. Super. Ct. 1990).

114. *Id.* at 1138. The court also found that the parental rights enjoyed by married parents continue after divorce. *Id.* at 1139.

that of the other, the court stated that *Yoder* required there to be “a substantial risk of harm” and that “[a]ny intervention . . . would have to be the least intrusive measures adequate to protect the interests identified” before a parent could be deprived of the right to direct the religious upbringing of the child.¹¹⁵ The court thus concluded that to forbid the father from taking the child to religious services in this situation was unconstitutional.¹¹⁶

Other state courts have cited *Zummo* for the proposition that free exercise claims made in custody disputes assert hybrid rights, without offering any further explanation for why that should be the case.¹¹⁷ Consider, for example, the reliance on *Zummo* by the Colorado Court of Appeals in *In re Marriage of McSoud*.¹¹⁸ In *McSoud* the court considered a mother’s appeal of a court order that had granted the father decision-making ability with respect to their child’s religious upbringing.¹¹⁹ The decision had specifically instructed the mother not to give the child “mixed messages” with respect to religion.¹²⁰ Relying on *Zummo*, the court found that strict scrutiny was required and demanded a showing of substantial harm to the child from exposure to the mother’s religion before the court would prohibit it.¹²¹

The failure of the court in *McSoud* to explain its reliance on hybrid rights is especially peculiar because the court discussed *Smith*.¹²² The court recognized that generally, *Smith* stands for the rule that a state’s compelling interest is not required to impinge on religious conduct. “*Smith* raised a First Amendment challenge to a neutral, generally applicable law The Supreme Court held that a compelling state interest need not be shown”¹²³ The opinion then stated that “a lower standard of review” was not authorized for hybrid situations.¹²⁴ It concluded that “[b]ecause the case before us involves both the Free Exercise Clause and a parent’s fundamental right to the care, custody, and control of a child, we adhere to the strict scrutiny test.”¹²⁵ As simply as that, the court found that a hybrid right exists, requiring the use of strict scrutiny.

This lack of explanation is more perplexing because the court seems to recognize that both parents could have competing claims, stating that the “allocat[ion] to the father [of] sole decision-making regarding the child’s religious upbringing” did not “alone deny [the] mother’s addi-

115. *Id.* at 1140.

116. *Id.* at 1157.

117. See, e.g., *In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339, 342–43 (Ct. App. 1996); *Bienenfeld v. Bennett-White*, 605 A.2d 172, 183 (Md. Ct. Spec. App. 1992).

118. 131 P.3d 1208 (Colo. Ct. App. 2006).

119. *Id.* at 1211.

120. *Id.* at 1219.

121. *Id.* (citing *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990)).

122. *Id.* at 1216.

123. *Id.*

124. *Id.*

125. *Id.*

tional First Amendment rights to influence the child's religious upbringing."¹²⁶ The court fails to explain how, or under what circumstances, both parents could be afforded heightened scrutiny.¹²⁷

Despite the reliance of other state courts on *Zummo*, the Supreme Court of Pennsylvania recently considered whether *Yoder* should apply in these types of situations.¹²⁸ In *Shepp v. Shepp*, the Supreme Court of Pennsylvania considered whether a father was entitled to discuss his belief in polygamy with his daughter, a belief that was religiously motivated.¹²⁹ In this case, the mother argued that after *Smith*, the strict scrutiny test is no longer required with respect to generally applicable prohibitions, such as the state's criminalization of polygamy.¹³⁰ While the opinion includes an extensive discussion of how *Smith* does not require strict scrutiny in general, the court was able briefly to conclude that the test is still required in the custody context. It stated, "The instant matter, combining free exercise claims with the fundamental right of parents to raise their children, is a hybrid case. As such, [*Smith*,] which presents a 'free exercise claim unconnected with any communicative activity or parental right,' does not directly answer the question" ¹³¹

It is particularly surprising that the majority provided so little explanation of its hybrid treatment, since the concurring judge argued in his own opinion that hybrid treatment is inappropriate precisely because recognizing one claim ignores the fact that the other parent has the same claim (and in doing so diminishes the protection afforded the other parent's claim).¹³² Without addressing the argument in the concurring opinion, the court applied heightened scrutiny and concluded that the risk of harm to the child is not substantial enough to justify so restricting the father.¹³³ The court in *Shepp* thus concluded that a hybrid claim should be afforded heightened scrutiny, without discussing the implications for the other parent's rights.

126. *Id.* at 1219.

127. *Id.*

128. *Shepp v. Shepp*, 906 A.2d 1165 (Pa. 2006). Recall that *Zummo* was a decision of the Superior Court of Pennsylvania. See *supra* note 113.

129. The father practiced Mormon fundamentalism, a set of beliefs and teachings which include plural marriage. 906 A.2d at 1166 & n.2.

130. See Brief for Appellee at 14, *Shepp*, 906 A.2d 1165 (No. 242 MAP 2003), 2003 WL 23623503, at *13.

131. *Shepp*, 906 A.2d at 1172–73 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (citation omitted)). It is interesting that the court itself picks up on the "communicative activity" language but chooses to recognize this as a free exercise parental rights hybrid, since these facts present an appealing free speech challenge. For a discussion of free speech and its role in custody, see *infra* text accompanying notes 206–207. Thus, *Shepp* seems to have been resolved the right way, but for the wrong reason.

132. *Shepp*, 906 A.2d at 1174–75 (Eakin, J., concurring). For discussion of the concurring opinion, see *infra* note 187 and accompanying text.

133. *Shepp*, 906 A.2d at 1172–73 (majority opinion).

B. *Some Courts Conclude the Free Exercise Clause Requires Heightened Scrutiny Without Discussing Hybrid Rights*

Other courts have been less explicit in recognizing that a hybrid exists, while still concluding that the Free Exercise Clause requires heightened scrutiny.¹³⁴ Many of these courts cite *Yoder*,¹³⁵ which means they are implicitly recognizing a hybrid right. These cases contain no discussion of why hybrid treatment is appropriate (as was also missing from the cases discussed in Part II.A), nor is there recognition of the fact that hybrid treatment is being afforded. In *Bienenfeld v. Bennett-White*, for example, the Court of Special Appeals of Maryland implicitly concluded that the Free Exercise Clause requires heightened scrutiny.¹³⁶ In this case, the court considered the mother's religiously-motivated views about the upbringing of their children when it awarded custody to the father.¹³⁷ The court cited *Yoder* and *Zummo*, but not *Smith*, and concluded that any interference with the mother's free exercise was justified because the state has a right to infringe upon religion if it "endanger[s] the secular welfare of the child."¹³⁸ If the mother had not been asserting a hybrid right, a post-*Smith* court could have considered religiously-motivated conduct regardless of whether it posed a threat to the child.

While *Bienenfeld* would have had the same end result even if *Smith* and *Yoder* had been found inapplicable (because there the compelling interest test was overcome by the danger posed),¹³⁹ this need not always be the case. If, under different facts, a parent's behavior had not posed a danger to the child, and, as a result, there were no compelling state interest, the court might very well have concluded that the mother was entitled to whatever she was seeking (at least in the sense of not being denied custody because of her proposed religious conduct). Depending on what was at stake, the court could have potentially denied that same right to the father.¹⁴⁰

C. *Some Courts Do Not Apply Heightened Scrutiny*

Though heightened scrutiny should be required by the Federal Constitution if custody claims represent hybrid rights, some courts simply fail to apply this standard.¹⁴¹ A relatively recent decision by the Supreme Court of Alabama, *Ex parte Laura Snider*, considered a situation in which a

134. See, e.g., *Bienenfeld v. Bennett-White*, 605 A.2d 172 (Md. Ct. Spec. App. 1992).

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

136. 605 A.2d at 183 (considering claim that custody decision "infringed upon [mother's] right to free exercise of religion under the first amendment of the Constitution of the United States").

137. *Id.*

138. *Id.*

139. See *id.*

140. For a discussion of how the right at issue affects the protection it should be afforded, see *infra* Part III.

141. See *supra* Part I.C.

change in a parent's religious beliefs had led to a change in which parent had custody over their child.¹⁴² The case was dismissed by the majority, not on the merits, but because of a procedural defect in the way in which the mother challenged the trial court's decision.¹⁴³ The dissent argued that not only should the procedural defect have been overlooked, but that the Alabama Religious Freedom Amendment required the use of heightened scrutiny.¹⁴⁴ The Alabama Religious Freedom Amendment is Alabama's version of the Religious Freedom Restoration Act (RFRA).¹⁴⁵ While the majority did not have to consider the dissent's substantive points, since it decided the case on a procedural ground, it chose to consider and rebut the argument advanced by the dissent.¹⁴⁶ In doing so, it neither affirmed that dependence on the Religious Freedom Amendment would be appropriate nor suggested that such a test would already be required under a hybrid *Smith* analysis.¹⁴⁷ It is not entirely clear from the opinion whether the court believed that the state constitutional amendment is irrelevant, that heightened scrutiny would not be required, or simply that the requirements of the test would be satisfied.¹⁴⁸

The fact that the dissent looked to the Religious Freedom Amendment is interesting, because it is one of the only courts to suggest it in custody cases. At a minimum, it supports the suggestion that state RFRA's could be used in this area.¹⁴⁹ Neither the dissent nor the majority mentioned the possibility that hybrid rights might apply, but this would not be necessary if the state RFRA would afford the requisite protection.¹⁵⁰

One court held explicitly that a hybrid right did not exist where a father who did not have custody brought suit to retain the ability to have input into the child's religious upbringing.¹⁵¹ In *Lange v. Lange*, the court prohibited the father from engaging in activities that would "cause[] the children to reject their mother's choice of religion," including "proselytizing."¹⁵² On rehearing, the court concluded that since the relevant state statute gave the custodial parent the right to direct the child's religious upbringing,¹⁵³ the father did not have a parental right

142. 929 So.2d 447 (Ala. 2005).

143. *Id.* at 459.

144. *Id.* at 466 (Parker, J., dissenting) (discussing Alabama Religious Freedom Amendment, Ala. Const. art. I, § 3.01).

145. For further discussion of the applicability of state RFRA's, where they have been enacted, see *infra* Part III.C.

146. See *Snider*, 929 So.2d at 456–59.

147. *Id.*

148. The latter seems to be a more plausible reading of the decision. However, the majority never directly affirms the appropriateness of the use of the Act.

149. For further discussion of the role that state RFRA's could play, see *infra* Part III.C.

150. See *infra* Part III.C.

151. *Lange v. Lange*, 502 N.W.2d 143, 148 (Wis. Ct. App. 1993).

152. *Id.*

153. Wis. Stat. Ann. § 767.001(2m) (West 2006).

with respect to religion.¹⁵⁴ As a result, the court concluded that he could not have a parental hybrid claim.¹⁵⁵ The court that originally heard the case had stated that because the father had not raised the possibility that these restrictions infringed on his free speech rights, it did not consider that issue.¹⁵⁶

While at first glance it might appear that this court, in the absence of the state statute, would have recognized a hybrid claim, this is puzzling, since a state statute could not preclude a federal constitutional claim. It also identifies an inherent difficulty with these situations; it is one parent's right against the other's. The court did not address whether or not the statute, as interpreted, is constitutional, dodging this issue by stating that the father never challenged the constitutionality of the statute.¹⁵⁷ The case is an example of an explicit rejection of hybrid treatment in a custody dispute.¹⁵⁸

D. *Some States Interpret Their Own Free Exercise Clauses to Require Heightened Scrutiny*

States that have interpreted their own free exercise clauses to be more protective than the Federal Clause, or that have enacted a state religious freedom restoration act (state RFRA), can base their use of heightened scrutiny on those sources.¹⁵⁹ While this protection would, in theory, be available only at the state level, courts making custody determinations, particularly with respect to potential infringement on religious rights, often look to the conclusions and procedures of other states (relating both to interpretations of the Federal Constitution and to interpretations of state constitutional provisions).¹⁶⁰

Some courts have used strict scrutiny and have argued that it is required under the protections afforded both by the Federal Constitution and by their state constitutions.¹⁶¹ By resting the requirement, at least in part, on the state constitution, the issue of whether or not the rights involved are federal hybrids is no longer dispositive. For example, in *Palmer*

154. *Lange*, 502 N.W.2d at 154 (opinion on reconsideration).

155. *Id.*

156. *Id.* at 148 n.4 (original decision). For a discussion of how isolated free speech issues could be treated, see *infra* notes 204–205 and accompanying text.

157. *Lange*, 502 N.W.2d at 147 (original decision).

158. *Id.* at 155 (opinion on reconsideration) (“We do not have a hybrid situation before us . . .”).

159. See, e.g., Conn. Gen. Stat. Ann. § 52-571b (West 2006); Fla. Stat. Ann. § 761.01–.05 (West 2005 & Supp. 2007); 775 Ill. Comp. Stat. 35 (2007); Mo. Ann. Stat. § 1.302 (West 2007); Okla. Stat. Ann. tit. 51, § 253 (West 2007); R.I. Gen. Laws § 42-80-1 (2006). In situations where the state RFRA has been adopted as an amendment to the state constitution, these inquiries collapse into one. See Alabama Religious Freedom Amendment, Ala. Const. art. I, § 3.01.

160. See, e.g., *Meyer v. Meyer*, 789 A.2d 921, 925 (Vt. 2001) (citing *LeDoux v. LeDoux*, 452 N.W.2d 1, 5–6 (Neb. 1990), in its discussion).

161. See, e.g., *Palmer v. Palmer*, 545 N.W.2d 751, 753 (Neb. 1996).

v. Palmer, the Supreme Court of Nebraska prevented the rule of law from shifting with changing United States Supreme Court interpretations of the Free Exercise Clause by finding that a compelling interest test was required based on “the Free Exercise Clause found in the First Amendment to the U.S. Constitution and article I, § 4, of the Nebraska Constitution.”¹⁶² Basing the holding on both constitutions implicitly interprets the federal Clause, and thus *Smith*, to require heightened scrutiny, without any explanation to support that conclusion. While such a holding may further confuse the issue with respect to the Federal Constitution, this holding offers protection even if the Federal Constitution is not found to afford it.¹⁶³

One way states have avoided the confusion stemming from the haze surrounding the federal constitutional protection is to base their holdings exclusively on provisions in their own state constitutions.¹⁶⁴ An example of such an approach is found in *In re Marriage of Marianne Jensen-Branch*, where the use of a compelling interest test followed from the fact that the “state constitution is more protective of religious freedom than is the First Amendment” and that a “burden on free exercise can be justified only by a compelling state interest and using the least restrictive alternative available.”¹⁶⁵ While this approach avoids determining whether heightened scrutiny is still required post-*Smith*, it is only available in those states where the state constitution is interpreted to provide more protection than the First Amendment, or where the state has not yet resolved the issue with respect to its own constitution (in which case it could be done in the custody case itself).¹⁶⁶ This is also the approach advocated by the dissent of *Ex parte Laura Snider*.¹⁶⁷ In *Snider*, the dissenting judge argued that such an approach is required because the state RFRA represents a recent sentiment of the people of Alabama that such protection is desirable.¹⁶⁸ These cases demonstrate that, where available, these additional sources can provide free exercise protection. This separate protection is valuable, given the confusion surrounding federal protection.¹⁶⁹

162. *Id.* at 756.

163. See Greenawalt, Religion and the Constitution, *supra* note 72, at 82 & n.53 (arguing state free exercise clauses may offer added protection).

164. This is an appealing approach outside of the custody area as well. See *id.* at 82 n.53 (arguing that state courts generally should consider their own free exercise clauses).

165. 899 P.2d 803, 808 (Wash. Ct. App. 1995).

166. Whether states have been increasingly likely to rely on their own constitutions this way in the wake of *Smith* is an interesting question, but one not addressed here.

167. 929 So.2d 447, 466 (Ala. 2005) (Parker, J., dissenting). For discussion of the majority opinion, see *supra* text accompanying notes 142–144.

168. 929 So.2d at 466 (Parker, J., dissenting).

169. The importance of using these sources, where available, is discussed in Part III.C, *infra*.

III. A FRAMEWORK FOR DETERMINING WHEN HEIGHTENED SCRUTINY IS (OR IS NOT) APPROPRIATE

This Part argues that courts should take the hybrid language of *Smith* seriously, yet also be careful about whether or not heightened scrutiny is appropriate. As a threshold matter, courts (at least those not relying on state constitutions) need explicitly to decide if they will recognize hybrid rights. Part III.A argues that heightened scrutiny is desirable, but acknowledges that some state courts may not want to recognize hybrid rights, and, in the absence of a state protection, may not afford heightened scrutiny. For states that do choose to recognize hybrid rights, Part III.B proposes a framework that courts could use to determine whether heightened scrutiny should be invoked, based on identifying those situations in which the right at issue is exclusive. Part III.C argues that courts in states that offer more free exercise protection than does the Federal Constitution should base their use of heightened scrutiny on those state sources, but should also use the framework presented in Part III.B to determine if such treatment is appropriate in a given situation.

A. Courts Need to Decide Whether They Recognize Hybrid Rights

This Part argues that state courts should recognize hybrid rights, although it acknowledges that there are some significant reasons for courts not to recognize them. Part III.A.1 considers why courts should recognize hybrid rights. The analysis that should follow this decision appears in Part III.B. Part III.A.2 explains what protection is left if a court does not recognize hybrid rights. Part III.A.3 then considers reasons why a court might decide not to recognize them.

1. *Courts Should Recognize Hybrid Rights.* — Courts should use the hybrid exception in custody disputes, as it offers an opportunity to afford free exercise protection to some claims, even if the Free Exercise Clause no longer generally provides such protection. Unlike in other areas, where hybrid rights have proved generally unworkable,¹⁷⁰ there are a number of state cases that have successfully identified hybrid rights and employed the hybrid framework.¹⁷¹ Since hybrid rights as applied to custody disputes are not per se unworkable, a major criticism of these rights disappears. More fundamentally, free exercise protection is generally desirable. The fact that a number of courts have continued to use heightened scrutiny post-*Smith* may be indicative of a general sentiment that such protection is important.¹⁷² This is certainly possible, as the passage of the federal RFRA and then the subsequent state RFRA suggests that the public values heightened free exercise protection.¹⁷³ This may be

170. See *supra* Part I.A.2.

171. See cases discussed *supra* Part II.A.

172. See *supra* Parts II.A–II.C.

173. For a discussion of RFRA, see *supra* notes 27–30. For a discussion of state RFRA, see *supra* note 159 and accompanying text.

especially true with respect to custody, where the loss of influence or custody over a child may be too great a penalty to inflict without heightened scrutiny and a consideration of whether it would actually harm the child.¹⁷⁴ State courts should think carefully before rejecting hybrid rights, which leads to a reduction in the level of protection afforded.

2. *How Custody Cases Could Be Resolved If Heightened Scrutiny Is Not Federally Required.* — Instead of attempting to sort through when hybrid treatment is appropriate,¹⁷⁵ a state court could simply conclude that the language about hybrid rights in *Smith* was dicta and not binding.¹⁷⁶ If a state court rejected the hybrid framework, the only federal constraint on free exercise post-*Smith* would be that a law be “valid and neutral [and] of general applicability.”¹⁷⁷ While this Note generally argues that such heightened protection is desirable, a court could choose to rule the other way.

Regardless of the level of federal protection, state courts are free to interpret their own constitutions to afford more protection than that offered by the Federal Constitution.¹⁷⁸ Thus they could still use heightened scrutiny even if it is not federally mandated. This option is discussed in more detail in Part III.C. If a state’s own constitution is not interpreted to offer more protection than the Federal Constitution, and heightened scrutiny is not federally required, then courts would be free to make determinations based on the absolute best interests of the child.¹⁷⁹ To return to the example from the introduction, any behavior that is somewhat unusual, such as refusing to allow a child to celebrate birthdays or holidays, could be used to tip the balance in a custody dis-

174. There is an additional incentive to “get it right” in the custody arena. In custody disputes, the fact that a child has been living with one parent for a period of time becomes a factor in subsequent custody considerations. How and when custody decrees should be modified is a contested topic. See generally Wexler, *supra* note 69 (arguing against presumption against change in custody). The courts are reluctant to uproot a child and disturb the patterns he or she has fallen into. *Id.* at 762. Thus, in custody cases, there is an additional incentive to ensure all parties are afforded the appropriate protections.

175. See *infra* Part III.B.

176. This is the conclusion reached by both the Second and Sixth Circuits. See *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (declining to apply “more stringent legal standard” in evaluating possible hybrid claims); *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (identifying discussion of hybrid rights in *Smith* as dicta and not binding); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting idea of hybrid claim because holding that “the legal standard under the Free Exercise clause depends on whether a free exercise claim is coupled with other constitutional rights . . . is completely illogical”).

177. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

178. See Greenawalt, *Religion and the Constitution*, *supra* note 72, at 82 (noting states are free to use their own constitutions to afford enhanced free exercise protection and arguing that they should do so).

179. See *supra* notes 69–74 and accompanying text.

pute.¹⁸⁰ No exception would have to be made for conduct that is religiously motivated, even if it were not harmful to the child.¹⁸¹

3. *Reasons a Court Might Reject the Hybrid Framework.* — While this Note argues that free exercise protection is desirable, there are genuine reasons why a court might decide not to recognize hybrid rights. The muddle that has been created by the various state courts that have tried to use the hybrid rights exception when dealing with custody-based claims may add support to the decisions of those circuit courts that have refused to take the hybrid language seriously.¹⁸² If a hybrid right does not present a viable claim in the custody area, it reinforces the idea that the *Yoder* exception may be very narrow and cannot easily be extended beyond its specific facts.¹⁸³ If custody is not a *Yoder*-hybrid, it is hard to imagine what else might be included. Since custody was one of the only areas in which such hybrid rights actually resulted in heightened scrutiny at the appellate level, the end of their use here could be the end overall. States may find it troubling that federal Free Exercise Clause protection should vary depending on how the state defines “exclusive” parental rights.¹⁸⁴ It is strange to use a federal test which then allows states to determine the level of protection. It would not be inconceivable for a state to simply reject the hybrid framework.¹⁸⁵

B. *Taking Federal Hybrid Rights Seriously Should Still Only Rarely Result in the Use of Heightened Scrutiny*

In a situation where a parent is asserting a hybrid claim, and the right at issue is exclusive (that is, only one parent can exercise it, they cannot both be granted it), a compelling interest test is inappropriate.¹⁸⁶ In these either/or situations, neither parent’s claim should be protected by a compelling interest test, because such treatment unfairly disadvantages the other parent’s claim.¹⁸⁷ If both parents can exercise the right, then it makes sense to use a compelling interest test before depriving

180. See *supra* notes 1–3 and accompanying text.

181. See *Smith*, 494 U.S. at 878–79.

182. See *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (rejecting hybrid framework and discussing similar approach in Sixth Circuit).

183. Douglas Laycock noted the possibility that the hybrid rights exception might be narrowly limited to the facts of the cases *Smith* distinguished. See Laycock, *supra* note 20, at 37.

184. For an explanation of why this variation occurs, see *infra* text accompanying note 202.

185. For a discussion of cases that do not rely on the hybrid framework, see *supra* Parts II.C–D.

186. Greenawalt, *Child Custody*, *supra* note 72, at 978–79 n.41. An example of a right that is nonexclusive is the ability to talk to the child about religious beliefs. By contrast, the right to have the child confirmed or bar or bat mitzvahed likely is exclusive, as the child (at least in a traditional religious sense) could not do both.

187. This argument is advanced in the concurring opinion in *Shepp*, although the majority opinion is silent about the risk. See *Shepp v. Shepp*, 906 A.2d 1165, 1174–75 (Pa. 2006) (Eakin, J., concurring).

either one of that right. Issues arising in custody disputes fall into two broad categories: disputes where a parent gains or loses custody because of his or her own religious practices, and disputes where a parent wants to influence the child's religious upbringing.¹⁸⁸ The courts that have recognized hybrid rights provide very little discussion of their rationale.

This Part offers a framework that courts can use to evaluate whether affording one parent heightened scrutiny protection deprives the other parent of his or her rights. Part III.B.1 maintains that in disputes over physical or legal custody, the parental rights cancel each other and thus there can be no hybrid to assert. Part III.B.2 argues that hybrid rights can be asserted in claims related to the religious upbringing of the child, but only when the specific right is one that both parents can be awarded.

1. *Claims Made in Determining Which Parent Will Be Awarded Custody Do Not Assert Hybrid Rights.* — When the issue is which parent will be awarded physical custody, neither parent can assert a hybrid right.¹⁸⁹ In these situations, a parent is denied custody because of his or her, often unusual, religious practices. For example, consider a situation where a mother's religious beliefs dictate that the child should be kept separate from others, including the child's father, who does not share the mother's religious belief, because they are "unclean."¹⁹⁰ If these actions were not religiously motivated, they would certainly be relevant in a custody dispute and the mother could easily lose custody as a result.

The mother would like the court to use a compelling interest test before depriving her of custody on religious grounds. Assuming both parents want custody (which is a safe assumption, considering they are in court fighting over it), the mother should not be able to assert a hybrid free exercise and parental rights claim.¹⁹¹ This is because the father is also asserting a parental right. The parental right components should cancel each other out, leaving the mother with only an isolated free exercise claim.¹⁹² Since *Smith* only protects hybrids, and not simple free exercise claims, heightened scrutiny is not appropriate.¹⁹³

2. *Disputes About the Child's Religious Upbringing.* — Where the ability to influence the child's religious upbringing is at issue, a hybrid right

188. This is an oversimplification, as there are claims that do not fit neatly into either of the two categories. However, this general framework is a move in the right direction.

189. See Greenawalt, *Child Custody*, supra note 72, at 978–79 n.41.

190. See *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Ct. App. 1967) (presenting these facts).

191. A version of this argument is made in the concurring opinion in *Shepp*. See discussion supra text accompanying note 132.

192. See Greenawalt, *Child Custody*, supra note 72, at 978–79 n.41.

193. Heightened scrutiny could be appropriate to protect an independent free exercise claim, if it were used not to require the granting of custody to one parent, but only to evaluate whether religiously motivated conduct was entitled to special treatment. See infra Part III.C. In this situation, the compelling interest test is really only being applied to an independent (non-hybrid) free exercise claim. The test should not be used, as it would if in a hybrid situation, to require a compelling interest before a parent could lose custody.

does exist.¹⁹⁴ These cases involve restrictions on the ability of one parent to expose the child to his or her religion or generally to direct the religious upbringing of the child.¹⁹⁵ The fact that a parent can assert a hybrid right does not mean, however, that heightened scrutiny is automatically appropriate. Unlike *Yoder*, where the parental right was asserted against the state,¹⁹⁶ in custody disputes the hybrid claim must compete with the rights of the other parent. In many situations, both parents will be able to assert hybrid claims with respect to religious influence.¹⁹⁷

If each parent asserts a hybrid claim to a right that only one of them can exercise,¹⁹⁸ heightened scrutiny is not appropriate.¹⁹⁹ Using heightened scrutiny to evaluate one parent's claim weights the determination strongly in favor of that parent.²⁰⁰ As the individual with the less mainstream belief is usually the one claiming free exercise protection, this would lead to a strange situation where the courts favor the parent with the more unusual practices.²⁰¹ In these "exclusive" situations, the parents' hybrid rights should be treated as canceling each other out, and as a result, heightened scrutiny is no longer required. This treatment transforms the hybrid inquiry into a question of whether the right is exclusive or can be exercised by both parents.²⁰²

If a parent wants the right to speak with the child about his or her religious beliefs, this should be protected by heightened scrutiny because the other parent can have the same right; it is not an exclusive situation.²⁰³ Discussing religion with the child, however, may not even have to be categorized as a hybrid free exercise right, because it would be pro-

194. Eugene Volokh makes a parallel argument with respect to custody and free speech issues. See generally Volokh, *supra* note 82 (examining constitutionality of various forms of child custody speech restraints).

195. See, e.g., *Shepp v. Shepp*, 906 A.2d 1165, 1165 (Pa. 2006), discussed *supra* text accompanying notes 129–133.

196. *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972).

197. For an example where both parents took their children to their own religious services, see *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990).

198. This situation refers to the right to direct an aspect of the child's religious upbringing. It is exclusive if the child can only participate in one religion. This depends on how the state defines the exclusive aspects of religion. For example, a child might be able to attend religious services for two religions, but only be able to attend religious classes for one religion. See *infra* notes 210–222 and accompanying text.

199. This claim assumes that the compelling interest test is difficult to overcome. See *supra* notes 59–62 and accompanying text for a suggestion that this may not be the case.

200. See *supra* notes 59–62 and accompanying text.

201. See, e.g., *In re Marriage of Jensen-Branch*, 899 P.2d 803, 803 (Wash. Ct. App. 1995) (discussing claim of father, who is member of Worldwide Church of God).

202. The fact that whether a viable hybrid right exists depends on whether it is exclusive is a little bit strange, and may push towards the idea that the hybrid concept should be rejected. This discussion continues on the assumption that the protection is nevertheless desirable and that the hybrid language should be taken seriously. For an argument that it should be rejected, see *supra* Part III.A.3.

203. See, e.g., *Shepp v. Shepp*, 906 A.2d 1165, 1173–74 (Pa. 2006) (granting noncustodial father right to speak with child about religious views).

tected under pure free speech (or a free speech and free exercise hybrid where the free exercise claim is superfluous).²⁰⁴ Such speech might also be guarded by the Free Exercise Clause as a “profession” of belief, which *Smith* states is still protected.²⁰⁵

Free speech provides a useful example of what is meant by a non-exclusive right situation. If the issue is whether one parent can speak about his or her religion, both parents can simultaneously be afforded this right. With free speech, there is no right to silence someone else with whom you disagree.²⁰⁶ Applying a compelling interest test to each parent’s claim to free speech requires the court to consider whether exposure to both viewpoints would be harmful to the child.²⁰⁷

On the other end, some religious practices involve “choosing” a religion, so presumably both parents could not have a right to have the child participate in these ceremonies. Examples would include a confirmation ceremony or a bar or bat mitzvah.²⁰⁸ Neither parent should have a hybrid right that entitles him or her to heightened scrutiny before being deprived of these exclusive aspects of the child’s religious upbringing, because each parent’s right to direct that aspect of the child’s religious upbringing should cancel the other’s.²⁰⁹

In between these extremes are a number of practices that are not entirely exclusive but also would likely not be protected by free speech or profession of belief.²¹⁰ Examples of these types of middle-ground activi-

204. A number of scholars have pointed out that free exercise claims often have a speech component. See, e.g., Brownstein, *Vouchers*, supra note 48, at 121–24; Gedicks, supra note 48, at 1190–91. For a discussion of the use of the Free Speech Clause in custody disputes, see generally Volokh, supra note 82.

205. *Employment Div. v. Smith*, 494 U.S. 872, 876–77 (1990).

206. There are situations in which the courts have silenced people because their speech posed some sort of threat. This is different from arguing that the Free Speech Clause gives someone the right to have only his or her view expressed at the exclusion of someone else’s.

207. In some situations, there is no indication that exposure to multiple religions would harm the child. See, e.g., *Hoedebeck v. Hoedebeck*, 948 P.2d 1240, 1242 (Okla. Civ. App. 1997) (stating lower court found not only that children were not harmed by exposure to two religions, but that “children enjoy[ed] participating in the religious lives of both parties”).

208. These are somewhat complicated examples because the idea from the religious perspective is that the child is choosing the religion. Since these “choices” are usually made at the preteen age, though, the child is still legally a minor. For a discussion of the role of the child’s rights, see supra note 99.

209. The concurring judge in *Shepp* makes this argument. See supra note 132 and accompanying text.

210. Where the line between speech and expression should be drawn is a matter of debate. For an argument that speech should be used extensively (as compared with expression), see Volokh, supra note 82, at 649. For an argument that religious activities should restrictively be categorized as speech, see Brownstein, *Protecting Religious Liberty*, supra note 49, at 121–23. Regardless of where the line is drawn, there are activities on each side. This discussion is not about which activities fall outside of speech, but how those that do should be treated.

ties, which could be carried on simultaneously, include taking a child to religious services,²¹¹ having a child participate in religious education classes,²¹² and religious ceremonies following the birth of the child.²¹³ In fact, children sometimes participate in these activities in both faiths when the parents are together (before divorce).²¹⁴ The differences between these activities are a matter of degree. Hybrid treatment may be appropriate for some or all of them, because heightened scrutiny could be applied without denying the other parent the same right. In other words, both parents could have a right to take the child to religious services, just as they did pre-divorce. However, some courts argue that the ability to direct the religious upbringing of the child is exclusive.²¹⁵ If it is thought of as exclusive, hybrid treatment would not be appropriate, because applying heightened scrutiny would weight the determination in favor of the parent making the claim and unfairly deny the other parent that right.²¹⁶

Unfortunately, neither *Smith* nor *Yoder* indicates where courts should draw the line between exclusive and non-exclusive religious exposure. *Yoder* describes a situation where parents have a fundamental right as against the government, or perhaps as against nonparents, to direct the upbringing of their child.²¹⁷ When the parents are divided, the government, acting through the court, will necessarily have to choose sides. The Court in *Yoder* recognized that at issue is “parental control over the religious upbringing and education of their minor children”²¹⁸ The Court also looked to its own precedent in *Pierce v. Society of Sisters*,²¹⁹ and

211. For an example where, before the parents divorced, the children attended both Catholic and Episcopalian church services, see *Burrows v. Brady*, 605 A.2d 1312, 1313–14 (R.I. 1992).

212. For an example where children attended classes and youth-related programs run by a Baptist Church and also classes by a congregation of Jehovah’s Witnesses until one parent objected, see *Baker v. Baker*, No. 03A01-9704-GS-00115, 1997 Tenn. Ct. App. LEXIS 837, at *2–*3 (Tenn. Ct. App. Nov. 25, 1997).

213. For an example where, before the parents divorced, the child was both baptized in a Catholic ceremony and named in a Jewish ceremony, see *Feldman v. Feldman*, 874 A.2d 606, 608 (N.J. Super. Ct. App. Div. 2005).

214. See, e.g., *id.* (describing case where children participated in both Jewish and Catholic religious rites).

215. See, e.g., *Overman v. Overman*, 497 N.E.2d 618, 619 (Ind. Ct. App. 1986) (stating “[t]he non-custodial parent must not impose his or her religious views on the child”).

216. This argument is advanced in the concurring opinion in *Shepp*. See *supra* note 132 and accompanying text.

217. *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972).

218. *Id.* at 231. The court then further clarified that the case “involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.” *Id.* at 232. The court is thus discussing the parents’ rights as compared with that of the state, and not one parent versus the other parent. Still, the opinion makes clear that the general parental right would not necessarily govern in all cases. See *id.* at 233–34.

219. 268 U.S. 510, 534–35 (1925).

stated that “the Court’s holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.”²²⁰ While *Yoder* and *Pierce* both strongly support the interpretation of the right to direct the child’s religious upbringing as a hybrid right, they do not describe the custody situation. In custody cases, there is no compelling interest requirement for the government to overcome in order to act, since the parties are asking the government to do just that: to choose one party’s parental rights over those of the other.

This Note does not resolve which activities should be considered exclusive rights. There are some activities or rituals, even some that are nonexpressive, that should not be exclusive, but this Note leaves open disputes about proper borders. Some state courts have awarded certain rights to both parents which others have granted to only one parent.²²¹ State courts have been unclear about why they rule the way they do, which obscures the debate. They should be explicit about which rights are exclusive and which are not.²²² Unless courts are clear, they deny claimants the ability to make the appropriate argument, which could lead to a denial of parental rights, a disservice to both the parent and child.

C. *Where Available, States Should Rely on State Sources to Trigger Heightened Scrutiny*

If a state offers protection for independent free exercise claims, either through its own constitution²²³ or through a state RFRA,²²⁴ then it should base its use of heightened scrutiny on those sources. This places the added protection offered in situations where the right to influence the child is at issue beyond the reach of the Supreme Court, which, given the instability surrounding hybrid rights, is a desirable and perhaps necessary precaution.²²⁵ It may also allow a court to offer protection not

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

221. A New Jersey appellate court, after deciding that “the primary caretaker has the sole authority to decide the religious upbringing of the children,” concluded that the noncustodial parent could take the children to religious services while they were in her custody but that she could not enroll them in religious classes of a second religion. *Feldman v. Feldman*, 874 A.2d 606, 608, 614 (N.J. Super. Ct. App. Div. 2005). By contrast, a Maryland appellate court concluded that a mother “retained unlimited prerogative to direct the children’s religious upbringing during visitation periods.” *Bienenfeld v. Bennett-White*, 605 A.2d 172, 183 (Md. Ct. Spec. App. 1992).

222. Courts instead tend to focus on whether or not granting the right to both parents would harm the child. This is a relevant inquiry, but should only apply after a court has concluded that the right is not exclusive. See, e.g., *Bienenfeld*, 605 A.2d at 183 (granting mother right but noting that limits could be placed if necessary for interests of children).

223. For a discussion of state free exercise clauses, see *supra* note 106 and accompanying text.

224. For examples of state RFRA, see *supra* note 159 and accompanying text.

225. For a discussion of the trouble courts have had with the *Smith* exceptions see *supra* Part I.A.

available at the federal level to claims about which parent will get custody.²²⁶

With respect to disputes about the right to influence the child's religious upbringing, the use of state protection leaves the situation as it was when protected by federal hybrid rights alone.²²⁷ In situations where the right is exclusive, heightened scrutiny would still be appropriate in the same manner as when triggered by hybrid treatment.²²⁸ Using a state constitution or RFRA would mean that changes in the understanding of hybrid rights at the federal level would not reduce the level of protection afforded.²²⁹

However, where a parent might be discriminated against and not receive custody on the basis of his or her religious beliefs, a compelling interest test would be appropriate if it is required by an independent free exercise right.²³⁰ Here the compelling interest test would not be used to force the court to choose one parent over the other, but only to require the state to show that a compelling interest exists (harm to the child) before treating religious factors like other factors.²³¹ Unlike a hybrid situation, where the parents' parental rights cancel each other out, here the mother's independent free exercise claim survives.²³² It is important to be clear that the free exercise right would not entitle the mother to heightened scrutiny before she could be deprived of custody. This would create a hybrid type situation and suffer from the same fatal problem.²³³ Assuming there is independent free exercise protection, heightened scrutiny would require that, if the religious practices were not harmful to the child, the court base its custody decision on other factors.²³⁴

CONCLUSION

This Note argues that expansive free exercise protection is desirable in custody cases. As a result, courts hearing custody disputes should take the *Smith* idea of a hybrid right seriously, but then should carefully con-

226. See, e.g., *Quiner v. Quiner*, 59 Cal. Rptr. 503, 517 (Ct. App. 1967) (presenting this type of dispute).

227. For a discussion of how this should be resolved, see *supra* Part III.B.

228. See *supra* Part III.B.

229. In states that have passed RFRA's, this is especially important because the RFRA itself is an expression of public sentiment that such protection is desirable.

230. See Greenawalt, *Child Custody*, *supra* note 72, at 978-79.

231. *Id.*

232. For an explanation of why this does not work in the hybrid context, see *supra* Part III.B.

233. See *supra* Part III.B.

234. See, e.g., *Roberts v. Roberts*, 586 S.E.2d 290, 295 (Va. Ct. App. 2003) (concluding that trial court's ruling did not infringe on father's constitutional right because "trial court specifically stated that it . . . did not base its decision on father's requirement that the children read the Bible, that they do chores, that they abstain from watching television, or that they be denied 'free time' . . . [but on] father's bitter denunciation of mother" and threats concerning mother).

sider whether hybrid treatment, and heightened scrutiny, are appropriate in a given situation. This Note urges courts, as a threshold matter, to determine whether they are going to recognize hybrid rights in custody disputes, and to be explicit about how they have answered that question. For those courts that do recognize hybrid rights, this Note offers a framework that courts can use to determine if, in a given situation, heightened scrutiny is appropriate, by asking whether or not the right at issue is exclusive—that is, can only be granted to one parent. If it is exclusive, courts should not use heightened scrutiny to evaluate one parent's claim, because that unfairly prejudices the decision against the other parent.

As to hybrid rights more generally, this Note has demonstrated that custody disputes provide an example of a way in which they can and are being used. Before courts conclude that no higher court has actually applied heightened scrutiny to a hybrid claim, as the Second Circuit did in *Leebaert*,²³⁵ they should at least consider the treatment given custody claims by state supreme and appellate courts. Custody cases should become part of the dialogue.

235. See *supra* note 63 and accompanying text.

